



Annex 18

CONCEPT NOTE
ON THE WITHDRAWAL OR SUSPENSION OF LETTERS OF APPROVAL

(Version 01.0)

I. Background

1. The Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol (CMP) at its seventh meeting, at paragraph 29 of decision 8/CMP.7 “requests the Executive Board to assess the implications of the withdrawal or suspension of letters of approval and make recommendations to be considered by the CMP at its eighth session” (emphasis added).
2. As such, the Board is asked only to consider the implications of withdrawal or suspension of letters of approval (LoA) and make recommendations to the CMP at its eighth session in relation to this aspect of LoAs, for their consideration.

II. Objective

3. The purpose of this note is to provide the Board with a description of issues that may arise in the event of withdrawal or suspension of LoAs and to obtain guidance from the Board on the its recommendations to the CMP and any stakeholder consultations on any such recommendations.

III. Analysis

A. Context of LoAs

4. In considering the implications of the withdrawal or suspension of LoAs, it is helpful to consider the legal context of LoAs. On review, it appears that LoAs have qualities also possessed by unilateral declarations of State that produce legal effects under treaty regimes.
5. These unilateral declarations of State are recognised to have the following key qualities (among others): they are made by a person with sufficient legal authority to bind the State internationally; and they are publicly made. Although a DNA, being a ministry of a Party, would not normally be capable of binding the State internationally, the decisions of the CMP seem to indicate that the Parties have accepted that DNAs may, and indeed only DNAs can, authorize participation in a CDM project activity or PoA.¹ Further, LoAs are made publicly, as they are posted on the CDM website following the request for registration by the validating DOE. As such LoAs may bind the State (Kyoto Party) on the intergovernmental level to ensure that such participation is consistent with the CDM rules.
6. There are principles of public international law that apply to such unilateral declarations of State. Primarily, such declarations may not be arbitrarily withdrawn or revoked by the State because the State owes a duty of good faith to other States (including a duty to fulfil the obligations that it has accepted).

¹ Decision 3/CMP.1, Annex, at paragraph 29 imposes a mandatory requirement that a Party wishing to participate in the CDM shall designate a national authority for the CDM. **At paragraph 40 of the same Annex, the “written approval of voluntary participation from the designated national authority of each Party involved”** is required as a condition precedent to the request for registration. Decision 7/CMP.1, recitals and paragraph 36, decision 1/CMP.2, recitals and paragraph 31, decision 2/CMP.3, recitals, decision 2/CMP.4 recitals and paragraph 52, decision 2/CMP.5, paragraph 44 and paragraph 46.



As a result, viewed as unilateral declarations of State producing binding legal effects, LoAs are not capable of being arbitrarily withdrawn or suspended.

7. Whether a withdrawal is arbitrary or not is a complex question that is dependent on the facts but generally, the principles closely circumscribe each State's ability to withdraw or revoke. Relevant elements include the extent to which those to whom the obligations are owed have relied on such obligations (note the “whom” refers to other States, but may potentially include organisations); and the extent to which there has been a fundamental change in the circumstances of the withdrawing State.

8. Accordingly, as treaty Parties, the CMP may have an interest in ensuring that any process it may develop in relation to withdrawal and/or suspension of LoAs does not cause States following such a process to inadvertently undermine the rights of other States that have relied in good faith on that LoA. As a corollary, any recommendations that the Board makes on withdrawal and suspension should respect, rather than undermine or conflict with relevant principles of public international law.

9. Equally, on the CDM level, LoAs are key to the registration of CDM project activities and PoAs, would be expected, under national law, to create rights for participants as against the approving Party. As between participants in a CDM project activity or PoA, the obtaining and maintaining of the LoA are key elements in key contractual relationships.

10. Below, the concept note works through general principles of law of treaties that apply where there are no specific rules in a treaty in relation to withdrawal (or suspension). This approach is taken to guide the Board as to what is the “default” position at treaty level where States did not agree alternative rules, so that parallels may be drawn at the level of the CDM. As such, the principles act as a guide only.

B. Application of the legal framework in the CDM context

1. Requirement to notify other Parties/stakeholders of withdrawal or intention to suspend

11. Currently, the CDM rules and requirements do not prescribe how a DNA may withdraw or suspend a LoA. As a result, there are also no notification procedures.

12. Where a treaty does not establish particular rules on withdrawal from it or suspension of performance of it, principles of the law of treaties² require notification by a State to other States of withdrawal from a treaty, or the intention to suspend performance of it. Taking this approach, a withdrawal of a LoA or an intention to suspend a LoA should be subject to notification to all other Kyoto Parties. Note that the notification in relation to suspension is an intention to suspend: the effect is not immediate - see paragraph 19 below.

13. In practice, it is not only other Parties to the Kyoto Protocol that would be affected by any withdrawal or suspension, but also (and more significantly) all the stakeholders in the particular CDM project activity or PoA. As a result, the Board may wish to consider recommending to the CMP that notification be made to all of: the project participant who received the LoA; the Board; and the secretariat (for the purposes of posting on the CDM website and so informing Parties).

14. As unilateral declarations of State may not be arbitrarily withdrawn, the Board may wish to recommend to the CMP that notices of withdrawal of LoAs and notices of intention to suspend LoAs contain reasons for the withdrawal or proposed suspension so that some assessment of the respect of this principle can be made by Parties and stakeholders.

² By law of treaties we mean the Vienna Convention on the Law of Treaties and the principles that it codifies.



2. Notice period following notification of withdrawal of LoAs or intention to suspend LoAs.

15. In order to both respect the rights of other Kyoto Parties and allow stakeholders of the relevant CDM project activity or PoA to mitigate or challenge (at national level) the impact of a withdrawal or a potential suspension, the Board may wish to consider recommending to the CMP that any notification process for withdrawing a LoA or of intention to suspend a LoA should contain a reasonable period between the date of notification and the date on which it takes effect (notice period).

16. Including a notice period would be consistent with applicable international law principles. As a guide, the Kyoto Protocol has a minimum notice period of one year from the time of notice of withdrawal from the treaty to the effective date of the withdrawal.

17. The Board may wish to recommend a minimum period of one year or recommend a longer period given the particularly severe impacts of withdrawal where the LoA comes from a host Party (see below). One option might be the end of the current crediting period of the relevant CDM project activity or PoA, given that investment decisions are frequently based on that horizon.

18. The need for a notice period applies equally to a suspension of a LoA. Given the different impact of suspension to withdrawal, this is discussed separately in paragraphs 19 and 20 below.

3. Specific provisions regarding suspension

19. Where a treaty does not specify how suspension of performance of the treaty is to be effected by a State, international law principles provide for various steps before suspension may become effective:

- (a) Notification of intention to suspend, providing reasons to all other States party to the treaty and a time period in which other States may object (objection period) (where an objection creates a “dispute”);
- (b) Period for amicable resolution of the dispute (running from end of objection period to specified end date) by the two or more States;
- (c) Period for formal dispute resolution where States in dispute cannot resolve dispute amicably (no maximum time period because relies on external dispute resolution forum);
- (d) Effective suspension date (which is: (i) end of objection period if no objections, or (ii) end of amicable dispute resolution period if dispute resolved in favour of suspension, or (iii) end of formal dispute resolution process if no amicable resolution); OR
- (e) No suspension and “end” of suspension notification process (where outcome of amicable or formal dispute resolution is no suspension); and
- (f) Where suspension becomes effective, a date for lifting/end of suspension.

20. As can be seen, the “default” approach under the law of treaties is to not allow suspension to become effective until there has been a meaningful (but potentially lengthy) process of dispute resolution between State parties. However, States can and do make different rules in particular treaties. In the same way, the CMP would be capable of specifying principles or rules for suspension that contained different provisions, and the above steps are therefore a “guide” only.

21. With the above principles in mind, the Board may wish to recommend to the CMP that a suspension process contain some or all of the following:



- (a) Principle that suspension cannot take effect until the date on which all processes below, if triggered, have been completed (this would provide project participants with “forewarning” of suspension and so assist them to mitigate potential losses);
- (b) Notification to other Parties, containing reasoning and a period for objections (setting a minimum period) (objection period);
- (c) Process for objection within the objection period;
- (d) Period for amicable dispute resolution where one or more Parties objects, and a notification of the outcome of such amicable dispute resolution to other Parties, affected project participants, the Board and the secretariat;
- (e) Identification of a formal dispute resolution forum where Parties have not resolved the dispute amicably and a requirement to notify other Parties and the Board and secretariat of the outcome of any formal dispute resolution;
- (f) A maximum suspension period, with automatic lifting of the suspension at the end of such a period; and
- (g) A provision that a DNA notification of withdrawal of the LoA at the end of the suspension period triggers the notification period under withdrawal.

22. With regard to what might be a reasonable notice period (which incorporates the objection period), the Board might wish to inform the CMP that a period of three months would be consistent with the “default” position under the law of treaties.

23. For suspension, the Board may wish to make a recommendation as to what would be the subject matter of the suspension: what aspects of the CDM project activity or PoA would cease to operate during suspension. Given the potentially severe impacts on the CDM project activity or PoA; the Board could recommend a very restrictive approach: only issuance of CERs and only where the LoA suspended is from a host Party (rather than Annex I Party).

24. Given the severity of a suspension where the LoA is from a host Party (please see paragraph 26(b) below), the Board may wish to recommend that any suspension should be only up to a (short) maximum period (for example three months), in order to limit the adverse impacts on project participants in the relevant CDM project activity or PoA.

4. Information to be provided by DNAs to the Board regarding their legal systems

25. As a result of the principle of good faith in public international law (and the related expressions of it), Parties need to be in a position to assess whether a withdrawal or proposed suspension of a LoA by another Party respects such a principle (i.e. is not an arbitrary withdrawal or suspension). The Board may wish to recommend to the CMP to encourage or require DNAs to provide the Board and secretariat, for information and publication, details of national laws that establish the conditions for a withdrawal or suspension of a LoA and that would allow stakeholders to challenge such a decision. This would have the further benefit of providing affected stakeholders with information on how to seek national law level remedies.

C. Implications of the suspension or withdrawal of LoAs

26. While the implications of withdrawal or suspension are severe in every case, the likely implications of a withdrawal or suspension of a LoA depend on whether the DNA is acting for a Party



that is a host Party or an Annex I Party. The following is a non-exhaustive list of major implications of withdrawal or suspension of LoAs in those circumstances:

(a) **Withdrawal by the host Party**

- (i) **Public international law impact:** Other Parties involved may have remedies under public international law based on their reliance on the original LoA from the host Party DNA;
- (ii) **CDM level impact:** Until the effective date of withdrawal, the CDM project activity or PoA continues to function as a full CDM project activity or PoA. Upon the effective date of withdrawal, the CDM project activity or PoA is no longer a registered CDM project activity or PoA (effectively, it is “deregistered”);
- (iii) **CDM level impact:** As a result of above, the CDM project activity or PoA ceases to generate CERs after the effective date of withdrawal of the host Party LoA;
- (iv) **Project level impact:** Absence of CERs revenue stream could make other aspects of the project financially unviable;
- (v) **Project level impact:** The inability of a CDM project activity or PoA to deliver CERs could have consequences for all the following:
 - Emission reduction purchase agreement (for example, triggering “no fault termination” events under contracts between project participants and investors/buyers);
 - Contracts between DOEs and project participants;
 - Contracts between project participants and investors.
- (vi) **National law level impact:** The termination of the CDM project activity or PoA as a result of the withdrawal of the LoA could lead to legal actions between project participants and employees or other affected third parties;
- (vii) **National law level impact:** Depending on the legal system of each host Party, remedies under national law may provide for project participants to challenge the decision to withdraw the LoA or seek compensation from the Party for lost revenue.

(b) **Suspension by the host Party (actual suspension)**

- (i) **CDM level impact:** For the period of suspension, the CDM project activity or PoA would not be capable of being treated as a fully registered CDM project activity or PoA. Extent of impact would need further assessment, but the Board may wish to recommend to the CMP to limit the suspension to CER issuance requests (allowing the CDM project activity or PoA to continue in all other respects);



- (ii) **Project level impact:** The suspension may affect the value of CERs from the CDM project activity or PoA in the market, e.g. it could affect the forward price of CERs after the notification of the suspension is made public;
 - (iii) **Project level impact:** Suspension may affect the financial viability of the CDM project activity or PoA. This could trigger similar consequences among project participants and affected parties as described in paragraph 26(a)(v) above;
 - (iv) **National law level impact:** Depending on the legal system of each host Party, remedies could be provided under national law for project participants to challenge a decision to suspend the LoA (before and, if applicable, after it takes effect), and/or seek remedies for the loss caused by suspension.
- (c) **Withdrawal by Annex I Party**
 - (i) **CDM level impact:** The host Party LoA remains intact, so the CDM project activity or PoA continues unaffected (assuming one host Party- approved project participant and one Annex I - approved project participant, position is same as unilateral CDM project activity/PoA);
 - (ii) **CDM level impact:** In order for the affected Annex I- approved project participant to be able to receive CERs directly from the CDM pending account, it would need to request a new LoA from the same or another Annex I Party (and, if necessary, open another Annex I registry account), with time, cost and potentially contractual implications. Otherwise, it cannot receive CERs from the CDM project activity or PoA directly;
 - (iii) **National law level impact:** Depending on law in Annex I Party, the project participant may be able to seek a remedy from the Party.
- (d) **Suspension by an Annex I Party**
 - (i) **CDM level impact:** The host Party LoA remains intact, so the CDM project activity or PoA continues unaffected (assuming one host Party - approved project participant and one Annex I Party- approved project participant, position is same as unilateral CDM project activity or PoA) - in these circumstances, the suspension does not impact the CER issuance, (even where the affected Annex I project participant is the focal point, as the focal point can be replaced by the project participants);
 - (ii) **CDM level impact:** Project participant affected can mitigate risk and potential loss by seeking LoA from another Annex I Party in the notice/objection period. Otherwise, cannot receive CERs from the CDM project activity or PoA directly, although issuance might continue (the proportion of CERs to which it is entitled under the request for issuance may need to be retained in the CDM pending account).



D. Application to existing LoAs

27. In general, the principle of non-retroactivity applies to decisions of the CMP.³ However, when a LoA is viewed as a unilateral declaration of State, it is arguable that States have been entitled to withdraw a LoA (in the limited circumstances permitted under international law) from the commencement of the CDM.

28. Accordingly, if the CMP directs the Board to develop a procedure, the Board may wish to request that the CMP provide guidance on the temporal effects of such a procedure. That is, would the procedure apply to new and existing LoAs, or new LoAs only?

IV. Expectation of the Board

29. The Board may wish to consider the following draft recommendations to the CMP:

- (a) To recommend that such action be an action of “last resort”, given:
 - (i) The limited circumstances at international law in which a withdrawal or suspension would be regarded as not arbitrary;
 - (ii) The potentially very severe impacts on the relevant CDM project activity or PoA;
- (b) To consider elements necessary for an effective withdrawal or suspension of LoAs by DNAs, including:
 - (i) A requirement to notify in writing the project participants, the Board and the secretariat (for publication to Parties) of the decision to withdraw or the intention to suspend that sets out, as a minimum, the effective date of withdrawal or intended effective date of suspension and the reasons that led to the decision to suspend or withdraw;
 - (ii) Minimum notice periods for withdrawal and for the objection period for proposed suspension;
 - (iii) Specific to suspension:
 - A maximum period that any case of suspension may last;
 - Dispute resolution processes between Parties;
 - The requirement that a decision to withdraw the LoA after suspension follow the steps for withdrawal.
 - (iv) To encourage/require DNAs to provide to the Board and secretariat details of national laws setting out the conditions for withdrawal or suspension and that allow stakeholders to challenge DNA decisions to withdraw or suspend.
- (c) To provide guidance on the application to existing LoAs of any procedure that the CMP may direct the Board to develop.

³ Decision 2/CMP.4, paragraph 14, and reaffirmed in decision 3/CMP.6, paragraph 15.



30. The Board may wish to request the secretariat to launch a call for inputs on the draft recommendations to the CMP as set out in paragraph 29 above, with a view to adopting final recommendations to the CMP at its sixty-ninth meeting, taking into account the inputs from stakeholders.

History of the document

Version	Date	Nature of revision
01.0	2 July 2012	Initial publication as an annex to the annotated agenda of EB68.
Decision Class: Regulatory Document Type: Information note Business Function: Registration		