

The Doha Outcomes Part I – The Doha Amendment to the Kyoto Protocol

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Introduction

1. The Doha climate change conference (COP18) culminated on Saturday 8 December 2012 with the adoption of the ‘Doha Climate Gateway’, a set of decisions adopted by near universal acclamation related to amendments to the Kyoto Protocol (the KP Decision),¹ the closure of the Ad-hoc Working Group on Long-term Cooperative Action (AWG-LCA) (the LCA Decision),² the Ad-hoc Working Group on the Durban Platform for Enhanced Action (ADP) (the ADP Decision),³ loss and damage and finance.
2. This is the first in a series of three briefing papers analysing legal aspects of the KP Decision, the LCA Decision and the ADP Decision. This briefing paper focuses on the KP Decision.⁴
3. The negotiations for the Kyoto Protocol⁵ began in 1995 and concluded two years later in 1997. The Kyoto Protocol included, amongst other things, rules for the first commitment period (CP1), institutional arrangements, the principles of the flexible mechanisms and various additional reporting requirements for Parties to the Kyoto Protocol which are listed in Annex I to the United Nations Framework Convention on Climate Change⁶ (Annex I Parties). By contrast the negotiations for the amendments to the Kyoto Protocol, mainly related to establishing a second commitment period (CP2) and associated rules, lasted for seven years.
4. The increased length of time is primarily due to changing dynamics in the broader UNFCCC negotiations. Negotiations in the late 1990s were less politicised and enjoyed political support from all developed countries (including the USA). However, in recent years, the issue of climate change has found its way higher up the political agenda, with ever increasing scrutiny being placed upon the distribution of obligations between all Parties. Although the Kyoto Protocol is intended to focus on the mitigation efforts of Annex I Parties, rapid economic growth in major developing countries and the effect of the financial crisis on

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¹ FCCC/KP/CMP/2012/13/Add.1, Decision 1/CMP.8.

² FCCC/CP/2012/8/Add.1, Decision 1/CP.18.

³ FCCC/CP/2012/8/Add.1, Decision 2/CP.18.

⁴ For the LRI Briefing Paper on the LCA Decision see *Barakat*, ‘The Doha Outcomes Part II – The Agreed Outcome of the Bali Action Plan’, LRI Briefing Paper No. 45 and for the LRI Briefing Paper on the ADP Decision see *Bavishi and Bird*, ‘The Doha Outcomes Part III – The ADP and CBDRRC’, LRI Briefing Paper No. 46, both available at <http://www.legalresponseinitiative.org/briefing.html> (accessed 25 April 2013).

⁵ Kyoto Protocol to the United Nations Framework Convention on Climate Change (Kyoto Protocol), opened for signature 11 December 1997, 2303 UNTS 148 (entered into force 16 February 2005).

⁶ United Nations Framework Convention on Climate Change (Convention), opened for signature 4 June 1992, 1771 UNTS 107 (entered into force 21 March 1994).

developed countries, amongst other things, has led to developed countries questioning the current application of the principles of common but differentiated responsibilities and respective capabilities (CBDRRC) and equity in the broader climate change regime.

5. As a result, progress in the AWG-KP over the period from 2005 to 2012 has often been hampered by the failure of Parties to reach agreement on the application of CBDRRC and equity in the context of the AWG-LCA. In particular, the tactic of certain developed countries to make progress in the AWG-KP conditional on progress in the AWG-LCA led to a degree of hostility in the negotiations and the perception by many developing countries that developed countries were failing to take the lead in combating climate change, as required by Article 3 paragraph 1 of the Convention.
6. Notwithstanding these dynamics, however, a breakthrough was reached in Durban whereby the Parties to the Kyoto Protocol (KP Parties) agreed there would be a CP2 and took note of draft amendments to legally put it in place. The task for 2012 was to reach agreement on certain elements of CP2 (e.g. length, ambition, eligibility for non-participating Parties and surplus carbon credits) such that the draft amendments could be adopted in Doha.⁷
7. The Doha conference reached an agreement on all of these elements, ensuring the continued survival of the multilateral rules-based, top-down regime, at least until the end of CP2.
8. This briefing paper analyses the basics of the agreement reached in Doha with respect to CP2 and how it addresses issues related to mitigation ambition, the carryover of surplus assigned amount units (AAUs) from CP1, the flexible mechanisms and the eligibility criteria for them during CP2, legal continuity and various procedural matters.

Executive Summary

9. In Doha, the KP Parties adopted amendments to the Kyoto Protocol relating to CP2 (the Doha Amendment).⁸ The Doha Amendment, once it has entered into force, will be binding under international law on the Parties that have deposited their instruments of acceptance in respect of the Doha Amendment. The Doha Amendment and the KP Decision set out the foundational rules related to CP2. The key aspects of CP2 are as follows:
 - CP2 will be eight years long, running from 1 January 2013 until 31 December 2020;
 - Parties taking on commitments in CP2 (CP2 Parties) are required to reduce their aggregate emissions by 18 per cent below 1990 levels in CP2. The commitments of individual Parties range from a 24 per cent reduction (in the case of Ukraine) to a 0.5 per cent reduction (in the case of Australia). The European Union, as a whole, is required to reduce its emissions by 20 per cent;
 - CP2 Parties are required to review their commitments by the end of 2014 with a view to increasing the level of their mitigation ambition;
 - Notwithstanding the commitments set out in Annex B to the Kyoto Protocol (as amended), each CP2 Party's commitment in CP2 must be at least as ambitious as its actual annual average emissions between 2008 and 2010;

⁷ FCCC/KP/CMP/2011/10/Add.1, Decision 1/CMP.7.

⁸ KP Decision, note 1 above, Annex I (the Doha Amendment); also available in all official languages from the UN Depository, reference no. C.N.718.2012.TREATIES-XXVII.7.c, <http://treaties.un.org/doc/Treaties/2012/12/20121217%2011-40%20AM/CN.718.2012.pdf> (accessed 25 April 2013).

- CP2 Parties may carry over surplus CP1 AAs into CP2 without limit but may only use or acquire such AAs in limited circumstances;
 - Access to all of the Kyoto Protocol’s market mechanisms remain uninterrupted for CP2 Parties; and
 - KP Parties agreed to the implementation of the Doha Amendment pending its formal entry into force, thus ensuring the Kyoto Protocol’s operational continuity.
10. The KP Decision and the Doha Amendment preserve the multilateral, rules-based regime in respect of mitigation commitments of Annex I Parties. Even though there has been no substantive increase in mitigation ambition since pledges were announced under the AWG-LCA after Copenhagen and Cancun, KP Parties’ endorsement of the top-down, rules-based regime, as embodied in the Kyoto Protocol, is potentially significant as negotiators shift their attention to the negotiations under the ADP related to the future of the climate regime.

The Basics

11. In Doha, the KP Parties adopted, by way of the KP Decision, the Doha Amendment, such amendments being annexed to the KP Decision. The KP Decision and the Doha Amendment go hand in hand, with some of the rules for CP2 set out in the KP Decision (where the CMP had competence to create or amend the relevant rules) and others in the Doha Amendment (where the CMP did not). Certain rules are set out in both.
12. The length of CP2 will be eight years, running from 01 January 2013 to 31 December 2020,⁹ and pursuant to the Doha Amendment, a new sub-article (Article 3 paragraph 1 bis) is inserted in the Kyoto Protocol under which Annex I Parties commit to ensuring that their:
- aggregate anthropogenic carbon dioxide equivalent emissions of greenhouse gases listed in Annex A do not exceed their assigned amounts...with a view to reducing their overall emissions of such gases by at least 18 per cent below 1990 levels in the commitment period 2013 to 2020.*¹⁰
13. The Doha Amendment also replaces the previous Annex B to the Kyoto Protocol with a new table¹¹ which sets out the quantified emission limitation or reduction commitment (QELRC) and emissions reduction pledge for each CP2 Party, as well as listing those KP Parties which have indicated that they would not be participating in CP2.¹²
14. The CP2 QELRCs for CP2 Parties (when compared to 1990 levels) range from 76 per cent (or a reduction of 24 per cent) in the case of the Ukraine (though, as set out in the surplus and carry over section below, this is stated to be subject to certain conditions), to 99.5 per cent (a reduction of 0.5 per cent) for Australia. The EU and its member states’ QELRC (which can, in accordance with Article 4 paragraph 1 of the Kyoto Protocol, be fulfilled jointly by the EU as a whole even if individual member states do not meet their QELRC set out in the amended Annex B)¹³ is 80 per cent (a reduction of 20%).
15. The amended Annex B includes a QELRC for Belarus, which is listed in Annex I to the Convention but was not included in Annex B when the Kyoto Protocol was adopted and

⁹ KP Decision, note 1 above, paragraph 4.

¹⁰ Kyoto Protocol, Article 3 paragraph 1 bis; Doha Amendment, note 8 above, Article 1.C (Article 3, paragraph 1 bis).

¹¹ Kyoto Protocol, Annex B (as amended); Doha Amendment, note 8 above, Article 1.A (Annex B to the Kyoto Protocol).

¹² These are: Japan, New Zealand and Russia.

¹³ Doha Amendment, note 8 above, Article 1.A (Annex B to the Kyoto Protocol), footnote 4; and document FCCC/KP/CMP/2012/13, paragraph 45.

whose subsequent amendment to be included in Annex B for CP1 has not entered into force.¹⁴ Additionally, Kazakhstan, which is not listed in Annex I to the Convention, has given a notification to the UN Depositary, pursuant to Article 4 paragraph 2(g) of the Convention, to be bound by Article 4 paragraphs 2(a) and (b) of the Convention (related to the adoption of national policies and measures for the mitigation of climate change by developed countries).¹⁵

16. The Doha Amendment also expands the list of greenhouse gases regulated by the Kyoto Protocol so that it now also covers nitrogen trifluoride (NF₃).¹⁶

Ambition

17. The QELRCs set out in the amended Annex B are intended to be equivalent to the quantified economy-wide emissions reduction targets or pledges put forward by Annex I Parties¹⁷ pursuant to the Copenhagen Accord¹⁸ and the Cancun Agreements.¹⁹ Despite efforts made by developing countries, the ambition of these initial pledges was not increased while converting them in QELRCs.
18. Instead, the KP Parties agreed to address the ambition gap in two ways. First, there is provision for a mechanism to easily ‘amend’ Annex B to increase a CP2 Party’s ambition (i.e. by lowering its QELRC) and second, the Doha Amendment sets a minimum level of ambition that is required in CP2.

Ambition Mechanism

19. The provisions related to the ambition mechanism are set out in the KP Decision and the Doha Amendment. The Doha Amendment sets out the procedure to be followed where a QELRC is to be ‘adjusted’ (to increase ambition) and the adoption of the adjustment and its entry into force. The KP Decision, for its part, sets out the obligations of Annex I Parties to revisit their QELRCs and how any adjustment to increase ambition will be made effective.
20. Pursuant to the KP Decision, Annex I Parties are required to revisit their CP2 QELRC by 2014. In order to increase ambition, an Annex I Party may decrease its QELRC in line with an aggregate reduction of greenhouse gas emissions not controlled by the Montreal Protocol²⁰ by Annex I Parties of at least 25 to 40 per cent below 1990 levels by 2020.²¹
21. However, Annex I Parties only committed to reviewing their QELRC; increasing ambition is discretionary. Notwithstanding this, the KP Decision requires CP2 Parties to notify the secretariat by 30 April 2014 of their intention to increase the ambition of their commitment and progress towards achieving their QELRC.²² This requirement increases pressure on CP2 Parties to increase their commitments, even though such increase is not mandatory. The

¹⁴ FCCC/KP/CMP/2006/10/Add.1, Decision 10/CMP.2 (the Belarus Amendment). The Belarus Amendment is in effect now of no consequential value given that it related only to CP1. The Doha Amendment, which lists Belarus in Annex B in respect of CP2 only, will once it enters into force give effect to Belarus’ long-standing desire (i.e. since 2006) to be included in Annex B.

¹⁵ In September 2009, Kazakhstan proposed an amendment to Annex B of the Kyoto Protocol under which it would take a 100 per cent QELRC in CP1 (see document FCCC/KP/CMP/2010/4). Although the proposed amendment has been considered by the CMP, no such amendment was adopted and in Doha, the CMP decided that, in relation to CP1, its consideration of the amendment was now concluded (see document, FCCC/KP/CMP/2012/13/Add.2, Decision 9/CMP.8), paragraph 4).

¹⁶ Kyoto Protocol, Annex A (as amended); Doha Amendment, note 8 above, Article 1.B (Annex A to the Kyoto Protocol).

¹⁷ Further information on these pledges can be found in documents FCCC/SB/2011/INF.1/Rev.1, FCCC/KP/AWG/2012/MISC.1/Add.1 and FCCC/KP/AWG/2012/MISC.1/Add.2.

¹⁸ FCCC/CP/2009/11/Add.1, Decision 2/CP.15.

¹⁹ FCCC/CP/2010/7/Add.1, Decision 1/CP.16

²⁰ Montreal Protocol on Substances that Deplete the Ozone Layer as amended (Montreal Protocol), opened for signature 16 September 1987, 1522 UNTS 3 (entered into force 1 January 1989).

²¹ KP Decision, note 1 above, paragraph 7.

²² KP Decision, note 1 above, paragraph 9.

information provided will be considered at a high-level ministerial meeting in 2014²³ and it is likely that this will be used as an opportunity to increase the political pressure on CP2 Parties to raise the level of their ambition.

22. In relation to the ambition mechanism, the Doha Amendment inserts two new sub-Articles into Article 3 of the Kyoto Protocol:

1 ter. A Party included in Annex B may propose an adjustment to decrease the percentage inscribed in the third column of Annex B of its quantified emission limitation and reduction commitment inscribed in the third column of the table contained in Annex B. A proposal for such an adjustment shall be communicated to the Parties by the secretariat at least three months before the meeting of the Conference of the Parties serving as the meeting of the Parties to this Protocol at which it is proposed for adoption.

1 quater. An adjustment proposed by a Party included in Annex I to increase the ambition of its quantified emission limitation and reduction commitment in accordance with Article 3, paragraph 1 ter, above shall be considered adopted by the Conference of the Parties serving as the meeting of the Parties to this Protocol unless more than three-fourths of the Parties present and voting object to its adoption. The adopted adjustment shall be communicated by the secretariat to the Depositary, who shall circulate it to all Parties, and shall enter into force on 1 January of the year following the communication by the Depositary. Such adjustments shall be binding upon Parties.²⁴

23. The effect of these provisions is to introduce a simplified procedure by which ‘adjustments’ can be made to the QELRCs in Annex B. But for these new provisions, changes to Annex B would be treated as ‘amendments’ to Annex B. If treated as amendments to Annex B, these changes would only enter into force in accordance with Articles 20 and 21 of the Kyoto Protocol. In brief, these require amendments to be:

- (A) communicated to the secretariat six months in advance of the CMP meeting at which they are proposed to be adopted;²⁵
- (B) adopted by the CMP by consensus (or as a last resort by a three-fourths majority);²⁶ and
- (C) consented to in writing by the Party concerned prior to adoption.²⁷

In addition, the amendment to Annex B would only enter into force for those Parties that have accepted the amendment on the ninetieth day after the date of receipt by the Depositary of an instrument of acceptance by at least three-fourths of Parties to the Kyoto Protocol.²⁸ Together, these are high hurdles to clear before an amendment can enter into force as is demonstrated by the fact that the Belarus Amendment²⁹ (related to Annex B) has not yet entered into force despite being adopted in 2006.

²³ KP Decision, note 1 above, paragraph 10.

²⁴ Kyoto Protocol, Article 3 paragraph 1 ter and quater; Doha Amendment, note 8 above, Article 1.D (Article 3, paragraph 1 ter) and Article 1.E (Article 3, paragraph 1 quater).

²⁵ Kyoto Protocol, Article 21 paragraph 3.

²⁶ Kyoto Protocol, Article 21 paragraph 4.

²⁷ Kyoto Protocol, Article 21 paragraph 7.

²⁸ Kyoto Protocol, Article 21, paragraph 7 and Article 20, paragraphs 4 and 5.

²⁹ See note 14 above.

24. However, Article 3, paragraphs 1 ter and quater classify the changes to Annex B to increase ambition as ‘adjustments’ rather than ‘amendments’, allowing the changes to bypass the lengthy amendment procedure. Consequently, the new provisions introduce a new ‘adjustment procedure’. These are often included in multilateral environmental agreements to allow for minor ‘amendments’ to lists of information, usually contained in an annex to the agreement, and for such ‘amendments’ to enter into force quickly.³⁰
25. The adjustment procedure (to increase the level of ambition) set out in Article 3, paragraphs 1 ter and quater of the Kyoto Protocol is very simple. Although proposed adjustments still need to be adopted by the CMP, they only need to be communicated to other Parties three months in advance of the relevant CMP and are deemed to be adopted unless more than three-fourths of KP Parties object to their adoption.³¹ Adopted adjustments will be communicated to the Depositary (and subsequently by it to the KP Parties) and will enter into force on 1 January of the year following the communication by the Depositary.³²
26. The effect of this is that adjustments proposed by CP2 Parties in August 2014 could be adopted at COP20 in November/December 2014 and enter into force on 1 January 2015. This is a vast improvement on the default amendment procedure for Annex B.
27. In order to make the adjustments adopted in accordance with Article 3, paragraphs 1 ter and quater effective, the KP Decision sets out technical rules to ensure that after such adjustment each relevant Party has the correct number of CP2 AAUs. If the adjustment occurs before a Party’s CP2 assigned amount is calculated,³³ the calculation shall be made using the adjusted QELRC percentage (rather than the one currently set out in the amended Annex B). However, if the adjustment occurs after a CP2 Party’s AAUs for CP2 are established, Parties whose QELRC has been adjusted are required to cancel a number of AAUs equivalent to the decrease in their QELRC by transferring them to a cancellation account established for this purpose in their national registry. Thereafter, such transferred AAUs cannot be used by the concerned Party – whether for compliance, trading or any other purposes.³⁴

Ambition Floor

28. Throughout the negotiations, developing countries tried to ensure that CP2 Parties’ actions in CP2 were more ambitious than in CP1. This led to numerous formulations of a new Article 3, paragraph 7 ter to address this issue.
29. However, the main proposals on the table³⁵ were deemed to be unnecessarily complicated and the revised Minister’s text (dated 7 December 2012 at 1.25 pm local time)³⁶ proposed a simplified provision intended to achieve the same result. It provided for the cancellation of a

³⁰ The most well-known of these is the one found in Article 2, paragraph 9 of the Montreal Protocol which allows Parties to ‘adjust’ (and make binding on all Parties) the ozone depleting potentials of gases listed in some of the protocol’s annexes and introduce or change an obligation on the Parties in respect of the production or consumption of such gases without consensus or having to go through ratification.

³¹ By contrast, the Montreal Protocol requires six months’ notice and has no deemed adoption provision. Instead, adjustments must be adopted by consensus or, as a last resort, by a two-thirds majority (including a majority of both developed and developing countries, as classified under the protocol).

³² Kyoto Protocol, Article 3 paragraph 1 quater.

³³ Each Party’s assigned amount for CP2 is to be calculated in accordance with the new Article 3, paragraph 7 bis, the amended Article 3, paragraph 8 and new Article 3, paragraph 8 bis (Doha Amendment, note 8 above, Articles 1.F (Article 3, paragraph 7 bis), 1.H (Article 3, paragraph 8) and 1.I (Article 3, paragraph 8 bis)). Article 3, paragraph 7 bis largely tracks Article 3, paragraph 7 (which relates to calculating assigned amounts for CP1) but rather than referring to a five year commitment period from 2008 to 2012, it refers to an eight year commitment period from 2013 to 2020. Article 3, paragraphs 8 (as amended) and 8 bis, allows (but does not require) Parties when calculating their CP2 assigned amount pursuant to paragraph 7 bis to use 1995 as the base year for hydrofluorocarbons, perfluorocarbons and 1995 or 2000 as the base year for nitrogen trifluoride.

³⁴ KP Decision, note 1 above, paragraph 8.

³⁵ See FCCC/KP/AWG/2012/L.3/Rev.1, Annex, Amendments I (Article 3, paragraph 7 ter) and J (Article 3, paragraph 7 [ter] [quater]).

³⁶ Copy on file with the author.

Party's CP2 AAUs to the extent that its total CP2 assigned amount differed from its emissions in 2012 multiplied by the length of CP2.

30. In the end, Article 3, paragraph 7 ter was adopted as follows:

*7 ter. Any positive difference between the assigned amount of the second commitment period for a Party included in the Annex I and average annual emissions for the first three years of the preceding commitment period multiplied by eight shall be transferred to the cancellation account of that Party.*³⁷

31. The effect of this provision is to try and limit the amount of new 'hot air' that could be created by CP2 Parties putting forward artificially high QELRCs. It creates a floor on the level of ambition and makes a CP2 Party's CP2 commitment at least as ambitious as its actual annual average emissions between 2008 and 2010. For each CP2 Party, any CP2 AAUs in excess of its actual average emissions between 2008 and 2010 multiplied by the length of CP2 must be cancelled by transferring such AAUs to its cancellation account.³⁸
32. There are two subtle differences between the text placed before Ministers and the ultimately adopted amendment. First, the comparator is no longer emissions in 2012, but rather average annual emissions between 2008 and 2010. In the ordinary course of events, one would expect annual emissions in 2012 to have been lower than in the period 2008 to 2010, meaning that the ambition floor would have been lowered by using the 2008 to 2010 reference point. However, due to the financial crisis, developed country emissions dropped significantly between 2008 and 2010 and it is not yet clear whether average emissions during this period were lower or higher than in 2012. If they were lower, Article 3, paragraph 7 ter has the effect of raising the ambition floor.
33. Second, the inclusion of the word "positive" suggests that a CP2 Party's CP2 AAUs will only be cancelled where its CP2 assigned amount is greater than its average 2008 to 2010 emissions multiplied by the length of CP2. Arguably, the proposal in the Minister's text could have required cancellation of the equivalent amount of a CP2 Party's CP2 AAUs even if its CP2 assigned amount was less than its average 2008 to 2010 emissions multiplied by the length of CP2. While this is unlikely to have been intended, the addition of the word "positive" limits the instances in which the ambition floor can be raised.

Surplus AAUs and Carry Over

34. The rules related to surplus CP1 AAUs and their carry over into CP2 are contained in the KP Decision and were a significant source of tension in the final hours of the Doha conference.
35. Article 3, paragraph 13 of the Kyoto Protocol (which was not amended by the Doha Amendment) states:

If the emissions of a Party included in Annex I in a commitment period are less than its assigned amount under this Article, this difference shall, on request of that Party, be added to the assigned amount for that Party for subsequent commitment periods.

This provision therefore states that a Party's surplus AAUs from one commitment period can be carried over and added to its assigned amount for the subsequent commitment period.

³⁷ Kyoto Protocol, Article 3 paragraph 7 ter; Doha Amendment, note 8 above, Article 1.G (Article 3, paragraph 7 ter).

³⁸ After the adoption of the KP Decision, at the joint meeting of the COP and CMP held on 8 December 2012, the EU stated that the new Article 3 paragraph 7 ter will be applied to the EU's assigned amount as a whole, pursuant to the agreement on joint fulfilment of the European Union and its member States, and will not be applied to EU Member States individually (see document FCCC/KP/CMP/2012/13, paragraph 45).

36. The KP Decision requires all CP2 Parties to establish a “previous period surplus reserve account” (PPSRA) in their national registry.³⁹ It further states that where a CP2 Party’s emissions in a commitment period are lower than its assigned amount for that commitment period, that Party may carry over the difference to the subsequent commitment period to differing degrees depending on whether the unit is an AAU, an emissions reduction unit (ERU) or a certified emissions reduction (CER).
37. Surplus AAUs, in accordance with Article 3, paragraph 13, will be carried over in their entirety and added to the relevant CP2 Party’s CP2 assigned amount. By contrast, surplus ERUs and CERs may only be carried over to subsequent commitment periods up to a maximum for each unit type of 2.5 per cent of the relevant Party’s CP1 assigned amount. Surplus AAUs, although added to the subsequent commitment period’s assigned amount, must be transferred to the PPSRA.⁴⁰ The KP Decision does not specify where eligible surplus ERUs and CERs should be transferred to. However, it is likely that they too will be transferred to the PPSRA.
38. CP1 units held in a CP2 Party’s PPSRA can, in limited circumstances, be used to meet its CP2 target or sold to other CP2 Parties. In relation to use, units in a CP2 Party’s PPSRA (whether such units have been carried over and/or acquired from another CP2 Party) can only be used for retirement during the additional period for fulfilling CP2 commitments to the extent that its CP2 emissions were greater than its CP2 assigned amount. This prevents a Party with a large CP1 surplus from using such CP1 units for CP2 compliance purposes rather than its CP2 AAUs, ERUs or CERs and limits the chances of creating a future build-up of surplus CP2 units.⁴¹
39. The KP Decision also specifies that units may be transferred and acquired between PPSRA accounts (i.e. they can be traded by CP2 Parties only). A CP2 Party, however, can only acquire units from other CP2 Parties’ PPSRA up to 2 per cent of its CP1 assigned amount.⁴² Together, these restrictions on use and sale were controversial.
40. Russia objected on the basis that such restrictions “alter the legal architecture of the Kyoto Protocol”,⁴³ in particular, Article 3, paragraph 13. However, this objection is not sustainable. Article 3, paragraph 13 clearly states that surplus units shall “be added to the assigned amount for that Party subsequent commitment periods”. This paragraph pre-supposes that the KP Party carrying over units will participate in the subsequent commitment period. Since Russia has indicated it does not intend to participate in CP2,⁴⁴ it will not have a CP2 assigned amount and therefore nothing to which its surplus CP1 units can be added.
41. As a result, the restrictions referred to above do not alter the legal architecture of the Kyoto Protocol; instead they merely provide more detail to the existing provisions related to carry over of surplus CP1 units. Since Russia reportedly has significant amounts of surplus units, Russia’s inability to carry these forward and sell them to other Parties removes a large amount of ‘hot air’ from the trading system.
42. In addition, Ukraine has communicated that its QELRC of 76 per cent is predicated on there being no cancellation of carry over units and no limitation on their use. This communication is included as a footnote to the amended Annex B.⁴⁵ It appears that Ukraine intended for this communication to act as a sort of reservation, modifying its legal obligations under the Kyoto

³⁹ KP Decision, note 1 above, paragraph 23.

⁴⁰ KP Decision, note 1 above, paragraph 24.

⁴¹ KP Decision, note 1 above, paragraph 25.

⁴² KP Decision, note 1 above, paragraph 26.

⁴³ FCCC/KP/CMP/2012/13, paragraph 42 and footnote 27.

⁴⁴ Doha Amendment, note 8 above, Article 1.A (Annex B to the Kyoto Protocol), footnote 16.

⁴⁵ Doha Amendment, note 8 above, Article 1.A (Annex B to the Kyoto Protocol), footnote 12.

Protocol to meet its CP2 target. However, pursuant to Article 26 of the Kyoto Protocol, no reservations are permitted and the footnote should be of no effect. As a result, and notwithstanding the footnote, the restrictions on carry over of surplus units as specified in the KP Decision should apply equally to Ukraine. It therefore remains to be seen whether Ukraine will ratify the Doha Amendment given the restrictions discussed above.

43. Notwithstanding Russia and Ukraine's positions, while the restrictions on use and purchase limit the usefulness of surplus CP1 AAUs, ERUs and CERs, there is no restriction on the amount of CP1 units a CP2 Party can *sell* to other CP2 Parties. In theory, therefore, a CP2 Party with a large number of CP1 units in its PPSRA could sell the bulk of these to other CP2 Parties (each buying up to 2 per cent of its CP1 assigned amount). This is a weakness of the adopted carry over regime, but the weakness is only theoretical.
44. To address this weakness, many CP2 Parties (i.e. Australia, the EU and all its member states, Liechtenstein, Monaco, Norway and Switzerland) and Japan have each made political declarations stating either that they will not purchase surplus CP1 AAUs or that they are prevented by legislation from using surplus CP1 AAUs in CP2.⁴⁶ In practice, therefore, this means that Belarus, Iceland, Kazakhstan and Ukraine⁴⁷ are the only countries that could constitute the market for surplus CP1 AAUs. To a large extent, this (together with the restrictions on use of surplus CP1 units as set out in the KP Decision) limits the risk of large-scale trading of surplus CP1 units.
45. Finally, despite strong call from the Africa Group, there is no provision in the KP Decision related to the cancellation at the end of CP2 of units held in a CP2 Party's PPSRA or surplus CP2 AAUs. As a result, it is not clear whether it is intended that such surplus units will be carried over into the new agreement to be negotiated under the ADP. This issue will need to be addressed either by the CMP in the future or in the context of the ADP negotiations.

Market Mechanisms and Eligibility

46. Another significant source of tension in the run-up to Doha was the extent to which Annex I Parties which indicated they would not participate in CP2 would be entitled to access and benefit from the Kyoto Protocol's flexible mechanisms (i.e. the clean development mechanism (CDM), joint implementation (JI) and international emissions trading (IET)).
47. Many developing countries believe that access to the market mechanisms should only be open to CP2 Parties, particularly given that one of the main purposes of the flexible mechanisms is to assist Annex I Parties meet their mitigation obligations under the Kyoto Protocol.⁴⁸ If such a Party does not have mitigation obligations in CP2, it does not need access to the mechanisms. On the other hand, various other Parties highlighted that the CDM has a dual purpose, one which also includes assisting non-Annex I Parties achieve sustainable development,⁴⁹ and that wide access to the CDM should be allowed to facilitate this.
48. The compromise that was eventually reached in the KP Decision reflected these divergent views. In respect of the CDM, for CP2, all Parties to the Kyoto Protocol (i.e. including Russia, Japan and New Zealand, but excluding Canada and the USA) will continue to be able to participate in ongoing CDM project activities and any CDM project activities registered after 31 December 2012.⁵⁰ However, as a matter of principle (and subject to certain

⁴⁶ KP Decision, note 1 above, Annex II; see also document FCCC/KP/CMP/2012/13, paragraph 43. The declarations do not say the same in respect of ERUs or CERs.

⁴⁷ Croatia has been excluded from this list on the basis that it will become a full member of the EU on 1 July 2013.

⁴⁸ Kyoto Protocol, Articles 6, 12 and 17.

⁴⁹ Kyoto Protocol, Article 12 paragraph 2.

⁵⁰ KP Decision, note 1 above, paragraphs 12 and 13.

- requirements), only CP2 Parties will be eligible to transfer or acquire CERs.⁵¹ The effect of this is that although Japan, for example, may participate in CDM projects, it will be unable to directly benefit from the CERs generated by such projects.
49. In respect of JI and IET, the KP Decision states that only CP2 Parties whose eligibility to participate in such mechanisms was established in CP1 shall (unless such Party's participation has been suspended by the Kyoto Protocol's Compliance Committee) be eligible to transfer and acquire AAs, CERs, ERUs and removal units (RMUs) which are valid in CP2 (i.e. Russia, Japan and New Zealand will not be able to trade such units at the international level in CP2).⁵² CP2 Parties whose eligibility was not established in CP1 will be unable to transfer or acquire carbon units until such eligibility in CP2 is established and the Subsidiary Body for Implementation has been mandated to expedite the process for establishing such eligibility in accordance with the existing CMP decisions (as amended by the KP Decision and potential future decisions related to CP2 eligibility).⁵³
50. The KP Decision also makes a number of consequential amendments to, or gives guidance for the interpretation of, existing CMP decisions in order to give effect to CP2.⁵⁴
51. A CP2 Party whose eligibility for accessing the mechanisms in CP2 has been deemed established may only use CERs to contribute to compliance with part of its CP2 commitments upon the entry into force of the Doha Amendment for that Party, provided that such Party must still continue to meet the criteria in paragraph 31 of Decision 3/CMP.1 (including in relation to maintaining a national system for the estimation of emissions by sources and removals by sinks, a national registry and submitting most recent annual inventories and any supplementary information required to be reported pursuant to the Kyoto Protocol).⁵⁵
52. The KP Decision also addresses the demand of many of the least developed countries (LDCs) for additional funding to be made available to the Adaptation Fund. It states that the share of proceeds for CDM projects shall be maintained at 2 per cent of the CERs issued for a project activity⁵⁶ and maintains that CDM project activities in LDCs shall continue to be exempt from the share of proceeds levy.⁵⁷ In addition, the share of proceeds levy is to be extended to JI projects and IET. In particular, in CP2 a 2 per cent share of proceeds shall be levied on the first international transfers of AAs and the issuance of ERUs for JI projects immediately upon the conversion to ERUs of AAs or RMUs previously held by Parties.⁵⁸
53. Finally, new Article 3, paragraphs 12 bis and ter were adopted as part of the Doha Amendment.⁵⁹ The provisions provide that any units generated from new market based mechanisms established under the Convention or its instruments may be used by CP2 parties to meet their mitigation commitments under the Kyoto Protocol.⁶⁰ Where such units are used for this purpose, a share of these units shall be used to cover administrative costs and to assist developing countries meet the costs of adaptation if such units are acquired through use of the IET mechanism. Although the percentage amount is not specified yet, this concept is similar to the rules related to the issuance of CERs and, pursuant to the KP Decision, CP2 ERUs and the first international transfers of CP2 AAs.

⁵¹ KP Decision, note 1 above, paragraph 13.

⁵² KP Decision, note 1 above, paragraph 15(a).

⁵³ KP Decision, note 1 above, paragraph 16.

⁵⁴ KP Decision, note 1 above, paragraphs 15(b), 17, 18 and 19.

⁵⁵ KP Decision, note 1 above, paragraph 14.

⁵⁶ KP Decision, note 1 above, paragraph 20 and FCCC/CP/2001/13/Add.2, Decision 17/CP.7, paragraph 15(a).

⁵⁷ KP Decision, note 1 above, paragraph 22 and FCCC/CP/2001/13/Add.2, Decision 17/CP.7, paragraph 15(b).

⁵⁸ KP Decision, note 1 above, paragraph 21.

⁵⁹ Doha Amendment, note 8 above, Article 1.J (Article 3, paragraph 12 bis and ter).

⁶⁰ LCA Decision, note 2 above, paragraphs 50-53 in relation to the process and timeline for the development of a new market mechanism under the Convention defined pursuant to document FCCC/CP/2011/9/Add.1, Decision 2/CP.17, paragraph 83.

Legal continuity

54. The Kyoto Protocol, which came into force in 2005, will remain in existence until terminated in accordance with the Vienna Convention on the Law of Treaties 1969 (VCLT);⁶¹ individual Parties, however, may withdraw from it in accordance with Article 27 of the Kyoto Protocol. However, CP1 only ran from 1 January 2008 until 31 December 2012.⁶² Thereafter, absent an amendment to the Kyoto Protocol, Annex I Parties would not be legally bound by emission reduction commitments in respect of the period after 31 December 2012.
55. Decision 1/CMP.1,⁶³ which established the AWG-KP to consider further commitments for Annex I Parties for the period after CP1 had expired, had as one of its aims adopting the outcome of the AWG-KP “as early as possible and in time to ensure that there is no gap between the first and second commitment periods”.⁶⁴
56. To ensure there was no gap between commitment periods, KP Parties agreed in Durban that CP2 “shall begin on 1 January 2013”.⁶⁵ This agreement was repeated in Doha.⁶⁶
57. However, CP2 will not be binding under international law until the Doha Amendment enters into force in accordance with Articles 20 and 21 of the Kyoto Protocol.⁶⁷ This may not occur for some time yet. There will, therefore, be a legal gap between CP1 and CP2.
58. Recognising this, KP Parties considered ways to close the legal gap by using a tool known as ‘provisional application’. This is a legal mechanism permitted under the VCLT⁶⁸ which would have allowed the Doha Amendment to have been legally binding on the Parties pending its formal entry into force.
59. As negotiations came down to the final days in Doha, there were two main options related to provisional application on the table. The first was an opt-out option, whereby Parties agreed to provisionally apply the Doha Amendment pending its formal entry into force unless they expressly opted out of such arrangements. This was strongly supported by the LDCs and the Alliance of Small Island States. The EU and Australia, however, had said that if this option was chosen they would have opted-out. The second option was an opt-in option, whereby Parties could declare that they would provisionally apply the Doha Amendment pending its formal entry into force, but would not be bound to do so. This option was strongly supported by the EU and Australia.
60. Given that the objective of the Doha Amendment was to impose mitigation obligations on CP2 Parties during CP2, its provisional application would have only had any practical effect if it was agreed to by CP2 Parties. Since the majority of CP2 Parties (the EU and Australia) had indicated they were not going to provisionally apply the amendments, the KP Decision ultimately settled on the opt-in option:

[The CMP]...Recognizes that Parties may provisionally apply the amendment pending its entry into force in accordance with Articles 20 and 21 of the Kyoto Protocol, and

⁶¹ Vienna Convention on the Law of Treaties (VCLT 1969), opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980).

⁶² Kyoto Protocol, Article 3 paragraph 1.

⁶³ FCCC/KP/CMP/2005/8/Add.1, Decision 1/CMP.1.

⁶⁴ See note 63 above, paragraph 3.

⁶⁵ See note 7 above, paragraph 1.

⁶⁶ KP Decision, note 1 above, paragraph 4.

⁶⁷ See paragraph 23 above for a brief description of the Kyoto Protocol’s entry into force procedure.

⁶⁸ VCLT, Article 25.

*decides that Parties will provide notification of any such provisional application to the Depository.*⁶⁹

61. To give comfort to non-Annex I Parties that the CP2 Parties would in any event implement their CP2 obligations pending the Doha Amendment's entry into force, the CMP further agreed that Parties which did not provisionally apply the Doha Amendment must implement their commitments and other responsibilities related to CP2 in a manner consistent with their national legislation or domestic processes.⁷⁰
62. The purpose of this provision was to ensure there would be no practical or operational gap between commitment periods and to ensure the operational continuity of the Kyoto Protocol and its various mechanisms and institutions.
63. However, it is clear that if the Doha Amendment for whatever reason never enters into force, CP2 Parties will be under no legal obligation to reduce their emissions during CP2 and will not incur state responsibility for failure to meet their CP2 QELRC.
64. The effect of the requirement to implement CP2 obligations is further diluted by the requirement that Parties only have to implement such obligations in a manner consistent with their national legislation or domestic processes. The practical effect of this is that, pending the Doha Amendment's entry into force, a Party whose national laws or processes are contrary to the Doha Amendment will not have to implement its CP2 obligations to the extent that there is a conflict between the two. There is no requirement to amend such national laws and/or processes to eliminate any inconsistency, though this of course will be necessary in order for each Party to ratify the Doha Amendment.
65. In order to mitigate these risks, the CMP calls upon all Parties to "deposit as soon as possible their instruments of acceptance in respect of the [Doha Amendment] with a view to expedite its entry into force."⁷¹ However, at the date of this paper no Parties had deposited their instruments of acceptance in respect of the Doha Amendment.

Other matters related to the KP Decision and the Doha Amendment

66. The manner in which the KP Decision was adopted was controversial. It was gavelled through the CMP by the CMP President even though the Russian delegate had indicated he was waiting to make an intervention. The President (in his capacity as COP President) then opened the COP, gavelled through some of the COP decisions related to the Doha Climate Gateway and closed the COP before opening a joint meeting of the COP and CMP. It was only at this point that Parties were invited to make statements. The effect of this was that interventions made by Parties were made only in respect of the Doha Climate Gateway as a whole rather than in respect of its individual decisions adopted by the COP and CMP.
67. Notwithstanding this, Russia raised procedural and substantive issues with the KP Decision. Since the intervention was made in the joint meeting of the COP and CMP (and not in the CMP plenary), it was treated as a point of order which would have no effect on the adoption of the KP Decision. Rather than going into the substance of Russia's concerns, the COP President agreed to note the intervention in the report of the session, which he duly did.⁷²
68. The treatment of the Russian objection raises interesting questions about the definition of consensus in the UNFCCC. In Cancun, Bolivia objected to the substance of the COP decision

⁶⁹ KP Decision, note 1 above, paragraph 5.

⁷⁰ KP Decision, note 1 above, paragraph 6.

⁷¹ KP Decision, note 1 above, paragraph 3.

⁷² See note 43 above.

related to the work of the AWG-LCA,⁷³ but the decision was adopted nonetheless (with the objection merely being noted in the report of the session⁷⁴). In Doha, Russia was not even given the opportunity to object in the CMP plenary and its concerns were similarly noted in the session's report. Whether this practice (i.e. declaring consensus despite there being an objection and merely noting the objection in the report of the relevant session) will become commonplace in the UNFCCC remains to be seen.

69. However, as alluded to by Russia in its intervention, such practice may have negative implications for the implementation of decisions adopted in such a manner or the national ratification of amendments (where required) by the aggrieved Party. This will be particularly relevant in the context of the adoption of the outcome of the ADP, particularly where such adoption requires consensus and where the outcome is a legal instrument which requires national ratification. Adoption of such an outcome in the face of an objection by a Party (or Parties) which is merely taken note of may undermine the outcome's objective to facilitate broad participation in the post-2020 climate regime.
70. The Doha Amendment also includes a small number of consequential amendments to the Kyoto Protocol which were required to ensure that the provisions of Article 4, which allow groups of Parties (such as the EU) to jointly fulfil their Article obligations, are equally applicable to CP2.⁷⁵
71. Finally, the KP Decision also includes various paragraphs intended to facilitate its implementation and decides that, further to its work in Doha, the AWG-KP has fulfilled its mandate (as set out in Decision 1/CMP.1⁷⁶) and that its work is therefore concluded.

Conclusion

72. Taken together, the KP Decision and the Doha Amendment will have limited effect on the climate. Prior to COP18, Russia, Japan and New Zealand had each declared they would not participate in CP2. On 15 December 2012, Canada's withdrawal from the Kyoto Protocol formally became effective. This, together with the fact that the US has never ratified the Kyoto Protocol, means that CP2 will regulate less than a quarter of the world emissions.
73. Nevertheless, they do keep the Kyoto framework in place another eight years. However, it is clear that these alone will not address the challenges posed by climate change. There has been no increase in CP2 Parties' mitigation ambition since pledges were made under the AWG-LCA. There is a mechanism built in to allow for ambition to increase by CMP10 and a floor on the level of ambition in CP2. However, the increase in ambition is not mandatory and the ambition floor is set at a very modest level.
74. Instead, the core issues addressed by the KP Decision and the Doha Amendment relate to technical aspects of CP2 and the operational continuity of the Kyoto Protocol, its mechanisms and institutions.
75. In fact, it is arguable that the main positive result to come out of the AWG-KP may not be the substance of the Doha Amendment, but rather that its adoption represents an endorsement of the rules-based, legally binding, multilateral regime. This may prove to be of particular importance as Parties shift their focus to the negotiations under the ADP.

⁷³ FCCC/CP/2010/7/Add.1, Decision 1/CP.16.

⁷⁴ FCCC/CP/2010/7, paragraph 48.

⁷⁵ Doha Amendment, note 8 above, Article 1.K (Article 4, paragraph 2) and Article 1.L (Article 4, paragraph 3).

⁷⁶ See note 63 above.