

National Interest Analysis [2016] ATNIA 11

with attachment on consultation

Doha Amendment to the Kyoto Protocol

(Doha, 8 December 2012)

[2016] ATNIF 24

NATIONAL INTEREST ANALYSIS: CATEGORY 1 TREATY

SUMMARY PAGE

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Nature and timing of proposed treaty action

1. The proposed treaty action is the deposit of an instrument of acceptance for the Doha Amendment to the Kyoto Protocol (the Amendment), done at Doha, Qatar on 8 December 2012. Australia has been a Party to the Kyoto Protocol since 2008.
2. The Amendment to the *Kyoto Protocol to the United Nations Framework Convention on Climate Change* (the Protocol) was adopted by the Conference of the Parties serving as the Meeting of the Parties to the Kyoto Protocol (COP-CMP), pursuant to Article 3, paragraph 9 of the Protocol and in accordance with its Articles 20 and 21.
3. The Amendment modifies the Protocol by establishing a second commitment period, which includes binding emission reduction commitments for participating Parties (those countries with commitments listed in the third column of the table contained in Annex B of the Protocol).
4. Acceptance of the Amendment would formalise, and make legally binding, Australia's commitment in the second period to limit average annual emissions over the period 2013 – 2020 to 99.5 per cent of 1990 levels. This is consistent with Australia's political commitment to reduce emissions to 5 per cent below 2000 levels by 2020 (the 2020 target).
5. As set out in paragraph 17 of this document, acceptance will establish new obligations under the Protocol in three areas. Existing obligations under the Protocol and *United Nations Framework Convention on Climate Change* (UNFCCC) will continue to apply. Acceptance of the Amendment for Australia will also mean that specific obligations under the Protocol which applied in achieving the commitment in the first period, will also apply in respect of achieving the commitment in the second period.
6. The treaty action would be taken as soon as practicable following consideration by the Joint Standing Committee on Treaties (JSCOT).

7. Pursuant to Article 20, paragraph 4 and Article 21, paragraph 7 of the Protocol, the Amendment will enter into force on the ninetieth day after three-fourths of the Parties have deposited their instruments of acceptance. At 17 August 2016, the Amendment is not yet in force as only 66 of the required 144 Parties (constituting three-fourths of 192) have deposited instruments of acceptance. Subject to any change in the number of Parties to the Protocol, for Australia, the Amendment, if accepted, will enter into force either: on the ninetieth day after 144 Parties (including Australia) have deposited their instruments of acceptance; or where 144 Parties (excluding Australia) have already deposited their instruments of acceptance, on the ninetieth day after Australia deposits its instrument of acceptance.

Overview and national interest summary

8. Acceptance of the Amendment will affirm, internationally, Australia's ongoing commitment to multilateral climate action. It will formalise, and makes legally binding, Australia's second period commitment to limit average annual emissions over the period 2013 – 2020 to 99.5 per cent of 1990 levels. This is consistent with Australia's 2020 target. This treaty action builds on the successful achievement of Australia's commitment in the first period and underscores the legitimacy of progress towards our 2020 target.

Reasons for Australia to take the proposed treaty action

9. Acceptance of the Amendment will underscore Australia's continued commitment to working constructively with the international community to address climate change. This action is consistent with Australia's extensive involvement in negotiating and implementing the Kyoto Protocol and will further demonstrate that Australia is delivering on its international commitments, following the achievement of its first period commitment.
10. As set out above, acceptance of the Amendment will formalise, and make legally binding, Australia's commitment in the second period under the Protocol, which is consistent with Australia's 2020 emission reduction target. The 2020 target is a natural extension of Australia's work to achieve its first period commitment, and an important milestone towards its 2030 emission reduction target.
11. Australia is on track to achieve the second period commitment and 2020 target. If the Amendment is accepted, reporting in accordance with the Protocol's measurement, reporting and accounting rules, and its audit and transparency processes, will highlight Australia's progress towards its second period commitment. Australia has effectively been following these rules for a number of years and acceptance of the Amendment will ensure that this effort is appropriately recognised.
12. The Protocol and its rules include a number of mechanisms designed to provide flexibility to countries so that they can manage emissions over time

and at least cost. Acceptance of the Amendment extends Australia's access to existing mechanisms for the second commitment period.

13. One such mechanism is 'carry over', which refers to the ability of Parties to the Protocol to count over-performance on their commitment in the first period towards their commitment in the second period. This rule is a feature of the original agreement. Article 3(13) of the Protocol provides that a Party in Annex I whose emissions in a commitment period were less than its assigned amount in that period, can have the difference added to its assigned amount for the subsequent commitment period upon request. Carry over is designed to help countries to achieve their targets in the most economically efficient way by allowing them to distribute emission reduction effort over a broader time than a single commitment period. In addition to providing flexibility, this provision ensures there is not a perverse incentive for countries to do the minimum necessary in any given commitment period.
14. Australia over-performed on its first period commitment by 128 million tonnes. Acceptance of the Amendment will formalise Australia's ability to apply this over-performance towards its 2020 commitments.
15. A further flexibility mechanism is the use of international carbon units, generated under articles 6, 12 and/or 17 of the Protocol, to assist countries to comply with their commitments through offsetting their emissions. The Amendment specifies in Article 1(J) that market-based mechanisms established under the Convention or its instruments may be used by the Parties in Annex I to assist them in achieving their limitation and reduction commitments under Article 3 of the Protocol. The Government presently holds around 24 million such units generated additionally to countries' assigned amounts and gifted to it by Australian businesses under the voluntary Waste Industry Protocol.
16. When the Amendment was adopted in 2012, Australia made a non-binding political declaration that it would not purchase surplus Assigned Amount Units, representing the initial allocation of greenhouse emissions permissible under the Protocol, that were carried over by other countries from the first commitment period under article 3(13).
17. A number of Australian businesses currently use international units to voluntarily offset their emissions under the Government's National Carbon Offset Standard. The Australian National Registry of Emissions Units provides a secure electronic system for businesses to hold, transfer or cancel such units. Acceptance of the Amendment would ensure businesses can continue to use this centralised system for international units generated in the second commitment period under Articles 6 and 12 of the Protocol. Non-acceptance would require business to use foreign registry accounts or become project participants to access these units – a more complex, potentially more burdensome, arrangement.

Obligations

18. Once entered into force, the Amendment will establish new obligations in three areas under the Protocol. These are 1) binding greenhouse gas emissions reduction commitments for the second commitment period (2013-2020); 2) measures which establish penalties where a Party's commitment in the second period is less ambitious than its emission reduction performance in the first three years of the first commitment period; and 3) the addition of nitrogen trifluoride (NF₃) to the list of gases covered by the Protocol.

The Second Commitment Period

19. Article 1 of the Amendment establishes a second commitment period covering the years 2013 to 2020, as contemplated in Article 3(9) of the Protocol.
20. The Amendment establishes binding Quantified Emission Limitation or Reduction Commitments (QELRCs) for participating countries for the second commitment period, listed in the table in Article 1(A), which replaces the table in Annex B to the Protocol. In 2012, each participating country submitted its QELRC for the second commitment period, expressed as a percentage of that country's emissions in the 1990 base year.
21. Australia committed to a second commitment period QELRC of 99.5 per cent, limiting average annual emissions to 0.5 per cent below the 1990 base year over the period from 2013 to 2020. Protocol rules require Australia to use 1990 as its base year and Australia's QELRC was established to be consistent with Australia's commitment to reduce emissions to five per cent below 2000 levels in 2020.
22. Article 1(C) of the Amendment inserts a new paragraph 1 *bis* to Article 3 of the Protocol and creates a legally binding obligation on each Party included in Annex I to individually or jointly ensure that their emissions do not exceed their assigned amount calculated in accordance with their QELRC for the second commitment period.
23. Article 1(F) of the Amendment inserts new paragraph 7 *bis* of Article 3 setting out how a Party's 'assigned amount' shall be calculated based on its QELRC. This paragraph takes into account the change in commitment period length to eight years in the second period, compared to five years for the first period, and restates specific requirements, relevant to Australia, for the calculation of base year emissions and assigned amounts.

Incentives and Penalties for Setting Commitments in the Second Period

24. The Amendment introduces, in Article 1(G), a provision establishing incentives for each Party in Annex I to the UNFCCC to set a second commitment period QELRC in Annex B of the Protocol which is no less ambitious than its emission reduction performance in the first three years of the first commitment period (2008-2010). New Article 3(7) *ter* achieves this

by effectively penalising Parties that do not do so - establishing obligations to transfer any positive difference between the second commitment period QELRC and the average annual emissions for such a Party in the years 2008-2010 to the cancellation account for that Party.

Nitrogen Trifluoride (NF₃)

25. The Amendment adds NF₃ to the list of gases in Annex A to the Protocol. This creates an obligation to include the gas in the calculation of Australia's greenhouse gas emissions for the purpose of determining compliance with its commitment in the second period.

Relationship to Existing Obligations

26. Various existing obligations under the Protocol – for example obligations under Article 2 - which applied generally in achieving the QELRC under Article 3 for the first period - will also apply in respect of achieving the QELRC in the second period. The Amendment will have no further impact on Australia's existing international obligations under either the Protocol or the UNFCCC.

Implementation

27. Legislation, policies and practices are already in place to implement Australia's obligations under the Amendment.
28. Key measures in place to achieve Australia's emissions reduction commitment in the second period include the Emissions Reduction Fund, the Renewable Energy Target and the National Energy Productivity Plan. The \$2.55 billion Emissions Reduction Fund enables businesses to earn carbon credits by carrying out projects that reduce their emissions. The Fund purchases credited emissions reductions at least cost through a reverse auction process. The Fund's 'Safeguard Mechanism' places limits on the growth of emissions elsewhere in the economy above business as usual levels to protect this investment. The Renewable Energy Target will ensure 23.5 per cent of Australia's electricity generation comes from renewable energy sources by 2020. The National Energy Productivity Plan encompasses a wide range of measures that will improve Australia's energy productivity (energy used per unit of GDP) by 40 per cent between 2015 and 2030.
29. The *Carbon Credits (Carbon Farming Initiative) Act 2011*, which implements the Emissions Reduction Fund and Safeguard Mechanism, would not require further amendment as it operates on the basis that the Amendment is in force.
30. Australia's official emissions projections to 2020, released in April 2016 (*Australia's Abatement Task: Tracking to 2020*), indicate that Australia is on track to meet its 2020 emissions reduction target.

31. In accordance with the obligations contained in the Amendment and relevant Protocol rules, Australia's National Inventory Report, to be submitted to the UNFCCC in May 2016, illustrates that Australia's commitment in the second period is more ambitious than its emission reduction performance in the first three years of the first commitment period. The data underpinning this conclusion will be subject to the annual international audit process.
32. The Amendment obligation related to NF₃ has been implemented by including reporting of the gas against *Source Category 2.E Electronics Industry* in the Australian Government's annual National Inventory Report, starting in the report published in May 2015. In accordance with UNFCCC inventory reporting guidelines, emissions of NF₃ in Australia are considered by the Department of the Environment and Energy to be negligible and therefore do not need to be estimated.
33. The Office of Best Practice Regulation (OPBR) has been consulted and confirms that a Regulation Impact Statement is not required for the ratification of the Amendment. Regulatory impacts have been assessed in the context of the specific policy measures that are in place to implement the obligations under the Amendment, including the Emissions Reduction Fund, its Safeguard Mechanism, and the Renewable Energy Target.

Costs

34. The most recent session of the COP-CMP finalised the rules that will apply for the second commitment period, which are substantively the same as those upon which Australia's existing 2020 target has been based. Accordingly, accepting the Amendment will not create any additional costs to those associated with efforts to achieve the 2020 target under existing policy measures.
35. Acceptance of the Amendment will formalise Australia's use of its first commitment period over performance and international carbon units generated under the Protocol to assist to meet its 2020 commitments. These flexibility mechanisms will provide Australia with additional options for achieving the 2020 target in a cost-effective way.
36. The Protocol's international audit process can involve the adjustment of national emissions totals if Australia's emissions estimates are found to be inconsistent with Protocol obligations or rules. Audit teams also assess the state of the 'national inventory system' where penalties for non-compliance include suspension of access to international carbon markets. Australia has actively managed this risk since its ratification of the first commitment period through the ongoing development and maintenance of a high quality national inventory system, participation of Australian experts in the international audit of other countries' inventories to promote comparable treatment, and effective engagement with the international experts that conduct Australia's annual international audit by the Department of the Environment and Energy.

37. Should Australia not achieve the second period commitment, there are potential penalties that may be applied in subsequent commitment periods. However, as Australia is already on track to meet the 2020 target, and penalties would be contingent upon a third commitment period (a situation not under active negotiation or consideration), this risk is considered negligible.
38. Acceptance of the Amendment will not alter the existing costs of remaining compliant with reporting and accounting obligations under the Protocol or the UNFCCC. Australia's contributions to the trust fund of the UNFCCC and the Protocol will not be impacted by the Amendment.
39. There are no additional costs to Australian business or industry, or to State and Territory governments, associated with this treaty action.

Future treaty action

40. The Amendment does not itself provide for future treaty action and does not alter the Protocol's existing procedures with respect to future treaty actions.
41. As the framework for international climate change action post-2020 will be addressed by the recently concluded Paris Agreement, no future treaty action is anticipated under the Protocol.

Amendments

42. Amendments to the Protocol are made in accordance with Article 20 of the Protocol, which provides that an amendment can be adopted by consensus or, failing that, a three-fourths majority vote, at any ordinary session of the COP-CMP.
43. Amendments do not automatically bind the Parties. Once an amendment is adopted by the COP-CMP, it will enter into force on the ninetieth day after three-fourths of the Parties have deposited instruments of acceptance. Upon meeting this criterion, it will enter into force for any other Party on the ninetieth day after the date on which it deposits an instrument of acceptance.
44. Article 21 of the Protocol addresses amendments to and inclusion of annexes, which form an integral part of the Protocol. The provisions of Article 20 apply with respect to the existing annexes. The inclusion of, or amendment to, any future annexes is subject to the same adoption process as described in Article 20, however, such an amendment will enter into force for all Parties six months after the date of communication by the Depository following the adoption, unless a Party notifies the depository of its non-acceptance within that period.

Reservations and declarations

45. Article 26 of the Protocol provides that no reservations may be made to the Protocol.

46. Article 19 of the Protocol applies Article 14 of the UNFCCC concerning settlement of disputes, which, amongst other things, provides for declarations accepting submission of a dispute to the International Court of Justice and/or arbitration. Australia has not made such a declaration.

Domestic treaty process

47. Any future treaty action, including an amendment to the Protocol, would be subject to Australia's domestic treaty-making requirements, including tabling and consideration by JSCOT.

Withdrawal or denunciation

48. The Amendment does not itself provide for withdrawal or denunciation, nor does it amend the existing provisions for this under the Protocol.
49. Article 27 of the Protocol provides that a Party may withdraw from the Protocol three years from the date on which the Protocol entered into force for that Party, by giving notice of withdrawal to the Depository. Any notice is then subject to a minimum one year waiting period. As the Protocol entered into force for Australia on 11 March 2008, withdrawal is possible at any time, subject to the minimum one year waiting period.
50. A Party to the Protocol may also withdraw by withdrawing from the UNFCCC pursuant to Article 25 of the UNFCCC.
51. Any withdrawals or denunciations would be subject to Australia's domestic treaty-making requirements, including tabling and consideration by JSCOT.

Contact details

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ATTACHMENT ON CONSULTATION

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CONSULTATION

52. The Amendment was negotiated over a period of seven years in a specialised working group under the UNFCCC, which is the head agreement under which the Protocol was concluded.
53. The then Department of Climate Change (and successors) consulted with stakeholders throughout the negotiation process through regular meetings and discussions.
54. The Amendment is judged to have negligible impact on the States and Territories and no State and Territory government representatives were directly engaged in negotiating the Amendment.
55. State and Territory governments were informed of the progress of negotiations on a regular basis, through the Commonwealth-State-Territory Standing Committee on Treaties (SCOT).