

Differentiation and due diligence in a new, global climate agreement

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A major question to be resolved in the negotiations of the new agreement is the issue of differentiation between Parties, based on Article 3 UNFCCC and the principle of common but differentiated responsibilities and respective capabilities (CBDR-RC). Rather than defining differentiation in more specific or principled terms, it should be understood in a dynamic and flexible way and reflected in the *design* of the agreement and its provisions.

The bottom-up nature of nationally determined contributions (NDCs) coupled with the broader array of parameters for differentiation will make it difficult to agree on a concrete set of criteria, or on differentiation in certain country groups or categories or on NDCs in specific manners. Any top-down attempt to categorize, be it in developed/developing countries or otherwise, might be deemed to fail.

The question, thus, is whether this situation necessarily leads to mere “self-differentiation” by Parties or whether tools exist that provide guidance to Parties on where and how to “place” themselves in the overall heterogenic and diverse picture of Parties.

One suggestion is to use the concept of *due diligence* as an argumentative means to help Parties conceptualize where their respective responsibilities lie (and where they should evolve or graduate to). The concept of due diligence in international law is a means to identify the *duty of care* to be exercised in international affairs. Acting with due diligence requires of a government to act in such a way or to use such care that governments in the same situation *may reasonably be expected* to exert in matters of international interest and obligation. It also implies that a due diligence standard requires governments to act in *proportion to the risk* to which they might be exposed. In order to act diligently, each state needs to *exert its best possible efforts*, take all *appropriate measures* according to *its best capabilities* in order to *progressively* achieve the protection of the interests or rights concerned.

While the due diligence standard is not specific or precise, it is the conduct that can reasonably be expected of a good (functioning) government. Accordingly, differentiated standards with regard to the type, scope and stringency of climate mitigation measures have to be applied to different States based on their level of economic development and emission levels and trends. States must exercise due diligence to reduce their net GHG emissions as is appropriate under the circumstances of each country. This principle represents both a formal departure from the strict and equal treatment of States under international law, but also a departure to the binary differentiation model contained in the UNFCCC, and could have a major influence on what constitutes a proportionate measure in any given case. It also means that all countries need to continue and scale-up their efforts without back-sliding or regression. Such a formulation would be a universal, but differentiated obligation. It would capture all Parties’ individual responsibilities, capacities and proportionate action – and require to “do the best they can”.