



UiO • **PluriCourts** – The Legitimacy of the International Judiciary
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Differentiation and Due Diligence in a new global UNFCCC climate agreement



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Overview

1. The issue of differentiation
2. INDCs and Self-Differentiation
3. Effective equality and Due Diligence
4. Due Diligence
5. Anchoring Due Diligence in the agreement
6. Reflections

1. The issue of differentiation

- What is differentiation?
 - From sovereign (formal) equality to effective equality
 - Recognizing differences
 - Creating equity by «treating different states differently»
- [Art. 3 UNFCCC](#)
 - Developed/developing country Parties
 - Annex I and II v. non-Annex
 - Kyoto Protocol
- Heterogeneity/diversity

2. INDCs and Self-Determination

- INDCs' nature
 - Nationally determined
 - Exclusive sovereign right over individual national target setting processes
- Self-determination
 - Appropriate, politically and legally feasible
 - «in light of national circumstances»
 - Providing up-front information in accordance with para 14 1/CP.20
 - Baseline/base year, sectors, methodologies, assumptions, fair and ambitious..

3. Effective equality and Due Diligence

- Effective equality
 - Differentiation is important (for a fair and effective agreement)
 - Treating different states differently
 - But: Heterogeneity, «two boxes» not reflective of today's or tomorrow's reality
 - 2020 onwards, no end-date
- Same standard of care for all states
 - Subject to different national circumstances
 - Acting with *due diligence*

4. Due Diligence

- A means to identify the standard of care to be exercised in international affairs.
- Standard of care: Every state needs to exert its best possible effort
- Use of 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).
- In some areas of international law, due diligence has become the prevailing legal standard for assessing the adequacy of government action (eg. CEDAW).

4. Due Diligence

- Every state ought to act according to its best capabilities, or “to do as good as it can” (“best efforts”)
- Appropriate, effective measures and actions
- Proportionate to the risk involved
- Good faith
- Requires formulating and implementing adequate policies and regulation
- «Reasonable efforts by a state to inform itself of factual and legal components that relate foreseeably to a contemplated procedure and to take appropriate measures, in a timely fashion, to address them.»

4. Due Diligence

- May change with time; what might be considered an appropriate and reasonable procedure, standard or rule at one point of time may not be considered as such at some point in the future.
- Due diligence requires states to keep abreast of technological changes (BAT) and scientific developments
- Accurate empirical data
- Degree of care is that of a good government: should possess a legal system and sufficient resources to maintain an adequate administrative apparatus to control and monitor activities

4. Due Diligence

- Determined by technical and economic abilities of a state
- Level of economic development and emission levels/trends define proportionate actions.
- Assurance that those with highest capacities and greatest responsibilities take leadership
- Standard of care/conduct – versus obligation of result
 - Self-determined
 - Information and transparency
 - Review?
 - Peer pressure
 - Pull factor

5. Anchoring DD in the agreement

- Examples:
 - “Parties should act with due diligence in achieving the objective of the Convention and this agreement. Accordingly, each Party’s commitment shall constitute its highest possible effort, according to national circumstances.”
 - «National efforts should represent each Party’s highest level of effort/ambition reflecting its national circumstances and capabilities and progressively increase over time beyond current undertakings of the Party [with those Parties with highest capabilities demonstrating leadership].»

5. Anchoring DD in the agreement

- Progression
- Best efforts
- Discretion for Least developing countries (LDCs)
- Reviews and dynamic cycle
- Full transparency
- Compliance mechanism and facilitation

6. Reflections

- Added value:
 - DD already inherent in the current approach
 - Recognising DD might bring more clarity, consistency and (perhaps) stringency into the structure and design of the agreement
 - «Capitalize» on international law – while remaining flexible
 - Additional pull factor
 - Allows for development and evolution over time (e.g. CEDAW, no-harm rule, state responsibility)
 - Determines the adequacy of state behaviour in a flexible manner, indefinitely

6. Reflections

- Represents a formal departure from the strict and equal treatment of states under international law – but also a departure from the binary, inflexible differentiation contained in the UNFCCC annexes
- Universal, but differentiated obligations
- National efforts need to be differentiated in a manner where all states to take (their) most ambitious/best effort according to their national circumstances
- Allows for self-differentiation and determinations – but within the boundaries of what reasonably can be expected from each Party

6. Reflections

- Parties themselves are best placed to understand their circumstances;
- Assurance that those with highest capacities and greatest responsibilities take leadership
- Allows also for a fair «placement» of those Parties with lower or lowest capabilities
- Fair and effective international agreement