

The Paris Agreement: What is the standard of conduct for parties?

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1. *Introduction*

With the Paris Agreement in place, the question now turns to the normative content and legal quality of the agreement's provisions. What is it that Parties to the agreement actually have committed to, once it enters into force? In other words, what is the standard of conduct that Parties need to exercise with respect to their obligations?

A treaty can contain a mix of different types of provisions. Some of them contain legally-binding obligations, either of substantive or of procedural nature. Such obligations can be collective or individual. Other provisions proclaim goals, values and expectations or give guidance, but are not legally binding *per se*. A third set of provisions establishes the institutional, methodological and procedural framework within which Parties will need to conduct their performance.

This note argues that depending on the type of provision, the standard of care, ie the performance required by Parties, differs. It ranges from concrete obligations of result to broader obligations of conduct, for example, for each Party to deploy its best efforts in the fight against climate change or, simply, to do as well as it can.

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2. *Legally-binding obligations*

The Paris Agreement has set up a number of legally-binding obligations for Parties.¹ Most of these obligations are procedural in nature and require Parties to submit certain types of information at certain points in time or in regular periods or to report or account in accordance with agreed rules. These obligations consist, *inter alia*, of the following:

- ‘Each Party shall prepare, communicate and maintain successive nationally determined contributions (NDCs)’ (Article 4(2));
- ‘... all Parties shall provide information necessary for clarity, transparency and understanding...’ (Article 4(8));
- ‘Each Party shall communicate a NDC every five years...’ (Article 4(9));
- ‘Parties shall account for their NDCs... In accounting, Parties shall promote environmental integrity, transparency, accuracy, completeness, comparability and consistency...’ (Article 4(13));
- ‘Each Party shall regularly provide information on national inventories [and] information necessary to track progress made in implementing and achieving its NDC...’ (Article 13(7)).

All of these obligations require a certain action (or omission) and can, thus, be considered to establish obligations of result that are also judicially or quasi-judicially reviewable.²

3. *Due diligence standard of conduct in the Paris Agreement*

Apart from those obligations of result, other provisions express an expectation that Parties act in a particular manner or according to agreed guidance. These provisions express a certain standard of conduct that corresponds with what a responsible State ought to do under

¹ See for an overview over the legal character of the provisions in the Paris Agreement D Bodansky, ‘Legal Character of the Paris Agreement’ *Rev Eur Comparative Intl Environmental L* (forthcoming, 2016).

² See C Voigt, ‘The Compliance and Implementation Mechanism of the Paris Agreement’, Article submitted to *Rev Eur Comparative and Intl Environmental L*, 29 February 2016.



normal conditions in a situation with its best practicable and available means, with a view to fulfilling its international obligation. In international law, this concept has been expressed as a best effort standard or ‘due diligence’.³ Because due diligence does not refer to a strict standard of conduct or an obligation of result, the margin of sovereign discretion in its application is often very broad and affords huge flexibility to actors concerned. However, it is not without normative value.

As has been noted, the standard of due diligence requires ‘nothing more nor less than the reasonable measures which a well-administered government could be expected to adopt under similar circumstances’.⁴ This is an ‘objective’ assessment criterion. It has however been rejected by several scholars, and arbitrators, which have instead relied on the ‘subjective due diligence standard’, taking into consideration the means at the disposal of the State, and the specific circumstances present in the State.⁵ Arguably, these two elements are not so easily separated. The standard is primarily an objective one. However, both for the assessment of ‘reasonableness’ and for the determination of ‘similar circumstances’, Parties’ specific circumstances need to be taken into account.

3.1. *Domestic measures aiming at achieving NDCs*

This standard of conduct applies, in particular, to the achievement of Parties’ nationally determined contributions (NDCs). The question of the legal nature of the content of Parties’ NDCs was one of the most controversial issues of the negotiations. The controversy around the legal status of NDCs was apparently resolved in Article 4(2), second sentence, which provides that ‘Parties shall pursue domestic mitigation measures, with the aim of achieving the objectives of such NDCs’. This provision has been interpreted as not establishing an individual obligation on each Party to implement or achieve its NDC.⁶

³ J Crawford, ‘Revising the Draft Articles on State Responsibility’ (1999) 10 Eur J Intl L 441.

⁴ AV Freeman, ‘Responsibility of States for Unlawful Acts of their Armed Forces’ (1955-II) 88 Recueil des Cours de l’Academie de Droit International 263, 277-278.

⁵ A Newcombe, L Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (2009) 310, para 6.44. See also T Koivurova ‘Due Diligence’, Max Planck Encyclopedia of Public International Law, vol 3 (OUP 2012) 236.

⁶ Bodansky (n 1) 10.



This does not mean, however, that the conduct of Parties in defining the content of and pursuing national measures to achieve their respective NDCs is left entirely up to Parties' discretion. Rather, Article 4(2), second sentence, establishes a *standard of conduct* according to which Parties ought to do as well as they can in designing, implementing and enforcing domestic measures aiming at achieving the objective of their respective NDC. The achievement itself does not become legally binding, but Parties are under the obligation to design measures that are necessary, meaningful and, indeed, effective to function as a means to this end. This implies that Parties will need to engage in legislative and political processes with the purpose of establishing, administrating and enforcing such measures.

The argument can be made that the due diligence standard of care which is to be exercised by Parties could be used as a tool for the pursuit of domestic mitigation measures with the aim of effective implementation of Parties' NDCs. It contains, arguably, a focus on the transformation of economic, political and legal frameworks and institutions that enable and sustain low greenhouse gas emissions development.

3.2. *The content of NDCs*

The Paris Agreement has further set up a number of parameters which define Parties' conduct – or duty of care – when preparing, communicating, maintaining and up-dating their respective NDC.

3.2.1. *Type of target*

One such set of parameters refers to the *type of target* that Parties are required to undertake. Article 4(4) stipulates that developed country Parties should continue taking the lead by undertaking economy-wide absolute emission reduction targets. Developing countries should enhance their efforts and are encouraged to move over time towards economy-wide emission reduction or limitation targets. Such targets for developing countries can be absolute or relative. The definition of targets in Article 4(4) is not an obligation. By using 'should' and 'encourages', it establishes expectations or recommendations, yet with slight differences in normative weight, rather than legal obligations.



Another set of parameters is contained in Article 4(3). Different from Article 4(4), however, these parameters amount to a normative duty of care – a standard of conduct – to be exercised by Parties. Article 4(3) determines that each Party's NDC will reflect that Party's 'highest possible ambition' and will progress beyond the previous NDC.

3.2.2. *Highest possible ambition and progression*

Articles 3 and 4(3) establish a requirement that the efforts of all Parties will represent a progression over time, meaning that every new effort will go beyond previous ones. This is connected to another central aspect of the agreement: the logic of regular preparation of successive contributions, informed by the outcomes of a collective assessment of progress towards the agreement's goal—the global stocktake, defined in Article 14. Moreover, each Party's NDC will reflect that Party's 'highest possible ambition, reflecting its common but differentiated responsibilities and respective capabilities, in the light of different national circumstances' (Article 4(3)).

At first sight, this language seems unpretentious. Yet, it is, in fact, a potent tool. The provision expresses the requirement that Parties will deploy their best efforts in setting their national mitigation targets and in pursuing domestic measures to achieve them. Article 4(3) establishes for each Party the standard of conduct to strive to attain its highest possible ambition in a manner that reflects its common responsibilities, respective capabilities, and national circumstances.⁷ Again, as mentioned above, this is reminiscent of a *due diligence* standard in international law which requires governments to act in proportion to the risk at stake and to their individual capacity.⁸ As a result, each Party commits to taking all appropriate measures at its disposal.⁹ This would require defining the highest possible mitigation target that is not economically disproportionately burdensome or impossible to achieve. Such a target should

⁷ C Voigt, 'The Potential Roles of the ICJ in Climate Change-related Claims' in M. Peeters, D Farber (eds) *Climate Law Encyclopaedia* (Edward Elgar, forthcoming, 2016).

⁸ See, for example, the first report of the ILA Study Group on Due Diligence in International Law, 7 March 2014, <http://www.ila-hq.org/en/committees/study_groups.cfm/cid/1045>.

⁹ See C Voigt and F Ferreira, 'Differentiation in the Paris Agreement', *Climate Law* (forthcoming, 2016).



be comprehensive and based on a thorough assessment of mitigation options in all relevant sectors. Parties would need to deploy all political, legal, socio-economic, financial and institutional capacities and possibilities in defining such target. Moreover, Parties would need to plan their climate strategies holistically and within a long-term time frame.¹⁰

While this requirement may not become reviewable or even justiciable, it could be expected, however, that each Party provides information that facilitates clarity and understanding of how its NDC reflects that Party's highest possible ambition, at each time of communicating a NDC. Guidance to this extent should be included in the work programme for the Ad Hoc Working Group on the Paris Agreement (APA), established under Decision 1/CP.21, para 28.

The notion of 'highest possible ambition' did not receive much attention or negotiation time, but was generally supported by Parties. The formulation of this notion changed throughout the year that preceded COP-21 in Paris, as illustrated in Table 1.

¹⁰ This expectation is also covered in art 4(19), according to which Parties should strive to formulate and communicate long-term low greenhouse gas emissions development strategies.

Document	Formulation	Link
Intervention and written submission by Norway during the ADP 2.8 session (Geneva, 8-13 February 2015)	'Each Party's mitigation commitment shall constitute its highest possible efforts, according to national circumstances.'	On file with the author
'Geneva negotiation text' (13 February 2015) para 20	Para 20 'Each Party's mitigation commitment shall constitute its highest possible effort according to its national circumstances.'	http://unfccc.int/documentation/documents/advanced_search/items/6911.php?priref=600008407#begin
'Co-chairs' tool' (24 July 2015), Part I, Section D. Mitigation, para 7	7. AMBITION 'Parties [shall][should][other] strive for the highest mitigation ambition in the light of science. Each Party's mitigation [commitment][contribution][action] shall constitute its highest possible effort according to its national circumstances.'	http://unfccc.int/documentation/documents/advanced_search/items/6911.php?priref=600008595
ADP co-chairs' non-paper of the 'Draft Agreement' of 5 October 2015, Article 3(3) (Mitigation)	Article 3(3) 'Each mitigation [contribution] [commitment] [other] [shall] [should] [other] reflect the Party's highest possible ambition, in light of its national circumstances.'	Non-paper, note by the co-chairs, 5 October 2015, A. Draft Agreement, Article 3(3), ADP.2015.8 Informal Note
Draft Agreement and draft decisions on workstreams 1 and 2 of the ADP, Edited version of 6 November 2015, re-issued 10 November 2015, Articles 3(5) and 3bis	Article 3(5) 'Each Party should ensure that its NDMC/NDMCC reflects its highest possible ambition in the light of its national circumstances and of recommendations of science.' Article 3bis Option (a): 'Each Party's NDMC/NDMCC [shall][should][other] reflect a progression beyond the Party's previous efforts and highest possible ambition <i>{level of ambition + progression}</i> [in accordance with][taking into account] its common but differentiated responsibilities and respective capabilities, in the light of different national circumstances <i>{principle based differentiation}</i> ' Option (b): 'Each Party's NDMC/NDMCC [shall][should][other] reflect the highest possible ambition [level of ambition] [in accordance with][taking into account] its common but differentiated responsibilities and respective capabilities, in the light of different national circumstances. <i>{principle based differentiation}</i> '	https://unfccc.int/documentation/documents/advanced_search/items/6911.php?priref=600008681
Draft Paris Outcome. Revised draft conclusions proposed by the ADP Co-Chairs, 5 December 2015, Article 3(6)	{Progression/ambition} '6. Each Party's successive ### [shall] [should][will] represent a progression beyond the Party's previous efforts and reflect its highest possible ambition [based on common but differentiated responsibilities and respective capabilities [[and] in light of different national circumstances [and best available science]] [based on provision of finance, technology and capacity-building to developing countries].'	FCCC/ADP/2015/L.6/Rev.1 http://unfccc.int/resource/docs/2015/adp2/eng/l06r01.pdf



Draft Paris Outcome, Proposal by the President, version 1 of 9 December 2015 at 15:00, Article 3(6)	Article 3(6) ‘[Progression/ambition] Each Party’s successive ### [shall] [should] [will] represent a progression beyond the Party’s previous efforts and reflect its highest possible ambition [based on common but differentiated responsibilities and respective capabilities, in light of different national circumstances]’	On file with the author
Draft Paris Outcome, Proposal by the President, version 2 of 10 December 2015 at 21:00; Article 3(6)	Article 3(6) ‘Each Party’s successive ### should represent a progression beyond the Party’s previous efforts and reflect its highest possible ambition.’	On file with the author
Paris Agreement, 12 December 2015, Article 4(3)	Article 4(3) ‘Each Party’s successive nationally determined contribution will represent a progression beyond the Party’s then current nationally determined contribution and reflect its highest possible ambition, reflecting its common but differentiated responsibilities and respective capabilities, in the light of different national circumstances.’	Decision 1/CP.21, Annex, Article 4(3) http://unfccc.int/meetings/paris_nov_2015/items/9445.php

Table 1: Negotiation history of ‘Highest possible ambition’, Article 4(3) of the Paris Agreement.

The concept of ‘highest possible ambition’ reflects a standard of conduct to be exercised by Parties. In the context of the Paris Agreement, due diligence as a duty of care exercised by Parties when designing their NDCs, is a normative means to help Parties conceptualize where their respective responsibilities lie.

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 governments act in *proportion to the risk* to which they might be exposed: ‘The required degree of care is proportional to the degree of hazard involved. [...] The higher the degree of inadmissible harm, the greater would be the duty of care required to prevent it.’¹¹

In order to act diligently, States need to take all *appropriate measures* according to their capabilities (‘best efforts’) in order to *progressively* (‘ongoing’) achieve the protection of the interests or rights concerned. In the context of the Paris Agreement, this means that each

¹¹ International Law Commission ‘Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, with commentaries’ [2001] II/2 YB Intl L Commission 148, 155, commentary to art 3, para 18.

NDC of a Party has to reflect its highest possible ambition. In other words, each successive NDC has to contain a Party's highest level of ambition – it must do *as well as it can* in order to progressively achieve the objective of the agreement, ie keep the increase in global temperature well below 2°C and pursue efforts to limit such increase to 1.5°C. Moreover, a Party's changing circumstances (eg a financial/economic crisis) cannot lead to a decrease in what can be considered its 'highest possible ambition' compared to the level contained in the previous NDC. In order to avoid a decrease in ambition level, the progression principle in Article 4(3) has a significant role to play. It not only sets a 'floor' for the next NDC, but requires each Party to go beyond each previous NDC. It is the combination of both principles that determines the strength of Parties' nationally determined contributions: 'Highest possible ambition' is responsive to States' differing responsibilities, capabilities, and circumstances, while at the same time aiming to match ambition with the overall aim, thereby combining effectiveness and fairness, and 'progression' to ensure that Parties do not divert from earlier ambition levels, but continue to increase such levels for every successive NDC.

4. *Due diligence in international law*

As mentioned above, the concept of due diligence in international law is a means to identify the duty of care to be exercised in international affairs. The concept is relevant to different areas of international law (such as human rights law, humanitarian law, criminal law, environmental law), but some common basic features apply across these different fields. In some areas of international law, due diligence has even become the prevailing legal standard for assessing the adequacy of government action. It has been defined as requiring 'Such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent [person, enterprise, State] under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case. In the context of the Guiding Principles, human rights due diligence comprises an ongoing management process that a reasonable and prudent [person, enterprise, State] needs to undertake, in light of its circum-



stances (including sector, operating context, size and similar factors) to meet its responsibility to respect human rights.¹² In international environmental law, in order to demonstrate to have acted diligently, a State is expected to prevent foreseeable, significant damage, or at least minimize the risk of such harm.¹³

Due diligence is a standard that varies according to context, as the *Seabed Mining Advisory Opinion* confirmed. The Seabed Dispute Chamber of the International Tribunal for the Law of the Sea stated that due diligence ‘may not easily be described in precise terms’ because it is ‘variable’. It may change ‘over time’ and ‘in relation to the risks involved in the activity’.¹⁴

The due diligence standard also varies in many contexts on the basis of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances. It is well-established that States differ significantly, but they may all face similar challenges to control the activities in their territory, and that this will affect the evaluation of whether they have breached their due diligence obligation.¹⁵ It is understood that the degree of care expected of a State with a well-developed economy and resources and with highly evolved systems and structures of government is different from States that are not so well-placed. Even in the latter case, vigilance, employment of infrastructure and the monitoring of dangerous activities in the territory of the State, which is a natural attribute of any government, are expected. The economic level of a State cannot be used to dispense the State entirely from its obligations.

While the due diligence standard is not specific or precise, it is the conduct that can be expected of a good (functioning) government. It

¹² UN Human Rights Office of the High Commissioner ‘The Corporate Responsibility to Respect Human Rights: An Interpretative Guide’ (2012) 4.

¹³ Draft Articles on Prevention of Transboundary Harm from Hazardous Activities (n 11) 154, commentary to art 3, para 10: ‘due diligence is manifested in 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’.

¹⁴ *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area* (Advisory Opinion, 1 February 2011) para 117.

¹⁵ Draft Articles on Prevention of Transboundary Harm from Hazardous Activities (n 11) 154-155, commentary to art 3, para 12, referring to Principle 11 of the Rio Declaration.



implies that every State ought to act according to its best capabilities, or 'to do as well as they can'. In other words, every State is required to exert its best possible efforts and to take all appropriate measures to holding the increase in temperatures well below 2°C.

The due diligence standard of care is usually determined by three elements: (i) opportunity to act or prevent (ii) foreseeability of harm and (iii) proportionality of the choice of measures to prevent harm or to minimize risk. With regard to climate change, while the first two elements are no longer controversial, the third element requires some more elaboration.

What measures a State is required to take has to be seen in relation to its national circumstances and to the risks involved. In order to determine whether a State has taken proportionate measures, the technical and economic abilities of the State controlling the activity must be balanced against the interests of the potentially harmed State to be protected against injury. The determination of proportionality depends, of course, on the specific circumstances of the Party and cannot be answered in detail in this general analysis. Not all States have the same abilities and capacities to reduce the amount of their GHG emissions. Equity concerns the requirement to take account of the actual capacity of a State. It is understood that the degree of care expected of a State with a well-developed economy and human and material resources and with a highly evolved system of governance is different from States which are not so well placed.¹⁶

Such standard of care has been shown to comprise an element of proportionality – including an equitable balancing of interests. Although a heavy burden of proof is placed on the State which has to establish a failure to act with due diligence by another State, this is not impossible. In a similar claim on the national level, the Hague District Court recently found that the State of the Netherlands had violated its duty of care – a standard analogous to the due diligence standard in international law – by defining an insufficient climate mitigation target. The Hague District Court thus ordered an increase in the Netherlands mitigation target by 5 per cent at the end of 2020. By finding that a mitigation target of 25 per cent and higher (as compared to the initial tar-

¹⁶ See R Lefeber, *Transboundary Environmental Interference and the Origin of State Liability* (Kluwer 1999) 65.



get of 20 per cent) would not be economically disproportionately burdensome or impossible for the Netherlands, the Court concluded that by adopting a mitigation target below the range of 25–40 per cent, the State had failed to fulfil its duty of care, acted negligently and therefore unlawfully.¹⁷

5. *Summary*

The principle of highest possible ambition sets out the standard of care now to be exercised in climate affairs. It implies a due diligence standard which requires governments to act in proportion to the risk at stake and to the means at their disposal. With that, each Party has committed to taking all appropriate and adequate climate measures according to its best capabilities and its responsibility in order to progressively achieve the long-term temperature goal of the Paris Agreement. ‘Highest possible ambition’ recognizes States’ differing national circumstances while at the same time striving to match ambition with the overall aim, thereby combining effectiveness and fairness.

Accordingly, differentiated expectations with regard to the type, scope and stringency of climate mitigation measures apply to different States based on their level of economic development and emission levels and trends. States must exercise due diligence to reduce their emissions to the highest possible extent, in a way appropriate to their circumstances, ie responsibilities and capabilities).

¹⁷ *Urgenda Foundation and 886 citizens v the State of The Netherlands*, [2015] C/09/456689 / HA ZA 13-1396, paras 4.52–4.93, in particular para 4.86. An English translation of the decision can be found at <<http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2015:7196>>.

