ALLEN & OVERY

Spotlight on COP26: Resetting of NDCs

More ambitious and better aligned climate action plans to progress national contributions, putting pressure on governments and businesses

The make-or-break issue for COP26 and for the world's ability to limit global warming as agreed in the Paris Agreement is the resetting of the Nationally Determined Contributions (**NDCs**) and their common timeframes. With current contributions actually amounting to a sizeable increase in global greenhouse emissions by 2030, the pressure will be on governments and, ultimately, businesses, to take more decisive action in the transition to net zero.

The Paris Agreement itself sets an overall global target to be achieved by all parties (the well-known 1.5 and no more than 2 degrees Celsius increase limit), but the Paris Agreement sets no actual targets for each state to achieve; rather the Paris Agreement leaves that essentially to the parties in a so-called "bottom-up" approach through NDCs. The Paris Agreement provides for a number of procedural rules and guidelines for NDCs, but is very much silent on the actual substantive requirements for NDCs.

NDCs: Role and relevance under the Paris Agreement

NDCs form a central component of the Paris Agreement, around which most of the rest of the Agreement's structure is based. The nationally determined nature of the NDCs is one of their critical design features, allowing each country to identify its own plans for climate action on the basis of its national circumstances and capabilities. Together, these climate actions determine whether the world will achieve the long-term goals of the Paris Agreement to rapidly reduce greenhouse gas (**GHG**) emissions in accordance with best available science. These actions would achieve a balance between both anthropogenic emissions by sources and removals by sinks of GHGs in the second half of this century.

Because of the nationally determined nature of the NDCs, the Agreement does not provide significant guidance on how NDCs should be developed or presented, except for information necessary to facilitate clarity, transparency, and understanding of the NDC itself.

All parties must "prepare, communicate and maintain" an NDC and communicate it in a way that promotes "clarity, transparency and understanding". Parties must submit and maintain an NDC every five years and then implement "domestic mitigation measures" in service of their NDC goals (Article 3 Paris Agreement). They must also comply with Article 4 procedural rules, such as ensuring "clarity, transparency and understanding" when communicating NDCs. Parties must also promote "environmental integrity, transparency, accuracy, completeness, comparability and consistency", and avoid "double counting" when reporting NDC progress.

The NDCs goals themselves are not legally binding or enforceable; there is no obligation to achieve NDC targets.

The NDCs transparency and information sharing processes and requirements are legally binding, but the enforcement process is non-punitive and non-adversarial, relying instead on reputational costs and peer pressure to enforce compliance.

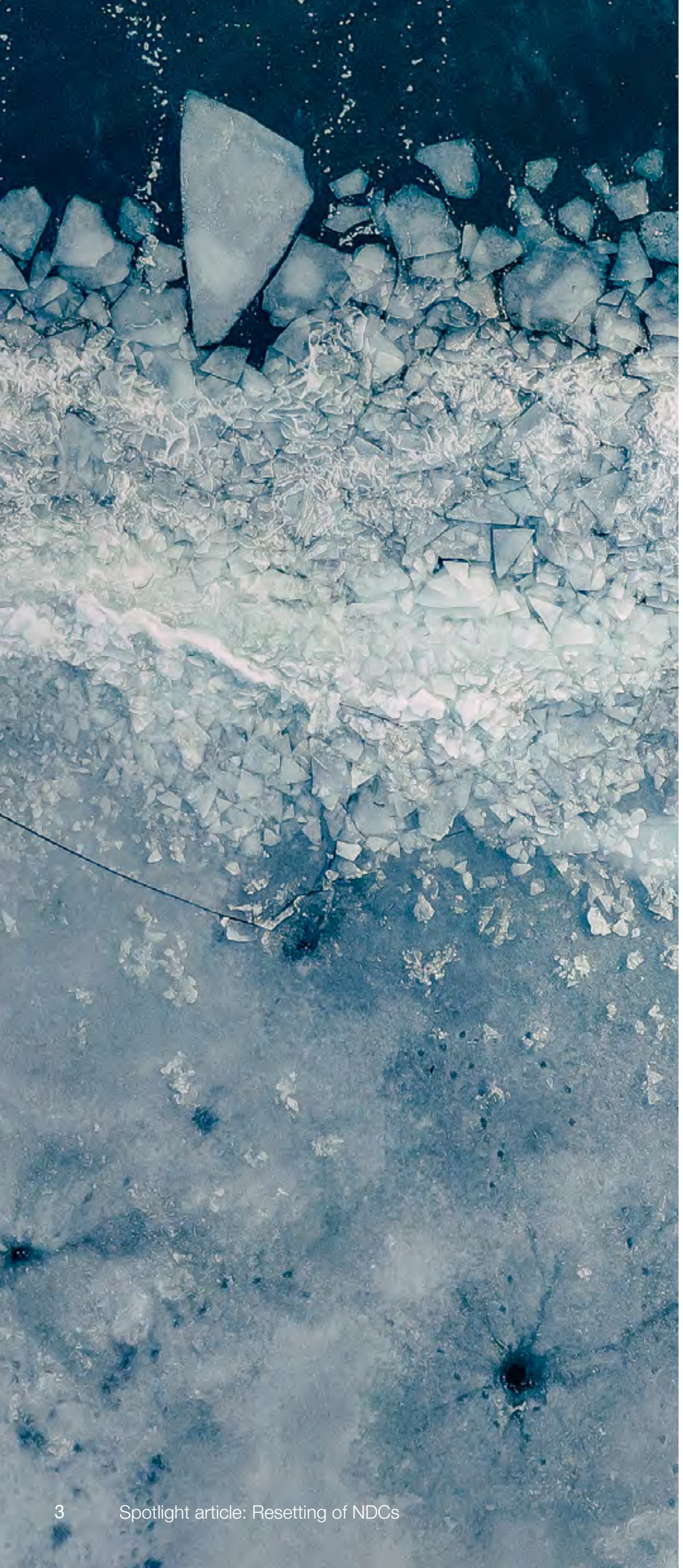
Subsequent NDCs must show "progression"

NDCs are submitted every five years to the UNFCCC secretariat. In order to enhance the ambition over time, the Paris Agreement provides that successive NDCs will represent a "progression" compared to the previous NDC and reflect its highest possible ambition.

While upwards review does not equate to the attainment of a standard of absolute adequacy, it does at least lock in the enhancement of ambition and challenge attempts to dilute ambition.

This provision on progression is critical, but is – at least in the Paris Agreement itself – not prescriptive as to how progression (ie in form or rigour) is determined, and is ambiguous as to who determines progression, thus implicitly leaving progression to self-determination.

The interpretative process will be undertaken in the context of the global stocktake, and the next round of NDCs, as well as in the shadow of extra-FCCC currents such as Article 17 (non-regression) of the Global Pact on the Environment.



What is in the NDCs on the eve of COP26? The UNFCC Synthesis Report

The **Synthesis Report** was requested by Parties to the Paris Agreement to assist them in assessing the progress of climate action ahead of COP26, and includes information from all 191 Parties to the Paris Agreement based on their latest NDCs available in the interim NDC registry as at 30 July 2021, including information from 86 updated or new NDCs submitted by 113 Parties.

Since the publication of the Synthesis Report on 17 September 2021, a further 23 countries (including Japan and Turkey) have provided **further updates**. There are currently more NDCs (194) than parties (191) to the Paris Agreement, with states that are not signatories to the Paris Agreement submitting an NDC. The result of these later reports have not been incorporated into the findings of the Synthesis Report.

The Synthesis Report highlights a number of trends. All parties provided information on mitigation targets or mitigation co-benefits resulting from adaptation actions and/or economic diversification plans. The mitigation targets range from economy-wide absolute emission reduction targets to strategies, plans and actions for low-emission development. Specifically in their NDCs:

- 70-90% of the Parties provided quantified mitigation targets, expressed as clear numerical targets, while some included strategies, plans and actions as components of their NDCs for which there is no quantifiable information
- 70-90% of the Parties communicated economy-wide targets, covering all or almost all sectors defined in the 2006 IPCC Guidelines, with an increasing number of Parties moving to absolute emission reduction targets in their new or updated NDCs
- more than 90% of NDCs cover CO_2 emissions, 70-90% cover CH_4 and N_2O emissions, many cover HFC emissions and a smaller group covers PFC, SF6 and NF3 emissions
- most of the Parties that submitted new or updated NDCs have strengthened their commitment to reducing or limiting GHG emissions by 2025 and/or 2030, demonstrating increased ambition in addressing climate change

The report also contains some worrying findings.

The available NDCs of all 191 Parties taken together imply a sizeable increase, of around 16%, in global GHG emissions in 2030 compared to 2010. According to the latest IPCC findings, such an increase, unless actions are taken immediately, may lead to a temperature rise of about 2.7°C by the end of the century.

In the context of a carbon budget consistent with a 50% likelihood of limiting warming to 1.5°C, cumulative CO_2 emissions in 2020-2030, based on the latest NDCs, would likely use up 89% of the remaining carbon budget, leaving a post-2030 carbon budget of around 55 Gt CO_2, which is equivalent to the average annual CO_2 emissions in 2020-2030.

Similarly, in the context of the carbon budget consistent with a likely chance of keeping warming below 2°C, cumulative CO_2 emissions in 2020-2030, based on the latest NDCs, would likely use up around 39% of the remaining carbon budget.

What COP26 needs to address: "common timeframes" for NDCs

Setting the scene

The Paris Agreement introduces the concept of common timeframes for NDCs, but does not provide further definition or guidance on what a common timeframe for NDCs is or might be.

Parties have decided that common timeframes should be applicable to the NDCs to be implemented from 2031 onward, but have not yet been able to agree on the length of the timeframes. Parties decided in December 2018 that NDCs to be implemented from 2031 onward will have common timeframes.

However, Parties failed to reach a decision on the length of the timeframe. This decision is one of the key outstanding elements of the Paris Agreement's implementing guidelines (also known as the Paris Rulebook).

Given the climate emergency, nations will need a clear indication of what timelines they are looking at, and what will be achievable in those timeframes. Resolving this question should be a high priority at COP26 because this will determine what upgrades nations make to their NDCs in 2025, with a particular focus on the period after 2030.

A decision on common timeframes will also have major implications for the implementation of other components of the Paris Agreement, to facilitate comparability of NDCs and, including the enhanced transparency framework, cooperative implementation under Article 6 (which we will discuss later in our series), and the global stocktake.

Both the accounting and review of individual countries' efforts mentioned are critical to facilitate the aggregation of NDCs and assess collective progress toward meeting the Agreement's long-term goals.

Every five years, the global stocktake will assess collective progress toward the Paris Agreement's long-term goals. NDC timeframes will define where Parties are in the implementation of their NDCs at the time of the global stocktake.

What timeframe?

The length of the timeframe is key as it can influence the level of ambition and pace for NDCs. Many countries support a five-year timeframe, while countries such as Japan and Russia are in favour of ten-year timeframes, arguing that the longer time period is better suited to their national planning. A 2019 working paper by the World Resources Institute, **A common time frame for nationally determined contributions**, suggests that parties should publish NDCs with a five-year timeframe, while also allowing them to indicate a ten-year timeframe if they desire to do so.

At the UN Climate Change subsidiary bodies sessions that took place between May and June 2021, the co-facilitators prepared an **informal note**. The options this note sets out are expected to run from the publication of the 2025 NDCs.

They suggest the following options:

– Five-year option – Parties will communicate their new NDCs by 2025 with a timeframe up to 2035

– Ten-year option – Parties will communicate their new NDCs by 2025 with a timeframe up to 2040, while also inviting Parties to communicate or update by 2030 their NDCs with a timeframe up to 2040, and provide an indicative target for 2035

– Five + five years option – Parties will communicate their new NDCs by 2025 with a timeframe up to 2035 and 2040, while also communicating by 2030 new NDCs for a period up to 2040

Common timeframes – relevance for the Enhanced Transparency Framework

With multiple timeframes, some Parties may report on achievement of NDCs every five years, while others may report on achieving NDCs only every ten years.

Under the enhanced transparency framework (**ETF**), reporting and review of progress in implementing and achieving NDCs will take place every two years. These assessments will consider whether the Party has achieved the targets for its NDC following the end of an NDC implementation period, and, as a result, the timeframe will have important implications for that assessment process.

Effective implementation of the ETF is necessary to establish a universal system that encourages all countries to enforce their commitments. Many of the modalities, procedures and guidelines (**MPGs**) were established at COP24. However, some technical details still need to be addressed at COP26 before the ETF can become fully operational, including:

– common reporting tables for electronic reporting of information in the national inventory reports of anthropogenic emissions by sources and removals by sinks of greenhouse gases

– common tabular formats for electronic reporting of information necessary to track progress, and information on financial, technology development and transfer and capacity-building support

– an outline of the biennial transparency report for use by all countries

– a training programme for the technical expert review procedure

Other issues that will need to be considered as regards ETF include:

– the need for capacity-building to assist developing nations' transition to the ETF system, through training and software development

– flexibility in reporting, as while the MPGs clearly provide for flexibility, the manner in which this will be made operational is unclear. Should nations be allowed flexibility in the scope, frequency and level of detail they provide in respect of their progress?

Given the fast-approaching deadlines of 2025 and 2030 that many nations have set for achieving certain emission reduction targets, agreement on the various aspects of the ETF regime is now becoming increasingly important. Parties need clarity on their reporting requirements and how they will be tracked. Once agreed, it will take some time to develop and implement the various systems and software.

Common timeframes – relevance for the global stocktake

A critical component of the Paris Agreement's plan-implement-review cycle is the global stocktake, which was established as a mechanism to assess collective progress in achieving the Paris Agreement's long-term goals. The findings of the global stocktake will inform future NDCs in increasing climate action and support the All Parties report on progress in implementing and achieving NDCs on the same schedule every two years. This ensures comprehensive inputs for the assessments of collective progress under the global stocktake.

If all parties use the same timeframe, they will all be at the same point in NDC implementation during the global stocktake. This may facilitate collective understanding on progress made in implementing and achieving NDCs. Otherwise, the global stocktake may be made on the basis of progress in implementing and achieving NDCs that may not be representative of all NDCs. Therefore, common and timely reporting, ensuring that all Parties are at the same point in the NDC cycle, is important to ensure that the global stocktake considers collective progress in light of best available science and equity (as required in Article 14.1).

Resetting NDCs: greater accountability of states?

Above, we highlighted the lack of clarity regarding the legal force of NDCs: the Paris Agreement contains binding procedural rules, but no binding rules on the substance of NDCs. The outcome of COP26 – especially if common timeframes would be agreed – can change that somewhat blurred picture. The result is that, in the not so far-fetched hypothesis of litigation on a State's alleged failure to implement its NDC – which is not entirely new[1] – such litigation could force states to revise their plans, and give rise to a new round of climate cases against states (both by NGOs and states).

[1] See e.g. *Sarah Thomson v Minister for Climate Change Issues*, Judgment of Mallon J (High Court of New Zealand, CIV 2015-485-919, [2017] [NZHC 733] para. 38); *Carvalho v Parliament and Council*, Order of the General Court (CJEU, Case T-330/18) para. 5; *Cleveland National Forest Foundation v San Diego Association of Governments*, Supreme Court of California, 3 Cal. 5th 497, 515; 397 P.3d 989, 1000 (simply alluding to the Paris Agreement in support of the need for mainstream considerations for climate change mitigation at all levels).

What does this mean for business?

In light of the above – the worrying findings of the Synthesis Report, the Parties' ambitions to agree on common timeframes and the threat of further climate litigation against States – governments will be put under further pressure to set more ambitious NDCs and accelerate decarbonisation. This pressure will undoubtedly result in increased regulation of industries, and such regulations will be introduced at a higher pace, such as the EU's Fit for 55 package.

Although pressure is now on governments, in light of the approaching COP26, this will soon shift to also include businesses. Businesses will be impacted by all of this in an unprecedented manner. New regulations will impact how markets operate and businesses function, and will urge companies to reconsider their efforts for fighting climate change and their contribution to a decarbonised world. And such regulations will impose reporting requirements on businesses, allowing governments to take efforts and contributions made into account when adopting future, progressed NDCs. COP26 may thus turn out to be essential for how we do business in the years to come, and hopefully provide businesses with new opportunities for green growth.

Authors

Click on a contact to view their full profile on **allenovery.com**

Jochem Spaans
Partner – Amsterdam
Tel +31 20 674 1500
jochem.spaans@allenovery.com

Gauthier van Thuyne
Partner – Brussels
Tel +32 2 780 25 75
gauthier.vanthuyne@allenovery.com