

The Paris Agreement’s Conciliation Annex: If Not Now, Then When?

Introduction: The Imperative

On the eve of the 26th U.N. Climate Change Conference of the Parties (COP26), to be held in Glasgow between October 31 and November 12, 2021, participating states face the challenge of undertaking decisive and transformative action on climate change. In taking up the Presidency of COP26, the U.K. has described COP26 as having particular urgency as “the world’s last best chance to get runaway climate change under control.”¹ To that end, countries are being asked to expand on the promises of the Paris Agreement.

To recall, during COP21 in 2015, the COP adopted the Paris Agreement under the United Nations Framework Convention on Climate Change (UNFCCC).² The 191 states parties to the Paris Agreement committed to keep a global temperature rise this century well below 2 degrees Celsius above pre-industrial levels and to pursue efforts to limit the temperature increase even further to 1.5 degrees Celsius, through mitigation, adaptation, and “making finance flows consistent with a pathway towards low greenhouse-gas emissions and climate-resilient development.”³ They also committed to setting out how much they would reduce their emissions through Nationally Determined Contributions (NDCs) and agreed to return every five years with an updated plan that would reflect their highest possible ambition. In addition, a “global stocktake” takes place every five years to assess collective progress; the first will take place from 2021 to 2023.⁴

The current challenge is steep. Just last month, the U.N. Intergovernmental Panel on Climate Change announced its conclusion that: “[g]lobal warming of 1.5°C and 2°C will be exceeded during the 21st century unless deep reductions in carbon dioxide (CO₂) and other greenhouse gas emissions occur in the coming decades.”⁵ In May 2021, the

International Energy Agency published its roadmap for the international energy sector to achieve what is called “net zero”—i.e., a balance between emissions produced and emissions removed from the atmosphere—by 2050.⁶ It stated that even if governments achieve their climate pledges, the emissions reduction would “fall well short of what is required to bring global energy-related carbon dioxide emissions to net zero by 2050.”⁷

Accordingly, for purposes of COP26, states are being asked to come forward with ambitious NDCs for 2030 in order to reach net zero by 2050. Other aspects of the COP26 agenda include adaptation measures to protect communities and natural habitats, mobilizing finance by raising at least \$100 billion in climate finance per year, and finalizing the rules needed to implement the Paris Agreement.⁸

Accountability and State/State Dispute Resolution

These are laudable and necessary goals for COP26, and achievement of these goals are critical to combat climate change risks. But one element that has not taken center stage, but arguably should, is the important role to be played by the Paris Agreement’s inter-state dispute resolution procedures (Article 24) in facilitating accountability. Article 24 adopts these procedures directly—*mutatis mutandis*—from Article 14 of the United Nations Framework Convention on Climate Change (UNFCCC). Thus, any dispute concerning the interpretation and application of the Paris Agreement will be subject to the options for dispute resolution contained in Article 14 of the UNFCCC, namely: negotiation or any other peaceful means of dispute resolution, and (i) if not settled within 12 months, submission to conciliation at the request of any of the parties to the dispute, or, (ii) by consent of the parties, recourse to the International Court of Justice (ICJ) or arbitration.

Notably, only a handful of states have made declarations under Article 14 of the UNFCCC to submit disputes to the ICJ and/or arbitration.⁹ The Netherlands is the only state that renewed its declaration to refer expressly to Article 24 of the Paris Agreement.¹⁰ Accordingly, conciliation is of paramount importance as an available dispute resolution mechanism for disputes concerning the interpretation and application of the Paris Agreement.

The dispute settlement provision in Article 14 of the UNFCCC/Article 24 of the Paris Agreement provides certain details of the conciliation process but leaves most procedures to be adopted in an annex on conciliation:

A conciliation commission shall be created upon the request of one of the parties to the dispute. The commission shall be composed of an equal number of

members appointed by each party concerned and a chairman chosen jointly by the members appointed by each party. The commission shall render a recommendatory award, which the parties shall consider in good faith.

Additional procedures relating to conciliation shall be adopted by the Conference of the Parties, as soon as practicable, in an annex on conciliation.¹¹

Notwithstanding the language that additional procedures “shall be adopted” by the COP “as soon as practicable,” to date no such annex on conciliation has been adopted. States parties (and others) urgently should consider what an annex on conciliation might look like and how it might contribute to the achievement of the key climate change goals set out in the Paris Agreement.

The Potential of Conciliation

Generally speaking, conciliation is a non-binding form of out-of-court settlement (unless parties agree that the outcome shall be binding).¹² It relies upon the appointment of a third party who is empowered by the parties to deploy various methods to assist the parties in resolving their dispute. The procedure can be tailored to the desires and needs of the parties, as it is inherently flexible, confidential and interest-based. Indeed, conciliation proceedings can more closely resemble diplomatic engagements or judicial proceedings, depending on the parties’ choices with respect to procedural modalities.¹³

Conciliation has been criticized on various fronts, including because the parties may invest time and costs only to find that the “fruits are lost at the last minute” if there is no will to find or accept a range of compromise solutions.¹⁴ It is certainly true that conciliation is not suited to all disputes: if parties are not willing or otherwise incentivized to find a compromise solution, the non-binding nature of a conciliation commission may not be enough to settle a dispute or change behavior.

However, there is much to commend conciliation in the context of climate change disputes. Some key potential advantages include the following.

First, tackling climate change requires global cooperation on a sustained basis. The emphasis of conciliation on amicable settlement and the *future* relationship of the parties may facilitate sustained collaboration more effectively than more backwards looking forms of dispute resolution. In addition, conciliation’s emphasis on finding a workable resolution to the dispute facilitates states bringing concerns of all natures—political, as well as legal—to the table and discussing a wide range of factors specifically tailored to

strengthening future cooperation. The flexible nature of conciliation also allows the interests of several states to be considered simultaneously, which is particularly apt in this context where climate change disputes are often multiparty or, by definition, implicate the interests of various states.

Second, the process of conciliation usually requires and involves significant communication between the parties and the conciliation commission, which can build trust and offer new perspectives on the other parties' positions. That also may help sustain a future relationship by giving the parties a better understanding of priorities and positions of the other countries involved, as well as assisting in the implementation of any recommendations of a conciliation commission.

Third, because there is variation in how different regions, histories, and cultures conceive of effective dispute resolution, conciliation may be well suited to cater to those different perspectives. As parties can tailor the procedures for communication, this also allows for different styles of diplomatic, legal or factual submissions or other forms of input, allowing parties to reflect cultural preferences.

Fourth, the issues arising under the Paris Agreement can be highly technical and require complex, technical solutions. Conciliation procedures may be crafted to ensure that the parties can present expert evidence, or the commission may appoint its own expert(s). This is not unlike other international dispute resolution procedures, but the inherently flexible and solution-focused nature of conciliation would allow for the parties and conciliation commission to more creatively engage with experts. For example, a series of experts on different topics could be tasked with finding a scientific solution to a series of mitigation measures or a staged financial mechanism to pay for adaptive measures over time with input from the parties. Conciliators can also request technical submissions or organize sessions focused purely on scientific issues.

In short, without a means to settle disputes—and engender some form of accountability when a state is not complying with its obligations—the force of the Paris Agreement is undermined. Equally, while parties can agree *ad hoc* conciliation rules once a dispute has arisen, that takes time and requires the cooperation of all involved states (which is not always forthcoming in a disputes context). Thus, to best ensure a forum for disputes to be settled, the conciliation rules should be developed, negotiated and agreed in advance.

Concluding Thoughts: An Annex on Conciliation

The following observations will require particular attention under the Paris Agreement:

- Engaging in the process of conciliation is mandatory (subject to a specific reservation), but the outcome is not binding;¹⁵
- The appointment procedure for a conciliation commission is laid out in part: each party shall appoint an even number of commissioners, and the chairperson is appointed by the other commissioners.¹⁶ However, the Agreement provides no time limits for appointment, no appointing authority or other mechanism should one party fail to make the necessary appointments of members, no mechanism by which to agree on the number of commissioners (for which there are cost consequences), and no challenge or replacement procedure.
- The commission shall issue a “recommendatory award,” which the parties are to consider in good faith.¹⁷ The concept of “award” can suggest findings of both fact and law. However, in keeping with the non-binding nature of conciliation, findings of fact and law may not be enough. Instead, recommendations for settlement or to move the parties into compliance are often the primary output of commissions at the end of the proceedings. There is also no guidance on who would have access to the award. For example, will it be circulated only to the parties to the conciliation process? For another example, if a conciliation commission’s findings have implications for the performance of the Paris Agreement more generally, should it be available to other states parties?¹⁸
- There are also many other outstanding questions on issues such as the powers of conciliators to make factual findings and offer legal interpretations, the input of third parties, forms of communication, confidentiality of proceedings,¹⁹ the use of experts, the means of written submissions and hearings, the presentation and challenging of evidence, the use of secretariats, time limits and costs and expenses, and procedures that will follow the issuance of the recommendatory award, such as potential publication, circulation, or monitoring mechanisms, if applicable.

An annex on conciliation would be able to clarify these and other important procedural questions, taking account of the objectives of the Paris Agreement, as well as likely aspects of any dispute concerning climate change. The objective is to facilitate the resolution of disputes between the parties, without lengthy debates (and potential stalemate) over conciliation rules, in order to ensure that the Paris Agreement can make the necessary contribution to adaptation, mitigation and limiting the global temperature rise to fulfil its objective for transformative action on climate change.

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¹ UK COP26, *COP26 Explained*, (2021), <https://2nsbq1qn1rl23zol93eyrcj-wpengine.netdna-ssl.com/wp-content/uploads/2021/07/COP26-Explained.pdf>.

² Conference of the Parties, *Report of the Conference of the Parties on its twenty-first session, held in Paris from 30 November to 13 December 2015: Decisions Adopted by the States Parties*, FCCC/CP/2015/10/Add.1 (Jan. 29, 2016).

³ Paris Agreement to the United Nations Framework Convention on Climate Change, art. 2(1), Dec. 12, 2015, T.I.A.S. No. 16-1104.

⁴ *Global Stocktake*, <https://unfccc.int/topics/science/workstreams/global-stocktake>.

⁵ UN Intergovernmental Panel on Climate Change, *Headline Statements from the Summary for Policymakers* (Aug. 9, 2021), https://www.ipcc.ch/report/ar6/wg1/downloads/report/IPCC_AR6_WGI_Headline_Statements.pdf, B.1.

⁶ International Energy Agency, *Net Zero by 2050: A Roadmap for the Global Energy Sector*, (2021), <https://www.iea.org/reports/net-zero-by-2050>.

⁷ International Energy Agency, *Pathway to critical and formidable goal of net-zero emissions by 2050 is narrow but brings huge benefits, according to IEA special report*, (May 18, 2021), <https://www.iea.org/news/pathway-to-critical-and-formidable-goal-of-net-zero-emissions-by-2050-is-narrow-but-brings-huge-benefits>.

⁸ UK COP26, *COP26 Explained*, (2021), <https://2nsbq1qn1rl23zol93eyrcj-wpengine.netdna-ssl.com/wp-content/uploads/2021/07/COP26-Explained.pdf>.

⁹ See U.N. Climate Change, *UNFCCC, Status of Ratification: Declarations by Parties*, <https://unfccc.int/process/the-convention/status-of-ratification/declarations-by-parties>.

¹⁰ U.N. Treaty Collection, Status of Ratification: Paris Agreement, U.N. Treaty Collection, Status of Ratification: Paris Agreement, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-7-d&chapter=27&clang=en. The Netherlands makes its declaration “for the European part of the Netherlands”. The Netherlands makes its declaration “for the European part of the Netherlands.”

¹¹ *U.N. Framework Convention on Climate Change Chapter XXVII Environment 7*, U.N. Treaty Collection (May 9, 1992), https://treaties.un.org/doc/Treaties/1994/03/19940321%2004-56%20AM/Ch_XXVII_07p.pdf, arts. 14(6)-(7).

¹² U.N. Charter, art. 33(1) (conciliation is one of the six methods for the peaceful resolution of inter-State disputes listed in the UN Charter, in addition to resorting to regional agencies or arrangements or other dispute resolution forms of their choice).

¹³ U.N. OFFICE OF LEGAL AFFAIRS, HANDBOOK ON PEACEFUL SETTLEMENT OF INTERNATIONAL DISPUTES, ¶ 140, U.N. Doc. OLA/COD/2394, Sales No. E. 92. V.7 (1992), (the UN Handbook on the Peaceful Settlement of International Disputes describes conciliation as “the peaceful settlement procedure which combines the elements of both inquiry and mediation.”); See also ANDREW CLAPHAM, Brierly’s Law of Nations 392 (7th ed. 2012).

¹⁴ CHRISTIAN TOMUSCHAT, *Concluding Observations*, in FLEXIBILITY IN INTERNATIONAL DISPUTE SETTLEMENT: CONCILIATION REVISITED 257, 263 (Christian Tomuschat & Marcelo Kohen eds., 2020).

¹⁵ *U.N. Framework Convention on Climate Change Chapter XXVII Environment 7*, U. N. Treaty Collection (May 9, 1992), art. 14.

¹⁶ *Id.*, art. 14(6).

¹⁷ *Id.*

¹⁸ For example, the International Convention on the Elimination of All Forms of Racial Discrimination provides for a conciliation process in which the commission's report is circulated to other States parties. See International Convention on the Elimination of All Forms of Racial Discrimination, art. 13, Dec. 21, 1965, 660 U.N.T.S. 190.

¹⁹ See, e.g., The "Timor Sea Conciliation" (Timor-Leste v. Australia), PCA Case No. 2016-10, Report and Recommendations of the Compulsory Conciliation Commission between Timor-Lest and Australia on the Timor Sea, 295 (Perm. Ct. Arb. 2018) (as the Timor Leste/Australia conciliation commission noted, confidentiality is often critical to ensuring full and frank discussions that can lead to a workable solution).