

Relationship between the Convention and the Paris Agreement

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*This advice is provided in response to **Query 11/22***

Query:

How could states collectively indicate that they consider the UN Framework Convention on Climate Change to be the "governing", "supreme" or otherwise guiding legal instrument in relation to the Paris Agreement? What legal tools would (in principle) be available under public international law to put forward and agree such an interpretation?

Executive Summary:

The issue of the hierarchy or precedence between the United Nations Framework Convention on Climate Change (“**UNFCCC**” or “**Convention**”) and the Paris Agreement is examined by applying conventional principles of public international law. We consider that there are some arguable grounds to contend that the Convention is the ‘governing’ or ‘supreme’ instrument. Equally, there are good reasons to consider both treaties as treaties in their own right and independent of each other. On balance, we are of the view that the more correct legal interpretation is that neither treaty is ‘governing’ or ‘supreme’ over the other. It is open for any State Party (or group of State Parties) to (collectively) express their view that the Convention is the governing instrument. There are some tools that parties could consider to put forward to agree the preferred interpretation, for instance through negotiation or a COP decision.

Advice:

1. Background and introduction

We understand the query is concerned with the ‘status’ of the Convention and its role as an interpretative tool in approaching the Paris Agreement, rather than being concerned with a circumstance in which an article of the Paris Agreement directly conflicts with an article in the Convention. If that is not the case, please let us know and we can re-consider our advice accordingly.

In order to properly contextualise this advice, we thus structure it by first setting out – briefly – the background to the UNFCCC, the Kyoto Protocol and Paris Agreement. We then consider how the UNFCCC and Paris Agreement interact with each other as a matter of interpretation and international law. We conclude by considering the potential tools available for putting forward and agreeing the preferred interpretation.

The UNFCCC entered into force on 21 March 1994. It was established as a framework for international cooperation to combat climate change by limiting greenhouse gas emissions (GHGs), minimising average global temperature increases, and coping with the impacts of climate change. Today, it has 197 parties.

In 1997, the Kyoto Protocol was adopted by certain parties to the UNFCCC as a means of implementing and strengthening the UNFCCC through legally binding emission reduction targets by developed country parties. It also established flexible market mechanisms for achieving these goals, including the clean development mechanism, joint implementation, and emission trading, as well as monitoring and reporting processes. It came into force on 16 February 2006, and, today, it has 192 parties.

In 2015, the Paris Agreement was adopted by most parties to the UNFCCC. It seeks to enhance the implementation of the Convention by further strengthening climate action. Three aims, or goals, are included: keeping the increase in mean global temperature to well below 2°C above pre-industrial levels, and preferably limit it to 1.5°C; increasing adaptation capacity; and making a fundamental shift in finance flows worldwide. To assist with the temperature goal, the Paris Agreement requires each party to determine, plan and report on its emission reductions contributions. It also establishes a framework for financial, technical, and capacity-building support between parties. The Paris Agreement came into force on 4 November 2016 and today has 193 parties.

Delegates and other participants to the SB56 meeting in Bonn feel that the interpretation of rights, obligations and principles in the Convention is only being carried out through the lens of the Paris Agreement, gradually marginalising the Convention (e.g. CBDRRC, “developed v developing country parties” etc). This is further exemplified by the fact that some bodies report to the CMA only and not the COP. They would like to “reinstate” (their interpretation) the role of the Convention.

2. Relationship between the Convention and the Paris Agreement¹

The two instruments under consideration -the Convention and the Paris Agreement- are “treaties” under international law. This is not controversial, it follows from the definition of “treaty” in the 1969 Vienna Convention on the Law of Treaties (“VCLT”).² Therefore, the law of treaty interpretation applies.

The VCLT is considered to be (in most respects) a codification of customary international law.³ It provides authoritative guidance on the proper approach to the interpretation of treaties.⁴ The starting point is to use the general rule of interpretation (Article 31 VCLT). This entails interpreting the terms of the treaty in good faith in accordance with their ordinary meaning, in their context (comprising of its text when read as a whole, preamble, annexes, conclusory instruments, and subsequent agreements regarding its interpretation),⁵ in light of subsequent agreements and practices between the parties, and with relevant rules of international law application between the parties taken into

¹ In light of the query’s concern with the interaction between the UNFCCC and the Paris Agreement, we have excluded the Kyoto Protocol from this analysis.

² VCLT Article 2(1)(a): “‘Treaty’ means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.” See also Daniel Bodansky, ‘The Legal Character of the Paris Agreement’, 25(2) *RECIEL* 142 (2016), refuting potential objections to the Agreement’s status as a treaty.

³ J. Crawford, *Brownlie’s Principles of Public International Law* (9th Ed.), p. 354.

⁴ The International Court of Justice recognised Article 31, in particular, as codifying the customary international law of interpretation: *Arbitral Award of 31 July 1989 (Guinea-Bissau v Senegal)*, ICJ Reports, 1991, p. 53, para. 70; *Pulau Ligitan/Sipadan*, ICJ Reports, 2002, p. 625, para. 645; *Avena (Mexico v US)*, ICJ Reports, 2004, p. 12, para. 48; *Bosnian Genocide*, Preliminary Objections, ICJ Reports, 2007, p. 43, paras. 109-110; *Maritime Dispute (Peru v Chile)*, ICJ Reports, 2014, p. 3, para. 23; *Croatia v Serbia*, ICJ Reports, 2015, p. 3, para. 64.

⁵ Article 31.2 of the VCLT, with *Brownlie’s*, p. 367.

account. To confirm the meaning resulting from an interpretation conducted in this manner,⁶ recourse may be had to supplementary means of interpretation, such as the preparatory work leading to and circumstances of the treaty's conclusion.⁷

Under Article 30.2 of the VCLT, “[w]hen a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.” There is no provision within the Paris Agreement that explicitly states that it is subject to the UNFCCC or that where there is any conflict between the two then the UNFCCC prevails.

On the contrary, were it to be said that the Paris Agreement covers the same subject matter as the UNFCCC,⁸ under Article 30.3 of the VCLT, the Paris Agreement, as the more recent treaty, would take precedence over the UNFCCC.⁹

However, another argument could be made that the two treaties rank equal between themselves. A central principle of international law identifies that all states are equal, meaning that all treaties between states are of equal importance. This is known as the principle of legislative equality. While some commentators have argued that the principle of legislative equality fails to take account of the reality of both formal and informal hierarchies of treaties, this principle still holds much sway.¹⁰

Leaving these arguments to one side for the time being, we examine what the treaties themselves might say about their relationship. If the Convention were “the ‘governing’, ‘supreme’ or otherwise guiding legal instrument in relation to the Paris Agreement”, as suggested by the Query, this would be indicated in the Paris Agreement itself or in the COP decision adopting it (1/CP.21). Alternatively, this might be indicated, in a general, indirect way, in the Convention.

2.1 What does the Paris Agreement say about its relationship with the Convention?

One of the first recitals in the Paris Agreement's preamble (which is part of its context) expresses the Agreement to be: “[i]n pursuit of the objective of the Convention, and being guided by its principles,..”. This could suggest, on a good faith reading of its ordinary meaning, that the purpose of the Paris Agreement is to engage with and continue the work of the UNFCCC.¹¹

Similar to the above, Article 2.1 states that “[t]his Agreement, in enhancing the implementation of the Convention, including its objective, aims to strengthen the global response to the threat of climate change” (emphasis added). To enhance something is to “increase [its] quality, value or extent”;¹² in this case, the Convention. On its ordinary meaning, enhancing a thing does not override its provisions, but instead amplifies and broadens their application. An enhancement is also, definitionally, an addition to the original; it cannot persist without it. An argument could be made that a thing that cannot survive without the other is subordinate to it. Such an interpretation of Article 2.1, strengthened by the context provided in its preamble, would mean that the UNFCCC ranks senior to the Paris Agreement, and therefore, that any conflicts between the two would be resolved by giving application to the former.

⁶ Or, where the interpretation results in an ambiguous, obscure, manifestly absurd or unreasonable result, recourse may also be had to such supplementary means of interpretation.

⁷ Article 32 of the VCLT.

⁸ Article 30.1 of the VCLT.

⁹ Article 30.4 makes provisions for where not all of the parties to an older agreement are parties to the newer agreement.

¹⁰ See, M. Prost, ‘Hierarchy and the Sources of International Law: A Critique’, *Houston Journal of International Law*, 39, 2017, 285-330, 286.

¹¹ *Paperback OED*, p. 585: “pursue...engage in or continue with an activity”.

¹² M. Waite, *Paperback Oxford English Dictionary* (7th Ed.), p. 235.

The above interpretation of Article 2.1 could be confirmed by having recourse to supplementary means of interpretation, such as the Paris Agreement's preparatory work and the circumstances of its conclusion.

The preparatory work of the Paris Agreement began with decision 1 of the COP at its seventeenth session in Durban, South Africa. Paragraph 2 of the same, established the Ad Hoc Working Group on the Durban Platform for Enhanced Action, which was "to launch a process to develop a protocol, another legal instrument or an agreed outcome with legal force under the Convention".¹³ It was this Ad Hoc Working Group that eventually facilitated and implemented the Paris Agreement at the COP's twenty first session in Paris.¹⁴ The wording "under the Convention" in paragraph 2 of 1/CP.17 could suggest that whatever protocol, legal instrument or agreed outcome was to be entered under, it would be in extension of, or below,¹⁵ the UNFCCC.

This language was repeated in decisions of the COP at each of its eighteenth, nineteenth and twentieth sessions leading up to the adoption of the Paris Agreement at its twenty-first.¹⁶ It is notable in this regard that the process leading to the Paris Agreement and the adoption of the Paris Agreement itself were both done by decisions of the COP to the UNFCCC, rather than separately.

Conversely, one could argue that the preamble, Article 2.1, and the other provisions mentioned above, do not, explicitly or implicitly, indicate the nature of the relationship between the two treaties. Rather, they imply that that the Convention's actions in the same areas have suffered from relatively weaker expectations, which need to be strengthened.¹⁷ For that reason, the Paris Agreement's purpose is to engage with and continue the work of the Convention. In doing so, it is expected to forge ahead and do better than its predecessor.

The reference to pursuing the UNFCCC's objective is of almost no consequence since the Paris Agreement's own objectives are more detailed and demanding than the Convention's. The Convention's objective is closer to being a background point of reference for the Paris Agreement and its own, more concrete, objectives.

As for the principles, the UNFCCC refers to principles in two places: in its preamble, where it affirms the principle of state sovereignty; and in its Article 3, where several general statements are found, some of which are self-standing principles of international law,¹⁸ and the rest of which are original to the UNFCCC.¹⁹ The Paris Agreement's preambular commitment to be "guided" by these assorted statements (consisting of recognised principles and a few other general elements) says little about its relation to the Convention, except that the two treaties share certain foundational ideas.

¹³ 1/CP.17, para. 2.

¹⁴ The work of the Ad Hoc Group is recognised in the preamble to the Paris Agreement: "*Pursuant to the Durban Platform for Enhanced Action established by decision 1/CP.17 of the Conference of Parties to the Convention at its seventeenth session*".

¹⁵ *Paperback OED*, p. 798: "under... extending or directly below".

¹⁶ 2/CP.18, 1/CP.19 and 1/CP.20 respectively and each of which were recalled in the preamble to decision 1/CP.21 of the COP adopting the Paris Agreement.

¹⁷ For example, see Articles 9.9, 11.5, and 13.3.

¹⁸ Principles not particular to the climate change regime are: Article 3.1, common but differentiated responsibilities and respective capabilities; Article 3.3, the precautionary principle; Article 3.4, right to pursue sustainable development; and Article 3.5, supportive and open international economic system.

¹⁹ Those original to the UNFCCC include: Article 3.1, "the developed country Parties should take the lead in combating climate change and the adverse effects thereof" (also reiterated in the last preambular clause of the Paris Agreement); Article 3.2, "The specific needs and special circumstances of developing country Parties ... should be given full consideration" (also reflected in several parts of the Paris Agreement); and Article 3.3, "Efforts to address climate change may be carried out cooperatively by interested Parties" (also recognized in the Paris Agreement's trading mechanisms, among other places).

With regard to the expression “under the Convention”, one could say that the use of “under” does not signify that the UNFCCC prevails over the Paris Agreement. “[U]nder” in this context simply means that the parties to the UNFCCC drafted the Paris Agreement and set it up and got it started. The ordinary meaning of “under” in this context is different from the much stronger term “subject to” in the VCLT, which results in a very different kind of treaty relation.²⁰

2.2 What might the Convention say about its relation to legal instruments under it?

Article 17 of the Convention provides for the adoption of protocols to the Convention (a protocol is an amendment or addition to a treaty). The Article, and the rest of the Convention’s text, are silent about the nature of the relation of the Convention to any protocol it might adopt. In addition, there is no indication that the Paris Agreement was adopted pursuant to Article 17. The Paris Decision 1/CP.21 that adopts the Paris Agreement leaves open the question of whether the Paris Agreement is a protocol under the Convention.²¹ There is therefore nothing in the Convention that sheds light on the relationship the Convention might have in respect of the Paris Agreement.

As outlined above, the answer to whether the UNFCCC is “governing”, “supreme” or “otherwise guiding” in respect of the Paris Agreement is not clear cut. Good arguments can be put forward for either side of the debate. On balance, we are of the view that the more correct legal interpretation is that both treaties are treaties of equal importance and independent of each other. Therefore, arguments that the Convention is supreme would most likely fail. This does not mean that the Convention does not have a guiding role in relation to the Paris Agreement. The earlier and more general “Framework” Convention was intended to be implemented through future legal instruments, in respect of which it would act as a guide. As such, the Paris Agreement inherited from the Convention a substantial body of normative, institutional, and technical elements.

3. Potential approaches to pursue a clarification

Nonetheless, if there was a desire to seek a formal recognition of the Convention’s ‘supreme status’ or an approval of this interpretation, a limited number of procedural options could be examined. The main practically available options in this context include further negotiations and conciliation, further COP decisions or good offices by the UN Secretary General.

3.1 Negotiation and Conciliation

Article 14(1) of the UNFCCC provides that in the event of a dispute between two or more parties concerning the interpretation or application of the UNFCCC, the parties “shall seek a settlement of the dispute through negotiation or any other peaceful means of their own choice”. In this respect, a party which is in dispute with another party about the interpretation and application of the two agreements could approach other parties to resolve their disagreement through further discussions inside or outside the UNFCCC negotiations.

If the parties to a dispute fail to settle it within a year, it can be submitted to conciliation in accordance with Article 14(5). Article 24 of the Paris Agreement states that Article 14 of the UNFCCC on dispute settlement applies *mutatis mutandis* (with the necessary changes) to the Paris Agreement. A party (or more) must then notify another party (or more) that a dispute about the interpretation or application

²⁰ See VCLT Article 30 (“Application of successive treaties relating to the same subject-matter”), and in particular Article 30(2): “When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.” No such specification is found in the present case.

²¹ Johns R. Bodle and S. Oberthür. 2017. “Legal Form of the Paris Agreement and Nature of Its Obligations”. In: D. Klein (eds). “The Paris Agreement on climate change, analysis and commentary”. Oxford: Oxford University Press, p.92.

of the UNFCCC (or the Paris Agreement) exists between them. If, after 12 months from the date of the notification, the parties have not been able to resolve their dispute, one (or more) of them can launch the compulsory conciliation process.

Conciliation combines fact finding and mediation. Pursuant to Article 14(6), a conciliation commission would be composed of members appointed by the parties concerned, with a chairperson chosen by those members. The commission would act as a mediator between both (or more) sides and aim to propose solutions that are acceptable for all. It has the power to render a recommendatory award which the parties are to “consider in good faith”. While the award is not binding it could influence parties’ future conduct.

Article 14(7) of the UNFCCC envisages that additional procedures relating to conciliation shall be adopted by the COP in an annex to the UNFCCC “as soon as practical”. To date, however, such procedures have not been adopted. In practice, this may present a significant obstacle in using conciliation. A party which seeks to submit a dispute to conciliation should, therefore, also push for such conciliation procedures to be adopted by the COP “*as soon as practicable*”.

3.2 COP Decision

Any party taking issue with the interpretation and application of the Convention can also raise the point in the COP and then propose for adoption a corresponding decision. The decision could address how the treaties should be interpreted and applied, including reaffirming the supremacy of the Convention as the core governing agreement. Such a decision would carry authoritative interpretative weight under Article 31.2 of the VCLT.

To adopt a COP decision, any party can propose an agenda item, including the consideration of a draft decision to be included on the provisional agenda.²² So long as the draft decision is not removed by the COP when adopting the agenda,²³ then the COP will proceed to consider and decide on the agenda item. Based on current practice of the COP, this means that the decision needs to be taken by consensus.

3.3 “Good offices” of the UN Secretary-General

Article 98 of the UN Charter provides that the Secretary-General, in addition to acting in the capacity of Secretary General in all meetings of the General Assembly, Security Council, Economic and Social Council and Trusteeship Council, shall perform such other functions as are entrusted to him by these organs. Such functions often involve the prevention and the peaceful settlement of disputes and are carried out under the “good offices” of the Secretary- General.

In theory, parties involved in a dispute regarding the Paris Agreement could call upon the UN Secretary-General to provide its “good offices” to mediate and facilitate dialogue between the opposing sides. This can be set in motion at the Secretary-General’s own initiative, in response to a request from one or more of the parties to a dispute, or as a result of a request from the Security Council or General Assembly.

The Secretary-General’s good offices have proven to be a successful method of dispute resolution in a number of inter-State disputes and civil conflicts, for example in Cambodia, Mozambique, Nicaragua

²² Before it is circulated by the secretariat (at least six weeks before the next COP), Rule 10(d) and Rule 11 of the Draft Rules of Procedure of the UNFCCC (“Draft Rules”). If already circulated, a party can propose its inclusion in a supplementary provisional agenda, Draft Rule 12.

²³ Draft Rule 13.

and El Salvador.²⁴ However, the procedure appears more suited to bilateral disputes as opposed to disputes that have the potential to affect numerous States, such as a dispute in relation to the Paris Agreement. Moreover, given the existence of the UNFCCC, it is likely that the Secretary-General would consider that any dispute in relation to the Paris Agreement should be dealt with within that specific framework rather than by means of an ad hoc procedure.

²⁴ See, Franck, 'The Secretary General's Role in Conflict Resolution: Past, Present and Pure Conjecture' 6 EJIL (1995), pp. 361-362, noting that good offices have been more successful since the expansion of the Secretary General's functions in the early 1990s and the Security Council's explicit invitation that more governments use this method of dispute resolution. See also, R. Lapidoth, 'Good Offices in Max Planck Encyclopedia of Public International Law' (2006), para. 6; Franck, 'The Secretary General's Role in Conflict Resolution: Past, Present and Pure Conjecture' 6 EJIL (1995), p. 367.