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Climate Change Dispute Resolution: Low-threshold hybrid mediative processes as a means to overcome institutional lock-ins

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Abstract

The United Nations Framework Convention on Climate Change (UNFCCC) provides in Art. 14 for the adoption, implementation and activation of formal instruments and mechanisms for conflict management and mediation. The majority of the formal instruments, processes and mechanisms of conflict transformation mentioned in Art. 14 UNFCCC are linked to preconditions that are difficult to fulfill, such as the elaboration and realization of an "Annex on Arbitration" or an "Annex on Conciliation", and are currently in a state of deadlock and therefore remain largely unused. To overcome this blockade, the development and implementation of low-threshold hybrid mediative tools and systems without arbitration elements is proposed here. Conceptually, these should be based on the possibility mentioned in Art. 14 para. 1 UNFCCC, to deal with disputes and conflicts between parties through "negotiations or other peaceful means of their own choice". In this context, it could also prove useful to activate and involve civil society affected by the climate crisis as a so-called "third side" of the crisis, whereby this could be represented by NGOs or actors from science and research as "low-key mediators", for example.

¹ This policy paper represents the personal views of the authors and not necessarily those of the Contarini Institute.

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A. Conflicting Climate Conferences

The 27th Conference of the Parties (COP) once again demonstrated its ability to act and the binding nature of previous agreements was called into question. In particular, the establishment of a compensation fund for the damage and losses caused by climate change appeared to be contentious and controversial. A year earlier, numerous lines of conflict were already emerging that proved to be insurmountable,⁴ although *Patricia Espinosa* (Executive Secretary of the United Nations Framework Convention on Climate Change (UNFCCC)) also spoke of a bridge between good intentions and measurable actions in view of the results achieved at the 26th COP, and thus of the function of this bridge as an important link in a historic transformation process.⁵ In view of the results of the negotiations, however, the sustainability of such a bridge is doubtful. In view of the particular interests of the contracting parties, which are shaped by national (national) economic considerations, hinder necessary progress and harbor a risk of conflict and blockade that should not be underestimated,⁶ a shift from the international level to the regional or even local level can be discerned.⁷ The results of the 27th COP show once again how much climate change as a collective global action problem is characterized by political conflicts and disagreement among the parties and at the same time reveal the deep divide between developing and industrialized countries - the global South and the global North - for which low-threshold hybrid mediative tools could prove useful.⁸

B. Conflict management without official procedural rules

Although the format of the climate negotiations has now existed for over twenty years, the parties have not yet been able to agree on the adoption of official procedural rules. Rather, these are adopted provisionally each year. As a result, the mediation efforts of climate diplomacy are therefore characterized on the one hand by the absence of an official set of rules for conflict management and on the other hand by a web of informal procedures and instruments. Breakthroughs or setbacks in climate diplomacy thus also depend on the successful use of hybrid mediative instruments of conflict

⁴ *Luft/Hermann*, ABGE-COP-PELT? Weshalb mediative Methoden dem Klimaschutz zuträglich sein könnten, 2022. Abrufbar via: <https://generationengerechtigkeit.info/abge-cop-pelt-mediative-methoden/>. UN Climate Change Conference 2021: Decision - /CP.26 – Glasgow Climate Change Pact. Available via: https://unfccc.int/sites/default/files/resource/cop26_auv_2f_cover_decision.pdf.

⁵ UN Climate Change Conference 2022: Statement by Patricia Espinosa, November 13, 2021 "At COP26, Parties Built a Bridge." Available via: <https://unfccc.int/news/at-cop26-parties-built-a-bridge-patricia-espinosa>.

⁶ *Luft/Hermann*, ABGE-COP-PELT? Weshalb mediative Methoden dem Klimaschutz zuträglich sein könnten, 2022. Available via: <https://generationengerechtigkeit.info/abge-cop-pelt-mediative-methoden/>.

⁷ See *Engel/Orbach*, Harvard Law and Policy Review, 2/2008, 120 (120 ff.); *Aall/Groven/Lindseth*, Global Environmental Politics, 7/2007, 83 (83 ff.).

⁸ *Kemp*, in Wilkenfeld/Bearsley/Quin (eds.), Research Handbook on Mediating International Crises, 2020, 337 (337).

management,⁹ although the literature on the use of mediative procedures in the context of the COP is scarce.¹⁰ Successful climate diplomacy therefore requires clear, transparent and "fair" conflict management tools, as well as the adoption of official procedural rules by the UNFCCC.¹¹

C. Maladaptive Mediation

In practice, climate diplomacy in recent years has been characterized by the use of a variety of informal formats and techniques,¹² such as negotiations and mediation efforts in the context of

- "contact groups",
- "spin-off groups" and
- "bloc negotiations".¹³

In most cases, these formats proved to be useful instruments for reaching short-term agreements, but in the medium term they entailed the risk of diluting the agreements reached and, in the long term, of further fanning the flames of conflict.¹⁴ *Kemp* refers to this "patchwork" of informal conflict management practices as "*maladaptive mediation*."¹⁵

D. Disadvantages of informal conflict management practices

Not infrequently, the success or failure of mediation efforts within the framework of the COP is closely linked to the actors of the respective COP presidency, and thus also to the efficiency and personal experience as well as the ability to defuse conflicts on the part of the respective COP presidents in office.¹⁶ In addition, the small, mostly unofficial meetings held in practice are also associated with disadvantages, which, according to *Kemp*, include the following

⁹ *Kemp*, in Wilkenfeld/Bearsley/Quin (eds.), *Research Handbook on Mediating International Crises*, 2020, 337 (337).

¹⁰ On this, see with regard to the role of the European Union (EU), *Oberthür/Groen*, *Wiley Interdisciplinary Reviews: Climate Change*, 8/2017, (1 ff.); Looking at rules and procedures, *Kemp*, *International Environmental Agreements: Politics Law and Economics*, 16/2016, 757 ff.); *Yamin/Depledge*, *The International Climate Change Regime: A Guide to Rules, Institutions and Procedures*, 2004; *Paor*, *Journal of International Dispute Settlement*, 8/2017, 179 (179 ff.); With regard to the practice of the new conflict management techniques developed under the UNFCCC, *Kemp*, in Wilkenfeld/Bearsley/Quin (eds.), *Research Handbook on Mediating International Crises*, 2020, 337 (338 ff.).

¹¹ *Kemp*, in Wilkenfeld/Bearsley/Quin (eds.), *Research Handbook on Mediating International Crises*, 2020, 337 (348).

¹² See in detail the 31 techniques described in *Biniaz. Biniaz*, *Michigan Journal of Environmental and Administrative Law*, 6/2016, 37 (37 ff.); UNFCCC, *Guide for Presiding Officers 2017*. Available via: https://unfccc.int/sites/default/files/20170919_guideforpresidingofficers_final; *Kemp*, in: Wilkenfeld/Bearsley/Quin (eds.), *Research Handbook on Mediating International Crises*, 2020, 337 (340).

¹³ *Kemp*, in Wilkenfeld/Bearsley/Quin (eds.), *Research Handbook on Mediating International Crises*, 2020, 337 (340 f.).

¹⁴ *Kemp*, in Wilkenfeld/Bearsley/Quin (eds.), *Research Handbook on Mediating International Crises*, 2020, 337 (349).

¹⁵ *Kemp*, in Wilkenfeld/Bearsley/Quin (eds.), *Research Handbook on Mediating International Crises*, 2020, 337 (346).

¹⁶ *Kemp* sums up his criticism of this approach as follows: "*Reyling on the president and host country is a risky and inconsistent mediation strategy*." *Kemp*, in Wilkenfeld/Bearsley/Quin (eds.), *Research Handbook on Mediating International Crises*, 2020, 337 (347).

- an exclusion of civil society,
- a marginalization of NGOs and scientists, as well as in
- a public impression of "minilateralism" and a "diplomacy behind closed doors",

which can lead to a lack of transparency and democratic deficits in the negotiations.¹⁷

In this context, however, the climate diplomacy efforts aimed at in the sense of "minilateralism" are to be judged ambivalently, as they may on the one hand lead to further fragmentation and greater lack of transparency, but on the other hand they may also contribute to building diplomatic bridges and thus also to the functioning of the COP.

E. Possible formal conflict management procedures

In view of the aforementioned drawbacks of the current practice of informal mediation and conflict resolution, *Kemp* refers to the as yet unused opportunities of the United Nations Framework Convention on Climate Change (UNFCCC) and recommends the adoption, implementation and activation of the formal instruments and mechanisms of conflict resolution and mediation provided for in Art. 14 UNFCCC, namely

- the pursuit of arbitration proceedings before the International Court of Justice
- the implementation of an arbitration procedure, to be defined in the "Annex on Arbitration" to be elaborated and adopted by the COP or
- the establishment of a "Conciliation Commission",

which will be briefly touched upon below.¹⁸

Arbitration before the International Court of Justice (ICJ)

One option for dealing with disputes and conflicts mentioned in the United Nations Framework Convention on Climate Change is the possibility of initiating arbitration proceedings before the International Court of Justice (ICJ) (Art. 14 para. 2 UNFCCC), although in practice none of the parties has made use of this option to date.¹⁹

Effort of arbitration specified in the "Annex on Arbitration"

Another instrument mentioned in Art. 14 para. 2 UNFCCC is the possibility of an arbitration procedure, which is still to be elaborated in the "Annex on Arbitration" to be adopted by the COP. However, this option of formal conflict resolution is also of a rather hypothetical nature, since neither an elaboration nor the introduction of an Annex on

¹⁷ *Kemp*, in Wilkenfeld/Bearsley/Quin (eds.), *Research Handbook on Mediating International Crises*, 2020, 337 (347).

¹⁸ *Kemp*, in Wilkenfeld/Bearsley/Quin (eds.), *Research Handbook on Mediating International Crises*, 2020, 337 (348).

¹⁹ *Kemp*, in Wilkenfeld/Bearsley/Quin (eds.), *Research Handbook on Mediating International Crises*, 2020, 337 (339).

Arbitration has been carried out by the COP so far and is not planned at the present time, although Art. 14 UNFCCC recommends the possibility of elaborating and adopting such an Annex *expressis verbis*.

Conflict management through the establishment of a settlement commission

In addition, the United Nations Framework Convention on Climate Change also provides for the possibility of establishing a so-called "Conciliation Commission" (Art. 14 para. 5, 6, 7 UNFCCC). Such a Conciliation Commission could be set up whenever previous efforts to resolve the conflict through the options mentioned in Art. 14 para. 1, 2 UNFCCC, i.e. by seeking arbitration before the International Court of Justice (ICJ) or by conducting arbitration after a period of one year, in accordance with an Annex on Arbitration to be elaborated and adopted by the COP, have failed. In practice, such a "Conciliation Commission", to be called by the parties to the conflict, would be authorized to make an award with the character of a recommendation, which the parties could examine. However, due to the lack of an annex on conciliation, the COP has not yet made use of this possibility.²⁰

F. Institutional lock-in

The vast majority of the formal instruments, processes and mechanisms for conflict resolution mentioned in Art. 14 UNFCCC are thus currently in a state of deadlock and remain unused. *Kemp* also speaks of a "procedural purgatory" in this context and also describes this state as a "*state of procedural purgatory with no formal, official measure for conflict resolution, or even decision-making.*"²¹ The reason for this "procedural purgatory" could be not least the arbitration elements envisaged in this context, which have so far met with little approval among the contracting parties, which is reflected in particular in the fact that so far none of the contracting parties has introduced a corresponding agenda item for the elaboration and realization of an "Annex on Arbitration" or an "Annex on Conciliation".²² As a result, there is currently no political will to implement arbitration elements.

²⁰ In practice, neither the Kyoto Protocol nor the Paris Agreement were able to close this existing gap. Rather, they rely on the United Nations Framework Convention on Climate Change (UNFCCC) and state that Art. 14 UNFCCC applies *mutatis mutandis* to the Kyoto Protocol nor the Paris Agreement. United Nations, 1998, Kyoto Protocol to the United Nations Framework Convention on Climate Change. Available via: <https://unfccc.int/resource/docs/convkp/conveng.pdf>; United Nations, 1992, United Nations Framework Convention on Climate Change. Available via: https://unfccc.int/files/essential_background_publications_htmlpdf/application/pdf/conveng.pdf; *Kemp*, in: Wilkenfeld/Bearsley/Quin (eds.), *Research Handbook on Mediating International Crises*, 2020, 337 (340).

²¹ *Kemp*, in Wilkenfeld/Bearsley/Quin (eds.), *Research Handbook on Mediating International Crises*, 2020, 337 (337).

²² *Kemp*, in Wilkenfeld/Bearsley/Quin (eds.), *Research Handbook on Mediating International Crises*, 2020, 337 (348).

G. Impulses for overcoming unilateralism and institutional lock-in

Another low-threshold way to deal with disputes and conflicts between the parties and thus to overcome unilateralism and institutional lock-in, in contrast to the procedural options mentioned in the Framework Convention and subject to preconditions (conducting arbitration proceedings or establishing a conciliation commission), may result from Art. 14 para. 1 UNFCCC. According to this, in the event of a dispute between two or more parties over the interpretation and application of *the* Convention, a settlement could also be reached "*through negotiation or any other peaceful means of their own choice*"²³, although this option has been criticized by voices in the literature for its lack of limitation and ambiguity and is considered unhelpful.²⁴

Reserve function low-threshold hybrid mediative forms of procedure

Notwithstanding the criticism expressed by parts of the literature regarding the possibility mentioned in Art. 14 para. 1 UNFCCC, possibility of dealing with disputes and conflicts between the parties through "negotiations or other peaceful means of its own choice",²⁵ it is precisely this option, which, due to its lack of limitation and ambiguity, is considered unhelpful, that has a potential as a "reserve function" that should not be underestimated,²⁶ for the hitherto dominant and rather cumbersome forms of conflict management of the COP. In view of the current lack of political will to implement arbitration elements, which is realized in particular in the fact that so far none of the parties has introduced a corresponding agenda item for the elaboration of an "Annex on Arbitration" or an "Annex on Conciliation",²⁷ the benefit results from the option described in Art. 14 para. 1 UNFCCC, mentioned possibility for the treatment of disputes and conflicts between the contracting parties by "negotiations or other peaceful means of own choice," from their low threshold and flexibility.²⁸ Unlike the other instruments for conflict management mentioned in Art. 14 UNFCCC, some of which are linked to preconditions that are difficult to fulfill, such as the elaboration and implementation of an "Annex on Arbitration" or an "Annex on Conciliation", Art. 14 para. 1 UNFCCC offers the possibility of developing and using low-threshold hybrid tools and systems for conflict management, which could also take into account existing conflict management

²³ United Nations, 1992, United Nations Framework Convention on Climate Change. Available via: https://unfccc.int/files/essential_background_publications_htmlpdf/application/pdf/conveng.pdf.

²⁴ Kemp, in Wilkenfeld/Bearsley/Quin (eds.), Research Handbook on Mediating International Crises, 2020, 337 (339).

²⁵ United Nations, 1992, United Nations Framework Convention on Climate Change. Available via: https://unfccc.int/files/essential_background_publications_htmlpdf/application/pdf/conveng.pdf.

²⁶ See the remarks in Henke regarding private arbitration as an alternative and reserve in the event that state jurisdiction is perceived as sufficient. Henke, Über die Evolution des Rechts, 2009, p. 195.

²⁷ Kemp, in Wilkenfeld/Bearsley/Quin (eds.), Research Handbook on Mediating International Crises, 2020, 337 (348).

²⁸ For example, Art. 14 para. 1 UNFCCC does not provide for the elaboration and implementation of an "Annex on Mediation".

traditions of the parties in order to increase acceptance.²⁹ In this context, proven role models for dealing with collective action problems, as can be observed in proto-democratic contexts, that transcend time and place could also prove to be helpful sources of impetus.

Time and cross-location role models for dealing with collective action problems

Low-threshold hybrid structures as instruments for dealing with collective action problems can be found across time and place and may prove useful due to their long, partly proto-democratic lines of tradition,³⁰ also for overcoming the current institutional lock-ins of the COP as well as for increasing its efficiency. One example is the well thought-out³¹ and proven³² hybrid³³ conflict management practice of the Hellenistic³⁴ city-states, which is reflected in the mediation efforts of the ancient institution of the so-called *Diaitetai* (δῆται)³⁵ or the survival strategy of the Icelandic settlers in the saga period, which was characterized by a collective and cooperative effort to contain discord and violence,³⁶ in whose center stood the "public as mediator" surrounding the conflict,³⁷ whereby historical comparisons should not be overstretched.³⁸

Activation of the civil society affected by the climate crisis

Similar to the Icelandic settler community in saga times, the parties to the COP are also currently in a situation where dealing effectively with a collective action problem, namely that of global warming and the threats it poses to people and the environment, is critical for the success of an indispensable climate protection. A possible instrument for overcoming the institutional lock-in of the COP could be seen in the collective and cooperative efforts described by *Ury* to overcome differences by means of a "public sphere as mediator" surrounding the conflict.³⁹ A promising approach for the development and implementation of low-threshold hybrid conflict management systems in the context of COP could therefore result from the processing and modification⁴⁰ of

²⁹ See *Rogers/Bordone/Sander/McEwen*, *Designing Systems and Processes for Managing Disputes*, 2013, p. 273.

³⁰ The conflict management strategies of the Icelandic settlers in the founding phase of the Icelandic Free State in the saga period, which was characterized by its egalitarian character, are exemplary here. See *Byock*, *Medieval Iceland-Society, Sagas and Power*, 1990, p. 51.

³¹ *Harter-Uibopuu*, *Willamette Journal of International Law and Dispute Resolution (WJILDR)*, 10/2002, 47 (47).

³² On the success rate of this conflict management tool, see, for example, *Eckstein*, *Historia: Zeitschrift für Alte Geschichte*, 51/2002, 268 (268).

³³ See, for example, *Kaščeev*, who describes this as follows: "*In the foreign policy of the Greeks, both procedures, arbitration and mediation, were practiced and were inseparable.*" *Kaščeev*, *Historia: Zeitschrift für Alte Geschichte*, 49/1997, 419 (423 f.).

³⁴ What is meant here is the period from about 336-27 BC.

³⁵ See *Kaščeev*, *Historia: Zeitschrift für Alte Geschichte*, 49/1997, 419 (422).

³⁶ What is meant here is the period from 930 to 1262.

³⁷ In this context, *Ury* also speaks of a so-called "third side" of a conflict. *Ury*, *The Third Side*, 2000, p. 4 ff.

³⁸ See also *Bercovitch*, in *Bercovitch/Rubin* (eds.), *Mediation in International Relations*, 1992, 1 (1 f.).

³⁹ *Ury*, *The Third Side*, 2000, p. 7.

⁴⁰ *Hermann*, *Tools, Tabellen und Visualisierungen*. Available via: moodle-wrm.fernuni-hagen.de.

mediative strategies and techniques⁴¹ that have proven themselves in practice to avoid or deal with deadlocked procedural situations.⁴² Such an approach could help to develop clear and transparent bases for discussing and dealing with climate conflicts, ideally also involving civil society as a "mediating public" and as a supplement to the existing key stakeholders, who are represented by

- NGOs,⁴³
 - private individuals⁴⁴ (e.g. former heads of government or former UN secretaries general)⁴⁵ and
 - actors from science and research,⁴⁶ ("low-key mediators")⁴⁷
- could be represented.⁴⁸

H. Summary

The majority of the formal instruments, processes and mechanisms for conflict management mentioned in Art. 14 UNFCCC are currently in a state of deadlock and remain largely unused. In order to increase efficiency and overcome this institutional lock-in, the hitherto little-noted option of dealing with disputes and conflicts between parties through "negotiations or other peaceful means of the Parties' own choice" (Art. 14 para. 1 UNFCCC) could therefore prove helpful. This option has a potential that should not be underestimated as a flexible "reserve function" whose benefits can be derived from both the

- developing and implementing low-threshold hybrid mediative structures and instruments for dealing with collective problems of action, as well as from a
- activation and involvement of civil society affected by the climate crisis (Third Side), results.

⁴¹ For example, the so-called "Breakthrough Strategy" according to *Ury* or the "Tools for Coping with Conflict" according to *Fisher/Kopelman/Kupfer-Schneider*. *Ury*, *Getting Past No - Negotiating in Difficult Situations*, 1993; *Fisher/Kopelman/Kupfer-Schneider*, *Beyond Machiavelli*, 1996.

⁴² See Program on Negotiation (Harvard Law School), Harvard Negotiation Project. Available via: https://www.pon.harvard.edu/category/research_projects/harvard-negotiation-project/.

⁴³ On the role and effectiveness of NGOs in the context of international conflict mediation, see, for example, the "International Conflict Management (ICM) Dataset" by *Bercovitch*, 2004. Available via: <http://www.arts.canterbury.ac.nz/bercovitch/databases.shtml>.; *Greig/Diehl*, *International Mediation*, 2012, p. 104 ff.; *Melin/Olander*, in: *Wilkenfeld/Bearsley/Quin* (eds.), *Research Handbook on Mediating International Crises*, 2020, 94 (100 f.); See on this with regard to the aspect of "reputation," also *Gent/Crescenzi/Menninga/Reid*, *International Theory*, 7/2015, 426 (430 f.); *Gent*, in: *Wilkenfeld/Bearsley/Quin* (eds.), *Research Handbook on Mediating International Crises*, 2020, 183 (192 f.); *Zartman/Touval*, in: *Crocker/Hampson/Aall* (eds.), *Managing Global Chaos*, 1996, 445 (450).

⁴⁴ *Hare*, in: *Bercovitch/Rubin* (eds.), *Mediation in International Relations*, 1992, 52 (52 ff.); *Melin/Olander*, in: *Wilkenfeld/Bearsley/Quin* (eds.), *Research Handbook on Mediating International Crises*, 2020, 94 (102).

⁴⁵ See *Kleiboer*, *The Journal of Conflict Resolution*, 40/1996, 360 (372 f.).

⁴⁶ *Kelman*, in: *Bercovitch/Rubin* (eds.), *Mediation in International Relations*, 1992, 64 (64 ff.); *Gent*, in: *Wilkenfeld/Bearsley/Quin* (eds.), *Research Handbook on Mediating International Crises*, 2020, 183 (183 ff.).

⁴⁷ See also *Vucović*, *International Multiparty Mediation and Conflict Management*, 2016, p. 23 f.

⁴⁸ In this context, the issues of so-called "biased mediation" and "weak mediators" must also be considered. *Svensson*, in: *Wilkenfeld/Bearsley/Quin* (eds.), *Research Handbook on Mediating International Crises*, 2020, 325 (334); See also *Savun*, *International Studies Quarterly*, 52/2008, 25 (25 ff.); *Kydd*, *American Political Science Review*, 3/2006, 449 (449 ff.).

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