

An implementing agreement under the UN Framework Convention on Climate Change - the US proposal and experience with the UN Convention on the Law of the Sea



Briefing Note

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The US submission to the Ad Hoc Working Group on Long-term Cooperative Action under the UN Framework Convention on Climate Change (UNFCCC) proposes an agreed outcome for the UN Copenhagen Climate Change Conference in the form of 'an implementing agreement' under the UNFCCC '...in order to allow for legally binding approaches and to reflect the Bali Action Plan's mandate to further the implementation of the Convention.'¹

Implementing agreements elaborate the details of a comprehensive or framework agreement. The goal is to facilitate implementation. Implementing agreements can be of various kinds: for example, they can be expressed in exchanges of letters and non-binding joint statements. There is limited experience with formal, legally binding implementing agreements.

What are the legal implications of the term 'implementing agreement'? To explore this question the briefing note provides a summary overview of experience with the 1982 UN Convention on the Law of the Sea (UNCLOS), as two legally binding 'implementing agreements' have been adopted under this convention:

- the 1994 Part XI Agreement, which deals with deep sea bed mining²
- the 1995 UN Fish Stocks Agreement³

The briefing note also considers the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage, as its relationship with UNCLOS and whether it could be viewed as an implementing agreement was a contested issue in the negotiations.

The US has played an active role in the negotiations on these three agreements, but has only become a party to the UN Fish Stocks Agreement.

¹ US Submission on Copenhagen Agreed Outcome, May 2009.

² Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982.

³ Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks.

The Part XI Agreement

UNCLOS was adopted in 1982 after lengthy negotiations. Presidential elections and a change of administration in the US meant that the US did not sign the convention. This change in position led to other industrialised countries being hesitant to ratify the convention.

The US and other industrialised countries' concerns centred on the deep sea bed mining provisions. Part XI of UNCLOS declared the deep sea bed the 'common heritage of mankind', with provisions on technology transfer and finance designed to ensure that developing countries had the opportunity to share in the expected benefits from mining of deep sea bed mineral resources.

As the convention failed to enter into force the UN Secretary General undertook consultations about Part XI in the early 90s, aimed at wider participation, leading to the adoption of the 'Part XI Agreement' in 1994. The Part XI Agreement contains some legal peculiarities in that it substantially modifies the original Part XI in order to take account of industrialised country concerns, although presented as an 'implementing agreement'.

The Part XI Agreement is to be applied as one with the original Part XI, but the Part XI Agreement prevails in case of inconsistency.⁴ After adoption any state that becomes a party to UNCLOS automatically becomes party to the Part XI Agreement and a state must become a party to UNCLOS to be party to the Part XI Agreement.⁵

In the consultations leading up to the adoption of the Part XI Agreement different legal formats were discussed: a protocol; an interpretative agreement on interpretation and application of the convention; an interpretative agreement involving an interim regime with establishment of a definitive regime when commercial production of deep seabed minerals became feasible; and an agreement additional to the convention providing for transition between the initial phase and the definitive regime.⁶

There was broad agreement that a legally binding format was needed. The US, together with the UK, Australia and Fiji, were the key countries behind the draft which eventually resulted in the implementing agreement.

The Part XI Agreement addressed the concerns of many countries and entered into force in 1996. UNCLOS had entered into force in 1994. However, although the US signed the Part XI Agreement, it has yet to ratify, nor has it become a party to UNCLOS.

The UN Fish Stocks Agreement

UNCLOS covers nearly all areas of oceans use and management. In some areas UNCLOS provides detailed rules, but in others it provides overarching general rules on the assumption that the detailed rules have or will be developed in other international

⁴ Part XI Agreement, Art. 2.

⁵ *Ibid.*, Art.4.

⁶ Law of the Sea, Consultations of the Secretary-General on outstanding issues relating to the deep seabed mining provisions of the United Nations Convention on the Law of the Sea, Report of the Secretary-General, UN Doc. A/48/950 9 June 1994, para. 11.

agreements or fora. Examples of the former include agreements adopted in the International Maritime Organization, while the latter include high seas fisheries.

The UN Fish Stocks Agreement deals with certain high seas fisheries of great economic importance.⁷ It was adopted explicitly as an implementing agreement to UNCLOS.⁸ It is to be interpreted and applied in a manner consistent with UNCLOS⁹ and does not alter the rights and obligations of states parties to both treaties.¹⁰ Conservation and management measures adopted and applied by the parties to the agreement must be in compliance with UNCLOS.¹¹ In one area the UN Fish Stocks Agreement goes beyond UNCLOS: its enforcement provisions break new ground in giving non-flag states certain rights.¹²

The US has signed and ratified the UN Fish Stocks agreement, which entered into force in 2001.

The UNESCO Convention on the Protection of the Underwater Cultural Heritage

The UNESCO convention covers underwater cultural heritage both within and beyond national jurisdiction (e.g. shipwrecks, archaeological sites).¹³ The convention builds on provisions in UNCLOS.¹⁴

During the negotiations of the UNESCO convention Norway proposed that the new agreement should be structured in the same way as the UN Fish Stocks Agreement, i.e. as an implementing agreement, limited to implementing provisions of UNCLOS. Italy argued that as UNCLOS Article 303.4 allows for the drafting of a more specific treaty regime, this regime should improve on UNCLOS. A strict link with UNCLOS was not incorporated in the final convention text.¹⁵

The UNESCO convention provides that it does not prejudice the rights, jurisdiction and duties of states under UNCLOS and is to be interpreted and applied in the context of and in a manner consistent with UNCLOS.¹⁶ However, the US opposed the convention, as in its view the convention created new rights for coastal states that could alter the delicate balance contained in UNCLOS.¹⁷

The UNESCO Convention entered into force in January 2009. The US is not a party.

⁷ UNCLOS, Arts. 63, 64.

⁸ UN Fish Stocks Agreement, Art.2.

⁹ *Ibid.*, Art.4.

¹⁰ *Ibid.*, Art.44.

¹¹ *Ibid.*, Art.1.

¹² *Ibid.*, Art. 21.

¹³ UNESCO Convention on the Protection of the Underwater Cultural Heritage, Arts.1.5, 11, 12.

¹⁴ UNCLOS Arts. 149, 303.4.

¹⁵ Roberta Garabello in Roberta Garabello & Tullio Scovazzi eds., *The Negotiating History of the Provisions of the Convention on the Protection of the Underwater Cultural Heritage*, The Protection of the Underwater Cultural Heritage – Before and After the 2001 UNESCO Convention, Martinus Nijhoff Publishers, pp 118-12.

¹⁶ UNESCO Convention Art.3, Preamble.

¹⁷ Sean D. Murphy, *US Practice in International Law 2002-2004*, Cambridge University Press, 2006.

Observations

The difference between an implementing agreement and a protocol does not need to be great in practice. Based on precedent from UNCLOS an implementing agreement would be legally binding (it would not just 'enable legally binding approaches', which could be interpreted as something different).

The US submission is set out as a 'Copenhagen Decision Adopting the Implementing Agreement'. Provisions in section 5 of the US submission, for example Article 9, which is intended to deal with signature and ratification/acceptance/approval and accession, indicate that the envisaged implementing agreement would be legally binding.

The format of an implementing agreement might appeal to some countries. It could co-exist with an amended Kyoto Protocol or a new protocol or protocols, or a comprehensive implementation agreement could even replace the Kyoto Protocol.

A risk with an implementing agreement is that it could, in the wrong circumstances, become an agreement that shifts – even undermines – principles that underpin the UNFCCC.

Although the emphasis on implementation corresponds with the emphasis that developing countries have placed on full implementation of the UNFCCC, a legally binding implementing agreement that includes quantified nationally appropriate mitigation actions for developing countries 'whose national circumstances reflect greater responsibility or capability' may be less appealing to them, especially as long as the financial provisions of the agreement are unclear.

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