



# **An International Instrument on Conservation and Sustainable Use of Biodiversity in Marine Areas beyond National Jurisdiction**

**Exploring Different Elements to Consider**

**PAPER I**

**Introduction on Scope, Parameters and Feasibility<sup>\*</sup>**

**By Thomas Greiber, with comments from Kristina Gjerde, Elisabeth Druel and Duncan Currie**

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<sup>\*</sup> DISCLAIMER: The views expressed in this paper do not necessarily reflect those of the German Federal Agency for Nature Conservation or the German Federal Ministry for the Environment, Nature Conservation, Building and Nuclear Safety.



## 1. Background

At the 2012 United Nations Conference on Sustainable Development (Rio+20), States committed themselves 'to address, on an urgent basis, building on the work of the Ad Hoc Open-ended Informal Working Group and before the end of the sixty-ninth session of the General Assembly, the issue of the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, including by taking a decision on the development of an international instrument under the United Nations Convention on the Law of the Sea.'<sup>1</sup> This commitment was recalled and reaffirmed by the United Nations General Assembly (UNGA) in its 67<sup>th</sup> and 68<sup>th</sup> session.<sup>2</sup> In its resolution 68/70, the UNGA also requested the United Nations Ad Hoc Open-ended Informal Working Group to study issues relating to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction (UN Working Group) to make recommendations to the UNGA 'on the scope, parameters and feasibility of an international instrument under the Convention'.<sup>3</sup> These recommendations shall help to prepare for the decision to be taken at the 69<sup>th</sup> session of the UNGA in 2015, whether to start the negotiation of an international instrument on the conservation and sustainable use of biodiversity in areas beyond national jurisdiction (ABNJ).

The International Union for Conservation of Nature (IUCN) in collaboration with different partners has prepared a series of policy briefs to provide technical input to the ongoing ABNJ discussions, and thereby support the UNGA decision-making process. The following paper provides an overall framework for this using the Arms Trade Treaty (ATT) as a potential model and case study. Through comparison to the ATT, it aims to explore the meaning of the wording 'scope, parameters and feasibility of an international instrument' in order to better understand what issues to consider in the context of ABNJ, and which topics to address in the series of IUCN policy briefs.

## 2. Origin of the Terms Scope, Parameters and Feasibility

The wording 'scope, parameters and feasibility of an international instrument' originates from the international process leading to the negotiations of the ATT which was finally adopted by the UNGA on 2 April, 2013.<sup>4</sup> It is therefore useful to take a brief look at the history of the ATT process as well as its interpretation of the terms scope, parameters and feasibility.

In 2006, the UNGA adopted resolution 61/89 which called on the Secretary-General to 'seek the views of Member States on the feasibility, scope and draft parameters for a comprehensive, legally binding instrument establishing common international standards for the import, export and transfer of conventional arms'.<sup>5</sup> Furthermore, the Secretary-General was requested to establish a group of governmental experts to examine the feasibility, scope and draft parameters for such an instrument.<sup>6</sup> In response to that, a report of States' views was issued in August 2007 indicating growing support

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<sup>1</sup> UNGA resolution 66/288. 'The future we want.' UN doc. A/RES/66/288, of 11 September 2012. Paragraph 162.

<sup>2</sup> UNGA resolution 67/78. 'Oceans and the law of the sea.' UN doc. A/RES/67/78, of 11 December 2012. Paragraph 181. UNGA resolution 68/70. 'Oceans and the law of the sea.' UN doc. A/RES/68/70, of 9 December 2013. Paragraph 197.

<sup>3</sup> UNGA resolution 68/70. 'Oceans and the law of the sea.' UN doc. A/RES/68/70, of 9 December 2013. Paragraph 198.

<sup>4</sup> For further information, visit the Website of the United Nations Office for Disarmament Affairs at [www.un.org/disarmament/ATT/](http://www.un.org/disarmament/ATT/) (last visited on 13 November 2013).

<sup>5</sup> UNGA resolution 61/89. 'Towards an arms trade treaty: establishing common international standards for the import, export and transfer of conventional arms.' UN doc. A/RES/61/89 of 18 December 2006. Paragraph 1.

<sup>6</sup> Ibid. Paragraph 2.

across many regions for an international treaty.<sup>7</sup> Another report from the group of governmental experts was prepared in August 2008 which, however, did not offer concrete suggestions due to the complexity of the issues at stake.<sup>8</sup> In resolution 63/240 of 2009, the UNGA therefore established an open-ended working group to further consider the feasibility, scope and draft parameters in order to gather sufficient consensus.<sup>9</sup> The working group convened twice that year to hear statements of numerous State representatives, as well as observers, after which it had an informal exchange of views with representatives of civil society.<sup>10</sup>

In January 2010, the UNGA resolution 64/48 endorsed the working group report, and agreed to convene a UN Conference on the ATT in 2012 *'to elaborate a legally binding instrument on the highest possible common international standards for the transfer of conventional arms'*.<sup>11</sup> To that end, the UNGA requested the Secretary-General to seek the views of Member States on proposed treaty elements, while converting the working group to a preparatory committee for the conference.<sup>12</sup>

The following similarities and differences between the process leading to the ATT and the process under the UN Working Group on biodiversity in ABNJ can be identified:

- In the ATT process, a vast majority of States were initially already in favour of a legally binding instrument to establish international standards, with the US as one of the key players opposing such an instrument. Similarly, in the UN Working Group on biodiversity in ABNJ the concept of an implementing agreement has been supported by the EU and G77 and many other States, with the US as a key player opposing such an instrument.
- The ATT working group was first established to consider how to achieve sufficient consensus for a legally binding treaty, and only in a second step was it converted into a preparatory committee for a negotiation conference. The current process in the UN Working Group on biodiversity in ABNJ is in part designed to determine if there is sufficient consensus for a legally binding treaty. Many States are ready to convert it into a preparatory process.
- Initially, the exercise of collecting views on scope, feasibility and desired parameters of a potential ATT had the objective to identify whether there was broad support for such an instrument; only then did this consultation aim at determining potential building blocks of a future regime. In 2011, the UN Working Group on biodiversity in ABNJ identified the package of building blocks for a new regime; the focus now is to determine if there is sufficient support.

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<sup>7</sup> *'Toward an arms trade treaty: establishing common international standards for the import, export and transfer of conventional arms – Report of the Secretary-General.'* UN doc. A/62/278, of 17 August 2007. Parts I, II & Add. 1-4.

<sup>8</sup> *'Report of the Group of Governmental Experts to examine the feasibility, scope and draft parameters for a comprehensive, legally binding instrument establishing common international standards for the import, export and transfer of conventional arms.'* UN doc. A/63/334, of 26 August 2008.

<sup>9</sup> UNGA resolution 63/240. *'Towards an arms trade treaty: establishing common international standards for the import, export and transfer of conventional arms.'* UN doc. A/63/240, of 8 January 2009. Paragraph 3.

<sup>10</sup> *'Report of the Open-ended Working Group towards an arms trade treaty: establishing common international standards for the import, export and transfer of conventional arms.'* UN doc. A/AC.277/2009/1, of 20 July 2009.

<sup>11</sup> UNGA resolution 64/48. *'The arms trade treaty.'* UN doc. A/64/48, of 12 January 2010. Paragraph 4.

<sup>12</sup> *Ibid.* Paragraphs 6 and 9.

- An important role was played by non-governmental organizations and civil society to enhance cooperation, improve information exchange and transparency, and assist States in implementing confidence-building measures in the field of responsible arms trade. Though still at an early stage, non-governmental organizations have been and continue to be actively engaged in all meetings of the UN Working Group on biodiversity in ABNJ, starting with the initial meeting in 2006 and leading to the present.

### 3. Scope

In the ATT process, States were first requested to consider '*elements of the conventional arms trade that should be included in the scope of the future arms trade treaty.*'<sup>13</sup> The views submitted by Member States, in general, interpreted scope to mean the types of conventional arms, ammunition, related equipment, and transfers the treaty should cover.<sup>14</sup> The ATT group of governmental experts understood scope as the types of weapons, activities, and/or transactions to be covered by the ATT.<sup>15</sup>

In the context of the UN Working Group on biodiversity in ABNJ, the term scope could therefore be interpreted as referring to questions on:

- **Substantive scope**

Substantive scope means the actual resources and activities that should be addressed by an international instrument for ABNJ under the United Nations Convention on the Law of the Sea (UNCLOS). As agreed by the 2011 UN Working Group, the scope would include '*marine genetic resources, including questions on the sharing of benefits, measures such as area-based management tools, including marine protected areas, and environmental impact assessments, capacity-building and the transfer of marine technology*' together and as a whole in a single package.<sup>16</sup>

To reflect existing obligations under the Convention on Biological Diversity and customary international law, an international instrument would logically apply to those activities and processes under national jurisdiction and control that have the potential to adversely affect marine biodiversity beyond national jurisdiction. A particular challenge in this context is how to address management of activities and any decisions regarding the management of a specific sector where activities are already regulated by existing competent authorities and legally binding instruments (e.g. Regional Fisheries Management Organizations, the International Maritime Organization, the International Whaling Commission, as well as related agreements). The specific question of how to enhance cooperation and coordination to ensure a coherent implementation of any new international instrument is further addressed in **Paper II** of this IUCN series.

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<sup>13</sup> '*Toward an arms trade treaty: establishing common international standards for the import, export and transfer of conventional arms – Report of the Secretary-General.*' UN doc. A/62/278, of 17 August 2007. Part I, Paragraph 3.

<sup>14</sup> '*Toward an arms trade treaty: establishing common international standards for the import, export and transfer of conventional arms – Report of the Secretary-General.*' UN doc. A/62/278, of 17 August 2007. Parts I, II & Add. 1-4.

<sup>15</sup> '*Report of the Group of Governmental Experts to examine the feasibility, scope and draft parameters for a comprehensive, legally binding instrument establishing common international standards for the import, export and transfer of conventional arms.*' UN doc. A/63/334, of 26 August 2008. Paragraph 20.

<sup>16</sup> UNGA resolution 66/231. '*Oceans and the law of the sea.*' UN doc. A/RES/66/231, of 24 December 2011. Paragraph 167.

- **Geographical scope**

Geographical scope refers to the maritime zones to be covered by the international instrument, namely ABNJ which comprise the high seas and the Area. For example, for the sharing of benefits from the utilization of marine genetic resources from ABNJ it needs to be considered that such resources move between the benthic zone (i.e. the Area) and the pelagic zone (i.e. the water column above), and that from a scientific as well as managerial point of view a comprehensive regime covering the entire ABNJ appears to be indispensable. This particular concern is raised in **Paper III** which focuses on benefit-sharing issues.

- **Level of detail**

Furthermore, it should be noted that in the ATT context, the group of governmental experts also discussed under scope *‘the balance between broad definitions that remain adaptable to technological advances and more detailed definitions that potentially require more regular review.’*<sup>17</sup> Agreement was reached that in all cases, *‘clarity in terms of purpose and implementation would be necessary.’*<sup>18</sup> This leads to the question of how detailed the overarching instrument should be, and what might be left to annexes or supplementary instruments (decisions, regulations, guidelines) for specific issues, to incorporate new information, or to enhance ease of decision-making, for example, on designation of marine protected areas (MPAs), adoption of management plans, conduct of environmental impact assessments (EIAs), etc.

#### **4. Parameters**

With regard to parameters, in the ATT process, States were requested to consider *‘principles, guidelines and parameters that should govern the international transfer of conventional arms.’*<sup>19</sup> The views submitted by Member States interpreted parameters as analogous to guidelines, conditions, and criteria to be applied to international trade in conventional arms.<sup>20</sup> The ATT group of governmental experts discussed principles, themes, and operational mechanisms of a potential treaty under parameters. The Charter of the United Nations, international human rights law, and international humanitarian law were all put forward as relevant treaty principles. Thematic areas included diverse issues, such as terrorism, organized crime, regional stability, socio-economic development, compliance with Security Council arms embargoes and other international obligations.<sup>21</sup> Operational mechanisms included information-sharing and exchange, reporting mechanisms, and international cooperation and assistance.<sup>22</sup>

In the ABNJ context, the term parameters could therefore be interpreted as covering:

- **General governance principles**

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<sup>17</sup> Ibid. Paragraph 21.

<sup>18</sup> Ibid.

<sup>19</sup> *‘Toward an arms trade treaty: establishing common international standards for the import, export and transfer of conventional arms – Report of the Secretary-General.’* UN doc. A/62/278, of 17 August 2007. Part I, Paragraph 3.

<sup>20</sup> Ibid. Parts I, II & Add. 1-4.

<sup>21</sup> *‘Report of the Group of Governmental Experts to examine the feasibility, scope and draft parameters for a comprehensive, legally binding instrument establishing common international standards for the import, export and transfer of conventional arms.’* UN doc. A/63/334, of 26 August 2008. Paragraph 25.

<sup>22</sup> Ibid. Paragraphs 24-26.

An overview of the most relevant governance principles in the context of conservation and sustainable use of marine biodiversity in ABNJ, as well as different approaches on how to include such principles in an international instrument for ABNJ under UNCLOS is provided in **Paper IV**.

- **Operational mechanisms**

The key operational mechanisms for implementation of a future international instrument for ABNJ would need to be developed for the issues identified in resolution 66/231.<sup>23</sup> These include

- Area-based management tools (ABMT), including MPAs: **Paper V** reviews different definitions on MPA and ABMT, **Paper VI** discusses various options and approaches for establishing and managing MPAs through an international instrument for ABNJ under UNCLOS, providing also references to related case studies.
- EIAs: **Paper VII** explains the relation between EIAs, strategic environmental assessments and spatial planning, while **Paper VIII** proposes potential EIA elements, screening criteria and thresholds reflecting minimum to maximum options.
- Benefit-sharing: **Paper III** discusses potential options for sharing the benefits from the utilization of marine genetic resources from ABNJ (see above).
- Capacity-building and transfer of marine technology: **Paper IX** looks into issues related to capacity-building and technology transfer, as well as current practices.

Operational measures would also include institutional mechanisms to enhance cooperation, coordination and coherency such as a conference of parties, a secretariat, a science body, compliance review mechanisms and a funding system (see **Paper II**). **Paper XI** aims to provide basic ideas for a possible institutional structure, while **Paper XII** reviews different international procedures to ensure science-based decision-making. **Paper XIII** analyses compliance and verification mechanisms under different multilateral environmental agreements.

## 5. Feasibility

Finally, in the ATT process, States were requested to consider *'any other features that might contribute to the development and adoption of an effective arms trade treaty.'*<sup>24</sup> Feasibility implied both the process and foundation by which a comprehensive, legally-binding, and enforceable treaty may be agreed upon. The report developed by the ATT group of governmental experts concluded that a feasible treaty would need to respect state sovereignty and be *'fair, objective, balanced, non-political, non-discriminatory and universal within the framework of the United Nations.'*<sup>25</sup> It also recognized that the question of feasibility had both political and technical dimensions.<sup>26</sup> Finally, it is important to note the understanding of experts that feasibility was dependent on collective

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<sup>23</sup> UNGA resolution 66/231. *'Oceans and the law of the sea.'* UN doc. A/RES/66/231, of 24 December 2011. Paragraph 167.

<sup>24</sup> *'Toward an arms trade treaty: establishing common international standards for the import, export and transfer of conventional arms – Report of the Secretary-General.'* UN doc. A/62/278, of 17 August 2007. Part I, Paragraph 3.

<sup>25</sup> *'Report of the Group of Governmental Experts to examine the feasibility, scope and draft parameters for a comprehensive, legally binding instrument establishing common international standards for the import, export and transfer of conventional arms.'* UN doc. A/63/334, of 26 August 2008. Paragraph 15-19.

<sup>26</sup> *Ibid.* Paragraph 15.

agreement around the treaty's clearly defined scope and parameters, objectives, practical applicability, resistance to political abuse, and potential for universality.

In the context of the ABNJ process, the term feasibility could therefore be interpreted as referring to:

- **General need for a new instrument**

Given the fact that cumulative pressures on biodiversity in ABNJ increase, and potential additional threats from future forms of utilization arise, the question has to be posed whether the traditional regional and sectoral governance approach still adequately serves the present needs of marine biodiversity conservation. *Paper X* briefly summarizes the existing regulatory, institutional and general governance gaps related to the conservation and sustainable use of biodiversity in ABNJ.

- **Technical feasibility**

Multilateral legally binding instruments have been established in different policy areas where international cooperation is necessary to achieve collectively agreed objectives. Two Implementing Agreements have also been successfully negotiated and adopted under UNCLOS. A potential international instrument for biodiversity in ABNJ could therefore take advantage of the lessons learned from implementing these agreements, but also of modern technologies which have opened a window on the sea, enabling improved observation and monitoring of remote activities, species and oceanographic conditions.

- **Political feasibility**

States may wish to discuss the prospects for negotiation of an international instrument for biodiversity in ABNJ, possible timeframes for a diplomatic conference and modalities for entry into force (such as provisional application).

## **List of Papers**

Paper I: Introduction on Scope, Parameters and Feasibility

Paper II: Enhancing Cooperation and Coordination

Paper III: Options and Approaches for Access and Benefit-sharing

Paper IV: Governance Principles

Paper V: Understanding Area-based Management Tools and Marine Protected Areas

Paper VI: Options and Approaches for Establishing and Managing MPAs

Paper VII: Relation between Environmental Impact Assessments, Strategic Environmental Assessments and Marine Spatial Planning

Paper VIII: Options for Environmental Impact Assessment Elements

Paper IX: Technology Transfer and Capacity-building

Paper X: Existing Regulatory, Institutional and General Governance Gaps

Paper XI: Basic Ideas for a Possible Institutional Structure

Paper XII: International Procedures to Ensure Science-based Decision-making

Paper XIII: Compliance and Verification Mechanisms