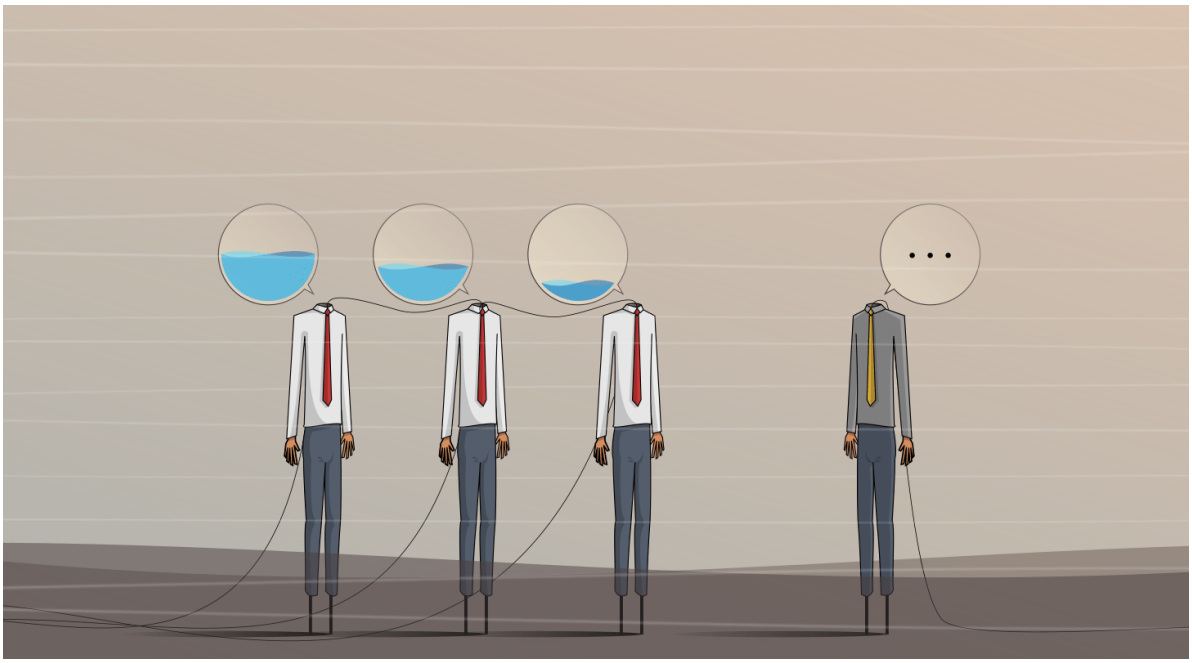
THE 2030 AGENDA AS A BLUEPRINT

Marine Exploitable Areas: shifting the burden of proof for marine protection

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This article is an updated abstract from an essay published in March 2021 during the Monaco Ocean Week. The authors are veteran ocean advocates and campaigners with more than 40 years of experience each. They form the Varda Group for environment and sustainability.

Will 2021 be a *super year* for the ocean? Those working to protect marine biodiversity hope so, after the global pandemic led to the cancellation or postponement of a line-up of potentially catalytic events in 2020. However, with the pandemic forecasted to stretch far into 2021, and possibly even 2022 if vaccines prove less effective against emerging variants or continue to be only a privilege for the richest countries, those hopes may rapidly fade. To be sure, much can be accomplished even in the absence of face-to-face international gatherings, bolstered by exciting political developments such as the election of Ngozi Okonjo-Iweala (who has made ending harmful fisheries subsidies a top priority) as the new Director-General of the WTO, or the return of John Kerry – a seasoned passionate ocean champion – as a member of the US President's team.

But forced confinement presented us with an opportunity to sit back and reflect on past campaigns we have run and present efforts we support, and to consider *out-of-the-box* ideas for the future of ocean protection, which the Prince Albert II of Monaco Foundation kindly published as an independent contribution during the virtual Monaco Ocean Week of March 2021 in the form an essay which we called Blue Food for Thought [1]. These ideas stemmed from our own decades of experience working on ocean policy, and campaigning for fundamental changes in how the ocean is used.

One of these ideas is an alternative approach to Marine Protected Areas, making marine life and habitat protection the rule rather than the exception, at least in the high seas.

Ocean of hope

Ocean advocates hope that the Conference of the Parties to the Convention on Biological Diversity (CBD COP15), in Kunming, China, and the 26th Conference of the Parties to the UN Framework Convention on Climate Change (UNFCCC COP26), in Glasgow, Scotland will take place in October and November 2021 respectively. Both international gatherings expected to be decisive for unlocking key conservation objectives for the next decade were postponed in 2020 [2].

Other key meetings that were also on the 2020 agenda, however, have already been postponed into 2022. The fourth (and hopefully final) session of the Intergovernmental Conference on an international legally binding instrument on the conservation and sustainable use of marine biological diversity in areas beyond national jurisdiction (BBNJ) is being rescheduled for the second time. A High-Level UN Ocean Conference in Lisbon, Portugal, to review progress on the implementation of the Sustainable Development Goal for the Ocean (ODS14), will not take place before 2022. Moreover, a decision on the launch of global convention on plastic litter expected at the 5th UN Environment Assembly in Nairobi, Kenya will also have to wait at least until next year.

In order to maintain momentum in 2020, some multilateral meetings took place online, but limitations inherent to “virtual meetings” prevented reaching agreements sought by ocean advocates. For example in October 2020, at the virtual meeting of the Convention for the Conservation of Antarctic Living Resources (CCAMLR), the Russian Federation and China said more in-depth consultations were needed before they would consider lifting their opposition to the designation of three marine protected areas in the Southern Seas around the Antarctic continent, a goal that requires a consensus agreement and which all other CCAMLR Parties have been striving towards for years.

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Likewise, the World Trade Organization (WTO) has failed to stay on course to comply with its SDG14 mandate to eliminate by 2020 fisheries subsidies that contribute to overfishing, overcapacity and "IUU" (illegal, unreported and unregulated) fishing. WTO Director-General Dr. Ngozi Okonjo-Iweala has convened a "virtual" ministerial meeting on 15 July 2021 with the aim of concluding these fisheries subsidies negotiations, but the WTO seems to be lowering expectations in the final days of preparation. The pandemic has taught everyone to meet and talk online, but multilateral negotiations require informal "corridor consultations" that rely on physical presence to build trust and reach deals. We shall certainly travel less for meetings and conferences after the pandemic has passed, but physical meetings will not completely disappear, even if hybrid formats will remain.

Progress nonetheless?

2020 ended with the launch of the report of the High Level Panel for a Sustainable Ocean Economy made up of the Heads of State and Government of 14 countries pledging to put sustainability at the heart of ocean management, production and protection. The sustainable blue economy is seen as an essential component of the green economy. In the words of the EU Commissioner for Environment and Ocean, Virginijus Sinkevičius: "green without blue is yellow".

In addition to kick-start 2021, on 11 January the Government of France hosted in collaboration with the UN, the World Bank and other countries the third edition of its One Planet Summits, which was focussed this time on biodiversity, including the ocean. A High Ambition Coalition (HAC) for Nature and People was launched there, made up of more than 45 countries. The coalition is co-chaired by Costa Rica and France, and by the UK serving as Ocean Co-Chair for the marine aspects of the initiative. Its purpose is to champion a global deal to halt the growing loss of species and vital ecosystems on land and seas. HAC members are signing up to the so-called 30×30 goal, which consists in pursuing the protection of 30% of our planet – land and seas – by 2030.

Ocean of distress

Looking in the rear-view mirror, however, on the one hand we find it hard to get excited by this new pledge, because 30×30 is a new iteration of a failed 2010 CBD commitment known as Aichi Target 11 to protect within 10 years 17% of the land and 10% of ocean and coastal areas. Moreover, that 2010 commitment itself was also preceded by another pledge to "end biodiversity loss by 2010" made at the World Summit on Sustainable Development in Johannesburg in 2002 (Rio+10). It is thus tempting to disqualify it all as just so much "blah-blah" as the young Swedish activist Greta Thunberg did on the day of the One Planet Summit. Why should we believe governments this time, if we know they did not put their words into action when their stated ambition was even lower? The granting of 61 new licences for offshore oil and gas exploitation by the Government of Norway just a few weeks after its Prime Minister Erna Solberg had launched the report of the High Level Panel for a Sustainable Ocean Economy which she chaired also raised questions inevitably about the true level of ambition of its members.

On the other hand, however, looking further into the rear-view mirror, the first UN Conference on the Human Environment (Stockholm, 1972) which triggered the genesis of the modern environmental movement looms large. The contemporary environmental laws and multilateral regulations that stemmed from that conference created a safety net that bought us time by limiting or delaying environmental damage. The global environment is undeniably in a very deep crisis, but it is hard to overstate how much worse it could have been without that safety net. In other words, just because efforts do not accomplish everything we would wish, it cannot be said that those efforts have been wasted. Achievements can be strengthened over time. While this notion is not new to anyone working in the policy community, we would like to provide a historic example as it shapes so much of our thinking about campaigning for policy.

A few weeks after the 1972 UN Conference, the first global treaty for the prevention of marine pollution was adopted, known at the time as the London Dumping Convention, and a year later the so-called MARPOL Convention to prevent pollution from shipping was also enacted. After these treaties entered into force, dumping or discharging wastes from ships would soon no longer be regarded as acceptable. The 1972 Conference also marked the creation of the UN Environment Programme (UNEP) at the origin of a Regional Seas Programme, started in the mid'1970s, whereby coastal states and their scientists started to work together to protect their shared seas beyond borders. Some great achievements indeed, in the context of half a century ago.

The problem is that the holes in the post-1972 safety net were too wide to stop the flow. In addition the London Dumping Convention still allowed the dumping at sea of barrels of radioactive and other industrial wastes. It took years of sustained high-profile public campaigning combined with behind-the-scenes political advocacy before the Parties to the LDC adopted in 1993 a binding amendment banning the deliberate dumping of industrial waste at sea. Three years later, in 1996, the "London Protocol" was adopted to modernize the convention, and then replaced it – the convention is now simply called the London Convention, after the word "dumping" was dropped in recognition of the need to shift away from ocean dumping as we had proposed [3].

But despite a number of notable successes (the protection of Antarctica from mining in 1991, the ban on incineration of wastes at sea in 1990, or the ban on nuclear weapons testing in 1996 to name a few), the safety net became increasingly fragile over time, as environmental problems became more intractable, for reasons everyone is aware of and that won't be repeated here.

> The goal to protect the 30% of our planet by 2030 is a new iteration of a failed 2010 CBD commitment. Why should we believe governments this time, if they did not put their words into action when their stated ambition was even lower?

Next year will mark the 50th anniversary of the 1972 UN Conference which took place half a century ago in Greta Thunberg's home city of Stockholm. The anger and concern of young people for their future is more than justified and we owe it to them to plug the holes in the safety net and modernize environmental policy and law – adapting it to the dire times our planetary environment and the natural world are going to experience according to the findings of the Intergovernmental Panel on Climate Change (IPCC) and the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES). This is of course what the ocean community is striving to do.

Marine Exploitable Areas (reverse listing)

As ocean advocates continue to fight an uphill battle which is taking years to seek the designation of an increasing number of marine protected areas around the world, let alone their proper management, would it be worthwhile to explore another option that would consist in designating *marine exploitable areas* instead? A *reverse listing* approach whereby extraction would be the exception rather than the norm?

Accordingly, those seeking a licence to exploit ocean space and resources would have to demonstrate to competent authorities that their activities cause no harm to marine biodiversity and habitats, or put remedial measures in place. Instead of ocean advocates having to demonstrate that protection is feasible, industry advocates would be required to demonstrate that exploitation is environmentally safe, with a negligible or acceptable environmental footprint. This new approach would effectively shift the burden of proof to prospective fishing corporations, shipping companies or mining conglomerates, who would also need to show the absence of alternatives to their proposed extractive activities.

Aichi Target 11 and now the 30×30 campaign are reflecting a growing consensus on the need to build effective networks of MPAs. But implementation is always a very long journey. Even the designation of a marine protected area does not automatically mean species and habitats are protected. In December 2020, the specialized NGO Oceana estimated that 96% of European marine parks allow destructive activities within their boundaries. The expression "paper parks" has become commonplace in environmental policy literature.

According to the World Database on Protected Areas, which records information submitted by countries, more than 15,000 MPAs protect more than 27 million square kilometres of ocean. In other words, nearly 7.5% of the ocean, an area the size of North America, is under some kind of protection. But MPA designations can mean many different things. The International Union for the Conservation of Nature (IUCN) has traditionally recognized six different categories of MPAs ranging from strict nature reserves to protected areas with "sustainable use" of natural resources. Lubchenco *et al* (2018) have shown that fully or highly protected areas are the most effective tools to restore marine biodiversity, but currently they make up only just 2% of all Marine Protected Areas. The existence of insufficiently effective Marine Protected Areas can thus be due to a lack of capacity by a country to enforce its own intentions or laws, as it had been said for example of the Phoenix Islands Protected Areas (PIPA) in the Republic of Kiribati in the South Pacific, a country

with an Exclusive Economic Zone larger than the continental United States, before the establishment of a partnership and trust fund in 2015 to improve management and control. It can also be due to deliberate *laisser-faire* as in the case of certain marine parks failing to ban industrial fisheries or even seabed mining.

Ongoing negotiations on the conservation and sustainable use of marine biodiversity beyond national jurisdiction (BBNJ) could serve as an opportunity to explore whether (and if so how) such a reverse listing approach could apply to the high seas. Areas beyond national jurisdiction, also known as the high seas, represent 64% of the world ocean's surface that is equivalent to 45% of the Earth's surface and 95% of the ocean's volume. Ocean advocates have invested considerable energy and resources in the BBNJ negotiations over the last decade.

But even if the multilateral agreement they seek under the UN Convention on the Law of the Sea to improve high seas governance and conservation is adopted next year, it will take considerable additional efforts to reach consensus on the area-based management tools needed to implement it, such as high seas marine protected areas. Even after its adoption and its entry into force (which will also take some time), the Parties to the BBNJ agreement are unlikely to reach consensus overnight on where and how to designate and manage marine protected areas in the high seas.

If it could be agreed from the outset that it is the responsibility of the users of ocean space and resources to prove that their action would not cause undue harm to marine biodiversity, it would set a powerful, game-changing precedent. If we imagine the future BBNJ agreement as the chessboard on which the international community's efforts to improve the conservation and sustainability of high seas biodiversity will play out, ocean life would be in a much better position if the departing point were protection rather than exploitation. While RFMOs manage ongoing fishing operations, a reverse listing approach under the BBNJ agreement could also serve to identify which fishing operations are acceptable and which ones are not. For example, under the BBNJ agreement, reverse listing could become an effective tool to secure that the obligation to conduct Environmental Impact Assessments (EIAs) enshrined in the draft agreement, is fully implemented and EIAs' conclusions taken into account.

Alternatively, or in addition, reverse listing could also be envisaged in the framework of certain regional agreements. For example, at the One Planet Summit of January 2021, the Union for the Mediterranean announced that it would draw an Action Plan for Exemplary Mediterranean by 2030 that would revolve around four pillars, including raising ambition for the preservation of marine biodiversity, ending overfishing by 2030, redoubling efforts against marine pollution and the greening of the shipping sector. Applying the reverse listing approach in the Southern Ocean under the Convention for the Conservation of Antarctic Marine Living Resources (CCAMLR) could also be a solution to remove the obstacles to the designation of marine protected areas in that region. Rather than fighting to reach agreements on the designation of marine protected areas, ocean advocates would watch industry fighting to reach agreements on the designation of marine exploitable areas. In addition, all areas not designated as marine exploitable areas would by definition be

protected.

> Instead of ocean advocates having to demonstrate that protection is feasible, industry advocates seeking a licence to exploit ocean space and resources would have to demonstrate to authorities that their activities cause no harm to marine biodiversity and habitats

This approach may seem far-fetched, given the roadblocks to achieving more modest protections. But as the London Convention and other past examples show, having powerful aspirational goals (combined with high-profile public campaigning) can be key to generating the kind of public support and demand for action that protecting the ocean entails. All the more so when governments have already gone on the record committing to reverse the loss of biodiversity and so forth. There is no crisis without opportunity, and there may be a precedent in the International Agreement to Prevent Unregulated Fishing in the High Seas of the Central Arctic prompted by climate change and signed in 2018 by Canada, China, Denmark, the EU, Iceland, Japan, the Republic of Korea, Norway, the Russian Federation and the USA, which prevents commercial fisheries until science-based management and control are in place.

Policy recommendations

NGOs, Scientists, Governments and Intergovernmental organizations could:

- Push to shift the burden of proof through a reverse listing approach whereby prospective extractors and users would be required to apply for licences in Marine Exploitable Areas to use ocean space and resources. Seascape outside of these areas would by definition become Marine Protected Areas.
- Address this proposal within the context of the UN Decade of Ocean Science for Sustainable Development under the auspices of UNESCO’s Intergovernmental Oceanographic Commission (2021-2030), the BBNJ negotiations, and regional fora.
- Plan to discuss consideration of this precautionary approach at the High-Level UN Ocean Conference to be held in Lisbon in 2022, taking into consideration deliberations on the 30×30 MPA proposal by the Parties to the Convention on Biological Diversity at their 15th Conference of the Parties.

REFERENCES

1 — The International Institute on Sustainable Development (IISD) also published a summary in their SDG Knowledge Hub, under the title “Blue Food for Thought: Four New Ideas for Protecting the Ocean”. Available online.

2 — At the time of writing (end of June 2021) the CBD website continues to announce that the COP15 will take place in Kunming 11-24 October 2021, but this schedule is likely to be modified soon, while further details on plans for UNFCCC COP26 in Glasgow in November 2021 are likely to be fixed at a ministerial preparatory meeting convened by the UK COP26 Presidency at the end of July 2021.

3 — See Paragraphs 4.24 and 4.25 of the Report of the 15th Consultative Meeting of the Parties to the London Convention, 1992.



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