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# MARIPOLDATA Ocean Seminar

## "Dispute Prevention & International Community Interests in BBNJ"

10<sup>th</sup> November, 2021

**Guest Speaker:** Cymie Payne

**Cymie Payne** is Associate Professor at Rutgers University, New Jersey, where she researches global governance of the environment and the consequent evolution of international law. She participates in the BBNJ negotiation with the IUCN delegation. She has participated as counsel and expert in cases before the International Tribunal for the Law of the Sea and the International Court of Justice, and was legal officer with the environmental reparations program at the UNCC. She holds a MA from The Fletcher School of Law and Diplomacy and a JD from the University of California, Berkeley School of Law.

### Reading Material for the Session:

Payne, C. R. (2020). Negotiation and Dispute Prevention in Global Cooperative Institutions: International Community Interests, IUU Fishing, and the Biodiversity Beyond National Jurisdiction Negotiation, *International Community Law Review*, 22(3-4), 428-438. doi: <https://doi.org/10.1163/18719732-12341439>

The monthly **MARIPOLDATA Ocean Seminar Series** offer a virtual space to get information and engage in exchanges on ocean governance issues, through presentations by international experts from academia, governments, international organisations and civil society.

**To register:** Please contact [ina.tessnow-vonwyssocki@univie.ac.at](mailto:ina.tessnow-vonwyssocki@univie.ac.at), indicating your name and institution.  
**More information:** [MARIPOLDATA Ocean Seminar Series](#)

The MARIPOLDATA Ocean Seminar Series is part of the MARIPOLDATA project which has received funding from the European Research Council under the Horizon 2020 research and innovation programme (No 804599).



## MARIPOLDATA Ocean Seminar Series

# Dispute Prevention & International Community Interests in BBNJ

Wednesday, November 10, 05:00 – 06:30pm (CET)  
Venue: Online

Legal rules for the ocean where it lies beyond the jurisdiction of individual sovereign states have significant defects. This was due to the primitive state of scientific information about the ocean's physical properties and life forms, although the UN Law of the Sea Convention, agreed and codified in 1982, brought important advances to ocean governance.

Years of discussion at the United Nations led to a preparatory conference (2016-2017) followed by an intergovernmental negotiation of a new legally binding instrument mandated for the conservation and sustainable use of marine biological diversity (BBNJ) (2018 to the present). The new agreement should operationalize the Convention's article 192, states' obligations to the international community to protect and preserve the marine environment.

This seminar will explore how a modern agreement for the ocean could respond to the needs of Earth governance in the Anthropocene.



**Cymie Payne** is Associate Professor at Rutgers University, New Jersey. She researches global governance of the environment and the consequent evolution of international law, with a focus on climate change, ocean resources and protection of the environment in relation to armed conflict. She has special expertise in the international law of responsibility, liability and compensation for environmental damage, and nonmarket environmental damage valuation. She participates in the BBNJ negotiation with the IUCN delegation. She has participated as counsel and expert in cases before the International Tribunal for

the Law of the Sea and the International Court of Justice, and was legal officer with the environmental reparations program at the UNCC. She holds a MA from The Fletcher School of Law and Diplomacy and a JD from the University of California, Berkeley, and is a Fellow of the American College of Environmental Lawyers and a member of the International Law Association Committee on Sustainable Natural Resource Management For Development.

**To register:** via email to [ina.tessnow-vonwyssocki@univie.ac.at](mailto:ina.tessnow-vonwyssocki@univie.ac.at), indicating your name and institution. You will receive an email with further information and the link to participate in the virtual space

**More information:** <https://www.maripoldata.eu/newsevents/#oceanseminarseries>

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## The interests of the international community

The BBNJ instrument that is under current negotiations aims to conserve and sustainably use marine biodiversity of areas outside of national jurisdictions (ABNJ). For the successful and effective implementation of the BBNJ agreement, it needs to be enforced – if necessary with juridical means. Therefore, the BBNJ agreement – as many other international treaties – will possess some form of a dispute settlement mechanism through which two parties can settle their conflict in over an issue regulated by the agreement. In the case of the high seas, this means however, that someone is required to present the high seas, which do not belong to anyone, in such a dispute settlement mechanism and possibly in court. Because traditionally only affected state parties have a legal standing in front of international courts, but in ABNJ no state party may directly be affected, this legal problem needs to be resolved in the BBNJ agreement.

One way may be to designate the conservation of the high seas as an interest of the international community which may then be represented in court by all states (whether affected or not) or non-state actors. This possibility is discussed in Cymie Payne’s recent paper on “Negotiation and Dispute Prevention in Global Cooperative Institutions: International Community Interests, IUU Fishing, and the Biodiversity Beyond National Jurisdiction Negotiation”. There it was concluded that “international courts have found that individual states have standing to represent community interests” (Payne, 2020, p. 428). In cases when, “existential interests of humanity are at stake“, any state has legal standing to take a violation of the community rights to court (Payne, 2020). This was recently confirmed in the *Gambia vs. Myanmar* case by the International Court of Justice in which Gambia – although not directly affected – successfully espoused the interests of the Rohingya in front of the ICJ.<sup>1</sup>

## The place of the international community in the BBNJ agreement

Regarding the place of the international community in the BBNJ agreement, Cymie Payne was more skeptical towards the chance of having more progressive terms for third party dispute settlement in the BBNJ agreement. Although non-state actors are granted standing to represent the public interest in national courts (Payne, 2020), states appear very hesitant to grant non-state actors a similar role for the high seas. Payne explained that international law by at large is still a bipartite meeting. States are generally more comfortable facing each other 1:1 instead of having multilateral COPs. Therefore, dispute settlement is generally bilateral although it could be multilateral as well. In this regard, the case of the International Whaling Commission was mentioned where Australia made case against Japan and New Zealand intervened on behalf of the whole community of the world that cares for whales. It was also manifested that community interests are intergenerational.

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<sup>1</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Order for Provisional Measures, 23 January 2020.*



## Dispute settlement in the BBNJ negotiations

Generally, Payne described that states have become more reluctant with establishing 3rd party dispute settlement mechanisms in multilateral agreements. Whereas powerful states used to embrace dispute settlement they have recently rather pulled away from such mechanisms. According to Cymie Payne this is because powerful states simply do not have to use such mechanisms. They may only see the possibility to become targets of litigation themselves while if they want to enforce something they have other means. Hence, there is the real danger that if a dispute settlement is established under the BBNJ agreement which states do not respect it may erode the treaty as a whole.

The current discussions in the BBNJ negotiations indicate that a dispute settlement would follow agreement on substantive elements of treaty or that a mutatis-mutandis provision takes over the dispute settlement functions set out in Section 5 of UNCLOS. Payne however highlighted that current UNCLOS provisions cannot grasp the extent of the BBNJ agreement as it was negotiated under very different knowledge and terms. Another approach has been to use the dispute settlement mechanism of the UN fish stocks agreement but again, it was highlighted that the BBNJ agreement applies across species and regions and aims to take into account broad planetary systems – something that goes beyond what current Treaties offer.

## Q&A

In the Q&A session, participants discussed how to define and represent the community interests, especially taking into account information disbalances and uncertainties. In this light, the discussion also highlighted the central role of science – not only to inform the public about the current state of ecosystems – but also to inform a possible court. Proceedings in the Tribunal for the Law of the Sea already rely heavily on technical expertise by scientists. Judges can decide between law, policy and facts evaluated by scientists but cannot have the necessary scientific or technical expertise themselves.

The MARIPOLDATA Team is happy to further contribute to keeping the momentum by bringing together policy-makers, scientists, and civil society from around the world in the monthly Ocean Seminars to discuss relevant ocean issues and present timely research, inviting experts in the field.

We thank Cymie Payne for the presentation and discussion on Dispute Prevention & International Community Interests in BBNJ.

The MARIPOLDATA Team is looking forward to upcoming Sessions!

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