
ONE FOR ANOTHER: THE UNSETTLING ‘GREEN-ON-GREEN’ PARADOX

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Introduction

In the desperate rush to address climate change, governments across countries alike are taking actions such as reducing their fossil fuel emissions and instead expanding their renewable energy sources. This modus operandi works wonders for the mitigation of the climate crisis, but poses startlingly harsh human rights issues.¹ The climate crisis has become staggeringly recognized, causing the global calls for increased mitigation action to become heavy on the minds of individual countries. The energy transition agendas that consequently follow have truly devastating side-effects like social exclusion, restricted access to land and other resources and the increased marginalization of communities (particularly tribal ones).² The projects regarding renewable energy and biodiversity present a slightly unsettling overlap. The Green-on-green paradox is rampant where the development of climate-positive infrastructure results in the degradation of localized biodiversity and the systematic dispossession of the very communities who have, for ages, served as the earth’s most loving conservationists.

This paper aims to deconstruct the ‘Green-on-green’ paradox by analysing how global climate policies are operationalized through tools like dispossession. The methodology is primarily doctrinal and secondarily, critical legal analysis oriented. There will be use of a multi-scalar approach, road mapping numerous treaties alongside directives and legislation. The doctrinal foundation will be supplemented by a Socio-legal case study focusing on the energy battle in the Thar Desert. The paper, furthermore, takes on a political ecology lens when necessary, thus allowing for a comprehensive analysis of the topic at hand.

Climate Policy and Legal Framework

The UNFCCC (1994) is the international framework legislation directed at climate action. It

¹ OECD, Human Rights and Indigenous People in Just Energy Transition (OECD Publishing 2024)

² ‘Ryan Stock and Trevor Birkenholtz, ‘Spatial Justice and the Land Politics of Renewables: Dispossessioning Vulnerable Communities through Solar Energy Mega-Projects’ (2016) 76 *Geoforum* 90

manages its implementation essentially through its supreme decision-making body known far and wide as the Conference of Parties (COP) which meets annually.³ This conference is attended by representatives of member nations party to the Convention where they extensively deliberate and pass motions on the intricacies of the Climate Agreement. At the renowned fifteenth session of the COP held in Copenhagen, the goal of submitting GHG emission-reduction targets for 2020 was undertaken by the parties.⁴ Numerous representatives saw the reduction of dependence on fossil fuels and an increased focus on renewable energy sources as a step towards successful mitigation of climate change. The Paris Agreement is for all intents and purposes, not a globally policeable force seeing as it may not require legislative approval in some countries, be a part of domestic law or necessarily be applied by domestic courts. It therefore, requiring some means of creating incentivization for the countries' enforcement of their assurances, utilizes transparency as enforcement.⁵

Under the Enhanced Transparency Framework (Article 13), countries must publicly report their progress, thereby working as a multi-scalar accountability mechanism. This public commitment holds countries accountable not only to the global platform but to their domestic constituencies. Consequently, sub-state and non-state actors can leverage these public commitments to catalyse political will. By aligning domestic pressure with the pledges made internationally, these actors create a 'pincer effect' that compels states to escalate their mitigation ambitions, thereby operationalizing the iterative 'ratchet' necessity put forth in the Paris Agreement.⁶ The Ratchet policy is essentially the requirement of each state party to submit a nationally determined contribution every five years. Article 4(3) of the Paris Agreement requires that each party's successive NDC will reflect its 'highest possible ambition' (HPA); an important normative requirement crucial for raising mitigation ambition. As Voigt and Ferreira (2016) have put forth, the 'Highest Possible Ambition' standard remains a normative vacuum. The Agreement lacks a centralized metric for 'ambition' and this truly allows for states to stretch the definition thin according to their own national priorities and other surrounding elements.⁷ This flexibility allows governments to prioritize high-output

³ United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994)

⁴ UNFCCC, 'Decision 2/CP.15: Copenhagen Accord' in Report of the Conference of the Parties on its fifteenth session (18 December 2009) UN Doc FCCC/CP/2009/11/Add.1

⁵ UNFCCC, 'Preparing for the Enhanced Transparency Framework' (UNFCCC 2024) <https://unfccc.int/process-and-meetings/transparency-and-reporting/preparing-for-the-ETF>

⁶ Thomas Hale, 'The Role of Sub-state and Non-state Actors in International Climate Processes' (Chatham House 2018)

⁷ Christina Voigt and others, 'The Legal Power of Highest Possible Ambition: Setting Legal and Scientific

carbon mitigation projects while categorizing the resulting displacement of communities (often indigenous tribes) as a vital and inevitable trade-off for fulfilling their international ‘ambition’ mandates.

The Biodiversity Shield

The Convention on Biological Diversity 1992, serves as the primary legal counter-weight. The Kunming-Montreal Global Biodiversity Framework of 2022 established the ambitious ‘30x30’ target (target 3) which put forth a commitment to protect thirty percent of the world’s terrestrial and marine ecosystems by 2030. This framework treats biodiversity not as an afterthought that trails behind human carbon goals but as a sovereign necessity. The Convention states that states are obligated to establish a system of equitably governed ‘protected areas’ where biological resources are managed in-situ.⁸ This effectively creates a shield, where industrial activity is not generally allowed to ensure and maintain ecological integrity.

The EU’s Natura 2000 network, governed by the Habitats Directive and the Birds Directive⁹ present the most active application of the international goals preached above. The Habitats Directive houses Article 6(3) that codifies the precautionary principle.¹⁰ It needs proof, beyond reasonable doubt, that any project (regardless of whether it is a green project) will not have an adverse effect on the integrity of the site. This is particularly pivotal because it is a monumental hurdle that developers have to get past. They have to prove a negative, with enough certainty to bypass reasonable doubt.

The Current Plaguing Tensions

However, while the CBD and Natura 2000 have established a biodiversity shield, the modern energy transition has weaponized a particular legal exception: Article 6(4) of the Habitats Directive. This provision allows for a derogation from strict protection if a project has received

Indicators to Assess Highest Possible Ambition under Article 4(3) of the Paris Agreement’ (2023) 23 International Environmental Agreements: Politics, Law and Economics 315

⁸ CBD, ‘Decision 15/4: Kunming-Montreal Global Biodiversity Framework’ (19 December 2022) UN Doc CBD/COP/DEC/15/4 (Target 3)

⁹ Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds [2010] OJ L 20/7

¹⁰ Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora *OJ L 206*, 22.7.1992

the title of an ‘Imperative Reason of Overriding Public Interest’ (IROPI).

Historically, IROPI was a massively restrictive legal tool that needed a complete lack of alternative solutions and the implementation of compensatory measures to ensure that there was fundamental coherence of the ecosystem. Schoukens’ (2018) analysis of Article 6 revealed that the current operation of IROPI exposes a structural conflict between mitigation strategies and biodiversity. Habitat restoration measures designed to offset ecological damage cannot be treated as mitigation, they belong exclusively within the derogation regime of IROPI. This preserves the preventive logic enshrined in 6(3) and prevents developers from neutralising harm through promises of future restoration. Schoukens’ defence of this strict structure simultaneously places emphasis on a deeper tension. Those numerous projects that fail the test of integrity are not environmentally regressive developments inherently, but infrastructure linked to climate mitigation or sustainable economic transition. Since Article 6(4) does not differentiate between fossil-fuel projects and infrastructure based on renewable energy, they must meet the same criterion under 6(4). This ultimately means that biodiversity protection at the site level can legally obstruct broader objectives that are pursued constantly by the EU, like decarbonisation. Schoukens, thus, does not argue that the integrity test must be weakened but instead that the structure of article 6 intensifies green-on-green conflicts by forcing environmentally beneficial projects into a fundamentally strict derogation framework.¹¹ The subsequent result is therefore structural tension within EU governance.

The essential reason why the offset of this article affects countries across the world is because of the ‘Brussels Effect’. This term, coined by Professor Anu Bradford, explains how the EU rules often turn into global standards. The functional idea is simply that the companies that want to sell to the EU’s 450 million customers must follow its strict rules. Over time, these EU rules shape not just company practices but also the laws of other countries.¹²

Green Colonialism and the Orans - The sacred groves at the Thar desert

The Orans are community forest lands (representing a 450-year-old tradition) in the Thar desert in Rajasthan, India. They are rich in biodiversity, home to endangered species and a water source in the desert. Unfortunately, the lands hosting these resources are currently allotted to

¹¹ Hendrik Schoukens, ‘Proactive Habitat Restoration and the Avoidance of Adverse Effects on Protected Areas: Development Project Review in Europe after Orleans’ (2017) 14 *Journal for European Environmental & Planning Law* 73

¹² Anu Bradford, *The Brussels Effect: How the European Union Rules the World* (OUP 2020)

Private Renewable Power Corporations without effective impact assessments, social inclusion or stakeholder consultations.¹³ The Orans have a wealth of culture and importance to the traditional communities that reside there but since the land has a favourable geographical location for solar and wind power, it has duly been allotted to the PRPCs.¹⁴ Reports show that these corporations are restricting the indigenous tribal communities from accessing the Orans and additionally, cutting down trees and vegetation to make room for solar panels, laying down power lines and building ancillary infrastructure over the Orans.¹⁵

The truly most significant legal collision in regards to this is the case of *M.K. Ranjitsinh v. Union of India* (2021-24).¹⁶ This litigation places pivotal focus on the survival of the Great Indian Bustard (GIB), a critically endangered species whose remaining population resides almost exclusively in the Thar desert. The primary cause of GIB death was collision with high-voltage overhead transmission lines, the infrastructure used to export electricity from massive solar/wind farms to the urban centres of India. In 2021, the Supreme Court of India issued a landmark protective order, placing focus on biodiversity over industrial expansion by mandating that all low voltage power lines in GIB habitats be laid underground. This was a significant win in this biodiversity battle. However, in 2024, the legal tide shifted towards Climate Exceptionalism and the Supreme Court modified its mandate. Its verdict was framed from the perspective of an urgent need to meet the country's NDCs. They established a committee to balance the survival of the GIB against national energy security, essentially invoking a domestic version of the IROPI logic nestled in European Law.¹⁷

The administrative weapon truly was the smoking gun in this issue, that being the Wasteland Atlas of India. The 'Wasteland' classification is a direct inheritance of the British land-revenue logic which categorized any territory that did not produce taxable agricultural surplus as essentially 'waste'. In this day and age, the state has digitized and expanded the logic, using the atlas to 'unmap' communal lands. By defining parts of this beautiful desert as 'waste', it

¹³ Pradeep Chaudhry, Naveen K Bohra and Karna Ram Choudhary, 'Conserving Biodiversity of Community Forests and Rangelands of a Hot Arid Region of India' (2011) 28 Land Use Policy 506

¹⁴ Radhika Pardikar, 'Orans of Rajasthan Are in Danger of Being Taken Over by Green Energy Projects' *Frontline* (4 January 2023) <https://frontline.thehindu.com/environment/orans-of-rajasthan-in-danger-of-being-taken-over-by-green-energy-projects/article66329333.ece>

¹⁵ Athar Parvaiz, 'Feature-Rare Birds, Forest Protectors Clash with India's Clean Energy Vision' *Thomson Reuters Foundation* (13 February 2022) <https://www.reuters.com/article/india-solar-just-transition-idAFL8N2TL3I6>

¹⁶ *M.K. Ranjit Singh & Ors v Union of India* AIR SC (2021).

¹⁷ SC forms expert panel to balance Bustard conservation with sustainable energy goals' *The Hindu* (New Delhi, 22 March 2024) <https://www.thehindu.com/news/national/sc-forms-expert-panel-to-balance-bustard-conservation-with-sustainable-energy-goals/article67977617.ece>

overrides the need to go through the Forest Rights Act (2006) and the requirement for Free, Prior, and Informed Consent (FPIC) from the forty villages that depend desperately on these commons. In this maddening legal vacuum, the 450 year old groves are treated as a canvas for solar panels, completely ignoring the vital and intricate livelihoods and systems that have kept the region and its people rejuvenated for ages.¹⁸

Essentially, this case study goes to show that there is a devastatingly sad fallacy of the green on green trade off. The issue is not to be a biodiversity v. mitigation scenario. The real 'high ambition' that is enshrined in the documents is moving past the wasteland logic and taking into account indigenous sovereignty as a primary necessity. This is essentially just the continuation of the past, colonialism, with an empowered mask.

Indigenous Sovereignty and its Importance

In international law, there is only one objective criterion which has repeatedly been mentioned to be essential in order for a group to be regarded as indigenous: the special and spiritual connection ancestral lands. During the 20th century, there was a debilitating concept that the lands inhabited by indigenous people were *terrae nullius* (that is, no man's land) which was approved by the Permanent Court of International Justice in 1933 in its decision regarding Eastern Greenland. Later, only in the 1970s did the attitudes begin to shift again and the concept of *terrae nullius* was rejected firmly by the International Court of Justice. They believed that since tribes were socially and politically organized, they thus held sovereignty over their lands. The *terra nullius* doctrine was also rejected repeatedly by other national courts. It was after so much struggle that the indigenous people finally had the right to claim their very own land.¹⁹

The IPBES (2019) Global Assessment provides the empirical baseline that establishes that indigenous lands harbour eighty percent of the world's remaining biodiversity. The operational facet of indigenous sovereignty is the principle of Free, Prior and Informed consent, enshrined deeply in the Article 32 of UNDRIP.²⁰ There has to be a negotiated, bilateral and communicated agreement to take anything that has to do with the indigenous people further.

¹⁸ Ryan Stock and Trevor Birkenholtz, 'Left in the Dark: Colonial Racial Capitalism and Solar Energy Transitions in India' (2024) 51 *Journal of Peasant Studies* 745

¹⁹ Katja Göcke, *Indigenous Peoples in International Law* (Göttingen University Press 2017)

²⁰ UNGA, 'United Nations Declaration on the Rights of Indigenous Peoples' (2 October 2007) UN Doc A/RES/61/295 (UNDRIP)

Concluding remarks

The global energy transition is currently caught in a web of legal and ethical dilemmas. As this paper has demonstrated, the ‘Green on Green’ conflict is not a neutral collision between two environmental goods, but a structural tension within the international legal order. While the Paris Agreements’ ‘Highest Possible Ambition’ (HPA) and the Brussels Effect drive a rapid, market-led expansion of renewable infrastructure, they simultaneously facilitate a ‘climate state of exception’. In this state, the global necessity of carbon mitigation is simply weaponized to override the local biodiversity and ancestral land rights of indigenous communities. The transition, as a result, is at the risk of becoming a ‘green’ iteration of the very colonial and extractive logics it ostensibly seeks to replace.

The centre of this failure can be attributed to the administrative erasure of the communal landscapes. By utilizing the legal tools of the past age when unfairness was ripe (like the wasteland classification), there is the threat of losing out on territory that has been sustainably managed for centuries. This transforms densely cultural landscapes into blank slates to perform activities on, usually industrial too. This additionally allows for bypassing the requirements for Free, Prior and Informed Consent, practically disallowing epistemic equality to prevail. Climate Exceptionalism is also present in the judiciary like seen in the case of the Great Indian Bustard.

However, as argued through the lens of epistemic sovereignty, the Green on Green dilemma is a false choice.²¹ The assumption that we must sacrifice one to save the other is simply a byproduct of colonial capitalism. By reducing the environment to nothing but useable land, the state commits epistemicide which is essentially the systematic destruction of indigenous knowledge systems that offer more resilient models of climate adaptation than industrial-scale solar or wind parks. A rights-based energy transition is vital where sovereignty must be recognized as a vital part of the larger scheme. Only by reconciling the Paris Ratchet with the Sovereignty shield can we successfully achieve sustainability.

²¹ Dina Lupin Townsend and Leo Townsend, ‘Epistemic Injustice and Indigenous Peoples in the Inter-American Human Rights System’ (2020) 26 Australian Journal of Human Rights 147