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Investor-State Dispute Resolution in a Fast-Paced World

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Abstract

Although States have the right to territorial sovereignty, the world is increasingly becoming 'borderless'. As States continue to trade with each other and investors carry on investing in foreign jurisdictions, the world has become a global village. It follows that with these increased interactions and investment opportunities, disputes become inevitable. Often these disputes are either between States or States and Investors. As a result, a need is created for a robust, effective, and efficient mechanisms not only for the resolution of these disputes but also their prevention. It would appear as if this was the premise for making Investor-State Dispute Settlement (ISDS) a common feature of International Investment Agreements (IIAs). The existing and previous body of treaties, multilateral and bilateral investment agreements, and arbitral decisions provide extensive literature that is important in the examination and conceptualization of ISDS. Currently, developing states lead in being parties to ISD procedures particularly as respondents. It is noteworthy that this system is not fool proof. The object of this essay is to conceptualize and problematize investor-state disputes resolution in a fast-paced world.

1.0 Introduction

Foreign Investments have continued to increase exponentially throughout the past years. This increase stems from the continued attraction of foreign investors by various States. Generally, States with the highest number foreign investors are characterised by better investment protection mechanisms. There are various standards of investment protection. These

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standards include; the national treatment and most-favoured nation principle.[1] The national treatment dictates that the relevant state must accord the same treatment it would extend to its nationals to foreign investors[2], while the most favoured nation principle entails extending the same treatment given to investors of a contracting State to investors of non-party states.[3] Further, there are complimentary standards to the protection of investors which include prompt and adequate compensation for losses, fair and equal treatment, and protection against expropriation.[4] An investment is every asset that an investor owns or controls, either directly or indirectly, with the characteristic of an investment including the commitment of capital or other resources with the goal of making a profit or gain or assumption of risks.[5] On the other hand, an investor is defined by the German BIT as any natural person, juridical person within federal law meaning, or a commercial, company or association with or without legal capacity founded pursuant to federal law.[6] For the purposes of this exposition, this essay shall adopt the foregoing definitions of investments and investors within the US and German Models respectively.

Since the mid-1900s there have been several Bilateral Investment Treaties (BITs) and IIAs that have been entered into between states and between states and investors. The object of these agreements is to address a litany of issues that arise between the host countries and investors when trading in goods or services. As such, these BITs confer substantive obligation between the parties including the resolution of disputes through arbitration. Conventionally, disputes were brought by the States against other states, however most treaties allow investors to bring direct international

[1] Herdegen Matthias, *Principles of International Economic Law* (Second Edition, Oxford University Press 2016).
[2] US Model Bilateral Investment Treaty USTR 2012Article 1(3).
[3] *Ibid n1,* p393.
[4] Marvin Rowe, 'Fundamental Principles of Foreign Investment Protection' [2012] Fundamental Principles of Foreign Investment Protection Marvin Rowe *https://www.academia.edu/5088589/Fundamental_Principles_of_Foreign_Investment_Protection,* accessed 27 May 2022.
[5] US Model Bilateral Investment Treaty USTR 2012, Article 1.
[6] German Model Bilateral Investment Treaty 2008, Article 1.

investment claims against the host state.[7] Historically, developing states have continued to be the respondent in claims submitted for arbitration.[8] This is because developing countries enter contracts with foreign companies to foster development and to raise revenue through taxes as a result of structural adjustment programmes seeing as most developing countries[9] are riddled with debt. [10]

Against this background, developing states have continued to evaluate Investor-State Dispute Resolution provisions with the attempt to align them with the prevailing state policies and to increase their exercise control over the arbitration process. In contrast to this, some states have opted to remove themselves from ISDS.[11]

This essay is divided into two parts, with the first part seeking to conceptualise the nature of Investor-State Dispute settlement including the use of international arbitration as a mechanism for resolving these disputes. Further, this part shall outline the advantages and disadvantages for using international arbitration to resolve these disputes. The second part of this exposition shall evaluate the evolution of investor state dispute resolution including the process for the settlement of disputes under the International Centre for Settlement of Investment Disputes (ICSID) framework. Lastly, this essay shall proffer remedies to the shortcomings characterising Investor-State Disputes.

[7] 'Investor-State Dispute Settlement', UNCTAD Series on Issues in International Investment Agreements II (United Nations 2014) *<https://unctad.org/system/files/official-document/diaeia2013d2_en.pdf>* accessed 26 May 2022.
[8] *Ibid n7,* p19.
[9] Herdegen Matthias, Principles of International Economic Law (Second Edition, Oxford University Press 2016).
[10] York W Bradshaw and Jie Huang, 'Intensifying Global Dependency: Foreign Debt, Structural Adjustment, and Third World Underdevelopment' (1991) 32 The Sociological Quarterly 321.
[11] *Ibid n7.*

2.0 Conceptualising the Nature of Investor-State Disputes Settlement

Investor-State disputes under International Investment Agreements (IIAs) are unique from conventional international disputes. Owing to this uniqueness it follows that these disputes must be resolved by employing befitting mechanisms. Firstly, these disputes have as the defendant, a sovereign state. This is different from other forms of investment disputes which have business entities as the parties. Besides, the foreign investor will challenge the acts or measures taken by the state of one if its agents in their sovereign capacity hence the nature of the measures or acts being challenged remains idiosyncratic. Therefore, a dispute runs the risk of turning into a political issue both within the jurisdiction of the host state and international community. This is particularly so when the matter involves huge public funds. Currently, in Kenya here has been a lot of controversies surrounding the Mombasa port and the Standard Gauge Railway project contract which was signed between the Kenyan Government and Chinese contractors because of the heavy capital investment by the government.[12]

Moreover, the nature of remedy for the resolution of these disputes is specific and limited. This is contrary to the remedies available when solving an ordinary legal dispute. For investor-state disputes the available remedy is the international arbitration. It follows that, international arbitration has established itself as the main option for investors for dispute settlement in contemporary investment law. International arbitration is seen as a neutral way on resolving disputes between states and investors. It depoliticises disputes, it assures adjudicative independence, expeditious, flexible, and affordable. Besides, international arbitration guarantees the parties substantial control over the matter since they can choose their arbitrator and even the law which should govern the dispute resolution.[13]

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[12] Philip Munyanga, 'State Rejects Once Again Plea to Make SGR Contract Public' Business Daily (12 January 2022) <*https://www.businessdailyafrica.com/bd/news/state-rejects-once-again-plea-make-sgr-contract-public-3680312*> accessed 28 May 2022.

[13] 'Investor–State Disputes: Prevention and Alternatives to Arbitration' (United Nations 2010) <*https://unctad.org/system/files/official-document/diaeia200911_en.pdf*> accessed 26 May 2022.

Lastly, the relationship that exists between the parties is characterised by long-term engagement with mutual dependence. For example, the state may enter into a Bilateral Investment Treaty with a private foreign investor to provide public services or where the BIT involves an investment with high sunk costs where returns are only feasible after years. Therefore, the state and the investor will be obliged to maintain a functioning relationship despite the existence of a dispute. This relationship can only be preserved if the disputes are resolved amicably whilst preserving the relationship that exists. International arbitration offers an amicable way or resolving Investor-State Disputes without severing the relationship that exists between the parties.[14]

2.1 Evaluating the Efficacy of International Arbitration in Resolving ISD

Although international arbitration has found its place in international investment law as the preferred mechanism for resolving investor-state disputes, it has advantages and disadvantages. One of the advantages of international arbitration is that it allows the investor to have a neutral, independent and qualified arbitrator or tribunal to facilitate the resolution of the dispute. This has boosted investor confidence because previously the investor would seek redress form domestic courts which were accused of being biased and under the political influence of the host state.[15] Also, independence could be enhanced by picking an arbitration seat that is outside the host country. An arbitration seat means the law that the parties will use to determine the procedural framework for the arbitration.[16]

Secondly, arbitration allow the parties to exercise control over the dispute. Firstly, the parties have the authority to choose the arbitration tribunal or appoint arbitrators of their choice. Moreover, the parties can choose the seat

[14] *Ibid n13,* p12.
[15] 'Investor-State Dispute Settlement',, UNCTAD Series on Issues in International Investment Agreements II (United Nations 2014) <*https://unctad.org/system/files/official-document/diaeia2013d2_en.pdf*> accessed 26 May 2022.
[16] Prof Dr Klaus Peter Berger Cologne LL M, University of and Klaus Peter Berger, 'Principle XIII.3.3 - Seat of Arbitration' <*https://www.trans-lex.org/969040/_/seat-of-arbitration/*> accessed 28 May 2022.

of the arbitration and the venue for the arbitration.[17] This is different with litigation where the control of the case lies with the courts of law. Besides, through arbitration the matter is often settled expeditiously because it avoids the case backlogs that come with court litigation and the parties can determine how fast they want the matter to be resolved. By expediting the resolution of these cases, the parties can cut costs that result from the lengthy court process.

Lastly, international arbitration is considered more effective that other alternative forms of dispute resolution. This is primarily because arbitral awards are enforceable against the other party despite the public international law doctrine of inviolability of states. The ICISID and UNCITRAL arbitration rules and the New York have provided a mechanism that has guaranteed the enforcement of arbitration awards against the parties. [18] Besides, the anchoring of international arbitration in treaties, and recognition and enforcement of arbitral awards have given legitimacy to international arbitration as a mode of resolving disputes.

Despite these advantages, there are disadvantages that are associated with international arbitration. To begin with, the costs of for international arbitration have skyrocketed in the recent past. This is against the popular notion that arbitration is cost effective compared to litigation. These costs are not exclusively on the amount paid to the arbitrators but also the settlement amounts that the states must pay to honour the award. For instance, in *Plama Consortium v Bulgaria*,[19] the legal costs for the claimant amounted to $4.6 million while that of the respondent amounted to $13.2

[17] Sunday Fagebemi, 'The Doctrine Of Party Autonomy In International Commercial Arbitration: Myth Or Reality?' (2015) 6 <*file:///C:/Users/USER/Downloads/128033-Article%20Text-347306-1-10-20160113.pdf*> accessed 25 May 2022.
[18] 'INVESTOR-STATE DISPUTE SETTLEMENT',, UNCTAD Series on Issues in International Investment Agreements II (United Nations 2014) <*https://unctad.org/system/files/official-document/diaeia2013d2_en.pdf*> accessed 26 May 2022.
[19] ICSID Case No. ARB/03/24.

Million. It was worth noting that in the award, the claimant was directed to pay all the legal costs. [20]

There have been significant delays in the enforcement of arbitral awards. Generally, the parties delay the enforcement of arbitral awards under the guise of exhausting all the procedural mechanisms available for the setting aside of arbitral awards. It has been argued that exhausting these procedural possibilities for annulment may take up to four years.[21] For instance, the *Nyutu case*[22] was instituted in 2016 but was determined by the supreme court of Kenya in 2019. Therefore, the delay occasioned lasted for almost four years. It follows that the time used to litigate over commercial matters in courts is not different from the time taken in arbitration before the enforcement of the award.

Lastly, the goal of dispute resolution through arbitration has been to ensure compensation for damages arising from the violation of the treaty provisions and obligations. As this exposition has established before, the nature of BITs may sometimes require that the parties maintain a functioning relationship for the future. This is particularly so where the subject matter of the investment treaty is the provision of public services by a private foreign investor to the citizens of the host state. The danger with focusing on compensation is that it ignores the need for a room for the investor and host state to strike a deal including possible changes that will enhance disputes avoidance between the parties.[23]

3.0 The Evolution of Investor-State Dispute Resolution

Prior to the standardization of Investor-State Dispute resolution, investors had only two ways of enforcing obligations arising from Bilateral Investment Treaties. Firstly, the investor relied on the prevailing domestic judicial and administrative system. However, this was mired with challenges, a notable lack of judicial independence since the judiciary bowed to the political

[20] *Ibid n18.*
[21] *Ibid n18.*
[22] *Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party)* [2015] eKLR.
[23] *Ibid 18.*

influence of the host state and inviolability of the state under domestic laws.[24] Ergo, investors were unable to recover their losses against the host state. Secondly, in the event the domestic mechanisms were considered ineffective, the investor would rely on their home government to espouse the claim.[25] However, this is only as effective and efficient as the investor's home state is. For instance, if the home state is a 'powerful' State then the investor stood a better chance against the host state. On the contrary, for an investor coming from a less powerful country, which is the case for developing countries, obtaining espousal from the state proved difficult. It is essential to note that this system had challenges.[26] For example, by virtue of the home state taking up the claim, the investors control became diminished control over the claim, seeing as the claim would now belong to the state. Besides, for transnational corporations it may be difficult to establish the home state. These challenges stoked the fires calling for a neutral forum for the resolution of investor-state disputes. Consequently, the International Centre on Settlement of Investment Disputes (ICSID) was established pursuant to the ICSID convention.[27]

3.1 The International Centre for Settlement of Investment Disputes

The International Centre for Settlement of Investment Disputes (ICSID) is one of the five organizations under the World Bank Group. This institute was created by the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of other States. Today, the centre is known for being a leader in Investor-State Arbitration. This object of this centre was to create and promote a predictable legal regime for the resolution of disputes

[24] *Ibid n7,* p23.
[25] J Reuben Clark, 'Diplomatic Protection of Citizens Abroad: Or the Law of International Claims. By Edwin M. Borchard. New York. The Banks Law Publishing Company. 1915. Pp. Xxxvii, 988.' (1916) 10 American Journal of International Law 182.
[26] *Ibid n7.*
[27] Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1965

arising from foreign investments. Since its inception, the Convention has about 147 member states around the world.[28]

3.1.1 Appraising the ICSID Framework

ICSID was established to facilitate conflict avoidance, promote access to justice, and settle investment disputes. ICSID has the jurisdiction over the settlement of ISD where the contracting state and the host state or the host state and investor have consented in writing to arbitrate under the ICSID framework.[29] Consent is crucial as it gives ICSID exclusive jurisdiction of the arising matter. However, it is noteworthy that in some treaties, consent may be contingent on the exhaustion of local remedies.[30] Also, since states enjoy diplomatic immunity, this convention prohibits the invocation of diplomatic immunity when it comes to the enforcement of arbitral awards.[31] Moreover, this convention limits appeals that may rise from the arbitral awards under Article 53 which provides that;

> *"[t]he award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention."*

The above provision bolsters the recognition of arbitral awards by states party to the ICSID convention. Through recognition the parties will be honour the obligations set out of the award; that is, it promotes compliance to the award. Therefore, the party states must enforce the arbitral awards as if they were the final determination by their courts of law.[32]

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[28] Sergio Puig, 'Recasting ICSID's Legitimacy Debate Towards a Goal-Based Empirical Agenda' (2013) 36 Fordham International Law Journal <*https://core.ac.uk/download/pdf/144232035.pdf*> accessed 27 May 2022.

[29] ICSID Convention 1995, Article 25 para 1.

[30] Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1965, Article 26.

[31] Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1965, Article 27(1). ICSID

[32] Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1965, Article 51 Para 1.

The finality of arbitral award provides certainty to the process thus making it attractive for investors to enter into BITS because they are guaranteed resolution that is not only expedient but also final. It has been argued that allowing appeals to the highest level of the judicial system like the supreme risks arbitration being used as a springboard for litigation.[33] Also, appeals would increase the lag in the resolution of these disputes which is harmful to the reputation of the investors, their investments, and may lead to higher economic costs because of legal representation throughout the appeal process. However, the finality or arbitral awards has been criticised as a challenged to access to justice for the parties. African countries such as Kenya have been on the limelight for setting aside awards that have violated public policy.[34] It has been argued that public policy is an 'unruly horse' and that the function of deciding what is public policy is purely legislative and judicial function. Besides, defining the nature of public policy is problematic because of relativity; that is, Kenya's public policy are different to Tanzania's policy.

3.1.2 Efficacy of ICSID in Resolving ISD

Despite ICSID remaining to be the leading framework for the resolution of investment disputes, it has fallen on the axe of sharp criticisms by developing countries. The relationship between ICSID and developing countries remains strained. Consequently, developing countries such as India are not party to ICSID while countries such as Venezuela, Ecuador, and Bolivia have pulled out from the ICSID Convention. [35] India's refusal to join the ICSID Convention was informed by India's Council for Arbitration. This council believed that the convention favoured developed countries. Besides, there was no scope provided for reviewing the awards granted, seeing as Article 53 of this convention states that the arbitral award is final and not subject to

[33] Kariuki Muigua, 'Arbitration Law and the Right of Appeal in Kenya' (Social Science Research Network 2021) SSRN Scholarly Paper 3953985 <*https://papers.ssrn.com/abstract=3953985*> accessed 27 May 2022.
[34] *Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party)* [2019] eKLR.
[35] Abhisar Vidyarthi, 'Revisiting India's Position to Not Join the ICSID Convention' (Kluwer Arbitration Blog, 2 August 2020) <*http://arbitrationblog.kluwerarbitration.com/2020/08/02/revisiting-indias-position-to-not-join-the-icsid-convention/*> accessed 27 May 2022.

any appeals unless within the framework of the convention. India wanted to reserve the right to have awards set aside for violating public policy.

ICSID was founded with the best intentions. However, it has failed to meet its objectives. The ad hoc investor-state arbitration is seen as unfair because the members of this body lack independence.[36] Therefore, they serve the interest of Transnational Corporations and the economically powerful.[37] International law is shaped by political power. This power interacts with other forces to form the outcome of the system for resolution of disputes. Therefore, the ICSID system is arguably idealized. This system seeks to pierce the veil of diplomatic immunity by ensuring that states participate in the arbitration process and fulfil the obligation set under the awards. The so-called international legalization that this ICSID system tries to promote is blind to the force that is borne by the elite players in the international economic realm. Ergo, certain developing countries are reluctant in becoming members of this system because they believe it is skewed in favour of the politically and economically powerful.

ICSID plays an important role in ensuring a stable and increased flows in Foreign Direct Investment (FDI). An increase in FDI enhances the economic growth of developing countries because these investments are a source of revenue and employment. Many developing countries are burdened with a high unemployment gap. Therefore, ICSID:

> *"should be regarded as an effective instrument of international public policy which is meant in the final analysis to secure a stable and increasing flow of resources to developing countries under reasonable conditions. ... ICSID is not merely a dispute settlement mechanism, [it] aims at improving the international investment climate .... ICSID*

[36] Emilie M Hafner-Burton, David G Victor and Yonatan Lupu, 'Political Science Research on International Law: The State of the Field' (2012) 106 American Journal of International Law 47.
[37] *Ibid n24.*

> *should renew its efforts to secure a stable and increasing flow of resources to developing countries under reasonable conditions."*[38]

Perhaps this is the reason why developing states that are not party to this convention have a low-level attraction for foreign investors. This is owed to investor scepticism over using domestic laws to resolve investment disputes. Developing countries like India have developed domestic laws that govern foreign direct investment. Bilateral Investment Disputes in India are governed by the 2015 India Model BIT. However, India has been urged to join ICSID because it provides a more transparent, reliable, and predictable framework which automatically improves investor confidence in states that are members to this convention.[39]

4.0 Conclusion

Undoubtedly, the resolution of investor-state dispute resolution is critical. Consequently, the international community came up with the ICSID framework to form the foundation and regime for resolving these disputes. Although this framework has provided a predicable regime for the resolution of disputes thus boosting investor confidence among the members of this convention, it has its share of weakness and challenges that must be resolved. Besides, the use of arbitration has a mode of resolving these disputes has become double edged sword that has become costly, slow, and solely focused on compensation for violation of obligation as opposed to dispute avoidance. Also, with arbitration come confidentiality which has substantially lowered transparency. Admittedly, there is a need for reforms to make the international arbitration and the ICSID more effective to serve their purpose.

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[38] Sergio Puig, 'Recasting ICSID's Legitimacy Debate Towards a Goal-Based Empirical Agenda' (2013) 36 Fordham International Law Journal <*https://core.ac.uk/download/pdf/144232035.pdf*> accessed 27 May 2022.

[39] Abhisar Vidyarthi, 'Revisiting India's Position to Not Join the ICSID Convention' (Kluwer Arbitration Blog, 2 August 2020) <*http://arbitrationblog.kluwerarbitration.com/2020/08/02/revisiting-indias-position-to-not-join-the-icsid-convention/*> accessed 27 May 2022.

5.0 Reforms

Focus should be shifted towards dispute avoidance as opposed to dispute settlement. Dispute prevention policies are essential because they are geared towards highlight potential disputes and preventing them from happening. This will ensure that costs and time are not lost. Besides, it will preserve the relationship existing between the parties.

Improving transparency. The arbitration process is always confidential. This is because most of the arbitration agreements have non-disclosure clauses. This has been the case even where there is high public interest because the sums used are public funds. It is essential to note that transparency will improve the legitimacy of the arbitration process thus increasing investor confidence. Under the ICSID framework the proceeding are confidential unless the parties consent to the disclosure of the award.[40] It is therefore important that this rule be reviewed to make the disclosures automatic unless the party concerned sends or raises an objection the award should be made available to the public.

The introduction of an appeals facility is long overdue. From the above discussions, this essay has established that developing countries like India are not party to the ICSID convention because it does not provide for a mechanism for appealing the arbitral awards. However, the grounds of appeal should be limited to avoid the use of arbitration as a springboard to litigation which may result in delays in the enforcement of the arbitral awards under the guise of exhausting of appeal mechanism available to the parties. Because of relativity of public policies and subject matter of investment treaties, it is prudent to tailor the existing regime for the resolution of these disputes per the relevant International Investment Agreements. This will serve to best meet the desires and interests of the parties.

[40] 'Investor-State Dispute Settlement,' *UNCTAD Series on Issues in International Investment Agreements II* (United Nations 2014) <*https://unctad.org/system/files/official-document/diaeia2013d2_en.pdf*> accessed 26 May 2022.

Lastly, international investment agreements have often given rights to the investors against the host state. However, obligations are not extended to the investors. It has been argued that International Investment law does not exists in a vacuum and as a result IIA must appreciate human rights and environmental concerns which form part of the principles of international economic law.[41] Therefore, IIAs must in the future be sensitive to these emerging concerns and sustainable development goals.

[41] Herdegen Matthias, *Principles of International Economic Law* (Second Edition, Oxford University Press 2016).

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Status of Participation of Women in Mediation: A case Study of Development Project Conflict in Olkaria IV, Kenya

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Abstract

Peace remains indispensable for a thriving development. Yet, development continues to be problematized by the discontented community of its potential negative effects resulting in conflicts whose impacts are largely felt by women. Women are the central custodians of their families and equally play an important role in neutralizing conflicts in communities. While mediation continues to be advocated as an effective strategy for managing natural resources conflicts, the participation of women in its processes and their significance remains rather questionable, including among the pastoral communities.

This paper reviews the status of participation of women in mediation that was successfully used between 2015 and 2016 to resolve conflicts between Kenya Electricity Generating Company (KenGen) and the community. The paper demonstrates a need for further democratization of the mediation processes to cater for more participation of women to enhance the mediation results and offer more sustainable resolutions. Further research is needed to determine the extent to which women are involved at every mediation phase, with a database on the challenges and solutions to their participation to improve mediation's effectiveness as an alternative dispute resolution mechanism in resolving natural resources conflicts beyond Kenya.

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Key words: Natural resources and development conflicts, mediation processes, participation of women, pastoral communities, sustainable peace.

Introduction

While the world strives to tackle persistent and emerging challenges including climate change through investments in germane development such as exploration of renewable energy, these developments continue to be problematized by the community due to socio-economic and environmental impacts, resulting in conflicts whose largest brunt is borne by women.[1] Women constitute at least half of every community.[2] Women are the central custodians of their families, and they equally play an important role in neutralizing conflicts in community including among the pastoral communities.

Women and children are deemed as the greatest victims of conflicts largely because of the inequalities that exist between men and women in social, economic and political spheres. The Global Gender Gap Report 2020 ranked Kenya at 109 out of 153 countries with significant inequalities between males and females' health outcomes, representation in decision-making, labour force participation, and education attainment,[3] rendering women

[1] Kong'ani and others, 'Variety and Management of Developmental Conflicts: The Case of the Olkaria IV Geothermal Energy Project in Kenya' (2021) 21 Conflict, Security & Development 781; Guangdong Wu, Xianbo Zhao and Jian Zuo, 'Effects of Inter-Organizational Conflicts on Construction Project Added Value in China' (2017) 28 International Journal of Conflict Management 695.

[2] Ester Boserup, Su Fei Tan and Camilla Toulmin, *Woman's Role in Economic Development* (0 edn, Routledge 2013) *<https://www.taylorfrancis.com/books/9781134036981>* accessed 18 February 2022; Agbajobi Damilola, 'The Role of Women in Conflict Resolution and Peacebuilding', *eds. R. Bowd and A. B. Chikwanha, Understanding Africa's Contemporary Conflicts, African Human Security Initiative* (2010) *<https://gsdrc.org/document-library/the-role-of-women-in-conflict-resolution-and-peacebuilding/#:~:text=There%20are%20obvious%20reasons%20why%20women%20are%20important%20to%20the%20peacebuilding%20process.&text=Women%20are%20also%20advocates%20for,they%20have%20contributed%20as%20observers.>;* Jyoti Jaggernath, 'Women, Climate Change and Environmentally-Induced Conflicts in Africa' (2014) 28 Agenda 90.

[3] Klaus Schwab and others, *Global Gender Gap Report 2020 Insight Report* (World Economic Forum 2019).

more vulnerable to greater losses and suffering during conflicts.[4] Similarly, to men, women have needs, priorities, and voices which ought to be considered and met to prevent them from being used to promote hatred and violence, often at their expense. Thus, including women at conflict resolution tables will grant them an opportunity to be heard and their needs and priorities met leading to more inclusive and sustainable resolutions.

Women have played important role in conflict resolution in communities since antiquity. The elderly women for instance were revered and acknowledged for giving insights on conflict resolution behind closed doors. They also employed their wisdom and creativity to solve disputes in their community.[5] Women's central role as advocates for peace, peacekeepers and builders continues to be recognized worldwide.[6] Accord Insight for instance, acknowledges the essential role that women played in lobbying elders to intervene and end conflicts resulting in peace conferences in Somaliland.[7] This Insight also highlights women's key role in mobilizing funds e.g., through social groupings to convene women for peace initiatives.[8]

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[4] Kariuki Muigua, 'Mainstreaming the Role of Women in Peacemaking and Environmental Management in Kenya' *<http://kmco.co.ke/wp-content/uploads/2020/07/Mainstreaming-the-Role-of-Women-in-Peacemaking-and-Environmental-Management-in-Kenya-Kariuki-Muigua-July-2020.pdf>*.

[5] Ernest E Uwazie, *Conflict Resolution and Peace Education in Africa* (Lexington 2003).

[6] Damilola (n 2); Vicky Karimi, 'Securing Our Lives: Women at the Forefront of the Peace and Security Discourse in Kenya' *<https://africanleadershipcentre.org/attachments/article/557/VIcky_Karimi%20_APN_Working_Paper.pdf>;* Susan Mbula Kilonzo, 'Silent Peacemakers: Grass-Roots Transitional Justice and Peacebuilding by Women in Kenyas North Rift Conflicts' (2021) 9s2 Journal of the British Academy 53; Muigua (n 4); UNSC, 'United Nations Security Council (2020). Report of the Secretary-General on Women Peace and Security (S/2021/827), Para. 15. Data Come from the Council on Foreign Relations, Women's Participation in Peace Processes.' (United Nations Security Council 2020) S/2021/827 *<https://www.unwomen.org/en/what-we-do/peace-and-security/facts-and-figures#notes>*.

[7] Accord Insight (ed), *Women Building Peace* (Conciliation Resources 2013).

[8] Ibid.

Women in pastoralist communities are respected for persuading their men to negotiate with the antagonist parties on contentious issues. Such influence has been demonstrated through women's act of tying a belt around their waists suggesting a need for the conflicting parties to cease-fire, and promote a conducive environment for child bearing and nurturing.[9] Also, women often discourage their men from pursuing their enemies by expressing fear to lose their men, and encourage them through meals preparations after a successful raid.[10]

Women's participation in peace talks enables them to share their daily experiences on matters related to inter alia, security, human rights, health care and employment which are essential components in promoting the relevancy and durability of peace and security plans.[11] Concerted efforts have been made in the implementation of the United Nations Security Council Resolution (UNSCR) 1325 call for the increased involvement of women at all levels of decision-making on conflict resolution and peacebuilding. This has resulted in the development of Action Plans at the country levels, Kenya included, amplifying women's vital role in responding to peace, conflict and security related issues.

Further, the Constitution of Kenya 2010 espouses the rights of women. Article 27 of the provides for the women and men's right to equal treatment including entitlement to enjoy equal opportunities in the political, social and economic spheres.[12] Moreso, Kenya has obligations to innumerable

[9] Janpeter Schilling, Francis EO Opiyo and Jürgen Scheffran, 'Raiding Pastoral Livelihoods: Motives and Effects of Violent Conflict in North-Western Kenya' (2012) 2 Pastoralism: Research, Policy and Practice 25; Caleb Maikuma Wafula, 'Does Community Saving Foster Conflict Transformation?: The Debate and Evidence from Kenya's ASAL Counties of West Pokot and Turkana.' *<http://hdl.handle.net/10625/59483>*.

[10] Schilling, Opiyo and Scheffran (n 9).

[11] Muigua (n 4); Mullen Michael and others, *Women on the Frontlines of Peace and Security* (National Defense University Press 2015) *<https://ndupress.ndu.edu/Portals/68/Documents/Books/women-on-the-frontlines.pdf>*.

[12] Constitution of Kenya, 'The Constitution of Kenya, 2010' [2010] National Council for Law Reporting with the Authority of the Attorney General 194.

international, regional and sub-regional instruments and commitments including the Universal Declaration of Human Rights and the Convention on the Elimination of all forms of Discrimination Against Women, all of which guarantee gender equality.

However, while the inclusion of women in peacebuilding processes and initiatives has accelerated in policy discussions over the past decade, the number of women in decision-making processes and conflict resolution remains rather minimal.[13] Although it's worth noting that there is an improvement in women's representation in other public decision-making roles such as political positions, women's underrepresentation at the peace tables remains low.[14] It is on this premise that this paper reviews the status of participation of women in mediation that was used successfully to resolve conflicts that emerged between Kenya Electricity Generating Company (KenGen) and the project affected persons (PAPs), during the establishment of Olkaria IV geothermal energy project to answer the following question:

> To what extent were women involved in the Olkaria IV mediation processes held between 2015 and 2016 to resolve the conflicts between the KenGen and the PAPs?

The Feminist Conflict Resolution Theory

This review is based on the feminist conflict resolution theory[15] which focuses on women's non-violent struggles for peace worldwide, and the theoretical frameworks considered to make sense of the relationship between women and peace, men and conflict, and sexism and militarism.[16] The theory

[13] Damilola (n 2); Karimi (n 6); Kilonzo (n 6); Louise Khabure, 'Committed to Peace or Creating Further Conflict? The Case of Kenya's Local Peacebuilding Committees' (December 2014) *<https://www.peaceinsight.org/en/articles/committed-peace-creating-conflict-case-kenyas-local-peacebuilding-committees/?location=kenya&theme=>;* Deockary JF Massawe, 'Roles of Women and Young People in Initiating Culture of Peace-Building in Kenya' (2021) 3 Journal of Sociology, Psychology & Religious Studies 117; Muigua (n 4).

[14] Karimi (n 6).

[15] M Bailey J, 'Mediation as a "Female" Process' (1989).

[16] Ibid.

seeks to establish elements of women input, observation and their understanding of reality which, could be critical ingredients at conflict resolution tables. This could be premised on the fact that women are the custodian of their families and also suffer the most from the consequences of conflicts including among the pastoral communities like in Olkaria IV area. Thus, the feminist conflict theory advocates for the incorporation of their experiences and ways of knowing as fundamental enablers to functional conflict management strategies and peacebuilding initiatives including mediation. Further, feminist scholars and activists suggest that there is need to approach a conflict from the weaker party's (like women) perspective to enable transform conflicts which involve unequal power relations. This includes in development activities among the pastoral communities where women are given equal status as children, [17] thus more likely to be marginalized during the mediation processes compared to their male counter parts[18]. Yet, their contribution in conflict resolution is deemed to generate more sustainable resolutions.

Study area

The research was conducted at the Resettlement Action Plan land (RAPland) in the development area of Olkaria IV which encompasses 155 households with 1209 PAPs. [19] RAPland is located in the Olkaria geothermal block in Naivasha-Sub-County, Nakuru County. The block was gazetted as a Geothermal Resource Area in 1971 [20] and is situated on KenGen's land covering about 80 square kilometers in the Hell's Gate

[17] Dorothy L Hodgson, 'Women as Children: Culture, Political Economy, and Gender Inequality among Kisongo Maasai' (1999) 3 Nomadic Peoples 115; WK Omoka., 'Briefing Paper No. 11: Climate Change, Lake Turkana and Inter-Communal Conflicts in the Ilemi Triangle Region.' *<https://shalomconflictcenter.org/briefing-paper-no-11/>*.

[18] Bailey (n 15).

[19] Gibb Africa, 'Updated Resettlement Action Plan for the Olkaria IV Power Station : Olkaria IV (Domes) Geothermal Project in Naivasha District' (Kenya Electricity Generating Company Ltd 2012) RP883v11 rev *<https://documents1.worldbank.org/curated/en/508361468046149605/pdf/RP8830v110P1030IA0IV0RAP0JULY002012.pdf>*; Kong'ani, Wahome and Thenya (n 1); Kong'ani, Wahome and Thenya (n 2).

[20] Sena Kanyinke, *Renewable Energy Projects and the Rights of Marginalised* (International Working Group for Indigenous Affairs report, 21 2015).

National Park (HGNP). The HGNP lies at 0°54′57″S, 36°18′48″E, to the south of Lake Naivasha, approximately 120 km north-west of Nairobi. Development of Olkaria IV energy plant compelled the relocation of four villages namely Cultural Centre, OlooNongot, OlooSinyat, and OlooMayana Ndogo from the Olkaria IV site to RAPland[21] located outside the park. The relocation aimed at protecting the community from the potential adverse impacts of the project, including disruption of their livelihood streams and noise pollution. However, PAPs raised complaints to project funders regarding KenGen's failure to translate some pledges like additional houses for those who had been left out resulting in conflicts between them. The PAPs complaint to the project financiers led to the recommendation of mediation of the conflicts.

Methodology

This study employed mixed approaches to collect qualitative data (the inception of mediation, its processes and the respondents' involvement) and quantitative data (respondents' demographics). Qualitative research enables a clear comprehension of the interviewee's opinions on subject under study and also enable researchers' access to information such as gender inclusion, [22] which could be a thorny issue in a patriarchal system. Quantitative research puts emphasis on quantification in data gathering.[23] Secondary data sources included desk review of literature on journal articles and published books on natural resources, development, conflict and conflict resolution, project implementation and mediation reports which provided the foundation for the argument. A reconnaissance was conducted in May 2019, where four research assistants (three males and one female) were recruited from RAPland and trained on various features of the

[21] Gibb Africa (n 19).

[22] Quan Nha Hong and others, 'Mixed Methods Appraisal Tool (MMAT), Version 2018' *<http://mixedmethodsappraisaltoolpublic.pbworks.com/w/file/fetch/127916259/MMAT_2018_criteria%C3%A2%E2%82%AC%20manual_2018%C3%A2%E2%82%AC%2008%C3%A2%E2%82%AC%2001_ENG.pdf>;* David Silverman, 'Qualitative Research', *A guide to the principles of qualitative research* (3rd edn, Sage Publications 2011).

[23] Julia Brannen (ed), *Mixing Methods: Qualitative and Quantitative Research* (Paperback ed, repr, Ashgate 2000).

questionnaire and interview procedures and etiquette. The semi-structured questionnaire was pilot tested and adjusted to improve its validity, proceeded by the collection of primary data in the four villages in RAPland including Cultural Centre, OlooNongot, OlooSinyat, and OlooMayana Ndogo.

Primary data was collected through a complete enumeration. Sampling of the entire population in a small populations promotes attainment of the required precision. [24] Thus, this study targeted the entire population relocated to RAPland comprising of 155 households. This aimed at recording insights from individual households on gender participation in Olkaria IV mediation. But, the study surveyed 117 households, 24 homes were not occupied by the time of the study since their occupants had temporarily moved out of RAPland in search of greener pastures. The occupants of 14 more households were also inaccessible, reportedly because of work-related engagements outside RAPland.

Data was collected through three focus group discussions (FGDs) of elders, women and youth each comprising of eight participants purposively selected from the four villages. The sampling was based on the participants' experiences and participation in the Olkaria IV mediation process. The female elders were separated from males to facilitate free participation and discussions, especially among women. The researcher also conducted in-depth interviews with eight key informants purposively sampled that generated further qualitative data. The informants included two participants (complainants), two from the Resettlement Action Plan Implementation Committee (RAPIC), two village elders, one mediator and an informer from KenGen. The interviews and discussions were conducted with the aid of a guide and checklist designed in advance. The researcher also engaged the research assistants through casual talks to complement the information gathered.

[24] Ajay S Singh and Masuku B Micah, 'Sampling Techniques & Determination of Sample Size in Applied Statistics Research: An Overview' (2014) 2 nternational Journal of economics, commerce and management 1.

The completed questionnaires were checked for adequacy and clarifications, and coded. The quantitative data were organized into Microsoft Excel, imported into the R program,[25] and rigorously analyzed using a combination of descriptive statistics (frequencies and percentages). Qualitative data gathered through semi-structured questionnaire, FGDs, and informant interviews notes were typed, and the interview recordings transcribed. The transcripts were imported into qualitative research software, NVivo[26] for coding and content analysis through deductive and inductive approaches.

Results and Discussions

Awareness of mediation

The respondents were asked if they had heard of mediation's use in conflicts before the 2015 mediation, and if yes, to share their sources of knowledge about mediation? More than half (59%) of the respondents claimed that they had not heard of mediation before the one in which they got involved. The rest (41%) who had heard identified community conflict resolution (36%), government (21%), media (19%), school (17%), and friends/neighbors (7%) as their sources of information. Among those who were not aware, majority (60%) were women. A female FGDs participant noted, '*I can't really tell what mediation is since I'm a charcoal burner, I'm neglected because I am a Samburu and I don't have a husband*.' Thus, the lack of knowledge of mediation among such women is not only attributable to work related engagements that prohibits them from access to important information and benefits that could improve their lives. This also reveals the thinkable

[25] Gentleman, Robert, *Computer Science and Data Analysis Series. R Programming for Bioinformatics.* (CRC Press, Tylor & Francis Group 2008) *<https://books.google.co.ke/books?hl=en&lr=&id=34Y6WjJy8zEC&oi=fnd&pg=PP1&dq=Gentleman,+Robert.+(2008).+Computer+Science+and+Data+Analysis+Series.+R+programming+for+bioinformatics.+CRC+Press.&ots=UjRe-r8fkO&sig=5bJrppECm9YPBtGBffTfx9ZHUUA&redir_esc=y#v=onepage&q=Gentleman%2C%20Robert.%20(2008).%20Computer%20Science%20and%20Data%20Analysis%20Series.%20R%20programming%20for%20bioinformatics.%20CRC%20Press.&f=false>*.

[26] Bazeley, Patricia and Kristi Jackson Eds., *Qualitative Data Analysis with NVivo.* (2nd edn, SAGE publications limited 2013).

cultural discrimination in the community on the basis of women, who besides being a widow, and hails from a different community and therefore, forbidden to participate in important decision-making processes, like at peace tables in this case, issues that are likely to render such women more susceptible during conflicts.

Mediation has been used to resolve conflicts in traditional set-ups since antiquity although the community does not call it as so. It is therefore safe to say that perhaps the lack of awareness could have been because of the low application and lack of community exposure to formal mediation processes. This could also be linked to the technicality of the term, "mediation," which could not be well comprehended by the majority (73%) of women who lacked any level of education. This findings aligns with Global Gender Gap Report 2020 which points out the inequalities between males and females in the country inter alia, education attainment, [27] which could be more pronounced among the pastoral communities and other marginalized groups, with women being disadvantaged. Yet, empowering women enables them to adequately participate and contribute not only in conflict resolution processes but also development.[28]

However, whereas the empowerment of women is essential, this might not readily translate into meaningful inclusion and participation of women due to cultural issues that confine them to domestic duties. These traditional practices also bar women from speaking in the same public space with elders and men. This includes mediation of conflicts beyond natural resources use and development within the communities.[29] Other studies among the Pokot community[30] suggests that women's low levels of literacy in the remote areas are exacerbated by the cultural and structural barriers results in their inability to access and benefit from technical information on conflict management among others, the likely case in Olkaria IV. Thus, the question would be,

[27] Schwab and others (n 3).
[28] Muigua (n 4).
[29] Angela Jill Lederach and others (eds), *Building Peace from within: An Examination of Community-Based Peacebuilding and Transitions in Africa* (AISA 2014); Muigua (n 4).
[30] Omoka. (n 17).

how do we penetrate such barriers to enhance women's participation in conflict resolution especially among the pastoral communities including in Olkaria?

The Pre-mediation phase

Ground setting

While the foundational meetings to mediation were held between European Investment Bank Complaints Mechanism (EIB-CM) designated mediator, KenGen and the PAPs in May 2015 to inform the scope of mediation and gather PAPs' views and expectations of mediation, only 15% of women inputted their views. Whereas, Article 27(8) of the Bill of Rights in the Constitution of Kenya 2010 provides for the State to take legislative and other measures to implement the principle requiring that not more than two thirds of the members of elective or appointive bodies shall be of the same gender," the 15% of women inclusion in Olkaria IV mediation inception meetings failed to meet this requirement. However, it would be safe to state that perhaps the promulgation of the Constitution of Kenya was still at its infancy stage in 2015, with little impact on gender inclusion.

Women are the main care takers of their families, and just like men, they have needs and priorities whose input in decision making processes including in conflict resolution would offer more sustainable outcomes, and deter them from being used to promote hatred and violence. Either, women's participation in peace talks enables them to share their daily experiences on security matters for instance as also advocated by the feminist conflict resolution theory.[31] Women's insights on based on their experiences are essential components in promoting the relevancy and durability of peace and security plans,[32] thus their inclusion at peace tables is paramount.

On the flipside, the study established that one female mediator aligned to the EIB-CM was involved in the mediation. The female mediator chaired the opening sessions of the mediation, where the mediator welcomed the

[31] Bailey (n 15).
[32] Michael and others (n 11); Muigua (n 4).

participants, took them through the itinerary of all mediation sessions, and officially opened the negotiations. The Olkaria IV mediation case advances the growing argument on the inclusion of female mediators in peace talks, positions that were previously dominated by male.[33] According to the report of the Secretary-General on women and peace, [34] only 13 per cent of negotiators were women, 6 per cent mediators and another 6 per cent of signatories in major peace processes worldwide between 1992 and 2019. This report also suggests that about seven out of every ten peace processes did not include any women mediators or signatories. However, women represented 23 per cent of conflict parties' delegations in UN supported peace processes in 2020, which would have been much lower without the UN's concerted efforts towards this end,[35] the likely case in Olkaria IV.

However, it is worth noting that although women representation at this "senior level," in the Olkaria IV mediation would have boosted the confidence of female participants in the mediation, facilitating the much-needed input, the process was largely conducted by the two male mediators. The female mediator only came in when there emerged thorny issues like the Cultural Center's occupation and the title deed concerns which could have possibly affected the final mediation agreement's results, perhaps to exert the financiers' positions. Generally, the acceptability of the female mediator in Olkaria IV mediation by the Maasai community is a stride towards penetrating the deeply rooted patriarch system among the pastoralist communities.

Selection of the representatives

PAPs and KenGen were the main parties to mediation. KenGen was represented by three participants. PAPs were represented by 17 participants where Resettlement Action Implementation Committee (RAPIC) nominated six members (two women, one youth, and three men) to represent resettled PAPs and the non-resettled PAPs nominated six participants (two women,

[33] Lederach and others (n 29).
[34] UNSC (n 6).
[35] UNSC, 'United Nations Security Council (2021). Report of the Secretary-General on Women Peace and Security (S/2021/827), Para. 19.' (United Nations Security Council 2021) S/2021/827 <*https://undocs.org/S/2021/827*>.

one youth, and three men) resulting in about a one-third representation of women. This result contradicts other mediation practices worldwide suffering from persisted conflicts and where most mediation teams do not include or encourage the voices and representation of women.[36]

The one-third representation of women in the Olkaria IV mediation team contributes towards narrowing the women inclusion gap which is also aligned to the Constitution of Kenya 2010. Article 27 of the Constitution espouses the rights of women as being equal in law to men, and are entitled to among others, the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.[37] However, some women suggested that their voices were suppressed, and views oppressed, thus, begging the questions on what is meaningful participation especially among the pastoral communities and other marginalized groups which are also mainly patriarchal. Perhaps, there is a need to redefine participation with concerted efforts to overcome the potential cultural barriers prohibiting women from meaningful involvement in important decision-making processes including in peace talks, should sustainable conflict resolution, peace and development be achieved beyond pastoral communities.

The election of representatives by the community was facilitated by the three mediators. While nearly two-thirds (65%) of the representatives were satisfied with the process of nomination the representatives to the mediation team, about one-third (35%) of the respondents were dissatisfied with the majority (70%), being women. They cited among other issues, nepotism and failure to use secret ballots. The latter could have contributed to the lack of fair participation by women, maybe due to the fear of reprisal.

Further, a participant in the FGDs with female indicated that, *'During the election, we were not involved fully, I remember I was working and the election was held.*' Another evidence of work-related engagements by women limiting their participation in conflict resolution processes. This

[36] Muigua (n 4).
[37] Constitution of Kenya (n 12).

result collaborates with the experiences among the Pokot community,[38] where the unequal gender norms are deemed to deny and further foreclose women's capacity for decision-making among the pastoralist communities. Women were traditionally excluded because of unequal division of labour that prohibits them from participation since they increasingly have less time given their labour-intensive household obligations and because of cultural restrictions[39] to their mobility, the likely case in Olkaria IV mediation, resulting in the dissatisfaction among (70%) of women.

In regards to community leadership and representation in the mediation process, the study established that four Council of Elders (CAC) members, all males, one each from the four villages (Olomayana Ndogo, Cultural Centre, Oloongonot and Oloosinyatti) were invited to participate as friends of the three mediators. The all-male dominated leadership among the PAPs' reflects a possible continued marginalization of women in similar settings in the country. This is a clear demonstration of the little change in the status of women in the study community, where women are accorded equal status with children,[40] with norms among the Pokot pastoral communities continuing to prohibit women from speaking in the same spaces where men are gathered.[41]

The absence of women in the community's leadership and the suppression of their voices resonates the findings recorded in the "Feeling the heat: responses to geothermal development in Kenya's Rift Valley[42]," which suggested that women's leadership in the Maasai community was not yet fully recognized by the Maasai men, and that majority of the meetings at the village level were dominated by men who would shout down a woman leader

[38] Omoka. (n 17).
[39] Ibid.
[40] Hodgson (n 17); Blessing Nonye Onyima, 'Women in Pastoral Societies in Africa' in Olajumoke Yacob-Haliso and Toyin Falola (eds), *The Palgrave Handbook of African Women's Studies* (Springer International Publishing 2019) *<http://link.springer.com/10.1007/978-3-319-77030-7_36-1>* accessed 21 July 2022.
[41] Omoka. (n 17).
[42] Hughes Lotte and Rogei Daniel, 'Feeling the Heat: Responses to Geothermal Development in Kenya's Rift Valley' [2020] Journal of Eastern African Studies 1.

that spoke for her village women, demonstrating further challenges of patriarchal systems.

The Mediation phase

During the mediation phase which started in August 2015, the mediation team hosted at least three meetings before the negotiation of the issues. The mediation Chairperson and the team drafted the procedure for the mediation agreement. However, the study revealed that the mediation participants were left to read and sign the mediation agreement without mediator intervention or support. The pact was written in English, and it is not clear whether the community representatives understood the mediation rules since only 24% of them (4/17) – all male, were literate, further complicating the adequate participation of the women in this process.

Although the efforts could have been made by the mediation team to engage a Maasai lady to translate English to Maa and vice-versa to break the language barrier and enhance the participation of women, the respondents noted there were many issues that could have been inappropriately translated from English to Maa because Maa is loaded with varied nuances. This could have been further complicated by the possibility of the uneasiness among the PAPs' Elders who oversee the implementation of the Maasai cultural practices among which those that which forbid women from speaking in the same public space with men.

While slightly more than half of the respondents (53%) were satisfied by the mediation process, those who were dissatisfied (47%) were mainly women (72%), citing the inadequate publicity of the process, little consultation at the initial stage, inadequate capacity building on the mediation process, poor coordination and limited public participation. Besides, the FGDs with women revealed that some of them were dissatisfied, since they were denied voice because of their sex, suppressed, and their views disregarded. Similarly, Hughes & Rogei,[43] recorded that the village representatives were predominantly middle-aged to elderly men (all Maasai males) over about 40 identify as elders and women complained that their grievances were ignored.

[43] Ibid.

The respondents in Olkaria mediation case also acknowledged that they had elected leaders who made decisions on their behalf, with which they had to abide irrespective of their feelings on the matters, another possible hindrance to adequate participation of women in the mediation processes.

Endorsement of the mediation agreement

The results established that the community was convened in June 2016 at the RAPland's Social Hall for a *Baraza (meeting)* where the mediators read out the 27 items in the agreement to both parties (PAPs and KenGen). Since the agreement was already signed, the community in general did not see the need to give input to it, talk less of women. They felt that they were denied an opportunity to react to the mediation resolutions. However, most of these community members including women endorsed the accord perhaps for fear of victimization. The endorsement of the agreement in an open forum could have further inhibited their freedom of voting especially among women who have a little say in decision-making processes among the pastoral communities.[44] Possibly, their honest decision would have been exercised if the secret ballots had been used. There could be a need to redefine public participation which is one of the central values of democracy enshrined in the Constitution of Kenya, 2010. Article 10 of the Constitution[45] provides for a right to all citizens to have a say in decisions affecting their lives, including among the marginalized communities like in Olkaria IV.

It is worth noting that the mediation resulted in the reaching of consensus on contentious issues between KenGen and the PAPs with subsequent reduction in conflicts, mended and improved relationships between parties and improved PAPs' livelihoods. However, while the majority of the respondents (83%) suggested they would recommend mediation of any other community development project conflicts, only (35%) of the women held this view, a further demonstration of their dissatisfaction that could have been linked to their minimal participation. A likely threat to the sustainability of the resolutions. Sustainable Development Goals (SDGs) recognizes the need to promote peaceful and inclusive societies (inclusive of women and

[44] Omoka. (n 17).
[45] Constitution of Kenya (n 12).

descending/minority voices) that provides for access to justice for all and build effective, accountable and inclusive institutions at all levels. Thus, much work is needed towards adequate inclusion of women in conflict resolution beyond Olkaria IV mediation case.

Conclusion and recommendations

The Olkaria mediation processes yielded an agreement on contentious issues, reduced conflicts, mended relationships and oiled the project operations. However, the adequate inclusion of women in such processes as advocated for also by the feminist conflict resolution theory as enablers to functional conflict resolution processes and the legal frameworks around Women Security and Peace still has a long way to go. Limited knowledge and exposure to formal mediation processes, cultural and structural barriers remain a hindrance to women's adequate participation at peace tables. While there is need to redefine meaningful participation in peace talks among the pastoral communities, and build women's capacity to enhance their participation and inclusion, much effort should also be geared towards addressing the traditional practices that prohibit women from this meaningful participation through co-designing of conflict resolution processes. Further research is needed to determine the extent to which women are involved at every mediation phase, with a database on the challenges and solutions to their participation to improve mediation's effectiveness as an alternative dispute resolution mechanism in resolving natural resources conflicts beyond Kenya.

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Gentleman, Robert, Computer Science and Data Analysis Series. R Programming for Bioinformatics. *(CRC Press, Tylor & Francis Group 2008) <https://books.google.co.ke/books?hl=en&lr=&id=34Y6WjJy8zEC&oi=fnd&pg=PP1&dq=Gentleman,+Robert.+(2008).+Computer+Science+and+*

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The Business of Climate Change: An Analysis of Carbon Trading in Kenya

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1. Introduction

The Climate Change phenomenon continues to put the world on edge with several intervention measures being put into place as attempts to arrest its negative effects remain on course. One of the most significant intervention measures which the global community has put into place is the concept of carbon trading. Carbon trading remains a popular although sometimes a controversial phenomenon, more so, between the developed versus the developing countries' dichotomy.

This article analyses the business of carbon trading in the context of Kenya's legal framework. In order to undertake this task, the article would be organised into various interrelated sections. This first section offers introductory remarks. The second explores over the climate change phenomenon. This would then examine the legal framework that underpins climate change into the Kenyan legal system. The third section would then provide an exposition of the concept of carbon trading and its various forms. The final section would then offer concluding remarks to the discussion.

2. Climate Change

Climate Change is the response of the planet's climate system to the altered concentration of the greenhouse gases (hereinafter GHGs) within the global atmosphere.[1] It entails changes of climate which are attributed either directly

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or indirectly to human activities that alter the composition of the global atmosphere and which are in addition to natural climate variability observed over comparable time periods.[2]

The Climate Change causes several effects on the environment. These include depletion of the ozone layer which provides a shield against harmful exposure to ultraviolet radiations from the sun and control over the temperature structure of the stratosphere.[3] It also causes acid rain and ecological harm which arise when acidic gases such as carbon dioxide, sulphur dioxide and nitrogen dioxide react with water vapour to form weak acidic solutions such as carbonic acid, sulphuric acid and nitric acid solutions in rainfall.[4] In addition, climate change also causes direct harm to human health which, especially, arises from changes in the concentration of gases in the atmosphere have been proven to cause respiratory problems, brain damage and cancer. As a result, there is more reduction of life expectancy as the climate worsens.

There are three principal causes of climate change. These include air and atmospheric pollution, anthropogenic sources, and the urban and transboundary air pollution.[5] Atmospheric pollution is the group of gases produced from combustion processes including carbon monoxide (CO), carbon (IV) oxide (CO_2), and oxides of nitrogen (NO_X).[6] Another source of atmospheric pollution is Sulphur dioxide (SO_2) which is released in the atmosphere from the combustion of fossil fuels that contain Sulphur.[7] A third

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[1] Hunter, D., Salzman, J., and Zaelke, D., (eds.), *International Environmental Law and Policy*, Thomson West: Foundation Press, 2007, p. 631.
[2] Article 1 (2) of The United Nations Framework Convention on Climate Change defines Climate Change.
[3] Sivasakthivel T. and Reddy, K.K.S.K., "Ozone Layer Depletion and Its Effects: A Review", *International Journal of Environmental Science and Development*, Vol. 2, No.1, February 2011, p. 30.
[4] Njeru, M., *Comprehensive Secondary Chemistry*, Oxford University Press, Nairobi, 2002, p. 60.
[5] Fakana, S.T., "Causes of Climate Change: Review Article", *Global Journal of Science Frontier Research: (H) Environment & Earth Science*, Volume 20 Issue 2 Version 1.0 Year 2020, p. 8.
[6] Njeru *supra*, p. 52.
[7] Twoli, N., and Mungai, D., *School Certificate Chemistry*, East African Educational Publishers, Nairobi, 2004, p. 142

source of atmospheric pollution arises from particles of Lead metal and other heavy metals that arise from combustion processes in motor vehicles, metal processing industries and waste incineration, particularly waste batteries.[8]

Aside from the above substances, another source of atmospheric pollution includes the very small particulate matter such as PM_{10} and $PM_{2.5}$ which arise from diesel engines. Further, the role of complex pollutants which are produced from the incomplete combustion of fuels can also not be gainsaid. These substances, which are highly toxic at small levels, include dioxins, furans, polyaromatic hydrocarbons (PAHs), polychlorinated biphenyls (PCBs).[9] Other sources include volatile organic compounds (VOCs) which are released from vehicle exhaust gases, either as unburnt fuels or combustion products, chlorofluorocarbons (CFCs), used in aerosol sprays, solvents, refrigerants, air-conditioning units etc. CFCs and hydrochlorofluorocarbons (HCFCs) which are inert in the lower atmosphere do undergo a significant reaction within the upper atmosphere and do destroy stratospheric ozone. The last group of atmospheric pollutants is methane which is emitted during the production and transportation of coal, natural gas and oil.[10]

On its part, anthropogenic activities have increased the concentrations of the gases in the atmosphere.[11] Examples of human activities spearheading change in concentrations of gases include increased use of fossil fuels deforestation, increasing livestock farming leads to increase in methane, farming using artificial fertilizers, use of equipment that produce fluorinated gases such as refrigerators, air conditioning systems and heat pumps, fire extinguishers, solvents and aerosol propellants, foam agents etc. Transboundary air pollution emerged after the effects of large-scale

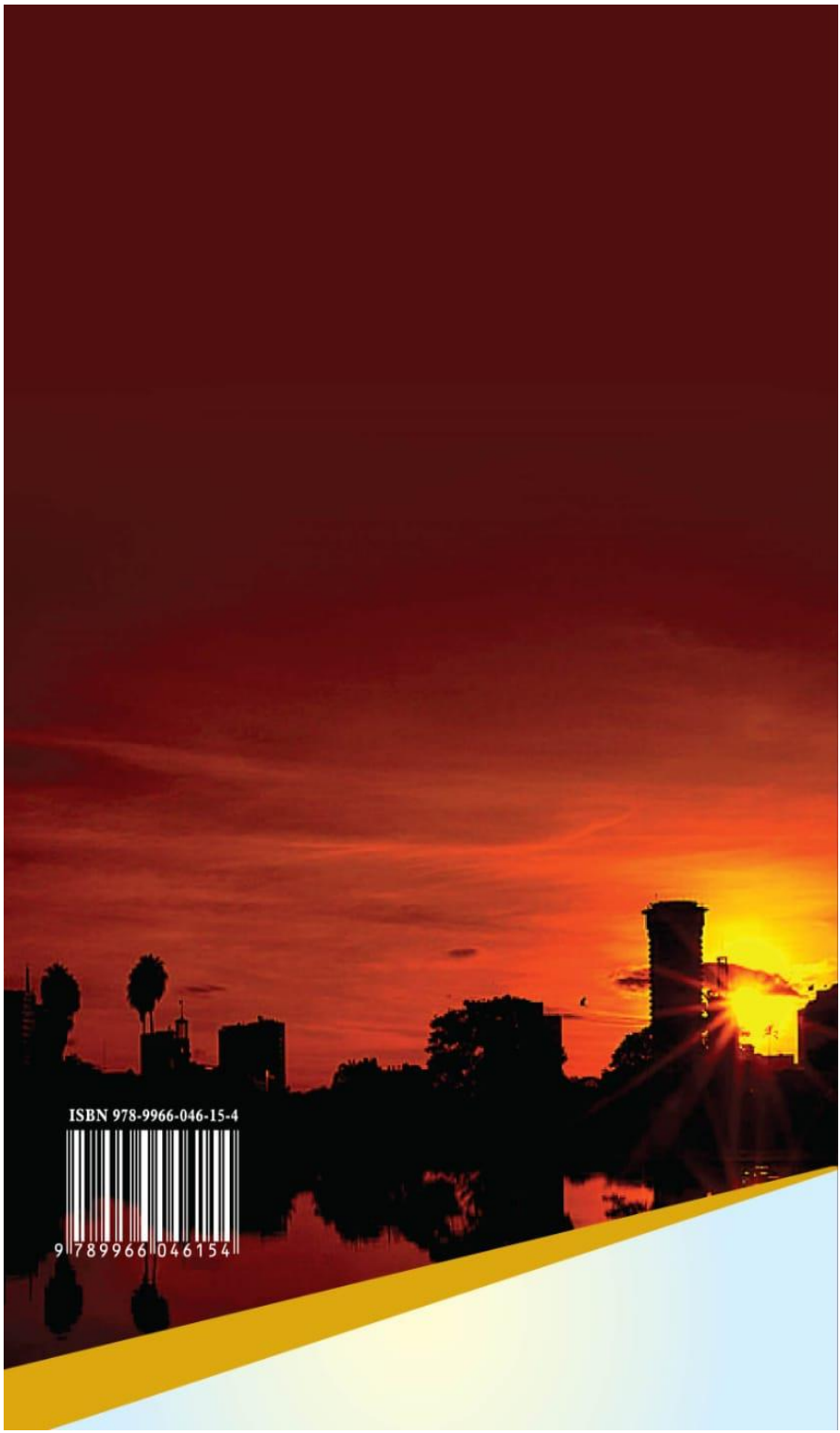
[8] Njeru, *supra*, p. 190.
[9] Bhargava, A., Dlugogorski, B.Z., and Kennedy, E.M, "Emission of Polyaromatic Hydrocarbons, Polychlorinated Biphenyls and Polychlorinated Dibenzo-p-dioxins and Furans from Fires of Wood Chips," *Fire Safety Journal*, Volume 37, Issue 7, October 2002, p. 659.
[10] Rojas-Downing, M.M, Nejadhashemi, A.P., Harrigan, T., and Woznicki, S.A., "Climate Change and Livestock: Impacts, Adaptation, and Mitigation," *Climate Risk Management*, 2017, Volume 16, p. 145.
[11] Fakana, *supra.* See also, Trenberth, K.E., "Climate Change Caused by Human Activities is Happening and it Already Has Major Consequences", *Journal of Energy & Natural Resources Law*, 2018, Vol. 36(4), pp. 463-481.

industrialisation and intensive development such as nuclear testing, air pollution from ships and aeroplanes became evident.[12] The Trail Smelter Case was the first major international dispute over transboundary air pollution.[13]

3. Legal Framework Governing Climate Change

[12] Bergin M.S., West J.J., Keating T.J, and Russell A.G., "Regional Atmospheric Pollution and Transboundary Air Quality Management", *Annual Review of Environmental Resources*, 2005, Vol. 30, pp. 1–37.

[13] Trail Smelter case, 16 April 1938, 11 March 1941, 3 RIAA 1907 (1941) *https://legal.un.org/riaa/cases/vol_III/1905-1982.pdf* (accessed 19/01/22). See also Wirth J.D., "The Trail Smelter Dispute: Canadians and Americans Confront Transboundary Pollution, 1927-41," *Environmental History*, April 1996, Volume 1, No. 2, p. 34.



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