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Renkens, Ilse Maria

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Mind the Gap: Conflicts in the Implementation of Kenya's Lake Turkana Wind Power Project

Ilse Maria Renkens 

Department of Social Sciences and Business, Roskilde University, Roskilde, Denmark

Abstract Renewable energy projects are increasingly being implemented at scale to meet global climate goals, often targeting lands on the margins of the state and affecting the livelihoods of Indigenous or marginalized populations. This article argues a need for project-developers, investors and rights advocates to consider the potentially significant 'gap' between their expectations that the rights of local populations will be settled at the start of a particular investment and the conflicts over rights, recognition and benefits that emerge during implementation that risk derailing investments. This is particularly relevant for renewable investments, as their claims to global and national benefits divert attention from their local impacts. Empirically, this is explored through the case of the Lake Turkana Wind Power project in Kenya. Based on interviews and literature review, the article examines the relations between the key stakeholders in this project by acknowledging their various 'ways of seeing' rights. Ruling elites often see rights as settled once they have been written into law and investors assume that rights have been dealt with at the project's start, but local populations typically begin exploring their rights following project-induced changes. The interaction of stakeholders with such diverse views has important implications for the practice of human rights in the context of renewable energy investments.

Keywords: renewable investments; human rights; Indigenous peoples; sub-Saharan Africa; sustainable development

Introduction

To meet the targets of the 2015 Paris Agreement, renewable or low-carbon investments are increasingly being planned and constructed at scale. They frequently target lands and resources on the 'margins of the state' (Das and Poole, 2004, p.6), where rights upheld centrally are rarely implemented (Hagmann and Korf, 2012). They are justified through discourses that misrepresent these lands as uninhabited and idle, ignoring their role in sustaining diverse populations, including Indigenous Peoples (Gilbert, 2017). Additional justification is derived from discourses that portray these lands as frontiers, 'spaces where the global capitalist system creates and recreates new waves of expansion and

accumulation as new resources are (re-)discovered or invented’, offering opportunities for sustainable development (Haller et al., 2023, p.113). When foreign investors begin operating in these spaces, they are often ill prepared to meet the challenges required to bring a project to completion, while also making sure that the rights of impacted populations are respected in the investment process. Especially in states that are ‘rule[d] by law’ – where rules are enforced by a strong state that is not itself subject to those rules (Khan, 2017, p.648) – it is not a given that rights are established and respected. Local populations may have poorly protected rights and limited resources to challenge the implementation of large-scale projects (Cotula, 2013). In such scenarios, it cannot be taken for granted that human rights conventions and national legislation will be complied with (de Gaay Fortman, 2011).

In recognition of this reality, the article argues that there is a need for project-developers, investors and rights advocates to consider the potentially significant ‘gap’ between their expectations that the rights of local populations will be settled at the start of a particular investment, and the conflicts over rights, recognition and benefits that emerge during project implementation. While renewables are a major part of climate mitigation, they must be implemented in a way that respects human rights. Instead, they have the potential to *entrench* existing inequalities and social relations, and uphold processes of *exclusion* – ‘unfair planning, policymaking, or lack of representation, recognition, and due process’ – and *enclosure*¹ of lands previously held in common (Sovacool, 2021, p.2).² This threatens not only the land-use based livelihoods of local populations but the mobility and resilience needed to adapt to climate-induced changes to the landscape (Haller et al., 2023). The article aims to shed light on these injustices, revealing a sharp contrast where the initial promise of renewable investments, amplified through discourses of sustainable development, can quickly turn to disillusionment and rights infringements.

The article asks what conflicts emerge over rights during the implementation of renewable energy investments, and what are the implications for the practice of human rights? It contributes to a critical scholarship that increasingly recognizes commonalities between rights violations in traditional (oil, gas, mining) extractive³ and renewable investments, including flawed consultations (Ramirez, 2021), exclusion from project benefits (Cormack and Kurewa, 2018), and their dependency on the mining of transition minerals (Dunlap and Laratte, 2022) which has been linked to

1 The process of enclosure has alternatively been conceptualized as land grab and / or accumulation by dispossession (e.g. Hall, 2013).

2 Sovacool pursues a political ecology framework using the concepts of *entrenchment*, *exclusion*, *enclosure*, and *encroachment* to explore the potential for injustices of climate mitigation processes. The framework shares certain commonalities with tenet approaches in environmental and energy justice that explore recognition, distribution, and procedural (in)justices.

3 Rights violations in traditional extractives range from lack of inclusion in decision-making processes (Leifsen et al., 2017) to involuntary resettlement (Yang et al., 2017) and threats to and killings of land and environmental defenders (Global Witness, 2022).

severe rights abuses. In line with this critical scholarship and contributing with empirical evidence the article also aims to challenge the extent to which investor standards and Corporate Social Responsibility (CSR) measures protect against rights violations in renewable investments.

The argument that rights are not settled at the start of an investment – rather, conflicts over rights, recognition and benefits may emerge during project implementation – builds on Grindle and Thomas’s (1991) work on policy implementation in developing-country contexts. The authors demonstrate the need, already in the policy-formulation phase, to be mindful of the political struggles and conflicts that often first occur in the implementation phase as the project’s impacts become more evident. This insight is crucial for the implementation of renewable investments, as their claims to global and national benefits distract from their local impacts and their potential for rights violations. As the energy transition gets underway, this issue merits more attention. Consistent with the call to ‘mind the gap’, the different actors involved in investments do not necessarily consider the need for rights to be embedded in society. Ruling elites may see rights as settled once they have been written into law or once they have taken a decision on investments. Investors, conversely, assume that, because their investment is based in law and / or has the approval of the state authorities, the rights involved will be taken care of by default (Buur et al., 2020). Experiencing what they consider rights violations, local populations challenge these notions. To analyse these different ‘ways of seeing’ rights in investments (Lind et al., 2020, p.14), the article draws upon a sociological reading of rights that sees rights as generated in society (Madsen and Verschraegen, 2013). Furthermore, it uses the analytical framework of Buur et al. (2019; 2020), to study what is exchanged in the relationships between three key actors in natural resource investments: ruling elites, investors and local populations.

Empirically, the call to ‘mind the gap’ is explored through the case of Kenya’s large-scale, onshore wind project, Lake Turkana Wind Power (LTWP). Developed since 2006 and operational since 2019, financial closure was reached in 2014 through equity from a consortium of foreign and domestic investors and debt finance from the European Investment Bank (EIB) and others. LTWP is located in Loiyangalani Ward in sparsely populated Marsabit County (Figure 1). An estimated 80 per cent of the county’s inhabitants are pastoralists, meaning that their livelihoods are derived from raising livestock (Kazimierczuk, 2020). LTWP anticipated that the wind project would have potentially negative impacts for the El Molo, Rendille, Samburu and Turkana ethnic groups. However, both ruling elites and investors underestimated what was needed to implement a project on this scale in this area without violating the rights of local populations as formulated in (inter)national legal norms, particularly their rights to land and to free, prior and informed consent (FPIC). Conflicts over land rights ultimately resulted in a court case against both LTWP Ltd. and the state authorities involved in the land-acquisition process. While rights advocates have argued that the Kenyan authorities are convention-bound to ensure local

Figure 1. Location of LTWP in Marsabit County, Kenya. Credits: International Work Group for Indigenous Affairs



populations' rights to FPIC, etc., the empirical material shows that legal rights do not necessarily translate into practice.⁴ Furthermore, while LTWP cited international standards and volunteered CSR efforts through its Winds of Change Foundation,

⁴ Kenya's 2010 Constitution enshrines its international law obligations. While Article 10 mandates public participation, it omits FPIC. Since 2016, the Community Land Act, implementing Article 63(5) of the Constitution, replaced the category of trust land with community land.

accusations of a lack of compliance with such standards persist, as do perceptions that the project has amplified existing ethnic tensions and benefited some more than others.

The article is structured as follows. The next sections briefly present methods and materials and the analytical framework. Under the heading ‘results’, the article first shows how the relationship between ruling elites and investors was crucial to furthering the LTWP investment, despite changing over time. Second, it explores the relationship between investors and local populations with an emphasis on conflicts over consultations, recognition and benefits. Third, it examines how, in the relationship between local populations and ruling elites, local populations contested the land lease that had been approved by state authorities through arbitration. Based on these findings of conflicts over rights over the course of the project’s implementation, the article considers the call to ‘mind the gap’ in its concluding discussion.

Materials and methods

The article is based on empirical material, including project documentation, legal documents, and grey and academic literature reviews. Furthermore, between 2019 and 2023, 24 in-depth, semi-structured, anonymized interviews and six informal conversations were conducted with affected persons from the project area, directors of Kenyan civil society organizations (CSOs), academics who have studied the case, experienced consultants with knowledge of the workings of this and similar investments, and investors.⁵ Ethical reflections before, during, and after each interview (Hesse-Biber, 2011) ensured an iterative consent process (Mackenzie et al., 2007).

Since the COVID-19 pandemic prevented in-person fieldwork in Kenya, many interviews were conducted through online platforms. Without careful consideration of issues like digital access, digital literacy and ethics in online research (e.g. Engward et al., 2022; Hannemann et al., 2023) potential research participants, especially those local to the project area, risk being excluded (Zadkowska et al., 2022). To ensure their inclusion, local contacts were established through existing contacts with local CSOs. Remotely accessing state actors and project investors proved challenging too, likely due to ongoing court proceedings. Trust was built through repeated interactions.

Despite access challenges and technical issues, the unplanned online research yielded rich material. Questions covered the project area’s historical and climate context, challenges related to how to interpret and apply investor standards, and the lawsuit. Sovacool (2021), whose framework uncovers processes of exclusion, entrenchment, and enclosure, inspired questions on consultation, recognition of indigeneity, project impacts on social cohesion / conflict between and among stakeholders,

⁵ The category of ‘investor’ is complex, referring here to both lenders and shareholders in the LTWP consortium, and ranging from development finance institutions to private investors.

benefit distribution, and land / resources access. Buur et al. (2020) inspired questions related to what is exchanged in the relations between key stakeholders.

Online fieldwork and triangulation (Patton, 1990) may not fully capture stakeholder dynamics and perspectives. To address this and reconcile contradictory views, this article applies Lind et al.'s (2020) methodological approach. With a focus on pastoralist east Africa, the authors argue that in understanding how investments unfold on the margins of the state, it is crucial to explore the different subjectivities or 'ways of seeing' investments by the actors involved. These perspectives can be expressed through competing discourses or narratives (Hajer, 2006).⁶ For example, ruling elites and investors may embrace a characterization of existing land uses as environmentally detrimental or wasteful, while they legitimize renewable investments by emphasizing a narrative of opportunity, in terms of employment, economic growth or access to sustainable energy. Conversely, local populations may see a threat to their lands and livelihoods (García et al., 2023).

Analysing rights and investments

This article's call to 'mind the gap' builds on Grindle and Thomas's work on policy implementation in developing-country contexts,⁷ which points to the importance of being mindful that 'a considerable amount of political participation and accommodation of interests occurs during the implementation of policy' (1991, p.135). There is an assumption among policy-makers that, while policy decisions are inherently political, policy implementation is a matter of administration, so that once a policy decision is made, its implementation can simply be ignored and left to others. Instead, policy implementation should be thought of as a process prompting reactions that may drive policy adaptation in the implementation phase as well (or especially) (ibid.). The same holds true in relation to the implementation of investments, where having the appropriate permits for the use of land and resources through the support of ruling elites and state institutions alone does not preclude conflicts over rights to these resources emerging during project implementation.

To make sense of the concept of contested rights, a sociological reading of rights is needed that 'draws attention to the broader societal preconditions for human rights

6 According to Hajer, when 'a group of actors that, *in the context of an identifiable set of practices*, shares the usage of a particular set of story lines over a particular period of time' one can speak of a discourse coalition. Discourse institutionalization happens when discourse solidifies into institutional practices (2006, p.70).

7 From an anthropological perspective, Mosse provides an alternative take on the gap between policy and practice, which he argues is not 'an unfortunate gap to be bridged between intention and action; it is a necessity, actively maintained and reproduced' (2005, p.231). That which makes good policy, does not necessarily make good practice, as '[g]ood policy is unimplementable' by design (ibid., p.230). In this view, policy does not necessarily drive development practice.

protection' (Madsen and Verschraegen, 2013, p.11). Whereas a legal-positivistic understanding of rights sees rights as individualized and as existing regardless of their enforcement and social preconditions, a sociological understanding of rights requires them to be embedded in societal institutions and people's mind-sets for them to have social meaning and be realized in practice (ibid.; Hilhorst and Jansen, 2012). In a sociological understanding of rights, the courts alone are not enough to address rights violations. This is not just because courts require legitimacy and competence, which, especially in a developing country, may be assumed. For example, to address gender discrimination, societal values need to change, whereas the right to education requires institutions like schools, demonstrating that rights are generated in society (Madsen and Verschraegen, 2013).

Going beyond the methodological approach of Lind et al. (2020) to analyse the different 'ways of seeing' rights in investments, it is important to consider the key actors involved therein. The article follows the analytical framework of Buur et al. (2019; 2020), who identify three key actors involved in natural resource investments: ruling elites, investors and local populations.⁸ They argue that it is important to explore what is exchanged in the relations between these key actors, as it affects both the incorporation of rights in, and implementation of, investments. If any of the three relations break down, conflicts may ensue, potentially derailing the investment. Thus, if ruling elites fail to meet investors' expectations, relations between them may turn sour, and an investment may not get off the ground. Furthermore, if local populations are not on board, investors risk losing access to land and resources. Investors thus have an interest in making sure local populations are properly involved and compensated for what they are giving up in exchange for the investment. The three relationships are interlinked. The relation between ruling elites and local populations, although often overlooked, may be rooted in a complicated history of domination and marginalization, and it cannot be assumed that the rights of local populations are respected. For an investor, perhaps expecting that ruling elites have taken care of formal rights, one-off transactions may be anticipated to be enough to ensure local support for an investment, whereas the expectations of local populations may go far beyond that.

In line with a sociological reading of rights, in this framework rights are negotiated and contested during implementation: 'we need to determine how "procedural rights" become realized in practice, instead of taking rights as a given' (Buur et al., 2020, p.920). Empirically, this is explored through the case of LTWP. Discussion of this renewable-energy investment considers the relationships between the three key actors, starting with that between ruling elites and investors, and paying particular attention to the respective actors' different 'ways of seeing'.

⁸ Civil-society actors do not have independent positions in the model, as they support, contest or become embedded with all three of the key actors.

Results

Ruling elites and investors: approving renewable investments

The idea for the LTWP project was conceived after one of the founders noticed strong winds while visiting the area. Together with five others, in 2006 he set up the Dutch-Kenyan firm KP&P BV Africa, which then created LTWP Ltd. Good contact with the Secretary of Energy was essential in ensuring the Ministry of Energy's permission for exclusive rights to carry out wind feasibility studies in the same year. The studies' results showed immense potential and generated excitement for the investment at the highest levels of the Kenyan government (Kazimierczuk, 2020). The ruling elites showed an interest not least because LTWP fitted Kenya's Vision 2030 for development, as well as its ongoing ambition to reduce the country's dependence on hydropower and expensive imports of fossil fuels (Newell and Phillips, 2016).⁹

A 33-year land-lease agreement (with what, prior to devolution, was the Marsabit County Council), twice renewable, was signed in October 2007. The lease of 150,000 acres (607 km²) – roughly the size of Nairobi County – was confirmed by the Office of the President in February 2008 (Kazimierczuk, 2020). Seeing the projected benefits of the project in terms of its tax contributions, savings on fossil-fuel imports and earnings from carbon credits (Aldwych International, 2014), the founders' contacts in the government helped open doors further. LTWP entered into a Power Purchase Agreement (PPA) with Nairobi stock-listed and majority state-owned utility Kenya Power (also known as KPLC) in January 2010, which was amended several times in following years. Usually Kenya Power chooses bids for independent power producers (IPPs) through a competitive process, but LTWP was initiated as an unsolicited bid directly with the Government of Kenya, contrary to the applicable legal frameworks (OAG, 2021).

The principal developer, KP&P, brought in the co-developer Aldwych International and signed a Joint Development Agreement with the other equity partners. The LTWP consortium raised almost €125 million in equity from Aldwych International, KP&P, Finnfund, Norfund, Vestas, Investeringsfonden for Udviklingslande (IFU) and Sandpiper Ltd.¹⁰ The African Development Bank (AfDB, the lead arranger for the project), the EIB and others contributed €498 million in debt finance, including mezzanine finance, bringing total capital investment in the LTWP project to €623 million (Klage and Nweke-Eze, 2020). Furthermore, the US Overseas Private Investment Corporation (OPIC) provided an investment guarantee of €185 million (Petrova,

9 Kenya aims for 100 per cent renewable energy generation by 2030, with feed-in-tariffs and auctions policies aiding this goal. Key plans include the 2023 Energy Transition and Investment Plan and 2020 National Energy Efficiency & Conservation Strategy. Furthermore, at the 2023 Africa Climate Summit, President Ruto strongly advocated for Africa's leadership in the green transition.

10 Norfund sold its shares to the Anergi Group in 2021. In 2023 and 2024 Finnfund, Vestas and IFU sold their shares to Climate Finance Partnership, managed by BlackRock.

2014). Securing the loans was a lengthy process that became even more complicated when the World Bank pulled out of the project in 2012, citing concerns about the take-or-pay provision within the PPA, as well as fears that the Kenyan grid would not be able to absorb the electricity generated and that the timeline for construction of a 428-km transmission line was inadequate, exposing Kenya Power to unacceptable risk (OAG, 2021). The same day the AfDB stepped in, and a preliminary loan agreement was signed in March 2014, after which financial closure was reached in December 2014 (Kazimierczuk, 2020). Sarima village, located on the 40,000-acre site (161 km²) where LTWP constructed its turbines, was relocated a kilometre away at the request of its Turkana inhabitants because of health and safety concerns. Sarima and LTWP signed a Memorandum of Understanding in August 2014, and relocation took place from February to October 2015 (LTWP, 2017).

Two months prior to financial closure, on 14 October 2014, nine plaintiffs of Rendille heritage, acting on behalf of the residents of Laisamis Constituency and Karare Ward in Marsabit County, filed a lawsuit against LTWP Ltd. and the state authorities as the defendants, including the Marsabit County Government. The plaintiffs claimed illegalities in the way the land had been acquired and sought, inter alia, cancellation of the land titles granted to LTWP (Kenya Law, 2021). LTWP did not question the legality of the land lease (Pedersen and Ryelund, 2018) and continued construction of the 310 MW project – for comparison, the total installed electricity capacity of Kenya was 2,989.6 MW in 2021 (KNBS, 2022). Finalized in April 2017, the project required 365 wind turbines delivered by the Danish firm Vestas. LTWP also required the construction of a 200-km access road from Laisamis to Marsabit, partly self-financed. Prior to construction, as part of risk mitigation, an Environmental and Social Management Plan was drawn up, based on the guidelines set out in the International Finance Corporation's (IFC) Performance Standards.¹¹ The project reached full commercial operation on 6 March 2019 and was commissioned by the then President Uhuru Kenyatta himself (Power Technology, 2019).

The support of ruling elites is crucial for implementing investments requiring land and resources. They may back the investment to keep their promises of jobs and social services to their electorate or to use resource allocations for patronage (Cotula, 2013). They may also view investments as helping develop and bring areas on the margins of the state under control. In 2019, then President Kenyatta commissioned the LTWP project, highlighting its benefits for the country and showcasing Kenya as a great investment destination:

The successful implementation of Lake Turkana Wind Power demonstrates Kenya's outstanding credentials as an investment destination in Africa and is a perfect example of the immense potential of the public-private partnership model of implementing development projects. I invite other investors ... to join hands with the government in conceptualising

11 OPIC (n/d) 'Public Project Summary'. Available at: https://www3.dfc.gov/Environment/EIA/laketurkanawind/Final_Public_Project_Summary.pdf.

and delivering transformative projects that secure measurable returns for our people as well as the investors. (quoted in Power Technology, 2019)

There is ongoing interaction with ruling elites across an investment's development, construction and operational phases concerning land concession agreements, permits, licenses, construction, health and safety laws, clearance for goods at ports, etc.¹² However, an initial relation of 'compatible interests' between ruling elites and investors may evolve over time as interests change (Buur et al., 2020, p.920), illustrating Grindle and Thomas's point that 'implementation is an interactive and ongoing process of decision making by policy elites' (1991, p.125). Since the 2021 ruling in the court case, local elites, including the Governor of Marsabit County, have made fresh demands of the project, requesting project revenues for the County Government. Additionally, local elites have asked for grid connection for county constituents, guaranteed jobs and socially responsible investments (Walter, 2021).

National elites have also voiced concerns that may still affect LTWP. A delay of almost 21 months in an associated facility, the transmission line between Loiyangalani and Suswa, which state-owned utility KETRACO was responsible for, resulted in high penalties for the government, reflected in higher tariffs for consumers (OAG, 2021). Furthermore, amid nationwide outrage against expensive PPAs between the state utility Kenya Power and IPPs (like LTWP), resulting in high electricity prices for consumers, the government ordered a review in March 2021 (Ambani, 2021). Over the course of its development phase, LTWP, apart from potentially facing such renegotiations, has had to manoeuvre in a changing institutional and legal landscape, with the introduction of the National Land Policy (2009), a new Constitution (2010), Land Acts (2012) and devolution (2013).

Local populations and investors: conflicts over consultations and benefits

Exclusion from impact assessments and consultations

If local populations oppose an investment, investors risk losing access to land and resources, potentially derailing the investment. In the case of LTWP, relations between local populations and investors were complicated from the start. Allegations arose that LTWP Ltd '[c]arried out a self-serving [Environmental Social Impact Assessment] ESIA of the Project ... without evaluating the possible impact to the Project of the economic, social, cultural and physical wellbeing of the local community and holistic wellbeing of the indigenous community' (Kenya Law, 2016, par. 2.iii). Examining the publicly available ESIA's, several elements stand out.

First, echoing findings from extractive projects (e.g. Kirsch, 2014), the initial ESIA concluded in July 2009 anticipated minor negative impacts on local communities (increased risks of community conflict, incidences of HIV/AIDS and 'cultural

12 Interview, Investor, 26 May 2021.

contamination' by outside workers) that could be easily mitigated by industry best practices. Instead, '[p]erhaps the most serious negative impact the project is likely to have on the project area is the potential for birds' mortality' (LTWP, 2009, p.12). Resettlement was not deemed necessary. The ESIA reflects a positive view of the project, which it believes is shared by local populations, who it says see the project as an opportunity to 'solve their many challenging problems' (ibid., p.42).

Second, the ESIA acknowledges that public consultations with local communities and community-based organizations were flawed, suggesting that requirements for consultation were not fully considered:

To get the message across, the consulting team had to rely on local interpreters. At times it was not clear whether the consultants' explanation of the project's workings, the impacts generated and the mitigation measures proposed were well understood by the local members of the local community in the project area. (ibid., p.126)

In a project involving diverse national and international stakeholders, project challenges are seen from different rationalities. For example, a development finance institution will lack familiarity with the local contexts of all the projects it invests in. Consequently, it may be difficult for the project-developer to communicate the challenges around consultations, or implement grievance mechanisms within strict deadlines, to investors who are sitting in offices in Copenhagen and London and who are not experiencing these challenges first hand. From the perspective of the local populations, CSOs and scholars who have studied the investment, negotiations with the illiterate or company employees are problematic.¹³ This is because they see an extreme power imbalance there:

People are so disempowered, they politely clap for everyone who comes [to consult with them], be it the company promising employment, the government promising road improvements, or an NGO [non-governmental organization] telling them they have rights. Every day people are dragged from their homes, listen to what they are told, and clap for whoever comes.¹⁴

Studies that recognize the limits of what are essentially invited spaces of consultation and participation affirm such dynamics (e.g. Cornwall, 2004). On the other hand, one investor argued that 'a person who is employed in a project hopefully will be comfortable with raising a concern'.¹⁵ This view reflects what scholars have criticized as the lack of consideration of the power imbalances that are inherent in corporate instruments like ESIA's (e.g. Aguilar-Støen and Hirsch, 2015). It does not consider the reduced likelihood that those employed by the project will be critical of it

13 Interview, Local (wider project area), 3 May 2021. See also: Interviews, Director Kenyan NGO, 20 May 2019, 16 November 2021; Interview, Scholar, 3 June 2021.

14 Interview, Scholar, 1 June 2021.

15 Interview, Investor, 22 July 2021.

(Schilling-Vacaflor and Eichler, 2017): ‘When the company that you work for is coming to ask for you to be moved, it becomes a bit difficult to refuse’.¹⁶

Those local to the project area shared accusations that attendance sheets were being used to rubber-stamp blanket consent to the project, and that in the consultation process for the resettlement of the inhabitants of Sarima village, they agreed to resettlement without full understanding.¹⁷ Other impressions were that ‘a lot of meetings were behind closed doors, and certain people were required to ferry certain people in to represent their communities, meaning there is smaller political dynamics going on’.¹⁸ This may reflect a broader issue of opaque agreement-making common in transnational investment projects (Bhatt, 2020). Some believed that LTWP would intentionally focus on elders as ‘they can be easily manipulated because they do not know what is at stake or have children working at the company’.¹⁹ They pointed out that, by virtue of elders being respected, other voices remained silent, including those of women, ‘who tend to speak last, and are then unlikely to go against everyone else in the community’.²⁰ The exclusion of certain voices is recognized in the literature on consultation and participation (e.g. Schilling-Vacaflor and Eichler, 2017) and contradicts IFC Performance Standards, indicating an implementation gap.

While the World Bank, which pulled out in 2012, considered triggering its Operational Manual 4.10 on Indigenous Peoples, the 2009 and revised 2011 ESAs, as well as the 2012 Indigenous Peoples Policy Framework, stress that no Indigenous Peoples were identified within the project area (LTWP, 2011). This is despite acknowledgment that ‘most of the ethnic tribes within the project fulfil the general criteria of indigenous people of the World Bank, African Union and Kenya’.²¹ Of the diverse rationales for non-recognition identified by Salcito (2020) – being too poor, too rich, too assimilated to society or too prevalent in a locality – here the rationale ‘not marginalized enough’ was used. Evidently, agreement among investors did not come easily: ‘There were a lot of discussions. We were many stakeholders, we were many consultants’.²² The mention here of the role of consultants is interesting as it is often left unexplored, even though consultants have a significant impact on deciding which standards to follow (Bhatt, 2020). On the other hand, one of the investors emphasized the extreme due diligence involved in a project with so many lenders: ‘Here you have several different actors that have done their due diligence. If there were something, one would think that they would have picked it up, at least one of them’.²³

16 Interview, Director Kenyan NGO, 15 March 2021.

17 Interview, Local, 3 May 2021.

18 Interview, Scholar, 3 June 2021.

19 Interview, Local, 5 May 2021.

20 Interview, Director Kenyan NGO, 15 March 2021.

21 See ‘Indigenous Peoples Policy Framework’, p.5, <https://bit.ly/3DzL3ik>.

22 Interview, Investor, 19 January 2021.

23 Interview, Investor, 22 July 2021.

However, from the local perspective it seemed as if ‘these guys were looking for the easiest way out’.²⁴

Conversely, investors argued that indigeneity is disputed in Kenya. Furthermore, identity is not fixed, and indigeneity can be used as a ‘tool’ by local populations to demand investor accountability²⁵ similar to how ethnicity can be strategically deployed to claim land rights (Cormack and Kurewa, 2018; Drew, 2020). At the same time, investors could cynically take this up to argue that indigeneity claims are merely opportunistic. Moreover, recognizing one affected ethnic group as Indigenous but not others could risk losing host communities’ support due to perceived preferential treatment. Instead, investors claimed to treat everybody as Indigenous and argued that the lack of formal FPIC and recognition did not make any difference to their treatment.²⁶ This, however, is not the same as adhering to international standards, as ‘consultation is not the adequate standard when those to be resettled are Indigenous’.²⁷

Investors emphasized changing international standards for ESIA, consultation, etc., which they believe explain some project shortcomings around these issues. As one investor pointed out, ‘ESIA have always been very much environmental and very little social’.²⁸ While international standards are ever changing, arguments that there was less guidance in 2008, when the ESIA was conducted,²⁹ gloss over the fact that standards like the 2006 Performance Standards already required the free, prior and informed consultation of Indigenous Peoples in projects that adversely impact them (IFC, 2006). While investors expect further improvements of the standards: ‘Now, nobody is asking why you have to manage environmental impacts, and it’s going to be the same on the social / human rights part’,³⁰ it is not evident that they act on these expectations.

Consultants in the renewable-energy sector emphasize the sector’s (lack of) experience and maturity when sector-specific guidelines and standards are ever evolving or have only recently been drawn up.³¹ This is a kind assessment of the renewable sector based in a belief that international standards and practices are improving with advancing insights. However, this view overlooks not only the limits of such standards, which may favour business interests over local rights, but implementation challenges in marginalized areas. It also ignores the continued ‘struggle for recognition’ (Honneth, 1995, p.1) of Indigenous Peoples around the world (Salcito, 2020).

24 Interview, Local, 5 May 2021.

25 Interview, Scholar, 1 June 2021.

26 Interview, Investor, 19 January 2021.

27 Interview, Scholar, 20 January 2021.

28 Interview, Investor, 19 January 2021.

29 Based on fieldwork notes, 2021.

30 Interview, Investor, 22 July 2021.

31 Interview, Consultant, 20 November 2020; Interview, Consultant, Copenhagen, 3 December 2020.

CSOs have a more cynical perspective on renewable investments in Kenya and Africa: ‘Africa is a landing spot for all sorts of green energy investment from the world. It’s a kind of scramble for Africa’.³² They view renewable investments as taking place according to the same logic of extractive, capitalist power structures, which they replicate: ‘It is the same way of doing business, taking away more from those who don’t have’.³³ They furthermore believe them to be blind to the human costs of ‘clean’ energy: ‘I mean, the likes of Shell are now in renewable energy’.³⁴

Unfairly perceived distribution of project impacts entrenches conflict

Investor reports highlight the socio-economic benefits of LTWP, including improved market access and employment since, and especially during, the construction of the project’s 200-km road. Most LTWP employees to this day are from Marsabit County (LTWP, 2019; NIRAS, 2020). CSR efforts, too, are considered positively, as evidenced by posts about these efforts under the hashtag #LTWPCares on the company’s Twitter feed.³⁵ Winds of Change voluntarily dedicates €500,000 annually to these CSR activities for the PPA duration.

Those local to the project area contest both the distribution and extent of the project’s benefits. After targeting the needs of those directly affected first, once CSR activities were extended to the wider project area, some did not appreciate the fact that other communities needed support too, highlighting the significance of local ‘fairness’ notions (Lind et al., 2021, p.285). During construction of the access road, road-blocks would frequently occur, which, following Scott (1987, p.32), can be seen as an ‘everyday form of resistance’. Locals used the road as a conflict site to express grievances over the perceived lack of benefits and to communicate directly with the project (Cormack and Kurewa, 2018). They link LTWP’s arrival to increased ethnic violence: ‘Being brought up here, I’ve never seen such heightened conflict as when the wind farm came. It never involved women and children. But during the wind farm construction, we saw lots of women and children were victims’.³⁶ What is more, some research participants accuse company employees of helping to instigate conflicts between Samburu and Turkana, believing the company aims to ‘get rid of Sarima’.³⁷ According to others, such perspectives rather reflect the direct link that local populations perceive

32 Interview, Director Kenyan NGO, 16 November 2021. Scholars have taken up the concept of ‘green grabbing’ in relation to conservation in Kenya (e.g. Hazard and Adongo, 2015), while ‘green colonialism’ has also been used in relation to renewable investments (e.g. Normann, 2020), though thus far only grey literature seems to employ it in a Kenyan context.

33 Interview, Local, 5 May 2021.

34 Interview, Director Kenyan NGO, 15 March 2021.

35 See the official company account on Twitter: @LTWPOfficial.

36 Interview, Local, 5 May 2021.

37 Interview, Local, 3 May 2021.

between the investment and conflict – ‘the company came, and violence followed’ – and the different subjectivities that exist in parallel.³⁸

In contrast, investors emphasize increased security within the project area, but acknowledge violent incidents in the wider area. They are often rooted in cattle-raiding, a practice in northern Kenya since pre-colonial times (Greiner, 2017). This forces LTWP to monitor the vehicles that frequent the project site for security reasons, even though this may worsen perceptions of LTWP controlling access. Furthermore, the presence of a large-scale investment may fuel existing tensions and *entrench* (Sovacool, 2021) conflict by contributing to perceptions of unequal benefit distribution: ‘The project used a tactic of divide and rule, giving CSR projects to the hometowns of their workers, making communities fight among each other’.³⁹

Locals and CSOs dispute the impact of CSR efforts, pointing to the lack of quality water access⁴⁰ or a hospital: ‘People are dying of snake bites, and women die of maternal death’.⁴¹ Such grievances over unmet expectations, perhaps better addressed to ruling elites, like the County Government, are directed at LTWP, which must explain – using community liaison officers, who are not always trusted (Drew, 2020) – why it cannot resolve them or fulfil old promises. For example, LTWP cannot legally connect local populations to the grid, as this is a state utility task.⁴² This highlights a larger communication issue, partly due to recent internal turmoil, including a lack of understanding of the importance of managing social issues and community relations, and financial misconduct allegations resulting in an organizational reshuffle (Ambani, 2021).⁴³ Moreover, it reaffirms the argument that investors do not fully anticipate what is needed for successful project implementation.

Resettlement of Sarima village

Regarding the resettlement of Sarima village, locals’ grievances echo the observations made by Voller et al. (2016) of (increased) prostitution and alcoholism,⁴⁴ resulting in trauma and ‘broken families’.⁴⁵ Conversely, LTWP emphasizes the ‘overwhelming support’ they believe they have from local populations, without whom the investment would never have been completed (Pedersen and Ryelund, 2018, p.128).⁴⁶

38 Interview, Scholar, 1 June 2021.

39 Interview, Local, 3 May 2021.

40 Interview, Local, 5 May 2021.

41 Interview, Local, 3 May 2021.

42 LTWP uses its social media platforms to explain this, with a tweet by @LTWPOfficial of 31 May 2021 asking: ‘Did you know that LTWP does not distribute electricity to Kenyans?’

43 Also based on fieldwork notes, 2021.

44 Interview, Local, 5 May 2021; Interview, Director Kenyan NGO, 18 May 2023.

45 Interview, Local, 3 May 2021.

46 Also based on fieldwork notes, 2021.

However, such claims fail ‘to recognize the special rights of indigenous peoples to their lands and territories’ (Kirsch, 2014, p.209) or that local support alone does not constitute a social license. Furthermore, those whom investors acknowledge are really struggling may simply lack the ability to organize and hold out during conflicts (Behuria et al., 2017) to protest the ‘raw deal’ they perceive they have received. Some investors stressed that every researcher provides locally affected people an opportunity to express grievances to; researchers who may take those grievances at face value and are not privy to the project’s complexity.⁴⁷ This view overlooks potentially valid concerns. Scholars consistently expressed their discomfort in visiting Sarima village: ‘I did not feel secure there’.⁴⁸

The compensation given to Sarima’s resettled inhabitants is a final point of contestation: ‘How much was or should have been paid’.⁴⁹ Investors note that the replacement homes met IFC guidelines, being of equal or better quality than original structures. LTWP compensated for more and better sticks, disturbance period and for what locals would have had to spend were they to replace their *manyatta* themselves. Villagers were able to improve their *manyattas*’ roof quality through the plastic tarpaulins LTWP provided (LTWP, 2017). While the resettlement may have been in line with the IFC guidelines, compensation was treated as a one-time exchange (Buur et al., 2020) which does not recognize long-term impacts and the land’s (changing) value to which people are attached (Cormack and Kurewa, 2018). On the other hand, high compensation levels might have pitfalls if seen as unfair and excessive by other locals, highlighting the complexity of implementing international standards.

The strong grievances expressed by some research participants were amplified by national and international CSOs, adding to the project’s reputational damage, a project cost that strengthens CSOs’ ‘leverage’ in combatting rights violations (Tezcür et al., 2021). Like other large investments, the LTWP project is a good target for broader human rights discussions. Investors expect such scrutiny, and those from the development finance sector willingly admit mistakes: ‘There are projects in Latin America where we, as a sector, as investors, are not fully proud of what happened’.⁵⁰ However, not all criticism is perceived as fair:

Sometimes when you hear criticism in northern Europe, it is from people who have never been in a remote place, and they don’t understand the problem. Rule of law is different. Social security is different. And they do not understand the context. And what is possible.⁵¹

Perhaps introspection on where to direct this criticism is appropriate.

47 Based on fieldwork notes, 2021.

48 Interview, Scholar, 3 June 2021.

49 Ibid.

50 Interview, Investor, 19 January 2021.

51 Ibid.

Investors underestimated and continue to underplay LTWP's negative local impacts. Their lack of awareness of local context, expectations and needs contributed to conflicts over consultations, recognition and benefits. Such conflicts are also evident in local populations' relations with ruling elites, to which the article turns next.

Local populations and ruling elites: enclosure and exclusion result in conflicts over land rights and FPIC

When both ruling elites' ultimate decision-making power over land and resources and local populations' special connections to them are recognized, a relation of mutual recognition occurs, where local populations may expect substantial compensation and inclusion in development (Buur et al., 2020). Such a relation may be difficult to achieve. As Grindle and Thomas argued (1991), the country context matters. Colonial rule and the independence struggle have left their mark on Kenya. The LTWP project is in an area that, under colonial rule, formed part of the underserved Northern Frontier Districts, and it remains marginalized to this day. Local populations have largely been ignored, although devolution is changing the dynamics, as ruling elites need their support to be voted into office.

The relation between local populations and ruling elites nonetheless remains problematic, as evidenced from the 2021 court ruling blaming the now-defunct County Council and national government for failing to set up a Divisional Board and irregularities in the project's land lease (Kenya Law, 2021). The court's ruling that unlawfully setting apart the land did not violate cultural rights was criticised by CSOs for failing to recognize local populations' special relationship to the land. They argued that a lack of knowledge on the part of the bench prevented it from seeing 'how rights to land and culture are intricately linked, so that if land rights are violated, so are cultural rights'.⁵² Locals affected by the land allocation did not receive generous compensation. As to their inclusion in development, particularly in the decision-making process for this investment, plaintiffs alleged that the process was exclusive (Kenya Law, 2021). This claim is backed by Kazimierczuk (2020, p.217), who showed that the development phase of the investment was rather 'occlusive', reflecting the reality of doing business in a context where building a relationship with the 'right' people is key. This sentiment is echoed by Cotula (2013), noting that contract negotiations between investors and African state authorities tend to lack transparency, take part behind closed doors, and exclude interested third parties like local populations.

A particular point of contestation for the plaintiffs in the court case was 'that their free, prior and informed consent was not sought' (Kenya Law, 2021, par. 6) before the 2007 land lease approval. Despite Kenya not ratifying the International Labour Organisation's (ILO) Indigenous and Tribal Peoples Convention 169 (C169), it still had legal

52 Interview, Director Kenyan NGO, 16 November 2021.

obligations to pursue FPIC(-like processes) under other human rights instruments and their interpretative jurisprudence. Plaintiffs argued that their rights are enshrined in C169 and the Banjul Charter and that Kenya's ratification of International Covenants on Civil and Political Rights, and on Economic, Social and Cultural Rights in 1972, provoke state duties similar to FPIC (Kenya Law, 2021).

Some research participants suggested that the absence of FPIC may be partly blamed on Kenya's changing legal framework over the course of the project's development phase from 2006 to 2014.⁵³ In 2010, Kenya adopted a new constitution, which for the first time mentions Indigenous communities under its definition of 'marginalized community', which it vows to protect under Article 56.⁵⁴ According to CSOs, this, and a report already adopted by the African Commission on Human and Peoples' Rights in 2003 (ACHPR, 2005), settles the question of Indigenous identity in Kenya, at least 'on paper': 'The challenge is that the legal document [the Constitution] changed, but the conviction, the value system of the technocrats is not there yet'.⁵⁵

Ruling elites justify large investments and corresponding land deals as ways to reduce aid dependency, boost economic growth, create jobs, etc. These arguments are given even more weight against imaginaries of empty or marginal areas that could be used more productively (Lind et al., 2020). Offering a 'rival' or competing discourse (Hajer, 2006; Tezcür et al., 2021, p.1357) to the rights-based discourse of civil-society actors, ruling elites hailed LTWP as a flagship project that would contribute to Kenya's development. They defended their land lease approval in court and had no scruples in raising expectations, as when President Kenyatta fully endorsed the project at its July 2015 construction start:

It is my duty today to encourage the local people to open their eyes to the opportunities coming down this way, and to get ready to take advantage of them. Nothing will get in the way of this wind turbine project. (quoted in Voller et al., 2016, p.8)

Powerful narratives about opportunities can help shape green-economy agendas (Buseth, 2021). For global South countries especially, it can be difficult to reject a project like LTWP that is projected to bring in revenue, and which promises to advance Kenya's Vision 2030, expand electricity access and deliver carbon credits.⁵⁶ When comparing the potential negative impacts of a wind project with those of a hydropower or gas plant – for example, in terms of how many will need to resettle – 'the government may have asked itself, why not do it?'⁵⁷

53 Interview, Consultant, 20 November 2020; Interview, Consultant, Copenhagen, 3 December 2020.

54 Government of Kenya (2010), 'The Constitution of Kenya'.

55 Interview, Director Kenyan NGO, at COP 25 in Madrid, 4 December 2019.

56 Interview, Scholar, 20 January 2021.

57 Interview, Consultant, Copenhagen, 3 December 2020.

Discussion

This article has argued that, in large-scale projects operating on the margins of states, there is a need for project-developers, investors and rights advocates to consider the potentially significant gap between their expectations that the rights of local populations will be settled at the start of an investment and the conflicts that emerge over rights, recognition and benefits during project implementation, which illustrate an empirical reality that rights are far from consolidated. This insight is particularly relevant for renewable projects, as their claims to global and national benefits distract from their local impacts and potential rights violations. At the present juncture of an increased focus on sustainability and the energy transition, which have been described as ‘key moral issues of the early twenty-first century’ (McDowell, 2009, p.189), renewables have a unique selling point, as they can be marketed as inherently beneficial both nationally and globally. Renewable investments thus become ‘part of a global moral economy imaginary’ (Olwig et al., 2015, p.2316). This not only changes and ‘inverts’ (ibid.) the ‘moral economy’ of local struggles over land and livelihood (Scott, 1977, p.3), where local populations usually have the upper hand when confronting extractive investments; it may create blind spots when questions of human rights and their violations emerge:

These are the ‘good guys’. The problem with renewables – all the narrative of benefits being for the greater good is at country and planet level, but the impacts are local. ... There is a rosy picture of renewables and denial from the government, public and companies on the impact they produce. Denial. Total blind spot. Especially on social issues.⁵⁸

As the energy transition gets underway, this issue merits more attention. The case of LTWP exemplifies how climate mitigation projects can uphold processes of *exclusion*, *entrenchment* and *enclosure* (Sovacool, 2021). The article has revealed that, in the course of implementing LTWP, and in their relation with ruling elites, investors had to navigate a changing institutional and legal framework, and altered demands from elites. In an illustration of how climate mitigation projects can uphold processes of *exclusion* (ibid.), local populations, in their relations with investors, contested the manner of consultation, claiming it overlooked power imbalances and failed to recognize Indigenous Peoples. They also disputed the extent and distribution of project benefits, contributing to and *entrenching* conflicts. National and international CSOs supported them in their views. For their part, investors neglected to consider what was needed to ensure proper consultation, provide security, meet long-term needs and manage expectations.

Following Buur et al. (2019), all three relations between the key actors in investments were found to be essential for investments to be implemented with respect for the human rights of affected local populations. This includes the often-overlooked

⁵⁸ Interview, Consultant, Copenhagen, 3 December 2020.

relation between ruling elites and local populations. In the LTWP case, ruling elites failed to ensure the legality of the land lease, which resulted in a lengthy court case. On 19 October 2021, the Meru Environment and Land Court judged for the plaintiffs, finding *inter alia* that the process of setting apart the land was unlawfully undertaken and that the land title should be cancelled if after one year these irregularities were not resolved. The defendants, excluding LTWP, were given one year ‘to strictly comply with the existing law on setting apart, failing which the impugned titles will stand cancelled and the suit land shall revert to the community’ (Kenya Law, 2021, par. 161). In April 2022, an application by LTWP asked that the court ‘stays or suspends the 1-year timeline for the 2nd, 3rd, 4th and 5th Defendants to comply with the existing laws until this application is heard and determined’, citing fears that LTWP might lose KES billions, as it had not yet seen action on the ruling of 19 October 2021 (Kenya Law, 2022, par.3.10). The court denied this request in May 2023 (Kenya Law, 2023). Questions remain for CSOs about the possibility of regularizing an irregular process and the (amount of) compensation for local communities for the land that was held in trust for them and irregularly leased to LTWP. This resulted in *enclosure* of community lands (Sovacool, 2021).⁵⁹ Long after LTWP entered its operational phase, uncertainties over the implications of the court ruling remain. Announcements of additional wind development in Marsabit of up to 1,000 MW (Mutua, 2024) add to concerns over the future.

The court case reaffirms the article’s call to ‘mind the gap’, as it illustrates how rights are not necessarily settled prior to project implementation. Roadblocks over the distribution of project benefits similarly affirmed this. This may have serious implications for project-developers and investors, especially those operating in places on the margins of the state. Expecting that rights are settled amongst ruling elites and local populations prior to project implementation, project-developers and investors instead find themselves forced to take on the state’s responsibilities, as the prospect of a large-scale project raises local populations’ expectations for employment, the extension of social services, etc. This risks blurring the line between state and investor responsibilities. With a history of state neglect of local needs, local populations’ ‘expectations can shift from the state to the private sector’ (Bhatt, 2020, p.2). Until ruling elites start delivering rights and social services to local populations, they ‘know they are more likely to be successful by targeting foreign investors’ (Buur et al., 2020, p.927). However, ruling elites may not be so inclined in anticipation of a large-scale investment, with one civil-society observer claiming that ‘Marsabit County Government deliberately did not put resources into Loiyangalani because of the assumption that social services were going to be provided by LTWP’.⁶⁰

59 Interview, Director Kenyan NGO, 16 November 2021.

60 Interview, Director Kenyan NGO, 15 March 2021.

When local populations' expectations fail to materialize, their grievances, too, will be directed towards the private sector. LTWP faced this when its Winds of Change Foundation started fast-tracking implementation of CSR activities in 2011, constructing boreholes and classrooms to meet urgent needs and fulfil the expectations of those directly affected first, which may go against local notions of fairness (Lind et al., 2021). This fast track was not budgeted for and 'put LTWP in a position where they felt the need to provide services and projects that normally should have been delivered by the state' (Kazimierczuk, 2020, p.191). Although investors take on state responsibilities, they do not want to be seen as the state,⁶¹ to avoid being held accountable for its shortcomings (Kirsch, 2014). For example, local suspicions of political interference in LTWP⁶² reflect badly on investors. Although the development phase of an investment may not be able to avoid political interference, this risks reproducing existing power relations involving patrimonialism and ethnic clientelism (Kazimierczuk, 2020). Now that the court has judged that the ruling elites bypassed some crucial steps in the investment's process of acquiring land, such suspicions have been all but confirmed. Thus, while LTWP has repeatedly provided emergency food relief programmes, it makes sure to emphasize that these efforts should be seen as complementing government efforts only.⁶³

Contributing to scholarly debates about the practice of human rights in the context of renewable energy investments, the case of LTWP illustrates that rights on paper are not necessarily translated into practice. This results in investors navigating international standards to fit local realities and at times, although this cannot be presumed, compensating for rights that on paper should be safeguarded by the state. Instead of placing the burden of safeguarding rights with rights holders and defenders, and while acknowledging an important role for ruling elites, it is necessary for project-developers and investors to be fully prepared for and aware of the human rights gap and challenges in implementing business standards that they give much credence to – prior to project implementation.

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61 Interview, Investor, 22 July 2021.

62 Interview, Local (wider project area), 5 May 2021.

63 See the LTWP website: <https://ltwp.co.ke/winds-of-change/>. Also based on fieldwork notes, 2021.

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AUTHOR

Ilse Maria Renkens is a PhD candidate at Roskilde University. Her research explores how key stakeholders in large-scale wind projects in Kenya and Sweden understand and contest Indigenous rights norms, and what shortcomings in norm implementation may ensue from such contestations.

ORCID

Ilse Maria Renkens  <http://orcid.org/0000-0003-1645-1642>

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