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### Rights to land and extractive resources in Tanzania (2/2)

The return of the state

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**RIGHTS TO LAND AND EXTRACTIVE  
RESOURCES IN TANZANIA (2/2):  
THE RETURN OF THE STATE**

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## **ABSTRACT**

Under recent policy reforms in Tanzania's extractive sectors, the state is taking centre stage in the governance and regulation of minerals and oil/gas/petroleum resources. Through state-owned companies it is also re-emerging as a more direct investor in these sectors. This affects the rights of other stakeholders, not least the multinational companies. This paper analyses the key features of contemporary mining and petroleum legislation and their implications for smallholders, investors and state actors. It argues that recent return of the state signifies a major shift in bargaining power between the state and other actors, especially multinational companies. At the same time, while smallholders saw a gradual strengthening of their rights, rights to land in extractive investments are still precarious. For local communities, although local content and CSR provisions have been strengthened, local content is often reinterpreted to mean national content. This may potentially disfavour communities that bear burdens of extraction at the sub-national levels.

### **Keywords:**

Land; Mining; Petroleum; Gas; Rights; Investments; Tanzania

## INTRODUCTION

This is the second of two papers on rights to land and natural resources in the extractive sectors in Tanzania. The first paper – *Rights to land and natural resources in Tanzania (1/2). The history* focuses on the historical development of rights in the mining and petroleum sectors in mainland Tanzania (Pedersen et al. 2016). It analyses how the three main groups of actors, influence – or are influenced by – the investment processes, namely smallholders, investors and state actors. The first paper points out that rights are much more fluid than most often depicted in the good resource governance literature. Overall, the paper argued that the role of the state in *governing* investments in the extractive sectors had been gradually strengthened, from the laissez faire approach of early colonial times to the very detailed legislation we see today regulating employment conditions, environment, taxation, local content and CSR standards. Often, new legislation has been a response to investor interest. The private investors' role and influence has waxed and waned accordingly. Often, smallholders' influence on investment decisions is limited, but they experience their consequences through the loss of land and livelihoods. Therefore, rights to land are a key focus in both papers.

The present paper analyses the contemporary period that has been characterised by major reforms in both the mining and petroleum sectors. Based on a review of these reforms and the general resource extraction literature, it argues that the period has witnessed a continuation of the strengthening of the state's regulatory capacity. The recent reforms, both the Mining Act of 2010 and the Petroleum Act of 2015 are more detailed about the obligations of the extractive sector companies and the right of the state to oversee, control and tax operations. What is new in the period is the return of the state as an investor in the extractive sectors. Whereas the liberalisation phases from around 1980 onwards gave foreign investors ever-stronger guarantees against expropriation and state interference in operations, this is now being somehow reversed as the state increasingly claims a stake in operations. However, this does not mean direct state takeover like in the 1970s, but it means that state companies are envisaged to partner with the investors and also, increasingly, run their own operations. A new Public Private Partnership Act, 2010 regulates such joint venture investments that involve different combinations of public and private actors. This need not mean a smaller role for private sector companies if these are the terms set out from the beginning when licenses are applied for. However, the reforms, in particular the Mining Act of 2010, have led to higher taxes and royalties than set out in the Mining Development Agreements they had signed with the government, resembling creeping expropriation.

Smallholders saw a strengthening of their rights with the 1999 land acts towards the end of the late liberalisation period and this trend is continuing in the present period. The artisanal miners' rights are thus strengthening in the 2010 Mining Act and smallholders are increasingly protected by more detailed environmental regulation by law and in contracts. However, smallholders' rights to land are still precarious. Whereas the de jure recognition of existing, customary rights to land took place with the enactment of the land acts in 2001, de facto implementation of

the new legal and institutional framework is still often wanting (Pedersen 2012). Furthermore, land acquisition for extractive sector investments are still governed by the 1967 Land Acquisition Act, which is not very clear on the limits to the 'public purpose' required to justify expropriations. For local communities, stronger CSR and local content requirements aiming at increasing local stakes in operations are major innovations in the regulatory framework, more so in the recent 2015 Petroleum Act than in the older 2010 Mining Act. However, also here, much is decided by implementation and in this regard local content is often reinterpreted to mean national content. The emphasis on maximizing the extractive sectors' contribution to the national economy may thus limit the benefits harvested by the communities affected by operations at the sub-national level.

The paper is based on a review of the extractive sector legislation combined with a review of the literature on mainland Tanzania's economic development models and supplemented with key informant interviews conducted between 2015 and 2016. The current period has been marked by big increases in investments into the extractive sector as global commodity prices started increasing around the turn of the century, peaked in around 2007–8 and were followed by a major downturn from around 2014 onwards. However, Tanzania is still experiencing strong overall economic growth rates of around 7% annually and high levels of investment. Investments in the extractive sectors may to some extent have abated, but they have not stopped. New mining and petroleum sector projects are being launched at a steady rate across the country, triggering related investments into infrastructure and industrialisation. Typically, the extractive investments are on a scale that requires the involvement of foreign companies with capital and capacity, but increasingly domestic Tanzanian state companies are also involved, often in different types of investments in the form of joint ventures and partnerships.

Rather than providing a detailed mapping of *all* changes in laws and regulations, the paper is structured around landmark decisions, that is the emergence of new policy paradigms that require not only adaptation, but also significant political and administrative effort to institutionalise (Hall 1993; Kjær & Therkildsen 2012). Furthermore, whereas we may write about 'state', 'smallholders' and 'investors' as if they are fixed categories it is important to bear in mind that these are analytical constructs. Indeed, it was a main finding in the historical paper that these categories are characterised by both a great deal of continuity and change. The reach of 'state' institutions, for instance, develops from colonial times to independence with significant implications for different groups of smallholders and investors. The further unpacking of these categories – and of the more political struggles over the claim to represent smallholders, the state and investors – is a task for future research.

Finally, in parts of its history Tanzania's rights regime has been influenced by international institutions in different ways, but this will not be the main focus of the present paper. In the period it covers, the various regional and international voluntary standards on extractive resources governance have more become important. Most of these initiatives put pressure on both mining companies and host nations to promote, adopt and implement best practices in transparency,

accountability, and respect to communal rights, labour and safeguarding the environment (Basada & Martin 2013). Despite their popularity in recent years, critics argue that, these voluntary standards are too soft and suffer from lack of political will from both resource-rich nations and mining companies (MacNamara 2011). Most notably, Tanzania joined the Extractive Industries Transparency Initiative in 2009 and a local chapter, Tanzania Extractive Industries Transparency Initiative (TEITI), was formed by a collaboration of stakeholders from civil society, government departments and extractive companies in oil, gas and mineral sub-sectors (TEITI 2015). Such developments will be mentioned when relevant, but since the paper's main focus is on the development of rights, which are most often decided upon at the national political level, this part of the analysis may appear cursorily. Zanzibar, which is also part of the Union, has its own legislation when it comes to land, and is envisaged to also get it for petroleum, and will therefore not be included.

**Box 1            Tanzania's mining sector in brief**

Tanzania is endowed with various minerals such as diamonds, gold, coal, uranium, copper, nickel, platinum group metals, silver and tanzanite, a rare gemstone unique to Tanzania. Other minerals include iron ore, tin, lead, bauxite, rubies and graphite (MEM 2014). The country is among Africa's top mining nations, currently being Africa's fourth-largest gold producer behind South Africa, Ghana and Mali (Lokina & Leiman 2014). There are seven large-scale gold mines, one active large-scale coal mine, several medium-scale mines (mainly for diamonds and tanzanite). Similarly, various advanced<sup>1</sup> projects for other minerals including uranium, coal, iron, copper and nickel are ongoing at different stages in different parts of the country.

Artisanal mining forms a big part of the mining sector; there are a number of small-scale mines, mainly for gold, diamonds and coloured gemstones, operating across the country, which provide many jobs. For long, artisanal mining's importance was downplayed by the government due to the low taxes generated from the sector. However, under the current law (Mining Act 2010), the position and importance of artisanal miners has been strengthened as highlighted in section 3 of this paper.

## **CONTEMPORARY MINING RIGHTS – THE RETURN OF THE STATE**

The mining sector has been an important avenue for attracting foreign investment into Tanzania since colonial times. After a downturn under the period of African Socialism, when the state sought bigger direct stakes in operations, the sector has grown steadily over the years since the first liberalisation reform in 1980 to the present period (see Pedersen, Jacob, Kweka and Maganga, 2016). Whereas the state's regulatory power has been on the increase throughout, its direct economic stake in the sector has thus been waxing and waning. The structural adjustment period in the 1990s saw a retrenchment of direct state interests, but the tide has turned in the present period, especially with the introduction of the 2010 Mining Act. It signifies a major shift in bargaining power between the state and private investors, especially multinational companies.

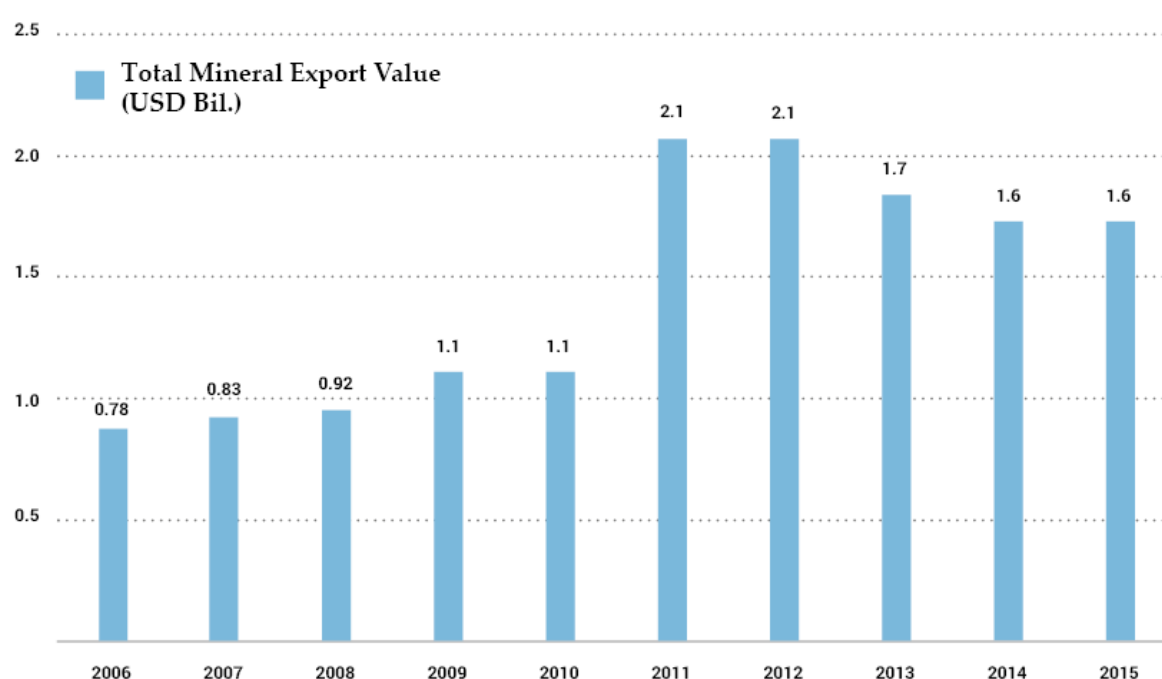
The contrast with the 1998 Mining Act is significant. The latter aimed at attracting foreign investments in the mining sector through various incentives to create an enabling environment, for instance allowing 100% foreign ownership, unlimited repatriation of profits and capital, and it offered guarantees against nationalisation and expropriation (Bourgouin 2011). Other incentives include generous tax exemptions (no import duty or Value Added Tax (VAT)) on mining equipment and a relatively low royalty rate of 3% (Butler 2004). By comparison, the 2010 act aims to maximise Tanzanian stakes in operations through increased state participation through state-owned enterprises, removal of tax exemptions, increase in royalty levels, and a push for local content requirements (URT 2010). It also promotes indigenous investors by stipulating (section 8) that licenses to mine for gemstones should only be granted to Tanzanians, regardless of the size of the operation, except where the Minister determines that the development is most likely to require specialised skills, technology or a high level of investment (URT 2010).

The sector remains the largest recipient of foreign direct investments, dominated by the gold sub-sector. It was the largest contributor to Tanzania's exports until 2014 when it was overtaken by tourism. It has long been a goal that mining should contribute 10% of the country's GNP by 2025. Revenues have gone up recently, but they are still far from the 10% threshold. Despite the boom in in the past two decades, the mining sector thus still faces challenges. Often, these relate to the political situation in the country, where the perception that the sector contributes too little to state revenues and the general economy is widespread. The share of jobs and revenues going to Tanzanian stakeholders is increasing (Lange & Kinyondo 2016), but many critics still find that integration with other sectors of the economy is limited. They argue that efforts to fully integrate the mining sector with the rest of the economy are hindered by various factors such as weak capacity of domestic firms and local entrepreneurs, poor policies, and weak institutional capacity and strong interests of the ruling elites (Hansen, M. W. et al. 2015).

The perception that the mining sector does not contribute may to some extent date back to the period before the 2010 Mining Act, which toughened conditions significantly, and maybe even to the 1990s, before the 1998 Mining Act when a number of contracts were signed in a rushed manner (Nyankweli 2012). Based on

the recommendations of a number of mining sector review commission reports in the 2000s,<sup>2</sup> terms have been strengthened significantly. Not only is the state seeking more involvement in operations through direct shares in new operations through the State Mining Corporation (STAMICO) and National Development Corporation (NDC), it has also toughened the fiscal terms of existing operations despite stability clauses in the mining development contracts, to an extent that the term ‘creeping expropriation’ may be applicable. Furthermore, local content provisions have been strengthened, calling for companies to more actively procure local goods and services as well as train Tanzanian staff to replace expatriates. However, it has been noticed that these requirements are not always very binding for the companies (Mjimba 2011).

**Figure 1 Historical Mineral Export Value (Gold, Silver & Copper) 2001 – 2015**



Note: Tanzania Minerals Audit Agency Annual Report 2015

### The Mining Act of 2010 in short

The current Mining Act No 14 of 2010 replaced the 1998 Mining Act, which was considered by various stakeholders (civil society organisations, political opposition and the general public among others) to be very generous to mining companies, especially regarding fiscal terms (taxes and royalties) (Fisher 2007; Curtis & Lissu 2008; Bourgouin 2011). The new act was inspired by the Mining Policy of 2009, which was the result of a series of mineral sector review reports (the Kipokola Report 2004, the Masha Report 2006 and the Bomani Report 2008), which had revealed that the country had not benefited from mining as much as it should (SID 2009). The three reports recommended among other things: a review of taxation and a strengthening of government oversight in large-scale mines, and the need for the government to take an equity share in minerals (Bomani 2008). Based on such recommendations a new mining policy was approved in 2009 followed by the

current mining act of 2010.

The overall aim of the new mining act is to strengthen Tanzanian stakes in and benefits from the mining sector. This will be achieved through state participation in mining investments, promotion of Tanzanian companies in certain sectors, and increased taxes and royalties and direct Tanzanian stakes in mining operations (URT 2010). A particular change is the strengthening of the rights of artisanal miners, who were previously often expelled when the larger companies entered an area, giving rise to conflicts, especially in the gold sub-sector. In most cases this has happened because the granting of mineral rights to large-scale investors effectively awards land rights to the mineral right holder at the expense of smallholders. An element in this has been the poor compensation schedules and lack of proper environmental protection (Ayis 2009; Lange 2008; Lissu & Curtis 2008; Lugoe 2010). The new act also seeks to accelerate the integration of the mining sector with other sectors of the economy, maximising the contribution of the mineral sector to the economy, increasing income and employment opportunities for Tanzanians and ensuring state participation in strategic mining ventures. It has also toughened the conditions under which mining companies operate by removing some tax exemptions and increasing taxes and royalty levels (ibid).

Some provisions of the 2010 mining act have been slightly amended following the introduction of the Tanzania Extractive Industries (Transparency and Accountability) Act in 2015. The changes are not too dramatic, but may have different implications for mineral rights holders (Kasanda et al. 2015). The most notable ones include:

- Increase in initial capital investment for primary mining licence from a maximum of US \$100,000 to US 5 million.
- Requiring mining and special mining licence holders to commence mining activities within 18 months of being issued with the licence.
- Formally incorporating Tanzania Minerals Audit Agency in the Mining Act.
- Limiting the duration of the mining development agreements to ten years.
- Introduction of the Tanzania Extractive Industries Transparency and Accountability Committee which will have powers to access and publish information from mining companies.
- Limiting the practice of applying for a mining or special mining licence over a prospecting licence issued to another right holder.
- Allowing the High Court of Tanzania to review decisions made by the Minister of Energy when needed.

## **Box 2 State participation in mining investments**

The emphasis on the state's right to participate in mining investments has moved beyond mere rhetoric and the state has invested heavily to transform and recapitalise the once inactive State Mining Corporation (STAMICO) and the National Development Corporation (NDC) to oversee state interest in mineral resources. The two state-owned enterprises (SOEs) are now playing a more active role in the mining sector especially in coal, gold and Tanzanite

(Jacob 2015).

Since the new mining act came into effect in 2010, STAMICO has regained the ownership of the Kiwira coal mine in 2013 after failed privatisation under TANPOWER.<sup>3</sup> STAMICO is currently searching for partners to invest in the coal mine.<sup>4</sup> The corporation also owns the Tulawaka mine, formerly operated by Canada's Barrick Gold and now trading in Tanzania as Acacia Mining PLC. Tulawaka is owned by STAMIGOLD, a subsidiary company under STAMICO. STAMICO is also involved in a joint venture with Tanzania One (South Africa) in a Tanzanite mine in Mererani, Manyara region. The company also currently owns the Buhemba gold mine through its subsidiary company STAMIGOLD. STAMICO is also involved in a joint venture with TANZAM 2000 in Buck Reef gold mine around Lake Victoria. TANZAM owns 55%, while STAMICO has 45%.

The NDC has also been very active in the mineral sector. In 2011 the NDC and its Chinese partners signed a \$3 billion deal to set up Tanzania–China International Mineral Resources (TCMR) as a joint venture. The deal was hailed as the biggest single investment deal in Africa at the time. The project involves the development of the Mchuchuma coal mine in south-western Tanzania, with a coal-fired power plant being established as part of the same project. It is estimated that the plant will generate 600 megawatts of electricity, of which 350 megawatts will be fed to the national grid, while the government is expected to receive 3.13 trillion shillings per year (Taylor 2011; Ng'wanakilala 2011).

Under the same joint venture agreement, the NDC and its Chinese partners are also involved in the development of an iron-ore project in Liganga. According to the NDC, the project is expected to produce over one million tons of iron annually and will make Tanzania the third-largest iron producer in Africa and help to reduce the burden of its imports.

The NDC is also involved in another joint venture with the Intra Energy Corporation of Australia in Ngaka coal mine located in Mbinga District, Ruvuma Region. Under the joint venture, a new company called TANCOAL was formed in 2008<sup>5</sup>, and production started in 2011. TANCOAL produced 327,141 tons of coal worth about Tsh 25.2 billion between 2014 and 2015. TANCOAL has been selling coal to various industries in Tanzania and neighbouring countries such as Kenya, Malawi and Zambia. The project also involves the construction of a 270 megawatts coal-fired power plant.

### **Investors vis-a-vis state authorities in the mining sector: rights and obligations**

According to the mining policy (2009), the Ministry of Energy and Minerals (MEM) is responsible for guiding investments in mining by administering, regulating, promoting, facilitating and providing services to both large-scale and small-scale

mining operators (URT 2009). It is also in charge of issuing licences (mineral rights), collection of mining tax, royalties, and other charges (MEM 2014). Mining investments are protected by the state mainly through the Mining Act (2010) and the Tanzania Investment Act (1997) which regulates all investments in the country. The Investment Act offers protection to mining companies against nationalisation and expropriation by the state. The act is also very clear that no legally registered business enterprise shall be nationalised or expropriated by the state (URT 1997):

*There shall not be any acquisition, whether wholly or in part of a business enterprise to which this Act applies by the State unless the acquisition is under the due process of law which makes provision for- (a) payment of fair, adequate and prompt compensation, and (b) a right of access to the Court or a right to arbitration for the determination of the investor's interest or right and the amount of compensation to which he is entitled. (URT 1997; section 22)*

The 2010 Mining Act calls for state participation and state control that in some ways contradicts the protection previously provided to investors. Its call for active involvement of the state as an investor in the sector (section 10: 2) marks a significant change from the 1998 Mining Act, which had done away with the state's right to acquire stakes in operations. Now the government would have a right to take a stake in any *new* 'strategic' mining operation, to be determined by 'the type of minerals and the level of investment'. Existing MDAs under the 1998 act won't be affected. It (section 112: f) further vests more powers in the minister of mines, allowing the minister power to prescribe a standard model form Mining Development Agreement (MDA) for all *new* projects exceeding US \$100m. This is opposed to the 1998 act (section 10: 2) where the minister had limited power over MDAs. This is due to the fact the both the 1997 investment act and the previous mining act (1998) were enacted at the peak of the liberalisation era which focused on attracting FDI and protecting foreign investments. The new mining act (2010) calls for a strong Tanzanian stake in the sector.

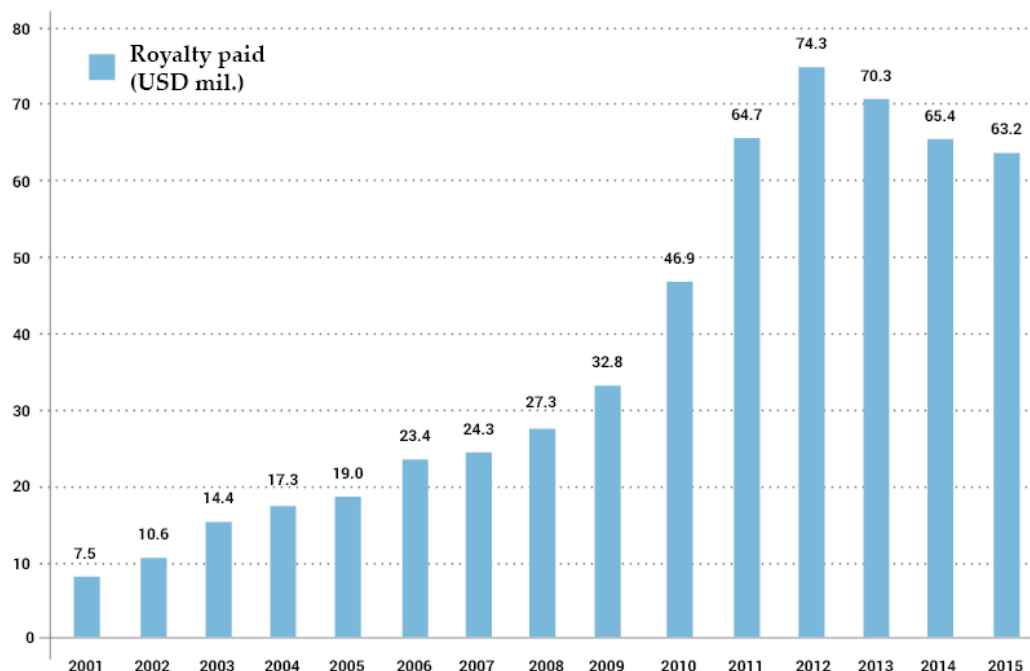
The act also amends the method by which government royalties are calculated (section 87). Royalties are levied on the gross value of minerals, rather than the previous method of calculation which was based on the net value. It also increases the rates of royalties levied by the government on the gross value of some minerals as follows (section 87:1) (previous royalties rate in brackets):

- Uranium – 5% (3%)
- Diamonds – 5% (5%)
- Metallic minerals (copper, gold, silver, and platinum group) – 4% (3%)
- Polished and cut gemstones – 1% (0%)
- In the case of other minerals, including building materials, salt, all minerals within the industrial minerals group – 3%

This contradiction in the legal framework is equivalent to what may be called 'creeping expropriation' in international mining investments, a phenomenon characterised by encroachment of investor's ownership rights by a host state through nationalistic pieces of legislation (Leon 2009; Ayisi 2009). The act further

calls for a greater degree of disclosure and transparency (section 100; see also box on transparency and accountability below) by the holders of mineral rights in respect of reports, records and general information.

**Figure 2 Historical royalties paid by large-scale gold mines (2001–2015)**



Source: Tanzania Minerals Audit Agency Annual Report 2015

### **Investors vis-a-vis state authorities in the mining sector: enforcement**

The Mining Act itself is not very specific on the settlement of disputes between mining companies and state authorities, but it refers to the Model Mining Development Agreements, stating that they should outline the provisions guiding conflicts ‘arising out of or relating to the development agreement, the administration of this Act, or the terms and conditions of a special mining licence, including provisions relating to the settlement of any such dispute by international arbitration (URT 2010; section 10, 4, d).

Tanzania is a member of the International Centre for Settlement of Investment Disputes (ICSID) and a signatory to the United Nations Commission on International Trade Law (UNCITRAL). This implies international arbitral awards are enforceable through the Tanzanian judicial system and hence mining companies are guaranteed the right to international arbitration in the case of disputes with the government (Kapinga & Sinda 2002). However, Tanzania has in recent years joined other African countries (South Africa, Zimbabwe, Liberia and Senegal) in expressing dissatisfaction with the ICSID system (Cosmas 2014). Tanzania now increasingly encourages disputes settlement under domestic law and national tribunals as opposed to international arbitration. This will be discussed in more detail in the section on petroleum investments.

**Box 3            The Tanzania Minerals Audit Agency and the Tanzania Revenue Authority**

The Tanzania Minerals Audit Agency (TMAA) was established in 2009 replacing the former Gold Audit Programme at MEM following recommendations from the mineral policy of 2009. A semi-autonomous institution under MEM, TMAA is responsible for monitoring and auditing financial and tax records of mining companies, and ensuring sound environmental management in all mining areas. It also audits quality and quantity of minerals produced and exported by mining companies to ensure the state benefits accordingly. TMAA works in close collaboration with the Tanzania Revenue Authority (TMAA 2011).

The Tanzania Revenue Authority (TRA) is responsible for administering tax laws related to the mining sector for the purpose of assessing, collecting and accounting for all revenues related to the laws applicable. Taxes associated with the mining sector include both income and corporate taxes and consumption-related taxes arising from VAT and customs duties. Since mining companies are among Tanzania's main taxpayers, mining is categorised under TRA's large taxpayers department (Muganyizi 2012).

**Smallholders' and artisanal miners' rights to land and resources**

Things thus change a great deal upon the successful discovery of minerals, overruling previous categories of land use and with the exception of conservation areas which fall under reserved land (Lugoe 2010). Whereas the 2010 Mining Act sees a strengthening of artisanal miners' rights to mineral resources, smallholders' rights to land are almost as precarious as they have been since colonial times when mineral resources are discovered. Once minerals are discovered underneath land, mining legislation (the Mineral Policy and Act) takes precedence over land legislation that regulates surface rights. This is usually followed by the granting of mineral rights, which immediately nullifies existing land rights accompanied by resettlement of communities who are forced to vacate their ancestral land against their will (Emel et al. 2011; Ayisi 2009; Lange 2008; 2011).

These provisions in some ways neutralise the better protection of existing rights to land in the 1999 land acts. According to the Land Act, minerals are not categorised as part of the land in Tanzania. Subsoil mineral resources do not feature among its three categories of land which are: general land, village land and reserved land (URT 1999, section 4:4). Instead, the discovery of subsoil mineral resources falls under the 1967 Land Acquisition Act, which provides for compulsory acquisition which allows existing surface rights-holders to appeal the level of compensation, but not the land acquisition in itself.

The level of compensation, however, has improved. Whereas rights-holders previously were only compensated for the improvements they had made on the land (for instance houses and crops), with the 1999 land acts they are also compensated for the market value of their land. They also make it clear that land

acquisition should go in parallel with the right to adequate and prompt compensation to affected landowners (URT 1999). The Mining Act has two provisions for compensation of surface land rights-holders. First, they are entitled to compensation for disturbance or damage during operations (section 96) and secondly, if compulsory acquisition of land becomes necessary, mining companies are required to ensure smooth implementation of a plan on compensation, relocation and resettlement of the owners or occupiers of the land before commencement of any mining operations (section 97. See also box 4). The Mining Act is particularly specific on compensation for compulsory land acquisition which, according to the act, will be settled under guidance from the Land Act and the Village Land Act (URT 2010). Nevertheless, since the liberalisation of the mining sector in 1990s, compensation for loss and damages has remained the main source of conflict in mining investments and hence a major element of dispute resolution.

A similar trend is observed on mining rights between artisanal miners and large-scale mining. Past experiences from the gold sub-sector (Geita, Bulyanhulu and North Mara) showed that artisanal miners from different parts of the country have been forcibly removed from their mining plots to pave the way for large-scale mining (Emel et al. 2011; Schroeder 2010; Lange 2008; LEAT 2002). This was widespread after the 1998 mining act, whose provision that everybody had the right to apply for a mining license did not de jure champion the interests of large-scale foreign mining companies, but did de facto because of artisanal miners' limited capacity to do so. In fact, some have argued that this favouring of large multinational corporations may still apply. Despite the strengthening of artisanal miners' rights through section 15 (2b), which emphasises the granting exclusive areas for primary licenses to artisanal miners, the lack of a clear commitment to uplift the conditions of artisanal miners, they write, is due to local elites' vested interest in the large-scale mining operations (Jønsson & Fold 2011).

The typology of conflicts is likely to change in light of recent mining investments in the form of joint ventures involving SOEs and MNCs. Under this new investment configuration (joint ventures), the topography of investment-related conflict is likely to change from being one of struggles between smallholders and investors (mainly foreign), to one between public-private partnerships and smallholders. This newly configured landscape contains a potential conflict of interest for the state, as the state is now part of investments and hence conflicts between local people and government could occur.

**Box 4                      Environment in the mining sector**

Environmental issues appear with greater force through the period and become a tool for increased state regulation. Whereas for instance the 1979 Mining Act stated that operations should take 'proper account of environmental and safety factors' it was not very detailed on how to monitor and enforce these provisions. Even the 1998 Mining Act provided a waiver for forced compliance to deal with environmental problems arising from mining activities. Often environmental assessments prior to operations were shallow, preliminary in nature and driven more by the desire to secure donor

development assistance than to prevent pollution (Mwalyosi, Hughes, & Howlett 1999).

However, with the Environmental Management Act in 2004, the environmental impact assessment got more institutionalised by requiring that assessments should be undertaken to 'ensure that environmental considerations are explicitly addressed and incorporated into the development decision making process' (URT 2004, p. section 12). The scope of these assessments must be approved by the National Environment Management Council (NEMC), an institution responsible for enforcing environmental regulations, pollution control measures and monitoring compliance by mining companies. NEMC also conducts environmental audits in mining areas to ensure compliance with environmental laws and regulations and advises the minister on his decision. These provisions are now incorporated into the 2010 Mining Act along with a number of other quite detailed environmental regulations. Whether this has also strengthened the technical capacity to enforce environmental regulation, which has previously been found wanting (Carstens & Hilson 2009), is not clear.

Apart from the sector-specific authorities, the Vice President's office, Division of Environment (VPO-DOE), is also responsible for coordination of environment programmes and projects related to mining activities. The division is also responsible for environment planning, monitoring and coordination at a national and international level (VPO 2004).

### **Smallholders' and artisanal miners' rights to land and resources: enforcement**

Both land and mining legislations share common principles around security of tenure, compensation for loss and peaceful settlement of disputes. Both legislations provides for arbitration, bipartisan negotiations and court hearing as tools for dispute resolution. The legal framework provides various avenues (legal intervention and reconciliation) for settling disputes between various actors in the sector, especially those involving the state against multinational companies and also conflicts between multinationals and small-scale rights-holders. Section (102) of the Mining Act empowers the commissioner of mines to settle disputes between persons involved in prospecting or mining operations and other stakeholders. Section (104) of the act offers the option to appeal to the High Court in case any party is not satisfied with commissioners' decisions (URT 2010).

While various legislations provide various channels to address compensation claims and conflict resolution, the reality on the ground is different due to the uneven playing field between the unrivaled corporate, financial and legal superiority of MNCs over other rights-holders such as such as farmers, herders, fishermen, artisanal miners and local authorities and non-governmental organisations acting on their behalf (Lugoe 2010). However, recent experience shows mining companies are increasingly becoming interested in negotiating with

existing land rights holders due to concerns over security, financial loss and overall long-term sustainability of investments (ICMM 2015). Despite existing conflicts, it remains vital for the government and other stakeholders to find sustainable means to reconcile the interests of both the state and small-scale right-holders. While most of the benefits associated with mining investments accrue to national level, most of the costs, such as loss of land and livelihoods, relocation and pollution among others, are felt at the local level.

#### **Box 5 Tanzania and international mining standards**

##### *World Gold Council Standards*

The Conflict-Free Gold Standards were released by the World Gold Council in 2012 to ensure that gold is extracted in a manner that does not accelerate armed conflicts or lead to serious abuses of human rights. The standards aim to stop gold mining from funding conflicts in gold-producing states and they are applicable throughout the entire gold supply chain.

##### *Kimberley Process Certification Scheme*

Tanzania is a signatory to the Kimberley Process Certification Scheme (KPCS) which was established in 2002 to control trade in diamonds from conflict zones through a certification and sanctioning scheme. The KPCS is also a coalition between civil society, governments and the diamond industry. It provides both incentives and disincentives in the form of certification for compliance and sanctions for non-compliance, and also applies a 'name and shame strategy' to expose companies for non-compliance (Coumans 2010).

##### *The Africa Mining Vision*

The Africa Mining vision (AMV) was adopted by the summit of heads of states of the African Union (AU) in 2009. The AMV aims at achieving a... 'Transparent, equitable and optimal exploitation of mineral resources to underpin broad-based sustainable growth and socio-economic development' (AMV 2009). It further emphasises the need to integrate mining into Africa's long-term development agenda, transforming natural resource wealth to ensure African economies are competitive globally with the ultimate objective of reducing African states' economic dependence on commodity exports. The AU has called on its member states to 'incorporate AMV in all relevant national visions, policies, laws, regulations, standards and procedures' but recognises that the domestication process of the AMV needs to be country and context specific (ibid).

##### *Responsible Mineral Development Initiative*

The Responsible Mineral Development Initiative (RMDI) was established at the World Economic Forum in 2010 with the aim of developing a better understanding of the challenges and complexities involved in making mineral-led development responsible and sustainable (WEF 2013). The initiative was

established out of the realisation that despite the potential of the mining sector to transform the economies of mineral-rich developing countries, governments and communities are increasingly questioning the role of this sector. Increasing debates over benefit sharing and escalating trends in resource nationalism call for broader stakeholder engagement (ibid). Tanzania is currently being assisted technically by the United Nations Development Programme (UNDP) to implement the initiative.

#### *International Finance Corporation Standards*

The International Finance Corporation (IFC) is a body that serves as the investment wing of the World Bank. It has developed its own standards which act as a benchmark for disbursing funds related to various investment projects in the world, including those in the extractive industry. IFC's standards require companies to incorporate and seek free, prior, and informed consent (FPIC) from surrounding local communities especially where projects are likely to have severe social and environmental impacts.

### **Local content, local communities and local governments**

Issues related to CSR and local content do not feature as prominently in the 2010 Mining Act as in the 2015 Petroleum Act. Still, the 2010 Mining Act also covers sections on these issues building from the concerns raised by the Bomani Review Report of the 1998 Mining Act (Bomani 2008) and the 2009 mineral policy which sought to integrate the mining sector with the broader economy and promote local participation. This is done in ways that affect both the national and the local level of operations. First, the act forces foreign mining companies to list on the local stock exchange and set aside a certain percentage of their production for processing, smelting or refining within the country (section 109).

Secondly, section 44 (d) of the mining act provides conditions for granting special mining licences (SML) which include among other things: employment and training of Tanzanian nationals, succession plans for expatriate staff and plans for procurement of goods and services available in Tanzania. It also stipulates that, in renewing SML, investors must show proof of how the conditions for granting the SML were implemented. SML is covered by Mining Development Agreements.

Thirdly, procurement of local goods and services is further cemented in sections 34(1) (f), 41(4) (g) and 49(2) (h). With regard to employment and training of locals, sections 47(b) and 51(e) of the 2010 act call for government to prioritise employment of local nationals during licensing and call on investors to put in place succession plans to expatriate employees. Sections 44(d) (iii), 47(b), 50(c) and 52(e) of the act provide guidelines for tailor-made training in the mining sector (ibid).

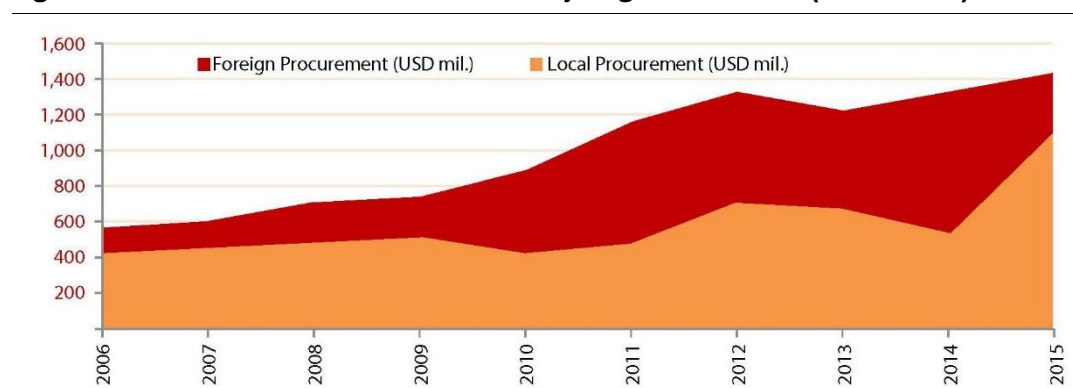
### Local content, local communities and local governments: enforcement

The Ministry of Energy and Minerals is responsible for enforcing laws and regulations guiding mining activities and environmental protection, environmental monitoring and auditing, dispute resolution in the mining sector and coordination of Corporate Social Responsibility (CSR) activities (ibid). On top of that, the ministry in collaboration with the Prime Minister's Office (PMO) is also responsible for enforcing local content policy.<sup>6</sup> According to the energy policy (URT 2015a), the ministry will collaborate with other institutions such as the national oil and gas company, local government authorities and the private sector.

Local content enforcement provisions are quite general and more administrative through the submission of plans; companies are required to submit their local content plans (employment, local supply training and technology transfer) to the ministry and evaluation will take place on an annual basis to track the extent to which the companies have lived up to their promises.

There has been significant increases in the procurement of local goods and services by large scale mines in recent years. In 2015, it surpassed foreign procurement by far (TMAA 2015). Still, critics have argued that linkages remain limited to low value goods and services due to shortage of human capital and poor infrastructure. Existing local content requirements in the 2010 Mining Act are also non-binding (Mjimba 2011). Others have pointed to weak capacity of domestic firms and local entrepreneurs as factors limiting successful linkages in the mining sector (Hansen, M. W. et al. 2015).

**Figure 3 Procurement of Goods and Services by Large Scale Miners (2001–2015)**



Source Tanzania Minerals Audit Agency Annual Report 2015

## **CONTEMPORARY PETROLEUM RIGHTS – THE RETURN OF THE STATE**

Unlike the mining sector, the petroleum sector remained unreformed until the late 2000s. This is due to the fact that commercial interest in exploring and extracting petroleum resources was limited. The first gas finds were made around Songo Songo Island in the south-eastern part of Tanzania in 1974, but gas is difficult and expensive to transport for export markets and the Tanzanian domestic market was still deemed too small for viable production. Therefore, it was only in 2004 and only with significant donor assistance that gas-to-electricity production based on the Songo Songo finds began (Pedersen & Bofin 2015). Since then, commercial interest has taken off, and with the large offshore, deep-sea finds in the Indian Ocean in the late 2000s, extraction on a larger scale has become more likely. Subsequently, the entire regulatory framework has undergone major reforms, transforming both laws and institutions. This has resulted in a major strengthening both of the state's regulatory power as well as its direct involvement as an investor in the petroleum sector.

The change from previously can be illustrated in Tanzania's national energy policy. Whereas the former energy policy from 2003 focused on developing the 'limited resources' in order to reduce fuel imports, which, by then, consumed 26% of national export earnings (URT 2003b, p. 22), the Energy Policy of 2015 has changed focus to developing the significant amount of natural gas that has been found, including managing petroleum revenues to promote the 'domestic use of petroleum resource to accelerate socio-economic transformation'. This includes the objective to 'enhance State and public participation in developing petroleum infrastructure' (URT 2015a). Similar objectives can be found in the Draft Natural Gas Utilization Master Plan, which outlines how to develop the natural gas sector in Tanzania (URT 2016). In other words, over a decade, the perception of the sector has developed from one about how to remedy scarcity to one about how to manage and distribute wealth. In this, the state should no longer primarily play a role as a regulator, but also as a direct investor in the sector.

The major new act of the period is the Petroleum Act of 2015, which provides the outline for the development of the entire sector in a comprehensive and up-to-date piece of legislation. A major change from the 1980 Petroleum Act is the clearer separation of regulatory and commercial functions, which had previously been taken care off by TPDC. With the 2015 act a regulator for exploration and production, the Petroleum Upstream Regulatory Authority (PURA) was established, to grant reconnaissance permits and to advise the minister before entering into contracts and production sharing agreements with companies, emulating the establishment of a similar institution for the midstream infrastructure and downstream marketing activities in 2003, the Energy and Water Utilities Regulatory Authority (EWURA), though the division of labour between PURA and the ministry is not always clear (Clyde & Co 2015; Maajar & Tibshraeny 2015). EWURA was inscribed in the petroleum laws with the 2008 Petroleum Act, which covered only midstream and downstream activities, and whose making most likely

was triggered by the Mtwara gas-to-electricity project that was implemented by a private consortium soon after the completion of the Songo Songo project. Unlike the 2015 act, it did not require state participation in, or ownership of, key infrastructure.

PURA's role is to regulate and monitor activities in the upstream sector. TPDC on the other hand, is expected to play a more prominent commercial role on behalf of the state, granting licenses to other companies, entering into joint ventures, or carrying out operations on its own. Recently TPDC was awarded two offshore blocks. It had always been envisaged that TPDC could choose to acquire interests in the operations of private oil companies to ensure Tanzanian participation in what would typically be foreign-run operations, but the size of interests varied, now upwardly. Whereas the Model Production Sharing Agreement from 1989 had operated with up to 50% interests, this was reduced to up to 20% in 1995 and 2004, and increased to not less than 25% in 2008 and 2013. In the Petroleum Bill presented to Parliament in June 2015, this is turned into a mandatory 25% interest for TPDC (section 45, 5), but amended in the final version from September to 25%, but with the exit option 'unless the National Oil Company decides otherwise' (URT 2015c, p. section 44). Combined with the domestic market supply obligation and the ever-tougher fiscal regime, the direction towards maximising benefits, including increasing the state's direct involvement as an investor, is clear.

For private sector actors, the Petroleum Act's priority to maximise the petroleum sector's contribution to the national economy means that they have to operate under stricter conditions than previously. The act's very detailed provisions in all aspects of petroleum operations mean increased state regulation. Furthermore, the aim to promote Tanzanian stakes in the sector through the national oil company combined with local content provisions aiming at enhancing local participation across the petroleum value chain signify more direct involvement in their commercial activities. This may also imply a higher risk of political meddling in their affairs. From their perspective, a worrying element in this regard may be the absence of access to international arbitration in case of conflict – an element that was also absent in the 1980 Petroleum Act, but had been an element of all model production sharing agreements (PSAs) from 1989 onwards.

For smallholders, on the other hand, the act marks several improvements. Surface land rights are still of secondary importance vis-à-vis the subsurface petroleum rights. In this regard, the act continues in the tradition from colonial times: rights to minerals are vested in and shall be managed by the government and surface rights-holders have no right to extract. However, due to improvements in the general legal and institutional framework governing land in Tanzania, existing rights to land are better accommodated than in previous laws. Furthermore, social and environmental concerns are increasingly incorporated into the new legal and administrative frameworks. CSR plans for how to link up to communities are now mandatory. Furthermore, very detailed local content provisions mean new economic opportunities. Overall, there is a move away from the do-no-harm approach reflected in the 1980 Petroleum Act, towards a more interactionist role for the operator.

## **The 2015 Petroleum Act in short**

The Petroleum Act covers Tanzania Mainland and Zanzibar, but, with time, the latter will get its own institutions to govern the sector (URT 2015c, p. section 2).<sup>7</sup> The associated Oil and Gas Revenues Management Act of 2015 and the Tanzania Extractive Industries (Transparency and Accountability) Act of 2015 were also passed by parliament in July 2015. The acts build on a number of policies, most importantly the National Natural Gas Policy (2013), the Draft National Petroleum Policy (2014) and the Local Content Policy (2015). The main focus of the Petroleum Act is the regulation of the relation between oil companies and the state, where important economic interests are at play. It covers oil and gas, as well as all phases in the petroleum cycle, from upstream (exploration and production) over midstream (transportation, storage and wholesale marketing) to downstream (refining, marketing and distribution of products).

Initially two sets of legislation were underway; one for oil and one for gas. A Natural Gas Act had been drafted and was scheduled for parliament in the beginning of 2015 (Omujuni 2014), but it was withdrawn, supposedly because it was realised that in order to avoid overlapping legislation one consolidated Act would be better. Subsequently, the process was rushed through, both in terms of the drafting of the new act and when it was passed by Parliament under a Certificate of Urgency in July this year. Explanations for the rushed through process differ, but most point to a president, President Jakaya Kikwete, who wanted this as part of his legacy before retiring after the elections a few months later, combined with pressure from the big foreign oil companies, which had found large quantities of natural gas in the Indian Ocean offshore of southern Tanzanian and needed up-to-date legislation before investing billions of dollars.

The hurried policymaking process also means that there are contradictions in the act. Some are likely to originate in the late merging of two different draft acts; the draft Natural Gas Act and the draft Petroleum Act. Thus, for instance, whereas the act mentions that both the upstream regulator, PURA, and the mid- and downstream regulator, EWURA, are tasked with promoting local content contributions by local businesses, only PURA is mentioned under the local content provisions (section 218-221). Furthermore, under 'Offences and Penalties' in the act (Part X) a distinction between petroleum and natural gas is upheld, making petroleum a PURA affair and natural gas an EWURA affair, though this distinction seems to be a reminiscent of the separate policies and makes little sense in an consolidated act in which the main distinction is between upstream (PURA) and mid- and downstream (EWURA) activities, not the type of resource.

The Petroleum Act of 2015 is thus a complex piece of legislation, which not only involves natural resource rights, but also a number of state authorities whose division of labour is not always very clear. In order to provide an overview of the rights issues in the act, the analysis below will be structured according to the logic of the paper, namely focusing on the rights of smallholders, investors and state actors respectively. Furthermore, because the act covers the entire range of petroleum operations from upstream (exploration and production) over midstream

(infrastructure) to downstream (marketing) activities, this analysis will highlight rights related to each of these three activities. More attention will generally be paid to the upstream and midstream activities, which more often have implications for smallholders' rights to land than downstream activities.

**Box 6 Transparency and accountability in the Tanzanian petroleum sector**

After heated debates about (lack of) transparency and accountability in the management of the Tanzanian petroleum sector (Pedersen & Bofin 2015) the three Petroleum Acts provide for major changes in this regard. Tanzania first joined the Extractive Industries Transparency Initiative in 2009 and has been compliant since 2012 (TEITI 2015), but it is the Tanzania Extractive Industries (Transparency and Accountability) Act of 2015 that gives the Tanzania Extractives (Transparency and Accountability) Committee, consisting in equal numbers of representatives from government, extractive industries companies and civil society, a legal basis. The act proposes that all Mining Development Agreements (MDAs) and Production Sharing Agreements (PSAs) be made public through a website, including those entered into during and before the passage of the bill.

The Oil and Gas Management Revenues Act of 2015 provides for the establishment of an Oil and Gas Fund housed in the Bank of Tanzania (BOT) and for the management of government revenues from the petroleum sector. It also sets aside 0.1% of GDP to a fund for the National Oil Company, prescribes that the allocation of funds is not exempted from the normal state budgetary process, and limits the maximum amount to be allocated to 1% of GDP, in the case of which it should be approved by the Minister of Finance and the Parliament (URT 2015b, p. section 17).

Overall, the acts are stronger on transparency than on accountability. The upstream regulatory authority, PURA, the downstream regulatory authority, EWURA, and the national oil company, TPDC, are all firmly under the government's control. The chairman of the PURA board is thus appointed by the president and the other four members by the minister, and the same is the case with the EWURA board. The oversight role of the parliament has increased, but this has been more related to the personality of activist committee chairmen and has not really been institutionalised. With a more partisan parliament after the last election of 25 October 2015, the checks on the executive may have been reduced. Symbolically, when the three Petroleum Acts were passed within a week under Certificates of Urgency in July 2015, only a cursory examination by the Committee for Energy and Minerals had been carried out (Pedersen & Bofin 2015). The most significant change in the acts in terms of accountability, therefore, is the provision that agreements with IOCs must now be approved by the Cabinet (Clyde & Co 2015).

**Investors vis-a-vis state authorities: rights and obligations**

The Petroleum Act of 2015 covers the entire range of activities in the petroleum sector, but its main concern is with the regulation of upstream exploration and production activities. All sub-surface mineral resources are vested in and should be managed by the government on behalf of the people, but the government may grant investors the right to extract these resources. The act is peculiar in the way it blends public and private interests in this regard. It operates with a national oil company that shall guard and promote the interests of the Tanzanian government. The national oil company may operate as one regular oil company among other companies, but it shall also be granted exclusive operation rights over all upstream petroleum rights, which it can then enter into partnership with other entities to develop, in the case of which it has the right to a participating interest of not less than 25%, but it may decide otherwise (URT 2015c, p. section 44). For this purpose it may retain a portion of funds from oil and gas revenues, the size of which is decided in more detail in the Oil and Gas Revenues Management Act 2015.

Overall, agreements for **upstream activities** shall only be granted by the minister through 'transparent and competitive public tendering' (section 48). This is a change compared to the 1980 Petroleum Act, which vested much more discretionary power in the minister of energy and minerals. A minister may, however, still award blocks directly to the national oil company or, in case no bids are accepted in a bid round, enter into direct negotiations with companies. To qualify for a license (but not for reconnaissance permits) an investor should be registered in Tanzania and have recognised capacity to develop the resource. A distinction is made between different kinds of licenses; reconnaissance permits (three years), which can be applied for at PURA (section 34) in order to carry out surveys without the participation of the national oil company; an exploration license (four years) with a detailed work plan and minimum expenditure (section 52), and; a development license (twenty-five years), which shall include 'proposals for development and production of reservoir, including method for use or disposal of associated gas' (section 67).

There are detailed mutual rights and obligations attached to each of the above permits/licenses for the investors and for state authorities. For instance, data collected by a company under a reconnaissance permit is the property of the government, but if the government sells the data, revenues should be split (section 42). Similarly PURA may, upon the discovery of oil, direct the license-holder to assess feasibility of operation within a two year period (section 65), but the license-holder may, in turn, apply for a development license, also within two years for oil and three years for gas (URT 2015c, p. section 66). A more detailed model production-sharing agreement (PSA) that may be revised regularly will guide the negotiation of specific agreements and can be adjusted to reflect price volatility. The latest model PSA from 2013 prescribes royalty terms of 12.5% for onshore/shelf and 7.5% for offshore combined with sliding scales for profits from oil that gives the government increased shares – up to 85% – as production increases.

The **mid- and down-stream activities** are also regulated by the 2015 Petroleum Act. Generally companies interested in undertaking activities should apply for licenses at EWURA. There are three types of licenses; processing, transportation and storage

licenses (section 146); liquefaction, shipping and re-gasification licenses (section 152); and distribution licenses (section 155). Though they often receive less attention than upstream exploration and production, these activities are important in their own right, as they promote and regulate the infrastructure and are thus important for Tanzania's plans for developing its industrial capacity, most recently laid out in its new Five Year Plan (2016–2021).

Relatedly, upstream producers are obliged to deliver gas to the domestic market 'as a necessary measure to ensure diversification of the gas economy before export market' as the Natural Gas Policy puts it (The National Natural Gas Policy of Tanzania 2013, p. 9). This gas can be used for electrification through the construction of various power plants, as has been the case with the exploration and pipeline projects from 2004 onwards (Pedersen & Bofin 2015), but it may also be used in order to attract energy-intensive industries from abroad and promote domestic ones. The domestic market obligation may also help ease the strain that the importation of petroleum products puts on foreign exchange earnings by replacing imported products with domestic ones. The national oil company has the exclusive right to purchase, collect and sell the gas produced under the domestic market obligation through a subsidiary company, GASCO (section 125), which puts it in a monopoly-like position vis-à-vis the upstream companies obliged to sell. There are provisions for determination of gas and petroleum prices in the Petroleum Act, with reference to international best practices (section 165–167).

### **Investors vis-a-vis state authorities: enforcement**

There is no doubt that the state authorities are the stronger party. For instance, the sale of a license, or interest in a license shall be approved by the minister (section 86). Furthermore, quite a bit of enforcement in the 2015 Petroleum Act will be done by administrative fiat. This is remarkably similar to the 1980 Petroleum Act, which also vested much discretionary power in an administrative body (the 'Commissioner') to settle disputes (URT 1980, pp. section 76–80). Generally the oversight bodies, PURA for upstream activities and EWURA for downstream activities, may decide in any conflict between parties and direct civil courts to enforce their decisions. Similarly, they may impose penalties for, for instance, withholding information, providing false information or obstructing officers in carrying out their duties, but also for obstructing license-holders in their activities. If actors fail to comply, PURA and EWURA may take them to court (section 234–241). Investors aggrieved by PURA and EWURA on the other hand may go to a 'Fair Competition Tribunal'. This refers to a tribunal that can be set up under the Fair Competition Act of 2003, which deals with the prevention of monopolies and cartels (URT 2003a).

The act has been evaluated as being not very strong on disputes that go beyond mere offences (Maajar & Tibshraeny 2015). PURA is exempt from deciding in disputes involving the government (section 242) and it is not very clear how upstream conflicts involving the government are to be settled. Here the 2015 Petroleum Act is less clear than the 1980 Petroleum Act, which allowed any person aggrieved by a decision by the commissioner to file an appeal at the High Court

(URT 1980, pp. section 78, 71). For mid- and downstream investors ordinary courts still seem to be an option. International arbitration is not mentioned at all. The 2013 model PSA is a bit clearer on this. Overall, it states that disputes should be settled by negotiation between the parties involved. Only if negotiation fails will arbitration be initiated in 'accordance with the International Chamber of Commerce Rules of Conciliation and Arbitration', but carried out in Dar es Salaam and applying Tanzanian law (TPDC 2013, p. article 28).

#### **Box 7**

##### **The gradual separation of the national oil company and oversight authority**

Despite a long history of exploration and ten years of natural gas production, Tanzania's legal and institutional framework has been lagging behind in a number of ways. First and foremost it was designed for oil exploration, not for the gas that was actually found. Furthermore, the regulation of mid- and downstream gas activities was wanting. Finally, increasing demand for transparency and a clearer separation of commercial and regulatory activities has led to a complete overhaul of the country's legal and institutional framework as reflected in the three new acts, which add to ongoing reforms of government institutions; the Petroleum Act 2015; the Oil and Gas Revenue Management Act and the Tanzania Extractive Industries (Transparency and Accountability) Act.

One consequence of the reforms is a gradual separation of the regulatory and oversight functions and commercial activities. Previously the national oil company, Tanzania Petroleum Development Corporation (TPDC), had taken care of a number of different roles within the sector (Jourdan 1989). Now EWURA takes care of the regulation of mid- and downstream and PURA of the regulation of upstream activities, both under the Ministry of Energy and Minerals. Furthermore, the Petroleum Act provides for an Oil and Gas Advisory Bureau (OGAB) established in the President's Office that can advise the government on petroleum matters. Therefore, TPDC gets a clearer role as the government's commercial arm in the petroleum sector.

At the same time TPDC is undergoing its own internal reforms. In 2014 it was split into an upstream and a downstream directorate. The latter has again been split into two commercial entities, namely the Gas Supply Company (GASCO) and PETROTAN for the marketing of Tanzanian gas and oil. The Petroleum Act furthermore prescribes the establishment of a subsidiary under TPDC that can act as a gas 'aggregator', GASCO, which can purchase, collect and sell the gas produced under the domestic market obligation (URT 2015c, p. section 125). This is likely to limit petroleum companies' ability to sell the production to other customers (Clyde & Co 2015). Thus, despite its increased market orientation, TPDC retains some state functions. De jure it is also still granted all licenses, but de facto operations are managed by other companies as part of a 'partnership' where these companies as contractors carry the full obligations of the national oil company (URT 2015c, p. section 55).

## Smallholders' rights to land

The 2015 Petroleum Act's main concern is how to manage the petroleum activities and surface rights are subservient to mineral rights. An example on this can be found in the act's emphasis that investments in processing facilities should be located onshore in order to maximise the sector's contribution to developing the domestic economy (See also The National Natural Gas Policy of Tanzania 2013, pp. 7–8; URT 2015c, p. section 146 and 148). This includes various kinds of petroleum infrastructure like gas processing plants and pipelines. Mozambique, by comparison, has allowed the use of an offshore floating LNG plant (Maugeri 2014), which will have minimal impact on local land rights. Its main focus is the license-holder's wayleave, that is, access to surface land under which resources may be found (for upstream), the land upon which petroleum infrastructure is to be constructed (midstream), or the land upon which associated petroleum-related investments will be carried out (downstream). Each of these types of operations will involve different combinations of actors, but again the state will take a leading role.

The Petroleum Act is not very explicit on the compulsory acquisition of land, other than it states that an investor may conduct 'expropriation activities' in an area by referring to the land Acquisition Act of 1967 in case of disputes over compensation. This act provides the legal basis for acquiring land for 'public purpose' in Tanzania and explicitly mentions oil and mining activities (URT 1967, p. section 3 and 7), which are, furthermore, exempted from the more restrictive 1999 land acts. According to the 1967 act the president may allow digging or boring under any land if he deems it desirable, just as he may acquire the land within a six week notice period (section 7). The government shall offer compensation in money or land, or money combined with land equivalent to the value of the acquired land, though the latter is not a very common practice in Tanzania.

Regarding surface rights related to *upstream activities*, a petroleum license-holder may not enter public, private or customarily-held land without the written consent of the owner, who can continue his or her activities (for instance grazing or cultivation) in an exploration or development area, but may not erect structures without the consent of the license-holder (sections 80 and 110). If the license-holder interferes in any way, the landholder shall have 'fair and reasonable compensation' (section 111, 1). If operations proceed from exploration to development and production, the 2015 Petroleum Act states that the license-holder should submit a 'development plan', that is a plan accompanying the application for a development license, which proposes how operations are to be carried out, assesses their impact on environment, including, on land use, and describes how it will accommodate national and international standards in this regard (section 67).

Regarding surface rights related to *mid- and downstream activities*, the Petroleum Act 2015 states that the general principles for wayleave seem to be in the still-unfinished 'Gas Utilization Master Plan'. In consultation with the relevant authorities, the investor shall acquire wayleave around existing and future petroleum infrastructures and installations and compensate the affected rights-holder. Since it also states that it is the duty of the national oil company to own and operate 'major

gas infrastructures' and 'hold land for key oil and natural gas projects' (URT 2015c, p. section 9), in practice it will often be TPDC acquiring land and compensating rights-holders. Again, petroleum projects should be applied for with detailed project plans that include land issues. The plans are to be approved by the Energy and Water Utilities Regulatory Authority (EWURA) and the National Environment Management Council (NEMC), which, in turn, should take into consideration possible environmental and social impacts of the activities (section 132). This is similar to the draft National Petroleum Policy from 2014, which required that the government shall ensure that petroleum operations comply with national and international laws, including land laws (Draft National Petroleum Policy 2014, p. 28).

### **Smallholders' rights to land: enforcement**

Generally, the Petroleum Act refers to the 1967 Land Acquisition Act and not the 1999 Land Act, which is seen as more protective of smallholders' rights to land. On the one hand this means that conflicts over whether compulsory acquisitions of land are justified or not are unlikely, due to the Land Acquisition Act's limited restrictions in this regard. On the other, conflicts may develop over the level of compensation. Conflicts over compensation between the investor and smallholders, 'shall be settled in accordance with the *Land Acquisition Act*' (section 186). This seems to be an improvement when compared to the 1980 Petroleum Act, where disputes over compensation were referred to the Commissioner for Petroleum Affairs to decide (URT 1980, pp. Part IV, par. 74, 73).

Despite the reference to the Land Acquisition Act, compensation schedules are likely to follow the more generous 1999 land acts. Apart from the fundamental principle of the 1999 land acts that land has value in itself and compensation therefore should be paid according to market value (Tenga & Mramba 2014, p. 89 and 178ff) the bigger improvements are on procedural rights. The Land Act thus demands 'full, fair and prompt compensation' in case of compulsory acquisition (URT 1999, pp. Part 2, section 1). Resettlement should be limited as much as possible and, if it becomes necessary, it should follow principles of due process and fair administration.

### **Local content, local communities and local governments**

The emphasis on maximising local benefits in the 2015 Petroleum Act is new when compared to the 1980 Petroleum Act. The latter first and foremost sought to promote Tanzanian economic interests through TPDC. The promotion of local content, local communities and local governments only appeared gradually in the model PSAs from 1989 onwards, and initially more as declarations of intent. This changes with the new Petroleum Act, which has detailed and binding provisions, and establishes control functions and procedures to enforce them. Their emergence partly reflects international trends (IPIECA 2008 2012; Radon 2007), but they also reflect specific Tanzanian experiences from the mining sector in the 2000s, where the public increasingly doubted that Tanzania benefitted from the operations of foreign companies, and where initial neglect of community relations had led to

sustained conflict. Many of the provisions in the new legal and administrative framework are similar to the ones guiding mining operations. The thinking that Tanzania's own private economic interests should be promoted in the petroleum economy can be found throughout the act.

In terms of local content, the 2015 Petroleum Act states that companies shall give preference to 'goods which are produced in Tanzania and services which are rendered by Tanzanian citizens and or local companies' (section 219). Generally, elaborate plans for how to achieve these goals are to be submitted to the sector's regulatory bodies for approval. These plans shall cover all activities under the petroleum value chain and spell out how Tanzanian employees will be trained or educated and how knowledge and technology transfers will be maximised, taking into consideration issues like gender, but also 'host communities', that is inhabitants in the area of operations.

The act describes PURA as a promotor of 'local content including supporting national enterprises and Tanzanians to participate in the petroleum upstream industry' (section 12), and EWURA as a promotor of 'the use of local goods and services produced and provided in Tanzania' (section 30). The promotion of Tanzanian citizens and Tanzanian-owned companies is also specified in the act, which states that if goods and services are not available they shall be produced by a joint venture with a Tanzanian company that holds not less than 25% of the operation. Furthermore, it is specified that a 'local company' means 'a company or subsidiary company incorporated under the Companies Act, which is one hundred per cent owned by a Tanzanian citizen or a company that is in a joint venture partnership with a Tanzanian citizen or citizens whose participating share is not less than fifteen per cent' (section 219, 9).

In terms of oil companies' relations to local communities and governments, the Petroleum Act has a section on Corporate Social Responsibility requiring a plan that takes into account the priorities of the local government, which is submitted to and approved by the local government (URT 2015c, p. section 222). It is the responsibility of the same local government authority to prepare guidelines for and to oversee implementation of the plan. The National Natural Gas Policy (2013) and the draft Petroleum Policy (2014), upon which the act is built, generally call for such more formalised relations between communities, local government authorities and investors, but they put more emphasis on the rights of communities and less on the local governments. The Natural Gas Policy states that in order to prevent conflicts and 'achieve harmony', preferably working through community-based organisations as well as local government authorities, calling this a 'contractual obligation' (see The National Natural Gas Policy of Tanzania 2013, pp. 15–16). The Draft National Petroleum Policy has tougher requirements in this regard (Draft National Petroleum Policy 2014, p. 27).

In terms of fiscal transfers to the local level, the Petroleum Act of 2015 is not very detailed. The Oil and Gas Management Revenues Management Act of 2015 is slightly more outspoken in this regard by stating that 'Local government authorities to which oil and gas activities are undertaken shall receive revenue from service

levy of the oil and gas as shall be approved by the National Assembly' (URT 2015b, p. section 17). The model PSA of 2013 states that the contractor shall be taxed so that 'local Government rates or taxes not in excess of those generally applicable in the United Republic of Tanzania...' (TPDC 2013, article 16). Again, the policies are slightly clearer. The Petroleum Policy prescribes that the government shall ensure local communities 'a fair share of benefit from revenues emanating from [upstream, ed.] petroleum operations in the outskirts of their respective localities' (Draft National Petroleum Policy 2014, p. 24). For mid and downstream activities, it refers to the Local Government Finances Act of 1982, which requires all corporate entities to pay to the relevant district councils 0.3% of the turnover net of the value added tax and the excise duty (URT 1982).

### **Local content, local communities and local governments: enforcement**

There are detailed provisions for enforcing the 2015 Petroleum Act's local content requirements. In terms of goods and services, companies must make a five-year procurement plan that accounts for how they will live up to the local content provisions and submit it for approval. Annually, furthermore, they shall submit a progress report in this regard. They shall also report annually on recruitment and training, including 'a supplier development programme', i.e. a programme that may go beyond the purchasing of local goods and services (the local supply chain) to include the active development of local suppliers, as well as progress in terms of knowledge and technology transfer. It is not spelled out how breaches will be dealt with, which means that they will probably fall under the general provisions of the 'Offences and Penalties' part of the act (Part X), which sets levels of fines and imprisonment.

By contrast, the act is not very explicit on the enforcement of CSR provisions besides the fact that companies shall submit a plan for approval by the local government. It does not state whether this should happen before or after a company's submission to national-level authorities of its 'Development Plan' that is required before development and production can begin, nor does it state how disputes over local plans are to be settled. The Natural Gas Policy (2013) and the Draft Petroleum Policy (2014) are not much clearer in this regard. The draft Petroleum Policy puts more emphasis on government authorities' role in building capacity than in enforcing CSR provisions. Thus, it recognises the importance of providing local communities with relevant and sufficient information and, furthermore, obliges the government to 'initiate programmes to build capacity at the national level to develop a clear framework and guidance for CSR and the local community level to prioritise and propose investments' (Draft National Petroleum Policy 2014, p. 27).

## CONCLUSION

Tanzania's extractive sectors have undergone major reforms in recent years. The most recent ones, the 2010 Mining Act and the 2015 Petroleum Act, change the rules of the game for all stakeholders when compared to the more liberal reforms and measures implemented in the 1990s, which aimed at attracting foreign direct investments. This paper has reviewed these changes, focusing on landmark decisions, that is on the emergence of potential new policy paradigms that will require significant political and administrative effort to institutionalise. It is the second of two papers focusing on the development of rights in Tanzania's extractive sectors. The first paper concluded that the rights of stakeholders have varied significantly over the years, but that the role of state actors governing investments has been gradually strengthened. This trend continues in the present period and is supplemented with a new willingness by the state to engage more directly as an investor in the mining and oil/gas sectors following the deregulation period of the 1990s to the 2000s. In the mining sector state participation in investments is mainly through state-owned enterprises' (STAMICO and NDC) joint ventures with transnational mining companies, and in the petroleum industry this happens through state ownership of gas infrastructure combined with increased emphasis on participating interests for the national oil company, the Tanzanian Petroleum Development Corporation (TPDC), with international oil companies.

The paper maps and analyses the implications that changes in the legal and institutional framework may have for different types of actors. For analytical reasons it focuses on three main categories of actors, namely state actors, investors and smallholders, which are directly engaged in or affected by operations. In practice, this categorisation should be further unpacked in future research as it encompasses a wider range of actors. Whereas the role and rights of investors are somewhat reduced due to a tougher fiscal and legal regime and the increased state engagement mentioned above, the paper demonstrates that the major change is for smallholders, including artisanal miners, whose rights, for the first time since colonial times, de jure have been strengthened, first with the 1999 land acts and later with the extractive sector legislation, which are much more detailed in terms of CSR, local content, environment, etc. than previously. Still, the rights of smallholders remain precarious. First, implementation of the new legal and institutional framework is often wanting, and second, the land acquisition processes related to extractive investments are still to a large extent governed by the Land Acquisition Act of 1967, which leaves much discretionary power in the hands of state actors, is unclear on the limits to the 'public purpose' that permits expropriation of land, and is weak on procedural rights, that is the rights to information, participation and compensation. If the conflicts that often accompany major natural resource investments are to be ameliorated and the rights of smallholders strengthened de facto, the issue of implementation and a reform of the Land Acquisition Act are required.

The precariousness of smallholders' rights is aggravated by the fact that with increased direct state investment in the extractive sectors, the topography of investment-related land conflicts changes to one where the interests of smallholders

increasingly compete with those of the state. The extractive investments (in mining, gas pipelines, LNG plants etc.) are increasingly framed as projects of national significance upon which the future of the country depends. In other words, the state is facing a delicate balancing act: safeguarding smallholders' land rights on the one hand and securing land for state-owned enterprises and their international investment partners on the other. Increased state involvement thus raises questions about the legitimacy of the Tanzanian state's willingness to mobilise and appropriate land to facilitate investments in the extractive sectors. In the same vein, the oversight over and accountability of the state-owned entities become more important; an issue not really touched upon in this paper. Research into these political economy aspects of large-scale extractive resource investments, not least when state-owned enterprises are involved, is important if we wish to better understand these issues in Tanzania.

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## END NOTES

1 Advanced projects are those projects where mineral and reserve estimates have been confirmed, mining methods and operation costs established and preparations are underway to develop the sites into full-scale mines.

2 The mining review commission reports include the Mboma Report (2002), Kipokola Report (2004), Masha Report (2006), Bukuku Report (2007) and the Bomani Report (2008).

3 In 2005, the government controversially privatised the Kiwira coal mine (then owned by STAMICO) to TANPOWER, a private company whose major shareholders included former president Benjamin Mkapa and the then Minister of Energy and Minerals, Daniel Yona, and their close associates (Thisday 2007). There was a public outcry following the controversial fast-tracked privatisation deal, which saw TANPOWER obtain 85% ownership of the mine, while the government retained only 15%. While the mine and its infrastructure were valued at 7 billion tsh based on valuation carried out in 1991, TANPOWER bought it for 700 million tsh in 2005.

4 Key Informant Interview with STAMICO's representative, July 2015.

5 TANCOAL, a joint venture between the National Development Corporation of Tanzania (NDC) and Intra Energy (Tanzania) Limited (IETL) was established in 2008. Under the terms of the Joint Venture Agreement, IETL owns 70% of Tancoal and NDC owns 30%. IETL is owned by Intra Energy Corporation of Australia.

6 Local Content Policy for Oil & Gas passed by Government in May 2015.

7 Until Zanzibar gets its own laws in place, petroleum will remain a Union matter. In the draft Constitution of April 2015, petroleum is no longer a Union matter and Zanzibar is therefore expected to govern its own petroleum affairs when and if a new Constitution is enacted.