

**RIGHTS TO LAND AND EXTRACTIVE
RESOURCES IN TANZANIA (1/2):
THE HISTORY**

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ABSTRACT

The extractive industries are becoming more important for Tanzania's economy. Mining and gas production contribute to generating jobs and revenues. However, investments may also pose a threat to existing rights to land, not least because it is the state that owns the sub-soil resources. Generally, it prioritises extraction over the protection of surface land rights. Based on reviews of the extractive sector legislation, the extractive sector literature, and the literature on mainland Tanzania's economic development models, this paper focused on how the rights of different stakeholders have changed over time. It focuses on three different groups of actors, namely smallholders, investors and state actors. It argues that the role of the state in governing investments in the extractive sectors have gradually been strengthened, but that its direct involvement as an investor has waxed and waned. Recently, it has been on its way back in again through state co-ownership in joint-venture operations. This is documented in a second paper, *Rights to land and natural resources in Tanzania (2/2): The return of the state*.

Keywords:

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

INTRODUCTION

Despite the recent downturn in commodity prices, Tanzania is still experiencing high economic growth of around 7% annually and increasing levels of investment. Investments in the extractive sectors may have abated, but they have not completely dried up.¹ Across the country new mining and petroleum sector projects are being launched at a steady rate and they trigger related investments into infrastructure and industrialisation. These investments bring the promise of economic development, but the benefits are often unevenly distributed and there are also people who lose out. In a developing country with strong economic growth, rights to land and natural resources are undergoing constant change, not only due to foreign investments, but also to increased domestic demand.

From the local perspective, investments may pose a threat to livelihoods. This is, not least, the case where existing rights to land – which is a key focus area in this paper – tend to be weakly documented and where investments may generate landlessness. In Tanzania this is a real threat because it is the state that owns the sub-soil resources and it generally prioritises their extraction over the protection of surface rights to land. Furthermore, the country has a strong tradition dating back to colonial times for acquiring land to promote national economic development (Ndjovu 2003). How this takes place however, is not a constant. Rights are infringed on – or accommodated – to varying degrees. The outcome is decided by a combination of the political economy of a given locality and the character of the extractive companies – often foreign ones – who invest. A new land policy is under preparation that will touch upon and clarify some of these issues (URT 2016).

Based on a review of the extractive sector literature combined with an analysis of changes in laws and regulations, this paper analyses how rights related to natural resource investments have changed in mainland Tanzania over time. It focuses on three different groups of actors that influence – or are influenced by – these processes, namely smallholders, investors and state actors. Overall, the paper argues that the role of the state in *governing* investments in the extractive sectors has gradually been 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. On the other hand, the state's direct involvement as an investor in the extractive sectors has waxed and waned across the years. Recently, it has been on its way back in again through state co-ownership in joint venture operations as documented in a second paper, *Rights to land and natural resources in Tanzania (2/2): The return of the state* (Jacob et al. 2016, 2016).

The private investors' role has also waxed and waned accordingly. Often, new legislation has come as a response to investor interest. However, the strengthening of their rights has not been steady, most notably demonstrated by the threat of nationalisation in the 1970s, but many more safeguards are in place today, which protect against nationalisation; laws have been strengthened, and they have recourse to courts. The smallholders have been the weaker party throughout. Although the protection of their rights has improved with the 1999 Land Acts, the

implementation of the legal and institutional framework is still wanting (Pedersen 2012). Furthermore, the Tanzanian rules and regulations for compulsory acquisition, which facilitate most extractive investments, date back to 1967 and provide limited protection for customary rights-holders. They, therefore, most often bear the costs by giving land to the investments. In order to encompass smallholders in the analysis, the paper pays particular attention to how extractive investments affect local rights to land.

The paper thus depicts rights as much more fluid than often depicted in the recent good resource governance literature, which aims at promoting secure individualised property rights (de Soto 2000) or investors' rights (Ayisi 2009; Leon 2009; Blumenthal 2013) in order to promote economic growth. The paper's main emphasis is on how rights to land and natural resources have developed from the colonial era since some of legislation prior to Independence has, in many ways, framed what was to take place later on. The paper demonstrates that property rights regimes and economic development models are characterised by co-variation, but that one should be careful with assuming causality between the two. Laws and institutions tend to develop at a slower pace than do economic policies. Furthermore, policies and laws have been the subject of struggles throughout the years and their implementation reflects compromises that may deviate from the predominant policy discourse². The latter political economy aspects of natural resource governance are generally less well developed in the literature.

Rather than providing a detailed mapping of changes in all laws and regulations the paper is structured around landmark policies, that is, the emergence of new policy paradigms that require not only adaptation, but significant political and administrative effort to institutionalise (Hall 1993; Kjær and Therkildsen 2012). The paper's analysis of changes in extractive sector legislation is combined with a review of relevant literature with a particular focus on the relationship between mainland Tanzania's extractive sectors and economic development models. This means that the paper draws on texts that have been written in different periods and will to some extent be influenced by their vocabulary and approaches. For instance, whereas we pay particular attention to 'smallholders', colonial authorities regulated 'natives', and the Arusha Declaration of 1967 referred to 'peasants and workers'. Knowing that they may not always cover exactly the same content, we use the terms of the period when relevant.

Zanzibar, which has been part of a union with the Tanzanian mainland since 1964, has its own legislation when it comes to land and is expected to get its own for petroleum, and will therefore not be included. Furthermore, in parts of its history, Tanzania's rights regime has been influenced by international institutions in different ways, from the League of Nations' interference in British colonial rule, to the international financial institutions' sponsoring of policymaking in the era of structural adjustment to the international best practice standards developed since the turn of the century (Emel et al. 2011). When relevant, these influences will be mentioned, but since the paper's main focus is on the development of rights, this part of the analysis will be quite brief.

LAND AND EXTRACTIVE RIGHTS DURING THE COLONIAL PERIOD

The first Mining Ordinance in 1920 must have been one of the first pieces of real legislation passed under British authority. From when the British took over control over the territory from Germany at the end of the First World War, they governed by proclamation until the constitutional basis under the League of Nations mandate was in place in 1920 (Richter 1996). The Mining Ordinance came as a response to the discovery of alluvial gold in areas around Lake Victoria, which had caused a veritable gold rush. In many ways, it came to lay the path for the hierarchy of land and extractive resource rights up until this day. The African population generally had limited access to the formal institutions that had been set up to regulate and protect Europeans' rights to land. Although there were also attempts to protect Africans' rights to land as reserves, this meant that they often lost out when land was deemed 'unowned', unoccupied or was thought to have potential to be put into more productive use (Debusmann et al. 1996. See also box). In the extractive sectors, this means that the right to explore and prospect for minerals generally trumps customary rights, also after Independence.

This was laid out in the Mining Ordinance: *'The holder of a prospecting license may prospect and search for any gold, precious stones or minerals on any land [authors' emphasis, ed.] in the territory and may peg out [mark, ed.] and exclusively occupy a claim'* (T.T. 1920). However, this right did not cover private land that had been granted or leased, that is land that had been surveyed and incorporated into the formal economy by European settlers, who, if disturbed by mining activities, would have the right to compensation decided through arbitration. In comparison, if the land was occupied by 'natives', the compensation would be paid to the District Political Officer, *'who shall distribute the same in such manner as he shall think fit among the natives who are affected'* (T.T. 1921). In other words, they did not have the right to be involved directly.

Most of these provisions were upheld in the 1929 Mining Ordinance, which furthermore additionally stated that all minerals were vested in the Governor, who could then grant rights to individuals and companies. This signified a strengthened control of mineral resources by the colonial state and echoed the Land Ordinance of 1923, which in the same vein had declared all land public land under the control of the Governor. De jure, these provisions were within the British mandate under the League of Nations, which should have limited the transfer of 'native' land to 'non-native' use, but which de facto were not too difficult to circumvent (Richter 1996). In 1926 the Land Acquisition Ordinance facilitated the transfer of land from 'natives' to 'non-natives' for investment purposes (T.T. 1929; Fimbo 2004; Ndjovu 2003). The 1929 Mining Ordinance set up a more elaborate administrative system, providing for a commissioner of mines to take over some responsibility on behalf of the governor. Whereas the 1920 Ordinance came as a response to the discovery of alluvial gold in areas around Lake Victoria, the 1929 Ordinance was formulated to further regulate the gold rush that had started in the south-western parts of the territory in the early 1920s and which had, by 1928, attracted the interest of larger British and South African mining companies (Roberts 1986; Chachage 1993b;

Harragin et al. 1931). It focused on encouraging large-scale investments in mining.

The 1929 Ordinance's more elaborate requirements to mining rights holders, including their demonstrated ability to raise '*sufficient working capital to ensure the development of and carrying on of mining operations in the area applied for*' of surface rights holders (T.T. 1929), which, combined with the preference for large-scale miners of colonial authorities, made mining more difficult to such an extent that it has been seen as an attempt to discourage artisanal mining altogether (Chachage 1993b; Knight and Stevenson 1986). The period up to the Second World War saw an influx of big foreign mining companies to Tanganyika, mainly British and South African, interested in gold and diamonds. Large-scale mining investors included companies such as Tanganyika Diamond and Gold Development Company (South Africa), South Nyanza Development Company (Britain) and Anglo-Transvaal Consolidated Investment Company (South Africa) (Chachage 1995).

No similar commercial development happened in the petroleum sector until the 1950s, when BP and Shell started their exploration activities (T.T. 1922; Pedersen and Bofin 2015). In 1958 the existing outline of a petroleum law, the very brief 1922 Mineral Mining Ordinance, was replaced by a new Mining (Mineral Oil) Ordinance, which outlined the implications for petroleum exploration in more detail. Like the Mining Ordinances it treated native land as a separate category that provided natives with less control when compared to private land. Thus, notices before exploration activities were to be given to the district commissioner of an area, who would then spread the word to the natives 'as he shall deem fit'. Similarly, compensation should be paid to the commissioner. However, an important novelty in this regard was the participation of the court system, partly through the involvement of a magistrate to control the size of the compensation and partly through the option of appealing to the High Court (T.T. 1958b), an option that had been barred for natives in the 1929 Mining Ordinance where the only avenue for appeal had been to the Commissioner, allowing for an administrative rather than a judicial decision.

Box 1 Protection vs. effective use of land

From the German colonial era in the 1890s through the 1920s when Tanganyika became a 'Trust Territory' of the League of Nations, Tanzania was considered as having potential for plantation farming. When the Germans took over control of the coast from the Zanzibar Sultan in 1888 and sought to expand inland, small Swahili/Arab plantations already existed, but new European-owned plantations were promoted in the following years (Sippel 1996). In their first land ordinance in 1895, it was decided that rights over unowned ('herrenlos') land belonged to the government. This continued under the British authorities and became what Lis Alden Wily has termed the paradigm of 'effective occupation', which was used to deny the colonised people access to huge areas of land. Though this land was unfarmed it was used by the respective tribes and villages for off-farm purposes such as hunting, grazing, wood collection and shifting cultivation (Alden Wily 2012).

In a reaction to a reminder by the League of Nations that Britain had been ceded the former German territory as trustee, not owner, the Governor of Tanganyika enacted the Land Tenure Ordinance 1923, which claimed to respect African rights to 'use and enjoy' the King's land. It was also this ordinance that introduced the right of occupancy system, that came to denote the two distinct classes of rights to land that still exists in Tanzania today, namely granted rights granted by the governor and customary rights (Twaib 1996). There were, thus, also attempts to provide some protection of the 'natives' rights, for instance through the establishment of reserves. However, the governor also undermined this by launching 'a certain amount of white settlement to develop the country's resources' (1926) involving one million hectares. In addition, the Governor 'deems the customary rights of occupancy to be similar to the titled Rights of Occupancy awarded settlers (1928), but only so long as use is visible and active' (Alden Wily 2012: 760).

After the Second World War there was another land rush under which commercial farming expanded dramatically. In Tanganyika, the British launched the infamous Groundnut Scheme (1946), which was funded partly by multinationals, administered by the British Ministry of Food, and implemented by former British army officers promised land at the end of the war. The scheme failed within a decade after absorbing a big share of credit, inputs and subsidies. Also, in Northern Tanganyika there was the famous Meru Land Case, where the Meru elders presented their grievances about white settler land grabbing to the UN. This idea that land is to be put into productive use continues to influence land legislation up to this day.

LAND AND EXTRACTIVE RIGHTS DURING THE EARLY YEARS OF INDEPENDENCE

The main features of the colonial administration of land and natural resources were retained after Tanganyika's independence in 1961. Some attempts were made to define a place and position for customary law, but this did not change the generally weak protection of existing, undocumented rights to land significantly (see box 2). The approach of the new government was still characterised by a positive attitude towards private investments, as reflected, for instance, in the Foreign Investment (Protection) Act of 1963, which guaranteed 'full and fair' compensation in case of nationalisation (Chachage 1995; Dias 1970). The tension between providing some protection to smallholders' customary rights to land on the one hand and optimising the use of resources to promote economic development of the territory on the other, also remained (Tenga and Mramba 2014). Land and natural resources were viewed as resources that should be put into productive use. Existing rights to land were if not irrelevant then deemed less important.

This was already preshadowed in the debate about the status of rights prior to independence. Whereas Britain had a policy of promoting the insertion of a bill of rights into its overseas territories prior to independence, this was vehemently rejected by the party of liberation, the Tanganyika African National Union (TANU), and its leader, Julius Nyerere (Parkinson 2007). Though supportive of human rights in general, they believed that a bill of rights would be aimed at protecting the rights of ethnic minorities, that is, Europeans and Asians, and that since TANU was aiming to create a multi-ethnic party and society, it was believed that ethnic minorities would require no special treatment. Furthermore, the Presidential Commission on the Establishment of a Democratic One-Party State in 1965 argued that a bill of rights would hamper the 'revolutionary change in the social structure' that were part of the government's plans for economic development (Parkinson 2007). Strong individual rights would prevent the redistribution of resources that the party aimed at.

As a consequence the dual land tenure system that had been introduced by the British with a land tenure category for customary use rights, the 'deemed rights' of occupancy for the natives, and different types of formal 'granted rights' (covering freehold titles and to some extent leasehold) continued. So did the weaker protection of customary rights. Colonial authorities had followed a broad interpretation of the public purpose that could justify compulsory acquisition and this was upheld after Independence (Ndjovu 2015; Kombe 2010). By then, land continued to be public land, which was now vested in the new Republic's president (not the governor), who administered it on behalf of the citizen (not the natives). The president could still quite easily acquire land in the name of the public good, which meant extensive administrative discretionary power at the expense of customary rights (URT 1994; Tenga and Mramba 2014).

Box 2 Precarious rights to land in the farming sector during early independence

Whereas the early post-independence property rights regime was characterised by a continued positive attitude towards to larger private investments, in the early years it was combined with an effort to recognise customary law. A series of conferences were held in order to chart out the future of customary and Islamic law within the emerging legal systems of the emerging, independent African states (Rubin and Cotran 1971). In 1961 the Legislative Council enacted the Judicature and Application of Laws Ordinance (JALO), to provide for a general framework for the growth and development of customary law. The legislation gave customary laws a general formal recognition. However, it set strict parameters within which customary law could later grow and develop. Thus, the ordinance is very clear that customary laws and Islamic laws cannot apply over areas covered by written laws. Furthermore, customary law only covers matters of a civil nature, not criminal matters. Therefore, it only applies between members of a community in which its rules relevant to the matter are established. Hence, law courts could not apply any rule or practice of customary law which is abolished, prohibited, punishable, declared unlawful or superseded by any written law. Under the statutory scheme provided by JALO, customary laws were to grow under the ambit of district councils. Subsequently a few district councils formalised customary laws in relation to inheritance and custody of children (Juma and Maganga 2005).

The reforms of customary law were combined with a drive towards building a modern nation-state by attracting private investments, in particular foreign ones. Simultaneously, a gradual strengthening of government control over land and an erosion of small- and medium-scale landholders' rights took place.³ In many ways, this heralded what was to come in the following decades. In 1963, the Freeholds Titles (Conversion) and Government Leases Act was enacted and made the republic the landlord of freehold land as well, by prescribing its conversion into leaseholds. Though aimed at eliminating privately owned, large-scale farming, it signified an attempt to intensify this type of farming, which generated a large part of export earnings; the leasehold category introduced development conditions on the land, which, if unmet, should be replaced by other farming operations (URT 1994; see also Fimbo 2004). The act was to some extent a response to foreign settlers, who had started leaving the country in large numbers, distrustful of the guarantees issued by the independence government that their land would not be taken (Coulson 1982; Sundet 1997, unpublished).

Similar efforts to promote intensified agriculture could be observed in areas held under customary tenure, with severe consequences for existing rights to land. Cattle ranches in pastoralist areas were introduced by the 1964 Range Development and Management Act (Hodgson 2004). It practically extinguished customary right in the area of ranching associations and replaced it with a statutory granted right (Fimbo 2004; Tenga and Mramba 2014). In

1965, the Land Tenure (Village Settlements) Act sought to promote modern farming through the conversion of customary land into more formally held land through new village settlement cooperatives, which would be granted settlement rights under which villagers could get more individualised derivative rights. The act extinguished customary rights without compensation except for those who agreed to join the village settlement, in which case they would be compensated in the form of a credit (Sundet 1997, unpublished).

These acts can be seen as the new TANU government's attempt to promote more large-scale, formalised and to some extent individualised types of tenure (Fimbo 2004), but without creating the land market that the party had criticised the British colonial authorities for suggesting prior to independence, and which it feared would lead poor Tanganyikans to sell their land to rich local and foreign capitalists, leaving them even poorer (Tenga and Mramba 2014; Coulson 1982). They were quite draconian in their approach to customary tenure, but their application was more pragmatic in these early years; for instance, the Village Settlement Act was most often implemented through experiments and pilot projects. The settlement scheme under the act only encompassed 0.04% of the population in 1967 (Ellman according to Sundet 1997, unpublished). This changed towards the end of the 1960s.

LAND AND EXTRACTIVE RIGHTS IN THE ERA OF AFRICAN SOCIALISM

In 1967 TANU proclaimed the Arusha Declaration in an effort to speed up economic development. The declaration spelled out a policy of socialism and self-reliance with implications for the entire economy. It emphasised that Tanzanian peasants should own the means of production, either through the state or through cooperatives. For rights-holders on customary land this signified no major change in the legal status of their rights, which had always been precarious, but it did signify a major change in the *scale* of state intervention. The major change came in the more formalised rights, including the granted rights of land and minerals, which were now up for change as the state sought more direct control over and ownership of the economy. The most immediate outcome of the new drive toward African Socialism was the nationalisation of banking, industries, extractive industries, large-scale farming operations, and property.

Many of the country's industries were nationalised and turned into parastatals through five acts.⁴ However, only half of industrial operations, in particular those owned by people of Asian origin, were nationalised and many only partly nationalised during the period, for instance through the formation new joint ventures through state acquisition of up to 60% of shares, which reduced the compensation payments, secured access to skilled foreign staff through the initial mother companies (Silver 1984; Dias 1970) and reduced the damage to the country's reputation as an investment destination. Owners were entitled to compensation, in particular when their investments were protected by the Foreign Investment (Protection) Act of 1963. However, the criteria for nationalisation and the procedures for how compensation was to be decided were unclear, and this left much discretionary power in the hands of the government (Bradley 1967). Furthermore, when the nationalisation of houses took off with the Acquisition of Buildings Act in 1971, compensation was limited (URT 1971; Komu 2011). Though not mentioning race explicitly, it often targeted buildings belonging to Tanzanians of Asian origin. In Dar es Salaam, Tanzanian-Asians homeowners made up 98%, but some Africans also lost considerable wealth (Brennan 2012). The act came to hamper investment into construction until the power to acquire buildings was reduced in 1985 (Fimbo 2004).

The nationalisations increased the Tanzanian government's direct involvement in the economy through its parastatals and other state-owned enterprises. This happened in terms of both form and scale. The direct involvement in the extractive sectors had begun already in 1958 when the Tanganyikan government, eager to gain more control over one of its bigger foreign currency earners, acquired 50% of the shares in Williamson Diamond Mine in collaboration with South African De Beers upon the death of its founder and owner (Knight and Stevenson 1986). In all likelihood this is what triggered the establishment of a 'Department of Mines' by a Mining (Amendment) Ordinance that same year (T.T. 1958a). The state also held minority equity in Nyanza salt mines, Liganga Iron and Rungwe Coal and was a guarantor for a loan to Uruwira Mineral. Unlike later, however, state participation

seems to have happened voluntarily without the use of expropriation, the state did not interfere much in the management, and the parastatals were expected to operate on market terms (Mukandala 1989).

After independence, direct government in the economy was sped up in 1962 with the establishment of the Tanganyika Development Corporation, the predecessor of what later became the National Development Corporation (NDC), and which took control over Williamson Diamonds, the latter continuing to generate the major part of NDC's surplus in the early year of independence. Whereas NDC initially aimed at catalysing private indigenous investment, for instance through joint ventures, it soon became a tool for the state to acquire and hold major stakes in key sectors of the economy, including the extractive sectors, aiming at a minimum of 50% state ownership. With the 1964 NDC Act, NDC came under direct presidential control and whereas it previously had been dominated by company managers, it became dominated by ministers and presidential appointees and this became the starting shot to increasingly politicised projects, with poor management and economic outcomes as a result (Mukandala 1989). In 1972 seven mining companies under NDC were divested to the newly established State Mining Corporation (STAMICO).

In 1969 a Mining Ordinance (Amendment) Bill was introduced that gave extensive discretionary power to the minister to renew – or exterminate – prospecting licenses, which provided the basis for the nationalisation of mining enterprises (Chachage 1995; Lange 2008; URT 1969a). The shifting priorities were reflected in the five-year plans of the period. Whereas the first five year plan (1964–69) only mentioned the aim of expanding existing mining operations, in particular within gold and diamonds, and continuing prospecting (URT 1964), the second five year plan (1969–1974), which covered the first post-Arusha Declaration period, emphasised state control of the exploitation of major mineral resources through NDC combined with promotion of artisanal mining of minor deposits (URT 1969c). However, it also notes the closure of gold mines and, in the third five year plan (1976–1981), a 'downward' trend in mineral production is acknowledged. This may be the explanation why the latter plan, though maintaining state engagement through the State Mining Corporation (STAMICO, established in 1972, taking over stakes in a number of mining operations from NDC), mentions that operations can be carried out in collaboration with both local and foreign companies (Silver 1984; URT 1976; Moshi 1982).

The petroleum sector followed a different trajectory, partly because of the later development of the sector and partly because the sector was so demanding in terms of capital, skills and technology that the involvement of foreign, private firms was hard to avoid. In 1966 the Tanzanian and Italian Petroleum Refining Company Limited (TIPER) was established and it was owned by the Italian oil company ENI. It was classified with the chemicals industry to maintain confidentiality, in all likelihood because it was linked to construction of the 1,680 km long Tanzam pipeline (shared ownership between Tanzania and Zambia) delivering refined petroleum products to Zambia in order to reduce its dependency on the apartheid regime in neighbouring Rhodesia (Silver 1984; Gleave 1992). In 1969, Tanzania Petroleum Development Corporation (TPDC) was founded by a government order

on 30th May with reference to the Public Corporation Act from the same year, which had empowered the president to establish parastatals by simple decree (URT 1969b; Mukandala 1989) in order to help develop a domestic petroleum industry and ensure more direct state ownership shares of operations.

TPDC was not mentioned in the second development plan, published in the same year, and its establishment was thus in all likelihood a response to the agreement with the Italian oil company, AGIP, also in 1969, allowing it to explore for oil (Jourdan 1989; URT 1980). The one year-old service agreement with AGIP was then turned into a production sharing agreement between TPDC and AGIP (Killagane undated). TPDC was subsequently granted all exploration licenses from the government and could enter joint ventures with foreign partners through production sharing agreements (PSAs). It also took a share in the TIPER oil refinery, which initially had been fully paid for by ENI, but on the condition that the government could take over a 50% share after a given period of time (ibid; Nyerere 1965). Due to a lack of technical capacity and resources TPDC only began actual operations in 1973 (Moshi 1982).

The most conspicuous change in land law was the passing of the Land Acquisition Act of 1967, which provides the legal basis for acquiring land for ‘public purpose’ in Tanzania, which included the extractive sectors (section 3, e), but also large-scale agricultural investments, urban development, industrial sites, housing, etc. In many ways, it is a continuation of the colonial era land regime with an interpretation of ‘public purpose’ that justifies the taking of land at short notice (six weeks) for a wide range of activities, including commercial ones like ‘industrial, agricultural or commercial development, social services or housing’ (URT 1967). It also enabled the extinction of private rights to land in redevelopment areas. The act has generally been seen as providing the state, represented by the president, with far-reaching discretionary power (Shivji et al. 2004; Tenga and Mramba 2014). The act provides for compensation for the value of land for owners holding a granted right, but only for the value of ‘improvements’, that is not for the land in itself, possibly supplemented with land replacing the acquired land. In many ways these far-reaching provisions were a continuation of colonial land management that allowed the authorities to acquire customary land quite freely (Tenga and Mramba 2014). To some extent they remain in place today.

Box 3 Villagisation under African socialism

The development in land law and administration after the Arusha Declaration was significant. Whereas the immediate post-independence period had been characterised by experiments and gradual change the transformation of Tanzania’s countryside was now fast-tracked. In 1967, President Nyerere published his paper ‘Socialism and Rural Development’ in which he declared that ‘*land is the only basis for Tanzania’s development; we have no other*’ (Nyerere 1967). This meant that individual rights to land, in particular customary ones, might have to give way to the development of other projects. This affected small- medium- and large-scale agriculture. Whereas the initial villagisation scheme had, unsuccessfully, been an attempt to resettle people into settlements

where they could learn proper agricultural techniques for cultivation and mechanisation (Coulson 1982; Sundet 1997, unpublished), Nyerere, together with more radical factions in TANU, made a new push for the transformation of the sector. According to Nyerere, the better alternative would be communal farming in Ujamaa villages, which would provide the scale of operations that was required to push mechanisation.⁵

In 1973 an enabling act, the Rural Lands (Planning and Utilisation) Act, was passed, which provided the government with wide-ranging administrative power, first by allowing the president to declare any area a development area and second, by allowing the minister of regional administration to extinguish existing rights to land in the said area in order to establish ujamaa villages (Fimbo 2004). Over the years, the villagisation programme became increasingly heavy-handed and though Nyerere may never directly have ordered compulsory resettlement, his statements from 1972 onwards that the stage of persuasion was over and (Schneider 2004), and TANU's position in 1973 that all peasants should live in ujamaa villages by the end of 1976 (Fimbo 2004) were shaping the actions of implementing local bureaucrats. In 1975 nine million people were living in these villages, a very significant part of the rural population.

LAND AND EXTRACTIVE RIGHTS UNDER EARLY LIBERALISATION

At the end of the 1970s Tanzania had entered a deep economic crisis and gradually started reforming its economy. It was under increasing pressure from the donor community to do so and within the government and bureaucracy there were also factions pushing for liberalisation (Lofchie 2014). The most conspicuous change in this regard came with the insertion into the Constitution of 1977 of a Bill of Rights in 1984, which included a right to own property and to have it protected (Shivji et al. 2004, Tenga and Mramba 2014), but changes in the mining and petroleum sectors started earlier.

The extractive sector reforms meant a gradual withdrawal of the state's direct engagement as an investor. Shortage of capital meant that the Tanzanian parastatals increasingly reneged on government control over operations, as embodied in the 1979 Mining Act and the 1980 Petroleum Act. The timing of these reforms is remarkable. Whereas some scholarly research emphasises that liberalising reforms have been imposed on Tanzania by international financial institutions (see, for instance, Butler 2004; Manji 2006) these acts were introduced *before* the renewed negotiations with the IMF from 1985 to 1986 on a structural reform program (Mtei 2009). However, the state's regulatory powers were retained and allowed for significant discretionary decision-making by the minister. The two acts provided comprehensive law reforms in the extractive sectors for the first time since colonial times.

During the 1970s the government had not really managed to revive large-scale gold mining despite the rising gold prices; its attempt to create a state mining company, STAMICO, and the establishment and promotion of artisanal mining associations, did not register much success. With the 1979 Mining Act, ownership of mineral resources remained vested in the state, but government participation in exploration was no longer mandatory (Chachage 1995). Gradually, independent gold mining companies, mostly foreign owned, started operating. Implicitly, it also permitted artisanal mining, which had undergone a process of informalisation in the 1970s, a change confirmed by the publication of the Small Scale Mining Policy Paper of 1983, which encouraged people to supplement their incomes with mining activities (Jönsson and Fold 2009).

Similarly, an important aspect of the Petroleum (Exploration and Production) Act of 1980 was to provide security for investors. It stated that petroleum resources belonged to the state, but allowed the minister, through TPDC, to enter agreements with international oil companies. A Model Production Sharing Agreement (PSA) developed to guide the negotiations of these agreements was introduced in 1989 (Killagane undated). In contrast to both the 1979 Mining Act and the 1980 Petroleum Act, which were not clear on investors' access to courts in case of conflicts with the government, the PSA provided for international arbitration through the International Convention on the Settlement of Investment Disputes (ICSID). The petroleum sector too witnessed increased private sector interest, but the resources that had been found along the coast of south-eastern Tanzania were gas and by then, the domestic market was deemed too small for viable operations and the volume of

the finds too limited for the capital intensive infrastructure that was required for exporting the gas. Only much later and with donor funding did the first gas-to-electricity project take off during the 1990s (Pedersen and Bofin 2015).

These changes in ownership structures in the extractive sectors were part of broader changes in the economic policies of the period. Poor performance and shortage of capital in the parastatal sector meant that the state increasingly reneged on the demand for majority control over companies (Mukandala 1989), though the option to acquire interests in operations was retained. In the mining sector, the more welcoming attitude to foreign investors was followed by a liberalisation of the trade in minerals (which had been controlled by state agencies since 1967) in 1987–89. A huge increase in gold production ensued, not only due to increased production, but also to the registration of the unrecorded but existing production in the artisanal mining sector. This growth continued in the following decades (Gibbon 1995b; Bryceson et al. 2012; Nyankweli 2012).

While the early reforms aimed at strengthening investors' rights, the idea that land was a means for development was also retained; customary rights to land were only gradually strengthened in the following decades. Both the 1979 Mining Act and the 1980 Petroleum Act merely state that operations should interfere as little as possible and that the right-holder should maintain the right to use the land, but may not put up buildings on it. If the right-holder is disturbed he or she has a right to a limited compensation. The president may choose to allocate un-alienated land to the petroleum license holder for development purposes. A commissioner decides on disputes, but with recourse to the High Court (URT 1979; URT 1980). In this respect, the new extractive sector legislation was more about continuity than change.

Box 4 The re-emergence of the domestic entrepreneurial farmer

The agricultural sector witnessed a gradual opening up of land to more private ownership of land as part of a new agricultural policy in 1982–1983 that aimed at restoring economic growth and reducing food shortages. The policy had a dual purpose, first to promote medium- and large-scale privately owned farms, whether national or foreign (marking a change from Nyerere’s anti-capitalist farmer rhetoric of the 1960s), and second, to improve tenure security for villagers (Chachage 1993a; Sundet 1997, unpublished).⁶ The latter involved sub-leases to villagers that allowed them to hold land over longer periods of time. By then villagers had gradually started moving back to the land from which they had been forcefully displaced in the 1970s. The returning villagers gave rise to a number of conflicts over the ownership of land – a problem that was attempted to be solved with an act in 1992, the Land Tenure (Established Villages) Act, that extinguished rights to land held prior to Ujamaa villagisation. The Act, however, was rejected by the High Court and in the 1999 Land Act all existing rights to land were acknowledged, but it was left open how to decide between competing claims (Sundet 1997, unpublished). The fact that most of these changes happened through changes in policies, not in new Acts – this only happened with the 1999 Land Acts - can be seen as a sign of how politically sensitive this sector was.

LATE LIBERALISATION AND MULTIPARTY DEMOCRACY

Whereas the early phase of liberalisation had been characterised by a focus on reforming policies and institutions to allow for more private sector involvement in the economy, the privatisation of state-owned enterprises only happened at a foot dragging pace (Jacob et al 2016). Only eleven enterprises had been privatised by the end of 1992. However, from around 1993, the pace of privatisation gradually increased and the inflow of FDI increased manifold. It was combined with a gradual strengthening of investors' rights, which was deemed necessary to regain investor confidence after decades of nationalisation and state-centric African Socialism. Defunct parastatals were put on sale first, but some others followed, wholly or partly, and FDI increased rapidly (Gibbon 1999, 1995a). In the extractive sectors, the sale of an additional 30% of state shares in Williamson Diamonds in 1994 set the trend. Mining rights were now auctioned under favourable terms to attract foreign investments – too favourable in many people's eyes (Emel et al. 2011). In the more capital-demanding petroleum sector development was slower and only really took off after the turn of the century.

The efforts to promote private investments, including foreign ones, were initially reinforced by the National Investment (Promotion and Protection) Act of 1990, which protected foreign investments. First, it safeguarded investments against nationalisation without compensation, secondly, it offered investment incentives, and, finally, it established the Investment Promotion Centre, later turned into the Tanzania Investment Centre (TIC) (Chachage 1995, 2009; Gibbon 1995a; Gray 2013). Tanzania ratified the International Convention on the Settlement of Investment Disputes (ICSID) in 1992, allowing foreign investors to sue Tanzania if it breaches the conditions agreed upon (Cosmas 2014). The changes were confirmed with the Tanzania Investment Act of 1997 (Kweka 2009; Chachage 2009). The Parastatal Sector Reform Commission (PSRC) was established through the Public Corporation (Amendment) Act of 1993 for privatisation. Those not sold by PSRC were later transferred, again to the Loans and Advances Realisation Trust (LART), for liquidation and, in 2007 ended up in the Consolidated Holding Corporation (CHC) for privatisation (Chachage 2009).

The period was also characterised by a gradual increase in the protection of customary rights to land, though the extent of improvement is disputed (see box). The previous effort to create large-scale state-owned farms by acquiring customary land had subsided. However, the unregulated market in land that had emerged with early liberalisation had led to a large increase in the number of conflicts over land (Sundet 1997, unpublished), which represented a hindrance to the private investments that the country now sought to promote. They also represented a threat to political stability. It was therefore hardly a coincidence that the new land policy was finalised in 1995, the same year as the country's first multiparty elections, which turned out to be more competitive than anticipated by the ruling party. It is therefore argued that customary rights to land were now strengthened for real.

In the petroleum sector, changes did not involve major reforms. This was in part because of a still limited commercial interest. Innovations were introduced in bits

and pieces as the need arose. In 1989 a Model Sharing Production Agreement – the first of five to date – was introduced to structure negotiations between TPDC and foreign oil companies, which in many ways represented a similar move towards a more rules-based system as could be observed in the mining sector. It outlined royalty and taxation terms, thus limiting the room for negotiation somewhat. An important innovation was the possibility of foreign arbitration in case of conflict (TPDC 1989). In terms of rights to land and of local communities' rights, it kept mum, but it does mention the environment, stating that the contractor 'shall take necessary and adequate steps to prevent pollution and protect the environment' and that damages to property should be compensated (Article 22). However, it also maintained TPDC's right to enter joint ventures by fiat with ongoing operations.

More indirect changes happened in related sectors. In 1992 a National Energy Policy had opened up for private sector involvement in power production (Gratwick et al. 2006; Ghanadan 2009). In 1993 a private-public partnership (PPP) in the form of a project was launched with donor support from the World Bank, the European Investment Bank and the Swedish International Development Cooperation Agency (SIDA), aimed at developing the gas resources that had been found in the Songo Songo gas field in the southern part of Tanzania in 1974, but remained undeveloped due to lack of private sector interest. The project, however, did not materialise until the early 2000s. This coincided with the establishment of the Energy and Water Utilities Regularity Authority (EWURA) in 2001, which is responsible for technical and economic regulation of the electricity, petroleum, natural gas and water sectors in Tanzania (Ghanadan 2009). By then TPDC had ceased its oil marketing operations and concentrated on monitoring exploration.

Box 5 Improved protection of smallholders' customary rights to land?

The most marked break with past policies came with the passing of the Land Act and the Village Land Act by Parliament in 1999. The Land Acts can be seen as a response to the land conflicts and rampant land grabbing under the unregulated capitalism that had developed during the early phase of liberalisation (URT 1994; Gibbon 1995b). The 1999 acts also signified a reversal of the Ujamaa Villages Act of 1975, which had 'decentralised' power by establishing village councils, but made TANU leaders automatically leaders of the village institutions. Combined with the creation of district and regional development councils controlled by the executive, this was, in many ways, a centralisation of power with limited restriction on land allocations (Sundet 1997, unpublished; Fimbo 2004).

The Land Acts provided for a complex reform that covers a range of different areas, from land administration over land dispute settlement to valuation of land. The Acts did mark an acceptance of a market in land, also in areas under customary tenure, which disappointed some stakeholders and scholars, who believed this had been pushed by donors and international financial institutions (Shivji 1998, 1999; Manji 2006), but it also sought to regulate these markets by establishing a number of checks and balances. On paper, the reform strengthened local control in rural areas decisively. This was done in two ways.

First, by explicitly recognising existing, customary, rights to land, putting them on a par with granted rights. Secondly, through decentralisation over the control and administration of land to the village level, which could prevent higher-level officials from selling land without involving the villagers (Pedersen 2013). By requiring consent, the reform allowed villagers to reject investment projects promoted by investors, politicians and higher level bureaucrats (Nelson et al. 2012).

The reform also marks a major change from the Land Acquisition Act of 1967, which had stated that for unalienated (i.e. customary) land, compensation should only be paid for improvements, not for the land in itself. The Land Acts retain public ownership of land, but demand '*full, fair and prompt compensation to any person whose right of occupancy or recognised long-standing occupation or customary use of land is revoked or otherwise interfered with to their detriment by the State under this Act or is acquired under the Land Acquisition Act*' (Part 2, section 1, URT 1999). In other words it states that land has value in itself, even when not developed, and compensation should be paid according to market value (Tenga and Mramba 2014). Furthermore, the acts signify improvements on a wider range of procedural rights. For instance, in the case of resettlement it should be limited as much as possible and, if it happens, should follow principles of due process and fair administration. The affected persons should be given a 180 days' notice, which leaves right-holders with much more time than allowed by the Land Acquisition Act (URT 1967; Tenga and Mramba 2014). These provisions are important for extractive investments.

However, critics have noted new threats to customary land rights, including the dramatic increase in land areas reserved for conservation purposes (Benjaminsen and Bryceson 2012). Apart from the 16 national parks there are several game reserves (including the Selous, Africa's largest protected areas and one of the biggest in the world), government forest reserves, marine parks, game controlled areas, etc – there are new categories of protected areas on village land, including wildlife management areas (WMAs) and community-based forest reserves. These are, in particular, promoted by a new Wildlife Act, passed by Parliament in 2009, which provides for a recentralisation of Tanzanian Wildlife Management by giving state authorities more power to intervene in the management of village land. Currently, there are 21 WMAs, and the number is planned reach 38 in the near future. By 2012 the land under conservation had surpassed 40%, compared to the about 20% of land area which was under conservation at independence. At the same time, the human population has grown from 9 million people at independence to about 55 million now. The increase in state intervention is a more general phenomenon in the late 2000s. For the extractive sectors, it is analysed in more depth in a second paper, *Rights to land and extractive resources in Tanzania (2/2)— The return of the State* (Jacob et al 2016).

In the mining sector, the commercial interest was bigger and substantial legislative changes came earlier. The mining sector was envisaged to play an important role as a vehicle for private sector-led growth in this period by attracting foreign investments. In July 1998, the 1979 mining act was replaced by the then new mining act of 1998. By then, four mining development agreements had already been entered into with private investors (Nyankweli 2012). The 1998 mining act was a result of a World Bank-sponsored mining reform programme which focused on assisting Tanzania to create a new regulatory framework which would provide a better investment climate and boost private sector involvement in the mining sector (Butler 2004). The World Bank viewed the 1979 act as state centred, ant-private sector, outdated and unable to cope with socio-economic and political dynamics of Tanzania under liberalisation. It aimed at creating a more conducive environment for investors by compelling the ministry to conduct geological mapping and make data available to private companies and the general public, and it offered foreign mining companies tax exemptions.

Overall, the new mining act represented a break with much of the discretionary power that had been vested in the executive since colonial times. The provisions for the right of the state to acquire interests in mining operations disappeared in the new act. The transfer of mining rights, which had been up for ministerial approval previously, now became a right of the investor to a much larger extent (URT 1998), especially if stipulated in the Mining Development Agreements (MDAs) – a new feature introduced in the early 1990s and institutionalised with the Act – which investors negotiated with the Tanzanian state. MDAs are designed to allow multinational companies to negotiate long-term fixed tax rates and waivers for forced compliance with regard to dealing with environmental problems arising from mining activities (URT 1998). Rights could also be used as collateral for loans, something that made them transferable to foreign financial institutions without government approval. Furthermore, the recourse to international arbitration provided another break. As concluded by Paula Butler, the ‘1998 Mining Act represents a shift to a more “rules-base” system of management of the mining sector’ (Butler 2004).

For smallholders, there was more continuity than there were breaks in the Mining Act. Artisanal miners were mentioned in the act, but its emphasis was on their upgrading. They had the same rights to apply for mining licenses as large-scale miners, but with limited capacity to do so and limited outreach capacity of the authorities, this was more often de jure than de facto; a few were incorporated in the formal sector, but most were not (Fisher 2008). This subsequently led to conflicts and resettlement when large-scale miners moved into areas with poorly-documented artisanal rights (Bryceson et al. 2014; Lange 2008; Carstens and Hilson 2009). Whereas the artisanal miners had dominated the foreign exchange revenue earnings in the beginning of the 1990s, this shifted in favour of large-scale miners at the end of the decade (Nyankweli 2012). In terms of rights to land, there was increased emphasis on consent by surface rights-holders, but they could be sidelined if they withheld consent ‘unreasonably’, in which case the Ministry could dispense of this provision just as it could likewise designate ‘vacant’ areas for

mining operations (Lange 2008). The improved protection of customary rights that was embodied in the 1995 Land Policy and the 1999 Land Acts (see box above) did not find their way into the 1998 Mining Act, though the Land acts did finally have some impact when enacted in 2001.

CONCLUSION

Tanzania has undergone profound changes in its land tenure and investment regimes that fundamentally reconfigure the rights to land and extractive resources of different stakeholders. Based on an analysis of changes in mining and petroleum legislation combined with a review of relevant literature on the development of Tanzania's extractive sectors and its economic development models, this paper has focused on the rights of three different groups of stakeholders in the extractive sectors, namely smallholders, investors and state actors, in the colonial period until the post-structural adjustment reforms of the late 2000s. It has focused on landmark policies, that is, the emergence of new policy paradigms that require not only adaptation, but significant political and administrative effort to institutionalise. Particular attention has been paid to the plight of smallholders during the period. Whereas the discovery of minerals in the mining and petroleum sectors can mobilise resources for development as well as stimulate economic growth, the Tanzanian state ownership of sub-soil resources, whose extraction is largely in partnership with foreign investors, investments may mean the loss of land and livelihoods for these smallholders. This loss is associated with resettlement and various compensation claims

Overall, the paper argues that the state's power to govern the sectors has become ever-stronger over the years, but that its role as a direct investor in the sectors has waxed and waned according to the predominant economic policy regime of the time. During the period of African Socialism, it sought to take over operations through nationalisations, but this was reversed during the late liberalisation reforms of the 1990s when the state withdrew as a direct investor and instead vied for foreign private investments through stronger investment guarantees with recourse to international arbitration. At the end of the 2000s – a period not covered by this paper – the state re-emerges as a more direct investor, a change which is gradually embodied in the legal and institutional reforms of the period, the Mining Act of 2010 and the Petroleum Act of 2015. These acts are analysed in more depth in a second paper, *Rights to land and extractive resources in Tanzania (2/2): the return of the state* (Jacob et al 2016, forthcoming).

Throughout the period, the rights of smallholders, whether over land or over artisanal mining resources, were precarious. With the introduction of the 1999 Land Acts an improvement in their procedural rights, that is their right to information, participation and compensation when compulsory acquisition of land takes place, could be observed, compared to the wide-ranging discretionary power granted to the state by the colonial land ordinance and the 1967 Land Acquisition Act. However, this did not significantly narrow the broad definition of the public purposes that may justify compulsory land acquisition in the Land Acquisition Act and which allow state actors and investors to acquire, often large portions of land compulsorily with limited opportunities for smallholders to challenge these acquisitions. It is also did not change in any significant way in the later extractive sector reforms. Therefore, it is laudable that it looks like it will be addressed in the reform of Tanzania's land policy that has started with stakeholders' consultations

recently (URT 2016).

The paper has thus reviewed the historical changes in the extractive sector legislation combined with its economic development models all the way up to the spike in commodity prices in around 2007–8. The bottom line is that the property rights regimes and economic development models are characterised by co-variation. However, because changes in the legal frameworks governing sensitive land and the extractive sectors tend to be slower than those in economic policies, there is significant continuity from one phase to another. Whereas the literature sheds some light on these changes in laws and policies, their actual implications for the distribution of benefits within and across groups is often less well investigated. Thus, although colonial and post-colonial authorities disadvantaged artisanal miners, we also know that the latter continued operating. We just do not know much about the scale of their operations. Such broader political economy issues could be taken up in future research. What we do know is that the strength of rights among stakeholders changes further in the most recent period from the late 2000s. Not only does the most recent development signify increased direct state involvement as an investor in the extractive sectors. It also marks the emergence of a new group of local stakeholders, namely the local communities, local governments and local content. And perhaps even of strong civil society organisations too.

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END NOTES

1 These include several gas projects, a \$3.5 billion crude oil pipeline from Uganda scheduled to be completed in 2020, and plans for a \$6 billion standard gauge railway to link major coalfields in the south-western part of Tanzania with Mtwara port. The 997 km railway is scheduled to be completed in 2023.

2 There never was consensus in Tanzania with regard to natural resource policies. For land policies see Sundet 1997, unpublished, for mining policies see Chachage 1995, and for petroleum see Pedersen and Bofin, 2015.

3 Nyerere's dislike of capitalist farmers was well established already back in 1958 when, in the pamphlet *Mali ya Taifa* (National Property), he warned against promoting freehold land, which would cause the emergence of tenants and 'bloodsucker' landlords and, thus create antagonism in the country (Nyerere 1966. See also Nyerere 1967).

4 The National Bank of Commerce (Establishment Act) from 1967, the State Trading Corporation (Establishment Etc.) Act of 1967, the National Agricultural Products Board (Vesting of Interests) Act from 1967, the Insurance (Vesting of Interests and Regulations) Act from 1967, the Industrial Shares (Acquisition) Act from 1967 Silver, M. S. 1984. *The Growth of Manufacturing Industry in Tanzania. An Economic History*, Boulder, USA, Westview Press, Coulson, A. 1982. *Tanzania. A Political Economy*, New York, USA, Oxford University Press.

5 The World Bank and several other donors warned against the element of communal farming (Sundet 1997, unpublished. *The Politics of Land in Tanzania*. PhD dissertation PhD Thesis (Unpublished), University of Oxford.

6 The recommendations of the task force that prepared the 1982–3 Agricultural Policy, were met with hostility in the ruling party's National Executive Council because these changes were deemed to be in conflict with the country's socialist policies, and their acceptance required President Nyerere's personal intervention (ibid.)