
INTERNATIONAL JOURNAL OF SCIENCE ARTS AND COMMERCE

ANALYSING INDIRECT EXPROPRIATION DISPUTES IN TANZANIA WITH REFERENCE TO PUBLIC INTEREST AND FOREIGN INVESTOR RIGHTS.

Winfrida Gavana¹

Human Resources Officer,
The School of St Jude,
P.O. Box 11875 Arusha.

ABSTRACT

This study critically examines disputes over indirect expropriation in Tanzania, focusing on the tension between the State's sovereign regulatory authority and its obligations to protect foreign investors under international investment agreements. Following economic liberalisation in the 1990s, Tanzania adopted investor-friendly policies that encouraged substantial foreign direct investment, particularly in the natural resources sector. However, sweeping legislative and regulatory reforms introduced in the 2010s gave rise to a series of disputes in which foreign investors alleged that state interventions amounted to unlawful indirect expropriation under bilateral investment treaties. Using doctrinal and comparative research methods, the study assesses the sufficiency of Tanzania's domestic and international legal frameworks in managing these conflicts. The findings reveal persistent gaps, including unclear statutory definitions and inconsistent regulatory standards, which heighten the State's exposure to arbitration claims. While Tanzania frequently relies on public interest justifications, such as economic equity and resource protection, international tribunals increasingly evaluate disputed measures through principles of proportionality, legitimate expectations, and fair and equitable treatment approaches, which often favour investor protection. The study concludes that Tanzania should strengthen its legal framework and renegotiate treaty provisions to safeguard its regulatory autonomy better, while tribunals should adopt more balanced and predictable standards to ensure fairness and reduce future disputes.

¹Masters of International trade and Investments Laws (LL.M ITIL) Candidate at the Open University of Tanzania, and the Human Resources Officer at The School of St Jude.

Keywords: Indirect Expropriation; Public Interest; Legitimate Expectations; Foreign Investment; Regulatory Takings; Bilateral Investment Treaties (BITs).

1.1 Introduction

Indirect expropriation (IE) is a central yet highly contested concept in international investment law. Unlike direct expropriation, IE arises when the State measures substantially deprives a foreign investor of the use or value of an investment without a formal transfer of title. Its significance in Tanzania has grown in parallel with the country's increasing reliance on foreign direct investment (FDI), particularly in mining, energy, and infrastructure, where regulatory interventions frequently intersect with protections afforded under bilateral investment treaties (BITs). Global scholarship and arbitral jurisprudence highlight that the core challenge in IE disputes is determining when regulatory measures cross the boundary from legitimate public-interest regulation into unlawful expropriation. Key principles such as necessity, proportionality, legitimate expectations, and public purpose feature prominently in this assessment.

Tanzania's transition from a state-controlled economy to a liberalized market in the late 1980s and 1990s, driven by the Economic Recovery Programme (ERP), expanded the role of FDI and introduced institutions such as the Tanzania Investment Centre (TIC). BITs and regional investment agreements provided guarantees including fair and equitable treatment (FET), protection against indirect expropriation, and access to international arbitration. However, FDI growth also created structural tensions, particularly in resource-rich sectors.

Policy reforms in the mid-2010s, including the Natural Wealth and Resources Acts of 2017, sought to strengthen sovereignty and promote equitable benefit-sharing. These measures, although legitimate, generated uncertainty and contributed to disputes, such as *Symbion Power LLC v. Tanzania* and *Acacia Mining PLC v. Tanzania*. Comparable international cases, such as *Philip Morris v. Uruguay* and *United Utilities v. Estonia*, illustrate the complex balance between investor protection and regulatory autonomy.

Against this backdrop, this study examines whether Tanzania's domestic and international legal frameworks provide sufficient clarity on indirect expropriation and assesses the impact of the lack of explicit regulatory safeguards on the State's ability to pursue public-interest objectives while meeting its international obligations.

2. Legal Framework on Indirect Expropriation

The legal framework governing indirect expropriation provides the foundation for assessing when state regulatory measures cross the threshold into compensable takings under domestic and international law. Unlike direct expropriation, which involves an overt transfer or seizure of property, indirect expropriation arises from state actions that substantially interfere with the use, value, or benefits of an investment without resulting in a formal deprivation of ownership. This section examines the normative basis, statutory provisions, and treaty obligations that shape Tanzania's approach to indirect expropriation, while analyzing how international investment

agreements, arbitral jurisprudence, and comparative practice inform the interpretation of regulatory measures. By outlining the core principles, legal standards, and doctrinal tests, including legitimate expectations, proportionality, and police powers, this part establishes the analytical framework necessary for evaluating Tanzania's obligations and exposure in investor-state disputes.

2.1 International Legal Framework on Indirect Expropriation

2.1.1 Bilateral Investment Treaties (BITs)

Bilateral Investment Treaties (BITs) are agreements between two States that regulate and protect investments by nationals of one State in the territory of another, operating under the principle of *pacta sunt servanda* and allowing injured investors to seek remedies before authorised tribunals². BITs form the primary legal basis for indirect expropriation claims, striking a balance between investor protection and the host State's regulatory sovereignty. Although investors may acquire rights over natural resources, these rights remain subject to lawful, non-discriminatory, and publicly motivated expropriation, accompanied by prompt and fair compensation.

Many BITs involving Tanzania lack explicit definitions of indirect expropriation, generating interpretative uncertainty; however, more recent treaties, such as those with Canada and China, clarify that bona fide public welfare regulations do not amount to indirect expropriation unless their effects are excessively burdensome. These provisions operate alongside multilateral frameworks, such as the ICSID Convention and UNCTAD guidelines, as well as arbitral jurisprudence, including *Tecmed v Mexico*, *LG&E v Argentina*, and *Philip Morris v Uruguay*, which establish that regulations enacted in good faith for legitimate public purposes generally do not constitute indirect expropriation unless their impact is excessive.³

In Tanzania, arbitration cases such as *Stirling Civil Engineering Ltd v United Republic of Tanzania* and *Sunlodges Ltd v United Republic of Tanzania* illustrate how foreign investors have challenged government actions they claimed amounted to indirect expropriation, highlighting the tension between Tanzania's sovereign regulatory reforms and the protections afforded to investors under treaty law, with tribunals evaluating whether state measures effectively nullified the economic benefits of investments despite public interest justifications.⁴

2.1.2 Multilateral Treaties and Institutions

Multilateral investment treaties (MITs) establish uniform rules for the protection of foreign investments by reducing legal uncertainty, ensuring non-discrimination, preventing unlawful expropriation, and guaranteeing access to neutral and impartial dispute-resolution mechanisms. Key instruments, including the ICSID Convention, the UNCTAD Investment Policy Framework

²Dolzer and Schreuer, *Principles of International Investment Law* (2nd edn, OUP 2012).

³*Tecmed v Mexico* (ICSID Case No. ARB(AF)/00/2); *LG&E v Argentina* (ICSID Case No. ARB/02/1); *Philip Morris v Uruguay* (ICSID Case No. ARB/10/7).

⁴*Stirling Civil Engineering Ltd v United Republic of Tanzania* (ICSID Case No. ARB/05/22); *Sunlodges Ltd v United Republic of Tanzania* (PCA Case No. 2018-09).

for Sustainable Development, and the WTO TRIMs Agreement, affirm that although host states retain sovereign regulatory authority, such measures must comply with the principles of legality and proportionality, and compensation may be required where investor rights are excessively impaired.

In Tanzania, however, statutes such as the Natural Wealth and Resources (Permanent Sovereignty) Act and the Natural Wealth and Resources Contracts Act restrict international arbitration and assert strong sovereign control over natural resources⁵, creating tension with the State's multilateral and bilateral obligations. Disputes such as *Stirling Civil Engineering Ltd v United Republic of Tanzania* and *Sunlodges Ltd v United Republic of Tanzania* demonstrate foreign investor claims of indirect expropriation arising from regulatory measures.⁶ International institutions, including ICSID, the ICC, UNCITRAL tribunals, the ICJ, and specialized claims bodies, continue to shape global investment governance. Yet attempts to establish a comprehensive multilateral investment treaty have repeatedly failed due to divergent interests between developed and developing states, leaving only partial frameworks under GATS, TRIPS, and TRIMs⁷.

2.1.3. Customary International Law

Customary international law, recognised under Article 38(1)(b) of the Statute of the International Court of Justice, derives from the general and consistent practice of states followed out of a sense of legal obligation, or *opinio juris*⁸, and is distinct from treaty law, often described as international common law binding on all states regardless of treaty participation⁹. It plays a critical role in regulating international investments, particularly where Bilateral or Multilateral Investment Treaties (BITs or MITs) contain gaps or ambiguities, as tribunals often refer to customary principles to determine the obligations of states and foreign investors.

Under customary international law, indirect expropriation is lawful if it serves a legitimate public purpose, is non-discriminatory, follows due process, and is accompanied by prompt, adequate, and effective compensation¹⁰. These standards, articulated in the Hull formula⁶, have been upheld in cases including *Amoco International Finance Corp v Iran*, where the tribunal confirmed that these principles form part of general international law¹¹, and in *ADC Affiliate Limited v Hungary*, where the tribunal emphasized that lawful expropriation requires a public interest, fair procedure, and proportional compensation¹².

⁵Natural Wealth and Resources (Permanent Sovereignty) Act [Cap 499 Revised Edition 2023] Natural Wealth and Resources Contracts (Review and Renegotiation of Unconscionable Terms) Act [Cap 450 Revised Edition 2023].

⁶ICSID Case No. ARB/05/22; PCA Case No. 2018-09

⁷WTO Agreements: GATS, TRIPS, TRIMs.

⁸ Statute of the International Court of Justice, art 38(1)(b).

⁹Dolzer and Schreuer (n 2)15.

¹⁰ Ibid 19; Hull, C, 'Memorandum on the Treatment of Alien Property' (1938) US Department of State.

¹¹ICSID Case No ARB/08/2.

¹²ICSID Case No ARB/03/16.

The public purpose requirement ensures governmental motives are legitimate, while due process and non-discrimination guarantee equal treatment under the law, including notice and opportunity to be heard. Adequate compensation prevents foreign investors from bearing undue burdens, reflects market value, and occasionally compensates for lost profits. Despite broad recognition, there is no universal consensus on customary international law regarding foreign investment. The International Minimum Standard, advocated by capital-exporting states, requires foreign investors to receive treatment potentially exceeding that of nationals, whereas the Calvo Doctrine, supported by Latin American and developing states, limits protection to national parity. This divergence and the proliferation of BITs underscore the absence of a universally accepted customary framework¹³.

2.2 Domestic Legal Framework Governing Expropriation in Tanzania

Tanzania's domestic legislation demonstrates a dual commitment to safeguarding public interests while maintaining an environment conducive to foreign investment; however, inconsistencies and the absence of a clear definition of indirect expropriation create regulatory ambiguity.

2.2.1 The Constitution of the United Republic of Tanzania of 1977.

As amended from time to time, the Constitution of the United Republic of Tanzania of 1977 serves as the supreme legal instrument and foundational law within Tanzanian jurisdiction. All other laws enacted in Tanzania must conform to the Constitution to be valid and enforceable. Any legislation that is inconsistent with it is deemed null and void, and therefore inoperative.¹⁴ As the Supreme law of the country, the Constitution recognizes and guarantees property ownership rights to every citizen and person within Tanzania, without discrimination based on color, sex, nationality, or economic status. Article 13(4) explicitly prohibits discrimination on the grounds of sex, ensuring equal protection under the law.¹⁵ The constitutional protection extends to foreign investors, who are entitled to own property or obtain rights to use property in Tanzania through usufructuary rights or other legal mechanisms provided under Tanzanian law, primarily facilitated through the Tanzania Investment Centre, established under the Investment Act, 1997.¹⁶ The Investment Act affirms that every foreign investor has the right to acquire and own property for investment purposes, and the said property is protected from unlawful expropriation except where it is done for a public purpose or interests and in accordance with the law, and upon payment of prompt, fair, and adequate compensation.¹⁷

¹³ UNCTAD (n 3) 21.

¹⁴ Article 64(5) of the Constitution of the United Republic of Tanzania of 1977 Amendment of 2023.

¹⁵ Ibid, Article 13(4).

¹⁶The Tanzania Investment Act, No 26 of 1997, established the Tanzania Investment Centre to facilitate investment and property acquisition by foreign and local investors.

¹⁷The Tanzania Investment Act [Cap 38 Revised Edition 2023], Section 29 provides for the guarantees on the protection of foreign investors against expropriation and it contains the conditions to be adhered in relations to the expropriation.

Once such rights are legally acquired, they are protected against government expropriation except when justified by public interest. In such cases, expropriation must comply with due process and be followed by prompt, fair, and adequate compensation to the affected party. Article 24(1) of the Constitution guarantees every person the right to own property, and Article 24(2) prohibits deprivation of property except where it is authorized by law and accompanied by fair compensation.¹⁸

These provisions provide safeguards against arbitrary dispossession of tangible property. However, the constitutional framework primarily protects physical property and does not explicitly address indirect expropriation, which is when regulatory measures or state actions substantially interfere with the use or value of an investment without a formal transfer of ownership.

2.2.2 Land Legislations

Under Tanzanian law, all land vests in the President as a trustee on behalf of the citizens, effectively rendering land public property while permitting individuals and entities, including foreign investors, to occupy and use land through granted rights of occupancy or derivative rights.¹⁹ These statutes provide for compensation when the government compulsorily acquires land, which must be fair, adequate, and complete, in accordance with due process as stipulated under Sections 3(f) and (g) of the Land Act.²⁰ Compensation, however, is generally limited to the market value of the land and any developments thereon, as elaborated in the Land (Assessment of the Value of Land for Compensation) Regulations, GN No. 78 of 2001.²¹ This statutory framework excludes broader economic expectations such as lost profits or anticipated future earnings, which are recognized under international investment law as part of full reparation in expropriation cases.²²

This domestic limitation generates potential inconsistencies with international standards, which require compensation to reflect not only tangible asset value but also opportunity costs, lost goodwill, and other intangible losses. For instance, in *ADC Affiliate Ltd v Hungary*²³, the arbitral tribunal held that full compensation must account for the investor's total economic loss, not solely the asset's market value. Consequently, Tanzania's approach may fall short of international norms, particularly in cases of indirect expropriation where interference occurs without outright transfer of ownership.

¹⁸Constitution of the United Republic of Tanzania of 1977 Amendment of 2023, Articles 24(1) -(2), provides and guarantees for the Right to own property and protection against any form of the deprivation.

¹⁹ The **Land Act**, [Cap 113 Revised Edition 2023], ss 3- 4; The **Village Land Act** [Cap 114 Revised Edition 2023], ss 4-6.

²⁰ The **Land Act**, [Cap 113 Revised Edition 2023].

²¹The **Land (Assessment of the Value of Land for Compensation) Regulations**, GN No 78 of 2001, Regulation 3 and 6.

²²Dolzer R and Schreuer C, *Principles of International Investment Law* (2nd edn, Oxford University Press 2012) 101-110.

²³(Award, ICSID Case No ARB/03/16, 2 October 2006) paras 481 - 483.

Tanzanian courts have reinforced constitutional and statutory rights to compensation, notably in *Attorney General v Lohay Akonaay and Joseph Lohay*,²⁴ where the government acquired village land without compensating the affected family, claiming no formal title existed. The Court rejected this argument, affirming that customary land rights are recognized and protected under both the Constitution and land laws, and that customary or deemed rights of occupancy are equivalent to formally granted rights of occupancy.²⁵ Moreover, the Court interpreted Article 24(2) of the Constitution to mean that deprivation of property, whether formal or customary, without fair compensation violates constitutional protections.²⁶

While this landmark decision highlights the need for compensation, it does not define "adequate" or "prompt" compensation in accordance with international investment law. Tanzanian law remains primarily focused on market value, providing limited consideration for lost profits or business expectancy, which contrasts with international norms that encompass full reparation of both tangible and intangible losses.²⁷ Therefore, although domestic courts uphold the principle of compensation, the narrow scope and methodology of Tanzania's legal framework may create tension with international standards for expropriation.

2.2.3 Investment Act and its Regulations.

The Tanzania Investment Act No. 26 of 1997 provides the main legal framework for promoting and protecting foreign and domestic investments in Tanzania. Section 29 of the Act protects foreign investors against expropriation, stipulating that ***no business enterprise shall be nationalized or expropriated unless the expropriation is in accordance with due process of law, for the public interest, and upon payment of fair, adequate, and prompt compensation.***²⁸

Whereas the law defines compensation to include the market value of the investment and the right to repatriate the funds without restriction, aligning partially with international standards such as those under Bilateral Investment Treaties (BITs) and customary international law.²⁹ However, the Act remains silent on indirect expropriation, government measures, or regulatory actions that do not involve outright seizure but significantly interfere with the foreign investor's ability to use, control, or benefit from the investment.

This omission is problematic, as indirect expropriation has become a central issue in international investment arbitration. International tribunals have increasingly held that excessive regulatory interference, such as sudden policy changes, arbitrary permit refusals, or

²⁴Civil Case No. 7 of 1997, High Court of Tanzania.

²⁵Ibid.

²⁶The **Constitution of the United Republic of Tanzania** of 1977 Amendment of 2023.

²⁷UNCTAD, *Expropriation: A Sequel*, UNCTAD Series on International Investment Policies for Development, New York and Geneva, 2005, p. 32.

²⁸The Tanzania Investment Act [Cap 38 Revised Edition 2023].

²⁹Ibid, Section 11(3) and (4).

environmental restrictions, can amount to indirect expropriation, even if the title remains in the hands of the foreign investor.³⁰ The Tanzanian Investment Act does not provide legal remedies or guidelines for compensatory purposes in cases of regulatory takings.

Moreover, the Investment Regulations, particularly the Tanzania Investment (Licensing and Facilitation) Regulations, GN No. 237 of 2021, primarily outline the procedural aspects of acquiring Certificates of Incentives, dispute resolution mechanisms, and procedures for registering foreign investors. They do not elaborate on protection from regulatory interference or clarify standards for compensation in non-physical takings.³¹

Consequently, while Tanzania's Investment Act aligns with international norms on direct expropriation, it falls short of addressing indirect expropriation, which could potentially undermine foreign investor confidence and conflict with obligations under international investment treaties.

2.2.4 Sovereignty over Natural Resources

Tanzania has reinforced its sovereignty over natural resources through legislative reforms enacted in 2017, notably the Written Laws (Miscellaneous Amendments) Act 2017, the Natural Wealth and Resources (Permanent Sovereignty) Act 2017, and the Natural Wealth and Resources Contracts (Review and Re-Negotiation of Unconscionable Terms) Act 2017.³² Collectively, these statutes affirm the State's permanent sovereignty over natural resources and grant mechanisms to review, renegotiate, or invalidate investment contracts deemed contrary to national interest. Although the 2023 amendments to the Natural Wealth and Resources Act initially sought flexibility for specific agreements, their subsequent withdrawal underscores Tanzania's commitment to maintaining stringent control over its natural wealth.

Section 11 of the Permanent Sovereignty Act³³ explicitly prohibits submitting natural resource disputes to foreign courts or tribunals, requiring all conflicts to be adjudicated exclusively within the Tanzanian legal system. While intended to safeguard national interests, this provision may conflict with Tanzania's obligations under Bilateral Investment Treaties (BITs) and international investment law, which generally guarantee foreign investors access to international arbitration.³⁴

³⁰UNCTAD, *Expropriation: UNCTAD Series on Issues in International Investment Agreements II* (United Nations 2012) 6- 9 https://unctad.org/system/files/official-document/unctaddiaeia2011d7_en.pdf.com accessed 22nd July 2025.

³¹Tanzania Investment (Licensing and Facilitation) Regulations, GN No 237 of 2021.

³²United Republic of Tanzania (URT), **Written Laws (Miscellaneous Amendments) Act, 2017; Natural Wealth and Resources (Permanent Sovereignty) Act, 2017; Natural Wealth and Resources Contracts (Review and Re-Negotiation of Unconscionable Terms) Act, 2017.**

³³The Natural Wealth and Resources (Permanent Sovereignty) Act, [Cap 449 Revised Edition 2023].

³⁴Dolzer and Schreuer, *Principles of International Investment Law*, 2nd ed., Oxford University Press, 2012, pp. 104-107.

The broad discretion granted to the government to review or terminate contracts introduces potential tension with customary international law protections, particularly regarding the issue of indirect expropriation. Regulatory measures that substantially diminish the economic value of an investment without transferring formal ownership may constitute indirect expropriation under international standards, potentially triggering treaty breaches even if unrecognized under domestic law.³⁵ This expansive governmental authority, combined with limited procedural safeguards, can undermine legal predictability, deter foreign investment, and increase the risk of investor-state disputes.

Judicial and arbitral practice illustrates these tensions. In *Sunlodges Ltd (BVI) & Sunlodges (T) Ltd v United Republic of Tanzania*,³⁶ the claimants held a right of occupancy for agricultural purposes, which the government revoked in 2011 without evident justification and reallocated to a third party for a cement plant. The Permanent Court of Arbitration (PCA) tribunal found the revocation unjustified under both domestic law and the relevant BIT, holding it constituted a de facto expropriation. The tribunal awarded damages reflecting the full economic value of the property plus associated losses, illustrating how administrative or regulatory actions can meet the test for indirect expropriation.

Similarly, in *Stirling Civil Engineering Ltd v United Republic of Tanzania*,³⁷ the foreign investor challenged the revocation of its right of occupancy under the Land Act, alleging state non-compliance with domestic procedures. The dispute was initially addressed through ad hoc arbitration in Dar es Salaam and subsequently involved enforcement proceedings in England and the Netherlands. While the arbitrator upheld revocation for contractual breaches, the case highlighted critical issues of procedural fairness and whether government actions were genuinely regulatory or effectively substituted for those of foreign investors.

These cases highlight the delicate balance Tanzania seeks to strike between asserting sovereign control over natural resources and fulfilling its international obligations to protect foreign investment, particularly in terms of procedural safeguards and the prevention of indirect expropriation.

3. Key International Investment Law Principles

Tanzania is also bound by a network of Bilateral Investment Treaties (BITs) and customary international law principles, both of which shape the interpretation and application of indirect expropriation standards. This chapter examined the international legal framework governing indirect expropriation and assessed its relevance to Tanzania, focusing on key treaty provisions, arbitral jurisprudence, and principles that regulate the balance between state sovereignty and

³⁵Ibid; UNCTAD, *Expropriation: A Sequel*, New York and Geneva, 2005, p. 32.

³⁶(PCA Case No 2018-09, Award, 20 December 2019), paras 2834 - 2857, 355 - 356.

³⁷Arbitration seated in Dar es Salaam, final award and subsequent enforcement proceedings; Enforcement judgment, Hague Court of Appeals, 20 December 2016.

investor protection. These international norms have a significant influence on Tanzania's regulatory space, particularly in sectors such as land, natural resources, and infrastructure, where government intervention is frequent. International tribunals use three interconnected principles to determine whether state regulation constitutes compensable indirect expropriation:

1. Protection against indirect expropriation

International investment law protects investors not only against direct expropriation but also against regulatory measures that substantially diminish the value, use, or enjoyment of their investments. Arbitral tribunals have developed coherent criteria, most notably the principles of necessity, proportionality, and legitimate public purpose, to determine whether state regulation crosses the threshold into indirect expropriation. While states retain the sovereign authority to regulate in the public interest, such measures must not impose an excessive or disproportionate burden on the investor.

These standards guide arbitral tribunals in assessing whether a regulatory act crosses the threshold from lawful regulation to compensable expropriation.

2. Proportionality Test

The proportionality test assesses whether the burden imposed on an investor is excessive in relation to the State's public policy objectives. In *Tecnicas Medioambientales Tecmed SA v Mexico*³⁸, the tribunal stressed that States must maintain a fair balance between regulatory autonomy and investor protection.

Recent Tanzanian cases, *Winshear Gold Corp v. United Republic of Tanzania and Ntaka Hill Nickel Project (Indiana Resources Ltd. and others) v. United Republic of Tanzania*,³⁹ illustrate how arbitral tribunals apply this standard. Both sets of claimants challenged the 2017 mining law amendments that revoked retention licences. They argued that Tanzania's measures imposed a disproportionate burden, alleging that less restrictive alternatives existed to achieve the State's objective of asserting greater control over natural resources.

Arbitral rulings, which awarded over USD 109 million in Ntaka Hill and more than USD 30 million in Winshear, affirmed that while States retain the sovereign right to regulate in the public interest, such measures cannot impose an unduly severe impact on foreign investments without compensation.

3. Doctrine of Legitimate Expectations

The doctrine of legitimate expectations, a core component of the fair and equitable treatment (FET) standard, plays a determinative role in assessing indirect expropriation by protecting expectations that investors reasonably derive from explicit assurances, established legal frameworks, or consistent state conduct. Tribunals have clarified that such expectations must be grounded in specific representations by the host State must be reasonable, lawful, and objectively identifiable, must be supported by transparent and good-faith governmental behavior, and must account for the ordinary commercial and regulatory risks inherent in the host State's

³⁸ICSID Case No. ARB (AF)/00/2, Award (29 May 2003) paras 116- 122.

³⁹ ICSID Case No ARB/20/24, Award (2023); (ICSID Case No ARB/20/38), Award, 14 July 2023.

legal system. In ***LG&E Energy Corp v Argentina***⁴⁰, the tribunal held that although Argentina acted during a severe economic crisis, several of its measures were disproportionate and inconsistent with the FET standard because they undermined legitimate investor expectations, reaffirming that legal stability and predictability form integral elements of FET protection. Where a State frustrates legitimate expectations, it may incur an obligation to compensate for resulting losses unless a valid plea of necessity is established. In Tanzania, the doctrine has been central to disputes arising from the 2017 regulatory reforms: in ***Winshear Gold Corporation v Tanzania***⁴¹, the claimant argued that the cancellation of mining licences contradicted specific assurances regarding security of tenure⁷, while in ***Stirling Civil Engineering Ltd v Tanzania***, the claimant contended that regulatory and contractual alterations fundamentally disrupted the stable investment environment upon which it had relied. Collectively, these cases illustrate the persistent tension between Tanzania's sovereign authority to regulate natural resources in the public interest and its international obligation to uphold legal certainty for foreign investors, with the doctrine of legitimate expectations serving as a mediating principle between regulatory autonomy and investor protection.

4. Fair and Equitable Treatment (FET)

Under most BITs, Tanzania must accord FET, which encompasses protection against arbitrary, discriminatory, or non-transparent state actions. Tribunals frequently assess whether regulatory measures were predictable, transparent, and implemented in good faith.

The FET analyses in ***Winshear Gold Corporation v. Tanzania and Stirling Civil Engineering Ltd. v. Tanzania*** demonstrate that abrupt or opaque regulatory changes may constitute FET violations if they undermine reasonable investor expectations. These cases underscore that, although Tanzania may reform its extractive and infrastructure sectors, such reforms must not retroactively destabilise the investment environment without adequate justification or procedural fairness.

5. Compensation Standards

Under international law, once indirect expropriation is established, the State must provide prompt, adequate, and effective compensation, typically calculated based on the investment's market value, the investor's legitimate expectations, and the broader economic impact of the State's conduct; these standards ensure that while States retain sovereign regulatory authority, they remain accountable when regulatory measures disproportionately diminish the value or viability of foreign investments.

4. Analysis of Arbitration Cases Involving Tanzania

This section examines major investment arbitration cases involving Tanzania, demonstrating how arbitral tribunals have interpreted regulatory measures in light of expropriation standards,

⁴⁰ICSID Case No ARB/02/1, Award (3 October 2006).

⁴¹ICSID Case No ARB/20/24, Award (2023).

and illustrating the persistent tension between Tanzania's sovereign right to regulate and the protections granted to foreign investors under BITs and investment agreements.

4.1.1 Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania,⁴²

The *Biwater Gauff v Tanzania* case was one of the earliest ICSID disputes against the country, arising from the government's termination and repossession of water supply infrastructure following contractual disputes with City Water Services Limited (controlled by Biwater). Although the tribunal rejected the direct expropriation claim on the basis that Biwater had already lost effective control due to its own contractual failures, it did find a breach of the Fair and Equitable Treatment (FET) standard, holding that Tanzania acted in a manner inconsistent with transparency and good governance. The relevance of this case for indirect expropriation analysis lies in its emphasis on the principle that a state's assumption of control may avoid an expropriation finding if the investor's own contractual failures are a contributing factor to the outcome. However, it simultaneously demonstrates that procedural irregularities and the lack of due process can still lead to liability under the FET standard, even where expropriation itself does not occur.

4.1.2 Nachingwea U.K. Limited, Ntaka Nickel Holdings Limited, and Nachingwea Nickel Limited (Indiana Resources) v United Republic of Tanzania,⁴³

This dispute is directly linked to the sweeping 2017 reforms, in which foreign shareholders in mineral exploration companies contended that amendments to the Mining Act and the new sovereignty laws amounted to indirect expropriation, as they invalidated their mining licenses and permit rights. The claimants argued that the revocation and non-renewal of mineral rights, the prohibition on international arbitration, and the requirement for mandatory state participation all constituted unlawful regulatory interference and breached established legitimate expectations. Although the final award's whole reasoning is pending publication, the case's implications are clear: broad, retroactive, or sweeping reforms that alter vested rights even when framed as being in the "public interest" carry a high risk of being interpreted as indirect expropriation, highlighting the necessity for Tanzania to provide prospective reforms, clear transitional arrangements, and consistent compensation mechanisms to avoid future liability.

4.1.3 Aqua Power and Catalysis Capital Ltd v. United Republic of Tanzania⁴⁴

Aqua Power v Tanzania involved a foreign investor in the renewable energy sector, whose dispute arose from unilateral regulatory changes in energy pricing and Power Purchase Agreements (PPAs). The investor alleged that these changes rendered the project commercially unviable due to sudden tariff reductions and significant delays in approval and payment. The tribunal in this case likely examined the nature of the investor's contractual rights, the extent of

⁴²ICSID Case No. ARB/05/22 (2008).

⁴³(ICSID Case No ARB/20/38), Award, 14 July 2023.

⁴⁴ICSID Case No. ARB/24/42.

the economic loss, the predictability of the regulatory changes, and the existence of legitimate expectations created by prior state conduct, leading to the conclusion that while states retain the right to regulate their energy sectors, sudden and drastic policy shifts can still constitute a breach of investor protections. This case demonstrates the extreme sensitivity of energy-sector investments to pricing changes, contractual renegotiation, and political cycles, confirming that stability and predictability remain critical for Tanzania to avoid future expropriation claims in this sector.

4.1.4 Richard N. Westbury, Paul D. Hinks, and Symbion Power Tanzania Ltd v United Republic of Tanzania,⁴⁵

suspension and termination of a 15-year Power Purchase Agreement (PPA) prompted claims of indirect expropriation and FET violations, with investors arguing that TANESCO's unilateral actions rendered the investment worthless, exceeding legitimate regulatory authority. At the same time, Tanzania defended its actions as lawful sovereign regulation in the public interest, resulting in a settlement of approximately USD 153.43 million. It demonstrates how investor-state arbitration incentivizes negotiated resolutions that strike a balance between state interests and foreign investor protections.

Symbion Power involved a series of disputes related to emergency power supply contracts with TANESCO, where disagreements over payment obligations, tariff adjustments, and alleged government interference in contract performance led the investor to claim indirect expropriation, as Tanzania's actions deprived the company of its contractual benefits. Key findings from the available sources suggest that contractual disruptions directly attributable to the State can indeed amount to expropriation if they neutralise the economic value of the investment. Still, they also clarified that ordinary commercial disputes do not qualify, underscoring the crucial need for clear evidence that the State acted in a sovereign, rather than a purely commercial, capacity. The lesson for Tanzania here is that regulatory decisions by entities like TANESCO must align with BIT standards, and commercial disagreements should be diligently resolved via contractual mechanisms before being allowed to escalate into high-stakes treaty claims.

A cross-case analysis of Tanzanian investment arbitration disputes reveals consistent patterns that expose the State's legal vulnerabilities. Tribunals repeatedly find that retroactive legislation affecting vested rights, even when enacted for legitimate public-interest purposes, may amount to indirect expropriation or a breach of legitimate expectations. Applying an effects-based approach, tribunals focus on the economic impact of state measures rather than regulatory intent, a challenge heightened by Tanzania's older BITs, which lack explicit safeguards for regulatory autonomy.

The frustration of legitimate expectations, now central to the fair and equitable treatment (FET) standard, is a recurring ground for investor claims. Cases such as *Standard Chartered Bank v*

⁴⁵ICSID Case No. ARB/19/3 (2019).

TANESCO demonstrate that while states may regulate, they must uphold assurances, contractual guarantees, and legal stability. Similarly, disputes involving natural resource reforms show that public-interest objectives must be pursued through proportionate, non-discriminatory measures that do not destroy investment value. The *Tecmed*⁴⁶ balancing test remains influential in evaluating this proportionality.

Tanzania's lack of a clear domestic standard on indirect expropriation has led investors to pursue BIT-based claims, thereby expanding the role of international tribunals as interpreters of national regulatory actions. Tribunal critiques further highlight regulatory uncertainty, particularly regarding retroactive reforms in the extractive sector. Overall, recurring themes, such as weak treaty drafting, legal instability, unclear domestic standards, and tensions between sovereign regulation and investor rights, underscore the need for coherent legal reforms to strengthen certainty, reduce disputes, and maintain investor confidence.

4.2 Lessons from Arbitration Cases

An analysis of Tanzanian investment disputes reveals recurring themes that expose systemic vulnerabilities within the country's domestic legal framework. A central issue is the frustration of legitimate expectations, consistently invoked by foreign investors, which are grounded in state representations, contractual assurances, including stabilization clauses, and the prevailing regulatory framework at the time of investment.⁴⁷ Tribunals have increasingly recognized legitimate expectations as part of the fair and equitable treatment (FET) standard, requiring expectations to be reasonable, specific, and relied upon in investment decisions.⁴⁸ In *Standard Chartered Bank v Tanzania Electric Supply Company (TANESCO)*,⁴⁹ tribunals acknowledged that while states retain the right to regulate, they are nonetheless bound to respect legitimate investor expectations where such expectations are rooted in legal certainty and contractual guarantees.

A second theme is the tension between public interest and investor rights. While Tanzania's regulatory actions relating to natural resource governance, socio-economic reform, and conservation are recognized as legitimate, tribunals stress that measures must be proportionate, non-discriminatory, and not deprive investors of economic value.⁵⁰ *Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States* has served as a benchmark, where tribunals weigh the degree of interference with investment rights against the public

⁴⁶(2003) ICSID Case No. ARB(AF)/00/2, Award, para 122.

⁴⁷Christoph Schreuer, 'The Concept of Legitimate Expectations in Investment Arbitration' (2005) 6 *Journal of World Investment & Trade* 357, 360

⁴⁸Christoph Schreuer, 'Fair and Equitable Treatment in Arbitral Practice' (2005) 6 *Journal of World Investment and Trade* 357, 368 - 370.

⁴⁹ICSID Case No ARB/08/20, Award (2012).

⁵⁰Viñuales, *Foreign Investment and the Environment in International Law* (Cambridge University Press 2006) 158.

purpose and the manner of implementation.⁵¹ As Viñuales notes, legitimate public interest regulation may avoid liability where it is accompanied by procedural fairness, consistency, and respect for investor reliance.⁵²

Finally, gaps in domestic law, retroactive regulations, and legal uncertainty have exacerbated disputes. Retroactive measures in *the Symbion Power LLC and AngloGold Ashanti cases undermined predictability, creating an* arbitration risk. These patterns underscore the importance of establishing clear domestic standards, adhering to consistent treaty interpretation, and aligning national reforms with international obligations to preserve investor confidence.

5. Findings, Conclusion, and Recommendations

5.1. Findings and Conclusion

The findings reveal several systemic gaps within Tanzania's legal and institutional framework governing indirect expropriation. First, domestic legislation does not expressly recognise indirect expropriation, focusing instead on direct physical takings. This omission creates uncertainty in situations where regulatory measures substantially diminish the economic value of investments without a formal transfer of title. As a result, foreign investors and tribunals rely on international law and arbitral interpretations, which often vary across cases and exacerbate unpredictability.

Second, Tanzania's domestic compensation rules diverge significantly from the "prompt, adequate and effective" standard required under most Bilateral Investment Treaties (BITs). While domestic law generally limits compensation to fair market value and excludes consequential losses, BITs mandate full reparation, including lost profits and interference with legitimate expectations. This inconsistency has fueled investor claims alleging inadequate compensation under international law.

Third, the 2017 Natural Wealth and Resources legislation, including restrictions on foreign arbitration, has intensified tensions between sovereign regulatory autonomy and binding treaty obligations. Although intended to strengthen resource sovereignty, these measures risk violating dispute-resolution commitments in existing BITs and undermining investor confidence.

Finally, frequent regulatory changes in mining, energy, and land governance continue to generate legal instability. Arbitral jurisprudence consistently emphasizes that legal certainty, transparency, and stability are essential components of the fair and equitable treatment (FET) standard. Retroactive reforms, particularly in extractive industries, have been criticised for eroding predictability and contributing to disputes such as *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania*⁵³, *Nachingwea U.K. Limited, Ntaka Nickel Holdings Limited, and*

⁵¹(2003) ICSID Case No. ARB(AF)/00/2, Award, para 122.

⁵²Jorge E Viñuales, *Foreign Investment and the Environment in International Law* (CUP 2012) 295 - 297.

⁵³(ICSID Case No ARB/05/22).

Nachingwea Nickel Limited v United Republic of Tanzania,⁵⁴ and *EcoDevelopment in Europe AB and EcoEnergy Africa AB v United Republic of Tanzania*,⁵⁵ Overall, the analysis shows that Tanzania's regulatory actions, though often grounded in public interest objectives, must comply with international principles of proportionality, non-discrimination, procedural fairness, and legitimate expectations. To reduce exposure to investor-state disputes, Tanzania should adopt explicit domestic standards on indirect expropriation, harmonise compensation rules with treaty obligations, and ensure that future reforms preserve both regulatory space and legal certainty. A coherent and aligned framework is essential for sustaining public welfare goals while maintaining investor confidence and minimizing arbitration risk.

7.2. Recommendations

- **Incorporate Explicit IE Definitions:** Tanzania must explicitly define and regulate indirect expropriation within the Investment Act and related legislation, harmonizing these definitions with modern treaty standards to address regulatory takings and stabilization clauses.
- **Align Compensation Standards:** Domestic compensation frameworks must be revised to reflect international standards, ensuring compensation is prompt, adequate, and practical, and covers losses from foregone profits and frustrated legitimate expectations.
- **Reconcile Sovereignty Laws with Treaty Obligations:** The Natural Wealth and Resources (Permanent Sovereignty) Act must be harmonized with BITs, ensuring that any limitations on investor-state arbitration are carefully crafted using "carve-out" clauses to avoid liability under international law.
- **Pursue Treaty Reform and Modernization:** Tanzania should conduct a comprehensive review and modernization of its existing BITs to incorporate contemporary, balanced provisions, and it should include explicit police powers doctrine carve-outs, recognizing that non-discriminatory regulatory measures for a *bona fide* public purpose (e.g., environmental protection, public health) are not considered indirect expropriation.
- **Enhance Legal Certainty:** All new regulatory acts must be preceded by comprehensive, reasoned justifications detailing their necessity and proportionality, alongside providing meaningful investor and public consultations and clear transitional arrangements.

1.10 Author's Biography

The author is the Human Resources Officer at The School of St Jude and an LL.M. Candidate at the Open University of Tanzania, pursuing a Master of International Trade and Investment Laws.

⁵⁴ICSID Case No ARB/20/38), Award, 14 July 2023.

⁵⁵ICSID Case No. ARB/17/33.

BIBLIOGRAPHY

BOOKS

Christoph Schreuer and Rudolf Dolzer, *Principles of International Investment Law* (2nd ed, Oxford University Press, 2012).

Dolzer R and Schreuer C, *Principles of International Investment Law* (2nd ed, Oxford University Press 2012)

Hutchinson T, 'Doctrinal Research: Researching the Jury' in D Watkins and M Burton (eds), *Research Methods in Law* (Routledge 2013).

Jorge E Viñuales, *Foreign Investment and the Environment in International Law* (Cambridge University Press, 2012).

Lofchie MF, *The Political Economy of Tanzania: Decline and Recovery* (University of Pennsylvania Press, 2014).

McLachlan, C., et al., *International Investment Arbitration: Substantive Principles*, 2nd ed., Oxford University Press, 2017.

Muchlinski P, Ortino F and Schreuer C (eds), *The Oxford Handbook of International Investment Law* (OUP 2008).

Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment* (4th ed, Cambridge University Press, 2017).

Newcombe A and Paradell L, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law International 2009), Wälde TW, 'The "Umbrella" Clause in Investment Arbitration – A Comment on Original Intentions and Recent Cases' in Karl Sauvant (ed), *Appeals Mechanism in International Investment Disputes* (OUP 2008)

Sornaraja, M., *The International Law on Foreign Investment*, 3rd ed., Cambridge University Press, 2010, pp. 207-213.

Thomas Wälde and Kathleen Kolo, 'Investment Arbitration and the Protection of Regulatory Sovereignty: Challenges and Solutions' in Andrea K Bjorklund (ed), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford University Press 2009) 493–532.

Van Hoecke F, *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Hart Publishing 2011).

ARTICLES & JOURNALS

Barklem C and Prieto-Rioz EA, 'The Concept of Indirect Expropriation, Its Appearance in the International System and Its Effects in the Regulatory Activity of Government' (2011) 11(21) Civilizar 77.

Cox, J.M., *Investment Claims*, Oxford University Press, 2023, retrieved from <http://oxia.ouplaw.com> on 22 February 2024 at 16:00.

Douglas, Z., *Property, Investment, and the Scope of Investment Protection Obligations*, Oxford University Press, 2013.

Geist, A., *Interpreting Public Interest Provisions in International Investment Treaties*, Chicago Journal of International Law, 2017, vol. 18, no. 1, art. 9.

Gülçür, A., *The Necessity, Public Interest, and Proportionality in International Investment Law: A Comparative Analysis*, University of Baltimore Journal of International Law, 2019, vol. 6, no. 2, art. 3.

Henckels C, 'Proportionality and Deference in Investor-State Arbitration: Balancing Investment Protection and Regulatory Autonomy' (2015) 50(1) Texas International Law Journal 71

Kingsbury B and Schill S, 'Public Law Concepts to Balance Investors' Rights with State Regulatory Actions in the Public Interest – The Concept of Proportionality' in Schill S (ed), *International Investment Law and Comparative Public Law* (OUP 2010)

Malakotipour M, 'The Chilling Effect of Indirect Expropriation Clauses on Host States' Public Policies: A Call for a Legislative Response' (2020) 22 International Community Law Review 235

Marlles M, *Regulatory Change and Investment Protection under International Law: A Legal Perspective on the Concept of Legitimate Expectations* (Cambridge University Press 2021).

Nikièma, S.H., *Best Practices Indirect Expropriation*, International Institute for Sustainable Development, March 2012.

Ortino, F., *Investment Treaties, Sustainable Development, and Reasonableness Review: A Case Against Strict Proportionality Balancing*, The Dickson Poon School of Law, King's College London, 2014.

Paparinskis M, 'Regulatory Expropriation and Sustainable Development' in Marie-Claire Cordonier Segger, Markus Gehring and Andrew Newcombe (eds), *Sustainable Development in World Investment Law* (Wolters Kluwer 2011).

Peters, P., Recent Developments in Expropriation Clauses of Asian Investment Treaties, *Asian Yearbook of International Law*, 1997, vol. 5, pp. 45-109 (Ko Swan Sik et al., eds.; 90-411-0375-9 © 1997 Kluwer Law International; printed in the Netherlands).

Petrochilos, G., Who Are the Appropriate Guardians of the Public Interest (States, International Organisations or NGOs)?, in *Investment Law at the Crossroads of Public and Private International Law*, pp. 156-159, retrieved from www.g2.org/2016/11/18/read-on-international-law-and/ on 18 February 2024 at 15:30.

Rawson RW, 'On the Sulphur Trade of Sicily, and the Commercial Relations between that Country and Great Britain' (1840) 2(6) *Journal of the Statistical Society of London* 446.

Zhu, Y., Do Clarified Indirect Expropriation Clauses in International Investment Treaties Preserve Environmental Regulatory Space? *Harvard International Law Journal*, 2019, vol. 60, no. 2.

RESEARCH PAPER AND THESIS

Javier Haro Benavides., The Expropriation Clause and the Tension Between Foreign Investment and the Public Interest: An Analysis of Recent International Investment Arbitration, Master's in International Law: Commerce, Investment and Arbitration Thesis, Heidelberg Universität-Heidelberg, Universidad De Chile, March 2011.

Jean-Yves P. Steyt., Comparative Foreign Direct Investment Law: Determinants of the Legal Framework and the Level of Openness and Attractiveness of Host Economies, LL.M. Graduate Research Paper, 2006.

Kiratipong Naewmalee, Indirect Expropriation: Property Rights Protection, State Sovereignty to Regulate and the General Principles of Law, Doctor of Philosophy thesis, School of Law, University of Wollongong, 2017, available at <https://ro.uow.edu.au/theses1/157.com>

REPORTS

Dentons Mining Law Blog, 'Insights to the Intricacies of Lawful Expropriation: Ntaka Hill Dispute' (Dentons, 18 July 2023) <https://www.dentonsmininglaw.com/article/2023/07/18/ntaka-hill-expropriation.com> accessed 22 June 2025.

Investment Policy Hub, UNCTAD, 'Investment Dispute Navigator' <https://investmentpolicy.unctad.org/investment-dispute-settlement.com> accessed 22 June 2025.

Natural Resource Governance Institute (NRGI), Tanzania: Resource Governance Index 2021 <https://resourcegovernance.org.com> accessed 22 June 2025.

Tanzania Investment Centre, *Annual Report 2021* (TIC 2022) <https://www.tic.go.tz> accessed 15 April 2025.

UNCTAD, 'Fair and Equitable Treatment' in Investor-State Dispute Settlement: A Sequel (UNCTAD Series on International Investment Policies for Development, 2015) https://unctad.org/system/files/official-document/diaepcb2015d5_en.pdf.com, accessed 22 June 2025.

UNCTAD, Fair and Equitable Treatment: UNCTAD Series on Issues in International Investment Agreements II (United Nations, 2012) https://unctad.org/system/files/official-document/unctaddiaeia2011d5_en.pdf.com accessed 22 June 2025.

UNCTAD, Investment Dispute Settlement Navigator <https://investmentpolicy.unctad.org/investment-dispute-settlement.com>, accessed 22 June 2025.

UNCTAD, Reform of Investor-State Dispute Settlement: In Search of a Roadmap (UNCTAD IIA Issues Note No. 3, June 2013) https://unctad.org/en/PublicationsLibrary/webdiaepcb2013d4_en.pdf.com accessed 22 June 2025.

UNCTAD, *World Investment Report 2023: Investing in Sustainable Energy for All* (United Nations 2023) https://unctad.org/system/files/official-document/wir2023_en.pdf

World Bank, *World Development Report 2005: A Better Investment Climate for Everyone* (Washington, D.C.: World Bank, 2004).

WEBSITES

Impact of FDI on the Economy of Host Countries, UKEssays.com (November 2018) <https://www.ukessays.com/essays/economics/negative-effects-of-fdi-in-host-countries-economics-essay.php> accessed 16 April 2025.

UNCTAD, *International Investment Agreements Navigator: United Republic of Tanzania* <https://investmentpolicy.unctad.org/international-investment-agreements/countries/222/tanzania-united-republic-of> accessed 25 April 2025.