TANZANIA INVESTMENT POLICY ASSESSMENT 2018

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Increased investment flows are important for developing countries...

**Jobs:** FDI increases the number and type of jobs. FDI can also create new and better standards for jobs, improving local skills.

**Capital:** Local entrepreneurs increase access to capital, expand businesses and create new ones.

**Technology transfer:** Technology, innovation often accompanies FDI with positive spillover effects to the economy.

**Competitiveness:** Local firms supply, collaborate and compete with foreign ones, often upgrading their work practices.

**Export supply:** FDI can enhance the efficiency and sophistication of local production thereby increasing external demand for local goods and services.

Sources: World Bank Group, UNCTAD, Author Reflections
...yet developing countries don’t always receive transformative levels of foreign investment.

2.8%  
(94/199 countries)  
Tanzania’s Inward FDI Flow as % GDP, 2016

Sources: UNCTAD, Author Calculations
Investment policy measures often present barriers to foreign investment

- Foreign investors can experience procedural and substantive barriers as they enter, operate in and exit an economy.
- Some measures are intentional, to achieve clear policy outcomes. Tanzania requires foreign investors to inject $5m to set up in a Special Economic Zone - a measure targeting high value investment.
- Other measures are unintentional. Tanzania’s requirement for locals to hold at least $1/3 of controlling interest in insurance companies may unintentionally slow down or repel foreign investment.

Sources: World Bank Group, UNCTAD, The Hub
What the **assessment measures**

Thorough review of laws, regulations, resulting in a catalogue of **154 investment policy instruments**.

Analysis covers investor entry, operation and exit phases – **the life of an investment**.

Benchmarks Tanzania’s policy instruments to **international best practice for foreign investment regulation**.

Answers **83 key questions** that establish legal conformity to international best practice and detect legal gaps.

Does not seek to establish the **de facto** position
Data Collection and Analysis

**Desk Review:** Investment policy experts review laws and regulations, settling on **154 relevant instruments.**

**Verification with regulators:** Answers shared with relevant ministries. Adjustments made.

**Respondent Surveys:** **83 investment policy questions** administered to business people, professionals and regulators.

**Sharing preliminary findings:** with **24 experts** from public and private sectors, to assure accuracy.

**Internal Review:** Questionnaires reviewed, conflict of answers addressed.

**Reports Completed:** Coding of answers, indices drawn, analysis undertaken and reports written.

**Peer Review:** Hub subject matter experts examine final reports.
What does investment entry entail?

Investment Entry is the phase during which foreign investors apply to invest, enter a host country, set up and begin to operate their business.

It encompasses the very first expression of interest or request for information that an investor may make, up until the investor is fully operational in the country.

Investment entry barriers are restrictions, regulations, procedures and practices which impose unreasonable, discriminatory burdens on foreign investors during investment entry.

- Legal and regulatory barriers
- Procedural barriers
- De facto barriers

Sources: World Bank Group, UNCTAD, Author Reflections
What are **sectoral restrictions** to foreign investment?

Countries sometimes limit or prohibit foreign investment in selected sectors or activities where only domestic investment is allowed. When implicit this could take the form of:

- **Geographical restrictions**
- **Limits to the number of foreign service providers in a sector**
- **Mandatory foreign investment approval for greenfield investments in a sector**

**Best Practice**

Sectors that are not sensitive or subject to security concerns should be open to foreign investment. Where closed, a gradual approach to opening may be explored as regulatory capacity improves to manage new business activity.

Sources: World Bank Group, UNCTAD, The Hub, Author Reflections
Tanzania conforms to best practice in several cases

- No geographical restrictions on location for private establishments with foreign participation or ownership
- No limitations on number of foreign services providers that can operate in a given sector
- No specified sectors in which foreign investment approval is required for Greenfield FDI, which is not required of domestic companies

$100m

Proposed AB InBev investment for a new Dodoma brewery.

By acquiring SABMiller in 2016, Ab InBev now controls 50% of Tanzania Breweries.
Foreign investment is **discouraged** in selected sectors...

Tanzania discourages foreign investment in selected aspects of telcoms, mining, shipping, fishing and civil aviation by imposing investment ceilings, onerous licensing requirements.

- **Electronic and Postal Communications (Licensing) Regulations 2011**
  - Free to air broadcasting licenses require 51% local ownership

- **Mining Act of 2010**
  - Primary mining licenses exclusively for Tanzanian citizens, partnerships, companies
  - Gemstone mining exclusively for Tanzanians, waiver by ministerial discretion
...and includes strict investment restrictions in fisheries

- **Merchant Shipping Act of 2003**
  - Only citizen-owned ships to engage in local trade, waiver by ministerial discretion

- **The Shipping Agency Act**
  - Only Tanzanians may be licensed as shipping agents

- **The Fisheries (Amendment) Regulations, 2009**
  - Onerous conditions for foreigners to fish and export fishery products. Foreign licenses cost x3 local ones, exclude several operations and collection of specified fish and fish products.

$204m
Approximate value of Tanzania fish and fish product exports in 2016.

€6.8m
Fines issued to 19 foreign-registered fishing vessels in Feb 2018 for avoiding mandatory post-fishing inspections.
Limits imposed on jobs a foreign contractor may perform

- **Contractors Registration Act of 1997**
  - Foreign contractors get temporary registration only. Contracts must be specific, for a minimum sum, expats must have skills unavailable in Tanzania. Contractors must commit in writing to leave Tanzania upon completion.

- **Conditions for Temporary Registration**
  - Proof of fitness to serve the public.
  - Only expatriates with qualifications, skills not available in Tanzania.
  - Promise CRB in writing to wind up company and leave Tanzania after job.
  - Eligibility only for period of contracted works.
  - Certificate of registration surrendered to CRB upon expiration of works.

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<th>CLASS LIMIT FOR CONTRACT ($m) (May, 2018 rates)</th>
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- Foreign contractors eligible
- Prohibited
Foreign **investors barred** from selected SME businesses

Tanzania bars or discourages foreign investors interested in specified tourism activities, artisanal mining and fishing.

- **Tourism Act, 2008:** Foreigners barred from mountain guiding, travel agency, car rental or tour guiding.

- **Zanzibar Investment Promotion and Protection Act, 2004:** Minister can gazette Zanzibari-only small scale businesses, designate better terms for Zanzibaris engaged in businesses requiring natural resources.

- **SUMATRA (Misc. Ports Services Licencing) Rules, 2015:** Port services licenses solely for citizen-owned Tanzania companies.

- **Contractors Registration (Amendment) By- Laws, 2004:** Foreign contractors limited to specified, more complex classes of work.
What are performance requirements?

Refers to mandatory actions – often exclusive to foreign investors – that an investor must satisfy as a basis for grant of entry.

Mandatory actions include:

- Forced joint ventures; mandatory use of local inputs, staff; conditions for hiring foreign staff
- Maximum or minimum equity, quotas for service providers, limits on types of shareholding
- R&D disproportionate to investor intentions, change in product line, export more than investor plans to
- Establish using limited legal formats, offer services only through local establishment, economic needs tests
- Geographical restrictions on location choices, limited use of land
- Foreign investment approval for greenfield investment in specified sector

**Best Practice**

Conduct a cost-benefit analysis on existing performance requirements, and for future ones on an ex-ante basis before applying them.
Tanzania conforms to **best practise** in several cases

- No requirement to change product line
- No economic needs tests for private investment
- No restrictions on types of shares foreigners may own
- No temporal or geographic restrictions
- No restrictions on legal forms of establishment
In specified sectors, joint ventures mandatory

Minimum domestic shareholding is required in several sectors including shipping, insurance, specified categories of mining, and for free-to-air broadcasting.

- **Mining (Minimum Shareholding and Public Offering) Regulations:** Special Mining Licence requires 30% local shareholding
- **Electronic and Postal Communications (Licensing) Regulations:** Content Services Licence for free to air broadcasting requires 51% local ownership
- **Public Procurement (Amendment) Act:** Offers margins of preference when foreign firms form joint ventures or sub-contract domestic contractors, suppliers or consultants
- **Merchant Shipping Act:** Mandatory joint venture with Tanzania nationals for local vessel registration
- **Insurance Act:** All insurers require 1/3 controlling interest by Tanzania citizens

**2013:** Year Richland Resources and State Mining Corporation signed a 10 year JV agreement over TanzaniteOne, to comply with requirement for 50% local ownership.

Revenue realized by AngloGold Ashanti from Geita mine by 2017, **$7bn**, $1.1 billion of which paid to Tanzania government.
Education, energy sectors explicitly require hiring of local staff

Tanzania enforces mandatory hiring of local staff primarily through compulsory training and succession plans, quotas and the exercise of wide regulatory discretion

- **Universities (General) Regulations, 2013**: For foreign universities, number of foreign admin and teaching staff shall not exceed half the locals

- **Oil and Gas (Upstream) Act 2016, Zanzibar**: Contractors submit detailed yearly programme for recruitment, training of Zanzibaris in accordance with approved local content plan

- **Zanzibar Investment Promotion and Protection Act, 2004**: Investor may employ non-citizens to Authority-approved key positions, but give priority to Zanzibaris for the rest

- **Non –Citizens (Employment Regulation) Act of 2015**: Labor commissioner ensures no local experts available before approving work permit, succession plans mandatory in any case.

- **Petroleum (Local Content) Regulations, 2016**: Tanzanian citizen given priority in employment, training on petroleum operations
Foreign investors encouraged to use locally produced inputs

Suppliers of local goods, services get head start over foreign ones through favorable award of fees, permits, procurement marks

- Written Laws (Miscellaneous Amendments) Act (No. 4) 2017, amending Mining Act, 2010, S. 4: “...local content means the...deliberate utilization of Tanzanian human, material and mining operations in order to stimulate the development of capabilities indigenous to Tanzania and to encourage local investment and participation”

- Tanzania imposes higher permit fees for foreign companies and medical representatives
Elaborate **local input requirements** in energy sector

Suppliers of local goods, services get head start over foreign ones through favorable award of fees, permits, procurement marks

- **Petroleum (Local Content) Regulations, 2016**: Requires a contractor, sub-contractor, licensee to:
  - Give preferences to local goods, services
  - Use engineering services from local firms. Offshore services require approval
  - Prioritize local financial institutions for services
  - Maintain bank account, transact using licensed Tanzanian Bank
  - Structure bidding processes to provide advantages to local companies
  - A local company requires no less than 51% ownership by Tanzanians

- **Petroleum Act 2015**: Provides preference for local goods, services, requires preferences across petroleum value chain

- **Oil and Gas (Upstream) Act 2016, Zanzibar**: Contractors must favor goods, services traded by Zanzibaris and local companies

$2.34bn

*The contribution to GDP from oil and gas activities in 2016, equivalent to 4.8% of GDP.*
Procurement laws assign **additional marks** for foreign-local partnerships

Public Procurement (Amendment) Act of 2016 requires foreign consultancy firms to include local experts, firms. Procuring entities are required to assign weights in a procurement process:

- **Participation of local firms:**
  Maximum weight of 15% to be included in RFP. Full marks for firms with at least 50% participation of local firms.

- **Participation of national experts:**
  Maximum weight of 10% to be included in the RFP. Full marks for firms where Tanzanians comprise +60% key staff.
Foreign investors in petroleum sector compelled to invest in **technology transfer**

Law requires that plans are designed and implemented for Tanzanians to gain knowledge in petroleum operations, plans which may include establishment of local facilities for technology transfer.

- *Petroleum (Local Content) Regulations, 2016, Regulation 8:* “…a Tanzanian citizen is given priority in any matter relating to the technology transfer, research and development in any petroleum operations…”

238,182 m³

Storage capacity of Tanzania International Petroleum Reserves Ltd, the country’s largest oil terminal. It is a joint venture between the Government of Tanzania and Swiss-based Oryx Energies.
Export zone investors must export majority of products

In exchange for fiscal incentives, investors located in export processing zones must export at least 80% of products.

- Export Processing Zones Act, Revised Edition 2012: A maximum of 20% of annual production can be offloaded into the domestic market.
- Zanzibar Investment Promotion and Protection Act, 2004: Investors in Freeport Zones can offload 20% of total turnover into the domestic market subject to payment of all taxes.

**Incentives: Export Processing Zones Act 2002**

**Fiscal Incentives:**
- Exemptions from:
  - Corporate tax, 10 years
  - Withholding tax on rent, dividends and interest, 10 years
  - VAT on utility and wharfage charges
  - Local government taxes and levies
- Customs duty remission, VAT and other tax on raw materials, goods of a capital nature

**Non-fiscal incentives:**
- Exempt from pre-shipment, destination inspection
- Lower (transit) cargo charges
- Unconditional transferability of profits, dividends, royalties
- Export credit guarantee rights
- Sale of 20% goods to local market
Limited land rights for foreign investors

Foreign investors acquire land rights only on approval of investment plans.

- **Land Act 1999, S. 19(2):** “…a person or a group of persons...who is or are noncitizens, including a corporate body the majority of whose shareholders or owners are non-citizens, may only obtain a right of occupancy or derivative right for purposes of investment prescribed under the Tanzania Investment Act or issued under the Export Processing Zones Act...”

- **Zanzibar Investment Promotion and Protection Act, 2004,Section 19 (1):** “...for acquisition of land, other than designated land in Freeport and Free Economic Zones, the Authority shall make recommendations to the Minister responsible for land on the appropriate land and lease terms and conditions and the Minister responsible for land shall take such recommendations into account in granting the lease.”
Residency required for licenses in sections of insurance, civil aviation sectors

Air operators, insurance providers must demonstrate local establishment in order to obtain licenses.

- Civil Aviation (Air Operator Certification and Administration) Regulations, 2011
  - Regulation 6: “...the authority may issue an air operator certificate to an applicant if that applicant has its principal place of business and it is registered in Tanzania.”
  - Regulation 12: “...an air operator certificate holder shall maintain a principal base of operations in Tanzania.”
  - Insurance Act, S. 24 (1): “...insurer to be company registered under the company law or any other law in Tanzania...”

145,619
Total Tanzania aircraft movements in 2016.

3.4m passengers and 20,634 tonnes of cargo were transported that year.
Tanzania maintains foreign equity ceilings in insurance, mining

Foreign investors limited by equity ceilings in specified sectors.

- **Mining (Minimum Shareholding and Public Offering) Regulations, 2016 G. N Number 286 of 2016, Regulation 4:** “...minimum local shareholding requirement of a holder of Special Mining Licence shall be thirty percent of the total issued and paid up shares...”. The minister may however waive the requirement.

- **Insurance Act Cap.212, S.16:** “…an insurer shall not be registered...unless...deemed to be resident in Tanzania and at least one third of the controlling interest...are held by citizens of Tanzania...”
Tanzania imposes *quotas* for foreign employees

- **The Non-Citizens (Employment Regulation) Act, 2015, S. 19 (1):** “...any person granted incentives ...shall (be) entitled to an...immigrant quota of up to five persons during the startup period of the investment.” Admissions of additional immigrants subject to negotiation with TIC and Immigration Department.

- **The Zanzibar Investment Promotion and Protection Act, 2004, S. 18 (1):** “…an investor...may employ non-citizens in what the Authority determines to be key positions for the duration of the certificate...with the exception (that) every investor shall...give priority to Zanzibaris.”

- **The Universities (General) Regulations, 2013, S. 14 (3):** “…foreign staff for both academic and administrative staff...shall not exceed half of the total number of local staff.”

- **Non-Citizens (Employment Regulations) Regulations, 2016, Regulation 9 (1):** “…an employer wishing to make bulk recruitment to seek permission of the Labour Commissioner in writing...”

- **Investment Act, S. 24(1):** Foreign investors may hire up to 5 expatriates, additional ones require approval.
Economic needs test for foreign work permits

Expatriate hire only possible after demonstrating lack of local expertise.

- **Non–Citizens (Employment Regulation) Act of 2015, S. 11 (2):** “...the labor Commissioner shall, before approving an application for a work permit, satisfy himself that all possible efforts have been explored to obtain a local expert.”

- **Employers must also submit succession plans for foreign employees.**
Political risk perceptions remain a major obstacle for foreign investment

“The probability of disruption of business operations by political forces or events, and in particular the actions of governments...” – MIGA, World Investment and Political Risk, 2009

- Severe impediment to foreign investment in developing countries.
- New environments promise better prospects, but are deemed too risky.
- Investors however note and are influenced by a country’s investor protection safeguards.

Sources: World Bank Group, MIGA
Expropriation: the risk of loss of investment as a result of acts by any branch of government.

Breach of contract by host government: the risk of losses resulting from the breach and failure to honor an arbitral award granted.

Currency inconvertibility, transfer restrictions: the risk of losses arising from an investor’s inability to convert and transfer currency from host country.

Adverse regulatory changes: the risk of losses for foreign investors stemming from arbitrary changes to regulation.

Political violence: the risk of losses resulting from damage or permanent loss of use directly caused by political violence.

Non-honoring of sovereign debt obligations: the risk of losses due to a government’s failure to make a payment when due under an unconditional financial obligation or guarantee.

Sources: World Bank Group, UNCTAD, IMF, USAID
Domestic laws, treaties cover foreign investor protection

The constitution and a set of laws covering investment, company incorporation, tax, specific sector regulation, forex regulations regulate foreign investment in Tanzania.

- Investment laws
- Sector Laws
- Income Tax Act
- Companies Act
- Bank of Tanzania, Forex laws
- Capital Markets and Securities Act
- Natural Wealth and Resources laws
- Bilateral investment treaties

10 Bilateral investment treaties with Tanzania in force, covering a substantial amount of FDI.

At least 15 domestic instruments guide foreign investment regulation (May 2018).

Best Practice

Coherence and consistency between commitments under international investment agreements, FDI-specific laws and regulations and other components of the domestic legal framework.
Investment Act, treaties define foreign investors and foreign investment

- Tanzania laws define “foreign investor” and “foreign national”.
  - *Tanzania Investment Act (1997), S. 3:* “...a person who is not a citizen of Tanzania...a company incorporated under the laws of any country other than Tanzania in which more than fifty percent of the shares are held by a person who is not a citizen of Tanzania...a partnership in which the partnership controlling interest is owned by a person who is not a citizen of Tanzania.”

- No definition of “foreign investment” in laws, though all BITs offer specific definitions.
- Tanzania maintains a general body of administrative law, has a Judicature Act, follows common law and its doctrines of equity.

**Best Practice**

A foreign investment statute, clear definitions of “foreign investor” and “foreign investment” in national laws, and presence of a general body of administrative law and institutions.
Tanzania Laws Cover Both **Tangible and Intangible Property**

Tanzania’s constitution, companies act, land act, and export processing zones act define and address property rights.

**Tangible property:** The *Constitution*, a series of *land* and *urban acts*, and the *investment act* define the rights to tangible property and the exercise of these rights by Tanzanians and foreigners.

**Intangible property:** The *Constitution*, *Investment Act*, *Patents Acts*, *Copyright* and *Neighboring Rights Act*, *Trade* and *Service Marks Act* and the *Companies Act* provide the legal basis for the identification and exercise of intangible property rights.
No explicit list of assets protected against expropriation

Tanzania’s laws do not explicitly provide for a list of assets protected against unlawful expropriation.

**Typical Coffee Miller’s Assets**

**Non-current assets**
- Plant property & equipment
- Accumulated depreciation
- Biological assets
- Intangible assets (goodwill, trademarks, patents, industrial designs)
- Long term investments

**Current assets**
- Inventory
- Receivables & Prepayments
- Cash & cash equivalents

**Best Practice**

Both tangible and intangible property rights are protected against unlawful expropriation. Specify in the expropriation provision that it applies to both tangible and intangible property rights or define “investment” sufficiently.
Tanzania expropriation laws require fair and prior compensation

Tanzania’s laws contain provisions for the taking of property, define the circumstances and manner in which government may deprive an investor of their property.

- The constitution and investment acts require government to refrain from nationalization.
- Government to guarantee due process: fair, adequate and prompt compensation; access to court; right to arbitration.
- For protection under Tanzania Investment Act, foreign investors require $500,000 minimum capital (a local one needs $100,000).
- Zanzibar explicitly requires gazette notice by minister responsible, prior to acquisition.

Best Practice

Uniform application of statutes that apply across the board for both foreign and domestic investors. Singling out of foreign investors should be for the purpose of providing protection.
Property taking has several legal definitions

**Tanzania’s laws variously express the taking of property.** The investment acts and BITs use “nationalization” and “expropriation”, intellectual property laws use “compulsory licensing”.

- Expropriation is not defined under any law, nor are measures of equivalent effect to direct expropriation defined under the law.
- Naturally, there are therefore no criteria for determining what action amounts to a measure of equivalent effect, or indirect expropriation.
- Property taking that does not amount to expropriation should be defined.

**Best Practice**
Provide protection to investors against measures amounting to both direct and indirect expropriation.
Non-expropriatory deprivation of assets in customs, oil and gas

Measures may be taken to conserve state interests in petroleum facilities or exploration blocks to recover royalties, incentivize regularization of licenses or retake exploration allocations.

- **Investment Act 1997, S. 2(4):** Notwithstanding guarantees against expropriation, officials may terminate petroleum and mining licenses.

- **Petroleum (Exploration and Production) Act, S. 45(1):** Minister may revoke grant of an exploration location if exploration license holder fails to apply for development license within 2 years.

- **Oil and Gas (Upstream) Act 2016 (Zanzibar), S. 81:** Companies, contractors must surrender copies of data, information and reports free of charge.

- **EA Customs Management Act, S. 210-214:** Customs officials can seize, detain goods. Also provides procedures for taking, disposal or restoration to owner.

- **The Natural Wealth and Resources (Permanent Sovereignty) Act 2017:** Confers blanket discretionary powers to National Assembly to review investment arrangements and agreements.
Non-expropriatory deprivation of assets in customs, oil and gas

*Petroleum Act 2015, S. 31, 195 – Government Takeover of Petroleum Facilities*

**Conditions for Takeover:**
- License irregularities (Expired, Surrendered, Cancelled, Costs fully recovered)
- Failure to pay royalties by contractor or license holder
- Permanent termination of use of facilities
- Only 6 months after license expires or if facilities abandoned

**Government responsibilities:**
- Proper maintenance
- Chief Government Valuer determines penalties due for poor maintenance

**Resumption of control by license holder:**
- Payment of prescribed fees, penalties or waiver thereof

- If takeover amounts to expropriation, compensation paid per regulations
- Does not include third party assets sited at facilities

**Best Practice**

Clear definition of direct and indirect expropriation, clear definition of the measures that amount to indirect expropriation, and clear guidelines on how non-compensatory measures are taken.
Expropriation is only for public purposes

The constitution outlaws deprivation of property for the purposes of nationalization or any other purpose without the authority of the law.

- **Land Acquisition Act 1967, S. 3:** “The President may...acquire any land...where such land is required for any public purpose.”

- **Patents (Registration) Act, S. 62:** “…where a vital public interest...requires it...the patented invention shall, even in the absence of authorization from the owner of the patent, be exploited by a government agency or by a third person designated by the Minister...”

- No requirement that expropriation must be non-discriminatory.

**Best Practice**

Lawful expropriation should be non-discriminatory. The measure should be motivated by reasons of public purpose, public order or public welfare. The timing should be prior to the taking.

*In 2016 only 1 patent application received a grant in Tanzania.*

Kenya granted 26, South Africa – 4255.
Conflict of laws presents challenge to due process

Tanzania’s laws explicitly require that lawful expropriation follows due process, avail a review mechanism and guarantee compensation. However, new sovereignty laws present challenge.

- **Tanzania Investment Act, S. 22(2):** “There shall not be any acquisition...unless the acquisition is under the due process of law which makes provision for...payment of fair, adequate and prompt compensation, and a right of access to court or arbitration for the determination of the investor’s interest or right and the amount of compensation...” Zanzibar’s investment act is similar.

New sovereignty laws negate forum provisions in BITs.

- **Natural Wealth and Resources (Permanent Sovereignty) Act, 2017, S. 11(1):** Excludes international courts, dispute mechanisms from adjudication of disputes arising from exploitation or extraction of natural resources and wealth.

- **Natural Wealth and Resources Contracts (Review and Re-negotiation of Unconscionable Terms) Act, 2017, S. 6(1):** Prohibits Tanzania government from entering into contracts, agreements regarding extraction of natural resources and wealth which subjects the state to the jurisdiction of foreign laws and forum.
Best Practice

The procedure for taking must be set in the domestic legal framework and abided by and the right of the investor to seek review of any measure must be recognized and guaranteed.

Conflict of laws presents challenge to due process

BITs that expressly provide for ICSID, UNICTRAL forums are: Canada, Denmark, Finland, Italy, Mauritius, South Africa, Sweden, Switzerland and Turkey. United Kingdom and Republic of Korea provide only for ICSID.

Tanzania may be subject to other forums arising from regional treaties.

Standard Chartered Bank v. TANESCO

$148.4m Award on 12th Sep 2016 granted by ICSID in favor of SCB + interest

Investment: Debt indirectly owed to SCB under loan agreement with ITPL (which had a contract with TANESCO).

Status: Stay on award enforcement pending appeal
Tanzania explicitly guarantees compensation for expropriated persons

The constitution, investment, oil and gas, land and intellectual property acts provide for fair and adequate compensation for expropriated persons.

- Constitution of the United Republic of Tanzania, 1997, Article 24(2): “...it shall be unlawful for any person to be deprived of their property...without the authority of law which makes provision for fair and adequate compensation...”
- The Investment Act requires prompt payment.

Best Practice

Expropriation can take place only against payment of compensation. The payment should also be prompt, adequate and effective. The date of taking of the property should be legally unambiguous.
No valuation guidance for intangible property

The law only provides guidance for valuation of land

- **The Land Acquisition Act 1967, S. 14**: “In assessing compensation...the minister shall... take into account the value at the time of the publication of notice...without regard to any improvement or work made or constructed thereafter...”

- No valuation guidance for intangible property.

- No guidance for defining the date of taking of property or date for valuation of property (except land).

**Best Practice**

The date of taking of the property is important to facilitate the calculation of amount of compensation, interest and determining kick off date for the right of appeal. The investor should also not suffer losses on account of any devaluation of property due to prior public knowledge of the measure. Valuation should be based on fair market value.
Tanzania laws require monetary compensation

Compensation is monetary, and must be paid in freely transferrable and convertible currency.

- **Tanzania Investment Act 1997**
  - **S. 22(3):** “…any compensation...shall be paid promptly and authorization for its repatriation in convertible currency, where applicable, shall be issued…”
  - **S. 21:** “…a business enterprise...shall be guaranteed unconditional transferability through any authorized dealer bank in freely convertible currency…”

- **Zanzibar Investment Promotion and Protection Act 2004**
  - **S. 21:** “…a foreign national who has invested in Zanzibar may transfer out to Zanzibar in convertible currency at the prevailing official rate of exchange…”

**Best Practice**

Compensation should be paid in freely convertible currency, and transferrable with minimal procedures.
Interest is calculated for the period covering the date of taking to the date of satisfaction of the award.

Civil Procedure Code, Order 20, Rule 21:
“The rate of interest on every judgment debt from the date of delivery of the judgment until satisfaction shall be seven per centum or such other rate, not exceeding twelve per centum…”

Land Acquisition Act, S. 15(1): “…the Minister shall pay...in addition to compensation, interest thereon at the rate of six per centum from the date when possession is taken until such compensation is paid…”

Best Practice

Law should explicitly provide for payment of interest on the amount of compensation at a commercially reasonable rate. LIBOR or PIBOR are examples of specific rates.

I order that TANESCO pays SCB $148.4m with simple interest at three month LIBOR plus 4%.

– Prof. Donald McRae, ICSID
Legal framework supports international capital flows and payments

- **Bank of Tanzania Act, Banking and Financial Regulations (Foreign Exchange Exposure Limits) Regulations, Tanzania Investment Act**, and the **Foreign Exchange (Bureau de Change) Regulations** address the transfer and conversion of currency in Tanzania.

- **Tanzania Investment Act** expressly provide for unconditional transferability in freely convertible currency of: net profits; foreign loans; royalties; fees or charges in respect of technology agreements; remittance of proceeds in event of liquidation or sale; emoluments and other benefits due to foreign personnel.

- **Zanzibar Investment Promotion and Protection Act** albeit with fewer detail works from a similar premise.

**Best Practice**

Investors have the ability to transfer funds into and out of the host state with minimal barriers. International practice grants states unfettered discretion on control of their capital accounts – this discretion requires judicious use. Current account transfers should however remain open and not subject to the discretion of the state.
Exceptions to free transfer and conversion of currency

- **Foreign Exchange (Bureau de Change) Regulations 2015, Regulation 28:** “...a bureau de change shall not sell foreign currency to a non-resident unless...the Tanzanian shillings were obtained in Tanzania from the sale of foreign currency or obtained from other lawful activities with proper identification and retention of record.”

- **Banking and Financial Institutions (Forex Exposure Limits) Regulations 2014:** “...the overall foreign exchange risk exposure of any bank or financial institution...shall not exceed the limit prescribed by the Bank of Tanzania...”

- Exceptions also apply in:
  - Balance of payments situations
  - In fulfillment of domestic law relating to dealing in securities, minimum capital requirements and earnings from natural wealth and resources (which must be retained in local financial institutions).

- No conditions to the application of exceptions.

- No requirements for prompt transfer nor guidance for the reference date for determining the exchange rate.

**Best Practice**

Investors should be allowed to make transfers promptly. Domestic law should explicitly state that transfers must be made in a freely convertible currency, and that the rate of conversion of currency be the market rate of exchange as on the date of the transfer of the currency.
Tanzania requires consultation—including publication of Legislative Bills

Parliamentary Standing Orders 80 and 84 require publication of texts relating to expropriation and provide for a consultation process.

- Bills brought under a certificate of urgency may waive the public participation requirement.

Best Practice

Publish all legal texts in a manner that is easily and publicly accessible.
No exit restrictions, save for limits on sale of securities and coupons

Tanzania imposes no restrictions for company liquidation, winding up of partnerships, take over or capital flotation. There is also no mandatory expropriation and no time restrictions for exit.

- Foreign investors pay 10% capital gains tax on sale of assets, like local ones
  - Finance Act (2012) amending Income Tax Act, S. 90(1) “Tax is payable by seller of direct asset...at the rate of 20% of the gain in the case of a non-resident and...10% in the case of a resident.”

- Sale of securities to non-residents must however be from externally acquired funds.
  - Forex Amendment Regulations GN 133 of 2014, Regulation 9: “A resident may...sell or transfer to a non-resident any security or coupon if...the buyer...is a resident of a prescribed territory, and the security or coupon is...funded exclusively by externally acquired funds.”
No restrictions on business transfer save incentives, energy licenses

Certificates of incentives are not transferrable to third parties.

- **Tanzania Investment Act, S. 17(7):** “...transfer of a certificate of incentive [requires] approval of the Tanzania Investment Centre...”

- **Zanzibar Investment Promotion and Protection Act (2004), S. 16:** “...the authority may amend a certificate granted...which...some foreign national has succeeded to the interest of the enterprise of the holder of the certificate by substituting for the name of the holder, the name of his successor...”
Licenses in energy sector not freely transferrable on exit

Approval by licensing authority is required to transfer an interest in a license granted by a ministry or regulator in the energy sector.

- **Petroleum Act 2015, S. 86(1):** “Transfer of an interest in a license to be approved by Minister...”

- **Electricity (Supply Services) Rules, 2014 S. 17(1):** “...no license shall be assigned or transferred to another person without written approval of the authority...”

- **Zanzibar Oil and Gas (Upstream) Act 2016, S. 79:** “…transfer of an interest in a license to be approved by the minister...”

- **Zanzibar Oil and Gas (Upstream) Act 2016, S. 96 (1):** “…where the development license is granted... in partnership with a contractor, that contractor shall not...without consent...register transfer of shares... or enter into agreements...that gives that particular person control of the contractor’s company...”

EWURA issues 16 mid and downstream petroleum licenses that cover wholesale, storage, distribution and other operations.

The set of investment policy questions that guided the research process are adapted from the World Bank Group.


International best practice is cited from several sources including:


  See https://openknowledge.worldbank.org/handle/10986/25206

- U.S Department of State. See https://www.state.gov/documents/organization/228691.pdf

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