TATIC

Tanzania Trade and Investment Coalition

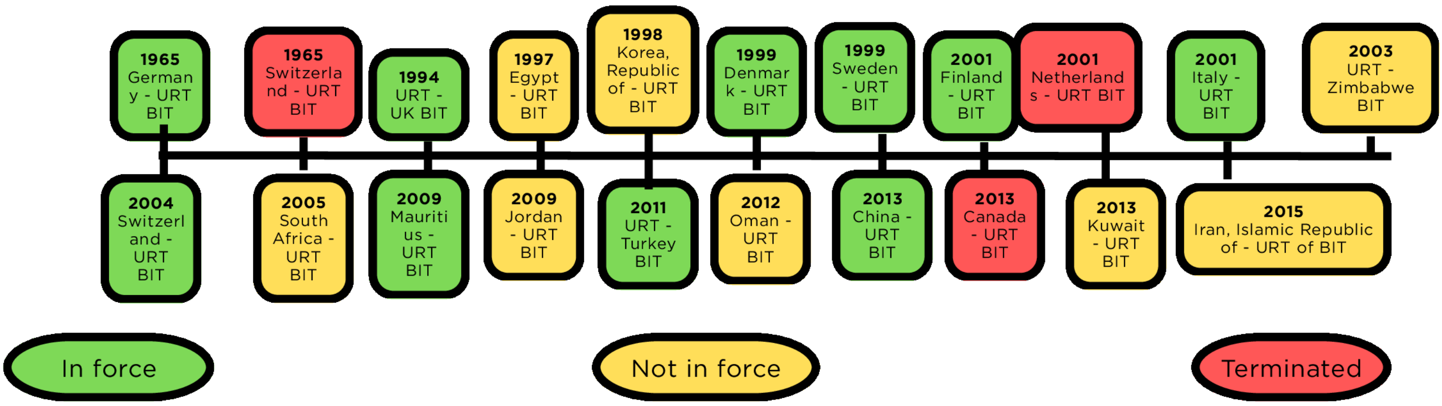
THE COST OF 'PROTECTION': HOW BILATERAL INVESTMENT TREATIES (BITS) UNDERMINE TANZANIA'S MINING SOVEREIGNTY.

Tanzania's Strategic Resource Endowment and Investment Imperative

The United Republic of Tanzania (URT) is a country richly endowed with natural resources, including but not limited to arable land, vast mineral deposits, significant natural gas reserves, extensive water bodies (lakes, rivers, wetlands, and the Indian Ocean), forests, and globally renowned wildlife. These resources (though not fully exploited) have served as a catalyst for economic growth for Tanzania. Available resources have attracted increased investment and the recent contribution of 10.2% of the mineral sector to the country's GDP is a testament to the importance of natural resources and the financial impact on the nation.

To maximize the financial contribution of resources, Tanzania has taken various policy and legislative initiatives. Some initiatives are historic, dating back to 1965 (i.e., the Germany – URT BIT). Similar efforts continued through periods of Structural Adjustment Programs – SAPs e.g., URT – UK's 1994 BIT and persist today, where current policy and strategic visions emphasize inviting external stakeholders. These strategic directions are deemed necessary following insufficient domestic capital and technology for large-scale extraction. Attracting Foreign Direct Investment (FDI) is seen vital , necessitating an environment that assures stability, legal security and high-reward ventures.

Unfortunately, these strategic efforts, have become a source of challenges for Tanzania. BITs have exposed Tanzania to international arbitration thus victimizing the country to adverse awards that extravagantly export taxpayers money. This piece, explores how BITs lead to sustained monetary losses for the country.



What are BITs?

This foundational question is critical before analyzing how BITs have led to severe financial losses. The danger is particularly acute for Tanzania's extractive industry projects, where disputes have involved massive capital. The recent $1.2 billion claim announced by Orca Energy Group Inc. against the United Republic of Tanzania and the Tanzania Petroleum Development Corporation (TPDC) is a concrete example**.**

BITs are agreements between two countries designed to protect and encourage foreign investment by establishing legal standards for investor treatment and dispute resolution, including safeguards like protection from expropriation and access to international arbitration.

A Constraining Network of Binding Investment Pacts

To encourage investment, Tanzania has established a broad and complex network of Bilateral Investment Treaties (BITs). The network includes decades-old pacts, such as the Germany BIT (1965) and the UK BIT (1994), which remain in force, as well as more recent BITs with Canada (2013) and China (2013).

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Compounding this, Tanzania receives more FDIs from Kenya, Nigeria, and Vietnam, without the existence of BITs. Moreover, Ethiopia receives high FDIs from the UK, USA, and India without BITs. The examples of abundant FDI inflows to Tanzania and Ethiopia, without BITs, raise questions about the importance of BITs for Tanzania. Worse , Tanzania has BITs with countries where the FDI inflow to the country is small (e.g., Sweden). The disparity creates a valid narrative that BITs provide minimal guaranteed capital inflow from countries but ensure costly exposure to international arbitration.

The URT, with its BITs, has faced numerous arbitration where investors, shielded by BIT, have demanded massive compensations. Many arose during the 2017 to 2020 period following regulatory changes. The changes generated claims with key cases including: the Acacia/Barrick saga ($300 million), the Winshear case ($30 million), and the Indiana Resources (Nachingwea) case ($76.70 million)

BITs typically grant investors a set of powerful rights designed to safeguard their capital and operations. These fundamental Investor Rights Under BITs include Non-discrimination (ensuring equal treatment with domestic or foreign competitors), Fair and Equitable Treatment (FET), Most Favoured Nation (MFN) status, protection against direct and indirect expropriation, free transfer of capital, and most critically, Access to international arbitration, such as the ICSID. The very rights, deeply embedded within Tanzania's BITs, have proven to be a bitter thorn for the nation. Indeed, these legal protections are precisely what enabled investors to successfully demand massive compensation.

Company	BIT Used	Partner State (BIT Country)
Acacia Mining PLC	The companies utilized the UK BIT (1994) before reaching the $300M settlement.	UK BIT.
Winshear Gold PLC	Canada BIT (2013)	Canada
Indiana Resources (Nachingwea)	Although Indiana is an Australian company (and Tanzania has no BIT with Australia), the investment was channeled through a country with a BIT with Tanzania—a form of "Treaty Shopping." According to case sources, the claim was pursued under the UK BIT (1994) via its UK-registered subsidiary.	United Kingdom (UK)

The Investor's Demand for Protection and the Role of MFN

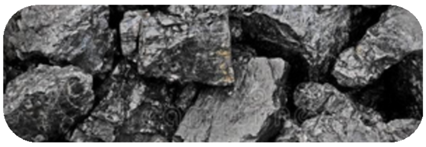
International investors, often committing capital for decades in politically sensitive sectors like mining and energy, demand rigorous protection against sovereign risk, including discriminatory taxation or outright expropriation. This need is addressed through BITs, which guarantee rights such as Fair and Equitable Treatment (FET) and the powerful Most-Favoured Nation (MFN) clause. The MFN provision allows an investor from one partner country to claim the superior treatment standards found in any of Tanzania's other BITs. This ensures that the state is legally bound to the most investor-friendly provisions across its entire treaty portfolio, instantly escalating its legal risk.

The Clash: Nationalism, Reforms, and Financial Penalties

The 2017 nationalist push that fueled legislative amendments, asserting permanent sovereignty over natural resources, collided with the binding clauses of BITs. Although the government successfully negotiated a new framework with Barrick Gold (formerly Acacia) that secured a 16% free-carried interest, this outcome was achieved only after a protracted, expensive dispute. Simultaneously, other claims resulted in mandatory payouts: the Canadian investor Winshear was awarded a settlement of $30 million (approx. TZS 73.8 billion), and Indiana Resources (Australian investor) won an award of $76.70 million (approx. TZS 188.8 billion).

Assurances, Expectations, and Treaty Shopping Vulnerability

The protection of an investor's "legitimate expectations" regarding the regulatory and tax environment is a core pillar of BITs. Unfortunately, this assurance is often exploited through tactics like "treaty shopping," where multinational corporations channel their investment through a shell company in a jurisdiction that holds a particularly favorable BIT with Tanzania, even if the company's ultimate owners are elsewhere. This tactic grants investors access to international dispute mechanisms that were never intended for them, bypassing domestic courts and enabling companies to challenge sovereign regulatory decisions in international arbitration.



Historical Losses: The SCB and Mikindani Awards

The history of BITs shows a consistent pattern of the state bleeding funds. One of the most severe historical losses was the dispute involving Standard Chartered Bank (SCB) and its subsidiary, filed partly under the UK-Tanzania BIT (1994). The resulting ICSID award forced the state to pay $148.4 million (approx. TZS 365.2 billion), with a related claim adding a further $185.45 million (approx. TZS 456.5 billion). These massive, unexpected payouts, combined with other awards like the Mikindani Estate case ($24 million, approx. TZS 59.1 billion), represent a significant financial strain that diverts development funds to legal liabilities.

Mining Sector Investment and the Dual Risk

The mining sector, which includes SMLs for companies operating in Gold and Nickel projects, attracts billions in FDI due to the assurances provided by BITs. However, while some companies invest productively, others secure valuable exploration licenses and mining areas only to hold them without making the promised capital investment. This practice leads to the sterilization of national assets, locking up resources that could otherwise be utilized by committed developers. Such non-performing, yet BIT-protected, licenses prevent the government from re-allocating assets and maximizing economic returns, effectively making the licenses a liability rather than a source of revenue.

The Energy Sector: The $1.2 Billion Songo Songo Claim

The Songo Songo Gas-to-Electricity Project, initially developed by the government with significant borrowing, is now the subject of the single largest claim to date. Orca Energy Group, using the Mauritius-Tanzania BIT (2009), has filed an arbitration claim of $1.2 billion (approx. TZS 2.95 trillion). The claim arose after the government instructed the company to maintain subsidized gas supply post-contract expiry, an action Orca argues breaches the BIT's FET clause. This case underscores how treaties protect past and existing infrastructure projects, and how tax-haven BITs are weaponized for treaty shopping, exposing the nation to damages over decisions.

Regulatory Chill and the Escalating Financial Risk

The inherent uncertainty and punitive financial consequences of these massive awards create a debilitating "regulatory chill." This chilling effect deters the government from implementing essential and necessary changes to tax, environmental, and public service laws for fear of triggering further ISDS proceedings under binding BITs. The escalation in claim size—from the SCB hundreds of millions to the Orca billion-dollar demand—demonstrates that the financial risk is not static; it grows exponentially over time, forcing the nation to prioritize investor comfort over sovereign regulatory duties.

FDI Success Beyond the BIT Network

Importantly, Tanzania's ability to attract valuable FDI is not solely dependent on its BITs. A substantial flow of capital continues to enter the country from nations with which Tanzania has no operative BITs, including rising economies like South Korea, Nigeria, and Kenya. This indicates that fundamental economic factors, such as resource quality, market size, and domestic political stability, are often more critical determinants of investment than a signed BIT. This reality directly challenges the outdated premise that these treaties are an absolute prerequisite for capital attraction.

The Necessity for Urgent Treaty Review and Reform

Given the consistent pattern of financial losses, Tanzania's current generation of BITs is unsustainable. The government must move decisively to reform its treaty policy. This requires a comprehensive review to identify the most dangerous treaties (like the long-term Sweden BIT (1999) and Finland BIT (2001)) and manage the threat of large-scale pending claims, such as the Montero case ($27 million) and the $500 million sought by Aqua Power. Immediate action is needed to stop the continuous financial bleeding caused by investor arbitration.

Lessons from Global BIT Reform and Sunset Clauses

Tanzania must draw lessons from countries that successfully exited their problematic BIT obligations. Both India and South Africa undertook mass terminations of their old treaties, replacing the ISDS mechanism with domestic law for investor protection. Crucially, any termination strategy must be mindful of "sunset clauses," which often keep the treaty protections active for up to 10-20 years post-termination. For example, treaties like the defunct Netherlands BIT (2001) and Switzerland BIT (1965) may still legally protect investments made prior to their termination date.

Charting a Cautious and Sovereign Path Forward

To safeguard national assets, as mandated by the Constitution, Tanzania must adopt a cautious and deliberate strategy. This involves terminating outdated, unfavorable BITs and simultaneously developing a new, pro-sovereignty Model BIT. Future agreements must explicitly narrow definitions of "indirect expropriation" and "legitimate expectations," ensuring sufficient policy space for the government to regulate public interest areas like health, environment, and taxation. The long-term goal must be to prioritize state-to-state dispute resolution over corporate access to costly international arbitration.

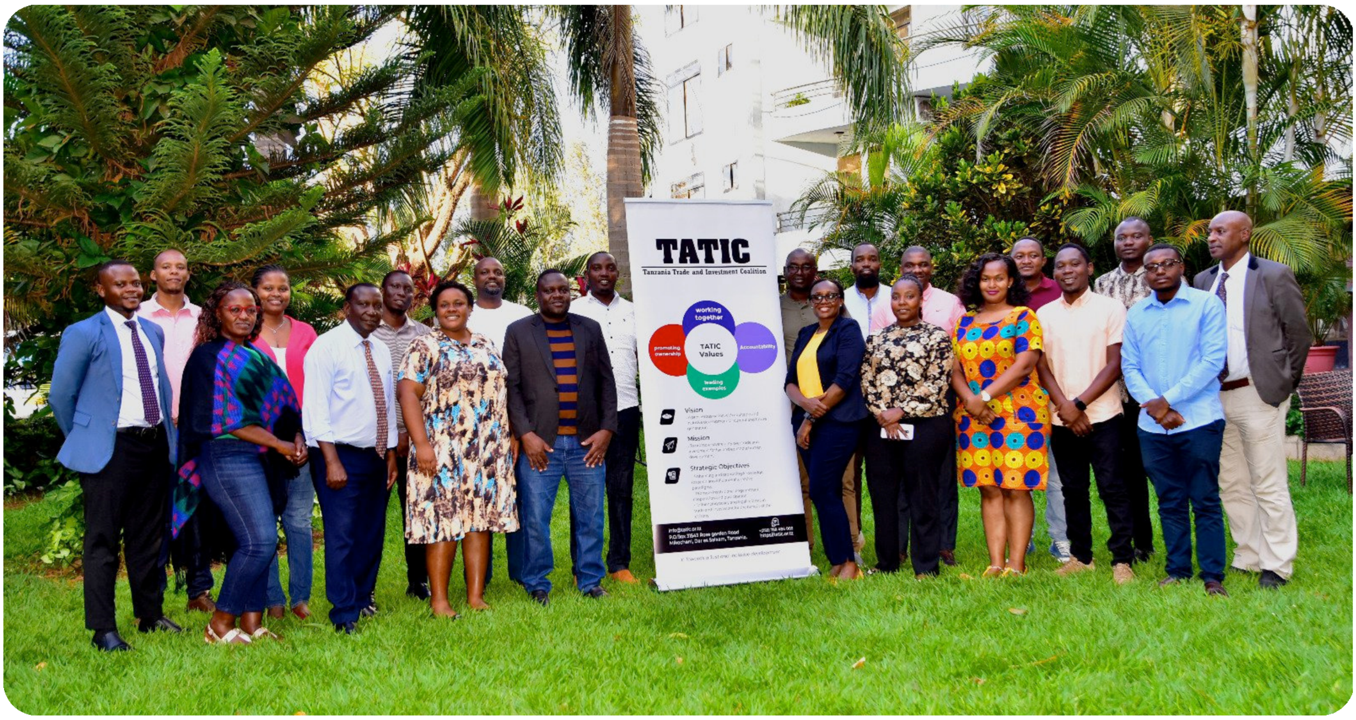
About TATIC

TATIC is a coalition of Civil Society Organizations (CSOs) and representatives from media, research and academic groups from Tanzania Mainland convened for progressively building a think tank towards institutional engagement on Trade and Investment frameworks related to national and international development discourses.

TATIC started in July 2018 where six CSOs namely: Legal and Human Right center (LHRC), Tanganyika Law Society (TLS), HakiMadini, Lawyers' Environmental Action Team (LEAT), East African Civil Society Organizations' Forum (EACSOF), Environmental Human Rights Care and Gender Organization (ENVIROCARE) and representatives from research and academic groups convened for a learning session on Bilateral Investment Agreement (BITs) facilitated by Southern and Eastern African Trade Information and Negotiations Institute (SEATINI) Uganda and HakiMadini.

Enthused by the learning, the coalition made a written submission backed by an in-depth analysis of the negative impact of BITs models, specifically the Tanzania-Netherlands BIT which was approaching its expiration and due for automatic renewal. The Coalition called on the Government of the United Republic of Tanzania to terminate the BIT and recommended renegotiation on more favorable terms. The Government of Tanzania through the Attorney General agreed to dialogue with the coalition and heeded the call by immediately terminating the Tanzania-Netherlands BIT.

After the engagement and consultation with different stakeholders the founding members organized several training sessions on Bilateral Investment Treaties and their Impacts where other stakeholders were invited. Through the organized sessions TATIC then was formed and the formalization for the existence was done in 2022.



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