IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MBEYA SUB-REGISTRY)

AT MBEYA

(NDUNGURU, ISMAIL AND KAGOMBA, JJJ)

MISCELLANEOUS CIVIL CAUSE NO. 5 OF 2023

IN THE MATTER OF THE CONSTITUTION OF THE UNITED REPUBLIC OF TANZANIA, 1977 [CAP 2 R.E. 2002] AS AMENDED FROM TIME TO TIME

AND

IN THE MATTER OF A PETITION TO CHALLENGE PROVISIONS OF THE CONTRACT AND PROCESS OF RATIFICATION OF THE INTERGOVERNMENTAL AGREEMENT BETWEEN THE UNITED REPUBLIC OF TANZANIA AND THE EMIRATE OF DUBAI (IGA) BY THE NATIONAL ASSEMBLY OF THE UNITED REPUBLIC OF TANZANIA FOR BEING ILLEGAL AND UNCONSTITUTIONAL

BETWEEN

ALPHONCE LUSAKO .... 1ST APPLICANT

EMMANUEL KALIKENYA CHENGULA .... 2ND APPLICANT

RAPHAEL JAPHET NGONDE .... 3RD APPLICANT

FRANK JOHN NYALUS .... 4TH APPLICANT

AND

THE ATTORNEY GENERAL .... 1ST RESPONDENT

MINISTER FOR WORKS AND TRANSPORT .... 2ND RESPONDENT

PERMANENT SECRETARY MINISTRY OF

WORKS AND TRANSPORT .... 3RD RESPONDENT

THE CLERK OF THE NATIONAL ASSEMBLY .... 4TH RESPONDENT

JUDGMENT

28th July, & 10th August, 2023

ISMAIL, J.

The Petitioners in this matter are a disgruntled quartet of citizens of Tanzania who are suing on an Inter-governmental Agreement (known in acronym as "**IGA**"), which has become the talk of the country for the past two months. This is an agreement executed between the United Republic of Tanzania ("**URT**"), on one part, and the Emirate of Dubai ("**Dubai**"), on the other ("**State Parties**"), on 25th October, 2022. The subject matter of the Agreement is the economic and social partnership for the development and improvement of performance of sea and lake ports in Tanzania.

The preambular part of the IGA reveals that its signing was in furtherance of a major step which entailed execution of a Memorandum of Understanding ("**MoU**"), between Tanzania Ports Authority ("**TPA**") and DP World ("**DPW**"), a Dubai based state owned enterprise, signed on 28th

February, 2022, on the sidelines of the Dubai Expo, which was attended by Her Excellency Samia Suluhu Hassan, the President of the United Republic of Tanzania. The MoU signaled the intention to cooperate and singled out areas of cooperation between TPA and DPW *"for development and/or improvement of the operations and management of strategic ports infrastructure of Tanzania Sea and lake ports, special economic zones, logistic parks and trade corridors...."*

Subsequent to execution of the IGA, the ratification process on the Tanzanian side began in earnest. This process was in pursuance of Article 25 (2) of the IGA which entailed tabling it in Parliament where it was debated and ratified on 10th June, 2023. The debate on the floor of the Parliament was reportedly preceded by issuance of a notice to the public, for solicitation of opinions on the draft parliamentary resolution that was to be debated and passed as a prelude to the ratification of the IGA. While the notice was issued on 5th June, 2023, public hearing was scheduled for 6th June, 2023. In the end, the IGA was given a resounding nod by a majority of Members of Parliament in attendance on the day.

Execution of the IGA and the eventual ratification has elicited an emotive discussion that has polarized the country, with a section of the population feeling that the IGA is flawed in many ways, and that it should

not be allowed to see the light of the day. Those who have found faults in the IGA include the petitioners. The quartet has come up with a raft of allegations which attempt to poke deep holes in the entire chain of the process that birthed the IGA and its eventual ratification. The blemishes are thrown at Minister for Works and Transport; the Ministry's Permanent Secretary; and the Clerk to the National Assembly. The Attorney General is impleaded as a necessary party whose presence in the proceedings is, by law, indispensable. Through a petition, preferred by way of originating summons, that is supported by the petitioners' affidavit, four grounds have been raised as the basis for their unreserved denunciation of the IGA. These grounds are as reproduced hereunder:

1. *That, the respondent's (sic) action of signing the International Agreement (IGA) and tabling the same before the Parliament of the United Republic of Tanzania for ratification without a dully (sic) notice to the public or making the same available to the general member (sic) and without availing the member (sic) of public a reasonable time to participate and give their opinion as required by law and the subsequent ratification of the same by the Parliament of the United Republic of Tanzania was given, submitted and given ratified in the ought (sic) right contravention of the provisions of section 11 (1) and (2) of the Natural Wealth and Resources (Permanent Sovereignty) Act No. 5 of 2017 read together with section 5 (1), 6 (2) (a), (b), (e) and (i) of the Natural Wealth and*

Resources Contracts (Review and Re-Negotiation of Unconscionable Terms Terms) Act No. 6 of 2017;

2. *That, the Intergovernmental Agreement between the United Republic of Tanzania and the Emirate of Dubai signed by the second respondent and witnessed by the third respondent by virtue of articles 2 (1), 4 (2), 5 (1), 6 (2), 7 (2), 8 (1) (a), (b) (c), 8 (2), 10 (1), 20 (2) (a), (e) (i) and (ii), Article 18, 21, Article 23 (1), (3) and (4), articles 26, 27 and 30 (2) of the international agreement contravene the laws and the Constitution of the United Republic of Tanzania;*

3. *That, by the acts and conduct of the 2nd and 3rd respondents, and circumstances of this case the respondents did not only violate the express provision of the law but exposed the important natural resource to wit ports and other strategic infrastructure in a lousy agreement full of uncertainty contrary to the interest of the Public; and*

4. *That, Respondent's action of signing the Intergovernmental Agreement between the United Republic of Tanzania and the Emirate of Dubai while there are terms which endanger not only sovereignty but also security of our country as referred under Articles 7 (2), 23 (4) of the signed and ratified contract.*

The supporting affidavit, jointly sworn by the petitioners has laid grounds on which the prayers sought in the originating summons are

premised. In general terms, the affidavit has taken a swipe at the process that culminated in the signing and ratification of the IGA; the danger that it poses to national security and sovereignty of the country in the control and management of her natural resources as enshrined in the Constitution of the United Republic of Tanzania, 1977 ("**the Constitution"** or "**URT Constitution**") and Acts No. 5 and 6 of 2017. Of specific relevance in the petitioners' deposition are paragraphs 12, 13, 14, 15 and 16 of the said affidavit, whose substance is reproduced hereunder, with all their grammatical challenges:

> *12. That, the granting of such tender to DWP for Emirate of Dubai is discriminatory and in contravention of the laws of Public Procurement Regulatory Authority Acts (PPPR) Cap 410 of 2011 as amended and other relevant laws as amended time to time.*
>
> *13. That, the respondents' acts and conducts has;*
>
> > *(a) Undermined Sovereignty and Security of the United Republic of Tanzania in respect of its power to own manage and control its natural resources for the interest of the United Republic of Tanzania;*
> >
> > *(b) Infringed the Rights of the Member of the Public to participate in a meaningful discussion in respect of the Intergovernmental Agreement subject of this Petition;*

(c) *That the deliberate act of the 2nd Respondent to table the Intergovernmental agreement without adhering to the due process of law breached the provisions of the constitution, rule of law, good governance and respect of the nation and utilization of her natural resources.*

14. *That as the Intergovernmental Agreement subject of this application touches issue of natural resources the respondent ought to have complied with compulsory requirements of the law to make the agreement available for public scrutiny.*

15. *That, acts, conducts and circumstances of the 2nd and 3rd respondents would lead to anarchy in the administration of harbor and ports and all other strategic economic zone subject of the Intergovernmental Agreement and that there is no administrative mechanism or organ in and outside the National Assembly with power and authority to control or review, make good the situation and return to the constitution and law.*

16. *That, on 10th June 2023 the Parliament of the United Republic of Tanzania illegally and arbitrary ratified the aforesaid the intergovernmental agreement between United Republic of Tanzania and the Emirate of Dubai while the said agreement was in violation of the Constitution of the United Republic of Tanzania and other laws of the United Republic of Tanzania.*

The respondents have fielded a ferocious opposition to the petition. This was done through a reply to the originating summons and counter-

affidavits affirmed and sworn by Mohamed Salum and Mariam Mpali Mdulugu, both principal officers. These depositions were in support of the respondents' case. Whereas the former deposed on what the respondents consider to be an unblemished process that led to the signing of the IGA and what it contains, the latter's was, by and large, an attempt to vindicate the process of ratification of the IGA in the National Assembly.

In the case of Mohamed Salum's averments, the contention is that the IGA between the United Republic of Tanzania ("URT") and the Emirate of Dubai sets a framework of areas of co-operation for development, improvement and operation of the ports, economic zones, logistic parks, trade corridors and other related ports infrastructures; and that the URT, through TPA, will continue with ports' operations, and that all issues of safety and security of the URT have been addressed in the agreement. The respondents further averred that comprehensive and detailed agreements on the project, in the form of Host Government Agreement (HGA) and Project Agreements would be concluded at a later stage.

With respect to the ratification process, the latter of the deponents stated that, on the direction of the Speaker of the National Assembly, a notice was published in media platforms, inviting the general public to submit their opinions on the draft resolution on the IGA. It was averred that 72

people opined to the resolution, before the joint committee of the Parliament prepared and tabled a report for deliberation by the National Assembly. The Parliament deliberated on the IGA and ratified it.

Hearing of the matter was through oral submissions that pitted Messrs Mpale Mpoki, Boniphace Mwabukusi, Phillip Mwakilima and Levino Ngalimitumba, learned counsel whose services were enlisted by the petitioners, against Messrs Mark Mulwambo, Edson Mweyunge and Hangi Chang'a, all Principal State Attorneys, and Ms. Alice Mtulo, Senior State Attorney, along with Messrs Stanley Kalokola and Edwin Webiro, both learned State Attorneys. They represented the respondents.

Before the proceedings got underway, both sets of learned counsel came up with a proposal of issues that they thought would guide the proceedings. The proposed issues, along with one more issue drawn by the Court, were acceded to by the Court. The following issues were adopted and recorded:

1. *Whether the signing, tabling and ratification of IGA was in contravention of section 11 (1) and (2) of the Natural Wealth and Resources (Permanent Sovereignty) Act No. 5 of 2017, read together with section 5 (1), 6 (2) (a) (b) (e) and (i) of the Natural Wealth and Resources Contract (Review and Renegotiation of Unconscionable Terms) Act No. 6 of 2017;*

2. *Whether the public was duly notified and afforded reasonable time to participate and give their opinions according to the laws during the ratification process of IGA;*

3. *Whether Articles 2, 4 (2), 5 (1), 6 (2), 7 (2), 8 (1) (a) (b) (c), 8 (2), 10 (1), 20 (2) (a) (e) (i) & (ii), Articles 18, 21, 23 (1) (3) & (4), Articles 26, 27 and 30 (2) of IGA contravene Articles 1, 8, 28 (1) & (3) of the Constitution;*

4. *Whether IGA is a contract;*

5. *Whether Articles 2 and 23 of IGA contravene section 25 of the law of Contract Act; and*

6. *Whether the IGA between the United Republic of Tanzania and the Emirate of Dubai followed legal procedures on selection method of procurement provided under section 64 of the Public Procurement Act.*

The petitioners' onslaught was launched by Mr. Mpoki who expectedly went for a jugular. Besides setting a ground for the petitioners' case, he submitted on the second issue. The issue, as recorded, queries the reasonableness or otherwise of the notice that called for public participation in the process that preceded ratification of the IGA.

Learned counsel argued that, in terms of Article 25 (2) of the IGA, the State Parties had 30 days (from the date of signing) within which to

commence the ratification process, either by the Court or by the Parliament, whichever is relevant in a particular jurisdiction. It was pursuant thereto, Mr. Mpoki argued, that on 5th June, 2023, the 4th respondent issued a notice that invited the public to appear in Msekwa Hall, Dodoma for a public hearing which was slated for 6th June, 2023. This means, in his contention, the notice was issued 24 hours prior to the date set for hearing. As if this was not serious enough, learned counsel asserted, a copy of the IGA was not attached to the notice, a testimony that the public was treated to a 'bag of unknown'. Mr. Mpoki argued that logic demanded that the Agreement be attached to the notice.

Pitching a tent on the notice, further again, Mr. Mpoki took a serious exception to the manner in which it was issued. His contention is that 24 hours are such a paltry duration to serve any useful purpose and reach to the wider population, and for them to comprehend the notice and contribute meaningfully. It would not allow people from across the country to travel to Dodoma and participate in the public hearing. He was also critical to the method of dissemination of information to the public. In his view, social media was not an ideal channel through which information would reach a wider population.

Making reference to paragraphs 5 and 6 of the counter-affidavit of Maria Mpali Mdulugu, Mr. Mpoki argued that these averments constitute an admission by the 4th respondent that the notice was issued on 5th June, 2023, and that what was attached to it is the intended resolution and not the Agreement. In his view, this was a serious omission. On the number of respondents, Mr. Mpoki contended that 72 respondents was extremely measly a number from a pool of millions of Tanzanians. He attributed the low turnout to the short notice as he believed that more time would guarantee a wider participation.

Submitting on the attachment to the affidavit in which names of the respondents are listed, learned counsel's view is that the settled position is that when an affidavit mentions somebody then a sworn deposition of such person must also be filed, lest the information becomes an inadmissible hearsay evidence. On this, the learned advocate referred us to the decision of the Court of Appeal of Tanzania in ***Diana Rose Spare parts Ltd v. Commissioner General, Tanzania Revenue Authority***, CAT-Civil Application No. 245/20 of 2021 (unreported). He urged us to disregard the averments in paragraph 7 of the counter-affidavit.

Reverting to the manner in which the notice was issued, Mr. Mpoki was heard submitting that notice is a creature of Order 108 of the Parliamentary

Standing Orders, and that the whole essence of issuing it is to enlist the public's assistance in reviewing agreements and treaties. It is a matter that should be taken seriously and that the instant proceedings would not be instituted if the notice was given the seriousness it deserved and rules governing public participation were adhered to. In Mr. Mpoki's contention, a proper notice would entail informing the invitee of the subject matter of the hearing; affording him sufficient time; and allowing him to participate. It would also require reflecting the views of the invitee in the deliberations that preceded the passage of the resolution. To fortify his position, Mr. Mpoki referred us to the Privy Council's decision in ***The Mayor and Corporation of Port Louis v. The Honourable Attorney General of Mauritius*** [1965] AC 1111; [1965] 3 WLR 67.

Learned counsel argued further that, cognizant of the fact that the IGA relates to sea, lake and dry ports as well as economic zones, the framework that touches on these vast interests of the economy ought to have attracted a broad based participation. This would require issuance of an adequate notice and foster consultation, aware of the fact that consultation is part of natural justice. His take is that, any attempt to stifle realization of natural justice must be censured by any court.

He wound up his submission in chief by imploring us to hold that there was no notice issued to the public, and that, if any, such notice was inadequate, meaning that principles of natural justice were trampled, and that the Court should get it out of its way.

Coming hammer-and-tongs was Mr. Mwabukusi, whose submission was in relation to the 1st, 4th and 5th issues. He chose to combine 4th and 5th issues while the 1st issue was argued separately. He began by beaconing his argument on section 25 (1) and (2) of the Interpretation of Laws Act, Cap. 1 R.E. 2019. It was his assertion that, whilst sub-section 1 states that the preamble to a law is part of the law and is intended to explain purports and objectives, sub-section 2 states that an appendix or a schedule to the law, together with any attachment thereto form part of the law.

On the 1st issue, learned counsel urged the Court to cast an eye on paragraphs 1 and 2 of the preamble to Act No. 5. These paragraphs contain a policy statement as highlighted in Articles 8 (1) and 9 (f) of the URT Constitution which recognize that Tanzania is a democracy and that sovereign powers are vested in the people from whom government derives its powers. Mr. Mwabukusi further contended that the country's permanent sovereignty over its natural wealth and resources is recognized by international law, as acknowledged under paragraph 2 in the said preamble.

The preamble also carries a statement that all arrangements and agreements must protect peoples' interests and resources.

Referring to section 11 (1) and (2) of Act No. 5, Mr. Mwabukusi submitted that, in terms of Article 27 (1) of the URT Constitution, the country enjoys permanent sovereignty over natural wealth and that disputes on the resources shall not be a subject of proceedings in any foreign court. The learned advocate further argued that sub-section (2) of section 11 is to the effect that jurisdiction to determine disputes arising from the use of natural wealth and resources is exclusively vested in the judicial bodies established in the URT and in accordance her laws. In his view, that provision bars proceedings on natural resources to be adjudicated by foreign courts and using foreign laws. He further submitted that the 2nd Schedule to Act No. 5 and the URT Constitution insulate the country from being coerced into undertaking actions that impair her sovereignty.

Regarding Act No. 6, Mr. Mwabukusi was heard submitting that, whereas section 5 (1) thereof provides that all arrangements or agreements on natural wealth and resources shall, within six sitting days of the National Assembly next following their making be reported to the National Assembly, section 6 (2) talks about unconscionable terms of an agreement. Specifically,

he contended, section 6 (2) (i) outlaws acts of subjecting the country to jurisdiction of foreign laws and fora.

Giving the genesis of the IGA from when the process began on 28th February, 2022 and its signing on 25th October, 2022, Mr. Mwabukusi argued that the import gathered from the preambular provisions and Article 2 (1) of the IGA is that this is a binding agreement. On its effect, learned counsel took the view that Article 4 (2) of the IGA wears out sovereignty of the State on how to enjoy, exploit and use the country's natural resources. This provision places an obligation to Tanzania to inform Dubai of other available investment opportunities, to allow Dubai to express interest and submit proposals. This, he contended, contravenes the law and subjects the country to the whims of Dubai by according preferential treatment to one investor. Mr. Mwabukusi cast further aspersions on inclusion of Article 23 (4) of the IGA which erodes the country's sovereignty on management of resources.

Turning to 4th and 5th issues, the contention by Mr. Mwabukusi is that, based on what transpired on 10th June, 2023, and what was tabled by the Minister *i.e.* Resolution for ratification of an Agreement, the petitioners' view is that IGA is not an Agreement. The reason for this is twofold. ***One***, that it lacks consideration, a key ingredient under section 25 of the Law of Contract Act, Cap. 345 R.E. 2019 (LCA). In the petitioners' contention, the fact that

there are no details of financials with respect to the quantum that DP World or the Emirate of Dubai was going to invest contravenes section 25 (1) (a) and (b) of the LCA. In the learned advocate's view, such omission renders the IGA void. ***Two***, there is a question of capacity or competence of one of the parties to contract. This is in respect of section 11 (1) of the LCA, read together with Article 123 of the Constitution of the United Arab Emirates ("**UAE**"). These provisions bar an Emirate from concluding any international agreements which touch on foreign relations without express authority of the UAE Supreme Council.

Mr. Mwabukusi further observed that IGA is an international agreement governed by the Montevideo Convention on the Rights and Duties of States, 1933, whose Article 1 sets conditions for a state to enter into an agreement. In Mr. Mwabukusi's contention, Dubai does not have the status of a state and, therefore, unable to enter into any international agreement of IGA's stature. Emphasizing on the status of a party to a contract, the learned advocate made reference to this Court's decision in ***Faith Day Care & Primary School v. International Commercial Bank (T) Ltd***, HC-Civil Case No. 110 of 2019 (unreported), wherein the aspect of capacity to contract was canvassed.

It was Mr. Mwabukusi's conclusion that, since Dubai is not a competent party to contract, the petitioners' humble request is that the Court should find the IGA lacking necessary traits of a valid contract. He urged the Court to declare it *void ab initio*. He maintained that the IGA is defective and lacking in many respects.

Next on the line was Mr. Ngalimitumba, another of the petitioners' counsel. He addressed the Court on the 3rd issue. He began his submission by restating the supremacy of the Constitution and the need for adherence to it. While quoting the book authored by Professors Issa Shivji and Hamud Majamba, titled: **Rule of Law versus Rulers of Law**, learned counsel was unequivocally of the view that the IGA contravened the provisions of the URT Constitution, especially Articles 1, 8 and 28 (1) and (3). He contended that Article 4 (2) of the IGA has apportioned an obligation to the Government of the URT to inform the Government of Dubai of any investment opportunities. Mr. Ngalimitumba's take is that this is not a friendly responsibility as it affects sovereignty of the URT proclaimed under Article 1 of the Constitution by reducing her to a mere agent. He further contended that the provision erodes supremacy of the country to source better investors than Dubai. He urged the Court to find that the IGA has offended the URT Constitution and that it should be annulled.

He also took an issue with Article 5 (1) of the IGA which he contends is in contravention of Article 28 (1) and (3) of the URT Constitution on the duty of the State to defend its national security as it has granted to Dubai exclusive rights to that deny the country of its right to defend itself. Mr. Ngalimitumba argued that, in the absence of any reservation which allows the country to defend itself, it is his prayer that the IGA be annulled. The same was said with respect to Article 6 (2) of the IGA, and the contention by learned counsel is that the responsibility accorded under the said provision has the effect of endangering national security and subordinating the country's sovereign status to Dubai.

Turning to Articles 8 (1) (a), (b) & (c) and (2), 10 (1), 20 (a) (e) (i) & (ii), Article 18, 21, 23 (1), (3) and (4), 26 and 27 of the IGA, the contention is that these are all offensive of Articles 1, 8 and 28 (1) & (3) of the URT Constitution, as the former are intended to propagate invasion by providing exclusive land rights to DPW. This, he said, has the potential of allowing economic invasion as well. Mr. Ngalimitumba invited the Court to see that Article 10 of the IGA, on confidentiality, prejudices the rights of the citizens under Article 21 of the Constitution, to know details of contracts that touch on their resources, especially ports and exclusive zones. He also invited the Court to censure Article 23 (4) of the IGA, on the ground that it sets very

stringent conditions for termination of the IGA, an act that prevents the country from taking steps that are of interest to her people. The same was said with regards to Articles 26 and 27 of the IGA which are accused of subordinating the country and the supremacy of the Constitution.

Overall, learned counsel implored the Court to hold the 3rd issue in the affirmative.

Mr. Mwakilima's entry into the fray was in relation to the 6th issue. His entry point was that section 64 of the PPA imposes a condition that is to the effect that every tender should be competitively awarded. He argued that the application of the word "***shall***" has the connotation that conformity to it is imperative. He contended that in the impugned IGA, DPW has been awarded a tender but there is nothing to show that there was any tendering process that culminated into the award. In his view, it took the conversation of two persons to have the deal concluded. It was Mr. Mwakilima's argument that TPA is a public authority that is bound by the provisions of section 64 of the Public Procurement Act, Cap. 410 R.E. 2019 ("**PPA**").

He dwelt on section 4 (e) of the PPA and contended that the requirement is that all tenders must be advertised. Mr. Mwakilima argued that, whereas the preamble to the IGA talks about the capacity that DPW is

endowed with, the public is not told how they gauged that capacity. The only assumption, in his view, is that bids were invited from across the world. It was his fervent argument that, the fact that the entire process was shrouded in secrecy means that the motive for doing so was evil, and that such an act was a flagrant violation of section 4 (a) of the PPA. His contention is that the culpability rests on the TPA for not conforming to the law, and the National Assembly that legitimized what he contends as an illegality.

Traversing the PPA, yet again, Mr. Mwakilima argued that, while section 64 (2) (b) talks about urgency in procurement, the respondents' reply has not shown that the award to DPW was a matter of urgency as to justify the wanton violations stated above.

Regarding the life of the IGA, Mr. Mwakilima's take is that, while Article 23 talks about cessation of project activities, such activities are not defined and the impression is that this is an agreement for life. He was emphatic that this award should be crossed off lest it sets a bad precedent. He concluded by praying for a declaratory order that the IGA offended the procurement law and that the Parliament ought to have first looked into the tender process and its conformity or otherwise with the law.

Not unexpectedly, the respondents' counsel came with all guns blazing. Setting the tone was Mr. Mulwambo who began by seeking a permission to adopt the respondents' reply to the originating summons and counter-affidavits as part of the respondents' submissions. He highlighted the parties' divergence in the matter, stating that the divergence revolves around the legality of signing and ratifying the IGA between the two State Parties. The learned Principal State Attorney was in agreement with his counterparts on the supremacy of the Constitution and the all-important need of all organs of the State to conform to the requirements of the Constitution.

While making reference to Article 107A (1) and (2) of the Constitution that vests the power of dispensing justice in the Judiciary, Mr. Mulwambo underscored the need to uphold the independence of the Judiciary. Pursuant to the powers vested in the Judiciary, he argued, this Court must determine if what the Government did in the ratification process offended the Constitution. In his view, that is done by leafing through the pleadings and allegations and see if they pass the threshold of the infractions cited in the petition. He took the view that this can only be achieved if the petitioners cite the impugned provisions of the Constitution. On this, the learned Attorney referred us to the Court of Appeal's decision in ***The Attorney***

General v. Jeremia Mtobesya, CAT-Civil Appeal No. 65 of 2016 (unreported).

While acknowledging that this is a constitutional matter that has been preferred under the provisions of Article 108 (2), among other provisions, Mr. Mulwambo's take is that, in these kind of matters, just like in all other cases, the burden of proof lies on the complainant, and the standard of proof is beyond reasonable doubt. He submitted that this is in line with the reasoning in the case of ***Reverend Christopher Mtikila v. The Attorney General*** [1995] TLR 31. On how this is done, the respondents' contention is that the guiding tool is the Court's decision in ***Centre for Strategic Litigation & Another v. Attorney General & 2 Others***, HC-Misc. Civil Cause No. 21 of 2019 (unreported); and the Court of Appeal's decision in ***Julius Francis Ndyanabo v. Attorney General*** [2004] TLR 14.

He implored the Court to place the IGA on one hand and the Constitution on the other, as opposed to placing the IGA on one hand and laws and processes on the other hand. Learned counsel urged the Court to exercise restraint in deciding whether the IGA conflicts with the laws. At the end of the day, he argued, the expected word from the Court is whether the IGA contravenes the provisions of the Constitution.

Taking the baton from Mr. Mulwambo was Mr. Kalokola whose submission was in reply to submissions on the 4th, 5th and 6th issues. He kicked the first ball by making reference to the originating summons that refers the IGA as an international agreement, and that one of the reliefs is a declaratory order which recognizes the IGA as an international agreement. In his contention, this position is fortified by paragraph 5 of the petitioners' affidavit which refers to it as an international agreement. From this, the learned Attorney came up with a question as to whether it is in order for the petitioners to apply municipal laws in an international agreement. He contended that the applicable law, in such circumstances, is the Vienna Convention on the Law of Treaties, 1969, whose Article 2 (a) defines an international agreement and what guides it. He maintained that the IGA is an international agreement which must be governed by international law.

Regarding ratification, learned counsel's contention is that Article 63 (3) (e) of the URT Constitution justified the Parliamentary resolution's treatment of the IGA as an agreement which requires ratification, a common feature in all international agreements, in line with Article 2 (b) of the Vienna Convention, and consistent with Article 25 (2) of the IGA. He argued that the complaints on the ratification process justify the fact that the IGA is an international agreement. In his view, this reality renders the contention that

the same is governed by LCA weak and misconceived. Mr. Kalokola argued that his contention is fortified by Article 27 of the Vienna Convention which is to the effect that local or municipal laws cannot defeat an international agreement.

Regarding the Dubai Emirate's capacity to contract, the view by Mr. Kalokola is that resort has to be had to the provisions of the Montevideo Convention on the Rights and Duties of States, 1933. This treaty defines a state in the same fashion as that quoted by Mr. Mwabukusi. Addressing us on the import of Article 120 of the UAE Constitution, the respondents' Attorney contended that it is true that union matters are the domain of the Union. He was quick to submit, however, that Article 123 talks about what the Emirates cannot individually do, and that they include foreign relations issues. It was the respondents' take that the IGA relates to investment issues which are allowable under Article 116 of the UAE Constitution, and it is in view thereof, that an issue of procurement has surfaced and picked up by the petitioners.

Further on the capacity to contract, Mr. Kalokola invited us to review Article 28 of the IGA which provides, in clear terms, that the parties have set out that they are competent to sign the IGA. He posited that, under Article 99 (4) of the UAE Constitution, powers of interpretation of its constitutional

provisions are vested in the Union Supreme Court, arguing that the petitioners have not stated if there is any matter that has founded an action on the violation of the UAE Constitution. He aided his cause by citing the decision of this Court in the case of ***Tanganyika Law Society v. Minister for Foreign Affairs & Another***, HC-Misc. Civil Cause No. 23 of 2014 (unreported).

With regards to dispute settlement, the view held by Mr. Kalokola is that Article 66 (a) of the Vienna Convention provides for a mechanism for settlement of disputes arising out of international agreements. On this, the choice is between going to the International Court of Justice or to an arbitrator of the parties' choice. This is why, he argued, the State Parties settled on international arbitration as provided for under Article 20 (1) of the IGA. It was Mr. Kalokola's conclusion that application of the LCA in this Agreement is a flawed choice, and that such choice will only be relevant to HGAs and other project agreements in the manner stated in Article 21 of the IGA.

With regards to the 6th issue, the contention by Mr. Kalokola is that this issue is predicated on relief No. 4 in the Petitioners' prayers. He argued that the contention that a tender was awarded to DPW of the Emirate of Dubai was rebutted in Mohamed Salum's affidavit in paragraph 14, and that

the respondents' position is that the IGA is an international agreement. He was of the view that the argument that it is governed by the provisions of the PPA is imperfect, adding that even the dispute settlement mechanism reflects that reality. Mr. Kalokola reiterated the contention that IGA is a framework agreement that creates relationship on investment. As such, the same cannot be subjected to the PPA.

On the failure to advertise the tender, Mr. Kalokola's reaction is that this being a non-procurement issue, the law that ought to have been applied is the TPA Act whose section 12 (1) (l) spells out the functions of TPA which entail promoting local and international investment in ports infrastructure. It explains why TPA features in the IGA. He argued that section 4 (1) of the PPA provides an answer on which law should supersede the other in case of conflict between the provisions of the IGA and the PPA. In this case, the law governing the international agreement or treaty holds the sway. The contention that section 64 of the PPA was not conformed is, in the eyes of the respondents, flawed.

While contending that the issue should be answered in the negative, the Court was urged to be inspired by the decisions in the ***Tanganyika Law Society case*** (supra) and the ***Centre for Strategic Litigation case*** (supra).

Mr. Mweyunge's submission was in relation to issues No. 1 and 2. Submitting with a gusto, he singled out Article 21 of the Constitution which talks about election of Members of Parliament and their role as representatives of the people. He argued that the said provision is in sync with Article 63 (2) of the Constitution whose import is that the Parliament is the people's representative in supervising and advising the Government, while Article 63 (3) relates to powers of the Parliament to ratify agreements and conventions.

The learned Attorney invoked the provisions of Article 89 (1) (2) of the URT Constitution which provides for promulgation of the Parliamentary Standing Orders which guide in the performance of duties of the Parliament. A case in point is Order 108 (2) of the Standing Orders which provides for issuance of a notice for public participation where an agreement requires ratification. He submitted that the IGA followed this procedure. In the instant case, Mr. Mweyunge retorted, the notice was issued to invite the public to air out their views and that the testimony to that is annexure OSG-F2. He argued that the petitioners were aware of the notice as acknowledged in paragraph 11 of the petition. Their only qualm, he argued, is on the adequacy of the time given, but regretted that the petitioners have been

economical with facts on whose time was not reasonable or that their failure to participate was due to time constraint.

On the theme of the notice, the contention by the respondents is that the notice called only those with views, and that the 72 people who came forward are the ones who had views to air, arguing that the complaints by the petitioners are nothing better than sheer speculation. Mr. Mweyunge defended the mode of transmission of the notice, terming it the easiest as there is no time lag between sending and receiving the message and that the 72 people who responded came from across the country. He insisted that views need not be given physically and that, in the respondents' view, emails were enough and served the purpose.

Still on the adequacy of the notice, the view expressed by the respondents is that Order 108 (2) of the Standing Orders has not prescribed the time frame for giving such views. He took the position that, since the call for opinions was done by the Parliament, it was left in the wisdom of the august house to choose the timeframe that suits their purpose. He maintained that reasonableness of time is dependent on the circumstances, the subject matter, its urgency and importance placed thereon.

Underscoring the importance of reasonableness with respect to parliamentary activities, the learned Attorney invited us to be persuaded by the decision of the South African Constitutional Court in ***Doctors for Life International v. Speaker of the National Assembly & 11 Others***, Case CCT 12/05. He emphasized that it is the Parliament that has to determine what is considered to be an appropriate public involvement. He was of the contention that what was done was enough and that there is nothing blemished in that respect, urging the Court to find that the time given was adequate. He fortified his view by citing two more decisions. These are: ***Land Access Movement of South Africa & 5 Others v. Chairperson of the National Council for Provinces***, Case No. CCT 40/15; and ***British Railways Board & Another v. Pickin*** [1974] 1 All ER 608; [1974] AC 765.

Reacting on the decision in ***Mayor & Corporation of Port Louis of Mauritius v. Honourable Attorney General*** (supra), Mr. Mweyunge submitted that what was quoted by Mr. Mpoki was a submission of a counsel in the case and not the decision of the court. He contended that the decision in the case is found at page 9 of the decision and that the court's conclusion was that the timeframe of the notice was reasonable. Regarding the failure to attach a copy of the Agreement, the counsel's contention is that it was solely in the remit of the Parliament to determine how views were to be

collected and that the notice was clear that views were on the resolution. He termed as baseless, the complaint against the choice of the media used to publish the notice. His argument is that, the fact that notice was seen is enough. The respondents further contended that it is speculative to argue that many people would respond had time been extended as it is also possible that none would come forward to give their views. He maintained that the question of reasonableness is in the hands of the Parliament.

As an alternative submission, Mr. Mweyunge came with a contention that, after all, Article 21 (1) of the URT Constitution provides that Members of Parliament are representatives of the people whose other limb of responsibility is to advise the Government. To the extent that they participated in the ratification process, people were adequately represented.

Regarding the reasoning in ***Diana Rose Spare parts*** (supra), learned counsel's view is that the same is distinguishable as circumstances of the instant case are different and render it inapplicable in the instant matter.

Mr. Mweyunge expressed his misgivings on the inability of the petitioners to cite the provisions of the URT Constitution which are alleged to have been flouted in this respect. He took the view that the petition is lacking in the requisite adequacy.

Turning to the 1st issue, Mr. Mweyunge's argument is that Article 5 (2) of the IGA provides that its implementation is dependent on the signing of other definitive agreements, and that that would require preparation of project proposals. He referred us to paragraphs 8 and 12 of Salum's Affidavit which are to the effect that extraction or exploitation of natural resources is dependent on the execution of other agreements. He found nothing from which to infer that the IGA is capable of violating Acts No. 5 and 6 of 2017.

On ratification, the Attorney's view is that such process conformed to Article 63 of the URT Constitution and Order 108 of the Standing Orders. Learned counsel held the view that the provisions cited by the petitioners have nothing to do with ratification. In his contention, the petitioners ought to have cited the provisions of the URT Constitution alleged to have been infringed. While imploring the Court to be persuaded by the decision in ***Tanganyika Law Society*** (supra), Mr. Mweyunge submitted that in the case of ***Ally Linus & 11 Others v. THA*** [1998] TLR 5, it was held that courts are enjoined not to depart from previous court decisions on a similar matter, and that conformity to such decisions is not a matter of mere courtesy.

The respondents' counsel reiterate his earlier position that the IGA was a Framework Agreement and not a project agreement that should conform

to the requirements of Acts No. 5 and 6 of 2017. He argued that this position is clearly discernible from Article 21 of the IGA.

Regarding the import of Article 4 (2) of the IGA, the contention by the respondents is that issuance of information to DPW is not an issue to squawk about as that only enhances the scope of the people that the URT intend to cooperate with. Mr. Mweyunge, again, castigated the petitioners for not being able to cite any provision of the URT Constitution that has allegedly been violated.

Mr. Webiro was the respondents' 'last line of defence'. His submission was in response to the petitioners' representations on the 3rd issue. He began by submitting that, when a matter relating to violation of the Constitution is at stake, what is examined is the impugned provision against a specific provision allegedly violated. He argued that this position was restated in the case of ***Attorney General v. Dickson Sanga***, CAT-Civil Appeal No. 175 of 2020 (unreported); and ***Reverend Christopher Mtikila's case*** (supra). In the cited decisions, Mr. Webiro submitted, it was held that the constitutionality of the statutory provision is not formed on what could happen in its operation but what it actually provides for. Mere possibility of a statutory provision being abused in actual operation will not make it invalid. He implored the Court to look at the impugned provisions mindful of the

principle enunciated in the cited cases and not to look at them and say what happens when they are implemented.

Addressing the Court in relation to Articles 1 and 8 of the Constitution, the learned Attorney argued that it is apposite that the term "Sovereignty", that has featured so prominently in the proceedings, be defined, and that the most fitting definition is that which was canvassed in ***SMZ v. Machano Khamis Ali & 17 Others***, CAT-Criminal Application No. 8 of 2000 (unreported). It refers to freedom of a country to make and enforce laws; to decide on its affairs without any external control. To be able to determine that, he argued, the following features must be looked into:

(i) Power to do anything in a state without accountability;

(ii) Power to make laws, to execute and apply them;

(iii) Existence of an impartial body charged with mandate of dispensing justice;

(iv) Power to impose and collect taxes and levies;

(v) Power to make war or peace if need be; and

(vi) Power to form and enter into treaties or alliances with nations and the like.

He termed as baseless, the contention that sovereignty of the country will be eroded while aware that this country attained its independence in 1961. He scoffed at his counterpart's assertion that exclusive rights, as spelt out in Article 5 of the IGA, imply that control of the port will go to Dubai. In his view, exclusive rights refer to exclusion of other investors after DPW takes over the project and before expiry of the contract. It excludes other investors for the entirety of the period during which the IGA and HGAs will be in force. He found nothing untoward in that, adding that such exclusivity has nothing to do with sovereignty of the country. He was insistent that Article 5 (2) of the IGA talks about the signing of HGAs and that Article 21 provides that HGAs will be governed by the laws of Tanzania.

With regards to the import of Article 6 (2), Mr. Webiro's take is that the same talks about security issues and it clearly states that DPW may request the Government to prevent any illegal and unauthorized interference of the project. This, in his contention, proves that the country is sovereign, and that the Government would still interfere if need for so doing arose.

Regarding the land rights, learned Attorney's argument is that Article 1 of the IGA defines land rights and the term refers to what is catered for in section 20 of the Land Act, Cap. 113 R.E. 2019. This provision bars a non-Tanzanian from owning land. He argued that the URT undertakes to observe

all laws when availing land rights to DPW. He emphasized that the applicable laws will still be Tanzania laws.

On Article 18 of the IGA, the contention by Mr. Webiro is that imposition of taxes, duties and other charges will be done in adherence to the laws prevailing in the country, adding that sovereignty of a country is measured by the country's ability to impose and collect taxes. He took the view that this sovereign power has not been disturbed.

Regarding dispute settlement, the respondents' view is that, since IGA is an international agreement governed by the provisions of the Vienna Convention, resort has to be had to Article 66 (a) of the Convention which gives right to two State Parties to decide how they would wish to pursue their disputes. In this case, the parties chose arbitration. Such ability to make choice has only served to strengthen sovereignty of the country and not otherwise. The same was said with respect to matters relating to consultation in respect of which Mr. Webiro argued that it was intended to keep in line with norms that govern international agreements.

With respect to termination of the Agreement, learned counsel's contention is that Article 23 (53) clearly provides for termination. In the

counsel's view, this is compatible with what is provided by Article 54 of the Vienna Convention.

On the adequacy and applicability of Articles 26 and 27 of the IGA, the position taken by the respondents is that these provisions are in sync with Article 25 of the IGA, noting that the said Agreement went through the process of making it a law by having it ratified. It cannot be said, they contended, that such act is tantamount to surrendering sovereignty. It is in conformity with Article 14 of the Vienna Convention.

Mr. Webiro scoffed at the petitioners' argument that revolves around Article 4 (2) of the IGA. He argued that there is no intention of creating any binding obligation on anybody. The provision only creates a goodwill between the two countries and that the grant of any request will depend on assessment as to whether it is for the interest of the country. It was his take that none of the provisions of the IGA infringes or erodes sovereignty of the country.

Addressing us on the import of Article 28 (1) and (3) of the URT Constitution, the argument by learned Attorney is that this provision exclusively provides for the government's and citizens' duty to defend the country against any invasion. He was of the view that sub-section (3) can

only come into play in times of war or invasion, and that there is nothing in the petitioners' submission from which an inference may be made that the country is at war or under invasion, or that the IGA is a signature to lose war or surrender our land to an invader or at all. Mr. Webiro concluded that the petitioners have failed to demonstrate any breach of the provisions of Article 28. He implored the Court to hold so and be guided by the decision in ***Centre for Strategic Litigation case*** (supra).

Rebutting on the impact of Article 21 of the IGA, Mr. Webiro argued that the country will still be in control of the project and that security will be guaranteed as all law enforcement agencies will take charge. The same was said with respect to land rights; employment rights; maritime issues; immigration issues; standard issues; tax and revenue issues; and similar other issues.

In his wrap up address, Mr. Mulwambo urged the Court to dismiss all the prayers made by the petitioners, and pressed for award of costs to the government.

The petitioners' rejoinder followed the sequence of submissions in chief. Mr. Mpoki took the lead and his first point of contention was with respect to costs. He was emphatic that this is a public interest litigation which

was preferred *bonafide*, for the benefit of the public and serves to develop jurisprudence. He argued that public interest demands that the IGA be subjected to this process as it is laden with controversies which are apparent everywhere. He added that the outcome of this process will breed jurisprudence of constitutionalism which will last for a century. Condemning the petitioners to costs will be unfair.

On Mr. Mulwambo's contention regarding the burden of proof, Mr. Mpoki argued that the principle is that the person who denies presence or existence of violation must prove that there is none. He argued further that these principles, which were elucidated in the ***Julius Ndyanabo case*** (supra) recognize that the Constitution is supreme. On the standard of proof, the view by Mr. Mpoki is that it is prima *facie* case, as stated in the ***Dickson Sanga case*** (supra), which has overridden the ***Change Tanzania case*** (supra), the former being the decision of the Court of Appeal of Tanzania. Distinguishing the ***Mtikila case*** (supra), Mr. Mpoki held the view that law reporters did not capture the gist of the case as the issue for determination in that cases was whether a Zanzibari can hold a ministerial position in a non-union ministry. He argued that proof beyond reasonable doubt does not operate where the violation is blatant.

On the separation of powers, learned counsel argued that the only organ which can intervene or meddle in the affairs of another organ is the court, and this is what is called checks and balances. He argued that jurisdiction of this Court is unlimited and that the Court can knock every door in fulfilment of its role as a defender of the Constitution.

On public consultation, the argument by the learned advocate is that none of the principles were observed in the notice issued on 5th June, 2023, calling upon the public to appear on 6th June, 2023. It was his submission that there was no need to prove negative which cannot be proved. The contention that there was no notice is, in his views, a negative which cannot be proved. He maintained that the effect of inadequate notice is reflected in the low turnout. He took the view that participation cannot be there while what was posted on the website and the notice was a resolution and not the IGA.

On the decision of the Constitutional Court of South Africa, the argument is that the impugned notice was for 30 days but the complainants still felt that it was too short. He submitted that complaining about a 24-hour notice, in the instant case, is not a bad thing.

Regarding representation by Members of Parliament, Mr. Mpoki's contention is that this is a weak argument. He wondered why did the Parliament promulgate Order 108 (2) if representation by Members of Parliament was considered enough? He argued that the said provision is not ornamental. It had the purpose to serve and the purpose was to ensure that participation is wider. He wound up by arguing that failure by the petitioners to file a rejoinder cannot be construed as an admission of the contents in the counter-affidavits.

On his part, Mr. Mwabukusi was adamant that the question of capacity to contract is settled by Article 120 of the UAE Constitution, read together with the Vienna Convention and the Montevideo Convention. It was his view that the respondents were under obligation to show that Dubai had what it takes to enter into such agreement, which the respondents have not done. He argued that a provision in the IGA cannot create the status of a state to Dubai.

On the argument that IGA is an international agreement and subject to international laws, the contention by learned counsel is that the same cannot be an international agreement where Dubai's statehood has not been ascertained. He argued that, to the extent that the agreement touches on the country's interest in natural wealth, then this is a matter which touches

on sovereignty of the country, and that this brings in the application of Acts No. 5 and 6 of 2017, and Articles 8 and 9 of the URT Constitution. He argued that the clear message is that the objective of placing resources in the hands of Tanzanians and institutions created therefor is in jeopardy.

On the contention that the HGAs and project agreements will put terms and specific conditions, learned counsel's argument is that the respondents' submission is flawed, and that Article 12 of the IGA does not support that contention. In fact, Article 20 (3) talks about arbitration in an international arbitral body in a neutral country. He argued that, since IGA will be the basis for all other agreements then the spirit of Article 20 (3) (e) of the IGA will still live on.

On the ***TLS case***, the argument is that this decision is distinguishable. He argued that the said decision was delivered while Acts No. 5 and 6 of 2017 were not yet in force. He reiterated what is in the preamble to Act No. 5 and section 11 (2) both of which bar matters founded on natural wealth to be determined by foreign courts and tribunals.

On his part, Mr. Ngalimitumba was of the view that the ***Mtikila*** and ***Sanga cases*** are distinguishable as issues were different from what is at stake in this case. He argued that, whereas in the ***Dickson Sanga case*** the

question was on the legality of section 148 (5) of the Criminal Procedure Act, Cap. 20 R.E. 2019 (CPA), the ***Mtikila case*** was on the provisions of Act No. 4 of 1995 which was intended to amend the URT Constitution. This is unlike the matters at stake in the instant case in which the issue is on the provisions of an Agreement.

On the ***Machano Khamis case***, learned counsel's argument is that sovereignty as defined therein is correct and the petitioners subscribed to that thinking. Regarding Article 6 (2) of IGA, the contention is that the same interferes with safety and security conditionally and as understood by State Parties. This, he argues, takes away the country's sovereignty to defend itself, rendering the IGA illegal.

Regarding land rights, the argument is that the provisions in the IGA entitle DPW to occupy land in Tanzania. Mr. Ngalimitumba submitted on the settlement of disputes outside Tanzania, and his reaction is that that is a contravention of the law. He insisted that the Government is duty bound to know their boundaries, and that such failure renders the IGA void *ab initio*.

Submitting on the termination of the IGA, counsel's contention is that the provisions of Article 23 (3) have imposed conditions one of which is the requirement of consent of the Government of Dubai. This subjects the URT

to the whims of Dubai, thereby preventing the Country from planning for her development. He argued that Article 54 of the Vienna Convention, read with Article 60 of the Vienna Convention, the said provision of the IGA has offended the Vienna Convention.

With regards to the requirement of ratification, learned counsel's argument is that the good intention expressed in Article 14 of the Vienna Convention has been abused in that the process enshrined in Article 63 (2) of the URT Constitution and Order 108 (2) of the Parliamentary Standing Orders has not been conformed to. In his contention even the Vienna Convention has been breached.

On Article 4 (2) of the IGA on notification of investment opportunities, learned counsel's argument is that every agreement is a binding agreement.

On Article 28 (3) of the URT Constitution and what obtains therein, relative to what is in the IGA, the contention is that the world has changed. He argued that survival of the country is dependent on the means of economy and revenue sources, and that these include natural wealth and resources as well as logistic centres. On this, the case of ***Julius Ndyanabo*** was referred. He prayed that the Court should disregard all submissions put forward by Mr. Webiro.

Mr. Mwakilima's rejoinder was brief and reiterated the contention that there is no conflict between the IGA and the Convention. He took the view that IGA has no quality of being a treaty the reason being that Dubai has no status of entering into any treaty. It is for that reason that he considers that section 64 of the PPA has been breached, and that DPW has no legitimacy of carrying out activities enumerated in the IGA.

From these lengthy and contending submissions, the broad question for our determination is whether this petition is meritorious.

As we embark on an unenviable disposal journey we feel the need to express our debt of gratitude to both sets of counsel for their industry and zeal in presenting their clients' cases. Their manner of submission was as profoundly admirable and scintillating as the depth and quality of their submissions. We are of the view that their representations have given us a direction on the areas we need to focus on.

This being a Constitutional petition brought under Article 108 (2) of the URT Constitution, the Court would ordinarily confine itself to such issues which have bearing on the breach of the Constitution. Save for issue No. 3 as framed, the rest of the issues would fall outside the scope of this Constitutional Court. However, the law guides that each case has to be

determined according to its own facts and peculiar circumstances. Much as there has been a mixture of constitutional and non-constitutional arguments in the rest of the issues, the public quest for answers for all the issues renders their determination by this Court inevitable. Under this peculiar situation the Court has no room for abdication. We are emboldened in our position by the letter and spirit of Article 107A (2) (e) of the URT Constitution which emphasizes on dispensation of justice without being tied up with technicalities which may obstruct substantive justice. In our view, substantive justice demands that we should determine all matters as raised in the framed issues.

Our starting point is the determination of 4th and 5th issues. We have chosen to resolve these issues in a combined fashion because, in our view, they are interrelated and revolve around one key issue. This is as to whether IGA is a contract governed by the provisions of the LCA. As observed from the submissions, parties are diametrically opposed to one another on this aspect. The unanimous view of both sides, however, is that the IGA is not a Contract. Reasons for such contention are varied, and we propose to get to the heart of this discussion.

The petitioners' view on why IGA is not a contract is, as shown above, predicated on two main things. ***One***, that one of the State Parties, the

Emirate of Dubai, did not have the capacity to contract on the ground that the same does not have the status of a state that would contract with another state. ***Two***, that an exchange of consideration, a key ingredient in the formation of a contract, was not furnished. The view taken by their adversaries is that, this being an international agreement falling within the ambit of the Vienna Convention, it is not governed by municipal laws. This rules out the application of the LCA, especially section 25, cited by the petitioners.

As we move to pronounce ourselves on these issues, it is to be noted that, under the LCA, any formation of a contract has to have some key prerequisites. These are spelt out in section 10 of the LCA, and consideration constitutes one of the indispensable features. The said provision states as hereunder:

> *"All agreements are contracts if they are made by the free consent of parties competent to contract,* ***for a lawful consideration*** *and with a lawful object, and are not hereby expressly declared to be void:*
>
> > *Provided that, nothing herein contained shall affect any law in force, and not hereby expressly repealed or disapplied, by which any contract is required to be made in writing or in electronic form*

or in the presence of witnesses, or any law relating to the registration of documents." [Emphasis is added]

Noting that consideration has featured so prominently in the parties' submissions, we feel constrained to attempt to define it by resorting to a splendid illustration given by learned authors of ***Sutton and Shannon on Contracts***; 4th edition, Butterworths, 1937, quoted with approval by the Court in the case of ***Richard Msuya v. ASB Tanzania Limited t/a Melia Serengeti Lodge***, HC-Civil Appeal No. 17 of 2021 (Arusha-unreported). While admitting that the concept of consideration can be confusing, it was observed that:

> *"the law exists to enforce mutual bargains, not gratuitous promises; and that consideration exists if two conditions are met, (1) if the promisee, in exchange for a promise by the promisor, does or promises to do something that the promisee has otherwise no legal obligation to do; and (2) if the promisee refrains, or promises to refrain, from doing something that the promisee has otherwise a legal right to do."*

So critical is the prevalence of consideration that section 25 of the LCA considers contracts lacking consideration void *ab initio*. This is the position

that the petitioners have clung on throughout their potent submissions. While this position may sound resonating, we are persuaded that its potency and relevance is limited to agreements or contracts made under or governed by the provisions of the LCA, and we do not consider the IGA to be one of them. This is so because, as argued by the respondents, the position that we wholly associate with, the IGA is a framework agreement that sets standards of the areas agreed for cooperation. This contention is based on what obtains from literatures by eminent scholars one of whom is Johanner Poirier in his article titled: **The Functions of Intergovernmental Agreement: Post Devolution Concordats in a Comparative Perspectives July, 2021** (retrieved from https://www.ucl.ac.uk/constitution-unit/sites/constitution-unit/files/75.pdf). At page 7, the learned author opined as follows:

> *"Intergovernmental agreements represent one of the most formal mechanisms of co- operation in the tool-box of intergovernmental relations. These agreements are "ubiquitous" instruments of policy-making in federations, whether these systems are described as cooperative, competitive, executive, or even 'confrontational'."*

It follows that an agreement whose sole purpose is to provide a set up for cooperation between or among its parties cannot be expected to embody features that are enshrined in the LCA, a legal regime whose sole purpose is to regulate contracts of the type spelt out in section 10 of the LCA.

Further distinction resides in the manner in which the agreement becomes operational. Counsel for both sides are in unison that the IGA, the subject matter of these proceedings, went through a ratification process in the National Assembly. The ratification was preceded by a public hearing through which opinions were solicited and gathered. While aspersions have been cast on the legitimacy of the ratification process, there is no denying that the agreement required an endorsement (ratification) of the National Assembly. This alone fundamentally distinguishes the IGA from the rest of the agreements whose effectiveness commences the moment the parties append their signatures or on the date appointed by the parties.

The 'ritual' of ratification of intergovernmental agreements is increasingly becoming prominent across jurisdictions. The article by Johanner Poirier (supra) testifies to this position, in the following words:

> *"Canadian intergovernmental agreements are negotiated, as their name suggests, by the Executives. They have traditionally given rise to very little public or parliamentary*

debate or scrutiny, although there is a certain degree of evolution in that respect. Agreements are generally not endorsed by legislative assemblies, and until recently they were not published. The same is essentially true of Australia 'because intercantonal Swiss concordats must - in theory - be communicated to the federal legislative Assembly, they are generally more accessible. Some agreements are also subject to referendums. In Belgium, some types of legally-binding agreement require legislative approval, while others do not. In the first case they are systematically published, while in the latter, publication is more haphazard. The role of legislatures is significant, especially in terms of democratic control and accountability, but it does not necessarily have an impact on the legal status of the agreements nor on the functions they play.'"

From the quoted excerpt, we discern that intergovernmental agreements are entered by the executive branch of the government, and that what makes them binding is completion of the ratification process.

An argument has been raised by the petitioners that ports, special economic zones, logistic parks and trade corridors have been listed as potential areas for takeover by DPW. The impression here is that, to the extent that the same have been clearly stated, then these are areas which are being given to DPW without anything in return *i.e.* consideration. With

respect, this contention is misconceived and we are not persuaded to go along with it. In our considered view, the listing of these areas is informed by the fact that these are specific areas of cooperation agreed by State Parties. They may not necessarily crystalize into areas of investment unless the Host Government Agreements and Project Agreements define the scope of investment and benefits to be gained from each party to the agreements.

The petitioners have put a formidable contention that brings the impression that the IGA is a nullity for want of Dubai's statehood which would enable her to negotiate and strike an international agreement. The petitioners' argument is premised on what is enshrined in Article 120 of the UAE Constitution, the Montevideo Convention and the Vienna Convention. The view by learned counsel is that this Agreement falls into the category of matters of international cooperation which are the exclusive domain of the Union, and that there is no evidence that permission was sought and granted to Dubai to transact in such areas. In other words, and going by what the Montevideo Convention states, Dubai is not a State.

Our entry point in this issue is the Montevideo Convention whose Article 1 provides qualifications of a state and these are four, namely; permanent population; a defined territory; government; and capacity to

enter into relations with the other states. Article 2 states that the federal state shall constitute a sole person in the eyes of international law.

While it is acknowledged that three of the four qualifications fit well as far as Dubai is concerned, doubts have been expressed with regards to her capacity to enter into relations with other states. This is in view of the fact that the Emirate of Dubai is one of the constituent members of the State known as United Arab Emirates. Issues relating to capacity to contract have been taken care by the UAE Constitution. Article 120 has enumerated items which are considered to be Union matters in respect of which an Emirate cannot singly enter into an agreement. The qualification to this restriction is spelt out in Article 123 of the UAE Constitution. The said qualification relates to limited powers with respect to foreign policy and international relations. The lease of life provided in this provision relates to agreements of a local and administrative nature with neighbouring states or regions.

With this position in mind, the question is whether Dubai would still have the capacity to enter into the IGA that is under the cosh in the instant proceedings. In our unflustered view, the answer to this question is in the affirmative, and the reason for our contention is twofold. ***One***, issues relating to trade and investment covered in the IGA are not matters touching on foreign policy and international relations which are within the purview of

the Union. This, as Mr. Kalokola correctly argued, is a permissible indulgence under the provisions of Article 116 of the UAE Constitution, which allows the Emirates to exercise all powers not assigned to the UAE by the said Constitution. This acknowledges the fact that issues of trade and investment are not Union matters, covered by Article 120 of the UAE Constitution as to require the express permission of the Union. In our settled view, the IGA is one of the bilateral agreements in respect of which Dubai is allowed to sign, as it outlines the intent of cooperation and serves as a framework for future collaboration in trade and investment.

Two, the petitioners have not provided any semblance of factual account which shows that, if this is a matter falling within the Union jurisdiction, permission to enter into such arrangement, in this case the IGA, was not sought and/or granted prior to the signing. We take the view that, while the issue of capacity to contract is legal, the question on whether permission was granted to the Emirate of Dubai is a factual issue which must be proved by a party that alleges that none was granted. As we settle on position, we are not oblivious to the established canon of evidence that is to the effect that a party cannot prove the negative. This position has been amply elucidated by Sarkar in **Sarkar's Laws of Evidence**, 18th Edn., ***M.C. Sarkar, S.C. Sarkar and P.C. Sarkar***, published by *Lexis Nexis*. In an

excerpt quoted by the Court of Appeal in ***Paulina Samson Ndawavya v. Theresia Thomas Madaha***, CAT-Civil Appeal No. 45 of 2017 (unreported), it was stated as hereunder:

> ***"…. the burden of proving a fact rests on the party who substantially asserts the affirmative of the issue and not upon the party who denies it; for negative is usually incapable of proof.*** *It is ancient rule founded on consideration of good sense and should not be departed from without strong reason …. Until such burden is discharged the other party is not required to be called upon to prove his case.* ***The Court has to examine as to whether the person upon whom the burden lies has been able to discharge his burden. Until he arrives at such a conclusion, he cannot proceed on the basis of weakness of the other party…"*** [Emphasis added].

We contend, however, that in this case, what the petitioners have put forward is an allegation that the Emirate of Dubai did not have capacity to contract, the ground being that it was not authorized by the UAE to enter into an agreement with the URT. Needless to say, in our view, this required a factual account which would prove lack of capacity of the Emirate of Dubai to contract. The petitioners have not treated us to anything that suggests that such permission was withheld.

We have scrupulously reviewed, as well, Article 28 of the IGA which provides an assurance by the parties that they are public authorities with competence, powers and authorities set out in their respective countries' national legislation, for entering into international agreements on behalf of their States. Our take is that this is reassuring and we find nothing on which a few jitters would be raised on the capacity of the Emirate of Dubai to enter into the IGA.

Overall, we are settled in our view that, since the parties were competent and with capacity to enter into trade and investment cooperation agreement, the signing of the IGA was not shrouded in any irregularity which would render it invalid or illegal. We are also settled in our minds that IGA is an international agreement whose oversight framework is not the LCA. We conclude that, to the extent this is not a normal contract, section 25 of the LCA is, in the circumstances of this case, immaterial.

Another area of consternation relates to compliance with the provisions of the PPA. This featured as the 6th issue, and the contention by the petitioners is that section 64 of the PPA was infracted. The respondents are valiantly opposed to this argument, terming it as baseless and misplaced. From this contention the narrow issue to be resolved is whether the IGA flouted the said provision.

We hasten to state and take the view that the petitioners were too removed from the realities of international law that has modelled these types of agreements in a manner that excludes the application of municipal laws that the petitioners contend that they have been infracted. In our considered view, it is a folly, to say the least, to contend that this is an Agreement which would be governed by any or all of the provisions of the Public Procurement Act while the petitioners are aware or ought to be aware that:

(i) No procurement had actually been done by any of the State Parties;

(ii) That this is not the kind of an agreement which would factor in low levels issues of procurement whose 'place of domicile' is in the Host Government Agreement and/or project agreements that await further negotiations between TPA and DPW;

(iii) That assuming, just for the sake of argument, that procurement of goods or services had been done, it is not clear, and the petitioners have not stated, with any absolutes, if such procurement was through tendering, a condition precedent for the invocation of section 64 (1) of the PPA;

(iv) If TPA was involved in the conversation that is alleged to have bred the award which is said to infract section 64, then TPA

ought to have been impleaded and be called to answer questions that surround the alleged award;

(v) The petitioners ought to be aware of the overriding effect of section 4 (1) (a) of the PPA which is to the effect that an obligation under international treaty or agreement supersedes provisions of the PPA.

As stated earlier on, the provision that is said to have been infracted is section 64 of the PPA. To be able to opine on the plausibility or otherwise of the petitioners' contention, it behooves us to reproduce the substance of the said provision. Of particular relevancy is section 64 (1) which states as follows:

> "***Procuring entity engaging in the procurement of goods, works, services, non consultancy services or disposal by tender*** *shall apply competitive tendering, using the methods prescribed in the regulations depending on the type and value of the procurement or disposal and, in any case, the successful tenderer shall be the tenderer evaluated to have the capacity and capability to supply the goods, to provide the services or to undertake the assignment or the highest evaluated offer in case of services for revenue collection or disposal of public assets."*

From the quoted excerpt the clear message is that relevance of the provisions of section 64 comes in where there is a procurement and that such procurement is through tender. We entertain no doubt, therefore, that the contention by the petitioners on the alleged violation of the law lacks the spine which would hold it firm and form the basis for a plausible argument. We are unpersuaded by the argument that the PPA is a relevant law on which to gauge the propriety or otherwise of the IGA.

The respondents have argued that section 4 (1) of the PPA is their safety valve as it places URT obligations under international agreements above provisions of the PPA. We subscribe to the superiority of international obligations over the provisions of the domestic procurement legislation, and hold the view that, since it is now settled that the IGA is an international agreement whose manner of execution is dictated by the Vienna Convention, the provisions of the PPA have no business meddling in the affairs of the IGA, and it would be utterly flawed to gauge validity of the IGA against the provisions of the law whose applicability has been excepted.

The 2nd issue queries on the adequacy or reasonableness of the notice issued to the public calling for their opinions on the IGA. The petitioners are critical of the manner in which the notice was issued. Duration of the notice,

what accompanied the notice, and the apathetic turn out of the members of the public, are some of the issues which have also been scathed by the petitioners. The alleged haphazardness in engaging the public is considered to be a wanton breach of the principles of natural justice that must be censured. The respondents find nothing untoward in substance or the procedure used to disseminate information to the public. The argument is that the test of reasonableness that applies in such cases was sufficiently conformed to and the contention that low turnout was caused by the short notice and poor service channel have been given a wide berth. The respondents' other argument is that this is a matter that touches on the manner in which the Parliament conducts its business, and that nobody is allowed to interfere with it.

As stated earlier on, the notice issued was in conformity with Order 108 (2) of the Parliamentary Standing Orders. The said provision is under Part Three of the Standing Orders, titled **"UTARATIBU WA KURIDHIA MIKATABA YA KIMATAIFA"**. For ease of reference, Order 108 (2) states as follows:

> *"Kamati iliyopelekewa hoja itatoa tangazo au barua ya mwaliko kumwalika mtu yeyote afike kutoa maoni yake*

mbele ya Kamati hiyo kwa lengo la kusaidia katika uchambuzi wa Mkataba husika."

Worth of a mention is the fact that the foregoing provision compliments what is clearly the Parliament's duty of ratifying Agreements and Treaties, as enshrined in Article 63 (3) of the URT Constitution, whose substance is as reproduced hereunder:

> *"(3) Kwa madhumuni ya utekelezaji wa madaraka yake Bunge laweza-*
>
> *(e) kujadili na kuridhia mikataba yote inayohusu Jamhuri ya Muungano na ambayo kwa masharti yake inahitaji kuridhiwa."*

In discharging this noble duty, the Parliament chose to invite public participation with a view to soliciting views which would constitute an input in the process. This is what Order 108 (2) is all about. From the pleadings and submissions by counsel the following is gathered:

(i) The notice to the public was issued on 5th June, 2023 and lasted for 24 hours;

(ii) That, the notice called upon the public to either appear physically in Dodoma or send their opinions through social media platforms;

(iii) That, the notice was accompanied by a draft resolution in respect of which opinions were called from the public;

(iv) That, 72 respondents came forward and gave their views on the resolution.

These factual settings have bred the disquiet expressed by the petitioners that the notice was neither adequate nor was it sufficient and reasonable. The respondents maintain that reasonableness, which is a test in such cases, is dependent on the circumstances of issuance of the notice.

As submitted by counsel for the parties, and we see no reason of not associating with their thinking, whenever a notice is issued calling for participation of the public or a section thereof, then such notice must, in all respects, be reasonable. Literature and judicial pronouncements are replete with this imperative requirement. By this, what we understand is that a notice which, in the circumstances of a particular case, fails the test of reasonableness, must be considered to be insufficient of triggering the engagement process and it fails the test. This stringent measure takes into account that public engagement, especially in parliamentary affairs,

strengthens democratic participation, especially for those who do not have representatives (See: ***Simeon Kioko Kitheka & 18 Others v. County Government of Machakos & 2 Others*** [2018] eKLR). The reasoning in the cited case echoes what was guided in the South African case of ***South African Veterinary Association v. Speaker of the National Assembly and Others*** [2018] ZACC 49 [africalii], wherein it was held that obligation to facilitate public participation is a material part of the law making process.

So critical is the question of participation that in some jurisdictions this requirement is a constitutional right enshrined in their constitutions. The clear example is Namibia whose Constitution provides so under Article 132 (3). Through this enactment, public participation has become an integral means to justify the outcome of a particular process.

That reasonableness of the notice is objective and dependent on the circumstances of each case is an emotive debate that has featured in many a decision. We will pick a few cases to illustrate this point. In the case of ***Minister of Health and Another v. New Clicks South Africa (Pty) Ltd and Others*** [2005] ZACC 14. It was held as follows:

> *"The forms of facilitating an appropriate degree of participation in the law-making process are indeed capable of infinitive variation. What matters is that at the*

end of the day a <u>reasonable opportunity</u> is offered to members of the public and all interested parties to know about the issues and to have an adequate say."

In ***Doctors for Life International*** (supra), the court reasoned (at p. 70) with regard to reasonableness as follows:

> *"Reasonableness is an objective standard which is sensitive to the facts and circumstances of a particular case. "In dealing with the issue of reasonableness," this Court has explained, "context is all important."*

The court further held:

> *"Whether a legislature acted reasonably in discharging its duty to facilitate public involvement will depend on a number of factors. The nature and importance of the legislation and the intensity of its impact on the public are especially relevant. Reasonableness also requires that appropriate account be paid to practicalities such as time and expense, which relate to the efficiency of the law-making process. Yet the saving of money and time in itself does not justify inadequate opportunities for public involvement."*

Mr. Mweyunge has strenuously contended that the notice issued on 5th June, 2023 for a public hearing slated for 6th June, 2023, passed the threshold of reasonableness. After all, he argued, reasonableness is what the Parliament considers to be reasonable. We will come to the question of the Parliament's own evaluation of what is reasonable in a bit. But judging from a neutral eye's point of view, we cannot go along with Mr. Mweyunge's contention that a period of less than 24 hours is reasonable or adequate to convey information to a large section of the public with a view to giving constructive views on the draft resolution, let alone the IGA itself.

While nobody would tell, with any semblance of mathematical precision, that elongated timeframe for solicitation of views would draw attention of more than the 72 respondents who turned up and; whereas quantity of the respondents would not guarantee quality of the views from the public, there is no denying that this constrained timeframe denied or limited the opportunity for wider participation. Whilst the importance of the IGA is clearly understood to many, the respondents have not given the clearest of the indications that tabling of this Agreement was a matter of urgency on the basis of which time for calling for public participation would be truncated.

In our view, and not oblivious to the fact that the Standing Orders have not set a time prescription for invitation of public participation, circumstances of this case and the mighty importance of the business set for the day, some more time was needed to ensure that the coveted importance of public participation is upheld and seen to have been conformed to. This is despite the fact that the Parliament would not be bound by such public opinion anyway.

Mr. Mpoki has castigated the manner in which the notice was let to the public. In his view, social media platforms are less effective compared to the conventional print and audio-visual channels. In the absence of anything to suggest that preference of social media to other forms of dissemination had an inhibiting impact, the contention is, at the best, a detachment from the realities of today where the power of social media outweighs any other, as far as speed and coverage or outreach is concerned. With this reality in mind, we find that this contention is lacking in tackiness as to persuade us to hold that it had an adverse impact on the turn out.

The respondents have attempted to persuade us to agree that nothing was lost since Members of Parliament are representatives of the people, and that if we take the view that public participation fell short of the known standard, then presence of Parliamentarians filled the void. We hold the view

that this contention is stranger than fiction and that such contention cannot find any purchase. We are of the view that public participation was not meant to be a public relations exercise. It was meant to create an engagement that the Parliament itself considered to be an integral part of the process. Need would not arise for such solicitation if the Parliament considered its members as sufficiently representing people in that respect.

Reverting to the Parliament's own evaluation of the reasonableness of the notice, we are in agreement with the respondents' submission that reasonableness has to be looked into from the perspective of what the Parliament considers to be reasonable. This means that what is considered to be unreasonable to others may not be so looking at some practicalities as determined by the Parliament itself. This probably explains why Order 108 (2) of the Parliamentary Standing Orders is silent on the time frame for issuance of notices. The emphasis put by courts (See: ***Doctors for Life International*** (supra); and ***Land Access Movement of South Africa*** (supra) is that:

> "... *in evaluating the reasonableness of Parliament's conduct, this Court will have regard to what the Parliament itself considered to be appropriate public involvement in the light of the legislation's content, importance and urgency. Indeed, this Court will pay*

*particular attention to what Parliament considers to be appropriate public involvement." (**Doctors for Life International**)*

The foregoing excerpt confirms the fact that the Parliament enjoys some privileges and authority to plan on how it should conduct its house business. This is reflected in the promulgation of rules of procedure which should be followed before a bill or a treaty is passed or ratified. In our case, this was done through passage of the Parliamentary Standing Orders. The acknowledged and enduring principle is that matters that fall within the powers of the Parliament are for the Parliament to deal with. Thus, in ***British Railways Board and Another v. Pickin*** (supra), Lord Reid held as follows:

> *"....it must be for Parliament to decide whether its decreed procedures have in fact been followed. It must be for Parliament to lay down and to construe its standing orders and further to decide whether they have been obeyed. It must be for Parliament to decide whether it is satisfied that an Act should be passed in the form and with the wording set out in the Act. It must be for Parliament to decide what documentary material or testimony it requires and the extent to which Parliamentary privilege should attach. It would be impracticable and undesirable for the High Court of*

Justice to embark on an enquiry concerning the effect or effectiveness of the internal procedures of Parliament or an enquiry whether in any particular case those procedures were effectively followed."

The foregoing subscription is a restatement of what Courts in England considered and deliberated upon. They are all in unison that privileges bestowed on the Parliament are unquestionable even where mistakes are committed. In their discussion of the Parliament's exclusive right to regulate its own business, O. Hood Philips and Paul Jackson, authors of **O. Hood Philips' Constitutional and Administrative Law**, 7th Editions, quoted (at p. 53) an old British case of ***Edinburgh and Dalkeith Ry v. Wanchope*** ((1842) 8 CLXF 710):

"The Court had no concern with the manner in which Parliament, or its officers in carrying out its standing orders, performed their functions."

To compliment what the court held in the foregoing case, the learned authors guided as follows:

"the courts must presume that so august an assembly as the house of Common discharges its functions lawfully and properly. They will therefore not take cognizance of

matters arising within the walls of the House, and they will accept the interpretation put the Commons upon A statute affecting their internal proceedings."

(at p. 243)

The most captivating position on the matter was laid done by the Privy Council in the case of ***Hoani Te Heuheu Tukino v. Aotea District Maori Land Board*** [1941] 2 All ER 93, wherein Viscount Simon LC guided at p. 97, as follows:

> *"it is not open to the court to go behind what has been enacted by the legislature and to inquire how the enactment came to be made, and whether it arose out of incorrect information, or, indeed, out of actual deception by someone on whom it placed reliance. The court must accept the enactment as the law unless and until the legislature itself alters such enactment on being persuaded of its error."*

See also: ***Labrador Company v. R*** [1893] AC 104.

The stance taken by courts in other jurisdictions is also what Courts in Tanzania have pronounced themselves on. It is a position that the Parliament of Tanzania has associated with. It has been

described as *"power of control over its own affairs and proceedings"*, as aptly put by Pius Msekwa, a luminary in parliamentary issues and erstwhile Speaker of the National Assembly. In his Article, titled ***Parliamentary Privilege in Tanzania***, issued in June, 2003, he states at p.18 as hereunder:

> *"The power of control over its own affairs and proceedings is one of the most significant attributes of an independent Legislature. Article 89 of the Constitution of the United Republic of Tanzania grants the necessary powers to parliament to make Rules (known as standing orders) prescribing procedure for the conduct of its business. The courts have long confirmed that parliaments have exclusive jurisdiction over their own internal proceedings, or internal affairs of the House. There are many examples of this confirmation, starting with the ancient English case of Stockdale v. Hansard (1839) 9A.J.E at p114.; wherein it was stated that "whatever is done within the walls of either House must pass without question in any other place ...."*

The spirit demonstrated in the quoted excerpt was exhibited by this Court in the case ***Augustino Lyatonga Mrema v. Speaker of the National Assembly & Another*** [1999] TLR 206, in which the Court

dismissed, with costs, an application in which Mr. Mrema was seeking to issue a stay order against full implementation of the Parliamentary resolution that suspended him from further attending Parliamentary sessions. While dismissing the application, the learned brethren stated at pp. 229 and 230, as hereunder:

> *"…. it is clear, that the Indian Court would not be entitled to question the validity of "any proceedings" in Parliament on ground of irregularity of procedure, not to matters done without jurisdiction, or done in defiance of mandatory provisions of the Constitution, or exercising powers not granted by the Constitution…. To maintain the dignity of the House in its serious business and to maintain its relevance to its business and the rights of Parliament as a people's institution, the preservation of those interests must be given precedence otherwise, as Lord Coleridge said, "They sink into utter contempt, and inefficiency without it."*

The reasoning in the ***Mrema case*** (supra) and others which were cited in the ***Msekwa Book*** (supra) distils one important principle. That the conduct of the Parliament in this matter, from the issuance of the notice and all other subsequent steps, however mistaken they may be, are matters which would not be questioned by any court, including this Court. It is a no

'fly zone' that should be observed and we are not persuaded that we should drift from that established position. At this juncture, we take the view that the words of Yacoob, J., in ***The Doctors for Life International*** (supra), are invaluable and we subscribe to them. He held at p. 196 as follows:

> *"I would however advance the approach that this Court ought never to intervene during the proceedings of Parliament unless irreparable and substantial harm would otherwise result. However the question does not arise in view of the conclusion I have reached."*

It is our conclusion that, while there are obviously inadequacies surrounding the issuance of the notice and the duration thereof, we are inclined to hold that the net effect of the inadequacies would not have the consequence of vitiating the ratification process or render the IGA invalid. This Court would not be tempted to cross the judicial line and poke our fingers or meddle in the affairs of the Legislature.

Next for our determination is the 1st issue which queries on the propriety or otherwise of the signing, tabling and ratification of the IGA *vis-a-vis* the provisions of section 11 (1) and (2) of Act No. 5 of 2017 and sections 5 (1), 6 (2) (a), (b), and (e) (i) of Act No. 6 of 2017.

On this issue, the petitioners peg their hope on section 11 (2) of Act No. 5 which vests jurisdiction in the judicial bodies in the URT and in accordance with the laws of Tanzania; the 2nd Schedule to Act No. 5 and the URT Constitution both of which insulate the country from being coerced into undertaking actions that impair its sovereignty.

There are also provisions of section 5 (1) on arrangements or agreements on natural wealth and resources and section 6 (2) (i) of Act No. 6 which talks about unconscionable terms of an agreement and outlaws acts of subjecting the country to jurisdiction of foreign laws and forums. The argument is that introduction of Articles 4 (2), 20 (3) and 23 (4) in the IGA stifles the spirit enshrined in the cited provisions.

The view held by the respondents is diametrically different from the petitioners' contention. The former's argument is that implementation of the IGA is subject to specific contracts to be signed, including the HGAs under which national laws will apply and prevail.

As we have pronounced ourselves earlier on, the IGA is an international agreement which cannot be subjected to domestic or national laws. This is in line with Article 2 (1) (a) of the Vienna Convention. To the extent that the

IGA has the attributes of an international agreement, its status and treatment befit those of a treaty which is defined to mean:

> *"... an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation."*

Regarding the alleged conflict between what the IGA provides in Article 20 (3) and the import of section 11 (1) and (2) of Act No. 5, we are in agreement with the petitioners' counsel that, to the extent that disputes arising out of or relating to natural resources have to be handled by courts and judicial bodies in Tanzania, this provision contrasts with Article 20 (3) of the IGA. The latter is to the effect that disputes arising out of the HGAs must be handled through arbitration. This is contrary to what the respondents' counsel alluded to during their submissions. We are left in limbo as to the rationale and the practical reality of having the HGAs and Project agreements applying the laws of Tanzania but disputes adjudicated outside Tanzania, using the laws in force in Tanzania.

As we consider this to be anomalous, we take the view that a better drafting would rectify this misstep and align it with what would work better,

taking into account that HGAs and Project Agreements will constitute terms and conditions which will touch on the national resources. Article 22 of the IGA provides for such right by either or both of the State Parties. There is also an avenue, under Article 24 of the IGA, for State Parties to come up with an Addendum to address matters which were not sufficiently addressed or new matters that are necessary. That said, however, we do not find that the anomaly in not aligning provisions of the IGA and the provisions of Act No. 5 of 2017 would have the effect of declaring the IGA a nullity or illegal as the petitioners have clamoured all along.

Regarding the contention that Article 4 (2) of the IGA is violative of the Act No. 5 of 2017 and the constitutional provisions on sovereignty, our unflustered view is that the petitioners' construction of the said provision is ill-thought-out, if not misleading. Our unfleeting reading of Article 4 (2) brings out the fact that, whereas the URT will have the obligation of relaying information on investment opportunities that may be available, such information does not convey any automatic or outright privilege or right by DPW or the Emirate of Dubai to invest in the opportunity in respect of which information has been relayed. Any subsequent engagement is subject to submission of proposal and evaluation of its viability, singly, or alongside other proposals. We do not find anything that obligates the URT to grant or

award anything subsequent to the passage of information on the investment opportunities. It is our construction that "to inform" conveys no other meaning than "to make one aware of something". It is merely an act of imparting knowledge especially of facts or occurrences (*See: https://www.merriam-webster.com*). By conveying information, nothing takes away the URT's ability and right to weigh the feasibility of any offers and proposals submitted, either by Dubai or by any prospective investor on the area of investment in respect of which information under Article 4 (2) has been passed.

As we consider this petitioners' contention drifting from the actual construction and intent, we also find the argument that this provision grants exclusivity to Dubai off the mark. Information to Dubai does not curtail or prevent the URT from passing the same information to other strategic and willing investors. It is merely an alert in order to get to know what is on offer. We reckon that passage or dissemination of information on trade and investment opportunities is daily done by embassies across the globe and that cannot be said to be violative of any country's law. It is in view thereof, that we consider the submission by the petitioners lacking the necessary cutting edge which would convince us to hold otherwise.

Further on permanent sovereignty of the State in respect of natural wealth and resources, as enshrined in Act No. 5 of 2017, our take is that construction of the provisions of the said law should also take into account the international standards and norms set with respect to countries' sovereignty in its resources. As we attempt to address issues raised by the counsel for the parties, it is apposite that the term sovereignty be given the meaning. Kumkum Shah, an eminent writer stated in his article: **Analysis of Doctrine of Permanent Sovereignty over Natural resources,** National Law University Jodhpur (at p. 2), as follows:

> *"The basic meaning of the words sovereignty is the absolute, uncontrollable and supreme power of a state, but this concept has evolved a lot now, it now is not just restricted to territorial sovereignty but also includes the permanent sovereignty over the natural resources (PSNR) i.e. the state can freely use, dispose or exploit its natural resources, but at the same time creating a balance by laying certain duty on state to manage and use its resources appropriately and carefully."*

It is edifying to note that PSNR provides three main rights which are: the Sovereign right to freely dispose, use and exploit natural resources. Under this, a state and the people enjoy an inalienable right to freely dispose,

exploit and use their natural resources; the freedom of sovereign state to choose its own economic, environmental and development policies; and the right to freely regulate, expropriate and nationalize foreign investments. In the latter, a country is to have right to stipulate the conditions of entrance and conduct of the foreign investors and the power to enforce its national laws and regulations over them.

Guided by these principles, our considered view is that none of them has been violated by the provisions of the IGA. We have not been treated to any plausible and convincing argument that the country's sovereign power to freely dispose, use and exploit natural resources; sovereign power to choose its own economic, environmental and development policies; and the sovereign right to freely regulate, expropriate and nationalize foreign investments, will be stifled or grabbed from the country, through execution of the IGA. On the contrary, the signing of the IGA is one form of conserving the sovereign status of the country.

Regarding the contention that the terms of Acts No. 5 and 6 of 2017 have been flouted, we are convinced that the application of these laws is, in the circumstances of this case, skewed. We take the view that, as Mr. Mweyunge contended, IGA is a Framework Agreement and not a project agreement that should conform to the requirements of Acts No. 5 and 6 of

2017. We are convinced that, as stated in Article 21 of the IGA, it is the HGAs and Projects Agreements whose architecture must conform to the national laws. It is, in our view, pre-mature to raise so specific issues which would be addressed by HGAs and Project Agreements. These are appropriate instruments whose terms would be gauged to see if they bring anything that is considered unconscionable. They will contain arrangement or agreement on natural wealth and resources and from which a conclusion about their propriety or otherwise would be made.

We have taken time to painstakingly review the contents of sections 5 (1) of Act No. 5 of 2017; and section 6 (2) (a), (b), (e) (i) of Act No. 6 of 2017 on which the petitioners' contention of violation is premised. While section 5 provides for inalienability of natural wealth and resources, section 6 talks about the re-negotiations of unconscionable terms and provide guidelines for identifying such terms in the arrangements or agreements. From the deliberation on the status of the IGA as a framework agreement for intergovernmental cooperation, these provisions are not abrogated, save for deficiencies we have observed earlier on.

The petitioners' other point of disquiet relates to what the petitioners contend to be an infraction of the provisions of sections 5 (1), 6 (2) (a), (b), (e) and (i) of Act No. 6 of 2017. The prayer is that the IGA should be declared

null and void. We have critically reviewed the cited provisions and the import that they bring vis-à-vis what the IGA caters for. As widely submitted by counsel for the petitioners, enactment of Act No. 6 has introduced a new role to be performed by the National Assembly. It has vested the power in it (National Assembly) to review all arrangements or agreements on natural wealth and resources and ensure that any unconscionable terms are rectified or expunged. This is enshrined in section 4 (1) of the Act and it provides as hereunder:

> *"For effective performance of oversight and advisory functions stipulated under Article 63 (2) of the Constitution, the National Assembly may review any arrangements or agreement made by the Government relating to natural wealth and resources."*

The procedure of declaring a clause in an arrangement or agreement unconscionable begins with the tabling of the said agreement or arrangement in the National Assembly, consistent with section 5 (1), (2) and (3) of Act No. 6 of 2017. If the National Assembly is convinced that the tabled agreement or arrangement contains terms which are considered to be unconscionable, a resolution is passed to advise the Government to re-negotiate the agreement or the arrangement with a view to rectifying it.

What is considered to be unconscionable is spelt out in section 6 (2) of Act No. 6 of 2017.

From the foregoing, the clear position, in our considered view, is that it is only through the process initiated by the National Assembly that an arrangement or agreement may be declared by a resolution to be unconscionable. Such process cannot be done by an institution whose powers does not reside in the provisions of Article 63 (2) of the URT Constitution. In our case such institution is the National Assembly before which the IGA was tabled, discussed and ratified. If any of the covenants of the IGA was considered or deemed to be unconscionable, the powers to order re-negotiation or any other remedy would not come from any other institution than the National Assembly. It is for this reason that the quest for declaring any or all of the provisions of the IGA unconscionable is, in our conviction, misconceived and untenable. We are simply not seized of such powers.

As we wind down on this issue, we feel constrained to pronounce ourselves on the issue that surfaced in the course of the petitioners' rejoinder submissions. It was jointly addressed by Messrs Mwabukusi and Ngalimitumba, and it was in respect of Article 23 of the Constitution. They both expressed their unhappiness with Article 23(4) of the IGA for different

reasons. Mr. Mwabukusi' argument was on the first issue and his contention was that this provision completely removes the national sovereignty to denounce, terminate or withdraw from the IGA, contrary to the provisions of the natural resources' laws. Unfortunately, he did not clarify his contention, probably due to an objection from respondents' counsel that Article 23(4) of IGA was not among the contested Articles under the first issue. Ostensibly, the argument was picked up by Mr. Ngalimitumba who submitted for the Petitioners on the third issue.

In his submission, Mr. Ngalimitumba invited the Court to find that Article 23(4) of the IGA contravenes the URT Constitution by denying the government the right to take appropriate measures of denouncing or withdrawing from the IGA for benefits of its people. He contended that the said Article, among other impugned articles of the IGA, contravenes Articles 1, 8, 28(1) & (3) of the URT Constitution. Article 1 is about proclamation that URT is one sovereign state. Article 8 is on recognition that sovereignty resides in the people from whom the government derives its power and authority; and Articles 28 (1) & (3) is about the duty of every citizen to protect, preserve and maintain the independence and sovereignty, as well as a prohibition for any person to sign an act of capitulation and surrender of the nation to the victor, among other things.

We have keenly read the provision of Article 23(4) of the IGA in light of the misgivings expressed by the learned counsel. Under this provision of the IGA, both State Parties agree to disentitle themselves the right to denounce, withdraw from, suspending or terminating the IGA under any circumstances whatsoever. Not unexpectedly, such a stringent clause was likely to raise questions and worries when read at a glance, especially on its prohibition that the State Parties shall not run away from the IGA obligation, even in the event of severance of diplomatic or consular relations.

It is unfortunate the counsel for both parties didn't dwell on this provision. The economical nature of the counsel's submissions took away the benefit that the Court would have on what the said provision is all about. Having thoughtfully considered the import and purpose of this sub-Article, we are of the view that to the extent that the said sub-Article (4) is subjected to a dispute settlement mechanism under Article 20 of the IGA, it is intended to satisfy the requirement of UNICITRAL Arbitration Rules, which the parties chose to utilize in case of a dispute, as we shall demonstrate. The State Parties, under Article 20(1), agree on an amicable settlement of dispute as a first line of action, which if it fails and a dispute is declared to exist, the second option under Article 20(2)(a) is for an aggrieved party to submit the matter to Arbitration under UNICITRAL Rules.

Article 3(3) (c) of the UNICITRAL Arbitration Rules, 2013 requires the claimant to identify the arbitration agreement or treaty giving rise to the arbitration while Article 20(3) of the Rules obliges the claimant to annex, among other documents, a copy of the arbitration agreement to the statement of claim. In the context of this matter, IGA is the arbitration agreement which either party may invoke when filing a dispute under the Rules.

Knowing that disputes may arise at any time in the course of implementation of the IGA, and in so far as access to arbitration under UNICITRAL Rules requires an arbitration agreement to be annexed, our reading of the import of Article 20 (3) of UNICITRAL Rules, 2013 is that such arbitration agreement, which essentially establishes jurisdiction for determination of the declared dispute, has to be subsisting. IGA is in this context a facilitative instrument for dispute settlement between the parties, a reason why it has to outlive all the HGAs and other projects agreements, no matter the circumstances.

The above interpretation is in sync with Article 23(2) of the IGA which provides for a situation where HGAs are terminated prior to the expiration of the IGA. In such a situation, the State parties agree that IGA shall remain in force for the time and to the extent any State party may assert rights or

protection of its endangered interests or bringing up proceedings resulting from termination of the HGA. That said, we find no infringement of the country's sovereignty as contended by the learned counsel since the right to prefer a dispute for arbitration is for both contracting Parties, and disputes know no time and circumstances to occur.

In sum, we are fortified in our view that this issue has to be disposed of in the negative and we so hold.

The 3rd issue revolves around the petitioners' contention that some of the Articles in the IGA are in contravention of the Articles of the URT Constitution. The provisions singled out for criticism are Articles 2, 4 (2), 5 (1), 6 (2), 7 (2), 8 (1) (a) (b) (c), 8 (2), 10 (1), 20 (2) (e) (i) (ii), 18, 21, 23, 26, 27 and 30 (2) of the IGA. These are said to be inconsistent with Articles 1, 8 and 28 (1) (3) of the URT Constitution. The general conviction by the petitioners is that sovereignty of the country has been eroded and that supervision of the resources has been surrendered to Dubai. Three main areas of concern by the petitioners are in relation to Article 4 (2) of the IGA which provides for the duty of the URT to inform the Emirate of Dubai on the opportunities that may be available; Article 5 (1) of the IGA which gives exclusive right of development of the project; and provisions relating to land rights. The respondents have shrugged off these contentions, arguing that

land rights are subject to laws that govern land tenure and development, while matters relating to imposition and collection of taxes will be governed by tax laws that apply to all. On the choice of forum, the argument is that IGA will be governed by the Vienna Convention, particularly Article 66.

Before we delve into the merits or otherwise of the rival contentions, we wish to restate the fundamental aspect of statutory interpretation, especially where an allegation is levelled that a certain provision of the law or agreement is in contravention of the constitutional provision. The trite position is that for a case to acquire the status of a constitutional case, the impugned provisions of the law must be looked at in comparison with the provisions of the Constitution which are alleged to have been breached. Focus of the court in such a case is to look at and determine the constitutionality of the impugned provisions and not how they are applied, because failure to comply with the impugned provisions is a question of administration and not one of deficiency of the provision itself (See: ***Rashid Ahmed Kilindo v. Attorney General***, HC-Misc. Civil Cause No. 30 of 2018 (unreported).

It has also been emphasized that, in discharging the task of constitutional interpretation, courts should avoid crippling the basic law by construing it technically or in a narrow spirit. Fundamental rights provisions

should be interpreted broadly and liberally, jealously protecting and developing the dimensions of those rights (***Julius Ndyanabo case*** (supra)).

Reverting to the parties' consternation, we hasten to hold that the argument on the implication of Article 4 (2) of the IGA has been sufficiently canvassed in the issue that preceded this instant one. We believe that we have pronounced ourselves adequately. We do not think that need arises, any more, for us to delve into what this provision caters for. Suffice to state, here and now, that the petitioners' interpretation of the provision is outrightly off the mark, if not far-fetched.

Regarding exclusivity that arises from Article 5 (1) of the IGA, we are in agreement with the respondents that the exclusivity in this case refers to the right that DPW will have with regards to investments that they will embark on and for the entirety of the project duration. This does not, by any stretch of imagination, erode sovereignty of the State, if the principle of PSRN is anything to go by. We are of the considered view that, under this doctrine, what is referred to by the petitioners as independence is essentially an interdependence between states in sharing the resources with the world (Ref: ***Kumkum Shah's Article*** (supra)).

On the rights over land, we are of the settled view that we see nothing untoward or derogatory of the country's sovereignty. We say so because land tenure system in this country is replete with pieces of legislation that govern the grant of land tenure. These include the Land Act, Cap. 113, R.E. 2019, read together with the Tanzania Investment Act, Cap. 38 R.E. 2022, whereby land for investment purpose, once identified, will be allocated to Tanzania Investment Centre as a title holder and a derivative right will be created to the investor concerned. We are also aware of the provisions of the Ports Act, Cap. 166 R.E. 2019. Section 12 (1) of the Act provides for functions of the TPA, and they include (a) to administer land and waters within the limits of the ports; and (b) to promote the use, improvement and development of ports and their hinterland. Grant of land tenure to port investors has to take cognizance of the powers vested in the TPA and follow the procedural requirements set in the law and authorities vested with powers are expected to play their roles. Doing otherwise will be contrary to the law and befitting appropriate sanction.

On the petitioners' castigation of Article 20 (1) of the IGA on the settlement of disputes, our unfleeting review of the said provisions gives us a plausible impression that this is purely on the settlement of disputes between states and that is quite in order. We take the view, as well, that

there could never be any other mechanism through which such a dispute would be handled internally using a legal regime of one country. Noting that this is an international agreement, the remit for dispute resolution should be within the mechanism vested with powers to handle disputes arising out of a treaty by two states.

The only notable observation which we consider to be a miss is that the term "dispute" has not been defined, and it is unclear if such term would also include a divergence on the interpretation of the provisions of the IGA. Lack of clarity on the matter is an area of concern and a potential for disagreements.

We subscribe to the respondents' contention, as well, that specific agreements will be more particular on what the petitioners consider to be areas of serious national interest.

In the whole, we find that the invocation of Article 28 (1) and (3) of the URT Constitution as a testimony of erosion of sovereignty is utterly erroneous, as issues of sovereignty under the provision are limited to defence and security. We resist the temptation of stretching the import of the said provision to cover matters of trade and investment as Mr. Ngalimitumba sought to impress upon us.

In the upshot of all this we find this, petition barren of fruits. Accordingly, the same is hereby dismissed. Since this is a public interest matter, we do not find any justification for granting of costs. We, therefore, make no order as to costs.

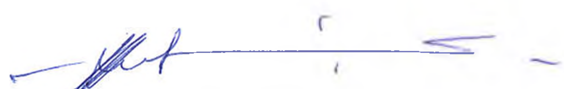
Order accordingly.

DATED at **MBEYA** this 10th August, 2023.

DUNSTAN B. NDUNGURU

JUDGE

10/08/2023



MUSTAFA K. ISMAIL

JUDGE

10/08/2023

ABDI S. KAGOMBA

JUDGE

10/08/2023