



# The Tanganyika Law Society

The Bar Association Of Tanzania Mainland

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## STATEMENT

### **IN RESPECT TO THE INTERGOVERNMENTAL AGREEMENT (IGA) BETWEEN THE UNITED REPUBLIC OF TANZANIA AND THE EMIRATE OF DUBAI CONCERNING THE ECONOMIC AND SOCIAL PARTNERSHIP FOR DEVELOPMENT AND IMPROVING THE PERFORMANCE OF SEA AND LAKE PORTS IN TANZANIA DATED 25TH OCTOBER 2022**

Tanganyika Law Society is a professional body established by the Tanganyika Law Society Act, Cap. 307 R.E. 2002. As stated in Section 4 of the Act, the Society's aims include, among other things: aiding the Government, Parliament, and Courts in matters affecting legislation, administration, and and practice of the law in Tanzania; representing, protecting, and assisting members of the Tanzanian legal profession in practice conditions and other areas; and protecting and assisting the Tanzanian public in all matters touching, ancillary or incidental to the law.

Besides, In addition, according to Article 27(1) of the Constitution of the United Republic of Tanzania, Cap. 2, R.E. 2002, every person has the duty to protect the natural resources of the United Republic, the property of the state authority, all property collectively owned by the people, and also to respect another person's property. Sub-article (2) obligates all persons by law to protect state authority's property and all property collectively owned by the people., fight against all forms of waste and squander, and manage the national economy diligently as people in control of their nation's destiny.

The Tanganyika Law Society is conscious of the public discourse around the ratification process and content of the the Intergovernmental Agreement (IGA) between the United Republic of Tanzania and the Emirate of Dubai concerning Economic and Social Partnership for the Development and Improving Performance of Sea and Lake Ports in Tanzania. Given the agreement's characteristics, possible impact, urgency, and sensitivity, on 7<sup>th</sup> June 2023, the TLS Governing Council assembled a team of specialists to examine the IGA, which at the time was still pending before the Tanzanian Parliament for ratification. The IGA was ratified by the Parliament of the United Republic of Tanzania on 10<sup>th</sup> June 2023. Since then, the Tanzanian Government, Media, Civil Society, Faith-based organizations, Private Sector, and various other stakeholders have voiced their opinions on the IGA, leading to conflicting conclusions and general lack of consensus. When the TLS Governing Council nominated this team of experts, they were tasked with the following specific objectives:

1. To dissect the proposed intergovernmental agreement between the United Republic of Tanzania and the Emirate of Dubai concerning economic and social partnership for development and improving the performance of sea and lake ports in Tanzania, dated October 2022.
2. To seek advice from relevant individuals who might provide additional insight to enhance the analysis, findings, and suggestions.
3. To conduct a comparative study on similar inter-governmental agreements in other jurisdictions, specifically those involving the Emirate of Dubai.
4. To submit a comprehensive analysis report with suggestions to the TLS Governing Council by 12<sup>th</sup> June 2023.

On 12<sup>th</sup> June 2023, the team of experts delivered their report to the Governing Council as per their mandate. The report was discussed and contemplated by the Governing Council, and it is now intending to issue this statement.

## **1. TLS' OVERALL OBSERVATION ON PEOPLE-ORIENTED SUSTAINABLE INVESTMENTS**

TLS recognizes and acknowledges the government's commendable initiatives to attract foreign investments and stimulate the national economy for the benefit of the country's prosperity. TLS fully supports all efforts that enhances national prosperity, rule of law. However, TLS urges the Government and the Parliament of the United Republic of Tanzania to consistently secure ample and extensive public involvement in the planning, discussion, and decision-making stages concerning national resources and such grand-scale investments in accordance with the Constitution of the United Republic of Tanzania, specifically Articles 8 and 9, and most notably, Article 21(2), which grants **every citizen has the right and the freedom to participate fully in the process leading to the decision on matters affecting him, his well-being or the nation.**

TLS expresses concerns over the inadequate time allotted for stakeholder's engagement during the ratification of this Intergovernmental Agreement (IGA). Although the Parliament of the United Republic of Tanzania invited stakeholders to offer their feedback on the agreement on June 6<sup>th</sup>, 2023, the public hearing that followed was held on June 7<sup>th</sup>, 2023. This left many stakeholders unable to present their recommendations to the Parliament's Standing Committee due to the short notice. The limited time did not permit TLS to thoroughly scrutinize the IGA and provide a detailed legal perspective, as stipulated by Section 4 of the TLS Act – Cap. 307. TLS has always closely collaborated with the Parliament of the United Republic of Tanzania and other key stakeholders. We urge the Government and the Parliament to respect the legal provisions and regulations related to stakeholder engagement.

**TLS notes that the Intergovernmental Agreement (IGA) was not well- well-drafted, leading to vagueness, doubts, ambiguities and diverse interpretations by different actors. Also, there are provisions/clauses that overlook, contradict or contravene the national interests, and we**

**suggest their total removal.** These clauses could lead to disputes during the implementation of the IGA, subsequent HGAs, and Project Agreements. In view of this, TLS advocates for the active involvement of experts and stakeholders with specialized expertise to share their insights on crucial matters towards modifying the highlighted provisions. We stress on leveraging TLS experts and/or individual private advocates to aid our nation in negotiating and drafting significant investment agreements, ensuring better clarity, efficiency, and mitigating the risks of future investment disputes, which could be costly for our country.

Moreover, we highly recommend In addition, we strongly propose substantial revisions to the Tanzanian legal framework on procedures for ratifying international agreements. The Parliamentary Standing Orders (June 2020) paragraph 108 should be amended to bolster the Parliamentary role in ratification processes. TLS requests that the Standing Orders be amended to mandate an adequate timeframe within which stakeholders can comprehensively analyze the agreements and submit their recommendations to the relevant Parliamentary Committees.

## **2. TLS' TECHNICAL FEEDBACK PERTAINING TO THE INTERGOVERNMENTAL AGREEMENT (IGA)**

### **2.1 LEGALLY BINDING AREAS OF COOPERATION**

2.1.1. **Provision:** Article 2 of the IGA establishes a legally binding framework of areas of cooperation focusing on the development, improvement, management, and operation of sea and lake ports, special economic zones, logistics parks, trade corridors, and other related port infrastructure. It also includes areas like capacity building, knowledge transfer, skill development, technology transfer, strengthening training institutions, and supporting market intelligence.

2.1.2. **TLS Observation:** Some stakeholders, as observed by TLS, believe that Article 2 of the IGA suggests that Tanzania is restricted from negotiating agreements with other entities regarding the development of ports along the Indian Ocean coast and Lakes Tanganyika, Victoria, Nyasa, and others. This interpretation has led to the perception among some members of the public and stakeholders that this clause hinders Tanzania's ability to collaborate with other parties.

2.1.3. **TLS Recommendations:** TLS advises that the IGA's clauses should be considered in conjunction. In this context, Article 2, when read in conjunction with Article 4(2) and Article 5(1) of the IGA, grants exclusive rights to DP World pertaining only to the projects outlined under Appendix-1 Phase 1. Moreover, such exclusivity is capped at 12 months from the IGA's signature date, provided that DPW or its affiliates reach an agreement with the Tanzania Ports Authority (TPA) within these 12 months or fail to

do so, whichever is earlier. Regarding projects not listed in Appendix-1 Phase 1, there is no exclusivity, and Tanzania retains the right to engage with investors other than DP World. This interpretation aligns with Article 4(2)'s mandate for Tanzania to inform Dubai about any other opportunities (presumably in Appendix-1 Phase 2) related to free zones and logistics sectors in Tanzania, enabling Dubai entities to express interest and submit proposals. TLS suggests that Article 2 should be modified for clarity, stating that the outlined areas are not exclusive to DPW except for the projects listed in Appendix-1 Phase 1. This would ensure the full meaning of Article 2 is understood without referring to Article 5(1) and 4(2) of the IGA.

2.1.4. **Basis for TLS Suggestions:** As it stands, Article 2 of the IGA can be interpreted broadly, potentially disadvantaging the interests of the United Republic of Tanzania. Article 9(j) of the United Republic of Tanzania's Constitution requires that economic activities do not result in wealth concentration or the monopolization of significant production means in the hands of a few.

2.1.5. **Anticipated Impact of the Issue on Our Country:** If this provision remains unamended, it could lead to differing interpretations by each party, thereby potentially sparking trade/investment disputes. Should DP World adopt a broader interpretation, the IGA could result in unforeseen adverse impacts affecting other ports within the United Republic of Tanzania.

## 2.2. DISPUTE RESOLUTION

2.2.1. **Provision:** Article 20 lays out a mechanism for dispute resolution through arbitration.

2.2.2. **2TLS Observations:** TLS believes that the arbitration process outlined in Article 20 of the IGA is lengthy process.. The provisions in Article 20 state that any arising dispute related to the IGA should be amicably resolved by the parties, either through diplomatic channels or the IGA Consultative Committee established under Article 3 of the IGA. If the dispute isn't resolved within 90 days, the aggrieved party may declare a dispute, after which the process of appointing arbitrators and a chair begins. The appointment process alone could take up to 90 days if the two arbitrators fail to agree on a third arbitrator, who would act as chair, necessitating referral to the Secretary General of the Permanent Court of Arbitration seated in the Hague.

- 2.2.3. **2TLS Recommendations:** The time span before making an arbitration request is excessively long. The parties should consider reducing this pre-request period. TLS recommends that the combined period of amicable resolution and pre-request before starting dispute resolution proceedings should not exceed 90 days.
- 2.2.4. **Basis for Recommendations:** TLS draws attention to the decision in *Manufacturer v Manufacturer, Final Award, ICC Case No. 8445, 1994*,<sup>1</sup> where it was stated that: - “ *Arbitrators believe that a clause calling for attempts to settle a dispute amicably are primarily expressions of intention, and should be viewed in light of the circumstances. They should not be applied in a way that obliges parties to engage in fruitless negotiations or to delay an orderly resolution of the dispute. Accordingly, the arbitrators have determined that there was no obligation on the claimant to carry out further efforts to find an amicable solution, and that the commencement of these arbitration proceedings was neither premature nor improper.*”
- 2.2.5. **Anticipated Impact of the Issue on Our Country:** If this provision remains unamended, it could lead to extended dispute resolution processes. Meanwhile, the opposing party may continue business operations during this prolonged period, potentially detrimental to the interests of the affected party. Tanzania should steer clear of any dispute settlement mechanism that is susceptible to potential delays or fruitless negotiations.

## 2.3 AGREEMENT'S GOVERNING LAW

- 2.3.1. **Provision:** Article 21 of the IGA states the governing law clauses. The IGA stipulates that it is governed by English Law, while the Host Government Agreements (HGAs) and Project Agreements are governed by Tanzanian laws. Concurrently, Article 25 (3) states that the IGA's provisions will apply to all Project Activities as defined in Article 1, including those undertaken before the IGA or the relevant HGAs take effect. Article 17 mandates that labor rights and occupational health are governed by Tanzanian laws, and Article 18 mandates that taxes, charges, and duties are governed by Tanzanian laws.
- 2.3.2. **TLS Observations:** TLS considers that Article 21 presents conflicting governing laws (English law vs Tanzanian Law). For instance, it's common to have loan

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<sup>1</sup> Albert Jan Van Den Berg (ed), Yearbook Commercial Arbitration 2001 – Volume XXVI, Yearbook Commercial Arbitration, Volume 26 (© Kluwer Law International; ICCA & Kluwer Law International 2001) pp 167 – 18

agreements governed by laws other than Tanzanian law, but it's impractical to apply English law to land rights, investment incentives, environmental and occupational health issues, safety and security rights, labor and local content issues, tax matters, technical requirements, government permits, renewal rights for permits or licenses, or against the suspension or revocation of permits or licenses. The Project Company cannot be subjected to both Tanzanian and English law on the same matters.

- 2.3.3. **TLS Recommendation:** TLS proposes that Article 21 be revised for the reasons mentioned above. Article 21 should state that the IGA is governed by Tanzanian Law. This can be realized through Article 22 of the IGA, once the ratification process is completed by exchanging the instruments for ratification as per Article 25(4).
- 2.3.4. **Basis for TLS Recommendations:** The IGA states that the applicable laws are English Law and Tanzanian Laws, which presents an issue because the agreement does not define the limit or scope of these laws' application. The agreement bestows rights to parties regarding Land Rights. Notably, the English Law and Tanzanian law differ on this matter - in Tanzania, a foreigner cannot own land as provided for by the Land Act, except when a foreigner possesses land for investment purposes via the Tanzania Investment Center (*as per the Land Act and Investment Act*) section 20(1) of Land Act Cap 113 RE 2019 and Section 17(2) of the Tanzania investment Act Cap 26 of 1997 RE 2019. In contrast, English law does not impose similar restrictions on foreigners owning land as is the case in Tanzania.
- 2.3.5. **Anticipate Impact of the issue on Our Country:** If this provision remains unamended, it could lead to a conflict of applicable law, where the IGA, as an Umbrella framework, would be governed by a different law from the HGAs. Applying English law to issues like land rights, investment incentives, environmental and occupational health, labor, safety and security rights in Tanzania would not be possible. The Project Company cannot be governed by both Tanzanian and English law on the same matters.

## 2.4 IGA AMENDMENTS

- 2.4.1 **Provision:** Article 22 of the IGA stipulates that amendments to the IGA can be made at any time in writing through mutual agreement of the State Parties. Additionally, it establishes that no amendment will take effect without the agreement, signified by signature and ratification and/or adoption of the appropriate documentation, by the State Parties.

- 2.4.2 **TLS Observations:** TLS notes that the IGA provides for amendments through Article 22. However, the article unusually mandates that amendments can only be proposed after the IGA has been ratified and the instruments of ratification have been exchanged. The IGA comes into force only after the exchange of the ratification instruments (Article 31). TLS finds it peculiar and highly risky that the IGA only allows the parties to make amendments after the fact. Article 22 is also silent on the timeline for decisions on IGA amendments. The Agreement should have clearly specified the timeline, following the receipt of an amendment proposal by one Party, within which the Parties will agree on and establish a schedule for processing and taking final action on the amendment proposal.
- 2.4.3 **TLS Recommendations:** Given the seriousness and magnitude of the anomalies and the areas requiring changes as outlined in this document, TLS recommends that the Government of Tanzania immediately leverage Article 22 to address them. Article 22 should also be amended to include timelines for decisions on IGA amendments. TLS suggests that the total period for the Parties to agree on and establish a schedule for processing and finalizing the amendment proposal should not exceed 30 days.
- 2.4.4 **Basis for TLS Recommendations:** The gravity, severity and seriousness of the anomalies identified in various provisions of this IGA as detailed in this opinion statement.
- 2.4.5 **Anticipated Impact on Our Country:** If the provisions with anomalies are not amended, TLS is concerned that the IGA will be enforceable despite its anomalies. Once ratified, the IGA becomes binding to the parties, and an amendment can only succeed if the parties reach a mutual agreement. Otherwise, the IGA will be operational as ratified, potentially to the detriment of the aggrieved party.

## 2.5 DURATION AND CONCLUSION OF THE AGREEMENT

- 2.5.1. **Provisions:** Article 23 (1) outlines two scenarios for termination: (i) a complete halt to all Project Activities; or (ii) the expiration of all HGAs and all Project Agreements (accounting for any additions or extensions) and decisive dispute resolutions, if any. Moreover, Article 23(2) covers the case where an HGA is prematurely terminated, and suggests extending such agreement to enable the party or Project Company to assert its rights and protect accrued rights. Article 23(3) states that the IGA can only be terminated with the other party's consent, which should not be unreasonably withheld. Article 23(4) declares that the State Parties

are not allowed to denounce, withdraw from, suspend, or terminate this Agreement under any circumstances, including material breach, fundamental changes of circumstances, severance of diplomatic or consular relations, or any other causes recognized under international law. However, any disputes arising under such circumstances between State Parties should be handled following the stipulations of Article 20 of this Agreement.

- 2.5.2. **TLS Observations:** Article 23(1) of the IGA, which ties the agreement's lifespan to the existence of the related investments, is largely standard for an overarching investment-related agreement like the IGA, implying termination restrictions. Bilateral Investment Treaties (BITs) often have a fixed term subject to renewal. If there is a set duration, the investor will aim to include a clause that extends the agreement beyond its expiry date with respect to current investments if the agreement is not renewed. TLS questions why Article 23(2), which deals with an HGA being prematurely terminated, shouldn't be omitted from the IGA and instead included in the HGAs. TLS expresses serious concern about Article 23(3), which indicates that the IGA can only be terminated with the other party's consent. This type of binding could lead to negative consequences for a party wishing to end the agreement. Even though the IGA mentions that a party shouldn't unreasonably withhold consent, this could be damaging where the IGA imposes termination restrictions even in the case of a significant adverse breach. TLS believes that this Article doesn't align with Tanzania's interests or the dispute resolution process.

Furthermore, TLS considers Article 23(4), which prevents the State Parties from denouncing, withdrawing from, suspending, or terminating this Agreement under any circumstances, as inappropriate and inalterably biased. If there is a significant adverse breach, Tanzania wouldn't be able to terminate the IGA except through Article 23(3), which requires the consent of the other party. Articles 23(3) and 23(4) are highly unusual as they restrict corrective actions. Nevertheless, they allow for arbitration if there's a dispute, as per Article 20, although the process is unusually lengthy.

- 2.5.3. **TLS Recommendations:** strongly advises that Articles 23(3) and 23(4) of the IGA should be completely discarded. Additionally, TLS recommends that the IGA should only retain the provisions of Article 23(1) and 23(2). The agreement, entered into freely by the parties, should allow either party to terminate it, provided that a previously agreed notice period is given to the impacted party. TLS suggests a notice period of 30 days or slightly more for termination. Moreover, the phrases in Article 23(1), "permanent cessation of all project activities" or "expiration of all the HGA and all Project agreements and definitive resolution of disputes," are too broad and should be reconsidered in the best interest of both parties.



- 2.5.4. **Basis for TLS Recommendations:** Tanzania is a signatory and member of the Charter of Economic Rights and Duties of States,<sup>2</sup> Tanzania's fundamental purpose is to promote a new international economic order based on equality, sovereign equality, interdependence, common interest, and cooperation among all states, regardless of their economic and social systems. Article 2(2) allows each state to regulate foreign investment within its national jurisdiction in line with its laws, regulations, objectives, and priorities. The IGA provisions shouldn't be interpreted to limit Tanzania's rights to regulate or, in a worst-case scenario – withdraw or denounce the agreement in a way that is compatible with its domestic and international laws.
- 2.5.5. **Anticipated Impact of the Issue on Our Country:** Should this provision not be amended, one party could invoke the IGA provisions to make termination untenable and impossible. A perpetual agreement, despite material breaches, fundamental changes of circumstances, or severance of diplomatic relations, poses a risk to the interests of the United Republic and its people.

## 2.6 EFFECTIVENESS PRIOR TO AGREEMENT AND IMPLEMENTATION

- 2.6.1. **Provision:** Article 25 (1) compels Tanzania to swiftly "implement administrative and regulatory measures after signing the IGA to ensure that "Early Project Activities" can be legally conducted by/and on behalf of one or more investors or the Project Company". Early Project Activities are defined in Article 1 of the IGA as any Project Activity initiated prior to the final investment decision concerning the Project, particularly the technical work essential for the front-end engineering design related to the initial stage of system design, construction, and development.
- 2.6.2. **TLS Observations:** The expenses for Early Project Activities and the potential liability to a host party if ratification is denied could be substantial. Article 25(1) legitimizes contracts for Early Project Activities made before ratification under the IGA. It's unclear whether any Early Project Activities have been carried out under the IGA. It is uncommon for an agreement, which necessitates ratification, to have a significant provision within it being effective before the agreement is ratified
- 2.6.3. **TLS Recommendations:** TLS suggests removing all references to early project activities from the IGA. TLS assumes there's an existing legal document governing such early project activities, which should be sufficient as a standalone legal and binding document.
- 2.6.4. **Basis for TLS Recommendations:** , which requires ratification, to have a substantial provision in it that becomes effective before the agreement is ratified.

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<sup>2</sup> GA Res. 3281(xxix), UN GAOR, 29th Sess., Supp. No. 31 (1974) 50

Given that IGA repeatedly uses the term "State parties", TLS wants to reference Articles 12 (2) (b), 10, and 18 of the Vienna Convention on the Law of Treaties 1969:

A representative can sign a treaty ad referendum, meaning the signature is only valid once confirmed by his state. In this case, the signature becomes definitive when it is verified by the relevant authority - in this context, the Parliament of the United Republic of Tanzania.<sup>3</sup>

Furthermore, where the signature is subject to ratification, acceptance, or approval, it does not establish the consent to be bound. Instead, it is a means of authentication and communicates the willingness of the signatory state to proceed with the treaty-making process. The signature qualifies the signatory state to proceed to ratification, acceptance, or approval. It also creates an obligation to abstain, in good faith, from actions that would defeat the treaty's objectives and purpose.<sup>4</sup>

- 2.6.5. **Anticipated Impact of the Issue on Our Country:** Making a substantive provision in the IGA effective before the agreement is ratified imposes an obligation on the Country. Moreover, permitting the initiation of the execution of part of the IGA (Early Pre Project-Activities) without specific project agreements may expose our Country to undesired investment disputes and potential losses. Also, it deprives the Parliament of the United Republic of Tanzania of the chance to prevent, in good faith, actions that would undermine the objectives and purpose of the IGA.

## 2.7 NON-CONFLICT COMMITMENT (PARTIES' RIGHTS TO ENGAGE IN OTHER INTERNATIONAL AND DOMESTIC OBLIGATIONS)

- 2.7.1. **Provision:** Article 27 stipulates that each state party ensures and guarantees that, upon this agreement's effectiveness and all relevant enabling legislation, it won't be involved in any domestic or international agreement or commitment, or legally obliged to comply with or enforce any domestic or international law, regulation, or agreement, that clashes with or to implement this Agreement or the pertinent HGA and any Project Agreement to which such State Party is a participant.

- 2.7.2. **TLS Observations:** We find that the non-conflict obligation extends to future HGAs and Project Agreements. Article 27 of the IGA peculiarly obligates Tanzania not to be part of any domestic or international agreement or commitment, or legally required to observe or enforce any domestic or international law, regulation or

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<sup>3</sup> [Art.12 (2) (b), Vienna Convention on the Law of Treaties 1969]

<sup>4</sup> [Arts.10 and 18, Vienna Convention on the Law of Treaties 1969]

agreement, that contradicts or to initiate or execute the Agreement or the relevant HGA and any other Project Agreement to which such Party is involved.

- 2.7.3. **TLS Recommendations:** TLS advises modifying Article 27 to limit the non-conflict commitment only to the IGA because a non-conflict obligation's purpose is to ensure parties disclose contractual or statutory duties that might obstruct or restrict the party making the commitment from fulfilling its responsibilities under an agreement once the agreement is finalized and effective.
- 2.7.4. **Basis for TLS the Recommendations:** The scope of Article 27 is unacceptable as it extends the commitment to future Project Agreements and HGAs. This poses issues as it potentially exposes Tanzania to liabilities for unintended violation of Article 27. The HGAs and Project Agreements will include clauses addressing non-conflict. There is no necessity to extend the non-conflict commitment to HGAs and Project Agreements. Chapter 1 of the Charter of Economic Rights and Duties of States<sup>5</sup> outlines the principles of international economic relations. The Charter mandates that economic, political and other relations among States should be governed, among other things, by the following principles: (a) Sovereignty, territorial integrity, and political independence of States. Subjecting the United Republic to unknown future contractual conditions is unusual and might compromise the economic independence outlined in the Charter.
- 2.7.5. **Anticipated Impact of the Issue on Our Country:** The Country is prematurely compelled to represent and warrant that upon the effectiveness of the HGAs and Project Agreements, the terms and conditions of which are yet to be established and enforced, it won't be involved in any domestic or international agreement or commitment, or legally obliged to observe or enforce any domestic or international law, regulation, or agreement that contradicts or to initiate or execute the relevant HGA and any Project Agreement to which our Country is a party.

## **2.8 CAPACITIES OF THE STATE PARTIES AND THEIR SIGNATORIES**

- 2.8.1. **Provision:** Article 28 of the IGA outlines the capacities of the state parties and their signatories.
- 2.8.2. **TLS Observations:** TLS has identified several irregularities in this Article. The title of the Article refers to state parties. This, under international law, specifically the

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<sup>5</sup> GA Res. 3281(xxix), UN GAOR, 29th Sess., Supp. No. 31 (1974) 50

Monte Video Convention of 1933, clarifies the definition of a state.<sup>6</sup> TLS believes that on behalf of the United Republic of Tanzania, the Signatory possesses the legal capacity to sign the agreement as a State party.

However, TLS has observed that various entities have expressed concerns regarding the international legal status of the Emirate of Dubai. TLS is unable to form an opinion on the status of the Emirate of Dubai until it has sought a legal opinion from a competent Dubai entity. Such an opinion should clarify issues such as whether the Emirate of Dubai qualifies as a state under international law or belongs to the United Arab Emirates; whether the reference to state parties is correct or not; whether the preamble's reference to the Emirate of Dubai as a state party is legally correct; whether the signatory on behalf of the Emirate of Dubai can bind a state to an international agreement and whether the omission of the name and title of the Dubai agent's witness is proper. At this time, TLS cannot definitively comment on the compliance with the provisions of Article 28.

2.8.3. **TLS Recommendations:** TLS believes that if any doubts arise concerning Article 28 of the IGA, a separate legal opinion should be procured from a Dubai entity that is well-versed in Dubai laws.

2.8.4. **Basis for the TLS Recommendations:** TLS recommendations are rooted in the fact that the Parliament of the United Republic of Tanzania is authorized by Article 63(3)(e) of the Constitution of the United Republic of Tanzania to ratify international agreements which require ratification.

2.8.5. **Anticipated Impact of the Issue on Our Country:** Unless the above issues are professionally resolved at an early stage, the legal status and binding nature of this Intergovernmental Agreement between the United Republic of Tanzania and Emirate of Dubai could become a subject of future dispute under international law.

## 2.9 STABILITY CLAUSE

2.9.1. **Provision:** Article 30 stipulates that Tanzania will implement the required legal modifications to foster a favorable investment environment. The parties concur that the legal and contractual framework relating to the Project will be stabilized in a way that is comparable and satisfactory to the parties, the Project Company, and that such

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<sup>6</sup> Montevideo Convention on the Rights and Duties of States; Done at: Montevideo; Date enacted: 1933-12-26; In force: 1934-12-26: - Article 1 The state as a person of international law should possess the following qualifications: a permanent population; b. a defined territory; c. government; and d. capacity to enter into relations with the other states.

satisfaction's details will be agreed upon between DPW and TPA and reflected in the HGAs.

- 2.9.2. **TLS Observations:** TLS considers that this provision, which calls for the enhancement of Tanzania's investment legal infrastructure, may have positive impacts on Tanzania. TLS, however, is concerned with the phrasing of the Article that requires the Project to be stabilized in a way that is comparable and satisfactory to the parties and the Project Company. It is also widely known that the existing legal environment across all sectors does not favor private or PPP investments, including the PPP law. Most businesses operate based on the political leadership's commitment to enhancing the investment conditions. TLS notes that the investment policy hasn't been altered, but what has changed are the laws that impede investments. These laws largely remain intact. That's why the TLS leadership, during a courtesy call to the President (Her Excellency Dr. Samia Suluhu Hassan) in 2021, suggested that a comprehensive overhaul of the legal and regulatory framework affecting investments, including the criminal justice system, should be prioritized. A piece-by-piece approach doesn't allow for stakeholder input into the reforms. Furthermore, TLS acknowledges the Stabilization Clause in the IGA, HGA, and other international investment agreements as a way for foreign investors to mitigate or manage the political risks associated with their projects, and for the Host Country to attract investors. TLS also recognizes various types of stabilization clauses, the most common being: the Freezing clause, the Economic equilibrium clause, and the Hybrid clause. The current IGA between the United Republic of Tanzania and the Emirates of Dubai has chosen a freezing clause. However, TLS believes a Hybrid clause would have been ideal and beneficial for the Tanzanian people, offering a balanced arrangement between the two parties. TLS also noted that the Stabilization clause under Article was open-ended without being limited to any specific fiscal terms or specific timeframe. TLS believes that an open-ended stabilization clause may have serious impact on our country's tax policy and regime in the future.
- 2.9.3. **TLS Recommendations:** TLS suggests that Article 30 be reworded to eliminate interpretational ambiguities that could lead to future disputes. TLS further recommends that the government undertake comprehensive legislative and regulatory reforms sector-wise, taking cues from the Business Environment Strengthening for Tanzania (BEST) Program. In this context, Article 30 should be revised to incorporate a Hybrid stabilization clause. The application of the stabilization clause should be confined to specific fiscal terms and a particular timeframe to mitigate its impact on our tax policy and administration.<sup>7</sup>
- 2.9.4. **Reasons for the Recommendations:** The most harmful type of stabilization clause is the freezing clause, which aims to freeze the law pertaining to the investment for

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<sup>7</sup> OECD (2019). *Guiding principles for durable extractive contracts*.  
[https://www.oecd.org/dev/Guiding\\_Principles\\_for\\_durable\\_extractive\\_contracts.pdf](https://www.oecd.org/dev/Guiding_Principles_for_durable_extractive_contracts.pdf)

as long as the concession is active. As a result, no provision in the current IGA agreement can be superseded by the exercise of state privileges without the explicit consent of the investor.

Other types of stabilization clauses include economic equilibrium and Hybrid clauses that aim to maintain the economic balance between the parties at the time of contract's signing. Rights arising from stabilization clauses are frequently upheld by tribunals in investor-state arbitration, often resulting in a finding of a breach and leading to an obligation on the host state to compensate the investor.<sup>8</sup>

2.9.5. **Potential Consequences for Our Country:** A freezing clause might inhibit the Government of the United Republic of Tanzania from implementing necessary actions to safeguard citizens' rights and enforce national laws that apply elsewhere in the country. Excessive preferential treatment may discourage competition and deter local investors. StabilisationStabilization clauses, particularly Freezing and Economic equilibrium clauses, are criticized by Amnesty International as they exempt foreign investors and their projects from complying with human rights laws.

### 3. CONCLUSION

To sum up, TLS will keep monitoring the implementation of its recommendations to provide basis for its future interventions as may deem just and necessary. TLS has realistic expectation that these recommendations will receive the requisite attention from the relevant authorities. We reiterate our pledge to aid in shaping the United Republic of Tanzania into a thriving nation where every individual is accorded freedom, justice, fraternity, and peace.

**MAY GOD BLESS TANZANIA.**

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**ISSUED BY THE GOVERNING COUNCIL OF TANGANYIKA LAW SOCIETY**

Dated at Dar es Salaam this 25<sup>th</sup> June, 2023.

Harold Sungusia

TLS President – 2023/2024

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<sup>8</sup> *Texaco v Libya* (1978) 17 ILM 1; *Aminoil v Kuwait* (1981) 21 ILM 976; [Societe des Mines de Loulo S.A. \(Somilo\) v. Mali](#), ICSID Case No. ARB/13/16.