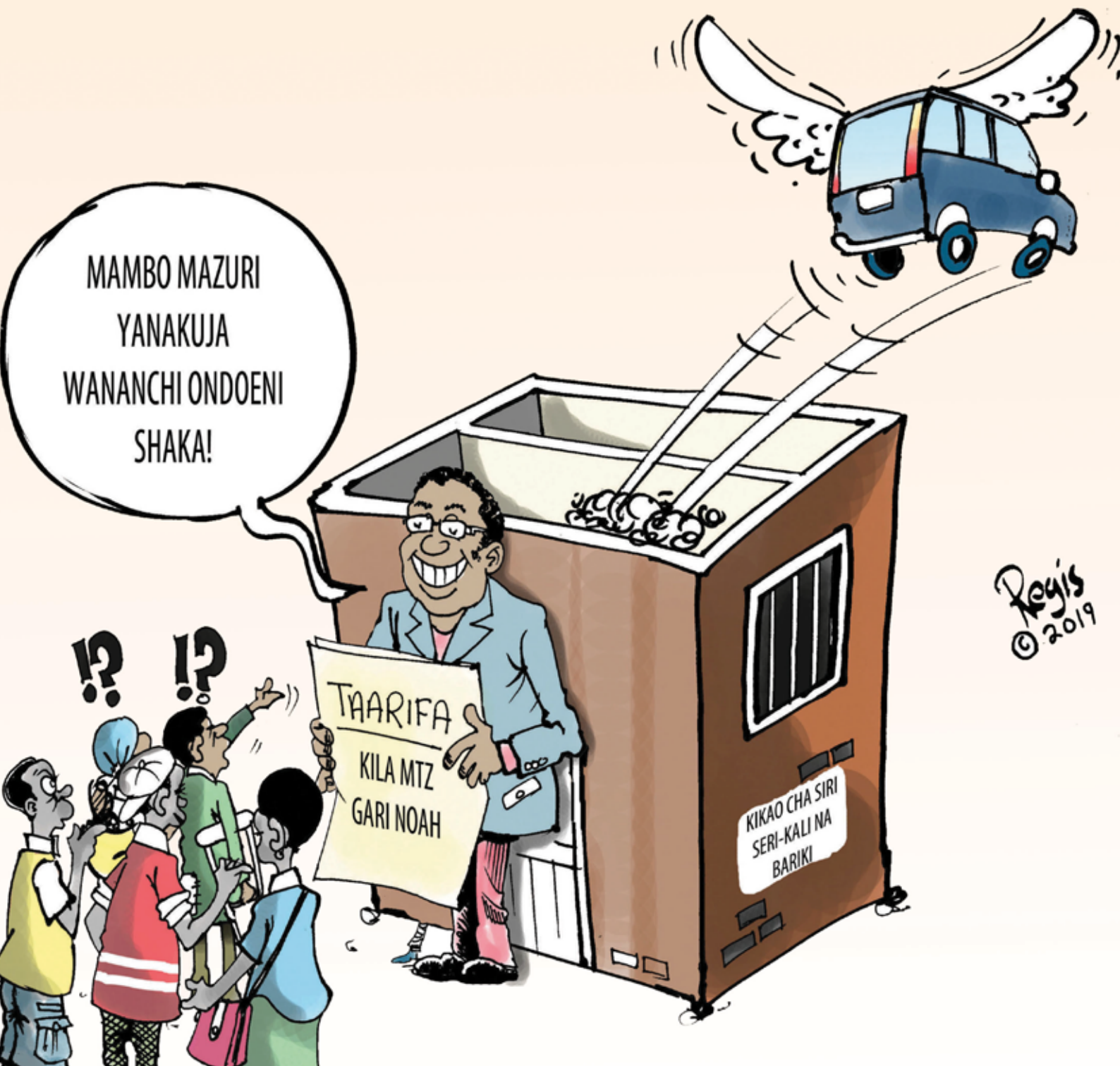



THE DOWNFALL OF ACACIA MINING PLC IN TANZANIA": WILL TANZANIA GET A BETTER DEAL?





By virtue of article 27 of the Constitution of the United Republic of Tanzania “every person has the duty to protect the natural resources of United Republic of Tanzania (URT)” and by virtue of section 4(1) of the Permanent Sovereignty Act of 2017 providing that; “The people of United Republic of Tanzania shall have a Permanent Sovereignty over all natural wealth and resources”.

We, the HakiRasilimali, Tanzanian advocates for the natural resource (mining, oil and natural gas) justice; our aim is to see the people of Tanzania benefit out of natural resource wealth. Therefore, having read and analysed the “Recommended Final Offer for the acquisition of ACACIA MINING PLC; WE, COMMEND the government’s (herein referred to as GoT) efforts to renegotiate with BARRICK Gold Corporation with the aim to secure better terms for the country.

TAKING NOTE of the Framework Agreement for a possible settlement initiated by the GoT in May 2019 and the release of “The Recommended final offer for the acquisition of ACACIA MINING PLC by means of court-sanctioned scheme on July 19th, 2019. If fully executed, BARRICK Gold Cooperation will wholly own ACACIA PLC. These developments are the result of desire and efforts by the GoT to revamp the mining sector. This is a crucial step towards the conclusion of negotiation between GoT and BARRICK. The two documents propose key terms as reflected in the Appendix 4 of the later. These are among others:

50/50 sharing of economic benefits derived from Tanzanian mining between Barrick and GoT . Economic benefits according to this agreement includes taxes, royalties, fees and other *fiscal* levies and through the GoT’s 16% free carried interest in all distributions (including shareholder loan repayments) from the Tanzanian mine operating subsidiaries (TMCs) and a new Tanzanian management company.

USD 300 million settlement payment in consideration for the full, *final* and comprehensive settlement of all existing disputes between the GoT and the Acacia Group, including all liability to taxation and a waiver of actual or potential claims on a mutual basis.

VAT Refund and Fiscal stabilization: VAT, carry forward losses and shareholder loan balances are to be confirmed and agreed in advance, as will the

taxes, royalties, duties, fees and levies payable by the TMCs in order to achieve the 50/50 Principle. Corporate Social Responsibility: The Framework Agreement provides that the TMCs will commit up to US\$70m in aggregate, plus up to US\$6 per ounce of gold sold in concentrate and doré from the Mines, on various specified CSR-related initiatives in Tanzania. These CSR-related payments will be treated as operating costs of the TMCs for the purposes of the 50/50 principle and shall be fully deductible for corporate income tax purposes.

Formation of a new merger Tanzanian company with its headquarters in the country.

Concern;

Some of the proposed terms in their current form suggest a raw deal to the country due to their concessionary nature. They also deviate from the spirit and letter of the Natural Resource Wealth Permanent Sovereignty Act, 2017. The Natural Wealth and Natural Resources Wealth (Contract review and re-negotiation 2017 of unconscionable terms) and the Written Laws (Miscellaneous amendment) act, 2017.

THE PRINCIPLE OF 50/50 SHARING OF ECONOMIC BENEFITS:

Public expectation of the 50/50 was that the government and the company will share equally profits generated by the projects rather than the calculated taxes which would have been paid to the government anyhow. The ‘Recommended Final Offer’ provides for an annual review of fiscal terms in line with the provisions of the 2017 law that requires contracts to provide for periodic review, it effectively stabilizes the fiscal regime to ensure that the government cannot get more than 50% share in future. Implicitly, this puts a ceiling on how much progressive taxes can capture a bigger share for government as profits increase.

THE USD 300 MILLION QUESTION: A SETTLEMENT AGREEMENT OR PAYMENT OF GOOD FAITH?

Different stakeholders have differing views about what the amount is for, and how it would be executed. In March 2017, both the GoT and Barrick's Executive Chairman Prof. John Thornton made public announcement that Barrick had agreed to effect one-off payment of USD 300 million to the GoT as a gesture of "Good faith" (commonly understood as KISHIKA UCHUMBA). In contrary, the 'Recommended Final Offer' for the acquisition of ACACIA MINING PLC suggests that the payment is in consideration for the full, final and comprehensive settlement of all existing disputes between the GoT and the Acacia Group, including all liability to taxation and a waiver of actual or potential claims on a mutual basis! **This suggests that the USD 300 million payment will be all the government gets towards its claim of \$190 billion! Is this what Tanzanians were expecting taking into consideration significant adverse economic consequences since 2016?**

From a legal perspective,

Good will = Good faith is an abstract and comprehensive term that encompasses a sincere belief or motive without any malice or the desire to defraud others. It derives from the translation of the Latin term *bona fide*, and courts use the two terms interchangeably. In contract law, the implied covenant of good will or good faith and fair dealing is a general presumption that the parties to a contract will deal with each other with no legal guarantees, honestly, fairly, and in good faith, so as to not destroy the right of the other party or parties to receive the benefits of the contract. Thus no legal guarantees for one to be held accountable.

Settlement agreement: In law, a settlement is a resolution between disputing parties about a legal case, reached either before or after court action begins. The term "settlement" also has other meanings in the context of law. Structured settlements provide for future periodic payments, instead of a one-time cash payment.

UPLIFTING OF THE BAN AND VALUE ADDITION:

Among other reasons, the ban of the concentrate

was based on the fact that Tanzania wants to promote value addition in the mining sector by allowing investors to construct refineries for the doré and smelters for the concentrates produced. With the BARRICK Recommended Final Offer" addresses the need to amend and restate the MDAs, the zero-rating of concentrate export implicitly provides for concentrates export is in gross inconsistency with the provisions of the Tanzanian Laws and policies such as Mineral Policy of 2009, Section 9 (1) of the Natural Wealth and Resources (Permanent Sovereignty) of 2017 2017 law (The Mineral Policy of 2009 provides for the government to collaborate with private sector, regional and international organizations to strategically invest in smelting and refinery industries of its gemstones as well as metals. This is seconded by the Section 9 (1) of the Natural Wealth and Resources (Permanent Sovereignty) of 2017 which prohibits the exporting for Raw resources to be exported for beneficiation outside the URT) and sets strong premises for the amendments of the said law. Similarly, No obligation to establish smelters or refineries, which is inconsistent with the 2017 law. Another inconsistency is the waiver of obligation to establish smelters or refineries. These inconsistencies are likely to widen further the law implementation gap as reported by the NRG (https://resourcegovernance.org/analysis-tools/publications/resource-governance-index-sub-saharan-africa-highlights).

DELISTING OF TMCs FROM THE DAR ES SALAAM STOCK EXCHANGE (DSE):

It is recommended that the Got waive the requirement for mining companies to list in Tanzania. This, apart from its inconsistency with the 2017 law, it will potentially deny the people of Tanzania from owning the 30% that they were entitled to through DSE listing.

TREATMENT OF CORPORATE SOCIAL RESPONSIBILITY-CSR:

The Framework Agreement provides that the TMCs will commit up to US\$70m in aggregate, plus up to US\$6 per ounce of gold sold in concentrate and doré from the Mines, on various specified CSR-related initiatives in Tanzania. These CSR-related payments will be treated as operating costs of the TMCs for the purposes of the 50/50 principle and shall be fully deductible for corporate income tax purposes.

Concerns:

CSR will be a fixed amount that is to be paid annually by the company and other hand it will be a fee paid on revenue per each ounce sold by the company.

In this case, the question to treat CSR as an operating cost of the TMCs of the 50/50 economic benefit share, will have adversarial effect on the general voluntary role played by mining companies in Tanzania; it will reduce the base for the 50% government share while on the other side, the government will miss the opportunity for tapping on voluntary non-deductible re-investment of corporate profit.

Practically CSR programmes are meant for Community development. If taxing CSR will be the now case, how and where will these taxes be collected? Will it be at the Local Government Level as it is done with the service levy of the annual turnover or through the central government?

INTERNATIONAL ARBITRATION:

The 'Recommended Final Offer' provides for international arbitration, which is again inconsistent with the 2017 laws i.e Permanent sovereignty Act, 2017 vs Investment Act of 1997 section 23.

THE GOVERNMENT PARTIALITY IN THE NEGOTIATIONS.

Noting from the "Recommended Final Offer" issued by Barrick Gold Corporation on 19 July 2019, it seems ACACIA Mining has been excluded from further negotiations. However, the irrevocable undertakings will thus remove Acacia Mining from existence in the investment landscape in Tanzania. For the purpose of being objective on the matter, it would have been prudent for all interested parties i.e The Government of Tanzania, Acacia mining and Barrick Gold Corporation to be part and parcel of the discussion/negotiations.

Concern:

The authenticity of Barrick Gold Corporation being directly involved in the negotiation that should have, in the first place, be between the Government of Tanzania and Acacia Mining. For the interest of the general public and stakeholders

understanding of the signatories behind the Mineral development Agreements (MDAs), we therefore, urge all interested parties to disclose HOW and with WHOM these agreements were signed.

NOTE: In order to strike a deal that is transparent and fair, there is need to have consensus adidem on the deal. As it stands, we feel this will give room for furthering unaccountable and corrupt system that goes against the principle of integrity that the Government of Tanzania stands for.

TAX AVOIDANCE: The 'Recommended Final Offer' provides for the 50/50 principle VAT, carry forward loss and shareholder loan balances will be confirmed and agreed in advance, as will the taxes, royalties, duties, fees and levies payable by the TMCs;

Concern:

How genuine are the carry forward losses? If practices (allowing carry forward losses) will continue to be entertained by the government, we will continue to cast shadows of doubt about the companies' estimations of the time needed for their projects to start making profits.

GENERAL RECOMMENDATION:

The GoT should comprehensively assess short and long term economic and social cost and benefits before signing of the offer. In our view, this is a bad deal that will leave Tanzania worse off than before!

The understanding of the 50/50 share of economic benefits as provided in the 'Recommended Final offer' is a technical jargon that needs further clarity for thorough stakeholder scrutiny.

There is need for the Government to avoid and find better mechanism to discourage carry forward losses or put carryforward loss thresholds. There is need to install effective monitoring mechanisms in place that will ensure that carry forward costs are genuinely authenticated.

It would also be proper for the GoT to reflect on its legal framework that addresses the issues of mineral beneficiation in the aspect of considering these changes to other mining investors to enjoy the waiver not to be obligated for the construction

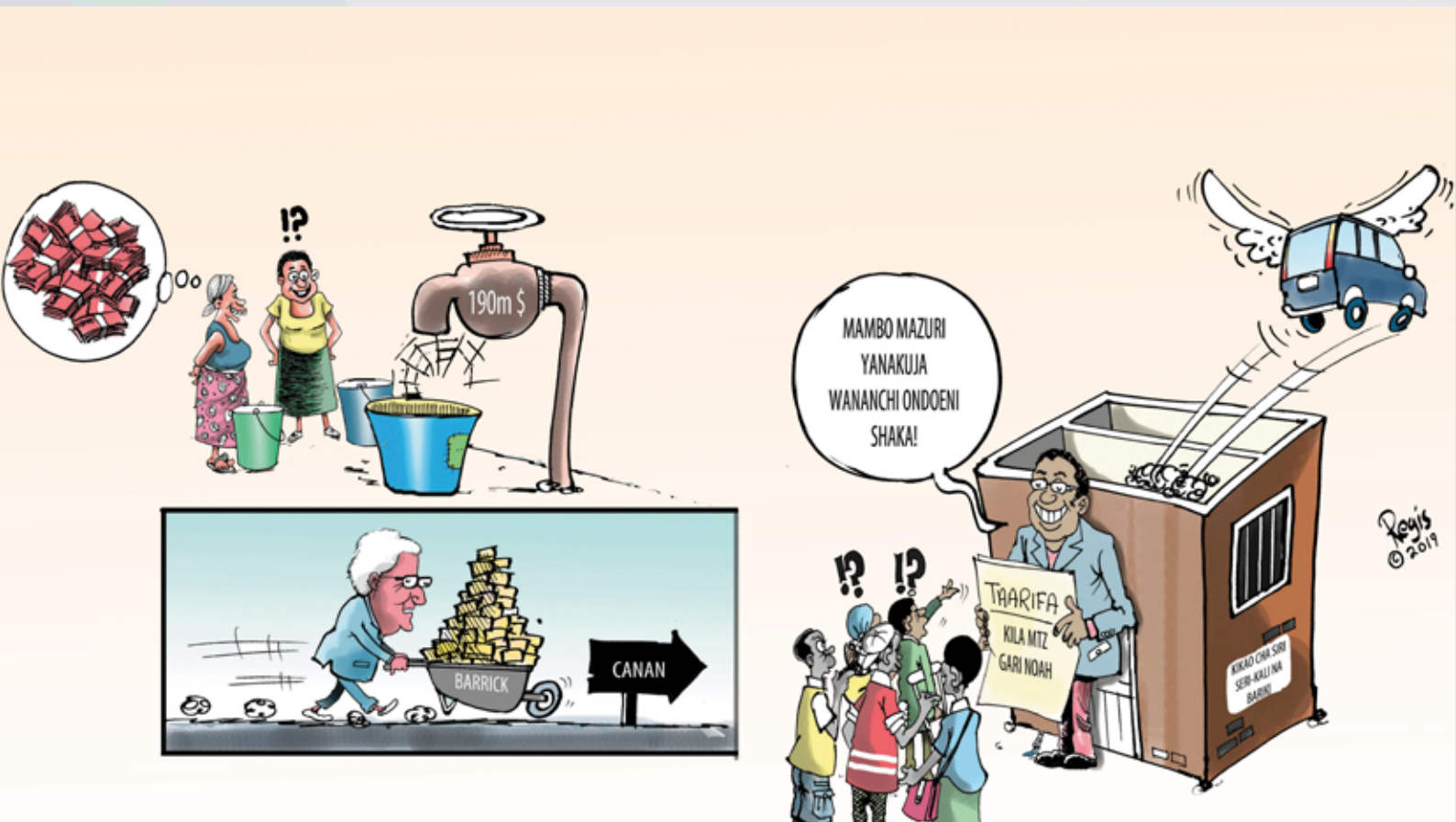
of the refinery and smelting facilities. Otherwise, the Government of the United Republic of Tanzania shall be forced to do away with such sections in the enacted laws currently regulating the sector.

Before any further decision is on this offer, We STRONGLY urge the government to take effective measures to ensure that settlements in this dispute, are made in the full light of public scrutiny, and that final agreements SHOULD NOT be made without the approval of PARLIAMENT. It is only through this process the will of the public could be adequately represented in a self-governing

there will be total confusion for all interested parties since there will be an agreement that contradicts Laws and Policies that have already been enacted.

GENERAL STATEMENTS TO PONDER

This letter (the “GoT Negotiating Team Letter”) states that the GoT will not execute final agreements for the resolution of the Company’s disputes if Acacia is one of the counterparties to the agreements and that it will only sign such agreements “if satisfied that substantial changes have been made to the management style of the Operating Companies and of their shareholders”.




practice. The public needs to be thoroughly informed about what they opt to receive from the new arrangements between BARRICK/ ACACIA settlement. That way, the public interest could be better served by the government.

To avoid future challenges and uncertainties over the implementation of the ‘Recommended Final Offer’ and any agreements that will be entered thereafter, there is need for the government to enact a new law to serve the purpose of overruling all other existing laws in the mining sector. If not

Acacia immediately reached out to the most senior levels in the GoT to seek clarity on the letter received and to date has received no response.

Deferred Cash Consideration Dividends paid to the Scheme Shareholders, based (on a fully diluted basis) on the number of Acacia Shares (if any) they would have received but for awards being cash settled. Such payments will be made at the same time as payments are made to Scheme Shareholder. It is also a condition of the Acquisition that, following the date of this Announcement, Barrick



does not discover that the GoT has decided not to continue discussions with a view to finalising the Transaction Documents or to propose or request any change or modification to any of the terms of the Transaction Documents as summarized in Appendix 4 which is or might reasonably be expected to be material in the context of the Wider Acacia Group taken as a whole.

It is also intended that, following the Scheme becoming effective, Acacia will be re-registered as a private company under the relevant provisions of the Companies Act. No cancellation of Acacia mining rights 1. There having been no withdrawal, cancellation, termination or modification of any prospecting right or mining right, licence, permit, waiver or concession held or used by any member of the Wider Acacia Group, or of any mining development agreement to which any member of the Wider Acacia Group is a party or otherwise bound, where such withdrawal, cancellation, termination or modification is or might reasonably be expected to be material in the context of the Wider Acacia Group taken as a whole, and if a cancellation or termination has occurred it has not been: (i) withdrawn, lifted or revoked in writing by the relevant minister or official (or other relevant agency or organ of government); or (ii) set aside, nullified or otherwise suspended by the order of a court of competent jurisdiction, within 15 business days of such cancellation or termination (or, if earlier, by the date scheduled for the Court Meeting), and there having been no notice or intimation of any decision or intention to withdraw, cancel, terminate or modify any of the same.

Provides for an annual review of the fiscal regime, but it stabilizes the regime to ensure that the government cannot get more than 50% share in future. So possibly doesn't go against the letter of the 2017 law that requires contracts to provide for periodic review, but goes against its spirit that lifetime stabilization is prohibited.

Ensures that the government always gets 50% share but prevents it from getting any more. So puts a ceiling on how much progressive taxes can capture a bigger share for government as profits increase.

No obligation to establish smelters or refineries, which is inconsistent with the 2017 law.