DECISION

Number 36/PUU-X/2012

FOR THE SAKE OF JUSTICE UNDER THE ONE ALMIGHTY GOD

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF INDONESIA

[1.1] Hearing constitutional cases at the first and final level, has passed a decision in the case of petition for Judicial Review of Law Number 22 Year 2001 concerning Oil and Natural Gas against the 1945 Constitution of the State of the Republic of Indonesia, filed by:

[1.2] I. **The Central Executive Board of Muhammadiyah** established under the Provisions of Articles 1, 2 and 5 of *Staatsblaad* 1870 Number 64 concerning Incorporated Associations, subsequently legalized under Decision of the Governor General of Netherlands East Indies Number 81 dated August 22, 1914 as subsequently adjusted to Decree of the Minister of Law and Human Rights Number AHU-88.AH.01.07. Tahun 2010. Domiciled at Jalan Cik di Tiro Number 23, Yogyakarta and Jalan Menteng Raya Number 62 Central Jakarta, in this case represented by Prof. Dr. H.M. Din Syamsuddin, MA in his capacity as the General Chairperson of the Central Executive

Board of Muhammadiyah, therefore lawfully acting for and on behalf of the Central Executive Board of Muhammadiyah, as **Petitioner I**;

II. ***Lajnah Siyasiyah Hizbut Tahrir Indonesia***, registered with the Ministry of Home Affairs of the Republic of Indonesia, Directorate General of National Unity and Politics under Number 44/D.III.2/VI/2006, domiciled in Jakarta, in this case represented by Ir. Rahmat Kurnia. M.Si in his capacity as the Chairperson, therefore lawfully acting for and on behalf of Lajnah Siyasiyah Hizbut Tahrir Indonesia, as **Petitioner II**;

III. **The Central Executive Board of *Persatuan Ummat Islam***, under Decree of the Minister of Justice of the Republic of Indonesia Number JA/5/86/23 and reregistered with the Department of Home Affairs of the Republic of Indonesia under Number 104/DIII.3/XII/2006. Domiciled in Jakarta, as **Petitioner III**;

IV. **The Central Executive Board of Syarikat Islam Indonesia**, registered with the Ministry of Home Affairs of the Republic of Indonesia, the Directorate General of National Unity and Politics Number 117/D.III.3/III/2010, domiciled in Jakarta, in this case represented by H. Muhammad Mufti in his capacity as the

President of *Lajnah Tanfidziyah* of *Syarikat Islam Indonesia*, and therefore lawfully acting for and on behalf of the Central Executive Board of *Syarikat Islam Indonesia*, as **Petitioner IV**;

V. **The Central Executive Board of *Lajnah Tanfidziyah* of *Syarikat Islam*** established under Decree of the Minister of Law and Human Rights Number C-266.HT.03.06-Th. 2004 dated September 23, 2004 and certificate of registration based on the statement of the Ministry of Home Affairs Number 09/D.III.3/II/2006. Domiciled at Jalan Taman Amir Hamzah Number 2 Central Jakarta 10320, in this case represented by Drs. Djauhari Syamsuddin in his capacity as the General Chairperson of the Central Executive Board of *Syarikat Islam*, therefore lawfully acting for and on behalf of the Central Executive Board of *Syarikat Islam*, as **Petitioner V**;

VI. **The Central Executive Board of the Indonesian Muslim Brotherhood (*Persaudaraan Muslimin Indonesia*)**, registered on the basis of the statement of the Ministry of Home Affairs Number 82/D.I/VI/2003, domiciled in Jakarta, in this case represented by Drs. H. Imam Suhardjo HM in his capacity as the Secretary General, and therefore lawfully acting for and on

behalf of the Central Executive Board of *Persaudaraan Muslimin Indonesia*, as **Petitioner VI**;

VII. **The Central Executive Board of *Al-Irsyad Al-Islamiyah* registered** with the Department of Home Affairs and Regional Autonomy of the Republic of Indonesia Number 80/D.I/VI/2001, domiciled in Jakarta, in this case represented by KH Abdullah Djaidi in his capacity as the General Chairperson of the Central Executive Board of *Al Irsyad Al Islamiyah*, therefore lawfully acting for and on behalf of the Central Executive Board of *Al Irsyad Al Islamiyah*, as **Petitioner VII**;

VIII. **The Executive Board of the Indonesian Moslem Youth (*Pemuda Muslimin Indonesia*)** domiciled in Jakarta, in this case represented by H. Muhtadin Sabili in his capacity as the Chairperson of the Executive Board of the Indonesian Moslem Youth, therefore lawfully acting for and on behalf of the Executive Board of the Indonesian Moslem Youth, as **Petitioner VII**;

IX. ***AL Jami'yatul Washliyah***, based on the legal right pursuant to the stipulation of the Minister of Justice dated October 17, 1956 Number J-A-/74/25 as amended by Decree of the Minister of Law and Human Rights of the Republic of Indonesia dated May

9, 2006 Number C-20.HT.01.06. TH.2006 and recorded in Supplement to State Gazette of the Republic of Indonesia dated December 19, 2006 Number 101, in this case represented by Drs. HA. Aris Banadji in his capacity as the Chairperson, therefore lawfully acting for and on behalf of the Executive Board of *AL Jami'yatul Washliyah*, as **Petitioner IX;**

X. **Solidarity of Parking Lot Attendants**, Sidewalk Vendors, Businessmen and Employees (*Solidaritas Juru Parkir, Pedagang Kaki Lima, Pengusaha, dan Karyawan/*SOJUPEK), based on Deed of Establishment Number 05 dated September 9, 2011 of Notary Hanita Sentono, SH, domiciled at Jalan Gadjah Mada Number 16B Central Jakarta, represented by Lieus Sungkharisma in his capacity as the coordinator, therefore lawfully acting for and on behalf of SOJUPEK, as **Petitioner X**;

XI. **K.H. Achmad Hasyim Muzadi**, Indonesian Citizen, Teacher, Jalan Cengger Ayam Number 25 Neighborhood Ward 001/Neighborhood Block 0014, Tulus Redjo, Lowokwaru, Malang, as **Petitioner XI**;

XII. **Drs. H. Amidhan**, Indonesian Citizen, Retiree, Ministry of Religious Affairs Complex Number 26, Kedaung Kali Angke, Cengkareng, West Jakarta, as **Petitioner XII**;

XIII. **Prof. Dr. Komaruddin Hidayat**, Indonesian Citizen, Civil Servant, Jalan Semanggi II Number 3 Neighborhood Ward 003/Neighborhood Block 003 Cempaka Putih, Ciputat Timur, Tangerang, as **Petitioner XIII**;

XIV. **Dr. Eggi Sudjana. SH, M.Si**, Indonesian Citizen, Advocate, VIP Jalan Sultan Agung Number 1 Neighborhood Ward 005/Neighborhood Block 006, Babakan, Central Bogor City, Bogor, as **Petitioner XIV**;

XV. **Marwan Batubara**, Indonesian Citizen, Entrepreneur, Jalan Depsos I Number 21, Neighborhood Ward 001, Bintaro, Pesanggrahan, South Jakarta, as **Petitioner XV**;

XVI. **Drs. Fahmi Idris, MH**, Indonesian Citizen, Jalan Mampang Prapatan IV/20, Neighborhood Ward 015/Neighborhood Block 002 Tegal Parang, Mampang Prapatan, South Jakarta, as **Petitioner XVI**;

XVII. **Moch. Iqbal Sullam**, Indonesian Citizen, Private Person, Jalan Petojo Sabangan V Number 10, Neighborhood Ward 004/Neighborhood Block 004, Petojo Selatan, Gambir, Central Jakarta, as **Petitioner XVII**;

XVIII. **Drs. H. Ichwan Sam**, Indonesian Citizen, Lecturer, Patriajaya Complex Block A Number 90B Neighborhood Ward 002/Neighborhood Block 013, Jati Rahayu, Pondok Melati, Bekasi City, West Java, as **Petitioner XVIII**;

XIX. **Ir. H. Salahuddin Wahid**, Indonesian Citizen, Jalan Irian Jaya 10 Tebu Ireng, Neighborhood Ward 11/Neighborhood Block 009, Jombang, East Java, as **Petitioner XIX**;

XX. **Nirmala Chandra Dewi M, SH**, Indonesian Citizen, Entrepreneur, Jalan Cemara Number 21, Neighborhood Ward 003/Neighborhood Block 003, Gondangdia, Menteng, Central Jakarta, as **Petitioner XX**;

XXI. **HM. Ali Karim OEI, SH**, Indonesian Citizen, Entrepreneur, Jalan Duri Mas Raya I/221 Neighborhood Ward 003/Neighborhood Block 010, Duri Kepa, Kebon Jeruk, West Jakarta, as **Petitioner XXI**;

XXII. **Adhie M. Massardi**, Indonesian Citizen, Private Employee, Pondok Timur Mas A Number 22, Neighborhood Ward 009/Neighborhood Block 013, South Bekasi, Bekasi City, as **Petitioner XXII**;

XXIII. **Ali Mochtar Ngabalin**, Indonesian Citizen, Private Employee, Jalan Menteng Raya Number 58 Neighborhood Ward 001/Neighborhood Block 009, Kebon Sirih, Menteng, Central Jakarta, as **Petitioner XXIII**;

XXIV. **Hendri Yosodiningrat, SH**, Indonesian Citizen, Advocate, Jalan Margasatwa Raya, Number 888 HY Pondok Labu, Cilandak, South Jakarta, as **Petitioner XXIV**;

XXV. **Laode Ida**, Indonesian Citizen, Member of the Regional Representatives' Council of the Republic of Indonesia (DPD RI), Jalan Batas Barat III Number 58, Neighborhood Ward 006/Neighborhood Block 003, Kalisari, Pasar Rebo, East Jakarta, as **Petitioner XXV**;

XXVI. **Sruni Handayani**, Indonesian Citizen, Private Employee, Jalan Cianjur Number 10 Neighborhood Ward 007/Neighborhood Block 004, Menteng, Central Jakarta, hereinafter referred to as Petitioner XXVI;

XXVII. **Juniwati T. Maschun S**, Indonesian Citizen, Member of the Regional Representatives' Council, Jalan Kolonel Sugiono Block D/17, Duren Sawit, East Jakarta, as **Petitioner XXVII**;

XXVIII. **Nuraiman**, Indonesian Citizen, University Student, Kedaung Hijau Blik D 11/43 Neighborhood Ward 001/Neighborhood Block 005, Kedaung Village, Pamulang, South Tangerang, as **Petitioner XXVIII**;

XXIX. **Sultana Saleh**, Indonesian Citizen, Jalan Kebon Jahe III/2 Neighborhood Ward 002/Neighborhood Block 001, Petojo Selatan, Gambir, Central Jakarta, as **Petitioner XXIX**;

XXX. **Marlis**, Indonesian Citizen, Entrepreneur, Jalan Kramat Pulo GG, Neighborhood Ward 002/Neighborhood Block 003, Kramat, Senen, Central Jakarta, as **Petitioner XXX**;

XXXI. **Fauziah Silvia Thalib**, Indonesian Citizen, Jalan Tamansari IV Number 33 Neighborhood Ward 001/Neighborhood Block 003, Maphar, Tamansari, West Jakarta, as **Petitioner XXXI**;

XXXII. **King Faisal Sulaiman, SH. LL.M**, Indonesian Citizen, Lecturer at Faculty of Law of Khairun University of Ternate, having his address at Jalan Pertamina Gambesi Ternate North Maluku Province, as **Petitioner XXXII**;

XXXIII. **Soerasa, BA**, Indonesian Citizen, Journalist, Jalan Empang Bahagia, Neighborhood Ward 009/Neighborhood Block 006, Jelambar, Grogol, West Jakarta, as **Petitioner XXXIII**;

XXXIV. **Mohammad Hatta**, Indonesian Citizen, Employee, Jalan Empang Bahagia, Neighborhood Ward 004/Neighborhood Block 002, Petukangan Utara, Pesanggrahan, South Jakarta, as **Petitioner XXXIV**;

XXXV. **M. Sabil Raun**, Indonesian Citizen, Journalist, GG. Bahasawan, Neighborhood Ward 003/Neighborhood Block 007, Kebon Kacang, Tanah Abang, Central Jakarta, as **Petitioner XXXV**;

XXXVI. **Edy Kuscahyanto, S.SI**, Indonesian Citizen, Employee, Jalan Danau Banggaibaiba D II Number 57, Neighborhood Ward 004, Bendungan Hilir, Tanah Abang, Central Jakarta, as **Petitioner XXXVI**;

XXXVII. **Yudha Ilham, SH**, Indonesian Citizen, Entrepreneur, Jalan Kapten Baharudin Neighborhood Ward 001/Neighborhood Block 004, Cianjur, as **Petitioner XXXVII**;

XXXVIII. **Joko Wahono**, Indonesian Citizen, private person, Kaliwangan, Temon Wetan, Neighborhood Ward 025/Neigborhood Block 003, Kulon Progo Yogyakarta, as **Petitioner XXXVIII**;

XXXIX. **Dwi Saputro Nugroho**, Indonesian Citizen, Private Person, Jalan Bumi Pratama Timur, B Block R/7 Neighborhood Ward 007/Neighborhood Block 006 Dukuh, Kramat jati, East Jakarta, as **Petitioner XXXIX**;

XL. **A.M Fatwa**, Indonesian Citizen, Jalan Kramat Pulo Gundul Neighborhood Ward 002/Neighborhood Block 009, Tanah Tinggi, Johar Baru, Central Jakarta, as **Petitioner XL**;

XLI. **Hj. Elly Zanibar Madjid**, Indonesian Citizen, Entrepreneur, Bilimun Block IV/12, Neighborhood Ward 008/Neighborhood Block 10, Pondok Kelapa, Duren Sawit, East Jakarta, as **Petitioner XLI**;

XLII. **Jamilah**, Indonesian Citizen, Employee, Jalan Tamansari III Number 31 Neighborhood Ward 004/Neighborhood Block 003, Maphar Taman Sari, West Jakarta, as **Petitioner XLII**;

In this case by virtue of Special Power of Attorney dated March 29, 2012, granting authority to 1) **Dr. Syaiful Bakhri, S.H., M.H.,** 2) **Drs. Muchtar Luthfi,**

S.H. Sp.N., 3) **Zulhendri Hasan, S.H., M.H.,** 4) **Dwi Putri Cahyawati, S.H., M.H.,** 5) **Najamudin Lawing, S.H. MH.,** 6) **Maryogi, S.H., M.H.,** 7) **Hendra Muchlis, S.H., M.H.,** 8) **Umar Husin, S.H., M.H.,** 9) **Feri Anka Sugandar, S.H., M.H.,** 10) **Jurizal Dwi, S.H., M.H.,** 11) **Noor Ansyari, S.H.,** 12) **Jaja Setiadijaya, S.H.,** 13) **Sutedjo Sapto Jalu, S.H.,** 14) **Ibnu Sina Chandranegara, S.H.,** 15) **Bachtiar, S.H.,** and 16) **Umar Limbong, S.H.,** all being the Advocates and General Defense Counsels associated in the TEAM OF LAW AND HUMAN RIGHTS COUNCIL OF THE CENTRAL EXECUTIVE BOARD OF MUHAMMADIYAH, having chosen their legal domicile at Jalan Menteng Raya Number 62, Central Jakarta, in this case either jointly or severally acting for and on behalf of the authorizers;

All being referred to as --- **the Petitioners**;

[1.3] Having read the petition of the Petitioners;

Having heard the statements of the Petitioners;

Having examined the evidence of the Petitioners;

Having heard and read the written statement of the Government;

Having heard the statements of the experts of the Petitioners and the Government as well as the witnesses of the Government;

Having read the written conclusions of the Petitioners and the Government;

2. FACTS OF THE CASE

[2.1] Whereas the Petitioners have filed the petition dated March 29, 2012, subsequently registered with the Registrar's Office of the Constitutional Court (hereinafter referred to as the Registrar's Office of the Court) on March 29, 2012, based on Certificate of Petition File Receipt Number 112/PAN.MK/2012 and registered in the Registry of Constitutional Cases on April 10, 2012 under Number 36/PUU-X/2012, which was revised and received at the Registrar's Office of the Court on April 30, 2012, which principally describes the following matters:

I. AUTHORITIES OF THE CONSTITUTIONAL COURT

1. Whereas Law Number 22 Year 2001 concerning Oil and Natural Gas (Oil and Gas Law) was formally and judicially reviewed by the Court in advance, as set out in Decision of the Constitutional Court Number 002/PUU-I/2003 and Decision of the Constitutional Court Number 20/PUU-V/2005;

2. The injunctions of formal and judicial review of case Number 002/PUU-I/2003 are to reject the Petitioners' petition for judicial review and to decide

upon Article 12 paragraph (3) insofar as it contains the phrase "**which is authorized**"; - Article 22 paragraph (1) insofar it contains the word "**maximum**"; - Article 28 paragraphs (2) and (3) which reads "(2) The prices of Oil Fuel and Natural Gas shall be entrusted to the fair and reasonable business competition mechanism; (3) The implementation of the pricing policy as referred to in paragraph (2) does not reduce the social responsibility of the Government for specific community groups" of Law Number 22 Year 2001 concerning Oil and Natural Gas (State Gazette of the Republic of Indonesia Year 2001 Number 136, Supplement to State Gazette of the Republic of Indonesia Number 4152) are inconsistent with the 1945 Constitution of the State of the Republic of Indonesia; To declare that Article 12 paragraph (3) insofar as it contains the phrase "**which is authorized**", Article 22 paragraph (1) insofar as it contains the word "**maximum**", and Article 28 paragraphs (2) and (3) of Law Number 22 Year 2001 concerning Oil and Natural Gas (State Gazette of the Republic of Indonesia Year 2001 Number 136, Supplement to State Gazette of the Republic of Indonesia Number 4152) have no binding legal effect"; and based on decision Number 20/PUU-V/2005, the Court declared that the petition cannot be accepted;

3. Whereas previously in case Number 002/PUU-I/2003, the Petitioners petitioned for review of the Oil and Gas Law in its entirety, nevertheless, in fact, the norms decided upon reduced into Article 12 paragraph (3) insofar

as it contains the phrase “**which is authorized**”, Article 22 paragraph (1) insofar it contains the word “**maximum**”, and Article 28 paragraphs (2) and (3) of the Oil and Gas Law. Although the constitutional reasons or requirements proposed the previous Petitioners are similar to those of the present Petitioners, namely Article 28C paragraph (2), Article 28D paragraph (1), Article 28H paragraph (1) and Article 33 paragraphs (2) and (3) of the 1945 Constitution; the norms reviewed are different with those of the present Petitioners, namely **Article 1 sub-articles 19 and 23, Article 3 sub-article b, Article 4 paragraph (3), Article 6, Article 9, Article 10, Article 11 paragraph (2), Article 13 and Article 44** of the Oil and Gas Law;

4. Similar to the previous Petitioners in case Number 20/PUU-V/2005, although with similar touch stones, namely Article 11 paragraph (2), Article 20 and Article 33 paragraphs (2) and (3) of the 1945 Constitution to those of the present Petitioners, there remains different test cases, namely **Article 28C paragraph (2), Article 28D paragraph (1) and Article 28H paragraph (1) of the 1945 Constitution**;

5. Whereas, in addition thereto, although there have been similar test cases in its entirety to those of case Number 20/PUU-V/2005, the Court have declared it cannot be accepted because the Petitioners in case Number 20/PUU-V/2005 did not have legal standing, and therefore the

examination of the case *a quo* cannot be said to be *nebis in idem* since the substance of the case has not been decided upon;

6. Whereas the authorities of the Constitutional Court in examining, hearing and deciding upon the case of judicial review of Law against the 1945 Constitution of the State of the Republic of Indonesia (hereinafter referred to as the 1945 Constitution) are regulated in (a) Article 24C paragraph (1) of the 1945 Constitution; (b) Article 10 paragraph (1) sub-paragraph a of Law Number 24 Year 2003 concerning the Constitutional Court; (c) Article 29 paragraph (1) sub-paragraph a of Law Number 48 Year 2009 concerning the Judicial Power; and (d) Regulation of the Constitutional Court Number 06/PMK/2005 concerning Guidelines on Legal Proceedings in Judicial Review of Law;

7. Whereas Article 24C paragraph (1) of the 1945 Constitution states that "*The Constitutional Court shall have the authority to hear cases at the first and final level, the decisions of which shall be final, in conducting judicial review on laws against the Constitution, to decide upon disputes concerning to the authorities of state institutions whose authorities are granted by the Constitution, to make decisions on the dissolution of political parties, and to decide upon disputes concerning the results of general elections.*";

8. Whereas Article 10 paragraph (1) sub-paragraph a of Law Number 24 Year 2003 concerning the Constitutional Court states that "*The Constitutional Court shall have authority to hear cases at the first and final level, the decisions of which shall be final, to review laws against the 1945 Constitution*";

9. Whereas Article 29 paragraph (1) sub-paragraph a of Law Number 48 Year 2009 concerning Judicial Power states that "*The Constitutional Court shall have authority to hear cases at the first and final level, the decisions of which shall be final, to review laws against the 1945 Constitution*";

10. Whereas the Constitutional Court itself has Regulation of the Constitutional Court Number 06/PMK/2005 concerning Guidelines on Legal Proceedings in Judicial Review of Law. It is evident that the Constitutional Court has authority to review the Oil and Gas Law against the 1945 Constitution of the State of the Republic of Indonesia.

II. LEGAL STANDING OF THE PETITIONERS

1. Whereas pursuant to Article 51 paragraph (1) of Law Number 24 Year 2003 concerning the Constitutional Court as well as its Elucidation, the parties which may file a petition for judicial review of Law against the 1945 Constitution shall be those who consider that their constitutional rights

and/or authority granted by the 1945 Constitution have been impaired by the coming into effect of a Law, namely:

a. *Individual Indonesian citizens (including groups of people having a common interest);*

b. *Customary law community units insofar as they are still in existence and in line with the development of the communities and the principle of the Unitary State of Republic of Indonesia as provided for in Law;*

c. *Public or private legal entities; or*

d. *State institutions.*

2. Whereas the Elucidation of Article 51 paragraph (1) of Law Number 24 Year 2003 concerning the Constitutional Court states as follows "*"Constitutional rights" shall be the rights provided for in the 1945 Constitution of the State of the Republic of Indonesia"*;

3. Whereas based on Decision of the Constitutional Court Number 006/PUU-III/2005 dated May 31, 2005 and Decision of the Constitutional Court Number 11/PUU-V/2007, as well as subsequent decisions, the Court is of the opinion that the impairment of constitutional rights and/or authorities

as intended in Article 51 paragraph (1) of Law Number 24 Year 2003 concerning the Constitutional Court must meet five requirements, namely:

a. The existence of constitutional rights and/or authority of the Petitioners granted by the 1945 Constitution;

b. The Petitioners consider that such constitutional rights and/or authority have been impaired by the coming into effect of the law petitioned for review;

c. The impairment of such constitutional rights and/or authority must be specific and actual or at least potential in nature which, pursuant to logical reasoning, can be assured of occurring;

d. There is a causal relationship (*causal verband*) between the intended impairment and the coming into effect of the law petitioned for review;

e. It is likely that with the granting of the Petitioners' petition, the constitutional impairment argued by the Petitioners will not or will no longer occur;

4. Whereas such five requirements as intended above have been explained again by the Court based on Decision of the Court Number 27/PUU-VII/2009 in the formal review of the Second Amendment to the Supreme

Court Law (page 59), which states, "*based on the practice of the Court (2003-2009), individual Indonesian Citizens, especially tax payers; vide Decision Number 003/PUU-I/2003), various associations and NGOs concerned about Law for public interest, legal entities, Regional Governments, state institutions, and others which by the Court are considered to have legal standing to file a judicial review petition, both formal and substantive review of law under the 1945 Constitution".*

5. Whereas **Petitioner I** up to **Petitioner X** are legal subjects which have legal entities in Indonesia, which generally aim at materializing the forming of civil society order or the true Islam community (*al-mujtama' al-madani*), implemented through various efforts of guidance, development, advocacy and social renewal in the sectors of education, health services, social services, people empowerment, national political role and so on. The submission of petition for judicial review of the articles *a quo* of the Oil and Gas Law constitutes the organizational mandate in making efforts to materialize the civil society or the true Islam community by constitutional enforcement. This is reflected in the Articles of Association and/or the deeds of establishment. (vide exhibit P-1 up to exhibit P-10);

6. Whereas organizations which may act to represent public interest are organizations which meet the requirements stipulated in various laws and regulations and jurisprudence, namely:

a. in the form of legal entities or foundations;

b. the articles of association of the relevant organizations expressly state the purpose of their establishment;

c. they have carried out their activities in accordance with their articles of association.

7. Whereas **Petitioner XI** up to **Petitioner XLII** are Indonesian citizens in their capacity as individual Petitioners whose constitutional rights are granted by the 1945 Constitution, including, among other things, but not limited to:

   a. **Article 28D paragraph (1) of the 1945 Constitution** "***Every person shall have the right to the recognition, guarantee, protection and legal certainty of just laws as well as equal treatment before the law***";

   b. **Article 28C paragraph (2) of the 1945 Constitution** "***Every person shall have the right to improve him/herself in striving for his/her rights collectively for building his/her society, nation, and state***".

8. Whereas in addition to Article 28D paragraph (1) above, the Petitioners also have other constitutional rights as referred to in:

   a. **<u>Article 11 paragraph (2) of the 1945 Constitution</u>** **"*The President in concluding other international treaties which bring an extensive and fundamental impact on the life of the people related to state financial burden, and/or requiring amendments or formulation of laws, must obtain the approval of the People's Legislative Assembly*"**

   b. **<u>Article 20A paragraph (1) of the 1945 Constitution</u>** **"*The People's Legislative Assembly shall have legislative, budgetary and oversight functions*."**

   c. **<u>Article 28H paragraph (1) of the 1945 Constitution</u>** **"*Every person shall have the right to live a physically and mentally prosperous life, to have residence, and to obtain a proper and healthy living environment as well as to obtain health services*".**

   d. **<u>Article 28I paragraph (4) of the 1945 Constitution</u>** **"*The protection, Promotion, and enforcement of the human rights are the responsibility of the state, particularly the government*"**

e. <u>Article 33 paragraphs (2) and (3) of the 1945 Constitution</u>

(2) Production branches which are important for the state and which affect the livelihood of the public shall be controlled by the state;

(3) Land and water and the natural resources contained therein shall be controlled by the state and shall be used for the greatest prosperity of the people".

9. Whereas the Petitioners are individuals and the private legal entities whose constitutional rights are impaired by the coming into effect of **Article 1 sub-articles 19 and 23, Article 3 sub-article b, Article 4 paragraph (3), Article 6, Article 9, Article 10, Article 11 paragraph (2), Article 13, and Article 44** of the Oil and Gas Law which read as follows:

a. **Article 1 sub-article 19 of the Oil and Gas Law: "*Cooperation Contract shall be a Production Sharing Contract <u>or any other form of cooperation contract</u> in Exploration and Exploitation activities, which is more favorable to the State and the whose results shall be used for the greatest prosperity of the people*".**

b. **Article 1 sub-article 23 of the Oil and Gas Law: "*Executive Agency shall be an agency established to control Upstream Oil and Natural Gas Business Activities*";**

c. **Article 3 sub-article b of the Oil and Gas Law: "*The Implementation of Oil and Natural Gas Business Activities shall be aimed at:…(b) Ensuring effective implementation and control of accountable processing, transportation, storage and trade activities <u>implemented through a reasonable, fair and transparent business competition mechanism</u>*"**

d. **Article 4 paragraph (3) of the Oil and Gas Law: "*Government as the holder of Mining Authorization shall establish the Executive Agency as provided for in Article 1 sub-article 23*"**

e. **Article 6 of the Oil and Gas Law: "*(1) The Upstream Business Activities as intended in Article 5 sub-article 19 shall be conducted <u>and controlled through the Cooperation Contract</u> as intended in Article 1 sub-article 19; (2) The Cooperation Contract as referred to in paragraph (1) shall at least contain the following requirements: (a). Ownership of natural resources shall remain in the hand of the Government up to the delivery point; (b). Operational management shall be controlled by the Executive Agency; (c). all capital and risks*

***shall be borne by Business Entities or Permanent Establishments*”.**

f. **Article 9 of the Oil and Gas Law: *“(1) The Upstream and Downstream Business Activities as intended in Article 5 Sub-article 2 <u>may</u> be conducted by: a. State-Owned Enterprises; b. Region-Owned Enterprises; c. Cooperatives; micro businesses; and private business entities; (2) Permanent Establishments may only conduct Upstream Business Activities;*”.**

g. **Article 10 of the Oil and Gas Law: “*(1) Business Entities or Permanent Establishments conducting upstream business activities shall be prohibited from conducting Downstream Business Activities; (2) Business Entities conducting Downstream Business Activities may not carry out Upstream business activities*”.**

h. **Article 11 paragraph (2) of the Oil and Gas Law: “*Every Cooperation Contract which has been signed shall be notified in writing to the People’s Legislative Assembly of the Republic of Indonesia*”.**

i. **Article 13 of the Oil and Gas Law: *"(1) Only 1 (one) operational area shall be provided for any Business Entity or Permanent Establishment; (2) in the event of a business entity or Permanent Establishment operating several operational areas, a separate legal entity must be formed for each operational area."***

j. **Article 44 of the Oil and Gas Law: "*(1) The Supervision over the implementation of Cooperation Contract of Upstream Business Activities as intended in Article 5 sub-article 1 shall be performed by the Executive Agency as intended in Article 4 paragraph (3); (2). The Executive Agency as referred to in paragraph (1) shall have the function of supervising Upstream Business Activities so that the exploitation of Oil and Gas resources of the state can provide maximum benefits and revenues for the state for the greatest prosperity of the people.; (3) The Executive Agency as referred to in paragraph (1) shall have the following duties: a. giving considerations to the Minister for his/her policies on the preparation and offering of Operational Areas as well as Cooperation Contracts; b. signing Cooperation Contracts; c. assessing and presenting the plans of field development to be produced for the first time in an Operational Area to the Minister for approval; d.*

***approving the plans of field development other than those referred to in sub-paragraph c; e. approving work plans and budgets; f. monitoring and reporting the implementation of Cooperation Contracts to the Minister; g. appointing sellers of state's share of Petroleum and/or Natural Gas which may generate maximum profit for the state*.”**

10. Whereas the forms of constitutional impairments which are suffered or potentially suffered by the Petitioners are among other things as follows:

    a. Whereas the meanings of norms contained in **Article 1 sub-articles 19 and 23, Article 3 sub-article b, Article 4 paragraph (3), Article 6, Article 9, Article 10, Article 11 paragraph (2), Article 13 and Article 44 of the Oil and Gas Law**, **are ambiguous and have multiple interpretations**, and therefore they may lead to legal uncertainty and reduction of the constitutional rights of the Petitioners in obtaining the guarantee and legal protection as intended in Article 28D paragraph (1) of the 1945 Constitution;

    b. Whereas the provisions of **Article 1 sub-article 19 and Article 6 of the Oil and Gas Law** have clearly **degraded the state's dignity**, since such provisions give the opportunity for using cooperation contract system in the management of oil and gas in

which, in general, such contracts always refer to International arbitration to examine and hear disputes, hence as a legal consequence, in the event that the state loses, it means the loss of Indonesian people and that is the point of degradation of the state's dignity. Therefore, the constitutional rights of the Petitioners have become neglected and this is inconsistent with Article 28C paragraph (2), Article 28D paragraph (1), Article 28I paragraph (4) and Article 33 paragraphs (1), (2) and (3) of the 1945 Constitution;

c. Whereas the existence of **Article 11 paragraph (2) of the Oil and Gas Law has evidently understated the function of the People's Legislative Assembly of the Republic of Indonesia (DPR-RI) as the representative institution of the people *in casu*** the Petitioners, either in legislative, budgetary or oversight function implementation level. This clearly indicates that the provision of the Article *a quo* has highly impaired the constitutional rights of the Petitioners as intended in Article 1 paragraph (2), Article 11 paragraph (2) and Article 20A of the 1945 Constitution;

d. Whereas **when the petition** of the Petitioners **is granted**, the People's Legislative Assembly of the Republic of Indonesia as the representation of the Petitioners certainly has the legal basis to perform its functions as intended in Article 20A of the 1945

Constitution, so that the constitutional impairments of the Petitioners will no longer occur.

e. Whereas the coming into effect of **Article 1 sub-articles 19 and 23, Article 3 sub-article b, Article 4 paragraph (3), Article 6, Article 9, Article 10, Article 11 paragraph (2), Article 13 and Article 44** of Law Number 22 year 2001 concerning Oil and Natural Gas have evidently **reduced the people's ownership of natural resources contained in Indonesian land and waters which are still controlled by the government**. Accordingly, the purpose of "shall be used for the greatest prosperity of the people" has become unfulfilled, or in other words, the rights of the Petitioners to enjoy and obtain the benefits of natural resources contained in land and waters which shall be controlled by the state are not properly obtained by the Petitioners as mandated in Article 33 paragraphs (2) and (3) of the 1945 Constitution;

f. Whereas the Petitioners believe that even though the Court has annulled several norms of the Oil and Gas Law under the Court's Decision Number 002/PUU-I/2003, it **does not have any positive impacts** on the Petitioners and the Indonesian people as a whole, since the Government frequently makes regulations under Laws and policies on the liberalization of Oil and Gas Industry which are

obviously inconsistent with the substantive meaning of Decision of the Court Number 002/PUU-I/2003, so that it extremely impairs the constitutional rights of the Petitioners as idealized by Article 28C paragraph (2) and Article 33 paragraphs (2) and (3) of the 1945 Constitution.

11. Whereas based on the description above, the Petitioners clearly have legal standing as Petitioners in the judicial review of the Oil and Gas Law and they **have legal relationship** *(causal verband)* particularly for filing the petition for judicial review of Article 1 sub-articles 19 and 23, Article 3 sub-article b, Article 4 paragraph (3), Article 6, Article 9, Article 10, Article 11 paragraph (2), Article 13 and Article 44 of the Oil and Gas Law against Article 28D paragraph (1), Article 11 paragraph (2), Article 20A paragraph (1), Article 28C paragraph (2), Article 28H paragraph (1), Article 28I paragraph (4), Article 33 paragraphs (2) and (3) of the 1945 Constitution;

12. Whereas based on the description above, all the Petitioners clearly have fulfilled the quality and the capacity as Petitioners for filing the petition for judicial review of Law against the 1945 Constitution as provided for in Article 51 sub-article c of Law Number 24 Year 2003 concerning the Constitutional Court as well as a number of decisions of the Constitutional Court providing the explanation of the requirements for becoming Petitioners in judicial review of a Law against the 1945 Constitution.

Therefore, all Petitioners also clearly have the legal right and interest to represent public interest for filing the petition for judicial review of the Oil and Gas Law against Article 28D paragraph (1), Article 11 paragraph (2), Article 20A paragraph (1), Article 28C paragraph (2), Article 28H paragraph (1), Article 28 paragraph (4), Article 33 paragraphs (2) and (3) of the 1945 Constitution;

III. REASONS AND SUBSTANCE OF THE PETITION FOR JUDICIAL REVIEW

The people of Indonesia have legal goals (*rechtsidee*) in living their social life and devoting their lives to the nation and country. These legal goals of the people of Indonesia serve as the guide for the direction of the life of the people of Indonesia. The Preamble to the 1945 Constitution is the legal goal of the people of Indonesia to develop an independent, sovereign, just and prosperous state. The Preamble to the 1945 Constitution contains *Pancasila* which constitutes the source of all sources of law in Indonesia, namely (1) Belief in The One and Only God, (2) just and civilized Humanity, (3) the Unity of Indonesia, (4) Democracy guided by the inner wisdom of deliberations amongst representatives, (5) social Justice for all the people of Indonesia. The 1945 Constitution is the constitution for the people of Indonesia which is inspired by *Pancasila* as the fundamental norm of the constitution itself. The formulation of law from

the perspective of Indonesia is the translation of *Pancasila* into the laws and regulations. Therefore, any Law must be inspired by *Pancasila*; any Law which is not inspired by Pancasila has betrayed the values of religion, nationalism, legal unity in diversity and the value of social justice for all the people of Indonesia.

Since the beginning of its formulation the Oil and Gas Law has reaped the controversy for not being inspired by *Pancasila*. When the reform era began, one of the reform agendas which also effected the political configuration in the formulation of the Oil and Gas Law was to meet international pressure to reform the energy sector, particularly Oil and Gas. The energy sector reform concerns, among other things, (1) reform of energy price and (2) institutional reform of energy management. The energy reform is focused not only on the effort to abolish Oil Fuel subsidies, but it is also aimed at giving a big opportunity for international corporations to penetrate the oil and gas business in Indonesia.

One of the international pressure efforts through the Memorandum of Economic and Finance Policies (IMF Letter of Intent) dated January 20, 2000 was concerning monopoly of Oil and Gas Industry implementation which at that time was accused of having led to inefficiency and rampant corruption. Therefore, one of the factors stimulating of the formulation of the Oil and Gas Law in 2001 was to accommodate foreign pressures and

even foreign interests. Hence, the monopoly of Oil and Gas management through the State-Owned Enterprise (Pertamina) which under Law Number 8 Year 1971 became the symbol of state institution in oil and gas management shifted toward the concept of corporate oligopoly due to the formulation of the Oil and Gas Law. International interests which penetrated each political consideration adopted in the Oil and Gas Law made the formulation of the Oil and Gas Law defective, even though it was considered to have be made through the designated formal procedure, when the intention of the formulation of the Oil and Gas Law was to injure the mandate of Article 33 of the 1945 Constitution. Accordingly, the state control over production branches which are important for the livelihood of the public has become a mere constitutional illusion;

In addition, the Oil and Gas Law has been legally defective since it was made or it may even be considered **fake** since in its *in view of* consideration section, it states that the Oil and Gas Law refers to "**Article 33 paragraphs (2) and (3) of the 1945 Constitution <u>which has been amended in the second amendment to the 1945 Constitution</u>".** In fact, Article 33 paragraphs (2) and (3) has never been amended, and even there was the **Addition of Article 33 paragraphs (4) and (5) in the fourth amendment to the 1945 Constitution.**

Article 1 sub-articles 19 and 23, Article 3 sub-article b, Article 4 paragraph (3), Article 6, Article 9, Article 10, Article 13 and Article 44 of Law Number 22 Year 2001 concerning Oil and Natural Gas are inconsistent with Article 33 paragraphs (2) and (3) of the 1945 Constitution

Article 11 paragraph (2) of Law Number 22 Year 2001 concerning Oil and Natural Gas is inconsistent with Article 1 paragraph (2), Article 11 paragraph (2), Article 20A and Article 33 paragraph (3) of the 1945 Constitution

1. Whereas since the coming into effect of Law Number 22 Year 2001 concerning Oil and Natural Gas, the Oil and Gas management has been using the Cooperation Contract (*KKS*) System. This constitutes an open system which has been adopted since the Mining Authorization was delegated to the Government *cq*. the Minister of Energy and Mineral Resources and which has become the basis for the implementation of the national oil and gas management as stated in Article 6 of the Oil and Gas Law

   (1) The Upstream Business Activities as intended to in Article 5 sub-article 19 shall be conducted and controlled through the Cooperation Contract as intended in Article 1 sub-article (19);

(2) The Cooperation Contract as referred to in paragraph (1) shall at least contain the following requirements : (a). ownership of natural resources remains in the hand of the Government up to the delivery point; (b). operational management shall be controlled by the Executive Agency; (c). all capital and risks shall be borne by Business Entities or Permanent Establishments",

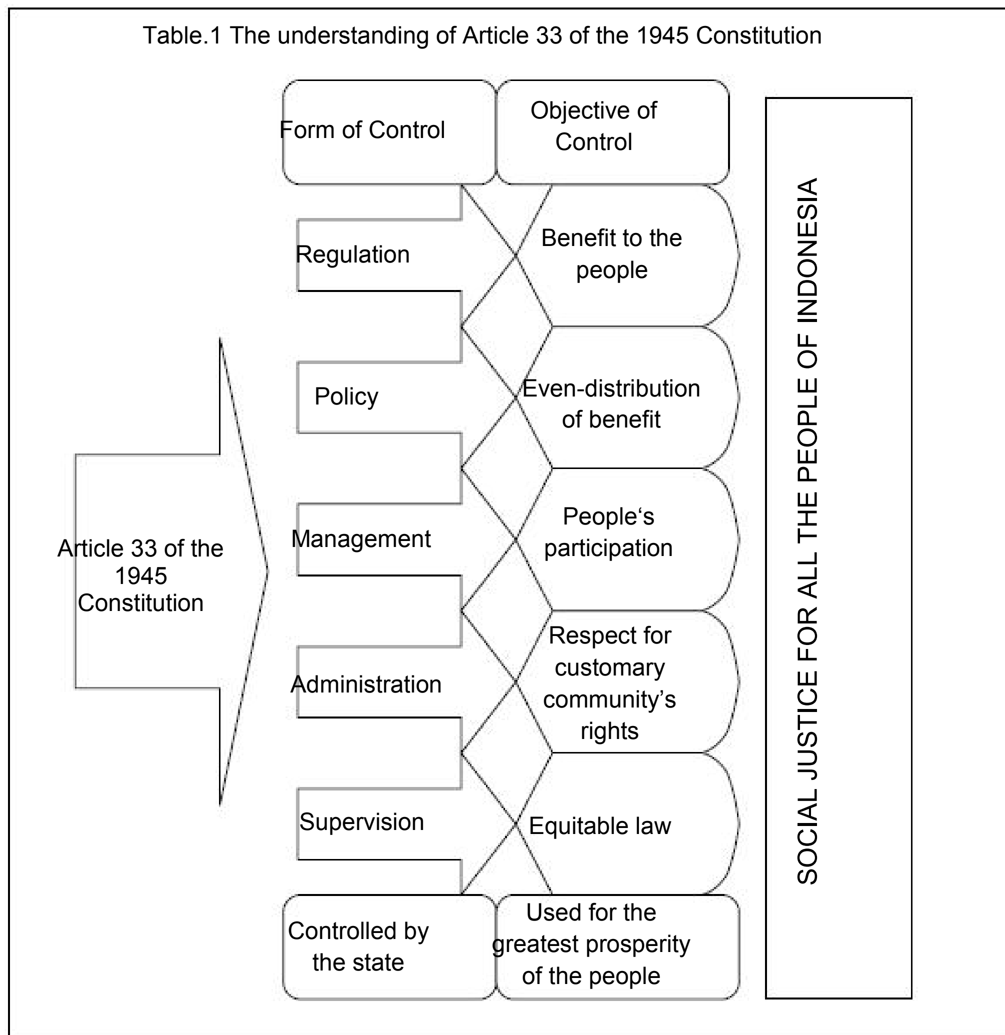
Subsequently, the definition is being provided for in Article 1 sub-article 19 of the Oil and Gas Law. **"*Cooperation Contract shall be a Production Sharing Contract <u>or any other form of cooperation contract</u> in Exploration and Exploitation activities, which is more favorable to the State and the results shall be used for the greatest prosperity of the people*".**

The phrase **"*or any other form of cooperation contract" in Article*** 1 sub-article 19 of the Oil and Gas Law has led to legal uncertainty in the understanding of such other contracts. This is obviously inconsistent with Article 28D paragraph (1) of the 1945 Constitution. With the multi-interpreted phrase, a cooperation contract may contain clauses which do not reflect the greatest prosperity of the people as mandated in Article 33 paragraphs (2) and (3) of the 1945 Constitution. Moreover, the phrase "***<u>or</u>***

<u>controlled through the Cooperation Contract</u>" indicates the use of multi-interpreted contract system in controlling the national oil and gas management. In this condition, the general principles of contract law applicable in the contract law will be inherent, namely the balance and proportionality principles to the **<u>state</u>**. Herlien Budiono stated that the balance principle is (i) ethical principle, so that the share of burden is balanced, and (ii) the balance principle is juridical and justice principle, and therefore, when a construction of contract is unbalanced for the parties, such contract may be deemed unbalanced. In his dissertation, Sogar Simamora stated that the proportionality principle is the existence of equal obligations. This condition clearly **degrades the state's dignity** because the parties entering into contract in the cooperation contract referred to in the Oil and Gas Law are the Executive Agency for Upstream Oil and Gas Business Activities on behalf of the state and a corporation or a private corporation. Therefore, in the event of disputes, the parties entering into such contract generally always refer to International arbitration to examine and hear disputes, and as the legal consequence thereof, the state's loss means the loss of Indonesian people and that is the point of degradation of the state's dignity. Therefore, the party representing Indonesia should be a State-Owned Enterprise, such as Pertamina,

but it should not be a single enterprise. This concept sufficiently reflects the state control of the production branches which are important for the livelihood of the public as set forth in Article 33 paragraphs (2) and (3) of the 1945 Constitution. In broad outlines, the Court states that Article 33 paragraphs (2) and (3) concerning the definition of "*controlled by the state*" must be defined in such a manner that it includes control by the state in the broad sense of the term based on and derived from the concept of sovereignty of the Indonesian people over resources "*land, waters and the natural resources contained therein*", including the definition of public ownership by the collective people over the intended resources. The people are collectively construed by the 1945 Constitution as giving mandate for the state to provide policies (*beleid*) and administration measures (*bestuurdaad*), regulation (*regelendaad*), management (*beheersdaad*) and supervision (*toezichthoudensdaad*) for the greatest prosperity of the people. Furthermore, according to the Court, the production branches must be controlled by the state if: "(*i) the production branches are important for the state and for the livelihood of the public; or (ii) important for the state but not for the livelihood of the public; or (iii) not important for the state but important for the livelihood of the public*". To this date, the Oil and Gas management under the Law *a*

quo does not meet the elements of policy (*beleid*), administration measures (*bestuurdaad*), regulation (*regelendaad*), management (*beheersdaad*) and supervision (*toezichthoudensdaad*). The five provisions constitute a unity so that the Petitioners' right to the fulfillment of the livelihood which also constitutes the livelihood of the people of Indonesia have been impaired since the contract system does not meet the elements of policy (*beleid*), administration measures (*bestuurdaad*), regulation (*regelendaad*), management (*beheersdaad*) and supervision (*toezichthoudensdaad*). (table 1)



2. Whereas the establishment of the Executive Agency for Upstream Oil and Gas Business Activities (*BP Migas*) was under the instruction of Article 4 paragraph (3) of the Oil and Gas Law which states that ***"the Government as the holder of Mining Authorization shall <u>form</u> the Executive Agency as intended in Article 1 sub-article 23"*** makes the concept of Mining Authorization obscure (*obscuur*). This is because the Executive

Agency for Upstream Oil and Gas Business Activities has the duty to represent the state to sign contracts, to supervise and to control the reserve and the production of oil and gas as stated in Article 4 of the Oil and Gas Law that:

(1) ***The Supervision over the implementation of Cooperation Contract in Upstream Business Activities as intended in Article 5 sub-article 1 shall be performed by the Executive Agency as intended in Article 4 paragraph (3);***

(2) ***The Executive Agency as intended in paragraph (1) shall have the function of supervising Upstream Business Activities so that the exploitation of Oil and Gas owned by the state can provide maximum benefits and revenues for the state for the greatest prosperity of the people.;***

(3) ***The Executive Agency as intended in paragraph (1) shall have the following duties:***

a. ***giving considerations to the Minister for his/her policies on the preparation and offering of***

Operational Areas as well as Cooperation Contracts;

b. ***signing Cooperation Contracts***

c. ***assessing and presenting the plan of field development to be produced for the first time in an Operational Area to the Minister for approval;***

d. ***approving the plans of field development other than those referred to in point c;***

e. ***approving work plans and budgets;***

f. ***monitoring and reporting the implementation of Cooperation Contracts to the Minister;***

g. ***appointing sellers of the state's share of Petroleum and/or Natural Gas which may generate maximum profits for the state."***

These matters obviously reduce the meaning of the state in the phrase "controlled by the state" contained in Article 33 paragraph (2) and paragraph (3) of the 1945 Constitution. The system developed by Article 4 paragraph (3) and Article 44 of the Oil and

Gas Law makes the Executive Agency for Upstream Oil and Gas Business Activities as though it has the same position as the state. This is obviously different from the meaning of management as intended by Article 33 paragraph (2) and paragraph (3) of the 1945 Constitution. In addition, the Executive Agency for Upstream Oil and Gas Business Activities is not an operator (business entity), but rather, it is merely in the form of a State-Owned Legal Entity (known as *BHMN*). Accordingly, with its position, it cannot be directly involved in the oil and gas exploration and production activities. The Executive Agency for Upstream Oil and Gas Business Activities does not own oil wells, refineries, tankers, haul trucks and Public Gas Stations; it cannot sell government's share of oil, either and as a result, it cannot guarantee the security of domestic Oil Fuel/Gas Fuel supply. This proves that the existence of the Executive Agency for Upstream Oil and Gas Business Activities has disparaged the meaning of Article 33 paragraph (2) and paragraph (3) of the 1945 Constitution and it has caused the meaning of "controlled by the state" which has been interpreted and decided by the Court to become obscure since it does not meet the element of the state control that covers the functions of regulation, administration, control, and supervision as a whole, as it has become a merely constitutional illusion;

3. Whereas the position of the Executive Agency for Upstream Oil and Gas Business Activities (*BP Migas*) which represents the government in the mining authorization does not have any commissioners/supervisors, while the Executive Agency for Upstream Oil and Gas Business Activities is a Legal Entity (*BHMN*). This clearly has an impact on the exercise of unlimited power since this institution has become structurally flawed. This has an impact on the cost recovery having no clear acceptable threshold. The extremely great power will tend to corrupt and it was proven when the Audit Board's data of audit results indicated that during the 2000-2008 period, the potential state losses as a result of inaccurate cost recovery imposition in the oil and gas sector reached Rp345.996 trillion per year or 1.7 billion per day. In the audit of semester II-2010, the Audit Board discovered 17 cases of inaccurate cost recovery imposition which surely would cause no small state losses.

4. Whereas Article 3 sub-article b of the Oil and Gas Law states **"*The implementation of Oil and Natural Gas Business Activities shall be aimed at:.....*(b) *ensuring effective implementation and accountable processing, transportation, storage and trade activities implemented through a reasonable, fair and***

transparent business competition mechanism". This article indicates that even though the Court has decided Article 28 paragraph (2) concerning the setting of "**Oil Fuel Price and Gas Fuel Price is entrusted to a fair and reasonable business competition mechanism**", Article 3 sub-article b which constitutes the heart of the Law *a quo* has not been annulled at the same time under Court Decision Number 022/PUU-I/2003. Therefore, the Petitioners believe that the Court must annul the Article *a quo* in order to abolish the whole spirit of the Oil and Gas Law which accommodates the idea of oil and gas liberalization which is, of course, inconsistent with Article 33 of the 1945 Constitution paragraph (2) stating that *"production branches which are important for the state and which affect the livelihood of the public shall be controlled by the state"* and paragraph (3) stating that "*land and waters and the natural resources contained therein shall be controlled by the state and shall be used for the greatest prosperity of the people*";

5. Whereas Article 3 sub-article b of <u>the Oil and Gas Law</u> states **"*The implementation of Oil and Gas Business Activities shall be aimed at:.....*(b) *ensuring effective implementation and accountable processing, transportation, storage and trade implemented through a reasonable, fair and transparent***

business competition mechanism". This article indicates that even though the Court has decided Article 28 paragraph (2) concerning the determination of "**Oil Fuel Price and Gas Fuel Price is entrusted to a fair and reasonable business competition mechanism**", Article 3 sub-article b which constitutes the heart of the Law *a quo* has not been annulled at the same time under the Court Decision Number 022/PUU-I/2003. Therefore, the Petitioners believe that the Court must annul the Article *a quo* in order to abolish the whole spirit of the Oil and Gas Law which accommodates the idea of oil and gas liberalization which is absolutely inconsistent with Article 33 of the 1945 Constitution paragraph (2) stating that *"production branches which are important for the state and which affect the livelihood of the public shall be controlled by the state"* and paragraph (3) stating that "*land and waters and the natural resources contained therein shall be controlled by the state and shall be used for the greatest prosperity of the people*";

6. Whereas Article 9 of the Oil and Gas Law states that ***"(1) Upstream Business Activities and Downstream Business Activities as intended in Article 5 Sub-Article 2 <u>may</u> be conducted by: a. State-Owned Enterprises; b. Region-Owned Enterprises; c. Cooperatives; Small Businesses; and private***

companies; (2) Permanent Establishments may only conduct Upstream Business Activities;". The phrase "may" in Article 9 is clearly inconsistent with Article 33 paragraph (2) and paragraph (3), since this Article indicates that the State Owned-Enterprise only becomes a player in the oil and gas management. So, the State Owned-Enterprise must compete with its own country in order to manage oil and gas. Such construction can undermine the form of state control over natural resources which effect the livelihood of the public

7. Whereas Article 10 of the Oil and Gas Law states that ***"(1) Business Entities or Permanent Establishments conducting upstream business activities shall be prohibited from conducting Downstream Business Activities; (2) Business Entities conducting Downstream Business Activities may not conduct Upstream business activities".*** Article 13 of the Oil and Gas Law states that **"(*1) Only 1 (one) operational area shall be provided for any Business Entity or Permanent Establishment; (2) in the event of a business entity or permanent establishment operating several operational areas, a separate legal entity must be formed for each operational area ."*** These norms clearly reduce the sovereignty of the state for controlling natural resources (in this case Oil and Gas) since State-Owned

Enterprises must **split the organization vertically and horizontally (unbundling) so as to create new managements that will, *mutatis mutandis,* determine their respective costs and profits. The impacts of this concept are the existence of open competition and the existence of profitable investment opportunities for foreign corporations, while the investment has unfavorable impacts on the people.** Therefore, the philosophy of the Court in the Constitutional Court Decision Number 002/PUU-I/2003 which does not allow the existence of a market price used for oil price and gas price becomes unrealized because, like it or not, the system built in Article 10 and Article 13 is inconsistent with Article 33 of the 1945 Constitution and it is of course inconsistent with the Constitutional Court Decision Number 002/PUU-I/2003;

8. Whereas Article 11 paragraph (2) of the Oil and Gas Law states that ***“Every Cooperation Contract which has been signed shall be notified in writing to the People’s Legislative Assembly of the Republic of Indonesia”.*** This provision is clearly inconsistent with Article 1 paragraph (2) of the 1945 Constitution that states, “*Sovereignty shall be in the hand of the people and shall be exercised in accordance with the Constitution”,* Article 11 paragraph (2) of the 1945 Constitution states that, “*The President in*

concluding other international treaties which bring an extensive and fundamental impact on the life of the people related to state financial burden, and/or requiring amendments or formulation of laws must obtain the approval of the People's Legislative Assembly". Article 20A states "*(1) The People's Legislative Assembly shall have legislative, budgetary and oversight functions; (2) In implementing its functions, in addition to the rights stipulated in other articles of this Constitution, the People's Legislative Assembly shall have the right to interpellation, the right to inquiry and the right to express opinion; (3) In addition to the rights stipulated in other articles of this Constitution, every member of the People's Legislative Assembly shall have the right to raise a question, to submit a proposal and opinion, and the right to immunity; (4) Further provisions on the rights of the People's Legislative Assembly and the rights of members of the People's Legislative Assembly shall be regulated in law.* Under such construction, therefore a Cooperation Contract is classified into the other international treaties as intended in Article 11 paragraph (2) of the 1945 Constitution, namely international treaties which bring an extensive and fundamental impact on the life of the people related to state financial burden must obtain the approval of the People's Legislative Assembly. The provision in Article11 paragraph (2) of

the Oil and Gas Law has negated Article 1 paragraph (2) since the sovereignty of the people must be exercised in accordance with the Constitution, while the position of the People's Legislative Assembly which only receives a carbon copy of every Cooperation Contract document clearly has negated the sovereignty of the people of Indonesia. In addition, mere written notice on the existence of Oil and Gas Cooperation Contracts that have been signed to the People's Legislative Assembly seems to have negated the participation of the people as the collective owners of the natural resources, in the *toezichthoudensdaad* function intended for supervision and control so that the aforementioned state control over natural resources is actually implemented for the greatest prosperity of the people. Since every agreement contains potential deviation at every transaction stage and the fact that there is no sufficient information related to the basic aspects of contracts of work or production sharing or cooperation contracts in the field of oil and gas, if the method applied is only the written notification to the People's Legislative Assembly as regulated in Article 11 paragraph (2) of the Oil and Gas Law, then the article is inconsistent with Article 20A and Article 33 paragraph (3) of the 1945 Constitution.

Based on the foregoing, we have come to a conclusion that the Oil and Gas Law has degraded the sovereignty of the state, the economic sovereignty, and it "has manipulated" the sovereignty of the law so that it becomes a Law which is unjust for the people of Indonesia themselves. Oil and Gas which constitute one of the energy sources which since long time ago have been expected to be able to provide general welfare and to be used for developing the intellectual life of the nation have been disparaged by the "*pacta sunt servanda"* dogma. The state should have the sovereignty over mineral resources existing in Indonesian land, while in fact, they have been held hostage and ordered around by the guests who should have complied with the rules of the host country. The contracts made by the Government and international corporations are not different from forming a constitution above the 1945 Constitution which constitutes the constitution for the whole nation of Indonesia. While it is relative that the People's Legislative Assembly and the President can only keep silent and keep the people of Indonesia waiting for the existence of the Oil and Gas Law which is more "*red and white*", the Petitioners hope that the authority of the Constitutional Court is the authority expected to be able to annul the Law which is inconsistent with the 1945 Constitution.

IV. *PETITUM*

Based on the aforementioned reasons, the Petitioners request the Constitutional Court to pass the following decisions:

1. To grant the Petitioners' petition in its entirety;

2. To declare that Article 1 sub-article 19, Article 3 sub-article b, Article 6 of Law Number 22 Year 2001 concerning Oil and Gas are inconsistent with the 1945 Constitution of the State of the Republic of Indonesia and that they do not have any binding legal force;

3. To declare that Article 1 sub- article 23, Article 4 paragraph (3), Article 9, Article 10, Article 13, and Article 44 of Law Number 22 Year 2001 concerning Oil and Gas are inconsistent with the 1945 Constitution of the State of the Republic of Indonesia and that they do not have any binding legal force;

4. To declare that Article 11 paragraph (2) of Law Number 22 Year 2001 concerning Oil and Gas is inconsistent with the 1945 Constitution of the State of the Republic of Indonesia and that it does not have any binding legal force;

Or to pass an alternative decision, namely:

To Declare That Law Number 22 Year 2001 Concerning Oil And Gas Is inconsistent With The 1945 Constitution Of The State Of The Republic Of Indonesia and Therefore, It Does Not Have Any Binding Legal Force In Its Entirety.

Or in the event that the Panel of Constitutional Court Justices is of a different opinion, the decision is requested to be passed according to principles of what is just and good (*ex aequo et bono*);

[2.2] Whereas to substantiate their arguments, the Petitioners have presented written evidence/writings as follows:

1	Exhibit P – 1.1	Photocopy of the Amendment to the Articles of Association of *Persyarikatan Muhammadiyah* Year 2010;
2	Exhibit P – 1.2	Photocopy of Identity Card in the name of Petitioner I;
3	Exhibit P – 1.3	Photocopy of Decree of the Minister of Law & Human Rights concerning the Amendment to the Articles of Association of *Persyarikatan Muhammadiyah* Year 2010;
4	Exhibit P – 2.1	Photocopy of Identity Card in the name of Petitioner II;

5	Exhibit P – 2.2	Photocopy of *Hizbut Tahrir Indonesia*'s Deed of Establishment Number 09 Year 2005 by Notary Sarinandhe, Dj. S.H., Notary in Bekasi;
6	Exhibit P – 2.3	Photocopy of *Hizbut Tahrir Indonesia*'s Deed of Organizational Change Number 03 Year 2008 by Notary Sarinandhe, Dj. S.H., Notary in Bekasi;
7	Exhibit P – 2.4	Photocopy of Legalization Deed of *Hizbut Tahrir Indonesia*'s Composition of Management of the Central Executive Board for the Period of 2007-2013 Number 09 Year 2008 by Notary Sarinandhe, Dj. S.H., Notary in Bekasi;
8	Exhibit P – 2.5	Photocopy of *Hizbut Tahrir Indonesia*'s Certificate of Registration by the Director General of Unity, Nationalism and Politics of the Ministry of Home Affairs *(Dirjen Kesbangpol DEPDAGRI)* Number 139/D.III.3/XII/2008 dated December 22, 2008;

9	Exhibit P – 3.1	Photocopy of Articles of Association/By Law of *Persatuan Umat Islam* (PUI);
10	Exhibit P – 3.2	Photocopy of *Persatuan Umat Islam*'s Certificate of Registration by the Director General of Unity, Nationalism and Politics of the Ministry of Home Affairs *(Dirjen Kesbangpol DEPDAGRI)* Number 104/D.III.3/XII/2006 dated December 13, 2006;
11	Exhibit P – 4.1	Photocopy of Identity Card (KTP) and Taxpayer Registration Number (NPWP) in the name of Petitioner IV;
12	Exhibit P – 4.2	Photocopy of *Syarikat Islam Indonesia*'s Certificate of Registration by the Director General of Unity, Nationalism and Politics of the Ministry of Home Affairs *(Dirjen Kesbangpol DEPDAGRI)* Number 117/D.III.3/III/2010 dated March 30, 2010;
13	Exhibit P – 4.3	Photocopy of Deed of the Amendment to the Articles of Association of *Partai Syarikat Islam*

		1905 Number 64 Year 2004 by Notary Yonsah Minanda, SH., MH, Notary in Jakarta;
14	Exhibit P – 4.4	Photocopy of Articles of Association/By Law of *Syarikat Islam Indonesia*;
15	Exhibit P – 5.1	Photocopy of Identity Card in the name of Petitioner V;
16	Exhibit P – 5.2	Photocopy of Political Party *Syarikat Islam*'s Certificate of Registration by the Director General of Unity, Nationalism and Politics of the Ministry of Home Affairs *(Dirjen Kesbangpol DEPDAGRI)* Number 09/D.II.3/XII/2006 dated February 17, 2006;
17	Exhibit P – 5.3	Photocopy of *Syarikat Islam*'s Deed of Establishment Number 2 Year 2005 by Notary Yudo Paripurno, SH. Notary in Jakarta;
18	Exhibit P – 6.1	Not submitted;
19	Exhibit P – 6.2	Photocopy of the Receipt of Notification of the Existence of Organization of the Indonesian Muslim Brotherhood (*Persaudaraan Muslim*

		Indonesia) the Director General of Unity, Nationalism and Politics of the Ministry of Home Affairs *(Dirjen Kesbangpol DEPDAGRI)* Inventory Number 82/D.I/IV/2003 dated June 17, 2003;
20	Exhibit P – 6.3	Photocopy of Deed of the Amendment to Articles of Association/By Law and Composition of Management of *Persaudaraan Muslim Indonesia* (Parmusi), Number 07 Year 2010. Notary Tatyana Indrati Hasjim, SH. Notary in Jakarta;
21	Exhibit P – 7.1	Photocopy of Identity Card of Petitioner VII;
22	Exhibit P – 7.2	Photocopy of Articles of Association/By Law of *Al-Irsyad Al-Islamiyyah* for the Period of 1427-1432 H / 2006-2011 AD;
23	Exhibit P – 8.1	Photocopy of Identity Card of Petitioner VIII;
24	Exhibit P – 8.2	Photocopy of Deed of Decision Statement of *Syarikat Islam Indonesia*'s Extraordinary *Majlis Tahkim* (XXXVI) Number 3 Year 2009 by

		Notary Dewi Maya Rachmandani Sobari, SH., M.Kn. Notary in Tangerang;
25	Exhibit P – 8.3	Photocopy of *Pemuda Muslimin Indonesia*'s Basic Regulations and Internal Regulations. Year 2009;
26	Exhibit P – 9	Photocopy of Identity Card of Petitioner IX (*Al Jami'yatul Washliyah*);
27	Exhibit P – 10	Photocopy of Identity Card in the name of Petitioner X (*Sojupek*);
28	Exhibit P – 11	Photocopy of Identity Card in the name of Individual Petitioner, Achmad Hasyim Muzadi, H;
29	Exhibit P – 12	Photocopy of Identity Card in the name of Individual Petitioner, Drs. H. Amidhan;
30	Exhibit P – 13	Photocopy of Identity Card in the name of Individual Petitioner, Komaruddin Hidayat;

31	Exhibit P – 14	Photocopy of Identity Card in the name of Individual Petitioner, DR. Eggi Sudjana, SH.,M.Si;
32	Exhibit P – 15	Photocopy of Identity Card and Taxpayer Registration Number in the name of Individual Petitioner, Marwan Batubara, M.Sc;
33	Exhibit P – 16	Photocopy of Identity Card in the name of Individual Petitioner, Fahmi Idris;
34	Exhibit P – 17	Photocopy of Identity Card in the name of Individual Petitioner, Moch Igbal Sullam;
35	Exhibit P – 18	Photocopy of Identity Card in the name of Individual Petitioner, Ichwan Sam;
36	Exhibit P – 19	Photocopy of Identity Card in the name of Individual Petitioner, Ir. H. Salahuddin Wahid;
37	Exhibit P – 20	Photocopy of Identity Card in the name of Individual Petitioner, Nirmala Chandra Dewi M, SH;

38	Exhibit P – 21	Photocopy of Identity Card in the name of Individual Petitioner, H.M. Ali Karim, SH;
39	Exhibit P – 22	Photocopy of Identity Card in the name of Individual Petitioner, Adhi M. Massardi;
40	Exhibit P – 23	Photocopy of Identity Card in the name of Individual Petitioner, Ali Mochtar Ngabalin;
41	Exhibit P – 24	Not submitted;
42	Exhibit P – 25	Photocopy of Identity Card in the name of Individual Petitioner, Laode Ida;
43	Exhibit P – 26	Photocopy of Identity Card in the name of Individual Petitioner, Sruni Handayani;
44	Exhibit P – 27	Photocopy of Identity Card in the name of Individual Petitioner, Hj. Juniwati T. Masjghun. S;
45	Exhibit P – 28	Photocopy of Identity Card and Taxpayer Registration Number in the name of Individual Petitioner, Nuraiman;

46	Exhibit P – 29	Photocopy of Identity Card in the name of Individual Petitioner, Sultana Saleh;
47	Exhibit P – 30	Photocopy of Identity Card in the name of Individual Petitioner, Marlis;
48	Exhibit P – 31	Photocopies of Identity Card and Taxpayer Registration Number of Individual Petitioner, Fauziah Silvia Thalib;
49	Exhibit P – 32	Photocopies of Identity Card and Taxpayer Registration Number of Individual Petitioner, King Faisal Sulaiman, SH;
50	Exhibit P – 33	Photocopy of Identity Card in the name of Individual Petitioner, Soerasa BA;
51	Exhibit P – 34	Photocopy of Identity Card in the name of Individual Petitioner, Mohammad Hatta;
52	Exhibit P – 35	Photocopy of Identity Card in the name of Individual Petitioner, M. Sabil Raun;

53	Exhibit P – 36	Photocopies of Identity Card and Taxpayer Registration Number of Individual Petitioner, Edy Kuscahyanto, S.Si;
54	Exhibit P – 37	Not submitted;
55	Exhibit P – 38	Photocopy of Identity Card in the name of Individual Petitioner, Joko Wahono;
56	Exhibit P – 39	Photocopy of Identity Card in the name of Individual Petitioner, Dwi Saputro Nugroho;
57	Exhibit P – 40	Photocopy of Identity Card in the name of Individual Petitioner, DR. A. M. Fatwa;
58	Exhibit P – 41	Photocopy of Identity Card in the name of Individual Petitioner, Hj. Elly Zanibar Madjid;
59	Exhibit P – 42	Photocopy of Identity Card in the name of Individual Petitioner, Jamilah;
60	Exhibit P – 43.1	Photocopy of a Compilation of Media Articles, Kompas Daily Newspaper, Tuesday, March 27, 2012, Opinions Rubric, entitled:

1. *Sulit Bertahan Jika Kebijakan Energi Minim* (It is Difficult to Survive Under Minimum Energy Policies) (Author: Ratna Sri Widyastuti/Research and Development of Kompas);

2. *Menggugat Politik Anggaran* (Criticizing Budget Politics);

3. *Pertegas Politik Energi* (Confirm the Politics of Energy);

4. *Ancaman Krisis Minyak* (The Threat of Oil Crisis);

Exhibit P – 43.2 Photocopy of a Compilation of Media Articles, Kompas Daily Newspaper, Thursday, March 22, 2012 Opinions Rubric, entitled:

1. *Salah Kelola Sektor Migas* (Mismanagement of the Oil and Gas Sector) (Author: M Kholid Syeirazi);

2. *Membangkitkan Potensi Panas Bumi* (Reviving Geothermal Potentials);

61	Exhibit P – 44	Photocopy of the 1945 Constitution of the State of the Republic of Indonesia;
62	Exhibit P – 45	Photocopy of Law Number 22 Year 2001 concerning Oil and Natural Gas.

In addition, the Petitioners have presented the experts whose statements have been heard in the hearing of the Court, who explain as follows:

1. Expert Dr. Kurtubi

Whereas four main reasons why the Oil and Gas Law has inflicted loss to the state and has violated the constitution are:

1. The Oil and Gas Law has eliminated the state's sovereignty over oil and gas resources existing within the land of the state of Indonesia.
2. The Oil and Gas Law has financially inflicted loss to the state.
3. The Oil and Gas Law has split the structure of the companies, and the integrated national oil industry has been split into the upstream and downstream business activities or unbundling.
4. With this Oil and Gas Law, the management system of cost recovery submitted to *BP Migas* has inflicted loss to the state.

Based on the aforementioned four reasons, the Expert will explain them one by one, *first*, that the Oil and Gas Law adopts the business to government (B to G) relationship pattern with investors or oil companies. This provision is set forth in Article 1 sub-article 23 concerning the definition of *BP Migas* established to control upstream business activities. Article 4 paragraph (3) concerning the Government serving as the holder of the mining authorization which shall subsequently establish *BP Migas*. Article 11 paragraph (1) is concerning upstream business activities conducted by investors based on contracts with *BP Migas*. Article 44 paragraph (3) sub-paragraph b assigns *BP Migas* to sign the contracts with investors or oil companies. The provisions in the aforementioned Oil and Gas Law provide that the party who will sign cooperation contracts with contractors or oil companies is the government, represented by *BP Migas*. Since the government has entered into the contract, the state's sovereignty has ceased to exist since the state's position has become equal to the contractors. The government becomes one part of the contracting parties. The government downgrades itself to become equal with oil companies or investors.

The clauses in the standard production sharing contract which enable to guarantee the state's sovereignty become invalid and

inapplicable since the government has participated in entering into the contracts. The standard clauses are as follows:

1. *The law of the republic of Indonesia shall apply to this contract*.

2. *No term or provision of this contract including the agreement of the parties to submit to arbitration hereunder shall prevent or limit the government of the republic of the Indonesia from exercising inalienable rights*.

Based on the Oil and Gas Law, the B to G relationship pattern makes the government equal to investors or contractors. Accordingly, the policies or regulations on the management of oil and gas resources cannot be executed without the agreement of the contractors.

The B to B pattern with the government being above the contract can guarantee the state's sovereignty. The government can execute the law's regulations for the state and nation's interest without the approval of the contractors. Therefore, it is sovereign, while it is not under B to G pattern.

Secondly, the Oil and Gas Law creates a system which evidently inflicts financial loss to the state, so that the management of national oil and natural gas deviates, no longer being for the greatest prosperity of the

people due to improper management which inconsistent with the companies' efficient management principles for the interest of their stakeholders. This happens because the state's share in the form of oil and gas from oil contractors with a ratio of 85%:15%, with 85% being for the state, cannot directly be sold by *BP Migas*, but it must appoint third parties. This obviously inflicts loss to the state, although the Oil and Gas Law contains a clause *for the greatest prosperity of the state*. However, when third parties are appointed, they will obtain fees and profits which decrease the state's revenues, while it would have been far more efficient if the oil and gas are sold by the state itself through State-Owned Enterprises, in accordance with the constitutional mandate. As to gas, *tangguh* fields have been found and operated by the foreign oil companies which, under the *production sharing contract*, the ratio is 60% for the state and 40% for foreign companies.

Third, the Oil and Gas Law designs the structure of national oil companies or national oil and gas industries in a disintegrated manner, which is *devide et impera*, a colonial method. The upstream business is separated from the downstream business. This is set forth in Article 5 paragraph (1) and paragraph (2) and Article 10 paragraph (1) and paragraph (2) of the Oil and Gas Law. The unbundling management is inconsistent with the constitution as explicitly stated in Article 33 paragraph (2) and paragraph (3) of the 1945 Constitution. Article 33 of the

1945 Constitution states that *oil and gas resources within the land shall be controlled by the state*. Oil and gas resources or any resource within the land shall be controlled by the state and shall be used for the greatest prosperity of the people. Studies in the field of oil economy indicate that the integrated oil industries operating in the upstream and downstream are so much better and more efficient than those in the upstream or downstream only.

Subsequently, the Oil and Gas Law causes the oil system in Indonesia to become very inefficient and inconsistent with the good corporate governance principles which lead to the widely open inefficiencies. Currently, the cost recovery managed by *BP Migas* is around $15 billion. Cost recovery is the cost expended by oil companies/investors. The state gives back the costs in order to find oil, for exploration, exploitation, oil production, oil well maintenance and so on. From the beginning of the cost recovery's process, foreign oil companies submit the development plan to *BP Migas*. *BP Migas* then processes it, and then the work program and budget will be issued. Then, comes the authority search expenditure, which is the authority to use money. The procurement of all goods and services for the foreign oil companies is under *BP Migas*. Meanwhile, with its organizational structure, *BP Migas* is not equipped with a board of commissioners. Obviously, this is an inefficient system which encourages massive markup which inflicts loss to

the nation and the state, causing our oil and gas management no longer for the greatest prosperity of the people. Probably the quote-unquote becomes the greatest prosperity for certain individuals. There is no company in the world which only consists of a board of directors without a board of commissioners. *BP Migas* does not have a control mechanism instrument over the company.

2. Expert Dr. Ichsanudin Noorsy

Whereas the thesis conveyed by the Round Table Conference states that domination of foreign companies inhibits the growth of the national economy, as required by the state department through the Round Table Conference, which still proceeds up to this time.

Based on a research, when foreign companies, investments and corporations are more and more dominant in a country, the economy will become increasingly unbalanced, and the social and corporate conflicts will become stronger. The second thesis is that foreign domination is increasingly encouraging denationalization and it will take the national economic surplus out. Then the third thesis is that many parties perceive that the domestic industries will face foreign power's position, and domestic market share will be flooded with imported goods.

Whereas the government to business pattern is actually good in the production contract or the work contract because they state that their work contracts can be made equal to the constitution and therefore, it is difficult for the government to conduct renegotiation.

Whereas in accordance with the document possessed by the expert, it is clearly proved that the US Department of Energy (USAID) has designed the Oil and Gas Law. In this document, it is even proved that if people get angry due to the energy increase, bribe them politically. Therefore, USAID collaborated with Eddy Bidden from the World Bank, including a number of multilateral institutions on how to materialize this Law. That matter also became one evidence of how it was translated into an offshore debt agreement with the government, namely the agreement of the Government of the Republic of Indonesia with the World Bank which ordered that the Direct Cash Transfer (BLT) was given only because of an increase in Oil Fuel price. Whereas the agreement was numbered 4712-IND, entered into in December 2003 and signed by Prof. Dr. Boediono.

Whereas such background has created two Laws, namely Law Number 20 Year 2002 concerning Electricity and Law Number 12 Year 2001.

There are three terms as to what the government has played. The *first* term is that the prices of fuel oil and natural gas shall be entrusted to

a fair and reasonable business competition mechanism. We will find that the government has changed the terms, and then the government itself has acknowledged that the terms have been acknowledged at least by the deceased Widjajono Partowidagdo and also Bambang Brodjonegoro, which essentially apply the free market mechanism.

The *second* term is the economic price. This term is applied with blueprint design of *BPH Migas*. According to the blueprint of BPH 2004-2020, *BPH Migas* states that "*As to the market at the open market stage 2010, the fuel oil price shall be entrusted to a fair and reasonable business competition mechanism*." With reference to the opinions of the deceased, Bambang Brodjonegoro and even in the debate with Purnomo Yusgiantoro as the Minister of Energy and Mineral Resources at Soegeng Sarjadi, the one that shall obey is the free market mechanism.

The next one is the blueprint of the national energy management prepared by the Ministry of Energy and Mineral Resources with reference to Presidential Regulation No. 5 Year 2006. The content is the same, from the target, constraints up to the strategy, even up to the main program toward the total free market mechanism.

The second one is as indicated in Article 7 of Law Number 30 Year 2007 which states that "*The price of energy shall be determined based on the fair economic value.*" Fair economic value refers to the value/cost

which reflects the energy production cost, including environment and conservation costs, as well as the profit assessed and determined by the government based on the people's ability. The same case concerning the use of the term of the price referring to the fair and reasonable business competition is stipulated again in Law Number 30 Year 2009 concerning Electricity. Article 33 paragraph (1) states that the selling price of electricity and rental cost for electricity network are determined based on fair business principles. It must be translated that the definition of fair business is entirely subject to the definition of economy and it means that profit is all.

Whereas all the expressions appearing in The National Security Strategy of US are well applied in the laws' reference, particularly in the context of liberalization. It was signed by George Walker Bush at the White House on September 17, 2002.

The next one is how Indonesia has been demanded to keep its promise to fulfill its commitment to revoke the Oil Fuel subsidy by the Secretary General of OECD in the meeting with the Vice President of the Republic of Indonesia. There are two important sentences here. The first one is that Indonesia is demanded to fulfill its commitment. The second one is that Indonesia is demanded to revoke the subsidy. In other words, it constitutes the evidence that the Government of the Republic of Indonesia

has the commitment to revoke the subsidy. There are two reasons for such statement of the Secretary General of OECD, namely *first,* the economic growth and *second,* the increased purchasing power. Based on such matters, actually there is a strategic problem built by foreign investors from the upstream to the downstream, namely what Dr. Kurtubi, calls unbundling, which is the *divide et impera* method. However, in the expert's view, unbundling is, from the financial and institutional perspectives, inconsistent with the economy of scale theory. The present fact is that Indonesia is included in the top 10 gas-producing countries but it is powerless to supply gas for its own people.

On July 15, 1974, Time Magazine asked, "Who is the most influential great leader in the world?" All people answered that he is a Jew named Jelius Marseman. It said, "Not a name, but the criteria." The 3 criteria are accepted, namely as follows:

1. Protecting his/her followers or people.
2. Improving the intellectual life of his/her followers or people or making them prosperous.
3. Growing and developing the belief of his followers or people that the journey ahead is right.

The *third* point is the constitution. The keyword is how great the formulation of Michael Hart is as written in a book in America on 100 famous figures in the world, while Indonesia already formulated it on August 18, 1945.

3. Expert Kwik Kian Gie

The figures indicate that the price of Indonesian oil, known as Indonesian Crude Price (ICP) is 105 US Dollar per barrel. The lifting for Indonesian crude is 930,000 barrels per day. Oil Fuel consumption of Indonesian people is 63,000,000 kiloliters per year, and other assumptions. The Government of Indonesia must expend a cash subsidy in the amount of Rp123.6 trillion.

The government does not have cash in that amount so that the State Revenues and Expenditures Budget is broken-down. Accordingly, the Government must increase Oil Fuel Price for the premium type which is always called the subsidized Oil Fuel. The Government, scientists, observers, the press and other elite components of the nation have convinced Indonesian people concerning their opinion which is absolutely untrue and even misleading. In its various questions and explanations, the government stated that "*Cash must be spent for the subsidized Oil Fuel*." Evidently, the government is inconsistent with its writings in the financial

note and Amended Draft State Revenues and Expenditures Budget Year 2012.

In the financial note year 2012, the subsidy figure set at Rp123.6 trillion on page 4.VII in the form of table number 4.III titled “Subsidy in the amount of Rp123.5997 trillion” or rounded up to Rp123.6 trillion.

In the financial note, three pages set out the cash revenues from Oil Fuel which have never been mentioned by the government. The three pages are as follows.

On page 3.VI, there is table III.3 titled “Tax Revenues Year 2012.” In this table, there is an income tax item of oil and gas in the amount of Rp60.9156 trillion. Accordingly, there are cash revenues from income tax item of oil and gas in the amount of Rp60.9156 trillion. It was written by the government itself in an official document, the financial note.

On page III.12, there is table III.7 titled “Progress of Non-Oil and Gas State Revenues (*Penerimaan Negara Bukan Migas/PNBM*) Year 2012.” In this table, there is an inflow item of oil and gas resources in the amount of Rp159.4719 trillion. Accordingly, there is cash inflow in the amount of Rp159.4719.

On page 4.43, there is table IV.5 titled “Transfer to Regions” with an explanation of the profit sharing fund in the amount of Rp32.3762 trillion.

We see that there are two inflow figures, namely tax income from oil and gas in the amount of Rp60.9156 trillion and from non-tax state revenues in the amount of Rp159.4719 trillion. These two figures are cash flow included in the state treasury office in the amount of Rp220.3875 trillion which has never been mentioned in relation to conveying the so-called subsidy.

The financial note indicates two outflow figures, namely the so-called subsidy in the amount of Rp123.5997 trillion and the so-called profit sharing fund in the amount of Rp32.3267 trillion. We see that there are two inflow figures. The total is Rp220.3875 trillion minus two outflow figures in the amount of Rp155.879 trillion, producing cash surplus in the amount of Rp64.5116 trillion. However, the cash outflow named profit sharing fund is not the expense of the people of Indonesia. It is cash inflow in the state treasury office forwarded to the regions in to the context of financial autonomy. Accordingly, this figure shall properly be deemed to be cash inflow so that if it is added, the total of cash surplus becomes Rp96.7878 trillion. Accordingly, it is obviously incorrect to say that the government has expended cash in the amount of Rp123.5997 trillion for

expending the subsidized Oil Fuel. The truth is that net cash inflow amount is Rp96.8 trillion.

The coalition factions in the People's Legislative Assembly conclude that if the ICP in the international market reaches US$105 per barrel plus 5% or reaches US$ 120.75 per barrel, the State Revenues and Expenditures Budget will broke down. Consequently, the government is allowed to increase the premium gasoline price without the approval of the People's Legislative Assembly. This agreement is indicated in the famous Article 7 paragraph (6a). In the international market, increased price only affects the crude volume which must be imported, only the volume which must be imported.

The agreement of the People's Legislative Assembly states that when the ICP reaches 150% or $150 plus 15% per barrel, the government is allowed to increase the fuel oil price without the approval of the People's Legislative Assembly because deficit caused by the subsidy is too great so that it is unbearable. From the figures presented in table II, it can be seen that the government still has cash surplus in the amount of Rp74.1915 trillion, although the ICP reaches $120.75 per barrel. According to the table, it can be seen that the increased price of ICP in the international market only affects the portion which must be imported or it only affects the 25.1292 trillion-liters. Another need which is 37.7808

billion-liters is fulfilled from oil contained within the land of Indonesia. Therefore, the impact is the management of the extra amount of 22.563 trillion so that there remains cash surplus in the amount of Rp74.1915 trillion, although the ICP becomes $120.75 per barrel.

Ideologically, the elite of the nation of Indonesia has been successfully brainwashed. Accordingly, they cannot think other than thinking automatically or as a reflex, as they believe that the crude component in Oil Fuel shall be valued in certain prices by the market mechanism called a fair and reasonable business competition mechanism in Article 28 paragraph (2) of Law Number 22 Year 2001,.

The price established in the international market through an institution, the New York Mercantile Exchange, known as NYMEX, is not related to the basic price of Oil Fuel whose crude oil is our own.

The basic price of gasoline from self-owned crude oil because it has been extracted from within the land of Indonesia consists of cash expenditures for lifting activities, refining, and average cost of transportation to gas stations. The costs total $10 per barrel. 1 barrel is equal to 195 liters and with an assumption that the exchange rate of $1 is Rp9,000.00, the costs in the form of cash which must be spent are in the amount of 10 divided by 159 then multiplied by Rp9,000.00 or equal to

Rp566.00. Cash which must be spent for procuring gasoline from crude oil within the land of Indonesia is Rp566.00.

Therefore, the basic price of one liter of premium gasoline is in the amount of Rp6,509.00, based on the crude oil price in the international market in the amount of $105 per barrel with 1 barrel being equal to 159 liters with the assumption that $1 is equal to Rp9,000.00 which is adopted by the State Revenues and Expenditures Budget 2012. The oil component in one liter of premium gasoline is 105 divided by 159 then multiplied by Rp9,000.00, which is equal to Rp5,934.3, added with lifting, refining and transportation costs in the amount of Rp566.00 per liter so that the basic price of premium gasoline is in the amount of Rp6,509.00 per liter.

It is known that the price of premium gasoline is Rp4,500.00 per liter. Consequently, the government claims to have suffered of Rp2,009.00 per liter, namely Rp6,509.00 minus Rp4,500.00. In other words, the government has provided a subsidy for Indonesian people who buy premium gasoline in the amount of Rp2,009.00 for each liter. According to the government, the total consumption of Oil Fuel with the price of Rp4,500.00 per liter is 61.62 million kiloliters or 61.62 billion liters. The government believes that it has suffered loss to provide the subsidy to the people using gasoline in the amount of Rp123.59 billion. This figure is

indicated in the financial note year 2012. Table 4.III, titled subsidy on page 4.7.

It is clear that such mindset is based on the fundamentalist ideology of the market mechanism applied to crude oil and Oil Fuel, namely that the price of Oil Fuel shall be determined by the market mechanism. The government is not allowed to interfere in determining the price of Oil Fuel applied for its people, although the crude oil which is processed to become Oil Fuel is possessed by the people. The government which represents the people who own oil within the earth, its land and waters, may not determine the price applied for the people.

In deductive and objective logic, it can be recognized that the application of the oil price in the world market for Indonesian people who buy their own oil, is intended to make Indonesian people internalize the belief that the price being paid for Oil Fuel automatically must be the price applied in the world market. If this has been put into the mind and blood-and-flesh of the entire nation of Indonesia, giant oil companies in the world will be able to sell Oil Fuel in Indonesia and obtain great profits.

It is known that around 90% of Indonesian oil is exploited by foreign companies based on production sharing contracts. Indonesia has obtained 85% and the foreign parties have obtained 15%. However, in fact, Indonesia has obtained 70% and the foreign contractors have obtained

30% in the present distribution. The cause is the existence of the provision that the exploration cost shall be paid first, in kind or in the form of crude oil extracted from the land of Indonesia.

Foreign contractors have marked-up their exploration costs. Accordingly, up to this time, as there have been no longer any exploration for a long time, the exploration cost called "recovery cost" is still paid. The amount is 15% of the extracted crude oil. Accordingly, if the volume of all extracted crude oil is 930,000 barrels per day with 90% or 837,000 barrels per day being extracted by foreign contractors. The foreign contractors are entitled to the 30%, but because the 15% is deemed to be the compensation for the exploration cost called "recovery cost", it means that their train of thought is just followed, assuming it's the obtainment of net 15%. This means that every day, all foreign contractors having operated in Indonesia obtain 15% from 837,000 barrels or 125,500 barrels of oil per day or 19,954,500 liters per day.

It is witnessed that Shell, Petronas, et cetera, have opened their gas stations. They only sell gasoline type which is equal to Pertamax with the price around Rp10,000.00 per liter, which means that they are entitled to have 19,954,500 liters per day. The cost for lifting, refining, and transportation to their gas stations is Rp566.00 per liter. With the selling price of Rp10,000.00 per liter, their profit is Rp9,434.00 per liter. The

volume is 19,954,500 liters per day so that the profit from Indonesian consumers by selling gasoline the crude oil of which is from within the land of Indonesia is Rp185,255,847,000.00 per day, namely Rp19,954,500 x Rp10,000.00 deducted with the same amount, multiplied by expended cash of Rp566 or equal to Rp 1888,255,847,000.00 per day. Therefore, the total profit of the foreign contractors operating in Indonesia is Rp68.71 trillion a year.

4. Expert Irman Putra Sidin

Whereas one of the elements of the people's prosperity, in addition to sufficient availability and even distribution, is the quality and inexpensive price with respect to land, waters, and natural resources, as well as production branches controlled by the state. Comparing Rp4,500.00 per liter to the price of Rp9,500 per liter, inexpensive qualification is the lower price with the assumption of different quality and insignificant impacts.

Whereas Decision on Case 001-021-022/PUU-I/2003 concerning Judicial Review of Law Number 20 Year 2002 concerning Electricity and Decision on Case Number 002/PUU-I/2003 Judicial Review of Law Number 22 Year 2001 concerning Oil and Natural Gas have set down the concrete constitutional framework regarding the constitutional economic system. In the aforementioned decisions, the concept of the phrase

“controlled by the state” shall be defined to cover the meaning of “controlled by the state” in a broad sense of the term derived and coming from the concept of the sovereignty of the people of Indonesia over all resources, land, waters and natural resources contained therein, also including the definition of public ownership by people’s collectivity over the intended assets. The people is collectively constructed by the 1945 Constitution to have given the mandate to the state to make the policies, to take administrative actions, regulations, management and supervision actions for the greatest prosperity of the people.

The administrative function of the state is implemented by the government by its authority to issue and revoke permission, license and concession facilities. The regulation function of the state is implemented through the legislation authority of the People’s Legislative Assembly together with the government and with the regulations of the executive. The management function is implemented by shareholding mechanism and/or by direct involvement in the management of state-owned enterprises or state-owned legal entities as the institutional instruments through the interpretation that the state *c.q.* the government effectively uses its control over such natural resources to be used for the greatest prosperity of the people.

The supervision function of the state is implemented by the state *c.q.* the government for the purpose of supervision and control so that the state control over the intended production branches which are important and/or which control the livelihood of the public is truly implemented for the greatest prosperity of the people.

Based on the aforementioned 5 concepts of the phrase *controlled by the state*, as constructed in the aforementioned decisions of the Court, namely policies, administration, regulation, management and supervision concepts, only the concept of regulation expressly mentions the involvement of the people's representative institution, such as the People's Legislative Assembly. This may be due to the People's Legislative Assembly's being merely viewed as a legislative institution, while in addition, it is also inherently a budgeting and supervising institution.

Meanwhile, the other concepts of the phrase *controlled by the state*, namely policies, administration, regulation, management and supervision, seem to justify the government's autonomous authority in all its manifestations to act independently. It is sufficient for the independency in acting to obtain the attribution and delegation justification in a legislation theory of a law produced jointly by the President and the People's Legislative Assembly. It is also necessary to become a generic

contemplation in the state administration law that the concept of state cannot be reduced to be only the government. It is sufficient with the attribution or delegation theory in the legislation science. Accordingly, the institutions' constitutional role of the people's sovereignty is finished by the people's representative institutions in the elucidation of the concept of *controlled by the state*.

Whereas the state of Indonesia is deemed to have existed so that the government needs to be affirmed, considering that theoretically, a state exists upon the fulfillment of territory, citizens and recognition so that the affirmation of the preamble to the constitution is the government of the state of Indonesia or, with the second assumption, it can be that the center of gravity of the state of Indonesia is the government, where the power in government is held by the president simultaneously acting as the head of state who also has legislative power. It means that the state automatically refers to the government *c.q.* the president *c.q.* the ministers *c.q.* the institutions under the control of the president. One of the implications of the executive control is that that state can take actions of controlling the land, waters, natural resources, as well as the production branches which are important and/or which control the livelihood of the public.

There are 2 constitutional concepts which are currently effective concerning *controlled by the state* as interpreted by the Constitutional

Court in its decisions. The phrase *controlled by the state* does not automatically become the government's autonomous authority or at least it is constitutionally justified. The two concepts are as follows. The first one is that the management function is performed through a shareholding mechanism and/or direct involvement in the management of state-owned enterprises or state-owned legal entities as the institutional instruments through which the government must maintain an institutional relationship with the people's representative institutions, namely the People's Legislative Assembly, the Regional Representative Council and/or the Regional People's Legislative Assembly in provinces and regencies/cities effectively using its control over such assets to be used for the greatest prosperity of the people.

The second one is the concept that the supervision function of the state is performed by the state *c.q.* the government in order to supervise and control the implementation of the state control over the production branches which are important and/or which affect the livelihood of the public, in order to ensure that such control is implemented for the greatest prosperity of the people. Therefore, the supervision function performed by the people's representative institutions in cooperation contracts must be preceded by the establishment of a constitutional relationship between the government and the people's representative institutions. Such relationship can be in the form of consultation or confirmation. Therefore, the

consultation forum does not prevent the people's representative institutions from disagreeing or refusing the proposal.

It is not necessary for a cooperation contract which will be signed to go through an interpretation leap to become a construction of international treaty. Whereas to justify that a cooperation contract with another party only by the concept of international treaty must first be acknowledged or even approved by the People's Legislative Assembly. According to the regime in Article 33 of the 1945 Constitution, cooperation agreements or contracts must be entered into when the state establishes a relationship in the context implementing the concept of "controlled by the state". However, all agreements or contracts entered into by the state are not automatically construed as international treaties. Nevertheless, although they are not construed as international treaties, if such agreements or contracts are related to the concept of "controlled by the state" and then transplanted in the oversight function of the people's representatives, the mechanism to be implemented is the approval mechanism.

The concept of approval by other people's representative institutions of a cooperation contract is intended to be used maximally for the greatest prosperity of the people in the context of the implementation of the state control over the production branches which are important and/or which affect the livelihood of the public, or land, waters, as well as

natural resources contained therein. The concept of this approval is the approval from other people's representatives of all policies of the state in the context of the oversight function of the people's representative institutions. However, as a note, if a production sharing contract involves international or other legal subjects that evidently have broad and fundamental consequences for the people's life related to the financial burden of the state, and/or which require amendments to or formulation of a Law, such cooperation contract shall be construed as an international treaty.

The concept of the state in Article 33 of the 1945 Constitution is inseparable from the concept of the people actually living as the instrument of the state administration management. In the state administration, the instrument of the people is an institution whose members are selected through an election as members delegated to represent the people. Therefore, the people in the concept of the phrase *controlled by the government* cannot be disconnected from the concept of their ownership over the land, waters, natural resources, as well as the production branches which are important and/or which affect the livelihood of the public, to subsequently take a part with the government in the relationship of decisions regarding the regulation, management, and supervision functions from the concept of the phrase *controlled by the state*.

Therefore, the people's representative institutions indeed must be expressly involved in performing the concept of state control, not only in the regulation, but also in the management and supervision although to a certain extent, it is not necessary for its roles to be too far.

It is not necessary for Article 11 of the 1945 Constitution concerning International Treaties and Article 33 of the 1945 Constitution to be combined to obtain the approval of the People's Legislative Assembly. A cooperation contract might not have been categorized as international treaty, but it must be approved by the People's Legislative Assembly due to the concept of *controlled by the state*.

5. Expert Margarito Kamis

In relation to the reference to Article 33 paragraph (1), paragraph (2) and paragraph (3) of the 1945 Constitution, they have never been amended but it is stated that they have been amended in this law being reviewed. This is a fatal mistake. By what kind of constitutional logic must the experts of the constitutional law justify that the articles and/or paragraphs in the 1945 Constitution which have been amended both by the legislators and through the judges' interpretations in order to have the legal value as being amended?

Reference to articles in the 1945 Constitution to ensure or to justify both the authority of the law-making institutions and the substance or to ensure the law-making institutions and the substance to be regulated certainly does not ensure the standard of legality, use, legislators' authority and legitimacy of the material of laws formulated.

Reference to articles and paragraphs in the 1945 Constitution is to ensure that the legal actions of the legislators have legal and constitutional grounds. If the material grounds are incorrect, how can it be possible to determine the constitutional legality of not only the material contents but also the law?

Something legitimate is not automatically legal. Legality rests on two matters with different legal considerations in the science of law. Legality rests on norms, while legitimacy rests on political considerations; Something politically abstract is not automatically legally valid. Up to this time, Article 33 paragraph (1), paragraph (2) and paragraph (3) have never been amended either formally and substantively. No amendment to Article 33 paragraph (1), paragraph (2) and (3) of the 1945 Constitution has been agreed upon in the general sessions of the People's Consultative Assembly in 1999 up to 2002. So, it is unclear as to which Article 33 paragraph (1), paragraph (2) and paragraph (3) of the 1945 Constitution has been amended by the People's Consultative Assembly in

Indonesia, as referred to by Law Number 1 Year 2001 as the basis for formulating the Law.

The processing, transportation, storage and commercial businesses, the norms reviewed in the hearing, natural resources contained in the land, particularly oil and natural gas (*migas*), are governmental affairs. As governmental affairs, the legal actions in the form of processing, storage and commercial businesses shall be implemented based on the good government principles. One of them is for the public benefit or, using the terminology of the Constitution, that Article 33 of the 1945 Constitution is aimed for the prosperity of the people in order to make them prosperous.

In Article 33, the phrase *prosperity of the people* is valued not only as a norm but also as the constitutional-ethical purpose of the establishment of the state. Such circumstances shall be used as the grounds to formulate the policies in living as a state.

Managing natural resources contained therein, in this case oil and natural gas, is a concrete form of the fulfillment of the government‘s obligation to make the people prosperous. How can it be possible that the government’s actions are constitutionally its constitutional obligation are controlled by a cooperation contract? The government’s actions over natural resources, which are not other than the concrete actions of the

governmental affairs, should be purely based on the constitutional principles and the good government principles applicable in Indonesia rather than a cooperation contract. A cooperation contract is nothing but a contract between two parties legally recognized universally. For both parties having entered into the contract, it means that the other party having entered into the contract takes part in determining the actions of the other legal party, in this case Indonesia over its own natural resources. While the legal action being performed by Indonesia over its natural resources is the fulfillment of its constitutional obligation which must be based on the constitution.

There are several types of contracts regulated in this Law which are not clearly specified. The issue is whether the norms of other forms of cooperation contracts also regulated in other similar Laws existing in Indonesia enable the parties having entered into the contracts to make the systematic or *a contrario* interpretations when facing problems in the contracts.

The definition of contracts signed by the People's Legislative Assembly following the coming into effect of a Law is that the legal value of notification is not more than a confirmation. Consequently, this is a norm only in its form rather than its substance, with the involvement of the People's Legislative Assembly as the legislators being only qualified as

notification which is constitutionally inadequate. The actions of entering into contracts between the government and other parties, especially foreign parties, in accordance with the origin of the concept of treaty is not an executive agreement but rather, an action to stake the sovereignty of this nation.

In an approval, the legal binding power over the action of the agreement emerges after it is given the legal quality by the legislative body, while the legal value of notification as it is in a Law has existed since both parties have agreed. In the approval, the legislative body has authority to assess the substance of an agreement and to approve the notification as it is in a Law, both of which cannot be performed by the People's Legislative Assembly. In the case of entering into a contract with a foreign party to manage natural resources contained therein, it is proper to qualify the social quality as a governmental action which requires an approval rather than notification.

Whereas granting authority of control and/or supervision to the executive agency indicates nothing but the legislators' underestimating the constitutionality of oil and natural gas which are nothing but the natural resources contained in the land as intended in Article 33 paragraph (1), paragraph (2) and paragraph (3).

In accordance with its elements, such institutions, *BP Migas* for instance, has been established because the matter to be handled is minor but its value has a direct impact on the people's life. Secondly, the legislators in a legislative system not involving the government are not accustomed to making or regulating general matters because they do not have the time to do so, so that further regulations are surrendered by delegating such authority to the legislators or to such institutions. This is related to the doctrine of authority delegation.

6. Expert Rizal Ramli

The first one is the process of formulation of the Oil and Gas Law. The Oil and Gas Law has been funded and sponsored by USAID with the following motives:

1. For the oil and gas sector to be liberalized.
2. For encouraging price internationalization, for domestic prices of oil and gas to be adjusted to the international prices.
3. For foreign parties to be allowed to participate in the downstream sector which is highly profitable and even with lower risks than the upstream sector.

The formulation of a Law funded by a foreign party usually has many preconditions and *conditionalities*, and is often lured with loans, known as long type lost, which is a Law related to loans. Thus, a Law being related to offshore loans is full of preconditions. It is impossible for its purpose to make the people and the state of Indonesia prosperous. There are certainly strategic and business interests behind it which comply with the preconditions of the Law.

As to the price, it is equal to the international price. A very simple example is that the production cost of this pen is Rp90.00. If it is sold in Indonesia, the price is Rp100.00. But if this pen is sold in New York, the price is Rp1,000.00. The neo-liberal economists will say, “Indonesia will suffer loss because if it is sold domestically, it is only Rp100.00. If it is sold in foreign countries, for instance in New York, it will be Rp1,000.00 in New York.” Such matter has become the background of many thoughts that domestic prices should be equal to international prices, and it has also happened in the health, education and oil and gas sectors, and so on. The price is the international one but people’s income is Malayan income, local income. Such policy or strategy is the fast way to stimulate the process of structural impoverishment. Why? If this were what we want, the Indonesian people should have asked, “Raise our income first to be the same as in New York,” which is US$40,000 in average or Rp400,000,000.00. If their income has reached that amount, Indonesian

people will not have any objection to any price which is equal to that in New York.

Asian countries which have successfully catch up with Western countries do not take the first step, namely by making adjustments to the international prices. They have supported and stimulated the economic growth to be above 10%, created employment opportunities, increased income. The prices were adjusted later on. Accordingly, there is a basic difference from what has been done by Indonesia. Adjustment to international prices seems to be the only solution. This is inconsistent with the 1945 Constitution, especially for strategic commodities such as oil and gas, education and health. If it is related to cars, electronics, et cetera, there is no problem, just leave it to the market mechanism. However, if it is related to strategic interests, the state shall have the right to determine and interfere so that prices are not always consistent with the international price.

Article 33 of the 1945 Constitution states that, “Land, waters and natural resources of Indonesia shall be controlled by the state and shall be used for the greatest prosperity of the people.” In the original of the Law, there were no words stating that they shall be possessed by the people of Indonesia and shall be controlled and managed by the state. As a result, the term *shall be controlled* can be frequently manipulated and engineered

to ultimately become the control by private parties, especially foreign parties.

It is hoped that after this regime is over, we will propose an amendment to Article 33 so that the words will be complete. “Land and waters and natural resources of Indonesia shall be possessed by the people of Indonesia, shall be controlled and managed by the state and shall be used for the greatest prosperity of the people”, so that there will no longer any multiple interpretations.

Whereas according to the expert, the statement of the state’s expert that the government does give anything to foreign parties and that it only gives the economic right is an extremely dangerous interpretation because it should be controlled by the Government of Indonesia.

Subsequently, Article 3 of the Oil and Gas Law states that the implementation shall be accountable which shall be executed through a reasonable, fair and transparent business competition mechanism. In fact, the most important aspect is the principles and purposes as indicated in Article 33 paragraph (2) of the 1945 Constitution which states, “*Production branches which are important for the state and which affect the livelihood of the public shall be controlled by the state*.”

Related to the modus of cooperation contracts, Indonesia adopts the system of production sharing arrangement (PSA). Actually it is not the only modus, as there are operational contracts and ownership. Successful and relatively powerful and big countries in the oil and gas sector, especially Arabian and Latin America countries, do not adopt the PSA but they adopt ownership. For instance, the majority shares of Aramco are controlled by the Government of Saudi Arabia. According to the expert, this majority ownership system is much more effective than the PSA because its cost control can be performed internally without the need to use audit because the representatives of the government of Saudi Arabia sit in the management, participate in exercising the management control, the cost control, transfer of technology process which is good enough, and so on. Therefore, most of the many giants or State-Owned Enterprises in big developing countries exist because of majority ownership while the minority shares are foreign shares. The *second* one is that the production has decreased from 1,300,000 barrels per day to only around 850 barrels per day but the cost recovery has increased almost twofold without any explanation. The *third* one is the bureaucratic habit where it wants to control and supervise everything, and excuse me, the culture of control and supervision in Indonesia is biased because most of them are identical to extortion. With more control, more supervision must be exercised, and more officials must be served. "*Shall be controlled by the government*"

should not be considered great and awesome because the procedure of the control is not sophisticated. In fact, it is simple; This cost belongs to which oil production? Which depth? That's all. Details are not necessary. Accordingly, it is not peculiar that the Government of Indonesia has given hundreds of concessions in the natural oil and gas sector in the last 8 years. However, the exploration level has been low, new finding has been nearly absent. It has been caused by the complicated and complex bureaucracy as published in one of magazines concerning oil and gas, namely that the investment climate in Indonesia is very complicated because of too much control and there are so many things to do but the costs have not been controlled. Sometimes, *BP Migas* needs to be controlled so that friends are able to get in as suppliers or any other matters;

Related to *BP Migas*, basically the function of *BP Migas* can be taken over by the Directorate General of Oil and Gas, by the Energy and Mineral Resources. There are only two differences, namely that the costs of *BP Migas* are greater than the costs of the Directorate General of Oil and Gas because its employees are more professional and must be highly paid. The *second* one is that Article 10 of the Oil and Gas states that, "*Business entities or permanent establishments conducting upstream business activities shall be prohibited from conducting downstream business activities*", while in practice, vertical integration still occurs, for

instance, Shell can establish limited liability companies in the downstream while it still exists in the upstream.

Whereas the expert has agreed regarding the People's Legislative Assembly's being notified only without its approval being requested.

There is a concern that the previous model of pertamina occurs, namely that if the Oil and Gas Law is abolished, it can be settled by establishing two great state-owned companies in order to compete with each other so that the benefits for the people are very great.

The next one is concerning international arbitration. Based on the research of Prof. Joseph Stiglitz, a Nobel Prize winner, evidently 99% of the results of international arbitrations have been unfavorable to the developing countries and have always been favorable to the developed countries. Similarly, according to Prof. Paul Krugman who conducted an investigation concerning international arbitrations which was submitted to the President SBY, 99% of the international arbitrations have been unfavorable to the developing countries. Therefore, arbitration settlement should not be inserted into the dispute settlement of agreements concerning oil and gas and should be required to apply domestic laws only.

The next one is concerning foreign investments. Foreign investments should not be idolized because the State of Japan was developed without any foreign investment at all. After World War II, Japan was developed without any offshore loan, yet with domestic loans. Another example is China, which used foreign capital but in a very restrictive manner. The state has an important role. There are certainly foreign investments but they were limited. The state still has great power. China has been developed without any debt, while Indonesia has been developed with debts and foreign capital. Since both are linked to each other, lenders would always request Laws afterwards, including the Oil and Gas Law which has been funded by USAID, and other Laws. Loans have been used as conditionalities and preconditions to give more facilities for the foreign parties to control the economy of Indonesia.

The expert suggests that there should be any alternative to the production sharing arrangement. The production sharing arrangement should not be idolized as if it is the greatest one, while in fact, the longer production sharing arrangement's cost recovery takes time, the more it cannot be controlled. The production has sharply decreased from Rp1,300,000.00 per barrel to Rp900,000.00 per barrel but the cost recovery has increased twice.

There is another successful model in Latin American and Arabian countries, namely that the countries own shares in joint venture companies with foreign parties. For instance, Saudi Aramco's majority shares are held by Saudi Arabia and around 30% are held by foreign parties. Therefore, Saudi Arabia participates in the management of Aramco so that Saudi Arabian officials learn about proper oil business and are aware of the risks, and so on.

According to the expert, dependence on the PSA model is in fact dangerous because Indonesian bureaucracy is not very sophisticated so that it is often deceived about the costs. For instance, the cost for playing golf is included as cost recovery, the cost of headquarter is included the cost recovery, and the regulation function of *BP Migas* may be returned to the Directorate General of Oil and Gas.

[2.3] Whereas with respect to the Petitioners' petition, the Government presented its statement during the hearing on May 24, 2012, as follows:

I. CONCERNING THE SUBSTANCE OF THE PETITIONERS' PETITION

1. Whereas according to the Petitioners, Article 1 sub-article 19 and Article 6 of the Oil and Gas Law have raised legal uncertainty in the definition of the words "other contracts". It is clearly inconsistent with Article 28D paragraph (1) of the 1945 Constitution. With such

phrase which is subject to multiple interpretations, cooperation contracts may contain clauses which do not reflect the greatest prosperity of the people as mandated in Article 33 paragraph (2) and paragraph (3) of the 1945 Constitution;

2. Whereas according to the Petitioners, the establishment of the Executive Agency for Upstream Oil and Gas Activities (*Badan Pelaksana Migas*/*BP Migas*) as mandated by Article 1 sub-article 23, Article 4 paragraph (3) and Article 44 of the Oil and Gas Law has caused the concept of Mining Authorization to become obscure (*obscuur*) by reducing the definition of the phrase “controlled by the state” in Article 33 paragraph (2) and paragraph (3) of the 1945 Constitution;

3. Whereas according to the Petitioners, although the Constitutional Court has annulled Article 28 paragraph (2) of the Oil and Gas Law regarding the provision “Prices of Oil Fuel and Natural Gas shall be entrusted to a fair and reasonable business competition mechanism”, Article 3 sub-article b which is the heart of the Law *a quo* has not been annulled with the decision of the Constitutional Court Number 002/PUU-I/2003. The aforementioned Article accommodates the idea of Oil and Gas liberalization which is

certainly inconsistent with Article 33 paragraph (2) of the 1945 Constitution;

4. Whereas according to the Petitioners, the word “may” in Article 9 of the Oil and Gas Law is clearly inconsistent with Article 33 paragraph (2) and paragraph (3) of the 1945 Constitution because this article points out that the State-Owned Enterprise (*Badan Usaha Milik Negara*/BUMN) is only one of the players in the management Oil and Gas. Accordingly, State-Owned Enterprises must compete in their own country to be able to manage Oil and Gas. Such construction may weaken the form of the state control over natural resources which affect the livelihood of the public;

5. Whereas according to the Petitioners, Article 10 and Article 13 of the Oil and Gas Law have reduced the state’s sovereignty over the control of natural resources (in this case, Oil and Gas) because State-Owned Enterprises must split the organization vertically and horizontally (*unbundling*) in order to create a new management which will, *mutatis mutandis*, determine the respective costs and profits. This concept leads to open competition and it is more favorable to foreign corporations but unfavorable to the people. Consequently, the Constitutional Court’s inspiration through the decision of the Constitutional Court Number 002/PUU-I/2003 which

does not allow market prices to be adopted for oil and gas prices, fails to materialize because the system established in Article 10 and Article 13 of the Oil and Gas Law, like it or not, is inconsistent with Article 33 paragraph (2) and paragraph (3) of the 1945 Constitution and certainly with the Decision of the Constitutional Court Number 002/PUU-I/2003;

6. Whereas according to the Petitioners, Article 11 paragraph (2) of the Oil and Gas Law is classified into the construction of international treaty having extensive and fundamental consequences to the people's life in relation to the financial burden of the state which shall be approved by the People's Legislative Assembly. The provision contained in Article 11 paragraph (2) of the Oil and Gas Law is deemed to have denied the position of the People's Legislative Assembly as the people's representative and also it has denied the people as owners of natural resources so that it is inconsistent with Article 1 paragraph (2), Article 11 paragraph (2), and Article 20A as well as Article 33 paragraph (3) of the 1945 Constitution;

II. LEGAL STANDING OF THE PETITIONERS

According to the Government, the Petitioners' interests have to be questioned, namely whether the Petitioners are properly the parties who

deem that their the rights and/or authorities have been impaired by coming into effect of Article 1 sub-article 19 and sub-article 23, Article 3 sub-article b, Article 4 paragraph (3), Article 6, Article 9, Article 10, Article 11 paragraph (2), Article 13 and Article 44 of the Oil and Gas Law, and also whether the intended constitutional impairment of the Petitioners is specific and actual or at least potential in nature which, based on logical reasoning, can be assured of occurring, and whether there is a causal relationship (*causal verband*) between the impairment and the coming into effect of the Law being petitioned for judicial review.

With respect to the aforementioned questions, the Government is of the following opinion:

1. According to the Government, the materials being petitioned for judicial review, namely the Oil and Gas Law, has been reviewed under a constitutional review and has been decided upon by the Constitutional Court through Decision Number 002/PUU-I/2003 and Decision Number 20/PUU-V/2007.

   Whereas the substance of articles, paragraphs, and/or any part of a Law which has been reviewed cannot be petitioned again for review, unless for other or different reasons (vide Article 60 of the Constitutional Court Law, Article 42 of Regulation of the

Constitutional Court Number 06/PMK/2005 concerning Guidelines on Legal Proceedings of Judicial Review);

Whereas the Government does not find any other or different reasons between the petition in case Number 002/PUU-I/2003 and case Number 20/PUU-V/2007 from the reasons being petitioned by the Petitioners in the petition *a quo*. According to the Government, based on such consideration, the petition of the Petitioners to review the constitutionality of the articles *a quo* shall be declared *ne bis in idem*;

2. According to the Government, the Petitioners cannot argue the constitutional impairments suffered by them due to the coming into effect of Article 1 sub-article 19 and sub-article 23, Article 3 sub-article b, Article 4 paragraph (3), Article 6, Article 9, Article 10, Article 11 paragraph (2), Article 13 and Article 44 of the Oil and Gas Law under articles of the 1945 Constitution which have been used as the touchstones. Furthermore, there is no causal relationship (*causal verband*) between the argued impairment and the coming into effect of the Law being petitioned for judicial review

The Petitioners' legal standing will be explained in more detail in the complete Statement of the Government which will be presented in the next hearing or through the registrar's office of the Constitutional Court.

Based on the foregoing, the Government is of the opinion that the Petitioners in this petition **are not qualified** as the parties having legal standing and it is proper for the Chief Justice/Panel of Constitutional Court Justices **to prudently declare that the Petitioners' petition cannot be accepted** (*niet ontvankelijk verklaard*).

Nevertheless, the Government has fully left it to the Chief Justice/Panel of Constitutional Court Justices to consider and judge whether the Petitioners have legal standing or not, as provided for by Article 51 paragraph (1) of Law Number 24 Year 2003 concerning the Constitutional Court as amended by Law Number 8 Year 2011, and based on the Constitutional Court's previous decisions (vide decision Number 006/PUU-III/2005 and decision Number 11/PUU-V/2007).

III. STATEMENT OF THE GOVERNMENT CONCERNING THE PETITION FOR JUDICIAL REVIEW OF LAW NUMBER 22 YEAR 2001 CONCERNING OIL AND NATURAL GAS AGAINST THE 1945 CONSTITUTION

Before thoroughly explaining the substance of norms being petitioned for review by the aforementioned Petitioners, the Government shall first state the philosophical, juridical and sociological grounds in the formulation of Law Number 22 Year 2001 concerning Oil and Natural Gas, as follows:

A. GENERAL

Article 33 paragraph (2) and paragraph (3) of the 1945 Constitution has confirmed that production branches which are important for the state and which affect the livelihood of the public shall be controlled by the state. Similarly, land and waters and the natural resources contained therein shall be controlled by the state and shall be used for the greatest prosperity of the people.

Considering that oil and natural gas constitute strategic non-renewable natural resources controlled by the state, and constitute vital commodities which play an important role in supplying raw materials for industries, which constitute an important source of the state's foreign exchange and in fulfilling the domestic energy needs, they must be optimally managed to be used for the greatest prosperity and welfare of the people of Indonesia.

Whereas to deal with global needs and challenges in the future, oil and natural gas business activities are always required to be more capable of supporting the continuity of national development in the context of increasing the people's prosperity and welfare. Based on such matters, the Government and the People's Legislative Assembly have jointly agreed to formulate a Law concerning oil and

natural gas in order to be able to provide the legal grounds for the measures of renewing and reordering business activities in the oil and natural gas sector. Whereas such opportunity is eventually reflected in the enactment of Law Number 22 Year 2001 concerning Oil and Natural Gas (State Gazette of the State of the Republic of Indonesia Year 2001 Number 136, Supplement to State Gazette Number 4152) on November 23, 2001.

Whereas the formulation of this Law basically has the following purposes:

1. To guarantee the implementation and control of the management of oil and natural gas as natural and development resources which are strategic and vital in nature;

2. To support and enhance the development of national capability to be more competitive;

3. To increase state revenues and to make the greatest contribution to the national economy, to develop and strengthen the industry and trade of Indonesia;

4. To create employment, to improve the environment, as well as to improve the welfare and prosperity of the people.

This Law includes the principal matters of substance concerning provision that oil and gas as the strategic natural resources contained in Indonesian mining jurisdiction constitute national assets which are controlled by the state and which are organized by the Government as the holder of Mining Authorization in the Upstream Business Activities. Meanwhile, Downstream Business Activities shall be conducted by Business Entities upon first obtaining prior Business Permit from the Government. In addition, for the Government to be able to perform its function efficiently as the regulator, manager, and supervisor, it has established the Executive Agency for Upstream Oil and Gas Business Activities (*BP Migas*) and the Oil Fuel Supply and Distribution and Natural Gas Pipeline Business Activities Regulatory Body (*BPH Migas)*.

We need to note that business activities in the field of oil and gas in the past 50 (fifty) years have made great contributions to the national economy and have played an important role in generating foreign exchange and state revenues, supplying domestic energy needs as well as raw materials for industries, becoming the vehicle

for technology transfer, creating employment, and stimulating area development.

The oil and gas industries as the main capital of the long-term development are still expected to give optimistic hope, because it has been a well-known fact that the potency of Indonesian oil and gas resources can still be utilized and developed where only 16 (sixteen) out of 60 (sixty) sediment basins potentially containing oil and gas have been operated.

However, we are faced with the fact that the trend of Indonesian oil and gas production since 1995 until now has been decreasing significantly. This is due to the fact that oil and gas that we produce are mostly generated from relatively aging fields which have been producing since 1970-1980. The discovery and addition of oil and gas reserves are not proportional to the production drain rate. On the other hand, there has been a sharp increase in domestic energy need for oil and gas from year to year, and accordingly, to solve this problem, we have to discover new oil and gas reserves to replace the fields with decreased production, so that the production rate can at least be sustained.

Furthermore, the discovery of new reserves requires high investment according to the nature of the upstream oil and gas

business activities which are high cost, high risk, and high tech, and therefore, in the context of avoiding state financial burden, the Government and the People's Legislative Assembly, as provided for in the Oil and Gas Law, have decided that the appropriate form of Oil and Gas Cooperation Contract is the Production Sharing Contract or any other form of contract which are profitable for the state. This decision has been made by considering that the appropriate for Cooperation Contract of Oil and Gas is the Production Sharing Contract, and therefore, the Government will not be encumbered with risks in case commercial oil and gas reserves are not discovered during exploration period (risks are borne by contractors). Moreover, the contractor must also pay for any necessary costs, provide human resources, and technologies.

B. THE GOVERNMENT'S RESPONSE TO ARTICLES PETITIONED FOR JUDICIAL REVIEW BY THE PETITIONERS

With respect to the Petitioners' assumption that Article 1 sub-article 19 and sub-article 23, Article 3 sub-article b, Article 4 paragraph (3), Article 6, Article 9, Article 10, Article 11 paragraph (2), Article 13, and Article 44 of Law Number 22 Law Number 22 Year 2001 concerning Oil and Natural Gas are considered inconsistent with Article 28C paragraph (2), Article 28D paragraph (1), Article 28I

paragraph (1) and paragraph (4) as well as Article 33 paragraph (2) and paragraph (3) of the 1945 Constitution, the Government can give the following explanation:

1. Whereas in relation to the Petitioners' assumption in their petition stating that Article 1 sub-article 19 and Article 6 of the Oil and Gas Law have caused legal uncertainty in understanding of the meaning of "other contracts", so that they are inconsistent with Article 28D paragraph (1) of the 1945 Constitution, the Government can provide the following explanation:

   a. Whereas with reference to "*controlled by the state*" concept as provided for in Article 33 paragraph (2) of the 1945 Constitution, in the Oil and Gas Law this concept is known as Mining Authorization (mining right) granted by the Government. Then the Government grants the *business right* to Business Entities and/or Permanent Establishments conducting the upstream oil and gas business activities under the Cooperation Contract, the terms and conditions of which are stipulated by the Government. The Cooperation Contract is signed by the Executive

Agency for Upstream Oil and Gas Business Activities and Business Entities and/or Permanent Establishments. The contract system in the upstream oil and gas business activities is commonly applied by many countries having oil and gas resources because the contract system will in fact establish more legal certainty of rights and obligations of the parties involved in the contract.

b. Whereas until now there are two contract system models commonly adopted in the world namely Production Sharing Contract and Service Contract. In the Service Contract mechanism, the contractor is paid in the form of money for oil operation works, and the whole production results of oil and gas belong to the Government. Meanwhile, in the Production Sharing Contract mechanism, either the Government or the contractor receives the portions of the upstream business activities' production results.

c. Whereas in Indonesia, the operation of upstream business activities in the field of oil and gas generally uses production sharing contract considering that oil

and gas are vital and strategic natural resources. The use of production sharing contract is chosen since the upstream business activities in the field of oil and gas have the criteria of high risk, high technology, and high capital, so that the high capital, technology, and risk are borne by the contractors and they will not burden the state finance and the values of profit sharing of the oil and gas in accordance with the generally accepted contracts, as follows:

– Petroleum: 85% for the state and 15% for the contractor

– Natural Gas: 70% for the state and 30% for the contractor

d. Whereas the existence of the phrase “or any other form of “or any other form of cooperation contract” provided for in Article 1 sub-article 19 of the Oil and Gas Law is intended to apply the use of the contract forms other than production sharing contract (such as the form of Service Contract) or to apply a new contract system considered more profitable to the state. Currently, the Government has applied Service

Contract for operational areas the risk of which is lower, and therefore, it will be more profitable to the state considering that the whole production results will fully belong to the state.

e. Moreover, the use of cooperation contract in the form of production sharing contract or any other form of cooperation contract which cannot be excluded from the provision of Article 6 paragraph (2) of the Oil and Gas Law which states that the intended cooperation contract must at least meet the following requirements:

a) Ownership of permanent natural resources is still in the hands of the Government until the ownership up to the point of delivery;

b) Operational management shall be controlled by the Executive Agency;

c) Capital and risks are borne by Business Entities or Permanent Establishments",

and under Article 11 paragraph (3) of the Oil and Gas Law, 17 provisions must be stated in the cooperation contract.

Based on the Government's explanation above, the statement of the Petitioners that Article 1 sub-article 19 and Article 6 of the Oil and Gas Law are inconsistent with Article 33 paragraph (2) and paragraph (3) of the 1945 Constitution is groundless and incorrect.

2. With respect to the assumption of the Petitioners stating that the formation of the Executive Agency for Upstream Oil and Gas Business Activities is under the instruction of Article 1 sub-article 23, Article 4 paragraph (3) and Article 44 of the Oil and Gas Law has caused the concept of mining right to become obscure (*obscuur*) since it reduces the meaning of "controlled by the state" as provided for in Article 33 paragraph (2) and paragraph (3) of the 1945 Constitution, the Government can provide an explanation of the said assumption of the Petitioners, as follows:

    a. Whereas the Executive Agency for Upstream Oil and Gas Business Activities as the executive and controller of the upstream oil and gas business activities has the management right in the cooperation

contract to be able to perform its duties as mandated under the cooperation contract, while the Government is the holder of the Mining Authority (mining right) which will set the terms and conditions as well as other policies in the field of oil and gas, such as the policy on the utilization of oil and gas produced from such upstream business activities.

b. The party appointed as the executive and controller of the upstream oil and gas business activities is not in the form of State-Owned Enterprise, with the objective that the State-Owned Enterprise can focus more on the implementation of oil and gas business activities and perform the management more efficiently.

c. Whereas the formation of the Executive Agency for Upstream Oil and Gas Business Activities is not intended to transfer the mining authorization, but to fulfill its duties imposed by the Government as the holder of the mining authorization in the control of the upstream oil and gas business activities through the cooperation contract.

d. The formation of the Executive Agency for Upstream Oil and Gas Business Activities as the controller of the upstream oil and gas business activities is also intended for the state as the holder of the mining authorization not to be directly involved in the contract with Business Entities/Permanent Establishments. As a result, the position of the contractor and the position of the state are not equal. Thus, it is hoped that this condition can prevent the state from having civil matters arising from any dispute over the cooperation contract. In addition, the transfer of duty from Pertamina to the Executive Agency for Upstream Oil and Gas Business Activities has an objective that Pertamina can focus more on its business as a State-Owned Enterprise.

e. Whereas if the upstream oil and gas business activities are still controlled by Pertamina, the Government worries that the mandate of Article 33 paragraph (2) and paragraph (3) of the 1945 Constitution is not achieved, considering that the existence of Pertamina as a business entity has the objective of gaining profit in doing its business

activities, and therefore, the Government has established the Executive Agency for Upstream Oil and Gas Business Activities as the entity which is neutral in nature and which constitutes the representative of the Government in signing cooperation contracts on upstream oil and gas business activities, and this entity does not have the objective of gaining profit but it participates in managing the use of oil and gas for the interest and prosperity of the people.

Based on the explanation above, the Government is of the opinion that the argument of the Petitioners stating that Article 1 sub-article 23, Article 4 paragraph (3) and Article 44 of the Oil and Gas Law has reduced the meaning of "controlled by the state" is incorrect and groundless.

3. With respect to the assumption of the Petitioners stating that even though the Constitutional Court has annulled Article 28 paragraph 2 of the Oil and Gas Law, Article 3 sub-article b which constitutes the heart of the Law *a quo* has not been annulled, and therefore, it is inconsistent with Article 33 paragraph (2) of the 1945 Constitution, the Government can

provide an explanation of the said assumption of the Petitioners, as follows:

a. Whereas basically Article 3 sub-article b of the Oil and Gas Law regulates the objective of implementing oil and gas business activities for both upstream and downstream business activities. Meanwhile, the special provision regarding Downstream Business Activities is clearly provided for in Article 3 sub-article b of the Oil and Gas Law which states "*Ensuring effective implementation and accountable processing, transportation, storage and trade implemented through a reasonable, fair, and transparent business competition mechanism*".

b. According to the Government, this provisions is different from the provision of Article 28 paragraph (2) of the Oil and Gas Law which in essence provides for the setting of fuel oil price and gas fuel price being entrusted to a fair and reasonable business competition mechanism", which has been annulled by the Constitutional Court under decision Number 022/PUU-I/2003. In order to follow-up this decision,

the Government has revised the article by imposing Government Regulation Number 30 Year 2009 concerning the Second Amendment to Government Regulation Number 36 Year 2004 which states that the price of fuel oil and gas fuel is regulated and/or set by the Government.

c. Whereas the phrase "implemented a reasonable, fair, and transparent business competition mechanism" in Article 3 sub-article b of the Oil and Gas Law constitutes the translation of transparency in the downstream oil and gas business activities. Downstream business activities in the field of oil and gas are conducted through the mechanism of granting Business Permit to Private Companies, State-Owned Enterprises (BUMN), Region-Owned Enterprises (BUMD), Cooperatives, as well as small businesses engaging in the field of processing, transportation, storage, and trade of oil and gas.

d. This means that the law creates business opportunities to national companies or Indonesian incorporated companies to engage in the downstream

oil and gas business activities throughout Indonesia, and therefore, with the existence of the principle "through a fair, reasonable, and transparent business competition mechanism" as intended in Article 3 sub-article b of the Oil and Gas Law, legal certainty of the provision and distribution of oil and gas to the people in all regions of Indonesia is guaranteed.

e. Whereas the provision of Article 3 sub-article b of the Oil and Gas Law also guarantees that there is no monopoly by a certain business entity in the implementation of downstream business activities in the field of oil and gas in accordance with the mandate of Law Number 5 Year 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition (Law Number 5 Year 1999).

f. Furthermore, the Government still exercises its development and supervision through the mechanism of granting business permit for downstream oil and gas business activities and the regulation as well as setting of fuel oil and gas fuel prices.

Therefore, the Government still have the functions of policy, administration, regulation, management, and supervision over the oil and gas in downstream sector in the field of oil and gas so that the mandate of Article 33 paragraph (2) of the 1945 Constitution is still maintained. Therefore, the Government is of the opinion that the arguments of the Petitioners stating that Article 3 sub-article b is inconsistent with Article 33 paragraph (2) of the 1945 Constitution are incorrect and groundless.

4. With respect to the assumption of the Petitioners stating that the use of phrase “may” in Article 9 of the Oil and Gas Law is inconsistent with Article 33 paragraph (2) and paragraph (3) of the 1945 Constitution, since this kind of construction can reduce the form of state control over natural resources which affect the livelihood of the public, the Government can provide an explanation of the said assumption of the Petitioners as follows:

   a. Whereas Article 9 of the Oil and Gas Law is actually intended to give the opportunity to national companies (Region-Owned Enterprises (BUMD), cooperatives, small businesses, as well as private companies) to

participate in oil and gas business activities (especially upstream business activities).

b. Particularly for Pertamina as a State-Owned Enterprise, the Oil and Gas Law and its implementing regulations grant the following forms of privileges:

a) Article 61 sub-article b of the Oil and Gas Law, when a company as the replacement for Pertamina was established, this State-Owned Enterprise executed a cooperation contract with the Executive Agency for Upstream Oil and Gas Business Activities to continue the exploration and exploitation on Pertamina's ex-territory of mining authorization and it was deemed that the company had obtained the necessary business permit as intended in Article 24 of the Oil and Gas Law for the activities of processing, transportation, storage, and trade. The provisions of this article are explained further in the Elucidation stating that the intended cooperation contract provided for in this article includes the obligation to pay to

the state and the amount of such payment is in accordance with the prevailing provisions of Pertamina's mining authorization territory.

b) As the further implementation of Article 61 sub-article b of the Oil and Gas Law, Government Regulation Number 35 Year 2004 concerning Oil and Gas Upstream Business Activities (Government Regulation Number 35 Year 2004) has been stipulated. Under Article 104 sub-article k, Pertamina and its subsidiaries have the obligation to pay to the state the amount of payment in accordance with the prevailing provisions of the current mining authorization territory, namely 60%. These provision grants privileges to Pertamina, compared to other contractors which must pay much greater percentage to the state.

c) Article 5 of Government Regulation Number 35 Year 2004 states that basically Pertamina can submit an application to the Minister to obtain a certain Open Area insofar as 100% of

Pertamina’s shares are owned by the state, and therefore, Pertamina does not have to first go through a tender mechanism.

d) Pursuant to Article 28 paragraph (9) of Government Regulation Number 35 Year 2004, basically Pertamina can submit an application to the Minister for an Operational Area the contract validity of which will expire insofar as 100% of Pertamina’s shares are owned by the state, and therefore, Pertamina does not have to first go through a tender mechanism.

Whereas based on the explanation above, the Government is of the opinion that Article 9 of the Oil and Gas Law is not at all inconsistent with the provisions of Article 33 paragraph (2) and paragraph (3) of the 1945 Constitution.

5. With respect to the assumption of the Petitioners stating that Article 10 and Article 13 of the Oil and Gas Law have reduced the sovereignty of the state in controlling natural resources (in this case oil and gas) since the State-Owned Enterprises must split the organization vertically and horizontally (unbundling) so as to create new managements

that will, *mutatis mutandis,* determine their respective costs and profits and that they are inconsistent with Article 33 paragraph (2) and paragraph (3) of the 1945 Constitution as well as the Constitutional Court Decision Number 022/PUU-I/2003, the Government can provide an explanation of the said assumption of the Petitioners, as follows:

a. Whereas the concept of unbundling is aimed at optimizing the operation of both upstream and downstream business activities, and with this concept, it is hoped that business actors of upstream business activities can focus their objectives on searching for oil and gas resources as well as optimizing exploration activities to search for oil and gas reserves.

b. Whereas since the characteristic of downstream business activities is more commercial and that it does not use the mechanism of operational costs refund, the concept of unbundling in the downstream business activities makes it possible for a fair and reasonable business competition mechanism to develop.

c. Whereas the upstream and downstream business activities in the field of oil and gas have different characteristics. In the upstream business activities conducted mostly based on product sharing contracts, there is an element of cost recovery, while the downstream business activities are more commercial in general. Therefore, with such different characteristics, the consolidation of costs and taxes must be avoided through the mechanism of separation between upstream and downstream business activities (unbundling). Thus, the state revenues generated from the upstream oil and gas business activities are still optimum.

d. Whereas the provision of Article 13 of the Oil and Gas Law regulating that “A Business Entity or Permanent Establishment shall be given only one Operational Area” is aimed at ensuring that the operational cost and tax imposition in one Operational Area cannot be consolidated with the operational cost and tax imposition in the other Operational Areas, so that in this case, it will optimize the state revenues.

Whereas therefore, based on the description above, the Government is finally of the opinion that the provisions of Article 10 and Article 13 of the Oil and Gas Law do not impair the Petitioners' constitutional rights and/or authorities, and accordingly they are not inconsistent with Article 33 paragraph (2) and paragraph (3) of the 1945 Constitution.

6. With respect to the assumption of the Petitioners stating that Article 11 paragraph (2) of the Oil and Gas Law is classified into the construction of international treaty having extensive and fundamental consequences to the people's life in relation to the financial burden of the state which shall be approved by the People's Legislative Assembly, the Government can provide an explanation of the said assumption of the Petitioners, as follows:

    a. Whereas the Government is of the opinion that International Treaty intended in Article 11 paragraph (2) of the 1945 Constitution refers to an instrument currently known in constitutional law and international law in accordance with the 1969 Vienna Convention and the 1986 Vienna Convention on the Law of Treaties. The term of International Agreement used in

the Vienna Convention is Treaty. Article 1 of the 1969 Vienna Convention on Law of Treaties defines the scope of this Convention which applies to treaties between states. Furthermore, in Article 2, treaty is defined as follows:

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

In addition, Article 1 of the 1969 Vienna Convention confirms that the scope of a treaty is an agreement between one or more states and one or more international organizations, and an agreement between international organizations.

b. The parameter of being *governed by international law* constitutes a very important element to distinguish a treaty from the characteristic of a civil agreement which is governed by law such as a cooperation contract on oil and gas. In the discussion on the 1969 Vienna Convention, a document is stated to be

governed by law if it fulfills the requirements of two elements, namely being intended to create obligations and a legal relationship under international law. On the other hand, even though an agreement is executed between states, the agreement can possibly be subject to national law instead of international law.

c. Whereas by referring to the aforementioned opinions, the Government is of the opinion that the legal subjects of treaties are the states and the legal subjects of other international agreements are international organizations. Meanwhile, the characteristics of the cooperation contract on oil and gas are that it civil and governed by national law.

d. Whereas in accordance with Article 1 sub-article a of Law Number 24 Year 2000 on Treaties (Law Number 24 Year 2000) which constitutes the mandate of Article 11 paragraph (3) of the 1945 Constitution, treaty is defined as follows:

Agreement in certain forms and names which is regulated in international law, that is concluded in

writing as well as creating rights and obligations in the field of public law.

Further in Article 4 paragraph (1) of Law Number 24 Year 2000, elements of treaty are stated as follows:

a) Concluded by states, international organizations, and other international legal subjects;

b) Regulated by international law;

c) Creating to rights and obligations in the field of public law.

e. Whereas the term of treaty as intended in Article 11 of the 1945 Constitution must be interpreted by relating it to the President's authority as the head of state in relation to foreign policies and relating to other states. If it is related to the head of state's traditional authorities such as declaring war, making peace as well as concluding treaties (prerogative right), these matters are related to other states. If it is related to this prerogative right, the legal interpretation becomes

inaccurate, if a commercial and civil agreement such as a cooperation contract on oil and gas is classified into the context of Article 11 of the 1945 Constitution. Therefore, in the Government's opinion, the commercial relationship between the Government and foreign corporations is not the domain of Article 11 of the 1945 Constitution, since the Government in this context constitutes and actor of commercial activities and it does not act as a state with the attribute of sovereignty.

f. Whereas a cooperation contract is a contract which is civil in nature and which is subject to international law, so that both parties entering into the contract (Executive Agency and Business Entity/Permanent Establishment) are not legal subject of international law.

g. Whereas based on the explanation above, it can be concluded that a cooperation contract on oil and gas does not fulfill the criteria for being considered as an international treaty as intended in the 1945 Constitution and Law Number 24 Year 2000, and

therefore, the assumption of the Petitioners stating that Article 11 paragraph (2) of the Oil and Gas Law is inconsistent with Article 11 paragraph (2) of the 1945 Constitution is inaccurate and groundless.

h. Whereas the Government disagrees with the Petitioners stating that a Cooperation Contract is classified into the other international treaties which have extensive and fundamental consequences to the life of the people related to the financial burden of the state and which shall be approved by the People's Legislative Assembly, since the position of the People's Legislative Assembly is that it only receives a carbon copy of every Cooperation Contract document, so that the construction of Article 11 paragraph (2) of the Oil and Gas Law has breached the sovereignty of the people of Indonesia and the people of Indonesia's participation as the collective owners of the natural resources.

i. Whereas the Government is of the opinion that the Petitioners' opinions as stated above are groundless since a cooperation contract on oil and gas is a

business contract which is civil in nature and which is not a treaty.

j. Whereas in accordance with the provisions of Law Number 4 Year 1999 concerning the Structure and Status of the People's Consultative Assembly, The People's Legislative Assembly, and Regional People's Legislative Assembly *juncto* Decision of the People's Legislative Assembly of the Republic of Indonesia Number 03A/DPR RI/2001-2002 regarding the DPR Rules of Procedure, the right of members of the People's Legislative Assembly has been fulfilled upon the approval of the substance of the Article 11 paragraph (2) of the Oil and Gas Law.

k. Based on the explanation above, the Government is of the opinion that Article 11 paragraph (2) of the Oil and Gas Law does not at all breach the sovereignty of the people of Indonesia. On the contrary, Article 11 paragraph (2) of the Oil and Gas Law has provided legal confirmation and/or certainty to the People's Legislative Assembly as the state institution representing the interests of the people of Indonesia.

On the other hand, the provision of Article 11 paragraph (2) of the Oil and Gas Law has imposed the limitation for the Government to implement international contracts between the Government and international companies.

Whereas based on the description above, the Government is finally of the opinion that the provision of Article 11 paragraph (2) of the Oil and Gas Law does not impair the Petitioners' constitutional rights and/or authorities, and therefore, it is not inconsistent with Article 1 paragraph (2), Article 11 paragraph (2), and Article 20A, and Article 33 paragraph (3) of the 1945 Constitution.

IV. CONCLUSION

Based on the statements and arguments, the Government requests for the Chief Justice/Panel of Constitutional Court Justices examining and deciding upon the constitutional review of Law Number 22 Year 2001 concerning Oil and Natural Gas against the 1945 Constitution of the State of the Republic of Indonesia to pass the following decisions:

1. To declare that the Petitioners do not have legal standing;

2. To reject the constitutional review petition of the Petitioners (as being void) in its entirety or at least to declare that the judicial review petition of the Petitioners cannot be accepted (*niet onvankelik verklaard*);

3. To accept the statement of the Government in its entirety;

4. To declare that Article 1 sub-article 19 and sub-article 23, Article 3 sub-article b, Article 4 paragraph (3), Article 6, Article 9, Article 10, Article 11 paragraph (2), Article 13 and Article 44 of Law Number 22 Year 2001 concerning Oil and Natural Gas are not inconsistent with Article 28C paragraph (2), Article 28D paragraph (1), Article 28H paragraph (1), Article 28I paragraph (4) and Article 33 paragraph (2) and paragraph (3) of the 1945 Constitution of the Nation of the State of the Republic of Indonesia;

5. To declare that Article 1 sub-article 19 and sub-article 23, Article 3 sub-article b, Article 4 paragraph (3), Article 6, Article 9, Article 10, Article 11 paragraph (2), Article 13 and Article 44 of Law Number 22 Year 2001 concerning Oil and Natural Gas continue to have legal power and binding effect throughout the entire territory of the Unitary State of the Republic of Indonesia.

Additional Statements of the Government

1. Expert Rudi Rubiandhini

Whereas the revenues from oil and natural gas exploitation activities and the expenditures in the context of fuel oil subsidies become as follows: The first one is that the amount revenues from oil and gas taxes is Rp60.9 trillion and the amount of Non-Tax State Revenues is Rp159.5 trillion. Accordingly, the estimated total of the revenues from oil and gas in 2012 is Rp220.4 trillion. The expenditures, namely fuel oil subsidies total Rp123.6 trillion so that there is a surplus in the amount of Rp96.8 trillion. It means that the state revenues are bigger than the expenditures for fuel oil subsidies.

"To view this as a public deception and delusion is inaccurate and dramatized for the following reasons." *First*, it is a misleading view to say that the revenues from oil resources plus gas resources in the total amount of Rp220.4 trillion are used for financing subsidies because the revenues from oil and gas resources are also used for the needs of the State Revenues and Expenditures Budget in turning the wheel of the government administration, such as salaries for Civil Servants, members of the armed forces, policemen, costs for judicial administration, costs for the religious sector, costs for art and culture development, infrastructural development, operational expenditures, et cetera, in accordance with the allocations of other state expenditures.

Second, such analogy may raise a question as to why coal resources are not considered as revenues at the same time. It still produces energy after all. Accordingly, it seems that its surplus will become increasingly larger and will be higher than Rp96.8 trillion. *Third*, it is still mistaken to say that only oil resources shall be used for supplying the whole Oil Fuel. This is because there is no special dedication of the commodities' revenues which are only reused for similar commodity in the preparation of the State Revenues and Expenditures Budget.

The last one is that the opinion that the entire of Indonesian crude oil shall be used for the people for free so that the burden to the people is just LRT costs which have value of Rp566.00 only is misleading information.

The second one is the Oil Fuel price versus the procurement cost. Several assumptions used so far are as follows:

1. Crude oil or the so-called crude oil of the state's portion is around 63% of the national crude oil production, which means 63% of planned 930,000 so that a volume 586,000 barrels per day is obtained.

2. The price of Indonesian crude petroleum as referred to as ICP is US$105 per barrel and the exchange rate is Rp9,000.00 per US$.

3. Allocations for premium and diesel fuel are 38.3 million-meters, 1.7 million-kiloliters for kerosene, 23 million-kiloliters for non-subsidized Oil Fuel.

4. Imported crude oil is 265,000 barrels per day. Imported Oil Fuel is 537,000 barrels per day.

5. Costs for lifting, refining, transportation, abbreviated to LRT, are in the amount of US$24.1 per barrel which consist of processing cost in the amount of US$12.8 and transporting cost in the amount of US$11.3.

Based on the calculation, it seems that the revenue obtained from selling crude oil and Oil Fuel is in the amount of Rp573 trillion. Meanwhile, the expenditures for procuring, importing Oil Fuel crude, importing crude, and processing, as well as transporting to the gas stations (SPBU) are in the amount of Rp577.88 trillion so that there is a deficit amount of Rp5.8 trillion.

The third one is the profit versus loss of Oil Fuel price of Rp4,500.00. By a simple calculation, if world oil price is in the amount of Rp105 per barrel or equivalent to Rp5,943.00 per liter, plus refining as well as transporting costs in the amount of US$24.1 per barrel or equal to Rp1,364.00 per liter, the Oil Fuel basic price is Rp7,307.00 per liter. After

tax deduction of 15%, its selling price is around Rp8,404.00 per liter. The fourth one is the regulations concerning the management of oil and gas resources. In the management of upstream oil and gas resources management, Indonesia has applied the PSC (production sharing contract) method which is translated into *Bahasa Indonesia* as *kontrak bagi hasil*. There are several principal points of the production sharing contract, namely as follows:

1. The contractors shall supply exploration, development, up to operational funds. The government shall not provide even one rupiah.

2. The contractors shall bear 100% of the risks if oil and gas are not found. The government shall not have any obligations to pay indemnity.

3. The government shall become the sole owner of oil and gas production up to the selling delivery point. The contractors will obtain remuneration in the form of investment return which has been issued, and will gain 15% profit from oil as well as 30% from gas in the form of crude oil or the so-called production sharing contract.

4. *BP Migas* shall use the range from 22% to 29% to control the recoverable cost.

5. To control the recordable cost, the equipment, such as plan of development world program and budget which is issued annually, AFE (authorization for expenditure) which is issued on each project by performing pre audit, current audit and post audit, and eventually audits by the Agency for Finance and Development Supervision (BPKP) as well as the Audit Board (BPK), are used.

The last one is the additional component of state revenue other than Non-Tax State Revenues or which is referred to as government equity share. On this picture, the equity share of the government and also withholding tax as well as domestic market obligation (DMO), from the operating year, on the next page, it can be seen that the state revenue is around 62% in 2012 up to April this year. Meanwhile, the contractors have 15% amount and the investment which has never revolved is 23%. It shows that the contractors who have brought the capital in the amount of 23% have the remuneration in the amount of 15%, and the Indonesian Government has profit in the amount of 62% from any oil which comes out of the bowels of the motherland. It is above 51%, as applied for by the members of the People’s Legislative Assembly in order to fulfill the inspiration of the 1945 Constitution.

Whereas international price is the standard for Oil Fuel price calculation. In the world, so many institutions issue price standards every day, namely, among other things, NYMEX from New York, WTI, Brand and so on, with the prices being different between one and another. Indonesian oil also has various prices. There are lower prices than the WTI price. In fact, some prices are higher than the *brand*. Accordingly, to facilitate the transaction, a term called ICP (Indonesian Crude Price) is made, obtained from the average price of all types of oil in Indonesia. Since Indonesian oil depends on the movement of the world oil prices, the ICP also depends on the world price movement. Finally, the crude oil price from each field will have a value ICP minus which means under the ICP. Some prices also have the value of ICP plus which means above the ICP.

[2.4] Whereas to support its statement, the Government has presented experts and witnesses whose statements have been heard under oath, namely as follows:

1. Expert Dr. Ir. Rachmat Sudibyo

- Whereas in the Oil and Gas Law, the mining authorization is held by the government and shall not be given to business actors. Thereby, the government shall have the power to exploit natural resources, while business actors which are only given a status as contractors, as the parties who shall enter into contracts with the

government. However, the Oil and Gas Law also imposes a limitation or safeguarding in the form of buffer, namely by establishing an executive agency. The government has established the executive agency for exercising its control. The government cq the minister shall prepare and determine cooperation contracts deemed to be in accordance with the operational areas presumed to contain natural resources in the form of potential oil and gas resources. The government, rather than *BP Migas*, should prepare and determine the operational areas. For that purpose, a tender or an offer is conducted by the Government *cq* the minister to the business actors.

- The executive agency certainly has given considerations to the government regarding the terms and conditions of the cooperation contract based on their experience from hundreds of existing cooperation contracts. Then, the executive agency signs the cooperation contract to exercise such control. Business actors only have minimum roles because they do not have the operational management control. If they want to develop a field, they cannot automatically determine as they must obtain the approval from the executive agency, and so on. The business actors only enjoy the economic right. They do not have the mineral right. The system adopted by Indonesia so far is production sharing contract, namely

that the remuneration from the efforts performed by the business actors shall be the products, either in kind as so far applied in the production sharing contract or other contracts.

- The form of cooperation contract in the Oil and Gas Law is production sharing contract applied since 1968. May be there are other forms of cooperation contracts. This production sharing contract is the principal contract which divide the productions in kind. The government never spends any cash or even cost recovery. Costs spent by the contractors are also paid in kind. How to calculate the in kind volume with its cost? It is certainly by the government's standard price, namely the Indonesian Crude Price.

- Whereas Article 6 paragraph (2) is the most important article in the Oil and Gas Law in order to maintain the state control in accordance with the mandate of Article 33 paragraph (3) of the 1945 Constitution, namely *first,* that the natural resources' ownership shall remain in the hands of the government, up to the export point of course. The *second* one is that the management control shall be in the hands of the government *c.q.* the executive agency. The contractors shall not have the rights to control. All must be approved first. It means that there are work programming budget, plan of development and even authorization for expenditure

in the Government Regulation for each project having bigger value than $5,000,000.00. The *third* one is that capital and risks shall be borne by the contractors rather than the government.

- Whereas related to one operational area (range fencing), according to the expert, the *first* one is that such matter is regulated so that mining business actors are not allowed to use money earned in one operational area for exploration in other operational areas because it will reduce the state revenues, especially the regional government's revenues where such operational area exists. The business actors are allowed, if they want, to have more than one operational area but they must establish different legal entities, for instance PT. Cevron Riau or PT. Cevron Selat Makasar. Such regulation is actually to keep the state revenues safe from the exploration and exploitation activities in accordance with the mandate of Article 33 paragraph (3) of the 1945 Constitution. The *second* one is that such regulation is made because it has been agreed that the state shall not be allowed to fund and to bear the risks. If the article *a quo* is annulled, there will be chaos that the state will bear all costs and risks in oil mining activities;

- Whereas in respect of the upstream and downstream activities, the 1945 Constitution has regulated them, namely that the upstream

part is related to natural resources which shall be controlled by the state for the greatest prosperity of the people. Meanwhile, the downstream part refers to the production branches. Similar to Oil Fuel, the upstream activities shall be controlled by the state, in this case by the government. However, it shall not be possessed in the downstream. It means that it only performs guidance and supervision as regulated in accordance with applicable laws like an industry only that it is performed more strictly;

- Whereas according to the expert, oil and natural gas activities are not disintegrated. According to the Law *a quo*, business entities or actors who want to have it all are allowed to request it by applying for permission at once. However, if a business actor does not have large capital and it only has capital for transportation, it can participate in the downstream industry;

- Whereas Article 9 paragraph (1) of the Oil and Gas Law regulates that *the Upstream and Downstream Business Activities as intended in Article 5 sub-article 2 may be conducted by:*

  a. state-owned enterprises;

  b. region-owned enterprises;

c. *cooperatives; small businesses;*

d. *private business entities*.

Such regulation is different with the previous one which, *de jure,* only allowed one State-Owned Enterprise to conduct oil and natural gas activities although *de facto,* there are business actors conducting oil and natural gas activities. Such regulation exactly opens the chance for the business actors to compete with State-Owned Enterprises in managing oil and natural gas activities;

2. Expert Prof. Dr. Erman Rajagukguk

- Whereas Article 33 of the 1945 Constitution states:

"(1) The economy shall be organized as a common endeavor based upon the principle of family system.

(2) Production branches which are important for the state and which affect the livelihood of the public shall be controlled by the state.

(3) Land and waters and the natural resources contained therein shall be controlled by the state and shall be used for the greatest prosperity of the people.

(4) The national economy shall be organized based on economic democracy with the principles of togetherness, efficiency with justice, sustainable and environmentally insight, independence as well as by keeping a balance between progress and unity of national economy.

(5) Further provisions concerning the implementation of this article shall be regulated in law."

Therefore, it is not true that the Oil and Gas law is inconsistent with Article 33 of the 1945 Constitution which gives the opportunity to international corporations to enter the Oil and Gas businesses in Indonesia. The truth is that Indonesia does not have enough capital to explore oil and natural gas because this sector needs large capital, has high risks and needs special expertise. It takes time from 6 to 10 years to ensure whether an exploration can be continued to exploitation, and it takes more time from 1 to 3 years to build facilities. All costs required during such exploration and exploitation are the contractors' burden. Recovery of such costs is merely estimated based on the results of Oil and Gas, namely if Oil and Gas exist and can be produced commercially.

- Whereas if oil reserve or commercial Oil and Gas cannot be found in one operational area, such operational area shall be returned to the government, and the costs spent by the contractor become its own burden and risk.

- Whereas as non-renewable resources, the productivity will naturally decrease, and Oil and Gas production is increasingly expensive while its production cost is increasingly high. To give an opportunity to international corporations is not inconsistent with Article 33 of the 1945 Constitution because the aforementioned Article 33 of the 1945 Constitution does not prohibit foreign capital.

- Whereas in the subsequent development, the Constitutional Court interpreted the aforementioned Article 33 of the 1945 Constitution as follows. The 1945 Constitution mandates the state to make policy (*beleid*) and to perform administration (*bestuurdaad*), regulation (*regelendaad*), management (*beheersdaad*) and supervision (*toezichthoudensdaad*) actions for the greatest prosperity of the people.

  The state's administrative function is implemented by the government with authority to issue and revoke permission, license and concession facilities. The state's administration function is

implemented through the legislative authority of the People's Legislative Assembly together with the government and the government regulations.

The management function is implemented through shareholding mechanism and/or through direct involvement in the management of state-owned enterprises or state-owned legal entities as institutional instruments through which the state *c.q.* the government effectively uses its control over assets which shall be used for the greatest prosperity of the people.

Therefore, the state's supervisory function is implemented by the state *c.q.* the government for the purpose of supervision and control so that the state control over the production branches which are important and/or which affect the livelihood of the public really exercised for the greatest prosperity of the people.

Likewise, the expert is of the opinion that Article 1 sub-article 19 and sub-article 23, Article 3 sub-article b, Article 4 paragraph (3), Article 6, Article 9, Article 10, Article 11 paragraph (2), Article 13 and Article 14 of Law Number 22 Year 2001 concerning Oil and Natural Gas are not inconsistent with Article 1 paragraph (2), Article 11 paragraph (2), Article 20A and Article 33 paragraph (2) and

paragraph (3) of the 1945 Constitution, with the following explanation;

a. Article 1 sub-article 19 of the Oil and Gas Law. That the cooperation contract shall be a production sharing contract or any other form of cooperation contract and so on, is not inconsistent with Article 33 paragraph (2) and paragraph (3) of the 1945 Constitution because the other forms of cooperation contracts are service contracts and enhanced oil recovery contracts which explore old oil wells again, and the results are effectively used for the greatest prosperity of the people. By this article, the 1945 Constitution mandates the state to make policy, to take administrative, regulation and management actions for the greatest prosperity of the people.

b. Article 1 sub-article 23 of the Oil and Gas Law. That executive agency shall be an agency established to control upstream business activities in the oil and natural gas sector, is not inconsistent with Article 33 paragraph (2) and paragraph (3) of the 1945 Constitution because the executive agency is established to control the upstream activities in the oil and natural gas sector. This is the

implementation of the 1945 Constitution which mandates the state for the management.

c. Article 3 sub-article b of the Oil and Gas Law. That the implementer of oil and natural gas business activities is aim at assuring effective implementation and accountable management, transportation, storage and provision activities conducted through a reasonable, fair and transparent business competition mechanism, is not inconsistent with Article 33 paragraph (2) and paragraph (3) of the 1945 Constitution because the reasonable, fair and transparent business competition mechanism is the implementation of Law Number 5 Year 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition.

d. Article 4 paragraph (3) of the Oil and Gas Law. That the government as the holder of mining authorization shall establish an executive agency as intended in Article 1 sub-article 23, is not inconsistent with Article 33 paragraph (2) and paragraph (3) of the 1945 Constitution because the executive agency is established to control the upstream activities in this oil and natural gas sector. It is the

implementation of the 1945 Constitution which mandates the state for the management.

e. Article 6 of the Oil and Gas Law. First, that the upstream business activities as intended in Article 5 sub-article 1 shall be conducted and controlled through the intended cooperation contracts and so on, is not inconsistent with Article 33 paragraph (2) and paragraph (3) of the 1945 Constitution because the cooperation contracts terms are included as the implementation of the 1945 Constitution which mandates the state to make policies, to take administrative, regulation, management and supervision actions for the greatest prosperity of the people.

f. The aforementioned Article 9 of the Oil and Gas Law, Article 10, Article 13 and Article 14, altogether are not inconsistent with Article 33 paragraph (2) and paragraph (3) of the 1945 Constitution because such articles are the implementation of the 1945 Constitution which mandates the state to make policies (*beleid*), to take administrative, regulation, management and supervision actions for the greatest prosperity of the people.

- The production sharing ratio between the Government of the Republic of Indonesia and foreign corporations is 71.1538% to 24.8462% where the capital for finding and extracting such oil as well as the risk which may emerge are the burden of the foreign corporations. In addition, the foreign corporations still bear the government's tax of 48% so that the foreign corporations only receive 15% and the state receives 85%.

- Whereas the expert concludes that the articles referred to by the Petitioners are not inconsistent with the constitution, particularly Article 33 paragraph (2) and paragraph (3) of the 1945 Constitution.

3. Expert Prof. Dr. Hikmahanto Juwana

- Whereas the Expert wants to convey two principal matters, namely in respect of agreement's existence, in this case the Production Sharing Contract, namely whether it is the contract intended in Article 11 paragraph (2) or not, and the s*econd*, in respect of *BP Migas*' existence.

- Whereas in entering into an agreement or a contract, the state can act in two capacities; *First* as civil law subject and *second*, as international law subject. It will be determined depending on who is faced in an agreement. If the civil law subject must faced, the state

becomes a civil law subject where the agreement entered into is subject to binding provisions in the field of the civil law. Meanwhile, if a state which is an international law subject is faced, the agreement being entered into is subject to the Law concerning International Treaties, namely Law Number 24 Year 2000 and the provisions of international law in relation to the agreement.

- Whereas in respect of the cooperation contract in the Oil and Gas Law, the expert is of the opinion that such cooperation contract is a civil contract, rather than an international treaty. Whereas the party in the cooperation contract is the Executive Agency for Upstream Oil and Gas Activities (*BP Migas*) which is a statutory body in the form of a state-owned legal entity. It is confirmed in Article 45 paragraph (1) of the Oil and Gas Law which reads as follows, "The executive agency as intended in Article 4 paragraph (3) shall be a state-owned legal entity." Furthermore, the elucidation of Article 45 paragraph (1) of Oil and Gas further states that "the state-owned legal entities in this provision shall have the status of civil law subject and shall not be a profit-oriented institution and shall be managed professionally". Moreover, the cooperation contracts (*kontrak kerja sama/KKS*) cannot be deemed as other international treaties because *BP Migas*' partners in the cooperation contracts are not non-state international law subjects in the form of

international organizations, international red cross or belligerent. As we know it, k *BP Migas*' partners in the cooperation contracts are both domestic and international contractor companies which are civil law subjects. Accordingly, in the field of legal science, the cooperation contracts are international business contracts which are part of the international legal science.

- Whereas in the cooperation contracts, the principle of balance depends on the bargaining position and accuracy in drafting the contracts. The substance of a cooperation contract as a an agreement will depend on what is being agreed upon by the parties, although the parties have equal position from the legal aspect so as to fulfill the first element of Article 1320 of the Civil Code, namely on the existence of agreement. However, in fact, some parties in the contract sociologically may have high, low or equal bargaining position. If one of the parties has high bargaining position, such party is able to determine the agreement's content, while the owner with weak bargaining position only has the opportunity to agree or not with the agreement's content which has been determined. Such contract or agreement is often called standard contract or agreement.

- Whereas in a standard contract, parties having low bargaining position will be protected by the state from excessive exploitation by parties having high bargaining position. The state's protection is implemented in the form of laws and regulations or judicial decisions. Meanwhile, if the parties have relatively similar bargaining position sociologically, the parties will be involved in a long negotiation process. The contract or the agreement will contain the results of the parties' negotiations or compromises. Accuracy and intelligence in negotiating and formulating agreements are required here. Therefore, the principle of balance in an agreement, where the parties have relatively equal bargaining position, does not automatically come up or it is not given but it must be managed by the respective parties wishing to enter into the contract.

- Whereas in the field of contract law, states may be the parties in a treaty. Clauses on dispute settlement can be agreed in the agreements between states and corporations or individuals. These clauses are aimed at anticipating any disputes in the future. Clauses on dispute settlement contain 2 stages, namely settlement by mutual consensus and if it cannot be settled, it will be settled through a dispute settlement institution.

- Whereas dispute settlement through a dispute settlement institution can be chosen through court or arbitration. The court or arbitration can be chosen whether inside or outside the country. Accordingly, when *BP Migas* has entered into contracts with its partners in cooperation contracts, this choice must certainly be agreed upon during the process until reaching such agreement. If the bargaining position is relatively similar, negotiations must be conducted. Arbitration may be chosen to settle disputes based on the negotiations, and it shall be performed in a foreign country. If it turns out that *BP Migas* must have settled a dispute with its partners through arbitration in a foreign country and if *BP Migas* is declared to be losing party, it does not mean that it is the loss of the State of the Republic of Indonesia or that the result degrades the nation's dignity. In the law of contracts, *BP Migas*' loss does not mean the state's loss. *BP Migas*' loss means that the dispute settlement institutions deems that *BP Migas* is in default as alleged by its partners. Settlement through arbitration does not mean downgrading of the nation's dignity, either, considering that arbitration is the dispute settlement institution among subjects of civil law. In a production sharing contract, *BP Migas* is acting as a civil law subject who shall not involve the nation's dignity.

- Whereas the existence of *BP Migas* as a legal entity is intended to limit loss insurance. In civil law science, *BP Migas* is a subject in the form of legal entity. *BP Migas* is categorized as the kind of statutory body established by the government, whose establishment is based on special laws and regulations. It is different from limited liability companies which are company legal entities established by the government based on one of the forms of legal entities regulated in applicable laws and regulations, in this case the Law on Limited Liability Companies.

- Whereas since long time ago, Indonesia has recognized statutory bodies or legal entities established by the government under special laws and regulations, for instance Pertamina. In the beginning, before the coming into effect of the Oil and Gas Law, it was established under Law Number 8 Year 1971 concerning State-Owned Oil and Gas Mining Company (*Perusahaan Pertambangan Minyak dan Gas Bumi Negara*). Article 2 paragraph (1) states that by the name of state-owned oil and gas mining company (*perusahaan pertambangan minyak dan gas bumi negara*), abbreviated to Pertamina, hereinafter referred to as the company, an oil and gas mining company shall established owned by the State of the Republic of Indonesia. Another example for a statutory body is Law Number 24 Year 2004 concerning Indonesian Deposit

Insurance Corporation (*Lembaga Penjamin Simpanan*) which established the deposit insurance corporation. Article 2 paragraph (1) of such Law states that under this Law, the Indonesian Deposit Insurance Corporation, hereinafter referred to as LPS, shall be established.

- Whereas legislations applied to establish or stipulate state-owned legal entities are not only Laws, but also government regulations. For example, the statutory body status of a number of public universities has been stipulated by government regulation. University of Indonesia has been given the statutory body status based on Government Regulation Number 152 Year 2000. Its Article 2 paragraph (1) states that by this government regulation, University of Indonesia shall be stipulated as a state-owned legal entity which shall organize the education sector. Furthermore, Article 4 states that the university as a state-owned legal entity as intended in Article 2, shall be a non-profit legal entity.

- Whereas the history of *BP Migas*' establishment is not separated from the existence of public universities as state-owned legal entities. *BP Migas* has been intended to become a statutory body which is separated from the state by the legislators of the Oil and Gas Law, but it does not adopt the form of limited liability company

or public company which are two forms of state-owned legal entities. The idea of *BP Migas*' establishment is intended for limiting the state's responsibilities when it must bear losses, being limited to the assets possessed by *BP Migas* and not being consolidated with the assets possessed by the state.

- Whereas the capacity of *BP Migas* as the state's representative is different from the state when it enters into contracts with partner companies. In General Mining Laws, for instance Law Number 1 Year 1967, the state has entered into contracts with contractor companies called contracts of work. Based on the contracts of work, the state can be sued by the contractor companies to a dispute settlement institution as agreed upon by the parties. If the state loses and must bear the losses, the state's assets to indemnify such losses cannot be limited.

- Whereas it is to be understood that in the mining industry, including oil and gas mining, investments made by partner companies are large. Accordingly, if the losses are not limited, the state's assets can be used as assets to cover the contractor companies' losses. Therefore, based on the description above, *BP Migas*' existence is important to mitigate the state's responsibilities in the event of any claim for damages by contractor companies.

- Whereas Article 2 paragraph (2) of Law Number 8 Year 1971 states that the definition of state-owned company indicated in Law Number 44 *Prp* Year 1960, particularly Article 1, shall be read as the company in the definition of this Law. Based on the aforementioned provision, Pertamina shall hold the mining authorization. Nevertheless, in fact, in addition to holding the mining authorization entering into contracts with contractor companies, Pertamina shall also act as a legal entity which shall conduct exploration and exploitation in the oil and natural gas mining sector. Accordingly, before the Oil and Gas Law came into effect, Pertamina had two roles at the same time, namely as the holder of mining authorization and the business actor.

  The Oil and Gas Law has intended to separate the two Pertamina's roles when there is potential conflict of interest between one role and another. Related to such matter, Pertamina's position as the mining right holder was then been substituted by *BP Migas*. Meanwhile, Pertamina maintained its position as a business actor. *BP Migas*' position as the mining right holder is based on the provisions of Article 4 paragraph (2) and Article 4 paragraph (3) of the Oil and Gas Law. Article 4 paragraph (2) of the Oil and Gas Law states, "*The control by the state as intended in paragraph (1)*

shall be exercised by the government as the holder of mining authorization." Moreover, paragraph (3) states that "*The Government as the holder of Mining Authorization shall establish the Executive Agency as intended in Article 1 sub-article 23*" and Article 1 sub-article 23 states that "*Executive Agency shall be an agency established to control Upstream Business Activities in the Oil and Natural Gas sector*."

- Whereas as a business actor, Pertamina is required under the Oil and Gas Law to transform into a state-owned legal entity established under the Law on Limited Liability Companies. It is regulated in Article 60 sub-article a, which reads as follows, "*Pertamina shall be transformed into a limited liability company (Persero) by a Government Regulation by no later than two years*."

Witness Sampe L. Purba

- Whereas the Oil and Gas industry is an industry with a long life span, which requires a very long time spectrum or the type of life span. While one exploration activity alone requires three up to six years, it requires one up to two years to make sure whether the results of exploration, if any, are sufficient for commercial use, and the development plan requires approximately three up to six years, and the production activity requires

approximately 10-20 years, and the whole process may be completed one or two years thereafter.

- Whereas considering the very long period namely about three to five years for exploration activity alone, the process requires a certainty, since oil and natural gas business is a business with very long period, high risk, high cost, and high tech, which means that it highly requires both legal certainty and certainty of the rules of procedure. The great opportunity for cooperation in the upstream oil and gas sector has been provided for State-Owned Enterprises or Region-Owned Enterprises, private companies, co-operatives, foreign companies, or small businesses, with how strong and how far these respective parties can gain access to this industry depending on their own abilities. This industry, at least, might require approximately seven years to produce;

- Whereas in the event of any disputes or any matter, the provisions regulated in contracts shall be referred to;

- Whereas oil and gas operational areas in Indonesia have been developing considerably from year to year. Oil and gas exploration efforts have been conducted but more than that, efforts to discover new oil reserves, new types of oil and gas, as well as efforts to search for and drive the economy have been made in so many ways that they fulfill the needs, not only

domestic needs but also export needs, and other needs in accordance with the government's policies.

- Whereas during the development of operational areas in 2002-2012, there were approximately 107 operational areas in 2002 and there are approximately 293 operational areas in 2012. This means that there has been intensity, increased volume, and increased efforts required in the management of upstream oil and gas industrial activities. Therefore, the condition in 2002 cannot be compared to the current condition. There have been developing dynamics and also increased weight and work load of the institution. Before 2002, before the era of regional autonomy, all activities were decided by the government in Jakarta but currently, the implementation of upstream Oil and Gas activities must interact with the ministry and other agencies, including the Regional Government, with the entire process requiring efforts and manpower. This condition leads to and is adjusted to the need for manpower or employees required in the Executive Agency for Upstream Oil and Gas Business Activities to manage upstream Oil and Gas activities.

- Whereas within the last 5-6 years, the Government and Regional Governments in all regions, as well as all relevant institutions in governmental agencies have made considerable efforts to make sure that many investors invest in the sector of upstream Oil and Gas. These

investments are entirely from the sector or the contractors of cooperation contract themselves, with none of these investments being made by the government. For the long-term business to run, the investments are required for the efforts of exploration, administration, development, and production activities, with the figures of investment value in 2006 being approximately US$ 7,500,000.00 and the investment value in 2012 being approximately US$ 20,900,000.00. These investments are not from the state or State Revenues and Expenditures Budget, instead, they are entirely from business actors themselves. For this reason, legal certainty and conducive environment need to be improved continuously. These are necessary not only for searching for new production, but also for changing production and driving the economy.

- The second discussion is about organizational governance of the Executive Agency for Upstream Oil and Gas Business Activities, namely that in terms of policy, regulation, or operation, and supporting business of Oil and Gas, this industry is a state industry where the state and the community are jointly the holders of sovereignty over the natural resources. The community then gives its mining right to the Government, the Government makes the policies, and then technical and business regulations are also made by the Government, while the regulations are implemented by the contractors of the cooperation contracts as the holders of economic interest. Since they are the ones who make

investments in accordance with the terms and conditions set by the government and cooperation which are accepted by the contractors, then for the implementation of the contracts, the Government has established the Executive Agency for Upstream Oil and Gas Business Activities.

- The Executive Agency for Upstream Oil and Gas Business Activities is merely an executive body of the government policies on the one hand and the Executive Agency for Upstream Oil and Gas Business Activities constitutes an agency that accommodates the aspiration as well as the facilities of Oil and Gas business activities on the other hand. Therefore, there is an overlap of interests between business interests on the one hand and the government's interests as the maker of the regulations or other policies on the other hand. The Executive Agency for Upstream Oil and Gas Business Activities is not an institution which is not affected by policies or an institution which does not have any accountability, since the policies that it enforces do not depend on or are not supervised by other institutions in the state system of Indonesia. The head of Executive Agency for Upstream Oil and Gas Business Activities is appointed by and shall report to the President upon consultation with the People's Legislative Assembly, in this case the commission in charge of the energy sector.

- Whereas the work mechanism of its personnel organizational structure is regulated by government regulations. The management of its assets, revenues and expenditures budget, as well as its annual work plan is stipulated by the Minister of Finance upon receipt of technical considerations from the Ministry of Energy and Mineral Resources. With respect to the implementation of duties by the Executive Agency for Upstream Oil and Gas Business Activities itself in the context of supervision and control of the upstream Oil and Gas business activities, there is an internal audit by the government, or external audit of performance management or financial management.

- Whereas in the scheme of upstream Oil and Gas, the existence of the Executive Agency for Upstream Oil and Gas Business Activities is not merely for the supervision of cost expenses, but also for the supervision of all segments both in work plans and budgets of the contractors. This matter reflects that the private party contractors or the parties involved in the Cooperation Contracts do not merely incur expenditure in accordance with their needs, but that the expenditure must be adjusted to government policies. Similarly, the execution, supervision of control, technical operation, manpower, compliance with regulations of the relevant institutions, and the contractors' operational costs must be adjusted to government policies. This operational cost which is permitted as the Oil and Gas operational cost is also examined and audited by the parties,

including parties involved in the Cooperation Contracts. The reason is that there are two parties involved in Cooperation Contracts; the first party is an operator and the other party is merely an investor. Both parties to the contract must also ensure that the operator’s capital or the mutually agreed objectives are implemented. This is called audit by the partners. In addition to that, the Executive Agency for Upstream Oil and Gas Business Activities in this context must also implement a part of the management since controlling is a part of the supervisory function. The Audit Board, the Agency for Finance and Development Supervision, the Directorate General of Taxes, and all institutions established by the government perform their respective duties in the context of supervision and control of the intended activities. The ownership and policies on the activities are also stipulated by the state.

- Whereas the components of state revenues in the Cooperation Contract are completely similar to those in the upstream Oil and Gas sector, which are in the form of non-tax revenues, in kind, and also taxes. In general, the value ranges between approximately 65% and 85% of the total state net revenues. This is the industry that supports the State Revenues and Expenditures Budget by approximately 30% per year directly, excluding the taxes.

- Whereas the management of the upstream Oil and Gas industry has macro and micro dimensions. The perspective of time ranges from short to long terms, and it is not merely aimed at ensuring cost recovery or ensuring production, but it must also be viewed comprehensively, as well as at applying the use of technological facilities, maintaining the economic aspect of the projects, multiplier effect, that are not merely money-oriented or profit-oriented, but rather, they are adjusted to government policies.

- Whereas the purpose of increasing Oil and Gas production is not merely to increase production or only to fulfill the temporary needs in the State Revenues and Expenditures Budget, but also to maintain the balance of reserves, domestic needs, and so forth. However, since the upstream Oil and Gas industry is a strategic industry and that oil and gas are vital commodities which constitute the compulsory mandate of the State Revenues and Expenditures Budget, the duty must therefore still be performed. The fact is that within the last five to six years, the Government has always been making efforts to perform the duty mandated by the state under the State Revenues and Expenditures Budget by making all efforts and certainly with the conducive environment of all the relevant stakeholders.

- Whereas with regard to costs or results of industry or economy, the indicator is the ratio. Therefore, when we make a comparison between

costs and results, it must always be the comparison which is not out of context. Whereas the distribution of state revenues must still be at the approximate level of 60%. No matter how much cost of industry is incurred, state revenues are related to three matters, namely cost factor, price factor, and volume factor;

- Whereas LNG is not free from the influence of the supply and demand law. The increase and decrease in price are affected by buyers, market capacity, market prediction, and sellers. Therefore, the upstream Oil and Gas industry, including its LNG, is not free form the general laws of supply and demand;

- Whereas the implementation of upstream business activities is open, not exclusive for foreign companies. The Laws provide equal opportunities for State-Owned Enterprises, Region-Owned Enterprises, private companies, and foreign companies, by prioritizing local State-Owned Enterprises and Region-Owned Enterprises, while how they avoid risks of capital and other matters depends on their own abilities;

- Whereas the Executive Agency for Upstream Oil and Gas Business Activities as an institution established by the Government under the order of Law Number 22 Year 2001 which is implemented in Government

Regulation Number 40 Year 2002, has the accountability and governance which are measurable and accountable in public administration system.

- Whereas the management of upstream business activities includes matters of financial revenues, cost control, discovery of new reserves, and the business activities are expected to function as the locomotive of the economy.

- Whereas the prices of oil, gas, and LNG are subject to laws of supply and demand mechanism in the market, similar to other commodities.

[2.5] Whereas the Petitioners have submitted their written conclusion received at the Registrar's Office of the Court on August 9, 2012, in which in principle the parties are consistent with their stand;

[2.6] Whereas the Government has submitted its written conclusion received at the Registrar's Office of the Court on August 13, 2012, in which in principle it is consistent with its statement;

[2.7] Whereas to shorten the description in this decision, all which have occurred in the hearings are sufficiently indicated in the minutes of hearing, which shall constitute an integral and inseparable part of this decision;

3. LEGAL CONSIDERATIONS

[3.1] Whereas the purpose and objective of the Petitioner's petition for judicial review is to review the constitutionality of Article1 sub-article 19 and sub-article 23, Article 3 sub-article b, Article 4 paragraph (3), Article 6, Article 9, Article 10, Article 11 paragraph (2), Article 13 and Article 44 of Law Number 22 Year 2001 concerning Oil and Gas (State Gazette of the Republic of Indonesia Year 2001 Number 136, Supplement to State Gazette of the Republic of Indonesia Number 4152, hereinafter referred to as the Oil and Gas Law) against the 1945 Constitution of the State of the Republic of Indonesia (hereinafter referred to as the 1945 Constitution);

[3.2] Whereas before considering the substance of the petition, the Constitutional Court (hereinafter referred to as the Court) will first consider the following matters:

a. authority of the Court to hear the petition *a quo*;

b. legal standing of the Petitioners;

With respect to the aforementioned both matters, the Court is of the opinion as follows:

Authority of the Court

[3.3] Whereas under the provisions of Article 24C paragraph (1) of the 1945 Constitution, Article 10 paragraph (1) sub-paragraph a of Law Number 24

Year 2003 concerning the Constitutional Court as amended by Law Number 8 Year 2011 concerning the Amendment to Law Number 24 Year 2003 concerning the Constitutional Court (State Gazette of the Republic of Indonesia Year 2011 Number 70, Supplement to State Gazette of the Republic of Indonesia Number 5226, hereinafter referred to as the Constitutional Court Law), Article 29 paragraph (1) sub-paragraph a of Law Number 48 Year 2009 concerning Judicial Power (State Gazette of the Republic of Indonesia Year 2009 Number 157, Supplement to State Gazette of the Republic of Indonesia Number 5076), the Court has authority to hear cases at the first and final level, whose decision shall be final, to conduct judicial review of Laws against the 1945 Constitution;

[3.4] Whereas the Petitioner's petition for judicial review is to review the constitutionality of Article1 sub-article 19 and sub-article 23, Article 3 sub-article b, Article 4 paragraph (3), Article 6, Article 9, Article 10, Article 11 paragraph (2), Article 13 and Article 44 of the Oil and Gas Law against the 1945 Constitution, which is one of the authorities of the Court, and therefore, the Court has authority to hear the petition *a quo*;

Legal Standing of the Petitioners

[3.5] Whereas under Article 51 paragraph (1) of the Constitutional Court Law together with its Elucidation, parties which may file a petition for judicial review of a Law against the 1945 Constitution are those who consider that their

constitutional rights and/or authorities granted by the 1945 Constitution are impaired by the coming into effect of a Law, namely:

a. individual Indonesian citizens (including groups of people having a common interest);

b. customary law community units insofar as they are still in existence and in accordance with the development of the community and the principle of the Unitary State of the Republic of Indonesia as regulated in law;

c. public or private legal entities; or

d. state agencies;

Therefore, the Petitioners in the judicial review of a Law against the 1945 Constitution must first explain and substantiate:

a. their legal standing as Petitioners as intended in Article 51 paragraph (1) of the Constitutional Court Law;

b. the impairment of constitutional rights and/or authorities granted by the1945 Constitution due to the coming into effect of the Law being petitioned for judicial review;

[3.6] Whereas following its Decision Number 006/PUU-III/2005, dated 31 May 2005 and the Decision Number 11/PUU-V/2007, dated 20 September 2007,

as well as subsequent decisions, the Court has been of the opinion that the impairment of constitutional rights and/or authorities as intended in Article 51 paragraph (1) of the Constitutional Court Law shall meet 5 requirements, namely:

a. the existence of the constitutional rights and/or authorities of the Petitioners granted by the 1945 Constitution;

b. the Petitioners believe that such constitutional rights and/or authorities are impaired by the coming into effect of the Law being petitioned for judicial review;

c. the constitutional impairment must be specific and actual or at least potential in nature which, based on logical reasoning, can be assured of occurring;

d. there is a causal relationship (*causal verband*) between the intended impairment and the coming into effect of the Law being petitioned for judicial review;

e. if the petition is granted, it is likely that the constitutional impairment argued will not or will no longer occur;

[3.7] Whereas in the petition, the Petitioners consist of three groups, namely:

1. Petitioner 1 up to Petitioner IX are incorporated associations which in general have the purpose of realizing the order of civil society or a true Islamic society (*al-mujtama' al-madani*), implemented by various efforts of guidance, development, advocacy and community renewal in the fields of education, health service, social service, community empowerment, political role of nationalism, and so forth. These efforts constitute the form of defense and struggle for public interest in general and religious community interest in particular (*vide* Exhibit P-1 up to Exhibit P-10);

2. Petitioner X up to Petitioner XXIV, Petitioner XXVI, Petitioner XXVIII up to Petitioner XLII are individual Indonesian citizens;

3. Petitioner XXV and Petitioner XXVII are individuals who are members of the People's Legislative Assembly of the Republic of Indonesia;

The Court gives consideration to the Petitioners as follows:

Whereas under Article 51 paragraph (1) of the Constitutional Court Law and the decisions of the Court concerning legal standing as well as related to the Petitioners' impairment, according to the Court, the Petitioners are categorized as individual Indonesian citizens (including groups of people having a common interest) whose the constitutional rights are potentially impaired by the coming into effect of the articles of the Oil and Gas Law being petitioned for judicial review and if the petition is granted the constitutional impairment argued will not

or will no longer occur. Therefore, according to the Court, the Petitioners have legal standing to file the petition for judicial review *a quo*;

[3.8] Whereas since the Court has authority to hear the petition *a quo* and the Petitioners have legal standing to file the petition for judicial review *a quo*, the Court will consider the substance of the petition;

Substance of the Petition

Opinion of the Court

[3.9] Whereas after carefully hearing and reading the statements of the Petitioners, the Government, the experts and witnesses of the Petitioners, experts of the Government, as well as examining the evidence in the form of letters/writings presented by the Petitioners and the Government, the Court discovers several constitutional problems in the petition filed for judicial review *a quo*, namely:

1. Legal standing of the Executive Agency for Oil and Natural Gas, hereinafter referred to as *BP Migas*;

2. Cooperation Contract on Oil and Gas;

3. The phrase "*implemented through a reasonable, fair, and transparent business competition mechanism";*

4. Position of State-Owned Enterprise which can no longer be monopolized;

5. Prohibition of the merging of upstream business and downstream business;

6. Notice of Cooperation Contract to the People's Legislative Assembly;

[3.10] Whereas before considering the constitutional problems, the Court first puts forth that Oil and Natural Gas (hereinafter referred to Oil and Gas) are included as production branches which are important for the state and which affect the livelihood of the public, as well as natural resources contained in the land and waters of Indonesia which must be controlled by the state and must be used for the greatest prosperity of the people as intended in Article 33 paragraph (2) and paragraph (3) of the 1945 Constitution. The Court has given the meaning of the state control in Article 33 of the 1945 Constitution, as taken into account in the Decision Number 022/PUU-I/2003, dated 21 December 2004 concerning judicial review of the Oil and Gas Law, which stated that,

"…the state control in Article 33 of the 1945 Constitution has a higher or broader definition than ownership in the concept of civil law. The concept of state control constitutes the concept of public law related to the principle of sovereignty of the people which is adhered to in the 1945 Constitution, both in the fields of politics (political democracy) and economy (economic democracy). In the concept of sovereignty of the people, the people are acknowledged as the source, owners,

as well as the holders of the highest power in living as a state, in accordance with the doctrine "from the people, by the people, and for the people". The definition of the highest power also includes the definition of public ownership by the collective people. Whereas the land and waters and the natural resources contained in the jurisdiction of the state substantially belong to public of all the collective people which are mandated to the state for control to be used for the greatest collective prosperity. Therefore, Article 33 paragraph (3) defines "land and waters and the natural resources contained therein shall be controlled by the state and shall be used for the greatest prosperity of the people".

That decision also considered that the meaning of "controlled by the state" cannot be interpreted only as a right to regulate, since this matter is automatically inherent in the functions of the state without having to be stated specifically in the Constitution. Even if Article 33 is not included in the 1945 Constitution, the authority of the state to regulate will still belong to the state, even in a state that adheres to the concept of liberal economy. Therefore, in that decision the Court considered that,

"…the definition of "controlled by the state" must be interpreted by including the meaning of state control in a broad sense which is based on and derived from the concept of the sovereignty of the people of Indonesia over all natural resources "land, water and the natural resources contained therein", also including the definition of public ownership of the natural resources by the

collective people. The collective people construed by the 1945 Constitution give the state mandate to formulate policies (beleid) and take administrative measures (bestuursdaad), regulation (regelendaad), management (beheersdaad), and supervision (toezichthoudensdaad) aimed at the greatest prosperity of the people. Administrative function (bestuursdaad) of the state is performed by the Government with its authority to issue and revoke licensing facilities (vergunning), license (licentie), and concession (consessie). Regulation function of the state (regelendaad) is performed through joint legislative authority of the People's Legislative Assembly and the Government, and regulatory authority of the Government. Management function (beheersdaad) is performed through the mechanism of share-holding and/or through direct involvement in the management of State-Owned Enterprises or State-Owned Legal Entities as an institutional instrument, where the State, c.q. the Government, through these institutions efficiently use its control over the natural resources to be used for the greatest prosperity of the people. Similarly, supervision function (toezichthoudensdaad) is performed by the State, c.q. the Government, in the context of supervision and control so that the aforementioned state control over the natural resources is actually implemented for the greatest prosperity of the people.

The definition of the control includes the definition of civil ownership as an instrument to retain the level of State control, c.q. the Government, in the management of oil and gas production branches. Accordingly, the concept of the

state private ownership of shares in business entities that are related to the production branches which are important for the state and/or affect the livelihood of the public cannot be dichotomized or alternated with the concept of regulated by the state. Both concepts are cumulative in nature and they are included in the definition of state control. Therefore, the state does not have the authority to regulate or set rules that prohibit itself from owning shares in a business entity that are related to the production branches which are important for the state and affect the livelihood of the public as a state's instrument or way to retain control over the natural resources aimed at the greatest prosperity of the people.

[3.11] Whereas the definition of "state control' as taken into account in the Court decision Number 022/PUU-I/2003, dated 21 December 2004, needs to be given an in-depth meaning so that it better reflects the meaning of Article 33 of the 1945 Constitution. In the said Court decision, state control is understood that the collective people construed by the 1945 Constitution give the state a mandate to formulate policies (*beleid*) and take administrative measures (*bestuursdaad*), regulation (*regelendaad*), management (*beheersdaad*), and supervision (*toezichthoudensdaad*) for the greatest prosperity of the people. The administrative function (*bestuursdaad*) of the state is performed by the Government with its authority to issue and revoke licensing facilities (*vergunning*), license (*licentie*), and concession (*consessie*). The regulation function of the state (*regelendaad*) is performed through joint legislative authority by the People's Legislative Assembly and the Government, and regulatory

authority of the Government. The management function (beheersdaad) is performed through the mechanism of share-holding and/or as an institutional instrument, where the State, *c.q.* the Government, efficiently use its control over the natural resources to be used for the greatest prosperity of the people. Similarly, the supervision function of the state (toezichthoudensdaad) is performed by the State, *c.q.* the Government, in the context of supervision and control so that the aforementioned state control over the natural resources is really implemented for the greatest prosperity of the people. The five forms of state control in the said decision, namely the functions of policy and administration, regulation, management and supervision are placed in equal position. In the event that the Government only performs one of the four functions of state control, for example it only performs the regulation function, it can be defined that the state has exercised its control over the natural resources. In fact, the regulation function is a general state function in any states without necessarily being set out in Article 33 of the 1945 Constitution. If it is understood this way, the meaning of state control does not achieve the goal namely to achieve the greatest prosperity of the people as intended in Article 33 of the 1945 Constitution.

According to the Court, Article 33 of the 1945 Constitution requires the state control to have impacts on the greatest prosperity of the people. In this case, the definition of “controlled by the state” cannot be separated from the meaning of “the greatest prosperity of the people” which becomes the objective of Article 33

of the 1945 Constitution. This matter gets a more solid basis from the 1945 Constitution which in Article 33 paragraph (3) states, *"Land and waters and the natural resources contained therein shall be controlled by the state and shall be used for the greatest prosperity of the people*.*"*

In Court decision Number 3/PUU-VIII/2010, dated 16 June 2011, the Court considered that, "… with the existence of the clause *"shall be used for the greatest prosperity of the people",* the greatest prosperity of the people becomes a parameter for the state in determining the administration, regulation, or management of the land, waters and the natural resources contained therein…" (*vide* paragraph **[3.15.4]** page 158 of Court decision Number 3/PUU-VIII/2010). If the state control is not connected directly to and is not an integral part of the greatest prosperity of the people, it can give inaccurate constitutional meaning. It means that the state is very likely to exercise full control over the natural resources but it does not provide benefits for the greatest prosperity of the people. On the one hand the state can show its sovereignty over the natural resources, but on the other hand, the people do not automatically enjoy the prosperity from the natural resources. Therefore, according to the Court, the constitutional criteria for measuring the constitutional meaning of state control in fact lies in the phrase "**for the greatest prosperity of the people**";

[3.12] Whereas in the context of achieving the goal of the greatest prosperity of the people, the five roles of the state/government in the definition of

state control as described above, if not interpreted as integral parts of action, must be interpreted in stages based on the effective achievement of the greatest prosperity of the people. According to the Court, the first level and most important form of state control is that the state provides direct management of the natural resources, in this case Oil and Gas, so that the state gains bigger profit from the management of the natural resources. The state control at the second stage is that the state formulates policies and performs administration, and then the third stage of the state functions includes the regulation and supervision functions. As long as the state has the capacity in the form of capital, technology, and management in managing the natural resources, the state must choose to provide direct management of the natural resources. With direct management, it is certain that the entire results and profits gained will be included in the state profits which indirectly provide greater benefits to the people. The direct management referred in this decision is appropriate for the form of direct management by the state (state organ) through State-Owned Enterprises. On the other hand, if the state delegates the management of the natural resources to private companies or other legal entities apart from the state, profits earned by the state will be divided, and therefore, the benefits for the people will be reduced. This direct management is the purpose of Article 33 of the 1945 Constitution as revealed by Muhammad Hatta as one of the founding fathers of Indonesia who put forth, "… *The Goal that lies in Article 33 of the 1945 Constitution is the production which as far as possible can be implemented by*

the Government with the help of capital assistance from foreign companies. If this strategy is not successful, foreign companies also need to be given the opportunity to invest their capital in Indonesia under the terms determined by the Government… If national manpower and capital are not sufficient, we borrow foreign manpower and capital to accelerate production. If foreign nations are not willing to lend their capital, they are given the opportunity to invest their capital in our Fatherland under the terms determined by the Government of Indonesia itself. The terms which are determine mainly guarantee that our natural resources, such as our forests and fertile soil, must still be preserved. Whereas in the development of the state and community, the proportions of manpower and national capital become larger and larger, while manpower and capital assistance have reached a point where the proportions become smaller and smaller"… (Mohammad Hatta, *Bung Hatta Menjawab* [Mr. Hatta Answers], pages 202 to 203, PT. Toko Gunung Agung Tbk. Jakarta 2002). Muhammad Hatta's opinion implies that the opportunity was given to the foreign companies because the condition of the state/government was still incapable of production and it was temporary. Ideally, the state fully manages the natural resources;

[3.13] Whereas based on the considerations above, the Court hereinafter shall subsequently assess the constitutionality of the constitutional issues questioned in the petition for judicial review *a quo;*

Regarding *BP Migas*

[3.13.1] *BP Migas* is a state-owned legal entity which under the laws is specifically established by the Government as the holder of Mining Authorization responsible for controlling Upstream Business Activities in the field of Oil and Gas [*vide* Article 1 sub-article 23, Article 4 paragraph (3) of the Oil and Gas Law]. Upstream Business Activities which include exploration and exploitation are conducted by Business Entities or Permanent Establishments under Cooperation Contracts with the Executive Agency [*vide* Article 11 paragraph (1) of the Oil and Gas Law]. *BP Migas* performs functions of control and supervision over the implementation of Cooperation Contracts on Upstream Business Activities so that the extraction of the state's Oil and Natural Gas resources can provide maximum benefits and revenues for the state and for the greatest prosperity of the people [*vide* Article 44 paragraph (1) and paragraph (2) of the Oil and Gas Law]. In order to perform the said functions, *BP Migas* performs the following duties:

a. giving considerations to the Minister for his/her policies on the preparation and offering of Operational Areas as well as Cooperation Contracts;

b. signing Cooperation Contracts;

c. assessing and presenting the plans of field development to be produced for the first time in an Operational Area to the Minister for approval;

d. approving the plans of field development other than those referred to in sub-paragraph c;

e. approving work plans and budgets;

f. monitoring and reporting the implementation of Cooperation Contracts to the Minister;

g. appointing sellers of the state's share of Petroleum and/or Gas which generate maximum profit for the state. [*vide* Article 44 paragraph (3) of the Oil and Gas Law].

By taking into account the concept of *BP Migas* under the Law *a quo*, in relation to the management of Oil and Gas natural resources, *BP Migas* constitutes a special government organ, in the form of State-Owned Legal Entity (hereinafter referred to as BHMN). It has a strategic position to act on behalf of the Government in performing the functions of state control of Oil and Gas, particularly upstream activities (exploration and exploitation), namely the functions of control and supervision including the planning and signing of contracts with business entities, developing operational areas, granting approval of the work plans and budgets of the business entities, monitoring cooperation contract implementation, as well as appointing the sellers of the state's share of Oil and Gas to other legal entities. Since *BP Migas* only performs the functions of control and supervision of the management of Oil and Gas natural resources, the

state in this case the Government cannot directly manage Oil and Gas natural resources involved in the upstream activities. Under the Oil and Gas Law, the parties that can directly manage Oil and Gas natural resources are only Business Entities (namely State-Owned Enterprises (BUMN), Region-Owned Enterprises (BUMD), Cooperatives as well as private companies) and Permanent Establishments. Accordingly, the construction of the relationship between the state and Oil and Gas natural resources pursuant to the Oil and Gas Law is established by the Government as the holder of Mining Authorization which is exercised by *BP Migas*. In this case, *BP Migas* performs the function of state control in the form of control and supervision of Oil and Gas management which is performed by Legal Entities in the form of BUMN, BUMD, Cooperatives, small businesses or private legal entities or Permanent Establishments. The relationship between *BP Migas* and Legal Entities or Permanent Establishments that manage Oil and Gas is established in the form of Cooperation Contracts (hereinafter referred to KKS) or other cooperation contracts with the following minimum conditions, namely: i) ownership of natural resources is in the hands of the Government up to the delivery point, ii) operational management shall be controlled by *BP Migas*, and iii) capital and risks are entirely borne by Business Entities or Permanent Establishments (*vide* Article 6 of the Oil and Gas Law). Based on such construction of relationship, there are two important aspects which must be taken into account. *First*, the state Control of Oil and Gas is exercised by the Government through *BP Migas*. *Second*, the form of state

control of Oil and Gas exercised by *BP Migas* is only within the limit of control and supervision.

[3.13.2] Whereas the background of the establishment of *BP Migas* is an intention to separate entities performing regulatory function or formulating policies from entities performing Oil and Gas business function, both functions being previously performed by Pertamina. *BP Migas* is expected to focus on implementing the objectives of controlling upstream oil and gas business activities without being burdened by an obligation to earn profits for itself and rather to focus more on state interest as well as avoiding the existence of state financial burden through the State Revenues and Expenditures Budget. Therefore, the function of control and supervision in the upstream Oil and gas activities previously performed by Pertamina has been transferred to *BP Migas,* and *BP Migas* performs the function as the representative of the Government as the Holder of Mining Authorization which exercises the state control of the Oil and Gas natural resources. *BP Migas* is a State-Owned Legal Entity which does not constitute a business institution, but rather, it is an institution that controls and supervises Oil and Gas business in the upstream sector. The Government wants *BP Migas* to play a role as the front line of business, so that the Government is not directly involved in the Oil and Gas business and it does not directly deal with the business actors;

[3.13.3] Whereas as taken into account in paragraphs **[3.11]** and **[3.12]**, the first stage and the most important form of state control that must be exercised by the Government is direct management of the natural resources, in this case Oil and Gas. Referring to the construction of relationship as described in paragraph **[3.13.1]**, *BP Migas* only performs the functions of control and supervision of the management of Oil and Gas natural resources, and it does not perform direct management, since the function of Oil and Gas management in the upstream sector, both exploration and exploitation, is performed by State-Owned Enterprises or non state-owned enterprises, based on the principle of fair, efficient, and transparent business competition. According to the Court, the model of relationship between *BP Migas* as the representative of the state and Business Entities or Permanent Establishments in the management of Oil and Gas degrades the meaning of the state control of Oil and Gas natural resources, which is inconsistent with the mandate of Article 33 of the 1945 Constitution. Even though the Oil and Gas Law sets the minimum conditions in the Cooperation Contract (KKS), namely i) ownership of natural resources is in the hands of the Government up to the point of delivery , ii) operational management shall be controlled by *BP Migas*, and iii) capital and risks are entirely borne by Business Entities or Permanent Establishments. These three minimum conditions do not necessarily mean that the state can effectively control natural resources for the greatest prosperity of the people. This condition is due to three things, namely: *First*, the Government cannot directly perform the management

or appoint state-owned enterprises to manage all operational areas of Oil and Gas in the upstream activities; *Second*, after *BP Migas* signs the Cooperation Contract (KKS), the state is immediately bound by all the contents of the Cooperation Contract (KKS), which means that the state loses its freedom to impose regulations or policies that are inconsistent with Cooperation Contract (KKS); *Third*, the state does not gain maximum profits for the greatest prosperity of the people due to the existence of potential control of profits from Oil and Gas business by the Permanent Establishments or Private Legal Entities exercised based on the principle of fair, reasonable and transparent business competition. In this case, with the construction of control of Oil and Gas through *BP Migas*, the state loses its authority to directly perform the management or appoint State-Owned Enterprises to manage the Oil and Gas natural resources. This is inconsistent with the management function of the state which is the first stage and the most important form of state control to achieve the greatest prosperity of the people.

Due to such construction of relationship, according to the Court, the existence of *BP Migas* pursuant to the Law *a quo* is inconsistent with the constitution which requires the state control to provide benefits for the greatest prosperity of the people, while *BP Migas* should prioritize the state control at the first stage namely by performing the management of Oil and Gas natural resources that generates greater benefits for the people. According to the Court, the direct management by the state or business entities owned by the state is the principle required by

Article 33 of the 1945 Constitution. Only to the extent that the state is incapable or lacks the capability in terms of capital, technology and management to manage Oil and Gas natural resources, the state may delegate the management of natural resources to private entities.

Whereas to recover the state's position in connection with the Oil and Gas natural resources, the duties and authorities of the state/government cannot be restricted to the function of control and supervision only but the state also performs the management function. According to the Court, separation between entities performing the regulatory function or formulating policies and entities performing Oil and Gas management as well as business functions leads to degradation of the state control of Oil and Gas natural resources. Even though the priority of Oil and Gas management has been delegated to a State-Owned Enterprise which has been the Court's stand in decision Number 002/PUU-I/2003 dated 21 December 2004, the effectiveness of the state control in fact becomes real if the Government directly performs the regulatory function and formulates policies without additional bureaucracy by establishing *BP Migas*. In such position, the Government has the discretion to formulate regulations, policies, administration, management, and supervision over Oil and Gas natural resources. In exercising the state control of Oil and Gas natural resources, the Government takes administrative measures over Oil and Gas natural resources by giving concessions to one or several State-Owned Enterprises to manage the upstream Oil and Gas business activities. These State-Owned Enterprises are

will enter into Cooperation Contracts (KKS) with Region-Owned Enterprises, Cooperatives, Small Businesses, private legal entities, or Permanent Establishments. With such model, all aspects of state control mandated by Article 33 of the 1945 Constitution are actually implemented.

[3.13.4] Whereas the main objective of the provisions of Article 33 paragraph (3) of the 1945 Constitution is the management of natural resources “for the greatest prosperity of the people”, and therefore, the implementation in state organization and the government must be aimed at accomplishing that objective. Accordingly, the establishment of every state organization and all its units must be prepared based on efficient bureaucracy rationality and it must not open the opportunity for inefficiency and abuse of power. Since the existence of *BP Migas* potentially causes great inefficiency and allegedly, in practice, it has opened up the opportunity for abuse of power, according to the Court, the existence of *BP Migas* is unconstitutional, inconsistent with the objective of the state in terms of natural resources in the organization of the government. Even if it is stated that there has not been any evidence that *BP Migas* has abused its power, it is adequately grounded to state that the existence of *BP Migas* is unconstitutional because based on Decision of the Constitutional Court Number 006/PUU-III/2005, dated 31 May 2005 and the decision of the Constitutional Court Number 11/PUU-V/2007, dated 20 September 2007, something which will potentially violate the constitution can be decided upon by the Court as a case of constitutionality. If it is assumed that the authority of *BP Migas* is returned to the

unit of government or relevant ministry while it still potentially causes inefficiency, it does not reduce the Court's conviction to decide the return of natural resources management to the Government because the existence of this decision of the Court, should in fact become the momentum for the legislator to perform reorganization by prioritizing equitable efficiency and minimizing the proliferation of governmental organizations. With such decision of the Court, the Government can immediately begin the reorganization of natural resources in the form of Oil and Gas on the grounds of "state control" fully oriented toward the efforts to provide "the greatest benefits to the people" with efficient organizations and under the direct control of the Government. Based on the foregoing, the Petitioners' argument, insofar as it is concerned with *BP Migas,* has legal grounds;

[3.13.5] Whereas even though the Petitioners only petition for judicial review of Article 1 sub-article 23, Article 4 paragraph (3) and Article 44 of the Oil and Gas Law, while this decision of the Court is related to the existence of *BP Migas* which is also regulated in other articles of the Law *a quo*, the Court must undoubtedly also declare that articles which regulate "the Executive Agency", namely the **phrases "with the Executive Agency" in Article 11 paragraph (1), "through the Executive Agency" in Article 20 paragraph (3), "based on the considerations of the Executive Agency and" in Article 21 paragraph (1), Article 41 paragraph (2), Article 45, Article 48 paragraph (1), "the Executive Agency and" in Article 49, Article 59 sub-article a, Article 61, and Article 63,**

and all phrases regarding the Executive Agency in the Elucidation are inconsistent with the 1945 Constitution and that they do not have any binding legal effect;

Cooperation Contract (KKS)

[3.14] Whereas the Law *a quo* constructs the relationship between the state and business entities performing Oil and Gas management with civil relationship in the form of Cooperation Contract (KKS). Pursuant to the Oil and Gas Law, Cooperation Contract (KKS) shall be a Production Sharing Contract or any other form of cooperation contract in exploration and exploitation activities which is more favorable and whose output shall be used for the greatest prosperity of the people [*vide* Article 1 sub-article 19 of the Oil and Gas Law). In a Cooperation Contract (KKS), *BP Migas* acts as the representative of the Government as a party in the Cooperation Contract (KKS) with a Business Entity or a Permanent Establishment which manages Oil and Gas. In such position, the relationship between *BP Migas* (the state) and the Business Entity or Permanent Establishment is a relationship which is civil in nature, with the state and the Business Entity or Permanent Establishment having equal position. In this case when the contract has been signed, the state becomes bound by the contents of the Cooperation Contract (KKS). As a result, the state loses its discretion to formulate regulations for people's interest which is inconsistent with the contents of Cooperation Contract (KKS), and therefore, the state loses its sovereignty in

controlling natural resources, namely the sovereignty for regulating Oil and Gas, which is inconsistent with the contents of Cooperation Contract (KKS). This is inconsistent with the role of the state as the representative of the people in controlling natural resources which must have the freedom make rules that bring benefits for the greatest prosperity of the people. According to the Court, the relationship between the state and private entities in the management of natural resources cannot be established as a civil relationship, but rather, it must constitute a public relationship, namely in the form of granting concession or license which are fully under the control and power of the state. A civil contract will degrade the state's sovereignty over the natural resources, in this case Oil and Gas. Based on such consideration, according to the Court, the relationship between the state and Oil and Gas natural resources insofar as it is constructed in the form of Cooperation Contract (KKS) between *BP Migas* as a State-Owned Legal Entity as the Government's party or the party that represents the Government in the contract with a Business Entity or a Permanent Establishment as regulated in the Law *a quo* is inconsistent with the principle of state control referred to in the constitution. In order to avoid such relationship, the state can establish or appoint a State-Owned Enterprise which is granted a concession to manage Oil and Gas in Indonesian Mining Territory or Indonesian Operational Areas, so that the State-Owned Enterprise is the one that enters into the Cooperation Contract (KKS) with a Business Entity or a Permanent Establishment, and therefore, the relationship is no longer between the state and

a Business Entity or a Permanent Establishment, but rather, between a Business Entity and a Business Entity or a Permanent Establishment. Based on that consideration, according to the Court, Article 6 of the Oil and Gas Law constitutes a general regulation which, if not connected to *BP Migas* as the Government, would not be inconsistent with the constitution.

[3.15] Whereas the Petitioners argue that Article 1 sub-article 19 of the Oil and Gas Law, to the extent of the phrase "**or any other form of cooperation contract**", is inconsistent with the constitution for the reason in principle that this phrase leads to legal uncertainty and that it leads to multiple interpretations since it places the state and business entities in equal position, so that it degrades the position of the state. According to the Court, the phrase "**or any other form of cooperation contract**" in Article 1 sub-article 19 of the Oil and Gas Law constitutes the form of contract intentionally made by the legislator for the purpose of referring to not only the Cooperation Contract (KKS) in the form of production sharing contract but also other possible forms of Cooperation Contract (KKS), provided that it is profitable for the state, for example the currently called KKS in the form of service contract. The form of KKS in addition to production sharing contract is not inconsistent with the constitution insofar as it brings the benefit for the greatest prosperity of the people and it does not violate the principle of state control referred to in the constitution. Therefore, to the extent of the phrase "**or any other form of cooperation contract**", Article 1 sub-article 19 the Oil and Gas Law is not inconsistent with the 1945 Constitution;

Reasonable, Fair, and Transparent Business Competition

[3.16] Whereas one of the objectives of Oil and Gas business activities administration pursuant to Article 3 sub-article b of the Oil and Gas Law is "*ensuring effective implementation and accountable processing, transportation, storage and trade implemented through a reasonable, fair and transparent business competition mechanism"*. According to the Court, Article 3 sub-article b is completely different from the provision of Article 28 paragraph (2) of the Oil and Gas Law. The Article 28 paragraph (2) *a quo*, which provides that the setting of fuel oil price and gas fuel price shall be entrusted to a fair and reasonable business competition mechanism, has been declared inconsistent with the 1945 Constitution and to have no binding legal effect by the Court in decision of the Court Number 002/PUU-I/2003, dated 21 December 2004. The phrase "*implemented through a reasonable, fair and transparent business competition mechanism"* in Article 3 sub-article b of the Oil and Gas Law constitutes the translation of transparency implementation in downstream oil and gas business activities. The downstream business activities in the field of oil and gas are conducted by the mechanism of granting Mining Business Permits to Private Companies, State-Owned Enterprises (BUMN), Region-Owned Enterprises (BUMD), Cooperatives, as well as small businesses engaging in the field of processing, transportation, storage, and trade of oil and gas. Under Article 9 paragraph (2) of the Oil and Gas Law, downstream business activities cannot be

conducted by Permanent Establishments. This means that it opens up business opportunities to national companies or Indonesian incorporated companies to engage in the downstream oil and gas business activities throughout Indonesia, and therefore, the existence of the principle "through a reasonable, fair, and transparent business competition mechanism" as intended in Article 3 sub-article b of the Oil and Gas Law guarantees that there is no monopoly by a certain business entity in the implementation of downstream business activities in the field of oil and gas. Accordingly, it is in accordance with the mandate of Law Number 5 Year 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition. Article 3 sub-article b is related to Article 23 paragraph (2) of the Oil and Gas Law which states *"Business licenses required for Petroleum business activities and/or Natural Gas business activities as referred to in paragraph (1) shall be classified into: a. Processing Business License; b. Transportation Business License; c. Storage Business License; d. Trade Business License".* Therefore, Article 3 sub-article b of the Law *a quo*, opens up business opportunities for any parties who wish to engage in oil and natural gas business, whether to do the business as a whole or to only conduct the processing, transportation, storage, trade business, all ultimately depends on the business actors' capital capability. Based on the considerations above, according to the Court, the Petitioners' argument has no legal ground;

The Position of State-Owned Enterprises

[3.17] Whereas the Petitioners argue that Article 9 of the Oil and Gas Law insofar as the word "may" is inconsistent with Article 33 paragraph (2) and paragraph (3) of the 1945 Constitution. According to the Petitioners, such provision indicate that State-Owned Enterprises becomes only one of the parties involved in Oil and Gas management, and in order to manage Oil and Gas business, the State-Owned Enterprises must compete with other entities in their own country. According to the Court, Article 9 of the Oil and Gas Law *a quo* is intended to give opportunities for national companies in the form of State-Owned Enterprises, Region-Owned Enterprises, Cooperatives, small businesses, and private companies to participate in oil and natural gas business activities. The Court, in Decision Number 002/PUU-I/2003 dated 21 December 2004 considered, among other things, "… ***must prioritize (voorrecht) State-Owned Enterprises. Therefore, the Court suggests that such guarantee of priority right is regulated properly in Government Regulation".*** Moreover, by declaring all the provisions on BP Migas in the Law *a quo* inconsistent with the constitution as considered in paragraph **[3.13.1]** up to paragraph **[3.13.5]**, the position of State-Owned Enterprises becomes highly strategic since they will obtain right to the management from the Government in the form of management permit or any other form of permit in upstream Oil and Gas business. Therefore, the assumption of the Petitioners stating that the State-Owned Enterprises must compete with other entities in their own country constitutes an incorrect

argument. Based on the consideration above, according to the Court, the argument of the Petitioner does not have any legal ground;

[3.18] Whereas the Petitioners argue that Article 10 and Article 13 of the Oil and Gas Law are inconsistent with Article 33 of the 1945 Constitution for the principal reason that the norms in these articles have reduced the state's sovereignty over natural resources (Oil and Gas) since the vertical and horizontal organizational split (unbundling) will create new managements that will determine their respective costs and profits. With respect to such argument of the Petitioners, the Court in its Decision Number 002/PUU-I/2003, dated 21 December 2004 has considered the split (unbundling) of business activities, namely "… *the provisions of the article must be interpreted that it does not apply to business entities that have been owned by the state which in fact must be empowered so that the state control becomes more effective. Article 61 included in transitional provisions must be interpreted that it is limited to the transition of Pertamina's status to become a liability company and it does not eliminate its existence as a Business Entity which still conducts upstream and downstream business activities, despite the fact that such downstream and upstream business must be done by two Business Entities, namely "Upstream Pertamina" and "Downstream Pertamina" both of which are still controlled by the state".* Even though Article 13 of the Oil and Gas Law is not included in that Court decision, since its substance is the same as the substance of Article 10 of the Oil and Gas Law, namely regarding horizontal organization split (unbundling), the considerations of the Court shall,

mutatis mutandis, apply to judicial review of Article 13 of the Oil and Gas Law. Therefore, according to the Court, the separation between upstream business and downstream business in oil and natural gas activities is already appropriate. Whereas according to the Court, the reason of the possibility that horizontal organization split will create new managements which will determine their respective costs and profits does not have any relationship with the issue of constitutionality. Therefore, the argument of the Petitioners does not have any legal ground.

[3.19] Whereas the Petitioners argue that Article 11 paragraph (2) of the Oil and Gas Law is inconsistent with Article 1 paragraph (2), Article 11 paragraph (2), Article 20A and Article 33 paragraph (3) of the 1945 Constitution for the principal reason that KKS is classified as a treaty, so that the written notification of the Cooperation Contract (KKS) to the People's Legislative Assembly has breached the sovereignty of the people and has breached the people's participation as the collective owners of natural resources. According to the Court, the Cooperation Contract (KKS) in oil and natural gas business activities constitutes a contract which is civil in nature and which is subject to civil law. This matter is clearly different from the treaty referred to in Article 11 paragraph (2) of the 1945 Constitution. Article 1 sub-article a of Law Number 24 Year 2000 on Treaties which constitutes the implementation of Article 11 paragraph (3) of the 1945 Constitution, has defined treaty as "*Agreement in a certain form and names which is regulated in international law which is concluded in writing and which*

creates rights and obligations in the field of public law." Subsequently, Article 1 sub-article a and Article 4 paragraph (1) of Law 24/2000 specify the elements of a treaty, as follows:

a) having a certain form and name;

b) regulated in international law;

c) concluded in writing;

d) concluded by states, international organizations, and other legal subjects of international law;

e) leads to rights and obligations in the field of public law.

In addition, Article 1 of the 1969 Vienna Convention on the Law of Treaties states that, "*The present Convention applies to treaties between states*." Subsequently, in Article 2 (a), treaty is defined as follows *"treaty" means 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.* In addition, Article 1 of the 1986 Vienna Convention states that, "*The present Convention applies to: (a) treaties between one or more States and one or more international organizations, and (b) treaties between international organizations."*

Based on the description of considerations, the Court is of the opinion that an Oil and Gas cooperation contract is not qualified to be categorized as an international treaty as intended in Article 11 paragraph (2) of the 1945 Constitution, so that it does not need the approval of the People's Legislative Assembly.

Whereas in addition, in the decision Number 20/PUU-V/2007 dated December 17, 2007, the Court considers among other things, *"…because by declaring that Article 11 paragraph (2) of the Oil and Gas Law does not have any binding legal effect, there will be no longer any provisions requiring written notification to the People's Legislative Assembly. This means that it will be more harmful for the People's Legislative Assembly as an institution…";*

Article 20A paragraph (1) of the 1945 Constitution states that, "*The People's Legislative Assembly shall have legislative, budgetary and oversight functions*." Considering the position of oil and natural gas as non-renewable strategic natural resources which shall be controlled by the state and which are vital commodities affecting the livelihood of the public and having an important role in the national economy, their management shall provide maximum prosperity and welfare to the people (vide consideration item b of the Oil and Gas Law). Accordingly, the contracts which shall be notified in writing to the People's Legislative Assembly are in the context of the oversight function of the People's Legislative Assembly as a mechanism which involves the people's participation through their

representatives in the People's Legislative Assembly in the event of any contract inflicting loss to the nation and the state of Indonesia. Therefore, the Court is of the opinion that the arguments of the Petitioners do not have legal ground;

[3.20] Whereas this decision concerns the legal status of *BP Migas* which is positioned as very important and strategic institution by the Law *a quo*, and therefore, it is necessary for the Court to determine the legal consequences arising following the pronouncement of this decision based on the consideration that the decision made by the Court should not create legal uncertainty which may cause chaos in oil and natural gas business activities;

If the existence of *BP Migas* is immediately declared inconsistent with the 1945 Constitution and that at the same time it shall not have any binding legal effect, the implementation of the ongoing oil and gas business activities will be disrupted or obstructed because it has lost its legal basis. Such matter may cause chaos and legal uncertainty which are not desired by the 1945 Constitution. Therefore, the Court must consider the importance of legal certainty for the state organ performing the functions and tasks of *BP Migas* until new rules are formulated;

[3.21] Whereas in accordance with the considerations above, the Court's view is that it is necessary to confirm the legal consequences of this decision. Whereas based on Article 47 of the Constitutional Court which states that "*A decision of the Constitutional Court shall have full legal effect as from its pronouncement in a plenary hearing open to the public*", a decision of the

Constitutional Court has obtained full legal effect and shall apply prospectively as from its pronouncement in a plenary hearing open to the public. Therefore, all cooperation contracts signed by *BP Migas* and Legal Entities or Permanent Establishments, shall continue to be effective up to their expiry dates or for any other period in accordance with the agreement;

[3.22] Whereas to fill legal vacuum due to the absence of *BP Migas*, it is necessary for the Court to confirm the state organ which will perform the functions and duties of *BP Migas* until new rules are formulated. The Court is of the opinion that such functions and duties shall be performed by the Government as the holder of mining authorization, in this case the Ministry having authorities and responsibilities in the Oil and Gas sector. Following this decision, all rights as well as authorities of *BP Migas* in cooperation contracts shall be exercised by the Government or a State-Owned Enterprise stipulated by the Government;

[3.23] Whereas based on the whole description of the considerations above, the Court is of the opinion that the petition of the Petitioners has legal grounds partly;

4. CONCLUSIONS

Based on the assessment of laws and facts above, the Court has arrived at the following conclusions:

[4.1] The Court has authority to hear the petition of the Petitioners;

[4.2] The Petitioners have legal standing to file the petition *a quo*;

[4.3] The substance of the Petitioners' petition has legal grounds partly;

Under the 1945 Constitution of the State of the Republic of Indonesia, Law Number 24 Year 2003 concerning the Constitutional Court as amended by Law Number 8 Year 2011 concerning the Amendment to Law Number 24 Year 2003 concerning the Constitutional Court (State Gazette of the Republic of Indonesia Year 2011 Number 70, Supplement to State Gazette of the Republic of Indonesia Number 5226), Law Number 48 Year 2009 concerning Judicial Power (State Gazette of the Republic of Indonesia Year 2009 Number 157, Supplement to State Gazette of the Republic of Indonesia Number 5076);

5. INJUNCTIONS OF DECISION

Passing the Decision,

To declare:

1. Granting the petition of the Petitioners partly;

   1.1 Article 1 sub-article 23, Article 4 paragraph (3), Article 41 paragraph (2), Article 44, Article 45, Article 48 paragraph (1), Article 59 sub-article a, Article 61 and Article 63 of Law Number 22 Year 2001

concerning Oil and Natural Gas (State Gazette of the Republic of Indonesia Year 2001 Number 136, Supplement to State Gazette of the Republic of Indonesia Number 4152) inconsistent with the 1945 Constitution of the State of the Republic of Indonesia;

1.2 That Article 1 sub-article 23, Article 4 paragraph (3), Article 41 paragraph (2), Article 44, Article 45, Article 48 paragraph (1), Article 59 sub-article a, Article 61 and Article 63 of Law Number 22 Year 2001 concerning Oil and Natural Gas (State Gazette of the Republic of Indonesia Year 2001 Number 136, Supplement to State Gazette of the Republic of Indonesia Number 4152) do not have any binding legal effect;

1.3 The phrase “with the Executive Agency” in Article 11 paragraph (1), the phrase “through the Executive Agency” in Article 20 paragraph (3), the phrase “based on the considerations of the Executive Agency and” in Article 21 paragraph (1), the phrase “the Executive Agency and” in Article 49 of Law Number 22 Year 2001 concerning Oil and Natural Gas (State Gazette of the Republic of Indonesia Year 2001 Number 136, Supplement to State Gazette of the Republic of Indonesia Number 4152) inconsistent with the 1945 Constitution of the State of the Republic of Indonesia;

1.4 That the phrase “with the Executive Agency” in Article 11 paragraph (1), the phrase “through the Executive Agency” in Article 20 paragraph (3), the phrase “based on the considerations of the Executive Agency and” in Article 21 paragraph (1), the phrase “the Executive Agency and” in Article 49 of Law Number 22 Year 2001 concerning Oil and Natural Gas (State Gazette of the Republic of Indonesia Year 2001 Number 136, Supplement to State Gazette of the Republic of Indonesia Number 4152) do not have any binding legal effect;

1.5 That all matters related to the Executive Agency in the Elucidation of Law Number 22 Year 2001 concerning Oil and Natural Gas (Supplement to State Gazette of the Republic of Indonesia Number 4152) are inconsistent with the 1945 Constitution of the State of the Republic of Indonesia;

1.6 That all matters related to the Executive Agency in Elucidation of Law Number 22 Year 2001 concerning Oil and Natural Gas (Supplement to State Gazette of the Republic of Indonesia Number 4152) do not have any binding legal effect;

1.7 That the functions and duties of the Oil and Natural Gas Executive Agency shall be performed by the Government *c.q.* the relevant Ministry, until a new Law regulating such matters is enacted;

2. Rejecting the other and the remaining parts of the petition of the Petitioners;

3. Ordering the promulgation of this Decision properly in the Official Gazette of the Republic of Indonesia.

In witness whereof, this decision was passed in the Consultative Meeting of Justices attended by nine Constitutional Court Justices, namely Moh. Mahfud MD, as Chairperson and concurrent Member, Achmad Sodiki, Harjono, Hamdan Zoelva, M. Akil Mochtar, Muhammad Alim, Maria Farida Indrati, Ahmad Fadlil Sumadi, and Anwar Usman, respectively as Members, on **Monday, the fifth of November year two thousand and twelve,** and was pronounced in the plenary session of the Constitutional Court open to the public on **Tuesday, the thirteenth of November year two thousand and twelve,** by eight Constitutional Court Justices, namely Moh. Mahfud MD., as Chairperson and concurrent Member, Achmad Sodiki, Harjono, Hamdan Zoelva, M. Akil Mochtar, Muhammad Alim, Maria Farida Indrati, and Ahmad Fadlil Sumadi, respectively as Members, assisted by Cholidin Nasir as the Substitute Registrar, in the presence of the Petitioners/their attorneys, the Government or its representative, and the People's Legislative Assembly or its representative. With regard to this decision of the Court, Constitutional Court Justice Harjono has a dissenting opinion;

CHIEF JUSTICE,

Sgd.

Moh. Mahfud MD.

JUSTICES,

Sgd.	Sgd.
Achmad Sodiki	**Harjono**
Sgd.	**Sgd.**
Hamdan Zoelva	**M. Akil Mochtar**
Sgd.	**Sgd.**
Muhammad Alim	**Marida Farida Indrati**

Sgd.

Ahmad Fadlil Sumadi

6. DISSENTING OPINION

With regard to this decision of the Court, Constitutional Court Justice Harjono has a dissenting opinion, as follows:

I. Whereas the Court is less accurate in considering the legal standing of the Petitioners as conveyed in **paragraph [3.5]** up to **paragraph [3.7]**. Although the Court has based its decision on Article 51 paragraph (1) of the Constitutional Court Law and Decision Number 006/PUU-III/2005 and Decision Number 11/PUU-V/2007, the Court does not present any fundamental arguments, namely on how the Petitioners' rights granted by the 1945 Constitution have been impaired by the articles of the Oil and

Gas Law petitioned for review. The arguments of the Court in granting legal standing are very important because they are related to the extremely essential matter in the judicial process, namely that only those having direct interests may file cases to the court. The Court does not describe sufficient juridical arguments because the Court does not seem to have followed the deductive process to arrive at the conclusion that the Petitioners have legal standing;

II. Whereas Article 1 paragraph (2) of the 1945 Constitution states that sovereignty shall be in the hands of the people and shall be exercised in accordance with the Constitution. In regulating the implementation of such sovereignty, the system of the Constitution provides the authority to stipulate and amend the Constitution is granted to the state institution, namely the People's Consultative Assembly (MPR) [vide Article 3 paragraph (1) and Article 37 of the 1945 Constitution] while the authority to formulate Laws is granted to the People's Legislative Assembly and the President (vide Article 20 of the 1945 Constitution). The existence of governmental agencies not stipulated in the Constitution does not causes such government agencies to be automatically unconstitutional. The Constitution only stipulates constitutional institutions and none of the provisions in the Constitution prevents the establishment of government agencies. Such matter is reasonable because it is impossible for the Constitution to limitedly stipulate government agencies in a detailed

manner. Types and numbers of state ministries which are also indicated in the Constitution are not determined. The practice of government implementation needs government agencies, and Laws become the powerful grounds because no legal product is higher than law. If the need for such government agency is so important, the People's Consultative Assembly can amend the Constitution by including the provisions concerning such governmental agency in the Constitution so that it becomes a constitutional institution. In implementing the people's sovereignty, the system of the Constitution stipulates two different functions, namely to stipulate and amend the Constitution which is assigned to the People's Consultative Assembly, and to formulate Laws which is assigned to the People's Legislative Assembly and the President. The people's sovereignty is reflected in the two institutions because members of the People's Consultative Assembly consist of members of the People's Legislative Assembly and the Regional People's Legislative Assembly which are directly elected by the people and the legislative function which is implemented by the People's Representative Council and the President which are also directly elected by the people. The Constitutional Court as a non-representative institution which exercises judicial power having the duties to perform the state administration judicature must respect and uphold the people's sovereignty system established by such Constitution;

III. The constitutional establishment of government agencies becomes the domain of the legislators obtaining a direct mandate from the sovereign people because the legislators, namely the People's Legislative Assembly and the President are directly elected by the people. Such matter does not absolutely close the possibility that the Court cannot reach the exercise of authority to makes Laws related to the establishment of government agencies or institutions in judicial reviews. The Court must have strong and measurable reasons why a Law concerning the establishment of a government agency shall be annulled so that such reasons can be adopted by the legislators in establishing other government agencies as in the future there will certainly be more needs for the establishment of similar agencies. As a legal political process, legal products Laws shall be respected. The legislators, namely the People's Legislative Assembly and the President, know better what are needed and in what affairs they are needed because actually, both state institutions are directly involved;

IV. Article 33 paragraph (3) of the 1945 Constitution states that land, waters and natural resources contained therein shall be controlled by the state and shall be used for the greatest prosperity of the people. Meanwhile, while paragraph (5) states that further provisions concerning the implementation of this article shall be regulated in law. Article 33 paragraph (3) of the Constitution does not determine which government

agency will control as the state in its capacity. However, it is clear that the Law delegates the implementation to be regulated in Law based on paragraph (5). The question is, if the legislators have regulated its implementation by formulating the Oil and Gas Law regulating the Oil and Gas Executive Agency (*BP Migas*) questioned by the Petitioners, the issue where the structural mistake is based on the Constitution. Even in the establishment of *BP Migas*, the state is so powerful in it because based on Article 45 paragraph (3) of the Oil and Gas Law, the Head of the Executive Agency is appointed and discharged by the President after a consultation with the People's Legislative Assembly and it is responsible to the President for the implementation of its duties. These provisions clearly have the ground that *BP Migas* is very important, so that two people's representative institutions directly elected by the people are involved in appointing the Head of the Executive Agency. Such matter makes the state stronger, even when it is compared to the ministers referred to in the Constitution who are appointed by the President only. In relation to Article 33 of the Constitution, Court Decision Number 002/PUU-I/2003 dated December 21, 2004 states that state control means that the people are collectively construed by the 1945 Constitution to give mandate to the state. With the phrase "the people collectively give the mandate to the state", and with such mandate being implemented in the general election, it is clear that the Head of the Oil and Gas Executive Agency is

more powerful and legitimate to represent the state because the President has consulted with the People’s Legislative Assembly. The issue is why such matter has happened because it is certainly the domain of the legislators to consider and determine the best one among the existing options;

V. Whereas in its relation to the Cooperation Contract, the majority opinion of the Court in this decision states in **paragraph [3.14]**: “the relationship between the state and the private entities in the management of natural resources cannot be established as a civil relationship, but rather, it must constitute a public relationship, namely in the form of granting concession or license which are fully under the control of the state. A civil contract will degrade the state’s sovereignty over the natural resources, in this case Oil and Gas”. The possibility of the state’s being able to have full control certainly becomes a separate problem if it is only possible with the public law in the form of concession and permit. The concession has long been abandoned because it indeed has inflicted loss to the state and may create *de facto* control of the areas. Meanwhile, it is not true that the permit enables the state to have full because the state of Indonesia is a constitutional state. Accordingly, for the sake of legal certainty and protection of the state’s actions taken by the state administration can also be legally disputed through the State Administration Court so that the state cannot arbitrarily use its authority, including in the case of permit. Legal

cases related to foreign investments do not become national jurisdiction's authority only, as they even become cases settled by international arbitration. In such cases, the state often becomes a party in a dispute which is not different from an ordinary legal entity. If the signatory of the Cooperation Contract (KKS) is *BP Migas*, a dispute arising does not directly involve the state. Nevertheless, if the minister or its ministerial files and ranks enter into a contract, the state will be directly involved in the dispute between the state and legal entities which, like it or not, will be treated as having equal position;

VI. I agree with the majority as conveyed in **paragraph [3.12]** which states that the first level and the most important form of state control is that the state directly performs the management. As far as the state has the capabilities, namely capital, technology and management, in managing natural resources, the state shall choose to directly manage the natural resources. Cooperation Contract is not a model made by *BP Migas*, but by a Law whereby, in its implementation, *BP Migas* represents Indonesia. Cooperation Contract is indeed applied because the state is unable to provide the costs, especially as the exploration poses high risks because the exploration costs are not low while it cannot be ensured whether oil or gas resources will be found. Therefore, Cooperation Contract is temporary until the state is able to perform the management independently. State institutions, the President and the People's Legislative Assembly know

better when the state will have been able to do it independently, rather than the Court as a judicial institution;

VII. **Paragraph [3.13.4]** states that, "even if it is stated that there has not been any evidence that *BP Migas* has abused its power, it is adequately grounded to state that the existence of *BP Migas* is unconstitutional because based on Decision of the Court Number 006/PUU-III/2005 dated May 31, 2005 and Decision of the Court Number 11/PUU-V/2007 dated September 20, 2007, something which will potentially violate the constitution can be decided upon by the Court as a case of constitutionality. With regard to such statement, the question is what actually becomes the basic grounds to decide upon unconstitutional existence of *BP Migas* as it is said to be adequately grounded to be based on the reference to Decision Number 006/PUU-III/2005 and Decision Number 11/PUU-V/2007. The Court does not question whether there is any abuse of power or not in *BP Migas*. However, the extremely fatal error is that the decision is based on the phrase "something which will potentially violate the constitution can be decided upon by the Court as a case of constitutionality". Such phrase is related to the granting of legal standing to the Petitioners, not to the decision upon substance of the case. The Petitioners argue that any article or part of a Law which, in their opinion, potentially violates the constitution so as to impair their constitutional rights is sufficient to be the ground for the Court to grant

legal standing. Meanwhile, in the substance of the case, such impairment shall actually exist and shall be proved by the Petitioners because the decision will have *erga omnes* consequences, namely that the impairment is suffered not only by the petitioners personally, but also by those who have the constitutional rights;

VIII. Based on the description above, the establishment of the government agency *c.q. BP Migas,* is not inconsistent with the structure of the Constitution. *BP Migas* has the value as a relatively strong state-owned entity because it has been established based on the Law, and especially because the appointment of the Head of *BP Migas* has involved two state institutions which are directly elected by the people, namely the President and the People's Legislative Assembly. The Petitioners cannot explicitly prove their constitutional impairment which is only a constatation. In addition, the Court also has not provided sufficient considerations on which constitutional impairments are actually suffered by the Petitioners. Therefore, the petition of the Petitioners is not legally proven and therefore, it shall be rejected.

SUBSTITUTE REGISTRAR,

Sgd.

Cholidin Nasir