DECISION

Number 25/PUU-VIII/2010

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 4 Year 2009 concerning Mineral and Coal Mining against the 1945 Constitution of the State of the Republic of Indonesia Year, filed by:

[1.2] 1. Name : **Fatriansyah Karya**
Place/Date of Birth : Muntok, June 9, 1986
Nationality : Indonesia
Address : Kampung Keranggan Atas, Neighborhood Ward 01/Neighborhood Block 11, Tanjung Sub-District, Muntok District, Bangka Barat Regency, Bangka Belitung Islands Province

2. Name : **Fahrizan**
Place/Date of Birth : Pangkalpinang, December 23, 1981
Occupation : Entrepreneur
Nationality : Indonesia
Address : Jalan Kenangan Number 250, Neighborhood

Ward 003/Neighborhood Block 002, Rawa Bangun Sub-District, Taman Sari District, Pangkalpinang City, Bangka Belitung Islands Province

In this matter granting power of attorney **Iwan Prahara Nur Asnawi, S.H., Muhammad Sholeh, S.H., Ferdy Hermawan Faried, S.H.,** and **Aristio Pratama Putra, S.H.,** all being advocates associated in the **Advocacy Team for the Rights of Bangka Belitung,** having its legal domicile at the Advocates/Legal Consultants' Office of "IWAN PRAHARA & PARTNER" at Jalan Jenderal Ahmad Yani Number 92, Pangkalpinang City, Bangka Belitung Islands Province, to accompany as well as to represent the authorizers by virtue of Special Power of Attorney dated April 13, 2010;

Hereinafter referred to as ---------- **the Petitioners;**

[1.3] Having read the petition of the Petitioners;

Having heard the statement of the Petitioners;

Having heard and read the written statement of the Government;

Having read the written statement of the People's Legislative Assembly;

Having carefully examined the written evidence of the Petitioners;

Having heard and read the statements of Experts of the Government;

2. FACTS OF THE CASE

[2.1] Whereas the Petitioners have filed a petition dated April 14, 2010 received at the Registrar's Office of the Constitutional Court (hereinafter referred to as the Registrar's Office of the Court) on Wednesday, April 14, 2010 based on the Deed of Case File Receipt Number 52/PAN.MK/2010 on Monday, April 19, 2010, which has been revised and which was received at the Registrar's Office of the Court on May 12, 2010, describing the following matters:

A. BACKGROUND

The spirit of Law No. 11 of 1967 concerning Basic Provisions of Mining is intended to comply with the provisions of Article 33 paragraph (3) of the 1945 Constitution. For approximately four decades, Law No. 11 of 1967 has given an important contribution to the national development. However. it is understandable that the contents of the Law are centralized and still considered no longer compatible with the present situation and future challenges, especially bearing in mind the swift impact of globalization, which encourages the establishment of democratization, regional autonomy and the increased understanding of human rights.

Thus, it is necessary to formulate a new regulation in order to provide legal basis for the renewal and restructuring of mining activities, Accordingly, Law No. 4 of 2009 on Minerals and Coal (hereinafter referred to as Law No. 4/2009) was

issued, Following its ratification, Law No. 4/2009 is expected to provide solutions and answers to the problems and challenges in the mining sector.

The issuance of a new regulation typically has its own problem because it is not always able to satisfy the sense of justice for everyone, This is reasonable given the social differences and diversity in social and cultural characteristics, thus leading to the pros and cons among the people, Similarly, the enactment of Law No. 4/2009, although it has an impression of being democratic and providing the decentralization of licensing as well as opening broad opportunities for people to open a business in the mining sector, there are still nuances of legal uncertainty in Law No. 4/2009, so it is considered disrupting other people's sense of justice.

Social differences as well as characteristics of each region seem less likely to receive attention in the formulation Law No. 4/2009. Thus, it is feared this could cause new problems for the mining sector itself. Whereas, each region must have differences in social, and cultural characteristics. These differences should be anticipated so the journey can be aligned with the goals and ideals of the preparation of Law No. 4/2009. This problem has not been able to be answered fully by Law No. 4/2009.

As it happens in the province of Bangka Belitung, a region known as a producer of tin in the world, since its ratification, Law No. 4/2009 has caused turmoil and unrest for the people who had been engaging in and lived on tin mining. Whereas, the faucet of freedom to do business in the mining sector was not

been felt by the people of Bangka Belitung until approximately the last ten years.

In short, the history of tin mining in Bangka and Belitung has started since hundreds of years ago, Although there is no data that may indicate when the actual tin mining has commenced, tin has been considered a strategic commodity since the 18th century under the leadership of the Sultan of Palembang, Following a shift of power from the Sultan of Palembang to the VOC in the 19th century, the exploitation of tin increased, accompanied by the ever-expanding world tin market, Dutch authority through the VOC tried to monopolize it by making a regulation known as *Tin Reglement*, which prohibited indigenous people and private companies from conducting mining activities.

In 1913, the Dutch set up a state company called Bangka Tin Winning (BTW), which later became the forerunner of PT, Timah Tbk, Subsequently, the mining sector situations went through a bleak period of exploitation by colonizers, including during the Japanese occupation (1942-1950), In short, after some periods of history, there was a process of tin nationalization in 1953, through a political movement of nationalization. Since then, the Indonesian government controlled tin mining, At the time under government control, there have been several changes in the name of the company exploiting the tin in Bangka and Belitung, Finally, in the 1990s, the name of the State Owned Enterprises was replaced with PT, Lead, Limited, Even in 1995, PT, Tin went public and had set up several subsidiaries.

The presence of PT. Timah Tbk as a state company is expected to improve the living standards and welfare of the people in Bangka and Belitung. However, these expectations turn out to be like an old adage that says, "*jauh panggang dari api* (far from the truth)", PT. Timah Tbk just wants to exploit the tin without any regard to the interests of the people and the region, The level of concern of PT. Timah Tbk for the people of Bangka Island and Belitung Island is considered very minimal, not equivalent compared to the profits it has earned from exploiting the natural wealth in the two regions for decades. It is said that more profits have flown to Jakarta,

The people are only given promises, promises that have never been realized. A small example was the reclamation program (reforestation) launched by PT. Timah, aimed at closing mining holes and former quarry pits made by PT. Timah (widely spread in almost all areas in the islands of Bangka and Billiton); even this program to date have not revealed any results.

PT. Timah which first reaped tin proceeds in the islands of Bangka and Belitung was subsequently followed by the presence of a Company (investor) from the state of Australia named PT. KOBA TIN (now PT. KOBA TIN has been taken over by an entrepreneur from the country of Malaysia) in 1974. This company is a purely private enterprise which could be predicted from the outset to only aim at draining the tin resources in Bangka island. The operation of PT. KOBA TIN is only based on the Work Contract (concession) with the central government through the relevant agencies, especially the Department of Mining (as we have

described earlier). Based on that Work Contract, then PT. KOBA TIN has freely participated in exploiting tin natural resources from Bangka Island.

Ironically, this still continues. Without any comprehensive and logical explanation from the government on the questions of the people. The questions that often come up are, for example, when actually the work contract given to PT. KOBA TIN is going to end, what the obligations and contributions PT. KOBA TIN will give to the people and the region? Such questions should have been addressed properly and wisely by the government.

Let alone the answers, the people have in fact been faced with painful reality that the Work Contract of PT. KOBA TIN has continued to be extended by the government, most recently being extended up to 2013. It appears that the government has been more concerned with the investor and has forgotten about the rights of its own people. The government may argue that the people do not need to be involved in the granting the mining concession and permit, especially the government at that time was an authoritarian and centralized rule.

In addition to getting the authority to conduct mining activities, the aforementioned two companies are given extraordinary regulation with respect to land tenure by the Mining Authorization (KP), each with. KP detailed as follows:

PT. Timah Tbk has an area under Mining Authority in Bangka Island covering 360,000 hectares (which means 35% of the area of Bangka Island). Meanwhile,

in Belitung Island the area covers 57,470.25 hectares (30% of the area of Belitung Island).

Meanwhile, PT. Koba Tin has a Work Contract (KK) covering an area of 41.680 hectares, located in Bangka Tengah are with an undisturbed area of 80 km2.

The Province of Bangka Belitung Islands itself covers an area of 18,000 km2, consisting of Bangka Island (11,614,125 km2) and Belitung Island (4,800 km2).

B. THESE ASSETS BELONG TO THE PEOPLE

Where is the position of the people? The people should have been able and should have had the right to the natural resources, but the authoritarian ruler at that time could weaken their bargaining position. As a result, for hundreds of years, people were forced to be quiet and to let the tin reserve in their areas be continuously drained, having no courage to resist it, considering that the forces of power during the new order regime were also applied by the two mining companies to the people in Bangka and Belitung (at the time being yet to become a province). Military forces were used and the strategy of using military arms was proven successful for putting pressure to and force the people to keep quiet. During that time, social inequality was extremely felt in the life of the people of Bangka and Belitung. Many people lived below the poverty line in the midst of their abundant natural resources.

Finally, around 1999, the people in Bangka and Belitung Islands began to enjoy

the fresh air following the wave of reform. The fall of the New Order regime in 1998 was actually able to change the situation and the policies in the mining sector, especially in Bangka and Belitung. For the previous decades, only PT. Timah Tbk and PT KOBA TIN were allowed to conduct tin mining operations, but since 1999 the public has been allowed to conduct tin mining. Following the issuance of the Decree of the Minister of Industry and Trade No. 146/MPP/Kep/Tahun 1999 which suggests that the currently, anyone can carry out tin trade system , the people who have thus far become spectators only to the tin exploitation have begun to open small-scale mining businesses (known as unconventional mining).

The euphoria of regional autonomy as well as the formation of Bangka Belitung Islands Province in 2001 being separate from South Sumatra increasingly expanded the space for people to engage in tin mining business. The effects arising of course drastically increased the economy of the people of Bangka Belitung. This growth was evidently felt. It turned out that the domino effect of the free tin mining business made the people prosperous. This was different from the previous times, when for hundreds of years people were like rats dying in the granary. All this time, their resources have been exploited since the colonial era by the colonists, and even up to the era of independence, they are still colonized by their own government.

C. THE MOST BEAUTIFUL GIFT TO INVESTORS IN LAW NUMBER 4 YEAR 2009

In principle, the ratification of Law Number 4 Year 2009 concerning Mineral and Coal Mining has not changed the scope of the mining Law in managing mine resources. This Law is still the same with the previous Law, regulating activities of mine resource exploitation under a similar legal umbrella. The difference is only in the concession status being replaced with mining permit.

As a matter of fact, the regulation of mineral and coal in the same Law is not so relevant when seen from the dynamic development of the economy and politics today, given the various types of natural resources with their respective characteristics, especially when associated with the needs of the people of Indonesia for mining resources themselves, as well as different mining resource reserves owned by each region in Indonesia. Certainly, each has its characteristics and the degree of urgency which cannot be generalized to one another.

During this time, natural resource exploitation activities merely meet the needs of national exports. So actually, the regulation and management of mineral and coal in the same Law further confirms the status of natural resources as nothing more than mere commodities. Exploitation activities just to meet market demand, especially overseas markets. Thus, this is the same as in previous times where it is certain that almost all of the articles contained in this Law have been forced to serve the interests of capital owners only, and to be subject to the free trade and investment regime, regardless of limited capital capacity people,

while people also have the rights to conduct mining activities.

It can be ascertained that the main spirit shown by this Law is the spirit to continuously exploit all mining resources on a large scale. However, the exploitation can only be conducted by those having large capital. Of course, a form of systemized legal discrimination has occurred in Law No. 4/2009, considering the closed opportunity for those not having large capital to do business in the field of mining, due to the restrictions on the area of mining business permit.

Thus, despite the articles stating that mining business permits can be granted to business entities, cooperatives as well as individuals, the applications for the mining business permits will ultimately be in vain due to the restriction on the area of mining business, with only a number of people or groups being able to comply with such rules.

D. INCONSISTENCY WITH THE 1945 CONSTITUTION

Whereas Article 33 paragraph (3) of the 1945 Constitution confirms that all natural resources shall be managed by the state, to be used for the greatest prosperity of all the people, with the expected materialization of justice for every citizen with respect to the natural resources possessed by the Indonesian nation.

Moreover, in the application the aforementioned Article 33 paragraph (3) of the

1945 Constitution, Law Number 11 Year 1967 concerning Basic Provisions of Mining has been issued, which of course, has not been able to provide a sense of justice for some people, being inseparable from the centralistic nature of its substance.

Therefore, it is considered no longer in accordance with the developments of the current situation and future challenges. The most important challenges faced by the mineral mining sector are the impacts of globalization, changes in the political climate from authoritarianism to democracy, euphoria of regional autonomy, as well as the increasing awareness of human rights.

The increasing awareness of human rights and also the sectoral ego due to the emergence of regional autonomy have caused the state's role to become smaller in the management of mining resources, thus giving rise to demands for wider participation of the community. These have caused the government to respond by granting authority for granting permits for the community (both business entities and individuals) intending to engage in the mining sector.

Furthermore, Article 28 paragraph (2) of the 1945 Constitution confirms that every citizen will automatically obtain protection from any form of unfair treatment. The Indonesian Constitution provides a guarantee for each of its citizens to obtain his/her rights without discrimination in terms of social status, economy as well as religion. Of course, there shall be no discriminatory characteristics against the people who want to engage in businesses, especially

in the mining sector. Therefore, requirements considered incriminating to a person to obtain the permit to engage in the business can be considered as a form of discrimination against a person's socio-economic capability.

In fact, Law No. 4/2009 has clearly provided the greatest opportunity to legal entities, cooperatives as well as individuals to apply for Mining Business Permits, as conveyed in Article 38 of Law No. 4/2009.

Meanwhile, it is impossible for Article 22 sub-article f and Article 52 paragraph (1) of Law No. 4/2009 to be complied with, considering the limited area which can be made as the Mining Business Permit Area (WIUP), whereby only large investors are likely to be able to have an area of 5,000 (five thousand) hectares.

The existence of Article 22 sub-article f and Article 52 paragraph (1) of Law No. 4/2009 has indirectly limited the rights and discriminated against people applying for Mining Business Permits (IUP). In addition, the elucidation reads "self-explanatory", while the words in the aforementioned articles which limit the Mining Business Permit Area (WIUP) to be 5,000 (five thousand) hectares have limited the rights of other people who have insufficient capital to engage in the business sector. Therefore, the aforementioned articles must be explained in detail or be removed at all.

Whereas the reasons which become the basis of consideration for the filing of this Petition are as follows:

E. AUTHORITY OF THE CONSTITUTIONAL COURT

Whereas based on the provision of Article 24C paragraph (1) of the Third Amendment to the 1945 Constitution (hereinafter referred to as the 1945) *juncto* Article 10 of Law Number 24 Year 2003 regarding the Constitutional Court Law (the Constitutional Court Law) states that the Constitutional Court shall have authority at the first and final level, the decisions of which shall be final in nature, to conduct judicial review of Laws against the Constitution; to decide upon Disputes over the Authorities of State Institutions whose authorities are granted by the 1945 Constitution, to decide upon the Dissolution of Political Parties and to decide upon Disputes over the Results of General Elections.

F. LEGAL STANDING OF THE PETITIONERS

1. Whereas Article 51 paragraph (1) of the Constitutional Court states that the Petitioners shall be the parties considering that their constitutional rights and/or authority are impaired by the coming into effect of a Law, namely:
    a. individual Indonesian citizens;
    b. customary law community groups 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 regulated in Law;
    c. public or private legal entities, or;

d. state institutions.

Whereas the elucidation of Article 51 paragraph (1) of the Constitutional Court Law states that referred to as “constitutional rights” shall be the rights regulated in the 1945 Constitution.

2. Whereas the Petitioners are Indonesian citizens who consider that the application of Article 22 sub-article f and Article 52 paragraph (1) of Law No. 4/2009 has the potential to impair the Petitioners’ constitutional rights.

3. Whereas subsequently in the Constitutional Court’s Decision Number 006/PUU-III/2005 and Decision Number 010/PUU-III/2005, the Constitutional Court has determined 5 (five) requirements of constitutional impairment as intended in Article 51 paragraph (1) of the Constitutional Court Law, as follows:

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 of constitutional rights and/or authority and the Law petitioned for review;

e. the possibility that with the granting of the petition, the impairment of such constitutional rights and/or authority argued will not or will no longer occur;

4. Whereas the Petitioners are indigenous people born in Bangka Island, where for approximately 5 (five) years the Petitioners' job is to find tin by opening Unconventional Mine (*Tambang Inkonvesional*/TI), a kind of mini-scale mining using simple equipment. Unconventional Mine (TI) itself was initially the classification used by PT. Timah for mining activities with a capacity of mineral removal under 30m/hour. However, this definition has shifted to become tin mining activities conducted by the community in general.

5. Finding tin using this Unconventional Mine (TI) system became open following the issuance of the Decree of the Minister of Industry and Trade Number 146/MPP/Kep/4/Year 1999 which

changed the status of tin commercial system into unsupervised exported goods.

6. Whereas so far, in conducting their mining activities, the Petitioners have not encountered many obstacles, considering that the management system is more traditional, with the habit of the Petitioners to cooperate with land owners with a production sharing calculation system if they have their own land.

7. Whereas as the people living in Bangka Island, the Petitioners have no other option than to open Unconventional Mines to fulfill their and their families' living necessities, because gardening or farming is considered more difficult, considering the increasingly narrow area due to tin exploitation for these hundreds of years.

8. Whereas the enactment of this Law No. 4/2009 has made the Petitioners worried and feel threatened, considering that it would be impossible for them to meet the requirements contained in the aforementioned Article 22 sub-article f and Article 52 paragraph (1) of Law No. 4/2004.

9. Whereas the Petitioners' worry is understandable, considering that most of the land area of Bangka Island has been controlled by 2 (two) big companies, namely PT. Timah Tbk and PT. Koba Tin, respectively controlling the following Mining Authorization areas:

PT. Timah Tbk: possessing a Mining Authorization land area in Bangka Island reaching 360,000 hectares (which means 35% of the land area of Belitung Island). and 57,470.25 hectares in Belitung Island (30% of the area of Belitung Island).

PT. Kobatin: possessing a Work Contract (KK) covering an area of 41.680 hectares, located in Central Bangka with an undisturbed area of 80 km2.

The Land area of the Province of Bangka Belitung Islands itself is 18,000 km2 consisting of Bangka Island (11,614.125 km2) and Belitung Island (4,800 km2).

G. SUBSTANCE OF THE PETITION

1. Whereas Article 22 sub-article f and Article 52 paragraph (1) of Law Number 4 Year 2009 concerning Mineral and Coal Mining are inconsistent with Article 33 of the 1945 Constitution.

2. Whereas the text of Article 22 sub-article f of Law Number 4 Year 2009 concerning Mineral and Coal Mining is as follows:

   The criteria to for the designation of the WPR are as follows:

   Constituting an area or location of community mining activities which has been operated for at least 15 (fifteen) years.

3. Whereas the text of Article 52 paragraph (1) of Law Number 4

Year 2009 concerning Mineral and Coal Mining is as follows:

The holder of an Exploration IUP for metal minerals shall be granted a WIUP with a minimum area of 5,000 (five thousand) hectares and a maximum area of 100,000 (one hundred thousand) hectares.

4. Whereas in this case, the Petitioners have constitutional rights guaranteed by the 1945 Constitution, namely as follows:

Article 27 paragraph (1) of the 1945 Constitution states that:

All citizens shall have an equal position before the law and government and shall be obligated to uphold the law and government without exception.

Article 28D paragraph (1) of the 1945 Constitution states that:

Every person shall have the right to the recognition, the guarantee, the protection and the legal certainty of just laws as well as equal treatment before the law.

Article 28 paragraph (2) of the 1945 Constitution states that:

Every person shall have the right to be free from discriminatory treatment on any basis whatsoever and shall have the right to obtain protection against any such discriminatory treatment.”

Article 33 of the 1945 Constitution states that:

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 managed by the state.

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

4. Whereas after the provisions of Article 22 sub-article f and Article 52 paragraph (1) of Law No. 4/2009 have been carefully examined, it turns out that the existence of such articles have eliminated the meaning of the recognition, the guarantee, the protection and the legal certainty of just laws as well as equal treatment before the law as mandated by Article 27 paragraph (1), Article 28D paragraph (1) and Article 28D paragraph (2) of the 1945 Constitution, because they have eliminated the Petitioners' right to obtain equal treatment before the law.

5. Whereas the phrase *has been operated for at least 15*

(fifteen) years in Article 22 sub-article f of Law No. 4/2009 is impossible and illogical, because it can be ascertained that the relevant area no longer has any tin reserve, as it has been exhausted through exploitation by the previous miners. Therefore, working on it would be a useless job.

6. Whereas the phrase *has been operated* in Article 22 sub-article f of Law No. 4/2009 may lead to the interpretation that mining activities may only be conducted in a used area which has been previously exploited, which has certainly be exploited by big companies that have conducted mining activities for years, such as PT. Timah Tbk and PT. Kobatin.

7. Whereas the phrase *a minimum area of 5,000 (five thousand) hectare* in Article 52 paragraph (1) of Law No. 4/2009 indicates that the enactment of this Law No. 4/2009 is a form of disguised restriction to individuals, so that they cannot apply for Mining Business Permits, with the birth of Law No. 4/2009 being seemingly intended for gradually eradicating community mining activities. There is an assumption that the people would be once again deprived of their rights to their natural resources they have just enjoyed for less than the last ten years.

8. Whereas the phrase *minimum area* in Article 52 paragraph (1) of Law No. 4/2009 contains injustice, because, as we have described above, most of the Mining Authorizations (KP) areas in Bangka Island and Belitung Island are owned by PT. Timah Tbk, covering an area of 360,000 hectares (which means 35% of the area of Bangka Island), and 57,470.25 hectares in Belitung Island (30% of the area of Belitung Island). The control of the entire Mining Authorization (KP) areas in Bangka and Belitung by the aforementioned two companies has thus closed the right of other people to open mining businesses.

9. Whereas Article 52 paragraph (1) of Law No. 4/2009 has clearly provided the privilege and opportunity by the state to the companies which have so far exploited tin, namely PT. Timah Tbk and PT. Koba Tin, because only the two companies are able to meet the requirements in Article 52 paragraph (1) of Law No. 4/2009. Therefore, it can be substantiated that there has been a discriminatory treatment in Article 52 paragraph (1) of Law No. 4/2009.

10. Whereas it must be admitted that mineral resources throughout Indonesian territory have been given by the government, particularly the New Order government, to

profit-oriented foreign mining companies, domestic private companies and State-Owned Enterprises. This privilege has also been given to PT. Timah Tbk as a state company and PT. Koba Tin as a foreign company obtaining a Work Contract (KK) from the central government. Therefore, all tin resources in Bangka and Belitung have become the parcels of the aforementioned large-scale companies. Thus, it is clear that Article 52 paragraph (1) of Law No. 4/2009 has positioned natural riches which should have been managed by the state for the prosperity of the people to be enjoyed only by a small number of people and some of them have, in fact, been given to foreign parties.

11. The Petitioners are of the opinion that they have legal standing as the parties in the petition for judicial review against the 1945 Constitution.

12. Article 22 sub-article f and Article 52 paragraph (1) of Law No. 4/2009 reflect unequal status and treatment, injustice, and legal uncertainty and discrimination against the Petitioners.

13. In the Indonesian Standard Dictionary published by the Department of Education and Culture, Balai Pustaka,

second edition year 1995, discrimination is defined as different treatment of fellow citizens. Meanwhile, pursuant to Article 1 paragraph (3) of Law Number 39 Year 1999 concerning Human Rights, the definition of discrimination is: any limitation, harassment or ostracism, both direct and indirect, on grounds of differences in religion, ethnicity, race, group, class, social status, economic status, sex, language, or political belief, which results in the degradation, aberration, or eradication of the recognition, exercise, or application of human rights and basic freedoms in both individual and collective life in the political, economic, legal, social, cultural, or any other aspects of life.

14. If the meaning of discrimination above is carefully observed, it is clear that the substance of Article 52 paragraph (1) of Law No. 4/2009 is a form of discriminatory article regulation, because it gives unequal treatment between the Petitioners and other owners of large mining companies.

15. Article 28 of the 1945 Constitution states that In exercising his/her right and freedom, every person must submit to the restrictions stipulated in laws and regulations with the sole purpose to guarantee the recognition of and the respect for other persons' rights and freedom and fulfill fair demand in

accordance with the considerations of morality, religious values, security, and public order in a democratic society.

16. Whereas if related to human rights, Article 52 paragraph (1) of Law No. 4/2009 is not synchronous with Article 3 of Law Number 39 Year 1999 concerning Human Rights which states that:

A. Paragraph (1), Everyone is born free with the same and equal status and human dignity, and is bestowed with the intellect and conscience to live in the society, nation and state in a spirit of brotherhood.

B. Paragraph (2), Everyone shall have the right to the recognition, guarantee, protection and treatment under just laws and to obtain legal certainty and equal treatment before the law.

C. Paragraph (3), Everyone has the right without any discrimination, to protection of human rights and obligations.

D. Therefore, the provision of Article 22 sub-article f of Law No. 4/2009, particularly the phrase *has been operated for at least 15 (fifteen) years* “shall have no

binding legal effect". At least, the phrase *has been operated for at least 15 (fifteen) years* in Article 22 sub-article f of Law No. 4/2009 shall be removed.

E. In addition, Article 52 paragraph (1) of Law No. 4/2009, particularly the phrase *a minimum area of 5,000 (five thousand) hectares* must be declared as "having no binding legal effect:, or at least the phrase *a minimum area of 5,000 (five thousand) hectares* in Article 52 paragraph (1) of Law No. 4/2009 shall be removed.

PETITUM

Based on what we have described above, the Petitioners request for the Constitutional Court to pass a decision with the following injunctions:

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

2. To declare:

   Article 22 sub-article f and Article 52 paragraph (1) of Law Number 4 Year 2009 concerning Mineral and Coal Mining inconsistent with the 1945 Constitution, particularly Article 27 paragraph (1), Article 28D paragraph (1), Article 28I paragraph (2) and Article 33 paragraph (1), paragraph (2) and paragraph (3).

3. To declare:

Article 22 sub-article f and Article 52 paragraph (1) of Law Number 4 Year 2009 concerning Mineral and Coal Mining **inconsistent** with the 1945 Constitution, particularly Article 27 paragraph (1), Article 28D paragraph (1), Article 28I paragraph (2) and Article 33 paragraph (1), paragraph (2) and paragraph (3).

4. To order the publication of this decision properly in the Official Gazette of the State of the Republic of Indonesia.

Or, if the Constitutional Court is of a different opinion, the decision is requested to be passed by principles of what is fair and just (*ex aequo et bono*).

[2.2] Whereas to substantiate their arguments, the Petitioners have presented documentary or written evidence marked as Exhibits P-1 through P-3 legalized at the hearing on Wednesday, May 19, 2010, as follows:

1. Exhibit P-1 : Photocopy of Law Number 4 Year 2009 concerning Mineral and Coal Mining;

2. Exhibit P-2 : Photocopy of the 1945 Constitution;

3. Exhibit P-3 : Photocopy of Law Number 24 Year 2003 concerning the Constitutional Court

Whereas the Petitioners did not present any witness and/or expert to support their arguments;

[2.3] Whereas to respond to the arguments in the Petitioners' petition, the government has presented its oral statement at the hearing on Wednesday, October 27, 2007, and submitted its written statement at the hearing on Wednesday, December 15, 2010, principally explaining as follows:

I. SUBSTANCE OF THE PETITIONERS' PETITION

The petitioners has filed a petition for constitutional review of the provisions of Article 6 paragraph (1) sub-paragraph e, Article 9 paragraph (2), Article 10 sub-article b; the provisions of Article 22 sub-article a, sub-article c, and sub-article f, Article 38, Article 51, Article 52 paragraph (1), Article 55 paragraph (1), Article 58 paragraph (1), Article 60, Article 61 paragraph (1), Article 75 paragraph (4), Article 162, Article 172, and Article 173 paragraph (2) of Law No. 4/2009 against the 1945 Constitution, which, according to the Petitioner, are principally as follows:

1. Whereas the provisions of Article 6 paragraph (1) sub-paragraph e, Article 9 paragraph (2) and Article 10 sub-article b of Law No. 4/2009 are considered to have denied the collective rights of the community, particularly the right to self-determination, the right to use the natural riches and resources, the rights of the minority (particularly if the mining

areas have taken the right customary law communities) as well as the environmental rights, so that such provisions are inconsistent with the principles of justice and participation as they have indirectly accommodated practices of exploitation of Indonesia natural resources today and still continue the colonial view through the control of land on a large scale and for a long time, facilitate large investors, mobilize cheap productive laborers and have export orientation, and that they do not seriously protect the people's right to land, particularly in relation to the clause on the government's authority to determine mining areas without involving the decision of the land-owner community, as well as without considering whether the mining business destroys the environment or violates the people's ownership right. In short, according to the Petitioners, the provisions *a quo* have led to the determination of mining areas without involving the decision of land-owner community, community's refusal of the process of mining area determination being rendered impossible, and that the profile of mining business development in Indonesia shows more facts of human misery and destructive power to the environment compared to their contributions to the economic development of the nation.

2. Whereas the provisions of Article 22 sub-article a, sub-article c and sub-article f of Law No. 4/2009 are considered potential to reduce and even they have eliminated the opportunity for the community/small and

medium-scale entrepreneurs to engage in the mining sector, and that it can be interpreted that mining activities may only be conducted on used areas which have been previously exploited.

3. Whereas the provision of Article 38 of Law No. 4/2009 is considered to have differentiated the status or given unequal treatment between incorporated business entities and unincorporated business entities, because only business entities qualified as legal entities may obtain the Mining Business Permits.

4. Whereas the provision of Article 51 of Law No. 4/2009 is considered not in line and inconsistent with the philosophy of economic democracy which prioritizes the principles of togetherness and justice, and that Article 52 paragraph (1), Article 55 paragraph (1), Article 58 paragraph (1), Article 60, Article 61 paragraph (1) of Law No. 4/2009 have covertly prevented and tripped the medium/small-scale entrepreneurs from obtaining Mining Business Permits (IUP) in the name of law, since it is impossible for small/medium-scale companies to meet the aforementioned requirement of minimum Mining Business Permit Area (WIUP) for exploration. The Mining Business Permit Area (WIUP) of 5,000 (five thousand) hectares, according to the Petitioners, has limited the right of other people who have no sufficient capital to engage in the mining sector.

5. Whereas the provision of Article 75 paragraph (4) of Law No. 4/2009 is

considered unfair since it has positioned medium/small-scale business entities face to face with large business entities.

6. Whereas the provision of Article 162 of Law No. 4/2009 is considered to have eliminated the meaning of the recognition, guaranteed protection and certainty of just laws, as well as equal treatment for every citizen before the law, and is considered to have legitimized criminalization practices against civilians who criticize or protest mining companies.

7. Whereas the provisions of Article 172 and Article 173 paragraph (2) of Law No. 4/2009 are considered discriminatory between the holders of Mining Authorizations and Community Mining Authorization and the holders of Work Contracts;

II. CONCERNING THE LEGAL STANDING OF THE PETITIONERS

Pursuant to Article 51 paragraph (1) of Law Number 24 Year 2003 concerning the Constitutional Court, the Petitioners shall be the parties considering that their constitutional rights and/or authority are impaired by the coming into effect of a Law, namely:

a. individual Indonesian citizens;

b. customary law community groups 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 regulated in Law;

c. public or private legal entities; or

d. state institutions;

The aforementioned provision is confirmed in its elucidation, namely that referred to as “constitutional rights” shall be the rights regulated in the 1945 Constitution of the State of the Republic of Indonesia. Therefore, the persons or parties to be eligible as Petitioners having legal standing in a petition for judicial review of a Law against the 1945 Constitution of the Republic Indonesia must first explain and substantiate:

a. their qualification in the petition *a quo* as intended in Article 51 paragraph (1) of Law Number 24 Year 2003 concerning the Constitutional Court;

b. the Petitioners’ constitutional rights and/or authority in the intended qualification considered to have been impaired by the coming into effect of the reviewed Law;

c. the impairment of constitutional rights and/or authority of the Petitioners as a result of the coming into effect of the Law being petitioned for review;

Furthermore, the Constitutional Court has provided the cumulative definition of impairment of constitutional right and/or authority as a result of the coming into effect of a Law pursuant to Article 51 paragraph (1) of Law Number 24 Year 2003 concerning the Constitutional Court (*vide* Decision Number 006/PUU-

III/2005 and Decision Number 002/PUU-V/2007), which 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 of constitutional rights and/or authority and the Law petitioned for review;

e. the possibility that with the granting of the Petitioner's petition, the impairment of such constitutional rights and/or authority argued by the Petitioner will not or will no longer occur;

Therefore, the Government needs to question the Petitioners' interest whether it has been accurate that the Petitioners are the parties considering that their constitutional rights and/authority are impaired by the coming into effect of Article 6 paragraph (1) sub-paragraph e *juncto* Article 9 paragraph (2), Article 10

sub-article b and Article 162 of Law No. 4/2009, and also whether the Petitioners' constitutional impairment is specific and actual in nature or at least potential in nature which, according to logical reasoning, can be assure of occurring, and whether there is a causal relationship (*causal verband*) between the impairment and the coming into effect of the law petitioned for review.

Based on the foregoing, the Government, through the Chief Justice/Panel of Constitutional Court Justices, requests for the Petitioners to first substantiate that they really are the parties whose constitutional rights and/or authority have been impaired by the coming into effect of the Law being petitioned for review.

III. THE GOVERNMENT'S EXPLANATION ON PETITION FOR JUDICIAL REVIEW OF LAW NUMBER 4 YEAR 2009 CONCERNING MINERAL AND COAL MINING

With respect to the aforementioned petition of the Petitioners, the Government shall first present the purpose and the main thoughts on mineral and coal management as provided for in Law No. 4/2009, where the purposes of mineral and coal management are no other than to:

1. ensure effective implementation and control of mining business activities in an effective, efficient and competitive manner;

2. ensure the benefits of mineral and coal mining in a sustainable manner and with environmental insight;

3. ensure the availability of minerals and coal as basic materials and/or as sources of energy for domestic needs;

4. support and develop the national capacity to be more competitive at the national, regional and international levels;

5. increase the income of the local communities, the regions and the state as well as to create employment opportunities for the greatest prosperity of the people; and

6. ensure legal certainty in the implementation of business activities of mineral and coal mining.

Whereas Law No. 4/2009 contains the main thoughts as follows:

1. Mineral and coal as non-renewable resources shall be managed by the state and their development and utilization shall be implemented by the Government and the Regional Government together with business actors.

2. The Government shall subsequently give the opportunity to Indonesian incorporated business entities, cooperatives, individuals, as well as local communities to conduct mineral and coal business activities based on the permit, in line with the regional autonomy, granted by the Government and/or regional government in accordance with their respective authorities.

3. For the purpose of implementing decentralization and regional autonomy, mineral and coal mining shall be managed based on the principles of externality, accountability, and efficiency involving the Government and Regional Government.

4. Mining business must give economic and social benefits for the greatest prosperity of the Indonesian people.

5. Mining business must be able to accelerate regional development and encourage economic activities of the community/small and medium-scale entrepreneurs as well as encourage the growth of mining-supporting industries.

6. For creating sustainable development, mining business activities must be implemented by considering the principles of the environment, transparency and community participation.

Subsequently, the Government can give an explanation on the assumptions/arguments of the Petitioners, as follows:

1. With respect to the Petitioners' opinion on the provision of Article 6 paragraph (1) sub-paragraph e *juncto* Article 9 paragraph (2) of Law No. 4/2009 which principally states that:

Whereas according to the Petitioners, the phrase "the Government's authority in the management of mineral and coal mining shall be the

designation of Mining Area (WP) conducted after the coordination with the regional government and the consultation with the People's Legislative Assembly of the Republic of Indonesia, and the Mining Area (WP) as intended in paragraph (1) shall be stipulated by the Government after the coordination with the regional government and the consultation with the People's Legislative Assembly" in Article 6 paragraph (1) sub-paragraph e *juncto* Article 9 paragraph (2) of Law No. 4/2009 is illogical because it does not really protect the people's right to land because of not allowing for the involvement of the decision of the land-owner community and the community's refusal of the process of mining area designation.

The Government gives the following explanation:

Whereas the statement of Mining Area designation is the authority of the Government in the management of mineral and coal mining after the coordination with the Regional Government and the consultation with the People's Legislative Assembly of the Republic of Indonesia, and shall be stipulated by the Government after the coordination with the Regional Government and the consultation with the People's Legislative Assembly of the Republic of Indonesia is very logical and reasonable because in the state administration system of the Republic of Indonesia, the People's Legislative Assembly constitutes the people's representatives elected democratically through general elections in a direct, general, free and in a honest and fair manner.

The provision of Article 6 paragraph (1) sub-paragraph e and Article 9 paragraph (2) of Law No. 4/2009 regulating the criteria for the authority on the management of mineral and coal mining and the criteria for Mining Areas are intended for giving legal certainty for an area with respect to whether or not mining business activities can be conducted in the relevant area. The designation of Mining Areas by the Government is based on the provision of Article 1 paragraph (29) of Law No. 4/2009 which states that:

Mining Area, hereinafter referred to as WP (Wilayah Pertambangan), shall be an area that has mineral and/or coal potentials and one that is not bound by the government's administrative restrictions which constitutes a part of the national spatial layout.

In addition, the implementing regulation of Law No. 4/2009, namely Government Regulation Number 22 Year 2010 concerning Mining Area, in Article 3, states that:

The Mining Area (WP) planning as intended in Article 2 paragraph (3) sub-paragraph a shall be prepared through the following stages:

a. Making an inventory of mining potentials; and

b. Preparation of Mining Area (WP) plan.

Article 15 of the Government Regulation states that:

(1) *The Mining Area (WP) plan as intended in Article 14 paragraph (3) shall be designated by the Minister to become a Mining Area (WP) after the coordination with the governor, regent/mayor and the consultation with the People's Legislative Assembly of the Republic of Indonesia (DPR RI).*

(2) *A WP can be reviewed 1 (one) time in 5 (five) years.*

(3) *The governor or regent/mayor, according his/her authority, may propose a change to a WP to the Minister based on the results of investigation and research.*

Therefore, it is clear that the designation of a mining area shall be conducted in accordance with the provisions on spatial layout regulated in Law Number 26 Year 2007 concerning Spatial Layout (hereinafter referred to as the Spatial Layout Law) in Article 3 which states:

The implementation of spatial layout is aimed at creating the national spatial area which is safe, comfortable, productive and sustainable based on the Archipelagic Perspective and National Resilience by:

a. *realization of harmony between natural environment and artificial environment;*

b. realization of integrity in the utilization of natural resources and artificial resources with due observance of human resources; and

c. realization of protection of the spatial functions and prevention of negative impacts on the environment due to spatial utilization.

and Article 6 which states:

(1) Spatial layout shall be implemented with due observance of:

a. physical condition of the territory of the Unitary State of the Republic of Indonesian which is vulnerable to disasters;

b. potentials of natural resources, human resources, and artificial resources; economic, social, cultural, political conditions, law, defense and security, environment, as well as science and technology as a unity; and

c. geostrategy, geopolitics, and geoeconomics;

(2) The national spatial layout, provincial spatial layout, and regency/city spatial layout shall be conducted in a gradual and complementary manner.

(3) The national spatial layout shall cover the jurisdictional territory and the national sovereign territory including land, sea space and airspace on the earth as a unity.

(4) Provincial and regency/city spatial layout shall include land space, sea space, and airspace, including within the earth in accordance with the provisions of laws and regulations.

Based on the explanation above, according to the Government, the provision of Article 6 paragraph (1) sub-paragraph e *juncto* Article 9 paragraph (2) of Law No. 4/2009 **is not inconsistent** with Article 33 paragraph (1), paragraph (2), paragraph (3) and paragraph (4), Article 27 paragraph (1), Article 28C paragraph (2), Article 28D paragraph (1), Article 28G paragraph (1), Article 28H paragraph (1) and paragraph (4), and Article 28I paragraph (2) of the 1945 Constitution, because Article 6 paragraph (1) sub-paragraph e *juncto* Article 9 paragraph (2) of Law No. 4/2009 is not directly related to the articles in the 1945 Constitution being made as the test tool/touchstone by the Petitioners. Therefore, Article 6 paragraph (1) sub-paragraph e *juncto* Article 9 paragraph (2) of Law No. 4/2009 **does not** contain any norm reflecting unequal status and discriminatory treatment, injustice, and legal uncertainty.

2. With respect to the Petitioners' opinion on the provision of Article 10 sub-article b of the Mineral and Coal Mining Law, which principally states that:

Whereas according to the Petitioners, the phrase *the determination of Mining Area (*WP*) shall be implemented in an integrated manner with due*

observance of the opinions of the relevant government agencies, the community and by considering the ecological, economic and socio-cultural aspects, environmental perspective; and with due observance of the aspirations of the region in Article 10 sub-article b of Law No. 4/2009 is illogical because the profile of mining business development in Indonesia shows more facts of human misery and destructive power to the environment compared to their contributions to the economic development of the nation. The local people whose territory would be made as a mining area is being positioned only for consultation and consideration, without any mechanism being provided for the land-owners and land tillers to know the correct, honest and comprehensive information in the process of mining area designation.

The Government gives the following explanation:

Whereas the provision of Article 10 sub-article b of Law No. 4/2009 regulating the intended Mining Area (WP) designation which shall be implemented in an integrated manner with due observance of the opinions of the relevant government agencies, the community and by considering the ecological, economic and socio-cultural aspects, environmental perspective; and with due observance of the aspirations of the region is intended for providing legal certainty for the communities around the mine to be able to actively participate in the designation of mining area for the implementation of mining business activities in

Indonesia, which is in line with the objective of the formulation of Law No. 4/2009, namely to guarantee legal certainty in the implementation of business activities of mineral and coal mining.

Furthermore, as described above, the mining area designation is a part of the implementation of the provisions regulating spatial layout, so that Article 13 of the Spatial Layout Law states that:

(1) *The Government shall provide guidance on spatial layout to provincial regional governments, regency/city regional governments and the community.*

(2) *The guidance on spatial layout as intended in paragraph (1) shall be conducted through:*

a. *coordination of spatial layout implementation;*
b. *dissemination of laws and regulations and dissemination of the guidelines in the field of spatial layout;*
c. *provision of guidance, supervision, and consultation on the implementation of spatial layout;*
d. *education and training;*
e. *research and development;*
f. *development of the spatial layout information and communication system;*
g. *dissemination of information on spatial layout to the*

community; and

h. development of awareness and responsibility of the community.

Article 16

(1) The spatial layout plan may be reviewed.

(2) The review of the spatial layout plan as intended in paragraph (1) may produce recommendations in the form of:

a. the existing spatial layout plan may remain applicable according to its effective period; or

b. the existing spatial layout plan needs revision.

Based on the explanation above, according to the Government, the provision of Article 10 sub-article b of Law No. 4/2009 **is not inconsistent** with Article 33 paragraph (1), paragraph (2), paragraph (3) and paragraph (4), Article 27 paragraph (1), Article 28C paragraph (2), Article 28D paragraph (1), Article 28G paragraph (1), Article 28H paragraph (1) and paragraph (4), and Article 28I paragraph (2) of the 1945 Constitution, because Article 10 sub-article b of Law No. 4/2009 is not directly related to the articles in the 1945 Constitution of the State of the Republic of Indonesia being made as the test tool/touchstone by the Petitioners. Therefore, Article 10 sub-article b of Law No. 4/2009 **does**

not contain any norm reflecting unequal status and discriminatory treatment, injustice, and legal uncertainty.

3. With respect to the Petitioners' opinion on the provision of Article 22 sub-article a, sub-article c, and sub-article f of Law No. 4/2009, which principally states that:

Whereas according to the Petitioners, it is impossible to conduct activities of mining tin ores at the locations of river and/or riverbank because the mineral (tin) reserve does not exist in the river and/or riverbank and in practice, tin mining activities have never been conducted in the river and/or riverbank. In fact, the provisions of the Regional Regulations of Regencies/Cities throughout the Province of Bangka Belitung Islands prohibit mining at locations of river and/or riverbank.

Subsequently, the Petitioners argue that community mining of the metal mineral (tin) in Bangka Belitung Province has not been conducted at mines already operated for at least 15 (fifteen) years, so as to restrict the opportunity of the people to conduct mining, particularly to mine tin in Bangka Belitung Province.

Whereas the phrase "has been operated for at least 15 years" in Article 22 sub-article f of Law No. 4/2009 is impossible and illogical, because it can be ascertained that the relevant area no longer has any tin reserve, as it has been exhausted through exploitation by the previous miners.

Whereas the phrase “has been operated” in Article 22 sub-article f of Law No. 4/2009 may lead to the interpretation that mining activities may only be conducted in a used area which has been previously exploited, which has certainly be exploited by big companies that have conducted mining activities for years, such as PT. Timah Tbk and PT. Kobatin.

The Government gives the following explanation:

Whereas the provision of Article 22 of Law No. 4/2009 regulating the criteria for the designation of Community Mining Area is intended for providing legal certainty for the people who want to conduct community mining as well as for giving the opportunity to the people to participate in development, particularly in mineral and coal mining activities.

Article 21 of Law No. 4/2009 states that the authority to designate a Community Mining Area (WPR) shall be delegated to the regent/mayor after the consultation with the regional people’s legislative assembly of the regency/city. Article 67 paragraph (1) of Law No. 4/2009 also regulates the granting of authority to the regent/mayor to issue Community Mining Permits (IPR).

With the authority granted by Law No. 4/2009 to the Regent/mayor to designate WPR, the application of the criteria for stipulating WPR as intended in Article 22 of Law No. 4/2009 shall be delegated to the

regent/mayor in accordance with the conditions and uniqueness of each region. Furthermore, the words "**and/or**" in Article 22 needs to be considered, which can be interpreted that WPR designation may be "cumulative" or "alternative" in nature. Therefore, the regent/mayor may determine the criteria in accordance with the conditions of his/her region. The application of the criteria for WPR designation will be further regulated in a Regional Regulation.

Article 134 paragraph (2) of Law No. 4/2009 states that:

Mining business activities cannot be conducted in places where mining business activities are prohibited in accordance with laws and regulations.

Based on the aforementioned Article, if the Regional Regulation prohibits mining at certain locations, for example in the river and/or riverbank, then mining business activities cannot be conducted there. Also, this is not inconsistent with the substance of Article 22 of Law No. 4/2009 because the WPR criteria in Article 22 would be delegated to the regent/mayor for determining which criteria are obligatory and which criteria are optional based on the conditions of their respective regions.

Whereas even if the Petitioners' argument stating that community mining of metal mineral (tin) in Bangka Belitung Province has not been conducted in mines have been operated for at least 15 (fifteen) years were true, that would not restrict the people's opportunity to conduct

mining, particularly to mine tin in Bangka Belitung Province, because Article 24 of Law No. 4/2009 states that:

"*An area or location of community mining activities which has been operated but has not been designated as WPR shall be prioritized to be designated as WPR*".

Based on the aforementioned Article 24 of Law No. 4/2009, community mining existing prior to the enactment of Law No. 4/2009 shall be prioritized to be designated as WPR, so that the people in Bangka Belitung Province can still conduct mining business activities in the WPR.

Therefore, according to the Government, the provisions of Article 22 sub-article a, sub-article c, and sub-article f of Law No. 4/2009 **are not inconsistent** with Article 28I paragraph (2), Article 33 paragraph (1) and paragraph (4) of the 1945 Constitution, because Article 22 sub-article a, sub-article c and sub-article f of Law No. 4/2009 is, in fact, intended for providing legal certainty for community mining activities as well as for accommodating the conditions or uniqueness of regions and providing legal certainty for the people who want to conduct community mining as well as giving the opportunity to the people to participate in development, particularly in mineral and coal mining.

Article 21 of Law No. 4/2009 states that the authority to designate WPR is delegated to the regent/mayor after the consultation with the regional

people's legislative assembly of regency/city. Article 67 paragraph (1) of Law No. 4/2009 also regulates the granting of authority to the regent/mayor to issue Community Mining Permits (IPR).

With the authority granted by Article 21 and Article 67 of Law No. 4/2009 to the regent/mayor for designating WPR and issuing Community Mining Permits (IPR), then the application of the criteria for WPR designation as intended in Article 22 of Law No. 4/2009 shall be delegated to the regent/mayor in accordance with the conditions and uniqueness of the respective regions. The words "and/or" in Article 22 needs to be considered, which can be interpreted that WPR designation may be "cumulative" or "alternative" in nature. Therefore, the regent/mayor may determine the criteria in accordance with the conditions of his/her region. The application of the criteria for WPR designation will be regulated in a Regional Regulation.

The Government is of the opinion that the petitioners' assumption that the area has been previously exploited by large companies is groundless because based on the provisions of applicable laws and regulations, WPR shall not overlap with KP areas or areas of Work Contract (KK)/Work Contract for Coal Mining Operation (PKP2B).

Therefore, according to the Government, the provisions of Article 22 sub-article a, sub-article c and sub-article f of Law No. 4/2009 **are not**

inconsistent with Article 27 paragraph (1), Article 28D paragraph (1), and Article 33 of the 1945 Constitution, because Article 22 sub-article a, sub-article c and sub-article f of Law No. 4/2009 is not directly related to the articles in the 1945 Constitution being made as the test tool by the Petitioners. Therefore, Article 22 sub-article f of Law No. 4/2009 **does not** contain any norm reflecting unequal status and discriminatory treatment, injustice, and legal uncertainty.

4. With respect to the Petitioners' opinion on the provision of Article 38 sub-article a of Law No. 4/2009, which principally states that:

Whereas according to the Petitioners, the provision of Article 38 sub-article a of Law No. 4/2009 has deliberately given unequal status and treatment between incorporated legal entities and unincorporated legal entities in order to obtain IUP. Article 38 of Law No. 4/2009 states that:

"*IUP shall be granted to:*

a. Business entities;
b. Cooperatives; and
c. Individuals."

Meanwhile, Article 1 sub-article 23 in the Chapter on General Provisions of Law No. 4/2009 states that:

"*Referred to as "business entity" shall be a "legal entity" engaging in the*

field of mining which is established under the laws of Indonesia and domiciled within the territory of the Unitary State of the Republic of Indonesia".

Based on the provision of Article 38 sub-article a of Law No. 4/2009, only "business entities" qualified as "legal entities" may obtain IUP, which means that IUP cannot be granted to "business entities" which are not "legal entities". Business entities qualified as "legal entities" are Limited Liability Companies, Cooperatives, State Companies, Regional Companies, and so on. Meanwhile, Under Article 38 sub-article a of Law No. 4/2009, IPU cannot be granted to business entities in the form of *Commanditer Vennootschap* (CV), Firms and Trade Companies (*Perusahaan Dagang*/PD), while IPU can be granted to business entities which are legal entities and individuals.

Therefore, according to the Petitioners, any provision which gives unequal treatment unjustly (discriminatory) to able to conduct a mining business is inconsistent with/violates the principles of human rights protected by Article 28D paragraph (1), Article 28I paragraph (2) and Article 33 paragraph (5) of the 1945 Constitution.

The Government gives the following explanation:

One of the principles in Law No. 4/2009 is the principle of participation which means that the opportunity to conduct mining business activities is

opened to the greatest possible extent to every community member meeting the requirements provided for in Law No. 4/2009 and its implementing regulation. The community may participate in mining business activities by forming business entities, cooperatives or as individuals.

In Law No. 4/2009, the word “business entity” is indeed defined as “incorporated legal business”, but it does not mean that an unincorporated business entity is not accommodated or in other words, it cannot be granted the Mining Business Permit based on Law No. 4/2009.

Article 49 of Law No. 4/2009 states that:

“*Further provisions on the procedures for the granting of Exploration IUP…and Production Operation IUP…shall be regulated with a Government Regulation*”.

The Government Regulation regulating the procedures for the granting of IUP pursuant to the mandate of Law No. 4/2009 is Government Regulation Number 23 Year 2010 concerning the Implementation of Business Activities of Mineral and Coal Mining stipulated by the Government on February 1, 2010.

Article 6 paragraph (1) and paragraph (3) of Government Regulation Number 23 Year 2010 concerning the Implementation of Business

Activities of Mineral and Coal Mining states that:

Paragraph (1):

IUP shall be granted by the Minister, governor, or regent/mayor according to his/her authority based on the application submitted by:

a. business entities;

b. cooperatives; and

c. individuals.

Paragraph (3):

Individuals as intended in paragraph (1) sub-paragraph a may be in the form of individual person, firms, or limited partnerships.

Based on the aforementioned Article 6 paragraph (1) and paragraph (3) of Government Regulation Number 23 Year 2010 concerning the Implementation of Business Activities of Mineral and Coal Mining, it can be known that the existence of unincorporated business entities such as firms or limited partnerships (CV) is also recognized and of course, they can be granted IUP.

If seen from its characteristics, a Trade Company also can actually be categorized as an individual company. However, it is necessary to note that Exploration IUP and Production Operation IUP are indeed not

granted to Trade Companies, considering that Exploration IUP and Production Operation IUP are only granted to business entities, cooperatives and individuals engaging in the business activities of mineral and coal mining. Meanwhile, the activities of Trade Companies are limited only to goods and/or service trading activities.

If a Trade Company wants to conduct mining business activities, particularly in mineral and/or coal trade, a Production Operation IUP Specifically for Trading and Transportation will be granted to the Trade Company.

Based on the explanation above, the Petitioners' argument stating that the provision of Article 38 sub-article a of Law No. 4/2009 is discriminatory to unincorporated Companies is groundless at all. Therefore, there is no contradiction between the norm in Article 38 sub article a of Law No. 4/2009 and the norms in Article 28D paragraph (1) of Article 28I paragraph (2) and Article 33 paragraph (5) of the 1945 Constitution.

Based on the explanation above, according to the Government, the Petitioners' argument stating that the provision of Article 38 sub-article a of Law No. 4/2009 is discriminatory to unincorporated Companies is groundless at all. Therefore, there is no contradiction between the norm in Article 38 sub article a of Law No. 4/2009 and the norms in Article 28D

paragraph (1) of Article 28I paragraph (2) and Article 33 paragraph (5) of the 1945 Constitution.

5. With respect to the Petitioners' opinion on the provisions of Article 51, Article 60, Article 75 paragraph (4) of Law No. 4/2009, which principally states that:

Whereas according to the Petitioners, the granting of IUP/IUPK for metal mineral and coal by tender is similar to hampering and preventing medium/small-scale entrepreneurs. This tender method will make it difficult for small/medium-scale entrepreneurs to compete with large companies/investors to obtain IUP/IUPK for metal mineral and/or coal.

Whereas Article 51, Article 60, Article 75 paragraph (4) of Law No. 4/2009 regulating the granting of WIUP/WIUPK for metal mineral and coal through a tender system are considered unfair for positioning medium/small-scale business entities face to face with large business entities, particularly foreign companies (Foreign Investment Companies/PMA). That has directly put medium/small-scale business entities and cooperatives in the weak position to compete in the tender for WIUP/WIUPK.

Whereas according to the Petitioners, the granting of IUP/IUPK for metal mineral and coal by tender in Article 51, Article 60, Article 75 paragraph (4) of Law No. 4/2009 is inconsistent with the economic democracy which

prioritizes the principles of togetherness and justice in the implementation of the national economy as regulated/stipulated in Article 33 paragraph (4) of the 1945 Constitution.

The Government gives the following explanation:

Whereas the fundamental objective of the formulation of regulation on the tender for metal mineral and coal WIUP is to implement the principles of transparency, justice and accountability enshrined in Article 2 sub-article a and sub-article c of Law No. 4/2009. With the application of the tender system for metal mineral and coal WIUP, then business entities, cooperatives and individuals have an equal opportunity to obtain WIUP for metal mineral and coal.

In the tender system regulated in Law No. 4/2009, the tender price is based on the information data compensation, namely a collection of data and information possessed by the Central/Regional Government on the areas to be tendered. The collection of data and information is obtained based on the results of investigation and research as well as exploration conducted by the Central/Regional Government. Since the aforementioned data and information have an economic value, it is very reasonable to apply the tender system for metal mineral and coal WIUP.

The tender system for metal mineral and coal WIUP regulated in Law No. 4/2009 is not at all intended for hampering/preventing medium/small-

scale entrepreneurs from obtaining WIUP for metal mineral and coal or an effort to position large business entities face to face with small/medium-scale business entities.

Conducting business activities in the field of metal mineral and coal mining, especially exploration activities, indeed requires enormous cost (high capital); high risk and high technology). If small/medium-scale entrepreneurs want to do business of metal mineral and coal in WIUP/WIUPK, they may merge their businesses to be able to compete with entrepreneurs having strong capital in the WIUP/WIUPK tender.

Another alternative which can be sought by small/medium-scale entrepreneurs to do business of metal mineral and coal is to submit an application for Community Mining Permit (IPR) to the local regent/mayor as regulated in Article 47 paragraph (1) of Government Regulation Number 23 Year 2010 concerning the Implementation of Business Activities of Mineral and Coal Mining.

Therefore, Law No. 4/2009 has, in fact, given an equal yet proportional opportunity in encouraging economic activities of the community/small and medium-scale entrepreneurs which will ultimately allow for small/medium-scale entrepreneurs to play a role in accelerating the development of the local area/region.

Based on the explanation above, according to the Government, the

Petitioners' argument stating that the provisions of Article 51, Article 60, Article 75 paragraph (4) of Law No. 4/2009 hamper/prevent medium/small-scale entrepreneurs from obtaining WIUP for metal mineral and coal or constitute an effort to position large business entities face to face with small/medium-scale business entities is incorrect. Therefore, there is no contradiction between the norms in Article 51, Article 60, Article 75 paragraph (4) of Law No. 4/2009 and the norm in Article 33 paragraph (4) of the 1945 Constitution.

6. With respect to the Petitioners' opinion on the provision of Article 52 paragraph (1), Article 55 paragraph (1), Article 58 paragraph (1) and Article 61 paragraph (1) of Law No. 4/2009, which principally states that:

Whereas according to the Petitioners, the phrase "a maximum area of 25,000 (twenty-five thousand) hectare" in Article 52 paragraph (1) of Law No. 4/2009 indicates that the enactment of this Law No. 4/2009 is a form of disguised restriction to individuals, so that they cannot apply for mining business permits, with the birth of Law No. 4/2006 being seemingly intended for gradually eradicating community mining activities.

Whereas Article 52 paragraph (1) of Law No. 4/2009 has clearly given a privilege and opportunity by the state to mining businesses which have so far exploited tin, namely PT. Timah, Tbk and PT. Koba Tin, because the

aforementioned two companies are able to meet the requirements in Article 52 paragraph (1) of Law No. 4/2009. Therefore, discriminatory treatment can be substantiated in Article 52 paragraph (1).

Whereas all mineral sources throughout Indonesian territory have been given by the Government, particularly to profit-oriented foreign mining companies, domestic private companies, and State-Owned Enterprises (BUMN). This privilege is also given to PT. Timah, Tbk as a state company and PT. Koba Tin as a foreign company obtaining a Work Contract (KK) from the government. Therefore, all tin resources in Bangka and Belitung have been under the control of large-scale tin mining companies. Thus, it is clear that Article 52 paragraph (1) of Law No. 4/2009 has positioned natural resources which should have been managed by the state for the prosperity of the people can only be enjoyed by a small number of people and even such natural resources have been partly given to foreign parties.

Whereas the required minimum area of exploration WIUP determined by Article 52 paragraph (1), Article 55 paragraph (1), Article 58 paragraph (1), and Article 61 paragraph (1) of Law No. 4/2009 may/can only be met by individuals and companies having large capital. The area of exploration WIUP so determined will have the consequence of financing which must be incurred by the IUP applicant, namely among other things in the form of:

a. guarantee deposit;

b. reclamation deposit;

c. land acquisition compensation; and

d. operating cost

in extremely large amount and which is unlikely for small and medium-scale entrepreneurs to afford/pay.

Therefore, according to the Petitioners, the stipulation of the minimum area of exploration WIUP is inconsistent with economic democracy which prioritizes the principles of togetherness and justice in the implementation of the national economy as regulated/stipulated in Article 33 paragraph (4) of the 1945 Constitution of the State of the Republic of Indonesia.

The Government gives the following explanation:

It is necessary for the Government to convey that Article 52 paragraph (1) of Law No. 4/2009 does not contain the phrase “a maximum area of 25 (twenty-five) hectares”, so that the petition for substantive review filed by the Petitioners is obscure (*obscuure libel*) and inaccurate.

Law No. 4/2009 does not restrict individuals to conduct mining business activities. Article 38 sub-article c of Law No. 4/2009 basically states that IPU can be granted to individuals, so that the Petitioners’ opinion is automatically incorrect.

Article 52 paragraph (1) of Law No. 4/2009 does not regulate community mining so that the Petitioners' statement that Article 52 paragraph (1) of Law No. 4/2009 is aimed at gradually eradicating community mining activities is incorrect. Article 52 paragraph (1) of Law No. 4/2009 does not give any privilege to TP. Timah, Tbk. and TP. Koba Tin. Article 52 paragraph (1) is intended for IUP which will be issued following the coming into effect of Law No. 4/2009, rather than for the Mining Authorization (KP) possessed by PT. Timah, Tbk. and the Work Contract (KK) possessed by PT. Koba Tin, so that the Petitioners' argument is inaccurate.

Whereas the basic philosophy for making the regulation on the minimum area of Exploration WIUP in Article 52 paragraph (1), Article 55 paragraph (1), Article 58 paragraph (1), and Article 61 paragraph (1) of Law No. 4/2009 is to realize the principles of sustainability and environmental perspective enshrined in Article 2 sub-article d of Law No. 4/2009. The principles of sustainability and environmental perspective are further sharpened in Article 18 sub-article c and sub-article d of Law No. 4/2009 which become the norm of conservation and environment's supporting capacity as the criteria for WIUP designation.

From the environmental viewpoint, the minimum area of Exploration WIUP for mineral and coal needs to be regulated in Law No. 4/2009

because it is closely related to the aspect of land sufficiency which also affects the supporting capacity and the accommodating capacity of the environment. If the Exploration WIUP is too small, the environment's supporting capacity and accommodating capacity will be inadequate, particularly when performing the production operation stage, considering the fact that the WIUP area granted during exploration will not increase when performing production operation. It will also be difficult to manage the land for developing mining facilities/infrastructure during production operation in a limited WIUP. The minimum areas of 5,000 ha for Exploration WIUP for metal mineral and coal, 500 ha for non-metal, and 5 ha for rocks are considered to have met the requirements of environment's supporting capacity and accommodating capacity.

The regulation of the minimum area of Exploration WIUP which can be operated in Law No. 4/2009 is also intended rocks entrepreneurs engaging in the mining sector. With the existence of the provision on the minimum area of Exploration WIUP, the opportunity to obtain mineral and coal along with their reserve becomes increasingly bigger. The big opportunity to obtain mineral and coal reserve will also be increasingly open if the area of Exploration WIUP granted is adequate.

Whereas as business activities, the mineral and coal mining industry is indeed a high capital, high risk and high technology industry. However, it does not mean that entrepreneurs with small capital (small/medium-scale

entrepreneurs) cannot engage in mining business activities. Small/medium-scale entrepreneurs can also engage in mining business activities in the form of community mining, namely by applying for the Community Mining Permit (IPR) to the local regent/mayor. This has been regulated in Articles 67 through 73 of Law No. 4/2009.

In the event of any area less than the minimum area determined in Law No. 4/2009 and any indication of existence of mineral and coal under it, exploration activities may be conducted by the Minister, Governor, or Regent/Mayor pursuant to Article 16 paragraph (5) of Government Regulation Number 22 Year 2010 concerning Mining Area, as a part of the Government's duties for the purpose of accelerating area development and encouraging economic activities of the community/small and medium-scale entrepreneurs.

Based on the explanation above, according to the Government, the Petitioners' argument stating that the provisions of Article 52 paragraph (1), Article 55 paragraph (1), Article 58 paragraph (1), and Article 61 paragraph (1) of Law No. 4/2009 is discriminatory against small/medium-scale entrepreneurs is incorrect. Therefore, there is no contradiction between the norms in Article 52 paragraph (1), Article 55 paragraph (1), Article 58 paragraph (1), and Article 61 paragraph (1) of Law Number 4 Year 2009 concerning Mineral and Coal Mining and the norm in Article 33 paragraph (4) of the 1945 Constitution.

7. With respect to the Petitioners' opinion on the provision of Article 162 of Law No. 4/2009, which principally states that:

Whereas according to the Petitioners, the phrase "Any person hampering or disturbing the mining business activities of a holder of IUP or IUPK having fulfilled the requirements as intended in Article 136 paragraph (2) shall be punished by a maximum imprisonment of 1 (one) year or a maximum fine of Rp.100,000,000 (one hundred million rupiah)" in Article 162 of Law No. 4/2009 is illogical because when the community refuses to surrender their land to mining companies or refuses the mining operation plan based on considerations of the adverse impacts on their life, intimidating, manipulative as well as repressive approaches which are often applied by mining companies are not rarely legitimized by the government. Faced with such test, more often the communities around the mine become the losing victims who not rarely end up with criminalization through the judicial process.

The Government gives the following explanation:

Whereas the phrase "Any person hampering or disturbing the mining business activities of a holder of IUP or IUPK having fulfilled the requirements as intended in Article 136 paragraph (2) shall be punished by a maximum imprisonment of 1 (one) year or a maximum fine of Rp.100,000,000 (one hundred million rupiah)" in the provision of Article

162 of Law No. 4/2009 cannot be automatically imposed to the community if they refuse to surrender their land to mining business actors, because in Law No. 4/2009:

The interpretation of the provision of Article 162 cannot be separated from the provision of Articles 136 through 138 of Law No. 4/2009.

Article 136 of Law No. 4/2009 states that:

(1) Before conducting production operation activities, IUP or IUPK holders must settle the rights to land with the title holders in accordance with the provisions of laws and regulations.

(2) The settlement of rights to land as intended in paragraph (1) may be conducted in stages according to the needs for land of the IUP or IUPK holders

Article 137 of Law No. 4/2009 states that:

"IUP or IUPK holders as intended in Article 135 and Article 136 who have settled land areas may be granted with the rights to land in accordance with the provisions of laws and regulations."

Article 138 of Law No. 4/2009 states that:

"The rights to IUP, IPR or IUPK are not land titles".

Whereas the provision of Article 162 of Law No. 4/2009 is intended to protect IUP or IUPK holders having performed their obligations in relation to the rights possessed by land title holders, namely in the form of compensation based on a mutual agreement with land title holders in the form of lease, sale-purchase as well as borrow-use in accordance with the provision of Article 100 of Government Regulation Number 23 Year 2010 concerning the Implementation of Business Activities of Mineral and Coal Mining.

If the IUP or IUPK holders have performed their obligation in relation to the land title as intended above, then it is reasonable and logical for the IUP or IUPK holders to obtain legal protection in performing their obligations.

Based on the explanation above, according to the Government, the provision of Article 162 of Law No. 4/2009 is not inconsistent with Article 33 paragraph (1), paragraph (2), paragraph (3) and paragraph (4), Article 27 paragraph (1), Article 28C paragraph (2), Article 28D paragraph (1), Article 28G paragraph (1), Article 28H paragraph (1) and paragraph (4), and Article 28I paragraph (2) of the 1945 Constitution, because Article 162 of Law No. 4/2009 is not directly related to the articles in the 1945 Constitution being made as the touchstone by the Petitioners. Therefore, Article 162 of Law No. 4/2009 **does not** contain any norm reflecting unequal status and discriminatory treatment, injustice, and legal

uncertainty.

8. With respect to the Petitioners' opinion on the provision of Article 172 of Law No. 4/2009, which principally states that:

Whereas according to the Petitioners, the provision of Article 172 of Law No. 4/2009 has positioned the holders of Mining Authorization (KP) and holders of Community Mining Authorization (KPR) discriminately and unequally before the law compared to the holders of Work Contract (KK) which are foreign capital companies.

According to the Petitioners, the provision of Article 172 of Law No. 4/2009 only gives the tolerance/dispensation by still acknowledging the application of KK and Work Agreement due to the coming into effect of Law No. 4/2009 while the Transitional Provision of Article 169 of Law No. 4/2009 does not give any tolerance/dispensation, where under Article 173 paragraph (1), KP and KPR are declared no longer applicable.

The Government gives the following explanation:

Whereas the provision of Article 172 of Law No. 4/2009 basically regulates the applications for KK and PKP2B prior to the coming into effect of Law No. 4/2009 and it is not related to Mining Authorization.

Article 172 of the Mineral and Coal Mining Law constitutes a transitional provision to "bridge" the transition from the contract regime applicable in

Law No. 11/1967 to the permit regime applicable in Law No. 4/2009.

Whereas Article 172 of Law No. 4/2009 has, in fact, been made to prevent legal vacuum and to guarantee legal certainty in mineral and coal mining operation, particularly with the existence of changes in the management of mined commodities of mineral and coal. Such transitional provision constitutes a form of implementation of the universal principle, namely respect to the contract, in this matter the work agreement between the Minister of Energy and Mineral Resources and mining contractors.

9. With respect to the Petitioners' opinion on the provision of Article 173 paragraph (2) of Law No. 4/2009, which principally states that:

Whereas according to the Petitioners, the provision of Article 173 paragraph (2) of Law No. 4/2009 has positioned the holders of Mining Authorization (KP) and holders of Community Mining Authorization (KPR) discriminately and unequally before the law compared to the holders of Work Contract (KK) which are foreign capital companies.

The provision in Article 169 paragraph (1) of Chapter XXV Transitional Provisions of Law No. 4/2009 only gives the tolerance/dispensation by still acknowledging the application of KK and Work Agreement due to the coming into effect of Law No. 4/2009 while the Transitional Provision of Article 169 of Law No. 4/2009 does not give any tolerance/dispensation,

where under Article 173 paragraph (1), KP and KPR are declared no longer applicable.

Therefore, according to the Petitioners, the provision of Article 173 paragraph (2) cannot be made as the legal basis for the application of KP and KPR because on non-fulfillment of the requirement “to the extent it is not inconsistent with the provisions in this law”.

The Government gives the following explanation:

Whereas the provision of Article 173 paragraph (2) of Law No. 4/2009 basically regulates that the implementing regulation of Law Number 11 Year 1967 concerning Basic Provisions of Mining is still applicable, to the extent that it is not inconsistent with Law No. 4/2009. The Petitioners’ assumption that with the coming into effect of Article 173 paragraph (2) of Law No. 4/2009 then KP shall be declared no longer applicable is groundless, because the revocation of the implementing regulation of Law Number 11 Year 1967 concerning Basic Provisions of Mining does not automatically render KP no longer applicable. Article 112 sub-article 4 of Government Regulation Number 23 Year 2010 concerning the Implementation of Business Activities of Mineral and Coal Mining states that:

“Mining Authorization, Regional Mining Permit, and Community Mining Permit granted based on the provisions of laws and regulations prior to

the stipulation of this government regulation shall be still applied until they expire ….."

Based on the aforementioned Article, KP is still honored and applied until they expire.

Law Number 11 Year 1967 concerning Basic Provisions of Mining along with its implementing regulation have never recognized the term "Community Mining Authorization" referred to by the Petitioners in their petition. Therefore, the Government considers that to the extent it is concerned with the term "Community Mining Authorization" the Petitioners' petition is obscure (*obscure libel*) and it does not need to be responded to.

Based on the description above, according to the Government, the Petitioners argument stating that the provision of Article 173 paragraph (2) of Law No. 4/2009 is discriminatory to KP holders, is incorrect and groundless.

IV. CONCLUSION

Based on the explanation and arguments above, the Government requests to the honorable Chief Justice/Panel of Constitutional Court Justices hearing the petition for judicial review of Law Number 4 Year 2009 concerning Mineral and Coal Mining against the 1945 Constitution of the State of the Republic of

Indonesia, to pass the following decision:

1. To reject the Petitioners' judicial review petition in its entirety or at least to declare that the Petitioners' judicial review petition cannot be accepted (*niet ontvankelijk verklaard*);

2. To accept the Government's statement in its entirety;

3. To declare the provisions of Article 6 paragraph (1) sub-paragraph e, Article 9 paragraph (2), Article 10 sub-article b; the provisions of Article 22 sub-article a, sub-article c and sub-article f, Article 38, Article 51, Article 52 paragraph (1), Article 55 paragraph (1), Article 58 paragraph (1), Article 60, Article 61 paragraph (1), Article 75 paragraph (4), Article 162, Article 172 and Article 173 paragraph (2) of Law Number 4 Year 2009 concerning Mineral and Coal Mining **not inconsistent** with the provisions of Article 27 paragraph (1), Article 28C paragraph (2), Article 28D paragraph (1), Article 28G paragraph (1), Article 28H paragraph (1) and paragraph (4), Article 28I paragraph (2), and Article 33 paragraph (1), paragraph (2), paragraph (3) and paragraph (4) of the 1945 Constitution of the State of the Republic of Indonesia.

However, if the Chief Justice/Panel of Constitutional Court Justices if a different opinion, the decision is requested to be passed by principles of what is fair and just (*ex aequo et bono*).

In addition to the Government's Written Statement above, the

Government has also submitted its written response to the questions of Constitutional Justices at the hearing on October 27, 2010, as follows:

Questions of Constitutional Justice Dr. M. Arsyad Sanusi, SH. MK

1. Can the operation of mineral and coal constituting state assets be tendered?

2. Article 172 of Law No. 4/2009 states that “The applications for KK and PKP2B shall be submitted to the Minister…” Why does the Central Government monopolize the KK/PKP2B? How about the spirit of decentralized autonomy and regional autonomy?

3. Law Number 11 Year 1967 is more democratic, while Law Number 4 Year 2009 tends to have a neoliberal characteristic in managing minerals.

4. Why does KK become the monopoly of the central government so that the bureaucracy becomes too long, while Law No. 4/2009 grants the right to provincial, regency and municipality governments?

The Government‘s Answers

1. In granting the permit for conducting mining activities, Law No. 4 Year 2009 uses two mechanisms, namely tender and area application. The tender mechanism is applied to obtain a Mining Business Permit Area (WIUP) for metal mineral and coal, where Article 51 of Law No. 4/2009

stipulates that:

WIUP for metal mineral shall be granted to business entities, cooperatives and individuals through tender.

Article 60 stipulates that:

WIUP for coal shall be granted to business entities, cooperatives and individuals through tender.

Therefore, the tender mechanism is conducted not for the mined commodities (metal mineral or coal), but rather, for the area.

This is in line with the provision of Article 92 of Law No. 4/2009 whereby the Holders of Mining Business Permit (IUP) and Special Mining Business Permit (IUPK) shall be entitled to possess the mineral or coal already produced if they have settled the exploration contributions or production contributions. The area tender mechanism is different from the commodity tender mechanism, where in the commodity tender, the tender awardee shall be automatically entitled to the tendered commodity.

2. Article 172 of Law No. 4/2009 fully reads as follows:

The application for work contract for the operation of coal mining which has been submitted to the Minister by no later than 1 (one) year prior to the coming into effect of this Law and which has obtained a principle

approval or a preliminary investigation permit shall continue to be honored and can be processed for its permit without going through a tender under this Law.

Article 172 of Law No. 4/2009 constitutes a transitional provision to "bridge" the transition from the contract regime applicable in Law Number. 11 Year 1967 concerning Basic Provisions of Mining (hereinafter referred to as Law Number 11 Year 1967) to the permit regime applicable in Law No. 4/2009.

Based on Article 10 paragraph (1) of Law Number 11 Year 1967, the Government *c.q.* the Minister of Mining and Energy (now the Minister of Energy and Mineral Resources) has authority to appoint other parties as contractors for coal business operation in the form of Work Contract (KK) or Work Contract for Coal Mining Operation (PKP2B) and to sign the aforementioned KK and PKP2B.

Whereas Article 172 of Law No. 4/2009 has, in fact, been made to prevent legal vacuum and to guarantee legal certainty in mineral and coal mining operation, particularly with the existence of changes in the management of mined commodities of mineral and coal. Such transitional provision constitutes a form of implementation of the universal principle, namely respect to the contract, in this matter the work agreement between the Minister of Energy and Mineral Resources and mining

contractors.

3. Law Number 11 Year 1967 was ratified and effective during the time when the community wants private parties to be given more opportunities to conduct mining in order to accelerate the national economic development, but it still adhered to the basic norm that the state shall fully manage all minerals for the interest of the state and for the prosperity of the people, because such mineral are national assets.

   Based on Law Number 11 Year 1967, natural resources can be utilized by operation methods as follows;

   a. directly operated by Government agencies;

   b. operated by state Companies;

   c. operated by companies with joint capital between State Companies and Regional Companies;

   d. operated by Regional Companies

   e. operated by companies with combined capital between state Companies and private companies; or it may be combined capital with individuals, provided that they are Indonesian citizens; or with private bodies whose entire management consists of Indonesian Citizens;

f. operated by private parties; or by individuals provided that they are Indonesian Citizens; or private bodies whose entire management consists of Indonesian Citizens, especially in the form of cooperatives.

The same principle is basically applied in Law No. 4/2009, where mineral and coal are non-renewable natural resources constituting national assets which shall be managed by the state for the greatest prosperity of the people, the operation of which is granted in the form of permit (rather than contract) to business entities, cooperatives, and individuals.

Law Number 11 Year 1967 was centralistic, meaning that all which were related to mining activities were operated by the Central Government without involving the regional government, because at that time there had been any regulation on regional autonomy. Similarly, the work contract/agreement was made between companies and the Government (the Central Government), in this case represented by the Minister.

4. Law Number 11 Year 1967 was a legal product before the era of regional autonomy which adhered to a centralistic principle. The central government had authority to grant Mining Authorization (KP), to sign KK and PKP2B; whereas Law No. 4/2009 was issued after the era of regional autonomy so that most permits in mineral and coal operation have been delegated to the regions.

Questions of Constitutional Justice Dr. Hamdan Zoelva, SH. MH

1. What is the regulation of the provisional provision for Mining Authorization (KP)?

2. What is the regulation if KP covering an area of less than 5,000 hectares?

3. The philosophy of Law No. 4/2009 is to provide total defense of companies already given IUP. Anyone who disturbs it will be punished. IUP may conflict with titles and other rights. Will the people who protest it be also punished?

4. Community mining may only be conducted after being operated for 15 years. Does it mean that new mining areas which have not been processed may not be intended for the people?

The Government's Answers

1. Article 112 paragraph (4) sub-paragraph a of the Provisional Provisions of Government Regulation Number 23 Year 2010 concerning the Implementation of Mining Business Activities of Mineral and Coal Mining fully reads as follows:

   Upon the coming into effect of this Government Regulation:

   (4) Mining authorizations, regional mining permits, and community

mining permits granted based on the provisions of laws and regulations prior to the coming into effect of these laws and regulations ***shall continue to be applied until they expire*** *and must:*

a. be adjusted to become IUP or IPR in accordance with the provisions of this Government Regulation within a period of no later than 3 (three) months following the coming into effect of this Government Regulation and particularly for State-Owned Enterprises (BUMN) and Region-Owned Enterprises (BUMD), for Production Operation IUP constituting the First Production Operation IUP.

Based on the provision above, it can be said that the existing KP is still honored until it expires, but it must be adjusted to become IUP in accordance with Law No. 4/2009 and its implementing regulation.

2. As conveyed above, in Government Regulation Number 23 Year 2010, there is a provision that KP which had been granted before the stipulation of the aforementioned Government Regulation shall continue to apply until it expires. Therefore, the aforementioned KP shall not be bound by the provision on the minimum area of WIUP regulated in Law No. 4/2009.

3. Article 162 of Law No. 4/2009 states that:

Any person hampering or disturbing the mining business activities of a holder of IUP or IUPK ***having fulfilled the requirements as intended in Article 136 paragraph (2)*** *shall be punished by a maximum imprisonment of 1 (one) year or a maximum fine of Rp.100,000,000 (one hundred million rupiah).*

Furthermore, Article 136 states that:

(1) Before conducting production operation activities, IUP or IUPK holders must settle the rights to land with the title holders in accordance with the provisions of laws and regulations.

(2) The settlement of rights to land as intended in paragraph (1) may be conducted in stages according to the needs for land of the IUP or IUPK holders

Therefore, if on the land area to be operated by the holders of IUP/IUPK there is any entitlement in the form of title, the Right of Cultivation (HGU), Right of Building (HGB), Right to Use, HPH, and so on, then the holder of IUP/IUPK must first settle the land title before commencing mining business activities. The settlement of the land title may be conducted by way of lease, sale-purchase or borrow-use as regulated in the elucidation of Article 100 paragraph (2) of Government Regulation Number 23 Year 2010.

Whereas the threatened punishment in Article 162 of Law No. 4/2009 **may only be imposed on any person hampering or disturbing the mining business activities having fulfilled the requirements of land title settlement.** The existence of such penal provision is expected to be able to provide legal certainty as well as protection for IUP/IUPK holders having settled the land title in accordance with laws and regulations.

4. Article 21 states that:

*WPR as intended in Article 20 shall be designated by the regent/mayor after **the consultation** with the Regional People's Legislative Assembly of Regency/City.*

Article 22 reads:

The criteria to designate WPR shall be as follows:

a. having secondary mineral reserves in rivers or between river banks;

b. having primary reserves with the maximum depth of 25 (twenty-five) meters;

c. terrace sediment, flood plain, prehistoric river sediment;

d. the maximum area of peoples mining is 25 (twenty-five) hectares;

e. specifying the type of commodity to be mined; ***and/or****.*

f. constituting an area or a place of community mining activities which has been operated for at least 15 (fifteen) years.

Based on the aforementioned provision of Article 22, it is clear that the criteria to designate WPR may be “cumulative” or “alternative” in nature. This means that the criteria for WPR designation do not require that it has been previously operated for 15 years.

If Article 21 is related to the criteria for WPR designation in Article 22, then it can be concluded that in designating WPR, the regent/mayor may determine the criteria in accordance with the conditions of his/her region, as further regulated in Regency/City Regional Regulations.

Questions of Constitutional Justice Dr. Harjono

1. The limitation of authority using the criteria of cross-regency/city or province authority can become a bone of contention or a trick, while the mined commodities are located over the same stretch without being limited by the territories of provinces or regencies/cities.

2. Item 32 of the General Provision gives the impression of existence of previous business activities prior to WP designation. It should have been conducted by first designating the WP.

The Government's Answers

1. Based on Law No. 4/2009, Mining Business AREA (WUP) may consist one or several Mining Business Permit Areas (WIUP). Exploitation (Production Operation) is conducted within the WIUP rather than WUP.

   For Exploration WIUP, the authority for its granting is indeed based on the location of the area. This means that it is likely for the stretch of mined commodity to expand across regency/city or provincial borders. If the WIUP is located in one regency/city, then it becomes the authority of the regent/mayor. If the WIUP is located across regencies/cities, it becomes the authority of the Governor. If the WIUP is located across provinces, then it becomes the authority of the Minister.

   Based on the provision of Article 9 paragraph (2) of Government Regulation Number 23 Year 2010, every Applicant (business entity, cooperative and individual body) may only be granted with one WIUP. Therefore, if the WIUP is located across regencies, or across provinces, then the Petitioners cannot submit two applications at once, either to the Regent or the Governor. to determine the WIUP location across borders, coordination between the government and the governor, regent/mayor according to their authorities will be conducted.

2. Article 1 sub-article 32 of Law No. 4/2009 defines WPR as "a part of WP where community mining business activities are conducted." The

aforementioned article intends to explain that community mining may only be conducted in a WPR (may not be conducted in a WUP or WPN), and that the WPR shall be a part of WP in accordance with the national spatial layout.

Article 21 of Law No. 4/2009 states that the authority to designate WPR is granted to the regent/mayor after the consultation with the Regional People's Legislative Assembly of Regency/City. Article 67 of Law No. 4/2009 also regulates the granting of authority to the regent/mayor to issue the Community Mining Permit (IPR).

Mining conducted by the people in the area or place of community mining which has been operated but not yet designated as WPR is prioritized to be designated as WPR.

Whereas in response to the Petitioners' petition, as well as to support its statement, the Government has presented 3 (three) Experts, namely Dr. Ir. Simon F. Sembiring, Prof.Dr. Daud Silalahi, and Pr. Dr. Rudy Sayoga Gautama who have presented their written statements and verbal statements at the hearing on Wednesday, March 9, 2011, principally giving the following explanation:

Dr. Ir. Simon F. Sembiring

- The expert outlined the philosophical background and general description

of Law Number 4 Year 2009 as well as its differences from the previous Law, namely Law Number 11 Year 1967;

- The most basic background and process of the issuance of Law Number 4 Year 2009 were that there had to be a change to Law Number 11 Year 1967. In 1967, Indonesia had just collapsed from the economic, social and cultural aspects, with inflation reaching 600% and devaluation. Then the Government came up with an idea which was so brilliant under the conditions at that time, which produced Law Number 1 Year 1967 concerning Foreign Investment (PMA), and then Law Number 11 Year 1967;

- The background and process of the issuance of Law Number 4 Year 2009 are as follows:

    - ❖ The agreement on the Bogor declaration (1994) and globalization. This indicates that we implement the 1945 Constitution, namely to keep world peace, surely through the cultural, economic and social aspects.
    - ❖ Domestic political and economic reform in 1998, democratization and regional autonomy;
    - ❖ Pressure on environmental preservation, sustainable development;
    - ❖ Great needs for global and national primary energy;
    - ❖ Demands for the increase in the “added value” of minerals for

fulfilling maximum utilization for people's prosperity. Following the ratification of Law Number 11 Year 1967, almost 99% of Indonesia's mined products were exported in a raw condition, never made as semi-finished products for our industry.

- Advancement of the information technology and knowledge was very rapid. Talking about hand phones, it reflected the values of mining. That was in the mining community, as the need for technological advancement increased;
- Demands for "human rights", especially the rights to land and customary land rights. This had not been adopted by Law Number 11 Year 1967;
- Demands for Corporate Social Responsibility (CSR) and "community/area development;
- Demands for "mineral and coal conservation". We see that many want our tin to be exhausted by its exploitation. However, through Law Number 4 Year 2009, there are conservation beliefs, so that we can pass this to the young generation in the future, and thus, this Law Number 4 Year 2009 also contains conservation principles. Therefore, there is area limitation as described in Law Number 4 Year 2009;
- Demands for law enforcement and conducive guarantee to do business. During the review of the Government Regulation in Lieu of the Forestry Law, the Expert once stated that at that time there

was no guarantee for mining entrepreneurs because a production forest could be suddenly converted into a protected forest, and a protected forest was suddenly converted into a national park.

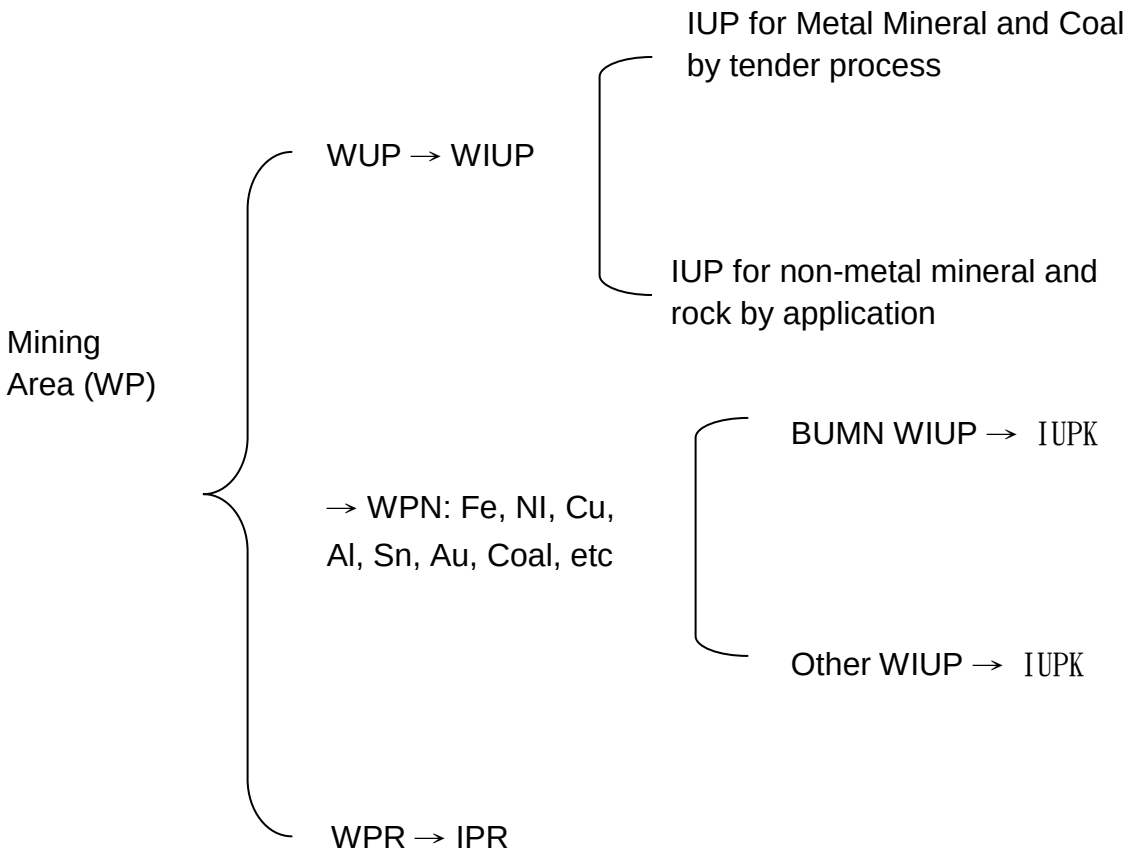
- The philosophy of Indonesian mining sector is as follows:
  - ❖ Mineral and coal are part of non-renewable natural resources with “specific” locations being managed by the state which must be utilized for the greatest prosperity of the people;
  - ❖ The Government (“the State”), in accordance with the regional autonomy, shall give the opportunity to Indonesian incorporated Business Entities/individuals/local communities to conduct mining operation. This means that it shall invite participation of all without any discrimination;
  - ❖ Mining management shall be performed based on the principles of benefit, justice, balance, externality, and accountability, which involves the regional government as the regulator;
  - ❖ Mining business activities must be conducted based on the principles of environment, transparency and community participation to achieve “”sustainable development”;
  - ❖ Prioritization of national interests, both from the aspect of domestic needs, increase of added value, use of local and national goods and services;
  - ❖ Openness for the participation of “foreign investors” by still adhering to the 1945 Constitution as well as other Laws.

- Several differences of the mining sector from other economic sectors are as follows:
  - ❖ It is non-renewable, with specific location, form and reserve amount;
  - ❖ Generally located below the land surface;
  - ❖ Requiring time to ensure the amount, form and distribution of reserve (3-5 years), thus having a high risk;
  - ❖ The production process tends to change the local ecosystem and environment;
  - ❖ Activities are generally conducted in remote areas;
  - ❖ The price of the mined commodity is relatively “stable” (non-fluctuative);
  - ❖ Mined products generally require processing and refinement to be consumed by the manufacture industry;
  - ❖ Constituting the main sector supporting “civilization” as well as modernization in all fields, especially science and technology, transportation as well as telecommunication.
- Whereas Law Number 4 Year 2009 adopts the permit system, no longer adopting the contract system. We know many shortcomings of a contract. It is said that a contract is a law, while the processes of making laws are different. The contract is only the recommendation of the People’s Legislative Assembly (DPR) for foreigners. That is not law. There may be any law on private issues, as though it became a bond. We feel weak

because even a small company can bring the government to arbitration. This is unbalanced. Therefore, in Law Number 4 Year 2009, there is no longer any contract system, but it has adopted the mining business permit;

- There used to be 6 (six) types of permit, while now, there are only 2 (two) types of permit, namely the exploration permit and the production permit. Exploration permit is in the form of general investigation (1 year), exploration (3+2 years), feasibility study (1+1 year). If a feasibility has been conducted, it will continue to the construction (2 years), and subsequently the production process and processing, transportation, marketing (the whole process taking place for 18 years + 2 x 10 years). Thus we have left the contract regime behind, and now we follow the permit regime. This means that the government's position has been restored to the right status, both the central government and the regional government;
- Area division. This is crucial. Community participation in mining areas is regulated in a government regulation. The problem is, to what extent does the government regulate the community's participation? The law *a quo* does not refer to the "how". Therefore, it can be later seen in the government regulation;
- Division of mining areas has its own process, from the region, after the meeting with the community, then to the province, and finally to the central government. From the government as a unity, then it goes to

DPR;



- Mining areas are divided into 3 (three) types:

  1. Mining Business Area (WUP);
  2. State Reserve Area (WPN), intended as a conservation area and to anticipate any event of immediate operation for national interests, particularly for Ferrell, nickel, copper, aluminum, tin, gold and coal;
  3. Community Mining Area (WPR), as determined by the region;

  It is from these areas that the Mining Business Permit Area (WIUP) is provided. The WIUP tender is for metal mineral and coal. There is no tender for WPR and Community Mining Permit (IPR). Any regional

government stating that WPR and IPR is tendered, it violates the law, since tender is for IUP area. As it is similar to adopting oil tender. Thus, it is the location which is tendered rather than the contents in the location. How the tender will be conducted depends on the existing information, openness of the government, rather than by stating that there are 5 tons in that location, but by stating, “we have conducted a research, and geologically, the potentials are this and this,” openly. If I tender it to the people, to the community, and I am honest, then surely I do not lie. If the government says, “Oh, there are 60 tons, without data,” that is a lie. In a tender, the Government will only give information data it has, so that the community, entrepreneurs are allowed. What is the benefit? It is transparent and it has a value to the state treasury, and the relevant party is also responsible for that;

- Furthermore, the IUP for non-metal mineral and coal is obtained by application, that is application;
- The permit for WPN is the special mining business permit (IUPK), which is specifically granted for State-Owned Enterprises (BUMN), but “the door is open” also for other entrepreneurs.
- WPR through the Community Mining Permit (IPR) is even regulated by the Regional Regulation (*Perda*). Even the regent may delegate his/her authority to the sub-district head. This law provide such details. Therefore, WPR is never tendered. WPR is determined by the region after listening to the community, then the province, then the government,

to the DPR, for determining the aforementioned three categories of mining areas;

- Actually, WPR is not only for rivers. An old river is noticeable; if we are on a plan, the valley we see is an old river. Therefore, in this law there are civilian investigators. If there is a problem some of the experts know it is unsure that Regional Government apparatuses know it, but there must be the experts. For that purpose, civilian investigator will be immediately formed;
- A depth of 25 meters is not for sediment. The sediment has been buried far. In the depth of 25 meters are hard rocks and coal which is impossible to dig using a hoe. In this law, primary sediment, not secondary sediment, is mentioned. Thus, the secondary sediment is the river and old river.
- Other matters:
  - ❖ There is a clear authority in mine management.

    With the regional autonomy, such division becomes clear in accordance with the Regional Autonomy Law. Previously, Law Number 11 did not clearly regulate the matter, and moreover, Law Number 11 only granted authority for class C. What used to be vital has now been granted to the region in accordance with the Regional Autonomy law. This Law is sufficiently democratic;

  - ❖ Arrangement of the existing KP agreements.

    The KP will then be arranged to become IUP.

- Guarantee of certainty to do business, WP being part of spatial layout.

  Determination of WP must be in accordance with the Spatial Layout Law. Probably this has not been determined until now, but it has caused problems. It is this process that we are waiting for, namely how this WP is implemented. The expert assumes that the right process is when the determination of this WP involves the community. If the community has agreed that their land be made as WP, there should be no complaint for disagreement in the future. This will not give any legal certainty. As to compensation, surely there are laws and regulations to determine it.

- Obligation of domestic processing and refinement.

  This is very important. So far, we have only produced concentrates, with only tin being offered in the form of metal. But generally, bauxite, iron ore, and nickel are exported as raw materials. Coal is exported and then processed in Korea, in Japan, in advanced countries, and then we will buy finished products. Therefore, this law states that within a period 5 years, raw materials cannot be exported, as they must be processed in Indonesia. So, this is an extremely advanced leap.

- Strengthening of the (central and regional) government’s function

as the regulator.

Pursuant to Law Number 11 Year 1967, the government was the principal in the contract, having a weak position.

The use of mining services shall prioritize national and local services.

So far, Law Number 11 has not regulated it, but now this law regulates service job, both at the national level and at the local level, with the priority on the local level. This means that this law also pays attention to the problems of the surrounding community to allow for the development of economic activities.

- Obligation to apply corporate social responsibility (CSR).

  This law also adopts the obligation for mining companies to implement CSR.

- The guarantee of community protection from direct negative impacts of mining business activities in accordance with applicable laws and regulations.

  If there are any rights of the community being disturbed as an impact of mining, the matter can be legally processed in accordance with the applicable law.

- Clear regulation of state and region's revenues.

  Formerly, it was not regulated that mining companies or regions

may impose regional taxes. Now, in this law, there is such regulation. Therefore, the functions of the central government and DPR have been performed properly.

❖ Regulation of Civil Servant Investigators granted with special authority in accordance with laws and regulations.

Mining have its specificities. It would be Nonsense if everyone understands mining, even the police do not necessarily understand the technical issues of mining. Therefore, in the case of K-3 mining accident problem, there are always people who are experts in mining, which we call mine inspectors, who participate and help the police because there are many kinds of accidents, and they are not necessarily criminal. Therefore, the old river issue was mentioned earlier, there must be an expert who said it was an old river or not. The Police also do not know anything about the old river. There is therefore a Civil Servant Investigator, who would be educated in the future, who understands the problems of mining to help the Police of the Republic of Indonesia.

- Some points of comparison between Law Number 11 Year 1967 and Law Number 4 Year 2009:

Law Number 11/1967	**Law Number 4/2009**
Title: **Basic Provisions of Mining**	Title: **Mineral and Coal Mining**

Law Number 11/1967	Law Number 4/2009
Mining resources are called minerals: • The management of mined minerals shall be held by the government (**Article 1**).	**Mineral and coal specific mining:** • Shall be managed by the State, implemented by the government and/or regional government (**Article 4**). • The Government and DPR shall stipulate the policies on the prioritization of mineral and coal for national interests. The Government shall have authority to stipulate the production of each province in order to control production and export (**Article 5**)
Classification of mined minerals • Strategic • Vital • Non-strategic and non-vital (**Article 3**)	**Classification of mined minerals:** • Radioactive mineral, metal mineral, non-metal mineral, and rocks (**Article 34**)

Law Number 11/1967	Law Number 4/2009
Implementation of mined mineral management: • The state's management over strategic and vital classes shall be implemented by the Minister. • Non-strategic and non-vital class shall be managed by the Level I Regional Government (**Article 4**)	**Management authority** • The central government (national scope policies and management. There are 21 areas of authority (**Article 6**) • Provincial government (provincial area policies and management) There are 14 areas of authority (**Article 7**) • The regency/city government (regency/city policies and management. There are 12 areas of authority (**Article 8**)
Mining area: • Not regulated in detail, provided that it does not include: cemeteries, sacred places, public facilities, other mines, buildings, dwellings, or factories	**Mining Area:** • Mining area shall be a part of the national spatial layout designated by the Government after the coordination with the Regional Government and the People's

Law Number 11/1967	Law Number 4/2009
(**Article 16 paragraph (3)**).	Legislative Assembly of the Republic of Indonesia (DPR RI) (**Article 10**) • The Mining Area consists of mining business area (WUP), community mining area (WPR), and national reserve area (WPN) (**Article 13**) • WUP, WPR and WPN shall be regulated in detail (**Articles 14-33**)
Mining business: The forms are: • Work Contract (**Article 10**) • Mining Authorization (KP) (**Article 15**) • Regional Mining Permit (SIPD)	**Mining business** No longer being the work contract. The forms are: • Mining business permit (IUP) • Community mining permit (IPR) • Special mining business permit (IUPK) (**Article 35**)

Law Number 11/1967	Law Number 4/2009
• Community Mining Business Permit (SIPR)	
Stages of Mining Business Mining business includes: • General investigation • Exploration • Exploitation • Processing and refinement • Transportation • Marketing (**Article 14**)	**Stages of Mining Business** Consisting of 2 stages: **1. Exploration, including** • General investigation • Exploration • Feasibility study (**Article 36**) **2. Operation, Production, including:** • Construction • Mining • Processing and refinement • Transportation and marketing (**Article 36**)
Business actors: • Domestic investors (KP, SIPD, PKP2B) • Foreign investors (KK, PKP2B) • Areas of mining business not	**Business actors:** • IUP is granted to business entities, cooperatives and individuals (**Article 38**) • IPR is granted to the local population, both individuals and

Law Number 11/1967	Law Number 4/2009
detailed.	community groups, and/or cooperatives (**Article 67**), with areas being detailed (**Article 68**) • IUPK is granted to Indonesian incorporated business entities, namely BUMN, BUMD, as well as private businesses. BUMN and BUMD are prioritized (**Article 75**)
Rights and Obligations of Business Actors: • Financial: - For KP, in accordance with applicable laws and regulations - For KK/PKP2B, still upon the signing of the contract. • Environment (slightly regulated) • Added value (regulated only in the contract	**Rights and Obligations of Business Actors:** • Financial To pay the state and regional revenues; Taxes, PNBP, contributions **(Articles 128-133)** • Environment: - Good mining practices (**Article 95**) - Reclamation, post-mining and conservation which have

Law Number 11/1967	Law Number 4/2009
• Utilization of local manpower (not regulated) • Partnership with local entrepreneurs (not regulated) • Community development and empowerment (not regulated)	been planned, along with the funds provided (**Articles 96-100**) • Added value. Holders of Production Operation IPU must perform the processing and refinement of domestic mining results **(Articles 103-104)** • Prioritized utilization of local manpower (**Article 106**) • During the production operation stage, participation of local entrepreneurs is required (**Article 107**) • Formulation of community development and empowerment program (**Article 108**) • Obligation to use local and/or national mining service

Law Number 11/1967	Law Number 4/2009
	companies such as consultation and planning (**Article 124**)
Divestment: • Not regulated	**Divestment:** • After 5 years of operation, business entities holding IUP and IUPK whose shares are owned by foreign parties must conduct divestment to the Government, regional government, BUMN, BUMD, or national private enterprises (**Article 112**)
Guidance and Supervision: • Centralized (particularly for KP, KK, and PKP2B)	**Guidance and Supervision:** • IUP (Minister, Governor, Regent/Mayor – according to their authorities) (**Articles 139-142**). Forms of supervision are very detailed. • IPR (Regent/Governor) (**Article 143**)
Community Protection	**Community Protection**

Law Number 11/1967	Law Number 4/2009
• KP Holders must return the land in such a way that it does not cause any disease or any other harm to the community (**Article 30**)	• The community directly affected by the negative impacts shall be entitled to obtain decent compensation, or to file a lawsuit (**Article 145**)
Investigation: • Not regulated	**Investigation:** • Investigator of the Police of the Republic of Indonesia • Civil Servant Official (PPNS) (**Article 149**)
Penal Provisions: • Regulated, but no longer in accordance with the current situation and condition. For example: maximum imprisonment of 6 years and/or maximum fine of Rp.500,000.- for those not having KP but conducting mining business activities (**Article 31**)	**Penal Provisions:** • Minister, Governor, Regent/Mayor – in accordance with their authorities shall have the right to impose administrative sanctions to IUP, IPR and IUPK holders. Sanctions are warning up to permit revocation (**Article 151**) • Sanctions are quite severe. For

Law Number 11/1967	Law Number 4/2009
	example, every person operating mining business without IUP, IPR or IUPK shall be punished by maximum imprisonment of 10 years and maximum fine of Rp. 10 billion.

- Closing remarks on Law Number 4 Year 2009 concerning mining:

  - ❖ Greatly concerned with national interest without ignoring openness to foreign investment;

  - ❖ Applying regional autonomy consistently with other laws and regulations;

  - ❖ Guaranteed business opportunity for investors. Cooperatives, individuals and the people, including investors;

  - ❖ Guaranteeing the land rights of the owners and adherence to environmental conservation and preservation;

  - ❖ Balanced treatment for the government, entrepreneurs and the community. This related to penal articles. It has been assumed that mining areas are determined together, and certainly the criminal sanctions shall also apply to all parties, not only those issuing the

permit, not only the entrepreneurs. The community having no legal basis but hampering must also be imposed with sanctions;

- ❖ Considered “very nationalist” and in accordance with the 1945 Constitution by many parties.

- The Law *a quo* exists to ensure legal certainty to do business for the parties who surely want to develop mining;

- If the law *a quo* is implemented in accordance with its spirit, there should have been a procedure from the bottom before being determined by the government and the parliament. If the people are not involved, let us together complain to the Parliament;

- Mining areas are currently being processed in the House. It is necessary to question whether the process has involved the community, that's the key. If the process does not involve the community, the People's Legislative Assembly (DPR) must reject it and the money is returned, because the Law *a quo* mandates the involvement of the community. Non-involvement of the community means violating the law. If passed by DPR, then the Parliament and the Government have jointly committed a mistake.

Prof. Daud Silalahi

- The Law concerning the Environment and the Law concerning Spatial

Layout must be made as the basis for evaluating the Mineral and Coal Mining Law *a quo.* For example, the mining area is expressly stated to be based on spatial layout. The activities shall always be based on environmental preservation;

- The Law *a quo* shall not be evaluated or interpreted article per article, but it must be comprehensive since the legal approach is holistic. For example, Chapter 2 on Principles and Objectives the issues of environment, economy and efficiency are combined. Therefore, the review of interpretation of the Mineral and Coal Mining Law *a quo* must be analyzed in these three Laws (Law No. 4/2009, the Environment Law, the Spatial Layout Law);

- Article 15 of the Environment Law states that the government and the regional government must conduct a Strategic Environmental Assessment to ensure that the principles of sustainable development are realized, based on the spatial layout, environmental quality standards, Environmental Impact Analysis (AMDAL), and so on;

- Spatial layout serves the function of determining the allocation. Spatial layout started to be designed in 1992;

- The Mineral and Coal Mining Law *a quo* must be seen from its academic script, in order to assess whether it is academically correct or not;

- In the civil law system adopted in Indonesia, the Mineral and Coal Mining Law *a quo* of course still has shortcomings because it does not expressly regulate technical matters. Technical-economic matters are regulated in the Government Regulation. Based on the Expert's experience as a drafter, it is very difficult to make extremely concrete articles properly because the articles must be the same from Sabang to Merauke, while the environment locations vary. Therefore, articles in a law are made relatively general for concrete translation further in the Government Regulation;

- The spearhead of the Environment Law is the Environmental Impact Analysis (AMDAL) because it can provide a clear picture of the technical, economic and other aspects. Therefore, AMDAL is part of the feasibility study related to technical feasibility, economic feasibility, environmental feasibility and social feasibility;

- It is no longer possible for the articles related to the environment to be interpreted by common people, common lawyers and common law scholars. They must be interpreted scientifically be experts. Therefore, the Expert agrees with Prof. Nyoman's description that the precautionary principle is required, namely that a decision on whether something is allowed or not must be guaranteed by full scientific evidence. Therefore, data interpretation becomes a tool for legal interpretation;

- The Expert as the Team Leader for Draft Law No. 4/2009 states that Law No. 4/2009 shall be formulated after considering public recommendations through NGOs and after conducting a feasibility study as well. However, if the formulation is like what it is now, it is a trade off, and this is the maximum that can be obtained;

- For this Law No. 4/2009 to be operational, it lies in the Draft Government Regulation (RPP). According to the Expert, the legal system consists of three leverages: (1) The law which to a greater extent stipulates the rights and obligations; (2) The Government Regulation which stipulates the economic law in a measurable manner; (3) The decision on how to implement it and the technology;

- To understand and interpret whether the value of a law is good or bad, it is necessary to have conceptual-academic understanding in a holistic manner and that it cannot be evaluated article by article;

- According to the Expert, the law always lags behind so that a law will not last long. This reality, according to experts, should be made as the basis of thought that a law should be judged based on the context of the development of technology, the dynamics of development, and other developments relating to it;

- Talking about resources, the conflict is extraordinary, and that is why

spatial layout is required.

Prof. Dr. Rudy Sayoga Gautama

- The Expert is a Mining Expert and a Lecturer of Mining Engineering in ITB. Therefore, the Expert does not highlight the legal issues and the laws, but he will convey the matters related to the mining engineering and the environment;

- The forms of minerals may vary depending on their formation process. In Mining Geology, this is called genesis. There are minerals formed from the process of igneous rocks, from magma that freezes and then it contains some concentrations of valuable minerals. The distribution is more vertical. Sometimes it looks like small veins and it is rarely found in big forms. Actually it there is one known as *porphyry* copper, with quite big size but more dominantly in the vertical direction;

- Some minerals have been formed through the sedimentation process, rock erosion process, being subsequently carried, transported and becoming sediments in lower plains, in prehistoric rivers. The example is tin, whose distribution can be found in prehistoric rivers, because alluvial tin is located there;

- Where is the primary rock sediment or the igneous rock (primary sediment rock)? The Expert does not know about it in Bangka region, but that it exists in Belitung region. According to the Expert, there is primary

tin mining meaning that it has been formed through the freezing process of magma;

- Coal is a part of the sediment group originating from plants. Meanwhile, an example of mineral originating from weathering process is Nickel located in Southeast Sulawesi and North Maluku. In addition, there is Bauxite in Bintan region, originating from the weathering process. The weathering process as well as sedimentation results are usually found in locations not so far from the surface. Tin, for example, can be found in a depth of 30-40 meters. Iron sand at the southern area of Java coast is located only in a depth of 6-10 meters, nickel in a depth of approximately 25 meters. Coal, however, due to the tectonic process, may exist in a depth of 400-1,000 meters.

- In the exploitation process, the term recovery is recognized. In performing the mining process, it is impossible to mine 100 percent because there is always some which is left. It is similar to the processing, because of technological and economic considerations. Therefore, often, in tin mining for example, tin processing which used to be conducted in the 1980s is now conducted again. This makes sense because the economic and technological conditions in the past were different from the current conditions, so that it is impossible to say that only 80 percent was mined in the past and the remaining 20 percent has been lost in the tailing. If the economic value has now increased, it could be mined again;

- In the form of reserve, there are two different mining systems: (1) open mining also called surface mining; (2) underground mining or deep mining;

- Is there any community mining conducted manually reaching up to 25 meters? If it is gold mining, there are many. Community gold mining may reach a depth of 25 meters, because gold is located in the primary sediment in the form of small veins. In North Sulawesi, according to the Expert, some community mines reach more than 30 meters deep manually without using equipment. However, this cannot be applied to tin mining due to different conditions;

- According to the Expert, this Law No. 4/2009 must regulate all kinds of mined minerals, since certain articles may become weird from the viewpoint of any other mined minerals, while it is suitable if seen from the viewpoint of any other mineral. In fact, this Law No. 4/2009 must accommodate all kinds of minerals;

- As to the environmental issue, demands for environmental management continue to increase. In the last 20 years, according to the Expert, the government have made such efforts;

- The reclamation guarantee was introduced in 1995. This was actually a lesson learned from the reforestation fund. Thus, the reclamation

guarantee is the guarantee fund which must be prepared by the company to ensure its implementation of the reclamation, so that it must be adjusted to the plan. So, the company makes a plan of 5-year guarantee, as there are many mining entrepreneurs, so that it is still possible for disobedient parties who just abandon the mine after the mining. Therefore, reclamation regulation has now become stricter.

- Concerning post-mining. The concept is that all companies which will apply for production operation mining business permit must make a post-mining plan. According to the Expert, this is very strategic. Indonesia just issued this regulation in 2008. So, all who will open a mine, according to the permit, must already know what will happen in the next 10 or 20 years. In the mining terminology, this is called good mining practice, making an integrated plan from the beginning to the end, seeing various risks which may emerge, optimizing results, recovery and also minimizing various environmental impacts.

[2.4] Whereas in response to the arguments in the Petitioners' petition, the People's Legislative Assembly has submitted its written statement received by the Registrar's Office of the Court on Thursday, December 23, 2010, principally describing as follows:

A. THE PROVISIONS OF LAW NUMBER 4 YEAR 2009 CONCERNING MINERAL AND COAL MINING PETITIONED FOR REVIEW AGAINST

THE 1945 CONSTITUTION OF THE STATE OF INDONESIA.

The Petitioners has filed the petition *a quo* for judicial review of the Articles in Law Number 4 Year 2009 concerning Mineral and Coal Mining against the 1945 Constitution, namely:

Article 22 sub-article f, which reads:

"The criteria to designate WPR shall be as follows:

f. constituting an area or a place of community mining activities which has been operated for at least 15 (fifteen) years.

Article 52 paragraph (1), which reads:

(1) "The holder of an Exploration IUP for metal minerals shall be granted a WIUP with a minimum area of 5,000 (five thousand) hectares and a maximum area of 100,000 (one hundred thousand) hectares".

B. CONSTITUTIONAL RIGHTS AND/OR AUTHORITY CONSIDERED BY THE PETITIONERS TO HAVE BEEN IMPAIRED BY THE COMING INTO EFFECT OF AW NUMBER 4 YEAR 2009 CONCERNING MINERAL AND COAL MINING (HEREINAFTER REFERRED TO AS LAW NO. 4/2009).

In the petition *a quo,* the Petitioners state that their constitutional rights

have been impaired and violated by the coming into effect of Article 22 sub-article f and Article 52 paragraph (1) of Law No. 4/2009 under the 1945 Constitution, namely as follows:

1. Whereas the Petitioners consider that the phrase “has been operated for at least 15 years” as regulated in Article 22 sub-article f of Law No. 4/2009 is impossible and illogical, because it can be ascertained that the relevant area no longer has any tin reserve, as it has been exhausted through exploitation, so that its operation would be a useless job, and also the phrase *a quo* can also be interpreted as only allowing (*vide*: Petition *a quo* on page 12 point 5 and point 6)

2. Whereas the phrase “a minimum area of 5,000 (five thousand) hectares” in Article 52 paragraph (1) of Law No. 4/2009 indicates that the enactment of this Law No. 4/2009 is a form of disguised restriction to individuals, seemingly intended for gradually eradicating community mining activities (*vide:* Petition *a quo* on page 12 point 7)

3. Whereas the phrase “a minimum area of 5,000 (five thousand) hectares” in Article 52 paragraph (1) of Law No. 4/2009 contains injustice, because most of the Mining Authorizations (KP) areas in Bangka Island and Belitung Island are owned by PT. Timah Tbk,

> covering an area of 360,000 hectares (which means 35% of the area of Bangka Island), and 57,470.25 hectares in Belitung Island (30% of the area of Belitung Island). The control of the entire Mining Authorization (KP) areas in Bangka and Belitung by the aforementioned companies has thus closed the right of other people to open mining businesses. (*vide:* Petition *a quo* on page 12 point 8).

In their petition, the Petitioners assume that the provisions of Article 22 sub-article f and Article 52 paragraph (1) of Law No. 4/2009 reflect unequal status and treatment, injustice, and legal uncertainty and discrimination, and there for they are inconsistent with Article 27 paragraph (1), Article 28D paragraph (1), Article 28I paragraph (2), and Article 33 paragraph (1), paragraph (2) and paragraph (3) of the 1945 Constitution, which read:

Article 27 paragraph (1):

“All citizens shall have an equal position before the law and government and shall be obligated to uphold the law and government without exception”

Article 28D paragraph (1):

“Every person shall have the right to the recognition, the guarantee, the

protection and the legal certainty of just laws as well as equal treatment before the law"

Article 28I paragraph (2):

"Every person shall have the right to be free from discriminatory treatment on any basis whatsoever and shall have the right to obtain protection against any such discriminatory treatment."

Article 33:

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

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

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

C. STATEMENT OF THE PEOPLE'S LEGISLATIVE ASSEMBLY (DPR)

With respect to the Petitioners' arguments as described in the Petition *a quo,* DPR, in presenting its views, shall first describe the legal standing, which can be explained as follows:

1. Legal Standing of the Petitioners

The qualification which must be met by the Petitioners as parties has been regulated in the provision of Article 51 paragraph (1) of Law Number 24 Year 2003 concerning the Constitutional Court (hereinafter briefly referred to as the Constitutional Court Law), stating that "*The Petitioners shall be the parties considering that their constitutional rights and/or authority 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 groups 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 regulated in Law;

c. public or private legal entities; or

d. state institutions;

The constitutional rights and/or authority intended in the aforementioned provision of Article 51 paragraph (1) are confirmed in the elucidation of the article, namely that "*referred to as*

"constitutional rights" shall be the rights regulated in the 1945 Constitution." The provision in the Elucidation of this Article 51 paragraph (1) confirms that only the rights explicitly regulated in the 1945 Constitution shall be categorized as "constitutional rights".

Therefore, pursuant to the Constitutional Court Law, for the persons or parties to be eligible as Petitioners having legal standing in a petition for Judicial Review of a Law against the 1945 Constitution, the Petitioners must first explain and substantiate:

a. their qualification in the petition *a quo* as intended in Article 51 paragraph (1) of Law Number 24 Year 2003 concerning the Constitutional Court;

b. the Petitioners' constitutional rights and/or authority in the intended the **"Elucidation of Article 51 paragraph (1)"** considered to have been impaired by the coming into effect of the Law;

As to the parameters of constitutional impairment, the Constitutional Court has provided the meaning and definition of impairment of constitutional impairment as a result of the coming into effect of a Law, which must meet 5 (five) requirements (*vide* Decisions on Case 006/PUU-III/2005 and Case Number 002/PUU-

V/2007), namely as follows:

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 of constitutional rights and/or authority and the Law petitioned for review;

e. the possibility that with the granting of the Petitioner's petition, the impairment of such constitutional rights and/or authority argued by the Petitioner will not or will no longer occur;

If the aforementioned five requirements are not met by the Petitioners in the petition for review of the Law *a quo,* then the Petitioners shall not have legal standing as Petitioners.

In response to the petition of the Petitioners *a quo*, DPR views that the Petitioners must be able to first evidence that they really are the parties considering that their constitutional rights and/or authority have been impaired due to the coming into effect of the provisions petitioned for review, particularly in constructing the existence of impairment of their constitutional rights and/or authority as a result of the coming into effect of the provisions petitioned for review.

With respect to the aforementioned legal standing, DPR fully leaves it to the Chief Justice/Panel of Constitutional Court Justices to consider and assess whether the Petitioners have legal standing or not, as regulated by Article 51 paragraph (1) of the Constitutional Court Law and based on Decisions of the Constitutional Court on Case Number 006/PUU-III/2005 and Case Number 011/PUU-V/2007.

However, if the Panel of Constitutional Court Justices is of a different opinion, DPR shall also present its view on the substantive review of Law No. 4/2009.

2. Substantive Review of Law Number 4 Year 2009 concerning Mineral and Coal Mining

The Petitioners in the petition *a quo* assume that their constitutional rights have been impaired by the coming into effect of Article 22 sub-article f and Article 52 paragraph (1) of Law No. 4/2009.

With respect to such views of the Petitioners, DPR gives the following statement:

1. Whereas DPR disagrees with the Petitioners arguing that the provision of Article 22 sub-article f gives different treatment and restricts the Petitioners' constitutional rights. With respect to the aforementioned argument of the Petitioners, DPR views that the provision of Article 22 of Law No. 4/2009 regulating the criteria for the designation of Community Mining Area is intended to give legal certainty for the people who want to conduct community mining as well to give the opportunity to the people to participate in development, particularly in mineral and coal mining activities.

2. Whereas it is necessary for the Petitioners to understand that the provision of Article 22 sub-article f states that: *"The criteria to designate WPR shall be as follows: f. constituting an area or a place of community mining activities which has*

been operated for at least 15 (fifteen) years." The aforementioned provision is clearly not intended to discriminate business actors, but to categorize the types of mining areas in accordance with the criteria intended in the Law *a quo.* The provision of the Article of the Law *a quo* does not restrict or give different treatment between the areas designated under the same criteria. Therefore, it is incorrect for the Petitioners to assume that the Article *a quo* is considered to have violated/to be inconsistent with Article 28I paragraph (2) of the 1945 Constitution. This is in accordance with the principle of equality as conveyed by Ateng Syarifudin (1991), namely that the principle of equality (*egalite*) is interpreted "*equal matters must be treated equally".*

3. Whereas even if the Petitioners' argument were correct that community mining for metal mineral (tin) in the Province of Bangka Belitung has not been conducted in mines which have been operated for at least 15 (fifteen) years, that would not mean that the people's opportunity to conduct mining, particularly tin mining in the Province of Bangka Belitung became restricted, considering Article 24 of Law No. 4/2009 stating that:

"*An area or location of community mining activities which has been operated but has not been designated as WPR shall be prioritized to be designated as WPR*".

Based on the aforementioned Article 24 of Law No. 4/2009, community mining existing prior to the enactment of Law No. 4/2009 shall be prioritized to designated as WPR, so that the communities in the Province of Bangka Belitung may continue their mining business activities in WPR.

4. Whereas based on the description, DPR views that the provision of Article 22 sub-article f of Law No. 4/2009 **is not inconsistent** with Article 28I paragraph (2), Article 33 paragraph (1) and paragraph (4) of the 1945 Constitution, because in fact, Article 22 sub-article f of Law No. 4/2009 gives legal certainty for community mining activities and accommodates the conditions or uniqueness of the region and gives legal certainty for the people who want to conduct community mining as well as the opportunity to the people to participate in development, particularly in the activities of mineral and coal mining.

5. Whereas in relation to the provision of Article 52 paragraph (1) of the Law *a quo* also petitioned for review by the

Petitioners, it is necessary to first understand the substance of the provision of Article 52 paragraph (1) of Law No. 4/2009 which states that: "*The holder of an Exploration IUP for metal minerals shall be granted a WIUP with a minimum area of 5,000 (five thousand) hectares and a maximum area of 100,000 (one hundred thousand) hectares".* The provision of Article 52 paragraph (1) of this Law means that the aforementioned norm is the regulation of the criteria for the granting of WIUP, so that any holder of Exploration IUP for metal mineral shall be granted with WIUP covering a minimum area of 5,000 hectares and a maximum area of 100,000 hectares, including when the Petitioners are holders of mineral Exploration IUP. Therefore, it is incorrect to consider Article 52 paragraph (1) discriminatory. The normative provision regulating the criteria for mining business permit area is not inconsistent with the principle of democratic economy as regulated in Article 33 of the 1945 Constitution stating that: "*The economy shall be organized as a common endeavor based upon the principle of family system".*

6. Whereas DPR views that the provision of Article 52 paragraph (1) of Law No. 4/2009 does restrict individuals to

conduct mining business activities at all, considering that Article 38 sub-article c of Law No. 4/2009 states that IUP can be granted to individuals, so that the Petitioners' opinion is automatically incorrect and groundless.

7. Whereas if understood and observed, the meaning of the provision of Article 52 paragraph (1) of Law No. 4/2009, in fact, does not regulate the norm of community mining, so that the statement of the Petitioners arguing that the provision of Article 52 paragraph (1) of Law No. 4/2009 has been intended to gradually eradicate community mining activities is incorrect and completely groundless. Whereas the provision of Article 52 paragraph (1) of Law No. 4/2009 does not give any privilege to PT. Timah, Tbk. and PT. Koba Tin. It is necessary for the Petitioners to understand that Article 52 paragraph (1) of Law No. 4/2009 is intended for IUP which would be issued following the coming into effect of Law No. 4/2009, not for KP possessed by PT. Timah, Tbk. and KK possessed by PT. Koba Tin, and therefore, the Petitioner's argument is incorrect.

8. Whereas the basic philosophy of the making of the regulation on the minimum area requirement for Exploration WIUP in the provision of Article 52 paragraph (1) of Law No.

4/2009 is to realize the principles of sustainability environmental perspective enshrined in Article 2 sub-article d of Law No. 4/2009. The aforementioned principles of sustainability and environmental perspective are further sharpened in Article 18 sub-article c and sub-article d of Law No. 4/2009 which make the principles of conservation and the supporting capacity of environmental protection as the criteria for designating WIUP.

9. Whereas from the environmental viewpoint, the minimum area of Exploration WIUP for mineral and coal needs to be regulated in Law No. 4/2009 because it is closely related to the aspect of land sufficiency which also affects the supporting capacity and the accommodating capacity of the environment. If the Exploration WIUP is too small, the environment's supporting capacity and accommodating capacity will be inadequate, particularly when performing the production operation stage, considering the fact that the WIUP area granted during exploration will not increase when performing production operation. It will also be difficult to manage the land for developing mining facilities/infrastructure during production operation in a limited WIUP. The minimum areas of 5,000 ha for

Exploration WIUP for metal mineral and coal, 500 ha for non-metal, and 5 ha for rocks are considered to have met the requirements of environment's supporting capacity and accommodating capacity.

10. Whereas the regulation of the minimum area of Exploration WIUP which can be operated in Law No. 4/2009 is also intended rocks entrepreneurs engaging in the mining sector. With the existence of the provision on the minimum area of Exploration WIUP, the opportunity to obtain mineral and coal along with their reserve becomes increasingly bigger. The big opportunity to obtain mineral and coal reserve will also be increasingly open if the area of Exploration WIUP granted is adequate.

11. Whereas as business activities, the industry of mineral and coal mining is high capital; high risk and high technology industry. However, it does not mean that entrepreneurs having small capital (small/medium-scale entrepreneurs) cannot conduct mining business activities. Small/medium-scale entrepreneurs may conduct mining business activities in the form of community mining, namely by applying for Community Mining Permit (IPR) application to the local regent/mayor. The matter has been regulated in the

provisions of Articles 67 up to Article 73 of Law 4/2009.

12. Whereas the Petitioners' argument stating that their constitutional rights are impaired with the violation of the right to equal treatment/non-discrimination as regulated in Article 28I of the 1945 Constitution due to the coming into effect of Article 22 sub-article f and Article 52 paragraph (1) of Law No. 4/2009 is an incorrect and groundless assumption, considering the fact that Article 22 sub-article f and Article 52 paragraph (1) of Law No. 4/2009 are applied as prerequisite norms for all Indonesian citizens meeting the requirements to obtain the permit, and this is not the slightest violation of the right to equal treatment/non-discrimination. This is in accordance with the principle of equality which according to Ateng Syarifudin (1991), namely that the principle of equality (*egalite*) is interpreted "*equal matters must be treated equally",* and based on Law Number 39 Year 1999 concerning Human Rights, the provision of the Article of Law No. 4/2009 is not discriminatory, because it does not contain any element of discrimination as regulated in Article 1 sub-article 3 of the Human Rights Law which states that *"Discrimination shall be any limitation, affront or ostracism, both direct and*

indirect, on grounds of differences in religion, ethnicity, race, group, faction, social status, economic status, sex, language, or political belief, that results in the degradation, aberration, or eradication of recognition, execution, or application of human rights and basic freedoms in political, economic, legal, social, cultural, or any other aspects of life".

13. Whereas based on the foregoing, it is clear that Article 22 sub-article f and Article 52 paragraph (1) of Law No. 4/2009 has been applied to anyone meeting the requirements to obtain IUP, meaning that the provisions of the articles *a quo* of Law No. 4/2009 are not intended for a certain condition where anyone including the Petitioners which have not been incorporated but which have themselves registered as legal entities, would certainly have equal rights with those which have been incorporated based on the provisions of the articles *a quo* of Law No. 4/2009. Whereas in addition, the provisions of the articles *a quo* of Law No. 4/2009 are not intended for the capability condition of the Petitioners which currently have small capital, since if the Petitioners meet the provisions on minimum WIUP or meet the minimum operation for 15 years, they would surely have the same

rights as others. Therefore, the provisions of Article 22 sub-article f and Article 52 paragraph (1) of Law No. 4/2009 are not at all inconsistent with Article 27 paragraph (1), Article 28D paragraph (1), Article 28I paragraph (2), and Article 33 paragraph (1), paragraph (2) and paragraph (3) of the 1945 Constitution.

Therefore, the People's Legislative Assembly (DPR) requests the honorable Chief Justice/Panel of Constitutional Court Justices to pass the following injunctions:

1. To declare that the petition *a quo* shall be rejected in its entirety or at least to declare that the petition *a quo* cannot be accepted;

2. To declare that the Statement of DPR shall be accepted in its entirety;

3. To declare the provisions of Article 22 sub-article f and Article 52 paragraph (1) of Law Number 4 Year 2009 concerning Mineral and Coal Mining not inconsistent with Article 27 paragraph (1), Article 28D paragraph (1), Article 28I paragraph (2), and Article 33 paragraph (1), paragraph (2) and paragraph (3) of the 1945 Constitution;

4. To declare that the provisions of Article 22 sub-article f and Article

52 paragraph (1) of Law Number 4 Year 2009 concerning Mineral and Coal Mining still have binding legal effect.

[2.5] Whereas the Petitioners, the Government and the People's Legislative Assembly (DPR) did not submit any conclusion on the case *a quo* up to the deadline determined by the Court, namely on Wednesday, March 16, 2011;

[2.6] Whereas to shorten the description in this decision, all which happened at the hearing shall be indicated in the minutes of hearing, and shall constitute an inseparable part of this decision;

3. LEGAL CONSIDERATIONS

[3.1] Whereas the purpose and objective of the Petitioners' petition are concerned with substantive review of Article 22 sub-article f and Article 52 paragraph (1) of Law Number 4 Year 2009 concerning Mineral and Coal Mining (State Gazette of the Republic of Indonesia Year 2009 Number 4, Supplement to the State Gazette of the Republic of Indonesia Number 4959, hereinafter referred to as Law No. 4/2009) against Article 27 paragraph (1), Article 28D paragraph (1), Article 28I paragraph (1), and Article 33 paragraph (1), paragraph (2) and paragraph (3) of the 1945 Constitution of the State of the Republic of Indonesia (hereinafter referred to as the 1945 Constitution);

[3.2] Whereas prior to considering the substance of the petition, the Constitutional Court (hereinafter referred to as the Court) shall 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 two issues, the Court is of the following opinion:

Authorities of the Court

[3.3] Whereas pursuant to Article 24C paragraph (1) of the 1945 Constitution as restated in Article 10 paragraph (1) sub-paragraph a of Law Number 24 Year 2003 concerning the Constitutional Court (State Gazette of the Republic of Indonesia Year 2003 Number 98, Supplement to the State Gazette of the Republic of Indonesia Number 4316) 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 the State Gazette of the Republic of Indonesia Number 5226, hereinafter referred to as the Constitutional Court Law) and 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 the State Gazette of the Republic of Indonesia Number 5076), one of the authorities of the Constitutional Court is to review Laws against the 1945 Constitution;

[3.4] Whereas the petition *a quo* is concerned with judicial review of Law, *in*

casu Law No. 4/2009 against the 1945 Constitution, so that the Court has authority to hear the petition *a quo;*

Legal Standing of the Petitioners

[3.5] Whereas pursuant to Article 51 paragraph (1) of the Constitutional Court Law along with its Elucidation, the parties that can act as Petitioners in a judicial review of a Law against the 1945 Constitution shall be those who consider that their constitutional rights and/or authority are impaired by the coming into effect of the Law petitioned for review, namely:

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

b. customary law community groups 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 regulated in Law;

c. public or private legal entities; or

d. state institutions;

[3.6] Whereas, following the issuance of Decision Number 006/PUU-III/2005 dated May 31, 2005 and Decision Number 11/PUU-V/2007 dated September 20, 2007, as well as subsequent Decisions, the Court is of the opinion that the impairment of constitutional rights and/or authority as intended

in Article 51 paragraph (1) of the Constitutional Court Law must meet five requirements, as follows:

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

b. the Petitioner considers 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 of constitutional rights and/or authority and the Law petitioned for review;

e. the possibility that with the granting of the Petitioner's petition, the impairment of such constitutional rights and/or authority argued by the Petitioner will not or will no longer occur;

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

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

b. existence of impairment of constitutional rights and/or authority granted by the 1945 Constitution due to the coming into effect of the Law petitioned for review:

[3.7] Whereas the Petitioners as Indonesian citizens argue that Article 22 sub-article f and Article 52 paragraph (1) of Law No. 4/2009 potentially impair the Petitioners' constitutional rights regulated in Article 27 paragraph (1), Article 28D paragraph (1), Article 28I paragraph (2), and Article 33 paragraph (1), paragraph (2), and paragraph (3) of the 1945 Constitution;

Article 22 sub article f of Law No. 4/2009 states that, "*The criteria to designate WPR shall be as follows:*

a. and so on.

f. constituting an area or a place of community mining activities which has been operated for at least 15 (fifteen) years."

Article 52 paragraph (1) of Law No. 4/2009 states that, "*"The holder of an Exploration IUP for metal minerals shall be granted a WIUP with a minimum area of 5,000 (five thousand) hectares and a maximum area of 100,000 (one hundred thousand) hectares";*

The Petitioners are native people of Bangka Island working as tin finders by opening Unconventional Mine (*Tambang Inkonvesional*/TI) [*sic*], namely a kind of small-scale mining using simple equipment, hereinafter referred to by the Court as traditional mining. So far, in conducting their activities, the Petitioners

have not faced many hindrances, considering the traditional nature of the management system. The Petitioner's habit is that if they do not own land, they would cooperate with land owners using a production sharing system;

As native people living in Bangka Island, the Petitioners do not have any choice other than opening traditional mines to fulfill their living needs, because gardening and/or farming is considered more difficult considering the increasingly narrow land area due to tin exploitation for hundreds of years. The petitioners become worried and feel threatened by the enactment of Law No. 4/2009, considering that it would be impossible for them to meet the requirements contained in the aforementioned Article 22 sub-article f and Article 52 paragraph (1) of Law No. 4/2004;

Based on the provision of Article 51 paragraph (1) of the Constitutional Court Law and the requirements of impairment of constitutional rights and/or authority as described above, the Court is of the following opinion:

a. The Petitioners meet the qualification as individual Indonesian citizens (including groups of people having a common interest);

b. The Petitioners have constitutional rights as regulated in the 1945 Constitution, particularly:

Article 27 paragraph (1):

"All citizens shall have an equal position before the law and government

and shall be obligated to uphold the law and government without exception"

Article 28D paragraph (1):

"Every person shall have the right to the recognition, the guarantee, the protection and the legal certainty of just laws as well as equal treatment before the law"

Article 28I paragraph (2):

"Every person shall have the right to be free from discriminatory treatment on any basis whatsoever and shall have the right to obtain protection against any such discriminatory treatment."

Article 33 paragraph (1), paragraph (2), and paragraph (3):

(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 managed by the state;

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

The Legal Consideration of the Decision of the Constitutional Court

Number 001-021-022/PUU-I/2003 regarding the Judicial Review of Law Number 20 Year 2002 concerning Electricity, dated December 15, 2004, on page 335, state as follows:

"Those that have to be managed by the state are branches of production which are considered important to the state and/or which affect the livelihood of many people, namely: (i) a branch of production which is important for the state and affects the livelihood of many people, (ii) important to the state but does not affect the livelihood of many people, or (iii) not important for the state but affecting the livelihood of many people. The three have to be managed by the state and used for the prosperity of the people. However, it is up to the government and together with the people's representative institution to assess whether and when a branch of production is important to the state and/or affects the livelihood of many people. A branch of production which at a certain time is important for the state and affects the livelihood of many people, may at other point in time become no longer important for the state and does not affect the livelihood of many people. However, the Court also has the authority to assess by reviewing it against the 1945 Constitution if in fact there are parties who claim to have been impaired constitutionally by such assessment of the legislators;"

The consideration section paragraph a of Law No. 4/2009 states: *"whereas mineral and coal contained in the legal mining area of Indonesia*

are non-renewable resources bestowed by the one Almighty God and have an important role in ***fulfilling the livelihood of the people at large****. Therefore, the management thereof must be* ***controlled by the State*** *to provide actual added value to the national economy in the context of achieving the people's welfare and prosperity in a just manner.*

Based on the Decision of the Constitutional Court Number 21-22/PUU-V/2007 regarding judicial review of Law Number 25 Year 2007 concerning Capital Investment, dated March 25, 2008, in Paragraph **[3.9]**, it has been stated that, "…*in the aforementioned Article 33 of the 1945 Constitution there are economic and social rights of citizens as the interests protected by the constitution through the involvement or role of the state. In other words, Article 33 of the 1945 Constitution is the provision regulating the involvement or active role of the state to take actions in the context of respect, protection and fulfillment of the economic and social rights of citizens";*

Whereas based on the legal considerations above, according to the Court, the Petitioners have met the qualification as Petitioners of individual Indonesian citizens (including groups of people having a common interest) being included in the category of "people at large" whose livelihood must be fulfilled [*vide* Article 33 paragraph (2) of the 1945 Constitution] and included in the category of the "people" whose greatest prosperity must be realized [*vide* Article 33 paragraph (3) of the

1945 Constitution]. Whereas referred to as “the people at large” in Article 33 paragraph (2) of the 1945 Constitution and the “people” in Article 33 paragraph (3) of the 1945 Constitution shall every Indonesian citizen whose constitutional rights are guaranteed and regulated in the 1945 Constitution, and the Petitioners are included in such definition;

c. The Petitioners basically earn a living and maintain their life in the field of mineral mining who think that they are not treated justly and equally before the law, namely by the provisions of Law No. 4/2009 principally regulating the criteria for the designation of Community Mining Area (WPR) and regulating the criteria for the designation of Mining Business Permit Area (WIUP) considered incriminatory and unable to be fulfilled and being considered discriminatory to the Petitioners to participate in opening mining businesses. Therefore, *prima facie,* according to logical reasoning at least the Petitioners’ constitutional impairment can be assured of occurring due to the coming into effect of the Law No. 4/2009 *a quo*. Furthermore, this matter will be considered in the substance of the petition;

d. Whereas there is a causal relationship (*causal verband*) between the intended impairment to the Petitioners and the provision of the Law No. 4/2009 *a quo,* particularly those regulating the criteria for WPR and WIUP designation considered incriminatory and unable to be fulfilled as well as discriminatory to the Petitioners to participate in opening mining

businesses, and if the Petitioners' petition is granted, it is believed that the Petitioners' rights will not or will no longer be impaired.

Based on the legal considerations above, the Court is of the opinion that the Petitioners have legal standing to file the petition for judicial review of Law No. 4/2009.

[3.8] Whereas since the Court has authority to hear the petition *a quo,* and the Petitioners have legal standing, then the Court shall further consider the Substance of the Petition

Substance of the Petition

[3.9] Whereas in their petition, the Petitioners file a petition for substantive review of Article 22 sub-article f and Article 52 paragraph (1) of Law No. 4/2009 against Article 27 paragraph (1), Article 28 D paragraph (1), Article 28I paragraph (1), and Article 33 paragraph (1), paragraph (2) and paragraph (3) of the 1945 Constitution, principally questioning the constitutionality of the criteria for WPR designation, which particularly states that the area or place of community mining shall have been operated for at least 15 (fifteen) years and the minimum WIUP shall be 5,000 (five thousand) hectares and the maximum area shall be 100,000 (one hundred thousand) hectares;

[3.10] Whereas the Court has examined the written evidence presented by the Petitioners to substantiate their arguments, the list of which has been described

in the Facts of the Case section above (Exhibits P-1 through P-3) and the Petitioners have not presented any Witness and/or Expert;

[3.11] Whereas the Government has presented its verbal statement and its written statement principally stating as follows:

- Whereas the provision of Article 22 of Law No. 4/2009 regulating the criteria for the designation of Community Mining Area (WPR) is intended for providing legal certainty for the community who want to conduct community mining as well as for giving the opportunity for the people to participate in development, particularly in mineral and coal mining activities;

- With the authority granted by Law No. 4/2009 to the Regent/mayor to designate WPR, the application of the criteria for stipulating WPR as intended in Article 22 of Law No. 4/2009 shall be delegated to the regent/mayor in accordance with the conditions and uniqueness of each region.

  Furthermore, the words "**and/or**" in Article 22 needs to be considered, which can be interpreted that WPR designation may be "cumulative" or "alternative" in nature. Therefore, the regent/mayor may determine the criteria in accordance with the conditions of his/her region. The application of the criteria for WPR designation will be further regulated in a Regional Regulation;

- Article 52 paragraph (1) of Law No. 4/2009 does not regulate community mining so that the Petitioners' statement that Article 52 paragraph (1) of Law No. 4/2009 is aimed at gradually eradicating community mining activities is incorrect. Article 53 paragraph (1) of Law No. 4/2009 does not give any privilege to TP. Timah, Tbk. and TP. Koba Tin. Article 52 paragraph (1) is intended for IUP which will be issued following the coming into effect of Law No. 4/2009, rather than for the Mining Authorization (KP) possessed by PT. Timah, Tbk. and the Work Contract (KK) possessed by PT. Koba Tin;

- Whereas the basic philosophy for making the regulation on the minimum area of Exploration WIUP in Article 52 paragraph (1), Article 55 paragraph (1), Article 58 paragraph (1), and Article 61 paragraph (1) of Law No. 4/2009 is to realize the principles of sustainability and environmental perspective enshrined in Article 2 sub-article d of Law No. 4/2009. The principles of sustainability and environmental perspective are further sharpened in Article 18 sub-article c and sub-article d of Law No. 4/2009 which become the norm of conservation and environment's supporting capacity as the criteria for WIUP designation;

- From the environmental viewpoint, the minimum area of Exploration WIUP for mineral and coal needs to be regulated in Law No. 4/2009 because it is closely related to the aspect of land sufficiency which also

affects the supporting capacity and the accommodating capacity of the environment. If the Exploration WIUP is too small, the environment's supporting capacity and accommodating capacity will be inadequate, particularly when performing the production operation stage, considering the fact that the WIUP area granted during exploration will not increase when performing production operation. It will also be difficult to manage the land for developing mining facilities/infrastructure during production operation in a limited WIUP. The minimum areas of 5,000 ha for Exploration WIUP for metal mineral and coal, 500 ha for non-metal, and 5 ha for rocks are considered to have met the requirements of environment's supporting capacity and accommodating capacity.

- The regulation of the minimum area of Exploration WIUP which can be operated in Law No. 4/2009 is also intended rocks entrepreneurs engaging in the mining sector. With the existence of the provision on the minimum area of Exploration WIUP, the opportunity to obtain mineral and coal along with their reserve becomes increasingly bigger. The big opportunity to obtain mineral and coal reserve will also be increasingly open if the area of Exploration WIUP granted is adequate.

To support its statement, the Government presented experts whose statements were heard at the hearing on March 9, 2011, principally describing as follows:

1. Dr. Ir. Simon F. Sembiring

- Area division is crucial. Community participation in mining areas is regulated in a government regulation. The problem is, to what extent does the government regulate the community's participation? The law *a quo* does not refer to the "how". Therefore, it can be later seen in the relevant Government regulation;

- Division of mining areas has its own process, from the region, after the meeting with the community, then to the province, and finally to the central government. From the central government, then it goes to DPR;

- Mining areas are divided into 3 (three) types: (1) Mining Business Area (WUP), (2) State Reserve Area (WPN), and (3) Community Mining Area (WPR). It is from these areas that the Mining Business Permit Area (WIUP) is provided. The WIUP tender is for metal mineral and coal. There is no tender for WPR and Community Mining Permit (IPR).

- If Law No. 4/2009 is implemented in accordance with its spirit, there should have been a procedure from the bottom before being determined by the government and DPR. If the people are not involved, let us together complain to the Parliament;

- Mining areas are currently being processed in DPR. It is necessary to question whether the process has involved the community, that's the key. If the process does not involve the community, the People's Legislative Assembly (DPR) must reject it and the money is returned, because the Law *a quo* mandates the involvement of the community. Non-involvement of the community means violating the law. If passed by DPR, then DPR and the Government have jointly committed a mistake.

2. Prof. Daud Silalahi

- In the civil law system adopted in Indonesia, the Mineral and Coal Mining Law *a quo* of course still has shortcomings because it does not expressly regulate technical matters. Technical-economic matters are regulated in the Government Regulation. Based on the Expert’s experience as a drafter, it is very difficult to make extremely concrete articles properly because the articles must be the same from Sabang to Merauke, while the environment locations vary. Therefore, articles in a law are made relatively general for concrete translation further in the Government Regulation;

- As the Team Leader for Draft Law No. 4/2009, the Expert states that Law No. 4/2009 shall be formulated after considering public

recommendations through NGOs and after conducting a feasibility study as well. However, if the formulation is like what it is now, it is a trade off, and this is the maximum that can be obtained;

3. Prof. Dr. Rudy Sayoga Gautama

- In the exploitation process, the term recovery is recognized. In performing the mining process, it is impossible to mine 100 percent because there is always some which is left. It is similar to the processing, because of technological and economic considerations. Therefore, often, in tin mining for example, tin processing which used to be conducted in the 1980s is now conducted again. This makes sense because the economic and technological conditions in the past were different from the current conditions, so that it is impossible to say that only 80 percent was mined in the past and the remaining 20 has been lost in the tailing. If the economic value has now increased, it could be mined again;

[3.12] Whereas DPR has presented its written statement which is principally similar to the Government's statement;

Opinion of the Court

[3.13] Whereas, after carefully examining the Petitioners' petition, statement of the Government, statement of the People's Legislative Assembly (DPR),

statement of experts of the Government, as well as documentary/written evidence presented by the Petitioners, as included in the Facts of the Case section, the Court is of the following opinion.

The Court needs to refer to the Court's Decision Number 001-021-022/PUU-I/2003 dated December 2004 considering as follows:

*"…*whereas *by viewing the 1945 Constitution as the system concerned, thus the interpretation of "managed by the state" in Article 33 of the 1945 Constitution contains a higher or broader interpretation than ownership in the civil law concept. The concept of control by the state is a public legal conception which is related to the principle of the sovereignty of the people in the 1945 Constitution, in the field of politics (political democracy) and economy (economic democracy). In the people's sovereignty principle, the people are the ones recognized as the source, owner and the holder of the highest power in living as a state, in accordance with the doctrine of "from the people, by the people and for the people". In the interpretation of the highest power, the interpretation of public ownership by the people collectively is also included;*

… whereas if the phrase "managed by the state" is just interpreted as ownership in the civil (private) sense, it will not suffice to use the control to achieve the "greatest prosperity of the people". Therefore the mandate to "promote public welfare" and to "implement social justice for all the people" stated in the Preamble of the 1945 Constitution will be impossible to realize.

However, the civil ownership conception itself must be recognized as one of the logical consequences of the control by the state which also includes the interpretation of the collective public ownership by the people of the resources concerned. The expression "managed by the state" cannot be interpreted simply as the right to regulate, because it is automatically inherent in the functions of the state without having to be specifically mentioned in the constitution. Even if supposedly Article 33 is not included in the 1945 Constitution, as common in many countries which adopt the liberal economy principle which do not regulate basic economic norms in their constitutions, the state automatically has the authority to perform the regulatory function. Therefore, it is impossible to reduce the meaning of the phrase "managed by the state" as merely concerning the authority of the state to regulate the economy. Therefore, the view which interprets "managed by the state" as ownership in the civil conception sense and the view that interprets "managed by the state" simply as the authority of the state to regulate, are both rejected by the Court;

… Considering whereas based on the above descriptions and opinions, therefore the phrase "managed by the state" must be interpreted to include the interpretation of control by the state in the broad sense which is based on the conception of the sovereignty of the Indonesian people over all of the resources consisting of the "land and water and natural resources contained therein". Included in it is the interpretation of the collective public ownership by the people of the resources concerned. The people collectively are constructed by the 1945

Constitution as giving the mandate to the state to make policy (beleid) and perform the administration (bestuursdad), regulation (regelendaad), management (beheersdaad) and oversight (toezichthoudensdaad) for the purpose of the greatest prosperity of the people. The function of administration (bestuursdaad) by the state is carried out by the government with its authority to issue and revoke permit facilities (vergunning), licensing (licentie), and concession (concessie). The state's regulatory function (regelendaad) is performed through the legislative authority of the People's Legislative Assembly together with the government, and regulation by the government (executive). The management function (beheersdaad) is performed through shareholding mechanism and/or through direct involvement in the management of the State Enterprises as instruments through which the state c.q. the government will exercise its control over the natural resources for the greatest prosperity of the people. The function of oversight by the state (toezichthoudensdaad) is carried out by the state cq the government in the context of supervising and controlling so that the exercise of control by the state upon vital branches of production which affect the livelihood of many people will be performed for the greatest prosperity of the people;

Based on the Constitutional Court's Decision Number 21-22/PUU-V/2007 regarding judicial review of Law Number 25 Year 2007 concerning Capital Investment dated March 25, 2008, in paragraph **[3.9]**, it has been stated that "…*in the aforementioned Article 33 of the 1945 Constitution there are economic*

and social rights of citizens as the interests protected by the constitution through the involvement or role of the state. In other words, Article 33 of the 1945 Constitution is the provision regulating the involvement or active role of the state to take actions in the context of respect, protection and fulfillment of the economic and social rights of citizens";

The consideration section paragraph a of Law No. 4/2009 states: *"whereas mineral and coal contained in the legal mining area of Indonesia are non-renewable resources bestowed by the one Almighty God and have an important role in* ***fulfilling the livelihood of the people at large****. Therefore, the management thereof must be* ***managed by the State*** *to provide actual added value to the national economy in the context of achieving the people's welfare and prosperity in a just manner';*

Based on the reference to the legal considerations of the Court above and the consideration section of the Law No. 4/2009 a quo, it is evident that mineral and coal are categorized as natural resources having an important role in fulfilling the livelihood of the people at large the management of which must be managed by the state as a form of involvement or active role of the state to take actions in the context of respect, protection and fulfillment of the economic and social rights of citizens;

Based the Court's Decision Number 001-021-022/PUU-I/2003 dated December 15, 2004 *a quo* and the Court's Decision 21-22/PUU-V/2007 dated March 25, 2008 *a quo,* the Court has principally stated that the state *c.q.* the

Government shall control and use the earth, water and all natural resources contained therein for the greatest prosperity of the people;

Based on the legal considerations above, the Court will further consider the matters stated by the Petitioners in the *posita* and *petitum*, as follows:

[3.13.1] The Petitioners argue that Article 22 sub-article f of Law No. 4/2009 is inconsistent with Article 27 paragraph (1), Article 28D paragraph (1), Article 28I paragraph (2), and Article 33 paragraph (1), paragraph (2) and paragraph (3) of the 1945 Constitution;

Law No. 4/2009 designates Mining Areas (WP) consisting of Mining Business Area (WUP), Community Mining Area (WPR), and State Reserve Area (WPN) [*vide* Article 13 of Law No. 4/2009];

The Government, in its statement, states that the provisions on WPR in Law No. 4/2009 are intended to give legal certainty for the community who want to conduct community mining as well as to give the opportunity to the people to participate in development, particularly in mineral and coal mining activities. The phrase “and/or” in Article 22 sub-article e of Law No. 4/2009 *a quo,* according to the Government, is interpreted that the criteria for stipulating WPR may be “cumulative” or “alternative” in nature. The regent/mayor may determine the criteria included in Article 22 *a quo* wholly or in part, in accordance with the conditions of their region, to be further stipulated in a Government Regulation;

According to the Court, the provisions on WPR in Law No. 4/2009 is a form of implementation of Article 33 of the 1945 Constitution giving the mandate to the state to be involved or to play an active role in taking actions in the context of respect, protection and fulfillment of economic and social rights of citizens. Therefore, with respect to the aforementioned explanation of the Government, according to the Court, to the extent it is concerned with the criteria included in Article 22 sub-articles a through e, the criteria do not have any contradiction of norms because each one of the criteria can be applied based on the conditions from one area to another, so that the criteria included in sub-articles a through e can be applied both alternatively and cumulatively. However, if related to Article 22 sub-article f, according to the Court, it will hamper the people's right to participate and to fulfill their economic needs through mineral and coal mining activities, because in fact, not all community mining activities have been conducted for at least 15 (fifteen) years. Such is the experience of the Petitioners as community mining business actors in Bangka Belitung areas which at the time of submission of this petition had not reached 10 (ten) years of enjoying community mining;

To determine that a mining activity has been conducted for at least 15 (fifteen) years, further substantiation is of course required, both formally and substantively, while Law No. 4/2009 evidently does not regulate the substantiation criteria and mechanism. Law No. 4/2009 mandates that further provisions regarding the criteria and mechanism of WPR designation as

intended in Article 22 to be regulated by a regional regulation of regency/city [*vide* Article 26 of Law No. 4/2009]. Even if it is true that the provision on the time limit of 15 years becomes a part of an open legal policy, both the Government and DPR, in their statements, do not explain the existence of logical-rational reasons for the time limit of 15 years as a sufficient time limit to designate a WPR. In addition, with the absence of reference to the criteria and mechanism which are similar for every regional government to determine whether or not a mining location has been operated for at least 15 years. according to Court, this will in fact create legal uncertainty, especially as Article 22 sub-article f of Law No. 4/2009 can also lead to a contradiction of norms if related to Article 24 of Law No. 4/2009 which states that, "*An area or location of community mining activities which has been operated but has not been designated as WPR shall be prioritized to be designated as WPR,*" because Article 22 sub-article f provides a definite limit of 15 years, while Article 24 does not provide any time limit. According to the Court, the Article 24 *a quo* is potential to be interpreted differently if related to Article 22 sub-article f, as follows:

- If related to the provision of Article 22 sub-article f, Article 24 may be interpreted as: "An area or place of community mining activities which has been operated for *at least 15 (fifteen) years* but which has not been designated as WPR shall be prioritized to be designated as WPR";
- If not related to the provision of Article 22 sub-article f, Article 24 may be interpreted as: "An area or place of community mining activities which has

been operated either *not yet operated not yet for 15 (fifteen) years and/or already operated for 15 (fifteen) years* but which has not been designated as WPR shall be prioritized to be designated as WPR";

Such two different interpretations may create legal uncertainty.

Therefore, to guarantee legal certainty for all Indonesian people, particularly the community conducting mining business activities, according to the Court, the provision of Article 24 of Law No. 4/2009 has provided sufficient guarantee of legal certainty as well as the guarantee of the obtainment of the respect, protection and fulfillment of citizens' economic and social rights, particularly for those conducting community mining activities, both those who have not met the operation time of at least 15 years and those who haven't, so that the regulation as included in Article 22 sub-article f of Law No. 4/2009 is not required, as it will in fact, potentially impair the constitutional rights of citizens;

Based on the legal considerations above, the Court is of the opinion that the argument of the Petitioners *a quo* on Article 22 sub-article f of Law No. 4/2009 has legal ground and also the phrase "and/or" in Article 22 sub-article e of Law No. 4/2009 becomes irrelevant and must be nullified;

[3.13.2] The Petitioners argue that Article 52 paragraph (1) of Law No. 4/2009 is inconsistent with Article 27 paragraph (1), Article 28D paragraph (1), Article 28I paragraph (2), as well as Article 33 paragraph (1), paragraph (2) and paragraph (3) of the 1945 Constitution;

One of the Government's authorities in the management of mineral and coal mining is to designate Mining Areas after the coordination with the regional government and the consultation with the People's Legislative Assembly of the Republic of Indonesia (DPR RI) [*vide* Article 6 paragraph (1) sub-paragraph e of Law No. 4/2009]. Law No. 4/2009 has stipulated that WP shall consist of WUP, WPR and WPN [*vide* Article 13 of Law No. 4/2009];

The Court agrees with the Expert of the Government, Prof. Daud Silalahi, who principally states that WP shall be stipulated based on the spatial layout, the activities of which must also be based on environmental preservation efforts. This is also in accordance with Article 1 sub-article 29 of Law No. 4/2009 stating that, "*Mining Area, hereinafter referred to as WP (Wilayah Pertambangan), shall be an area that has mineral and/or coal potentials and one that is not bound by the government's administrative restrictions which* ***constitutes a part of the national spatial layout***." Therefore, according to the Court, the Government in designating WP, must make adjustment to the national spatial layout and must be oriented to environmental preservation and it must also ensure that the aforementioned division into the three kinds of mining areas (WUP, WPR and WPN) shall not overlap one another, both in the same government administration area or across different government administration areas. In designating a WP, the Government must differentiate between areas to become WUP, areas to become WPR, and areas to become WPN, and in the WPN, WUPK must also be detailed further. In addition to preventing the emergence of

overlaps of permits for mining activities and allocation of an area based on the national spatial layout, this kind of management is also intended for ensuring the fulfillment of the role and responsibility of the state, particularly the government, in the context of guaranteeing the implementation of protection, advancement, enforcement and fulfillment of the economic and social rights of citizens by dividing WP in the form of express and clear division of areas into WUP, WPR, and/or WPN. This is in line with Article 28I paragraph (4) of the 1945 Constitution and the UN Convention on Economic, Social and Cultural Rights which has been ratified by Law Number 11 year 2005 concerning the Ratification of the International Covenant on Economic, Social and Cultural Rights [State Gazette of the Republic of Indonesia Year 2005 Number 118, Supplement to the State Gazette of the Republic of Indonesia Number 4557]. In addition, that can also prevent the occurrence of: (1) conflicts among actors of mining activities in the WP, (2) conflicts between the actors of mining activities and communities in the WP as well as affected parties, and (3) conflicts between actors of mining activities and/or communities in the WP as well as the affected parties and the state, in this case the government;

In the context of control for actual implementation of the control by the state of production branches which are important and/or which control the livelihood of the people at large for the greatest prosperity of all the people [*vide* Constitutional Court's Decision Number 001-021-022/PUU-I/2003 dated December 15, 2004], then in addition to clearly and expressly dividing areas into

WUP, WPR, and WPN, the state, in this case the Government must also stipulate the prioritized areas which must be designated first out of the three kinds of WP divisions. Therefore, according to the Court, the division of WP into the three kinds of mining areas must be prioritized for: *first,* WPR for the reason of guaranteeing the people's economic rights and guaranteeing the continuity of community mining activities which have been existing earlier. *Second,* WPN for the reason other than those included in Article 27 paragraph (1) of Law No. 4/2009 along with its Elucidation, as well as to maintain environmental preservation and to guarantee the survival and economic guarantee through the utilization of natural resources for future generations. *Third,* WUP for the reason that the relevant area is indeed intended for exploration area and production operation which may only be conducted by mining business actors under certain conditions as well as the supporting capacity of the latest equipment allowing for optimum production of mining results, because the industry of mineral and coal mining is actually high capital, high technology and high risk industry;

The Petitioners as community mining actors in a small/medium scale with a maximum mining area of 25 hectares [*vide* Article 22 sub-article d of Law No. 4/2009], feel that their source of income is threatened and discriminated by the provision of Article 52 paragraph (1) of Law No. 4/2009 regulating Exploration WIUP for metal mineral with a minimum area of 5,000 hectares;

In its statement, the Government states that the minimum area for Metal Mineral exploration is 5,000 hectares because it is closely related to the aspect

of land sufficiency which also affects the supporting capacity and accommodating capacity of the environment. If the Exploration WIUP is too small, the environment's supporting capacity and accommodating capacity will be inadequate, particularly when performing the production operation stage, considering the fact that the WIUP area granted during exploration will not increase when performing production operation. It will also be difficult to manage the land for developing mining facilities/infrastructure during production operation in a limited WIUP. The minimum areas of 5,000 ha for Exploration WIUP for metal mineral and coal, 500 ha for non-metal, and 5 ha for rocks are considered to have met the requirements of environment's supporting capacity and accommodating capacity. According to the Government, the regulation on the minimum Exploration WIUP which can be operated in Law No. 4/2009 is also intended for protecting entrepreneurs doing business in the mining sector. The existence of the provision on the minimum Exploration WIUP is to increase the opportunity to obtain mineral and coal along with the reserve thereof. This opportunity will become increasingly bigger. This opportunity will become increasingly open if the area of Exploration WIUP granted is adequate;

Based on the Court's considerations above on the need to make a clear and express limitation as well as to priority of WPR designation first, then WPN and lastly WUP, then the minimum area limit of 5,000 hectares will automatically have the potential to reduce or even eliminate the rights of entrepreneurs in the mining sector who would perform exploration and production operation within the

WUP, because it is uncertain that within a WP a minimum exploration area of 5,000 hectares is available if WPR and WPN have been previously designated. Conversely, the provision on the minimum area of 5,000 hectares can also be interpreted that in order to designate WUP, the Government needs to first designate the borders of the minimum area of 5,000 hectares. If this happens, it will potentially eliminate or at least reduce the people's rights to engage in the small/medium-scale mining because the designation of the area of 5,000 hectares will also potentially reduce WPR as well as WPN. Even if the criteria of 5,000 hectares constitutes a part of the open legal policy, the unclear aspect of land sufficiency affecting the environment's supporting capacity and accommodating capacity not being regulated in Law No. 4/2009, will in fact make the significant value of the minimum area of 5,000 hectares more obscure, because it could be that an area of 3,000 hectares up to 4,000 hectares is already sufficient for conducting exploration and production operation activities. Moreover, by first designating WPN before designating WUP, then as described above, that would mean that from the beginning, the state, in this case the Government, has determined the existence of mineral and coal reserve which must be kept for future generations which also serves the function of maintaining the sustainability and preservation of the environment against full exploitation presently. Whereas, according to the Court, without reducing the rights possessed by mining entrepreneurs who will operate in WUP, Article 33 paragraph (3) of the 1945 Constitution mandates to the state, in this case the Government, to control and use the earth, water and natural resources

contained therein for the greatest prosperity of the people. This means that the Indonesian people have given the mandate to the state, in this case the Government, to be able to manage the earth, water and natural resources therein for the greatest prosperity of the people. In the case *a quo,* this is realized by, among other things, the granting of priority for mineral and coal mining operation to the people with small and medium economy. However, it is not closed to large-scale and high-cost mining business actors, both national private parties and foreign companies, to participate in the mining business for utilizing natural resources for the greatest prosperity of the people. Therefore, according to the Court, the Petitioners' arguments *a quo* have legal grounds;

4. CONCLUSION

Based on the examination of the facts and laws as described above, the Court has come to the following conclusions:

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

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

[4.3] The substance of the Petitioners' petition have legal grounds.

Based on 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 the State Gazette of the Republic of Indonesia

Number 5226), as well as Law Number 48 Year 2009 concerning Judicial Power (State Gazette of the Republic of Indonesia Year 2009 Number 157, Supplement to the State Gazette of the Republic of Indonesia Number 5076);

5. INJUNCTION OF DECISION

Passing the Decision,

To declare:

- To grant the Petitioners' petition in its entirety;
- Article 22 sub-article e to the extent of the phrase "**and/or**" and Article 22 sub-article f of Law Number 4 Year 2009 concerning Mineral and Coal Mining (State Gazette of the Republic of Indonesia Year 2009 Number 4, Supplement to the State Gazette of the Republic of Indonesia Number 4959) inconsistent with the 1945 Constitution of the State of the Republic of Indonesia;
- That Article 22 sub-article e to the extent of the phrase "**and/or**" and Article 22 sub-article f of Law Number 4 Year 2009 concerning Mineral and Coal Mining (State Gazette of the Republic of Indonesia Year 2009 Number 4, Supplement to the State Gazette of the Republic of Indonesia Number 4959) shall have no binding legal effect;
- Article 52 paragraph (1) to the extent of the phrase "**with a minimum area of 5,000 (five thousand) hectares and**" of Law Number 4 Year 2009 concerning Mineral and Coal Mining (State Gazette of the Republic of Indonesia Year 2009 Number 4, Supplement to the State Gazette of

the Republic of Indonesia Number 4959) inconsistent with the 1945 Constitution of the State of the Republic of Indonesia;

- That Article 52 paragraph (1) to the extent of the phrase "**with a minimum area of 5,000 (five thousand) hectares and**" of Law Number 4 Year 2009 concerning Mineral and Coal Mining (State Gazette of the Republic of Indonesia Year 2009 Number 4, Supplement to the State Gazette of the Republic of Indonesia Number 4959) shall have no binding legal effect;
- To order the publication of this decision properly in the Official Gazette of the Republic of Indonesia;

In witness whereof, this decision was made in the Consultative Meeting of Justices by nine Constitutional Court Justices, namely Moh. Mahfud MD., as Chairperson and concurrent Member, Achmad Sodiki, Harjono, Maria Farida Indrati, M. Akil Mochtar, Anwar Usman, Ahmad Fadlil Sumadi, Hamdan Zoelva, and Muhammad Alim, respectively as Members, on **Wednesday, April the eleventh** year **two thousand and twelve,** and was pronounced in the Plenary Session open for the public on **Monday**, **June the Fourth** year **two thousand and twelve**, by eight Constitutional Court Justices namely Moh. Mahfud MD., as Chairperson and concurrent Member, Achmad Sodiki, Maria Farida Indrati, M. Akil Mochtar, Anwar Usman, Ahmad Fadlil Sumadi, Hamdan Zoelva, and Muhammad Alim, respectively as Members, assisted by Wiwik Budi Wasito as Substitute Registrar, in the presence of the Government or its representative, and the

People's Legislative Assembly or its representative in the absence of the Petitioners/their attorney.

CHIEF JUSTICE,

Sgd.

Moh. Mahfud MD.

JUSTICES,

Sgd.	**Sgd.**
Achmad Sodiki	**Maria Farida Indrati**
Sgd.	**Sgd.**
M. Akil Mochtar	**Anwar Usman**
Sgd.	**Sgd.**
Ahmad Fadlil Sumadi	**Hamdan Zoelva**
Sgd.	**Sgd.**
Hamdan Zoelva	**Anwar Usman**

Sgd.

Muhammad Alim

SUBSTITUTE REGISTRAR,

Sgd.

Wiwik Budi Wasitos