DECISION
Number 30/PUU-VIII/2010

FOR THE SAKE OF JUSTICE UNDER THE ONE ALMIGHTY GOD

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF INDONESIA

[1.1] Hearing and deciding upon 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, filed by:

[1.2] 1. Name : **Johan Murod**

Occupation : Director of PT. Bangka Belitung Timah Sejahtera;

Address : Jalan Nyatoh Number 262 Bukit Sari Sub-District, Gerunggang District, Pangkalpinang City

2. Name : **Zuristyo Firmadata**

Occupation : Self-Employed/mining entrepreneur

Address : Parit Tiga Village, Jebus District, West Bangka Regency

3. Name : **Nico Plamonia**

Occupation : Self-Employed/mining entrepreneur

Address : Jalan Bukit Nyatoh Number 21 Neighborhood Ward 003/ Neighborhood Block 003 Kacang Pedang Kejaksaan Sub-District, Gerunggang District, Pangkalpinang City

4. Name : **Johardi**

Occupation : Self-Employed/mining entrepreneur

Address : Jalan Manggis Neighborhood Ward 002/ Neighborhood Block 003 Bukit Sari Sub-District, Gerunggang District, Pangkalpinang City

By virtue of the Special Power of Attorney dated April 25, 2010, in this matter authorizing **Dharma Sutomo Hatamarrasjid, S.H., M.H., Gala Adhi Dharma, S.H.,** and **Fahriansyah, S.H.** all of whom being Advocates having their legal domicile at "DHARMA SUTOMO & Associates" Advocates/Legal Consultants Office, having its address at Jalan H. Bakri Number 36 Pangkalpinang, to act for and on behalf of the authorizer;

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

[1.3] Having read the petition of the Petitioners;

Having heard the statements of the Petitioners;

Having examined the evidence of the Petitioners;

Having heard the statements of the witnesses and the experts of the Petitioners;

Having heard and read the written statement of the Government;

Having heard the statements of the Experts of the Government;

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

Having read the written conclusion of the Petitioners;

2. FACTS OF THE CASE

[2.1] Considering whereas the Petitioners have filed a petition dated May 3, 2010, which was received and registered at the Registrar's Office of the Constitutional Court (hereinafter referred to as the Registrar's Office of the Court) on May 3, 2010 based on Certificate of Petition File Receipt Number 70/PAN.MK/2010 and recorded in the Constitutional Case Registration Book under Number 30/PUU-VIII/2010 on May 6, 2010, and which has been revised most recently by petition dated May 24, 2010, which was received at the Registrar's Office of the Court on May 24, 2010, and which essentially describes the following matters:

I. AUTHORITY OF THE CONSTITUTIONAL COURT

1. The Petitioners request the Constitutional Court to review Law Number 4 Year 2009 concerning Mineral and Coal Mining, particularly Article 22 sub-articles a, c, and f, Article 38 sub-article a, Article 51, Article 52 paragraph (1), Article 55 paragraph (1),

Article 60, Article 61 (1), Article 75 paragraph (4), Article 169 sub-article a, and Article 172;

2. This petition has been filed by the Petitioners to the Constitutional Court in view of the provision of Article 24C paragraph (1) of the 1945 Constitution (hereinafter referred to as the 1945 Constitution) *juncto* Article 10 paragraph (1) sub-paragraph a of Law Number 24 Year 2003 concerning the Constitutional Court (hereinafter referred to as the Constitutional Court Law) which states that one of the Constitutional Court's authorities is to conduct judicial review of Law against the 1945 Constitution;

Article 24C paragraph (1) of the 1945 Constitution

The Constitutional Court shall have authority to hear cases at the first and final levels the decisions of which shall be final in conducting judicial review of Laws against the Constitution, to decide upon disputes over the authority of state institutions whose authority is granted by the Constitution, to decide upon the dissolution of political parties, and to decide upon disputes over the results of general elections.

Article 10 paragraph (1) sub-paragraph *a*

of the Constitutional Court Law

The Constitutional Court shall have authority to hear cases at the first and final levels, the decisions of which shall be final in order to:

a. Review Laws against the 1945 Constitution;

b. Decide upon disputes over the authority of state institutions whose authority is granted by the 1945 Constitution;

c. Decide upon the dissolution of political parties, and;

d. Decide upon disputes over the results of general election.

3. Article 7 of Law Number 10 Year 2004 concerning the Formulation of Laws and Regulations regulates the hierarchy of laws and regulations, in which the 1945 Constitution is hierarchically on the highest position above Laws, hence all provisions of laws and regulations shall not be inconsistent with the 1945 Constitution. Therefore, the provisions of laws and regulations may be petitioned to the Constitutional Court for review;

4. Whereas based on the provision of Article 24C paragraph (1) of the 1945 Constitution *juncto* Article 10 paragraph (1) sub-paragraph *a* of the Constitutional Court Law, the Constitutional Court has authority to *examine*, *hear* and *decide* upon the petition for review of Law Number 4 Year 2009 concerning Mineral and Coal Mining (hereinafter referred to as Law No. 4/2009) filed by the Petitioners;

II. LEGAL STANDING OF THE PETITIONERS

1. Whereas who the parties having legal standing in judicial review are has been regulated and determined in Article 51 paragraph (1) of the Constitutional Court Law

Article 51 paragraph (1) of the Constitutional Court Law 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.

The elucidation of Article 51 paragraph (1) of the Constitutional Court Law states that "*referred to as constitutional rights*" shall be the rights granted by the 1945 Constitution. Based on the provision of the aforementioned Article 51 paragraph (1) of the Constitutional Court Law, two requirements must be satisfied by the Petitioners in order to have legal standing in judicial review, namely:

First : *whether the Petitioners are subjects having the quality to act as Petitioners* as referred to in Article 51 paragraph (1) of the Constitutional Court Law and;

Second : *whether the Petitioners' constitutional rights can/are potentially, or have been impaired by the coming into effect of such law;*

2. Whereas the Petitioners are individual citizens of the Republic of Indonesia who are registered and recorded in the territory of the Unitary State of the Republic of Indonesia (*vide* Exhibit P-4, Exhibit P-5, Exhibit P-6, Exhibit P-7), who in their daily lives have the profession of tin mining entrepreneurs joining the Indonesian Tin Entrepreneurs' Association (*Asosiasi Pengusaha Timah Indonesia*/APTI) and the Regional Community Mining Association (*Asosiasi Tambangan Rakyat Daerah*/ASTRADA) of Bangka Belitung Islands Province (*vide* Exhibit P-2 and Exhibit P-3). Hence, the requirement of "individual/citizen of Indonesia" provided for by Article 51 paragraph (1) sub-paragraph a of the Constitutional Court Law has been satisfied;

3. Whereas the Provision of Article 38 sub-article a of Law No. 4/2009 states that "Mining Business Permits shall be granted to '*business entities*'". Article 1 sub-article 23 of Law No. 4/2009 provides the

definition as follows: "*business entity shall mean any 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*";

In corporate law, business entities are differentiated into two qualifications namely business entities which are in the form of legal entities such as limited liability companies, state companies, regional companies, cooperatives, and business entities which are not in the form of legal entities such as limited partnerships (*Commanditer Vennootschap/CV*), firms;

Based on the provision of Article 38 sub-article a of Law No. 4/2009 which states that "Mining Business Permits shall be granted to business entities", it means that Mining Business Permits as the basis to be able to conduct mining business may only be granted to business entities in the form of legal entities, while business entities which are not in the form of legal entities (limited partnerships (CV)/firms) may not be granted Mining Business Permits, so that they cannot conduct mining business;

The aforementioned Article 38 sub-article a of Law No. 4/2009 has positioned business entities in the form of legal entities and business entities which are not in the form of legal entities in an unequal and discriminatory manner before the law;

4. Whereas the provisions of Article 169 sub-article *a* and Article 172 of Law No. 4/2009 only grants dispensation to holders of Contracts of Work (*Kontrak Karya*/KK) and Work Agreement for Coal Mining under the provision of Article 173 paragraph (1) of Law No. 4/2009, while holders of Mining Authorizations (*Kuasa Pertambangan*/KP) and Community Mining Authorizations (*Kuasa Pertambangan Rakyat*/KPR) are not granted dispensation;

   The granting of dispensation only to holders of Contracts of Work and Work Agreements constitutes a form of *unequal* and *discriminatory* treatment and *not granting equal legal status* between holders of Mining Authorizations and Community Mining Authorizations and holders of Work Contracts and Work Agreements for Coal Mining;

Article 27 (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 28I 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.

The constitutional norms of Article 27 paragraph (1) and Article 28I paragraph (2) of the 1945 Constitution reflect the principles of equality, equal position, equal treatment in the life of a nation and a state, including in conducting business in the field of mining;

The Petitioners, who are individuals having the status as Indonesian citizens conducting (tin) mining business activities by holding permits in the form of Mining Authorizations and Community Mining Authorizations have been impaired as a result of the coming into effect of the provisions of Article 38 sub-article a and Article 169 sub-article a and Article 172 of Law No. 4/2009 and also with the coming into effect of Article 22 sub-articles a, c, and f, Article 51, Article 52 paragraph (1), Article 55 paragraph (1), Article 60, Article 61 (1), Article 75 paragraph (4) of Law No. 4/2009. Hence the requirement of, "*whether the Petitioners' constitutional rights can/are potentially or have been impaired by the coming into effect of the aforementioned Law No. 4/2009*" as provided for by Article 51 paragraph (1) sub-paragraph a of the Constitutional Court Law has been satisfied;

Based on the matters described and conveyed above by the Petitioners, the Petitioners are persons/parties who have legal standing as Petitioners to file a petition for Judicial Review of Law No. 4/2009 as stated in Article 51 paragraph (1) of the Constitutional Court Law;

III. REASONS FOR FILING THE PETITION FOR REVIEW OF LAW NO. 4/2009

A. The Provisions of Article 38 sub-article a, Article 169 sub-article a, and Article 172 of Law No. 4/2009 do not satisfy the principles of equality, equal status before the law and they are discriminatory;

1. Article 38 sub-article a of Law No. 4/2009 states that:

   "*Mining Business Permits shall be granted to:*

   a. Business entities;

   b. Cooperatives; and

   c. Individuals."

   The definition of "business entity" pursuant to Article 1 sub-article 23 of Law No. 4/2009 is "*any 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*.";

The phrase "Mining Business Permits shall be granted to *a*. business entities" in Article 38 of Law No. 4/2009 has given a discriminatory/unequal treatment between business entities which are not in the form of/qualified as "legal entities" and "legal entities" which are in the form of/qualified as "legal entities";

In accordance with the provisions of Indonesian corporate law, business entities in the form of limited partnership and Firm are not qualified as business entities in the form of "legal entities", so that pursuant to Article 38 of Law No. 4/2009, business entities in the form of limited partnership and firm cannot be granted Mining Business Permits as referred to in Article 38 sub-article a of Law No. 4/2009, as the basis for conducting business in the field of mining;

2. With the coming of the provision of Article 38 sub-article *a* of Law No. 4/2009, business entities which are not in the form of legal entities such as business entities/companies in the form of limited partnership and firm cannot be granted Mining Business Permits constituting the entitlement to conduct business in the field of mining;

3. The provision of Article 38 sub-article a of Law No. 4/2009 has positioned/treated business entities in the form of legal entities

unequally compared to business entities which are not in the form of legal entities in terms of the granting of Mining Business Permits;

4. Article 169 sub-article 1 and Article 172 of Law No. 4/2009 have given a discriminatory treatment between holders of Mining Authorizations, Community Mining Authorizations and holders of Contracts of Work/Work Agreements for business types other than Coal Mining;

Article 169 of Law No. 4/2009 states that

a. Contracts of work and work agreements for coal mining operation existing prior to the coming into effect of this Law shall remain valid until the expiration of the contracts/agreements.

b. The provision, ... and so on;

c. The exception, ... and so on.

Article 172 of Law No. 4/2009 states that

(1) 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.

The provision of Article 169 sub-article a of Law No. 4/2009 only grants dispensation to Contracts of Work and Work Agreements for coal mining as a result of the provision of Article 173. With the non-inclusion and non-regulation of Mining Authorizations, Community Mining Authorizations as well as Contracts of Work and Work Agreements for business types other than coal mining operation in Article 169 sub-article a of Law No. 4/2009, then following the coming into effect of this Law No. 4/2009, the provision has become no longer applicable and cannot be used as the basis of the right to conduct mining business;

Contracts of Work/Work Agreements are types of mining operation permits granted to foreign companies and Foreign Capital Investment (*Penanaman Modal Asing*/ PMA), while Mining Authorizations and Community Mining Authorizations are types of mining operation permits granted to national companies and community miners;

Article 169 sub-article *a* and Article 172 of Law No. 4/2009 have explicitly granted a special and discriminatory treatment between foreign companies holding Contracts of Work/Work Agreements for coal mining operation and companies holding Mining Authorizations

and Community Mining Authorizations which are *nota bene* national companies and community miners;

The provisions of Article 38 sub-article *a*, Article 169 sub-article a, and Article 172 of this Law No. 4/2009 are explicitly inconsistent with the 1945 Constitution;

Article 27 (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, guarantee, protection, and legal certainty of just laws as well as equal treatment before the law.

Article 28I 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.

Constitutional norms in Article 27 paragraph (1), Article 28D paragraph (1), and Article 28I paragraph (2) above contain

principles which uphold human rights and which are free from discriminatory treatment which are universally applicable, including to the Petitioners who, as mining business actors, have such constitutional rights without any discrimination;

5. The phrases “all citizens” and “every person” in Article 27 paragraph (1), Article 28D paragraph (1) and Article 28I paragraph (2) indicate the necessity of the existence of equality, equal treatment instead of the opposite, namely the existence of discrimination of position and unequal and different treatment before the law;

6. The phrase “Business Entities” in Article 38 sub-article *a* and the phrase “Contracts of Work/Work Agreements” in Article 172 of Law 4.2009 are inconsistent with the 1945 Constitution, particularly Article 27 paragraph (1), Article 28D paragraph (1) and Article 28I paragraph (2);

7. The constitutional rights of the Petitioners as Indonesian citizens and as business actors in the field of mining which, among others, conduct mining business using business entities which are not/not qualified as legal entities and as holders of Mining Authorizations and Community Mining Authorizations have been impaired by the coming into effect of the provision of Article 38 sub-article *a* and Article 27 paragraph (1) of the Constitutional Court Law;

B. The Provisions of Article 22 sub-articles a, c, and f, Article 51, Article 52 paragraph (1), Article 55 paragraph (1), Article 60, Article 61 (1), Article 75 paragraph (4) of Law No. 4/2009 are inconsistent with the principles of economic democracy

1. Article 22 sub-articles a, c, and f, Article 51, Article 52 paragraph (1), Article 55 paragraph (1), Article 60, Article 61 (1), Article 169 paragraph (1), Article 75 paragraph (4) of Law No. 4/2009 are potential to reduce and have even eliminated the opportunity for the community, particularly small- and medium-scale entrepreneurs to conduct business in the field of mining which has been going on for so long;

2. Article 22 sub-articles a, c, and f of Law No. 4/2009:

    a. The provision of Article 22 sub-articles a, c, and f constitutes 3 (three) out of the 6 (six) criteria which must be satisfied to designate Community Mining Areas.

       The word "criteria" (*criterion*) means "measurement, standard". As a measurement/standard to stipulate Community Mining Area (*Wilayah Pertambangan Rakyat*/WPR), any one of the elements of such criteria shall not be lacking (they have to be satisfied entirely).

Whereas Law No. 4/2009 contains rules which are applicable and binding to all types of mining, which means that every type of mining activities must refer to this Law, while in fact, each type of mining has different specifications so that the mining process is different and cannot be given a similar treatment;

b. It is impossible to meet the criteria of Community Mining Area being “located in the rivers and/or riverbanks” in Article 22 sub-article a, “terrace deposits, floodplains, and paleochannels” in Article 22 sub-article c as well as the criteria “which have been operated for at least 15 (fifteen) years” in Article 22 sub-article f for several certain types of mining, such as tin, coal, bauxite mining etc. Such criteria cannot be fulfilled because geologically, not all types of mining are located in the rivers and/or riverbanks, and so is the criteria of “constituting an area or a place of community mining activities which has been operated for at least 15 (fifteen) years”;

In practice, the activities of “tin” type community mining until now have not been conducted in rivers or in areas which have been operated for at least 15 (fifteen) years, as they

are also conducted in areas which have never been worked on/mined;

c. The application of the provisions of laws and regulations which are impossible to satisfy and implemented and not in accordance with the custom which is applicable in the relevant community constitutes a law which is illogical and which does not satisfy the community's sense of justice;

d. The provisions of Article 22 sub-articles a, c, and f of Law No. 4/2009 are potential to impair and have impaired the interest of community miners, since people will be no longer able to conduct business activities of democratic economy, particularly in the community mining sector;

Article 33 paragraph (4) of the 1945 Constitution states that:

"The national economy shall be based on economic democracy with the principles of togetherness, efficiency, justice, sustainability, environmental perspective, independence, as well by keeping a balance between the progress and the unity of the national economy."

The phrases “economic democracy, togetherness, justice” in Article 33 paragraph (4) of the 1945 Constitution have given birth to a constitutional norm namely that the national economy based on economic democracy shall be implemented by actively involving community participation as a manifestation of togetherness and justice;

The stipulated criteria for community mining areas in Article 22 sub-articles a, c, and f of Law No. 4/2009 are impossible to satisfy for community miners and they are beyond the custom of the people, so that stipulation of such criteria constitutes an obstruction to the people’s right to conduct business in the field of mining which is guaranteed by the constitution.

3. The phrases “a minimum exploration Mining Business Permit Area (WIUP) of 5,000 (five thousand) hectares for metal mineral and coal Mining Business Permit Area (WIUP)” in Article 52 paragraph (1) and Article 61 paragraph (1), “a minimum non-metal mineral exploration Mining Business Permit Area (WIUP) of 500 (five hundred) hectares”, as intended in Article 55 paragraph (1) of Law No. 4/2009 as well as the phrase “by tender” in Article 51, Article 60, and Article 75 paragraph (4) of Law No. 4/2009, have weakened the Petitioners’ position and competitive edge as small-

/medium-scale entrepreneurs against large entrepreneurs/capital owners and Foreign Capital Investment;

4. The provisions regarding the stipulation of minimum exploration Mining Business Permit Area (WIUP) stipulated in Article 52 paragraph (1), Article 55 paragraph (1) and Article 61 paragraph (1) have directly impaired the constitutional rights of small- and medium-scale mining entrepreneurs;

   The minimum area requirement of 5,000 (five thousand) hectares for exploration Mining Business Permit Area (WIUP) to obtain Mining Business Permit for metal mineral and coal mining types and the minimum area of 500 (five hundred) hectares for non-metal mineral mining type will hamper small- and medium-scale mining entrepreneurs including the Petitioners to obtain Mining Business Permit Areas (WIUP) so that they cannot have the opportunity to conduct business in the field of mining;

5. Such hindered opportunity to obtain Mining Business Permit is caused by the business capital capacity factor, no small fund/capital is required in order to have metal mineral and coal exploration Mining Business Permit Area with a minimum size of 5,000 (five thousand) hectares and non-metal mineral exploration Mining Business Permit Area with a minimum size of 500 (five hundred) hectares,. In addition, in the areas/small islands such as

Bangka Belitung Islands and Bintan Island, it is very difficult to obtain Mining Business Permit Area of 5,000 (five thousand) hectares in one plain area;

6. Whereas every citizen who conducts business activities in Indonesia shall be in a business competition situation which is sound and fair, so as to prevent concentration (monopoly) of economic power by certain individuals or groups;

7. The phrase “by tender” in Article 51, Article 60, and Article 74 paragraph (4) of Law No. 4/2009 has confronted large entrepreneurs/foreign entrepreneurs (Foreign Capital Investment) to small-/medium-scale entrepreneurs freely and openly to have the opportunity to obtain Mining Business Permits/Special Mining Business Permits with unbalanced capacities;

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

“Every person shall have the right to obtain facilities and special treatment in obtaining equal opportunities and benefits in order for achieving equality and justice.”

The phrase “shall have the right to obtain facilities and special treatment” as well as the phrase “equality and justice” reflect the constitutional norm regarding “Justice” adhered to by the 1945 Constitution namely justice which reflects togetherness among the

strong and the weak, namely by providing facilities and special treatment to the weak party/group;

The Mining Business Permit Area “Tender” mechanism is in substance contesting the financial strength of tender participants. Therefore, obtaining Mining Business Permit through tender mechanism freely and openly by confronting small-/medium-scale entrepreneurs to large entrepreneurs/foreign capital (Foreign Capital Investment) as regulated in Article 52 paragraph (1), Article 55 paragraph (1), and Article 61 paragraph (1), Article 51, Article 60, and Article 74 paragraph (4) of Law No. 4/2009 is already inconsistent with the spirit of just economic democracy as referred to in Article 33 paragraph (4) of the 1945 Constitution;

8. Whereas based on the aforementioned provision of Article 28I paragraph (2) of the 1945 Constitution, there should be similarity and equality among citizens both as individuals and as groups, so that there shall be no discrimination or lower/weaker positioning between one and another;

9. Whereas the provisions regulated by Article 22 sub-articles a and f, Article 38 sub-article a, Article 52 paragraph (1), Article 55 paragraph (1), Article 58 paragraph (1), Article 61 paragraph (1), Article 55, Article 60, Article 169 paragraph (1), Article 75 paragraph (4), Article 172 of Law No. 4/2009 are potential to reduce

and have even eliminated the opportunity of the people/small- and medium-scale entrepreneurs to conduct business in the field of mining particularly Tin mining in Bangka Belitung Islands Province which has been going on for so long;

10. The provision of Chapter XXV regarding Transitional Provision in Article 169 paragraph (1), Article 172 of Law No. 4/2009 has positioned holders of Contracts of Work for coal mining, which *nota bene* are foreign capital companies (Foreign Capital Investment), and holders of Mining Authorizations and Community Mining Authorizations discriminately and unequally before the law, since Law No. 4/2009 only grants tolerance/dispensation by only recognizing the coming in to effect of Contracts of Work and Work Agreements for coal mining as a result of the coming into effect of Law No. 4/2009, while Mining Authorizations and Community Mining Authorizations are not granted any tolerance/dispensation by the Transitional Provision of Article 169 of Law No. 4/2009. In fact on the contrary, following the coming into effect of Law No. 4/2009, Mining Authorizations and Community Mining Authorizations have been declared No Longer Applicable;

11. The provision of Article 173 paragraph (2) of Law No. 4/2009 cannot be used as for legal basis for applying Mining Authorizations and Community Mining Authorizations because of non-fulfillment of

the requirement “to the extent not inconsistent with the provisions of this Law”.

The legal status of Mining Authorizations and Community Mining Authorizations, including the legal status of Contracts of Work and Work Agreements regulated by Law Number 11 Year 1967 concerning Basic Provisions of Mining has fundamental and principal inconsistencies/differences with the legal status of Mining Business Permit, Special Mining Business Permit and Community Mining Business Permit regulated in Law No. 4/2009;

12. As the persons (parties) who until now have conducted tin mining business activities, the Petitioners are of the opinion and believe that the provisions of Law No. 4/2009, particularly the provisions of Article 22 sub-articles a, c and f, Article 38 sub-article a, Article 51, Article 52 paragraph (1), Article 55 paragraph (1), Article 60, Article 61 (1), Article 75 paragraph (4), and Article 172 contain rules and requirements which have impaired and which may impair the Petitioners’ constitutional rights as Indonesian citizens to be able to conduct mining business, since they have positioned the Petitioners as small-/medium-scale entrepreneurs in a weak and unbalanced position compared to large mining entrepreneurs and foreign capital entrepreneurs (Foreign Capital Investment);

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

“Every person shall have the right to obtain facilities and special treatment in obtaining equal opportunities and benefits for achieving equality and justice.”

Article 33 paragraph (4) of the 1945 Constitution states that:

“The national economy shall be organized based on economic democracy with the principles of togetherness, efficiency, justice, sustainability and environmentally perspective, independence and by keeping a balance between progress and unity of the national economy.”

Such provisions of Article 28H paragraph (2) and Article 33 paragraph (4) of the 1945 Constitution have given birth to constitutional norms which place/position the Petitioners’ rights as medium-/small-scale miners and community miners in an equal and just manner compared to the treatment to large mining entrepreneurs and foreign investors (Foreign Capital Investment);

The phrase “shall have the right to obtain facilities and special treatment in obtaining equal opportunities and benefits” in Article 28H paragraph (2) of the 1945 Constitution has given birth to a constitutional norm which protects the existence of small-/medium-scale mining and community mining in obtaining equal and just opportunities and benefits in conducting business in the mining

sector by providing facilities and special treatment which are different from large mining entrepreneurs and foreign investors (Foreign Capital Investment);

14. The phrases “a minimum exploration Mining Business Permit Area (WIUP) of 5,000 (five thousand) hectares for metal mineral and coal Mining Business Permit Area (WIUP)” and “a minimum non-metal mineral exploration Mining Business Permit Area (WIUP) of 500 (five hundred) hectares” as referred to in Article 52 paragraph (1), Article 55 paragraph (1), Article 61 paragraph (1) of Law No. 4/2009 as well as the phrase “by tender” in Article 51, Article 60, and Article 75 paragraph (4) of Law No. 4/2009, have positioned small-/medium-scale entrepreneurs equally in an absolute manner with large entrepreneurs/Foreign Capital Investments in exercising the rights and performing obligations in fulfilling the requirement for obtaining Mining Business Permit Area (WIUP), and are potential to impair the Petitioners’ constitutional rights as medium-/small-scale miners;

IV. CONCLUSIONS

Based on the matters described and proposed by the Petitioners above, it can be concluded as follows:

1. Whereas every citizen shall be free from discriminatory treatment on any basis whatsoever and shall be protected against such discriminatory treatment, including discriminatory treatment in disguise which is protected on behalf of law;

2. Whereas every citizen shall have equal rights and opportunities to conduct business activities in the field of mining in accordance with his/her capacity and capability based on the principles of economic democracy as referred to in Article 33 paragraphs (1) and (4) of the 1945 Constitution;

3. Whereas the definition of "Business Entity" pursuant to Article 1 sub-article 23 of Law No. 4/2009 constitutes a discriminatory treatment against Business Entities which are not Legal Entities in obtaining Mining Business Permits as referred to in Article 38 sub-article a of Law No. 4/2009. Hence, the provision of Article 169 sub-article a and Article 172 of Law No. 4/2009 has also discriminated between holders of Mining Authorizations and Community Mining Authorizations and holders of Contracts of Work/Work Agreements for Coal Mining;

4. Whereas the minimum area requirement for Exploration Mining Business Permit Area regulated in Article 52 paragraph (1), Article 55 paragraph (1), Article 58 paragraph (1), and Article 61 (1) of Law No. 4/2009 and Mining Business Permit Area Tender mechanism to obtain Special Mining Business Permit Area as regulated in Article 51, Article 61 and Article 75 paragraph (4) of Law No. 4/2009 have obstructed and tripped medium-

/small-scale entrepreneurs' right to obtain metal mineral and coal Mining Business Permits (IUP) and Special Mining Business Permits (IUPK);

5. Whereas therefore, the provisions of Article 22 sub-articles a, c and f, Article 38 sub-article a, Article 51, Article 52 paragraph (1), Article 55 paragraph (1), Article 60, Article 61 (1), Article 75 paragraph (4), Article 172 of Law No. 4/2009 have been inconsistent with the 1945 Constitution, particularly Article 28I paragraph (2), Article 33 paragraphs (1) and (4) and they shall be declared unconstitutional;

V. ***PETITUM***

Based on the matters described by the Petitioners above and the attached exhibits, the Petitioners hereby request for the Panel of Constitutional Justices examining, hearing and deciding upon the Petitioners' petition to pass the decision with the following injunctions:

1. To accept and grant the Petitioners' petition entirely;

2. To declare the provisions of Article 22 sub-articles a, c and f, Article 38 sub-article a, Article 51, Article 52 paragraph (1), Article 55 paragraph (1), Article 60, Article 61 (1), Article 75 paragraph (4), Article 169 sub-article a and Article 172 of Law No. 4/2009 inconsistent with the 1945 Constitution, particularly the provisions of Article 27 paragraph (1), Article 28D paragraph (1), Article 28H paragraph (2), Article 28I paragraph (2), Article 33 paragraphs (1) and (4), which shall be unconstitutional;

3. To declare that Article 22 sub-articles a, c and f, Article 38 sub-article a, Article 51, Article 52 paragraph (1), Article 55 paragraph (1), Article 60, Article 61 paragraph (1), Article 75 paragraph (4), Article 169 sub-article a and Article 172 of Law No. 4/2009 do not have any binding legal force with all its legal consequences;

4. To declare that this decision shall be promulgated in the Official Gazette of the Republic of Indonesia;

Or:

Should the Panel of Constitutional Court Justices examining, hearing and deciding upon this case be of a different opinion, the Petitioners request for the decision to be passed by principles of what is fair and just (*ex aequo et bono*).

[2.2] Whereas to evidence their arguments, the Petitioners have presented written evidence marked as Exhibits P-1 through P-8, as follows:

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

2. Exhibit P-2 : Photocopy of Deed of Notary Wahyu Dwi Cahyo, S.H.Mkn, Decision Letter of the Minister of Law and Human Rights number C-784.HT. 03.01.TH.2004 dated December 31, 2004 concerning Deed of

Establishment of the Indonesian Tin Miners' Association;

3. Exhibit P-3 : Photocopy of Deed of Notary Mary Mayasari, S.H. Mkn, Decision Letter of the Minister of Law and Human Rights number C-281.HT. 03.01.Th.2005 dated July 25, 2005 concerning Deed of Establishment of the Regional Community Mining Association dated April 21, 2010;

4. Exhibit P-4 : Photocopy of Identity Card in the name of Johan Murod;

5. Exhibit P-5 : Photocopy of Identity Card in the name of Zuristyo Firmadata;

6. Exhibit P-6 : Photocopy of Identity Card in the name of Johardi;

7. Exhibit P-7 : Photocopy of Identity Card in the name of Hendra Apolo;

8. Exhibit P-8 : Photocopy of Identity Card in the name of Nico Plamonia Utama;

In addition, the Petitioners also presented one Expert and 2 (two) witnesses who gave their statements under oath during the court hearings on December 15, 2010 and March 9, 2011, which in substance stated as follows:

The Petitioners' Expert

H. Ismiryadi

- The Expert can sense the existence of an ironical condition experienced by Bangka Belitung community in relation to tin mining. The existence of Laws related to regional autonomy has slightly released Bangka Belitung community from the chains. However, with the existence of Law No. 4/2009 the Bangka Belitung community feels fettered again;

- The Expert has had the occasion to appear before Commission VII to question the provision of Article 22 deemed inconsistent with the provisions of the Environment Law as stated by witness Rudi Fitrianto. During the meeting with Commission VII, the Expert received an explanation that "rivers" in Article 22 of Law No. 4/2009 refers to paleochannels, underground rivers. However, in the Expert's opinion, the text of Article 22 states "rivers" and "riverbanks" and "river borders". Meanwhile, environment law enforcement does not talk about paleochannels, but it talks about rivers on the surface due to the existence of the word "border". Therefore, any regional head implementing the aforementioned provision of Article 22 must be ready to face a suit under the Environment Law. The Expert believes that community miners do not dare to conduct such mining activities. This, in the Expert's opinion,

causes injustice for Bangka Belitung community who want to process their natural resources in the form of tin ore;

- It needs attention to revise Article 22 sub-article b of Law No. 4/2009 regarding the maximum depth of 25 meters, since there is a provision to dig up to the aforementioned depth of 25 meters using simple tools, even the horse power has been determined, while in fact, in the field practice, it is difficult to do. Any person using heavy-duty equipment would surely be arrested since the Law states that simple tools must be used;

- The logic of exploration Mining Business Permit granted to tender awardee, in the Expert's opinion, does not make any sense since the law on the tender of goods has had a prediction of how much result will be taken from the ground to be tendered. Such tendered goods are like "a pig in a poke", as it is unclear how much material is there within the earth being tendered by the regional government;

- The Mining Authorization in the domain of permits is the most expensive as to exploration expenses since according to the Expert's experience, drilling expense for one point is Rp 500,000.00 to obtain a few existing deposits. The question is, can the government provide the guarantee of tin production?;

- Whereas the Expert conveyed some more matters regarding the plain area of the minimum area of 5,000 hectares, and by chance the Expert once attended a socialization session of this Law;

- Regarding such plain area of 5,000 hectares, when the Expert attended the socialization session on Law No. 4/2009, it was explained at that time that the plain area was not allowed to be smaller than 5,000 hectares, even though such area overlapped people's settlement. The Expert was of the opinion that there was "a shrimp behind the stone/a hidden motive" in such provision, namely the reclamation deposit, since one of the requirements to obtain a Mining Business Permit was to pay the reclamation which, pursuant to Law No. 11/1967, totaled 750 US Dollar per hectare. This, in the Expert's opinion, is impossible to apply in Bangka Belitung since its area does not reach 1/3 of the size of West Kalimantan, except, if such plain area is divided into areas of 500 hectares being located in several places in the name of the same company as it is the case is with oil palm permit;

- In relation to Article 169 sub-article a, which in substance states that contracts of work and work agreements already existing prior to the coming into effect of Law No. 4/2009 shall remain valid until they expire, the Expert, also acting as the Chairperson of the Regional People's Legislative Assembly of Bangka Belitung Province, has invited PT. Timah, which during such forum stated that PT. Timah has Mining Authorization

permit until 2027, while regional governments starting from the governors, mayors, regents in average grant permits until 2013. There is a permit gap between 2013 and 2027. This 14-year time is not easy. If Law No. 4/2009 is not revised, particularly Article 22, you will never dream that Bangka Belitung community can participate in enjoying their natural resources with all the existing permits pursuant to the Regional Autonomy Law;

The Petitioners' Witnesses

1. IR. MB. Gunawan, M.M.

- Whereas the Witness works in the tin sector in Bangka Belitung;
- Whereas in relation to the article which states that the minimum Exploration Mining Business Permit Area shall be 5,000 hectares, several operational obstacles in the field can be conveyed;
- The first is concerned with the area size. Such area of 5,000 hectares is highly impossible in Bangka Belitung Islands because the area has been mostly urban or rural areas, being settlement areas of the population. That is from the aspect of size and area;
- Whereas from the aspect of existence or plain area of the mineral deposits therein, the minimum area of 5,000 hectares is also too large;

- Whereas before the Witness applied for a Mining Authorization, which was at that time called Mining Authorization, but now it is called Mining Business Permit, a prior geological research had certainly been conducted, and until now, the maximum tin reserve plain areas found in Bangka Island is the maximum valley width of 200 meters;

- Whereas let's say that we take 30% of the area of 5,000 hectares, it equals 2,000 hectares, which means 2,000,000 m^2. The areas of 2,000,000 m^2 divided by the valley width of 200 meters means 100,000 meters, namely 100 km;

- Whereas such tin or tin mineral deposit is found at a maximum of 15 km of its source, so that it would be highly impossible, highly illogical if we have to take up the 100 km;

- Whereas for the Witness as a medium- and small-scale entrepreneur, applying for 5,000 hectares would not have insignificant financial consequences;

- Whereas with the aforementioned three considerations, eventually for the Witness it is not applicable at all on field;

- Whereas community mining business permit which states that it may be granted for areas which have been operated for 15 years also constitutes something which will never be possible;

- Whereas such community mining is mostly conducted in areas which actually have not been mined;

- Whereas tin reserve exists along the craters;

- Whereas such large craters have been mined by large companies, at that time PT Timah and other companies, while small craters which they deemed uneconomical were abandoned, so that they are mined by community miners;

- Whereas it is and it will be impossible for the areas to have been operated for 15 years since tin will be exhausted in a maximum of 3 years when mined in that way due to its being in the form of deposit;

- Whereas there has never been one single mine in Bangka Island which reaches 10 years in one mining front area, let alone 15 years;

2. Rudi Fitrianto

- Whereas if Law No. 4/2009 is actually applied, community mining activities currently existing in Bangka Belitung would not, of course, provide a sense of justice for the community;

- Whereas Article 22 of Law No. 4/2009 explains to or requires the community to mine in the rivers, in the middle of rivers, and in riverbanks;

- Whereas the community's conducting such mining activities will be automatically inconsistent with the Environmental Law. In Law No. 4/2009 itself, the community is advised to mine in the rivers;

- Whereas in this case, the community is trapped because when working in watershed areas and the law enforcement process is carried out, they will be charged with the Environmental Law, and the watershed is also a factual condition;

- Whereas if Law No. 4/2009 itself is applied to mining areas and community mining activities in Bangka Belitung, automatically the community cannot conduct mining activities, since the Law itself explicitly stops the community's mining activities;

[2.3] Whereas to respond to the arguments of the Petitioners' petition, the Government has conveyed its verbal statement at the hearing on Wednesday, October 27, 2010, and submitted its written statement during the hearing on Wednesday, December 15, 2010, principally stating as follows:

I. THE SUBSTANCE OF THE PETITIONERS' PETITION

The Petitioners have 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-articles a, c and 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, the substance of which, according to the Petitioners, is as follows:

1. Whereas the provisions of Article 6 paragraph (1) sub-paragraph e, Article 9 paragraph (2), Article 10 sub-article b of Law No. 4/2009 are deemed to have denied the community's collective rights, particularly the right to self determination, the right to use natural riches and resources, the right to mining, minority rights (particularly if mining areas take away the rights of traditional communities) as well as the right to environment, so that the aforementioned provisions are inconsistent with the principles of justice and participation, and have indirectly accommodated the current practices of exploitation of Indonesian natural riches as well as continued the colonial view through ownership of land in large scale and for a very long period, facilitation of large investors, mobilization of cheap and export-oriented productive workforce, and lack of seriousness in protecting the people's land titles, particularly in relation to the clauses regarding the authority of the government to stipulate mining areas without involving the decision of landowners, as well as without considering whether the mining business damages the environment or violates people's property rights. In

brief, according to the Petitioners, the provisions *a quo* have resulted in the designation of mining areas without involving the decision of landowners, with community's refusal to mining area designation process being made impossible, and with the Indonesian mining business development profile having more facts of human affliction as well as damaging and destructive power against the environment than its contribution to the development of the nation's economy.

2. Whereas the provision of Article 22 sub-articles a, c, and f of Law No. 4/2009 is deemed potential to reduce and even to have eliminated the opportunity for community members/small- and medium-scale entrepreneurs to do business in the mining sector, as well as leading to the interpretation that mining activities may only be conducted on ex-mining sites which have been previously exploited.

3. Whereas the provision of Article 38 of Law No. 4/2009 is deemed to have discriminated the status or have given unequal treatment between business entities with legal entity status and business entities without legal entity status, since only business entities qualified as legal entities are eligible to obtain Mining Business Permits.

4. Whereas the provision of Article 51 of Law No. 4/2009 is deemed inconsistent and contradictory to the philosophy of economic democracy which prioritizes the principles of togetherness and justice, and Article 52 paragraph (1), Article 55 paragraph (1), Article 58 paragraph (1), Article

60, Article 61 paragraph (1) of Law No. 4/2009 have, in a disguised manner, prevented and stripping medium/small-scale entrepreneurs from obtaining Mining Business Permits in the name of law, because it is impossible for small/medium- scale enterprises to meet such minimum area requirement for Exploration Mining Business Permit Area. According to the Petitioners, the Mining Business Permit Area of 5,000 (five thousand) hectares has limited the rights of other persons not having sufficient capital to run a business in the mining sector.

5. Whereas the provision of Article 75 paragraph (4) of Law No. 4/2009 is deemed unjust since it has confronted medium/small-scale business entities and cooperatives against large business entities.

6. Whereas the provision of Article 162 of Law No. 4/2009 is deemed to have eliminated the meaning of the recognition, guarantee, protection and legal certainty of just laws, as well as equal treatment for every citizen before the law, and is deemed to have legitimized the practice of criminalization against civil community members criticizing or protesting against mining companies.

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

II. Regarding the Legal Standing of the Petitioners

Pursuant to the provision of Article 51 paragraph (1) of the Constitutional Court Law, 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 "constitutional rights" refer to rights granted by the 1945 Constitution of the State of the Republic of Indonesia. Hence, for a person or a party to be eligible as the Petitioner having legal standing in a petition for judicial review of Law against the 1945 Constitution of the State of the Republic of Indonesia, the Petitioners must first explain and substantiate:

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

b. Their constitutional rights and/or authority in the qualification deemed to have been impaired by the coming into effect of the Law being reviewed;

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

Furthermore, the Constitutional Court has provided the meaning and definition cumulatively regarding the impairment of constitutional rights and/or authority due to 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 11/PUU-V/ 2007), which must satisfy 5 (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 Law being petitioned for review;

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

d. There is a causal relationship (*causal verband*) between the intended impairment and the coming into effect of the Law being 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.

Hence, the Government needs to question the interest of the Petitioners, whether it is already appropriate for them to be the parties considering that their constitutional rights and/or authority have been 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 there is any impairment of such constitutional rights and/or authority which is specific and actual or at least potential in nature which, pursuant to logical reasoning, can be assured of occurring, and whether there is a causal relationship (*causal verband*) between the impairment and the coming into effect of the Law being petitioned for review.

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

Particularly for the Petitioners in the registered case Number 32/PUU-VIII/2010, the Petitioners do not clarify their standing or position in mining activities in the Provinces of: Papua, East Nusa Tenggara, North Sulawesi, East Java, Yogyakarta Special Region, Jakarta Capital City Special Region, Bengkulu, and West Nusa Tenggara.

Based on the description above, the Government requests for the Chief Justice/ Panel of Constitutional Court Justices to wisely declare that the Petitioners' petition shall not be granted or at least cannot be accepted (*niet ontvankelijk verklaard*). Nevertheless, if the Chief Justice/Panel of Constitutional Court Justices is of a different opinion, the explanation of the Government in relation to the material being petitioned for review by the Petitioners is conveyed as follows:

III. The Government's Explanation on the Petition for Review of Law Number 4 Year 2009 Concerning Mineral and Coal Mining

With respect to the materials of the aforementioned Petitioners' petition, the Government shall first convey the purposes and main thoughts on the

management of mineral and coal as stipulated in Law No. 4/2009, in which the purposes of the management of mineral and coal are o other than to:

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

2. Guarantee the benefits of mineral and coal mining in sustainable manner and with environmental perspective;

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

4. Support and develop 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. Guarantee legal certainty in the implementation of mineral and coal mining business activities.

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

1. Mineral and coal as non-renewable resources shall be owned 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 provide the opportunity to Indonesian incorporated business entities, cooperatives, individuals, as well as local community to conduct mineral and coal mining business activities based on the permit, in line with the regional autonomy, granted by the Government and/or regional governments according to their respective authorities.

3. In the context of implementing decentralization and regional autonomy, mineral and coal mining shall be managed based on the principles of externality, accountability, and efficiency which shall involve the Government and the 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 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.

Furthermore, the Government can give an explanation on the Petitioners' assumptions/arguments as follows:

1. **With regard 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 Areas (WP) after the coordination with the regional governments and the consultation with the People's Legislative Assembly, and the Mining Areas (WP) as intended in paragraph (1) shall be stipulated by the Government after the coordination with the regional governments and the consultation with the People's Legislative Assembly of the Republic of Indonesia" 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 by not allowing for the involvement of the decision of landowners and community's refusal of the process of mining area designation

   The Government fives the following explanation:

   Whereas the statement that stipulation of Mining Areas is the authority of the Government in the management of mineral and coal

mining after the coordination with the regional governments and the consultation with the People's Legislative Assembly, and shall be stipulated by the Government after the coordination with the regional governments and the consultation with the People's Legislative Assembly of the Republic Indonesia is a 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 democratically elected through general elections held in a direct, general, free, and secret as well as in a honest and fair manner.

The provision of Article 6 paragraph (1) sub-paragraph e *juncto* Article 9 paragraph (2) of Law No. 4/2009 regulating the criteria for the Authority in the Management of Mineral and Coal Mining and the criteria for Mining Areas is aimed at providing legal certainty for an area with respect to whether or not mining business activities may be conducted in the relevant area. The designation of Mining Areas by the Government is based on the provision of Article 1 sub-article 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:

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.

and Article 15 states:

(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.

Hence, it is clear that the designation of a mining area shall conducted in accordance with the provisions on spatial layout regulated in Law Number 26 Year 2007 concerning Spatial Layout Plan (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 paragraphs (1), (2), (3), (4), Article 27 paragraph (1), Article 28C paragraph (2), Article 28D paragraph (1), Article 28G paragraph (1), Article 28H paragraphs (1) and (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. Hence, 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, legal uncertainty.

2. **With regard to the Petitioners' Opinion on the Provision of Article 10 sub-article b of Law No. 4/2009, which principally states that:**

Whereas according to Petitioners, the phrase *the designation 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 affliction as well as damaging and destructive power to the

environment compared to their contributions to the development of the nation's economy. The local people whose area will be turned into mining areas are being positioned only for consultation and consideration, without mechanism being provided for the landowners 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 the opinions of the relevant government agencies, the community members, and by considering the ecological, economic, and socio-cultural aspects as well as environmental perspective; and with due observance of the aspirations of the regions, is intended for providing legal certainty for the communities around the mining sites to be able to participate actively in the designation of mining areas for the implementation of mining business activities in Indonesia, which is in line with the purpose of the formulation of Law No. 4/2009, namely to guarantee legal certainty in the implementation of mineral and coal mining business activities.

Subsequently, 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 for the provincial governments, regency/municipal governments, and the community.

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

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

Article 16

(1) Spatial layout plans may be reviewed.

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

a. the existing spatial layout plan may remain applicable in accordance with its effective period; or

b. the existing spatial layout plan need 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 paragraphs (1), (2), (3), (4), Article 27 paragraph (1), Article 28C paragraph (2), Article 28D paragraph (1), Article 28G paragraph (1), Article 28H paragraphs (1) and (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 being made as the test tool/touchstone by the Petitioners. Hence, 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 regard to the Petitioners' Opinion on the Provision of Article 22 sub-articles a, c, and 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 rivers and/or riverbanks 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 rivers and/or riverbanks. In fact, the provision of the Regional Regulations of Regencies/Cities throughout the Province of Bangka Belitung Islands prohibit mining activities at locations of rivers and/or riverbanks.

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

Whereas the phrase “have 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 by the previous miners.

Whereas the phrase “have been operated” in Article 22 sub-article f of Law No. 4/2009, according to the Petitioners, may lead to the interpretation that mining activities may only be conducted in ex-mining sites which have been previously operated, which have

certainly been exploited by large companies which have been conducting mining activities for so long, 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 Areas is intended for providing legal certainty to the community having the intention to conduct community mining as well as providing the opportunity for 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 regents/mayors after the consultation with the regional people's representative assembly of districts/municipals. Article 67 paragraph (1) of Law No. 4/2009 also regulates the granting of authority to regents/ mayors to issue Community Mining Permits (IPR).

With the authority granted by Law No. 4/2009 to the Regents/Mayors in designating Community Mining Areas, the application of criteria for designating Community Mining Areas as intended in Article 22 of Law No. 4/2009 shall be delegated to the

regents/ mayors according to the conditions and characteristics of each region. Furthermore, the words “**and/or**” in Article 22 needs to be considered, which can be interpreted that the criteria for designating Community Mining Areas may be “cumulative” or “alternative” in nature. Hence, the regents/mayors may stipulate which criteria are suitable to the conditions of their regions. The application of criteria for designating Community Mining Areas will be further regulated in Regional Regulation.

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

Mining business activities may not be conducted in places where mining business activities are prohibited in accordance with the provisions of laws and regulations.

Based on the aforementioned Article, if the Regional Regulation prohibits mining at certain locations, such as in the rivers and/or riverbanks, then mining business activities may not be conducted there. In fact, this is not inconsistent with the substance of Article 22 of Law No. 4/2009 because the criteria of Community Mining Areas in Article 22 will be delegated to the regents/mayors to determine which criteria are compulsory in nature and which 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 mining sites which have been operated for at least 15 (fifteen) years were true, that would not restrict the opportunity for people to conduct mining, particularly tin mining in Bangka Belitung Province, because Article 24 of Law No. 4/2009 states that:

"Areas or locations of community mining activities which have been operated but have not been designated as Community Mining Areas shall be prioritized to be designated as Community Mining Areas".

Based on the aforementioned Article 24 of Law No. 4/2009, community mining sites existing prior to the enactment of Law No. 4/2009 shall be prioritized to be designated as Community Mining Areas, so that the community in Bangka Belitung Province may still conduct mining business activities within the Community Mining Areas.

Hence, according to the Government, the provisions of Article 22 sub-articles a, c, and f of Law No. 4/2009 **are not inconsistent with** Article 28I paragraph (2), Article 33 paragraphs (1) and (4) of the 1945 Constitution, because Article 22 sub-articles a, c, and f of Law No. 4/2009 is in fact intended for providing legal certainty to

community mining activities as well as for accommodating the conditions and characteristics of regions and providing legal certainty to the community having the intention to conduct community mining as well as giving the opportunity for 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 community mining areas shall be delegated to the regents/mayors after the consultation with the regional people's representative assembly of regencies/municipals. Article 67 paragraph (1) of Law No. 4/2009 also regulates the granting of authority to regents/ mayors to issue Community Mining Permits.

With the authority granted by Article 21 and Article 67 of Law No. 4/2009 to the regents/mayors in designating Community Mining Areas and issuing Community Mining Permits, the application of criteria for designating Community Mining Areas as intended in Article 22 of Law No. 4/2009 shall be delegated to the regents/ mayors according to the conditions and characteristics of each region. The words "and/or" in Article 22 need to be considered, because it may be interpreted that the criteria for designating Community Mining Areas may be "cumulative" or "alternative" in nature. Hence, the regents/mayors may stipulate which criteria are

suitable to the conditions of their regions. The application of the criteria for designating Community Mining Areas will be regulated in a Regional Regulation.

The Government is of the opinion that the Petitioners' assumption that the land has previously been fully exploited by large companies is groundless because in accordance with the provisions of applicable laws and regulations, Community Mining Areas shall not overlap with Mining Authorization areas or areas of Contracts of Work/Work Agreements for Coal Mining Operation (PKP2B).

Hence, according to the Government, the provisions of Article 22 sub-articles a, c, and 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 of the State of the Republic of Indonesia, because Article 22 sub-articles a, c, and 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. Hence, 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 regard 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 intentionally given unequal status and treatment between incorporated business entities and unincorporated business entities in obtaining a Mining Business Permit. Article 38 of Law No. 4/2009 states that:

"*Mining Business Permits shall be granted to:*

a. business entities;

b. Cooperatives; and

c. Individuals."

Meanwhile, 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 a Mining Business Permit, which means that Mining Business Permits cannot be granted to "business entities" which are not "legal entities". From the corporate law point of view, not all "business entities" are "legal entities". Business entities qualified as

"legal entities" are Limited Liability Companies, Cooperatives, State Companies, Regional Companies etc. Meanwhile, under Article 38 sub-article a of Law No. 4/2009, Mining Business Permits cannot be granted to business entities in the form of Limited Partnerships (*Commanditer Vennootschap* (CV)), Firms, and Trade Companies, while Mining Business Permits can be granted to business entities in the form of legal entities and individuals.

Therefore, according to the Petitioners, any provision which unfairly gives unequal treatment (discriminatory) in order to be able to conduct 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 participation in conducting mining business activities may be conducted by forming a business entity, cooperative, or individual.

In Law Number 4 Year 2009 concerning Mineral and Coal Mining, the phrase "business entity" is indeed defined as "incorporated business entity", but it does not mean that an unincorporated business entity is not accommodated or in other words, it cannot be granted, a Mining Business Permit under Law No. 4/2009.

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

"*Further provisions on the procedures for the granting Exploration Mining Business Permits ... and Production Operation Mining Business Permits ... shall be regulated in a Government Regulation.*"

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

Article 6 paragraphs (1) and (3) of Government Regulation Number 23 Year 2010 concerning the Implementation of Mineral and Coal Mining Business Activities states that:

Paragraph (1):

"*Mining Business Permits shall be granted to:*

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

As seen from its characteristics, Trading Companies also can actually be categorized as sole proprietorships. Nevertheless, it is necessary to note that Exploration Mining Business Permit and Production Operation Mining Business Permit are indeed not granted to Trade Companies, considering that Exploration Mining Business Permit and Production Operation Mining Business Permit are only granted to business entities, cooperatives, and individuals engaging in the field of mineral and coal mining. Meanwhile, the

activities of a Trade Company are limited only to goods and/or services trading activities.

If a Trade Company has an intention to conduct special mining business activities in the field of mineral and/or coal trading, then the Trade Company shall be granted a Special Production Operation Mining Business Permit for Trading and Transportation.

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 completely groundless. Hence, the norm of Article 38 sub-article a of Law No. 4/2009 is not inconsistent with the norms of Article 28D paragraph (1), 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 completely groundless. Hence, the norm of Article 38 sub-article a of Law No. 4/2009 is not inconsistent with the norms of Article 28D paragraph (1), Article 28I paragraph (2), and Article 33 paragraph (5) of the 1945 Constitution.

5. With regard to the Petitioners' Opinion on the Provision 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 metal mineral and coal Mining Business Permit/Special Mining Business Permit 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 Mining Business Permits/Special Mining Business Permits for metal mineral and/or coal.

Whereas Article 51, Article 60, Article 75 paragraph (4) of Law No. 4/2009 regulating the granting of metal mineral and coal Mining Business Permit Area/Special Mining Business Permit Area by tender system are deemed unfair for confronting medium/small-scale business entities and cooperatives against large business entities, particularly foreign companies (Foreign Capital Investment). This has directly placed medium/small-scale business entities and cooperatives in a weak position to compete in the tender for Mining Business Permit Area/Special Mining Business Permit Area.

Whereas according to the Petitioners, the granting of metal mineral and coal Mining Business Permit/Special Mining Business Permit

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 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 Mining Business Permit Area is to implement the principles of transparency, justice, and accountability enshrined in Article 2 sub-articles a and c of Law No. 4/2009. With the application of the tender system for metal mineral and coal Mining Business Permit Area, business entities, cooperatives, and individuals have an equal opportunity to obtain metal mineral and coal Mining Business Permit Area.

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. Such data and information collection is obtained based on the results of survey and research as well as exploration conducted by the Central/Regional Government. Since such data and information

have an economic value, it is very reasonable to apply the tender system for metal mineral and coal Mining Business Permit Area.

The tender system for metal mineral and coal Mining Business Permit Area regulated in Law No. 4/2009 is not at all intended for hampering/preventing medium/small-scale entrepreneurs from obtaining metal mineral and coal Mining Business Permit Area or an effort to confront large-scale business entities against small/medium-scale business entities.

Conducting business activities in the field of metal mineral and coal, especially exploration activities, indeed requires enormous cost (high capital); high risk and high technology. If small/medium-scale entrepreneurs have the intention to mine metal mineral and coal in a Mining Business Permit Area/Special Mining Business Permit Area, then the small/medium-scale entrepreneurs may merge their businesses to be able to compete with entrepreneurs having strong capital in the tender for Mining Business Permit Area/Special Mining Business Permit Area.

Another alternative which may be sought by small/medium-scale entrepreneurs to do business of metal mineral and coal is to submit an application for Community Mining Permit to the local regent/mayor as regulated in Article 47 paragraph (1) of

Government Regulation Number 23 Year 2010 concerning the Implementation of Mineral and Coal Mining Business Activities.

Hence, Law No. 4/2009 has, in fact, provided an equal yet proportional opportunity in encouraging economic activities of the community/small- and medium-scale entrepreneurs which will eventually allow for small/medium-scale entrepreneurs to play a role in accelerating the development of 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 metal mineral and coal Mining Business Permit Area or constitute an effort to confront large-scale business entities against small/medium-scale business entities is incorrect. Hence, the norms of Article 51, Article 60, Article 75 paragraph (4) of Law No. 4/2009 are not inconsistent with the norms of Article 33 paragraph (4) of the 1945 Constitution.

6. **With regard to the Petitioners' Opinion on 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, which principally states that:**

Whereas according to the Petitioners, the phrase “a maximum area of 25 (twenty-five) hectares” in Article 52 paragraph (1) 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 permit, with the birth of this Law No. 4/2009 being seemingly intended for gradually eradicating community mining activities.

Whereas Article 52 paragraph (1) of Law No. 4/2009 has clearly given the privilege and opportunity by the state to mining businesses which so far have 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 evidenced in Article 52 paragraph (1).

Whereas all mineral sources throughout the Indonesian territory have been transferred by the Government, particularly by the new order regime, to profit-oriented, foreign, domestic private, and state-owned mining companies. Such privilege is also given to PT. Timah, Tbk. as a state company and PT. Koba Tin as a foreign company obtaining a Contract of Work from the government. Therefore, all of tin resources in Bangka Belitung have been under the control of large-scale tin mining companies. Therefore, it is

clear that Article 52 paragraph (1) of Law No. 4/2009 has positioned natural resources which should have been controlled by the state for the prosperity of the people can 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 an exploration Mining Business Permit Area provided for 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 stipulated exploration Mining Business Permit Area so determined will have the consequence of financing which must be incurred by the Mining Business Permit applicant, namely, among other things, in the form of:

a. guarantee deposit;

b. reclamation deposit;

c. land acquisition compensation; and

d. operating costs

in extremely large amount and which is unlikely for to be paid by small- and medium-scale entrepreneurs.

Therefore, according to the Petitioners, stipulation of minimum area of exploration Mining Business Permit Area is inconsistent with

economic democracy which prioritized 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:

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 from conducting mining business activities. Article 38 sub-article c of Law No. 4/2009 basically states that Mining Business Permit may 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 PT. Timah, Tbk. and PT. Koba Tin. Article 52 paragraph (1) is intended for Mining

Business Permits which will be issued following the coming into effect or Law No. 4/2009, rather than for Mining Authorization held by PT. Timah and Contract of Work possessed by PT. Koba Tin, so that the Petitioners' argument is inaccurate.

Whereas the basic philosophy of the formulation of the regulation on the minimum area requirement for an Exploration Mining Business Permit Area 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-articles c and d of Law No. 4/2009 which become the norm of conservation and environment's supporting capability as the criteria for the designation of Mining Business Permit Area.

From the environmental point of view, the minimum area of an Exploration Mining Business Permit Area 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 environment's supporting and accommodating capacity. If area size of an Exploration Mining Business Permit Area is too small, it's the environment's supporting and accommodating capability will be

inadequate, particularly when performing the production operation stage, considering the fact that the Exploration Mining Business Permit 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 at the production operation stage in a limited Mining Business Permit Area. The minimum areas 5,000 ha for metal mineral and coal, 500 ha for non-metal mineral, and 5 ha for rocks are considered to have met the requirements of environment's supporting and accommodating capacity.

The regulation on the minimum area of Exploration Mining Business Permit Area which may be operated in Law No. 4/2009 is also intended for protecting entrepreneurs conducting business in the field of mining. With the provision on the minimum area of an Exploration Mining Business Permit Area, 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 Exploration Mining Business Permit Area granted is adequate.

Whereas as business activities, the mineral and coal mining industry is indeed a high capital, high risk, and high technology industry. Nevertheless, it does not mean that entrepreneurs with

small capital (small-/medium-scale entrepreneurs) cannot engage mining business activities. Small-/medium-scale entrepreneurs can also conduct mining business activities in the form of community mining, namely by applying for Community Mining Permit to 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 the 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 in the context 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 are discriminatory against small/medium-scale entrepreneurs is incorrect. Hence, the norms of Article 52 paragraph (1), Article 55 paragraph (1), Article 58 paragraph (1), and Article 61 paragraph (1) of Law No. 4/2009

are not inconsistent with the norm of Article 33 paragraph (4) of the 1945 Constitution.

7. **With regard 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 Rp100,000,000.00 (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. When facing such ordeal, the communities around the mining sites usually become the defeated victims who often 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 Rp100,000,000.00 (one hundred million rupiah)" in the provision of Article 162 of Law No. 4/2009 cannot be automatically imposed to the community when 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 provisions 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, Mining Business Permit or Special Mining Business Permit holders must settle land titles with the title holders in accordance with the provisions of laws and regulations.

(2) The settlement of land titles as referred to in paragraph (1) may be conducted in stages adjusted to the needs for land of Mining Business Permit or Special Mining Business Permit holders.

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

"*Mining Business Permit or Special Mining Business Permit holders as intended in Article 135 and Article 136 who have settled land areas may be granted land titles in accordance with the provisions of laws and regulations.*"

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

The rights to Mining Business Permit, Community Mining Permit, or Special Mining Business Permit are not land titles."

Whereas the provision of Article 162 of Law No. 4/2009 is intended for protecting Mining Business Permit or Special Mining Business Permit holders having performed their obligations in relation to the rights possessed the holders of land titles, namely in the form of compensation based on a mutual agreement with holders of land titles, either in the form of lease, sale-purchase or borrow-use pursuant to the provision of Article 100 of Government Regulation Number 23 Year 2010 concerning the Implementation of Mineral and Coal Mining Business Activities.

If the Mining Business Permit or Special Mining Business Permit holders have performed their obligations in relation to the land title as intended above, then it is reasonable and logical for such Mining Business Permit or Special Mining Business Permit 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 paragraphs (1), (2), (3), (4), Article 27 paragraph (1), Article 28C paragraph (2), Article 28D paragraph (1), Article 28G paragraph (1), Article 28H paragraphs (1) and (4), and Article 28I paragraph (2) of the 1945 Constitution of the State of the Republic of Indonesia, because Article 162 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 touchstone by the Petitioners. Hence, Article 162 of Law No. 4/2009 **does not** contain any norm reflecting unequal status and discriminatory treatment, injustice, and legal uncertainty.

8. With regard 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 Mining Authorization and Community Mining Authorization holders discriminately and unequally before the law compared to the Contract of Work holders which are foreign capital companies.

According to the Petitioners, the provision of Article 172 of Law No. 4/2009 only gives tolerance/dispensation by still recognizing the

application of Contracts of Works and Work Agreements as a result of the coming into effect of Law No. 4/2009, while the Transitional Regulation of Article 169 of Law No. 4/2009 does not give any tolerance/dispensation, where under the provision of Article 173 paragraph (1), to Mining Authorizations and Community Mining Authorizations 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 Contracts of Work and Work Agreements for Coal Mining prior to the coming into effect of Law No. 4/2009 and it is not related to Mining Authorization.

Article 172 of Law No. 4/2009 constitutes a transitional provision to "bridge" the transition from the contract regime applied in Law No. 11/1967 to the permit regime applied in Law No. 4/2009.

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

agreements between the Minister of Energy and Mineral Resources and mining contractors.

In relation to the provision of Article 172 of Law No. 4/2009 being petitioned for review by the Petitioners, we need to convey to the Honorable Chief Justice/Panel of Constitutional Court Justices that the aforementioned provision has been petitioned for review, namely in the registered case Number 121/PUU-VII/2009, which has not been decided upon by the Constitutional Court. Therefore, the full explanation of the Government on the provision *a quo* shall refer to the previous Statement of the Government.

9. **With regard 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 Mining Authorization and Community Mining Authorization holders discriminately and unequally before the law compared to Contract of Work holders which are foreign capital companies.

The provision of in Article 169 paragraph (1) of Chapter XXV regarding Transitional Provisions of Law No. 4/2009 only gives tolerance/dispensation by still recognizing the application of

Contracts of Works and Work Agreements as a result of 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 to Mining Authorizations and Community Mining Authorizations, where under Article 173 paragraph (1), Mining Authorizations and Community Mining Authorizations are declared no longer applicable.

Therefore, according to the Petitioners, the provision of Article 173 paragraph (2) cannot be used as a legal basis for the application of Mining Authorizations and Community Mining Authorizations because of 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 assumption of the Petitioners stating that following the coming into effect of Article 173 paragraph (2) of Law No. 4/2009, Mining Authorizations 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 Mining Authorizations no longer applicable. Article 112 sub-article 4 of Government Regulation Number 23 Year 2010 concerning the Implementation of Mineral and Coal Mining Business Activities 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 Article above, Mining Authorizations shall remain honored and applicable 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 (*obscuure libel*) and it does not need to be responded to.

Based on the statement 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 Mining Authorization holders is untrue and groundless.

IV. CONCLUSION

Based on the explanation and arguments above, the Government requests to the honorable Chief Justice/Panel of Constitutional Court Justices examining, hearing and deciding upon the petition for 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' petition for judicial review in its entirety or at least to declare that the Petitioners' petition for judicial review 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 provision of Article 22 sub-articles a, c, and 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 paragraphs (1) and (4), Article 28I paragraph (2), and

Article 33 paragraphs (1), (2), (3), and (4) of the 1945 Constitution of the State of the Republic of Indonesia.

However, if the Chief Justice/Panel of Constitutional Court Justices is of 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 Written Statement of the Government above, the Government has also submitted its written response to the questions of the Constitutional Court Justices during the hearing on October 27, 2010, as follows:

Questions of the Constitutional Justice Dr. M. Arysad Sanusi, SH. MH

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 neo-liberal characteristic in managing mineral.

4. Why does Mining Authorization become the monopoly of the central government so that the bureaucracy becomes too long, while Law No.

4/2009 grants the right to the provincial, regency, and municipal governments?

The Government's Answers

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

   Mining Business Permit Area for metal mineral shall be granted to business entities, cooperatives, and individuals by tender.

   and Article 60 stipulates that:

   Mining Business Permit Area for coal shall be granted to business entities, cooperatives, and individuals by tender.

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

   This is in line with the provision of Article 92 of Law No. 4/2009 whereby Mining Business Permit and Special Mining Business Permit holders have the right to own the already produced mineral or coal 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 applied in Law Number 11 Year 1967 concerning Mining Basic Provisions (hereinafter referred to as Law No. 11/1967) to the permit regime applied in Law No. 4/2009.

Based on Article 10 paragraph (1) of Law No. 11/1967, 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 a Contract of Work or a Work Agreement for Coal Mining and to sign the aforementioned Contract of Work or Work Agreement for Coal Mining.

Whereas Article 172 of Law No. 4/2009 has, in fact, been formulated 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. The aforementioned transitional provision constitutes a form of implementation of the universal principle, namely the respect to agreement/contract, in this case the Contract of Work or Work Agreement for Coal Mining between the Minister of Energy and Mineral Resources and mining contractors.

3. Law No. 11/1967 was ratified and came into effect at a time when the community demanded for the private sector to be given more opportunities to conduct mining in order to accelerate the implementation of national economic development, while still holding on to the basic norm that the state shall fully control all minerals for the interest of the state and for prosperity of the people, because such minerals are natural assets.

   Based on Law No. 11/1967, natural resources can be utilized by operation methods, as follows:

   a. directly operated by a Government agency;
   b. operated by a State Company;
   c. operated by a company with joint capital between a State Company and a Regional Company;
   d. operated by a Regional Company;
   e. operated by a company with joint capital between a State Company and a private company; or it could be joint capital with an individual, provided that he/she is an Indonesian citizen; and could also be

joint capital with a private entity whose entire management consists of Indonesian Citizens;

f. operated by a private party; or by an individual, provided that he/she is an Indonesian citizen; and could also be a private entity whose entire management consists of Indonesian Citizens, especially in the form of a cooperative.

The same principle is basically also applied in Law No. 4/2009, in which mineral and coal are non-renewable natural resources constituting national assets which shall be controlled 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 No. 11/1967 was centralistic in nature, meaning that all which were related to mining activities were operated by the Central Government without involving the regional government, because at the time there had been no regulation on regional autonomy. Similarly, the work contracts/work agreements were made between companies and the Government of the Republic of Indonesia (the Central Government), in this case represented by the Minister.

4. Law No. 11/1967 was a legal product before the era of regional autonomy which adhered to a centralistic principle. The central government had authority to grant Mining Authorizations, to sign Contracts of Work and

Work Agreements for Coal Mining; while 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 the Constitutional Justice Dr. Hamdan Zoelva, S.H., M.H:

1. What is the regulation of the transitional provision for Mining Authorizations?

2. What is the regulation for Mining Authorizations 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 granted Mining Business Permits. Anyone who disrupts them will be punished. Mining Business Permits may conflict with titles and other rights. Will the people who protest against it also be punished?

4. Community mining may only be conducted on sites already operated for 15 years. Does it mean that new mining areas which have never been operated may not be intended for the people?

The Government's Answers

1. Article 112 paragraph (4) sub-paragraph a regarding of the Transitional Provision of Government Regulation Number 23 Year 2010 concerning

the Implementation of Mineral and Coal Mining Business Activities 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 remain in effect 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 Mining Authorizations shall remain honored until they expire, but they must be adjusted to become Mining Business Permits pursuant to Law No. 4/2009 and its implementing regulation.

2. As conveyed above, in Government Regulation Number 23 Year 2010, there is a provision that Mining Authorizations already granted prior to the stipulation of the aforementioned Government Regulation shall remain in

effect they expiring. Hence, such Mining Authorizations are not bound to the provision regarding the minimum Mining Business Permit Area 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 Mining Business Permit or Special Mining Business Permit holders ***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 Rp100,000,000.00 (one hundred million rupiah)*.

Furthermore, Article 136 states that:

(1) Before conducting production operation activities, Mining Business Permit or Special Mining Business Permit holders must settle land titles with the title holders in accordance with the provisions of laws and regulations.

(2) The settlement of land titles as referred to in paragraph (1) may be conducted in stages adjusted to the needs for land of Mining Business Permit or Special Mining Business Permit holders.

Hence, if on the land area to be operated by the holders of Mining Business Permit/Special Mining Business Permit there is a 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 land titles 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 titles in accordance with laws and regulations.

4. Article 21 states:

*Community Mining Areas as referred to in Article 20 shall be designated by the regents/mayors 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.*

From the provision of Article 22 above, it is clear that the criteria for the designation of Community Mining Areas may be “cumulative” or “alternative” in nature. This means that criteria for the designation of Community Mining Areas do not require that the areas have been operated for at least 15 years.

If Article 21 is related to the criteria for the designation of Community Mining Areas in Article 22, then it can be concluded that in designating Community Mining Areas, regents/mayors may determine which criteria are suitable to the conditions of their regions, as further regulated in the Regional Regulation of Regency/City.

The Questions of the 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' Answers

1. Under Law No. 4/2009, a Mining Business Area may consist of one or several Mining Business Permit Area(s). Exploitation (Production Operation) is conducted within a Mining Business Permit Area rather than within a Mining Business Area. **For Exploration WIUP, the authority for its granting is indeed based on the location of the area.** It means that, there is a possibility that the stretch of mined commodities to expand across borders of a regency/municipal or a province. If a Mining Business Permit Area is located within a regency/city, it becomes the authority of the Governor. If the Mining Business Permit Area is located across provinces, then it becomes the authority of the Minister.

   Under the provision of Article 9 paragraph (2) of Government Regulation Number 23 Year 2010, every applicant (business entity, cooperative, and individual) may only be granted one Mining Business Permit Area. Hence, if the Mining Business Permit Area is located across regencies, or across provinces, then the applicant may not file two applications at once, to both the Regent and the Governor. To determine the location of Mining Business Permit Areas across borders, coordination between the government and the governor, regent/mayor according to their authority will be conducted.

2. Article 1 sub-article 32 of Law No. 4/2009 defines a Community Mining Area as "a part of Mining Area where community mining business activities are conducted." The aforementioned article is intended to explain that community mining may only be conducted within a Community Mining Area (may not be conducted in a Mining Business Area or a State Reserve Area), and such Community Mining Area shall be a part of a Mining Area in accordance with the national spatial layout.

   Article 21 of Law No. 4/2009 states that authority to designate community mining areas shall be granted to the regents/mayors 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 regents/mayors to issue Community Mining Permits.

   Mining conducted by the people in a community mining area or site which has been operated but not yet designated as a Community Mining Area, shall be prioritized to be designated as a Community Mining Area.

In addition to presenting its statement, the Government has presented 3 (three) Experts, namely **Dr. Ir. Simon F. Sembiring**, **Prof. Dr. Daud Silalahi**, and **Prof. Dr. Rudy Sayoga Gautama** who have given their written and verbal statements under oath during the court hearing on Wednesday, March 9, 2011, principally stating as follows:

1. Dr. Ir. Simon F. Sembiring

- The Expert outlined the philosophical background and general description regarding 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 and 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 the prosperity of the people. Following the ratification of Law Number 11 Year 1967, almost 99% of Indonesian mining products were exported in a raw condition, never made as semi-finished products for our own 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 controlled by the state which must be utilized for the greatest prosperity of the people.

  - The Government (“the State”), in accordance with 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:

- Non-renewable, with specific location, form, and quantity of reserve;
- 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 local ecosystem and environment;
- Activities are generally conducted in remote areas;
- The price of the mined commodity is relatively “stabile” (not fluctuative);
- Mined products generally require processing and refinement to be consumed by the manufacture industry;
- Constituting the main sector supporting “civilization” and modernization in all sectors, 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

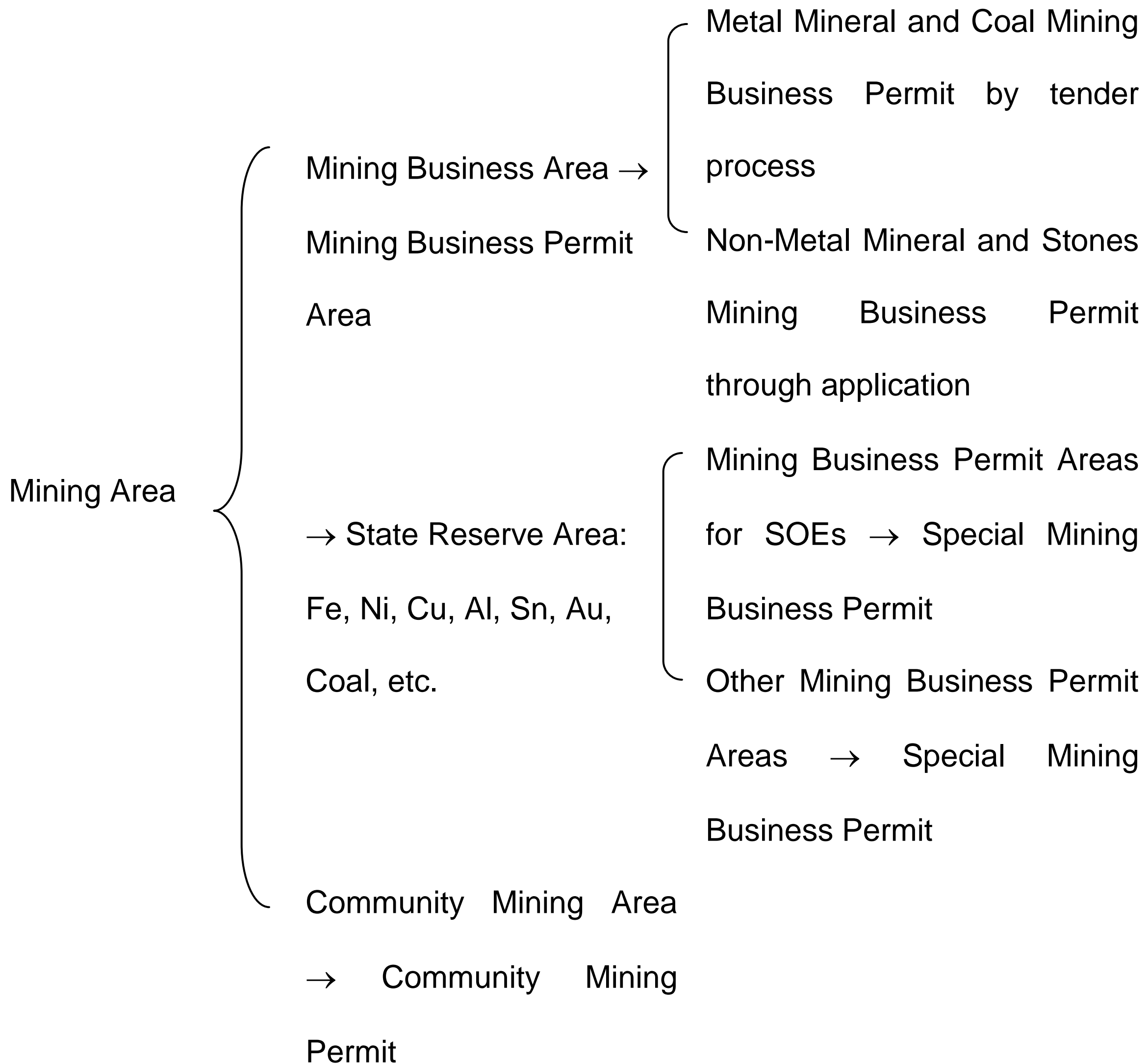
unbalanced. Therefore, in Law Number 4 Year 2009, there is no longer any contract system, but it has adopted the mining business permit;

- 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;

- Mining area division 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 the People's Legislative Assembly;



- 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 interest, particularly for ferrel, nickel, copper, aluminum, tin, gold, and coal;

3. Community Mining Area, which is designated 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;

- Subsequently, a Mining Business Permit for non-metal mineral and rocks shall be 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;

- Community Mining Area (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;

- In fact, 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 reserve, is mentioned. Thus, secondary reserves refer to rivers and paleochannels;

- 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 existing Mining Authorization agreements.
    The Mining Authorization (KP) will then be arranged to become Mining Business Permits (IUP).

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

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

Law Number 11/1967	Law Number 4/2009
Title: **Mining Basic Provisions**	Title: **Mineral and Coal Mining**
Mining Resources are referred to as minerals: • The control of mined minerals shall be held by the government **(Article 1).**	**Mining is specific to mineral and coal:** • Controlled by the State, implemented by the government and/or regional government **(Article 4).**

Law Number 11/1967	Law Number 4/2009
	• The government and the People's Legislative Assembly shall stipulate the policies on the prioritization of mineral and coal for national interest. 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, non-vital **(Article 3)**	**Classification of mining business:** • Mineral mining and coal mining **Classification of mineral mining:** • Radioactive mineral, metal mineral, non-metal mineral, and stones **(Article 34)**
Implementation of control of mined minerals: • State's control over strategic and vital groups is exercised by the Minister. • State's control on non-strategic non-vital groups is exercised by	**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)

Law Number 11/1967	Law Number 4/2009
Level I Regional Government **(Article 4)**	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 **[Article 16 paragraph (3)]**	**Mining area:** • Mining area shall be a part of national spatial layout plans, designated by the Government after the coordination with the Regional Government and the People's Legislative Assembly of the Republic of Indonesia **(Article 10)** • Mining areas consist of Mining Business Area, Community Mining Area, and State Reserve Area **(Article 13)** • Mining Business Area, Community Mining Area, and State Reserve Area are regulated in detail **(Articles 14-33)**

Law Number 11/1967	Law Number 4/2009
Mining business: The forms are: • Work Contract (**Article 10**) • Mining Authorization (KP) (**Article 15**) • Regional Mining Permit (SIPD) Community Mining Business Permit (SIPR)	**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**)
Stages of Mining Business: Mining business includes: • General survey • Exploration • Exploitation • Processing and refinement • Transportation • Marketing **(Article 14)**	**Stages of Mining Business:** Consisting of 2 stages: **1. Exploration, which consists of:** • General survey • Exploration • Feasibility study (Article 36) **2. Operation, Production, which consists of:** • Construction • Mining • Processing and refinement • Transportation and sales **(Article 36)**
Business actors:	**Business actors:**

Law Number 11/1967	Law Number 4/2009
• Domestic investors (Mining Authorization, Regional Mining License, Work Agreement for Coal Mining) (KP, SIPD, PKP2B) • Foreign investors (Contract of Work, Work Agreement for Coal Mining) (KK, PKP2B) • Mining area size is not detailed	• Mining Business Permit is granted to business entities, cooperatives, and individuals **(Article 38)** • Small-Scale Business Permit is granted to local population, either individuals or community groups and/or cooperatives **(Article 67)**, with detailed area size **(Article 68)** • Special Mining Business Permit is granted to business entities with Indonesian legal entity, either in the form of State-Owned Enterprises, Region-Owned Enterprises, or private enterprises. State-Owned Enterprises and Region-Owned Enterprises shall have the priority **(Article 75)**
Rights and Obligations of Business Actors: • Financial: - For Mining Authorization (KP): in accordance with applicable laws	**Rights and Obligations of Business Actors:** • Financial: Paying state income and regional income: Taxes, Non-Tax Revenues,

Law Number 11/1967	Law Number 4/2009
and regulations. - Contract of Work/Work Agreement for Coal Mining (KK/PKP2B), still upon the signing of the contract. • Environment (slightly regulated) • Added Value (regulated only in contracts) • Employment of local workforce (not regulated) • Partnership with local entrepreneur (not regulated) • - Community development and empowerment programs (not regulated)	fees **(Articles 128-133)** • Environment: - Good mining practices **(Article 95)** - Reclamation, post-mining and reclamation plans, along with the available funds **(Articles 96-100)** • Added Value. Holders of Production Operation IPU must perform the processing and refinement of domestic mining results **(Articles 103-104)** • Prioritized employment of local workforce **(Article 106)** • At the production stage, participation of local entrepreneurs is required **(Article 107)** • Formulation of community development and empowerment program **(Article 108)** • Obligation to use local and/or

Law Number 11/1967	Law Number 4/2009
	national mining service 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 Mining Authorization, Contract of Work, and Work Agreement for Coal Mining)	**Guidance and Supervision:** • Mining Business Permit (Minister, Governor, Regent/Mayor – within their authority) **(Articles 139-142)**. Forms of supervision are highly detailed. • Community Mining Permit (Regent/ Mayor) **(Article 143)**
Community protection: • Mining Authorization holders must	**Community Protection:** • The community directly affected by

Law Number 11/1967	Law Number 4/2009
return the land in such a way that it does not cause any disease or any other harm to the community **(Article 30)**	the negative impacts shall be entitled to obtain decent compensation, or to file a lawsuit **(Article 145)**
Investigation: • Not regulated	**Investigation:** • Investigating officers from the State Police of the Republic of Indonesia • Civil Servant officials **(Article 149)**
Penal Provision: • 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 any person not having KP but conducting mining business activities **(Article 31)**	**Penal Provision:** • The Minister, Governors, Regents/Mayors – in accordance their authorities shall have the right to impose administrative sanctions against Mining Business Permit, Community Mining Permit, and Special Mining Business Permit holders. Sanctions range from warning to revocation of permits **(Article 151)** • Sanctions are quite severe. For example, every person operating mining business without IUP, IPR or

Law Number 11/1967	Law Number 4/2009
	IUPK shall be punished by maximum imprisonment of 10 years and maximum fine of Rp. 10 billion.

- Closing remarks on Mining Law Number 4 Year 2009:
  - 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;

- The Law *a quo* exists to ensure legal certainty in conducting business for parties who really have the intention to develop the mining sector;

- If the Law *a quo* is implemented according to its spirit, there should have been a bottom-up procedure prior to designation of mining area by the government and the parliament. If community is 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.

2. 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;

- Law 4/2009 *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.

3. Prof. Dr. Rudy Sayoga Gautama

- The Expert is a Mining Expert and a Lecturer of Mining Engineering in Bandung Institute of Technology (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 mined materials may vary depending on their formation process. In Mining Geology, this is called genesis. There are mined materials 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 mined materials 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, the example originating from the 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 mined material. In fact, this Law No. 4/2009 must accommodate all kinds of mined materials;

- 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 of the Petitioners' petition, the People's Legislative Assembly has submitted a written statement received at the Registrar's Office of the Constitutional Court on Wednesday, December 15, 2010, principally describing as follows:

A. The provisions of Law No. 4/2009 being petitioned for Review against the 1945 Constitution

The Petitioners has filed the petition *a quo* for judicial review of the provisions of Law No. 4/2009 against the 1945 Constitution, namely:

Article 22 sub-articles a, c, and f, which reads as follows:

"*The criteria to designate Community Mining Areas are determined are as follows:*

a. secondary mineral reserve found in the rivers and/or between two banks of the river;

c. terrace reserve, floodplains, and paleochannels;

f. community mining areas or sites that have been operated for at least 15 (fifteen) years;"

Article 38 sub-article a, which reads as follows:

"*Mining Business Permits shall be granted to:*

a. business entities;"

Article 51 which reads as follows:

"*Metal mineral Mining Business Permit Areas (WIUP) shall be granted to business entities, cooperatives, and individuals by tender*."

Article 52 paragraph (1), which reads as follows:

(1) "*The holder of an Exploration Mining Business Permit for metal minerals holders shall be granted a Mining Business Permit Area with a minimum area of 5,000 (five thousand) hectares and a maximum area of 100,000 (one hundred thousand) hectares*."

Article 58 paragraph (1), which reads as follows:

(1) "*The holder of Exploration Mining Business Permit for rocks shall be granted a Mining Business Permit Area with a minimum area of 5 (five) hectares and a maximum area of 5,000 (five thousand) hectares*."

(2)

Article 60 which reads as follows:

"*Coal Mining Business Permit Areas shall be granted to business entities, cooperatives, and individuals by tender*."

Article 61 paragraph (1), which reads as follows:

(1) “*The holder of Exploration Mining Business Permit for Coal shall be granted a Mining Business Permit Area with a minimum area of 5,000 (five thousand) hectares and a maximum area of 50,000 (fifty thousand) hectares*.”

Article 75 paragraph (4), which reads as follows:

(4) “*Private business entities as intended in paragraph (2) shall obtain Special Business Mining Permits by means of tender for Special Mining Business Permit Areas* .”

Article 172 which reads as follows:

“*Applications for contracts of work and work agreements for coal mining which have been filed with the Minister within a period of maximum 1 (one) year prior to the coming into effect of this Law and which have obtained principle approvals or preliminary survey permits shall remain honored and their permits may be processed without going through any tender under this Law.*”

B. The Constitutional Rights and/Or Authority Which the Petitioners Considered to Have Been Impaired By the Coming into Effect of 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-articles a,

c, and f, Article 38 sub-article a, Article 51 paragraph (1), Article 60, Article 61 paragraph (1), Article 75 paragraph (4), and Article 172 of Law No. 4/2009 against the 1945 Constitution, namely as follows:

1. Whereas the Petitioners assume that Article 38 sub-article a of Law No. 4/2009 has differentiated/given unequal position between incorporated business entities and unincorporated business entities. According to the Petitioners, this violates/is inconsistent with the right to equal/non-discriminatory treatment as regulated in Article 28I of the 1945 Constitution. (*vide* petition *a quo* in point 7 on page 7);

2. Whereas according to the Petitioners, the provisions of Article 169 and Article 173 paragraph (2) of Law No. 4/2009 have differentiated/given unequal position between foreign capital companies as contract of work holders, and national private companies as mining authorization holders as well as community miners as community mining authorization holders. The Petitioners consider that this violates/is inconsistent with the right to equal/non-discriminatory treatment as regulated in Article 28I of the 1945 Constitution. (*vide* petition *a quo* in point 7 on page 7);

3. Whereas in the petition *a quo* it is conveyed that the minimum area requirement for exploration Mining Business Permit Area stipulated in Article 52 (1), Article 55 paragraph (1), Article 85 paragraph (1) and Article 61 (1) of Law No. 4/2009, may/can only be met by individuals and companies having large capital. Hence, the provisions of the

aforementioned articles have intentionally hampered/prevented small-/medium-scale entrepreneurs from conducting business in the mining sector, and this has been inconsistent with the provision of Article 33 paragraph (4) of the 1945 Constitution. (*vide* petition *a quo* in point 8 on page 8);

4. Whereas the Petitioners also assume that the provision of Article 22 sub-articles a and f stipulating the criteria for community mining areas requires mining in the river and/or riverbanks as well as in areas which have been operated at least for 15 years, while, in the Petitioners' opinion, tin mining particularly is not located in rivers/riverbanks, and also in Bangka Belitung Province in particular there is no mining which has exceeded 15 years so that the matter may disadvantage the Petitioners. (*vide* petition *a quo* in point 9 on page 8);

5. Whereas according to the Petitioners, Article 51, Article 60, and Article 75 paragraph (4) of Law No. 4/2009 regulating the granting of Mining Business Permit Areas and Special Mining Business Areas to business entities, cooperatives and individuals by tender have a direct consequence of positioning small-/medium-scale business entities and cooperatives in a weak position to compete in tenders so that it may disadvantage the Petitioners. (*vide* petition *a quo* in point 12 on page 9);

In their petition, the Petitioners assume that the provisions of Article 22 sub-articles a, c, and f, Article 38 sub-article a, Article 51 paragraph (1), Article 60,

Article 61 (1), Article 75 paragraph (4), and Article 172 of Law *a quo* are inconsistent with Article 28I paragraph (2) and Article 33 paragraph (4) of the 1945 Constitution, which read as follows:

Article 28I paragraph (2) of the 1945 Constitution, which reads as follows:

"*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 (4) of the 1945 Constitution, which reads as follows:

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

C. STATEMENT OF THE PEOPLE'S REPRESENTATIVE ASSEMBLY

With respect to the Petitioners' arguments as described in the petition *a quo*, the People's Legislative Assembly, in conveying its view, shall first describe the legal standing, which can be explained as follows:

1. Legal Standing of the Petitioner

The qualification which must be fulfilled by the Petitioners as parties has been regulated in the provision of Article 51 paragraph (1) of the

Constitutional Court Law, which 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."

The constitutional rights and/or authority intended in the aforementioned Article 51 paragraph (1) are confirmed in the elucidation thereof, namely that "*referred to as "constitutional rights" shall be rights regulated in the 1945 Constitution of the State of the Republic of Indonesia*." The provision of the Elucidation of Article 51 paragraph (1) confirms that only the rights explicitly regulated in the 1945 Constitution of the State of the Republic of Indonesia are classified as "constitutional rights".

Therefore, according the Constitutional Court Law, for the persons or parties to be eligible as Petitioners having legal standing in a petition for judicial review of law against the 1945 Constitution, they must first explain and substantiate:

a. The Petitioners'

b. Constitutional rights and/or authority as intended in the "**Elucidation of Article 51 paragraph (1)**" they consider to have been impaired by the coming into effect of the law.

With regard to the parameters of impairment of constitutional rights and/or authority, the Constitutional Court has provided the meaning and definition of impairment of constitutional rights and/or authority due to the coming into effect of a law, which must meet 5 (five) requirements (*vide* Decisions on Case Number 006/PUU-III/2005 and Case Number 011/PUU-V/2007), namely as follows:

a. the existence of constitutional rights/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 law being petitioned for review;

c. the referred Petitioners' impairment of such constitutional rights and/or authority is specific (special) and actual, or at least potential in nature which, pursuant to logical reasoning, can be assured of occurring;

d. the existence of causal relationship (*causal verband*) between the impairment and the coming into effect of the law being petitioned for review;

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

If the aforementioned five requirements are not satisfied by the Petitioners in the case of Judicial Review *a quo*, then the Petitioners shall not have the qualification of legal standing as Petitioners;

In response to the petition of the Petitioners *a quo*, the People's Legislative Assembly is of the opinion that the Petitioners have to be able to prove first whether they are truly the parties considering that their constitutional rights and/or authority have been impaired by the coming into effect of the provisions being petitioned for review, particularly in constructing the existence of impairment of their constitutional rights and/or authority as an impact of the coming into effect of the provisions being petitioned for review.

With respect such legal standing, the People's Legislative Assembly fully leaves it to the honorable Panel of Justices to consider and judge whether the Petitioners have legal standing or not as regulated in Article 51 paragraph (1) of the Constitutional Court Law and based on Constitutional Court's Decisions Number 006/PUU-III/ 2005 and Number 011/PUU-V/2007;

2. Review of Law No. 4/2009

The Petitioners in the petition *a quo* assume that their constitutional rights have been impaired or are potential to be impaired by the coming into effect of the provisions of Article 22 sub-articles a, c, and f, Article 38 sub-

article a, Article 51 paragraph (1), Article 60, Article 61 paragraph (1), Article 75 paragraph (4), and Article 172 of Law No. 4/2009.

With respect to such views of the Petitioners, the People's Legislative Assembly gives the following statements:

1. Whereas the Petitioners' argument stating that their constitutional right have been impaired due to the violation of the right to equal/non-discriminatory treatment as regulated in Article 28I of the 1945 Constitution with the coming into effect of Article 38 sub-article a, Article 169, and Article 173 paragraph (2) of Law No. 4/2009 is an incorrect assumption, considering that Article 38 sub-article a, Article 169, and Article 173 paragraph (2) 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".

2. Whereas if related to Ateng Syafrudin's view and Law Number 39 Year 1999, according to the People's Legislative Assembly, the provisions of Article 38 sub-article a, Article 169, and Article 173 paragraph (2) of Law *a quo* shall apply to every person meeting the requirements to obtain Mining Business Permit, meaning that the provisions of the Articles *a quo* of the Mineral and Coal Law are not intended for a condition of not being a legal entity. Any person including the Petitioners themselves at the time of registration as legal entities, certainly have the same rights with other legal entities. Whereas in addition, the provisions of the Articles *a quo* of the Mineral and Coal Law do not regulate capital capacity either. However, if the Petitioners meet the minimum of Mining Business Permit Area requirement or the minimum operation period of 15 years, they would certainly have the same rights as the others;

3. Whereas in point 12 the Petitioners argue that the provisions of Article 51, Article 60, and Article 75 paragraph (4) of the Law *a quo* regulating the granting of Mining Business Permit Area and Special Mining Business Permit Area to business entities, cooperatives and individuals by tender are considered fair, since such provisions have confronted small-/medium-

scale business entities and cooperatives to large business entities, particularly Foreign Capital Investment, and have directly positioned small-/medium-scale business entities and cooperatives in a weak position to compete in the tender for Mining Business Permit Area/Special Mining Business Permit Area. With regard to the Petitioners' argument, the People's Legislative Assembly is of the opinion that the argument proposed by the Petitioners is inconsistent in relation to the argument proposed by the Petitioners in point 7 stating that Article 38 sub-article a, Article 169, and Article 173 paragraph (2) of the Law *a quo* are discriminatory in nature since they have differentiated between incorporated business entities and unincorporated business entities. In substance the Petitioners request to be granted equal treatment and rights, while in point 12 the Petitioners consider that the treatment weakens the Petitioners. Therefore, the Petitioners' reason regarding impairment of their constitutional rights becomes obscure, not concrete, and inaccurate;

4. Whereas the provision of Article 22 sub-articles a and f of the Law *a quo* states that, "*The criteria to designate Community Mining Areas are determined shall be as follows: a. secondary mineral reserve located in the rivers and/or riverbanks; and f. community mining areas or sites that have been operated for at least 15 (fifteen) years.*" Such provision is explicitly not intended to differentiate business actors, but it is intended for categorizing mining area types in accordance with the criteria intended in

the provision of Law *a quo*. The provision *a quo* does not limit or grant different treatment within an area designated based on one similar criteria. Therefore, the Petitioners' assumption is incorrect that the article *a quo* is deemed to have violated/inconsistent with Article 28I paragraph (2) of the 1945 Constitution. This is in accordance with the equality principle proposed by Ateng Syafrudin (1991), equality principle (*egalite*) being interpreted as "*equal matters must be treated equally*";

5. Whereas the provision of Article 38 sub-article a of the Law *a quo* stating that Mining Business Permits are granted to: a. Business entities; b. Cooperatives and c. Individuals, is declared inconsistent with Article 28D paragraph (1), Article 28I paragraph (2) and Article 33 paragraph (5) of the 1945 Constitution, since in the Petitioners' assumption, the intended business entities are only incorporated business entities while unincorporated business entities are not entitled to obtain Mining Business Permit. The provision *a quo* provides that legal subjects which may obtain Mining Business Permit area. Business entities; b. Cooperatives and c. Individuals, so that if a person has an unincorporated business entity, he/she may apply for Mining Business Permit individually or if the person wants it to be in the name of his/her business entity, the business entity's status has to be upgraded into a legal entity. This provision is a requirement applicable to any Indonesian citizen. Therefore, it is not true that the intended provision of Article 38 sub-article a of the Law *a quo* gives unequal treatment between Indonesian citizens in the same matter,

as the intended provision evidently does not indicate any unequal/ discriminatory treatment at all;

6. Whereas the provision of Article 51 of the Law *a quo* states that, "*Mining Business Permit Area for metal mineral shall be granted to business entities, cooperatives, and individuals by tender.*" Such provision explicitly indicates that the granting of Mining Business Permit Area is conducted fairly, in the sense that all parties are treated equal. The provision of tender regulated in the aforementioned Article 51 is expected to guarantee the implementation of the granting of Mining Business Permit Area genuinely. The positioning of the parties in a common and just manner or non-discriminatory manner contains the equality principle (*egalite*). The tender method is not inconsistent with the principle of democratic economy as regulated in Article 33 of the 1945 Constitution;

7. Whereas the provision of Article 52 paragraph (1) of the Law *a quo* states that, "*Metal mineral Exploration Mining Business Permit holders shall be granted Mining Business Permit Area with a minimum area of 5,000 (five thousand) hectares and a maximum area of 100,000 (one hundred thousand) hectares*." This provision constitutes a requirement for the granting of Mining Business Permit Area, with a specific area. Such provision for the granting of Mining Business Permit Area to Metal Mineral Exploration Mining Business Permit holders has been considered with due observance of various aspects;

8. Whereas the provision of Article 55 paragraph (1) of the Law *a quo* states that, "*The holder of Exploration Mining Business Permit for metal mineral shall be granted Mining Business Permit Area with a minimum area of 500 (five hundred) hectares and a maximum area of 25,000 (twenty-five thousand) hectares*." The provision *a quo* constitutes the granting of Mining Business Permit Area with certain requirement for every holder of Exploration Mining Business Permit for Non-Metal Mineral;

9. Whereas the provision of Article 58 paragraph (1) of the Law *a quo* states that: "*The holder of Exploration Mining Business Permit for rocks shall be granted a Mining Business Permit Area with a minimum area of 5 (five) hectares and a maximum area of 5,000 (five thousand) hectares*." The provision *a quo* constitutes the granting of Mining Business Permit Area with certain requirement for every holder of Exploration Mining Business Permit for rocks;

10. Whereas the provision of Article 61 paragraph (1) of Law *a quo* states that: "*The holder of Exploration Mining Business Permit for Coal shall be granted a Mining Business Permit Area with a minimum area of 5,000 (five thousand) hectares and a maximum area of 50,000 (fifty thousand) hectares*." The provision *a quo* constitutes the granting of Mining Business Permit Area with certain requirement for every holder of Exploration Mining Business Permit for Coal;

11. Whereas the provisions of Article 55 paragraph (1), Article 58 paragraph (1), Article 61 paragraph (1) of the Law *a quo* regulating the requirements for the granting of Mining Business Permit Area for every Mining Business Permit holder do not contain any discriminatory element, and therefore they are not inconsistent with the principle of democratic economy as regulated in Article 33 of the 1945 Constitution.

12. Whereas the provision of Article 75 paragraph (4) of Law *a quo* states that, "*Private business entities as intended in paragraph (2) shall obtain Special Business Mining Permits by means of tender for Special Mining Business Permit Areas*." Such provision explicitly indicates that the granting of Special Mining Business Permit is conducted fairly. Through the tender mechanism, the parties will obtain equal treatment. Therefore, it is incorrect to consider the intended provision discriminatory, so that it is not inconsistent with the principle of democratic economy as regulated in Article 33 of the 1945 Constitution.

13. Whereas the provision of Article 172 of Law *a quo* states that, "*Applications for contracts of work and work agreements for coal mining which have been filed with the Minister within a period of maximum 1 (one) year prior to the coming into effect of this Law and which have obtained principle approvals or preliminary survey permits shall remain honored and their permits may be processed without going through any tender under this Law.* This provision is a transitional provision applicable

equally without any discrimination to any person whose application has been filed 1 year prior to the coming into effect of this law.

Hence the People's Legislative Assembly requests for the honorable Panel of Justices to pass the following injunctions of decision:

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

2. To declare that the statement of the People's Legislative Assembly is accepted in its entirety;

3. To declare the provisions of Article 22 sub-articles a, c, and f, Article 38 sub-article a, Article 51 paragraph (1), Article 60, Article 61 paragraph (1), Article 75 paragraph (4), and Article 172 of Law No. 4/2009 not inconsistent with Article 28I paragraph (2) and Article 33 paragraph (4) of the 1945 Constitution;

4. To declare that the provisions of Article 22 sub-articles a, c, and f, Article 38 sub-article a, Article 51 paragraph (1), Article 60, Article 61 paragraph (1), Article 75 paragraph (4), and Article 172 of Law No. 4/2009 still have binding legal force;

[2.5] Whereas the Petitioners have submitted their conclusion on Wednesday, March 16, 2011, principally stating that they stick to their standpoint;

[2.6] Whereas to shorten the description in this decision, all which happened during the hearing shall be indicated in the minutes of hearing, which constitutes 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-articles a, c, and f, Article 38 sub-article a, Article 51, Article 52 paragraph (1), Article 55 paragraph (1), Article 58 paragraph (1), Article 60, Article 61 paragraph (1), Article 75 paragraph (4), and Article 172 of Law Number 4 Year 2009 concerning Mineral and Coal Mining (State Gazette of the Republic of Indonesia Year 2009 Number 4, Supplement to State Gazette of the Republic of Indonesia Number 4959, hereinafter referred to as Law No. 4/2009) against Article 27 paragraph (1), Article 28I paragraph (2), Article 33 paragraphs (1) and (4) of the 1945 Constitution of the State of the Republic of Indonesia (hereinafter referred to as the 1945 Constitution);

[3.2] Whereas prior to examining 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 examine, hear and decide upon the petition *a quo;*

b. Legal standing of the Petitioners;

With respect to the aforementioned two matters, the Court is of the following opinion:

Authorities of the Court

[3.3] Considering whereas pursuant to Article 24C paragraph (1) of the 1945 Constitution which is 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 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 *juncto* 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 Court's constitutional authorities is to review Laws against the 1945 Constitution;

[3.4] Whereas the petition *a quo* is concerned the review of Law *in casu* Law No. 4/2009 against the 1945 Constitution, so that the Court has authority to examine, hear and decide upon the petition *a quo*;

Legal Standing of the Petitioners

[3.5] Whereas pursuant to Article 51 paragraph (1) of the Constitutional Court Law and the Elucidation thereof, the parties eligible to act as Petitioners in the review of Law against the 1945 Constitution shall be those considering that their constitutional rights and/or authority are impaired by the coming into effect of a Law being 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 has been 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 the following five requirements:

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 referred 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;

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

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

b. the impairment of constitutional right and/or authority granted by the 1945 Constitution as a result of the coming into effect of the law being petitioned for review;

[3.7] Whereas the Petitioners argue that they are individual Indonesian citizens having the profession of tin miners, associated in the Indonesian Tin Miners' Association (*Asosiasi Pengusaha Timah Indonesia*/APTI) and the Regional Community Mining Association (*Asosiasi Tambangan Rakyat Daerah*/ASTRADA) of Bangka Belitung Islands Province, who in substance argue that Article 22 sub-articles a, c, and f, Article 38 sub-article a, Article 51, Article 52 paragraph (1), Article 55 paragraph (1), Article 58 paragraph (1), Article 60, Article 61 paragraph (1), Article 75 paragraph (4), and Article 172 of Law No. 4/2009 have impaired their constitutional rights granted by Article 27 paragraph (1), Article 28I paragraph (2), Article 33 paragraphs (1) and (4) of the 1945 Constitution;

Article 22 sub-articles a, c, and f of Law No. 4/2009 states, "*The criteria to designate Community Mining Areas are shall be as follows:*

a. having secondary mineral reserve in the rivers and/or between two banks of the river and riverbanks;

b. ...;

c. terrace reserve, floodplains, and paleochannels;

d. ...;

e. ...; and/or

f. constituting community mining areas or sites that have been operated for at least 15 (fifteen) years.

Article 38 sub-article a of Law No. 4/2009 states, "*Mining Business Permits shall be granted to: a. business entities*";

Article 51 of Law No. 4/2009 states, "*Mining Business Permit Area for metal mineral shall be granted to business entities, cooperatives, and individuals by tender.*";

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

Article 55 paragraph (1) of Law No. 4/2009 states, "*The holder of Exploration Mining Business Permit for metal minerals shall be granted Mining Business Permit Area with a minimum area of 500 (five hundred) hectares and a maximum area of 25,000 (twenty-five thousand) hectares*.";

Article 58 paragraph (1) of Law No. 4/2009 states: "*The holder of Exploration Mining Business Permit for rocks shall be granted a Mining Business Permit Area with a minimum area of 5 (five) hectares and a maximum area of 5,000 (five thousand) hectares*."

Article 60 of Law No. 4/2009 states, "*Mining Business Permit Area for coal shall be granted to business entities, cooperatives, and individuals by tender.*";

Article 61 paragraph (1) of Law No. 4/2009 states, *"The holder of Exploration Mining Business Permit for Coal shall be granted a Mining Business Permit Area with a minimum area of 5,000 (five thousand) hectares and a maximum area of 50,000 (fifty thousand) hectares."*;

Article 75 paragraph (4) of Law No. 4/2009 states, "*Private business entities as intended in paragraph (2) shall obtain Special Business Mining Permits by means of the tender for Special Mining Business Permit Areas*.";

Article 172 of Law No. 4/2009 states, *"Applications for contracts of work and work agreements for coal mining which have been filed with the Minister within a period of maximum 1 (one) year prior to the coming into effect of this Law and which have obtained principle approvals or preliminary survey permits shall remain honored and their permits may be processed without going through any tender under this Law."*;

The Petitioners are tin mining business actors holding permits in the form of Mining Authorizations and Community Mining Authorizations who in substance consider that their constitutional rights have been impaired by the coming into effect of Law No. 4/2009 because Mining Business Permit is granted only to incorporated business entities, while unincorporated business entities (Limited Partnership/Firm) cannot be granted Mining Business Permit so that they cannot conduct mining business. In addition, the Petitioners also principally argue about the existence of discriminatory treatment between holders of Mining Authorizations and Community Mining Authorizations and holders of Contracts of

Work and Work Agreements in the form of dispensation for holders of Contracts of Work and Work Agreements in order to remain able to conduct preliminary survey without going through any tender;

Whereas pursuant to the provision of Article 51 paragraph (1) of the Constitutional Court Law and the requirements of such 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 (included in the group of people having a common interest);

b. As individual Indonesian citizens (including in the group of people having a common interest), the Petitioners have constitutional rights as regulated in Article 27 paragraph (1) and Article 28I paragraph (2) of the 1945 Constitution. The Petitioners also argue that they have constitutional rights regulated in Article 33 of the 1945 Constitution. In relation to this matter, in line with the legal considerations of Constitutional Court's Decision Number 001-021-022/PUU-I/2003 dated December 15, 2004, Constitutional Court's Decision Number 21-22/PUU-V/2007 dated March 25, 2008, and Constitutional Court's Decision Number 25/PUU-VIII/2010 dated June 4, 2012, the Petitioners have fulfilled the qualification as individual Indonesian citizens Petitioners (including groups of people having a common interest) included in the category of "the people at large" whose livelihood has to be fulfilled [*vide* Article 33 paragraph (2) of the

1945 Constitution] and who are included as “the people” whose greatest prosperity has to be realized [*vide* Article 33 paragraph (3) of the 1945 Constitution]. Meanwhile, “the people at large” in Article 33 paragraph (2) of the 1945 Constitution and “the people” in Article 33 paragraph (2) of the 1945 Constitution refer to every Indonesian citizen whose constitutional rights are guaranteed and granted by the 1945 Constitution, and the Petitioners are included in such definition;

c. Whereas the Petitioners are tin mining business actors holding permits in the form of Mining Authorizations and Community Mining Authorizations who consider that their constitutional rights have been impaired by the coming into effect of Law No. 4/2009 because Mining Business Permit is granted only to incorporated business entities, while unincorporated business entities (Limited Partnership/Firm) cannot be granted Mining Business Permit so that they cannot conduct mining business. In addition, the Petitioners in substance also argue about the existence of discriminatory treatment between holders of Mining Authorizations and Community Mining Authorizations and holders of Contracts of Work and Work Agreements in the form of dispensation for holders of Contracts of Work and Work Agreements in order to remain able to conduct preliminary survey without going through any tender. Therefore, *prima facie* it is at least potential for the Petitioners who, pursuant to logical reasoning, can be assured of experiencing impairment of such constitutional rights and/or authority as a result of the coming into effect of Law No. 4/2009.

Furthermore, this matter shall be considered in the substance of the petition;

d. Whereas there is a causal relationship (*causal verband*) between the impairment intended by the Petitioners and the provisions of Law No. 4/2009, particularly regulating the granting of Mining Business Permit to business entities and the granting of dispensation to holders of Contracts of Work and Work Agreements so as to discriminating the Petitioners from participating in opening mining business, and if the Petitioners' petition is granted, it is believed that the impairment of the Petitioners' constitutional rights will not or will no longer occur.

Based on the legal considerations above, the Court is of the opinion that the Petitioners have legal standing to file the petition *a quo*;

[3.8] Whereas since the Court has the authority to examine, hear and decide upon the petition *a quo*, and the Petitioners have legal standing, the Court shall subsequently consider the substance of the petition;

Substance of the Petition

[3.9] Considering whereas in their petition, the Petitioners petition for judicial review of Article 22 sub-articles a, c, and f, Article 38 sub-article a, Article 51, Article 52 paragraph (1), Article 55 paragraph (1), Article 58 paragraph (1), Article 60, Article 61 paragraph (1), Article 75 paragraph (4), and Article 172 of Law No. 4/2009 against Article 27 paragraph (1), Article 28I paragraph (2), Article 33

paragraphs (1) and (4) of the 1945 Constitution, principally arguing that the aforementioned provisions of the articles *a quo* stipulate Mining Business Permit as the basis for conducting mining business being granted only to incorporated business entities, while unincorporated business entities (Limited Partnerships/Firms) cannot be granted Mining Business Permit so that they cannot conduct mining business and that the articles *a quo* have given discriminatory treatment since they do not grant equal legal status between holders of Mining Authorizations and Community Mining Authorizations and holders of Contracts of Work and Work Agreements for Coal Mining;

[3.10] Whereas Court has examined the written statements presented by the Petitioners to prove their arguments, the complete list of which has been described in the Facts of the Case section above (exhibits P-1 through P-8);

The Court has heard the statements of the Petitioners' witnesses and Experts presented at the hearings, principally describing as follows:

The Petitioners' Witnesses

1. IR. MB. Gunawan, M.M.

- The articles stipulating the minimum Exploration Mining Business Permit Area of 5,000 hectares become operational obstacles in the field and are highly impossible to be applied in Bangka Belitung Islands since the area has become urban or rural areas. From the aspect of existence or spreading of the mineral reserve therein, the

minimum area of 5,000 hectares is also too large. If we take 30% of it, it will become 2,000 hectares (2,000,000 m^2). If the area of 2,000,000 m^2 is divided with the valley width of 200 meters, there is 100,000 meters left, which means 100 km. Before applying for Mining Authorization (now called Mining Business Permit), a prior geological assessment has been conducted, and the valley width is 200 meters.

- Such tin or mineral tin reserve is found at a maximum of 15 km from its source, so that if we have to take up to 100 km, it is highly impossible and highly illogical. For a medium- and small-scale entrepreneurs, requesting for 5,000 hectares requires no small cost;

- Community mining business permit is allowed only for areas which have been operated for 15 years, which is also impossible, since tin is merely in the form of deposit which will be exhausted if mined for more than three years. There has never been any single community mine in Bangka Island which has been exploited for up to 10 years in one mining area, let alone 15 years;

2. Rudi Fitrianto

- Article 22 of Law No. 4/2009 does not give any sense of justice for the community actively conducting community mining in Bangka

Belitung since such provision explains or requires the community to mine in the rivers, in the middle of rivers, and in riverbanks. If the community's conducting mining activities as intended to in Article 22 of Law No. 4/2009 is in fact inconsistent with the Environmental Law.

The Petitioners' Experts

1. H. Ismiryadi

- The definition of paleochannel in Article 22 of Law No. 4/2009 is inconsistent with environmental law enforcement since the environment law talks about rivers on the surface. Any regional head implementing the aforementioned provision of Article 22 of Law No. 4/2009 must be ready to face a suit under the Environment Law. Therefore, community miners do not dare to conduct mining activities in the rivers. This causes injustice for Bangka Belitung community intending to process their natural resources in the form of tin ore;

- Article 22 sub-article b of Law No. 4/2009 regarding the maximum depth of 25 meters needs to be revised because there is a provision that such excavation shall be conducted using simple tools. In practice, it is difficult to do. Any person using heavy-duty

equipment would surely be arrested since the Law states that simple tools must be used ;

- The logic of exploration Mining Business Permit granted to the tender awardee does not make any sense since the law on the tender of goods has had a prediction of how much result will be taken from the ground to be tendered. Such tendered goods are like “a pig in a poke”, as it is unclear how much material is there within the earth being tendered by the regional government. Based on the Expert’s experience, exploration cost are very high, so that the Expert doubts if the government can provide a guarantee that such area will certainly produce tin;

- The spreading area of 5,000 hectares as intended in Article 52 of Law No. 4/2009 is impossible to apply in Bangka Belitung Province since its area is less than 1/3 of West Kalimantan except, if such plain area is divided into areas of 500 hectares being located in several places in the name of the same company as it is the case is with oil palm permit;

- In relation to Article 169 sub-article a which in substance states that contracts of work and work agreements already existing prior to the coming into effect of Law No. 4/2009 shall remain valid until they expire, the Expert, also acting as the Chairperson of the Regional People’s Legislative Assembly of Bangka Belitung Province, has

invited PT. Timah, who during such forum stated that PT. Timah has Mining Authorization permit until 2027, while regional governments starting from the governors, mayors, regents in average grant permits until 2013. Therefore, there is a 14-year permit gap. If Article 22 of Law No. 4/2009 is not revised, you will never dream that Bangka Belitung community can participate in enjoying their natural resources with all the existing permits pursuant to the Regional Autonomy Law;

[3.11] Whereas the Government has presented its verbal and written statements principally stating that:

- Article 22 sub-articles a, c, and f of Law No. 4/2009 is not inconsistent with Article 28I paragraph (2), Article 33 paragraphs (1) and (4) of the 1945 Constitution since it is intended providing legal certainty to community mining activities as well as accommodating regional conditions or characteristics and providing legal certainty to the community having the intention to conduct community mining as well as giving the opportunity for the people to participate in development, particularly in mineral and coal mining activities;

- Article 38 sub-article a of Law No. 4/2009 is not inconsistent with Article 28D paragraph (1), Article 28I paragraph (2) and Article 33 paragraph (5) of the 1945 Constitution, since based on Article 6 paragraphs (1) and (3) of Government Regulation Number 23 Year 2010 concerning the

Implementation of Mineral and Coal Mining Business Activities, it can be known that the existence of unincorporated business entities such as firms or limited partnerships is also recognized and of course, they can be granted Mining Business Permits since they are included in the criteria of “individuals”. As seen from its characteristics, Trade Companies also can actually be categorized as individuals. Exploration Mining Business Permit and Production Operation Mining Business Permit are indeed not granted to Trade Companies, considering that Exploration Mining Business Permit and Production Operation Mining Business Permit are granted only to business entities, cooperatives, and individuals engaging in the field of mineral and coal mining. Meanwhile, the activities of a Trade Company are limited only to goods and/or services trading activities. If a Trade Company intends to conduct special mining business activities in the field of mineral and/or coal trading, then the Trade Company shall be granted a Special Production Operation Mining Business Permit for Trading and Transportation;

- Article 51, Article 60, and Article 75 paragraph (4) of Law No. 4/2009 are not inconsistent with Article 33 paragraph (4) of the 1945 Constitution since with the coming into effect of the tender system for metal mineral and coal Mining Business Permit Area, business entities, cooperatives, and individuals have an equal opportunity to obtain a metal mineral and coal Mining Business Permit Area. 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. Such data and information collection is obtained based on the results of survey and research as well as exploration conducted by the Central/Regional Government. Since such data and information have an economic value, it is very reasonable to apply the tender system for metal mineral and coal Mining Business Permit Area The tender system for metal mineral and coal Mining Business Permit Area regulated in Law No. 4/2009 is not at all intended for hampering/preventing medium/small-scale entrepreneurs from obtaining metal mineral and coal Mining Business Permit Area or an effort to confront large-scale business entities against small/medium-scale business entities. Conducting business activities in the field of metal mineral and coal, especially exploration activities, indeed requires enormous cost (high capital); high risk and high technology. If small/medium-scale entrepreneurs have the intention to mine metal mineral and coal in a Mining Business Permit Area/Special Mining Business Permit Area, then the small/medium-scale entrepreneurs may merge their businesses to be able to compete with entrepreneurs having strong capital in the tender for Mining Business Permit Area/Special Mining Business Permit Area. Another alternative which may be sought by small/medium-scale entrepreneurs to do business of mine metal mineral and coal is to submit an application for Community Mining Permit to the local regent/mayor as regulated in Article 47 paragraph (1) of Government

Regulation Number 23 Year 2010 *a quo*. Hence, Law No. 4/2009 has, in fact, provided an equal yet proportional opportunity in encouraging economic activities of the community/small- and medium-scale entrepreneurs which will eventually allow for small/medium-scale entrepreneurs to play a role in accelerating the development of local area/region.

- Article 52 paragraph (1), Article 55 paragraph (1), Article 58 paragraph (1), and Article 61 paragraph (1) of Law No. 4/2009 are not inconsistent with Article 33 paragraph (4) of the 1945 Constitution since from the environmental point of view, the minimum Exploration Mining Business Permit Area 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 environment's supporting and accommodating capacity. If the Exploration Mining Business Permit Area is too small, the environment's supporting and accommodating capacity will be inadequate, particularly when performing production operation stage, considering the fact that the Exploration Mining Business Permit 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 at the production operation stage in a limited Mining Business Permit Area. The minimum areas 5,000 ha for metal mineral and coal, 500 ha for non-metal mineral, and 5 ha for rocks are considered to have met the requirements of environment's supporting and accommodating capacity. The regulation

on the minimum area of Exploration Mining Business Permit Area which may be operated in Law No. 4/2009 is also intended for protecting entrepreneurs conducting business in the field of mining. With the provision on the minimum area of an Exploration Mining Business Permit Area, 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 Exploration Mining Business Permit Area granted is adequate.;

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

To prove its statements, the Government has presented 3 (three) Experts whose statements have been heard at the hearing on March 9, 2011, principally describing as follows:

1. Dr. Ir. Simon F. Sembiring

- 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;

- Mining area division 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 the People's Legislative Assembly;

- Mining Areas are divided into 3 (three) types: (1) Mining Business Area, (2) State Reserve Area, and (3) Community Mining Area. Based on these areas, Mining Business Permit Areas are issued. The tender for Mining Business Permit Area is intended for metal mineral and coal. There is no tender for Community Mining Areas and Community Mining Permits;

- If the Law *a quo* is implemented according to its spirit, there should have been a bottom-up procedure prior to designation of mining area by the government and the parliament. If community is not involved, please complain to the People's Legislative Assembly;

- 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.

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 the People's Legislative Assembly has presented its written statements principally the same with the statement of the Government;

Opinion of the Court

[3.13] Whereas after carefully examining the Petitioners' petition, the Government's statements, the People's Legislative Assembly's statements, statements of the Petitioners' witnesses and Experts, the statements of the Government's Experts, as well as written evidence in the form of letters/writings presented by the Petitioners as included in the Facts of the Case section, the

Court shall subsequently consider the matters already stated by the Petitioners in their *posita* and *petitum* as follows:

[3.13.1] After scrutinizing the Petitioners' petition, judicial review of Article 22 sub-article f and the phrase "...*with a minimum area of 5,000 (five thousand) hectares and*..." in Article 52 paragraph (1) of Law No. 4/2009 has been decided upon by the Court with decision Number 25/PUU-VIII/2010 dated June 4, 2012. Therefore, based on Article 60 paragraph (1) of the Constitutional Court Law which states, "*The substance of paragraphs, articles, and/or parts of a Law which have been reviewed shall not be petitioned for another review*", the petition for constitutional review of Article 22 sub-article f and the phrase "*with a minimum area of 5,000 (five thousand) hectares and*" in Article 52 paragraph (1) of Law No. 4/2009 is *ne bis in idem* so that it shall not be considered;

[3.13.2] According to the Petitioners, Article 22 sub-articles a and c of Law No. 4/2009 has the potential to reduce and even to eliminate the opportunity for the community, particularly small- and medium-scale entrepreneurs to conduct business in the field of mining. The criteria stated in Article 22 of the Law *a quo* must be satisfied entirely, while in practice, every type of mining activity has different specification so that there is a difference in the mining process and they cannot be treated similarly and must satisfy all the criteria stated in Article 22 of the Law *a quo*;

With regard to Article 22 sub-articles a and c, the Court has given its legal considerations as stated in Decision Number 25/PUU-VIII/2010 dated June 24, 2012, as follows:

"...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.";

The process for determining which criteria of sub-articles a through e shall be applied in a regency/city, is determined by the regent/mayor after the consultation with the Regional People's Legislative Assembly of the regency/city [*vide* Article 21 of Law No. 4/2009] based on planning and synchronization of data as well as information through the Mining Area information system [*vide* Elucidation of Article 21 of Law No. 4/2009];

The regents/mayors are also obligated to announce Community Mining Area plans to the public transparently [vide Article 23 of Law No. 4/2009] which shall be conducted at the office of village/sub-district and the relevant office/agency, accompanied by situation maps depicting the locations, size, boundaries, list of coordinates and lists of titleholders of land within the Community Mining Areas [*vide* Elucidation of Article 23 of Law No. 4/2009];

Based on the legal considerations above, according to the Court, the provision of Article 22 sub-articles a through e of Law No. 4/2009 may be applied either cumulatively or alternatively in accordance with the conditions of respective areas, the stipulation of which shall refer to the mechanism regulated in Article 21 and Article 23 of Law No. 4/2009 and the Elucidation thereof. Therefore, with due observance of the Indonesian geographical conditions, the norm *a quo* is already appropriate and not inconsistent with the 1945 Constitution, so that the argument of the petition of the Petitioners' *a quo* is not legally proven;

[3.13.3] The Petitioners argue that Article 38 sub-article a of Law No. 4/2009 has positioned/treated business entities in the form of legal entities unequally compared to business entities which are not in the form of legal entities in terms of the granting of Mining Business Permit, so that business entities such as Limited Partnerships and Firms which are not legal entities cannot be granted Mining Business Permit constituting the entitlement to conduct business in the field of mining;

In its statement, the Government states that the phrase "business entities" is indeed defined as "incorporated business entities", but it does not mean that unincorporated business entities are not accommodated or in other words, they cannot be granted Mining Business Permit based on Law No. 4/2009. Based on Article 49 of Law No. 4/2009, Article 6 paragraphs (1) and (3) of Government Regulation Number 23 Year 2010 concerning the Implementation of Mineral and Coal Mining Business Activities, unincorporated business entities such as firms or limited partnerships are also recognized and they can be granted Mining Business Permits, since both forms of business entities are included in the definition of individual [*vide* Article 6 paragraph (3) of Government Regulation Number 23 Year 2010 concerning the Implementation of Mineral and Coal Mining Business Activities as amended by Government Regulation Number 24 Year 2012 concerning Amendment to Government Regulation Number 23 Year 2010 concerning the Implementation of Mineral and Coal Mining Business Activities]. The participation of business actors in the form of Limited Partnerships and Firms, as stated above, has actually their been regulated so that they still can

obtain Mining Business Permits. According to the Court, Declaring that Article 38 sub-article a of Law No. 4/2009 have no binding legal force would in fact lead to legal vacuum for mining business actors, particularly business entities;

Based on legal considerations above, according to the Court, the arguments of the petition of the Petitioners *a quo* are not legally proven;

[3.13.4] The Petitioners argue that the phrase “by tender” stated in Article 51, Article 60, and Article 75 paragraph (4) of Law No. 4/2009 has weakened their position and competitive edge as small-/medium-scale entrepreneurs against large entrepreneurs/capital owners and foreign capital owners;

In the Court’s opinion, Mining Business Permit Area and Special Mining Business Permit Area are basically allocated for exploration and production operation which can only be conducted by mining business actors meeting certain requirements as well as the support of updated equipment which enable optimum production of mined products, since mineral and coal mining industry is indeed an industry which is capital-intensive (high capital), risk-intensive (high risk), and technology-intensive (high technology) [*vide* Decision Number 25/PUU-VIII/2010 dated June 4, 2012];

Referring to Article 28D (1) of the 1945 Constitution which states, “*Every person shall have the right to the recognition, guarantee, protection and legal certainty of just laws as well as equal treatment before the law*.” and Article 28D paragraph (2) of the 1945 Constitution which states, “*Every person shall have the*

right to work and to receive fair and proper remuneration and treatment in work relationships.", Law No. 4/2009 has normatively provided legal certainty and equal business opportunity to legal entities, cooperatives, and individuals, including firms or limited partnerships to be able to participate in the tender for Mining Business Permit Areas and Special Mining Business Areas. Nevertheless, Law No. 4/2009 does not differentiate the tender participants into business entities, cooperatives, as well as individuals, which certainly have different administrative/management, technical, environmental, and financial capacity which can be categorized as small mining business, medium mining business, and large mining business. This has prevented tender participants of small-/medium-scale entrepreneurs from competing for the tender in order to obtain a Mining Business Permit Area and a Special Mining Business Area.

In its statement, the Government states that 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. Such data and information collection is obtained based on the results of survey and research as well as exploration conducted by the Central/Regional Government. Since such data and information have an economic value, it is very reasonable to apply the tender system for metal mineral and coal Mining Business Permit Area. According to the Court, in the context of performing regulatory function (*regelendaad*) for the greatest prosperity of the people [*vide* Court's Decision Number 001-021-022/PUU-I/2003 dated December 15, 2004], in addition to

having to determine the collection of data and information which have economical value, the Government also has to further determine the classification of Mining Business Permit Areas and Special Mining Business Areas based on the collection of data and information of the areas to be tendered, namely classification based on the capability to conduct exploration and production operation. Such classification is intended for differentiating exploration and production operation capability which can be fulfilled by business entities, cooperatives, and individuals which are included in small mining business, medium mining business, and large mining business, so that the Government shall not confront between the three mining business groups in a single tender competition;

Based on the legal considerations above, to provide legal certainty and business opportunity fairly in the field of mining, according to the Court, the phrase "by tender" in Article 51, Article 60, and Article 75 paragraph (4) of Law No. 4/2009 is inconsistent with the 1945 Constitution to the extent interpreted that the tender is conducted by giving equal treatment between participants in the tender for Mining Business Permit Area and Special Mining Business Permit Area in terms of different administrative/management, technical, environmental, and financial capacity with respect to the object to be tendered;

[3.13.5] The Petitioners argue that the stipulation of the minimum Exploration Mining Business Permit Area provided for in Article 55 paragraph (1) and Article

61 paragraph (1) of Law No. 4/2009 has impaired the constitutional rights of small- and medium-scale miners;

With regard to Article 55 paragraph (1) and Article 61 paragraph (1) of Law No. 4/2009, the Court has given its legal consideration as stated in Decision Number 25/PUU-VIII/2010 dated June 24, 2012, as follows:

"... *according to the Court, in designating WP, the Government 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;"

Based on the legal considerations above, the Court is of the opinion that the minimum area of 500 hectares [*vide* Article 55 paragraph (1) of Law No. 4/2009] and the minimum area of 5,000 hectares [*vide* Article 61 paragraph (1) of Law No. 4/2009] will automatically reduce or even eliminate the rights of the entrepreneurs in the field of mining who will conduct exploration and production operation within a Mining Business Permit Area, since it is uncertain that within a Mining Business Permit Area, there will be an exploration area with a minimum area of 500 hectares and 5,000 hectares, especially if Community Mining Areas and State Reserve Areas have previously been designated. Even if such criteria of 500 hectares and 5,000 hectares constitute a part of an open legal policy, an area of less than 500 hectares or less than 5,000 hectares may be enough for conducting exploration activities, and subsequently for conducting production operation still with due observance of the environmental aspect (green mining). The removal of the minimum area to be granted non-metal mineral exploration Mining Business Permit Area and coal exploration Mining Business Permit Area is still in line with the potential and supporting capacity of the environment;

Based on the legal considerations above, according to the Court, Article 55 paragraph (1) to the extent of the phrase "**with a minimum area of 500 (five hundred) hectares and**" as well as Article 61 to the extent of the phrase "**with a minimum area of 5,000 (five thousand) hectares and**" of Law No. 4/2009 are inconsistent with the 1945 Constitution of the State of the Republic of Indonesia;

[3.13.6] The Petitioners argue that Article 172 of Law No. 4/2009 only grants dispensation to holders of Contracts of Work and Work Agreements for Coal mining, so that the absence of regulation regarding Mining Authorizations, Community Mining Authorizations, and Contracts of Work/Work Agreements other than for Coal mining has made the aforementioned three things inapplicable and it cannot become the entitlement for conducing mining business;

Article 172 of Law No. 4/2009 has been petitioned for review and has been decided upon by the Court in Decision Number 121/PUU-VII/2009 dated March 9, 2011. The Petitioners in the aforementioned Case Number 121/PUU-VII/2009 in principally questioned the legal certainty for applications of Contracts of Work and Work Agreements for Coal Mining which had been or were being processed based on the provision of Law Number 11 Year 1967 concerning Basic Provisions of Mining, with the *Petitum* part requesting for the Court to declare the phrase "*with the Minister by no later than 1 (one) year*" and the phrase "*and already obtained principle approvals or preliminary survey permits*" in Article 172 of Law No. 4/2009 inconsistent with Article 1 paragraph (3) *juncto*

Article 22A *juncto* Article 28D paragraph (1) of the 1945 Constitution. The Court in the aforementioned decision declared to reject the Petitioners' petition;

Even though the petition *a quo* is to review the constitutionality of the same article with petition Number 121/PUU-VII/2009, the substance of the petition is different. Therefore, the Court shall consider the petition *a quo* as follows.

Article 172 of Law No. 4/2009 only regulates the transition of Contracts of Work and Work Agreements for Coal Mining rather than regulating the transition of Mining Authorizations and Community Mining Authorizations. On this basis, the holders of Mining Authorizations as well as Community Mining Authorizations are not subject to Article 172 of Law No. 4/2009, so that automatically, the applications for Mining Authorizations and Community Mining Authorizations already processed shall remain recognized and continued without going through any tender;

If the Petitioners intend to participate in mineral and coal mining in the context of new Mining Business Permit Area, as already considered above, based on Article 49 of Law No. 4/2009, Article 6 paragraphs (1) and (3) of Government Regulation 23/2012 as amended by Government Regulation 24/2012, the Petitioners can still be granted Mining Business Permit by participating in a tender first;

If the Petitioners still want to conduct mining business in the context of Community Mining, the mechanism to obtain such right to mineral and coal mining may be sought through the mechanism as stipulated in Articles 20 through 26 of Law No. 4/2009 as further regulated in a regional regulation. Therefore, the Court is of the opinion that the arguments of the Petitioners *a quo* are not legally proven;

[3.14] Whereas in the *posita* of their petition, the Petitioners also argue about the constitutionality of Article 169 sub-article a and Article 173 paragraph (2) of Law No. 4/2009, without being petitioned in the *petitum*, so that the aforementioned argument of the Petitioners' petition shall be disregarded;

4. CONCLUSION

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

[4.1] The Court has authority to examine, hear, and decide upon the Petitioners' petition;

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

[4.3] The substance of the Petitioners' Petition with respect to Article 51, Article 55 paragraph (1), Article 60, Article 61 paragraph (1), and Article 75 paragraph (4) of Law No. 4/2009 has legal grounds;

[4.4] The substance of the Petitioners' Petition with respect to Article 22 sub-article f and Article 52 paragraph (1) of Law No. 4/2009 is *ne bis in idem*;

[4.5] The substance of the Petitioners' Petition with respect to Article 22 sub-articles a and c, Article 38 sub-article a as well as Article 172 of Law No. 4/2009 has no legal ground;

[4.6] The substance of the Petitioners' Petition with respect to Article 169 sub-article a and Article 173 paragraph (2) of Law No. 4/2009 is disregarded;

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 Amendment to Law Number 24 Year 2003 concerning the Constitutional Court (State Gazette of the Republic of Indonesia Year 2011 Number 70, Supplement to State Gazette of the Republic of Indonesia Number 5226), as well as Law Number 48 Year 2009 regarding Judicial Power (State Gazette of the Republic of Indonesia Year 2009 Number 157, Supplement to State Gazette of the Republic of Indonesia Number 5076);

5. INJUNCTIONS OF DECISION

Passing the Decision,

To declare:

- To grant the Petitioners' petition partly;

- Article 22 sub-article f, Article 52 paragraph (1), Article 169 sub-article a, and Article 173 paragraph (2) of Law Number 4 Year 2009 concerning Mineral and Coal Mining (State Gazette of the Republic of Indonesia Year 2009 Number 4, Supplement to State Gazette of the Republic of Indonesia Number 4959) unacceptable;

- Article 55 paragraph (1) to the extent of the phrase "**with a minimum area of 500 (five hundred) 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 State Gazette of the Republic of Indonesia Number 4959) inconsistent with the 1945 Constitution of the State of the Republic of Indonesia;

- That Article 55 paragraph (1) to the extent of the phrase "**with a minimum area of 500 (five hundred) 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 State Gazette of the Republic of Indonesia Number 4959) has no binding legal force;

- Article 61 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 State Gazette of the Republic of Indonesia Number 4959) inconsistent with the 1945 Constitution of the State of the Republic of Indonesia;

- That Article 61 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 State Gazette of the Republic of Indonesia Number 4959) has no binding legal force;

- The phrase "**by tender**" in Article 51, Article 60, and Article 75 paragraph (4) of Law Number 4 Year 2009 concerning Mineral and Coal Mining (State Gazette of the Republic of Indonesia Year 2009 Number 4, Supplement to State Gazette of the Republic of Indonesia Number 4959) inconsistent with the 1945 Constitution of the State of the Republic of Indonesia to the extent interpreted as "**the tender shall be conducted by giving equal treatment between the participants in the tender for Mining Business Permit Area and Special Mining Business Permit Area in terms of different administrative/management, technical, environmental, and financial capacity with respect to the object to be tendered**";

- That the phrase "**by tender**" in Article 51, Article 60, and Article 75 paragraph (4) of Law Number 4 Year 2009 concerning Mineral and Coal Mining (State Gazette of the Republic of Indonesia Year 2009 Number 4, Supplement to State Gazette of the Republic of Indonesia Number 4959) has no binding legal force to the extent interpreted as "**the tender shall be conducted by giving equal treatment between the participants in**

the tender for Mining Business Permit Area and Special Mining Business Permit Area in terms of different administrative/management, technical, environmental, and financial capacity with respect to the object to be tendered";

- To order the promulgation of this Decision properly in the Official Gazette of the Republic of Indonesia;
- To reject the other and the remaining parts of the Petitioner's petition;

Hence this decision was made in the Consultative Meeting of Justices attended by nine Constitutional Court Justices, namely Moh. Mahfud MD as Chairperson and concurrent Member, Achmad Sodiki, M. Akil Mochtar, Ahmad Fadlil Sumadi, Hamdan Zoelva, Harjono, Maria Farida Indrati, Muhammad Alim, and Anwar Usman respectively as Members, on **Thursday** the **nineteenth** of **April two thousand and twelve**, and was pronounced in the Plenary Session of the Constitutional Court which open for the public on **Monday**, the **fourth** of **June two thousand and twelve**, by eight Constitutional Court Justices, namely Moh. Mahfud MD as Chairperson and concurrent Member, Achmad Sodiki, M. Akil Mochtar, Ahmad Fadlil Sumadi, Hamdan Zoelva, Maria Farida Indrati, Anwar Usman, and Muhammad Alim, respectively as Members, assisted by Ina Zuchriyah Tjando, as the Substitute Registrar, in the presence of the Petitioners/their Attorneys, the Government or its representative, and the People's Legislative Assembly or its representative.

CHIEF JUSTICE,

Sgd.

Moh. Mahfud MD.

JUSTICES,

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

Sgd.

Muhammad Alim

SUBSTITUTE REGISTRAR,

Sgd.

Ina Zuchriyah Tjando