DECISION

Number 32/PUU-VIII/2010

FOR THE SAKE OF JUSTICE UNDER THE ONE ALMIGHTY GOD

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF INDONESIA

[1.1] Examining, 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 : **Friends of the Earth Indonesia (*Wahana Lingkungan Hidup Indonesia*/WALHI)**

Status : Indonesian Legal Entity

Address : Jalan Tegal Parang Number 14, Mampang Prapatan, South Jakarta

Represented by : Name : Berry Nahdian Forqan

Position : Executive Director

Address : Jalan Srikandi II Number 51 Neighborhood Ward 003/ Neighborhood Block 015,

Bantarjati, North Bogor, West Java

Hereinafter referred to as----------**Petitioner I;**

2. Name : **Indonesian Legal Aid and Human Rights Association (*Perhimpunan Bantuan Hukum dan Hak Asasi Manusia Indonesia*/PBHI)**

Status : Indonesian Legal Entity

Address : Mitra Matraman Block A2/18, Jalan Matraman Raya 148 Jakarta, 13150

Represented by : Name : Syamsuddin Radjab, S.H., M.H.

Position : Chairperson

Address : Kp. Jawa – Rawasari Neighborhood Ward 010/Neighborhood Block 09, Rawasari Sub-District, Cempaka Putih District, Central Jakarta

Hereinafter referred to as---------- **Petitioner II;**

3. Name : **Agrarian Reform Consortium (*Konsorsium Pembaharuan Agraria*/KPA) Foundation**

Status : Indonesian Legal Entity

Address : Jalan Duren Tiga 64, South Jakarta

Represented by : Name : Idham Arsyad

Position : General Secretary

Address : Jalan Todopuli X Number 18 Neighborhood Ward 002/ Neighborhood Block 006, Borong Sub-District, Manggala District, Makassar City 90233

Hereinafter referred to as ---------- **Petitioner III;**

4. Name : **Coalition for Fisheries Justice (*Koalisi untuk Keadilan Perikanan*/KIARA)**

Status : Indonesian Legal Entity

Address : Jalan Tegal Parang Utara Number 43, Mampang Prapatan, South Jakarta

Represented by : Name : Muhamad Riza Adha Damanik

Position : General Secretary

Address : Beranda Ganesha Block F9/11 Neighborhood Ward 005 Neighborhood Block 013, Tegal Village, Kemang District, Bogor 16310

Hereinafter referred to as ---------- **Petitioner IV;**

5. Name : **Women's Solidarity (*Solidaritas Perempuan*/SP)**

Status : Indonesian Legal Entity

Address : Jalan Siaga II Number 36, Pejaten Barat, Pasar Minggu, South Jakarta

Represented by : Name : Risma Umar

Position : Chairperson of the National Executive Board

Address : Kalibata Tengah, Neighborhood Ward 004/Neighborhood Block 003, Kalibata, Pancoran, South Jakarta

Hereinafter referred to as ---------- **Petitioner V;**

6. Name : **Nur Wenda**

Address : Jalan Kanguru Number 18, Harapan Village, Mimika District, Papua Province

Occupation : Farmer

Hereinafter referred to as ---------- **Petitioner VI;**

7. Name : **Paulus Wangor**

Address : Wela, Goloworok Sub-District, Ruteng District, Manggarai, East Nusa Tenggara

Occupation : Farmer

Hereinafter referred to as ---------- **Petitioner VII;**

8. Name : **Wihelmus Jogo**

Address : Wela, Goloworok Sub-District, Ruteng District, Manggarai, East Nusa Tenggara

Occupation : Farmer

Hereinafter referred to as ---------- **Petitioner VIII;**

9. Name : **Eduardus Sanor**

Address : Wela, Neighborhood Ward 008/Neighborhood Block 002, Goloworok Village, Ruteng District, Manggarai, East Nusa Tenggara

Occupation : Farmer

Hereinafter referred to as ---------- **Petitioner IX;**

10. Name : **David Katang**

Address : Batu Putih Atas, Neighborhood Ward 009/Neighborhood Block 003, Batu Putih Atas Sub-District, Ranowulu District, Bitung City, North Sulawesi Province

Occupation : Self-Employed

Hereinafter referred to as ---------- **Petitioner X;**

11. Name : **Petherson Natari**

Address : Jaga II, Rinondoran Sub-District, Likupang Timur District, North Minahasa, North Sulawesi Province

Occupation : Fisherman

Hereinafter referred to as ---------- **Petitioner XI;**

12. Name : **Helena A. Laehe**

Address : Jaga II, Rinondoran Sub-District, Likupang Timur District, North Minahasa, North Sulawesi Province

Occupation : Housewife

Hereinafter referred to as ---------- **Petitioner XII;**

13. Name : **A. Iwan Dwi Laksono**

Address : Jalan Bratang Binangun 5/39 Surabaya, East Java Province

Occupation : Private Employee

Hereinafter referred to as ---------- **Petitioner XIII;**

14. Name : **Sumanta**

Address : Pedukuhan I Bugel, Neighborhood Ward 001/ Neighborhood Block 02, Panjatan District, Kulonprogo Regency, Special Region of Yogyakarta

Occupation : Self-Employed

Hereinafter referred to as ---------- **Petitioner XIV;**

15. Name : **Suyanto**

Address : Pedukuhan II, Neighborhood Ward 007/Neighborhood Block 04, Pleret Village, Panjatan District, Kulonprogo Regency, Special Region of Yogyakarta

Occupation : Self-Employed

Hereinafter referred to as ---------- **Petitioner XV;**

16. Name : **Trisno Widodo**

Address : Dukuh II Garongan, Neighborhood Ward 005/Neighborhood Block 03, Garongan Village, Panjatan District, Kulonprogo Regency, Special Region of Yogyakarta

Occupation : Self-Employed

Hereinafter referred to as ---------- **Petitioner XVI;**

17. Name : **Gigih Guntoro**

Address : Pejaten Timur Neighborhood Ward 001/Neighborhood Block 008, Pejaten Timur, Pasar Minggu, South Jakarta

Occupation : Self-Employed

Hereinafter referred to as ---------- **Petitioner XVII;**

18. Name : **Valentinus Dulmin**

Address : Jalan Kramat Sentiong Gg. IV/415 Neighborhood Ward 010/Neighborhood Block 007, Kramat, Senen District, Central Jakarta

Occupation : Employee

Hereinafter referred to as ---------- **Petitioner XVIII;**

19. Name : **Salikin**

Address : Penago Baru, Bengo Baru Sub-District, Ilir Talo District, Beluma Regency, Bengkulu Province

Occupation : Farmer

Hereinafter referred to as ---------- **Petitioner XIX;**

20. Name : **Takril Halumi**

Address : Pasat Talo, Pasat Talo Village, Ilir Talo District, Beluma Regency, Bengkulu Province

Occupation : Honorary Worker

Hereinafter referred to as ---------- **Petitioner XX;**

21. Name : **Yani Sagaroa**

Address : Poto Village Neighborhood Ward 005/Neighborhood Block 003 Poto, Moyo Hilir

District, Sumbawa, West Nusa Tenggara Province

Occupation : NGO Activist

Hereinafter referred to as ---------- **Petitioner XXI;**

In this matter granting power to **Asep Yunan Firdaus, S.H., Andiko, S.H., M. Irsyad Thamrin, S.H., Abdul Hadi Lubis, S.H., Orchida Ramadhania, S.H., LLM., Dedi Ali Ahmad, S.H., Tandiono Bawor Purbaya, S.H., Iki Dulagin, S.H., Totok Yulianto, S.H., Johnson Panjaitan, S.H., Ulung Purnama, S.H., Judianto Simanjuntak, S.H., Wahyu Wagiman, S.H., Jumi Rahayu, S.H., LLM.,** and **Wibi Andrino, S.H.,** all of whom being Advocates and General Defense Counsels, associated in the **Advocacy Team for the Right to Environment (*Tim Advokasi Hak Atas Lingkungan*)**, having its legal domicile at Jalan Tegal Parang Utara Number 14, Mampang, South Jakarta 12790, to act, manage and represent as well as performing other actions for and on behalf of the party granting the power, in accordance with the rules of law, by virtue of the Special Power of Attorney dated April 21, 2010;

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

[1.3] Having read the petition of the Petitioners;

Having heard the statements of the Petitioners;

Having heard and read the written statements of the Government;

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

Having examined the evidence, the statements of the witnesses and the statements of the Experts of the Petitioners as well as the statements of the Experts of the Government;

Having read the written conclusion of the Petitioners;

2. FACTS OF THE CASE

[2.1] Considering, whereas the Petitioners have filed a petition dated April 21, 2010, which was received at the Registrar's Office of the Constitutional Court (hereinafter referred to as the Registrar's Office of the Court) on Friday, May 7, 2010 based on Certificate of Receipt of Petition File Number 76/PAN.MK/2010 and recorded in the Registry of Constitutional Cases on Wednesday, May 12, 2010 under Number 32/PUU-VIII/2010, which has been revised and received at the Registrar's Office of the Court on Tuesday, June 8, 2010, which describes the following matters:

I. INTRODUCTION

The Constitution of the Republic of Indonesia has included the articles concerning human rights in more details since the ratification of the second amendment to the 1945 Constitution by the People's Consultative Assembly (*Majelis Permusyawaratan Rakyat*/MPR) in the Annual Session of the People's Consultative Assembly in 2000. The ratification indicated the awareness of the Indonesian People to stand upright to protect, respect and fulfill the human rights of its citizens. This ratification seemed to have the intention to put an end to the

debate among the founding fathers as to whether or not the articles on human rights should be included in the 1945 Constitution. At that time, in the meeting of the Investigation Committee on the Preparation of Indonesian Independence (*Badan Penyelidik Usaha Persiapan Kemerdekaan Indonesia*/BPUPKI), there was a substantial debate as to whether or not it is necessary to include the articles on human rights in the 1945 Constitution. Soekarno and Supomo were on the refusing side, while Hatta and Yamin were on the supporting side.

Hatta and M. Yamin would certainly be content if they can witness the current Constitution of the Republic of Indonesia, which has included in more details the articles concerning human rights. This is because both of them were really concerned that without the articles protecting the citizens, Indonesia would fell into being a power state (*machtstaat*). Hatta, in the BPUPKI's meeting, stated his concern as follows:

> *"It is true that we have to resist individualism ... We established a new country based on mutual assistance and the result of mutual efforts. However, there is one thing that I am concerned of, namely if there is no conviction or accountability to the people in the Constitution concerning the right to express opinion ... We ought to take the requirements into account so that the country we established would not become a power state.*

The conviction held by Hatta and M. Yamin's was concurred in by the people's representatives in the MPR in its annual session in 2000, which ratified the inclusion of Chapter XA concerning Human Rights, which upon closer examination of the substance of the chapter, it includes the protection, respect and fulfillment of the fundamental rights in the civil-political category as well as the economic, social and cultural category. The provisions on human rights in the 1945 Constitution are stated in detail in Article 28 A-J.

The awareness of the Indonesian People became more complete with the issuance of Law Number 39 Year 1999 concerning Human Rights and the ratification of two main covenants of international human rights legal instrument, namely the Covenant on Economic, Social and Cultural Rights through Law Number 11 Year 2005 and the Covenant on Civil-Political Rights through Law Number 12 Year 2005.

The legal implication of the protection, promotion, enforcement and fulfillment of the human rights of the citizens is the state's obligation to realize such rights. Article 8 of the Human Rights Law (39/1999) reads:

"*The principal responsibility for protecting, promoting, enforcing and fulfilling human rights shall lie with the Government.*"

Subsequently, Articles 71-74 state:

Article 71:

"*The government shall have the duties and responsibilities to respect, protect, enforce and promote human rights as set forth in this Law, other laws and regulations, and international laws concerning human rights ratified by the state of the Republic of Indonesia.*

Article 72:

"*The duties and responsibilities of the Government as intended in Article 71, shall include effective implementation measures in the legal, political, economic, social, cultural, state security and defense sectors, as well as other sectors.*"

Article 73:

"*The rights and freedom set forth in this Law may only be limited by and based on laws, solely for the purposes of guaranteeing the recognition and respect for the human rights and fundamental freedom of other persons, morality, public order, and the interest of the nation.*"

Article 74:

"*No provision in this Law may be interpreted to provide that the Government, any political parties, factions, or parties shall be permitted to prejudice, impair or eliminate the human rights or fundamental freedom provided for in this Law.*"

Hierarchically and systematically, the provisions in various laws and regulations may not be materially inconsistent with the 1945 Constitution as stated in Article 8 and Articles 71-74 of the Human Rights Law.

In the petition *a quo*, Law Number 4 Year 2009 concerning Mineral and Coal Mining should reflect the provisions on protection, respect and fulfillment of human rights as provided for in the 1945 Constitution and other Laws regulating human rights. And it is the obligation of the Government to ensure that human right norms guaranteed in the 1945 Constitution and other Laws concerning human rights are included in all laws and regulations in Indonesia

II. AUTHORITY OF THE CONSTITUTIONAL COURT

Whereas under the provision of Article 24C paragraph (1) of the 1945 Constitution, the Constitutional Court shall have the authority to hear cases at the first and final levels, the decision of which shall be final, among others in order to review laws against the 1945 Constitution. The aforementioned provision is further affirmed in Article 10 paragraph (1) of Law Number 24 Year 2003 concerning 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, hereinafter referred to as the Constitutional Court Law) *juncto* Article 12 paragraph (1) of Law Number 4 Year 2004 concerning Judicial Power (State Gazette of the Republic of Indonesia Year 2004 Number 8, Supplement to the State Gazette of the Republic of Indonesia Number 4358);

Whereas the Petitioners in this case petitioned to the Constitutional Court to conduct Judicial Review of Article 6 paragraph (1) sub-paragraph e *juncto* Article 9 paragraph (2), Article 10 sub-article b and Article 162 *juncto* Article 136 paragraph (2) of Law Number 4 Year 2009 concerning Mineral and Coal Mining against the 1945 Constitution.

Whereas the Petitioners' petition is a Petition for Judicial Review against the Law *a quo*, namely Law Number 4 Year 2009 concerning Mineral and Coal Mining against the 1945 Constitution, therefore, the Constitutional Court has the authority to examine, hear, and decide upon the petition *a quo.*

III. LEGAL STANDING AND CONSTITUTIONAL INTEREST OF THE PETITIONERS

Whereas the recognition of the right of every Indonesian citizen to file a petition for judicial review of a law against the 1945 Constitution of the State of the Republic of Indonesia is one of the positive indicators in the development of state administration, which reflects improvement towards the strengthening of the Constitutional State principles.

Whereas in view of the aforementioned matter, the Constitutional Court, having the functions, among others, as the "guardian" of "the Indonesian Constitution", is a judicial body which safeguard human rights as the constitutional and legal rights of every citizen. It is with such awareness that THE PETITIONERS

subsequently filed a petition for the Review of Law Number 4 Year 2009 concerning Mineral and Coal Mining.

Whereas Article 51 paragraph (1) of Law Number 24 Year 2003 concerning Constitutional Court states:

"*The Petitioner shall be the party considering that his/her 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 the Republic of Indonesia as regulated in the law, (c) public or private legal entities, or (d) state institutions*."

Legal Standing

a. Private Legal Entity Petitioners

Whereas the Petitioners are Non-Governmental Organizations having legal entity status and Individuals having concern for Human Rights, Environment and Agrarian issues, and having interests which are related to the petition for Review of Law Number 4 Year 2009 concerning Mineral and Coal Mining against the 1945 Constitution.

Whereas Petitioners I up to and including V are Non-Governmental Organizations (NGOs) growing and developing on a self-supporting basis, upon their own intention and will amid the society, which are established based on the

concern for being able to provide environmental education and development in various sectors, legal and human rights education, defense of marginalized community who become victims of development, as well as collectively making efforts to participate in *the development of their society, nation and country*;

Whereas the duties and roles of Petitioners I up to and including V in implementing the activities of environmental education and direction in various sectors, legal and human rights education, defense of marginalized community who become victims of development, have been performed continuously by utilizing the entire capacity of their respective institutions, and this is reflected in the Petitioners' Deeds of Establishment/Articles of Association **(Exhibit P-2, Exhibit P-3, Exhibit P-4, Exhibit P-5)**.

Whereas the legal basis and interest of Petitioners I up to and including V in filing the Petition for Review of **Law Number 4 Year 2009 concerning Mineral and Coal Mining** can be proven from the Deeds of Establishment/Articles of Association of the institutions in which the Petitioners conduct their activities. The Deeds of Establishment/Articles of Association explicitly state the purpose of the establishment of the petitioners' organizations, and that they have conducted activities in accordance with their Articles of Association.

In **Article 2** of the Deed of Establishment/Articles of Association of **Petitioner I, Friends of the Earth Indonesia (*Wahana Lingkungan Hidup Indonesia*/WALHI) Foundation**, it is stated that the foundation is established

with the purposes and objectives as follows: 1) in the field of social affairs: to encourage the participation of NGOs in the effort of developing the Environment as well as to channel its aspiration at the national level; 2) in the field of humanity: to increase the awareness of the society as the party developing the environment and to control the prudent utilization of resources.

In **Article 6** of the Deed of Establishment/Articles of Association of **Petitioner II, The Indonesian Legal Aid and Human Rights Association (*Perhimpunan Bantuan Hukum dan Hak Asasi Manusia*/PBHI)**, it is stated that the Association is aimed at providing legal aid, actualizing a state having the governmental system in accordance with the aspiration of a constitutional state, creating a democratic political system and social justice, actualizing a legal system which provides extensive protection for human rights.

In **Article 5** of the Deed of Establishment/Articles of Association of **Petitioner III, Agrarian Reform Consortium (*Konsorsium Pembaruan Agraria*/KPA) Foundation,** it is stated that the Foundation is aimed at pioneering or contributing efforts, energy and thoughts in the field of agrarian affairs in order to support national development, particularly in the field of agrarian affairs, in the context of disseminating information through research studies and scientific review. In order to achieve such objective, one of the efforts taken is the study on the Basic Agrarian Law as well as the customary laws developing in the society.

In **Article 9** of the Deed of Establishment/Articles of Association of **Petitioner IV, The People's Coalition for Fisheries Justice (*Koalisi Rakyat untuk Keadilan Perikanan*/KIARA)**, it is stated that the Association is aimed at strengthening the community groups living in coastal areas and small islands to obtain the proper protection and life welfare from the government of the Republic of Indonesia. Subsequently, it is stated in **Article 7** that one of the values it adheres to is respecting and recognizing local rights and wisdom;

In **Article 3** of the Deed of Establishment/Articles of Association of **Petitioner V, Women's Solidarity (*Solidaritas Perempuan*/SP) Union,** it is stated that its objectives is to actualize a democratic social order, with the principles of justice, ecological integrity, respect of diversity, refusal of discrimination and violence, based upon a system of equal relationship of men and women, in which both genders may share access and control on natural, social, cultural, economic, and political resources fairly;

Whereas in order to achieve their purposes and objectives, Petitioners I up to and including V have conducted various efforts/activities continuously, which already become commonly known facts (*notoire feiten*). The forms of the activities conducted are as follows:

a. Education and training to broaden the perspective of, and to develop the skills and attitude of non-governmental organizations in the context of

increasing their efficiency and effectiveness in the field of environmental development;

b. Gathering/documenting environmental and natural resources issues as well as finding various alternative solutions;

c. Providing legal aid as well as legal and human rights counseling for community members;

d. Producing books, manuals, reports, magazines/bulletins, the substance of which comes from the results of researches, seminars/workshops, experiences in advocacy/defense;

e. Developing advocacy network for policies/laws and regulations related to natural resources management/utilization;

f. Gathering information on environment and disseminating the information to the general public;

g. Striving for equal rights in various legal systems, decision making systems and natural resources management systems, particularly with regard to women's involvement.

Whereas the efforts in environmental education and development in various sectors, legal and human rights education, defense of marginalized community who become victims of development, conducted by Petitioners I up to and

including V are already stated in the 1945 Constitution, the articles which are relevant in this petition in particular are Article 28H paragraph (1), Article 28C paragraph (2), Article 28D paragraph (1) and Article 28E paragraph (3).

Whereas the efforts in environmental education and direction in various sectors, legal and human rights education, defense of marginalized community who become victims of development, conducted by Petitioners I up to and including V are already stated in the national laws, among other things, Law Number 39 Year 1999 concerning Human Rights and Law Number 32 Year 2009 concerning Environmental Protection and Management;

Whereas Law Number 4 Year 2009 concerning Mineral and Coal Mining particularly Article 6 paragraph (1) sub-paragraph e *juncto* Article 9 paragraph (2), Article 10 sub-article b and Article 162 *juncto* Article 136 paragraph (2) being the object of the Judicial Review, constitutes a source of conflict in the field of natural resources management, particularly mining, and it constitutes justification of excessive natural resources utilization which tends to reduce the environmental containing capacity and carrying capacity, and it also constitutes justification of the Government's arbitrary action in expropriating the citizens' proprietary rights which are actually protected by the constitution of the Republic of Indonesia;

Furthermore, the filing of the petition for review of Law Number 4 Year 2009 concerning Mineral and Coal Mining, particularly Article 6 paragraph (1) sub-

paragraph e *juncto* Article 9 paragraph (2), Article 10 sub-article b and Article 162 *juncto* Article 136 paragraph (2), is a manifestation of the concern and effort of Petitioners I up to and including V in encouraging the fulfillment of the rights to healthy environment, controlled and prudent utilization of natural resources, fulfillment and protection of citizens' rights as stated in the 1945 Constitution.

Whereas therefore, the existence of Law Number 4 Year 2009 concerning Mineral and Coal Mining particularly Article 6 paragraph (1) sub-paragraph e *juncto* Article 9 paragraph (2), Article 10 sub-article b and Article 162 *juncto* Article 136 paragraph (2) is violating/having the potential to violate the constitutional rights of Petitioners I up to and including V, directly or indirectly, undermining the various efforts which have been conducted continuously in the context of performing the duties and roles in environmental education and development in various sectors, legal and human rights education, defense of marginalized community who become victims of development, which have been conducted so far by Petitioners I up to and including V;

b. Individual Petitioners

Whereas Petitioners VI up to and including XXI are individual Petitioners, Citizens of the Republic of Indonesia, being the parties whose constitutional rights are potentially impaired, directly or indirectly, or affected or their existence is threatened directly by the coming into effect of Law Number 4 Year 2009 concerning Mineral and Coal Mining, particularly Article 6 paragraph (1) sub-

paragraph e *juncto* Article 9 paragraph (2), Article 10 sub-article b and Article 162 *juncto* Article 136 paragraph (2);

Whereas Petitioner VI, Nur Wenda, is a Citizen of the Republic of Indonesia, having the occupation as farmer and residing in Harapan village, Mimika District, Papua Province, who is affected by the mining business of PT Freeport Indonesia which disposed its tailing into Ajwa River, polluting the river and rendering it unable to serve as a source of living in the place where the Petitioner resides.

Whereas Petitioner VII, Paulus Wangor, is a citizen of the Republic of Indonesia, having the occupation as farmer and residing in Wela village, Goloworok sub-district, Ruteng District, Manggarai Regency, East Nusa Tenggara, in which the Wela Area where the Petitioner currently resides is a water source for the community and for the irrigation of Cancar rice fields. However, since the Wela area is about to be turned into an operational area of a mining company, the petitioner's constitutional rights are potentially impaired in the event of any environmental damages in the Wela area.

Whereas Petitioner VIII, Wihelmus Jogo, is a citizen of the Republic of Indonesia, having the occupation as farmer and residing in Wela village, Goloworok sub-district, Ruteng District, Manggarai Regency, East Nusa Tenggara, in which the Wela Area where the Petitioner currently resides is a water source for the community and for the irrigation of Cancar rice fields. However, since the Wela

area is about to be turned into an operational area of a mining company, the petitioner's constitutional rights are potentially impaired in the event of any environmental damages in the Wela area.

Whereas Petitioner IX, Eduardus Sanor, is a citizen of the Republic of Indonesia, having the occupation as farmer and residing in Wela village, Goloworok sub-district, Ruteng District, Manggarai Regency, East Nusa Tenggara, in which the Wela Area where the Petitioner currently resides is a water source for the community and for the irrigation of Cancar rice fields. However, since the Wela area is about to be turned into an operational area of a mining company, the petitioner's constitutional rights are potentially impaired in the event of any environmental damages in the Wela area.

Whereas Petitioner X, David Katang, is a citizen of the Republic of Indonesia, a self-employed person and residing in Batu Putih village, Batu Putih Sub-District, Ranowulu District, Bitung City, North Sulawesi. The Petitioner and the residents of Rinondoran Bay, North Sulawesi, are against the plan to turn their area into a mining area. However, the government through the Department of Energy and Mineral Resources and the Ministry of Environment continues to turn their area into a mining area. As a result, the petitioner's constitutional rights are potentially impaired/have been impaired due to the mining operations in the area where the petitioner resides.

Whereas Petitioner XI, Patherson Natari, is a citizen of the Republic of Indonesia, having the occupation as fisherman and residing in Jaga Village, Rinondoran Sub-District, Likupang Timur District, North Minahasa, North Sulawesi. The Petitioner and the residents of Rinondoran Bay, North Sulawesi, are against the plan to turn their area into a mining area. However, the government through the Department of Energy and Mineral Resources and the Ministry of Environment continues to turn their area into a mining area. As a result, the Petitioner's constitutional rights are potentially impaired/have been impaired due to the mining operations in the area where the Petitioner resides.

Whereas Petitioner XII, Helena A. Laehe, is a citizen of the Republic of Indonesia, having the occupation as Housewife and residing in Jaga Village, Rinondoran Sub-District, Likupang Timur District, North Minahasa, North Sulawesi. The Petitioner and the residents of Rinondoran Bay, North Sulawesi, are against the plan to turn their area into a mining area. However, the government through the Department of Energy and Mineral Resources and the Ministry of Environment continues to turn their area into a mining area. As a result, the Petitioner's constitutional rights are potentially impaired/have been impaired due to the mining operations in the area where the Petitioner resides.

Whereas Petitioner XIII, A. Iwan Dwi Laksono, is a citizen of the Republic of Indonesia, having the occupation as Private Employee and residing at Jalan Bratang Binangun 5/39 Surabaya, East Java. The stipulation of mining area without taking into account the consent of the affected people has impaired the

Petitioner's constitutional rights, namely the petitioner's right to promote himself in striving for his rights collectively for building the society and the nation. The Petitioner is an individual campaigning that mining should not marginalize the people.

Whereas Petitioner XIV, Sumanta, is a citizen of the Republic of Indonesia, a self-employed person and residing in Pedukuhan I Bugel, Panjatan District, Kulonprogo Regency, Yogyakarta Special Region, who became the victim of the arbitrary action of the Regional and Central Governments, which stipulated a mining area in Kulonprogo Regency which will remove the living space of Sumanta and other residents, the area of which will subsequently be mined by PT. Jogja Masaga Mining. Sumanta, along with other residents, have previously succeeded in turning the infertile land in the south coast area into a land for the people's subsistence in the form of plantation;

Whereas Petitioner XV, Suyanto, is a citizen of the Republic of Indonesia, having the occupation as farmer and residing in Pedukuhan II Pleret, Pleret Village, Panjatan District, Kulonprogo Regency, Yogyakarta Special Region, who became the victim of the arbitrary action of the Regional and Central Governments, which stipulated a mining area in Kulonprogo Regency which will remove the living space of Suyanto and other residents, the area of which will subsequently be mined by PT. Jogja Masaga Mining;

Whereas Petitioner XVI, Trisno Widodo, is a citizen of the Republic of Indonesia, a Self-Employed person and residing in Pedukuhan II Garongan, Garongan Village, Panjatan District, Kulonprogo Regency, Yogyakarta Special Region, who became the victim of the arbitrary action of the Regional and Central Governments, which stipulated a mining area in Kulonprogo Regency which will remove the living space of Trisno Widodo and other residents, the area of which will subsequently be mined by PT. Jogja Masaga Mining;

Whereas Petitioner XVII, Gigih Guntoro, is a citizen of the Republic of Indonesia, a Self-Employed person and residing in Pejaten Timur, Neighborhood Ward 001, Neighborhood Block 008, Pasar Minggu, South Jakarta. The stipulation of mining area without taking into account the consent of the affected people has impaired the Petitioner's constitutional rights, namely the petitioner's right to promote himself in striving for his rights collectively for building the society and the nation. The Petitioner is an individual campaigning that mining should not marginalize the people.

Whereas Petitioner XVIII, Valentinus Dulmin, is a citizen of the Republic of Indonesia, having the occupation as Employee, residing at Jalan Kramat Sentiong Gg. IV/415, Neighborhood Ward 010, Neighborhood Block 007, Pasar Senen District, Central Jakarta. The stipulation of mining area without taking into account the consent of the affected people has impaired the Petitioner's constitutional rights, namely the petitioner's right to promote himself in striving for

his rights collectively for building the society and the nation. He is an individual who is always campaigning on the integrity and harmony of the nature.

Whereas Petitioner XIX, Salikin, is a citizen of the Republic of Indonesia, having the occupation as farmer and residing in Penago Baru, Bengo Sub-District, Ilir Talo District, Beluma Regency, Bengkulu, in which his current area of residence will be turned into an iron sand mining area. The Petitioner and the residents of Penago Baru Village and Rawa Indah Village believe that the mining will lead to a high level of coastal abrasion. In this matter, the Petitioner's constitutional rights will be impaired should their area be turned into a mining area.

Whereas Petitioner XX, Takril Halumi, is a citizen of the Republic of Indonesia, having the occupation as Honorary Worker, residing in Pasat Talo, Pasat Talo Village, Ilir Talo District, Beluma Regency, Bengkulu. His current area of residence will be turned into an iron sand mining area. The Petitioner and the residents of Penago Baru Village and Rawa Indah Village believe that the mining will lead to a high level of coastal abrasion. In this matter, the Petitioner's constitutional rights will be impaired should their area be turned into a mining area.

Whereas Petitioner XXI, Yani Sagaroa, is a citizen of the Republic of Indonesia, having the occupation as NGO activist, residing in Poto Village Neighborhood Ward 05, Neighborhood Block 003, Poto Village, Moyo Hili District, Sumbawa, being a social movement activist who has been criminalized due to his statement

on the behavior of PT. Newmont Nusa Tenggara (PT. NNT), to which he demanded the responsibility for the reduction of health quality of the people of Tongo Sejorong since the company disposed its tailing into Senunu Bay. He stated that, as a result of the disposal of tailing by PT. NNT, there have been symptoms of diseases suffered by the people living in PT. NNT's mining area which are similar to the diseases suffered by the people living in Buyat, North Sulawesi. Petitioner XXI was sentenced to 4 months imprisonment by virtue of the decision of the Sumbawa Besar District Court Number 12/Pid.B/2005 **(Exhibit P-7)**.

Whereas Petitioners VI up to and including XXI are individuals who have been the victims of mining policies as well as mining practices, and they are activists who have been actively organizing education and campaign for actualizing healthy environment and the utilization of natural resources in a controlled and non-destructive manner. Individual petitioners being the victims are generally farmers whose subsistence is highly dependent on the natural resources available around their residencies, which subsequently have to be removed because the areas have been unilaterally stipulated by the Regional and Central Governments as mining areas. Despite the refusal from the Petitioners, who also represented the interest of other residents, the stipulation of mining areas and the granting of mining permits are still being made in favor of the entrepreneurs.

Whereas Petitioners VI up to and including XXI have conducted activities to defend their rights, among other things:

a. The Petitioners who are in the position as victims have been expressing their refusal through letters, statements, or demonstrations, as the form of their disapproval of the mining policies and mining practices which impair their rights and destructing environmental conservation.

b. The Petitioners who are in the position as activists have been continuously promoting environmental protection and controlled utilization of natural resources, in collaboration with Non-Governmental Organizations and the People Who Became Victims, conducting campaign against mining which destroys the environment and deprives the people of their proprietary rights which are protected by the Constitution of the Republic of Indonesia.

Whereas the efforts in defending the rights of the individual petitioners, who are in the position as victims or as activists, conducted by Petitioners VI up to and including XXI, are already stated in the 1945 Constitution, the articles which are relevant in this petition in particular are Article 28C paragraph (2), Article 28D paragraph (1), Article 28E paragraph (3), Article 28G paragraph (1), Article 28H paragraphs (1) and (4).

Whereas therefore, the existence of Law Number 4 Year 2009 concerning Mineral and Coal Mining, particularly Article 6 paragraph (1) sub-paragraph e *juncto* Article 9 paragraph (2), Article 10 sub-article b and Article 162 *juncto* Article 136 paragraph (2) is violating/having the potential to violate the constitutional rights of Petitioners VI up to and including XXI, directly or indirectly,

undermining the various efforts which have been conducted continuously by the people who became victims to defend and preserve their rights, or in the context of promoting environmental protection and controlled utilization of natural resources.

Constitutional Interest of the Petitioners

Whereas the Petitioners have a significant interest in a number of articles in Law Number 4 Year 2009 concerning Mineral and Coal Mining, particularly Article 6 paragraph (1) sub-paragraph e *juncto* Article 9 paragraph (2), Article 10 sub-article b and Article 162 *juncto* Article 136 paragraph (2). The provisions of the aforementioned articles highly impair the Petitioners' constitutional rights as guaranteed by the 1945 Constitution, particularly Article 28C paragraph (2), Article 28D paragraph (1), Article 28E paragraph (3), Article 28G paragraph (1), Article 28H paragraphs (1) and (4). Therefore, in the Petitioners' opinion, this petition has satisfied the qualification as intended in the provision of Article 51 paragraph (1) sub-paragraph a of Law Number 24 Year 2003 concerning Constitutional Court.

Whereas subsequently, Decision of the Constitutional Court Number 006/ PUUIII/2005 and Decision of the Constitutional Court Number 010/PUU-I11/2005 have stipulated the following 5 (five) requirements of the impairment of constitutional rights as intended in Article 51 paragraph (1) of Law Number 24 Year 2003 concerning Constitutional Court:

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

b. such constitutional rights and/or authority are considered as having been impaired by
the coming into effect of the Law petitioned for review;

c such impairment of the constitutional rights and/or authority must be specific (special) 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 impairment of constitutional rights and/or
authority and the Law petitioned for review;

e. the possibility that with the granting of the petition, the impairment of such constitutional rights and/or authority argued by the Petitioner will no longer occur.

Whereas based on the aforementioned criteria, the Petitioners are the parties having a causal relationship (*causal verband*) between the impairment of constitutional rights and/or authority and the coming into effect of the Law petitioned for review, this is because Article 6 paragraph (1) sub-paragraph e *jo.* Article 9 paragraph (2), Article 10 sub-article b and Article 162 *jo.* Article 136 paragraph (2) are inconsistent with the 1945 Constitution, namely Article 28C

paragraph (2), Article 28D paragraph (1), Article 28E paragraph (3), Article 28G paragraph (1), Article 28H paragraphs (1) and (4). Whereas therefore, the Petitioners are of the opinion that they have the legal standing as a party in the petition for review of Law against the 1945 Constitution.

Whereas based on the aforementioned explanation, the Petitioners have evidently fulfilled the quality as well as the capacity, either as Indonesian Citizen Individual Petitioners or as Private Legal Entities Petitioners, in this case, foundations or associations, in the context of judicial review of Law against the 1945 Constitution as set forth in Article 51 sub-article c of Law Number 24 Year 2003 concerning Constitutional Court. Therefore, it is also evident that the Petitioners have the legal rights and interests to represent the public interest to file a petition for review of Law Number 4 Year 2009 concerning Mineral and Coal Mining particularly Article 6 paragraph (1) sub-paragraph e *juncto* Article 9 paragraph (2), Article 10 sub-article b and Article 162 *juncto* Article 136 paragraph (2) and.

IV. THE SUBSTANCE OF THE PETITION

Whereas as the subject of the petition, namely judicial review of Article 6 paragraph (1) sub-paragraph e *juncto* Article 9 paragraph (2), Article 10 sub-article b and Article 162 *juncto* Article 136 paragraph (2) of Law Number 4 Year 2009 concerning Mineral and Coal Mining against the 1945 Constitution, the legal grounds of the petition *a quo* are as follows:

a. **Whereas Article 6 paragraph (1) sub-paragraph e *juncto* Article 9 paragraph (2) *juncto* Article 10 sub-article b which read:**

Article 6 paragraph (1) sub-paragraph e:

(1) Authority of the Government in the management of mineral and coal mining shall be, among other things:

e. stipulation of Mining Areas, which is conducted upon coordinating with the regional governments and consulting with the People's Legislative Assembly of the Republic of Indonesia.

Article 9 paragraph (2):

(2) the Mining Areas as intended in paragraph (1) shall be stipulated by the Government upon coordinating with the regional governments and consulting with the People's Legislative Assembly of the Republic of Indonesia.

Article 10 sub-article b:

The stipulation of Mining Areas as intended in Article 9 paragraph (2) shall be conducted:

b. in an integrated manner by taking into account the opinions of the relevant government agencies, the community, and by considering the ecological, economic and socio-cultural aspects as well as having environmental perspective; and

✓ **The inconsistency between Article 6 paragraph (1) sub-paragraph e *juncto* Article 9 paragraph (2) *juncto* Article 10 sub-article b** and **Article 28H paragraph (1)** which reads: "*Every person shall have the right to live a physically and mentally prosperous life, to have residence, and to obtain a proper and healthy living environment as well as to obtain health services*."

Whereas the Right to have residence includes the freedom to choose a place of residence and the freedom from compulsion to move to other places of residence (freedom from eviction). Physically and mentally prosperous life can be considered to have been achieved if all necessities can be fulfilled, including the aforementioned freedom to choose a place of residence.

Whereas the Right to obtain a proper and healthy living environment becomes crucial in the community's refusal of the stipulation of mining areas, this is because previous experiences, such as the cases of Freeport **(Exhibit P-8)**, Lapindo and Newmont have provided the community with the understanding on the destructive power of mining.

Mining, even in its smallest scale, still has destructive power over the environment. There are already sufficient evidence, such as the investigation results of JPIC OFM on the mining in Manggarai **(Exhibit P-9)** which describe the destructive power of mining over the environment and the community. In order to enforce the aforementioned right to environment, the community has the right to refuse the stipulation of mining areas which may affect their life, which will also prejudice their right to live a physically and mentally prosperous life.

- ✓ **The inconsistency between Article 6 paragraph (1) sub-paragraph e *juncto* Article 9 paragraph (2) *juncto* Article 10 sub-article b** and **Article 28H paragraph (4)** which reads: *Every person shall have the right to possess personal proprietary rights and such proprietary rights may not be taken over arbitrarily by anybody.*

  Whereas Article 28H paragraph (4) may be interpreted grammatically as **the existence of the guarantee of protection for every person that they have the right to possess personal proprietary rights and such proprietary rights may not be taken over arbitrarily by anybody.**

  Whereas the meaning of may not be taken over arbitrarily by anybody contains the meaning that this right shall not be prejudiced. Although it is admitted that there are restrictions on the implementation of the aforementioned right which are stipulated by the laws, it is necessary to

underline that such restrictions have the sole purpose of guaranteeing the recognition of and the respect for other people's rights (*vide* Article 28J paragraphs (1) and (2)). Such restrictions are explicitly not aimed at expropriating proprietary rights arbitrarily – **in the sense of without the consent and approval of the owner of the proprietary rights** – to be turned into mining areas. This is because the stipulation of mining areas, albeit set forth in a law, **does not have the qualification of restriction as set forth in the 1945 Constitution.**

Whereas therefore, the mining areas stipulated by the Government upon coordinating with the Regional Government and consulting with the People's Legislative Assembly, which limits the community's involvement to be merely "**taking into account the opinions of**" is inconsistent with the provision set forth in Article 28H paragraph (4) of the 1945 Constitution.

- ✓ **The inconsistency between Article 6 paragraph (1) sub-paragraph e *juncto* Article 9 paragraph (2) *juncto* Article 10 sub-article b** and **Article 28G paragraph (1)** which reads: *Every person shall have the right to protect themselves, their family, their honor, dignity and property under their control, and shall have the right to the feeling of security and protection against the threat of fear to do, or not to do something that constitutes a human right***.**

Whereas Article 28G paragraph (1) may be interpreted grammatically as **the existence of the guarantee of protection for every person with regard to the property under their control.**

Whereas the protection of the property under their control, may be interpreted to include land and sources of natural resources (sea, mines, forests, plantations), the ownership of which is recognized by state law or by customary/local rules. The ownership of such property, either individual or collective/communal, is a constitutional right.

Whereas despite the recognition of the guarantee of the constitutional right, there are restrictions in the implementation of such right which are stipulated by the law, it is necessary to underline that such restrictions have the sole purpose of guaranteeing the recognition of and the respect for other people's rights (*vide* Article 28J paragraphs (1) and (2)). Such restrictions are explicitly not aimed as a legitimation that the stipulation of mining areas may be conducted **without the consent and approval of the owner of the right**. This is because stipulation of mining areas, albeit set forth in a law, **does not have the qualification of restriction as set forth in the 1945 Constitution.**

Whereas therefore, the mining areas stipulated by the Government upon coordinating with the Regional Government and consulting with the People's Legislative Assembly, which limits the community's involvement

to be merely "**taking into account the opinions of**" is inconsistent with the provision set forth in Article 28G paragraph **(1)** of the 1945 Constitution.

- ✓ **The inconsistency between Article 6 paragraph (1) sub-paragraph e *juncto* Article 9 paragraph (2) *juncto* Article 10 sub-article b** and **Article 28D paragraph (1)** which reads: *Every person shall have the right to fair recognition, guarantee, protection and legal certainty as well as equal treatment before the law*.

  Whereas furthermore, the stipulation of mining areas also contains legal uncertainty as guaranteed by **Article 28D paragraph (1)**. Therefore, every person is at risk at any time with the presence of the mining. Any piece of land owned by a landowner may be abruptly, without the owner's consent, included in a mining area.

  The stipulation of a mining area will subsequently become a Mining Business Permit Area, which enables the issuance of Mining Business Permit and Special Mining Business Permit. Legal uncertainty becomes more evident when Article 136 paragraph (2) of Law *a quo* enables a gradual settlement of land titles according to the land requirement of the Mining Business Permit and Special Mining Business Permit holders.

Whereas the Petitioners' right to obtain the guarantee of legal certainty as well as equal treatment before the law has been denied and/or negated/disregarded (by omission) by the drafters of the Law.

Whereas the provision of rule of law may be interpreted as "a legal system in which rules are clear, well-understood, and fairly enforces". And one of the characteristics of a constitutional state is the existence of legal certainty which contains the principles of legality, **predictability**, and **transparency**;

Whereas the existence of the predictability norm in the drafting of the Law is an indication of certainty, which constitutes an important part of the conception of constitutional state, as contained in Article 28D paragraph (1) of the 1945 Constitution;

Whereas the constitutional impairment of the Petitioners is specific (special) and actual or at least potential in nature which, pursuant to logical reasoning, can be assured of occurring, or there is a causal relationship (*causal verband*) between the impairment that has been suffered or that will be suffered and the law petitioned for review, and with the granting of the petition, the constitutional impairment argued will not occur;

Whereas the parties that will be affected by the mining are not only the people whose area or land is included in the mining area, but the

community outside the mining area will also be affected, such as the fishermen community, whose production of fish caught will be disrupted by the disposal of waste into the rivers and the sea. In addition to that, civil society organizations such as Petitioners I up to and including V will also be affected in relation to human rights, environmental and agrarian advocacy activities which they conduct. Either directly or indirectly, mining has the potential of undermining the various efforts which have been made continuously in the context of performing the duties and roles for environmental education and development in various sectors, legal and human rights education, defense of marginalized community who become victims of development in Indonesia, which have been conducted so far by Petitioners I up to and including V, as described above in the section concerning the constitutional impairment of the Petitioners.

Whereas the argument on the inconsistency of norms between the provisions of Article 28H paragraph (4), Article 28G paragraph (1) and Article 28D paragraph (1) **and** Article 6 paragraph (1) sub-paragraph e *juncto* Article 9 paragraph (2) *juncto* Article 10 sub-article b, is supported by the situation in the field in which the community (people/group of people) whose proprietary right and or the property under their control – recognized by state law or by Customary/local rules – is stipulated as mining areas, expressed their protest or refusal. This has occurred in West Manggarai Regency, East Nusa Tenggara Province, in which the

community in Loh Mbongi/Batu Gosok Labuan Bajo, supported by various community organizations united in the Anti-Mining Community Movement (*Gerakan Masyarakat Anti Tambang*/GERAM), delivered a letter to the Regent of West Manggarai, dated June 26, 2009, which stated the refusal of the mining operations in West Manggarai region **(Exhibit P-10)**.

Whereas other evidence which support the fact of citizen's constitutional rights being violated or which are potentially violated by the provision of Article 6 paragraph (1) sub-paragraph e *juncto* Article 9 paragraph (2) *juncto* Article 10 sub-article b, are indicated on the statements of refusal as well as mass media coverage on the community's protest/refusal actions against the stipulation of mining areas without the consent of the community. The community's letter of statement of refusal came from, among others, 44 community organizations in North Sulawesi, the non-governmental organizations refused the operations of PT. MSM and submitted a petition against the stance adopted by the Minister of Energy and Mineral Resources **(Exhibit P-11)**, there were also statements from the Heads of Villages/*Hukum Tua*, who were strongly against the operations of PT. MSM (Meares Soputan Mining) **(Exhibit P-12)**. The joint statement of stance of the landowners who refused the activities of gold mining exploration or exploitation in the areas of Batu Gosok, Toro Sitangga, and around Labuan Bajo sub-district **(Exhibit P-13)**.

Whereas there were also mass media coverage, among others, "*Warga Gelar Demo, Tolak Pengoperasian PT MSM, Sikap Dukungan 13 Anggota Dekab Minut Dipertanyakan* (Citizens Held a Demonstration, Refusing the Operations of PT. MSM, Supportive Stance of the 13 Members of North Minahasa Regency Assembly Being Questioned)" (Swara Kita, November 28, 2007), "*Ribuan Massa Tolak MSM Goyang DPRD* (Thousands of People Refusing MSM Rocked the Regional People's Legislative Assembly)" (Swara Kita, November 28, 2007), "*Penolakan PT. MSM Menuai Dukungan Luas* (Refusal to PT. MSM Reaped Extensive Support)", "*13 Legislator Pro MSM Dikecam Ratusan Demonstran 'Serbu' Dewan* (13 Pro-MSM Legislators Criticized, Hundreds of Demonstrants 'Invaded' the Assembly)" (Komentar, November 28, 2007) **(Exhibit P-14)**, "*1000 Warga Duduki Tambang Emas* (1,000 Citizens Occupied the Gold Mine)" (Pos Kupang, June 27, 2009) **(Exhibit P-15)**, "*Lokasi Tambang Emas Batugosok di Labuan Bajo Diblokir* (Batugosok Gold Mining Site in Labuan Bajo Blockaded)" (Kompas, June 28, 2009) **(Exhibit P-16)**, "*Bupati Pranda Dinilai Otoriter* (The Regent of Pranda is Deemed Authoritarian" (Flores Pos Daily, June 26, 2009) **(Exhibit P-17)**.

Whereas the National Commission on Human Rights also admits that the exploitation of natural resources is still perilous for the community, not only in terms of environmental issues, but also in the arbitrary expropriation/acquisition of land by the government which is closely

related to the granting of permits to companies (*Korban Pelanggaran HAM dalam Era Global* (Victims of Human Rights Violation in the Global Era), National Commission on Human Rights p. 112, **Exhibit P-18**). Mining permits are sometimes granted for lands which are under the ownership/which are the proprietary right of the people, either owned by individuals, groups, or owned on behalf of the customary community. Such practices occur often, particularly in the post-New Order era in which the government issued a policy to increase the utilization of natural resources. Such policy is reflected on the easy process of licensing, the guarantee of security, as well as the positioning of several mining industries in strategic industries positions, which means that all guarantees on exploration activities become the Government's priority. The arising disputes on lands are disregarded, instead, the local/traditional community groups defending the rights on their lands are considered as act against the state, part of the groups that disrupt security, and a stigma is attached to them (*Korban Pelanggaran HAM dalam Era Global* (Victims of Human Rights Violation in the Global Era), National Commission on Human Rights p. 113, **Exhibit P-19**).

Whereas in addition to that, the community's refusal of the expropriation of land titles has also been expressed in the form of filing a suit with the court. The stipulation of mining areas without taking the community's fate into account has given justification to mining companies for evicting

people from the land they own. The community's refusal of the eviction is usually responded with violence by security apparatus, as occurred in the action of 2,500 community members, including women and children, from Jailolo, Kao, and Malifut Districts, North Halmahera and West Halmahera Regencies, North Maluku Province, who refused the eviction for the purpose of mining operations of PT Nusa Halmahera Mineral (NHM)/Newcrest ('*Aksi 2500 Masyarakat Kao dan Malifut Dibalas dengan Kekerasan oleh PT NHM/Newcrest dan Brimob*' (The Action of 2,500 Citizens of Kao and Malifut was Responded with Violence by PT NHM/Newcrest and the Mobile Brigade', Press Release on the Website of the Mining Advocacy Network (*Jaringan Advokasi Tambang*/JATAM), February 15, 2005). In other cases, such as in Buyat Pante community, the community has expressed its objection against the disposal of gold mining waste into Buyat Bay because they were afraid that the waste will pollute the sea and the fish will die. At that time, although the delegation from PT Newmont and the Mining Service Office stated that the waste are safe since they have been processed before being disposed, the community still refused and in the end, the mining was still carried out and it caused a disaster to the community (*Tambang & Pelanggaran HAM* (Mines & Human Rights Violations) p.98, Jatam 2007, **Exhibit P-20**). The community in Loli Oge village, Banawa District, Donggala Regency, Central Sulawesi also refused the extractive C mining due to its negative impacts, starting from physical suffering due to dust resulting from the

company's activities, the noise of stone crusher machines, the lost of livelihood source. The main water sources which have so far been used for irrigating the rice fields have dried up, as a result, the lands practically cannot be utilized any more, except for tending cattles. On the contrary, during rainy seasons, the lands are flooded with water overflowing from the river due to the damage in watershed caused by the exploitation of the company which took the stones. Although the community has repeatedly filed protests, by coming to the office buildings of the Regent and the Level II Regional People's Legislative Assembly of Donggala, up to creating blockade in the mining site, the company still continues its operations (*Tambang & Penghancuran Lingkungan* (Mines & Environmental Destruction), p.131, Jatam 2006).

Whereas based on the aforementioned legal considerations and evidence, we request the panel of Justices of the Constitutional Court to stipulate that Article 6 paragraph (1) sub-paragraph e *juncto* Article 9 paragraph (2), Article 10 sub-article b and Article 162 *juncto* Article 136 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 the State Gazette of the Republic of Indonesia Number 4959) do not have force of law considering that, or at least declaring that the articles *a quo* shall remain constitutional under the 1945 Constitution provided that the phrase "by taking into account the opinions of the community" is

interpreted as the stipulation of Mining Areas by the Government upon coordinating with the regional governments and consulting with the People's Legislative Assembly and upon obtaining written approval from every person whose area or land property is included in a mining area and from the community which shall be negatively affected.

b. **Whereas Article 162 *juncto* Article 136 paragraph (2), which reads:**

Article 162

"Any person who prevents or disrupts mining business activities belonging to the Mining Business Permit or Special Mining Business Permit holders that have met the requirements as intended in Article 136 paragraph (2) shall be sentenced to imprisonment for a maximum period of 1 (one) year or a fine in a maximum amount of Rp100,000,000.00 (one hundred million rupiah)."

Article 136 paragraph (2)

(1) Mining Business Permit or Special Mining Business Permit holders, prior to carrying out production operation activities, shall be required to settle land titles with the title holders in accordance with the provisions of laws and regulations.

(2) The settlement of land titles as intended in paragraph (1) may be conducted gradually according to the land requirement of the Mining Business Permit or Special Mining Business Permit holders.

✓ **The inconsistency between Article 162 *juncto* Article 136 paragraph (2)** and **Article 28E paragraph (3) of the 1945 Constitution**

Whereas based on the principles of democracy, the right to the freedom of association, assembly and expression of opinion which can be categorized as the right to freedom of expression constitutes an important matter for every individual citizen, because this is related to the demand of change and the fate of the people (citizens), or in other words, related to the community effort in defending its rights as a citizen, particularly its economic, social and cultural rights. For example, the labor's demand for salary raise in a certain company, customary community's refusal of the expropriation/annexation/appropriation of its customary land to become Logging Concession (*Hak Pengusahaan Hutan*/HPH) area by a certain private company.

Whereas if it is viewed from the substance of human rights, the right to the freedom of association, assembly and expression of opinion constitutes the basic and fundamental human rights which must be protected and respected by the state.

Whereas since the right to the freedom of association, assembly and expression of opinion are very important, the constitution of the state of the Republic of Indonesia grants a constitutional guarantee as intended in Article 28E paragraph (3) of the 1945 Constitution, which states that:

"...*every person* ***shall have the right to the freedom of association, assembly and expression of opinion***..."

Whereas in addition to the guarantee in the Constitution, the right to the freedom of association, assembly and expression of opinion is also guaranteed in other legal instruments, namely: Article 25 of Law Number 39 Year 1999 concerning Human Rights, Article 19 paragraphs (1) and (2) of Law Number 12 Year 2005 concerning the Ratification of the International Covenant on Civil and Political Rights (ICCPR), Article 19 of the Universal Declaration of Human Rights.

Article 25 of Law Number 39 Year 1999 concerning Human Rights:

"*Every person* ***shall have the right to express opinions in public****, including the right to go on strike in accordance with the provision of laws and regulations*..."

Article 19 paragraphs (1) and (2) of Law Number 12 Year 2005 concerning Ratification of the International Covenant on Civil and Political Rights:

(1) Every person **shall have the right to express opinions** without interference.

(2) Every person **shall have the right to freedom of expression**; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

Article 19 of the Universal Declaration of Human Rights:

"Every person ***shall have the right to freedom of opinion and expression****; this right shall include freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers*..."

Whereas if it is viewed from the substance, the constitution (the 1945 Constitution) explicitly grants the guarantee of protection on human rights, particularly the right to the freedom of association, assembly and expression of opinion. Therefore, it can be stated that the existence of the 1945 Constitution constitutes a progress in the field of Human Rights, particularly the right to the freedom of association, assembly and expression of opinion. However, the enactment of Law Number 4 Year 2009 concerning Mineral and Coal Mining (hereinafter referred to as Law

4/2009) constitutes a setback in the field of human rights, particularly the right to the freedom of association, assembly and expression of opinion. Therefore, it can be stated that the existence of Law 4/2009 constitutes a denial of Article 28E paragraph (3) of the 1945 Constitution which guarantees the protection on the citizens' right to the freedom of association, assembly and expression of opinion.

Whereas the reason that Law 4/2009 constitutes a setback in the field of human rights and a denial of Article 28E paragraph (3) of the 1945 Constitution is indicated in the provision of Article 162 *juncto* Article 136 paragraph (2) of Law 4/2009 which states that:

"*...Any person who prevents or disrupts mining business activities belonging to the Mining Business Permit or Special Mining Business Permit holders that have met the requirements as intended in Article 136 paragraph (2) shall be sentenced to imprisonment for a maximum period of 1 (one) year or a fine in a maximum amount of Rp100,000,000.00 (one hundred million rupiah)*..."

Whereas the provision of Article 162 *juncto* Article 136 paragraph (2) of Law 4/2009 constitutes **a constraint and restriction on the right to the freedom of association, assembly and expression of opinion**. The state did this through an effort of criminalization of the community attempting to defend its land titles either individually or collectively against

expropriation/annexation and appropriation conducted by (private) investors to turn the lands into mining areas through the mining permits issued by the government. Meanwhile, the methods used by the community in defending its rights are in the form of joint declaration, demonstration and filing a suit with the court.

Whereas the repression and restriction attempts on the right to the freedom of association, assembly and expression of opinion against communities who refuse mining companies can be seen from empirical experiences as described below:

> *Community refusal against eviction is usually responded with violence by security apparatus as occurred during the action of 2,500 citizens, including women and children, from Jailolo, Kao, and Malifut Districts, North Halmahera and West Halmahera Regencies, North Moluccas Province, who refused the eviction for the purpose of mining operations of PT Nusa Halmahera Mineral (NHM)/Newcrest ('Action of 2,500 Community Members of Kao and Malifut Responded with Violence by PT NHM/Newcrest and the Mobile Police Brigade', Press Release on the Website of JATAM, February 15, 2005). Refusal against mining business also occurred when community members fear the impact of mining, therefore, the refusal is not merely due to appropriation of land titles. For example, the community in Batu Gosok, Toro Sitangga, and*

surroundings, who have been refusing the mining in their area since 1996. However, the refusal has never been responded. (Community Joint Statement, ***Exhibit P-21****). In other cases such as the Buyat Pante community, the community has expressed its objection against the disposal of gold mining waste into Buyat Bay because they are afraid that the waste will pollute the sea and the fish will die. At that time, although the delegation from PT Newmont and the Mining Service Office stated that the waste are safe since they have been processed before being disposed, the community still refused and in the end, the mining was still carried out and it caused a disaster to the community (*Tambang & Pelanggaran HAM *p.98, Jatam 2007,* ***Exhibit P-22****). The community in Loli Oge village, Banawa District, Donggala Regency, Central Sulawesi also refused the extractive C mining due to its negative impacts, starting from physical suffering due to dust resulting from the company's activities, the noise of stone crusher machines, the lost of livelihood source. The main water sources which have so far been used for irrigating the rice fields have dried up, as a result, the lands practically cannot be utilized any more, except for tending cattles. On the contrary, during rainy seasons, the lands are flooded with water overflowing from the river due to the damage in watershed caused by the exploitation of the company which took the stones. Although the community has repeatedly filed protests, by coming to*

*the office buildings of the Regent and the Level II Regional People's Legislative Assembly of Donggala, up to creating blockade in the mining site, the company still continues its operations (*Tambang & Penghancuran Lingkungan*, p.131, Jatam 2006).*

Whereas when the community takes an action to refuse the mining, they will usually ***be criminalized and given discriminatory treatment****. In the aforementioned case of refusal against extractive C mining in Loli Oge, a community member was accused to have burned an excavator belonging to the extractive C company in Loli Oge and was arrested arbitrarily because he was considered as opposing the operations of mining company (*Tambang & Penghancuran Lingkungan*, p.133, Jatam 2006). The administrators of United Farmer Group Hamka Darasan Tono Ramat, and Amiruddin were taken to the office of Bengalon Sub-District Police. They were held responsible for 'taking hostage' a number of heavy equipment belonging to PT. Kaltim Prima Coal (KPC) in Spaso Village, Bengalon District. They were forced to admit that they have committed, and accused to have committed, extortion and assault and battery, which they have never committed in reality. While in fact, the seizure of KPC's heavy equipment was based on the decision letter of East Kutai Regent number: 590/339/T.Pem-*

> *B/2002, the content of which prohibits heavy equipment from entering the location of United Farmer Group before KPC settles the conflict occurring within the community (*Tambang & Penghancuran Lingkungan*, pp.156-158, Jatam 2006).*

Whereas in addition to that, the existence of Article 162 *juncto* Article 136 paragraph (2) of Law 4/2009 may also be used by the state as a legal basis to criminalize human right defenders, either individual or on behalf of organizations, who provide advocacy and defense of the community affected by mining companies. Therefore, the existence of Article 162 of Law 4/2009 constitutes a serious threat to the community and human right defenders who are critical and refusing the existence of mining companies.

Whereas the effort of criminalization as intended in Article 162 *juncto* Article 136 paragraph (2) of Law 4/2009 are inconsistent and not in accordance with the principle of penalization in the criminal code, because the formulation intended by the phrase *who prevents or disrupts mining business activities belonging to the Mining Business Permit or Special Mining Business Permit holders* is not clear, multi-interpretative, while in reality, the community who makes a defense and refusal against mining companies has the purpose of defending its rights, particularly land titles from expropriation/annexation by mining companies through the mining permits issued by the government. Therefore in this case, community

effort is part of the right to democracy (civil freedom), not in the domain of criminal code, thus it cannot be categorized as a contempt of court/criminal act. In other words, the subjective and objective elements as the condition for penalization are not related to the community effort in defending its rights through refusal, demonstration, and other efforts against the existence of mining companies which cause many negative impacts to the community.

Whereas the efforts of repression and restriction on the right to the freedom of association, assembly and expression of opinion as stated in Article 162 *juncto* Article 136 paragraph (2) of Law 4/2009 constitute an effort of restricting the citizens' civil freedom. This constitutes the state's effort to prevent the community from defending its rights, namely the land titles which are given by the state to investors as Mining areas, the right to obtain a proper and healthy living environment, the right to live a physically and mentally prosperous life.

Whereas since Article 162 *juncto* Article 136 paragraph (2) of Law 4/2009 repress and restrict the community's rights to defend its rights, particularly the land titles, individually or collectively, then it can be concluded that Article 162 *juncto* Article 136 paragraph (2) of Law 4/2009 **are inconsistent with Article 28E paragraph (3) of the 1945 Constitution concerning the right to the freedom of association, assembly and expression of opinion**.

Whereas since they are evidently inconsistent with Article 28E paragraph (3) of the 1945 Constitution, it is appropriate that Article 162 *juncto* Article 136 paragraph (2) of Law 4/2009 are declared as **not having binding legal force with all its legal consequences.**

- ✓ **The inconsistency between Article 162 *juncto* Article 136 paragraph (2)** and **Article 28C paragraph (2) of the 1945 Constitution**

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

"*Every person shall have the right to promote themselves in striving for their rights collectively for building their society, nation, and state*."

Based on the aforementioned article, Article 162 *juncto* Article 136 paragraph (2) will hinder the citizens' right to promote themselves in striving for their rights collectively for building themselves and their society, particularly the society being negatively affected by mining.

Paul Sieghart identified at least 6 categories of collective rights, among others are as follows:

1. The right to self determination

2. The right to international peace and security

3. The right to use natural wealth and resources

4. The right to mining.

5. The rights of minorities.

6. The right to environment.

Whereas the “every person” element in this article constitutes a general criteria without exception, which means that every person deemed preventing or disrupting mining business activities belonging to the Mining Business Permit or Special Mining Business Permit holders may be penalized, if such Mining Business Permit or Special Mining Business Permit holders have settled, although gradually, the land titles . This article will criminalize the holders of land titles which have been settled and which have not been settled, and it will also criminalize the interested people other than holders of the land titles (such as the citizens in the surrounding areas who might suffer from environmental impacts of the mining).

Whereas, the phrase prevents or disrupts is highly multi-interpretative, and it may be interpreted according to desire of the mining companies, the government and the law enforcement apparatus. This article may legitimate the criminalization practice against civil society expressing their critics and protests against mining companies, as occurred to Petitioner XXI and in many other cases.

Whereas the element of prevents and disrupts in Article 162 *juncto* Article 136 paragraph (2) silences the voices demanding the enforcement of environmental law and community rights. Many conflicts have emerged, starting from land acquisition not conducted in accordance with the agreement, some of the payments not paid to the landowners, disruption to the environmental order due to the high activities of transportation vehicles and other mining activities, environmental pollution and the absence of evenly distributed welfare, particularly within the community in the surrounding areas of the mining, there are only a few people who gain benefit from the existence of the mining. The conflict and difference of interests in mining areas have lead to the repression and intimidation efforts from the companies against the parties demanding the responsibilities of mining companies. As a result, many victims fell during incidents either within or outside mining areas.

Whereas therefore, Article 162 *juncto* Article 136 paragraph (2) reflect unequal position and treatment, injustice, legal certainty, and it is discriminating in nature against the Petitioners, this is because through this article, the activity of mining advocacy is deemed as an action which may be interpreted as “prevents and disrupts”, while in fact, demanding a right, either individually or collectively, is guaranteed by various laws including the 1945 Constitution.

Whereas if we pay close attention to the aforementioned definition, it is evident that the content of Article 162 *juncto* Article 136 paragraph (2) is a form of discriminatory article provision, because it can easily be interpreted in a broad manner according to the desire of mining companies through law enforcers in order to restrict the Petitioners' rights.

Whereas, the element of preventing or disrupting in Article 162 *juncto* Article 136 paragraph (2), in relation to human rights, is not in line with the purpose of the granting of guarantee on Human Rights as intended in Article 28C paragraph (2) of the 1945 Constitution and Article 3 of Law Number 39 Year 1999 concerning Human Rights which states:

Article (1) "*Every person is born with human dignity and honor which are same and equal, and is bestowed with the intellect and conscience to live with others in a society, nation and state in a spirit of brotherhood.*"

Article (2) "*Every person shall have the right to recognition, guarantee, protection, and fair treatment before the law as well as legal certainty and equal treatment before the law.*""

Article (3) "*Every person shall have the right to protection of human rights and basic freedom of humanity, without any discrimination.*"

Whereas the phrase in the sentence, preventing or disrupting, has violated the Universal Declaration of Human Rights of the UN. Article 9 states:

"*freedom from arbitrary arrest, detention or exile*" and Article 19 states: "*the right to freedom of opinion, information and expression*".

Whereas the criminalization in this article violates the Covenant on Economic, Social and Cultural Rights, as ratified through Law Number 11 Year 2005. The damage caused by mining companies and the community's source of livelihood resulted in the violation of every person's right to enjoy attainable mental and physical health standards **(Exhibit P-23)**.

Whereas Article 12 of the Covenant on Economic, Social and Cultural Rights as well as the right to Food in Article 11 of the Covenant on Economic, Social and Cultural Rights, Torture and other cruel acts which are inhumane and humiliating, as well as the arbitrary detention in Article 7 of the Covenant on Civil and Political Rights, the absence of the sense of security and liberty of movement in Article 19 of the Covenant on Civil and Political Rights, Freedom to Expression in Article 19 of the Covenant on Civil and Political Rights have been ratified in Law Number 12 Year 2005 **(Exhibit P-24)**.

PT. NMR had previously made a report against Rignolda Jamaluddin because he was deemed to have committed an unlawful act (defamation) through his statement published on Kompas Daily dated July 20, 2004 and Sinar Harapan dated July 21, 2004. On the two Dailies, Rignolda stated

that symptoms of Minamata disease were found in some Buyat Pante citizens who suffered from illness. Although at that time the government concluded that the pollution in Buyat Bay was caused by Newmont's tailing waste, the company still accused Rignolda of making the statement which was absolutely groundless and not supported by accountable scientific evidence *(Tambang & Pelanggaran HAM*, p.30, Jatam 2007, **Exhibit P-25**)*.*

Whereas the right to obtain healthy living environment, particularly one which is free from negative impacts of mining, is a human right. The silencing of the community conducting environmental advocacy through court may be categorized as SLAPP (Strategic Lawsuit Against Public Participation).

The criminalization against the community who defend their human rights in this article is inconsistent with Article 100 of Law Number 39 Year 1999 concerning Human Rights which reads: *All people, groups, political organizations, community organizations, non-governmental organizations or other community-based organizations, shall have the right to participate in the protection, enforcement, and advancement of human rights*.

More specifically, Law Number 32 Year 2009 concerning Environmental Protection and Management prohibits the criminalization of the parties struggling for environmental cause in Article 66: *Every person struggling*

for a right to a proper and healthy environment may not be prosecuted under the criminal code or charged under the civil code.

Whereas this article is inconsistent with the principle of Law Number 4 Year 2009 itself, particularly the principles of benefit, justice and balance; as well as being in favor of the interest of the nation (Article 2).

Whereas based on the above-mentioned matters, we request the panel of justices of the Constitutional Court to declare Article 162 *juncto* Article 136 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 the State Gazette of the Republic of Indonesia Number 4959) as not having binding legal force.

V. ***PETITUM***

Based on the reasons described above, the Petitioners request that the Constitutional Court grant a decision with the following injunction:

1. To grant the Petition petitioned by the Petitioners in its entirety;

2. To declare Article 6 paragraph (1) sub-paragraph e *juncto* Article 10 sub-article b, Article 162 *juncto* Article 136 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 the State

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

3. To declare Article 6 paragraph (1) sub-paragraph e *juncto* Article 10 sub-article b, Article 162 *juncto* Article 136 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 the State Gazette of the Republic of Indonesia Number 4959) as not having binding legal force; or

4. To declare that Article 6 paragraph (1) sub-paragraph e *juncto* Article 10 sub-article b of Law Number 4 Year 2009 concerning Mineral and Coal Mining (State Gazette of the Republic of Indonesia Year 2009 Number 4, Supplement to the State Gazette of the Republic of Indonesia Number 4959) remains constitutional under the 1945 Constitution of the State of the Republic of Indonesia provided that the phrase “by taking into account the opinions of the community” is interpreted as the stipulation of Mining Area by the Government upon coordinating with the Regional Government and consulting with the People’s Legislative Assembly and upon obtaining written approval from every person whose area or land is included in a mining area and from the community which shall be negatively affected;

5. To declare Article 162 *juncto* Article 136 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 the State Gazette of the Republic of Indonesia Number 4959) as not having binding legal force;

6. To order the promulgation of this decision in the Official Gazette of the Republic of Indonesia as appropriate;

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

[2.2] Considering, whereas in order to prove their arguments, the Petitioners have presented documentary or written evidence marked as Exhibit P-1 up to and including P-26, which have been legalized during the court session on Monday, June 14, 2010, as follows:

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

2. Exhibit P-2 : Photocopy of the Notarial Deed of the Friends of the Earth Indonesia (*Wahana Lingkungan Hidup Indonesia*);

3. Exhibit P-3 : Photocopy of the Notarial Deed of the Indonesian Legal Aid and Human Rights Association

(*Perhimpunan Bantuan Hukum dan Hak Asasi Manusia Indonesia*);

4. Exhibit P-4 : Photocopy of the Notarial Deed of the Agrarian Reform Consortium (*Konsorsium Pembaharuan Agraria*);

5. Exhibit P-5 : Photocopy of the Notarial Deed of the Coalition for Fisheries Justice (KIARA);

6. Exhibit P-6 : Photocopy of the Notarial Deed of the Women's Solidarity (*Solidaritas Perempuan*);

7. Exhibit P-7 : Photocopy of Decision of Sumbawa Besar District Court Number 12/Pid.B/2005 Yani Sagaroa;

8. Exhibit P-8 : Photocopy of WALHI Book, 2006. *Freeport, Bagaimana Pertambangan Emas dan Tembaga Raksasa "Menjajah" Indonesia.* Jakarta: Walhi (p. vii);

9. Exhibit P-9 : Photocopy of JPIC-OFM Indonesia, September 29, 2008. Data of the Ministry of Environment (pp. 39-46);

10. Exhibit P-10 : Photocopy of the letter from GERAM to the Regent of West Manggarai, June 26, 2009;

11. Exhibit P-11 : Photocopy of the Support to the Governor of North Sulawesi to refuse PT. MSM/TT and the Petition against the stance adopted by the Minister of Energy and Mineral Resources

12. Exhibit P-12 : Photocopy of the Statement from several Village Heads/*Hukum Tua* who strongly refuse PT MSM and PT TTN;

13. Exhibit P-13 : Photocopy of the Joint Statement of Landowners Refusing the Activities of Gold Mining Exploration or Exploitation in the Areas of Batu Gosok, Toro Sitangga, and the Surrounding Areas in Labuan Bajo Sub-District, Komodo District, West Manggarai Regency;

14. Exhibit P-14 : Photocopy of Swara Kita dated November 28, 2007. *Warga Gelar Demo, Tolak Pengoperasian PT. MSM*; Komentar Daily dated November 28, 2007. *Sikap Dukungan 13 Anggota Dekab Minut Dipertanyakan, "13 Legislator Pro MSM Dikecam Ratusan Demonstran 'Serbu' Dewan"*;

15. Exhibit P-15 : Photocopy of Pos Kupang dated June 27, 2009. *1000 Warga Duduki Tambang Emas*;

16. Exhibit P-16 : Photocopy of Kompas dated June 28, 2009. “*Lokasi Tambang Emas Batugosok di Labuan Bajo Diblokir*”

17. Exhibit P-17 : Photocopy of Flores Pos Daily dated June 26, 2009. *Bupati Pranda Dinilai Otoriter*;

18. Exhibit P-18 : Photocopy of the National Commission on Human Rights (KOMNAS HAM), 2008. *Korban Pelanggaran HAM dalam Era Global* (p. 112);

19. Exhibit P-19 : Photocopy of the National Commission on Human Rights, 2008. *Korban Pelanggaran HAM dalam Era Global* (p. 113);

20. Exhibit P-20 : Photocopy of Jatam, 2007. *Tambang & Pelanggaran HAM* (p. 98);

21. Exhibit P-21 : Photocopy of Community Joint Statement;

22. Exhibit P-22 : Photocopy of Jatam, 2007. *Tambang & Pelanggaran HAM* (p. 98);

23. Exhibit P-23 : Photocopy of Law Number 11 Year 2005 concerning the Ratification of the International Covenant on Economics, Social and Cultural Rights;

24. Exhibit P-24 : Photocopy of Law Number 12 Year 2005 concerning the Ratification of the International Covenant on Civil and Political Rights;

25. Exhibit P-25 : Photocopy of Jatam, 2007. *Tambang & Pelanggaran HAM* (p. 30);

26. Exhibit P-26 : Photocopy of the 1945 Constitution.

Considering whereas in order to support their arguments, in addition to the exhibit above, the Petitioners also presented 4 (four) witnesses who have given their statements during the court sessions on Wednesday, December 15, 2010 and Wednesday, March 9, 2011, as well as one Expert, Prof. Dr. I Nyoman Nurjaya, S.H., M.H. who has given his statement during the court session on Wednesday, March 9, 2011, which in substance provided the following statement:

Statement of the Witnesses

1. Florianus Surion

- The witness is a member of customary community in West Manggarai Regency, Flores, East Nusa Tenggara, in Komodo island to be precise;

- The witness stated that in his area, there are 10 (ten) Mining Authorizations granted by the Government in the region the topography of which has tourism potential;

- The presence of mining in West Manggarai Regency is currently disturbing because the whole region belongs to the communal land of the local people and to date, there has been no single negotiation which may give hope for the owners of the communal land titles in the aforementioned 10 Mining Authorizations;

- The 10 Mining Authorizations were granted in 2008 by the Government without any effort at all to seek permission from the landowners, particularly with regard to the communal land titles, which caused a gap with the Regional Government, and this has a high conflict potential;

- The witness hopes that the current mining in West Manggarai Regency shall be immediately closed since they have marginalized and alienated the local community from the customary tradition of *kapu manuk, lele tuak* [sic!]. The tradition means that, any guests who came and ask the community, owner of the communal land title, to sit together, chew betel leaf and areca nut together, and tell about the side dishes. But now, the local community is startled because in their region which they have fenced with coffee

plantation, are now prohibited for them to make fences or pick coffee beans since the region has been included in the title of mining authorization holder.

- Against the existence of mining activities in the aforementioned communal land area, the local customary community has taken an action to occupy the land by erecting fences according to the boundaries of their communal land title. In relation to the action, there are two *Tua Teno* [sic!] in the detention of Manggarai District Police.

2. Maryanto

- The witness stated about the community involvement in the stipulation of mining areas, particularly in the coastal area of Kulon Progo;

- Around the 1980s, Kulon Progo Coastal Area was a barren, infertile area with sand bars which were always moved by the wind gust and caused diseases to the community such as asphyxia, cough, influenza, eye sickness etc. However, with the independent efforts of the Kulon Progo Coastal Community, such barren condition was managed into potential land for agriculture and livestock ranch, which produces among others rice, secondary crops, fruits,

vegetables, and is used for ranches such as cows, goats, poultries, which was able to make the community in coastal area prosperous.

- The well-being of the Kulon Progo Coastal Community had been achieved and they have a peaceful life, however, in 2005 there was a plan for the mining of iron sand in Kulon Progo Coastal Area, which certainly disrupted the peace among the Kulon Progo Coastal Community, because the coastal community was threatened to lose its agricultural land. One of the forms of refusal of the Kulon Progo Coastal Community against the plan for iron sand mining was by organizing a demonstration at the office of the Regional People's Legislative Assembly of Kulon Progo which was participated by thousands of people to refuse the aforementioned plan for mining because the Government stipulated the mining area unilaterally, and the Witness, as one of the community members who will be affected, was never invited for a consultation;

- The iron sand mining constituted a pilot project. There had been activities in the form of sand digging which caused disadvantage in the form of reduced debit of wells in the surrounding areas of the pilot project area, also many vegetable plants in the surrounding areas were damaged by the dust resulting from the exploitation process;

- The land in the south coast area has been inhabited since the time of the ancestors, from generations to generations, and the Witness himself is already 33 years old, and certainly the Witness' parents and grandparents had previously inhabited the area. Then, suddenly in 2005, there was information from the Government of Kulon Progo about the exploitation or mining or the plan for mining in the South Coast of Kulon Progo. The witness learnt about the information from the mass media, and as a community member who will be affected, he was never invited for a consultation. From there, the investor had signed a contract of work for a 22 kilometers long and 1.8 kilometers wide mining plan. The area constituted an agricultural land as well as ranch area and the settlement of people. In addition to that, the lands already had certificates, so that such matters will disrupt the life of the community in the south coast of Kulon Progo;

- With the expertise of the people in processing their land, their welfare was getting better from the products of plants, such as pepper, melon, watermelon, or vegetable plants, hence the community cannot be separated from agriculture, because it is the custom of the majority of people in Kulon Progo coastal area.

- The coastal area was claimed by the Sultanate of Jogyakarta as a sultanate land, and the community who have been living there for

tens of years certainly refused, and the refusal had been expressed many times, including on October 23, 2008, when thousands of members of the Kulon Progo coastal community held a demonstration at the office of the Kulon Progo Regional People's Legislative Assembly, but there was no response.

- On October 27, 2008, a form of intimidation from the Government of Kulon Progo towards the community of coastal area occurred by vandalism and arson of the neighborhood security post as well as the community command post and community members' houses, conducted by unknown persons, this will certainly cause conflict between the community of coastal area and the unknown persons. However, praise be to God, the community of coastal area did not let themselves go at the moment so that no bloodshed occurred;

- In end-2008, suddenly the investor built a pilot project to conduct exploration of iron sand sample digging, and this caused a reduction in the debit of wells in the agricultural area. The exploration was conducted on the land of the community member which had been purchased.

- On October 20, 2009, in the Glass Building (*Gedung Kaca*) of the Government of Kulon Progo Regency, a public consultation was held, attended by investors, the Government of Kulon Progo

Regency as well as community members including the Witness. At that time, thousands of farmers from Kulon Progo coastal area came to the place of public consultation on the plan for iron sand mining in the glass building of Kulon Progo Regency to express their opinion to the government and investors in relation to the refusal against the aforementioned mining plan. However, at that time, the community members were blocked by fully-armed police apparatus, the community members were in fact coercively dismissed by tear gas, shot and beaten with clubs, as a result, many community members, according the Witness himself, had to be treated in the hospital;

- Up to the time of the conveyance of this statement, in determining the mining site in Kulon Progo coastal area, the government has never listened to the aspiration of the community which will be affected. For such reason, the farmers in Kulon Progo coastal area who are united in the community of farmers in Kulon Progo coastal area refuse the plan for iron sand mining because: (1) it kills the farmers' plants on sandy land, (2) it reduces the water debit of the people's wells, (3) it causes unrest amid the community due to the fear that they land will be turned into a mining area, (4) it causes horizontal conflicts amid the community, (5) it causes criminalization of community members of coastal area. There has

been a case in which one of the community members of coastal area was reported to the authority for asking information from the sub-village head to learn about the data collection conducted by the aforementioned sub-village head on land. (6) there have been acts of violence conducted by police apparatus against community members, (7) as farmers, they will lose their right to farm on their own land;

- If the government keeps on unilaterally stipulating mining areas without listening to the refusal or aspiration of the Kulon Progo coastal community, the community members will certainly agree to resist to the very end.

3. Sapari

- The Witness is a farmer in Sukolilo area, Pati. The Witness is a farmer who cannot be separated from his land of livelihood as well as his daily job;

- The Witness stated that ever since there was a plan for the construction of Semen Gresik Factory in Sukolilo area, since 2006 there were land middlemen or brokers who have been spreading unrest amid the community in Sukolilo area, Pati, because they were farmers who did not know about the actual condition on what will be carried out by the Regency Government, and suddenly there

was an unilateral action of the middlemen by intimidating people to sell their lands. While in fact the lands were used for daily life, the lands as well as the water sources within the area were really needed by the people in Sukolilo and the surrounding areas;

- In South Pati area, farmers were making extraordinary income from the activity of rice planting;

- The Witness was not willing to sell his land to land middlemen, while 8 (eight) of the Witness' neighbors had sold hectares of their land to middlemen. Initially, the middlemen said that the land would be used for reforestation, namely for Castor Oil (*Jarak Cino*) plants used in biogas production, but in reality, the middlemen lied to the community because there was a movement towards cement factory construction plan;

- As a local community member, the Witness has never been informed that there will be a construction of a cement factory.

- The Witness heard himself that there was an intimidating action in the form of frightening the people by stating that if the land was not sold, as soon as the factory operates, the Witness' land will just be cleared without any compensation. This has worried the Witness.

4. Abdul Madjid Ridwan

- The Witness stated about his experience in relation to a summon from the police which placed the Witness as a suspect under Article 162 of Law 4/2009, namely the Witness was deemed to conduct an action which prevented and disrupted mining business;

- The Witness stated about the incident which happened in his area, namely Wotgalih Village, Yosowilangun District, Lumajang Regency, East Java Province;

- Whereas 10 (ten) years ago, PT. Aneka Tambang have conducted iron sand mining activity. Two years later, PT. Aneka Tambang planned to conduct reproduction. However, from the mining activity since 10 years ago, the community has not received any contribution or anything else, the community was only left with environmental damages which were already very severe. Subsequently, on May 22, 2010, PT. Aneka Tambang held a dissemination event which was attended by the Regional Head Consultation, the Village Head Consultation, and some members of the Regional People's Legislative Assembly, in which the majority of community members refused the reproduction. Due to the community's refusal, the village head issued a statement letter dated July 8, 2010, which basically refused the existence of iron sand mining in the Witness' village.

- Around July 2010, the community heard news in mass media and electronic media that the mining business permit had suddenly been issued, which was followed up by a representative of the mining company conducting a survey and taking samples of sand, accompanied by a community member. After conducting a survey and taking samples of sand, the house of the community member who accompanied the representative of the mining company was visited by other community members, who reminded him and asked him to be taken to the village hall because he violated the agreement of the statement letter of the village head in which the community refused the mining;

- After the person was taken to the village hall to be held accountable, several weeks later 9 (nine) community members in the Witness' place of residence were summoned by the Lumajang Resort Police on different dates, in relation to the aforementioned issue. A week later, 7 (seven) of the 9 persons summoned as witnesses were charged with criminal act under Article 335 and Article 170, with Mr. Hidayat as the reporting party. The seven persons were H. Artiwan, Samsuri, Muhin, Fendi, Maih, the Witness himself – Ridwan, and H. Mahruji. At the end, four of the seven persons, namely H. Artiwan, Samsuri, Muhin, and Fendi, were immediately arrested by the Lumajang Resort Police. The four

persons being arrested were subsequently processed in a court trial in Lumajang Court and sentenced with imprisonment of 5 month and 2 day in accordance with the detention period;

- A week after the aforementioned arrest, community members were summoned once more by the Lumajang Resort Police as witnesses under Article 162 of Law Number 4 Year 2009 concerning Mineral and Coal Mining. Since the people felt traumatic about the arrest and detention of the four persons, who were initially summoned as witnesses and then became the suspects, nine of the people summoned by the Resort Police in relation to Article 162 of Law Number 4 Year 2009 did not responded to the summon. It was also unclear from the summon letter who the reporting party was, it was not stated therein;

- Through the aforementioned incidents, the spirit of Yosowilangun Village community members was strengthened and they were unified to refuse iron sand mining in order to maintain the environmental preservation in the village.

- The way to demonstrate refusal as conducted by local community was by organizing mass prayers to ask for help (*istighosah*) continuously with the Islamic clerics (*alim ulama*) in every mosque every time after the Friday prayer. Then they conducted peaceful

demonstration action, however, there was still no response from the government. Lastly, the local community conducted reforestation in the ex-mining site, once in a week.

- The government has never explained about the mechanism for community members to convey their complaints or to refuse the aforementioned mining business;

- PT. Aneka Tambang ceased its operation because the permit was expired in 2008, and subsequently they requested a new permit. Local people were not involved at all in the process of new permit issuance. The new permit was issued for the continuation of the activity in the previous area;

- The status of the land which became the area for the business permit was initially state-owned, however, the claimant of the land's status was unclear, whether the Air Force, the Indonesian State Forestry Company or the Ministry of Forestry. For the time being, the land to be mined is used by the Air Force for training purpose;

- The land to be re-exploited is in the form of mountains which served as a shield or protector for local people from waves, including tsunami, since the area is close to the south sea. The land is not agricultural land.

Statement of Expert, Prof. Dr. I Nyoman Nurjaya, S.H., M.H.

- The expert stated about matters related to public participation in decision making, stipulation, policy, and transparency, as well as matters related to the criminalization of mining business;

Constitutional Platform

- Paragraph IV of the Preamble of the 1945 Constitution of the State of the Republic of Indonesia:
  - to protect the entire Indonesian whole nation and the entire Indonesian motherland;
  - to promote general welfare;
  - to develop the intellectual life of the nation;
  - to establish eternal peace;
- Article 18B paragraph (2) of the 1945 Constitution states: “The State shall recognize and respect customary (*adat*) law community units along with their traditional rights insofar as they are still existent and are in conformity with the development of society and the principle of the Unitary State of the Republic of Indonesia, as stipulated in law.”;

- Article 28C paragraph (2) of the 1945 Constitution states: “Every person shall have the right to promote themselves in striving for their rights collectively for building their society, nation, and state.”;

- Article 28D paragraph (1) of the 1945 Constitution states: “Every person shall have the right to fair recognition, guarantee, protection and legal certainty as well as equal treatment before the law.”;

- Article 28E paragraph (3) of the 1945 Constitution states: “Every person shall have the right to the freedom of association, assembly and expression of opinion.”;

- Article 28G paragraph (1) of the 1945 Constitution states: “Every person shall have the right to protect themselves, their family, their honor, dignity and property under their control, and shall have the right to the feeling of security and protection against the threat of fear to do, or not to do something that constitutes a human right.”;

- Article 28H paragraph (4) of the 1945 Constitution states: “Every person shall have the right to possess personal proprietary rights and such proprietary rights may not be taken over arbitrarily by anybody.”;

- Article 28I paragraph (3) of the 1945 Constitution states: “The cultural identity and the rights of traditional communities shall be respected in conformity with the development of times and civilization.

- Article 32 paragraph (1) of the 1945 Constitution states: “The state shall promote Indonesian national culture amidst world civilization by guaranteeing freedom to the society in maintaining and developing their cultural values.”

- Article 33 paragraph (3) of the 1945 Constitution states: “Land and water and the natural resources contained therein **shall be managed by the state** and shall be used for the greatest **prosperity of the people**.”;

LAWS

- Law Number 39 Year 1999 concerning Human Rights;

- Law Number 11 Year 2005 concerning the Ratification of the International Covenant on Economic, Social, and Cultural Rights;

- Law Number 12 Year 2005 concerning the Ratification of the International Covenant on Civil and Political Rights;

- Article 66 of Law Number 32 Year 2009 concerning Environmental Protection and Management which states: “Every person struggling for a right to a proper and healthy environment may not be prosecuted under the criminal code or charged under the civil code.”;

- Article 6 paragraph (1) sub-paragraph e of Law Number 4 Year 2009 concerning Mineral and Coal Mining (Law 4/2009) states: “The authority of

the Government in the management of mineral and coal mining shall be, among other things: ... e. stipulation of Mining Areas upon coordinating with the regional governments and consulting with the People's Legislative Assembly of the Republic of Indonesia; ... and so on";

- Article 9 paragraph (2) of Law 4/2009 reads as follows: "Mining Areas as intended in paragraph (1) shall be stipulated by the Government upon coordinating with the regional governments and consulting with the People's Legislative Assembly of the Republic of Indonesia.";

- Article 10 of Law 4/2009 reads as follows: "Stipulation of Mining Areas as intended in Article 9 paragraph (2) shall be conducted:

  a. in a transparent, participatory and responsible manner;

  b. in an integrated manned by taking into account the opinions of the relevant government agencies, the community, and by considering the ecological, economic, and socio-cultural aspects as well as having environmental perspective; and

  c. by taking into account the regional aspirations.";

- Article 136 of Law 4/2009 states:

  (1) Mining Business Permit or Special Mining Business Permit holders, prior to carrying out production operation activities, shall be

required to settle land titles with the title holders in accordance with the provisions of laws and regulations.

(2) The settlement of land titles as intended in paragraph (1) may be conducted gradually according to the land requirement of the Mining Business Permit or Special Mining Business Permit holders.

- Article 162 of Law 4/2009 states, “Any person who prevents or disrupts mining business activities belonging to the Mining Business Permit or Special Mining Business Permit holders that have met the requirements as intended in Article 136 paragraph (2) shall be sentenced to imprisonment for a maximum period of 1 (one) year or a fine in a maximum amount of Rp100,000,000.00 (one hundred million rupiah).”;

NATIONAL DEVELOPMENT

- To actualize the mandate of the constitution, the Government implements national development as a medium to actualize the welfare and prosperity of the people;

- Natural resources constitute the main capital in implementing national development, in addition to taxes, retributions, inviting investors, and even relying on loans or foreign debts;

- The paradigm of national development, which is still adhered to, is: **economic growth development**, namely a development paradigm

having the orientation towards pursuing economic growth and towards the actualization of the mandate to promote general prosperity;

- After economic growth is achieved, it should drip or flow down to enhance the welfare and prosperity of the people, towards a justice and prosperous society in line with the mandate of the 1945 Constitution;

ECONOMIC GROWTH DEVELOPMENT

- There are two dimensions in achieving economic growth development, namely: **target** and **process**, which have to be in balance;

- **Development targets** are to achieve economic growth as expected, through a proper and humane **process**; to respect and protect human rights of the people and the rights of traditional communities; to make the people smile, protected, and sheltered; and the environment is preserved and its sustainability is protected ;

TARGET-ORIENTED DEVELOPMENT

- The journey of the implementation of national development, which is reflected on its legal products, seems to put more emphasize on the achievement of development **targets** by disregarding the **process**. If they are in balance, there will be no issue. However, if we see, observe and criticize, the legal products which are relevant to natural resource management seem to prioritize the target than the process and disregard

the process, disregard the protection on human rights of the people, the rights of traditional communities, and whether it makes people smile or protected, or not the opposite;

- If national development rather pursues the targets, it means there is exploitation by disregarding the process. Meanwhile, the implication of more target-oriented national development is: high cost of development and the emergence of victims of development, or what Prof. Soetandyo calls as “casualties of development”;

VICTIMS OF DEVELOPMENT

- Meanwhile, the manifestations of high cost of development are as follows:
  - The violation of human rights of the people, unguaranteed economic-social-political and legal rights, economic helplessness and poverty;
  - Environmental pollution and damage;
- Both of the manifestations above are never accounted for as the **results of national development (unaccounted cost of development)**, but both of them actually occurred in the field;

PRINCIPLES OF NATURAL RESOURCE MANAGEMENT

- As the result of the aforementioned issues, in relation with judicial review of Law 4/2009 against the 1945 Constitution, it is worth to pay close attention as to whether or not the existing legal products have satisfied the important principles of natural resource management;

- ***Precautionary principle***. Early prevention principle – carefulness principle:

  – Natural resources and environment are the source of human livelihood which must be preserved and protected. Therefore, we should be careful in their usage and utilization;

  – Environmental pollution may threaten human life and in fact, it is said that the history of Mesopotamian civilization in the most fertile area in the Valley of Euphrates and Tigris Rivers was destroyed due to environmental issues;

  – In legal products, this early prevention principle should have been reflected starting from:

    o Arrangement, planning and stipulation of the decision makers;

    o Environmental impact assessment (EIA) for prevention;

    o Licensing system;

- Supervision after issuance of permit. Usually, the government's weakness lies in this matter, after the permit has been issued, the government does not consider the rest to be important anymore, but leaves it to the company owner;
- Monitoring and evaluation;

- Justice principle:
  - having philosophical dimension;
  - Justice for the generation having the right to enjoy in the future;
  - Justice for the current generation;
  - Just in terms of allocation of exploitation and usage;
  - Just in terms of utilization for the welfare and prosperity of the people;
- Democracy principle:
  - Its dimension is equality in the relationship between people and government in being a nation and a state. It is reflected on how community involvement is arranged in the planning and preparation of policy, decision, and stipulation;

- The existence of transparency in policy-decision making;
- The existence of government's accountability to the people'
- The existence of recognition and protection of the rights of people, particularly traditional communities; and
- The existence of recognition of fact of legal plurality in the community;

- Free and prior informed consent principle
  - Constitutes a principle of management of natural resources and environment;
  - Its dimension is equality in the relationship between people and government in the management of natural resources and environment;
  - Constitutes a manifestation of recognition by the state of legal plurality and protection of the rights of people, and communal rights of traditional communities to ownership of natural resources within their customary area;
  - People, particularly traditional communities, ought to be prior informed about a policy-decision-stipulation plan of the government

and subsequently granted the freedom to consent/not to consent on such government plan;

- Sustainability principle:
  - Its dimensions are environmental protection and sustainability;
  - Natural resources are in the form of stock and commodity. An example of stock: landscape in the form of watershed, lake. Examples of commodities which are real and constitute economic commodities: in forestry, the commodity is wood, in mining, the commodities are mineral, coal, etc.;
  - Natural resources are either renewable or nonrenewable. Examples of nonrenewable resources: mineral and coal. Even if they can be renewed, it would take thousands of years.
  - There is limitation in capacity and support capability;
  - Environmental quality standard;
  - Preventing negative impact in the form of environmental pollution and damage is better than recovering an impact of environmental pollution and/or damage;
- The principles of legal development related to natural resource management, in the Expert's opinion, are already reflected in the 1945

Constitution, namely in: the 4th Paragraph of the Preamble of the 1945 Constitution, Article 18B paragraph (2), Article 28C paragraph (2), Article 28D paragraph (1), Article 28E paragraph (3), Article 28G paragraph (1), Article 28H paragraph (1), Article 28I paragraph (3), Article 32 paragraph (1), and Article 33 paragraph (3) of the 1945 Constitution.

- In the laws, reflection of protection of human rights can be found in Law Number 39 Year 1999 concerning Human Rights. There are also international conventions which have been ratified by the government, such as Law Number 11 Year 2005 concerning the Ratification of the International Covenant on Economic, Social, and Cultural Rights and Law Number 12 Year 2005 concerning the Ratification of the International Covenant on Civil and Political Rights;

- Article 66 of Law Number 32 Year 2009 concerning Environmental Protection and Management is related to criminalization and decriminalization;

COMMENTS

- Article 6 paragraph (1), Article 9 paragraph (2), and Article 10 sub-article b of Law 4/2009 are related to:

  – the essence of the early prevention principle – in planning-stipulation of Mining Areas;

- democracy principle – genuine public participation – transparency – recognition of community rights;

- prior informed consent principle – no room for granting approval/not freely.

- With regard to Article 10 of Law 4/2009, the Expert questioned whether the aforementioned article has reflected what we know as the genuine public participation, or a real, genuine public participation or community involvement, not a pseudo public participation, or a lip-servicing, deceitful involvement. In the Expert's opinion, Article 10 of Law 4/2009 seems to be a mere lip-service, particularly in Article 10 sub-article b which refers to the word community in the stipulation of mining areas;

- Article 162 of Law 4/2009 correlates with Article 136 paragraph (2) of Law 4/2009;

- Article 162 of Law 4/2009 may only be applied if the **legal obligations** of Mining Business Permit or Special Mining Business Permit Holders, as set forth in Article 136 of Law 4/2009, have been settled;

- The critical question is: why is it that the criminal sanction for **mining business permit or special mining business permit holders who do**

not satisfy their legal obligations not regulated? This constitutes a discriminative treatment before the law;

- The landowners' resistance arises due to the occurrence of criminalization while Article 136 of Law 4/2009 has not been satisfied yet by mining business permit or special mining business permit holders.

[2.3] Considering whereas in responding to the arguments of the Petitioners' petition, the government has conveyed its verbal statement in the court session on Wednesday, October 27, 2010, and conveyed its written statement which was presented during the court session on Wednesday, December 15, 2010, which substantially stated as follows:

I. THE SUBSTANCE OF THE PETITIONERS' PETITION

The Petitioners filed a petition for constitutional review of the provision 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 4/2009 against the 1945 Constitution of the State of the Republic of Indonesia, the substance of which, in the Petitioners' opinion, is as follows:

1. Whereas the provision of Article 6 paragraph (1) sub-paragraph e, Article 9 paragraph (2), Article 10 sub-article b of Law 4/2009 is deemed as creating denial of the community's collective rights, particularly the right to self determination, the right to use natural riches and resources, the right to mining, the rights of minorities (particularly if the mining area expropriate the rights of customary community) as well as the right to environment, therefore, the aforementioned provision is inconsistent with the principles of justice and participation, and has indirectly accommodated the current practices of exploitation of Indonesian natural riches as well as continued the colonial point of view through ownership of land in wide scale and 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 taking into account the decision of landowners, as well as without regarding whether the mining business damages the environment or violates people's proprietary rights. In brief, in the Petitioners' opinion, the provision *a quo* has resulted in: the stipulation of mining areas conducted without taking into account the decision of landowners, community refusal against mining areas stipulation process is made impossible, and the Indonesian mining business development profile which has more facts of human affliction as well as its 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 4/2009 is deemed as potentially diminishing, and even eliminating, the opportunity for community members/small-scale and medium-scale entrepreneurs to run a business in the mining sector, and it may be interpreted 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 4/2009 is deemed as discriminating the positions or giving unequal treatment between business entities which are legal entities and business entities which are not legal entities, since business entities which are eligible for obtaining a Mining Business Permit are only business entities which are qualified as legal entities.

4. Whereas the provision of Article 51 of Law 4/2009 is deemed not in line and inconsistent with the philosophy of economic democracy which promotes the principles of communality and justice, and Article 52 paragraph (1), Article 55 paragraph (1), Article 58 paragraph (1), Article 60, Article 61 paragraph (1) of Law 4/2009 have been explicitly obstructing and hampering medium/small-scale entrepreneurs in obtaining a Mining Business Permit in the name of the law, because such requirement for

minimum area size of an Exploration Mining Business Permit Area is impossible to achieve for small-scale/medium-scale enterprises. The area size of a Mining Business Permit Area at 5,000 (five thousand) hectares has, in the Petitioners' opinion, limited the right of other person who does not have sufficient capital to run a business in the mining sector.

5. Whereas the provision of Article 75 paragraph (4) of Law 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 4/2009 is deemed as omitting the meaning of recognition, guarantee, protection and legal certainty of just laws, as well as equal treatment for every citizen before the law, and is deemed as legitimating the practice of criminalization against civil community members who express their critics or protests against mining companies.

7. Whereas the provisions of Article 172 and Article 173 paragraph (2) of Law 4/2009 are deemed as discriminating between Mining Authorization and Small-Scale Mining Authorization holders and Contract of Work holders;

II. REGARDING THE LEGAL STANDING OF THE PETITIONERS

Pursuant to the provision of Article 51 paragraph (1) of Law Number 24 Year 2003 concerning the Constitutional Court, it is stated that the Petitioners shall be the party 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 further clarified in the elucidation of the Law, that "*constitutional rights*" refer to the rights granted by the 1945 Constitution. Therefore, in order that a person or a party can be accepted as the Petitioner with legal standing in the petition for review of Law against the 1945 Constitution of the State of the Republic of Indonesia, they must first explain and substantiate:

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

b. Their constitutional rights and/or authority according to the qualification, which they consider 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 understanding and limitations cumulatively regarding the impairment of constitutional rights and/or authority which resulted from 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. Whereas the Petitioner considers that such constitutional rights and/or authority have been impaired by the Law being petitioned for review;

c. Whereas the aforementioned 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 a 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 impairment of such constitutional rights and/or authority as argued by the Petitioners will not or will no longer occur.

Therefore, the Government needs to question the interest of the Petitioners, whether it is already appropriate for them to be the party which considers 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 4/2009. Also, whether or not there is an impairment of such constitutional rights and/or authority which is specific (special) and actual or at least potential in nature which, pursuant to logical reasoning, can be assured of occurring, and whether or not 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 aforementioned matters, the Government through the Chief Justice/Panel of Justices of the Constitutional Court requests that the Petitioners should prove first as to whether or not they are truly the party whose constitutional rights and/or authority have been impaired by the coming into effect of the Law being petitioned for review.

For the Petitioners in case registration Number 32/PUU-VIII/2010 in particular, the Petitioners did not clarify their standing or position in the 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 that the Chief Justice/ Panel of Justices of the Constitutional Court declare, at his/its discretion, that the Petitioners' petition is rejected or inadmissible (*niet ontvankelijk verklaard*). Nevertheless, should the Chief Justice/Panel of Justices of Constitutional Court be of another opinion, the clarification of the Government in relation to the material being petitioned for review by the Petitioners is as follows:

III. CLARIFICATION OF THE GOVERNMENT ON THE PETITION FOR REVIEW OF LAW NUMBER 4 YEAR 2009 CONCERNING MINERAL AND COAL MINING

With regard to the material content of the aforementioned Petitioners' petition, the Government shall first convey the purposes and main ideas of the management of mineral and coal as stipulated in Law 4/2009, in which the purposes of the management of mineral and coal are none other than to:

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

2. guarantee the benefit of mineral and coal mining which is sustainable and having environmental perspective;

3. guarantee the availability of mineral and coal as raw material and/or as energy source for domestic needs;

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

5. increase the income of local communities, regions and state as well as to create job 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 4/2009 contains the following main ideas:

1. Mineral and coal as unrenewable resources shall be owned by the state and their development and empowerment shall be conducted by the Government and Regional Government in collaboration with business actors.

2. The Government subsequently shall provide the opportunity to Indonesian business entities which are legal entities, cooperatives, individuals as well as the local community to conduct mineral and coal mining based on a

permit granted by the Government and/or regional governments according to their respective authorities, in line with regional autonomy.

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

4. Mining business should provide economic and social benefit for the greatest prosperity of the Indonesian people.

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

6. In the context of actualization of sustainability development, mining business activities should be implemented by taking into account the principles of environment, transparency, and community participation.

Furthermore, the Government conveys its clarification on the Petitioners' assumptions/arguments as follows:

1. With regard to the Petitioners' Opinion regarding the Provision of Article 6 paragraph (1) sub-paragraph e *juncto* Article 9 paragraph (2) of Law 4/2009, which In Substance Stated That:

Whereas in the Petitioners' opinion, the phrase "authority of the Government in the management of mineral and coal mining shall be the stipulation of Mining Areas upon coordinating with the regional governments and consulting with the People's Legislative Assembly, and Mining Areas as intended in paragraph (1) shall be stipulated by the Government upon coordinating with the regional governments and consulting 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 4/2009 is illogical since it lacks the seriousness in protecting land titles of the people, due to the stipulation of mining areas without involving the decision of landowners and community refusal against mining areas stipulation process made impossible

The clarification of the Government is as follows:

Whereas the statement that the stipulation of Mining Areas lies within the authority of the Government in the management of mineral and coal mining, conducted upon coordinating with the regional governments and consulting with the People's Legislative Assembly, and stipulated by the Government upon coordinating with the regional governments and consulting with the People's Legislative Assembly of the Republic Indonesia is a very logical and reasonable matter, since in the state structure system of the Republic of Indonesia, the People's Legislative Assembly constitutes the representatives of the people who are

democratically elected through the general election held in a manner which is direct, general, free, and secret as well as honest and fair.

The provision of Article 6 paragraph (1) sub-paragraph e *juncto* Article 9 paragraph (2) of Law 4/2009 which regulates the criteria for Authority in the Management of Mineral and Coal Mining and the criteria for Mining Areas is aimed at providing legal certainty for a region, on whether or not mining business activities may be conducted in such region. The stipulation of Mining Areas by the Government is based on the provision of Article 1 paragraph (29) of Law 4/2009 which states:

*Mining Area, hereinafter intended as WP (*Wilayah Pertambangan*), shall be an area that has mineral and/or coal potential, which shall not be bound by governmental administrative boundaries as a part of the national spatial layout.*

In addition to that, the implementing regulation of Law 4/2009, namely Government Regulation Number 22 Year 2010 concerning Mining Area in Article 3 states:

Mining Area Plan as intended in Article 2 paragraph (3) sub-paragraph a shall be formulated through the following stages:

a. inventorization of mining potentials; and

b. formulation of Mining Area Plan.

And Article 15 states:

(1) Mining Area Plan as intended in Article 14 paragraph (3) shall be stipulated by the Minister to become a Mining Area upon coordinating with the governor, regent/mayor and consulting with the People's Legislative Assembly of the Republic of Indonesia.

(2) Mining Area may be reviewed 1 (once) in every 5 (five) years.

(3) The governor or regent/mayor, by virtue of their authority, may recommend a revision of Mining Area to the Minister based on results of survey and research.

Therefore, it is evident that the stipulation of a mining area is conducted pursuant to the provisions on spatial layout set forth in Law Number 26 Year 2007 concerning Spatial Planning (hereinafter referred to as Spatial Planning Law), which in Article 3 states:

Spatial planning shall be aimed at actualizing a safe, comfortable, productive, and sustainable national space based on the Archipelago concept and National Defense through:

a. the actualization of harmony between natural and artificial environments;

b. the actualization of integrity in utilizing natural and artificial resources with respect to human resources; and

c. the actualization of protection of spatial function and prevention from negative impacts to the environment due to space utilization.

and Article 6 states:

(1) Spatial planning shall be implemented with regard to:

a. physical condition of the territory of the Unitary State of the Republic of Indonesia which is prone to disasters;

b. potential of natural resources, human resources, and artificial resources; the economic, social, cultural, political, legal, defense and security, environmental, as well as science and technological condition as a unity; and

c. geostrategy, geopolitics and geoeconomy.

(2) National spatial planning, provincial spatial planning, and regency/municipal spatial planning shall be implemented in stages and in a complementary way.

(3) National spatial planning shall cover jurisdictional and national sovereignty territory which shall consist of land space, oceanic space and air space, including space within the earth as a unity.

(4) Provincial and regency/municipal spatial planning shall consist of land space, oceanic space, and air space, including space within the earth in accordance with the provision of laws and regulations.

Based on the clarification above, in the Government's opinion, the provision of Article 6 paragraph (1) sub-paragraph e *juncto* Article 9 paragraph (2) of Law 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 6 paragraph (1) sub-paragraph e *jo.* Article 9 paragraph (2) of Law 4/2009 are not directly related to the articles in the 1945 Constitution of the State of the Republic of Indonesia being the tools/benchmark argued by the Petitioners. Therefore, Article 6 paragraph (1) sub-paragraph e *juncto* Article 9 paragraph (2) of Law 4/2009 **do not** contain any norm which reflect discrimination in position and treatment, injustice, legal uncertainty and discriminating in nature.

2. With regard to the Petitioners' Opinion regarding the Provision of Article 10 sub-article b of Law 4/2009, which in substance stated that:

Whereas in the Petitioners' opinion, the phrase Stipulation of Mining Areas shall be implemented in an integrated manned by taking into account the

opinions of the relevant government agencies, the community members, and by considering the ecological, economic, and socio-cultural aspects as well as having environmental perspective; and by taking into account the regional aspirations in Article 10 sub-article b of Law 4/2009 is illogical, since the profile of Indonesian mining business development has more facts of human affliction as well as its damaging and destructive power against the environment, than its contribution to the development of the nation's economy. Local people whose area will be turned into mining areas are only positioned as the party to consult with and to be merely taken into account, no mechanism is provided for the people who own and cultivate the land to learn about the true, honest and comprehensive information in the stipulation process of mining areas.

The clarification of the Government is as follows:

Whereas the provision of Article 10 sub-article b of Law 4/2009, which regulates the Stipulation of Mining Areas as referred, is implemented in an integrated manned by taking into account the opinions of the relevant government agencies, the community members, and by considering the ecological, economic, and socio-cultural aspects as well as having environmental perspective; and by taking into account the regional aspirations, is aimed at providing legal certainty for the community in the surrounding of the mining sites to be able to participate actively in the stipulation of mining areas for the implementation of mining business

activities in Indonesia, which is in line with the purpose of the formulation of Law 4/2009, namely to guarantee legal certainty in the implementation of mineral and coal mining business activities.

Subsequently, as already described above that the stipulation of mining areas is a part of the implementation of the provision which regulates spatial planning, the Spatial Layout Law in Article 13 states:

(1) *The Government shall provide direction on spatial planning for the provincial government, regency/municipal government, and community.*

(2) *The direction of spatial planning as intended in paragraph (1) shall be implemented through:*

a. *coordinating on implementation of spatial planning;*

b. *socialization of laws and regulations and socialization of direction on the field of spatial planning;*

c. *provision of assistance, supervision, and consulting in the implementation of spatial planning;*

d. *education and training;*

e. *research and development;*

f. development of spatial planning information and communication system;

g. dissemination of spatial planning information to the community; and

h. development of community awareness and responsibility.

Article 16

(1) Spatial layout plans shall be open for re-evaluation.

(2) Re-evaluation on the spatial layout plans as intended in paragraph (1) may result in a recommendation in the form of:

a. the applicable spatial layout plans may still be effective in accordance with its validity period; or

b. the applicable spatial layout plans need to be revised.

Based on the clarification above, in the Government's opinion, the provision of Article 10 sub-article b of Law 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 10 sub-article b of Law 4/2009 is not directly

related to the articles in the 1945 Constitution of the State of the Republic of Indonesia being the reviewing tool argued by the Petitioners. Therefore, Article 10 sub-article b of Law 4/2009 **does not** contain any norms which reflect discrimination in position and treatment, injustice, legal uncertainty and discriminating in nature.

3. **With regard to the Petitioners' Opinion regarding the Provision of Article 22 Sub-Articles a, c and f of Law 4/2009, which In Substance Stated That:**

Whereas in the Petitioners' opinion, in conducting tin ore mining, it is impossible to conduct mining activities in the river and/or between two banks of the rivers, because secondary mineral deposits (tin) does not exist in the river and/or on between two banks of the rivers. In fact, the provision of Regency/municipal Regional Regulation in the whole Bangka Belitung Islands prohibits mining activities in the river and/or between two banks of the rivers.

Subsequently, the Petitioners stated that small-scale mining of metal mineral (tin) in Bangka Belitung Province is not conducted in mining sites which have been worked on for at least 15 (fifteen) years, so that the opportunity for people to conduct mining, in particular tin mining in Bangka Belitung Province is repressed.

Whereas the phrase “which have been worked on for at least 15 years” in Article 22 sub-article f of Law 4/2009 is impossible and illogical, because it can be assured of that the land shall not have tin deposits any more, since it has been fully exploited by the previous miners.

Whereas the phrase “which have been worked on” in Article 22 sub-article f of Law 4/2009, in the Petitioners’ opinion may be interpreted that mining activities may only be conducted in ex-mining sites which previously have been worked on, certainly such land has been fully excavated by large companies which have been conducting mining activities for so long, such as PT. Timah, Tbk and PT. Kobatin.

The clarification of the Government is as follows:

Whereas the provision of Article 22 of Law 4/2009 which regulates the stipulation criteria for Small-Scale Mining Areas is aimed at providing legal certainty to the community having the intention to conduct small-scale mining as well as providing opportunity to the people to participate in the development, particularly in mineral and coal mining activities.

In Article 21 of Law 4/2009, it is stated that authority to stipulate small-scale mining areas shall be granted to the regents/mayors upon consulting with the regional people’s representative assembly of districts/municipals. Article 67 paragraph (1) of Law 4/2009 also regulates the granting of authority to regents/mayors to issue Small-Scale Mining Permit.

With the authority granted by Law 4/2009 to the Regents/Mayors in stipulating Small-Scale Mining Areas, the application of criteria for stipulating Small-Scale Mining Areas as intended in Article 22 of Law 4/2009 will be left to the regents/mayors according to the condition and characteristics of each region. Furthermore in Article 22, with regard to formulation of the phrase "**and/or**", it may be interpreted that the criteria for stipulating Small-Scale Mining Areas may be "cumulative" or "alternative" in nature. Therefore, the regents/mayors may stipulate which criteria are suitable to the condition of their regions. The application of criteria for stipulating Small-Scale Mining Areas shall be regulated in Regional Regulation.

In Article 134 paragraph (2) of Law 4/2009, it is stated that:

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

Based on the aforementioned Article, if Regional Regulation prohibits mining in certain locations, such as in the river and/or between two banks of the rivers, then mining business activities may not be conducted in the area. In fact, this is not inconsistent with the content of Article 22 of Law 4/2009 because the criteria of Small-Scale Mining Areas in Article 22 will later be left to the regents/mayors to determine which criteria are

compulsory in nature and which are optional based on the condition of their respective regions.

Whereas despite the truth in the Petitioners' argument which stated that small-scale mining of metal mineral (tin) in Bangka Belitung Province is not conducted in mining sites which have been worked on for at least 15 (fifteen) years, it does not mean that the opportunity for people to conduct mining, in particular tin mining in Bangka Belitung Province is repressed, because Article 24 of Law 4/2009 stated that:

"Small-scale mining areas or sites which have been worked on but not yet determined as Small-Scale Mining Areas shall be prioritized to be determined as Small-Scale Mining Areas".

Based on the aforementioned Article 24 of Law 4/2009, small-scale mining sites which already existed before the enactment of Law 4/2009 shall be prioritized to be determined as Small-Scale Mining Areas, so that the community in Bangka Belitung Province may still conduct mining business activities within the Small-Scale Mining Areas.

Therefore, in the Government's opinion, the provision of Article 22 sub-articles a, c and f of Law 4/2009 **is not inconsistent with** Article 28I paragraph (2), Article 33 paragraphs (1) and (4) of the 1945 Constitution of the State of the Republic of Indonesia, because Article 22 sub-articles a, c and f of Law 4/2009 is in fact aimed at providing legal certainty to

small-scale mining activities as well as to accommodate regional condition or characteristics and to provide legal certainty to the community having the intention to conduct small-scale mining as well as to provide the opportunity for the people to participate in the development, particularly in mineral and coal mining activities.

In Article 21 of Law 4/2009, it is stated that authority to stipulate small-scale mining areas shall be granted to the regents/mayors upon consulting with the regional people's representative assembly of districts/municipals. Article 67 paragraph (1) of Law 4/2009 also regulates the granting of authority to regents/ mayors to issue Small-Scale Mining Permit.

With the authority granted by Law 4/2009 to the Regents/Mayors in stipulating Small-Scale Mining Areas, the application of criteria for stipulating Small-Scale Mining Areas as intended in Article 22 of Law 4/2009 will be left to the regents/ mayors according to the condition and characteristics of each region. Furthermore in Article 22, with regard to formulation of the phrase "**and/or**", it may be interpreted that the criteria for stipulating Small-Scale Mining Areas may be "cumulative" or "alternative" in nature. Therefore, the regents/mayors may stipulate which criteria are suitable to the condition of their regions. The application of criteria for stipulating Small-Scale Mining Areas shall be regulated in Regional Regulation.

The Government is of the opinion that the Petitioners' assumption that the land has previously been fully excavated by large companies is ungrounded because in accordance with provision of applicable laws and regulations, Small-Scale Mining Areas may not overlap with Mining Authorization areas or Contract of Work/ Work Agreement for Coal Mining areas.

Therefore, in the Government's opinion, the provision of Article 22 sub-articles a, c and f of Law 4/2009 **is 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 4/2009 is not directly related to the articles in the 1945 Constitution of the State of the Republic of Indonesia being the reviewing tool argued by the Petitioners. Therefore, Article 22 sub-article f of Law 4/2009 **does not** contain any norm which reflects discrimination in position and treatment, injustice, legal uncertainty and discriminating in nature.

4. With regard to the Petitioners' Opinion regarding the Provision of Article 38 sub-article a of Law 4/2009, which In Substance Stated That:

Whereas in the Petitioners' opinion, the provisions of Article 38 sub-article a of Law 4/2009 have intentionally made discrimination in position and

unequal treatment between business entities which are legal entities and business entities which are not legal entities in obtaining a Mining Business Permit. Article 38 of Law 4/2009 states that:

"*Mining Business Permits shall be granted to:*

a. business entities;

b. Cooperatives; and

c. Individuals."

While in the General Provisions Chapter, article 1 sub-article 23 of Law 4/2009 states:

"*Business entity" shall mean any "legal entity" engaging in the field of mining, established under the laws of Indonesia and domiciled in the territory of the Unitary State of the Republic of Indonesia*."

As seen in the provision of Article 38 sub-article a of Law 4/2009, only a "business entity" qualified as a "legal entity" may obtain a Mining Business Permit, which means a Mining Business Permit cannot be granted to a "business entity" which is not a "legal entity". From 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. While business entities in the

form of Limited Partnerships, Firms, and Trading Companies under Article 38 sub-article a of Law 4/2009 may not be granted Mining Business Permit, meanwhile, business entities which are legal entities and individuals may be granted Mining Business Permit.

Therefore, in the Petitioners' opinion, every single provision which unfairly gives unequal treatment (discriminative) in order to be able to conduct mining business constitutes a provision of rules which is inconsistent with/violates human rights principles protected by Article 28D paragraph (1), Article 28I paragraph (2), and Article 33 paragraph (5) of the 1945 Constitution.

The clarification of the Government is as follows:

One of the principles in Law 4/2009 is the participatory principle, which means that the opportunity to conduct mining business activities is opened as wide as possible to every community member who satisfies the requirements set forth in Law 4/2009 and its implementing regulation. Community participation in conducting mining business activities may be conducted by forming a business entity, cooperative or as individuals.

In Law Number 4 Year 2009 concerning Mineral and Coal Mining, the phrase "business entity" is indeed defined as "business entity having legal entity", nevertheless, it does not mean that a business entity without legal

entity has no place, or in other word cannot be granted, a Mining Business Permit under Law 4/2009.

Article 49 of Law 4/2009 states:

"*Further provisions on procedures for granting Exploration Mining Business Permit ... and Production Operation Mining Business Permit ... shall be regulated by Government Regulation.*"

Government Regulation regulating procedures for granting Mining Business Permit in accordance with the mandate of Law No. 4/2009 is Government Regulation Number 23 Year 2010 concerning 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 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 individuals, firms or limited partnerships.

Based on the aforementioned Article 6 paragraphs (1) and (3) of Government Regulation Number 23 Year 2010 concerning Implementation of Mineral and Coal Mining Business Activities, it is ascertainable that the existence of business entities without legal entity such as firms or limited partnerships is also recognized and they can certainly be granted a Mining Business Permit.

If we view from its characteristics, in fact, Trading Companies may be categorized as sole proprietorships. Nevertheless, we must keep in mind 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 Trading Company are only limited to goods and/or services trading activities.

If a Trading Company has an intention to conduct special mining business activities in the field of mineral and/or coal trading, then the Trading

Company shall be granted a Special Production Operation Mining Business Permit for Sales and Transportation.

Based on the clarification above, the Petitioners' argument which stated that the provision of Article 38 sub-article a of Law 4/2009 is discriminative against Companies without legal entity is completely ungrounded. Therefore, there is no inconsistency between the norm of Article 38 sub-article a of Law 4/2009 and the norm of Article 28D paragraph (1), Article 28I paragraph (2), and Article 33 paragraph (5) of the 1945 Constitution.

Based on the clarification above, in the Government's opinion, the Petitioners' argument which stated that the provision of Article 38 sub-article a of Law 4/2009 is discriminating against Companies without legal entity is completely ungrounded. Therefore, there is no inconsistency between the norm of Article 38 sub-article a of Law 4/2009 and the norm 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 regarding the Provision of Article 51, Article 60, Article 75 paragraph (4) of Law 4/2009, which In Substance Stated That:

Whereas in the Petitioners' opinion, the granting of Mining Business Permit/ Special Mining Business Permit for metal mineral and coal through a tender is the same as hampering and impeding medium/small-scale

entrepreneurs. In a tender, it will be difficult for small/medium-scale entrepreneurs to compete with large companies/investors to obtain a Mining Business Permit/Special Mining Business Permit for metal mineral and/or coal.

Whereas Article 51, Article 60, Article 75 paragraph (4) of Law 4/2009 which regulate the granting of a Mining Business Permit Area/Special Mining Business Permit Area for metal mineral and coal through a tender system is deemed unfair since it has confronted medium/small-scale business entities and cooperatives against large business entities, in particular foreign companies (foreign capital investment). This has indirectly placed medium-scale/small-scale business entities and cooperatives in a weak position to compete in tenders for a Mining Business Permit Area/Special Mining Business Permit Area.

Whereas in the Petitioners' opinion, the granting of Mining Business Permit/ Special Mining Business Permit for metal mineral and coal through a tender in Article 51, Article 60, Article 75 paragraph (4) of Law 4/2009 is inconsistent with the economic democracy which promotes the principles of communality and justice in the implementation of national economy as dictated/stipulated in Article 33 paragraph (4) of the 1945 Constitution.

The clarification of the Government is as follows:

Whereas the fundamental objective of the preparation of rules concerning the tender of a Mining Business Permit Area for metal mineral and coal is in the context of implementing the principles of transparency, justice, and accountability stated in Article 2 sub-articles a and c of Law 4/2009. With the coming into effect of the tender system of a Mining Business Permit Area for metal mineral and coal, then business entities, cooperatives, and individuals have the same opportunity to obtain a Mining Business Permit Area for metal mineral and coal.

In a tender system as set forth in Law 4/2009, the tender price is based on the compensation for information data, namely the collection of data and information owned by the Central/Regional Government about the area to be tendered. Such data and information collection are obtained based on 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 conduct a tender system for a Mining Business Permit Area for metal mineral and coal.

The tender system for a Mining Business Permit Area for metal mineral and coal as set forth in Law 4/2009 is absolutely not aimed at hampering/impeding medium-scale/small-scale entrepreneurs in obtaining a Mining Business Permit Area for metal mineral and coal or as an effort to confront large-scale business entities against small-scale/medium-scale business entities.

Indeed, to conduct business activities in the field of metal mineral and coal, in particular exploration activities, it needs high capital; high risk and high technology. If small-scale/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-scale/medium-scale entrepreneurs may join their businesses so that they can compete with strong-capitalized entrepreneurs in a Mining Business Permit Area/Special Mining Business Permit Area tender.

Another alternative which may be attempted by small-scale/medium-scale entrepreneurs to be able to mine metal mineral and coal is by filing an application of Small-Scale Mining Permit to the local regent/mayor as set forth in Article 47 paragraph (1) of Government Regulation Number 23 Year 2010 concerning Implementation of Mineral and Coal Mining Business Activities.

Therefore, Law 4/2009 has in fact provided the opportunity equally but proportionally in encouraging the economic activities of the community/small-scale and medium-scale entrepreneurs which eventually gives capacity to small-scale/medium-scale entrepreneurs in accelerating the development of local area/region.

Based on the clarification above, in the Government’s opinion, the Petitioners’ argument which stated that the provision of Article 51, Article

60, Article 75 paragraph (4) of Law 4/2009 hampers/impedes medium-scale/small-scale entrepreneurs in obtaining a Mining Business Permit Area for metal mineral and coal or is an effort to confront large-scale business entities against small-scale/medium-scale business entities is not true. Therefore, there is no inconsistency between the norm of Article 51, Article 60, Article 75 paragraph (4) of Law 4/2009 and the norm of Article 33 paragraph (4) of the 1945 Constitution.

6. **With regard to the Petitioners' Opinion regarding the Provision of Article 52 paragraph (1), Article 55 paragraph (1), Article 58 paragraph (1), and Article 61 paragraph (1) of Law 4/2009, which In Substance Stated That:**

Whereas in the Petitioners' opinion, the phrase "for a maximum area of 25 (twenty-five) hectares" in Article 52 paragraph (1) indicates that the ratification of this Law 4/2009 is an implicit restriction on individuals to render them unable to apply for a mining business permit. Therefore, there is an impression that the issuance of Law 4/2009 is aimed at gradually eliminating small-scale mining activities.

Whereas Article 52 paragraph (1) of Law 4/2009 has evidently provided a special treatment and an opportunity from the state to mining businesses which have been exploiting tin, namely PT. Timah, Tbk and PT. Koba Tin. This is because only the aforementioned two companies which are able to

satisfy the requirements dictated in Article 52 paragraph (1) of Law 4/2009. Therefore, it can be proven that there has been discriminative treatment in Article 52 paragraph (1).

Whereas all mineral sources all over the Indonesian territory have been given by the Government, in particular the new order regime, to profit-oriented foreign and domestic private companies and state-owned mining companies. Such special treatment is also given to PT. Timah, Tbk. as a state company and PT. Koba Tin as a foreign company receiving a Contract of Work from the government. Therefore, all of tin resources in Bangka Belitung have been plotted by large-scale tin mining companies. Therefore, it is evident that Article 52 paragraph (1) of Law 4/2009 has made the benefit of natural resources, which should have been owned by the state for the prosperity of the people, only enjoyed by a few persons, in fact, parts thereof have been handed over to foreigners.

Whereas the minimum area size requirement for an exploration Mining Business Permit Area as specified by Article 52 paragraph (1), Article 55 paragraph (1), Article 58 paragraph (1) and Article 61 paragraph (1) of Law 4/2009 is only possible to/can only be satisfied by individuals and companies with large capital. The stipulated exploration Mining Business Permit Area will result in financing consequences to be paid by a Mining Business Permit applicant, which are, among other things, in the form of:

a. sincerity guarantee;

b. reclamation guarantee;

c. compensation for land acquisition; and

d. operational costs

the values of which are high and impossible to be financed/paid by small-scale and medium-scale entrepreneurs.

Therefore, in the Petitioners' opinion, the stipulation of minimum area size of an exploration Mining Business Permit Area is inconsistent with the economic democracy which promotes the principles of communality and justice in the implementation of the national economy as provided for/stipulated in Article 33 paragraph (4) of the 1945 Constitution of the State of the Republic of Indonesia.

The clarification of the Government is as follows:

The Government needs to state that there is no phrase "for a maximum area of 25 (twenty-five) hectares" in Article 52 paragraph (1) of Law 4/2009, therefore, the petition for judicial review petitioned by the Petitioners is obscure (*obscuure libel*) and inaccurate.

Law 4/2009 does not restrict sole proprietorships from conducting mining business activities. Article 38 sub-article c of Law 4/2009 in substance

states that a Mining Business Permit may be granted to individuals, therefore, the Petitioners' opinion is incorrect in itself.

Article 52 paragraph (1) of Law 4/2009 does not provide for small-scale mining, therefore, the Petitioners' statement which stated that Article 52 paragraph (1) of Law 4/2009 is aimed at gradually eliminating small-scale mining activities is inappropriate.

Whereas the basic philosophy of the formulation of provision on the minimum area size 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 4/2009 is aimed at actualizing the principles of sustainability and having environmental perspective stated in Article 2 sub-article d of Law 4/2009. The aforementioned sustainability and having environmental perspective principles are subsequently more focused on in Article 18 sub-articles c and d of Law 4/2009 which determine the principles of conservation and environmental support capability as the criteria in stipulating a Mining Business Permit Area.

From the environmental point of view, the minimum area size of an Exploration Mining Business Permit Area for mineral and coal needs to be regulated in Law 4/2009, because it is closely related to the aspect of land adequacy, which also has an impact on the environmental support

capability and capacity. If the area size of an Exploration Mining Business Permit Area is too small, then its environmental support capability and capacity will not be adequate, particularly when entering the production operation stage, considering that the area of an Exploration Mining Business Permit Area granted will not increase by the time of the implementation of production operation. Land management for the construction of mining facilities/infrastructure at the production operation stage will also be difficult to be performed in a Mining Business Permit Area with a limited area size. The area size of an Exploration Mining Business Permit Area of minimum 5,000 ha for metal mineral and coal, 500 ha for non-metal mineral and 5 ha for stones is deemed as already meeting the requirements of environmental support capability and capacity.

The regulation on minimum area size of an Exploration Mining Business Permit Area which may be mined in Law 4/2009 is also aimed at protecting the entrepreneurs conducting business in the field of mining. As the result of the provision on minimum area size of an Exploration Mining Business Permit Area, the opportunity to find mineral and coal along with their deposits in large quantity will be larger if the Exploration Mining Business Permit Area granted is adequate.

Whereas as a business activity, mineral and coal mining industry is indeed a high-capital, high-risk, and high-technology industry. However, it does

not necessarily mean that entrepreneurs having small capital (small/medium entrepreneur) may not engage in mining business activities. Small/medium entrepreneurs may also engage in mining business activities in the form of small-scale mining, namely by submitting an application for Small-Scale Mining Permit (*Izin Pertambangan Rakyat*/IPR) to local regent/mayor. It is provided for in Articles 67 to 73 of Law 4/2009.

Should there be an area with a size of less than the minimum area size stipulated in Law 4/2009 and there are indications on the existence of mineral and coal within the land, 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 development of the region and encouraging economic activities of the community/small-scale and medium-scale entrepreneurs.

Based on the clarification above, in the Government's opinion, the Petitioners' argument which stated that the provision of Article 52 paragraph (1), Article 55 paragraph (1), Article 58 paragraph (1), and Article 61 paragraph (1) of Law 4/2009 is discriminating against small-scale/medium-scale entrepreneurs is not true. Therefore, there is no inconsistency between the norm of Article 52 paragraph (1), Article 55 paragraph (1), Article 58 paragraph (1), and Article 61 paragraph (1) of

Law 4/2009 and the norm of Article 33 paragraph (4) of the 1945 Constitution.

7. With regard to the Petitioners' Opinion regarding the Provision of Article 162 of Law 4/2009, which In Substance Stated That:

Whereas in the Petitioners' opinion, the phrase "Any person who prevents or disrupts mining business activities belonging to the Mining Business Permit or Special Mining Business Permit holders that have met the requirements as intended in Article 136 paragraph (2) shall be sentenced to imprisonment for a maximum period of 1 (one) year or a fine in a maximum amount of Rp100,000,000.00 (one hundred million rupiah)" in Article 162 of Law 4/2009 is illogical because, when the community refuses to transfer their land to a mining company or refusing the mining operation plan due to the consideration of adverse effects on their life, mining companies often use intimidating, manipulative as well as repressive approaches, which in many cases are legitimized by the government. When facing such ordeal, the community in the surrounding areas of the mining site usually becomes the defeated victim, in fact, they are often end up being penalized through a legal process.

The clarification of the Government is as follows:

Whereas the phrase "Any person who prevents or disrupts mining business activities belonging to the Mining Business Permit or Special

Mining Business Permit holders that have met the requirements as intended in Article 136 paragraph (2) shall be sentenced to imprisonment for a maximum period of 1 (one) year or a fine in a maximum amount of Rp100,000,000.00 (one hundred million rupiah)" in the provision of Article 162 of Law 4/2009 cannot automatically be imposed on the community when they refuse to transfer their land to mining business actors, because Law 4/2009 in:

The interpretation of the provision of Article 162 cannot be separated from the provisions of Articles 136 up to and including 138 of Law 4/2009.

Article 136 of Law 4/2009 states:

(1) Mining Business Permit or Special Mining Business Permit holders, prior to carrying out production operation activities, shall be required to settle land titles with titleholders in accordance with provision of laws and regulations.

(2) The settlement of land titles as intended in paragraph (1) may be conducted gradually according to the land requirement of the Mining Business Permit or Special Mining Business Permit holders.

Article 137 of Law 4/2009 states:

"*Mining Business Permit or Special Mining Business Permit holders as intended in Article 135 and Article 136 who have settled parcels of land*

may be granted land titles in accordance with provision of laws and regulations."

Article 138 of Law 4/2009 states:

Title to a Mining Business Permit, Small-Scale Mining Permit, or Special Mining Business Permit shall not constitute ownership of land titles."

Whereas the provision of Article 162 of Law 4/2009 is aimed at protecting Mining Business Permit or Special Mining Business Permit holders who have settled their obligations in relation to the right owned by holders of land titles, namely in the form of compensation based on mutual agreement with the holders of land titles, either in the form of rental, sales purchase or lease agreement pursuant to the provision of Article 100 of Government Regulation Number 23 Year 2010 concerning Implementation of Mineral and Coal Mining Business Activities.

If the Mining Business Permit or Special Mining Business Permit holders have settled their aforementioned obligations in relation to land parcels, it would be reasonable and logical that such Mining Business Permit or Special Mining Business Permit holders obtain legal protection in performing their obligations.

Based on the clarification above, in the Government's opinion, the provision of Article 162 of Law 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 4/2009 is not directly related to the articles in the 1945 Constitution of the State of the Republic of Indonesia being the reviewing tool argued by the Petitioners. Therefore, Article 162 of Law 4/2009 **does not** contain any norms which reflect discrimination in position and treatment, injustice, legal uncertainty and discriminating in nature.

8. With regard to the Petitioners' Opinion regarding the Provision of Article 172 of Law 4/2009, which In Substance Stated That:

Whereas in the Petitioners' opinion, the provision of Article 172 of Law 4/2009 has placed Mining Authorization and Small-Scale Mining Authorization holders in a discriminatory manner in such position which is not having equality before the law compared to Contract of Work holders which are foreign capital investment companies.

The provision of Article 172 of Law 4/2009, in the Petitioners' opinion, only grants tolerance/dispensation by still recognizing the enforcement of Contract of Works and Work Agreements as a result of the coming into effect of Law 4/2009, while the Transitional Provisions of Article 169 of Law 4/2009 do not grant any tolerance/dispensation to Mining

Authorizations and Small-Scale Mining Authorizations, in fact, the provision of Article 173 paragraph (1) states that Mining Authorizations and Small-Scale Mining Authorizations are no longer valid.

The clarification of the Government is as follows:

Whereas the provision of Article 172 of Law 4/2009 in substance regulates the application for Contract of Work and Work Agreement for Coal Mining prior to the coming into effect of Law 4/2009 and it is not related to Mining Authorizations.

Article 172 of Law 4/2009 constitutes a transitional provision to “bridge” the shift from the contract regime applied in Law 11 1967 towards the permit regime applied in Law 4/2009.

Whereas Article 172 of Law 4/2009 is in fact formulated in order that there will be no legal vacuum and to guarantee the existence of a legal certainty in mineral and coal mining enterprises, particularly as the result of a change in the concept of mineral and coal mining commodity management. The aforementioned transitional provision constitutes an implementation form of the universal principle, namely respecting the agreement/contract, in this case the work agreement between the Minister of Energy and Mineral Resources and mining contractors.

With regard to the provision of Article 172 being petitioned for review by the Petitioners, we need to convey to the Chief Justice/Panel of Justices of the Constitutional Court, that the aforementioned provision has been petitioned for review as in case register Number 121/PUU-VII/2009, which has not been decided upon by the Constitutional Court, therefore, the full clarification of the Government against the provision *a quo* shall refer to the previous Statement of the Government.

9. With regard to the Petitioners' Opinion regarding the Provision of Article 173 paragraph (2) of Law 4/2009, which In Substance Stated That:

Whereas in the Petitioners' opinion, the provision of Article 173 paragraph (2) of Law 4/2009 has placed Mining Authorization and Small-Scale Mining Authorization holders in a discriminatory manner in such position which is not having equality before the law compared to Contract of Work holders which are foreign capital investment companies.

The provisions of Chapter XXV, Transitional Provisions, Article 169 paragraph (1) and Article 172 of Law 4/2009 only grants tolerance/dispensation by still recognizing the enforcement of Contract of Works and Work Agreements as a result of the coming into effect of Law 4/2009, while Transitional Provisions, Article 169 of Law 4/2009 does not grant any tolerance/dispensation to Mining Authorizations and Small-Scale

Mining Authorizations, in fact, the provision of Article 173 paragraph (1) states that Mining Authorizations and Small-Scale Mining Authorizations are no longer valid.

Therefore, in the Petitioners' opinion, the provision of Article 173 paragraph (2) may not be used as a legal basis for the enforcement of Mining Authorizations and Small-Scale Mining Authorizations because it does not satisfy the requirement "to the extent not inconsistent with the provision of this Law".

The clarification of the Government is as follows:

Whereas the provision of Article 173 paragraph (2) of Law 4/2009 in substance regulates the survival of the implementing regulation of Law Number 11 Year 1967 concerning Basic Provisions of Mining to the extent non inconsistent with the provision of Law 4/2009. The assumption of the Petitioners who stated that Mining Authorizations shall be declared invalid with the coming into effect of Article 173 paragraph (2) of Law 4/2009, is an ungrounded assumption, because the revocation of the implementing regulation of Law Number 11 Year 1967 concerning Basic Provisions on Mining shall not in itself make the Mining Authorizations invalid. Article 112 sub-article 4 of Government Regulation Number 23 Year 2010 concerning Implementation of Mineral and Coal Mining Business Activities states that:

"*Mining Authorizations, Regional Mining Licenses, and Small-Scale Mining Licenses granted in accordance with provision of laws and regulations prior to the stipulation of this government regulation shall continue to be valid until the end of its validity period...*"

Based on the Article above, Mining Authorizations will still be respected and valid until the end of its validity period.

Law Number 11 Year 1967 concerning Basic Provisions on Mining and its implementing regulation never mentioned the term "Small-Scale Mining Authorization" as mentioned by the Petitioners in their petition. Therefore, the Government deems the Petitioners' petition, to the extent related to the term "Small-Scale Mining Authorization" obscure (*obscuure libel*) and should not be responded to.

Based on the statement above, in the Government's opinion, the Petitioners' argument which stated that the provision of Article 173 paragraph (2) of Law 4/2009 is discriminating in nature against Mining Authorization holders is untrue and groundless.

IV. CONCLUSIONS

Based on the clarification and argument above, the Government requests that the honorable Chief Justice/Panel of Justices of the Constitutional Court, who examine, hear and decide 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, may grant the decision as follows:

1. To reject the Petitioners' petition for review in its entirety or at least to declare the Petitioners' petition for review inadmissible (*niet ontvankelijk verklaard*);

2. To accept the Statement of the Government in its entirety;

3. To declare the provisions of Article 6 paragraph (1) sub-paragraph e, Article 9 paragraph (2), Article 10 sub-article b, the provisions of Article 22 sub-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.

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

In addition to the Written Statement of the Government above, the Government also conveyed written replies to the questions from the Constitutional Justices during the court session on October 27, 2010, namely as follows:

The Questions from Constitutional Justice Dr. M. Arysad Sanusi, SH. MH

1. May mineral and coal mining, which constitutes state property, be placed in a tender?

2. In Article 172 of Law 4/2009 it is stated that, “Applications for Contracts of Work and Work Agreements for Coal Mining which have been filed with the Minister...” Why do the Contracts of Work and Work Agreements for Coal Mining fall under the monopoly of the Central Government? What happened to the spirit of decentralization 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 do Mining Authorizations fall under the monopoly of the central government, such that the bureaucracy becomes too extended, while Law 4/2009 grants the right to the provincial, regency and municipal governments?

The Replies of the Government

1. In granting the permit to conduct mining activities, Law Number 4 Year 2009 uses two mechanisms, namely tender and application for areas. The mechanism of tender is applied in obtaining a Mining Business Permit Area for metal mineral and coal, in which Article 51 of Law 4/2009 stipulates:

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

   While Article 60 stipulates:

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

   Therefore, the mechanism of tender is not conducted on the mining commodity (metal mineral or coal), but on the areas.

   This is in line with the provision of Article 92 of Law 4/2009, in which Mining Business Permit and Special Mining Business Permit holders have the right to own the already produced mineral or coal if they have paid the exploration fee or the production fee. The aforementioned area tender mechanism is different from the commodity tender mechanism, in which in a commodity tender, the party winning the tender directly obtains the right to the commodity in the tender.

2. The complete text of Article 172 of Law 4/2009 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 respected, and their permits therefore may be processed without a tender under this Law.

Article 172 of Law 4/2009 constitutes a transitional provision to "bridge" the shift from the contract regime applied in Law Number 11 Year 1967 concerning Mining Basic Provisions (hereinafter referred to as Law Number 11 Year 1967) towards the permit regime applied in Law 4/2009.

Pursuant to Article 10 paragraph (1) of Law Number 11 Year 1967, the Government *c.q.* the Minister of Mining and Energy (now the Minister of Energy and Mineral Resources) has the authority to appoint any other party as coal mining contractor in the form of a Contract of Work or a Work Agreement for Coal Mining and to execute the aforementioned Contract of Work or Work Agreement for Coal Mining.

Whereas Article 172 of Law 4/2009 is in fact formulated in order that there will be no legal vacuum and to guarantee the existence of legal certainty in mineral and coal mining enterprises, particularly as the result of the change in the concept of mineral and coal mining commodity

management. The aforementioned transitional provision constitutes an implementation form of the universal principle, namely 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 Number 11 Year 1967 was ratified and came into effect at a time in which the community demanded that private sector should be given more opportunity to conduct mining in order to accelerate the implementation of national economic development, while still holding on to the basic norm that the State fully controls all minerals for the interest of the State and prosperity of the people, because such minerals constitute National resources.

   Pursuant to Law Number 11 Year 1967, the utilization of natural resources may be conducted through enterprises by way of:

   a. conducted directly by a Government agency;

   b. managed by a State Company;

   c. managed by a company based on joint-venture between a State Company and a Regional Company;

   d. managed by a Regional Company;

e. managed by a company the capital of which constitutes joint capital between a State Company and a private company; or joint capital with an individual, as long as he/she has an Indonesian citizenship; and it could also be joint capital with a private entity the overall management of which constitutes Indonesian Citizens;

f. managed by a private party; it could be an individual, as long as he/she has an Indonesian citizenship; and it could also be a private entity the members of which are all Indonesian Citizens, particularly in the form of a cooperative.

The same principle is basically also applied in Law 4/2009, in which mineral and coal as unrenewable natural resources constitute national resources owned by the state for the greatest prosperity of the people, the concession of which is granted in the form of permit (not contract) to business entities, cooperatives and individuals.

Law Number 11 Year 1967 is centralistic in nature, which means that everything related to mining activities was conducted by the Central Government without involving the regional government, because at that time, there was not yet any arrangement on regional autonomy. This is also the case with contracts of work/work agreements, which were executed between companies and the Government of the Republic of

Indonesia (the Central Government), which was in such cases represented by the Minister.

4. Law Number 11 Year 1967 is a pre-regional autonomy legal product which adheres to the centralistic principle. The authority for granting Mining Authorizations, the execution of Contracts of Work and Work Agreements for Coal Mining lies within the central government; while Law 4/2009 was issued after the regional autonomy era, therefore, the granting of permits in mineral and coal enterprises are mostly delegated to the regions.

The Questions from Constitutional Justice Dr. Hamdan Zoelva, SH. MH

1. What is the arrangement in the transitional provisions for Mining Authorizations?

2. What is the arrangement for Mining Authorizations with area size of less than 5,000 hectares?

3. The philosophy of Law 4/2009 is to total defend the companies which have been granted Mining Business Permits. Whoever disrupts them shall be penalized. Mining Business Permits may be in conflict with proprietary rights and other rights. Will the protesting people also be penalized?

4. Small-scale mining may only be conducted on sites which are already worked on for 15 years. Therefore, are new mining areas which have never been worked on prohibited for the people?

The Replies of the Government

1. The complete text of Article 112 paragraph (4) sub-paragraph a regarding Transitional Provisions in Government Regulation Number 23 Year 2010 concerning Implementation of Mineral and Coal Mining Business Activities reads as follows:

At the time this Government Regulation comes into effect:

(4) Mining authorizations, regional mining licenses and small-scale mining licenses, which have been granted in accordance with the provisions of laws and regulations prior to the coming into effect of these laws and regulations ***shall remain valid up to the end of validity period*** *and they must be:*

a. adjusted to become Mining Business Permits or Small-Scale Business Permits according to the provisions of this Government Regulation within a maximum period of 3 (three) months starting from the coming into effect of this Government Regulation, and particularly for State-Owned and Regional-Owned Enterprises, the Production Operation Mining Business Permit shall be the First Production Operation Mining Business Permit.

Based on the provision above, it can be proposed that the existing Mining Authorizations shall remain respected until the end of its validity period, however, they must be adjusted to become Mining Business Permits pursuant to Law 4/2009 and its implementing regulation.

2. As stated previously, that there is a provision in Government Regulation Number 23 Year 2010 stating that Mining Authorizations which have granted prior to the stipulation of the aforementioned Government Regulation shall remain valid until the end of its validity period. Therefore, such Mining Authorizations are not bound to the provision regarding minimum area size of a Mining Business Permit Area set forth in Law 4/2009.

3. Article 162 of Law 4/2009 states:

Any person who prevents or disrupts mining business activities belonging to the Mining Business Permit or Special Mining Business Permit holders that have met the requirements as intended in Article 136 paragraph (2) shall be sentenced to imprisonment for a maximum period of 1 (one) year or a fine in a maximum amount of Rp100,000,000.00 (one hundred million rupiah).

Furthermore, Article 136 states:

(1) Mining Business Permit or Special Mining Business Permit holders, prior to carrying out production operation activities, shall be required to settle land titles with titleholders in accordance with provision of laws and regulations.

(2) The settlement of land titles as intended in paragraph (1) may be conducted gradually according to the land requirement of the Mining Business Permit or Special Mining Business Permit holders.

Therefore, if there is a document of entitlement on the land surface which will be managed by the Mining Business Permit/Special Mining Business Permit holders, in the form of property right, Right to Cultivate (HGU), Right to Build (HGB), Right to Use, Forest Concession Right (HPH), etc., then the Mining Business Permit/Special Mining Business Permit holders have to settle the land title first prior to starting the mining business activities. The settlement of land titles may be conducted in the form of rental, sales purchase or lease agreement as set forth in the elucidation of Article 100 paragraph (2) of Government Regulation Number 23 Year 2010

Meanwhile, the criminal sanction in Article 16 of Law 4/2009 **may only be imposed upon every person who prevents or disrupts mining business activities which already met the requirement of the settlement of land titles**. Such penal provision is expected to provide

legal certainty as well as protection for Mining Business Permit/Special Mining Business Permit holders who have settled their land titles in accordance with laws and regulations.

4. Article 21 states:

Small-Scale Mining Areas as intended in Article 20 shall be stipulated by the regents/mayors upon ***consulting*** *with the Regional People's Legislative Assembly of districts/municipals*.

Article 22 states:

The criteria under which Small-Scale Mining Areas are stipulated shall be as follows:

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

b. having primary metal or coal deposits at a maximum depth of 25 (twenty-five) meters;

c. terrace deposits, floodplains and paleochannels;

d. the maximum area size of a small-scale mining area shall be 25 (twenty-five) hectares;

e. reference to the types of commodities to be mined; ***and/or***

f. constitutional small-scale mining areas or sites that have been worked on for at least 15 (fifteen) years.

From the provision of Article 22 above, it is evident that the criteria for the stipulation of Small-Scale Mining Areas may be “cumulative” or “alternative” in nature. This means that the criteria for the stipulation of Small-Scale Mining Areas do not have to include having been worked on for at least 15 years.

If Article 21 is related to the criteria for the stipulation of Small-Scale Mining Areas in Article 22, then it can be concluded that in stipulating Small-Scale Mining Areas, regents/mayors may determine which criteria are suitable to the condition of their regions, which shall be further regulated in Regional Regulation of Regent/Municipal.

The Questions from Constitutional Justice Dr. Harjono

1. Restriction of authority which uses the criteria of cross-regency/municipal or provincial authority may become something competed for or machinations, while the spread out area of the mining commodity lies on the same spread out area without being restricted by the existence of provincial or regency/municipal territory.
2. Item 32 of the General Provisions gives an impression that there must be prior mining activities before the stipulation as a Mining Area. It should be conducted systematically with the Mining Area being stipulated first.

The Replies of the Government

1. Under Law 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, not within a Mining Business Area. **The authority of granting an Exploration Mining Business Permit Area is indeed based on territorial location.** It means that, there is a possibility that the spread out area of its mining commodities overlaps the boundaries of a regency/municipal or a province. If a Mining Business Permit Area is located within a regency/municipal, then it lies under the authority of the Regent. If a Mining Business Permit Area is located cross-regencies/municipals, then it lies under the authority of the Governor. If a Mining Business Permit Area is located cross provinces, then it lies under the authority of the Minister.

   Under the provision of Article 9 paragraph (2) of Government Regulation Number 23 Year 2010, every applicant (business entities, cooperatives and individuals) may only be granted one Mining Business Permit Area. Therefore, should the Mining Business Permit Area lie upon a cross-regency or cross-provincial territory, the applicant may not file two applications at the same time, to both the Regent and the Governor. The determination of the location of bordering Mining Business Permit Areas will be conducted through coordination between the government and the governor, regent/mayor according to their authority.

2. Article 1 sub-article 32 of Law 4/2009 defines a Small-Scale Mining Area as “a part of Mining Area where small-scale mining business activities are

conducted." The aforementioned article is explaining that small-scale mining may only be conducted within a Small-Scale Mining Area (it may not be conducted in a Mining Business Area or a State Reserve Area), and such Small-Scale Mining Area should constitute part of a Mining Area in accordance with the national spatial layout.

Article 21 of Law 4/2009 states that authority to stipulate small-scale mining areas shall be granted to the regents/mayors upon consulting with the regional people's representative assembly of districts/municipals. Article 67 paragraph (1) of Law 4/2009 also regulates the granting of authority to regents/mayors to issue Small-Scale Mining Permit

Mining conducted by people in a small-scale mining area or site which is already worked on but not yet stipulated as a Small-Scale Mining Area shall be prioritized to be stipulated as a Small-Scale Mining Area.

Considering whereas in order to support its statement, the Government called 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 the oath during the court session on Wednesday, March 9, 2011, which in substance stated the following:

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 difference 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 is that there must indeed be a change, particularly in Law Number 11 Year 1967. In 1967, Indonesia was still in poor condition in its economic and socio-cultural aspects, such that the inflation rate reached 600% and devaluation occurred. The Government subsequently raised an idea, which for the condition of the time being was very brilliant, which resulted in Law Number 1 Year 1967 concerning Foreign Capital Investment and subsequently Law Number 11 Year 1967.
- The background and process of the issuance of Law Number 4 Year 2009 is as follows:
    - ❖ The agreement in Bogor Declaration (1994) and globalization. This indicated that we are implementing the 1945 Constitution, namely to keep the world's peace, certainly through culture, economy and social;
    - ❖ The emergence of domestic political and economic reform in 1998 resulting in democratization and regional autonomy;
    - ❖ Pressure for environmental preservation and sustainable development;
    - ❖ The high level of the world's and national's demand for primary energy;
    - ❖ The demand for increasing the "value added" of mineral to satisfy the maximum utilization for the prosperity of the people. After the ratification of Law Number 11 Year 1967, nearly 99% of Indonesian

mining products were exported in raw condition, and they were never converted into semi-finished goods for our own industries;

- The highly rapid advancement in information technology and knowledge. When talking about handphones, it is the values of extractives inside the mining. It is a mining community, therefore, the demand is indeed increasing along with the technological advancement;
- The demand for “human rights”, in particular land titles and community land titles. This has not been adopted by Law Number 11 Year 1967;
- The demand for Corporate Social Responsibility (CSR) and “community/area development”;
- The demand for “mining and coal conservation”. We see that nowadays many parties want our tin to be fully exploited today, our coal to be fully exploited today. However, in Law Number 4 Year 2009 there are doctrines of conservation, in order that we may also leave it to the young generation in the future. Therefore, Law Number 4 Year 2009 also contains the conservation principle. Therefore, there is a restriction on area as stated in Law Number 4 Year 2009;
- The demand for law enforcement and guarantee of conducive business activities. During the review of Government Regulation in lieu of Law concerning Forestry, the Expert has stated that at that

time, there was no guarantee for mining enterprises because a production forest may suddenly be turned into a protected forest abruptly, and a protected forest may suddenly be turned into a national park.

- The philosophy of Indonesian mining sector is as follows:
  - Mineral and coal are part of unrenewable natural riches with “specific” location owned by the state and they must be used for the greatest prosperity of the people.
  - The Government (“the State”), in line with regional autonomy, provides the opportunity for Business Entities having the status of Indonesian legal entities/individuals/local communities to conduct mining. Which means to invite all participations, there shall be no discrimination;
  - The management of mining is conducted based on the principles of benefit, justice, balance, externality, accountability, which involves the government and regional government as regulators;
  - Mining business activities should be conducted based on the environmental, transparency and community participation principles to achieve “sustainable development”;
  - Giving preference to national interest in terms of domestic needs, increasing value added or the use of local and national goods and services;

- Opening itself for “foreign investor” participation by still complying with the provisions of the 1945 Constitution as well as other Laws.

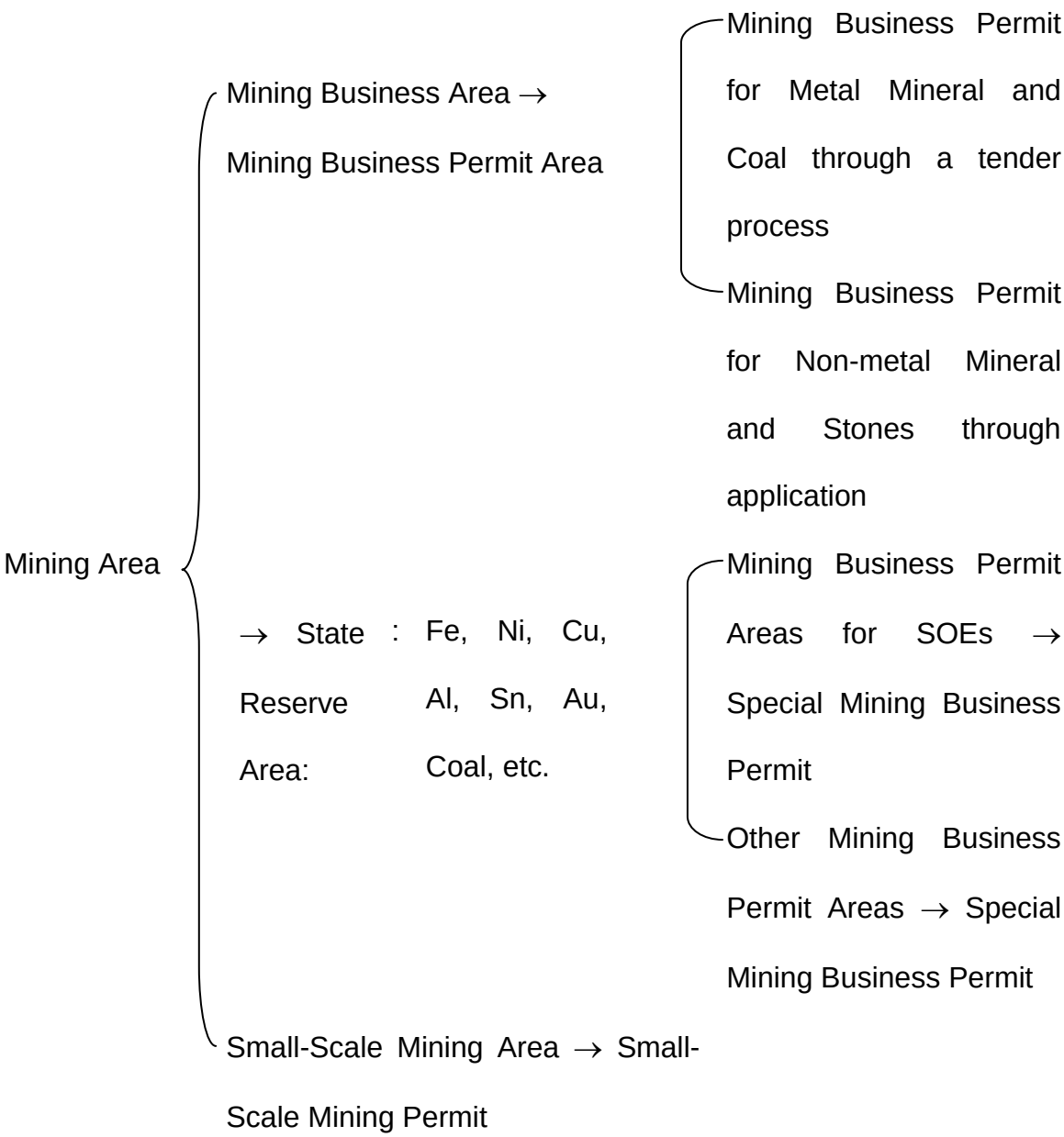
- Several differences between the mining sector and other economic sectors are as follows:
  - Unrenewable, specific location, forms and the quantity of deposits;
  - Generally located under the land surface;
  - Time is needed to ensure its quantity of deposits, forms and spread out area (3-5 years), which results in high risk;
  - The production process tends to change the local ecosystem and environment;
  - The activities are generally conducted in remote areas;
  - Mining commodity prices are relatively “stable” (not fluctuating);
  - In general, mining products require processing and refining process prior to be consumed by the manufacturing industry.;
  - Constitutes the main supporting sector for “civilization” and modernization in all sectors, particularly 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 that there are many weaknesses of a contract system. It is said as if a contract is the same as law, while in fact law is formulated through a different process. A contract is merely a recommendation from the People’s Legislative Assembly for foreigners. That is not a law. There may be a law concerning civil issues, as if it is

binding. We feel weak because even a small company may take the government to the arbitration. This is inappropriate. Therefore, in Law Number 4 Year 2009, the contract system is no longer exist, it is replaced with mining business permits;

- Previously, there were 6 (six) types of permit, but currently there are only 2 (two) types of permit, namely exploration permit and production permit. Exploration permit is granted for the activities of general survey (1 year), exploration (3+2 years), and feasibility study (1+1 years). After feasibility study has been conducted, the process will continue to the production process. After a production permit has been granted, the company will start to conduct construction process (2 years), subsequently production and processing process, transportation, sales (all of these processes shall last for 18 years + 2 x 10 years). So, we have left the contract regime, currently we follow the permit regime. This means that the position of the government, namely the central government or the regional government, has been reinstated to the appropriate status;
- Dividing the area. This is a crucial matter. Community participation in mining areas is regulated in a government regulation. The problem is, how far does the government regulate such community participation? In the Law *a quo*, it is not stated “how”. Therefore, it can be seen later in the relevant government regulation;
- Dividing the area has its own process, starting from the region, upon meeting with the community, subsequently continued to the province, then

to the central government. From the central government, it will enter the People's Legislative Assembly;



- There are 3 (three) types of mining area:

  1. Mining Business Area;

2. State Reserve Area, with the purpose of becoming a conservation area and as a safeguard for the national interest should something unexpected happens, particularly for ferrel, nickel, copper, aluminum, tin, gold and coal;

3. Small-Scale Mining Area, which is stipulated by the region;

Based on these areas, Mining Business Permit Areas are issued. Mining Business Permit Area tender is for metal mineral and coal. There is no tender for Small-Scale Mining Areas and Small-Scale Mining Permits. If a regional government stated that Small-Scale Mining Areas and Small-Scale Mining Permits are placed in a tender, this will violate the law, the areas that can be put in tender are Mining Business Permit Areas, which is similar to adopting oil tender. Thus, it is the location which is put in tender, not the content within. How does the tender subsequently conducted? Depending on available information, the government shall be open, not by stating that the location is guaranteed to contain 5 tons, but be open as to state, “here we have conducted a research, geologically its potentials are such and such,” openly. If I put in a tender for the people, for the community, and I am honest, certainly I am not lying. If the government states, “Look, here is 60 tons, without any data,” now that is a lie. In a tender, the government only provides the information that they have, so that community members and businessmen are welcomed. What

is the benefit? It is transparent and there are values that will go to the state treasury, and the concerned parties are also responsible for it;

- Subsequently, a Mining Business Permit for non-metal mineral and stones should be obtained by filing an application;

- The permit for a State Reserve Area is Special Business Mining Permit, which is reserved for SOEs, but “the door is opened” too for other businessmen.

- A Small-Scale Mining Area is granted through a Small-Scale Mining Permit, this is in fact regulated in a Regional Regulation. In fact, the regent may delegate his authority to the district head, the law is so detailed. Therefore, Small-Scale Mining Areas are never put in tenders. A Small-Scale Mining Area is stipulated by the region upon hearing the community’s opinion, and then the province, and then the government, it goes to the People’s Legislative Assembly, and finally a mining area is stipulated within the aforementioned three categories;

- In fact, a Small-Scale Mining Area does not only include rivers. Paleochannels are clearly visible, when we see a valley while travelling by plane, then it is a paleochannel. Therefore, there are civil investigators in this law. Should there be any issues, there are experts who understand. Regional Government apparatus does not always know everything, but

there has to be an expert. Therefore, civil investigators shall soon be developed.

- The depth of 25 meters is not for sediment. Sediment is something that has immersed deeply. The 25 meters is for hard stones and coal, which are impossible to be dug using a hoe. In this law, this is referred to as primary deposits, not secondary. Thus, secondary deposits refer to rivers and paleochannels.

- Other points:

  - Mining management with clear authority.

    With the emergence of regional autonomy, the division becomes clear in line with the Regional Autonomy Law. Previously, Law Number 11 does not regulate it, in fact, Law Number 11 only grants category C authority. Nowadays, in fact, what previously called vital matters have been delegated to regions in accordance with the Regional Autonomy Law. This Law is fairly democratic in nature;

  - Arrangement on the existing Mining Area agreements.

    The Mining Areas shall be arranged into Mining Business Permits.

  - Guarantee of business certainty, Mining Area as part of spatial layout.

Mining Areas should be determined in accordance with the Spatial Layout Law. This is perhaps a subject that has not yet been determined, but it has already become an issue. We are waiting for this process, how Mining Area shall be implemented. The Expert believes that the appropriate process is if the stipulation of Mining Area involves the community. If the community has agreed that their land will be turned into a Mining Area, they should not make any further complain of disagreement in the future. In terms of compensation, certainly there shall be laws and regulations to determine this matter.

- The compulsory domestic processing and refining.

  This is very important. Until now, we only produces concentrates, tin is the only mineral that we present in the form of metal. In general however, bauxite, iron ore and nickel are exported in raw forms. Coal is exported to, and subsequently processed in Korea, Japan, in developed countries, then we purchase the end-products. Therefore, the law states that in 5 years we may not export raw materials anymore, they have to be processed in Indonesia. Therefore, it will constitute a very progressive leap.

- Intensification of government function (central and regional governments) as regulators.

In Law 11 Year 1967, the capacity of the government in contracts is as principal, which has a weak position.

- Use of mining services by giving preference to national and local services.

  It is not regulated in Law Number 11 previously, but currently it is regulated in this law that service jobs, either at national or local level, must give preference to local services. It means that this Law also regards the issues in the surrounding community, so that their economic activities may develop.

- Compulsory implementation of corporate social responsibility (CSR).

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

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

  Should there be community rights which are impaired by the effect of the mining, the issue may be directly refer to legal process in accordance with applicable laws.

- Clear allocation of national and regional income.

  Previously it is not set forth in regulations that mining companies or regions may impose regional taxes. Currently, it is regulated in this law. Therefore, the functions of the central government and the People's Legislative Assembly are implemented appropriately.

- Arrangement on Civil Servant Investigators who are given special authority in accordance with laws and regulations.

  Mining has its specialties. It is nonsense if every person understands about mining, even the police do not always understand about the technical issues in mining. Therefore, in terms of Work Safety and Health in the issues of mining accidents, there is always an expert miner, which we refer to as mining inspector, who participates in assisting the police because there are various kinds of accident, not always a criminal one. Therefore, such as in the case of the previously mentioned paleochannels, there should indeed be an expert to state whether it is a paleochannel or not. The police know nothing either about such paleochannel. For such purpose, there is a Civil Servant Investigators, who should subsequently be given education, who understand about mining issues in order to assist the National 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: **Basic Provisions on Mining**	Title: **Mineral and Coal Mining**
Mining Resources are referred to as minerals: • Control on minerals is exercised by the government **(Article 1)**	**Mining is specific to mineral and coal:** • Controlled by the State, conducted by the government and/or regional government **(Article 4)** • The government and the People's Legislative Assembly may stipulate the policy regarding preference for mineral and coal for national interest. The government has the authority to set the annual production of any province to control production and export **(Article 5)**
Categories of mineral: • Strategic	**Categories of mining business:** • Mineral mining and coal mining

Law Number 11/1967	Law Number 4/2009
• Vital • Non-strategic - non-vital **(Article 3)**	**Categories of mineral mining:** • Radioactive mineral, metal mineral, non-metal mineral, and stones **(Article 34)**
The exercise of control on minerals: • State control on strategic and vital groups is exercised by the Minister. • State control on non-strategic - non-vital groups is exercised by Level I Regional Government **(Article 4)**	**Authority in the management:** • Central government (policy and management at national level). There are 21 authorities **(Article 6)** • Provincial government (policy and management in provincial territory). There are 14 authorities **(Article 7)** • Regency/municipal government (policy and management in regencies/ municipals). There are 12 authorities **(Article 8)**
Mining area: • Not regulated in detail. The most important is that it does not include: cemeteries, sacred	**Mining area:** • Mining area is a part of national spatial layout, stipulated by the Government upon coordinating

Law Number 11/1967	Law Number 4/2009
places, public works, other mining areas, buildings, dwellings or factories **[Article 16 paragraph (3)]**	with the Regional Government and the People's Legislative Assembly of the Republic of Indonesia **(Article 10)** • Mining area consists of Mining Business Area, Small-Scale Mining Area, and State Reserve Area **(Article 13)** • Mining Business Area, Small-Scale Mining Area, and State Reserve Area are regulated in detail **(Articles 14-33)**
Mining business: Forms: • Contract of work **(Article 10)** • Mining Authorization **(Article 15)** • Regional Mining License • Small-Scale Mining Business License	**Mining business:** No more contract of work, but the forms are: • Mining business permit • Small-scale mining permit • Special mining business permit **(Article 35)**
Stages of Mining Business: Mining business consists of:	**Stages of Mining Business:** Mining business consists of 2 stages:

Law Number 11/1967	Law Number 4/2009
• General survey • Exploration • Exploitation • Processing and refining • Transportation • Sales **(Article 14)**	**1. Exploration, which consists of:** • General survey • Exploration • Feasibility study (Article 36) **2. Operation, Production, which consists of:** • Construction • Mining • Processing and refining • Transportation and sales **(Article 36)**
Business actor: • Domestic investor (Mining Authorization, Regional Mining License, Work Agreement for Coal Mining) • Foreign investor (Contract of Work, Work Agreement for Coal Mining) • Mining area size is not detailed	**Business actor:** • Mining Business Permit is granted to business entities, cooperatives and individuals **(Article 38)** • Small-Scale Business Permit is granted to local residents, either individual or community groups and/or cooperatives **(Article 67)**,

Law Number 11/1967	Law Number 4/2009
	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 Actor: • Financial: – Mining Authorization: in accordance with applicable laws and regulations. – Contract of Work/Work Agreement for Coal	**Rights and Obligations of Business Actor:** • Financial: Paying state income and regional income: Taxes, Non-Tax Revenues, fees **(Articles 128-133)** • Environment: – Good mining practices

Law Number 11/1967	Law Number 4/2009
Mining, fixed at the time of contract execution. • Environment (not much regulated) • Value added (only regulated in contracts) • Employment of local workforce (not regulated) • Partnership with local entrepreneur (not regulated) • Community development and empowerment programs (not regulated)	**(Article 95)** – Reclamation, post-mining and reclamation plans, along with the available funds **(Articles 96-100)** • Value added. Production Operation Mining Business Permit holders are required to conduct the processing and refining of mining products domestically **(Articles 103-104)** • Preference on employment of local workforce **(Article 106)** • At the production stage, compulsory to involve local entrepreneurs **(Article 107)** • Preparing community development and empowerment programs **(Article 108)** • Compulsorily engaging local and/or national mining service

Law Number 11/1967	Law Number 4/2009
	companies such as consulting and planning services **(Article 124)**
Divestment: • Not regulated	**Divestment** • After 5 years of operation, entities holding a Mining Business Permit and a Special Mining Business Permit, of which the shares are owned by foreign parties, must divest their shares to the Government, Regional Governments, State-Owned Enterprises, Region-Owned Enterprises, or national private enterprises **(Article 112)**
Development and Supervision: • Centralized (in particular for Mining Authorization, Contract of Work, and Work Agreement for Coal Mining	**Development and Supervision:** • Mining Business Permit (Minister, Governor, Regent/Mayor – within their authority) **(Articles 139-142)**. Forms of supervision are highly detailed.

Law Number 11/1967	Law Number 4/2009
	• Small-Scale Mining Permit (Regent/ Mayor) **(Article 143)**
Community protection: • A Mining Authorization holder is required to restore the land in such condition as not to evoke any disease or any other danger to the community **(Article 30)**	**Community Protection:** • The public directly affected by negative impacts has the right to obtain reasonable compensation, or file a claim with the court **(Article 145)**
Investigation: • Not regulated	**Investigation:** • Investigators from the National Police of the Republic of Indonesia • Civil Servant Investigators (PPNS) **(Article 149)**
Criminal Provision: • Regulated, but not suitable anymore to current situation and condition. For example: imprisonment for a maximum period of 6 years and/or fine for maximum amount of Rp	**Criminal Provision:** • The Minister, Governors, Regents/Mayors – within their authority shall have the authority to impose administrative sanctions against Mining Business Permit, Small-Scale

Law Number 11/1967	Law Number 4/2009
500,000,- for any person carrying mining activities without holding a Mining Authorization **(Article 31)**	Mining Permit, and Special Mining Business Permit holders. Sanctions are ranging from warning to revocation of permits **(Article 151)** • The sanctions are fairly harsh. For example, every person conducting mining business without holding a Mining Business Permit, Small-Scale Mining Permit, or Special Mining Business Permit shall be charged imprisonment for a maximum period of 10 Years and fine in a maximum amount of Rp 10 billion

- Closing remarks regarding Mining Law Number 4 Year 2009:
  - Highly concerned with the national interest without disregarding openness to foreign investors;
  - Implements regional autonomy and other laws and regulations consistently;

- Guarantees business to investors. Cooperatives, individuals and people are also investors;
- Guarantees land titles to landowners and adheres the principles of conservation as well as environmental preservation;
- Balanced treatment to the government, businessmen and community. This is related to articles of the criminal code. It is already assumed that mining areas are stipulated jointly, certainly the criminal code is also applicable for all parties, not only the party issuing permits, not only businessmen, but also the community members who disrupt without any legal ground, have to be imposed with sanction;
- It is viewed by many parties as “very nationalistic” and in line with the 1945 Constitution;

- The Law *a quo* exists in order that there is legal certainty in conducting business for parties that are truly intending 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 stipulation of mining area by the government and the parliament. If the community is not involved, then let us complain together to the People’s Legislative Assembly;

- Currently, mining area is under the process in the People's Legislative Assembly. It has to be questioned as to whether or not the community has been involved in the process, which constitutes the key point. If it has not involved the community, the People's Legislative Assembly should reject it and the money should be returned, because the order of Law *a quo* is that it should involve the community. If it does not involve the community, it means violating the law. If it is ratified by the Assembly, it means that the Assembly and the Government have made a collective mistake.

2. Prof. Daud Silalahi

- The Law concerning Environment and the Law on Spatial Layout should become a platform to assess the Law on Mineral and Coal *a quo*. For example, a mining area is explicitly stated to be specified based on the spatial layout, and the activities are always conducted based on environmental preservation;

- The Law *a quo* may not be viewed or interpreted per article, but it has to be viewed or interpreted comprehensively because the legal approach is holistic. For example, the content of Chapter 2 regarding Principles and Objectives unifies the subjects of environment, economy and efficiency. Therefore, the interpretation review analysis of the Law on Mineral and Coal *a quo* should take into account the three Laws (Law 4/2009, Environmental Law, Spatial Layout Law);

- In Article 15 of the Environmental Law, it is stated that the government and regional governments are required to prepare a Strategic Environmental Assessment to ensure that the principles of sustainable development are actualized, which is based on spatial layout, environmental quality standard, EIA (Environmental Impact Assessment), etc.;

- The function of spatial layout is to determine the allocation. Spatial layout has been planned since 1992;

- Law 4/2009 *a quo* has to be viewed from its academic text, to review whether it is academically correct or not;

- In the civil law system adopted in Indonesia, certainly Law 4/2009 *a quo* still has its weaknesses since it does not explicitly regulate technical issues. Technical-economic issues are regulated in a Government Regulation. Based on the Expert's experience as a drafter, it is very difficult to formulate very concrete articles properly because the articles applied have to be the same from Sabang until Merauke, while the location of environment is different. Therefore, the articles in the law are formulated in a rather general manner while its Government Regulation may be interpreted in a concrete manner;

- The key point of the Environmental Law is EIA since it can clearly portray the technical, economic aspects etc. Therefore, EIA is a part of feasibility study related to technical feasibility, economic feasibility, environmental feasibility and social feasibility;

- Interpreting the articles relevant to the environment is impossible to be conducted by commoners, common lawyers and common bachelors of law. It has to use scientific interpretation by an expert. Therefore, the Expert agrees with the description of Prof. Nyoman that it needs the precautionary principle, which means a decision containing a subject of what is and is not allowed has to be guaranteed by full scientific evidence. Therefore, data interpretation becomes a tool for legal interpretation;

- The Expert as the Head of the Team for the Draft of Law 4/2009 stated that Law 4/2009 is already formulated by taking into account public proposals through NGOs and a feasibility study has also been conducted. However, if the formulation subsequently became the way it is today, then there has been a trade-off, and this is the maximum result that can be achieved;

- What should be done in order that this Law 4/2009 can be operational, lies upon the Draft Government Regulation (RPP). In the Expert's opinion, legal system consists of three leverages: (1) Law which stipulates rights and obligations; (2) Government Regulation which stipulates the economic

law measurably; (3) Decision regarding how to implement it and which technology to be used;

- In order to understand as to whether or not the value and interpretation of a law is proper, it is necessary to have academic conceptual understanding in a holistic manner and it cannot be viewed per article;

- In the Expert's opinion, a law is always outdated, thus it cannot remain for long. This reality, in the Expert's opinion, should become the thinking platform that in order to view a law, we must see the context of technological progress, dynamics of development, and other relevant developments;

- If we talk about resources, there is an extraordinary conflict in this issue, that is why spatial layout is needed.

3. Prof. Dr. Rudy Sayoga Gautama

- The Expert is a Mining Expert and Lecturer of Mining Technique in Bandung Institute of Technology (ITB). Therefore, the Expert did not highlight issues in laws and regulations, but would convey the subjects relevant to mining technique and environment;

- Forms of mining material can be various depending on the process of its formation. In Geological Science, Mining is referred to as *genesa*. There are mining materials formed by the process of igneous rocks, from cooled

magma in which there is a concentration of some precious minerals. The spreading is more vertical. Sometimes their shape is like small veins, and they are rarely found in large shapes. There is indeed what is known as porifery copper, rather large in size, but more dominantly vertical;

- There are mining materials formed by the sedimentation process, stone erosion process, which are subsequently transported and deposited in lowlands, in paleochannels. For example tin, the spreading of which can be found in paleochannels, because that is where alluvial tin can be found;

- Where are the primary stone or coagulated stone deposits (primary coagulated stones)? The Expert does not know where it is in Bangka area, but in Belitung area, according to the Expert, there is a primary tin mine, which means that it is formed by the process of frozen magma;

- Coal is part of the sedimentary group, which originate from plants. While an example from corrosion process is Nickel, which can be found in South-East Sulawesi and North Maluku areas. In addition, there is Bauxite in Bintan area, which is formed by decomposition process. Corrosion process, as well as sedimentation result, can usually be found in locations not too deep from the surface. Tin for example, can be found at 30-40 meters depth. Iron Sand in the southern territory of Java Coast is only located at 6-10 meters depth. Nickel can be found in 25 meters depth.

However, Coal, due to the tectonic process, may be found in 400-1,000 meters depth;

- In the exploitation process, we know the term, recovery. When we conduct mining process, it is impossible to mine 100 percent since there are always leftovers. This is also the case in the processing process, due to technological and economic considerations. Therefore, often times, as in the example of tin mining, ex tin processing sites worked on in 1980s, is currently mined again. This is logical, because the economic and technological condition at that time was different from today, thus let us say that only 80 percent have been mined in the past, which means that there are still 20 percent which would be disposed in the tailing. If its economic value today is increasing, it could be mined again;

- In terms of deposit form, there are two different mining systems: (1) open mining or also referred to as surface mining; (2) underground mining or in-depth mining;

- Is there any small-scale mining which is worked on manually to the depth of 25 meters? For gold mining, there are many. Small-scale mining for digging gold may reach 25 meters depth, because gold is located in primary deposits in the shape of small-veins. In North Sulawesi, according to the Expert, there are small-scale mining sites with the depth of more

than 30 meters which are worked on manually without tools. However, this cannot be applied in tin mining due to the difference in condition;

- In the Expert's opinion, Law 4/2009 must regulate all kinds of mineral, so that it is possible that there are articles that, from the point of view of certain minerals, become strange. However, from the point of view of other certain minerals, they are appropriate. While in fact, Law 4/2009 must accommodate all types of mineral;

- Regarding environmental issues, the demand for the existence of environmental management is higher. In the past 20 years, in the Expert's opinion, the government has made such efforts;

- Regarding reclamation deposits, this was introduced in 1995. This is actually learning from reforestation fund. Therefore, reclamation deposits are guarantee funds which have to be prepared by a company in order to convince that it shall conduct reclamation, so that it has to be adjusted to the company's plan. Therefore, the company makes a plan for 5 years guarantee, since mining entrepreneurs are numerous, it is possible that there are mischievous ones who, after conducting mining activities, leave it just like that. Therefore, regulation on reclamation is currently more strict;

- Regarding post-mining. The concept is that all companies starting production operation mining business permit have to make a post-mining

plan. In the Expert's opinion, this is very strategic. Indonesia just launched this regulation in 2008. Therefore, all parties having the intention to open a mine, according to its permit, should have known what will happen 10 or 20 years late. In mining term, this is referred to as good mining practice, namely making an integrated plan from the start to the end, seeing various risks which are possible to come up, optimizing gain, recovery, and also minimizing various environmental impacts.

[2.4] Considering whereas in order to respond to the arguments of the Petitioners' petition, the People's Legislative Assembly has presented a written statement, which was received at the Registrar's Office of the Constitutional Court on Wednesday, December 15, 2010, which essentially states as follows:

A. THE PROVISIONS OF LAW NUMBER 4 YEAR 2009 CONCERNING MINERAL AND COAL MINING BEING PETITIONED FOR REVIEW AGAINST THE 1945 CONSTITUTION OF THE STATE OF THE REPUBLIC OF INDONESIA

The Petitioners in their petition filed for a review of Article 6 paragraph (1) sub-paragraph e, Article 9 paragraph (2), Article 10 sub-article b of Law Number 4 Year 2009 which are inconsistent with Article 28H paragraphs (1) and (4), Article 28G paragraph (1), and Article 28D paragraph (1) of the 1945 Constitution of the State of the Republic of Indonesia. Subsequently, the Petitioners also consider that Article 162, Article 136 paragraph (2) of Law *a quo* are inconsistent with

Article 28E paragraph (3) and Article 28C paragraph (2) of the 1945 Constitution of the State of the Republic of Indonesia.

The Petitioners also believe that the provisions of Article 162, Article 136 paragraph (2) of Law *a quo* are also inconsistent with Article 25 of Law Number 39 Year 1999 concerning Human Rights, Article 19 paragraphs (1) and (2) of Law Number 12 Year 2005 concerning the Ratification of the International Covenant on Civil and Political Rights, and Article 19 of the Universal Declaration of Human Rights.

Article 6 paragraph (1) sub-paragraph e:

1. *Authority of the Government in the management of mineral and coal mining shall be, among other things:*

    e. *stipulation of Mining Areas upon coordinating with the regional governments and consulting with the People's Legislative Assembly of the Republic of Indonesia.*

Article 9 paragraphs (1) and (2):

1. *Mining Areas as part of the national spatial layout shall be a foundation on which mining activities are stipulated.*

2. *Mining Areas as intended in paragraph (1) shall be stipulated by the Government upon coordinating with the regional governments and*

consulting with the People's Legislative Assembly of the Republic of Indonesia.

Article 10 sub-article b:

Stipulation of Mining Areas as intended in Article 9 paragraph (2) shall be conducted:

b. in an integrated manned by taking into account the opinions of the relevant government agencies, the community, and by considering the ecological, economic, and socio-cultural aspects as well as having environmental perspective; and

Article 162

"Any person who prevents or disrupts mining business activities belonging to the Mining Business Permit or Special Mining Business Permit holders that have met the requirements as intended in Article 136 paragraph (2) shall be sentenced to imprisonment for a maximum period of 1 (one) year or a fine in a maximum amount of Rp100,000,000.00 (one hundred million rupiah)."

Article 136 paragraphs (1) and (2)

(1) Mining Business Permit or Special Mining Business Permit holders, prior to carrying out production operation activities, shall be required to settle

land titles with titleholders in accordance with provision of laws and regulations.

(2) The settlement of land titles as intended in paragraph (1) may be conducted gradually according to the land requirement of the Mining Business Permit or Special Mining Business Permit holders.

B. THE CONSTITUTIONAL RIGHTS AND/OR AUTHORITY WHICH THE PETITIONERS CONSIDERED BEING IMPAIRED BY THE COMING INTO EFFECT OF LAW NUMBER 4 YEAR 2009 CONCERNING MINERAL AND COAL MINING (HEREINAFTER REFERRED TO AS LAW 4/2009)

The Petitioners in the petition *a quo* stated that their constitutional rights have been impaired and violated or at least potentially impaired and violated, in which pursuant to logical reasoning, the impairment can be assured of occurring by the coming into effect of Article 6 paragraph (1) sub-paragraph e, Article 9 paragraph (2), Article 10 paragraph b, Article 162, Article 136 paragraph (2) of Law 4/2009 which in substance as follows:

1. Whereas, the Petitioners argued that Article 6 paragraph (1) sub-paragraph e is inconsistent with Article 28H paragraph (1) of the 1945 Constitution which reads as follows: "*Every person shall have the right to live a physically and mentally prosperous life, to have residence, and to*

obtain a proper and healthy living environment as well as to obtain health services."

2. Whereas, the Petitioners are of the opinion that the right to reside including the freedom to choose residence and free from compulsion to move to another residence which is guaranteed by Article 28H paragraph (1) of the 1945 Constitution of the State of the Republic of Indonesia includes the freedom from eviction, therefore, '*the existence of mining violates such constitutional right*'.

3. Whereas, the Petitioners argued that Article 6 paragraph (1) sub-paragraph e *juncto* Article 9 paragraph (2) *jo.* Article 10 sub-article b of Law *a quo* is inconsistent with Article 28H paragraph (4) of the 1945 Constitution of the State of the Republic of Indonesia which reads as follows: "*Every person shall have the right to possess personal proprietary rights and such proprietary rights may not be taken over arbitrarily by anybody.*" The Petitioners believe that Article 28H paragraph (4) of the 1945 Constitution is grammatically interpreted as the existence of the guarantee of protection for every person to have the right to possess personal proprietary rights which shall not be expropriated arbitrarily. It means that such private ownership may not be reduced except by a restriction set forth in a law with the sole purpose of guaranteeing the recognition and respect of the rights of other people [*vide* Article 28J paragraphs (1) and (2) of the 1945 Constitution].

4. Whereas, the Petitioners interpreted the arbitrary expropriation of ownership in the sense that there is no willingness and consent of the owner of such titles to be turned into mining areas. Therefore, although the stipulation of mining areas is determined by a law, it does not qualify as a restriction set forth in the 1945 Constitution, because it causes '*the lost of the right to possess personal proprietary rights*.'

5. Whereas, the Petitioners argued that the phrase '*by taking into account the opinion of*' set forth in Article 6 paragraph (1) sub-paragraph e *juncto* Article 9 paragraph (2) *juncto* Article 10 sub-article b of Law 4/2009 are inconsistent with Article 28H paragraph (4) since it '*restricts community involvement*'. This is based on the stipulation of mining areas, which is conducted by the Government, upon coordinating with the Regional Government and upon consulting with the People's Legislative Assembly.

6. Whereas, the Petitioners argued that Article 6 paragraph (1) sub-paragraph e *juncto* Article 9 paragraph (2) *juncto* Article 10 sub-article b of Law *a quo* are inconsistent with Article 28G paragraph (1) of the 1945 Constitution which reads as follows: "*Every person shall have the right to protect themselves, their family, their honor, dignity and property under their control, and shall have the right to the feeling of security and protection against the threat of fear to do, or not to do something that constitutes a human right*.**"**

7. Whereas, the Petitioners argued that the guarantee of protection on '*the right to the property that they own*' may be interpreted as the right to land and resources of natural riches (sea, mine, forest, garden) which can be owned individually or collectively so that the phrase '*by taking into account the opinion of*' set forth in Article 6 paragraph (1) sub-paragraph e *juncto* Article 9 paragraph (2) *juncto* Article 10 sub-article b of Law *a quo* are inconsistent with Article 28G paragraph (1) of the 1945 Constitution.

8. Whereas, the Petitioners argued that Article 6 paragraph (1) sub-paragraph e *juncto* Article 9 paragraph (2) *jo.* Article 10 sub-article b of Law 4/2009 are inconsistent with Article 28D paragraph (1) of the 1945 Constitution which reads as follows: "*Every person shall have the right to fair recognition, guarantee, protection and legal certainty as well as equal treatment before the law*."

9. Whereas, under Article 28D paragraph (1) of the 1945 Constitution, the Petitioners argued that Article 6 paragraph (1) sub-paragraph e *juncto* Article 9 paragraph (2) *juncto* Article 10 sub-article b of Law *a quo* '*contains legal uncertainty*' such that it causes every person to be in a threatened condition as the result of mining, since every landowner may lose their land without their consent if the land is included in a mining area. Whereas based on the interpretation of the provision of Article 28D paragraph (1) of the 1945 Constitution, the Petitioners believe that "*the*

right to obtain the guarantee of legal certainty and equal treatment before the law has been denied and/or negated/disregarded" by the Lawmakers.

10. Whereas, the Petitioners argued that Article 162 *juncto* Article 136 paragraph (2) of Law *a quo* are inconsistent with Article 28E paragraph (3) of the 1945 Constitution which reads as follows: "*Every person shall have the right to the freedom of association, assembly and expression of opinion*." The Petitioners believe that the provision of Article 162 *juncto* Article 136 paragraph (2) of Law *a quo* '*have repressed and restricted the right to the freedom of association, assembly and expression of opinion*.' The Petitioners also stated that one of the forms of freedom to express opinions is a demonstration of opinion by a group of people and filing a suit to the court. However, in practice, they will usually experience criminalization and discriminative treatment as in the case of Mineral C Mining in Loli Oge.

11. Whereas, the Petitioners consider that the provision of Article 162 *juncto* Article 136 paragraph (2) of Law *a quo* is used as a legal basis to '*criminalize the defenders of human rights, either individually or on behalf of organizations conducting advocacy for the community affected by mining*.' Therefore, Article 162 constitutes a serious threat to the community and the defenders of human rights. Whereas the Petitioners argued that the phrase '*prevents or disrupts mining business activities belonging to the Mining Business Permit or Special Mining Business*

Permit holders' *is obscure and multi-interpretative as well as restricting the civil freedom of the citizens*.'

12. Whereas, the Petitioners argued that the provision of Article 162 *juncto* Article 136 paragraph (2) of Law *a quo* '*repress and restrict the community's rights to defend its rights, particularly land titles, either individually or collectively*.' Whereas the Petitioners interpreted the provision of Article 162 *juncto* Article 136 paragraph (2) of Law *a quo* as '*reflecting discrimination in position and unequal treatment, injustice, legal uncertainty, and it is discriminating in nature against the Petitioners*.'

C. THE STATEMENT OF THE PEOPLE'S LEGISLATIVE ASSEMBLY

With regard to the Petitioners' arguments as described in the Petition *a quo*, the People's Legislative Assembly in conveying its view has first described about the legal standing, which can be explained as follows:

1. Legal Standing of the Petitioner

The qualification which has to be fulfilled by the Petitioners as a Party has been set forth in the provision of Article 51 paragraph (1) of Law Number 24 Year 2003 concerning the Constitutional Court (hereinafter abbreviated as the Constitutional Court Law), which states that "*The Petitioners shall be the party 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 as intended in the aforementioned Article 51 paragraph (1) are clarified in the elucidation of the article, namely, "*referred to as "constitutional rights" shall be the rights set forth 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 set forth in the 1945 Constitution of the State of the Republic of Indonesia are classified as "constitutional rights".

Therefore, according the Constitutional Court Law, in order that a person or a party can be accepted as the Petitioners with legal standing in the petition for review of Law against the 1945 Constitution, they must first explain and substantiate:

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

b. Their constitutional rights and/or authority as intended in the "**Elucidation of Article 51 paragraph (1)**" which they consider impaired by the coming into effect of the Law.

With regard to the parameter of impairment of constitutional rights and/or authority, the Constitutional Court has provided a definition and limitation of impairment of constitutional rights and/or authority caused by the coming into effect of Law, which has to meet 5 (five) requirements (*vide* Decision 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 of the State of the Republic of Indonesia;

b. that the aforementioned Petitioners' constitutional rights and/or authority are considered by the Petitioners as having been impaired by the Law being reviewed;

c. whereas 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 do not have the qualification of legal standing as Petitioners.

In responding to the petition of the Petitioners *a quo*, the People's Legislative Assembly is of the opinion that the Petitioners must be able to prove first whether or not they are truly the party which considers their constitutional rights and/or authority as having been impaired by the coming into effect of the Law 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 Law being petitioned for review.

With regard to the specific arguments about the legal standing as proposed by the Petitioners *a quo*, the People's Legislative Assembly is not of the same opinion, with the clarification thereof as follows:

1. Whereas, the fundamental principle in the effort of fulfilling, guaranteeing and implementing human rights, either in the fields of civil, politics,

economics, social, or culture is the proportionality principle. The proportionality principle has three important elements. *First*, the issued law or regulation must be aimed at protecting human rights of every person fairly without discrimination. *Second*, should there be any restriction on human rights, it has to be consistent with the general principle of restriction on human rights, namely to protect the public interest and order as well as to protect the fundamental rights of other people. *Third*, the restriction should be made based on the applicable laws and constitute the last instrument, which has to be chosen on the sole consideration of urgent public interest.

2. Whereas, the norms regarding human rights of Indonesian citizens and the constitutional authorities of lawmakers to protect, guarantee and fulfill human rights set out in the 1945 Constitution of the State of the Republic of Indonesia have the fundamental principle of human rights, since all laws and regulations are applicable generally regardless of a person's status and background. Restriction on human rights as mandated by Article 28J paragraph (2) of the 1945 Constitution of the Republic of Indonesia is a constitutional authority of lawmakers to control the life in the nation and state with a sole purpose of promoting public interest and order as well as protecting other people's fundamental right.

3. Whereas, the state's role in the concept of economic, social and cultural rights is different than in the concept of civil and political rights. Economic,

social and cultural rights are positive rights since they need state intervention (‘positive intervention’) in the fulfillment of such rights. The state needs to implement policies to intervene economic, social and cultural rights by way of issuing a series of laws. One of the efforts is by guaranteeing free education for citizens as set forth in Article 31 paragraph (2). While state intervention for economic rights is set forth in Article 33 paragraphs (1), (2), (3), (4), and (5) of the 1945 Constitution which reads:

1. *The economy shall be organized as a common endeavor based on the family principle.*

2. *Production branches which are important for the state and which affect the livelihood of the public shall be managed by the state.*

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

4. *The national economy shall be organized based on economic democracy under the principles of togetherness, fair, sustainable and environmentally friendly efficiency, independence and by maintaining a balance between development and national economic unity.*

5. Further provisions concerning the implementation of this article shall be provided for in law.

Whereas, the aforementioned provision of Article 31 paragraph (5) of the 1945 Constitution constitutes a basic norm of the formation of Law 4/2009, therefore, the existence of the aforementioned Law is constitutionally in accordance with the 1945 Constitution of the State of the Republic of Indonesia.

4. Whereas, the provision of Article 1 paragraph (3) of the 1945 Constitution mandates that: "*The State of Indonesia shall be a state based on the rule of law*" and Article 28D paragraph (1) of the 1945 Constitution of the State of the Republic of Indonesia dictates that: "*Every person shall have the right to fair recognition, guarantee, protection and legal certainty as well as equal treatment before the law*." The meaning of the provision of this article is that all activities of state and government administration should be based on applicable positive laws in order to create legal certainty for all its citizens. Whereas Law 4/2009 is aimed at guaranteeing the rights of Indonesian citizens and population who are willing to improve themselves as set forth in Article 28C paragraph (2) of the 1945 Constitution of the State of the Republic of Indonesia which reads as follows: "*Every person shall have the right to promote themselves in striving for their rights collectively for building their society, nation, and state*." The provision which is set forth in Law 4/2009 to guarantee every person's right to

‘*promote themselves*’ through economic activities in the field of mining contains the dimension of human rights which is highly fundamental since the aforementioned provision is applicable to any person, without mentioning the type of occupation, group, human difference, ethnicity, religion, tribe and race.

5. Whereas, Article 28I paragraph (5) of the 1945 Constitution states that “*to enforce and protect human rights in accordance with the principle of a democratic constitutional state, the exercise of human rights shall be guaranteed, stipulated and set forth in laws and regulations.*” The meaning of the provision of this article is to provide the constitutional authority to lawmakers to manage the fulfillment of the citizen’s human rights comprehensively without taking into account the background of economy, social, culture, political affiliation, job type, religion, ethnicity, and race. The purpose is that the effort of satisfying, guaranteeing, and implementing the values of human rights in Indonesia for Indonesian citizens and population does not disrupt public order and security which may threaten the sovereignty of the state and other people’s fundamental rights. Therefore, the purpose of the provision of Article 162 of Law *a quo* which contains threat of criminal penalty for any person preventing or disrupting mining business activities is to protect economical rights of every citizen and population in Indonesia who is willing to improve themselves to develop their society, their nation and their country.

6. Whereas, the phrase '*Any person who prevents or disrupts mining business activities belonging to the Mining Business Permit or Special Mining Business Permit holders*" mentioned in Article 162 of Law *a quo* regarding threat of criminal penalty **does not in any way reflect** unequal treatment, injustice, and legal uncertainty. Instead, the phrase '*any person*' contains legal certainty, justice and equal treatment to anyone violating the applicable positive law provisions. The provision of the Article *a quo* of Law 4/2009 on the threat of criminal penalty is also protecting the citizens or residents in Indonesia who already have Mining Business Permit or Special Mining Business Permit pursuant to the stipulated laws and regulations as well as procedures. A law or regulation is considered as applying unequal treatment, injustice and legal uncertainty if such law or regulation is stating any human background or status as a basis for the stipulation of such law or regulation, such as penalizing certain community, certain ethnicity, certain group or certain interest.

7. Whereas, all mining activities and Mining Business Permit or Special Mining Business Permit holders have gone through legal procedures as stipulated in laws and regulations. Among others, Article 136 paragraph (1) of Law *a quo* requires *all Mining Business Permit or Special Mining Business Permit holders to settle land titles with titleholders in accordance with provision of laws and regulations*. Therefore, the provision on mining activities which is regulated by Article *a quo* of Law 4/2009 constitutes

positive law and the provision on threat of criminal penalty is stipulated solely to enforce Article 1 (3), namely: "*The State of Indonesia shall be a state based on the rule of law*" and Article 28D paragraph (1) of the 1945 Constitution which dictates as follows: "*Every person shall have the right to fair recognition, guarantee, protection and legal certainty as well as equal treatment before the law*."

8. Whereas, the provision of Article 6 paragraph (1) sub-paragraph e, Article 9 paragraph (2) and Article 10 sub-article b of Law *a quo* never prohibits the citizens or population of Indonesia to associate, assemble, and express opinions. Community's right to participate in considering the ecological, economic, and socio-cultural aspects in stipulating Mining Areas is already guaranteed in Article 10 sub-article b of Law *a quo*. However, in the practice of state structure in Indonesia, all kinds of decision fall under the government's authority by taking into account the consideration of the Regional Government and People's Legislative Assembly. This means that the community has been given a very significant portion to participate in stipulating Mining Areas, because in addition to direct involvement, people also have their representatives in the People's Legislative Assembly and Regional Government. The majority votes used by the government to stipulate mining areas based on the consideration of the community, People's Legislative Assembly, and

Regional Government does not mean that there is no single person who disagrees.

9. Whereas, the Petitioners' interpretation against Article 28G paragraph (1) of the 1945 Constitution which states '*property under their control*" includes '*sources of natural riches (sea, mine, forest, garden) are owned either individually or collectively/communally as a constitutional right*". The Petitioners' interpretation has clearly violated the provision of Article 33 paragraph (3) of the 1945 Constitution of the State of the Republic of Indonesia which dictates that "*Land and water and the natural resources contained therein shall be managed by the state and shall be used for the greatest prosperity of the people.*" This means that the state, on behalf of the government or citizens, either individually or collectively associated in trading associations or companies, has the right to explore natural riches for the interest of the state and the community. In this case, there is no single mining which does not involve any worker, therefore, mining activities constitute a collective effort to develop the economic right as a constitutional right.

10. Whereas, the right to freedom of expression and to express opinions as stated by the Petitioners should in fact take into account the norm of applicable positive law in order to not disrupt public order and security as well as other people's human rights. This is aimed at protecting other people's human rights as well as maintaining public order and security as

the state's responsibility. In terms of protecting the right of the citizens already holding a Mining Business Permit or a Special Mining Business Permit, law enforcement apparatuses are authorized to arrest or detain any person under the provision of law *a quo*, namely any person who prevents or disrupts the right of Mining Business Permit or a Special Mining Business Permit holders to conduct mining activities.

Based on the aforementioned descriptions, the People's Legislative Assembly is of the opinion that the Petitioners do not have legal standing, as required by Article 51 paragraph (1) and the Elucidation of Constitutional Court Law, as well as by the definition of impairment of constitutional rights and/or authority which has to be satisfied pursuant to previous Constitutional Court's decisions. Therefore, the People's Legislative Assembly requests the honorable Chief Justice/Panel of Justices of the Constitutional Court to declare at their discretion that the Petitioners does not have legal standing, therefore, the Petitioners' Petition should be declared inadmissible (*niet ontvankelijk verklaard*).

However, should the honorable Chief Justice/Panel of Justices of the Constitutional Court be of another opinion, the Clarification of the People's Legislative Assembly in relation to the review material of Law Number 36 Year 2009 concerning Health is conveyed as follows:

2. Review of Law 4/2009

The Petitioners in the petition *a quo* assume that their constitutional rights have been impaired or potentially impaired by the coming into effect of the provision of Article 6 paragraph (1) sub-paragraph e, Article 9 paragraph (2) and Article 10 sub-article b of Law 4/2009.

With regard to such assumption stated by the Petitioners, the People's Legislative Assembly conveyed its view by providing the following statements/explanation:

1. Whereas, the natural riches of the state of Indonesia are very abundant, spread in various regions. The Government should invite all parties, either individuals or business groups to explore such natural riches for the prosperity of the nation. Therefore Article 33 paragraph (4) of the 1945 Constitution of the State of the Republic of Indonesia affirms: "*The national economy shall be organized based on economic democracy under the principles of togetherness, fair, sustainable and environmentally friendly efficiency, independence and by maintaining a balance between development and national economic unity.*" Economic democracy principle means that the exploration of natural riches is not only conducted by the government as the holder of the *de jure* right on the existing natural riches, but it involves various sectors including the private sector, both domestic and foreign. Therefore, the 1945 Constitution and Law 4/2009 do not specifically mention the parties having the right to conduct economic activities such as mining. However, all kinds of economic activities in

Indonesia have to be conducted in accordance with applicable laws and regulations to guarantee legal certainty and in order to not disrupting other people's human rights.

2. Whereas, Article 6 paragraph (1) sub-paragraph e, Article 9 paragraph (2) and Article 10 sub-article b of Law *a quo* grant the authority to the government to stipulate Mining Areas upon coordinating with the Regional Government and the People's Legislative Assembly. This provision is aimed at performing the legislative, supervisory and coordinating functions in the government to guarantee the implementation of democracy process as mandated by the 1945 Constitution. The meaning of the provision '*upon coordinating with the Regional Government*' is to implement Article 18 paragraphs (2) and (5) of the 1945 Constitution. Meanwhile Article 18 paragraph (2) of the 1945 Constitution states: "*The provincial, regency, and municipal government administrations shall regulate and administer their own governmental matters in accordance with the principle of autonomy and* ***duty of assistance***" and Article 18 paragraph (5) of the 1945 Constitution reads: "*The regional government administrations shall exercise autonomy to the broadest possible extent, with the exception of governmental matters determined by law as affairs of the Central Government.*"

3. Whereas, under the provision of Article 18 paragraph (2) of the 1945 Constitution '*duty of assistance*' means the existence of a coordinating line

between the Regional Government and the Central Government to issue a policy. While the meaning of the provision of Article 18 paragraph (5) of the 1945 Constitution is to grant authority to Regions to provide inputs regarding mining potentials which will become the stipulation basis by the central government in stipulating Mining Areas.

4. Whereas, the phrase "*upon consulting with the People's Legislative Assembly of the Republic of Indonesia*" in Article 6 paragraph (1) sub-paragraph e, Article 9 paragraph (2) and Article 10 sub-article b of Law *a quo* is to implement Article 20A paragraph (1) of the 1945 Constitution which reads as follows: "*The People's Legislative Assembly shall have legislative, budgetary and supervisory functions*." This means that the provisions of Article 6 paragraph (1) sub-paragraph e, Article 9 paragraph (2) and Article 10 sub-article b of Law *a quo* do not violate the 1945 Constitution, because the policy making process by the government based on Law *a quo* has been consistent with the constitutional mechanism which requires the government to coordinate with the regional government and to consult the People's Legislative Assembly.

5. Whereas, the purpose of the provision of Article 6 paragraph (1) sub-paragraph e, Article 9 paragraph (2) and Article 10 sub-article b of Law *a quo* regarding '*coordinating with the Regional Government and consulting with the People's Legislative Assembly of the Republic of Indonesia*' is to implement the provision of Article 33 paragraph (4) of the 1945

Constitution which reads: "*The national economy shall be organized based on economic democracy under the principles of togetherness, fair, sustainable and environmentally friendly efficiency, independence and by maintaining a balance between development and national economic unity.*" The principle of togetherness is reflected on the existence of government agencies which are involved, such as the Government, the People's Legislative Assembly and the Regional Government. While the principle of fair efficiency is reflected on the involvement of community in Article 9 paragraph (2) *juncto* Article 10 sub-article b of Law 4/2009. This means that the non-involvement of the community in the final decision making of a Mining Area is solely for the purpose of implementing the fair efficiency principle as set forth in the 1945 Constitution.

6. Whereas, the government's authority in Article 6 paragraph (1) of Law 4/2009 to stipulate a Mining Area is implemented in accordance with provision of laws and regulations. Whereas Article 6 paragraph (2) of Law *a quo* regulates as follows: "*The Government's authority as intended in paragraph (1) shall be implemented in accordance with provision of laws and regulations*." This means that the provision is also stipulated to comply with the rule in Article 33 paragraph (5) of the 1945 Constitution regarding National Economy and Social Welfare which regulates that: "*Further provisions concerning the implementation of this article shall be provided for in law*."

7. Whereas, the Petitioners also consider that the provision of Article 162 of Law *a quo* which provides for the threat of criminal penalty is inconsistent with Article 25 of Law Number 39 Year 1999 concerning Human Rights which reads as follows: "...*Every person shall have the right to express his opinion in public, including the right to go on strike in accordance with provision of laws and regulations*..." Whereas the aforementioned provision of Article 25 of Law Number 39 Year 1999 is not inconsistent with the provision regarding the freedom to express opinions set forth in Article 28E paragraph (3) of the 1945 Constitution of the State of the Republic of Indonesia which reads as follows: "*Every person shall have the right to the freedom of association, assembly and expression of opinion*." While the phrase ...*the provision of laws and regulations...* set forth in Law Number 39 Year 1999 is consistent with Article 1 paragraph (3) of the 1945 Constitution which stated that: "*The State of Indonesia shall be a state based on the rule of law.*"

8. Whereas, with regard to the aforementioned Petitioners' argument the People's Legislative Assembly views that, the provision regarding '*the right to express opinions*' regulates civil and political rights which is categorized as negative law. Meanwhile the phrase '...*in accordance with provision of laws and regulations*...' set forth in Article 25 of Law Number 39 Year 1999 is aimed at implementing Article 28J paragraph (1) of the 1945 Constitution which reads: "*Every person shall be obligated to respect*

the human rights of other people in the community, national and state life order." Therefore, the expression of opinions in public such as demonstration and all kinds of expression of opinions are regulated by laws in order to not disrupting state order and security as well as other people's human rights. Therefore, the provision of Article 162 of Law 4/2009 which provides for the threat of criminal penalty does not contain the element of criminalizing certain parties since it is applicable to any person.

9. Whereas, the Petitioners also argued that the criminal provision set forth in Article 162 of Law 4/2009 is inconsistent with Article 19 of the Universal Declaration of Human Rights which reads as follows: "...*every person shall have the right to freedom of opinion and expression; this right shall include freedom to hold opinions without interference, and to seek, receive, and impart information and opinions through any media and regardless of frontiers*..." This provision is also consistent with Article 28E paragraph (3) of the 1945 Constitution. Based on the aforementioned provision, the Petitioners consider that Article 162 of Law 4/2009 regarding threat of criminal penalty represses the freedom to associate, assemble and express opinions. However, the provision of ...*regardless of frontiers*... set forth in Article 19 of the Universal Declaration of Human Rights means that it is not discriminating the status of every person or it is adhering to the non-discriminating principle.

10. Whereas, the People's Legislative Assembly is not of the same opinion with the aforementioned Petitioners' argument, because the aforementioned provision of the Universal Declaration of Human Rights is not binding to the state since the aforementioned international instrument regarding human rights is in the form of Declaration, not Convention or Covenant. Therefore, should there be conflict of norms between national law and international law, Indonesia has a sovereignty of law which cannot be intervened by anyone whomsoever. Pursuant to international law, an international regime may intervene the sovereignty of Indonesian law if the Indonesian government commits a violation of the absolute norms in human rights or *jus cogens*. Included in such absolute norms are war crime, genocide, crime against humanity and piracy. The aforementioned four norms of *jus cogens* require external intervention because they threaten the pre-emptory norms of the right to life, the right to freedom from all kinds of torture and freedom from slavery.

11. Whereas, the Petitioners also quoted Paul Sieghart's opinion to affirm the existence of inconsistency between Article 162 *juncto* Article 163 paragraph (2) of Law *a quo* and Article 28C paragraph (2) of the 1945 Constitution of the State of the Republic of Indonesia which states as follows: "*Every person shall have the right to promote themselves in striving for their rights collectively for building their society, nation, and state*." Based on this opinion, the People's Legislative Assembly is of the

opinion that a person's opinion which does not refer to the Indonesian Constitution is not a legal source which can be a basis for judicial review. Therefore, the basis of the Petitioners' argument is not valid to serve as the basis of the review of the Law *a quo*.

12. Whereas, the Petitioners' petition to review Article 6 paragraph (1) sub-paragraph e, Article 9 paragraph (2) and Article 10 sub-article b of Law 4/2009 on the ground of the occurrence of noise, dust and/or environmental pollution is inappropriate. This is because the regulation concerning environmental pollution resulted from the existence of businesses or activities which dispose waste is regulated in Government Regulation Number 82 Year 2001 concerning Water Quality Management and Water Pollution Control. Therefore, the judicial review on this Government Regulation falls under the Supreme Court's authority, not under the Constitutional Court's authority. Therefore, it is appropriate that the Petitioners' argument be rejected or at least disregarded.

Based on the aforementioned argument, the People's Legislative Assembly is of the opinion that the provisions of Article 6 paragraph (1) sub-paragraph e, Article 9 paragraph (2) and Article 10 sub-article b of Law *a quo* do not cause the loss of or is potential to lose the Petitioners' constitutional rights and therefore the petition for judicial review against the Law *a quo* is groundless. Therefore, it is evident that the provisions of Article 6 paragraph (1) sub-paragraph e, Article 9 paragraph (2) and Article 10 sub-article b of Law *a quo* **are not inconsistent in**

any way with Article 1 paragraph (3), Article 20A paragraph (1), Article 28E paragraph (3), Article 28G paragraph (1), Article 28H paragraphs (1) and (4), Article 28I paragraph (5), and Article 28J paragraphs (1) and (2) of the 1945 Constitution.

Whereas based on the above-mentioned arguments, the People's Legislative Assembly requests that the Chief Justice/Justices of the Constitutional Court may pass the following injunction of decision:

1. To declare the Petitioners *a quo* as not having legal standing, therefore, the petition *a quo* should be declared inadmissible;

2. To reject the petition *a quo* in its entirety or at least to declare the petition *a quo* inadmissible;

3. To declare Article 6 paragraph (1) sub-paragraph e *juncto* Article 9 paragraph (2), Article 10 sub-article b of Law 4/2009 **not inconsistent with** Article 28H paragraphs (1) and (4), Article 28G paragraph (1) and Article 28D paragraph (1) of the 1945 Constitution of the State of the Republic of Indonesia;

4. To declare Article 6 paragraph (1) sub-paragraph e *juncto* Article 9 paragraph (2), Article 10 sub-article b, Article 162 *juncto* Article 136 paragraph (2) of Law 4/2009 continue to have binding legal force;

5. To declare Article 162, Article 136 paragraph (2) of Law *a quo* **not inconsistent with** Article 28E paragraph (3) and Article 28C paragraph (2) of the 1945 Constitution of the State of the Republic of Indonesia (hereinafter referred to as the 1945 Constitution);

[2.5] Considering whereas the Registrar's Office of the Court has received the Petitioners' conclusion on Wednesday, March 16, 2011;

[2.6] Considering whereas in order to shorten the description in this decision, all that occurred during the court session shall be indicated in the official minutes of the court hearing, which constitutes an inseparable part of this decision;

3. LEGAL CONSIDERATIONS

[3.1] Considering whereas the purpose and objective of the Petitioners' petition is the judicial review of the constitutionality of Article 6 paragraph (1) sub-paragraph e, Article 9 paragraph (2), Article 10 sub-article b, Article 136 paragraph (2), and Article 162 of Law Number 4 Year 2009 concerning Mineral and Coal Mining (State Gazette of the Republic of Indonesia Year 2009 Number 4, Supplement to the State Gazette of the Republic of Indonesia Number 4959, hereinafter referred to as Law 4/2009) against Article 28C paragraph (2), Article 28D paragraph (1), Article 28E paragraph (3), Article 28G paragraph (1), Article 28H paragraphs (1) and (4) of the 1945 Constitution of the State of the Republic of Indonesia (hereinafter referred to as the 1945 Constitution) or to declare that Article 6 paragraph (1) sub-paragraph e, Article 9 paragraph (2), and Article 10

sub-article b remains constitutional to the extent that the phrase “by taking into account the opinions of the community” is interpreted as stipulation of Mining Areas by the Government upon coordinating with the Regional Government and upon consulting with the People’s Legislative Assembly of the Republic of Indonesia and upon obtaining written approval from every person whose area or land property is included in a mining area and from the community which shall be negatively affected;

[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. authorities of the Court to examine, hear and decide upon the petition *a quo;*

b. legal standing of the Petitioners;

With regard 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 the Law Number 24 Year 2003 concerning the Constitutional Court as already 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 a Law against the 1945 Constitution;

[3.4] Considering whereas the petition *a quo* is regarding the review of Law *in casu* Law 4/2009 against the 1945 Constitution, therefore, the Court has authority to examine, hear and decide upon the petition *a quo*;

Legal Standing of the Petitioner

[3.5] Considering whereas pursuant to Article 51 paragraph (1) of the Constitutional Court Law and the Elucidation thereof, the parties eligible to act as Petitioner 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] Considering whereas the Court, 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, is of the opinion that the impairment of constitutional rights and/or authority as intended in Article 51 paragraph (1) of the Constitutional Court Law must meet 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 such impairment of constitutional rights and/or authority and the Law petitioned for review;

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

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

a. his/her position as a Petitioner as intended 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] Considering whereas the Petitioners argued as Non-Governmental Organizations (NGOs) and individuals having concern on the issues of human rights, environment, and agrarian affairs, who have interest in the review of Law 4/2009 against the 1945 Constitution;

Petitioners I up to and including V as NGOs have conducted efforts in environmental education and direction in various sectors, legal and human rights education, as well defense of marginalized community who become victims of development, who have constitutional rights as set forth in Article 28C paragraph

(2), Article 28D paragraph (1), Article 28E paragraph (3), and Article 28H paragraph (1) of the 1945 Constitution;

Petitioners VI up to and including XXI are individual Indonesian citizens either as victims of mining or as environmental activists who have constitutional rights as set forth in Article 28C paragraph (2), Article 28D paragraph (1), Article 28E paragraph (3), article 28G paragraph (1), as well as Article 28H paragraphs (1) and (4) of the 1945 Constitution;

The Petitioners argued that their constitutional rights mentioned above are violated or potentially violated, either directly or indirectly, by the coming into effect of Article 6 paragraph (1) sub-paragraph e *junctis* Article 9 paragraph (2), Article 10 sub-article b of Law 4/2009 with respect to the phrase “by taking into account the opinions of the community”, and Article 162 with respect to the threat of criminal penalty for the violation of Article 136 paragraph (2) of Law 4/2009;

Article 6 paragraph (1) sub-paragraph e of Law 4/2009 states that, “*Authority of the Government in the management of mineral and coal mining shall be, among other things: ... e. stipulation of Mining Areas upon coordinating with the regional governments and consulting with the People’s Legislative Assembly of the Republic of Indonesia*”;

Article 9 paragraph (2) of Law 4/2009 states that, “*Mining Areas as intended in paragraph (1) shall be stipulated by the Government upon*

coordinating with the regional governments and consulting with the People's Legislative Assembly of the Republic of Indonesia";

Article 10 sub-article b of Law 4/2009 states that, "*Stipulation of Mining Areas as intended in Article 9 paragraph (2) shall be conducted: ... b. in an integrated manned by taking into account the opinions of the relevant government agencies, the community, and by considering the ecological, economic, and socio-cultural aspects as well as having environmental perspective*";

Article 136 paragraph (2) of Law 4/2009 states that, "*The settlement of land titles as intended in paragraph (1) may be conducted gradually according to the land requirement of the Mining Business Permit or Special Mining Business Permit holders.*"

Article 162 of Law 4/2009 states that, "*Any person who prevents or disrupts mining business activities belonging to the Mining Business Permit or Special Mining Business Permit holders that have met the requirements as intended in Article 136 paragraph (2) shall be sentenced to imprisonment for a maximum period of 1 (one) year or a fine in a maximum amount of Rp100,000,000.00 (one hundred million rupiah)*";

The Petitioners also request the Court to declare Article 6 paragraph (1) sub-paragraph e *junctis* Article 9 paragraph (2), Article 10 sub-article b of Law 4/2009 to remain constitutional provided that the phrase "**by taking into account**

the opinions of the community" is interpreted as the stipulation of Mining Areas by the Government upon coordinating with the Regional Government and upon consulting with the People's Legislative Assembly of the Republic of Indonesia and upon obtaining written approval from every person whose area or land property is included in a mining area and from the community which shall be negatively affected;

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 satisfy the qualification as Indonesian citizen individual petitioners (included in the group of people having a common interest);

b. The Petitioners have the constitutional rights as set forth in the 1945 Constitution, particularly Article 28C paragraph (2) regarding the right to promote themselves in striving for their rights collectively for building their society, nation, and state; Article 28D paragraph (1) regarding the right to recognition, guarantee, protection, and legal certainly of just laws as well as equal treatment before the law; Article 28E paragraph (3) regarding the right to the freedom of association, assembly and expression of opinion, Article 28G paragraph (1) regarding the right to protect themselves, their family, their honor, dignity and property under their control, and shall have the right to the feeling of security and protection against the threat of fear

to do, or not to do something that constitutes a human right; Article 28H paragraph (1) regarding the right to live a physically and mentally prosperous life, to have residence, and to obtain a proper and healthy living environment as well as to obtain health services; and Article 28H paragraph (4) regarding the right to possess personal proprietary rights and such proprietary rights may not be taken over arbitrarily by anybody;

c. The Petitioners constitute a group of people having a common interest who consider themselves potentially impaired by the existence of the aforementioned articles since they are not explicitly involved in the stipulation of Mining Areas and threatened to be subject to criminal sanction if they prevent or disrupt the implementation of mining business activities which have obtained a Mining Business Permit and/or a Special Mining Business Permit. Therefore, in the Court's opinion, the Petitioners *prima facie* have legal standing to file the petition *a quo*;

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

The Substance of the Petition

[3.9] Considering whereas the Petitioners in their petition filed for judicial review of Article 6 paragraph (1) sub-paragraph e, Article 9 paragraph (2), Article 10 sub-article b, Article 136 paragraph (2), and Article 162 of Law 4/2009 which in

substance questioned the constitutionality of the stipulation of Mining Areas which is conducted by and involving the Regional Government, the Central Government, and the People's Legislative Assembly of the Republic of Indonesia, without involving the community. What is more, the community may be subject to criminal sanction for being considered as conducting an action which prevents or disrupts the implementation of mining business activities which have obtained a Mining Business Permit and/or a Special Mining Business Permit;

[3.10] Considering whereas the 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 up to P-26);

The Court has heard the statements of the witnesses, as well as heard and read the statements of the experts presented by the Petitioners, which in substance explained as follows:

The Statement of the Witnesses

1. Florianus Surion

- The witness as a member of traditional community in West Manggarai Regency, Flores, East Nusa Tenggara, in Komodo island to be precise, stated that in his area there are 10 (ten) Mining

Authorizations granted by the Government in the region the topography of which has tourism potential;

- The presence of mining in West Manggarai Regency is currently disturbing the community because the whole region belongs to the communal land of the local people;

- The 10 Mining Authorizations were granted in 2008 by the Government without any effort at all to seek permission from the landowners, particularly with regard to communal land titles;

- With regard to the existence of mining activities in the aforementioned communal land area, the local customary community has taken an action to occupy such land by making fence according to the boundaries of their communal land title. With regard to the action, two community members were detained by the Manggarai Resort Police.

2. Maryanto

- The witness stated that in Kulon Progo coastal area, in late 2008, there was an investor who built a pilot project to conduct exploration of iron sand sample digging and this caused a decrease in the debit of wells in agricultural area. The exploration was

conducted on the land of community member which had been purchased;

- On October 20, 2009, in the Glass Building of the Government of Kulon Progo Regency, a public consultation was held, attended by investors, the Government of Kulon Progo Regency, as well as community members including the Witness. At that time, the farmers from Kulon Progo coastal area came to the place of public consultation to express their refusal of the aforementioned mining plan. However, at that time, the community members were blocked by fully-armed police apparatus, the community members were in fact coercively dismissed by tear gas shot and beaten with clubs, as a result, many community members, including the Witness himself, had to be treated in the hospital;

- Up to the time of the conveyance of this statement, in determining the mining site in Kulon Progo coastal area, the government has never listened to the aspiration of the community which will be affected. For such reason, the farmers in Kulon Progo coastal area who are united in the Community of Farmers in Kulon Progo Coastal Area (*Paguyuban Petani Lahan Pantai Kulon Progo*) refuse the plan for iron sand mining because: (1) it kills the farmers' plants on sandy land, (2) it reduces the water debit of the people's wells, (3) it causes unrest amid the community due to the fear that they

land will be turned into a mining area, (4) it causes horizontal conflicts amid the community, (5) it causes criminalization of community members of coastal area, (6) there have been acts of violence conducted by police apparatus against community members, (7) as farmers, they will lose their right to farm on their own land.

3. Sapari

- The Witness as a farmer in Sukolilo area, stated that ever since there was a plan for the construction of Semen Gresik Factory in Sukolilo area, since 2006 there were land middlemen or brokers who have been spreading unrest amid the local community because community members did not know about what actually will be carried out by the Regency Government, because suddenly, there was an unilateral action of the middlemen by intimidating people to sell their land;

- As a local community member, the Witness has never been informed that there will be a construction of cement factory.

- The Witness heard himself that there was an intimidating action in the form of frightening the people by stating that if the land was not sold, as soon as the factory operates, the Witness' land will just be cleared without any compensation. This has worried the Witness.

4. Abdul Madjid Ridwan

- The Witness in substance stated that the Witness had been placed as a suspect by the Police under Article 162 of Law 4/2009, namely the Witness was deemed to conduct an action which prevented and disrupted mining business of PT. Aneka Tambang which had the intention to conduct reproduction of iron sand mining business in the Witness' area, namely in Wotgalih Village, Yosowilangun District, Lumajang Regency, East Java Province.
- The government has never explained about the mechanism for community members to convey their complaints or to refuse the aforementioned mining business;
- The land to be re-exploited was in the form of mountains which served as a shield or protector for local people from waves, including tsunami, since the area is close to the south sea.

The Statement of the Expert, Prof. Dr. I Nyoman Nurjaya, S.H., M.H.

- Article 6 paragraph (1), Article 9 paragraph (2), and Article 10 sub-article b of Law 4/2009 in substance are related to: (1) the early prevention principle – the precautionary principle in planning and stipulating Mining Areas; (2) the democracy principle in the form of genuine public participation which is transparent in making policies-decisions as well as recognizing the community's rights; (3) the free and prior informed consent principle, which means that the people and the customary communities in

particular must be given prior information regarding a plan of policy-decision-stipulation of the government and subsequently provided the freedom to give/not to give their consent on such government plan;

- Article 10 sub-article b of Law 4/2009 constitutes a pseudo public participation (a lip-servicing, deceitful involvement) when indicating the word “community” in the stipulation of mining areas;
- Article 162 of Law 4/2009 may only be applied if **legal obligations** of Mining Business Permit or Special Mining Business Permit Holders as set forth in Article 136 of Law 4/2009 have been settled;
- The critical question is: why does the criminal sanction for mining business permit or special mining business permit holders who fail to satisfy their legal obligations is not provided for? This constitutes discriminative legal treatment. Therefore, the landowners’ resistance arose because while the provisions of Article 136 of Law 4/2009 was not yet satisfied by mining business permit or special mining business permit holders, some of the community have been criminalized.

[3.11] Considering whereas the Government have provided verbal and written statements which are contained in full in the Facts of the Case section which in substance stated as follows:

With regard to Article 6 paragraph (1) sub-paragraph e *juncto* Article 9 paragraph (2) of Law 4/2009

- Stipulation of Mining Areas as the Government's authority in the management of mineral and coal mining upon coordinating with the regional governments and consulting with the People's Legislative Assembly of the Republic Indonesia is, in the Government's opinion, a very reasonable and logical matter;
- The provision of Article 6 paragraph (1) sub-paragraph e and Article 9 paragraph (2) of Law 4/2009 which regulates the criteria for authority in the management of mineral and coal mining, and the criteria for Mining Areas is aimed at providing legal certainty for a region as to whether or not mining business activities may be conducted in such region.

With regard to Article 10 sub-article b of Law 4/2009

- Article 10 sub-article b of Law 4/2009 regulates the Stipulation of Mining Areas as referred, which is implemented in an integrated manned by taking into account the opinions of the relevant government agencies, the community members, and by considering the ecological, economic, and socio-cultural aspects as well as having environmental perspective, and by taking into account the regional aspirations, aimed at providing legal certainty for the community in the surrounding of the mining sites to be able to participate actively in the stipulation of mining areas for the implementation of mining business activities in Indonesia. This is in line with the purpose of the preparation of Law 4/2009, namely to guarantee

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

With regard to Article 162 *juncto* Article 136 paragraph (2) of Law 4/2009

- Article 162 of Law 4/2009 cannot be directly applied to the community when they refuse to submit their land to mining business actors, since the provision of Article 162 cannot be separated from the provision of Articles 136 up to 138 of Law 4/2009.

To prove its statements, the Government presented several experts whose statements have been heard during the court session on March 9, 2011, which in substance stated the following:

1. Dr. Ir. Simon F. Sembiring

- Division of area constitutes a crucial matter. Community participation in Mining Areas is regulated in Government Regulation. The problem is, how far does the government regulate such community participation? In the Law *a quo*, it is not stated “how”. Therefore, it can be seen later in the relevant Government Regulation;
- Area division has its own process, starting from the region, upon meeting with the community, subsequently continued to the province, then to the central government. From the central government, it will enter the People’s Legislative Assembly;

- Mining Area is divided into 3 (three) types, namely (1) Mining Business Area, (2) State Reserve Area, and (3) Small-Scale Mining Area. Based on these areas, Mining Business Permit Areas are issued. Mining Business Permit Area tender is for metal mineral and coal. There is no tender for Small-Scale Mining Areas and Small-Scale Mining Permits.
- If Law 4/2009 is implemented according to its spirit, there should have been a bottom-up procedure prior to the stipulation of mining area by the government and the parliament. If the community is not involved, then they may complain to the People's Legislative Assembly;
- Currently, mining area is under the process in the People's Legislative Assembly. It has to be questioned as to whether or not the community has been involved in the process, which constitutes the key point. If it has not involved the community, the People's Legislative Assembly should reject it and the money should be returned, because the order of Law *a quo* is that it should involve the community. If it does not involve the community, it means violating the law. If it is ratified by the People's Legislative Assembly without the community's involvement, it means that the Assembly and the Government have made a collective mistake.

2. Prof. Daud Silalahi

- In the civil law system adhered to in Indonesia, certainly Law 4/2009 *a quo* still has its weaknesses since it does not explicitly regulate technical issues. Technical-economic issues are regulated in a Government Regulation. Based on the Expert's experience as a drafter, it is very difficult to formulate very concrete articles properly because the articles applied have to be the same from Sabang until Merauke, while the location of environment is different. Therefore, the articles in the law are formulated in a rather general manner while its Government Regulation may be interpreted in a concrete manner;
- The Expert as the Head of the Team for the Draft of Law 4/2009 stated that Law 4/2009 is already formulated by taking into account public proposals through NGOs and a feasibility study has also been conducted. However, if the formulation subsequently became the way it is today, then there has been a trade-off, and this is the maximum result that can be achieved;

3. Prof. Dr. Rudy Sayoga Gautama

- In the exploitation process, we know the term, recovery. When we conduct mining process, it is impossible to mine 100% since there are always leftovers. So is in the processing process, due to technological and economic considerations. Therefore, often times, as in the example of tin mining, ex tin processing sites worked on in

1980s is currently mined again. This is logical, because the economic and technological condition at that time was different from today, thus let us say that only 80% have been mined in the past, which means that there are still 20% which would be disposed in the tailing. If its economic value today is increasing, it could be mined again;

[3.12] Considering whereas the People's Legislative Assembly has presented written statements which in substance stated as follows:

With regard to Article 6 paragraph (1) sub-paragraph e, Article 9 paragraph (2) and Article 10 sub-article b of Law 4/2009

- Article 6 paragraph (1) sub-paragraph e, Article 9 paragraph (2) and Article 10 sub-article b of Law *a quo* grant the authority to the government to stipulate Mining Areas upon coordinating with the Regional Government and the People's Legislative Assembly. This provision is aimed at executing the legislative, supervisory and coordinating functions in the government to guarantee the implementation of democracy process as mandated by the 1945 Constitution;

- The meaning of the provision '*coordinating with the regional government*' is to implement Article 18 paragraphs (2) and (5) of the 1945 Constitution. Pursuant to the provision of Article 18 paragraph (2) of the 1945 Constitution, '*the duty of assistance*' means the existence of a

coordination line between the Central Government and the Regional Government in order to issue a policy, while the meaning of the provision of Article 18 paragraph (5) of the 1945 Constitution is to grant authority to Regions to provide inputs regarding mining potentials which will become the stipulation basis by the central government in stipulating Mining Areas;

- The phrase "*upon consulting with the People's Legislative Assembly of the Republic of Indonesia*" in Article 6 paragraph (1) sub-paragraph e, Article 9 paragraph (2) and Article 10 sub-article b of Law *a quo* is to implement Article 20A paragraph (1) of the 1945 Constitution. This means that the provisions of Article 6 paragraph (1) sub-paragraph e, Article 9 paragraph (2) and Article 10 sub-article b of Law *a quo* do not violate the 1945 Constitution, because the policy making process by the government based on Law *a quo* has been in accordance with the constitutional mechanism which requires the government to coordinate with the regional government and to consult the People's Legislative Assembly.

- The purpose of Article 6 paragraph (1) sub-paragraph e, Article 9 paragraph (2) and Article 10 sub-article b of Law 4/2009 regarding '*coordinating with the Regional Government and consulting with the People's Legislative Assembly of the Republic of Indonesia*' is to implement the principles of "togetherness" and "fair efficiency" which are stated in Article 33 paragraph (4) of the 1945 Constitution. The "togetherness principle" is reflected on the existence of involved

government agencies such as the Government, the People's Legislative Assembly and the Regional Government. The non-involvement of community in the final decision making of a Mining Area is solely aimed at implementing the "fair efficiency" principle as set forth in the 1945 Constitution;

- The government's authority which is provided for in Article 6 paragraph (1) of Law 4/2009 to stipulate a Mining Area is implemented in accordance with the provisions of laws and regulations [Article 6 paragraph (2) of Law 4/2009 and Article 33 paragraph (5) of the 1945 Constitution];

- The Petitioners' petition to review Article 6 paragraph (1) sub-paragraph e, Article 9 paragraph (2) and Article 10 sub-article b of Law 4/2009 on the ground of the occurrence of noise, dust and/or environmental pollution is inappropriate, since the regulation concerning environmental pollution resulted from the existence of businesses and/or activities which dispose waste is regulated in Government Regulation Number 82 Year 2001 concerning Water Quality Management and Water Pollution Control. Therefore, the judicial review of this Government Regulation falls under the Supreme Court's authority, not under the Constitutional Court's authority.

With regard to Article 162 *juncto* Article 136 paragraph (2) of Law 4/2009

- The expression of opinions in public such as demonstration and all kinds of expression of opinions are regulated by laws in order to not disrupting state order and security as well as other people's human rights. Therefore, the provision of Article 162 of Law 4/2009 which provides for the threat of criminal penalty does not contain the element of criminalizing certain parties since it is applicable to any person.

- The People's Legislative Assembly is not of the same opinion with the Petitioners' argument which stated that the criminal provision set forth in Article 162 of Law 4/2009 is inconsistent with Article 19 of the Universal Declaration of Human Rights of the Petitioners because it is repressing the freedom to associate, assemble and express opinions. The aforementioned provision of the Universal Declaration of Human Rights is not binding on the state since the aforementioned international instrument regarding human rights is in the form of Declaration, not Convention or Covenant. Should there be any conflict of norms between national law and international law, Indonesia has a sovereignty of law which cannot be intervened by whomsoever;

- The People's Legislative Assembly is not of the same opinion with the Petitioners' argument who quoted Paul Sieghart's opinion to affirm the existence of inconsistency between Article 162 *juncto* Article 163 paragraph (2) of Law *a quo* and Article 28C paragraph (2) of the 1945 Constitution, since the People's Legislative Assembly viewed that a

person's opinion which does not refer to the Indonesian Constitution is not a legal source which can be a basis for judicial review. Therefore, the basis of the Petitioners' argument is not valid to serve as the basis of the review of the Law *a quo*.

The Opinion of the Court

[3.13] Considering, after the Court examined carefully the Petitioners' petition, the Government's statements, the People's Legislative Assembly's Statement, statements of the Petitioners' witnesses and experts, statements of the Government's experts, as well as written evidence in the form of letters/writings presented by the Petitioners, as contained in the Facts of the Case section, the Court is of the following opinion:

[3.13.1] The Petitioners argued that Article 6 paragraph (1) sub-paragraph e *juncto* Article 9 paragraph (2) *juncto* Article 10 sub-article b of Law 4/2009 are inconsistent with Article 28D paragraph (1), Article 28G paragraph (1), Article 28H paragraphs (1) and (4) of the 1945 Constitution, because the Government's authority to stipulate Mining Areas upon coordinating with regional governments and upon consulting with the People's Legislative Assembly of the Republic of Indonesia, is deemed as impairing the Petitioners' constitutional rights to obtain guarantee, protection and legal certainty because any person, at any time, is in a threatened condition of losing their land titles and residence due to being included in a Mining Area, losing their right to obtain protection upon property

which are owned individually or communally either in the form of land or sources of natural riches, the right to reside and free from coercion to move to other residence (eviction) and the right to enjoy a proper and healthy living environment.

The Petitioners also requested the Court to declare Article 6 paragraph (1) sub-paragraph e *juncto* Article 9 paragraph (2) *juncto* Article 10 sub-article b of Law 4/2009 to remain constitutional to the extent that the phrase “by taking into account the opinions of the community” is interpreted as the stipulation of Mining Areas by the Government upon coordinating with the Regional Government and upon consulting with the People’s Legislative Assembly of the Republic of Indonesia and upon obtaining written approval from every person whose area or land property is included in a mining area and from the community which shall be negatively affected;

Article 6 paragraph (1) sub-paragraph e of Law 4/2009 states that, “*Authority of the Government in the management of mineral and coal mining shall be, among other things: ... e. stipulation of Mining Areas upon coordinating with the regional governments and consulting with the People’s Legislative Assembly of the Republic of Indonesia*”;

Article 9 paragraph (2) of Law 4/2009 states that, “*Mining Areas as intended in paragraph (1) shall be stipulated by the Government upon*

coordinating with the regional governments and consulting with the People's Legislative Assembly of the Republic of Indonesia";

Article 10 sub-article b of Law 4/2009 states that, "*Stipulation of Mining Areas as intended in Article 9 paragraph (2) shall be conducted: ... b. in an integrated manned by taking into account the opinions of the relevant government agencies,* ***the community****, and by considering the ecological, economic, and socio-cultural aspects as well as having environmental perspective*";

Based on the description above, the constitutional issue which has to be answered by the court is whether or not the state's management of the land and water as well as the natural resources contained therein which are used for the greatest prosperity of the people through the Government's authority in stipulating Mining Areas upon coordinating with regional governments and upon consulting with the People's Legislative Assembly of the Republic of Indonesia is inconsistent with the citizens' constitutional rights to obtain the guarantee, protection, and legal certainty to reside, to possess personal proprietary rights, and to enjoy a proper and healthy living environment;

To give consideration upon petition *a quo*, the Court needs to refer to the Court's Decision Number 001-021-022/PUU-I/2003 dated December 15, 2004 which among others stated as follows:

"Considering whereas by viewing the 1945 Constitution as a system as referred, the definition of "managed by the state" in Article 33 of the 1945 Constitution contains a higher or broader understanding than the definition of ownership in the conception of private law. The conception of control by the state constitutes a public law conception which is related to the sovereignty of people principle adhered to in the 1945 Constitution, either in the field of politics (political democracy) or economy (economic democracy). In such sovereignty of people ideology, it is the people who are recognized as the source, owner, and at the same time the holder of highest power in the life of a state, in line with the doctrine "from the people, by the people and for the people". Such definition of highest power also includes the definition of public ownership by the people collectively;

Considering whereas if the definition of the phrase "managed by the state" is simply interpreted as ownership in the sense of private, the aforementioned provision shall not be adequate in using such control to achieve the purpose of "the greatest prosperity of the people", which means that the mandate of "to promote general welfare" and "to create social justice for the entire people of Indonesia" in the Preamble of the 1945 Constitution is impossible to actualize. Nevertheless, the conception of private ownership itself has to be recognized as a logical consequence of the state's management which also includes the definition of public ownership by the people collectively of such sources of riches. The definition of "managed by the state" cannot be defined as merely restricted

to the right to regulate either, since the aforementioned is already attached by itself in the state functions without having to be particularly mentioned in the constitution. Had Article 33 not stated in the 1945 Constitution, as is common in many countries which adhere to the liberal economic ideology which do not regulate the basic norms of economy in their constitution, the state by itself has the authority to conduct the regulatory function. Therefore, the definition of the phrase "managed by the state" is impossible to be reduced to only related to the state's authority to regulate the economy. Therefore, the view which interprets the phrase control by the state as identical with ownership in the sense of civil conception or the view which interprets such definition of control by the state is merely restricted to the authority of regulatory by the state are both rejected by the Court;

*Considering whereas based on a series of opinions and descriptions above, the phrase "managed by the state" must therefore be interpreted to include the meaning of control by the state in the broad sense which is based on and resulted from the conception of the sovereignty of the Indonesian people over all of the resources of the "land and water as well as the natural resources contained therein", including therein the definition of public ownership by the people collectively of such resources. The people collectively are constructed by the 1945 Constitution to give the mandate to the state to make policy (*beleid*) and to perform administration (*bestuursdad*), regulation (*regelendaad*), management (*beheersdaad*) and oversight (*toezichthoudensdaad*) with the purpose of the*

*greatest prosperity of the people. The function of administration (*bestuursdaad*) by the state is executed by the government with its authority to issue and revoke permit facilities (*vergunning*), licensing (*licentie*), and concession (*concessie*). The state's regulatory function (*regelendaad*) is performed through the legislative authority of the People's Legislative Assembly together with the Government, and regulation by the Government (*executive*). The management function (*beheersdaad*) is performed through share holding mechanism and/or through direct involvement in the management of the State-Owned Enterprises or State-Owned Legal Entities as institutional instruments through which the state* c.q. *the Government will exercise its control over the resources of the riches for the greatest prosperity of the people. So is the function of oversight by the state (*toezichthoudensdaad*) executed by the state* c.q. *the Government in the context of supervising and controlling so that such exercise of control by the state upon vital branches of production which are important and/or affect the livelihood of many people is actually performed for the greatest prosperity of the entire people;*

In addition to that, the Court also needs to refer to Decision of the Constitutional Court Number 21-22/PUU-V/2007 on the review of Law Number 25 Year 2007 concerning Investment, dated March 25, 2008, Paragraph **[3.9]** of the Decision states that, "… *in the aforementioned Article 33 of the 1945 Constitution, there are economic and social rights of the citizens as the interest protected by the constitution through the involvement or the role of the state. In*

other words, Article 33 of the 1945 Constitution is the provision which provides for the involvement or the active role of the state in taking the actions in the context of respecting, protecting and fulfilling the economic and social rights of the citizens";

The Court in Decision Number 25/PUU-VIII/2010 dated June 4, 2012, stated that the Government, in stipulating Mining Areas, in addition to adjusting it to the national spatial layout and to have orientation towards environmental preservation, must also ensure that such division of the three forms of mining areas (Small-Scale Mining Area, National Reserve Area, and Mining Business Area) will not overlap one another, either in the same government administrative area or between different government administrative areas, as well as to prioritize the division of Mining Areas by first determining and stipulating Small-Scale Mining Areas, subsequently National Reserve Areas, then Mining Business Areas;

Based on the legal considerations above, it is evident that the people are collectively constructed by the 1945 Constitution to give the mandate to the state *c.q.* the Government to make policy (*beleid*), to perform administration (*bestuursdad*), regulation (*regelendaad*), management (*beheersdaad*), and oversight (*toezichthoudensdaad*) with the purpose of the greatest prosperity of the people. In addition to that, the 1945 Constitution also constructed that the state *c.q.* the Government is involved or participating actively to perform actions in the context of respecting, protecting and fulfilling the citizens' economic and

social rights. Therefore, in the context of executing such mandate of the 1945 Constitution, in stipulating Mining Areas, the Government may not act arbitrarily, therefore, it must first coordinate with regional governments and consult with the People's Legislative Assembly of the Republic of Indonesia, as well as take into account the opinions of the community;

The mechanism of stipulation of Mining Areas in the form of the activities of coordination, consultation and taking into account the opinions of the community, as set forth in the articles petitioned by the Petitioners *a quo*, in the Court's opinion, has the potential of violating the citizens' constitutional rights when such mechanism is conducted merely to satisfy formal-procedural provisions as contained in the laws and regulations and obscuring the main purpose, namely to respect, protect and fulfill the citizens' economic and social rights, which, in the context of natural resources, should be used for the greatest prosperity of the people. Furthermore, the Elucidation of Article 10 *a quo* only states "sufficiently clear", therefore, it also becomes unclear which community is actually the one whose opinion is to be taken into account. In relation to this, the use of the phrase "by taking into account" in Article 10 sub-article b of Law 4/2009 actually has an imperative meaning which confirms that the Government, in stipulating Mining Areas, is required to involve community's opinion first as a form of control function against the Government to ensure the fulfillment of citizen's constitutional rights to a prosperous life physically and spiritually, to reside, and to enjoy a proper and healthy living environment, to possess personal

proprietary rights and such ownership may not be expropriated arbitrarily by whomsoever [*vide* Article 28H paragraph (1) and (4) of the 1945 Constitution]. Therefore, in order to further strengthen the community's control function over the Government and at the same time to guarantee legal certainty of just laws for the community in general and the community which is included in Mining Areas and the community being affected in particular, including mining business actors, as well as for the sake of achieving the mandate of the 1945 Constitution, in the Court's opinion, it will not be sufficient if such control function is conducted only through the consultation forum with the People's Legislative Assembly of the Republic of Indonesia, but rather, it must also be strengthened through a control function which is performed directly by the community, particularly the community whose area or land will be included in the Mining Area and the community which will be affected;

In accordance with the legal considerations above, the Court places stronger emphasis on the implementation of the obligation to involve the community's opinions, instead of the written consent from every person as petitioned by the Petitioners, since in the Court's opinion, the form of active participation of the community in the form of direct involvement in the expression of opinions in the process of stipulation of Mining Areas which is facilitated by the state *c.q.* the Government, constitutes a concrete form of the implementation of Article 28H paragraphs (1) and (4) of the 1945 Constitution, which is more valuable than mere formality which can be proven by written statements which

are not always truly made by the person concerned. In addition to that, in the Court's opinion, the community's right to express thoughts and opinions has to be protected as guaranteed by Article 28 of the 1945 Constitution, therefore, the community must be involved in the process of stipulation of Mining Areas, because they are the party who will be affected directly in the process of mineral and coal mining. Meanwhile, the manifestation of the implementation of the obligation to involve community's opinions must be proven in a concrete manner, which will be facilitated by the Government. Such concrete evidence may prevent the emergence of conflict between mining business actors and the community as well as the state *c.q.* the Government, in the Mining Area. In addition to that, further mechanism on the obligation to involve community's opinions and the decision on which persons will be included in the community group whose area or land will be included in mining areas as well as which community will be affected, are completely under the Government's regulating authority in accordance with the applicable laws and regulations by referring to the legal considerations stated by the Court in Case Decision Number 25/PUU-VIII/ 2010 dated June 4, 2012, Case Decision Number 30/PUU-VIII/2010 dated June 4, 2012, and the decision of this case, by constantly respecting and enforcing human rights;

Based on the legal considerations above and in order to guarantee the citizens' constitutional rights as set forth in Article 28D paragraph (1), Article 28G paragraph (1), Article 28H paragraphs (1) and (4) of the 1945 Constitution, the

Court is of the opinion that the Petitioners petition have grounds in part, namely to the extent of the phrase "... by taking into account the opinions of the... community..." in Article 10 sub-article b of Law 4/2009;

[3.13.2] The Petitioners argued that Article 162 *juncto* Article 136 paragraph (2) of Law 4/2009 are inconsistent with Article 28C paragraph (2) and Article 28E paragraph (30 of the 1945 Constitution, because they repress and restrict the rights to the freedom of association, assembly and expression of opinion, as implemented by the state through the efforts of criminalization against the members of the community who attempts to defend their land titles, either individually or collectively, from expropriation/annexation and appropriation conducted by (private) investors in the form of mining areas through the mining permits issued by the Government;

Article 162 of Law 4/2009 states that, "*Any person who prevents or disrupts mining business activities belonging to the Mining Business Permit or Special Mining Business Permit holders that have met the requirements as intended in Article 136 paragraph (2) shall be sentenced to imprisonment for a maximum period of 1 (one) year or a fine in a maximum amount of Rp100,000,000.00 (one hundred million rupiah)*."

Article 136 paragraph (2) of Law 4/2009 states that, "*The settlement of land titles as intended in paragraph (1) may be conducted gradually according to*

the land requirement of the Mining Business Permit or Special Mining Business Permit holders";

In the Court's opinion, pursuant to the laws and regulations, Exploration Mining Business Permit or Exploration Special Mining Business Permit holders may only conduct their activities after obtaining consent from the holders of land titles. Furthermore, prior to conducting production operation activities, Mining Business Permit or Special Mining Business Permit holders are required to settle land titles with the titleholders in accordance with the provisions of laws and regulations, and the settlement of such land titles may be conducted gradually according to the land requirement of the Mining Business Permit or Special Mining Business Permit holders. The Court's Decision Number 25/PUU-VIII/2010 dated June 4, 2012, Number 30/PUU-VIII/2010 dated June 4, 2012, and the Court's legal considerations in paragraph **[3.13.1]** above, specified in substance that in stipulating a Mining Area, the state *c.q.* the Government must conduct it with the following requirements:

1. Adjusting it to the national spatial layout and having orientation towards environmental preservation;

2. Ensuring that the division of the three forms of mining areas, namely Mining Business Area, Small-Scale Mining Area, and National Reserve Area must not overlap one another, either in the same government administrative area or between different government administrative areas;

3. Determining and stipulating Small-Scale Mining Areas first, subsequently National Reserve Areas, and then Mining Business Areas;

4. It is compulsory to involve the opinions of the community, whose area or land will be included in mining areas, and the community which will be affected.

Whereas before arriving to the process of obtaining Exploration Mining Business Permit and Production Operation Mining Business Permit for business actors in the field of mineral and coal mining, the state *c.q.* the Government must first implement the criteria as stipulated in the Court's legal considerations above, therefore, since the beginning, the stipulation of a Mining Area will not only be made through the process of coordination with regional governments and consultation with the People's Legislative Assembly of the Republic of Indonesia, but it has also undergone the procedure of the obligation to involve opinions, one of which is the opinion of the community, all of which are required in order to guarantee the existence of legal certainty of just laws for the Government, the community in mining areas, the community which will be affected and the mining business actors;

Based on the legal considerations above, the Court is of the opinion that the argument of the Petitioners' petition to the extent related to Article 162 *juncto* Article 136 paragraph (2) of Law 4/2009 is not legally proven.

4. CONCLUSIONS

Based on the aforementioned considerations of facts and laws, 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 10 sub-article b of Law 4/2009 is legally founded in part;

[4.4] The substance of the Petitioners' petition for the other and remaining parts is not legally founded;

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

5. INJUNCTION OF DECISIONS

Passing the Decision,

To declare:

- To grant the Petitioners' petition in part;

- Article 10 sub-article b to the extent of the phrase "... by taking into account the opinions of ...community..." of Law Number 4 Year 2009 concerning Mineral and Coal Mining (State Gazette of the Republic of Indonesia Year 2009 Number 4, Supplement to the State Gazette of the Republic of Indonesia Number 4959) is conditionally inconsistent with the 1945 Constitution of the State of the Republic of Indonesia insofar as it is not interpreted as, "***required to protect, respect and fulfill the interest of the community whose area or land will be included in a mining area and the community which will be affected***";

- Article 10 sub-article b to the extent of the phrase "... by taking into account the opinions of ...community..." of Law Number 4 Year 2009 concerning Mineral and Coal Mining (State Gazette of the Republic of Indonesia Year 2009 Number 4, Supplement to the State Gazette of the Republic of Indonesia Number 4959) has no binding legal force insofar as it is not interpreted as, "***required to protect, respect, and fulfill the***

interest of the community whose area or land will be included in a mining area and the community which will be affected";

- To order the promulgation of this decision in the Official Gazette of the Republic of Indonesia;

- To reject the other and 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 the Chief Justice and concurrent Member, Achmad Sodiki, Harjono, M. Akil Mochtar, Ahmad Fadlil Sumadi, Maria Farida Indrati, Hamdan Zoelva, Muhammad Alim, and Anwar Usman, respectively as Members, on **Tuesday** the **fifteenth** of **May two thousand and twelve**, and was pronounced in the Plenary Session of the Constitutional Court which was open for the public on Monday, the fourth of June two thousand and twelve, by eight Constitutional Court Justices, namely Moh. Mahfud MD as the Chief Justice and concurrent Member, Achmad Sodiki, M. Akil Mochtar, Ahmad Fadlil Sumadi, Maria Farida Indrati, Hamdan Zoelva, Muhammad Alim, and Anwar Usman, respectively as Members, assisted by Wiwik Budi Wasito as the Substitute Registrar, in the presence of the Petitioners/their Attorney(s), 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	**Maria Farida Indrati**
Sgd.	**Sgd.**
Hamdan Zoelva	**Muhammad Alim**

Sgd.

Anwar Usman

SUBSTITUTE REGISTRAR,

Sgd.

Wiwik Budi Wasito