

# Duplik of Defendant I

## PT NEWMONT MINAHASA RAYA

**1 Introduction.** As we have communicated verbally, that as it turned out nothing new was presented in the Replik by Public Prosecutor, except for the following quote on page 24 of the Replik:

"..... if the Defendants say that sediment, which is very fine particle, will remain stable on the bottom of Buyat Bay at a depth of 50-82 meters, then we would like to invite this court to review a very recent news about the detection of the black box of Adam Air in the waters off Majene, West Sulawesi by USNS Mary Sears at a depth of 2000 (two thousand) meters. The black box itself weighs about 6 (six) kilograms and all experts, both Indonesian and those aboard Mary Sears have advised that the black box be immediately retrieved because they are concerned that it may move due to ocean currents. It needs to be noted that with regard to concerns for Adam Air black box moving at the depth of 2000 (two thousand) meters due to ocean currents, no expert has contested it. This reinforces the opinion of expert Abdul Gani Ilahude that [thermocline in] the oceans of Indonesia is only found at depths between 100-350 meters beneath the sea surface..... "

If this Replik intends to only inform new matters as quoted above, then we have wasted time. The Public Prosecutor need not even have presented this Replik in the first place. But since the Replik was presented, than the Duplik must be produced. This is to say that this Replik did not add anything to what has already been informed in the Requisitor. Because, *first*, there is no explanation in this Replik about how this court shall "**review recent news**" about "the fact of Adam Air black box" as the Public Prosecutor has invited. As an example, no sources were quoted in regards to where we can look up this statement. Who the expert and what was the specific expertise was also not stated in this Replik. And whether it is true that no expert disputes it, also cannot be clarified in the Replik. If this court cannot ascertain the veracity of the statement above then how can this "fact of Adam Air black box" can legally be accepted as evidence according to the law of evidence in this particular criminal case, that is, to support the statement of Abdul Gani Ilahude regarding the occurrence of

thermocline in Indonesia. Ilahude stated that generally thermocline is only found in Indonesia at a depth of 100-350 meters below the ocean surface, thus, with the interpolation method (not empirical because the expert admitted that he has never been to Buyat Bay) it was concluded that there is no thermocline layer in Buyat Bay. And actually, to add emphasis, whether there is thermocline or not in Buyat Bay is not the main issue in proving the facts in this case. The main issue as court fact is whether Buyat Bay is polluted and/or damaged and can no longer function accordingly due to the mining activity of the Defendant (causality).

Secondly, the quote discusses sediment, whereas what PTNMR places in Buyat Bay is tailings. So it is two different things. In other words, the Public Prosecutor stated something that contradicts its own Charges. Furthermore, PTNMR never produced or disposed of sediment in Buyat Bay. And, as additional information, sediment is soil, sand or mud transported by water flow or river flow. PTNMR actually dammed the sediment that could possibly be carried by rainwater in the sediment pond to prevent it from spreading and damaging the environment, something that is required by law.

If we are to compare what this Replik informed us with what is being stipulated in article 185 (5) of KUHAP which said "Whether opinions of assumptions obtained produced by reasoning, and not from witness testimony" then the statement about "Adam Air black box" is no more and no less merely an assumption by the Public Prosecutor to support statements of Ilahude in this case. While Ilahude's statement regarding thermocline is clearly illogical. Therefore, "the fact of Adam Air black box" is no "valid evidence" that can be justified by article 183 of KUHAP for the judges to produce a verdict.

In addition to the above explanations, in fact the entire elaborations in the Replik, when scrutinized it would be the same as what is quoted above. When not postulating, the Public Prosecutor in this Replik quotes sentences from the Pledoi and then ventures to provide a response arbitrarily. Moreover, evidently, these responses did not make things clearer, more complete and understandable with regard to the issues, but to the contrary. Because, some are even wrong. This is similar to what has been informed in the Pledoi, that is, that the Requisitor has addressed the wrong Indictment, for example, where the indictment states [the defendant] violated Law No.

5 of 1994, and it turned out that law was about a ratification of International Convention on Biological Diversity, which is irrelevant to the indictment. Strictly speaking, with this Replik the case has become even more obscure. As an example, on page 27 of the Replik:

”Response of the Public Prosecutor”:

..... that if a region has not been specifically designated vis-à-vis its allocation, then the general designation shall apply. Generally, it is recognized that the designation and the function of Buyat Bay is as a place for fish or sea grass aquaculture and a place for Buyat Bay community to catch fish. Pollution and/or destruction taking place in “surface waters” refer to waters that are in direct contact with air. Therefore, in this regard, seawater can also fall under the definition of surface water.”

Whereas the Law has governed about the designation of a certain region, that is in Law No.24 of 1992 and PP No.47 of 1997 regarding National Spatial Planning. There are no clauses in the Law providing “if a region has not been specifically designated, then the general designation shall apply” but such was only statements of Rignolda in the court hearing on 3 March 2006 (vide, transcript page 741) was then stated unilaterally with regards to the designation of Buyat Bay. As it is known, unilateral statement cannot constitute the element of legality principle (an act in contravention of the law) in the criminal law.

What is even more fatal is the erroneous assertion in the Replik stating that “surface water” is defined as water that is in direct contact with air, as such by this definition, seawater also falls under the definition of surface water. Article 1 (3) of Law No. 7 of 2005 regarding Water Resources stipulates clearly about surface water, and that is, all water on land surface. What is defined as “surface water”, if the Public Prosecutor did not have the chance to read it, Prof. Dr. Andi Hamzah, who was part of the team that drafted UUPLH, in the court hearing on 14 July 2006 has also specifically stated what is meant by “surface water”. Professor Andi Hamzah explained that seawater is not *oppervlakte water*, or surface water (vide, transcript page 1630).

Therefore, once again, this Replik has not reinforced or added anything with regard to truth and conviction about facts in this case. In other words, even with this Replik, the Public Prosecutor Team still has not managed to refute what has been elaborated in the Pledoi that the Requisitor cannot prove the indictment that Buyat Bay has been damaged and polluted, based on criminal law of evidence. The suppositions by the Public Prosecutor team such as how this case was started by “a group” of individuals campaigning with the supposition of “there is Minamata in Minahasa” was certainly not based on any proof to be able to incriminate someone. The Public Prosecutor Team must be careful with regards to such matters.

To put it more clearly, this Replik has not changed any legal facts in the Pledoi, as we will explain in the following. The following elaborations are distinguished into two categories, they are, *first*, general and *second*, more specific. General in this case is (1) anything related to how the Public Prosecutor Team has read and responded to the Pledoi, and specific is (2) the response of the Replik to specific issues elaborated in the Pledoi.

**2 Regarding the Response of Replik Material in General.** When analyzing the Replik in general one can tell that the Public Prosecutor did not read the entire Pledoi. Much less the attachments and the transcripts of court hearings submitted as part of the Pledoi. Just from the table of contents, the Public Prosecutor Team should have been able to distinguish which parts of the Pledoi based on the rules of evidence *must be* responded to and which parts of the Pledoi *need to* be responded to. The terms *must* and *need to* in law (norms) of evidence has gradual sense. The term *must* has direct consequence and the term *need to* has indirect consequence. Because even the table of contents of the Pledoi has very clearly informed about the materials elaborated in every part. But it seems that the Public Prosecutor Team chose to respond to what *need to* be responded, rather than *must be* responded from the point of view of the rules of evidence in this case.

In part A of the Pledoi, i.e. the introduction, beginning from page 1 until 19, the nature is only introductory, and is not about the process of evidence itself. Even though ultimately the statements in the introduction will relate to the material of evidence. But in this Replik, this introduction has been responded to as though it was part of the evidence itself (*vide*, Replik pages 1 – 25, points 1, 2, 3, 4, 5, 6, 7, 8, 9, 10,

11, 12, 14, 15, 16, 17, 18 and pages 25 – 37, points 19 – 31 also still quoted parts from the introduction with a few exceptions in points 21, 22, 24, 25, 26, 27, 28). Therefore, it can be informed to the Honorable Panel of Judges, this Replik apparently only responded to the introduction of the Pledoi of Defendant I. Which means that it can be interpreted that the Public Prosecutor agrees with the entire Pledoi, except for the introduction.

Pledoi part B talks about descriptive and prescriptive facts, beginning from page 20 to 201. This part is the main and most important part of the Pledoi because it is the evidence material itself, that is, whether the legal facts of this case including (1) whether what is being informed in the Requisitor is accurate in the sense that it is based on information from valid and convincing evidence or not, and (2) the evidence submitted by the Defendant himself has concluded legally and convincingly the existence of **ten** facts of law in this case from page 201 to 204. The existence of those ten facts of law proves that there has been no act of environmental crime committed by the Defendant. But this very legal fact of the Pledoi was not responded to in the Replik. This means that the Public Prosecutor Team has agreed to what has been said in the Pledoi.

Pledoi in part C, that is, Legal Analysis: Whether these facts of law have fulfilled the elements of crime beginning from page 205 until 222. And lastly, it was closed with a conclusion and a request. The conclusion is, because there was no act of environmental crime proven to be committed by the defendant, then [the defendant] must be freed from all indictments and charges.

Additionally, in part E of the Pledoi a number of materials was attached, i.e.: (1) court transcript, that is, all information conveyed verbally in court, presented in writing as they are, (2) list of documentary evidence presented by the Defendant, and (3) *ad informandum*, that is, regulations etc, including newspaper and magazine clippings. *Ad informandum* is intended to be additional information to add to the explanation and not as evidence, as stipulated by article 184 of KUHAP. By reading and studying this *ad informandum* then one can quickly and easily understand what is being elaborated in the Pledoi. As such, when one reads the Pledoi, *ad informandum* is marked by the code **attachment III-1 to 10** in **bold**, while documentary evidence is marked with the

code **T.I-1 to T.I-109**. But there is no indication in the Replik that the Public Prosecutor Team has paid any attention to it.

Therefore, the response of the Public Prosecutor Team on page 14 of the Replik providing the following judgement to the contents of the Pledoi is wrong:

"2) National Geographic Indonesia magazine and Kompas cannot be used to obtain evidence to prove that there is no pollution and/or destruction of the environment in Buyat Bay, because both evidence is not valid evidence based on Jurisprudence of the RI Supreme Court Number: 1479K/Pid/1989 dated 20 March 1993. The presentation of evidence of Kompas article dated 18 December 2006 should be disqualified because it has never been presented in this case."

Because on page 8 of the Pledoi, where this quote was taken from, it says:

"National Geograpic Indonesia magazine of August 2006 edition titled "Surga Karang-Karang Kubah" [Dome Coral Paradise] and Kompas article dated 18 December 2006, that is, pictorial reporting of Buyat Bay, with a caption "A Fisherman in Buyat Bay, South Minahasa Selatan District, North Sulawesi, is arranging his net after netting fish, Sunday (17/12). Every day the catch around eight buckets of fish that are sold at Rp. 40.000 per bucket".

serves as "additional information" in the introduction, *not as documentary evidence*, and the picture was pasted on page 9 of the Pledoi (part A, introduction). As such, the evidence code for the magazine and the newspaper was not indicated in the introduction. But, because the substance and the consistency with other evidence, then in the introduction of the Pledoi, part B, that magazine was included as evidence with the code T.I-28. And this is allowed pursuant to article 188 of KUHAP.

However, additionally, the Replik at the same time contradicted itself when providing judgement to the Pledoi as mentioned above. The Replik uses a double standard. On page 19, the Replik mentioned a news article as evidence, as follows:

"..... evidence of Kompas Daily article dated 24 December 2004 saying that PT Newmont Minahasa Raya has disposed of 33 (thirty three) tons of

Mercury in 4.5 years. Of the 33 tons of Mercury disposed, 17 (seventeen) was released into the atmosphere as gasses and the remaining 16 (sixteen) disposed through a pipe into the bottom of Buyat Bay.”

This quote shows that the Public Prosecutor team has contradicted its own opinion. Regardless of whether its judgement referred to what it calls jurisprudence is truly jurisprudence. Because Supreme Court decisions do not automatically become jurisprudence. There are requirements that must be met before a Supreme Court decision can be accepted as jurisprudence (*vide*, Replik page 3).

Beside what is elaborated above, when studying further how the Public Prosecutor responded to the Pledoi it appears as though "items of evidence" before us now are evidence in some sort of a civil case. What is more disconcerting, the Public Prosecutor Team selectively picked sentences in the Pledoi and twisted the interpretation. The Replik responds to the Pledoi as though the evidence were to provide *arguments*, not "*facts or situations*", as stipulated in article 197 (1) d of KUHAP. An *argument*, besides being a term used in a civil suit or arguments, also has the meaning of "*opinions expressed and defended as being true*" (*vide*, Kamus Besar Bahasa Indonesia [Indonesian Comprehensive Dictionary] published by Balai Pustaka 1989). Therefore, the Public Prosecutor could easily say that if the evidence did not suit their wishes then they ask that it be "disqualified". Unlike a civil case, [evidence in] a criminal case is imperative in nature. If the evidence is *valid* and the material is *convincing* then there can be no opinion to disqualify it.

Furthermore, evidence in a criminal case is meant to support certain *facts* or *conditions* as basis for the judge to ultimately produce a verdict. The court cannot produce a verdict based on an *argument*. Therefore, the evidence presented must be tested, (1) whether it is valid or not, and (2) whether it is accurate and convincing or not, [including] the testimony that was obtained/ given. So it would be impossible to disqualify certain items of evidence just like that when it is, *valid*, *accurate* and *convincing*. Such a response can be seen in the Replik in points 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 28, 29, 30, 31. While what is being responded to in the above points are *facts* and *conditions* resulting from an evidence process (conclusion) and not *arguments*. The Pledoi did not pose *arguments*, but referred to *facts* and *conditions* in this court that the evidence presented in the Requisitor was not true because, among others, **it was not based on valid evidence or information found**

**or conveyed by/arising from the evidence was not accurate or convincing.** In other words, there are no "facts (of law) and conditions" supporting that Buyat Bay has been damaged and/or polluted, and that the community is sick due to the mining activity of Defendant I.

**3 Regarding the Specific Response to Replik Material.** In the response to the Pledoi in point 1 of the Replik stating that the Requisitor was not based on court facts and/or legal facts as quoted in the Replik:

"b the Public Prosecutor only referred to testimonies of Dra. Masnellyarti Hilman, MSc, Ir . Sulistyowati, MM, and Ir. Isa Karmisa (*Pled. I page 1-2, Pled II, Pled III*)"

This statement is simply wrong. Because the statement on page 1 of the Pledoi paragraph 3 as presented by the Defendant was as follows:

"Even when analyzed further the considerations in the Requisitor, than it is clear that the Public Prosecutor's consideration tended to only refer to testimonies of Dra. Masnelyarti Hilman, Msc dan Ir Sulistyowaty, M.M serta Ir. Isa Karmisa only." [sic]

It is a fact indeed, that their testimony dominated the basis for the considerations in the Requisitor. Even Ir. Isa Karmisa, who never stated that PTNMR no longer submitted their RKL/RPL reports in 2002, the transcript has been quoted completely in the Pledoi and the Defendant himself has played a video clip [of the testimony] in court, but still, on page 28 of the Replik it was mentioned that Ir. Isa Karmisa testified that RKL/RPL was never submitted since 2002.

In the reposnse in point 3 of the Replik to Pledoi page 2 in the introduction, that is, in regards to the Goodwill Agreement signed by the government who agreed, among others, that "further studies, monitoring and scientific analysis are still required to obtain final conclusions," the Public Prosecutor stated that "Concerns of PT Newmont Minahasa Raya itself supported by article 4.5 of the Goodwill Agreement by retracting the appeal to the decision of South Jakarta District Court in the civil case

brought forward by the Government of Republic of Indonesia.” The response of the Public Prosecutor Team shows a fatal mistake, at the same time also shows that there is no communication (coordination) among the prosecutors and according to Law, they act as one, so all prosecutors should have had the same information at all times. Because, it was not PTNMR who retracted the appeal to the decision, and it was the Attorney General Office representing the government who filed the appeal in this case. The suit by the Government represented by the Attorney General Office against PTNMR was ruled as unacceptable, which then went to appeals and retracted after Goodwill Agreement was signed.

In the response in point 4 the Replik discussed the material contended in the Pledoi, that is, that no distinction was made between acts by the corporation and the individual or the management in the corporation, so both the corporation and the President Director have together automatically became the defendants. But what the Replik responded is the part mentioned in the introduction stating that officially when a legal entity is indicted of having committed a crime such as in this case, called *corporate crime*, therefore, requiring that care be exercised. However, the material was elaborated in more detail on page 210-211 of the Pledoi that detailed the requirements that must be met when a corporate crime such as one in this case can be stated as proven. But it is this very part that was not responded to. Because no response was made then it can be concluded that the Public Prosecutor Team has accepted well the truth of the arguments.

The response in point 5 of the Replik stated ”The Legal Counsel Team stated: 1) That it is Buyat and Ratatotok community who has the right to file suit” which was further responded by the Public Prosecutor Team by stating that ”It is the Public Prosecutor who is given the legal authority to represent the sense of justice in the community [sic]”. This statement is an attempt to mislead by the Public Prosecutor because there is no statement in the Pledoi that ever asserted that the community could replace the functions of the Prosecutor and doubting the normative tasks of the Prosecutors in filing this suit. Page 5 of the Pledoi introduction only spoke of who were the real victims of the pollution and/or destruction of the environment in Buyat Bay, which completely is as follows:

”secondly, as part of PTNMR social responsibility, especially to the communities in Buyat and Ratatotok villages in South Minahasa, in which

case the indictment and the charges of the Public Prosecutor Team were true, then it is them who are the real victims of pollution and or destruction of the environment in Buyat Bay, and not politicians or whoever lives outside of Buyat Bay. Because PTNMR has from the onset worked together with the surrounding community. Social responsibility to the neighboring communities has even become a legal commitment of PTNMR for 10 years after the closure of the mine as stipulated in the Goodwill Agreement (vide, evidence T.1-98).”

In other words, the Public Prosecutor Team has responded to something that was neither mentioned nor contended in the Pledoi.

In the response in point 6 of the Replik, the Public Prosecutor Team who intended to respond to the elaborations of the Pledoi which indicated that based on evidence of witness and expert testimonies, documentary evidence, which was consistent in proving legally, accurately and convincingly that the Requisitor, was inaccurate and the fact is that Buyat Bay is neither damaged nor polluted, the Public Prosecutor Team all of a sudden referred to something it called permanent jurisprudence of the Supreme Court, that is, ruling number: 1479K/Pid/1989 of 20 March 1993. This ruling, according to Public Prosecutor Team, confirmed ”that valid and admissible evidence in court is that that meets the requirement of being valid and legal. Legal, meaning that it was requested and submitted by the Investigator with the methods of examination according to KUHAP, while valid meaning that that it is based on accurate and valid methodology (scientific methods). On the basis of that, [the Replik/ Prosecutor] amazingly did not proceed to discuss the evidence presented by the Defendant, but changed course and discussed their own evidence, that is ”documentary evidence in the form of a dossier of Criminal Laboratory Examination of Center for Forensic Laboratory of Mabes Polri Number: 4171/KTF/2004 dated 27 September 2004” and stated, just like that, that it has ”fulfilled the requirements of being legal and valid as stipulated in the permanent Jurisprudence of Supreme Court of RI.”

Regardless of the fact that this response has suddenly changed from the context and whether the Supreme Court ruling is permanent jurisprudence or not, this Duplik would like to stress that because it ”was not based on accurate and valid methodology (scientific methodology) that the documentary evidence is not valid,

accurate, or convincing, as was elaborated on page 49 of the Pledoi. When applying the opinion and the way of the Public Prosecutor Team that "In the criminal law system, when illegal evidence is found then that evidence must immediately be disqualified, without even looking whether that evidence has met the requirement of being valid from the point of view of methodology", therefore the documentary evidence must be disqualified as elaborated on page 49 of the Pledoi. The simple reason being that the letter is not legal as evidence in the case of "environmental crime" for several reasons. *First*, the laboratory was not accredited to examine samples in environmental cases as stipulated in Kepmen LH No.113 of 2000, which was acknowledged by Puslabfor itself in an assignment memo No.Pol.:B/ND-402/XI/2004/Puslabfor regarding Puslabfor Response to P-19 of the Public Prosecutor. *Second*, the samples examined are not valid because (i) the number taken in the field was 24, (ii) the number received in the laboratory was 34, (iii) the number exhibited in court was 29, (iv) the person receiving the samples from divers was not an investigator/officer but a witness against the Defendant, that is, Rignolda Djamaluddin, (v) the samples were left 4 days in an unmaintained, unprotected room and not sealed, (vi) confiscation of evidence by the Investigator was without a court order from Tondano District Court which has jurisdiction over the location of evidence, similar to collecting of evidence of water and sediment in Buyat river tributary [sic], that is court order of Tondano District Court No.334/Pen.Pid/2004/PN.TDO., (vii) report of Puslabfor results exceeded its legal authority, that is, by concluding who "the perpetrator" and the statement that "[it has] degraded the quality of seawater/ river water," something that is not allowed based on the professional standard as attested to by forensic expert dr. Munim Idris in court session on 7 July 2006.

At the same time, split samples of the seawater to be examined for comparison in ALS environmental laboratory, which is accredited pursuant to Kepmen LH No.113 of 2000, has shown that the levels of metals in the seawater in Buyat Bay were below the quality standard limits established. In other words, seawater in Buyat Bay is not damaged and/or polluted.

In the response in point 31 of the Replik, the Public Prosecutor Team responded by calling it "arguing" the evidence, that is, results of studies by Minamata Institute, CSIRO, and WHO by comparing it with dossier of Criminal Laboratory Examination of the Center for [Forensic] Laboratory of Mabes Polri and report of the

Integrated Team. This Replik did not refute the accuracy of the documentary evidence presented by the Defendant (*vide*, evidence T.1-68 and T.1-13a) but only stated "Because the aspects studied was very limited, then the conclusion would be very weak with regards to whether or not there is pollution in Buyat Bay...". Furthermore, elaborating the Integrated Report Team in a table... [sic]. The "**Initegrated Team Report**" as explained in the Pledoi, cannot be accepted as valid evidence and the information as accurate and convincing based on following reasons, (i) the Integrated Team report used ASEAN quality standards for sediment, which is unknown of. The standards written in the report of the minister of environment was a paper presented by a scholar from the Philippines, but is not yet acknowledged as quality standard by ASEAN. ASEAN's environmental section itself never stated that there is sediment quality standard for ASEAN, (ii) the Integrated Team Report has miscalculated index of benthos and plankton diversity, caused by inaccurate sampling methods, (iii) the Integrated Team report has miscalculated hazard exposure index by using inaccurate formula, the results of which are attached in table 3.7 of the report. This miscalculation has produced error up to 4500% or in other words has deviated by 4500%, (iv) the Integrated Team report stated that of the 6 wells examined by the Team it was found that 4 wells had arsenic concentratins in excess of the drinking water quality standard allowed by the Minister of Health. At the same time, the Minister of Environment has issued a report stating in general that the results of analysis for metals in the seawater in the sampling locations determined indicated that levels of metals were still below the quality standards pursuant to Kepmen LH No. 02/1988 and Kepmen LH No. 51/2004 (*vide*, evidence T.1-14a) and confirmed again by the former Minister of Environment Nabel Makarim in court session on 14 July 2006, that is, that the water in Buyat Bay and the fish in those waters are not polluted (*vide*, transcript page 1572).

In the Replik points 14, 15, 16 regarding the permit for tailings placement and whether tailings are B3, as well as whether the ERA was completed and submitted, [these issues] have been discussed in detail in the Pledoi on pages 201 and 202, as well as 222 and 224. It has been explained in brief that PTNMR's tailings, based on a series of TCLP testes, and not based on mere opinions such as those in the Requisitor, based on article 7(2) of PP No.85 of 1999, are not B3. And then, the ERA, even though it was not a new legal obligation that is valid, has also been conducted and submitted officially and it has been proven that there has been no official rejection of the ERA.

**4 Closing.** With the Pledoi presented and the above elaborations, the ten legal facts that were proven with valid, accurate and convincing evidence, are legal facts of the court that is valid for consideration in order to produce a verdict in this case. The ten legal facts are those elaborated in part B of the pledoi, i.e., elaborations regarding descriptive and prescriptive facts the conclusions of which are as follows:

- *First*, it has been proven that PTNMR has made all necessary efforts to ensure the preservation of the functions of the environment as well as have managed waste produced from the business and/or activity (detoxification) properly using the latest detoxification technology to prevent environmental destruction and pollution in Buyat Bay. PTNMR has conducted its activities based on contract of work, has AMDAL documents, including Andal and RKL/RPL, that were approved by the government. Based on this AMDAL document PTNMR has also obtained various permits required, beginning from the pre-operations (*feasibility study*), exploration stage, exploitation stage and production until mine closure. Once again, all those activities have permits.

In addition, PTNMR has reported all its activities in RKL/RPL every quarter and has been inspected by mining inspectors at least every 6 months and the monitoring is recorded in a mine book. PTNMR had never received a reprimand, for example, for violating a quality standard after RKL/RPL was submitted and recorded in the mining book; Even the documentary evidence used by the Public Prosecutor Team as basis to state that there has been a reprimand to PTNMR was called a recommendation and not a reprimand by the writer of the document, Ir. Isa Karmisa Adiputra.

- *Second*, it has been proven that besides having all necessary permits in conducting all activities, PTNMR also has a permit to store and process B3 material. Specifically for submarine tailings placement (STP), a change in Environmental Management Law (UUPLH) from Law NO.4 of 1982 to Law No.23 of 1997, where this new UUPLH stipulates about a permit regarding disposal of waste into the sea with a provision of a 5-year transition period to adjust to this new UUPLH. So UUPLH went into effect in 2002. Even though there was still time to adjust until 2002, PT NMR has filed documents to adjust

the new permit according to what was necessary based on the new UUPLH, that is, a permit to place tailings in Buyat Bay. So it was earlier than required.

Minister of Environment/ Head of Bapedal, Dr. Sony Keraf in his reply has given his approval (permit), that is, letter No. B-1456/BAPEDAL/07/2000 dated 11 July 2000 (*vide*, evidence T.I-80). The testimony of administrative law expert, Prof. Safri Nugraha, S.H., LL.M., Ph.D, confirmed that the letter of Minister Sony Keraf was a permit; similarly, the testimony of former Minister of Environment, Dr. Nabel Makarim, stated that he as the authorized person at that time, no longer needed to issue a permit for tailings placement because he considered Dr. Sony Keraf's letter a permit. Dr. Sony Keraf also confirmed in court that the letter was a permit.

- *Third*, it has been proven that tailings do not fall under the category of B3 based on TCLP testing pursuant to Article 7 (2) of PP No 85 of 1999. PTNMR's tailings are not B3 waste based on the following: (i) PTNMR conducted its own testing in 1997 until 1999 and the result was that tailings are not B3 (*vide*, documentary evidence T.I-37, T.I-38, T.I-39, T.I-40a, T.I-40b); (ii) TCLP testing conducted by the Provincial Government of North Sulawesi in 1999 also showed similar results, that is, that tailings are not B3; (iii) Minister of Environment has given his approval to place tailings in Buyat Bay, which means that tailings are not B3 because B3 cannot be disposed of into the sea (*vide*, documentary evidence T.I-, T.I-35, T.I-36); (iv) North Sulawesi Provincial Government in 2004 confirmed once again that the condition of Buyat Bay waters in 2004 based on the analysis of fish samples and sediment, the levels of heavy metal are still below the quality standards, so it can be concluded that tailings are not B3; (v) Witness Ir. James Paulus, Ir. David Sompie and Prosecutor's Witnesses, Ir. Diby Kuntjoro and Siegfried Lesiasel in public court hearings stated that tailings are not B3.
- *Fourth*, it has been proven that the ERA study was not a new legal obligation and even that the ERA study was still in the stage of being drafted as new regulation in KLH office. The ERA study is a practice in North America that became known in Indonesia from a paper read by KLH staff. Even so, PTNMR with the help of environmental consultants approved by the government has

fulfilled, submitted and carried out the ERA study within the time asked by KLH; Witnesses presented by PTNMR in court, including Prof. Dr. Daud Silalahi, Prof. Dr. Safri Nugraha, Dr. Nabiel Makarim, as well as Prosecutor's Witnesses, including Dr. Sonny Keraf and Ir. Isa Karmisa Adiputra, confirmed the same matter.

- *Fifth*, it was proven that thermocline is found in Buyat Bay. Thermocline itself is a temperature gradient in the sea at certain depths. Based on empirical data and monthly observation data submitted by PTNMR in RKL/RPL, expert from ITB, Dr. Andoyo Wuryanto has proven of the existence of thermocline in Buyat Bay. In addition, it was also proven that tailings were placed below the thermocline layer because, among others, seawater on the surface appears clear, and secondly, tailings were found mixed in coral reefs. If tailings were mixed then coral reefs would have been dead and [traces of tailings] would be measured as solids in the water column.
- *Sixth*, It has been proven that seawater samples from Buyat Bay has not exceeded the quality standards pursuant to Attachment II of KepMenLH No.51/2004. Additionally, this Ministerial Decree cannot be applied retroactively to RKL/RPL [submitted] in 1997 to 2001 as legal basis to state that there has been acts of crime as elaborated in the Indictment. When applied voluntarily, KepMen No. II/MENLH/1988 in this case to measure RKL/RPL reports from 1997 until 2001, then the results would show that on a monthly average, seawater samples of Buyat Bay do not exceed the quality standard limits established in the Ministerial Decree. Furthermore, results of studies of several Independent institutions that are credible and renowned, such as CSIRO, WHO, as well as studies by teams formed by the government, such as the North Sulawesi Independent Team and the Ministry of Environment in 2004 also confirmed this matter and the results of ALS laboratory analysis in the split samples taken by Polri Investigators.
- *Seventh*, it has been proven that it is not true that PTNMR has degraded the seawater quality of Buyat Bay, because seawater quality of Buyat Bay is still below the quality standard limits as proven by, among others, results of ALS laboratory examination on additional samples that Public Prosecutor once

rejected. Similar results were also obtained by several international institutions whose credibility is recognized, such as WHO, Institute for Minamata Disease, and Lorax, as well as team formed by the government, such as the North Sulawesi Independent Team and the Ministry of Environment. It has also been proven in court that PTNMR with a PROPER method from KLH, using data from RKL/RPL report from the last three years, PTNMR would obtain a green rating, which means [it has] “carried out environmental management efforts and obtained results better than the requirements governed by laws and regulations.”

- *Eighth*, it has been proven that it is not true that the sludge from the sediment pond has degraded the quality of Buyat River. Based on the results of Expert and Witness Dr. Rudi Sayoga from ITB, and results of resampling by Expert and Witness Sri Bimo Andi from ALS, besides proving that the groundwater flow from PTNMR is not connected to Buyat River, there is also no processed water flowing from PTNMR into the river. In addition, the sediment pond has no connection to the activity and mechanism of mining production of PTNMR, but the sediment pond was made available to fulfill the requirements of ESDM Department, which is a requirement for the company for environmental purposes. The function of the sediment pond is to settle mud and materials eroded by flowing water, including runoff water as well as natural flow of water through the mine, before that water reaches Buyat River. By having the sediment pond, mud and materials carried would first be settled in the sediment pond so Buyat River water will not become murky by natural waters passing through the mine and then pollute the environment.
- *Ninth*, it has been proven that it is not true that samples of marine biota from Buyat Bay have been contaminated by mercury (Hg) and arsenic (As) as reported in studies by CSIRO, Institute of Minamata Disease, the 14 October KLH report, which has also been confirmed by Prosecutor witnesses, Rachmansyah, as well as NMR witnesses Dr. Inneke Rumengan, Dr. Keith Bentley, and Ir. Lalamentik.
- *Tenth*, it has been proven that residents of Buyat Hamlet are not contaminated by mercury (Hg) and arsenic (As), as proven by studies of ALS, KLH, Polri,

CSIRO, WHO/Institute of Minamata Disease in collaboration with Department of Health, UNSRAT, Puskesmas Ratatotok and dr. Sandra Rotty, the Head of Puskesmas Ratatotok. Testimonies of witnesses and experts who directly conducted studies, Prof. Dr. dr. Winsy Warouw and dr. Joy Rattu, Ph.D, even a number of residents, including Dahlan Ibrahim, Jantje Aring, Madjid Andaria, and Salam Ani, who were also witnesses in this court, also stated the same.

Because it has been proven that there is no legal fact supporting that there has been violation of law in the form of pollution and/or destruction of the environment, as well as residents becoming ill due to mining activity of the Defendant, then there is no wrongdoing to be held accountable by the Defendant. As such, the requests expressed in the Pledoi was a request based on legal, accurate, and convincing evidence. Therefore, we kindly ask the honorable Panel of Judges to rule as we have expressed in the Pledoi, that is: (1) to rule Defendant I PT Newmont Minahasa Raya has not been proven legally and convincingly of having committed a crime of "Pollution and Destruction of the Environment" as stipulated and criminalized in Article 41 (1) *jo* Article 45, Article 46 (1), and Article 47 of Law Number 23 of 1997 in the Primary Indictment and (2) absolve defendant I PT Newmont Minahasa Raya of all indictments and charges or at least free [the Defendant] of all legal charges, and (3) give the right to compensation and rehabilitation as stipulated in laws and regulations.

Manado, March 2007

Legal Counsel for Defendant I

PT Newmont Minahasa Raya

Luhut M.P Pangaribuan

Rahmat S.S Soemadipradja

H.J.J Mangindaan

Mochamad Kasmali

Nira S Nazarruddin