

MINING BUSINESSES LICENSING IN INDONESIA: PERSPECTIVE ADMINISTRATIVE LAW AFTER THE REVISION OF THE MINERAL AND COAL LAW

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Abstract: *The regulation of mining business licenses (IUP) has experienced dynamics. In Law No. 4 of 2009 on Mineral and Coal Mining (Minerba Law), the central and regional governments exercise the licensing authority proportionally. Then, in 2020, the head of mining licenses was changed again through Law No. 3 of 2020. Based on this law, the licensing authority is fully vested in the central government. This shift in licensing authority is interesting to study. The study departs from the questions: (a) how are the boundaries of legal and illegal mining businesses in Indonesia; (b) how are the procedures and requirements for obtaining an IUP from an administrative law perspective; (c) how are the sanction arrangements for illegal mining business actors after the revision of the Minerba Law. This study departs from the use of normative legal research methods with a statutory approach and conceptual approach. Finally, the study results reveal that the basic principle underlying the management of natural resources, especially mineral resources, is the licensing instrument. Licensing, which is included in the administrative law regime, requires the state to intervene actively in matters concerning public welfare. Through licensing, the government can control or at least reduce the rate of pollution and environmental damage due to mining activities. In ensuring that efforts to regulate mining activities by the government-run as they should, sanctions are set to provide law enforcement, which is the form of administrative and criminal sanctions.*

Keywords: *lorem ipsum;*

INTRODUCTION

The management of mineral and coal mining businesses still refers to Law Number 3 of 2020 on Amendments to Law Number 4 of 2009 on Mineral and Coal Mining (from now on, abbreviated as the Minerba Law). The Minerba Law has also undergone substantial changes through Law Number 11 of 2020 on Job Creation (Job Creation Law).¹ However, because the Job Creation Law faced legal trouble after being declared conditionally unconstitutional by the Constitutional Court (Decision No. 109/PUU-XVIII/2020), the status of Job Creation Law has yet to guarantee a legal guarantee certainty to business actors. Responding to legal uncertainty, the President of the Republic of Indonesia stipulated Government Regulation in Lieu of Law (Perppu) Number 2 of 2022 on Job Creation (Perppu on Job Creation). The uncertainty has continued,² even though the plenary session of the House of

¹ See Article 38 and Article 39 Paragraph 5 on Energy and Mineral Resources in Law Number 11 of 2020 on Job Creation.

² The uncertainty is not over yet because the approval of Perppu No. 2 Year 2022 into law in the plenary session of the House of Representatives on March 21, 2023, still has the potential to invite public reactions, especially from workers. This is because the DPR's approval still leaves a constitutional problem. On November 25, 2021, the Constitutional Court stated that Law No. 11 of 2020 (Job Creation Law) is conditionally unconstitutional. The Constitutional Court gave the lawmakers (the President and the DPR) time to amend the law within 2 years. However, the fact shows that the President instead issued the Job Creation Perppu on December 30, 2022. Then, it was approved in the DPR plenary meeting, on March 21, 2023.



Representatives has approved Government Regulation in Lieu of Law (Perppu) No. 2 of 2022 on Job Creation into Law on Tuesday, March 21, 2023.³

It must be recognized that the political character of the current Minerba Law tends to be centralized.⁴ This is because the amendment to the Minerba Law (Law No. 3 of 2020) has negated the authority of district/city governments in determining Mining Business Licenses (IUP), including in establishing Regional Regulations relating to mineral and coal management.⁵ The political character of the Minerba Law is further emphasized through Government Regulation No. 96 of 2021 on the Implementation of Mining Business Activities. Article 6 of this Government Regulation (PP) states that mining businesses are carried out based on business licenses from the Central Government before the amendment of the Minerba Law through Law No. 3 of 2020 (new), Article 8 of Law No. 4 of 2009 (old) authorized regency/city governments to enact Regional Regulations (Perda) and issue IUPs. Then, that authority was removed with Law No. 3 of 2020.⁶

Furthermore, the current Minerba Law (Law No. 3 of 2020) also negates the authority of the provincial government in granting IUP, including the formation of local regulations relating to mineral and coal mining businesses.⁷ However, through Presidential Regulation No. 55 of 2022, the central government delegated some of its authority to the provincial government in granting business licenses in the mineral and coal mining sector. The authority delegated by the central government to the provincial government related to the granting of business licenses in the mineral and coal mining sector, namely: (a) granting certificates and permits; (b) guidance on the implementation of delegated business licenses; and (c) supervision on the implementation of delegated business licenses. Although regulatory dynamics exist in managing mineral and coal mining businesses, exploration licensing and IUP issuance terms have remained the same. Currently, the laws and regulations that are used as the basis of a reference (legality) in licensing mining business exploration and issuing IUP, among others:

1. Law No. 3 of 2020 on Amendments to Law No. 4 of 2009 on Mineral and Coal Mining.
2. Government Regulation No. 96 of 2021 on the Implementation of Mineral and Coal Mining Business Activities (revokes and declares invalid Government Regulation No. 23 of 2010 on the Implementation of Mineral and Coal Mining Business Activities as amended several times, most recently by Government Regulation No. 8 of 2018 on the Fifth Amendment to Government Regulation No. 23 of 2010 on implementing Mineral and Coal Mining Business Activities).
3. Presidential Regulation No. 55 the Year 2022 Delegation of Business Licensing in the Mineral and Coal Mining Sector.
4. Minister of Energy and Mineral Resources Regulation No. 34 the Year 2017 Licensing in the Field of Mineral and Coal Mining.
5. Circular Letter (SE) No. 1.E/HK/03.MEM.B/2022 on Guidelines for Implementing Presidential Regulation No. 55 of 2022 on Delegation of Business Licensing in the Mineral and Coal Mining Sector.

Starting from the description above, it is interesting for the author to examine the provisions of mining licenses and arrangements related to sanctions for IUP holders after the enactment of the revision of the Minerba Law so that matters on the limitations in conducting mining business in Indonesia are

³ Source: Press Release of the Coordinating Ministry for Economic Affairs of the Republic of Indonesia: HM.4.6/109/SET.M.EKON.3/03/2023: Bill on the Stipulation of Job Creation Perppu Officially Approved by the House of Representatives to be Enacted into Law, Jakarta March 21, 2023.

⁴ Muhammad Salman Al Farisi, "RESENTRALISASI KEWENAGAN PENGELOLAAN PERTAMBANGAN MINERAL DAN BATURA," *"Dharmasisya" Jurnal Program Magister Hukum FHUI* 2, no. 3 (January 4, 2023), <https://scholarhub.ui.ac.id/dharmasisya/vol2/iss3/38>.

⁵ Derita Prapti Rahayu & Faisal, "The Existence of People's Mining After the Enactment of Amendments to the Law on Mineral and Coal Mining," *Indonesian Journal of Legal Development* 3, no. 3 (n.d.): 338, <https://doi.org/10.14710/jphi.v3i3.337-353>.

⁶ Sinta Ana Pramita, I. Gusti Ayu Ketut Rachmi Handayani, and Lego Karjoko, "The Model Of Mineral And Coal (Minerba) Authority Arrangement In Realizing Ecological Justice," *Baltic Journal of Law & Politics* 15, no. 3 (November 21, 2022): 25–34.

⁷ See Article 7 of Law No. 4/2009 on Mineral and Coal Mining.



known.

1. RESEARCH METHOD

This paper/article study material comes from normative legal research. The study focuses on legal norms resulting from legal and political policies in Law Number 3 of 2020 on Amendments to Law Number 4 of 2009 on Mineral and Coal Mining. The approach in this research uses legislative and conceptual approaches. This legislative approach is intended to unravel the licensing provisions in the mining business in Indonesia so that the mining business is said to be legal. The conceptual approach is intended to parse the concept of licensing from the administrative law perspective to obtain a clear legal basis or reasoning related to the simplification of mining licenses.

2. DISCUSSION

2.1. Legal and Illegal Mining from a Licensing Perspective

The description of the boundaries of legal and illegal mining in this discussion is intended to explain the postulates⁸ of why these boundaries are crucial. In simple terms, something⁹ is said to be legitimate if it is in accordance with legislation or law. Meanwhile, something is said to be illegal if it is not legal or not by laws and regulations.¹⁰ Therefore, it is necessary to outline the basic principles that become the boundaries of the mining business in Indonesia. The licensing instrument is the basic principle underlying the management of all natural resources, especially mineral resources. On that basis, not all business actors incorporated as legal entities or individual businesses can freely explore, manage, touch, and/or obtain economic benefits from mineral resources, especially non-metallic ones. To manage mineral resources and bring economic benefits in the management of mineral resources, every business actor incorporated and individual businesses must obtain a business license by applicable laws and regulations.

Licensing, which is included in the administrative law regime, was born by the increasing development of government function; which is directly related to the development of the welfare state understanding, which requires the state to intervene actively in matters concerning public welfare.¹¹¹²¹³ Therefore, in the concept of the welfare state, licensing is a bare minimum form of state responsibility for the welfare of the people that the government must regulate in such ways all matters concerning the livelihood of many people, one of which is in the mining sector to achieve legal certainty, justice, and usefulness. Mining activities are one of the extractive businesses that have high risks. In addition, it is also very impactful on the surrounding environment, both biologically and among people who are directly involved.¹⁴ As an indicator of whether a mining business has a positive impact

⁸ Postulates come from the Latin words *postulatum* and *postulate*, which mean to ask and demand. The term *postulate* is usually used to denote a proposition that is the starting point for a search that is not a definition or a temporary assumption. In this research, the term "postulate" is used to provide a basis for arguing the importance of licensing instruments in realizing a business climate in the mining sector that provides legal certainty, justice and usefulness. See further Lorens Bagus, *Dictionary of Philosophy* (Jakarta: Gramedia, 1996), pp. 868-869.

⁹ The term "something" in this study refers to mining activities/businesses.

¹⁰ Dwi Haryadi, "Illegal Mining," *University Bangka Belitung's Article*, https://www.ubb.ac.id/index.php?page=artikel_ubb&&id=615, accessed March 13, 2023.

¹¹ Palguna D. G, *Welfare State Vs. Globalization: The Idea of Welfare State in Indonesia* (Depok: PT Raja Grafindo Persada, 2019).

¹² Helmi, *Environmental Licensing Law* (Jakarta: Sinar Grafika, 2012).

¹³ Sri Pudyatmoko, Y, *Licensing: Problems and Improvement Efforts* (Jakarta: PT Gramedia Widiasarana Indonesia, 2009).

¹⁴ Hamdani, F., Fauzia, A., Putra, E. A. M., Walini, E. L., Pambudi, B. A., & Akbariman, L. N, "Environmental Issues in the Job Creation Law and the Direction of Its Improvement After the Constitutional Court Decision Number 91/PUU -XVIII/2020," *Journal of Empowered Indonesia* 3, no. 3 (2022): 980.



on the lives of surrounding communities and the environment, as well as to ensure that mining activities will carry out a rehabilitation process for the damaged environment, a business license is required.¹⁵

Business licensing is the legality given to business actors to start and run their business and/or activities (Article 1 point 6c of Law No. 3 of 2020 *jo.* Article 9 of PP No. 96 of 2021). In Bagir Manan's perspective, a permit is a form of approval from the authorities based on statutory regulations to allow specific actions or actions that are generally prohibited.¹⁶ Because mining activities are extractive businesses with high risks, it is necessary to have continuous control by the central government granting mining business licenses. In an article written by Agus Lanini, et al., he argued that Transparency International Indonesia (TII) had released research results on the vulnerability and risk of corruption in granting mining permits. The unclear mechanism for mining auctions for regional business permits is one of the points prone to corruption.¹⁷ And this has long been a habit that if you want a fast-licensing process, there must be a compensation of a certain amount of money that must be given to agency officials. This of course creates injustice for the lower classes of society, who find it difficult to meet their daily needs.¹⁸

With the birth of the Job Creation Law and the ratification of the revision of the Minerba Law, the business climate, especially related to licensing, has become more simplified to realize investment certainty and ease of doing business in the mineral and coal mining sector. However, seeing the status of the Job Creation Law, which is still conditionally unconstitutional, and the Government Regulation in Lieu of Law on Job Creation has not yet received approval from the House of People's Representatives, legal certainty related to licensing provisions refers to the latest Minerba Law and its derivative regulations.

Article 35, paragraph (2) of Law No. 3 of 2020 *jo.* Article 6 paragraph (2) of PP No. 96 of 2021 *jo.* Article 2 of Presidential Regulation No. 55 of 2022, business licensing is implemented through the granting of (a) A business Identification Number; (b) Standard Certificate, and/or (c) a License. Then, the legality of business licensing and/or mining business activities requires a Mining Business License (IUP), which is a license to carry out mining business (Article 7 of Law No. 3 of 2021 *jo.* Article 10 of Government Regulation No. 96 of 2021). Mining business actors must pass 2 (two) stages to obtain IUP, which are: (a) granting of Mining Business License Area (WIUP): and (b) granting of Mining Business License (IUP). (Article 16 of Government Regulation No. 96 of 2021). Then, the granting of IUP includes 2 (two) stages of activity, which are: (a) Exploration; and (b) Production Operations (See; Article 36 of Law No. 3 of 2020 *jo.* Article 28 paragraph (1) of Government Regulation No. 96 of 2021).

Before obtaining an IUP, Business Entities, Cooperatives, or individual companies that have acquired non-metal Mineral WIUP, certain types of non-metal Mineral WIUP, or rock WIUP within a maximum period of 10 (ten) working days must submit an IUP application to the Minister. However, because Presidential Regulation No. 55 of 2022 has delegated authority to the provincial government, the IUP application for business actors who pocket WIUP in one area in the provincial territory - is submitted to the provincial head (governor). Before obtaining a WIUP, a business entity, cooperative, or individual company must submit an application accompanied by the following conditions:

- a. Business Identification Number;
- b. Profile or Business Entity, Cooperative, individual company;
- c. The composition of the management, list of shareholders or capital, and list of beneficial owners of the Business Entity or individual company;
- d. Equipped with geographical coordinates in the form of latitude and longitude by the geographical information system that applies nationally;
- e. Pay the area reserve fee, map printing fee; and

¹⁵ Samsul Wahidin, *Legal Aspects of Contemporary Mining and Unlicensed Mining* (Yogyakarta: Pustaka Pelajar, 2019), p. 98.

¹⁶ Andrian Sutedi, *Licensing Law in the Public Service Sector* (Jakarta: Sinar Grafika, 2010).

¹⁷ Agus Lanini et al., "LEGAL STATUS OF LAND RIGHTS OF THE MINING COMPANIES IN CENTRAL SULAWESI," *Tadulako Social Science and Humaniora Journal* 2, no. 1 (November 25, 2021): 08–15, <https://doi.org/10.22487/sochum.v2i1.15547>.

¹⁸ Fatma Ulfatun Najicha et al., "Implementation of Licensing Services in the Perspective of State Administrative Law in Indonesia," *Baltic Journal of Law & Politics* 15, no. 3 (November 21, 2022): 228–35.

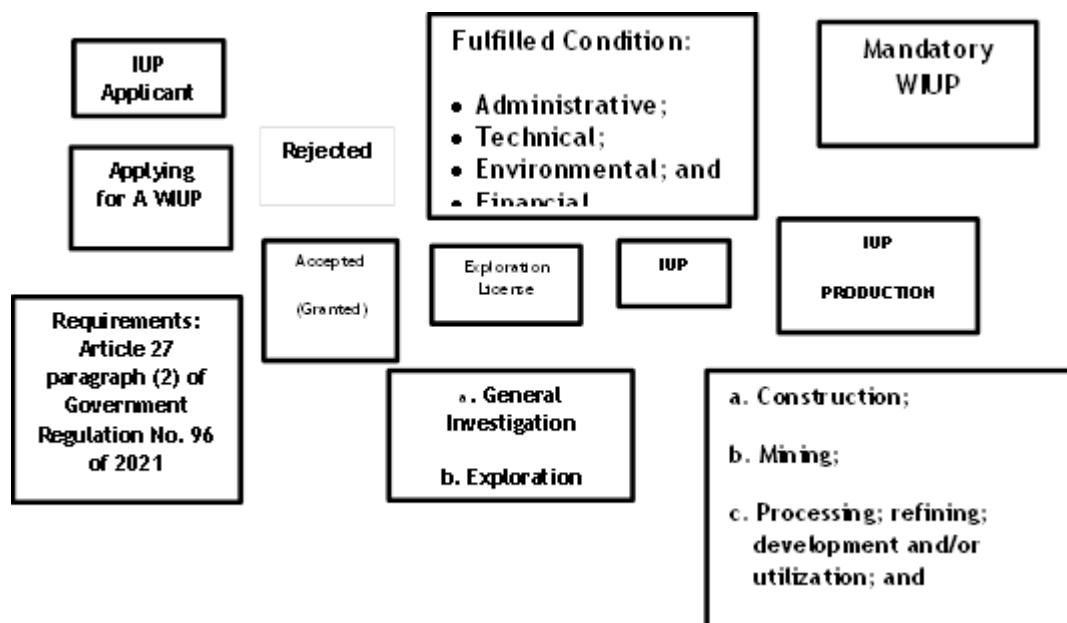


f. Approval from other mining commodities IUP/IUPK holders for applications submitted in areas that have been granted IUP/IUPK (See; Article 27 paragraph (2) of PP No. 96 of 2021).

In submitting a WIUP application, the authorized official may reject or accept (grant) the WIUP application within 10 (ten) days of the application being submitted. Then, suppose the application is received (granted). In that case, the WIUP applicant is obliged to submit a map with the boundaries and coordinates of the WIUP (Article 27 paragraph (4) and (5) and Article 30 paragraph (1) of PP No. 96 of 2021). Furthermore, the Exploration activity stage includes several activities, namely: (a) General Investigation; (b) Exploration; and (c) Feasibility Study (Article 28 paragraph (2) of GR No. 96 of 2021). Meanwhile, the production operation stage includes several activities, which are: (a) construction; (b) mining; (c) processing and/or refining or development and/or utilization; and (d) transportation and sales (Article 28 (3) of GR No. 96 of 2021).

IUP holders who have completed Exploration activities are guaranteed to be able to carry out Production Operation activities as a continuation of their mining business activities (Article 46 paragraph (1) of Law No. 3 of 2020). However, before carrying out production operation activities, IUP holders must first fulfill administrative, technical, environmental, and financial requirements (Article 46 paragraph (1) of Law No. 3 of 2020 jo. Article 31 of Government Regulation No. 96 of 2021). Furthermore, suppose the IUP holder has carried out operating activities production. In that case, the holder is obliged to install a WIUP boundary sign for the production operation stage (Article 49 paragraph (1) of Government Regulation No. 96 of 2021).

Furthermore, the procedures and requirements for obtaining an IUP are simplified in the following chart.



Source: Relevant laws and regulations (processed by the author).

2.2. Setting Sanctions for IUP Holders

In the context of licensing law, the government can control or at least reduce the rate of pollution and environmental damage due to mining activities through strict, selective, and proportional procedures.¹⁹ In other words, the terms and stages of licensing will significantly determine the management of mining that meets the aspects of sustainability and environmental sustainability. This licensing is a regulatory function regarding the government's authority to realize administrative control through licensing. The author outlines the terms and stages in the first discussion. Still, the licensing

¹⁹ Rahayu, D. P., and Faisal, "Legal Politics of Mining Licensing Authority after the Amendment of the Minerba Law," *Pandecta Research Law Journal* 16, no. 1 (2021): 2.



instrument issued by the government is only sufficient if the provision of sanctions accompanies it. Therefore, sanctions are needed to ensure law enforcement.

2.2.1. Administrative Sanctions

According to Paul de Haan et al. in Srilaksmi, in State Administrative Law, the use of administrative sanctions is intended to stop the action of a violation, so administrative sanctions are a juridical instrument that is preventive and repressive non-judicial to end the violation or prevent violations of the provisions contained in the laws and regulations.²⁰ This administrative sanction for J.B.J.M ten Berge is also referred to as *regressive sanctions*, which are applied as a reaction to non-compliance with the provisions contained in the provisions issued by the government.²¹ In the context of the mining business, authorized officials can impose administrative sanctions on IUP holders who are proven to have violated the provisions referred to in Article 151 of Law No. 3 of 2020 jo. Article 185 of Government Regulation No. 96 of 2021. Administrative sanctions can be in the form of (a) written warning; (b) imposition of fines; (c) temporary suspension of all exploration or production operations; and (d) revocation of IUP (See: Article 151 paragraph (2) of Law No. 3 of 2020 jo. Article 185 of Government Regulation No. 96 of 2021 jo. Article 38 of the Ministerial Regulation ESDM No. 34 the Year 2017).

Apart from being threatened with administrative sanctions, IUP holders are also threatened with criminal sanctions in prison in the event of carrying out production operations at the exploration stage. The threat of criminal sanctions is regulated in Article 160 paragraph (2) of Law No. 3 of 2020, which is a maximum of 5 (five) years and a maximum fine of IDR 100,000,000,000.00 (one hundred billion rupiahs). Persons whose IUP has been revoked and has expired but who do not carry out reclamation and/or post-mining obligations; and/or the placement of reclamation guarantee funds and/or post-mining guarantee funds shall be punished with a maximum imprisonment of 5 (five) years and a maximum fine of Rp100,000,000,000.00 (one hundred billion rupiahs) (See: Article 161B of Law No. 3 of 2020).

Furthermore, IUP holders who submit incorrect reports or submit false statements as referred to in Article 110 obtained from exploration and production operations to the Minister, governor, or regent/mayor by their authority shall be punished with a maximum imprisonment of 5 (five) years and a maximum fine of Rp 100,000,000,000.00 (one hundred billion rupiahs). See; Article 159 of Law No. 3 of 2020).

2.2.2. Threats of Criminal Sanctions for Illegal Mineral Miners (Without IUP)

Sanctions are a closing part and are considered important in a law. In general, there is no point in including obligations or prohibitions for citizens in statutory regulations when rules of deviant behavior cannot be imposed by the state through the imposition of sanctions.²² Sanctions are the result of an act that violates. If there is a violation of the law or violation of the law, then the competent authority has the authority to impose sanctions on the perpetrators.²³ Mineral mining practices that do not have an IUP (illegal mining or mining without an IUP) are not only categorized as violations but can also be categorized as crimes because illegal mining activities (without IUP) and damage to the environment have also harmed the economic potential that should have been obtained by the state. Against the act of violation or crime, there are criminal sanctions. Determining sanctions in criminal regulation is not just a technicality but is an inseparable part of the substance or material of the legislation, so it must be understood comprehensively.²⁴ The application of criminal sanctions for mining entrepreneurs who do not have an IUP is the last means or the last remedy (*ultimum remedium*) for

²⁰ Ni Ketut Tri Srilaksmi, "Environmental Law Enforcement with Administrative Sanctions for Environmental Pollution Offenders in the Community," *Pariksa: Journal of Hindu Law* 5, no. 5 (2001): 3.

²¹ Spelt, N. M., and Berge, J. B. J. M. T, *Edited by Philipus M. Hadjon, Introduction to Licensing Law* (Yuridika Publishers, 1993).

²² Philipus M. Hadjon, *Pengantar Hukum Administrasi Indonesia Introduction to the Indonesia Administrative Law*, 12th ed. (Yogyakarta: Gadjah Mada University Press, 2015).

²³ Zahra Malinda Putri, Dewi Kania Sugiharti, and Zainal Muttaqin, "ADMINISTRATIVE SANCTIONS AGAINST ABUSE OF AUTHORITY IN THE ENVIRONMENTAL LICENSING SECTOR BASED ON POSITIVE LAW IN INDONESIA," *Journal of Law and Policy Transformation* 7, no. 2 (January 1, 2023): 84–99, <https://doi.org/10.37253/jlpt.v7i2.6869>.

²⁴ Made Satria Wibawa Nugraha and Suatra Putrawan, "Criminal Sanctions as *Ultimum Remedium* in the Environmental Protection and Management Law," *Kertha Wicara* 7, no. 2 (2018): 6.



committed violations. In illegal mining practices (without IUP), the provisions of Article 158 of Law No. 3 of 2020 apply as follows: "Every person who conducts mining without a permit as referred to in Article 35 shall be punished with a maximum imprisonment of 5 (five) years and a maximum fine of Rp100,000,000,000.00 (one hundred billion rupiahs).

Illegal mining practices (without IUP), as referred to in Article 158 of Law No. 3 of 2020, also have the potential to be carried out by mineral mining business actors who have an IUP. Illegal mining practices occur when IUP holders conduct mining outside the designated WIUP or conduct mining or production operation activities in areas that are not included in the map with the boundaries and coordinates of WIUP (Article 27 paragraphs (4) and (5) and Article 30 paragraph (1) of PP.No. 96 of 2021).

If a legal entity carries out illegal mining practices (without IUP), the provisions of Article 163 of Law No. 3 of 2020 apply; namely, in addition to being subject to the threat of imprisonment and fines against its management, it can also be subject to aggravating punishment plus 1/3 (one third) times the maximum provisions of the imposed fine.

Furthermore, for every person who conducts mining without a permit, as referred to in Article 35, in addition to being punishable with a maximum imprisonment of 5 (five) years and a maximum fine of Rp100,000,000,000.00 (one hundred billion rupiahs) as referred to in Article 158 of Law No. 3 of 2020, perpetrators of criminal acts (illegal mining) can also be subject to additional punishment based on Article 164 of Law No. 3 of 2020, namely in the form of (a) forfeiture of used goods in committing a criminal offense; (b) forfeiture of profits obtained from a criminal offense; and/or (c) obligation to pay costs incurred as a result of a criminal offense.

CONCLUSION

The basic principle underlying the management of natural resources, especially mineral resources, is the licensing instrument. Licensing, included in the administrative law regime, was born by the development of government functions; among others, it is directly related to the development of the understanding of the welfare state, which requires the state to intervene actively in matters concerning the welfare of society. Mining business actors must pass 2 (two) stages to obtain IUP, namely: (a) granting of Mining Business License Area (WIUP) and (b) granting of Mining Business License (IUP). Then, the granting of IUP includes 2 (two) stages of activity, namely: (a) Exploration; and (b) Production Operation. The regulated provisions related to licensing, in Bagir Manan's perspective, are interpreted as a form of approval from the authorities based on laws and regulations to allow specific actions, which in this case is a mining business. Through licensing, the government can control or at least reduce the rate of pollution and environmental damage due to mining activities. In ensuring that the government's efforts to control mining activities run properly, sanctions are set to ensure law enforcement. The sanctions are divided into two, namely administrative sanctions and criminal sanctions. Authorized officials impose these administrative sanctions on IUP Holders who are proven to have violated the provisions referred to in Article 151 of Law No. 3 of 2020 jo. Article 185 of Government Regulation No. 96 of 2021. Meanwhile, criminal sanctions are used as an *ultimum remedium* in case of a criminal offense committed by a mining entrepreneur who does not hold/have an IUP.

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