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Risk-Based Mining Investment in the Framework of Fair Legal Certainty

Article

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Abstract

Investment requires a legal system that provides certainty and justice for the community because policy changes are not enough without a market-oriented legal system to attract more investors.This study aims to analyze risk-based mining investment, in order to increase legal certainty in the mining investment sector. The approach used is the legislative, conceptual, and historical approach, by conducting dogmatic, theoretical, and philosophical legal studies. From this study it shows that. The rapid growth of investment flows not only affects the business aspect itself, but also affects the regulatory aspect of the host country. Indonesia's investment policy is driven by several factors such as lack of capital, experience and technology to cultivate economic potential into real economic power, so the use of foreign capital needs to be utilized optimally to accelerate economic development and regions or sectors that cannot be overcome by capital itself. Specifically in the implementation of the mining business, a shift towards a permit-based system is needed to increase regulatory clarity and the need for clarity in the division of authority between the central and regional governments to encourage community involvement in resource management. Mining business permits must be viewed as a preventive instrument aimed at controlling increasingly uncontrolled mining activities, in addition it turns out that mining activities are based on changing policies so that they often cause uncertainty in their implementation.

Kayword: *Risk-based; investment; mining; legar certainty*.

IntrOduction

The ideals of a nation can be seen from its constitution, and for Indonesia it can be seen from the 1945 Constitution which has been amended four times to date. Article 33 of the 1945 Constitution contains the basis of economic democracy, namely where production is carried out by all, for all under the leadership or assessment of members of society. The prosperity of society is prioritized, not the prosperity of an individual, therefore the economy is structured as a joint effort based on the principle of family.

The desire to realize economic democracy is the ideal choice of the Indonesian nation in accordance with the state philosophy contained in the Preamble to the 1945 Constitution which is 'people's sovereignty', this is contrary to the socialist system, namely *"...Socialist philosophy regards the public ownership of the major means of production and a minimum claim of each to a share of the resources of the nation as elementary aspects of justice"*[1] di samping itu juga bahwa "*...The centralised command economy may suffer more severely from political manipulation, corruption, the arbitrary exercise of power, poor information, cumbersome system and perverse incentives"*[2].

In an economy based on democracy, the economy is directed towards the prosperity of all people, therefore the branches of production which are important for the country and which control the lives of many people must be controlled by the state, and only companies which do not control the lives of many people may be in the hands of one person, whereas in a socialist system that *the major means of production are socialized and subject to centrally directed planning,* artinya tidak terdapat *coexitence of public and private economic power.*[3]

The goals and directions of national development set out in the National Development Program stipulated by Law No. 25 of 2000 concerning the National Development Program for 2000-2004,[4] namely, trying to realize a just and prosperous society, which is realized through development in various fields, including the economic sector such as; agriculture, forestry, industry, mining, trade, construction, services and others.

Every country certainly wants to be sovereign and economically independent, and for that, financial institutions and mechanisms are needed to encourage savings rates and domestic capital markets. For this purpose, an efficient legal system is something that is very essential and has a very significant role.[5]

In order to realize economic independence, investment is needed, and if the desire to invest exceeds the available savings, then foreign savings must be used. In this case, there is an alternative between loans made by the government to finance public investment or attracting investment to the private sector.[6] Investment requires a legal system that provides certainty and justice for the community because policy changes are not enough without a market-oriented legal system to attract more investors, besides that *"...the enactment of legislation without reliable system of enforcement will only be of limited utility"*.[7]

The hope for the entry of foreign investors in reality is still very difficult to realize, especially since the current investment situation has decreased sharply compared to the previous period. This

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1 W. Friedmann, *The State and The Rule of Law in Mixed Economy* (London: Stevens & Sons, 1974).

2 *European Bank for Reconstruction and Development*, *Transition Report*, London, October 1994, h. 3 dalam Robert Pritchard, *The Contemporary Chelenges of Economic Development*, Kluwer Law International, London, 1996, h. 1

3 W. Friedmann, *The State and The Rule of Law in Mixed Economy*.

4 Program Pembangunan Nasional lima tahun (PROPENAS) merupakan pelaksanaan dari Ketetapan Majelis Permusyawaratan Rakyat Republik Indonesia Nomor IV/MPR/1999 tentang Garis-garis Besar Haluan Negara Tahun 1999-2004, memuat kebijakan secara terinci dan terukur untuk mewujudkan tujuan pembangunan nasional, PROPENAS Tahun 2000-2004 merupakan landasan dan pedoman bagi Pemerintah dan penyelenggara negara lainnya dalam melaksanakan pembangunan lima tahun.

5 Robert Pritchard, *The Contemporary Challenges of Economic Development* (London: Kluwer Law International, 1996).

6 Pritchard.

7 Pritchard.

condition has consequences for the reluctance of most foreign investors to enter Indonesia or are reluctant to realize their investment plans that have been approved by the government and also the many industrial relocations to other countries which result in a very large capital flight. Factors that can support the entry of investment flows into a country that are needed are legal certainty and stability in investment, and an investor will refuse to invest in a country if the country does not provide guarantees, although there are no absolute and universal guarantee standards. This is a question that must provide satisfaction for investors, even though in the early stages they have commercial and financial motivations.[8]

Therefore, only the bravest foreign investors will invest their capital without any legal protection (which offers no constitutional or legislative safeguards).[9] As is known, the purpose of law is to maintain social order, avoid chaos in community life, and balance conflicting interests in society, and more than that, to maintain justice and fairness.[10]

Peter Mahmud Marzuki said that in maintaining social order and balancing the interests that exist in society, values need to be used as a reference and new values must be accommodated in such a way that they do not damage existing values. Peter Mahmud Marzuki said that[11] in maintaining social order and balancing the interests that exist in society, values need to be used as a reference and new values must be accommodated in such a way that they do not damage existing values.[12] Therefore, it is increasingly relevant to consider risk-based mining investments in Indonesia.[13] The result of the minimal risk-based mining investments is the proliferation of mining conflicts. According to a report from the National Mining Advocacy Network (Jatam), there were 45 mining conflicts in 2020 involving an area of 714,692 hectares. This number has increased fourfold compared to 2019, which recorded 11 conflicts. The conflicts are divided into 22 cases of environmental pollution, 13 cases of land encroachment, 8 cases of criminalization of citizens opposing mining, and 2 cases of termination of employment.[14] Based on the description above, the important issue in this article is related to risk-based mining investment in the context of fair legal certainty.

REsearch method

Based on the substance of the problem to be studied in this research, this research is a legal research, which contains dogmatic, theoretical, and philosophical analysis, namely a research that primarily examines problems based on positive legal rules, relevant theories, and general legal principles, as well as conducting systematic expositions, and analysis of the relationship between legal rules in the fields of investment and mining, thus this research uses several approaches, that are statute, conceptual, and historical approaches.[15] The statute approach is used to find out how the

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8 David Flint, et.al., *Constitutional and Legislative Safeguards for FDI: A Comparative Review Utilizing Australia and China* (London: Kluwer Law International, 1996).

9 Kondisi ini kata David Flint dikarenakan sistem hukum dari setiap negara adalah unik, yang merupakan refleksi dari kondisi politik, sosial dan ekonomi. See, Flint.

10 Peter Mahmud Marzuki, *Penelitian Hukum Edisi Revisi*, Cetakan ke (Jakarta: Prenadamedia Group, 2016).

11 Marzuki.

12 Peter Mahmud Marzuki, "Penelitian Hukum, Cetakan Ke-11," *Jurnal Pembangunan Hukum Indonesia*, 2022.

13 Hariyanto Hariyanto, "Risk-Based Business License and Problems Arising After The Job Creation ACT," *Jurnal IUS Kajian Hukum Dan Keadilan* 10, no. 2 (August 23, 2022): 354–66, https://doi.org/10.29303/IUS.V10I2.1082.

14 Pradipta Pandu, "Kegiatan Pertambangan Belum Memerhatikan Risiko Bencana," kompas.id, 2021.

15 Marzuki, "*Penelitian Hukum*."

juridical aspects of the mining business implementation along with various intertwined regulations in regulating all aspects related to mining permits. The conceptual approach is used to conceptualize a risk-based licensing approach that can be applied to investment management in the mining scope. To examine how investment began and developed in Indonesia, a systematic historical approach was used. In this study, the technique of collecting legal materials was carried out through literature studies. This method is used to obtain secondary data, including books, research results, court decisions, and relevant laws and regulations. The legal materials that have been collected are then analyzed using qualitative descriptive analysis methods to draw conclusions on the problems being studied.

Analysis and DISCUSSION

History of Invesment

Around the 18th and 19th centuries, investment was formed as part of colonialism. Therefore, investment did not require protection as the colonial legal system was incorporated into the imperial power and imperial system, thus investment received sufficient protection if it entered the colony.[16]

Meanwhile, the development of investment in Indonesia can be traced since the arrival of Europeans to Indonesia, namely since the Portugurnese (1511-1596), the Dutch (1596-1795), Francis (1795-1811), England (1811-1816), the return of the Dutch (1816-1942) and the Japanese occupation (1942-1945).[17]

M. Sornarajah, *The International Law on Foreign Investment*, Grotius Publications, Cambridge University Press, Australia, 2004.

Around 1600, the political process in Europe influenced economic development in Indonesia. Dutch merchants became the first investors to encourage and organize their capital to do business in Indonesia. But investment at that time was not as we know it today, where investment at that time did not have the aim of building the economy in Indonesia. However, it was the beginning of the organization of foreign interests in seeking profit in Indonesia. In fact, Portuguese investors made investments first, namely in 1596, but were not as organized as the Dutch.[18]

In carrying out investments, Dutch traders used several strategies, namely by establishing a company on March 20, 1602 called the VOC (Vereenigde Oost Indische Compagnie / United East-Indies Company), the founders of this company were Amsterdam, Zeeland, Delft, Rotterdam, Hoorn, Enkhuyzen, and the Dutch Government represented by the States General. So that the VOC has dual authority, namely as a trading organization and power in carrying out business. Then another strategy is to do monopoly business and conquest.[19]

The issue of nationalization became a debate but rhetoric was more prominent than its legal aspects.[20] The aspiration for advancing national legal development is currently confronted with several suboptimal conditions. Every law and policy formulated within the framework of the

[16] M. Sornarajah, *The International Law on Foreign Investment* (Autralia: Grotius Publications, Cambridge University Press, 2004).
[17] Charles Himawan, *The Foreign Investment Process in Indonesia* (Singapore: Gunung Agung-Singapore, 1980).
[18] Himawan.
[19] Himawan.
[20] Sornarajah, "*The International Law on Foreign Investment.*"

national legal system must be contextualized within the Indonesian setting.[21] A new law can be considered successful in reflecting the nation's spirit if it aligns with and reinforces the values embedded in the Constitution.[22]

Capital exporting countries wanted international legal standards in protecting foreign investment, while newly independent countries stated the need for state control over the foreign investment process. The current hostile feelings have ended with the regulation of the economy by newly independent countries.In this period, nationalization included in economic reform and reorganization did not include violations of the law, this shows a shift in international relations to replace applicable norms with norms that reflect the tendencies of the international community.

Second, rationalization carried out by the state. At the international level, capital exporting countries made changes to laws related to the international economy including foreign investment, and they also adjusted their legal systems with a pragmatic approach to foreign investment. This pragmatic approach is also a response to the new perception of multinational companies as promoters of development if they shackle the economic goals of the host state. As is known, multinational companies are seen as a threat to state sovereignty, but now sovereignty is used in a more meaningful form.

Third, the modern period is marked by pragmatism in the investment area, namely the significant changes in the econoy and military power of the so-called Big Powers. The dissolution of the Soviet Union, the recession in the United States and Europe, the growth of Germany and Japan as economic powers and the shift in economic power from the Atlantic to the Pacific, the rapid industrialization of developing countries such as China, India, Brazil, Mexico and Nigeria are significant changes that are the responses of developing countries. Changes in the global pattern of foreign investment are very real.[23] In some parts, Japan quickly overtook the United States and Europe which were considered capital exporters, so that no single power could dictate others. Like developed countries, developing countries also have the same experience in foreign investment. Developing countries shifted from import substitution to exporting goods. The collapse of the philosophy of communism and the acceptance of free markets from formerly communist countries.

The period after colonialism, M. Sornarajah divides it into three parts, first there is a hostile and antagonistic nature towards foreign investment, and nationalism is a consequence of anti-colonialism that is widespread in the world. In addition, there is also a desire from newly independent countries to return control over vital economic sectors from foreign investors and colonial powers, so that this condition gives rise to the nationalization of foreign assets.[24]

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[21] Imam Asmarudin et al., "Initiating the Reform of Principle Norms in the Formation of Laws in Indonesia," *Jurnal IUS Kajian Hukum Dan Keadilan* 12, no. 2 (August 19, 2024): 208–26, https://doi.org/10.29303/IUS.V12I2.1390.

[22] Ikhsan Wahyudi et al., "The Urgency of Ratification of the New and Renewable Energy Law in Effforts to Develop Sustainable Energy as an Instrument for Climate Change Adaptation and Mitigation," *Jurnal IUS Kajian Hukum Dan Keadilan* 12, no. 3 (2024): 607–16, https://doi.org/10.29303/ius.v12i3.1469.

[23] Marwanto et al., "Business on Nickel Downstreaming with China and European Union Lawsuits," *Jurnal IUS Kajian Hukum Dan Keadilan* 12, no. 2 (2024): 315–29, https://doi.org/10.29303/ius.v12i2.1381.

[24] Ha-Joon Chang, "Regulation of Foreign Investment in Historical Perspective," *The European Journal of Development Research* 16, no. 3 (2004): 687–715, https://doi.org/10.1080/0957881042000266660.

National Interest In Investment

The flow of investment widely provideys the belief that it will help to fulfill the resources, technology and foreign exchange, which force towards the development of poor countries.[25] The influx of investment has increased the attention of policy makers at the national and international levels in the last decade. The rapid growth of investment provides optimism for developing countries that not only provide solutions to resource shortages but also related to entrepreneurship, technology, organizational capacity, and sometimes market access. This rapid growth is the main driver of economic optimism, supported by improvements in infrastructure, financial development, human resources, and global economic integration.[26] These factors collectively contribute to sustainable economic growth and development.[27] Therefore, most developed countries liberalize their policies and try to attract by providing incentives and some privileges.[28]

With the rapid development of technology, the government must play an active role in designing, adjusting, and supervising existing laws and regulations. This is especially important for achieving comprehensive standardization and certification.[29] The ability of a country to attract investment can be determined by regional factors, income and development levels, urbanization, and also the existence of better infrastructure. Other factors also determine the imbalance of global savings that will determine the flow of foreign investment, regional competitiveness in specific industries that make it attractive to investors, and the competitiveness of companies that allow them to exist in a globalization strategy.[30] While the competitiveness of developing countries based on low labor wages as well as policy liberalization alone is not enough to attract investment.[31]

From an investor's perspective, there are two types of investments that can be identified: domestic investment and foreign investment. Domestic investment generally refers to investment activities conducted by individuals or entities originating from that country. In contrast, foreign investment involves funds from overseas investors or partnerships between foreign investors and the host country.[32]

Foreign investment is expected to drive more growth compared to domestic investment in the host country, but it turns out that this is not certain. Several studies report that there is no significant impact of foreign investment on the growth of developing countries, such as no consequences for

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25 Josephine Ofosu-Mensah Ababio et al., "Foreign and Domestic Private Investment in Developing and Emerging Economies: A Review of Literature," *Cogent Economics & Finance* 10, no. 1 (2022), https://doi.org/10.1080/2332 2039.2022.2132646.

26 Mapule Mofokeng, Abdul Latif Alhassan, and Bomikazi Zeka, "Public–Private Partnerships and Economic Growth: A Sectoral Analysis from Developing Countries," *International Journal of Construction Management* 24, no. 10 (2024): 1029–37, https://doi.org/10.1080/15623599.2023.2217374.

27 Samir Saidi et al., "Dynamic Linkages between Transport, Logistics, Foreign Direct Investment, and Economic Growth: Empirical Evidence from Developing Countries," *Transportation Research Part A: Policy and Practice* 141 (November 1, 2020): 277–93, https://doi.org/10.1016/J.TRA.2020.09.020.

28 Carlos M. Correa and Nagesh Kumar, *Protecting Foreign Investment, Implication of a WTO Regime and Policy Options* (New York: Zed Books, 2003).

29 Ashadi L. Diab et al., "Safeguarding Consumers: The Role of Industry and Trade Office in Countering Monopolistic Practices and Ensuring Business Protection," *Volksgeist: Jurnal Ilmu Hukum Dan Konstitusi* 6, no. 2 (2023): 299–312, https://doi.org/10.24090/volksgeist.v6i2.9065.

30 Pritchard, "*The Contemporary Chelenges of Economic Development.*"

31 Nagesh Kumar, *Globalization and Quality of Foreign Direct Investment* (New Delhi: Oxford University Press, 2002).

32 Januari Nasya Ayu Taduri, "The Legal Certainty and Protection of Foreign Investment Againsts Investment Practices in Indonesia," *Lex Scientia Law Review* 5, no. 1 (2021): 119–38, https://doi.org/10.15294/lesrev.v5i1.46286.

economic and industrial growth, and no effect on medium-term economic growth in relation to per capita income. So there is no difference in the influence between foreign investment and domestic investment in the level of economic growth, and it is said that foreign investment has a negative impact on domestic investment, namely only enlivening domestic investment.[33]

Investment that developed after the 1990s is an extraordinary instrument in carrying out expansion. Therefore, developed countries prefer free regulations for investment and further towards trade interests. The growing trend in investment flows is concentrated in middle and high-income countries, while poor countries are marginalized. Studies show that investment policies are limited to countries with low economies. In some literature related to the impact of investment, there are different variations in their experiences. There are countries that have a good impact with investment such as the spread of knowledge while others only enliven domestic investment and have no impact on knowledge development.[34]

So the question is whether investment regulation for the host country is important. Because investment carries a potential risk that important decisions made outward are not in accordance with national interests, and are often influenced by the national interests of the home country. In order to maintain national interests, the host country regulates investment in sensitive sectors such as the defense industry, media industry and land ownership. With different variations in investment flows, the government is improving the quality of policies such as entry policies, implementation regulations, trade policies to encourage the use of local goods and additional policies in conducting promotions.[35]

Legal protection for investors is provided through two primary aspects: preventive and punitive measures.[36] Preventive legal protection in the capital market, aimed at safeguarding investors from fraudulent practices such as market manipulation, is outlined in Law Number 8 of 1995 on Capital Markets and Law Number 21 of 2011 on the Financial Services Authority. Preventive measures in these regulations are executed by enforcing the principle of "full disclosure." This principle mandates that companies must fully disclose all pertinent information in their financial statements, including details about their assets, liabilities, income, and expenses.[37]

Indonesia's investment policy is driven by several factors such as lack of capital, experience and technology to process economic potential into real economic strength, so that the use of foreign capital needs to be utilized optimally to accelerate economic development and areas or sectors that cannot be overcome by own capital (Part considering Law No. 1 of 1967 concerning PMA), to accelerate national economic growth, face changes in the global economy and participation in various international agreements (Part considering Law No. 25 of 2007 concerning Investment).[38]

The description above shows the background of the country making investments, then the question is the factors that cause companies to make investments:[39]

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33 Lihat Maxwell J. Fry, *Foreign Direct Investment in a macroeconomic framework: finance, efficiency, incentives and distortions*, *PRE Working Paper*, Washington, DC: World Bank, 1992.

34 Correa & Kumar, "*Protecting Foreign Investment, implication of a WTO Regime and Policy Options.*"

35 Robert Pritchard, "*The Contemporary Chelenges of Economic Development*."

36 Yogi Muhammad Rahman et al., "Legal Protection for Investors against Fraud by Market Manipulation in the Indonesian Capital Market," *Jurnal IUS Kajian Hukum Dan Keadilan* 12, no. 3 (2024): 517–29, https://doi.org/10.29303/ius.v12i3.1416.

37 Rahman et al.

38 Correa & Kumar, "*Protecting Foreign Investment, implication of a WTO Regime and Policy Options."*

39 Pritchard, "*The Contemporary Chelenges of Economic Development*."

1. Motivation, and the biggest motivation is to get a market for goods and services. An example is an entrepreneur who wants to set up a factory abroad with the aim of supplying products to the market at competitive prices. Another motivation is to create low-cost production facilities and to obtain raw materials.
2. Location, a common misconception is that companies make investments solely to exploit the advantages of the host country, such as low wages, cost low real estate, tax incentives, high skills, availability of raw materials or energy, weak environmental standards, or to overcome tariff barriers.[40] These factors explain why certain countries are competitive in specific industries. Although location factors are important influences on whether investment is possible, they are not the determinants.
3. Risk diversification, another common misconception is that companies sometimes invest to diversify risk, as in portfolio investment. This risk diversification is not clear because direct investment is broader than portfolio investment. Investment strategies to reduce risk through diversification usually occur in portfolio investment.
4. Choice of doing business, the investment debate is a question of why companies invest in a country. This question is useful when the question is why investment is the preferred method of doing business. It turns out that investment is not the only choice. If a company is competitive, it will follow a globalization strategy, and not choose investment but will license production technology to local companies in the host country, or rather than investing in raw materials, the company prefers long-term supply contracts with the host country.
5. Competitive advantage, in reality whether a company can make an investment depends on whether it has a competitive advantage in the industry. If a company with a competitive advantage follows a globalization strategy, it will consider several factors in determining the choice of strategy, such as the rate of return, location factors, risk factors, and transaction costs.
6. Joint venture, in a foreign country offers further options. With a joint venture, a foreign company expects its business to be established, subsequent transaction costs will be cheaper than a long relationship, and this requires costs to establish and manage the business.

In addition, there are several temporary factors that can influence investment decisions:[41]

1. Fluctuations in currency values that will change the comparative advantage of home and host countries.
2. The tendency of opportunistic trading partners, which sometimes increase import costs and increase export costs, this applies to the market.
3. The quality of merchandise products that are difficult to determine precisely
4. Complex production technology.
5. The desire to maintain the secrecy of new technologies hinders international offers and requires long and difficult negotiations.

[40] M. Wildan Humaidi, Hariyanto Hariyanto, and Mabarroh Azizah, "Green Philanthropy: Islamic Activism on Indonesia's Environmental Democracy," *Ijtihad : Jurnal Wacana Hukum Islam Dan Kemanusiaan* 24, no. 2 (December 2024): 167–91, https://doi.org/10.18326/ijtihad.v24i2.167-191.

[41] Pritchard.

Implementation of Mining Business

Mineral and coal resources in Indonesia are part of non-renewable natural resources. As they support the livelihoods of many, mining activities play a crucial role in enhancing national economic growth and fostering sustainable development in the regions surrounding mining areas.[42] The mining business activities directly create employment opportunities and significantly contribute indirectly to state revenue in the form of taxes or non-tax sources such as royalties, fixed fees, and dividends.[43] As profit-driven organizations, businesses necessitate the innovative thinking and boldness of their board of directors to pursue new decisions or breakthroughs that serve the interests of the company.[44]

The requirement to carry out General Mining business is the existence of Mining Authorization (KP), and this KP can be done in the form of KK and Coal Mining Business Work Agreement (PKP2B) (Article 59 of Government Regulation No. 75 of 2001 concerning the Second Amendment to Government Regulation No. 32 of 1969 concerning the Implementation of Law No. 11 of 1967 concerning the Main Provisions of Mining). The concept of Mining Authorization is a concept derived from Article 8 of Law No. 5 of 1960 concerning Basic Agrarian Regulations (Basic Agrarian Law/UUPA) which states "On the basis of the right to control from the State as referred to in Article 2, the taking of natural resources contained in the earth, water and space is regulated".

The concept of KP in General Mining is different from that in oil and gas mining. In General Mining, KP is defined as the authority of an agency/individual to carry out mining business (Article 2 UUPP), while KP in Oil and Gas mining is the authority given by the State to the Government to carry out exploration and exploitation (Article 1 of the Oil and Gas Law). This means that KP in General Mining is the authority of an agency/individual, while in Oil and Gas mining, it is the authority of the State given to the Government, so that the Government is the owner of KP authority in Oil and Gas mining.

If associated with Article 8 of the UUPA, the concept of KP in Oil and Gas mining which defines KP as the authority of the State is more relevant, because the power over the earth, water and space including the natural resources contained therein is controlled by the State and not the authority of an agency or individual.

The state's rights to control contained in Article 8 of the UUPA refers to Article 2 of the UUPA which states:

1. Based on the provisions in Article 33 paragraph 3 of the Basic Law and matters as referred to in Article 1, the earth, water and space, including the natural resources contained therein, are at the highest level controlled by the State, as an organization of power for all the people. (writer's italics)
2. The state's right to control referred to in paragraph 1 of this article provides the authority to:

[42] Devi Roma Loisa Gultom, "Perlindungan Hukum Atas Pencabutan Izin Usaha Pertambangan Oleh Satuan Tugas Penataan Penggunaan Lahan Dan Penataan Investasi," *Media Hukum Indonesia* 2, no. 3 (2024): 627–35.

[43] Tri Sulistianing Astuti and Luthfi Widagdo Eddyono, "Dinamika Pengaturan Dan Kepastian Hukum Kewenangan Pemerintah Pusat Atas Pengelolaan Pemanfaatan Tidak Langsung Panas Bumi," *Jurnal Rechts Vinding: Media Pembinaan Hukum Nasional* 11, no. 3 (2022): 493–510.

[44] Faisal Santiago, "Reconstruction of the Business Judgment Rule Doctrine in Indonesia: Legal Comparison with England, Canada, the United States, and Australia," *Jurnal IUS Kajian Hukum Dan Keadilan* 12, no. 1 (2024): 107–21, https://doi.org/10.29303/ius.v12i1.1371.

a. regulate and organize the allocation, use, supply and maintenance of the earth, water and space;
b. determine and regulate legal relationships between people and the earth, water and space;
c. determine and regulate legal relationships between people and legal acts concerning the earth, water and space.

Article 2 of the UUPA is guided by Article 33 paragraph (3) of the 1945 Constitution that "The land, water and natural resources contained therein are controlled by the state and used for the greatest prosperity of the people". The description above provides an understanding of the concept of Mining Authority which comes from the state's right to control (at the highest level controlled by the State), but the concept of "state's right to control" is contradictory when associated with Article 1 paragraph (2) of the 1945 Constitution which states "Sovereignty lies in the hands of the people and is implemented according to the Constitution", for the following reasons:

1. Conceptually, sovereignty is a concept that is usually used as an object in political philosophy and state law, in which there is a concept related to the idea of supreme power associated with the state.[45] The word sovereignty comes from Arabic, namely daulat and daultan, in its classical meaning it means change, transfer or circulation (of power). In the Qur'an which reflects the use of classical Arabic language, the word daulah is used only twice (in two places), namely in QS. 3:140 which uses the verb nudawiluha (we replaced him and took turns), and in QS. 59:7 which uses the verb duulatan (circulate). From the first verse it is used to understand the change of power in the political field and the second verse refers to the concept of power in the economic field. The term daulat (sovereignty) in history is used to understand dynasty, political regime or period of power. Thus the word sovereignty in its classical meaning is closely related to the idea of supreme power, both in the economic field and especially in the political field.[46]
2. In various political, legal, and state theory literature today, the terminology of sovereignty is generally recognized as a concept borrowed from Latin, soverain and superanus, which later became souvereign or souvereignty in English meaning ruler and supreme power. In modern Arabic today, the term sovereignty is understood in the context of the meaning of the word souvereignty as in the West. The terminology of sovereignty in Indonesian political language is no longer distinguished in its meaning, whether it comes from a Western source or its original source, namely Arabic. Therefore, the most important thing is that technically, the concept of sovereignty is related to the concept of supreme power. Sovereignty as an idea regarding the highest power in the history of legal and political thought, there are five known theories or teachings, namely: Theory of God's Sovereignty, Theory of King's Sovereignty, Theory of State Sovereignty, Theory of People's Sovereignty and Theory of Legal Sovereignty.
3. So sovereignty means the highest power, and based on Article 1 paragraph (2) of the 1945 Constitution that the highest power is in the hands of the people, so that the theory adopted is the theory of people's sovereignty which is in accordance with the principles of democracy, namely from, by, and for the people.

[45] Jimly Asshiddiqie, *Konstitusi Dan Konstitusionalisme Indonesia* (Jakarta: Konstitusi Press, 2006).
[46] Asshiddiqie.

The concept of the highest level controlled by the State (article 2 UUPA), "right to control from the State" (article 8 UUPA), "controlled by the state" (article 33 paragraph (3) of the 1945 Constitution) relating to the earth and water and the natural resources contained therein, are unclear concepts, the consequence of which is that the concept of "Mining Authority" is an inappropriate concept, because:

1. Intrinsically, the earth, water and natural resources contained therein are a gift from God to the Indonesian people and not to the state, this can be seen in:
    a. The entire territory of Indonesia is a unified homeland of all Indonesian people, who are united as the Indonesian nation (article 1 paragraph (1) UUPA);
    b. All the earth, water and space, including the natural resources contained therein in the territory of the Republic of Indonesia as a gift from God Almighty are the earth, water and space of the Indonesian nation and are national wealth (article 1 paragraph (2) UUPA);
    c. That the Indonesian environment as a gift and blessing from God Almighty to the people and nation of Indonesia is a space for life in all its aspects and dimensions in accordance with the Archipelago Outlook (Considering Law No. 23 of 1997 concerning Environmental Management);
    d. That the territorial space of the unitary state of the Republic of Indonesia as a gift from God Almighty to the nation of Indonesia with a strategic location and position as an archipelagic country with natural resources that need to be appreciated, protected, and managed to realize the goals of national development as a practice of Pancasila (Considering Law No. 24 of 1992 concerning Spatial Planning).
2. The concept is not in accordance with the principle of people's sovereignty contained in Article 1 paragraph (2) of the 1945 Constitution;
3. The concept above is a concept that has connotations on the theory of state sovereignty which is not in accordance with the philosophy of the Indonesian state which is people's sovereignty (Paragraph 4 of the Preamble to the 1945 Constitution) and democracy;
4. The state is an organization that protects the nation, advances public welfare, improves the nation's intelligence, and carries out order in the sense of Public Service, not as the owner of the land, water and natural resources contained therein.
5. Based on Sri Hajati's conclusion, although according to the UUPA, the state is not the owner of the land but only controls the land based on the State's Right to Control contained in Article 2 of the UUPA, in reality based on various other laws and regulations in force in the land sector, it is as if the state is the owner of the land. This is because the state's power in question concerns all land, water and space. So both those that have been appropriated by someone, those that are appropriated by the customary law community and those that are not appropriated by anyone.[47]
6. The concept of the State's Right to Control which has been utilized by the government so far to deny the people's rights to agrarian resources and utilize them to provide space for the operation of large companies in the name of development. Therefore, this state's right to control should be strictly limited for the future and it is time to think about alternatives

[47] Sri Hajati, "Pengaturan Hak Atas Tanah Dalam Kaitannya Dengan Investasi, (Disertasi)" (, Program Pascasarjana Universitas Airlangga, Surabaya, 2003).

> to the state's right to control or how this right can be made limited in nature in concept and implementation. It is fitting that the process of concentration of control of agrarian resources by one party and agrarian disputes encourage the government policy maker to reform land law. That the main cause of the concentration of land control and agrarian disputes is the use of excessive state power over land represented by the political concept of state control rights. This limitation can be done by reviewing various laws related to state power over land that is too large, which of course includes the UUPA. In line with comprehensive reform for the sake of the order of national life, a new paradigm needs to be accommodated. The implementation of authority in granting land rights that is centralistic is shifting towards decentralization.[48]

Therefore, the concept of at the highest level controlled by the State control rights from the State and 'controlled by the state' must be removed or replaced with Controlled by the people, regulated by the State, implemented by the Government based on laws and regulations. Controlled by the people, because intrinsically it is the people who are given the earth, water and natural resources contained therein, not the state. Regulated by the State, because the state as an organization formed with the aim of achieving the welfare of the people is not a ruler, because power is in the hands of the people, and is implemented by the Government based on statutory regulations, because the Government is executive whose function is to implement based on the applicable laws and regulations. Like Article 33 paragraph (3) of the 1945 Constitution if replaced it will become "The earth and water and the natural resources contained therein are controlled by the people, regulated by the State, implemented by the Government based on laws and regulations and used for the greatest prosperity of the people".

The reasons above which are based on the approach (conceptual, legislation, philosophical, and theory), show that the concept of 'Mining Authority' which is based on and ends with the concept of 'Controlled by the State' in Article 33 paragraph (3) of the 1945 Constitution, is a concept that needs to be replaced with a more appropriate alternative, namely the concept of 'permit', because 'permit' is a special permission to do something that is generally prohibited; the logic is:[49]

1. Every prohibited act but allowed to be done, requires a permit
2. Exploration and exploitation are basically activities that cause influence (impact) on the environment, socio-culture, health and others, so they must be prohibited;
3. Therefore, exploration and exploitation (mining) require a permit.
4. With the concept of "permit" it will be more in sync with other mining laws, such as Oil and Gas Mining using the concept of "Business Permit", and Geothermal Mining using the concept of "Mining Business Permit".

In Oil and Gas mining, KP is not the basis for implementing a business, because the basis is KKS and Business Permit, this is different from General Mining businesses which require KP (Article 15 of Law No. 11 of 1967 concerning Basic Provisions on Mining). Control and management in General Mining are differentiated based on the group of mining materials, for groups a and b carried out by the Minister, and for group c carried out by the Regional Government Level I (Province), by taking into account the development of the Region in particular and the State in general for group

[48] Hajati.
[49] Bruggink, *Refleksi Tentang Hukum* (Bandung: Citra Aditya Bakti, 1999).

b (for certain mining materials), the Minister can hand over control to the Regional Government Level I (Province) (Article 4 UUPP).

In Oil and Gas mining, control by the State is carried out by the Government as the holder of KP and the Government forms an Implementing Agency and a Regulatory Agency. While in Geothermal mining, the business is carried out by a Business Entity after obtaining an IUP from the Minister, Governor, Regent/Mayor in accordance with their respective authorities (Article 11 paragraph (3) of Law No. 27 of 2003 concerning Geothermal).

KP in General Mining is granted by a Ministerial Decree (Article 15 paragraph (3) of the UUPP), but in Article 1 paragraph (2) of Government Regulation No. 75 of 2001 concerning the Second Amendment to Government Regulation No. 32 of 1969 concerning the Implementation of Law No. 11 of 1967 concerning Basic Provisions on Mining, KP is given:

1. Regent/Mayor (in Regency/City and 4 nautical miles)
2. Governor (several regencies/cities and no cooperation and 4 – 12 nautical miles
3. Minister (several provinces and no cooperation and outside 12 nautical miles)

While the form of General Mining KP (Article 2 paragraph (1) of Government Regulation No. 75 of 2001 concerning the Second Amendment to Government Regulation No. 32 of 1969 concerning the Implementation of Law No. 11 of 1967 concerning Basic Provisions on Mining), is:

1. Mining assignment decree (given by the Minister, Governor, Regent/Mayor to government agencies including general investigations and exploration)
2. People's mining permit decree (given by the Regent/Mayor to local people including general investigations, exploration, exploitation, processing and refining, transportation and sales)
3. Decree on granting KP (granted by the Minister, Governor, Regent/Mayor to PN, PD, private bodies/individuals including general investigation, exploration, exploitation, processing and refining, transportation and sales)

In addition to the three forms mentioned above, there is another form, namely Regional Mining Permit (Article 47 of PP No. 75 of 2001 concerning the Implementation of Law No. 11 of 1967) which is granted by the Level I Regional Government (Province) (Article 47 of Government Regulation No. 75 of 2001 concerning the Second Amendment to Government Regulation No. 32 of 1969 concerning the Implementation of Law No. 11 of 1967 concerning the Main Provisions on Mining). If we pay attention to the provider and form of KP above and relate it to Regional Mining Permits and People's Mining Permits, several problems arise, including:

1. If the location of the Regional Mining Permit is in a Regency/City area, then who issues the permit, is it the Regent/Mayor or still the Level I Regional Government (Governor)?
2. If the mining location is in a Regency/City area, what permit is given? Is it a Regional Mining Permit or a People's Mining Permit? Because both of these permits are for class C mining materials, as is known for class C mining materials based on Article 4 paragraph (2) UUPP in conjunction with Article 47 PP No. 32 of 1969 is granted by the Regional Government Level I.

The type of General Mining business determines the type of KP granted (Article 7 of Government Regulation No. 75 of 2001 concerning the Second Amendment to Government Regulation No. 32 of 1969 concerning the Implementation of Law No. 11 of 1967 concerning the Main Provisions of Mining), namely KP:

1. General investigation
2. Exploration
3. Exploitation
4. Processing and refining
5. Transportation and sales

Meanwhile, for Oil and Gas mining, the type of business will determine the basis for its implementation, which is divided into two, namely for upstream businesses consisting of exploration and exploitation based on the KKS with the Implementing Agency, while for downstream businesses it is based on the Business License granted by the Government. Then, the Job Creation Law simplifies the system for implementing upstream and downstream oil and gas business activities by rorelying only on business licenses.[50] This simplification is needed in order to harmonize regulations that are too many and overlap, even seem inconsistent.[51]

The comparison between General Mining and Oil and Gas mining can be systematically seen in Table 2. In the era of regional government where regions have autonomy to regulate their own affairs, including in the mining sector, because in UUPP and its implementing regulations, namely PP No. 32 of 1969 in conjunction with PP No. 75 of 2001, regional authority has been clearly stated.

This authority is also systematically seen in Law Number 23 of 2014 concerning Regional Government, Chapter III Article 9 paragraph (1) states that Government affairs consist of absolute government affairs, concurrent government affairs, and general government affairs. Then, Article 10 paragraph (1) explains that absolute government affairs include:

1. Foreign Policy
2. Defense
3. Security
4. Judiciary
5. national monetary and fiscal and
6. Religion

Acontrario that the Regional Government will organize government affairs that are its authority, namely outside of what is determined above. In organizing government affairs that are the authority of the region, the regional government exercises the broadest possible autonomy to regulate and manage its own government affairs based on the principles of autonomy and assistance tasks.

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[50] Mardianto Mardianto, John Pieris, and Wiwik S. Widiarty, "Meningkatkan Perlindungan Investor Dalam Usaha Hulu Minyak Dan Gas Bumi Dalam Konteks Indonesia," *Ilmu Hukum Prima (IHP)* 6, no. 2 (2023): 200–210, https://doi.org/10.34012/jihp.v6i2.4225.

[51] M. Iqbal, M. Misbahul Mujib, and Yuliannova Lestari, "Does Omnibus Law Affect the Indonesian Investment Regulations towards Chinese Investors?," *Volksgeist: Jurnal Ilmu Hukum Dan Konstitusi* V, no. 40 (2022): 179–97, https://doi.org/10.24090/volksgeist.v5i2.6838.

Based on the provisions above, it can be seen that the mining sector is the authority of the Region, and this is indeed very rational because the Region as the person in charge of the authority certainly has the right to all activities related to the exploitation of its region, therefore it has the authority over matters concerning the interests of its region, and moreover, these activities are in its jurisdiction. So that all activities in its region must obtain permission and approval from the person in charge of the Region and in this case the Regional Government.

The Regional Government Law delegates investment authority to the Region, but with the issuance of Presidential Decree No. 28 and No. 29 of 2004, this authority can be returned to the Center. Presidential Decree No. 28 of 2004 regulates the Investment Coordinating Board (BKPM). While Presidential Decree No. 29 of 2004 regulates the implementation of investment in the context of PMA and PMDN through a one-stop service system. Presidential Decree No. 120 of 1999 has even assigned the Minister of State for Investment/Head of BKPM to delegate the authority to grant approval for investment facilities and permits to the regions. This provision was then strengthened by the Decree of the Minister of Home Affairs No. 130-67 of 2002 which recognized the authority of the Regent/Mayor for domestic investment (PMDN), and the authority of the Governor for foreign investment (PMA).

Mining Business Licensing Based on Risk Considerations

Ten Berge describes the motivations for using permits based on the Dutch permit system, that are:[52]

1. The desire to direct (control) certain activities, for example building permits;
2. Preventing harm to the environment (environmental permits);
3. The desire to protect certain objects (logging permits, permits to dismantle monuments);
4. Wanting to distribute objects that are few in number (permits for occupying areas among residents; and
5. Directing by selecting people and activities (permits based on Drank-en Horecawet, where administrators must meet certain requirements).

In relation to the motivations above, permits are more of a preventive instrument, or have the character of a preventive instrument. A permit is a State Administrative Decree (KTUN), but not every KTUN is a permit. KTUN is a legal act of the Agency or State Administrative Officer which is a statement of will that arises from the administrative organ in special circumstances, intended to cause legal consequences in administrative law.[53] As a decision, a permit has elements contained in Article 1.3 of Law No. 5 of 1986, including:

1. Written stipulation
2. Issued by State Administrative Officials
3. Contains state administrative legal actions
4. Individual and concrete in nature

[52] Tatiek Sri Djatmiati, "Prinsip Izin Usaha Industri Di Indonesia, (Disertasi)" (Program Pascasarjana Universitas Airlangga, Surabaya, 2004).

[53] Dola Riza, "Pengaturan Terhadap Hakikat Keputusan Tata Usaha Negara Menurut Undang-Undang Peradilan Tata Usaha Negara Dan Undang-Undang Administrasi Pemerintahan," *Jurnal Bina Mulia Hukum* 3, no. 1 (2018): 85–102, https://doi.org/10.23920/jbmh.v3n1.7.

5. Final in nature
6. (gives rise to) legal consequences for a person or civil legal entity.

Licensing is a means of controlling the life of society, so as not to deviate from the provisions of existing laws and regulations, thus licensing is also intended by the Government to limit the activities of citizens, so as not to harm the rights of others.[54] Licensing is based on authority obtained through attribution, delegation, or mandate. Attribution refers to the original authority based on the provisions of state administrative law, delegation confirms a delegation of authority to another government agency, while a mandate does not involve any delegation in the sense of granting authority, but the official given the mandate acts on behalf of the mandate giver. In granting a mandate, the official giving the mandate appoints another official to act on behalf of the mandator (mandate giver).

In relation to the concept of attribution, delegation, the mandate was stated by J.G. Brouwer and A.E. Schilder, that:

1. With attribution, power is granted to an administrative authority by an independent legislative body. The power is initial (originair), which is to say that is not derived from a previously existing power. The legislative body creates independent and previously non existent powers and assigns them to an authority.
2. Delegation is the transfer of an acquired attribution of power from one administrative authority to another, so that the delegate (the body that has acquired the power) can exercise power in its own name.
3. With mandate, there is no transfer, but the mandate giver (mandans) assigns power to the other body (mandataris) to make decisions or take action in its name.

In the mining sector, it was initially implemented with a work contract, but the work contract was seen as the root cause of the state's lack of sovereignty over mining, because the government was positioned as a private legal entity, which had an equal position with the private legal entity of a mining company.[55]

Then it was also used in the form of a mining authority (KP), this KP was obtained by submitting a request to the minister, both for general investigations, exploration, exploitation, processing and refining, transportation, and sales as regulated in Law No. 11 of 1967 in conjunction with PP No. 32 of 1969, in this case KP is the authority of the Central Government.

However, in PP No. 75 of 2001 which is the second amendment to PP No. 32 of 1969, this authority was changed to be based on territory, the regent/mayor has KP authority in the district/city area and in the sea area up to 4 miles, then the governor for areas located in several districts/cities and in sea areas between 4 - 12 miles, while the minister is located in several provincial areas and/or in sea areas located outside 12 miles.

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[54] Dewi Sukma Kristianti, "Prinsip Kebersamaan Dalam Hukum Investasi Undang-Undang Nomor 11 Tahun 2020 Tentang Cipta Kerja: Politik Hukum Kepentingan Investasi Ataukah Kesejahteraan Masyarakat," *Pattimura Magister Law Review* 1, no. 2 (2021): 90–113.

[55] Henry Donald et al., "PERGESERAN PARADIGMA HUKUM INVESTASI PERTAMBANGAN," *Jurnal Rechts Vinding: Media Pembinaan Hukum Nasional* 4, no. 2 (August 31, 2015): 255–77, https://doi.org/10.33331/RECHTSVINDING.V4I2.23.

Mining sector policies often show the phenomenon of legal uncertainty. The phenomenon of legal uncertainty is like mismanagement of mining area management, community demands for injustice in mining management, weak and inconsistent law enforcement, and various other problems related to the applicable legal system.[56]

This regional-based authority is an adjustment to Law No. 22 of 1999 concerning Regional Government, which gives authority to regions to manage the resources available in their regions, this authority is different from that previously regulated and mining policies must be adjusted to follow the pattern contained in Law No. 22 of 1999.

The KP regime then changed with the licensing regime based on Law No. 4 of 2009 concerning Minerals and Coal (Minerba), the authority to manage Minerba is still based on the region with different classifications of types of permits, and unfortunately this did not last long because it had to change with the presence of Law No. 23 of 2014 concerning Regional Government, the authority of the district/city in the mineral and coal sector was withdrawn to the province including in the issuance of mining business permits (IUP), people's mining permits (IPR) and permits for investment purposes.

The authority of the province regarding mining in the district/city area also did not last long because it had to be set aside with the enactment of Law No. 3 of 2020 which is an amendment to Law No. 4 of 2009. In Law No. 3 of 2020 all permits are the authority of the Central Government which is the same as the risk-based permits regulated in Law No. 11 of 2020 in conjunction with PP No. 5 of 2021, namely by granting a Business Identification Number (NIB), Standard Certificate, and Permit.

Law No. 3 of 2020 removes the authority of provinces and districts/cities in organizing and managing mineral and coal mining, initially in Law No. 4 of 2009 the implementation of mineral and coal was carried out by the Government and/or regional governments, then amended by Law No. 3 of 2020 which was carried out by the Central Government alone without regional governments, as well as in the issuance of permits, which initially provinces and districts/cities were authorized to issue IUP and IPR but now this authority has been removed, and becomes the authority of the Center.

Regarding regional authority, the Constitution determines that regions regulate their own affairs based on the principle of the broadest possible autonomy except for those that are the affairs of the Central Government (Article 18 of the Constitution), or the Regional Government Law calls it an absolute affair which includes: foreign policy, defense, security, justice, national monetary and fiscal, and religion. From here it can be seen that mining is outside the affairs of the Central Government, meaning that constitutionally the sector has been decentralized to the regions.

Mining of minerals and coal which is included in the scope of energy and mineral resources, in Law No. 23 of 2014 concerning Regional Government, is classified in optional concurrent affairs, namely government affairs divided between the Central Government, provinces and districts/cities, which are based on the principles of accountability, efficiency, and externalities, as well as national strategic interests.

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[56] Hartana Hartana, "Hukum Pertambangan (Kepastian Hukum Terhadap Investasi Sektor Pertambangan Batubara Di Daerah)," *Jurnal Komunikasi Hukum (JKH)* 3, no. 1 (2017): 50–81, https://doi.org/10.23887/jkh.v3i1.9244.

The Central Government in carrying out concurrent government affairs has the authority to set guidelines (norms, standards, procedures, and criteria), carry out coaching and supervision of the implementation of government affairs that are the authority of the region. On the other hand, the region has the authority to set policies with mandatory provisions referring to the Central Government guidelines, and if they are not in accordance, the Central Government will cancel the policy.[57] Explicitly, there is a centralization of mining authority because the region remains under the supervision, control, and control of the Central Government.

The negation of authority is very apparent from the description above, and efforts to distort the principle of regional autonomy can be seen from the changing regulations, this not only in the mining sector but can also be observed in education matters, and especially in the determination of regional officials which are widely reported in the media and discussed by the wider community.

The implementation of risk-based business licensing is one of the government's efforts to improve the investment ecosystem and business activities, which is carried out through:

1. the implementation of business licensing more effectively and simply; and
2. supervision of transparent, structured, and accountable business activities in accordance with the provisions of laws and regulations.

Based on this, now business actors who want to start and carry out business activities are required to meet the basic requirements for business licensing, which include the suitability of space utilization activities, environmental approvals, building approvals, and certificates of functional feasibility and/or risk-based business licensing.

The implementation of risk-based business licensing including the energy and mineral resources sector is regulated in Article 6 paragraph (2) of PP No. 5 of 2021. The implementation of risk-based business licensing in each of these sectors includes the following regulations:

1. Indonesian Standard Business Classification Code (KBLI)/related KBLI, KBLI title, scope of activities, risk parameters, risk level, business licensing, time period, validity period, and business licensing authority, which are listed in Attachment I of PP No. 5 of 2021
2. Requirements and/or obligations for risk-based business licensing, which are listed in Attachment II of PP No. 5 of 2021.
3. Guidelines for risk-based business licensing, which are listed in Attachment III of PP No. 5 of 2021.
4. Business activity standards and/or product standards, which are regulated by ministerial/ head of agency regulations, Attachment IV of PP No. 5 of 2021.

Risk-based business licensing is carried out based on the determination of the risk level and ranking of the scale of business activities including micro, small, and medium enterprises (UMK-M)

[57] Dian Agung Wicaksono and Faiz Rahman, "Penafsiran Terhadap Kewenangan Mengatur Pemerintahan Daerah Dalam Melaksanakan Urusan Pemerintahan Melalui Pembentukan Peraturan Daerah (Interpretation of the Regional Government's Authority to Regulate in Implementing Government Affairs through the ...)," *Negara Hukum: Membangun Hukum Untuk Keadilan Dan Kesejahteraan* 11, no. 2 (2020): 231–48, https://doi.org/10.22212/jnh.v11i2.1614.

and/or large businesses.[58] The determination of the risk level is carried out based on the results of the risk analysis, which will then determine the type of business license that must be fulfilled by the business actor.[59] The scale of risk consists of several aspects such as health, security, environment, as well as the utilization and management of resources.[60]

The risk analysis is carried out by the central government through:

1. Identification of business activities
2. Assessment of the level of danger

   The assessment of the level of danger is carried out on aspects of health, safety, environment, and/or utilization and management of resources by taking into account the type, criteria, and location business activities and resource limitations, and/or volatility risks.
3. Assessment of potential hazards

   This assessment consists of:
   a. almost impossible to occur;
   b. unlikely to occur;
   c. likely to occur; or
   d. almost certain to occur.
4. Determination of risk level and business scale ranking

   This determination is obtained based on an assessment of the level of danger and potential for danger.
5. Determination of the type of business license

Based on the assessment as mentioned above, business activities are classified into business activities with:

1. Low risk level

   Business licensing for this business activity is in the form of a Business Identification Number (NIB) which is the identity of the business actor as well as the legality to carry out business activities. Specifically for Micro and Small Businesses, NIB also applies as the Indonesian national standard (SNI) and halal guarantee statement.
2. Medium risk level

   This risk level is divided into medium low and medium high risk levels. Business licensing for medium low and high risk business activities is in the form of NIB and standard certificates. Please note that the standard certificates issued for medium-low and high-risk business activities are different. Specifically for medium-high risk business activities, new standard certificates can be issued after the NIB is issued and the business actor makes a statement through the OSS system, based on the results of verification of the fulfillment of business activity implementation standards by the business actor.

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58 I Made Bayu Brhaspati, "TRIPS Waiver: Pembelajaran Dari Pandemi Covid-19," *JATISWARA* 38, no. 3 (December 1, 2023): 328–39, https://doi.org/10.29303/JTSW.V38I3.517.

59 Ridwan Arifin et al., "Protecting the Consumer Rights in the Digital Economic Era: Future Challenges in Indonesia," *Jambura Law Review* 3, no. Special Issue (2021): 135–60, https://doi.org/10.33756/jlr.v3i0.9635.

60 Hadry Harahap, B. F. Sihombing, and Adnan Hamid, "Impact of the Omnibus Law/Job Creation Act in Indonesia," *International Journal of Scientific Research and Management* 8, no. `10 (2020): 266–81, https://doi.org/10.18535/ijsrm/v8i10.lla01.

3. High risk level

   Business permits for this business activity are in the form of NIB and permits. Both are business permits for business actors to carry out operational and/or commercial business activities. The permit in question is the approval of the central government or regional government for the implementation of business activities that must be fulfilled by business actors before carrying out their business activities. In the case of business activities with a high risk level requiring fulfillment of business standards and/or product standards, the central or regional government according to their respective authorities issues business and product standard certificates according to the verification of fulfillment of standards.

Thus, based on the explanation above, now the business permits required by business actors are adjusted to the level of risk of the business activities carried out by them, the types of business permits of which also differ based on the classification of business activities.

CONCLUSION

Based on the discussion above, it can be concluded that the rapid growth of investment flows not only affects the business aspect itself, but also affects the regulatory aspect of the host country. Indonesia's investment policy is driven by several factors such as lack of capital, experience and technology to cultivate economic potential into real economic power, so the use of foreign capital needs to be utilized optimally to accelerate economic development and regions or sectors that cannot be overcome by capital itself. Mining activities actually play an important role in national economic growth and regional development. This central-regional policy asymmetry needs to be re-examined so that it does not cause anomie in implementation, changing policies will reflect legal uncertainty and ultimately make it difficult to realize an investment ecosystem that benefits the people. Ideally, in every development, especially those related to the interests of the community, the region should be part of the ownership, so that as long as the industry is present, the region will benefit sustainably, unlike today, where the region has nothing and is nothing in industrial development in the region, thus giving rise to the stereotype that the region is only a broker that facilitates foreign people or companies to exploit regional potential. Risk-based business licensing is regulated in Articles 7-12 of Law No. 6 of 2023 concerning the Stipulation of Government Regulation in Lieu of Law No. 2 of 2022 concerning Job Creation into Law, which is then specifically regulated in PP No. 5 of 2021 concerning the Implementation of Risk-Based Business Licensing. PP No. 5 of 2021 revokes PP No. 24 of 2018 concerning Electronically Integrated Business Licensing Services, which divides the types of business licensing into business licenses and commercial or operational licenses. Risk-based business licensing is the basis for business actors to start and run their businesses and/or activities based on the level of potential for injury or loss from a hazard or a combination of the possibilities and consequences of hazards.

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