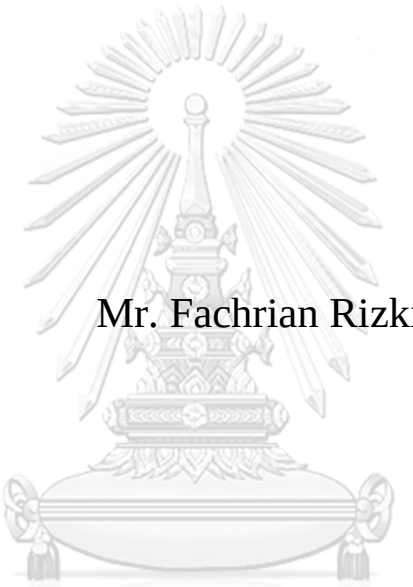
The Corporate Criminal Misconducts against the Environment: the Comparative Study of Indonesia, Thailand, and South Africa

Mr. Fachrian Rizki



A Thesis Submitted in Partial Fulfillment of the Requirements
for the Degree of Master of Laws in Business Law
FACULTY OF LAW
Chulalongkorn University
Academic Year 2022

ความรับผิดทางอาญาขององค์กรธุรกิจเกี่ยวกับสิ่งแวดล้อม: กรณีการศึกษาเปรียบเทียบของประเทศอินโดนีเซีย ประเทศไทย และประเทศแอฟริกาใต้

นายฟาเรียน ริสกี้

วิทยานิพนธ์นี้เป็นส่วนหนึ่งของการศึกษาตามหลักสูตรปริญญานิติศาสตรมหาบัณฑิต
สาขาวิชากฎหมายธุรกิจ ไม่สังกัดภาควิชา/เทียบเท่า
คณะนิติศาสตร์ จุฬาลงกรณ์มหาวิทยาลัย
ปีการศึกษา 2565

Thesis Title	The Corporate Criminal Misconducts against the Environment: the Comparative Study of Indonesia, Thailand, and South Africa
By	Mr. Fachrian Rizki
Field of Study	Business Law
Thesis Advisor	Assistant Professor Dr. NATCHAPOL JITTIRAT

Accepted by the FACULTY OF LAW, Chulalongkorn University in Partial Fulfillment of the Requirement for the Master of Laws

..... Dean of the FACULTY OF LAW
(Assistant Professor Dr. PAREENA SRIVANIT)

THESIS COMMITTEE

..... Chairman
(Professor Dr. Mark Findlay)
..... Thesis Advisor
(Assistant Professor Dr. NATCHAPOL JITTIRAT)
..... Examiner
(Professor Dr. KANAPHON CHANHOM)

ฟาเรียน ริสกี้ :
ความรับผิดทางอาญาขององค์กรธุรกิจเกี่ยวกับสิ่งแวดล้อม: กรณีการศึกษาเปรียบเทียบของประเทศอินโดนีเซีย ประเทศไทย และประเทศแอฟริกาใต้. (The Corporate Criminal Misconducts against the Environment: the Comparative Study of Indonesia, Thailand, and South Africa) **อ.ที่ปรึกษาหลัก : ผศ. ดร.ณัชพล จิตติรัตน์**

มาตรา 96 อนุมาตรา (b) มาตรา 151 และมาตรา 161B ของพระราชบัญญัติหมายเลข 3 ของปี 2020 ซึ่งประกาศใช้ขึ้นเพื่อแก้ไขพระราชบัญญัติหมายเลข 4 ของปี 2009 เกี่ยวกับการทำเหมืองแร่และถ่านหินของประเทศอินโดนีเซียได้วางรากฐานในการกำหนดความผิดฐานประมาทเลินเล่อของนิติบุคคลที่ละเลยภาระผูกพันภายหลังจากการทำเหมืองแร่จนมีผลกระทบต่อสิ่งแวดล้อมดังนั้น ซึ่งหากนิติบุคคลไม่ปฏิบัติตามภาระผูกพันหลังการทำเหมืองแร่ นิติบุคคลดังกล่าวจะได้รับโทษทั้งทางปกครองและทางอาญา อย่างไรก็ตามเป็นที่ถกเถียงกันว่าการกำหนดบทลงโทษทั้งทางปกครองและทางอาญาต่อนิติบุคคลและเจ้าหน้าที่ผู้รับผิดชอบนั้นไม่ได้สัดส่วนและก่อให้เกิดผลในการป้องปรามอาชญากรรมที่เกินสมควร โดยเชื่อว่าการกำหนดบทลงโทษทางปกครองเพียงอย่างเดียวก็สามารถก่อเกิดสภาพบังคับและป้องกันการประกอบอาชญากรรมดังกล่าวได้ จากประเด็นดังกล่าวก่อให้เกิดปัญหาของการวิจัยเรื่องความได้สัดส่วนของการบังคับใช้โทษทางอาญาในความผิดฐานนิติบุคคลละเลยภาระผูกพันภายหลังจากการทำเหมืองแร่จนมีผลกระทบต่อสิ่งแวดล้อม ซึ่งผู้วิจัยได้ทำการเปรียบเทียบบทบัญญัติของประเทศไทยและประเทศแอฟริกาใต้ในค้นหามาตรการที่เหมาะสมในการป้องกันพฤติกรรมดังกล่าว

สาขาวิชา	**กฎหมายธุรกิจ**	**ลายมือชื่อนิสิต** .....
ปีการศึกษา	2565	**ลายมือชื่อ อ.ที่ปรึกษาหลัก** .....

6484010134 : MAJOR BUSINESS LAW
KEYWORD: corporate post-mining obligations against the environment; negligence of corporate post-mining obligations against the environment; combined imposition of administrative and criminal sanctions

Fachrian Rizki : The Corporate Criminal Misconducts against the Environment: the Comparative Study of Indonesia, Thailand, and South Africa. Advisor: Asst. Prof. Dr. NATCHAPOL JITTIRAT

Article 96 Subsection (b), Article 151 and Article 161B of the Act Number 3 of 2020 on the Amendment of the Act Number 4 of 2009 on Mineral and Coal Mining of Indonesia create a strong foundation for the regulation and punishment of negligence of corporate post-mining obligations against the environment. Accordingly, if a corporation fails to comply with its post-mining obligations against the environment, the corporation will be subjected to a combined imposition of administrative and criminal sanctions. However, it is argued that the imposition of both administrative and criminal sanctions on the corporation and its responsible officers is disproportional and over-deterrent, believing that imposing administrative sanctions only has met the due deter to the negligence of corporate post-mining obligations against the environment. This brings into question whether or not the combined imposition of administrative and criminal sanctions is disproportional and over-deterrent. Thus it will be compared to the provisions of Thailand and South Africa, in regulating and punishing the negligence of corporate post-mining obligations, to acknowledge the measures applied by the compared jurisdictions.

The purpose of this research is to understand the fundamental concept of corporate criminal misconduct against the environment and its development from the global perspective; to understand whether a combined imposition of administrative and criminal sanctions against the negligence of corporate post-mining obligations is necessary; and to acknowledge how the laws of the compared jurisdictions regulate and punish the negligence of corporate post-mining obligations against the environment.

Field of Study:	Business Law	Student's Signature .....
Academic Year:	2022	Advisor's Signature .....

ACKNOWLEDGEMENTS

First of all, let us pray to Allah the Almighty, the lord of the world, the master of the day later, and the creator of the universe. His mercy makes me able to accomplish this thesis research entitled: THE CORPORATE CRIMINAL MISCONDUCTS AGAINST THE ENVIRONMENT: THE COMPARATIVE STUDY OF INDONESIA; THAILAND; AND SOUTH AFRICA.

This thesis research is presented to fulfil one of the requirements for accomplishing a Master of Law Degree in the LL.M. in Business Law (International Programme), Faculty of Law, Chulalongkorn University. Peace and salutation be upon the messenger our Prophet Muhammad SAW, the last messenger of Allah SWT, who has shown us the right way of Islam, so we can live happily on the earth and the hereafter.

I would like to express my special gratitude to my supervisor, Assistant Professor Dr. Natchapol Jittirat, for the valuable assistance, support, and motivation for the completion of this thesis research. I would like to express my deep gratitude to my inspiring examiner, Professor Dr. Mark Findlay and Professor Dr. Kanaphon Chanhom who have given me valuable advice and suggestions for the improvement of this thesis research. I would also like to extend my gratitude to all of my lecturers, especially

the lecturers from the LL.M in Business Law (International Programme), Faculty of Law, Chulalongkorn University. Further, I would also like to deliver my greatest thanks to my favourite staff of the programme, Ms. Sirithida Ngeanthong, for all of her kind and helpful assistance and guidance for the completion of my study at the Faculty of Law, Chulalongkorn University.

In the end, the greatest honor and appreciation would be finally dedicated to my beloved parents, Edi Azwar and Rohani, for every single priceless prays; inspiration, and encouragement they have given to me, and also my sincere thanks and love are also dedicated to my beloved brother and sisters, thank you so much from my deepest heart.

Another remarkable thing is having genuine support from all of my friends and colleagues. For all of my friends and colleagues, thank you for all of your meaningful assistance and motivation.

Fachrian Rizki

TABLE OF CONTENTS

Page

Chapter I
Introduction

Under this Chapter, there will be elaborated the concept of corporate criminal misconduct against the environment that will be discussed further in each of this Chapter's parts, *inter alia* research background; problem identifications; scope and research objectives; hypothesis; contributions of the research; literature review; research methodology and research scheme.

A. Research Background

The economic growth of Indonesia has never been apart from the contribution of the mineral and coal mining sector to the Indonesian non-tax state income. Up to November 2022 itself, the mineral and coal mining sector have contributed to the non-tax state income for a sum of USD9.9 billion which is calculated as 152 percent of the targeted non-tax state income, derived from mineral and coal mining sector, of the year.[1] It can be said that the mineral and coal mining sector is vital to the national economic growth of Indonesia.

It is a certainty that mineral and coal mining activities should be subjected to a sequence of regulations bearing legal obligations to the mining supply chains, primarily, the legal obligations of the mining corporations against the environment. In fact, the legal obligations are given even before the corporations obtain the mining licenses from the central government. Environmental impact analysis against the planned mining location, for instance, is one of the mandatory requirements to be fulfilled before the corporations may finally obtain the mining licenses and begin their mining operations.[2]

[1] Ministry of Energy and Mineral Resources, 'Minerba Online Data Indonesia' (*MODI*, 22 November 2022) <https://modi.esdm.go.id/filter?tahun=2022> accessed 22 November 2022.
[2] See Act Number 11 of 2020 on Job Creation, a 1 (11) (ID) and Act Number 32 of 2009 on Protection and Management of the Environment, a 22 (1) (ID).

The fulfilment of pre-mining obligations is indeed obligatory to the corporations, thus leaving them *nolens volens* fulfilling the obligations to obtain the mining licenses. It can be said that regulating pre-mining obligations is among the crucial steps in preventing environmental damages resulting from unauthorised mining activities.[3] However, there are many small mining businesses, owned by local residents yet lack of mining licenses, operating their mining activities in many parts of Indonesia.[4] Nevertheless, the government of Indonesian has regulated these unauthorised mining activities under Act Number 4 of 2009 on Mineral and Coal Mining (hereinafter referred to as the 2009 Mineral and Coal Mining Act) and under Act Number 3 of 2020 on the Amendment of the Act Number 4 of 2009 on Mineral and Coal Mining (hereinafter referred to as the 2020 Mineral and Coal Mining Act), thus considering such action to be criminal misconduct against the environment which punishable by imprisonment and/or fine.

Unfortunately, the regulations on post-mining operations are somehow looser compared to the regulations on pre-mining operations. It is shown by legal feebleness in regulating and punishing negligence of corporate post-mining obligations.[5] By referring to Article 96 Subsection (c) of the 2009 Mineral and Coal Mining Act, the mining corporation was obliged to carry out management and monitoring, including reclamation and post-mining activity (hereinafter referred to as corporate post-mining obligations), against the environment surrounding the mining areas. However, if the mining corporation tends to neglect its legal obligations, it might only be subjected to administrative sanctions as set in Article 151 of the 2009 Mineral and Coal Mining Act, meaning that such negligence would not be prosecuted before the criminal court. Nevertheless, by the enactment of the 2020 Mineral and Coal Mining Act, as an amendment to the 2009 Mineral and Coal Mining Act, the negligence of corporate post-mining obligations is eventually punishable by criminal sanctions.[6]

[3] See Act Number 32 of 2009 on Protection and Management of the Environment, a 14 (e) (ID).
[4] Syarif, 'Ministry of Energy and Mineral Resources Says That There are 2.741 Illegal Mining in Indonesia' (*Media Nikel Indonesia*, 28 September 2021) <https://nikel.co.id/kementerian-esdm-sebut-ada-2-741-tambang-liar-ada-di-ri/> accessed 3 October 2022.
[5] See Act Number 3 of 2020 on the Amendment of the Act Number 4 of 2009 on Mineral and Coal Mining, a 151 (2) (ID).
[6] Ibid, a 161B (1) (ID).

Regardless of the remarkable development of the 2020 Mineral and Coal Mining Act that finally considers the importance of criminalising the negligence of corporate post-mining obligations, the regulation on corporate post-mining obligations is yet still considerably unjust; arbitrary; infirm, and lacks environmentally-friendly perspectives. It was shown by the setback in the regulation of the 2020 Mineral and Coal Mining Act,[7] which deemed loosening corporate post-mining obligations against the environment and somehow creating legal loopholes and widening the possibility of the corporation to "legally" damage the environment and the community.

Before the enactment of the 2009 Mineral and Coal Mining Act and the 2020 Mineral and Coal Mining Act (hereinafter referred to as the Indonesian Mineral and Coal Mining Acts), mining activities were regulated under Act Number 11 of 1967 on the Basic Principles of Mining (hereinafter referred to as the 1967 Basic Principles of Mining Act), whereby corporate misconducts against the environment, including negligence of corporate post-mining obligations, have never been taken into consideration. During this time, the deviant corporations were seemingly unreachable by the applicable laws making them unimpededly executing their deviant behaviour against the environment. These were due to the notion that a corporation is not a subject of criminal law because the corporation is a non-natural entity (*recht persoon*).[8] Consequently, the corporations were freed from any kind of sanctioning, neither administratively nor criminally.

Undeniably, the effects of this corporate negligence, either directly or indirectly, are even more massive compared to the recognised corporate crimes within the 2020 Mineral and Coal Mining Act which are closely related to unauthorised mining activities. These are due to the mining activities are, undoubtedly, inseparable from the livelihood of the people surrounding the mining areas, whereby the impacts of the mining activities are not only limited to the environment but also to the socio-

[7] Cf Act Number 3 of 2020 on the Amendment of the Act Number 4 of 2009 on Mineral and Coal Mining, a 96 (b) (ID); and Act Number 4 of 2009 on Mineral and Coal Mining, a 96 (c) (ID).
[8] Ridho Kurniawan and Siti Nurul Intan Sari D, 'Pertanggungjawaban Pidana Korporasi Berdasarkan Asas Strict Liability' (2014) 1 Jurnal Yuridis 153, 161.

economic of the local residents.[9] Moreover, the continuing presence of the negligence of corporate post-mining obligations against the environment will also be affecting the integrity of the mining industry. Accordingly, the 2020 Mineral and Coal Mining Act is expecting corporations to carry out management or monitoring of the possible direct or indirect impacts of their mining activities on the environment and the local people.

Despite the specified obligations, in practise, some corporations tend to neglect their obligations with the grounds that the reclamation and post-mining activity (corporate post-mining obligations) are the obligations of the government, not the corporations,[10] thus leaving the mining areas to be abandoned and forgotten. As an example, between 1979 and 2004, when the 1967 Basic Principles of Mining Act was still in force, Aneka Tambang, Co. Ltd.[11] (hereinafter referred to as PT ANTAM) was carrying out mining operations in Gebe Island which is located in East Halmahera Regency, North Maluku Province of Indonesia.[12] Miserably, PT ANTAM preferred to neglect its post-mining obligations against the exploited areas of Gebe Island, leaving the Gebe Island to be damaged, uncultivable, and abandoned.[13] Sadly, the legal feebleness in regulating and punishing negligence of corporate post-mining obligations seemingly led PT ANTAM to be untouchable by the positive law of Indonesia. Consequently, PT ANTAM escaped from any kind of sanctioning, neither administratively nor criminally, while the environment and the local residents were dying of and suffering from the direct and indirect impacts of its negligence.[14]

Even if the 1967 Basic Principles of Mining Act has been revoked by the enactment of the 2009 Mineral and Coal Mining Act and the 2020 Mineral and Coal Mining Act finally has taken into force, the regulations on corporate post-mining

---

[9] Afidah Nur Rizki and Amrie Firmansyah, 'Kewajiban Lingkungan atas Reklamasi dan Pasca Tambang Pada Perusahaan Sektor Pertambangan di Indonesia' (2021) 6 EKOMBIS Sains 37, 38.
[10] Ibid.
[11] PT ANTAM is one of the Indonesian State-Owned Enterprises operating mining-related businesses, including trade; industry; and transportation of the mineral resources;
[12] Della Syahni, 'The Operation of PT Antam is Polluting the East Halmahera Coast' (*MONGABAY*, 4 May 2021) <https://www.mongabay.co.id/2021/05/04/tambang-antam-cemari-pesisir-halmahera-timur/> accessed 3 October 2022.
[13] JATAM, 'The Grief of Indonesian Small Islands in the Grip of Mine' (*JATAM*, 22 July 2021) <https://www.jatam.org/nestapa-pulau-kecil-indonesia-dalam-cengkeraman-tambang/> accessed 22 November 2022.
[14] Syahni (n 11).

obligations are still infirm. It is shown by the circumstance that the Indonesian Mineral and Coal Mining Acts yet cannot accommodate the fundamental needs of the people for just, firm, and environmentally-friendly regulations regulating mining activities. Even though Article 163 of the 2009 Mineral and Coal Mining Act and Article 161B of the 2020 Mineral and Coal Mining Act finally guarantees that deviant corporations might be held criminally liable, by imposing criminal liabilities upon their Director or Administrator, for neglecting their post-mining obligations, however, the applicability of these articles are still problematic.

Even if this research will not further discuss the law enforcement of the Indonesian Mineral and Coal Mining Acts, in particular the 2020 Mineral and Coal Mining Act, however, this research will further discuss the regulation and punishment of the negligence of corporate post-mining obligations to acknowledge whether or not the regulation and punishment of such negligence have been proportional and sufficient in eradicating the negligence of corporate post-mining obligations against the environment. It is interesting since, on the one hand, the imposition of both administrative and criminal sanctions is deemed over-deterrent, believing that the deterrence effect of administrative sanctions alone is considerably high.[15] However, on the other hand, the imposition of administrative sanctions alone, such as fines even with relatively high amounts, is deemed disproportional to the overwhelming profits resulting from the corporate business activities, considering that fines and other administrative sanctions in the perspective of the corporation are considerable as 'cost of doing businesses'.[16]

Therefore, to acknowledge whether or not the regulation and punishment of the negligence of corporate post-mining obligations are proportional and sufficient, a comparative legal study is necessary to be conducted. It is beneficial to conduct comparative legal studies to understand different approaches applied by different countries, with the primary objective to find a better reach of laws in regulating and punishing negligence of corporate post-mining obligations against the environment.

[15] Anonymous, 'Corporate Crime: Regulating Corporate Behaviour through Criminal Sanctions' (1979) 92 Harvard Law Review 1227, 1373.
[16] Nicholas T. Schnell, 'Beyond All Bounds of Civility: An Analysis of Administrative Sanctions against Responsible Corporate Officers' (2017) 42 Journal of Corporation Law 711, 715.

The comparative legal analysis will be conducted by comparing the rules within the Indonesian Mineral and Coal Mining Acts, in particular the 2020 Mineral and Coal Mining Act, to the rules of some other jurisdictions which regulate and punish negligence of corporate post-mining obligations. The selected foreign jurisdictions are Thailand and South Africa, because despite the similarity in their legal tradition, more importantly, there are economic and development similarities of Thailand and South Africa to Indonesia. Through this comparative legal study, it is expected that there will be acknowledged the laws considered have a preferable reach in the regulation and punishment of the negligence of corporate post-mining obligations and may contribute more directly to protecting the environment and avoiding damages. Finally, it is hoped that Indonesia may transplant the deemed preferable provisions in the regulation and punishment of the negligence of corporate post-mining obligations so that the future mining regulation of Indonesia can be a just, firm, and environmentally-friendly regulation which bring about justice and order to all of the mining stakeholders.

Based on the aforementioned background, it is necessary to research **"The Corporate Criminal Misconducts against the Environment: the Comparative Study of Indonesia, Thailand, and South Africa"** to provide broader views on the proportionality in the imposition of both administrative and criminal sanctions against the negligence of corporate post-mining obligations against the environment and to discover the better laws, with a preferable reach, in regulating and punishing negligence of corporate post-mining obligations against the environment through a comparative legal study.

B. Problem Identifications

According to the research background, there are several questions arise, namely:

a. What the fundamental concept of corporate criminal misconduct against the environment is and how is its development in the global perspectives?

b. Whether a combined imposition of administrative and criminal sanctions against the negligence of corporate post-mining obligations is necessary?

c. How do the laws of the compared jurisdictions regulate and punish the negligence of corporate post-mining obligations against the environment?

C. Scope and Research Objectives

1. Scope of Research

To limit the discussion of this research and to achieve the research objectives, therefore this research will focus on discussing the Indonesian Mineral and Coal Mining Acts and some other mining-related and/or environmentally-related legislations of Indonesia. There will also be discussed the corporate criminal misconduct against the environment as well as negligence of corporate post-mining obligations against the environment according to the Indonesia and global perspectives. Moreover, this research will also focus on comparing the mining laws of Thailand and South Africa which regulate post-mining obligations, to the laws of Indonesia.

2. Research Objectives

With the composed Problem Identifications, this research is intended as follows:

a. To understand what is the fundamental concept of corporate criminal misconduct against the environment and how is its development in the global perspective.

b. To understand whether a combined imposition of administrative and criminal sanctions against the negligence of corporate post-mining obligations is necessary.

c. To acknowledge how the laws of the compared jurisdictions regulate and punish the negligence of corporate post-mining obligations against the environment.

D. Hypothesis

The formulated hypothesis of this research is that "the 2020 Mineral and Coal Mining Act of Indonesia which provides a combined imposition of administrative and criminal sanctions against the negligence of corporate post-mining obligations proportionate and not over-deterrent comparing to the relevant provisions of Thailand and South Africa."

E. Contributions of the Research

The corporate misconducts, in particular negligence of corporate post-mining obligations against the environment, within the scope of the mineral and coal business undeniably create undue difficulties for the people surrounding the mining areas. In this regard, this research will be beneficial to:

1. Local Residents

As the greatest impacts of the negligence of the corporate post-mining obligations are experienced by the local residents surrounding the mining areas, therefore this research will deliver its benefits primarily to the local residents. This research will be one of the ways for the local residents in expressing their desperation against the unjust; infirm; and lack of environmentally-sound applicable laws in regulating and punishing the negligence of corporate post-mining obligations against the environment which, directly or indirectly, destructing the environment and socio-economic of the local residents. This research will also be expected to promote just, firm, and environmentally-friendly laws in regulating and punishing negligence of corporate post-mining obligations within the territory of the Republic of Indonesia.

2. Corporations

The content of this research will also be beneficial to corporations because the research will discuss comprehensively the necessity of corporations to carry out their post-mining obligations against the

environment. Therefore, it is expected that the corporations may obtain a broader view and understanding of the regulation and punishment of the negligence of corporate post-mining obligations against the environment, and finally, the corporations may also benefit from the research as a reference to behave in accordance with the mining regulations to protect the integrity of the mining industry.

3. Future Researchers

This research will also be beneficial to future researchers researching similar and/or related topics, in this regard corporate criminal misconduct against the environment particularly the negligence of corporate post-mining obligations against the environment. This research can be used as a reliable reference for any other relevant research conducted in the future.

F. Literature Review

1. Indonesian Mineral and Coal Mining Acts

Before the enactment of the 2009 Mineral and Coal Mining Act and the 2020 Mineral and Coal Mining Act (the Indonesian Mineral and Coal Mining Acts), mining activities were regulated under Act Number 11 of 1967 on the Basic Principles of Mining (the 1967 Basic Principles of Mining Act). The Act was in force for the last forty-two years, before it was finally revoked by the enactment of the 2009 Mineral and Coal Mining Act. The 1967 Basic Principles of Mining Act, can be said, was “too basic” to be able to cover all of the necessities in regulating mining operations. It was due to the Act was enacted in the absence of applicable law in the mining sector, thus leading to the Act does not comprehensively mention what are the post-mining obligations of the corporations against the environment, thus leading the Act to be unclear yet lack of environmentally-friendly perspectives.

The only article mentioning the post-mining obligations of the corporations is Article 30 of the 1967 Basic Principles of Mining Act,

whereby the article only emphasises the health impacts resulting from the closed mining areas against the surrounding community, while the environmental impacts of the closed mining areas are left disregarded.[17] Whereas, either directly or indirectly, the environment is undoubtedly being effected by the mining activities as well. As mentioned by Saini, mining activities, in particular coal mining activities, are closely related to the "degradation of natural resources and destruction of flora and fauna".[18] Therefore, mining activities, including reclamation and post-mining activity, should always be regulated appropriately.

After the enactment of the 2009 Mineral and Coal Mining Act, the mining regulations were developed in a much better way, whereby the mining activities were finally subjected to more sustainable and environmentally-friendly principles.[19] Moreover, the Act finally stipulated several legal obligations of corporations in carrying out mining businesses, including paying attention to environmental carrying capacity.[20] This Act became the first Act that eventually obliged corporations to carry out management and monitoring, including reclamation and post-mining activity, against the environment surrounding the mining areas, as stipulated in Article 96 Subsection (c) of the 2009 Mineral and Coal Mining Act.

After some time, the 2009 Mineral and Coal Mining Act was amended for the reasons that the Act yet could not keep up with the development; problems; and legal needs of the mineral and coal mining industries.[21] Thus, the 2020 Mineral and Coal Mining Act finally takes into effect and amends several articles of the 2009 Mineral and Coal Mining Act, including Article 96 of the Act.

---

[17] See Act Number 11 of 1967 on the Basic Principles of Mining, a 30 (ID).
[18] Prafful Saini, 'Impact of Coal Mining on the Environment and the Climate' (2020) 1 Law Essentials Journal 15, 15.
[19] See Act Number 4 of 2009 on Mineral and Coal Mining, a 2 (d) (ID).
[20] Ibid, a 95 (e) (ID).
[21] Ibid, considering (c) (ID).

The 2020 Mineral and Coal Mining Act is somehow relaxing the corporate post-mining obligations against the environment. The most prominent changing is that Article 96 Subsection (c) of the 2020 Mineral and Coal Mining Act is no longer obliging the corporation to carry out both reclamation and post-mining activity against the environment. The amended article lets the corporation decide either to carry out one or both the post-mining obligations by amending the word "reclamation 'and' post-mining activity", to "reclamation 'and/or' post-mining activity".[22] Reclamation and post-mining as part of the management and monitoring processes against the environment (which in this research referred to as "post-mining obligations") are two different processes that also result in two different outputs. The purpose of reclamation is to restore the physical condition of the environment, while the purpose of post-mining is to restore both the physical condition of the environment and the socio-economic of the people surrounding the mining areas.[23] In this regard, the amendment of Article 96 Subsection (c) of the 2009 Mineral and Coal Mining Act is undoubtedly relaxing the corporate post-mining obligations against the environment.

Even if the 2020 Mineral and Coal Mining Act, unsuitably, loosened the rule on corporate post-mining obligations, nevertheless the 2020 Mineral and Coal Mining Act eventually recognises the importance of criminalising negligence of corporate post-mining obligations. Interestingly, the 2020 Mineral and Coal Mining Act applies a combined imposition of administrative and criminal sanctions against the negligence of corporate post-mining obligations, meaning that the administrative sanction will be imposed upon the deviant corporation while the criminal sanction will be imposed upon the responsible corporate officers. Moreover, compared to the 2009 Mineral and Coal Mining Act, the 2020 Mineral and Coal Mining Act finally adds fines as one of the administrative sanctions for the negligence of the corporate post-

[22] Cf Act Number 3 of 2020 on the Amendment of the Act Number 4 of 2009 on Mineral and Coal Mining, a 96 (b) (ID); and the Act Number 4 of 2009 on Mineral and Coal Mining, a 96 (c) (ID).
[23] Rizki (n 8) 40.

mining obligations.[24] This is a remarkable development in the punishment of the negligence of corporate post-mining obligations in the history of Indonesian mining regulations.

Regardless of the development of the 2020 Mineral and Coal Mining Act, what brings to mind is whether or not the combined imposition of administrative and criminal sanctions against the negligence of corporate post-mining obligations is proportional and not over-deterrent. This is due to the notion arguing that a combined imposition of administrative and criminal sanction against a deviant corporation is deemed over-deterrent, believing that the imposition of administrative sanctions, particularly in the form of fines, has presence a high deterrence effect against the deviant corporation.

2. Corporate Criminal Misconducts against the Environment

Since the earliest of the twelfth century, the European civil law countries were trying to develop the concept of 'persons' which is not limited only to a natural person but also juristic person, such development led to a question of whether or not the juristic person may be held criminally liable for every misconduct it performed just like a natural person be held liable for his/her criminal behaviour.[25] Maitland argues that a juristic person cannot commit any crimes,[26] due to the reason that, simply, the concept of corporate criminal liabilities was likely not developed in civil law countries, different from common law countries, thus the corporate criminal liabilities were deemed to be held upon the individual actors.[27] This was influenced by a notion that legal entities were lack mental state, arguing that a corporation was not similar to an individual whose mental state can be shown by his physical action, making it unable to determine its moral culpability.[28] Nevertheless, due to its irrelevancy to the legal and social development, in particular the increasing number of corporate misconducts, the view has been changed and developed to a more

[24] Cf Act Number 3 of 2020 on the Amendment of the Act Number 4 of 2009 on Mineral and Coal Mining, a 151 (2) (ID); and Act Number 4 of 2009 on Mineral and Coal Mining, a 151 (2) (ID).
[25] Thomas J Bernard, 'The Historical Development of Corporate Criminal Liability' (1984) 22 Criminology 3, 3.
[26] Ibid, 5.
[27] Ibid, 3.
[28] Anonymous, 'Corporate Crime: Regulating Corporate Behaviour through Criminal Sanctions', 142.

advance thinking. As a result, the identification approach was developed by which the mental state of the legal entities might be shown by the mental state of their employers,[29] leading the legal entities can be held criminally liable just like human entities.

In Indonesia, the identification approach of corporate criminal liabilities was initially introduced by the enactment of the Act Number 23 of 1997 on Management of the Environment, making a corporation alone can be held criminally liable for its misconduct against the environment.[30] Beforehand, the concept of vicarious liability was widely accepted in dealing with corporate wrong-doing saying that the blameworthiness of corporate misconduct will be laid on its employer.[31] However, during its development, the concept of corporate criminal liabilities never being implemented properly in Indonesia. Deviant corporations always find ways to circumvent the applicable laws leading them to escape from criminal liabilities.

In relation to this, the 2009 Mineral and Coal Mining Act has recognised the notion that corporate blameworthiness will be laid upon its high officials as well as the corporation itself.[32] It simply means that the physical punishment will be borne upon the high officials of the corporation, while the non-physical punishment will be imposed upon the corporation. Thus, the negligence of corporate post-mining obligations against the environment which is deemed as criminal misconduct and, under several circumstances, as a regulatory offence will be subjected to the applicable punishment within the 2020 Mineral and Coal Mining Act.

3. Foreign Laws Regulating Post-Mining Obligations

The regulations on post-mining obligations which are implemented in some other jurisdictions will be very beneficial to discuss. Different countries,

[29] Meaghan Wilkinson, 'Corporate Criminal Liability: the Move to Recognising the Genuine Corporate Fault' (2003) 9 Canterbury Law Review 142, 142.
[30] See Act Number 23 of 1997 on Management of the Environment, a 45 (ID).
[31] Rzk, 'Metamorphosis of Indonesian Legal Entities' (*Hukum Online.com*, 14 October 2007) <https://www.hukumonline.com/berita/a/metamorfosis-badan-hukum-indonesia-hol17818> accessed 18 March 2022.
[32] See Act Number 4 of 2009 on Mineral and Coal Mining, a 163 (1) (ID).

certainly, have their different approaches to regulating and punishing negligence of corporate post-mining obligations against the environment, notwithstanding the main objective of laws is to make all mining activities carried out orderly. To acknowledge the countries' approaches in regulating corporate mining activities, therefore there will be selected two different jurisdictions as a comparison to the Indonesian Mineral and Coal Mining Acts, in particular the 2020 Mineral and Coal Mining Act. The selected foreign jurisdictions are Thailand; and South Africa, whereby the laws regulating post-mining obligations will be elaborated on and discussed to get a better insight into the laws of the selected foreign jurisdictions.

In Thailand, mining operations are regulated under the Thai Minerals Act B.E. 2560 (2017), which is the most recent mining regulation of Thailand. The Act consists of 189 sections that comprehensively regulate mining activities, including defining some legal terms used within the Act. The Act has stipulated that corporation is obliged to carry out rehabilitation during and after the closure of the mining activities to the environment, according to the approved rehabilitation plans by the minerals committee of Thailand.[33] Moreover, the failure in complying with this obligation will lead to the rise of civil liability in the form of compensations which will be reimbursed to the impacted individuals or communities.[34] Moreover, the failure to place security deposits will be subject to administrative sanction in the form of revocation of mining licenses.[35] Interestingly, the Thai Minerals Act B.E. 2560 (2017) also recognises the criminalising of the negligence of corporate post-mining obligations against the environment,[36] other than the civil liability approach.

In South Africa, mining operations are regulated under the Act Number 49 of 2008 on Mineral and Petroleum Resources Development, which is an amendment and the most recent mining regulation of the country. This Act amends a number of provisions of the previous Mineral and Petroleum

[33] See Thai Minerals Act, B.E. 2560 (2017), s 68 (8) (TH).
[34] Ibid, s 70 (TH).
[35] Ibid, s 70 (TH).
[36] Ibid, s 160 (1) (TH).

Resources Development Act, which was deemed no longer to meet the development of the mining industry. Concerning the post-mining obligations, the Act stipulates that the holders of the mining rights remain responsible for any environmental liability, pollution, or ecological degradation before they finally cease their mining operation.[37] It is interesting since the mining corporations need to fulfil their post-mining obligations, because the fulfilment of the post-mining obligations is mandatory, before the Ministry of Mineral Resources and Energy of South Africa may finally issue a closure certificate for the concerned mining corporations.[38] The fulfilment of the corporate post-mining obligations will primarily be assessed by the related governmental departments to inspect the compliance with the conditions of the environmental authorisation.[39] Finally, after the related governmental departments confirm corporate compliance, then the closure certificate may finally be issued. If the corporation fails to comply with the mandatory post-mining obligations, the competent authority will not issue the closure certificate making the mining activities deemed still in operation. Nevertheless, the Act does not clearly specify the applicable punishments for the negligence of corporate post-mining obligations against the environment.

G. Research Methodology

1. Type and Research Approach

The type of this research will be normative legal research which is intended to describe a body of law and how it applies.[40] This normative legal research will be done by researching library materials with the objective to study the legislation by examining all relevant laws and regulations to the research. The method will describe and explain comprehensively whether or

[37] See Act Number 49 of 2008 on Mineral and Petroleum Resources Development Amendment Act, s 43 (1) (ZA).
[38] Ibid.
[39] Ibid, s 43 (5) (ZA).
[40] Michael McConville and Wing Hong Chui, *Research Methods for Law* (Edinburgh University Press 2007) 19.

not the Indonesian Mineral and Coal Mining Acts, particularly the 2020 Mineral and Coal Mining Act, have been proportional and sufficient in regulating and punishing the negligence of corporate post-mining obligations against the environment. Furthermore, this method will also be beneficial in the comparative legal analysis processes of the laws of the compared jurisdictions to the Indonesian Mineral and Coal Mining Acts, in particular the 2020 Mineral and Coal Mining Act.

2. Data Sources

This research uses the secondary data source obtained through library research. The secondary data covers:

a. Primary Sources

The primary sources can be found by collecting case law and any other relevant legislation to the research.[41] The primary sources are as follows:

1) Act Number 3 of 2020 on the Amendment of the Act Number 4 of 2009 on Mineral and Coal Mining (ID);
2) Act Number 4 of 2009 on Mineral and Coal Mining (ID);
3) Act Number 11 of 1967 on the Basic Principles of Mining (ID);
4) Act Number 11 of 2020 on Job Creation (ID);
5) Act Number 23 of 1997 on Management of the Environment (ID);
6) Act Number 32 of 2009 on Management and Protection of the Environment (ID);
7) Governmental Decree Number 78 of 2010 on Reclamation and Post-Mining (ID);
8) Thailand and South Africa laws regulating mining businesses;

[41] Ibid.

b. Secondary Sources

The secondary sources are the legal substances that explain the primary sources' documents, for instance, the research and writing of legal scholars. The secondary sources will be comprising of, but not limited to, journal articles and commentary on the case law and legislation such as legal reviews; reliable legal news; law reference books as well as books about law.[42]

c. Tertiary Sources

The tertiary sources are the materials that provide instructions and/or explanations of the primary and secondary sources, *inter alia*, legal dictionary, and any other relevant materials to the research.

3. Data Analysis

The collected data are analysed and interpreted qualitatively to answer the questions of the research problem identifications. From the data analysis, it is expected to deliver conclusions that give answers to the research problem identifications, whereby temporarily the theory of proportional justice will be used as the ground theory for this research. Moreover, the selected foreign laws and the Indonesian Mineral and Coal Mining Acts will also be analysed and interpreted qualitatively to acquire a better law, with a preferable reach and implementation, which regulates and punishes the negligence of corporate post-mining obligations against the environment.

H. Research Scheme

This research will be composed of six chapters, as follows:

Chapter I, as the introductory chapter, this chapter will consist of several subchapters discussing the background of the research; problem identifications; scope

[42] Ibid.

and research objectives; hypothesis; contributions of the research; literature review; research methodology as well as research scheme.

Chapter II, this chapter will focus on elaborating the relevant data to the research to answer the first and the second questions of the Problem Identifications. Thus, this chapter will discuss the definition of corporate criminal misconduct against the environment; the historical background of corporate criminal misconduct against the environment from the global perspective; damages resulting from corporate activities; negligence of corporate post-mining obligations against the environment; as well as the measure relating to the prevention of corporate criminal misconducts against the environment. Moreover, this subchapter will also elaborate on the concept of corporate punishment to provide a better insight into the applicable punishments for corporate criminal misconduct against the environment.

Chapter III, in this chapter I will focus on elaborating and discussing the Indonesian perspectives of corporate criminal misconduct against the environment, to answer the second and the third question of the Problem Identifications. In this regard, the chapter will elaborate on the historical background of corporate criminal misconduct against the environment in Indonesia; laws relating to corporate criminal misconduct against the environment in Indonesia; corporate post-mining obligations against the environment in Indonesia as well as the negligence of corporate post-mining obligations against the environment in Indonesia.

Chapter IV, in this chapter, I will focus on elaborating and discussing the foreign legal instruments relating to corporate criminal misconduct against the environment, to answer the third problem identification of the research. Therefore, there will be discussed each of the compared countries' perspectives, *inter alia* Thailand and South Africa, in regulating corporate criminal misconduct against the environment. Moreover, this subchapter will also discuss the Western perspectives on corporate criminal misconduct against the environment to acknowledge the foreign provisions with a better outcome in protecting the environment and avoiding environmental damage.

Chapter V, as the issues analysing chapter, initially this chapter will be comparing the laws of the selected jurisdiction, *inter alia* Indonesia; Thailand; as well as South Africa. In this regard, there will be discussed, compared, and analysed the corporate post-mining obligations; the negligence of corporate post-mining obligations against the environment; as well as the applicable punishment under the compared countries' laws. Furthermore, this subchapter will also present the legal model in regulating and punishing negligence of corporate post-mining obligations against the environment which is derived from the legal transplantation of a number of provisions that seemed to have a better outcome and may contribute more directly to protecting the environment and avoiding environmental damages.

Chapter VI, as the closing chapter, this chapter will consist of a research conclusion and recommendation relating to the composed research Problem Identifications.

Chapter II
Fundamental Concept of Corporate Criminal Misconducts against the Environment

Under this Chapter, there will be elaborated the concept of corporate criminal misconduct against the environment that will be discussed further in each of this Chapter's parts, *inter alia* definition and historical background of corporate criminal misconduct against the environment; damages resulting from corporate activities; negligence of corporate post-mining obligations against the environment; measure relating to the prevention of corporate criminal misconduct against the environment; and the concept of corporate punishment.

A. The Definition of Corporate Criminal Misconducts against the Environment

As a primary subchapter of the second chapter, this subchapter will discuss the definition of corporate criminal misconduct. The definition will not be limited to the definition stipulated by the Indonesian legislation and/or developed by legal scholars, but also derived from some other relevant foreign materials and/or definitions developed by foreign legal scholars. Moreover, it will be explained the correlation between corporate criminal misconduct and the environment afterward. This subchapter helps in understanding the definition of corporate criminal misconduct and what elements should be fulfilled to consider misconduct as corporate criminal misconduct and helps in understanding the concept of corporate criminal misconduct against the environment.

1. Definition of Corporate Criminal Misconduct

As generally known that, in the view of civil law, the natural person and legal person have an equal position before the law, meaning that both the

natural person and legal person may perform any legal actions which create rights and obligations to the natural person and the legal person. However, these two subjects of civil law have a fundamental difference in their ability in carrying out legal actions. A natural person can conduct legal actions by him/herself without the need for any intermediary. In contrast, a corporation as a legal person certainly needs the presence of a human intermediary acting for and on behalf of the corporation, meaning that the legal person does not have any capacity to carry out the legal actions by himself. Therefore, the corporation will be represented by its employees acting for and on behalf of the corporation in specific areas of interest.

Nonetheless, this employment circumstance, when connected with the view of criminal law, somehow may generate possible opportunities for the employee to commit crimes within his/her working scope, believing that neither he/she nor his/her corporation will face any criminal punishments. This is due to the commonness of the employee to their working environment, making them able to assess the ratio of profits and risks when they find the opportunities. Criminal misconduct can be committed either in the interest of the employee or in the interest of his/her corporation. As a result of this legal phenomenon, the term white-collar crime was finally established.

As frequently happened, the terms white-collar crime and corporate crime oftentimes bring about confusion in their application. This lead to the circumstance whereby the term white-collar crime and corporate crime are used interchangeably, notwithstanding corporate crime and white-collar crime are two different phenomena. Certainly, this is because both white-collar crime and corporate crime are committed within the scope of corporate business activities. Navarro has provided a prominent definition of white-collar crime, he explains that white-collar crime is ‘an overarching term that includes an array of illegal activities committed by those who occupy positions of authority or those who have access to the financial resources of an

organisation'.[43] While corporate crime by referring to Clinard and Yeager is defined as 'any act committed by corporations that are punished by the state, regardless of whether it is punished under the administrative, civil or criminal law'.[44] According to these two definitions, it is understandable that white-collar crime is a comprehensive term that includes individual crime and corporate crime. This simply means that corporate crime is a category of white-collar crime in which the crime should be committed within the scope of corporate business activities and committed for the interest of the corporation.

However, according to Baucus and Dwrokin, the definition provided by Clinard and Yeager somehow creates overlapped in defining corporate crime and illegal corporate behaviour, whereby the legal scholars believe that both corporate crime and illegal corporate behaviour are the same phenomenon thus leading to the definition used interchangeably.[45] It is suggested by Baucus and Dwrokin that corporate crime should be defined as 'violation of criminal law where the court has ruled that the firm committed a criminal act', while illegal corporate behaviour is 'violations of administrative and civil law, resolved through a variety of procedures such as consent decrees, settlements, judgments against the firm, or fines'.[46] Moreover, it is argued that the applicable enforcement and case resolve, whether through criminal law or administrative or civil law, will be the determinant in differing corporate crime and illegal corporate behaviour.[47] Nonetheless, the distinction between corporate crime and illegal corporate behaviour as suggested by Baucus and Dwrokin somehow provides uncertainty in defining corporate crime and illegal corporate behaviour in the global context, whereby Baucus and Dwrokin argue that corporate crime may be considered illegal corporate

[43] John Navarro, 'Corporate Crime' in Jay S. Albanese (ed), *The Encyclopedia of Criminology and Criminal Justice*, vol 1 (1st edn, John Wiley & Sons, Inc 2014) 1.
[44] H. Setiyono, *Kejahatan Korporasi: Analisis Victimologi dan Pertanggungjawaban Korporasi dalam Hukum Pidana Indonesia* (Bayumedia Publishing 2005) 20.
[45] Melissa S. Baucus and Terry Morehead Dworkin, 'What Is Corporate Crime - It Is Not Illegal Corporate Behavior' (1991) 13 Law & Policy 231, 232-33.
[46] Ibid, 234.
[47] Ibid, 235-36.

behaviour in some societies and vice versa,[48] thus making the definition will be depending on who deal with such phenomenon. Baucus and Dwrokin argue that the definition will be changed overtime, thus suggesting that the context of the phenomenon should be considered when dealing with such a phenomenon.[49]

Finally, by referring to Baer, corporate crime can be regarded as a form of legal mechanism aimed at establishing criminal liability to the corporation for deviant acts committed by its employees.[50] This simply means that corporate crime is a mechanism for imposing criminal liability against a corporation as the result of its employee's criminal misconduct. In this regard, Baer adds that there should be fulfilled three elements used as the basis in imposing criminal liabilities upon a corporation as the result of its employees' deviant behaviour, *inter alia*: (i) the scope of employees' authority; (ii) intention to benefit the corporation; and (iii) lack of corporate compliance defence.[51]

Under the definitions of corporate crime provided by legal scholars, it concludes that there is a disharmony of legal scholars in defining the term corporate crime. The definition of corporate crime has also developed time by time as a result of the development in the legal knowledge and the cases involving corporations are getting higher and the damages are getting worse. This development has also resulted in the recognition of deviant behaviour of corporate officials, either by its employees or by its high officials, are eventually considered as corporate crime,[52] leading the corporate officials can be held criminally liable as long as the three elements described by Baer are met.

By means of this research, the term corporate criminal misconduct will be a substitution for the term corporate crime, by the reason that the scope of

[48] Ibid, 240.
[49] Ibid.
[50] Miriam H. Baer, 'Three Conceptions of Corporate Crime (and One Avenue for Reform)' (2021) 83 Law and Contemporary Problems 1, 1.
[51] Ibid.
[52] Navarro, 'Corporate Crime', 1.

this research will not truly rely on the criminal provision which has been regulated within the criminal law provisions. Whereby this research will, one of which is to, assess the possibility of the negligence of corporate post-mining obligations being considered a corporate crime by the selected jurisdictions.

2. Corporate Criminal Misconduct against the Environment

By referring to Clinard and Yeager, corporate crime is consisting of six forms, one of which is a corporate crime in the field of environment.[53] This form of corporate crime is referred to as '*corporate environmental crime'* by some legal scholars such as Simpson; Gibbs; Rorie; Slocum; Cohen and Vandenbergh. Nonetheless, I will refer to this form of corporate crime as corporate criminal misconduct against the environment.

By referring to Topan, corporate criminal misconduct against the environment can be interpreted as '*a form of corporate deviation in carrying out its business activities which has an impact on environmental damages*'.[54] This form of corporate criminal misconduct has endangered many lives compared to the conventional crimes committed by individuals, whereby Navarro in his research gave an example of corporate criminal misconduct against environmental pollution which annually contributes to 200.000 premature deaths.[55] The case example provided by Navarro in his article, certainly, is an instance of corporate criminal misconduct which actively associated with corporate business activities, meaning that the corporation shall bear the liability by itself. Nonetheless, the corporation was deemed to lack mental state, leading to the imposition of criminal liability against the corporation is recurrently questioned.

The liability may also be imposed upon the corporation due to the failure of the corporation to advise its employee to not involving in any illegal

[53] Muhammad Topan, *Kejahatan Korporasi di Bidang Lingkungan Hidup: Perspektip Viktimologi dalam Pembaruan Hukum Pidana di Indonesia* (Nusa Media 2019), 48.
[54] Ibid, 50.
[55] Navarro, 'Corporate Crime', 2.

activities which are related to corporate business operations or the failure of the corporation to monitor its employee to avoid such deviant behaviour to occur.[56] Baer adds that a corporation can be held criminally liable for its employees' criminal behaviour when the three elements are met, in this regard the lack of corporate compliance defence.[57] Interestingly, even in the United States of America, there are no laws and regulations stating that a corporation will be criminally liable for the failure of the corporation to fulfil the corporation's compliance programme to the laws.[58]

Need to be remembered that, to make a deviant corporation be held criminally liable, corporate criminal misconducts against the environment need to be regulated within the criminal laws. This means that a non-criminal regulatory provision cannot be a legal mechanism for imposing criminal liability against the deviant corporation. For instance, in Indonesia itself, before the enactment of the 2020 Mineral and Coal Mining Act, the recognised corporate criminal misconducts against the environment were closely related to the illegal mining activities committed by small local mining businesses, thus leaving the corporate criminal misconduct against the environment committed by large corporations to be regarded as a regulatory offense. Interestingly, these large corporations certainly do not face any problems with mining licensing, because they are seemingly carrying out their business activities orderly. However, what exactly the problem is that these large corporations tend to neglect their mining obligations against the environment, thus leading to environmental damages. In fact, many corporate criminal misconducts against the environment, before the enactment of the 2020 Mineral and Coal Mining Act, were not considered corporate crimes due to the lack of criminal provisions regulating so. Therefore, these criminal misconducts against the environment were classified as regulatory offenses punishable by administrative sanctions.

[56] Baer, 'Three Conceptions of Corporate Crime (and One Avenue for Reform)', 9.
[57] Ibid, 1.
[58] Ibid, 8.

B. The Historical Background of Corporate Criminal Misconducts against the Environment in Global Perspectives

This subchapter will discuss the development of corporate criminal misconduct against the environment in a global perspective. It will be beneficial to observe; acknowledge; and understand the current global development in regulating corporate criminal misconduct.

During the development of the world economy post-global economic crisis, the global communities through their respective governments started to welcome foreign investments as much as possible with the main goal was to revitalise their countries' economies which suffered as the impact of the global economic crisis. Natural resources became the most magnetic sector of foreign investment. However, the exploitation of natural resources was not in line with environmental recovery planning, particularly through proper environmental management and monitoring provisions, making the damages resulting from the corporate activities were passing the environmental carrying capacity.

At the beginning of its recognition, environmental provisions only focused on regulating threats that endanger human health,[59] such as environmental pollution resulting from corporate business activities. This means that environmental protection, sustainability, and recovery have not been put into consideration yet. Nonetheless, environmental provisions are eventually starting to expand thus paying more attention to the survival of humankind.[60] Therefore, environmental provision finally pays attention to the importance of the protection, sustainability, and recovery of the environment to ensure the continuity of the environment for today and future generations. Serious violations against environmental regulations are deemed to be subjected to severe sanctions, even though in practise the sanctions imposed are still relatively low and do not provide a deterrent effect on perpetrators of environmental law violations.[61]

[59] Julie Adshead, 'Doing Justice to the Environment' (2013) 77 The Journal of Criminal Law 215, 215.
[60] Ibid.
[61] Ibid.

C. Damages Resulting from Corporate Activities

This subchapter will provide a further discussion on the possible damages resulting from corporate activities, whereby the scope of this discussion will not only be limited to the discussion of environmental damages and socio-economic damages but also the discussion of the possible damages that may be directly or indirectly experienced by the deviant corporations as the result of corporate criminal misconducts against the environment.

1. Environmental Damages: Direct or Indirect

Corporate business activity, in particular the business linked with the exploitation of natural resources, is closely related to the damages, either environmental or socio-economic damages, it may create. One of the most distinguished business sectors linked to the exploitation of natural resources is the mining industry. The process of mining exploration and exploitation, when operated unorderly, has always injured the environmental landscape of the mining area, which is an instance of the predicted impact of the unordered mining industry. Sadly, it is often overlooked that the unordered mining industry will always be linked with the presence of unpredicted impacts, not only against the environment but also against the socio-economic of the people living surrounding the mining areas as well as the corporation itself. In fact, the damages are most likely to present at a later time as an indirect impact of corporate criminal misconduct, meaning that the direct impacts are somehow less likely to occur.

Corporate mining activities may be resulting in a sequent of environmental damages, one of the most prominent is the physical environment of the mining areas. These environmental damages are *inter alia* water, land, and air pollution; destruction of environmental landscapes and habitats; deforestation and also erosion.[62] Furthermore, in the sector of the coal mining industry, the damages will be related to the loss of biodiversity

[62] Saini, 'Impact of Coal Mining on the Environment and the Climate', 15.

and degradation of natural resources as well as global warming.[63] These are due to the firm relationship between the mining industries to the environment of the mining areas, thus the deforestation of the environment surrounding the mining areas is unavoidable.

Deforestation may directly be resulting in the degradation of natural resources of the environment surrounding the mining areas. This activity certainly cannot be avoided by the mining corporation, but the effect may be prevented through proper management and monitoring prior to and during the mining operation.

2. Socio-economic Damages: Direct or Indirect

Corporate criminal misconduct against the environment in the mining sector is also, directly and indirectly, damaging the socio-economic of the people living surrounding the mining areas. The most prominent socio-economic damage is the loss of residents' livelihood against their environment, due to the destruction of their environmental landscape. This environmental landscape destruction, directly, will also be resulting in economic losses suffered by the affected community,[64] meaning that the harm will not be directly experienced by the community. However, often forgotten that the indirect impact may create larger and greater effects to the community, due to the circumstance that the indirect impact is difficult to predict and assess.[65]

This might be argued that the presence of the mining industry may improve the economic condition of the people by presenting alternative employment to the impacted community. Nonetheless, the mining industry will only last temporarily, meaning that the exploited natural resources will be completely exhausted making the corporation undoubtedly will stop its business activities. As a result, the people will have no choice other than to withdraw their employment offered by the corporation and return to their basic

[63] Ibid, 23.
[64] Gabrio Forti and Arianna Visconti, 'From Economic Crime to Corporate Violence: The Multifaceted Harms of Corporate Crime' in Melissa L. Rorie (ed), *The Handbook of White-Collar Crime* (1st edn, John Wiley & Sons, Inc 2020), 68.
[65] Ibid, 68-69.

occupation, nonetheless, the only thing left is the damaged and uncultivable environment.

It is undebatable that the indirect consequences of corporate crime provide broader effects on the socio-economic of the people living surrounding the mining areas because the indirect damages resulting from the corporate activities will be experienced far away after the closure of the mining areas. When the land is damaged, the local resident cannot enjoy their land for cultivation purposes any longer. Even if the presence of a corporation may contribute to the economy of the local resident, however, its presence is temporary, meaning that when the mines closed, the local resident will not enjoy any further occupational privileges, and what is left for the people is the damaged and uncultivable environment.

Corporate criminal misconduct may also create damages that may be indicated through corporate victimisation, notwithstanding that corporate victimisation is considerably hard enough to be detected at the early stage of corporate criminal misconduct. It takes years to finally realise that corporate criminal misconduct is producing victims through its indirect impacts. It is due to the notion that the corporation deemed not intending to produce victims, but their orientation for profit-maximisation frequently resulted in numbers of victims, thus making the blameworthiness of the corporation hard to prove.[66] When connecting to the mining industry, this corporate victimisation could be in the form of late-detected disease derived from water, air, and land pollution which results in casualties.

Moreover, the expansion of the mining industry, either from a national or multinational corporation, has a direct correlation to the presence of indigenous movements opposing the appearance of large-scale mining corporations impacting their land and culture.[67] These indigenous people are certainly vulnerable, to the direct or indirect environmental damages resulting

[66] Navarro, 'Corporate Crime', 4-5.
[67] Al Gedicks, 'Transnational Mining Corporations, the Environment, and Indigenous Communities' (2015) 22 Brown Journal of World Affairs 129, 130-31.

from corporate activities, due to their strong dependency on environmental resources which is essential for their lives.[68]

As Hatton argues that the view believing that environmental offence is not a serious offence is derived from the indirect effect of environmental offence which harms the people or threatens social stability.[69] Hatton explains that the presence of environmental law is not only ensuring justice for the people but also for the environment, for now, and for the future generation.[70]

3. Corporate Damages: Direct or Indirect

Undoubtedly, corporate criminal misconduct against the environment may, directly and indirectly, damage the environment and the socio-economic of the affected community. However, these are not the only damages resulting from corporate criminal misconduct against the environment, whereby the corporate itself may also experience direct and indirect damages. One of the most serious damages that may be experienced by the concerned corporation is reputational damages. According to Adshead, the present environmental offences involving corporate activities are somehow greater compared with the past, making environmental offences attract a serious stigma to the corporation.[71] The stigma may severely damage the corporate reputation by attracting public attention which results in significant monetary consequences against the deviant corporation.[72]

Unquestionably, corporations, particularly the large scale, are concerned about their good reputation in doing business, making them highly aware of the lawsuits brought by victims of environmental and human rights abuses.[73] These circumstances might damage directly or indirectly the reputation of the corporation itself, as the result of their misconduct. The reputation, in certain, is directly proportional to the corporate profitability, meaning that damages to

[68] Ibid, 131.
[69] Adshead, 'Doing Justice to the Environment', 230.
[70] Ibid.
[71] Ibid, 229.
[72] Ibid.
[73] Gedicks, 'Transnational Mining Corporations, the Environment, and Indigenous Communities', 136.

corporate reputation will be resulting in the loss of market preference; a fall in the corporation's share prices as well as a cessation of business activities.

D. Negligence of Corporate Post-Mining Obligations against the Environment

This subchapter is formulated as a further discussion of the previous subchapters that will be directing the reader to understand the concept of the negligence of corporate post-mining obligations against the environment. Therefore, the goal of this subchapter is to make clear the urgency and necessity of properly regulating and punishing the negligence of corporate post-mining obligations against the environment.

1. Definition of Negligence

As the scope of this research is focusing on the negligence of corporate mining obligation as a form of corporate criminal misconduct against the environment, therefore initially there will be discussed the definition of negligence. According to the Collins Dictionary of Law, negligence is defined as '*the tort or delict of being careless in breach of a duty to take care*'.[74] Similarly, the West's Encyclopaedia of American Law defines negligence as a '*conduct that falls below the standards of behaviour established by law for the protection of others against unreasonable risk of harm*'.[75] These definitions explicitly imply that negligence is divided into two forms, *inter alia*, civil negligence, and criminal negligence.

By means of this research, the negligence will be limited to criminal negligence only. Therefore, the definition of criminal negligence provided by West's Encyclopaedia of American Law will be applied. According to West's Encyclopaedia of American Law, criminal negligence is defined as '*the failure*

[74] W. J. Steward, 'Negligence' (*Collins Dictionary of Law*, 2006) <https://legal-dictionary.thefreedictionary.com/negligence> accessed 9 March 2023.
[75] The Gale Group, 'Negligence' (*West's Encyclopedia of American Law*, 2008) <https://legal-dictionary.thefreedictionary.com/negligence> accessed 9 March 2023.

to use reasonable care to avoid consequences that threatened or harm the safety of the public and that are the foreseeable outcome of acting in a particular manner'.[76] This definition expresses that negligence is considered a criminal act that poses threats and endangers public safety and results from careless behaviour in avoiding possible damages, in this regard relating to the violation of environmental regulations.

2. Negligence of Corporate Post-mining Obligations against the Environment

As often classified, violations of environmental regulations are considered regulatory offences, whereby there is no moral blameworthiness for regulatory offences.[77] However, in its development, the element of negligence and blameworthiness are applied to be able to criminally prosecute the violator of environmental regulations.[78]

By referring to Noyon and Langemeijer, the word 'action' within the word 'criminal action' has a positive and negative meaning, this means that an action has a positive meaning if the action has been carried out, otherwise, an action has a negative meaning if the action has not been carried out.[79] In consequence, negligence can be defined as an action that has not been carried out as it is supposed to be carried out, hence corporation may certainly be held criminally liable for its negligence.

Different from the intention in doing criminal misconduct, negligence '*does not involve the inquiry into the state of mind of the accused*',[80] meaning that the criminal culpability of the deviant corporation will be based on its failure to comply with the applied standards, in this regard the corporate post-mining obligations against the environment.

---

[76] The Gale Group, 'Criminal Negligence' (*West's Encyclopedia of American Law,* 2008) <https://legal-dictionary.thefreedictionary.com/negligence> accessed 9 March 2023.
[77] Adshead, 'Doing Justice to the Environment', 218.
[78] Ibid.
[79] Paul W. Yudoprakoso, *Pertanggungjawaban Pidana Korporasi dan Pemidanaan Korporasi* (Kanisius 2016), 34.
[80] David Kerem, 'Change We Can Believe in: Comparative Perspectives on the Criminalization of Corporate Negligence' (2012) 14 Transactions: The Tennessee Journal of Business Law 95, 109.

3. Urgency in Regulating and Punishing Negligence of Corporate Post-Mining Obligations against the Environment

Recalling the direct and indirect damages that may be experienced by the physical environment; the local community and the corporation itself as the result of the negligence of corporate post-mining obligations, the regulation and punishment of such negligence need to be taken into greater attention. Arguably, the effects of the negligence of corporate post-mining obligations are not visual, due to the effects most likely appearing after a period of time. For instance, corporate victimisation which considerably hard enough to be detected at the early stage of corporate misconduct, in this regard the negligence of corporate post-mining obligations. This circumstance will eventually be resulting in casualties since the indirect impact of the negligence of corporate post-mining obligations will not be detected at that very moment, in particular in the case of the abandonment of a closed mining area.

The formulation of proper provisions in the regulation and punishment of the negligence of corporate post-mining obligations will be directly proportional to the efficacy in preventing the negligence to occur. Undeniably, the prevention of the negligence of corporate post-mining obligations will be the initial step in eradicating such a problem. Nonetheless, proportional provisions need to be acknowledged by analysing foreign laws which deemed to have a preferable reach and at the same time deemed contributing more directly to protecting the environment and avoiding damages.

E. The Measure Relating to Prevention of Corporate Criminal Misconducts against the Environment

This subchapter will provide a further discussion on the applicable measures in preventing corporate criminal misconduct against the environment. There will be discussed the corporate pre-mining obligations and post-mining obligations to understand the importance of these two measures. This subchapter will also provide a broader insight into the necessity of paying attention to the environment surrounding

the mining areas. Finally, there will also be discussed the importance of establishing a new fresh law that may overcome or at least reduce the number of the on-going problems of the negligence of corporate post-mining obligations against the environment.

As previously discussed the urgency to regulate corporate criminal misconduct against the environment more proportionally, this subchapter will discuss the applicable measures to prevent corporate criminal misconduct against the environment by referring to the accounts of legal scholars.

Topan, in his book, argues that there should be three phases done to prevent and overcome corporate criminal misconduct against the environment, *id est*: (i) the formulation phase (legislative policy); (ii) the application phase (judicative policy); and (iii) the execution phase (executive/administrative policies).[81] These phases, according to Topan, will provide better output in handling corporate criminal misconduct against the environment. In the first phase, which is the formulation phase, Topan believes that penal reform is necessary to be performed so that any misconception of the regulations' formulation, in this regard the substantive criminal regulations, will be resulting in a great hindrance in executing the next two phases.[82] The formulation phase, I strongly believe, should be carried out proportionally, by paying more attention to any small details that correlate to the mining industry. It is due to the first phase is critical since the other two phases will be firmly dependent on its outcome. Moreover, I argue that the formulation of the regulations is not necessarily only in the form of penal reform within the criminal regulations, but also within the administrative regulations which possess criminal sanctions. It is because environmental-relating regulations, for instance, environmental protection law and mining law, are constituted as administrative regulations. Nonetheless, need to be considered that in constituting the criminal regulations, there should be alerted environmental perspectives which beneficial not only to the corporation but also to the community as well as the environment itself. Therefore penal reform will finally

[81] Topan, *Kejahatan Korporasi di Bidang Lingkungan Hidup: Perspektip Viktimologi dalam Pembaruan Hukum Pidana di Indonesia, 63.*
[82] Ibid, 63-64.

be able to start preventing and overcoming corporate criminal misconduct against the environment for the favour of the present and future generations.

It is widely accepted that the primary reason for a corporation to conduct any illegal activities is profit maximisation, meaning that the corporation has acknowledged that the cost of punishment is incomparable to the high number of profits obtained from deviant activities.[83] As explained by Cohen and Simpson, the high rates of profits and low possibility of discovery and prosecution will be directly proportional to the appearance of criminal opportunity and vice versa.[84]

As to realise a deterrence to the deviant corporation, criminal sanctioning should be severely imposed upon the corporation as well as its high official who is responsible for the deviant actions, because in fact corporation itself cannot be imprisoned thus the imprisonment should be attached to the responsible high official of the corporation, while the corporations itself should be bound by monetary penalties.[85] Moreover, the imposition of monetary penalties should be high enough to make the corporation, on the one hand, deters and on the other hand, perforce to discharge all of the profit obtained from the illegal activities.[86] Somehow, the present criminal sanctions against the corporation are incomparable with the profit it obtains through criminal misconduct since the profits are multiple times higher compared to the monetary penalties it pays. What criminal regulation should regulate is the measure to discharge all of the profits obtained by the corporation from its deviant behaviour and at the same time to impose monetary penalties in the form of monetary fines. Certainly, the corporate officials responsible for the deviant behaviour should also be imposed with proportional imprisonment. Nonetheless, the application of the criminal prosecution for both corporation and its high official is somehow raising questions on the fairness in imposing tough criminal punishment against the

[83] Anonymous, 'Corporate Crime: Regulating Corporate Behaviour through Criminal Sanctions', 1365.
[84] Sally S. Simpson and others, 'An Empirical Assessment of Corporate Environmental Crime-Control Strategies' (2013) 103 Journal of Criminal Law and Criminology 231, 233.
[85] Anonymous, 'Corporate Crime: Regulating Corporate Behaviour through Criminal Sanctions', 1365.
[86] Ibid, 1365-66.

individual which deemed less likely morally blameworthy to the corporate criminal misconducts.[87]

Simpson's model on preventing corporate criminal misconduct against the environment, suggests that corporate criminal misconduct against the environment should be regulated by corporate self-regulation that '*draws on informal social controls*' which are deemed more effective compared to deterrence-based regulation.[88] Nonetheless the deemed efficacy of self-regulation, I believe, is still inadequate to be enforced in countries in which corporations tend to neglect their legal obligations stipulated by the laws of the countries. Yet, government influences are still considered the most significant way in preventing and overcoming corporate criminal misconducts against the environment in countries which is unready to carry out corporate self-regulation. To achieve this goal, the government initially needs to carry out an appropriate legal formulation that regulates and punishes corporate criminal misconduct against the environment.

Undeniably, the formulation of a proper mining regulation that regulates and punishes negligence of corporate post-mining obligations is crucial to effectively prevent such negligence from occurring. This legal formulation, I believe, will be directly proportional to the positive impacts, not only against the environment and the local community but also against the mining corporation itself.

F. The Concept of Corporate Punishment

This subchapter will mainly discuss the concept of punishment. Thus, there will be explained comprehensively the concept of criminal punishment as well as administrative punishment punishable to the negligence of corporate post-mining obligations against the environment. In this regard, there will be argued the reasons why criminalising, other than sanctioning through administrative sanctions, is necessary to be imposed upon the negligence of corporate post-mining negligence

[87] Ibid, 1368.
[88] Simpson and others, 'An Empirical Assessment of Corporate Environmental Crime-Control Strategies', 266.

against the environment. Therefore, there will be used some relevant secondary sources such as legal journals and books, either written by national scholars or international scholars, as well as tertiary sources deemed necessary to acknowledge the possible punishments applicable to the negligence of corporate post-mining obligations.

1. Proportionality, Harm, and Wrongdoing in Criminalisation Theory

Fundamentally, criminal action is deemed should be punished proportionally to the types of criminal acts committed. It is embodied a notion believing that the fairness of punishment's imposition should be depending on the proportionality in punishing an offense based on its wickedness or seriousness. It is then developed the principle of proportionality which require that punishments be proportional to the seriousness of a crime.[89] Hart explained that '*at the sentence stage, the punishment must bear some sort of relationship to the act: it must in some sense "fit" it or be "proportionate" to it*'.[90] Montesquieu noted that '*it is a great abuse amongst us to subject to the same punishment a person that only robs on the highway, and another that robs and murder. Obvious it is that for the public security some difference should be made in the punishment*'.[91] Further, Montesquieu explained that '*it is essential that there should be a certain proportion in punishments, because it is essential that a great crime should be avoided rather than a lesser one, and that which is more pernicious to society rather than that which is less*'.[92] Likewise, Beccaria discussed that '*if an equal punishment is meted out to two crimes that offend society equally, the men find no stronger obstacle standing in the way of committing the more serious crime if it holds a greater advantage*'.[93] These refer to the same idea that the proportionality of punishment is not merely ended up with the proportional punishment against criminal actors only, but it is also applicable as an instrumental which is

[89] Andrew von Hirsch, 'Proportionality in the Philosophy of Punishment' (1992) 16 Crime and Justice 55, 56.
[90] Thomas J. Miceli, 'On Proportionality of Punishments and the Economic Theory of Crime' (2016) 46 European Journal of Law and Economics 303, 304.
[91] Ibid, 304-05.
[92] Ibid, 305.
[93] Ibid.

deemed will reduce the rate of similar crimes in the future. These simply mean that the fitness and proportionality of the punishments will be directly proportional to the prevention of crime in the future.

Miceli in his account noted four conceptions of proportionality norm in punishing criminal perpetrators, *id est*: (i) proportionality concept 1: punishments should equal harms; (ii) proportionality concept 2: punishments should increase with harms, and (iii) proportionality concept 3 and 4: expected punishments should equal (increase with) harms.[94] On the basis of the first conception, it is interpreted that the imposed punishments should be equal to the harmfulness of the committed crimes. Miceli connected this conception to economic theory which overcoming the measurement problem to the equity of the punishments and harms through dollar-equivalent terms, noting that the amount of monetary punishments should be equated to the dollar value of the harm that is imposed by the perpetrator on society.[95] Based on the second conception, it is argued that the imposition of punishments should be proportional to the wickedness or seriousness of the crimes which is indicated by the scale of imposed punishments.[96] While the third and fourth conceptions rely on criminal deterrence which is not the imposition of the actual punishments but the expected or can be said the effective punishment.[97]

In connection with the principle of proportionality, the harm principles of Feinberg are also necessary to discuss. Feinberg in his account, Harm to Others, distinguished that there are two senses of harm, *id est:* (i) non-normative sense of harm; and (ii) normative sense of harm.[98] These two senses addressed the threshold of the harm which are dissimilar but correlated. On the one hand, according to the non-normative sense of harm, harm is defined as a setback to the interest of the harmed, while on the other hand, harm is defined

[94] Ibid, 306-07.
[95] Ibid, 306.
[96] Ibid.
[97] Ibid, 306-07.
[98] Robert Amdur, 'Harm, Offense, and the Limits of Liberty' (1985) 98 Harvard Law Review 1946, 1947.

as a violation of someone's rights.[99] Under the harm principle, it is also addressed that '*it is always a good reason in support of penal legislation that it would probably be effective in preventing harm to persons other than the actor and there is probably no other means that is equally effective at no greater cost to other values.*'[100] Nevertheless, legal scholars proposed to replace this single-element theory, which focuses merely on the harm principle, with the dual-element theory of wrongfulness and harm.[101] Under this dual-element theory, criminalisation will be on the ground that '*the conduct is injurious and is perpetrated in a manner that makes it wrong.*'[102]

2. Applicable Criminal Punishments for the Negligence of Corporate Post-Mining Obligations against the Environment

As the natural person may be held criminally liable for his or her criminal behaviour, the non-natural person (*recht persoon*) should also be held criminally liable for any criminal misconduct, in this regard, which closely relates to its business operation. Criminal prosecution given to someone must have fundamental reasons why the criminal prosecution should be imposed upon the criminal perpetrator. On this occasion, punishment can be given for the following reasons: (i) the criminal perpetrator must receive punishment; (ii) sentencing can improve the character of the offender; (iii) punishment can provide a deterrent effect both for the criminal perpetrator and for anyone who potentially becomes a future perpetrator of the similar criminal act.[103] Nevertheless, it is questioned whether or not these three reasons are applicable as the basis for imposing penalties on the deviant corporation, and whether or not the imposed criminal penalties are worth enough compared to the resulting damages. The theory of proportional justice will be used to answer these questions.

[99] Ibid.
[100] Judith Jarvis Thomson, 'Feinberg on Harm, Offense, and the Criminal Law: A Review Essay' (1986) 15 Philosophy & Public Affairs 381, 382.
[101] Andreas von Hirsch, 'Harm and Wrongdoing in Criminalisation Theory' (2014) 8 Criminal Law and Philosophy 245, 246.
[102] Ibid, 247.
[103] Sylvia Rich, 'Corporate Criminals and Punishment Theory' (2016) 29 Canadian Journal of Law and Jurisprudence 97, 97.

Just as a person may be subjected to criminal sanctions, for any of his/her actions deemed violating criminal provisions, the corporation may also be subjected to criminal sanctions. The imposition of criminal sanctions against a corporation can be done as long as the criminal act is committed within the scope of its business activities.[104] As explained by Rich, if the corporation receives different treatment in the sanctioning which is different from what a person may receive, there should be good reasons explaining why such different treatment is given.[105] In practise, it is undeniable that corporations are treated in a special way different from how a person will be treated. The reasons could be in the form of a corporation's ability to shape political policies, due to the strong dependency of the government on the corporation's economic gains, particularly through its taxations.

Imposing criminal sanctions against the deviant corporation as well as its high official, as explained above, somehow brings about the notion that the law is applied arbitrarily because the applicable law is overburdening. Nonetheless, it is sometimes forgotten that the damages and victimisations resulting from corporate criminal misconduct are incomparable to the damages and victimisations of conventional crime.

There are several theories embraced on why the criminal perpetrator should be punished. The first theory is the retributivism theory, whereby this theory is a strong foundation for the principle of proportionality in imposing criminal sanctions against criminal perpetrators, as retributivism considers that the criminal perpetrator deserves the punishment as retribution for violating criminal provisions he/she committed.[106] In contrast to this theory, the theory of utilitarianism considers that a person may be subjected to a criminal sentence not solely because he/she deserves to be punished, but this theory focuses more on the deterrent effect and prevention of the perpetrator or other person from committing a criminal act in the future, to make people respect to

[104] Ibid.
[105] Ibid.
[106] Rommel Clemente, 'Theory of Punishment' (2008) 3 Columbia Undergraduate Law Review 27, 28.

the applicable laws.[107] However, on the other hand, there exists a theory that combines the two theories above, which is recognised as the virtue ethics theory. This theory does not only focus on punishment as a form of retaliation for behaviour that tarnishes the values prevailing in society, but this theory also looks at the efforts that can be made to prevent and improve the behaviour of a person who is considered to have tarnished these values by positioning the perpetrator at a form of a neighbourhood that makes he/she changes through religion; education; general reflections and others means as obtained by convicts in the prison.[108] This means that the perpetrator is not only given imprisonment as a form of retaliation for his/her behaviour, but the imprisonment will also become a manner for the perpetrator to improve his/her attitude through education during his/her imprisonment.

Nevertheless, the concept of retributivism theory is said to rarely justify the application of criminal prosecution against corporations, as the result of its lack of moral blameworthiness so that criminal prosecution cannot be justified or its application against corporate criminal misconduct must be limited.[109] Indeed, the corporate liability system itself also contradicts the objectives of criminal law, *id est* to punish the morally capable, whereby the corporate criminal liability is not based on individual crime, but based on vicarious fault.[110]

In 1962, the American Law Institute adopted the model penal code system which contains three different systems for determining corporate criminal liability. In the first system, criminal regulations still focus on crimes of intent committed by individuals, such as manslaughter, fraud, murder, or other criminal acts that do not involve corporations, so in the first system criminal acts related to corporate activities have not yet been considered by the legislature.[111] Nonetheless, a corporation can still be held criminally liable for

[107] Ibid, 29.
[108] Ibid, 31.
[109] Rich, 'Corporate Criminals and Punishment Theory', 100.
[110] Kerem, 'Change We Can Believe in: Comparative Perspectives on the Criminalization of Corporate Negligence', 98.
[111] Anonymous, 'Corporate Crime: Regulating Corporate Behaviour through Criminal Sanctions', 1251.

its agent's misconduct if "*the offence was performed, authorised, recklessly tolerated by the board of directors or a high managerial official*".[112] Moreover, in the second system, the corporation can be said to be criminally liable if the criminal acts committed by lower-level employees of the corporation benefit the concerned corporation.[113] Finally, in the third system, the principle of strict liability is applied, neither the intention to commit the crime nor the intention to gain profit does not need to be proven to hold the corporation criminally liable.[114]

In the view of the theory of strict liability, the element of *mens rea* does not need to be proven to impose criminal liability against a deviant corporation, whereby the prosecutor only needs to prove the presence of *actus reus*.[115] Amrani explains that there are several indicators in the application of the principle of strict liability to corporate criminal misconduct, namely: (i) the principle applies to certain types of crime, especially those that endanger society; (ii) the act is unlawful and contrary to the precautionary principle required by law; (iii) the act is strictly prohibited by law because it poses a danger to public health, safety and moral; and (iv) the act was committed without paying attention to the preventive measures of the reasonable impact.[116] Nonetheless, the application of the principle of strict liability will be depending on the legislature of the country, whereby this principle cannot necessarily be applied without any regulatory basis.

Above all, the corporation can still be held criminally liable even if the corporation has openly prohibited its employees from committing deviant acts, or has monitored its employees to detect and prevent them from committing such deviant acts.[117] As long as the elements, such as the crime committed within the scope of workers' authority and/or committed to benefit the corporation, are fulfilled, the corporation can certainly be held criminally

[112] Ibid.
[113] Ibid.
[114] Ibid, 1252.
[115] Amrani, Hanafi and Mahrus Ali, *Sistem Pertanggungjawaban Pidana: Perkembangan dan Penerapan* (Raja Grafindo Persada 2015) 112.
[116] Ibid, 115.
[117] Baer, 'Three Conceptions of Corporate Crime (and One Avenue for Reform)', 9.

liable.[118] Setiyono argues that if there is an element of intent or negligence caused by an employee, then the corporation can be held criminally liable.[119]

In connection with, when referring to the view of responsible corporate doctrine, the corporate criminal liability will be transferred to the responsible corporate executives, so that if the corporation committed any corporate criminal misconduct, there will be applied the principle of individual liability will be borne upon by the executives of the deviant corporation.[120] Importantly, even though the corporate executive does not know or does not play an active role in corporate activities, he/she can still be held criminally liable.[121]

Nevertheless, as I have previously discussed, the regulations in corporate criminal misconduct against the environment, in this regard in the mining sector, focus on regulating and punishing corporate criminal misconduct which closely relates to illegal mining. According to Sudirman and Feronica, there are three parameters for corporate punishment, one of which is that the applicable laws explicitly stipulate that corporation is a subject to criminal law.[122] This means that the criminal provisions need to clearly regulate that corporations can be prosecuted for committing some type of criminal misconduct. Therefore, if a corporation commits corporate criminal misconducts which are not regulated and punished under the criminal provisions, the corporation cannot and will not be able to be held criminally liable based on this model penal code. Hence, that type of corporate misconduct will only be subjected to civil and administrative law procedures.

3. Applicable Administrative Punishments for the Negligence of Corporate Post-Mining Obligations against the Environment

[118] Ibid.
[119] Yudoprakoso, *Pertanggungjawaban Pidana Korporasi dan Pemidanaan Korporasi, 68.*
[120] Schnell, 'Beyond All Bounds of Civility: An Analysis of Administrative Sanctions against Responsible Corporate Officers', 712.
[121] Ibid.
[122] Yudoprakoso, *Pertanggungjawaban Pidana Korporasi dan Pemidanaan Korporasi, 68.*

During its development, the application of administrative sanctions such as fines against a corporation does not actually have a deterrent effect on the corporation, whereby the imposition of fines, even if with relatively high amounts, is disproportional to the overwhelming profits resulting from its business activities.[123] Even from a corporate perspective, fines and other administrative sanctions are considered as a '*cost of doing business'*, making the law enforcers have shifted their focus from imposing administrative sanctions to criminal sanctions against executives of the deviant corporation.[124]

Besides the application of criminal sanctions against corporate criminal misconduct, the administrative sanctions which are imposable against regulatory offences have been recognised. Recalling that violations of environmental regulations are often considered regulatory offences.[125] Many argue that the corporation does not commit any serious crimes so that criminal prosecution is rarely imposed upon a corporation, and if crimes committed by the corporation are found, administrative sanctions such as warnings and fines will be applied against the corporation, even though these sanctions considered to not truly burdening the corporation.[126]

The emergence of civil sanctions somehow, according to Adshead, is closely related to the rise of the perception that environmental offences are not as serious as conventional crime, leading to the decriminalisation of environmental offences.[127] It is unfortunate that environmental crimes, at least in the UK after 2008, were treated as less serious regulatory offences punishable by low rates of monetary penalties.[128] Adshead suggests that administrative sanction should never be a substitution for criminal sanction, it should be an additional tool in dealing with environmental offences.[129] I would

[123] Schnell, 'Beyond All Bounds of Civility: An Analysis of Administrative Sanctions against Responsible Corporate Officers', 715.
[124] Ibid, 712.
[125] Adshead, 'Doing Justice to the Environment', 218.
[126] Navarro, 'Corporate Crime', 4.
[127] Adshead, 'Doing Justice to the Environment', 225-27.
[128] Ibid, 226.
[129] Ibid, 227.

agree with the suggestion of Adshead that the administrative and civil sanctions should not be a substitution of the criminal sanction, whereby the administrative and civil sanctions should be applied as the additional sanctions imposed upon the deviant corporation due to the nature that the corporation cannot be imposed with physical imprisonment. While criminal sanctions should certainly be imposed upon responsible corporate officials.

4. The Importance of Imposition of Criminal Punishments

In connection with the application of sanctions against corporations, Rich in her article provides several interesting arguments. Rich describes the three parts of why she argues that corporations cannot be punished. In essence, Rich tries to explain that if suffering is the goal of punishing a corporation, then the corporation cannot be punished because a corporation cannot suffer.[130] Nonetheless, Rich believes that although punishment cannot make a corporation suffer, punishment can make a corporation financially suffer by imposing penalties in the form of confiscation of the corporation's assets.[131] This is in line with my point of view that the corporation itself, other than its responsible officer, should be punished by administrative sanctions, in this regard in the form of financial penalties. Even so, punishments that cause suffering, physically and mentally, must still be given to corporate officers who are responsible for corporate activities that are considered to be against the applicable law.

Practically, criminal prosecution is applied as an additional sanction to administrative and civil sanctions, particularly in the matter of corporate criminal misconduct against the environment, which applies to both corporation and its responsible officer as the result of their collective misconduct.[132] As generally recognised, the mental state of the corporation can be shown by the mental state of its employees as long as these three elements are met, namely: (i) the corporate agent is responsible for the criminal act; (ii)

[130] Rich, 'Corporate Criminals and Punishment Theory', 110.
[131] Ibid.
[132] Simpson and others, 'An Empirical Assessment of Corporate Environmental Crime-Control Strategies', 232.

the criminal act is carried out by the corporate agent within the scope of his/her work; and (iii) the criminal act aims to provide benefit, either fully or partially, to the corporation.[133]

On the other hand, there is a notion that the imposition of criminal sanctions against individuals involved in corporate criminal misconduct is somehow over-deterrence, believing that the deterrent effect of the administrative sanctions alone is considerably high.[134] Nonetheless, it is sometimes forgotten that the damages, either directly or indirectly, resulting from corporate criminal misconduct against the environment undeniably are extremely high which affects the environment, the community as well as the corporation itself.

By means of this research, the scope of corporate criminal misconduct is limited to the negligence corporate of post-mining obligations, thus the individuals involved in the illegal behavior should be closely related to the importance of corporations, not the importance of the individuals themselves. In this regard, the application of criminal penalties against the individual, as well as the corporation, will meet the due deterrent while not over-deterring the concerned individual.

[133] Kerem, 'Change We Can Believe in: Comparative Perspectives on the Criminalization of Corporate Negligence', 96.
[134] Anonymous, 'Corporate Crime: Regulating Corporate Behaviour through Criminal Sanctions', 1373.

Chapter III
Corporate Criminal Misconducts against the Environment in Indonesia

Under this Chapter, there will be elaborated the concept of corporate criminal misconduct against the environment that will be discussed further in each of this Chapter's parts, *inter alia* historical background of corporate criminal misconduct against the environment in Indonesia; laws relating to corporate criminal misconduct against the environment in Indonesia; and negligence of corporate post-mining obligations against the environment in Indonesia.

A. Historical Background of Corporate Criminal Misconducts against the Environment in Indonesia

The first subchapter of this chapter, there will be elaborated on the historical background of corporate criminal misconduct against the environment from the Indonesian perspective. In this regard, the development of Indonesian corporate criminal law as well as the relevant cases of corporate criminal misconduct against the environment in Indonesia will also be discussed. This subchapter is important because discussing the historical background of corporate criminal misconduct against the environment in Indonesia will provide a clearer vision of how corporate criminal misconduct against the environment is regulated under Indonesian law.

1. History of Corporate Criminal Misconduct against the Environment: the Not Recognised Corporate Criminal Misconducts against the Environment in Indonesia

The recognition of the corporation as a subject of criminal law in Indonesia has been paying attention since the beginning of the 1950s. This recognition brought about the likelihood of the corporation, as a subject of criminal law, to be borne by criminal liability, notwithstanding that the

applicability of the criminal law within that era has never been truly successful in imposing criminal liability towards corporations. According to the data, counting from 1951 to 2010, there was only one case whereby a corporation was accused of alleging corporate criminal misconduct.[135] It was argued that the circumstance was due to the difficulty in proving the *mens rea* of a corporation for its criminal misconduct.

Years after this recognition, the scope of corporate criminal misconduct within Indonesian law began developing to recognise the importance of environmental protection against irresponsible corporate behaviours. The rationale for this recognition was closely related to the emergence of environmental issues that were derived from the irresponsible corporate activities caused by the absence of environmental regulations regulating corporate business operations. These circumstances led to the emergence of an ideal that corporate misconduct against the environment was regarded as a form of corporate criminal misconduct. Unfortunately, what considered corporate criminal misconducts against the environment were yet too narrow.

During that time, Indonesian law has recognised and regulated corporate criminal misconduct against the environment in the mining sector, through the establishment of the Government Regulation in Lieu of Law Number 37 of 1960 on Mining.[136] Surprisingly, such regulation was the earliest applicable law of Indonesia regulating corporate criminal misconduct against the environment, notwithstanding the criminal provisions may only apply to certain types of corporate criminal misconduct against the environment. Nevertheless, since the nature of this Government Regulation may only be issued when there are immediate urgencies such as a legal vacuum, the Government Regulation, sooner after the completion of an official Act designated thereto, should be revoked. Therefore, seven years after the enforcement of this temporary regulation, Act Number 11 of 1967 on the Basic Principles of Mining (the 1967 Basic Principles of Mining Act) was

[135] Yudoprakoso, *Pertanggungjawaban Pidana Korporasi dan Pemidanaan Korporasi, 26.*
[136] Government Regulation in Lieu of Law Number 37 of 1960 on Mining, chapter XI.

finally enacted, notwithstanding the criminal provisions within the 1967 Basic Principles of Mining Act are a total transcription of the previous regulation.[137]

The 1967 Basic Principles of Mining Act has addressed the importance of post-mining against the environment, by obliging the corporation to recover the aftertaste of the mining operations to avoid disease and hazards to the surrounding community.[138] However, the Act was not yet considering the environmental effects of corporate negligence against its post-mining obligations against the environment. This Act was also focused on the regulation and punishment of illegal mining activities carried out either by corporations or by individuals. Sadly, the Act did not regulate any applicable punishments against the post-mining obligations to recover the mining areas, neither criminally nor civilly. This simply means that the Act only "recommends" the corporation to carry out the post-mining obligations without giving any further punishments for any occurring violations against that obligations. These circumstances, I strongly believe, have brought about corporate reluctance in carrying out its post-mining obligations which led to environmental damages, due to the lack of environmentally-friendly perspectives and the lack of applicable punishments. In fact, the Act was the only applicable law regulating mining operations, which last for about forty-two years without any amendments, leading to the uncertainty in the regulation and punishment of the negligence of corporate post-mining obligations in Indonesia during that time.

Thirty years after the enactment of the 1967 Basic Principles of Mining Act, the legislature finally enacted an environment-based regulation to cover the necessity of the management and protection of the environment through the establishment of the Act Number 23 of 1997 on the Management of the Environment. Nonetheless, the management and protection were substantially focused on regulating the release and disposal of hazardous waste materials into the environment which may lead to environmental pollutions and

[137] Cf Act Number 11 of 1967 on the Basic Principles of Mining, chapter XI; and Government Regulation in Lieu of Law Number 37 of 1960 on Mining, chapter XI.
[138] See Act Number 11 of 1967 on the Basic Principles of Mining, a 30 (ID).

damages.[139] Yet, the Act was not regulating and punishing the negligence of corporate post-mining obligations, leaving the negligence of corporate post-mining obligations remained unregulated.

2. History of Corporate Criminal Misconducts against the Environment: the Beginning of Recognition in Indonesia

Forty-two years after the uncertainty in the regulation of corporate post-mining obligations against the environment within the 1967 Basic Principles of Mining Act, Act Number 4 of 2009 on Mineral and Coal Mining (the 2009 Mineral and Coal Mining Act) eventually revoked the 1967 Basic Principles of Mining Act and finally became the first environmentally-friendly regulation which developed in a much better way. The Act finally stipulated several legal obligations of corporations in carrying out mining businesses, including paying attention to environmental carrying capacity.[140] This Act became the first act that eventually obliged the corporations to carry out management and monitoring, including reclamation and post-mining activity, against the environment surrounding the mining areas, as stipulated in Article 96 Subsection (c) of the Act. These obligations, *id est* reclamation and post-mining activity, hereinafter referred to in this research as post-mining obligations.

The enactment of the 2009 Mineral and Coal Mining Act finally became an outbreak of the occurring legal uncertainty for environmental protection against mining operations, in particular the lack of applicable punishments for the negligence of corporate post-mining obligations. By referring to the 2009 Mineral and Coal Mining Act, the execution of post-mining obligations does not consider a "recommendation" as the 1967 Basic Principles of Mining Act did. This is indicated by the regulation of applicable punishment within the 2009 Mineral and Coal Mining Act, whereby the negligence of corporate post-mining obligations is considered a regulatory offence which subjects to

[139] See Act Number 23 of 1997 on Management of the Environment, a 16 (ID).
[140] See Act Number 4 of 2009 on Mineral and Coal Mining, a 95 (e) (ID).

administrative sanctions,[141] *inter alia* (i) written reprimand; (ii) cessation of mining activities; and (iii) revocation of mining licenses.[142]

3. History of Corporate Criminal Misconducts against the Environment: the Development of Regulating and Punishing Corporate Criminal Misconducts against the Environment in Indonesia

During its development, the 2009 Mineral and Coal Mining Act was deemed unable to provide legal certainty in the mining sector,[143] leading to the Act was eventually amended, even if the Act is still in force, by the enactment of Act Number 3 of 2020 on the Amendment of the Act Number 4 of 2009 on Mineral and Coal Mining (the 2020 Mineral and Coal Mining Act). This amendment, according to the legislature, was intended to keep up the regulation of the mining industry with the development; problems; and legal needs of the mineral and coal mining industries.[144] As a consequence of this amendment, the regulation of corporate post-mining obligations has also been amended making the regulation itself become loosened.

It is argued that the amendment of the 2009 Mineral and Coal Mining Act was intended for the importance of the mining corporation, so that the corporation may overlook environmental provisions, in particular the corporate post-mining obligations against the environment, which hinders profit-maximisation of the corporation. This is shown by the loosening of the corporate post-mining obligations against the environment, which is proven by comparing the regulations on corporate post-mining obligations of both the 2009 Mineral and Coal Mining Act and the 2020 Mineral and Coal Mining Act. At first, the corporation is obliged to carry out reclamation and post-mining activity as inclusive post-mining obligations. However after the enforcement of the 2020 Mineral and Coal Mining Act, the corporation is only

[141] Ibid, 151 (1) (ID).
[142] Ibid, 151 (2) (ID).
[143] See Act Number 3 of 2020 on the Amendment of the Act Number 4 of 2009 on Mineral and Coal Mining, explanation (ID).
[144] Ibid.

expected to carry out one of the two post-mining obligations,[145] meaning that the disregard of one of the post-mining obligations will not be considered negligence, thus the corporation will be out of the applicable punishment. Nevertheless, by the enactment of the 2020 Mineral and Coal Mining Act, the corporation eventually can be held criminally liable for neglecting its post-mining obligations against the environment.

Recently, the 2020 Mineral and Coal Mining Act has also been amended by the enactment of Act Number 11 of 2020 on Job Creation (hereinafter referred to as the 2020 Job Creation Act), notwithstanding that the regulation and punishment of the negligence of corporate post-mining obligations against the environment are not affected by this amendment. This indicates that there is no further development in the regulation and punishment of the negligence of corporate post-mining obligations after the establishment of the 2020 Job Creation Act, whereby the applicable punishments are still limited to administrative sanctions only.

4. PT ANTAM Case

The abovementioned development of corporate criminal misconduct against the environment has a close relation to the mining cases that occurred during that time. It was prominent that in Indonesia, before the enactment of the 2009 Mineral and Coal Mining Act, the mining operations were merely committed to realising the profit-maximisation of the corporations, likewise the Indonesian state-owned enterprises. The state-owned enterprises, in particular, whose business is related to the exploration and exploitation of mining resources, have greatly contributed to environmental damages caused directly or indirectly by their business operations. One of the uppermost Indonesian state-owned enterprises in the mining sector is Aneka Tambang,

[145] Cf the Act Number 4 of 2009 on Mineral and Coal Mining Act, a 96 (c) (ID), and See Act Number 3 of 2020 on the Amendment of the Act Number 4 of 2009 on Mineral and Coal Mining, 96 (b) (ID).

Co. Ltd. (PT ANTAM) which deals with the trade; industry; and transportation of mining resources, *inter alia* gold; coal, and nickel.[146]

Environmental cases involving PT ANTAM became the most prominent environmental cases which happened at the time of the legal vacuum in the punishment of the negligence of corporate post-mining obligations against the environment in Indonesia. Between 1979 and 2004, before the 2009 Mineral and Coal Mining Act was passed by the legislature, PT ANTAM was asserted to have contributed to the degradation of natural resources and destruction of the flora and fauna surrounding its mining areas, especially due to its negligence against its post-mining obligations. This corporate misconduct, on the one hand, has greatly destructing the environment and affected the neighboring community. However, on the other hand, such corporate misconduct has not yet been considered an offence under Indonesian law thus leaving PT ANTAM to be out of any kind of applicable punishments. It was disappointing that environmental destruction which lead to the loss of biodiversity was closely related to the lack of environmentally-friendly regulations and applicable punishments which led to the reluctance of the mining corporations, including PT ANTAM, to carry out their post-mining obligations.

These circumstances may be illustrated by an environmental case involving PT ANTAM on an island named Gebe Island. PT ANTAM has been operating its mining operations on Gebe Island, which is located in East Halmahera Regency, North Maluku Province of Indonesia, for a sum of 25 years. During the mining operations, PT ANTAM has heavily exploited the mining resources of the island, without paying attention to the destruction of the environmental landscape of the island. It was very disappointing that after the closure of its mining areas, PT ANTAM did not provide any types of environmental management and monitoring, which are considered as corporate post-mining obligations, against the closed mining areas. Worst, PT

[146] ANTAM, 'Products & Services: What We Produce' (*ANTAM*, April 2023) <https://antam.com/en/products> accessed 27 April 2023.

ANTAM deliberately left the damaged and uncultivable land to the local community,[147] without any further management. Unfortunately, due to the legal vacuum in the punishment of the negligence of corporate post-mining obligations, PT ANTAM escaped from any kind of liabilities.

Just before the closure of its mining areas on Gebe Island, in 2003, PT ANTAM expanded its mining operations to a neighbouring island, located in the north of Gebe Island, named Gee Island.[148] Seven years after its expansion to Gee Island, PT ANTAM also started its mining operations on Pakal Island. Miserably, both the islands experienced similar circumstances to what Gebe Island has previously experienced. However, before PT ANTAM completed its mining operations in these islands, the 2009 Mineral and Coal Mining Act was put into force and the regulation and punishment against the negligence of corporate post-mining obligations eventually ruled. Interestingly, because such negligence was finally punishable, PT ANTAM attempted to carry out the management and monitoring of its mining areas after the closure of its mining operations in the islands. However, such management and monitoring were carried out through an irresponsible solution by giving up all of the accomplishment processes to the local residents without proper management and monitoring by the corporation.[149] In fact, such an irresponsible way in the accomplishment of the post-mining obligations led to improper and undesired outcomes against the affected environment and the community. Nevertheless, there was no imposition of punishments against PT ANTAM.

Undeniably, the cases of Gee Island and Pakal Island occurred after the enactment of the 2009 Mineral and Coal Mining Act which was deemed more environmentally-sound, however, the applicability of the Act is in question. Whereas under Article 151 of the 2009 Mineral and Coal Mining Act, the Act has clearly emphasised that neglecting corporate post-mining obligations will be subjected to administrative sanctions. However, in fact, PT ANTAM has never been successfully sanctioned by the authority.

[147] Syahni, 'The Operation of PT Antam is Polluting the East Halmahera Coast'.
[148] Ibid.
[149] JATAM, 'The Grief of Indonesian Small Islands in the Grip of Mine'.

These cases bring to the conclusion that there is a legal feebleness in the regulation and punishment of the negligence of corporate post-mining obligations in Indonesia. This legal feebleness arguably led PT ANTAM to be untouchable by the Indonesian positive law, making PT ANTAM was escaped from any kinds of civil; administrative and criminal prosecutions, thus leaving the environment and the local resident suffering from the direct and indirect consequences of its irresponsible action. Moreover, by referring to the cases, it can be concluded that the regulation and implementation of mining operations, in particular on the post-mining obligations, in Indonesia are very weak and insufficient. The applicable administrative sanctions are somehow inapplicable due to the high possibility of the corporation to shape the authorities' decision when the corporation neglects its post-mining obligations. Furthermore, the rules are considerably arbitrary against the environment and the affected local residents, meaning that the rules are somehow supporting the deviant corporation to carry out their deviant behaviour through safer and seemingly environmentally-friendly ways.

The aforementioned cases of PT ANTAM are amongst the most prominent mining-related cases in Indonesia which indicates that the mining regulation and its enforcement in Indonesia are considered very weak. Even when the 2009 Mineral and Coal Mining Act has been enforced, the legal enforcement on the cases relating to the negligence of corporate post-mining obligation is still in question. Somehow, this uncertain regulation was amended to keep up with the development; problems; and legal needs of mineral and coal mining industries,[150] notwithstanding the amended Act, in this regard the 2020 Mineral and Coal Mining Act, is somehow favouring the corporation while on the other hand disfavouring the environment and the society. It is not a total fault of the corporation that its mining operations establish environmental damages and loss of biodiversity which directly and indirectly affect the economy of the local residents, because the failure of the

[150] See Act Number 4 of 2009 on Mineral and Coal Mining, considering (c) (ID).

Indonesian government to construct proper legal provisions has also contributed to the resulting environmental and socio-economic damages.

B. Laws Relating to Corporate Criminal Misconducts against the Environment in Indonesia

After all, this subchapter will explain comprehensively the laws of Indonesia which regulate corporate criminal misconduct against the environment, especially the Indonesian Mineral and Coal Mining Acts. In this regard, the relevant articles of the Acts will also be elaborated thoroughly, so the provisions of the Acts will be understood properly. In connection with the second subchapter of this chapter, this subchapter will mainly focus on discussing the corporate post-mining obligations against the environment in Indonesia, meaning that the discussion will also closely relate to the rules of the Indonesian Mineral and Coal Mining Acts. It is necessary because the discussion will bring about a proper understanding of the Indonesian ways, perspectives, and preferences in regulating corporate post-mining obligations against the environment.

1. The 1967 Basic Principles of Mining Act

As briefly discussed within the first subchapter of this chapter, the mining-related regulations of Indonesia are consisting of the 1967 Basic Principles of Mining Act; the 2009 Mineral and Coal Mining Act; the 2020 Mineral and Coal Mining Act; and the 2020 Job Creation Act. Nevertheless, due to the limitation of this research which only focuses on the corporate post-mining obligations against the environment, the 2020 Job Creation Act will not be further discussed in this subchapter.

Discussing the 1967 Basic Principles of Mining Act, as the earliest mining regulation of Indonesia other than the temporary Government Regulation in Lieu of Law Number 37 of 1960 on Mining, will not be far away from the word “insufficient”. The insufficiency of this mining regulation has a close relation to the economic situation of the country, meaning that the

early mining regulation was shaped to fulfil the needs of the country for the possible economic gains from the mining sectors,[151] and to fulfil the lack of mining regulation experienced by Indonesia. These led to the opening of wider access for any interesting parties to start carrying out exploration and exploitation of the mining resources available in nature, which in fact, are incapable to be merely explored and exploited by the government itself. Therefore, to attract the investors, the government somehow lowered their mining standards within the Act to be more likely corporate-oriented, notwithstanding the possible direct and indirect impacts on the environment in particular.

As previously discussed in the previous subchapter, the 1967 Basic Principles of Mining Act only consist of the very basic concept of environmental protection, to avoid disease and hazard, without paying attention to the applicable sanctioning for the violations of its rules. Under the 1967 Basic Principles of Mining Act, there is only one article mentioning the corporate post-mining obligations after the completion and the closure of the mining areas. It says that the corporation is sooner after the completion of the mining activities obliged to return the land in such a way as to avoid undesirable disease hazards or any other hazards against the local residents.[152] According to the Act, environmental damage is not regarded as an important clause to be considered, thus the formulation of this article was mainly intended to protect the local residents from the undesirable health issues resulting from the closed mining areas. Worst, this only rule concerning the corporate post-mining obligations may only be considered as a recommendation to the corporation due to the lack of administrative and criminal provisions sanctioning the corporation for any deviant behaviours it committed leading the deviant corporation to have never been imposed by any sanctioning and criminal prosecutions.

2. The 2009 Mineral and Coal Mining Act

[151] See Act Number 11 of 1967 on the Basic Principles of Mining, considering (a) (ID).
[152] Ibid, a 30 (ID).

On January 2009, the government finally revoked the previous mining regulation which was deemed no longer relevant to the global development in the mining sectors by enacting the 2009 Mineral and Coal Mining Act. This Act finally paid attention to the fact that the mining resources are non-renewable, thus these resources need to be exploited in responsible; efficient; and environmentally-oriented ways to ensure sustainable national development.[153] The enactment of this Act has brought better insight into the mining sector on the importance of environmentally-friendly mining operations against the environment; the people and the mining sector itself.

Compared with the previous mining regulation, the 2009 Mineral and Coal Mining Act eventually considered that corporate post-mining obligations against the environment are crucial for the continuity of the mining sector. This led to the formulation of Article 96 Subsection (c) of the Act which obliged the corporation to carry out management and monitoring of the mining areas, including reclamation and post-mining activity, which in this research are referred to as corporate post-mining obligations against the environment. In connection with this, the enactment of the 2009 Mineral and Coal Mining Act has also contributed to the regulation of security deposits, within Article 100 of the Act, which might be claimed by a third party if the corporation has failed to carry out its post-mining obligations against the environment.[154]

Different from the 1967 Basic Principles of Mining Act which only recommend the corporation fulfilling its mining obligations without providing any sanctioning, the 2009 Mineral and Coal Mining Act provides threats, through administrative sanctioning in the forms of written reprimand; cessation; and revocation of mining licenses, to any corporations which fail to fulfil the mandate of the Article 96 Subsection (c) and Article 100 of the Act.[155] Notwithstanding that, I believe at least in the case of violation of Article 96 Subsection (c) of the Act, the provided administrative sanctions are inapplicable to the closed mining businesses, due to their nature which may

[153] See Act Number 4 of 2009 on Mineral and Coal Mining, consideration (c) (ID).
[154] Ibid, a 100 (ID).
[155] Ibid, a 151 (ID).

only be effective against the on-going mining businesses, not the closed mining businesses. Nonetheless, the 2009 Mineral and Coal Mining Act provides criminal sanctions, even though the sanctions are closely related to illegal mining activities, thus leaving no space for the negligence of corporate post-mining obligations against the environment to be held criminally liable.

The 2009 Mineral and Coal Mining Act is consisting of a number of implementing rules, but to be certain, this research will only discuss an implementing rule which relating to the reclamation and post-mining activity as mandated by Article 96 Subsection (c) and Article 100 of the 2009 Mineral and Coal Mining Act. Governmental Decree Number 78 of 2010 on Reclamation and Post-Mining (hereinafter referred to as the 2010 Governmental Decree on Reclamation and Post-Mining) is one of the implementing rules of the 2009 Mineral and Coal Mining Act which specifically regulates a more detailed explanation of the 2009 Mineral and Coal Mining Act, in particular Article 96 of the Act. However, by referring to these regulations, there is no clear provision regulating the cessation and closure of mining areas. Surprisingly, the 2009 Mineral and Coal Mining Act and its implementing rule do not recognise a closure certificate as proof that the corporation has ceased its mining operation and has successfully fulfilled all of its post-mining obligations.

3. The 2020 Mineral and Coal Mining Act

As the amended version of the regulations within the 2009 Mineral and Coal Mining Act, the regulations within the 2020 Mineral and Coal Mining are very much alike to the 2009 Mineral and Coal Mining Act, particularly in the context of corporate post-mining obligations against the environment. This simply means that the fundamental ideas of both these Indonesian Mineral and Coal Mining Acts are considerably a little bit different. The 2020 Mineral and Coal Mining Act was enacted on the basis that the previous Act was deemed unable to address the current issues and factual conditions in the exploitation

of mining resources in Indonesia.[156] Nonetheless, the enactment of the 2020 Mineral and Coal Mining Act brings about critics of the corporate obligations against the environment, including its post-mining obligations, which were deemed intentionally weakened by the government.

The corporate post-mining obligations against the environment within Article 96 were amended resulting in the weakening of corporate post-mining obligations against the environment,[157] meaning that the corporation will only be obliged to carry out one of the two post-mining obligations, *id est* reclamation or post-mining activity. Interestingly, the reclamation and post-mining activity have their own scope and purposes. On the one hand, reclamation is defined as: '*an activity carried out throughout the stages of mining business with the aims to organise; restore; and improve the quality of the environment and ecosystem so that the function of the environment and the ecosystem can be fully restored in accordance with their designations*'.[158] The phrase '*throughout the stages of mining business*' can be understood that the reclamation should be carried out gradually to every exploited mining area until the mining activity is finally ceased and closed. On the other hand, post-mining activity is defined as '*a planned; systematic; and continuous activity after the completion of a part or all of the mining business activities with the aims to restore the natural environment function and social function according to the local conditions throughout the mining areas*'.[159] The phrase '*after the completion of a part or all of the mining business activities*' means that the post-mining activity is the final phase of the mining activity making the post-mining activity should be carried out immediately upon the completion and the closure of one or all of the mining areas. According to these two definitions, it can be concluded that the reclamation and post-mining

[156] See Act Number 3 of 2020 on the Amendment of the Act Number 4 of 2009 on Mineral and Coal Mining, explanation para (2) (ID).
[157] Cf Act Number 3 of 2020 on the Amendment of the Act Number 4 of 2009 on Mineral and Coal Mining, a 96 (b) (ID); and Act Number 4 of 2009 on Mineral and Coal Mining, a 96 (c) (ID).
[158] See Act Number 3 of 2020 on the Amendment of the Act Number 4 of 2009 on Mineral and Coal Mining, a 1 (26) (ID).
[159] Ibid, a 1 (27) (ID).

activity have several distinguishing elements, *inter alia*: (i) timelines; (ii) targets; and (iii) objectives of the activities.

According to the timelines, reclamation, different from post-mining activity, should be carried out during and after the completion of mining businesses. This also means that even if a corporation has fully exploited and closed one of its mining areas, the corporation should start carrying out an immediate reclamation to that mining area without the necessity to wait for all of its mining areas to be finally closed. The necessity to have an immediate execution against the closed mining area aims to avoid further damages and to ensure the affected environment can be restored in accordance with its designation. While the post-mining activity, as the final phase of mining activity, may only be carried out after the completion of a part or all of the mining businesses, notwithstanding during the post-mining activity the corporation can still carry out the reclamation process. By means of the targets, the differentiation between reclamation and post-mining activity can be indicated by the targets of these post-mining obligations. The target of reclamation is the environment and the ecosystem, whereas the target of post-mining is not merely the environment but also the surrounding community. Finally, both reclamation and post-mining activity have dissimilar objectives, since the objective of the reclamation is limited to the restoration of environmental function, while the objective of the post-mining activity is not limited to the restoration of environmental function but also the restoration of social function. According to these brief explanations, it can be concluded that both reclamation and post-mining activity are different but surely correlating, meaning that the implementation of both these post-mining obligations will be beneficial to the continuity of the environment and the welfare of the affected community. Therefore, the nonfulfillment of these post-mining obligations will certainly be resulting in direct and indirect damages, not only against the environment but also against the local community simultaneously.

Moreover, similar to Article 96 Subsection (c) of the 2009 Mineral and Coal Mining Act, Article 100 of the 2009 Mineral and Coal Mining Act is

seemingly also weakened by the enactment of the 2020 Mineral and Coal Mining Act, meaning that the 2020 Mineral and Coal Mining Act lower the obligation of the corporation to only provide security deposits for one of the two post-mining obligations.[160] The amendment of these two articles, I strongly believe, may create a major impact against the targets and objectives of the post-mining obligations due to the lower of standardisation for environmental and social protections in the 2020 Mineral and Coal Mining Act. Since the 2020 Mineral and Coal Mining Act provides options for the corporation to carry out one of the two post-mining obligations and to supply security deposits for one of the two post-mining obligations, the corporation may securely "surrender" one of the two post-mining obligations with the "regulatory safeguard" of the 2020 Mineral and Coal Mining Act.

Regardless of the deemed weakened corporate post-mining obligations against the environment as in Article 96 Subsection (c) and Article 100 of the 2009 Mineral and Coal Mining Act, the 2020 Mineral and Coal Mining Act remarkably amends the article regulating the administrative sanctions, which eventually considers fines as a form of administrative sanctions against the negligence of post-mining obligations against the environment,[161] as mandated in Article 96 Subsection (b) of the 2020 Mineral and Coal Mining Act. Furthermore, the 2020 Mineral and Coal Mining Act has also surprisingly constructed another additional article that recognises the importance of criminalisation of the negligence of corporate post-mining obligations as well as the negligence to supply security deposits.[162] By referring to Article 161B Subsection (1) of the 2020 Mineral and Coal Mining Act, a deviant corporation eventually can be held criminally liable for neglecting its post-mining obligations against the environment or neglecting its obligation to supply security deposits, with threats in the form of imprisonment for a

[160] Cf Act Number 4 of 2009 on Mineral and Coal Mining, a 100 (ID); and Act Number 3 of 2020 on the Amendment of the Act Number 4 of 2009 on Mineral and Coal Mining, a 100 (ID).
[161] Cf Act Number 3 of 2020 on the Amendment of the Act Number 4 of 2009 on Mineral and Coal Mining, a 151 (2) (ID); and Act Number 4 of 2009 on Mineral and Coal Mining, a 151 (2) (ID).
[162] See Act Number 3 of 2020 on the Amendment of the Act Number 4 of 2009 on Mineral and Coal Mining, a 161B (1) (ID).

maximum of five year and fines for a maximum of IDR100 billion,[163] which is approximately equal to USD6.7 million.

It is necessary to acknowledge that the regulations of the 2020 Mineral and Coal Mining Act are seemingly intertwined. It is simply due to the Act providing sanctioning to both the ongoing mining activity and the completed mining activity at the same time, meaning that the applicable punishments will be very much different. For instance, negligence of corporate post-mining obligations when neglected before the completion of mining activity is punishable by administrative sanctions,[164] however, negligence of corporate post-mining obligations when neglected after the completion of mining activity is punishable by criminal sanctions.[165] This simply means that, in relation to this research, the applicability of these punishments is totally depending on the "timelines" of the negligence, either occurring before the completion of the mining activity or occurring after the completion of the mining activity.

Even if the 2020 Mineral and Coal Mining Act is eventually amended by the enactment of Act Number 11 of 2020 on Job Creation (the 2020 Job Creation Act), however both the 2009 Mineral and Coal Mining Act and the 2020 Mineral and Coal Mining Act have not been revoked yet, meaning that both the Acts are still in force and the regulation on corporate post-mining obligations against the environment are still applicable. This recent amendment is seemingly not interested in settling the problems within the Indonesian Mineral and Coal Mining Acts (the 2009 Mineral and Coal Mining Act and the 2020 Mineral and Coal Mining Act) on the corporate post-mining obligations. Whereas, there is no other means to punish negligence of corporate post-mining obligations in Indonesia other than the means as stipulated within the Indonesian Mineral and Coal Mining Acts as well as in the 2020 Job Creation Act.

[163] Ibid, a 161B (1) (ID).
[164] Ibid, a 151 (ID).
[165] Ibid, a 161B (1) (ID).

As to establishing firm and just mining regulations, the government of Indonesia needs to pay extra attention to the importance of environmental and social protections that are vulnerable to the direct and indirect impacts resulting from corporate negligence of its post-mining obligations. This is due to the current applicable laws somehow creating legal loopholes and widening the possibility of "legally" damaging the environment and the community. Moreover, several rules within the Indonesian Mineral and Coal Mining Acts are also deemed to lower the mining standards of the corporation. Notwithstanding the remarkable rule on the criminalisation of the negligence of corporate post-mining obligations, the post-mining regulations of Indonesia, however, can still be considered unjust; arbitrary; infirm, and lack environmentally-friendly perspectives. In these regards, there should be organised a legal model which deemed just; orderly; firm, and environmentally-sound that might be translated to the Indonesian mining regulations through a legal comparison of the Indonesian mining regulations to the foreign mining regulations. Therefore, it is expected that the organised legal model will be effectively settling the existing problems, at least in the regulation and punishment of corporate negligence of its post-mining obligations, which occurs in the mining sector of Indonesia.

C. Negligence of Corporate Post-Mining Obligations against the Environment in Indonesia

Finally, in this subchapter, there will be a further explanation of the negligence of corporate post-mining obligations against the environment as well as the impacts of the negligence by referring to the cases discussed in the first subchapter of this chapter. Moreover, there will also be referred to some other relevant disciplines, in particular environmental science, to obtain better insight into the impacts of corporate negligence on the environment. This subchapter will also be beneficial to suggest whether or not the negligence of corporate post-mining obligations against the environment should be criminally prosecuted.

1. How the Indonesian Acts Regulate and Punish Negligence of Corporate Post-Mining Obligations against the Environment

The 2020 Mineral and Coal Mining Act, in the context of this research, becomes the only mining regulation applicable in the regulation and punishment of the negligence of corporate post-mining obligations, whereby the applicable main articles are Article 96 Subsection (b); Article 151 Subsection (1) and Article 161B Subsection (1) of the 2020 Mineral and Coal Mining Act. These articles are correlating with each other since the concept of corporate negligence in the Indonesian mining regulation is divided into: (i) the negligence before the closure of mining activity; and (ii) the negligence after the closure of mining activity, whereby the regulation and punishment are actually dissimilar. Article 96 Subsection (b) of the 2020 Mineral and Coal Mining Act is the main rule in the regulation of corporate post-mining obligations against the environment, whereby the applicable punishment will be depending on the circumstances of the negligence of corporate post-mining obligations. This means that when a corporation is neglecting its post-mining obligations before the mining activity is ceased and completed, the deviant corporation is punishable by administrative sanctions as set in Article 151 Subsection (1) of the 2020 Mineral and Coal Mining Act. While on the contrary, when a corporation is neglecting its post-mining obligations after the mining activity is finally ceased and completed, the deviant corporation is punishable by criminal sanctions as set in Article 161B Subsection (1) of the 2020 Mineral and Coal Mining Act. This is interesting since, by referring to these articles, the 2020 Mineral and Coal Mining Act recognises a combination of applicable punishment against the negligence of corporate post-mining obligations against the environment, which according to my standpoint is a proper method of punishing corporate negligence of its post-mining obligations.

Nevertheless, the discussion as elaborated in the previous subchapter has provided an initial viewpoint that the present mining regulations of Indonesia, in this regard the Indonesian Mineral and Coal Mining Acts and the 2020 Job

Creation Act, are still disproportionally formulated making the present mining regulations deemed arbitrary to the affected community and at the same time lack of environmentally-friendly perspectives. Notwithstanding the exceptional applicable criminal punishments against the negligence of corporate post-mining obligations as in Article 161B Subsection (1) of the 2020 Mineral and Coal Mining Act, the regulation of the negligence of corporate post-mining obligations against the environment of Indonesia needs to be reviewed.

2. How the Acts Affect the Negligence: Decreasing or Increasing Cases

The regulation and punishment of the negligence of corporate post-mining obligations within the 2020 Mineral and Coal Mining Act, can be said, yet has a weak legal formulation and ineffective legal enforcement. Yet, negligence of corporate post-mining obligations against the environment has major impacts not only against the environment but also against the socio-economic of the local resident as well as the corporate reputation, thus the regulation and punishment of the negligence need to be treated with extra attention. The Indonesian government has established a sequence of reclamation and post-mining activity guidelines which require corporations to thoughtfully prepare the reclamation and post-mining activity from the beginning of the mining operations, nonetheless, the enforcement and its efficacy will be depending on the concerned mining corporation. This is problematic since the misleading and inappropriate enforcement of these post-mining obligations will rarely face a genuine sanctioning, due to the unwillingness of the government to proportionately punish the deviant corporation.

The applicability of the specified administrative punishments, *id est* written reprimand; cessation; revocation of mining licenses, and fines, should highly be questioned, due to their imposition will be up to the Minister of

Energy and Mineral Resources of Indonesia.[166] Worst, counting from 2020 to 2023 itself, there has not been a single case of criminal prosecution against the corporation for allegedly neglecting its post-mining obligations as punishable by Article 161B Subsection (1) of the 2020 Mineral and Coal Mining Act.[167] These are clearly proving that there is a hardship in the enforcement of punishment, either administratively or criminally, to the negligence of corporate post-mining obligations, which I believe is affected by the weak legal formulation and ineffective legal enforcement of Indonesia. However, due to the limit of this research, I will not discuss the Indonesian legal enforcement of the negligence of corporate post-mining obligations any further in this research.

3. The Importance of Criminalising Corporate Negligence

The enactment of the 2020 Mineral and Coal Mining Act, undeniably, has been a remarkable development in the regulation and punishment of the negligence of corporate post-mining obligations against the environment, since the Act finally considers the importance of criminalisation against such corporate misconduct. The previous mining regulations of Indonesia, *id est* the 1967 Basic Principles of Mining Act and the 2009 Mineral and Coal Mining Act, have certainly led to the increase in the negligence of corporate post-mining obligations which directly and indirectly impact the environment and the local community. Unfortunately, the negligence was never effectively punished by the authority, due to the authority in imposing the administrative punishments presented to the Minister; Governor; as well as to the Regent or Mayor.[168] Compared to the previous mining regulations of Indonesia the 2020 Mineral and Coal Mining Act has been improving in a significant way, particularly in the punishment of the negligence of corporate post-mining obligations, despite the setback in the regulation of the same matter.

[166] Ibid, a 151 (1) (ID).
[167] Supreme Court of Indonesia, 'Decision Directory' (*Supreme Court of Indonesia*, 2023) <https://putusan3.mahkamahagung.go.id/search.html?q=Undang-undang+nomor+3+tahun+2020&jenis_doc=putusan&cat=9a49acde4116f41729db232e7979515b&t_reg=2020> accessed 3 April 2023.
[168] See Act Number 4 of 2009 on Mineral and Coal Mining, a 151 (1) (ID).

Emphasising the application of administrative sanctioning against the deviant corporation, I strongly believe, is not completely an inaccurate decision, but at the same time, it is not completely an accurate decision as well. It is argued that the imposition of administrative sanctions alone does not present a deterrent effect on the deviant corporation. Recalling to Schnell's account, the imposition of administrative sanctions, such as fines with relatively high amounts, is disproportional to the overwhelming profits resulting from corporate business activities.[169] Even from the perspective of the corporation, fines, and other administrative sanctions are considered as the 'cost of doing business, which leads to the shifting of administrative sanctions to criminal sanctions against executives of the deviant corporation.[170] Moreover, by referring to the suggestion of Adshead, administrative sanctions should never be a substitution for the criminal sanction, meaning that administrative sanctions should also be imposed against the deviant corporation as an additional tool to the criminal sanctions in dealing with environmental offences,[171] in this regard negligence of corporate post-mining obligations against the environment.

I would totally agree with the suggestion of Adshead that in dealing with environmental offences, in this regard negligence of corporate post-mining obligations against the environment, the administrative and civil sanctions should not be applied as a substitution to the criminal sanction, but the administrative and civil sanctions should be imposed as additional sanctions to the criminal sanctions. This means that the administrative and civil sanctions should be imposed upon the corporation, due to its nature that is unable to be physically punished, while the criminal sanctions, to be certain of the physical punishments, should be imposed upon the responsible corporate officers.

Even if the status of a corporation as a subject of criminal law is still debated by legal scholars, however, the argument that I stand on is that

[169] Schnell, 'Beyond All Bounds of Civility: An Analysis of Administrative Sanctions against Responsible Corporate Officers', 715.
[170] Ibid, 712.
[171] Adshead, 'Doing Justice to the Environment', 227.

corporation, as well as its responsible officers, are subject to criminal law as long as the criminal law recognises so,[172] and in fact, the 2020 Mineral and Coal Mining Act says so. Similarly, the status of the corporate mental state is also questioned, nonetheless criminalising negligence is different from criminalising conventional crime whereby there is no need to prove the intention of the corporation against the negligence.[173] Therefore, according to this view, the liability of the corporation will be flown from the fact that the corporation has failed to fulfil its post-mining obligations against the environment. Nevertheless, the present situations indicate that there is a major role of the corporation in the formulation of the mining regulations which are seemingly derived from its economic power, making the corporation may shape the political policies for the advantage of the corporation. This situation certainly is in line with the situation experienced by Indonesia, in the regulation of mining, up to the present time.

[172] Yudoprakoso, *Pertanggungjawaban Pidana Korporasi dan Pemidanaan Korporasi*, *68.*
[173] Kerem, 'Change We Can Believe in: Comparative Perspectives on the Criminalization of Corporate Negligence', 109.

Chapter IV
Laws Relating to Negligence of Corporate Post-Mining Obligations against the Environment in Foreign Countries

Under this Chapter, there will be elaborated the concept of corporate criminal misconduct against the environment that will be discussed further in each of this Chapter's parts, *inter alia* laws relating to negligence of corporate post-mining obligations against the environment in Thailand; South Africa; and Australia.

A. Laws Relating to Negligence of Corporate Post-Mining Obligations against the Environment in Thailand

This subchapter will introduce and elaborate on Thailand mining-related regulations, particularly the Thai Minerals Act, B.E. 2560 (2017). There will also discuss how Thailand punishes corporations for neglecting its post-mining obligations against the environment. It is important because the Thailand regulations will be used as an instrument of this comparative legal analysis, with the main intention to acknowledge and understand whether or not the laws of Thailand have a better outcome, in protecting the environment and avoiding environmental damages resulting from corporate activities, compared to the Indonesian Mineral and Coal Mining Acts.

1. Introduction to the Thai Minerals Act

As one of the compared jurisdictions, Thailand has comprehensively regulated mining operations within the Thai Minerals Act B.E. 2560 (2017) (hereinafter referred to as the 2017 Thai Minerals Act). The foundation of this Act is to realise the benefits of the nations and the people in a sustainable manner by paying attention to the equilibrium of economic and social

development and the possible impacts on the environment.[174] The enactment of the 2017 Thai Minerals Act has eventually revoked the previous mining regulation of Thailand which was in force for the last fifteen years, *id est* the Thai Minerals Act (No. 5) B.E. 2545 (2002), making the 2017 Thai Minerals Act to be the most recent mining regulation of Thailand. By referring to the 2017 Thai Minerals Act, mining activities are categorised into three types of mining activities, *id est* mining (in general); underground mining; and small-scale mining. Generally, these three types of mining activities can be differentiated by the scope; size, and methods of the mining activities.[175] In these regards, I will not discuss the 2017 Thai Minerals Act in a comprehensive explanation, whereby I will be more focusing on the regulation and punishment of the negligence of corporate post-mining obligations against the environment, in particular, the mining (in general) only, within the 2017 Thai Minerals Act.

2. Negligence of Corporate Post-Mining Obligations against the Environment: the Regulations and Punishments

The 2017 Thai Minerals Act regulates and punishes the negligence of corporate post-mining obligations in the fourth chapter of the Act on Rights and Duties of Holders of Concession Certificates. Precisely, the obligations of a corporation that possesses the mining license are regulated under Section 68 Subsection (1) to (12), including the obligations to carry out rehabilitation to the closed mining areas (which in this research will be mentioned as a post-mining obligation). By referring to Section 68 Subsection (8) of the 2017 Thai Minerals Act, the corporation is obliged to carry out rehabilitation during and after the closure of the mining activities to the affected environment. Even though the term reclamation and post-mining activity, as applied by the Indonesian Minerals and Coal Mining Acts, are not defined and applied by the Act, however, the Act uses the term rehabilitation which meaning is similar to the meaning of reclamation according to the 2020 Mineral and Coal Mining

[174] See Thai Minerals Act, B.E. 2560 (2017), s 7 (TH).
[175] Cf ibid, s 6, s 7, and s 8 (TH).

Act of Indonesia,[176] notwithstanding the Act does not explicitly define such term.

In connection with the corporate post-mining obligation to rehabilitate the closed mining areas as in Section 68 Subsection (8), the Act further obliges the corporation to place security deposits intended thereto.[177] In this regard, if by any means the corporation fails to comply with its post-mining obligation to carry out rehabilitation against the closed mining areas, thus the security deposits will be applied by the Department of Primary Industries and Mines of Thailand, and the Department will further notice the corporation to provide a replacement to the applied security deposits.[178] Nonetheless, if, within fifteen days after the notice, the corporation does not place the security deposits to maintain the original amount without any reasonable cause, the corporation will be imposed an administrative sanction in the form of revocation of the mining license.[179] This simply means that, as in Section 70 of the 2017 Thai Minerals Act, the failure to comply with the post-mining obligation will be resulting in the application of the security deposits by the authority, and the failure to place the security deposits or to maintain its original amounts will be further resulting in the revocation of the mining license possessed by the concerned corporation.

Furthermore, if in any case, the negligence of corporate post-mining obligation is likely to cause damages to the environment and the local community, the corporation will also be subjected to a sequence of administrative punishments. Under Section 129 of the 2017 Thai Minerals Act, it is stipulated that if the corporation fails to comply with its obligations, or in some other circumstances violates the rules within the Act, the corporation, initially, will be ordered by the authority to rectify or improve the

[176] Cf Act Number 3 of 2020 on the Amendment of the Act Number 4 of 2009 on Mineral and Coal Mining, a 1 (26) (ID); and the Thai Minerals Act B.E. 2560 (2017), s 68 (8) (TH).
[177] See Thai Minerals Act, B.E. 2560 (2017), s 68 (9) (TH).
[178] Ibid, s 70 para (1) (TH).
[179] Ibid, s 70 para (4) (TH).

environment and affected people's conditions.[180] However, if the corporation fails to comply with the order, the corporate mining operations will be temporarily ceased with the purpose to rectify and improve the situation of the impacted environment and people correctly and appropriately within the period of a specified time.[181] Nevertheless, if the concerned corporation is yet unable to carry out the rectification and improvement within the specified time, the mining license of the corporation will be revoked by the authority.[182] These provisions are interesting since the deviant corporation is yet allowed to restore and improve the damages that occurred in the environment and experienced by the local community, and not directly punish, either administratively or criminally, the corporation for its negligence against its post-mining obligation.

3. Applicable Punishment

Nevertheless, other than the specified administrative sanction against the negligence of corporate post-mining obligation, the deviant corporation will also be punishable by criminal sanction in the form of fines and imprisonment, meaning that the 2017 Thai Minerals Act recognises a combined imposition of administrative and criminal sanctions against the negligence of corporate post-mining obligation. By referring to the Act, the maximum length of imprisonment should not be exceeding one year and the number of fines should not be exceeding THB300.000,[183] which is approximately equal to USD9000. The court may apply one or both criminal punishments upon the deviant corporation, nonetheless, the appointed judges should respect the maximum rate of the applicable punishment. Moreover, the negligence of corporate post-mining obligations, when causing damages in the form of loss of life; physical damage; and property damage to any persons, may result in

[180] Ibid, s 129 (TH).
[181] Ibid, s 130 para (1) (TH).
[182] Ibid, s 130 para (3) (TH).
[183] Ibid, s 160 (1) (TH).

the rise of civil liability against the deviant corporation in the form of compensation,[184] including punitive compensation.[185]

Regardless of the applicable criminal sanctions to the negligence of corporate post-mining obligation, by referring to the Constitution of the Kingdom of Thailand, B.E. 2560 (2017), it is mentioned that '*The State … should prescribe criminal penalties only for serious offences.*'[186] Even though is not further defined what the threshold for serious offences is, however, when connecting with the 2017 Thai Minerals Act which recognises criminal sanctions against the negligence of corporate post-mining obligations, it can be concluded that negligence under the laws of Thailand is considered a serious offence.[187]

According to the aforementioned provisions, it can be concluded that the 2017 Thai Minerals Act sets two types of applicable punishment for the negligence of corporate post-mining obligations against the environment and the affected community, which are administrative sanction and criminal sanction. The administrative sanction will be in the form of cessation of the mining operation and revocation of the mining license,[188] while the criminal sanction will be in the form of imprisonment or fines, according to the specified rules of the Act. Moreover, the 2017 Thai Minerals Act also recognises the civil liability that might rise when affected individuals file civil lawsuits before the court. Furthermore, the 2017 Thai Minerals Act applies a combination of administrative and criminal punishment against the negligence of corporate post-mining obligations against the environment. This is indicated by the provisions of the Act which requires the corporation to pay attention to the environment and community directly or indirectly affected by its mining operations. This also means that the monetary punishment will certainly be borne upon the corporation, as a non-natural person, while the physical

[184] Ibid, s 139 (TH).
[185] Ibid, s 142 (TH).
[186] See Constitution of the Kingdom of Thailand, B.E. 2560 (2017), s 77 para (3) (TH).
[187] Cf Constitution of the Kingdom of Thailand, B.E. 2560 (2017), s 77 para (3) (TH); and Thai Minerals Act, B.E. 2560 (2017), s 130 para (3) (TH).
[188] Thai Minerals Act, B.E. 2560 (2017), s 160 (1) (TH).

punishment will be borne upon the responsible corporate actors. Even though the applicable punishments against the negligence of corporate post-mining obligations are considerably low, nonetheless the applicable punishments are a good start for Thailand in eradicating corporate criminal misconduct against the environment, and countries with similar situations to Thailand may consider applying such rules to their jurisdiction.

Furthermore, it is also interesting that the 2017 Thai Mineral Act also recognise a type of conservative approach, not only against the environment and local resident but also against the corporation itself. This means that when a corporation violates or fails to comply with the provisions of the Act, including the post-mining obligations, the 2017 Thai Minerals Act will not directly punish the corporation, instead the corporation will be given time to make rectifications or perform correctly and appropriately within a period of time.[189] Nonetheless, if within the specified time, the corporation fails to make rectifications or to perform correctly and appropriately, and the failure may result in serious damage to the environment and the local community, the Director-General of the Thai Department of Primary Industries and Mines may impose an administrative punishment in the form of revocation of mining license against the deviant corporation.[190]

4. Applicable Preventive Measures

Nevertheless, the applicable punishments are intended to make deterred a deviant corporation when it eventually neglects its post-mining obligations to rehabilitate the closed mining areas. While to prevent negligence from occurring, the 2017 Thai Minerals Act also regulates preventive measures for the management and monitoring of the impacted mining areas. In this regard, the 2017 Thai Minerals Act requires a formulation of a mining-impact surveillance committee to examine, control, and exercise the impacts of the

[189] Ibid, s 130 para (1) (TH).
[190] Ibid, s 130 para (3) (TH).

mining activities, which costs will be borne to the mining license holder.[191] This measure is undoubtedly beneficial to make sure that the corporation behaves correctly and appropriately, leading to corporate negligence may finally be prevented from occurring.

B. Laws Relating to Negligence of Corporate Post-Mining Obligations against the Environment in South Africa

This subchapter will introduce and elaborate on South African mining-related regulations, particularly Act Number 28 of 2002 on the Mineral and Petroleum Resources Development Act and the Act Number 49 of 2008 on the Mineral and Petroleum Resources Development Amendment Act. There will also discuss how South Africa punishes corporations for neglecting its post-mining obligations against the environment. It is important because South African regulations will be used as an instrument of this comparative legal analysis, with the main intention to acknowledge and understand whether or not the laws of South Africa have a better outcome, in protecting the environment and avoiding environmental damages resulting from corporate activities, compared to the Indonesian Mineral and Coal Mining Acts.

1. Introduction to the 2002 Mineral and Petroleum Resources Development Act and the 2008 Mineral and Petroleum Resources Development Amendment Act

South Africa, as one of the compared jurisdictions, has also developed its mining regulations twice through the establishment of Act Number 28 of 2002 on Mineral and Petroleum Resources Development Act (hereinafter referred to as the 2002 Mineral and Petroleum Resources Development Act) and the Act Number 49 of 2008 on Mineral and Petroleum Resources Development Amendment Act (hereinafter referred to as the 2008 Mineral and Petroleum Resources Development Act). These were a breakthrough for the enforcement of a more environmentally-sound mining regulation that may benefit the

[191] Ibid, s 67 (TH).

present and future generations of the country.[192] The 2002 Mineral and Petroleum Resources Development has experienced major amendments, due to its inability to meet the recent development of the mining industry, through the establishment of the 2008 Mineral and Petroleum Resources Development Act. Nevertheless, both these Acts are still in force in South Africa.

By referring to the 2008 Mineral and Petroleum Resources Development Act, the corporation is obliged to comply with the conditions of an environmental authorisation,[193] which will be considered; investigated; assessed, and reported by the corporation to the competent authority. This process is crucial for the management and monitoring of the mining impacts after the mining operation has been carried out by the corporation.[194]

According to the 2008 Mineral and Petroleum Resources Act, the corporation, either the current or the previous holder of the licenses, will remain responsible for any environmental liability, pollution, or ecological degradation before the corporation finally cease its mining operation which is indicated by the issuance of a closure certificate.[195] This is due to South Africa requiring such responsibility against the corporation before it may acquire a closure certificate issued by the competent authority, in this regard the Ministry of Mineral Resources and Energy of South Africa. This is interesting since the corporation needs to prove to the competent authority that it has fulfilled its post-mining obligations against the environment, making this step will be mandatory against the corporation. Moreover, the fulfilment of the corporate post-mining obligations against the environment will be initially

[192] See Act Number 28 of 2002 on Mineral and Petroleum Resources Development Act, preamble (ZA).
[193] See Act Number 49 of 2008 on Mineral and Petroleum Resources Development Amendment Act, s 25 (e) (ZA).
[194] See Act Number 8 of 2004 on the National Environmental Management Amendment Act, s 24 (4) (f) (ZA).
[195] See Act Number 49 of 2008 on Mineral and Petroleum Resources Development Amendment Act, s 43 (1) (ZA).

assessed by the competent authority to inspect compliance with the conditions of the environmental authorisation.[196]

2. Negligence of Corporate Post-Mining Obligations against the Environment: the Regulations and Punishments

As the 2008 Mineral and Petroleum Resources Development Act has stipulated several obligatory obligations of corporations who hold mining right, *inter alia* to comply with the conditions of an environmental authorisation, the 2002 Mineral and Petroleum Resources Development Act has also governed the applicable law to the negligence of corporate post-mining obligations. In this regard, by referring to Section 93 of the 2008 Mineral and Petroleum Resources Development Act, a corporation will be punishable by administrative sanctions, if by any means the corporation fails to comply with any provisions of the Act or any conditions of the environmental authorisation, in the form of revocation of mining license, notwithstanding that the deviant corporation will be given time to make rectification against such circumstances.[197]

In connection with this, if there is occurred environmental damages against the mining areas as the result of corporate mining operations, the government of South Africa may provide supervision against the concerned corporation, through the Ministry of Environmental Affairs and Tourism,[198] to take necessary measures to prevent and rehabilitate the concurrence impacts.[199] This means that the government of South Africa will be hands-off from the occurring damages resulting from the corporate misconduct without any further actions. Such provisions, I believe, will be beneficial for the importance of the immediate rectification and recovery of the damaged environment and local community.

3. Applicable Punishment

[196] Ibid, s 43 (5) (ZA).
[197] Ibid, s 93 (ZA).
[198] See ibid, s 45 (1) (ZA).
[199] Ibid, s 46 (1) (ZA).

As to punish the negligence of corporate post-mining obligation, by referring to the 2002 Mineral and Petroleum Resources Development Act and the 2008 Mineral and Petroleum Resources Development Act, such negligence can be punishable by administrative and criminal sanction, even though the 2002 Mineral and Petroleum Resources Development Act and the 2008 Mineral and Petroleum Resources Development Act do not clearly mention what is the consequence that will be borne upon the corporation for neglecting its mining obligations. Even if the 2002 Mineral and Petroleum Resources Development Act and the 2008 Mineral and Petroleum Resources Development Act have regulated a section that specifically listed types of offences that may be punishable by criminal sanctions,[200] however, both the Acts yet do not consider a violation of any of Section 43 Subsection (1) or Section 93 of the 2008 Mineral and Petroleum Resources Development Act, which regulating negligence of corporate post-mining obligations, as offences that may be subjected to criminalisation.

Therefore, it can be concluded that there is no exact punishment applicable against the corporation for neglecting its post-mining obligations as stipulated under Section 43 Paragraph (1) of the 2008 Mineral and Petroleum Resources Development Act. This simply means that the disobedience of the mandatory post-mining obligations will not subject to any criminal punishments, nonetheless as a result of this disobedience, the corporation will not obtain a closure certificate that will be issued by the competent authority, making the mining activities within the mining areas are deemed in operation, and further, the corporation will be subjected to administrative sanction in the form of suspension or termination of mining operations,[201] and also cancellation of the mining license.[202] Nevertheless, the 2002 Mineral and Petroleum Resources Development Act stipulates that "*any person is guilty of*

[200] See See Act Number 28 of 2002 on Mineral and Petroleum Resources Development Act, s 99 (ZA); and See Act Number 49 of 2008 on Mineral and Petroleum Resources Development Amendment Act, s 98 (ZA).
[201] See Act Number 28 of 2002 on Mineral and Petroleum Resources Development Act, s 93 (1) (ii) (ZA).
[202] See Act Number 49 of 2008 on Mineral and Petroleum Resources Development Amendment Act, s 47 (1) (ZA).

an offence if he or she contravenes or fails to comply with any other provisions of this Act",[203] which also be subjected to a monetary fine which amount does not expressly regulate and/or imprisonment not exceeding six months.[204] This flexible rule, I believe, is the only applicable rule to be borne upon the deviant corporation for neglecting its mining obligations. Moreover, by the application of both administrative sanctions in the form of suspension or termination of mining operations and cancellation of mining license as well as the criminal sanctions in the form of fines and imprisonment, it can be concluded that the 2002 Mineral and Petroleum Resources Development Act and the 2008 Mineral and Petroleum Resources Development Act provide a possibility to put a combined imposition of administrative and criminal sanctions against the negligence of corporate post-mining obligations.

4. Applicable Preventive Measures

Environmental authorisation, is certainly, a type of measure applied to prevent future impacts on the environment and socio-economic of the people resulting from corporate mining activities.[205] According to the system, the corporation is required to fulfil several environmental-related programmes, including investigation; assessment; and communication of the potential impacts of the proposed mining activities by the concerned corporation.[206] This initial process will be very beneficial since environmental authorisation will be given to the qualified corporation in accordance with their capability in fulfilling the criteria stipulated by the competent authority of the country.

Interestingly, the 2008 Mineral and Petroleum Resources Development Act recognises the presence of a closure certificate which will be issued by the competent authority when the corporation finally fulfils all of its mining obligations, in particular post-mining obligations. This closure certification

[203] See Act Number 28 of 2002 on Mineral and Petroleum Resources Development Act, s 98 (a) (viii) (ZA).
[204] Ibid, s 99 (1) (g) (ZA).
[205] See Act Number 107 of 1998 on the National Environmental Management Act, s 23 (2)(b)(c) (ZA).
[206] See Act Number 8 of 2004 on the National Environmental Management Amendment Act, s 24 (4) (ZA).

must be applied by the corporation, one of which is when the mining operation completed and the mining areas will be finally ceased.[207] The procedure in which the closure certificate will be issued has never been apart from the major role of the Ministry in the assessment of the mining impacts on the safety; health; society and environment.[208]

C. Laws Relating to Negligence of Corporate Post-Mining Obligations against the Environment in Australia

This subchapter will briefly introduce and discuss a mining-related regulation of other foreign jurisdictions, other than Thailand and South Africa. The proposed jurisdiction is Australia, whereby the scope of discussion will be limited only to the mining-related regulation of Australia. The main objective of this subchapter is to look forward to the laws of Australia, which are considerably more advanced, to acknowledge its ways, perspectives, and preferences in regulating and punishing negligence of corporate post-mining obligations against the environment. Therefore, as a result, there will be understood whether or not Australia is applying a criminal prosecution against the negligence of corporate post-mining obligations against the environment.

1. The Regulation and Punishment of the Negligence of Corporate Post-Mining Obligations in Australia

Other than the two compared jurisdictions, there will also be elaborated and discussed the mining regulations of the other jurisdiction necessarily for the importance of composing a legal model with the deemed appropriate mining provisions. Australia, in this regard, will be presented by the state of New South Wales, which has developed a pleasing mining regulation that considers the significance of the environment, ensuring protection for the

[207] See Act Number 49 of 2008 on Mineral and Petroleum Resources Development Amendment Act, s 43 (3) (d) (ZA).
[208] Ibid, s 43 (9) (ZA).

community,[209] to minimise the direct and indirect impacts of the mining operation.

By referring to the Mining Act 1992 No 29 of the New South Wales (hereinafter referred to as the NSW Mining Act 1992), the government agency of the New South Wales, in this regard Secretary or inspector, may provide directions for the corporation as to present protection for the environment, one of which is by directing the corporation to rehabilitate the present or future impacts of its mining operation against the environment,[210] either to the environment within the mining areas or to the environment outside of the mining areas.[211] Interestingly, if without any reasonable excuse, the corporation fails to comply with the directions to rehabilitate the impacts, the corporation that will be represented by its responsible officer,[212] is guilty of an offence and thus will be imposed with fines for a maximum of 10.000 penalty units,[213] whereby one penalty unit is set for AUD110 in the state of New South Wales. Moreover, the NSW Mining Act 1992 has also recognised administrative sanctions against contravention of the Act's provisions, in the form of cancellation of the mining licenses.[214] However, according to the Act, the state of New South Wales yet does not recognise the application of criminal sanctions against corporate negligence of its mining obligations, including its post-mining obligations.

2. Applicable Preventive Measures

The mining rules within NSW Mining Act 1992 has never been apart from environmental planning and assessment measures regulated within the Environmental Planning and Assessment Act 1979 No 203 of the New South Wales (hereinafter referred to as the NSW Environmental Planning and Assessment Act 1979). As to realise environmentally-friendly mining

[209] See Mining Act 1992 No 29 of the New South Wales, s 3A (AU).
[210] Ibid, s 240 (1) (e) (AU).
[211] Ibid, s 240 (1B) (AU).
[212] Ibid, s 378F (2) (AU).
[213] Ibid, s 240C (AU).
[214] Ibid, s 125 (1) (b) (AU).

operations, corporations are also required to fulfil conditions and directions for the importance of management, development, and conservation of the environment to promote the social and economic welfare of the community.[215]

The NSW Mining Act 1992 has stepped forward to implement environmentally-sound mining regulations which are proven by the complexity of the regulation's formulation, in particular its preventive measures. Through these preventive measures, the mining corporation is expected to conduct a more circumspect mining operation to prevent the unpredicted and undesired damages, resulting from the mining operation, against the environment as well as the community. The applicable sanctioning, including the administrative sanctions to cancel the mining licenses, can also be considered as one of the proper preventive measures against the violation of mining provisions. It is interesting that by referring to Section 125 Subsection (1) (b) of the NSW Mining Act 1992, there is no need for a prosecution for the contravention committed by the corporation to cancel its mining licenses, when the competent authority concludes that the corporation has failed to comply with the regulation, the competent authority may immediately cancel the mining licenses of the corporation.

[215] See Environmental Planning and Assessment Act 1979 No 203 of the New South Wales, s 1.3 (a) (AU).

Chapter V
Comparison of Corporate Post-Mining Obligations against the Environment of Indonesia, Thailand, and South Africa

Under this Chapter, there will be elaborated the concept of corporate criminal misconduct against the environment that will be discussed further in each of this Chapter's parts, *inter alia* corporate post-mining obligations under the Indonesian, Thailand, and South African laws; applicable punishment to the negligence of corporate post-mining obligations against the environment under the Indonesian, Thailand, and South African laws; and legal model in regulating and punishing negligence of corporate post-mining obligations against the environment.

A. Corporate Post-Mining Obligations under the Indonesian, Thailand, and South African Laws

As a part of the comparative and analysing chapter, this subchapter will mainly compare the legal provisions on post-mining obligations under the laws of Indonesia, Thailand, and South Africa. The outcome of this subchapter is to discover the similarities and differences between the compared jurisdictions in regulating corporate post-mining obligations against the environment. Furthermore, this subchapter will also compile the deemed appropriate provisions of the compared jurisdictions to formulate a legal model in the regulation and punishment of the negligence of corporate post-mining obligations.

Based on the elaboration and discussion within the third and fourth chapters of this research, it can be said that the regulations on corporate post-mining obligations under the Indonesian, Thai, and South African laws have conspicuous similarities and differences, particularly in their applicable measures in the regulation and punishment of the negligence of corporate post-mining obligations. In this regard, there will be compiled the regulation and punishment of the mining regulations of the compared

jurisdictions to distinguish the similarities and differences between the mining regulations of each jurisdiction being compared. Basically, the compared jurisdictions have been aware that the establishment of a mining regulation is for importance in ensuring the equilibrium in the economic and social development of the mining industries by paying more attention to environmental protections to ensure the continuity of the environment for the present and future generations of the countries.

Starting from the regulation of corporate post-mining obligations of the compared jurisdictions. In Indonesia, under Article 96 Subsection (b) of the 2020 Mineral and Coal Mining Act of Indonesia, the corporation is obliged to '*carry out management and monitoring, including reclamation and/or post-mining activity, surrounding the mining area.*' In Thailand, under Section 68 Subsection (8) of the 2017 Thai Minerals Act, the corporation must '*rehabilitate the mined area, during the mining and subsequent to the closure of the mine …'*. While in South Africa, by referring to Section 25 of the 2009 Mineral and Petroleum Resources Development Act of South Africa, the corporation must '*comply with the conditions of environmental authorisation.*', for the importance to manage and monitor the mining impacts after the mining operation has been carried out by the corporation.[216] According to these three regulations of the compared jurisdictions, it can be considered that the corporate post-mining obligations against the environment, in this regard to rehabilitating the mining areas, is a mandatory obligation of a mining corporation. Regardless of the difference in the applied terms of the countries, however, it is clear that all of the countries are aware that the corporate post-mining obligations against the environment are necessary for the importance of environmental continuity.

It is also prominent that by referring to the aforementioned provisions of the countries, there are also differences in particular the conception of the corporate post-mining obligations within the mining regulation of the compared jurisdictions. Firstly, the mining regulation of Indonesia, different from Thailand and South Africa, directly mentions that the corporation is obliged to carry out reclamation or post-mining

[216] See Act Number 8 of 2004 on the National Environmental Management Amendment Act, s 24 (4) (f) (ZA).

activity against the exploited mining areas as a form of corporate post-mining obligations against the environment. In relation to, the 2020 Mineral and Coal Mining Act of Indonesia provides clear definitions of reclamation and post-mining activity in the first part of the Act,[217] which cannot be found in Thai and South African mining regulations, making the type and process of the corporate post-mining obligations easy to distinguish. While the mining regulation of Thailand generally mentions that the corporation must carry out rehabilitation against the exploited mining areas, without further explaining the types of activities to be carried out by the corporation to rehabilitate the exploited mining areas. Furthermore, the mining regulation of South Africa does not mention what are the types of activity to be carried out by the corporation against the exploited mining areas. South Africa also does not directly mention that the corporation is obliged to carry out rehabilitation against the mining areas, instead, it mentions that the corporation must comply with the conditions of environmental authorisation which definition is not defined within the 2008 Mineral and Petroleum Resources Development Act. This circumstance leads to confusion in acknowledging the mandatory obligations of the corporation against its closed mining areas.

It is also prominent that the compared jurisdictions have a similarity in obliging the corporation to place security deposits to the countries' authorised departments by means to guarantee that the corporate post-mining obligations will surely be accomplished even if the corporation fails to comply with its post-mining obligations. By referring to Article 100 Subsection (1) of the 2020 Mineral and Coal Mining Act, it is stated that '*holders of mining business license or special mining business license are required to provide and place guarantee funds for reclamation and/or post-mining activity.*' According to Section 68 Subsection (9) of the 2017 Thai Minerals Act, a corporation has to '*place such security, for the purpose of rehabilitating the mined area and provided remedies to persons affected by the mining …*'. Nevertheless, South Africa in the 2008 Mineral and Petroleum Resources Development Act, different from Indonesia and Thailand, does not really mention any

[217] See Act Number 3 of 2020 on the Amendment of the Act Number 4 of 2009 on Mineral and Coal Mining, a 1 (26); and a 1 (27) (ID).

provisions regulating the obligation of the corporation to place security deposits for the importance of guaranteeing compliance to its post-mining obligations against the environment. Whereas, South Africa in its 2002 Mineral and Petroleum Resources Development Act obliges the corporation to place such security deposits, even though the provision has been repealed by the enactment of the 2008 Mineral and Petroleum Resources Development Act.[218]

Interestingly in South Africa, by referring to the 2008 Mineral and Petroleum Resources Development Act, the corporation either the current or the previous holder of the licenses, will remain responsible for any environmental liability, pollution, or ecological degradation before the corporation finally cease its mining operation which indicated by the issuance of a closure certificate. This closure certificate cannot be instantly issued by the competent authority due to corporate compliance will be initially assessed by the competent authority,[219] meaning that the failure to comply with the corporate obligations will be resulting in the unissued closure certificate to the corporation. This system, which will be used to assess and determine corporate compliance against its obligations including post-mining obligations, is very unique because it cannot be found in the mining regulations of Indonesia and Thailand.

Even though Indonesia, Thailand, and South Africa have similarities in their provisions in the regulation of corporate post-mining obligations against the environment, nevertheless the provisions of these countries have their distinctive and unique measures to regulate the negligence of corporate post-mining obligations against the environment. These unique and distinctive measures, I believe, derived from the practical issues experienced by each of the countries that are expected to be more directly proportional to dealing with the negligence of corporate post-mining obligations against the environment, due to the mining regulations of the countries explicitly mention that their previous mining regulations are no longer relevant to deal with the current development in the mining sector. In this regard, this legal

[218] Cf Act Number 28 of 2002 on Mineral and Petroleum Resources Development Act, s 41 (1) (ZA); and See Act Number 49 of 2008 on Mineral and Petroleum Resources Development Amendment Act, s 41 (ZA).
[219] Act Number 49 of 2008 on Mineral and Petroleum Resources Development Amendment Act, s 43 (5) (ZA).

comparison will be very beneficial to acknowledge the applicable measures that can be translated into the legal model to regulate and punish and further prevent the negligence of corporate post-mining obligations against the environment in the future.

B. The Applicable Punishment to the Negligence of Corporate Post-Mining Obligations against the Environment under the Indonesian, Thailand, and South African Laws

This subchapter focuses on comparing the applicable punishments, either criminally or administratively, adopted by Indonesia, Thailand, and South Africa in dealing with negligence of corporate post-mining obligations against the environment. Afterward, there will also be discussed and elaborated the possible reasons why such punishments applied by the concerned jurisdictions, and finally analyse the possible outcome of the rules for the protection of the environment.

In accordance with the applicable punishment to the negligence of corporate post-mining obligations against the environment, it is found that the compared jurisdictions commonly recognise two types of punishments imposable to the negligence of corporate post-mining obligations against the environment, *id est* administrative sanctions and criminal sanctions. It is also prominent that the compared jurisdictions recognise a combined imposition of administrative and criminal sanctions on the deviant corporation as well as its responsible officers. In this regard, there will be elaborated the similarities and differences in the punishment of the negligence of corporate post-mining obligations applied by Indonesia, Thailand, and South Africa in their respective mining regulations.

Starting from the applicable administrative sanctions to the negligence of corporate post-mining obligations against the environment of the compared jurisdictions. In Indonesia, under the 2020 Mineral and Coal Mining Act, the imposition of sanctioning against the negligence of corporate post-mining obligations will be depending on the timeline of the negligence, meaning that the 2020 Mineral and Coal Mining Act divides the negligence into: (i) the negligence before the closure

of mining activity; and (ii) the negligence after the closure of mining activity. This means that, if the negligence occurs before the closure of mining activity, thus the corporation will be punishable by administrative sanctions, while on the contrary when the negligence occurs after the closure of mining activity, thus the corporation will be punishable by criminal sanctions. There are several administrative sanctions imposable upon a deviant corporation for neglecting its post-mining obligations before the closure of mining activity. By referring to Article 151 Subsection (2) of the 2020 Mineral and Coal Mining Act, it is stated that '*Administrative sanctions as referred to in Subsection (1) are: (a) written reprimand; (b) fines; (c) cessation; and (d) revocation of mining licenses.*' Similarly, in Thailand, by referring to Section 70 Paragraph (4) of the 2017 Thai Minerals Act, if a corporation fails to comply with its post-mining obligations, the corporation will be imposed by administrative sanction in the form of revocation of mining license, which may only be imposed if the corporation is yet unable to comply with its post-mining obligations even after the corporation is given time to behave correctly and appropriately. While in South Africa, by referring to Section 93 Subsection (1) of the 2002 Mineral and Petroleum Resources Development Act, the imposable administrative sanctions against corporations are in the form of a suspension or termination of mining operations. Moreover, subject to Section 47 Subsection (1) of the 2008 Mineral and Petroleum Resources Development Act, the corporation can also be imposed by an administrative sanction in the form of cancellation of its mining license. These have indicated that there are similarities of the compared jurisdictions in imposing administrative sanctions to the negligence of corporate post-mining obligations against the environment, particularly the types of administrative punishments recognised by the Indonesian and South African mining regulations, notwithstanding both Indonesia and South Africa use different terms to refer to the types of punishments which are actually the same.

In connection with the aforementioned provisions of the countries, it is prominent that there are several differences in the punishment for the negligence of corporate post-mining obligations against the environment of the compared jurisdictions. Indonesia, different from Thailand and South Africa, recognises a more

complex type of administrative sanctions against the negligence of corporate post-mining obligations, including monetary penalties upon the deviant corporation. Moreover, Thailand only recognises a revocation of mining licenses as a type of applicable administrative sanction upon the corporation, while South Africa recognises three types of administrative sanctions in the form of suspension or termination of the mining operations and cancellation of mining license upon the deviant corporation. These has also indicated that the 2020 Mineral and Coal Mining Act applies a gradual imposition to the negligence of corporate post-mining obligations against the environment, meaning that the failure to comply with the corporate post-mining obligations will not directly be resulting in the revocation of mining licenses, but the deviant corporation will be initially imposed by a lower types administrative sanctions, *inter alia* written reprimand and cessation.

Moving to the imposable criminal sanctions against the negligence of corporate post-mining obligations, in Indonesia, according to Article 161B Subsection (1) of the 2020 Mineral and Coal Mining Act, the deviant corporation will be imposable by criminal sanctions in the form of imprisonment not exceeding five years and fines not exceeding IDR100 billion. In addition, the corporation may also be imposed by an additional penalty in the form of payment of funds to fulfil the neglected post-mining obligations.[220] Since the 2020 Mineral and Coal Mining Act has divided the types of negligence into two types, thus such criminal sanctions may only be imposed upon the negligence occurring after the closure of mining activity. Similarly, in Thailand, as in Section 160 Subsection (1) of the 2017 Thai Minerals Act, the negligence of corporate post-mining obligations will be subject to imprisonment not exceeding one year and/or fines not exceeding THB300.000. These show that both Indonesia and Thailand have quite similar measures in punishing negligence of corporate post-mining obligations against the environment, notwithstanding the amount of the applicable criminal sanctions is very much different.

[220] Act Number 3 of 2020 on the Amendment of the Act Number 4 of 2009 on Mineral and Coal Mining, 161B (2) (ID).

The Applicable criminal sanctions in South Africa are different from the other two countries since the 2008 Mineral and Petroleum Resources Development Act leaves a legal vacuum in the punishment of the negligence of corporate post-mining obligations against the environment. This is shown by the Act leaves room for the negligence to be punished by a flexible provision which may also be applied to the other types of corporate misconduct that are not clearly punished within the 2002 Mineral and Petroleum Resources Development Act and the 2008 Mineral and Petroleum Resources Development Act. It is stated under Section 98 Subsection (1) of the 2002 Mineral and Resources Development Act that a corporation is guilty of an offence if it contravenes or fails to comply with any other provisions of this Act. The penalty for the offence is governed in Section 99 Subsection (1) (g) of the 2002 Mineral and Resources Development Act which imposes the corporation with imprisonment not exceeding six months and/or fines whose amounts do not explicitly stipulate. This is a prominent difference since both Indonesia and Thailand have directly ruled that neglecting corporate post-mining obligations will be imposable by criminal sanctions within their respective mining regulations, while on the contrary South Africa in its mining regulation does not even stipulate a specific provision intended to criminally punish the negligence of corporate post-mining obligations against the environment. This is very sad that South Africa can be considered to be left behind in punishing negligence of corporate post-mining obligations against the environment compared to Indonesia and Thailand, whereas South Africa is the largest platinum-producing country in the world.[221]

C. Legal Model in Regulating and Punishing Negligence of Corporate Post-Mining Obligations against the Environment

As a closing part of this chapter, this subchapter will wrap up all of the favourable perspectives of the compared jurisdictions as well as the perspectives of the Western countries relating to the regulation and punishment of the negligence of

[221] Statista, 'Major Countries in Global Mine Production of Platinum in 2022' (*Statista*, 2022) <https://www.statista.com/statistics/273645/global-mine-production-of-platinum/> accessed 6 March 2023.

corporate post-mining obligations against the environment, to formulate a model law which presumably may contribute more directly to protecting the environment and avoiding environmental damages. This model law derives from a combination of strong legislation from the countries with more developed situations. In this regard, there will be discussed how to measure whether or not the law may provide a "better" contribution to the problems, and what is the measurement.

1. Model Law in Regulating Corporate Post-Mining Obligations against the Environment

Recalling the account of Topan, in his book, which argues that there should be three phases done to prevent and overcome corporate criminal misconduct against the environment, in this regard the negligence of corporate post-mining obligations, *id est*: (i) the formulation phase (legislative policy); (ii) the application phase (judicative policy); and (iii) the execution phase (executive/administrative policies).[222] These phases, according to Topan, will provide better output in handling corporate criminal misconduct against the environment. The formulation phase, I strongly believe, should be carried out proportionally, by paying more attention to any small details that correlate to the mining industry. It is due to the first phase is critical since the other two phases will be firmly dependent on its outcome.

The corporate post-mining obligations against the environment need to be regulated proportionally and sufficiently, meaning that the legal formulation phase is the initial and the most crucial part to be accomplished. The failure to proportionally and efficiently regulate the corporate post-mining obligations, I strongly believe, will be resulting in future damages, particularly against the environment and the local community. In fact, the regulation of the corporate post-mining obligation, at least in developing countries, has indicated that it has been improperly and inefficiently formulated. One of the most possible answers for that circumstance is the presence of mining corporations. The corporations have the ability to shape the political policy for

[222] Topan, *Kejahatan Korporasi di Bidang Lingkungan Hidup: Perspektip Viktimologi dalam Pembaruan Hukum Pidana di Indonesia, 63.*

their own benefit, [223] through the placement of monetary support, which most likely results in corruption, to the legislature of the developing countries. This corporation's ability is somehow leading to improper protection of the environment and also the affected local community. As a quick example, the loosened of corporate post-mining obligations against the environment in the Indonesian Mineral and Coal Mining Acts has surely indicated that the Indonesian legislature has been affected by the corporation's ability to shape the political policy in the mining sector. Undeniably, the loosening of the corporate post-mining obligations in the Indonesian Mineral and Coal Mining Acts is benefiting the corporation, while on the contrary, it is detrimental to the environment and the local community. Therefore, to prevent such circumstances from occurring, the proper and sufficient formulation in the regulation of corporate post-mining obligations against the environment is very critical.

Concerning the legal formulation of corporate post-mining obligations against the environment, I argue that the corporate post-mining obligations need to be clearly defined within the mining regulation so that the timeline; target; and objective of the corporate post-mining obligations can be easily understood by all of the mining stakeholders. Indonesia is a good example for its considerate decision to clearly define the term reclamation and post-mining activity,[224] which are types of corporate post-mining obligations, within the 2020 Mineral and Coal Mining Act. These clear definitions will be resulting in the timeline; the target and objective of both the corporate post-mining obligations can be explicitly understandable and distinguished. This formulation, nevertheless, yet cannot be found in both Thai and South African mining regulations.

Moreover, I would further appoint to the 2009 Mineral and Coal Mining Act of Indonesia which is considerably proportional in regulating the corporate post-mining obligations against the environment. As in Article 96

[223] Gedicks, 'Transnational Mining Corporations, the Environment, and Indigenous Communities', 135.
[224] Cf Act Number 3 of 2020 on the Amendment of the Act Number 4 of 2009 on Mineral and Coal Mining, a 1 (26); and a 1 (27) (ID).

Subsection (c) of the 2009 Mineral and Coal Mining Act of Indonesia, the corporation must carry out both reclamation and post-mining activity immediately after the completion and the closure of the exploited mining area. Recalling the defined terms of reclamation and post-mining activity, the corporation *nolens volens* needs to comply with the set timeline; target, and objective of the post-mining obligations. This means that, according to the timelines, reclamation should be carried out during and after the completion of mining businesses. While the post-mining activity, as the final phase of mining activity, may only be carried out after the completion of a part or all of the mining businesses. By means of the target, the reclamation focuses on the environment and the ecosystem of the mining areas, whereas the post-mining activity does not merely focus on the environment but also focus on the surrounding community. Finally, the objective of the reclamation is limited to the restoration of environmental function only, while the objective of the post-mining activity is not limited to the restoration of environmental function but also the restoration of social function. Thus, by obliging the corporation to perform both these post-mining obligations, the corporation will not merely rehabilitate the environmental function of the mining areas, but, at the same time, the corporation will also rehabilitate the social function of the affected local community. According to these brief explanations, it can be concluded that both reclamation and post-mining activity are actually different but surely correlating, meaning that the implementation of both these post-mining obligations will be beneficial to the continuity of the environment and the welfare of the affected community. Therefore, the nonfulfillment of these post-mining obligations will certainly be resulting in direct and indirect damages, not only against the environment but also against the local community simultaneously.

It is interesting that in Thailand, it is recognised a conservative approach to the negligence of corporate post-mining obligations, meaning that the corporation will not directly be punished when it neglects its post-mining obligations. According to the 2017 Thai Minerals Act, if a corporation violates

or fails to comply with the provisions of the Act, including the post-mining obligations, the corporation, initially, will be given a period of time to make rectifications or perform correctly and appropriately within a specified time.[225] Nonetheless, if within the specified time the corporation yet fails to make rectifications or to perform correctly and appropriately, and the failure may result in serious damages to the environment and the local community, the corporation will be imposed by an administrative punishment in the form of revocation of mining license,[226] furthermore, the corporation at the same time will be imposed by imprisonment not exceeding one year or fines not exceeding THB300.000.[227] This measure, certainly, will provide a strong foundation for the equilibrium in the mining sector, meaning that the corporation yet has another chance to restore and improve the damages it unintentionally creates, whereby further negligence of the corporation will be directly imposable by administrative and criminal sanctions, regardless the small amount of the applicable sanctioning.

To acknowledge whether or not the corporation has fulfilled its post-mining obligations against the environment, it is wise that the government, through its department destined for it, provides a sequence of environmental and social assessments to inspect the corporate compliance to the regulation of corporate post-mining obligations against the environment. In this regard, the fulfilment of the corporate post-mining obligations against the environment will be indicated by the issuance of a closure certificate by the governmental authority. South Africa is a good model for the application of a closure certificate indicating the success in complying with the corporate post-mining obligations against the environment. It is interesting since the mining corporations need to fulfil their post-mining obligations because the fulfilment of the post-mining obligations is mandatory prior to the Ministry of Mineral Resources and Energy of South Africa may finally issue a closure certificate

[225] Thai Minerals Act, B.E. 2560 (2017), s 130 para (1) (TH).
[226] Ibid, s 130 para (3) (TH).
[227] Ibid, s 160 (1) (TH).

for the concerned mining corporations.[228] Such fulfilment obligations will primarily be assessed by the related governmental departments of South Africa to inspect the compliance to the conditions of the country's environmental authorisation as well as a management and sustainable closure of the exploited mining area.[229] Finally, after the related governmental departments confirm corporate compliance, then the closure certificate may finally be issued. However, if the corporation fails to comply with the mandatory post-mining obligations, the competent authority will not issue the closure certificate making the mining activities deemed still in operation. This provision will be very beneficial in ensuring that the corporation has totally fulfilled its post-mining obligation and will not irresponsibly abandon the exploited mining areas. Therefore, by applying this measure, it is expected that the objectives of corporate post-mining obligations to rehabilitate environmental and social function will eventually be accomplished as the mining operations ceased.

2. Model Law in Punishing Negligence of Corporate Post-Mining Obligations against the Environment

It is widely accepted that the primary reason for a corporation to conduct any illegal activities is profit maximisation, meaning that the corporation has acknowledged that the cost of punishment is incomparable to the high number of profits obtained from deviant activities.[230] As explained by Cohen and Simpson, the high rates of profits and low possibility of discovery and prosecution will be directly proportional to the appearance of criminal opportunity and vice versa.[231] In this regard, the punishment for the negligence of corporate post-mining obligations needs to be proportionately and sufficiently regulated as well. The proportionality in punishing negligence of corporate post-mining obligations can be said to be a determinant of the fairness of a punishment's imposition and the reduction of its application will

[228] See Act Number 49 of 2008 on Mineral and Petroleum Resources Development Amendment Act, s 43 (1) (ZA).
[229] Ibid, s 43 (5) (ZA).
[230] Anonymous, 'Corporate Crime: Regulating Corporate Behaviour through Criminal Sanctions', 1365.
[231] Simpson and others, 'An Empirical Assessment of Corporate Environmental Crime-Control Strategies', 233.

result in a less just scheme.[232] Noting Miceli's account, it is noted that there are four conceptions of proportionality norm in punishing criminal perpetrators. On the basis of the first conception, it is interpreted that the imposed punishments should be equal to the harmfulness of the committed crimes. Miceli connected this conception to economic theory which overcoming the measurement problem to the equity of the punishments and harms through dollar-equivalent terms, noting that the amount of monetary punishments should be equated to the dollar value of the harm that is imposed by the perpetrator on society.[233] Based on the second conception, it is argued that the imposition of punishments should be proportional to the wickedness or seriousness of the crimes which is indicated by the scale of imposed punishments.[234] While the third and fourth conceptions rely on criminal deterrence which is not the imposition of the actual punishments but the expected or can be said the effective punishment.[235]

In connection with this, the wickedness and seriousness of negligence of corporate post-mining obligations should be scaled to acknowledge whether or not it is a harmful and serious offence. Thus recalling its direct and indirect damages, not only against the environment and the local resident but also against the corporation itself, the negligence of corporate post-mining obligations is undeniably a harmful and serious offence. As to measure the equity of the harm and punishment, it is necessary to assess the value of the harm and the amount of the punishments for the negligence of corporate post-mining obligations.

Moreover, recalling the dual-element theory which relies on harm and wrongfulness, criminalisation will be on the ground that '*the conduct is injurious and is perpetrated in a manner that makes it wrong.*'[236] It is clear that negligence of corporate post-mining obligations against the environment is perpetrated in a wrong manner, and this wrong manner has directly and

[232] Hirsch, 'Proportionality in the Philosophy of Punishment', 93.
[233] Miceli, 'On Proportionality of Punishments and the Economic Theory of Crime', 306.
[234] Ibid.
[235] Ibid, 306-07.
[236] Hirsch, 'Harm and Wrongdoing in Criminalisation Theory', 247.

indirectly damaged the environment; the local community; and the corporation itself. Thus, to eradicate such deviation, it is necessary to proportionately regulate and punish the negligence of corporate post-mining obligations against the environment.

I would say that it is proportional and sufficient to impose a combination of administrative and criminal sanctions against the negligence of corporate post-mining obligations, meaning that the administrative sanction will be imposed upon the corporation, while the criminal sanction will be imposed upon the responsible corporate officers. However, it is argued that the imposition of criminal sanctions against individuals involved in corporate criminal misconduct is somehow over-deterrence, believing that the deterrent effect of the administrative sanctions alone is considerably high.[237] The emergence of administrative sanctions somehow, according to Adshead, is closely related to the rise of the perception that environmental offence is not as serious as conventional crime, leading to the decriminalisation of environmental offences.[238] Nonetheless, it is sometimes forgotten that the damages, either directly or indirectly, resulting from the negligence of corporate post-mining obligations against the environment undeniably are extremely high which affects the environment, the community as well as the corporation itself. Moreover, the responsible corporate officers are most likely involved in the negligence corporate of post-mining obligations, not because of the importance of the corporate officers themselves. Therefore, the application of criminal sanction upon the individual as well as administrative sanction upon the corporation, I argue, will meet the due deterrent while not over-deterring the concerned individual as well as the corporation.

As to realise a deterrence to the deviant corporation, criminal sanctioning should be severely imposed upon the corporation as well as its responsible officers, because in fact corporation itself cannot be imprisoned thus the imprisonment should be attached to the responsible corporate officers, while

[237] Anonymous, 'Corporate Crime: Regulating Corporate Behaviour through Criminal Sanctions', 1373.
[238] Adshead, 'Doing Justice to the Environment', 225-27.

the corporations itself should be bound by administrative sanction, in particular the monetary penalties.[239] Moreover, the imposition of monetary penalties should be high enough to make the corporation, on the one hand, deters and on the other hand, perforce to discharge all of the profit obtained from the illegal activities.[240] What criminal regulation should regulate is the measure to discharge all of the profits obtained by the corporation from its deviant behaviour and at the same time to impose monetary penalties in the form of monetary fines. Certainly, responsible corporate officers should also be imposed with proportional imprisonment.

In practise, for instance in South Africa, negligence of corporate post-mining obligations still be proceed before the magistrates' court, and the application is somehow resulting in considerably low penalties, particularly in the form of fines.[241] The prosecutions before the magistrates' court most of the time result in unsatisfied results, which according to Dupont and Zakkour is due to the inexperience of the magistrates' court in dealing with environmental cases.[242] A country, such as Australia in its state of New South Wales,[243] has established a Land and Environment Court to deal with environmental offences meaning that the prosecution of environmental cases will be borne upon considerably more experienced judges. On the other hand, in Indonesia, no court specifically deals with environmental cases yet, meaning that environmental offences will be prosecuted before the first-level court. Nonetheless, since 2011, the Supreme Court of Indonesia has held a sequent of formal education for the first-level court judges interested in the area of environmental law, so that the judges will have expertise in environmental law thus making them capable to adjudicate environmental cases.

The imposition of criminal sanctions against the corporation may only be possible as long as the law recognises so. Recalling the account of Sudirman and Feronica, there are three parameters for corporate punishment, one of

[239] Anonymous, 'Corporate Crime: Regulating Corporate Behaviour through Criminal Sanctions', 1365.
[240] Ibid, 1365-66.
[241] Adshead, 'Doing Justice to the Environment', 223-24.
[242] Ibid, 223.
[243] Ibid.

which is that the applicable laws explicitly stipulate that corporation is a subject to criminal law.[244] This means that the criminal provisions need to clearly regulate that corporations can be prosecuted for committing the negligence of corporate post-mining obligations. Therefore, if a corporation commits corporate criminal misconducts which are not regulated and punished under the criminal provisions, the corporation cannot and will not be able to be held criminally liable based on this model penal code. Hence, that type of corporate misconduct will only be subjected to civil and administrative law procedures. Nonetheless, as the result of the legal comparison of the Indonesian, Thai, and South African mining regulations, it is found that the countries recognise the imposition of criminal sanctions against the corporation, regardless of the countries apply different standards in imposing the criminal sanctions against the negligence of corporate post-mining obligations.

Indonesia can be a good example in the combined imposition of both administrative and criminal sanctions against the negligence of corporate post-mining obligations, due to Indonesia has clearly and explicitly threatened the negligence with considerably strong sanctioning. Under the 2020 Mineral and Coal Mining Act of Indonesia, the imposition of sanctions against the negligence of corporate post-mining obligations will be depending on the timeline of the negligence. This is due to the 2020 Mineral and Coal Mining Act dividing the negligence into: (i) the negligence before the closure of mining activity; and (ii) the negligence after the closure of mining activity, whereby the regulation and punishment are actually dissimilar. This means that when a corporation is neglecting its post-mining obligations before the mining activity is ceased and completed, the deviant corporation is punishable by administrative sanctions in the form of written reprimand; cessation; revocation of mining licenses, and fines.[245] While on the contrary, when a corporation is neglecting its post-mining obligations after the mining activity

[244] Yudoprakoso, *Pertanggungjawaban Pidana Korporasi dan Pemidanaan Korporasi*, *68.*
[245] See Act Number 3 of 2020 on the Amendment of the Act Number 4 of 2009 on Mineral and Coal Mining, a 151 (2) (ID).

is finally ceased and completed, the deviant corporation is punishable by criminal sanctions in the form of imprisonment for a maximum of five years and fines for a maximum of IDR100 billion,[246] which is approximately equal to USD6.7 million. Moreover, the corporation may also be subject to an additional penalty in the form of payment of funds to fulfil the neglected post-mining obligations.[247]

Accordingly, it can be said that the imposition of both these punishments will not be given at the same time, due to the timelines of the negligence is different. It can be translated from the 2017 Thai Minerals Act in its measure which directly applies both administrative and criminal sanctions against a corporation, while yet still applying the amount of sanctioning in the 2020 Mineral and Coal Mining Act of Indonesia. This will be resulting in strong sanctioning which is considerably proportional and not over-deterrent to the side of the corporation. Therefore, the application of this measure is expected will be contributing more directly to the protection of the environment and avoiding damages that result from the direct and indirect impacts of the negligence of corporate post-mining obligations against the environment.

Furthermore, Australia, in this regard will be presented by the state of New South Wales, which has developed a pleasing mining regulation that considers the significance of the environment, ensuring protection for the community,[248] to minimise the direct and indirect impacts of the mining operation. By referring to the NSW Mining Act 1992, the government agency of New South Wales, in this regard Secretary or inspector, may provide directions for the corporation as to present protection for the environment, one of which is by directing the corporation to rehabilitate the present or future impacts of its mining operation against the environment,[249] either to the environment within the mining areas or to the environment outside of the

[246] Ibid, a 161B (1) (ID).
[247] Ibid, 161B (2) (ID).
[248] See Mining Act 1992 No 29 of the New South Wales, s 3A (AU).
[249] Ibid, s 240 (1) (e) (AU).

mining areas.[250] Interestingly, if without any reasonable excuse, the corporation fails to comply with the directions to rehabilitate the impacts, the corporation that will be represented by its responsible officer,[251] is guilty of an offence and thus will be imposed by fines for a maximum of 10.000 penalty units,[252] whereby one penalty unit is set for AUD110 in the state of New South Wales. Moreover, the NSW Mining Act 1992 has also recognised administrative sanctions against contravention of the Act's provisions, in the form of cancellation of the mining licenses.[253] However, according to the Act, the state of New South Wales yet does not recognise the application of criminal sanctions against corporate negligence of its mining obligations, including its post-mining obligations, thus leaving the deviant corporation may only be imposed by administrative sanctions, in the form of monetary penalties.

Undeniably, the formulation of a proper mining regulation that regulates and punishes negligence of corporate post-mining obligations is crucial to effectively prevent negligence of corporate post-mining obligations from occurring. The legal formulation in the regulation and punishment of the negligence of corporate post-mining obligations, I believe, will be directly proportional to the positive impacts, not only against the environment and the local community but also against the mining corporation itself. The deemed proper and sufficient regulation of corporate post-mining obligations against the environment certainly will not only be limited to the importance of environmental protection but also to the affected local community. This means that the regulation on corporate post-mining obligation should be formulated by adopting measures that are environmentally-sound and socio-economic oriented.

Australia is an excellent instance that has successfully linked environmental and social measures in its mining regulation, through

[250] Ibid, s 240 (1B) (AU).
[251] Ibid, s 378F (2) (AU).
[252] Ibid, s 240C (AU).
[253] Ibid, s 125 (1) (b) (AU).

management, development, and conservation of the environment to promote social and economic welfare of the community.[254] Australia, as represented by the State of New South Wales, has stepped forward to implement environmentally-sound mining regulations which are proven by the complexity of the regulation's formulation, particularly in its preventive measures. Through these preventive measures, the mining corporation is expected to conduct a more circumspect mining operation to prevent the unpredicted and undesired damages, resulting from the mining operation, against the environment as well as the community. The applicable sanctioning, including the administrative sanctions to cancel the mining licenses, can also be considered as one of the proper preventive measures against the violation of mining provisions. It is interesting that by referring to Section 125 Subsection (1) (b) of the NSW Mining Act 1992, there is no need for a prosecution for the contravention committed by the corporation to cancel its mining licenses, when the competent authority concludes that the corporation has failed to comply with the regulation, the competent authority may immediately cancel the mining licenses of the concerned corporation.

It is expected that the application of these proposed measures in regulating and punishing corporate post-mining obligations will create a favourable outcome and contribution to preventing negligence of corporate post-mining obligations from occurring. Furthermore, it is expected that these deemed proportional and sufficient measures will be directly proportional to protecting the environment and avoiding damages resulting from the negligence of corporate post-mining obligations.

[254] See Environmental Planning and Assessment Act 1979 No 203 of the New South Wales, s 1.3 (a) (AU).

Chapter VI
Conclusion and Recommendation

A. Conclusion

Violations of environmental regulations have long been considered a regulatory offence and damages are considered to be less serious. However corporate criminal misconduct against the environment, particularly negligence of corporate post-mining obligations against the environment, can no more be considered a regulatory offence due to its serious impacts on the environment and the local community. The direct and indirect impacts of the negligence of corporate post-mining obligations have damaged the environment and the local community, further resulting in late-detected victimisation of the local community. Furthermore, the direct and indirect impacts will also be experienced by the concerned corporation. In dealing with the negligence of corporate post-mining obligations, proper and sufficient legal formulation, as an initial step to overcome such negligence from occurring, need to be conducted by the legislature of every country. This proper and sufficient legal formulation will be directly proportional to the just; firm and environmentally-friendly mining regulation that may overcome and prevent the negligence of corporate post-mining obligations in the future.

The continuity of corporate negligence of its post-mining obligations can be said, is resulting from the considerably low standards in the regulation and punishment of the negligence of corporate post-mining obligations against the environment. The low standards have correlated with the notion believing that the imposition of an administrative sanction in the form of monetary penalty alone has considerably met the due deter of the deviant corporation. Nevertheless, the direct and indirect impacts of the negligence of corporate post-mining obligations have created harm that injuries the environment; local community; and the corporation itself. This implies that the impacts resulting from the negligence of corporate post-mining obligations are considered massive. Therefore, I strongly believe that a combined

imposition of administrative sanction against the corporation and a criminal sanction against the responsible corporate officers will be proportional and not over-deterrent to both corporation and its responsible officers.

Indonesia, Thailand, and South Africa in regulating and punishing negligence of corporate post-mining obligations against the environment have similar and also different applicable measures which are unique and distinctive. These compared jurisdictions recognise that the mining operations should be carried out in an environmentally-friendly perspective without leaving the importance to create an equilibrium in the economic and social development of the countries, which leads to the formulation of a legal provision obliging the corporation to carry out post-mining obligations against the environment during and subsequent to the closure of the mining activity. Moreover, the compared jurisdictions apply a combined imposition of administrative and criminal sanctions against the negligence of corporate post-mining obligations, by means to proportionally and sufficiently punish negligence of corporate post-mining obligations against the environment, notwithstanding that there are different measures applied by the countries in punishing such negligence. Nevertheless, the compared jurisdictions have dissimilar thresholds on the harm of negligence of corporate post-mining obligations against the environment and the proportional punishment to be imposed. Therefore, the countries like Thailand and South Africa provide a considerably low punishment rate against the neglected corporation as well as its responsible officers.

B. Recommendation

The continuity of the negligence of corporate post-mining obligations against the environment has a close relation to the failure to formulate a proper and sufficient regulation and punishment for the negligence of corporate post-mining obligations against the environment. It is recommended that countries' legislature, at least Indonesia; Thailand; and South Africa, strictly and carefully formulate the regulation and punishment of the negligence of corporate post-mining obligations against the

environment, so that the future mining regulations of the countries may be just, firm, and environmentally-friendly mining regulations.

Concerning the application of a combined imposition against the negligence of corporate post-mining obligations, I argue that such imposition will not over-deterring the corporation as well as its responsible corporate officers, meaning that the combined imposition of administrative and criminal sanctions will meet the due deterrent. I suggest that this combined imposition can be translated by countries who face issues relating to the negligence of corporate post-mining obligations against the environment so that the countries may present a deterrent effect to the corporation and its responsible officers.

By means of proportionately and sufficiently regulating and punishing negligence of corporate post-mining obligations, I strongly believe that a combined imposition of administrative sanctions and criminal sanctions will be proportional and not over-deterrent to the negligence of corporate post-mining obligations against the environment. I recommend that at least in the future mining regulations of Indonesia, the legal formulation for the regulation and punishment of the negligence of corporate post-mining obligations should be carried out in a proportional and sufficient so that the future mining regulation may contribute more directly to the protection of the environment and avoiding damages.

REFERENCES

Legislations

Act Number 3 of 2020 on the Amendment of the Act Number 4 of 2009 on Mineral and Coal Mining
Act Number 4 of 2009 on Mineral and Coal Mining
Act Number 8 of 2004 on the National Environmental Management Amendment Act
Act Number 11 of 1967 on the Basic Principles of Mining
Act Number 11 of 2020 on Job Creation
Act Number 23 of 1997 on Management of the Environment
Act Number 28 of 2002 on Mineral and Petroleum Resources Development Act
Act Number 32 of 2009 on Protection and Management of the Environment
Act Number 49 of 2008 on Mineral and Petroleum Resources Development Amendment Act
Act Number 107 of 1998 on the National Environmental Management Act
Environmental Planning and Assessment Act 1979 No 203 of the New South Wales
Government Regulation in Lieu of Law Number 37 of 1960 on Mining
Mining Act 1992 No 29 of the New South Wales
Thai Minerals Act, B.E. 2560 (2017)
Constitution of the Kingdom of Thailand, B.E. 2560 (2017)

Books

Amrani, Hanafi and Ali M, *Sistem Pertanggungjawaban Pidana: Perkembangan dan Penerapan* (Raja Grafindo Persada 2015)
McConville M and Chui WH, *Research Methods for Law* (Edinburgh University Press 2007)
Setiyono H, *Kejahatan Korporasi: Analisis Victimologi dan Pertanggungjawaban Korporasi dalam Hukum Pidana Indonesia* (Bayumedia Publishing 2005)
Topan M, *Kejahatan Korporasi di Bidang Lingkungan Hidup: Perspektip Viktimologi dalam Pembaruan Hukum Pidana di Indonesia* (Nusa Media 2019)
Yudoprakoso PW, *Pertanggungjawaban Pidana Korporasi dan Pemidanaan Korporasi* (Kanisius 2016)

Book Sections

Forti G and Visconti A, 'From Economic Crime to Corporate Violence: The Multifaceted Harms of Corporate Crime' in Rorie ML (ed), *The Handbook of White-Collar Crime* (1st edn, John Wiley & Sons, Inc 2020)
Navarro J, 'Corporate Crime' in Albanese JS (ed), *The Encyclopedia of Criminology and Criminal Justice*, vol 1 (1st edn, John Wiley & Sons, Inc 2014)

Journal Articles

Adshead J, 'Doing Justice to the Environment' (2013) 77 The Journal of Criminal Law 215
Amdur R, 'Harm, Offense, and the Limits of Liberty' (1985) 98 Harvard Law Review 1946
Anonymous, 'Corporate Crime: Regulating Corporate Behaviour through Criminal

Sanctions' (1979) 92 Harvard Law Review 1227
Baer MH, 'Three Conceptions of Corporate Crime (and One Avenue for Reform)' (2021) 83 Law and Contemporary Problems 1
Baucus MS and Dworkin TM, 'What Is Corporate Crime - It Is Not Illegal Corporate Behavior' (1991) 13 Law & Policy 231
Bernard TJ, 'The Historical Development of Corporate Criminal Liability' (1984) 22 Criminology 3
Clemente R, 'Theory of Punishment' (2008) 3 Columbia Undergraduate Law Review 27
Gedicks A, 'Transnational Mining Corporations, the Environment, and Indigenous Communities' (2015) 22 Brown Journal of World Affairs 129
Hirsch Av, 'Proportionality in the Philosophy of Punishment' (1992) 16 Crime and Justice 55
Hirsch Av, 'Harm and Wrongdoing in Criminalisation Theory' (2014) 8 Criminal Law and Philosophy 245
Kerem D, 'Change We Can Believe in: Comparative Perspectives on the Criminalization of Corporate Negligence' (2012) 14 Transactions: The Tennessee Journal of Business Law 95
Kurniawan R and Nurul Intan Sari D S, 'Pertanggungjawaban Pidana Korporasi Berdasarkan Asas Strict Liability' (2014) 1 Jurnal Yuridis 153
Miceli TJ, 'On Proportionality of Punishments and the Economic Theory of Crime' (2016) 46 European Journal of Law and Economics 303
Rich S, 'Corporate Criminals and Punishment Theory' (2016) 29 Canadian Journal of Law and Jurisprudence 97
Rizki AN and Firmansyah A, 'Kewajiban Lingkungan atas Reklamasi dan Pasca Tambang Pada Perusahaan Sektor Pertambangan di Indonesia' (2021) 6 EKOMBIS Sains 37
Saini P, 'Impact of Coal Mining on the Environment and the Climate' (2020) 1 Law Essentials Journal 15
Schnell NT, 'Beyond All Bounds of Civility: An Analysis of Administrative Sanctions against Responsible Corporate Officers' (2017) 42 Journal of Corporation Law 711
Simpson SS and others, 'An Empirical Assessment of Corporate Environmental Crime-Control Strategies' (2013) 103 Journal of Criminal Law and Criminology 231
Thomson JJ, 'Feinberg on Harm, Offense, and the Criminal Law: A Review Essay' (1986) 15 Philosophy & Public Affairs 381
Wilkinson M, 'Corporate Criminal Liability: the Move to Recognising the Genuine Corporate Fault' (2003) 9 Canterbury Law Review 142

Websites

ANTAM, 'Products & Services: What We Produce' (*ANTAM*, April 2023) <https://antam.com/en/products> accessed 27 April 2023
Indonesia SCo, 'Decision Directory' (*Supreme Court of Indonesia*, 2023) <https://putusan3.mahkamahagung.go.id/search.html?q=Undang-undang+nomor+3+tahun+2020&jenis_doc=putusan&cat=9a49acde4116f41729db232e7979515b&t_reg=2020> accessed 3 April 2023
JATAM, 'The Grief of Indonesian Small Islands in the Grip of Mine' (*JATAM*, 22 July 2021) <https://www.jatam.org/nestapa-pulau-kecil-indonesia-dalam-cengkeraman-tambang/> accessed 22 November 2022

Ministry of Energy and Mineral Resources, 'Minerba Online Data Indonesia' (*MODI*, 22 November 2022) <https://modi.esdm.go.id/filter?tahun=2022> accessed 22 November 2022

Rzk, 'Metamorphosis of Indonesian Legal Entities' (*Hukum Online.com*, 14 October 2007) <https://www.hukumonline.com/berita/a/metamorfosis-badan-hukum-indonesia-hol17818> accessed 18 March 2022

Statista, 'Major Countries in Global Mine Production of Platinum in 2022' (*Statista*, 2022) <https://www.statista.com/statistics/273645/global-mine-production-of-platinum/> accessed 6 March 2023

Steward WJ, 'Negligence' (*Collins Dictionary of Law*, 2006) <https://legal-dictionary.thefreedictionary.com/negligence> accessed 9 March 2023

Syahni D, 'The Operation of PT Antam is Polluting the East Halmahera Coast' (*MONGABAY*, 4 May 2021) <https://www.mongabay.co.id/2021/05/04/tambang-antam-cemari-pesisir-halmahera-timur/> accessed 3 October 2022

Syarif, 'Ministry of Energy and Mineral Resources Says That There are 2.741 Illegal Mining in Indonesia' (*Media Nikel Indonesia*, 28 September 2021) <https://nikel.co.id/kementerian-esdm-sebut-ada-2-741-tambang-liar-ada-di-ri/> accessed 3 October 2022

The Gale Group, 'Criminal Negligence' (*West's Encyclopedia of American Law*, 2008) <https://legal-dictionary.thefreedictionary.com/negligence> accessed 9 March 2023

The Gale Group, 'Negligence' (*West's Encyclopedia of American Law*, 2008) <https://legal-dictionary.thefreedictionary.com/negligence> accessed 9 March 2023

VITA

NAME	Fachrian Rizki
DATE OF BIRTH	25 June 1998
PLACE OF BIRTH	Takengon
INSTITUTIONS ATTENDED	LL.B. - Syiah Kuala University, Indonesia LL.M. - Chulalongkorn University, Thailand
HOME ADDRESS	Gatot Subroto Rd., Bale Atu, Laut Tawar Subdistrict, Aceh Tengah Regency, Aceh Province, Indonesia
PUBLICATION	1. Fachrian Rizki and M. Ya'kub Aiyub Kadir, 'Difference in Faith as an Ultimate Reason in Submitting Divorce Lawsuits in Indonesian Families of Different Religions' (2021) 5 Jurnal Ilmiah Mahasiswa Bidang Hukum Kenegaraan 1. 2. M. Ya'kub Aiyub Kadir and Fachrian Rizki, 'Interfaith Marriage in Indonesia: a Critique of Court Verdicts' (2023) 38 Yuridika 171.
AWARD RECEIVED	1. International Block Course Scholarship - Prince of Songkla University, Thailand. 2. Graduate Scholarship Programme for ASEAN and Non-ASEAN Countries - Chulalongkorn University, Thailand.