CHAPTER I

INTRODUCTION

A. Background

Growing international linkages through foreign direct investment ("**FDI**") are an important feature of financial globalization and raise important challenges for policymakers and statisticians in industrial and developing countries alike. With the integration of international capital markets, world FDI flows grew strongly in the 1990s at rates well above those of global economic growth or trade. This has placed the activities of direct investors and direct investment enterprises under increasing scrutiny and presented new challenges for statistical recording, balance of payments projections, economic surveillance, and vulnerability analysis.[1]

Currently, Indonesia is a growth country that has a very large market in the globalization trade world. The growth of foreign investments are increasing annually. Investment performance indicates a positive trend which is quite solid, even in times of global economic slowdown, investment transformed into one of the main components support economic growth tends to displace exports are likely to slow down. Recent economic growth data from Central Statistics Agency (*Badan Pusat Statistik* "**BPS**") recorded investment component of third quarter 2012 grew 10.02% compared to the same quarter in 2011.[2] Thus, Indonesia has an opportunity to grow faster than before.

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[1] International Monetary Fund Journal**, Foreign Direct Investment Trends and Statistic**, Prepared by the Statistics Department, In consultation with other departments, Approved by Carol S. Carson October 28, 2003, page 4-5

[2] Rahma, **Faktor Kunci Meningkatnya Investasi di Indonesia**, 1 Januari 2013, http://setkab.go.id/artikel-6596-.html, (Aug. 7, 2013)

Indonesia is very rich in natural resources such as the minerals, including gold, silver, copper, coal, oil and gas which were controlled by the state. The rights of a mastery of the state provides the authority to regulate, manage and oversee the management or exploitation of minerals, and contains an obligation to use it for the greatest prosperity of the people.[3] It is listed in the philosophy of *Pancasila*[4] as the state administration, the underlying natural resource management and economic concepts. One of its manifestations is following :

".....for the sake and prosperity of people, the state entirely controls and implements economic management of the sources of wealth concerning livelihood of many people...."

In mining exploitation, the government can implement its own and/or hire a contractor if necessary to carry out jobs that do not or can not be carried out by government agencies. When mining operations carried out by the contractor, the position of the government is giving permission to the relevant contractor. Permission granted by the government in the form of Indonesian Mining Rights (*Kuasa Pertambangan* "**KP**"), Indonesian Mining License (*Izin Usaha Pertambangan* "**IUP**"), Contract of Works (*Kontrak Karya* "**KK**"), Coal Mining Exploitation Working Arrangements (*Perjanjian Karya Pengusahaan Pertambangan Batubara* "**PKP2B**") and Production Sharing Contracts.[5]

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[3] Salim HS, **Hukum Pertambangan di Indonesia**, Jakarta: PT Rajagrafindo Persada, 2008, page 1

[4] *Pancasila* is the basis for the ideology of Indonesia. This name consists of two words from Sanskrit: *pañca* means five and *śīla* means principle or principles. *Pancasila* is the formulation of guidelines and national life for all Indonesian people. (source: http://id.wikipedia.org/wiki/Pancasila) (November.13, 2013)

[5] Salim, Op. Cit, page 2

To date, the mining sector become the sector which is the most interested for foreign investor. This statement is supported by the realization of Foreign Capital Investment (*Penanaman Modal Asing* "**PMA**") into Indonesia until September 2012 ago. This statement does not change compared with semester I. Realization of PMA in the mining sector in the third quarter reached U.S. $ 1 billion. Based on data from the Investment Coordinating Board (*Badan Koordinasi Penanaman Modal* "**BKPM**") as of September 2012, PMA realization that mining investment value is equal to the basic chemical industry, chemical and pharmaceutical amounted to U.S. $. 1.1 billion. After that followed the transport sector, warehouse and telecommunications (U.S. $. 0.8 billion); paper industry, paper products and printing (U.S. $. 0.7 billion), and transportation equipment industry and other transport (U.S. $. 0, 5 billion).[6]

The mining sector has a very important advantage for the development, modernization, and economic growth in many countries in the world, especially for developing countries, including Indonesia. But it also poses many problems for the environment and society where it operated. Historically mining industry relations with local communities have a heavy problem. The interests of the shareholders became the main target for the interest than the fulfillment of environmental and social protection. There are many complaints from local communities where mining activities carried out. It does not bring a direct positive impact on the lives and their welfare. Similarly, the education level of the local communities to fill the jobs must be in accordance with the needs of the mining companies. It continues to

[6] Dusep Malik, **Investasi Sektor Pertambangan Tetap Paling Diminati**, 23 October 2012, http://www.indonesiafinancetoday.com/read/35393/Investasi-Sektor-Pertambngan-Tetap-Paling-Diminati, (May. 5, 2013)

accumulate that eventually the local communities showed hostility. As a result, many companies are getting operation interferences from the local people, local non-governmental organization and international people.[7]

In mining activity, mining companies should undertake community development activities. For investors, social performance will increase and attracted interest because it can ensure their investment, that they are socially safe from the violation of investment law and ethics, as well as free from public pressure. Therefore, the business outcomes can be useful to minimize the risk of politics of the business. Socially, community development programs will successfully increase the "social legitimacy" or "validity social" for the existence and operation of the corporation in certain social environment, especially for the local community. However, it was not satisfactory in practice. On the one side, mining companies feels that they have set aside sufficient funds to carry out the "Community Development" in accordance with their estimation, on the other side, local communities assume that what has been done by the mining companies is not in accordance with their needs.[8]

B. Problems Identification

Based on the background above, the author would like to identify problems are following:

a) What is the legal perspective of community development of foreign direct investment in coal mining?

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[7] **CSR Pada Subsektor Pertambangan**, 25 November 2010, http://www.tambangnews.com/serba-serbi/opini/834-csr-pada-subsektor-pertambangan-umum-.html, (November.13, 2013)

[8] Ida Bagus Rahmadi Supancana, **Teaching Subject: Laporan Tim Analisis Dan Evaluasi Tentang Community Development**, 2007, page 1-3

b) What is the social change perspective of community development of foreign direct investment in coal mining?

c) How is the relation the legal perspective and the social change of community development in coal mining?

C. Research Objectives

The objectives of this research are following:

a) To determine the legal perspective of community development of foreign direct investment on coal mining. I will identify the relevant regulations on community development of foreign direct investment on coal mining law in Indonesia.

b) To determine the social change perspective of community development of foreign direct investment on coal mining.

c) To determine the relation between the legal perspective and social change perspective of community development of foreign direct investment in coal mining.

D. Research Benefits

The benefits of this research are following:

1. Theoretical benefits

   Completing the materials provided in the Legal Studies courses, particularly Mining Law, Investment Law and their relation to Community Development. The research will be useful as additional information for interested parties to the above problems.

2. Practical benefits

The author expects that the research can constitute advice, ideas, concepts and suggestions for use of the interested parties, both for practitioners, academics or law enforcement officers.

3. Benefits for the community

The research is expected to provide information to the public regarding the particular Investment Foreign Investment in Coal Mining Sector and the relation to Community Development.

E. Methods

1. Types of Research

This research will use a type of normative judicial, i.e review of the regulations, conventions, and international agreements, including the review of norms and principles contained in the regulation.[9] Because in reviewing the above problems should according to the relevant applicable regulations regarding foreign investment and coal mining.

2. Types and Sources of Data

Type of data on this research is secondary data, which is data that is sourced from the literature. Secondary data is then divided into three groups, namely primary legal materials, secondary legal materials and tertiary legal materials.[10] The descriptions are as follow:

a. Primary legal materials, which is a material that is the legal basis of laws are as follow:

1) Law No. 25 of 2007 Regarding Investment;

[9] Yanti Fristikawati, **Modul Kuliah Metode Penelitian Hukum**, Fakultas Hukum Unika Atma Jaya, Jakarta, 2006, page 4

[10] Soerjono Soekanto, **Pengantar Penelitian Hukum**, Universitas Indonesia (UI-Press), 2007, page 12

2) Law No. 1 of 1967 Regarding Foreign Investment;
3) Law No. 40 of 2007 Regarding Limited Liability Company;
4) Law No. 4 of 1999 Regarding Mineral and Coal Mining;
5) Law No. 11 of 1967 Regarding Principles of General Mining;
6) Presidential Decree No. 49 of 1981 Regarding Principles of PKP2B Between Coal Mining State's Company and Private Contractor;
7) Presidential Decree No. 21 of 1993 Regarding Principles of PKP2B Work Agreement Between PT Tambang Batu Bara Bukit Asam (PERSERO) and Coal Mining Contractor Company;
8) Presidential Decree No. 75 of 1996 Regarding Principles of PKP2B;
9) Government Regulation No. 23 of 2010 Regarding Implementation of Law. No. 4 of 2009 as amended Government Regulation No. 24 of 2012;
10) Minister of Energy and Mineral Resources Decree No. 680.K/29.M.Pe/1997 Regarding Implementation of Presidential Decree No. 75 of 1996;
11) Minister of Energy and Mineral Resources Decree No. 1453 K/29/MEM/2000 Regarding Technical Guidelines on Implementation of Governance Task in Public Mining Sector; and
12) other relevant regulations.

b. Secondary legal materials, which provides an explanation of primary legal materials following matters relating to the content of primary legal

materials. The materials are books, newspaper articles, journals, and internet.

c. Tertiary legal materials, the material that provides instructions and explanations of the primary legal materials and secondary legal materials. The material is the legal dictionary in Indonesian and English.

3. Location of Data

For the location of data collection, in addition to internet searching online, too involves visiting a library, such as in Atma Jaya University Library, Indonesia University Library, etc.[11]

4. Data Search Methods

Data search method is through the research of literature (library research) by finding and reading the books specifically according to the issue of the Mining Law and Foreign Investment Law, and Community Development as well as collect the articles from the internet as an example, which will be discussed and related to the basic theory as well as legislation that would serve as the legal basis in this research.[12]

F. Thinking Framework

In this research, the authors will examine the legal perspective and the social change perspective of community development in coal mining. From the perspective of the law will be reviewed the relevant applicable regulations of community development in the coal mining. From the perspective of social change will be examined with existing concepts in accordance with social change. Lastly,

[11] Tommy Hendra Purwaka, **Metodologi Penelitian Hukum**, Universitas Atma Jaya, Jakarta, 2007, page 77
[12] Peter Mahmud Marzuki, **Penelitian Hukum**, Prenada Media Group, Jakarta, 2005, page 194

this research will examine how is the relation between legal and social change in the community development of coal mining in accordance with the theories of law and social changes. Please see Diagram1 below.

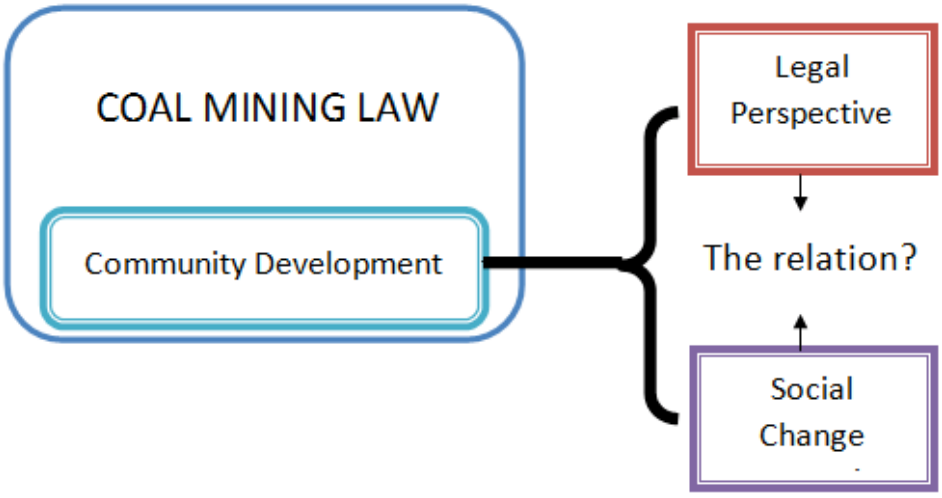

Diagram 1. Thinking Framework

CHAPTER II

THEORITICAL AND CONCEPTUAL FRAMEWORK

A. Law And Social Change

1. Classic Theories of Law and Social Change

a. Emile Durkheim Theory

Durkheim's interest in law is secondary to his overriding concern with social solidarity and the scientific study of society. He seeks to analyze law in general way in order to reveal principles of social organization and collective thinking. Durkheim tends to conceptualize law as derivative from and expressive of a society's morality. For Durkheim, social solidarity is the social phenomenon binding individuals together to create a society that exist. Social solidarity has a life of its own and is more than the sum of its constitutive parts. Social life is constituted by social facts, the characteristics of which are external to the individual, they exercise constraints on people and provide sanctions for nonconformity, and they are independent of the actions of particular individuals but exist throughout the social group.[13] The most important social facts are collective representations and Durkheim comments:

> *While one might perhaps contest the statement that all social facts without exception impose themselves from without upon the individual, the doubt does not seem possible as regards religious beliefs and practices, the rules of morality and the innumerable precepts of law – that is to say all the most characteristic manifestations of collective life.*

[13] Satjipto Rahardjo, **Hukum dan Masyarakat**, Angkasa, Bandung, 1980, page 103

All are expressly obligatory, and this obligation is the proof that these ways of acting and thinking are not the work of the individual but come from a moral power above him.

Even though social life is experienced as an objective reality, it is not directly amenable to empirical observation, and scientific study. This presents a significant problem for Durkheim's aspirations for a positivistic sociology. He observes that in scientific method selects only those results that are the most objectives and the most quantifiable. He proposes that solidarity is a social fact that can only be known thoroughly through its social effects and can be measured.[14] Durkheim said:

"Social solidarity is a wholly moral phenomenon which by itself is not amenable to exact observation and especially not to measurement. To arrive at this classification, as well as this comparison, we must therefore substitute for this internal datum, which escapes us, an external one which symbolizes it, and then study the former through the latter. That visible symbol is the law."

Durkheim's interest in the evolution of societies and the implications of the increasing division of labour for social solidarity means that he is concerned to identify and classify different types of social solidarity. Where the society or social type is relatively small, there is only a rudimentary division of labour, members are relatively homogeneous in needs and interest, the social structure is relatively simple and there is a dominating collective consciousness, mechanical solidarity prevails. On the other side, where the society has a relatively large population, a complex division of labour causing interdependence

[14] Sharyn L. Roach Anleu, **Law and Social Change**, Sage Publication London, 2003, page 13

between the specialized component parts, greater differences between individuals and a relatively weak collective consciousness, organic solidarity dominates. The method is clear and simple: in order to discern the type solidarity, it is necessary to distinguish and examine the types of law, specifically: 'Since law reproduces the main forms of social solidarity correspond to them.[15]

The next methodological question is how to classify and measure different types of law. Durkheim defines legal precepts as rules of behavior to which sanctions apply. He then makes a bold assumption and claims that 'it is clear that the sanctions change according to the degree of seriousness in which the precepts are held, the place they occupy in the public consciousness, and the role they play in society. Different legal rules are then measured according to their sanctions, which are of two main types: repressive and restitutive.[16]

Repressive sanctions entail the imposition of suffering or disadvantage on the perpetrator of a crime. The purpose of the sanction is to deprive offenders of their life, fortune, honour, liberty or other possession. Repressive sanction are usually contained in the criminal or penal law. An offence against an individual offends the entire society and the criminal law reflects this. Penal law is an expression of the shared outrage against acts that offend the collective morality and, where mechanical solidarity prevails, there is only a collective morality.

[15] *Ibid*
[16] *Ibid*

Repressive law corresponds to what is at the heart and centre of the collective consciousness, indeed: “an act is criminal when it offends the strong, well-defined states of the collective consciousness”. An act does not offend the common consciousness because it is criminal when it offend the common consciousness because it is criminal but the converse: the act is a crime because it is condemned. Durkheim observes: ‘Crime is not only injury done to interests which may be serious; it is also an offence against an auhority which is in some way transcedent’. Ironically, crime serves to reinforce and strengthen the collective consciousness. The common expression of anger enhances social solidarity by reaffirming agreement on social norms. In primitive societies law is wholly penal or represssive in character, it is the people assembled together who mete out justice.[17]

Restitutive sanctions aim to restore the status quo ante, they do not necessarily imply any suffering on the part of the offender, who may be an individual or corporate citizen. The aim of the sanctions is to establish relationships and restore the previous state of affairs that have been disturbed through the actions or inaction of one of the parties to the relationship. Rules with restitutory sanctions are not established directly between the individual and the society but between limited and particular sectors of society, for example between and among individuals, associations, companies or governments, which they link together. Examples of laws with restitutive sanction include civil law,

[17] Satjipto Rahardjo, Op. Cit, page 103-104

tort, commercial law, contract, laws that concern personal status, for example family law, administrative and constitutional law. Violation of these relationships and the obligations thereby established generally does not offend the entire collective consciousness, it inconveniences or harms only the plaintiff or complainant. In civil law cases the judge awards damages or orders spesific performance to complete the requirements of the obligation; the sanctions are neither penal nor expiatory. The losing plaintiff is not disgraced nor their honour impugned. While repressive law tends to stay diffused throughout society, restitutory law sets up for itself ever more specialized bodies, for example consular courts, industrial and administrative tribunals. The institutions of the civil law are more specialized than those of the criminal law.[18]

Restitutive law nevertheless remains connected, albeit weakly, to the conscience collective: it does not just concern private actors. While restitutive law does not intervene by itself and of its own volition but must be initiated by one or more of the parties concerned, it is society that lays down the law through the body representing it. Society is not absent: if a contract has a binding force it is society that confers the force. Every contract therefore presumes that, behind the parties binding each other, society is there, quite ready to intervene and enforce respect for undertakings entered into. However, contract law does not enforce all obligations between private parties, only those that conform

[18] Sharyn L. Roach Anleu, Op. Cit, page 13

with the rules of law, that is, obligatory force only attaches to those contracts that themselves have a social value. In the law of contract agreements can be null and void if they contravene the criminal law, entail coercion or conflict with public policy.[19]

The reliance on restitutive laws to regulate many and various types of social relationship indicates organic solidarity: law becomes a way of coordinating the differentiated parts of the society and integrating the diverse needs, interests and expectations. As societies expand, the collective consciousness must transcend all local diversities and become more abstract, thereby leaving more scope for individual variations. As a result, transgressing restitutive laws does not evoke the same strong sentiments as violating repressive laws. The evolution of societies from those characterized by mechanical solidarity to those where organic solidarity dominates is indicated by a drift towards more restitutive law, while repressive law regulates a smaller quantity of offences and range of relationships.[20]

Organic solidarity explained that the law required is no longer work to give a penalty or limiting, but which provides the substitution accordingly so as the situation be recovered again as before.[21]

b. Max Weber Theory

Max Weber constructs a typology of law based on different modes of legal thought. He addresses the process of legal thought in

[19] *Ibid*, page 14-15
[20] *Ibid*
[21] Satjipto Rahardjo, Op. Cit, page 104

general and recognize that legal systems can be dominated by such figures as priests, professors, consultants or judges. This typology is an example of an ideal type, that is, a hypothetical constructs that involves the theoretical enumeration of all the possible characteristics against which empirical material may be compared. The concept of rationality is central to the typology of law. Both law making – the establishment of general norms that assume the character of rational rules of law and law finding the application of established norms and legal propositions deduced via legal thinking to concrete facts or particular cases can be rational or irrational and can vary in terms of being formal or substantive.[22] Weber's typology of law has four main variants:

1) Formal irrationality

   In a legal system characterized by formal irrationality, law makers and finders apply means that are beyond the control of reason. Recourse to the pronouncements of an oracle or a prophetic revelation, for example, determines legal outcomes.

2) Substantive irrationality

   In this situation, decisions are influenced by concrete factors of the particular case evaluated in terms of ethical, emotional or political values rather than general norms. Law makers and law finders deal with particular cases arbitrarily or in terms of their own conscience based on emotional evaluations. Examples include decisions of the tyrant or the kadi (the Islamic judge in the

[22] Sharyn L. Roach Anleu, Op. Cit, page 22

marketplace), who apparently renders decisions without reference to general rules but assesses the particular merits of individual cases.

3) Substantive rationality

A legal system characterized by substantive rationality occurs where legal decisions are made by reference to rules that reflect value commitments or ethical imperatives, for example is Jewish Talmudic law of Church Canons, where a central issue is the interpretation of scripture in the light of general principles articulated as part of the religious value system. Implementation of welfare policies, collectivist goals or social justice policies via legislative programmes and principles that determine, or at least influence, judicial pronouncements is also an example of substantive rationality.

4) Formal rationality

This is the most sophisticated form of systematization. A law is formally rational insofar as significance in both substantive law and procedure is ascribed exclusively to operative facts, which are determined not from case to case but in a generically determined manner. All formal law is, formally at least, relatively rational. Law, however is “formal” to the extent that, in both substantive

and procedural matters, only unambiguous general characteristics of the facts of the case are taken into account.[23]

c. Richard Schwartz and James C. Miller Theory

The development of the law in relation to the nature of the composition of the community seems to remain an enticing target for the attention of researcher. Richard D. Schwartz together with James S. Miller has also conducted a study which can be seen as an attempt to convince the discovery that has been put forward by Durkheim above, namely that saw the relationship between legal sanctions which substitute with the increasing division of labor in society. But the result of investigations of Miller and Schwartz is the development of such a law was actually found in many people who do not even have the simplest specialization.

Schwartz study is a cross-cultural investigation by taking targeted 51 people by seeing whether in each community can be found the forms of organizing legal: counsel (regularly using specialist lawyers and there is no relative among the lawyers to settle a dispute), mediation (use a third party who is not a relative in the settlement of disputes); police (special forces assigned to either partially or completely in order to carry out the law). With a view to find the relationship between the development of the legal organization in the level of complexity of the arrangement of society from simple to very complex. The results of these studies were from 51 people who are simplest societies to the

[23] *Ibid*, page 23

complex societies, 11 societies did not have the above three characteristics; 20 societies just had mediation and police; 7 societies had only three characteristics mentioned above. There were 2 societies who deviate in which there is just police. Societies where mediation is not found that is the simplest societies which had not even familiar with money. Otherwise, two-thirds of the people familiar with mediation had used the money in the economic system. The community had known the concept of compensation which is the precondition of mediation. Because there were 20 societies who had mediation but they did not know police, so it is clear that both of these characteristics does not always evolved together. Societies who knew the police, generally had advance economic system and had a certain degree of specialization; most of them had pastors, teachers, and government officials.[24]

The findings of Schwartz and Miller aforesaid contrary to Durkheim's theory about the development of repressive laws to the law of restitution. Because police found in people who have a certain degree of division of labor. On the contrary, mediation that is restitutive (when connected with the concept of compensation) can be found in societies who are not familiar with the division of labor. The utilization of councel only be found in societies which are very complex.[25]

[24] Soerjono Soekanto, **Pokok-pokok Sosiologi Hukum**, Rajawali Pers, Jakarta, 2012, page 105
[25] *Ibid*, page 106

2. Law As A Tool Of Social Change Theory

There are several ways of considering the role of law in social change. Law plays an important indirect role in social change by shaping various social institutions, which in turn have a direct impact on society. Law interacts in many cases directly with basic social institutions, constituting a direct relationship between law and social change. For example, laws probihiting racial discrimination in education have a direct influence on social change by enabling previously excluded groups to attend schools of their choice.[26]

Law exerts an indirect influence on social change in general by influencing the possibilities of change in various social institutions. For example, the existence of a patent law arising the rights of inventors encourages inventions and furthers change in the technological institutions, which, in turn, may bring about other types of social change.[27]

There are two types of change through law: "planning" and "disruption". Planning refers to architectural construction of new forms of social order and social interaction. Disruption refers to the blocking or amelioration of existing social forms and relations. Planning through law is an omnipresent feature of the modern law. Although it is most pronounced in socialist countries (for example, five of plans of social and economic development), all nations are commited to planning to a greater or lesser extent. Both planning and disruption operate within the existing legal system

[26] *Ibid*, page 337
[27] *Ibid*

and can bring about: "positive" or "negative" social change, depending on one's perspective.[28]

Law is determined by the sense of justice and the moral sentiments of the population, and legislation can only achieve results by staying relatively close to the prevailing social norms. According to the other view, law and especially legislation, is a vehicle through which a programmed social evolution can be brought about. At one extreme, then, is the view that law is a dependent variable, determined and shaped by current mores and opinions of society. According to this position, legal changes would be impossible unless preceded by social change; law reform could do nothing except codify custom. This is clearly not so and ignores the fact that throughout history, legal institutions have been found to have a definite role, rather poorly understood, as instruments that set off, monitor, or otherwise regulate the fact or pace of social change. The other extreme, is the view that law as an instrument for social engineering. Accordingly, during the period of the transition from capitalism to socialism, legislation was used to guide society, establish and develop social economic forms, abolish each and every form of exploitation, and regulate the measure of labor and the measure of consumption of the products of social labor. It used legislation to create and improve the institutions of socialist democracy, to establish firm law and order, safeguard the social system and state security, and build socialism.[29]

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[28] *Ibid*, page 340

[29] Soerjono Soekanto, **Fungsi Hukum dan Perubahan Sosial**, Citra Aditya Bakti, Bandung, 1991, page 33-38

These view still represent the two extremes of a continuum representing the relationship between law and social change. The problem of the interplay between law and social change. The problem, of the interplay between law and social change is obviously not a simple one. Essentially, the question is not, Does law change society? Or Does social change alter law? Both contentions are likely to be correct. Instead, it is more appropriate to ask under what specific circumstances law can bring about social change, at what level, and to what extent. Similarly, the conditions under which social change alters law need to be specified.[30]

Although there is an obvious and empirically demonstrable reciprocal relationship between law and social change, for analytical purposes, I will consider this relationship as unilateral.

According to Roscoe Pound, the law is used as a tool of social engineering (engineering tool or a means of community building societies). Pound described the relation of law and social engineering as follows:

"For the purpose of understanding the law of today, I am content with a picture of satisfying as much of the whole body of human wants as we may with the least sacrifice. I am content to think of law as social institution to satisfy social wants-the claims and demands and expectations involved in the existence of civilized society-by giving effect to as much as we may with the least sacrifice, so far as such wants may be satisfied or such claims given effect by an ordering of human conduct through politically organized society. For the present purposes, I am content to see in legal history the record of a continually wider recognizing and satisfying of human wants or claims or desires through social control; a more embracing and more effective securing of social interests; a continually more complete and effective elimination of

[30] *Ibid*

waste and precluding of friction in human enjoyment of the goods of existence-in short, a continually more efficacious social engineering."[31]

However, this is contrary to the opinion of Daniel S. Lev, professor of the School of Law and Department of Political Science University of Washington. According to Lev, the most important role in social change is not made by law, but by social and political leaders such as judges, prosecutors, and advocates. Law can not determine social change, political change, economic change, and this is dependent on the power and strength in the people for themselves.[32]

Further, Lev said that role of law is indirect in social change. He just gave ideological framework within the social change which to be desired to guarantee people that they will be treated fairly. This is important, because without this guarantee, social changes desired in society is almost impossible, because people do not believe in the state, the structure of society, or on anything.[33]

Furthermore, Lev said, if we observe "a tool of social engineering" idea now, there are several meanings. First, in the good point of view, the government can use the law to lead people into a certain direction. From the other side, it means the people are not given a chance for themselves, they would always be manipulated. Thus "a tool of social engineering" has two meanings. Sometimes used in a good sense once, but it turns out to be a very

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[31] H Richard Hartzler and Harry T. Allan, **Law And Societies Department: Legal Theories Of Roscoe Pound And Karl Llewellyn: Their Application To The Study Of Behavior Within Business Organizations i. Introduction,** American Business Law Journal, 1986, page 4-5

[32] Erman Rajagukguk, **Hukum dan Masyarakat**, Bina Aksara, Jakarta, 1983, page 72-73

[33] *Ibid*

dangerous thing. If we discuss the law as a tool of social engineering, that means giving a very full powers to the government. People always use the term as something neutral. However, the term is not neutral and can be used for good purposes or for bad purposes.[34]

This opinion is supported by Idit Lev Kostiner, who wrote in his research as follows:

" *...the effects of law on social change have tended toward a critical view of law, arguing that legal tactics are usually futile in bringing about meaningful social reform,....legal tactics may indirectly empower social movements and provide leverage for political mobilization...*"[35]

The Efficacy of Law as an Instrument

As an instrument of social change, law entails two interrelated processes: the institutionalization and the internalization of pattern of behavior. Institutionalization of a pattern of behavior refers to the establishment of a norm with provisious for its enforcement (such as desegregation of public schools), and internalization of a pattern of behavior means the incorporation of the value or values implicit in a law (for example, integrated public schools are "good"). Law can affect behavior directly only through the process of institutionalization of attitudes or beliefs.[36]

Often, law is an effective mechanism in the promotion or reinforcement of social change. However, the extent to which law can provide an effective impetus for social change varies according to the conditions present in

[34] *Ibid*
[35] Idit Kostiner, **Evaluating Legality: Toward a Cultural Approach to the Study of Law and Social Change,** Law & Society Review 37.2 (Jun 2003): 323-368,260, page 323-324
[36] Steven Vago, Op. Cit, page 341

particular situation. A law likely to be successful to induce change if it meets the following conditions:

a. The law must emanate from an authoritative and prestigious source or must introduce its rationale in terms that are understandable and compatible with existing values;

b. The advocates of the change should make reference to other communities or countries with which the population identifies and where the law is already in effect;

c. The enforcement should include positive as well as negative sanctions;

d. The enforcement of the law must be aimed at making the change in relatively short time or the law must themselves be very much committed to the change intended by the law; and

e. The enforcement of the law should be reasonable, not only in the sanctions used but also in the protection of the rights of those who stand to lose by violation of the law.[37]

The efficacy of law as a mechanism of social change is conditioned by a number of factors. One is the amount of information available about a given piece of legislation, decision, or ruling. When there is insufficient transmission of information about these matters, the law will not produce its intended effect. Ignorance of the law is not considered an excuse for disobedience, but ignorance obviously limits the law's effectiveness. In the same vein, law is limited to the extent that rules are not stated precisely, and not only because people are uncertain about what the rules mean. Vague rules

[37] *Ibid*

permit multiple perceptions and interpretations. Consequently, the language of the law should be free of ambiguity, and care should be exercised to prevent multiple interpretations and loopholes.[38]

In addition, Yehezkel Dror said that the actions in the society purely instrumental as in commercial activities, with the real one can accept the effect of the regulations of the new law. Instead areas of social life which is closely connected with beliefs and institutions that are basic, as well as dealing with the actions that constitute the expression of beliefs will undergo minor changes, though issued regulations that attempt to give shape and direction to the field these areas; included in these areas are: family life and marriage. Although widely recognized, that the fields are "free from the element of faith, beliefs and values" easier to work on and directed by the law, but few investigations have proved, that also in areas called the law was not neutral fully control the situation according to what he wanted. Investigation conducted by Stewart Macaulay has revealed practices in the field of trade law, which also explains a little more about the limits of the use of the law. Macaulay Research proves that internal control mechanisms were more instrumental than to do by law. Or if at some point people rely on the use of formal legal means (such as a contract or legal sanctions), the underlying considerations are not purely legal, but also personal interests. What are investigated by Macaulay belong to the field of civil law, which is essentially the driving motor is the free will of each person. Therefore, the

[38] *Ibid*

limitations of the law in carrying out the function of the setting here is determined by the freedom given each person.[39]

B. Foreign Direct Investment

1. Investment

Investment is a term that is closely related to finance and economics. Investment terms derived from Latin, namely *investire* (use), while in English, referred to as investment. The experts have different views about the theoretical concept of investment. Fitzgerald defines investment are:

> *"Activities related to the business of the withdrawal of resources (funds) used to hold a capital goods would be generated stream of new products in the future."* [40]

Another definition proposed by Todung Mulya Lubis. He argues that the investment law is :

> *"Not only contained in the legislation and other rules in force relating to the following matters of foreign investment (other the subsequent law and regulations coming into force of matters relevant to foreign investment matters)"*[41]

However, this definition has been criticized by Salim, because this definition is only focused on the sources of investment law. However, investment law was not only examine the legal sources, but regulate the relationship between the investor and the capital recipient. Accordingly, the two definitions needs to be supplemented and refined.

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[39] Satjipto Rahardjo, **Hukum dan Masyarakat**, Angkasa, Bandung, 1980, page 112-115
[40] Salim dan Budi Sutrisno, **Hukum Investasi di Indonesia**, Jakarta: PT Rajagrafindo Persada, 2008, page 31
[41] *Ibid*, page 10

According to Salim, definition of investment law as follows :

"*All rules of law governing the relationship between the investor and the capital recipient, business sectors are open to investment, as well as to regulate the procedures and requirements of investing in a country."*[42]

More specifically in his book, Supancana formulate law investment terms as follows :

"In the wider community, the investment has a broader sense because it can include direct investment (direct investment) as well as indirect investments (portfolio investment).....Investment can be defined as an activity undertaken by an individual (natural person) or legal entity (juridicial person), in an effort to improve and or maintain the value of its capital, either in the form of cash money, equipment, immovable assets, intellectual property, and expertise."[43]

In Indonesia, the investment stipulated in Law No. 25 of 2007 on Investment is applicable from the date of enactment, which is dated 26 April 2007.

2. Foreign Direct Investment Law

a. What is foreign direct investment?

Foreign direct investment ordinary occurs when an entity, usually a corporation, from one state, the home state, makes a physical investment in another state, the host state. Typically, such investment involves building a factory and investing in machinery, equipment, and related corporate assets. Foreign direct investment is distinguished from foreign indirect investment consisting primarily of portfolio investments by foreign entities in local companies. These investments

[42] *Ibid*

[43] Ida Bagus Rahmadi Supancana. **Kerangka Hukum dan Kebijakan Investasi Langsung Di Indonesia,** Bogor, Ghalia Indonesia, 2006, page 1-2

are "indirect" because portfolio investments ordinarily do not entail control of the local investment.[44]

At the outset, it is important to note that foreign direct investment does not ensure economic growth. Actually, economic studies suggest that, as far as developing states are concerned, foreign direct investment has not accounted for accelerated economic growth. It is equally true, however, that foreign direct investment can promote growth; much will depend on the state issue, the nature of foreign direct investment, the manner of its use, and the regulations imposed on it. The volume of global foreign direct investment had expanded geometrically in recent decades, only to contract in 2009. For example, the total annual global flow of foreign direct investment rose from $55 billion in 1985 to $315 billion in 1995. Foreign direct investment has also given rise to a significant increase in the share of gross domestic production ("**GDP"**) in high-income countries from between 0.5 percent to 1.0 percent in the 1980s to more than 5 percent in 2000. This percentage, however, then declined to 1.4 percent in 2003, rebounded, and the declined significantly in 2009. While the increase in foreign direct investment inflows was less drastic in low and middle income countries, the percentage of foreign direct investment in GDP remained at more than

[44] Leon E. Trakman, **Foreign Direct Investment: Hazard or Opportunity?**, George Washington International Review, 2009, page 5

2 percent after the of 2000, indicating a slightly higher significance of foreign direct investment flows in developing countries.[45]

Sales by Multinational Corporations ("**MNC**") of foreign affiliates, sales that exceeded the value of world trade in goods and services, was particularly instrumental in the growth of foreign direct investment. In rough terms, intra-firm trade among MNCs today constitutes approximately one-third of world trade, MNC exports to non-affiliates account for another third and one-third consists of trade among national (non-MNC) firms. This not only highlights the wide expanse of foreign investment, but also introduces controversy over the questionable public benefit arising from looser forms of capital such as portfolio investment.[46]

b. State Sovereignty and Foreign Direct Investment

Nation states, understandably, are cautious permitting foreign entities to establish profitable beachheads on their soil when capital outflows might exceed inflows. Despite foreign direct investment's ability to provide nation states with needed infrastructure and the capability to develop economically, foreign direct investment may also intrude on domestic economies and threaten local investors and domestic interests. As a result, states may restrict foreign direct investment selectively in order to protect particular local industries from foreign competition on domestic public policy grounds. Their

[45] *Ibid*
[46] *Ibid,* page 5-6

justification in containing foreign direct investment may include their alleged exercise of sovereign power. Their means of regulating foreign direct investment may encompass resort to trade and investment legislation, administrative regulations, and procedures governing foreign direct investment. Just as states liberalized foreign direct investment beyond narrow customary grounds based on their "essential security interests", they have invented new ways of regulating it. In as much as they have identified institutions and established procedures to protect the substantive and procedural rights of investors, they have established regulatory regimes to circumscribe the due process claims of foreign investors in the domestic interest.[47]

Historically, resistance to foreign direct investment has emanated from developing states. Their rationale has been that foreign direct investment represents economic exploitation by investors from developed states, notably MNCs. Their modus operandi has been to selectively erect barriers to foreign direct investment, insisting that such barriers render them more self-reliant economically, more self-confident culturally, and more self-sufficient politically. They have expressed their resistance through multilateral entities such as the World Trade Organization. At the same time, they have concluded free trade agreements and bilateral investment agreements selectively with

[47] *Ibid*, page 6

other states, including developed ones, on strategic political and economic grounds.[48]

The ambivalence of states towards the liberalization of foreign direct investment now also includes developed states. In decade past, the primary preoccupation of developed states was to find new homes abroad for their burgeoning investment capital. Today, investment exporters have become investment importers, and historical global exporters of investment, like the United States, have become destinations investment for investment from Europe, Japan and China. Once the bastion of the liberalized trade and investment, developed states increasingly place an armory of restrictions around foreign direct investment. Notably among these are limits the Unites States has placed on the free inflow of investment capital, such as in regulating sovereign wealth funds. Such restrictions on foreign direct investment are likely to grow as both developed and developing states attempt to limit their exposure to financial and related risks worldwide. In a postmodern world in which foreign direct investment has grown perceptibly more complex, nation states have devised more creative barriers to protect their homegrown industries from foreign investors. Coupled with these developments has been an identifiable shift from old to new investment wealth in the East, seeking access to previously unchartered investment waters in the West. A more recent phenomenon is host states appreciation that innovations in regulating trade and investment,

[48] *Ibid*

including regulating shift of capital, represent important means of addressing the unfolding global economic crisis.[49]

c. Regulating Foreign Direct Investment

In theory, the liberalization of foreign direct investment not only should benefit foreign investors, but also should help domestic economies share in the wealth derived from foreign investment. foreign direct investment, as a means of generating domestic revenue, may also serve as an effective means by which to redeploy those revenues into a nation's economic, social, and political infrastructures. In so far as states restrict foreign direct investment in protected sectors, they may encouraged it in less protected sectors. In regulating foreign direct investment strategically in the short term, states may also stabilize foreign direct investment's economic impact in the longer term, including for the benefit of foreign investors.[50]

States inevitably make strategic choices in regulating foreign direct investment. Those choices include choosing among competing measures of reform ranging from reformulating tax and monetary policy to social law reform. States prioritize among domestic interest that are not necessarily compatible in selectively seeking to attract foreign direct investment. For example, they may encourage foreign direct investment to secure cheaper goods for sale in local markets, while recognizing the negative impact such foreign direct investment

[49] *Ibid*
[50] *Ibid*

may have on domestic employment. They make strategic choices, not only in deciding whether to reduce regulatory restrictions on foreign direct investment, but also when and how to do so.[51]

States may succumb to double talk in regulating foreign direct investment. Some states may apply their regulatory practices unevenly, embedding privileged constituencies at the expense of disadvantages ones, regardless of whether the publicly declare their commitment to international standards of due process of law. States that initially present attractive foreign investment laws and regulations governing foreign direct investment, may subsequently subjugate foreign direct investment through nationalization and expropriation without due process of law. In expropriations of foreign investors by denying protection to legitimate property rights. By presenting foreign direct investment as "theft" of national resources, states may legitimate their "confiscation" of foreign investments.[52]

None of this is to suggest that states abuse their sovereignty powers as a matter of course in regulating foreign direct investment. Though their actions may be intrusive, host states may use the revenues generated from taxing foreign direct investment to build economic infrastructures, including those that support foreign direct investment. Far from denying foreign investors due process to law, states may act quite legitimately under international investment law. The tensions

[51] *Ibid,* page 6-7
[52] *Ibid*

between states encouraging and restricting foreign direct investment are best understood in light of developments in foreign direct investment during the second half of the twentieth century.[53]

d. The International Regulation of Foreign Direct Investment

A new era of trade liberalization and investment began following World War II, heralded by the adoption of the General Agreement on Tariffs and Trade ("**GATT**") in 1947. The GATT's purposes was to reduce protectionist barriers that had preceded World War II and to guide the liberalization of trade and investment. In practice, the ambit of the GATT largely excluded the treatment of foreign direct investment. The contracting parties of the GATT, however, did adopt a resolution in 1955 on International Investment for Economic Development in which they "urged" member states to conclude bilateral investment agreements. The issue of international investment was also addressed by a GATT Panel in Canada-Administration of the Foreign Investment Review Act. While Canada clearly had the right to regulate foreign investment, the issue was whether it had engaged in "trade distorting" measures through its local content and export performance requirements and whether such conduct violated the GATT. The panel held that Canada's local content requirements were inconsistent with its "national treatment" duties under Article III(4) of the GATT. In contrast, the panel held that Canada's export "performance requirement" were not inconsistent with its GATT obligations. In so

[53] *Ibid*

determining, the panel also confirmed the GATT's limited scope in regulating foreign direct investment.[54]

1) The World Trade Organization ("**WTO**")

Over the latter third of the twentieth century, the WTO evolved into a global mechanism capable of generally liberalizing trade and investment. The WTO inherited what the GATT began as a patchwork quilt in 1947. The WTO, however, has been reluctant to liberalize international investment in a comparable manner to its liberalization of trade. In particular, the WTO, dominated by developing states, opposed any comprehensive inclusion of foreign investment in multilateral talks. The limited recognition of foreign direct investment in the Uruguay Round of negotiations between 1986 and 1994, during which most of the WTO agreements were negotiated, exemplified this reluctance to liberalize international investment regulation, initially spearheaded by the Soviet Union and its allies. The open hostility to liberalizing foreign direct investment at successive ministerial WTO meetings in Singapore, Doha, and especially Cancun, further imbedded this reluctance.[55]

The resistance of the developing world to liberalized foreign direct investment was also audible before the United Nations passed General Assembly Resolution 1803 in 1962. This resolution formally protected the "permanent sovereignty of states over natural

[54] *Ibid*
[55] *Ibid*, page 8

resources and sanctioned "nationalization, expropriation or requisitioning" on "grounds or reasons of public utility, security or the national interest which are recognized as overriding purely individual or private interests." Resolution 1803 transformed the protection of natural resources into paramount domestic public policy.[56]

Other steps to entrench state sovereignty over foreign investors followed Resolution 1803. The otherwise obscure U.N Charter of Economic Rights and Duties of States also recognized the states right to expropriate foreign investment. That charter is notable for omitting uniform international standards of due process to govern "government takings" and compensation. The result, again, was the United Nation's affirmation of host states paramount public interest in regulating foreign investment including, but not limited to, those of MNCs. Two countervailing movements offset the pervasive resistance by the WTO to the liberalization of international investment: the first was the selective liberalization of foreign direct investment by individual WTO members.[57]

2) Piecemeal Liberalization

Despite the WTO's resistance to the liberalization of foreign direct investment in the Uruguay Round of trade talks, the WTO reached several limited agreements on investment. Most pronounced

[56] *Ibid*
[57] *Ibid*

among these was the agreement on Trade Related Investment Measures ("**TRIMs**"). The Agreement deals with certain trade-related aspects of foreign investment. The main objective of this Agreement was to improve economic efficiency. It forbids WTO members from applying any TRIMs that is inconsistent with the principle of national treatment to be found in the GATT Article III and with the provision concerning prohibition of quantitative restrictions in GATT Article XI. It prohibits governments from requiring foreign investors to purchase inputs locally or to sell their output domestically rather than exporting it. In other words, the TRIMs Agreement forbids states from taking measures that circumvent the principle of national treatment or the ban on quantitative measures.[58] An Annex to the TRIMs Agreement outlines the obligations of WTO members as follows:

1. *TRIMs that are inconsistent with the obligation of national treatment provided for in paragraph 4 of the Article III of GATT 1994 include those which are mandatory or enforceable under domestic law or administrative rulings, or compliance with which is necessary to obtain an advantage, and which require:*

   a) *the purchase or use by an enterprise of products of domestic origin or from any domestic source, whether specified in terms of particular products, in terms of volume of value products, or in terms of a proportion of volume or value of its local production; or*

   b) *that an enterprise's purchases or use of imported products be limited to an amount related to the volume or value of local products that it exports.*

[58] Huala Adolf, **Perjanjian Penanaman Modal dalam Hukum Perdagangan Internasional (WTO)**, Keni Media, Bandung, 2010, page 85-88

2. *TRIMs that are inconsistent with the obligation of general elimination of quantitative restriction provided for in paragraph 1 of Article XI of GATT 1994 include those which are mandatory or enforceable under domestic law or under administrative rulings, or compliance with which is necessary to obtain an advantage, and which restrict:*

   a) *the importations by an enterprise of products used in or related to its local production, generally or to an amount related to the volume or value of local production that it exports;*

   b) *the importation by an enterprise of products used in or related to its production by restricting its access to foreign exchange to an amount related to the foreign exchange inflows attributable to the enterprise; or*

   c) *the exportation or sale for export by an enterprise of products, whether specified in terms of particular products, in terms of volume or value of products, or in terms of a proportion of volume or value of its local production.*

As can be seen from the provisions just outlined, the TRIMs Agreement is a fairly technical agreement of narrow scope, the application of whose provisions are limited to trade in goods. Nevertheless, it is designed to promote foreign investment across international frontiers by eliminating certain trade-related barriers to such investment. The US desired the removal of TRIMs as they were both restrictive and acted as a barrier to trade and the development of global economy. It was also seeking freedom for foreign investors to hire nationals of their choice in key management positions.[59]

The view held by developing countries was that the right to permit foreign investment and its regulation was an internal matter and therefore did not fall within the scope of GATT. Basically, the

[59] *Ibid*, page 88-89

argument was that GATT was not the appropriate forum for the discussion of the issue of investment policy. The counter-argument was that the restrictions imposed on the capacity of foreign companies to invest locally were a matter of concern for international trade law. This latter argument prevailed and the TRIMs was adopted, paving the way for further regulation of foreign investment under the auspices of the WTO in the future, rather than under the auspices of the UN Conference on Trade and Development ("**UNCTAD**") as preferred by developing countries. Only a few cases referred to the WTO's Dispute Settlement Body ("**DSB**") have dealt with foreign investment matters. Moreover, since the scope of the DSB is limited to interpreting the provisions of the TRIMs Agreement, the WTO cases, unlike the ICSID cases, do not deal with traditional issues relating to foreign investment. For instance, the case concerning Certain Measures Affecting the Automobile Industry, referred to the DSB, concerned the compatibility of Indonesian local content requirements for the automobile industry with Indonesia's TRIMs obligations under the TRIMs Agreement.[60]

There are other WTO agreements such as the General Agreement on Trade in Services ("**GATS**"), the Agreement on Trade-related Aspects of Intellectual Property Rights ("**TRIPs**") and plurilateral Agreement on Government Procurement which include provisions relating to the entry and treatment of foreign investors

[60] Leon E. Trakman, Op. Cit, page 8

and the protection of their intellectual property rights. GATS deals with foreign investment issues by defining four modes of supply. One of these consist of the provisions of services through an established presence in a foreign country, referred to as a 'commercial presence' in the Agreement. Under the most-favoured nation ("**MFN**") rule of GATS, WTO members are committed to treating service and service providers from one member country in the same way as services and service providers from one member country in the same way as services and service providers from any other member country.[61]

With regard to the relevance of the TRIPs Agreement to foreign investment, it related to be share of Transnational Corporation ("**TNC**") assets accounted for by tangible assets, such as brands, patents, trademarks, etc. These assets of TNC are protected by the TRIPs Agreement in the same manner as any other intellectual property belonging to other entities, or to the creators, owners or innovators of such property. The plurilateral Agreement on Government Procurement requires that there can be no discrimination against foreign products and foreign suppliers or against locally established suppliers on the basis of their degree of foreign affiliation or ownership.[62]

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[61] *Ibid*
[62] *Ibid*

3) Free Trade and Bilateral Investment Agreement

Developing states that collectively resisted liberalized international investment through the WTO and The United Nations sometimes have pursued selected trade and investment partnership, including with developed states. Eastern European states that ardently resisted foreign direct investment as capitalist exploitation prior to the Cold War, have since endorsed bilateral investment agreements ("**BITs**") and free trade agreements ("**FTAs**") to prop up their fragile economies. China's historical ideological opposition to foreign direct investment has mutated into an affirmation of foreign direct investment, strictly regulated on national interest grounds.[63]

This selective liberalization of foreign direct investment has been far from seamless. An unavoidable tension has evolved between the common interests of developing states not to liberalize foreign direct investment through the WTO and their individual interests to conclude BITs with developed states. As a result, developing states have had to weigh their need to maintain their fealty to the WTO agreement, while pursuing strategic investment treaties with states like the United States and Regional entities like the European Union. An uncomfortable consequence has been that the same developing states that have voted against foreign direct investment in multilateral forums have concluded a splattering of

[63] *Ibid*

regional and bilateral investment agreements that favor foreign direct investment.[64]

Developing states that support foreign direct investment in this manner have take calculated risks. Often they have built expensive social and economic infrastructures which they could ill afford in order to present themselves to prospective investment partners as economically sustainable. Such nations have sometimes repressed political dissent and distributed the benefits of foreign direct investment inequitably to appease powerful local interests, to create a sense of political stability, and also attract foreign direct investment. Such ambivalence towards the liberalization of foreign direct investment is not limited to developing states. Developed states that historically proclaimed their commitment to liberalization have increasingly faced pressure from domestic interest to regulate foreign direct investment. These pressures have grown as investment inflows have exceeded investment outflows and as domestic investors have lost their competitive advantage to foreign investors.[65]

4) Early Efforts at Liberalization

A pre- and early post-World War II incantation of the liberalization of international investment was the development of various treaties under the guise of treaties of friendship, commerce,

[64] *Ibid*, page 9
[65] *Ibid*

and navigation ("**FCN treaties**"). In the postwar era, nation states used FCN treaties in part to protect their investors operating in foreign markets under the umbrella of the GATT. The underpinnings of FCN treaties lay in the dual bulwarks of investment equality, notably in "most favored nation treatment" and "national treatment" accorded to investors from foreign states. FCN treaties usually provided for dispute resolution. Ordinarily investors were required to first exhaust local remedies in the courts of the host state. After having done so, however, provision was made for submitting disputes to the International Court of Justice with the consent of the host state.[66]

5) Free Trade and Bilateral Investment Agreement in Operation

FCN treaties overlapped in part with the early development of modern BIT and FTAs. Starting in 1959, with an investment agreement between West Germany and Pakistan, BITs grew steadily into a substitute for a global agreement on foreign direct investment, which the WTO and United Nations were unwilling to deliver. Today, there are close to 30,000 BITs and FTAs, mostly concluded in the past two decades. BITs and FTAs are distinguishable from one another by these attributes: their variety; the uneven economic clout of their parties; the variable manner in which they define "investor", "investment", "assets", and "enterprise"; and the different standards of treatment they accord to foreign "investors" and "investments".

[66] *Ibid*

BITs and FTAs also use different mechanism to resolve international investment disputes.[67]

BITs provide two primary mechanism for the resolution of investor-state disputes through investment arbitration, or less frequently, by submitting disputes to the domestic courts of host states.

The most pronounced provisions in BITs and FTAs relate to expropriation. Some such provisions include the requirement that signatory parties agree not to expropriate foreign direct investment so long as the measures adopted are nondiscriminatory; the parties apply them for a public purposes; they accorded host investors with due process of law; and they make payment of prompt, fair, and adequate compensation in consequence of a legitimate "taking".[68]

BITs and FTAs also diverge significantly in their manner of regulating foreign direct investment. For example, they impose different standards of compliance on investors and grant dissimilar concessions that reflect a variable body of international norms governing foreign direct investment. They also offer uneven guidance on the permissible nature and limits of a "government taking".[69]

[67] *Ibid*, page 10
[68] *Ibid*
[69] *Ibid*

e. Regulation of Foreign Direct Investment in Indonesia

Law no. 25 of 2007 Regarding Investment is ("**Investment Law**") applicable dated 26 April 2007. This regulation has been explicitly distinguish between direct investment (direct investment) and indirect investments (portfolio investment). It stated in the explanation of Article 2 of the law as follow:

"Is an investment in all sectors in the territory of the Republic of Indonesia is a direct capital investment and excluding indirect investment or portfolio."

The definition of foreign investment is stipulated in Article 1 point 9 of Investment Law as follow:

"The activities of planting to do business in the territory of the Republic of Indonesia conducted foreign investors either use foreign capital entirely or joint venture with domestic investors."

Another applicable regulations in accordance with foreign investment are as following:

1) Regulation of Head of BKPM No. 5 of 2013 on Procedures and Guidelines of Permit and Non-Permit of Investment as amended by Head of Regulation of BKPM No. 12 of 2013

   The main points in this regulation are as following:

   a) The basic principles of domestic investment are processed using the minimum investment value of IDR 500,000,000.
   b) The investment value of IDR 10 billion (equivalent value in U.S.$) are required with a minimum paid up capital or issued capital with amount of IDR 2.5 billion (quivalent value in

U.S.$) and the minimum nominal equity stake in the company is IDR 10 billion (equivalent value in U.S.$).

c) The mechanism of application in the field of business and services, beginning with a presentation on business activity plan.

d) The entire of investment licensing preceded by Principle License (*Izin Prinsip*).

e) Procedures for the utilization of Foreign Workers.

2) Presidential Regulation No. 36 of 2010 on List of Business Fields Closed and Open with Conditions.

The main points in this regulation are as following:

a) The existence of a few specific areas that are prohibited to conduct business as investment activities (Negative List).

b) The existence of certain sectors that can be cultivated as investment activities with certain conditions, namely the business field is reserved for micro, small, medium enterprises and cooperatives, business sector required by the partnership, the business sector required capital ownership, the business sector required with a specific location, and business fields with the required special permit (Business Fields Open with Conditions).

3) Law No. 13 of 2003 Regarding Manpower

These regulations are principally regulate employment in Indonesia is generally for the people of Indonesia and for foreigners. But on Foreign Workers, shall be accompanied by Indonesian Manpower, except for certain positions (such as Commissioner and Director).

4) Minister of Manpower and Transmigration Regulation No. PER.02/MEN/III/2008 of 2008 Regarding Procedures of Employment Foreign Workers

This regulation is subject technically how to regulate the utilization of foreign worker in Indonesia dates of the following processes:

a) Expatriate Manpower Utilization Plan (RPTKA)
b) Visa Application Recommendations; and
c) Expatriate Work Permit (IMTA).

This regulation also connect with the regulations regarding the utilization of foreign worker specific to foreign investment regulations set forth in the Regulation of Head of BKPM No. 5 of 2013 on Procedures and Guidelines of Permit and Non-Permit of Investment as amended by Head of Regulation of BKPM No. 12 of 2013.

5) Minister of Manpower and Transmigration Decree No. 40 of 2012 on Certain Positions Prohibited For Expatriates

This regulations contains the list of certain positions prohibited for foreign worker (please see Table 1. below).

No	List of Positions		
	Indonesian	**ISO**	**English**
1.	Direktur Personalia	1210	Personnel Director
2.	Manajer Hubungan Industrial	1232	Industrial Relation Manager
3.	Manajer Personalia	1232	Human Resource Manager
4.	Supervisor Pengembangan Personalia	1232	Personnel Development Supervisor
5.	Supervisor Perekrutan Personalia	1232	Personnel Recruitment Supervisor
6.	Supervisor Penempatan Personalia	1232	Personnel Placement Supervisor
7.	Supervisor Pembinaan Karir Pegawai	1232	Employee Career Development Supervisor
8.	Penata Usaha Personalia	4190	Personnel Declare Administrator
9.	Kepala Eksekutif Kantor	1210	Chief Executive Officer
10.	Ahli Pengembangan Personalia dan Karir	2412	Personnel and Careers Specialist
11.	Spesialis Personalia	2412	Personnel Specialist
12.	Penasehat Karir	2412	Career Advisor
13.	Penasehat tenaga Kerja	2412	Job Advisor
14.	Pembimbing dan Konseling Jabatan	2412	Job Advisor and Counseling
15.	Perantara Tenaga Kerja	2412	Employee Mediator
16.	Pengadministrasi Pelatihan Pegawai	4190	Job Training Administrator
17.	Pewawancara Pegawai	2412	Job Interviewer
18.	Analis Jabatan	2412	Job Analyst
19.	Penyelenggara Keselamatan Kerja Pegawai	2412	Occupational Safety Specialist

Table 1. List of Certain Positions Prohibited For Foreign Worker

6) Law No. 7 of 1983 Regarding Income Tax as amended lastly by Law No. 36 of 2008.

This law is associated with the foreign investment, due to set the income tax for foreign investors.

f. Efforts to Regulate Transnational Corporation and Transforming Foreign Direct Investment

In the scope of International, there are some noteworthy initiatives to develop a global multilateral agreement on foreign direct investment. This section discusses selected examples, including the The Organization for Economic Co-operation and Development Guidelines for Multinational Enterprises, the United Nations Code of Conduct on Transnational Corporations, and Protect, Respect and Remedy: A Framework for Business and Human Rights. Non-governmental organizations and private sector entities have also put forth several initiatives. This section is not intended to be a comprehensive survey of initiatives, but rather to highlight points on a trajectory toward Corporate Social Responsibility and Corporate Social Accountability.[70]

1) The Organization for Economic Co-operation and Development ("**OECD**") Guidelines

OECD developed a set of voluntary guidelines that had some success. The OECD membership is comprised of more developed countries and was established by the 1960 Convention on the Protection of Foreign Property. This convention never went into effect. However, later efforts by the OECD were more successful. The OECD Guidelines for Multinational Enterprises ("**OECD Guidelines**") is a voluntary code of conduct OECD member

[70] Rachel J. Anderson, **Toward Global Corporate Citizenship: Reframing Foreign Direct Investment Law**, Michigan State University College of Law, 2009, page 7

countries adopted in 1976. The OECD Guidelines address a range of issues, including labor and the environment. Although the OECD Guidelines themselves are voluntary standards, each country that adopts them is obligated to establish a National Contact Point to promote and implement the OECD Guidelines. Numerous cases have been brought under the OECD Guidelines, any interested party can raise the case with the appropriate National Contact Point. National Contact Point have had varying success. The OECD Guidelines are currently being reviewed and a revised set of guidelines is expected to be completed by mid-2010.[71]

2) United Nations ("**U.N**") Iniatives

The United Nations also attempted to address the question of regulating transnational corporations. Although the United Nations was unsuccessful in its efforts to achieve a mandatory, legally binding framework for transnational corporations, it has had some success with developing voluntary guidelines.

The U.N Code of Conduct on Transnational Corporations is an early attempt by the United Nations to develop hard law rules governing foreign direct investment. The U.N. Economic and Social Council requested the drafting of a code of conduct for transnational corporations in 1982. In 1984, the Intergovernmental Working Group on a Code of Conduct drafted the U.N Code of Conduct on Transnational Corporations. It addressed a wide range of issues

[71] *Ibid*, page 8

including human rights, environmental issues, and respect for social and cultural objectives and policies. However, the drafters were unable to reach agreement on all issues and the United Nations never adopted the U.N. Code of Conduct on Transnational Corporations. Among other issues, the drafters did not resolve whether the U.N. Code of Conduct on Transnational Corporations would be a universally applicable, legally binding framework or a voluntary guideline for transnational corporations.[72]

Continuing the success it achieved developing soft law norms, the United Nations launched the U.N. Global Compact in 2000. The U.N. Global Compact is a voluntary international policy initiative that seeks to align the interest of business, governments, civil society, labor, and the United Nations. The U.N. Global Compact focuses on public accountability, transparency, and disclosure as tools to further "a more sustainable and inclusive global economy." It promotes ten core principles that are grouped into four categories: human rights, labor, environment, and anti-corruption. Although its effectiveness is disputed, the U.N. Global Compact has over 5,000 business participants in 135 countries.[73]

In a subsequent attempt to regulate transnational corporations, the U.N. Working Group on the Working Methods and Activities of Transnational Corporations began drafting the Norms on the

[72] *Ibid*
[73] *Ibid*

Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights. The Norms on The Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights are based on human rights standards and numerous legal documents, including the Universal Declaration of Human Rights, the International Covenants on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights. The U.N. Sub-Commission on the Promotion and Protection of Human Rights approved the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights on August 13, 2003. However, the norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights is a soft law documents, and therefore, did not establish mandatory rules for transnational corporations. The strength of The Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights lies in the potential for soft law to shape voluntary behavior, become the basis for developing binding treaties, influence public opinion, and document political will.[74]

In 2005, the Commission on Human Rights recognized the relationship between transnational corporations and human rights. Further, the Commission on Human Rights requested the Secretary-

[74] *Ibid*

General to appoint a special representative for human rights and transnational corporations and other business enterprises. John Ruggie was appointed the U.N. Special Representative of the Secretary General on Human Rights. In June of 2008, John Ruggie submitted his final report to the Human Rights Council ("**Ruggie Report**"). This report set out a framework with three core principles "the State duty to protect against human rights abuses by third parties, including business; the corporate responsibility to respect human rights; and the need for more effective access to remedies." The Ruggie Report and its related documents set out current perspectives on the relationship between business and human right at the international level. Although the Ruggie Report mentions environmental issues, its primary focus is the relationship between business and human rights. The Ruggie Report is an important step toward comprehensive laws regulating foreign direct investment by transnational corporations. It identifies a conceptual and policy framework that can integrate laws and regulations with other measures to address human rights abuses.[75]

g. Private Sector Initiatives

The private sector put forward several initiatives in the second half of the twentieth century. More recently, a group of institutional investors engaged in the development of the Principles for Responsible Investment at the request of the U.N. Secretary-General. The U.N.

[75] *Ibid*, page 9

Environment Programme Finance Initiative and U.N. Global Compact coordinated the process. The voluntary Principles for Responsible Investment require signatories to incorporate environmental, social, and corporate governance issues into their investment decision-making processes and ownership practices. In July 2009, there were over 550 signatories to the Principles for Responsible Investment.[76]

Private sector initiatives are necessarily voluntary, and so far, successful multilateral efforts to regulate transnational corporations are also voluntary. However, financial crises and the stock market crash of 2008 called into question the neoclassical economical model and principle of non-interference into the economic activities of private actors. Voluntary measures are insufficient because foreign direct investment law does not create incentives for officers and directors of transnational corporations to act in a way that would result in a more equitable distribution of economic development and prosperity. Instead, foreign direct investment law grants rights to and protects the rights of transnational corporations without establishing corresponding obligations. Without enforceable legal obligations, parties injured by transnational corporations will continue to have insufficient legal protections and avenues to seek legal remedies.[77]

[76] *Ibid*
[77] *Ibid*

f. Transforming Foreign Direct Investment Law

Transforming foreign direct investment law requires rethinking the role of corporations, and particularly transnational corporations, in society. The debate about the role and responsibilities of public corporations is not new. In the United States, corporations economic goals and responsibilities. This economic function is then tempered by legal and ethical restraints while still allowing corporations to take on discretionary responsibilities such as philanthropy. However, the primacy of the economic function is questioned by both practitioners and theorist, and these voice became louder and gained broader credence in light of the recent financial crises. Nonetheless, however one comes out on this question, there is general agreement that corporations do not enjoy unlimited power. Legal and ethical restraints set the limits of corporate activity. Thus, the question remains where lines should be drawn and what constraints should be applied to corporate activity.[78]

Although it may be more difficult to make the close calls, there is a strong argument to be made that certain core values are so important that they should be protected by law. These include human rights and environmental protection. This section discusses Corporate Social Responsibility and Accountability Movements, the emergence Corporate Citizenship in the business and management literature, and opportunities and challenges for reform.

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[78] *Ibid*

1) Corporate Social Responsibility and Accountability

Generally, when United States ("**U.S**") legal scholars question the role of corporation in society, they do so either in the context of Corporate Social responsibility or both. These theoretical frameworks can be traced back to arguments advanced by E. Merrick Dodd in a debate between Adolph Berle and E. Merrick Dodd in the 1930s. Berle essentially argued for the primacy of obligations to shareholders. Dodd essentially argued that corporations have responsibilities to shareholders and societal stakeholders. The roots of the modern legal discourse on Corporate Social Responsibility are in Dodd's position. In more recent decades, the Corporate social Accountability movement expanded the discourse.[79]

The exact scope and contours of Corporate Social Responsibility are disputed within U.S. legal discourse, and they also vary from country to country. However, it is fair to say that Corporate Social Responsibility relates to the scope of ethical obligations that corporations have to shareholders, societal stakeholders, and society as a whole. In corporate legal theory, Corporate Social Responsibility generally focuses on economic and governance issues. The underlying question revolves around the purpose of the corporation. In the U.S. corporate law context, the rules governing Corporate Social Responsibility tend to be found in

[79] *Ibid*, page 10

state and federal statutes. These "hard laws" are generally enforceable in a court of law.[80]

In international legal theory, Corporate Social Responsibility generally focus on human rights. The underlying question revolves around what constitutes acceptable conduct from a moral and societal standpoint. In international and transnational business, the rules governing Corporate Social Responsibility tend to be found in codes of conduct or documents produced by international organizations. These types of "soft law" tend to be non-binding and unenforceable in a court of law. In U.S legal discourse, domestic corporate governance and international human rights occasionally have uncomfortable meetings. However, they have not yet been integrated into one overarching theoretical framework.[81]

The Corporate Social Accountability movement attempts to implement the principles of Corporate Social Responsibility as legally enforceable "hard law". Among other things, Corporate Social Accountability is an attempt to link human rights, the environment, and other societal issues to the economic and corporate governance concerns of corporations. This can take the form of disclosure rules, national and international standards, and legal

[80] *Ibid*
[81] *Ibid*

liability for the social and environmental effects of corporate actions.[82]

Corporate Social Accountability is a shift from Corporate Social Responsibility because it moves from a discussion of moral and ethical obligations and responsibilities to a discussion of socially and legally enforceable obligations and responsibilities. Accordingly, Corporate Social Accountability is more instrumental than theoretical. It allows us to link domestic corporate governance with international human rights, but it does not offer a comprehensive theoretical framework for bridging gaps between the interests of shareholders and societal stakeholders.[83]

There are many options for reframing foreign direct investment law, some more traditional and some more novel. An alternative that some scholars have suggested is the multilateral negotiation of foreign direct investment law in a new international organization. The idea is that such an organization would do for foreign direct investment what the GATT and the WTO have done for international trade. Another option would be to strengthen the role of the WTO in regulating foreign direct investment law. Alternatively, a non-governmental organization, also known as civil society, like the International Labor Organization, could be created in the area of foreign direct investment. Codes of conduct and other

[82] *Ibid*
[83] *Ibid*

soft law options present further alternatives. Scholars have argued that these forms of non-binding soft law can contribute to the creation of responsibilities and obligations over time.[84]

A new international institution might be able to reduce fragmentation in international foreign direct investment law but would not necessarily be ideally equipped to reduce the asymmetries discussed above. A new international institution would be only one piece of the puzzle. Without the development of a new theoretical framework and mandate, such an institution may be insufficiently novel to resolve the underlying asymmetries. These asymmetries must be resolved to bring foreign direct investment law into the twenty-first century.[85]

2) The Emergence of Global Corporate Citizenship

Global Corporate Citizenship offers a useful theoretical framework with which to integrate and analyze the interest of shareholders and societal stakeholders in this age of globalization. Global Corporate Citizenship posits that corporations have rights and obligations in society similar to citizens. It addresses the ethical responsibilities of companies operating in a global market and the values that should guide corporations engagement with society. In effect, principles of Global Corporate Citizenship require

[84] *Ibid*
[85] *Ibid*, page 11

corporations to engage with shareholders and societal stakeholders as well as act as stakeholders themselves.[86]

Global Corporate Citizenship is already influential in terms of policy and practice in several areas. International institutions are endorsing Global Corporate Citizenship as a framework for international development and economic policy. Many transnational corporations have incorporated Global Corporate Citizenship into their business goals and policies. Management and business scholars began theorizing Global Corporate Citizenship in the 1990s, and a substantial body of scholarship developed since that time. Global Corporate Citizenship has been defined a variety of ways. While the definitions vary, there are substantial commonalities. For example, corporations have direct duties to local, regional, national, and global societal stakeholders. Societal stakeholders include individuals, employees, shareholders, customers, suppliers, and communities where corporations conduct business and serve markets. Some scholars go further and argue that corporations should understand themselves as societal stakeholders with duties to contribute to the well-being of the world in general in addition to their duties to individual stakeholders and groups of stakeholders.[87]

There is not universal agreement on the scope of Global Corporate Citizenship. Some management scholars view Global

[86] *Ibid*
[87] *Ibid*

Corporate Citizenship as an umbrella for various forms of Corporate Social Responsibility. Other claims that Global Corporate Citizenship is one of five core aspect of business engagement along with corporate governance, corporate, philanthropy, corporate social responsibility, and corporate social entrepreneurship. Going forward, this question will also need to be addressed in the legal context. However, human rights and environmental protection are core values that fall easily within the scope of global Corporate Citizenship.[88]

The underlying values of Global Corporate Citizenship are recognized by an increasing number of corporations and business leaders. Corporations are becoming increasingly engaged in promoting Global Corporate Citizenship as a result of a lack of global leadership in the political, policy, governance and legal fields. Chief Executive Officers of over seventy transnational corporations published a joint statement with the World Economic Forum. This statement set out a framework for the implementation of Global Corporate Citizenship into the policies of the transnational corporations has moved beyond the group of companies and Chief Executive Officers associated with the joint statement. Transnational corporations have begun including Global Corporate Citizenship into the portfolios of their in-house counsel.[89]

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[88] *Ibid*
[89] *Ibid*

Developing Global Corporate Citizenship in the legal literature is an opportunity to reframe foreign direct investment law and policy and establish a legal literature is an opportunity to reframe foreign direct investment law and policy and establish a legal theoritical framework that values ethics and morality as well as the interests of shareholders and societal stakeholders. Global Corporate Citizenship theoory facilitates an analysis of the intersection of corporate governance and human rights from a legal perspective. It allows us to reframe foreign direct investment law so that we no longer focus on moral and ethical issues as they relate to transnational business. The development of Global Corporate Citizenship as a theoretical framework will make it possible to postulate that shareholder and stakeholder interests are interrelated and to systematically develop, analyze, and answer questions about the issues raised by their convergence.[90]

3. Coal Mining Law in Indonesia

a. General Regulation

In terms of utilization of mineral resources, derivatives of Article 33 of the 1945 Constitution is Article 1 of Law Number 11 Of 1967 Regarding the Principles of General Mining, stated as follows:

"All the minerals contained within the Indonesian mining law is a natural sediments as a gift of God Almighty is the national wealth of the Indonesian nation, controlled and used by the State to the overall prosperity of the people."

[90] *Ibid*, page 12

Law No. 11 of 1967 concerning the Principles of General Mining stipulates that by having KP, a legal entity or individual is entitled to conduct exploitation of mining extractive. For KP holders and KK holders who have successfully commercialize the open mining extractive, it possible that they can have the mining extractive which commercialized.

The procedure of the transfer of ownership of mining extractive to the KP holder or KK holder is the fulfillment of obligations to the state, ie fixed fees and exploration fees for exploration's KP holder, as well as fix fees and exploitation fees for exploitation's KP holder.[91] But in its development finally arised the Law No. 4 of 2009 Regarding Mineral and Coal Mining ("**Mining Law**"). The Mining Law stated that KP must adjust to IUP. To date, the implementation of IUP arise many problems for mining business. Then it needs to be *clean and clear* system to be adjusted to obtain IUP.[92]

b. PKP2B

PKP2B is one of the legal instruments in the field of mining, especially in the field of coal. This agreement is made between the Government of Indonesia with private contractors. The term of PKP2B is found in Article 10 paragraph (2) and paragraph (3) of Law No. 11 of 1976 Regarding Principles of General Mining. However, the

[91] Adrian Sutedi, **Hukum Pertambangan**, Sinar Grafika, Jakarta, page 24-25

[92] Lay, Penyesuaian KP Menjadi IUP Dimulai, 5 May 2009, http://www.hukumonline.com/berita/baca/hol21906/penyesuaian-kp-menjadi-iup-dimulai, (Aug. 10, 2013)

construction used in the provision not only of treaties in the coal mining per se, but also in the fields of gold, copper, silver etc.[93]

In Article 1 of Presidential Decree No. 49 of 1981 Regarding Principles of PKP2B Between Coal Mining State's Company and Private Contractor, the term used is a cooperative agreement. Cooperation agreements are:

"Agreements between state coal mining company as the holder of mining rights and the private sector as a contractor for the operation of a coal mine for a period of thirty ofs under the provisions mentioned in this decree."

This cooperation agreement made between:

1) Coal mining state company with contractors;
2) The object is coal;
3) The duration is thirty years; and
4) The implementation of the cooperation agreement is based on Presidential Decree No. 49 of 1981.[94]

The terms which used in Presidential Decree No. 75 of 1996 Regarding Principles of PKP2B is coal mining concession. Understanding PKP2B can be found in Section 1 of Presidential Decree No. 75 of 1996 Regarding Principles of PKP2B:

"Agreements between the government and private contractors to carry out mining operations, mineral coal".

Another definition of PKP2B can also be seen in Article 1 of the Minister of Mining and Energy Decree No. 1409.K/201.M.PE/1996

[93] Salim HS, **Hukum Pertambangan di Indonesia**, RajaGrafindo Persada, Jakarta, 2012, page 225
[94] *Ibid*, page 226

Regarding Procedures for Granting Submission Processing Mining Authority, Principle Permit, Work Agreement Contract of Work and Coal Mining Business. The provisions mentioned in that PKP2B is:

"An agreement between the Government of the Republic of Indonesia with foreign private companies or joint venture between foreign national (in order foreign investment) for the utilization of coal based on Law No. 1 of 1967 Regarding Foreign Investment and Law Number 11 of 1967 Regarding Principles of General Mining ".

The comparison of two definitions above, from the aspect of its elements, we can find the differences between them. The elements listed in Article 1 of Presidential Decree No. 75 of 1996 Regarding Principles of PKP2B are as follows:

1) The parties to this agreement are the government and private contractor company; and
2) The object is the exploitation of mineral coal mining.[95]

Meanwhile, the elements listed in Article 1 of the Minister of Mines and Energy Decree No. 1409.K/201/M/PE/1996 Regarding Procedures for Granting Submission Processing Mining Authority, Principle Permit, Work Agreement Contract of Work and Coal Mining Business are:

1) The existence of the agreement;
2) Legal subject is the Government of the Republic of Indonesia with foreign private companies or joint venture between foreign national in order to foreign investment;
3) The object is for exploitation of coal;

[95] *Ibid*, page 227

4) Guidelines used in the agreement is the work of Law No. 1 of 1967 Regarding Foreign Investment and Law Number 11 Of 1967 Regarding Principles of General Mining.[96]

In Article 1 of Presidential Decree No. 75 of 1996 is not explained in detail about the company private contractors who can perform the operation of coal. Meanwhile, in Article 1 of the Minister of Mines and Energy Decree No. 1409.K/201.M.PE/1996, private contractors who can perform the operation of private coal not only national company, but also foreign private and/or combination of national private company with foreign investment. The equation of the second element of the work agreement is a coal mining concession have the same object, namely the exploitation of coal.[97]

c. Legal Basis of PKP2B in Indonesia

Laws governing coal mining work agreements in Indonesia is Law No. 11 of 1967 Regarding Principles of General Mining and Law No. 1 of 1967 Regarding Foreign Investment. Further elaboration of the Law No. 11 of 1967 Regarding Principles of General Mining:

1) Presidential Decree No. 49 of 1981 Regarding Principles of PKP2B Between Coal Mining State's Company and Private Contractor;
2) Presidential Decree No. 21 of 1993 Regarding Principles of PKP2B Between PT Tambang Batu Bara Bukit Asam (PERSERO) and Coal Mining Contractor Company;

[96] *Ibid*
[97] *Ibid*, page 228

This last Decree is no longer valid, because it has been replaced by Presidential Decree No. 75 of 1996 Regarding Principles of PKP2B. There are three considerations set this Presidential Decree, which is as follows:

a) To speed up the process of development of coal mining in the implementation of national energy policy and national energy policies as well as the wisdom of non-oil exports, the development and utilization of coal resources need to be improved.
b) With the decreasing role of government in the coal mining business, it is necessary to increase participation of the private sector as a government contractor in the coal mining business.
c) In connection with the above matters, it is necessary to review the provisions of Presidential Decree No. 21 of 1993 Regarding Principles of PKP2B Between PT Tambang Batu Bara Bukit Asam (PERSERO) and Coal Mining Contractor Company with Presidential Decree.[98]

Further elaboration of the Presidential Decree No. 75 of 1996 Regarding Principles of PKP2B has been stipulated in the Minister of Energy and Mineral Resources Decree No. 680.K/29.M.Pe/1997 Regarding Implementation of Presidential Decree No. 75 of 1996.

Since the era of regional autonomy, the various policies that have been issued by the central government must accommodate the various interests of the region, especially for those areas that have natural

[98] *Ibid*, page 229

resources as coal if it does not receive the attention of local interests, local governments can protest various policies has been issued by the central government. Even coal mining companies operating in the area will be rejected. Now the central government has issued a policy that gives a role to the local government to become a party to the contract entered into, whether it be by foreign and domestic companies.[99]

C. Community Development

1. Business Ethics

Good ethics is also good business because it allows businesses to avoid outside restrictions. If business is not self regulated, it will be regulated by others. Unethical conduct brings about those things that businesses least desire: government regulations and restrictions, hostile employee relations resulting in an unproductive work force, and consumer rejection of its products and services. The point is that we cannot have two sets of moral standards, one for businesses and another for the rest of the world. The increasing pressure from society-expressed through legislation and in the courts to hold businesses accountable to the same standards of conduct imposed on individuals.[100]

In general, the principles that apply in a real good business activities can not be separated from our lives as human beings. Similarly, the principles that are closely related to the value system adopted by each community. As a

[99] *Ibid*, page 230
[100] David Stewart, **Business Ethic**,McGraw Hill, Singapore, 1996, page 5-8

special ethics, the principles of ethics in business is the application of ethical principles in general. These principles are as follows:

a) principle of Autonomy;

b) principle of Honesty;

c) principle of justice;

d) principle of mutual benefit; and

e) principle of moral integrity.

From all of the above principles, the principle of justice is the most fundamental principles. The principle is the principle of commutative justice that we can refer to as *No Harm*. No Harm Principle is the principle that the most minimal and most principal to be there for any social interaction, including business. This means that, without this principle, the business will not survive. Just as each party doing business with any party does not harm, it can run a business and survive.[101] So, what is the relation business ethic with community development?

2. Definition of Community Development

Definition of community development is development activities intended to expand public access to achieve socio-economic-cultural better when compared with the previous development activities. Community development is a socio-cultural adaptation process undertaken by the industry, local and central government to local community activities. Community development is often associated with approach or how to make a change to the community or target group to achieve well-being. As

[101] Sony A. Keraf, **Etika Bisnis dan Tuntutan Relevansinya**, Kanisius, Yogyakarta, 1998, page 73-81

highlighted at the introduction, generally there are several popular approaches such as technical assistance approach, self-help approach and partnership approach. Implementation of this approach depends on (a) the resources and development objectives, (b) the level of community involvement and (c) the sharing of 'power and responsibility between the community and interested or not interested stakeholders.[102]

Community development is not just a spontaneous, bottom-up, grassroots movement. It requires a sophisticated understanding at senior levels in government and the private sector to grow up.[103]

In general, the scope of the programs "community development" can be divided by category as follows:

a) Community services, a corporate services to meet the public interest or the public interest;
b) Community empowerment, is a program that is concerned with providing greater access to the public to support independence; and
c) Community relations, i.e. activities related to the development of understanding through communication and information to the relevant parties.[104]

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[102] Abdul Hadi Sulaiman and partners, **Community Development and its Influence on Community Policing**, Institute for Social Science Studies, Universiti Putra Malaysia, Malaysia, American Journal of Applied Sciences, 2012, page 969

[103] Gertrude MacIntyre, **Active partners: Education and community development,** *Education & Training,* 1999, page 181

[104] Ida Bagus Rahmadi Supancana**, Subject Materials: Laporan Tim Analisis dan Eveluasi Tentang Community Development**, Op. Cit, page 8-9

3. Parties of Community Development

Community development activities essentially involve many parties. Broadly speaking, the parties involved in the development community are:

a) Government

Government is the party who most responsible for the welfare of the community effort. Therefore, the government has the greatest portion of the development community. Indirectly, the government had engaged in community development through the implementation of development programs in various fields of life. On other side, the government as mandated by the authority of its citizens, making a variety of regulations aimed at the creation of the life of a prosperous society.

In performing its duties, the government have a lot of cooperation with other institutions to conduct demanding community development.

b) Organization

Organizations involved in the development of society is an organization that also organizes community development or community development implementers. The organization can also provide funding for community development activities. In most organizations are generally in direct contact with the public in carrying out community development, especially after the government gave a larger portion to the Non-Governmental Organization to participate to implement community development.

c) Community

In the community development approach, community is as a target to have a very strategic position. Society no longer seen as an object of activities that will only accept the results of community development activities, but as the party must also determine in these activities. What's more with the new paradigm, namely 'people-centered development'.

d) Executor / Agents of Change

Change agents generally have a fairly high awareness and concern greatly to the community development.[105]

4. Corporate Social Responsibility

Community development normally preceded by corporate social responsibility. the notion of corporate social responsibility ("**CSR**") is related to ethical and moral issues concerning corporate decision-making and behaviour. In fostering good corporate governance, there must be a corporate social responsibility. The company shall be responsible for the actions and activities of its business that have influence over certain people, communities, and the environment in which the company operates their business. The concept of corporate social responsibility actually refers to the fact that the company is a legal entity formed and consisted of a human. This suggests that just as man can not live without the other, so the company can not live, operate, and gain business advantage without the other party. It also demanded that

[105] http://journal.ui.ac.id/index.php/humanities/article/view/893/852, (Aug. 18, 2013)

the company needs to run remain responsive, caring, and responsible for the rights and interests of many other parties.[106]

Knowing if a company should undertake certain activities or refrain from doing so, because they are beneficial or harmful to society, is a central question. The controversy is over the responsibilities companies have regarding the social impacts of their activities. Should they undertake actions designed to avoid or repair the negative impact of their operations on society or even to have a beneficial impact by promoting socially desirable ends?[107]

CSR is related to complex issues such as environmental protection, human resources management, health and safety at work, relations with local communities, and relations with suppliers and consumers. The present-day dominant conception of CSR implies that firms voluntarily integrate social and environmental concerns in their operations and interactions with stakeholders. There is an assumption that firms can be trusted to address, on their own, any problems their operations may cause, without being bound by laws and regulations. It is thus necessary to understand what kind of motivations the companies have to engage in social responsibility activities.[108]

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[106] Sony A. Keraf, Op. Cit, page 122

[107] Manuel Castelo Branco and Lu´cia Lima Rodrigues, **Corporate Social Responsibility and Resource-Based Perspectives,** Journal of Business Ethics, 2006, page 111

[108] *Ibid*

Conceptually there is some sense that raised about "Corporate Social Responsibility", among others:

a) "The commitment of business to act ethically, operating legally and contribute to economic development along with improving the quality of life of employees and their families, the local community and wider society".

b) "The commitment of business to contribute to sustainable economic, working with the employees of the company, the family, the local community and society as a whole, in order to improve the quality of life".

c) "All efforts to make the company's voluntary act responsibly because of ethical and social considerations".

In the international level, initiatives towards the implementation of "Corporate Social Responsibility" continues to grow as formulated in several international instruments, as follow:

a) OECD Guidelines On Corporate Social Responsibility

In addition to the OECD Guidelines, the following instruments are reviewed: the Caux Principles for Business, the Global Reporting Initiative, Global Sullivan Principles, the Principles for Global Corporate Responsibility: Benchmarks, Social Accountability 8000 (SA 8000) and the United Nations Global Compact. The review is based on material developed by Business for Social Responsibility ("**BSR**"), a business association that advises companies on the design of their corporate

responsibility programmes. BSR selected these instruments because they are among the prominent initiatives shaping individual company initiatives. The discussion of this material is divided into three sections: sponsors of the instruments, content and follow-up.[109]

b) The International Labour Organization ("**ILO**") Declaration (a voluntary code of conduct relating to the labor and social aspects of multinational corporations)

1) CSR is a way in which enterprises give consideration to the impact of their operations on society and affirm their principles and values both in their own internal methods and processes and in their interaction with other actors. CSR is a voluntary, enterprise-driven initiative and refers to activities that are considered to exceed compliance with the law.[110]

2) There is considerable debate on CSR and on the role of enterprises in society. Some are concerned that the expectations of enterprise CSR initiatives extend well beyond what might be considered as the legitimate role of an enterprise in society: CSR cannot substitute for the role of government. While others might agree with the primacy given to the law and its implementation, they note that CSR should not be confused with what society considers as the social responsibilities of enterprises: CSR is a voluntary concept involving responsibilities unilaterally identified by enterprise management. There is also criticism

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[109] *Ibid*

[110] Lou Tessier and Helmut Schwarzer, **The extension of social security and the social responsibility of multinational enterprises: An exploratory study**, **ESS – Document No. 35,** INTERNATIONAL LABOUR OFFICE, GENEVA, 2013, page 5, http://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---multi/documents/publication/wcms_213756.pdf, (Aug. 20, 2013)

that in some instances CSR commitments represent little more than declaratory statements of intent. There are concerns over the number and quality of audits being conducted by buyers. Some argue that this is introducing a multiplicity of demands and unnecessary costs in supply chains with little return to suppliers in terms of market expansion, or to workers in terms of an improvement in working conditions.[111]

3) The point of reference for the ILO's work on CSR is the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy ("**MNE Declaration**"). The MNE Declaration is the only universal instrument addressed, among others, at enterprises which has been agreed to by governments, employers' and workers' organizations.[112]

c) <u>UN Global Compact</u>

An important dimension of CSR involves "a shift of focus from the maximization of shareholder value to the satisfaction of the interests of a broader set of stakeholders". These stakeholders are frequently divided into two categories. Primary stakeholders are directly related to the business such as stockholders, customers, suppliers, and employees. Secondary stakeholders frequently include governments at various levels, charities, community organizations, and in broader definitions, activist groups and the media. It can be argued that this comprehensive view of stakeholders would include the United Nations which represents 191

[111] *Ibid*
[112] *Ibid,* page 6

countries encompassing almost all human beings on earth. CSR advocates believe that contemporary business must go beyond profit maximization and fulfill the aspirations of a wide range of stakeholders. A classic expression of this is by Davis and Frederick who have written, "In the long-run, the greatness of the business as an institution may depend as much on its heart as on its brain."

To facilitate interaction among business and its stakeholders, the United Nations Global Compact includes civil society organizations often also referred to as non-governmental organizations, academic institutions, business associations, labor unions and various governmental entities.[113]

With over 6,000 business participants, the Compact is "the largest voluntary corporate citizenship network of its kind," and this gives it "a strong local presence than other similar initiatives in many countries". Prior to the Compact, there was a lack of a strong influential body to promote CSR. Nations have imposed some rules regarding CSR, but there is an absence of significant global governance. Supporters believe that the Compact is the first-step in managing global corporate social responsibility. During a Global Compact Counter-Summit in June 2004, pro-Compact attendees stated that the Compact has started a process of establishing international standards and laws that can govern multinational enterprises. It has helped increase awareness of human rights, fair labor practices, and environmental violations of corporations, especially those of

[113] Joan Bitanga and Larry Bridwell, **Corporate Social Responsibility and The Global Compact of the United Nations**, Pace University, page 3, larrybridwell.com/UN%20and%20The%20Global%20Compact.docx, (Oct. 10, 2013)

multinational enterprises, and has expanded international awareness of important CSR principles. Also, because the Compact strongly promotes networking among corporations, government institutions, and civil society organizations, mutual learning is fostered across many stakeholders.[114]

d) International Chamber of Commerce

Since its foundation in 1919, International Chamber of Commerce ("**ICC**") has promoted an open international trade and investment system, based on multilaterally agreed rules and responsible business conduct. In relation to this mission, ICC strongly encourages corporate responsibility initiatives by companies. ICC supports the notion that responsible, long-term oriented entrepreneurship is the driving force for sustainable economic development and for providing the managerial, technical, and financial resources needed to meet social and environmental challenges. It is important to distinguish the respective roles of business and government in this respect. Governments' role is to provide the basic national and international framework of laws and regulations for business operations. Business has the duty to abide by these laws and a responsibility to develop and implement management systems to ensure good corporate practice. A commitment to responsible business conduct requires consensus and conviction within a company. Voluntary business principles have the advantage of responding to the cultural diversity that exists among enterprises and offering the flexibility to tailor solutions to particular circumstances. Voluntary approaches minimize competitive

[114] *Ibid*, page 4

distortions, as well as transaction costs associated with regulatory compliance, and inspire many companies to go beyond the regulatory baseline. A "one-size-fits-all" approach is incompatible with the great diversity that exists within business.[115]

Although the nature of the various international instruments above are as "soft law", but has a lot of influence on the policies adopted by some major countries.

In a further development there are even certain countries like the United States and the countries in which multinational corporations centered, government began to associate voluntarily applying CSR initiatives with policy and international agreements that they do in the field of trade. The Dutch government, for example promote to companies that want to gain access to export credits to declare submission to the "OECD Guidelines on CSR Practices".[116]

CSR does not only cover the company's obligations under the terms of the applicable legislation on corporate law in general, but also includes the obligations of the "morality", such as:

a) protection and preservation of the environment;

b) human rights;

c) labor rights;

d) education;

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[115] http://www.iccwbo.org/Advocacy-Codes-and-Rules/Areas-of-work/Corporate-Responsibility-and-Anti-corruption/Corporate-responsibility-explained/, (Oct. 12, 2013)

[116] Ida Bagus Rahmadi Supancana, **Subject Matters : Laporan Tim Analisis dan Eveluasi Tentang Community Development**, 2007, Op. Cit, page 12

e) welfare of the local community;

f) health;

and others.[117]

[117] *Ibid*

CHAPTER III

DISCUSSION

A. Legal Perspective of Community Development of Foreign Direct Investment In Coal Mining

The capital which invested by the investor has a very important role for local communities because these investments directly give impact in the lives of local communities. The question is whether the legal basis so that companies that invest in a region that was required to develop a community around that area. Law No. 1 of 1967 Regarding Foreign Investment and Law No. 6 of 1968 Regarding Domestic Investment did not specify the provisions of governing local community development programs. In Article 10 of Law No. 1 of 1967 Regarding Foreign Investment determined that the foreign capital enterprises shall meet their manpower needs by Indonesian citizens. Article 19 of Law No. 6 of 1968 Regarding Domestic Investment is determined liability companies, both national and foreign experts to use the Indonesian nation.

Both provisions were only focused on the obligation to use the Indonesian Worker, while the matters relating to the development of education, health, and local economies are not specifically regulated.

In other legislation or ministerial regulations and in various investment contracts, we can find a variety of investment contracts, we can find a variety of special provisions governing the development of local communities.

1. Related Regulations

The relevant applicable laws in relation to community development are as follows:

a. Constitutional in 1945

Constitutional in 1945 is basic law and the constitution of Republic of Indonesia. Article 33 of Constitutional in 1945 stated that:

1) The economy is structured as a joint venture based on the principle of kinship.

2) Branches of production which are important for the control of the State and the welfare of the majority controlled by the State.

3) Earth, water and natural resources contained therein controlled by the State and used for the prosperity of the people.

4) The national economy be conducted in accordance with the principles of economic democracy, equitable efficiency, sustainability, environmental friendliness, independence, and balancing economic progress and national unity.

5) Further provisions on the implementation of this Article shall be regulated by law.

As stated above, the utilization and management of mineral resources and coal as a source of natural resources contained within the Indonesian mining law controlled and organized by the State Government as the holder of the mining authority. In accordance with Law No. 32 of 2004 Regarding Local Government, the implementation of the authority has done through regulation, supervision and development of mineral and coal resources management by

the central government and regional governments on behalf of and for the overall prosperity of all the people and nation of Indonesia.[118]

b. Law No. 25 of 2007 Regarding Investment

Article 15 (b) of Law No. 25 of 2007 stated that:

Each investor is obliged to:
a. apply the principles of good corporate governance;
b. implementing corporate social responsibility;
c. report on investment activities and submit it to the Investment Coordinating Board;
d. respect the cultural traditions surrounding the location of investment business activities; and
e. comply with all the provisions of the legislation.

Article 15 (b) of Law No. 25 of 2007 as stated above contains the obligations of investors, which is carrying out social responsibility. Corporate social responsibility is the responsibility in any investment to create relationships remain harmonious, balanced, and in accordance with the environment, values, norms, and culture of the local community. Obligations of the investor is to continue to create a harmonious and balanced relationship between the company and the local community. Harmonious and balanced relationship should be in accordance with:

a. the environment;
b. value;
c. norms; and
d. local culture.[119]

[118] Ida Bagus Rahmadi Supancana**, Bahan Ajar Kuliah: Laporan Tim Analisis dan Eveluasi Tentang Community Development**, 2007, Op. Cit, page 19
[119] Salim HS dan Budi Sutrisno, **Hukum Investasi di Indonesia**, Rajawali Pers, Jakarta, 2012, page 379

Moreover, the article which also organize community development is Article 17 of Law No. 25 of 2007 which set out the obligation of investors to allocate funds for the gradual recovery of the location that meets the environmental standards that governed its implementation in accordance with applicable laws. The explanation stated that this provision is intended to anticipate the environmental damage caused by investment activities. This article specifically govern the obligations of companies, especially mining companies to set aside for environmental improvement.

c. Law No. 40 of 2007 Regarding Limited Liability Company

Article 74 Law No. 40 of 2007 stated that:

1) Company having its business activities in the field of and/or related to natural resources, shall be obliged to perform its Social and Environmental Responsibility.

2) Social and Environmental Responsibility as referred to in paragraph (1) shall constitutes the obligation of the Company which is budgeted and calculated as the cost of the Company, implementation of which shall be performed with due observance to the appropriateness and fairness.

3) The Company which fails to perform its obligation as referred to in paragraph (1) shall be imposed with sanction in accordance with the provision of regulation.

There are three points that set forth in Article 74 paragraph (1) Law No. 40 of 2007, namely:

a. Social responsibility of the company;

b. Provide budget; and

c. Sanctions.

Corporate social responsibility is defined in Article 74 paragraph (1) Law No. 40 of 2007. Social responsibility is focused on the company that

runs its business activities in the field and or relating to natural resources, particularly in mining. To carry out that obligation, the company must provide a budget. This budget is calculated as the cost of the company. For the company, which does not carry out the obligations imposed sanctions. Sanction of it will be determined by government regulation.

d. Government Regulation No. 47 of 2012 Regarding Social and Environmental Responsibility of Limited Company.

Article 3 of Government Regulation No. 47 of 2012 stated that:

1) Social and environmental responsibility into a liability for the company that runs its business activities in the field and/or related to the natural resources under the applicable Laws.

2) The obligation referred to in paragraph (1) shall be implemented both within and outside the Company.

These regulations also regulate in more detail the social and environmental responsibility by companies held by the Directors based on the Company's Annual Work Plan after the approval of the Board of Commissioners or the General Meeting Shareholders ("**GMS**"). Implementation of social and environmental responsibility contained in the Company's Annual Report and be accountable to the GMS.

e. Decree of the Minister of Energy and Mineral Resources No. 1453 K/29/MEM/2000 Regarding Technical Guidelines on Implementation of Governance Task in Public Mining Sector

In this provision is set on regional development, social development and joint cooperation. In addition, the contents of Article 6 of Decree of the Minister of Energy and Mineral Resources No. 1453 are as follows :

a. *Local Government in accordance with the scope of their respective authorities assign the holder of (KP), Contract of Work (KK) and PKP2B accordance with the stages and the scale of its efforts to help the community development programs and regional development in the local community which include human resource development, health and economic growth.*

b. *Governor/ Regent/ Mayor to provide guidance and oversight to the implementation of community development programs and the development of the area as referred to in paragraph (1).*

Furthermore, in Article 7 of Decree of the Minister of Energy and Mineral Resources No. 1453 K/29/MEM/2000 stated that :

"Governor/ Regent/ Mayor shall endeavor creation of joint cooperation between holders of KP, KK and PKP2B with local communities based on the principle of mutual benefit."

When we consider that provision, it appears that the mining company commissioned to carry out community development programs, regional development, and joint cooperation by Governor/ Regent/ Mayor. Community development programs should include:

a. Human resources;

b. Health;

c. Economic growth;

d. Regional development; and

e. Partnership.

f. <u>Law No. 4 of 2009 Regarding Mineral and Coal Mining</u>

Article 95 of Law No. 4 of 2009 states that The holder of the IUP and the IUPK are obligated to implement development and the empowerment of the local community. And Article 108 of Law No. 4 of 2009 states that the holder of an IUP and an IUPK is obligated to compile a community

development and empowerment program. The program compilation and planning as stated is to be consulted to the Government, Regional Government, and the community. What is meant by community is the community that is resident in close proximity to the mining operation.

g. Government Regulation No. 23 of 2010 Regarding Implementation of Law No. 4 of 2009 as amended by Government Regulation No. 24 of 2012

Article 106 of Government Regulation No. 23 of 2010 states that IUP and IUPK holder shall develop programs development and empowerment of communities around WIUP and WIUPK (mine site area of IUP and IUPK holder).

h. Government Regulation No.55 of 2010 Regarding Development and Supervision of Management of Mineral and Coal Mining

Implementation of Community Development conducted by the company should receive guidance and supervision from both central and regional governments in order to right on the target, with respect to the Government issued Government Regulation No.55 of 2010 Regarding Development and Supervision of Management of Mineral and Coal Mining. In Article 13 paragraph (2), Article 16 (k) and (m), Article 31 and Article 32 of Government Regulation No.55 of 2010 describes the supervision and coaching development and empowerment of local communities.

2. Analyse

Corporate social responsibility is a concept that used to be known as a form of corporate activities undertaken voluntarily and without coercion.

However, since the emerging new regulations such as Law No. 25 of 2007 Regarding Investment, Law No. 40 of 2007 Regarding Limited Liability Company and the Mining Law, the paradigm of CSR shifts from voluntary becomes mandatory.

When we review the explanation of the community development regulation in the Law No. 40 of 2007 Regarding Limited Liability Company, it limited only in the field of natural resources. Whereas community development is not enough only in certain fields, but should also be applied to other fields.

In the Mining Law, community development focused only on community empowerment. If we see the Chapter II before, more broadly, community devleopment not only include community empowerment but also community services and community relations.

B. Social Change Perspective of Community Development of Foreign Direct Investment In Coal Mining

1. Concept of Social Change

Social change can be thought of as the change in the social system. More precisely, there is a difference between the state of a particular system in a different time period. Speaking of change, we imagine something that happens after a certain period of time: we are dealing with a state of the observed difference between before and after a certain period; circumstances when we deal with the differences observed between before and after a certain period. To be able to declare the difference, the baseline characteristics of the unit must be determined by careful analysis despite

constantly changing. So the basic concept of social change involves three ideas: (1) differences, (2) at different times, and (3) in the same state of the social system. Example of a good definition of social change is every change that does not repeated from the social system as a single entity.[120]

Social change can be divided into several types, depending on point of view of observation: whether from an aspect, a fragment or a dimension of social systems. This is due to the state of the social system is not simple, not just one-dimensional, but it arises as the result of a combination of circumstances or a combination of various components are as follows:

a) Essential elements (e.g. the number and types of individuals, and their actions).
b) Relationships between elements (e.g. social ties, loyalty, dependability, interpersonal relationships, integration).
c) Functioning of the elements in the system (e.g. the role played by individual job or the need for specific measures to preserve social order).
d) Maintenance boundary (e.g. the criteria for determining who include members of the system, in terms of individual acceptance of the group, the principle of recruitment within the organization, etc).
e) Susbsistem (e.g. the number and type of sections, segments, or division can be distinguished).
f) Environment (e.g. natural state or geopolitical location).[121]

[120] Piötr Sztompka, **Sosiologi Perubahan Sosial**, Prenada, Jakarta, 2008, page 3
[121] *Ibid,* page 3-4

The creation of stability or imbalances, consensus or dissension, harmony or discord, cooperation or conflict, peace or war, prosperity or crisis, etc derived from the nature of the interplay of the overall characteristics of the complex social systems.

When separated into its main components and dimensions, systems theory implying the possibility of the following changes:

a) Changes in the composition (e.g. migration from one group to another group, a member of a particular group, a reduction in the number of people from starvation, demobilization of social movements, the dissolution of a group).

b) Changes in the structure (e.g. the creation of inequality, the crystallization of power, the emergence of the bonds of friendship, partnership formation or competitive relationship).

c) Changes in function (e.g. job specialization and differentiation, the destruction of the economic role of the family).

d) Boundary changes (e.g. merging several groups or one group by another group, loosening the criteria for membership, and conquest).

e) Changes in inter-sub-systems of relationship (e.g. control over the political regime of economic organization, controlling the entire family and private life under totalitarian governments).

f) Environmental changes (e.g. ecological damage, earthquake, or the HIV virus outbreaks, the disappearance of the bipolar international system).[122]

[122] *Ibid,* page 4

Sometimes changes occur only partial, limited in scope, without major consequences on other elements of the system. The system as a whole remains intact, no changes covered the elements therein changes occur gradually. For example, the strength of the democratic political system lies in its ability to face challenges, reduce and resolve conflicts with the protest held a reshuffle in part without endangering the stability and continuity of the state as a whole. Changes like this are an example of a change in the system. However, on other occasions, the change might include a whole (or at least include the core) aspects of the system. However, on other occasions, the change might include a whole (or at least include the core) aspects of the system, resulting in a complete change, and creating a new system that is fundamentally different from the old system. Changes like this are exemplified by all the great social revolution. This radical transformation is more accurately described as the system changes. The boundary between these two types of change rather vague. Changes in the system often accumulate and eventually touch the core of the system, and then transformed into a system change. In a social system is often seen gradual changes of the overall characteristics and traits leads to the "quantitative" and "qualitative" new. All tyrants and dictators only able to cover up public displeasure and to some extent their power gradually slump without inevitably open the door for democracy.[123]

The examples of social change definition contained in sociology textbook, it appears that experts put pressure on different types of changes.

[123] *Ibid*

But most of them look important structural changes in relationships, organizations, and the bond between the elements of society:

a. Social change is the transformation in society, in the patterns of thinking and behavior at a certain time.
b. Social change is a modification or transformation in the organization of society.
c. Social change refers to the variation in the relationship between individuals, groups, organizations, culture and society at a given time.
d. Social change is a change in behavior patterns, social relations, institutions and social structures at a specific time.[124]

The rationale behind the emphasis is more often directed to structural changes than other types is due to changes in the system as a whole rather than a change in the social system alone. The social structure of the community is a kind of skeleton formation and operation. If the structure is changed, then all the other elements tend to change as well.

The concept of social change include the 'atom' smallest social dynamics, changes in circumstances, or changes in the social system of every aspect. However, a single change rarely occurs in isolation. Change is usually associated with other aspects and sociology should find a more complex concept to analyze the connection forms.[125]

Most important is the idea of "social process" which describes a series of interrelated changes. The classic definition proposed by Pitirim Sorokin.

[124] *Ibid*
[125] *Ibid*

According to him, social process is any changes in the course of time a particular subject, whether it changes its place in space, or modification of the quantitative or qualitative aspects.

Thus, the concept of social processes show: (1) changes, (2) refers to the same social system (occurring in it or change it as a whole), (3) interconnected causal and not simply a factor that accompanies or is precedes other factors, (4) changes that follow each other in succession in time (sequentially by a series of time). Examples of social processes that move from the macro level to the micro level include: industrialization, democratization, the expansion of the war, the mobilization of social movements, crystallization circle of friends and family crisis. Once again, the problem is the theoretical importance of the link between the micro and the macro.[126]

Two of the specific form of social processes have been sociologists and has been the target of their attention for decades. The first is the social development process describe the development potential inherent in the social system. The concept of '***social development'*** also includes three additional features:

1) Towards a specific direction in the sense of the state of the system is not repeated itself at every level;
2) Circumstances of system at the next time reflects reflects a higher level than the original (i.e. an increase in the differentiation of structure, the increase in economic output, economic growth, or population growth), or

[126] *Ibid,* page 6

at any time, and then the state of the system is getting closer to general characteristics (e.g. society perilously close to the characteristics of social justice, public welfare, or democratic); and

3) These developments triggered by the tendency that comes from within the system (e.g. population growth followed by an increase in density, reduction of internal contradictions by creating new forms of life better, innate creativity channeled towards innovation that means).[127]

Other forms of social processes which emphasized the sociologist is a ***'social circulation'***. The process here is no longer socially towards a certain direction but also not haphazard. This process is marked by two characteristics: 1) follow a circular pattern: the circumstances of the system at the certain time is likely reappear in the future and is a replica of what has happened in the past, and 2) is due to the tendency of a permanent loop in the system due to the evolving nature how to move. Thus, although there is a change in the short term, but long-term changes do not occur because the system back to the early state. In other opportunities will be presented a group of influential theories that interpret history according to the social circle: a circular theory of change.[128]

One concept is again the most widely debated but the most influential in the history of human thought (not only in the history of sociological thought) is thinking about ***'social progress'***. Thought this added dimension more objective assessment categories and more neutral towards normative

[127] *Ibid,* page 7
[128] *Ibid,* page 7-8

aspects of life. It basically is meant by 'progress' is: 1) The process of lead; 2) Continuously bringing the system closer to the social situation better or more profitable (or in other words to the application of certain choices based on ethical values such as happiness, freedom, prosperity, justice, or the ideal society achievements in the form of a utopian society).[129]

2. Concept of Alternative Progress

Given the origin of the concept of social progress is closely related to process the image according to a straight line, then there are some questions that can be asked for its distinctive features are more specialized. In the phase where the concept of progress regarding the process or in the phase where the convergence process? There are three possible answers. The first most common in classical sociological theory, progress refers to the result or end product of the process, defined as a comprehensive reference, complex citran about upcoming community or as a special feature of society and its elements (eg. wealth, health, productivity, equality, happiness). Here people can talk about the progress of a partially ideals. Answer a second placing overall advancement in logic process in which each step is seen as an improvement from the previous stage and consequently more perfect, but without a final destination (this marks the evolution of the concept of gradual differentiation or improvement adjustment). Here one can speak of "development as conditions are getting better". The third answer contains the progress with the initial process mechanisms, emphasizing the potential or capacity advances contained in the agent of progress. Here is becoming the principal meaning of

[129] *Ibid,* page 8

progress is not the quantity of what actually happened, but the potential "to be". In theory underlying the doctrine of constructivism modern development, new emphasis is aimed at individuals in the historical and social context. The driving force of change (progress agent) are placed in everyday social activities of the agent. Part of the proceeds of progress may be expected but mostly imagined as something unexpected and often is the result of human efforts unconscious. Or viewed as a product of the "invisible hand"; product of "intelligence reasoning" or the product of "situational logic". Finally, the agent is placed in human beings progress and socialized. The ordinary man is put back into the picture and get a real human size: knowledgeable conscious but not exceptional, but not absolute power, creative but not without hurdles, free but not without limit. Discussion on the progress of such agents offered and emphasized by structuration theory morphogenesis.[130]

Stated that the orientation of the flow of new theories of modern development, especially morphogenesis-structuration presents a new approach to social progress as follows: (1) social progress over rated as a result of potential capacity rather than as a final achievement, (2) be assessed as the relative quality of the concrete social processes dynamic and changing rather than as an external standard, absolute and universal, (3) be considered as a historical opportunity, opportunities and open opportunities rather than as a necessity, and the inevitable tendency of the imposed, and (4) be considered as a product, often unexpected and collective unconscious of human action rather than as a result of God's will, great attention tremendous human or

[130] *Ibid,* page 37-38

automatic operation of social mechanisms. It provides a framework for a radical new concept of progress. Expectations regarding an increase indefinitely, without stopping, to provide answers to the puzzle the cause of progress.[131]

In the formulation presented here, progress is closely related to the strength of the agent. Whenever an agent is said to progressive? Seen from the point of advancement, each agent clearly better than non-agent. To be developed, we need to change purposive and purposive change when it is considered to be produced by humans, the agent becomes a condition of progress. Perannyalah necessary and sufficient one person to carry it out. Do not forget that a purposive change may also lead backward; generating means more setbacks than progress. Kind of specific agents that could potentially drive the progress. The characteristics of agents that could potentially drive the progress is:

a. The characteristics of the actor

There are several characteristics opposite actor that can be compared. Actors may be creative, innovative, achievement-oriented or passive, conservative, ascriptive oriented position. They may emphasize autonomy, independence, personal integrity or antikompromi, adapt, dependent. They may have a self-awareness about their social situation adequately or completely ignored, caught up in the mythology or have false consciousness. The characteristics which owned most of the actors or primarily affecting actors, will determine the quality of the agent.

[131] *Ibid,* page 39

b. Structural features.

They may be rich with ideas, pluralistic, heterogeneous, complex, or otherwise may be poor with the idea, limited, homogeneous and simple. They may be open, flexible, tolerant, willing to gather people from different layers, or closed, rigid, dogmatic, against something new. Structural features which surround the majority of the actors or primarily affecting actors, will be reflected in the quality of agents.

c. The characteristics of the environment in the community where it is located will have an impact at two levels: through the objective conditions and the subjective attitudes through. Natural conditions may be favorable; resource-rich, easily tilled, or arid, poor, and forbidden. One might seek to cultivate, complain and conquer, adjusting to the needs and aspirations of their nature, or they just simply want to adjust to the natural, and the subject remains in a passive state.

d. When people remember the historical dimension that can not be reduced, the course emphasizes the characteristic tradition of objective and subjective level. At the objective level, the question is whether the tradition is characterized by continuity, consistency, has a long history of or characterized by destruction, unsustainable and ambiguous. Subjectively, comity and tied to tradition may be opposed to the showy attitude and a rejection of the past without critical (this is typical to the present generation).

e. The characteristics of the expected future may also be an important feature. Optimistic attitude contrary to pessimistic, disappointed and discouraged. The belief that an uncertain future, the success of all plans rely on human effort as opposed to all the traits of fatalism. Image or a long-term strategic plan for the future very different from the short term plans, expectations or opportunist attitude immediately.[132]

If you see the list of agents above characteristics, would seem divided into two groups. The group determines whether people are willing to act in the direction of the transformation of society. The variable group action-oriented form of motivation. Another group of variables determine whether people will be able to act. The variable group forming opportunistic actions. Agents may only progressive think if it has two terms: "motivation" and "opportunity". Agents may only be progressive if he wanted to act and be able to act.

Such a situation can be estimated by linking the conditions at the starting point of each dichotomy, namely by combining:

1) Actor creative, autonomous and know yourself;
2) The structure is flexible and rich;
3) The natural environment is a challenging and friendly;
4) Sustainable and respectable tradition; and
5) Optimistic, has a long-term plan for the future.

That are the ideal type "active society" that generates an agent oriented to progress.

[132] *Ibid,* page 39-41

It was illustrated by the synthesis of two concepts: freedom and self-transcendence. So, to some extent, progress-oriented agents are free and independent. There are two kinds of freedom. "Negative freedom" (free from) means having a certain degree of autonomy, and in spite of obstacles; are in the open atmosphere and the opportunity to choose the opportunities that exist. "Positive Freedom" (free for) means it has the capacity to influence, transform, reduce barriers and expand facilities, up to a certain degree to have power and control over the environment.[133]

But the difficulty, most of the important characteristics likely to lead to independence; overcome barriers and obstacles, pass "barrier". The independence occurred in three "limiting" human capabilities: overcoming natural obstacles to control, manage, and use it; overcome obstacles by way of deliberate social structures, distorted, remodel and revolution; increase the independence of individual actors with learning, exercise, introspection, hard working, overcome the limitations of the technology workforce.

This trend can be explained as a natural growth of two fundamental human traits: creativity actors produce objects, ideas and original and new institutions, which continue to grow and enrich the human experience, and individual human beings learn from life experiences and social (cultural) of trip history. Finally, the main source of progress contained in the infinite creativity and never shrinks and the ability to learn, the ability to create

[133] *Ibid,* page 41

something new and inherited and continue innovation continually expanding knowledge, skills, strategies and techniques they belong together.[134]

If practiced in conditions as described in the ideal type of progress that the agent -oriented tendencies and the ability to maintain independence and continuous progress of mankind. Here it should be emphasized on the word "if". There is no necessity of progress because there is no provision that the person would be willing and able to carry out their creative capacities. Barriers natural conditions, structural or historical or oppressed motivation to be active (eg influenced by socialization passivity, by the adjustment mechanism, to defend themselves in situations that inhibit or through bitter experience, haunted by past failures) can prevent the development of creativity. Similarly, the accumulation process. Continuity of tradition may be disrupted at both the individual and the level of historical experience (quality of family, school, church, mass media and other institutions can be influential here). In such cases, it is likely that there will be stagnation and even retrogression rather than progress.

Independence of the community in which the agency participates as an ultimate power that gives feedback on the agent itself, will result in independence itself. Potential through the development of potential agents diaktualisasi himself. Emancipation agent through practical experience will broaden and strengthen freedom tendency toward self-sufficiency. Last progressivity agents determined progress in the fact that the agent was not

[134] *Ibid,* page 42

only progress but also advance the trigger himself. This is a historical accumulative result of his own role as an agent of progress.[135]

3. Analyse

Social change in communities around the mine including the structural changes can occur because the bond of friendship or cooperation between local communities and enterprises. But it may happen that the public will enjoy the advantages of community development and not vice versa. Because there are many mining companies who carried out the ineffectiveness of community development.

The development community is included in the concept of social progress. Because the concept of social progress is a process of continuous development of society carries a social system closer to a state of better or more profitable. So it is in accordance with previous understanding of community development, which is a process designed to create conditions of economic and social progress for all people in the community with the active participation and initiative as far as possible to grow the community itself .

According to the first theory of classical sociology, progress refers to the outcome or the final product. When society becomes more advanced and developed because of the community development undertaken by the mining company, the social change that makes the concept of alternative progress. It can be analyzed that the agent driving the progress of the mining company itself. The final goal is actually becoming self-sufficient communities and

[135] *Ibid,* page 43

ultimately provide feedback to the company that the company was also make a progress.

C. The Relation Between The Legal Perspective And The Social Change of Community Development of Foreign Direct Investment In Coal Mining

In general, the authors argue that the effect of the law on areas of social life is not the same: there are areas which can easily accept the influence of the changes required by law, while other areas can not easily be influenced so easily, or even not be affected at all. If legal theorists reject the opinion, that the law can be used as a means to bring about social change, then maybe they see it from the persperctive of the areas of life that are difficult to be affected by the law. But not all areas are covered for setting actions by law. Yehezkel Dror argues that the actions in the society purely instrumental as in commercial activities, with the real one can accept the effect of the regulations of the new law. Instead areas of social life which is closely connected with beliefs and institutions that are basic, as well as dealing with the actions that constitute the expression of beliefs will undergo minor changes, though issued regulations that attempt to give shape and direction to the field these areas; included in these areas are: family life and marriage. Although widely recognized, that the fields are "free from the element of faith, beliefs and values "easier to work on and directed by the law, but few investigations have proved, that also in areas called the law was not neutral fully control the situation according to what he wanted. Investigation conducted by Stewart Macaulay has revealed practices in the field of trade law, which also explains a little more about the limits of the use of the law. Macaulay Research proves that internal control mechanisms

were more instrumental than to do by law. Or if at some point people rely on the use of formal legal means (such as a contract or legal sanctions), the underlying considerations are not purely legal, but also personal interests. What are investigated by Macaulay belong to the field of civil law, which is essentially the driving motor is the free will of each person. Therefore, the limitations of the law in carrying out the function of the setting here is determined by the freedom given each person.[136]

Based on the relationship of law and social change, the law governing community development is an instrument of social change for the communities around the mine. Here, the law can serve as a means to bring about social change because of community development in the field of education is an area that is easily accepted by the public.

[136] Satjipto Rahardjo, **Hukum dan Masyarakat**, Angkasa, Bandung, 1980, page 112-115

CHAPTER IV

EPILOGUE

A. Conclusion

1. Since the emerging new regulations such as Law No. 25 of 2007 Regarding Investment, Law No. 40 of 2007 Regarding Limited Liability Company and the Mining Law, the paradigm of CSR shifts from voluntary becomes mandatory. In the Mining Law, community development focused only on community empowerment. But community development should not only include community empowerment but also community services and community relations.
2. The development community is included in the concept of social progress. Because the concept of social progress is a process of continuous development of society carries a social system closer to a state of better or more profitable. So it is in accordance with previous understanding of community development, which is to expand public access to achieve socio-economic-cultural better when compared with the previous development activities. Community development is a socio-cultural adaptation process undertaken by the industry, local and central government to local community activities. And finally the main goal is making the mining coal companies promoting themselves.
3. The relation law and social change is the law as an instrument for social change. The purpose of community development is the social progress society of local communities. The law governing community development is an instrument of

social change for the communities around the mine site. Here, the law can serve as a means to bring about social change because of community development in the field of education is an area that is easily accepted by the public.

B. Recommendation

Based on the various existing legal perspectives on community development, these are the things that need to be considered:

1. It needs explication in the regulations (laws, PKP2B, etc.), the translation of the rules (in the form of guidelines and technical rules), implementation, supervision, and enforcement obligations concerning "community development" so that there is legal certainty regarding the rights and obligations of all parties;
2. It needs close communication and coordination between all stakeholders in the field of mining activities in the planning and implementation of "community development";
3. It needs active inclusion of local communities in planning and implementation of activities and establish "community development" for the benefit and empowerment services to their interests; and
4. It needs to increase the protection of the interests of local communities (especially indigenous peoples) to the risk and impact of mining operations, environmental protection and respect for and enforcement of human rights.

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