



The nature of justice as the platform of contractual relations towards contract review (Re-negotiation) by parties in the development of business law in Indonesia

Nenden Herawaty Suleman¹, Wulanmas APG Frederik², J Ronald Mawuntu³, Ronny A Maramis⁴

¹ PhD Student, Departement of Law, Graduate Program, Sam Ratulangi University, Manado, Sulawesi Utara, Indonesia

^{2,3} Professor, Departement of Law, Graduate Program, Sam Ratulangi University, Manado, Sulawesi Utara, Indonesia

⁴ Departement of Law, Graduate Program, Sam Ratulangi University, Manado, Sulawesi Utara, Indonesia

Abstract

Re-negotiation should take into account the interests of the parties, including the interests and ability of the company to implement the articles of the agreement that has been agreed. Through this normative legal research, an abstraction of legal material is obtained through the deduction process of the applicable positive legal norms, in the form of legal systematization and legal synchronization both horizontally and vertically to know and evaluate the relevant legislation in the implementation of the agreement if the parties to the agreement wish to review the agreements previously agreed upon (re-negotiation). In this layer of law, description, systematization, analysis, interpretation and evaluation of positive law are undertaken. Similarly to the legal aspect of the contract, it is intended that the contract designer must be able to write the transactions and the business interests of the parties into a valid and enforceable contract. This is based in the notion that the contract that was made is to contain the rule of law that will apply to the parties subjected to the contract so as to provide legal protection for the parties in reviewing (re-negotiating) a contract.

Keywords: justice, re-negotiation, contracts, business law

1. Introduction

Agreements carried out or exercised by the parties have a binding legal force, whether the agreement is oral or written. The desire to make improvements in the agreement becomes logical if it is followed by the rules of legislation which form the basis for the parties who wish to review the contents of the agreements that have previously been agreed upon. The provisions of Article 1315 of the Civil Code reads, "In general no one can bind themselves on his own behalf or ask for a promise other than himself." From this formula we can assume that an agreement is basically made by a person in his capacity as an individual, the subject of personal law, will only be applied to and is only binding for himself.

Contract renegotiation may encourage the parties to conduct a self-evaluation of the contract implementation, and how the next contract will be implemented if the existing contract has expired. Renegotiation is very important, considering the imbalance in share ownership between the Government of the Republic of Indonesia and PT. Freeport Indonesia, which has resulted in the disadvantage of the Government and the people of Indonesia (low foreign exchange earnings, the benefits for the Papuan community is also low/the contribution is very small) in the implementation of the Work Contract which has been previously agreed upon, due to other government controls in the company's operations that is also weak, because of such little amount of shares. The legal aspect has a meaning that the contract designer must be able to mold the business transactions of the parties into a valid and

enforceable contract. It should be remembered that making a contract is to create a rule of law that will be applied to the parties that are subjected to the contract.

In essence it cannot be released in relation to the issue of justice. Contracts, as a forum that brings the interests of one party to another, demand a fair share of interests. So that the interests of the parties should take precedence, proper regulation and side with both parties are important. Re-negotiation of contract is executed not only in work contract but must also be applied to other contracts, so that the principle of justice for each party can be fulfilled. According to Aristotle, "justice consists in treating equals equally and unequally, in proportion to their inequality". This principle departs from the assumption "for the same things are treated equally, and the same is not the same, proportionally treated". In the mining industry, contract renegotiations are common. Some countries have that have implemented it include Chile, Congo, Liberia, Ecuador, Venezuela, Tanzania, and Peru. Renegotiation becomes prevalent because of the length of the contract term; and therefore, it is vulnerable to changes in political conditions, economics, and technological developments. Renegotiations requests are generally filed by the government where mining operations are located and few requests are made by the company. The contract renegotiation process continues to be done by the government. So far there is a positive trend in the process even though there are also obstacles to be faced. Article 169 letter b of Act No.4/2009 concerning Minerals and Coal stipulates that the provisions in

the work contract and the coal work concession agreement shall be adjusted no later than one year after the act is enacted, except on state revenue.

This research, in the case of a review (renegotiation) of the contract and the agreement that was reached therein, then by itself has applied the contract law which has the specificity and validity that is binding as regulated in Article 1338 of the Civil Code that all agreements that are made legally are applicable as a law for those who had made it. The agreement shall not be withdrawn other than by the agreement of both parties or for reasons prescribed by the law. In renegotiating, freedom of contract can only provide justice if the parties have a balanced bargaining power. Legal protection for contracting parties must be provided by using the principles of equality and not harming one party or another. This requires renegotiation of the contract. On each clause to be agreed upon, it is necessary to make it possible to be adjusted to fit the law, but its achievement will not always be as expected. Changed remain oriented to the restoration of state control over mining goods but also to the Company's ability to produce a proportional contract as a result of a renegotiation that can be exercised by the negotiating party. Legal certainty for the parties in implementing contract renegotiation, especially in business continuity for the development of business law in Indonesia, can also be based on the principle that in a fundamental condition which requires balance of the parties' obligations, it should be possible to renegotiate the contract.

2. Frame of Mind

2.1 Frame of Mind

2.1.1 Theory of Justice

The author uses Rawls's theory of justice in this paper. Regardless of the criticisms towards Rawls' theory, it must be admitted, as modern philosophical thinkers argue, that the main points of Rawls' justice theories are brilliant and original that even may approach a comprehensive theory^[1]. Given the notion of Rawls, Nozick or any other scholar, it is likely that in understanding the pattern of contractual relationships between business actors that lead to the meaning of justice, it should be distributed to a proportional framework and context. Theory of Justice. Aristotle said that justice is a policy related to the relationship between humans, and Justinian's Law states that justice is the constant and perpetual will to give each his own (*justitia est constans et perpetua voluntas ius suum cuique tribuendi*). Jeremy Bentham and Henry Sidwick with the notion of utilitarian justice tend to assume that everyone's happiness is the same, so the preference for giving benefits, or in other words understood fairness utilitarians put forward the value of the benefits of justice being smashed, while Immanuel Kant with the theory that the law is a notion of Kantianism justice, putting forward individual freedom.

2.1.2 The legal certainty theory

The Theory of Legal Certainty. The approach taken in the preparation of this dissertation by Kelsen is called The Pure Theory of Law. Legal development in Indonesia can be done through the improvement of the legal system that covers all

the important areas that make the system work well. Conceptual and procedural revision can be an option with the added possibility of creating a new field of legal education, legislation and institutions of law enforcement and services.

The fundamental and important aspect that is always present in the nomenclature development is improvement. Under the legal shutter, improvement tends to be termed under a revision that can be done either wholly or only partly in accordance with the needs, circumstances and also in accordance with the times.

Ideologically, a revision is derived from the very fundamental element, that is, concept. Each field has its own concept. The law in the concept always does not come out of its normative nature and inside it contains the meanings of values about justice, propriety and so on. A concept will have no meaning without further action. What is contained in it, ideally, should be up to practical strictness. Mechanisms in which the concept wants to be realized are related to the etiquette or procedure. Both are so closely interconnected that there is always the fact that concept revisions are always coupled with procedural revisions. These related actions are as if a system. Various events can lead to improvement efforts both in the form of conceptual and procedural revisions. Some events even make it as not only a revision in the context of development, but more that that it leads to the creation of something truly new (invention) and not just in the sense of finding something that has existed before (discover)^[2].

Durkheim distinguishes two types of facts, social-material and non-material realms. Social material facts, such as architectural styles, forms of technology and law and legislation, are relatively easy to understand because they can be observed directly. Obviously, for example, rules are found outside of the individuals and they force them. More importantly, such material social facts often express a greater and stronger moral force that compels them. This moral power is called the non-material social fact^[3].

The binding power of contracts in principle has power (*streking*) limited to the parties who have made the contract. This suggests that rights that are born are individual rights (*persoonlijk*) and are relative. However, in certain situations it can be extended to reach other parties. This can be observed from the provision of Article 1317 of the Civil Code which states "Moreover, it is also permissible to require the promulgation of an agreement for the benefit of a third party, if an agreement, made by himself for a person or a gift to another, contains such a promise."

Other provisions which indicate the existence of the expansion of work force (*strekking*) agree with the agreement, as contained in the provisions of Article 1318, 1365, and 1576 of the Civil Code. Said articles are an example of the strengthening of the individual (*persoonlijkrecht*) which in principle is relative, only binding to the parties that turn out to be in certain situations to show a strong figure. This condition is called *verzakelijking* or the strengthening of individual rights and reveal the characteristics of material rights.

¹ *Ibid*, p. 109.

² Imam Kabul, *Paradigma Pembangunan Hukum di Indonesia*, Kurnia Kalam, Yogyakarta, p. 1-2.

³ George Ritzer dan Douglas. J. Goodman, *Teori Sosiologi*, Kreasi Wacana, Bantul, 2006, p. 83.

In the Continental European view, the principle of freedom of contract is a consequence of the other two principles of an agreement, namely consensualism and the power of the binding power of an agreement commonly referred to as *pacta sunt servanda*. Consensualism relates to the occurrence of an agreement, *pacta sunt servanda* in connection with the consequence of an agreement ie/that is the binding of the parties who have entered into an agreement while the freedom of contract concerning the contents of the agreement.

An agreement is a form of a deal between the two parties within which it will create legal consequences for the parties involved. An agreement is a deal between one or more persons who bind themselves to another or more than one person (Article 1313 of the Civil Code). The meaning of the above mentioned agreement is still in a very broad sense, because the meaning is only about unilateral agreements and does not concern the binding of both parties. Engagement refers to two things. Engagement is an abstract term or statement, which refers to a legal relationship in the field of property between two or more persons or parties, in which the legal relationship creates an obligation to one of the parties involved in said legal relationship.

The occurrence of a contract is due to the occurrence of a legal relationship between two or more persons. One person is a creditor, and the other is a debtor. Both persons have equal rights and obligations in the contract they have agreed on, one of the parties is obliged to carry out the achievement and the other is entitled to demand fulfillment of said achievement ^[4].

This principle of freedom of contract means that anyone may enter into any contract, whether as provided for in legislation, or as otherwise is not yet provided for in legislation (see Article 1338 of the Civil Code).

Thus, in fact, each person is given the freedom to determine for himself the content and form of the agreement he has made with the other party. From this principle it is also seen that there is protection for human dignity and human rights and basic human rights and obligations. But with regard to freedom afforded to mankind, the law also imposes restrictions in respect of the exercise/use of said right, which is not to be contrary to the law, public order, morals ^[5].

Economic principles and legal certainty in standard agreements are seen from the interests of business actors, not from the interests of consumers ^[6]. Based on the agreement standard stated above, Mariam Darus Badruzaman said that the principle of the standard agreement is as follows:

- a. The contents are determined by one party, usually by the creditor/business actor/other party whose position is relatively stronger than the party in need/debtor/consumer.
- b. One party, usually the debtor/consumer, accepts the agreement.
- c. The configuration is written/resembles forms.
- d. Already prepared collectively/in bulk.

⁴ Syahmin AK, *Hukum Kontrak Internasional*, PT RajaGrafindo Persada, Jakarta, 2011, p. 3.

⁵ F.X.Suhardana, *Hukum Perdata I*, Prehallindo, Jakarta, p. 19-20.

⁶ Abdulkadir Muhammad, *Perjanjian Batu Dalam Praktek Perusahaan Perdagangan*, Citra Aditya Bakti, Bandung, 1992, p. 6-9.

Based on the characteristics of standard agreement stated above, it can be seen that the standardization of the terms of agreement which constitutes the standard agreement is a manifestation of the efforts of the business actors to guarantee their economic interests on the consumers. The consumer's position in this case only approves the terms offered to him by the business actor, because he is driven by need, the consumer receives the formulation of the terms of the argument presented. Usually a new customer feels the weakness of his position in the agreement after an adverse event, and the loss becomes his responsibility under the terms of the agreement. Not all contracts are born at the time of conclusion of said agreement because the time of the birth of a contract depends on the type of contract that is being made. Accordingly, three types of contracts are known, which are as follows:

- a. Consensual contract
Consensual contracts are born at the conclusion of an agreement on the essential elements of the contract
- b. Formal contract
Formal contracts are born at the time of certain formalities, which are done in writing
- c. Real/*Riel* contract
A real/*reil* contract is born at the time of delivery of the goods that are the object of the contract ^[7].

According to David Allan, since 450 BC to present time there have been four stages of development of thinking about the strength of the binding power of contracts, that is:

- a. The first stage is called *contracts re*;
- b. The second stage is called *contracts verbis*;
- c. The third stage is called *contracts litteris*;
- d. The fourth stage is called *contracts consensus*.

In perspective of the Civil code, the binding power of contracts can be observed in the formulation of Article 1338 paragraph (1) "all agreements made legally are valid as legislation for those who have made it". Understanding applies as legislation to those who make it, indicate that the legislation itself acknowledges and places the position of the parties in the contract parallel to the legislator. According to L.J. Van Apeldoorn, there is a certain analogy between the agreement or the contract with the law. To some extent, the contracting parties act as legislators (private legislators). Of course, in addition to the above equations, there is a difference between the two, which is associated with the validity of power. The law, with all its processes and procedures, is applicable and binding for all people and abstract in nature. Meanwhile, the contract has limited force to contractors, in addition to the contracts of the parties intending to commit concrete actions. Niewenhuis, stated that the binding power of an agreement which arises in accordance with the principle of freedom of contract which gives freedom and independence to the parties, in certain situations its applicable power is limited by two things:

- a. First, the binding power of an agreement is limited by good faith as provided for in Article 1336 paragraph (30) of

⁷ Ahmadi Miru, *Hukum Kontrak Perancangan Kontrak*, PT. RajaGrafindo Persada, Jakarta, 2011, p. 38.

the Civil Code, that the agreement shall be executed in good faith.

- b. Second, the existence of *overmacht* or *force majeure* also limits the binding power of the agreement to the parties making said agreement. In principle, the agreement must be fulfilled by the parties, if it is not fulfilled then there has arisen a default/wanprestasi and for the creditors there is an attached right to file a lawsuit, either the fulfillment, compensation and even the dissolution of the agreement. However, with the *overmacht*, or *force majeure*, the lawsuit of the creditor will be disregarded, given the absence of such achievement beyond the debtor's fault (vide Article 1444 of the Civil Code) [8].

2.1.3 Re-negotiating business contracts

Re-negotiating a contract as a business is important for the parties to implement when making a contract, renegotiation will direct the contract as so to keep it in context and update conditions as the business situation develops and as the business environment develops as well.

Re-negotiation comes from the word Negotiation, where a negotiation is a form of social interaction when the parties involved try to complement each others' goals and also contradict one another. According to *Kamus Besar Bahasa Indonesia (KBBI / the Indonesian Dictionary)* Negotiation is a bargaining process where the parties negotiate to reach a mutual agreement between one party (group or organization) and another party (group or organization) [9].

Renegotiation is a process of renegotiating/renegotiating that is an interaction when two parties reach an agreement that can meet the satisfaction of all parties concerned with elements of cooperation and competition, which is re-done with the aim of reaching a mutual agreement in a negotiation process. This includes the actions taken when communicating, cooperating or influencing others to achieve certain goals. In addition, negotiation is also an *ijab kabul* (solemnization of a marriage) of an interaction process undertaken by both parties in order to give and receive something that had been determined by mutual agreement [10].

Basic skills in negotiation and renegotiation are as follows:

- a. Sharpness of mind or shrewdness.
- b. Patience
- c. Ability to Adapt
- d. Durability
- e. Ability to socialize
- f. Concentration
- g. Ability to communicate
- h. Have a sense of humor

The criteria that must be fulfilled in conducting a negotiation/renegotiation, among others, are as follows: [11]

- a. There are parties involved
- b. There is a goal to be achieved by each party

- c. There is a problem being discussed
- d. There is a bargaining process
- e. There is hope of reaching an agreement

The steps in negotiating/renegotiating are as follows:

- a. Opening/Preamble
- b. Begin the negotiation process
- c. The Bargaining Zone
- d. Building deals

It is important in the early stages of negotiation/renegotiation to understand and know the attitudes of others, through what is spoken orally, the language of gestures and facial expressions. Because if, since the beginning, one party has no intention or desire to reach an agreement, then it is only wasting the time and energy of the negotiators. For that, other ways need to be found, such as conciliation, mediation and arbitration through third parties [12].

In the mining industry, contractual re-negotiations are common, because of the length of the contract period, which is vulnerable to changing political, economic and technological conditions [13].

Referring to the ongoing process of re-negotiation, there are six important points of concern. The six points are the area of the mine, the time period, the amount of royalty to be paid, the construction of the smelter, the use of domestic services, and the divestment. The meeting point is most difficult to achieve whenever it come to area, time, and royalty [14].

3. Research Methods

3.1 Types of research

Legal studies recognizes two types of research: normative legal research and sociological or empirical legal research [15]. The research method used in this study is the normative legal research method conducted by examining the materials of law or written data either in the form of legislation, library materials in the form of books, magazines, journals or other written materials related to the research material.

According to H. Zainuddin Ali, normative legal research or commonly referred to as normative juridical research, consists of:

- a. Research on legal principles.
- b. Research on legal systematics.
- c. Research on the level of legal synchronization.
- d. Research on Legal History.
- e. Research on Comparative Law [16]

H. Zainuddin Ali further states that in research on the level of legal synchronization, the object of research is to where the

⁸ *Ibid*, p. 129.

⁹ The Indonesian Dictionary (*Kamus Besar Bahasa Indonesia / KBBI*). 2017. Definition of Renegotiation. Online dictionary version. <https://kbbi.web.id/renegosiasi>.

¹⁰ Tionunit6.blogspot.co.id 2016. Negotiation. <http://tionunit6.blogspot.co.id/>

¹¹ Stephen Kozicki, 1998. *Creative Negotiating (Critical Skills for Your Business)* Adam Press, <https://www.amazon.com/> pp.5-6

¹² Roger Dawson, 2010. *Seni Negosiasi, Seni Canggih untuk Melejitkan Kesuksesan Anda*. Gramedia Pustaka Utama, Jakarta. www.gramedia.com

¹³ Lelisari, Bismar Nasution, 2016. *Renegosiasi Kontrak Perusahaan Pertambangan Memperkuat Tanggung Jawab Sosial Perusahaan Terhadap Masyarakat dan Lingkungan (Studi di PT. Newmont Nusa Tenggara)*, *Journal GaneÇ Swara* Vol. 10 No.2 September 2016, pp.1-9. Accessed on 27 August 2017.

¹⁴ *Ibid*.

¹⁵ Soerjono Soekamto dan Sri Mahmudji, *Penelitian Hukum Normatif Suatu Tinjauan Singkat*, PT. Raja Grafindo Persada, Jakarta, 1986, p. 50.

¹⁶ H. Zainuddin Ali, *Metode Penelitian Hukum*, Sinar Grafika, Jakarta, 2013, p. 12.

existing positive law is written, synchronous or harmonious with each other. This can be done through two factors: ^[17]

- a. Vertical:
- b. Horizontal:

Johny Ibrahim states that the method of normative legal research is a procedure of scientific research to find the truth based on logical scientific research procedures to find the truth based on the logic of science from the normative side ^[18].

This normative legal research is one type of research that is commonly known in the study of jurisprudence. The normative legal approach is used in an attempt to analyze legal materials with reference to existing legal norms. According to Soerjono Soekanto, the manner to examine library materials is called normative legal research or literature research ^[19].

3.2 Data Source(s)

Speaking of data sources, Salim H.S and Nurbani, stated that data sources are where data can be obtained. Data sources are classified into two types:

- a. Primary data source and
- b. Secondary data source

According to Soerjono Soekanto, there are three classes of materials that can be made as an object of study, namely primary legal materials, secondary legal materials and tertiary legal materials ^[20].

3.3 Problem approach

This study uses a legal political approach that examines laws related to positive law in order to determine how the law should or is expected to be or examine changes in the applicable law (*ius constitutum*) that must be done to meet the demands of the change in society into the law that should be (*ius constituendum*). The focal point is to examine what changes should be made in the current law (*ius constitutum*) in accordance with the reality in the implementation of the agreement by the parties if later on said parties wish to review the contents of the contract that has been agreed, how is the legal impact for the parties.

4. Discussion

4.1.1 Legal consequences in the re-negotiation of contracts for the parties

A business contract review (Re-negotiation) is very important today, especially for parties involved in a contract. As a repetition of the negotiating process undertaken by the parties to an agreement, re-negotiation has an important role for the process of renegotiating a contract. Renegotiation comes from the word negotiation that Jackman states that negotiation is a process that takes place between two or more parties who

initially have different ideas until they reach an agreement ^[21]. Re-negotiation comes from the word Negotiation, where as negotiation is a form of social interaction when the parties involved try to complement each others' goals and also contradict one another. According to *Kamus Besar Bahasa Indonesia (KBBI / the Indonesian Dictionary)* Negotiation is a bargaining process where the parties negotiate to reach a mutual agreement between one party (group or organization) and another party (group or organization) ^[22].

Referring to U.S. Act of 1951, "renegotiation means to negotiate again, renegotiation is done to obtain more equitable or favorable terms. For example, it may be with regard to adjusting interest rates of a loan or getting more money by changing terms of a contract ^[23]. Thus, renegotiation means renegotiating. Re-negotiations are made to obtain a fairer or more profitable portion, for example, such as adjusting the loan interest rate or to earn more money by changing the terms of the contract agreed upon. (Is this just the translation/repetition of the US Act?)

Oliver stated that negotiation is a transaction in which both parties have the right to the final result. Therefore, approval from both parties is necessary so that there is a mutual giving and receiving process to reach a mutual agreement. ^[24] The negotiation process always involves two or more people interacting, seeking a mutual agreement, and achieving the desired objectives with both parties involved in the negotiations ^[25].

Re-negotiation is also referred to as an interactive process (repeated negotiations) made to reach an agreement. This process involves two or more people who have different views but want to achieve/improve some resolutions together. McGuire also adds that: "Negotiation is often referred to as an art because it involves creative thinking ^[26]. Thus, a negotiator must have the art of negotiation and also involve creative thinking in negotiating or renegotiating.

Re-negotiation is also a repetition of a two way communication process, namely between the parties namely the first party as a communicator and the second party as a communicant or alternate both in communicating their respective interests.

Judging from the legal and regulatory aspects, re-negotiation has a very important role, to protect the public interest, namely the interests of the people and the of Indonesia, especially in the effort to save the wealth and natural wealth, as well as the efforts to provide protection to the environment from the process of excessive exploitation. The concept of the welfare state, as has been embraced by the state of Indonesia, has become the duty of the Indonesian government to provide

¹⁷ *Ibid*, p. 27.

¹⁸ Johny Ibrahim, *Teori dan Metodologi Penelitian Hukum Normatif*, Bayumedia Publishing, Malang 2006, p. 57.

¹⁹ Soerjono Soekanto dan Sri Mamudji, *Penelitian Hukum Normatif*, Rajawali, Jakarta, 2006, p. 14.

²⁰ Salim HS, Elies Septiana Nurbani, *Penerapan Teori Hukum Pada Penelitian Tesis dan Disertasi*, Rajawali Pers, Jakarta, 2013, pp. 15-16.

²¹ The Indonesian Dictionary (*Kamus Besar Bahasa Indonesia / KBBI*). 2017. Definition of Renegotiation. Online dictionary version. <https://kbbi.web.id/renegosiasi>.

²² Renegotiation Act of 1951 is a U.S. law. Renegotiation Law and Legal Definition. <https://definitions.uslegal.com/r/renegotiation/> Accessed on 10 October 2017.

²³ Jackman, Ann, *How To Negotiate*, Erlangga, Jakarta, 2005.

²⁴ Djoko Purwanto, *Komunikasi Bisnis* Erlangga, Jakarta, 2006, p. 67.

²⁵ Bintang Arif Billah, 2012, *Negosiasi*. <http://bintangarif.blogspot.co.id/2012/> accessed on 12 September 2017.

²⁶ McGuire, R. 2010. Negotiation : An Important Life Skill. *The Pharmaceutical Journal*. Vol.273. (23-25). Accessed on 12 September 2017.

the welfare and prosperity of the people as has been conceptualized in the welfare state. In the Constitution of the Republic of Indonesia, namely *Undang-Undang Dasar Negara Republik Indonesia Tahun 1945 (UUD NRI 1945)*, it explicitly states that natural resources are controlled by the state and utilized as much as possible for the welfare of the people^[27].

Re-negotiations conducted by the Indonesian government towards mining companies operating in Indonesia have concepts that are aligned with efforts to achieve improvement in the welfare of the people. One aspect in providing prosperity for the people of Indonesia is the utilization of natural resources contained in the land of Indonesia for the benefit of the people, not for the benefits/interests of the elite, the giant miners and the big investors. The exploitation of natural resources in Indonesia should be based on the interests of the people, namely the welfare and prosperity of the people. For the company and the company management, renegotiation of contract activities in a business is very important to be implemented by the parties who are bound in said contract. Re-negotiation will direct the contract so as to keep it updated in context and conditions, as the business situation develops and the business environment changes, where adjustments are needed as a result of such changes.

Re-negotiation is a process of renegotiating that is an interaction where two parties reach an agreement that can meet the satisfaction of both/all the parties concerned with the elements of cooperation and competition, re-done with the aim of reaching mutual agreement in a negotiation process. This includes the actions taken when communicating, cooperating or influencing others to achieve certain goals. A case example of negotiation, such as Christopher Columbus convincing Queen Elizabeth to finance his expedition at the time when England was experiencing a massive, costly war. Formally, negotiation can be defined as a form of a business meeting between two or more parties to achieve a business deal.

Negotiation is a discussion between two parties in which there is a process of giving, receiving, and bargaining. In addition, negotiation is also an *ijab kabul* (solemnization of a marriage) of an interaction process undertaken by both parties in order to give and receive something that had been determined by mutual agreement^[28].

In companies, the example of re-negotiation such as the renegotiation of a work contract between the Government of the Republic of Indonesia and PT. Newmont Nusa Tenggara, conducted on September 3, 2014, is only a memorandum of understanding (MoU) of contract amendments. Then the MoU will be followed by the signing of a special mining business license (*izin usaha pertambangan khusus / IUPK*) in exchange for the work contract.

The direction towards the people's interest, that is, the welfare and prosperity of the people has been mandated in our constitution, namely in Article 33 paragraph (3) of the Constitution (*UUD NRI 1945*) which states that: "*The earth*

and water and natural resources contained therein are controlled by the State and used as much as possible for the welfare of the people". Furthermore, as the implementation of Article 33 paragraph (3) above, there are various implementing regulations that constitute actualization of said provision.

Based on the mandate of Article 33 paragraph (3) of the Constitution (*UUD NRI 1945*), the process of renegotiation of contracts such as mining companies are done by the Government of Indonesia. In the mining industry, contract renegotiations are common, due to the length of the contract period, which is vulnerable to changing political, economic and technological conditions (Re-negotiation is done in the light of the previously established contract, which is unable to fulfill the principle of justice and propriety in the effort and in the making of an agreement). An example of contract renegotiation includes, among others, the Government of Indonesia and PT. Newmont Nusa Tenggara, or with PT. Freeport Indonesia, and other mining companies. Indeed, in the mining industry, contract renegotiations are common. Some countries that have implemented it include: Chile, Congo, Liberia, Ecuador, Venezuela, Tanzania, and Peru. Current re-negotiations are commonly done in remembrance of the long length of the term or the contracts, making them vulnerable to changes in political, economic, and technological developments and public perceptions of justice. Demand for renegotiation is generally proposed by the government where the mining activities are located and few requests are made by the company^[29].

The contract negotiation/renegotiation process requires basic skills for a negotiator to negotiate and re-negotiate a contract, such as the following:

- a. Sharpness of mind or shrewdness.
- b. Patience
- c. Ability to Adapt
- d. Durability
- e. Ability to socialize
- f. Concentration
- g. Ability to communicate
- h. Have a sense of humor

Likewise, in conducting a negotiation or renegotiation, there are criteria that must be fulfilled in order to conduct a negotiation or re-negotiation, among others are as follows:³⁰

- a. There are parties involved;
- b. There is a goal to be achieved by each party;
- c. There is a problem being discussed;
- d. There is a bargaining process;
- e. There is hope of reaching an agreement.

The steps in conducting a negotiation or renegotiation include

a. Opening/Preamble

Starting a negotiation or renegotiation is not as easy as imagined. The team must be able to create an atmosphere or

²⁷ Lelisari. Bismar Nasution, Renegosiasi Kontrak Perusahaan Pertambangan Memperkuat Tanggung Jawab Sosial Perusahaan Terhadap Masyarakat dan Lingkungan (Study in PT.Newmont Nusa Tenggara. *Journal GaneÇ Swara* Vol. 10 (2) Sept. 2016, pp. 1-9.

²⁸ Tionunit6.blogspot.co.id. 2016. Negotiation. <http://tionunit6.blogspot.co.id/> accessed on 12 September 2017.

²⁹ Humas Setkab.go.id. 2015. Catatan Atas Renegosiasi Kontrak (Notes on Contract Renegotiation). <http://setkab.go.id/>

³⁰ Stephen Kozicki, 1998. *Creative Negotiating* (Critical Skills for Your Business) Adam Press, <https://www.amazon.com/> pp.5-6

the right atmosphere right before the negotiation/re-negotiation process begins. To initiate a negotiation/re-negotiation properly and correctly, we need confidence, calmness, and clarity of the Team's goals for negotiating/re-negotiating. There are three attitudes that need to be developed in starting a negotiation/re-negotiation, that are: pleasant, assertive, and firm. A smile is also one of the things we need to start a negotiation, as it will provide a comfortable and open feeling for both parties.

Furthermore, in the initial discussion, start by building a common ground, which is something in common between the two sides and can be used as a foundation is basically something apart from having differences, both parties have some similarities that can be used as a basis to build trust with each other.

b. Starting the negotiation process

The first step in starting the negotiation/re-negotiation process is to submit (propose) the desire or demand for the negotiation/re-negotiation. Noteworthy in the delivery process are:

1. Wait for the right time for both parties to start a discussion on the subject matter of negotiation/re-negotiation;
2. Keep your requirements or demands clear and concise;
3. Emphasize that you or your organization wish to reach an agreement with them;
4. Provide space for maneuvering or bargaining in negotiations, do not make only yes or no options;
5. Convey that "if you'll give us this, we'll give you that." So they clearly understand what they should give as compensation for what will be given.
6. The second thing in the early stages of the negotiation/re-negotiation process is to listen effectively to what is offered or what the other party demands. Effective listening requires certain habits and techniques. Such as how to interpret body movement and facial expressions of the speaker. Always keep eye contact with the speaker and we will be in a relaxed yet caring condition.

c. The Bargaining Zone

The core process of negotiation/re-negotiation is that we need to know what The Bargaining Zone (TBZ) is. TBZ is an area of space that is limited by the Seller's Opening Price and the Buyer's Opening Offer. Between the two points are the Buyer's Ideal Offer, the Buyer's Realistic Price and the Buyer's Highest Price on the buyer's side and the Seller's Ideal Price, the Seller's Realistic Price and the Seller's Lowest Price on the buyer. The best of both parties' deals is within the territory called the Final Offer Zone that is limited by the Seller's Realistic Price and the Buyer's Realistic Price. Normally a negotiation/re-negotiation agreement occurs when there is an overlap between the parties in the Final Offer Zone area.

d. Building deals

The final round in the negotiation/re-negotiation process is to build an agreement and close the negotiation/re-negotiation. When an agreement is reached, both parties usually shake hands as a sign that a deal or an agreement has been reached and both parties are committed to implementing it. What

should be known in the negotiation/re-negotiation will never reach an agreement if from the beginning of each or one of the parties have no intention to reach an agreement. An agreement must be built from the desire or intention of both parties, so that it will not be one sided late on.

Therefore, it is important in the early stages of negotiation/re-negotiation to understand and know the attitude of others, through what is spoken orally, and through body language and facial expressions. Because, if since the beginning, one party has no intention or desire to reach an agreement, then it means wasting the time and energy of the negotiators. For that, other ways need to be found, such as conciliation, mediation and arbitration through third parties^[31] In the mining industry, contract renegotiations are common, because the length of the contract period is vulnerable to changing political, economic and technological conditions^[32].

One of the things regulated in Act No.4/2009 concerns the adjustments of existing mining contracts. In the regulation enacted on January 12, 2009 it is mentioned that the existing mining contracts must be adjusted no later than one year since the act was enacted or on January 12, 2010. However, in reality, it is not easy. The re-negotiations laid down by the law did not work out as they should have. In fact, the first contract amendment was only made in 2014 towards a holder of a Work Contract, namely PT. Vale Indonesia Tbk or 5 (five) years since that rule was enacted^[33].

Demand for re-negotiation is generally proposed by the government where mining activities are located and few requests are made by the company^[34].

Re-negotiating Work Contract and Coal Mining Concession Working Agreement is legally regulated in Article 169 letter b of Act No.4/2009 stating that the provisions contained in the article of Work Contract and Coal Mining Concession Working Agreement are adjusted no later than one year since the Act was enacted (January 12, 2009). Based on this, on January 12, 2010 all Work Contracts and Coal Mining Concession Working Agreement have been renegotiated between the Government and the contractor. The seriousness of the Indonesian Government to renegotiate the Work Contracts and Coal Mining Concession Working Agreement in concrete terms was only seen in 2012 with the establishment of an Adjustment Team for the Evaluation of Work Contract and Coal Mining Concession Working Agreement through Presidential Decree No.3/2012. The team is headed by the Coordinating Minister for Economic Affairs^[35].

The process of contract re-negotiation continues to be done by

³¹ Roger Dawson, 2010. *Seni Negosiasi, Seni Canggih untuk Melejitkan Kesuksesan Anda*. Gramedia Pustaka Utama, Jakarta. www.gramedia.com

³² Lelisari, Bismar Nasution, 2016. *Renegosiasi Kontrak Perusahaan Pertambangan Memperkuat Tanggung Jawab Sosial Perusahaan Terhadap Masyarakat dan Lingkungan (Study at PT. Newmont Nusa Tenggara)*, *Journal GaneÇ Swara* Vol. 10 No.2 September 2016. pp.1-9. diakses pada tanggal 27 Agustus 2017.

³³ Lelisari, Bismar Nasution, *ibid*, p. 2.

³⁴ Humas Sekretaris Negara (PR of the State Secretariat), 2015. *Catatan Atas Renegosiasi Kontrak (Note on Contract Renegotiation)*, dated 14 July 2015, <http://setkab.go.id/catatan-atas-renegosiasi-kontrak/>, accessed on 27 August 2017.

³⁵ Ahmad Redi, 2013. *Quo Vadis Renegosiasi Kontrak Pertambangan*. <http://ahmadredi2003.blogspot.co.id> accessed on 29 Agustus 2017.

the Government. So far there is a positive trend in the process even though there are also obstacles that are faced. Article 169 letter b of Act No.4/2009 concerning Minerals and Coal stipulates that the provisions in the contract of work contract and the coal work concession agreement shall be adjusted no later than one year after this act is enacted, except on the acceptance of the state ^[36].

Referring to the renegotiation process that has been going on, there are six important points of concern. The six points are the area of the mine, the time period, the amount of royalty to be paid, the construction of the smelter, the use of domestic services, and the divestment. The meeting point is most difficult to achieve then it comes to area, time, and royalty ^[37]. When viewed in the constitution of the Republic of Indonesia, namely *Undang-Undang Dasar Negara Republik Indonesia Tahun 1945 (UUD NRI 1945)*, it has been expressly stated that natural resources are controlled by the state and used for the greatest prosperity of the people. Similarly, the more detailed provisions on mineral resource regulation are also regulated in Act No.4/2009 concerning Mineral and Coal Mining, which is a refinement of the previous Mining regulation of Act No.11/1967 concerning the Basic Provisions of Mining. With *belied* (regulations that emerges at the beginning of the New Order regime that arose a variety of mining management contracts better know as the Work Contract).

This evaluation team's work focus is to re-negotiate mining contracts of work/work contract holders and mining concession agreements. As for the things or materials re-negotiated are: ^[38]

- a. Expanse of the work area;
- b. The extension of the contract into a mining business permit (*izin usaha pertambangan / IUP*) or a special mining business license (*izin usaha pertambangan khusus / IUPK*);
- c. State revenue of either tax or royalty;
- d. Liabilities of divestment;
- e. Obligation of management and refinery development (smelter) in the country
- f. Obligation to use domestic mining goods and services.

Renegotiations/negotiations are generally conducted by the local government, and only a few Demands are made by the company ^[39]. Examples of such contract renegotiations are between the Government of Indonesia and PT. Vale Indonesia Tbk., PT. Newmont Nusa Tenggara (PT NNT) and PT Freeport Indonesia.

Re-negotiation of contract between the Government of Indonesia and PT. Freeport Indonesia is the latest re-negotiation process conducted in 2017. PT. Freeport Indonesia is an Indonesian corporation in which the ownership belongs to Freeport McMoran, one of the world's largest international

mining companies from Phoenix Arizona United States, which entered into a work contract with the Government of Indonesia. At the time of the work contract, Bob Duke became the legal expert at PT Freeport Indonesia to prepare a contract known as a work contract ^[40].

However, the fact that the work contract did not provide a good position for Indonesia. In the work contract that was undertaken, an agreement made between PT. Freeport Indonesia and the Indonesian government, Indonesia only got 1.5% to 3.5% of the net sales of copper and 1% of gold and silver sales. This is certainly not comparable with the profits obtained by PT. Freeport Indonesia from the gold and silver and copper mines from Papua. The percentage gained by the government is not proportional to the dredged mineral resources and environmental degradation caused by mining ^[41].

PT. Freeport Indonesia is again becoming an Opinion and public talk of late, which is then published on the news, it cannot be separated from government policy against the largest American company, which is one of the largest single copper and gold producers in the world, and contains one of the largest copper reserves that can be extracted in the world, mines, process and conduct exploration of ores containing copper, gold and silver ^[42]. PT. Freeport operates in the highlands of the Mimika Regency of the Province of Papua, Indonesia.

In the case that there arises a problem concerning PT. Freeport, it can be said that: "The government, in *de jure*, has no right to deviate. Unfortunately, in the *de facto*, many irregularities must be cleared up". The mandate of the Constitution in our country explicitly explains in Article 33 paragraph (3) of *UUD NRI 1945* that the Earth, Water, and natural resources contained therein are controlled by the State and used for the greatest prosperity of the people.

Given that minerals and coal as natural resources contained in the earth are non-renewable natural resources, their management must be considered and optimized, efficient, transparent, sustainable and environmentally sound, and equitable in order to gain the greatest benefit for the people's sustainable prosperity.

4.1.2 Legal protection for parties conducting contract re-negotiation

Legal protection for contracting parties must be provided by applying the principles of equality and not harming one party or any other. This requires renegotiation of the contract. Against each clause to be agreed upon, it is necessary to make it possible to be adjusted in order to fit the law/legislation, but its achievement will not always be expected. Changes remain oriented to the restoration of state control over mining goods but also to the Company's ability to produce a proportional contract as a result of a renegotiation that can be exercised by the negotiating party. The continuation of the renegotiation process between the Government and PT Freeport Indonesia,

³⁶ hukumonline.com. 2013. Belasan amandemen kontrak tambang siap diteken (Dozens of mine contract amendments are ready to be signed). Ada klausul kontrak yang sulit disepakati (There is a hard-to-agree-on clause). <http://www.hukumonline.com/> accessed on 29 Agustus 2017.

³⁷ *Ibid.*

³⁸ David Dwiarto, 2015, Tuntaskan Renegosiasi Kontrak Pertambangan (Complete Mining Contract Renegotiation), Ima-api.com, accessed on 3 September 2017.

³⁹ *Ibid.*

⁴⁰ Nanik Trihastuti, 2013. *Hukum Kontrak Karya*. Malang: Setara Press, p. 6.

⁴¹ *Ibid.*, p. 92.

⁴² Kompasiana.com, 2017. Prespektif Hukum Renegosiasi Kontrak dan Izin Usaha Freeport. Article. <http://www.kompasiana.com/> Accessed on 29 August 2017, p.1.

due to the inconsistency of the articles contained in the Mineral and Coal Mining Act, thus causing legal loopholes for the non-implementation of the main mission in the Mineral and Coal Mining Act by PT. Freeport Indonesia.

The status of Work Contract and Coal Mining Concession Working Agreement that exist with the enactment of Act No.4/2009 concerning Mineral and Coal Mining. Act No.4/2009 concerning Mineral and Coal Mining and Government Regulation No.23/2010 concerning the Implementation of Mineral and Coal Mining Business Activities stipulate that Work Contract and Coal Mining Concession Working Agreement that already exist, are acknowledged as long as it is in accordance with the Acts. This provision poses a problem because it is not possible to make contractual adjustments to the law without changing the contents of the contract.

The termination of the work contract and coal mining concession working agreement may be based on a mining contract as an international agreement or as a regular agreement and as a contract. In the event that the work contract and coal mining concession working agreement are regarded as international agreements, then in the event of the termination of said contract, the provisions of Act No.24/2000 concerning International Agreements govern 8 (eight) causes of the termination of international agreements, which are: ^[43]

- a. There is an agreement of the parties through the procedure stipulated in the agreement;
- b. The purpose of the agreement has been reached;
- c. There are fundamental changes that affect the implementation of the agreement;
- d. One of the parties does not enforce or violates the terms of the agreement;
- e. A new agreement is created that replaces the old agreement;
- f. New norms emerge in international law;
- g. The object of the agreement disappears; and
- h. There are things that are detrimental to national interest.

If the work contract and coal mining concession working agreement are considered as a civil agreement subject to Indonesian law, then the provisions of the Civil Code stipulate 10 (ten) reasons for the termination of the contract, that are as follows: ^[44]

- a. Payment;
- b. Consignment;
- c. Novation (debt renewal);
- d. Compensation;
- e. Confucius (debt mixing);
- f. Debt relief;
- g. The loss of goods;
- h. Nullification or cancellation;
- i. The void requirement is applied;
- j. Expiration.

The clauses in the contract usually set the termination of the

⁴³ Tempo, 2015. Lobi Melambung Tinggi dari Arizona (High Bounce Lobby from Arizona), 2nd Edition February 2015.

⁴⁴ I Ketut Oka Setiawan, *Hukum Perikatan*, 1st Print, Sinar Grafika, Jakarta, 2016, p. 112.

contract separately. A suggestion for the Government in conducting re-negotiation of work contract and coal mining concession working agreement. For the work contract and coal mining concession working agreement that already exist: ^[45]

- a. Work contract and coal mining concession working agreement that have been maintained and respected in their existence until the validity period is over.
- b. Work contract and coal mining concession working agreement are not canceled because the cancellation will potentially lead to dispute in the form of demands of foreign mining operators to international arbitration bodies.
- c. The contract is sufficiently revised and amended by entering the charge:
 1. A fairer change of profit sharing;
 2. More attention towards the environment;
 3. Enabling community awareness around mining operations;
 4. Avoid legal smuggling;
 5. Enhance government oversight by placing government representatives in management. The supervision is intended to ensure that the company does not harm national interests, especially in terms of royalties, taxes, and the environment.
 6. Country c.q. The government not only as the facilitator and administrator of mining but also as the owner and master of mining.
- d. A revision or amendment may be based on a clause in the contract, Civil Code, or Act No.24/2000 on International Agreements. Work contract and coal mining concession working agreement that have expired the validity period are not automatically renewed. The old company can mine based on Act No.4/2009 concerning Mineral and Coal Mining. If the company does not agree with the new scheme, then mining operations may be offered to other companies.
- e. Anticipation should be done by the Government.
 1. The implementation of the above stated re-negotiation policy has the potential to result in the departure of companies holding work contract and coal mining concession working agreement. For that, the government must prepare anticipatory plans, for example, by preparing domestic workers to operate the mine or look for other companies that can meet the norms and standards set forth in the legislation and regulations of Indonesia.
 2. The government also needs to anticipate the boycott of foreign companies due to the lack of legal certainty and business certainty in Indonesia.
 3. The government should re-negotiate or make new contracts in a transparent, accountable, and corruption-free manner.
- f. Re-negotiation examples (best practice) in other countries

The newly formed Tanzanian government proposed a re-negotiation with Anglo gold mining operator company. The government withdrew all concessions and re-negotiated all old

⁴⁵ Tempo, 2015. Lobi Melambung Tinggi dari Arizona (High Bounce Lobby from Arizona), 2nd Edition February 2015.

mining contracts. Both ultimately resulted in a deal that benefited both sides/parties. Concessions and contracts continued with a new scheme that had been agreed upon.

Concerning PT. NNT, one of the mining companies that will re-negotiate the contract. Initially, PT.NNT signed the Generation IV Work Contract on December 2, 1986. As much as 56% of the shares are owned by Nusa Tenggara Partnership CV, controlled by Newmont Mining Corporation and Nusa Tenggara Mining Corporation of Japan. The other shareholders are PT. Pukuafu Indah (17.5%), PT. Multi Daerah Bersaing (24%), and PT. Indonesia Masbaga Investama (2.2%). Basically, in the Work Contract made between the Government of Indonesia and PT. NNT already contains the obligations of divestment of shares and community development.

In the work contract, after 10 years of commercial production, PT. NNT must sell 51% of shares to local investors. Construction began in early 1997 and production began on March 1, 2000. In March of 2008, the Indonesian Government sued PT. NNT to the international arbitration for failing to exercise its share divestment in 2006 and 2007. In March of 2009, the government won the lawsuit and PT. NNT was required to immediately divest. Towards the agreement on negotiating the contract signed on Wednesday, September 3, 2014, it is only a memorandum of understanding (MoU) of contract amendments. Later, the MoU will be followed by the signing of a special mining business license (*izin usaha pertambangan khusus / IUPK*) in exchange for the contract of work/work contract. Wherein the contract amendment discussion lasted for 6 (six) months. Generally, there is no change in the terms of the work contract other than royalty and fixed fee. The contents of the MoU is the increase of gold, silver and copper royalty from the previous 1.1% and 3.5% respectively to 3.75% and 4% in accordance with Government Regulation No.9/2012 on Non-Tax State Revenue. PT. NNT was also charged a fixed fee of two US dollars per hectare. Then, the obligation to build a smelter will be accompanied by a deposit of USD \$25 million, with a reduction of land area from 87,000 ha to 66,422 ha, with divestment of 51% of shares, and use of domestic components. Under Regulation of the Minister of Finance, PT. NNT will be subject to the import duties on the export of the consortium of 7.5%. The exit rate will drop to five percent if smelter development progresses beyond 7.5% and 0% if smelter development progresses beyond 30%. In this case, there have been tough negotiations between the Government of Indonesia and PT. NNT related to the prohibition of exporting raw minerals, which caused PT. NNT to sue the Indonesian Government to the International Center for the Settlement of Investment Disputes (ICSID), dated July 1, 2014, but ultimately PT. NNT canceled the lawsuit ^[46].

From interviews conducted with the legal section of PT. NNT, regarding the progress of the contract re-negotiations, were still not final, there were still some items that have not been approved by the Government, namely the construction of smelters and processing facilities; where, basically, the construction of the smelters were already listed in the work contract, that is, in Article 10 concerning the period of

operation.

The construction of the smelters is also one of the requirements to obtain a copper concentrate export permit. PT. NNT had received temporary concentrate export permits which were valid from March 18, 2015 to September 18, 2015 with a quota of 447,000 tonnes of copper concentrate. The concentrate export permit will be extended if PT. NNT commits to building a smelter. In this case, PT. NNT, worked together with PT. Freeport Indonesia constructing a smelter by signing a memorandum of understanding (MoU).

PT. NNT's commitment of smelter construction has not shown significant progress. Although all of the requirements have been met by PT. NNT, there are some things that must continue to be met by PT. NNT. This was the second time PT. NNT was requested to complete this requirement. In October of 2015, the Ministry of Energy and Mineral Resources asked PT. NNT to exhibit their commitment of smelter development. Therefore, PT. NNT extended the memorandum of understanding (MoU) of smelter development with PT. Freeport Indonesia. PT. NNT had completed all requirements requested by the government in order to obtain export recommendations and permit, including submitting an extension of the MoU with PT. Freeport Indonesia, which was more detailed than the previous one related to the development of new refining/smelter facilities by PT. Freeport Indonesia.

However, for the second time, the Ministry of Energy and Mineral Resources (*Energi Sumber Daya Mineral / ESDM*) rejected the proposed extension of the MoU for the smelter construction of PT. NNT. The proposal was not detailed about what kind of cooperation, what kind of involvement and how much the financial aspects would cost. The most important thing that was not fulfilled in detail was the ability of PT. NNT in building smelters, although in this case the context was cooperation.

As it is known, the construction of copper smelters in Gresik, East Java, is planned to have a 2 (two) million ton capacity of copper concentrate worth USD \$2.3 billion. Therefore, if PT. NNT would like to receive a recommendation for an export extension letter (*surat perpanjangan ekspor / SPE*), the ESDM Minister requests that PT. NNT should revise the proposal. PT. NNT, finally revised the proposal by agreeing to donate a total of USD \$3 million for the construction of a smelter in Gresik. This fund was only 0.13% of the total investment to be performed with PT. Freeport Indonesia.

On November 18, 2015, the Government finally issued a letter of export approval of copper concentrate, which was valid for the next 6 (six) months from November 18, 2015 to May 18, 2016. However, the Government reduced the export quota from 477 thousand tons to 430 thousand tons. Based on information from the Director General of Mineral and Coal Mining of the ESDM Ministry, stated that the export permit was approved with the payment of import duty of 7.5% ^[47]. The value was in accordance with the Regulation of the Ministry of Finance No.153/PMK.011/2014, which requires the payment of 7.5% duty if the absorption of new smelter development funds reaches 0-7.5%. However, the Government has a strong reason to implement a smelter

⁴⁶ www.esdm.go.id mineral accessed on 10 October 2017.

⁴⁷ www.esdm.go.id mineral accessed on 10 October 2017.

development policy in Indonesia, while the legal basis is:^[48]

- a. Article 33 paragraph (3) of *Undang-Undang Dasar Negara Republik Indonesia Tahun 1945 (UUD NRI 1945)* states that: The earth, water and natural resources contained within it are controlled by the State and used for the greatest welfare of the people
- b. Act No.4/2009 concerning Mineral and Coal Mining,
 1. Article 3 letter c states that: In order to support sustainable national development, the purpose of mineral and coal management is c. to ensure the availability of minerals and coal as raw materials and/or as sources of energy for domestic needs; mining business activities are efficient, effective, and competitive.
 2. Article 103 paragraph (1), states that: Holders of *IUP* and *IUPK* Production Operations shall conduct processing and refining of mining products within the country
 3. Article 170, stipulates that: The holder of the work contract, as meant in Article 169, already producing shall purify, as referred to in Article 103 paragraph (1), no later than 5 (five) years since this Act is enacted.
- c. Presidential Instruction (*Instruksi Presiden / Inpres*) No.3/2013 concerning Acceleration of the Increase of Mineral Added Value through Processing and Purification in State.

Value Added Minerals Through Processing and Purification within the State. According to the Minister of Energy and Mineral Resources of the Republic of Indonesia, the Government's policy directions on Mineral and Coal Mining are as follows^[49].

- a. Implementing priority fulfillment of minerals and coal for domestic needs
- b. Providing certainty and transparency in mining activities (supporting regulation of Act No.4/2009 concerning Mineral and Coal Mining, sanction violation of provisions, etc.)
- c. Implementing increased supervision and coaching
- d. Encouraging increased investment and state revenues
- e. Encouraging the development of value added products of mining commodities (among others: processing, refining, local content, local expenditure, labor and CSR)
- f. Maintaining environmental sustainability through environmental management and monitoring, including reclamation and post-mining

Based directions and policies stated above, it generates mineral and coal investment opportunities, including:

- a. Processing Ore/Smelting
- b. Coal
- c. Power Plants for the Processing of Ore Minerals/Smelting

Based on the description above, indeed, it is undeniable that with the re-negotiation of contracts related to domestic management and purification obligations by mining

companies can strengthen the social responsibility of the mining company.

Then, the other contract re-negotiation points are: the obligation to use domestic mining goods and services can also strengthen the social responsibility of the mining company. Wherein, the emergence of community business activities, especially local communities, to support the mining company's operations. Associated with PT. NNT, which has been working with more than 100 local and national business partners and 5000 contractors to support Batu Hijau mining operations. This collaboration has provided positive benefits not only to companies and business partners but also impacted the people of West Sumbawa, and West Nusa Tenggara.

Toward the mining management of PT Freeport Indonesia (PT FI), which has a Contract of Work/Work Contract to pursue quarry materials in the *Grasberg* and *Ertsberg* mining areas which started in 1967 and will only end in 2021, this time it has been a good surprise as seen by the people of Indonesia and the world. Since the issuance of Act No.4/2009 concerning Mineral And Coal Mining, the regulation of mineral and coal concessions shall be in accordance with the *Pancasila* and *Undang-Undang Dasar Negara Republik Indonesia Tahun 1945 (UUD 1945)*, but since the Mineral and Coal Mining Act only reaches the legal action after the issuance of the Mineral and Coal Mining Act, related issues that existed before the Mineral and Coal Mining Act are unreachable^[50]. On the other hand, the existence of the work contract of PT FI is deemed as incompatible with the *Pancasila*, that is, the Fifth Precept "Social Justice for All Indonesian People" and Article 33 paragraph (3) of *Undang-Undang Dasar Negara Republik Indonesia Tahun 1945 (UUD NRI 1945)* concerning the substance of earth, water and natural resources are "controlled by the state" and "are used for the greatest prosperity of the people".

5. Closing

5.1 Conclusion(s)

- a. The re-negotiation of the contract and the agreement reached therein shall, in effect, have automatically applied contractual laws which have the specificity and validity as binding as provided for in Article 1338 of the Civil Code, all legally-made agreements shall apply as laws/legislation to those who have made it. The agreement shall not be withdrawn other than by the agreement of both parties or for reasons prescribed by the law. In renegotiation, freedom of contract can only provide justice if the parties have a balanced bargaining power.
- b. Legal protection for contracting parties must be provided by applying the principles of equality and not harming any of the parties. This requires renegotiation of the contract. Toward each clause to be agreed upon, it is necessary to make it possible to be adjusted to fit the law/legislation, but its achievement will not always be as expected. Changes remain oriented to the restoration of state control over mining goods but also to the Company's ability to produce a proportional contract as a result of a

⁴⁸ Article 33 paragraph (3) of *Undang-Undang Dasar Negara Republik Indonesia Tahun 1945 (UUD NRI 1945)* and Act No.4/2009.

⁴⁹ www.esdm.go.id mineral accessed on 10 October 2017.

⁵⁰ Ahmad Redi. 2016. Kontrak Karya PT Freeport Indonesia dalam Perspektif Pancasila dan UUD NRI 1945. Article. Faculty of Law of Tarumanagara University. *Jurnal Konstitusi (Constitution Journal)*, Vol.13 (3) Sept.2016.

renegotiation that can be exercised by the negotiating party. The continuation of the renegotiation process between the Government and PT Freeport Indonesia, due to the inconsistency of the articles contained in the Mineral and Coal Mining Act, thus cause legal loopholes for the non-implementation of the main mission in the Mineral and Coal Mining Act by PT. Freeport Indonesia.

5.2 Suggestion(s)

Based on the discussion and research results, it is suggested as follows:

- a. The government should review the rules in the Mineral and Coal Mining Act so as not to contradict each other, to create legal certainty for the government as a holder of power over the natural resources contained therein, such as in Article 169(b), the government may insist on adjusting to existing contracts. However, it is contradictory to Article 169(a) that protects the old contracts and Article 169(a) is also strongly contrary to Article 170 of the Mineral and Coal Mining Act.
- b. Mining companies (including PT Freeport Indonesia) should cooperate with the principle of good faith to renegotiate contracts that have been signed earlier and are no longer suitable to current conditions, even to the detriment of the government which embodies the will of the public. PT Freeport Indonesia, which controls most of the shares in a Joint Venture company with the Government of Indonesia, should not be guided by a clause called stabilization clauses.

6. References

1. Syahmin AK, *Hukum Kontrak Internasional*, PT Raja Grafindo Persada, Jakarta. 2011, 3.
2. Suhardana FX. *Hukum Perdata I*, Prehallindo, Jakarta, 19-20.
3. Abdulkadir Muhammad, *Perjanjian Baku Dalam Praktek Perusahaan Perdagangan*, Citra Aditya Bakti, bandung. 1992, 6-9.
4. Ahmadi Miru, *Hukum Kontrak Perancangan Kontrak*, PT. RajaGrafindo Persada, Jakarta. 2011, 38.
5. The Indonesian Dictionary (*Kamus Besar Bahasa Indonesia / KBBI*). Definition of Renegotiation. Online dictionary version, 2017. <https://kbbi.web.id/renegosiasi>.
6. Tionunit6.blogspot.co.id 2016. Negotiation. <http://tionunit6.blogspot.co.id/>
7. Stephen Kozicki. *Creative Negotiating (Critical Skills for Your Business)* Adam Press, <https://www.amazon.com/>. 1998, 5-6.
8. Roger Dawson. *Seni Negosiasi, Seni Canggih untuk Melejitkan Kesuksesan Anda*. Gramedia Pustaka Utama, Jakarta, 2010. www.gramedia.com
9. Lelisari, Bismar Nasution. Renegosiasi Kontrak Perusahaan Pertambangan Memperkuat Tanggung Jawab Sosial Perusahaan Terhadap Masyarakat dan Lingkungan (Studi di PT. Newmont Nusa Tenggara), *Journal GaneÇ Swara*. 2016; 10(2):1-9. Accessed on 27 August 2017.
10. Soerjono Soekamto dan Sri Mahmudji, *Penelitian Hukum Normatif Suatu Tinjauan Singkat*, PT. Raja Grafindo Persada, Jakarta. 1986, 50.
11. Zainuddin Ali H. *Metode Penelitian Hukum*, Sinar Grafika, Jakarta, 2013, 12.
12. Ibid, 27.
13. Johny Ibrahim, *Teori dan Metodologi Penelitian Hukum Normatif*, Bayumedia Publishing, Malang. 2006, 57.
14. Soerjono Soekamto dan Sri Mamudji, *Penelitian Hukum Normatif*, Rajawali, Jakarta, 2006, 14.
15. Salim HS, Elies Septiana Nurbani, *Penerapan Teori Hukum Pada Penelitian Tesis dan Disertasi*, Rajawali Pers, Jakarta. 2013, 15-16.
16. The Indonesian Dictionary (*Kamus Besar Bahasa Indonesia / KBBI*). 2017. Definition of Renegotiation. Online dictionary version. <https://kbbi.web.id/renegosiasi>.
17. Renegotiation Act of 1951 is a U.S. law. Renegotiation Law and Legal Definition. <https://definitions.uslegal.com/r/renegotiation/> Accessed, 2017.
18. Jackman, Ann, *How To Negotiate*, Erlangga, Jakarta, 2005.
19. Djoko Purwanto, *Komunikasi Bisnis* Erlangga, Jakarta, 2006, 67.
20. Bintang Arif Billah. Negosiasi. <http://bintangarif.blogspot.co.id/2012/> accessed, 2017.
21. McGuire R. Negotiation: An Important Life Skill. *The Pharmaceutical Journal*. 2010; 273(23-25). Accessed on, 2017.
22. Lelisari. Bismar Nasution, Renegosiasi Kontrak Perusahaan Pertambangan Memperkuat Tanggung Jawab Sosial Perusahaan Terhadap Masyarakat dan Lingkungan (Study in PT. Newmont Nusa Tenggara). *Journal GaneÇ Swara*. 2016; 10(2):1-9.
23. Tionunit6.blogspot.co.id. 2016. Negotiation. <http://tionunit6.blogspot.co.id/> accessed on 12 September 2017.
24. Stephen Kozicki. *Creative Negotiating (Critical Skills for Your Business)* Adam Press, <https://www.amazon.com/> 1998, 5-6.
25. Tempo. Lobi Melambung Tinggi dari Arizona (High Bounce Lobby from Arizona), 2nd Edition, 2015.
26. Article 33 paragraph (3) of Undang-Undang Dasar Negara Republik Indonesia Tahun 1945 (UUD NRI 1945) and Act No.4/2009.
27. www.esdm.go.id mineral accessed, 2017.
28. Ahmad Redi. Kontrak Karya PT Freeport Indonesia dalam Perspektif Pancasila dan UUD NRI 1945. Article. Faculty of Law of Tarumanagara University. *Jurnal Konstitusi (Constitution Journal)*. 2016; 13(3).