THE PROSPECT OF CHANNELING DISPUTE BETWEEN LABOUR AND FOREIGN INVESTOR

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Abstract: The recent trend of international investment agreement (IIA) is the termination of bilateral investment treaties, although on the other direction, free trade agreement with investment chapter is growing in numbers. Most of the reason of the termination is because of the unbalance position between two parties in the agreement. Added to the problem is the investor-state dispute resolution which made possible for the investor to bring claim to the host state government. The IIA was constructed to provide a protection for the investor from unfair treatment from the host country, however in the end the one who treated unfairly was the host country. The multinationals corporation, as prominent actors in global FDI, changed the way of production chain which then substituted their presence within the host country and replaced it by a third-party for supplying the MNC’s need. Many cases regarding violations of labour rights happened because of this production chain model. However, the MNCs denied the responsibility and argued that the supplier should take the responsibility based on the production chain model. This paper will explain on why IIA is not an effective channel to solve labour dispute and that National Contact Point established by OECD as one of options available for this type of dispute.

Keywords: Channeling Dispute, International Investor, Labour Law

Abstrak: Trend perjanjian investasi internasional pada saat ini adalah banyaknya negara yang kemudian menterminasi perjanjian investasi yang mereka pernah buat, walaupun di sisi lain perjanjian perdagangan bebas yang mengandung ketentuan investasi semakin bertambah. Alasan terbanyak dari terminasi perjanjian ini adalah karena tidak seimbangnya kedudukan dari kedua belah pihak dalam perjanjian. Satu hal yang juga dianggap masalah adalah dengan adanya penyelesaian sengketa investor dan negara yang memungkinkan bagi investor untuk menggugat pemerintah dari negara tempat investasi itu dilakukan. Perjanjian investasi internasional memang dikonstruksikan untuk memberikan perlindungan bagi investor dari perlakuan yang tidak adil pemerintah negara tempat investasi dilakukan, tetapi pada akhirnya negaralah yang menjadi korban. Perusahaan multinasional sebagai pemain utama dalam investasi global, mengubah rantai produksi dimana mereka sebelumnya memiliki perusahaan pada negara tempat investasi dilakukan, menjadi pihak ketiga untuk memasok kebutuhan perusahaan multinasional ini. Banyak kasus pelanggaran hak tenaga kerja akibat dari model rantai produksi ini. Tetapi perusahaan nasional kemudian menolak untuk bertanggung jawab dan berargumen bahwa pemasok lah yang seharusnya bertanggung jawab didasarkan pada model rantai produksi yang mereka lakukan. Artikel ini akan menjelaskan kenapa perjanjian investasi internasional bukanlah saluran yang tepat untuk menyelesaikan permasalahan tenaga kerja dan bahwa National Contact Point yang didirikan oleh OECD adalah satu pilihan untuk penyelesaian sengketa ini.

Kata Kunci: Penyaluran Sengketa, Investor Internasional, Hukum Ketenagakerjaan
INTRODUCTION
To gain benefit from FDI for Indonesian development, the Government has established many ways to improve themselves in order to invite foreign investors into the country, and one way to entice them is by providing protection for both investor and investment through the provisions under bilateral investment treaties (BIT), a form of international investment agreement (IIA). Until 2013, there are 67 bilateral investment treaties signed by the government to provide protection towards foreign investment, known as Perjanjian Peningkatan dan Perlindungan Penanaman Modal (P4M). From 67 BITs, 63 of which entered into force, and six of them has caused Indonesia to involved in dispute with foreign investors (Setiawati 2018: 161). In 2014 the Indonesian Government decided to terminate the BITs and by far there are 22 BITs (Argentina, Bulgaria, Cambodia, China, Egypt, France, Hungary, India, Italy, Lao People’s Democratic Republic, Malaysia, Netherlands, Norway, Pakistan, Romania, Singapore, Slovakia, Spain, Switzerland, Turkey, Viet Nam, Kyrgyzstan), which Indonesia already sent the termination notification to the State partner (BKPM (a) n.d.).

The shifting policy of Indonesian Government’s policy towards foreign investment is not a new thing. Earlier, in 2007 Bolivia denounced the ICSID Convention and subsequently terminated 10 out of 23 BITs (Gwynn, July 2017), followed by Ecuador in 2008 which also denounced ICSID in July 2009, and terminated 9 of their 27 effective BITs (from 30 signed BITs) and the second termination for the rest of BITs happened on May 3, 2017 (Global Arbitration Review, August 29, 2017). Venezuela denounced ICSID on 2012 and terminated its BIT with Netherlands, then South Africa followed suit by terminated its 9 out of 38 BITs (Tralac, June 21, 2017). On April 1, 2017, India sent their notice to terminate 58 BITs with their trading partners, and this policy was the result of the new model BIT that approved by the Union Cabinet in December 2015 (The Hindu Business Line, April 9, 2017). These series of events probably cannot be called as a growing trend since many countries still believe in BITs, as shown in 30 BITs concluded in 2016 (UNCTAD (a) 2017: 111).

But for those predecessor countries in terminating BITs, the reason for termination is similar with Indonesia, whereas until early 2018, these countries faced with the highest number of investor-state dispute settlement (ISDS) cases: Argentina has faced 60 cases as respondent State, Venezuela with 44 cases, Ecuador with 23 cases and Mexico with 27 cases. Ecuador has also faced the second highest award against a host state (US$ 1.77 billion), although an annulment proceeding has recently reduced it to around US$ 1 billion (Lazo 2016: 375). Meanwhile, India faced 24 cases, Bolivia 14 cases, and South Africa 1 case (UNCTAD Investment Policy Hub (a), n.d.). For the Latin American countries, the investor-state arbitration cases against them are representing around 30% of its total number of cases (Lazo 2016: 376).

One argument that support those countries’ decision in terminating the BITs is the imbalance position between state parties in the agreement, whereas one party usually a developed country and the other is developing country or transition economy. With investor-state dispute settlement that caused countries suffered billions of dollars from the system, thus countries started to denounce the ICSID Convention to defend themselves as carried out by Bolivia in 2007, Ecuador in 2009, and Venezuela in 2012 (Market and Titi: 427). As Stiglitz said that the purpose of IIA’s provision is not about
protecting the investors anymore, instead it is to impede health, environmental, safety and even financial regulation (Stiglitz 2015).

Several attempts to improve the position between foreign investor and the host country has evolved the provision in the BITs. The commitment for environment protection and human rights have been established in the new generation of BITs. Including the provision regarding labour and their rights is also one attempt as leverage to the position between investor and host country in IIA, as existed in 2012 US Model BIT Article 13, India’s Model BIT (Radi 2016), Trans-Pacific Partnership, EU-US Transatlantic Trade and Investment (TTIP) (Araujo 2018) and even FTA such exampled in the CARIFORUM-EU Economic Partnership Agreement (concluded in 2008) Article 72 (Johnson, Sachs and Coleman 2014).

However, the provision under IIA was proven not enough to answer all the problems regarding the protection of labour rights. This paper will discuss the inadequacy of these IIAs’ provision toward one labour issue, specifically regarding the fleeing investor from the host country without following proper procedure of divestment and analyse whether the provision of dispute settlement under IIA will cover such practice. In the first part, the discussion will start by presenting the cases regarding fleeing investor and show that this practice happened as the result of global value chain and how this system is utilized under the control of MNC and also the failure of the IIA to protect the host country at the same level of protection to the investor. The provision about labour in existing IIA will be discussed in the second part, and how the provision on dispute settlement in those agreement cover the labour dispute. Another prominent issue concerning the possibility of bringing the labour disputes toward the investor through other channel, aside than one provided within the IIA will be reviewed in the final part. The discussion will examine every possible mechanism available for labour dispute especially regarding fleeing investor.

To emphasize this paper will not try to provide solution in regard of dispute settlement mechanism on labour dispute. Because labour dispute basically structured from layers of perspective: political, social, and economy. Thus, this paper will describe what is the most effective way so far to solve problems regarding the fleeing investor, and by using Indonesia experiences to explain how farfetched is the enforcement of human rights especially labour rights.

I. MULTINATIONAL CORPORATION, GLOBAL VALUE CHAIN AND FLEEING INVESTOR

The preliminary idea of a country to attract foreign investment was to encourage investor from other country to put their capital in the domestic economy, and come with it is the expected spill over that would help the development of one nation. Developing countries utilized this trend in the utmost, then foreign direct investment has become the largest source of external finance, surpassing official development assistance, remittances, or portfolio investment flows (World Bank Group 2018: 1). Foreign investment can come into domestic country in many types as UNCTAD has categorized: natural-resources-seeking, market-seeking, efficiency-seeking, and strategic-asset-seeking foreign investment (Colen, Maertens and Swinnen 2008: 10).
However, the focus of FDI gradually shifted from resources- and efficiency-seeking to market- and strategic-seeking FDI, and this is because of MNC involvement in the FDI (UNCTAD (a) 2017: 27).

MNC have the biggest share in global outward FDI, with 72 per cent share means MNC has dominate and even control the global economic and including the effect of FDI towards the recipient countries (UNCTAD (a) 2017: 13). This domination from MNC is possible because the involvement of MNC in global supply chain, which they use developing countries as part of their global production chain, by importing inputs and exporting processed goods and this makes developing countries to serve as export platforms for MNC (Bodea and Ye (n.d.): 12). Thus, MNC can be called the ‘global factory’, a system that use several techniques to generate products and services and their subcomponents, inputs and intellectual property which may not be owned by a single firm at any one time but their component activities are controlled by a system described as the global factory (Bartels, Buckley and Mariano 2009: 1).

With MNC as the lead firms who control and define the main activities in terms of price, delivery and performance in both producer-driven and buyer-driven global value chain, the system links both developed and developing countries into a common global supply chain (Gereffi and Luo 2014: 6). The techniques they use are one or combining some of these methods namely outsourcing, offshoring, co-sourcing, supply chain, third-party logistics, near-shoring are some techniques used by firms in managing supply relationship in global factory (Bartels, Buckley and Mariano, 2009: 1).

The opportunity to participate in global economy attracts the developing countries, including Indonesia, and the expectation of FDI’s spill over that follow the global supply chain comes through five channels of spillover effects from FDI companies to domestic firms: imitation, formation of human capital, competition, crowding-in and export effects (Colen, Maertens and Swinnen 2008: 16). Between vertical and horizontal spill over, there are evidence in studies that Indonesia enjoy most of the positive vertical spill over (Blalock 2001) and the effect is the increasing wages in domestic firms (Lipsey and Sjöholm 2004: 415-422). This means the FDI spill over in Indonesia happens mostly in the formation of human capital and crowding-in.

With all those positive spill overs, the impacts of FDI has increased the value added in Indonesia, which then Sjöholm emphasized on the contribution of MNC to the industrial expansion and thereby to economic growth and increased living standard (2016). However, there is another view on the negative impact of FDI or ‘race to the bottom’, where foreign companies choose the location for production in countries or regions with low wages, low taxes and weak social and environmental regulations, which then resulted in developing countries forced to lower their standards (Colen, Maertens and Swinnen 2008: 33). This situation happens because of the competition among developing countries to participate in the global value chain, and for developing countries with low-skill tasks have risk of losing their position, since their role in supply chain can easily replace. This means the business carried out by supplier will be shifted to competing countries, and to gain better benefit from other countries, firms will decide to relocate, which can cause social displacement. (WTO 2014: 80). This practice occurs in Indonesia, and from the span of almost couple decades similar
cases keep repeating, and below is the summary of those cases.

**PT. Singacom and PT. Singamip – 2002**
Located in Batam, both companies owned by Singaporean citizens, Singacom employed 420 workers and Singamip employed 80 (Tempo, 2005). Both owners locked the factory and abandoned their workers without paying their 5 months suspended wages and severance payments (The Jakarta Post, 2008). Batam City Government, Batam Authority and Regional House of Representatives decided to sell the companies' asset to pay the workers (Tempo, 2005).

**PT. Tae Hwa - 2005**
This company located in Tangerang and owned by Korean company and has been produced sport shoes for FILA since 1991 and also other brands (Clean Clothes Campaign (CCC), 2013). According to Oxfam, the company closed down in February 2005 with the management nowhere to be found, and left behind the 3,500 workers with suspended wages and no severance payments (Oxfam, 2006; Clean Clothes Campaign, 2013). Oxfam and Clean Clothes Campaign tried to urge FILA to take responsibility in this problems and FILA refused, thus still no solution for the workers (2013).

**PT. Dong Joe Indonesia - 2006**
This company established in 1989, located in Tangerang and at first acted as supplier for Reebok and then solely for Adidas for its footwear line. In 2006, the owner of PT. Dong Joe, Kim CK, a South Korean citizen, fled the company and left behind tax and bank debt for Rp. 333,46 miliar (around US$ 25 million), and also debt to supplier around RP. 150 miliar (around US$ 11,5 million) (Hutabarat, 2013). There was also problem with the 10,500 workers where the company failed to pay 3 months salary prior the disappearance of the owner and severance payments that calculated as Rp. 95,2 miliar (around US$ 10,6 million) (Worker Rights Consortium (WRC), 2012). When the company in bankruptcy process brought by taxation office as preference creditor, couple of workers had taken some machinery, and the taxation office reported the workers to the police under criminal charge on embezzlement and sentenced with 10 months in prison (Putusan No. 38/PID/2010/PT.BTN, 2010). At that time beside Dong Joe there is also another company shuttled down, PT. Spotec, with 4,500 workers become unemployed. Therefore, Oxfam requested Adidas as the sole customer for both companies to responsible towards the workers, which Adidas refused and only agreed on convening meetings between Korean and Indonesian government and arranging for workers to receive priority in hiring at other Adidas suppliers including the new firm that took over PT. Spotec site (WRC, 2012). In the end, Adidas' diplomatic way of solving the problem was not effective at all.

**PT. Livatech – 2007**
Established in 1994 by Goh Sing Hing a Malaysian citizen, this company located in Batam and produced electronic components (International Metalworkers’ Federation (IMF) News Brief, 2007). By the time the owner fled in 2007, the factory still operating so no one notices anything. After the factory stopped its operation there was 1,309 workers’ 4 months salary and severance payment amounted to Rp. 21,2 miliar (around US$ 1,6 million) still not settled, and according to FSPMI, the management has used police and military forces to attack and intimidate workers that rallied for their
The International Metalworkers’ Federation (IMF) in its effort to help the workers sent letters of appeal to the Indonesian President Susilo Bambang Yudhoyono and Malaysian Prime Minister Mr. Abdullah Badawi to urge settlement with the workers (Metal World, 2007: 7) but no information on the progress.

**PT. Kizone International - 2011**

Established in 1990 by Jin Woo Kim, a South Korean citizen, this company produced sport apparel and supply for many big sport brand: Adidas, Nike, Reebok and Dallas Cowboys (Merdeka, 2012; WRC, 2011). The problem started in September 2010 when the company failed to pay salary to its 2,800 workers, and this problem prolonged to January 2011 when the owner fled from the country without paying severance payment to the workers that amounted to US$ 3.4 million (WRC, 2012). The buying agent, Green Textile, took over the factory although not for long, next in April 2011 PT. Kizone declared bankrupt and closed (WDI, 2014). Nike and Dallas Cowboy agreed to pay partial severances while Adidas held out, and after a number of universities’ movement to cut off contract with this brand and many labour organizations from other countries forced Adidas to take responsibility of the workers, then Adidas conceded with the claim of workers union (CCC, 2014).

**PT. Sun Creation Indonesia (SCI) – 2013**

This company located in Batam and produced electronic component and coil for optical, and supplied for Ricoh and Panasonic. Established as a subsidiary of Taiyokoki, a Japanese company, the management headed by four Japanese citizens (Suara Kepri, 2013). At first, the asset and machineries were moved to the El Sol Electronic, Philippines based factory, and no one had any suspicion about that (Batampos, 2013: 8). In 27 June 2013, the factory stopped its production, and the workers then found out that the Japan management, Kazaya Nakauchi (President Director) and Rudi Hartanto (General Manager) had left the company and out of the country (Batampos, 2013: 9). There were 732 workers abandoned with no settlement from the management, although the Japan management sent money in the amount of US$ 70,000 to the workers, however that amount only covered half from the total amount the worker entitled (Tribun Batam (a), 2013). The last information on the case was about the bankruptcy claim brought by PT. SCI to court in Nagasaki concerning the life of the workers (Tribun Batam (b), 2013).

**PT. Yee Woo – 2015**

Owned by a Chinese citizen, this company established in 2005 and located in Batam. In 12 Januari 2015, the workers found that the management had abandoned them and taken valuables from the factory. The management has the responsibility for the amount of Rp. 12 miliar (around US$ 953,346) for 305 workers salaries and severance payments (Batampos, 2015; The Jakarta Post, 2015). This company mostly produced Adidas brand apparel, however Adidas refused to take responsibility in this case since the business relationship they have was with the supplier PT. Bintan Bersatu Apparel and according to them there was no ongoing business with PT. Yee Woo (Adidas Group, n.d.).

This conduct exists not only in Indonesia but also in other countries participated in global supply chain, like Vietnam (Vietnam Investment Review, March 6, 2018),
Cambodia (CCC, July 11, 2017), Turkey (CCC, September 25, 2017) and Phillipines (CCC, March 1, 2017). In Indonesia this cases mostly happen within the Export Processing Zones (EPZ), which in Nam’s paper mentioning the debate that EPZ have a bad reputation among labour rights activists, although various reports by international organizations such as the ILO, the Organization for Economic Cooperation and Development (OECD), the World Bank, and the International Confederation of Free Trade Unions (ICFTU) indicate that any presumption that the existence of such zones by definition means that human rights violation occur in such zones is not supported (Nam 2006: 162).

But, looking at the facts, these violations to the basic labor rights and human rights for employment as stated in the preamble of 1964 Employment Policy Recommendation, really do exists (ILO 2015 :185). The supply chain system where the relation between MNC and the supplier based on sale and purchase contract, has characterized this as an arms-length market exchange, not an intra-firm transaction (Ruggie 2007: 7).

Hence, when the supplier violates the labour rights, in terms of fleeing from the host country where the production of goods located, and that they failed in fulfilling their obligation for severance payment or even wages. In the end, it is just like Yun said that the race to the bottom is being run not only amongst individual countries but also by individual corporations who are gaining competitive advantage in international markets by “mobile exploitation” (2008: 162).

By shifting its organizational structure from a hierarchy to a network, MNC manages to maintain economic control over the global supply chain without being liable for its social and environmental impact (2006:168). Meanwhile, when it comes to the context of MNC as the actor behind the supply chain that brought FDI into the host country, they depicted as vulnerable to nationalization and expatriation, thus needed the protection established in the IIA. Formed between states as parties in the agreement, IIA is devised with major obligations for the host country to protect foreign investment and only minor obligations for the foreign investor which usually regarding the obligation to abide the existing regulation. IIA bind the foreign investor that enter host country, so when it is the subsidiary that enter the host country, it is them who has the obligation, not the MNC with the arms-length control towards the said subsidiary. Until now, still there is no development in investment agreement that able to repair this imbalance position between the protection of corporation’s rights and the obligations to be respected by MNCs (Yun 2008: 155).

II. LABOR RIGHT AND DISPUTE SETTLEMENT IN IIA

International Labour Organization (ILO) has established 189 conventions (ILO 2015: 13) with mission to promote rights at work, encourage decent employment opportunities, enhance social protection and strengthen dialogue on work-related issues (ILO n.d.). The 1998 ILO Declaration on Fundamental Principles and Rights at Work sets out four Core Standards which consists of: (a) freedom of association and the effective recognition of the right to collective bargaining; (b) the elimination of all forms of forced or compulsory labour; (c) the effective abolition of child labour; and (d) the elimination of discrimination in respect of employment and occupation (ILO 2017: 17).
In the trend of IIAs, the provision regarding respecting and implementing labour rights is starting to be included (Sauvant and Sachs 2009: xxxvii). There are quite numbers of BIT which contain labour rights, marked for BIT established after year 2000, meanwhile for BIT prior that year such provision is rarely exist. Only BIT between Germany-Brunei Darussalam (1996) and all BIT with US established after the 1994 model (UNCTAD Investment Policy Hub (b) n.d.), because it was not existed in the 1984 US model (Berkeley n.d.) The preamble of Germany-Brunei Darussalam BIT stated that: “recognizing the importance of the transfer of technology and human resource development arising from such investments.” (UNCTAD Investment Policy Hub (c) n.d.) The 1994 US Model BIT sounding a similar provision: “recognizing that the development of economic and business ties can promote respect for internationally recognized worker rights” (UNCTAD Investment Policy Hub (d) n.d.).

For BIT signed after year 2000, mostly contain provision with labor rights, either in the preamble or in certain chapter, or both. Like in all US BIT after the 2004 Model then enhanced in the 2012 Model which has labour rights in the preamble that read as follows: “Desiring to achieve these objectives in a manner consistent with the protection of health, safety, and the environment, and the promotion of internationally recognized labour rights.” Another provision is within Article 13 of Investment and Labour which reads in relevant part as follows (U.S. n.d.):

1. The Parties reaffirm their respective obligations as members of the International Labour Organization (‘ILO’) and their commitments under the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up.

2. The Parties recognize that it is inappropriate to encourage investment by weakening or reducing the protections afforded in domestic labour laws. Accordingly, each Party shall ensure that it does not waive or otherwise derogate from or offer to waive or otherwise derogate from its labour laws where the waiver or derogation would be inconsistent with the labour rights referred to in subparagraphs (a) through (e) of paragraph 3, or fail to effectively enforce its labour laws through a sustained or recurring course of action or inaction, as an encouragement for the establishment, acquisition, expansion, or retention of an investment in its territory.

3. For purposes of this Article, ‘labour laws’ means each Party’s statutes or regulations, or provisions thereof, that are directly related to the following:
   (a) freedom of association;
   (b) the effective recognition of the right to collective bargaining;
   (c) the elimination of all forms of forced or compulsory labour;
   (d) the effective abolition of child labour and a prohibition on the worst forms of child labour;
   (e) the elimination of discrimination in respect of employment and occupation; and
   (f) acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.

Same provisions also exist in the Japan-Colombia BIT, where the preamble states: “Recognizing the importance of the cooperative relationship between labour and management in promoting investment between the Contracting Parties” (UNCTAD
Investment Policy Hub (e) n.d.). Meanwhile in the Article 21 of Measures on Health, Safety, Environment and Labour, reads as follows:

“Each Contracting Party recognizes that it is inappropriate to encourage investment activities of investors of the other Contracting Party and of a non-Contracting Party by relaxing its domestic health, safety or environmental measures or by lowering its labour standards. Accordingly, each Contracting Party should not waive or otherwise derogate from such measures or standards as an encouragement for the establishment, acquisition or expansion in its Area of investments by investors of the other Contracting Party and of a non-Contracting Party.”

However, with all the provisions regarding labour rights, but none is within the dispute settlement provision, even 2012 US Model BIT put a limitation on the ground for a claim which excludes labour issue as regulated in Article 24 (U.S. n.d.). Article 13.4 of the 2012 US Model BIT only provide for an interstate consultation with respect to labour disputes:

“A Party may make a written request for consultations with the other Party regarding any matter arising under this Article. The other Party shall respond to a request for consultations within thirty days of receipt of such request. Thereafter, the Parties shall consult and endeavour to reach a mutually satisfactory resolution.”

Another option offered in US Model BIT is the state to state dispute settlement, which is outstanding from other BIT, but the ground for a claim is limited to the interpretation or application of the treaty which has not been solved through consultations or other diplomatic channels as exhaustive remedies prior the claim brought to arbitration under UNCITRAL (U.S. n.d.). However, there is no information available on how this option is being use to solve problem of fleeing investor.

India’s Model BIT which established recently in 2016, shows the evolvement of IIA, especially in labour rights. In Article 12 concerning Compliance with Law of Host State read as follows (India n.d.):

“Investors and their Investments shall be subject to and comply with the Law of Host State. This includes, but is not limited to, the following:

(i) Law concerning payment of wages and minimum wages, employment of contract labour, prohibition on child labour, special conditions of work, social security and benefit and insurance schemes applicable to employees.”

Although, labour issue is not included as the ground to bring a claim, but the objective of setting these obligations towards investor and investment is to ensure the conduct, management and operations of investor are consistent with the law of the host state and thus enhance the contribution of investment to inclusive growth and sustainable development of the host state. Any breach to those obligations shall give the host state a sole discretion in accordance to the law to seek suitable enforcement, regulatory or other legal action in response to the breach (India n.d.).

India is quite exceptional with their model BIT, however, the provisions will also not enough to solve the problem of fleeing investor. As Bodea and Ye (n.d.) said in their study that BITs depress de facto labour practices which violating the human rights and
thus affect how states practice it. To add to that, BITs constrain governments' policy for sustainable development and welfare improvement, since states who ratify IIA devoted to the protection of foreign investments are burdened by obligations thus limiting the regulatory powers of the state.

III. OTHER OPTION FOR LABOR DISPUTE SETTLEMENT IN INTERNATIONAL MECHANISM

Member states of ILO bound with the commitment by ratifying the conventions and therefore abide to promote implementation of labour commitments with the obligations to produce periodic reports on measures they have taken to implement the conventions they have ratified, and ILO also provided *ad hoc* procedures help countries deal with issues of noncompliance (Gaukrodger and Gordon 2013). However, there is one view that labour standards have been allocated to the ILO precisely because it has no power to punish (Nam 2006: 180). Although, another view considered the ILO system which is a softer international compliance mechanisms such as international cooperation, peer pressure, and non-compulsory dispute resolution involving mainly declaratory remedies, play the role as complementary (Gaukrodger and Gordon 2013).

Indonesia has several cases brought to the ILO, however most cases are regarding freedom of association and from 19 cases almost all of them are proceed with confidentiality. Reading several case texts, the committee only play out as mediator in the cases, and produce non-binding recommendations as the final result (ILO (b) n.d.). As presented from the cases provided in the ILO website, one issue to pinpoint is that all of those cases brought to ILO mostly about the relationship between employer and the labour or how the government treat the labour within the same domestic country. In other words, there is no labour case related to the foreign nationality whether person or company that become the respondent in those cases, thus no evidence that ILO settlement system can solve the problem of fleeing investor.

There is another forum non-judicial established by OECD, called National Contact Point. This system based on The OECD Guidelines which is part of the OECD Declaration and Decisions on International Investment and Multinational Enterprises, an included within it is a new human rights chapter, which is consistent with the UN's Guiding Principles on Business and Human Rights (Cîrlig 2016: 232). The OECD Guidelines are recommendations for responsible business conduct that the participating governments address to MNCs which operate in or from their territory (Wouters and Chané 2015: 18).

OECD Guidelines require the adhering governments to establish National Contact Points to promote the Guidelines and to receive 'specific instances', or complaints by interested parties in cases of non-compliance by companies (Schutter 2006: 8). National Contact Points are either a government department, or independent structures comprising government officials, trade unions, employers unions, and sometimes non-governmental organizations (Cîrlig 2016: 233).

Since it is non-judicial, NCPs do not have the power to impose sanctions, however the
specific instance procedure is quite effective in curbing corporate conduct because adverse findings against a company may cause negative publicity affecting its reputation, and may be further used in civil litigation or criminal prosecution. Some governments also linked compliance with the OECD Guidelines to the provision of external trade assistance and export credit (Cîrlig 2016: 233). For example, Ruggie explained that the International Finance Corporation (IFC) has adopted performance standards that companies are required to meet in return for IFC investment funds, which include several human rights elements. There is an effect to this, as these standards followed by banks adhering to the Equator Principles, which are responsible for some 80 percent of global commercial project lending (Ruggie 2007: 22).

NCP provided a platform for discussion and assistance to stakeholders to help find a resolution for issues arising from violation of the Guidelines, and with transparency upon the complaints and decision, the system acquired interests from parties in dispute. Since, becoming complainants in this system is available for individuals or communities affected by a company’s activities or, more frequently, by NGOs acting on their behalf. These complaints may be submitted either in the enterprises home country or any country in which the enterprise operates and which adheres to the Guidelines (Cîrlig 2016: 233).

However, from 11 cases related to Indonesia in the NCP, only three cases are regarding labour rights, two cases were filed in September 5, 2002 where Indonesia represented by Clean Clothes Campaign (CCC) Austria brought claims towards Adidas and Nike representations in Austria and their headquarters in Germany (Adidas) and USA (Nike) (OECDWatch (a) n.d.). The complaints filed to the Austrian NCP regarding Adidas and Nike corporate conduct where the subsidiary companies from the two MNCs alleged of labour rights violation on right to organize and collective bargaining. For the Nike case, the Austrian NCP was not accepted the case on the ground that there is no link with Austria, thus the case is forwarded to the US NCP. The US NCP concluded that the there is no indication of the need for US NCP involvement since the Nike’s conduct already effectively addressed through other appropriate means (OECDWatch (a) n.d.).

Meanwhile, for the Adidas case, from Austrian NCP which gave the same respond as in the Nike case, the case then forwarded to the German NCP which accepted the case (OECDWatch (b) n.d.). After mediation process held by NCP with the disputing parties, German NCP then issued statement and proposals for future action, which according to the NCP, Adidas already maintains a comprehensive internal programme intended to ensure the principles contained in the in-house “Standards of Engagement” (SOE) are complied with by the supplier firms of its business partners. Included in this standard is the obligatory recognition of core labour standards by the management in the supplier factories, monitoring by the experts, identification of specific problems, active training and advice to the factory management (OECDWatch (b) n.d.). In the end, the NCP council managed to get both parties to remain in communication and to utilize the information for further progress on the improvement of working conditions. However, this result was not satisfactory, since Adidas refused the CCC proposals for corrective action, thus shows the lack of this NCP system to remedy the labour for the violation of their rights by the MNC and its subsidiary in the supply
chain. This is what Schutter mention that since no sanctions may be imposed on multinational enterprises which either refuse to cooperate with the NCP, or are found to be in violation of the Guidelines, only the effect of adverse publicity that will make them comply with the NCP requests (2008: 8).

To see whether the NCP system is effective is quite easy, because the case mentioned earlier regarding Adidas and Nike is happened in the early year 2000, then see the cases presented in Part I of this paper, as happened in PT. Dong Joe, PT. Kizone and PT Yee Woo, where the same MNCs still practicing bad supply chain and violated labour rights, even the basic labour rights on wages and severance payments. Hence, the NCP system failed to control the conduct of MNCs and its subsidiaries.

Finally, the option that works for fleeing investor and violation of labour rights, is the social movement as shown in the PT Kizone case. In Kizone case, the movement to solve this labour issues came from students in universities in US. Worker Rights Consortium (WRC), an independent labor rights monitoring organization, released a report regarding sweatshop allegations against Adidas and other brands. This report enraged many students in the US universities, which led to forcing the universities to terminate license to manufacture university logo apparel (AFL-CIO n.d.: 42). Fair Labor Association (FLA) whose been reported about Kizone case took a stand with the brand MNCs, thus although FLA already requires factories to have severance funding in place but they claimed that they cannot force the companies to comply with the FLA’s Code of Conduct and Compliance Benchmarks which includes the provision to protect workers facing termination (AFL-CIO n.d.: 44).

It was not until a case filed by Wisconsin University trustees to the court against Adidas alleging breach of contract, which according the university, Adidas failed to comply with contractual provisions regarding labour rights in sponsorship and licensing agreements that requiring Adidas to provide legally mandated benefits to workers who produce goods bearing the university logo (BHRRC n.d.). Another push came Cornell University which asking FLA to pressure companies to pay worker’s severance in Kizone (AFL-CIO n.d.: 44). Then the FLA responded to these pressures by hosting Global Forum for Sustainable Supply Chains to discuss solutions for workers, however, this move was also raise critics, that the FLA as an multi stakeholders initiatives is a failure, because when it funded largely by those being monitored is problematic (AFL-CIO n.d.: 44). In the end, the position between investor and labour in terms of lost fund is far too different, where investors able to seek restoration of lost funds at the World Bank’s International Centre for Settleemtn Disputes, meanwhile labour have no forum for the stolen wages and severance that the investor took from them (AFL-CIO n.d.: 44).

IV. CONCLUSION
The global supply chain is already spreading out worldwide, with the MNCs hold the control over it. Even when international organization or even countries speak loudly about human rights and labour rights, still no effective implementation when it faced economical purpose. Developing countries with their capabilities and limitation were forced to follow the global system to gain benefit that would improve their condition. However, the race to the bottom do exist here, with boundaries within IIA plays as a
strong foothold on government capability to set policy or even implement it.

The same situation seems apply to international organization initiatives said to enforce or encourage the implementation of human right or labour rights. The practice of MNCs and its subsidiaries keep happening and repeating in countries, with no sanction that have a punitive effect. Thus, fleeing investor will keep continuing and without any effort to improve this situation, the sole victim will be the labour.

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