Master's Thesis of Political Science and International Relations

Who Dares to Confront?
Respondent Side Explanation of Heterogeneous Investor-state Dispute Outcomes

누가 분쟁에 맞서는가? 피항소국 정부 특성을 중심으로
살펴본 투자자-국가간 분쟁에 대한 연구

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Who Dares to Confront?
Respondent Side Explanation of Heterogeneous Investor-state Dispute Outcomes

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이 논문을 외교학석사 학위논문으로 제출함

2022 년   8 월

서울대학교 대학원

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이 종 현

이종현의 외교학석사 학위논문을 인준함

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Abstract

Why do some investor-state dispute cases get settled before reaching the ruling stage? While prevailing expectation is that investor-state disputes consequently result in lopsided losses to the host economies, there exists no hard evidence since the settlement procedure is still a "black box". In this paper, I offer an answer with a respondent country's domestic politics. I argue that the likelihood of settlement depends on executives' partisan lines: right-wing governments are more likely to settle disputes without reaching the ruling stage. This is because, when sued, respondent governments face a trade-off between preservation of domestic social welfare and investment promotion. A priority, is then, decided by the executives' partisan lines. Business friendly right-wing governments are more likely to settle disputes to appease the dissatisfied investors and to maintain their reputation as a favorable investment environment. Left-wing governments, on the other hand, are less likely to settle since settlement can be viewed as allegedly capitulating their public welfare to the foreign investors' demands. Using original data on 733 concluded investor-state disputes that are due to governments' regulatory action in 1990 - 2020, I find strong support for my hypothesis. In addition, qualitative evidence from two representative cases confirms causal pathway linking executives' partisan lines and likelihood of settlement.

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Chapter 1. Introduction

1.1. The Puzzle

Host states are facing enormous burdens as respondents of investor-state disputes. Not only it takes substantial amounts of public funds for host states to defend the claim, but the incidence of dispute itself tends to threaten countries' reputation and reduce the investment flows by third-party investors (Allee and Peinhardt 2011; Aisbett, Busse, Nunnenkamp 2018). [1] In case of indirect expropriations which consists majority of cases in investor-state disputes, just being sued can lead to an additional cost of constrained regulatory ambition regardless of the litigation outcome (Moehlecke 2020; Thompson, Broude and Haftel 2019). Given the high costs, scholars have presumed host states' incentive to avoid pushing through the arbitration even if their probability of winning a stake is high (Franck 2009; Pelc 2017). However, real world evidence presents a completely different picture.

As seen in Figure 1, top 10 respondents of investor-state disputes all differ in the way they handle disputes. It can also be observed that the outcomes do not follow the host countries' economic capabilities as literature have predicted (Behn, Berge and Langford 2017; Strezhnev 2017). For instance, a proportion of settlement and final ruling differ between Argentina and Mexico although they share similar economic status (i.e. GDP per capita) and political structure (i.e. democracy). Specifically, among 50 concluded investment claims that have been filed on Argentina, only half of these cases (i.e. 26 cases) have reached the stage where arbitration tribunal renders an award and other half being settled or discontinued. In

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[1] Since 2013, the average costs of ISDS per disputes is about USD 5.2 million for governments (Hodgson and Campbell 2017).

contrast to Argentina, more than 85 percent of cases (i.e. 21 out of 24 cases) have reached an end with award in Mexico and remaining cases being settled or discontinued. Within variation in a single country is also notable. Argentina happened to be claimed twice by the same water supply company called "Azurix" in the early 2000s for similar reasons of alleged unfair taxation by regulation. However, whereas the first case filed in 2001 proceeded until the final award came out, the second case which was filed in 2003 discontinued with no tribunal decision on awards. Such evidence renders a following question. If arbitration is that costly to host countries, what explains such heterogeneity in dispute settlement across the nations and even within each one of them?
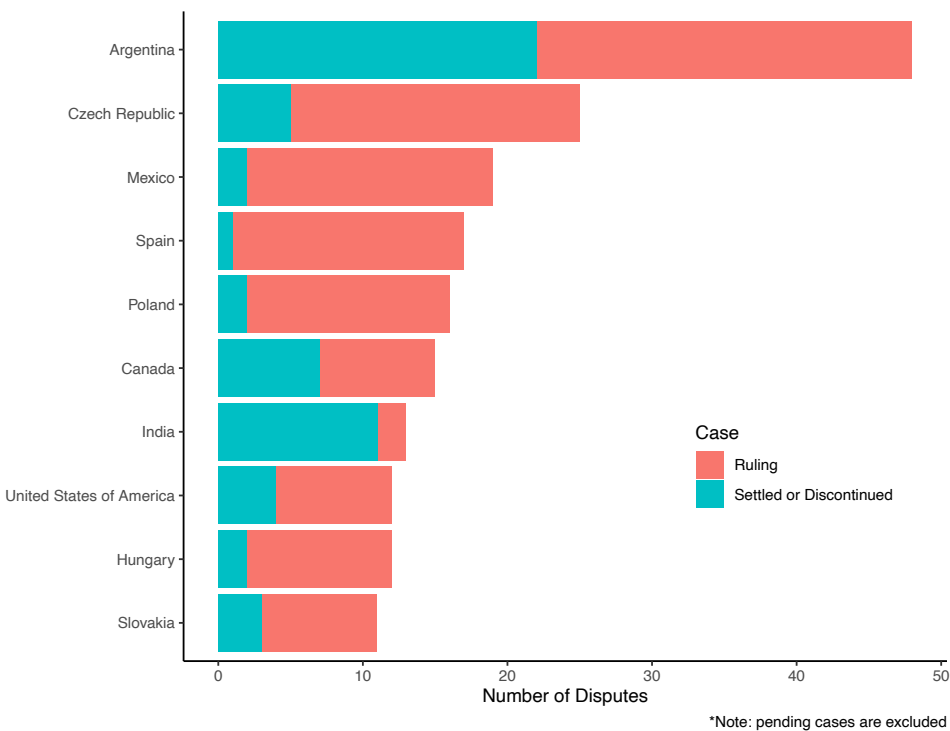
<Figure 1> Dispute Resolution in Top 10 Respondent Countries

1.2. Political Logic of Dispute Settlement and Unique Traits of ISDS

Understanding empirical pattern of dispute outcome is crucial for evaluating how international institutions shape state behavior and promote international cooperation overall. As regards, international agreement literature have thrived on answering how and why states resolve disputes through formal dispute settlement mechanisms. In general, dispute patterns somewhat followed a political logic in trade, territory, and human rights area. To list a few, Davis (2012) and Allee and Huth (2006) argued that democracies are less likely to settle disputes during the adjudication process. Pervez (2015) and Chaudoin (2014) emphasized the role of political business cycle in resolving disputes since signaling a resolved attitude toward the disputing country enabled a home country to garner the support of its domestic constituents. However, due to a unique trait of Investor State Dispute Settlement (ISDS) of which firms are the only actor that can directly file claims against host governments, less interest was given to the host governments. Rather, scholars paid attention to how firms would strategically carry out the claims they have initially filed (Franck 2009; Moehlecke 2020; Pelc 2017; Wellhousen 2019).

1.3. Respondent Side Explanation of Investor-state Dispute Outcomes

Contrast to previous literature, however, this paper manages to show the importance of host government's side of explanation when analyzing the patterns of investor-state dispute outcomes. As the modern landscape of investor-state dispute features increasing subject of regulatory conflict regarding public interests, democratic governments face a trade-off between preserving public welfare and risk

of losing investment promotion.[2] In this circumstance, I argue that the possibility of host's exploiting different measures in ISDS highly reflects its partisan line. Based on economic partisanship framework, right-wing governments are more likely to consider maintaining their reputation of being amicable investment climate as more important job compared to preserving social welfare of the public. Therefore, when investors file arbitration claims against the governments' regulatory policies, right-wing governments are more likely to promote settlement or discontinuance of the case to appease the displeased investors since continuing the arbitration can be seen as a defiance to the investor's claim. In addition, lengthy periods of publicity of the suit can also be viewed as a negative sign to the third-party investors. Thus, even if their former governments initiated the disputes, they are highly likely to hamper the will of predecessors by discontinuing the litigation proceeding. On the other hand, left-wing governments are more likely to prioritize the preservation of domestic social welfare over increased investment. This makes them less likely to settle the ongoing disputes since settlement is regarded as a capitulation of their regulatory spaces to firms' interests. Thus, confronting an arbitration regardless of a ruling outcome is a costly signal for the left-wing governments that they are fulfilling their commitment to support public welfare which have been harmed by foreign investors' interests.

1.4. Research Method

To prove that my hypotheses are valid enough, I use integrative multi-method research design which combines quantitative approach of regression type

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[2] Excluding for the pending cases, investment disputes which are happening due to government's "regulatory expropriation" takes up almost 75 percent of all the cases since 1994.

analysis with qualitative evidence of vignette case studies. This type of research design has distinctive strength in finding causal relationship between my key independent variable and the outcome, especially if the main outcomes are based on regression type analysis, as the narrative account of qualitative design corroborates the specific pathway for single and unified causal inference (Seawright 2016). In this research, I employ two investor-state disputes as representative cases: TransCanada v. USA and Aguas Argentina S. A v. Argentina. These cases represent lasting disputes which occurred throughout successive governments of left and right partisan executives. Within time variation analyses show how each partisan government in a single country expressed different attitudes toward the same investment disputes. In terms of cross-national comparison between USA and Argentina cases, similar logic was identified despite different country characteristics they possess except that both are democracies with accountable executives serving terms in office.

1.5. Contribution and Outline of the Dissertation

This paper contributes to the deeper understanding of politics of international cooperation and international investment law. As the basic goal of ISDS is to facilitate state's commitment to enforced rules and promote global capital flows, it is important to acknowledge the actors' nuanced signals of political risk behind arbitration decisions. What is the host government's motivation behind arbitration and how would market actors interpret this signal? What role does investment agreement play in this bargaining process? This paper contributes to the understanding by focusing on the respondent side explanation in dispute settlement, specifically on the importance of government ideology. Implications highlight that

host governments with certain partisanship background are less likely to burn the bridges with the investors even if they have been brought into the dispute.

This paper proceeds as follows. First, I survey the literature of political logic of dispute settlement mechanisms in different international institutions to find general patterns and compare the difference with unique ISDS environment where related literature lacks in. Then, I introduce the theory on how states strategically utilize dispute settlement in investment disputes: partisanship of the host government and heterogeneous arbitration results. Next, I conduct quantitative analysis to evaluate cross-national difference of dispute behavior with the novel dataset. Lastly, I conclude by carrying out qualitative analysis to reinforce causal evidence for my argument and list further implications of this research for future researchers.

Chapter 2. Literature Review

2.1. Political Logic of State Behavior in Dispute Settlement

One of the main functions of international institution is to facilitate international cooperation by promoting state compliance with international law (Keohane 1984; North 1990). Institutionalist scholars who emphasize the design of international institution, argue that international legal dispute settlement mechanism (DSM) devised by such institution is effective in bringing cooperation among relevant actors. Two possible mechanisms are considered: providing information and enforcing legal rules. On the one hand, information provided by DSM clarifies legal uncertainty of complex rules and reduce transaction costs through official verdicts rendered by adjudication or arbitration bodies (Oye 1986; Rosendorff 2005). On the other hand, DSM serves as a fire alarm to inform various audiences to detect possible violations of member states' previous commitment. In trade and investment literature, such a fire alarm informs audiences including investors and the partner countries (Buthe and Milner 2008, 2014; Allee and Peinhardt 2014; Simmons 2014) as well as domestic audiences to punish the government for defecting from international cooperation (Bearce and Cook 2018; Dai 2007; Tomz 2008). Thus, scholars had a firm belief that the design of DSM within international institutions could possibly enforce states to abide by the negotiated rules since failure to comply with those rules would consequently lead to increase in the related costs (Aisbett, Busse and Nunnenkamp 2018; Allee and Peinhardt 2011; Tomz 2007).

Still, the enforcement of DSM is not without its blind spots. Compliance with international law, especially when disputes are initiated, somewhat depended on international distribution of power (Goldsmith and Posner 2005; Posner and Yoo 2005). Other times, violations did not lead to punishment as decentralized authority

of DSM lacked monitoring systems to identify the defections.[3] In addition, costly legal fees incentivized both disputing parties to choose informal negotiation over formal rulings as a more plausible option (Ásgeirsdóttirj and Steinwand 2015). Given such weaknesses, it is questionable why member states would prefer to use DSM to resolve disputes in the first place. Ultimately, solving a puzzle of how these members would strategically behave within the formal ruling process is an immediate concern for building a relevant literature.

Patterns of dispute settlement often serve domestic purposes. Mostly, high political stakes associated with disputes attract a great deal of attention in domestic arena and domestic circumstances affect states' strategic behavior in dispute settlement. With regards, scholars have searched for empirical evidence of how domestic politics influence state's strategic behavior in various types of disputes. In the field of territorial disputes, democratic leaders often utilize legal dispute settlement as a domestic cover since they face higher political costs from domestic audiences when they settle the disputes behind backdoors (Allee and Huth 2006). Huth, Croco and Appel (2011) backs up the following hypothesis with additional evidence, arguing that nationalism is linked to the territorial disputes and concessions to these disputes often sacrifice the national interests. They argue that in order to secure justification, democratic states are highly likely to settle disputes through the rulings of formal legal bodies over private bilateral negotiations.

Domestic politics in trade disputes are even more sophisticated. Davis (2012), for example, argued that patterns of dispute outcomes are determined by constraints on executive autonomy. States, where executives face higher legislative

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[3] Some few treaty organizations such as the International Atomic Energy Agency in the Non-proliferation Treaty regime have strengthened their enforcement mechanisms by providing centralized monitoring programmes.

constraints are more frequent users of adjudication process and are more likely to result in a tribunal ruling than a settlement during the formal process. This is because legislative branch which represents commercial interests of domestic industry group (i.e. exporting industries in challenging countries and import competing industries in defendant countries) pressures executive to make an accountable decision. In the actual cases of executives in defendant countries, leaders choose to fight back against the challenging countries until the rulings are made. This is to signal their domestic audiences that they are fully committing to the audiences' interests rather than caring for diplomatic relations through a compromise settlement. Norms which democracy provides are also placed as an alternative mechanism of why governments or firms heavily use formal legal process to settle disputes. As Galanter (1975) explained the reason why related actors in advanced democracy constitutes a large share of litigation as plaintiffs and defendants is due to commitment to legal norms and civil liberties. Leaders in democratic states also use DSM to garner electoral support. Pervez (2015) and Chaudoin (2014) both argues that government leaders initiate disputes in the WTO around their election seasons to garner political support from large domestic industries as well as public audiences.

2.2. Unique Traits of ISDS and Political Logic Underpinning the System

Unlike other types of dispute settlement, however, literature of investor-state dispute settlement (ISDS) is still in its infancy to explain political logic of state behavior. This may be due to unique characteristics which the investment treaty

regime holds.[4] One representative trait of ISDS is the identity of the claimants. Whereas state-to-state proceedings were main interests in territorial, human rights, and trade disputes, the scope of potential claimants are reduced to investors including multinational firms, state-owned enterprises, and individual investors. These actors can directly claim against the host government without reaching local remedies in the first place (Simmons 2014). States, on the other hand, can only stand as a defendant in the trial process. Such a rule in ISDS drives scholars to consider state as a "less important" actor compared to investors when studying the patterns of outcome in investor state disputes (Moehlecke, Thrall and Wellhausen 2020; Pelc 2017; Kerner and Pelc 2021). Another important trait of ISDS is that its compensation rule allows the state actor to make "efficient breach" of international agreement, giving no space for politics to explain the dispute process (Pauwelyn 2006; Pelc and Urpelainen 2015). According to Pelc and Urpelainen (2015), the reason why there is no breach and pay system in trade dispute settlement is that the benefits of violation are distributed to related industries and thus made left out domestic groups (i.e. import-competing sectors) to threat the government through mobilization. This connects to the political motivation of why governments strategically behave during trade disputes. However, the benefit of expropriating investor's asset only accords with a host government in the investment regime. Thus, the monetary compensation design in ISDS effectively allows the host government to breach the agreement and pay the victim to facilitate the return to a cooperative

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[4] The investment treaty regime refers to the definition stated in Bonnitcha, Poulsen and Waibel (2017), which consists of three main components: investment treaties, set of rules governing investment treaty arbitration and decisions from the arbitral tribunals.

status, but at the same time leaves no space for domestic politics to intervene in the dispute process.[5]

Recent landscape of investor-state disputes, however, is changing at a rapid state as most firms are filing claims against the host governments for the regulations made in public policy domains (Thompson, Broude, and Haftel 2019). As can be seen from figure 2, although investment disputes are increasing over the recent years, we can see a clear difference in the number and the growth rate between two different types of disputes. Indeed, regulatory dispute between a firm and a host government is now positioned as a major problem in the modern investment treaty regime, which accounts for about 70 percent of total investment disputes since 1994 (Pelc 2017).[6]
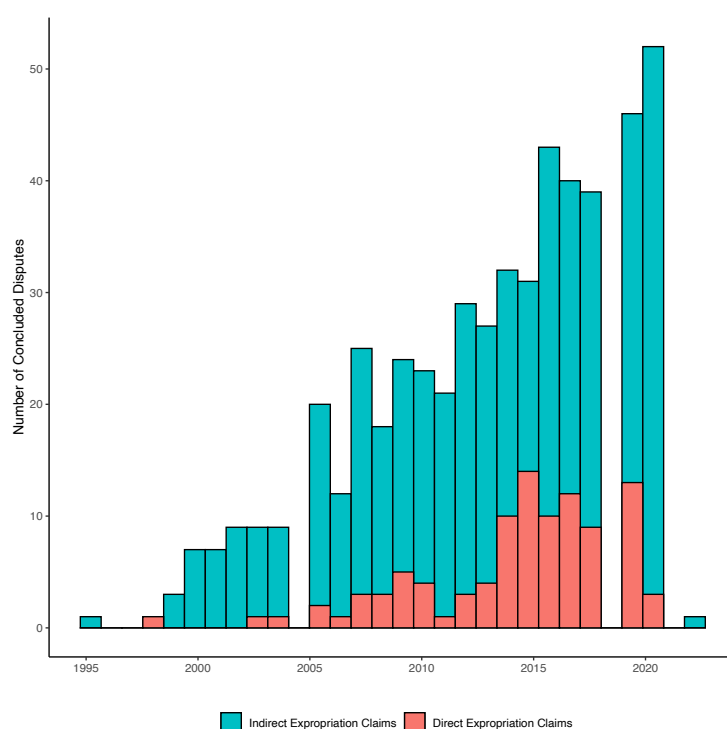
<Figure 2> Number of Concluded Investment Disputes by Expropriation Types

[5] Wellhausen (2019) brings similar logic of "efficient breach" to explain firms' re-investment patterns after the disputes take place.

[6] The result from my analysis below shows that cases due to so called host government's regulatory changes have increased up to 74 percent since the period of Pelc's finding.

Understandably, regulatory disputes occur mostly in democratic regimes where government leaders are placed in a more vulnerable position of being responsive to the demands of preserving domestic regulatory autonomy against multi-national corporations (Berge and Berger 2021; Tienhaara 2011; Van Harten and Scott 2016). However, a lack of understanding on how governments would react to such investment claims led to half-baked, firm specific theories. Studies would normally regard regulatory disputes as an opportunity for the firms since firms can achieve the primary benefit of swaying host governments' adverse regulations no matter how the odds of litigation outcomes are against them (Pelc 2017). Other times, firm size would highly matter since MNCs with deep global value chain integration in the host countries often have outsized leverage in shaping the host's domestic regulation in the first place (Moehlecke, Thrall and Wellhausen 2020). The only thing that governments can do is to avoid severe litigation costs by preventing the implementation of adversarial policies in the first place, a famous term called "regulatory chilling" (Moehlecke 2020; Thompson, Broude and Haftel 2019). Otherwise, when disputes occur, governments would place limits on arbitration proceedings. This is because, on average, governments spend 4 to 5 million dollars for the legal fees defending the case and the compensation award worth about hundred million dollars (Hodgson 2014).[7] In addition, the regulation that is delayed due to dispute process often takes about 3.73 years on average to normalize (Zarate et al 2020). These costs would render host governments to settle disputes as early as possible.

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[7] Substantial amount of compensation and uncertainty in legal outcome is one of the reasons why the host governments avoid legal dispute in the first place (Pelc 2017). Also, UNCTAD (2018) reported that by the end of 2017, the average amount of compensation awarded to the claimant was $504 million and these amounts do not even pertain any legal costs defending the case.

The fragmented evidence, however, are not solid enough to solve the puzzle why each individual governments would pursue different behaviors after all their costly efforts put into avoiding such disputes in the shadows of litigation. Few research has delved into the host government's perspective in finding dispute patterns in ISDS, but explanations fall short due to perception of bias trapped in countries' developmental status. For instance, developing countries violate obligations more often since they have poorer regulatory governance (Bhen et al 2017) or that these countries possess weaker infrastructure to filtering out cases which the odds are against them at the settlement stage (Strezhnev 2017; Moehlecke 2020). Nevertheless, poor regulatory governance carried out by developing economies is not enough to explain the heterogeneity in investment dispute patterns and therefore, a large gap exists between the theoretical prediction and the real-world evidence as presented in figure 1.

Chapter 3. Partisan Politics and Heterogeneity in Investor-State Dispute Outcomes

This paper fills the gap mentioned above through the theory of political logic in investor-state disputes. I argue that the host government's strategic behavior in investor-state disputes follows its partisan line and results in different outcomes. Precisely, when a firm claims an investment dispute against a host government for the regulatory changes that the government has made in the previous period, the government faces a trade-off between two different types of risks. One type of risk involves the possibility or the fear of losing future investment opportunities. Publicized dispute harms foreign investment promotion since firms (including those that were not involved in the dispute process) no longer perceive countries under dispute as promising environments for future investments (Aisbett et al. 2018; Allee and Peinhardt 2011). These studies have proved the validity of their logic by finding the cross-national and time series empirical relationship between the host governments' experience in investor-state disputes and their future FDI inflows. Being afraid of future FDI losses, states that are heavily reliant on these foreign revenues even retreat the adversarial regulatory changes made when they observe their neighboring countries being claimed by the related investors (Moehlecke 2020).

Occurrence of investor-state disputes, however, also place democratic governments under greater willingness for freer legislation and implementation of regulations in public policy domains (Thompson, Broude and Haftel 2019). Reasons may vary, but the most convincing logic relates to the pressure of popular demands for public policies. From public's perspective, regulatory actions in public health, environment, or social policy where most of the disputes occur are considered a

government's legitimate exercise of public authority (Kim 2017; Thompson, Broude and Haftel 2019). Settling disputes, in this case, would be perceived by domestic audiences as a capitulation of the government's regulatory rights to the demands of large corporations (Rao 2021). Thus, the presence of investor-state disputes would lead to host governments' opportunity to trade-off promoting investment friendly environment against protecting domestic regulatory spaces and vice-versa. The question is, how would, then, a government weigh the trade-off between two different types of risks?

This is the step where the host government's partisanship intervenes and mediates the government's decision to prioritize the risks they face in the trade-off and therefore, choose to proceed or discontinue the dispute process. Specifically, the partisan effect on welfare expenditures should affect the partisan government's decision on ruling process. The question of welfare expenditures in economic policy making traditionally relied on left-right partisan divide which the left-wing governments intervene in markets with redistributive policies to reduce economic inequality and the right-wing governments on the other hand, restricts market intervention and support policies based on neo-liberal agenda (Huber et al. 1993; Iversen and Cusak 2000). With the advent of globalization risks involving trade and investment, individuals who felt more economic insecurity liked his or her preference for welfare state expansion (Iverson and Soskice 2001; Walter 2010). Their demand for compensation led to preference and support for left parties and numerous studies have supported for this renowned "compensation hypothesis" (Allan and Scruggs; Boix 1998; Garrett 1998). Although some scholars have argued the end of partisan link between so called "the losers of globalization" and left-wing governments with the overwhelming systematic constraints from economic

globalization since the 1990s (Garrett and Mitchell 2001; Huber and Stephens 2001; Rodrik 2011), recent empirical evidence linking traditional partisan influence on welfare expenditures with the influence of various economic globalization risks still thrives across the developmental status of diverse countries (Burgoon 2012; Ha 2012; Jager 2017). Burgoon (2012), for example, finds that traditionally left parties such as social democratic or communist parties in advanced economies disproportionately represent those who experience economic insecurity from international trade and investment while other parties do less so and object domestic protection and welfare. Ha (2012) also finds similar partisan patterns in economic policies of developing economies, where leftist governments provide more active social protections to their populations while right-wing governments concentrate on providing more business-friendly environment.

Following this line of reasoning, I argue that such political ideologies of each partisan government possess extends to the area of foreign policy decisions where the governments weigh on the trade-off between preserving its authority on domestic market regulation for welfare purposes versus making business-friendly environment for foreign investors. The governments, therefore, decide whether to confront the arbitration claims until the ruling comes out or settles the dispute through embracing the request offered by the disputing investors. Left-wing governments, who emphasize the strengthening of welfare state and societal protections against the neo-liberal agenda should be more responsive to securing regulatory policies against the external pressures. This leads them to weigh the risk coming from public's regulatory demands more serious than promoting additional investment opportunity. Thus, leftist governments are more likely to reach the ruling stage than other partisan governments.

Right-wing governments on the other hand are more likely to settle the disputes. This is due to more intimate connection with foreign investors based on their political ideology. Research on state-business relations provides empirical evidence on such relationship between right-wing governments and foreign business actors (Bechtel 2009; Sattler 2013; Barta and Johnston 2018). One notable research done by Weymouth and Broz (2013) verifies this special type of right-wing business ties by surveying firm owners' perception of property rights under different partisan governments. The neo-liberal agenda which the right-wing governments embrace is what guides the close partisan ties between right-wing governments and foreign investors and therefore, enables higher chance of reconciliation during investor-state disputes than other partisan governments. To appease the upset foreign investors, incumbent right-wing executives are more likely to moderate regulatory ambitions by settling or discontinuing disputes since confronting the arbitration until the ruling stage is likely to be viewed as a defiance to the investors' preference. Even if their predecessors are the root cause of disputes, they are highly likely to hamper the will of the predecessors by discontinuing the litigation proceedings.

Some might argue that left-wing governments implement more investment friendly policies compared to right-wing governments as their core constituents of labor demand them to do so. This is because inward FDI stimulates the demand for more workers and these workers share rents with the foreign firms as the firms make profits (Pinto 2013). This may be true when the scope condition is limited to labor intensive sectors. However, left parties have diverse socioeconomic class foundations that are not solely confined to the workers' interests. For instance, Quinn and Inclan (1997) categorizes left-partisan supporters into two different groups where one group depends on government's social spendings in general and the other

group as unions representing worker groups. Investor-state dispute cases occur across diverse sectors in general and thus, the framing of each dispute event is more likely to provoke the former's partisan identity rather than the latter, subordinating to the classic partisan logic of welfare compensation incurred by economic globalization framework. Therefore, my theory of government ideology on investor-state disputes leads to a following hypothesis.

Hypothesis 1: *When host governments are faced with ISDS claims, right-wing governments are more likely to settle or discontinue the investment disputes compared to other partisan governments.*
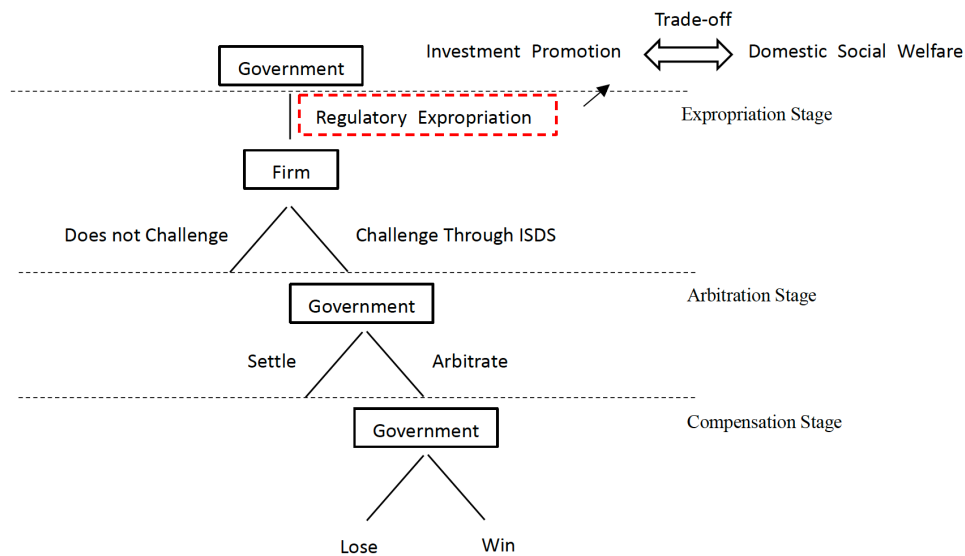
<Figure 3> Investor-state Dispute Process and Host Government's Trade-off

Chapter 4. Data, Measurement and Research Design

To evaluate the empirical relationship between host government's partisanship and the following outcome of regulatory disputes in ISDS, I have constructed a new dataset on investment disputes taking place due to host government's regulatory changes. First, I employed UNCTAD's Investment Dispute Settlement Navigator to collect information on the date which the dispute has initiated and ended, host and home country related to the dispute, status of the dispute, types of disputes and economic sector of the involved firms. However, UNCTAD does not provide detailed information on the summary of disputes and some cases are even left as blank for privacy issues. Such missingness on the information related to disputes, if not fixed, could critically bias the analysis of empirical results. Thus, I employed Investment Arbitration Reporter (IA Reporter)[8], Jus Mundi[9], and other secondary source of data such as local media reports to gather information on the specific contents of the disputes, correct dates for the misidentified cases and corresponding status in the current period.[10] Together, these works contribute to acquiring 733 concluded investment disputes cases from 1990 to 2020 and clearer justification on why we should focus on regulatory types of disputes rather than

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[8] https://www.iareporter.com/

[9] https://jusmundi.com/en

[10] Even with the help of other secondary sources, detailed summary of some cases (coded as NA (7%) in Figure 2) could not be obtained due to the arbitration rules which allow proceedings to be kept confidential with members' request. See more details related to transparency in ISDS on Hafner-Burton et al. (2016) and Hafner-Burton, Puig and Victor (2017).

traditional ones in the modern investment treaty regime.[11] As shown in Figure 2, regulatory disputes account for 75 percent of total cases (544 cases), whereas traditional type of disputes (i.e. disputes occurred due to direct expropriation of the government) which has received a major attention in previous ISDS literature only accounts for about 10 percent in total. This leads to reduced sample size of 544 cases in the analysis, but since I test the hypotheses in the context of democratic governments, my sample finalizes into covering 336 cases in total.[12]

Indirect Expropriation (74.0%)
Direct Expropriation (10.0%)
Others (9.0%)
NA (7.0%)

1 square = 10 cases

Arbitral Award (74%)
Settled or Discontinued (26%)

1 square = 5 cases
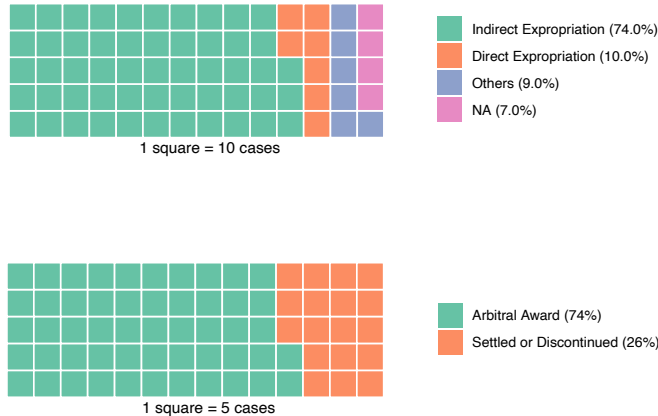
<Figure 4> Proportion of Dispute Types and the Following Results

Dependent Variable

My dependent variable is the outcome of each investor-state dispute cases taken from UNCTAD Investment Dispute Settlement Navigator. The dataset contains three separate categories of dispute outcome, each indicating whether the

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[11] The dataset includes one case that was concluded in the year 2022 (i.e. Westmoreland v. Canada). However, since the data availability of other exploratory variables are limited to 2020, I exclude this case from the analysis.

[12] I measure democracies as countries with a Polity score of 6 or above.

parties of the dispute have settled or discontinued a case or if not, then have reached a final ruling stage with an award stated. I recode this dataset into a binary variable of 1, if the dispute has reached a final ruling stage with a stated award and 0, if the dispute has settled or discontinued.[13] I bind settled and discontinued categories together since a discontinued case shares the same meaning of both parties establishing "focal points" for mutual expectations of withdrawing regulations and promoting further investment as with a settled case.[14] A representative example comes from the case of TransCanada v. the United States, where TransCanada filed a claim against the Obama administration for rejecting the company's proposed Keystone XL pipeline construction but soon after discontinued the case when the firm acknowledged that newly elected president Trump fully committed to advance the project through signing an executive order which contains the content of continuing the construction that was halted before.[15]

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[13] Pending cases were excluded since these cases do not contain specific information on the contents of the dispute, therefore beyond the scope of this paper.

[14] In a legal perspective, however, settled cases does differ from discontinued cases in that firms can obtain certain amount of monetary compensation through reaching an agreement with the host government (Bonnitcha, Poulsen and Waibel 2017).

[15] Geoffrey Morgan, "TransCanada Corp still 'fully committed' to Keystone XL, plans to engage with new president Trump", *Financial Post*, November 09, 2016. Available at:
https://financialpost.com/commodities/energy/transcanada-corp-plans-keystone-xl-pitch-to-new-president-trump-who-is-on-record-for-his-support
(Accessed: 2022. 02.26)
Tom DiChristopher, "Trump signs executive actions to advance Keystone XL, Dakota Access pipelines", *CNBC*, January 24, 2017. Available at:
https://www.cnbc.com/2017/01/24/trump-to-advance-keystone-dakota-pipelines-with-executive-order-on-tuesday-nbc.html
(Accessed: 2022.02.26)

Independent Variable

The explanatory variable I use for the host government's partisanship is a party orientation data from the Database of Political Institutions (DPI) compiled by Scartascini, Cruz, and Keefer (2017). This variable perfectly suits testing my hypothesis since it defines partisanship in a strictly economic term as I have theorized in the previous section. I recode this variable into a binary dummy variable where 1 stands for right wing executives in control of the government and 0 when other party executives are in control of the government (including centrist-party governments).[16]

Control Variables

I estimate my models using six different sets of control variables. These sets of variables follow the logic from the previous findings. First, variables that are related to host countries' developmental status include a LOGGED GDP PER CAPITA and GDP GROWTH. Both variables are taken from the World Developmental Indicators.[17] I also include FDI INFLOW from the same dataset to see how host governments with different backgrounds of investment inflow would react to such disputes in the shadows of reputational crisis. Next, in a political

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[16] I also recoded this variable into two different types of variables to test as a robustness check. First type of category includes all three different party dummies which are left, right, and central government and exclude cases with no information on the executive's economic partisanship although the executive exists as a head of government. The second type of variable is a binary dummy variable of right-wing government as a main category but excludes cases with no information on the executive's economic partisanship. This measurement excludes 64 observations. Results are significant with p-value below 0.05 and consistent with the main result. See the robustness check section below for the detailed description of the tables.

[17] https://datatopics.worldbank.org/world-development-indicators/

perspective, I add WGI REGULATION from World Governance Indicators dataset.[18] This variable helps me to test how the host government's regulatory environment overall affects an investment dispute outcome. In addition, I include IDEALPOINT DISTANCE from Bailey, Strezhnev, and Voeten (2017) as a measure of how closely the home and the host government in the disputed parties voted in the UN general assembly. I also include DIVIDED GOVERNMENT from the Database of Political Institutions (2017). Lastly, I include host countries' cumulative ISDS experience before the current event of investor-state dispute.[19] All variables except the duration of disputes are lagged a year to prevent endogeneity problems as well as post-treatment bias followed by the similar logic presented in Berge and Berger (2021).

Model Specification

I use logistic regression for modeling the probability of my binary dependent variable given the set of explanatory variables. The following equation is expressed below.

$$\text{logit}(p_{ijrt}) = \log\frac{p_{ijrt}}{1-p_{ijrt}} = \beta Partisanship_{it} + Z_{it} + u_r + v_j + \epsilon_{ijrt} \qquad (1)$$

where p_{ijrt} is the probability that the dispute case ends with arbitral ruling, *i* indexes host governments in disputes, *j* indexes industries of the claiming companies, *r*

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[18] http://info.worldbank.org/governance/wgi/

[19] Amount claimed by investors in million US$ is also included as a control variable in the robustness check section. However, due to the data loss, I did not include this variable as my main models.

indexes continent regions of the host governments, t indexes years. Z_{it} is a set of control variables that have been already described in a previous section, u_r is host fixed effects, v_j is industry fixed effects, and finally ϵ_{ijrt} is an error term.

I include regional-level fixed effects to account for unobserved region-specific incidents such as different incentives which foreign investors have when suing the region with rich host countries compared to developing economies (Wellhausen 2019).[20] I also include industry-level fixed effects in some models with and without region fixed effects to account for biases given that industry related characteristics are crucial in affecting the dispute outcomes. Standard errors are clustered by region.

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[20] To add, since investment disputes do not occur in regular cycles, some of the host countries do not pertain enough number of clusters to apply a country-level fixed effects.

Chapter 5. Quantitative Evidence

5.1. Main Results

Table 1 provides summary information of all the observations in my sample. On average, 74 percent of disputes were finalized with the stated award, and right-wing governments comprised about 33 percent of entire cases when the timing of disputes reached an end. Lastly, we see that regulatory disputes took 3.85 years on average to reach and end either through settlement and discontinuance or arbitral ruling.

Variables	Mean	Median	Max	Min
Dependent Variable				
Arbitral Ruling	0.74	1.00	1.00	0.00
Main Independent Variable				
Right Wing Government	0.33	0.00	1.00	0.00
Controls				
GDP per Capita (logged)	9.06	9.21	10.97	5.52
GDP Growth (annual %)	2.88	2.85	13.17	-14.76
FDI Inflow (billion $US)	2.00	0.65	47.44	-6.44
WGI Regulatory Quality	0.35	0.41	1.90	-1.11
Ideal Point Distance	1.09	0.95	3.47	0.00
Divided Government	0.66	1.00	1.00	0.00
Duration (year)	3.85	3.00	15.00	0.00
Number of ISDS Experience	18.15	11.00	60.00	1.00
Amount Claimed (million $US)	516.32	100.00	19000.00	0.04

<Table 1> Descriptive Statistics

Moving on to the results table, Table 2 describes the estimates of the equation (1) where I regress the probability of investment disputes that would end with arbitral ruling on the economic partisanship of the government with control variables. The results from columns (1) through (5) indicate that being a right-wing government has a negative and highly significant effect on the log odds of disputes reaching a tribunal ruling. In other words, right-wing governments have lower

probability of reaching a final ruling compared to other partisan governments. In addition, the results are consistent and even stronger when fixed effects (column 2-3 – region fixed effects, column 4 – industry fixed effects, and column 5 – two-way fixed effects) are adjusted and standard errors are clustered at region–year level (column 3-5), compared to the model with no fixed effects (column 1). These findings imply that my key explanatory variable is not correlated with any of the time invariant differences across continental regions as well as industry sectors.

My analysis of control variables is even consistent with previous findings. To explain some of the variables, we see that as host countries have more FDI inflows from the MNCs, they are highly likely to settle the disputes compared to those that do not rely on (Kerner and Pelc 2021). In addition, host governments who hold close ties with the home governments prefer to conclude disputes with settlement than a ruling from a formal institution (Lee 2019).

	Dependent variable:				
	Arbitral Ruling				
	(1)	(2)	(3)	(4)	(5)
Right Wing Government	−0.721**	−0.951***	−0.951**	−0.807**	−0.980**
	(0.321)	(0.346)	(0.482)	(0.400)	(0.425)
GDP per Capita (logged)	0.031	−0.020	−0.020	0.089	0.148
	(0.213)	(0.254)	(0.434)	(0.284)	(0.392)
GDP Growth	−0.002	−0.028	−0.028	0.023	−0.0001
	(0.042)	(0.046)	(0.018)	(0.029)	(0.026)
FDI Inflow (billion US)	−0.070**	−0.045	−0.045***	−0.069***	−0.045***
	(0.028)	(0.028)	(0.011)	(0.007)	(0.010)
WGI Regulation	0.892**	0.764**	0.764	0.948**	0.620
	(0.356)	(0.373)	(0.621)	(0.433)	(0.583)
Ideal Point Distance	0.057	0.442**	0.442***	0.124	0.572***
	(0.159)	(0.197)	(0.082)	(0.253)	(0.112)
Divided Government	−0.175	−0.354	−0.354	−0.070	−0.317*
	(0.315)	(0.342)	(0.373)	(0.129)	(0.161)
Duration of the Dispute (year)	0.181**	0.225***	0.225***	0.208**	0.248**
	(0.075)	(0.077)	(0.060)	(0.090)	(0.105)
Constant	0.158	−1.052	−1.052	15.848	13.528
	(1.777)	(2.052)	(3.563)	(2.413)	(3.484)
Region	No	Yes	Yes	No	Yes
Sector	No	No	No	Yes	Yes
Clustered SE?	No	No	Yes	Yes	Yes
Observations	271	271	271	271	271
Akaike Inf. Crit.	321.159	312.730	312.730	323.413	314.305

Note:	*p<0.1; **p<0.05; ***p<0.01

<Table 2> Effects of government partisanship on the probability of arbitral

ruling

Next, I standardized the estimates of main models (i.e. model (3) and model (5)) and drew a box and whisker plot to effectively deliver the interpretation of the coefficients. Red dots in Figure 5 indicate negative coefficients which are odds ratio below 1, whereas blue dots indicate positive coefficients (odds ratio above 1). Right-wing governments' odds of dragging the dispute until the arbitral ruling are 61% smaller than the left-wing governments. The outcome is similar (62%) when both

region and industry fixed effects are added to the model. This provides direct evidence for my hypothesis that right-wing governments are more likely to settle or discontinue the disputes compared to other governments. Their strategic decision-making process follows the partisanship mechanism and therefore place more importance on investment promotion in the trade-off when compared with preserving social welfare through regulatory autonomy.

<Figure 5> Odds ratios for arbitral ruling given explanatory variables (Model 3)

Arbitration Ruling (binary logit)

<Figure 6> Odds ratios for arbitral ruling given explanatory variables (Model 5)

5.2. Robustness Check

Although all of my models are statistically significant with p-value below 0.05, the effect might not be stable if the scales of my main independent variable changes or additional confounding variables come in to influence the relationship between the independent and dependent variable. I deal with this problem, step by step in this section.

Regarding the scale of my independent variable, as my main regression result draws from the partisan variable with a binary indicator problems can be raised whether appropriate partisan governments are included in the reference category and whether the measurement follows the theoretical argument I have set up. Thus, I ran additional regression models with different scales of measurements. First, I test the model with a same partisan variable in the DPI dataset but excludes observation that

has no partisan information of the government. This excludes 64 additional observations in the analysis. Results are shown in Table 3 with effect size and statistical significance consistent with the main result.

	Dependent variable:				
	Arbitral Ruling				
	(1)	(2)	(3)	(4)	(5)
Right Wing Government	−0.693*	−0.999**	−0.999**	−0.740**	−0.996***
	(0.371)	(0.447)	(0.470)	(0.309)	(0.344)
GDP per Capita (logged)	−0.014	−0.179	−0.179	0.100	0.008
	(0.265)	(0.305)	(0.390)	(0.197)	(0.303)
GDP Growth	0.006	−0.039	−0.039	0.029	−0.029
	(0.056)	(0.062)	(0.050)	(0.041)	(0.034)
FDI Inflow (billion US)	−0.082***	−0.055*	−0.055***	−0.083***	−0.061***
	(0.030)	(0.031)	(0.015)	(0.013)	(0.014)
WGI Regulation	1.182***	1.110**	1.110***	1.192***	0.898***
	(0.416)	(0.437)	(0.372)	(0.251)	(0.328)
Ideal Point Distance	0.103	0.537**	0.537***	0.211	0.627***
	(0.188)	(0.238)	(0.175)	(0.202)	(0.177)
Divided Government	−0.283	−0.446	−0.446	−0.186	−0.377***
	(0.356)	(0.392)	(0.340)	(0.162)	(0.106)
Duration of the Dispute (year)	0.194**	0.232**	0.232***	0.194**	0.214**
	(0.089)	(0.091)	(0.052)	(0.084)	(0.086)
Constant	0.376	−0.902	−0.902	15.579***	14.643***
	(2.304)	(2.622)	(3.471)	(2.449)	(2.439)
Region	No	Yes	Yes	No	Yes
Sector	No	No	No	Yes	Yes
Clustered SE?	No	No	Yes	Yes	Yes
Observations	207	207	207	207	207
Log Likelihood	−116.126	−108.659	−108.659	−101.855	−95.262
Akaike Inf. Crit.	250.252	241.318	241.318	253.710	246.524

Note: *p<0.1; **p<0.05; ***p<0.01

<Table 3> Probability of arbitral ruling with alternative partisanship measure

To account for theoretical justification of why left governments are more likely to confront arbitration with foreign investors compared to the right-wing

governments, I separate the binary dummies into three different nominal scale. Thus, the re-scaled dummy variable includes left-wing governments, centrist-party governments, and right-wing governments. This allows direct comparison of the partisan effect between left-wing and right-wing governments on the probability of arbitral ruling. As can be seen from Table 4, compared to right-wing governments, left-wing governments are more likely to confront arbitration until the final ruling comes out (with positive log-odds coefficient) and two-way fixed effects model (i.e. model 5) is significant with p-value below 0.05. But even with the effort of showing clear statistical evidence to reveal the relationship between the government's partisanship and the arbitration outcome, the causal path underpinning the findings still depends upon its theoretical conjecture. Thus, in the following section, I show why these right-wing (or left-wing) governments are likely to settle more often compared to other types of governments with two confirmatory cases.

In case of confounding effect which could critically bias the main models I have presented, I added two important variables that relate to my independent and dependent variables. First, I added the number of past ISDS experiences that the host country has experienced prior to the one that is ongoing at the moment. This could seriously bias the current government's decision on arbitral ruling since the hosts learn from their past ISDS experiences and strategically cope with them afterward (Poulsen and Aisbett 2013). In addition, I also included amounts claimed by the investors. This is due to the seriousness of disputes which the hosts could weigh on when they are claimed by the investors. Thus, if the investors claim large amounts to the host government, then it might be hard for the host to reject the settlement offered by the investors afterward. Results shown in Table 5 indicate that my argument is robust even with the additional control variables.

| | Dependent variable: | | | | |
| | Arbitral Ruling | | | | |
	(1)	(2)	(3)	(4)	(5)
Left Wing Government	0.731*	1.198**	1.198*	0.870*	1.291**
	(0.405)	(0.497)	(0.683)	(0.512)	(0.603)
Centrist Party Government	0.594	0.566	0.566	0.408	0.337
	(0.547)	(0.605)	(1.075)	(1.032)	(1.104)
GDP per Capita (logged)	−0.024	−0.219	−0.219	0.067	−0.031
	(0.269)	(0.311)	(0.478)	(0.281)	(0.403)
GDP Growth	0.004	−0.050	−0.050*	0.026	−0.043
	(0.056)	(0.063)	(0.028)	(0.044)	(0.036)
FDI Inflow (billion US)	−0.082***	−0.054*	−0.054***	−0.084***	−0.061***
	(0.030)	(0.030)	(0.016)	(0.013)	(0.016)
WGI Regulation	1.197***	1.162***	1.162**	1.244***	0.969**
	(0.421)	(0.447)	(0.526)	(0.336)	(0.476)
Ideal Point Distance	0.104	0.571**	0.571***	0.215	0.679***
	(0.188)	(0.241)	(0.146)	(0.222)	(0.143)
Divided Government	−0.272	−0.403	−0.403	−0.134	−0.296*
	(0.359)	(0.397)	(0.429)	(0.224)	(0.172)
Duration of the Dispute (year)	0.193**	0.229**	0.229***	0.193**	0.212**
	(0.089)	(0.091)	(0.057)	(0.089)	(0.094)
Constant	−0.228	−1.659	−1.659	15.133***	13.750***
	(2.261)	(2.675)	(4.350)	(3.086)	(3.174)
Region	No	Yes	Yes	No	Yes
Sector	No	No	No	Yes	Yes
Clustered SE?	No	No	Yes	Yes	Yes
Observations	207	207	207	207	207
Log Likelihood	−116.096	−108.148	−108.148	−101.603	−94.403
Akaike Inf. Crit.	252.192	242.297	242.297	255.206	246.805

Note: $^{*}p<0.1$; $^{**}p<0.05$; $^{***}p<0.01$
reference dummy = right-wing government

<Table 4> Comparing the partisan effect between left-wing and right-wing governments

	Dependent variable:			
	Arbitral Ruling			
	(1)	(2)	(3)	(4)
Right Wing Government	−0.682***	−0.755***	−0.738**	−0.885**
	(0.226)	(0.273)	(0.354)	(0.360)
GDP per Capita (logged)	0.550	0.467	0.444	0.426
	(0.739)	(0.875)	(0.656)	(0.871)
GDP Growth	0.003	0.006	0.015	0.011
	(0.044)	(0.051)	(0.055)	(0.057)
FDI Inflow (billion US)	−0.073***	−0.052***	−0.069***	−0.048***
	(0.012)	(0.012)	(0.015)	(0.008)
WGI Regulation	−0.191	−0.251	0.097	−0.024
	(0.735)	(0.879)	(0.536)	(0.819)
Ideal Point Distance	0.076	0.498*	0.205	0.666***
	(0.225)	(0.257)	(0.217)	(0.225)
Divided Government	0.068	−0.134	0.142	−0.106
	(0.154)	(0.181)	(0.308)	(0.312)
Duration of the Dispute (year)	0.366***	0.398***	0.349***	0.380***
	(0.095)	(0.091)	(0.089)	(0.095)
Number of Dispute Experience	−0.025	−0.029	−0.015	−0.012
	(0.020)	(0.023)	(0.021)	(0.020)
Amount Claimed (US Million)	0.00002	0.00002	0.0001	0.0001
	(0.0001)	(0.00004)	(0.0001)	(0.0001)
Constant	−4.182	−4.722	14.021**	12.369*
	(6.400)	(7.368)	(5.991)	(7.243)
Region	No	Yes	No	Yes
Sector	No	No	Yes	Yes
Observations	201	201	201	201
Log Likelihood	−93.903	−88.715	−86.402	−81.535
Akaike Inf. Crit.	209.806	205.430	226.803	223.071

Note: $^{*}p<0.1$; $^{**}p<0.05$; $^{***}p<0.01$

<Table 5> Number of dispute experiences and the amount claimed by investors added model

Chapter 6. Qualitative Evidence: Case of the United States and Argentina

Given the limitations of applying quantitative research method for probing causal relationship between my explanatory variable and the outcomes of interests, I additionally provide qualitative evidence to justify the relationship described in the hypothesis. I gather and examine the evidence from the compilation of primary and secondary sources, including original decisions made by ICSID, specialized media reports, published articles by relevant experts, and government's record of decision and presidential speech. I select two diverse cases from the United States and Argentina's investor-state dispute for two purposive reasons following the classification provided by Seawright and Gerring (2008). First, these cases are confirmatory in that they reveal a single causal pathway as my hypothesis presents despite the full range of variations between the outcomes of investment disputes and different partisanship background of the governments. Second, the following cases are also exploratory in that they are chosen from the range of both extreme values of my interest variables in the empirical dataset. Theoretically, the logic of partisanship should affect the government's decision-making process more effectively in the democratic environment since democratic leaders face more political risks than autocratic leaders when they face trade-off between preserving regulatory autonomy and promoting foreign investments. However, the cut-off points for the democratic countries in this research followed the Polity score of equal to or above 6. Thus, I seek to explore the alternative plausibility of my hypothesis with host countries of various democratic backgrounds covering most solid case of United States (10) and

moderate level case of Argentina (ranging from 7 to 9). In addition, these two cases each represent developed and developing economic status which the latter case is predicted to be more vulnerable in making a bold decision when dispute is in place. The results, however, are all confirmative and illustrative to my argument.

I now turn to more detailed within-case evidence of each investor-state disputes belonging to different groups of democratic level as well as economic development with the goal of exploring how a right-wing executive's decision-making process (the United States) lead to a higher probability of settlement in investment disputes, and a left-wing executive (Argentina) leading to higher probability of arbitral ruling.

TransCanada v. the United States

In June 2016, TC Energy Corporation (formerly TransCanada Corporation) headquartered in Canada filed an ISDS claim under NAFTA demanding $15 billion for compensating the breach of US government to reject the previous bid of building a pipeline.[21] A story behind the claim was controversial given the large debate regarding pipeline construction over the society. Up to 12,000 people demonstrated outside the White House against building the pipeline, whereas the oil industry, construction related unions and the Canadian government lobbied in favor of the project.[22] Both chambers of congress approved the project when the Senate passed a

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[21] Tucker Todd, "TransCanada is Suing the U.S. over Obama's Rejection of the Keystone XL Pipeline. The U.S. Might Lose", *The Washington Post*, January 8, 2016. Available at: https://www.washingtonpost.com/news/monkey-cage/wp/2016/01/08/transcanada-is-suing-the-u-s-over-obamas-rejection-of-the-keystone-xl-pipeline-the-u-s-might-lose/ (Accessed 13 March 2022)

[22] Eilperin, J., & Mufson, S, "Obama administration rejects Keystone XL pipeline", *Washington Post*, *18*. January 18, 2012. Available at: https://www.washingtonpost.com/national/health-science/obama-administration-to-reject-keystone-pipeline/2012/01/18/gIQAPuPF8P_story.html

bill called the Keystone Pipeline Approval Act on January 29, 2015 and The House of Representatives soon approved Senate bill to build a pipeline through a 270 to 152 vote on February 11, 2015 then forwarded the bill to the president.[23] However, President Obama vetoed the Act.[24] The reason behind Obama's decision was two-folded. Fist, that the pipeline construction could cause severe environmental, safety, and public health problems and second, that the project does not serve the national interest of the United States considering its marginal economic benefit in the long-term.[25] Before making a presidential speech to express his opinion on the issue, President Obama continuously sought for consultation with the public as well as other agencies.[26] Environmental Protection Agency (EPA) especially advised President Obama that the tar sands oil which the pipeline would carry from the Canada would severely damage to the climate. In consequence, Obama decides to reject the project for "symbolic reasons, not because of the merits."[27] As can also be witnessed in his official statement on the project.

(Accessed date 14 March 2022)

[23]Complaint at 11, TransCanada Keystone Pipeline, LP & TC Oil Pipeline Operations Inc. v. John F. Kerry, Secretary of the Department of State; et al, *U.S. Chamber of Commerce Litigation Center,* January. 6, 2016. (No.4:16-cv-00036).

[24] IBID. at 16.

[25] Barrack Obama, "Statement by the President on the Keystone XL Pipeline," *The White House*, November 6, 2015. Available at:
https://obamawhitehouse.archives.gov/the-press-office/2015/11/06/statement-president-Keystone-XL-pipeline
(Accessed 14 March 2022)

[26] Goldenberg, S., & Roberts, D, "Obama rejects Keystone XL pipeline and hails US as leader on climate change," *The Guardian*, November 6, 2015. Available at:
https://www.theguardian.com/environment/2015/nov/06/obama-rejects-keystone-xl-pipeline
(Accessed 14 March 2022)

[27] TransCanada Corporation & TransCanada PipeLines Limited v. The Government of the United States of America, Notice of Intent, January 6, 2016. Available at:

https://jusmundi.com/en/document/pdf/other/en-transcanada-corporation-and-transcanada-pipelines-limited-v-united-states-of-america-notice-of-intent-to-submit-a-claim-to-arbitration-under-chapter-11-of-nafta-wednesday-6th-january-2016

(Accessed 14 March 2022)

The Point is… We couldn't promote economic growth and protect our environment at the same time… The pipeline would not make a meaningful long-term contribution to our economy. So if Congress is serious about wanting to create jobs, we should be passing a bipartisan infrastructure plan and keep those jobs coming.[28]

The Obama administration also showed a firm attitude after the cabinet was being sued by TransCanada. When a journalist asked about the government's reaction to TransCanada suing over the pipeline project, a principal deputy press secretary Eric Schultz answered with the following statement.

We don't comment on pending litigation or arbitration. But I do know that State Department determined that the Keystone XL pipeline did not serve the national interest. And we're confident that this determination is entirely consistent with all of our domestic and international obligations…. We're confident that will be upheld.[29]

However, with the advent of new right-wing incumbent president Donald Trump came into office in 2017, the dispute was discontinued without delay. Trump signed an executive order to approve the project he issued just two days after taking

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[28] IBID at 21.

[29] Eric Schultz, "Press Briefing by Principal Deputy Press Secretary Eric Schultz," June 6, 2016. Available at:
https://obamawhitehouse.archives.gov/the-press-office/2016/06/27/press-briefing-principal-deputy-press-secretary-eric-schultz-62716
(Accessed 15 March 2022)

office.[30] He evinced his position on the controversial project as he invited the CEO of TransCanada Russel K. Girling to the Oval Office of the White House to make an announcement of official approval of the presidential permit for the Keystone XL Pipeline.

> Today, we begin to make things right and to do things right. Today we take one more step in putting the jobs, wages, and economic security of American citizens first…. This is just the first of many energy and infrastructure projects that my administration will approve in order to help put Americans back to work, grow our economy and rebuild our nation.[31]

Soon after the announcement, TransCanada CEO announced that the company will drop the $15 billion NAFTA complaint which it has filed last year special thanks to the President Trump's administration for approving the project.[32]

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[30] Timothy Gardner, Eric Breech, "Trump tries fresh approach with long-delayed Keystone XL pipeline," *REUTERS,* March 30, 2019. Available at:
https://www.reuters.com/article/us-usa-oil-transcanada-trump-idUSKCN1RA2DG,
Ethan Lou, "TransCanada's $15 billion U.S. Keystone XL NAFTA suit suspended," *REUTERS*, March 1, 2017. Available at:
https://www.reuters.com/article/us-canada-pipeline-lawsuit-idUSKBN1671W1
(Accessed 15, March 2022)

[31] Donald Trump, "Remarks by the President in TransCanada Keystone XL Pipeline Announcement," *The White House,* March 24, 2017. Available at:
https://trumpwhitehouse.archives.gov/briefings-statements/remarks-president-transcanada-keystone-xl-pipeline-announcement/
(Accessed 15, March 2022)

[32] Ben Lefebvre, "Trump administration greenlights Keystone Pipeline," *Politico*, March 24, 2017. Available at:
https://www.politico.com/story/2017/03/trump-administration-approves-keystone-xl-236456
(Accessed 15, March 2022)

The clear distinction between Trump and Obama's attitude towards the dispute with TransCanada shows how each executive place more weigh on the decision between promoting investment opportunity and preserving social welfare through regulation. Their decisions are clearly reflected in the dispute outcome where the arbitration proceeded until the end of the Obama's term and soon became discontinued after the Trump's presidential speech.

Aguas Argentina S. A. v. Argentina

Whereas the time frame of the dispute process in the United States case started from the left-wing government and terminated by right-wing government's decision, the case of Argentina will be delivered in the opposite direction. However, its theoretical prediction remains the same, providing more detailed mechanism in the left-wing executive's case.

Aguas Argentina S. A. (AASA), operated by three joint corporations of Suez and Vivendi Universal (based in France), Sociedad General de Aguas de Barcelona (Spain), and AWG Group (the United Kingdom) started to provide water and wastewater services in Argentina during the presidency of right-wing executive, Carlos Menem (1989-1998). To solve hyperinflation, Menem introduced Currency Convertibility Plan in 1991 which liberalized Argentina's investment market (Calvert 2018). He aimed to attract foreign investment into utilities sector to reduce the government spending and it was during this period that AASA made a concession contract with the government. During the initial period of operations, customer service in both water and sewage treatment improved.[33] However, the company

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[33] See Suez, Sociedad General de Aguas de Barcelona S. A. and Vivendi Universal S. A. v. the Republic of Argentina, Decision on Liability, ICSID Case No. ARB/03/19, pp. 15–17.

accelerated a series of tariff increases in return of commitment to infrastructure upgrades which added up to increased amounts of 13.5 percent in 1994 (Schiffler 2015). Contrast to the verbal commitment, however, no infrastructure upgrade was made and unrefined sewage system soon exacerbated environmental and public health problems (Vilas 2004).

In the end of 1990s, an economic shock in Argentina rapidly deteriorated its economic instability. The series of shocks manifested a re-assessment of Menem's privatization policies which had dismantled most of traditional social protections. Nestor Kirchner, a left-wing executive, was elected in this political climate. Along with the advent of left-wing executive, AASA soon filed an investment arbitration against Argentina for the measures of freezing utility rates. Although the measures were initially implemented in the previous emergency government for the purpose of protecting public livelihood during the crisis, Kirchner's attitude towards renegotiating the terms of contract with AASA was uncompromising even after the economic recovery was made in part. Kirchner's hardline approach towards AASA's ISDS claim was due in part to his partisan background. His stance toward international capital was hostile in general and he committed to his regulatory measures that are related to citizen concerns such as human rights and public health.[34] Thus, Kirchner's decision to terminate the contract and proceed the dispute against AASA before ICSID tribunal was buttressed by the public opposition to the AASA company, but at the same time, the probability of settling dispute became less likely, which ultimately led to a determination of the merits by an arbitration tribunal (Post and Murillo 2013).

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[34] See Wylde (2011) for more details on Kirchner's relations with international capital.

Argentina's case shows how and why a left-wing executive reaches a decision of continuing the arbitration process despite the source of dispute (i.e. economic crisis in Argentina) partly solved during his presidency. Also, the company's importance of providing the benefit of investment inflows in utility sector did not work as an attractive alternative for making a concession. The reason behind such an irreconcilable dispute with AASA was due to a Kirchner's partisanship color which guided him to take a hardline stance towards foreign investors and to be committed on regulating firm's policies for the national sovereignty and public health.

Chapter 7. Conclusion

Why would some host governments choose to fight against the investors until the rulings are made, whereas others prefer to settle during the disputes? This is puzzling given an obvious disadvantageous position the host government is placed , as the government not only spends tremendous amounts of litigation costs for defending the case but also experience a frustration of domestic sovereignty when dispute takes place. However, studies have overlooked host governments' motivations behind these conflicts even though the uneven playing field has yielded some host countries to backlash against ISDS (Peinhardt and Wellhausen 2016). Literature have only sought firms' motivations behind arbitration in that firms' outsized leverage in deterring the adverse regulation came into as an attractive source of answering why regulatory disputes have surged in recent decades.

Although attractive, looking at only a slice of certain actor can create shortages in explaining the diverse patterns of dispute outcomes. In this paper, I seek to solve the shortages by focusing on the respondent side strategies in investor-state disputes. Especially, I have argued that host government's partisanship plays a key role in its decision-making process. Although democratic governments hold accountable for protecting public interest and therefore implement regulatory policies on foreign companies, they lack in understanding how firms are going to react on the corresponding regulation until they are able to observe a clear signal from the firms (e.g. notice of arbitration through ICSID). Thus, the governments' calculation starts after they are being sued. When the host governments get challenged by the investors for the regulation they have implemented, the hosts face a trade-off between investment promotion and preserving domestic social welfare.

In this situation, right-wing parties weigh more importance on the former choice and tries to settle or discontinue the litigation as possible. Thus, the credible commitment of observing the purpose of ISDS and returning to the cooperative relationship after the dispute takes place becomes more viable to the right-wing governments compared to other partisanships. The following implication also suggests a pathway for firms on how they can strategically approach the investor-state disputes. Firms can strategically delay the timing of arbitration based on the electoral cycle of host countries until they encounter the government with favorable partisan ideology since these governments can save the firms' litigation costs with high chance of settlement and at the same time make the regulation environment more favorable.

Avenues for future research also remain fruitful. I have assumed that democratic governments calculate their cost and benefit strategies once they observe a visible threat of ISDS claims from foreign investors. However, as my argument critically hinges on the observable cases of investor-state disputes, my argument still rests on the possibility of selection bias. Cases could be driven by selection where governments have survived from the firms' threats in the shadows of litigation.[35] Future research should, therefore, engage in further data collection of cases proceeding behind the doors of official arbitration process to overcome the shortage in this paper. Studies could also interview the related officials so to verify the government's fixed intention despite frequent threats from the firms in dispute process. Besides from the selection bias problem, future studies could also test how

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[35] An interview of a top lawyer for the Czech Republic's Ministry of Finance supports the sentence with a remark of "every day I get a threat… we have to review the risks, and the size of the claim to minimize the costs of the state". Chris Hamby. "The Secret Threat That Makes Corporations More Powerful Than Countries", *BuzzFeed News*, August 30, 2016. Available at: https://www.buzzfeednews.com/article/chrishamby/the-billion-dollar-ultimatum (Accessed: 2022.01.13)

much democratic executives' ideological preferences are insulated from the regime's accountability mechanism when they make foreign policy decisions. Until today, investor-state disputes were regarded as somewhat more elite-related decision which the public's attention didn't come by. However, as the characteristic of dispute has changed to more of a public-related issues, government's foreign policy decisions related to investment disputes have now become a newspaper topic. Thus, there exists a possibility of audience costs in this topic which could critically affect the government's strategies whilst the disputes are ongoing. With the growing importance of investor-state disputes in government's foreign policy decisions, my research may play a leading role in predicting dispute outcome and possible state-business relationship in this bargaining framework.

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국문 초록

투자자-국가 분쟁 시 왜 일부 소송은 중재판정 결과가 나오기 전에 해결되는가? 본 논문은 투자유치국의 국내정치(domestic politics) 특성, 특히 행정부 지도자의 당파성(executive partisanship)에 입각하여 베일에 가려져 있는 투자자-국가 분쟁해결 과정과 그에 따른 상이한 결과들을 설명한다. 투자자의 중재신청 이후 투자자와의 합의(settlement)를 통해 해결한 분쟁양상은 높은 확률로 다른 정부에 비해 우파 정부에서 더 두드러지는데 그 이유는 소송 당한 정부가 맞서는 공익 수호와 투자유치기회 사이의 상충관계(trade-off relationship)에 있다. 구체적으로, 본 논문에서는 친 기업 성향을 띄는 우파 정부 특성상 분쟁 과정에서 투자자와 합의를 할 가능성이 더 높을 것이라고 예상한다. 그 이유는 합의를 통해 화가 난 투자자를 달래어(appease) 추가적인 투자유치 기회손실을 줄이고 투자유치국의 명성을 유지하기 위함에 있다. 이에 반해, 좌파 정부의 경우 투자자와 합의를 맺을 가능성은 낮고 중재(arbitration) 결과에 상관 없이 분쟁을 끝까지 끌고 갈 가능성이 높다고 예상하는데 이는 투자자와 합의를 하는 행위가 이들로 하여금 당파적으로 좌파의 역할에 가까운 정부의 공익 수호 의무를 외면하고 투자자들의 이익 창출 행위 요구에 순응하는 결과를 야기하기 때문이다. 본 논문은 유엔무역개발회의(UNCTAD Investment Dispute Settlement Navigator)에서 제공하는 정보를 기반으로 만든 독창적 데이터(original data)를 이용하여 투자유치국의 당파성에 따른 상이한 분쟁 결과 가능성을 경험적으로 검증한다. 추가적으로, 두 가지 대표적인 투자자-국가 분쟁 사례들을 근거로 제시하여 본 논문의 가설이 제시하는 단일 인과 경로를 입증해 보인다.