

Choosing the Right Court: Forum Shopping for Litigating International Investment Disputes

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Abstract

With increased transnational investment activities, multinational firms and states find their interests conflicted and decide to litigate disputes in international investment disputes courts. Given that there are multiple venues to settle international investment disputes, which court do firms and governments choose and why? We argue that investors tend to choose a system to maximize their interests, and thus consider characteristics of the respondent country and the characteristics of industries that they included. We empirically find that investors tend to proceed with ICSID rule when respondent countries have less direct control their economy and when home and respondent ties are weak.

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1. Introduction

Investor-state dispute settlement (ISDS), in which investors can directly sue host countries to international organizations to mediate disputes, is the most prominent institutional tools to regulate international investment based on a web of bilateral investment treaties (BITs) and Free trade agreements (FTA) (Bonnitcha et al., 2017).

First appearing under a bilateral trade agreement between the Netherlands and Indonesia signed in 1968, ISDS has gradually increased over the last two decades. By the end of 2022, 1,257 cases have been filed of which some have been completed while others are still ongoing. Of the 1257 cases filed thus far, not all cases are filed in a single dispute settlement system. Rather, foreign investors could choose one among a variety rules from investment disputes to commercial disputes in ISDS provisions. This is because of ISDS's decentralized mechanism, that is, it is based on agreements made by each country, not a unified international organization. Especially, investors can choose which rule to proceed when filing an ISDS. As a result, the role of investors is very important when ISDS is happened in terms of they have right to choose any rules to proceed with investment disputes.

This study aims to examine what factors is an important determinant in the process of investors choosing arbitrator rules for ISDS, focusing on the forum shopping theory. Specifically, this study argues that investors tend to choose a system to maximize their profits, that is, to compensating their property by winning the dispute settlement or changing the policy of the host countries, and thus it makes investors consider the characteristics of the ISDS rules when file ISDS. In this article, we argue that the characteristics of the industry that file ISDS affect arbitration rule selection. Among them, the mobility of the industry is related to the way the investor earns profits and losses in the host country, so this will also have a great influence on the incentive to choose ISDS rule. Specifically, industries with low

mobility will prefer ICSID, and industries with high mobility will prefer non-ICSID.

To empirically examine these arguments, this study conducts an analysis using the ISDS data containing all cases filed during the period from 1987 to 2022. To examine which ISDS venues are utilized, we run a series of logistic regressions. We find that investors tend to proceed with ICSID rule when respondent countries have less direct control their economy and when home and respondent ties are weak.

This paper is composed of the following. First, section 2 show process of ISDS and explore characteristics of each rule for ISDS and in section 3 presents a hypothesis about why investors choose the rule for their investment dispute settlement. After that, section 4 presents a research design to verify the hypothesis, and then the analysis results. Finally, section 5 summarizes the results of this study and presents implications.

2. Puzzle: Competing Regimes in Investor-State Dispute Settlement

Process of ISDS

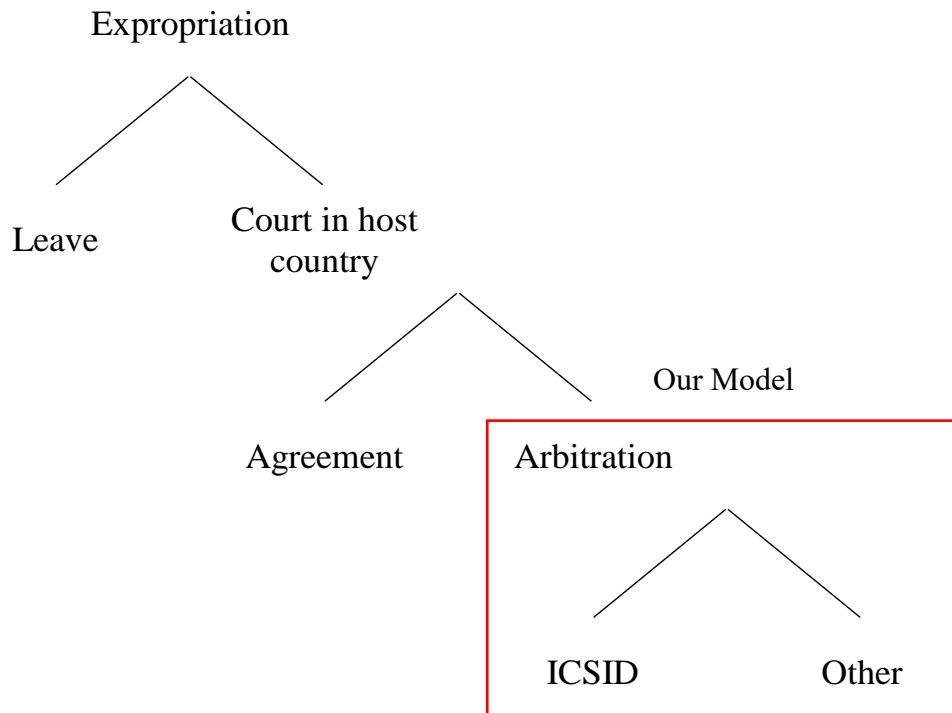
Over the past two decades, international investment arbitration has become common in order to resolve disputes between a foreign investor and the host country government. Specifically, a total of 1,257 international arbitration procedures have been filed in 2022 since the first claims in 1987- *Asian Agricultural Products Ltd v. Sri Lanka* -. The right of private foreign investors to sue the host country directly to international arbitration by ad-hoc tribunals is guaranteed in ISDS clause, which is included in international investment agreements such as bilateral investment treaties (BITs) or preferential trade agreements (PTAs) containing investment chapters, and ongoing investment disputes are based on these ISDS provisions.

A massive surge in ISDS has attracted public attention and made heated debate on it. In this context, we also want to present unresolved questions about ISDS. Before we raise the puzzle regarding the determinant that influence investors' choices in arbitration rules for ISDS, it is important to introduce readers to the characteristics of international investment dispute and each arbitration rule in order to explain our reasoning.

In principle, international investment arbitration is a legal remedy for foreign investors suffering damage in their property from government of host country. If investors loss their asset in host country due to a series of policies conducted by the host country, they may file a lawsuit against the government in the domestic court of the host country. However, investors do not prefer to domestic laws of the host country because domestic laws are likely to rule against investors regardless of the level of the rule of law of the host country (Bell, 2003). Therefore, investors intend to use the international system of a third party to overcome this problem. Thus, investors prefer to use ISDS for compensation, and in this situation, they have to decide where they go for investment dispute. Figure 1 shows the process of foreign investor proceeding with investment disputes.

Especially, if investors decide to arbitration, they must decide through which system to proceed with the sue. This is the last step of the process lending to an ISDS claims. However, previous literature has little attention to this part. They usually focus the effect of ISDS to the host countries, for example, how the ISDS affect FDI inflows to the host countries (Allee & Peinhardt, 2011; Buthe & Milner, 2008; Franck, 2007; Kerner & Pelc, 2021; Neumayer & Spess, 2005; Salacuse & Sullivan, 2009), or the reason why foreign investors sued the host countries (Kim, 2017; Pelc, 2017; Gertz et al., 2018). Unlike these previous literatures, this article focusses on the stage where lawsuits are made. In particular, we will look at which rules are chosen when a ISDS is filed.

Figure 1 The choice of investors when dispute occurred

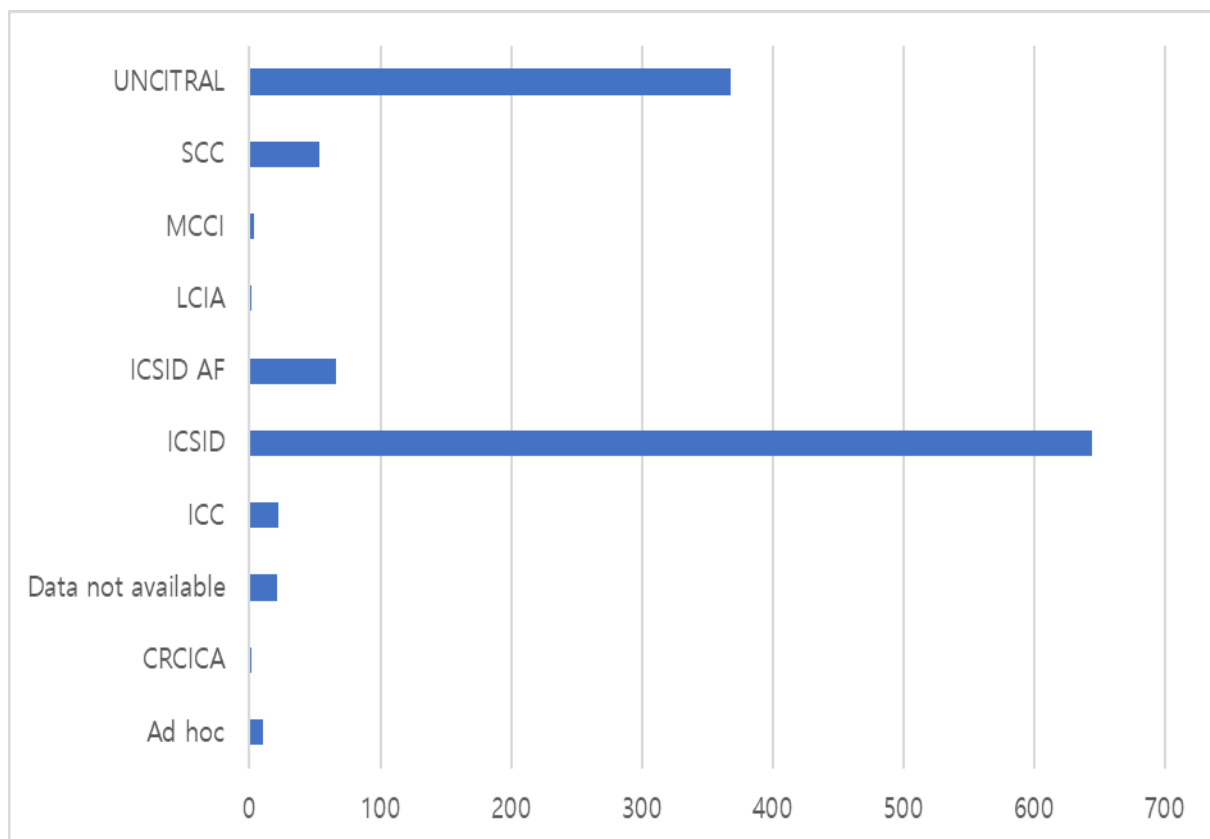


Feature of each arbitration rule for ISDS

Investment disputes, unlike other international trials such as WTO dispute mechanism, are not centralized because it is based on each BIT or PTA. Therefore, investors could decide which rules to use to proceed with the dispute. There are a lot of applicable arbitration rules for ISDS. The arbitration rules for ISDS is divided into (1) the ICSID arbitration based on a World Bank body that specializes in investment disputes and (2) non-ICSID arbitration following UNCITRAL Model Law on International Commercial Arbitration, which associated with Cairo Regional Center for International Commercial Arbitration (CRCICA), International Chamber of Commerce (ICC), London Court of International Arbitration (LCIA), Moscow Chamber of Commerce and Industry (MCCI), Permanent Court of Arbitration (PCA), Stockholm Chamber of Commerce (SCC), United Nations Commission on International Trade Law (UNCITRAL), Inter-American Commercial Arbitration Commission (IACAC).

Figure 2 shows what arbitration rules was used to proceed with ISDS from 1987 to 2022. Investors are using various rules in proceeding with ISDS. Although arbitration tribunals operate most often under the rules established by the World Bank’s ICSID, ISDS is also underway through other rules, especially the UNCITRAL. Specifically, most investors choose ICSID (54% of all cases) for ISDS, and thus ICSID is evaluated as a central arbitration rule in investment disputes. Nevertheless, other rules except for ICSID are still being used in investment disputes, and this trend is strengthening over time. the number of cases filed with the ICSID has dropped since 2008.

Figure 2 The number of ISDS by arbitration rules (1987-2021)



Source: Investment Dispute Settlement Navigator (accessed 22/10/22)

In order to understand why different choices of investors occurred in proceeding investment dispute, it is necessary to know the characteristics of each arbitration rule. As above mentioned, ICSID is the most commonly used rule. This is because ICSID is only for investment dispute rule made by World Bank while other rules are based on the commercial dispute rules. In turn, ICSID has unique characteristics that are different from other rules: *jurisprudence, transparency, finality and enforceability* (Diel-Gliger, 2011). This may or may not work as a benefit to investors in proceeding with investment disputes.

First, ICSID has double jurisdictional nature. Compared to other commercial arbitration rules, ICSID has narrower definition of the term “investment” and “investor”. If an investor chooses an ICSID for investment dispute settlement mechanism, an arbitration trial is possible only when both the investment defined in the legal basis for investment arbitration (such as BIT) and the investment defined in the ICSID Convention are satisfied. The issue of jurisdiction is the most important in international arbitration trials, and in the case of ICSID, it is more likely that the trial will be dismissed due to lack of jurisdiction in this court in the process of satisfying all the definitions of investment. Therefore, this is likely to be a difficult constraint for investors. Since other rules are not affected by the ICSID Convention, arbitration is achieved if only the definition of investment specified in the Agreement such as BIT or FTA is satisfied.

Second, transparency is a representative characteristic that distinguishes ISDS rules. In particular, the transparency is drawing much attention due to the state's participation as an arbitration party, the dispute subject to arbitration is linked to the public interest of the host countries, and the large amount of damages due to the arbitration result. On the other hand, one of the important characteristics of arbitration is confidentiality, which is the subject of many discussions that it applies in principle to investment arbitration. ICSID and ICSID AF have

transparent procedure compared with other rules. ICSID discloses all processes through their website from the beginning of the dispute to the time when the judgment is completed.³ In particular, as the number of cases associated with the public interest of the host country increases, the agreement was revised to allow disclosure without the consent of the parties to the dispute after 2006. On the other hand, systems such as UNCITRAL, ICC, and SCC traditionally tend to take a private position due to the influence of commercial arbitration. The SCC's cases are disclosed annually only for statistics, and do not disclose the parties in the dispute. In the case of UNCITRAL, although it lacks a lot in terms of transparency, the principle of transparency was established in the 2010.

Third, finality is related with the appeal procedures. It is also a feature that clearly reveals differences between rules. The appeal procedure refers to whether the investor and the host country can file an objection to it when investors file a complaint with the host country and are sentenced to the arbitration system. According to this standard, ICSID and other rules are clearly distinguished. The former only stipulates the procedure for revocation of the judgment, but the state or investor cannot appeal and therefore has finality. The cancellation procedure of the judgment is recognized only when there is a problem with the qualification of the arbitrator, so there is no procedure for appeal again according to the content. Furthermore, ICSID obliges the contracting States to recognize and enforce the award after reaching a final judgment through ICSID without any prior review on the basis of domestic laws. This is generally referred to as a self-contained enforcement mechanism. On the other hand, other rules such as UNCIRAL, ICC, and SCC do not have cancellation procedures, and the judgment can be amended, suspended, or canceled by the domestic court in arbitration.

³ <https://icsid.worldbank.org/cases/case-database>

In other words, unlike other rules based on commercial disputes such as UNCIRAL, SCC, ICC, the ICSID has the distinctive characteristics such as jurisprudence, transparency and finality, which affects investors' choice of rule. The characteristics of each of applicable arbitration rules for ISDS are summarized in Table 1.

Table 1 Comparison of ISDS Rules

	ICSID	ICSID AF	UNCTRAL	SCC	ICC / PCA
Foundation	1966	1966	1976	1917	1899
Purpose	Arbitrate investment dispute	Arbitrate investment dispute	Arbitrate commercial dispute	Arbitrate trade and commercial dispute	Arbitrate commercial dispute
Condition of Prosecution	Both countries are in the treaty	One of the countries are in the treaty	No limit	No limit	No limit
Definition of Investment	Following BIT and FTA	Following BIT or FTA	Following BIT or FTA	Following BIT or FTA	Following BIT or FTA
Transparency	Opening Principle	Recommend Opening	No clause. Revision in 2010, Operation from 2012	No clause	No clause
Finality	Unable to appeal after judgment (Article 53, 54)	Court in the place of arbitration can amend, suspend, or cancel	Court in the place of arbitration can amend, suspend, or cancel	Court in the place of arbitration can amend, suspend, or cancel	Court in the place of arbitration can amend, suspend, or cancel
Diplomatic Espousal	O	X	X	X	X
Arbitrator	3	3	1 ~ 3	No limit	No limit

3. Theoretical Argument: Why do some investors choose ICSID for their dispute while others do not?

ISDS is proceeding through one of the applicable rules as discussed in the previous chapter. Crucially, foreign investors who file ISDS should choose the rule between ICSID and non-ICSID when they bring lawsuits against their host government in international tribunals. As a result, different rules are used for each ISDS case. If so, what factors affect investors' choice of rule – especially, between ICSID and non-ICSID – for their dispute settlement? While the reasons for why individual investors choose some arbitration rules vary, it is possible to identify common incentives across investors. Especially, the characteristics of each applicable rules could affect investors' choice of rule (Born, 2013), and we analyze how these each rule affect investors' incentives for the choice of the rule based on forum shopping literatures, which emphasize the most important consideration for actors is to achieve a favorable decision in their favor when choosing a forum (Mondré, 2015).

The main goals investors want to achieve through bringing ISDS are twofold: (1) to resolve underlying disputes and get compensation for property losses incurred due to host government policies and (2) to gain more bargaining power with host government when doing business in the country by putting pressure on the host country. We argue that factors that incentivize investors to decide to opt for ICSID or non-ICSID arbitration are likely to differ depending on the characteristics of the industry. This is because each industry has a different characteristic, and it is associated with the way investors make profits and losses. Therefore, investors show different cost-benefit analysis in decision-making depending on the industry to which they belong.

Especially, we focus on the level of mobility, which means whether those industries in

which assets are location specific or not, and it is the pivotal determinant shaping the preference of investors toward the rule for ISDS. The mobility of industry is related to the potential political risk from the host government (Vernon, 1971; Wellhausen, 2016; Pelc, 2017). Foreign investors in ‘immobile’ industries such as agriculture, mining, oil and gas are exposed to higher potential state interference. As immobile industries cannot move their assets well, investors become more vulnerable to changed policies treated by host government, and they continue to stay in the host countries for keeping their business. However, a set of industries with more ‘mobile’ assets such as services sector and manufacturing can withdraw their assets quickly from the host country if a potential threat to their property is found.

The difference in a way making profit and loss by industry due to the level of mobility creates a difference in the purpose of filing ISDS, and accordingly, it guides investors’ preferences for ICSID or non-ICSID arbitration.

For industries with low mobility, the primary objective of ISDS is to resolve underlying disputes and secure compensation for property losses. This is closely tied to the difficulties of these industries in relocating their assets swiftly, rendering them more susceptible to policy changes. They lose all their property without a way out if there is expropriation or policy change in the host country. Consequently, they need to stability and long-term presence within the host country. To address this vulnerability, such industries may favor ICSID arbitration. The specialized nature of ICSID’s investor-state dispute settlement framework and its emphasis on protecting foreign investors can offer a higher level of assurance to industries exposed to potential state interference. By choosing ICSID, these industries aim to mitigate risks and ensure that their investments are safeguarded against adverse government actions. Also, ICSID arbitration ensure a higher level of enforceability of arbitral awards. This ensures that compensation can be properly received from the country. Furthermore, the trial procedure guaranteed by the ICSID alleviates the problem of sunk costs arising from the prolonged expropriation period. In the case of industries

with low mobility, ICSID, which results faster, will be preferred because the damage caused by longer trials is greater than that of industries that do not. Therefore, ICSID's robust standards and automatic enforceability across member states provide a sense of security for investors in immobile industries.

Industries in mobile sector, on the other hand, may prefer non-ICSID arbitration rule for their ISDS proceeding. Their ability to quickly relocate assets makes these industries better mitigate potential political risks, and it give investors more bargaining power with host government. Furthermore, they want to expand their influence within the host country by strategically utilizing ISDS. According to Pelc (2017), many foreign investors file ISDS to the host government despite the low success rate of dispute for investors in order to ease regulations in the host country. This strategy is effective in changing the host country's regulatory policy in favor of investors (Strange 1996; Johns et al., 2019; Moehlecke, 2020; Moehlecke et al., 2023). It is called regulatory chill, and it is mainly carried out in the name of indirect expropriation (Pelc, 2017), much of which is done by mobile industries such as the financial and insurance industries. These industries want to expand their influence by controlling arbitration procedures, and as a result, they may opt for non-ICSID rules. Non-ICSID arbitration allows parties to tailor proceedings according to their needs, which can be beneficial for industries that might require different approaches based on changing circumstances. Non-ICSID rule that provides flexibility in arbitration is used by mobile industries for specific requirements or strategic reasons to dictate the pace, structure, and format of the arbitration.

In sum, the divergent objectives pursued through ISDS hinge on industry-specific attributes, especially mobility. While immobile industries emphasize dispute resolution and compensation, mobile industries leverage ISDS to bolster their negotiating leverage. This underscores the importance of tailoring ISDS strategies to the distinct characteristics of each industry, enabling investors to navigate the complexities of international investment with precision.

Based on these arguments, we made the following hypothesis:

Hypothesis: Investors in immobile industries, unlike those in mobile industries, will choose ICSID as rule for ISDS process.

4. Research Design

Data and Variables

This study is based on new dataset of ISDS arbitrations compiled by provided by UNCTAD ISDS Navigator⁴, which is comprised of 1257 known investment arbitration disputes brought under an investment treaty including ICSID as well as other non-ICSID arbitration from 1987 to 2022. Based on this dataset, the unit of analysis is the individual foreign investors who file ISDS-respondent country-year. A detailed description of the variables is as follows.

The dependent variable in this study is which system the investor chose among the arbitration rules. Based on the ISDS Navigator, there are ten arbitration systems that investors can choose from: CRCICA, ICC, ICSID, ICSID AF, LCIA, MCCI, PCA, SCC, UNCITRAL, IACAC. As above seen, ICSID accounts for almost 50% of the case, and has unique characteristics that are different from other rules. Therefore, whether the investor chooses ICSID or arbitration other than ICSID is the dependent variable, and so the dependent variable of this study is a discrete variable with a value of 1 if the investor selects the ICSID and a value of 0 if the system other than the ICSID is selected.

⁴ <https://investmentpolicy.unctad.org/investment-dispute-settlement>

Main independent variable is industry sector. ISDS Navigator shows which field the company that filed the ISDS belongs to. According to this classification, industries with low mobility were classified as Agriculture, forestry and fishing, Construction, Electricity, gas, steam and air conditioning supply, Mining and quarrying, Real estate activities, Water supply. In this study, if company belonged to the sector, they were coded as 1.

In additions, it is necessary to control other factors that may affect investors' choice of forums in the analysis. Therefore, we control the characteristic of respondent countries. Regarding the characteristics of the respondent country, the following variables are controlled.

First, economic characteristic of respondent countries is controlled. It includes GDP per capita and economic openness of the respondent's countries. GDP data from the World Development Index provided by the World Bank are used as indicators, and the value taken as a natural log considering the skewness of the variable. Also, economic openness is measured by the ratio of FDI inflow in respondent countries provided by WDI. If the amount of FDI inflow is larger, that is, the more foreign investors are in the respondent countries, the more investors expect the investment host country not to take expropriation that could harm foreign investors. In this respect, the incentive for investors to choose ICSID is relatively small. Finally, we include state ownership of economy. This variable is drawn from V-Dem dataset, and it measure the degree to which the state owns and controls capital including land in the industrial, agricultural, and service sectors. In addition, this variable means that the larger the number, the weaker the degree of control.

Second, domestic political economic characteristic of respondent countries is also controlled. It includes the level of democracy, and previous experience with ICSID rule. Investors are likely to choose ICSID when they dispute with authoritarian countries. This is because leaders in authoritarian countries appear freer because they only need to gain support

from their core group, even under pressure from the international community. Accordingly, investors want to ensure their rights in the international community and disclose damage from authoritarian regimes through ICSID that are guaranteed transparency. For measuring democracy, we use V-dem's electoral democracy index. This index means that the larger the number, the higher the level of democracy. In addition, respondent countries could accumulate know-how by continuing to experience rules for ISDS. Accordingly, investors tend to choose a rule with less experience in the respondent countries in order to proceed with disputes from an advantageous position. Thus, previous ICSID experience of respondent countries is controlled. It means whether the respondent countries have previously experienced investment disputes under the same rule. This is measured by the number of times that the respondent country has experienced in which ICSID rules since 1987 in the year when the investment dispute occurred.

In addition, South America and Europe, where is the regions of respondent countries, are controlled in this study are. In the case of Europe, it was considered as a variable in that the ICSID made a judgment centered on the unwritten law and case law centered on the United States, and that the European bilateral investment agreement was different from the U.S. agreements. In addition, several South American countries have often been sued the most in investment arbitration. However, considering the political and economic relationship with the United States, ICSID was often chosen over other arbitration systems. Therefore, if the investment host country belongs to Europe or South America, a dummy variable with a value of 1 was designated.

The descriptive statistics for the variables are shown in Table 2 below.

Table 2 descriptive statistics

Variable		Obs	Mean (Percent)	Std. dev.	Min	Max
ICSID						
	0	513	(47.02)			
	1	578	(52.98)			
Immobile Industry			0	0	0	0
	0	521	(47.75)			
	1	570	(52.25)			
GDP per capita (logged)		1,091	8.79	1.129	4.631	11.375
FDI (% GDP)		1,091	4.039	11.753	-34.210	224.428
Democracy		1,091	0.591	0.252	0.015	0.913
Economic Control		1,091	0.756	1.016	-2.488	2.782
previous ICISD experience		1,091	5.201	8.848	0	54
South America						
	0	807	(73.97)			
	1	284	(26.03)			
Western Europe						
	0	950	(87.08)			
	1	141	(12.92)			

Estimation Method

Since the dependent variable in this study is a dummy variable with a value of 1 when an investor selects the ICSID and 0 when selecting a rule other than the ICSID, a logistic regression analysis is used. In logistic regression analysis, in order to verify the significance of independent variables, the relationship between the core independent variable and the dependent variable was examined, and then the model including both the control variable - the characteristics of the respondent country, and the relationship between home and host countries- was sequentially analyzed.

Empirical Results

Table 3 shows the results of our logistic regression. Model 1 and Model 2 show the result of main logistic regression, but Model 2 include year fixed effect. According to these analysis results, the hypothesis 1 is supported. Concretely, hypothesis 1 is supported in all model. It means that investors in industries with low mobility use more the ICSID rule than non-ICSID rules when they sue the host country as we expected. Also, the degree of economic control for controlling variable affects investors' choice of forums. In other words, the more lawsuits are filed against countries with high economic control, the higher the likelihood of choosing ICSID. Democracy is also influencing investors' choice of forums. According to the results, the higher the level of democracy in the affected country, the more likely it is to choose rules other than ICSID, and further research is needed on why this phenomenon occurs.

Table 3 Result of Logistic Regression

	(1)	(2)
	Model 1	Model 2
Immobile Industry	0.508*** (0.130)	0.511*** (0.134)
GDP per capita (logged)	-0.196** (0.0697)	-0.151 (0.0780)
FDI (% GDP)	0.000854 (0.00536)	0.000775 (0.00547)
Economic Control	0.218* (0.0994)	0.224* (0.103)
Democracy	-1.229** (0.444)	-1.323** (0.471)
previous ICISD experience	0.0783*** (0.0111)	0.0791*** (0.0114)
South America	0.322 (0.166)	0.254 (0.175)
Western Europe	0.273 (0.253)	0.258 (0.264)
Constant	1.664** (0.575)	1.937** (0.704)
<i>Year Fixed</i>	No	YES
<i>N</i>	1,095	1,091
<i>Pseudo R2</i>	0.0776	0.0941

Standard errors in parentheses

* $p < 0.05$, ** $p < 0.01$, *** $p < 0.001$

5. Conclusion

This study tried to find out which institution foreign investors use and why they choose some institution when they face investment dispute with the host countries. In particular, this study attempted to analyze through the ‘forum shopping’ theory through which rule investors realize their interests among various international institution. To this end, we focus whether investors chose ICSID as an arbitration rule or other rules for investment dispute settlement. This is because ICSID is the leading arbitration rule in ISDS, which have distinctive characteristic such as transparency, finality, and enforcement. Based on this, we hypothesized that the characteristics of each rules, the industry to which sue the government, and respondent countries’ characteristics could affect forum shopping and tried to verified these hypotheses through empirical methods. In particular, this study focused on the following things: the degree to which the state controls their economy and mobility of the industries. And we analyzed these hypotheses through logistic regression analysis. As a result, it was found that all the hypotheses of this study were statistically significantly supported.

This study has implications in that it expanded the research on ISDS, which had remained only in existing law-level research, politically. Existing studies on ISDS only focus on research on the ICSID itself, or only look at the characteristics of the laws. However, this study expanded these existing discussions, combined ISDS with forum shopping which is one of major concept in political science, and test it statistically. Accordingly, this study can be significant in that it has expanded the horizon of ISDS-related research, which has recently been increasing in interest.

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