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Wenxin Lu March 26, 2019

Forum Shopping: Facing

Expropriation, Foreign Firms' Choice between Domestic Litigation and International Litigation

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Abstract

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Investor-state dispute settlement (ISDS) was created to provide a platform for international investors to pursue compensation from alleged discriminatory practices by host states. Despite its advantages of being impartial and transparent, some foreign firms continue to litigate in host states' domestic courts. This thesis intends to unravel the motivation behind firms' choices to litigate in one legal forum over the other one. With detailed research on ten cases, this thesis illustrates the relationship between three independent variables (host state's judicial independence, firms' political connectedness with the host state authority, the strength of the bilateral investment treaty (BIT) that are applied or can be applied by the firm in trials) and the dependent variable (firms' forum choices). The results show that as firms become more politically connected, they are more likely to sue domestically and that stronger BITs can attract firms to litigate through international judicial process. However, host states' higher judicial independence does not make investors more likely to resort to domestic courts.

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Introduction

Under the backdrop of globalization, multinational firms proliferated and diversified their investment in various states through foreign direct investment. Accompanying the growing amount of investment abroad is the rising number of investment disputes (United Nations 2018, 92). During the process of entry or expansion, foreign firms may face friction or outright conflicts with local authority. The expropriation risk of governments taking over assets from investors or breaching contracts with firms is the most concerned risk for firms operating abroad (Jensen et al. 2014, 2). Expropriation can occur directly and indirectly. Direct takings involve the transfer of title and/or outright physical seizure of the property, which most often refer to states' act of "nationalization" (UNCTAD 2012, xi). Indirect expropriations are categorized as measures short of physical takings but instead permanently destroy the economic value of the investment or deprive the owner of its ability to manage, use or control its property in a meaningful way (UNCTAD 2012, xi). Given the sunk costs for foreign direct investment, firms tend to lose more than the government if any conflict emerges. Thus, either direct or indirect expropriation is a convenient and often used measure for governments to take advantage of foreign firms.

Measures have been taken by host states to maintain their attractiveness to investors by promising a safe and cooperative environment, while home states protect their overseas investors by establishing an international platform to ensure the transparency and fairness of transactions. This platform is known as investor-state dispute settlement (ISDS), which is increasingly used by foreign direct investors to resolve investment disputes. ISDS is a system through which investors can sue governments for discriminatory practices, thus reducing political risks for investors. At

the end of 2017, around 855 treaty-based investor-state disputes were publicly known – approximately 13 times more than the 67 known cases fifteen years earlier (United Nations 2018, 91). However, even with the protection of ISDS, the risk of expropriation remains a priority for foreign investors and even ISDS cannot guarantee of the safety of foreign investment. Due to the emphasis put on host states' expropriation behavior by investors and their home states, this thesis narrows down its focus to only expropriation conflicts between investors and host states and whether investors choose to use ISDS to protect their interests facing expropriation.

Facing expropriation conflicts, foreign firms actually have more than the one option of ISDS. There are four common practices for firms to choose from based on the circumstances of the host state and the firm itself. Firstly, firms can exit or divert capital away from the host state. For example, in April 2017, General Motors joined a wave of international companies that have shut their doors voluntarily or under duress (Krauss et al. 2017). In G.M.'s case, the Venezuelan authorities seized the company's local vehicle assembly plant and put it under "embargo" (Gillespie 2017). Strongly rejecting the arbitrary illegal judicial seizure of its assets, the company announced its final departure (Krauss et al. 2017).

Wellhausen argues that nationality constrains firms' legal rights and shapes their investment behavior such that conational MNCs are likely to worry about their conational's broken contract as a forewarning of their own problems and to divert their investments in response (2015, 240). Despite the spillover effects among conationals, however, not all kinds of firms can afford the consequences of choosing to exit. Due to the obsolescing bargain (meaning over time as the multinational enterprise's fixed assets in the host state increase, the bargaining power shifts to the government) on foreign-owned assets, firms' de facto investment can incur great sunk costs that make exiting from a committed investment prohibitively costly (Wellhausen

2015, 242). Certain types of investments appear to have lent themselves more easily than others to be physically seized by the unilateral use of force by host governments, which is especially true for investments with site-specific and easily appropriated rents, such as firms in the primary or secondary industries like raw materials and agriculture (Frieden 1994, 568). In short, though exiting remains an option for foreign firms, not all firms are willing or can afford to do so. In this G.M case, the final loss of its Venezuelan operations would be about 100 million, which may be unaffordable to smaller firms (Gillespie 2017).

This leads to the second common practice: domestic settlement without legal intervention. Chinese telecommunications giant ZTE was found to have worked around U.S. sanctions preventing sales to Iran and North Korea, resulting in a ban from the U.S. Department of Commerce preventing American companies from selling components to ZTE. Because the Android operating system, an American-made software, is indispensable for ZTE's production, coupled with the fact that being targeted by the U.S. government as a potential security threat put ZTE's survival in question, ZTE chose to acknowledge the mistake and settle the case with the U.S. government in the end (Stolyar and Looper 2018). In this case, though the U.S. government did not take over ZTE's physical assets, its ban on local firms providing materials to and cooperating with ZTE harmed the firm's capability to operate and make profits. Immediately after the ban went into effect, ZTE issued a statement claiming that the company would actively communicate and cooperate with all relevant parties as required and seek a solution (Mozur 2016). ZTE kept negotiating with the U.S. government, seeking further reprieves on the ban until November 28, 2016 (He 2016). As a last resort, ZTE agreed to pay a $1 billion penalty and place $400 million in a U.S. bank in exchange for the lifting of the governmental ban on U.S. suppliers selling to ZTE.

Different from firms' easily observed action of either exiting or suing, firms' bargaining and negotiation process with domestic businesses or government is like the huge chunk of iceberg hidden under the sea level, difficult for outsiders to get a glimpse of the whole picture. The contact of two sides may involve not only normal consultation, but also illegal bribery and corruption. A comprehensive picture of the interactions between two sides containing either the lawful part of bargaining or the illegitimate portion of misusing funds is out of the scope of this thesis.

Firms' third option is domestic litigation in the host state. This practice is exemplified by the Russian mining company, Norilsk Nickel's lawsuit against Botswana for reneging on a deal. Originally, Norilsk agreed to sell operations including its 50% stake in South Africa's Nkomati mine to a Botswana's state-backed mining company, BCL Group. But BCL filed for liquidation just before the transaction was due to be completed, on the grounds that it was unable to afford the purchase price (Cotterill 2017). BCL Group's act of walking away prompted Norilsk Nickel's decision to sue Botswana's government domestically in Gaborone, Botswana's capital, to recover more than $270m (Cotterill 2017).

To reach a decision of filing cases in host states' domestic courts, firms need to make two separate decisions. First, to settle or to sue. If the latter, then to sue domestically or internationally. Regarding the first decision, the idea of reputational cost can be applied. Jensen et al. argue that while expropriations may offer tempting short-term benefits, the destabilizing effect of investment and financial repercussions make the reputational consequences concerning (Jensen et al. 2014, 2). Being taken before arbitration venues like the International Centre for the Settlement of Investment Disputes (ICSID) conveys negative information about a host country's behavior to the broader investment community (Allee and Peinhardt 2011, 401). Governments

would experience reduced foreign direct investment (FDI) upon becoming an ICSID respondent, even if the case is pending or unresolved; and the ultimate loss of an ICSID dispute could hurt a state's reputation even more, leading to further decreases in FDI (Allee and Peinhardt 2011, 429). Thus, firms may make the decision to sue rather than settle due to the larger reputation cost for the expropriating state, if the lawsuit is made public instead of settled secretly.

However, suing against the state may not always be the optimal choice for firms due to the risk of losing lawsuits. Under the situation of a firm losing a lawsuit, the firm loses the legal fee and gains nothing, while the state would suffer much less reputational cost or even turn the reputational cost into reputational benefits if the court rules the state's behavior as lawful and firm's as unreasonable. In light of both sides' potential losses from losing a lawsuit, there is some common ground for negotiations to avoid lawsuits. Firms may have the opportunity to strike a deal with the state, or the state may compromise in exchange for firms' concession. In either case, for the firm, the value of a deal with the state combined with its safety may outweigh the benefits of suing the state considering the risk of losing. In light of that, firms may choose to settle.

Lanjouw and Lerner's (1997) examination of the enforcement of intellectual property rights provides another perspective on the first decision. Summarizing the extant research, they propose that the propensity to litigate patents is associated with: the expected benefits of litigation, the cost of litigation (particularly for young capital-constrained firms), private value of the patent rights left from the deducted cost of enforcing patents, and the impact of intellectual property litigation on the firm itself (Lanjouw and Lerner 1997, 240). Though this thesis is not limited to intellectual property rights, the cost-benefit analysis made by firms on whether to

pursue a litigation is worth considering. Firms in other fields involved in most kinds of cases may weigh their choice of settlement or litigation based on expected benefits and costs.

Previous literature of Jensen et al., Allee and Peinhardt, and Lanjouw and Lerner point out the advantages and disadvantages for firms to settle or to sue, but they do not address the second question of where to sue, if firms choose so. Regard to this, Silberman (1993) and Jovanović (2017) support firms' forum choices of domestic courts. Silberman focuses on American courts: Courts in the United States attract plaintiffs, both foreign and resident, because they offer procedural advantages beyond those of foreign forums: the availability of broad discovery, easier access to courts and lawyers, contingent fee arrangements, etc (Silberman 1993, 502). Thus, parties asserting claims arising from international transactions may find United States law – often enforced only in United States courts – a favored tool (Silberman 1993, 502). Not only American courts, Jovanović supports overall domestic courts by arguing that the "ISDS system is beyond reparation and the existing court systems in the self-assured democracies of Europe, North America and Australia are sufficient" (2017, 152). He argues for the general evils of the ISDS system that "countries' welcoming of FDI in exchange for more investment is to the detriment of the legislative powers of the host governments" (Jovanović 2017, 163). Also, he identifies the arcane nature of the ISDS tribunal due to reasons like "lack of consistency in the interpretation of treaties and rulings," "no institutional memory and case law (precedents)," "arbitrators (as opposed to the judges) being beyond the reach of national legal machinery if they drift from a reasonable evaluation on the solution of cases" (Jovanović 2017, 163). These arguments may partially contribute to firms' forum choice of domestic courts.

However, to make a rational decision of whether to sue domestically or internationally, it is helpful to understand more about the last common practice: international dispute settlement,

specifically, ISDS. In 2017, Tza Yap Shum, a Chinese national and the majority shareholder of TSG Peru SAC (TSG), filed a claim against the Republic of Peru to ICSID under the Peru-China BIT (Investment Policy Hub a). TSG is a Peruvian company engaged in the manufacturing, import, export, and distribution of fish flour (Thomson Reuters 2009). In December 2004, Peru's national tax authority (SUNAT) charged TSG for an alleged tax debt in the amount of four million dollars(Thomson Reuters 2009). SUNAT then imposed a tax lien on TSG's bank accounts, which effectively paralyzed the company, preventing it from continuing its manufacturing operations(Thomson Reuters 2009). The investor initiated an international arbitration, alleging that the arbitrary exercise of taxing power by a state constituted indirect expropriation (Pathirana 2017).

The international dispute settlement mechanism was created with the hopes of home states and investors to be independent, efficient and fair. However, these advantages of the international dispute settlement mechanism may not be the only reasons attracting firms to bring their cases to international courts. There are also elements regarding host states' domestic courts that push investors away and dissuade them from bringing cases to them. Some studies have examined firms' preferences for international litigation. For example, Bhattacharya et al. (2007, 625) argue for a home court advantage for U.S. firms in U.S. federal courts because U.S. firms are less likely to lose than are foreign firms. Thus, this home court advantage may redirect foreign investors from pursuing lawsuits in U.S. federal courts and turning to international courts. This home court advantage of domestic firms can be applied to local or even national authority as well, especially in states with less separation between the executive branch and the judicial system, in which the court ruling may attach more weight to interests of the government. Although Bhattacharya et al.'s article only covers the situation in the U.S., it is reasonable for

firms in other states to take the possibility of home court advantage into their consideration of forum choice. Furthermore, Smit (1994) contends that adjudication by host states' domestic courts of disputes involving foreign parties has additional problems, such as domestic courts' adjudicatory authority over firms' home states; difference in effectiveness of litigation documents service (e.g. notice of proceedings) between the issuing state and the recipient state; and the difficulty and complexity of obtaining evidence abroad. While this thesis cannot be exhaustive of all the considerations held by foreign firms when they face a forum choice, these two studies contribute two noteworthy perspectives favoring international dispute settlement by pointing out potential problems with host states' domestic courts.

All literatures cited above indicate the current extent of existing literatures that can be related to the phenomenon of firms' forum shopping. As these literatures provide arguments about the inherent advantages in one option over the other and in one forum over another, we can see that each one of firms' four choices has its own advantages and weaknesses. When facing expropriations, firms can resort to any one of them based on their own situations. However, one thing that remains in concern is the existence of firms filing cases to both litigation venues sequentially. The case of the Standard Chartered Bank (SCB) suing United Republic of Tanzania in the ICSID through the application of Tanzania – United Kingdom BIT in 2011 serves as an example. Claims arose out of outstanding invoices under a loan agreement which was concluded between a SCB's subsidiary and a company that had contracted with this Tanzania Electric Supply Company for the construction and operation of an electricity generating facility. Following the case, the Tanzania government took control over the power plant and the Tanzanian courts refused to enforce a ruling in favor of the investor (Investment Policy Hub b). Unsatisfied with the government's expropriation and the courts' refusal of enforcement, SCB

brought suit to the international court. In this case, SCB first sued in Tanzanian courts. When the domestic courts proved to be unhelpful, SCB appealed to the international court. Though SCB appealed to both litigation venues, it is important to notice that SCB chose domestic courts first when it had choices between domestic and international courts; only after it became disappointed with domestic courts did it seek justice from the international court. In this thesis, cases like this one is understood as a firm appealing to domestic courts and all cases should fall under firms' first choice.

Although it is true that each firm may factor different considerations into its forum choices, the fact that some states are much more likely to become respondent states than others in the ISDS system indicates the existence of some systematic factors leading firms to make similar choices when dealing with the same group of host states. For instance, as of 2017, the ten most frequent respondent states account for 386 cases, or 45% of the total 855 known ISDS cases (United Nations 2018, 92). The underlying reasons accounting for the variation in the frequency of certain states being the respondents motivate this research. This thesis focuses on firms' litigation forum choice between host states' domestic courts and international courts in the system of ISDS to answer the question: what political factors lead to foreign firms' court forum decisions, when they face expropriation conflicts. This thesis proposes that host states' judicial independence, foreign firms' political connectedness, and the strength of the applied BIT all factor into firms' decision on court forum choice. To be specific, higher levels of the host states' judicial independence and firms' political connectedness with host state authority favor firms' decision to sue domestically, while stronger BITs are more likely to result in firms' decision to sue internationally.

Currently, literatures that touch upon the topics of domestic courts and international courts mostly focus on illustrating opinions supporting either one, but none of them get to the point of addressing the variation in firms' forum choices. While many of the literature inspired this thesis's choices of independent variables, this thesis is the first one to research the underlying political factors leading to firms' forum choices using case-level data and from a perspective of the firms. The scholar community is informed about the advantages and limitations of host states' domestic courts and international courts, respectively, thanks to all the existing literatures. However, the scholar community has no idea of how foreign firms take those advantages and limitations into consideration. In other words, which factors matter, and which do not is still unclear. To provide a clear answer of which factors matter in firms' forum choices is the scholarly contribution that this thesis makes. Through examining aspects of host states' judicial independence, foreign firms' political connectedness, and the strength of the applied BIT, this thesis gives out a causal story with all aspects factored into account for firms' forum choices and even predict firms' potential future choices.

This thesis is organized as follows. Section I details this thesis's theory through reviews of past literature. Section II provides hypotheses that the following sections will test. Section III outlines the research design. Section IV provides the results of case analyses. Section V discusses the results and two concerns that this thesis is aware of. The final section VI concludes this thesis.

Section I. Theory

This section serves to lay out the central argument through examination of existing literatures. This thesis intends to understand the political factors involved in the process of firms'

forum shopping when they face expropriation. Host states' level of judicial independence, foreign firms' level of political connectedness with host state authority, and the strength of BITs applied by firms are independent variables to explain firms' decisions.

Judicial Independence

Judicial independence refers to the ability of courts to provide legal checks against other branches of government without undue political influence (Randazzo et al. 2016, 583), which has more implications than its definition suggests. It is deemed as a necessary component for rule of law and a fair, just and efficient ruling, as claimed by Justice Kelly that the key link to fostering and establishing the rule of law is ensuring an independent judiciary (2002, 20). Thus, as a core part of rule of law, host states' level of judicial independence is highly correlated with states' strength of rule of law. Kim answers the question of what makes some governments more likely than others to enact policies that can harm the interests of foreign investors and thus risk being challenged by referring to the degree of political risks (Kim 2017, 301). He argues that the host governments' risk of being challenged by foreign investors before international arbitration tribunals is greatest when its system of rule of law remains weak (2017, 300). In other words, weak rule of law deters investors from suing in host states' domestic courts. As the level of judicial independence is closely associated with the strength of rule of law, it is reasonable to argue that weak rule of law implies low level of judicial independence, which discourages investors from suing in domestic courts. Despite the better rule of law attached to higher levels of judicial independence, Voigt and Gutmann (2014) argue for another reason to relate judicial independence with a firm's inclination to litigate domestically. They argue that "the actual independence of the judiciary as well as that of prosecution agencies is correlated with lower levels of corruption" (2014, 156). They deem the independence of judicial agencies the opposite

of corruption, which is the misuse of public office for private gain (Voigt and Gutmann 2014, 158). High level of corruption in one state is not a good indication of a promising destination for foreign direct investment because of the shortage of transparency in the interaction between states' executive branches and the judicial system. Firms may enter the domestic market without knowing the severity of the corruption in the host states, or it is possible that the domestic market is too big and enticing for firms to refuse entry even facing high level of corruption. Furthermore, state-owned firms already enjoy better local information resources, developed human network and proximity to elites. With a high level of corruption, domestic firms can easily defeat foreign firms in co-opting judicial officials. This is supported by Cole et al.'s argument that FDI is attracted to Chinese provinces that are most strongly engaged in the fight against corruption (Cole et al. 2009, 1494). A high level of corruption is not only harmful to foreign investors by its implication on an unfair competition between investors and domestic firms, but also deters investors from litigating in domestic courts by hurting the judicial independence. This is supported by the message of Supreme Court Associate Justice Marvic Leonen, who claimed that "corruption weakens judicial independence far more than political interference" (Roxas 2018). As due process is guaranteed, and corruption is better checked in such a system, the risk of governmental measures being challenged by foreign investors is lower than in systems lacking institutions promoting strong rule of law (Kim 2017, 301). In this sense, a high level of judicial independence bringing rule of law can also reduce the corruption level, which is a double attraction to firms to sue domestically.

Though this thesis mainly focuses on the judicial independence of the host states, Beazer and Blake (2018) widen the vision by bringing the impact of home states' level of judicial independence into play. By arguing that home country institutions shape firms' practices and

capabilities and determine the environments that firms are best prepared to face abroad, they propose that states with independent judiciaries are particularly attractive to investment from countries also possessing independent courts (Beazer and Blake 2018, 470). Similarly, countries with low judicial independence disproportionately send FDI to countries lacking independent judiciaries (Beazer and Blake 2018, 470). Their argument implies that foreign firms coming from a home state with independent judiciaries and a set of institutionalized rules of law may be unaccustomed to host states' undesirable domestic legal system (incongruence exists between the host states' judicial institutions and those of the home states) and thus would rather turn to the more universal international dispute settlement. This is a potential explanation for firms' motivation to litigate internationally.

Finally, Karl questions the extent to which ISDS' positive discrimination of foreign investors can be justified (Karl 2013, 2). Positive discrimination, similar to the affirmative action, refers to special measures that aim to foster greater equality among groups (AHRC website). In this setting, positive discrimination means that the ISDS system, set up to help investors sue states, would attach more weights to investors' interests. Governments are worried about the increasing number of ISDS disputes directed against states with highly developed domestic judicial systems (Karl 2013, 2). Though Karl does not specify his definition of "developed domestic judicial system," the states that he mentions as examples like US and Canada have highly independent courts. In this sense, those states are "penalized" for their developed judicial system because with lower chance of winning in host states' domestic courts, firms turn to ISDS, which naturally stands with investors against states. Karl's argument implies that higher level of judicial independence may actually lead to more ISDS cases against the host state. However, things may be more complex than what Karl has argued. The results of

concluded ISDS cases between 1987 and 2017 show that during this time period, 37% of all 548 ISDS concluded proceedings were decided in favor of the state while only 28% decided in favor of the investor (United Nations 2018, 94). In light of this, it is not fully convincing to argue firm's preference over ISDS procedure against host states with developed judicial system is due to ISDS' positive discrimination of investors. Nevertheless, it remains possible that even though investors have a lower chance of winning in ISDS proceedings, they have a still lower odds of winning in host states' domestic courts and so firms simply choose the lesser of two evils.

Overall, Kim's idea of host states being challenged by investors due to a weak rule of law, Voigt and Gutmann's argument that a higher level of judicial independence reduces corruption and encourages firms' domestic litigations, and Beazer and Blake's implication on the effect of home states' judicial independence on firms' choices all contribute to the first part of my theory: host states' level of judicial independence influences firms' forum shopping between courts in host states and international courts. The higher the level of host states' judicial independence, the more likely firms will choose to litigate domestically.

Political Connectedness

Political connectedness for businesses refers to firms' capability of building connections with authorities to extract information, resources and contracts, and avoid troubles to their interests. Many firms build both national and local connections, the diversification of which provides double insurance for firms under uncertain political circumstances (Wang 2016, 321). Firms rely on political connections as a substitute for formal legal protection (Wang 2014, 217). Though political connection between governments and businesses is a globally common

phenomenon, China has a much higher political connectedness (12.5% of firms) than most other states (Wang 2016, 325).

In these two articles, Wang uses the executive membership in the National People's Congress (NPC) and/or the Chinese Communist Party (CCP) as surrogates to quantify political ties, which is regarded as only the tip of the iceberg by Yang et al (2018, 1). Rather, in their article, Yang et al. identify government work experience, political membership, family connections and shared social identity as effective ways of building political ties in China (2018, 1). Similar to Wang's approach, Truex shows that over 500 deputies to China's National People's Congress are CEOs of various companies and a seat in the NPC is worth an additional 1.5 percentage points in returns (2014, 235). Though these studies mostly focus on domestic businesses instead of foreign firms, we can view them from a different perspective. If expropriation happens indirectly through domestic (mostly state-owned) firms' actions, foreign investors, facing an established and ingrained network of personal ties and political connections between state-owned firms and the authority (it is even possible that state-owned firms' actions were ordered by the authority), will avoid the domestic court where they are most likely to be outcompeted by state-owned firms in resources. If expropriation happens straight from the behavior of the host state, it may be difficult for foreign investors to pin their hope on the ability of host states' legal system to override the executive branch when those foreign firms are not politically connected. Thus, it is understandable for firms to resort to international courts, hoping to have a fairer and more transparent ruling. However, the previous two situations can be greatly changed if foreign investors have a sufficient level of political connections with the authority, which could provide firms with more confidence or insider information in protecting their interests through domestic courts.

Chen's article points out that the major obstacle for a city government bureaucrats to garner resources for domestic technology development comes from influence of international commerce bureaucrats (2017, 381). Chen's article does not address the relationship between firms' political connectedness and their litigation forum choices, but his argument focusing on the formation of a cohesive coalition by foreign capital within local bureaucracy inspires this thesis's argument. Foreign firms' higher level of political connectedness with local authority may gain them unusual leverage or resources, which can help them either avoid the expropriation beforehand, or give them disproportionate support in domestic courts than in international courts. Unlike Chen who points out the influence that foreign firms can have on governments' decisions when they are highly connected with the authority, Lu et al. address the question of foreign firms' forum choice from the perspectives of domestic firms. Lu et al. find that Chinese courts favor state-owned firms with personal political ties and the positive effect of political connectedness is pronounced in the outcomes of litigation (Lu et al. 2015, 829). Both of these two studies, one focusing on foreign firms' clout due to their political connections and another one on domestic firms' advantage in courts, identify the importance of firms' political connections. This thesis is inspired to relate foreign firms' political connectedness to their forum choice. When firms are less politically connected, and thus have less confidence and information in domestic court, international courts would be an optimal venue for them. Otherwise, domestic courts may also serve the interests of those firms. Because political connections are more likely to be covert, it would be difficult for foreign firms to compare their political connectedness with that of the defendant. Thus, this thesis assumes that only the foreign firm's political connectedness factors into its forum choice.

There are few existing studies relating firms' political connectedness to their forum choice. Those previous literatures, though they barely touch upon the research question, suggest a possible independent variable, and thus informs the second part of this thesis's theory: foreign firms' levels of political connectedness influence firms' forum choice. The higher level of political connectedness with the host state that a firm has, the more likely that it will choose domestic courts.

Strength of BIT

Bilateral Investment Treatments (BITs), since the first one concluded by Germany with Pakistan in 1959, "set forth broad undertakings of each state party to give national companies of the other state party non-discriminatory treatment, protection and security, adequate and effective compensation in the event of expropriation" (Parra 2000, 41). BITs usually prescribe certain minimum protections including protection from expropriation, cancellation of licenses/concessions, and dispute resolution by neutral international arbitration for disputes between host states and private investors (Connick et al. 2012). By signing BITs, which contain strong enforcement provisions, investment-seeking governments are thought to more credibly commit to protecting whatever FDI they receive, which in turn should lead to increased confidence among investors (Allee and Peinhardt 2011, 401). Especially, countries with high expropriation risk can increase their attractiveness by the use of a BIT (Hallward-Driemeier 2003, 2).

As of end 2017, up to 20 developed countries out of a little more than 100 countries in total had faced investment arbitration; ISDS is becoming increasingly risky (United Nations 2018, 91). Governments' risk and cost of being sued by foreign investors is growing (Karl 2013, 2). Some countries, in particular Canada and the U.S., have taken a defensive approach in

international investment agreements (IIAs, including BITs) to preserve domestic regulatory space, mainly by clarifying treaty provisions, introducing exception clauses and limiting access to ISDS (Karl 2013, 2). With states' reservation over ISDS, the protection offered by BITs is the pivotal point in foreign firms' choice over international litigations. The extent of subject matter jurisdiction is not uniform under BITs. Some cover only disputes relating to an "obligation under this agreement", i.e. only for claims of BIT violations, while others extend the jurisdiction to "any dispute relating to investments" (Yannaca-Small 2006, 3). "Umbrella clauses" refer exactly to the latter kind of provision that a host state shall "observe any obligation it may have assumed" and "guarantee the observance of the commitments it has entered into" (Yannaca-Small 2006, 3). In short, umbrella clauses greatly protect investors against any interference with their contractual rights, regardless of whether the interference resulted from a mere breach of contract or a legislative or administrative act (Mann 1981, 246). The inclusion of umbrella clauses in BITs can be reassuring and attractive to investors, boosting foreign firms' confidence in the future application of such protections and enabling them to utilize international courts more often.

More than the inclusions of the ISDS mechanism and umbrella clauses, whether a BIT addresses both direct and indirect expropriation is also a concern for firms, because as introduced in the beginning of this thesis, the definition of indirect expropriation implies much more potential measures for states to utilize to take advantage of firms. Firms' foreign assets and their use may be subjected to taxation, trade restrictions involving licenses and quotas, or measures of devaluation, which in principle, are not unlawful and do not constitute expropriation (OECD 2004, 4). Currently, there is no generally accepted and clear definition of the concept of indirect expropriation and what distinguishes it from non-compensable regulation, although this question

is of great significance to investors (OECD 2004, 5). To the investor, the line of demarcation between measures for which no compensation is due and actions qualifying as indirect expropriations (that require compensation) may well make the difference between the burden to operate (or abandon) a non-profitable enterprise and the right to receive full compensation (Dolzer and Stevens 1995, 99). Thus, to reduce the possibility of states manipulating the range of behaviors counted as indirect expropriation after the investment is made, it is important for investors to have BITs articulate the difference between indirect expropriation and the right of the governments to regulate without compensation (OECD 2004, 3). Thus, whether a BIT addresses both states' direct and indirect expropriation behavior counts towards the measure of the strength of BITs. In light of previous discussions of dispute resolution mechanisms, umbrella clauses, and two kinds of expropriation behavior, this thesis defines the strength of a BIT based on the inclusions of the investor-state dispute mechanism, umbrella clauses and addresses of both direct and indirect expropriation behavior. The address of indirect expropriation can be very important to investors because this means that the BIT grants a protection to foreign investors who may face serious alterations of the investment climate which they could not have reasonably anticipated.

It is also worth briefly mentioning the existence of treaty shopping. Treaty shopping under international investment law occurs when an investor structures an investment (through incorporation and restructuring business operations) seeking to qualify for protections conferred by particular investment treaties (Gaukrodger and Gordon 2012, 55). This holds true for firms seeking protection under BITs. This practice typically involves firms establishing an entity in a state that is party to the targeted treaty to ensure treaty protection where none would otherwise be available (Gaukrodger and Gordon 2012, 55). Firms' behavior of shaping investment structure

according to the existing system of law indicates the emphasis that firms put on the protection that they can get from BITs.

In all, the last part of this thesis's theory posits: the strength of BITs exerts an influence on foreign firms' litigation forum choices. The stronger BITs are (inclusion of the ISDS mechanism, umbrella clauses and addresses of both direct and indirect expropriation behavior), the more assured firms are in choosing international litigation forum.

Alternatives

The previous three sub-sections highlight this thesis's primary independent variables. However, host states' level of judicial independence, foreign firms' level of political connectedness with the authority, and the strength of BITs could not exhaustively cover all factors in firms' forum shopping. This thesis mainly focuses on factors around foreign firms and host states, but alternative explanations related with characteristics of different courts may also play a role in firms' forum choices. The criticisms regarding international arbitrations center around the cost. A study of the Corporate Counsel International Arbitration Group (CCIAG) found that 100% of the corporate counsel participants believe that international arbitration "costs too much" (Reed 2010). One OECD survey shows that legal and arbitration costs for the parties in recent ISDS cases have averaged over USD 8 million with costs exceeding USD 30 million in some cases (Gaukrodger and Gordon 2012, 24). This exorbitant fee, especially the cost for hiring professional arbitration lawyers, along with the uncertain rules for allocating these costs among the parties pose a problem for small and underfunded firms, which may face a potential outcome of being "out-lawyered" by developed states with the best resources. The disproportionality between the amount of compensation claimed in court and the actual amount of compensation

awarded further worsened the problem of prohibitive litigation fee. Based on UNCTAD data, there were 43 billion dollar of claims by the end of 2012 while the principal amounts awarded to the investor totaled only about 6.8 billion dollars (Rosert 2014, 3). This exorbitant fee for international litigation with little hope of being fully compensated back even after winning a case would make international courts daunting to firms short of funds or unworthy to firms with sufficient funds.

Furthermore, the problem with the three-arbitrator tribunal formation in international courts may also play a part in firms' litigation forum choice. The complex guesswork and strategizing practices of arbitrator selection by both the claimant and the respondent might deter firms with no international litigation related experience to enter the ISDS process (Gaukrodger and Gordon 2012, 43). Lastly, consistency of decision-making in ISDS may also be considered by potential claimants. The inconsistency arising in ISDS, including either the inconsistency of interpretation of legal rules in different disputes or the inconsistency in outcomes in separate cases involving the same dispute, may render the outcomes of litigations insecure, unpredictable and illegitimate (Gaukrodger and Gordon 2012, 60). Thus, it is difficult for firms to predict the possibility of winning their cases based on precedents. This unpredictability of outcomes makes international litigations less desirable for firms, especially with that exorbitant fee in mind.

Uncertainties in the allocation of costs, the hard-to-control formation of the three-arbitrator tribunal, and the inconsistency in the ruling outcome may affect firms' evaluation of the worthiness of international litigations. In general, if foreign firms evaluate the international litigation forum as too costly and unpredictable to worth a try, they may turn to host states' domestic courts; if not, then international litigation remains an option for firms.

Section II. Hypotheses

The theories proposed in the previous section present three hypotheses respectively:

Hypothesis one (H1): The higher level of host states' judicial independence, the more likely for foreign firms to litigate in host states' domestic courts.

Hypothesis two (H2): The higher level of political connectedness a foreign firm has, the more inclined the firm would be to utilize host states' domestic courts.

Hypothesis three (H3): The stronger the BIT applied by the firm, the more likely the firm resorts to the international dispute settlement mechanism.

Null Hypothesis: Host states' level of judicial independence, foreign firms' level of political connectedness and the strength of BITs have no effect on firms' forum shopping.

Section III. Research Design

This research compiles a list of ten expropriation cases in which firms' have made their forum choices. Cases are of diverse firms and states. Cases involving foreign firms' different forum choices are the units of analysis. Because firms' final forum choice is the dependent variable, it is the goal of this thesis to see what factors in each case lead to the firms' forum choices. In each case, host states' judicial independence, foreign firms' political connectedness and the strength of the applied BIT, serving as independent variables, would be tested separately. The following paragraphs will introduce sources of data for the measurement of dependent variables and independent variables.

For this thesis, the dependent variable is firms' forum choices, which should have already been made for any case to be selected into the data. Like a dummy variable, the dependent variable only has two values that firms either enter into domestic litigations or international

litigations. For the data collection of the expropriation cases, I have the same number of cases for either forum choice: five cases in which firms litigated in domestic courts and five in which litigations happened in international courts. The former is partially built upon the expropriation dataset constructed in Christopher Hajzler's article (2012). He provided partial information of those cases online for reproduction use. For each of the case, he includes only the firm's name, state, year, sector, issue and settlement. Due to the very limited number of cases ended up in domestic courts and the incomplete information in his list, most of this thesis's cases are selected and researched upon based on information provided by news sources with international coverage such as Factiva, LexisNexis/Nexis Uni, and the Economist Intelligence Unit. The data collection for domestic cases generally starts from countries that are more likely to be reported by the media. In each country, this thesis tries to search for foreign firms litigating against the state or any state-owned enterprises for alleged discriminatory expropriation behavior. It is noticeable that one weakness of the searching mechanism is that the resulted coverage of expropriation cases is not likely to be random. For instance, cases involving larger firms or involving contentious issues such as land distribution are probably more likely to receive attention. For cases ended up in firms' appealing to international courts, the case data comes from the Investment Policy Hub website of UNCTAD and the italaw website, which contain most of the known ISDS cases, including both cases appealed to ICSID and to UNCTAD.

The ten chosen cases and their information are shown in the Figure 1 in the Appendix, with each assigned a case number. This number will be used in the later graph presenting the correlation between the high court judicial independence and low court judicial independence in host countries. Figure 1 provides the basic information for each case: host countries, home countries, legal forums that firms filed cases to, firms' names, higher court judicial independence

scores, BITs applied by firms, firms' employee numbers, how long in years a firm has been invested in the host state, firms' stakes in host countries, and strength of BIT. Firms' stakes, represented by either one firm's investment in the host country, or one firms' annual sales in the country, in current million dollars, means the value that the firms stand to lose if they leave the host country. The scores ranging from 4 – 6 in the column of 'BIT strength' are scores calculated based on the three composition parts: the existence of an investor-state dispute mechanism, the existence of umbrella clauses, and whether both direct and indirect expropriation are covered. The formation of those scores will be detailed in later parts of the research design in the measurement of the strength of BITs. To provide a better understanding of the motivation and background of each firm's choice, a detailed illustration of each firm and the dispute between the firm and the host state is presented in the Appendix.

The first independent variable is the strength of the BIT which is applied to the case by firms. Before measuring the strength of the applied BIT, whether these is any BIT existing between the home state and the host state needs to be confirmed. For all the cases included, there exists either a direct BIT or an indirect BIT for the firm to apply to if it wants to take the case to the international courts. It needs to admit that it is possible for firms to file cases to domestic courts simply because there is no BIT or ISDS mechanisms between the host country and the firms' home country (or even the countries where firms' subsidiaries located in). However, this thesis's goal is to investigate the motivation for firms to choose either one of the legal forum when both of the two options are open for them. One thing worth mentioning is that even when there is no enforcing BIT between firms' home country and the host country, the firm can still sue the host country internationally if one of the firm's subsidiary is in one other country that has a BIT including an ISDS mechanism with the host country. There are several precedents for this.

For example, in the case of Alhambra Resources Ltd. and Alhambra Coöperatief U.A. v. Republic of Kazakhstan, the firm's home country is Canada, but due to one of its subsidiary's location in Netherlands, the firm sues through the Kazakhstan – Netherlands BIT (2002) (Investment Policy Hub c). Also, in the case of Perenco Ecuador Limited v. Republic of Ecuador (Petroecuador). The home state of the investor is Bahamas, but there is no BIT existing between Ecuador and Bahamas. In the end, Perenco sued under the Ecuador – France BIT (1994) (Investment Policy Hub d). Thus, it is possible for firms to sue internationally even when there is no direct BIT between the home state and the host state, as long as one of the firm's subsidiary is located in another state that has a BIT with the host state. For the ten cases included in this thesis, firms can all apply either a direct or an indirect BIT to its case. In other words, for all the ten cases, firms had both two options open to them when they were making their forum choice.

When one firm has more than one subsidiary located in different countries from where it can borrow a BIT, this thesis randomly chooses one BIT to analyze. One BIT's strength is composed by three parts: inclusions of an investment dispute settlement mechanism, umbrella clauses and addresses of states' both direct and indirect expropriation behavior. Measurement of the strength of one BIT borrows from the BITSel index (Chaisse and Bellak 2014). This index shows whether one BIT contains an international dispute settlement mechanism, umbrella clauses and addresses of states' both direct and indirect expropriation behavior. This index is constantly being updated and expanded since 2009 with more than 1500 BITs.

When measuring the strength of BITs under the category of whether there exists the investor-state dispute mechanism, this index gives 2 if "yes, there exists" and 1 if "no, there does not exist." Under the category of whether umbrella clauses are included, this index gives 2 if "yes, there exists" and 1 if "no, there does not exist." Within the category of whether both direct

and indirect expropriation are included, this index gives 2 for the existence of both direct and indirect expropriation, 1 for the existence of only direct expropriation, and 0 for zero mentioning of either direct or indirect expropriation. In figure 1, the values in the last column 'BIT strength' are the sum of the three categories for each BIT. For example, for the Germany – Russian Federation BIT (1989), it contains the ISDS mechanism, umbrella clauses, and inclusion of both direct and indirect expropriation acts by the state; thus, the scores on its BIT strength is 6. In contrast, for the Botswana – Switzerland BIT (1998), it contains the ISDS mechanism and umbrella clauses, but it only addresses the direct expropriation without the indirect one, so it gains a score of 5. All the following BIT strength scores are calculated in this way. The more inclusive and protective a BIT is, the higher score it achieves under 'BIT strength.'

The second independent variable is foreign firms' political connectedness. This thesis intends to use three proxies to measure firms' connectedness in an indirect way. The first one is the duration that firms have stayed in the host state. This thesis assumes that with more time spent in the host state, firms would have more opportunities to connect with local authorities. That is to say, if a firm has spent longer time in the host country, it is more likely to be politically connected with the host country's government. The second measurement is the number of employees that a firm hires in the host country. For both democratic and authoritarian regimes, anything that has the potential to increase the unemployment rate is undesirable; for the former ones, unemployment affects the outcomes of elections, while for the latter ones, unemployment increases costs of repression. Thus, it would be much easier for large foreign firms, solving the employment problem for thousands of people to establish a close connection with the government. Firms' political connectedness can also be measured by firms' financial stake in the host countries, which is represented either by the value of investment that a foreign firm brought

into the host state or by the annual sales that a firm makes from the local market. From the perspective of the state, it would naturally be more willing to help, network and even confer benefits to foreign firms that can bring in greater value and supply goods to meet local demand. From the perspective of the firm, it can exchange its value for local human resources and political connections, which would further help it strengthen its tie with local authority. In all, the longer time that the firm has spent in the host country, the more employees that the firm hires, and the more financial stake that the firm has in the host country, the higher level of firms' political connectedness. All the data for how long in years a firm has been invested in the host state, number of employees, and firms' stakes is based on online information.

Measurement of host states' judicial independence borrows from the V-Dem dataset, which assigns a specific score to each country each year. The higher the score is, the more independent the court is. The measurement of judicial independence in the V-Dem dataset is separated into two parts: higher court independence and lower court independence. Both of these two indexes are measured by the same question "how often would you say that the court makes decisions that merely reflect government wishes regardless of its sincere view of the legal record?" The only difference between these two independence scales is that the high court index is for cases that are salient for the government and the lower court index is for cases that are not. This thesis chooses to use higher court judicial independence for two reasons. First, the higher court judicial independence is highly correlated with that of the lower court's (89.49%). As shown in figure 2 in the Appendix, the distribution of points with case numbers roughly shows a linear relationship between these two judicial independence scores. In addition, considering the fact that firms in expropriation cases sued either the government or state-related firms that have

government's support, it is reasonable to assume that this kind of expropriation cases are salient to the government.

This thesis will use histograms to illustrate the relationship between those aforementioned independent variables and the dependent variable: firms' forum choices.

Section IV. Results

This section unfolds the relationship between five factors (BIT strength, how long in years a firm has been invested in the host country, number of employees, firms' stakes, and host countries' judicial independence) and the dependent variable (firms' forum choices). With the use of histograms, this section will contrast different forum results under the influence of different factors and provide explanations for patterns either fit in or fall out of this thesis's expectations.

Figure 3 in the Appendix consists of two histogram with the x-axis representing the strength of BIT and the y-axis the number of cases. The histogram on the left includes all cases ending in domestic courts while the one on the right with cases filed to ISDS. This figure clearly shows the difference in the strength of BIT for domestic cases and ISDS cases that the BITS for all cases that filed to ISDS have a perfect score (score of 6), while the BITs for cases that ended in domestic courts have two scores of 4, one score of 5, and two scores of 6. For the BITS in the domestic cases that did not achieve a full score, the BIT with a score of 5 lacks addresses on indirect expropriation, and the two BITs with a score of 4 have no umbrella clauses nor inclusion of indirect expropriation. For foreign firms, umbrella clauses and the inclusion of indirect expropriation are one of the most important protective mechanism to boost their confidence in winning the case in ISDS. Because it is unlikely for firms' forum choices to affect the strength of BITs achieved between countries, thus the result of cases filed to ISDS usually enjoying stronger

BITs can be understood as when firms facing a potential stronger BIT that can be applied to protect firms and their assets, it is more likely for firms to appeal through ISDS rather than domestic courts in host countries.

Figure 4, 5, and 6 all fall under the category of firms' political connectedness. They all have the same structure of histograms as figure 3, with the only difference that figure 4 contrasts domestic cases with international cases with the factor of how long in years a firm has been invested in the host state in consideration, while figure 5 compares the two from the perspective of the number of employee, and lastly, figure 6 contemplates their difference with firms' stakes as the independent variable. In figure 4, it is interesting to see that relatively, firms in cases that ended in ISDS endured a shorter period of time in the host countries than firms in domestic cases. However, this difference is petty and could not be supposed to have exerted a huge impact on firms' different forum choices. The contrast before the two kind of cases is much more salient in figure 5 and 6. Figure 5 shows that firms in the cases that filed to ISDS overall have fewer number of employees than cases that filed in domestic courts. All international cases have firms hiring less than 2000 people: four out of five firms have less than five or six hundred employees, and only one has employees a little more than 1000. On the contrary, for cases litigated domestically, the distribution of employee numbers is rather dispersed across several intervals. As one can see both from figure 1 and 5, one firm has less than 100 employees, three firms' number of employees fall into the interval of 1000 to 2000, and one other firm has a great number of 4000 employees. Thus, because it is less likely that firms' forum choices affect their hiring strategy, it is rather safe to conclude that on average, firms with more employees are more likely to litigate domestically while firms with fewer employees choose ISDS more often. Lastly, figure 6 unravels the relationship between firms' forum choices and firms' stakes in the host

state. Here, firms' stakes refer to values that firms and the local government may lose if firms stop investing or operating in the country, either in the form of investments in the host state or in the form of firms' annual sales in the host state. Figure 6 shows a stronger contrast between domestic cases and international cases than those of previous two figures. It is no coincidence that all firms suing through ISDS have firm stakes less than $1000 million, while among firms suing domestically, one of them has around $2000m and another two firms even have firm stakes higher than $6000m. Similar to the other two political connectedness factors, it is unlikely for firms to decide its investing or marketing strategies based on their forum choices, so this thesis can conclude that it is more likely for firms investing or making less money to litigate internationally, while other firms with bigger firms stakes to sue domestically.

In light of the separate analysis, for the independent variable of political connectedness, this thesis believes that though how long in years a firm has been invested in the host state does not make a big difference, firms with larger number of employees and bigger firm stakes are more likely to litigate domestically. That is to say, it is more likely for firms that are more political connected to pursue their interests through domestic courts in host countries.

Last but not least, figure 7 summaries the cases based on the level of judicial independence in the host state. In the left histogram for cases litigated domestically, there are two cases in which the host states had very low judicial independence scores: -2.56 and -2.73, and the rest of cases fall evenly from 0 to 4. On the right side, for all cases litigated internationally, there is only one case in which the host state had a relatively low score: -2.15, while there are two cases in which the host states reached two pretty high scores: 1.69 and 2.27. Taking average, it seems that the host states in domestic cases had an average score of -0.298 of judicial independence, which is lower than the average score of 0.616 for states in international

cases. This runs against this thesis's hypothesis that higher level of judicial independence of the host state, the more likely for firms to choose domestic litigation. Though it is understandable for firms located in host states with a high level of judicial independence to still go with an international trial, if those firms find the protection of the BIT more promising, it is hard to understand why firms in states that suffer from a low level of judicial independence (as low as -2) still choose to litigate domestically. Thus, in the next paragraph this thesis will try to understand those two cases in which facing host states' low level of judicial independence, firms did not turn away to international trial but rather stayed in domestic litigation.

The first case is Siemens vs. Russia. In 2017, the German manufacturing giant Siemens sued a Russian state-owned firm after two Siemens gas turbines ended up in Crimea, a region subject to EU sanctions (Allen-Ebrahimian 2017). This location was not the location that Siemens agreed to when the turbines were bought. Thus, Siemens, under the pressure from the EU, sued for the return of those gas turbines. In this case, despite Russia's low level of judicial independence, Siemens' huge number of employees and high firm stakes could contribute to the reason why Siemens chose to litigate in Russia. Regarding number of employees, Siemens had over 4000 employees ("Siemens in Russia", 5). In addition, Siemens had a firms stake as high as $1358m (Ewing and Kramer, 2017). Furthermore, based on Siemens' prior corruption scandal, it is possible for Siemens to remain an active connection with high level of government officials in Russia. Ten years ago, the scale of a colossal corruption scandal involving Siemens marked it out as the biggest corruption case of the time and including Russia and other countries, Siemens bribes government officials and civil servants in total over $1.4 billion (Venard 2018). Swiss federal prosecutors claimed that Sweden-based Siemens Industrial Turbomachinery made payments between 2004 and 2006 to "senior executives of the Russian state-owned" gas

production company and in return, this subsidiary received contracts to supply gas turbines for the construction of a gas pipeline (The Moscow Times, 2013). In light of these, we can see that Siemens' high level of political connectedness could compensate for the low level of judicial independence in the host state Russia, contributing to Siemens' decision to sue domestically.

The second case is Compania de Cementos Argos SA vs. Venezuela. Cementos Argos S.A. is a directly-owned subsidiary of the parent company Grupo Argos S.A, a Colombian conglomerate with large investments in the cement and energy industries. Cementos Argos was part of a judicial process in regard to the expropriation by the Venezuelan government of its plant located in the Trujillo state in Venezuela (Argos 2017, 2). Though in the Siemens case, other factors compensate the insufficiency of Russia's judicial independence, it is very hard to do so in this Argos case. Cementos Argos is not a large company either in employee number or firm's stakes, so it is hard to expect it to exert a local influence in the Venezuelan government as large as Siemens did. However, it is possible that the reason for its choice to litigate domestically lies not in its not-so-good domestic condition, but rather in its worse BIT conditions. The indirect France – Venezuela, Bolivarian Republic of BIT (2001) that it could apply only has the ISDS mechanism without umbrella clauses nor the inclusion of indirect expropriation, making the protection of the BIT rather weak. Though we are not able to know exactly why Cemento Argos chose to follow Venezuela's domestic judicial process, it is possible that the weak protection of the BIT outweighed Venezuela's low judicial independence and deterred Cemento Argos from international litigations.

Section V. Discussions

This section summarizes the general pattern of the results analyzed in the previous section and expresses two concerns that this thesis has toward those results. In the end, this section touches upon the endogeneity and generalizability of this research outcome.

Generally speaking, the results of this research match the H2 and H3 but runs counter to H1. H1 states that host states' higher level of judicial independence may attract foreign firms to be more likely to appeal to domestic courts when facing expropriation acts. The research results could not confirm this hypothesis because the average score of judicial independence for cases ending in international courts is higher than that for cases filed to domestic courts, which means host states' higher level of judicial independence did not attract those firms to domestic courts. H2 claims that as a foreign firm becomes more political connected with the local government, embodied as firms' longer staying time in the host state, greater number of local employees hired by firms, and greater firms' stakes (investment into the state or firms' annual sales), firms would have more confidence and be more inclined to follow domestic judicial process. For the three sub-factors under the category of political connectedness, the research shows that how long in years a firm has been invested in the host state does not make much a difference, while firms that fire more employees and have greater investment into the state or have higher annual sales have a higher chance of litigating in domestic courts. Thus, overall, H2 is supported. Finally, H3 is backed without controversy. H3 asserts that the stronger the BIT that could be applied by the firm, the more likely the firm resorts to the international dispute settlement mechanism, this is exactly what shows in the outcome of the research. Firms that ended in international courts used BITs that are more likely to cover all three compositions of ISDS mechanism, umbrella clauses, and inclusion of both direct and indirect expropriation, compared with the potential BITs that

could be used by firms that ended in domestic courts. Thus, in all, the research outcomes support H2 and H3.

There are two concerns regarding this research, one is about the representativeness of the cases selected and the other is about the potential of the relationship between the host state and the home state being a common cause affecting the BIT strength and firms' legal forum decisions.

In regard to the representativeness of those selected cases, figure 8 in the Appendix lists the average scores of the ten cases' judicial independence relative to those of all countries' judicial independence in the years of those cases, the averages of the standard deviations of all countries' judicial independence scores in those ten years, and the number of standard deviations that the average scores of cases have away from those of the world. It can be seen that the average score of judicial independence for the host states in domestic cases was -0.298, while in those years the average score of judicial independence for the world was 0.316. The average score for host states in domestic cases is 0.43 standard deviation away from the world's average. For international cases, the average score of judicial independence for the host states was 0.616, and in those years that for the world was 0.292. The average score for host states in international cases is 0.23 standard deviation away from the world's average. Overall, with all cases in consideration, the average score for selected cases was 0.159 while that for the world in those same years was 0.304. This time, the average score for host states in all cases is 0.1 standard deviation away from the world's average. Thus, for the judicial independence factor, though there was some discrepancy between the scores for cases and for the world, the scores for those cases did not fall far away from the world average. Thus, it can be safe to say the from the perspective of judicial independence, those selected cases can be representative.

Things are more complicated for the representativeness of BITs, as shown in figure 9. For the cases selected in this thesis, 70% have three scores of 2, 10% has two scores of 2 and one score of 1, 20% have one score of 2 and two scores of 1, and 0% has three 1s. For all existing BITs in the world that have ISDS mechanism (this thesis focuses on firms' choices when they have both options open), 67% have three scores of 2, 32% has two scores of 2 and one score of 1, 0.35% have one score of 2 and two scores of 1, and 0.6% has three 1s (Chaisse and Bellak 2014). The selected cases have a similar percentage of cases with three 2s, but the compositions of cases with two scores of 2 and one score of 1, and one score of 2 and two scores of 1 are rather different. Therefore, from the perspective of BIT strength, the selected cases are less representative than from the aspect of judicial independence. This lack of representativeness in regard to BIT strength infers limited generalizability of this research's findings.

For the category of firms' political connectedness, because how long in years a firm has been invested, number of employees, and firms' stakes are difficult to compare with the world average, thus it is hard to check the representativeness of the selected cases from this angle.

Another concern that remains is the possibility of the relationship between the host state and the home state being a common cause that may affect the strength of the BIT between these two states and firms' forum choices in the same time. When two states maintain a good relationship, they hold a higher level of trust for one another and thus both sides are willing to tie their hands and concede more on investment treaties, so it would be more likely for them to sign a BIT with more restrictive and protective provisions (inclusion of ISDS, umbrella clauses and addresses of both direct and indirect expropriation) to protect investors from both sides. Also, if the host state and the home state have a good relationship, firms thus have more trust and confidence in host states' courts, resulting in firms' preference to use domestic courts. However,

this potential common cause is hard to be controlled because the existence of "a good relationship between two states" can be judged subjectively by firms. States being allies to each other economically or militarily does not necessarily imply an assuring relationship for investors, such as Turkey with some European states in NATO. To make things more complicated, a firm's feelings toward the relationship between two states may also be affected by this firm's own characteristics. For example, if the host state and the home state, though overall have a good relationship, have intense competitions in the industry sector that this firm is in, then it would hard to say whether the firm would perceive the relationship between two states as good or as intensely competing or somewhere in between. Thus, the potential variable of the relationship between the host state and the home state is difficult to control. This thesis argues that the strength of BITs indicates the relationship between states. When firms are making litigation venue decisions, regardless of the relationship between the host state and the home state, in the end it is the legal provisions that firms rely on, as a good state-level relationship alone cannot ensure firms against losing a case. Thus, this thesis deemphasizes the importance of the relationship between the host state and the home state being a common cause because it is too subjective from firms' perspective to control and it is incorporated in the strength of BITs.

If the outcome shows that any of these three independent variables, host states' judicial independence, foreign firms' political connectedness, and the strength of the BIT, has no effect on firms' forum shopping, then the hypotheses are falsified. As the outcome shows, H1 tends to be falsified.

The endogeneity problems in this research can be controlled. The strength of the BITs is determined beyond the control of foreign firms, so a reverse causality that foreign firms' forum choices affect the strength of the BITs is highly unlikely. With the finding that in cases with

stronger BITs, firms are more likely to end up in international courts and the possibility of reverse causality reduced, it is more likely to be the case that as the strength of BITs that could be applied increases, firms are more inclined to use international litigation. It is worth noting that it is possible for foreign firms to specifically strengthen their political connections with local authorities in anticipation of or after they decide to appeal to domestic courts to increase the likelihood of winning. However, the measurement for foreign firms' political connectedness can avoid this potential endogeneity problem. How long in years a firm has been invested in the host state is out of firms' control at the point of making forum choices. The number of employees and firms' stake (investment or annual sales), though can be determined by the firm, cannot be changed quickly under the restrictions of firms' structure, the process of decision-making or firms' financial capability. Thus, the endogeneity problem can be relatively controlled in this research.

This research has reasonable level of generalizability due to the relative representativeness of those expropriation cases chosen in the data. Those cases are different in host states, home states and firms' venue choices, covering a decent number of years, regions, industry sectors, and expropriation types all over the world. Thus, to a certain extent, this research can help people understand the reasons for a firm to choose one forum over another and even predict firms' future choices based on the performance of those proposed independent variables. However, this thesis acknowledges the limitations of this research because as shown in the end of introduction, there are many other characteristics of domestic courts or international courts that may account for firms' forum choices, and this thesis is not exhaustive of all potential causes. Also, the conclusion of this thesis is restricted due to the limited number of cases selected. Research outcomes based on only ten cases can be informative but not definite about

the conclusion. Furthermore, there can always be hidden causes of either firms or courts that scholars cannot think of or have a hard time to measure. Thus, the ability to predict firms' behavior is limited based on this thesis's research.

Section VI. Conclusions

The research in this thesis focuses on the relationship between three independent variables and one dependent variable, respectively, to answer the question that when facing expropriation, what factors play a role in foreign firms' legal forum choices. After analyzing the ten selected cases, this thesis concludes that higher level of firms' political connectedness with the local government (greater number of employees and firms' stakes) may result in higher probability of firms filing cases to host states' domestic courts, while stronger BITs that can be applied by firms (inclusion of ISDS mechanism, umbrella clauses and addresses of both direct and indirect expropriation) make the option of international litigations more attractive. The independent variable of judicial independence does not match with H1 that higher level of host states' judicial independence does not necessarily lead to firms' decision to file domestically.

A final touch of this thesis is on the implications of those findings on host states' judicial independence, on the usefulness or problems caused by ISDS, and on the impact of globalization and multinational firms on host states. Regarding the judicial independence of host states, this thesis claims that it may not an influential element factored into firms' legal forum decisions because some cases show that with higher judicial independence in the host states, firms may still decide to sue internationally. Though their decisions may under the influence of other independent variables in this thesis, it is possible that Karl's argument that certain states are "penalized" for their developed judicial system due to firms' lower chance of winning in host

states' domestic courts makes some sense (Karl 2013, 2). As discussed earlier, as states sued more and more often in international litigations, some of them begin to have reservations in regard to whether to keep their promise of the ISDS mechanism. Based on the outcomes of this thesis, it may be of less use for states to increase the judicial independence of their domestic courts in order to avoid being sued by investors in international courts. This relates to the discussion of the usefulness or problems caused by ISDS. For investors, ISDS is a creative and helpful measure to help them protect their interests against the potential forceful expropriation of states; for states, ISDS shows investors states' assurance and promise on a platform on which investors can sue for states' unlawful behavior and be compensated accordingly. However, as cases filed to ISDS increase each year, lawsuits received from ISDS become more of a burden for some states. Based on the findings of this research, though states may not be able to avoid international lawsuits through making domestic legal system more independent, states could reduce the strength of the BITs that they sign to deter investors from suing internationally.

States' inclination to curb the increasing trend of investors suing to ISDS through reducing their protective promises in BITs may have a negative impact on globalization. If states become more unwilling in allowing ISDS, umbrella clauses and addresses of both direct and indirect expropriation behaviors to appear in BITs, multinational firms may respond with more reservations in making large amount of investment into states where firms have no other protection for their investments but the protective clauses in BITs. For firms that have already invested or being strongly attracted to certain countries' markets despite the weaker BITs, this thesis's findings on the relationship between firms' stakes and firms' legal forum decisions may be useful. The results of this thesis show that when foreign firms have larger number of local employees and more firms' stakes (investments or annual sales in the host states), firms are more

likely to be politically connected to host states' authority and thus be more inclined to follow domestic legal process. In light of this, firms that have already invested or being strongly attracted to certain countries' markets, facing restrictiveness on international courts imposed by unwilling states, may spend more time and efforts in building and strengthening their local political connections in case of a potential domestic litigation.

In all, the current prevalence of ISDS litigation may lead to states' weariness and restrictions on protective measures for foreign investors, resulting in investors' prudence and tightening up of their investments; this two-sides interaction may halt the process of globalization and remind firms to be better prepared for domestic litigation through enhancing political connections.

There is still many improvement that can be made to this thesis or future research. For example, to include more cases to confer research outcomes more generalizability, or to include some other independent variables that may better explain firms' motivation in choosing one legal forum over the other. Protecting investors from huge resources that can be maneuvered by states, ISDS is meaningful for deeper global cooperation and investment. It is helpful for the improvement of the ISDS mechanism to assist more investors by investigating the motivation for firms to choose host states' domestic courts over the potentially more impartial and transparent international courts.

APPENDIX

I. Cases Litigated in the Host Countries' Domestic Courts

Case 1. Norilsk Nickel vs. Botswana Government

Norilsk Nickel, a Russian nickel and palladium mining and smelting company now named as Nornickel since 2016, sues the Botswana government over mine stake after a state-backed company failed to complete deal (Cotterill 2017). The lawsuit was served in Gaborone, Botswana's capital.

Best known for its diamond wealth, Botswana has been trying to diversify its economy, including directing the BCL Group , a state-owned enterprise, to invest in nickel and cooper assets. In 2014, Norilsk reached an agreement with the BCL Groupto sell operations including its 50 percent stake in South Africa's Nkomati mine for $337m, later reducing its price to $271m (Cotterill 2017). However, just before the transaction was due to be completed in 2016, BCL filed for liquidation on the grounds that it was unable to afford the purchase price (Cotterill 2017). BCL was a deeply unprofitable business for years propped up by loans from the Botswana government (Seccombe 2019). Norilsk accused BCL of "material breaches of the contract" for taking over the Tati Nickel operation but not making a payment (Seccombe 2019). Targeting to recover more than $270m for its 'significant loss as a result of BCL's failure to honor its obligations, Norilsk alleged that despite approval of the Nkomati deal at the highest levels of the government, Botswana was aware of BCL's financial condition and despite so, it is reckless for the government to let BCL enter into the transaction knowing it could not complete the deal without state funds (Seccombe 2019).

For Norilsk Nickel, both international litigations and domestic litigations are feasible. Though there is no direct BIT between Botswana and Russia, Norilsk, as a transnational firm,

could well use its subsidiaries in other countries which have a BIT with Botswana to sue the Botswana government using ISDS. For example, Norilsk could use the Botswana – Switzerland BIT (1998). Even so, Norilsk still chose to sue domestically. In the end, in 2019, the Botswana Court of Appeal has handed down a judgment in favor of Norilsk (Mining 2019).

Case 2. Siemens vs. Russia

In 2017, German manufacturing giant Siemens sued a Russian state-owned firm after two Siemens gas turbines ended up in Crimea, a region subject to EU sanctions (Allen-Ebrahimian 2017). Russia annexed Crimea from Ukraine in 2014, which traditionally depended on Ukraine's power grid for energy supply. Promising Crimean residents energy security, Russia failed its own plans to build two new power plants there due to EU's boycott on any infrastructure-related goods or services into the territory (Hille 2017).

Originally, Siemens sold several gas turbines to Russian state-owned Technopromexport, believing that the equipment would be sent to the southern Russian locality of Taman, but unexpectedly, Technopromexport later posted technical documents online revealing that two of those turbines were to be installed in new power plants in Crimea (Allen-Ebrahimian 2017). In 2015 and 2016, Siemens in total sold seven gas turbines to Russia, but four of them were later installed in Crimea (Hübner 2018). Siemens claimed that the relocation of the turbines defied a contractual agreement not to violate international sanctions (Ewing 2017). Siemens then filed a lawsuit to the Moscow Arbitration Court, the Russian capital's court for hearing business disputes, aiming to force a return of the transferred turbines from Crimea (Hille 2017).

For Siemens, both international litigations and domestic litigations are also feasible. Even better than the situation for Norilsk Nickel, Germany has a direct BIT with Russia. Thus,

Siemens could sue directly using the Germany – Russian Federation BIT (1989). Even so, Siemens still filed its lawsuit in Russia. It is possible that the colossal corruption scandal involving Siemens which paid bribes to government officials and civil servants in dozens of countries, including Russia, may have a bear on Siemens' decision to sue domestically (Venard 2018). In August 2017, Moscow's Arbitration Court rejected a request by Siemens to seize its gas turbines and later in December, the same court rejected again Siemens' claim that the sale of its turbines delivered to Crimea was invalid (Stolyarov 2017).

Case 3. Anjin Investments vs. Zimbabwe

Anjin, a Chinese mining company, carried out mining operations in Chiadzwa, Marange District in Zimbabwe (Zimbabwe Legal 2018). The government of Zimbabwe resolved to consolidate the diamond mining entities that were either already conducting mining activities or those that intended to do so in future in the area (Zimbabwe Legal 2018). Through a letter dated 22 February 2016, the Secretary for Mines and Mining Development communicated to Anjin's chief executive officer that Special Grants 4765 and 5274 for diamonds that had been issued to the company had since expired and, consequently, Anjin should cease all mining activities and vacate the mining areas covered by the two special Grants with immediate effect (Zimbabwe Legal 2018).

Anjin decided to sue against the Mines and Mining Development minister, commissioner general of police, the Zimbabwe Mining Development Corporation (ZMDC) and the Zimbabwe Consolidated Diamond Company (ZCDC) (Kamhungira 2018). Anjin filed its case to Zimbabwe's Constitutional Court, claiming its right to fair administrative conduct and due process as guaranteed in Section 68 (1) of the Constitution and right to freedom of association

has been violated; further, the firm asked for a reasonable opportunity to make representations before the grant was declared void (Kamhungira 2018). In Anjin's application, it sought the government's directive to be declared void and a court order directing the police to cease any actions that have an effect of preventing firms from lawfully accessing and conducting business (Kamhungira 2018).

Anjin could have chosen to file an international lawsuit against the Zimbabwe government, but instead it chose to sue domestically, even with the existence of a direct BIT: China – Zimbabwe BIT (1996). Unfortunately, Anjin lost its Constitutional Court application.

Case 4. Compania de Cementos Argos SA vs. Venezuela

Cementos Argos S.A. is a directly-owned subsidiary of the parent company Grupo Argos S.A, a Colombian conglomerate with large investments in the cement and energy industries. In 2014, Cementos Argos Colombia S.A had around 400 concrete facilities, 23 ports and 13 cement plants (Minerals Yearbook 2014). As claimed by Argos' "2017 Integrated Report" that its Venezuelan subsidiary Cementos Argos was part of a judicial process in regard to the expropriation by the Venezuelan government of its plant located in the Trujillo state in Venezuela (Argos 2017, 2).

On March 13th, 2006, Cemento Andino was stripped of its asset and a public and social interest utility by the government of Venezuela, resulting in the assessment of the company's administration that it has no control over the Group's entities even while maintaining a percentage of participation higher than 50% (Argos 2017, 138). Intending to maintain its claim for the investment in Venezuela, Argos brought its case to Venezuelan judicial bodies.

Similar to Norilsk Nickel's case that there is no direct BIT between Colombia and Venezuela, if Argos wanted to bring the government of Venezuela to international courts, it could have chosen one subsidiary whose host country has a BIT with Venezuela to sue. For example, the France – Venezuela, Bolivarian Republic of BIT (2001). However, in the end, Argos decided to follow Venezuela's domestic judicial process.

Case 5. Huawei vs. U.S.

On March 6, 2019, the Chinese electronics giant Huawei brought up a lawsuit against the United States government, arguing that it had been unfairly and incorrectly banned as a security threat (Mozur and Ramzy 2019). The U.S. has argued that Huawei poses a risk because its equipment could be used by the Chinese authorities to spy on communications and disrupt telecommunications networks, leading to major wireless carriers in the U.S. to avoid Huawei's equipment (Mozur and Ramzy 2019). Counter to the U.S. government's claim, Huawei said that the U.S. Congress has repeatedly failed to produce any evidence to support its restrictions on Huawei products and because of this, Huawei felt a necessity to take the legal action as a last resort (Pressman 2019). Risking deeper scrutiny of its business practices and relationship with the Chinese government, Huawei uses this lawsuit to force the government to make its case against the company more public (Mozur and Ramzy 2019).

Believing that the actual and intended effect of these prohibitions is to bar Huawei from significant segments of the U.S. market for telecommunications services, thereby inflicting immediate economic and reputational harms on it, Huawei filed its lawsuit in a United States District Court in Plano, Texas, where Huawei has its American headquarters (Kuo, 2019). Huawei argues that part of the 2019 National Defense Authorization Act is unconstitutional

because it singles out Huawei and the act bans government agencies from contracting with Huawei or companies that use Huawei's products. The company alleges the Act amounts to a "bill of attainder", a legislative act forbidden under the US constitution in which an individual or group is declared guilty of a crime without trial (Kuo, 2019).

In the case of Huawei, due to the lack of a direct BIT between China and the U.S., it could choose either to sue internationally through one of its subsidiaries all over the world, through other countries' BIT with the U.S., such as the Turkey – United States of America BIT (1985) or the Ukraine – United States of America (1994), or to sue domestically through U.S. courts. In the end, Huawei chose the domestic litigation process.

II. Cases Litigated Through Investor-State Dispute Settlement

Case 6. Siemens vs. Argentina

In 2001, Siemens sued Argentina government through ISDS due to the government's suspension and subsequent termination of a contract.

On August 26, 1996, Argentina called for bids on the provision of an integral service for the implementation of an immigration control, personal identification, and electoral information system, including the preparation of national identity cards (DNIs) (ICSID, 2007). To participate in the bidding, Siemens created SITS, a domestic Argentine company as required by the Bidding Terms and Conditions. Argentina selected SITS' bid, taking into consideration Siemens' credentials and financial soundness. The contract had a six-year term as from its effective date – November 21, 1998 (ICSID, 2007). Argentina suspended the production, printing and distribution of all new DNIs on February 24, 2000, due to a production mistake, which Argentina prohibited SITS from introducing any modification to correct this problem (ICSID, 2007). This suspension and a previous postponement occurred in the context of the Argentina government seeking to renegotiate the DNIs price and increase the number of free-of-charge DNIs (ICSID, 2007). In March 2000, the government set up a special commission under the Ministry of the Interior to review Siemens' contract and later gave Siemens a "Contract Restatement Proposal" (ICSID, 2007). However, the Minister of the Interior was replaced and in March 2001, the new Minister claimed to be unaware of the Contract Restatement Proposal. On May 3, 2001, SITS received a new Draft Proposal from the government which was different from the original one and was not negotiable (ICSID, 2007). Soon, on May 18, 2001, the contract that SITS had been following before the suspension was terminated under the Emergency Law by the government (ICSID, 2007).

For Siemens, significant investments had made during 1999 and further investments were made in 2000, for an aggregate amount of $284m up to May 18, 2001, and additional expenses exceeding $9.1m were incurred after termination of the contract under 2002 (ICSID, 2007). Under this situation, with the Argentina – Germany BIT (1991), Siemens filed its case to the international court.

Case 7. Murphy Exploration & Production Company International vs. Ecuador

Claims between Murphy and Ecuador arose out of Ecuador's enactment of Law No. 42, which imposed a 99% windfall levy on foreign oil revenues that allegedly resulted in the indirect expropriation of Murphy's investment (ICSID 2010). Unconvinced by this treatment, Murphy filed its case to the Permanent Court of Arbitration (PCA), holding that the levy on oil profits is well above a certain reference price and thus Ecuador breached the fair and equitable (FET) treatment under the Ecuador – United States of America BIT (1993) (ICSID 2010).

The starting point of the dispute is a Participation Contract signed in 1996 between the predecessor company of the state-owned Petroecuador and foreign investors for oil exploration and production, among them was a company controlled by Murphy (ITN 2016). In 2002, global prices of crude oil began to rise, and Ecuador exacted Law 42, amending the country's Hydrocarbons Law to allow "the state to receive from oil companies the surplus of oil sale prices" (ICSID 2010). Through Law 42 Ecuador set its participation at a minimum of 50 percent of the extraordinary profits resulting from prices exceeding the reference price; however, in 2007, through Decree 662, Ecuador changed it to 99 percent (ITN 2016).

Murphy alleged that Law 42 had been a unilateral medication of the Participation Contract and due to the law's detrimental effects on its investments, "it had no choice but to

forego its investment by selling its interest" (ITN 2016). Believing Ecuador government's modification of the contract was unfair, Murphy filed the government using ISDS under the Ecuador – United States of America BIT (1993).

Case 8. Middle East Cement Shipping and Handling Co. vs. Egypt

The claim between Middle East Cement Shipping and Handling (MEC) and Egypt arose out of Egypt's alleged expropriation of MEC's interests in a business concession located in Egypt and Egypt's alleged failure to ensure the re-exportation of Middle East Cement's assets (Investment Policy Hub f).

MEC was a Greek corporation, which establish its Egyptian branch in Suez in 1982 for the import and storage of bulk cement in depot ship and for packing and dispatch of cement within Egypt (ICSID 2002, 2). MEC carried out its operations until 1989, when Egypt issued Decree No. 195 prohibiting import of all kinds of Grey Portland Cement, and because of this, MEC had to stop sales in Egypt and failed to honor commitments to its suppliers and customers (ICSID 2002, 2). Furthermore, Egypt was withholding the approval to re-export MEC's on-shore installations until December 1995 and Poseidon 8, a ship time-chartered by MEC to its Egyptian branch, was seized by Red Sea Port Authority and sold at auction one month later for a fraction of its real value in 1999 (ICSID 2002, 3).

MEC claimed that all Egypt's actions amounted to expropriation and caused damages including lost profits in a total amount ranging from US$12m to 42m (ICSID 2002, 3). Under this situation, MEC decided to initiate proceedings through ISDS under the provisions of Egypt – Greece BIT (1993).

Case 9. Achmea B.V. vs. Slovakia

The dispute between Achmea (then named Eureko) and Slovakia was due to the Slovak government's announced plan to establish a unitary public health insurance system in Slovakia run by the state, which would allegedly entail the expropriation of Achmea's stake in a Slovak health insurance company (Investment Policy Hub g).

In 1993, the Slovak Republic established a universal public health insurance system by Act No. 9/1993 Coll (ICSID 2012, 20). Eureko has been active in the Slovak Republic since 1997, after it became a shareholder in a Slovak health insurer, Union Zdravotna Poistovna (UZP). In Dec 2005, shortly after the 2004 Reform to attract private investors, Eureko applied for a license to operate a health insurance company and incorporated in the Slovak Republic a new company, Union Healthcare (ICSID 2012, 22). However, the chairman of the Slovak Parliament believed that all public funds (including the health care levy) should be under public control, that non-state health insurance companies should not be permitted to make profits, the first sign of a significant intervention by the government in the health insurance market to Eureke (ICSID 2012, 27). In response to the Prime Minister's attitude, Eureko stopped trying to expand its business and later filed a complaint with the European Commission, but Eureko's influence on the direction of this complaint procedure is limited (ICSID 2012, 32).

In all, Eureko believed that the Slovak government denied its investment fair and equitable treatment by fundamentally altering the legal and business framework after Eureko had invested, and by taking measures with the elimination of privately-owned health insurers from the market (ICSID 2012, 36). Thus, it in the end filed the case to the PCA under the provisions of the Netherlands – Slovakia BIT (1991).

Case 10. Progas Energy Ltd vs. Pakistan

Progas engaged in import operations of liquid petroleum gas in Pakistan. The dispute between Progas and Pakistan arose out of the alleged government interference in operations at a gas import terminal at Port Qasim, leading to the alleged expropriation of Progas' liquid petroleum gas infrastructure in Karachi (Investment Policy Hub h).

Progas is a project development company with projects in the energy and infrastructure sectors in Pakistan, where it operates liquefied petroleum gas (LPG) marketing and distribution companies (Bloomberg 2019). Progas had been registered in Pakistan in 1998 and operated as a joint venture investing $40m in LPG bottling plant at Port Qasim, but it was later acquired by a state-owned gas company in late 2011 (Newsham 2016). Progas held Pakistan responsible for its failure of business because the Pakistan government had interfered in the setting of LPG prices from 2004 to 2008, making their business unviable (Bhutta 2016). Thus, to recover its loss, Progas brought the claims against the Pakistan government to PCA pursuant to the Mauritius – Pakistan BIT (1997).

Figure 1. List of Ten Cases

Case Number	Host Country	Home Country	Forum	Companies	Judicial Independence Score- HIGH	BIT Applied	Employee Number	Length of Staying Year	Annual Sales Investment mil	BITstrength
1	BOTSWANA	Russia	Domestic	Nornickel (Norilsk Nickel to 2016)	0.94	Botswana - Switzerland BIT (1998)	1183	10	6800	5
2	Russia	Germany	Domestic	Siemens	-2.56	Germany - Russian Federation BIT (1989)	4000	166	1358	6
3	Zimbabwe	China	Domestic	Anjin Investments	0.3	China - Zimbabwe BIT (1996)	1700	5	225	4
4	Venezuela	Colombia	Domestic	Compania de Cementos Argos SA	-2.73	France - Venezuela, Bolivarian Republic of BIT (2001)	90	50	25	4
5	U.S.	China	Domestic	Huawei	2.56	Turkey - United States of America BIT (1985) /Ukraine - United States of America BIT (1994)	1200	19	6550	6
6	Argentina	Germany	ISDS	Siemens	1	Argentina - Germany BIT (1991)	1400	145	4.94	6
7	Ecuador	US	ISDS	Murphy Exploration & Production Company	-2.15	Ecuador - United States of America BIT (1993)	364	16	103.6	6
8	Egypt	Greece	ISDS	Middle East Cement Shipping and Handling Co.	0.27	Egypt - Greece BIT (1993)	50	17	13	6
9	Slovakia	Netherland	ISDS	Achmea B.V.	1.69	Netherlands - Slovakia BIT (1991)	200	23	334.8	6
10	Pakistan	Mauritius	ISDS	Progas Energy Ltd	2.27	Mauritius - Pakistan BIT (1997)	175	15	40	6

Figure 2.

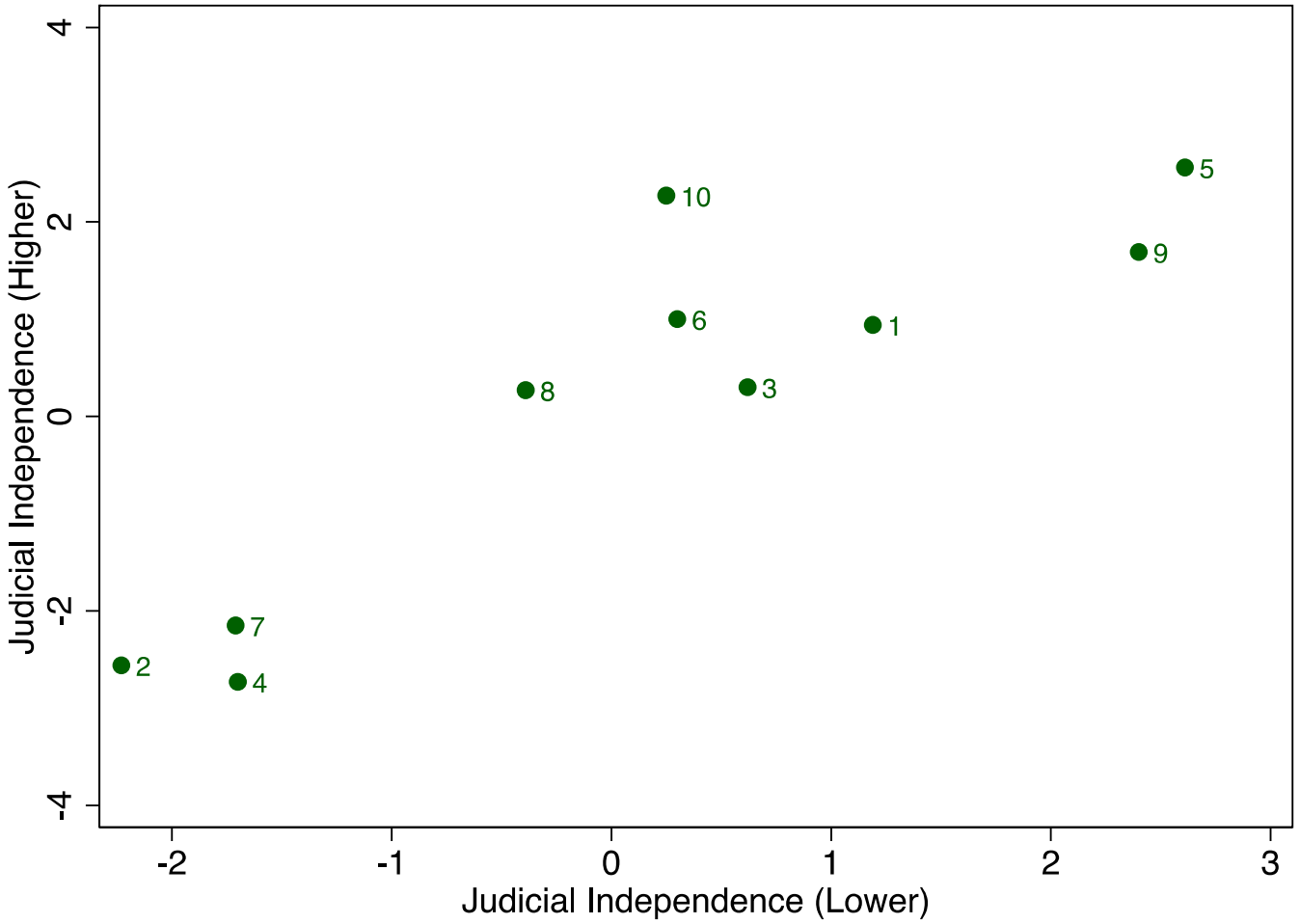
Judicial Independence (Higher)
4
2
0
-2
-4
-2
-1
0
1
2
3
Judicial Independence (Lower)
10
5
9
6
1
8
3
7
2
4

Figure 3.

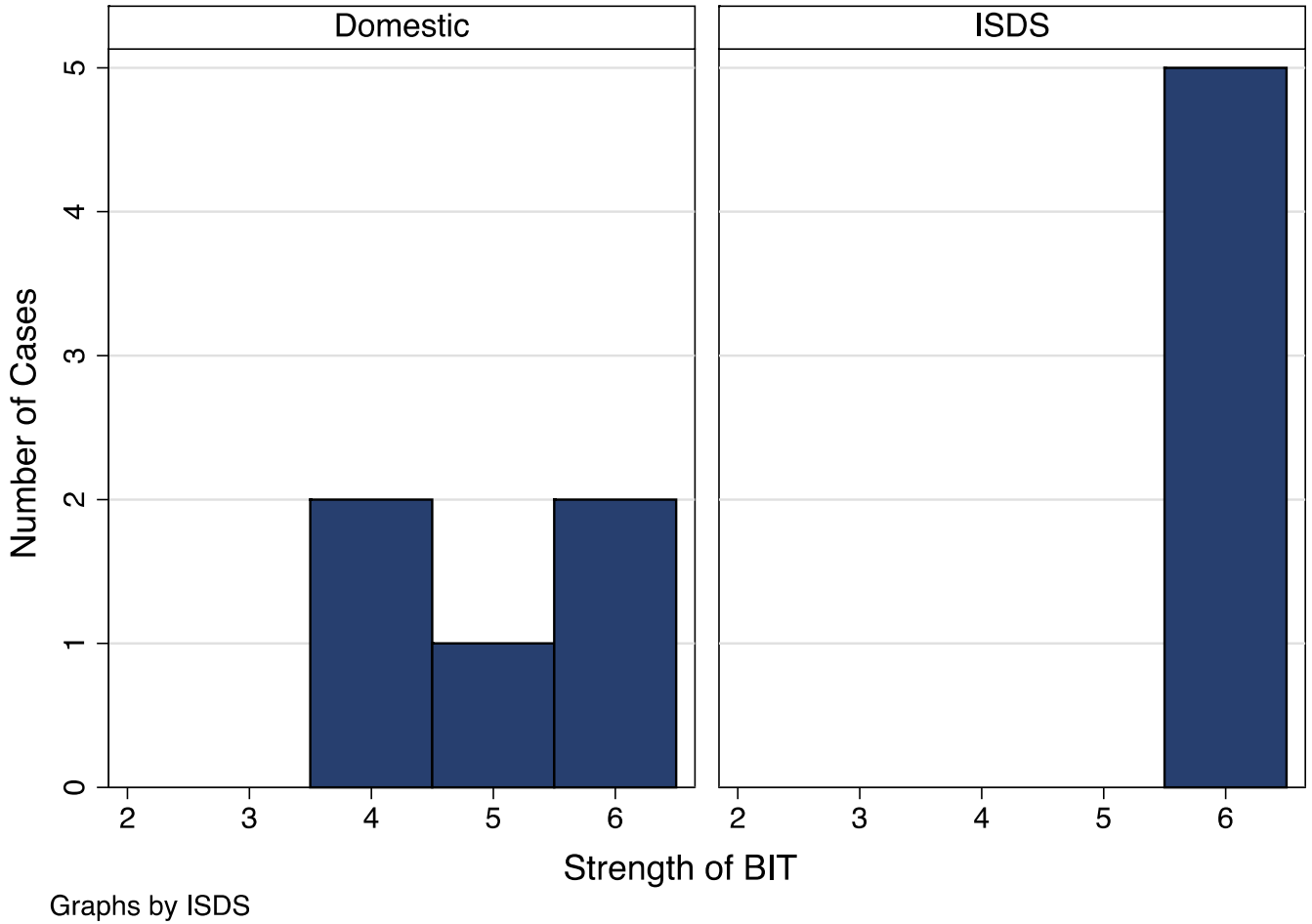
Domestic
ISDS
Number of Cases
0
1
2
3
4
5
2
3
4
5
6
Strength of BIT
Graphs by ISDS

Figure 4.

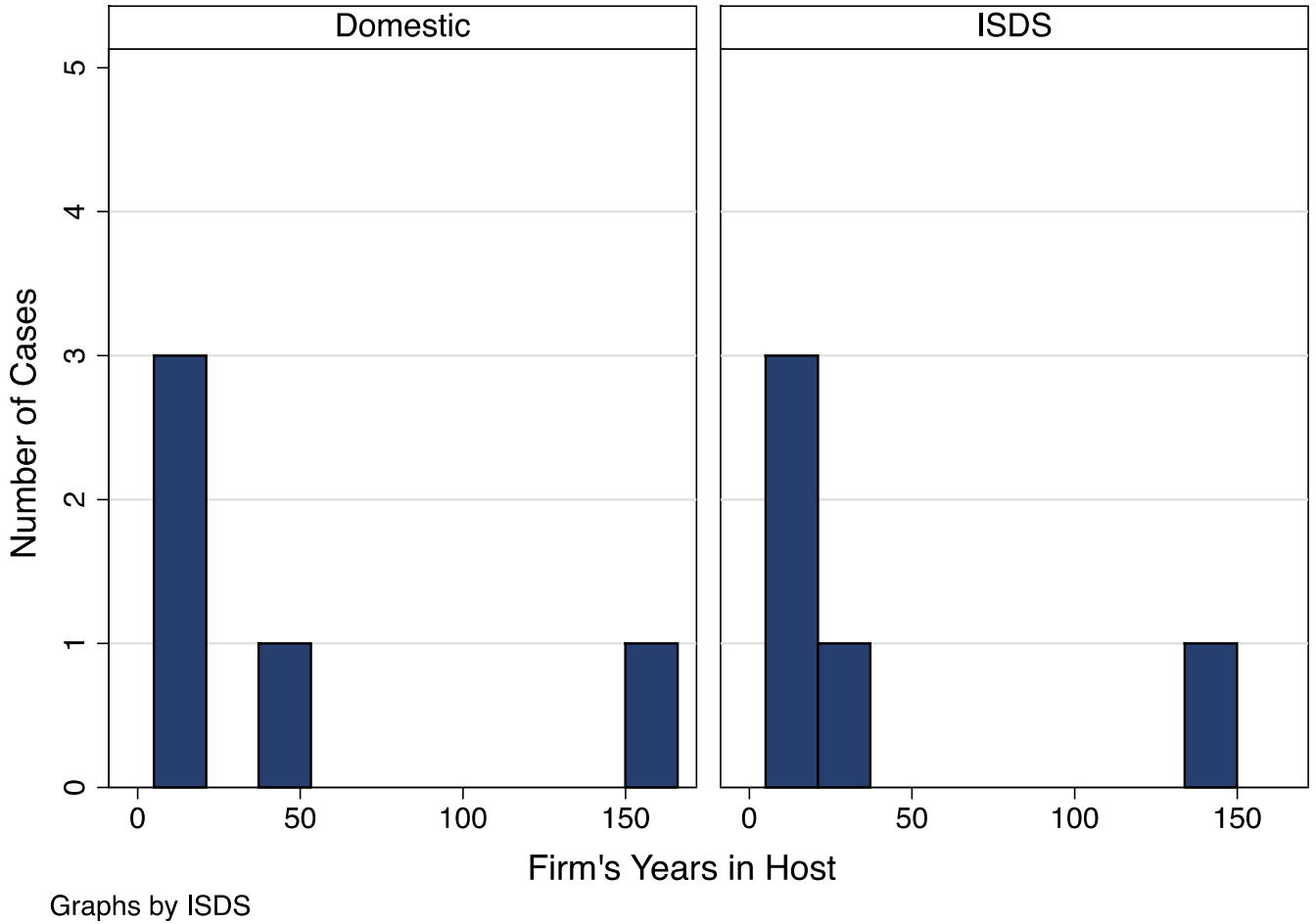
Domestic
ISDS
Number of Cases
0
1
2
3
4
5
0
50
100
150
Firm's Years in Host
Graphs by ISDS

Figure 5.

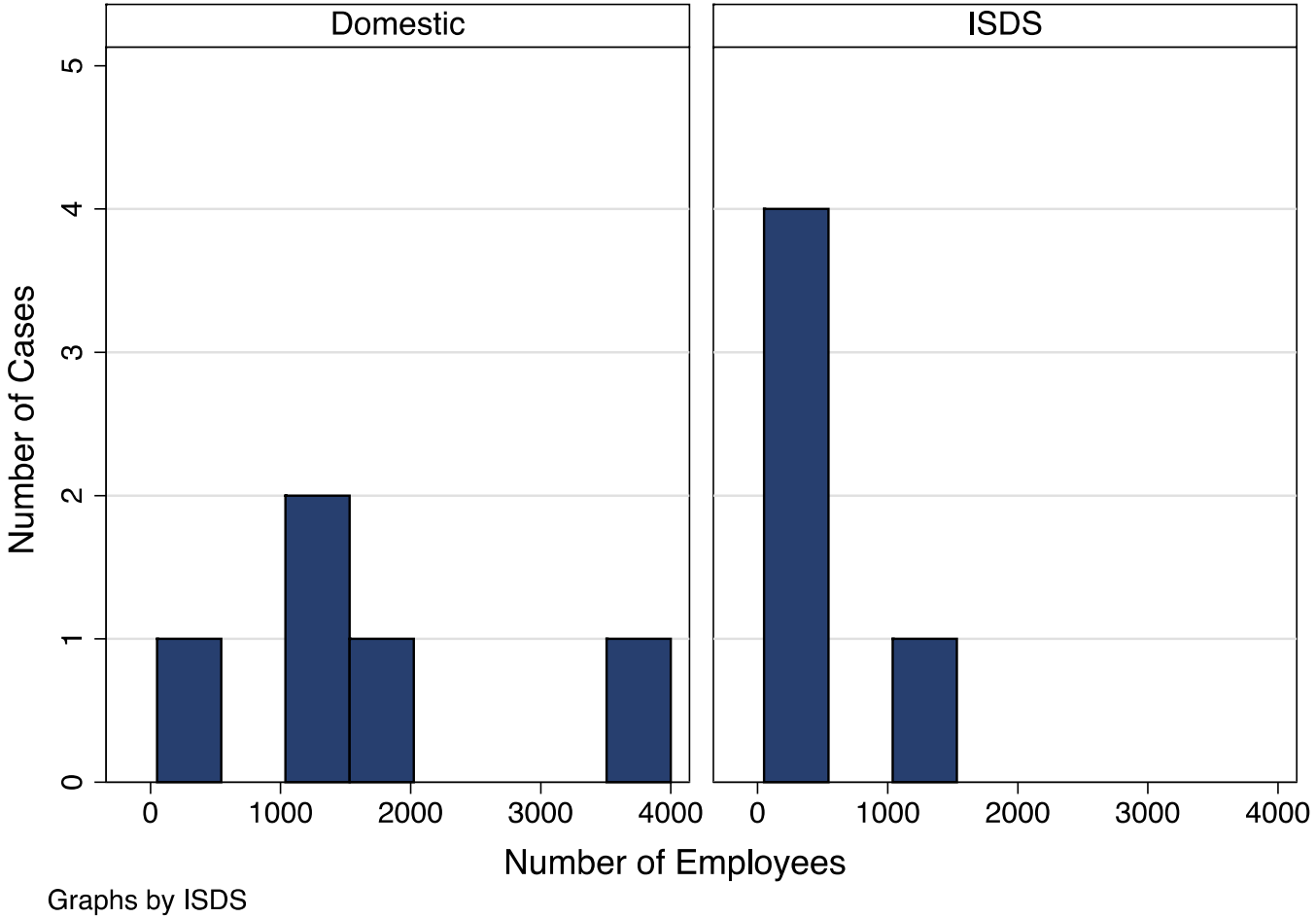
Domestic
ISDS
Number of Cases
0
1
2
3
4
5
0
1000
2000
3000
4000
Number of Employees
Graphs by ISDS

Figure 6.

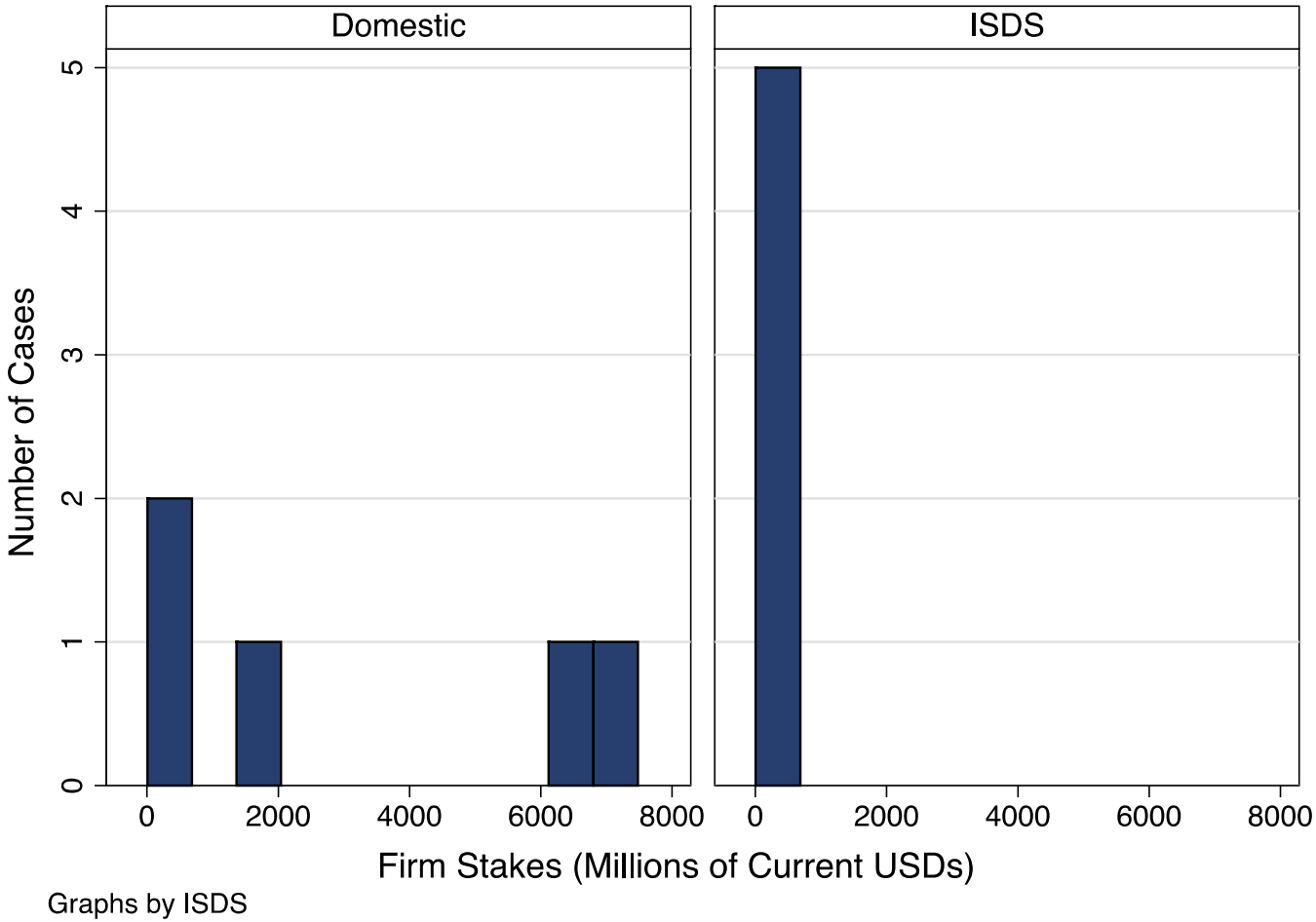
Domestic
ISDS
Number of Cases
0
1
2
3
4
5
0
2000
4000
6000
8000
Firm Stakes (Millions of Current USDs)
Graphs by ISDS

Figure 7.

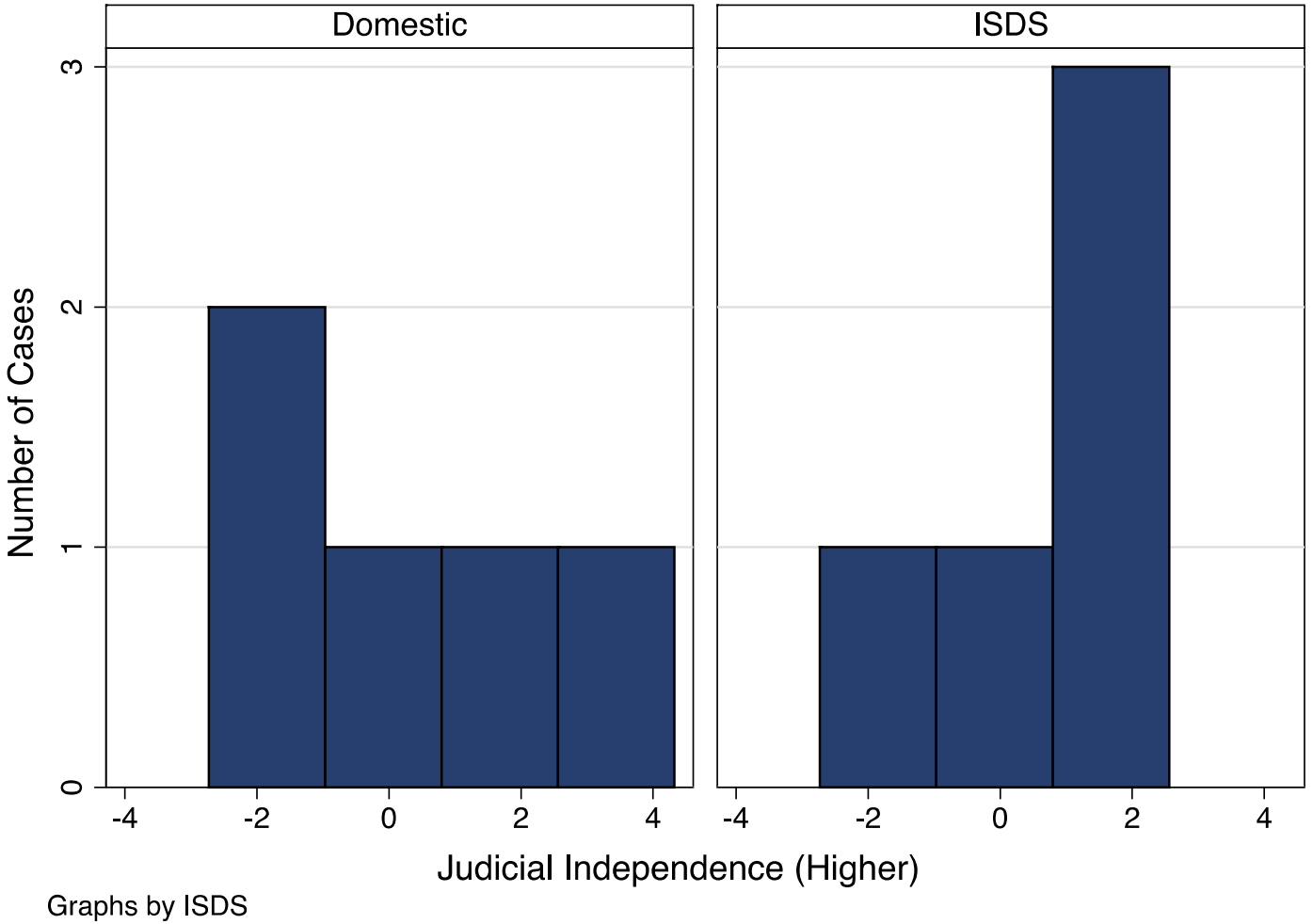
Domestic
ISDS
Number of Cases
0
1
2
3
-4
-2
0
2
4
Judicial Independence (Higher)
Graphs by ISDS

Figure 8.

	Cases Avg Judicial Independence	World Avg Judicial Independence	World STD	# of STD
Domestic	-0.298	0.316	1.422	0.43
International	0.616	0.292	1.412	0.23
All	0.159	0.304	1.417	0.1

Figure 9.

	Three 2s (%)	Two 2s & One 1(%)	One 2 & Two 1s(%)	Three 1s(%)
Selected Cases	70	10	20	0
All BITs with ISDS	67	32	0.35	0.6

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