LEGALIZATION, DIPLOMACY, AND DEVELOPMENT:

DO INVESTMENT TREATIES DE-POLITICIZE INVESTMENT DISPUTES?

Geoffrey Gertz
gtgertz@brookings.edu
Brookings Institution
1775 Massachusetts Ave., NW
Washington, DC 20036
United States

Srividya Jandhyala
Srividya.jandhyala@essec.edu
ESSEC Business School
Asia-Pacific Campus
5 Nepal Park
139408
Singapore

Lauge N. Skovgaard Poulsen
Ph: +44 7792113029
Fax: +44 2076794978
l.poulsen@ucl.ac.uk
University College London
Department of Political Science
Tavistock Square 29/31
WC1H 9QU, London
United Kingdom

Abstract

Developing countries have entered into investment treaties for decades. One promise of signing up to these potent agreements was that it would allow risky investment climates to attract more capital. This proclaimed benefit of the investment treaty regime is subject to a large, and growing, empirical literature – with mixed findings. Yet, another, and potentially far more important promise of the treaties has been entirely ignored in empirical literature. Architects of the investment treaty regime as well as many current proponents have suggested that the treaties would allow developing countries to de-politicize investor-state disputes; i.e. shield commercial disputes from broader political and diplomatic considerations with developed states. While this argument is widely accepted by legal scholars and practitioners and explicitly promoted by capital-exporting states, it has never been subjected to empirical investigation. We provide the first such test, using an original dataset of US diplomatic actions in 219 individual investment disputes across 73 countries as well as detailed case studies drawing on internal US State Department diplomatic cables. We find no evidence for the de-politicization hypothesis: diplomatic engagement remains important for investor-state dispute settlement, and American diplomats are just as likely to intervene in developing countries that have ratified investment treaties with the US as those that have not. And though aggressive, coercive American intervention in investment disputes is rare, this is a general feature of American investment diplomacy after the Cold War, rather than one limited to investors with recourse to legalized dispute settlement procedures. These findings provide a critical corrective to our understanding of the investment treaty regime, and have important implications for understanding the effects of international legalization on developing countries.

Keywords: investment treaties; investor-state disputes; legalization; diplomacy; power

Highlights:

(I) The US government routinely involves itself in disputes between American investors and developing countries, but aggressive diplomatic responses are rare compared to the Cold War period.

(II) The US government is as likely to intervene in investment disputes with and without investment treaty coverage.

(III) The results cast doubt on an important justification for the investment treaty regime, where developing countries have been promised that consent to investment treaty arbitration 'de-politicizes' disputes with foreign investors.

Acknowledgments

Funding from the Sigur Center for Asian Studies at George Washington University and the Strategic Research Foundation is gratefully acknowledged. We would also like to thank Barbara Zarate and InnovAccer for excellent research assistance, as well as Emma Aisbett, Andrew Delios, Mark Feldman, Robert Keohane, Andrew Kerner, Karolina Milewicz, Michael Plouffe, Clint Peinhardt, Rodrigo Polanco, Duncan Snidal, Anand Swaminathan, Rachel Wellhausen and seminar/conference participants at UCL ILAP, ESSEC, Princeton, George Washington University, Hebrew University of Jerusalem, University of Oxford, The Wharton School, The World Bank (ICSID), APSA Annual Conference, ISA Annual Conference, AIB Annual Conference, AoM Annual Conference and the Asia FDI Forum for comments on previous drafts.

Introduction

Studies of the effectiveness of the investment treaty regime have focused overwhelmingly on whether, and to what extent, treaties have succeeded in attracting foreign capital to developing countries. Results have been mixed (see, e.g., Aisbett 2009; Poulsen 2010; Yackee 2011; Peinhardt and Allee 2012; Kerner and Lawrence 2014; Jandhyala and Weiner 2014; Colen, Persyn, and Guariso 2016). Yet another main justification for the treaties has thus far received little attention by scholars of international political economy, namely the potential for investment arbitration to "de-politicize" investment disputes. This is unfortunate. If this potential has been fulfilled, it provides a powerful political argument for developing countries to enter into the agreements irrespective of whether the agreements promote foreign investment at the margin. Also, de-politicization was *the* major justification for the establishment of the modern investment treaty regime, not investment promotion.

Prior to the creation of this regime, private foreign investors facing property rights disputes with host governments depended on diplomatic protection from their home states. Although home governments often intervened on behalf of their investors, these interventions frequently impaired diplomatic relations between states, and at times even devolved into questions of war and peace (Maurer 2013). Developing countries would routinely be met with sanctions, or worse, if they failed to resolve serious investment disputes. The modern investment treaty regime provided an alternate system of dispute resolution, whereby private investors could directly hold host countries accountable for property rights violations through investor-state arbitration. Private access to international dispute settlement meant that disputes between foreign investors and host governments were relegated to technical legal procedures (Shihata 1986: 267-272), rather than politicized quarrels debated by diplomats. Thus, home country diplomatic

interventions – or the leveraging of state power and apparatus to advance the interests of private investors – would no longer be necessary in investment disputes. Conflicts over private investment disputes would no longer overshadow the bilateral agenda between the home and host states, or influence diplomatic priorities and discussions of aid, trade, investment and other benefits.

The idea that access to investor-state arbitration de-politicizes investment disputes has emerged as a key motivation for scholars and practitioners advocating for the expansion of the investment treaty regime. The US government continues to argue that one of the main benefits of investment treaty arbitration is to "resolve investment conflicts without creating state-to-state conflict" (USTR 2015). And while some point to de-politicization as a justification even for North-North investment agreements (see, e.g., EFILA 2015: 17; European Commission 2015: 22; UNCTAD 2015: 153), the argument is primarily used as a core benefit of investment treaties for less powerful developing countries (Johnson and Gimblett 2011: 692). Indeed, if the de-politicization promise is fulfilled, adopting investment treaties might be prudent for developing countries even if they do not substantially alter investment flows, since the treaties would act as an effective limitation on abuses of diplomatic protection by more powerful capital exporters. As noted by Echandi, "An important role … that many developing countries have expected [investment treaties] to perform is to depoliticize international investment-related conflicts." (2016, 246).

Yet the hypothesis that access to treaty-based investor-state arbitration de-politicizes investment dispute settlement has never been subject to empirical testing. In this paper, we present the first such test. We analyze the investment diplomacy of the United States government in the investment treaty era, and ask: is the US government less likely to intervene diplomatically

in disputes where investors have access to treaty-based investor-state arbitration than in disputes where investors lack such access? While the United States is not necessarily representative of all capital exporting countries, it is a crucial case for the de-politicization hypothesis: as discussed below, de-politicization was a key goal of the early American bilateral investment treaty (BIT) program, and for developing countries the US is the hegemon whose power is most in need of restraint. If the de-politicization hypothesis is correct, then the core benefit for a developing country entering into a BIT with the United States may not necessarily be a marginal increase in foreign investment, but rather reduced political pressure from the State Department (and, in the extreme, US armed forces) when disputes with American investors occur.

To assess whether this expectation is correct, we rely on a novel data source: internal US State Department diplomatic cables, which were subsequently publicly leaked. Using these cables we identify 219 investment disputes from 1996-2010 with information about the extent of US diplomatic interventions. The cables provide a unique window into behind-the-scenes American investment diplomacy, and allow us to study the otherwise hidden world of non-legalized dispute settlement with developing countries. This is a core innovation compared to other studies of investment dispute settlement. Lacking alternatives, many studies of political risk and government-firm disputes rely on datasets of publicly-known arbitration claims as the universe of investment disputes, blind to the much larger category of disputes that never make it to arbitration (Peinhardt and Allee 2016: 205-206). Our research design avoids this source of selection bias.

Two important findings emerge from our analyses. First, US diplomatic intervention in disputes between developing country governments and American investors is widespread. In nearly a third of the disputes in our dataset, the US government strongly intervened, placing

disputes on the states' bilateral agenda. While explicit threats of coercive sanctions were rare – a notable shift from the Cold War era – high-level US officials, legislators, ambassadors and other representatives regularly pushed top developing country officials to resolve outstanding disputes. Second, and crucially, our analysis suggests that legalization has no effect on the extent of diplomatic intervention in a dispute. We find no evidence that diplomatic intervention is less likely in disputes where American investors have access to investor-state arbitration than in those disputes where investors lack such access. Moreover, looking in-depth at three case studies of individual disputes, we find no evidence that actors' decision-making follows the logic suggested by the de-politicization hypothesis.

These results provide a corrective to our understanding of the investment treaty regime. Granting investors treaty-based rights to sue sovereign states in front of international tribunals has resulted in significant litigation in recent years, where investors have often walked away with hefty compensation. Moreover, investment treaty claims have touched on highly sensitive policy areas, including governments' responses to financial crises, environmental and public health regulation, sovereign debt, and court decisions. Not surprisingly, the often-heated debates about the treaties' impact on government regulation has begun to find its way into development literature (e.g. Manger 2009; Shadlen 2008; Cotula 2013; Bos and Gupta 2017). And given the economic and political costs to states of opening themselves to such claims, it is notable that one of the promises of the regime appears unfulfilled. In an era where many developing countries are rethinking their investment treaty practice, these results could hold important policy relevance.

More broadly, our findings have implications for the legalization literature. One expected benefit of the legalization of international economic disputes is that it offers states the ability to compartmentalize 'lowly' disputes over exports and money from broader political and

diplomatic relations (Jackson 1979: 3-4; Fischer 1982: 273; Abbott and Snidal 2000: 433; Davis 2012: 14-15; Puig 2013: 550-552). Legalized, third-party settlement of disputes can prevent individual disagreements from spilling over into other aspects of the bilateral agenda, allowing states to continue reaping benefits from cooperation and interdependence despite the occasional dispute (Davis and Morse 2016). Such de-politicization effects are of particular relevance for weaker states and are expected to be particularly strong when legalized regimes allow private actors direct access to file claims against sovereign states. When considering filing an international claim governments must weigh the foreign policy costs of pursuing an unfriendly diplomatic act, meaning that political considerations continue to shape inter-state disputes (Alter 2003: 799-800; Alvarez 2002: 156-157; Davis and Shirato 2007: 284; Davis 2012: 11-15). Private actors are not burdened with such diplomatic considerations, and thus legalized dispute settlement with private access should be further insulated from political relations (Levy and Srinivasan 1996: 95-96; Sykes 2005: 15). But although this is intuitively plausible, our results imply at a minimum that the relationship between private access to international dispute settlement and inter-state relations requires more scrutiny. In the investment treaty regime, at least, the benefits of de-politicization have been oversold to developing countries.

Assessing the De-Politicization Hypothesis

All international legal disputes are 'political' in one form or another (Lauterpacht 1933: 153-160). It is therefore important to clarify what is meant by 'politicized' dispute settlement. For instance, even when disputes don't go to international arbitration, public threats to sue a host government can lead to highly politicized and confrontational bargaining between foreign investors and host states (Post 2014: 6). When disputes do go to arbitration, politicization could

refer to the political costs suffered by either claimants or respondents in settling an investment dispute. In addition, legal literature on the investment treaty regime has variously defined 'politicization' as dispute resolution through (i) investor-host state negotiations; (ii) local courts biased against foreigners; (iii) formal inter-state dispute settlement; and (iv) informal inter-state negotiations. (Paparinskis 2012; Titi 2015: 265; Bonnitcha, Poulsen, and Waibel 2017, chs. 7-8).

We leave these conceptual issues aside and focus solely on the last understanding of the term, defining politicization as *extensive diplomatic involvement of the home state, wherein the dispute features on the bilateral diplomatic agenda and state power and apparatus are leveraged on behalf of the private investor's interest.* Removing this element of politicization was a main justification for the establishment of the modern investment treaty regime. During the 19th and much of the 20th century, disputes between private foreign investors and developing country governments were routinely politicized. If their assets were expropriated or otherwise interfered with, Western companies lobbied their home governments to coerce host states into paying appropriate compensation. Though home governments were often reluctant to get involved in 'lowly' economic disputes, especially when doing so could conflict with the state's other policy objectives, they frequently bowed to private pressure and intervened diplomatically to advance investors' interests.

Maurer (2013) documents in particular detail how the American government frequently, though reluctantly, intervened on behalf of US investors during the 19th and 20th centuries. The State Department and the CIA were wary of getting involved in investment disputes, as diplomatic protection often risked compromising broader foreign policy goals, most notably maintaining strategic alliances with developing country governments. Yet private pressure to assist American companies abroad was intense, as affected firms worked diligently to leverage

political connections (especially in Congress) and mobilize anti-communist public opinion to support business interests. This created domestic political costs that made it difficult for the State Department to turn down requests to intervene on behalf of American investors. Consequently, the executive branch routinely used diplomatic pressure and interventions to support US businesses abroad, even when doing so entailed significant foreign policy risks. After revolutionary Cuba initiated land reforms in 1959, for instance, American sugar firms lobbied Eisenhower to cut Cuba's sugar quota. He hesitated, as State Department officials warned that "keeping Cuba out of the Sino-Soviet orbit … is more important than salvaging of the U.S. investment in Cuba to the complete satisfaction of the U.S. business community" (quoted in Maurer 2013: 322). After a series of subsequent expropriations, Congress decided otherwise and retaliated by blocking the entry of Cuban sugar into the United States – a move which further pushed Castro into Soviet hands (Maurer 2013: 328). A few years later, in 1962, the story repeated itself. An expropriation in Brazil prompted a number of major American companies to lobby Congress to cut off all American aid to countries expropriating American capital. The Kennedy administration objected, but to no avail. Congress passed the Hickenlooper amendment to the Foreign Assistance Act requiring the executive to cut all foreign assistance to governments expropriating American capital. Over the coming decades, shifting American Presidents managed to (mostly) stay clear of invoking the Hickenlooper amendment as it risked further aggravating already sensitive diplomatic relationships. But the only way possible was to slash American aid to expropriating nations and threaten economic sanctions. The end-result was a success for expropriated American firms, who almost always managed to receive compensation at fair value, but had significant costs for developing countries.

Legal remedies, particularly international investor-state arbitration, could provide a solution to this strategic problem. The architects of the investment treaty regime argued that the best way to de-politicize investment disputes was to allow foreign investors to file international claims directly against the host state, without the involvement of their home government (Parra 2015: 326-329). Here a private tribunal had jurisdiction to determine the dispute and award damages. Decisions would be final with no real opportunities for appeal and if governments didn't comply, investors were empowered to confiscate their commercial assets around the world. The primary venue for hearing disputes - the International Center for Settlement of Investment Disputes (ICSID) - was part of the World Bank group, so non-compliance with awards could trigger economic sanctions by the Bank and its members.

Consent to investor-state arbitration could be provided in contracts or domestic laws, but a particularly powerful instrument would be through treaties, wherein states would give a standing offer to arbitrate disputes with a broad class of foreign investors (unlike in investor-specific contracts) without the ability to unilaterally withdraw the invitation to international arbitration (unlike in domestic laws). Most important were the growing number of bilateral investment treaties (BITs), which provide foreign investors protections against a wide range of political risks, including contract breach, discrimination, capital transfer restrictions, 'unfair and inequitable' treatment and uncompensated expropriation, including indirect expropriation. Since the late 1980s, the vast majority of BITs have coupled their substantive protections with recourse to investor-state arbitration and similar provisions have also been included in preferential trade agreements (PTAs) (like NAFTA) and the Energy Charter treaty. The United States began consenting to investment treaty arbitration in the late 1970s, and is currently party to 50 treaties that allow for investor-state arbitration (including BITs and investment chapters in PTAs).

Enshrining private access to investor-state arbitration into investment treaties established a potent legal system, and had the potential to prevent investment disputes from turning into inter-state conflicts. Indeed, the drafting documents of the ICSID Convention note that one of the key purposes of the ICSID system "was to remove disputes from the realm of diplomacy and bring them back to the realm of law" (ICSID 1968: 273). Similarly, Maurer (2013: 435) contends that this system insulates the US government from investor pressure to intervene in disputes, allowing it to "gracefully exit from the sorts of continual confrontations" that diplomatic protection entailed. American officials responsible for the US BIT program considered the potential to de-politicize investment disputes one of the central benefits of the system; as one of the lead negotiators of the time later wrote, investment treaty arbitration would ensure that dispute resolution is "wholly insulated from the political relationship between the investor's government and the host government" (Vandevelde 1988: 258).

This benefit was of particular relevance for weaker developing countries. A former investment treaty negotiator from Costa Rica is worth quoting at length:

> .. investor-state dispute settlement prevents politics from playing a role in resolving an investment dispute. .. Within this context, the international investment regime plays a fundamental role in international governance, and in particular, for smaller developing countries. In an increasingly interactive world that is prone to frequent international tensions, developing countries (especially the smaller ones) have very limited economic, political, and/or military power to defend their interests. Consequently, one of the few instruments that smaller economies have at their disposal to promote their agenda is, despite all its limitations, international law. Thus, it is in the best interest of developing countries to foster the development and effective implementation of the rule of law in international affairs, including investment relations. (Echandi 2011, 11-12)

Indeed, international legal scholars argue that such de-politicization is in fact the most important accomplishment of the investment treaty regime. Reisman (2012: 20-21), for instance, argues that the "central achievement" of the investment treaty regime is not the promotion of FDI flows, but rather the insulation of investor-state claims from "the caprice of sovereign-to-sovereign politics." Schwebel also claims that "what is clear is that investor-state arbitration has proved to be a significant and successful substitute for the gunboat diplomacy of the past" (2016: 6). In a similar vein, Alvarez (2009: 822) notes that "today, U.S. foreign investors are more likely to be protected by international investment treaties and not by lawless threats, nor even by the United States threatening to apply unilateral economic sanctions against an expropriating state." Lowenfeld aptly summarizes the consensus among legal scholars: "[t]he essence of [investment treaties] is that controversies between foreign investors and host states are insulated from political and diplomatic relations between states" (quoted in Paparinskis 2012: 3).

This line of reasoning appreciates the often-serious political costs that accompanied diplomatic interventions in the investor-state disputes of previous eras, and echoes the international relations and political science argument that legalization could help insulate commercial disputes from diplomatic relations. This suggests a testable (but as yet untested) empirical proposition: home governments are less likely to intervene diplomatically in disputes where investors have access to treaty-based investor-state arbitration than in disputes where investors lack such access.

Although the conventional wisdom is plausible, there are also reasons to be skeptical of the de-politicization hypothesis. In particular, the hypothesis is built on two assumptions about actors' motivations in investment disputes. The first is that firms involved in investment disputes dislike relying on their home governments to pursue dispute resolution, and would prefer having

direct access to international arbitration. The second is that home country governments dislike intervening diplomatically in investment disputes, and would prefer to leave investors to pursue their own recourses (Maurer 2013: 8-10; Vandevelde 1993: 161). Both assumptions can be questioned.

The first assumption is that investors facing disputes view legalized investor-state dispute settlement as an efficient and effective means of resolving disputes, and will opt to use arbitration when it is available. Yet studies examining investor motivations have documented that many firms are either unaware or unwilling to pursue investment treaty arbitration. Yackee (2010) finds that even many of the world's largest firms have little knowledge or awareness of BITs. Further, investment treaty arbitration is expensive, uncertain, and often complicates future relationships with the host government.[i] Thus few firms consider it to be an effective method in dealing with political risk (MIGA 2013: 51). For these reasons, while firms may appreciate the ability to file arbitration separately – hence investor lobbying for investment treaties – they will nevertheless continue to view diplomatic interventions as a preferred option to facilitate negotiated settlements. Indeed, Wellhausen (2014: 112-155) notes that firms often requested diplomatic assistance in disputes in Eastern Europe, Jandhyala and Weiner (2014) find that since state-owned firms may rely on diplomatic efforts to resolve disputes they value the option of investment arbitration less favorably than other investors, and Gertz (2016) finds that investors prefer relying on home state interventions to informally settle disputes rather than file arbitration claims. Some investors may also see the two options as complementary rather than competing, whereby investment treaty arbitration becomes a possible tool in case diplomacy fails.

Even if firms seek assistance by their home states to settle disputes, it is ultimately up to home state governments to determine whether, and how intensely, diplomats will intervene on

their firms' behalf. This brings us to the second assumption underlying the de-politicization hypothesis, namely that home state governments only reluctantly intervene in investment disputes, and would generally prefer not to engage. Yet home governments may have their own strategic incentives for intervening in investment disputes, independent of any private pressure to do so. For instance, many governments consider commercial diplomacy a foreign policy priority, and use it to explain the value of diplomacy to skeptical publics. Often, foreign diplomatic corps play a key role in developing and maintaining economic opportunities for home country firms (Rose 2007). In the US, the State Department has consciously and strategically reoriented itself toward commercial diplomacy in recent decades. Writing in the mid-1990s, two former high ranking State Department officials noted that "American ambassadors now spend more time on assisting U.S. businesses than on any other single function" (Eagleburger and Barry 1996: 5). Eager to claim credit for commercial diplomacy successes, diplomats may be disposed to intervene in investment disputes, even if investors have private recourse to arbitration. Indeed, in a 1995 Senate hearing debating ratification of a number of recently signed BITs, the U.S. Assistant Secretary of State for Business and Economic Affairs proudly noted that:

> when companies are interested in assistance, when they have a problem —*and, again, this is regardless of whether a BIT is in effect or not*—we, through the embassies, will provide consular assistance, meaning we will make representations to the other government…. I can say with assurance that protection of U.S. investor interests abroad is one of the principal concerns of the economic and commercial sections of our embassies. (US Senate 1995: 16, emphasis added)

More recently, in a 2011 speech then-Secretary of State Hilary Clinton argued that "when American businesses are not treated fairly, that's not just an economic issue. It is also a diplomatic issue, and we raise it at the highest levels" (Clinton 2011). Ironically, diplomatic interventions in disputes can be used by home state officials to emphasize the value of the rule of

law. And in private interviews, both recent government officials and private sector executives confirmed that American companies operating abroad frequently appeal to the State Department for assistance, and that such assistance is often (though not always) forthcoming and effective, even when firms have the ability to file independent treaty claims.[ii]

Thus, if both firms and home states may have reasons to continue relying on diplomacy to settle investment disputes even when they have access to investor-state arbitration, the de-politicization hypothesis can theoretically be indeterminate. Even if the treaties play a role in shaping inter-state deliberations - something we will return to – they may not reduce the propensity of home states to rely on diplomatic resolution of investment disputes in the first place. This would be important, since this is the core of the de-politicization that played a central role during the creation and expansion of the investment treaty regime and is still invoked today by policy-makers and senior legal academics today to justify the costs of investment treaty arbitration. It is therefore critical that the hypothesis be examined empirically, rather than accepted as a stylized fact.

The Dataset

One reason why the empirical analysis of diplomatic interventions in investment disputes has received little academic attention so far is the scarcity of data, as political pressure in informal investor-state dispute settlement is rarely observed. Home governments, host governments and foreign investors can all have incentives to keep negotiations over investment disputes confidential. And while the State Department makes public its guidelines on how and when US embassies abroad may assist Americans engaged in investment disputes, the policies are vague and it is difficult to assess how closely on-the-ground diplomacy follows such guidelines.[iii]

To confront this challenge, we take advantage of a data source which offers a window into these negotiations: internal US State Department diplomatic cables which were subsequently publicly leaked. In 2010-2011 the WikiLeaks organization publicly released some 250,000 diplomatic cables consisting of internal communications within the US State Department (Mackey et al 2011). The cables reveal internal communications between State Department headquarters in Washington, D.C. and diplomatic missions (embassies and consulates) abroad. They consist primarily of diplomats informing Washington-based officials about recent events in their country and embassy activities, as well as occasional requests for instructions on which policies or actions to adopt. The cables were never intended to be made public; a minority are classified, while many more are marked as sensitive but not classified. The cables range in date from 1966 to 2010, though the substantial majority of the cables are from since 2000.[iv]

Information from the cables has previously been used for studies on international relations in Asia (Khoo and Smith 2011; Mendis 2012), relations between the United States and unrecognized *de facto* states (Pegg and Berg 2016), free trade agreement negotiations between the United States and Jordan (El Said 2012), the negotiations of the Trans Pacific Partnership (Michael 2015), the use of US sanctions against Myanmar (Jones 2015) and US efforts to combat human trafficking (Kelley 2017)[v]. Partly as a result, substantial commentary has emerged about the methodological and ethical concerns regarding the academic use of such data (e.g Drezner 2010; Kelly 2012; Michael 2015: 175-184). To begin with, it is difficult to know whether the diplomatic cables made public are representative of American foreign policy, both because only a subset of cables were leaked and because the cables only capture communication between the State Department and embassies abroad, leaving other important players in the policy process out of the picture. While this means we may miss some Washington-based lobbying in investment

disputes, which is not transmitted to embassies, interviews with current and former State Department officials confirmed that economic officers and Ambassadors in-country are almost always the first point of contact for companies seeking diplomatic support in disputes.

Another potential concern is that data may be selectively leaked – with the goal of changing a certain policy or embarrassing a certain actor – which introduces the possibility of sampling biases. However, our focus is on the relatively 'low politics' of foreign economic policy in specific investment disputes, so it is highly unlikely any of the cables of interest to us were selectively chosen to garner headlines in newspapers. Indeed, our finding that US diplomatic engagement in disputes is usually benign and only rarely coercive challenges some of the anti-American narratives espoused by WikiLeaks, and thus it is unlikely the cables were selected on this parameter. Finally, and importantly, our focus on specific disputes in the economic realm assuages ethical concerns that this line of research may reveal particularly sensitive state secrets or substantially harm national interests.

Confident that our use of the cables does not present insurmountable methodological or ethical concerns, we searched for all mentions of investment disputes between an American company and a foreign government. The US government keeps track of such disputes partly to conform to the US Foreign Relations Authorization Act (1994, 1995), which requires the State Department to annually report to Congress on all outstanding investment disputes involving American citizens or corporations. Disputes were recorded if they were outstanding (or very recently resolved) at the time the cable was written. Based on the cables, we identify 214 distinct investment disputes involving American investors and foreign governments in 73 developing countries.[vi] The cables include a few disputes initiated back in the 1940s and 50s, but we only include disputes that were initiated since the second half of the 1990s. This is partly to ensure the

analysis is limited to the "BIT era" in American investment protection policy, and partly because there is only scarce information about disputes before this period.[vii] Table A.1 in the appendix indicates the distribution of disputes in our dataset across countries.

For each of the 219 disputes identified in the cables, we examine the extent of US diplomatic intervention. The cables reveal a wide range of diplomatic actions taken to advance the interests of American investors – including representations to local officials, writing official letters of complaint or protest, convening meetings with representatives of the investor and host country officials, lobbying regulators and political officials, and explicitly linking dispute resolution to other issues, such as aid and trade benefits – while in some disputes diplomats took no action on behalf of investors. We consider a dispute to involve serious diplomatic intervention as when American officials place the dispute on the political bilateral agenda between the US and the host government, either by (a) explicitly linking it to aid, trade or other benefits; (b) discussing the case with the head of state; of (c) raising it during an official diplomatic visit.

The first point to note is that explicit links to aid, trade, or other host state priorities were rare, made in only 2% of all disputes [Vidya to recheck with the updated data]. In each of these cases (five in Peru, one in Ecuador and one in United Arab Emirates [Vidya to recheck with updated data]) American government officials told local officials that negotiations of preferential trade agreements could be in peril without resolution of the dispute. As a matter of descriptive inference, the fact that disputes were explicitly linked to aid or trade benefits only 2 percent of the time indicates that the 'malign' diplomatic instruments with which investment disputes were resolved before the modern investment treaty regime was established are largely absent from the American diplomatic arsenal today. This is an important point which deserves individual scrutiny in future work. Yet, diplomacy can severely politicize a dispute even in the absence of

threats of sanctions, and the frequent recourse to diplomatic intervention in categories (b) and (c) mean that our dependent variable is coded 1 in approximately 30% of the disputes in our sample.

Of course, American diplomatic interventions in disputes could merely be cheap talk and empty bluffs, with little effect on host states' incentives or actions. Yet the cables suggest both American diplomats and host state officials take the disputes seriously and place considerable importance on their resolution, and that host states perceive political costs if they fail to resolve disputes. An illustrative example was when the largest US business contract with the Tajikistan government became subject to a dispute in 2006 and 2007. American officials did not explicitly threaten the Tajik government, but clearly and repeatedly told high-ranking Tajik officials – including the President and Foreign Minister - that the United States had an interest in seeing the dispute resolved.[viii] Tajikistan was displeased that the dispute was an irritant in the bilateral relationship; an advisor to the Tajik President told the US ambassador "that the [dispute] has unfortunately acquired an 'unnecessary emphasis' in the bilateral relationship, and that a 'commercial-economic' dispute should not become political" (06DUSHANBE403). While we cannot precisely identify to what extent diplomatic interventions were empty threats, these examples suggest contemporary levels of US diplomatic pressure can still involve significant political costs for developing country governments. Moreover, the assumption that diplomatic interventions were not meaningless actions is supported by recent literature that finds American diplomacy can help lead to the informal resolution of both investment (Gertz 2016) and trade (Gray and Potter 2015) disputes.

Using this data, we conduct two empirical tests of the de-politicization hypothesis. First, we conduct a large-N analysis to test whether, on average, diplomatic interventions are less likely in disputes where investors have access to investor-state arbitration. Second, we conduct

three detailed case studies that probe the assumed micro-foundations of the de-politicization hypothesis. Neither of these tests finds any robust support for the de-politicization hypothesis.

Testing the De-politicization Hypothesis: Quantitative Evidence

As an initial step, we first simply compare whether politicized diplomatic intervention was any more or less likely in the presence of a ratified international investment agreement (IIA) with private recourse to investment arbitration between the US and the host state. [ix] The de-politicization hypothesis suggests the US should be less likely to seriously intervene in countries with ratified US IIAs than those without. Yet the data reveal that the share of disputes with serious diplomatic engagement in non-IIA and IIA countries is almost exactly the same: 30 percent vs 29 percent. The results are summarized in Table 1: investment treaties do *not* appear to be correlated with significant diplomatic engagement.

	# disputes	Share with serious diplomatic engagement	SE	T-stat.	Degrees of freedom	P-value
No Investment Treaty	135	0.30	0.04	0.17	180	0.43
Investment Treaty	84	0.29	0.05			

NOTE: Table shows T-test of differences in serious diplomatic engagement in investment disputes with and without recourse to investment treaty arbitration. p values correspond to the one sided test [serious involvement (no investment treaty) – serious involvement (with investment treaty) > 0].

Table 1. Diplomatic engagement and access to treaty-based investor state arbitration

We next turn to estimating a basic regression model of the drivers of diplomatic interventions. We begin with a simple model consisting of only control variables. We include a number of host country economic variables, drawn from the World Development Indicators. The ability and effectiveness of US diplomacy may be related to the host country's development, thus

we include (the log of) host country *GDP per Capita*. We also include *GDP Growth*, as both investors and the US government may be more intent on a quick political solution in high growth host countries. We include (the log of) the stock of *US FDI* in the host country, from the US Bureau of Economic Analysis, as the US government may be more likely to intervene in countries that are important destinations for American foreign investment. US diplomatic efforts may also depend on the average or expected levels of investment risk in a host country and we therefore include ICRG's measure of the *Investment Profile*. This index captures the risks arising from contract viability, expropriation, profit repatriation, and payment delays.

Both official State Department guidelines and our interviews with government officials suggest American diplomats are more likely to intervene in disputes that touch on broader diplomatic priorities, such as the rule of law, due process and contract enforcement concerns. To capture this feature of American investment diplomacy, we include two dispute-specific variables, both coded from information in the cables. We include the binary variable *Local Court*, for whether the investor has previously sought resolution through the local legal system.[x] Second, we include the binary variable *Contract Dispute*, which measures whether the dispute is due to an alleged host state breach of contract with a US investor. It may be easier to justify diplomatic involvement in contract disputes compared to disputes over general government regulation, as contract breaches explicitly target individual US investors (as in the rare instances of direct expropriations, such as the Oxy case). Contract terms also provide reference points in negotiations. The variable descriptions along with the summary statistics are provided in Table A2 of the appendix.

Model 1 in Table 4 presents the results of the basic controls-only model. In this, and all subsequent models, robust standard errors are clustered by host country. The overall model itself

is highly significant. Of the host country characteristics, only GDP growth is found to be a weakly significant predictor of US intervention, whereas dispute-level characteristics are important. The US is significantly more likely to intervene diplomatically in disputes which have already been brought to local courts. Apart from following official guidelines, interventions in these cases may be designed to send a signal about US interests in a well-functioning judicial system free of political interference. Contract disputes are also more likely to involve serious US diplomatic involvement.

Model 2 adds the key independent variable of the de-politicization hypothesis, the presence of a ratified investment treaty, to this basic model. As shown in Table 2, the coefficient for the investment treaty is substantively small and statistically insignificant, nor does it have any effect on the other predictors in the model. Thus there is no evidence to support the hypothesis that the US is less likely to intervene diplomatically in countries with IIAs. Consistent with the results of the t-test reported in Table 1, investment treaties appear to have no effect on the level of diplomatic politicization in investment disputes.

	-1-	-2-
US Investment Treaty		0.111
		(0.494)
GDP per capita (logged)	-0.001	-0.013
	(0.221)	(0.229)
GDP growth	0.086*	0.086*
	(0.051)	(0.050)
US FDI (logged)	0.043	0.046
	(0.070)	(0.069)
Investment profile	0.025	0.027
	(0.115)	(0.116)
Local court	1.213***	1.211***
	(0.380)	(0.380)
Contract dispute	1.109***	1.102***
	(0.333)	(0.336)
Constant	-3.513**	-3.539**
	(1.639)	(1.672)

N	161	161
Log likelihood	-81.44	-81.4
Chi2	34.11	34.32

Notes: Standard errors in parentheses. Dependent variable is Serious Diplomatic Engagement. * p<0.1, ** p<0.05, *** p<0.01.

Table 2. Logit model of US diplomatic action

Before proceeding to robustness tests, we adopt the approach towards null-findings advocated by Rainey (2014) to actively demonstrate that the effect of investment treaties on diplomatic involvement is negligible. We do so by calculating the 90 percent confidence interval of the average marginal effect (AME) of access to investment arbitration on our measure of serious diplomatic involvement. By assessing how closely gathered around zero the range of plausible AMEs are, we can more specifically test for evidence of the absence of any substantial effect. The results are clear. The 90 percent confidence interval for serious US diplomatic involvement ranges between –11 percentage points and 14 percentage points, and we can therefore confidently say that recourse to investment treaty arbitration does not decrease the probability of serious US engagement by more than 11 percentage points (using a one-sided test, p<0.05). Even if this upper bound indicates the true effect, it would be a negligible effect compared with the very strong expectations in legal literature about the de-politicizing effect of investment treaties.

To test the robustness of this primary result, we include a series of models with additional control variables and model specifications in the appendix. We first consider alternative modelling and data sampling decisions, with results presented in Table A.3. In Model 3 we include 5-year period dummies, in case US investment protection policy shifts significantly over time. In Model 4 we include the diplomatic relationship between the US and the host country which might impact the likelihood of escalation of diplomatic intervention. In Model 5, we drop

disputes in the Dominican Republic – the host state with the largest number of disputes – to ensure one country is not driving our results. Model 6 excludes those disputes where the investing firm explicitly asked the embassy not to intervene; thus these disputes may not be informative of policymaking decisions within the US government. Models 7 and 8 respectively exclude individual private real estate disputes and disputes in which the investor is an individual, as these disputes may differ systematically from disputes involving the assets and rights of firms. Model 9 includes only contract disputes; if the US is particularly interested in these disputes (as our earlier results suggest), we want to confirm we do not miss any de-politicization effect specifically amongst these disputes.[xi] And in Model 10 we exclude two variables from our primary specification with limited data availability, *US FDI* and *Investment Profile*, in order to maximize the size of our sample.[xii] We once again find that our results are robust to all of these modelling and data choices.[xiii]

In addition to these robustness tests, it is worth considering whether there are other unobservable factors driving American intervention in disputes, and the extent to which such concerns may bias our results and lead us to miss any de-politicization effect. First, given that the US does not select investment treaty partners randomly, are there patterns in the distribution of BITs across host states that might bias our analysis? If the US was more likely to sign BITs in countries where the American government was particularly concerned about the investment climate and eager to intervene in disputes, then we might fail to observe a de-politicization effect, as the underlying propensity to intervene in BIT partner countries would be systematically higher. On the other hand, if de-politicization was an objective of the US BIT program, and treaty partners were selected partially because they were countries in which the United States particularly wanted to avoid being dragged into political negotiations in investment disputes, this

would bias in favor of finding a de-politicization effect. In this instance, the underlying propensity of American diplomats to intervene in disputes in BIT partners would be systematically lower than in other countries.[xiv] Recent research suggests the latter is much more likely; de-politicization was an important goal of the American BIT program, and US political and strategic concerns are better predictors of US BITs than investment risks (Vandevelde 2009: 27-30; Chilton 2016). Thus we do not think this form of endogeneity is a problem for our analysis, and if anything will lead us to overestimate any de-politicization effect.

A second potential concern is whether firms that invest in BIT countries are systematically different than those investing in non-BIT countries, or otherwise act differently when they have access to treaty protections than when they do not. That is, the firms investing in BIT countries, and the kinds of disputes they are likely to get into, may for some reason engender a greater likelihood of US intervention, which would lead us to underestimate the de-politicization effect of investment treaties. Yet even here there is reason to believe that, if anything, such endogeneity is likely to bias our analysis in favor of finding a de-politicization effect. Specifically, if there is any moral hazard effect of BIT protection leading firms to take more risks and more brazenly challenge the government, this type of reckless behavior would potentially make such firms less deserving claimants in the eyes of American diplomats. In interviews government officials often stressed that the underlying merit of the case was an important factor when deciding how strongly to support an investor in a dispute; if investors act more recklessly when they have access to treaty protection, diplomats are less likely to come to their defense.[xv] Moreover, research suggests that during the time period of our sample, most investors had very limited knowledge of investment treaties, thus it seems unlikely treaty protection substantially affected their corporate strategies one way or another (Yackee 2010). So

while the fact that we can't directly observe corporate strategy is an admitted limitation of our analysis, we see little reason to believe that this is leading us to systematically underestimate any de-politicization effect.

Nonetheless, in a series of additional tests described in the appendix and presented in Table A.4, we consider whether power and influence of the private investor affects the extent of diplomatic intervention in a dispute. We proxy for power and influence in two ways. First, bigger investors may have substantially more power to influence the actions of the home government; thus we include variables measuring firm size (revenues, Fortune 500 status), the value of assets under dispute, and if the investor is an individual (rather than a corporate entity). Second, investors may gain influence through lobbying the US government, and thus we include lobbying expenditure. The results from these additional tests suggest that private pressure has little independent effect on serious diplomatic involvement. Importantly, our main result on the de-politicization hypothesis is not affected by the inclusion of these additional controls.

Testing the De-politicization Hypothesis: Qualitative Evidence

The previous section demonstrated that overall American diplomats intervene in the same share of investment disputes in countries with US IIAs as without. In this section we build on these findings, using case studies to probe deeper into the underlying logic of de-politicization. We look at three disputes between American investors and Latin American governments during the mid-2000s in Latin America, thus accounting for region-specific effects as well as changes in US foreign economic policy over time. In particular, we examine qualitative evidence for three micro-foundations of the de-politicization hypothesis:

1) Firms dislike relying on diplomatic interventions to protect their assets, but in the absence of access to investor-state arbitration will pressure their home state diplomats for assistance;
2) Home states dislike intervening in investment disputes, and would prefer to compartmentalize commercial issues from the broader diplomatic relationship; and
3) Home states will use the availability of investor-state arbitration to deflect private pressure from firms and credibly deny requests for diplomatic interventions.

We do not find support for any of these claims; both firms and US government officials view diplomatic interventions as an appropriate means of encouraging settlement of disputes, whether or not an IIA is in place. Investment arbitration is considered an *additional* tool for protecting investment, rather than an alternative to politicized diplomatic interventions. Consistent with the quantitative results, there is no evidence that IIAs help to de-politicize investment disputes.

Occidental Petroleum v Ecuador[xvi] [Geoff: I don't have access from home, but could you possibly quote this somewhere?]

In 1999 Occidental Petroleum (Oxy) signed a concession contract with the government of Ecuador to explore and exploit oil in the Amazon. Oxy was the largest foreign investor in the Ecuador's oil sector. Five years later, the Ecuadoran government began publicly threatening to expel Oxy from the country, alleging that Oxy's improper sale of a minority stake in the deal constituted grounds to void the contract.[xvii] The Occidental dispute quickly leapt onto the bilateral agenda. Oxy came to the embassy for support on August 23, and by the end of following day Ambassador Kristie Kenney had raised the issue in separate discussions with Ecuador's President, Trade Minister, Minister of Economy, Minister of Government and

Minister of Foreign Affairs (04QUITO2327). Ambassador Kenney made clear that any decision to void Oxy's contract would have serious consequences for the US-Ecuador relationship. Subsequently, the Ambassador suggested talking points for US officials (both in DC and Ecuador), noting that if Ecuador followed through with cancelling the contract it risked losing its trade benefits under the Andean Trade Promotion and Drug Eradication Act (ATPDEA) as well as "the certain ruin of its investment climate" (04QUITO2462).

During this period, the United States was in the early stages of negotiating a preferential trade agreement (PTA) with Ecuador and US officials from the State Department, Commerce Department, the Trade Representative, and National Security Council repeatedly made clear that the treaty was off the table until the Oxy dispute was resolved (05QUITO601, 05QUITO681, 05QUITO798). Public debates in the US Congress also highlighted American demands to resolve outstanding investment disputes in Ecuador (United States Congress 2004).

Over the next several months, as populist protests against Oxy mounted, American diplomats remained deeply involved in the negotiations (05QUITO2578). On May 15, 2006, however, the Ecuadoran government finally bowed to domestic political pressure and announced it was voiding Oxy's contract and claiming its assets without any compensation. The very next day the United States announced it was suspending PTA negotiations, publicly citing the Oxy dispute as the reason (Miller 2006). Occidental itself filed an investment treaty claim case at ICSID; where a split tribunal awarded the company $1.8 billion in compensation – at the time the largest ICSID award in history (later reduced to $1 billion by an annulment panel). The dissenting arbitrator referred to the calculation of damages as a "manifest excess of power" by the tribunal (ICSID Case no. ARB/06/11, dissent, Oct. 5, 2012, par. 5). The United States to this date has not had any official PTA talks with Ecuador since the Occidental dispute.

The motivations and actions of key players in the Oxy case do not follow the core assumptions of the de-politicization hypothesis. Although Oxy successfully relied on investment treaty arbitration, it also worked closely with senior American diplomats to assert diplomatic pressure on the Ecuadorian government. Moreover, there is no evidence that US diplomats were reluctant to intervene in this dispute, or sought to compartmentalize it from broader relations. While Ecuadoran officials complained both privately (06QUITO321) and publicly (Marketwatch 2006) about American diplomats linking the Oxy case to PTA negotiations, American officials put the dispute as near the top of the agenda in the diplomatic relationship. The dispute was particularly important to the US because it was seen as a warning sign of increasing populism and resource nationalism, perhaps suggesting that Ecuador would follow a similar path as Venezuela and Bolivia. American diplomats intervened aggressively attempting to prevent this outcome. Given American diplomats' independent interests for intervening in this dispute, it is no surprise they did not use the availability of arbitration to deny requests for support, as the de-politicization hypothesis suggests. Indeed, as early as September 9, 2004 – nearly two years before Oxy's contract was cancelled – American officials were told by Oxy's leadership that the firm would likely pursue a claim if Ecuador followed through on its threats. But American diplomats displayed no interest in using this an excuse to leave Oxy to defend its own interests vis-à-vis Ecuador's government.

In sum, the Oxy case was extreme in the current universe of investment disputes by involving uncompensated direct expropriation, and the US responded with an economic sanction (cancelling a PTA negotiation) while knowing that the investor was planning to resolve the dispute through international arbitration. This is contrary to the expectations of the de-politicization hypothesis.

Americatel v Guatemala[xviii]

In June 2006, the American investment company Iselo Holdings LLC, a small firm run by a former investment banker, purchased the Guatemalan telecommunications company Americatel Guatemala ('Americatel'). The company had a pre-existing interconnection agreement with Telgua, the dominant telecom player in the country and part of Carlos Slim's telecom empire. In October 2006, in the midst of a contractual dispute between the two firms, Telgua unilaterally disconnected 20 percent of Americatel's capacity. This was a violation of the competition rules that Guatemala's telecoms regulator - known by its Spanish acronym SIT - had agreed to as part of the Central American Free Trade Agreement (CAFTA had been ratified that same year). Americatel repeatedly appealed to SIT to enforce these regulations and filed injunctions against the regulator in Guatemalan courts. As SIT refused to act, the company turned to the US embassy for assistance, alleging that the regulator was discriminating against Americatel and failing to live up to its international legal obligations.

USTR in Washington became involved in the dispute as well.[xix] In multiple meetings the embassy and USTR encouraged SIT to resolve the dispute by enforcing CAFTA's competition rules. This had little effect, likely because Guatemala was in the midst of an election and change in administrations in late 2007 and early 2008. Frustrated with the lack of progress, Americatel began the formal procedures to initiate an ICSID claim based on CAFTA (interview with Americatel representative, 08GUATEMALA689).[xx] This prompted the Guatemalan government to act, as it preferred to rely on diplomatic negotiations rather than have the arbitration claim proceed (08GUATEMALA689). Several high-ranking USTR officials visited Guatemala and met with the Minister of Economy, the head of SIT, and officials from the Ministry of Communications (08GUATEMALA1036). American diplomats believed the Minister of

Economy was motivated to settle the dispute, but saw "no indication" that the key agencies - SIT and the Ministry of Communications – wanted to change course and US officials thus predicted the ICSID claim would have to proceed (08GUATEMALA1036). Soon thereafter, however, the case was settled through the personal intervention of Guatemala's President and Carlos Slim, who agreed to settle the underlying dispute between Telgua and Americatel – by buying out Americatel's interests in Guatemala – and thereby obviate the looming CAFTA arbitration (personal interview with senior Americatel representative). While this did not address the broader shortcomings in Guatemala's telecoms regulations, it ensured Americatel could salvage its investment.

As in the case of Oxy above, events in the Americatel case do not support the core assumptions of the de-politicization hypothesis. Access to investment arbitration provided a useful leverage point for the investor, but it was a complement rather than substitute for diplomatic interventions. The active role of the US government was not because of lobbying, as the investor in this case was not a major multinational but a small, private firm owned by an individual. It is implausible such a company would have the political power to bring pressure on the US embassy in any case. Rather, American diplomats wanted to link – rather than compartmentalize - the dispute to broader Guatemala-US relations, namely the liberalization and effective regulation of Guatemala's telecoms sector (08GUATEMALA1036). In fact, a senior Americatel representative reports that USTR was "disappointed" the case would not be going forward, because American officials "saw it as an opportunity from a broader perspective" (interview). The US did not explicitly threaten the host state government with a sanction or economic penalty – as in the Oxy case – and the Americatel dispute is thereby more similar to the majority of politicized diplomatic interventions observed in the cables. Yet the US

government was still heavily involved in the dispute, despite the availability of investor-state arbitration.

American energy companies v. Brazil[xxi]

The third and final case examines a number of concurrent disputes between American energy companies and the Brazilian state oil company, Petrobras. Brazil is one of very few countries that have never ratified an investment treaty with investor-state arbitration. Nor is Brazil a member of ICSID. In the absence of consent to investment treaty arbitration, the de-politicization hypothesis suggests that diplomatic pressure should be crucial for the resolution of investment disputes involving Brazil (Maurer 2013: 447-450). Yet in this case there was only minimal US diplomatic engagement, and again we find no evidence that the logic suggested by the de-politicization hypothesis explains actors' decision-making processes.

The disputes emerged after several American companies – including Enron, El Paso, MDU Resources Group and NRG Energy – had partnered with Petrobras on a series of thermoelectric plants. In January 2005 Petrobras announced it wanted to revise the terms of the contracts and began delaying payments to American investors.[xxii] In a related dispute, El Paso energy claimed the governor of Parana State ordered the state electric company, Copel, to stop making payments. Both Brazil-based and visiting US officials frequently met with representatives of the US business community and were well aware of these issues. Yet, the level of diplomatic engagement was very low.

In June 2006 US Commerce Secretary Carlos Gutierrez made a high-profile, week-long trip to Brazil to discuss and advance the US-Brazilian commercial relationship, an event which would have been an ideal opportunity to push the Brazilian government on the specific interests

of particular US investors with disputes in the country. Yet, in a series of meetings with high-ranking Brazilian officials, discussions focused overwhelmingly on WTO negotiations, intellectual property rights protections, and potential for cooperation on biofuels and ethanol. The only evidence of a specific company's dispute being raised throughout the week of meetings is when the head of the Overseas Private Investment Corporation (OPIC) thanked Dilma Rousseff, then the President's chief of staff, for "the positive role she played" in resolving a dispute involving El Paso Energy (06BRASILIA1181). There is no evidence the US government lobbied aggressively to compel this involvement and none of the disputes resulted in significant diplomatic friction – despite the absence of an investment treaty.

So, although the firms involved had no access to investment treaty arbitration but considerable access to US diplomats, American diplomats were only minimally involved in the disputes. This was not because of any general reluctance of US diplomats to discuss commercial issues in the context of bilateral political relations, but rather because the US embassy was more interested in issues such as tax reform and excessive bureaucracy at the time. Just as the presence of investment treaties did not result in a de-politicization of investment disputes in Ecuador and Guatemala, the absence of an investment treaty did not result in a politicization of investment disputes in Brazil. This corresponds with our quantitative findings, but goes directly against the expectations of the de-politicization hypothesis.

Is American Investment Diplomacy Unique?

As the world's sole superpower, does American investment diplomacy differ systematically from that of other home states? While we lack data to fully examine this question, anecdotal evidence suggests that our results are not isolated to the US, and several other capital-exporting states also

intervene diplomatically in investment disputes, regardless of the presence of investment treaties. For example, when Argentina nationalized the assets of the Spanish oil company Repsol, the Spanish government threatened costly trade sanctions, despite the availability of the Spain-Argentina BIT (Minder 2012). Equally, the Canadian government sought to prevent the Democratic Republic of the Congo (DRC) from receiving debt relief from the multilateral Paris Club of creditors in the context of a dispute between the Canadian mining company First Quantum Minerals and the DRC, although the company had access to arbitration under the DRC's mining law (Wroughton and Manson 2010). And though such aggressive diplomatic engagement appears to be relatively rare today, active but not coercive diplomacy remains common, whether or not investment treaties are in place. For instance, the United Kingdom government lobbied considerably to defend the interests of the British electric company Rurelec in its dispute with Bolivia, even though the UK had a BIT with Bolivia.[xxiii] In one email then-British ambassador Ross Denny noted that "Our regular high-level lobbying on behalf of Rurelec has helped to demonstrate the seriousness with which we take protection of our companies' interests" (quoted in Provost and Kennard 2015). Equally, the UK government intervened to support both Cairn Energy and Vodafone in their disputes with the Indian Government, another UK BIT partner; the issues rose all the way up to Prime Minister David Cameron, who wrote to his Indian counterpart advocating for the British companies (Mason and Nelson 2011). Finally, it is not just Western states that use diplomacy to assist their foreign investors in the presence of a legalized alternative. For instance, Russian President Vladimir Putin allegedly postponed a state visit to India in order to express his displeasure at how the Russian company Sistema was being treated by the Indian government, rather than letting Sistema rely on the protections provided by the Russia-India BIT (Roche 2012). Although it would have to be subject to further testing, this

suggests that other governments also continue to intervene diplomatically in investment disputes despite the availability of investment treaties.

Conclusion

Private access to international dispute settlement tends to result in increased litigation against sovereigns. The investment treaty regime is an important case in point, where the explosion of investor claims has resulted in significant costs for developing countries in recent decades. The benefits of the regime for developing countries are less clear and empirical literature has focused almost exclusively on one potential benefit - increased investment – while ignoring another which could be equally, if not more, important: de-politicization.

Looking specifically at diplomatic interventions from the United States, this paper has filled this gap presenting the first test of the de-politicization hypothesis. We've used a new source of data to look behind the scenes of contemporary American investment diplomacy with developing country governments. Our results show that while Washington rarely uses explicit threats or sanctions in investment disputes – in contrast with the period before the end of the Cold War – diplomacy remains widely used to resolve disputes in the developing world. It comes as no surprise that investment protection is linked to broader political and diplomatic relations. Yet, in contrast with the conventional wisdom and arguments made by capital-exporting states to justify the treaties, our results show that the presence of an investment treaty makes little difference to how strongly the US government applies diplomatic pressure to resolve investment disputes. The de-politicization argument is not supported by the evidence. This has particular relevance for developing countries, as they bear the brunt of the costs of the investment treaty regime.

Our results are only a first step towards a deeper understanding of the role of investment treaties for diplomatic relations between developed and developing countries. Future work should clarify what role investment treaties play for informal investment dispute settlement. For instance, our results speak to the de-politicization hypothesis, but do not address how home or host governments can actively use the treaties to their favour when property right protections complicate their diplomatic relations. Moreover, our study cannot assess a more diffuse version of the de-politicization hypothesis, whereby the widespread institutionalization of the legal regime for investment disputes caused a more general shift toward less aggressive and coercive diplomatic interventions. It is possible that investment treaty arbitration has had a generalized de-politicization effect at the regime level, with spillover effects on all countries. This is an important subject for future research, yet it is difficult to assess empirically, as there are a number of contemporaneous potential alternative explanations. For instance, international norms related to aggressive diplomatic interventions for commercial ends, the legitimate use of force in international relations, and respect for the sovereignty of developing countries have all evolved over the last century, making aggressive diplomatic interventions less tolerable (Finnemore 2003). Moreover, the nature of investment disputes has changed: the more aggressive diplomatic interventions of the past were most often in disputes involving outright expropriation and nationalization, yet such disputes are much less frequent today, replaced by more nuanced disagreements over contractual terms and regulatory changes. Disentangling these effects from the effect of legalization will be challenging, but it could offer important insights to understand the impact of investment treaties on developing countries.

References

Abbott, Kenneth and Duncan Snidal. 2000. “Hard and Soft Law in International Governance.” *International Organization* 54 (3): 421-456.

Aisbett, Emma. 2009. Bilateral Investment Treaties and Foreign Direct Investment: Correlation or Causation. In *The Effect of Treaties on Foreign Direct Investment*, edited by Karl Sauvant and Lisa Sachs. New York: Oxford University Press.

Alvarez, Jose. 2002. The WTO as Linkage Machine. *American Journal of International Law* 96 (1):146-158.

-----. 2009. Contemporary International Law: An 'Empire of Law' or the 'Law of Empire'? *American University International Law Review* 24 (5): 811-842.

Alter, Karen. 2003. Resolving or exacerbating disputes? The WTO’s new dispute resolution system. *International Affairs* 79 (4): 783-800.

Associated Press. 2006. U.S. Breaks Off Trade Talks with Ecuador. 16 May 2006.

Baumgartner, Frank, Jeffrey Berry, Marie Hojnacki, David Kimball and Beth Leech. 2009. *Lobbying and Policy Change: Who Wins, who Loses, and Why*. Chicago: University of Chicago Press.

Bonardi Jean-Philippe, Amy Hillman and Gerald Keim. 2005. The Attractiveness of Political Markets: Implications for Firm Strategy. *Academy of Management Review* 30 (2): 397-413.

Bonnitcha, Jonathan, Lauge Poulsen, and Michael Waibel. 2017. *The Political Economy of the Investment Treaty Regime.* Oxford: Oxford University Press.

Bos, Kyra, and Joyeeta Gupta. forth. 2018. Climate Change: The Risks of Stranded Fossil Fuel Assets and Resources to the Developing World. *Third World Quarterly.*

Chilton, Adam. 2016. The Political Motivations of the United States' Bilateral Investment Treaty Program. *Review of International Political Economy* 23(4): 614-642.

Clinton, Hilary. 2011. Remarks at the 2011 U.S. Global Leadership Coalition (USGLC) Conference, 12 July 2011.

Colen, Liesbeth, Damiaan Persyn, and Andrea Guariso. 2016. Bilateral Investment Treaties and FDI: Does the Sector Matter? *World Development* 83:193-206.

Cotula, Lorenzo. 2013. The New Enclosures? Polanyi, International Investment Law, and the Global Land Rush. *Third World Quarterly* 34 (9):1605-1629.

Davis, Christina. 2012. *Why Adjudicate? Enforcing Trade Rules in the WTO*. Princeton: Princeton University Press.

Davis, Christina and Julia Morse. 2016. Protecting Trade by Legalizing Political Disputes: Why Countries Bring Cases to the International Court of Justice. Unpublished working paper.

Davis, Christina and Yuki Shirato. 2007. “Firms, Governments, and WTO Adjudication: Japan's Selection of WTO Disputes.” *World Politics* 59 (2): 274-313.

Drezner, Daniel. 2010. Why WikiLeaks is Bad for Scholars. *The Chronicle of Higher Education*, 5 December 2010.

Eagleburger, Lawrence and Robert Barry. 1996. Dollars and Sense Diplomacy: A Better Foreign Policy for Less Money. *Foreign Affairs* 75 (4): 2-10.

Echandi, Roberto. 2011. What Do Developing Countries Expect from the International Investment Regime. In: Jose Alvarez and Karl Sauvant, eds. *The Evolving International Investment Regime: Expectations, Realities, Options.* Oxford: Oxford University Press.

-----. 2016. Be Careful with What You Wish: Saving Developing Countries from Development and the Risk of Overlooking the Importance of a Multilateral Rule-Based System on Investment in the Twenty-First Century. In: Marc Bungenberg, Christoph Hermann, Markus Krajewski, and Jorg Terhechte, eds. *European Yearbook of International Economic Law 2016.* Springer.

European Federation for Investment Law and Arbitration (EFILA). 2015. A Response to the Criticism Against ISDS. Available at: <http://efila.org/wp-content/uploads/2015/05/EFILA_in_response_to_the-criticism_of_ISDS_final_draft.pdf>. Accessed 1 November 2016.

European Commission. 2015. Online Public Consultation on Investment Protection and Investor-to-State Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP). Available at < http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153044.pdf>. Accessed 1 November 2016.

El Said, Mohammed. 2012. Morning after: TRIPS-Plus, FTAs, and WikiLeaks: Fresh Insights on the Implementation and Enforcement of IP Protection in Developing Countries. *American University International Law Review* 28 (1): 71-104.

Finnemore, Martha. 2003. *The Purpose of Intervention: Changing Beliefs about the Use of Force*. Ithaca: Cornell University Press.

Fischer, Dana. 1982. Decisions to Use the International Court of Justice: Four Recent Cases. *International Studies Quarterly* 26 (2): 251-277.

Gertz, Geoffrey. 2016. Commercial Diplomacy and Political Risk. Unpublished working paper. [update Geoff?]

Gill, Michael and Arthur Spirling. 2015. Estimating the Severity of the WikiLeaks U.S. Diplomatic Cables Disclosure. *Political Analysis* 23 (2): 299-305.

Gray, Julia and Philip Potter. 2015. Diplomacy and the Settlement of International Trade Disputes. Unpublished working paper.

Hadani, Michael and Douglas Schuler. 2013. In Search of El Dorado: The Elusive Financial Returns on Corporate Political Investments. *Strategic Management Journal* 34 (2): 165-181.

Hillman, Amy, Gerald Keim and Douglas Schuler. 2004. Corporate Political Activity: A Review and Research Agenda. *Journal of Management* 30 (6): 837-857.

International Centre for Settlement of Investment Disputes (ICSID). 1968. *History of the ICSID Convention*. Washington: World Bank.

Jackson, John. 1979. Governmental Disputes in International Trade Relations: A Proposal in the Context of GATT. *Journal of World Trade* 13(1): 1–21.

Jandhyala, Srividya and Robert Weiner. 2014. Institutions sans frontières: International agreements and foreign investment. *Journal of International Business Studies*, 45(6): 649-69.

Johnson, O. Thomas and Johnathan Gimblett. 2011. From Gunboats to BITs: The Evolution of Modern Investment Law. In_*Yearbook on International Investment Law and Policy*, edited by Karl Sauvant, 649-692. New York: Oxford University Press.

Jones, Lee. 2015. *Societies Under Siege: Exploring How International Economic Sanctions (Do Not) Work*. New York: Oxford University Press.

Kelley, Judith. 2017. *Scorecard Diplomacy: Grading States to Influence their Reputation and Behavior*. Cambridge: Cambridge University Press.

Kelly, James. 2012. WikiLeaks: A Guide for American Law Librarians. *Law Library Journal* 104 (2): 245-262.

Kerner, Andrew and Jane Lawrence. 2014. What's The Risk? Bilateral Investment Treaties, Political Risk and Fixed Capital Accumulation. *British Journal of Political Science* 44 (1): 107-121.

Khoo Nicholas and MLR Smith. 2011. What the WikiLeaks Documents Tell Us About Asian Security. *Yale Journal of International Affairs* 6 (2): 133-136.

Lauterpacht, Hersch. 1933. *The Function of Law in the International Community*. Oxford: Clarendon Press.

Lettieri, Michael. 2006. Ecuador Breaks with Washington over Occidental Petroleum. *Council on Hemispheric Affairs (COHA) Memorandum to the Press*, 19 May 2006. Available at <http://www.coha.org/ecuador-breaks-with-washington-over-occidental-petroleum/>. Accessed 1 November 2016.

Levy, Philip and Thirukodikaval Srinivasan. 1996. Regionalism and the (Dis)advantage of Dispute-Settlement Access. *The American Economic Review* 86(2): 93-98.

Mackey, Robert, Jacob Harris, Ravi Somaiya and Nicholas Kulish. 2011. All Leaked U.S. Cables Were Made Available Online as WikiLeaks Splintered. *The New York Times - The Lede Blog*, 1 September 2011.

Manger, Mark. 2008. International Investment Agreements and Services Markets: Locking in Market Failure? *World Development* 36 (11): 2456-2469.

Mason, Rowena and Dean Nelson. 2011. David Cameron Intervenes for Cairn and Vodafone in India. *The Telegraph,* 19 February 2011.

Maurer, Noel. 2013. *The Empire Trap: The Rise and Fall of U.S. Intervention to Protect American Property Overseas, 1893-2013*. Princeton: Princeton University Press.

Mendis, Patrick. 2012. Destiny of the Pearl: How Sri Lanka's Colombo Consensus Trumped Beijing and Washington in the Indian Ocean. *Yale Journal of International Affairs* 7 (2): 68-76.

Michael, Gabriel. 2015. "Who's Afraid of WikiLeaks? Missed Opportunities in Political Science Research." *Review of Policy Research* 32 (2): 175-199.

Miller, Scott. 2006. United States Suspends Trade Negotiations with Ecuador. *US Federal News Service*, 17 May 2006.

Minder, Raphael. 2012. Spain Stings Argentina Over Oil Company Nationalization. *The New York Times*, 20 April 2012.

Multilateral Investment Guarantee Agency (MIGA). 2013. *World Investment and Political Risk*. Washington, DC: World Bank.

Paparinskis, Martins. 2010. The Limits of Depoliticisation in Contemporary Investor-State Arbitration. *Select Proceedings of the European Society of International Law* 3: 2-18.

Parra, Antonio. 2015. The Convention and Centre for Settlement of Investment Disputes. *Recueil des cours,* vol. 374.

Pegg, Scott and Eiki Berg. 2016. Lost and Found: The WikiLeaks of De Facto State–Great Power Relations. *International Studies Perspectives* 17 (3): 267-286.

Peinhardt, Clint and Todd Allee. 2012. Failure to Deliver: The Investment Effects of US Preferential Economic Agreements. *The World Economy* 35 (6): 757–783.

-----. 2016. Political Risk Insurance as Dispute Resolution. *Journal of International Dispute Settlement* (1): 205-224.

Post, Allison. 2014. *Foreign and Domestic Investment in Argentina: The Politics of Privatized Infrastructure*. Cambridge: Cambridge University Press.

Poulsen, Lauge Skovgaard. 2010. The Importance of BITs for Foreign Direct Investment and Political Risk Insurance: Revisiting the Evidence. *Yearbook on International Investment Law and Policy*: 539-74.

Provost, Claire and Matt Kennard. 2015. The Obscure Legal System that Lets Corporations Sue Countries. *The Guardian*, 10 June 2015.

Puig, Sergio. 2013. Emergence and Dynamism in International Organizations: ICSID, Investor-State Arbitration, and International Investment Law. *Georgetown Journal of International Law* 44: 531-607.

Rainey, Carlisle. 2014. Arguing for a Negligible Effect. *American Journal of Political Science* 58 (4): 1083–1091.

Reisman, Michael. 2012. Ecuador v. United States, Expert Opinion, Permanent Court of Arbitration, 4 April 2012.

Roche, Elizabeth. 2012. Indian Firms' Global Footprint Adds New Dimension to Diplomacy. *Live Mint*, 29 November 2012.

Rosales, Antulio. 2013. Going Underground: The Political Economy of the 'Left Turn' in South America. *Third World Quarterly* 34 (8): 1443-1457.

Rose, Andrew. 2007. The Foreign Service and Foreign Trade: Embassies as Export Promotion. *The World Economy* 30 (1): 22-38.

Schwebel, Stephen. 2016. Introduction. In *Arbitrating for Peace: How Arbitration Made a Difference*, edited by Ulf Franke, Annette Magnusson and Joel Dahlquist, 1-6. The Netherlands: Kluwer Law International.

Shadlen, Ken. 2008. Globalisation, Power, and Integration: The Political Economy of Regional and Bilateral Trade Agreements in the Americas. *Journal of Development Studies* 44:1-20.

Shihata, Ibrahim. 1986. "The Settlement of Disputes Regarding Foreign Investment: The Role of the World Bank, with Particular Reference to ICSID and MIGA." *American University International Law Review* 1: 97-116.

Smith, Mark. 2000. *American Business and Political Power: Public Opinion, Elections, and Democracy*. Chicago: University of Chicago Press.

Sykes, Alan. 2005. Public vs. Private Enforcement of International Economic Law: Of Standing and Remedy. John M. Olin Law & Economics Working Paper No. 235, The University of Chicago.

Titi, Catharine. 2015. Are Investment Tribunals Adjudicating Political Disputes? *Journal of International Arbitration* 32 (3): 261-288.

United Nations Conference on Trade and Development (UNCTAD). 2015. *World Investment Report 2015*. Geneva: United Nations.

U.S. Senate. 1995. Committee on Foreign Relations. *Bilateral Treaties Concerning the Encouragement and Reciprocal Protection of Investment*. 104th Congress, 30 November 1995.

U.S. House of Representatives. 2004. Committee on International Relations. *United States Trade Disputes in Peru and Ecuador*. *Hearing Before the Subcommittee on the Western Hemisphere*. 108th Congress, 6 October 2004.

-----. 2013. *Foreign Affairs Manual Volume 7*. Washington, DC: U.S. Department of State.

U.S. Trade Representative (USTR). 2015. Fact Sheet: Investor-State Dispute Settlement (ISDS). Available at <https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2015/march/investor-state-dispute-settlement-isds/>. Accessed 1 November 2016

Vandevelde, Kenneth. 1988. The Bilateral Investment Treaty Program of the United States. *Cornell International Law Journal* 21 (2): 201-276.

------. 1993. "Of Politics and Markets: The Shifting Ideology of the BITs." *International Tax and Business Law* 11: 159-186.

-----. 2009. *U.S. International Investment Agreements*. Oxford: Oxford University Press.

Weitzman, Hal. 2005. Ecuador Finance Minister Quits over Loan Dispute. *Financial Times*, 6 August 2005.

Wellhausen, Rachel. 2014. *The Shield of Nationality*. Cambridge: Cambridge University Press.

Wroughton, Lesley and Katrina Manson. 2010. Congo Wins Debt Relief Despite Canadian Concerns. *The Toronto Star*, 1 July 2010.

Yackee, Jason. 2010. Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Alternative Evidence. *Virginia Journal of International Law* 51 (2): 397-442.

Endnotes

[i] For instance, diplomatic cables describe a dispute involving a water desalination plant in Trinidad & Tobago, where General Electric repeatedly sought assistance from the US government. GE wished to settle with the local authorities and avoid an arbitration decision that they believed would sour relations and set the stage for future dispute (06PORTOFSPAIN374). In another dispute involving ConocoPhilips and Venezuela, the American investor had structured its investment to preserve arbitration rights against Venezuela, but company executives remarked to the Ambassador that "arbitration was the worst-case scenario for CP" (07CARACAS218). Even domestic court proceedings will often result in a hostile response from the host state. When Motorola took the Indian government to court, for instance, the American government was told that it would antagonize "the entire bureaucracy" (06CHENNAI2554). All diplomatic cables cited using their unique ID.

[ii] See discussion in (withheld for blind review).

[iii] See US Department of State (2013), Section 670 – *Assistance to Citizens Involved in Commercial, Investment and other Business Related Disputes Abroad*.

[iv] Some authors estimate that the leaked cables constitute approximately 5 percent of the full population of cables produced by the State Department during this period, though with considerable variation across country years (Gill and Sperling, 2015).

[v] Kelley (2017) is notable in that the project received funding from the government-funded National Science Foundation, which required the research design to be reviewed to ensure it was in the national interest (Kelly 2017: 26, n81).

[vi] We only include disputes for which the diplomatic cables include information about the nature and extent of US government involvement.

[vii] We specifically choose the cut-off year of 1996 since several of the firm-level explanatory variables we include in supplementary regressions, discussed below and presented in the appendix, are only available from this year; our core results are robust to extending or limiting the sample size by one or two years.

[viii] The dispute is discussed in the following cables: 06DUSHANBE403, 06DUSHANBE1420, 06DUSHANBE1711; 06DUSHANBE1840; 06DUSHANBE2229; 07DUSHANBE43; 07DUSHANBE158; 07DUSHANBE926; and 07DUSHANBE1581.

[ix] This includes all US BITs and a number of PTAs. Even in the absence of a US IIA, some investors can have secured recourse to investment treaty arbitration by routing investments through third countries. These patterns are difficult to identify, but more than four in five investment treaty claims brought by American investors were brought under American investment treaties (Author). Also, primarily large firms have the scale and legal resources to avail themselves of opportunities for treaty shopping, yet our results hold even after controlling for firm size.

[x] The State Department guidelines for embassies on assisting American investors abroad highlight that investors should first exhaust local remedies before seeking diplomatic support (US Department of State 2013).

[xi] The cables do not allow us to assess the share of contracts, which included international arbitration clauses. For contracts that did include such recourse - like in the Oxy dispute mentioned below - the consistent result that diplomatic responses are more likely in contractual disputes provide supplementary evidence against the de-politicization thesis, as the US

government was more likely to involve itself when investors had contractual recourse to international arbitration.

[xii] This increases the N from 157 to 204.

[xiii] We also considered using coarsened exact matching techniques to correct for any imbalance in our sample between disputes in countries with IIAs and those without. While the results do not alter any of our primary findings, we are hesitant to draw strong inferences from this analysis, as matching on key dispute and country level variables significantly decreased our sample size, and for this reason these results are excluded from the paper.

[xiv] We thank (name withheld for review) for pointing this out.

[xv] Interview with former State Department official, Washington DC, July 2015.

[xvi] The following cables were used for this case: 04QUITO2327; 04QUITO2462; 05QUITO601; 05QUITO681; 05QUITO798; 05QUITO1629; 06QUITO673; 06QUITO977; 06QUITO1249; 06QUITO1274; 06QUITO1547; and 06QUITO1924.

[xvii] Specifically, in 2000 Oxy had sold a 40 percent economic interest in the project to the Canadian energy company EnCana (then known as Alberta Energy Corporation, or AEC). However, Ecuador's domestic law and its contract with Occidental stipulated that the government needed to be informed and approve of any sale of exploration rights; Occidental failed to secure this approval before moving forward with the deal with AEC. In the summer of 2004, the Ecuadoran government learned of the deal, and the country's Procurador (Solicitor General) announced Occidental was under investigation for it. The Procurador publicly declared that if he found Occidental had broken the law that would be grounds to declare its contract void ('caducidad'), which would allow for the government to take over Occidental's existing assets without owing any compensation.

[xviii] This case study is based on cables 08GUATEMALA689 and 08GUATEMALA1036, as well as interviews with representatives of the firm and USTR.

[xix] USTR has long played an important role in telecommunications disputes, partially because under the Omnibus Trade and Competitiveness Act of 1988, USTR is required to produce an annual report (the 'Section 1377 Review') assessing the "operation and effectiveness of U.S. telecommunications trade agreements" (USTR 2017). USTR thus closely tracks telecoms issues in foreign countries, and invites American telecoms companies to submit comments on their experiences operating in foreign countries (as Americatel did).

[xx] A few months earlier another American investor, Railroad Development Corporation, had filed a claim against Guatemala, which was Guatemala's first case at ICSID and the first case ever under CAFTA. The new Colom administration was eager to avoid a second case.

[xxi] The following cables were used for this case: 04BRASILIA1917; 05BRASILIA1879; 06BRASILIA1178; 06BRASILIA1181; 06BRASILIA1188; 06BRASILIA1231; 06SAOPAULO454; and 06SAOPAULO675.

[xxii] Some of these disputes ended with Petrobras buying out its foreign partners after "a bit of 'arm twisting' by Petrobras" (05BRASILIA1879).

[xxiii] See Provost and Kennard (2015), as well as emails released under a Freedom of Information Request on file with the authors.

Appendix

Table A.1 – Disputes of US investors in foreign countries

	Country	# disputes		Country	# disputes		Country	# disputes
1	Afghanistan	1	26	Ethiopia	6	51	Oman	1
2	Albania	2	27	Fiji	1	52	Pakistan	1
3	Algeria	3	28	Georgia	3	53	Panama	6
4	Antigua & Barbuda	1	29	Ghana	1	54	Peru	10
5	Argentina	9	30	Guatemala	4	55	Poland	1
6	Armenia	2	31	Haiti	6	56	Romania	1
7	Azerbaijan	2	32	Honduras	6	57	Russia	5
8	Bahrain	2	33	India	5	58	Rwanda	1
9	Bangladesh	3	34	Indonesia	2	59	Serbia	2
10	Belarus	6	35	Jamaica	2	60	Slovakia	1
11	Bolivia	1	36	Jordan	3	61	Sri Lanka	5
12	Bosnia & Herz	1	37	Kazakhstan	6	62	St Lucia	1
13	Brazil	3	38	Kenya	1	63	St. Kits & Nevis	1
14	Bulgaria	2	39	Kuwait	1	64	St. Vincent	1
15	China	9	40	Kyrgyzstan	1	65	Tajikistan	1
16	Colombia	1	41	Laos	2	66	Trinidad & Tobago	2
17	Costa Rica	3	42	Latvia	1	67	Turkey	10
18	Croatia	1	43	Macedonia	1	68	Turkmenistan	2
19	Czech Republic	1	44	Mexico	5	69	UAE	3
20	DR Congo	3	45	Mongolia	1	70	Uzbekistan	10
21	Dominican Rep	16	46	Montenegro	2	71	Venezuela	1
22	Ecuador	3	47	Morocco	1	72	Vietnam	2
23	Egypt	3	48	Mozambique	2	73	Zimbabwe	4
24	El Salvador	1	49	Nepal	2			
25	Estonia	1	50	Nigeria	2		Total	219

SOURCE: Authors' coding from State Department cables.

Table A.2 – Summary Statistics

Variable	Description	Number	Mean	SD	Min	Max
Serious US engagement	Dispute prompts USG to (a) explicitly link it to aid, trade or other benefits; (b) discuss the case with the head of state; or (c) raise it during an official diplomatic visit. Source: US diplomatic cables (Wikileaks)	219	0.29	0.46	0	1
Ratified IIA	Dummy=1 if access to investment treaty arbitration through ratified US BITs or FTAs, 0 otherwise; Source: UNCTAD	219	0.38	0.49	0	1
GDP per capita (logged)	Natural log of host country per capita GDP. Source: World Development Indicators	212	7.62	1.17	4.85	10.68
GDP growth	Host country GDP growth rate. Source: World Development Indicators	214	4.61	4.75	-17.67	14.16
US FDI Stock (logged)	Natural log of host country US FDI stock. Source: Bureau of Economic Analysis	190	20.20	3.67	0	25.19
Investment profile	Investment risk in host country (high involves few risks). Source: International Country Risk Guide	184	7.82	2.30	0.67	11.5
Local court	Dummy = 1 if dispute been brought to host state courts, 0 otherwise. Source: WikiLeaks	217	0.35	0.48	0	1
Contract dispute	Dummy = 1 if dispute over breach over contract with host state, 0 otherwise. Source: WikiLeaks	219	0.38	0.49	0	1

Table A.3 Alternative models and data samples

	-3-	-4-	-5-	-6-	-7-	-8-	-9-	-10-
US Investment Treaty	0.1	0.108	0.044	0.2	0.118	-0.046	-0.443	-0.093
	(0.479)	(0.488)	(0.535)	(0.500)	(0.512)	(0.554)	(0.602)	(0.435)
GDP per capita (logged)	-0.063	-0.017	0.008	-0.024	-0.046	-0.162	0.124	-0.069
	(0.222)	(0.210)	(0.226)	(0.236)	(0.201)	(0.255)	(0.362)	(0.178)
GDP growth	0.088*	0.081*	0.073	0.090*	0.068	0.064	0.076	0.05
	(0.047)	(0.049)	(0.050)	(0.050)	(0.051)	(0.058)	(0.058)	(0.036)
US FDI (logged)	0.058	0.045	0.041	0.035	0.045	0.006	0.035	
	(0.075)	(0.069)	(0.068)	(0.081)	(0.068)	(0.080)	(0.064)	
Investment profile	0.03	0.021	0.016	0.02	0.001	-0.026	-0.148	
	(0.118)	(0.117)	(0.120)	(0.113)	(0.131)	(0.144)	(0.201)	
Local court	1.222***	1.221***	1.238***	1.200***	1.202***	1.161**	0.797	0.899***
	(0.387)	(0.382)	(0.403)	(0.399)	(0.391)	(0.463)	(0.584)	(0.331)
Contract dispute	1.064***	1.095***	1.179***	0.999***	0.805**	0.948**		0.748***
	(0.344)	(0.340)	(0.360)	(0.360)	(0.406)	(0.375)		(0.285)
1996-2000	0.181							
	(0.604)							
2000-2005	0.706							
	(0.531)							
Diplomatic Relationship		-0.151						
		(0.273)						
Constant	-3.878**	-3.701**	-3.446**	-3.044*	-2.734*	-0.744	-1.408	-1.277
	(1.758)	(1.671)	(1.632)	(1.829)	(1.529)	(1.914)	(2.441)	(1.397)
N	161	159	145	142	132	122	59	208
Log Likelihood	-80.17	-80.92	-74.86	-76.8	-72.22	-67.2	-36.83	-117.01
Chi2	33.2	33.23	29.53	27.2	18.63	19.89	5.06	19.94

Notes: Standard errors in parentheses, * $p<0.1$, ** $p<0.05$, *** $p<0.01$

Dependent variable is Serious US Engagement. Model 3 includes time period dummies. Model 4 includes the diplomatic relationship between the US and host country. Model 5 excludes disputes in the Dominican Republic. Model 6 excludes disputes in which investors did not request USG assistance. Models 7 and 8 exclude disputes involving private real estate and individual investors respectively. Model 9 includes only contract disputes. Model 10 excludes the variables US FDI and Investment Profile.

Results with additional firm level variables

We consider whether a number of firm characteristics influence the likelihood or severity of US intervention, or otherwise complicate our analysis of de-politicization. As noted above, previous research suggests historically firms were able to use their political power and influence to compel the US government to intervene on their behalf, even if such interventions compromised broader foreign policy objectives (Maurer 2013). Additionally, a significant literature in Business and Management studies the relationship between firm power/influence and government policy (see generally, Bonardi et al, 2005 ; and Hillman et al, 2004).

To test if similar dynamics explain US diplomatic interventions today, we consider two variables related to firm size: the log of the investor firm's *Revenues* (Model 11) and a binary variable that measures if an investor is a member of the *Fortune 500* (Model 12). Data on firm revenues are from the Orbis and Compustat databases. Data on the Fortune 500 are coded based on information in *Fortune* magazine; observations are coded as 1 if the firm appeared in the Fortune 500 for any year between 1996 and 2010, or if the firm appeared in the top ten of Forbes' list of the largest private companies in America over the same period.

To test if more politically-connected firms are better able to compel intervention we include *Lobbying* in Model 13, the average amount the investor spent lobbying public officials in the US during the three years surrounding the dispute, relying on data from opensecrets.org. It is compulsory for any firms and individuals to report their lobbying expenses under the terms of the Lobbying Disclosure Act. Thus, for all disputes in our dataset which occurred during the period covered by the Lobbying Disclosure Act (since 1998), we have exhaustive coverage of investors' lobbying: either the investor did lobby and thus shows up in the lobbying database

with a positive value, or the investor is not in the lobbying database and thus lobbying expenditures are assumed to be $0.

Additionally, it is possible the US is more likely to intervene in disputes with greater assets at stake; in Model 14 we thus include a measure of (the log of) *Dispute Size*, coded using information in the cables whenever such a figure is available. Note, that reporting in the cables variously refers to the best estimate of the asset value under dispute, the loss in revenues claimed by the firm, or damages requested in an arbitration claim. It is thus an imprecise measure of the size of the dispute, and should be interpreted cautiously. Finally, we include a dummy variable coded 1 if the dispute involves private *Real Estate* rather than commercial assets/operations, and a dummy variable coded 1 if the dispute involves an *Individual Investor* rather than a corporate firm, in Models 15 and 16, respectively. If the power of investors drives American interventions, action may be less likely in private real estate disputes or the disputes of natural persons.

The results, presented in Table A.4, strongly support our primary conclusions: in none of the models do we find a significant effect of investment treaties on the likelihood of US intervention even after controlling for various firm characteristics. The most important predictors from our initial model – local court and contract disputes – remain significant in most of these robustness tests. Additionally, none of the measures of firm power have significant effects. This suggests that in the contemporary period the State Department is strategically choosing when to intervene in disputes, rather than doing so when compelled to by private pressure, and is consistent with emerging scholarship that finds political investments by a firm have no significant effect on its commercial performance or policy outcomes (see, for example, Hadani and Schuler, 2013; Baumgartner et al, 2009). These results imply even large and influential firms appear to have little ability to twist the arm of the US executive vis-à-vis foreign governments.

Although this would have to be subject to further testing, it would be a significant departure from experiences during the Cold War.

That said; it is important to note government action in a dispute is conditional on the investor's request for intervention. Not all disputes are necessarily brought to the attention of diplomatic missions; moreover, even when a firm alerts the embassy to a dispute it may not request government assistance. Multiple cables record instances where firms specifically ask the government not to intervene in a dispute, and in these cases the government always stays out. Thus, even if there is little evidence that the government is more likely to intervene to benefit larger and more politically active firms, it does not follow that firms are passive players with no influence in the process.

Table A.4 – Regression Results with Additional Firm Level Variables

	-11-	-12-	-13-	-14-	-15-	-16-
US Investment Treaty	-0.019	0.086	0.016	0.322	0.068	0.077
	(0.704)	(0.482)	(0.475)	(0.638)	(0.491)	(0.500)
GDP per capita (logged)	0.081	-0.001	0.004	-0.403	-0.003	-0.02
	(0.338)	(0.237)	(0.236)	(0.380)	(0.233)	(0.245)
GDP growth	0.191**	0.084	0.079	0.129**	0.071	0.074
	(0.082)	(0.052)	(0.051)	(0.066)	(0.049)	(0.053)
US FDI (logged)	0.033	0.029	0.026	0.126	0.037	0.029
	(0.086)	(0.069)	(0.070)	(0.088)	(0.066)	(0.068)
Investment profile	-0.071	0.048	0.022	0.041	0.042	0.036
	(0.289)	(0.125)	(0.122)	(0.157)	(0.120)	(0.120)
Local court	0.738	1.206***	1.255***	1.137**	1.226***	1.197***
	(0.507)	(0.382)	(0.380)	(0.504)	(0.386)	(0.387)
Contract dispute	0.461	1.000***	0.990***	0.63	0.930**	0.982**
	(0.471)	(0.380)	(0.350)	(0.453)	(0.433)	(0.410)
Revenues (logged)	0.06					
	(0.066)					
Fortune 500		0.527				
		(0.537)				
Firm lobbying (logged)			0.037			
			(0.032)			
Dispute size (logged)				0.192		
				(0.147)		
Real Estate dispute					-0.882	
					(0.726)	
Individual investor						-0.556
						(0.738)
Constant	-4.327	-3.594**	-3.307**	-5.378*	-3.294*	-2.985
	(3.257)	(1.692)	(1.665)	(2.838)	(1.736)	(2.079)
N	62	161	159	83	161	161
Log likelihood	-35.74	-80.61	-80.05	-42.82	-80.47	-80.91
Chi2	9.8	32.48	31.32	16.02	46.99	39.99

Notes: Standard errors in parentheses, * p<0.1, ** p<0.05, *** p<0.01
Dependent variable is Serious US Engagement. Models 11 and 12 include proxies for firm size; firm revenues (logged) and Fortune500 status respectively. Model 13 includes logged value of firm lobbying expenditure. Model 14 includes the logged value of the assets under dispute. Models 15 and 16 include dummies for disputes involving private real estate (vs commercial assets) and natural persons (vs corporate entities).