Commercial Diplomacy and Investment Protection

American Diplomatic Interventions to Protect US Assets Overseas Since 1990

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Abstract

In recent decades international economic disputes have become ever more legalized, which in principle allows states to compartmentalize individual disputes from broader diplomatic relations. Nowhere is this more true than in the international investment regime, where private investors have been empowered to directly sue host states in international arbitration, rather than relying on their home states for diplomatic support.

I challenge the standard narrative that investment protection has become "depoliticized", and reveal the persistent importance of informal commercial diplomacy in the settlement of investment disputes. I show that the US government continues to intervene diplomatically in disputes between American investors and developing country governments, despite the availability of institutional alternatives. Moreover, I argue such interventions are not primarily driven by pressure from private companies, but by government bureaucracies strategically pursuing their own interests, including advocating for investment climate reforms and demonstrating the value of commercial diplomacy to domestic constituencies.

The empirical support for these claims proceeds in three stages. First, I use zero-inflated negative binomial regressions to demonstrate that American investors are more likely to file formal arbitration claims when they are less able to rely on diplomatic support, namely when the position of ambassador to the host state is temporarily vacant. Second, I provide a behind-the-scenes look at American investment protection policy using an original dataset of US diplomatic interventions in 256 investment disputes discussed in internal State Department cables released via WikiLeaks. Third, I use structured, focused comparisons in seven case studies of investment disputes to probe the particular drivers of US intervention, and show that diplomatic engagement is most likely in cases where the state itself has strong interests in intervening, rather than when private pressure compels it to do so.

This thesis makes important and original contributions both to the literature on the international investment regime – which to date has broadly ignored the role of commercial diplomacy in contemporary dispute settlement – and to broader debates on the legalization of international economic disputes and the strategies firms use to shield themselves from political risks.

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CHAPTER 1: INTRODUCTION

On 9 October 2003, the Ivorian businessman Alexander Galley, accompanied by 25 armed police officers, forcibly took over the offices of Cora de Comstar, a mobile telephone company operating in Cote d'Ivoire.[1] Cora had two principal American investors, Western Wireless and the Modern Africa Fund. The American investors had been embroiled in a longstanding dispute with Galley, a former shareholder in the company, over who legally owned the Ivorian operations. This dispute came to a head in the fall of 2003, when Galley - with at least tacit support from the Ivorian Government - took the dramatic step of forcibly evicting the company's management and staff and seizing all its assets.

When Galley and the forces accompanying him marched into Cora's offices on 9 October, Western Wireless and the Modern Africa Fund weren't about to mount a fire fight for its defence. But while they may have been outmanned (and outarmed) on the ground that day, they weren't completely helpless in the larger battle for Cora's assets. By themselves the investors perhaps had little leverage over the Ivorian government in this dispute, yet there was a powerful backer they could call upon to support their case: the American government.

The American investors, in fact, had previously been in contact with their embassy early on in the dispute. Once Galley had taken over their offices, the investors stepped up their appeals. As the CEO of Western Wireless later described the company's lobbying goal, "We needed to get support from various constituencies in the U.S. government to basically say, 'You can't do this. It violates contract sanctity. It's screwing a U.S. investor. It is a bad thing to do'" (quoted in The Hill Staff 2006).

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[1] This account is derived from the following news accounts and State Department cables: AllAfrica.com (2005), Kramer (2003), The Hill Staff (2006), 06ABIDJAN409 and 07ABIDJAN676. Note that throughout, WikiLeaks cables will be cited using their internal classification system, ie YYCITY###.

The American bureaucracy quickly sprung to action. Within two weeks of the event, then Assistant Secretary of Commerce William H. Lash, III officially complained to Ivorian embassy officials in Washington, and publicly described the case as “the worst treatment of an investor and the worst example of state-sponsored thuggery I have seen anywhere” (quoted in Kramer 2003). Importantly, Lash didn’t merely issue a stark rebuke to Ivorian government officials. He explicitly and publicly stated that the case could threaten Cote d’Ivoire’s eligibility for trade preferences under the African Growth and Opportunity Act (AGOA), which the US administration may revoke for individual countries if they are not making sufficient economic and political progress. In 2003, Cote d’Ivoire exported $46 million worth of goods to the US under the AGOA programme.[2]

This initial push from the United States government (USG) failed to settle the dispute. Soon after Galley had taken over Cora’s offices the investors shut down their remaining telephone network. Yet still the fight was not over; even if the investors were no longer going to operate in Cote d’Ivoire, they still wanted compensation for their assets which they claimed the Ivorian government had failed to protect. Again they looked to the American government to pressure the Ivorian government into paying compensation.

Over the next several years, the Cora de Comstar affair remained high on the US-Cote d’Ivoire bilateral agenda. The State Department, Commerce Department, United States Trade Representative (USTR), and OPIC were all engaged in the case, with the US ambassador and Under Secretary of State for African Affairs repeatedly raising the issue with Cote d’Ivoire’s President and Prime Minister. Remarkably, this was while Cote d’Ivoire went through a bitter civil war and a fragile and tenuous peace process – clearly the country had more pressing challenges than settling a single investment dispute. In April 2006, when the newly-installed

[2] This figure represents exports from Cote d’Ivoire to the US under the AGOA programme which did not also qualify for the General System of Preferences programme, and therefore would be at risk if AGOA benefits were withdrawn. Data from United States International Trade Commission (2016).

Prime Minister of a post-conflict unity government travelled to Washington to meet with World Bank, IMF, and American officials in order to restore economic relations between his country and the international community, the US made settlement of the dispute – along with democratic progress – a condition of resuming aid and trade benefits (06ABIDJAN409).

In May 2007 – three and a half years after Galley took over Cora's offices – the case was finally settled when both sides agreed to a deal in which the Cote d'Ivoire government paid the Cora de Comstar investors $6 million. The US embassy in Abidjan noted that it was "pleased to report" the end of the dispute to State Department headquarters, and the investors thanked the USG for their help throughout the dispute (07ABIDJAN676). The settlement of $6 million was perhaps much less than the investors hoped to receive; back in December 2003 they had threatened the Ivoirian government with an arbitration case seeking $54 million in damages. Yet it is also undoubtedly far more than they would have received had the USG not pressured the Ivorian government to settle (07ABIDJAN676).

1.1 Synopsis of Argument

To an observer from the early 20th century, American efforts to pressure the Ivorian government to settle the Cora investment dispute would be completely understandable. After all, Assistant Secretary Lash's description of Ivorian actions was not terribly different from American reactions to expropriations in the 1920s and 1930s, when high ranking officials from the executive branch would repeatedly insist host governments provide compensation to expropriated investors, and threaten serious diplomatic ramifications if compensation was refused. Political showdowns over particular investment disputes were the norm.

For any contemporary observer of the international investment protection regime, however, this chain of events presents a puzzle. Over the last several decades, states have created

a series of institutions – including political risk insurance and, most importantly, the legal investment regime which allows investors to directly sue host states in international arbitration courts – which are putatively meant to effectively eliminate diplomatic pressure as a tool for protecting foreign investments. The old “gunboat diplomacy”, which many years ago was the only means investors had of protecting their assets abroad, is meant to have been superseded by these new institutional approaches (Maurer 2013; Johnson and Gimblett 2011; Soley 1985). Investors no longer need to rely on their home states to pursue the settlement of specific investment disputes diplomatically; home states, for their part, no longer need to complicate bilateral relations through haggling over disputes, freeing them to focus on broader, strategic goals. Investment disputes are supposed to have become “depoliticized” (Shihata 1986).[3]

The spread of the modern investment regime is part of a broader trend toward the legalization of international disputes (Helfer and Slaughter 1997; Goldstein et al, 2000; Allee and Huth 2006; Davis 2012; Johns 2015). Today international courts are perceived as having greater reach and influence than ever before (Alter 2014). The power and jurisdiction of multiple international courts have increased substantially in recent years, including the International Court of Justice (Paulson 2004; Powell and Mitchell 2007), the European Court of Justice (Burley and Mattli 1993; Weiler 1994), the International Maritime Court (Charney 1996) and the Dispute Settlement Body and Appellate Body of the World Trade Organization (Alter 2003; Zangl 2008). The trend toward legalization appears to be particularly strong in economic disputes: thousands of bilateral trade agreements, investment treaties and tax treaties create legalized, institutionalized mechanisms for resolving inter-state economic disputes.

[3] While “politicization” can have multiple meanings in the international investment regime (Paparinskis 2012; Titi 2015), I focus specifically on politicization as extensive diplomatic engagement of the home state in the process of settling disputes, as removing this aspect of politicization was a core justification for the establishment of the investment treaty regime. Yet it is worth noting that arbitration cases can also create political controversies, and 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).

One promised benefit of such legalized regimes is they offer states the ability to compartmentalize specific disputes from broader political and diplomatic relations (Fischer 1982, p 273; Abbott and Snidal 2000, p433; Davis 2012, p14-15).[4] 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 2015). Settling disputes through legal, institutionalized forums thus helps states avoid the political costs associated with less formalized diplomatic approaches to dispute settlement, such as the risk that disputes in one issue area will undermine broader cooperation.

Yet, while the legalization literature has identified strategic benefits of legalized dispute settlement, less attention has been paid to the strategic benefits of informal, diplomatic settlements.[5] In certain instances, states may not want to compartmentalize economic disputes, instead preferring to link specific disputes to broader foreign policy objectives. Furthermore, diplomats themselves may have bureaucratic incentives to intervene in economic disputes, and thereby claim responsibility for successful settlements, rather than deferring dispute resolution to third party courts and tribunals. If states and bureaucrats are reaping benefits from diplomatic interventions in disputes, they may prefer to resolve disputes diplomatically even despite the availability of legalized alternatives. If this is the case, the benefits of legalization may have been oversold, and we are likely to observe the persistence of diplomatic interventions to resolve economic disputes even in an era of extensive legalization (Pauwelyn 2003).

[4] While legalized dispute settlement may have lower diplomatic costs than aggressive diplomatic (or military) dispute settlement mechanisms, it is also true that the decision to file a legal claim against another state may be viewed as an antagonistic act; see Davis (2012).

[5] While Allee and Huth (2006) are primarily interested in the strategic reasons states use legalized dispute settlement mechanisms, they also note that states may prefer diplomatic negotiations as a dispute settlement strategy because doing so allow them to better control information and the outcome of the settlement, and is often cheaper than legal alternatives. Allee and Huth (2006), however, do not address states' strategic interests *outside the context of the dispute itself*, i.e. how disputes can be strategically used to advance other state objectives.

To what extent has increasing legalization decreased the use and importance of diplomacy in the settlement of international economic disputes? I explore this question by examining the contemporary role of commercial diplomacy in the settlement of foreign investment disputes, focusing specifically on American diplomatic interventions since the end of the Cold War.[6] The investment regime is a hard test for identifying a continuing role of diplomacy in settling economic disputes. The investment regime is highly legalized, with some 3000 BITs providing foreign investors direct access to investor-state arbitration, without needing the approval of their home states. Moreover, historically the costs to states from diplomatic interventions in investment disputes have been high, with conflicts over foreign investments leading to diplomatic crises and even military conflict (Maurer 2013; Johnson and Gimblett 2011).

I challenge the standard narrative that investment protection is depoliticized in the contemporary era, and explain why the American government has continued to intervene in investment disputes since 1990. I make two central claims. First, I show that the USG frequently applied diplomatic pressure toward developing countries engaged in investment disputes with American investors despite the availability of institutional alternatives for protecting investments. Second, I argue that the USG was most likely to intervene in investment disputes when such interventions aligned with American foreign policy and bureaucratic interests, rather than when powerful private investors compelled intervention. Both claims are considered briefly below.

The first claim concerns the question of *whether* the USG applied diplomatic pressure in investment disputes in the contemporary period. The answer here is clearly yes. As it did

[6] I focus on the period since 1990 for two reasons. First, most crucially, I am interested in diplomatic interventions in the context of the institutionalized regime for investment protection. As discussed in Chapter 2, this regime evolved in a piecemeal fashion over the second half of the 20th century, making it impossible to identify a specific date as the beginning of the institutionalized era. However, by 1990 the core elements of the regime were in place, although it would continue to expand over the following years. Second, as discussed in Chapter 3, American foreign policy strategy changed substantially following the end of the Cold War, including an increased willingness to challenge developing country governments and a greater focus on commercial interests. Such changes are necessary for explaining the USG's interest in diplomatic interventions in investment disputes.

throughout the early 20th century, over the last twenty-five years the USG frequently – though not unequivocally – acquiesced to requests from American investors to help them resolve disputes with foreign governments. Contemporary commercial diplomacy is less overtly aggressive and confrontational than it was in earlier eras, but it remains an important tool for American investors managing political risks abroad. Typically, the USG exerted pressure by frequently and persistently raising particular disputes in bilateral diplomatic communications and meetings, including with heads of state and cabinet-level officials. Disputes were generally brought up privately at first, but if resolutions were not forthcoming the USG would also publicly criticize host states engaged in investment disputes. As few countries can afford to oppose or antagonise the world's lone superpower, such reminders of outstanding obstacles in the bilateral relationship could be quite effective. Once the USG decided to support an investor and place a dispute on the bilateral agenda, it was rarely removed from the agenda until it had been resolved; the USG may not always have been forceful in its demands, but it was persistent.

The finding that the USG intervened diplomatically in investment disputes may be self-evident to the hundreds of Commercial Officers and Economic Officers working in American embassies abroad – whose job descriptions state as much – but it represents a significant departure from the majority of the academic literature on contemporary investment protection. Recent work on the "investment regime" – within International Relations, Political Science and International Law – is focused almost exclusively on one narrow part of investment protection, namely the network of some 3,000 bilateral investment treaties (BITs) and the system of investor-state arbitration to settle investment disputes which BITs enshrine. And while a number of authors have analysed the *historical* role of home states in protecting the overseas assets of their citizens (Krasner 1978; Lipson 1985; Veeser 2007; Maurer 2013), very little is known about the *contemporary* role of the home state in investment protection (cf. Wells and Ahmed 2007; Wellhausen 2014). Academics working in the area have seemingly accepted the standard

narrative that in a world with formal institutions granting investors direct access to investor-state arbitration, there is no role for home state diplomatic pressure in investment protection. In a recent special issue symposium on foreign investment in a major International Relations journal, which included contributions from the leading scholars in the field, the topic of diplomatic pressure as a tool for protecting investments did not come up once.[7] Yet the evidence presented in this thesis suggests that the literature on contemporary investment protection cannot afford to ignore diplomacy as a tool for protecting investments, as it has done to date.

The second claim concerns the question of *why* the USG intervened diplomatically in investment disputes since 1990. Previous analyses of American commercial diplomacy have emphasized the importance of private pressure in encouraging USG interventions in disputes (Krasner 1978; Maurer 2013). If the USG is only reluctantly intervening in disputes when compelled to do so by powerful private interests, we should expect the government to refer investors to investor-state arbitration whenever possible. Conversely, if the state itself has its own interests for intervening in disputes, then it is more likely to consider intervening even if legalized alternatives are available.

I argue that, though private interests do have some influence over American investment protection policy, it is impossible to explain why the USG intervenes in investment disputes without also understanding the state's own strategic reasons for doing so. Specifically, diplomatic interventions in particular disputes were useful to the USG for two reasons. First, intervening in individual investment disputes was an opportunity to advance the foreign policy goal of advocating for investment climate reforms in developing countries with weak capitalist institutions. Disputes served as concrete examples of abstract notions such as property rights and contract sanctity; they created "teachable moments" in which USG officials could demonstrate to

[7] The special issue is the January 2014 volume of *World Politics*; contributions include Milner (2014), Simmons (2014), Allee and Peinhardt (2014) and Büthe and Milner (2014). For a recent analysis on the persistent importance of diplomacy in managing international trade disputes, see Gray and Potter (2015).

their host state counterparts what a strong investment climate did (and did not) look like. Moreover, by observing and engaging with host state officials over the course of a dispute American diplomats gained valuable private information on how seriously host states were committed to a strong investment climate.

Second, intervening in disputes contributed to the State Department's new priority of helping American businesses invest in global markets, and let bureaucrats demonstrate the value of commercial diplomacy. The end of the Cold War substantially altered the Department's mission and relevance to America's national interests. Searching for a new purpose, the Department consciously and strategically began to emphasize commercial diplomacy, which for decades had been discounted within the agency. Highlighting the benefits the State Department provided to American businesses helped the State Department to justify its budget and importance, to both Congress and the public.

With these broader concerns at stake, the USG did not shy away from intervening in investment disputes. If it were the case that interventions were driven by private interests that captured the policymaking process, then institutional alternatives which deflected this private pressure would have helped to depoliticize investment protection. But with the USG intervening in disputes to advance the state's own goals, the ability to deflect private pressure to investor-state arbitration has had only limited effect in depoliticizing American investment protection policy.

1.2 Research Strategy and Empirical Approach

Studying contemporary commercial diplomacy is difficult. Much of it occurs behind closed doors, in off-the-record negotiations and private meetings between diplomats and business executives. There is no publicly available database of commercial diplomatic interventions. The official

diplomatic records for the period have not yet been released. Furthermore, such interventions tend to be downplayed relative to more high-profile diplomatic activities such as resolving international crises and managing geostrategic relations, and thus may not be recorded when the history of diplomacy is being written.[8] These empirical challenges are one reason the literature on investment protection has focused overwhelmingly on the more easily observable BITs and arbitration cases, leading to a considerable gap in our understanding of commercial diplomacy and its role in contemporary investment protection.

To overcome these difficulties, I rely on a range of novel empirical sources, and adopt a mixed methods research strategy which combines large-N statistical analysis with small-N case studies. The empirical analysis proceeds in three sections, from the most generalized findings to the most specific.

In the first stage I provide statistical analysis which is suggestive of the enduring importance of US diplomatic interventions in resolving investment disputes of American firms. The fundamental challenge of a large-N study of the relationship between diplomatic interventions and investment dispute settlement is a lack of observable data. Indeed, both the independent variable (the diplomatic intervention) and the dependent variable (the settlement of an investment dispute) are generally unobserved. When an ambassador calls a host state Foreign Minister and successfully convinces her to resolve a complaint lodged by a foreign investor, neither the intervention nor the dispute resolution is typically observed, as both occur behind closed doors.

To begin to address this gap, I introduce a novel indicator to measure access to effective commercial diplomacy: temporary vacancies in the position of US ambassador in American embassies abroad. I show that American investors are significantly more likely to initiate investor-

[8] For example, in Moskin's (2013) sweeping 944 page history of the American Foreign Service, commercial diplomacy is only very briefly touched upon.

state arbitration disputes when the position of US ambassador to the host state is temporarily vacant – conditions which are determined overwhelmingly by US domestic political factors, and thus represent a quasi-natural experiment for testing the effects of commercial diplomacy. When ambassadorships are vacant commercial diplomacy is less effective, and investors are thus marginally more likely to rely on formal arbitration. The results suggest that beneath the surface of the formal, legalized world of investment arbitration, access to commercial diplomacy remains an important tool for settling investment disputes.

In the second stage I look more closely at what specific diplomatic interventions the USG uses to protect American assets abroad. This section uses an original dataset of USG diplomatic interventions in 256 investment disputes identified in the internal State Department cables released publicly via WikiLeaks.[9] The cables consist of communication between American embassies abroad and State Department headquarters in Washington, D.C. They provide a unique behind the scenes look into contemporary investment diplomacy, revealing the specific efforts of embassy officials to help US companies resolve ongoing disputes.

The cables show that while explicit coercive pressure – such as threatening aid or trade benefits – is relatively rare, the USG frequently places the settlement of specific disputes high on the bilateral agenda in meetings with heads of state and cabinet level officials. Both embassy staff and visiting Washington, D.C.-based officials discuss investment disputes with host state governments, and typically repeatedly raise the same disputes until they are resolved. Using logistic regressions, I show that the presence or absence of a bilateral investment treaty has no effect on the likelihood of USG interventions in disputes. Furthermore, neither the size of firms involved in disputes nor the amount spent lobbying the federal government are significant predictors of USG engagement. Conversely, the USG is more likely to intervene in disputes

[9] The dataset was originally produced as part of a joint paper with Lauge Poulsen and Srividya Jandhyala; the author gratefully acknowledges their assistance in creating the dataset.

during US presidential election years and more likely to intervene in disputes which are highly salient to broader concerns about the host state's investment climate.[10] These findings align with the theory that American intervention is driven more by state interests than by private pressure to intervene.

Finally, the third empirical section relies on structured, focused comparisons across seven cases of investment disputes to more directly probe the drivers of USG intervention. The cases examine a range of USG (non)interventions in investment disputes since 1990. Empirical material is drawn from State Department cables, press reports and semi-structured interviews with officials from the US government and host state governments as well as private sector investors and lobbyists representing investors. The case studies are designed to evaluate the extent to which private interests and state interests predict the strength of USG diplomatic interventions in specific disputes.

Case selection is driven by three factors. First, cases include variation across the key independent variables, the strength of private and state interests supporting intervention. Thus cases include both large, powerful, influential firms and smaller, less influential firms, as well as cases where the USG had strong state interests for intervening to promote investment climate reforms and cases where such incentives were weaker. Second, case selection is designed to reflect a range of different industries and host states. While industry- and region-specific factors may marginally influence American investment protection policy, I seek to identify and explain elements of that policy common across industries and regions. As will be demonstrated, interventions in disputes are broadly similar across industries and regions; it does not appear to be the case that there is one investment protection policy for Africa and another for Latin America, for example, or one policy for natural resources and another for telecommunications. Third and

[10] As discussed further in Chapter Five, these include disputes which have already been through the local court system and disputes arising out of a contract breach, while the USG is less likely to intervene in private real estate disputes.

finally, case selection is, by necessity, partially driven by the availability of empirical materials. Most importantly, this means that disputes which were very quickly or easily resolved, and which therefore have a paucity of available empirical data, do not feature in the case study analysis. There is thus a bias toward more difficult disputes, those that required greater time and effort to resolve.[11] To the extent that investors with easily resolvable disputes are relatively more likely to rely on commercial diplomacy than investment arbitration, given the high fixed costs of the latter, the results of the case study analyses likely understate the effectiveness of diplomatic interventions in resolving disputes.

The following table and brief synopses provide an overview of the cases covered in this study.

Table 1.1: Overview of Case Studies

Case	***Parent US Company***	***Host State***	***Industry***	***Level of USG Pressure***
Occidental Ecuador	Occidental Petroleum	Ecuador	Oil and Gas	Severe
Multiple Disputes in Ukraine	Multiple	Ukraine	Real estate, manufacturing	Severe
Cora de Comstar	Western Wireless, Modern Africa Fund	Cote d'Ivoire	Telecommunications	Strong
Dabhol Power Plant	Enron, GE, Bechtel	India	Power	Strong
Kosmos Jubilee Field	Kosmos Energy	Ghana	Oil and Gas	Moderate
Oil Suppliers in Venezuela	Multiple	Venezuela	Oil and Gas	Low
Firestone Liberia	Firestone	Liberia	Rubber	Low

- *Occidental Ecuador* – Occidental is a major US oil company with operations around the world. Occidental had signed a concession contract with Ecuador in 1999 to explore and exploit oil in the Amazonian region. Following a contract dispute, Ecuador began threatening to invalidate Occidental's contract in 2004. Over the following two years USG

[11] To a lesser extent, this also biases case selection toward those disputes which were publicly reported; yet efforts are made to overcome this limitation, for example by examining private materials in the WikiLeaks cables and through personal interviews.

officials aggressively advocated for Occidental, and the dispute was a major priority in the US-Ecuador bilateral relationship. American officials explicitly and repeatedly linked the dispute with ongoing negotiations for a free trade agreement (FTA) between the two countries; when Ecuador ultimately followed through on its threat to cancel Occidental's contract, the USG immediately announced it was suspending FTA negotiations, publicly citing the Occidental dispute as the reason why.

- *Multiple Disputes in Ukraine* – In the mid-1990s, a number of small American firms had disputes with the Ukrainian government, alleging rampant corruption and government interference. State Department officials spent considerable time and energy discussing the disputes with their Ukrainian counterparts, and the disputes featured prominently in a high-level binational commission chaired by Ukrainian President Leonid Kuchma and US Vice President Al Gore. Attention to the disputes increased even further when, against the wishes of the Clinton Administration, the Republican Congress made resolution of the disputes a condition for releasing US aid to Ukraine. Despite the extensive diplomatic engagement, the Americans had at best modest success in resolving the outstanding disputes; many lingered on the US-Ukrainian bilateral relationship for over a decade.

- *Cora de Comstar* – Two American investors, Western Wireless and the Modern Africa Fund, bought a mobile telephone company in Cote d'Ivoire in 2000. Soon after beginning operations, the investors had a dispute with a former shareholder in the project, who, with the support (or at least non-opposition) of the Ivorian Government, eventually seized the company's assets. The USG spent many years helping Western Wireless and Modern Africa receive compensation for its seized assets, and made resolution of the dispute a

priority in bilateral relations. Ultimately Cote d'Ivoire paid $5 million to settle the outstanding claim.

- *Dabhol Power Plant* – The Dabhol plant was a 2400 MW power plant near Mumbai, which was owned by Enron, General Electric (GE) and Bechtel; at the time it was the largest foreign investment in India's history, and was supported by OPIC and the US Export-Import bank. Enron and the state utility board ran into an investment dispute related to electricity pricing, which ultimately led operations and further construction to halt in 2001. The USG, under both the Clinton and Bush administrations, was deeply involved in the dispute; the National Security Council coordinated an inter-agency "Dabhol Working Group" solely devoted to resolving the dispute. The dispute was further complicated by Enron's bankruptcy; following a five-year closure, a consortium of Indian companies reopened the plant in 2006.

- *Kosmos Jubilee Field* – Kosmos Energy is a small oil exploration and development company based in Dallas, Texas. In 2004 the company signed a contract with the Ghanaian state oil company, the Ghana National Petroleum Company (GNPC), to explore for oil in the country, and in 2007 announced a major discovery. Kosmos' strategy had always been to sell its rights to development after discovery, yet when it attempted to sell to Exxon-Mobil in 2009 the Ghanaian government indicated that it opposed the sale and threatened to block it. The USG followed the case closely and raised the issue at very high levels with the Ghanaian government, yet stuck closely to talking points that the dispute should be resolved transparently and refrained from taking an active stance in support of Kosmos. Importantly, the USG position was informed by the belief that ultimately Ghana remained committed to providing a strong investment climate, and that this case did not suggest a

broader shift in Ghana's economic policy. Ultimately Kosmos and Exxon abandoned their planned transaction, and Kosmos switched business strategies, deciding to maintain ownership and pursue the development of the oil field itself.

- *Firestone Liberia* – Firestone has operated the world's largest rubber plantation in Liberia since 1926. Following the conclusion of the second Liberian Civil War in 2003, Firestone signed a concession contract with the interim Liberian Government in 2005. When the new President Ellen Sirleaf Johnson came to power in 2006, she announced she would be reviewing all concession contracts – including the one with Firestone – to ensure they contributed to the country's economic development. During the renegotiations the Liberian Government and its advisors worked strategically to minimize the possibility that the USG would intervene on Firestone's behalf. The US embassy took note of the renegotiations, but did not attempt to hold Liberia to the original agreement; American interest in advancing economic development in Liberia outweighed any interest in supporting Firestone. In 2008 Liberia and Firestone signed a new agreement which was substantially more favourable to Liberia than the 2005 agreement had been.

- *Oil Service Companies in Venezuela* – Venezuela opened its oil industry to foreign companies in the 1990s, then, following Hugo Chavez' election in late 1998, renationalized much of the industry. By the late 2000s the state-run oil company, PDVSA, had fallen behind in payments owed to a number of foreign oil service companies.[12] PDVSA initially sought to negotiate with oil service companies to write-off some of these outstanding invoices; when the companies refused, Venezuela passed a law in May 2009

[12] Oil service companies provide services (such as shipping, maintenance, etc.) to oil production companies but do not actually produce oil themselves; this means they have fewer assets tied up in particular oilfields.

providing for the nationalization of oil service companies. Throughout this process representatives from American oil service companies operating in the country frequently met with officials in the US embassy to discuss corporate strategy and next steps. While the USG was supportive of the companies, there were few concrete steps it could take to successfully pressure the Venezuelan government into settling disputes; the USG monitored the situation closely, but at best it was able to very modestly ameliorate an already bad situation for the American companies.

1.3 Contributions and Caveats

This thesis makes three substantial and original contributions to the field of International Relations.

First, it significantly improves our understanding of contemporary investment protection by highlighting the persistent role of home state diplomatic pressure. International investment is a key component of the global economy, and disputes between multinational corporations and host state governments are important flashpoints in global politics. Yet our understanding of how investment protection works in practice, and how investment disputes are resolved, is woefully incomplete. To date academics studying investment protection have predominantly focused on the easily available data, namely the 3000+ bilateral investment treaties and 600+ publicly known investor-state arbitration cases. This line of research has produced valuable information on why countries sign investment treaties (Elkins, Guzman and Simmons, 2006; Jandhyala, Henisz and Mansfield, 2011; Poulsen 2015), what factors lead to formal investment disputes (Jensen et al 2014; Freeman 2013; Williams 2015; Dupont, Schultz and Angin 2016) and whether and under what conditions investment treaties increase foreign investment (Sauvant and Sachs 2009; Allee

and Peinhardt 2011; Jandhyala and Weiner 2014; Kerner and Lawrence 2014). While these are important questions worthy of research, they are hardly the only – or necessarily the most important – facets of the contemporary investment protection regime. Indeed, in multiple interviews business leaders reported that filing investment arbitration claims was a "last resort", and that firms engaged in investment disputes were far more likely to appeal to their embassy for support before considering arbitration.[13] Focusing only on the legal arbitration regime thus presents a significantly biased view of the overall investment protection landscape.[14] To be sure, the empirical challenges of studying diplomatic pressure as a tool for protecting investment are considerable, and thus there are clear disincentives for academics to avoid the topic. Yet any serious treatment of how foreign investment is protected in the modern global economy must address the role of commercial diplomacy.

Second, this thesis advances our understanding of the strategies firms use to shield themselves from political risks. A growing literature in International Relations and International Business assesses how foreign investors minimize the likelihood and impact of adverse host state policy actions, including by forming joint ventures with local firms (Henisz 2000), integrating into supply chains (Johns and Wellhausen 2015), building political ties with host state policymakers (Henisz and Zelner 2005), and partnering with politically powerful multilateral institutions (Nose 2014). In studies of domestic political economy, it is well-known that firms with privileged access to domestic political actors and close ties to the state enjoy private advantages, and this appears to be particularly true in countries with weak institutions (Fisman 2001; Hellman, Jones and Kaufmann 2003; Faccio 2006; Truex 2014; Özcan and Gündüz 2015). There is little systematic evidence, however, on what effect foreign investors' access to political support from their home government has on their ability to manage political risk. I demonstrate

[13] Interview with lobbyists, Washington DC, July 2015 and November 2015.
[14] In her study of international trade disputes, Davis (2012) similarly notes that actually filed WTO disputes represent a small fraction of *potential* WTO disputes.

that access to commercial diplomacy remains a valuable asset for firms operating in risky foreign environments, and diplomatic interventions can help firms shield themselves from political risks. Yet in order to encourage diplomats to support their causes, firms need to strategically position themselves and the issues at stake in their disputes as aligning with the larger foreign policy interests of their home states.

Third, this thesis makes broader contributions to long-standing International Relations debates on how states and non-state actors manage processes of integration in the global economy. The academic literature on legalization has highlighted how and why states choose to delegate the regulation of certain inter-state relations to formal international institutions (Abbott and Snidal 1998; Goldstein et al 2000; Koremenos et al. 2001; Alter 2014; Johns 2015). A recent strand of this literature focuses specifically on the design and use of dispute resolution mechanisms (Alter 2003; Davis and Shirato 2007; Davis 2012; Davis 2016; Pelc and Urpeleinen 2016; Pervez 2016; Asgeirsdóttir and Steinwand 2016). Meanwhile, a separate but related literature has debated the extent to which the state has been usurped by non-state actors in regulating international relations, particularly within the sphere of international business and economics (Strange 1992; Strange 1996; Matthews 1997; Krasner 1999; Sending and Neumann 2006; Drezner 2008; Milner and Moravcsik 2009). The regime for settling international investment disputes appears to be an ideal example of both how states delegate power to formal legalized institutions and how non-state actors are today exercising power previously reserved for sovereign states. Yet I argue that in reality contemporary investment protection is considerably more complex than this standard narrative suggests. States have retained more power to intervene in investment disputes than previously assumed, and under certain conditions prefer to intervene through informal diplomatic negotiations rather than leave investors to pursue legalized dispute resolution. In demonstrating that diplomacy and informal power politics persist beneath the surface of the highly legalized regime for international investment, this thesis contributes to a growing literature on the enduring

importance of personal informal diplomacy in international affairs (Bayne and Woolcock 2011; Hall and Yahari-Miro 2012; Rathbun 2014; Gray and Potter 2016; Lebovic and Saunders 2015).

Finally, two caveats to this analysis should also be borne in mind. First, as previously noted, this study is concerned with a single home country, the United States. The United States is the subject of this study both for the practical reason that data are more easily available for the US than they are for other home states, and because the US clearly fulfils the necessary initial condition for the theory advanced, namely a home state must have the ability to project power in order to opt to use this power to intervene in investment disputes.[15] While a systematic assessment of the extent to which the findings regarding the US are generalizable to other home states is beyond the scope of this project, there is some anecdotal evidence that other home states have also intervened diplomatically to protect the assets of their overseas investors since the end of the Cold War. Over the course of 2010-2014, the UK embassy in La Paz significantly lobbied the Bolivian government concerning an investment dispute involving the British firm Rurelec (Provost and Kennard 2015). The Canadian government attempted to pressure the Democratic Republic of the Congo (DRC) into settling a mining dispute by threatening to delay Paris Club debt forgiveness for the country (Reuters 2010). In 2009 American diplomats reported that a phone call from Japanese Prime Minister Taro Aso to Venezuelan President Hugo Chavez helped Toyota resolve a dispute in that country, at a time when most foreign investors felt besieged in Venezuela (09CARACAS768). And one study has found suggestive quantitative evidence that Chinese diplomats help protect their foreign investors from political risks abroad (Duanmu 2014). Understanding how and why home states differ in their ability and willingness to intervene in investment disputes is an important area for future research.

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[15] Anecdotally, the capital exporting states which rely most strongly on the legal system for protecting investment appear to be among the less powerful, such as the Netherlands and Belgium.

As a second caveat, it is important to note that this study is in no way intended as an overall evaluation of the costs and benefits or effectiveness of the legal arbitration regime. It does not assess the overall role of institutions in the current investment protection regime, nor the specific question of whether or not these institutions have succeeded in increasing the overall level of investment protection and decreasing political risks and the number of investment disputes.[16] It is a study of the persistent role of informal power politics within the context of institutionalized solutions to investment protection. It challenges the particular claim that these institutions depoliticized investment disputes – a claim which, as will be discussed in Chapter Two, was a key motivation for creating these institutions and remains a core justification for their continued expansion – but does not address the myriad other contentious arguments for and against the legal arbitration regime.

1.4 Outline of Subsequent Chapters

The remainder of this thesis proceeds as follows. The next chapter begins with a conceptual discussion of foreign investment and investment disputes between investors and host state governments. It then describes the role of diplomatic pressure in American investment protection policy of the late 19th and early 20th century, and the series of steps taken in the second half of the 20th century to create new institutions for protecting the assets of foreign investors. It is these institutions which are meant to depoliticize investment disputes and obviate the need for diplomatic pressure in investment protection.

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[16] It is worth noting, however, that studies which have empirically assessed whether investment treaties cause increased FDI – which we would expect to observe if BITs had their intended effect of strengthening investment protection – have found, at best, very modest support for this claim. See, for example, Aisbett (2009).

The third chapter presents the primary theoretical arguments of the thesis. Previous analyses of USG investment protection policy have typically assumed that the state is reluctant to intervene in disputes, and will only do so when compelled by powerful private interests. The logic of the depoliticization hypothesis assumes that legalized alternatives to diplomacy will allow states to credibly deny requests for assistance from private investors, and that states will therefore no longer intervene diplomatically in disputes. Yet I argue this account undertheorizes the strategic reasons states have for engaging diplomatically in disputes, independent of any pressure from powerful private interests to do so. I build such a theory, highlighting two reasons why the USG had its own interest to intervene in disputes since 1990: promoting investment climate reforms in developing countries and demonstrating the utility of commercial diplomacy to both Congress and the public. The chapter concludes by specifying two key testable hypotheses which follow from this theory and discussing how they will be examined in the empirical chapters.

The fourth chapter presents the statistical analysis demonstrating that American companies are more likely to rely on the formal legalized investment regime when they lack access to effective commercial diplomacy, namely during temporary vacancies in the position of US ambassador. I first provide evidence of the key role ambassadors play in conducting personal commercial diplomacy: ambassadors have the authority to schedule meetings with ministers and heads of state, and ambassadorial engagement on an issue demonstrates that the USG is taking the matter seriously. Thus commercial diplomacy will be significantly less effective when ambassadors are not in place. I then show that US ambassadorial vacancies are driven overwhelming by US domestic political factors, meaning that from the position of host states they are plausibly exogenous events. Finally, I use zero-inflated negative binomial regressions to demonstrate that these exogenous vacancies are correlated with more formal investor-state dispute claims filed by American investors. While this is not clear causal evidence that diplomatic

pressure is necessarily resolving these disputes, it is suggestive that commercial diplomacy is operating beneath the surface of the international arbitration regime.

The fifth chapter moves from this suggestive, indicative evidence to more directly analysing American investment protection policy since 1990. The chapter begins with an analytic overview of how the USG designs and executes investment protection policy, identifying the key bureaucratic agencies involved and the range of carrots and sticks at their disposal. I then use a novel dataset of USG diplomatic interventions in investment disputes derived from internal State Department cables released via WikiLeaks to assess how frequently various diplomatic options are employed and to test under what conditions intervention is more or less likely. Using logistic regressions I demonstrate that USG diplomatic interventions are better predicted by state interests than private interests. Specifically, I show that strong interventions are more likely in US presidential election years and in disputes which are highly salient to broader concerns about the host state's investment climate. Moreover, investor access to treaty-based investment arbitration has no effect on the likelihood of USG intervention in disputes. This evidence is incompatible with the depoliticization hypothesis championed by proponents of the legal investment regime.

The sixth and seventh chapters consider American interventions in greater detail by providing structured, focused comparisons across seven cases of specific investment disputes since 1990. Chapter Six looks at four cases with strong USG interventions: Occidental Petroleum in Ecuador, a group of small investors in Ukraine, Cora de Comstar in Cote d'Ivoire and Dabhol in India. Chapter Seven looks at three cases where USG interventions were significantly weaker: Kosmos Energy in Ghana, Firestone in Liberia and oil service companies in Venezuela. These case studies examine how and why American government officials intervened (or did not) at the request of American companies, and test the extent to which USG policies reflected private interests and state interests. The findings reveal that while private pressure to protect assets played a role in American investment protection policy, such an explanation needs to be complemented

with an understanding of how state interests in promoting investment climate reforms and championing commercial diplomacy encouraged the USG to intervene in disputes.

Finally, the eighth chapter concludes the thesis, discussing the implications of this research for policy debates on reforming the international investment protection regime and the future role of home state diplomacy in investment dispute settlement.

CHAPTER 2: A BRIEF HISTORY OF INVESTMENT DISPUTES AND THEIR SETTLEMENT, 1900-1990

This chapter lays the groundwork for the theoretical and empirical arguments which will be developed over the course of the thesis. In order to understand the contemporary role of USG diplomatic interventions in the settlement of investment disputes – the primary subject of this study – it is necessary to first review (a) the crucial role diplomatic pressure played in settling disputes in the pre-institutional period, and (b) how new institutions to settle disputes were created in part as a response to objections to this system. I argue that contemporary investment protection resembles its historical precedents more than the proponents of the legal investment regime suggest, and that USG diplomatic pressure has persisted as an instrument of investment protection despite the availability of institutional alternatives. This chapter supports that argument by analysing the role of diplomatic pressure in investment disputes historically and by tracing the creation of the institutional regime for settling disputes, highlighting the promise of depoliticization held out by the regime's creators.

The chapter proceeds as follows. The next section introduces a conceptual definition of investment dispute which will be used throughout the thesis. The second section then discusses the role of USG diplomatic pressure in settling investment disputes through most of the 20th century, and explains why investors, host states and the USG all had reasons to be dissatisfied with this system. The third section explores how, over several decades in the second half of the century, this dissatisfaction with diplomatic pressure as a tool for settling disputes led to a number of institutional innovations designed to depoliticize investment disputes. The chapter concludes with an overview of the institutional landscape for investment protection in the contemporary period.

2.1 Defining Foreign Investment Disputes

Foreign investment takes place within the context of a negotiated "bargain" between a foreign investor and a host state.[1] As part of this bargain, both the investor and the host state hold both obligations and rights. Bargains may take the form of explicit contracts with the state – such as a contract between an oil company and a host state on how the proceeds of extracted oil will be shared. Yet not all foreign investors will have an explicit contract with the state, and even for those that do, not all elements of the bargain will necessarily be covered in the contract. Investment bargains may contain both explicit and implicit obligations and rights; as Sonarajah (2010) argues, the host state is inextricably engaged in foreign investment operations, even when there is no state contract. Thus even without an explicit contract, there is a negotiated bargain entailing rights and obligations for both investor and the state. For the investor, obligations may include respecting local laws and paying taxes, while rights may include the right to transfer profits abroad. For the host state, obligations may include enforcing property rights and avoiding the arbitrary imposition of regulations, while rights may include regulating businesses for social purposes such as public health and safety.

For the purposes of this study, investment disputes occur when a host state breaks an existing bargain with a foreign investor.[2] This includes everything from a government cancelling an odious contract to creeping expropriations imposed through regulatory and tax changes to outright expropriations; the definition does not necessarily imply culpability or responsibility on the part of the host state. Once a dispute is initiated by a host state breaking the bargain, it is not resolved until both the investor and the host state acquiesce to a new

[1] This definition is adopted from Emmons (2000).

[2] Of course it is also possible for the investor to break its side of the bargain. However, as this thesis is concerned with how investors protect their assets overseas, these situations are excluded from the universe of investment disputes; it is worth noting however that the question of how host states can hold investors to account is also worthy of study.

bargain – this new bargain may or may not include the continuation of operations, and may or may not include a compensation payment.[3] Disputes may quickly be resolved if the investor and host state are able to promptly reach a new agreement, or may linger for years or even decades.

In some instances it may not be clear if an investment dispute has occurred or not as different actors may disagree about whether or not the host state has broken the investment bargain. As this study is primarily concerned with the actions of the US government in protecting American foreign investors, the key judgment is that of the USG: the universe of relevant cases of investment disputes are those in which the USG deems that a host state has broken its investment bargain with an American investor. The study is primarily interested in how the USG acts *given* that it agrees an investment dispute has occurred; the related question of how the USG determines *whether* an investment dispute has occurred, while important, is only briefly addressed.

Finally, it is worth noting that this definition is, by design, broader in scope than the definition of "investment dispute" which is often used by legal scholars. When legal scholars discuss the universe of investment disputes, they are typically referring to the caseload of legal disputes lodged in formal arbitration courts. However I am interested in both those disputes which proceed to legal arbitration and those that do not; the term "investment dispute" is used for any instance in which host states break bargains with foreign investors, while "arbitration case" refers to the subset of investment disputes which end up as formal investor-state arbitration cases.

[3] This is similar to Charles Lipson's argument that "what is essential to future relations is often not the amount of compensation but mutual agreement on its acceptability" (Lipson 1985, p125).

2.2 Diplomacy and Investment Disputes in Historical Context

What happens after an investment dispute is initiated? As noted in the definition, an investment dispute is not resolved until both the investor and state have acquiesced to a new bargain. How do investors and states reach this new bargain and settle their dispute? Who should decide if an investor is entitled to compensation (monetary or otherwise), and how will these decisions be enforced?

This section discusses how investment disputes were settled in the past, emphasizing the role of home state diplomatic pressure as a key instrument in compelling host states to settle. It begins by analysing diplomatic pressure in relation to the then-available alternatives, namely direct negotiations with the host state and reliance on the domestic legal institutions of the host state. I argue that for most American investors operating in developing countries in the 20th century, diplomatic pressure was clearly preferable to direct negotiations or the domestic legal system. The section concludes, however, by noting that the USG, host states and foreign investors all saw flaws in this system, which over time created demand for new, depoliticized institutional solutions to investment disputes.

2.2.1 Direct Negotiations, Domestic Law and Diplomatic Pressure

Historically, foreign investors have had three principal options available to them in their attempts to settle disputes with host state governments: direct negotiations with the host state, reliance on the domestic legal institutions of the host state, or diplomatic pressure from their home state government. Shortcomings with the first two options led many American investors in developing countries to rely on diplomatic pressure to settle their disputes with host state governments.

The simplest, least institutionalized option was to attempt to settle the dispute through negotiations between the two parties, without any recourse to outside institutions or actors. That is, when a host state broke a bargain with a foreign investor, the investor could independently seek some compensation or – more likely – acceptable terms on a new contract with the host state. For example, imagine a host state unilaterally demanded a foreign oil company operating in the country pay the government $10 a barrel, instead of the $5 a barrel stipulated in the contract. One option for the oil company would be to begin negotiations to agree a new contract at a mutually acceptable price.

Whether or not negotiations were a viable strategy for a foreign investor depended largely on how much bargaining power the investor had relative to the host state (Vernon 1971). In the above example, if the oil company had particular expertise, making it difficult for the state to extract oil without it, then the investor might be able to secure a new contract at an acceptable price. Internal negotiations were most likely to be successful when both the host state and the investor had a long term interest in an ongoing business relationship, yet when there had been a finite, one-off shift in their relative bargaining power, prompting the host state to seek a new bargain which reflected this shift.

For an investor, however, there were a number of shortcomings to relying on direct negotiations to settle disputes. To begin with, this approach effectively rested on the self-interested actions of the host state: the only incentive a host state had to offer any concessions to an investor was its own self-interest (including an interest in continuing a particular business relationship or an interest in maintaining a good international reputation in order to attract future FDI). An investor who had been expropriated, however, may believe it is entitled to more compensation than the minimum which the self-interest of the host state compels. Relatedly, and perhaps more importantly, investors had reason to fear that any new bargain

they reached with a host state might not be honoured by the state – given that the previous bargain had been broken, what would make the new bargain credible?

If a foreign investor believed it deserved a better deal than that which it could receive through direct negotiations, it could turn to the domestic legal institutions of the host state. That is, a foreign investor could appeal to the institutions and law governing the host state's market to (a) determine if the host state government had broken the investment bargain with the investor; (b) if so, determine whether and how much the investor should be compensated; and (c) enforce these decisions. Foreign investors could, at least theoretically, use the same procedural processes to protect their property rights from illegal host state interference as a national of that host state.

This "national treatment" protection governed most foreign investment into advanced economies, which accounted for the majority of foreign investment during the 20th century. Yet investors operating in developing countries were often reluctant to rely on domestic institutions to settle disputes with the host state, as they lacked trust in the local court system. Investors may have feared that the judicial system was insufficiently independent of the executive; given that investment disputes pit foreign investors against host state governments, an investor would have to trust the host state government not to interfere in the domestic legal process. Even if they didn't fear political interference, foreign investors may simply have viewed domestic institutions in developing countries as unstable and inefficient. Foreign investors operating in countries with well-developed legal institutions may have been able to depend on domestic institutions, but those operating in countries with less stable and effective institutions wanted recourse to external processes for settling investment disputes.

When an American company found itself in an investment dispute which it was unable to resolve through direct negotiations with the government and when it did not trust the domestic legal system of the host state, what recourse did it have? Time and time again over

the 20th century, investors in this position appealed to the USG for help (Krasner 1978; Lipson 1985; Maurer 2013). The USG, in turn, repeatedly sought to convince, coerce or compel host states into settling disputes. Investor-state disputes were elevated to state-state disputes.

The idea that powerful home state governments could help protect the assets of their citizens overseas dates back several centuries: colonial empires, amongst their other goals and effects, served to protect the assets of investors from the metropole (Frieden 1994; Alvarez 2010). Of course American investors did not have the protection offered by formal empire. But they did have an extremely powerful government standing behind them, one which had substantial military and economic power which it could deploy in the aim of convincing host states to settle investment disputes.

The basic logic of home state diplomatic pressure was to alter the calculus of the host state by linking specific investment disputes to larger issues.[4] This extended what was at stake in the dispute, and thereby shifted the cost-benefit analysis of the host state: when the USG pressured a host state to resolve an investment dispute, it was attempting to raise the cost to the host state of not settling the dispute.[5] If this cost became sufficiently high that it exceeded the cost to the host state of paying compensation to the investor, then the host state would rationally choose to settle the dispute.

There were a wide range of actions the USG pursued to pressure host states to settle disputes. These actions can be thought of as lying along a spectrum, from weaker pressure to stronger pressure (Figure 2.1). At one end are more subtle actions, such as private discussions between home state diplomats and host state officials. At the other end are overt, high stakes actions, such as the threat or use of military force.

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[4] On issue linkage in international relations, see Davis (2004) and Poast (2012).

[5] It is worth noting that depending on the domestic political context of the host state, US political involvement can actually have the opposite effect: if the USG is visibly involved in attempting to settle a dispute, the host state may be less motivated to settle, because it benefits politically from opposing the US and/or would suffer politically if it is seen as caving in to American pressure.

Figure 2.1: The Spectrum of USG Pressure on Host States to Resolve Investment Disputes

Weaker Pressure Stronger Pressure

Throughout much of the 19th and 20th century the USG frequently used a range of diplomatic interventions to pressure host states engaged in investment disputes with American firms. The extent of pressure was determined both by features of the individual dispute, such as the political influence of the firm involved, as well as by American strategic foreign policy concerns (Maurer 2013). For example, in 1909 American marines supported a revolution in Nicaragua in large part to defend American mining interests. After Nicaruaguan President José Santos Zelaya threatened to cancel the concession of the La Luz Y Los Angeles Mining Company, the head of the company wrote to US Secretary of State Philander Knox saying he needed "protection" and that he "feared unjust confiscation by the government of Nicaragua" (quoted in Maurer 2013, p105). Soon thereafter, US marines landed in Nicaragua, and by 2010 Zelaya had been replaced by a more American-friendly regime. There is little doubt that La Luz' political power, and particularly the firm's close ties to Secretary Knox, was a key factor in compelling USG invervention in Nicaragua. Testifying to Congress years after the fact, Thomas Moffat, the US consul in 1909, explicitly stated that in his opinion the La Luz concession was "the cause of the desire to eliminate Zelaya" (quoted in Gismondi and Mouat 2002, p860). And many of the military officers on the ground were dismayed by private influence over American policy: the commander of the US Marines in Nicaragua believed that "the whole revolution is inspired and financed by Americans who have wild cat investments

down here," and went on to condemn "the whole game of these degenerate Americans ... [who hope] to force the United States to intervene and by so doing make their investments good" (quoted in Gismondi and Mouat 2002, p869).

In another dispute some thirty years later, the USG relied on economic pressure rather than military might to compel settlement. When Mexico nationalized its oil industry in 1938, American officials debated how to respond. President Roosevelt had recently announced the "Good Neighbor Policy" which called for more amicable relations with Latin America, and many in the Administration – including Interior Secretary Harold Ickes, Treasury Secretary Henry Morgenthau and US Ambassador to Mexico Josephus Daniels – favoured a moderate response (Maurer 2013, p282). Secretary of State Cordell Hull, however, pushed for forceful American action to defend the interests of the oil companies, and convinced the USG to pressure Mexico by halting official purchases of Mexican silver and suspending official silver price supports (Maurer 2011, p13). In 1936, the Mexican government earned nearly a quarter of its revenue from silver, twice as much as from oil. Thus cutting off silver purchases – and suspending price supports, so Mexico could not sell its silver for as high a price on the world market – was a serious blow to the government's revenues. Under this pressure, the Mexicans agreed to negotiate with the oil companies, with the USG mediating discussions. Ultimately all the major oil companies operating in Mexico received compensation which exceeded the net present value of the assets which had been expropriated (Maurer 2011).

A third example highlights how, after the United States began providing significant foreign aid to developing countries in the second half of the 20th century, this assistance became another pressure point to compel settlement of investment disputes. In 1963, Ceylon (present day Sri Lanka) expropriated 108 American-owned petroleum stations. The prior year, Republican Senator Bourke Hickenlooper had proposed an amendment to the Foreign Assistance Act which would require the suspension of foreign aid to any country which

expropriated American assets; despite explicit opposition from the Kennedy Administration, the amendment was adopted and signed into law on 1 August 1962 (Vandevelde 1988).[6] With its hands tied by this act of Congress, the US embassy in Colombo contacted the Ceylonese government 35 separate times seeking a resolution to the dispute, and warning of the repercussions if none was forthcoming (US Department of State, 1963); ultimately aid was cut off on 7 February 1963. The short term effect of suspending foreign assistance was a hardening of the dispute between oil companies and the government, as well as further deterioration in US-Ceylon relations. Though support from Communist countries increased in the 1963-65 period – as the State Department had feared would occur – this was not enough to make up for the drought of Western aid.[7] Under economic pressure, Ceylon finally moved toward settling the dispute in April 1964, so that aid flows might resume (Olson 1977). The ruling government collapsed before a solution could be implemented; the subsequent administration won the following election running on a platform promising to settle the dispute "within 24 hours" (Olson 1977, p217). American companies were paid back in full, and Western aid resumed immediately. The Ceylon case highlights both how Congress influenced US investment protection policy during the Cold War, as well as how American political pressure related to investment disputes could have significant domestic political effects in developing countries.

2.2.2 Diplomatic Pressure and its Discontents

As the examples of Nicaragua, Mexico and Ceylon suggest, USG diplomatic pressure proved quite successful in resolving investment disputes in favour of American investors. When the

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[6] The campaign for the amendment had been led by many of the country's largest foreign investors at risk of expropriation – including ITT, Texaco, Standard Oil, United Fruit and large copper companies – as well as business organizations including the American Petroleum Institute, the National Foreign Trade Council and the US Chamber of Commerce (Lipson 1985, p209).

[7] The effect of American sanctions was multiplied by the fact that the United Kingdom and World Bank, under US pressure, also cut off assistance. See (Olson, 1977) p211-213.

government deployed its power – either through military invasions or economic sanctions – host states generally decided to compensate investors and settle ongoing disputes. This did not always occur immediately, and the process could sometimes take several years; but sooner or later investors were paid back. Indeed, in nearly every instance of expropriation in extractive industries reported to the State Department between 1900 and 1987, the investor eventually received full, market-value compensation (Maurer 2013).

Yet, while American political pressure was generally successful in compelling host states to settle investment disputes, the USG, host states and foreign investors all had frustrations with diplomatic pressure as an instrument for protecting foreign investments. The criticisms and objections from each of these actors ultimately led to demand for institutions which would facilitate the settlement of disputes without relying on home state diplomatic pressure.

USG Discontent

For the USG, intervening in host states to compel settlement could be quite costly – militarily, economically and politically. Military invasions in the Dominican Republic in 1905 and again in 1916, in Nicaragua in 1911 and in Haiti in 1915 were at least partially motivated by the need to protect the assets of American investors, as were covert operations in Iran in 1953, Guatemala in 1954 and Chile in 1973, amongst others (Maurer 2013). And even when American pressure didn't mount to the level of military invasion, the government still faced considerable costs when pressuring host states through economic sanctions, which are costly to both the sender and the target.

The biggest cost to the American government of such an interventionist investment protection policy, however, was neither military nor economic but political. Investment disputes were often irritants in bilateral diplomatic relations, distracting from broader strategic

objectives (Krasner 1978; Maurer 2013). The US could find itself attempting to forge an alliance with a country for geo-strategic reasons while simultaneously clashing with that country over the terms of compensation in an individual investment dispute. The context of the strategic competition for allies during the Cold War made such choices particularly stark. The USG could choose to take a strong stance and aggressively defend the interests of American firms in developing countries, but doing so ran the risk of alienating those countries' governments. The threat that such confrontation would push developing countries into the Soviet orbit meant there was a high political cost to diplomatic interventions in investment disputes.

The options facing the US following Cuba's expropriation of American sugar companies are a case in point. Soon after Fidel Castro came to power in Cuba in 1959 – and before the United States was convinced that Castro would openly ally with the Soviet Union – Cuba announced a wide-ranging land reform policy, which effectively expropriated a number of American investors on the island, particularly the owners of sugar plantations (Schreiber 1973, p 389-91). The US sugar lobby pushed for a strong American response, including suspending Cuba's sugar quota, which would make it impossible for Cuba to export sugar to the US. Yet many top advisors in the State Department cautioned against such a move, warning it would further undermine US-Cuban relations and only push the island further toward the Soviet orbit. As one member of the Policy Planning Staff at the State Department noted at the time, "A continuation of the present impasse is dangerous. There is an observable slippage in Cuba toward Soviet influence and Afro-Asian neutralist orientation… The longer the present impasse continues, the more likely it is that Congress and antagonistic business elements may goad the Department into intemperate or punitive action… *I think our point of departure must be that keeping Cuba out of the Sino-Soviet orbit, and returning it to the Inter-American system, is more important than the salvaging of the US investment in Cuba to the complete satisfaction*

of the US business community" (FRUS, 1958-60, Vol 6, doc 458; emphasis added). Ultimately the US did cut Cuba's sugar quota, and relations between the countries quickly deteriorated; by 1961 diplomatic relations between the US and Cuba were formally ended, and the country was firmly in the pro-Soviet camp.

The Cuban experience highlights the dilemma that confronted American foreign-policymakers during the Cold War: they preferred to focus on high-level, strategic goals, yet faced the risk that pressure from the business community – supported by members of Congress – would compel intervention in investment disputes. Intervening in disputes came with a high cost for US foreign-policymakers: not only did it detract attention from more important high-level strategic priorities, but antagonizing foreign governments in order to secure compensation for American businesses was likely to lead to a deterioration in bilateral relations. Given these drawbacks, American foreign policy elites had little interest in pursuing a strong commercial diplomacy policy. During the Cold War the State Department viewed commercial diplomacy at best as an afterthought, at worst as a nuisance pushed on the Department by powerful private interests which compromised more important strategic foreign policy objectives. Interventions to support investors in specific investment disputes were often at odds with broader US foreign policy goals – but lacking any other means for investors to defend their assets overseas, the US often found itself intervening nevertheless.

Host State Discontent

If the USG found interventions in investment disputes an irritation in foreign policy, it was a much more serious problem for the host states on the receiving end of such interventions. Host states, quite understandably, resisted the notion that diplomatic pressure from the American government was a legitimate process for settling investment disputes. Given the power

asymmetry between the US and poor capital importing states, the US could compel a host state to compensate an investor even if the investor's substantive case for compensation was weak.

Of course, this power asymmetry also meant there was little capital-importing states could do to oppose American interventions. Latin American states, who faced the brunt of US investment-related interventions, led the charge against them. Tired of being bullied by their more powerful neighbour, Latin American states promoted the principle that foreign investment disputes should be settled domestically, without recourse to support from their home states or international law. This idea came to be known as the Calvo Doctrine, after the Argentine legal scholar Carlos Calvo (Calvo 1868). The Calvo Doctrine argues that sovereign states have the right to expect non-interference in their domestic affairs, including those related to the settlement of investment disputes, and thus that foreign investors should have to rely on domestic institutions and law in any dispute with the host government.

In the early twentieth century, variations of the Calvo Doctrine began to make their way into concession contracts between foreign companies and Latin American states and into Latin American domestic law itself (Garcia-Mora 1950). For example, the Mexican constitution of 1917 – which grew out of the Mexican Revolution, and is still in force today – explicitly states that foreign investors must waive their right to protection from their home governments. Article 27 of the constitution notes that foreigners may be allowed to own property and exploit natural resources "provided they agree before the Ministry of Foreign Relations to consider themselves as nationals in respect to such property, and bind themselves not to invoke the protection of their governments in matters relating thereto; under penalty, in case of noncompliance with this agreement, of forfeiture of the property acquired to the Nation" (Mexico Constitution of 1917, English translation). Yet even with such protections in the constitution, Mexico has struggled to bind foreign investors from not invoking the protection of their governments in investment disputes – as the 1938 case discussed above demonstrates. When the USG chose to

aggressively defend the interests of American investors abroad, host state governments were unable to simply assert that disputes should be settled domestically.

Foreign Investor Discontent

As noted earlier, in general American foreign investors did relatively well out of this (non)system, typically receiving full market-value compensation in investment disputes. Yet even for investors, the need to rely on the USG to settle their disputes with foreign host states was not ideal. The problem was that, in practice, there was no automatic mechanism compelling the USG to back investors, and thus there was always uncertainty over what the ultimate outcome would be. Investors knew the government had strategic foreign policy objectives which may or may not have aligned with investors' interest in receiving full compensation – if they did not align, the government might choose to prioritize strategic interests over investors' claims to compensation.

Working with their allies in Congress, investors attempted to create automatic mechanisms which would tie the hands of the executive branch, and force the US to pressure host states engaged in investment disputes with American investors (Lipson 1985, p200-2236; Vandevelde 1988). Congress passed a series of laws from the late 1950s into the 1970s which called on the US to cut off foreign aid to any country which expropriated American assets and failed to compensate the investor, including the 1962 Hickenlooper amendment discussed above.[8] The aim of this legislation was to create *automatic* punishment for any host state which

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[8] In addition to the Hickenlooper amendment to the Foreign Assistance Act of 1962, these included the Johnson-Bridges amendment to the Mutual Security Act of 1959 and the Gonzalez amendments to 1972 bills authorizing the Inter-American Development Bank, Asian Development Bank and the International Development Association, the concessionary arm of the World Bank. In 1994, similar legislation – the Helms amendment – was attached to the Foreign Relations Reauthorization Act.

expropriated or breached a contract with an American investor, eliminating Presidential discretion over such decisions.

While corporate interests succeeded in getting the legislation through Congress, this didn't necessarily give them the certainty of government support which they sought. The State Department, which had opposed the laws when they were being drafted, worked creatively to avoid needing to invoke them after they were passed – these laws were only officially invoked twice, in Ceylon as noted above and in Ethiopia in 1979.[9] While the threat of aid withdrawal was a powerful tool compelling host states to settle disputes with American investors, the fact that it was not in practice automatically invoked meant investors could not be completely sure how strongly the USG would back their case, especially in countries of strategic importance. Both Louis Wells (2004) and Theodore Moran (1973) argue that during the Cold War the United States frequently turned down investor requests for support in investment disputes, though Maurer (2013) argues otherwise.

Furthermore, even if the USG did endorse an investor's case, this was not necessarily a guarantee of a quick and easy settlement. Again, while overall host states generally acquiesced to USG demands to compensate investment, at times this took several years (and perhaps involved waiting for an intransigent government to be replaced by a new, more compliant regime). For investors – especially firms which had the majority of their assets tied up in the project under dispute – this could be a long and expensive delay.

[9] Though, even though the legislation was not officially invoked, the US did generally decrease aid to countries which had expropriated American assets, and threatened the complete cut off of aid. See Maurer (2013), p 343 – 346.

2.3 Institutional Solutions to Investment Disputes: The Promise of Depoliticization

Over the course of the 20th century, USG efforts to protect American investors abroad evolved from direct military interventions, such as those in Haiti and Nicaragua, to more sophisticated statecraft designed to pressure host states into settling disputes. Even after large scale military invasions were off the table, though, the US government, host states and foreign investors all had reasons to dislike relying on diplomatic pressure to settle disputes. This created considerable demand for institutional solutions to investment disputes which could function as alternatives to diplomatic pressure.

During the second half of the century, a number of new institutions were created both within the US and internationally to settle investment disputes without relying on USG pressure. This section first describes the multiple attempts to create a multilateral investment agreement, all of which ultimately failed due to fundamentally conflicting interests between capital-importing and capital-exporting states. It then examines the three key planks of the institutionalized investment protection regime which has evolved in the absence of a single large multilateral institution: investor-state arbitration, the process which allows foreign investors to directly sue host states; state contracts and international investment agreements, which determine which investors can access investor-state arbitration and what substantive rights are granted to investors; and political risk insurance, which allows investors to purchase insurance against the possibility of future investment disputes. A key objective of these institutions was to depoliticize investment disputes.

2.3.1 Failed Attempts at a Multilateral System

While all actors had some reasons for dissatisfaction with the investment protection regime centred on diplomatic pressure, they did not necessarily agree on either what the substantive norms of investment protection should be or on what procedural mechanisms should be used to enforce such norms. At heart this disagreement pitted capital-exporting states, who wanted strong protections and international procedures for enforcement, against capital-importing states, who favoured more flexible protections and national procedures for enforcement (the Calvo Doctrine discussed above).

This fundamental divide scuppered numerous proposals for a multilateral agreement on investment protection. The earliest of these dates to discussions in the late 1920s at the League of Nations, where states attempted to codify what rights should be granted to foreign investors, yet failed to reach any substantial agreement (Lipson 1985, p75-76). In the aftermath of the Second World War, investment protections were again debated as part of the draft agreement of the Havana Charter, which would have created an International Trade Organisation (ITO), the third pillar of the Bretton Woods system alongside the IMF and World Bank. Here again, compromise between capital exporters and importers proved impossible (Lipson 1965, p86-87). The proposal for an ITO ultimately collapsed; the more modest General Agreement on Tariffs and Trade (GATT), which governed international trade from the post-war era until the creation of the WTO in 1995, only peripherally addressed investment issues.

The issue was next taken up in the 1960s, when the OECD issued a Draft Convention on the Protection of Foreign Property in 1967.[10] The convention, which was designed to apply to all countries, not just OECD member states, was never ratified. Three decades later the

[10] The 1967 OECD text was based on the 1959 Abs-Shawcross Draft Convention on Investments Abroad, which had been produced by Dr Abs, of Deutsche Bank, and Lord Shawcross, a British politician and lawyer. See Tschofen (1992).

OECD tried again, with the 1995 launch of negotiations on a Multilateral Agreement on Investment (MAI). These discussions were abandoned in 1998 when states couldn't reach a deal (and following substantial criticism from civil society) (Tieleman 2000).

These multiple failed attempts over the course of the 20th century reveal that there was substantial demand for a multilateral institution to govern foreign investment, yet this demand was accompanied by deep, insoluble divides over what such an institution should look like. Due to such divides, the investment protection regime was institutionalized in a bilateral, piecemeal and incremental manner, over a period of several decades.

2.3.2 Investor-State Arbitration

As noted earlier, foreign investors operating in developing countries were often reluctant to rely on domestic legal institutions for settling investor disputes, viewing them as either corrupt and biased in favour of the government or simply inefficient and ineffective. Diplomatic pressure as a tool for settling disputes was thus a substitute for weak domestic legal systems. The creation of investor-state arbitration was an attempt to substitute weak domestic legal systems with *international* legal systems which would be unbiased, effective and enforceable.

The idea of legal (or quasi-legal) proceedings to settle investment disputes in fact has a very long history, in the form of state-state arbitrations. Home states could espouse their nationals' claims for compensation and then pursue compensation in state-state arbitration, with the home state then in turn paying out to the companies. While data on the extent of such practices are patchy, by one account the United States entered into about 40 arbitrations with Latin American states between 1829 and 1910 (Summers 1972, p7). It is difficult to discern to what extent host states accepted state-state arbitration of investment disputes willingly and to what extent they were coerced into doing so, yet it seems likely that home state diplomatic

pressure (implicitly or explicitly) was an important factor in convincing states to enter arbitration proceedings.[11]

The advent of investor-state arbitration, however, meant three revolutionary changes from state-state arbitration.[12] First, it gave investors direct access to recourse, cutting out the middle man of the home state; investors no longer needed to convince their government to get involved. Second, increasingly consent to arbitration became automatic and ex ante to the dispute, rather than ex post; states agreed to settle any future disputes in arbitration at the moment of investment rather than once the dispute was already underway. And third, rather than ad hoc arbitral proceedings investment arbitration became progressively more institutionalized and standardized, with agreed sets of rules and procedures and (at least in principle) more predictable outcomes.

While there were a handful of early investor-state arbitration cases in the early 20th century, it was only with the signing of two inter-state treaties in the 1950s-60s that the institutional tools were established to make investor-state arbitration credible and enforceable. Importantly, neither of these treaties took on the contentious substantive debates which had thwarted attempts to create an international institution governing foreign investment. Rather, they focused squarely on procedural aspects of dispute settlement.

The first was the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, known as the New York Convention. The New York Convention governs the execution of arbitration awards, and states that an arbitration award issued in any state could be enforced in any other contracting state. In practical terms this means that an investor which

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[11] The author of the most thorough history of Latin America's early experience with arbitration notes "This author had hoped to be able to classify the arbitrations, or at least some of them, according to whether they had been entered into willingly or unwillingly. It has been concluded that it is virtually impossible to make such a classification." (Summers, 1972) p 5 n15.

[12] It is worth noting that many contemporary bilateral investment treaties include the option of state-state arbitration, although it is extremely rarely used in practice; see discussion in Roberts (2014).

has won an arbitration case against a state has the right to seize commercial assets owned by that state located in nearly any country in the world.[13] There were 25 participating states by 1962 and 75 by 1988; between 1989 and 1999 a further 45 countries joined, and today there are 148 participating states. The United States joined in 1970.

The second, more important treaty was the 1965 convention which established ICSID, the International Centre for Settlement of Investment Disputes. ICSID, housed within the World Bank, provides the procedural machinery for investor-state arbitrations. It was not designed to set any substantive protections to be afforded to investors, but where such protections had already been agreed – typically either in a contract between a host state and an investor or in an international investment agreement (discussed below) – ICSID could makes such commitments credible and enforceable. If a host state was a signatory to ICSID and a foreign investor believed it had breached the terms of an investment contract or treaty, the investor could then file an arbitration claim. Three arbitrators would judge the case and rule on whether, and how much, compensation should be awarded to the investor. (ICSID is one of several venues for investor-state arbitration, including UNCITRAL, the International Chamber of Commerce in Paris, and the Stockholm Chamber of Commerce; ICSID, partially because it is the most public, is by far the best known.) The combined effect of the New York and ICSID conventions is to make investor-state arbitration one of the most binding and easily enforceable areas of international law; the available evidence suggests host states almost always voluntarily comply with arbitration awards.[14]

[13] For example, in one recent case an investor that had won an award against the Russian government was allowed to seize a $40 million Russian-owned apartment complex in Cologne, Germany. Cited in Yackee (2008, p422).
[14] The one notable exception, which only serves to prove the general point, is Argentina. Following a series of losses at ICSID in the mid-200s Argentina refused to comply with awards; however, as the cost of non-compliance increased – the United States sanctioned the country by suspending trade preferences – Argentina finally bowed to the pressure and settled with claimants in 2013.

ICSID's creators worked strategically to avoid the political debates over substantive investment protection which divided home states and host states (St John 2017). Even still, however, a number of capital-importing states – particularly in Latin American – were initially sceptical of the institution, and refused to ratify. 57 countries joined ICSID during its first five years, and a further 20 countries joined over the next two decades. As with the New York Convention, there was then a second wave of ratifications in the early 1990s, and by the end of the century 130 states had joined; today there are 150 members.

The promise of depoliticization was central to the institutionalization of investor-state arbitration, and specifically to the creation of ICSID. When Aron Broches, then-General Counsel of the World Bank and ICSID's primary architect, was attempting to sell the institution to World Bank member countries in 1963-64, he noted: "As a corollary of the principle of allowing an investor direct and effective access to a foreign State without the intervention of his national State it was proposed - and this was an important innovation - that an investor's national State would no longer be able to espouse a claim of its national ... The Convention would therefore offer a means of settling directly, on the legal plane, investment disputes between the State and the foreign investor and *insulate such disputes from the realm of politics and diplomacy* (quoted in ICSID 2006, emphasis added)."[15]

In the final draft of the ICSID convention the concept of depoliticization is found in Article 27, which states in part, "No Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit to or shall have submitted to arbitration under this Convention." This article has generally been interpreted narrowly, effectively meaning that states cannot pursue a separate state-state arbitration in parallel to an investor-state arbitration

[15] In the lead-up to the signing of the Convention the World Bank hosted four consultative meetings in Addis Ababa, Geneva, Bangkok and Santiago; at each meeting Broches made the same opening statement, including the cited quote.

of the same dispute, while not precluding other diplomatic contact and support a home state could provide an investor (Posner and Walter, 2014; Schreuer 2001, p399-414). Yet the early ICSID travaux suggests there was at least some support for giving the article a broader meaning, effectively proscribing diplomatic pressure in cases for which the host state agreed to arbitration.[16] Writing in 1986, Ibrahim Shihata, then-Secretary General of ICSID, argued that "the depoliticization of such disputes ... *is a fundamental objective of the ICSID system*" (Shihata 1986, p102-103). To the best of the author's knowledge, the US has never been accused of breaching Article 27 in the course of an ICSID arbitration.[17]

2.3.3 State Contracts and International Investment Agreements

The ICSID system created the machinery for the widespread use of investor-state arbitration. In order for this machinery to be useful, however, two other aspects were needed. Investor-state arbitration was a valuable dispute settlement mechanism when (a) a foreign investor and a host state had agreed on particular substantive standards of investment protection and (b) they had already consented to settle disputes related to these standards in investor-state arbitration. Such substantive standards and advance consent were institutionalized through two instruments: state contracts and international investment agreements (IIAs). It is the combination of state contracts and IIAs with the investor-state arbitration system which allows

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[16] The final text includes a clarifying paragraph, Article 27 Paragraph 2, which states "Diplomatic protection, for the purposes of paragraph (1), shall not include informal diplomatic exchanges for the sole purpose of facilitating a settlement to the dispute." This clause was not included in any of the earlier draft texts, and was inserted at the request of several developed countries, which believed informal diplomatic contacts might usefully lead to successful negotiations. See Schreuer (2001), p 413. Of course, the line between "facilitating a settlement" and coercing compensation will not always be clear.

[17] In *The ICSID Convention: A Commentary*, Christophe Schreuer notes that "Diplomatic protection does not appear to have created any practical problems in the context of ICSID arbitration" (Schreuer 2001, p399). Similarly, Juratowitch observes that "no arbitral tribunal has analyzed in depth Article 27 of the ICSID Convention." (Juratowitch 2008, p16).

investment disputes to be settled in international tribunals rather than through state-state diplomacy.

State contracts are contracts between a foreign investor and a host state detailing the terms of their business relationship, most frequently a concession contract. They are functionally similar to the millions of other contracts which govern commercial transactions across the globe, and would include terms such as at what price the government would buy oil from a foreign oil company. In addition to such commercial clauses, state contracts may also directly address political and regulatory issues; for example, many contracts include stabilization clauses that limit an investor's exposure to any future regulatory changes enacted by the host state (Shemberg 2009; Howse 2011).

In the absence of an effective international arbitration system, state contracts could be enforced through diplomatic pressure. The spread of the international arbitration regime, however, created a new mechanism for enforcing state contracts, one which did not rely on home state diplomatic pressure. Host states could provide advance consent to settle any disputes with a foreign investor through an established arbitration forum – such as ICSID – by including such a clause in a state contract with that investor. Once the contract had been signed, host states were obligated to comply with the awards of any international arbitration proceedings against them. If they objected to arbitration proceedings and refused to participate the case could still proceed without their involvement, and the strong enforcement mechanisms of the New York and ICSID conventions would still apply. The ICSID secretariat actively supported the inclusion of arbitration clauses in state contracts, and drafted and promoted model clauses which investors could then copy and paste into their contracts (St John 2017).

State contracts provided access to investor-state arbitration for the specific foreign investors whose contracts included arbitration clauses – a limited share of total foreign investors. International investment agreements (IIAs), however, dramatically increased the

number of investors who could access the arbitration system. IIAs offered substantive protections and advance consent to arbitration not just for *specific* investors but instead for *general classes* of investors, based on the nationality of the foreign investor. Today IIAs are often viewed as the backbone of the international investment regime (eg, Milner 2014, Simmons 2014).

IIAs are treaties signed by two or more countries in which the parties agree to substantive protections for all foreign investors from participating countries. The main types of IIAs are bilateral investment treaties (BITs), of which there are some 3,000 worldwide; investment chapters in bilateral or regional trade agreements, such as Chapter 11 in NAFTA; regional investment agreements, such as the Unified Agreement for the Investment of Arab Capital in the Arab States; or industry-specific multilateral agreements, such as the Energy Charter Treaty (ECT).

As with state contracts, IIAs predate the arbitration regime, and it was only as the ICSID system developed over the latter half of the 20th century that IIAs became closely linked with investor-state arbitration. Once again the ICSID secretariat played an important role in this development, drafting arbitration consent clauses to include in BITs as early as the 1970s (St John 2017). Nearly all IIAs signed in the last 25 years have included investor-state arbitration as a central feature. In ICSID's history, nearly three quarters of all arbitration cases have arisen out of IIAs (ICSID 2015).[18]

The United States initiated its investment treaty program in 1977 and began negotiating treaties with partner countries in 1982 (Salacuse 2010). There is some debate as to what the USG's motivations were in signing BITs (e.g. Vandevelde 1993; Lang 1998; Vandevelde 2009; Chilton 2015). Possible motivations include protecting existing US investors operating in treaty

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[18]The remaining cases arise out of state contracts or the domestic law of the host country.

partners, promoting new investment in treaty partners, developing the field of international investment law and strengthening relationships with strategic allies. Yet amongst these other motivations there is also compelling evidence that freeing the USG from needing to intervene diplomatically in disputes was an important motivation for the BIT program, particularly for early treaty negotiators in the Office of the Legal Advisor at the State Department. Kenneth Vandevelde, who worked in the Office of the Legal Advisor in the 1980s, argues that at its outset the core purpose of the BIT program was "to protect American foreign policy from the disruption caused by disputes between private U.S. investors and host-state governments. By providing legal protection for investment, the U.S. government could more easily refuse to intervene politically to aid private investors in their disputes with foreign governments" (Vandevelde 1993, p 161). He goes on to note that "The hope of U.S. BIT negotiators was that future investment disputes between U.S. nationals or companies and BIT-partners would be settled by arbitration in accordance with international law, rather than through the intervention of the U.S. government" (Vandevelde 1993, p 158-159). Even today, the United States Trade Representative (USTR) continues to cite depoliticization as a justification for including investor-state arbitration provisions in politically contentious trade and investment agreements, including the Trans-Pacific Partnership (TPP) and the Transatlantic Trade and Investment Partnership (TTIP). A Q&A explaining the benefits of ISDS lists "resolv[ing] investment conflicts without creating state-to-state conflict" as the top reason for including ISDS in trade and investment agreements, and notes that ISDS is a "more peaceful, better way to resolve trade conflicts between countries" than the "gunboat diplomacy" the US deployed to protect commercial interests early in its history (USTR 2015). Similarly, a number of scholars have also cited depoliticizing investment disputes as a core justification for investment treaties. As Johnson and Gimblett (2011) note, "in the current debates over the utility of bilateral investment treaties, it is important to keep in mind that perhaps their most important

achievement has been largely to remove investment disputes from the bilateral diplomatic agendas of treaty countries." And legal experts likewise highlight depoliticization as a core purpose of the investment regime. The noted arbitrator Michael Reisman, for instance, has argued that "part of the compact upon which BITs rest is the 'legalization' and corresponding 'depoliticization' of the standards of dispute resolution for investor-state disputes," which he describes as a "central achievement" of the BIT regime (Reisman 2012, p 14, 20).

2.3.4 Political Risk Insurance

While investor-state arbitration, state contracts and IIAs are the key legal institutions in contemporary investment protection, there is another important market instrument – political risk insurance (PRI) – which complements these legal tools. PRI – insurance foreign investors buy to cover specific political risks for particular foreign investment projects – shifts the burden of investment protection from *ex post* government action (applying pressure to settle disputes) to *ex ante* investor action (purchasing insurance). If an investor wants the strongest possible protections against future investment disputes – and in particular to be compensated quickly – it may choose to buy insurance even if it already has legal protection under a state contract or IIA.

The United States created the first PRI program as part of the Marshall Plan, to stimulate American investment in war-torn Europe by insuring investors against the risk of currency inconvertibility (Lipson 1978). The program's coverage soon expanded to include guarantees against expropriation, and beyond Europe to include investments in any country which had signed an investment insurance agreement with the US. The Nixon administration, looking to substantially expand the programme at the urging of the business community, created a stand-alone risk insurance agency in 1969, the Overseas Private Investment Corporation (OPIC). Today OPIC operates in almost all developing countries; over the course

of its history, it has paid out 294 insurance claim settlements totalling $977 million (OPIC 2014). In addition to PRI from OPIC, American investors also have the option of purchasing insurance from private providers, such as Llyods, and the Multilateral Investment Guarantee Agency (MIGA), the investment insurance arm of the World Bank.

As an institutional tool for depoliticizing disputes, PRI has complex and non-obvious effects. On the one hand, as both Lipson (1978, p362) and Maurer (2013, p409-410) note, OPIC was explicitly designed to be insulated from broader strategic foreign policy goals and bilateral diplomatic relations. It is meant to assuage private pressure on the USG to intervene in investment disputes by providing investors with a separate channel for protecting themselves against political risk. If an investor which would have been eligible for PRI but chose not to purchase it subsequently finds itself in an investment dispute with a host state, the USG could in principle more easily fend off appeals for diplomatic backing by claiming that the investor failed to adequately protect itself.

Yet risk insurance sold by OPIC can also increase the incentives for the USG to get involved in investment disputes, by giving it a direct monetary stake in the settlement of the dispute. In the early stages of a dispute involving an insured investor, the government will have an incentive to see the dispute settled so that it will not be compelled to pay out a claim. After a claim has been paid out, the right to pursue recovery of the claim is transferred to OPIC. OPIC has proved remarkably successful at recovering compensation, having recovered 91 percent of total claims paid (OPIC 2014). OPIC generally pursues recovery through informal negotiations with the host state, or may pursue recovery through formal arbitration, as it initiated with India in 2004 (the case was subsequently settled). As Johnston (2012) has argued, American power largely explains why OPIC has been so successful at recovering compensation – other risk insurers do not achieve recovery at a comparable rate.

Theoretically, then, the effect of PRI on the depoliticization of disputes between American investors and foreign governments is indeterminate. By providing investors with an alternative mechanism for protecting themselves against political risk – and leaving the decision on whether or not to pursue recovery of claims with the USG – the government should be better insulated from private pressure to intervene in disputes. Conversely, PRI also creates new incentives and opportunities for the government to engage in ongoing disputes. Yet it remains the fact that many champions of risk insurance (Shihata 1986) highlight its depoliticization effect, as do a number of academics (Maurer 2013; Lipson 1978).

2.4 Conclusion: Institutions for Investment Protection in the Post-Cold War Era

Historically, American investors operating in states with weak domestic institutions relied on USG diplomatic pressure to help them settle their disputes with host states. This system, however, had serious drawbacks – from the perspective of the USG, the host state *and* the foreign investor. These drawbacks created demand for new institutional tools for settling investment disputes, ones which would not require the USG to get involved in specific disputes.

Legal and insurance institutions for protecting investment developed in a piecemeal manner over second half of the 20th century. There is no single event or particular threshold one can easily point to as the moment when this new regime was formed. Investor-state arbitration was enshrined in principle in multilateral treaties in the 1950s and 60s, but it would be several decades until the caseload of actual arbitration cases began to grow. Similarly the earliest IIAs date back to mid-century, but the phenomenon really took off in the late 1980s and 1990s. PRI in the United States expanded most rapidly in the 1970s and 80s, before stabilizing in the 1990s.

The institutional regime, then, developed slowly and in fits-and-starts. Over time, however, a rich, multi-layered institutional landscape evolved for protecting the assets of American foreign investors. Today the United States has BITs in force with 41 countries; free trade agreements with BIT-like provisions exist with a further 16 countries (Akhtar and Weiss 2013). US-based multinational companies operating in a country without the protection of an IIA agreement can include investment arbitration clauses in state contracts, or can sometimes route their investment through a third-country which has signed a BIT with the host state.[19] Meanwhile OPIC offers PRI in 160 countries (OPIC 2014). In the contemporary period there is a dense web of institutions offering investment dispute settlement processes which do not involve USG diplomatic pressure.

The architects of these institutions and their contemporary proponents today argued that these legalized approaches would depoliticize investment disputes, and would obviate the need for USG diplomatic pressure as an instrument of investment protection. If, as the literature to date has assumed, the USG only reluctantly intervened in investment disputes when compelled to do so by private pressure, then such a hypothesis makes sense. Conversely if, as I argue, the state itself has reasons for intervening diplomatically in investment disputes, it is unclear if the availability of legalized alternatives would depoliticize investment protection. The following chapter develops this theory in further detail.

[19] The Netherlands, which has signed the most BITs in the world, is a popular destination for multinationals seeking to route investments through a shell company in order to gain IIA protection. The use of third-country BITs by American companies is discussed further in Chapter Four.

CHAPTER 3: A THEORY OF COMMERCIAL DIPLOMACY, AMERICAN INTERESTS AND THE INTERNATIONAL INVESTMENT REGIME

This chapter develops the core theoretical arguments of the thesis. I argue that existing explanations of commercial diplomacy in international investment disputes fail to appreciate states' strategic interests for intervening in disputes. Building on recent literature that assesses how states act strategically in choosing how to settle international disputes in other issue areas, notably trade, I develop a novel theory for understanding the USG's decisions to intervene in investment disputes. I then use this theory to help explain the international investment regime's limited depoliticization effect.

In brief, the central argument is that since 1990 the USG has intervened in investment disputes when doing so served the interests of state bureaucratic actors. While most earlier academic analyses have emphasized the role of private interest capture in determining strong commercial diplomatic interventions in disputes, this explanation is insufficient for explaining contemporary investment protection policy. In many instances the government actively intervened in investment disputes involving small, politically powerless companies with small investments; it is implausible that these companies were able to capture investment protection policy. In other instances large, powerful corporations were largely left to fend for themselves. While private interest capture was an important driver of investment protection policy, it must be complemented with an understanding of how state bureaucratic interests also compelled the USG to pursue an interventionist investment protection policy in the post-Cold War era. The interests at stake included promoting investment climate reforms in developing countries and demonstrating the utility of the State Department to the business community, for audiences in Congress and the American public. In disputes where these interests were at stake, the USG was more likely to intervene diplomatically.

The remainder of the chapter proceeds as follows. The next section begins with an overview of existing explanations of historical USG interventions in investment disputes, and argues that unlike in other areas of interstate disputes, states' roles as strategic actors have been undertheorized. Yet such a theory is necessary for understanding how and why the international investment regime could depoliticize investment protection. The following section then develops a theory of how investment disputes relate to broader USG interests. The subsequent section builds on this analysis to identify specific testable empirical hypotheses regarding USG interventions in investment disputes. The final section concludes by discussing how these hypotheses will be tested in the remainder of the thesis.

3.1 Existing Explanations of American Investment Protection Policy

In order to understand what effect the legalized investment regime has had on depoliticizing investment protection, it is necessary to first understand why the USG intervened in investment disputes in the absence of any legalized, institutionalized alternatives. Existing historical analyses of American investment protection policy have focused on pressure from private firms as the key explanatory variable explaining USG intervention in investment disputes. The shared assumptions in the current literature suggest that when private interests are powerful and able to capture the policymaking process, the USG is likely to intervene in disputes, whereas when state policymakers are able to repel this private pressure, the USG will refrain from such interventions.

Krasner (1978) presented one of the first major analyses of American investment protection policy. Krasner argues that the USG repeatedly declined requests from American investors to intervene in investment disputes because investment protection policy was driven by a concern for the national interest, rather than private interests. He writes that with respect

to investment protection, “companies usually wanted more support than central decision-makers were willing to give... Even the largest and most powerful private corporations were not able to turn instruments of state power to private purposes when this would violate the national interest” (p331-332). Krasner does suggest that the state’s interest in securing access to raw materials at times gave it reason to engage in disputes between US companies and foreign governments, but argues that this motive was often trumped by the state’s greater interest in its ideological competition with the Soviet Union.

Maurer (2013) depicts a starkly different interpretation of American investment protection policy. Maurer argues that from the 1890s through the 1980s the USG in fact provided substantial support to American investors operating abroad. Maurer claims that during this period the government “intervened often and intervened successfully” on behalf of investors, and that “domestic [private] interests trumped strategic imperatives, over and over again” (p3).

Rather than attempt any adjudication between these two conflicting findings, for the present purposes it is more interesting to focus on where they agree. Both Krasner and Maurer suggest that private interests uniformly support intervention in investment disputes while state interests predominantly favour a more restrained investment protection policy. Private firms will push the USG to support them in disputes; if the state is captured by these private interests (as Maurer argues) it will intervene, if not (as Krasner contends) it will not.

This account, however, undertheorizes states’ own interests for intervening in investment disputes. Indeed, recent literature in international trade has highlighted how states act strategically in choosing when and how to endorse certain trade disputes, while declining to bring forward other disputes. Davis (2012) argues that democracies strategically choose to adjudicate trade disputes as a costly signal of the executive’s commitment to supporting export interests. Building on this analysis, Pervez (2015) and Conconi et al (2015) link the strategic

filing of disputes to electoral cycles in the complainant country, while Chaudoin (2014) shows electoral cycles in the respondent country also influence strategic dispute filing. A related line of literature assesses how states in certain instances act strategically to *avoid* legalized dispute settlement in trade disputes, instead pursuing negotiated settlements. Kucik and Pelc (2016) find that states have an interest in privately negotiating settlements in WTO disputes: when WTO disputes lead to public awards, all WTO members with a stake in the dispute share in the gains from a trade barrier's removal, but when states privately negotiate a settlement to a dispute the complainant is able to capture a greater share of the resulting increased trade, presumably because it is able to negotiate beneficial side-payments. Johns and Pelc (2015) argue that developing countries may strategically choose not to participate as third-party observers in WTO disputes because this makes quick informal negotiated settlements less likely, and lengthy and costly litigation more likely. And Gray and Potter (2015) present empirical evidence that diplomatic exchanges help predict the early informal settlement of WTO disputes, particularly between countries that have divergent preferences.

Substantial differences in the design of dispute settlement mechanisms between international trade and international investment make it difficult to easily translate these insights from the trade literature to the field of investment (Sykes 2005; Pelc and Urpelainen 2016).[1] Yet given these findings from international trade there is reason to believe states also act strategically in choosing which international investment disputes to endorse and through which forums to do so.[2] This suggests there is a need to more seriously theorize home states'

[1] These differences include (a) in investment arbitration the significant legal costs of the complainant, one of the key disincentives of pursuing legalized dispute resolution rather than negotiation, are borne by the investor rather than the home state; (b) disputes are typically resolved by the payment of compensation rather than a change in policies; and (c) enforcement of legalized awards is more easily achieved in international investment, as investors are able to claim assets of the respondent located in foreign jurisdictions without necessarily needing the respondent's willing participation in compliance.
[2] Pelc (2016) analyzes the strategic actions of *investors* in choosing what disputes to bring to ISDS cases, highlighting how investors may bring frivolous suits even knowing they are likely to lose if doing so helps discourage future regulatory changes. Hafner-Burton and Victor (2016) consider the narrower question of states' and investors' strategic interests in keeping the outcomes of arbitration cases secret.

strategic interests in international investment disputes, expanding beyond and updating Krasner's (1978) argument that states seek secured access to raw materials.

Beyond just academic interest, this is an important issue for understanding the likelihood that the investment regime will depoliticize investment protection. If we believe the standard account that the USG is only reluctantly pulled in to investment disputes by powerful private interests, and its main strategic interest is in credibly denying investor requests for support, it would follow that legalized alternatives which provide direct access to investors should lead to substantially weaker diplomatic interventions in disputes, as Maurer (2013) argues. Conversely, if the USG has its own strategic interests for selectively intervening in investment disputes, interests which are not served by uniformly standing back and leaving investors to themselves to pursue investor-state arbitration cases, then there is reason to believe any depoliticization effect of the investment regime is likely to be more nuanced and attenuated. The investment regime is designed to give private actors more options for settling investment disputes, but does not seriously restrict state interventions, on the assumption that such restrictions are unnecessary: if states are only reluctantly intervening because they face private pressure to do so, then alleviating private pressure would lead to fewer interventions. The following section develops a theory of America's strategic interests in investment disputes.

3.2 A New Theory of American Investment Protection Policy since 1990

What interests of the USG might compel it to intervene in certain investment disputes in the post-Cold War era? I argue there are two particular reasons why USG bureaucracies had their own incentives to intervene in investment disputes: one driven by bilateral foreign policy concerns and one driven by domestic political economy concerns. First, in the post-Cold War

era the State Department strongly advocated for investment climate reforms throughout the developing world, particularly in former Communist countries. In this context, individual investment disputes became "teachable moments" which the USG viewed as opportunities to advance this broader goal. Second, following the end of the Cold War commercial diplomacy emerged as a key goal and organizing principle for the State Department. Fighting Communism had been the central goal of US foreign policy for four decades, justifying a substantial bureaucracy and international presence for the State Department. Once this goal was obviated by the end of the Cold War, supporting American businesses as they capitalized on new opportunities in foreign markets became a priority for the State Department, helping the bureaucracy demonstrate the benefits of a large international presence to the American public and Congress.

Together, these factors created the conditions such that the USG had its own interests – in addition to any private pressure – to intervene in certain investment disputes between American firms and foreign governments. The USG did not necessarily prefer to avoid engaging in investment disputes in order to pursue its broader goals, as the previous literature assumes; on the contrary, intervening in disputes could *help* the state pursue its broader goals. Table 3.1 presents a summary of the changes at the bilateral and domestic levels since 1990 which made this possible; the remainder of this section discusses each in greater detail.

Table 3.1. The Turn toward an Interventionist Investment Protection Policy: Bilateral and Domestic Dimensions

	Cold War Context	*Post-Cold War Context*
Bilateral Priority	Preserve Strategic Alliances	Promote Investment Climate Reforms
Domestic Priority	Emphasize International Political Relations	Emphasize Commercial Diplomacy

3.2.1 The Bilateral Dimension: The New Priority of Promoting Investment Climate Reforms in Developing Countries

Following the collapse of the Soviet Union, policymakers in the US government, at international institutions such as the World Bank and IMF, and within developing countries began championing the neoliberal economic policies of the "Washington Consensus" (Williamson 1993; Rodrik 2006; Babb 2013). The new dogma focused on ensuring private-sector, market-led economic growth, which required limiting government distortions and interventions in the economy. A key aspect of this new consensus on good economic policy was a strong investment climate, in which predictable and enforceable rules and low corruption encourage private sector growth, and particularly foreign private investment. Reforms to improve the investment climate in developing countries became an important goal for American international development and foreign policy programs.

Beginning in 1999, the State Department began publishing annual "Investment Climate Statements" for all countries in the world. These statements entail the official American assessment of the current investment climate in each country, complementing similar reports produced by the State Department on human rights, religious freedom and trafficking in persons. Such monitoring efforts can exert powerful social pressure and influence state behavior (Kelley and Simmons 2015). While the investment statements are aimed primarily at American firms looking to invest abroad, they reach much broader audiences, and can even create political controversy in host states. For example, the 2014 Investment Climate Statement for the Bahamas criticized that country's procurement processes and noted that successive administrations had reneged or renegotiated contracts issued by previous administrations (US Department of State 2014a). This public judgement was discussed widely in the Bahamian press (Dames 2014; Jones Jr. 2014; Thompson 2014; Lowe 2014). The Bahamian Prime Minister criticized the report as simply parroting the talking points of the opposition party,

many of the country's largest business leaders offered opinions on whether they agreed or disagreed with the American assessment, and the US embassy was compelled to issue an official statement defending the process of producing the report. The USG's willingness to publicly criticize other countries' investment climates, even at the risk of sparking diplomatic spats with allies, is evidence of the importance it places on the issue.

American investment protection policy was shaped within this broader project of supporting investment climate reforms in developing countries. Supporting investors' claims in disputes with foreign governments was an opportunity for the USG to engage the host state on the principles of a strong investment climate, including enforcing contract sanctity and property rights and supporting the rule of law. Specific investment disputes acted as real world examples to demonstrate to host states how to appropriately (according to American ideals) develop the institutions that would be welcoming to private investors. They were opportunities for the USG to apply pressure on host states to push them toward American-style legal institutions governing economic contracts. When a host state expropriated a foreign investor without paying prompt, adequate and effective compensation, breached a concession contract with a multinational corporation, or violated the property rights of an investor in any other way, it allowed American officials to open conversations with high-ranking developing country policymakers on general investment climate concerns.

Individual disputes, then, could be about much more than the specific company's assets at stake: disputes were about the principles of protecting foreign investors and promoting a strong investment climate supportive of foreign businesses. In pushing developing country officials to resolve outstanding disputes, the USG was not only helping American companies receive restitution but also trying to establish patterns of good (according to American principles) behavior toward foreign investors. American officials believed such developments

would not only benefit current and future American companies, but all foreign investors as well as the host state itself.

Indeed, the role of particular disputes as examples of broader policy concerns was so important that the USG would continue to highlight specific disputes as examples even after the dispute had been resolved. For instance, in Tajikistan in 2005-07, the US embassy repeatedly pushed Tajik officials to resolve an outstanding dispute with US firm Gerald Metals over a cancelled payment for an aluminum shipment. Following years of high-level diplomacy – the US ambassador and other high-ranking officials raised the dispute with the Tajik President and other cabinet-level ministers on at least nine separate occasions (06DUSHANBE403, 06DUSHANBE1420, 06DUSHANBE1655, 06DUSHANBE1711, 06DUSHANBE1840, 06DUSHANBE2229, 07DUSHANBE43, 07DUSHANBE501, 07DUSHANBE1581) – the Tajikistan government finally agreed to settle the dispute. Even after the dispute had been resolved, however, American officials would still mention the case during discussions of the business climate. Some five months after Tajikistan and Gerald Metals had finalized their settlement, a visiting State Department official brought up the case at a meeting with the Tajikistan President's top economic advisor (08DUSHANBE492). The State Department official wanted to draw attention to the American priority of improving the business climate in Tajikistan; rather than simply talking about investment climate reforms in generalized, abstract terms, the Gerald dispute served as a vivid example – even though the USG had no particular action request related to the dispute, as it had already been settled.

Moreover, discussing investment climate reforms in the context of specific disputes provided USG officials with valuable private information on the host state government's commitment to liberal economic policies. When an American official requested a specific dispute be resolved, the host state's ability and willingness to do so (or lack thereof) was an informative signal of its underlying commitment to protecting the interests of foreign investors.

Some host state politicians may publicly aver their government's liberal economic reform agenda (to please either domestic or foreign audiences), but in practice be incapable or uninterested in delivering a liberal investment climate. Others may adopt populist rhetoric opposing the investments of Western multinationals, but in practice quietly seek to attract foreign capital. By engaging diplomatically in specific disputes, and pressing host state officials for updates as disputes progressed through the bureaucracy, USG officials gained insights into how a host state treated foreign investors in reality, and how this did or did not align with public rhetoric.

Thus even if diplomatic interventions did not always lead to resolution of the dispute, interventions could still be valuable to American officials if they provided useful information about a host state government's true position on creating a liberal investment climate. The USG would frequently warn host states that disputes would tarnish the country's reputation and cost them future foreign investment. To a state that was genuinely interested in attracting foreign capital, this would be a costly loss. To a state that did not in fact value foreign capital, on the other hand, the prospect of missing out on potential foreign investment would not be a significant threat. By observing how host states responded to the risk of harming their reputation amongst foreign investors, American officials could infer valuable information about a host state's true interest in promoting a liberal investment climate.[3]

[3] Of course, observing how a host state responded to an investment dispute in which the USG had explicitly expressed interest was not the same as observing how a host state acted when the USG was not looking over its shoulder. Even if a host state would settle a case to please the US embassy, it might not treat all foreign investors – particularly those from other home countries – equally well. Thus a host state's actions in cases in which it knew the USG had an interest was not a strictly accurate signal of its overall commitment to the investment climate, and would tend to overstate a country's actual interest in investment protection. But it was a basic test of a host state's minimum willingness to resolve investment disputes effectively. In other words, if a country was unwilling or unable to settle a dispute even when it knew doing so irritated the American government, it was unlikely the host state would adopt pro-investor policies under other circumstances.

American interest in promoting investment climate reforms was both interest- and ideological-based. The United States undoubtedly benefitted materially from a world in which developing countries adopted liberal economic institutions and policies, and were open to and protective of incoming foreign investment (including but not limited to those from US investors). This not only created new opportunities for American businesses, but also served to reinforce the overall American-led liberal global order. At the same time, USG officials appear to have truly believed – and continue to believe – that promoting liberal investment climates was in developing country governments' own self-interest, and that it was crucial to building a modern, prosperous state. Even in private confidential internal communications which were never intended to be publicly released – the State Department cables released via WikiLeaks – US government officials routinely state that investment climate reforms are in a host state's own self-interest, not just in the service of increasing protections for American investors. The ideological commitment to liberal investment climates varied from embassy to embassy and ambassador to ambassador, with certain individuals being more ardent promoters of investment climate reforms than others. As one advisor to a developing country government who negotiated with American embassy officials over investment policy noted, it was not always clear if the ideological commitment was at the level of individual economic attachés at the embassy or reflected a broader institutional policy.[4]

3.2.2 The Domestic Dimension: Commercial Diplomacy as a New Justification for a Strong Foreign Presence

Following the end of the Cold War, commercial diplomacy (re)emerged as a key priority in America's foreign policy. Coincident with the third wave of globalization and increasing trade

[4] Interview with legal advisor to developing country, Washington DC, May 2015.

and investment links with emerging economies, the USG was eager to help American firms capitalize on business opportunities abroad. This policy encouraged the government to adopt a more hands-on, interventionist investment protection policy; helping firms settle disputes with foreign governments was one plank of a broader priority of using diplomatic institutions to promote the commercial interests of American firms. While the USG's emphasis on commercial diplomacy has waxed and waned somewhat over the past 25 years, as other foreign policy priorities emerged and then subsided, overall the government demonstrated a strong interest in using the instruments of foreign policy to support American investors abroad.

Commercial diplomacy has a long history in American foreign policy. The intertwined interests of American businesses and American foreign policy have been well-documented in Latin America at the turn of the 20th century – the classic era of "dollar diplomacy"— and in Western Europe after World War II (Rosenberg 2003; Veeser 2013; Hogan 1987). Throughout the Cold War period, however, ideological grand strategy concerns preoccupied American foreign policy. The bureaucracy and culture of the State Department was organized around fighting communism, not promoting commercial diplomacy. As a former State Department foreign service officer remarked about the agency in the late 1970s:

> "… international economics and international trade … was not a field that was necessarily appreciated at State at the time. I saw some phenomenal economic-cone officers sort of top out in terms of assignments… [The State Department] placed no priority on the commercial function, and those Foreign Service officers who liked commercial work were doomed not to advance in the system. And, let's face it, some officers who were not of the highest caliber ended up getting stuck doing commercial work. So you had this odd mix of people who were real good at what they did and ended up not getting rewarded, and people who just weren't good at what they did. None of them were judged on the basis of how they did commercial work" (Schwab 1993).

With the end of the Cold War, however, commercial diplomacy once again emerged as a key priority for US foreign policy. In 1989, the American Foreign Service Association (AFSA) – the professional union representing American diplomats – was grappling with the question of

how the foreign service should respond to the end of the Cold War, and what it's role would be in the emerging new world order. As part of this work AFSA created a taskforce to "consider means of projecting a favourable image of the Foreign Service and mobilizing a public constituency to support it" (Harter 2012, p158). This taskforce's first main recommendation was to host a large conference highlighting business-government dialogue in international economic affairs. The keynote speech at the conference was delivered by Lawrence Eagleburger, then the State Department's number two official; the organizer of the conference later described Eagleburger's speech as "a classic and much-quoted mandate for the Foreign Service to raise the priority of assistance to the overseas American business community" (Harter 2012, p159). The speech concluded with what came to be known as the "Bill of Rights for American Business", which include the rights to have their views heard on foreign policy issues that affect their interests, to receive assistance in contacting key public and private decisionmakers, to receive compensation in the event of expropriation and to receive assistance in amicably settling other trade and investment disputes (US Department of State 1991). In 1991 Eagleburger went on to declare that "the Department will assume a greater and more vigorous role in the promotion of America's economic interests overseas… American firms should be assured that the US government is interested and active on their behalf. Business people should know that the State Department is their friend and ally" (quoted in US Department of State 1991, p306).

Given the State Department's history of downplaying commercial diplomacy during the Cold War period, institutionalizing this shift required significant organizational changes. The strategic decision to embrace commercial diplomacy was communicated downward from high-ranking political appointees to ambassadors to rank-and-file diplomats. Lawrence Eagleburger publicly stated he was trying to "change the culture of the Foreign Service" to make assistance to US businesses a higher priority (quoted in US Department of State 1991,

p309). Appointees of the Clinton Administration – at both the State and Commerce Departments – were particularly vocal and forceful advocates of embracing commercial objectives in foreign policy (Friedman 1993; Stremlau 1994; Peterson and Green Cowles 1998). Testifying before the Senate during his confirmation hearing in 1993, Warren Christopher identified promoting economic interests as the first plank of the Clinton Administration's foreign policy (US Congress 1993). Pressed by Senator Coverdell on how he would implement this change, Christopher argued:

> I think this is, in many respects, a leadership problem. If I and my senior colleagues in the Department put emphasis on our Embassies assisting businessmen, they will do so. And if we fail to do it, they may go their way. There's been this long tradition in American Embassies that they prefer dealing with political issues, not in the pejorative sense, but in the sense of international political issues, to assisting American businessmen. And I think we have to change that concept (US Congress 1993).

Bureaucratic and organizational changes followed from this top-down directive. By 1991, the Department was revising its training courses for new Foreign Service Officers to place greater emphasis on commercial activities (US Department of State 1991). In 1993, the agency established a new "Office of the Coordinator for Business Affairs", with responsibility for aiding US firms doing business abroad (GAO 1996). In 1996, the State Department created a new annual award – the Cobb Award, named after former diplomat Charles Cobb – to recognize the Foreign Service officer who had done the most to promote American business interests abroad. And in 1998, for the first time ever a Commercial Service officer was appointed as an Ambassador (George Mu, to Cote d'Ivoire), underlining the significant shift the department had undergone since the days when commercial work was never rewarded (Ford 2005). 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).

The embrace of commercial diplomacy was a strategic and explicit attempt to identify new justifications for America's substantial foreign affairs budget and presence. Without the overarching narrative of the Cold War and the ideological battle with the Soviet Union, by the early 1990s both the American public and policymaking elites saw foreign policy as less important than other domestic concerns (Hames 1993; Stremlau 1994). Embassies and consulates were being closed to save costs, and the foreign policy budget was under further pressure from Congress (GAO 1996; Bacchus 2010). Public opinion polling showed that in the post-Cold War period Americans did not necessarily want to give up the United States' global leadership role, but wanted the country's economic interests to play a leading role in setting foreign policy priorities (Stremlau 1994). During Warren Christopher's confirmation hearing senators repeatedly pressed the nominee to do more for American businesses; a State Department official who had worked on business affairs in the early 1990s confirmed some members of Congress at the time believed State was not doing enough to support American firms, and behind the scenes pressed the agency to do more.[5] Highlighting how the State Department could serve the interests of American businesses thus helped create a new constituency in favour of a substantial American presence abroad.

Supporting firms in investment disputes with foreign governments was a key component of the renewed support for commercial diplomacy. The USG needed to demonstrate the benefits it could provide to American foreign investors (and would be investors), along with their supporters in Congress. Diplomatic interventions which helped resolve problems became "success stories" the State and Commerce Departments could highlight on their websites. Importantly, the State Department itself believed such interventions were important in both BIT and non-BIT host states; the presence of an investment treaty did not obviate the

[5] Interview with former State Department official, Washington DC, November 2015.

need to help investors diplomatically. Testifying before Congress in 1995, a high ranking State Department official 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. We will work with the U.S. investor in question and, if necessary, we will operate from Washington to try to impress the message upon the country in question. … 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. Those sections may be very small in some instances, but it is a principal concern, and it is quite in keeping with Secretary Christopher's notion that U.S. Embassies, wherever they are, should serve as a kind of America's desk for protecting and representing U.S. interests. (US Congress 1995, p 36; emphasis added)

The State Department told Congress that diplomatic support for firms with investment disputes was a "principal concern" in both BIT and non-BIT partners, because doing so aligned with Warren Christopher's priority of re-emphasizing commercial diplomacy.

Just as commercial diplomacy served to justify the State Department's budget to external audiences, within the internal bureaucracy of the State Department effective support for American businesses was used to validate budget allocation decisions. For example, in 2006 the US Embassy in Ghana wrote to State Department headquarters to justify funding for an Economic Officer position:

> EconOffs spent an inordinate amount of time from 2003-2005 advocating on behalf of Kaiser Aluminum, Western Wireless International, and CMS Energy in their disputes with the government. Post played a key role in the resolution of these disputes, especially in the clearance of $20 million arrears to CMS. ECON continues its heavy and increasing advocacy role on behalf of U.S. companies who frequently experience serious difficulties with the government or Ghanaian partners." (06ACCRA357)

Such a high level of activity on behalf of US firms made it necessary to continue funding officers to carry out commercial diplomacy.

To be sure, the importance the USG placed on commercial diplomacy relative to other foreign policy goals has waxed and waned over the past 25 years. Support for commercial diplomacy ebbed somewhat during the second Clinton term, amidst charges from some Republicans that it amounted to little more than corporate welfare (Garten 1997).[6] Following the September 11th attacks, commercial diplomacy dropped further on the list of US priorities, as focus shifted back to strategic defence issues. Yet even though commercial diplomacy was not prioritized at the grand strategic level in the early 2000s, the bureaucracies put in place to carry out day-to-day commercial diplomacy continued their work; the "culture shift" implemented by leadership in the early 1990s had had an effect. Under the Obama administration, Secretary of State Hilary Clinton once again prioritized commercial diplomacy, making the issue a "hallmark of her tenure" (Gaouette 2011). In a 2011 speech, 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). She went on to directly tie commercial diplomacy with justification for a large foreign affairs budget, which at the time was being threatened by Congress:

> The 1 percent of our budget we spend on all diplomacy and development is not what is driving our deficit. Not only can we afford to maintain a strong civilian presence; we cannot afford not to. The simple truth is if we don't seize the opportunities available today, other countries will. Other countries will fight for their companies while ours fend for themselves" (Clinton 2011).

Similarly, in his first official speech as Secretary of State John Kerry argued that one of the most effective ways of convincing the public to support the foreign affairs budget was "telling the story of how we stand up for American jobs and businesses" (Kerry 2013).

To what extent was the increase in commercial diplomacy since 1990 led by private actors? To be sure businesses benefitted from a closer relationship with the institutions of

[6] One high-ranking official in Clinton's Commerce department later publicly admitted "the Clinton Administration probably went too far in conducting a foreign policy so oriented to commercial and economic interests" (Garten 2002).

American foreign policy. Yet there is little overall evidence that they lobbied especially hard for this shift in policy. Indeed, particularly in the early 1990s the government seemed more concerned with demonstrating to the private sector that commercial diplomacy was important than the other way around.

For the most part, support for commercial diplomacy was broadly aligned with American support for strong investment climates in developing countries, yet there was the potential for tension between these two goals. That is, to what extent should US foreign economic policy be driven by liberal principles of supporting open markets for all vs. mercantilist principles of ensuring American firms receive preferential treatment abroad? As the Clinton quote above suggests, the US sought to manage this tension by repeatedly arguing that commercial diplomacy was necessary precisely because other countries were already vigorously supporting their own firms; American engagement, thus, was simply a means of "levelling the playing field". The US argued it did not intervene to ensure a particular American company was treated favourably, but rather to ensure no other country's firms were. This argument helped undercut both charges of mercantilism, as well as those of "corporate welfare" from domestic constituents wary of government support for individual companies.

3.2.3 Reassessing State Interests and American Investment Protection Policy

Earlier analyses of American investment protection policy have generally assumed that the government had little interest in intervening in disputes, as such interventions detracted from broader foreign policy goals. While particularly intense private pressure for interventions might at times compel the USG to intervene in a dispute, in principle the state preferred to avoid such interventions and focus on managing strategic relations with developing country governments.

Yet these preferences of the American state were shaped by the particular Cold War context, in which the USG was in competition for allies with the Soviet Union, prioritized

stable political relationships with developing countries and neglected the role of commercial diplomacy in foreign policy. Since 1990, significant changes in the bilateral and domestic levels have encouraged the USG to be more inclined to intervene in disputes. At the bilateral level, American foreign policy increasingly promoted investment climate reforms in developing countries; individual investment disputes served as hooks for broader discussions about developing the rules and institutions necessary to attract FDI. And at the domestic level, interventions in investment disputes allowed the USG to showcase the benefits of an active, engaged foreign policy to Congress and the general public. Thus while in the early 1980s BIT negotiators in the State Department were explicitly seeking to create institutions which would help insulate American foreign policy from commercial concerns, a decade later commercial interests were placed at the heart of US foreign policy. These changes meant the USG had strategic interests in selectively intervening in investment disputes, despite the availability of legalized dispute resolution mechanisms.

3.3 Operationalization: Testable Hypotheses of USG Interventions

The theory discussed above leads to a number of related testable hypotheses. Most generally, we should expect that the USG has continued to intervene diplomatically in investment disputes since 1990. In contrast to the emphasis in the literature on the formal legalized investment regime, American firms continue to rely on commercial diplomacy as an important mechanism for resolving investment disputes in the contemporary period. Increasing legalization has had only a moderate, if any, effect on the likelihood of USG diplomatic interventions in investment disputes.

> ***H1: USG commercial diplomacy remains an important mechanism for resolving investment disputes of American firms, despite the availability of investor-state arbitration.***

Furthermore, the theory also allows for specific predictions on which disputes the USG is most likely to intervene in. While the overall state interests of promoting investment climate reforms and highlighting the benefits of commercial diplomacy were general features of American foreign policy since 1990, these features were more salient in some disputes than in others. Officials were particularly likely to intervene in disputes when they perceived them as symptomatic of broader investment climate concerns. Similarly, bureaucrats were more likely to intervene when they reaped political gains from supporting American firms abroad, and were particularly eager to demonstrate their utility to American firms in rising emerging markets. Conversely, intense private pressure, the traditional explanation of strong USG interventions in investment disputes, is expected to have only a moderate effect on interventions in the post-1990 period.

> ***H2: Strong USG interventions are most likely in disputes in which investment climate reforms and commercial diplomacy are particularly salient. Private pressure has little effect on the strength of USG interventions.***

3.4 Conclusion: Empirically Examining the Theory

This chapter presents an original theory of American investment protection policy since 1990. I argue that, contrary to existing explanations in the literature, the USG does not only reluctantly intervene in investment disputes when compelled to do so by private pressure. Rather, the state itself has its own interests for intervening in investment disputes. These interests include advocating for investment climate reforms in developing countries and

demonstrating the utility of a well-funded foreign policy to both Congress and the public. Two specific testable hypotheses follow from this theory: that USG commercial diplomacy remains an important mechanism for resolving investment disputes between American firms and foreign governments, despite the availability of investor-state arbitration; and that the strength of USG interventions in disputes is better predicted by state interests than by private pressure.

The remainder of the thesis is dedicated to empirical tests of the above hypotheses. The test of H1 proceeds in two steps. As an initial inquiry, in Chapter Four I demonstrate that American investors continue to rely on informal commercial diplomacy by showing they are statistically more likely to file arbitration cases when they cannot rely on effective diplomatic support, namely when the position of US ambassador to the host state is temporarily vacant. This result suggests that behind the scenes of the formal investment regime, American diplomats are continuing to resolve disputes through informal commercial diplomacy. In a second step, in Chapter Five I analyse a new dataset of investment disputes reported in the State Department's internal cables released by WikiLeaks. This dataset allows us to see the range and frequency of specific diplomatic actions in investment disputes. Crucially, I show that access to investor-state arbitration has no effect of the USG's likelihood to intervene in investment disputes; the USG is just as likely to intervene in disputes occurring in countries that have ratified a BIT with the US as those that have not.

The statistical analyses presented in Chapter Five also provide some suggestive evidence for testing H2, and identifying the dispute-level covariates of USG diplomatic interventions. Yet given limits in effectively measuring the state and private interests at stake in these investment disputes, a more detailed analysis is carried out in structured, focused comparisons in Chapters Six and Seven. The case studies include four cases of strong USG interventions in disputes and three cases of weak interventions in disputes. These cases are designed to test to what extent the state interests of advocating for investment climate reforms

and demonstrating the utility of commercial diplomacy explain the strength of USG interventions in disputes. This state interests hypothesis is compared to the prime alternative explanation, that strong private interests predict USG interventions in disputes.

CHAPTER 4: AMERICAN AMBASSADORS AND THE INFORMAL SETTLEMENT OF INVESTMENT DISPUTES [7]

This chapter presents evidence of a statistical relationship between access to commercial diplomacy and the informal settlement of investment disputes. It argues that US firms operating abroad rely on American diplomats for support in pressuring host state officials to informally settle investment disputes. Investors are less likely to file formal investor-state arbitration cases when they have access to a strong diplomatic presence able to help them resolve disputes through informal negotiations.

As noted earlier, studies of the relationship between diplomatic interventions and investment protection are fundamentally challenged by a lack of observable data, as informal diplomatic interventions in disputes typically occur behind closed doors. To overcome this obstacle, this chapter uses a novel indicator to measure access to effective commercial diplomacy: temporary vacancies in the position of US ambassador in American embassies abroad. Ambassadors play a crucial role in pressuring host states to settle incipient investment disputes by intervening with high-level host state officials. When there is a resident ambassador in office, American investors have access to effective commercial diplomacy and are more likely to have their disputes resolved informally through diplomatic channels (which are unobserved). When the position of ambassador is temporarily vacant – conditions which are determined by US domestic political and bureaucratic factors, and are thus plausibly exogenous to host country factors – this makes it more difficult for American investors to settle disputes informally, leading to a greater reliance on formal legal arbitration (which is at least partially observed).[8] The findings suggest that beneath the surface of the formal, legalized world of

[7] Note: A journal article based on this chapter, titled 'Commercial Diplomacy and Political Risk', is currently at the Revise and Resubmit stage at *International Studies Quarterly*.
[8] Not all arbitration cases are observed, as some are conducted privately and confidentially.

investment arbitration, access to commercial diplomacy remains an important tool for settling investment disputes.

The remainder of the chapter proceeds as follows. The next section discusses the particular importance of ambassadors as key actors in conducting commercial diplomacy to resolve investment disputes. The subsequent section introduces the data, including evidence that US ambassador vacancies represent quasi-natural experiments of access to commercial diplomacy, and model specifications. The following section presents the results, showing that American investors are more likely to file arbitration claims during temporary vacancies in the position of US ambassador. The final section concludes.

4.1 Ambassadors and Commercial Diplomacy

By its nature commercial diplomacy often relies on personal interactions amongst a small number of individuals. Diplomats identify and engage with key players empowered to make decisions in specific transactions; given that the stakes in any individual transaction are often relatively low, personal relationships and the shadow of the future can shape decisions. Even if a minister may otherwise be disinclined to pay a foreign investor a few million dollars to settle a dispute, she may be willing to do so if she believes it will foster a closer relationship with her counterpart from the investor's home state, which in turn will lead to further cooperation in the future. Such issue linkage is at the heart of modern diplomacy (McGinnis 1986; Axelrod and Keohane 1985; Davis 2009; Poast 2012).

Commercial diplomacy is carried out both by traveling diplomatic delegations (Nitsch 2007; Lebovic and Saunders 2015; Gray and Potter 2015) and by country-based embassy staff. Ambassadors have a crucial role to play in country-based transactional commercial diplomacy. The former US ambassador to Singapore cites commercial diplomacy – both sales of US goods

and services and the resolution of disputes – as one aspect of an embassy's work where ambassadors can have the greatest impact (quoted in DePillis 2013). Ambassadors meet with ministers and heads of state to discuss various issues in the bilateral relationship, and these discussions can include requesting host state officials resolve outstanding investment disputes. While US diplomats place little explicit coercive pressure on host state officials, they ensure investment disputes remain on the agenda for high-level bilateral meetings, continually reminding host state officials that relations with the United States will be improved if the dispute is settled.

Persistent ambassadorial-level engagement demonstrates that the home government is taking the issue seriously and that it has prioritized this particular investment dispute within the broader bilateral relationship. As one former diplomat notes about a successfully resolved dispute concerning intellectual property in China, "The fact that the ambassador, who enjoyed great respect in China, engaged himself personally and devoted extended time to the issue made a deep impression on the Chinese officials" (Kopp 2003, p75). Moreover, ambassadors have sufficient authority to call meetings with – and develop personal relationships with – heads of state and cabinet level officials in the host state, while lower ranking embassy officials likely do not. Describing his relationship with then-Ukrainian President Leonid Kuchma, US Ambassador William Green Miller says Kuchma needed to "have constant engagement, that is, I had to meet him constantly to keep progress on agreed goals going. What I have just described is evidence that an ambassador has great value, simply as a human presence, if he can keep the discussions going on the goals that both sides agree are important. There's no substitute for it" (ADSTa 2012, p71). This high-level access is important because heads of state and cabinet level officials likely have significantly greater decision-making power to settle disputes with foreign investors.

When an embassy lacks an ambassador, then, companies will have diminished access to effective commercial diplomacy. The temporary chief of mission will of course continue the day-to-day work of the embassy, but her interventions in particular transactions are likely to be less effective than those of an ambassador. American government officials appear to agree with this argument. A recent Factsheet from the State Department's Bureau of Public Affairs explicitly links ambassadorial vacancies with commercial costs for US businesses: "Without ambassadors in place, America's economic interests are compromised. U.S. businesses have sought embassy assistance in pursuing $119 billion worth of contracts in countries currently without a U.S. ambassador. Last year, top-level diplomatic advocacy was responsible for more than $5.5 billion worth of contracts awarded to U.S. companies by foreign governments" (US Department of State 2014b). And speaking in 2006, during a debate in the Senate Foreign Relations Committee on ambassadorial appointments, then-Senator Joseph Biden noted, "We know from experience that leaving an embassy without an ambassador for an extended period of time is very bad for our interests because it reduces the amount of access to high levels of government for the U.S. embassy" (C-SPAN 2006).

Thus the presence or absence of an ambassador is an important indicator for access to strong commercial diplomacy. Diplomacy does not stop when there is no ambassador, but it is hamstrung. This paper tests whether we can observe the effects of restricting access to US commercial diplomacy in the settlement of investment disputes. This leads to the key testable hypothesis: American investors are more likely to initiate investment treaty arbitration cases when they are unable to appeal to a US ambassador to help informally settle the dispute through diplomatic channels.

4.2 Data and Model

Dependent Variable: Treaty Disputes

The dependent variable employed in this study is an original dataset of the count of treaty-based investment dispute arbitrations initiated by American companies and individuals against a particular country in a particular year. The dataset is limited to developing country host states and the years between 2000 and 2013.[9] The arbitration cases were obtained from four sources: the list of completed and pending cases on the ICSID website (ICSID 2015); the list of treaty-based arbitrations on *italaw.com* (italaw.com 2015); reporting in *Investment Arbitration Reporter* (IAReporter.com); and the list of ongoing treaty-based disputes in the "Arbitration Scorecard" published biannually since 2003 by *American Lawyer* (Goldfarber 2003 2005, 2007, 2009, 2011, 2013).

The dataset includes American companies or individuals initiating arbitration. Unlike most previous studies of investment arbitration, the nationality of the investor is not simply taken as the nationality listed in arbitral proceedings. Large multinational companies based in the United States often initiate treaty arbitration through subsidiaries based in third countries, for the purpose of gaining jurisdictional access to investment treaties.[10] Such "treaty shopping"

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[9] While this thesis is focused on the post-1990 period, for methodological reasons the analysis in this chapter is limited to the period 2000-2013. This is because there were only a handful of arbitration cases before 2000; extending the dataset to the earlier period would thus further exacerbate modeling difficulties associated with inflated zeroes, as will be discussed. Developing countries defined as all those except for those classified as "OECD High Income" by the World Bank. Results hold if the data is extended to also include developed countries. See robustness results D1-D3 in appendix.

[10] To give one example, in 2005-06 Exxon Mobil restructured its investments in Venezuela to be based out of the Netherlands, explicitly for the purpose of gaining access to the Netherlands-Venezuela BIT. In 2007 the company then filed a dispute under this treaty. In its ruling on jurisdiction, the tribunal in the dispute declared that "As stated by the Claimants, the aim of the restructuring of their investments in Venezuela through a Dutch holding was to protect those investments against breaches of their rights by the Venezuelan authorities by gaining access to ICSID arbitration through the BIT. The Tribunal considers that this was a perfectly legitimate goal as far as it concerned future disputes" (Venezuela Holdings, B.V. and others v. Venezuela, para 204). Such restructurings only protect firms against future discriminatory actions by the host state; jurisdiction cannot be retroactively applied.

can mask the true nationality of investors pursuing arbitration. In this study investors are considered American if they pursue arbitration under an American treaty (either a BIT or an investment chapter of a trade agreement, such as those included in NAFTA and DR-CAFTA[11]) or if they are a subsidiary of a company headquartered in the United States, identified through tracing parent-subsidiary relationships using the S&P Capital IQ (S&P 2015) database of private companies.

The dataset consists of 112 arbitrations between American investors and developing country governments between 2000 and 2013. Of these, 21 – or 19 percent – were initiated under treaties to which the United States is not a signatory, highlighting the importance of identifying parent companies of seemingly non-American companies. Of particular interest is the case of Venezuela, which has faced 12 treaty claims from American investors despite the fact that there is no US-Venezuela BIT. Most of these claims were by Dutch subsidiaries of American companies under the Venezuela-Netherlands BIT, although cases were also filed under the Barbados-Venezuela BIT, the Canada-Venezuela BIT, the Spain-Venezuela BIT and the Switzerland-Venezuela BIT.

Independent Variable: Ambassadorial Vacancies

The key explanatory variable is *Ambassador Vacancies*, the share of the year the position of US ambassador is vacant. US ambassadors are nominated by the President, must then be confirmed by the Senate, and then arrive in country to officially present their credentials and take up their post. There is always a gap between the departure of one ambassador and the arrival of the next, during which time the chargé d'affaires ad interim temporarily acts as chief

[11] US treaties that provide recourse to investment treaty arbitration include all US BITs, NAFTA, US-Chile FTA, US-Colombia FTA, CAFTA-DR, US-Korea FTA, US-Morocco FTA, US-Oman FTA, US-Panama FTA, US-Peru FTA, and US-Singapore FTA.

of mission. This paper seeks to exploit the exogenous variation in these vacancies to test the role of commercial diplomacy on the settlement of investment disputes.

Data on US ambassadorial appointments are available from the Office of the Historian of the US Department of State (2015), which provides a list of all current and previous ambassadors to countries with which the United States has (or previously had) diplomatic relations. For a given country the position of ambassador is considered occupied for the period between the day on which an ambassador presents her credentials and the day on which that ambassador's mission is terminated. The position of ambassador is considered vacant for the period between the termination of an outgoing ambassador's mission and the presentation of credentials of an incoming ambassador.

Over the period 2000-2013, there were a total of 595 ambassadorial vacancies for the 136 developing countries which had a resident US ambassador for at least part of this period. The average gap between ambassadors was 193.45 days – or slightly over 6 months – with a standard deviation of 254.37 days. There were 70 gaps of more than a year, and 71 gaps of less than a month. The average length of an ambassadorial appointment was 864.19 days, or slightly less than 2.5 years.

As the empirical analysis in this study rests on the assumption that the timing and duration of ambassadorial vacancies can be treated as exogenous to the causes of investment disputes, it is worth assessing the plausibility of this assumption in some detail. The exit of an outgoing ambassador and the length of time it takes to install a new ambassador depend on many factors. Crucially, the vast majority of changes in ambassador are unrelated to host-country policies or bilateral relations between the two governments. An ambassador will typically leave her current post because she is retiring or has taken another job, either inside or outside of the US government. Political appointees – who account for approximately one third of all ambassadorships – will frequently step down immediately or soon after a change in the

US administration; thus ambassadorial vacancies spike in 2001, the first year of the George W. Bush administration, and in 2009, the first year of the Barack Obama administration. There appear to be only a handful of instances in which the departure of an ambassador was directly related to host-country policies and bilateral relations: in 2005 the United States recalled its ambassador from Syria following the assassination of Rafik Hariri; in 2008 Evo Morales expelled the US ambassador from Bolivia, accusing him of fomenting unrest; and in 2010 Hugo Chavez refused to accept the credentials of Larry Palmer, who had been nominated to be the next US ambassador, after taking offense at a statement Palmer made concerning the Venezuelan military during his confirmation hearing before the US Senate. Thus even in the very few instances in which ambassadorial turnovers are policy-driven, they are generally unrelated to investment protection policy (or even economic policy more broadly).

Similarly, in almost all cases the length of the gap between ambassadors is largely driven by US bureaucratic processes and US domestic politics, rather than host state factors. As noted earlier, American ambassadors need to be confirmed by the US Senate, a process which can be quite lengthy. The Senate may refuse to confirm a President's nominated ambassador because they disapprove of the individual selected, or, more generally, simply to block an initiative of the President. Even if the Senate does not oppose the nominee, there may be considerable delays in scheduling a hearing and vote, due to variations in the schedule of the Senate and what other legislation is prioritized ahead of an ambassadorial confirmation hearing. The President may exceptionally choose to appoint an ambassador while Congress is in recess; this temporarily obviates the need for Senate approval, however if Senate approval has not been granted by the end of the subsequent Congressional term the ambassador must then be recalled (as recently occurred with the US ambassador to Azerbaijan).

Perhaps surprisingly, even ambassadors awaiting confirmation to important strategic allies can face long delays. The US ambassador to Australia was vacant for a 510 day stretch

in 2005-06, the ambassador to the United Kingdom was vacant for a 495 day stretch in 2004-05, and the ambassador to Saudi Arabia was vacant for a 486 day stretch in 2001-02. (To be sure, it is not only strategic allies who face long vacancies – some other countries who have recently experienced particularly long US ambassador vacancies include Bahamas, El Salvador, Eritrea, Gambia, Guyana, Mozambique and Turkmenistan.) There are a few instances of particularly long ambassadorial vacancies reflecting poor diplomatic relations, yet this occurs only in extreme conditions with countries the United States considers "rogue states", such as Burma, Libya and Syria.[12]

Both the timing and the length of ambassadorial vacancies, then, are primarily driven by US domestic factors rather than by host-state factors. As a basic examination of the relationship between host-state variables and ambassadorial vacancies, Table 1 presents a number of simple correlations. The table shows the correlations of both *Ambassador Turnover* (a 0/1 measure of whether the US ambassador to the country stepped down during the year) and *Ambassador Vacancy* (the percentage of the year the position of ambassador was vacant) with various economic and political characteristics of host states and the US-host state bilateral relationships. These include *GDP, GDP per capita, GDP growth, Population, Natural Resource Rents, Political Risk Rating, Democracy*, a measure of *Cooperative Bilateral Relations, US Imports from Country, US Exports to Country, US FDI in Country*, *US Economic Aid to Country* and *US Military Aid to Country*.[13]

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[12] The results presented in this paper are robust to whether or not these politically-motivated vacancies are included in the data. Countries to which the US refuses to appoint an ambassador as a political statement tend to host very little US-sourced foreign investment – often because they also are subject to US sanctions – thus there is very low potential for investment disputes, regardless of the presence or absence of an ambassador.

[13] The GDP, population and natural resource variables are all from World Bank (2015). The political risk score is the total political risk score from PRS (2015). The democracy variable is the net Polity IV score (Marshall et al 2014). The cooperative bilateral relations variable is a measure of net cooperation based on events data in the Global Database of Events, Language and Tone (2015); the author thanks *(withheld for blind peer review)* for sharing her coding of this data. Import, export and FDI data are from the US Bureau of Economic Analysis (2015). Economic and military aid data are from the USAid Greenbook (USAID 2015).

Table 1: Correlations of US Ambassador Vacancies and Host State Characteristics

Host Country Variables

	GDP	GDP per capita	GDP growth	Population	Natural Resource Rents as % of GDP	Political Risk Rating (ICRG)	Democracy
Ambassador Turnover	0.00	0.01	0.05	-0.01	0.00	0.03	0.03
Ambassador Vacancy	-0.03	0.01	-0.01	-0.03	0.01	-0.04	-0.11

US-Host Country Relationship Variables

	Cooperative Bilateral Relations	US Imports from Country	US Exports to Country	US FDI in Country	US Economic Aid to Country	US Military Aid to Country
Ambassador Turnover	0.01	-0.01	-0.01	0.00	0.02	0.03
Ambassador Vacancy	-0.07	-0.04	-0.04	-0.02	-0.05	-0.05

As expected, correlations between ambassador vacancies and host state variables are extremely low. Looking at ambassador turnovers, the absolute value of the correlation doesn't exceed 0.05 for any host state variables. Correlations between the percentage of the year the position of ambassador is vacant and host state variables are only slightly stronger, with absolute values never exceeding 0.11. There is some evidence that the US is less likely to leave the position of ambassador vacant for longer periods of time in democracies rather than autocracies, and in countries with which the US has poor bilateral relations, though these results are largely driven by a few outlying countries; excluding Burma, Syria and Libya, the correlations for democracy and bilateral relations diminish from -0.11 and -0.07, respectively, to -0.05 and -0.04. For the most part, the data suggests ambassadorial vacancies are largely independent of host state characteristics; there is no evidence that US ambassadorial vacancies are more or less likely in big or small economies, rich or poor countries, countries with high or low political risk, countries with whom the US trades and invests a lot or a little, or countries

to whom the US sends lots of economic aid. These findings suggest that, from the perspective of a host state, ambassadorial vacancies are exogenous events.

Model Specifications

To test the effect of commercial diplomacy on investment disputes, I use a zero-inflated negative binomial regression (ZINB) model. The dependent variable is a count of the number of arbitrations initiated by American investors in a particular host state in a particular year, while the key independent variable is the percent of the year the position of ambassador is vacant in a particular country. If access to effective commercial diplomacy is helping investors informally settle investment disputes, then we would expect ambassadorial vacancies to be positively and significantly associated with formal arbitration cases filed by American investors.

The dependent variable is characterized by excess zeros, as most countries in most years do not face any arbitration claims from American investors. It is also characterized by over-dispersion, as countries with one dispute are more likely to face additional disputes, leading to variance greater than the mean. Thus I adopt a ZINB model, which is the proper method for count data characterized by excessive zeros and over-dispersion. The ZINB model simultaneously estimates two separate relationships, a logit model to predict excess zeroes and a negative binomial count model. The logit model predicts those cases which will never have a positive value, and are thus always zero; of the cases which are not necessarily always zero, the negative binomial count model predicts the observed value, which may or may not be zero. Similar zero-inflated models are used to model investment disputes by Williams (2014) and Freeman (2013), and by Copelovitch and Pevehouse (2012) and Sattler and Bernauer (2011) to model WTO treaty disputes.

As an initial test I run Model 1, which includes very few control variables. I include only the basic variables which are expected to be the best predictors of disputes: *US Ratified BIT,* a dummy variable for the presence of a ratified investment treaty (or trade agreement with investor-state dispute settlement) between the host state and the US and *Disputes (lagged)*, a lag of the dependent variable. As noted earlier, while it is possible for American investors to initiate treaty-based arbitration claims by routing investment through subsidiaries in third-party countries, it is still the case that it is significantly easier for American investors to initiate arbitration cases against host states which have a ratified treaty with the US, thus the existence of a treaty is likely a strong positive predictor of disputes initiated by American investors. The one period lag of the dependent variable is included because a dispute in a given country in one year often predicts disputes in the following year (Simmons 2014). Both of these variables are included in both the count and inflation models. In this and all subsequent models, robust standard errors are clustered by country.

I expand slightly in Model 2, adding an additional two variables to the count model which are also highly likely to be correlated with disputes. First, I add an index of the *Investment Climate* (from the *International Country Risk Group* by (PRS 2015)), which is a composite measure of the risk of contract breach, expropriation and transfer restrictions in the host state. The index is based on expert surveys; if experts are influenced by news of dispute filings, this variable may be endogenous with the count of disputes filed. To account for this possibility, the *Investment Climate* variable is lagged one year. Second, I include the *US FDI Stock (log)* located in the host country. Countries with a poor investment climate and with a greater stock of FDI (and thus greater potential exposure to claims) are expected to have more disputes, in line with previous econometric studies of investment disputes (Freeman 2013, Williams 2014, Dupont et al 2016).

A third iteration further extends the model, adding in a number of additional control variables which may be associated with investment disputes (though which are less obvious predictors of disputes than the variables in models 1 and 2). In this Model 3, I include the number of *Total Ratified BITs* a host state has ratified, as a large network of BITs will create more opportunities for US investors to pursue claims via subsidiaries in third party countries. I include *Democracy* from the Polity IV database, which may be correlated to disputes but whose expected sign is indeterminate: on the one hand democratic leaders may be more constrained in taking capricious action against foreign investors, on the other hand some government actions leading to investment claims – such as introducing arguably discriminatory new environmental regulations – may be taken in response to public pressure which a democratic government will feel more strongly (Williams 2014).[14] As the natural resource sector is often a source of investment disputes, I include two measures related to natural resources: *Natural Resource Rents* as a share of GDP (a measure of current extraction) and (log of) proven *Oil Reserves* (a measure of potential future extraction, important because many disputes may relate to licensing and exploration activities).[15] I include both *GDP PC (log)* and its squared value, as previous evidence suggests the effect of GDP per capita may follow an inverse-U pattern on the likelihood of facing an arbitration claim, with middle-income countries more likely to face claims than either low-income or high-income countries (Jensen et al 2014 and Williams 2014). Finally, I also include year fixed effects, given a slight upward trend in ambassadorial vacancies and the general upward trend in the filing of arbitration cases (the latter perhaps reflecting greater awareness on the part of investors of the remedies available

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[14] The inclusion of democracy in the model also accounts for any concerns arising from the fact that the ambassador vacancy variable is weakly negatively correlated with democracy.

[15] Natural resource rents data are from World Bank (2015); oil reserves data from British Petroleum (2015). Oil reserves are measured as the log of (1 + number of barrels of reserves); this ensures that for the many countries with 0 barrels of reserves, the log value is ln(1)=0, rather than ln(0)=undefined.

under BITs). Table 2 provides descriptive statistics of the dependent variable, key independent variable and control variables.

Table 2: Descriptive Statistics

Variable	Observations	Mean	Standard Deviation	Min	Max
Disputes (count)	1904	0.06	0.34	0.00	7.00
Ambassador Vacancy (% of year)	1850	0.18	0.28	0.00	1.00
US Ratified BIT (yes/no)	1904	0.28	0.45	0.00	1.00
US FDI stock (log)	1547	18.08	5.53	0.00	25.70
Investment Climate (index, lagged one year)	1442	7.99	2.14	0.00	12.00
Count of Total Ratified BITs (count)	1904	17.67	18.37	0.00	105.00
Democracy (index)	1693	2.46	6.28	-10.00	10.00
Oil Reserves (number of barrels, logged)	1904	4.59	7.16	0.00	19.51
Natural Resource Rents (% of GDP)	1711	13.76	17.69	0.00	100.37
GDP PC (log)	1839	7.69	1.35	4.82	11.39

4.3 Results

Regression results are presented in Table 3. The results show that the greater the share of the year the position of US ambassador is vacant, the more investment disputes likely to be filed by American investors in that country-year. For all developing countries with a ratified US BIT (or FTA with ISDS), the mean number of investment disputes initiated by American investors is 0.17. When the position of ambassador is vacant 90 percent of the year, the predicted number of disputes rises to 0.35, effectively doubling the expected number of disputes.[16]

[16] For developing countries with a ratified BIT, the mean ambassador vacancy is 16 percent of the year.

Table 3: Regression Results

DV: Investment Disputes	1	2	3	4
Count Model				
Ambassador Vacancies	**0.588***	**0.749+**	**0.942***	**3.082*****
	(0.299)	**(0.410)**	**(0.380)**	**(0.880)**
Ambassador Vacancies * Investment Climate				**-0.320***
				(0.132)
US Ratified BIT	-0.027	1.631*	0.156	0.298
	(0.630)	(0.746)	(0.312)	(0.338)
Disputes (lagged)	0.424**	0.039	0.015	0.017
	(0.140)	(0.060)	(0.097)	(0.095)
Investment Climate		-0.277***	-0.222**	-0.162*
		(0.066)	(0.072)	(0.075)
US FDI Stock (log)		0.404***	0.242**	0.235**
		(0.069)	(0.090)	(0.091)
GDP PC (log)			6.196*	6.179+
			(3.097)	(3.156)
GDP PC^2 (log)			-0.376+	-0.377+
			(0.194)	(0.197)
Oil Reserves			0.064*	0.063*
			(0.026)	(0.027)
Natural Resource Rents			-0.017	-0.015
			(0.014)	(0.014)
Total Ratified BITs			0.003	0.003
			(0.006)	(0.007)
Democracy			0.029	0.039
			(0.028)	(0.029)
Constant	-1.325+	-8.839***	-31.920**	-32.114**
	(0.784)	(1.422)	(11.813)	(11.995)
Inflation Model				
Ratified BIT	-2.977***	-1.152	-3.026**	-2.941**
	(0.866)	(1.015)	(1.001)	(0.999)
Disputes (lagged)	-3.400**	-1.127	-17.851***	-15.515***
	(1.147)	(0.796)	(1.785)	(1.497)
Constant	3.349***	1.785*	2.740***	2.613***
	(0.820)	(0.726)	(0.800)	(0.789)
Year Fixed Effects	*No*	*No*	*Yes*	*Yes*
Robust SE clustered by country	*Yes*	*Yes*	*Yes*	*Yes*
N	*1,850*	*1220*	*1052*	*1052*

Note: Standard errors in parentheses

+ p<0.1, * p<0.05, ** p<0.01, *** p<0.001

Model 4 further explores the relationship between commercial diplomacy, political risk and investment protection by including the interaction between ambassador vacancies and the investment climate as an explanatory variable. The statistically significant negative coefficient demonstrates that it is particularly in countries with poor investment climates that ambassadors help deter investment disputes. Figure 1 shows the predicted number of disputes for countries with a BIT (top panel) and without a BIT (bottom panel), disaggregated by the host state's investment climate. Countries with strong investment climates are less likely to have disputes overall, and the presence or absence of effective commercial diplomacy has no influence on the predicted number of disputes. In countries with weak investment climates, however, ambassador vacancies are significantly correlated with disputes. In these countries, the economy is characterized by greater informality overall, and this appears to also be reflected in informal investment dispute settlement.

Given the small size of the dataset of investment treaty claims initiated by American investors – an inherent limitation of any statistical analysis of investment arbitrations – the results presented here should be interpreted cautiously. Bearing this in mind, however, the best available evidence suggests that American investors are more likely to initiate arbitration cases against host state governments during periods when there is no US ambassador to the host state. These findings suggest that behind the scenes of the formal, legalized investment regime ambassadors continue to intervene in investment disputes to push for informal settlement. As a test of the effect of commercial diplomacy, it is worth underlining that the results presented here show the *difference* in the effectiveness of commercial diplomacy when there is an ambassador vs. when there is not. Given that commercial diplomacy continues when there is no ambassador present, these results thus substantially understate the *total* effect of commercial diplomacy on the informal settlement of investment disputes. These results suggest that if the

USG did not pursue commercial diplomacy at all, we would observe significantly more international arbitration cases filed by American investors.

Figure 1: Ambassador Vacancies and Investment Disputes

Fig 1.a: Predicted Disputes, Countries with a Ratified US BIT

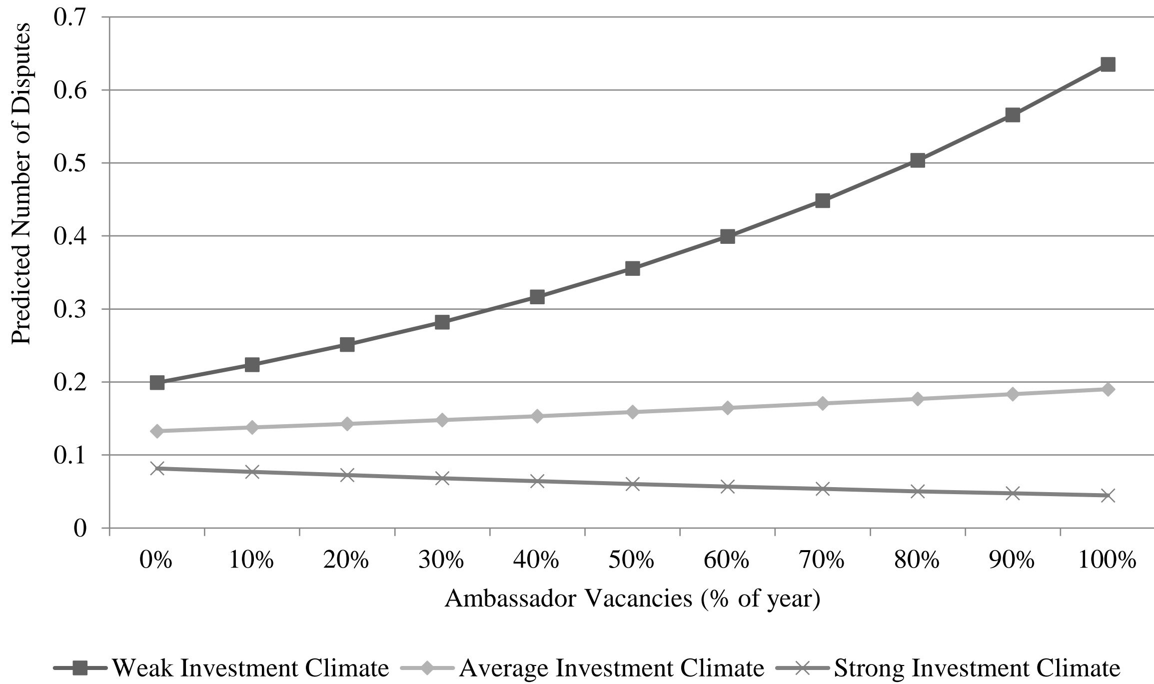
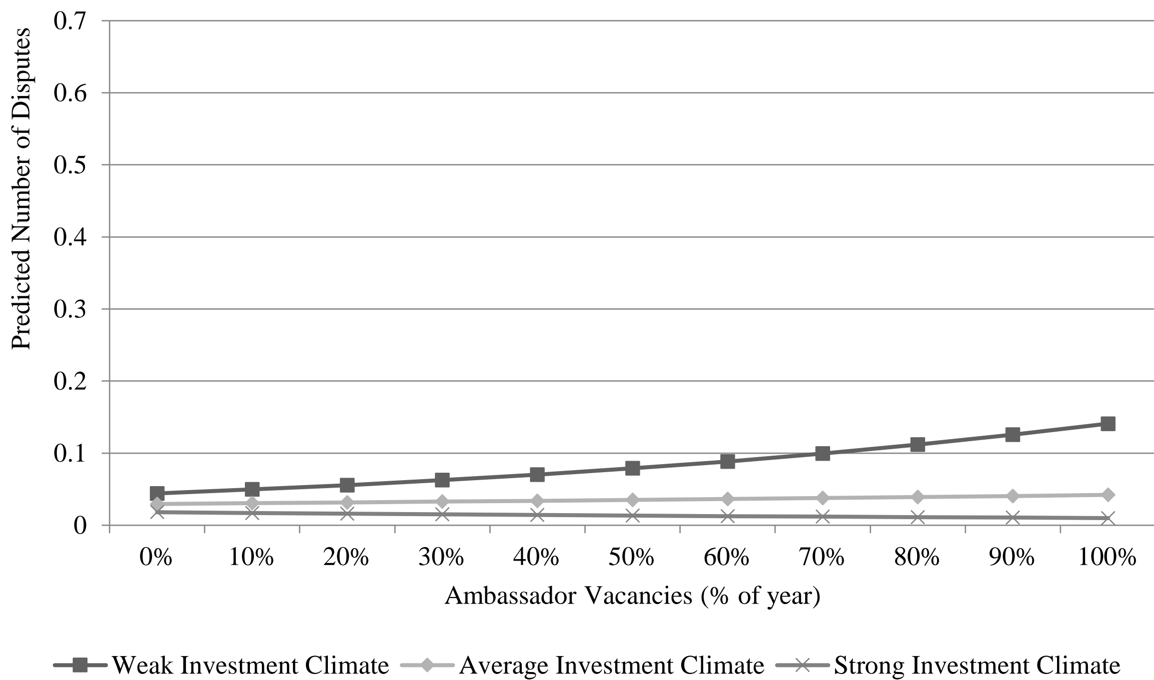


Fig 1.b: Predicted Disputes, Countries without a Ratified US BIT



Note: Weak investment climate = 10th percentile on the ICRG investment climate index, average investment climate = 50th percentile and strong investment climate = 90th percentile.

The control variables perform as expected. A ratified US investment treaty and the existence of a dispute in the previous year are positive predictors of treaty claims, however this effect is mediated once investment climate is included in the model, which is unsurprisingly a highly significant predictor of disputes. (Note that in the inflation model the negative sign on coefficients indicates a decreased likelihood of being an excess zero, and thus a positive relationship with investment disputes.) Countries are also likely to face more disputes if they have a greater stock of FDI, are home to oil reserves, and have moderate levels of GDP capita. Neither natural resource rents, total ratified BITs nor democracy are found to be significant predictors of investment disputes.

Robustness Checks

In order to confirm these results, I run a series of robustness checks, which are included in Appendix A. First, I exclude from the data disputes which were filed under a treaty to which the US is not a signatory (appendix results A.1). Since those firms filing under a non-US treaty may be less closely linked to the US, and thus less likely to receive diplomatic support from the American embassy, I expect the coefficients on ambassador vacancies in this set of models to be slightly higher than those in the primary results, which is indeed the case. Second, I extend the sample to also include high-income OECD countries as well as developing countries (appendix results A.2). The regression results in this set of models are expected to be slightly weaker than those in the developing country only model, as there are substantially fewer disputes between American investors and high-income countries. The results are as expected. Finally, I consider two alternative models for the data: a zero-inflated poisson model (appendix results A.3), which allows for zero-inflation but not over-dispersion, and a negative-binomial model (appendix results A.4), which allows for over-dispersion but not zero-inflation. The results are broadly consistent across these data and modelling choices.

4.4 Conclusion

The evidence presented in this chapter shows that American investors are more likely to initiate formal arbitration cases against foreign governments during periods when there is no resident US ambassador in the country, and that this is particularly true in countries with weak investment climates. These findings suggest that American embassies continue to assist US investors to informally settle their disputes with host states, thus avoiding arbitration. Despite the availability of legal alternatives, access to commercial diplomacy is still an important asset for firms seeking to manage political risks abroad.

The analysis in this chapter represents one means of overcoming the challenge of unobservable diplomatic interventions in investment disputes: by observing patterns in when formal arbitration claims are filed, we can make inferences about why informal settlement of disputes is sometimes more or less likely. Yet it tells us little about how specifically the USG engages diplomatically in investment disputes, nor about what motivates American diplomats to take up certain cases but not others. The remaining empirical chapters takes up these questions.

CHAPTER 5: A BEHIND-THE-SCENES LOOK AT DIPLOMATIC INTERVENTIONS IN INVESTMENT DISPUTES [17]

The previous chapter identified a statistically significant relationship between diplomacy and investment protection: American investors are less likely to file formal arbitration claims when they have access to a resident ambassador in the host country. While this evidence strongly suggests ambassadors are helping to resolve disputes informally through diplomatic channels, it tells us little about what particular actions diplomats are pursuing to settle disputes or under what circumstances the USG is more or less likely to intervene in a dispute. Since these interventions tend to occur behind closed doors and are only selectively publicly reported, to date it has been very difficult to study commercial diplomacy and investment protection.

This chapter presents a more in-depth look at the reality of American investment protection policies. It first provides an analytical overview of the various bureaucratic agencies that share responsibility for commercial diplomacy in investment disputes. It then introduces a novel dataset that provides a behind-the-scenes look at diplomatic interventions in investment disputes: the internal State Department cables publicly released via WikiLeaks. The cables consist primarily of reports from American embassies and consulates abroad to State Department headquarters in Washington, D.C., relaying diplomats' activities, information and opinions. They provide a unique window into the day-to-day work of commercial diplomacy, presenting information both on cases which make headlines in newspapers and those which are never publicly reported.

Overall, the cables depict an American foreign service which is actively engaged in encouraging host states to settle investment disputes involving US investors. The USG rarely

[17] This chapter relies on a dataset initially produced in a co-authored working paper with Srividya Jandhyala (ESSEC Business School, Singapore) and Lauge Poulsen (UCL). The author gratefully acknowledges the co-authors sharing of the data. Throughout this chapter, any analysis which draws directly on this co-authored work is explicitly cited as such.

explicitly threatens to cut off aid or trade benefits in disputes, but will regularly raise specific disputes in high-level meetings with ministers and heads of states. Visiting executive branch and Congressional delegations will also press high ranking host state officials to settle disputes; similarly, when host state officials travel to Washington their American counterparts will place disputes on the agenda. Diplomatic interventions to resolve disputes exist alongside and largely separate from the institutional regime for investment protection. There is extremely little evidence for the argument advanced by the creators of the investment regime and supported by Maurer (2013): that granting investors independent access to legal arbitration will give home states a credible way to turn down requests for diplomatic support in disputes. Based on reporting in the WikiLeaks cables, while US embassy officials will inform investors about potential rights available to them under an investment treaty, they appear to almost never suggest an investor should file an arbitration claim rather than pursue diplomatic resolution. Investment treaties have clearly not "insulated" investment protection from diplomacy, as its most ardent supporters claimed it would.[18] Both in host states with US investment treaties and those without, investment protection remains an important part of American diplomats' work.

The remainder of this chapter proceeds as follows. The next section first introduces the main bureaucratic agencies and actors responsible for American investment protection policy, highlighting the responsibilities and interests of the State Department, Commerce Department, US Trade Representative, OPIC and Congress. The following section then relies on the WikiLeaks dataset to assess American diplomatic interventions in 256 specific investment disputes. I show that the USG is more likely to strongly intervene in disputes in presidential election years (when the executive branch may particularly want to demonstrate its active commercial diplomacy) and in disputes which are highly salient to the overall quality of the

[18] See remarks by Aron Broches in (ICSID, 2006), as well as related discussion in Chapter 2.

host state's investment climate. Moreover, the USG is just as likely to intervene in host states with US BITs as those without, contrary to the conventional wisdom in the literature on the investment regime, and neither firm size nor firm lobbying expenditures predict interventions. The final section concludes.

5.1 The Bureaucracy of US Investment Protection Policy

American investment protection policy is designed and implemented not by one single government agency but rather by a collection of agencies with similar mandates for commercial diplomacy. These agencies often cooperate effectively with one another, while at times duplicating efforts and other times conflicting over strategy or implementation of policy. This section provides an overview of the agencies involved in American investment protection policy, highlighting where their interests and actions are aligned and where they differ. It focuses on four executive branch agencies – the State Department, the Commerce Department, the United States Trade Representative (USTR) and the Overseas Private Investment Corporation (OPIC) – as well as Congress.

The State Department

The State Department – including both embassy staff based in foreign countries and officials in Washington – is the primary USG agency responsible for intervening in investment disputes of American firms operating abroad. The US embassy is generally the first point of contact for an American investor in a dispute with a foreign government (Kopp 2003). The State Department's official manual – which describes policies and practices for its own staff – notes that "the USG may in its discretion decide to make diplomatic representations to the host government in order to encourage expeditious resolution of [an investment] dispute" (US

Department of State 2013). The manual instructs embassy staff to "avoid taking a position on the merits of a dispute" (except in coordination with the Department), but encourages staff to more subtly encourage host states to reach settlements with investors, for example by:

> "Emphasiz[ing] the direct link between an open and transparent investment climate, including dispute resolution mechanisms, and future United States citizen/national investment decisions… Explain[ing] the United States interest in seeing the parties to the dispute reach an amicable and timely resolution of the controversy in accordance with applicable law… [and] Refering to United States legislation that under certain circumstances limits financial assistance to countries that expropriate United States citizen/ United States national property (US Department of State 2013).

The manual, however, provides little direct guidance on whether and how strongly to intervene in disputes, leaving considerable discretion to embassy staff. Low-level disputes or more technical questions will be discussed by US Economic Officers and mid-level bureaucrats in foreign governments. Decisions to intervene at a higher political level move up the Department's chain of command, from Economic Officers to Ambassadors within an embassy and then to the Office of Commercial and Business Affairs in the Department's headquarters, and then potentially up to the Secretary of State or even the President.[19]

According to one lobbyist who helps firms engage USG diplomatic support during disputes, though it is not necessarily the case that you need "friends in Washington" in order to convince the USG to intervene, having good relationships with US embassy officials in country is important, and will make it more likely the embassy will initially be receptive to requests for help.[20] Similarly, one former ambassador noted that when considering intervening in a dispute ambassadors rely on investors to keep them informed on the details of their case and any progress; when investors do a poor job of keeping the embassy informed diplomatic support is significantly less likely.[21] Relationships between the US embassy and American

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[19] Interview with former high ranking State Department official, Washington DC, July 2015.
[20] Interview with lobbyist, Washington DC, July 2015.
[21] Interview with former ambassador, Washington DC, December 2015.

firms in a given country are often facilitated by local Chamber of Commerce or Business Council affiliates. These associations will host events for their members featuring ambassadors as well as visiting USG officials, ensuring their members have access to voice their opinions and concerns to the USG.

In addition to support provided by embassy-based officials, State Department officials based in Washington also intervene in disputes. The Office of Commercial and Business Affairs (CBA), which is based in the Bureau of Economic and Business Affairs, has responsibility for coordinating commercial diplomacy for US firms; over time this hierarchy has occasionally been reorganized, but since the early 1990s a similar office has existed in some form. While commercial diplomacy policy is formulated within CBA, other high ranking officials will also engage in disputes when the opportunity arises. Traveling State Department officials, such as the Assistant Secretaries who are the top officials responsible for each regional bureau of the agency, will discuss specific disputes in their meetings with host state governments, alongside other issues in the bilateral relationship. (Examples include the disputes in Ukraine and Cote d'Ivoire discussed in Chapter Six.) Similarly, Washington-based State Department officials will also discuss disputes with the DC embassies of foreign countries and visiting delegations.

Importantly, the State Department itself does not appear to share the belief – advocated by the supporters of the investment regime – that BITs supplant the need for diplomatic interventions in investment disputes. Testifying before Congress on the US BIT program in 1995, Daniel Tarullo, then Assistant Secretary of State for Economic and Business Affairs, told the Senators that "BITs supplement, rather than replace, other traditional means of resolving investment disputes, including general consular assistance to U.S. business, active diplomacy, and formal government-to-government understandings if investment problems are pervasive" (US Congress 1995, p 4). Similarly, in private interviews multiple current and former State

Department officials confirmed that today the Department views protecting American firms abroad as part of the agency's mission, and that there is an "important" and "legitimate" role for governments to advocate on behalf of their investors.[22]

Still, officials also stressed that "choosing to intervene is always weighed against other issues on the agenda."[23] The previous tensions between a strategic foreign policy and strong interventions in disputes, discussed in Chapter Two, attenuated after the end of the Cold War, but did not disappear altogether. One lobbyist noted that requests for support for an American firm in a dispute with the Haitian government were rebuffed by the State Department because the agency did not want to aggressively challenge the Haitian government while it was still working to recover from the 2010 earthquake.[24] More than most other agencies concerned with commercial diplomacy, the State Department evaluates requests for assistance within the context of the broader bilateral relationship.

Commerce Department

In addition to State, Commerce is the second agency with a general mandate for commercial diplomacy. Commerce's role in commercial diplomacy increased substantially in the late 1970s, when the Carter Administration worked with Congress to reorganize American foreign economic policy, resulting in the Foreign Service Act of 1980 which created the Foreign Commercial Service (FCS) as a branch of the Commerce Department (Ford 2005). Given the State Department's lacklustre interest in commercial affairs at the time, primary responsibility for the most important commercial operations was transferred away from State to the Commerce Department. Since 1980 FCS has been the lead agency responsible for promoting

[22] Interview with former State Department official, Washington DC November 2015.
[23] Interview with former State Department official, Washington DC July 2015.
[24] Interview with lobbyist, Washington DC July 2015.

American exports abroad and addressing trade barriers and disputes, and this mandate has often overlapped with diplomatic interventions in investment disputes.

As the State Department regained its interest in commercial diplomacy following the end of the Cold War, the lines between State and Commerce sometimes blurred, and at times there have been reports of tensions between the two agencies. (One reporter noted that Secretary of State Hilary Clinton "didn't seek permission when she not-so-subtly encroached on the Commerce Department's turf to install herself as the government's highest-ranking business lobbyist" (Dwoskin and Lakshmanan 2013)). For the most part, however, in the course of responding to specific disputes, former government officials perceived that State and Commerce generally agreed on the correct course of action, and there was rarely significant disagreement between the two.[25] Today FCS Officers are in US embassies and consulates in 78 foreign countries, those considered the most important markets for US exports and investment.[26] These FCS Officers, while officially Commerce Department employees, work alongside the State Department's Foreign Service Officers; in embassies in which there is no FCS Officer, the same functions are carried out by State Department diplomats. In practice, it is unclear if there is much substantial difference in commercial diplomacy carried out by FCS Officers and Economic Officers in the State Department, though given that FCS Officers have specific training in commercial matters and their career incentives are entirely focused on commercial work it is reasonable to assume they may be more assertive commercial diplomats.[27] And as is the case for the State Department, in-country advocacy by FCS officers is complemented by political interventions from higher ranking Washington-based officials in

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[25] Interviews with former State Department officials, Washington DC, July 2015 and November 2015.

[26] This figure calculated based on the list of foreign offices available on the FCS website at https://build.export.gov/main/worldwide_us/index.asp, excluding those countries identified as 'partner offices'. A number of other US government agencies have officers posted in embassies abroad, including the Department of Agriculture and the US Agency for International Development (USAID).

[27] Unfortunately there is no clear historical record of which embassies had FCS officers and which did not, making it impossible to systematically test this proposition.

the International Trade division of the Commerce Department, including at times up to the Secretary of Commerce.

United States Trade Representative (USTR)

Around the same time responsibility for export promotion was transferred away from the State Department to Commerce, responsibility for negotiating trade agreements was transferred from State to a new stand-alone agency, which would ultimately become the United States Trade Representative (USTR). The institutionalization of USTR was a strategic decision by pro-free trade interests to shield trade policy from protectionist pressures (Chorev 2005), and USTR critics allege it continues to be biased toward the corporate interests of exporting industries (Lee 2013; Kaminski 2014). Today USTR's mandate includes negotiating and implementing international economic agreements, including FTAs, BITs (for which it shares responsibility with State) and Trade and Investment Framework Agreements (TIFAs), as well as advising the President on all trade matters.[28]

USTR is less likely to engage in general day-to-day investment protection than State and Commerce; unlike these agencies, it does not have staff permanently posted in US embassies abroad. However, the agency will intervene in specific disputes if they are viewed as sticking points in the course of negotiating an international agreement. Such negotiations are often useful leverage points for pushing host states to resolve outstanding disputes; in some negotiations, such as the Ecuador FTA discussed in Chapter Six, the US negotiating team will have a list of disputes which it demands progress on as a condition of signing an agreement. The USG will discuss disputes in the context of negotiations both because it has greater leverage over the host state at this time and because State and USTR fear that Congress may

[28] TIFAs create an institutionalized framework for regular bilateral economic summits to discuss outstanding issues in the bilateral economic relationship, but do not otherwise bind signatories.

be less likely to ratify a signed deal if there are many public reports of US investors being mistreated by the negotiating partner.[29] USTR's primary interest is in negotiating agreements and then ensuring Congress ratifies deals that have been signed; within the scope of investment protection policy, this means it wants to ensure no disputes derail any potential treaties.

Overseas Private Investment Corporation (OPIC)

OPIC is the American public political risk insurance agency, and offers both insurance and equity financing to American companies investing in developing countries. Similar to USTR, OPIC is not generally involved in day-to-day investment protection policy, but it will significantly engage diplomatically in projects which involve OPIC insurance or finance and which become investment disputes. OPIC thus has a dual role in such disputes – it is at once a commercial partner in the project, with incentives similar to any firm engaged in a dispute, as well as an agency representing the interests of the USG, which cooperates with colleagues at the State and Commerce Departments.

In disputes where OPIC is involved, the agency can often play an important role and coordinate action on behalf of the various USG agencies involved. By virtue of having been closely involved in the investment from the beginning, OPIC will have significantly better knowledge of the project (and the origins of the dispute) and a significantly closer relationship with the private investor than any other USG agency. OPIC staff understand complex project finance far better than their counterparts at State and Commerce. Thus, even though OPIC is not particularly powerful overall in the American bureaucracy, the agency's informational advantage in specific disputes can give it significant influence. OPIC cannot simply overrule the State Department on which course of action to take, but it can seize initiative in presenting

[29] Interview with former State Departmnet official, Washington DC November 2015.

the perceived available options for USG intervention and shaping them in OPIC's favour. Moreover, OPIC's interests do not always closely align with those of other USG agencies or parties to the dispute: OPIC generally prioritizes ensuring the project can go forward, and would prefer not to pay out insurance claims. In particular, OPIC does not want to pay a claim for which the host state will refuse to compensate the agency, as this may prevent OPIC from insuring any other projects in the host state.[30] Both the State and Commerce Departments have significantly broader mandates, and will evaluate interventions in disputes as part of broader policy concerns rather than as one-off disputes.

Congress

In addition to the four executive branch agencies discussed above, whose leadership are appointed by the President, Congress also influences American investment protection policy. Though different executive agencies may have somewhat different interests in disputes given their varying mandates, members of Congress may have significantly more divergent preferences, both from one another and from the executive. Historically Congress has been more protectionist than the executive branch (Chorev 2007), and former State Department officials responsible for commercial diplomacy noted that Congress had a reputation for pushing State to adopt a more aggressive stance defending investors than it otherwise would.[31] Additionally, Congress is generally more susceptible to private pressure than the executive branch, as members seek to defend the interests of their constituents.

Congress can intervene in disputes in a number of ways. First, it can act independently of the executive branch, for example by sending letters expressing disapproval directly to

[30] In order to operate in a given country, OPIC and the host state sign an agreement which guarantees the host state will compensate OPIC for any insurance claims the agency pays out. If a host state refuses to offer such compensation then OPIC officially must cease operations in the country. OPIC did not operate in Ukraine for nearly a decade after the country refused compensation for a 1999 claim (OPIC 2009).

[31] Interviews with former State Department officials, Washington DC, July 2015 and November 2015.

foreign officials, by raising disputes with foreign officials during Congressional delegation trips abroad and by holding public hearings on investment disputes involving American firms.[32] Second, it can also seek to pressure the State Department into taking stronger action to assist firms with disputes. Both lobbyists and State Department officials agreed that when Congress contacts the State Department about a specific dispute, the Department would "pay special attention" to the case.[33] Such actions wouldn't necessarily compel USG intervention in the dispute, but at minimum if the State Department was not going to strongly defend an investor it would need to clearly articulate why not. Congress' influence in settling disputes – either by directly pressuring host states or by pushing the State Department to act – is greatest when it is known that Congress will soon be voting on some bill of direct relevance to the host state, such as ratifying an FTA or voting on a trade preference program.[34] So long as both the foreign government and the executive have an interest in seeing the legislation passed, they will be particularly motivated to ensure disputes are settled, so as not to give Congress any additional reason to vote against the bill.

While lobbyists generally perceived appealing to Congress to be an effective means of increasing the likelihood of a strong USG intervention, they also noted that it was typically a last resort, only pursued if the State Department was otherwise unresponsive.[35] Once a case has been brought to the attention of Congress, it is far more likely to become public knowledge, which firms generally preferred to avoid; in the words of one lobbyist, "once you approach Congress to ask for help, you've lost control over how the dispute negotiations will evolve."[36]

[32] For examples of the latter, see "United States Trade Disputes in Peru and Ecuador", Hearing before the Subcommittee on the Western Hemisphere of the Committee on International Relations, House of Representatives, 108th Congress, October 6 2004; as well as "Treatment of U.S. Business in Eastern and Central Europe", Hearing before the Subcommittee on European Affairs of the Committee on Foreign Relations, United States Senate, 106th Congress, June 28, 2000.
[33] Interview with lobbyist, Washington DC, July 2015; interview with former State Department official, November 2015.
[34] Interviews with former State Department officials, Washington DC, November 2015 x 2.
[35] Interviews with lobbyists, Washington DC, July 2015 and November 2015.
[36] Interview with lobbyist, Washington DC, July 2015.

Members of Congress may want to publicly appear to be aggressively fighting for the rights of their constituent firms, even if the actual firm involved would prefer more subtle, behind-the-scenes diplomatic interventions.

The Inter-Agency Process

How do these various players work together to shape American investment protection policy? As noted earlier, in practice there rarely appears to be substantial conflict amongst the different agencies involved in determining whether and how to intervene in a dispute. When there are disagreements, if they occur at the embassy level – say a Commercial Officer wants to intervene more aggressively than a Political Officer – the Ambassador is responsible for resolving them.[37] Given the central role embassies continue to play in diplomatic interventions in disputes, this ensures the State Department retains significant control over day-to-day investment protection policy. If disputes rise to a higher political level and there are still differences between agencies, these would then be resolved through an inter-agency process run by the White House and National Security Council (NSC), with the President's office having ultimate responsibility.[38] Whatever disagreements there may be, the USG seeks to ensure they are settled internally, so that host state officials are hearing the same message from various agencies in the USG; the State Department will often circulate specific talking points for various USG officials to deliver to their host state counterparts when they have the opportunity (eg 04QUITO2462).

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

5.2 US Investment Protection Policy in Practice

The previous section provided an analytical overview of the bureaucracy of American investment protection policy. To better understand how this bureaucracy functions in practice, the remainder of this chapter relies on data revealed in the WikiLeaks cables to assess actual USG interventions in disputes. After briefly discussing methodological concerns with the use of leaked cables as a source for academic research, I then present new data on the range of diplomatic interventions in investment disputes and show that the USG is most likely to intervene in disputes which are salient to state interests in promoting commercial diplomacy and investment climate reforms. Importantly, the presence or absence of an investment treaty has no effect on the likelihood of USG intervention.

5.2.1 Diplomatic Cables and Investment Protection Policy

In 2010-2011 the WikiLeaks organization publicly released some 250,000 diplomatic cables consisting of internal communications within the US State Department, in a leak known as Cablegate (Mackey et al 2011). The cables had been illegally obtained by Chelsea (then Bradley) Manning from confidential government servers; in 2013 Manning was convicted of various crimes under the Espionage Act for this leak and a series of other leaks of military cables. WikiLeaks had initially partnered with a number of news outlets, including *The New York Times, The Guardian, Le Monde, Der Spiegel* and *El Pais* to selectively release some of the diplomatic cables beginning in 2010; the full, searchable database of diplomatic cables was made publicly available online after divisions emerged between WikiLeaks and these traditional journalist partners (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 posted abroad 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. The leak does not include all State Department cables, but only a small sample. Gill and Sperling (2015) estimate that the leaked cables constitute approximately 5 percent of the full population of cables produced by the State Department during the period, though with considerable variation across country years.[39] The WikiLeaks cables thus do not completely reveal State Department policies and actions, but rather provide a series of glimpses into American foreign policy behind-the-scenes.

Substantial commentary surrounds the academic use of data from leaked documents (see, for example, Drezner (2010), Kelly (2012) and Michael (2015)). While there are important methodological, legal and ethical concerns regarding the academic use of leaked data, for present purposes such concerns are not insurmountable. To begin with, it is difficult to know whether the leaked diplomatic cables 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. Since little is known about the specific method Manning used to acquire the leaked cables, it is impossible to know if they represent a truly random sample of all cables. While the analysis of Gill and Sperling (2015) suggests the leaked cables sample is biased in that highly classified cables are underrepresented, perhaps because Manning lacked the highest security clearance, otherwise there is little evidence the leaked

[39] The authors rely on the internal indexing system for the cables, which allow the leaked cables to be treated as a sample from a uniform distribution with unknown maximum. They limit their analysis to the period 2005-2010, which is when the majority of released cables were written.

cables represent a significantly biased sample. Since interventions in investment disputes are unlikely to be classified as "Top Secret" – a classification more likely to be applied to military and intelligence information than foreign economic policy – this is unlikely to be a serious problem for this analysis. Similarly, when dealing with leaked data academics must be aware of the possibility that information has been selectively leaked – with the goal of changing a certain policy or embarrassing a certain actor – which introduces the possibility of further sampling biases. However, since my focus is on the relatively 'low politics' of foreign economic policy in specific investment disputes, it is highly unlikely any of the cables of interest were selectively leaked to garner headlines in newspapers. Moreover, my 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. The WikiLeaks data have previously been used by scholars in studying international relations in Asia (Khoo and Smith 2011; Mendis 2012), relations between the United States and unrecognized de facto states (Pegg and Berg 2015), free trade agreement negotiations between the United States and Jordan (El Said 2012) and the negotiations of the Trans Pacific Partnership (Michael 2015).

The WikiLeaks cables can similarly provide valuable data on American investment protection policy. Hundreds of cables discuss investment disputes between American companies and foreign governments, including descriptions of diplomatic interventions to encourage settlements. These cables broadly fall into three categories. First, every year each embassy files a "Section 527" report with State Department headquarters, which includes a list of outstanding disputes between American investors and the host state government. The title of these reports refers to Section 527 of the 1994-95 US Foreign Relations Authorization Act, which requires the State Department to annually report to Congress on outstanding investment

disputes; the individual accounts filed by embassies are then collated and sent on to Congress.[40] Second, a group of cables related to diplomatic visits from Washington-based officials – either State Department officials, those from other executive agencies such as the Commerce Department or USTR, or Congressional delegations – also discuss American investment protection policy. These include both "scenesetter" cables sent in advance of a visit, highlighting priorities and outstanding issues in the bilateral relationship, as well as "recap" cables which summarize actions and accomplishments during a visit. Third, a number of cables recounting the day to day activities of diplomats abroad also discuss investment disputes. Some of these cables are focused explicitly on specific disputes; other cables, such as a cable summarizing what the ambassador and foreign minister discussed during a meeting, will update Washington on a range of outstanding bilateral issues, including any progress on the resolution of specific disputes.

Of course, the cables do not reveal the entirety of home state, host state and firm strategies in negotiations over investment disputes; in particular they tell us little about firms' internal strategizing over investment protection, which may vary considerably from the information firms present to their home state diplomats. There is undoubtedly much more manoeuvring and strategizing by all parties than that which is presented in the cables. Moreover, disputes which are never brought to the attention of the embassy will not be included in the data; yet, as discussed, the local embassy is typically one of the first resources American companies turn to when they face problems with foreign governments. In any case, the WikiLeaks cables present a significantly broader picture of investment disputes than that which is publicly available and therefore serves as the empirical basis for most studies of investment disputes, namely the outcomes of publicly-known formal arbitration disputes. They thus allow

[40] These reports occasionally make it into the public record via Congressional hearings; see, e.g., US Congress (2004).

one of the first behind-the-scenes looks at the use of contemporary commercial diplomacy in investment protection.

5.2.2 A Catalogue of US Diplomatic Interventions in Investment Disputes

Jandhyala, Gertz and Poulsen (2016) search the WikiLeaks database to identify all investment disputes discussed in the leaked cables. In this chapter I rely on a subset of those disputes, those which occurred from 1990 onwards. This produces a dataset of 256 distinct investment disputes involving American investors and foreign governments in 79 countries. Table 5.1 indicates the distribution of disputes across countries. Sixty-five of the disputes involve the home or other property of an individual US citizen, while the remaining disputes involve the assets of corporate firms.

The strength of USG intervention in each dispute is classified using the following 5-point scale:

5. Highest Engagement: USG official or legislator explicitly links investment dispute to aid, trade or other host state government priority.

4. High Engagement: Embassy raises dispute with host state head-of-state; Washington-based USG official or legislator raises dispute during official visit to host state; Washington-based USG official or legislator raises dispute during official visit by host state official or legislator to US.

3. Moderate Engagement: Embassy raises dispute with host state minister or legislator; Washington-based USG official or legislator raises dispute with host state embassy in US.

2. Low Engagement: Embassy raises dispute with low-ranking host state official (including disputes in which it was impossible to discern at what level the embassy raised the issue with the host state).

1. No engagement: Company did not approach the USG for assistance or USG declined to intervene in the dispute.

Table 5.1 – Disputes of US Investors in Foreign Countries

Afghanistan	1	Ethiopia	6	Nepal	2
Albania	4	Fiji	1	Nicaragua	1
Algeria	3	Georgia	3	Nigeria	2
Antigua & Barbuda	1	Ghana	1	Oman	1
Argentina	9	Greece	4	Pakistan	1
Armenia	2	Guatemala	4	Panama	6
Azerbaijan	2	Haiti	6	Peru	10
Bahrain	2	Honduras	11	Poland	1
Bangladesh	3	India	5	Romania	1
Belarus	6	Indonesia	2	Russia	6
Bolivia	1	Ireland	1	Rwanda	1
Bosnia & Herzegovina	1	Italy	1	Serbia	2
Brazil	3	Jamaica	2	Slovakia	1
Bulgaria	2	Jordan	3	Sri Lanka	5
Canada	5	Kazakhstan	6	St Lucia	1
China	9	Kenya	1	St. Kitts & Nevis	1
Colombia	1	Kuwait	1	St. Vincent & Grenadines	1
Costa Rica	3	Kyrgyzstan	1	Tajikistan	1
Cote d'Ivoire		Laos	3	Trinidad and Tobago	2
Croatia	1	Latvia	1	Turkey	10
Czech Republic	1	Macedonia	1	Turkmenistan	2
DR Congo	3	Mexico	7	United Arab Emirates	3
Dominican Republic	28	Mongolia	1	Uzbekistan	10
Ecuador	4	Montenegro	2	Venezuela	1
Egypt	3	Morocco	1	Vietnam	2
El Salvador	1	Mozambique	2	Zimbabwe	4
Estonia	1			*Total*	*256*

Source: Author's calculations based on Jandyahala, Gertz and Poulsen (2016).

Table 5.2 provides a summary of the level of engagement by the USG in investment disputes, which is discussed in greater detail below. Note that each dispute is classified based on the greatest level of engagement, but in practice the USG may have pursued multiple interventions over the course of a single dispute; for example, if an ambassador raised a case first with the Foreign Minister and then with the President, this would be coded as '(4) High Engagement' and not '(3) Moderate Engagement'. It is also worth noting that this classification scale is, by necessity, a simplified measurement of the intensity of US engagement. When US officials

raise a dispute with a foreign government, it of course matters not only *whom* they talk to but also *what they say*: some conversations will be more cordial, others more aggressive and confrontational. Yet the cables frequently do not include enough information to classify either the substance or tone of US diplomatic interventions, and thus for this reason the intensity of disputes are classified based on which office of the host state the USG discusses the case with.

Table 5.2 – US Diplomatic Engagement in Investment Disputes

	Number	Percentage
(5) Highest Engagement	9	3.52
(4) High Engagement	60	23.44
(3) Moderate Engagement	52	20.31
(2) Low Engagement	100	39.06
(1) No Engagement	35	13.67
Total	*256*	*100.00*

Source: Author's calculations based on Jandhyala, Gertz and Poulsen (2016)

(5) Highest Engagement: The USG only rarely explicitly linked the resolution of disputes to aid, trade or other benefits for the host state. These cases include a number of disputes - six in Peru and one in Ecuador - in which American government officials told local officials that FTA negotiations could be in peril without resolution of the disputes. (The Ecuador case is discussed in greater detail in Chapter 6.) There was also one dispute in Cote d'Ivoire (also discussed in Chapter 6) in which settling a dispute was linked to receiving AGOA trade benefits, and a dispute in Nicaragua where resolution of the dispute was linked to receiving foreign aid.

(4) High Engagement: In 24 percent of the disputes identified in the WikiLeaks cables the USG raised the dispute with a head of state or the dispute was on the agenda during an official visit (either by a Washington-based official to the host state or vice versa). In these cases disputes were very rarely the sole focus of a visit or meeting; rather, meetings would cover a range of

bilateral issues, and dispute resolution would be one of many items discussed. The USG would not explicitly threaten any sanctions or punishment if the dispute was not resolved. Instead, appeals for resolution would focus on two planks. First, the USG would make clear that it wanted the dispute settled, and thus satisfactory resolution would promote a closer bilateral relationship, which would be beneficial to the host state in pursuing its other priorities. In this sense the USG used implicit issue linkage to push for the resolution of disputes. A former high-ranking State Department official confirmed that the implied need to maintain good relations with the US was often enough to compel host states to settle disputes, without any explicit mention of sticks or carrots.[41] Second, the USG would appeal to the host state's self-interest in maintaining a reputation for a strong investment climate, and the risk that a lingering dispute would deter other would-be foreign investors. By raising disputes at such a high level with host state officials, the USG indicated that it had particular interest in this specific dispute, and thus that it should be prioritized by the host state.

(3) Moderate Engagement: In an additional 20 percent of the disputes embassy officials raised cases with host state ministers or Washington-based officials raised the dispute with the host's embassy in the US. Disputes would most frequently be discussed with the Foreign Minister, though depending on the specific nature of the dispute other ministers could be approached, such as the Economy Minister or the Mining Minister. In some instances the embassy would strategically approach specific individuals that it believed had more liberal, investor-friendly views, while avoiding ministers with more populist views. In most host states the resolution of disputes could potentially fall under the portfolio of more than one ministry; the embassy would encourage sympathetic ministers to assert jurisdiction over cases which otherwise may be in

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

the portfolio of less investor-friendly ministers. Embassy officials on the ground had (and sought to improve) detailed knowledge of the domestic politics of their host states; they were not simply treated as one singular entity. The specific arguments embassy officials posed to ministers were similar to those posed to heads of state, focused on strong bilateral relations and the host state's investment climate reputation. Discussing cases with ministers but not raising the issue to the level of a head of state or official visit indicated that the USG took the case seriously, but that it was not one of the most important issues in the bilateral relationship.

(2) Low Engagement: In 39 percent of the cases identified the USG discussed disputes with lower-ranking host state officials. (This includes those disputes in which cables state the embassy contacted a host state ministry but do not specify which individual at the ministry.) In these instances the USG notifies the host state it is paying attention to the case and has an interest in seeing it resolved, but the case doesn't rise to a political priority in the diplomatic relationship. These disputes may be more technical in nature, and are not viewed by the USG as reflecting more broadly on the state of the investment climate in the host state.

(1) No Engagement: In 14 percent of the cases reported in WikiLeaks cables the USG did not intervene in the dispute. This is often because the firm or individual involved has asked the USG not to get involved (yet), as it is in the midst of pursuing its own direct negotiations with the host state government. Investors may want to inform the embassy of potential issues early on, so that if the dispute does escalate the embassy is up-to-date on the case and ready to engage.[42]

[42] This is analogous to the situation in political risk insurance, in which insurance contracts typically require investors to notify the insurer of any potential claimable events as soon as possible, well before an actual claim will be filed.

Overall, the cables suggest there was substantial diplomatic engagement – defined as raising the case at the level of a minister or above, or (3), (4) and (5) in the coding system – in just under half of all disputes. This evidence clearly suggests that investment disputes are not "insulated" from diplomacy, and regularly feature in America's bilateral diplomatic relations.

In their analyses of historical periods, both Maurer (2013) and Krasner (1978) argue that applying political pressure to resolve investment disputes could be costly to the US, as it prevented the State Department from pursuing other diplomatic goals. This was also a core justification for the early American BIT program, as discussed in Chapter Two. Yet the WikiLeaks cables do not reveal evidence of any significant policy cost to the United States from applying diplomatic pressure to resolve investment disputes. There is of course a basic opportunity cost of engaging in an investment dispute: when the US requests a host state resolve a specific dispute in a meeting of high-level officials, it is implicitly not asking for some other US objective. Though the number of issues which can be placed on the bilateral diplomatic agenda is not completely fixed, it is also not infinite. Yet the WikiLeaks cables contain no instances of State Department officials explicitly worrying that intervention in a dispute will set back relations or impede other diplomatic goals. Notably, there are no disputes in which USG officials choose to refer investors to arbitration because this would remove an irritant from the bilateral relationship. The cables do not suggest the State Department is reluctantly pulled into defending American investors abroad by a Congress captured by powerful private investors, as historical records suggest was the case during earlier eras (Maurer 2013).

5.2.3 What Predicts US Engagement in Disputes?

Why does the USG intervene more strongly in some disputes than in others? I argue that USG intervention is most likely when such interventions serve the USG's interest in promoting

investment climate reforms and advertising the utility of its commercial diplomacy functions. Conversely, previous analyses suggest USG intervention is most likely when investors are politically powerful and/or lack access to investor state arbitration (Maurer 2013; USTR 2015). The WikiLeaks dataset of USG interventions in disputes allows for the first systematic evaluation of these claims.

I run a series of logistic regressions to test what variables predict strong USG interventions in investment disputes. The dataset consists of the 256 disputes identified in the WikiLeaks cables. The dependent variable is a dummy indicating strong diplomatic involvement, which is coded 1 if there is evidence of at least moderate US engagement (5, 4 or 3 in our classification above) and 0 otherwise. This is the preferred measure of diplomatic engagement, because it demonstrates that a dispute was placed on the political bilateral agenda; when the embassy raises an issue below the ministerial level (coded 2), these interventions are often more technical and do not necessarily suggest a dispute features in the bilateral diplomatic relationship.

In Model 1 I include a number of variables to capture the USG's interest in active commercial diplomacy and investment climate reforms. First, I include a dummy variable *US Election Year*, which is 1 if the dispute occurred during a US Presidential election year and 0 otherwise. If the USG intervenes in disputes to demonstrate the utility of its commercial diplomacy to the public, then it should be more likely to strongly intervene during election years to gain political support.[43] Second, I include *GDP Growth Rate*, as the USG may have a particular interest in demonstrating the utility of commercial diplomacy in quickly growing, dynamic emerging economies. Third, I include a number of variables designed to measure USG interest in investment climate reforms. I consider the host state's *Investment Climate* (using the

[43] Pervez (2015) and Conconi et al (2015) demonstrate similar effects in the filing of WTO disputes.

same ICRG measure as in Chapter Four), as the USG may be more likely to intervene in countries with poor investment climates in need of reform. I also consider three variables related to the dispute itself, designed to test how salient this particular dispute is to the host state's broader investment climate. The first of these is *Local Court*, a dummy variable with the value of 1 if the dispute has already been heard by a local court in the host state; given the USG's particular interest in denial of justice claims, I expect a positive relationship between *Local Court* and USG interventions.[44] The second is *Contract Dispute*, a dummy variable with the value of 1 if the dispute arises out of an alleged breach of contract between the investor and the host state; given that disputes specifically tied to contract sanctity are more salient to investment climate concerns than general regulatory or tax complaints, I expect a positive relationship between *Contract Dispute* and USG interventions. The third is *Real Estate Dispute*, a dummy variable with the value of 1 if the dispute concerns an individual's private property rather than a firm's complaint regarding the business environment; given that real estate disputes are less salient to the overall business climate, I expect a negative relationship between *Real Estate Dispute* and USG interventions.[45] All three of these dispute-level variables are coded directly from the WikiLeaks data in Jandhyala, Gertz and Poulsen (2016).

In Model 2 I also include *ISDS*, a dummy variable with the value of 1 if the US has a ratified BIT or FTA including ISDS with the host state.[46] If the depoliticization thesis advanced by the advocates of the investment regime is true, we should expect ISDS to be significantly negatively correlated with USG diplomatic interventions. Conversely, my theory suggests

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[44] For instance, the official State Department manual on providing assistance to Americans involved in investment disputes notes that before the USG will get involved "normally the investor must pursue all available local remedies on its behalf" (US State Dept (2013) 7 FAM 670, p 2). Investors that have already pursued their cases in local courts will have demonstrated their attempt to exhaust local remedies, and thus embassy officials are more likely to take up their cases.

[45] An alternative interpretation of the *Real Estate Dispute* variable is that individuals have less power than firms and are thus less able to compel USG intervention; however, given the lack of evidence that firm size or firm lobbying has any influence on USG intervention, this seems unlikely.

[46] Both the ISDS variable and the lobbying and revenue variables mentioned below are also included in the analysis of Jandhyala, Gertz and Poulsen (2016).

ISDS should have a negligible effect on the likelihood of intervention, as the USG has its own interest in intervening in disputes whether or not investors have access to arbitration.

In Models 3-5 I test whether private pressure influences USG interventions in investment disputes. In Model 3 I include (log of) *Firm Revenue*, from the COMPUSTAT database of firm financial information. In Model 4 I include (log of) *Firm Lobbying,* measured as the three year average of annual federal lobbying expenditure, from the Center for Responsive Politics (2015). Model 5 includes both the revenue and lobbying variables. If investment protection policy is driven by private interests, then we would expect that larger firms and firms which spend more on lobbying would be more likely to receive strong diplomatic support when they face disputes with foreign governments. Conversely if, as I argue, private pressure has little impact in determining USG interventions in investment disputes, we should expect these variables to have negligible impact.

Results are presented in Table 5.3. I find considerable support for the hypothesis that USG interventions are driven by the state's interest in gaining political benefits from commercial diplomacy and advocating for investment climate reforms. The USG is significantly more likely to intervene during US election years, suggesting the executive branch perceives a political interest in assertively defending the interests of American investors abroad. There is weak evidence that USG interventions are more likely in quickly growing host states; though coefficients on *GDP Growth* are positive, as expected, they are only statistically significant in a minority of model specifications. On the other hand, *Investment Climate* does not appear to have any conclusive effect on the likelihood of USG intervention. This may be because there are two opposing dynamics at play: while the USG does want to intervene in countries with poor investment climates in need of reform, it also wants to intervene in countries where the host state has expressed some willingness to attract FDI and some interest

in preserving and improving its reputation amongst foreign investors.[47] Both of these factors may be partially captured in the ICRG measure of *Investment Climate*, confusing interpretation.

Table 5.3: Logistic Regressions of USG Intervention in Investment Disputes

DV: Strong USG Intervention	1	2	3	4	5
Election Year	0.923*	0.920*	1.345+	1.002*	1.301+
	(0.367)	(0.367)	(0.749)	(0.392)	(0.771)
GDP Growth	0.021	0.022	0.167*	0.02	0.169*
	(0.034)	(0.034)	(0.068)	(0.036)	(0.069)
Investment Climate	-0.011	-0.013	-0.158	0.017	-0.157
	(0.078)	(0.078)	(0.159)	(0.081)	(0.159)
Local Court Dispute	0.688*	0.685*	0.516	0.577+	0.51
	(0.327)	(0.327)	(0.578)	(0.344)	(0.578)
Contract Dispute	0.632+	0.630+	0.781	0.483	0.771
	(0.338)	(0.339)	(0.555)	(0.351)	(0.557)
Real Estate Dispute	-0.838+	-0.823+	0	-0.955+	0
	(0.436)	(0.439)	(.)	(0.503)	(.)
ISDS		0.089			
		(0.317)			
Firm Revenue			-0.075		-0.103
			(0.128)		(0.173)
Firm Lobbying				0.013	0.015
				(0.025)	(0.062)
Constant	-0.574	-0.607	0.95	-0.804	1.03
	(0.692)	(0.702)	(1.796)	(0.730)	(1.824)
N	*213*	*213*	*72*	*181*	*72*

Note: Standard errors in parentheses

*+ p<0.1, * p<0.05, ** p<0.0.1*

Notably, the dispute-level variables all perform as expected: the USG is more likely to intervene in disputes which have already been through the local court system and those which involve a breach of contract, and is less likely to intervene in real estate disputes. These results suggest the USG chooses to intervene in those disputes which it considers more egregious and

[47] For example, as shown in the Venezuela case discussed in Chapter Seven, when the investment climate is particularly hostile toward foreign investors and a host state has no interest in building an investor-friendly reputation, the USG has little interest or incentive to even attempt to intervene in disputes, as it already perceives such disputes as lost causes.

more symptomatic of broader problems in the business climate for foreign investors, and more likely to deleteriously affect a country's reputation amongst foreign investors.

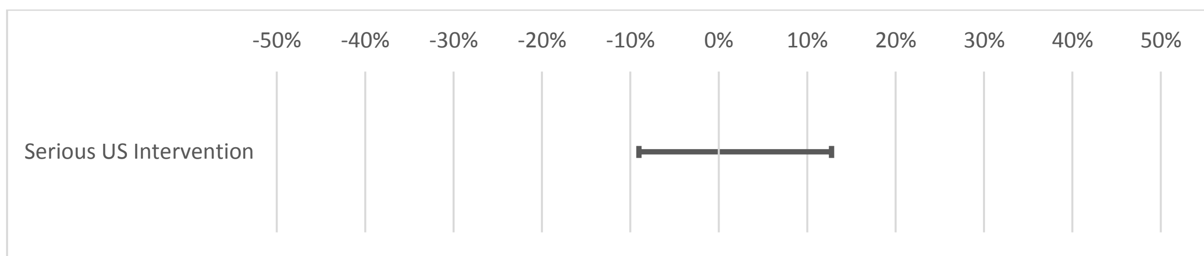
In Model 2, the ISDS variable is insignificant, suggesting that access to investor-state arbitration has no effect on the likelihood of USG intervention in disputes. By itself, however, the fact that the regression coefficient is insignificant is not strong evidence that recourse to investment treaty arbitration has no effect on diplomatic involvement; an absence of evidence is not always evidence of absence. To further probe this issue, I adopt the approach towards null findings advocated by Rainey (2014) to actively demonstrate that the effect of investment treaties on diplomatic involvement is negligible.[48] I do so by plotting the 90 percent confidence interval of the average marginal effect (AME) of access to investment arbitration on predicted diplomatic involvement. By assessing how closely gathered around zero the range of plausible AMEs is, I can more specifically test for evidence of the absence of any substantial effect. Figure 5.1 presents these results. The best estimate of the effect of access to investment treaty arbitration on serious diplomatic involvement is 1.9 percentage points, with a 90 percent confidence interval ranging between -9.0 percentage points and 12.8 percentage points. In other words, using a p threshold of 0.05, I reject the hypothesis that access to investment arbitration decreases the probability of serious US engagement by more than 9 percentage points. While Maurer (2013) suggests the USG should be significantly less likely to intervene diplomatically in investment disputes when BITs are in place, the results presented here are inconsistent with that hypothesis.

Models 3-5 reveal that neither of the firm-level variables are significant predictors of US diplomatic interventions in investment disputes, either individually or together. There is no evidence that larger firms or firms that spend more on lobbying are more likely to receive

[48] A similar approach is adopted in Jandhyala, Gertz and Poulsen (2016).

significant diplomatic support from the US government. Due to the limited sample size of these results – in particular, the analysis including firm size is limited to firms with publicly available corporate data, leaving a dataset of 78 disputes – the findings should be interpreted cautiously. Yet using the best available data, there is no evidence that large and influential firms are better able to twist the arm of the US executive vis-à-vis foreign governments, as Maurer (2013) argues they repeatedly did during the Cold War period. This suggests private pressure may not be an important driver of diplomatic engagement in disputes.

Figure 5.1: Marginal Effect of Access to Investment Treaty Arbitration on Predicted Diplomatic Engagement



NOTE: The figure shows 90 percent confidence intervals for the average marginal effect (AME) of access to investment arbitration on the predicted probability of US diplomatic engagement. See Rainey (2014) and text for further discussion.

To confirm these results, I run a number of robustness tests. First, instead of defining strong USG engagement as intervention at the ministerial level or above (codes 3, 4 and 5 using the coding system above), I adopt a narrower definition of strong engagement as intervention at the head of state or by traveling delegation or above (codes 4 and 5 using the coding system above). I then re-run the same set of models using this narrower definition of strong engagement as the dependent variable. Results are presented in Table B.1 of the Appendix, and are similar to those presented in this chapter. Second, I run a series of ordered logistic

regressions, using the coding scale from above. Results are presented in Table B.2 of the Appendix, and again are similar to those presented in this chapter.

Overall, the regression results support the hypothesis that state interests are a stronger driver of American investment protection policy than private interests. The USG decides when and where to raise disputes at the highest levels in host states based on its own interests. Access to investor-state arbitration does not decrease the use of diplomacy and there is no evidence that larger firms and firms that invest more in lobbying are more likely to receive strong support from the USG.

5.3 Conclusion

The diplomatic cables released by WikiLeaks provide an unprecedented behind-the-scenes look at American investment protection policy. The cables reveal internal USG discussion and analysis of American investment disputes brought to the attention of the State Department. Since the cables were never intended to be made public, they help researchers overcome the preference for secrecy amongst investors, home states and host states in investment protection policy.

The cables reinforce the central finding from the analysis of ambassador vacancies and arbitration cases in the previous chapter: embassies continue to engage diplomatically in many investment disputes. Explicit threats of aid or trade sanctions were relatively rare, and threats of military action – as occurred in previous historical eras – were non-existent. Yet diplomacy remains active, and in approximately half of all cases American officials raised disputes at the ministerial level or above. By placing disputes on the bilateral diplomatic agenda, USG officials demonstrated high-level interest in the cases, and implicitly linked resolution of the disputes to maintaining close relations with the United States. This in turn encouraged host

state officials to devote more time and energy to resolving these particular disputes than they otherwise would.

Regression analysis of the covariates of US diplomatic interventions suggest American investment protection policy is driven more by state interests than private interests. Interventions are more likely in US presidential election years, in disputes which have been through the local court system and in contract disputes, and less likely in real estate disputes. Moreover, whether or not an investor has access to treaty-based investment arbitration makes little difference in the likelihood of USG intervention in disputes. This contradicts the key promise of depoliticization through legalization asserted by proponents of the legal investment regime.

Whereas the previous chapter identified a general relationship between commercial diplomacy and the settlement of investment disputes, this chapter has delved deeper into the substance of American diplomatic interventions in investment disputes. The following two chapters proceed further into the details of American investment protection policy, considering seven cases of investment disputes with varying intensity of US diplomatic support.

CHAPTER 6: CASE STUDIES I: STRONG INTERVENTIONS IN INVESTMENT DISPUTES

Chapters Six and Seven present structured, focused comparisons across seven cases of specific investment disputes. The cases are designed to both elucidate what contemporary commercial diplomatic interventions look like in greater detail and to evaluate two potential drivers of American investment protection policy: state interests and private interests.

I argue that state interests are a more important driver of USG interventions than private interests. Specifically, the USG was likely to intervene when disputes were particularly salient to (a) broader USG concerns over the investment climate in the host state and (b) the USG's interest in demonstrating how commercial diplomacy could help American firms compete in emerging markets. Conversely, the strength of private interests – such as how large a firm was, and how much influence it had in the political system – were of only secondary importance in determining the strength of USG interventions.

Observing and measuring state and private interests is difficult. Yet there are several divergent observable implications of the state interests and private interests hypotheses which make it easier to distinguish between the two. To begin with, if large powerful corporations and those with close ties to the government are able to secure stronger diplomatic interventions than smaller, less well-connected firms, this suggests private pressure is an important cause of USG interventions in disputes. Conversely, if interventions are more likely not in those disputes involving powerful corporations but rather in those which diplomats view as particularly egregious or as warning signs of broader problems in the investment climate, this would be further evidence that state interests are driving American investment protection policy. Furthermore, historically Congress has been a strong supporter of private interests in investment disputes, and has pushed the State Department (and other executive agencies) to intervene more strongly than they otherwise would. Thus if we observe Congress playing a

strong role in determining the strength of USG interventions in disputes, this is evidence that private interests are driving USG interventions. On the other hand, if we observe American diplomats eagerly and willingly intervening in disputes, and treating them not as irritants in bilateral relations but as constructive opportunities to advance other foreign policy objectives, this would suggest state interests are the more important determinant of USG interventions in disputes. Similarly, if the USG intervenes in disputes in order to demonstrate the utility of diplomacy to Congress and the public, this is further evidence that state interests are driving USG interventions.

The case studies are designed to test the relative strength of these two competing explanations of USG investment protection policy. After describing the dispute and the extent of USG intervention, each case then considers how well the private interests and states interests hypotheses explain USG intervention. This chapter addresses four cases of strong US intervention, while the following chapter addresses three cases of weaker US intervention. Table 6.1 provides an overview of the cases discussed in this chapter.

Table 6.1: Evaluating State and Private Interests in Four Cases of Strong USG Interventions in Investment Disputes

Case	***State Interests Supporting Intervention***	***Private Interests Supporting Intervention***	***Intervention Outcome***
Occidental Petroleum (Ecuador)	Very High	Moderate	Severe
Mulitple Disputes (Ukraine)	High	Moderate	Severe
Cora de Comstar (Cote d'Ivoire)	High	Low	Strong
Dabhol Power Plant (India)	Moderate	High	Strong

6.1 Occidental Petroleum in Ecuador

In the mid-2000s an investment dispute between Occidental Petroleum (Oxy) and Ecuador emerged as a key issue in the US-Ecuador bilateral relationship, and ultimately led the US to abandon FTA negotiations with the country. Both the populist resource nationalism evident in Ecuador's decision to cancel Oxy's contract and the USG's aggressive diplomatic response are reminiscent of the mid-20th century, before the creation of the current investment regime. Though Oxy's political power partially explains the USG's strong intervention, the state's interest in promoting a liberal investment climate during a tumultuous period in Ecuadoran politics appears to have been the stronger driver.

Oxy is the fourth-largest US oil company, with operations in the US, Middle East and Latin America (Occidental Petroleum 2015). The company entered the Ecuador market in the mid-1980s, under a partnership with Petroecuador, the country's national oil company (Cheng and Bento 2012). In 1999 Oxy extended its operations in Ecuador, signing a concession contract with the government to explore and exploit oil in Block 15 of the Amazonian region. The contract made Ecuador the largest foreign investor in the country's oil sector, and would ultimately lead to a billion dollar dispute.

The year after signing the contract, Oxy 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 (04QUITO2327). 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.

Facing this threat from the Ecuadoran government, Occidental turned to the US embassy for assistance. Oxy came to the embassy for support on 23 August; by the end of the day on 24 August, Ambassador Kristie Kenney had already raised the issue in separate discussions with Ecuador's President, Trade Minister, Minister of Economy, Minister of Government and Minister of Foreign Affairs (04QUITO2327). In these meetings Ambassador Kenney made clear that any declaration of *caducidad* would be treated as an expropriation by the US government, with serious consequences for the US-Ecuador relationship. In a subsequent cable the Ambassador circulated suggested talking points for all US officials (both in DC and Ecuador) who would push the government on the issue, 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 also in the early stages of negotiating a free trade agreement (FTA) with Ecuador. The US hoped to sign an Andean FTA encompassing Colombia, Peru, Ecuador and (acceding at a later date) Bolivia. The push for an Andean FTA came amidst the collapse of negotiations for the proposed Free Trade Area of the Americas (FTAA); after that setback, there was significant pressure within the USG to move forward with the Andean pact. The Bush Administration informed Congress of its intent to negotiate an Andean FTA in November 2003, and the first round of negotiations between the US, Colombia, Peru and Ecuador was launched in May 2004 (USTR 2004).

As negotiations for the FTA progressed, the US government underlined that no deal would be signed until the Oxy dispute was resolved. The State Department continued to push this general argument in multiple high-level meetings over several months, and through a

tumultuous period in Ecuador's domestic politics (05QUITO601, 05QUITO681, 05QUITO798). Seeking to find a solution which could satisfy both US government demands and populist and opposition political pressure, President Gutierrez appointed one of his close confidants as a "commercial disputes czar", tasked with settling the Occidental case and a number of other pending commercial disputes (05QUITO798). Soon after that, however, domestic political pressures in Ecuador came to a boiling point; following a week in which Gutierrez announced he was dissolving the Supreme Court and declared a state of emergency, the Congress voted to remove him from office, to be replaced by the then-Vice President, Alfredo Palacio.

The new Palacio regime broadly followed similar policies as its predecessor, including professing to be interested in a negotiated settlement with Occidental, as the US embassy continued to demand. In September 2005, Ecuador's new Minister of Government told the US ambassador he believed the Occidental dispute would be resolved "in coming days", and expressed hope that FTA negotiations could be wrapped up in the fall (05QUITO2241). At the time Occidental and the government were in secret negotiations which were hidden not only from the public but also from most of Ecuador's politicians, as the public was still demanding Occidental's expulsion from the country. Only Occidental, President Palacio, a special emissary to the President, the head of the state oil company PetroEcuador and the US embassy were aware of the negotiations (05QUITO2578); Ecuador's Minister of Mines was only informed of the talks after he had threatened to resign in the face of public pressure for greater action against Occidental (06QUITO106).

While the executive branch – including the State Department, Commerce Department, United States Trade Representative and National Security Council – delivered this message in private to the Ecuador government, public debates in the US Congress also highlighted American demands to resolve outstanding disputes. In October 2004, the House of

Representatives held a congressional hearing on the subject "United States Trade Disputes in Peru and Ecuador" (US Congress 2004). In his opening statement, Congressman Cass Ballenger, chairman of the subcommittee on the Western Hemisphere, noted this was a rare area of cross-party agreement, and stated "In my considered opinion, Peru and Ecuador need to know that we are prepared to hold off on further free trade negotiations until they can resolve these investment disputes and assure that American companies are treated in a fair and equitable manner (US Congress 2004, p2). During the same hearing, Earl Anthony Wayne, the lead business and economic affairs official for the State Department, said the US government has "been trying very hard to use the leverage and the promise of a free trade negotiation to bring solutions to these problems" (US Congress 2004, p15).

Oxy and Ecuador were very close to reaching a deal in early January 2006, but it fell apart at the last minute on differing economic projections (06QUITO106). Protests by indigenous Ecuadorans against the looming FTA and Occidental continued to mount; in mid-March, with protestors marching in the streets, President Palacio was compelled to make an emergency national television and radio address to the people, rejecting demands to kick out Occidental and accusing protestors of seeking to destabilize the country (06QUITO673). Despite popular resistance, the Ecuadoran government continued to tell the Americans they were committed to securing the FTA, and believed the very few remaining issues in the negotiations could easily be resolved (06QUITO673, 06QUITO977).

On May 15, 2006, however, the Ecuadoran government finally bowed to domestic political pressure and announced it was voiding Occidental's contract and claiming its assets without any compensation. The very next day the United States announced it was suspending FTA negotiations, publicly citing the Occidental dispute as the reason (06QUITO1274, Miller 2006). In a private meeting with Ecuador's Foreign Minister, the State Department's Principal Deputy Assistant Secretary for Western Hemisphere Affairs, Charles Shapiro, stated "that the

USG would not ‘freeze’ broader relations with Ecuador over the [Occidental] decision, but that negotiations on an FTA were unlikely to resume” (06QUITO1274). The United States to this date has not had any official FTA talks with Ecuador since the Occidental dispute.

Occidental filed an international arbitration case at ICSID almost immediately after the 15 May 2006 ruling. American officials pressed Ecuador to participate in the arbitration process and respect its outcomes (06QUITO1547, 06QUITO1924, 05QUITO1629). In 2012, in a split decision the arbitration panel ruled in favor of Occidental, awarding the company $1.8 billion, at the time the largest award in ICSID’s history. Ecuador filed for an annulment of the award; in 2015 the annulment panel reduced the award to $1 billion.

6.1.1 Private Interests in the Occidental Dispute

Can private interests explain the USG’s strong response in the Oxy dispute? After all, Oxy was a substantial company; it had assets of $21 billion in 2004 (the year the dispute began), and employed some 8,000 people. The company was also actively engaged in trying to influence government policy, spending $2 million per year lobbying the federal government in both 2004 and 2005, rising to $9.1 million in 2006 (Center for Responsive Politics 2015). Furthermore, there is some evidence that Occidental has had success in influencing American foreign policy in the Andes. Between 2002 and 2005, the USG provided nearly $100 million in military assistance to Colombia to protect an oil pipeline operated by Occidental in the northeast of the country (GAO 2005). At least some analysts believed Occidental played an important role in lobbying for and creating support for the program, in both the US and Colombia (WOLA 2003; Stratfor 2002; Forero 2002).

Yet, while Occidental was a relatively powerful actor, there is little evidence it was able to successfully deploy this power to compel the USG to engage in its dispute with Ecuador. To

begin with, as early as September 2004 Oxy informed the US embassy that if Ecuador went forward with voiding its contract the company intended to file for arbitration under the US-Ecuador BIT (04QUITO2462), as it eventually did. Thus if the USG's sole interest was in ensuring Oxy received payment, there was little reason for it to aggressively intervene in the dispute. Oxy's access to investor-state arbitration ensured it would be able to have its case heard by independent arbitrators, and the USG was aware Oxy intended to make use of this right. (Arbitration was not necessarily the most attractive option for Oxy; even after the company won the dispute, it is only just now, in 2016, reaching agreement with Ecuador to receive payment (Reuters 2016). But it was still an option which provided a credible route for Occidental to receive compensation.) The USG still decided to abandon FTA talks with Ecuador due to the Oxy dispute, however, even though Occidental had the ability to pursue compensation on its own.

A second data point seemingly supporting the private interest driver in the Oxy case is that the company received significantly more assistance from the USG than another, much smaller American oil company that also had a dispute with the Ecuadoran government around the same time. City Oriente is a small, family-owned company that had also invested in Ecuador's oil sector, and also had a contract dispute with the government. Though both embassy officials and US Congress Members did raise City Oriente's case with Ecuadoran officials, the dispute did not take on nearly the same prominence in the US-Ecuador relationship as that of Oxy. Was this because City Oriente, as a smaller and less powerful firm, was less able to compel USG support? While Oxy's size and power may partially explain why the USG defended it so aggressively, it's important to remember that it was the Ecuadoran government (and particularly the Ecuadoran opposition and indigenous parties) that chose to make the Oxy dispute a symbolic focal point in the fight over liberal and leftist economic policies. Occidental was the largest and most visible foreign investor in Ecuador's oil sector,

and thus it was a lightning rod in debates over resource nationalism. The USG intervened more aggressively in the Oxy case than in the City Oriente case because Ecuadorans chose to make Oxy a focal point, rather than because the USG did.

Finally, it is worth briefly addressing the role of Congress in the Oxy dispute. As discussed earlier, engaging Congress is one way private firms can exert pressure over US foreign policy, and thus Congress' substantial engagement in the Oxy dispute may suggest private pressure was an important driver. However, the strong stance taken by the USG in the dispute predates any Congressional involvement. The talking points circulated by Ambassador Kenney immediately after the dispute emerged already included the threat of withdrawing the FTA, before Congress had any say in the issue (04QUITO2462). Thus, though Congress was strongly involved in this dispute – much more so than in most – the independent effect of Congressional pressure was limited; there is no evidence Congressional attention to the case led the State Department to act any differently than it otherwise would have.

6.1.2 State Interests in the Occidental Dispute

The United States government had significant reasons for intervening in the Oxy dispute, and for linking its resolution to the ongoing trade agreement negotiations. Most importantly, given recent political turmoil both within Ecuador and in other Latin American countries, promoting investment climate reforms and probing the Ecuadoran government's commitment to liberal economic policies was a priority for the US embassy in Quito. Would the government respect the rights of foreign investors and contract sanctity, even in the face of strong domestic pressure? With so many new ministers entering and leaving government, which individuals were supportive of liberal economic policies, and which leaned further to the left? Could the enticement of a FTA sway Ecuador toward embracing more liberal economic policies? Interventions in the Oxy dispute helped the USG address all of these questions.

As described above, Ecuador experienced significant political upheaval during the early and mid-2000s. One of the most important political cleavages in the country was between those supporting populist, leftist economic policies – including resource nationalism, sovereign debt defaults and renouncing the IMF – and more conservative interests who favoured liberal, orthodox economic policies. Lucio Gutierrez, who was President when the Oxy dispute first emerged, had been elected in 2003 under a populist platform and with support from left-leaning indigenous communities; once in power, however, he quickly moved away from his populist rhetoric and implemented market-friendly reforms (Ribando 2005). Gutierrez was then pushed out of office under pressure from the left, replaced by Alfredo Palacio, who similarly walked a fine line between leftist rhetoric and pro-Western economic policies. Between 2005 and 2006 alone, there were seven different Finance Ministers in Ecuador, with varying liberal and leftist leanings.[49]

The Oxy dispute emerged as something of a litmus test in this political divide. There was strong pressure from the left and indigenous groups to cancel the contract, while right-leaning politicians and interest groups warned such a move would damage the country's reputation (Lettieri 2006). Rafael Correa (who would later go on to be a leftist President of the country), was forced out of his position as Finance Minister after just 3.5 months, partially because he was seen as favouring cancelling Oxy's contract (Weitzman 2005).

In this context the USG's interest was two-fold. First, the embassy wanted to keep track of the various players entering and exiting government, and to know where they stood on the populist/conservative divide. As the example of Gutierrez highlighted, many politicians faced incentives to publicly adopt populist positions while ultimately sticking with conservative orthodoxy; others, such as Correa, were more committed to following through on their leftist

[49] The ministers were Mauricio Yepez, Rafael Correa, Magdalena Barreiro, Diego Borja, Armando Rodas, José Serrano and Ricardo Patiño.

rhetoric. The embassy needed a look behind the scenes at actual policymaking to understand which players were the more committed populists and which were more pragmatic politicians the USG could work with.[50] Second, and relatedly, in this populist/conservative divide the USG clearly had an interest in seeing the former triumph, though overt evidence of interfering in Ecuador's domestic politics could backfire.[51]

Diplomatic interventions in the Oxy dispute helped serve both of these interests, as diplomatic cables from the time make clear. In meetings with both Ecuadoran ministers and Oxy management, embassy officials sought updates on who was involved in the dispute and what their allegiances were. For example, one cable from late 2004 notes "Minister of Economy Yepez and Minister of Government Baca have told the Ambassador that [Solicitor General Jose Maria] Borja is a reasonable person who will approve a settlement reached by Oxy and the Minister of Energy, who is the person charged with finally deciding the fate of the accusations against Oxy" (04QUITO2613). Similarly, in September 2005 the American ambassador met with Oswaldo Molestina, Ecuador's new Minister of Government, the highest position in the country's cabinet. A cable recounting the meeting notes that, after the ambassador raised the Oxy dispute, the Minister "expressed hope that the Occidental case would be resolved 'in coming days'" (05QUITO2241). The cable then goes on to note that "To us, Molestina's appointment as first among ministers is encouraging on a number of fronts. He represents a distinct improvement over his predecessor, whose attitude toward Congress prevented dialogue and whose bias against USG interests was well known" (05QUITO2241).

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[50] An early 2008 cable is devoted entirely to comparing rhetoric to reality during Correa's first year in office, as the USG was still trying to determine what kind of leader Correa would be. See 08QUITO129.

[51] For example, a 2007 cable notes "Post considers that the USG cannot be out in front of the resource nationalism issue in Ecuador since we believe that doing so would back-fire, increasing nationalist sentiments and complicating the efforts of U.S. companies to secure negotiated settlements. However, we have and will continue to work the issue quietly behind the scenes, following the lead of affected companies" (07QUITO2513).

Molestina's interest in resolving the Oxy dispute is evidence that he will be a player with whom the USG can work, and who will help the USG achieve its goals in Ecuador.

The American decision to link the dispute to the FTA must also be understood in the context of the broader divide between populists and liberals in Ecuador. To be sure, threatening to withdraw the FTA because of the dispute was a warning designed to compel action on Ecuador's part. One State Department cable notes that President Gutierrez "told the Ambassador that he would be damned by the people if he settled with Oxy and damned by the USG if he did not. Still, he said that securing an FTA is a top priority" (05QUITO601). And Ecuadoran officials frequently complained about the USG decision to link the Oxy dispute and the FTA, both privately (06QUITO321) and publicly (Marketwatch 2006). The USG clearly believed that holding out the promise of a potential FTA could induce Ecuador to settle the dispute, even in the face of political pressure to cancel Oxy's contract.

Ultimately, this strategy was unsuccessful, and Ecuador cancelled the contract anyways; when it did so, the USG followed through on its threat and immediately suspended FTA talks. This latter move by the US is something of a puzzle. After all, if the USG had an interest in an FTA with Ecuador before Oxy's contract was cancelled, what had changed? It's possible the US felt the need to carry through with its threat in order to preserve its credibility when making similar threats in the future, either with Ecuador or with other countries that observed the Oxy dispute and its fallout. Yet this seems unlikely for two reasons. First, as discussed in Chapter 5, such explicit issue linkage was relatively rare in American investment protection policy. Given this rarity, there would be limited benefit to the US of preserving its ability to credibly make such threats. Second, in other instances the USG has made explicit threats related to investment disputes and then backed off even when the host state didn't comply, for example in the Ukraine case discussed below. Thus carrying through with the threat of suspending FTA talks appears to be out of line with previous experiences.

Instead of cancelling the FTA to preserve its credibility, the USG called off the FTA because the Oxy dispute led the US to recalculate whether an FTA with Ecuador was actually in America's interest or not. Again, the Oxy dispute was symbolic of broader divides concerning Ecuador's economic policy. When Ecuador cancelled Oxy's contract, it signalled to the USG that the more populist, leftist elements in the country had significant influence over the government. This was not the type of government the US wanted to partner with in an FTA. In comments explaining why the US had cancelled the FTA after the Oxy fallout, a USTR spokeswoman noted, "For a country to attract investment, and certainly to be a prospective FTA partner of the United States, it must obey the rule of law with respect to foreign investors… Free trade agreements are based on fundamental principles that both parties will respect the rule of law" (quoted in Associated Press 2006). The USG didn't cancel the FTA just to follow through with its threat and preserve its credibility, but rather because the Ecuadoran government's actions in the dispute revealed to the USG that an FTA with Ecuador was not in America's interest.

Overall, while Oxy's size and political power may have played some role in the USG intervention on its behalf, state interests appear to have been more important. Once the Oxy dispute had become emblematic of the broader political divide between Ecuador's liberals and leftists, the USG approached the dispute as part of its broader interest in supporting liberal economic policies in the country, leading to a strong diplomatic intervention.

6.2 Multiple Disputes in Ukraine

In the mid-1990s, many American investors entered the rapidly transforming Ukrainian market. A number of these investors accused the Ukrainian government of interfering with their businesses, and alleged that widespread corruption in the country made it impossible for

foreigners to do business. These disputes became a contentious issue in the US-Ukraine bilateral relationship. Resolving investment disputes occupied a substantial share of American diplomats' time and effort in the country, partially because Congress had dictated that further foreign assistance to Ukraine was conditional on progress in a number of specific cases. Ultimately, despite the extensive effort by American diplomats, there was at best modest success in resolving the disputes. Though the US didn't follow through on the most extreme threats to cut half of all aid, Ukraine's inability to improve its investment climate did contribute to a decrease in foreign assistance to the country.

Several American investors had disputes with the Ukrainian government during the early years of its transition to capitalism. Individually most disputes were relatively small, and perhaps could have been dismissed as poor investment decisions or petty corruption by a few bad-apple bureaucrats. Collectively, however, the disputes painted a picture of an illiberal investment climate plagued by rampant corruption, where government officials could interfere in private businesses with impunity. One American-owned radio station reported that the government systematically denied its request for licenses in order to benefit a rival station with ties to government officials (Bonner 1997). Another US company with a contract to sell brass and copper from decommissioned munitions from the Ukrainian army argued the Ministry of Defense defaulted on its contract by failing to deliver munitions (OPIC 1999). The American owner of a hotel alleged that a local partner had illegally forced her out of the investment, and that local courts refused to hear her case (Lardner Jr 1997). American owners of a petrochemical company had a similar complaint about being pushed out by joint venture partners (Warner 2000).

These investment disputes played a central role in US-Ukrainian diplomacy. In the mid-1990s the US embassy in Kiev frequently discussed specific cases with high-ranking Ukrainian

officials.[52] Moreover, in 1996 the US and Ukraine formed a high level binational commission chaired by American Vice President Al Gore and Ukrainian President Leonid Kuchma. Amongst other work on security cooperation, one of the Gore-Kuchma commission's key mandates was working to resolve particular investment disputes, improve the overall investment climate and tackle corruption (Lyle 1997).

While the State Department was already working on resolving these cases, interventions from Congress significantly increased the time and effort American diplomats devoted to investment disputes. A large and well-organized Ukrainian-American community helped ensure a strong pro-Ukraine caucus in Congress, which earmarked $225 million for Ukraine during the foreign assistance appropriations process for each of 1995, 1996 and 1997 (Tarnoff 2002). This figure made Ukraine the third-largest recipient of US aid – after just Israel and Egypt – and was significantly more than the Clinton Administration, which would have preferred to allocate a larger share of FSU aid to Russia, requested for the country (Tarnoff 2002).

During debate over the 1998 appropriations bill, however, Congressional goodwill toward Ukraine began to sour. On the same day the House Foreign Operations Subcommittee met to discuss appropriations, the *New York Times* ran a lengthy article detailing the problems US investors were having in Ukraine, which argued that "Despite hundreds of millions of dollars of American aid," Ukraine remained plagued by "rampant official corruption, which … is remarkable even by standards of the region" (Bonner 1997). In a subsequent appropriations hearing multiple American investors with problems in Ukraine testified to the committee, and Representative Sonny Callahan (R-AK) stated that "Ukraine is not going to get a nickel if the perception of corruption is not resolved" (quoted in Sawkiw Jr 1997). The final appropriations

[52] Interview with former State Department official, Washington, DC, December 2015.

bill for 1998 continued to earmark $225 for Ukraine, as previous years had, but with an important caveat: the Secretary of State needed to verify that Ukraine was making substantial progress toward resolving a dozen specific investment disputes by the end of April 1998, or else half of the money promised to Ukraine for that year would be cancelled.

Leading up to the April deadline, there was considerable debate over whether the US would – and should – verify Ukraine's progress and release the aid (Foley 1998). The issue dominated discussions over US aid to Ukraine; Ambassador Richard Morningtar, the Special Representative for assistance to all FSU countries, told Congress that he spent "half of [his] time literally in the last year dealing with [investment disputes] with the Government of Ukraine" (United States Congress 1998). Ultimately Secretary of State Madeline Albright approved the aid, against the wishes of the American Chamber of Commerce in Ukraine, citing the resolution of six of the twelve disputes (Carlsen and Korshak 1998). That spring, as Congress debated foreign appropriations for 1999, complaints about slow progress on investment climate reforms in Ukraine once again featured prominently (Sarkiw Jr 1998). Congress decreased the earmark for Ukraine to $195 million, after three consecutive years of $225 million, and once again inserted a provision that half would be withheld without progress on a list of nine outstanding investment disputes. Then-US ambassador to Ukraine Steven Pifer later publicly stated that disappointment with slow progress on the investment climate was one of the reasons aid was reduced by $30 million (quoted in Polityuk 1999). Secretary Albright again approved disbursing the second half of aid in February 1999 despite at best mixed progress, after Ukraine resolved four of nine disputes (Polityuk 1999). The following year Congress decided not to enter a hard earmark for aid to Ukraine, allowing the administration to shift funding from Ukraine to Russia, as it had wanted to for years; a high-ranking US official suggested that "frustration over business disputes" was an important reason Congress failed to

earmark funds for Ukraine in the 2000 appropriation process.[53] Writing in 2000, another journalist noted that "Dissatisfied with how few disputes have been resolved, the U.S. Congress has been gradually reducing Ukraine's allotment of U.S. aid for the last three years" (Warner 2000).

Some of the original disputes from the 1998 appropriations list lingered on the US-Ukrainian bilateral agenda for decades. OPIC insurance was unavailable in Ukraine until 2008, because Ukraine refused to compensate OPIC for a claim paid out to Alliant Kiev. R&J Trading continued (unsuccessfully) petitioning USTR to refuse trade benefits to Ukraine due to its dispute at least until 2006 (USTR 2006); in 2008 the US embassy in Kiev issued a statement expressing concern when R&J Trading's former assets were allegedly being offered for sale (US Embassy Kyiv 2008). Other US investors eventually decided to pursue investor-state arbitration under the US-Ukraine BIT, some successfully (Gala Radio) others not (Generation Ukraine).

Given that the US ultimately did not follow through on threats to withhold half of all aid to Ukraine, some researchers have characterized American diplomatic efforts in Ukraine during this period as "weak" (Wellhausen 2014). Yet, though American diplomatic efforts had at best mixed results, it is still clear that the United States government devoted inordinate time and effort to the resolution of these disputes. Moreover, some of those investors whose disputes were resolved cited the crucial work of American diplomats in helping them reach settlements (Carlsen and Korshak 1998). Thus while not as aggressive as threatened, American diplomatic engagement in the Ukrainian disputes was still significant, and had at least some positive results.

[53] Interview with former State Department official, Washington, DC, December 2015.

6.2.1 Private Interests in Ukrainian Disputes

How well do private interests explain US intervention in these disputes? To be sure, Congress played an important role in driving American investment policy in Ukraine. The decision by Congress to withhold half of the budgeted assistance for the country unless sufficient progress was made in a defined list of investment disputes compelled State Department officials to spend significantly more time on these disputes than they otherwise would have.[54] As was the case historically, Congressional interest at least partially reflected private pressure – Congress members invited individual investors to testify about their ordeals with Ukrainian corruption, and promised they would fight for their rights. As one State Department official later stated, "a couple of [the claimant companies] knew how to work Congress well."[55] In almost all of the disputes, the investors involved were not large, powerful corporations, but rather small, family-owned companies.[56] While such companies may have less influence over the executive branch, they make for sympathetic claimants in front of a Congressional panel.

Yet pressure from Congress cannot completely explain American interventions in Ukrainian investment disputes. After all, the embassy was intervening in disputes before Congress tied the issue to foreign aid disbursements (OPIC 1999). Expressing its displeasure with the initial restrictions on foreign aid in the 1998 appropriations bill, the Clinton administration argued it was already "repeatedly rais[ing] these issues with senior Ukrainian government officials," and would continue to do so (Clinton 1997).

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[54] Interview with former State Department official, Washington DC, December 2015.
[55] Interview with former State Department official, Washington DC, December 2015.
[56] Cargill was the only large firm included in the list of disputes to be resolved in order to release foreign aid. Motorola had also publicly announced it would not enter the Ukrainian market because it did not trust the government.

Thus while private interests – operating through their allies in Congress – do partially explain the extensive American engagement in Ukrainian disputes, it is clear the US government would have intervened even absent Congressional interest (if less aggressively). To understand why the US government would intervene in disputes even without Congressional interest, it is necessary to consider how state interests also encouraged intervention.

6.2.2 State Interests in Ukrainian Disputes

The Clinton administration was very clear that it would have preferred Congress not tie its hands in appropriations legislation (Clinton 1997; US Congress 1998). Yet this does not mean that it did not want to engage in investment disputes at all, just that it preferred flexibility in delivering aid to a key strategic partner. The State Department would not have devoted nearly as much time to resolving investment disputes had Congress not imposed restrictions on foreign assistance to the country, yet it also had its own reasons to support investment climate reforms in Ukraine, including through intervening in investment disputes.

Building liberal institutions and strengthening economic ties with the West was an important component of American foreign policy in former Soviet countries. Almost immediately after the fall of the Soviet Union the United States signed a flurry of investment treaties with these countries – the US had signed 14 BITs with former Soviet countries by the end of 1994, including one with Ukraine.[57] State Department officials believed that increasing economic interdependence with Eastern European countries would contribute to peace and stability in the region.[58]

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[57] The BIT with Ukraine entered into force in 1996. Note that some of the 14 signed investment treaties would never be ratified, including that with Russia.
[58] See, for example, Madeleine Albright's testimony at her Senate confirmation hearing (US Congress 1997).

The State Department believed Ukraine's poor investment climate was an important reason why American investment in Ukraine lagged behind that in other Eastern European countries, and that these diminished economic ties had costs both for American grand strategy and for American firms that were missing out on business deals.[59] Thus improving the investment climate – and particularly reducing corruption – was a priority for the State Department in Ukraine. Resolving particular disputes could contribute to reforming the perception of Ukraine amongst would-be American investors; State Department officials believed high profile US press coverage of disputes in Ukraine was shaping American investor perceptions.[60] Resolving these disputes – if for no other reason than to get them out of the American media – could help reframe American perceptions of Ukraine, and lead to greater US investment.

Ultimately, both private and state interests are necessary for understanding American engagement in Ukrainian investment disputes. Private companies pushed Congress to take up their causes, which in turn compelled the State Department to intervene aggressively in a number of specific disputes. Yet the State Department was also working on resolving investment disputes before Congress got involved, and undoubtedly would have continued working to resolve investment dispute – if less determinedly – even absent Congress' engagement.

[59] See, for example, testimony from Daniel Tarullo, Assistant Secretary of State for Economic and Business Affairs, before Congress debating ratification of the Ukraine BIT (US Congress 1995).
[60] Interview with former State Department official, Washington DC, December 2015.

6.3 Cora de Comstar in Cote d'Ivoire

Cora de Comstar was a mobile telephone company operating in Cote d'Ivoire.[61] In 2000 Western Wireless (a Bellevue, Washington-based telecommunications company) and the Modern Africa Fund (an investment fund backed by US and foreign firms with capital partially guaranteed by OPIC) bought Cora de Comstar from the company's previous owners. After the deal had been completed Alexander Galley, a Belgian-Ivoirian national, disputed the sale and claimed ownership over the company. (Galley had previously reached an agreement to purchase 51 percent of the company from the previous owners, but a Belgian court had nullified the contract and Galley's ownership claim after he failed to meet the terms of the contract.) The battle between Galley and Cora's new owners persisted in various Ivoirian courts for a couple years. It then escalated substantially when Galley, with armed support from the Ivorian police, seized the company's offices and assets on 9 October 2003.

Almost immediately after Galley had taken took over Cora's offices, the USG engaged diplomatically in the dispute. American Assistant Secretary of Commerce William H. Lash, III delivered what he termed a "very harsh demarche" to the Ivorian embassy in Washington, and publicly described the case as "the worst treatment of an investor and the worst example of state-sponsored thuggery I have seen anywhere" (quoted in Kramer 2003).

Over the subsequent four years the Cora case would remain on the US-Cote d'Ivoire bilateral agenda, and on multiple occasions USG officials raised the case with Cote d'Ivoire's President or Prime Minister. As was often the case in American investment protection policy, the Cora dispute was never at the centre of the bilateral relationship; for the most part meetings were not called explicitly to discuss the Cora case, but rather in the course of discussing other important bilateral priorities American diplomats would also raise the Cora case. Thus, for

[61] This account is derived from Kramer (2003), 07ABIDJAN676, TeleGeography (2003) and Greenberg (2003).

example, in 2005, American Undersecretary of State for African Affairs Constance Newman visited Abidjan to encourage Ivorian President Laurent Gbagbo to abide by a South African-mediated peace process (AFP 2005). Yet Newman used this opportunity to also raise the Cora dispute and push for a resolution (AllAfrica.com 2005). Similarly, when Ivorian Prime Minister Banny travelled to Washington in April 2006, the US embassy in Abidjan suggested USG priorities for the trip should include progress on the peace process, clearing arrears owed to the World Bank, fighting corruption in the cocoa and petroleum sectors, and resolving the Cora dispute (06ABIDJAN409).

Of particular interest is how USG officials connected the Cora dispute to Cote d'Ivoire's eligibility for trade benefits under the African Growth and Opportunity Act (AGOA). AGOA provides duty-free, quota-free access to the US market for exporters from eligible African countries, with eligibility based on a range of economic and political qualifications, including removing barriers to US trade and investment.[62] Based on these criteria, it is at the discretion of the executive branch whether to suspend or extend AGOA benefits to additional countries, as provided for in the authorizing legislation. Cote d'Ivoire initially gained eligibility for AGOA benefits in 2002; in 2003, it exported $46 billion under the program (USITC 2016).

In his initial comments on the Cora case Assistant Secretary Lash publicly warned that, though there was an inter-governmental process to determine AGOA eligibility, his view was "that we give [Cote d'Ivoire] a very tight deadline to remedy the situation before we take away their AGOA benefits" (quoted in Kramer 2003). At the time no country had ever had its AGOA benefits revoked; it was a significant diplomatic step to take in an investment dispute. Western

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[62] Officially, the US President is authorized to designate countries as eligible to receive the benefits of AGOA "if they are determined to have established, or are making continual progress toward establishing the following: market-based economies; the rule of law and political pluralism; *elimination of barriers to U.S. trade and investment*; protection of intellectual property; efforts to combat corruption; policies to reduce poverty, increasing availability of health care and educational opportunities; protection of human rights and worker rights; and elimination of certain child labor practices." (Italics added) See AGOA eligibility criteria at http://trade.gov/agoa/eligibility/index.asp.

Wireless and its lobbyists continued to make the case in Washington that Cote d'Ivoire should be suspended from AGOA because of the dispute, arguing the case with both USTR and the State Department.[63] The threat of withdrawing AGOA benefits was designed to spur action by Cote d'Ivoire – after all, settling with Cora would be far less costly than losing AGOA benefits.

Yet, as the country struggled through a civil conflict, no settlement was forthcoming. The USG did ultimately suspend Cote d'Ivoire's AGOA eligibility in 2005. The USG's publicly stated reasons for suspending Cote d'Ivoire's AGOA eligibility focused on political unrest and setbacks in the peace process, as well as secondarily corruption in the cocoa and petroleum sectors and general complaints about the business climate (USTR 2005, USTR 2011, GAO 2015). In private correspondence to Cote d'Ivoire, however, the USG provided more detailed reasons for the suspension, and clarified the benchmarks that would need to be met in order for the country to regain AGOA eligibility (APEX-CI 2015, 07ABIDJAN1018). The section on the business climate included resolving two particular disputes: Cora de Comstar, as well as a long-running business dispute between Exxon-Mobil and the French company Centaures Routiers.

It does not appear to be the case that Cote d'Ivoire was suspended from AGOA *because* of the Cora dispute – suspension did not come until over a year after Lash made his initial threat, and was likely much more driven by developments in the country's civil conflict. Yet once suspension was going to happen anyway, the dispute was added to an explicit list of reforms necessary to regain eligibility. And connecting the Cora case to AGOA eligibility does appear to have affected the dispute's resolution. A small task force led by Cote d'Ivoire's export promotion agency, Association pour la Promotion des Exportations de Cote d'Ivoire (APEX-CI) was formed with the goal of regaining AGOA eligibility. The head of this task force, Guy

[63] Interview with lobbyist, Washington, DC, July 2015.

M'Bengue, was the US embassy's key contact in negotiations to resolve the Cora dispute (06ABIDJAN758, 06ABIDJAN819).

Cora representatives and the negotiating team within the Ivorian government reached a deal in principle in February 2006, which led to a final settlement in May 2007. The government paid the Cora shareholders $6 million, and in exchange all sides agreed to shelve any other litigation related to the case (07ABIDJAN676, APEX-CI 2011). The US embassy in Abidjan noted that it was "pleased to report" the end of the dispute to State Department headquarters, and investors thanked the US government for their help throughout the dispute (07ABIDJAN676). AGOA benefits were not restored until 2011, due to ongoing political violence and contested elections in the country. In a 2011 submission to USTR arguing for the restoration of AGOA benefits, APEX-CI highlighted that both the Cora and Exxon Mobil disputes had been resolved, meeting the terms the USG had set. Indeed, according to APEX-CI as part of the Cora settlement the shareholders had agreed to "abandon their claims of expropriation, and unfavorable petitions on Cote d'Ivoire eligibility status" (APEX-CI 2011).

Overall, USG intervention in the Cora dispute was significant, if slightly less strong than in the cases of Occidental and in Ukraine. In the former two cases investment disputes were independent causes of changes in American policy, cancelling an FTA in Ecuador and lowering aid in Ukraine. In the Cora dispute, on the other hand, it appears unlikely that AGOA benefits would have been cancelled only because of the investment dispute. Once other political factors led the USG to suspend Cote d'Ivoire's AGOA benefits, however, the Cora dispute was added to the list of reforms the country needed to achieve for benefits to be reinstated. Though the threat of suspending benefits over the dispute didn't provoke a settlement – the Ivorian government could perhaps tell that Lash's initial threat was a bluff – the need to resolve the dispute to regain benefits does appear to have been a catalyst for

settlement. Thus in this instance the carrot of regaining AGOA benefits appears to have been more credible than the threat of suspending AGOA in the first place.[64]

6.3.1 Private Interests in the Cora de Comstar Dispute

How important were private interests in determining the intensity of USG engagement in the Cora de Comstar dispute? They appear to have played at best a supporting, not determining, role. To begin with, Cora was a relatively small company engaged in a small dispute. The firm had invested roughly $40 million in the project; they pursued an arbitration claim for $54 million yet ultimately settled for just $6 million.[65] The firm had two primary shareholders: Western Wireless International, a subsidiary of the American telecoms company Western Wireless, and the Modern Africa Fund, a $110 million investment fund which included both corporate investors and OPIC. Western Wireless had assets of $2.5 billion and a domestic workforce of 2,357 employees in 2003, the year the dispute began; it was not a large enough company to have particularly strong influence in American politics (SEC 2004.) The Modern Africa Fund was connected to OPIC, which conceivably could have helped the company gain better access to USG policymakers; in the case of Dabhol, discussed below, OPIC worked closely with the investor and played a crucial role in organizing and catalysing the USG intervention in the dispute. Yet OPIC appears to have been only marginally involved in the

[64] For more on the difference between carrots and sticks – or positive and negative economic sanctions – see Baldwin (1971).

[65] Cora de Comstar publicly announced it was pursuing an arbitration case against Cote d'Ivoire, but it's unclear under what jurisdiction a case could have been pursued. There is no official record that any arbitration case was ever registered, nor is there any evidence that a case actually took place. It seems likely Cora announced it was pursuing arbitration only as a threat to encourage Cote d'Ivoire to settle the dispute, a threat which does not appear to have had any effect.

Cora case, likely because it had only modest money at stake in the dispute[66] and because it was only indirectly involved as an investor in the Modern Africa Fund, rather than directly involved in project financing, as was the case in Dabhol. Moreover, in 2005 – in the middle of the dispute – Western Wireless was sold to Alltel, another American wireless company, and Alltel subsequently sold off Western Wireless' remaining international assets to focus solely on the US market (Bartash 2005; Trilogy International 2015).[67] Thus the primary company with a stake in the Cora dispute effectively disappeared during the course of the USG intervention, leaving just the Modern Africa Fund to pursue compensation. Yet there was little apparent change in the USG's approach before and after Western Wireless was sold; American officials brought up the case with high-ranking Ivorian officials both before and after Western Wireless was sold, and the case remained on the list of AGOA benchmarks to be resolved.

One data point which suggests private interests played some role in the Cora dispute is that the shareholders hired a Washington lobbying firm specifically to compel the USG to intervene in the dispute (The Hill Staff 2006). The lobbyist strategically reached out to multiple agencies of the US government – including USTR, the State Department and the Commerce Department – in an effort to gain support for the company's case.[68] This lobbying push likely played an important role in bringing the dispute to the attention of USG officials who otherwise may not have known of it; in particular, through the official public request for comments on AGOA eligibility, Cora and its lobbying team could bring the dispute to USTR's attention. Yet, while lobbying was informative, there is little evidence that lobbyists placed particular

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[66] According to Kramer (2003), OPIC's exposure in the Cora investment was $16 million, out of a total investment estimated at $40 million (40 percent). If the final $6 million settlement was split based on initial contributions, this suggest OPIC's share of the final payout was $2.4 million. Though again, since OPIC's involvement was indirect via Modern Africa Fund, it is unclear how exactly, if at all, OPIC shared in the $6 million settlement.

[67] It's unclear what value, if any, was placed on Western Wireless's residual claim against the government of Cote d'Ivoire. Some of the former partners in Western Wireless ultimately bought the company's overseas operations in developing countries under the name Trilogy International Partners; this same company is listed as a contact on the press release announcing the settlement of the Cora dispute.

[68] Interview with lobbyist, Washington DC, July 2015.

pressure on USG officials to intervene, as private companies did in the early and mid-20th centuries.

Overall, given that in the Cora dispute there was relatively little money at stake and no large, powerful private companies involved – and particularly given that the principal company changed owners over the course of the dispute, selling off its international assets – private interests cannot explain why the USG was so involved in this dispute. The lobbyists representing the Cora shareholders may have played an important role in bringing the dispute to the attention of relevant bureaucracies and explaining how it tied in to broader American interests, but could not have pressured the bureaucracy into action if there were not important state interests at stake. In other words, if the State Department and other USG bureaucracies had wanted to brush this dispute under the rug and not make a big deal of it in order to pursue broader strategic goals, it could have. Yet the USG still intervened strongly in the dispute, linking it to Cote d'Ivoire's AGOA eligibility.

6.3.2 State Interests in the Cora de Comstar Dispute

State interests played a much more important role in determining the strength of USG diplomatic interventions in the Cora de Comstar dispute. To begin with, once Galley had taken over Cora's offices with the backing of armed police officers, the dispute was linked to broader issues of security and the rule of law. Though Galley and the Cora shareholders had been fighting over the company for two years, there is no evidence of any substantial US diplomatic engagement in the case before the armed takeover. After this takeover, however, for the USG the case became, in Assistant Secretary Lash's words, an "example of state-sponsored thuggery". The Cora dispute wasn't just about welcoming US investors, but also about more general USG priorities including judicial and police reform. A strong intervention from the

USG was needed not only to signal that Cote d'Ivoire needs to protect the property of American investors, but also to send the message that the police and justice system need to be used to enforce public laws, rather than open to purchase from powerful individuals to pursue private objectives. Indeed, reforming and improving the judicial system was another of the AGOA eligibility benchmarks – it was clearly a priority for the USG in the bilateral relationship.

Given the conflict and unrest in Cote d'Ivoire over the course of the 2000s, the United States was unsure of Cote d'Ivoire's overall trajectory, and wanted clear signals that the country was committed to becoming a liberal, peaceful democracy. For the Ivoirian government, resolving the Cora dispute helped demonstrate to the US that even though the country was going through significant political strife, it remained committed to providing a market economy and welcoming foreign investors. For example, an embassy cable from 2007 – after the dispute had been settled – notes that, "despite the political crisis, Cote d'Ivoire has retained its free-market economy ... The government actively promotes Cote d'Ivoire and is eager to receive foreign investment" (07ABIDJAN1018). The cable goes on to approvingly cite the Cora settlement as an example of Cote d'Ivoire's progress on providing a strong business climate. Engaging in investment disputes was a way for the USG to see how the political turmoil in Cote d'Ivoire was affecting the country's investment policies.

Moreover, one of the USG's strongest interests in the dispute was simply observing whether the riven state was able to execute and finalize a Cora settlement. In other words, even if overall the government's willingness to settle disputes wasn't in question, its ability to do so was. Over the course of the 2000s various unity and coalition governments in Cote d'Ivoire sought to bring the two battling factions in the government together, and to give the rebel side a stake in the government in return for abandoning violence (Chirot 2006). The rebel side was in and out of unity governments, sometimes participating in and fighting the government at the same time. Many senior politicians in Cote d'Ivoire were attempting to undermine one another,

hampering the state's ability to execute policy. Embassy cables reveal that the USG observed "mixed signals" on whether the government of Cote d'Ivoire would stick with the initial 2006 Cora settlement; the head of the export promotion agency who was working with the US embassy to close the deal noted that he believed "the Prime Minister's office has been blocking final settlement of the case" (06ABIDJAN758). Thus by intervening in the Cora dispute, the USG gained some insight into the inner workings of the unity Ivorian government during a period of great turmoil and uncertainty. And it helped the USG identify actors in the Ivorian government – such as Guy M'bengue, the head of the export promotion agency – whose interests were broadly aligned with those of the USG, and who were able to deliver results for the USG.

Ultimately, these state interests do a significantly better job than private interests in explaining the USG's strong intervention in the Cora dispute. The American government associated the Cora dispute both with Cote d'Ivoire's overall investment climate and with the country's rule of law and professionalism of the police force. The USG considered resolution of the dispute an important signal of Cote d'Ivoire's economic and political trajectory in the aftermath of the country's civil war.

6.4 Dabhol Power Plant in India

In the early 1990s the American energy company Enron pursued an ambitious investment in India. The Dabhol power plant was to be a 2400 MW plant near Mumbai, and at the time it was the largest ever foreign investment in India. Enron was the project's lead sponsor (with a 65 percent ownership stake), and General Electric, Bechtel and OPIC were also involved. The basic framework for the deal was agreed in 1993; the final financing agreement included $200 million in OPIC insurance for the three main investors, as well as a $160 million OPIC loan

and $32 million in political risk insurance for banks financing the plant (Hanson, O'Sullivan and Anderson 2005).[69] Construction was underway by 1995, and after some initial hiccups the first phase of the plant was operating by 1999. Relations between the plant's owners and the Maharashtra State Electricity Board (MSEB), the local state government power agency, quickly deteriorated, mostly because the terms of the contract had badly overestimated energy demand (Kundra 2008). By late 2000 MSEB was delaying payments to Dabhol's owners, and over the course of 2001 the project effectively collapsed.[70]

The project involved multiple guarantees and counter-guarantees that came into play once payments were delayed. MSEB had promised to buy electricity from Dabhol at a set price, and the state government of Maharashtra guaranteed this contract. India's central government, in turn, guaranteed the state government's guarantee; if Maharashtra refused to pay, the Indian central government would pay the investors, and the central government would then withhold an equivalent sum from its annual appropriations to the state government (funds which are used to cover basic social services). On top of this, of course, was the political risk insurance guarantees purchased from OPIC.

As the payment delays from MSEB mounted over the course of 2001, Enron pursued a multi-pronged strategy. It first sought to get MSEB to pay up, then tried to call on guarantees from both Maharashtra State and the government of India, and finally attempted to get Indian partners to buy out Enron's stake in the project. In pursuing each of these objectives the company relied on US diplomatic support to encourage Indian government officials to settle the dispute. In January 2001, Richard Celeste, the American ambassador to India, raised the issue with the top Maharashtra state government official, and told a group of political and

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[69] Enron had also approached the World Bank for financing, but after studying the project the Bank concluded it was not economically viable, and thus declined to participate.

[70] For the sake of brevity, this article only includes a cursory overview of the events which led to the dispute and the complex legal manoeuvres which followed the dispute. More comprehensive accounts can be found in Van Harten (2011), Bettauer (2009), Kundra (2008) and Hanson, O'Sullivan and Anderson (2005).

business leaders that the Dabhol dispute was hurting India's reputation among foreign investors (Dugger 2001). In April 2001 then-Secretary of State Colin Powell raised the Dabhol dispute with the Indian Foreign Minister (US Department of State 2002). In late June then-Vice President Dick Cheney mentioned the dispute in a meeting with Sonia Gandhi, the leader of India's opposition Congress Party (Milbank and Blustein 2002). By the summer of 2001 the United States' National Security Council – an interagency council run out of the White House – had established a "Dabhol Working Group" to coordinate US diplomatic pressure related to the dispute (Milbank and Blustein 2002). In an interview with the Financial Times that August, Enron CEO Kenneth Lay stated that if Dabhol was expropriated American laws "could prevent the U.S. government from providing any aid or assistance or other things to India going forward;" company spokespeople later qualified the statement, and made clear that Enron had not requested the USG impose sanctions (BBC News 2001). A high ranking State Department official involved in the dispute during this period confirmed it was "a key issue in the bilateral relationship".[71]

In this diplomatic push OPIC played a unique role, as simultaneously an agent of the USG and an actor with money at stake seeking repayment. OPIC appears to be the agency Enron worked most closely with, likely because it was the agency that best understood the complex financing behind the deal, and was most familiar with these kinds of disputes. In an internal email from John Hardy, Enron's Vice President for Global Project Finance, to other Enron senior executives, Hardy writes that he has been meeting frequently with OPIC's President Peter Watson and Vice President Ross Connolly.[72] Hardy notes that "While OPIC

[71] Interview with former State Department official, Washington DC, November 2015.
[72] As part of the investigations into allegations of fraud and corporate malfeasance following Enron's collapse, a large database of internal Enron emails were publicly released, and are now searchable online at http://www.enron-mail.com/. All Enron emails cited in this chapter are available at the website, and also on file with the author. For more on the Enron emails and what they reveal about the firm's political activity, see Drutman and Hopkins (2013).

certainly does not have final say re the message on Dabhol they are clearly the driver within the USG and they have been very aggressive in that regard." In its role as a financer of the project OPIC's interests overlapped with Enron, while in its role as a government agency its interests overlapped with broader USG interests.

By mid-2001 Enron was eager to get out of the project (McMillan 2001). When the company's overtures to get the Indian government to buy out Enron's stake stalled in the fall of 2001, the company planned another significant diplomatic push, centred around the official visit of Indian Prime Minister Vajpayee to Washington in November 2001. Internal Enron emails reveal the firm successfully got talking points regarding Dabhol onto the agenda for a 9 November meeting between President Bush and the Indian PM; however, just before the meeting Dabhol was dropped from the agenda by the Americans (US Congress 2002). While it is unclear precisely why Dabhol was kept off the agenda, the day before the meeting Enron CEO Kenneth Lay had phoned Treasury Secretary John O'Neill, just before the company announced $586 million in previously undisclosed losses (Gullo 2002). Enron was by this point in the midst of its collapse, and within a month the company would declare bankruptcy; it appears likely the White House knew of the company's troubles, and this is why Enron's cause was dropped from the agenda for President Bush's meeting with the PM.

After Enron's collapse the dispute grew even more complicated, and dragged on for several more years; for the sake of brevity it will only briefly be covered here. Enron sought to sell its stake in Dabhol in early 2002, with a rumoured asking price of around $1 billion (Wall Street Journal 2002); ultimately in 2004 GE and Bechtel, who already each owned 10 percent of the project, ended up buying Enron's 65 percent stake for just $22 million (Bloomberg News 2004). OPIC paid out some $110 million in guarantees for the project, and then filed an arbitration claim against the government of India to recoup these payments (OPIC 2005). Meanwhile GE and Bechtel filed arbitration cases against India under both the Mauritius-India

BIT and the Netherlands-India BIT. Finally, by mid-2005, with the Indian government facing multiple arbitration claims, negotiations to reach a final settlement gained steam. In a meeting on 24 June 2005 including US Undersecretary of State William Burns and Indian Foreign Secretary Shyam Saran, American Ambassador to India David Mulford stressed to the Indians "the positive impact an end to the Dabhol dispute would have on US investors, and urged that a target date of early July be set for the completion of negotiations" (05NEWDELHI5047). The following month, an agreement was reached – on confidential terms – which saw full ownership return to Indian government agencies and all pending arbitration cases settled. OPIC appears to have been the crucial broker of the deal (Hanson, O'Sullivan and Anderson 2005).

While the USG was significantly involved in the Dabhol dispute, its support for Enron was not as strong as that provided in the previous cases discussed in this chapter. Both Ecuador and Ukraine faced substantial policy costs following their disputes. In the Dabhol case, though Enron raised the prospect of aid sanctions related to the dispute, the USG never did. Indeed, in private correspondence Treasury and State Department officials confirmed with Enron executives that sanctions were unlikely.[73] Still, the dispute did rise to the highest level of the USG, and American officials brought the case up multiple times with their Indian counterparts, and kept the issue on the bilateral agenda over several years. Support for Enron came from a wide range of USG agencies, including the State Department, OPIC, Treasury Department, National Security Council and the Vice President's office. By repeatedly raising the Dabhol dispute with India's government, USG officials made clear that bilateral relations would be improved if India agreed to settle.

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[73] A 27 August 2001 email from Treasury's Greg Christopulos to colleagues at the Treasury and State Department reveals that Christopulos spoke with Enron's John Hardy immediately after Kenneth Lay had raised the prospect of sanctions in an interview with the Financial Times. Email released under a FOIA request and on file with the author.

6.4.1 Private Interests in the Dabhol Dispute

How well do private interests explain the USG intervention in the Dabhol dispute? They certainly played a role. Enron was a uniquely powerful private company, and was able to use this power to help persuade the USG to come to its defence during the Dabhol dispute in India. Kenneth Lay was a long time donor and friend to George W. Bush. Charles Lewis, then head of the Center for Public Integrity, a non-profit investigative news agency which explores private influence over public institutions, claimed "There was no company in America closer to George W. Bush than Enron" (quoted in Gerstein 2001). Multiple former Enron executives and advisors had prominent positions in the Bush administration, including many who would have been involved in setting foreign economic policy, such as top economic advisor Larry Lindsey and the head of USTR, Robert Zoellick (Gerstein 2001). Enron lobbied extensively on multiple issues that affected its business, both in the US and overseas (Ismail 2003; Drutman and Hopkins 2013). Senior Enron employees discussed media coverage of potential ambassador appointments, identifying how specific individuals likely to be nominated as ambassadors might help Enron advance its interests overseas, due to their connections to the company (Enron email on file with author).

On the Dabhol dispute in particular, there is evidence that Enron enjoyed excellent access to USG officials. On 7 November 2001, as the dispute was at a high point, John Hardy, Enron's Vice President for Global Project Finance, emailed a number of his colleagues under the subject "Dabhol Washington Update" (email on file with author). Hardy noted that "For the last week plus I have provided daily updates to OPIC, to Larson's office at State [Alan Larson, Under Secretary of State for Economic, Business, and Agricultural Affairs], to the South Asia regional group [of the State Department] and to the NSC so they know of any new developments and where we are." The fact that Enron's representatives were providing *daily* updates to so many different offices of the USG highlights the breadth of their access.

Moreover, there is some evidence that Enron was able to help shift American policy by appealing directly to its friends in the White House, even going beyond what the State Department wanted. In the spring of 2001, the USG was preparing a new comprehensive Energy Plan to guide the country's energy policy. The State Department sent a near-final draft of the policy to the White House on 30 March; between the March draft and the final version of the plan issued on 17 May 2001, one new section was added. The new section specifically recommends that "the President direct the Secretaries of State and Energy to work with India's Ministry of Petroleum and Natural Gas to help India maximize its domestic oil and gas production" (quoted in Milbank and Morgan 2002). Congressman Henry Waxman publicly accused Vice President Dick Cheney of altering the draft prepared by the State Department to include this clause to help Enron settle its dispute with the Indian government (Waxman 2002). Subsequent reporting revealed that between when the State Department completed its draft and the White House issued the final policy, Cheney had met with Kenneth Lay, Enron's CEO (Milbank and Morgan 2002). Though the evidence that this change to US energy policy was specifically to support Enron in the Dabhol dispute was only ever circumstantial, there are no other more plausible explanations for the White House's decision to alter the State Department draft to explicitly include a new strategy related to India.

Yet there is also some evidence that Enron executives may have overestimated their leverage over the USG. For example, Enron was keen to have one of its former executives who had joined Bush's economic team, Lawrence Lindsey, take up the case with Indian officials. In the same 7 November 2001 email referenced above John Hardy reported to his colleagues that "It is being considered that Larry Lindsey will discuss Dabhol in greater detail, probably with [India's National Security Adviser Brajesh] Mishra. There was some concern about prior relationship to Enron but I understand from State the lawyers have taken care of the concern." Emails from USG officials on 8 November 2001, however, reveal that Lindsey was "advised

that he could not discuss Dabhol" due to his past connections to the company and possible conflict of interest (quoted in Milbank and Blustein 2002). Thus, though Enron did have excellent access to USG policymakers, it is also clear there were institutional checks in place to limit the company's influence over American policy. Enron may have had less ability to deploy public power for its own purposes than it believed.

Still, overall it does appear private interests played an important role in the Dabhol dispute, and that Enron's unparalleled links to the Bush administration help explain why the USG chose to take a more aggressive stance.

6.4.2 State Interests in the Dabhol Dispute

Do the state interests at stake in the Dabhol dispute predict a strong USG intervention? There are a number of reasons why state interests would predict at best only a moderate intervention. To begin with, the US-India relationship at the time was complicated by India's testing of nuclear weapons in 1998, which led the US to impose economic sanctions on the country, curtailing any economic or military assistance other than humanitarian aid (Hufbauer et al 2009). The sanctions were lifted incrementally over the following three years, and were finally fully lifted in late September 2001, reflecting India's support for the US-led war on terror (Rennack 2001). Thus the Dabhol dispute emerged on the bilateral agenda at the same time as the two countries were dealing with much larger questions in their international relationship, first over economic sanctions and then over ensuring support in the fight against terrorism. In a 26 September 2001 email from Wade Cline, the head of Enron India, to Kenneth Lay, Cline recounts that he recently discussed the Dabhol dispute with Robert Blackwill, the US ambassador to India:

> "The US embassy over here is very much up to speed. I met again with Ambassador Blackwill on Tuesday of this week and gave him a general update on the current status. His view is that it is very difficult in the post-Sept. 11 environment to get anyone in Delhi or Washington to pay attention to economic matters such as Dabhol, but he is trying as best he can" (email on file with author).

The ambassador to India was trying to help Enron in its dispute, but knew it would be difficult given other priorities in the bilateral relationship. The US did not want to antagonize India at a time when it needed the country's security cooperation, and thus state interests in intervening in the dispute were weak.

Moreover, the Indian government's actions in the dispute were not necessarily reflective of the government's broader approach to its investment climate. The primary actor which broke a contract with a foreign investor was the state-level government in Maharashtra, rather than the central government; a state level utility board refusing to pay for electricity was not necessarily a larger indictment of the Indian government's approach to foreign investment. (Though it should be noted that the Indian central government was implicated in the dispute after Enron invoked a federal guarantee of the state payments – see Anthony (2001)). Given that the financing of the deal and the dispute itself were so complex, it was difficult for the dispute to be interpreted as a clear signal on India's treatment of foreign investors, and thus less reason for the state to want to involve itself.

The internal Enron emails reveal company officials were aware the USG might be reluctant to be seen as too aggressively intervening on the company's behalf, rather than simply urging the two sides to negotiate. A May 2001 email notes "I think the USG wants to be on record politically encouraging the Indian Govt. to engage in discussions all parties consider to be meaningful in hopes of working things out before it is too late … The administration may be concerned that without such a diplomatic overture on its part it could be concluded that the USG has politically taken a position on the project." Too aggressive a stance in support of

Enron in the dispute would be detrimental to the broader priority of solidifying the US-India alliance. [74]

On the other hand, the USG did have some reasons for wanting to intervene in the Dabhol dispute. India was one of the countries identified by the Clinton administration as a priority emerging market in the late 1990s (Garten 1997), and the USG had a strategic interest in seeing the country welcome American investors. India has traditionally been relatively closed to foreign investment (Huang and Tang 2012). Dabhol was the first large FDI project in the country, and the USG had an interest in demonstrating both to the Indian government and to other would-be American investors that such projects could be successful. Such considerations likely partially explain the USG's strong support for the project in the early market entry stages of the project (Sanger 1995; US Congress 2002).

Ultimately, however, state interests alone provide an insufficient explanation of the USG's support for Enron in the Dabhol dispute. There were few clear state interests at stake in the dispute; the complexity of the case meant it wasn't obvious the dispute was a broader indictment of India's investment climate; and the Bush administration was in the midst of trying to forge a close alliance with India. As noted, OPIC had clear incentives for engaging in the dispute, and tried to organize other USG agencies to achieve this goal; but the strategic incentives of other USG agencies did not obviously support intervention. It seems unlikely the USG would have intervened as intensively had OPIC not been a financer of the project.

The observed intensity of US engagement in the dispute exceeds what would be predicted by the state interest explanation, suggesting that at least in this case private interests were important. Enron's unparalleled links to the Bush administration help explain why the USG chose to take a more aggressive stance. It is notable that the White House – in the form

[74] In a 2005 interview, the US ambassador to India stated "No bilateral relationship in George W. Bush's first term improved as much as that between the United States and India" (Blackwill 2005).

of both the NSC and the Office of the Vice President – had an outsized role in shaping policy, relative to Congress or the State Department, as Enron's links were particularly strong with both the Vice President and President. It was clearly unusual for the NSC to play such a strong role in resolving a dispute, as former USG officials noted at the time.[75] While the USG bureaucracies typically responsible for driving USG investment protection policy – most importantly the State Department – did not have significant reasons to intervene in the Dabhol dispute, Enron's influence with the White House appears to have helped it gain greater support than it otherwise would have.

6.5 Conclusion

In the Ecuador, Ukraine, Cote d'Ivoire and India cases discussed in this chapter, the USG intervened substantially in investment disputes of American firms. In Ecuador the USG cancelled an FTA over a dispute, while in Ukraine the USG threatened to halve aid to the country, even though it did not fully follow through on such threats. Meanwhile in Cote d'Ivoire, while the dispute did not directly lead to the host state losing its AGOA trade benefits, the resumption of AGOA eligibility was made conditional on the dispute's resolution. This appears to have played an important role in the ultimate resolution: the head of the Ivoirian agency with responsibility for regaining AGOA benefits was the individual who pushed through a resolution to the dispute. In India there was no direct threats from the USG to the

[75] In a Washington Post article, Susan Schwab, a former Commerce Department official who would go on to be head of USTR, noted she was surprised in the Dabhol case it was "not the State Department or Commerce Department but the NSC leading the working group" (Milbank and Sipress 2002). In the same article Daniel Tarullo, who worked on international economic issues in Bill Clinton's National Economic Council, agreed that "the norm would have been NSC participation in a discussion rather than NSC chairing it" in these kinds of commercial diplomatic interventions.

host state, but the dispute played an important role in the bilateral relationship, with multiple American officials pressing their Indian counterparts for a resolution over several years.

The systematic analysis of private and state interests in driving USG interventions reveals that the state interests hypothesis provides a better explanation of American investment protection policy. The intervention in the Oxy dispute was particularly strong because the dispute was widely viewed as embodying Ecuador's broader political debate between liberal and populist economic policy. In Ukraine, while Congressional pressure led the State Department to intervene more strongly than it would have preferred, the USG was intent on resolving disputes because it believed doing so would help attract greater American FDI to the country. In the Cote d'Ivoire dispute, the investor was not powerful enough to plausibly compel a strong intervention; rather, the USG was substantially engaged because the dispute reflected not only on Cote d'Ivoire's investment climate but also police and judicial reforms, which were American priorities in the post-conflict country. Finally, the Indian dispute is something of an outlier, as private pressure did play an important role in compelling USG intervention. But it should be noted that Enron was a uniquely powerful and well connected firm; we should thus be very cautious about generalizing from Enron's experience to other firms with investment disputes.

Overall, the cases reveal that when disputes were particularly salient to state interests, the USG intervened strongly, even for small investors with little power. And, as the following chapter will demonstrate, if state interests did not encourage intervention, the USG provided only minimal support, even in disputes involving powerful and influential firms.

CHAPTER 7: CASE STUDIES II: WEAK INTERVENTIONS IN DISPUTES

This chapter considers three cases where the US provided much more modest support to American firms engaged in investment disputes with foreign governments. In each case, the strength of private interests supporting intervention would have predicted a moderate to strong diplomatic intervention in the dispute. Yet state interests in the dispute were substantially weaker. In both Ghana and Liberia, American diplomats did not consider the disputes as typifying broader investment climate concerns, while in Venezuela the US embassy had already given up any hope of working with the host state to implement investment climate reforms. Without strong state interests at stake, the USG had less interest in intervening, and largely left American firms to fend for themselves.

Table 7.1 provides an overview of the three cases discussed in this chapter, which are considered in greater detail below.

Table 7.1: Evaluating State and Private Interests in Three Cases of Weak USG Interventions in Investment Disputes

Case	*State Interests Supporting Intervention*	*Private Interests Supporting Intervention*	*Intervention Outcome*
Kosmos Energy (Ghana)	Moderate	High	Moderate
Firestone (Liberia)	Low	Moderate	Low
Oil Service Companies (Venezuela)	Low	Moderate	Low

7.1 Kosmos Energy in Ghana

Kosmos Energy is a Dallas-based oil company founded in 2003 with private equity financial backing. The company's core focus was discovering new oil fields in difficult places. As one of its founders noted, "The easy oil has been found. The hard oil, the difficult oil, is where the future lies. That is what Kosmos is focused on - finding difficult oil … [O]ur business focus is on those areas which most companies have no interest in (quoted in Inkpen and Moffett 2011, p1). A year after its founding, Kosmos signed a contract with the Ghanaian state oil company, the Ghana National Petroleum Company (GNPC), to explore for off-shore oil. The initial 2004 agreement allowed for exploration and possible development of 483,600 acres off the coast of Ghana, with a further 273,298 acres added in late 2006 (Inkpen and Moffett 2011). While Kosmos was the lead operator, additional partners in the project included the US firm Anadarko Petroleum, the British firms Tullow Oil and Sabre Oil & Gas, as well as the Ghanaian firm EO Group – a small company owned by political allies of John Kufour, who had been President when Kosmos entered Ghana – and GNPC.

In 2007, Kosmos announced that it had made a major discovery, what would come to be known as the Jubilee Field. Preliminary estimates were of 400 to 800 billion barrels of high-quality oil (Inkpen and Moffett 2011); development of the Jubilee field was to be fast-tracked, with first production coming within three and a half years (end of 2010), rather than the eight years common in the industry (Inkpen and Moffett 2011). Kosmos' strategy had always been to discover oil, bring it to the point of production, then sell off the rights; its comparative advantage was in exploration rather than production. In February 2009, the reports emerged in the press that Kosmos was preparing to sell its stake in Jubilee for an estimated price of $3 billion; a Kosmos representative categorically denied its assets were for sale (GhanaWeb 2009). By that summer, however, Kosmos was well into discussions with a number of potential buyers. GNPC was also said to be interested in buying out Kosmos' share to operate the field

itself; Kosmos allegedly twice delayed bidding rounds for its Jubilee stake in order to allow GNPC to submit a bid, but the Ghanian state oil company failed to do so (Inkpen and Moffett 2011). Finally, on October 7, 2009 the Wall Street Journal reported that Kosmos had sold its stake to Exxon-Mobil for an estimated $4 billion (Gold 2009). It was Exxon's largest acquisition in a decade and, in the words of one analyst, confirmed "the relative low risk of investing in the country" (Korosec 2009).

For the deal to go through, however, it needed to be approved by the Ghanaian government. This quickly ran into trouble. Since the summer of 2009, GNPC was displeased with the fact that Kosmos was sharing proprietary data concerning the potential output of the Jubilee field with prospective bidders; though the information was necessary for bidders to make informed bids, GNPC argued that Kosmos did not have the right to share this information, and doing so breached Ghanaian law (Inkpen and Moffett 2011). After the deal with Exxon was announced, Ghana's hounding of Kosmos increased. In November 2009 the Bank of Ghana briefly froze then unfroze Kosmos's assets, without giving any clear indication why (though the move appears to have been related to corruption probes of the Ghanaian partner EO Group) (09ACCRA1226, 09ACCRA1339). In February 2010, press reports announced that Ghana was blocking the deal with Exxon, citing a letter from the Ghanaian Energy Minister to Exxon representatives (Connors 2010). The Energy Minister, however, quickly announced that no final decision had been made, but rather that GNPC and Kosmos would need to resolve their differences before any final deal with Exxon could be signed (Greenspan 2010).

This stand-off persisted for several months, amid rumours that GNPC still wanted to buy Kosmos' stake for itself, perhaps in conjunction with CNOOC, the Chinese state-owned oil company – blocking the Exxon deal could be a way to force down the market value of Kosmos' assets, thereby making them more affordable (Pham 2010). The press and NGOs in both the US and Ghana discussed the ongoing dispute, and Ghana's decision was debated in

the national parliament, with an opposition MP claiming the government was "derailing the confidence of investors in the country" (quoted in Inkpen and Moffett, p9-10). Ultimately, in August 2010 Exxon and Kosmos jointly announced that they were calling off their previous agreement (Gismatullin 2010). Defying speculation that it would sell to either GNPC or CNOOC, Kosmos decided to maintain ownership, and pursue development of the field in partnership with Tullow; Kosmos is still active in the Jubilee field today. Given that Kosmos' entire strategy had been to explore for oil then sell production rights, this appears to be a less than ideal outcome of the dispute for Kosmos.

Throughout the dispute, the US government followed the Kosmos case closely, and discussed the issue in multiple instances with Ghanaian officials. Notably, the US was clearly aware that Ghana might not approve the sale to Exxon as early as the first week of November, when the US ambassador discussed the issue with a Ghanaian adviser to the President (09ACCRA1155) – this was months before such news became public. The ambassador also discussed the case with Ghana's Attorney General in mid-November (09ACCRA1226), while visiting Assistant Secretary of State for Africa Johnnie Carson discussed Kosmos with Ghana's President John Atta Mills in February 2010 (10ACCRA139).

But while the US did engage on the case, it was very careful to refrain from intervening too aggressively of Kosmos' behalf, and took a less active stance than it did in other investment disputes. Early on in the dispute, the State Department and embassy officials in Ghana developed clear talking points on the issue, which essentially stated the dispute should be resolved transparently and following the rule of law. These same remarks were parroted in each meeting discussing the dispute (09ACCRA1155, 09ACCRA1226, 10ACCRA139), and each time Ghana officials assured American diplomats that Ghana was indeed committed to transparency and the rule of law. In a March 2010 statement on the Kosmos dispute, a State Department spokesman noted "We have conveyed to the Ghanaian government that we expect

any U.S. company to be treated fairly, transparently and responsibly in accordance with Ghanaian law. The Ghanaian response has generally been to acknowledge that responsibility and noting its legitimate right to apply Ghanaian law" (quoted in Neubauer 2010).

There was thus broad agreement between US and Ghanaian officials whenever the dispute was discussed. Indeed, long before any dispute emerged between Kosmos and Ghana, in a January 2009 meeting discussing Kosmos' investment, President Mills told the US Ambassador "that his primary objective is that any petroleum agreements and contracts be handled with utmost transparency" (09ACCRA41). The United States never seriously weighed in on Kosmos' side, or criticized any particular action by Ghana. There is no evidence the US strongly intervened after Exxon and Kosmos announced they were calling off their agreed sale.

7.1.1 Private Interests in the Kosmos Dispute

There was significant private pressure for the US government to act in the Kosmos dispute. While Kosmos wasn't a particularly large company, it was one of the most important American investors in Ghana, which gave it excellent access to the US embassy in Accra. Kosmos staff frequently met with embassy officials; when Assistant Secretary Carson visited Accra, he hosted a private roundtable with American oil and gas companies to hear of their complaints with the Ghanaian government (10ACCRA157). The fact that the dispute involved $4 billion in assets created incentives for the US to engage.

Moreover, Kosmos and its backers engaged in a well-funded lobbying effort to compel US action. Kosmos spent $345,000 in 2009 and $890,000 in 2010 to secure the services of three lobbying firms: Covington and Burling (where it was represented by Alan Larson, former State Department Undersecretary for Business and Economic Affairs), KRL International and Ogilvy Government Relations (Center for Responsive Politics 2005). Lobbyist disclosure forms reveal these firms represented Kosmos in discussions with officials from the State

Department, Treasury Department, US Senate, US House, White House, USTR and Commerce Department. Given that Kosmos' only substantial assets at the time were in the Jubilee field in Ghana, it is highly likely lobbyists were pushing for US support in this dispute.

In additional to this private lobbying push, Kosmos and its supporters worked to get several high profile newspapers to cover the dispute. On 18 February 2010 the Wall Street Journal ran an editorial titled "Why Africa is Poor" which was entirely about Ghana's mistreatment of Kosmos (Wall Street Journal 2010a). On 26 February 2010 Forbes Magazine also ran an opinion piece on the Kosmos dispute, arguing that "recent actions taken by the government of Ghana deserve deeper scrutiny from Washington" and that "as a partner with major political, economic and historical ties with the West African country, the U.S. owes it both to itself and its Ghanaian friends to try to use every lever of influence" to ensure Ghana respects the contractual rights of American oil companies (Pham 2010). On 26 March 2010 the Washington Times ran a 2,500-word article detailing Kosmos' dispute (Neubauer 2010). And on 1 May 2010 the Wall Street Journal followed up with a second opinion piece on the Kosmos dispute, which opened by noting "Ghana hasn't been a model citizen when dealing with foreign investors lately" (Wall Street Journal 2010b).

Yet, despite this extensive private pressure on the US to intervene in the dispute, America's support for Kosmos was only lukewarm. The State Department needed to demonstrate to private parties it was doing something related to the dispute, but this consisted solely of very moderate statements regarding transparency and the rule of law. One press report noted that Kosmos was trying "to press their case … onto the agenda of US-Ghana relations," but went on to conclude that "officials in both Washington and Accra insist there is nothing to worry about" (Wallis 2010). The State Department never expressed the opinion – publicly or privately – that Ghana was mistreating an investor. Whereas in Ecuador, Cote d'Ivoire, Ukraine

and India the US had taken a more direct stance, in this instance in Ghana American officials declined to strongly intervene.

7.1.2 State Interests in the Kosmos Dispute

American interests in Ghana help explain the United States' only moderate response in the Kosmos dispute. The United States government had identified Ghana as a strong performer in West Africa, and specifically did not think resource nationalism was an issue in the country. While the United States did have an interest in promoting a liberal investment climate in Ghana, which led it to follow the dispute and express some interest in the case, the US did not see the Kosmos dispute as a harbinger of broader problems in Ghana's investment climate and thus did not adopt a particularly aggressive stance, as it otherwise might have given the strong private pressure.

In a late 2007 cable, a few months after Kosmos had announced its discovery, a cable from the US embassy in Accra reported that "Private, foreign firms dominate the natural resources sector and their participation is generally welcomed with open arms" (07ACCRA2604). The cable went on to cite an unnamed executive from an American oil company that "I have never seen a place that has wanted to do business so much." In August 2009, a Congressional delegation visited Ghana and "pledg[ed] U.S. commitment to partnering with Ghana in its development and to stimulating investment" (09ACCRA832). In December 2009, reporting on Ghana's freezing then un-freezing of Kosmos' bank accounts, the embassy in Accra concluded that "If Ghana continues [interfering with American businesses], we could see … damage to Ghana's reputation as a safe destination for foreign direct investment. *That said, we believe Ghana at base is still a country of rule of law. Elements of the GOG can jawbone expropriation, but they cannot force a Kosmos sale without a legal basis unless Kosmos agrees* (09ACCRA1339, emphasis added). Even though the American press and

Ghanaian opposition officials were strongly criticizing the country's investment climate, the State Department continued to view Ghana as a strong economic performer that respected the rule of law.

Both the US government in general and bureaucrats in the State Department in particular had reasons for maintaining a positive assessment of Ghana's investment climate. In June 2009 President Obama had travelled to Ghana for his first presidential trip to sub-Sarahan Africa, selecting the country because it was an example of democracy and stability on the continent. Moreover, the embassy in Accra had emphasized Ghana's economic potential as a frontier market for American investors. In 2006, the embassy requested funding from State Department headquarters for an additional Economic Officer position, justifying its request because "The Economic Section's (ECON) activities have increased dramatically in response to the growing U.S.-Ghana economic engagement" (06ACCRA357). The State Department couldn't then easily turn around and say Ghana treated investors terribly, as *Wall Street Journal* opinion pieces suggested. Thus while the embassy still followed the Kosmos dispute closely, it was unwilling to directly criticize the Ghanaian government's investment policies. Notably, the official Investment Climate Statements released by the State Department in 2009, 2010 and 2011 – the key years of the dispute – all opened with the sentence "Attracting foreign direct investment continues to be a priority for the Government of Ghana." The statements provide no evidence to suggest the State Department believed "that sanctity of contracts is 'out the window' in Ghana" (10ACCRA157), which is how oil companies depicted the situation to Assistant Secretary Carson in February 2010.

Ultimately, the State Department's confidence in Ghana's commitment to a liberal investment climate helps explain why the embassy gently raised the Kosmos dispute with Ghanaian officials, but also why the US did not take an aggressive stance in the dispute, as private investors wanted it to. American officials told their Ghanaian counterparts the dispute

should be addressed transparently and within the rule of law; when Ghanaian officials agreed, the State Department did not further push the issue.

7.2 Firestone in Liberia

Firestone entered the Liberian market in 1926, and from the beginning had been an important economic and political actor in the country, as well as a crucial go-between in American-Liberian relations. The initial 1926 concession contract granted Firestone a 99-year lease at very favourable terms; moreover Firestone, with the backing of the State Department, insisted that the government of Liberia take out a $5 million loan from Firestone, for the specific purpose of granting Firestone greater control over Liberian politics (Chalk 1967).[76] Today, Firestone's plantation in Liberia is the largest single natural rubber operation in the world, and the company is the largest private employer in the country (Firestone 2016). The company effectively operates its own mini-enclave state, running 26 schools, a large hospital and housing for its employees (Firestone 2016).

Firestone's relationship with the Liberian government has waxed and waned over the decades, and through multiple Liberian coups and revolutions. On 12 April 2005, Firestone signed a new concession agreement with the Liberian transitional government, as the country was emerging from a decade and a half of civil conflict. The 2005 deal essentially extended the favourable terms of the previous agreement, which was little changed from the original

[76] The loan itself remained a contentious issue in Liberian politics. In 1956, the Liberian government erected a statue of then-President William Tubman commemorating the repayment of the loan four years earlier. The plaque on the memorial reads: "This monument erected by the people of Liberia is dedicated to the great relief brought to the Country by the Tubman Administration in the retirement of the '1927' Loan with its humiliating and strangulating effects on the economy of the Nation." Quoted in Chalk (1967), p32.

1926 concession deal; Firestone argued it needed an extension partially because the civil conflict had interrupted operations (Cook 2005). Almost immediately the new concession contract – along with another large deal reached with the Dutch company Mittal Steel – emerged as a controversial issue, both within Liberia and abroad (Cook 2005; Bavier 2005; Law 2006). Critics argued that the transitional government lacked the authority to negotiate such lengthy contracts which would have a lasting impact on the country's economy; moreover, the favourable terms achieved by both Mittal and Firestone in secret negotiations appeared suspicious, particularly given the fact that the transitional government faced a number of allegations of corruption and cronyism (Cook 2005). In its review of Liberia's economic management and performance in May 2005, the IMF warned the country it was cutting too generous deals with foreign investors, threatening much needed revenue streams for the government (IMF 2005, p12).

The transitional government stepped down in 2006 following the election of Ellen Johnson Sirleaf. Sirleaf was a Harvard-educated economist who had previously held senior positions with Citibank and the United Nations Development Programme; given her background, and status as Africa's first democratically elected female leader, she was widely celebrated across the world (eg Anderson 2006; Bergner 2010). Sirleaf and her team of advisers soon declared they would be reviewing the large concession deals signed by the transitional government; by January 2007, Sirleaf had announced her government would be seeking to renegotiate the Firestone agreement (Kaul and Heuty 2009, p 40).

Firestone initially rejected any call to renegotiate the contract, arguing that the previous contract was legal and legitimate. Dan Adomitis, Firestone's President, argued that even if the deal was signed by an interim government it should be respected, since "all governments have to enter into agreements that, in some way, survive their term" (quoted in Bavier 2005). The company felt it was being made a scapegoat for many of Liberia's problems, simply because it

had such a visible presence in the country (Kaul and Heuty 2009, p 40). Though Firestone agreed to meet with the Liberian team assigned to renegotiate the contract, up through the beginning of negotiations Firestone maintained that the 2005 agreement was valid and there was no basis for a renegotiation. Indeed, Firestone walked out of negotiations in March 2007 after Liberia questioned the validity of the 2005 contract (Kaul and Heuty 2009, p 46).

A government unilaterally demanding changes to a signed concession contract is a common form of investment dispute, and the type of dispute which American officials would often decry and intervene in to defend the rights of the company involved. Yet there is no evidence that American officials either in Washington or at the embassy in Monrovia provided any meaningful support to Firestone, or pushed Liberia to respect the terms of the 2005 contract. The USG was clearly aware of the Liberian government's demand to renegotiate the contract; it was, after all, public knowledge. But though the US embassy followed the renegotiation process closely (08MONROVIA242), there is no evidence that it ever tried to weigh in to support Firestone or caution the Liberian government about the risks of demanding to rewrite contracts. An independent senior advisor to the Liberian government for the negotiations confirmed that he did not recall the USG ever intervening to support Firestone's case.[77]

The USG's failure to act is all the more surprising given that there were multiple avenues available for government officials to express such opinions to Liberian counterparts. Throughout the course of 2006, as Liberia was publicly mulling its interest in renegotiating the contract but before talks had opened with Firestone, the USG took multiple steps to re-engage with Liberia. In February 2006 the US determined Liberia was eligible for trade benefits under the Generalized System of Preferences (GSP); in March 2006 OPIC reopened in the country;

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[77] Interview with advisor to Liberian government, Oxford, July 2014.

and in December 2006 the country was deemed eligible for further trade benefits under AGOA. Moreover, in February 2007 – just as negotiations with Firestone were beginning – President Sirleaf led a Liberian delegation visit to Washington, where they met with international donors at the World Bank, hosted a major forum designed to attract private investors to Liberia, and signed a Trade and Investment Framework Agreement (TIFA) with the United States (Corporate Council on Africa 2007; USTR 2007). These are precisely the kinds of events and discussions which the USG has in other circumstances used as pressure points to push host country governments on issues such as contract sanctity and property rights. In the case of Liberia, however, there is no evidence any such pressure took place. Rather, the focus and energy was entirely on securing new deals and investments. While commentators and participants in this series of events noted the significant challenges facing Liberia, opinions on the Sirleaf administration's economic policy were overwhelmingly positive.[78] It appears no one had any interest in criticizing the Liberian officials for insisting on renegotiating legally binding contracts.

After initially balking at renegotiating, Firestone representatives were eventually convinced by Liberian officials to participate in the talks.[79] Over the course of 2007 the two sides held a series of negotiations in both Washington and Monrovia; the two sides finally agreed to a new deal in February of 2008, which was ratified by the Liberian legislature and signed into law the following month (Kaul and Heuty 2009). The new concession agreement was substantially more favourable to Liberia than the 2005 contract had been. Amongst the concessions Firestone made were agreements to pay more in taxes and lease fees, to be subjected to general Liberian law rather than having special carve-outs from future regulatory

[78] See, for example, remarks from Condoleezza Rice at the Liberia Partners' Forum (Rice 2007); an official internal World Bank report discussing the meeting (World Bank 2007); and media coverage on NPR (NPR 2007).
[79] Though Firestone agreed to participate in talks, it appears to have never conceded the point that the 2005 agreement was invalid. See Kaul and Heuty (2009), p 46.

changes, to commit to investing $10 million in a rubber wood processing facility and to decrease the extendable term of the lease, from 89 years to 36 years. While the agreement was clearly a worse deal for Firestone than the previous contract had been, the new contract was one Firestone could live with; the fact that rubber prices had doubled since the 2005 contract had been signed probably also helped Firestone find higher taxes more palatable. Ultimately, Firestone was stuck with the reality that given its long term interest in operating in Liberia, it needed to be on good relations with the government, and had little choice but to accept the renegotiated contract.[80]

7.2.1 Private Interests in the Firestone Dispute

How well does the private interest explanation fit the Firestone case? In other words, was Firestone a particularly weak company, unable to compel the USG to act on its behalf? Hardly. Firestone was a major corporation, and moreover, the company had historically frequently called on the US government for assistance in its relations with Liberia. State Department support had been crucial to Firestone's initial entry into the country (Chalk 1967). The US ambassador to Liberia from 1948-53 later recounted how he would attend weekly joint meetings with the head of Firestone's Liberia plantation and the Liberian President (ADST 2012b, p12.). A National Security Council staffer from the 1960s later recalled how Firestone executives "were far more important in dealing with the country than any Liberian or U.S. official" (Morris 2003). Most memorably, during the country's civil conflict in 1991, the American ambassador Peter Jon de Vos secured a meeting with rebel leader Charles Taylor, to which he brought along Donald Ensminger, general manager of the Firestone plantation.

[80] This is the classic obsolescing bargain described by Vernon (1971).

Confused as to why Esminger was invited, Taylor asked if he now worked for the American embassy; Ambassador de Vos replied “No, America works for him” (quoted in Miller and Jones 2014, Chapter 3). In one unconfirmed episode from 2005, human rights advocates allege an officer at the US embassy in Monrovia told a US Department of Labor-funded NGO which was seeking to root out child labour in the country that it “was prohibited from targeting Firestone” (De Jong 2010). In short, Firestone had a long history of interacting closely with the US government, and of getting the government to come to its assistance in Liberia. It is implausible that the largest American company operating in Liberia would not be able to get the attention of the American embassy there, or that the embassy would take no interest in its fate.[81] Thus a lack of private power does not appear to be a sufficient explanation for why the USG did not intervene more forcefully in this dispute.

It is admittedly unclear how much Firestone tried to get the USG to come to its assistance, or what would have happened in the counterfactual situation had Firestone steadfastly refused to agree to re-open negotiations on the contract. Yet given the strong support from international donors for Liberia’s program of reviewing and renegotiating concession contracts, it seems unlikely the US would have put up any serious fight on Firestone’s behalf had the company taken a more aggressive stance. Firestone’s decision to ultimately acquiesce to Liberia’s demand for renegotiation was taken in the context of an overwhelming consensus amongst Liberians and the international community that renegotiation would serve Liberia’s interests, and was a smart move for the country’s long-term development (see discussion below). Firestone thus knew it would find little support had it aggressively refused to renegotiate the deal, and likely would face substantial pressure from the US and other countries

[81] While the Firestone operation in Liberia was a subsidiary of the Akron, Ohio-based Firestone Tire and Rubber Company, this latter company merged with Japan’s Bridgestone Tire Company in 1988. The Liberian plantation however continued to be managed by the Akron-based American team, and, as evidenced by the US government’s cooperation with Firestone throughout the civil war, the US embassy in Liberia still effectively considered the Firestone plantation an American investment.

to engage in productive negotiations which were seen as crucial to advancing Liberia's development plan. Given this reality, Firestone appears to have calculated that its best option was to agree to renegotiate and seek a balanced agreement, rather than fight to hold on to the discredited 2005 deal.

7.2.2 State Interests in the Firestone Dispute

The state interests hypothesis does a much better job at explaining the lack of USG intervention in the Firestone case. As I argue, one of the key reasons the US engaged in investment disputes was to probe a host state's commitment to liberal investment policies and to urge host states to adopt further investment climate reforms. In the Firestone case, the Liberian government strategically worked to portray the renegotiation as *contributing to*, rather than detracting from, its investment climate reform program. This framing strongly undercut any USG state interest to intervene in the dispute.

President Sirleaf had been immediately hailed by the international community upon her election. She then chose to appoint Antoinette Sayeh, a highly respected World Bank economist, as finance minister; press coverage from the time notes this move "delighted international financial institutions" (Blunt 2006). Sirleaf and Sayeh worked strategically to demonstrate to the US government (the country's most important donor), World Bank and IMF that the government was committed to reforming the economy with the ultimate goal of attracting sustainable foreign investment. Liberia was even named one of the "Top Reformers" for 2008/09 in the World Bank's *Doing Business* report, a measure of how quickly countries are improving their investment climate (World Bank 2009).

The effort to renegotiate certain concession contracts was sold as part of this broader policy package to improve Liberia's investment climate and rebuild its economy after 14 years

at war. The official review of recent concession contracts was carried out transparently and effectively, supported by a team of top outside lawyers. Liberia was able to portray its actions not as abandoning contract sanctity, but rather as rooting out corruption and ensuring that its concession and contracting processes followed international best standards, reforms designed to ultimately lead to a more liberal, investor-friendly domestic market. While there was never any evidence that Firestone had achieved its favourable 2005 contract through bribes or corruption, the general poor economic management of the transition government contributed to the view that the concession process had not followed international best standards. The new Sirleaf regime was fixing these mistakes, in order to better engage with the global economy and attract much-needed FDI. Indeed, the press release the Liberian government issued after the revised 2008 contract had been signed concluded by claiming that the Firestone agreement "makes it clear that, under the leadership of President Ellen Johnson Sirleaf, Liberia is again 'open for business'" (Executive Mansion of the Government of Liberia 2008).

This framing ensured the US government – as well as other donors in the international community – supported Liberia's efforts, rather than Firestone's right to have its contract enforced. In the official 2007 report on implementation of AGOA, the USG notes favourably that the Liberian government "is engaged in renegotiation of several major concession agreements concluded by the previous government. The government is also actively investigating allegations of corrupt practices of officials of the previous government" (USTR 2007b, p103). The US saw the concession renegotiations as part of a broader anti-corruption and transparency push rather than as evidence of a deteriorating investment climate – even though there was never any evidence that Firestone got its original favourable deal through corruption.

Embassy cable reporting confirms that the USG generally viewed the renegotiations as a positive step for Liberia's economy, though not without a little trepidation about Liberia's investment climate. After the 2008 contract had been ratified, a cable noted that:

> The amended Firestone agreement, like the revised contract with ArcelorMittal in 2007, illustrates the GOL's determination to negotiate and conclude detailed and transparent concession agreements with current and potential investors that maximize government revenue and promote social investments. Although the renegotiation of valid concession agreements runs the risk of establishing a precedent that future governments might exploit for private gain, and while the negotiations themselves were often protracted and vulnerable to rent-seeking, the agreements are more in line with international best practice and a break from the opaque and often imprudent concessions of the past (08MONROVIA242).

The USG contemplated the possibility that renegotiating contracts could create a precedent that "future investors might find off-putting" (08MONROVIA242), but ultimately decided that in this instance the benefits for the Liberian economy outweighed the risk. Liberia's strong push to attract investors and generally adopt economic policies endorsed by the World Bank and IMF likely contributed to this assessment. In the context of the government's overall liberal economic policy, the Firestone contract renegotiation looked less like a worrying signal of weakening contract sanctity – which the US would have likely pushed back against – and more like a genuine effort to get the best deal possible for the country's long term development. As such, the renegotiation did not dent American interest in re-engaging economically with Liberia, and the USG saw no interest in intervening in the dispute – despite the fact that it involved a large, powerful American firm.

7.3 Oil Service Companies in Venezuela

In the 1990s, Venezuela opened its oil industry to foreign investors, bringing in many large multinational companies on favourable terms (Witten 2008). To assist both the foreign oil companies and Venezuela's national oil company, Petróleos de Venezuela, S.A. (PDVSA), many oil service contract companies also entered the Venezuelan market. These companies were not directly responsible for resource extraction, nor did they own the rights to oil; rather,

they provided services such as maintaining and operating oil rigs and transporting personnel and equipment.

After Hugo Chavez rose to power, the Venezuelan government began reversing the opening of its oil industry. From 2005 to 2008, as world oil prices increased substantially, Venezuela took a number of steps to extract greater rents from upstream oil operations, including introducing new royalty fees and windfall taxes, and ultimately forcing multinational companies into joint ventures with PDVSA (Garcia 2010). As PDVSA took over a larger role in the oil industry, it became responsible for both new and existing contracts with domestic and foreign oil service companies. PDVSA struggled to meet the terms of these contracts, partially because the company's commercial performance and professionalism had declined substantially after Chavez had replaced many executives with party loyalists.[82] The collapse in world oil prices in the fall of 2008 put PDVSA under considerable economic strain; by the end of that year, the company owed an estimated $8 billion to oil service companies (Ravell 2011).

Just as it had done with the major oil companies, PDVSA pursued a number of steps to pressure oil service companies into more state-friendly deals. The state-run company was trying to push foreign operators into joint ventures from as early as 2006 (06CARACAS3402). PDVSA also sought to negotiate discounts of 20 to 30 percent on its outstanding debts with the service companies (Garcia 2010, p 243). When such negotiations were unable to clear the existing debts, however, on 8 May 2009 the Chavez government announced it would be nationalizing 13 oil rigs, 39 oil terminals and approximately 300 boats owned by domestic and foreign oil service companies (Romero 2009). These included a number of large (Schlumberger, Halliburton) and small (Tidewater, Williams, Wood Group) American firms.

[82] PDVSA employees joined a general strike in 2002 opposing many of Chavez' policies; when the stoppage was resolved, 18,000 employees had lost their jobs, and Chavez asserted control over the company. In the words of one analyst, citing the knowledge of industry insiders, "PDVSA's excessive contributions to the government's social programs, widespread mismanagement, lack of experienced personnel, and underinvestment have taken a serious toll on the State-owned company's capabilities to honor its contractual commitments" (Ravell 2011).

The initial 8 May announcement was not entirely clear on which companies' assets would be expropriated, when such expropriations might occur, or crucially on what terms any compensation might be offered (09CARACAS581). Over the coming weeks and months PDVSA officials seized the assets of many American companies, notionally opening negotiations over compensation (09CARACAS581, 09CARACAS644, 09CARACAS707, 09CARACAS725, 09CARACAS891). Despite Chavez' anti-American rhetoric, there was no particular evidence American firms were treated any better or worse than other domestic or foreign firms. Interestingly, even as the Venezuelan government was expropriating many oil service companies, it was still seeking to negotiate payments on its outstanding arrears with other companies (09CARACAS1129). Thus there is some evidence the government was still concerned with its reputation amongst investors, or at a minimum there were some officials within PDVSA that recognized the oil service companies needed some cash in order to keep operating, which was necessary for maintaining production levels. Meanwhile the Venezuelan government continued to take over the assets of oil service companies, seizing the assets of American firm Superior Energy Services as recently as November 2013 (Superior Energy Services, Inc. 2013). A number of American oil service firms – including Tidewater, Williams, and Helmerich & Payne – have pursued litigation in American courts or international arbitration against Venezuela, even while others – including Halliburton and Schlumberger – have continued to work with PDVSA (Vyas 2014).

Throughout these disputes, the US government provided no significant support to the American firms involved. The embassy closely followed the Venezuelan government's proclamations on upcoming nationalizations and revisions to hydrocarbon laws (09CARACAS581) and met with company representatives to be updated on the status of negotiations (09CARACAS854), but had no power to intervene in any significant way. There is no evidence of either any public or private statements from the US embassy in Caracas

concerning the expropriations. Companies were left to fend for themselves in their negotiations with the PDVSA and the Venezuelan government. Many of the smaller firms left the country and filed legal claims; the larger firms were more likely to stay in the country and try to establish some sort of working relationship with PDVSA, yet continued to face lengthy delays in receiving payments owed (Vyas 2014). There is no evidence the US embassy intervened in any of these disputes.

7.3.1 Private Interests in the Oil Service Companies Disputes

Did American diplomats fail to intervene in these disputes because there was insufficient private pressure to act? It does not appear to be the case. To begin with, the companies had good access to the US embassy in Caracas, and would frequently meet with embassy staff to discuss their challenges with the Venezuelan government (eg 09CARACAS592, 09CARACAS707, 09CARACAS725, 09CARACAS854, 10CARACAS9). There is no evidence the companies had any difficulty attracting embassy interest in their plight. Indeed, embassy officials were actively seeking out representatives from the oil service companies to gain information on their activities and interactions with the Venezuelan government, as the embassy had few other such channels available (see discussion below). This strong access gave the oil service companies significant ability to shape the narrative of their disputes with the Venezuelan government (eg 09CARACAS827, 09CARACAS854).

Furthermore, a number of the oil service companies were large, politically powerful firms, including Halliburton and Schlumberger. Halliburton, in particular, has a reputation for trading on its political connections, including its relationship to Dick Cheney and the Bush administration (eg Baum 2003, Chatterjee 2010). Yet there is no evidence the USG provided any greater assistance in these disputes to Halliburton and Schlumberger than to the much smaller companies also affected by the Venezuelan policy; when the US ambassador met with

company representatives to hear of their complaints, both small and large firms were represented (09CARACAS854). Moreover, around the same time other politically powerful American corporations such as Cargill (09CARACAS305, 09CARACAS433), also had disputes with the Venezuelan government, and there the US does not appear to have provided any meaningful support in these cases either.

Of course, given the anti-American rhetoric in Venezuela at the time, the oil service companies perhaps had reason to avoid particularly close connections to the US embassy.[83] Yet, in a July 2009 meeting with the US ambassador, representatives of oil service companies suggested a number of messages the ambassador could convey to the Venezuelan government which would help their cause. These messages included pushing for debts and arrears to be cleared, suggesting the Venezuelan government separate business concerns from political considerations, and highlighting the long term impact expropriations would have on the country's ability to attract further foreign investment (09CARACAS854). Thus while both the embassy and private companies may have wanted to avoid any particularly aggressive stance by the US government, which would have only further politicized the disputes, the companies still requested some US support. But the embassy appears to have never weighed in on these cases.

7.3.2 State Interests in the Oil Service Companies Dispute

The state interests theory does a better job of predicting the absence of US intervention in the oil service company disputes in Venezuela. In brief, by the time Venezuela began expropriating

[83] Indeed, in one dispute between Venezuela and a joint venture between the American firm Verizon and a Spanish partner, representatives from the joint venture noted they would likely seek representation from a Spanish legal firm rather than an American firm, as the later would fulfill expectations of a broad 'American empire vs Venezuela' divide (07CARACAS84).

US oil service companies, the American embassy had already determined Chavez had no real interest in promoting a liberal investment climate. The State Department is most likely to intervene in disputes when it believes the host state might be responsive to American diplomatic overtures, and when doing so could shift a host state toward more investor-friendly policies. This was not the case in Venezuela in the 2008-10 period. The US embassy knew it had no leverage in Caracas; indeed, US officials could not even schedule meetings with their Venezuelan counterparts. Given that the US had no influence or leverage over the direction of Venezuela's economic policy, American diplomats saw little reason to intervene in the oil service company disputes.

It hadn't always been that way. In a 1998 meeting with then-Presidential candidate Hugo Chavez, the US ambassador to Venezuela told Chavez that "foreign investment requires clear and reliable rules;" Chavez in turn responded that he wanted to attract FDI and he would do "everything possible to assuage the concerns of domestic and foreign investors" (98CARACAS2912). And in 2004, the ambassador discussed the dispute of American company SAIC with the Venezuelan Finance Minister, pressing for resolution (04CARACAS3501) – similar to how the State Department approached other investment disputes in other developing countries.

But by the time Hugo Chavez announced he would be nationalizing oil service companies, his approach to economic policy was clear, and the State Department had already realized there was little it could do to change the country's trajectory. In a major January 2007 speech, shortly after his re-election, Chavez declared that the country would be nationalizing key strategic sectors of the economy (Romero 2007). In a State Department cable analysing the speech, embassy officials noted that "Chavez's economic vision of '21st Century Socialism' includes placing 'strategic' sectors or companies (e.g. oil, telecommunications, and electricity) under BRV control, reforming the country's commercial code which regulates economic

activity, and stripping the Central Bank of its constitutional autonomy. While the timing of each step is still uncertain, the objectives are quite clear" (07CARACAS71). Thus two years before the Venezuelan government moved against the oil services companies, the US embassy had already determined the Chavez administration was committed to nationalizing key sectors of the economy.

Given the poor state of relations between Chavez and the US government, American diplomats in Caracas had little leverage over Venezuelan politics. Indeed, the US embassy was increasingly shut out from high levels of Venezuela's government from the mid-2000s. In multiple embassy cables US officials complained about lack of access to high-ranking Venezuelan officials (04CARACAS1087, 04CARACAS3788, 06CARACAS3238, 08CARACAS987, 09CARACAS1005); outside reporting also confirmed American diplomats had inadequate access to Venezuelan government officials (Billig 2004).

This lack of access to Venezuelan officials meant the US embassy had (a) limited information about what was going on behind-the-scenes in Venezuelan politics and (b) limited to no ability to influence events. Unlike in Ecuador, the US embassy in Venezuela was not attempting to probe the Chavez regime's commitment to liberal economic policies – the writing on the wall was clear. But the USG did still crave information specifically on Venezuela's policies and outlook for the oil industry, as Venezuela was an important import market for the US (Billig 2004). With traditional diplomatic information channels closed to American officials, the embassy adopted creative alternative means of gaining information. On two separate occasions, embassy officials recognized senior PDVSA employees visiting the consular section of the US embassy to apply for visas to travel to the US; following standard consular interviews, the employees were additionally interviewed by the embassy's petroleum attaché for insights on PDVSA's strategy (09CARACAS214, 09CARACAS1246). Furthermore, the US embassy would frequently meet with American oil companies

(07CARACAS721, 07CARACAS825, 08CARACAS487), foreign oil companies (07CARACAS528, 08CARACAS423) and diplomats from third countries based in Caracas (08CARACAS648, 09CARACAS768) to discuss Venezuela's oil policies and PDVSA's relations with various business partners.

Though these meetings helped partially fill the American information gap, they could not make up for America's lack of influence in Venezuela, which the embassy appeared to be mostly resigned to accept. When American investors in Venezuela were losing hundreds of millions of dollars because the Venezuelan foreign exchange authority was rationing the amount of dollars it would let companies buy, the embassy openly admitted there was nothing it could do to assist:

> "Our options for helping U.S. companies currently waiting for CADIVI [the foreign exchange office] authorizations are extremely limited. Direct advocacy with the [Venezuelan government] is unlikely to work for multiple reasons. First, we have next to no access: the Charge's request for a meeting with CADIVI's president has gone unanswered for over three months. Second, while we have no reason to believe CADIVI is discriminating against U.S. companies, there is also no reason to believe CADIVI would treat U.S. companies preferentially, particularly given President Chavez's frequent anti-U.S. tirades" (09CARACAS614).

Such logic also applied to the disputes with oil service companies. When Venezuelan ministers wouldn't even take calls from the US embassy, there were no channels through which US officials could push the country to resolve investment disputes. And even if American diplomats did somehow convey messages to their Venezuelan counterparts, as oil service companies had requested, there was no reason to think Venezuela would be responsive to such interventions.

Moreover, given the Chavez administration's well-known hostility toward American FDI, the USG had no interest in advertising how commercial diplomacy could serve American businesses in Venezuela. The Ex-Im bank had stopped providing financing for new projects in Venezuela in 2003, while OPIC had stopped supporting new projects in the country in 2005

(US Department of State 2009). The 2009 Investment Climate Statement for Venezuela opens by warning would-be American investors that "Given economic and political uncertainties, a recent history of actual and threatened nationalizations, and increasing state intervention in the economy, Venezuela's investment climate is considerably less welcoming than its relatively liberal legal framework suggests." The embassy also warned potential investors that they may have difficulty transferring currency out of the country (09CARACAS614). The State Department clearly had little interest in highlighting "success stories" about how its commercial diplomacy was helping American firms compete in Venezuela.

Overall, state interests do a much better job at explaining the lack of US intervention in the oil service companies' disputes with the Venezuelan government. The US embassy in Caracas had neither the ability nor the interest to intervene in the disputes, regardless of any private pressure to do so.

7.4 Conclusion

In investment disputes in Ghana, Liberia and Venezuela, the US government provided relatively little diplomatic support to American firms. In the Kosmos dispute in Ghana, the USG did follow the case closely, and discussed it with high-ranking officials. But the USG was careful never to explicitly endorse Kosmos' case, or to say that it believed the Ghanaian government was mistreating the investor. In the Liberian and Venezuelan cases, meanwhile, the USG did not substantially engage at all. Firestone was left to itself when the Liberian government demanded the company renegotiate a concession contract. And the US embassy could do nothing when the Venezuelan government nationalized many American oil service companies.

As was the case in the previous chapter, state interests provide a better explanation than private interests in determining the weak USG interventions. In both the Ghanaian and the Liberian case, the USG did not believe the disputes reflected more generally on the investment climate. Promoting investment climate reforms was not a priority for the US government, and thus there was little need to use individual disputes as opportunities to press host states on their treatment of foreign investors. Moreover, in both cases there was at least moderate private pressure encouraging intervention: Firestone is a powerful company with historic ties to American policy in Liberia, while Kosmos engaged in a wide-ranging lobbying push to influence USG officials, featuring multiple newspaper editorials that were highly critical of the Ghanaian government. Yet this private pressure appears to have had relatively little effect.

The Venezuelan case was slightly different: given that American officials had essentially no access to Venezuelan policymakers, there was little they could have done even had they wanted to. In any case, however, the US embassy had clearly already decided that Venezuela had little interest in attracting FDI, and saw no reason to try to impart to Venezuelan officials that their reputation as an investment destination was at risk. Venezuela's investment climate was a lost cause by 2009, and the USG was not going to expend any of its very limited political capital in Venezuela on the issue.

Taken together with the four cases discussed in the previous chapter, the case study analyses have highlighted that the USG was most likely to strongly intervene in disputes which were salient to state interests, and adopted a much less interventionist approach when state interests were not at stake.

CHAPTER 8: CONCLUSION

At first glance, the protection of international investment in the contemporary global economy appears to be highly legalized. Investment protection is regulated by thousands of BITs which provide individual investors private access to binding arbitration tribunals, with awards enforceable in most countries around the world. This legalized regime is said to have replaced the old world of gunboat diplomacy, where power politics governed the settlement of investment disputes and the need to protect the interests of foreign investors pulled reluctant home states into state-state conflict (Maurer 2013; Johnson and Gimblett 2010; Soley 1985). The international investment regime's supporters loftily argued the regime would remove investment disputes "from the realm of politics and diplomacy into the realm of law" (ICSID 2006).

Yet, as I have demonstrated, the reality of contemporary investment protection is significantly more complex than this simplistic narrative suggests. The legalized regime did not replace commercial diplomacy, which remains an important means of settling international investment disputes, just as it has since the earliest foreign investments. In particular, the US government continues to intervene diplomatically in disputes between American firms and foreign governments, despite the availability of legalized alternatives. It does so because today the USG has its own strategic interests for intervening in disputes; it is not necessarily looking for opportunities to credibly deny investor requests for support, as it did during the Cold War era. A wide range of quantitative and qualitative evidence support these conclusions on the enduring importance of commercial diplomacy in contemporary investment protection. Yet to date both academics and the supporters and critics of the international investment regime have focused their attention overwhelmingly on BITs and arbitration cases, leading them to largely overlook this reality.

The findings in this thesis have important implications for current policy debates on the future of the international investment regime. In recent years the regime has grown increasingly controversial, with significant public debates over the merits of the regime in places ranging from Bolivia to Indonesia to Australia to the EU. A number of contentious arbitration cases have challenged measures such as Australian tobacco regulations, South Africa's Black Economic Empowerment legislation, Canadian mining regulations and Germany's phase out of nuclear power plants.[84] To many, such claims appear to be fundamentally illegitimate; and even when these claims are unsuccessful, the mere fact of their filing can spark public outrage over the system of private justice that lets corporations sue states (see, eg Provost and Kennard 2015; Warren 2015). Keystone XL's recent decision to pursue a $15 billion investor-state arbitration case against the United States – after its proposal to build an oil pipeline was denied following years of political debate – seems likely to lead to more controversy over the investment regime in the US in the near future (Edwards 2016).

In light of this backlash against the international investment regime, its advocates are once again highlighting depoliticization as a major accomplishment of the regime, and a reason to continue supporting it; even if the current system produces the odd controversial case, it is still far better than the old world of gunboat diplomacy we used to inhabit (eg, USTR 2015; Quinn Emmanuel Urquhart & Sullivan, LLP 2015). The results of this thesis should be borne in mind when evaluating such claims. There is little evidence that investment treaties have in fact substantially decreased political interventions in investment disputes. Nor is there evidence that, were we to move away from investor-state arbitration, this would result in a significant *re*politicization of investment protection.

[84] These cases are Philip Morris Asia Limited v. The Commonwealth of Australia, UNCITRAL, PCA Case No. 2012-12; Piero Foresti, Laura de Carli & Others v. The Republic of South Africa, ICSID Case No. ARB(AF)/07/01; William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc. v. Government of Canada, UNCITRAL, PCA Case No. 2009-04; and Vattenfall AB and others v. Federal Republic of Germany (ICSID Case No. ARB/12/12).

More generally, the ideas in this thesis have broader implications for debates over the future of the international investment regime. The recent backlash has prompted a number of academics, arbitrators and policymakers to propose significant reforms to the system.[85] Notably, a number of these proposals call for some form of greater home state involvement in the investment regime. Brazil has introduced a new model BIT – and signed agreements with a handful of African and Latin American countries – which forgoes investor-state arbitration and instead calls for state-state diplomatic negotiations to resolve disputes (Perrone and Rojas de Cerqueira César 2015). An academic proposal on investment provisions in TTIP has suggested the inclusion of a filter which would allow home states to block particularly controversial or frivolous claims from going forward (Kleinheisterkamp and Poulsen 2014). The European Union has proposed a new "Investment Court" which would increase home state influence by allowing states to appoint permanent judges who would decide cases, rather than letting investors nominate private arbitrators for ad hoc tribunals (European Commission 2015). When states have the power to appoint international judges those judges' rulings tend to reflect states' long term interests (Helfer and Slaughter 2005), thus the EU proposal would allow home states to indirectly exert greater control over the investment regime.

Underlying these suggested reforms is an often unacknowledged appreciation for the positive role home state political considerations could play in the current investment regime. After all, many investment disputes increasingly encroach on inherently political questions, such as how states should respond to public demands for greater environmental regulation, or how the costs of a currency collapse should be borne between foreign energy companies and local electricity consumers (Paparinskis 2010; Titi 2015). By giving home states more power to exercise political control over the international investment regime, these proposed reforms

[85] For an overview of many of these proposed reforms, see the 2014 Special Issue of *Transnational Dispute Management* on "Reform of Investor-State Dispute Settlement: In Search of a Roadmap", which included 70 brief articles outlining proposed reforms.

suggest there should be greater scope for political resolutions to political disputes. Home state governments may better understand and better appreciate such political concerns than private arbitrators do. It may be less effective and less legitimate to attempt to resolve such disputes purely by appealing to legal reasoning, rather than balancing legal arguments with political considerations. This is particularly true given the significant incomplete contracting problems associated with vaguely-worded investment treaties that cover a wide range of industries and obligations which the host state must honour.

The original creators of the investment regime wanted to insulate disputes from the political considerations of home states, believing this would be a both more efficient and more legitimate means of settling investment disputes (Shihata 1986; ICSID 2006). As I have shown, however, political considerations have not been excised from contemporary investment protection practices. Nor, from a normative standpoint, is it clear that they should be. To be sure, in history there are many examples of abuses of power to compel the settlement of international investment disputes, such as the 1909 US invasion of Nicaragua discussed in Chapter Two. The supporters of the legalized investment regime understandably wanted to restrain such politicized interventions. Yet, as the current reform proposals suggest, today there is a need to reintegrate political considerations into the investment regime, by giving home states greater influence. Ultimately, perhaps the goal of the investment regime should not be to depoliticize investment disputes, but rather to regulate and develop shared norms around political interventions in disputes, seeking a balance between legal principles and political understandings.

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APPENDIX

Appendix A: Robustness Tests for Chapter 4

Table A.1: Results Excluding Disputes Filed Under Non-US Treaties

DV: Investment Disputes	1	2	3	4
Count Model				
Ambassador Vacancies	**0.635**	**0.855***	**0.757**	**4.075***
	(0.495)	**(0.398)**	**(0.477)**	**(1.620)**
Ambassador Vacancies * Investment Climate				**-0.455***
				(0.205)
US Ratified BIT	1.884*	2.970***	-0.343	-0.685
	(0.838)	(0.599)	(0.673)	(0.733)
Disputes (lagged)	0.328**	0.084	-0.067	-0.016
	(0.114)	(0.068)	(0.065)	(0.082)
Investment Climate		-0.273***	-0.257**	-0.174+
		(0.064)	(0.099)	(0.102)
US FDI Stock (log)		0.365***	0.244*	0.222*
		(0.076)	(0.102)	(0.099)
GDP PC (log)			14.830***	14.853***
			(4.061)	(4.478)
GDP PC^2 (log)			-0.902***	-0.902***
			(0.241)	(0.266)
Oil Reserves			0.069**	0.067**
			(0.024)	(0.025)
Natural Resource Rents			-0.013	-0.014
			(0.015)	(0.015)
Total Ratified BITs			-0.001	-0.002
			(0.006)	(0.006)
Democracy			0.033	0.026
			(0.042)	(0.043)
Constant	-2.703***	-9.399***	-65.663***	-65.699***
	(0.670)	(1.441)	(17.135)	(18.722)
Inflation Model				
Ratified BIT	-1.892+	-1.874*	-66.550***	-75.579***
	(1.075)	(0.880)	(5.138)	(5.142)
Disputes (lagged)	-1.021+	-0.631+	-26.452***	-30.074***
	(0.547)	(0.370)	(2.038)	(2.054)
Constant	3.060***	2.524**	66.192***	75.100***
	(0.861)	(0.932)	(5.115)	(5.112)
Year Fixed Effects	*No*	*No*	*Yes*	*Yes*
Robust SE clustered by country	*Yes*	*Yes*	*Yes*	*Yes*
N	*1,850*	*1220*	*1052*	*1052*

Note: Standard errors in parentheses
+ p<0.1, * p<0.05, ** p<0.01, *** p<0.001

Table A.2: Results Including High Income Countries

DV: Investment Disputes	1	2	3	4
Count Model				
Ambassador Vacancies	**0.511+**	**0.432**	**0.624+**	**2.254****
	(0.262)	**(0.269)**	**(0.346)**	**(0.731)**
Ambassador Vacancies * Investment Climate				**-0.237***
				(0.107)
US Ratified BIT	0.09	1.079**	0.501**	0.623***
	(0.623)	(0.399)	(0.175)	(0.159)
Disputes (lagged)	0.414***	0.112	0.027	0.035
	(0.118)	(0.098)	(0.092)	(0.092)
Investment Climate		-0.263***	-0.225***	-0.174*
		(0.056)	(0.065)	(0.073)
US FDI Stock (log)		0.372***	0.245**	0.240**
		(0.051)	(0.084)	(0.084)
GDP PC (log)			2.581*	2.483*
			(1.159)	(1.130)
GDP PC^2 (log)			-0.154*	-0.151*
			(0.068)	(0.066)
Oil Reserves			0.069***	0.069**
			(0.021)	(0.021)
Natural Resource Rents			-0.019	-0.017
			(0.013)	(0.013)
Total Ratified BITs			0.002	0.003
			(0.005)	(0.005)
Democracy			0.034	0.043+
			(0.025)	(0.025)
Constant	-1.346+	-8.100***	-17.270***	-17.135***
	(0.702)	(0.996)	(5.186)	(5.127)
Inflation Model				
Ratified BIT	-2.820***	-2.524*	-2.996***	-2.885***
	(0.754)	(1.089)	(0.784)	(0.767)
Disputes (lagged)	-3.073***	-2.570*	-15.089***	-13.749***
	(0.869)	(1.290)	(3.759)	(2.310)
Constant	3.249***	2.232***	2.621***	2.487***
	(0.726)	(0.517)	(0.563)	(0.534)
Year Fixed Effects	*No*	*No*	*Yes*	*Yes*
Robust SE clustered by country	*Yes*	*Yes*	*Yes*	*Yes*
N	*2,270*	*1619*	*1418*	*1418*

Note: Standard errors in parentheses
+ p<0.1, * p<0.05, ** p<0.01, *** p<0.001

Table A.3: Results Based on Zero-Inflated Poisson Model

DV: Investment Disputes	1	2	3	4
Count Model				
Ambassador Vacancies	**0.703**	**0.749+**	**0.942***	**3.081*****
	(0.714)	**(0.410)**	**(0.380)**	**(0.880)**
Ambassador Vacancies * Investment Climate				**-0.320***
				(0.132)
US Ratified BIT	0.315	1.632*	0.156	0.298
	(1.365)	(0.746)	(0.312)	(0.338)
Disputes (lagged)	0.257***	0.039	0.015	0.017
	(0.056)	(0.060)	(0.097)	(0.095)
Investment Climate		-0.277***	-0.222**	-0.162*
		(0.066)	(0.072)	(0.075)
US FDI Stock (log)		0.404***	0.242**	0.235**
		(0.069)	(0.090)	(0.091)
GDP PC (log)			6.192*	6.174+
			(3.096)	(3.154)
GDP PC^2 (log)			-0.375+	-0.377+
			(0.193)	(0.197)
Oil Reserves			0.064*	0.063*
			(0.026)	(0.027)
Natural Resource Rents			-0.017	-0.015
			(0.014)	(0.014)
Total Ratified BITs			0.003	0.003
			(0.006)	(0.007)
Democracy			0.029	0.039
			(0.028)	(0.029)
Constant	-0.935	-8.840***	-31.905**	-32.093**
	(0.918)	(1.422)	(11.809)	(11.988)
Inflation Model				
Ratified BIT	-2.081	-1.152	-3.025**	-2.942**
	(1.360)	(1.015)	(1.001)	(0.999)
Disputes (lagged)	-1.655	-1.127	-14.843***	-15.147***
	(1.593)	(0.796)	(1.785)	(1.496)
Constant	3.580***	1.784*	2.740***	2.612***
	(0.836)	(0.726)	(0.800)	(0.789)
Year Fixed Effects	*No*	*No*	*Yes*	*Yes*
Robust SE clustered by country	*Yes*	*Yes*	*Yes*	*Yes*
N	*1,850*	*1220*	*1052*	*1052*

Note: Standard errors in parentheses
+ p<0.1, * p<0.05, ** p<0.01, *** p<0.001

Table A.4: Results Based on Negative Binomial Model

DV: Investment Disputes	1	2	3	4
Count Model				
Ambassador Vacancies	**0.723***	**0.716***	**1.012****	**3.089*****
	(0.313)	**(0.321)**	**(0.368)**	**(0.810)**
Ambassador Vacancies * Investment Climate				**-0.307***
				(0.137)
US Ratified BIT	2.230***	2.360***	2.087***	2.117***
	(0.456)	(0.429)	(0.501)	(0.510)
Disputes (lagged)	1.219***	0.392**	0.35	0.300+
	(0.307)	(0.128)	(0.213)	(0.156)
Investment Climate		-0.291***	-0.289**	-0.207+
		(0.081)	(0.105)	(0.122)
US FDI Stock (log)		0.394***	0.230**	0.226**
		(0.068)	(0.077)	(0.082)
GDP PC (log)			3.25	3.353
			(2.526)	(2.647)
GDP PC^2 (log)			-0.183	-0.19
			(0.148)	(0.155)
Oil Reserves			0.054	0.056
			(0.034)	(0.034)
Natural Resource Rents			-0.009	-0.009
			(0.013)	(0.013)
Total Ratified BITs			0.005	0.005
			(0.009)	(0.009)
Democracy			0.023	0.025
			(0.040)	(0.039)
Constant	-4.541***	-10.263***	-22.305*	-23.226*
	(0.392)	(1.250)	(10.270)	(10.884)
Year Fixed Effects	*No*	*No*	*Yes*	*Yes*
Robust SE clustered by country	*Yes*	*Yes*	*Yes*	*Yes*
N	*1,850*	*1220*	*1052*	*1052*

Note: Standard errors in parentheses
+ p<0.1, * p<0.05, ** p<0.01, *** p<0.001

Appendix B: Robustness Tests for Chapter 5

Table B.1: Logistic Regression of USG Intervention in Investment Disputes, Using Narrower Definition of Serious USG Diplomatic Engagement

DV: Very Strong USG Intervention	1	2	3	4	5
Election Year	0.805+	0.796+	2.006**	0.862*	2.206**
	(0.419)	(0.420)	(0.729)	(0.439)	(0.777)
GDP Growth	0.049	0.05	0.151+	0.028	0.144+
	(0.042)	(0.043)	(0.078)	(0.044)	(0.078)
Investment Climate	0.058	0.055	-0.216	0.069	-0.216
	(0.099)	(0.099)	(0.177)	(0.102)	(0.180)
Local Court Dispute	1.259**	1.257**	0.98	1.282**	1.024
	(0.381)	(0.381)	(0.633)	(0.396)	(0.643)
Contract Dispute	0.882*	0.875*	-0.025	0.728+	0.029
	(0.385)	(0.385)	(0.587)	(0.396)	(0.594)
Real Estate Dispute	-0.9	-0.878	0	-0.786	0
	(0.580)	(0.582)	(.)	(0.658)	(.)
ISDS		0.15			
		(0.368)			
Firm Revenue			0.077		0.185
			(0.137)		(0.188)
Firm Lobbying				0.04	-0.06
				(0.028)	(0.069)
Constant	-2.895**	-2.951**	-1.062	-3.156**	-1.419
	(0.950)	(0.961)	(1.939)	(0.984)	(2.025)
N	*213*	*213*	*72*	*181*	*72*

Note: Standard errors in parentheses

*+ p<0.1, * p<0.05, ** p<0.01*

Note: DV = Very strong intervention, defined as engagement level 5 or 4 in the coding scheme developed in Chapter Five. Five-year time dummies included in model but not reported.

Table B.2: Ordered Logistic Regression of USG Intervention in Investment Disputes

DV: Intensity of USG Intervention	1	2	3	4	5
Election Year	0.796**	0.799**	1.546**	0.783*	1.620**
	(0.306)	(0.306)	(0.572)	(0.323)	(0.594)
GDP Growth	0.007	0.005	0.093+	0.006	0.088+
	(0.028)	(0.028)	(0.050)	(0.030)	(0.050)
Investment Climate	0.044	0.048	-0.188	0.056	-0.183
	(0.066)	(0.067)	(0.137)	(0.068)	(0.137)
Local Court Dispute	0.677*	0.682*	0.584	0.731*	0.597
	(0.277)	(0.277)	(0.472)	(0.301)	(0.473)
Contract Dispute	0.743*	0.752*	0.5	0.619*	0.536
	(0.300)	(0.301)	(0.461)	(0.314)	(0.468)
Real Estate Dispute	-0.688+	-0.706*	0	-0.677	0
	(0.355)	(0.358)	(.)	(0.415)	(.)
ISDS		-0.111			
		(0.274)			
Firm Revenue			-0.049		0.004
			(0.094)		(0.135)
Firm Lobbying				0.011	-0.029
				(0.022)	(0.054)
N	*213*	*213*	*72*	*181*	*72*

Note: Standard errors in parentheses

*+ p<0.1, * p<0.05, ** p<0.01*

Note: DV = Intensity of USG intervention, using the 1-5 coding scheme developed in Chapter Five. Five-year time dummies included in model but not reported.