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Legalization, Diplomacy, and Development
Do investment treaties de-politicize investment disputes?

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Abstract[4]

Empirical research on the impact of investment treaties has focused almost exclusively on their effect on foreign investment, with mixed results. Yet, another important promise of the treaties has been ignored altogether. Architects of the investment treaty regime, as well as many current proponents, have suggested that the treaties allow developing countries to de-politicize investor-state disputes; i.e. shield commercial disputes from broader political and diplomatic considerations with developed states. While this argument is widely accepted by legal scholars and practitioners and explicitly promoted by capital-exporting states, it has never been subjected to empirical investigation. We provide the first such test, using an original dataset of US diplomatic actions in 219 individual investment disputes across 73 countries as well as detailed case studies drawing on internal US State Department diplomatic cables. We find no evidence for the de-politicization hypothesis: diplomatic engagement remains important for investor-state dispute settlement, and the US government is just as likely to intervene in developing countries that have ratified investment treaties with the US as those that have not. Coercive American intervention in investment disputes is rare, but this is a general feature of American investment diplomacy after the Cold War, rather than one limited to investors with recourse to legalized dispute settlement procedures. These findings provide a critical corrective to our understanding of the investment treaty regime, and have important implications for understanding the effects of international legalization on developing countries.

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Introduction

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

Prior to the rise of investment treaty arbitration, private foreign investors unable to resolve property rights disputes with host states depended on diplomatic protection. Although home governments often intervened on behalf of their investors, such interventions could impair diplomatic relations between states, and at times even devolved into questions of war and peace. For instance, developing countries would routinely be met with sanctions, or worse, if they failed to resolve serious investment disputes with American investors (Maurer 2013). The modern investment treaty regime provided an alternate system of dispute resolution, whereby private investors could directly hold host countries accountable for property rights violations through international arbitration. Private access to international dispute settlement meant that disputes between foreign investors and host governments were relegated to technical legal procedures, rather than politicized quarrels debated by diplomats (Shihata 1986: 267-272). Thus, home country diplomatic interventions – or the leveraging of state power and apparatus to advance the interests of private investors – would no longer be necessary. Conflicts over private investment disputes could be removed from the bilateral agenda between the home and host state.

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

Yet the hypothesis that access to investment treaty arbitration de-politicizes investor-state dispute settlement has never been subject to empirical testing. In this paper, we present the first such test. We analyse the investment diplomacy of the United States government in the investment treaty era, and ask: is the US government less likely to intervene diplomatically in disputes where investors have access to treaty-based investor-state arbitration than in disputes where investors lack such access? While the United States may not be representative of all capital exporting countries, it is a crucial case for the de-politicization hypothesis: as discussed below, de-politicization was a key goal of the early American bilateral investment treaty (BIT) program, and for developing countries the US is the hegemon whose power is most in need of restraint. If the de-politicization hypothesis is correct, the core benefit for a developing country entering into a BIT with the United States may not necessarily be a marginal increase in foreign investment, but rather reduced political pressure from the State Department (and, in the extreme, US security services) when disputes with American investors occur.

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

Two important findings emerge from our analyses. First, US diplomatic intervention in disputes between developing country governments and American investors is widespread. In nearly a third of the disputes in our dataset, the US government strongly intervened, placing disputes on the states' bilateral agenda. While explicit threats of coercive sanctions were rare – a notable shift from the Cold War era – high-level US officials, legislators, ambassadors and other representatives regularly pushed top developing country officials to resolve disputes. Second, and crucially, we find no evidence that diplomatic intervention is less likely in disputes where American investors have access to investment treaty arbitration than in those disputes where investors lack such access. Moreover, looking in-depth at three case studies of individual disputes, we find no evidence that actors' decision-making follows the logic suggested by the de-politicization hypothesis.

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

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

Assessing the De-Politicization Hypothesis

All international legal disputes are 'political' in one form or another (Lauterpacht 1933: 153-160). It is therefore important to clarify what is meant by 'politicized' dispute settlement. For instance, even when disputes don't go to international arbitration, public threats to sue a host government can lead to highly politicized and confrontational bargaining between foreign investors and host states (Post 2014: 6). When disputes do go to arbitration, politicization could refer to the political costs suffered by either claimants or respondents in settling an investment dispute. In addition, legal literature on the investment treaty regime has variously defined 'politicization' as dispute resolution through (i) investor-host state negotiations; (ii) local courts biased against foreigners; (iii) formal inter-state dispute settlement; and (iv) informal inter-state negotiations (Paparinskis 2012; Titi 2015: 265; Bonnitcha, Poulsen, and Waibel 2017, chs. 7-8).

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

While there is limited research on the history of European investment diplomacy (an exception is (Yackee 2017)), Maurer (2013) documents in detail how the United States government frequently, though reluctantly, intervened on behalf of American investors during the 19th and 20th centuries. The State Department and the CIA were wary of getting involved in investment disputes, as diplomatic protection often risked compromising broader foreign policy goals, most notably maintaining strategic alliances with developing country governments. Yet private pressure to assist American companies abroad was intense, as affected firms worked diligently to leverage political connections (especially in Congress) and mobilize anti-communist public opinion to support business interests. This created domestic political costs that made it difficult for the State Department to turn down requests to intervene on behalf of American investors. Consequently, the executive branch routinely used diplomatic pressure and interventions to support US businesses abroad, even when doing so entailed significant foreign policy risks. After revolutionary Cuba initiated land reforms in 1959, for instance, American sugar firms lobbied Eisenhower to cut Cuba's sugar quota. He hesitated, as State Department officials warned that "keeping Cuba out of the Sino-Soviet orbit … is more important than salvaging of the U.S. investment in Cuba to the complete satisfaction of the U.S. business community" (quoted in Maurer 2013: 322). After a series of subsequent expropriations, Congress decided otherwise and retaliated by blocking the entry of Cuban sugar into the United States – a move which further pushed Castro into Soviet hands (Maurer 2013: 328). A few years later, in 1962, the story repeated itself. An expropriation in Brazil prompted a number of major American companies to lobby Congress to cut off all American aid to countries expropriating American capital. The Kennedy administration objected, but to no avail. Congress passed the Hickenlooper amendment to the Foreign Assistance Act requiring the executive to cut all foreign assistance to governments expropriating American capital. Over the coming decades, shifting American Presidents managed to (mostly) stay clear of invoking the Hickenlooper amendment as it risked further aggravating already sensitive diplomatic relationships. But the only way possible was to slash American aid to expropriating nations and threaten economic sanctions. The end-result was a success for expropriated American firms, who almost always managed to receive compensation at fair value, but had significant costs for developing countries.

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

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

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

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

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

> development and effective implementation of the rule of law in international affairs, including investment relations. (Echandi 2011, 11-12)

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

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

Although the conventional wisdom is plausible, there are also reasons to be sceptical. The de-politicization hypothesis assumes that home country governments dislike intervening diplomatically in investment disputes, and would prefer to leave investors to pursue their own recourses (Maurer 2013: 8-10; Vandevelde 1993: 161). But while home states undoubtedly prefer to stay clear of some individual disputes, we suspect that this is the exception rather than the rule, at least in recent decades. Many governments have reformed their diplomatic services to place greater importance on commercial objectives (Lee and Hudson 2004: 343-44), and the foreign diplomatic corps play a key role in developing and maintaining economic opportunities for home country firms (Rose 2007). In the United States, for instance, the State Department consciously and strategically reoriented itself toward commercial diplomacy following the end of the Cold War. Writing in the mid-1990s, two former high-ranking State Department officials noted that "American ambassadors now spend more time on assisting U.S. businesses than on any other single function" (Eagleburger and Barry 1996: 5). This includes intervening diplomatically in investment disputes. In a 1995 Senate hearing, the U.S. Assistant Secretary of State for Business and Economic Affairs proudly reported that:

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

The central role of commercial diplomacy gives the State Department an explicit incentive to fight for the interests of US investors involved in disputes, independent of private pressure to do so. As noted by then-Secretary of State Hilary Clinton in 2011, "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).

Home government officials, then, often have an interest in intervening in disputes. And provided these officials are effective and prudent in their involvement, such 'politicization' is useful for many foreign investors, including those with recourse to investment treaty arbitration. For although investment treaties offer potent property right protections, investment treaty arbitration is expensive, the jurisprudence is often uncertain, and investor claims can complicate future relationships with host states.[5] More generally, investors rarely consider international arbitration the most effective method for dealing with political risk in practice (see e.g.; MIGA 2013: 51) and, at least until relatively recently, only few of the world's largest firms have significant knowledge of their rights under applicable investment treaties (Yackee 2010). Investors may still value the ability to file an arbitration claim separately – one reason why firms lobby to support the investment treaty regime. Yet access to investment arbitration serves more as a complement to diplomacy, rather than as a substitute. Investors may worry that diplomacy will not be forthcoming or effective in a particular instance, or could expect investment diplomacy to be more effective in the 'shadow' of an investment treaty (on investment treaties as diplomatic focal points; see Poulsen 2018). But in general investors continue to view diplomatic interventions as a preferred option to facilitate negotiated settlements (Gertz 2018).[6]

For these reasons, it is therefore not surprising that US government officials and private sector executives confirm that American companies operating abroad frequently appeal to the US government for assistance, and that such appeals are often answered favourably, even when firms have the ability to file independent treaty claims (Gertz 2018). Unless the US is a unique case, a question we will return to, it appears that the de-politicization hypothesis is indeterminate at best. This calls into question a core justification for investment treaty arbitration advanced during the creation and expansion of the investment treaty regime by both policy-makers and senior legal academics. Rather than accepting the de-politicization hypothesis as a stylized fact, it should be evaluated empirically. We take on this problem in the remainder of this paper.

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[5] Using data on investment flows, Wellhausen (2018) suggest that investment treaty arbitration occasionally assist with restoring investor-host state relations. The conditions under which this is true is an important subject for future research, but for our purposes we note that there are plenty of examples where investors expect the opposite. For instance, diplomatic cables about a dispute between General Electric and Trinidad & Tobago describe how the multinational expected an arbitration claim would sour relations and set the stage for future disputes with the government and therefore repeatedly sought assistance from the US government to help settle the dispute instead (Cable ID: 06PORTOFSPAIN374). In another dispute involving ConocoPhilips and Venezuela, the American investor had structured its investment to preserve arbitration rights against Venezuela, but company executives remarked to the Ambassador that "arbitration was the worst-case scenario for CP" (07CARACAS218). Even domestic court proceedings may result in a hostile response from the host state. When Motorola took the Indian government to court, for instance, the American government was told that it would antagonize "the entire bureaucracy" (06CHENNAI2554). The US Trade Representative also advises American firms that investment treaty arbitration "is typically a recourse of last resort", as the investor could potentially be subject to future retaliation "by the host government (quoted in Wellhausen 2018).

[6] Equally, Wellhausen (2014: 112-155) notes that firms often requested diplomatic assistance in disputes in Eastern Europe, and Jandhyala and Weiner (2014) find that since state-owned firms may rely on diplomatic efforts to resolve disputes they value the option of investment arbitration less favourably than other investors.

The Dataset[7]

One reason why the empirical analysis of diplomatic interventions in investment disputes has received little academic attention so far is the scarcity of data, as political pressure in informal investor-state dispute settlement is rarely observed. Home governments, host governments and foreign investors can all have incentives to keep negotiations over investment disputes confidential. In the case of the US, the State Department makes public its guidelines on how and when US embassies abroad may assist Americans engaged in investment disputes, but the policies are vague and it is difficult to assess how closely on-the-ground diplomacy follows such guidelines.[8]

To confront this challenge, we take advantage of a data source which offers a window into these private negotiations: internal US State Department diplomatic cables which were subsequently publicly leaked. In 2010-2011 the WikiLeaks organization publicly released some 250,000 diplomatic cables consisting of internal communications within the US State Department (Mackey et al 2011). The cables reveal internal communications between State Department headquarters in Washington, D.C. and diplomatic missions (embassies and consulates) abroad. They consist primarily of diplomats informing Washington-based officials about recent events in their country and embassy activities, as well as occasional requests for instructions on which policies or actions to adopt. The cables were never intended to be made public; a minority are classified, while many more are marked as sensitive but not classified. The cables range from 1966 to 2010, though the substantial majority of the cables are from 2000 onwards.[9]

Information from the cables has previously been used for studies on international relations in Asia (Khoo and Smith 2011; Mendis 2012), relations between the United States and unrecognized *de facto* states (Pegg and Berg 2016), PTA negotiations between the United States and Jordan (El Said 2012), the negotiations of the Trans Pacific Partnership (Michael 2015), the use of US sanctions against Myanmar (Jones 2015) and US efforts to combat human trafficking (Kelley 2017)[10]. Partly as a result, substantial commentary has emerged about the methodological and ethical concerns regarding the academic use of such data (e.g. Drezner 2010; Kelly 2012; Michael 2015: 175-184). To begin with, it is difficult to know whether the diplomatic cables made public are representative of American foreign policy, both because only a subset of cables were leaked and because the cables only capture communication between the State Department and embassies abroad, leaving other important players in the policy process out of the picture. While this means we may miss some Washington-based lobbying in investment disputes, which is not transmitted to embassies, interviews with current and former State Department officials confirmed that economic officers and Ambassadors in-country are almost always the first point of contact for companies seeking diplomatic support in disputes.

Another potential concern is that data may be selectively leaked – with the goal of changing a certain policy or embarrassing a certain actor – which introduces the possibility of sampling biases. However, since our focus is on the relatively 'low politics' of foreign economic policy in specific

[7] Dataset and do-file is available from the Inter-university Consortium for Political and Social Research; ICPSR (Gertz, Jandhyala, and Poulsen, 2018).

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

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

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

investment disputes, it is highly unlikely any of the cables of interest to us were selectively chosen to garner headlines in newspapers. Indeed, our finding that US diplomatic engagement in disputes is only rarely coercive challenges some of the anti-American narratives espoused by the WikiLeaks organisation, and thus it is unlikely the cables were selected on this parameter. Finally, and importantly, our focus on economic disputes assuages ethical concerns that research using leaked diplomatic cables is complicit in revealing particularly sensitive state secrets or harming national security interests.

Confident that our use of the cables does not present insurmountable methodological or ethical concerns, we searched for all mentions of investment disputes between an American company and a foreign government. The US government keeps track of such disputes partly to conform to the US Foreign Relations Authorization Act (1994, 1995), which requires the State Department to annually report to Congress on all outstanding investment disputes involving American citizens or corporations.[11] Disputes were recorded if they were outstanding (or very recently resolved) at the time the cable was written. Based on the cables, we identify 219 distinct investment disputes involving American investors and foreign governments in 73 developing countries.[12] The cables include a few disputes initiated in the middle of the 20th century, but we only include disputes that were initiated since the second half of the 1990s. This is partly because there is only scarce information about disputes before this period and partly to ensure the analysis is limited to the period in which the US consented to investment treaty arbitration (American post-war Foreign, Commerce, and Navigation treaties were used as investment protection treaties, but did not include recourse to investor-state arbitration).[13] Table A.1 in the appendix shows the distribution of disputes in our dataset across countries.

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

The first point to note is that explicit links to aid, trade, or other host state priorities are rare, made in only 7 disputes (or roughly 3% of all disputes). In each of these cases (five in Peru, one in Ecuador and one in United Arab Emirates) American government officials told local officials that negotiations of PTAs could be in peril without resolution of the dispute. As a matter of descriptive inference, the fact that disputes were explicitly linked to trade benefits only 3 percent of the time – and never to aid

[11] Every year, the State Department officially transmits the resulting document—the "Report of U.S. Persons Expropriation Claims and Certain Other Commercial and Investment Disputes"—to Congress. The report is not released to the public, however, thus its contents, including summary statistics on the total number and distribution of disputes, are unknown.

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

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

benefits - indicates that American investment diplomacy is much more ‘benign’ today compared to the Cold War period.

Yet, while explicit sanctions are rare, high level, politicized diplomatic interventions are common. We find that disputes are discussed with the head of state or raised during an official diplomatic visit in 57 cases (or 26% of all disputes). In theory, such diplomatic interventions could merely be ‘cheap talk’ with little effect on host states’ incentives or actions. This is undoubtedly the case in some instances, yet the cables suggest that US officials place considerable importance on resolving the disputes and that host states expect political costs if they fail to do so. An illustrative example was when the largest US business contract with the Tajikistan government became subject to a dispute in 2006 and 2007. American officials did not explicitly threaten the Tajik government, but clearly and repeatedly told high-ranking Tajik officials – including the President and Foreign Minister - that the United States had an interest in seeing the dispute resolved.[14] Tajikistan was displeased that the dispute was an irritant in the bilateral relationship; an advisor to the Tajik President told the US ambassador “that the [dispute] has unfortunately acquired an ‘unnecessary emphasis’ in the bilateral relationship, and that a ‘commercial-economic’ dispute should not become political” (06DUSHANBE403). This is one example of how contemporary levels of US diplomatic pressure can involve significant political costs for developing country governments. Recent research suggesting that American diplomacy does in fact help resolve both investment and trade disputes (Gertz 2018; Gray and Potter 2017) also implies these interventions are not merely cheap talk.

Using the data compiled from leaked cables, we proceed to two empirical tests of the de-politicization hypothesis. First, we conduct a large-N analysis to test whether, on average, diplomatic interventions are less likely in disputes where investors have access to investment treaty arbitration. Second, we present three detailed case studies that probe the assumed micro-foundations of the de-politicization hypothesis. Neither of these tests suggest that the presence or absence of investment treaties play a crucial role for the politicization of investment disputes.

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

Testing the De-politicization Hypothesis: Quantitative Evidence

The de-politicization hypothesis suggests that the US government should be less likely to seriously intervene in investment disputes if the host state has ratified an investment treaty with the United States. As an initial step, we therefore compare whether diplomatic intervention was any more or less likely in the presence of a ratified US investment treaty.[15] The results are summarized in Table 1: the share of disputes with serious US diplomatic engagement is almost exactly the same in countries with and without US investment treaties: 30 percent vs 29 percent. This suggests that US investment treaties are uncorrelated with US diplomatic engagement.

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

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

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

To more carefully assess this result, we turn to estimating a basic regression model of the drivers of diplomatic interventions. We begin with a simple model of host country and dispute-level controls. As the ability and effectiveness of US diplomacy may be related to the host country's market size we include (the log of) host country *GDP*.[16] We also include *GDP Growth*, as both investors and the US government may be more intent on a quick political solution in high growth host countries. US diplomatic efforts may also depend on the average or expected levels of investment risk in a host country and we therefore include ICRG's measure of the *Investment Profile*. This index captures the risks arising from contract viability, expropriation, profit repatriation, and payment delays.

Both official State Department guidelines and our interviews with government officials suggest that American diplomats are more likely to intervene in disputes that touch on broader diplomatic priorities, such as the rule of law, due process and contract enforcement concerns. To capture this feature of American investment diplomacy, we include two dispute-specific variables, both coded from information in the cables. We include the binary variable *Local Court*, for whether the investor has previously sought resolution through the local legal system.[17] Second, we include the binary variable *Contract Dispute*, for whether the dispute is due to an alleged host state breach of contract with a US investor. The variable descriptions along with the summary statistics are provided in Table A2 of the appendix.

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[15] This includes all US BITs and a number of PTAs. Even in the absence of a US investment treaty, some investors can have secured recourse to investment treaty arbitration by routing investments through third countries. These patterns are difficult to identify, but more than four in five investment treaty claims brought by American investors were brought under American investment treaties (Gertz 2018). Also, primarily large firms have the scale and legal resources to avail themselves of opportunities for treaty shopping, yet our results hold even after controlling for firm size.

[16] The GDP and GDP growth variables are drawn from the World Development Indicators.

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

Model 1 in Table 2 presents the results of the basic controls-only model. In this, and all subsequent models, robust standard errors are clustered by host country. The overall model itself is highly significant. But while host country characteristics do not appear to be a significant predictor of US intervention, dispute-level characteristics are important. The US government is significantly more likely to intervene in disputes which have already been brought to local courts. Apart from following official guidelines, interventions in these cases may be designed to send a signal about US interests in a well-functioning judicial system free of political interference. Contract disputes are also more likely to involve serious US diplomatic involvement, perhaps because intervention is easier to justify when individual US investors are targeted compared to disputes over general government regulation.[18]

Model 2 adds the presence of a ratified investment treaty to this basic model. The de-politicization hypothesis implies that the presence of an investment treaty should have a significant negative effect on the likelihood of diplomatic intervention. Yet, this is not supported by the results presented in Table 2. For an "average" dispute which is not covered by a US investment treaty (a dispute that has not been through the local court system, does not involve a contract, and with all other variables set to their mean values), the predicted probability of serious diplomatic intervention is 0.12 (95% CI 0.04, 0.19). The predicted probability of serious US diplomatic intervention for a similar "average" dispute but *with* a US investment treaty is slightly *higher* at 0.15 (95% CI 0.07, 0.23). The difference is not only small and statistically insignificant, it also has the opposite sign than expected.

	-1-	-2-
US Investment Treaty		0.26
		(0.430)
GDP (logged)	0.008	0.016
	(0.124)	(0.117)
GDP growth	0.065	0.065*
	(0.039)	(0.039)
Investment Profile	0.018	0.014
	(0.088)	(0.090)
Local Court	1.092***	1.091***
	(0.322)	(0.323)
Contract Dispute	0.931***	0.909***
	(0.344)	(0.345)
Constant	-2.537	-2.818
	(3.075)	(2.948)
N	177	177
Log likelihood	-92.03	-91.78
Chi2	34.47	34.7
AIC	196.06	197.56

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

Table 2. Logit model of US diplomatic action

[18] Some of these contracts may include international arbitration clauses, giving investors recourse to investor-state dispute settlement beyond access provided in investment treaties; unfortunately, the cables do not include enough data about contractual clauses to draw any strong conclusions on this point. However, in the case of contract disputes that did include arbitration clauses – such as the Oxy dispute mentioned below - the consistent result that diplomatic responses are more likely in contractual disputes provide supplementary evidence against the de-politicization thesis, as the US government was more likely to involve itself when investors had contractual recourse to international arbitration.

Absence of evidence is of course not the same as evidence of absence. To actively demonstrate that the effect of investment treaties on diplomatic involvement is negligible we adopt the approach towards null-findings advocated by Rainey (2014), which calls for calculating the 90 percent confidence interval of the average marginal effect (AME) of the variable of interest. By assessing how closely gathered around zero the range of plausible AMEs are, we can more specifically test for evidence of the absence of any substantial effect. The 90 percent confidence interval for serious US diplomatic involvement ranges between –7 percentage points and 16 percentage points, and we can therefore confidently say that recourse to investment treaty arbitration does not decrease the probability of serious US engagement by more than 7 percentage points (using a one-sided test, $p<0.05$). Even if this upper bound indicates the true effect, it would be a negligible effect compared with the very strong suggestions in policy discourse and legal literature discussed earlier about how investment treaty arbitration "substitutes" for politicization by "insulating" investment disputes from diplomatic relations.

In the appendix we report on a series of robustness tests using alternative data sampling and modelling assumptions; in none of these tests do we find any evidence for the depoliticization hypothesis (Table A.3). Still, it is worth considering whether there are other unobservable factors driving American intervention in disputes, and the extent to which such concerns may lead us to miss any de-politicization effect. First, given that the US does not select investment treaty partners randomly, are there patterns in the distribution of BITs across host states that might bias our analysis? If the US was more likely to sign BITs in countries where the American government was particularly concerned about the investment climate and eager to intervene in disputes, then we might fail to observe a de-politicization effect, as the underlying propensity to intervene in BIT partner countries would be systematically higher. On the other hand, if de-politicization was an objective of the US BIT program, and treaty partners were selected partially because they were countries in which the United States particularly wanted to avoid being dragged into political negotiations in investment disputes, this would bias in favour of finding a de-politicization effect. In this instance, the underlying propensity of American diplomats to intervene in disputes in BIT partners would be systematically lower than in other countries.[19] Recent research suggests the latter is much more likely. De-politicization was an important goal of the American BIT program, and US political and strategic concerns are better predictors of US BITs than investment risks (Vandevelde 2009: 27-30; Chilton 2016). Thus, we do not think this form of endogeneity is a problem for our analysis, and if anything will lead us to overestimate any de-politicization effect.

A second potential concern is whether firms that invest in BIT countries are systematically different than those investing in non-BIT countries, or otherwise act differently when they have access to treaty protections than when they do not. That is, the firms investing in BIT countries, and the kinds of disputes they are likely to get into, may for some reason engender a greater likelihood of US intervention, which would lead us to underestimate the de-politicization effect of investment treaties. Yet even here there is reason to believe that, if anything, such endogeneity is likely to bias our analysis in favour of finding a de-politicization effect. Specifically, if there is any moral hazard effect of BIT protection leading firms to take more risks and more brazenly challenge the government, such behaviour could make the firms less deserving claimants in the eyes of American diplomats. Government officials stress in interviews that the underlying merit of a case is an important factor when deciding how strongly to support an investor; if investors act more recklessly when they have access to treaty protection, diplomats are less likely to come to their defence.[20] Moreover, as

[19] We thank Emma Aisbett for pointing this out.

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

mentioned above, even very large US investors had limited knowledge of investment treaties during the time period of our sample (Yackee 2010), thus it seems unlikely that treaty protection substantially affected US corporate strategies within the host state. So, although we can't use the cables to directly observe corporate strategy, there is little reason to expect that this biases against finding a de-politicization effect.

Nonetheless, in a series of additional tests described in the appendix and presented in Table A.4, we consider whether power and influence of the private investor affects the extent of diplomatic intervention in a dispute. We proxy for power and influence in two ways. First, bigger investors may have substantially more power to influence the actions of the home government; thus we include variables measuring firm size (revenues, Fortune 500 status), the value of assets under dispute, and if the investor is an individual (rather than a corporate entity). Second, investors may gain influence through lobbying the US government, and thus we include lobbying expenditure. The results from these additional tests suggest that private pressure has little independent effect on serious diplomatic involvement – an interesting result in itself - and our main result on the de-politicization hypothesis remains unaffected.

A final potential concern is if disputes reported in the cables differ systematically from the universe of investment disputes. In particular, if diplomats quickly and quietly dismiss smaller, seemingly less important disputes, and such actions are not deemed worthy to report in diplomatic cables, our data would disproportionately exclude low-intensity cases. Such selection bias could result in over-estimating the likelihood of diplomatic engagement. While this is possible, it is worth noting that (a) many seemingly small and unimportant disputes are in fact reported in the cables, such as a $30,000 dispute over a fruit processing plant in Uzbekistan (09TASHKENT927), a €150,000 dispute between an American investor and the Croatian national railroad (09ZAGREB375), and a $234,000 contract dispute over consulting fees for a hydroelectric dam project in Nepal (08KATHMANDU704); and (b) several cables report on disputes in which the embassy explicitly took no action, but the existence of the dispute itself was still deemed worthy of reporting (for instance 07MAPUTO675, 09LAPAZ232, and 10BRATISLAVA43). So, while we cannot definitively determine the extent to which our dataset is representative, there are plenty of examples to suggest that smaller disputes are not systematically excluded from our sample. Moreover, even if lower intensity disputes should be under-represented in our data, the key concern for our purposes is whether they are systematically more likely to be under-represented in countries with investment treaties than those without treaties. There is no reason to believe that the presence of an investment treaty would have any effect on such reporting.

Testing the De-politicization Hypothesis: Qualitative Evidence

The previous section demonstrated that US investment treaties appear to have a negligible impact on US intervention in investment disputes. In this section we build on these findings, using case studies to probe deeper into the underlying logic of de-politicization. We look at three disputes between American investors and Latin American governments during the mid-2000s, thus accounting for region-specific effects as well as changes in US foreign economic policy over time. In particular, we examine qualitative evidence to assess the core micro-foundation of the de-politicization hypothesis: Do home states prefer to compartmentalize commercial issues from broader diplomatic relationships, and use the availability of investor state arbitration to deflect private pressure to intervene in investment disputes?

We find no support for this claim; both firms and US government officials view diplomatic interventions as an appropriate and important means of settling investment disputes, whether or not an investment treaty is in place. Investment arbitration is considered an *additional* tool for protecting investment, rather than an alternative to politicized diplomatic involvement. Consistent with the quantitative results, there is no evidence that US investment treaties help developing country governments de-politicize disputes with foreign investors.

Occidental Petroleum v Ecuador[21]

In 1999 Occidental Petroleum (Oxy) signed a concession contract with the government of Ecuador to explore and exploit oil in the Amazon. Oxy was the largest foreign investor in Ecuador's oil sector. Five years later, the Ecuadoran government began publicly threatening to expel Oxy from the country, alleging that Oxy's improper sale of a minority stake in the deal constituted grounds to void the contract.[22] The Oxy dispute quickly leapt onto the bilateral agenda. The firm asked the embassy for support on August 23, and by the end of the following day the US Ambassador had raised the issue in separate discussions with Ecuador's President, Trade Minister, Minister of Economy, Minister of Government, and Minister of Foreign Affairs (04QUITO2327). The Ambassador made clear that any decision to void Oxy's contract would have serious consequences for the US-Ecuador relationship. Subsequently, the Ambassador suggested talking points for US officials (both in DC and Ecuador), noting that if Ecuador followed through with cancelling the contract it risked losing its trade benefits under the Andean Trade Promotion and Drug Eradication Act (ATPDEA) as well as "the certain ruin of its investment climate" (04QUITO2462).

During this period, the United States was in the early stages of negotiating a PTA with Ecuador. US officials from the State Department, Commerce Department, the Trade Representative, and National

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

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

Security Council repeatedly made clear that the treaty was off the table until the Oxy dispute was resolved (05QUITO601, 05QUITO681, 05QUITO798). Public debates in the US Congress also highlighted American demands to resolve outstanding investment disputes in Ecuador (United States Congress 2004).

Over the next several months, as populist protests mounted against Oxy, the US government remained deeply involved in the negotiations (05QUITO2578). On May 15, 2006, however, the Ecuadoran government finally bowed to domestic political pressure and announced it was voiding Oxy's contract and claiming its assets without any compensation. The very next day Washington announced it was suspending PTA negotiations, publicly citing the Oxy dispute as the reason (Miller 2006). Occidental filed an investment treaty claim at ICSID, and a split tribunal eventually awarded the company $1.8 billion in compensation - at the time the largest ICSID award in history (later reduced to $1 billion by an annulment panel). As of January 2018, the United States has not had any official PTA talks with Ecuador since the Occidental dispute.

The motivations and actions of key players in the Oxy case do not follow the assumptions of the de-politicization hypothesis. Although Oxy successfully relied on investment treaty arbitration, it also worked closely with senior American diplomats to assert diplomatic pressure on the Ecuadorian government. Moreover, there is no evidence that US diplomats were reluctant to intervene in this dispute, or sought to compartmentalize it from broader relations. While Ecuadoran officials complained both privately (06QUITO321) and publicly (Marketwatch 2006) about American diplomats linking the Oxy case to PTA negotiations, American officials put the dispute near the top of the agenda in the diplomatic relationship. The dispute was particularly important to the US because it was seen as a warning sign of increasing populism and resource nationalism, perhaps suggesting that Ecuador would follow a similar path as Venezuela and Bolivia.[23] The US government intervened aggressively attempting to prevent this outcome, and it is therefore no surprise that US officials did not use the availability of arbitration to deny requests for support. Indeed, as early as September 9, 2004 – nearly two years before Oxy's contract was cancelled – American officials were told by Oxy's leadership that the firm would likely pursue a claim if Ecuador followed through on its threats. But American diplomats displayed no interest in using this an excuse to leave Oxy to defend its own interests vis-à-vis Ecuador's government.

The Oxy case was extreme in the current universe of investment disputes. It involved direct expropriation of a major investment without compensation and, partly for that reason, resulted in economic sanctions (cancelling of PTA negotiations). Yet, the strong diplomatic response was not tempered by the presence of an investment treaty. The US government escalated the politicization of the dispute while knowing that the investor was going to seek compensation through international arbitration. This is contrary to the expectations of the de-politicization hypothesis.

Americatel v Guatemala[24]

In June 2006, the American investment company Iselo Holdings LLC, a small firm run by a former investment banker, purchased the Guatemalan telecommunications company Americatel Guatemala ('Americatel'). The company had a pre-existing interconnection agreement with Telgua,

[23] For a discussion on how the nationalization and control of natural resources was intrinsically linked to Ecuador's broader shift toward leftist politics, see Rosales (2013).

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

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

Officials from the United States Trade Representative (USTR) in Washington became involved in the dispute as well.[25] In multiple meetings the embassy and USTR encouraged SIT to resolve the dispute by enforcing CAFTA's competition rules. This had little effect, likely because Guatemala was in the midst of an election and change in administrations in late 2007 and early 2008. Frustrated with the lack of progress, Americatel began the formal procedures to initiate an ICSID claim based on CAFTA (interview with Americatel representative; 08GUATEMALA689).[26] This prompted the Guatemalan government to act, as it preferred to rely on diplomatic negotiations rather than have the arbitration claim proceed (08GUATEMALA689). Several high-ranking USTR officials visited Guatemala and met with the Minister of Economy, the head of SIT, and officials from the Ministry of Communications (08GUATEMALA1036). American diplomats believed the Minister of Economy was motivated to settle the dispute, but saw "no indication" that the key agencies - SIT and the Ministry of Communications – wanted to change course and US officials thus predicted the ICSID claim would have to proceed (08GUATEMALA1036). Soon thereafter, however, the case was settled through the personal intervention of Guatemala's President and Carlos Slim, who agreed to settle the underlying dispute between Telgua and Americatel – by buying out Americatel's interests in Guatemala – and thereby obviate the looming CAFTA arbitration (personal interview with senior Americatel representative). While this did not address the broader shortcomings in Guatemala's telecoms regulations, it ensured Americatel could salvage its investment.

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

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

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

diplomatic interventions observed in the cables. Yet the US government was still heavily involved in the dispute, despite the availability of investor-state arbitration.

American energy companies v Brazil[27]

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

The disputes emerged after several American companies – including Enron, El Paso, MDU Resources Group and NRG Energy – had partnered with Petrobras on a series of thermoelectric plants. In January 2005 Petrobras announced it wanted to revise the terms of the contracts and began delaying payments to American investors.[28] In a related dispute, El Paso energy claimed the governor of Parana State ordered the state electric company, Copel, to stop making payments. Both Brazil-based and visiting US officials frequently met with representatives of the US business community and were well aware of these issues. Yet, the level of diplomatic engagement was very low.

In June 2006 US Commerce Secretary Carlos Gutierrez made a high-profile, week-long trip to Brazil to discuss and advance the US-Brazilian commercial relationship, an event which would have been an ideal opportunity to push the Brazilian government on the specific interests of particular US investors with disputes in the country. Yet, in a series of meetings with high-ranking Brazilian officials, discussions focused overwhelmingly on WTO negotiations, intellectual property rights protections, and potential for cooperation on biofuels and ethanol. The only evidence of a specific company's dispute being raised throughout the week of meetings is when the head of the Overseas Private Investment Corporation (OPIC) thanked Dilma Rousseff, then the President's chief of staff, for "the positive role she played" in resolving a dispute involving El Paso Energy (06BRASILIA1181). There is no evidence the US government lobbied aggressively to compel this involvement and none of the disputes resulted in significant diplomatic friction – despite the absence of an investment treaty.

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

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

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

Is American Investment Diplomacy Unique?

As the world's sole superpower, does American investment diplomacy differ systematically from that of other home states? While we lack data to fully examine this question, anecdotal evidence suggests that our results are not isolated to the US. For example, when Argentina nationalized the assets of the Spanish oil company Repsol, the Spanish government threatened costly trade sanctions, despite the availability of the Spain-Argentina BIT (Minder 2012). Equally, the Canadian government sought to prevent the Democratic Republic of the Congo (DRC) from receiving debt relief from the multilateral Paris Club of creditors in the context of a dispute between the Canadian mining company First Quantum Minerals and the DRC, although the company had access to arbitration under the DRC's mining law (Wroughton and Manson 2010). And though this type of aggressive diplomatic engagement appears to be relatively rare today, active but not coercive diplomacy remains common, whether or not investment treaties are in place. For instance, the United Kingdom government lobbied considerably to defend the interests of the British electric company Rurelec in its dispute with Bolivia, even though the UK had a BIT with Bolivia.[29] In one email then-British ambassador Ross Denny noted that "Our regular high-level lobbying on behalf of Rurelec has helped to demonstrate the seriousness with which we take protection of our companies' interests" (quoted in Provost and Kennard 2015). Equally, the UK government intervened to support both Cairn Energy and Vodafone in their disputes with the Indian Government, another UK BIT partner; the issues rose all the way up to Prime Minister David Cameron, who wrote to his Indian counterpart advocating for the British companies (Mason and Nelson 2011). Finally, it is not just Western states that use diplomacy to assist their foreign investors in the presence of a legalized alternative. For instance, Russian President Vladimir Putin allegedly postponed a state visit to India in order to express his displeasure at how the Russian company Sistema was being treated by the Indian government, rather than letting Sistema rely on the protections provided by the Russia-India BIT (Roche 2012). Although it would have to be subject to further testing, this suggests that other governments also continue to intervene diplomatically in investment disputes despite the availability of investment treaties.

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

Conclusion

Private access to international dispute settlement often results in increased litigation against sovereigns. The investment treaty regime is an important case in point, where the explosion of investor claims has resulted in significant costs for developing countries in recent decades. The benefits of the regime for developing countries, however, are less clear. Empirical literature has focused almost exclusively on one potential benefit - increased investment – while ignoring another which could be equally, if not more, important: de-politicization. Looking specifically at diplomatic interventions from the United States, this paper has filled this gap presenting the first empirical test of the de-politicization hypothesis. In contrast with arguments made by capital-exporting states and prominent legal scholars, we find no evidence that an investment treaty makes a substantial difference to how strongly the US government applies diplomatic pressure to resolve investment disputes. This has particular relevance for developing countries, as they have routinely been encouraged to consent to investment treaty arbitration in return for less politicization of their investment disputes.

Our results are only a first step towards a deeper understanding of how investment treaties may influence diplomatic relations between developed and developing countries. Our look into the often-hidden world of informal investment diplomacy also raises broader questions about the roles of legalization, diplomacy, and corporate power when investors run into disputes in the developing world.

First, our results show that while the US government frequently intervenes in disputes in the developing world, Washington rarely uses explicit threats or sanctions in investment disputes. This implies an important shift in investment diplomacy since the period in which the investment treaty regime emerged. It also raises, at least hypothetical, questions about a more diffuse version of the de-politicization hypothesis, whereby the widespread institutionalization of the legal regime for investment disputes caused a general shift toward less aggressive and coercive diplomatic interventions. It is possible that investment treaty arbitration has had a generalized de-politicizing effect at the regime level, with spillover effects on all countries. This is an important subject for future research, yet it is difficult to assess empirically, as there are a number of contemporaneous potential alternative explanations. For instance, international norms related to aggressive diplomatic interventions for commercial ends, the legitimate use of force in international relations, and respect for the sovereignty of developing countries have all evolved over the last century, making aggressive diplomatic interventions less tolerable (Finnemore 2003). Moreover, the nature of investment disputes has changed: the more aggressive diplomatic interventions of the past were most often in disputes involving outright expropriation and nationalization, yet such disputes are much less frequent today, replaced by more nuanced disagreements over contractual terms and regulatory changes. Disentangling these effects from the effect of legalization will be challenging, but it could offer important insights to understand the impact of investment treaties on developing countries.

Our results also suggest that in the contemporary period the US government is strategically choosing when to intervene in disputes, rather than doing so when compelled by private pressure. Although these findings are preliminary and should be subject to further testing, they imply that home state involvement in investment disputes are driven more by whether politicization of the dispute aligns with US strategic interests, rather than the size and political influence of the investors involved. If true, this would be consistent with emerging scholarship that finds limited material benefits from firms' political investments (see, for example, Baumgartner et al, 2009; Hadani and Schuler, 2013). It would also imply a significant departure from American investment diplomacy during the Cold War.

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Appendix

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

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

Source: Authors' coding from State Department cables.

Table A.2 – Summary Statistics

Variable	Description	Number	Mean	SD	Min	Max
Serious US engagement	Dispute prompts USG to (a) explicitly link it to aid, trade or other benefits; (b) discuss the case with the head of state; or (c) raise it during an official diplomatic visit. Source: US diplomatic cables (Wikileaks)	219	0.29	0.46	0	1
US Investment Treaty	Dummy=1 if access to investment treaty arbitration through ratified US BITs or FTAs, 0 otherwise; Source: UNCTAD	219	0.38	0.49	0	1
GDP (logged)	Natural log of host country GDP. Source: World Development Indicators	215	24.42	1.86	20.15	28.88
GDP growth	Host country GDP growth rate. Source: World Development Indicators	214	4.61	4.75	-17.67	14.16
Investment profile	Investment risk in host country (high involves few risks). Source: International Country Risk Guide	184	7.82	2.30	0.67	11.5
Local court	Dummy = 1 if dispute been brought to host state courts, 0 otherwise. Source: WikiLeaks	217	0.35	0.48	0	1
Contract dispute	Dummy = 1 if dispute over breach over contract with host state, 0 otherwise. Source: WikiLeaks	219	0.38	0.49	0	1

Robustness Tests

To test the robustness of our results, we consider a series of models with additional control variables and model specifications, presented in Table A.3. In Model 3 we include 5-year period dummies, in case US investment protection policy shifts significantly over time. In Model 4 we include the diplomatic relationship between the US and the host country which might impact the likelihood of escalation of diplomatic intervention. In Model 5, we drop disputes in the Dominican Republic – the host state with the largest number of disputes – to ensure one country is not driving our results. Model 6 excludes those disputes where the investing firm explicitly asked the embassy not to intervene, as these disputes may not be informative of policymaking decisions within the US government. Models 7 and 8 respectively exclude individual private real estate disputes and disputes in which the investor is an individual, as these disputes may differ systematically from disputes involving the assets and rights of firms. Model 9 includes only contract disputes; if the US is particularly interested in these disputes (as our earlier results suggest), we want to confirm we do not miss any de-politicization effect specifically amongst these disputes. In model 10 we include (the log of) the stock of US FDI in the host country, from the US Bureau of Economic Analysis, as the US government may be more likely to intervene in countries that are important destinations for American foreign investment. And in Model 11 we exclude *Investment Profile* from our primary specification as it has limited data availability. Our findings are robust to all of these modelling and data choices.

We also used coarsened exact matching techniques to correct for any imbalance in our sample between disputes in countries with investment treaties and those without. While the results do not alter any of our primary findings, we are hesitant to draw strong inferences from them, as matching on key dispute and country level variables significantly decreased our sample size, and for this reason we do not report these results.

Table A.3 Alternative models and data samples

	-3-	-4-	-5-	-6-	-7-	-8-	-9-	-10-	-11-
US Investment Treaty	0.279	0.234	0.208	0.366	0.307	0.124	-0.379	0.197	0.002
	(0.418)	(0.421)	(0.464)	(0.454)	(0.456)	(0.487)	(0.539)	(0.450)	(0.406)
GDP (logged)	0.028	0.02	0.009	-0.027	0.003	-0.102	-0.014	-0.163	-0.092
	(0.116)	(0.116)	(0.117)	(0.124)	(0.123)	(0.125)	(0.147)	(0.198)	(0.106)
GDP growth	0.062	0.062*	0.055	0.077*	0.045	0.055	0.069	0.097**	0.049
	(0.039)	(0.037)	(0.038)	(0.041)	(0.040)	(0.044)	(0.052)	(0.045)	(0.033)
Investment profile	0.006	-0.006	0.014	0.006	-0.007	-0.06	-0.07	-0.015	
	(0.092)	(0.086)	(0.096)	(0.093)	(0.099)	(0.107)	(0.167)	(0.098)	
Local court	1.113***	1.108***	1.113***	1.109***	1.036***	0.963**	0.657	1.058***	0.791**
	(0.332)	(0.320)	(0.334)	(0.356)	(0.331)	(0.384)	(0.513)	(0.347)	(0.321)
Contract dispute	0.901***	0.904***	0.972***	0.903**	0.668*	0.851**		1.051***	0.710**
	(0.349)	(0.348)	(0.363)	(0.383)	(0.394)	(0.385)		(0.384)	(0.306)
1996-2000	-0.081								
	(0.586)								
2000-2005	0.379								
	(0.496)								
Diplomatic Relationship		-0.26							
		(0.240)							
US FDI (logged)								0.125	
								(0.110)	
Constant	-3.253	-3.181	-2.562	-1.602	-2.03	1.009	-0.01	-0.84	0.507
	(3.006)	(2.964)	(2.939)	(3.101)	(3.130)	(3.233)	(3.993)	(3.592)	(2.575)
N	177	175	161	156	146	136	64	164	211
Log likelihood	-91.15	-90.7	-85.29	-85.34	-81.11	-75.95	-40.39	-84.99	-120.41
Chi2	33.39	33.6	30.22	22.43	19	16.74	3.36	30.35	17.03
AIC	200.29	197.41	184.58	184.67	176.22	165.9	92.77	185.99	252.82

Notes: Standard errors in parentheses, * p<0.1, ** p<0.05, *** p<0.01. Dependent variable is Serious US Engagement. Model 3 includes time period dummies. Model 4 includes the diplomatic relationship between the US and host country. Model 5 excludes disputes in the Dominican Republic. Model 6 excludes disputes in which investors did not request USG assistance. Models 7 and 8 exclude disputes involving private real estate and individual investors respectively. Model 9 includes only contract disputes. Model 10 includes US FDI in the host country. Model 11 excludes Investment Profile.

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

To test if similar dynamics explain US diplomatic interventions today, we consider two variables related to firm size: the log of the investor firm's *Revenues* (Model 12) and a binary variable that measures if an investor is a member of the *Fortune 500* (Model 13). Data on firm revenues are from the Orbis and Compustat databases. Data on the Fortune 500 are coded based on information in *Fortune* magazine; observations are coded as 1 if the firm appeared in the Fortune 500 for any year between 1996 and 2010, or if the firm appeared in the top ten of Forbes' list of the largest private companies in America over the same period.

To test if more politically-connected firms are better able to compel intervention we include *Lobbying* in Model 14*,* the average amount the investor spent lobbying public officials in the US during the three years surrounding the dispute, relying on data from opensecrets.org. It is compulsory for any firms and individuals to report their lobbying expenses under the terms of the Lobbying Disclosure Act. Thus, for all disputes in our dataset which occurred during the period covered by the Lobbying Disclosure Act (since 1998), we have exhaustive coverage of investors' lobbying: either the investor did lobby and thus shows up in the lobbying database with a positive value, or the investor is not in the lobbying database and thus lobbying expenditures are assumed to be $0.

Additionally, it is possible the US is more likely to intervene in disputes with greater assets at stake; in Model 15 we thus include a measure of (the log of) *Dispute Size*, coded using information in the cables whenever such a figure is available. As reporting in the cables variously refers to the best estimate of the asset value under dispute, the loss in revenues claimed by the firm, or damages requested in an arbitration claim, it is an imprecise measure of the size of the dispute, and should be interpreted cautiously. Finally, we include a dummy variable coded 1 if the dispute involves private *Real Estate* rather than commercial assets/operations, and a dummy variable coded 1 if the dispute involves an *Individual Investor* rather than a corporate firm, in Models 16 and 17, respectively. If the power of investors drives American interventions, action may be less likely in private real estate disputes or the disputes of natural persons.

The results, presented in Table A.4, strongly support our primary conclusions: in none of the models do we find a significant effect of investment treaties on the likelihood of US intervention even after controlling for various firm characteristics. The most important predictors from our initial model – local court and contract disputes – remain significant in most of these robustness tests. Additionally, none of the measures of firm power have significant effects. That said; it is important to note government action in a dispute is conditional on the investor's request for intervention. Not all disputes are necessarily brought to the attention of diplomatic missions; moreover, even when a firm alerts the embassy to a dispute it may not request government assistance. Multiple cables record instances where firms specifically ask the government not to intervene in a dispute, and in these cases the government always stays out. Thus, even if there is little evidence that the government is more likely to intervene to benefit larger and more politically active firms, it does not follow that firms are passive players with no influence in the process.

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

	-12-	-13-	-14-	-15-	-16-	-17-
US Investment Treaty	0.098	0.193	0.127	0.075	0.218	0.226
	(0.605)	(0.417)	(0.407)	(0.589)	(0.422)	(0.436)
GDP (logged)	-0.141	-0.025	-0.038	0.003	-0.009	-0.014
	(0.169)	(0.123)	(0.122)	(0.153)	(0.120)	(0.132)
GDP growth	0.149**	0.062	0.061	0.102**	0.056	0.058
	(0.063)	(0.040)	(0.039)	(0.048)	(0.038)	(0.040)
Investment Profile	-0.217	0.029	0.012	0.05	0.029	0.02
	(0.183)	(0.092)	(0.090)	(0.118)	(0.092)	(0.093)
Local court	0.41	1.078***	1.124***	1.028**	1.114***	1.084***
	(0.425)	(0.320)	(0.322)	(0.451)	(0.328)	(0.326)
Contract dispute	0.118	0.796**	0.794**	0.546	0.782*	0.815**
	(0.428)	(0.378)	(0.364)	(0.449)	(0.412)	(0.387)
Revenues (logged)	0.057					
	(0.070)					
Fortune 500		0.651				
		(0.476)				
Firm lobbying (logged)			0.044			
			(0.029)			
Dispute size (logged)				0.203*		
				(0.118)		
Real estate dispute					-0.679	
					(0.693)	
Individual investor						-0.505
						(0.695)
Constant	3.001	-2.057	-1.584	-3.229	-2.101	-1.915
	(4.869)	(3.048)	(3.028)	(3.760)	(3.073)	(3.495)
N	71	177	175	90	177	177
Log likelihood	-41.99	-90.4	-89.9	-46.61	-91.15	-91.31
Chi2	10.17	35.95	35.37	19.46	41.46	42.01
AIC	99.99	196.81	195.8	109.21	198.29	198.63

Notes: Standard errors in parentheses, * p<0.1, ** p<0.05, *** p<0.01. Dependent variable is Serious US Engagement. Models 12 and 13 include proxies for firm size; firm revenues (logged) and Fortune500 status respectively. Model 14 includes logged value of firm lobbying expenditure. Model 15 includes the logged value of the assets under dispute. Models 16 and 17 include dummies for disputes involving private real estate (vs commercial assets) and natural persons (vs corporate entities).

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