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Commercial Diplomacy and American Foreign Policy

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Abstract

Throughout much of the 20th century, American diplomats had little incentive to invest time and effort in commercial diplomacy. Since 1990, however, commercial diplomacy has (re)emerged as a priority in American foreign policy, despite the fact that American businesses are increasingly empowered to act as independent agents in the global economy. This paper examines the rise of commercial objectives in contemporary American diplomacy. I argue that since the end of the Cold War, the historical tension between supporting American businesses abroad and pursuing a strategic foreign policy has evaporated; today, diplomatic interventions to support businesses abroad strengthen the American foreign policy objective of promoting investment climate reforms in developing countries. Specifically, interventions in investment disputes provide American diplomats with valuable private information on a given host state's commitment to liberal economic policies, and serve as focal points for discussions on the importance of a strong investment climate. This argument is supported by two case studies of American diplomatic (non)interventions in investment disputes in Ukraine and Liberia. The findings suggest a persistent role for diplomacy in the modern investment regime, despite the availability of investor-state arbitration as a mechanism for resolving investment disputes.

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Introduction

The modern international investment regime, which allows investors to directly sue host states in binding international arbitration without needing to appeal to their home state for support, was intended to replace commercial diplomacy as a means of resolving business-government disputes (Broches 1965; Shihata 1986; Maurer 2013). Yet recent research has identified a persistent role for home state diplomatic interventions in the settlement of investment disputes[2] (Wellhausen 2014; Gertz 2016; Peinhardt and Allee 2016; Gertz, Jandhyala and Poulsen 2016). This is puzzling. If states created this regime partially so they would no longer need to expend time and effort helping their investors in disputes with foreign governments, why do they continue to intervene abroad to settle disputes diplomatically?

This paper provides one potential answer to this puzzle, focusing on the particular case of the United States, the world's most powerful capital exporting country. Previous research has found that, at least through the Cold War period, officials within the US State Department had little interest in intervening in investment disputes (Krasner 1978; Maurer 2013). The people and institutions responsible for developing America's foreign policy preferred to focus on high-level strategic relations with foreign states; interventions in specific investment disputes at best distracted and at worst actively conflicted with this priority. This does not mean the United States never intervened diplomatically in disputes; however, it did so only when compelled to act by politically powerful private interests, and their allies in Congress and the Treasury and Commerce Departments (Maurer 2013).

I argue that today, however, the State Department is significantly more willing to intervene diplomatically in investment disputes, and does not need to be compelled by powerful private interests. This is because, in many (though not all) instances, such interventions contribute to the broader American foreign policy objective of supporting the creation of liberal investment climates in developing countries. Interventions in specific disputes create opportunities for American diplomats to gain valuable private information on how host states approach the resolution of investment disputes, and how committed host state officials are to attracting FDI. They similarly serve as pressure points for American officials to encourage host states to adopt more investor-friendly investment climates. Moreover, with the threat of pushing countries into the Soviet orbit no longer a factor, the political costs to the State Department of intervening in particular disputes are significantly lower than they were during the Cold War. Thus America's cost-benefit calculus for intervening in investment disputes has shifted considerably since 1990.

These arguments are supported with two case studies of American diplomacy in investment disputes. In the first case, the US government intervened significantly in disputes between American investors and the Ukrainian government, and Congress decreased aid for Ukraine partially due to frustration over these disputes. American interests in promoting liberal economic institutions in Ukraine help explain why these disputes were so prominent in the bilateral relationship. In the second case, the US government failed to provide any substantial diplomatic assistance to Firestone when the Liberian government demanded the company agree to renegotiate an existing concession contract. The Liberian government

[2] Throughout this paper, the term "investment dispute" refers to any instance of contract breach between a foreign investor and a host state, which may or may not proceed to a formal arbitration case.

successfully framed this renegotiation to the international community as an effort in improving procurement practices and promoting transparency and anti-corruption reforms, all the while averring its commitment to a liberal investment climate. The United States thus saw little interest in intervening in this dispute, and stayed out.

The remainder of this article proceeds as follows. The second section discusses American diplomatic interventions in investment disputes during the Cold War period, highlighting the tension between supporting American investors abroad and pursuing a strategic foreign policy. The following section explains why, in the post-Cold War period, the United States government has in fact had its own interests in intervening diplomatically in disputes, as such interventions supported the broader foreign policy objective of promoting liberal investment climates in developing countries. The fourth section provides empirical support for these claims with two case studies of US diplomatic (non)intervention in investment disputes. The final section concludes.

Investment Diplomacy and Strategic Trade-Offs during the Cold War

Before the creation of the modern investment regime, state-to-state diplomacy was the primary method of resolving investment disputes for American firms operating abroad (Krasner 1978; Lipson 1985; Maurer 2013). While such interventions were often successful at securing compensation for American firms (Maurer 2013), they came with significant costs for American foreign policy and strategic interests.

Both Krasner (1978) and Maurer (2013) emphasize the strategic costs to American interests of intervening in investment disputes to protect the assets of US firms abroad. Investment disputes were often irritants in bilateral diplomatic relations, distracting from broader strategic objectives. The United States might have an interest in strengthening an alliance with a country for geo-strategic reasons while simultaneously clashing with that country in a particular dispute. Yet while the State Department generally preferred to abstain from substantial diplomatic engagement in investment disputes, private pressure from powerful corporations – often backed by members of Congress and/or the Treasury Department – led the US to intervene anyways; as Maurer (2013) notes, "domestic interests trumped strategic imperatives, over and over again" (p3). Given the competition for allies during the Cold War, alienating developing country governments over an investment dispute had a high political cost.

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. 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.

Such views were reflected in the bureaucracy and culture of the State Department, which through much of the Cold War period downplayed the importance of economics and commercial diplomacy relative to broader strategic concerns. As a former State Department Foreign Service officer noted about the Department's culture 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… When the commercial operation was at State, not only did State not place a terribly high priority on the economic function, but it 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, p34-35).

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 greater strategic foreign policy objectives.

Investment Protection and American Foreign Policy in the Post-Cold War Era

Since the end of the Cold War, however, American foreign policy objectives have shifted significantly. In the post-Cold War era the State Department has 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 these broader goals.

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". 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 thus became an important goal for American international development and foreign policy programs.

Since 1999, the State Department has published "Investment Climate Statements" for all countries in the world. Though these publications 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 (Department of State 2014). 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 upholding property rights and the rule of law. Specific investment disputes acted as real world examples to demonstrate to host states how to appropriately (according to American ideals) protect property rights and follow just legal processes. 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.

Each individual dispute, then, was 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) behaviour 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.

Discussing investment climate reforms in the context of specific disputes provided USG officials with valuable private information on the host state government's underlying 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 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.

The American objective of 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 investments (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, US government 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.[3]

[3] Interview with advisor to developing country government, Washington DC, May 2015.

Empirical Evidence: Case Studies of US Diplomatic Policy in Investment Disputes

This section assesses USG diplomatic engagement in case studies of two investment disputes. In Ukraine, the USG strongly intervened in a series of small disputes; meanwhile in Liberia the USG provided no meaningful diplomatic support to Firestone in its dispute with the Liberian government. The USG was eager to intervene in the Ukraine disputes because at the time it was concerned about the trajectory of the country's economic policy, and diplomatic interactions were useful for promoting investment climate reforms. Conversely, in Liberia American diplomats did not see the demand to renegotiate Firestone's concession contract as a meaningful signal of an uncertain investment climate, as they were convinced of the Liberian government's commitment to instilling liberal economic reforms. The USG thus had little incentive to actively intervene in the Liberian dispute.

Strong Diplomatic Interventions 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.

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 Defence 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.[4] 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

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

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 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.[5] 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.

Why did the US intervene so strongly in these Ukrainian investment disputes? While pressure from Congress certainly played a role, interventions in investment disputes complemented broader American policy goals in Ukraine. 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.[6] State Department officials believed that increasing economic interdependence with Eastern European countries would contribute to peace and stability in the region.[7]

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.[8] 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

[5] Interview with former State Department official, Washington, DC, December 2015.
[6] 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.
[7] See, for example, Madeleine Albright's testimony at her Senate confirmation hearing (US Congress 1997).
[8] 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).

investor perceptions.[9] 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.

Moreover, one of the USG's strongest interests in these disputes was simply observing whether Ukraine was able to execute and finalize settlements. At the time the government was divided and fractured, and there were widespread rumours about whether certain members of the government were corrupt. The US embassy wanted to know which individuals in the Ukrainian government were interested in promoting a liberal investment climate, and which were more interested in protecting the profits of their crony friends. Diplomatic interventions in investment disputes were thus an opportunity to gauge the extent to which different senior officials in the Ukrainian government had interests broadly aligned with those of the US government.

The State Department's goal of promoting liberal economic institutions in post-Soviet countries encouraged it to intervene strongly in investment disputes in Ukraine, even at the potential cost of alienating an important ally in the region. Given the uncertainty and disruption in Ukraine's domestic politics at the time, these interventions helped American diplomats understand, and modestly shape, Ukraine's political-economic trajectory.

Weak Diplomatic Interventions 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 the company greater control over Liberian politics (Chalk 1967).[10] 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 April 12, 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 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

[9] Interview with former State Department official, Washington DC, December 2015.
[10] 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.

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 US government 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 (see, for example, WikiLeaks cable 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.[11]

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

[11] Interview with former advisor to the Liberian government, Oxford, April 2014.

reopened in the country; 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 ensure host country governments respect 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 (see, for example, remarks from Condoleeza 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). 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.[12] 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 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 is 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.

Why didn't the USG take a more active stance in this dispute? The Liberian government strategically worked to portray the Firestone renegotiation as *contributing to*, rather than detracting from, its investment climate reform program. This framing strongly undercut any US 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

[12] 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.

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 US government notes favourably that the Liberian government "has cancelled agreements that were not legally concluded and 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 US 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.

Conclusions

There is considerable evidence that during the Cold War period the architects of American foreign policy had little independent interest in intervening in investment disputes, and considered this commercial diplomacy a distraction from broader strategic goals. Over the last three decades, however, the interests shaping American foreign policy have shifted considerably. American diplomats now are eager to discuss the importance of liberal investment climates with government officials in developing countries. In this context, diplomatic interventions in specific disputes are focal points for broader discussions about the investment climate, and can provide US officials with valuable private information on what value developing country governments place on attracting FDI.

Understanding why diplomats have independent interests in intervening in investment disputes, beyond simply being compelled to act by powerful private interests, helps resolve the puzzle of why diplomacy remains important despite the widespread institutionalization of ISDS. The ISDS system provides foreign investors with an additional avenue to pursue the settlement of investment disputes, but it does little to close off diplomatic interventions as an alternate means of dispute settlement. Article 27 of the ICSID convention declares, “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.” While this may appear to limit diplomatic interventions, in practice 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 of the same dispute, while not precluding other diplomatic contact and support a home state could provide an investor.[13] Moreover, it is unclear what, if any, punishment might be given to a home state for breaching Article 27. Whereas host states face substantial costs for failing to live up to their obligations in the investment regime, there is substantially less clarity on (a) what the precise obligations for home states are and (b) what if any penalties should be imposed when a home state fails to meet these obligations. Given that the investment regime was sold to developing countries partially on the premise that it would lead to less diplomatic pressure from capital exporting states, such questions are important areas for future research.

[13] See Posner and Walter (2014) for a discussion of contemporary interpretation of Article 27, as well as Schreuer (2001) p 399-414.

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