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ABSTRACT

The case for the desirability of the modern system of investment treaty arbitration rests on certain stylized historical claims. Those claims serve to demonstrate that the pre-modern system of dealing with investor–state disputes was inferior compared to current arrangements, which allow foreign investors to initiate highly legalized (or “depoliticized”) arbitration against host state governments for alleged violations of investment treaties. The implication of the historical comparison is that we should accept, and perhaps even expand, investment treaty arbitration to avoid a return to a more dangerous practice. This article challenges the historicity of this standard story through an in-depth examination of an important but understudied episode of expropriation from the 1970s, Mauritania’s seizure of the MIFERMA iron ore operations. As I show below, politicized dispute settlement need not entail, nor even risk, resort to force. It can even be successful, especially where home and host state governments and the investor perceive mutual gains from continued cooperation. More generally, the article suggests the utility of micro-historical analysis of investor–state disputes as a methodology for gaining a more realistic understanding of how legal and diplomatic dispute settlement methods can interact to support negotiated outcomes.

INTRODUCTION

The modern international investment law regime is characterized by a high degree of legalization.1 By “legalization” I mean that foreign investors can unilaterally invoke a rules-based dispute-settlement process through which independent tribunals are given the power to authoritatively decide the investor’s dispute with a host state through a reasoned award that justifies the tribunal’s decision in the language of international law. The result has been an explosion of investor–state arbitration (ISA).2 The rise of ISA has transformed international investment law from a sleepy...
backwater, characterized by frustratingly abstract debates about whether expropriated investors deserve “full” or “fair” or “adequate” compensation, into one of the most vibrant areas of international legal practice and scholarship today.

ISA has nonetheless proved controversial, with proponents and opponents trading various arguments for and against. Opponents make claims about the undesirable restriction of sovereignty or of “policy space.” Proponents often suggest that a robust system of ISA is justified because it “depoliticizes” the settlement of investor – state disputes. It is said to do this by removing the home state government from its traditionally prominent role in deciding which of its citizens’ claims to pursue on the international stage, and in deciding how to pursue them. This article is one of the first, and perhaps the first, to provide an historical examination of the latter argument, which I call the “depoliticization thesis.” In doing so, it makes two contributions, one substantive and one methodological.

Substantively, I suggest that the depoliticization thesis exaggerates the dysfunction and danger of the pre-investment treaty era. While the depoliticization thesis has some intuitive appeal, its underlying depiction of politicized dispute settlement and its alleged defects rests on an outdated or even ahistorical understanding of how home state governments used the tools of “diplomatic protection,” broadly construed, to promote the interests of their investors. Politicized dispute settlement can be successful, especially where home and host state governments, and perhaps also the investor, perceive mutual gains from continued cooperation.

Methodologically, the article serves to demonstrate the intellectual utility of in-depth historical analysis of investor – state dispute settlement as a means of studying the function and relevance of international law. As evidence to support my substantive claims, I present a rich, detailed examination of the aftermath of a single but important episode of expropriation in the pre-investment-treaty era: Mauritania’s seizure and nationalization of the primarily French-owned MIFERMA iron ore operations in 1974. The article’s explicitly historical focus places it within the more general “turn to history” in both international legal scholarship generally, and in international investment law scholarship specifically, but with three important differences.

First, unlike much of the work in the “turn to history,” my arguments are based upon the sine qua non of the historical method: extensive archival research. I use my engagement with primary sources to reconstruct the ways in which investors, home and host states, and international institutions, like the World Bank, both craft and 


operate within an informal dispute-settlement process that, despite the absence of investment treaties, can succeed in pacifically and successfully resolving important investor-state conflicts.6

Second, and relatedly, my historical methodology is decidedly “micro” rather than “macro” in scope.7 My approach can be seen as a response to Koskenniemi’s suggestion that international law scholars of an historical bent narrow their focus of inquiry.8 In that spirit, I do not aim to provide a global account of the development of international investment law. My aim is rather to demonstrate the value of focusing in fine-grained detail on a specific case to uncover potentially generalizable lessons about how various actors experienced and acted within a politico-legal space in which international investment law was less formalized, and less hegemonic, than it is today.9

Third, my historical approach departs from the decidedly “critical” orientation that characterizes much of the “turn to history.” My interest is not in denouncing international investment law as reflecting the neo-colonial subjugation of the global South, but rather in exploring the extent to which a widely-accepted story of what the world was like in international investment law’s relative absence is reflected in the historical record. My conclusions are “critical,” but they are critical of how we justify international investment law, rather than of international investment law itself. That we should find evidence that the modern vision of politicized dispute settlement is something of a caricature is of significant policy importance, as it suggests that we might successfully de-legalize investor-state relations without necessarily returning to an era in which such disputes were supposedly resolved by threat of steel and fire.

The article proceeds as follows:

Section I sets the stage by describing the justification put forward by the advocates of depoliticization for highly legalized investor-state dispute settlement.

Sections II and III are dedicated to the historical narrative. I provide the reader with a full account of the parties’ thinking and actions, their tactics and strategies. The thickly descriptive focus, characteristic of micro-historical studies, is especially

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6 One of the article’s subsidiary aims is thus to encourage international law scholars to engage more frequently with primary sources, in order to make their historical claims more convincing. For a fuller discussion of this point, see Jason Webb Yackee, The First Investor-State Arbitration? The Suez Canal Dispute of 1864 and Some Reflections on the Historiography of International Investment Law, in The History of International Investment Law, supra note 5.


9 I say “potentially generalizable” because the obvious limitation of a single case study is that the findings might not be externally valid—that is, they might not apply to other cases, whether real of hypothetical, contemporaneous or future. And indeed, at least some historians of international law insist that searching for generalizable lessons in history is a fool’s errand, largely because the past is inevitably and fundamentally different than the present. See Randall Lesaffer, International Law and Its History: The Story of an Unrequited Love, in Time, History & International Law 26, 34-35 (Matthew Craven et al. eds., 2007). My own view is less pessimistic, as I explain in Jason Webb Yackee, The First Investor-State Arbitration? The Suez Canal Dispute of 1864 and Some Reflections on the Historiography of International Investment Law, in The History of International Investment Law, supra note 5. That said, the reader should recognize that I make no claim that the experiences narrated and analyzed here are necessarily representative of other cases.
justified by the poor state of our knowledge of how governments and international institutions like the World Bank attempted to manage and influence the aftermath of expropriation events. We know so little because the available evidence is typically hidden from view as state secrets. In the MIFERMA case, it is fortunate that the French and U.S. governments and the World Bank have declassified a large collection of relevant files. Those files provide a window into what traditional international investment law scholarship, with its focus on parsing published arbitral awards, typically views as unobservable. However, as we know, even in the modern era of investment treaty arbitration, many investor–state disputes continue to settle behind the scenes.

Section IV provides my core argument. I present the MIFERMA case as illustrating the promise, rather than the threat, of politicized dispute settlement. I suggest that even in the pre-investment-treaty era, investors had access to various modes of self-help, including law, and that politicized dispute settlement, exercised through a combination of legal and diplomatic means, could be effective, especially where the home state, host state, and the investor found themselves in a complexly interdependent relationship.

Section V offers a brief conclusion.

I. THE DEPOLITICIZATION THESIS

As treaty-based investor–state arbitration has received increasing amounts of criticism, it has become more important to justify the regime as offering important benefits. One of the key justificatory claims is the depoliticization thesis. The thesis, which permeates the international investment law literature,10 is more of a loose and informal collective sense than a fully worked-out theory.11 Its basic idea starts from a deep suspicion of a world in which the foreign investor's primary protection against host state malfeasance is the willingness of the investor's home state to take actions on the international stage to protect the investor's interests. In the absence of an independently exercisable, treaty-based private legal remedy, the foreign investor will pester his home state government to intervene diplomatically on his behalf. The

10 Martins Paparinskis, *The Limits of Depoliticisation in Contemporary Investor-State Arbitration*, in *3 Select Proceedings of the European Society of International Law* 271 (2012) ("The contemporary State practice, case law and legal writings consider it almost axiomatic that depoliticisation is the purpose of investment protection regime (even if differing about its implications and the degree of successful achievement).")

home state will be susceptible to such pressure, and its heavy-handed interventions will cause interstate tension and diplomatic crisis, or even war. This theme is evident in the fact that it has become standard expositional practice to introduce the subject of investment treaties by contrasting the modern era with a supposedly historical period in which “gunboat diplomacy”—armed intervention by the home state to protect foreign investors—was an ever-present threat. The effect of the juxtaposition is to suggest, in an exaggerated and rhetorical way, that the legalized processes of the modern era have replaced a more unprincipled or even violent past.

A more realistic position is that investment treaty arbitration was motivated by and is desirable because it discourages and replaces diplomatic interventions that fall short of threatened or realized military action. In this view, international investment law and the investor’s newfound private right of action replaces the old tradition of “espousal,” in which an investor’s remedies for international wrongs were said to be largely limited to convincing his or her home state government to set into motion the traditional system of “diplomatic protection.” While diplomatic protection, as a quasi-formal system, might sometimes involve law-like procedural and substantive norms (being implemented, as it typically is, by bureaucratically organized foreign ministries), it also obviously leaves room for “political” considerations, including threats of economic or other sanctions that would be out of bounds in a purely legal process.

12 See, e.g., Nigel Blackaby, Constantine Partasides, et al., Redfern and Hunter on International Arbitration 441, § 801 (2015); Noahs Rubins, Investment Arbitration - “Transparency” in Investment Arbitration: A Call to Cost-Benefit Analysis in 2010 Austrian Y.B. INT’L L. 293, 297-98 (“Whereas prior dispute resolution practices, such as diplomatic espousal, economic sanctions, and even gunboat diplomacy gave the advantage to economically and militarily powerful States, the new [ICSID] system was intended to place all States on an equal footing, and to allow dispute resolution to occur on the basis of principle.”); L. Yves Fortier, Arbitrating in the Age of Investment Treaty Disputes, 31 UNIV. NEW S. WALES L.J. 282, 289-90 (2008) (“Historically, investors were forced to rely on their own governments to take up and pursue their claims on their behalf through diplomatic, as opposed to legal, channels. This mode of dispute resolution, in its earliest form, typically resulted in a government sending a contingent of warships to moor off the coast of the offending state until reparation was paid, in a show of ‘gunboat diplomacy’. . . Although a return to the days of gunboat diplomacy is unlikely, care must be exercised to ensure that political considerations . . . do not creep back in to the dispute resolution process.”). As Judge Schwebel puts it, “the displacement of gunboat diplomacy by international arbitration is a very real achievement.” Stephen M. Schwebel, Keynote Address: In Defence of Bilateral Investment Treaties, in Legitimacy: Myths, Realities, Challenges 1 (18 ICCA Congress Series, Albert Jan van den Berg ed., 2015).

13 I have said “exaggerated and rhetorical” because most serious observers of the history of international investment law recognize that actual examples of gunboat diplomacy were rare and that there is virtually no risk of a contemporary return to it, in part because of changing rules and norms governing the use of force in international relations. The standard (and typically sole) example of arguably actual investment-driven gunboat diplomacy is the Venezuelan sovereign debt crisis of 1902-1903, in which the British, German, and Italian governments blockaded Venezuela in part because of that country’s refusal to pay its foreign debts or to adequately compensate foreigners injured during the course of a civil war. See, e.g., Veeraraghavan Inbavijayan, Arbitration and Investments: Initial Focus, 2 INDIAN J. ABB. L. 33, 34 (2013). As Weidemaier notes more generally, “Much of the empirical work demonstrating the efficacy of gunboat diplomacy as an enforcement regime focuses on relatively narrow time periods.” W. Mark C. Weidemaier, A Modern Legal History of Sovereign Debt: Contracting for State Intervention: The Origins of Sovereign Debt Arbitration, 73 LAW & CONTEMP. PROB. 335, 339 n.23 (2010).

14 For an insightful if now historical discussion of the law-like regularities to which the diplomatic protection of foreign investment may be subject, see Eugene Staley, War and the Private Investor: A Study in the Relations of International Politics and International Private Investment (1935).
Whether one views espousal as a problem to be resolved depends in part on one’s views on the possible superiority of law-based versus power-based systems of dispute resolution. The investment treaty literature is often somewhat vague on why exactly the latter is necessarily objectionable, illustrating, as one might expect from a literature populated mostly by lawyers, a largely unarticulated faith in both the feasibility and the desirability of cleanly separating international law from international politics.

We can nonetheless identify at least three relatively specific claims supporting law’s superiority. First, perhaps under an espousal regime foreign investors will be able to drag their home states into foreign investment disputes, causing diplomatic complications and embarrassments that interfere with the home state’s larger foreign policy goals. Second, perhaps diplomatic methods tend to be less fair, or even less effective, than the broad-based rights contained in modern international investment law. For example, under an espousal regime, not all investors will be able to convince their home state governments to intervene on their behalf, leaving some investors—and particularly small ones—largely helpless in the face of host state mistreatment. And finally, when the home state does intervene, the outcome may reflect unprincipled power politics rather than neutral and universal legal rules. Perhaps a reliance on home state intervention leads to gross overcompensation, or to radical under-compensation, depending not on the merits of the underlying legal case but on the balance of home state and host state power. Law may thus outperform politics by providing more accessible procedures and fairer, more consistent outcomes.

My approach in this article is to take these claims of investment treaty arbitration’s superiority over an older and primarily diplomatic and “politicized” system seriously, while also noting that claims of that superiority have largely failed to engage in a meaningful way with the historical record. Rather than looking at things from the perspective of the current state of affairs, and exploring whether legalized investor–state dispute settlement seems to promote or provide the benefits that the

15 For an articulation of this basic argument, see Sergio Puig, Recasting ICSID’s Legitimacy Debate: Towards a Goal-Based Empirical Agenda, 36 FORDHAM INT’L L.J. 465, 484-85 (2013); see also Paparinskis, supra note 10, (“depoliticisation could also suggest more broadly that controversies between foreign investors and host states are insulated from political and diplomatic relations between states”) (internal quotation omitted). For an important analysis along these lines, see NOEL MAURER, THE EMPIRE TRAP: THE RISE AND FALL OF U.S. INTERVENTION TO PROTECT AMERICAN PROPERTY OVERSEAS, 1893-2013 (2013).

16 Paparinskis, supra note 10. We might make a similar criticism of investment treaty arbitration: it can be costly and time-consuming, effectively pricing many investors out of the system. A recent study by international law firm Allen & Overy found that investment treaty arbitration entails an average over $4 million in legal costs per party, and that it takes, on average, nearly four years from the initiation of proceedings to receive a final award. Matthew Hodgson, Counting the Costs of Investment Treaty Arbitration, GLOBAL ARB. REV., Mar. 24, 2014.

17 Paparinskis, supra note 10.

18 However, we might question whether arbitral decisions are really all that principled and non-political, given that the principles that arbitrators are charged with neutrally applying are often quite vague, and arbitrators are dependent upon governments and businesses for appointment and re-appointment. Those two facts arguably assure plenty of incentive and room for politics to drive an ostensibly legal process. GUS VAN HARTEN, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW 173-74 (2007).

19 It is nonetheless interesting to note that investment treaty arbitration has sometimes been criticized for perceived inconsistencies in its treatment of highly similar cases. Susan D. Franck, The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions, 73 FORDHAM L. REV. 1521 (2005).
The depoliticization thesis suggests, I use an historical methodology to examine whether politicized dispute settlement was as bad as it is typically claimed to be.

II. MIFERMA FROM INCEPTION TO NATIONALIZATION TO NEGOTIATION

This section provides an historical overview of the MIFERMA investment (II.A); of the tensions leading up to the nationalization (II.B); the nationalization itself (II.C), and the yearlong negotiation process that led to a legally binding final settlement (II.D). The section is intended to provide the background necessary to discuss, in Section III, the specific ways in which the foreign investor called upon various home state governments and the World Bank to intervene.

I have selected the MIFERMA case in part for convenience (the historical record is unusually accessible and complete) but also because the case provides in some sense what should be an easy case for the depoliticization thesis that my analysis challenges. The balance of power between France and Mauritania was tilted strongly in France’s favor, and France certainly had the ability to threaten or to execute actual “gunboat diplomacy” should it have wished to do so. Moreover, MIFERMA was the main (and virtually only) large French investor in the country, its investors and managers were well-connected politically in France, and, as such, the company should have had significant ability to pressure the French government into an outsized reaction, or to secure an overly generous, and perhaps overbearing, settlement. In fact, and as I show below, “gunboat diplomacy” never makes even a hint of an appearance. More surprisingly, the French government’s reaction to the episode was both measured and supportive of a pacific and negotiated compromise solution. The net effect, I argue, is to provide us with a detailed, historically based illustration of investor–state dispute settlement as a relatively successful mixture of politics and law.

A. The Beginnings

Mauritania entered independence in late 1960 with an economy consisting of little more than subsistence agriculture and nomadic herding. Its population—about one million, in a territory twice as vast as metropolitan France—was almost entirely unschooled, and more than half its citizens lived an itinerant existence. But Mauritania had a “trump card,” as an article at the time put it: several years prior, foreign interests had discovered generous deposits of exceptionally rich iron ore in the north of the country, around Fort Gouraud (modern-day Fderič), near the border with the Spanish-controlled “Western Sahara”. The Mauritanian government’s need for mineral-related royalties and taxes was acute. Absent successful exploitation of its natural resources, the government could not cover the costs of its modest post-independence budget without substantial foreign assistance. The government’s

21 A 1965 article counted only fifteen university graduates in the entire country. Economic development, other than the newly opened ore operations, was “virtually nil.” One-partyism in Mauritania, 3 J. MODERN AFRICAN STUDIES 409, 409 (1965).
dependence on French aid to meet its basic needs raised the risk of politically destabilizing criticism that the country had “sold itself to France.” Mineral wealth promised to provide the funds necessary for Mauritania to fund its financial and political emancipation. But Mauritania lacked any native capacity to develop the ore deposits. Iron ore exploitation is capital-intensive, and building and operating a mining operation in the remote and harsh Mauritanian desert required significant technological know-how. Mauritania possessed very little in the way of either.

Foreign capital was essential, and it took the form of a joint-stock company, the Société Anonyme des Mines de Fer de Mauritanie, or MIFERMA. MIFERMA had been formed in the 1950s by the French Rothschilds. Its primary shareholder in the early days was Frobisher, a Canadian mining company. However, Frobisher exited the company before operations began, and a collection of European public and private steel and mining interests controlled the company during the period of interest. The French government controlled just over one-fourth of the shares through the Bureau de Recherche Géologique et Minières (BRGM). French steelmaker Usinor held 15%; the Rothschilds, about 10%; British Steel, 20%; Italian steelmaker Finsider, 15%, and German steelmaker Thyssen about 3%. French investment group COFIMER (Compagnie financière pour l’Outremer) held 9%. At the time of nationalization, in 1974, the structure of ownership was roughly the same, with two main exceptions. The Mauritanian government had obtained a 5% stake in 1965, and, just prior to nationalization, a U.S. company, International Minerals and Chemical Corporation (IMCC) purchased a 3% stake from French interests. However, French shareholders continued to control a majority stake.

MIFERMA’s share capital was insufficient to meet the full financing needs of the project, and public debt financing was critical. It was provided through a combination of loans from the World Bank and the French government. The World Bank loan—$66 million, to be paid back over nine years—was by far the most important source. The bank approved the loan in 1960 after a long and rigorous negotiation

23 Id. at 155.
24 In fact, to demonstrate its newfound financial independence, the Mauritanian government unilaterally rejected French budgetary assistance once the mine operations came on-line.
25 Georges Pompidou, future French prime minister and president, served as director-general of the Rothschilds’ banking operations during this period, and he was familiar with and worked on the MIFERMA project. Jean Audibert, MIFERMA: Une aventure humaine et industrielle en Mauritanie 63 (1991).
26 Data on shareholdings are taken from Audibert, supra note 25, at 74. For descriptions of shareholdings around the time of nationalization, see the untitled report dated June 6, 1974, in AN20000231/17. Relevant French documents are available both in the Archives Diplomatiques of the Ministry of Foreign Affairs, in La Courneuve, and in the Archives Nationales, in Pierrefitte-sur-Seine. Material from the former is in the series Direction des Affaires Africaines et Malgaches (DAM), Mauritanie 1975-1979, box 87 is cited as AD-MAE MAU87 (Mauritanie 1975-1979). Material from the Archives Nationales is cited using the prefix AN, followed by the box’s call number.
27 Audibert, supra note 25, at 75. At the time of nationalization, the company’s share capital was calculated at $61 million. Report sent by J.Y. Eichenberger to Paul Bourrelier [French Ministry of Industry and Research], July 18, 1975, in AN19820511/6 [hereinafter “Pennaroya Report”]. The World Bank estimated that the project would need a total of $190 million. Memorandum and Recommendation of the President, World Bank Document 1960/03/31. Audibert estimates that loans provided nearly sixty-five percent of the initial financing needs. Audibert, supra note 25, at 75.
28 Repayment on the loan was scheduled to begin in 1966 and end in 1975.
Despite the richness of the Fort Gouraud deposits, the financial and operational success of the project was far from certain, and the World Bank—for which lending to a private investor, rather than a state, was unprecedented—took several steps to protect its position. It requested (and received) formal guarantees of repayment by both the French and the Mauritanian governments; it required MIFERMA’s shareholders to formally guarantee to maintain sufficient working capital; it reserved the right to approve certain shareholder actions that might threaten the project’s cash flow, and it quickly sold off a large portion of the loan to private investors.

MIFERMA’s relationship with the Mauritanian government was regulated by a formal establishment agreement, signed in 1959 by future Mauritanian president Moktar Ould Daddah (acting as prime minister) and by the company. The agreement was subsequently approved by the Mauritanian parliament. It consisted of a preamble emphasizing repeatedly that the project’s success depended upon legal, financial, economic, and fiscal “stability,” with twenty-three articles spelling out each side’s rights and obligations.

Infrastructure to support the project was completely non-existent, and MIFERMA promised to construct not just the mining complex itself, but also to build a 650 km railway through the desert and under a mountain, a brand-new ocean port facility, and two cities. It also promised to export four million tons of ore within five years, and six million tons within ten, and to sell the ore at market rates. Mauritania’s various promises included rather elaborate guarantees regarding the “stability” that the preamble had declared so essential. For example, Article 3, entitled “legal guarantees,” engaged Mauritania “for the duration of the present agreement to neither provoke nor prescribe in regard to MIFERMA . . . any measure implicating directly or indirectly an unfavorable modification of the provisions in force at the date of the present convention concerning the constitution, the functioning, the dissolution and the liquidation of companies, the rights and conditions of transfer of shares.” Article 12 promised to lock into place the fiscal regime of 1959, establishing the governing tax and royalty framework. Other articles made promises as to MIFERMA’s freedom to export, import, and to transfer capital. Article 22 contained the intended enforcement mechanism: an arbitration clause committing the parties to arbitrate any dispute concerning “the interpretation or application of the present
agreement” before a three-member *ad hoc* tribunal, whose decision was to be “definitive” and “binding.”

**B. From Operational Success to Political Tension**

The World Bank closely monitored the MIFERMA operations over the years, periodically conducting site visits that produced detailed reports. Those reports and the associated correspondence provide probably the best and most objective analysis of the project’s problems and progress. The discussion below relies primarily on the World Bank’s 1972 site visit and report, the last such in-depth examination that it would conduct prior to the nationalization.33

On a purely operational level it is difficult to view the project as anything other than a success. Despite the scale and complexity of the work to be done, commercial operations began in 1963, and the enterprise showed a slim operating profit as early as 1965. Operating profits were in the range of seven to ten percent in the early 1970s.34 The full capacity of the project was originally calculated at six million tons per year,35 but by the early 1970s production exceeded nine million tons. The government revenue generated by the project was substantial, so much so that Ould Daddah was able to renounce virtually all direct French budgetary assistance by the mid-1960s. While the French had subsidized the budget of the Mauritanian government (Government of the Islamic Republic of Mauritania; hereinafter GIRM) to the tune of twenty-eight million French francs per year during the first half of the 1960s, those subsidies averaged only 1.2 million French francs annually from 1966-1974, and at or near zero by the 1970s.

MIFERMA was also relatively effective in managing political and other tensions with the Mauritanian government, at least in the early years. One potentially sticky question was whether to extend the favorable fiscal regime to ore exports above the six million ton threshold originally envisioned. Labor-management relations were also a problem; the company suffered its first workers’ strike in 1965. That episode (along with the need to settle the fiscal regime issue) led MIFERMA and GIRM to institute an annual “round table” in which they would review their relationship and attempt to address any difficulties. The round tables seem to have initially provided a relatively effective mechanism for the parties to address the tensions that inevitably arose. For example, it successfully renegotiated the fiscal regime on two occasions.36

In the early 1970s, however, and despite the increased production, MIFERMA was facing serious financial difficulties due to weakness in the steel industry and various international economic developments.37 In 1974 the company even threatened the World Bank with default. Company – GIRM relations also noticeably worsened.

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33 The Final Mission Report from the 1972 site visit, Aug. 25, 1972, can be found in WB: 1608159 [CORRESPONDENCE VOL. 1].
34 Id.
35 Report and Recommendations from the President to the Executive Directors [of the World Bank], Feb. 29, 1960, in WB: 1695923 [NEGOTIATIONS VOL. 6].
36 The company successfully negotiated extensions in 1965 and 1971. AUDIBERT, supra note 25, at 164, 177.
37 Those financial difficulties are discussed in the World Bank’s 1972 Site Visit Report, supra note 34. Two major problems were the declining value of the U.S. dollar (in which MIFERMA’s ore was priced and sold) and excess global iron ore production.
The sources of the tension were numerous. At a very general level we might view them as stemming from the fact that MIFERMA was a textbook example of an enclave enterprise, not just geographically remote but economically isolated as well. This is not to say that the company had no impact on the Mauritanian economy: its operations generated large amounts of revenue for the central government through export taxes, profit-sharing and dividends, taxes on employee income, and the like. The World Bank calculated that GIRM’s total fiscal receipts in 1959 were just 0.9 billion CFA francs. MIFERMA was providing at least one billion CFA francs to the government fisc by 1964, and in 1970 “the income tax alone yielded 1.9 billion CFA francs from Miferma.” The company’s total contribution through 1974 may have been somewhere between 17 and 25 billion CFA francs. MIFERMA’s operations also generated huge amounts of foreign exchange for the government. Iron ore constituted three fourths of Mauritania’s exports in 1969 and financed over a third of the country’s total imports.

And yet, despite these contributions, the company was vulnerable to the criticism that it was not doing enough to promote diversified and durable economic development. It employed relatively few Mauritanians: just 2,122 in 1963, and only about 3,300 in 1971. It purchased most of its inputs and it sold its output abroad, where higher-value-added activity, such as steelmaking, would take place. The failure of the operations to generate investment in other sectors was especially worrisome given that the richest deposits were being quickly depleted. It was estimated (and widely assumed by MIFERMA itself, the World Bank, and GIRM) that MIFERMA would run out of high-grade ore by the early 1980s. The company had identified substantial low-grade deposits in the nearby Guelbs, but developing those resources would require substantial new investments that it was uncertain MIFERMA would make.

We can trace the worsening relationship to two more specific points of conflict: lack of progress on “Mauritanization,” and inadequate worker housing. The establishment agreement required MIFERMA to prioritize Mauritanians in the hiring process and to train Mauritanians to eventually take over technical and management positions. While Mauritanization was, theoretically, in MIFERMA’s own financial interest—Mauritanian salaries would be substantially lower than expatriate European salaries—the company had great difficulty finding an adequate supply of indigenous skilled labor. The establishment agreement also required MIFERMA to provide adequate worker housing. In fact, up to the time of nationalization the company’s

39 Kalmanoff to Chadenet (Nov. 1, 1971), in WB: 1608169 [Correspondence Vol. 1].
41 Kalmanoff to Chadenet (Nov. 1, 1971), in WB: 1608169 [Correspondence Vol. 1].
42 Marbeau, supra note 38, at 188, reports that the 1963 figure. The 1971 figure is from Piso-Joo to Files, Apr. 12, 1972, in WB: 1608159 [Correspondence Vol. 1]. Europeans were always a minority of the workforce, Marbeau reports that just over 700 Europeans were employed at the end of 1963.
43 Kalmanoff to Chadenet, (Nov. 1, 1971), in WB: 1608169 [Correspondence Vol. 1].
44 MIFERMA would argue, apparently with some justification, that the few skilled Mauritanian workers available were often poached from the company by GIRM for government positions.
native workers, their families, and other followers-on lived in ramshackle shantytowns, while French expatriate employees lived in segregated and relatively luxurious privilege.

Company-labor relations took a particularly nasty plunge in 1968, when MIFERMA security guards opened fire on a group of protesters, killing several. At that year’s “Round Table,” the company formally agreed to work to improve the labor situation by achieving specific targets as to Mauritanization and housing. The World Bank site visit in 1972, however, found that MIFERMA was making only disappointing progress toward the 1968 Round Table goals. The site visit team viewed the lack of progress as quite troubling, and it blamed the company for “side-stepping” and for finding “convenient excuses . . . to justify procrastination.” The site visit team urged the World Bank to maintain pressure on MIFERMA to make better progress on both issues. It also flagged as problematic the fact that GIRM held only five percent of the company’s shares and only one seat on the Board of Directors. That situation made it impossible for GIRM to influence company decisions, worsening GIRM’s “feeling of impotence.”

C. The Nationalization

In retrospect, the beginning of the end might conveniently be dated to two GIRM policy decisions: in 1972 GIRM established the state-owned Société nationale industrielle et minière (SNIM), the corporate vehicle into which MIFERMA’s assets would eventually be transferred, and in 1973 GIRM decided to abandon the CFA regime and to establish its own currency. The transition to the new currency was supported by a newly restrictive foreign exchange control regime, under which all parties, including MIFERMA, were required to deposit foreign-currency earnings with the Mauritanian central bank. The latter would then have the responsibility of processing MIFERMA’s many thousands of annual exchange transactions. The company viewed the new arrangement as a clear breach of the concession agreement (which granted it generous rights to repatriate its earnings) and as a fundamental threat to its operations. In response, it sent in a former high-level French official to discuss the matter with President Ould Daddah. Despite a full year of difficult negotiations with the government, however, MIFERMA and GIRM were unable to reach a formal compromise. At the time of nationalization the company and the government were muddling through an uneasy informal truce, in which MIFERMA was formally subject to the “common” regime mandating full repatriation.

President Ould Daddah announced his decision to nationalize the company during the country’s annual independence day celebrations at the end of November, 1974. The announcement, and the parliament’s ratification of the nationalization the

45 Michel Delaborde, New developments in French-speaking Africa, 18 Civilisations 299, 307-09 (1968); Audibert, supra note 25, at 168 (describing the killings).

46 Unsigned Note, Paris, June 21, 1973, in AN20000231/17; see also Audibert, supra note 25, at 187 (noting that Guy de Rothschild dispatched Hervé Alphand, a former French ambassador to the United States, to discuss the matter personally with Ould Daddah).

47 Note pour le ministre: Audience de M. Audibert, Président de MIFERMA le 11 janvier, Jan. 11, 1974, in AN20000231/17.
next day, were met by collective celebration. Schools were closed; and the country’s youth partied in the streets. 48

Western governments appear to have grossly underestimated the probability of nationalization. In January 1974 the U.S. embassy in Nouakchott had reported that GIRM was not giving “serious consideration” to nationalization; 49 in June 1974, the embassy reported that while a “revision” of the MIFERMA concession was likely in the coming year, “foreign dominated iron mining” would continue in Mauritania for at least “several years.” 50 In its first in-depth analysis of the nationalization, the embassy admitted that it—like others—was taken by “complete surprise”: “[a]lthough the possibility of nationalization was always a hot topic of conversation in government and business circles in Mauritania, it was conventional wisdom among both foreign and local communities that the GIRM would not risk nationalization and kill their single golden goose.” 51 French diplomatic correspondence confirms that the French were taken completely unaware, as was the World Bank. The latter was reduced to gleaning information from newspapers—as were the GIRM officials who the World Bank, in vain, contacted for more information. 52

The parliamentary legislation ratifying the nationalization called for an “indemnity” to be paid, but was silent on the amount or method of calculation. 53 During a press conference in early December, Ould Daddah reiterated his promise to honor MIFERMA’s debt obligations to the World Bank and to the French government. 54 He also repeated his pledge to pay “fair reparations” to the shareholders. 55 Ould Daddah was counting on access to Arab petrodollars to pay MIFERMA’s debts and any compensation obligation to the shareholders, 56 though it appears he had actually failed to obtain firm commitments in advance from Arab states. 57 The result was a desperate scramble in December to raise funds just to keep the SNIM’s

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48 Ambafrance Nouakchott to Paris (Nov. 29, 1974), in AN20000231/17. Ould Daddah’s motivation in nationalizing MIFERMA seems to have been primarily political rather than economic or financial. His regime was facing serious internal pressure from organized labor and radical youth factions, and the nationalization seems to have been designed to pacify those elements. Audibert, supra note 25, at 192 (recounting a post-nationalization discussion with Ould Daddah in which the latter blamed “radical youth” for the nationalization). For similar analysis of the causes of the nationalization, see Philippe Marchesin, Tribus, ethnies et pouvoir en Mauritanie 144-45 (1992); Pierre Bonte, La Montagne de fer 189 (2001); Francisco Vergara, La voie étroite de la Mauritanie, Esprit 310, 317 (1976). French and U.S. diplomatic correspondence supports this theory. Nouakchott to Paris (Nov. 30, 1974), in AN20000231/17; 1974NOUAKC A-65, Dec. 6, 1974. U.S. sources can be found in an electronically searchable database of diplomatic cables, available both through Wikileaks and through the U.S. National Archives AAD (Access to Archival Documents) system. I cite diplomatic cables using canonical ID numbers.

52 de la Renaudière to Western Africa Files, Dec. 5, 1974, in WB: 1608160 [CORRESPONDENCE VOL. 2].
53 Ambafrance Nouakchott to Paris (Nov. 29, 1974), in AN20000231/17 (communicating the text of the legislation).
54 1974NOUAKC01941, Dec. 11, 1974 (reporting on the press conference); Nouakchott to Paris (Dec. 6, 1974), in AN20000231/17 (same).
55 Nouakchott to Paris (Dec. 6, 1974), in AN20000231/17
56 1974NOUAKC01857, Nov. 30, 1974 (describing the speech); Ambafrance Nouakchott to Paris (Nov. 28, 1974), in AN20000231/17 (same).
operations running. Moreover, Mauritania was apparently reluctant to ask its Arab supporters to provide funding for a compensation agreement until it had first exhausted its own resources, including the accounts receivable held hostage by MIFERMA overseas. Mauritania’s lack of foreign exchange would pose a major hurdle to settlement talks, as the government—according to the MIFERMA shareholders themselves—suffered from a “complete lack of funds to pay adequate compensation.”

D. The Indemnity Negotiations

MIFERMA’s first official move was to dispatch a delegation to Mauritania in mid-December to meet with GIRM’s Minister of Planning and Industrial Development, Sidi Ould Cheikh Abdallah, “to get a tentative reading of [the] situation.” The settlement talks did not formally begin until February 4, 1975. The shareholders initially relied on Jean Audibert, the company’s long-time director-general, to plead their case. Audibert had been with MIFERMA since the beginning, and he was intimately familiar both with the operations and with senior GIRM officials. At the start of the talks President Ould Daddah personally warned Audibert that the company would be ill-served by basing its claim on extravagant valuation methods. However, going forward the president would not play an active role in the negotiation sessions themselves, presumably viewing such involvement as beneath his rank. Instead, the main Mauritanian role was played chiefly by Sidi.

Audibert too would soon exit the stage. In March he was pushed aside by the shareholders in favor of Gerald Van Loo of British Steel. Van Loo was assisted by J.Y. Eichenberger (vice chairman of Penmaroya, a Rothschilds’-controlled mining services company), Louis Lacaille (assistant director general of COFIMER) and Paul Ouzillo (assistant to the director of MIFERMA). The U.S. embassy in Nouakchott interpreted Audibert’s removal, quite plausibly, “as [an] effort to keep [the] French, 

58 Id. (describing an emergency Mauritanian mission to Saudi Arabia in December 1974 that succeeded in raising $10.6 million; the U.S. embassy in Nouakchott nonetheless estimated the total cost of GIRM’s investment plans at $1 billion, $300 million of which would be needed for the mining industry). A “source at SNIM” told the embassy that Mauritania recognized that such amounts exceeded what “Arab friends” were “willing to invest,” and that Mauritania would need to complement petrodollars with U.S., European, or Japanese investments. Id.


60 1975NOUAKC00903, May 10, 1975. The cable also suggests—quoting a Mauritanian official—that Ould Daddah had lied during his announcement of the nationalization when he claimed to have already secured funds for compensation from rich Arab oil states. “Heads of state talk like that sometimes,” the GIRM official said.

61 1974NOUAKC02027, Dec. 26, 1974; a French cable describing the meeting, however, indicates that Audibert was ill and not able to attend. Instead, the shareholders were represented by an official from BRGM and by representatives from COFIMER and the Italian shareholders. Ambafrance Nouakchott to Paris, 23 Dec. 1973, in AN20000231/17.

62 Ambafrance Nouakchott to Diplomatie Paris (Feb. 1, 1975), in AN2000231/17 (reporting the Feb. 4 start date).

63 Ambafrance Nouakchott to Ministère de Coopération (Cabinet) (Feb. 5, 1975), in AN2000231/17.

64 Id.; see also 1975NOUAKC00730, Apr. 17, 1975.

65 1975NOUAKC00730, Apr. 17, 1975; Ambafrance Nouakchott to Paris (March 13, 1975), in AN20000231/17 (noting that Van Loo had taken over from Audibert as of the latest round of negotiations).
who bear [the] burden of colonialist background in Mauritania, behind the scenes. The British—represented here by Van Loo—are viewed more neutrally by GIRM. The embassy characterized this move as a “shrewd” one, given that the negotiations had become a "hot behind-the-scenes political issue in Mauritania." 

While the shareholders’ main interest in the outcome was obvious—they wanted “just and equitable compensation”—Mauritania’s position was more complicated. As the U.S. embassy reported, Mauritania needed to appease “activist elements” in Mauritanian politics (radicalized youth and labor) who demanded policies consistent with strident calls by Third World countries for a New International Economic Order (NIEO). On the other hand, “senior GIRM officials appreciate[d] [the] need to maintain [a] good reputation with [the] international financial community,” and Van Loo was “sure” that Ould Daddah did not “wish to see Mauritania written off as irresponsible.”

As is typical in expropriation disputes, the principal bone of contention was not so much whether compensation was due—Mauritania had admitted numerous times that it was—but rather, how the amount of compensation should be calculated. The question was obviously hugely important; the methodology chosen, if applied in good faith, would dictate the amount to be paid.

The shareholder’s main legal strategy was to articulate a “principled and undebatable” accounting methodology that would, when applied, generate with a high degree of certainty the amount that the shareholders were objectively due. The shareholders’ preferred methodology was the adjusted “actif net comptable,” a technique for appraising the value of an enterprise by subtracting the enterprise’s liabilities (the passif) from its assets (the actif), after adjusting the actif both for depreciation and inflation. The company was quick to produce the necessary analysis, from which it arrived at a figure of US$237 million. That amount would serve as the shareholders’ initial settlement offer.

The shareholders also implemented defensive measures designed to strengthen their bargaining position. In particular, they refused to turn over to SNIM $20 million in the company’s accounts receivable held overseas. GIRM did not take well to this move, initiating in early January 1975 various harassing actions against

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67 Id.
68 Id.
69 Id.
70 Id.
71 Id.
72 Ambafrance Nouakchott to Diplomatie Paris (March 13, 1975), in AN20000231/17.
73 Note sur l’indemnisation, (Jan. 22, 1975), in AN20000231/17. The note, which was mailed to the Ministry of Cooperation, is unsigned, but was clearly prepared by the shareholders.
74 The main advantage of the methodology is its simplicity: it can be implemented based on accounting ledgers, with minimal assumptions; the main disadvantage is a static, backward-looking focus, which may not adequately consider expected future cash flows from an ongoing operation.
75 Id. The note, which was mailed to the Ministry of Cooperation, is unsigned, but was clearly prepared by the shareholders. Pennaroya, the MIFERMA shareholder controlled by the Banque Rothschild, provided a similar analysis to the French government in July 1975. The PENNAROYA REPORT, supra note 27, suggested that a discounted cash flow methodology would provide an even higher valuation, of US$315 million.
MIFERMA’s bank, the Banque Internationale pour la Mauritanie (BIMA). Those actions included a lawsuit against both MIFERMA and BIMA in Mauritanian court for violations of Mauritania’s currency-repatriation laws. GIRM’s attack on BIMA greatly complicated the situation. BIMA was owned by the private Paris-based Banque internationale pour l’Afrique occidentale (BIAO), in which the First National City Bank of New York held a forty-nine percent share.

One technical problem with GIRM’s BIMA-related lawsuit was that MIFERMA, as an entity, no longer existed; SNIM had assumed the company’s assets and liabilities and dissolved MIFERMA upon nationalization. On the other hand, it was entirely possible that a Mauritanian court would ignore this legal impediment and impose a fine sufficient to offset most or all of whatever compensation the shareholders would be entitled to receive.76

GIRM publicly maintained that the domestic enforcement action and the MIFERMA indemnity negotiations were “two very different things,” and that the one should have no bearing on the other.77 But this assertion was not particularly credible, and it cast a cloud over the ongoing settlement talks, especially given GIRM’s other aggressive moves against the bank: in mid-January 1975, it prohibited BIMA from performing any foreign banking operations,78 and in mid-February, in reaction to BIAO’s rejection of a settlement proposal, GIRM seized administrative control, a potential prelude to outright nationalization.79 Mauritania also placed several former BIMA officials under house arrest.80

With the turmoil over BIMA lurking in the background, talks between MIFERMA and GIRM resumed in April. According to Van Loo, however, the Mauritians were still playing “hot and cold.” GIRM’s representative insisted that the shareholders were ignoring the serious internal political pressures that prevented the government from agreeing to an excessively generous settlement, and that in any case the shareholders’ initial offer was “much too high.”81 GIRM had yet, though, to propose an alternative amount.

The parties entered their fifth round of negotiations in early May, but talks were quickly suspended in response to what the shareholders viewed as a “ridiculous” and “humiliating” compensation offer by GIRM.82 Mauritania had proposed paying $60 million over 20 years, at 4.25% interest,83 though it had also suggested that it might pay up to $80 million.84 For their part, the shareholders were now willing to accept US$180 million, with half paid up front and the other half over a period of years, with interest.85 Another point of contention was how the settlement agreement

76 Ambafrance Nouakchott to Diplomatie Paris (March 13, 1975), in AN20000231/17.
77 L’économie de la Mauritanie reste ouverte aux investissements étrangers affirme le ministre de la Planification et du Développement (unattributed newspaper clipping), in AN20000231/17.
78 1975N0UAKC00093, Jan. 16, 1975.
80 1975N0UAKC01105, June 4, 1975.
81 Ambafrance Nouakchott to Ministère de Coopération (April 14, 1975), in AN20000231/17.
82 1975N0UAKC00903, May 10, 1975.
83 Id. By contrast, the ten-year U.S. treasury rate in 1975 was about 7.5%.
84 Ambafrance Nouakchott to Diplomatie Paris (May 7, 1975), in AN20000231/17.
85 The PENNAROYA REPORT, supra note 27, indicates that the shareholders’ proposal was for payment over eight years, at eight percent interest. Other documents indicate slightly different payment periods.
might be enforced. The shareholders demanded an arbitration clause, but the Mauritanians resisted.

Given the wide gulf between the two figures, Van Loo thought it best to temporarily break off discussion to give “both sides needed time to re-assess [the] situation.” In the interim, the parties authorized two lawyers to informally pursue a settlement in Paris. In those discussions, Mauritania was represented by Léon Boissier-Palun, a well-known Senegalese lawyer and diplomat who was close friends with Ould Daddah. The shareholders were represented by Jean-Paul Marty-Lavauzelle, a Paris-based corporate lawyer. Van Loo viewed Boissier-Palun as an “experienced horse trader” who “may be able to inject a note of realism into [the] GIRM position.” During the lull Van Loo also planned to make a “major effort” to meet directly with World Bank President McNamara (I discuss the bank’s role further below).

The shareholders also renewed their threat to proceed in arbitration under the concession contract should negotiations fail. The shareholders had initiated arbitral proceedings already in late December 1974, and by mid-January 1975 they had selected Armand Bérand, a career French diplomat, as their member of the three-person tribunal. Bérand’s selection triggered Mauritania’s obligation under the arbitration clause to name its own arbitrator, but GIRM refused to proceed. Happily for the shareholders, the arbitration clause contained a provision authorizing the vice-president of the French Conseil d’État to designate Mauritania’s arbitrator should Mauritania refuse to do so. The shareholders set this default procedure into motion in March through a formal request to Bernard Chenot, the vice-president of the Conseil. On May 5, 1975, Chenot informed the French Ministers of Cooperation and of Foreign Affairs of his choice: Robert Patry, a well-respected Swiss judge. The designation of Patry meant that the arbitral tribunal was one step closer to being fully constituted, and in June Patry and Bérand agreed on Sture Petren, a Swedish judge on the International Court of Justice, as the third arbitrator.

Chenot’s transmittal letter left the task of informing Mauritania of his decision to the “French government . . . by diplomatic channels.” The question at hand was
whether they should in fact do so. The French Ministry of Foreign Affairs (the Quai d’Orsay) consulted with Bérard and Chenot, both of whom apparently made it clear that GIRM needed to be formally notified. The move caused worry within the French diplomatic corps. The Quai d’Orsay’s Director of African and Malagasy Affairs, Paul Rebeyol, was careful to emphasize to the embassy in Nouakchott that “this formality [of giving notice to GIRM] . . . does not at all mean that the parties must abandon negotiations.” 97 A hand-written note on the cable added “I don’t see the point of this action by M. Chenot at this stage of negotiations.” 98 In fact, GIRM was none too happy. Chenot’s selection of the arbitrator was “bothersome,” 99 to the point that GIRM officials wrote directly to Patry to personally reject his appointment as an “unacceptable maneuver,” and to disparage the arbitration as an “illegitimate” attack on Mauritania’s “sovereign rights.” 100 GIRM negotiators would also claim that the shareholders’ insistence on pursuing arbitration demonstrated a worrisome “lack of trust.” 101

And yet, whether because of the threat of arbitration or because of other factors, GIRM would soon strongly signal a change in attitude. 102 In mid-June the French ambassador met with the Mauritanian minister of foreign affairs. 103 The latter declared that the “time had come” for France and Mauritania to “re-warm [réchauffer] their relations.” 104 The GIRM minister proposed that if the French prime minister would make a brief visit to Mauritania and have lunch with him, “the results would be nothing but excellent” in terms of helping to settle the MIFERMA affair, something which, in the context of future French-Mauritanian relations, was really “without any real importance.” 105 The minister let it be known that President Ould Daddah was eager for an invitation to make a state visit to Paris. He also dangled opportunities for French business in Mauritania. 106 While Mauritania now had access to petrodollars, it lacked the technical capacity to invest the proceeds in effective development projects; French companies could provide the necessary planning and organization. 107

Around the same time (June 1975), GIRM launched what the U.S. embassy called a “campaign to reassure USG of its honorary intentions.” 108 The Mauritanian foreign minister met with the U.S. ambassador to “express formal GIRM appreciation for

97 Id.
98 Id.
99 Id.
101 While GIRM was annoyed both by the pursuit of arbitration and by the shareholders’ communications with the World Bank, the shareholders understood that annoyance as “confirmation of [the] correctness of their tactical decision. MIFERMA action had served to remind GIRM effectively of [the high] international stakes in [the] compensation dispute.” 1975NOUAKCO1926, Sept. 22, 1975.
102 Ambafrance Nouakchott to Diplomatie Paris (June 24, 1975), in AN2000231/17.
103 1975NOUAKC01249, June 20, 1975.
[U.S. Government’s] quiet acceptance of [the] MIFERMA nationalization.”109 The minister also repeated promises to pay MIFERMA “full compensation.”110 The GIRM central bank governor made similar assurances to the U.S. ambassador, noting also that GIRM was “concerned that its reputation as a good place for private investment” might be “damaged or destroyed” should negotiations fail to produce an acceptable outcome.111 The ruling party also issued a document touting Mauritania as a “good prospect for foreign investment.”112

Negotiations resumed in mid-September.113 The parties’ positions continued to move closer together, despite GIRM annoyance over the composition of the arbitral tribunal and the fact that the shareholders had sought to involve the World Bank and the OECD.114 To address GIRM’s foreign exchange difficulties, the shareholders proposed taking their compensation largely in future iron ore deliveries.115 The parties also batted around cash offers. GIRM claimed that it might agree to pay a lump sum of $80 million, and the shareholders now insisted that they could not take less than $120 million.116 While the parties’ positions still remained some distance apart, the U.S. ambassador in Nouakchott was optimistic that the parties were closing in on a deal.117 In his view, the shareholders had “dr[awn] blood” by initiating arbitration and by keeping “international and regional organizations” [e.g. the World Bank and the OECD] informed about GIRM’s intransigence.118 Both tactics served to put external pressure on GIRM to be more accommodating. Moreover, the shareholders themselves were becoming anxious to settle: they feared that drawn-out talks might threaten their operations in other parts of the world.119 The French government was also encouraging settlement by offering GIRM a significant carrot: France had agreed to host Ould Daddah for a state visit in December, and the shareholders were hopeful that the French government would use the occasion to make a “subtle linkage between additional French aid . . . and final agreement.”120

The parties met for a seventh round of negotiations in mid-November, and reached an “agreement in principle” on December 19, 1975, just after the conclusion of Ould Daddah’s state visit to France.121 The BIAO/BIMA matter was settled at the same time as well.122 Both the final agreement between GIRM and the shareholders, and an associated “contract” between SNIM and the shareholders were formally

109 Id.
110 Id.
111 Id.
114 Id.
115 Id.
116 Id.
117 Id. The electronic text of the cable actually says that “the stage is not set” for a settlement. The rest of the document, however, strongly suggests that the “not” is a typographical error.
118 Id.
119 Id.
signed on January 28, 1976. GIRM agreed to pay the shareholders $90 million, in the form of a $40 million up-front payment, and the remaining $50 million in the form of non-interest-bearing notes payable by SNIM over the following five years. The shareholders agreed to turn over any of MIFERMA’s property (funds, technical documents, studies, and so on) still in the shareholders’ possession, while GIRM would reimburse the shareholders for certain cash advances that the shareholders had made to the company prior to nationalization. GIRM also provided a blanket *quietus*, giving up any right it might have to pursue the shareholders for alleged violations of Mauritanian law.

SNIM’s obligation to pay the notes was enshrined in the “contract.” That obligation was absolute: even *force majeure* would not excuse non-payment. SNIM also promised to supply, and the shareholders to take, a minimum quantity of ore over the next three years, with the price to be determined by future negotiations between SNIM and the shareholder-purchasers, and deducted from the payments due on the notes. The shareholders’ purchase obligation was of the “take or pay” variety, with SNIM authorized to withhold payment under the notes for any shortfall. An international arbitration clause ensured that the parties would honor their reciprocal obligations. In fact, GIRM made the payments as promised, and in 1981 Van Loo would write to the World Bank’s Regional Vice President for Western Africa, Roger Chaufournier, that “I am happy to inform you that . . . the matter is now closed.” Chaufournier was a French economist and the World Bank’s Regional Vice President for Western Africa, and he would eventually serve as the bank’s unofficial point man on the MIFERMA affair.

### III. THE ROLES OF HOME STATE GOVERNMENTS & THE WORLD BANK

The depoliticization thesis is primarily concerned with the reactions of the home state government to demands by investors to intervene on their behalf. MIFERMA was owned by investors of several nationalities, and in this section I examine the efforts the shareholders made to convince their various governments to intervene. I also detail the responses of those governments to the investors’ entreaties. We will see that the French government was most active in providing “diplomatic protection,” with the U.S. government playing only a minor role. We will also see that international financial institutions, like the World Bank, can play a role in protecting foreign investors through diplomatic interventions. The shareholders made convincing the World Bank to intervene a major part of their strategy. To some extent, they were successful. The bank appears to have counseled Mauritanian officials to settle. On the other hand, we see little evidence that either the French or the U.S.

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124 Contract Article IX. The clause specified arbitration in Geneva under the rules of the International Chamber of Commerce, with the arbitrators to decide any dispute as *amiables compositeurs* (that is, on basic equitable principles rather than on legal ones). There was no arbitration clause in the GIRM – shareholder agreement. This is not surprising, however, as the agreement made the shareholders’ obligations contingent on GIRM first transferring the $40 million.

governments, or the World Bank, were particularly heavy-handed in their responses and interventions. The discussion here, like the discussion in the prior section, is primarily descriptive. The descriptions will inform the analysis provided in the article’s penultimate section.

A. The French Reaction

Given that French interests held the majority of MIFERMA’s shares, and that the French government, through BRGM, was MIFERMA’s single largest shareholder, it is unsurprising that the French government took the nationalization quite seriously. Moreover, the French government’s financial stake in the matter went well beyond BRGM’s large shareholding. The French government had guaranteed several of MIFERMA’s debts (including what remained of the original World Bank loan) and its total loss exposure from the nationalization was calculated at 270 million French francs, an amount sufficient to ensure that the government could not adopt a hands-off approach. And indeed, the French government—once it overcame its initial surprise—carefully monitored the situation and intervened repeatedly at multiple levels. Importantly, however, the character and the quality of those interventions never approximated the stereotyped image of crude “gunboat diplomacy.” French intervention was relatively subtle and aimed at supporting a reasonable negotiated solution rather than a coerced victory.

The official French reaction was channeled through three main institutions: the Ministry of Foreign Affairs; the French embassy in Nouakchott, headed by Ambassador Henri Gauthier; and the Ministry of Cooperation. The latter’s primary role in French foreign policy was to administer French aid, technical assistance, and related programs for France’s ex-colonies. As a general matter, the division of foreign policy responsibilities between the Quai d’Orsay and the Ministry of Cooperation was fraught with bureaucratic difficulties. In the case of MIFERMA, however, the story is one of apparently successful and competent coordination.

The French government’s tactics were, broadly speaking, threefold: maintain regular contact with shareholders and GIRM officials in order to stay apprised of intentions and developments; communicate official displeasure with particular courses of action, actual or potential; and quietly suggest the linkage of aid or other favors to a satisfactory outcome.

The French government quickly conveyed to the highest levels of the Mauritanian government their pique at the failure of the Mauritanians to warn about the impending nationalization. In one of the first instructions to the French embassy in Nouakchott from Paris, Geoffroy Chodron de Courcel, Secretary-General of the Quai d’Orsay, complained that, while France recognized the sovereign right to

126 Note concernant les intérêts public français en relation avec MIFERMA situation au 28 novembre 1974, in AN20000231/17; Y. Chassagne to Stéphane Hessel (Dec. 9, 1974), in AN20000231/17. The amount is roughly equal to US$60 million in 1974, or about US$230 million in today’s dollars.


128 The Secretary-General was the highest career diplomat in the ministry, serving as the adviser to the minister himself.
nationalize subject to the payment of fair compensation, “we would have hoped, taking into account the friendly relations that our two countries maintain, that the announcement of this decision would have happened ... in a less sudden manner.”

Courcel instructed the ambassador to meet with President Ould Daddah and to “express to him the surprise that [the nationalization] provoked in Paris” and to “highlight to him that the French government will be paying attention to the negotiations” over the indemnity.

The Ministry of Cooperation, which was especially sensitive to the amount of French government funds at risk, echoed the warning. Early in the dispute, it brusquely ordered the French ambassador to remind Ould Daddah that France, through the BRGM, was the single largest shareholder in MIFERMA and that, as such, France was “very interested” in the affair and would be following the negotiations “with the greatest attention.” The Mauritanians had also suggested that the indemnity negotiations might not commence until late 1975; for the Ministry of Cooperation, such a delay was unacceptable, and it ordered the ambassador to insist that Ould Daddah set an appropriate start date.

The potential linkage between a settlement and future French development aid was also quick to make an appearance. In mid-December the Ministry of Cooperation sent a delegation of French aid experts to Mauritania for an allegedly “routine” survey of French aid programs in the country. The U.S. embassy in Nouakchott viewed the visit as clearly related to the MIFERMA situation, noting that, far from being “routine,” the visit “lasted ... four days and included extensive travel as well as [a] meeting and dinner with Ould Daddah.”

Further interventions quickly followed at a high level. Jacques Chirac, then prime minister, made a supposedly “private” visit to Mauritania at the end of December. He met with Mauritania’s minister of foreign affairs, and left, according to the French ambassador to Mauritania, “impressed by the special efforts” that the foreign minister would make to bring the upcoming compensation discussions to an acceptable conclusion. Chirac was “reassured that nationalization [would] be followed by appropriate compensation.” The French expected settlement talks to “proceed in [a] businesslike manner” and did not anticipate becoming “ennmeshed in [the] matter” unless the talks “bog[ged] down.” When they did “bog down” in April 1975, the French embassy would re-emphasize to GIRM officials France’s interest in a timely and fair outcome.

129 Affaires Africaines to Ambafrance Nouakchott (Nov. 29, 1974), in AN20000231/17.
130 Id.
131 J. Giri to Ambafrance Nouakchott, undated [but most likely mid-December 1974], in AN20000231/17.
132 Id.
136 Id.
137 Id.
138 Coop/DDE to Ambafrance Nouakchott, Apr. 26, 1975, in AN200000231/17 (instructing the embassy to intervene); Ambafrance Nouakchott to Ministère de Coopération, Apr. 28, 1975, in AN200000231/17 (confirming that the embassy would intervene).
The French Minister of Cooperation, Pierre Abelin, appeared next on the scene, meeting with Ould Daddah and other Mauritanian officials to discuss the MIFERMA issue after attending a Franco-African summit in Senegal. The effect of these repeated interactions may have been—as the U.S. embassy in Nouakchott speculated—an informal understanding between France and Mauritania that French aid to Mauritania would continue, if not improve, should the MIFERMA shareholders receive adequate compensation. The sense of *quid pro quo* is heightened by Mauritania’s request at the Senegal conference for French assistance in constructing a 1200 km road.

While the French government’s reaction to the nationalization thus was not passive, it also was not particularly heavy-handed. For example, Mauritania continued to receive significant amounts of French aid during 1975. The Ministry of Cooperation estimated total French public aid to Mauritania in 1975 at nearly 69 million *francs*, about twice the amount provided in 1970. The French government, like the U.S., also avoided public criticism of GIRM, a restraint for which GIRM’s foreign minister expressed gratitude. The French government also eschewed easy, public displays of discontent, in favor of discrete diplomatic exchanges and an approach of adapting to changed circumstances. A good example occurred in the days immediately following nationalization. The Ministry of Cooperation was faced with the question of whether to call off a planned “dialog” with Mauritanian officials in mid-December. It would be easy to understand a decision to cancel the event as serving as a valuable signal to Mauritania that it had better make things right, and quickly, or to other ex-colonies that they would follow Mauritania’s path at their peril. Instead, the ministry’s assessment was that the dialogue should continue as planned. Not only would it provide an opportunity for the ministry to “gather information on Mauritanian intentions regarding the indemnity,” but it would also help to lay the groundwork for providing “technical assistance” to the mine’s new owners. If the French could not own the mine anymore, they could still profit by helping it operate.

We also see the French government using the prospect of official visits as carrots to reward cooperative behavior. In mid-July 1975, as the prospects for a “rewarming” of Franco-Mauritanian relations were looking up, French ambassador Gauthier suggested that it might be useful to send a high-ranking French official to Mauritania. The Mauritanians would be “sensitive” to such a move, and the ambassador suggested that the Minister of Cooperation might be the one to make the trip. He also suggested, reciprocally, that France might find it useful to invite a high-ranking Mauritanian minister to visit Paris. Abelin visited Nouakchott in early November

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141 Id.
143 1975NOUAKC01249, June 20, 1975.
144 Paris to Ambafrance Port Louis (Mauritius) (Dec. 3, 1974), in AN20000231/17. See also Projet de réponse à la question écrite de M. MESMIN, Feb. 13, 1975, in AN20000231/17 (noting that the French government was actively considering the possibility of setting up a French company that would provide technical assistance to the Mauritanian mining industry).
145 Ambafrance to Nouakchott (July 15, 1975), in AN20000231/17.
for a three-day review of Franco-Mauritanian relations. In apparent honor of his visit, GIRM withdrew its legal complaint against BIMA. (The U.S. embassy in Nouakchott reported, perhaps inaccurately, that Abelin discretely avoided any direct mention of the MIFERMA situation during his visit).

Much more remarkably, in October 1975—while negotiations were still ongoing, and their outcome uncertain—French President Giscard d’Estaing invited Ould Daddah to make a state visit to Paris that December. The visit would serve as an opportunity for Ould Daddah to publicly declare the “relaunching of Franco-Mauritanian Cooperation,” as a headline in Le Monde put it. The MIFERMA question was apparently on the presidents’ agenda for discussion, though we have no direct record of the content of any exchange on the subject. For his part, Ould Daddah publicly denied that the subject was ever raised: first, because the dispute was one between Mauritania and a private company, and not between Mauritania and France, and second, because he had already promised that the shareholders would receive full compensation—why, therefore, would he and Giscard d’Estaing have needed to discuss it?

The shareholders nonetheless hoped that Giscard d’Estaing would use the opportunity to make a “subtle linkage” between settlement and future aid flows, and Holsey Handyside, the U.S. ambassador to Mauritania, reported, based on conversations with the French ambassador, that the French president’s involvement was essential. Giscard d’Estaing “intervened personally to ‘persuade’ [GIRM] to acquiesce” to the shareholders’ demands for a shorter repayment period, and the Mauritanians made the “clearly political” decision to sign an agreement out of a “pressing need for French support” and “to remove [the] last stumbling block to [an] extensive French aid program.”

B. The U.S. Government’s Reaction

U.S. ambassador Handyside monitored the negotiations closely, sending numerous telegrams back to Washington describing and analyzing the goings-on. It is easy to imagine the nationalization providing a source of excitement to embassy staff, stuck, as they were, in a dusty and remote post in which, ordinarily, little happened. However, the U.S. had virtually no concrete business interests in Mauritania. U.S. investment in the country, outside of IMCC’s recently purchased minority position in MIFERMA, was more or less nil, and despite Handyside’s efforts the U.S. government seemed to have little interest in promoting more of it. As a result, the U.S. government’s actions taken on behalf of the shareholders were limited.

146 1975NOUAKC02361, Nov. 17, 1975; Ambafrance Nouakchott to Diplomatie Paris (Oct. 31, 1975), in AN20000231/17. The shareholder representatives made a special trip to Nouakchott to meet with the minister during his visit.
147 Id.
148 Id.
154 1974STATE276039, Dec. 17, 1974 (noting hesitancy by the U.S. Export-Import Bank to finance a U.S. sugar-refinery investment in Mauritania); 1975NOUAKC02266, Nov. 5, 1975. In the latter cable,
Soon after the nationalization, Handyside met with Mauritania’s ambassador to the U.S., who happened to be in Mauritania at the time, and urged him to contact IMCC headquarters in order to “explain [the] recent decision [to] nationalize MIFERMA and give assurances that GIRM intends [to] negotiate compensation for all shareholders.” Handyside also reminded the Mauritanian ambassador about “US policy on full compensation . . . and [the] possibility that US aid could be cut off if compensation [is] not forthcoming,” and he made sure that the Mauritanian ambassador would communicate this policy to the GIRM leadership.

But Handyside’s desire to make a difference seemed to outpace Washington’s interest in getting entangled in what it viewed as an essentially French affair. In an April 17, 1975 cable from Handyside to the State Department, Handyside reported on the fourth round of compensation negotiations, relaying to Washington the shareholders’ suggestion that the embassy “make [the] point” to GIRM officials that “US law requires termination of grant assistance for [a] country which fails to pay adequate compensation for [a] nationalized US interest.” Handyside indicated that he intended to act on this suggestion “quietly on [an] appropriate occasion,” and that he thought it would be “useful” for Washington to “reiterate [the] USG position on [the] link between aid and adequate compensation” to the Mauritanian ambassador, “including perhaps providing him with copies of [the] relevant legislation at the same time.” Handyside seemed to recognize that his proposed démarche might be viewed as excessively aggressive. He qualified his suggestion by noting that he did “not wish to get too far in front on this issue” and that “for the time being, MIFERMA, including IMCC . . . does not want USG to push issue too hard.”

U.S. Secretary of State Kissinger responded quickly with a curt message telling the embassy to cool its heels. Because U.S. law required a suspension of aid only in the case of “significant” American investment in the nationalized property, and because IMCC’s interest was only three percent, neither the embassy nor the State Department should take up Handyside’s suggested line of action. Furthermore, Kissinger added, “[I]n general, [the] dep’t believes it would be wise for [the] embassy to let European embassies, whose nationals are major shareholders, make any demarches believed appropriate to protect shareholders’ interests.” Kissinger closed his response by pointedly suggesting that the embassy “may wish to review” previous formal guidance provided by the Department as to how embassy staff should handle such situations. Handyside’s future interventions with the Mauritanians seem to have followed Kissinger’s preferred and less threatening script.

Handyside issues a remarkably sharp and undiplomatic attack on U.S. commercial policy toward Mauritania, which he accuses of ignoring opportunities to promote U.S. interests.

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156 Id.
158 Id.
159 Id.
162 Id.
expected adequate compensation, and that, given Ould Daddah’s assurances that adequate compensation would be paid, the U.S. government “has no basis for uneasiness.”

The U.S. government seemed somewhat more involved in the BIAO/BIMA affair—perhaps not surprising given that a major U.S. bank held a forty-nine percent share in BIMA’s parent company, and given that the U.S. embassy staff in Nouakchott held their money in frozen BIMA accounts. In December 1974, Kissinger authorized the U.S. embassy in Nouakchott, “at its discretion,” to “point out to [the] appropriate GIRM office [the] significant US investment in BIAO and USG concern that US investors be treated in accordance with requirements of international law.” Kissinger himself “called in” the Mauritanian ambassador in Washington to make the same points. At that meeting, he obtained the promise of the ambassador to call upon the Mauritanian central bank governor, the ambassador’s personal friend, and to urge him to “act quote doucement unquote in dealings with BIMA.” Kissinger discussed MIFERMA’s situation with the Mauritanian ambassador as well, emphasizing the U.S. government policy of “prompt, adequate, and effective compensation.” Handyside also made sure to monitor and report on BIAO/BIMA-related developments, and to raise the issue in various meetings with GIRM officials.

In the end, though, the U.S. government seems to have been largely content to free ride on French diplomacy and on the efforts of First National City Bank’s Sherman & Sterling lawyer. The latter showed up in Nouakchott in May and managed to produce “major movement toward [a] settlement” of the BIMA/BIAO dispute by explicitly threatening to tie SNIM up in years of international litigation should GIRM proceed against BIMA. For its part, the French government was presumably responsible for encouraging the BIAO president and a BIAO director—whose relationship with GIRM officials had deteriorated dangerously—to prematurely “retire” from their positions. Their removal was viewed by GIRM as a positive development, and by the U.S. embassy as removing a major stumbling block to negotiations. When the BIAO/BIMA negotiations broke down again in late 1975, it was the French government that insisted that the time to settle had come. As Handyside reported back to Washington, First City, the American shareholder, was “thus the beneficiary of [the] GIRM political decision to repay [the] French for present political support and assistance . . . and economic aid anticipated in [the] mid- and long-term future.”

163 1975NOUKC01249, June 20, 1975.
165 Id.
167 Id.
169 Id. (mentioning the “retirements” as helping to encourage GIRM to negotiate on the BIMA issue); Mauritania Nouakchott to Department of State, 1975NOUKC01925, Sept. 22, 1975 (same).
C. The World Bank

At the time of MIFERMA’s nationalization, the World Bank’s direct financial interest in the project was minimal. The bank’s loan to MIFERMA was almost fully repaid; President Ould Daddah had explicitly and publicly declared that SNIM would make the remaining payments due; even if Mauritania defaulted, the French government stood by as guarantor; and the bank had long ago syndicated the loan. The World Bank nonetheless monitored the aftermath of the nationalization closely, and Bank President McNamara seems to have taken a personal interest in the affair. His interest makes some sense, even though the World Bank stood little chance of suffering any direct financial harm. It presumably had no desire to see those who had purchased its loans short-changed (something which might make it harder to syndicate loans in the future), or to see a project which was viewed as critical to Mauritania’s development, and to which the it had devoted a large amount of institutional time, effort, and prestige, fail.

However, the World Bank appears to have been wary of taking a public stance or to be seen as taking sides. Interestingly, the shareholders were wary of appearing to encourage the bank to take sides too. Van Loo insisted to the U.S. embassy that his contacts with World Bank officials were only intended to “inform” the bank of developments, and not to encourage it to intervene on the shareholders’ behalf.

Whether we believe Van Loo or not, it is true that the shareholders quickly and repeatedly sought to meet with World Bank officials. In early December 1974, just after the nationalization, the shareholders requested, through an intermediary, to meet with Roger Chaufournier. Chaufournier delayed responding to Audibert’s request, not wanting to respond “prematurely.” We can interpret his reluctance as indicative of the bank’s institutional sensitivity to being viewed as a partisan intervener. Chaufournier nonetheless eventually agreed to meet with Audibert during an upcoming visit to Paris. However, he instructed his intermediary to reject Audibert’s invitation to have lunch together.

Audibert quickly followed up by sending Chaufournier a formal letter informing the bank about the dispute, and offering to respond to any questions that he might want to ask.

Van Loo, succeeding Audibert as chief shareholder representative, also made sure that the bank stayed apprised of the negotiation’s progress. He told the U.S. embassy in Nouakchott in mid-April 1975 that the World Bank was “monitoring [the] compensation question closely” and was “urging [an] equitable settlement.” The embassy also noted that MIFERMA was “keeping [the] IBRD office in Paris informed of developments.”

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175 Chaufournier to Carrière (Dec. 13, 1974), in WB: 1608160 [CORRESPONDENCE VOL. 2].
176 Audibert to Chaufournier (Dec. 20, 1974), in WB: 1608160 [CORRESPONDENCE VOL. 2].
177 He even wrote to Chaufournier personally in 1981 to inform him that GIRM had made the last installment payment and that “the matter is now closed”. WB:1608161 [CORRESPONDENCE VOL. 3].
After negotiations broke down in late spring 1975, Van Loo decided to make a “major effort” to meet directly with World Bank President McNamara.\(^\text{179}\) There is no record of the meeting ever taking place, but Van Loo did later manage to meet with Chaufournier in New York.\(^\text{180}\) Chaufournier seems to have responded by formally contacting Mauritanian diplomats in regard to the dispute.\(^\text{181}\)

Guy de Rothschild also stepped in to serve as a shareholder emissary to the World Bank. On May 9, 1975, he sent McNamara a hand-written note requesting that McNamara meet with Eichenberger:\(^\text{182}\)

Dear Bob . . .

My colleague . . . Eichenberger is negotiating for all the shareholders of Miferma with the Mauritanian government some form of compensation. He has run into great difficulties and as I personally started the whole thing 20 years ago with the World Bank I am anxious to see an acceptable ending to this.

I would be most grateful to you to see my colleague and advise him.

With warm regards . . .

McNamara, however, seems to have been wary of meeting with the shareholders. Instead, he directed I.P.M. Cargill, the bank’s Vice President of Finance, to meet with Eichenberger. Cargill did so on May 17, 1975, reporting the details of the discussion back to McNamara, Chaufournier, and others.\(^\text{183}\) Eichenberger had explained that the parties were “far apart in their ideas” regarding the indemnity, and that he “had thought that the Bank might use its influence with Mauritania to help in bringing about a speedy settlement.” When Cargill asked Eichenberger for suggestions as to what the bank might do to help, Eichenberger was “not at all specific” as to what the bank could do. However, he did suggest that the main sticking point was Mauritania’s lack of sufficient foreign reserves to fund an indemnity, and he hinted that the World Bank might consider loaning Mauritania the necessary money. Cargill was non-committal: “I told [him] that for the time being I could not make any suggestions of how the Bank would help but if such opportunities arose, [I] would be in touch with him.” Cargill promised to consult with McNamara “should our thinking on this matter develop any further,” but the bank’s ultimate response to Eichenberger’s entreaties seems to have been purely informal and discrete.

\(^{179}\) 1975NOUAKC00903, May 10, 1975. The shareholders viewed a meeting with McNamara as tactically desirable because it would be likely to “pull . . . McNamara’s special assistant for [the] recycling of petro-dollars, Muhammad Nassim Koshman, into [the] dialog.” Koshman was a “Mauritanian national who is a close friend and sometime personal adviser to President Ould Daddah,” and the shareholders hoped that he would report back to Ould Daddah about the shareholders’ meeting with McNamara. \textit{Id.}

\(^{180}\) \textit{Communication téléphonique du président Perricaudet au sujet de MIFERMA} (unsigned, undated, handwritten note), in AN19830564/5. The note likely dates from December 1975, though it is clear that Van Loo met on earlier occasions with Chaufournier. \textit{See, e.g.,} 1975NOUAKC01926, Sept. 22, 1975.

\(^{181}\) \textit{Communication téléphonique du président Perricaudet au sujet de MIFERMA} (unsigned, undated, handwritten note), in AN19830564/5. The note likely dates from December 1975.

\(^{182}\) The original note can be found in WB:1608161 [\textit{CORRESPONDENCE VOL. 3}].

\(^{183}\) Cargill’s memorandum is in WB:1608161 [\textit{CORRESPONDENCE VOL. 3}].
Eichenberger would later report his sense that “the Mauritanians had been scolded by the World Bank,” but there is no evidence that the bank did much more than that. Chaufournier’s attitude seems to have been that “the Bank should clearly take no position on the fairness of the settlement and should not be embroiled in a situation which has a history of conflicting views over a number of years.” In fact, internally the bank suspected that the shareholders’ compensation claims were exaggerated (a point I develop more fully further below).

Just as the shareholders were eager to “inform” the World Bank of their problems, the Mauritanians were as eager to convince the bank that there was no reason to worry. We have seen that Ould Daddah was careful to signal in his speech announcing the nationalization that the bank’s loan would be repaid. GIRM formalized that commitment in a Telex to McNamara informing him of the nationalization and assuring him that Mauritania would honor the terms of its World Bank loan, and that all other creditors would be paid in full. The bank’s response was a Telex simply confirming when the next payments were due.

Soon after, Ould Daddah dispatched Sidi, his Minister of Planning and Industrial Development, to visit McNamara. While McNamara appears to have viewed it as improper to meet personally with the shareholders, meeting with GIRM officials was another matter. The disparate treatment seems justifiable: GIRM was a World Bank shareholder, and the ex-MIFERMA shareholders were not. GIRM would also make several other efforts over the next few months to court the bank. Sidi met with Chaufournier to discuss the MIFERMA matter at the annual World Bank-IMF meeting in September, and President Ould Daddah personally invited Chaufournier to visit Mauritania in early December 1975.

The meeting with McNamara was clearly the most important contact between GIRM and the World Bank. Sidi offered his justifications for the nationalization as well as his assurance that the government “would offer fair compensation.” He also raised the possibility of World Bank financing for the Guelbs project, as well as assistance for the troubled SOMIMA copper operations. Chaufournier took notes on the meeting, but he did not record McNamara’s reaction either to the promise of “fair compensation” or to the suggestion of future World Bank aid. The U.S. embassy in Nouakchott nonetheless reports that McNamara cautioned the Mauritanians

184 Communication téléphonique du président Perricaudet au sujet de MIFERMA (unsigned, undated, handwritten note), in AN19830564/S. The note likely dates from December 1975.
185 Office memorandum from L. Hartsell Cash to Rodger Fournier (Nov. 19, 1975), in WB:1608161 [CORRESPONDENCE VOL. 3]. The quoted language is Cash’s recitation to Chaufournier of their previous discussion on what role, if any, the bank should play in the settlement negotiations.
186 Id.
188 World Bank to Sidi Ould Cheikh Abdullah (Dec. 11, 1974), in WB: 1608160 [CORRESPONDENCE VOL. 2].
192 Id.
“against [an] inadequate compensation formula.” Furthermore, Chaufournier’s pre-meeting background memorandum to McNamara, after describing the Guelbs project, makes it plain that World Bank involvement in future Mauritanian projects would “[o]bviously . . . depend to a great extent on successful resolution of the MIFERMA nationalization issues.”

This is the closest that available documents come to showing a linkage between World Bank aid and the failure to pay adequate compensation. (Indeed, the bank’s board approved an $8 million loan to Mauritania in October 1975, while the MIFERMA negotiations were still ongoing). However, even despite the lack of an explicit linkage, Mauritania could hardly expect the World Bank to enthusiastically welcome future GIRM loan applications should it refuse to deal reasonably with the MIFERMA shareholders. And in fact, there is no evidence that the bank was dissatisfied with the outcome of the negotiations. The Mauritanian government moved quickly after their conclusion to secure further financial and technical assistance from the World Bank, approaching it in 1976 with a proposal to finance an expansion of iron ore mining operations in the Guelbs. The bank ultimately financed the project in 1979, providing $60 million in credit.

D. The Reactions of Other Governments

We do not know much about the role that other governments might have played—if any—in helping to encourage the parties to settle. The French and U.S. diplomatic material suggests, however, that any such role was relatively minor, though perhaps not entirely insignificant in terms of adding to the pressure on Mauritania to settle fairly and quickly. We know, for example, that just before the start of negotiations the Italian ambassador based in Dakar, Senegal had met with Ould Daddah to “express his desire . . . for the negotiations to proceed in the best interests of both parties and to be completed quickly.” The British appear to have initially stayed mostly on the sidelines, expressing in December 1974 their “satisfaction” with GIRM’s promises to pay a fair indemnity. However, in April 1975 Van Loo convinced the British embassy to send a message to the Mauritanian authorities indicating the “interest that they took in progress of the negotiations” and in their timely resolution. The Spanish government declined to make a formal demarche; it had


194 The project is described in detail in World Bank Report No. P-2433a-MAU, June 21, 1979. Mauritania made its first presentation on the project to the Bank in October 1976.

195 Ambafrance Nouakchott to Paris (Feb. 1, 1974), in AN20000231/17. The cable notes that Rome viewed its interest as that of a MIFERMA client, and not as a shareholder. The observation is interesting because it suggests that Italy’s interest was not so much in assuring full compensation for the loss of Finsider’s shares, but to ensure the continued ability to purchase large amounts of Mauritanian ore (which would, presumably, avoid harmful dislocations in the Italian steel-making industry).

196 Ambafrance Nouakchott to Paris (Feb. 1, 1974), in AN20000231/17.

197 Paris to Ambafrance Nouakchott (Apr. 23, 1975), in AN20000231/17.
no real stake in the matter, as Spanish investors held no MIFERMA shares. The Spanish government nonetheless suggested to the French that it might be willing to boycott SNIM should negotiations fail to proceed.\textsuperscript{199} Germany, in contrast, was directly implicated in the affair’s successful settlement, as it had “guaranteed” the German investment in MIFERMA (presumably through Germany’s political risk insurance program), and the German government would be responsible for indemnifying Thyssen, the sole German shareholder, should Mauritania fail to pay. As such, Germany “would not fail to consider, in their relations with Mauritania, the consequences of an eventual despoliation.”\textsuperscript{200} There is, however, no evidence that any of these assurances of assistance were ever put to the test. Third-party governments—including the U.S. government, as we have seen—seemed quite happy to allow the French to take the lead in encouraging GIRM to settle.

**IV. DISCUSSION & ANALYSIS**

The 1960s and 1970s are often viewed as an exceedingly dark period in investor–state relations. Host state mistreatment of foreign investors was arguably widespread, and investors lacked effective legal recourse in response.\textsuperscript{201} Instead, investors were supposedly left at the whim and mercy of their home state governments, whose main tool in response to nationalization and expropriation was interstate violence. The case study of the MIFERMA nationalization, however, does not provide much support for such a pessimistic view. In this section I extract several important implications that tend to cast investor–state dispute settlement in the pre-investment treaty era in a more favorable light.

**A. The Investor’s Ability to Self-Help**

The MIFERMA dispute illustrates that foreign investors in the pre-investment treaty era were far from helpless in defending their interests. The MIFERMA shareholders could pursue and implement several self-help strategies aimed at increasing the pressure on GIRM to settle on reasonable terms.\textsuperscript{202}

First, the shareholders could hold hostage a quite substantial amount of cash offshore, out of reach of Mauritanian authorities. Given GIRM’s shaky finances, this move seems to have caused GIRM serious inconvenience.

Second, the shareholders could threaten to interfere with SNIM’s ability to sell seized ore by implementing a buyer’s boycott. The shareholders, as major consumers of iron ore, could refuse to purchase SNIM’s output in the future.\textsuperscript{203} Any such threat appears to have been more implicit than explicit. The record suggests, however, that

\textsuperscript{199} Ambafrance Nouakchott to Paris (Feb. 1, 1974), in AN20000231/17.
\textsuperscript{200} Id.
\textsuperscript{203} Francisco Vergara, *La voie étroite de la Mauritanie*, ESPRIT 310, 313 (Sept. 1976) (“A boycott by the buyers [of SNIM’s ore] would have caused difficulties for an entire series of projects financed by the budget.”)
the shareholders were effective at convincing other consumers to informally boycott SNIM. For example, during the settlement negotiations, a GIRM official approached the Japanese seeking a purchase agreement with SNIM. The Japanese rebuffed the invitation to deal, asking pointedly whether Mauritania had settled yet with the shareholders. The U.S. embassy in Nouakchott, in reporting this episode, noted that the GIRM official “apparently got the message. Eichenberger did not deny that MIFERMA shareholders might have primed the Japanese, and observed that Japanese law facilitates efforts by ex-owners of nationalized companies to prevent sales of their products to Japan.”

Third, the investors could meaningfully access formal law even in the absence of overarching investment treaties. They did so in two ways.

First, they invoked the international arbitration clause in their establishment agreement. This point is an important one, given that the investment treaty literature sometimes (wrongly) implies that treaties are the only effective way to provide investors with access to international law. The threat to arbitrate under the concession contract seems to have been effective in the sense of increasing GIRM’s incentives to settle. The arbitral panel had successfully been formed—despite GIRM’s refusal to participate—and its membership was comprised of distinguished Western lawyers unlikely to be sympathetic to exaggerated NIEO claims of “permanent sovereignty” over natural resources. Mauritania was facing a real risk of an unfavorable arbitral award that would have raised the possibility of drawn-out and bothersome enforcement actions against SNIM assets, and GIRM’s decision to settle must be understood as taking place within the shadow of an imposed law-based solution.

The investors also threatened to use domestic law to make SNIM’s life difficult. We have seen an example of this tactic immediately above, in the shareholders’ threat to use Japanese law to interfere with a potential Japanese agreement to purchase SNIM ore. We also saw it in First National City Bank’s warning, communicated through the law firm of Sherman & Sterling, that it would tie SNIM up in years of international litigation should GIRM proceed against BIMA. The ability of investors to access law even absent investment treaties is a critical point that is too frequently ignored in modern debates about the supposedly crucial need for treaty-based protections. In many cases, investors will be able to access meaningful legal protections via a pre-existing contract with the state, or even through domestic legal regimes.

204 1975NOUAKC02378, Nov. 19, 1975. In the days immediately following nationalization, the shareholders also apparently considered, but did not implement, a plan to declare SNIM shipments of ore to be “rouge” (red), a move that would have placed those shipments at risk of seizure. Yvette Chassagne, Point sur la situation MIFERMA (Dec. 20, 1974) (unpublished note), in AN20000231/17. Also, as noted above, the Spanish government indicated that it might support a buyers’ boycott.

205 For example, in an influential article, Guzman, supra note 201, claims that absent investment treaties state promises to investors are not legally enforceable. For a contrary view, see Jason Webb Yackee, Pacta Sunt Servanda in the Era before Bilateral Investment Treaties: Myth & Reality, 32 FORDHAM INT’L L. J. 1550 (2009).
B. Politicized Dispute Settlement Can Be Pacific (and Moderating)

An exaggerated form of the depoliticization thesis implies that politicized dispute settlement is likely to lead to interstate violence. The MIFERMA example, however, suggests that in the modern era there is little or no real risk of military intervention for investor-protection purposes. The diplomatic record does not contain a shred of evidence that any of the various parties involved thought about, let alone threatened, military intervention. This is not surprising. On a formal legal level, the use of force in the collection of international debts has long been outlawed.

More importantly, we see through the MIFERMA example that home states, host states, foreign investors, and international institutions may find themselves in a complexly interdependent relationship that moderates excessive pressures and demands. By “complex interdependence” I mean that the various parties, broadly construed, are connected by multiple social and political relationships. Complex interdependence can serve as a moderating force to the extent that it renders extreme actions riskier (by increasing the chances of adverse reactions by other parties, or of adverse effects on other interests); it can provide multiple channels for pacific influence; and open up opportunities for long-term cooperation.

Mauritania, for example, remained dependent upon the World Bank, the French government, and even the shareholders themselves, for future assistance. The World Bank had funded the MIFERMA investment in the first place, and it was perfectly obvious to GIRM officials that they would someday be in the position of asking it to fund future projects. GIRM’s position vis-à-vis the World Bank is well illustrated in the early and repeated assurances that GIRM officials provided as to the government’s commitment to repaying the outstanding loan. It is also evident in the World Bank’s apparent readiness to link future loan decisions to GIRM’s willingness to settle the dispute with MIFERMA’s shareholders on reasonable terms. GIRM’s dependence on World Bank financing provided an opportunity for it to—quietly and behind closed doors—suggest that GIRM should behave responsibly. The French government was in an even better position to make linkages between potential future assistance and adequate compensation. Indeed, once it became clear that GIRM would behave reasonably, and that the shareholders could be convinced to moderate their demands, the French government was quick to promise significant additional aid.

Perhaps somewhat more surprisingly, the shareholders could play the linkage game as well. The shareholders suggested that their willingness to purchase SNIM’s output, or to provide technical assistance, was contingent on adequate compensation. More generally, it was obvious to GIRM that their development prospects

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206 This is the sense of the concept as developed by political scientists Robert O. Keohane & Joseph S. Nye, Jr. in their influential study *Power and Interdependence* (1977).

207 *La coopération entre Paris et Nouakchott va être relancée*, LE MONDE (Paris), Dec. 5, 1975 (noting that in the weeks prior to the formal settlement, the French government had promised to support a major deep-water port project, a cross-desert highway, an agronomy institute, a technical college, and other projects).

208 It is important to note that GIRM remained dependent upon, or at least interested in, future opportunities to cooperate with the World Bank, with France, and with the shareholders despite the availability of petrodollars. Windfall Arab oil money may have helped encourage GIRM to take the plunge and
depended on future access to private foreign capital. The diplomatic record suggests both that home state governments were quick to make the argument that Mauritania’s reputation as a good place to invest was at risk should Mauritania treat the shareholders unfairly and that GIRM officials were sensitive to the reputational effects of their actions.

Complex interdependence seems to have encouraged the various Western interests to moderate their demands too. For example, the World Bank’s official interest in Mauritania was in seeing the country develop, and it is reasonable to assume that the bank had little desire to see Mauritania pay an indemnity that would have threatened the state’s development prospects, or deprived Mauritania of the hard currency required to pay off the World Bank-sponsored debt.

Likewise, while the gunboat diplomacy notion implies that home governments may grossly overreact to investor claims of mistreatment, the French government’s response seems to have been rather restrained. That restraint makes geopolitical sense. Mauritania occupied a critical position as a bridge between French interests in the Maghreb and in Black Africa, and France had little incentive to adopt an unduly hard line that would risk pushing Mauritania into the socialist Arab camp. Perhaps even more importantly, France needed Mauritanian cooperation in dealing with the growing military conflict involving the Algerian-supported Polisario independence movement in the Western Sahara. That conflict threatened dangerous regional instability.209 France would eventually intervene militarily in Mauritania, but it did so to protect SNIM’s—the expropriator’s—operations from Polisario assault, not to protect French shareholders.

To put it another way, the French government was clearly not a stooge for the shareholders, as the French government’s long-term interests were not co-extensive with MIFERMA’s. The diplomatic record provides clear illustrations of the extent to which larger French interests were not necessarily convergent with those of the MIFERMA investors on whose behalf the French state was intervening. We see tensions, albeit relatively mild, arising from the very beginning: in late December 1974, Minister Abelin wrote personally to Audibert to insist that the shareholders do nothing that might “alter the future climate of negotiations.”210 Abelin was especially worried about how MIFERMA would respond to GIRM’s ire over the shareholders’ refusal to repatriate the company’s accounts received. That refusal clearly strengthened MIFERMA’s bargaining position vis-à-vis Mauritania, but it also greatly complicated France’s diplomacy by dragging another French investor into the dispute. The Ministry of Cooperation, in fact, would demand that the shareholders justify to the French government their decision to withhold the funds.211
The shareholders’ decision to push forward with arbitration was also bothersome to the Quai d’Orsay, which feared that the move might risk alienating the Mauritanians.212 Perhaps most remarkably, in response to suggestions from GIRM that the time was right to réchauffer the Franco-Mauritanian relationship, the Quai d’Orsay approached the shareholders to make an “argument to convince [them] that the moment had come for them to attempt to end [the negotiations] going as far as they believed possible down the path of conciliation.”213 This was very sensitive territory, and the Quai d’Orsay knew it. In the cable describing the intervention to the Nouakchott embassy, Rebeyol, the ministry’s Director of African Affairs, closed the communication with the following instruction, remarkable for its equivocation on the desirability of formal French intervention:

Assuredly, we would not intervene as a third party in discussions that only concern the ex-shareholders and the Mauritanian state. Such has been our attitude from the beginning and it must remain as such. But the importance of the contested issues is such that it is inevitable that the affair weighs on Franco-Mauritanian relations. . . . I would like you [the French ambassador to Mauritania] to seize the occasion of your next meeting with President Moktar [Ould Daddah] . . . to indicate to [him] that . . . you cannot hide from [him] the worry that the prolongation of talks is causing in Paris and that we strongly desire to see the talks terminate as soon as possible in a solution satisfactory to all of the parties, for the purpose of completely unburdening the relationship between the two countries.214

The shareholders would continue to complain and bluster about what they viewed as a lack of appropriately firm French support. In an aide mémoire provided to the Ministry of Foreign Affairs in preparation for Ould Daddah’s upcoming state visit to France, the shareholders warned that they would not accept an imposed solution that awarded them less than their “final minimum acceptable position” of $115 million. Should an inadequate settlement be imposed, the shareholders would “defend their interests with as much vigor as possible, using all accessible arbitral and judicial tribunals and before the various forums of international opinion that are interested in these sorts of problems.” This threat followed an even more remarkable outburst in an aide-mémoire from two weeks earlier. There, in a section entitled “desires as to action by the French government,” the shareholders pointed out that their investments in Mauritania had been “insistently encouraged” by the French government, and that the shareholders “would not be able to avoid defending their interests through means susceptible to disturbing relations between Mauritania and certain developed countries, if [the shareholders] do not receive active assistance from the French government.”215

Nouakchott (Dec. 24, 1974), in AN20000231/17. Audibert confirms that he viewed the ministry’s intervention here as an attempt to “pressure” the shareholders into releasing the funds. AUDIBERT, supra note 25, at 193.

212 Ambafrance Nouakchott to Diplomatie Paris (July 26, 1975), in AN20000231/17.
213 Affaires Africaines to Ambafrance Nouakchott (July 3, 1975), in AN20000231/17.
214 Id.
215 The aide-mémoire, dated October 31, 1975, can be found in AN19830564/5.
As we have seen in the historical narrative, the shareholders would end up accepting much less than they originally demanded, and even less than their last best offer. Their willingness to do so was certainly influenced by French government pressure to moderate their demands. But it is also important to recognize that the shareholders were susceptible to such pressure in part because of their own dependence upon future good relations both with Mauritania and with the French government. The shareholders stood to benefit from Mauritania’s willingness to sell them ore, and from Mauritania’s need for continuing management and technical assistance, which would lead to opportunities for service contracts. They also benefitted from continued French (and other Western) government support for the steel industry, and from French government political risk insurance and export credits. That continued dependence no doubt made it unwise for the shareholders to follow through on their threat to blow up Franco-Mauritanian relations. But the threat, to the extent that it was marginally credible, may also help to explain why the French government did not abandon the investors’ cause completely.

C. Politicized Dispute Settlement Can Be Effective

The MIFERMA affair suggests that politicized dispute settlement can be effective in the sense of securing meaningful compensation for the aggrieved investor in a relatively short period of time. Of course, the MIFERMA shareholders did not receive everything they initially demanded. But neither, typically, do investors who litigate through the modern investment treaty regime. Moreover, the MIFERMA shareholders themselves apparently viewed the final agreement as “reasonable,” even if sub-optimal. In his book on the MIFERMA affair, Audibert supports the conclusion that the indemnity was not unfair. He estimates that it represented a three percent return per year on the shareholders’ investments. Taking into account the consumer-shareholders’ discount on ore purchases, the net rate of return, he suggests, was approximately eight percent per year. The World Bank calculated the shareholders’ annual rate of return through 1971 at 5.2%, about equal to the average U.S. treasury note rate over the same period. Audibert’s estimate of the final return, if accurate, thus compares favorably to what the Bank thought the shareholders had been earning prior to nationalization.

216 A contemporaneous analysis of the expropriation made this point in suggesting that the compensation negotiations would likely proceed “without great difficulty,” as the shareholders had both “security [gage] and interest in the successful operation of the company to the extent that [the shareholders] are an essential part of Miferma’s clientele, whether nationalized or not.” PIERRE BARNE, PHILIPPE DECREINE, & PIERRE RONDOT, L’ANNÉE POLITIQUE AFRICAINE 1974, MAURITANIE, at II-9 (1975).

217 The French government was also likely concerned with how the settlement would be viewed by other ex-colonies. Too stingy a settlement might encourage further expropriations elsewhere. While France might have lacked incentives to push Mauritania to pay as much as the investors initially demanded, it probably had an interest in making sure that the investors got something plausibly viewed as adequate.

218 Hodgson, supra note 16, reports that investors win only forty-one percent of investment treaty arbitrations, and that when they win, they receive, on average, less than ten percent of what they initially claimed they were due.

219 Ambafrique Nouakchott to Diplomatie (Dec. 20, 1975), in AN20000231/17.

220 AUDIBERT, supra note 25, at 195-96.

221 AUDIBERT, supra note 25, at 196.

222 Pigossi & Chardon to Cash (Aug. 25, 1972), in WB: 1608161. The same document also suggests that, under an alternative approach taking into account the depletion of ore reserves, the discounted return to
Moreover, as mentioned above, the World Bank thought that the shareholders’ initial claims were exaggerated, especially if considering Mauritania’s assumption of MIFERMA’s substantial liabilities. In an internal memo prepared for Chaufournier near the end of the negotiations, L. Hartsell Cash, a mining expert at the World Bank, pointed out that it was “interesting to note that Miferma shareholders expected to receive par value for any shares sold to the Mauritanian government.”

(Prior to the nationalization MIFERMA had considered selling off part of itself to GIRM). Cash’s observation is interesting because, at par value, the company was worth only about $57 million, “substantially less than the $80 million” that GIRM was offering in the settlement talks. Even more strikingly, the World Bank’s view at the time of the 1972 site visit was that “the stock was not worth par value based on future profit expectations at that time.” Ultimately, Cash was unwilling to offer a definitive judgment on the correctness of a particular valuation. As he and Chaufournier “were well aware,” the matter was “more a political question than a question of financial judgment.” Cash’s characterization of the issue as “political” seems more pragmatic than cynical. The calculations necessary to compute what an expropriated investor objectively deserves are complicated and contested. They depend, in part, on data that may not exist, and on predictions about future states of the world that suffer from wide bounds of uncertainty.

The process that led to the MIFERMA settlement agreement was also surprisingly speedy. The final agreement was reached just thirteen months after the announcement of the nationalization. This time-to-completion compares favorably to investor – state arbitration proceedings, which tend, on average, to last nearly four years, and can drag on for many more. It is also important to consider that the nationalization and the settlement largely extricated MIFERMA from a rapidly deteriorating geopolitical situation. Its operations were perilously exposed to the Western Sahara conflict and to attack by Polisario guerrillas. The company’s financial situation was already somewhat precarious, and a military flare-up in the disputed territories might have seriously threatened its financial equilibrium. Given the simultaneous turmoil in world commodity and currency markets, as well as the growing military conflict, the MIFERMA shareholders might be seen as having been given the chance to exit their investment on decent terms at what would turn out to be a rather optimal time.

We might extract a larger lesson as well. The aim of the depoliticization movement seems to be to isolate investor – state disputes within a purified legal sphere, governed entirely by formal legal rules and processes and untainted by politics. But excessively cabined, overly legalistic proceedings may inhibit settlement, the shareholders might even be negative. If that view is correct, then the settlement may have overcompensated the shareholders.

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223 Cash to Chaufournier (Nov. 19, 1975), in WB: 1608161.
224 Hodgson, supra note 16 (reporting statistics on arbitration duration).
225 Indeed, in the U.S. embassy’s view, the shareholders had accepted the deal in part out of fear that the growing international crisis in Western Sahara might “decrease[] Mauritanian willingness and ability to pay.” 1975NOUAKC02663, Dec. 24, 1975.
226 Cf. [Redfern & Hunter 2015, § 8.09] (“This right of direct recourse [to investor-state arbitration] ensures that the investor’s claim is not subject to the political considerations inherent in diplomatic protection.”).
heighten tension and conflict, and destroy future opportunities to cooperate for mutual benefit.227 This possibility is hardly radical. A long line of research in the law-and-society tradition warns against exaggerating the conceptual and practical utility of a bright-line distinction between law and politics, and encourages us to be suspicious of claims of the inherent superiority (or even relevance) of formal legal rules and processes for the regulation of many kinds of disputes. In that spirit scholars have recently begun urging the architects of the investment treaty system to incorporate greater opportunities for mediation as an alternative to legalized arbitration.228

The MIFERMA affair suggests that politicized dispute settlement may possess some of the benefits of mediation and other forms of alternative dispute resolution. Politicized dispute settlement may provide room for the broader representation of interests and issues. Its informality, flexibility, and reliance on negotiated, context-sensitive solutions may also do a better job than litigation at preserving opportunities for future cooperation. Note, for example, that the MIFERMA settlement bound the two sides into a long-term commercial relationship. One of the shareholders’ main aims in setting up MIFERMA was to secure long-term access to a reliable supply of high-quality ore, and the settlement agreement preserved that important aspect of the original deal. GIRM, for its part, was eager to preserve markets for its ore, which the settlement agreement seems to have done.229 The settlement also kept open opportunities for SNIM to access future rounds of World Bank financing, in 1979 and in 1985.

Most importantly, the negotiations seem to have led directly to a fruitful reorientation in Franco-Mauritanian relations. In the years immediately prior to the nationalization, those relations had been at a post-independence nadir. MIFERMA’s nationalization obviously threatened a further deterioration. And yet, in responding to the nationalization French diplomats saw and seized an opportunity—extended by GIRM—to engage in a much more ambitious relational reset, evidenced by Ould Daddah’s state visit to Paris.230 With the MIFERMA “misunderstanding” (Ould Daddah’s word) out of the way, France and Mauritania could look forward to a reinvigorated policy of cooperation.231 The new arrangement would be based not on colonial domination, but on, as Prime Minister Chirac put it, respect for each other’s sovereign choices on development policy, in the spirit of “reciprocal dignity and

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230 As Ould Daddah himself put it, at the time of the state visit, “After a certain chill, our relations with France are excellent.” Après un froid certain, nos rapports avec la France sont excellents déclare le chef de l’État mauritanien, in LE MONDE (Paris), Dec. 8, 1975.
friendship.”232 In the months and years following the settlement, France and Mauritania would resume the tradition of annual “grand commissions,” in which GIRM demanded, and France supplied, assistance for sundry development projects. Overall, French financial and military assistance to GIRM increased dramatically as well. While Ould Daddah’s public comments on the eve of the MIFERMA settlement suggested that a new era of Mauritanian independence had arrived, in fact the post-MIFERMA years demonstrated that Mauritanian and French interests were intertwined as never before.233

V. CONCLUSION

One way to justify a current state of affairs is to denigrate how things used to be, and to suggest that if we abandon the now, we will revert to the then. In justificatory accounts of the modern investment treaty regime, the omnipresent bogeyman of “gunboat diplomacy” serves that purpose well. If the choice is between investment treaties and smoke, flame, and shrapnel, who would not choose the former? Even those who recognize that gunboat diplomacy disappeared decades before the advent of investment treaties argue that non-violent systems of diplomatic protection, based upon the theory of espousal, suffered from debilitating limitations and disadvantages. But to date we have had very little historical research to provide a realistic and evidence-based examination of how dispute settlement in the pre-investment treaty era actually worked, or failed to work.

This article suggests that how things worked was not, perhaps, all that bad. Investor–state dispute settlement may have been more politicized than it is today,234 but politicized dispute settlement could achieve reasonable outcomes in reasonable amounts of time, and it could do so entirely pacifically. The MIFERMA episode suggests that even in the absence of investment treaties, host states were not free to treat investors with impunity. Nor were investors able to drag their home states into military conflict. Politicized dispute settlement could be moderating, and it could be effective.

I think that there are at least two other important points to take away.

The first is that the modern debate about the value of international investment law hinges, at least in part, on essentially historical claims that are themselves subjectable to empirical-historical examination. While a single micro-historical case study may not offer definitive proof for or against predominant understandings of how the past was (and of how that past might validate a certain ordering of the present), it can at least provide hints and clues that destabilize those understandings and that

232 Id.

233 All would not end well for Ould Daddah, though it is difficult to blame that outcome on the MIFERMA settlement or on the politicized process that led to it. The Mauritanian economy continued to suffer, plagued by a shortage of skilled labor and a weak global market for iron ore. Polisario guerrillas attacked SNIM’s operations, killing and kidnapping French technicians and disabling the mine’s rail link. GIRM devoted an increasingly large portion of its budget to its military occupation force in the Western Sahara, diverting funds from development projects and implementing an unpopular defense tax on its citizenry. Polisario forces even managed to bombard Nouakchott on multiple occasions. Ould Daddah’s days were limited, and in July 1978 he was overthrown by his military in a bloodless coup, spending the rest of his days exiled in Paris.

234 Or perhaps not; for a challenge to that view, see Poulsen, Jandhyala & Gertz, supra note 20.
encourage further empirical inquiry into the historicity of international investment law’s justificatory rhetoric. 235

The second is that micro-historical exercises like this article excel at providing “more realistic and less mechanistic representations” of how various actors interact with and navigate a world of imperfectly institutionalized international law. 236 This function seems especially important given the increasing interest of social scientists in explaining how international investment law functions, or why it functions, through highly stylized models of purported general applicability. 237 Those models tend to present treaty-based investor–state arbitration as essential to the pacific resolution of investor–state disputes. But it need not be, nor, perhaps—as a number of scholars working in the tradition of alternative dispute resolution have argued—should it be. 238 International investment law exists alongside other modes and methods of investor–state dispute settlement, some more formal, some less so, some legal, some diplomatic, and some neither. More historical study is needed to gain a better understanding of how these methods overlap, conflict with, and mutually support each other. 239 This article has provided a first step in that direction, in the hope that others will follow.

235 As Levi puts it, micro-historical inquiry adopts a perspective of “small clue as scientific paradigm” in which “minimal facts and individual cases can serve to reveal more general phenomena.” These clues can call into question the adequacy of existing understandings of a particular phenomenon. Levi, supra note 7, at 109, 110.


237 For an overview of such studies, see Gregory Shaffer & Tom Ginsburg, The Empirical Turn in International Law Scholarship, 106 Am. J. Int’l L. 1, 35-38 (2012).

238 See, e.g., Salacuse, supra note 227; Franck, supra note 228; Welsh & Schneider, supra note 228.

239 As Anna Spain has noted, studies of the type presented above that focus on the “interactions among judicial methods and diplomatic approaches,” are exceedingly rare. See her review of Diplomatic and Judicial Means of Dispute Settlement (Boisson de Chazournes, Kohen & Vinuales eds., 2013), in 108 Am. J. Int’l L. 140 (2014).