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# Developing Narratives in International Investment Law

Tai-Heng Cheng\*

## I. Introduction

Once upon a time, “multinational corporations involved in extractive industries collaborate[d] with repressive governments to terrorize populations, instituting forced labor, attacking those who resisted, and spoiling the environment in ways that destroy traditional cultures.”<sup>1</sup> Then victims discovered the Alien Tort Statute, which allowed them to seek redress before U.S. federal courts.<sup>2</sup> Some lived happily ever after; many did not.<sup>3</sup> Through his article, *Corporations as Plaintiffs Under International Law: Three Narratives About Investment Treaties*, Professor Brower makes an important contribution to understanding the role of corporations in international investments by exploring three other narratives aside from the caricature of the corporation as a defendant in international investment disputes.<sup>4</sup> Focusing on the corporation as a plaintiff in disputes that arise under investment treaties, he tells three stories. They are respectively about private parties who negotiate international commercial transactions and expect their arrangements to be respected, about corporations, which have “human rights,” that should be protected from abusive host states,<sup>5</sup> and about governments that are shocked to discover that investment treaties circumscribe domestic regulatory measures, over which they legitimately seek to regain

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1. Charles H. Brower, II, *Corporations as Plaintiffs under International Law: Three Narratives about Investment Treaties*, 9 SANTA CLARA J. INT'L L. 179 (2011).
2. Alien Tort Claims Act, 28 U.S.C. § 1350 (2006).
3. Compare Ingrid Wuerth, *Wiwa v. Shell: The \$15.5 Million Settlement*, ASIL INSIGHT 1 (2009), <http://www.asil.org/files/insight090909pdf.pdf>, with *Aldana v. Del Monte Fresh Produce*, 416 F.3d 1242, 1247 (11th Cir. 2005).
4. Brower, *supra* note 1.
5. Ironically, the human rights narrative that José Alvarez originally proposed, and which Professor Brower quotes at some length, was not designed to engender sympathy for foreign investors. Instead, Professor Alvarez appears to have used this narrative to criticize the investor protections in Chapter 11 of NAFTA as a “human rights treaty for a special-interest group.” José E. Alvarez, *Critical Theory and the North American Free Trade Agreement's Chapter Eleven*, 28 U. MIAMI INTER-AM. L. REV. 303, 307–08 (1997), quoted in Brower, *supra* note 1, at 197.

control.<sup>6</sup> The brilliance of Professor Brower's storytelling is that his three stories, as well as the story of corporations as defendants, are neither mutually exclusive nor coterminous. Consequently, the reader is led to a more nuanced understanding of the role of corporations in international investments.

Professor Brower's article makes a further contribution to extant scholarship that is more subtle and potentially quite revolutionary. To this commentator's knowledge, Professor Brower is the first scholar to explicitly apply a narrative device to international investment law. The narrative method was first devised in feminist scholarship and later developed in critical legal studies ("crits"). In 1995, Arthur Austin suggested that legal scholarship had developed in three "stages": vocational, doctrinal and interdisciplinary.<sup>7</sup> If Professor Austin is correct, perhaps Professor Brower's article may represent a fourth stage of intradisciplinary scholarship between international law and its domestic analogs.<sup>8</sup> This essay explores briefly some uses and limitations of narratives in investment treaty law scholarship.

Preliminarily, it is unclear from Professor Brower's article the extent to which he intended to actually apply the feminist and crit narrative method, and the extent to which he meant to use the term narrative in a general sense. His method is similar in several ways to the feminist and crit method. However, it is also different in important ways. Regardless of Professor Brower's methodological intentions, these similarities and differences between his narrative method and the method of the crits and feminists suggests that it is useful to compare them, to appraise how well Professor Brower's method functions, and to explore how his method might develop further.

## II. The Narrative Method

In the legal academy, where benign neglect can be a death knell, the vigor with which scholars have debated the narrative method suggests it has achieved some traction. In 1989, the *Michigan Law Review* convened a symposium on the narrative method. Participating in the symposium, Richard Delgado explained that the narrative method uses personal stories of "outgroups" to create a "kind of counter-reality," which are "powerful means for destroying mindset—the bundle of presuppositions, received wisdoms, and shared understanding against a background of which legal and political discourse takes place."<sup>9</sup> They achieve this by inviting "the reader to suspend judgment, listen for their point or message, and then decide what measure of truth they contain."<sup>10</sup>

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6. Brower, *supra* note 1, at 192–97.

7. Arthur Austin, *Evaluating Storytelling as a Type of Nontraditional Scholarship*, 74 NEB. L. REV. 479, 480 (1995).

8. The term "stages," however, should not be taken to indicate anything more than a loose chronology. There are other instances of cross fertilization that began in the 20th century. The law and economics movement in domestic U.S. law found favor with some international law scholars, and the realist movement in U.S. law provided the foundations for realist and critical legal scholars in international law. See TAI-HENG CHENG, *WHEN INTERNATIONAL LAW WORKS*, CH. 2 (2011) (discussing history of international law).

9. Richard Delgado, *Legal Storytelling: Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2413 (1989).

10. *Id.* at 2411. Although the Michigan Law Review symposium was a watershed moment, the conception

Daniel A. Farber and Suzanna Sherry responded with a critique of the narrative method in the *Stanford Law Review*. They accepted that the narrative method had emerged as a “distinctive mode of legal scholarship.”<sup>11</sup> It emphasized storytelling over “conventional analytic methods,” focusing particularly on “ ‘stories from the bottom’—women and people of color about their oppression.”<sup>12</sup> Professors Farber and Sherry charged that because the narrative method focused on “aesthetic and emotional dimensions” and not whether the stories were “typical or descriptively accurate,”<sup>13</sup> the method raised questions about whether the stories were representative or truthful, even if recounted with utmost good faith.<sup>14</sup> Further, because personal narratives do not seek to justify their claim about some aspect of law or the legal system, there is no way for the reader to assess the validity of the “point of the message,”<sup>15</sup> to use Professor Delgado’s words, and, accordingly, no way to be persuaded.<sup>16</sup>

After Professors Farber and Sherry’s indictment, narrative scholars might have been down, but they were not out. Jane Baron, writing in the *Southern California Law Review*, criticized Professor Farber and Sherry for imposing the very methods of reasoning and persuasion that critical legal scholars reject in their use of the alternative methods of narratives. Professor Baron explains: “Stories are the creation of reason and analysis (more expansively understood) and could not exist apart from them; we do not, therefore need to worry about ‘pure narrative containing no legal analysis.’ ”<sup>17</sup> Yet, Professor Baron also conceded that narrative scholars could not adequately address Professor Farber and Sherry’s charge that the truth of narratives was not falsifiable and thus not verifiable. The movement needed to “clarify [its] own epistemological standpoints” if it wished to reject the standards of traditional scholarship that it contested.<sup>18</sup>

In summary, the three central features of the narrative approach are: (1) it rejects the notion of one true account of a legal system in favor of the idea that there are many valid accounts;<sup>19</sup> (2) it seeks through personal stories to reveal alternate perspectives about a legal system that are concealed by traditional methods of legal inquiry; and (3) it seeks to reform normative or policy underpinnings of a legal system through the messages embedded in stories, often in favor of “outsiders” or the downtrodden.

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of the narrative method had begun prior to that time. See, e.g., Robin West, *Jurisprudence as Narrative: An Aesthetic Analysis of Modern Legal Theory*, 60 N.Y.U. L. REV. 145 (1985).

11. Daniel Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807, 808 (1993).
12. *Id.*
13. *Id.*
14. *Id.* at 831–40.
15. Delgado, *supra* note 9, at 2416.
16. Farber & Sherry, *supra* note 11, at 849–50.
17. Jane Baron, *Resistance to Stories*, 67 S. CAL. L. REV. 255, 279–80 (1994).
18. *Id.* at 285; accord Austin, *supra* note 7, at 525 (“Thus far, no one, as Farber, Sherry and Abrams demonstrate, has satisfactorily accommodated truth and verification with experience narratives.”).
19. Baron, *supra* note 17, at 262.

### III. Using Narratives in Investment Treaty Law

Professor Brower's narrative method replicates some essential features of the method used by feminists and critical legal studies scholars, but also differs from them in important ways. Like feminists and critical legal studies scholars, he rejects the idea of one true, or even best, account of the legal system under investigation. Instead, he identifies three alternate but interlocking narratives. The commercial narrative views corporations in investment treaty law as commercial parties who have bargained for their investments.<sup>20</sup> The human rights narrative conceives of entities with rights that should be protected simply because they are rights.<sup>21</sup> The anti-globalization counter-narrative focuses on the limitations that foreign corporations and their investments place on sovereign authority to regulate internal matters and favors weaker investor protections to protect sovereignty.<sup>22</sup>

Professor Brower does not, however, rely on personal stories to construct narratives. Interestingly, the more traditional narratives about protecting commercial bargained-for exchanges and about maintaining sovereign rights to domestic regulation are constructed by referring to familiar modes of legal reasoning in traditional legal materials. He canvasses dicta in the decisions of arbitral awards to construct the following story: Initially, investment treaty law supported bargained-for investment protections and expectations of investors for a stable investment environment insulated from regulatory interference; recently, however, it has given increasing weight to the legitimate desire of governments to protect their domestic authority.<sup>23</sup> He reinforces this shift in the tale by textual interpretation of recent model investment treaties, which carve out from investment protections exceptions for domestic regulation.<sup>24</sup> Professor Brower enriches his story with consonant analysis by other scholars and a retired international judge.<sup>25</sup>

In contrast, the narratives about protecting the "human rights" of corporations and about the anti-globalist movement draw heavily, albeit not exclusively, on storytelling and emotional sentiments of civic groups. A human rights story emerges from *Desert Line Projects LLC v. Yemen*.<sup>26</sup> Although an award is not a primary source of law,<sup>27</sup> it is interesting that Professor Brower chooses to emphasize the facts rather than dicta. Professor Brower tells a personalized story about a foreign investor who was invited to build roads in Yemen, whose projects were later "siege[d]"; the investor fled Yemen after his son was thrown in jail and the investor received threats to his life.<sup>28</sup> This story sets a sympathetic foundation for investor protections as a story about human rights.

The anti-globalist narrative does not involve direct story telling. But it does convey a

20. Brower, *supra* note 1, at 181-97.

21. *Id.* at 197-205.

22. *Id.* at 205-12.

23. *Id.* at 184-91.

24. *Id.* at 191-95.

25. *Id.* at 186-87, 192-93.

26. *Desert Line Projects LLC v. Yemen*, ICSID (W. Bank) Case No. ARB/05/17, Award (Feb. 6, 2008), 2008 WL 2912764.

27. *See* Statute and Rules of Court, 1940 P.C.I.J. (ser. D.) No. 1, art. 38(1)(d) ("[J]udicial decisions and the teachings of the most highly qualified publicists of the various nations" are "subsidiary means for the determination of rules of law.').

28. Brower, *supra* note 1, at 199-201.

story about reactionary anger by recounting emotionally charged words of civic groups and news reporters. They describe arbitral tribunals as “secret trade courts,”<sup>29</sup> Chapter 11 of the NAFTA on investment arbitration as a “challenge [to] democracy [and an] end-run around the Constitution,”<sup>30</sup> and foreign investors as “panning for gold,” and “exploiting poor states.”<sup>31</sup> The human rights narrative and the anti-globalist counter-narrative revealed by these alternate sources of information are not as immediately obvious under traditional legal reasoning from arbitral awards and treaty texts.

Like feminist and critical legal studies scholars who use narratives, Professor Brower attempts to draw policy or normative conclusions from his narratives. But because he does not focus solely on the downtrodden outsiders, and instead considers conflicting narratives, his normative conclusions are not directed solely against prevailing orthodoxies. Instead, he favors “a path traversing the territory among competing paradigms,”<sup>32</sup> and explains that “the three narratives suggest that foreign investors need and should receive a measure of protection against political risks in their host states,” but investment treaties “do not guarantee the success of investments, protect against disappointment, or require host states to satisfy best practices in the conduct of public affairs.”<sup>33</sup> This balanced view accords more closely to the views of mainstream scholars.<sup>34</sup>

#### IV. Appraisal

Professor Brower’s application of the narrative method deepens the methodology. Proponents might reject his use of narratives as subverting the original purposes for which narratives were devised, that is, giving voice to the downtrodden. Professor Brower does not appear to embrace only their normative agenda of combating prevailing authority structures. Consequently, he does not present only the narratives of the downtrodden. His use of traditional sources may tend to give voice to mainstream views, alongside the more radical narratives promoted by the non-traditional sources upon which he draws. Professor Brower’s unorthodox construction of narratives through multiple legal and non-legal sources, rather than personal stories alone, might thus raise a critical eyebrow or two.

In this commentator’s view, however, any method predicated on multiple versions of truth and relevant experiences cannot in good faith only focus on narratives that buttress the storyteller’s politics. Thus, Professor Brower appropriately considers multiple narratives that emerge from different types of sources. His normative conclusions are richer, not poorer, for that.

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29. *Id.* at 206–07 (quoting *The Secret Trade Courts*, N.Y. TIMES, Sept. 27, 2004, at A26).

30. *Id.* at 206 (quoting *Bill Moyers Reports, Trading Democracy* (PBS television broadcast Feb. 5, 2002), transcript available at [http://www.pbs.org/now/transcript/transcript\\_tdfull.html](http://www.pbs.org/now/transcript/transcript_tdfull.html)).

31. *Id.* at 207 (quoting Kevin Gallagher, *Stop Private Firms Exploiting Poor States*, GUARDIAN (Feb. 5, 2010, 11:00 AM), <http://www.guardian.co.uk/commentisfree/cifamerica/2010/feb/05/el-salvador-gold-pacific-rim-mining>).

32. *Id.* at 213.

33. *Id.*

34. See, e.g., Philippe Sands, *Searching for Balance: Concluding Remarks*, 11 N.Y.U. ENVTL. L.J. 198, 207 (2002) (emphasizing the “need for balance” in investment treaty law: “balance between the domestic, the regional, and the global; balance between the interests of investors and social interests; balance between the state and its constituent parts”).

Further, Professor Brower's widening of sources goes some way to address the concerns of Professor Farber and Sherry that personal stories are not verifiable, and, in any event, are not necessarily typical. Canvassing a wider range of sources, especially treaty texts and arbitral awards with findings of fact, reduces reasonable doubt as to the veracity and typicality of narratives that emerge from those sources.

Yet adherents of personal stories have a point as well. This commentator's concern about Professor Brower's narrative method is not that it focuses on sources other than personal stories, but that it does not draw from *any* personal stories at all. There is a danger that by ignoring first person accounts of investments, the narratives of investment treaty law may inadvertently fail to consider or give adequate weight to the human dimensions implicated in this area of law and to policy considerations situated in these dimensions.

For example, Professor Brower presents a story of *Metalclad v. Mexico* that cuts against protecting investor's bargained-for investment rights:

[W]hen a U.S. investor acquired a project to build a hazardous waste facility near a rural Mexican town, it made an investment on Mexican territory, but did not thereby establish a commercial relationship with the host state. As a result, it did not bargain with the host state regarding the allocation of substantive obligations or the modalities for dispute settlement. Under these circumstances, the Supreme Court's business planning narrative loses relevance because it aims to facilitate the performance of bargains that simply do not exist.<sup>35</sup>

Had Professor Brower included first person accounts in his narrative, the story would have been different and more complex. "The company had asked for \$90 million in damages and estimated that it had spent more than \$20 million in planning, permitting and construction."<sup>36</sup> After the NAFTA tribunal found in *Metalclad's* favor and awarded \$16.7 million in damages, its CEO Grant S. Kesler bemoaned that the decision was

as Pyrrhic a victory as any I've experienced. . . . This is a token amount of money that doesn't really reflect the value of the project . . . . The biggest losers of all are the people of Mexico who continue to have to live in a country that produces 10 million tons of hazardous waste a year and has only one facility in the whole country to handle it.<sup>37</sup>

Mexican Deputy Commerce Secretary Luis de la Calle offered a different perspective: "We consider that the panel didn't take into account Mexico's arguments, and that the panel erroneously said that municipal permission is not required . . . What interests us is the principle of the constitutional right of municipalities to require permission for what happens in their territory."<sup>38</sup>

After challenging the award, Mexico eventually settled the dispute for roughly \$16 million. The *New York Times* issued the following report when Mexico made payment: "Mexico, struggling with a painful economic slowdown, tried to reassure investors, issuing a statement saying the government 'honors its international obligations, even when it does not agree with the findings of the international tribunal nor with the way the tribunal

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35. *Id.* at 201 (internal citations omitted).

36. Anthony DePalma, *Mexico is Ordered to Pay a U.S. Company \$16.7 Million*, N.Y. TIMES, Aug. 31, 2000, at C4.

37. *Id.*

38. *Mexico Appeals Decision on Metalclad*, L.A. TIMES, Sept. 1, 2000, at C2.

works.’ ”<sup>39</sup>

The narrative that emerges is more complex. Although it may be technically accurate that Metalclad did not make direct commercial arrangements with Mexico, nonetheless Metalclad had business expectations that its investment would be protected by the international investment framework that Mexico signed up for through NAFTA. This rendering of the “business planning narrative” is not predicated on direct commercial bargains between a foreign investor and host state, and may more accurately convey a message that investors have a legitimate expectation of a stable investment framework.

The Metalclad story also sheds light on the anti-globalist narrative. Even though government officials may be understandably concerned about abdicating constitutional authority to a foreign tribunal, ultimately they may accept such constraints if they are necessary to attract foreign investments, as was the case with Mexico.

First person accounts studied together with stories by third party observers may also reveal other narratives. Take, for example, the failed \$6.6 billion Dabhol power project that Enron, GE and Bechtel made in India, which resulted in investor-state arbitrations against India. Personal accounts of involved persons, along with fact-finding and research by third party observers, offer a rich account of the international investment regime. According to a Minority Staff Report of the Committee on Government Reform of the U.S. House of Representatives:

The local communities and other Indian interest groups strongly opposed the Dabhol project throughout its development. . . . [T]he project was predicted to displace 2,000 people and land was seized without notification or compensation. There were also environmental concerns with the project related to pollution of fresh water . . . .

....

Police beat and jailed human rights and environmental workers deemed to have instigated largely nonviolent protests against the project, tear-gassed demonstrators, and threw suspected protestors into preventative detention. . . .

....

[A] Human Rights Watch report found categorical evidence that Enron was paying the government directly to police the protests, and that it was lending the police its helicopters.

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After the project was cancelled, in late 1995 and 1996, Mack McLarty, a White House counselor, closely monitored the Dabhol Project with the U.S. ambassador to India, keeping [Enron CEO] Ken Lay informed of the administration’s efforts. . . . President Clinton’s ambassador to India, Frank Wisner, “was among the plant’s most influential advocates.” Mr. Wisner joined the board of an Enron-controlled company after he left the Foreign Service in 1997.

....

The Bush Administration intensified U.S. government efforts on behalf of Dabhol as the project ran into trouble again in early 2001. . . . On April 6, 2001, Secretary of State Colin Powell raised Enron’s problems regarding Dabhol in a discussion with India’s foreign minister. . . . Vice President Cheney

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39. *Eye on Investors: Mexico Pays U.S. Company*, N.Y. TIMES, Oct. 29, 2001, at A4.



raised the issue of Dabhol in a meeting with Sonja Gandhi, the president of India's opposition Congress Party, on June 27, 2001. . . .<sup>40</sup>

In August 2001, Ken Lay told the Financial Times, "There are U.S. laws that could prevent the U.S. government from providing any aid of assistance to India going forward if, in fact, they expropriate property of U.S. companies."<sup>41</sup> The Washington Post reported that the "Chief Minister of Maharashtra state in India decried 'the strong-arm tactics of Enron' he interpreted in Lay's words."<sup>42</sup>

The Congressional staff report continues:

[T]alking points were prepared for President Bush to discuss the issue in a meeting with Mr. Vajpayee on November 9, 2001. However, an email sent the day before the meeting, on November 8, warned that "President Bush cannot talk about Dabhol." That same day, Enron had disclosed a stunning \$568 million in previously unreported losses.

Since Enron's collapse, the Administration has continued to pursue the issue, but more quietly. U.S. Ambassador Robert Blackwill recently warned an Indian business audience about the effects of the dispute. He stated: "I hear frequent buzz from the United States that the sanctity of the contract may now be in doubt here, a concern that can spell the death for potential investments."<sup>43</sup>

Although the Dabhol investors commenced arbitration against India under the U.S.-India bilateral investment treaty, the investor-state arbitrations were settled before an award was rendered. Attorneys from the Chadbourne & Parke law firm, which represented one of the insurers of Enron's investment, the Overseas Private Investment Corporation, in the settlement negotiations, reported the reasons for the settlement:

The change in the [Government of India's] political leadership, the authority and resolve demonstrated by the new Indian negotiators, the looming \$6 billion Bechtel and GE arbitrations, the USG arbitration, the offshore banks' threatened arbitrations under bilateral investment treaties, the shortage of power to Maharashtra, and even general frustration and the size of mounting expenses may all have contributed to the sudden change in the Indians' negotiating position in March 2005, and all therefore contributed to the comprehensive commercial settlement that was achieved.<sup>44</sup>

A business school case file corroborates the personal narrative of the attorneys:

India's 2004 elections resulted in a new Prime Minister, Manmohan Singh . . . Singh wished to negotiate trade agreements with Washington, and he wanted to gain Washington's support for India's nuclear program. From this perspective, Singh needed a negotiated agreement prior to his U.S. visit, which had been scheduled for July 18, 2005.

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40. MINORITY STAFF OF COMM. ON GOV'T REFORM, H.R., 107TH CONG., BACKGROUND ON ENRON'S DABHOL POWER PROJECT 11-17 (2002), available at [http://finance-mba.com/Dabhol\\_fact\\_sheet.pdf](http://finance-mba.com/Dabhol_fact_sheet.pdf) [hereinafter Congressional Report] (internal citations omitted).

41. Dana Milbank & Alan Sipress, *NSC Aided Enron's Efforts*, WASH. POST, Jan. 25, 2002, at A18.

42. *Id.* at A16-18.

43. Congressional Report, *supra* note 40.

44. Kenneth Hansen et al., *The Dabhol Power Project Settlement: What Happened? and How?*, INFRASTRUCTURE JOURNAL, [http://www.chadbourne.com/files/Publication/a5aa1e52-4285-4bb5-87e6-7201123895a0/Presentation/PublicationAttachment/352f8f09-ae96-40fc-a293-720d0b8f0ca8/Dabhol\\_InfrastructureJournal12\\_2005.pdf](http://www.chadbourne.com/files/Publication/a5aa1e52-4285-4bb5-87e6-7201123895a0/Presentation/PublicationAttachment/352f8f09-ae96-40fc-a293-720d0b8f0ca8/Dabhol_InfrastructureJournal12_2005.pdf). See also Press Release, Chadbourne & Parke L.L.P., Chadbourne Represented OPIC in Settlement over Dabhol Power Plant (July 19, 2005), <http://www.chadbourne.com/Chadbourne-Represented-OPIC-in-Settlement-over-Dabhol-Power-Plant-07-19-2005/>.

[Indian Defense Minister] Mukherjee met with U.S. Vice-President Dick Cheney to seek his assistance in the negotiations, and Cheney did play a key role in convincing Bechtel and OPIC to reduce their demands. In the days prior to July 18, the government of India was able to negotiate a reduction of 20 per cent in the face value of DPC's bank loans, and it was able to purchase GE's equity for \$145 million and Bechtel's equity for \$160 million. The total payment was \$760 million.<sup>45</sup>

This brief case study of the Dabhol investment is neither comprehensive, nor is it intended to be. Its purpose is merely to illustrate how a closer review of narratives, including first person narratives (the lawyers involved in the dispute, Enron's CEO, and Indian government officials) and third person narratives (Human Rights Watch, congressional staff reports, business case studies) can illuminate non-obvious perspectives and interests.

The story that emerges from even this brief recounting of the Dabhol investment is not just about Professor Brower's concerns for stability of contractual rights, investor protections, and domestic regulatory authority. It is also about the cozy relationships among investors, their government and its officials, domestic politics in host states, and a plethora of intersecting international commercial interests. A proposal about appropriate levels of investor protections in investment treaties must account for these considerations. Although further inquiry beyond the scope of this commentary is necessary to fashion concrete recommendations, this narrative about Dabhol supports the anti-globalist narrative more persuasively than the knee-jerk statements of inward looking news reporters and civic groups, but it also suggests that the investment treaty framework can only be properly understood and appraised in the geopolitical context in which it exists.

Even with a thick narrative, the move from a story to the moral of the story can be difficult. The criticism leveled against narrative scholarship for inadequately establishing a causal link between narratives and legal conclusions applies equally to Professor Brower's thesis.<sup>46</sup> It is unclear how Professor Brower's narratives justify his normative conclusion that investment treaty law ought to balance investor protections against the legitimate regulatory interests of host states. His narratives may be reasonably constructed, and his normative position is certainly credible, but any causal connection between his narratives and his normative conclusion remains to be proven or at least reasonably demonstrated.

Perhaps the point of narratives is to persuade by stirring the soul. Consider Lord Denning's rousing story that prefaced the seminal decision by England's Court of Appeals in favor of damages for Mrs. Hinz's nervous shock in *Hinz v. Berry*:

It happened on April 19th, 1964. It was bluebell time in Kent. Mr. and Mrs. Hinz had been married some 10 years, and they had four children, all aged nine and under. The youngest was one. Mrs. Hinz was a remarkable woman. In addition to her own four, she was foster-mother to four other children. To add to it, she was two months pregnant with her fifth child.

On this day they drove out in a Bedford Dormobile van from Tonbridge to Canvey Island. They took all eight children with them. As they were coming back they turned into a lay-by at Thurnham to have a picnic tea. The husband, Mr. Hinz, was at the back of the Dormobile making the tea. Mrs. Hinz had taken Stephanie, her third child, aged three, across the road to pick bluebells on the opposite

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45. DANIELLE CADIEUX & DAVID CONKLIN, RICHARD IVEY SCH. OF BUS, INDIA'S NEGOTIATIONS CONCERNING THE DABHOL POWER COMPANY 2001–2005, Univ. of W. Ontario, at 2 (2006), <http://www.iveycases.com>.

46. See Austin, *supra* note 7, at 504–05 (“A legal story without analysis is much like a judicial opinion with ‘Findings of Fact’ but no ‘Conclusions of Law.’”).

side. There came along a Jaguar car driven by Mr. Berry, out of control. A tyre had burst. The Jaguar rushed into this lay-by and crashed into Mr. Hinz and the children. Mr. Hinz was frightfully injured and died a little later. Nearly all the children were hurt. Blood was streaming from their heads. Mrs. Hinz, hearing the crash, turned round and saw this disaster. She ran across the road and did all she could. Her husband was beyond recall. But the children recovered.

An action has been brought on her behalf and on behalf of the children for damages against Mr. Berry, the defendant.<sup>47</sup>

Nonetheless, without more attention to the causal connection between the narrative and the law, conservative skeptics legitimately may wonder what purposes are served by narratives that cannot be more concretely achieved through other methods in international legal scholarship, such as using policy-oriented jurisprudence to decide what investor protections to bargain for when negotiating investment treaties, or applying strict textual interpretation under Article 31 of the Vienna Convention on the Law of Treaties to decide the content of investment treaty provisions when arbitrating disputes.<sup>48</sup>

Although scholars committed to a normative agenda of promoting the downtrodden or developing world might disagree, the proper role of narratives may not be to displace other methods in international law. Its role may be instead to serve as a reality check against, or to confirm outcomes reached by, other methods that may not otherwise adequately account for the human context of law. Even Lord Denning ultimately based his decision on conventional methods of legal reasoning, including distinguishing prior cases to reach his conclusions of law, and applying a “wholly erroneous” standard to review the trial judge’s findings of fact.<sup>49</sup> He used the narrative about poor Mrs. Hinz as a supplementary tool to persuade generations of scholars and judges that he had reached the correct legal outcome.

A similar role may be assigned to narratives in investment treaty arbitration. Had the Dabhol arbitration brought by GE and Bechtel not settled, an award may well have found in favor of India if the evidence established that Enron was complicit in human rights violations, environmental damage and corruption. Under these facts, the tribunal could have found that India did not violate the fair and equitable treatment standard of the applicable bilateral investment treaty, because Enron would not have passed the legal test of having a legitimate expectation that the Indian government would not take regulatory measures to rectify Enron’s acts and omissions.<sup>50</sup> The anti-globalist narrative about Enron’s actions would buttress such an outcome, but it would not displace the legal reasoning necessary to reach that conclusion of law.

In the final analysis, Professor Brower’s innovative use of narratives in investment treaty law adds a new dimension to extant literature in the field. His development of the narra-

47. *Hinz v. Berry*, [1970] 2 Q.B. 40 (Eng.).

48. Vienna Convention on the Law of Treaties of 1969 arts. 31–32, May 23, 1969, 1115 U.N.T.S. 369; *accord* *Chevron v. Ecuador*, UNCITRAL, Partial Award on Merits by Bockstiegel, Brower, Ban den Berg, ¶¶ 159–65 (Mar. 30, 2010); *Pac Rim Cayman L.L.C. v. El Sal.*, ICSID Case No. ARB/09/12, Expert Opinion of W. Michael Reisman, at 13–19, (Mar. 22, 2010).

49. *Hinz*, 2 Q.B. at 42.

50. ANDREW NEWCOMBE & LLUIS PARADELL, *LAW AND PRACTICE OF INVESTMENT TREATIES* 279 (2009) (“Tribunals have identified the protection of legitimate expectations as a key element of fair and equitable treatment.”); *id.* at 297 (“The conduct of the foreign investor (whether malfeasance, misfeasance or non-feasance) cannot be separated from the issue of legitimate expectations or reasonable reliance.”).

tive method ameliorates some fundamental criticisms that have hitherto dogged its proponents. His method, especially when fully deployed, can reveal human dimensions in legal problems that traditional methods of inquiry may obscure. Although now well over five decades old, investment treaty law remains an emerging field of international law. Professor Brower's stories will doubtlessly add insights to future chapters of investment treaty law.

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