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Narrative and Lyrical Elements in International Investment Agreements: Towards an Imagination-Inspired Understanding of International Legal Obligations

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ABSTRACT

This article applies literary analysis to the unconventional subject of International Investment Agreements (IIAs), treating these sources of international law as if they were works of fiction with a view to uncovering insights into how they might be received by their readers. It proposes that IIAs may be imaginatively appreciated both for their narrative features (their capacity to tell stories in the tradition of novels or plays) as well as their lyrical ones (their poetic or figurative elements). Rather than leading to any concrete conclusions concerning how IIAs may have been misunderstood because of readers' neglect of these instruments' literariness or how they should thereby be construed going forward, the article calls upon readers of IIAs to be more aware of the feelings which these instruments might inspire, much as we would expect from novels or poems. This could in turn enhance our understanding of these treaties as they are viewed by the legal practitioners who draft and interpret them as well as the people whose rights they affect.

I INTRODUCTION

This article aims to explore the literary features of a particular embodiment of international law: the international investment agreement (IIA) by reference to some of the techniques associated with literary analysis, i.e. the tools used by scholars of literature to evaluate works of fiction such as novels and poems. It will attempt to cultivate a new way of understanding these legal instruments by engaging a separate set of cognitive faculties which are tied to the imagination and feeling. More specifically, the article seeks to unearth the aesthetic aspects of IIAs by treating them as if they were themselves works of literature, not as documents encapsulating legal obligations. By offering a glimpse of the potential for literary analysis to bring to light innovative ways of contemplating legal documents such as IIAs, this article will urge that the "fiction of fiction" has the potential to bring to bear ways of knowing inspired by

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the imagination. Although not typically associated with legal reasoning, these may generate valuable insights into how these documents are prepared, interpreted and applied.

The article rests on the premise that the explanatory framework provided by literary analysis can illuminate our appreciation of IIAs as an origin international legal rights. Cave suggests that “literature is both an instrument as well as a vehicle of thought,”¹ meaning that the creative processes involved in writing as well as reading works of fiction are a key aspect of our cognitive capacity. Recently others have drawn attention to the value in applying the creative instincts engendered by fiction to fields such as finance² and management.³ Bianchi astutely observes the links between law and literature by noting: “both law and literature create and rely on symbols and myths, use rhetoric in a constitutive fashion and shape reality through language.”⁴ Whereas most scholarship in this field tends to explore the role of law *in* literature⁵ this article will consider law *as* literature. There is also, of course, a well-established body of legal scholarship of this nature.⁶ But this approach has not been directed at this specific source of law (the treaty), typically focusing on the more obvious parallels between law and literature conveyed in case law including that of international courts.⁷

This article will be divided into two parts reflecting two chief, if arguably artificial, categories of literary features which may be discerned from IIAs. First, it will consider the narrative elements of IIAs, conceptualizing these legal instruments as works of fiction which demonstrate elements of stories where events unfold because of the actions and decisions of characters. Second, this article will examine the lyrical aspects of IIAs, meaning the extent to which they employ language in an artful or stylized manner for the purposes of conveying feeling in the spirit of poetry. Some conclusions will be offered in the final section which aims to encourage further study into this unique approach to the important field of international investment law.

Before proceeding with a discussion of the literariness of IIAs, it is essential to provide some brief background as to their origins, purpose and controversies. These instruments seek to enhance the flow of foreign direct investment (FDI) by mitigating some of the risks

¹ T CAVE, *THINKING WITH LITERATURE* (Oxford University Press, 2016) at 12

² M DESAI, *THE WISDOM OF FINANCE* (Houghton Mifflin, 2017), arguing that reading fiction can help us humanize those who work in financial services.

³ A Smith, *Memo to the Boss: Put Down those Papers and Read a Novel*, *The Financial Times* (London) 27 May 2017, arguing that reading fiction can help us understand other people’s viewpoint.

⁴ A BIANCHI, *INTERNATIONAL LAW THEORIES* (Oxford University Press, 2016) at 287

⁵ E.g. K Balsley, *Truth and Truthmaking in Ovid’s Metamorphosis*, 23:1 *Law and Literature* 48 (2011)

⁶ See e.g. R POSNER, *LAW AND LITERATURE* (Harvard University Press, 1988) Part II.

⁷ E Morgan, *New Evidence: The Aesthetics of International Law*, 18 *Leiden Journal of International Law* 163 (2005) at 163

associated with locating business activities in foreign states, where danger of expropriation and biased courts looms large in the minds of company directors and shareholders. There are now more than 3000 IIAs comprising traditional bilateral investment treaties and free trade agreements with investment chapters. IIAs create jurisdiction in international investment arbitration tribunals, modelled on private commercial arbitration. These confidential ad hoc bodies hear claims based on treaty protections brought by investors against states (known as investor-state dispute settlement or ISDS) and never the reverse. Several hundred decisions have been issued by tribunals such as those constituted under the International Centre for the Settlement of Investment Disputes (ICSID).⁸

IIAs are the source of much controversy in part because of the multi-million dollar awards levied against states by these tribunals and also because the treaties themselves are regarded as an affront to the sovereignty of domestic courts.⁹ Since IIAs grant investors the ability to bring claims directly against host states through the largely confidential arbitration process, it is often asserted that they undermine capacity of governments to regulate their economies in the manner that suits the needs of their citizens. Largely uniform in their structure and contents, IIAs provide standards of minimum treatment to foreign investors coupled with access to ISDS for the purposes of enforcement. As international treaties, they are legally binding documents which carry significant obligations for host states. While they pose the risk of large compensation claims payable by states to investors, IIAs are thought to stimulate the beneficial movement of capital around the world, especially to developing countries, where the risk of interference with investment activities is most acute.¹⁰

Just as IIAs are legally binding sources of international law, they are also written documents composed of verbal language and as such they can be evaluated not only for their capacity to create rights but also how they are perceived by readers, whoever they may be (lawyers, diplomats, academics, politicians, investors). IIAs may be regarded as an inherent literary form with their own history, authorship and audience. With this context in mind, this article will suggest not so much that there is a “literariness” about IIAs in the conventional sense, but that an effort to isolate the literary features of these materials may shed some light on how they are construed both by those within and outside the legal profession. It will accordingly contemplate what impressions might be invoked in a reader by an IIA if it were

⁸ See further D COLLINS, *AN INTRODUCTION TO INTERNATIONAL INVESTMENT LAW* (Cambridge University Press, 2016)

⁹ See e.g. N Butler and S Subedi, *The Future of International Investment Regulation: Towards a World Investment Organization*, 64 *Netherlands International Law Review* 43 at 46 (2017)

¹⁰ COLLINS, above n 9

beheld as a work of fiction, such as a short story or a poem. Law may not be intended as art but it may be appreciated as such if artful aspects of it are explored.

II NARRATIVE DEVICES IN INVESTMENT TREATIES

The narrative elements of law have been the subject of much academic discourse in the law and literature tradition, however this tends to relate to the judicial component of law as opposed to the legislative or statutory.¹¹ Commentators have persuasively argued that storytelling is very much part of what lawyers (or at least litigators) do. Constructing narratives from an array of often disparate and disjointed facts is essential to the art of advocacy.¹² If lawyers win cases by telling stories, or through “causal argumentation” as some have put it¹³, judges also rely on narrative formation to reach their decisions. Likewise, and again focusing on the judicial component of law-making, psychologists have observed how the human tendency to create stories to make sense of complex facts features prominently in the approach taken by judges deciding outcomes in legal disputes. They note, however, that there is an associated danger that imposing a narrative for the purposes of simplification or clarification risks obscuring issues which may not have an easy explanation.¹⁴ Others argue that legal decision-making (again judges) consists of people engaging in a form of reality construction via established social frameworks. Establishing truth consists of matching conventionally understood patterns of action or behaviour with the story at the heart of the dispute, which is necessarily internally coherent.¹⁵ This is not to say that facts or points of law are entirely random, but that their relationship with one another is not one which fits into our understanding of a story, which might be usefully summarized as a character pursuing a goal in which conflict is suffered and resolution is achieved. The centrality the narrative to law, again especially in relation to caselaw, is perhaps the fundamental observation of the law and literature movement.¹⁶

The extent to which story-building is present in the construction or reading of treaties like IIAs is less conspicuous and has not been explored in academic literature. The reason for

¹¹ E.g. W TWINING, *RETHINKING EVIDENCE: EXPLORATORY THEORIES* (Cambridge University Press, 2009) Ch 11 *Narrative and Generalizations About Questions of Fact*

¹² JC Rideout, *Storytelling, Narrative Rationality and Legal Persuasion*, 14 *Journal of the Legal Writing Institute* 53 (2008)

¹³ F BEX, *AN INTEGRATED THEORY OF CAUSAL STORIES AND EVIDENTIAL ARGUMENTS*, Proceedings of the 15th International Conference on Artificial Intelligence and Law, 13 – 22 (2015)

¹⁴ JS BRUNER, *MAKING STORIES: LAW, LITERATURE, LIFE* (Harvard University Press, 2003)

¹⁵ B JACKSON, *LAW, FACT AND NARRATIVE COHERENCE* (Deborah Charles Publications, 1988)

¹⁶ E.g. J BOYD WHITE, *THE LEGAL IMAGINATION* (University of Chicago Press, 1973)

this may be that there are no “characters” or “plot” in treaties like there are in the disputes which are brought before courts, international or otherwise. Yet such elements are there, they are simply not as readily detectable. In this spirit, Cave observes that imagination is a fundamental aspect of human cognition and that understandings based on fiction including character and “storyworlds” is one of the key strategies that we use to think. Literary study therefore becomes a vital source of knowledge through which other disciplines may be investigated.¹⁷ This is no less so for a legal document like a treaty where story-like elements can, it will be argued here, be extracted upon a close reading. With this aim in mind, this section will proceed with a closer look at some of the more specific narrative elements of IIAs.

i) Character

Character development is one of the central pillars upon which all forms of fiction is based. Mullan notes: “Nothing is ...more important in our reading of novels than the sense that we are encountering real people in them.”¹⁸ Transposing the notion of an invented person to an international treaty requires a good deal of imagination, although this process is assisted by the fact that in this context such figures are real. It is perhaps not coincidental that legal commentators regularly speak of the “actors” in international law.¹⁹ In a literal sense this means ones who take actions. More figuratively, it channels the idea of role-playing to an audience on a stage. We are already conditioned to think of international legal relations as a kind of theatre. Flowing from this is our understanding as lawyers that the rights and obligations encapsulated in IIAs only have meaning because they are attached to the agents which bear them. Indeed, law itself is often described as a system of social ordering, rather than one based on abstract norms.²⁰ The people or characters of IIAs are the governments of the signatory states as well as private parties and other stakeholders who directly or indirectly benefit or suffer from the legal obligations contained therein. In the Australia-Mexico Bilateral Investment Treaty we have in the opening line: “The Government of Australia and the Government of the United Mexican States, hereinafter referred to as ‘The Contracting Parties’ ...have agreed as follows...”²¹ These are the principals whose actions will dictate the pattern of events in the story.

¹⁷ CAVE above n 1 at 152

¹⁸ J MULLEN, *HOW NOVELS WORK* (Oxford University Press, 2006) at 79

¹⁹ J KLABBERS, *AN INTRODUCTION TO INTERNATIONAL ORGANIZATIONS LAW* (Cambridge University Press, 2015) at 7

²⁰ E.g. HLA HART, *THE CONCEPT OF LAW* (Clarendon Law Series, 1961)

²¹ signed 27 July 2007

Lodge theorizes that one of the reasons that we read fiction (or more specifically novels) is to gain understanding of why people act the way that they do – they provide insight into human motivation, in some cases by providing intimate access to the private thoughts of characters which are unavailable in the real world.²² Clearly the economic advantage associated with both inward and outward foreign investment is the prime motivator of the political actors whose will is enshrined in IIAs. We have only to look at the most recent round of US presidential elections to see that the conclusion (or withdrawal from) international treaties is one of the primary instruments through which these individuals fulfil their objectives of serving the interests of their people.

If the main characters in IIAs are the state signatories (at least in the case of the classic bilateral investment treaty), in regional treaties with investment chapters, the parties are relegated to somewhat of an ensemble cast, although the economically powerful states often occupy the position of authority and therefore centrality to the narrative. To take one noteworthy example, by withdrawing from the Trans Pacific Partnership (TPP), a planned trade and investment treaty originally among 12 states, the US effectively terminated that agreement's future, much as the absence of a key character (or actor) would undermine the feasibility of a sequel to a Hollywood movie. The US, China and the EU remain the dominant trend setters in global economic relations and as such are the lead "actors" in IIAs in terms of their economic significance and their capacity to establish global standards such as the extent of investor protections, the right to regulate and mechanisms for dispute settlement. These are the characters which make things happen, given their willingness to embrace new norms, for example the Investment Court System (ICS). They are also the characters which have evinced capacity to grow, which is a key component of the narrative. Smaller countries are the lead characters of their own IIAs, even where these trend-setting mega-regionals like the TPP operate in the backdrop or as the centre of gravity in a geographical region. International organizations like the World Trade Organization (WTO) which oversee the negotiation and implementation of global treaties, are characters of yet another kind.²³

When speaking of a state, or of an organization like the WTO, it is not truly one individual, as a character in a novel or a play, but rather a collective composed of many agencies and officials, such as diplomats, courts and legislatures.²⁴ In that sense it is difficult to attribute actions let alone feelings as one would with the people who populate stories in the

²² D LODGE, *THE ART OF FICTION* (Vintage, 2011) at 182

²³ See further KLABBERS, above n 19

²⁴ BIANCHI, above n 4 at 297-298

manner envisaged by literary critics. It is difficult to present an explanatory theory of behaviour in international law precisely because the main actors are not individual humans but rather collectives which are often highly dynamic in terms of their composition.²⁵ Still, there is an arguable tendency of readers to impose imagery in the place of the intangible. This may inspire readers of IIAs to imagine certain people in the act of speaking the written phrases or at least signing the final document. It is difficult, for example, to read the North American Free Trade Agreement (NAFTA) without imagining US President Bill Clinton (or perhaps for Canadians, Prime Minister Brian Mulroney) either speaking the phrases out loud or at least reading through the agreement. These individuals appear in our minds because they were the chief political architects of NAFTA during its inception in the 1990s. Well-known politicians attend the signing ceremonies of IIAs for precise this reason – they humanize a process which is otherwise remote and unknowable to most. The most imaginative among us might tie allegorical imagery to each state: the American eagle, the Russian bear and the Chinese dragon are well-known symbols for these countries. The drafters of IIAs almost certainly are aware that these figures will resonate in the minds of the lawyers and judges who ultimately read them. This serves to humanize what is otherwise rather dry technical language embodying legal entitlements. Obligations are owed to and by these “beings” carry an added layer of exigency.

There are a range of what might be considered minor characters which appear in IIAs. The most important of these are the investors themselves, which take on role of chief drivers of action in the IIA “story” although they are not signatory parties of the IIAs. It is the investors who enjoy the protections of the guarantees made in the treaties by the states and, in terms of furthering events, they are the characters which instigate claims through the investor-state dispute settlement mechanism and are ultimately vindicated or in some cases, punished. Foreign investors using IIAs tend to be large, well-resourced multinationals, more faceless than states because their leaders (CEOs or directors) are usually not public figures, just as their main shareholders are not individual people, as conventional characters in fiction. In their place, readers might visualize investors via their brands, such as Philip Morris or Shell, two significant claimant investors in recent years.²⁶ Secondary characters of lesser importance appear throughout the IIAs merely as facilitators of the friendship and ultimately the conflict

²⁵ A van Aaken and T Broute, *Behavioral Economic Analysis of International Law*, in E Kontorovich and F Parisi eds. *ECONOMIC ANALYSIS OF INTERNATIONAL LAW* (Edward Elgar, 2016)

²⁶ The parallel between brands and characters is more evident in the case of brands which *are* characters, allowing consumers to identify the personality of the character or mascot with the goods or services: S Hosany, G Prayag, D Martin and WY Lee, *Theory and Strategy of Anthropomorphic Brand Characters*, 29 *Journal of Marketing Management* 48 (2013)

between the host state and the investor. These include third party funders, various tribunals for dispute settlement, such as ICSID – which is simultaneously a character in that it is an assemblage of individual adjudicators (as captured in the investment arbitration awards) and a setting in which action unfolds – a theatre of war so to speak, of which more below. Some treaties refer to specific individuals by way of their title –such as the Secretary General of ICSID who has the authority to appoint arbitrators on behalf of parties under some circumstances.²⁷ This role is currently held by Meg Kinnear, but few will conjure an image of her in their mind’s eye. The process of extracting character from IIAs requires imagination, and may well take place sub-consciously.

It is difficult to resist the conclusion that Jungian archetypes lurk within IIAs, embodying some of the classic heroic character types proposed by Frye.²⁸ An understanding of the context of IIAs helps bring these archetypes into focus. For example, academic commentators will be familiar with the paradigm of the multinational investor exploiting the resources of the impoverished host state. The “evil” corporation is well-established in modern popular literature, notably King’s *Dark Tower* trilogy and Le Carre’s *The Constant Gardener*. In contrast, government archetypes developed in works such as Orwell’s earlier conception of the malevolent over-powerful state of *Nineteen Eighty-Four* or Kafka’s dark depiction of absurd bureaucratization explored in *The Trial*, are less well-entrenched in the academic commentary on IIAs. Modern audiences inspired by cultural norms as well as the reality of the treaty language are more likely to view profit-hungry investors as the antagonists against naïve governments. The developed state party to the treaty (in classic IIAs concluded between capital importing and capital exporting states) is therefore by extension the villain of the piece, notwithstanding the fact that states win most of the cases.²⁹

The hero of classic literature, as in for example, Spencer’s epic poem *Fairy Queen*, is tested through the unfolding of the narrative and facing various obstacles, overcomes his/her own character flaws to achieve victory, a motif common to most modern (if not post-modern) novels, like Bronte’s eponymous *Jane Eyre* to name one noteworthy example. In this regard, the claimant in ISDS, often the much-maligned multinational corporation bringing a case against a host state which has taken its property without compensation, captures the essence of Frye’s High Mimetic hero: somewhat superior in stature but still living in the ordinary world,³⁰

²⁷ E.g. Trans Pacific Partnership Art 9.1 Definitions (4 February 2016)

²⁸ N FRYE, *ANATOMY OF CRITICISM* (Princeton University Press, 1957)

²⁹ UNCTAD World Investment Report 2016 at 107 <http://unctad.org/en/PublicationsLibrary/wir2016_en.pdf>

³⁰ FRYE, above n 28 at 34

as for example Shakespeare's Julius Caesar or King Lear. These men were born of noble blood and bear the ills of their kingdom on their shoulders. In one sense the multinational corporation is merely a business competing for customers and often trades in mundane commodities but it is also superlative in that ISDS claimants typically have international dimension and with multi-million-dollar turnover. The heroic company must vindicate its hard-won rights (e.g. technological know-how or intellectual property) against a deceptive, indolent and in some cases corrupt ruler which holds its possessions to ransom. Since the multinational corporation is viewed with disdain by many for their focus on maximizing shareholder value at the expense of societal concerns (labour rights and environmental protection) it may be equally plausible to perceive foreign investors as anti-heroes in the tradition of Milton's Satan in *Paradise Lost*. While they are pursuing nefarious ends, we as readers of the IIA story cannot help identifying with them. Surely any business owner would feel aggrieved if their assets were expropriated without sufficient compensation.

To turn this paradigm on its head, the respondent state may be equally perceived as the hero of the IIA, possibly even more so because it must defend itself against the antagonism of the villainous profit-seeking multinational. Under this model, the host state hero is aligned more closely with Frye's Low Mimetic hero,³¹ perhaps someone like Salinger's highly sympathetic and surely non-threatening Holden Caulfield from *Catcher in the Rye* or Santiago, the tenacious old man in Hemingway's *The Old Man and the Sea*. While the state has authority over its citizens it is not an ordinary person ("one of us") it may yet be construed as an agent of the people. It may be underfunded (IIA parties are often developing countries) and suffer unequal representation relative to the investor. Host countries in the developing world are the moral equivalent of the common man using the investment treaty merely hoping to raise himself/herself out of poverty. The one-sided nature of IIAs, crafted by developed countries and enshrining rights exclusively for investors may themselves produce a relationship between the parties to them, whether there are heroes or villains, allies or opponents. There is more going on in the gaps between the public story of IIAs and their private realities.

ii) Plot / Structure

One of the characteristic features of any story is an identifiable, deterministic course of action in which occurrences unfold in sequence because of choices made by characters in response to things which took place before. Law and literature theorists have identified "deep structures"

³¹ Ibid, at 34

within legal decision-making which conform to a model of narrative coherence, including setting and effecting goals followed by recognition of these achievements or failures.³² This model may be applied to legislative law-making, just as it is to the more familiar judicial kind. This element is an exceedingly difficult one to glean from IIAs because they are not intended as stories, even if we can distil story-like elements from them.

Yet the imagination discloses aspects of IIAs which do conjure up impressions of narrativity. Most works of fiction exhibit certain structural or formal elements which are key to the maintenance of narrative movement. IIAs, like all international treaties, have a layout which consists of title, preamble, parts (further divided into sections and subsections reflecting distinct categories of legal rules) to conclude with signature, as in the US Model BIT of 2012. This formalism may be likened to the structural elements found in works of fiction, such as novels or plays. At the risk of over-simplification, stories first establish setting, characters are presented, and tension is introduced, ultimately leading to resolution. Basic literary templates allow readers to rapidly enter the author's world to develop an understanding of meanings and to establish expectations of outcomes in a manner that may be satisfying or confirmatory. Some believe that these recurrent patterns in literature may be the result of emotions which propel plot development along universally understood lines.³³ In one respect IIAs' structure is analogous to that of the epic, Homer's *Odyssey* being a classic example, in that they begin *in medias res*. Both are seized with events already begun to unfold. The signatory parties have already assessed each other's investment potential, undergone years of negotiating the legal commitments and are willing to make, bringing them to the point at which they are prepared to enshrine these commitments in writing. Rather than depicting events as in conventional stories, IIAs are the culmination of events which have gone before. NAFTA famously was the result of years of negotiation. This technique infuses what we *do* see with that much more grandeur because the vicissitudes of treaty negotiation, much like the brutality of the Trojan Wars, are left to our imaginations. Similarly, the friction of the courtroom – the conventional story which pre-occupies the imagination of law and literature scholars, is not conveyed in the IIA. Rather, its future eventuality is implied through the dispute settlement provisions, of which more below.

³² Jackson above n 15 at 27-28

³³ P C HOGAN, *THE MIND AND ITS STORIES: NARRATIVE UNIVERSALS AND HUMAN EMOTION* (Cambridge University Press, 2003)

Rather than interconnected events unfolding as in a classic “plot”³⁴, the actions which occur in the treaty story are confined to passive commitments by the characters. To be sure, much of the movement, as it were, which is associated with these undertakings is personified. State parties “agree” as if they were individual agents, not collectives. Some IIAs contain more energetic verbs such as “grant”, “treat”, “accord” or “expropriate.”³⁵ Admittedly, none of these constructs is particularly effective in conjuring a sense of things happening beyond that of the process of signing the treaty itself. Readers do not readily discern imagery from the promise to extend Full Protection and Security and non-discrimination³⁶, even when we subconsciously connect these commitments to individuals, as noted above.³⁷ Those seeking to visualize the “action” of an IIA unfold in their mind’s eye may simply envisage people in suits sitting around a board room table, or perhaps heads of state somewhat more dramatically signing leather bound documents with a backdrop of flags. This is the acting-out of the script – the drama of the treaty’s substantive legal principles is brought to stage in the ceremony of diplomacy before the eyes of the world. The ceremony associated with treaty signage is no accident – commentators have noted the importance of treaty signage to maintaining the rule of law and peace.³⁸

The “ritualization” of treaty formation that is embodied by their standardized formatting and the public nature of their signage is surely aspect of their legitimacy as sources of international law based on the unforced consent of state parties with capacity.³⁹ Ritualization is itself regarded as a form of narrative structure.⁴⁰ Bruner wrote that: “legal stories strive to make the world seem self-evident, a “continued story” that inherits a legitimated past.”⁴¹ In other words, an outcome is legally tenable because it conforms to a pattern of the way that satisfies our expectations, based on previous experiences. The “events” of the treaty are likewise assembled in such a way that they conform to our understanding of what the legal relationship between the state parties should be, now and in the future. Just as much of the “action” associated with IIAs has already transpired, the treaty happenings are in many respects

³⁴ Mullen observes that plot is not strictly necessary for novels. He further distinguishes plot as “the causal chain which connects events” and narrative which is “the way that the story is told.” Above n 18 at 170

³⁵ E.g. Australia-Mexico Arts 4 and 7 (23 August 2005)

³⁶ As in Art 2(2) of the Korea-Albania BIT (15 December 2003)

³⁷ These concepts also may allude to actual disputes (case law), which are a form of inset narratives to some readers, of which more below.

³⁸ JW Yakee, *Bilateral Investment Treaties, Credible Commitment and the Rule of (International) Law*, 42:4 Law and Society Review 805 (2008)

³⁹ Statute of the International Court of Justice Art 38(1)a).

⁴⁰ BRUNER above n 14 at 46

⁴¹ Ibid at 49

potential rather than actual – the framework is set through which future actions and reactions can unfold. The vagueness of legal entitlements captured by the Fair and Equitable Treatment standard (dramatically unspecified and undeveloped)⁴² hint at an ominous range of transgressions which could set the friendly treaty parties against each other. We must infer what will transpire from the sparseness of a language. An effective plot will make use of suspense – holding the attention of the audience by presenting obstacles and delaying their resolution.⁴³ Unlike cases, nothing truly “happens” in investment treaties, but the groundwork is laid into which unseen past (negotiation) and future (litigation) stories can fit. In other words, we discern narrativity where it does not actually exist, at least that is observable to readers. Far from a plot in the conventional sense, the narrative in IIAs consists of presenting many ways in which the characters may be betrayed.

If IIAs tell a story about the global economic relationship between states and multinational firms, then it is one which is optimistic and aspirational. It conveys connectedness and shared goals, even as it outlines points where disagreements could arise. Calling to mind Frye’s influential theory of the five fictional modes,⁴⁴ IIAs would seem to embody what Frye termed the “summer” or “romance” mode of narrative. They represent the completion of an ideal – the actualization of the potential for mutually beneficial investment and trade between two partner states. International law has often been described as “utopian” in that it enshrines the values of the international community with respect to progress through cooperation and the peaceful resolution of disputes, even though these may not exist quite so perfectly in reality.⁴⁵ IIAs’ idyllic state of affairs is captured no more clearly than in the preamble, as seen for example in the India-Malaysia Comprehensive Economic Cooperation Agreement which reads: “recognizing their long standing friendship, strong economic ties and close cultural links.”⁴⁶ This is the treaty’s “setting.” The relations between the parties will unfold in the context of this environment. Deviations from the equilibrium of friendly relations in the form of breaches of promises made throughout the remainder of the treaty and chronicled in investment arbitration caselaw, are brought into bold relief.

⁴² As in the Sweden-India BIT Art 3(2) which states simply: “investments and returns of investors of each Contracting Party shall at all times be accorded fair and equitable treatment” without an explanation as to the meaning of these words.

⁴³ LODGE, above n 22 at 14

⁴⁴ FRYE, above n 28

⁴⁵ I Feichtner, *Realizing Utopia Through the Practice of International Law*, 23:4 European Journal of International Law 1143 (2012)

⁴⁶ (18 February 2011)

Much as chapter divisions in a novel are useful for demarking transitions between time or place in the action of a novel, IIAs are broken quite formulaically into parts and sections. Like chapter headings, these divisions may also accentuate surprise or suspense, enticing the reader with the promise of sudden change or enlivening the pace by disclosing the development of the story in advance.⁴⁷ Headings break the text into smaller units which may communicate the overall structure of the narrative as well as the tempo at which it can or should be read.⁴⁸ The use of the word “chapter” in a text has the further effective drawing the reader’s attention to the compositional process of the work,⁴⁹ reinforcing that it is unreal. In IIAs the effect is precisely the opposite because the concept of “chapter” has echoes the structural presentation of novels, making the text feel more story-like. Most IIAs include chapter titles which contains short headings for each section including: Scope, Definitions, National Treatment, Expropriation and Compensation, Transfers and so on.⁵⁰ Many modern treaties contain even more descriptive titles for their parts and sections: “Non-Discriminatory Treatment as Compared with a Non-Party’s Investors”⁵¹ or “Investment Disputes in Financial Services” – a style that recalls that of 18th Century novels like Fielding’s *Tom Jones* where chapter titles were almost comical in their earnestness. These are more than a cue to the reader (lawyers seeking the relevant provision), they establish a pace and tone which when read consecutively convey a distinct sense of incremental tension, ultimately leading to conflict.

iii) Conflict and Resolution

Among the most vital narrative elements in any work of fiction is a challenge to be overcome. The process of so doing leads to growth on the part of the protagonist. This is a common thread throughout the novel and short story, just as it is to the epic poem and the drama. The field of law and literature readily draws attention to the element of conflict in the courtroom trial but, as with other narrative elements, it is much harder to pin down in the treaty. The conceptual links between litigation and formal combat are hardly new.⁵² IIAs themselves do not contain conflict in the literary sense because, again, they do not describe action unfolding but rather establish a framework through which battles can be fought. Whereas international treaties of

⁴⁷ LODGE above n 22 at 164

⁴⁸ Ibid at 167

⁴⁹ Ibid at 164

⁵⁰ 10 February 2015

⁵¹ Art 5 Hong Kong-Chile (18 November 2016)

⁵² See e.g. E Thornburg, *Metaphors Matter: How Images of Battle, Sport and Sex Shape the Adversary System* 10 Wisconsin Women’s Law Journal 225 (1995)

all kinds have the historic purpose of de-escalating tension to avoid *actual* battle, IIAs foster war of a different kind. They lay the foundations for figurative *legal* battle which may unfold between the characters and in that sense IIAs evoke narrative climax by implication. There are a (reasonably) clearly delineated set of potential conflicts which are specified in the text. As in most documents establishing legal rules, these are conveyed as statements of obligations on the part of the signatory parties.

The focus of conflict between the state parties and the investors are legal rights: the guarantees against discrimination (National Treatment and Most Favoured Nation), the promise of Fair and Equitable Treatment and Full Protection and Security, assurances against expropriation without compensation, and in some cases entitlements to currency repatriation.⁵³ Any of these can be exercised as the basis for a claim by an investor against a host state. The potential for these legal commitments to crystallize into a lawsuit culminates in the treaty's dispute settlement features.⁵⁴ Again, while this action is missing from the IIA in the literal sense, it is implied as a potential outcome, and is disclosed in the investment arbitration caselaw. There is a long tradition of the legal trial as the focal point of conflict (and its ultimate resolution), particularly in American literature. Harper Lee's novel *To Kill a Mockingbird* and Jerome Lawrence and Robert E Lee's play *Inherit the Wind* are among the most significant examples.

Presenting the IIA dispute settlement mechanism near the treaty's conclusion creates dissonance with the language in the opening preamble because it contemplates disharmony rather than amity between the parties. Something has gone wrong and the amicable international relations expressed at the outset are expressed in terms of rules for litigants partaking in international arbitration. IIAs specify how claims will be submitted and arbitrators appointed.⁵⁵ Portentously, "Contracting Parties" are now "disputing parties,"⁵⁶ or worse "claimants" and "respondents."⁵⁷

For conflict to be deployed effectively in literature it should ideally be built gradually, contributing to an ever-increasing tension. Likewise, IIA dispute settlement provisions tend to include procedural requirements which escalate in severity – consultation and negotiation must be attempted, a notice of intent to arbitrate must be submitted, consent to arbitrate granted,

⁵³ As in the US Model BIT of 2012 Arts 3-7

⁵⁴ For a useful summary of the criticisms of ISDS see S Lester, *The ISDS Controversy: How We Got Here and Where Next?*, The International Centre for Trade and Sustainable Development (1 June 2016)

⁵⁵ Art 13 Nigeria-Singapore (4 November 2016)

⁵⁶ Art 32.8 Hong Kong-Chile

⁵⁷ Art 32.1

tribunal members selected, a location for the arbitration hearing is established, interim measures may be ordered, a final determination is made by the tribunal on merits and relief is set. The technique of incremental tension-building can be construed in the exhaustion of local remedies requirement contained in many IIAs which hints at the prolongation of conflict, rather than its resolution. India's Model Bilateral Investment Treaty of 2016 requires that investors must pursue local remedies through domestic courts for a period of at least five years before it may bring a claim through an international arbitration tribunal.⁵⁸ Rather than providing closure to the dispute caused by the non-fulfilment of the treaty's promises through ISDS, this process serves to perpetuate it by calling attention to a protracted time frame. The exhaustion of local remedies contemplates a legal dispute between investors and states over many years, in a sense making the promise of release through the ISDS procedure, as combative as it is, illusory.⁵⁹

The dispute settlement provisions of IIAs are the climax of the treaty-story because, not only do they specify the practical significance of failing to perform the action/obligations contained in the first half of the treaty, they are the most powerful in terms of the imagery which they evoke. We see injury in the treaty language. For example, the US Model BIT speaks of "loss or damage" arising out of the breach of the IIA's guarantee. References to "damages" also appears in the awards rendered by tribunals, effectively the final resolution of the conflict when a winner emerges.⁶⁰ While lawyers know that "damages" means monetary compensation (itself a vibrant image – stacks of bills, cheques, perhaps gold), it is also word which imbued with notions of destruction and by extension retribution. If we have an image of the state party in our minds from the beginning of the story, perhaps a city or buildings filled with people, then "damages" imparts scenes of devastation – ruins, broken machinery, wounded people, perhaps even dead bodies. The amicable relations between the parties established at the treaty's outset have been rent asunder. This is the completion of a journey from friendship to hostility, battle and ultimately reconciliation with the understanding that there may yet be good times ahead.

III LYRICAL DEVICES IN INTERNATIONAL INVESTMENT AGREEMENTS

Having attempted to identify some of the story-like features of IIAs, this article will now turn to another lens through which to construct a literary reading of these legal instruments:

⁵⁸ Art 15.2

⁵⁹ As in *White Industries Australia v India*, UNCITRAL Award (30 November 2011)

⁶⁰ Art 32 Hong Kong - Chile

lyricity. While there is no established definition of “lyrical poetry”⁶¹ the Merriam-Webster dictionary defines “lyrical” simply as “having an artistically beautiful or expressive quality”⁶² much as one might expect of a poem. These two components may be discerned in all written language, including that of a legal nature. First, the words or phrase must be beautiful, meaning that they must be pleasing or have aesthetic value. Secondly, they must be capable of conveying meaning beyond the obvious, that is to say, there should be layered or latent meaning. The capacity to evoke feelings in readers is often viewed as a secondary feature of literary merit, compared to formal properties, such as those noted above in relation to the novel.⁶³ For documents as brief as treaties, it is the lyrical features which are more resonant.

Again, it would be a simpler exercise to address the lyrical features of caselaw because these are intended as instruments of rhetoric or persuasion. Academic commentary tends to dwell on the artful style of jurists who use not only explicit literary allusion but also rhetorical flourishes in their writing.⁶⁴ As observed by a leading commentator: “the weight and persuasive force of the arguments [in court] will also depend on the context and modalities of communication...widely used argumentative techniques in law include the resort to inductive logic, the invocation of shared rationality as a standard for judgment or as a background to reasoning.”⁶⁵ This is not narrativity but inducement through appeal to logic and emotion. In the context of an IIA, the purpose of lyricism in the text is not to convince a judge but to appease legislators who must vote in support the treaty for it to become enshrined as law.

Law is conventionally viewed as conveying propositional content – it says what it means. In contrast, fiction, especially poetry, the explicit propositional content is only part of what is being communicated. The same may be said of treaties, which share many features with poems.

i) Structure

There is an identifiable structural similarity between treaties like IIAs and poetry. Just as many forms of poetry, including romantic⁶⁶ and epic⁶⁷, are divided into stanzas, IIAs are divided into

⁶¹ M Thain, “Introduction” in M Thain ed. *THE LYRIC POEM: FORMATIONS AND TRANSFORMATIONS* (Cambridge University Press, 2013)

⁶² <<https://www.merriam-webster.com/dictionary/lyrical>>

⁶³ This is known as the Affective Fallacy, a core concept of New Criticism. Formal properties include well-developed characters and a suspenseful plot. WK Wimsatt and M Beardsley, *THE VERBAL ICON: STUDIES IN THE MEANING OF POETRY* (University of Kentucky Press, 1954)

⁶⁴ E.g. B Cardozo, *Law and Literature*, 14 *Yale Law Review* 699 (1925)

⁶⁵ Bianchi, above n 4 at 298

⁶⁶ E.g. W Wordsworth, *I Wandered Lonely as a Cloud*

⁶⁷ E.g. J KEATS, *ENDYMION*

chapters as well as articles and sections. At the risk of an over-generalization of the genre, this style of presentation creates an overall aesthetic impression that resembles that of the poem. While IIAs do not exhibit rhyme or metric (or if they do it is surely accidental), there is an unmistakable lyricism in the repeated phrasing evinced in many IIAs. One example of this is the repetition of “Recognizing”⁶⁸ to begin the statements of the preamble. Likewise, many treaties repeat the phrase “The Provisions of this Agreement”⁶⁹ to start sections. Another phrase which re-appears in some IIAs to open articles is “For greater certainty.”⁷⁰ If one reads these sections aloud there is an undeniable cadence to them, as one might expect in verse. Even unspoken there is a sense first of cohesiveness (to the article if not to the treaty) as well as an assuring impression of pattern or routine. The rhythm of poetry is often thought to be central to their capacity to deliver pleasure to their readers – we experience time rhythmically (cycles of day and night, heartbeats etc.) and words which follow such patterns are intuitively appealing.⁷¹ The legal obligations are manifest through the rhythm of the words are natural and established. We seem them as the mechanical workings of international economic relations rather than radical proposals which are untested and poorly conceived. Likewise, the repeated phrase “for greater certainty”⁷² is itself an ironic reassurance – the apparent vagueness of some of the legal obligations is inescapable.

The poetic structure of IIAs is conspicuously manifest in the concluding signatory page, typically presented along a horizontal axis with the signature parties’ representative side by side. This technique recalls the visual effect achieved in Herbert’s poem “The Altar” where the lines are famously presented in a form which recalls the object itself (i.e. the poem itself is in the shape of an altar), embracing the departure from an earlier era when poems were performed rather than printed.⁷³ IIAs signatory pages resemble the arrangement of a table at which the two world leaders would be sitting when the document is signed.⁷⁴ The visual as opposed to oral nature of engagement with IIAs fact may further explain the abundance of multi-syllabic words,⁷⁵ perhaps more of a pragmatic than aesthetic convention.

⁶⁸ Japan-Ukraine (26 November 2015)

⁶⁹ New Zealand – Chile Art 5 (17 August 1999)

⁷⁰ Canada – Mongolia Art 2 (8 September 2016)

⁷¹ T FURNESS AND M BATH, *READING POETRY: AN INTRODUCTION* (Routledge, 2007) at 34

⁷² E.g. US Model BIT 2012 Art 5

⁷³ P ROBERTS, *HOW POETRY WORKS* (Penguin, 2000) at 110

⁷⁴ E.g. Slovak Republic – Iran at [27] (19 January 2016) This treaty has not yet been signed – perhaps all the more reason for the image of what the signing ceremony might look like to be conveyed by the presentation of the signage page.

⁷⁵ E.g. “governmentally” “corporation” “institution”: Canada-Mongolia, (8 Sept 2016) Art 1 definitions. Such treaties are easier to read than to speak aloud.

ii) Image and Metaphor

Imagery is evident throughout IIAs if one engages the imagination. A few examples have already been mentioned. Some of the most vibrant uses of figurative language, altering the meaning of words, are achieved through metaphor, a classic lyrical technique. Since law is correctly described as an “abstract social phenomenon” in that it establishes a framework of rules through which people interact with each other, it is highly needful of metaphors as tools of understanding as well as communication.⁷⁶ The use of metaphors in law is believed to reveal insights into how legal reasoning, as an aspect of human cognition, works in relation to legal decision-making.⁷⁷ Relevance theory further suggests that language is context-dependant and that the listener (or reader) derives much information from what is implied.⁷⁸ This is very much part of what is contemplated by treaty interpretation – words can mean more than they say. The Vienna Convention on the Law of Treaties establishes that treaties should be interpreted “in good faith in accordance with the *ordinary* meaning given to the word in light of its object and purpose” the latter component of which will tend to expand upon the former.⁷⁹ But the *extraordinary* or imaginative meaning may be just as captivating.

Many image-bearing metaphors flash through the minds of attentive readers of an IIA. For example, the preamble of most IIAs speaks of stimulating the “flow” of capital and technology,⁸⁰ conjuring the image of a river, as if these intangible things (money, perhaps less so, technology) actually move in physical space. This image is key to the appreciation of the alleged value of IIAs as legal commitments between states. Describing foreign direct investment as a “flow” is a way of giving shape to an abstraction. Capital cannot be seen or touched but its role in the prosperity of a nation is undeniable. A flowing river of water, or perhaps flowing blood in arteries and veins, inspires a sense of health and vitality. States are connected like lakes and streams, like organs in the body, implying a certain naturalness to the economic union. The success of IIAs tends moreover to be measured against their capacity to stimulate increases in FDI, which tends to be measured by data on FDI “flows.”⁸¹ In reality, capital does not move to other countries of its own accord, as water does downstream. It must

⁷⁶ S LARSSON, *CONCEPTIONS IN THE CODE* (Oxford University Press, 2017) at 34. Larsson cites examples such as “binding” contracts, “breaking” the law

⁷⁷ M L Johnson, *Mind, Metaphor and Law*, 58 *Mercer Law Review* (2007) 845

⁷⁸ D Sperber and D Wilson, *A Deflationary Account of Metaphors*, in Ray Gibbs ed. *THE CAMBRIDGE HANDBOOK OF METAPHOR AND THOUGHT* (Cambridge University Press, 2008)

⁷⁹ Art 31 (1) and (2)

⁸⁰ E.g. Rwanda-Turkey (11 March 2016)

⁸¹ L Sachs and K Sauvant eds. *THE EFFECT OF TREATIES ON FOREIGN DIRECT INVESTMENT* (Oxford University Press, 2010)

be moved by an agent. Contrary to the picture painted by the treaty language, simply removing legal barriers to investment is not sufficient. This misperception, based on the metaphoric “flow” may be one reason that provisions proactively encouraging foreign direct investment in IIAs are rather limited in scope.⁸²

In another stirring use of figurative language derived from nature, IIAs regularly define “enterprise” by reference to “branches”⁸³, transposing the image of a tree onto that of the corporation, as if such organization were alive and growing as well as possibly protective and magisterial. If investors naturally move across international borders (only marginally true) then the treaty is merely setting in motion a logical or instinctive process. Focusing on the implication of spatial relationships among abstractions, many IIAs specify that expropriation and compensation must be taken “under” due process of law.⁸⁴ This metaphor situates the legal system *above* the state and the investor in a manner that carries connotations of authority and control. International law reassuringly supersedes domestic law. The treaty itself is framed in this context as a protective shield against the state’s intrusion.⁸⁵ In a more traditional legal metaphor, IIAs establish that decisions of *ad hoc* tribunals regarding investment claims shall be “legally binding” upon the parties.⁸⁶ The image of ropes or chains restricting the parties’ pursuit of alternative resolution evoked by this word choice is inescapable. It comforts investors that their assets in other jurisdictions are safe from arbitrary interference by local governments.

IIAs merely borrow these well-established metaphors rather than create them. But it is in the through the redeployment of pre-existing, symbolic language that IIAs manage to convey potent impressions which offer legal assurance of an emotional as well as rational kind. Poets tend to employ metaphoric language precisely because they influence the way we understand something, even if we do not realize it, a powerfully affective technique.⁸⁷ This may explain why IIAs have been popular throughout the world, even among countries where actual gains have been tenuous.⁸⁸

⁸² As in Art 3 of the US-Argentina FIPA which speaks rather vaguely of “monitoring and trade and investment relations” and “identifying opportunities.” (23 March 2016)

⁸³ E.g. Nigeria-Singapore Art. 1 (11 April 2016)

⁸⁴ E.g. Argentina-Qatar Art 5(1) (6 November 2016)

⁸⁵ These spatial legal metaphors have been observed by a number of academic commentators: G LAKOFF AND M JOHNSON, *PHILOSOPHY IN THE FLESH* (Basic Books, 1999) at 30-31

⁸⁶ E.g. Argentina-Qatar Art 14.3 d)

⁸⁷ Furniss and Bath above n 67 at 149

⁸⁸ See further L POULSEN, *BOUNDED RATIONALITY AND ECONOMIC DIPLOMACY: THE POLITICS OF INVESTMENT TREATIES IN DEVELOPING COUNTRIES* (Cambridge University Press, 2015)

iii) Allusion and Intertextuality

A good deal of the affective resonance achieved in the terse text of IIAs is derived from their intertextuality, i.e. their capacity to recall, in the minds of informed readers, the imagery and narrative from other sources. In the Romantic Era, poetry was characterized by references to earlier works of fiction, enriching the meaning which is conveyed by drawing upon the feelings that these other works inspire in their audiences, who would typically be familiar with classic sources such as Shakespeare, the Bible and mythology. Blake's *Songs of Innocence* and its many allegories comes to mind as a lyrical work enriched by extensive allusions to other works. This intertextuality allows certain readers, by recognizing the reference, to experience additional layers of emotion. The verse thus conveys more information with fewer words. It has been said that one of the purposes of literature is to de-familiarize, meaning to depict familiar concepts, whether images or stories, in novel or unexpected ways. Literature is effective when it causes readers to perceive something they have beheld before in a new light.⁸⁹ Wordsworth and Coleridge's poetry was intended to prevent their audience from perceiving it automatically.⁹⁰ In this regard, in addition to building upon pre-existing imagery and stories, IIAs also de-familiarize by drawing attention to established legal principles in a specialized context.

In modern IIAs there are echoes of other treaties or cases, even though they are not presented as formal allusions, except perhaps in fully annotated treaties, which are of course not the official versions. These phrases, like "Fair and Equitable Treatment"⁹¹ the legal effect of which is so much more than those words imply, is built upon a rich history of diplomacy, negotiation and arbitration itself rooted in decades or centuries of international relations through periods of peace and conflict alike. International investment lawyers will know that the phrase "prompt, adequate and effective"⁹² (describing the nature of compensation for expropriation) is also known as the Hull Formula, named after US Secretary of State Cordell Hull and rooted in his dealings with Mexico. Allusion to other sources is more obvious in international investment arbitration as an adjudicative process. Bruner has even suggested that the use of precedent in judicial decisions is analogous to locating a story within an established literary genre.⁹³ In keeping with the common law's doctrine of *stare decisis* which is based upon the acknowledged authority of prior cases, international investment arbitrators readily

⁸⁹ LODGE, above n 22 at 55

⁹⁰ Roberts, above n 69 at 131

⁹¹ E.g. China-Colombia Art 2.3 (signed 22 November 2008)

⁹² US Model BIT Art 5(5)

⁹³ BRUNER, above n 14 at 39

refer to previous tribunal decisions in their awards, even though there is no strict doctrine of precedent in international arbitration as there is in most common law domestic courts. It has been said that the use of allusion in poetry tends to emphasize the value that has been placed on the earlier tradition and in so doing the poet “implicitly stakes his or her own claim to join it.”⁹⁴

The definition of “Investments” are typically defined in IIAs in part by reference to “claims to money or any performance under contract”⁹⁵ which embraces the vast law of contract including its subordinate legal concepts like offer and acceptance and consideration, which come to mind in legally trained readers by implication. Intellectual property, its own distinct field of law, regularly appears as an aspect of the definition of “investment” as well.⁹⁶ In many instances, such allusions will be less distinct yet as voluminous, such as reference to conformity with “the applicable laws and regulations” operating within the territory of the parties.⁹⁷ Of course IIAs readily refer to other IIAs as well. This has the effect of locating the reader within a broader context of legal relations between the parties as well as in global economic governance.⁹⁸ This is sometimes done explicitly, as with WTO agreements, like the Agreement on Trade Related Aspects of Investment Measures.⁹⁹ Bringing in the image of the WTO further legitimizes the IIA by building upon that institution’s gravitas. Indeed, the three-letter acronym is a potent emblem of globalization, respected by many (and loathed by some). More generally IIAs allude to “customary international law”, that arcane, immense body of legal rules which exists in the absence of treaties and carries as much weight as the treaties themselves.¹⁰⁰ Most vaguely of all, IIAs speak of all “international agreements to which the Party is a party.”¹⁰¹ If this exercise of intertextuality evokes an image it is a highly subjective one. It might call to mind specific treaties to lawyers from certain backgrounds: human rights, the environment. Or it may simply convey an image of more pages with printed words on a screen or in a book, legal phrases and signatures – the very substance of which laws are physically composed.

Linked to allusion in terms of layered meanings evoking other sources of law are references in IIAs which are tied to points of contention which have arisen through actual

⁹⁴ Furniss and Bath above n 71 at 389

⁹⁵ E.g. Vietnam-Czech Republic Art 1 (signed 25 November 1997)

⁹⁶ China-Korea Free Trade Agreement Chapter 12.1 (1 June 2015)

⁹⁷ *Ibid*, art 12.2

⁹⁸ *Ibid*, art 12.4

⁹⁹ *Ibid*, art 12.7

¹⁰⁰ *Ibid*, art 12.5

¹⁰¹ *Ibid*, art 12.8

disputes and have necessitated modification of modern investment treaty practice. The so-called “*Micula* Exception” in the investment chapter of TTIP is perhaps the most well-known recent example of this phenomenon. Article 2 of the TTIP specifies that “nothing in this Section shall be construed as preventing a party from discontinuing the granting of a subsidy,” a provision which would prevent further such claims as were brought successfully in the recent, high profile *Micula v Romania* case.¹⁰² Much as a reader well-versed in the literary classics derives a richer understanding of the “message” in certain poems (the cryptic metaphysical poems of Donne, for example) the types of people (lawyers and legal academics) who read through IIAs are most likely possessed with the knowledge of what transpired in the *Micula* decision. The indirect allusion will lead them to raise a knowing eyebrow when seeing this limit on an investor’s capacity use the treaty’s protections. This is not to say that the drafters of TTIP were not aware of this case (this is precisely why the provision appears in the treaty) but the fact that they are aware of it is not evident in the text – the TTIP itself does not refer to the events which led to the inclusion of this material. The more knowledgeable the reader, meaning the more caselaw he/she is familiar with, the more likely such instances of intertextuality will arise, much as certain lines of poetry speak louder to some people’s ears than to others. While few modern readers may appreciate the references mythology in Keats’ “Ode to Psyche”, what international lawyer could read through the provisions on the ICS in the CETA without recalling the vast body of academic commentary which has criticised ISDS and upon which the existence of the new ICS owes its formulation?

When documents such as IIAs are read or discussed together in groups of experts, there is a shared understanding as to meaning and significance of sub-text. These allusions draw upon latent understandings contributing to “epistemic communities” built upon shared understandings which, when analysed and debated, help institutionalize ideas.¹⁰³ The voice of these communities often ultimately leads to the inclusion of new provisions in treaties like IIAs because they address deficiencies in the system. When we read the “*Micula* Exception” in the TTIP we cannot help but think – if only this had been here in the Romania-Sweden BIT and from there – what else might we have missed?

iv) Voice

¹⁰² ICSID Case No. ARB/05/20 (Final Award) (11 December 2013)

¹⁰³ E.g. P Haas, “Epistemic Communities” in D Bodansky, J Brunnee and E Hay eds. THE OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW (Oxford University Press, 2008)

Once again, notions of “speaker and audience” have traditionally been associated in the law and literature movement with the trial as a form of public spectacle. The judges are analogized to the speaker with the litigants or participants as the audience.¹⁰⁴ This aspect of IIAs, which is equally narrative as lyrical, is crucial to their capacity to provoke feelings in their readers.

The “point of view” in fiction, whether poem or prose, has been described as the most important single decision of the author, fundamentally affecting the way the reader responds emotionally and morally to the text.¹⁰⁵ IIAs are written in third person collective voice. An unseen and absent “narrator” reports the results of the states’ negotiations with each other: “Each Contracting Party shall ...”¹⁰⁶ rather than “we shall...” Clearly states cannot truly speak for themselves. Yet this is a curious disjunction from reality – negotiating parties to treaties do not dictate their commitments to a passive scribe – rather they collaborate to create their own text. The voice behind the IIA seemingly lacks identity, potentially prompting the reader to envisage a neutral scribe or, perhaps more like the Muse in classic mythology - the source of inspiration for the parties’ legal obligations to one another. Delving deeper into this second effect, the disembodied voice reading the IIA could cause readers to sense the speaker personified as an allegory. Could this be Globalization or the World Economy, projecting their will onto the state parties through divine wind? In this regard, it is worth noting that many international institutions contain artwork consisting of symbolic depictions of images which are central to the issues with which they are preoccupied. The UN Security Council chamber, for example, contains an allegorical painting by Per Krohg emphasizing the dangers of war and the need for peace, just as many of the works of art adorning the WTO building in Geneva depict symbols of labour and justice. An imaginative leap could lead us to see these figures whispering into the ears of those who draft international treaties.

v) *Irony*

It is hard to escape the characterization of IIAs as ironical constructs. As in poetry where the effect sought is one of emphasis, appreciating the irony in IIAs requires knowledge and experience. Just as non-international investment lawyers will not appreciate the intertextuality evident in IIAs, few inexperienced readers will see some of the inconsistencies or paradoxes which are portrayed in these treaties.

¹⁰⁴ See e.g. BIANCHI, above n 4 at 297 discussing the International Court of Justice

¹⁰⁵ LODGE, above n 22 at 26

¹⁰⁶ Kyrgyz – Kuwait Art 3.1 (13 December 2015)

One of the greatest ironies of IIAs has been alluded to before is only understood from context. Despite their stated purpose to increase FDI flows, there is a lack of convincing evidence that IIAs actually do this.¹⁰⁷ Just as the audience of a play may understand something which the character does not (Hamlet is hidden behind the tapestry), legally-trained readers of IIAs are aware that certain provisions in IIAs may end up harming a signatory state in a manner that it did not realize, without commensurate benefit. Russia, seemingly did not grasp that signing the Energy Charter Treaty would lead to multi-billion dollar lawsuits because of that treaty's guarantees of Fair and Equitable Treatment coupled with ISDS provisions.¹⁰⁸ Spain evidently did not appreciate that the Most Favoured Nation obligation could be bring in procedural protections found in other treaties which it had not intended.¹⁰⁹ Experienced lawyers familiar with decades of ISDS jurisprudence now recognize the risk inherent in these provisions in a manner that may not have been initially conceived by their drafters.

Umbrella clauses in IIAs are ironic in a different way in that their meagre wording belies their monumental power. Were they more conspicuously grand in their expression, umbrella clauses would not be nearly as dangerous. For example, the Switzerland-Pakistan BIT states simply that: "Either Contracting Party shall constantly guarantee the observance of the commitments it has entered into with respect to the investments of the other Contracting Party."¹¹⁰ But of course this provision means that any kind of commitment made by the host state may be subject to a claim by an investor which may be brought through arbitration. This includes matters such as normal commercial breaches of contract which might be more appropriately resolved through domestic courts because they do not engage with issues of public international law or state responsibility. In other words, the magnitude of the legal protection afforded by the provision is wildly disproportionate to the words and language used to express it, mundane and unassuming as they are. This resembles the poetic technique of magnification through understatement.

One of the most ironic features of investment treaties can be found in the definition of investment, found near the beginning of most treaties. Typically, this definition contains the phrase "every kind of asset...than an investor owns which has the characteristic of an investment..."¹¹¹ The circular nature of this definition captures the essence of lawyers' much

¹⁰⁷ Butler and Subedi above n 9

¹⁰⁸ E.g. *Hulley Enterprises (Cyprus) v Russia (Final Award)* PCA Case no. AA 226 (18 July 2014)

¹⁰⁹ E.g. *Mafezzini v Spain, (Decision on Jurisdiction)* 25 January 2000, 5 ICSID Reports 396

¹¹⁰ Art 11 (11 July 1995)

¹¹¹ E.g. CETA Chapter 8 s. 8.1 (30 October 2016)

maligned double-speak, informing those reading the treaty little more than investment means investment, or that it means what the parties wish it to mean at that time. The irony is that behind this definition two or more countries have expended vast resources on negotiating and finalizing their legal commitments, only to say very little about what key concepts actually mean. The practical effect of such vagueness is that investment tribunals will be tasked with determining whether various kinds of economic activity fall within an understanding of investment. This gives the impression that the entire IIA is a kind of lawyer's game in which things are not necessarily what they seem to be, despite the treaty's purported aim of clarifying legal obligations with a view to stimulating economic exchange.

The exceptions contained in IIAs have the flavour of irony, saying something quite removed from that which they appear to on the surface. For example, the investment chapter of CETA contains a provision on Market Access, which prohibits quantifiable restrictions on the establishment of an investment. It disallows, for example, the number of enterprises that may carry out a specific economic activity whether in the form of numerical quotas, monopolies, exclusive suppliers or the requirement of an economic needs test.¹¹² But the exceptions to the prohibition are so extensive as to make the practical applications of the provision extremely confined. Planning and zoning laws, competition laws, rules on professional qualifications, and environmental laws are all deemed to comply with CETA's market access rule.¹¹³ This disjunction (the exceptions are very nearly wider than the rule) invites the reader to question the purpose of the initial prohibition on market access limitations if there are so many exceptions to it. Liberalization is surrendered but control is maintained.

The commitment of National Treatment which binds signatory states to provide a legal regime which is "no less favourable than that which it accords to its own investors"¹¹⁴ offers another example of irony in IIAs. By extending treatment to foreign investors which is "no less favourable" host states perversely maintain the ability to grant foreign investors treatment which is actually *more* favourable to foreign firms than it is to domestic ones. The original purpose of National Treatment as a legal principle is to protect foreign firms so they do not suffer any adverse differentiation because they are foreign and therefore cannot compete on an even footing.¹¹⁵ The concept was never intended to enshrine preferential treatment to

¹¹² Art 8.4(1)a)i.

¹¹³ Art 8.4(2)

¹¹⁴ E.g. Energy Charter Treaty Art X(3)

¹¹⁵ D Collins, *National Treatment in Emerging Market Investment Treaties*, in A Kamperman Sanders ed. THE NATIONAL TREATMENT PRINCIPLE IN A EU AND INTERNATIONAL CONTEXT (Edward Elgar, 2014)

foreigners, according them advantages which local firms do not enjoy. It would seem absurd, particularly in the modern era of insipient protectionism, that a state would give regulatory preference to aliens. But governments often do precisely that – readily granting incentives to foreign firms to encourage them to locate in their jurisdiction, many of which are not available to local firms.¹¹⁶ This inconsistency raises the suspicion that states ominously collude with foreign corporations for their own mutual self-interest, marking a clear distinction between the objectives of the state and those of its citizens.

The final irony to be mentioned here is a thematic one which points less to a particular turn of phrase in IIAs but rather to the regime as a whole and in that sense it may be equally viewed as an aspect of narrative. IIAs were traditionally instigated at the behest of capital exporting states seeking commercial opportunities for their firms in unstable developing ones. As such, the state parties in IIAs were effectively either “home states” or “host states”, the former of which enjoyed the protections afforded by the treaty and the latter which suffered them in the hope of attracting foreign capital. In the modern era this paradigm is no longer accurate as many developing countries are now the home states of multinational firms seeking to invest in other developing states, and in some cases, in developed ones.¹¹⁷ Noted critic of the international investment law regime, Sornarajah drew attention to this irony when he quipped: “It would not be long before [developing Asian country] foreign investors use the investment treaties against the states in North America and Europe. The boot could well come to be on the unintended foot.”¹¹⁸ Sornarajah wrote elsewhere: “It will be interesting to see the response of these erstwhile capital exporters when faced with legal claims based on the laws they themselves had created for the protection of their own investors...states themselves may seek to withdraw from the system they created.”¹¹⁹ While such claims have not yet materialized on a massive scale, Sornarajah’s comments remain prescient given the withdrawal of the US from the TPP and the EU’s insistence on the ICS regime. Figuratively speaking, the chickens appear to be coming home to roost.

IV CONCLUSION

¹¹⁶ D COLLINS, *PERFORMANCE REQUIREMENTS AND INVESTMENT INCENTIVES UNDER INTERNATIONAL ECONOMIC LAW* (Edward Elgar, 2015)

¹¹⁷ D COLLINS, *THE BRIC STATES AND OUTWARD FOREIGN DIRECT INVESTMENT* (Oxford University Press, 2013)

¹¹⁸ M Sornarajah, *India, China and Foreign Investment*, in M Sornarajah and J Wang eds. *CHINA, INDIA AND THE INTERNATIONAL ECONOMIC ORDER* (Cambridge University Press, 2010) at 139

¹¹⁹ M SORNARAJAH, *THE INTERNATIONAL LAW ON FOREIGN INVESTMENT* (Cambridge University Press, 2010) at 28

This article has attempted to identify some of the literary features of a particular kind of international treaty with a view to reshaping the way we think about these documents as sources of legal rights and obligations for the party states, foreign investors, and for the citizens whose lives are affected by the presence of foreign capital in their territories. By approaching these decidedly non-literary materials as works of fiction, various imagination-inspired faculties may be engaged, such as those tied more closely to feelings and impressions. This perspective has the potential to stimulate a better understanding of how IIAs are negotiated by politicians, argued by lawyers, interpreted by tribunals, and viewed by the public. If this reading of IIAs can stir some of the same responses in readers as work of fiction, it may provoke us to re-think established paradigms or to experience unfamiliar patterns of thought that might normally remain unsurfaced. Though admittedly difficult to discern, the narrative elements of IIAs trace the inevitable struggle between states and investors arising from promises made under auspicious circumstances only to be shattered when put to the test through international arbitration. The lyrical elements of these treaties paint imagery which often undercuts the severity of the legal commitments between the parties just as they allude to disputes from other times and places, including the future.

The exercise of reading IIAs as stories and poems was not intended to offer any material recommendations, nor to answer pressing questions about international investment law and its controversies. Emphatically this article does not purport to identify a “better” way to read the law as if something specific has been missed in international investment law which has now been discovered. Rather, this article was intended as a study of the value of looking at ordinary (if legalistic) subjects in the same manner with which we would art – through feeling and inspiration. In that sense, this article was intended to remind those who regularly evaluate IIAs to ascertain their legal implications to think about how they might play upon our sense of artfulness and our appreciation of aesthetics.

Future studies may pursue some of the themes touched upon in this article to identify the “literariness” of legal documents of other kinds, such as other types of international treaties, caselaw and contracts, with a view to uncovering new insights into the way we write, read and think about these sources of the law as well as the implications of the rights and obligations which they create. More modestly, it is hoped that this article will encourage others to approach legal texts imaginatively and with an open heart as well as mind.