Don't Cross the Streams: Past and Present Overstatement of Customary International Law in Connection with Conventional Fair and Equitable Treatment Obligations

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Theodore Kill, Don't Cross the Streams: Past and Present Overstatement of Customary International Law in Connection with Conventional Fair and Equitable Treatment Obligations, 106 Mich. L. Rev. 853 (2008). Available at: https://repository.law.umich.edu/mlr/vol106/iss5/2

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The obligation to provide fair and equitable treatment to foreign investors and investments has existed as a concept of international economic law at least since the 1919 Covenant of the League of Nations. The fair and equitable treatment provision is a key protection contained in the vast majority of modern bilateral investment treaties. Tribunals adjudicating alleged breaches of these fair and equitable treatment provisions have not arrived at a uniform interpretation of the term. As a threshold issue, however, each tribunal must address the question of whether a state's obligations under a given treaty's fair and equitable treatment provision will be additive or equal to the state's preexisting obligations toward all aliens under the minimum standard required by customary international law. Some tribunals have responded to this question by announcing that the protections afforded under fair and equitable treatment provisions and customary international law have converged such that a state's obligations under either standard are coextensive. This Note contends that tribunals adopting the convergence approach overstate the protections afforded to investors under customary international law. By subsuming the obligation to provide fair and equitable treatment within customary international law, these tribunals also ignore the historical development of fair and equitable treatment as a solely treaty-based obligation that did not bind states as a matter of customary international law.

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INTRODUCTION

Modern bilateral investment treaties ("BITs") almost uniformly feature a provision that requires the host state to provide "fair and equitable treatment" to the investors and investments of the other treaty party. The provision has become the focal point of modern investor protection, emerging as "the outcome-decisive right, eclipsing even the more established protection against expropriation" in terms of importance. The standard of treatment required of a host state under such provisions has been defined differently by tribunals and academics alike. Nevertheless, a consensus of commentators and adjudicators agree that whatever the substantive content of the standard, unlike the applicable standards under national-treatment or most-favored-nation clauses, the fair and equitable treatment requirement is


4. The most-favored-nation standard requires a state to provide treatment to investors that is no less favorable than the treatment that the state provides to the investors of any other state. DOLZER & STEVENS, supra note 3, at 65–66; 1 U.N. CONFERENCE ON TRADE & DEV., supra note 3, at 191; Daigremont, supra note 3, at 107–08; Suzuki, supra note 3, at 680–81.
noncontingent. As a noncontingent requirement, the determination of what is fair and equitable in a given context does not depend on a state’s domestic laws or on the treatment of its own nationals or commitments to third states. In interpreting a state’s compliance with its obligation to provide fair and equitable treatment, adjudicators—in most cases international tribunals convened pursuant to BITs or multilateral investment treaty dispute resolution clauses—must therefore consider the actions of the state and investor in light of an objective international standard of fair and equitable treatment.

In addition to the inherent difficulty in developing a justiciable standard based on notions as broad as fairness and equity, institutional and doctrinal factors frustrate the enunciation of a clear and reliable standard. Because the provisions appear in bilateral agreements, the rules of treaty interpretation subject the term “fair and equitable” to a multiplicity of discreet, substantive meanings. Customary international law regarding the interpretation of treaties, as codified in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (“VCLT”), instructs adjudicators to give terms their ordinary meaning in light of each treaty’s context, object, and purpose, with reference to the circumstances of the treaty’s conclusion and preparatory work as appropriate. But because these contextual and teleological factors differ for each treaty, this rule permits, and may even require, tribunals to arrive at different conclusions regarding the proper standard of state behavior required to comply with identically worded fair and equitable treatment.

5. Dolzer & Stevens, supra note 3, at 58; A.A. Fatouros, Government Guarantees to Foreign Investors 135–41 (1962); U.N. Centre on Transnational Corps., Key Concepts in International Investment Arrangements and Their Relevance to Negotiations on International Transactions in Services 12 (1990); 1 U.N. Conference on Trade & Dev., supra note 3, at 215; Catherine Yannaca-Small, Fair and Equitable Treatment Standard in International Investment Law 2 (Directorate for Fin. & Enter. Affairs, Working Paper No. 2004/3, 2004), available at http://www.oecd.org/dataoecd/22/53/33776498.pdf. The tribunal in Genin v. Republic of Estonia reinforced this point by citing Dolzer and Stevens’ observation that fair and equitable treatment provisions “provide a basic and general standard which is detached from the host State’s domestic law.” Genin v. Republic of Estonia, Case No. ARB/99/2, Award, para. 367 (ICSID June 25, 2001). The only challenge to this orthodoxy so far appears to be an article that claims that the international minimum standard, understood to include fair and equitable treatment, is a noncontingent standard in part because the substantive content of the minimum standard must be determined with reference to other rules of international law. Nevertheless, the author acknowledges the accuracy of distinguishing between the noncontingent standard of fair and equitable treatment and the contingent standards of national and most-favored-nation treatment. The author agrees that “[f]air and equitable treatment is a non-contingent standard because it does not depend on external facts or law... Nevertheless, it derives its content from international law. In this sense, it is contingent on specific rules of international law.” Alireza Falsafi, The International Minimum Standard Of Treatment Of Foreign Investors’ Property: A Contingent Standard, 30 Suffolk Transnat’l L. Rev. 317, 354 (2007). The novelty of this approach seems to lie more in reimagining the definition of “contingent” than in redefining the scope of the substantive protections afforded under the minimum standard. See Suzuki, supra note 3, at 679 (stating that the fair and equitable treatment requirement implies that a state must respect all sources of international law in its relations with investors).

6. Oscar Schachter has said that “[n]o concept of international law resists precise definition more than the notion of equity.” Oscar Schachter, International Law in Theory and Practice: General Course in Public International Law, 178 Recueil des Cours 9, 82 (1982).

provisions. Furthermore, the nature of international investment dispute resolution contributes to the uncertainty regarding the standard of treatment. Despite the fact that hundreds, if not thousands, of BITs include the provision, the lack of a system of formal precedent or stare decisis leaves each tribunal free to construct its own definition of the applicable standard in a given dispute. While tribunals certainly take into account the findings of previous adjudicators, the precise scope of a host state’s substantive obligations under a fair and equitable treatment provision is in fact determined on a case-by-case basis.

Despite the diversity and uniqueness of factors inherent to any articulation of the applicable standard, almost all adjudicators called upon to interpret a fair and equitable treatment provision must answer the same question: under the terms of the particular treaty, does the term “fair and equitable treatment” impose an obligation over and above a state’s duty under customary international law to provide a minimum standard of treatment to aliens within their jurisdiction, or are the obligations under fair and equitable treatment provisions coextensive with this minimum standard? Put another way, each tribunal must determine whether obligations under a fair and equitable treatment provision are additive or equal to a state’s generally applicable obligations towards aliens under customary international law.


10. The minimum standard of treatment of aliens under international law is, like the fair and equitable treatment standard, a noncontingent standard. Unlike fair and equitable treatment, however, the minimum standard applies as a binding obligation on states under customary international law. States therefore have an obligation to meet the international minimum standard independent of their treaty obligations under BITs or other international instruments. See Ian Brownlie, *Principles of Public International Law* 502-03 (6th ed. 2003). Throughout this Note, the terms “minimum standard,” “customary minimum standard” and “international minimum standard” will be used to refer to the legal concept of the minimum standard of treatment of aliens under customary international law.

11. See e.g. Compania de Aguas del Aconguitar S.A. v. Argentine Republic, Case No. ARB/O7/3, Award, para. 7.4.10 (ICSID Aug. 20, 2007); Enron Corp. v. Argentine Republic, Case No. ARB/01/3, Award, para. 253 (ICSID May 22, 2007); Siemens A.G. v. Argentine Republic, Case No. ARB/02/8, Award, para. 289 (ICSID Feb. 6, 2007); CMS Gas Transmission Co. v. Argentine Republic, Case No. ARB/01/8, Award, para. 282 (ICSID May 12, 2005); Occidental Exploration & Prod. Co. v. Republic of Ecuador, Case No. UN 3467, Final Award, para. 189 (London Ct. of Int’l Arb. July 1, 2004); Saluka Invs. B.V. v. Czech Republic, Partial Award, paras. 289-94 (UNCITRAL March 16, 2006); McLachlan et al., supra note 2, para. 7.08. Some tribunals avoid the question entirely either by stating that the conduct in question violates either standard of treatment or thorough obfuscation. A notable example of the latter can be found in Siemens A.G., Case No. ARB/02/8, paras. 289-300.

12. The additive interpretation has been dubbed the “plain meaning” approach because the terms “fair and equitable” are given their ordinary meaning under such an interpretation. 1 U.N. CONFERENCE ON TRADE & DEV., supra note 3, at 212.
Under an additive or plain meaning approach, tribunals may take into account the underlying equities of the investor-state relationship in resolving a dispute. By contrast, under an approach that equates fair and equitable treatment with customary international law, the role of equity is limited to that of a background norm.

In large part, an interpretive note issued by the Federal Trade Commission ("FTC") to the North American Free Trade Agreement ("NAFTA") sparked the debate regarding the relationship of fair and equitable treatment and the customary minimum standard. The note specified that for purposes of the NAFTA, "[t]he concepts of ‘fair and equitable treatment’ and ‘full protection and security’ do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens." In light of the interpretive note, NAFTA tribunals have articulated a restrictive approach to the interpretation of NAFTA's fair and equitable treatment language. Under the restrictive approach, tribunals have found that obligations under the NAFTA article requiring fair and equitable treatment apply only within the scope of a state's obligations toward aliens under customary international law.

While adjudicators and commentators continue to disagree with regard to the delineation of the proper relation between fair and equitable treatment and the minimum standard, this Note argues that at least one view may be discounted. Specifically, the holdings of tribunals finding that the two standards have "converged" such that the protections afforded under an additive interpretation of the fair and equitable treatment standard are equal to those under the minimum standard of treatment of aliens under customary international law overstate the substance of the latter standard and should not be considered to represent an accurate depiction of customary law in subsequent disputes. In implementing their convergence approach, these tribunals have looked to the jurisprudence of tribunals that interpret fair and equitable treatment clauses to require a higher standard of treatment than that imposed by the minimum standard to inform the standard of treatment in the cases before them. Having defined the applicable standard with reference to the jurisprudence of the tribunals adopting an additive approach, the convergence tribunals then simply announce that the standard articulated is in fact equal to the minimum standard required under customary international law. This "crossing of the streams" is pernicious because it blurs the line between conventional and customary international law, provides


14. Suzuki, supra note 3, at 675, 678; Thomas J. Westcott, Recent Practice on Fair and Equitable Treatment, 8 J. WORLD INVESTMENT & TRADE 409, 411–12 (2007). A new book begins its chapter on investor treatment with the following sentence: "Of all the catalogue of rights vouchsafed to investors under bilateral investment treaties (BITs), none has proved more elusive, or occasioned as much recent controversy as the guarantee of ‘fair and equitable treatment.’" McLACHLAN ET AL., supra note 2, para. 7.01.

15. Brownlie notes the "tendency of writers and tribunals to give the international standard a too ambitious content." BROWNLIE, supra note 10, at 503.
inconsistent jurisprudence to future tribunals, and decreases the ability of potential parties to an investment dispute to predict whether or not a claim for violation of fair and equitable treatment is valid.\textsuperscript{16} The effects of convergence are particularly infelicitous for governments that may find many previously legitimate policy options are now deemed to violate customary international law as well as for those developing countries whose public administration may be incapable of meeting the stringent standard developed under the additive interpretation.\textsuperscript{17}

The convergence approach is also inconsistent with the historical evolution of fair and equitable treatment as a concept within international law. The consistent practice of multilateral treaties and international organizations up to the Havana Charter of the abortive International Trade Organization ("ITO") reveals that states did not view the obligation to provide fair and equitable treatment as deriving from customary international law. The assertion of the Organization for Economic Cooperation and Development ("OECD") in its 1962 and 1967 Draft Conventions on the Protection of Foreign Property that the fair and equitable treatment requirement is equal to the international minimum standard for treatment of aliens should therefore be discounted as representing the view of capital-exporting countries only. The contemporary criticisms of the OECD's assertion and the Draft Conventions' status as an outlier in this regard confirm that the Draft Conventions did not alter the conception of fair and equitable treatment as an obligation that states could assume independent of their existing customary international law obligations toward aliens.

This Note argues that tribunals adopting a convergence approach overstate the protections afforded to investors under customary international law and ignore the historical development of fair and equitable treatment as a legal concept independent of the customary minimum standard for treatment of aliens. Part I analyzes the important distinction between equity as a general principle informing the interpretation of customary international law and equity employed as a rule of decision under international law.\textsuperscript{18} This Part argues that tribunals that adopt the convergence approach and equate these two readings of equity overstate investors' substantive protections under customary international law. Part II then traces the trajectory of the notion of fair and equitable treatment under international economic law from its first appearance in the League of Nations Covenant to the 1967

\textsuperscript{16} See Van Harten, supra note 3, at 89.

\textsuperscript{17} A senior economist at the World Bank observes that "legal systems in most developing countries are inequitable." Varun Gauri, Social Rights and Economics: Claims to Health Care and Education in Developing Countries, in Human Rights and Development: Towards Mutual Reinforcement 65, 72 (Philip Alston & Mary Robinson eds., 2005). If the convergence approach is accurate and host states owe a duty of equitable treatment to foreign investors, then the simple operation of some states' legal systems may place these states in breach of customary international law.

\textsuperscript{18} By "rule of decision," I mean a legal norm that controls in a given case. On this definition, a rule of decision is distinguished from other normative considerations that, subject to the discretion of the adjudicator, may or may not affect the outcome of a case.
OECD Draft Convention. This Part concludes that the fair and equitable treatment provisions contained in these conventions did not refer to a standard of treatment that was coextensive with the minimum standard of treatment of aliens but rather created an applicable standard and an obligation that was—and remains—dependent of a state’s obligations under customary international law. Because the fair and equitable treatment provision found in modern BITs is a direct transplant from these early efforts to establish multilateral instruments for investor protection, the provision’s relation to the minimum standard for treatment of aliens under these instruments should inform modern-day understanding of the standard’s evolution.

I. CLARIFYING THE CURRENT CONFUSION REGARDING FAIR AND EQUITABLE TREATMENT

This Part provides an overview of the role of equity in international law and the modern jurisprudence regarding fair and equitable treatment, arguing that tribunals adopting the convergence approach have confused the two roles. Section I.A distinguishes between equity as a general principle of international law, which informs any interpretation of the law, and equity employed as a rule of decision, which international law proscribes absent some legal rule affirmatively requiring the application of equitable principles. This distinction is necessary because the primary substantive

19. Prior to 1967, the term had been used in U.S. BITs, but it was not until after this date that the explosion of BITs including fair and equitable treatment provisions took place. Also, note that the requirement for fair and equitable treatment did not cease to appear in multilateral conventions after 1967. Under UNCTAD’s principles for controlling restrictive business practices, state action taken to counteract such practices “should ensure treatment of enterprises which is fair, equitable, on the same basis to all enterprises, and in accordance with established procedures of law.” U.N. Conference on Trade & Dev., The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices at 12, U.N. Doc. TB/RBP/CONF/10/Rev.1, U.N. Sales No. E.81.nI.D.5 (1981), adopted by G.A. Res. 35/63, para. 1, U.N. Doc. A/RES/35/63 (Dec. 5, 1980); see also, e.g., ASEAN Agreement for the Promotion and Protection of Investments, Dec. 15, 1987, 27 I.L.M. 612, 613 (1988).

20. See Siemens A.G. v. Argentine Republic, Case No. ARB/02/8, Award, para. 291 (ICSID Feb. 6, 2007); Mondev Int’l, Ltd. v. United States, Case No. ARB(AF)/99/2, Award, para. 123 (ICSID Oct. 11, 2002); Pope & Talbot, Inc. v. Canada, Award, 41 I.L.M. 1347, paras. 60–61 (NAFTA May 31, 2002). Under Article 32 of the VCLT, tribunals could incorporate this Note’s historical analysis as circumstances of the treaty’s conclusion. Any application of the historical analysis under Article 32 would of course be subsidiary to the treaty’s ordinary meaning in light of its context and object and purpose. See Anthony Aust, Modern Treaty Law and Practice 196, 200 (2000) (stating that under Article 32, an interpreter “may also look at other treaties on the same subject matter adopted either before or after the one in question which use the same or similar terms”); Ian Sinclair, The Vienna Convention on the Law of Treaties 126–27, 141–47 (2d. ed., 1984). Muchlinski advances a non-VCLT-derived basis for reliance on this Note’s historical analysis. He states that adjudicators have a duty to determine the meaning of the standard “in the context of the value system that underlies the international investment protection treaties” requiring fair and equitable treatment. Peter Muchlinski, ‘Caveat Investor’? The Relevance of the Conduct of the Investor under the Fair and Equitable Treatment Standard, 55 Int’l & Comp. L.Q. 527, 533 (2006). The “value system” that underpins the investment treaties cannot be understood without reference to the legal history that gave birth to the modern day boom of fair and equitable treatment provisions.
difference between the additive and restrictive approaches relates to the role of equity. Under an additive approach, equity may be properly employed to craft rules of decision, while equity may be invoked only in its capacity as a background norm under the restrictive approach. Section I.B compares the applicable standard as articulated by ad hoc tribunals that have adopted an additive interpretation and NAFTA tribunals that have adopted a restrictive approach, applying the fair and equitable treatment standard only within the scope of a state's customary international legal obligations. Section I.B defends the proposition that when tribunals adopt an additive interpretation of fair and equitable treatment provisions, these provisions permit judges to have recourse to equity as a rule of decision in constructing a standard of required treatment that prohibits a wider range of government actions than those proscribed under the international minimum standard and tempered by the general principle of equity. Section I.C highlights the problem that results when tribunals purporting to apply the international minimum standard of treatment "cross the streams" and import jurisprudence developed under the additive approach into the articulation of the minimum standard under customary international law. The result is a vast overstatement of the prohibitions of customary international law and a conflation of the two roles of equity as set out in Section I.A.

A. The Roles of Equity in International Law

The difference in the substantive standards of treatment articulated by tribunals adopting additive and restrictive interpretations of fair and equitable treatment provisions is largely attributable to the role that the international law concept of equity plays under each interpretation. Equity is a malleable concept within international law, but even diffuse concepts can, and must, be parsed when applied in concrete cases. Equity writ large includes at least two discrete legal concepts. The first is equity as a background norm, or general principle of law, that informs an adjudicator's application of the relevant legal norms. The second is equity as a legal norm, or rule of decision, that directly controls the outcome of a given dispute. Equity in the former sense should be taken into account in every dispute. As a general principle of international law, judges should consider the equities of each case "with the goal of softening the sharp edges of the law in consideration of the particularities of each case."21 In this sense, equity is a manifestation of the general principle that in applying the law, judges render a just decision.22 Such an application of equity is considered to be infra legem—within the parameters of the law—because equity is employed only

21. Karl Strupp, Le Droit du Juge International de Statuer Selon L'Équité, 33 Recueil des Cours 351, 462 (1930) (“L'équité nous apparaît comme une disposition, ... comme principe général de droit, ... dans le sens ... d'une norme qualifiée au sens définit plus haut, avec le but d'adoucir la rigueur du droit par la considération de la situation propre à chaque espèce.”); see also Diversion of Water from the Meuse (Neth. v. Belg.), 1937 P.C.I.J. (ser. A/B) No. 70, at 77 (June 28) (separate opinion of Judge Hudson).
22. See Schachter, supra note 6, at 82–85.
as a "method of interpretation of the law in force." The Institut de Droit International characterizes the consideration of equity *infra lege* as inherent in any proper application of the law.

This conception of equity's role as a general principle of justice, however, does not permit judges to look to equity for generally applicable *rules* of decision in any dispute. As the Institut de Droit International observed, "considerations of equity cannot drive an international judge in rendering her sentence, without being required by the relevant law, unless all parties have given their clear and expressed consent." The decisions of the International Court of Justice ("ICJ") and its predecessor support this view. When the parties consent to resolve their dispute according to general principles of equity, the judge is said to apply equity *contra legem*.

However, when the applicable customary law requires an adjudicator to resolve a dispute by employing equitable principles so as to reach an equitable result, equity can provide the rules of decision in the absence of an expressed agreement between the parties to a dispute. In the case of maritime boundary delimitations, for example, "the legal concept of equity is a general principle directly applicable as law." In the *North Sea Continental Shelf* case, the ICJ stated that the adjudicator did not face "a question of

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24. *La compétence du juge international en équité*, 40 ANNuaire 271 (L’Institut de Droit International) (1937) (explaining that the consideration of equity is "normalement inhérente à une saine application du droit").


27. Louis B. Sohn, *Arbitration of International Disputes Ex aequo et bono, in International Arbitration: Liber Amicorum for Martin Domke* 330, 332–33 (Pieter Sanders ed., 1967). This acquiescence can be expressed using different treaty language; in the *Samoan Claims* case, the parties authorized the arbitrator to decide the case according to "the principles of international law or . . . equity." Samoan Claims (Ger. Gr.Brit., U.S.), 9 R.I.A.A. 15, 21 (Pern. Ct. Arb. 1902). In the Naomi Russell case, the parties indicated that equitable principles were to be applied by stipulating that "responsibility shall not be fixed according to the generally accepted rules and principles of international law." Naomi Russell (U.S. v. Mex), 4 R.I.A.A. 805, 829 (Mex.–U.S. Special Claims Comm'n 1931) (separate opinion of Comm'r Nielsen).

28. Cont'l Shelf (Tunis. v. Libya), 1982 I.C.J. 18, 60 (Feb. 24); see also Frontier Dispute, 1986 I.C.J. at 633; Cont'l Shelf (Libya v. Malta), 1985 I.C.J. 13, 38–40 (June 3).
applying equity simply as a matter of abstract justice, but of applying a rule of law which itself requires the application of equitable principles.”

In these cases, the immediate rule of law being applied is the customary international law of border delimitations, which in turn directs tribunals to apply equity in resolving border disputes. The result is that equity controls through application of a sort of renvoi provision under customary international law whereby an adjudicator applying the customary international law of maritime delimitations finds that the governing legal regime contains a choice of law provision that requires the application of equitable principles. The authority of the customary renvoi rule requires support in the same manner as any other rule under international law: either the consent of the parties or through its incorporation as binding customary law supported by opinio juris and state practice.

B. Differentiating the Additive from the Restrictive Interpretation of Fair and Equitable Treatment Provisions

In the BIT context, tribunals employing an additive interpretation of fair and equitable treatment language may refer to equitable principles in developing the applicable rule of decision, while a restrictive approach limits the role of equity to that of a general principle or background norm of interpretation. Fair and equitable treatment provisions under an additive interpretation fulfill a similar role with regard to investor-host-state relations as opinio juris and state practice do under the law of border delimitations: subject to the specific treaty terms, such provisions can empower judges to rule on host-state conduct drawing directly from general principles of fairness and equity. Thus tribunals interpreting fair and equi-


30. Black’s Law Dictionary defines renvoi as “[t]he doctrine under which a court in resorting to foreign law adopts as well the foreign law’s conflict-of-laws principles.” BLACK’S LAW DICTIONARY 1324 (8th ed. 2004). In the case of maritime delimitations, of course, the tribunal could never be said to be “resorting to foreign law” but rather only to be applying the governing international law. Nevertheless, the application of the governing international law can have implications for the choice of legal rule that operate not unlike the concept of renvoi, although the analogy is admittedly imperfect.

31. N. Sea Cont’l Shelf, 1969 I.C.J. at 46 (noting that the application of equitable principles has “from the beginning reflected the opinio juris in the matter of delimitation”). In international law, a norm is said to bind states as a matter of customary international law if there is sufficient state practice to demonstrate that a consensus exists regarding the norm as an international legal obligation. The notion that states comply with the norm because they perceive an international legal obligation to do so is known as opinio juris. Under ICJ Article 38 1(b), both state practice and opinio juris must be shown in order for a norm to apply as a matter of customary international law. See Brownlie, supra note 10, at 6–10; Malcolm N. Shaw, International Law 68–84 (5th ed. 2003); Pellet, supra note 25, at 749–59.

32. See McLachlan et al., supra note 2, at 262; Charles H. Brower, II, Structure, Legitimacy, and NAFTA’s Investment Chapter, 36 Vand. J. Transnat’l L. 37, 66 n.163 (2003); F.A. Mann, British Treaties for the Promotion and Protection of Investments, 52 Brit. Y.B. Int’l L. 241, 243 (1981); Muchlinski, supra note 20, at 531–32; Suzuki, supra note 3, at 679. As the tribunal in PSEG Global stated, the fair and equitable treatment provision allows “for justice to be done in the
table treatment provisions independent of the minimum standard have given the words extremely broad purchase in accord with their ordinary meaning. Given that states conclude BITs for the purpose of encouraging investment, under an additive interpretation, “fair and equitable treatment should be understood to be treatment in an even-handed and just manner, conducive to fostering the promotion of foreign investment.” Accordingly, tribunals have found that fair and equitable treatment provisions in BITs obligate governments to maintain transparency; due process; judicial propriety; nonarbitrary conduct; good faith; and, most commonly, fulfillment of legitimate investor expectations and maintenance of a stable legal and business framework in their relations with investors. These duties extend well beyond a state’s obligations towards aliens under customary international law.

In contrast, if the applicable standard of equitable treatment is coextensive with or limited to the minimum standard of treatment of aliens, an adjudicator may not employ equity as a rule of decision but rather must judge host-state compliance with customary international law. In its capacity as a general principle operating infra legem, equity will temper the application of the minimum standard, but adjudicators will not base their decisions on equitable considerations: only a state’s violation of the minimum standard will suffice to grant an investor the right to recover. On this view, the state has not assumed a binding international obligation to treat foreign investors equitably; rather the obligation to provide fair and equitable treatment adheres only within the scope of a state’s preexisting customary obligations.

NAFTA tribunals following the FTC interpretive note limiting the application of fair and equitable treatment within the bounds of the minimum standard have disregarded the jurisprudence of NAFTA tribunals convened prior to the note that adopted an additive approach to fair and equitable treatment. NAFTA tribunals convened after the issuance of the FTC’s note found that it permits the interpretation of the international minimum standard in light of the general principles of fairness and equity but not the absence of the more traditional breaches of international law standards.”

33. MTD Equity Sdn. Bhd. v. Republic of Chile, Case No. ARB 01/7, Award, para. 113 (ICSID May 25, 2004); see also Giorgio Sacerdoti, Bilateral Treaties and Multilateral Instruments on Investment Protection, 269 RECUEIL DES COURS 251, 341 (1997); Suzuki, supra note 3, at 679.

34. See Bamali Choudhury, Evolution or Devolution? Defining Fair and Equitable Treatment in International Investment Law, 6 J. WORLD INVESTMENT & TRADE 297, 302-316 (2005).

35. See BROWN, supra note 10, at 505 (“[I]t is not possible to postulate an international minimum standard which in effect supports a particular philosophy of economic life at the expense of the host state.”); SHAW, supra note 31, at 734–37; VAN HARTEN, supra note 3, at 88 (“[A] state’s misconduct must be of a very serious nature before it violates the customary standard.”); J.C. Thomas, Reflections on Article 1105 of NAFTA: History, State Practice and the Influence of Commentators, 17 ICSID REV. FOREIGN INVESTMENT L.J. 21, 29 (2002) (“The consistent theme in the present day commentary is that the minimum standard is not stringent.”).

36. The Loewen tribunal made explicit the fact that it did not look to, among others, the Pope & Talbot, Inc. award of April 10, 2001, to inform its discussion of fair and equitable treatment. Loewen Group, Inc. v. United States, Case No. ARB (AP) 98/3, Award, para. 128 (ICSID June 26, 2003).
development of an independent standard of fair and equitable treatment outside the minimum standard. The Waste Management tribunal synthesized this view with the holdings of other NAFTA tribunals regarding the applicable international minimum standard in articulating an ineloquently labeled, NAFTA-specific "minimum standard of treatment of fair and equitable treatment." This standard would be breached in cases where "conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety." This articulation of the minimum standard is noticeably less aggressive than that developed by the tribunals applying an additive approach. As such, it seems a credible summation of the protections that investors can expect to receive under current customary international law.

C. Converging on a Bad Idea

Thus far this Note has laid out two possible approaches to interpreting a BIT’s fair and equitable treatment provision. Ad hoc tribunals convened pursuant to BIT dispute resolution clauses have developed an additive interpretation of the provisions that disciplines a wide variety of state action. NAFTA tribunals, on the other hand, have restricted the application of the provision within the scope of preexisting customary obligations based on the FTC interpretive note. A third group, also composed of ad hoc tribunals, has adopted a different approach that this Note has labeled the “convergence approach.” These tribunals consider the customary minimum standard to be equal to the fair and equitable treatment standard but do not follow the example of the NAFTA tribunals in reading the fair and equitable treatment obligation as merely reflecting the role of equity as a general principle informing the application of the customary minimum standard. Rather, under the convergence approach, tribunals claim that customary international law has evolved such that the customary minimum standard requires that alien investors receive fair and equitable treatment as defined by tribunals adopting an additive interpretation of the standard. These tribunals have based the contention that customary international law and the independent inter-

37. Mondev Int’l, Ltd. v. United States, Case No. ARB(AF)/99/2, Award, paras. 118–20 (ICSID Oct. 11, 2002); see also ADF Group Inc. v. United States, Case No. ARB(AF)/00/1, Award, paras. 183–85 (ICSID Jan. 9, 2003). The formulations of the applicable standard in Mondev and ADF Group are in turn referenced in Waste Management. Waste Management, Inc. v. United Mexican States, Case No. ARB(AF)/00/3, Award, paras. 91–96 (ICSID April 30, 2004).

38. Waste Management, Inc., Case No. ARB(AF)/00/3, para. 98.

39. Id. paras. 91–96; see also Loewen Group, Inc., Case No. ARB (AF) 98/3, para. 132; ADF Group Inc., Case No. ARB(AF)/00/1, para. 190; Mondev Int’l, Ltd., Case No. ARB(AF)/99/2, para. 115; Int’l Thunderbird Gaming Corp. v. United Mexican States, Award, para. 194 (UNCITRAL Jan. 36, 2006).

40. See supra note 35.

41. See Westcott, supra note 14, at 429–30.
Don't Cross the Streams

pretation of treaty-based standards of treatment have converged on inaccurate or careless readings of previous tribunals, leading to confusion regarding the substantive content of customary international law.

The convergence approach allows tribunals to dodge the question of whether to interpret fair and equitable treatment provisions as additive or equal to the minimum standard under customary international law simply by asserting that whatever protections would lie under an additive interpretation of fair and equitable treatment provisions apply simply as a matter of customary international law.\(^4\) The flaw of the convergence approach is that the tribunals that employ it do not attempt to discern an independent international minimum standard that would meet the requirements of *opinio juris* and state practice. Instead they "cross the streams" by looking to the jurisprudence of tribunals that have applied an additive interpretation of fair and equitable treatment provisions contained in treaties. The tribunals in *CMS\(^4\)\) and *Occidental*,\(^4\) for example, relied on the *Tecmed* tribunal’s articulation of the fair and equitable treatment standard,\(^4\) which both *CMS* and *Occidental* subsequently pronounced to be binding as a matter of customary international law.\(^4\) Yet the *Tecmed* tribunal stated that “the scope of the undertaking of fair and equitable treatment under [the Treaty] described above is that resulting from an autonomous interpretation.”\(^4\) In other words, the *Tecmed* tribunal went out of its way to clarify that the standard it was enunciating was not customary international law but rather a conventional standard based on a reading of the specific terms of the treaty that applied only as between the two parties. *Tecmed* tried to warn future tribunals not to cross the streams.

Customary international law does evolve, however, and some make the case that international law in the investment context is currently growing so as to include a fair and equitable treatment requirement.\(^4\) Still, tribunals adopting the convergence approach make no attempt to prove that customary international law requires fair and equitable treatment at the level applied by those tribunals adopting an additive approach.\(^4\) The assertion

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43. *CMS Gas Transmission Co.*, Case No. ARB/01/8, para. 279.

44. *Occidental Exploration & Prod. Co.*, Case No UN3467, paras. 185–86.

45. Técnicas Medioambientales Tecmed S.A. v. United Mexican States, Case No. ARB(AF)/00/2, Award, para. 154 (ICSID May 29, 2003).


47. Técnicas Medioambientales Tecmed S.A., Case No. ARB(AF)/00/2, para. 155 (emphasis added).


49. Porterfield, *supra* note 9, at 81–82. Porterfield states that the assertions “have never been supported by any comprehensive empirical study of the actual practice of nations with regard to
that the fair and equitable treatment provision and customary international law are coextensive usually falls into a single line of the award. In Occidental, the tribunal simply stated that it was "of the opinion that . . . the Treaty standard is not different from that required under international law." Treaty language can effectively subsume the application of fair and equitable treatment within the limits of customary international law in some circumstances: the FTC interpretive note accomplishes exactly this. But when a tribunal understands a treaty to apply only within the bounds of customary international law, as the Occidental tribunal did, it should not then look to tribunals applying an additive interpretation of fair and equitable treatment to determine the applicable standard.51

By crossing the streams, tribunals couple the view that the customary minimum standard requires fair and equitable treatment with the expansive scope of investor rights protected under an additive interpretation of fair and equitable treatment. This approach leads tribunals to the inevitable, but untenable, conclusion that as a matter of customary law, states owe duties to foreign corporations, including the maintenance of stable, predictable, and transparent regulatory environments that do not frustrate the legitimate expectations of the foreign investors.52 Such a conclusion overstates the protections afforded to investors under customary international law.53 If the

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50. Occidental Exploration & Prod. Co., Case No UN3467, para. 190. The statement in CMS is no less conclusory. The tribunal held that "the Treaty Standard of fair and equitable treatment and its connection with the required stability and predictability of the business environment, founded on solemn legal and contractual commitments, is not different from the international law minimum standard and its evolution under customary law." CMS Gas Transmission Co., Case No. ARB/01/8, para. 284.

51. Occidental Exploration & Prod. Co., Case No UN3467, para. 188.

52. See Azurix Corp. v. Argentine Republic, Award, para. 365 (ICSID July 14, 2006); CMS Gas Transmission Co., Case No. ARB/01/8, para. 284; Occidental Exploration & Prod. Co., Case No UN3467, para. 191.

53. ADF Group Inc. v. United States, Case No. ARB(AF)/00/1, Award, para. 183 (ICSID Jan. 9, 2003) (stating that the tribunal was "not convinced that the Investor ha[d] shown the existence, in current customary international law, of a general and autonomous requirement . . . to accord fair and equitable treatment . . . to foreign investments"); Brownlie, supra note 10, at 503 (noting "the tendency of writers and tribunals to give the international standard a too ambitious content"); Van Harten, supra note 3, at 89 (stating with regard to the decision in CMS that the tribunal's depiction of the protections afforded under customary international law was "nothing short of adventurous"). Judge Rosalyn Higgins would have been "surprised" if the ICJ were to have found that a customary rule of international law applied requiring the application of equitable principles in the ELSI case in which it dealt with the minimum standard. Higgins, supra note 25, at 287. One commentator makes a powerful argument against the legitimacy of any articulation of the minimum standard of treatment as a customary norm of international law. The fact that tribunals
convergence tribunals are correct, then government actions that have been found to breach fair and equitable treatment provisions, including negligence in negotiations,\(^4\) approval of investment that is contrary to government policy,\(^5\) discrimination in the provision of financial assistance,\(^6\) and simple breaches of contract, would all be violations of customary international law.

The notion that the applicable standard under customary international law is less burdensome than that which applies under an additive approach to fair and equitable treatment provisions finds support in the jurisprudence of the ICJ. Although the ICJ acknowledges that states do owe certain duties with regard to the treatment of foreign investment,\(^5\) the scope of these protections is exceedingly narrow in comparison with the additive interpretation of fair and equitable treatment provisions. When the ICJ had the opportunity to comment on the duty to treat aliens in a nonarbitrary fashion, a duty subsumed within the obligation to provide fair and equitable treatment, it stated that “[a]rbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law. . . . It is a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety.”\(^5\) On this view, in order to constitute a violation of customary international law, a state’s arbitrary action must function as a “substitute” for the rule of law; simple negligence will not constitute an offense.\(^5\)

In support of their adventurous claims regarding the content of customary international law, tribunals have adapted the history of fair and equitable treatment to suit their purposes. For example, the Azurix and Siemens tribunals both claimed that in its seminal 1927 Neer decision, the U.S. Mexican Mixed Claims Commission (“MCC”) was applying its understanding of the requirements of the fair and equitable treatment standard as it then stood under customary international law.\(^6\) In Neer, however, the MCC was in no

\(^4\) PSEG Global Inc. v. Republic of Turkey, Case No. ARB/02/5, Award, para. 246 (ICSID Jan. 19, 2007).

\(^5\) MTD Equity Sdn. Bhd. v. Republic of Chile, Case No. ARB/01/7, Award, para. 166 (ICSID May 25, 2004).

\(^6\) Saluka Invs. B.V. v. Czech Republic, Partial Award, paras. 347, 466 (UNCITRAL March 16, 2006).

\(^5\) Barcelona Traction, Light & Power Co. (Belg. v. Spain), 1970 I.C.J. 3, 32 (Feb. 5). The Court observed that “[w]hen a State admits into its territory foreign investments or foreign nationals, whether natural or juristic persons, it is bound to extend to them the protection of the law and assumes obligations concerning the treatment to be afforded them.” \textit{Id.}


\(^5\) \textit{Id.}

\(^6\) Siemens A.G. v. Argentine Republic, Case No. ARB/02/8, Award, para. 289 (ICSID Feb. 6, 2007) (stating that the Commission in Neer offered a “description of conduct in breach of the fair and equitable treatment standard . . . as the expression of customary international law at that time”); Azurix Corp. v. Argentine Republic, Case No. ARB/01/12, Award, para. 365 (ICSID July 14, 2006) (stating that the Commission in Neer “considered . . . that a State has breached the fair and equitable treatment obligation when the conduct of the State could be described as outrageous, egregious or in
way concerned with articulating a standard of fair and equitable treatment. While some notion of equitable treatment existed within international economic law at the time, the obligation applied only as a matter of treaty commitment; the idea that a state owed a customary duty to treat foreign investors equitably would have been utterly alien to the MCC. The MCC understood its task primarily in terms of adapting the international delict of "denial of justice," which most international lawyers previously thought could be committed only by courts, to the actions of a state's executive or legislative branches. The MCC held that certain standards of conduct apply equally to the judicial as well as the political branches of government, but in articulating the international standard to which governments are held, the MCC made no mention of fairness or equity, much less in the capacity of a binding obligation. To the contrary, the MCC's test, which effectively requires the government to affect an outrage or willful neglect, makes it clear

bad faith or so below international standards that a reasonable and impartial person would readily recognize it as such.

61. I am joined in this conclusion by Sir Robert Jennings, Pope & Talbot, Inc. v. Canada, Award, 41 I.L.M. 1347, para. 61 n.49 (NAFTA May 31, 2002). The tribunal in ADF also observes that Neer concerned a quite different set of legal and factual matters such that there is "no logical necessity and no concordant state practice to support the view that the Neer formulation is automatically extendible to the contemporary context of treatment of foreign investors." ADF Group Inc. v. United States, Case No. ARB(AF)/00/1, Award, para. 181 (ICSID Jan. 9, 2003). Nevertheless, because I have plainly stated that the tribunal misrepresents the Neer case, it is appropriate that I offer the relevant text on which the reader may judge my claim. The paragraph in which the Neer Commission sets out the applicable standard follows in its entirety:

The Commission recognizes the difficulty of devising a general formula for determining the boundary between an international delinquency of this type and an unsatisfactory use of power included in national sovereignty. In 1910 John Bassett Moore observed that he did "not consider it to be practicable to lay down in advance precise and unyielding formulas by which the question of a denial of justice may in every instance be determined" (American Journal of International Law, 1910, p. 787), and in 1923 De Lapradelle and Politis stated that the evasive and complex character (le caractere fuyant et complexe) of a denial of justice seems to defy any definition (Recueil des Arbitrages Internationaux, II, 1923, p. 280). It is immaterial whether the expression "denial of justice" be taken in that broad sense in which it applies to acts of executive and legislative authorities as well as to acts of the courts, or whether it be used in a narrow sense which confines it to acts of judicial authorities only; for in the latter case a reasoning, identical to that which—under the name of "denial of justice"—applies to acts of the judiciary, will apply—be it under a different name—to unwarranted acts of executive and legislative authorities. Without attempting to announce a precise formula, it is in the opinion of the Commission possible to go a little further than the authors quoted, and to hold (first) that the propriety of governmental acts should be put to the test of international standards, and (second) that the treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to wilful [sic] neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency. Whether the insufficiency proceeds from deficient execution of an intelligent law or from the fact that the laws of the country do not empower the authorities to measure up to international standards is immaterial.


62. See infra Part II.A.


64. Neer, 4 R.I.A.A., paras. 4-5.
that the minimum standard falls well short of requiring fair and equitable treatment.

Three disputes that reached award in 2007, however, have reversed the "trend towards finding no real difference between the two standards." The two most recent cases, *Enron* and *Vivendi*, invoked the VCLT in support of reading fair and equitable treatment provisions as additive to the customary baseline. The tribunal in *Vivendi* went so far as to conclude that the convergence approach is "obsolete." The diligence of these tribunals in maintaining a clear distinction between customary international law and the individual treaty regimes is encouraging and hopefully indicative of a "new trend." Part II argues that this new trend is in fact in keeping with the evolution of fair and equitable treatment as a concept in international economic law that traces its roots back to the League of Nations.

II. The Evolution of Fair and Equitable Treatment as an Independent Standard of International Law

This Part provides historical support for the rejection of the convergence approach to the interpretation of fair and equitable treatment clauses by demonstrating that fair and equitable treatment evolved as a treaty-based standard independent of the obligations imposed under the minimum standard for treatment of aliens under customary international law. Section II.A examines the development of the concept beginning with its appearance in the 1919 Covenant of the League of Nations up to the Economic Agreement of Bogotá, concluded just after the Havana Charter. It argues that during this time, the obligation to provide equitable treatment applied over and above states’ obligations under customary law. Section II.B examines the circumstances surrounding the emergence of fair and equitable treatment as a prominent provision in the OECD’s Draft Conventions on the Protection of Foreign Property, which served as a model for many subsequently negotiated BITs, and concludes that customary international law imposed no obligation on states to provide fair and equitable treatment at the time of the OECD Draft Conventions.

A. The Birth of Fair and Equitable Treatment as an Independent Standard of International Law

While the 1948 Havana Charter for the abortive International Trade Organization is popularly credited as the original source of the now

65. Westcott, supra note 14, at 430. The fact that Westcott’s observation came in June 2007 demonstrates the dynamic nature of the issue. The three awards are *Compania de Aguas del Aconquija* S.A. v. Argentine Republic, Case No. ARB/97/3, Award (ICSID Aug. 20, 2007); *Enron Corp.* v. Argentine Republic, Case No. ARB/01/3, Award (ICSID May 22, 2007); and *PSEG Global Inc.* v. Turkey, Case No. ARB/02/5, Award (ICSID Jan. 19, 2007).

66. *Compania de Aguas del Aconquija* S.A., Case No. ARB/97/3, paras. 7.4.2—7.4.5; *Enron Corp.*, Case No. ARB/01/3, para. 259.

67. *Compania de Aguas del Aconquija* S.A., Case No. ARB/97/3, para. 7.4.46.
ubiquitous fair and equitable treatment treaty provision,\textsuperscript{68} the history of the concept of equitable treatment under international economic law dates back at least to the League of Nations Covenant. Article 23(e) of the Covenant contains a provision committing its members "to secure and maintain . . . equitable treatment for the commerce of all Members of the League."\textsuperscript{69} In light of the fact that no "accepted rules or certain principles of international law" governed the treatment of foreign commerce, much less required the provision of equitable treatment, the League convened an International Conference on the Treatment of Foreigners to develop an applicable standard of treatment under Article 23(e).\textsuperscript{70}

The Conference articulated a standard that raised the bar well above previous formulations of the customary minimum standard by proscribing, among other practices, "arbitrary fiscal treatment," "unjust discrimination," and generally all "unjust or oppressive treatment by one Member of the League of persons, firms and companies of another Member carrying on business . . . within its territories."\textsuperscript{71} The standard that the Conference ultimately developed was necessarily vague: it considered the attempt to "frame a definition of 'equitable treatment'" to be a "barren academic labour."

Despite this indeterminacy, however, the Conference's view of the applicable standard under equitable treatment, in providing broad protection against arbitrary and unjust treatment, was easily discernible from the classic articulation of the minimum standard of treatment of aliens under international law given in the \textit{Neer} case, which required malicious intent or shocking behavior.\textsuperscript{72} According to the Conference's formulation, states under an obligation to provide equitable treatment owed a greater duty of care \textit{vis-à-vis} foreign investors than they would if only the customary minimum standard applied. Thus equitable treatment had an additive nature under the League of Nations Covenant.

In 1928, the League prepared a Draft Convention on the Treatment of Foreigners pursuant to Article 23 of the Covenant that reconfirmed the lim-

\textsuperscript{68} See LG&E Energy Corp. v. Argentine Republic, Case No. ARB/02/1, Decision on Liability, par. 124 n.29 (ICSID Oct. 3, 2006); 1 U.N. CONFERENCE ON TRADE & DEV., \textit{supra} note 3, at 211; U.N. CENTRE ON TRANSNATIONAL CORPS., \textit{supra} note 5, at 12; Dolzer, \textit{supra} note 2, at 89 n.12; Christoph Schreuer, \textit{Fair and Equitable Treatment in Arbitral Practice}, 6 J. WORLD INVESTMENT & TRADE 357, 357 (2005); Thomas, \textit{supra} note 35, at 40; Yannaca-Small, \textit{supra} note 5, at 3. Westcott goes so far as to claim that "[t]he first known reference to 'equitable treatment' appears in the draft Havana Charter for an International Trade Organization." Westcott, \textit{supra} note 14, at 410 n.10. This is inaccurate.

\textsuperscript{69} League of Nations Covenant art. 23(e); see also MARTIN HILL, THE ECONOMIC AND FINANCIAL ORGANIZATION OF THE LEAGUE OF NATIONS 18–20 (1946) (discussing the origin of Article 23(e)). For a brief discussion of the state of international law with regard to investments prior to the First World War, see LOWENFELD, \textit{supra} note 1, at 391–92.


\textsuperscript{72} \textit{Id.} at 14.

\textsuperscript{73} See \textit{supra} note 61 and accompanying text.
iterated protections afforded under customary international law at the time. Article 16 of the League’s Draft Convention governed the treatment of foreign companies but mentioned neither fair and equitable treatment nor any noncontingent international minimum standard. The League proposal did not guarantee any protection in excess of that afforded under host-state municipal law, providing in Article 16.6 that the Members “agree not to prejudice acquired rights unless forced to do so, and consequently not to cancel an authorisation once given except for an infraction of the laws and regulations of the country.” Members tolerated restrictive measures so long as they complied with the principle of reciprocity. In terms of investor protection, the League’s Draft Convention represented a regression from the Covenant’s broad commitment to equitable treatment to little more than a platitude: states were not to violate investor’s rights unless “forced to do so.” The League Draft Convention, however, did not purport to reproduce the Covenant’s exhortation to equitable treatment in a legally binding document. Nevertheless, capital-exporting states welcomed even the Draft Convention’s provisions as an improvement over the minimal preexisting protections under international law.

Perhaps having learned from the League’s failure to define the substantive protections afforded by equitable treatment, the negotiators of the next major multilateral agreement on investment, the 1948 Havana Charter of the abortive ITO, drew a distinction between “unreasonable or unjustifiable action” and “just and equitable treatment.” Article 11(1)(b) of the Havana Charter prohibited states from taking “unreasonable or unjustifiable action” against the property or interests of foreign investors, while Article 11(2) of the Havana Charter empowered the ITO to promote international agreements designed “to assure just and equitable treatment” for investors in host states.

75. Id. at 13.
76. Id. at 33.
77. Id. at 13.
79. See Cutler, supra note 78, at 233–35.
The travaux preparatoires of the Charter reveal both the parties' intent to increase investor protection through treaty and the meager protections afforded to investors under customary international law at the time. Even the text of Article 11(1)(b) prohibiting "unreasonable or unjustifiable action" injurious to the investments of foreign nationals renders obligatory a lower standard of protection than that which would be applicable under a requirement to provide equitable treatment. The parties' intention that Article 11(1)(b) be a binding provision and the drafting history of the Charter reveal that even the prohibition on unreasonable injurious action was not a preexisting obligation under the international minimum standard. In the first draft, known as the New York Draft, Article 12 of the Charter provided that "not only will [Members] conform to the provisions of their relevant international obligations now in effect... but also... in general they will take no unreasonable action injurious to the interests of such other Members, business entities or persons." Thus the negative obligation to abstain from unreasonable injurious action, an obligation much weaker in substance than that imposed by a requirement of fair and equitable treatment, would be binding only as a treaty obligation to other members under the Havana Charter and not as a codification of existing customary international law. The language of the Draft Charter adopted by the Second Session, the so-called Geneva Draft, solidifies this view by placing the obligation to refrain from unreasonable injurious action in an instrumental context. The parties agreed to accept the obligation "[i]n order to stimulate and assure the provision and exchange of facilities for industrial and general economic development." Under this formulation, the prohibition against unreasonable injurious action is a means to an end that binds states based on their assent, not the rule's independent status as a general principle.

The final text of the Havana Charter also demonstrates that the obligation to provide just and equitable treatment could not have been a preexisting requirement under customary international law. The prohibition on "unreasonable or unjustifiable action" has the character of a responsibility incumbent upon the states party, while just and equitable treatment is an aspirational goal that the ITO has the power to achieve only by making recommendations and promoting further agreements. Because the Havana Charter drew clear distinctions between responsibilities that the parties must perform and grants of authority to the ITO, the Charter plainly did not view the requirement to provide equitable treatment as incumbent upon parties,

81. Mann, supra note 32, at 243.
83. Id. at 28.
85. 1 U.N. CONFERENCE ON TRADE & DEV., supra note 3, at 218.
whether as a treaty obligation or as a general principle of international law. Nevertheless, the states gathered at Havana could not agree even on this level of investor protection, among other issues, and the Havana Charter never entered into force. To the extent that the fair and equitable treatment standard enters into popular usage by virtue of the oft-cited Havana Charter, it does so in a hortatory capacity and not as a requirement under customary international law.

Two months after the adoption of the final text of the Havana Charter, the Economic Agreement of Bogotá, drafted by the Ninth International Conference of American States, which also produced the Charter of the Organization of American States ("OAS"), repeated the call for equitable treatment. Specifically, Article 22 of the Bogotá Agreement provides that "[foreign capital shall receive equitable treatment. The States therefore agree not to take unjustified, unreasonable or discriminatory measures that would impair the legally acquired rights or interests of nationals of other countries in the enterprises, capital, skills, arts or technology they have supplied." 87

The Bogotá Agreement’s aggregation of the two Havana Charter standards into a single equitable treatment standard is consistent with the assertion that the drafters of both documents understood the requirement to provide equitable treatment as additive to a state’s duties toward aliens under customary international law. In attempting to define the legal consequences flowing from the obligation to provide equitable treatment, the Bogotá Agreement differed from the Havana Charter. The Bogotá Agreement abandoned the Havana Charter’s careful distinction between the prohibition on unjustified action on the one hand and the exhortation to provide equitable treatment on the other. But the Bogotá Agreement confirmed the fact that states are not bound by a customary duty to treat alien investors with reference to an international standard of fair and equitable treatment. The Bogotá Agreement’s approach to the substantive obligation to provide equitable treatment is consistent with that of the Havana Charter with regard to the relationship between treaty-based obligations and the customary minimum standard. Under the Bogotá Agreement, the obligation to provide equitable treatment necessarily includes a prohibition on unjustified action, which coheres with the hierarchy of obligations and exhortations contained in the Havana Charter.

86. DEP’T OF STATE, THE GENEVA CHARTER FOR AN INTERNATIONAL TRADE ORGANIZATION: A COMMENTARY, Dep’t of State Pub. 2950, Com. Pol’y Series 107 at 11 (1947). The Havana Charter’s drafters viewed the prohibition on unreasonable actions as providing "the minimum security of private international investment" while the promotion of fair and equitable treatment falls under the ITO’s authority to "promote international agreement on further principles relating to . . . foreign investment." Id. at 13.

B. The OECD Draft Convention and the Status of Fair and Equitable Treatment under International Law

This Section argues that the evolution of fair and equitable treatment as an international legal concept, taking into account other multilateral instruments for investor protection, militates against the view that customary international law imposes, or imposed at the time of the OECD Draft Conventions, an obligation to provide fair and equitable treatment. Proponents of imposing an obligation to provide fair and equitable treatment under customary international law find support in commentary to the 1962 and 1967 OECD Draft Conventions on the Protection of Foreign Property that purported to ground the fair and equitable treatment requirement in customary international law. While the OECD Draft Conventions were a principal model for the text of subsequent BITs, the OECD is invested with no special power to make customary international law in this area.

In the wake of the failure of previous multilateral efforts involving developed and developing countries to agree upon a treaty providing for investor protection, the OECD seized the opportunity to produce a model convention that attempted to stretch the bounds of customary international law as reflected in the preceding instruments by asserting that the fair and equitable treatment concept was embodied in “customary” international law. The OECD Draft Convention, based in large part on the 1959 Abs-Shawcross Draft Convention on Investments Abroad, crystallized the formulation of “fair and equitable treatment” and contributed to the provision’s ubiquity. The impact of the OECD Draft Convention still reverberates: the tribunal in Pope & Talbot cited the OECD Draft Convention’s identification of a fair and equitable treatment requirement as support for the adoption of the convergence approach. The legal impact of the

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89. McLachlan et al., supra note 2, at 26 (2007); Van Harten, supra note 3, at 21.

90. OECD Draft Convention, supra note 88, art. 1 cmt. 4.

91. Draft Convention on Investments Abroad, 9 J. PUBL. L. 116 (1960) [hereinafter Abs-Shawcross Draft Convention]. The work of Abs and Shawcross stimulated the OECD to develop its Draft Convention. Indeed, the OECD Draft Convention was developed based on the text of the Abs-Shawcross Draft Convention. See Thomas, supra note 35, at 46.


93. Pope & Talbot, Inc. v. Canada, Award, 41 I.L.M. 1347, paras. 60 (NAFTA May 31, 2002). The tribunal acknowledged, however, that the OECD Draft Convention “did not rest upon an effort to discern the ingredients of international law but upon an independent consideration of how host countries should treat foreign owned property.” Nevertheless, the tribunal accepted the OECD’s characterization of fair and equitable treatment.
OECD Draft Convention’s requirement that “[e]ach Party shall at all times ensure fair and equitable treatment to the property of the nationals of the other Parties” is therefore fundamental to understanding the evolution of fair and equitable treatment.\textsuperscript{94}

Under the OECD Draft Convention, the requirement to provide fair and equitable treatment was an affirmative obligation that bound states independent of its existence as a treaty obligation by virtue of its status as a rule of customary international law. In contrast to every previous multilateral effort to articulate a standard of fair and equitable treatment, the OECD was careful to craft its fair and equitable treatment requirement in terms of pre-existing obligations under customary international law. The commentaries to Article 1 of the OECD Draft Convention state that the requirement to provide fair and equitable treatment is a rule that flows from the “well-established general principle of international law” requiring a state “to respect and protect the property of nationals of other States.”\textsuperscript{95} Under this view, “[t]he standard required conforms in effect to the ‘minimum standard’ which forms part of customary international law.”\textsuperscript{96} This characterization of fair and equitable treatment is a significant departure from previous multilateral conventions.

Although general principles have been invoked with similar scant documentation,\textsuperscript{97} the Draft Convention’s approach is troubling to the extent that it overstates the role that equity plays as a general principle of international law\textsuperscript{98} and purports to identify a customary international legal obligation to accord fair and equitable treatment.\textsuperscript{99} As previously discussed, the direct

\textsuperscript{94.} OECD Draft Convention, \textit{supra} note 88, art. 1(a). The requirement to provide fair and equitable treatment was also included in the first article of the Abs-Shawcross Draft Convention. \textit{Abs-Shawcross Draft Convention, supra} note 91. Nevertheless, the focus of the analysis will be on the OECD Draft Convention since this document has received more attention from recent tribunals.

\textsuperscript{95.} OECD Draft Convention, \textit{supra} note 88, art. 1 cmt.1. Note that the general principle invoked is not one that the drafters maintain is common to the legal systems of all nations but rather one that inheres in the international legal order. See Riccardo Monaco, \textit{Observations sur la hiérarchie des sources du droit international, in Völkerecht als Rechtsordnung, Internationale Gerichtsbarkeit Menschenrechte} 599, 602 (Rudolf Bernhardt et al. eds., 1983).

\textsuperscript{96.} OECD Draft Convention, \textit{supra} note 88, art. 1 cmt.4.

\textsuperscript{97.} See Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, para. 218, at 113–14 (June 27) (stating that the general principles of general international humanitarian law were related to the Geneva Conventions but were not coextensive with the Conventions); Reservations to the Convention on Prevention and Punishment of the Crime of Genocide, Advisory Opinion, 1951 I.C.J. 15, 21 (May 28) [hereinafter Reservations to the Genocide Convention] (stating the “generally recognized principle that a multilateral convention is the result of an agreement freely concluded upon its clauses and that consequently none of the contracting parties is entitled to frustrate or impair . . . the purpose and raison d’être of the convention”); Corfu Channel (U.K. v. Alb.), 1949 I.C.J. 4, 22 (April 9) (stating that Albania owed obligations under the “general and well-recognized principles [of] elementary considerations of humanity . . . the principle of the freedom of maritime communication; and every State’s obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States” without further elucidation).

\textsuperscript{98.} See \textit{supra} Part I.A.

\textsuperscript{99.} If, on the other hand, the OECD Draft Convention and Commentary intended simply to state that equity, in its capacity as a general principle or background norm of international law, plays a role in determining whether a state has breached the minimum standard, the result is neither
application of equitable principles as a rule of law requires the same adoption process as any other source of international law: states must voluntarily assent to the rule or the rule must apply as a matter of customary international law. At the time when both the Abs-Shawcross and OECD Draft Conventions were promulgated, there does not appear to have been anything approaching a uniform recognition that international law required host states to provide fair and equitable treatment to investors. A West German effort to draft a multilateral instrument for investor protection in 1950 attempted “to resuscitate ... the principle of inviolability of private property” that presumably lacked legal force at the time. In 1960, the inclusion of equitable treatment as a requirement under the minimum standard was considered “imaginative.”

The claim in both the Abs-Shawcross and OECD Draft Conventions that the general principles of international law compel a state to accord investors fair and equitable treatment is a mere assertion devoid of the state practice and opinio juris necessary to prove a customary rule of international law. The OECD Draft Convention likely adopted its view on the issue directly from the 1959 Abs-Shawcross Draft Convention, which also purported to ground the obligation of fair and equitable treatment in fundamental principles of international law. In third-party commentaries on the Abs-Shawcross Draft Convention, however, the “grave doubts ... expressed on the validity” of the Draft Convention’s rules meant that the provisions contained therein could only be viewed as binding upon adoption of the Convention and not by virtue of their independent existence as customary international law. Indeed, the absence of international consensus regarding the substantive protections afforded to investors under customary interna-
tional law is no less a problem today than it was in the 1950s. The authors’ commentaries to the Abs-Shawcross Draft provide citations to cases of the ICJ and the Permanent Court of International Justice to demonstrate the validity of nondiscrimination and the exclusion of unreasonable conduct as general concepts within law. The authors, however, do not offer any support for the assertion that fair and equitable treatment has a binding legal nature as a general principle.

The state of the law of investor treatment at the time of the OECD Draft Convention argues against a binding obligation of fair and equitable treatment based on general principles of international law. In contrast to the categorical prohibition on genocide in the major multilateral treaty on the subject, the previous multilateral efforts to develop standards for protection of international investment explicitly accommodated standards of treatment that were less than fair and equitable. This is true even if fair and equitable treatment is contrasted with other standards established in these treaties, let alone if fair and equitable treatment were to be given its modern-day additive interpretation. As seen above, the Havana Charter imposed no obligation to provide just and equitable treatment: if the applicable general principles of international law required adoption of the standard, the parties could easily have expressed that fact in the text of the Charter. The Havana Charter does, however, impose a negative obligation against a state party taking “unreasonable or unjustifiable action within its territory injurious to the rights or interests” of the investments of other members’ nationals.

Developments subsequent to the Havana Charter also indicate that most countries did not view the obligation to provide fair and equitable treatment as a binding general principle of international law. A 1958 resolution of the International Bar Association listed the general principles applicable to foreign investors. But the resolution did not include any reference to fair and equitable treatment, stating only that “the principle pacta sunt servanda applies to the specific engagements of States towards ... the Nationals of other States” while recognizing a state’s inherent right to expropriate. One year later, the Directing Committee of the Association for the Promotion and Protection of Private Foreign Investment (“APPFI”) included the requirement that “[a]liens and their property ... be treated without discrimination” in a list of general principles governing foreign investment under international law but did not include a reference to fair and equitable

106. McLACHLAN ET AL., supra note 2, at 203, 218–19; Dolzer, supra note 2, at 87; Porterfield, supra note 9, at 80–81.
108. See Brandon, supra note 104, at 7.
treatment. A Council of Europe report issued in the same year as the APPFI principles stated that countries wishing to attract foreign investment should make a commitment to treat foreign enterprises in an "equitable manner." The report describes equitable treatment not as an inherent right of foreign investors but rather as being gained in exchange for an investor's agreement to stay out of domestic politics and contribute to the development of the host state.

The different mix of states involved in the drafting of the OECD Draft Conventions on one hand and the Havana Charter, the League of Nations Covenant, and the Bogotá Declaration on the other likely explains the discrepancy between the treatment of the standard in the two classes of documents. While only industrialized countries participated in the drafting of the OECD Draft Convention, the texts of the other multilateral documents reflect a compromise between rich countries and developing countries. In developing its draft charter of the ITO, the United States was conscious of the need to keep developing countries on board. As a result, the U.S. proposals did not press too hard for more favorable treaty provisions on investment so as to avoid criticism of the ITO as another manifestation of the "general pursuit of economic hegemony in the service of American 'capitalistic-imperialism.'" Developing countries expressed a wide variety of objections to increased protection for international investment. Some viewed the presence of transnational companies as an impediment to regional integration. Others wished to preserve greater regulatory authority over their infant industries and viewed the influx of foreign capital as foster-
ing the continuation of a colonial economy. Developing countries also sought to preserve their ability to act in pursuit of legitimate policy objectives that could be compromised by treaty language viewed as too solicitous of investor rights.

With the developing countries out of the room and therefore under no pressure to compromise, the OECD took an opportunity, common in international law advocacy, to assert that its proposal in fact represented the present state of customary international law. In so doing, the OECD countries offered even greater protection to foreign investors than the International Chamber of Commerce ("ICC") had in its 1949 International Code of Fair Treatment for Foreign Investments. The ICC Code was explicitly designed to correct portions of the Havana Charter that it viewed as unfavorable and to convince developing countries of the potential benefits of foreign direct investment. The operative clauses of the ICC Code, however, include no reference to a binding noncontingent standard of treatment. Only the preamble contains a hortatory call "to establish . . . conditions of fair . . . treatment for investments.

CONCLUSION

Given the proliferation of BITs, the importance of developing a consensus regarding the proper approach to interpreting fair and equitable treatment provisions cannot be overstated. In particular, governments must be able to predict the circumstances under which they will be susceptible to the broad disciplines of an additive interpretation of the requirement to provide investors with fair and equitable treatment. The cacophony of international tribunal holdings with regard to the relationship between fair and equitable treatment and the customary minimum standard makes it impossible for governments to accurately predict the obligations imposed by customary international law.


120. See Brownlie, supra note 10, at 503 (stating that the tendency of scholars and tribunals "to give the international standard a too ambitious content" has been a "source of difficulty"); Martti Koskenniemi, From Apology to Utopia: The Structure of International Legal Argument 212 (1989) (pointing out that idealism is often transposed into law through the development of new "general principles"); Robert Y. Jennings, Teachings and Teaching in International Law, in Essays in International Law in Honour of Judge Manfred Lachs 121, 127 (Jerzy Makarczyk ed., 1984); Prosper Weil, Towards Relative Normativity in International Law?, 77 Am. J. Intr'l L. 413, 415–16 (1983) (discussing the propensity for international organizations to blur the "normativity threshold" in their resolutions). In this regard, the OECD can be seen as furthering a U.S. plan to project "principles favorable to foreign capital . . . onto the international plane." Walker, supra note 78, at 229.

121. ICC Code, supra note 114, at 18–19.

122. Id. at 9–10.

123. Id. at 13.
This Note argues that a major source of this uncertainty, the adoption of a convergence approach by a number of international tribunals, can and should be eliminated. The convergence approach suffers from the fatal flaw of "crossing the streams." While purporting to articulate the international minimum standard of treatment for aliens, these tribunals in fact rely upon a stream of jurisprudence developed under a plain meaning interpretation of the fair and equitable treatment treaty provisions. This approach incorrectly states the content of customary international law and should not guide future tribunals. Given the limited options for review of arbitral awards, by overstating a state's customary obligations to investors, convergence threatens to unexpectedly expose governments to liability for simple failure to maintain an adequately stable investment framework. This could occur in the event that a tribunal were to apply the convergence approach to the minimum standard in a context where a state has not accepted an independent obligation to provide fair and equitable treatment. Convergence also muddies the waters for future tribunals attempting to discern the applicable standard of treatment.

The Note's analysis of the early multilateral conventions demonstrates that the convergence approach is inconsistent with the evolution of fair and equitable treatment as a concept within international economic law. The idea that customary international law imposed an obligation to treat foreign commerce fairly and equitably emerged only in the 1950s and only among rich countries. To date, no legal or empirical study has shown that customary international law imposes an obligation to treat investors fairly and equitably. Tribunals should therefore be careful to distinguish between the jurisprudence articulating an additive approach to fair and equitable treatment and the jurisprudence relating to the customary minimum standard. By separating questions relating to fair and equitable treatment from questions relating to the minimum standard of treatment under international law, adjudicators, states, and investors would all benefit from greater clarity.