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THE HUMAN RIGHTS DEFENCE IN INTERNATIONAL INVESTMENT ARBITRATION: EXPLORING THE LIMITS OF SYSTEMIC INTEGRATION

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Abstract In a variety of investment arbitration cases, respondent States have argued that measures impugned by investors were mandated by that State's human rights obligations. Tribunals have generally been reluctant to engage with such arguments and to interpret the relationship between investment law and human rights in a straightforward manner. This article discusses two other possibilities: harmonious interpretation and prioritization. Harmonious interpretation seeks to read provisions from investment treaties and human rights treaties together, whereas prioritization gives normative superiority to one provision over another. We conclude that harmonious interpretation is facilitated by the discretionary character of common treaty standards in both human rights and investment law, but that the final result is unlikely to be very different from prioritization, because even harmonious interpretation requires that one provision is read in the light of, and thereby subjugated to, the other.

Keywords: public international law, human rights, investment arbitration, systemic integration, treaty interpretation, Vienna Convention on the Law of Treaties, fragmentation.

I. INTRODUCTION

The 2016 ICSID award in *Joseph Houben v Burundi* provides an important illustration of the potential—and limits—of States' human rights obligations as defences to claims by foreign investors under investment treaties.[1] The claimant in that case, Mr Houben, owned a piece of land that had been occupied by squatters with the acquiescence of the local authorities. The respondent State argued, amongst other things, that its authorities could not clear the area because the squatters were protected by international human rights law, in particular by Article 17 of the International Covenant on Civil

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[1] *Houben v Burundi*, ICSID ARB/13/7, Award of 12 January 2016.

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and Political Rights (ICCPR).[2] Such an argument, used recurrently as a defence in investor–State arbitrations, raises intricate questions concerning the relationship between international investment law on the one hand and international human rights law on the other, a topic which has evoked considerable academic discussion[3] and continues to be of real practical relevance.

Both human rights treaties and investment treaties limit State powers vis-à-vis private persons, and their respective scopes can overlap in various ways.[4] It is therefore unsurprising that numerous investment arbitration tribunals have looked at human rights law to inform their reading of investors' rights under investment treaties.[5] A clear example of a case in which the claimant

[2] ibid, para 177.

[3] See eg PM Dupuy, F Francioni and EU Petersmann (eds), *Human Rights in International Investment Law and Arbitration* (Oxford University Press 2009); B Simma and T Kill, 'Harmonizing Investment Protection and International Human Rights: First Steps Towards a Methodology' in C Binder *et al.* (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford University Press 2009); F Horchani, 'Les droits de l'homme et le droit des investissements internationaux' in L Boy *et al*. (eds), *Droit Économique et Droits de l'Homme* (Larcier 2009); A Al Faruque, 'Mapping the Relationship between Investment Protection and Human Rights' (2010) 11 Journal of World Investment and Trade 539; B Simma, 'Foreign Investment Arbitration: a Place for Human Rights' (2011) 60 ICLQ 573; E de Brabandere, 'Human Rights Considerations in International Investment Arbitration' in M Fitzmaurice and P Merkouris (eds), *The Interpretation and Application of the European Convention of Human Rights: Legal and Practical Implications* (Nijhoff 2012); A Kulick, *Global Public Interest in International Investment Law* (Cambridge University Press 2012) 269ff; EU Petersmann, 'Human Rights, Trade and Investment Law and Adjudication: the Judicial Task of Administering Justice' in N Jansen Calamita, D Earnest and M Burgstaller (eds), *The Future of ICSID and the Place of Investment Treaties in International Law. Investment Treaty Law Current Issues IV* (BIICL 2013); L González García, 'The Role of Human Rights in International Investment Law' in ibid; U Kriebaum, 'Foreign Investments and Human Rights: The Actors and Their Different Roles' in ibid; S Karamanian, 'The Place of Human Rights in Investor-State Arbitration' (2013) 17 Lewis and Clark Law Review 423; N Jansen Calamita, 'International Human Rights and the Interpretation of International Investment Treaties – Constitutional Considerations' in F Baetens (ed), *The Interaction of International Investment Law with Other Fields of International Law* (Cambridge University Press 2013); L Mouyal, *International Investment Law and the Right to Regulate. A Human Rights Perspective* (Routledge 2016); F Balcerzak, *Investor-State Arbitration and Human Rights* (Brill 2017); S Steininger, 'What's Human Rights Got to Do With It? An Empirical Analysis of Human Rights References in Investment Arbitration' (2018) 31 LJlL 33; E de Brabandere, 'Human Rights and International Investment Law' in M Krajewski and R Hoffmann (eds), *Research Handbook on Foreign Direct Investment* (Elgar 2019); see also the TDM special issue edited by U Kriebaum, 'Aligning Human Rights and Investment Protection' (2013) 1 TDM.

[4] T Nelson, 'Human Rights Law and BIT Protection: Areas of Convergence' (2011) 11 Journal of World Investment and Trade 27.

[5] eg *Mondev International Ltd v USA*, ICSID ARB(AF)/99/2, Award of 11 October 2002, paras 143–144; *Técnicas Medioambientales Tecmed SA v Mexico*, ICSID ARB(AF)/00/2, Award of 29 May 2003, paras 116–122; *Azurix v Argentina*, ICSID ARB/01/12, Award of 14 July 2006, paras 311–312; *Yukos Universal Limited v Russia,* PCA AA 227, Final Award of 18 July 2014, para 765. See for more critical stances, *Azurix v Argentina*, ICSID Case No ARB/01/12, Annulment Decision of 1 September 2009, para 128; *Frontier Petroleum v Czech Republic*, UNCITRAL, Final Award of 12 November 2010, para 338; *Roussalis v Romania*, ICSID ARB/06/1, Award of 7 December 2011, para 312. See for a comprehensive discussion J Alvarez, 'The Use (and Misuse) of European Human Rights Law in Investor-State Dispute Settlement)' in F Ferrari (ed), *The Impact of EU Law on*

successfully relied on international human rights law is *Hesham Talaat M. Al-Warraq v Indonesia*.[6] There, the tribunal read the respondent's obligation to guarantee fair and equitable treatment (FET) in the light of the ICCPR, to which Indonesia was a party and which was considered by the tribunal as 'a universal instrument which contains binding legal obligations'.[7] According to the tribunal, 'the rights enshrined within [the ICCPR] represent the basic minimum set of civil and political rights recognized by the world community'.[8] On the facts of the case, the tribunal found that 'the Claimant did not receive fair and equitable treatment as enshrined in the ICCPR'.[9]

Yet international human rights law and international investment law interact in less harmonious ways too.[10] A controversial question concerns whether human rights violations by foreign investors can and should limit their rights under investment treaties.[11] Recent awards suggest that human rights violations by the investor can be invoked by the host State under the compliance-with-the-law requirement,[12] as an element of contributory fault,[13] or in the form of a counterclaim if the applicable investment treaty allows such claims.[14]

International Commercial Arbitration (Juris 2017). For a critical argument, see T Isiksel, 'The Rights of Man and the Rights of the Man-Made: Corporations and Human Rights' (2016) 38 HumRtsQ 294.

[6] *Hesham Talaat M Al-Warraq v Indonesia*, UNCITRAL, Final Award of 15 December 2014. See the case comment by L Cotula, 'Human Rights and Investor Obligations in Investor-State Arbitration' (2016) 17 Journal of World Investment and Trade 148.

[7] *Al-Warraq v Indonesia* (n 6) para 559. The tribunal did not mention that Saudi Arabia, the investor's home State, was not a party to the treaty, which might have been relevant under art 31 (3)(c) VCLT.

[8] ibid.

[9] ibid, para 621. However, the claimant was not entitled to compensation as he had not complied with a unique investor obligations provision found in the applicable investment treaty. ibid, para 648.

[10] M Hirsch, 'Investment Tribunals and Human Rights: Divergent Paths' in Dupuy, Francioni and Petersmann, *Human Rights in International Investment Law* (n 3) 107–13.

[11] P Dumberry and G Dumas-Aubin, 'When and How Allegations of Human Rights Violations Can be Raised in Investor-State Arbitration' (2012) Journal of World Investment and Trade 349; F Balcerzak, 'Jurisdiction of Tribunals in Investor-State Arbitration and the Issue of Human Rights' (2014) 29 ICSIDRev 216; J Viñuales, 'Investor Diligence in Investment Arbitration: Sources and Arguments' (2017) 32 ICSIDRev 346. See generally on corporate accountability for human rights violations R McCorquodale, 'Pluralism, Global Law and Human Rights: Strengthening Corporate Accountability for Human Rights Violations' (2013) 2 Global Constitutionalism 287.

[12] *Phoenix Action Ltd v Czech Republic*, ICSID ARB/06/5, Award of 15 April 2009, para 78. The tribunal gave an 'extreme example', concerning 'investments made in violation of the most fundamental rules of protection of human rights, like investments made in pursuance of torture or genocide or in support of slavery or trafficking of human organs'. The status of the 'clean hands' doctrine as an admissibility bar remains controversial. P Dumberry, 'State of Confusion: The Doctrine of "Clean Hands" in Investment Arbitration after the Yukos Award' (2016) 17 Journal of World Investment and Trade 229.

[13] *Copper Mesa Mining Corp v Ecuador*, PCA 2012-2, Award of 15 March 2016, para 6.99, 6.102.

[14] *Urbaser SA and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v Argentina*, ICSID ARB/07/26, Award of 8 December 2016, paras 1143–1155. The *Urbaser* tribunal assumed jurisdiction over Argentina's counterclaim based on the human right to water, but rejected it on the merits: 'the enforcement of the human right to water represents an

This article focuses on yet another form of interaction between the fields of investment law and human rights: the potential conflict between a State's obligations under investment law on the one hand and human rights law on the other, as exemplified by the case of *Houben v Burundi*. It provides an overview of cases in which this type of argument was made, and distinguishes between three different responses that have been or could have been given by tribunals: evasion of the argument; harmonious interpretation of investment protection and human rights obligations; and prioritization of one obligation over the other. It is concluded that harmonious interpretation is facilitated by the discretion left to States under common treaty standards in both human rights and investment law. Nonetheless, if tribunals adopt a harmonizing approach, they still need to decide whether to read the BIT in the light of human rights or *vice versa*. This choice, which may often be made unconsciously, effectively determines which provision is subjugated to the other. Consequently, the result of harmonious interpretation will not be very different from that of prioritization, even if the techniques are conceptually different. This conclusion, inspired by various arbitral awards, sheds doubt on the utility of the notion of systemic integration as a tool for solving norm conflicts in international law.

II. THE HUMAN RIGHTS DEFENCE IN *HOUBEN* AND OTHER CASES

Houben v Burundi concerned a piece of land of about 14 hectares bought by the claimant in 2005.[15] While Mr Houben's ownership was subsequently contested because of irregularities in a previous transfer of the property, parts of the land were sold to and occupied by the local population, apparently with the approval of the local administration.[16] Mr Houben protested repeatedly against this situation, and even though his requests for police intervention were supported by the authorities at the national level, the local authorities refused to comply.[17] Before an ICSID tribunal, Mr Houben claimed various breaches of the BIT between the Belgium-Luxembourg Economic Union and Burundi, including a breach of the full protection and security (FPS) standard: 'M. Houben affirme … que le Burundi n'a pas identifié une seule occasion au cours de laquelle il aurait utilisé ses pouvoirs de police pour évacuer les squatteurs'.[18]

obligation to perform. Such obligation is imposed upon States. … The situation would be different in case an obligation to abstain, like a prohibition to commit acts violating human rights would be at stake. Such an obligation can be of immediate application, not only upon States, but equally to individuals and other private parties'. ibid, para 1210. See for a different argument J Cernic, 'Corporate Obligations under the Human Right to Water' (2011) 39 DenvJIntlL&Pol'y 303. Generally, see E de Brabandere, 'Human Rights Counterclaims in Investment Treaty Arbitration' (2018) [2017] Belgisch Tijdschrift voor Internationaal Recht 591.

[15] *Houben v Burundi* (n 1) paras 86–89. [16] ibid, para 93. [17] ibid, paras 166–167.

[18] ibid, para 168. 'Mr Houben contends … that Burundi has not identified a single occasion in which it used its police powers to expel the squatters' (all translations from the French are unofficial translations by the authors).

On the contrary, 'les autorités locales ont activement participé aux actes d'usurpation en délivrant les autorisations nécessaires aux usurpateurs'.[19] The tribunal accepted Mr Houben's claim and found a breach of the FPS standard.[20] It rejected Burundi's defence based on the rights of the occupants:

> Le Tribunal estime également sans pertinence les arguments du Burundi relatifs aux prétendus droits des squatteurs. … Le Burundi fait … valoir que le procureur ne pouvait expulser les occupants dès lors que ces occupants avaient érigé sur le terrain litigieux des habitations personnelles et étaient dès lors protégés par l'article 17 du Pacte relatif aux droits civils et politiques. Or, la question n'est pas de savoir si le Burundi était tenu d'expulser les usurpateurs après que ces derniers furent entrés en possession du terrain, ni si leur expulsion, une fois les habitations construites, aurait été contraire au droit international des droits de l'homme, mais si le Burundi a pris les mesures nécessaires pour empêcher, *a priori*, que ces usurpateurs ne prennent possession du terrain. Les circonstances de faits décrites ci-dessus démontrent que tel n'est pas le cas.[21]

The tribunal thus focused exclusively on the question of whether Burundi should have prevented the squatters from seizing the land. In doing so, it left unanswered whether an expulsion of the occupants, as requested by Mr Houben, would have interfered with their human rights. It might be questioned to what extent the tribunal's reply fully answered the arguments made by Burundi. Mr Houben's claim concerned not only the failure of the authorities to prevent squatters from accessing his property, but also their refusal to expel the occupants. In this context, Burundi's human rights defence was potentially relevant.

Houben v Burundi is not the first case where a respondent State has invoked the human rights of third parties in the context of an investment arbitration claim.[22] In a series of cases against Argentina concerning water and utility

[19] ibid. '[T]he local authorities actively participated in the acts of usurpation by issuing the necessary authorisations for the usurpers.'

[20] ibid, para 179.

[21] ibid, para 177. 'The tribunal also considers irrelevant Burundi's arguments relating to the alleged rights of the squatters. … Burundi argues … that the public prosecutor could not expel the occupiers since they had constructed private dwellings on the disputed land and were therefore protected by Article 17 of the Covenant on Civil and Political Rights. However, the question is not whether Burundi was obliged to expel the usurpers after the latter had come into possession of the land, nor if their expulsion, once the houses were built, would have been contrary to international human rights law, but whether Burundi had taken the necessary measures to prevent, *a priori*, these usurpers from taking possession of the land. The factual circumstances described above demonstrate that it had not done so.'

[22] A controversial case concerning South Africa's positive discrimination policies attracted significant societal and academic attention, but was discontinued. *Piero Foresti and Others v South Africa,* ICSID Case No ARB (AF)/07/1, Award of 4 August 2010. See eg A Wythes, 'Investor-State Arbitrations: Can the 'Fair and Equitable Treatment' Clause Consider International Human Rights Obligations?' (2010) 23 LJIL 241; F Adeleke, 'Human Rights and International Investment Arbitration' (2016) 32 SAJHR 1. Another more recent example is *Veolia Propreté v Egypt*, ICSID ARB/12/15. Allegedly, the case concerned amongst other issues a change of legislation increasing minimum wages. L Peterson, 'French Company, Veolia, Launches Claim against Egypt over Terminated Waste Contract and Labor Wage Stabilization

concession agreements, the respondent repeatedly invoked human rights law, and the human right to water in particular.[23] In *Azurix v Argentina*, the respondent argued that claimant should not have terminated a drinking water concession because this could be detrimental to the human rights of the consumers.[24] According to Argentina's expert, the 'public interest must prevail over the private interest of [the] service provider'.[25] In *Suez v Argentina*, the respondent argued that the economic measures complained about by the investor were justified by a state of necessity:

> Argentina argues that it adopted the measures in order to safeguard the human right to water of the inhabitants of the country. … In order to judge whether a treaty provision has been violated, for example the provision on fair and equitable treatment, Argentina argues that this Tribunal must take account of the context in which Argentina acted and that the human right to water informs that context.[26]

In *SAUR v Argentina*, the respondent argued that BIT provisions were not capable of impacting its human rights obligations, which have constitutional status under Argentine law. Consequently, 'les obligations qui émanent [du traité bilatéral d'investissement] soient interprétées en harmonie avec les règles relatives à la protection des droits de l'homme, et en particulier avec le droit de l'homme à l'eau'.[27] Finally, in *EDF v Argentina*, which dealt with an electricity concession, Argentine substantiated its necessity argument by referring to 'the right to life, health, personal integrity, education, the rights of children and political rights' which were 'directly threatened by the

Promises' IA Reporter (27 June 2012). The case was allegedly decided in favour of the State. D Charlotin, 'Egyptian Official Confirms Victory in Veolia Case at ICSID, as Company Remains Silent' IA Reporter (30 May 2018). See generally E de Brabandere, *Investment Treaty Arbitration as Public International Law: Procedural Aspects and Implications* (Cambridge University Press 2014) 141–7.

[23] Similar arguments were made by *amici* in *Biwater Gauff (Tanzania) Ltd v Tanzania*, ICSID ARB/05/22, Award of 24 July 2008, paras 379–380, 387. W Schreiber, 'Realizing the Right to Water in International Investment Law: An Interdisciplinary Approach to BIT Obligations' (2008) 48 NatResourcesJ 431; J Viñuales, 'Access to Water in Foreign Investment Disputes' (2009) 21 GeoIntlEnvtlLRev 733; P Thielbörger, 'The Human Right to Water versus Investor Rights: Double-Dilemma or Pseudo-Conflict?' in Dupuy, Francioni and Petersmann, *Human Rights in International Investment Law* (n 3); F Marrella, 'On the Changing Structure of International Investment Law: The Human Right to Water and ICSID Arbitration' (2010) 12 IntCLRev 335; H Bray, 'ICSID and the Right to Water: An Ingredient in the Stone Soup' (2014) 29 ICSID Rev 474; T Meshel, 'Human Rights in Investor-State Arbitration: The Human Right to Water and Beyond' (2015) 6 JIDS 277. [24] *Azurix v Argentina* (n 5) para 254. [25] ibid.

[26] *Suez, Sociedad General de Aguas de Barcelona, SA and Vivendi Universal, SA v Argentina*, ICSID ARB/03/19, Decision on Liability of 30 July 2010, para 252. See also the *amicus curiae* submissions, mentioned in para 256.

[27] *SAUR International SA v Argentina*, ICSID ARB/04/4, Decision on Jurisdiction and Liability of 6 June 2012, para 328. '[T]he obligations emanating from [the bilateral investment treaty] should be interpreted in harmony with the rules on the protection of human rights, and with the human rights to water in particular'. See for a case comment W Ben Hamida, 'SAUR International SA c République argentine. Droit national, droit international et droits de l'homme: l'histoire d'un ménage à trois' (2013) 28 ICSIDRev 241.

socio-economic institutional collapse suffered by the Argentine Republic'.[28] According to the respondent, 'obligations under investment treaties do not undermine obligations under human rights treaties, and thus, the Treaty should be construed and interpreted consistently with international canons aimed at fostering respect for human rights'.[29] Argentina considered that the relevant human rights norms constituted *jus cogens*.[30] Consequently, 'measures enacted to safeguard the free enjoyment of human rights should never result in international responsibility'.[31]

In the various cases mentioned, the human rights defences were raised in two different contexts. In some cases, the respondent argued that BIT provisions should be read in the light of human rights law, to the effect that government conduct justified by human rights concerns could not constitute a violation of such BIT provisions. Alternatively, it was argued that the contested measures, even if violating BIT provisions, could be justified by a necessity defence based on the mandatory character of the host State's human rights obligations. In either context, the host State's human rights defence failed to convince the tribunals in the cases mentioned. In most awards, the defence was largely ignored. The following section of this article discusses this practice of evasion before considering two alternative responses to the human rights defence: harmonious interpretation and prioritization.

III. THREE DIFFERENT RESPONSES TO THE HOST STATE'S HUMAN RIGHTS DEFENCE

A. Evasion

A first technique applied by tribunals in response to a human rights defence is evasion, meaning that the tribunal ignores or fails to assess the argument. In *Azurix v Argentina*, the tribunal noted that 'the matter has not been fully argued and the Tribunal fails to understand the incompatibility' between human rights law and the investment protection treaty.[32] In *Siemens v Argentina*, the tribunal held that the human rights defence had 'not been developed by Argentina. The Tribunal considers that, without the benefit of further elaboration and substantiation by the parties, it is not an argument

[28] *EDF International SA, SAUR International SA and León Participaciones Argentinas SA v Argentina*, ICSID ARB/03/23, Award of 11 June 2012, para 192. See also *Sempra Energy Int v Argentina,* ICSID ARB/02/16, Award of 28 September 2007, paras 331–332, noting 'the complex relationship between investment treaties, emergency and the human rights of both citizens and property owners'. The *Sempra* award was annulled in its entirety by decision of 29 June 2010. See also B Choudhury, 'Exception Provisions as a Gateway to Incorporating Human Rights Issues into International Investment Agreements' (2011) 49 ColumJTransnatlL 670.

[29] *EDF v Argentina* (n 28) para 192. [30] ibid, para 193. [31] ibid, para 194.

[32] *Azurix v Argentina* (n 5) para 261. In the concrete circumstances of the case, the tribunal noted that the provision of water to consumers was not interrupted by the termination of the concession. cf *South American Silver Ltd v Bolivia*, UNCITRAL, Award of 22 November 2018, para 217: '[t]he Respondent also fails to explain how [human rights] rules conflict with the Treaty or why they should prevail over its provisions'.

that, *prima facie*, bears any relationship to the merits of this case'.[33] In *Vivendi v Argentina (Vivendi II)*, Argentina complained before the annulment committee that the tribunal had 'disregarded fundamental issues between the parties', including the issue of 'the right to water as an essential human right', which was not discussed in the award.[34] The committee, however, rejected the request for annulment.[35]

In several other cases, tribunals considered that the human rights issues raised did not need to be resolved, even if they were somehow related to the case. In *Glamis Gold v United States*, one of the non-disputing parties, the Quechan Indian Nation, relied heavily on international human rights law.[36] In its award, the tribunal held:

> The Tribunal is aware that the decision in this proceeding has been awaited by private and public entities concerned with environmental regulation, the interests of indigenous peoples, and the tension sometimes seen between private rights in property and the need of the State to regulate the use of property. These issues were extensively argued in this case and considered by the Tribunal. However, given the Tribunal's holdings, the Tribunal is not required to decide many of the most controversial issues raised in this proceeding.[37]

In *Bernhard von Pezold and Others v Zimbabwe* and *Border Timbers Ltd and Others v Zimbabwe*, the tribunal refused an *amicus curiae* application by various indigenous communities who alleged that the cases raised 'critical questions of international human rights law'.[38] The tribunal disagreed with the petitioners' assertion that 'international investment law and international human rights law are interdependent such that any decision […] which did not consider the content of international human rights norms would be legally incomplete'.[39] According to the tribunal, the 'putative rights of the indigenous communities' did not fall within the scope of the dispute.[40]

[33] *Siemens AG v Argentina*, ICSID ARB/02/8, Award of 17 January 2007, para 79.

[34] *Compañiá de Aguas del Aconquija SA and Vivendi Universal SA v Argentina*, ICSID ARB/97/3, Annulment Decision of 10 August 2010, para 57.

[35] ibid, para 253.

[36] *Glamis Gold, Ltd v United States*, UNCITRAL, Non-Party Supplemental Submission of the Quechan Indian Nation of 16 October 2006, <https://www.italaw.com/sites/default/files/case-documents/italaw8868_0.pdf>.

[37] *Glamis Gold, Ltd v United States,* UNCITRAL, Award of 8 June 2009, para 8. See for a discussion of the case while it was still pending, J Cantegreil, 'Implementing Human Rights in the NAFTA Regime – The Potential of a Pending Case: *Glamis Corp v USA*, in Dupuy, Francioni and Petersmann, *Human Rights in International Investment Law* (n 3). It has been argued that even if the tribunal did not address the human rights issues explicitly, they were instrumental to the respondent's win on the merits: S Karamanian, 'Human Rights Dimensions of Investment Law' in E de Wet and J Vidmar (eds), *Hierarchy in International Law: The Place of Human Rights* (Oxford University Press 2012) 269.

[38] *Bernhard von Pezold and Others v Zimbabwe*, ICSID ARB/10/15, and *Border Timbers Ltd and Others v Zimbabwe*, ICSID ARB/10/25, Procedural Order No 2 of 26 June 2012, para 2.

[39] ibid, para 58.

[40] ibid, para 60. See for a comment T Leary, 'Non-Disputing Parties and Human Rights in Investor-State Arbitration. *Bernhard von Pezold and Others v Republic of Zimbabwe*, ICSID

Evasion has become a common response to human rights defences in investment arbitration. This may result from the way in which parties have argued a case,[41] or from mere considerations of convenience.[42] The relationship between international human rights and investment law is an intricate and controversial matter, so it is perhaps unsurprising that tribunals have shied away from issuing elaborate pronouncements. At the same time, evasion might confirm common beliefs that investment arbitration tribunals are insensitive to human rights concerns. For that reason, it might be thought preferable that a well-argued human rights defence receives a proper answer from the tribunal.

B. Harmonious Interpretation

Under a harmonizing approach, a tribunal interprets the applicable investment treaty norm in the light of human rights law or *vice versa*.[43] In this way, a conflict between the two fields is avoided. As noted by the International Law Commission's Report on Fragmentation, the interpretation of treaty provisions and the solution of apparent norm conflicts are part of the same process, because '[r]ules appear to be compatible or in conflict *as a result of interpretation*'.[44] The legal basis for harmonious interpretation by an

Case No ARB/10/15, Final Award, 28 July 2015' (2017) 18 Journal of World Investment and Trade 1062.

[41] P Dupuy, 'Unification rather Than Fragmentation of International Law? The Case of International Investment Law and Human Rights Law' in Dupuy, Francioni and Petersmann, *Human Rights in International Investment Law* (n 3) 59. It has been noted that host States which are critical of human rights discourse may be less inclined to raise a human rights defence, even if relevant. Simma and Kill, 'Harmonizing Investment Protection and International Human Rights' (n 3) fn 11.

[42] J Fry, 'International Human Rights Law in Investment Arbitration: Evidence of International Law's Unity' (2007) 18 DukeJ Comp&IntlL 77, 100: 'the tribunals in these cases did not seem to take the argument seriously'. De Brabandere, 'Human Rights Considerations' (n 3) 208: 'investment tribunals thus remain relatively reluctant to take up human rights considerations'. V Kube and EU Petersmann, 'Human Rights Law in International Investment Arbitration' in A Gattini, A Tanzi and F Fontanelli (eds), *General Principles of Law and International Investment Arbitration* (Brill 2018) 245: 'ISDS tribunals are in principle rather reluctant to accept human rights based arguments and have not developed a coherent methodology for evaluating the human rights dimensions of investment disputes'. See also D Desierto, *Public Policy in International Economic Law: The ICESCR in Trade, Finance, and Investment* (Oxford University Press 2015) 350–2. For a sociological explanation of 'the non-receptive approach of investment tribunals towards human rights norms', see M Hirsch, *Invitation to the Sociology of International Law* (Oxford University Press 2015) 128–56; M Sornarajah, *Resistance and Change in the International Law on Foreign Investment* (Cambridge University Press 2015) 322–3.

[43] C Borgen, 'Treaty Conflicts and Normative Fragmentation' in D Hollis (ed), *The Oxford Guide to Treaties* (Oxford University Press 2012) 459-61.

[44] 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law', Report of the Study Group of the International Law Commission, UN Doc A/CN.4/L.682 (4 April 2006) para 412.

investment arbitration tribunal can be found in applicable law clauses that include international law[45] or in the principle of systemic integration.[46]

Article 31(3) of the Vienna Convention on the Law of Treaties (VCLT) provides that, when interpreting a treaty, '[t]here shall be taken into account, together with the context: … (c) any relevant rules of international law applicable in the relations between the parties'.[47] Article 31 is generally agreed to reflect customary international law,[48] so it applies even when the parties to a treaty are not also parties to the Vienna Convention. Systemic integration relies on two presumptions: according to the *positive presumption*, international law provides the normative framework for questions which the treaty at hand does not resolve; according to the *negative presumption*, contracting States do not intend to act inconsistently with general international law or with previous treaty obligations towards third States.[49] When using Article 31(3)(c) or the customary rule which it reflects, an adjudicator is not applying another treaty but employing it as a tool with which to interpret the treaty which it is obliged to apply. This distinction—between the interpretation of one treaty by means of the provisions of another and the application of the latter treaty—is a fine one but needs to be maintained.[50]

The principle of systemic integration suggests that investment arbitral tribunals can interpret investment treaties in the light of other rules of international law.[51] Claims under investment treaties are claims under international law and it is international law which needs to be applied in order to interpret treaties as creatures of international law. At the same time,

[45] eg art 42 ICSID Convention; art 1131 NAFTA; art 26(6) ECT. H Kjos, *Applicable Law in Investor-State Arbitration: The Interplay between National and International Law* (Oxford University Press 2013) 222ff.

[46] See generally R Hofmann and C Tams (eds), *International Investment Law and General International Law: From Clinical Isolation to Systemic Integration?* (Nomos 2011); D Rosentreter, *Article 31(3)(c) of the Vienna Convention on the Law of Treaties and the Principle of Systemic Integration in International Investment Law and Arbitration* (Nomos 2015); P Merkouris, *Article 31(3)(c) and the Principle of Systemic Integration. Normative Shadows in Plato's Cave* (Brill 2015); R Yotova, 'Systemic Integration. An Instrument for Reasserting the State's Control in Investment Arbitration?' in A Kulick (ed), *Reassertion of Control over the Investment Treaty Regime* (Cambridge University Press 2017).

[47] See generally C McLachlan, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention on the Law of Treaties' (2005) 54 ICLQ 279; U Linderfalk, *On the Interpretation of Treaties: The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* (Springer 2007) 177-89; C Schreuer, 'The Development of International Law by ICSID Tribunals' (2016) 31 ICSIDRev 728.

[48] 'Fragmentation of International Law' (n 44) para 427. See for art 31(3)(c) specifically, *Oil Platforms (Iran v United States)*, ICJ, Judgment of 6 November 2003, para 41.

[49] 'Fragmentation of International Law' (n 44) para 465. It has been argued that investors should not be the 'victim' of incompatible treaty obligations, A Ghouri, *Interaction and Conflict of Treaties in Investment Arbitration* (Kluwer 2015) 112–13.

[50] R Gardiner, *Treaty Interpretation* (2nd edn, Oxford University Press 2015) 320.

[51] eg *Marfin Investment Group Holdings SA, Alexandros Bakatselos and Others v Cyprus*, ICSID ARB/13/27, Award of 26 July 2018, para 827.

Article 31(3)(c) does not justify resort to any rule of international law to guide the process of interpretation: only 'relevant' rules that are 'applicable in the relations between the parties' can be taken into account.[52] These are clearly flexible elements that leave room for debate.[53] If the criterion of 'relevance' is meant to include only rules that have the same subject matter as the BIT,[54] provisions from human rights treaties would probably not qualify as relevant rules. Yet it seems widely accepted that the criterion of 'relevance' should be understood more widely and does not necessarily exclude rules from other subfields of international law.[55] The requirement that the relevant rules should be 'applicable in the relations between the parties' has also evoked some debate.[56] Yet irrespective of one's interpretation of this element, it would at least cover human rights treaties that are binding upon both State parties to the relevant BIT.[57]

The Annulment Committee ruling on *Tulip Real Estate v Turkey* has explicitly endorsed the principle of systemic integration with regard to international human rights law, albeit not in the context of a human rights defence.[58] Before the committee, the investor argued that an application of Article 52(1)(d) of the

[52] cf *South American Silver v Bolivia* (n 32) para 216: 'this principle must be applied in harmony with the rest of the provisions of the same article and cautiously, in order to prevent the tribunal from exceeding its jurisdiction and applying rules to the dispute which the Parties have not agreed to'.

[53] S Suresh Bhat, 'A Study of the Issue of "Relevant Rules" of International Law for the Purposes of Interpretation of Treaties under Article 31(3)(c) of the Vienna Convention on the Law of Treaties' (2019) 21 ICLR 190.

[54] cf WTO Appellate Body in *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WTO DS379, AB Report of 11 March 2011, para 308.

[55] Simma and Kill, 'Harmonizing Investment Protection and International Human Rights' (n 3) 695–6. For examples where international adjudicators other than investment arbitration tribunals applied art 31(3)(c), see 'Fragmentation of International Law' (n 44) paras 433–460. Several of these examples concern rules that arguably have a different subject matter than the treaty that is being interpreted.

[56] eg U Linderfalk, 'Who Are "the Parties"? Article 31, Paragraph 3(C) of the 1969 Vienna Convention and the "Principle of Systemic Integration" Revisited' (2008) 55 NILR 343. The position that the relevant parties are the disputing parties which has been advanced in other contexts is untenable in regard to an investor–State dispute, if only because of art 1(g) VCLT which defines 'party' as 'a State which has consented to be bound by the treaty and for which the treaty is in force'.

[57] cf *South American Silver v Bolivia* (n 32) para 217. But see eg *Biwater Gauff (Tanzania) Ltd v Tanzania*, ICSID ARB/05/22, *Amicus Curiae* Submission of 26 March 2007, para 96, referring to the African Charter on the Rights and Welfare of the Child, to which Tanzania was a party, but not the United Kingdom. The situation is even more difficult if the treaty being interpreted is a multilateral treaty. cf *Philip Morris v Uruguay*, ICSID ARB/10/7, Award of 8 July 2016, para 401. Simma and Kill argue that *erga omnes* human rights obligations should in any case be covered by art 31(3)(c). Simma and Kill, 'Harmonizing Investment Protection and International Human Rights' (n 3) 698–702. See also Gardiner, *Treaty Interpretation* (n 51) 302–4, 310–17.

[58] *Tulip Real Estate and Development Netherlands BV v Turkey,* ICSID ARB/11/28, Decision on Annulment of 30 December 2015. See for the use of art 31 VCLT by tribunals eg OK Fauchald, 'The Legal Reasoning of ICSID Tribunals – An Empirical Analysis' (2008) 19 EJIL 301; A Saldarriaga, 'Investment Awards and the Rules of Interpretation of the Vienna Convention: Making Room for Improvement' (2013) 28 ICSIDRev 197; G Bücheler, *Proportionality in Investor-State Arbitration* (Oxford University Press 2015) 86ff; H Ascensio, 'Article 31 of the Vienna Conventions on the Law of Treaties and International Investment Law' (2016) 31 ICSIDRev 366.

ICSID Convention, which authorizes annulment in case of a 'serious departure from a fundamental rule of procedure' should be informed by human rights instruments and jurisprudence.[59] The Committee agreed. It noted that 'there is a widespread sentiment that the integration of human rights law into international investment law is an important concern'.[60] Having discussed the principle of systemic integration, the Committee concluded that:

> Provisions in human rights instruments dealing with the right to a fair trial and any judicial practice thereto are relevant to the interpretation of the concept of a fundamental rule of procedure as used in Article 52(1)(d) of the ICSID Convention. This is not to add obligations extraneous to the ICSID Convention. Rather, resort to authorities stemming from the field of human rights for this purpose is a legitimate method of treaty interpretation.[61]

One might think that what is sauce for the goose is sauce for the gander. If a resort to human rights law is legitimate in order to interpret references to procedural justice in the ICSID Convention, it seems equally legitimate to resort to human rights law in interpreting the substantive provisions of investment treaties.[62]

Some tribunals have taken a rather convenient approach to harmonization in response to human rights defences made by respondent States. In *CMS v Argentina*, the respondent argued that since 'the economic and social crisis that affected the country compromised basic human rights, no investment treaty could prevail as it would be in violation of such constitutionally recognized rights'.[63] The tribunal ruled that there was no collision between the BIT on the one hand, and Argentina's Constitution and international human rights law, on the other, for the following reasons: '[f]irst because the Constitution carefully protects the right to property, just as the treaties on human rights do, and secondly because there is no question of affecting fundamental human rights when considering the issues disputed by the parties'.[64] Commenting on this cursorily argued conclusion, Luke Eric Peterson remarked that:

> [T]he tribunal seems to dismiss concerns raised as to the impact of the Argentine financial crisis on the human rights by means of the following syllogism: property is a human right; investment treaties protect property; therefore, investment treaties are treaties which protect rather than harm rights.[65]

[59] *Tulip v Turkey* (n 58) para 65. [60] ibid, para 86. [61] ibid, para 92.

[62] cf *Urbaser v Argentina* (n 14) para 1200. The argument for this approach is even stronger in the case of a (newer) BIT that explicitly refers to human rights. cf the new Dutch Model BIT of 19 October 2018, Article 6(5): '[w]ithin the scope and application of this Agreement, the Contracting Parties reaffirm their obligations under the multilateral agreements in the field of … the protection of human rights to which they are party'.

[63] *CMS Gas Transmission Company v Argentina,* ICSID ARB/01/8, Award of 12 May 2005, para 114. [64] ibid, para 121.

[65] LE Peterson, *Human Rights and Bilateral Investment Treaties. Mapping the Role of Human Rights Law within Investor-State Arbitration* (Int'l Centre for Human Rights and Democratic Development 2009) fn 53.

It may be that investment treaties sometimes protect human rights, but this observation concerns situations where the investor, rather than the respondent, invokes human rights law.[66]

A more convincing way of harmonizing investment treaties and human rights treaties might point out that both types of treaties grant States a considerable amount of discretion with regard to how they implement their obligations.[67] It is commonly accepted that the application of broad human rights standards to specific political, economic, and social circumstances allows for diverse solutions.[68] Moreover, most of the human rights susceptible to being invoked in investor–State arbitration cases are codified in the International Covenant on Economic, Social and Cultural Rights (ICESCR).[69] Unlike the ICCPR, all of the provisions of which States must implement immediately, Article 2(1) of the ICESCR provides that:

> Each State Party to the present Covenant undertakes to take steps … to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means.

The principle of 'progressive realization' subject to 'available resources' renders it difficult to derive precise obligations from the provisions of the ICESCR to which it applies,[70] given the multifaceted nature of most of those obligations and the discretion granted States as to the means by which they can undertake them.[71] A similar argument can be made for common provisions in investment treaties. Given the open-ended language found in many of these provisions, they have often been held to grant a wide policy freedom, imposing only minimum standards on host States.[72] Once both

[66] Some investment disputes could be rephrased as horizontal conflicts between the right to property of the investor and the human rights of others. However, the human right to property is often heavily qualified in ways that common investment treaty provisions are not, see eg Article 1 of the First Additional Protocol to the European Convention on Human Rights.

[67] Jansen Calamita, 'International Human Rights and the Interpretation of International Investment Treaties' (n 3) 182.

[68] eg *James and Others v United Kingdom*, ECtHR 8793/79, Judgment of 21 February 1986, para 46.

[69] Simma, 'Foreign Investment Arbitration' (n 3) 586.

[70] Not all of the obligations in the ICESCR have this aspirational quality: see Committee on Economic, Social and Cultural Rights, 'General Comment 3: The Nature of State Parties' Obligations (Art. 2, para. 1 of the Covenant), UN Doc E/1991/23 (14 December 1990) para 10.

[71] A certain 'vagueness and lack of conceptual clarity' is not peculiar to economic, social and cultural rights, but applies to other human rights norms too. M Baderin and R McCorquodale, 'The International Covenant on Economic, Social and Cultural Rights: Forty Years of Development' in M Baderin and R McCorquodale (eds), *Economic, Social and Cultural Rights in Action* (Oxford University Press 2007) 11. Baderin and McCorquodale note, however, that 'the ESCR Committee has provided considerable conceptual clarity and elaboration to the nature and scope of many ESC rights contained in the ICESCR'.

[72] Al Faruque, 'Mapping the Relationship between Investment Protection and Human Rights' (n 3) 548: 'the general concepts of the investment protection contain within them considerable flexibility, which enables the arbitrators to balance the public and private interests and to ensure that the treaty protections leave a considerable margin of appreciation for the exercise of state

human rights and investment treaties are understood in this way, adjudicators should not have much difficulty in interpreting their provisions in light of each other and avoiding norm conflicts.[73]

In *Suez*, the tribunal concluded that Argentina's obligations under the BIT and under human rights law were not contradictory:

> Argentina is subject to both international obligations, *i.e.* human rights *and* treaty obligation, and must respect both of them equally. Under the circumstances of these cases, Argentina's human rights obligations and its investment treaty obligations are not inconsistent, contradictory, or mutually exclusive. Thus, … Argentina could have respected both types of obligations.[74]

According to the tribunal, 'Argentina could have attempted to apply more flexible means to assure the continuation of the water and sewage services to the people of Buenos Aires and at the same time respected its obligations of fair and equitable treatment'.[75] For example, to offset the harmful consequences of a tariff freeze, Argentina could have relieved the investors of some of their contractual obligations. Moreover, 'if Argentina's concern was to protect the poor from increased tariffs, it might have allowed tariff increases for other consumers while applying a social tariff or a subsidy to the poor, a solution clearly permitted by the regulatory framework'.[76] In other words, the discretion left to Argentina both under human rights and investment law allowed for solutions that would comply with both regimes. The *EDF* tribunal also rejected Argentina's claims that its obligations under investment law conflicted with its human rights obligations. It failed to see why Argentina's refusal to renegotiate tariffs 'was necessary to guarantee human rights', especially once the economy was recovering.[77]

sovereignty'; S Schill, 'Cross-Regime Harmonization through Proportionality Analysis: The Case of International Investment Law, the Law of State Immunity and Human Rights' (2012) 27 ICSIDRev 87: 'most of the standard rights granted under investment treaties … are not understood by tribunals as absolute guarantees'. See also R Moloo and J Jacinto, 'Standards of Review and Reviewing Standards: Public Interest Regulation in International Investment Law' in K Sauvant (ed), *Yearbook on International Investment Law and Policy 2011–2012* (Oxford University Press 2013).

[73] Simma and Kill, 'Harmonizing Investment Protection and International Human Rights' (n 3) 704, commenting on the FET standard: '[i]f the inherent flexibility of the standards contained in BITs does in fact "invite" States to exercise a margin of appreciation in observing such protection, then international human rights law can play a useful role in determining the bounds of this margin of appreciation'. J Bonnitcha, *Substantive Protection under Investment Treaties* (Cambridge University Press 2014) 34: '[i]t is difficult to imagine a situation in which a state's human rights and investment treaty obligations would be doctrinally inconsistent'. It has been argued that proportionality analysis could facilitate harmonization. See J Krommendijk and J Morijn, '"Proportional" by What Measure(s)? Balancing Investor Interests and Human Rights by Way of Applying the Proportionality Principle in Investor-State Arbitration' in Dupuy, Francioni and Petersmann, *Human Rights in International Investment Law* (n 3).

[74] *Suez v Argentina* (n 26) para 262.

[75] ibid, para 260.

[76] ibid, para 235. See for a more extensive discussion of the case A Tanzi, 'On Balancing Foreign Investment Interests with Public Interests in Recent Arbitration Case Law in the Public Utilities Sector' (2012) 11 LPICT 47, 55–64.

[77] *EDF v Argentina* (n 28) para 914.

In *SAUR*, the tribunal considered that human rights law was 'une des diverses sources' to be taken into account, as part of the Argentine constitutional legal order and of the general principles of international law.[78] Yet according to the tribunal, the exercise of State powers necessary to guarantee the human right to water of its population were compatible with the investor's rights under the APRI, the applicable BIT.

> Le droit fondamental à l'eau et le droit de l'investisseur à bénéficier de la protection offerte par l'APRI opèrent sur des plans différents: l'entreprise concessionnaire d'un service public de première nécessité se trouve dans une situation de dépendance face à l'administration publique, qui dispose de pouvoirs spéciaux pour en garantir la jouissance en raison de la souveraineté du droit fondamental à l'eau; mais l'exercice de ces pouvoirs ne se fait pas de façon absolue et doit, au contraire, être conjugué avec le respect des droits et des garanties octroyés à l'investisseur étranger en vertu de l'APRI.[79]

Although the *SAUR* tribunal somewhat cryptically held that human rights and investor rights 'operate on different levels', the final conclusion was that both sets of obligations should be read together instead of being contraposed. The tribunal considered that the fundamental right to water did not grant any absolute powers to the State; rather, Argentina's powers should be exercised in accordance with its obligations under the BIT. The approach taken by the *SAUR* tribunal provides an example of harmonization that served the case of the investor: the human right invoked by the host State was interpreted in the light of the applicable investment treaty, even if the respondent sought the opposite effect, namely an interpretation of the investment treaty in the light of human rights.

The latter form of harmonization has been advocated, not only by respondent States but also by the United Nations High Commissioner for Human Rights:

> While human rights should not provide a shield to protect unwarranted protectionism, administrative failures or unfair treatment, neither should they be made subject solely to an economic calculus. Consequently, it will be important to ensure that interpretations of these and other provisions in investment agreements place human rights and environmental considerations centrally within their reasoning where relevant.[80]

[78] *SAUR v Argentina* (n 27) para 330.

[79] ibid, para 331. 'The fundamental right to water and the investor's right to benefit from the protection offered by the APRI operate on different levels: the company holding a concession for a public service providing basic needs is in a position of dependency vis-à-vis the public administration, which has special powers to ensure its enjoyment because of the sovereignty of the fundamental right to water; the exercise of these powers, however, should not take place in an absolute manner but, on the contrary, must be combined with respect for the rights and guarantees granted to the foreign investor under the APRI.'

[80] UN High Commissioner for Human Rights, 'Human Rights, Trade and Investment', Report of 2 July 2003, E/CN.4/Sub.2/2003/9, para 35.

An example of an investment treaty being interpreted in the light of human rights law can be found in the case of the *Sawhoyamaxa Indigenous Community v Paraguay* before the Inter-American Court of Human Rights (IACtHR).[81] In this case, the Court found that Paraguay was in breach of its obligations under numerous provisions of the Inter-American Convention on Human Rights, including Article 21, the right to property. Consequently, the Court required the respondent State to 'formally and physically convey to the members of the Sawhoyamaxa Community their traditional lands'.[82] Yet those lands were owned and occupied by a number of German nationals, and there was an operative BIT between Germany and Paraguay under which the owners might claim if they themselves were dispossessed of their property. The Court noted, however, that the BIT allowed expropriation for 'a public purpose or interest', which could justify land restitution to an indigenous people.[83] The Court proposed that the requirement of 'public purpose or interest' imposed by the BIT should be read in the light of the Inter-American Convention. Consequently, it was open to Paraguay to comply with its secondary, if not its primary obligations under both treaties: by making restitution in one instance (under the American Convention) and paying compensation in the other (under the Germany–Paraguay BIT).[84]

C. Prioritization

A third response to the human rights defence is to prioritize a rule from one field over a rule from the other field. Host States invoking a human rights defence commonly assume that human rights treaties should override investment treaties.[85] In *Azurix*, it was argued on Argentina's behalf that 'a conflict between a BIT and human rights treaties must be resolved in favour of human rights'.[86] A similar stance was taken by the IACtHR in the *Sawhoyamaxa* case:

[81] *Sawhoyamaxa Indigenous Community v Paraguay*, Inter-American Court of Human Rights, Judgment of 29 March 2006. See for a discussion P Nikken, 'Balancing of Human Rights and Investment Law in the Inter-American System of Human Rights' in Dupuy, Francioni and Petersmann, *Human Rights in International Investment Law* (n 3).

[82] *Sawhoyamaxa Indigenous Community v Paraguay* (n 81) para 215. [83] ibid, para 140.

[84] cf J Waincymer, 'Balancing Property Rights and Human Rights in Expropriation' in Dupuy, Francioni and Petersmann, *Human Rights in International Investment Law* (n 3) 308: '[h]uman rights norms would rarely, if ever, call for expropriation without just compensation'. For the relationship between investment law and indigenous rights specifically, see J Levine, 'The Interaction of International Investment Arbitration and the Rights of Indigenous Peoples' in Baetens, *The Interaction of International Investment Law with Other Fields of International Law* (n 3); M Krepchev, 'The Problem of Accommodating Indigenous Land Rights in International Investment Law' (2015) 6 JIDS 42.

[85] Human rights bodies have repeatedly confirmed this. S Joseph, 'Trade Law and Investment Law' in D Shelton (ed), *The Oxford Handbook of International Human Rights Law* (Oxford University Press 2013) 866.

[86] *Azurix v Argentina* (n 5) para 254. cf *South American Silver v Bolivia* (n 32) para 210.

> The Court considers that the enforcement of bilateral commercial treaties negates vindication of non-compliance with state obligations under the American Convention; on the contrary, their enforcement should always be compatible with the American Convention, which is a multilateral treaty on human rights that stands in a class of its own and that generates rights for individual human beings and does not depend entirely on reciprocity among States.[87]

Even though one may have an intuitive sense that human rights obligations should prevail over investment protection obligations,[88] there seems to be no basis for this in treaty law. Unless the relevant human rights norms constitute *jus cogens* (in which case, were there a conflict between the two treaties, the BIT would be void),[89] it is difficult to see why the different nature of the two treaties should render a human rights treaty normatively superior to a BIT.[90] The *erga omnes* (*partes*) or multilateral character of human rights obligations does not necessarily give them a higher normative status than bilateral obligations of investment protection.[91]

Instead, assuming that nothing in the treaties speaks to the issue,[92] tribunals could resort to general maxims such as *lex specialis* or *lex posterior*, but their utility seems limited in practice. Under the *lex specialis* maxim, priority would be given to the treaty provision with the 'more precisely delimited scope of application'.[93] Yet it is difficult to determine whether the investment protection obligation or the human rights obligation would be the more precise one, in particular because both obligations originate from different fields of law.[94] According to the *lex posterior* maxim (Article 30 VCLT), a later treaty overrules an earlier treaty related to the same subject-matter as long as all parties are party to both treaties.[95] However, even if one understands the phrase 'relating to the same subject-matter' in a broad sense,[96] it seems problematic to prioritize an investment protection obligation

[87] *Sawhoyamaxa Indigenous Community Paraguay* (n 81) para 140.

[88] Bruno Simma hints at 'granting priority to the host State's human rights obligations, particularly where "minimum core" obligations' are affected'. Simma, 'Foreign Investment Arbitration' (n 3) 591.

[89] Art 53 VCLT. It should be noted that this would not establish hierarchy, but the invalidity of the BIT. D Desierto, 'Conflict of Treaties, Interpretation, and Decision-Making on Human Rights and Investment during Economic Crises' (2013) 10 TDM 1, 37–9.

[90] A van Aaken, 'Defragmentation of Public International Law through Interpretation: A Methodological Proposal' (2009) 16 Indiana Journal of Global Legal Studies 483, 493.

[91] This has sometimes been suggested. eg Sornarajah, *Resistance and Change* (n 42) 317. The ILC Report on Fragmentation clarified that '[t]he *erga omnes* nature of an obligation … indicates no clear superiority of that obligation over other obligations'. 'Fragmentation of International Law' (n 44) para 380.

[92] An example might be art 16 of the Energy Charter Treaty. However, a close reading of the provision seems to lead to the conclusion that it does not cover human rights treaties, as they do not concern investment promotion and protection.

[93] 'Fragmentation of International Law' (n 44) para 57.

[94] ibid, para 58.

[95] See for a general, critical account of art 30 VCLT, C Borgen, 'Resolving Treaty Conflicts' (2005) 37 GeoWashIntlLRev 573.

[96] As proposed in 'Fragmentation of International Law' (n 44) paras 21–4, 253–4.

over a human rights obligation (or *vice versa*) on this basis.[97] Indeed, in practice, a tribunal charged with deciding the issue does not have a real choice which treaty to apply in case of norm conflict: it must prioritize the treaty it is charged with applying, since it is only because of that treaty that it has jurisdiction to determine the dispute at all.[98] What this means is that in case of a treaty conflict, an investment arbitration tribunal has no real alternative than to prioritize the investment treaty over the respondent State's human rights obligations.[99]

IV. CONCLUSIONS

The potential impact of investment arbitration on the human rights of third parties is a recurrent theme in discussions about the legitimacy of international investment law, and it is commonly argued that tribunals should be sensitive to human rights concerns. Yet in general, tribunals seem inclined to evade human rights defences raised by respondent States. This article has highlighted two other possibilities: tribunals can choose to harmonize investment treaty obligations with human rights obligations or to prioritize one of them over the other.

The rules on treaty interpretation and, more fundamentally, the principle of systemic integration, require that treaties be read, as far as possible, consistently with other relevant rules of international law. Such harmonization is facilitated by the wide discretion commonly left to States in both investment law and human rights law. At the same time, the indeterminate character of ordinary provisions in both regimes suggests that no clear interpretative guidance can be obtained by looking at the other field. Consequently, the interpreter retains discretion as to *how* the provisions should be harmonized, which can be done in two different ways: tribunals might consider that States' human rights obligations restrict the scope of investment protection obligations; conversely, investment treaties might be used to delimit the scope of human rights obligations. In practice, tribunals seem to follow the latter approach, even if the host State invoked the relevant human rights provision with the opposite aim. Either way, the result of harmonious interpretation is unlikely be very different from that of prioritization.

The *Houben* case again serves as an illustration. If the tribunal had dealt with Burundi's human rights defence in more detail, it could have harmonized the

[97] R Michaels and J Pauwelyn, 'Conflict of Norms or Conflict of Laws? Different Techniques in the Fragmentation of Public International Law' (2012) DukeJComp&IntlL 349, 367: 'this type of conflict is more akin to inter-systemic conflict for which intra-systemic conflict rules such as *lex posterior* and *lex specialis* were not designed'.

[98] cf, in a different context, *Grand River Enterprises Six Nations Ltd et al. v USA*, UNCITRAL, Award of 12 January 2011, para 71.

[99] Host states may themselves be aware of the dilemma and apply the so-called 'principle of political decision', by choosing to honour one of the competing obligations. See De Brabandere, 'Human Rights Considerations' (n 3) 197; Desierto, 'Conflict of Treaties' (n 89) 81–2.

State's obligations under the BIT and the ICCPR. It could have read the BIT in the light of the ICCPR, ruling that the obligation to provide full protection and security does not oblige the State to evict people from their homes in violation of their human rights. Alternatively, the tribunal could have read the ICCPR in the light of the BIT, concluding that the squatters' right to privacy finds its limits in the property rights of a foreign investor. In any case, an attempt to harmonize the two sets of obligations would result in one of them prevailing over the other, which happens in the case of explicit prioritization as well. Harmonious interpretation is conceptually different from prioritization, because it denies the existence of a norm conflict, but the outcome of the analysis is likely to be similar. Consequently, the utility of the principle of systemic integration, often hailed as a solution to apparent norm conflicts in international law, seems limited in practice.