Informal Ministerial Meeting on
Responsible Business Conduct

Investment treaty law, sustainable development and responsible business conduct: A fact finding survey

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EXECUTIVE SUMMARY

1. Investment treaty law – which is scattered over 3000 international investment agreements (henceforth, referred to as IIAs) adopted over a period of 50 years – is a crucial but complex basis for regulating international investment flows. The system is now under pressure, with criticisms from both traditional sources and free market think tanks. One criticism is that investment treaty law creates rights but not responsibilities for covered foreign investors. It is thought to be silent on their responsibilities to host societies and on their contributions to sustainable development. Some commentators are also concerned that investment treaty obligations may unduly limit host governments' ability to enact public policies needed to promote sustainable development and responsible business conduct.

2. The present paper establishes a preliminary, factual and statistical basis for considering key aspects of these issues. It explores the relationship between investment treaty law and governments' ability to advance the sustainable development agenda and promote responsible business conduct (henceforth, referred to as SD/RBC). The specific SD/RBC issues covered are environmental protection, labour conditions and standards, anti-corruption and human rights. The paper presents survey results of 2107 investment treaties and 1113 treaty-based arbitration cases to answer the following questions:

- *Do governments use their IIAs to advance their SD/RBC agendas? More specifically, do they: 1) include treaty language aimed at preserving space for policy making in areas important to SD/RBC; 2) use investment treaties to raise investor awareness of major international instruments in the environmental, labour, anti-corruption and human rights fields and 3) include language in the IIAs that communicates directly to investors about RBC?*

- *Do arbitrators refer to SD/RBC issues when adjudicating treaty-based investor-state disputes and do they refer to other international agreements that are of particular relevance to SD/RBC when adjudicating these disputes in the context of investor state dispute settlement (henceforth, referred to as ISDS)?*

3. The treaty survey provides the following responses to the first set of questions:

Inclusion of SD/RBC issues has become a dominant treaty practice in recent years. More than three-fourths of recently concluded IIAs (i.e. between 2008 and 2013) contain language on SD/RBC (mainly Free Trade Agreements with investment protection provisions) and virtually all of the investment treaties concluded in 2012 and 2013 include such language. Forty-seven of the fifty-four countries covered by the survey have included some form of SD/RBC language in at least one of their treaties.

Older treaties without any SD/RBC language continue to dominate the treaty sample. Only 12 % of the entire stock of IIAs contains language on these matters. The issue most often addressed being environmental protection (10%), followed by labour standards (5.5%), anti-corruption (1.5%) and human rights (0.5%).

Treaty practice shows wide variation across countries, with no established pattern in this area. The treaty survey documents major variations across different countries' treaty practices, both with respect

to their approach to the broad legal functions of SD/RBC language in IIAs and with respect to "micro" variations in the exact language used for a given type of treaty text. Major functions of such treaty language are, in the order of prevalence: (i) establishing the context and purpose of the treaty and setting forth basic SD/RBC principles through preamble language; (ii) preserving policy space to enact public policies dealing with SC/RBC concerns; and (iii) not lowering standards, in particular not relaxing environmental and labour standards for the purpose of attracting investment. Generally, governments do not use these IIAs to communicate directly to companies on SD/RBC. No treaty-specific language on investor responsibility (aside from legality requirements for covered investments) was found in the sample and only 4 of the treaties surveyed specifically mention the *OECD Guidelines for Multinational Enterprises*.

4. The survey of investment treaty cases provides the following responses to the second set of questions:

Arbitrators frequently refer to issues and international agreements relating to SD/RBC. The thematic key word search of 1113 treaty-based decisions shows that 26% of these mention at least one SD/RBC issue, the most common concern being environment, followed by corruption. Human rights come in a distant third. Labour conditions and standards do not appear to be referred to in any of the cases in the sample. The survey also shows that arbitrators often refer to international SD/RBC instruments when they consider them to be relevant. The agreement-based key word search documents references to 28 international SD/RBC instruments in the treaty-based decisions surveyed. Most common references are to the European Convention on Human Rights (cited in 27 different decisions), the International Convention on the Elimination of All Forms of Racial Discrimination (referred to in 8 decisions) and the Convention on the Prevention and Punishment of the Crime of Genocide (mentioned in 7 decisions).

5. The treaty survey and the investment treaty cases survey allow drawing the following preliminary conclusions:

State parties and arbitrators are starting to recognize the interface between investment treaty law and other bodies of international law of particular relevance for SD/RBC. The survey of investment treaties shows that inclusion of SD/RBC issues in IIAs has become the dominant trend in recent years, though there are large variations among countries in terms of practice. Likewise, the survey of treaty-based investment arbitration cases shows that arbitration panels refer fairly frequently to SD/RBC issues and to related international agreements of relevance in their decisions. Thus, preliminary and partial evidence is provided in support of the view that both State parties to IIAs and investment arbitration tribunals are starting to consider the potential interactions between investment law and SD/RBC issues and related international instruments.

Caveats – including SD/RBC language in treaties will not contribute to achieve SD/RBC objectives if broader concerns in other substantive and procedural provisions remain. Interpretation and application of IIAs is based on the language they contain. Earlier OECD analysis has shown that substantive treaty commitments are broadly framed and that ISDS is generally 'lightly regulated'. Including SD/RBC language in investment treaties might therefore not yield full benefits if other treaty language does not succeed in providing incentives for improved public sector governance and attracting high quality investment. Governments will want to be mindful of the need to craft treaties that not only advance their objectives in relation to SD/RBC but that also include ISDS provisions that provide appropriate interpretive guidance to those charged with interpreting and applying the treaties.

INVESTMENT TREATY LAW, SUSTAINABLE DEVELOPMENT AND RESPONSIBLE BUSINESS CONDUCT: A FACT FINDING SURVEY[1]

The Government of Japan and the Government of the Independent State of Papua New Guinea, […]

Recognising the importance of foreign investment for national development, economic growth and general welfare of the citizens […]

Recognising that economic development, social development and environmental protection are interdependent and mutually reinforcing pillars of sustainable development and that cooperative efforts of the Contracting Parties to promote investment can play an important role in enhancing sustainable development;

Recognising also that these objectives can be achieved without relaxing health, safety and environmental measures of general application; […]

Preamble of the Japan-Papua New Guinea BIT (2011)

6. Most governments can be assumed to be committed to the objective of promoting sustainable development (henceforth, referred to as SD) and responsible business conduct (henceforth, referred to as RBC).[2] This paper explores a specific dimension of the broader challenge of making SD and RBC a reality in economies and in people's lives by looking at the role of investment treaty law in advancing these objectives. However, results from earlier OECD treaty surveys show that inclusion of these concerns in international investment agreements (henceforth, referred to as IIAs), as in the preamble of the Japan-Papua New Guinea BIT quoted above, remains rare. In general, until the recent past, governments have not tended to use IIAs to promote SD and RBC[3].

7. The current study is aimed at taking stock of the inclusion of SD and RBC concerns in investment treaty law by updating and extending earlier of investment treaty practice in relation to

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1 This draft Working Paper serves as reference material for the Informal Ministerial Meeting on Responsible Business Conduct taking place in Paris on 26 June 2014. It was prepared by Kathryn Gordon, Joachim Pohl and Marie Bouchard in the Investment Division of the OECD Directorate for Financial and Enterprise Affairs. The opinions and views expressed and arguments employed herein are those of the authors and do not necessarily reflect or represent the official views of the OECD or of the governments of its member countries. The final version of this paper will be published as a Working Paper in the OECD Working Papers on International Investment series www.oecd.org/daf/inv/investment-policy/working-papers.htm.

2 The definition of RBC used here is conduct consistent with applicable laws and internationally recognised standards. RBC is a broad concept that focuses on two aspects of the business-society relationship: 1) positive contribution businesses can make to economic, environmental, and social progress with a view to achieving sustainable development, and 2) avoiding adverse impacts and addressing them when they do occur. See OECD, *Responsible Business Conduct Matters – OECD Guidelines for Multinational Enterprises*, OECD Publications, 2013, pp. 6-7.

3 See Kathryn Gordon and Monica Bose, "International Investment Agreements: A survey of Environmental, Labour and Anti-Corruption Issues", *International Investment Law: Understanding Concepts and Tracking Innovations*, OECD Publishing, 2008, pp. 135-240 and Kathryn Gordon and Joachim Pohl, "Environmental Concerns in International Investment Agreements – A Survey", *OECD Working Papers on International Investment*, No. 2011/01, OECD Publishing.

SD/RBC and providing a preliminary statistical survey of the degree to which treaty-based arbitration cases refer to these concerns.

8. The paper begins with a brief review of the role governments can play in fostering SD and RBC and, more particularly, of the use of IIAs in this regard (**Section 1**). It then turns to a large sample survey of treaty practice and examines how such issues as the protection of the environment, labour conditions and standards, the fight against corruption and human rights are handled in treaty texts (**Section 2**). The paper then explores statistically the occurrence of these same issues in investor state arbitration cases and the citation of international agreements relevant to SD/RBC therein (**Section 3**). The conclusions place caveats on these findings and highlight the importance of the adequate design of the investor state dispute settlement (henceforth, referred to as ISDS) that have been established as an enforcement mechanism for the vast majority of the IIAs' provisions (**Section 4**).

1. Achieving public objectives for SD and RBC -- the role of IIAs

9. RBC results from the efforts of the business community operating in a broader "ecosystem of responsibility"[4]. The summary report from the 2013 Global Forum on RBC states that "all actors – not only enterprises – have a responsibility for building a healthy business environment. Governments cannot abdicate their responsibility for protecting internationally recognised fundamental rights and ensuring good governance, fair regulations, and transparency. Labour and civil society have to engage constructively to ensure accountability and provide a voice for the most disadvantaged."[5] Thus, business, labour and civil societies, as well as governments, all have a role in promoting SD and RBC.

10. In this broader "ecosystem of responsibility", government roles consist in developing and implementing a broad, public policy framework for the promotion of SD and RBC. The three main channels for government action in this area are:

- ***Developing domestic policies, including regulation, fiscal policy and law enforcement***. If properly designed, the public policy framework can create appropriate incentives for firms (and others) to contribute to SD and RBC as well as appropriate disincentives for business actions that detract from such orientations. These policies need to be transparent, effective in achieving their stated aims and to avoid unwarranted disruption of economic activity or violations of the rights of people affected by them[6].

- ***Participating in international cooperation processes*** that develop common regional or global goals and standards on issues of particular relevance to SD/RBC, such as the OECD and UN processes relating to the protection of the environment, health, labour conditions and standards, the fight against corruption and human rights.

- ***Communicating directly to firms about their role in supporting SD and adopting RBC approaches***. Governments can use alternative channels of communication (other than laws governing business activities) to clarify their positions and expectations regarding SD and RBC.

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4 See OECD, Global Forum on Responsible Business Conduct, Summary Report, June 2013, pp. 23-24.

5 OECD, Global Forum on Responsible Business Conduct, Summary Report, June 2013, p. 24.

6 David Gaukrodger and Kathryn Gordon, "Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community", *OECD Working Papers on International Investment*, No. 2012/03, OECD Publishing.

This can take place in a variety of ways, including the development of RBC instruments at the national and international levels. The *OECD Guidelines for Multinational Enterprises* are an example of a formal platform for this type of interaction between governments and firms.

11. Investment treaty law influences or potentially influences policies relating to all three of these channels for government promotion of SD/RBC. Specifically, governments can craft treaty language in order to:

- ***Preserving policy space***. Investment treaties are designed to promote investment protection for covered foreign investors. However, through such treaty commitments as 'national treatment' and 'fair and equitable treatment', they can also have an impact on the domestic policy making process. Governments wishing to promote SD and RBC will want to be mindful of the need to include provisions preserving their domestic policy making prerogatives in their IIAs, while also recognising the value of basic investment treaty principles (e.g. non-discrimination) for the design and enforcement of SD/RBC policies. The treaty survey presented in Section 2 documents the evolution of treaty language that attempts to preserve space for pursuing SD/RBC policies in a domestic context and shows that this a common type of SD/RBC language in recently concluded IIAs.

- ***Promoting international SD/RBC instruments***. These instruments (for example, multilateral environmental agreements and anti-bribery conventions) coexist with IIAs and are implemented in parallel with investment treaty law. They formalise international thinking and undertakings on the responsibilities of states and other actors (notably enterprises) in such fields as environment, labour, anti-corruption and human rights. Thus, many of them provide inputs relevant for public and private decisions relating to international investment. The survey of treaty-based arbitration cases in Section 3 examines the frequency with which these other international agreements are referred to in investment treaty decisions.

- ***Communicating directly to investors on SD/RBC***. IIAs could potentially contribute to the promotion of SD/RBC by including language on investor responsibility. Possible options range from creating obligations for investors in IIAs to using the treaties to promote SD/RBC instruments as the *OECD Guidelines for Multinational Enterprises* or the *UN Guiding Principles on Business and Human Rights*. The treaty survey in Section 2 shows that inclusion of such references in IIAs is very rare indeed.

2. A large sample survey of investment treaty language dealing with SD/RBC issues

12. IIAs contain commitments on investment protection. They also increasingly include language on how these commitments are to be integrated with other public policy goals and processes. This section explores statistically whether and how investment treaties include language aimed at integrating the goals of investment protection and the promotion of SD and RBC.

13. The OECD-hosted investment policy community has on several earlier occasions surveyed investment treaty practice, both for issues of particular relevance to SD and RBC and in relation to dispute settlement provisions.[7] An initial study carried out in 2007 surveyed references to environmental, labour

[7] Several studies were dedicated to approaches to integrating openness to foreign investment with national security. For the complete work accomplished in this area, visit www.oecd.org/daf/investment/foi.

and anti-corruption issues in IIAs.[8] An updated and enhanced study of treaty practice relating to environmental issues followed in 2010.[9]

14. The present study further updates and extends the earlier studies by expanding the issue coverage to four SD/RBC related areas (environment, labour, human rights and anti-corruption) and the treaty coverage to 2,094 bilateral treaties and 13 multilateral treaties. The sample includes all of the investment treaties that countries invited to participate in OECD-hosted investment dialogue – that is, 54 countries[10] plus the European Commission – have concluded with any other country, provided that the full text of the treaty was electronically available in early 2014.[11] This sample of 2,107 treaties covers more than 70% of the global investment treaty population.[12]

15. The survey restricts itself to a statistical characterisation of the frequency, kind and extent of language referring to SD/RBC concerns inserted in IIAs and of the evolution of the inclusion of such language over time. It does not analyse the legal significance or consequences that this content might have, although it does provide a starting point for such analysis.

2. A. Patterns and evolution of the inclusion of SD/RBC language in investment treaties

16. *Treaty language referring to SD/RBC concerns is rare, but its frequency has progressively increased in recent years.* Figure 1 shows the percentage of treaties concluded in a given year that contain such references, distinguished by subject area. Figure 2 shows the prevalence and evolution of such references in the entire treaty sample. The survey indicates that only 252 IIAs, or 12.1% of the overall sample, contain SD/RBC references, but that more than 75% of treaties signed between 2008 and 2013 -- mainly Free Trade Agreements (henceforth, FTAs) with investment chapters – refer to at least one of the four RBC-related issues. Figures 1 and 2 show that treaty language referring to SD/RBC issues remained rare until 1994, when the inclusion of SD/RBC language in IIAs started to evolve more rapidly.

17. *Different SD/RBC concerns have been introduced in treaty language at different times*. The survey shows that the inclusion in IIAs of each of the four RBC-related issues surveyed varies in time. Environmental concerns were the first SD/RBC issue to be mentioned in a treaty, appearing in a 1985 China-Singapore BIT. [13] Labour issues then appeared five years later, in 1990[14] and anti-corruption issues

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8 Kathryn Gordon and Monica Bose, "International Investment Agreements: A survey of Environmental, Labour and Anti-Corruption Issues", *International Investment Law: Understanding Concepts and Tracking Innovations*, OECD Publishing, 2008, pp. 135-240.

9 Kathryn Gordon and Joachim Pohl, "Environmental Concerns in International Investment Agreements – A Survey", *OECD Working Papers on International Investment*, No. 2011/01, OECD Publishing.

10 Argentina, Australia, Austria, Belgium, Brazil, Bulgaria, Canada, Chile, China, Colombia, Costa Rica, Czech Republic, Denmark, Egypt, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, India, Indonesia, Ireland, Israel, Italy, Japan, Jordan, Korea, Latvia, Lithuania, Luxembourg, Malaysia, Mexico, Morocco, Netherlands, New Zealand, Norway, Peru, Poland, Portugal, Romania, Russian Federation, Saudi Arabia, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, Tunisia, Turkey, United Kingdom, and United States.

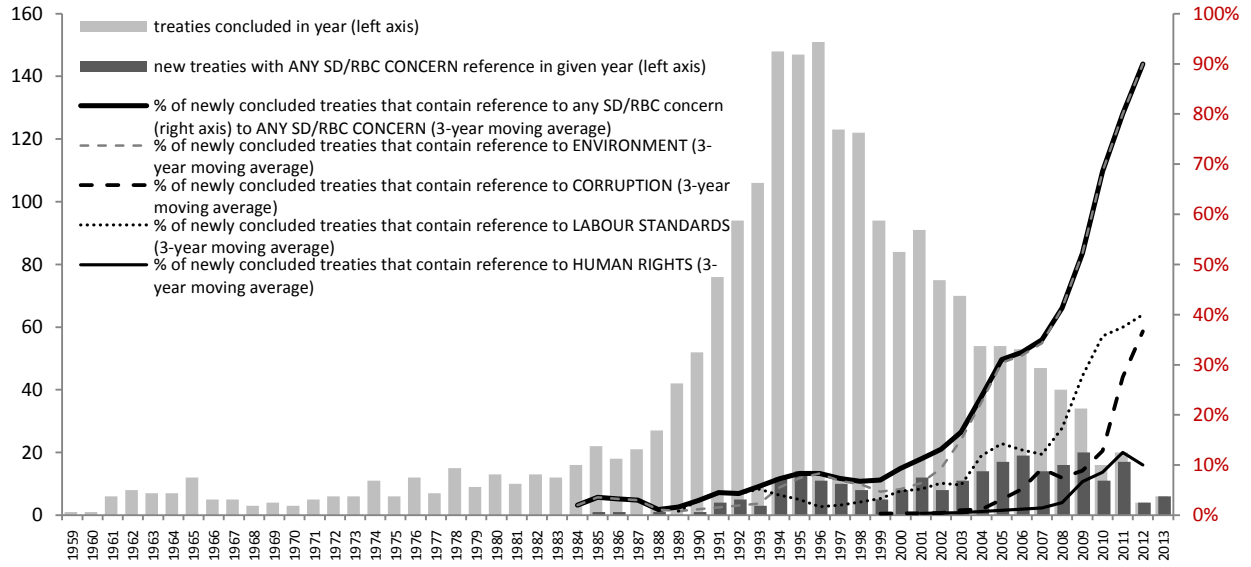
11 A description of the methodology, the sources used, and the IIAs included in the sample of the study is available in Annex 4.

12 According to UNCTAD data, there were, as of 15 November 2013, globally 2,866 BITs and approximately 345 other IIAs. See WTO, OECD, UNCTAD, 10th Report on G20 Trade and Investment Measures (Mid-May 2013 to Mid-November 2013), 18 December 2013, p.59.

13 China-Singapore BIT (1985), Article 11 "Prohibitions and Restrictions": "[t]he provisions of this Agreement shall not in any way limit the right of either Contracting Party to apply prohibitions or

fifteen years later, in 2000[15]. The first mention of human rights concerns occurred in a 2002 treaty.[16] The order in which the SD/RBC concerns first appeared in IIAs also corresponds to the order of frequency of occurrence. Among the four RBC-related issues considered in the survey, protection of the environment is found with the highest frequency. Figures 1 and 2 respectively show that 75.5% of recent treaties (i.e. treaties signed between 2008 and 2013) and about 10% of the entire sample mention environmental concerns. Environmental language is followed distantly by inclusion of treaty language referring to labour standards and conditions, the fight against corruption, and human rights.

Figure 1. Frequency of inclusion of SD/RBC references in bilateral IIAs concluded in a given year (3 year moving average)



18. *Legacy effects regarding the inclusion of language referring to SD/RBC are evident in the treaty sample*. The survey shows that the majority of recent treaties contain SD/RBC language, but that the inclusion of such language is only rarely found in the overall sample. This attests to the strong 'legacy' effects in the treaty production process. In other words, older approaches to treaty practice live on in older treaties that have not been renegotiated, presumably due to the high cost of treaty renegotiation, and that are still in force due to the length of their validity periods.[17] Treaty drafters will want to be mindful of

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restrictions of any kind or take any other action which is directed to the protection of its essential security interests, or to the protection of public health or the prevention of diseases and pests in animals or plants".

14 Poland-United States BIT (1990), Preamble: "[t]he United States of America and the Republic of Poland […]; Recognizing that the development of business and economic ties can contribute to the well-being of workers in both countries and promote respect for fundamental worker rights; […] Agree as follows: […]".

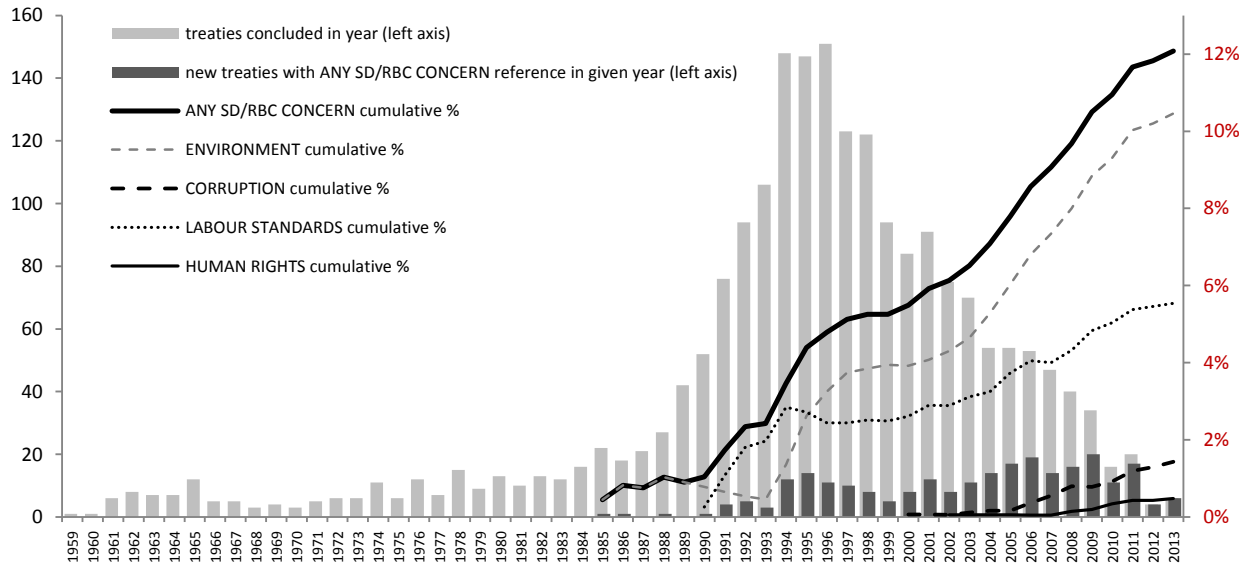
15 Austria-Uzbekistan BIT (2000), Article 25 "Nullification": "(1) Either Party to the dispute may request the annulment of an award, in whole or in part, on one or more of the following grounds, that: […] (c) there was corruption on the part of a member of the tribunal or on the part of a person providing decisive expertise or evidence […]".

16 Austria-Malta BIT (2002), Article 18 "Scope, Consultations, Mediation and Conciliation": "[…] (2) The application of the European Convention on Human Rights shall not be excluded".

17 For an overview of the validity periods contained in IIAs, see Joachim Pohl, "Temporal Validity of International Investment Agreements: a Large Sample Survey of Treaty Provisions", *OECD Working Papers on International Investment*, No. 2013/04, OECD Publishing.

these long-lasting effects as they draft IIAs and to craft treaty provisions that allow adaption to changing circumstances and emerging issues.

Figure 2. Evolution of the prevalence of references to SD/RBC concerns in bilateral IIAs



19. *Countries vary significantly in their approach to including SD/RBC language in investment treaties*. Table 1 shows that, overall, 47 of the 54 countries covered by the survey have included SD/RBC language in at least one of their IIAs. Some countries only very occasionally include such language. For example, Germany and the United Kingdom have just 2 treaties each with references to SD/RBC concerns out of 149 and 98 treaties, respectively. Countries with relatively high propensities to include such language include: New Zealand (89% of its treaties), Canada (82% of its treaties), the United States (74%), Japan (71%), and Colombia (60%). The specific treaty language used to frame specific issues also varies (e.g. in relation to the specific language used to describe lists of ILO core labour standards[18]).

Table 1. Bilateral IIAs with language on SD/RBC issues: Country overview

Country	No. of bilateral IIAs in the sample	Number of bilateral IIAs that contain references to SD/RBC concerns	Percentage of bilateral IIAs that refer to SD/RBC concerns	First occurrence of a reference to SD/RBC concerns in a bilateral IIA in the sample	Percentage of bilateral IIAs that contain SD/RBC reference since first occurrence
Argentina	59	2	3%	1991	14%
Australia	26	5	19%	2004	83%
Austria	63	20	32%	1996	45%
Belgium/Luxembourg	93	18	19%	2004	78%
Brazil	9	0	0%	-	-
Bulgaria	40	1	3%	1992	3%
Canada	39	32	82%	1994	100%
Chile	59	8	14%	1996	24%
China	107	7	7%	1985	7%

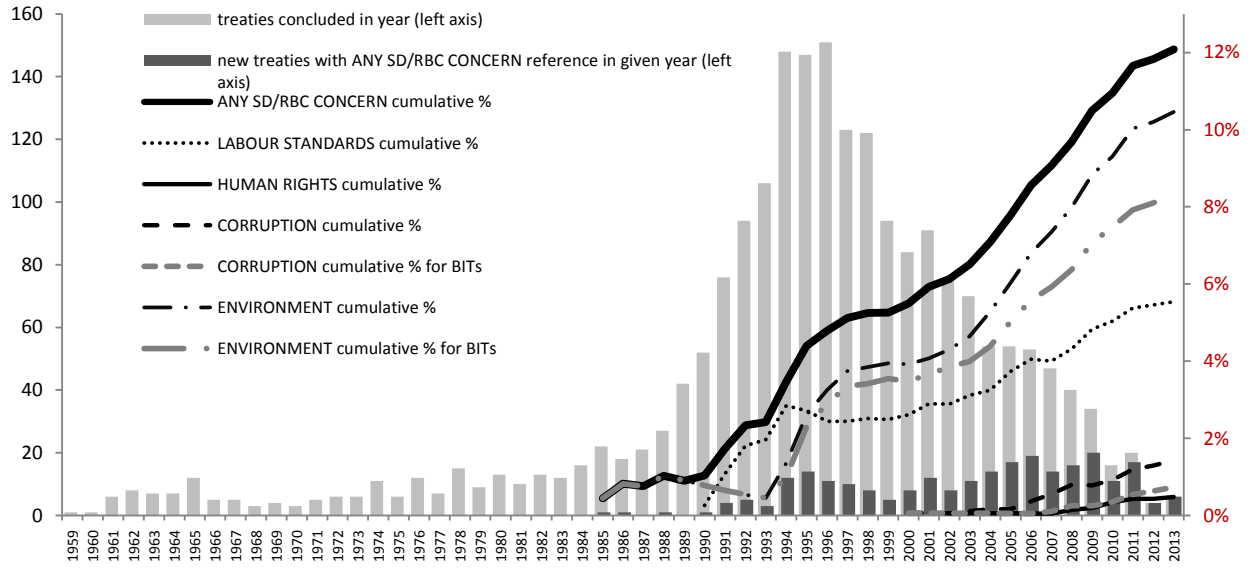
[18] See the lists of core labour standards in Annex 2 section (vii).

Country	No. of bilateral IIAs in the sample	Number of bilateral IIAs that contain references to SD/RBC concerns	Percentage of bilateral IIAs that refer to SD/RBC concerns	First occurrence of a reference to SD/RBC concerns in a bilateral IIA in the sample	Percentage of bilateral IIAs that contain SD/RBC reference since first occurrence
Colombia	15	9	60%	1994	60%
Costa Rica	22	4	18%	1994	21%
Czech Republic	80	6	8%	1991	9%
Denmark	50	0	0%	-	-
Egypt	70	2	3%	1996	5%
Estonia	21	2	10%	1994	18%
Finland	78	26	33%	2000	67%
France	104	1	1%	1997	3%
Germany	149	2	1%	1995	3%
Greece	37	0	0%	-	-
Hungary	57	1	2%	1995	5%
Iceland	5	1	20%	2007	100%
India	79	23	29%	1995	30%
Indonesia	67	2	3%	1997	6%
Ireland	1	0	0%	-	-
Israel	21	0	0%	-	-
Italy	71	1	1%	1995	3%
Japan	31	22	71%	2002	100%
Jordan	34	7	21%	1997	32%
Korea	101	12	12%	1996	20%
Latvia	29	3	10%	1995	18%
Lithuania	34	2	6%	1998	17%
Malaysia	41	2	5%	2005	67%
Mexico	37	13	35%	1994	35%
Morocco	47	1	2%	2004	10%
Netherlands	107	7	7%	2001	23%
New Zealand	9	8	89%	1988	89%
Norway	14	0	0%	-	-
Peru	43	14	33%	2005	100%
Poland	54	1	2%	1990	2%
Portugal	54	0	0%	-	-
Romania	84	4	5%	1992	7%
Russian Federation	43	3	7%	1995	8%
Saudi Arabia	16	1	6%	2013	100%
Slovakia	35	2	6%	2010	100%
Slovenia	35	2	6%	2001	22%
South Africa	46	1	2%	1995	2%
Spain	69	1	1%	2007	4%
Sweden	68	3	4%	1995	8%
Switzerland	121	11	9%	1995	18%
Tunisia	34	1	3%	2012	100%
Turkey	78	1	1%	2011	4%
United Kingdom	98	2	2%	2006	67%
United States	54	40	74%	1990	93%

20. *IIAs with language referring to SD/RBC concerns frequently mention several issues or raise one issue in several ways*. The survey shows that language referring to SD/RBC issues tends to be concentrated in a few IIAs.[19] In the entire sample, 377 references to the four SD/RBC concerns have been identified (not counting multiple references to the same issue in the same treaty), but these references are concentrated in only 252 treaties. Also, SD/RBC treaty language varies from brief (just a few words)[20] references to quite extensive texts (ranging up to several pages).[21]

21. *Different treaty practices for non-BITs IIAs as opposed to BITs*. The survey shows that non-BIT IIAs include language referring to SD/RBC concerns much more frequently than BITs do. Only 10% of the 2,042 BITs contain such language, as compared with 96% of the 50 non-BIT treaties (mainly FTAs and Economic Partnership Agreements -- henceforth, referred to as EPAs -- with investment protection provisions). The higher frequency of inclusion of such language in FTAs and EPAs partly explains the sizeable increase of the frequency of references in IIAs concluded recently. Figure 3 shows how the frequency of SD/RBC references has evolved for all bilateral IIAs as regards the protection of the environment and the fight against corruption. It indicates that, although the share of non-BIT IIAs in the sample is very small, the frequent inclusion therein of language referring to SD/RBC concerns, and in particular to the protection of the environment, contributes significantly to lifting the overall frequency of such references in the sample.

Figure 3. The prevalence of references to SD/RBC concerns in BITs and bilateral FTAs/EPAs



19 For an overview of the different SD/ RBC issues covered by each IIA including SD/RBC language, see Annex 1.

20 See, for instance, the preamble of the Switzerland-Kosovo BIT (2011): « [l]e Conseil federal suisse et le Gouvernement de la République du Kosovo, […] visant à encourager les investisseurs au respect des normes et principes de responsabilité sociale des entreprises internationalement reconnus, sont convenus de ce qui suit: […] ».

21 See, for instance, the Peru-United States FTA (2006) which contains full chapters on labour and environment, both spanning over several pages.

22. *The approach to including SD/RBC language in multilateral investment agreements differs from treaty to treaty*. Six of the 13 multilateral treaties covered by the survey contain language referring to SD/RBC issues. In some of these treaties, the provisions including SD/RBC language are very detailed. Other treaties only contain brief references to such issues. While all six of the multilateral treaties with the SD/RBC language include language on environmental protection, only 4 of them refer to labour standards and conditions, 2 to the fight against corruption and 1 to human rights. The most recently concluded agreements tend to contain more language referring to SD/RBC concerns than the older ones.

2. B. Functions of SD/RBC language inserted in IIAs

23. The different types of treaty language referring to SD/RBC can be categorised by their function and purpose in the treaty.[22] Among the 377 references to SD/RBC concerns that have been identified in 252 bilateral IIAs,[23] nine different approaches can be distinguished, testifying to the broad variation of the aim of these references.[24] In the order of frequency of their occurrence, these language categories are:

- *Preamble language*. This type of language is found in 154 of the treaties surveyed (or 7.4% of the sample). Such references can be found with respect to the protection of the environment, labour conditions and standards, the fight against corruption and human rights. Although preamble language does not create binding treaty commitments, it is nevertheless important inasmuch as it helps to clarify the object and purpose of the treaty as well as the broader context relevant for interpreting the treaty. As such, preamble language can provide essential inputs to the treaty interpretation process.
- *Language on preserving policy space*. This kind of provision, which aims at preserving policy space for regulating in the public interest, is found in 7% of the IIAs surveyed – or 146 treaties. Most of these references are specific to environmental concerns.
- *Not lowering standards*. This type of language, which seeks to discourage loosening of environmental or labour regulations in order to attract investment, is included in 82 of the treaties surveyed (or 3.9% of the sample). This language is generally inserted in the main body of the treaty but it also appears in the preamble in some IIAs.
- *Language establishing that, in general, environmental measures taken in order to protect public welfare objectives do not constitute indirect expropriation*. This kind of provision, which has similar functions as provisions on preserving policy space, establishes that, in general, non-discriminatory regulatory actions taken in order to protect public welfare objectives, such as the environmental protection, do not constitute indirect expropriation. They are contained in 54 of the treaties surveyed (or 2.6% of the sample).
- *Commitment to cooperate on SD/RBC matters language*. This type of language, in which treaty partners commit to cooperate on such matters as the environment, the fight against corruption, or labour conditions and standards are found in 35 treaties, or 1.7% of the sample.
- *Language establishing a relation between SD/RBC matters and ISDS*. This type of provision -- contained in 31 treaties -- links SD/RBC concerns with the IIA's ISDS mechanism. In most of

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22 This categorisation necessarily implies some degree of interpretation of the clauses. This interpretation is made only to reduce the complexity of the subject matter for the purpose of this study. As the following detailed presentation shows, the lines between these categories are sometimes uncertain and can lead to overlaps.

23 For this count, any given SD/RBC concern has been counted once per treaty only, even if it is approached in different functions. Multilateral IIAs have not been included in the count.

24 For detailed examples of treaty language for each of these categories, see Annex 2.

these cases, it provides that specific expertise be made available to the tribunal, through recourse to experts.[25] Two IIAs contain language establishing different kind of relations: one excludes claims based on obligations undertaken in accordance with the treaty's environmental and labour provisions from ISDS[26] and the other allows a party to a dispute to request annulment of the award if a member of the tribunal or an expert or witness was found to be corrupt.[27]

- *Language on maintaining or implementing internationally recognized standards*. Such language generally refers to standards that the treaty partners commit to implement with respect to the fight against corruption or the protection and implementation of labour conditions and standards. It is found in 28 IIAs, or 1.3% of the treaty sample. Examples of such language include the respect of certain internationally recognized labour standards (though core labour standards are not always expressed in the same way)[28] or criminal law requirements with respect to the fight against corruption[29]. Some treaty language on corruption is almost identical to the text of the *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*.
- *Language establishing commitments to act in the fight against corruption*. This kind of language, which expresses the treaty partners' commitments to take measures with respect to the fight against corruption, is contained in 16 treaties in the sample, or 0.8% of the treaties surveyed.
- *Language encouraging the respect of RBC standards*. With this language, treaty partners commit to encouraging enterprises to respect RBC standards; it is found in 9 treaties, or 0.4% of the sample. These commitments are either mentioned generically, most often in conjunction with a

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25 In 28 IIAs surveyed, recourse to experts is required for environmental issues. See, for instance, Article 42 of the Canada-Jordan BIT (2009) entitled "Expert Reports": "[w]ithout prejudice to the appointment of other kinds of experts where authorized by the applicable arbitration rules, a Tribunal, at the request of a disputing party or, unless the disputing parties disapprove, on its own initiative, may appoint one or more experts to report to it in writing on any factual issue concerning environmental, health, safety or other scientific matters raised by a disputing party in a proceeding, subject to such terms and conditions as the disputing parties may agree."

26 Articles VII(5) and VIII(4) of the Belgium/Luxembourg-Colombia BIT (2009): "[t]he dispute settlement mechanisms under articles XII and XIII of this Agreement shall not apply to any obligation undertaken in accordance with [articles VII on environment and VIII on labour]".

27 Article 25(c) of the Austria-Uzbekistan BIT (2000) entitled "Nullification": "(1) Either Party to the dispute may request the annulment of an award, in whole or in part, on one or more of the following grounds, that: […] (c) there was corruption on the part of a member of the tribunal or on the part of a person providing decisive expertise or evidence […]".

28 Note that core labour standards are not always formulated in identical ways (see Annex 2, subsection (vii)). See, also Article 18.1 of the Chile-United States FTA (2003) entitled "Statement of Shared Commitment": "1. The Parties reaffirm their obligations as members of the International Labor Organization (ILO) and their commitments under the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up (1998). Each Party shall strive to ensure that such labor principles and the internationally recognized labor rights set forth in Article 18.8 are recognized and protected by its domestic law. […]".

29 See, for instance, Article 21.6 of the Korea-United States FTA (2007) entitled "Anti-Corruption": "1. The Parties reaffirm their resolve to eliminate bribery and corruption in international trade and investment. 2. Each Party shall adopt or maintain the necessary legislative or other measures to establish that it is a criminal offense under its law, in matters affecting international trade or investment, for: (a) a public official of the Party or a person who performs public functions for the Party intentionally to solicit or accept, directly or indirectly, any article of monetary value or other benefit, such as a favor, promise, or advantage, for himself or for another person, in exchange for any act or omission in the performance of his public functions […]".

list of subject areas they should cover,[30] or reference is made specifically to the *OECD Guidelines for Multinational Enterprises*.[31]

24. Table 2 shows the frequency of these different approaches to SD/RBC language in IIAs.

Table 2. Frequency of occurrence of SD/RBC concerns in relation to their function in bilateral IIAs

(as a percentage of the total treaty sample)

	Any issue	Environment	Labour	Corruption	Human Rights
Any function	12.1%	10.5%	5.5%	1.4%	0.5%
Preamble language	7.4%	5.4%	4.6%	0.6%	0.5%
Reserving policy space	7.0%	7.0%	-	-	-
Not lowering standards	3.9%	3.7%	1.8%	-	-
Indirect expropriation – non-discriminatory environmental regulation do not constitute indirect expropriation	2.6%	2.6%	-	-	-
Commitment to cooperate on SD/RBC matters	1.7%	1.1%	1.2%	0.4%	-
ISDS relation to SD/RBC issues	1.5%	1.3%	0.1%	0.0%	-
Commitment to internationally recognized standards	1.3%	-	1.2%	0.5%	-
Commitment to act in the fight against corruption	0.8%	-	-	0.8%	-
Reference to RBC standards (e.g. the OECD Guidelines)	0.4%	0.4%	0.4%	0.3%	0.3%

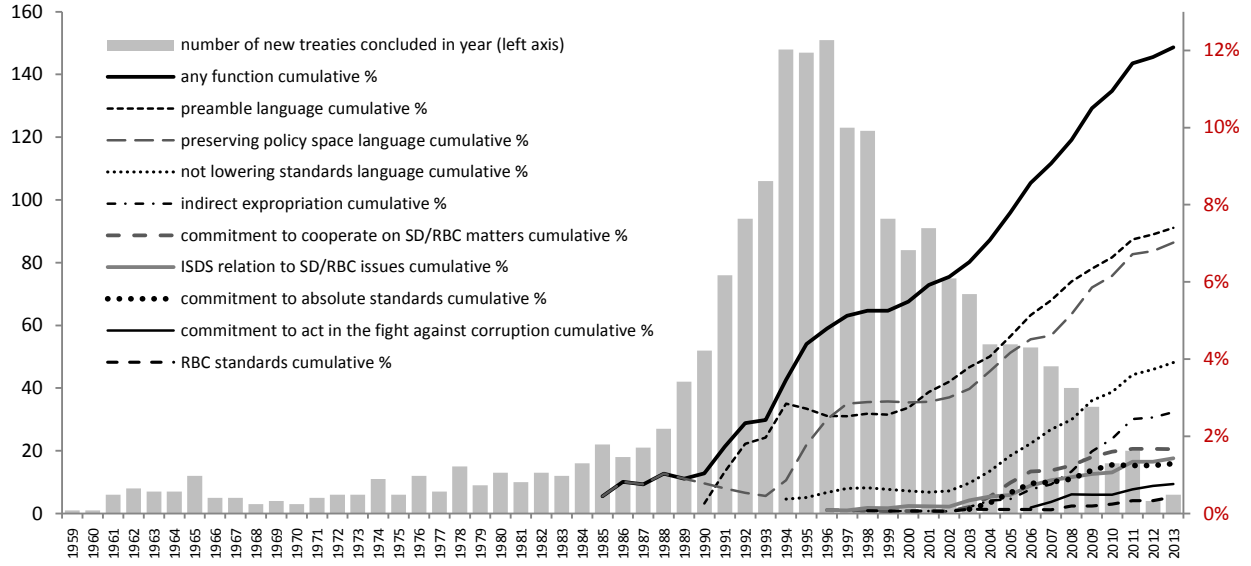
25. The frequency of the nine categories is variable and the evolution of their inclusion in IIAs has also not been homogenous in time. Figure 4 shows how the frequencies of provisions with specific functions in the overall treaty sample at the end of a given year have evolved over time. It indicates that references to SD/RBC concerns in preambles and language that seeks to preserve policy space are the functions that first appeared in IIAs and the most common categories of language. Commitments to not lower standards, which were first introduced in a treaty in 1994,[32] remain rare. Other categories of SD/RBC language (such as commitments to act in the fight against corruption or references to RBC standards) developed later and their frequency in the overall sample remains low.

30 See, for instance, Article 16 of the Canada-Benin BIT (2013) entitled "Corporate Social Responsibility": "[e]ach Contracting Party should encourage enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate internationally recognized standards of corporate social responsibility in their practices and internal policies, such as statements of principle that have been endorsed or are supported by the Contracting Parties. These principles address issues such as labour, the environment, human rights, community relations and anti-corruption".

31 See, for instance, the preamble of the Austria-Kosovo BIT (2010): "[t]he GOVERNMENT OF THE REPUBLIC OF AUSTRIA and the GOVERNMENT OF THE REPUBLIC OF KOSOVO, […] EXPRESSING their belief that responsible corporate behaviour, as incorporated in the OECD Guidelines for Multinational Enterprises, can contribute to mutual confidence between enterprises and host countries; […] HAVE AGREED AS FOLLOWS: […]".

32 See, for instance, Article 15.14(2) of the Mexico-Bolivia FTA (1994).

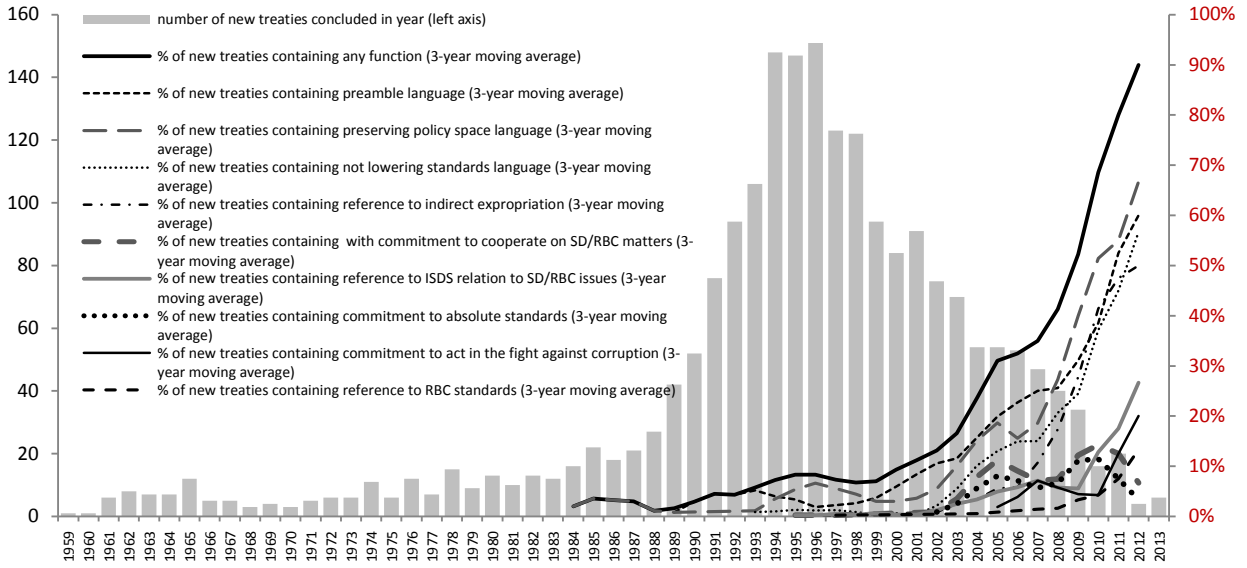
Figure 4. Evolution of references to SD/RBC concerns in the treaty sample by the reference's function



26. Figure 5 shows the dynamics of the introduction of SD/RBC language having specific functions in treaties signed in individual years. Differentiated by function, it illustrates the frequency of the inclusion of such references in IIAs concluded in a given year.[33] The graph indicates a clear upward trend in recent years in the inclusion of provisions aimed at preserving policy space and discouraging relaxation of standards, and, at a much lower frequency, of provisions stating the treaty partners' commitments to act in the fight against corruption. The frequency of other categories of SD/RBC treaty language has essentially stagnated in the IIAs concluded in the last decade.

[33] In order to improve readability, the graph shows three year moving averages.

Figure 5. Evolution of SD/RBC references in IIAs concluded in a given year differentiated by the reference's function (three year moving average)



27. Annex 1 shows which treaties in the sample contain references that fall in these categories, listing only bilateral IIAs that do include SD/RBC language. It illustrates, for instance that, while the number of SD/RBC concerns addressed in the treaty sample is limited, the approaches of both individual treaties and countries to this matter varies widely. Some IIAs contain only preamble language referring to SD/RBC issues (86 of the treaties shown in Annex 1 contain only preamble language). Others contain only one kind of language (47 treaties include language falling only into the preserving policy space category). Still others treaties contain extensive language covering many functions: 19 of the treaties shown in Annex 1 include language covering 5 or more of the policy purposes.

3. Investment treaty cases and SD/RBC – cross fertilisation or conflict?

"*One of the most* […] *urgent problems in international governance is how the different branches and norms of international law interact, and what to do in the event of conflict* […] *The main challenge is to marry trade and non-trade rules, or economic and non-economic objectives, at the international level.*"

Joost Pauwelyn, Conflict of Norms in Public International Law[34]

3.A. The general problématique – integrating bodies of law and resolving conflicts

28. Investment treaty law coexists with a growing number of other bodies of international law, including many that are of particular relevance for SD/RBC (for example, international instruments in the areas of environmental protection, labour conditions and standards, the fight against corruption and human rights). These different fields of international law are continually evolving and expanding and interacting

34 Joost Pauwelyn, *Conflict of Norms in Public International Law – How WTO Law Relates to other Rules of International Law,* Cambridge University Press, 2009, Frontmatter.

with one another. At the same time, the disjoint nature of the various bodies of international law and the diverse array of dispute settlement mechanisms associated with them is also increasing.

29. This profusion of rules and adjudicative bodies tends to expand the potential for conflicts. Such concerns are heightened by the fact that, while international law is becoming increasingly 'dense' (that is, the number of treaties covering various issue areas is expanding rapidly), it has not developed an established hierarchy of norms or adjudicative bodies. Unlike advanced domestic systems, which possess well- established judicial organizations and hierarchies of norms that help to resolve conflicts among rules and competing interpretations, "international law does not presently provide a sufficient set of rules for resolving such conflicts when they do arise". [35]

30. The interactions between the various bodies of international law – that is how (if at all) the different fields are coordinated in the context of their interpretation and application – are currently being explored in a variety of institutional and academic settings: in the context of international cooperation (in the UN system, at the OECD or in various other cooperation mechanisms set up by international agreements) but also by international adjudicative bodies (such as international courts or arbitral tribunals) and legal scholars.

31. The starting point of most of these analyses is the Vienna Convention on the Law of Treaties (henceforth, referred to as VCLT) and, in particular, its Section 3, which sets forth the rules of interpretation applicable to all treaties, including IIAs.

Box. Vienna Convention on the Law of Treaties – rules for interpretation

SECTION 3. INTERPRETATION OF TREATIES

Article 31: General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
   (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
   (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. **There shall be taken into account, together with the context**:
   (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
   (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
   (c) **any relevant rules of international law applicable in the relations between the parties.**
4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32: Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
   (a) leaves the meaning ambiguous or obscure; or
   (b) leads to a result which is manifestly absurd or unreasonable.

[…]

[35] William Burke-White, "International Legal Pluralism", *Michigan Journal of International Law*, Vol. 25, 2004, pp. 963-979, p. 968 referring to Joost Pauwelyn, "Bridging Framentation and Unity: International Law as a Universe of Inter-Connected Islands", *Michigan Journal of International Law*, Vol. 25, 2004, pp.903-929.

Vienna Convention on the Law of Treaties[36]

32. The VCLT – and especially its article 31(3)(c)[37] – states that all rules of international law where relevant and applicable in the relation between the parties shall be taken into account, together with the context, when interpreting a treaty.

33. The conclusions of the International Law Commission's Study Group on the Fragmentation of International Law indicate that this article, which embodies the principle of "systemic integration", "deals with the case where material sources external to the treaty are relevant in its interpretation" and that "[t]hese may include other treaties, customary rules or general principles of law". [38] The Study Group on the Fragmentation of International Law was constituted under the aegis of the International Law Commission to study the fragmentation of international law. Its conclusions on the "difficulties arising from the diversification and expansion of international law"[39], which are aimed at fostering coordination between different fields of international law, provide practical advice for determining the relationships between rules and principles belonging to various bodies of international law and, hence, resolving potential conflicts.

34. Several scholars have also considered the principle of "systemic integration". With respect to "integration" of international law, McLachlan maintains that "reference to other rules of international law in the course of interpreting a treaty is an everyday, often unconscious, part of the interpretation process."[40] He is of the view that the "systemic integration" of different bodies of international law is an ongoing, gradual process. In a similar vein, Philippe Sands refers to the growing tendency towards "cross-fertilisation" across bodies of international law.[41] Under this view adjudicative bodies in international law increasingly seek to apply international law (including investment treaty law) in its general context – that is, interpreting treaties while also integrating, where relevant and applicable, other components of international law (both customary and conventional) and of domestic law.

35. According to these perspectives, treaty interpreters should look for guidance in other rules and principles of international law for all the questions that are not expressly resolved by the treaty interpreted. This would seem to imply that investment arbitration tribunals should interpret and apply IIAs in their general context, that is taking into customary international law, general principles of law and consideration rules and principles from other fields of international law, including bodies of law relating to SD/RBC, where relevant and applicable.

36. Under this view, potential influences between investment treaty law and other fields of international law relevant for SD/RBC law run in both directions. Referring to other bodies of

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36 Emphasis added.

37 In bold in the Box.

38 United Nations, International Law Commission, *Conclusions of the Work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*, 2006, para. 18.

39 United Nations, International Law Commission, *Conclusions of the Work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*, 2006.

40 Campbell McLachlan, "The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention", *International and Comparative Law Quarterly*, Vol. 54, Issue 2, April 2005, p. 280.

41 Philippe Sands, "Treaty, Custom and the Cross-fertilisation of International Law", *Yale Human Rights and Development Law Journal*, Vol. I, November 1999, pp. 85-106.

international law relevant for SD/RBC could, for instance, be relevant for interpreting States' compliance with their investment treaty obligations in some cases. Conversely, investment treaty law could also provide guidance on how SD/RBC policies should be designed and implemented in order to comply with the States' investment treaty obligations.

37. Sections 3.B. and 3.C. aim to shed preliminary empirical light on these interactions and, more specifically, on whether issues and international agreements of particular relevance for SD/RBC are referred to in investment arbitration cases:

- Section 3.B looks at whether arbitration panels refer to broader issues than investment protection;
- Section 3.C. examines the related question of whether arbitral tribunals mention other international agreements in the areas of environmental protection, labour conditions and standards, anti-corruption and human rights.

3. B. Reference to SD/RBC issues in investment arbitration cases

38. One important interaction of investment protection and SD/RBC occurs when the two sets of issues intersect in the context of ISDS. The question raised in this context is whether arbitration panels confine their reasoning to the "four corners of the treaty"[42] – that is, taking into account only the commitments explicitly undertaken by the State parties in the IIA itself – or do they also refer to broader issues (such as domestic and international law relevant for SD/RBC)?

39. This section reports on the results of a survey of investment arbitration cases that mention SD/RBC issues. More specifically, a sample of 1113 documents contained in a subscription database -- the "Investor State Law Guide" -- and issued from treaty-based investment cases[43] was searched for the following SD/RBC-sensitive key words: "environment", "corruption", "bribery", "labour conditions", "labour standards", "labour law"[44], and "human rights".

40. The purpose of this key word search is to generate preliminary statistical information on what might be termed the 'cross fertilisation' or 'integration' principles described above. The results suggest that arbitrators might, in some cases, refer to SD/RBC issues alongside their consideration of a State's compliance with the IIAs' commitments on investment protection.

41. Specifically, 287 of the 1113 decisions surveyed mention at least one of these issues at least once – that is, 26% of the documents deal in some way with these SD/RBC-sensitive issues. The breakdown of references is as follows:

- The term "environment" occurs in 165 decisions;
- The term "human rights" is found in 131 documents;

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42 The term «four corners of the treaty » can be found in Campbell McLachlan, "The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention", *International and Comparative Law Quarterly*, Vol. 54, Issue 2, April 2005, p. 280.

43 The documents examined in the survey include decisions on petition for intervention as amicus curiae, decisions on jurisdiction, awards on merits, and separate opinions rendered by arbitrator(s), as well as decisions of annulment committees. For convenience, they are referred to hereafter as "decisions" or "documents".

44 Searches were also conducted on the North American spelling: "labor" conditions, standards and law.

- "Corruption" is referred to in 81 decisions, and "bribery" in 29 documents;

- References to "labour conditions", "labour standards" or "labour law" can be found in 2 decisions. A broader key word search on the term "labo(u)r" produced 131 results.[45]

42. In summary, the survey of treaty-based investment arbitration cases shows that 26% of the decisions rendered in this framework refer to issues other than the investment protection commitments contained within the " four corners of the treaty". At times, these references involve lengthy discussion of issues such as corruption, protection of the environment or of human rights. However, the present survey is merely statistical and does not explore arbitrators' reasoning. As such, it does not permit inferences as to whether the treatment of these issues involves persuasive legal reasoning and whether the 74% of cases that did not deal with such issues should have. It nevertheless provides a starting point to affirm that investment arbitration cases sometimes involve broader considerations than investment protection.

3. C. References to international agreements relevant for SD/RBC in investment arbitration cases

43. The preceding section shows that some arbitration panels refer to issues of particular interest to SD/RBC when adjudicating treaty-based investor-state disputes. This section explores a more specific, but related question: whether arbitration panels refer to international agreements relevant for SD/RBC (e.g. agreements dealing with environmental protection, labour conditions and standards, anti-corruption and human rights) when deciding arbitration cases.

44. The present section explores this question empirically. The same sample of 1113 documents contained in the "Investor State Law Guide" database was searched for references to major multilateral environmental agreements, anti-corruption conventions, human rights agreements and ILO instruments.[46] The survey limits itself to quantifying the frequency of such references in the sample of documents issued from treaty-based investment arbitration cases, without examining the legal reasoning underpinning these references.

45. The survey findings support the view that there is some interaction between ISDS and international agreements relevant for SD/RBC. A total of 28 agreements were cited in the sample of 1113 documents. Interestingly, none of the decisions surveyed refer to ILO instruments on labour conditions and standards.[47]

46. Table 3 provides the list of these international agreements and the number of decisions in which each is referenced. Annex 3 provides detailed quotes of these references.

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[45] A summary examination of the 20 first results produced by the general search on the key term "labo(u)r" shows that the cases referring to this term involve issues such as non-payment of workers in the context of bankruptcy and labour market flexibility or labour policy in the context of government responses to economic crises.

[46] A full list of the international agreements relevant for SD/RBC that were searched for is provided in Annex 4.

[47] The Indigenous and Tribal Peoples Convention No. 169 (1989) adopted under the aegis of the International Labour Organisation is cited but is categorised, for the purposes of this survey, as a human rights instrument.

Table 3. Environmental, Human Rights and Anti-corruption Agreements cited in investment arbitration cases

Name of International Agreement	No. of documents citing the agreement at least once[48]
International Environmental Agreements	
Aarhus Protocol on Persistent Organic Pollutants to the UNECE Convention on Long-Range Trans-boundary Air Pollution of 1979 (1998)	**1**
Basel Convention on the Control of Trans-boundary Movements of Hazardous Wastes and their Disposal (1989)	**2**
Espoo Convention on Environmental Impact Assessment in a Trans-boundary Context (1991)	**1**
North American Agreement on Environmental Cooperation (1993)	**2**
OSPAR Convention - Convention for the Protection of the Marine Environment of the North-East Atlantic (1992)	**4**
Resolution adopted by the General Assembly: 1803 (XVII). Permanent sovereignty over natural resources (1962)	**2**
Rio Declaration on Environment and Development (1992)	**3**
Stockholm Convention on Persistent Organic Pollutants (2001)	**1**
Stockholm Declaration on the Human Environment (1972)	**1**
UNESCO Convention concerning the Protection of the World Cultural Property and Natural Heritage (1972)	**1**
United Nations Convention on the Law of the Sea (1982)	**3**
United Nations Framework Convention on Climate Change (1992)	**1**
United States - Mexico Treaty Relating to the Utilization of Water (1944)	**1**
International Human Rights Agreements	
Charter of Fundamental Rights of the European Union (2000)	**1**
Convention on the Prevention and Punishment of the Crime of Genocide (1948)	**7**
European Convention on Human Rights (1950)	**27**
Indigenous and Tribal Peoples Convention No. 169 (1989) different	**1**
Inter-American Convention on Human Rights (1969)	**2**
International Convention on the Elimination of All Forms of Racial Discrimination (1965)	**8**
International Covenant on Civil and Political Rights (1966)	**5**
International Covenant on Economic, Social and Cultural Rights (1966)	**1**
Resolution adopted by the General Assembly: 61/295 United Nations Declaration on the Rights of Indigenous Peoples (2007)	**1**
Universal Declaration of Human Rights (1948)	**3**
International Anti-Corruption Agreements	
African Union Convention on Preventing and Combating Corruption (2003)	**1**
Council of Europe Civil and Criminal Law Conventions on Corruption (1999)	**1**
OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997)	**3**
United Nations Convention Against Corruption (2003)	**1**
Miscellaneous International Agreements	
Jay Treaty (1794)	**2**

[48] The documents include decisions on petition for intervention as amicus curiae, decisions on jurisdiction, awards on merits, and separate opinions rendered by arbitrator(s), as well as decisions of annulment committees. If an agreement is cited several times in the same case but in different dispute documents, the total number of different documents is counted. If several references to the same international instrument appear in the same dispute document, it is counted only once.

4. Conclusions and caveats

47. The present paper provides evidence that investment treaty law does interact with other bodies of international law of particular relevance to SD/RBC. The vast majority of recently concluded IIAs refer to at least one of the four SD/RBC issues considered in the survey (environmental protection, labour conditions and standards, anti-corruption and human rights). In addition, some treaty-based investment arbitration cases also refer to these four issues, as well as to international agreements of relevance for SD/RBC.

48. These findings, however, are subject to certain caveats and point to outstanding challenges for investment treaty lawmakers:

- ***Updating the treaty stock.*** Although nearly all recently concluded IIAs contain various types of language referring to SD/RBC issues, these treaties are a distinct minority in the entire sample. Indeed, new thinking and innovations in investment treaty commitments can only with difficulty be reflected across more than 2000 IIAs of all ages as updating treaties can be costly and time consuming. The OECD-hosted "Freedom of Investment" Roundtable examines the options available for governments wishing to adapt the content of their IIAs to changing needs and circumstances, while also preserving the benefits of stability and predictability.

- ***Making sure that ISDS mechanisms and broader treaty provisions are well designed***. The substantive and procedural provisions contained in IIAs form a single and inseparable whole. The ISDS mechanisms set up by the treaties' procedural provisions are the channel through which States' (often broadly framed) substantive investment treaty commitments are enforced. Yet, earlier OECD treaty surveys have shown that ISDS mechanisms tend to be "lightly regulated" in the majority of IIAs and that silence on most procedural questions is the dominant treaty practice for dispute settlement[49]. Other OECD studies also indicate that advanced systems of national law handle similar legal questions in ways that are very different from the way they are generally handled under investment treaty law[50]. Governments will want to be mindful of the need to craft IIAs that not only advance their objectives in relation to SD/RBC but that also include ISDS provisions aimed at ensuring that such concerns are taken into account by those in charge of interpreting and applying the treaties.

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49 See David Gaukrodger and Kathryn Gordon "Investor State Dispute Settlement: A Scoping Paper for the Investment Policy Community", OECD Working Paper on International Investment, No. 2012/3, OECD Publishing, p. 64.

50 See, for example, David Gaukrodger, "Investment Treaties as Corporate Law: Shareholder Claims and Issues of Consistency – A Preliminary Framework for Analysis", OECD Working Paper on International Investment, No. 2013/3, OECD Publishing, pp 15-20.

ANNEX 1. INTERNATIONAL INVESTMENT AGREEMENTS WITH SD/RBC LANGUAGE – DETAILED OVERVIEW

This annex lists the IIAs that contain SD/RBC language. The list includes only treaties that contain at least one reference to SD/RBC concerns. All treaties that a participant in the Freedom of Investment Roundtables has concluded are listed; that leads to duplicate mentioning of a certain number of treaties in the table. Treaties are sorted by alphabetical order of the treaty partner, and, in second order, by the year of signature. Shading of rows groups treaties of the same country are meant to enhance readability.

TREATY (YEAR OF SIGNATURE)	REFERENCE TO				FUNCTION OF THE REFERENCE								
	Environment	Labour	Corruption	Human Rights	Preamble language	Preserving policy space	Not lowering standards for the purpose of attracting investment	Commitment to act in the fight against corruption	Commitment to internationally recognized standards	Commitment to cooperate on SD/RBC matters	Non-discriminatory environmental regulation does not constitute indirect expropriation	ISDS relation to SD/RBC issues	Reference to RBC standards (e.g. the OECD Guidelines)
Argentina-New Zealand BIT (1999)	•					•							
Argentina-United States BIT (1991)		•			•								
Australia-Chile FTA (2008)	•				•	•					•		
Australia-New Zealand (ANZCERTA Investment Protocol) (2011)	•				•	•					•		
Australia-Singapore FTA (2004)	•					•							
Australia-Thailand FTA (2004)	•					•							
Australia-United States FTA (2004)	•	•			•	•	•		•	•	•		
Austria-Armenia BIT (2001)		•			•								
Austria-Azerbaijan BIT (2000)		•			•								
Austria-Bangladesh BIT (2000)		•			•								
Austria-Belize BIT (2001)		•			•								
Austria-Bosnia and Herzegovina BIT (2000)		•			•								
Austria-Cuba BIT (2000)		•			•								
Austria-FYROM BIT (2001)		•			•								
Austria-Georgia BIT (2001)		•			•								
Austria-Guatemala BIT (2006)		•			•								
Austria-Jordan BIT (2001)		•			•								
Austria-Kazakhstan BIT (2010)	•	•	•	•	•		•						
Austria-Kosovo BIT (2010)	•	•	•	•	•	•	•				•		
Austria-Kuwait BIT (1996)	•					•							
Austria-Malta BIT (2002)		•		•	•								
Austria-Mexico BIT (1998)													•
Austria-Namibia BIT (2003)		•			•								
Austria-Slovenia BIT (2001)		•			•								
Austria-Tajikistan BIT (2011)	•	•	•	•	•	•	•				•		•
Austria-Uzbekistan BIT (2000)			•									•	

TREATY (YEAR OF SIGNATURE)	REFERENCE TO				FUNCTION OF THE REFERENCE								
	Environment	Labour	Corruption	Human Rights	Preamble language	Preserving policy space	Not lowering standards for the purpose of attracting investment	Commitment to act in the fight against corruption	Commitment to internationally recognized standards	Commitment to cooperate on SD/RBC matters	Non-discriminatory environmental regulation does not constitute indirect expropriation	ISDS relation to SD/RBC issues	Reference to RBC standards (e.g. the OECD Guidelines)
Austria-Yemen BIT (2003)		•			•								
Belgium/Luxembourg-Barbados BIT (2009)	•	•				•	•		•	•			
Belgium/Luxembourg-Colombia BIT (2009)	•	•				•	•		•	•	•	•	
Belgium/Luxembourg-Congo (Democratic Republic) BIT (2005)	•					•	•			•			
Belgium/Luxembourg-Ethiopia BIT (2006)	•	•			•	•	•		•	•			
Belgium/Luxembourg-Guatemala BIT (2005)	•					•	•			•			
Belgium/Luxembourg-Korea BIT (2006)	•				•								
Belgium/Luxembourg-Kosovo BIT (2010)	•	•				•	•		•	•	•		
Belgium/Luxembourg-Libya BIT (2004)	•					•	•			•			
Belgium/Luxembourg-Madagascar BIT (2005)	•					•							
Belgium/Luxembourg-Mauritius BIT (2005)	•	•			•	•	•		•	•			
Belgium/Luxembourg-Nicaragua BIT (2005)	•	•			•	•	•		•	•			
Belgium/Luxembourg-Panama BIT (2009)	•	•				•	•		•				
Belgium/Luxembourg-Peru BIT (2005)	•	•			•	•	•		•	•			
Belgium/Luxembourg-Serbia BIT (2004)	•	•			•	•	•		•	•			
Belgium/Luxembourg-Sudan BIT (2005)	•	•			•	•	•		•	•			
Belgium/Luxembourg-Tajikistan BIT (2009)	•	•				•	•		•	•			
Belgium/Luxembourg-Togo BIT (2009)	•	•				•	•		•	•			
Belgium/Luxembourg-United Arab Emirates BIT (2004)	•	•				•	•			•			
Bulgaria-United States BIT (1992)		•			•								
Canada-Armenia BIT (1997)	•					•							
Canada-Barbados BIT (1996)	•					•							
Canada-Benin BIT (2013)	•	•	•	•	•	•	•				•	•	•
Canada-Chile FTA (1996)	•				•	•	•			•		•	
Canada-China BIT (2012)	•					•	•				•		
Canada-Colombia FTA (2008)	•	•	•	•	•	•	•		•	•		•	•
Canada-Costa Rica BIT (1998)	•					•							
Canada-Croatia BIT (1997)	•					•							
Canada-Czech Republic BIT (2009)	•					•	•				•		
Canada-Ecuador BIT (1996)	•					•							
Canada-Egypt BIT (1996)	•					•							
Canada-El Salvador BIT (1999)	•					•							
Canada-Jordan BIT (2009)	•					•	•				•	•	
Canada-Kuwait BIT (2011)	•					•	•				•	•	
Canada-Latvia BIT (1995)	•					•							
Canada-Latvia BIT (2009)	•					•	•				•		
Canada-Lebanon BIT (1997)	•					•							
Canada-Panama BIT (1996)	•					•							
Canada-Panama FTA (2010)	•	•	•	•	•	•	•		•	•	•	•	•
Canada-Peru BIT (2006)	•					•	•				•	•	
Canada-Peru FTA (2008)	•	•	•	•	•	•	•	•	•	•			•
Canada-Philippines BIT (1995)	•					•							

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Canada-Romania BIT (1996)	•					•	•				•		
Canada-Romania BIT (2009)	•					•	•				•		
Canada-Slovakia BIT (2010)	•					•	•				•		
Canada-South Africa BIT (1995)	•					•							
Canada-Tanzania BIT (2013)	•					•	•				•		
Canada-Thailand BIT (1997)	•					•							
Canada-Trinidad and Tobago BIT (1995)	•					•							
Canada-Ukraine BIT (1994)	•					•							
Canada-Uruguay BIT (1997)	•					•	•						
Canada-Venezuela BIT (1996)	•					•							
Chile-Australia FTA (2008)	•				•	•					•		
Chile-Canada FTA (1996)	•				•	•	•			•		•	
Chile-Colombia FTA (2006)	•	•	•		•	•	•	•	•	•		•	
Chile-Japan EPA (2007)	•				•		•					•	
Chile-Korea FTA (2003)	•				•	•	•					•	
Chile-Mexico FTA (1998)	•	•			•	•	•					•	
Chile-Peru FTA (2006)	•				•	•				•	•	•	
Chile-United States FTA (2003)	•	•			•	•	•		•	•	•	•	
China-Canada BIT (2012)	•					•	•				•		
China-Guyana BIT (2003)	•				•								
China-New Zealand BIT (1988)	•					•							
China-New Zealand FTA (2008)	•	•			•	•				•	•		
China-Peru FTA (2009)	•	•			•					•			
China-Singapore BIT (1985)	•					•							
China-Sri Lanka BIT (1986)	•					•							
Colombia-Belgium/Luxembourg BIT (2009)	•	•				•	•		•	•	•	•	
Colombia-Canada FTA (2008)	•	•	•	•	•	•	•		•	•		•	•
Colombia-Chile FTA (2006)	•	•	•		•	•	•	•	•	•		•	
Colombia-India BIT (2009)	•					•					•		
Colombia-Japan BIT (2011)	•	•	•		•	•	•	•				•	
Colombia-Korea FTA (2013)	•		•		•	•			•		•	•	
Colombia-Mexico FTA (1994)	•	•			•		•						
Colombia-Peru BIT (2007)	•					•	•				•	•	
Colombia-United Kingdom BIT (2010)	•					•					•		
Costa Rica-Canada BIT (1998)	•					•							
Costa Rica-Mexico FTA (1994)	•	•			•	•	•						
Costa Rica-Peru FTA (2011)	•					•	•				•	•	
Costa Rica-Singapore FTA (2010)	•	•			•	•			•	•	•		
Czech Republic-Azerbaijan BIT (2011)	•				•								
Czech Republic-Canada BIT (2009)	•					•	•				•		
Czech Republic-India BIT (1996)	•					•							
Czech Republic-Mauritius BIT (1999)	•					•							

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Czech Republic-Singapore BIT (1995)	•					•							
Czech Republic-United States BIT (1991)		•			•								
Egypt-Canada BIT (1996)	•					•							
Egypt-Switzerland BIT (2010)	•				•								
Estonia-Azerbaijan BIT (2010)	•				•								
Estonia-United-States BIT (1994)		•			•								
Finland-Algeria BIT (2005)	•	•			•								
Finland-Armenia BIT (2004)	•				•								
Finland-Belarus BIT (2006)	•	•			•								
Finland-Bosnia and Herzegovina BIT (2000)	•				•								
Finland-El Salvador BIT (2002)	•				•	•							
Finland-Ethiopia BIT (2006)	•	•			•								
Finland-FYROM BIT (2001)	•				•								
Finland-Georgia BIT (2006)	•				•								
Finland-Guatemala BIT (2005)	•	•			•								
Finland-Jordan BIT (2006)	•				•								
Finland-Kazakhstan BIT (2007)	•				•								
Finland-Kyrgyzstan BIT (2003)	•	•			•								
Finland-Mauritius BIT (2007)	•				•								
Finland-Mongolia BIT (2007)	•				•								
Finland-Montenegro BIT (2008)	•	•			•								
Finland-Mozambique BIT (2004)	•				•								
Finland-Namibia BIT (2002)	•				•	•							
Finland-Nepal BIT (2009)	•				•								
Finland-Nicaragua BIT (2003)	•	•			•								
Finland-Nigeria BIT (2005)	•	•			•								
Finland-Panama BIT (2009)	•	•			•	•							
Finland-Serbia BIT (2005)	•	•			•								
Finland-Tanzania BIT (2001)	•				•								
Finland-Ukraine BIT (2004)	•				•								
Finland-Vietnam BIT (2008)	•	•			•								
Finland-Zambia BIT (2005)	•	•			•	•							
France-India BIT (1997)	•					•							
Germany-India BIT (1995)	•					•							
Germany-Trinidad and Tobago BIT (2006)	•				•								
Hungary-Russian Federation BIT (1995)	•					•							
Iceland-India BIT (2007)	•					•					•		
India-Armenia BIT (2003)	•					•					•		
India-Bahrain BIT (2004)	•					•					•		
India-Bosnia and Herzegovina BIT (2006)	•					•							
India-Brunei Darussalam BIT (2008)	•					•					•		
India-Colombia BIT (2009)	•					•					•		

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India-Czech Republic BIT (1996)	•					•							
India-France BIT (1997)	•					•							
India-Germany BIT (1995)	•					•							
India-Iceland BIT (2007)	•					•					•		
India-Italy BIT (1995)	•					•							
India-Japan EPA (2011)	•		•		•		•	•		•			
India-Jordan BIT (2006)	•					•					•		
India-Korea BIT (1996)	•					•							
India-Korea CEPA (2009)	•				•	•	•				•		
India-Kuwait BIT (2001)	•					•							
India-Latvia BIT (2010)	•					•					•		
India-Lithuania BIT (2011)	•					•					•		
India-Mauritius BIT (1998)	•					•							
India-Mozambique BIT (2009)	•					•					•		
India-Nepal BIT (2011)	•					•					•		
India-Senegal BIT (2008)	•					•					•		
India-Slovenia BIT (2011)	•					•					•		
India-Syria BIT (2008)	•					•					•		
Indonesia-Japan EPA (2007)	•		•				•	•					
Indonesia-Mauritius BIT (1997)	•					•							
Italy-India BIT (1995)	•					•							
Japan-Brunei Darussalam EPA (2007)	•				•		•						
Japan-Cambodia BIT (2007)	•		•		•		•	•					
Japan-Chile EPA (2007)	•				•		•					•	
Japan-Colombia BIT (2011)	•	•	•		•	•	•	•				•	
Japan-India EPA (2011)	•		•		•		•	•		•			
Japan-Indonesia EPA (2007)	•		•				•	•					
Japan-Iraq BIT (2012)	•	•	•		•		•	•					
Japan-Korea BIT (2002)	•				•	•	•						
Japan-Kuwait BIT (2012)	•	•	•		•	•	•	•					
Japan-Lao PDR BIT (2008)	•		•		•	•	•	•					
Japan-Malaysia EPA (2005)	•						•						
Japan-Mexico EPA (2004)	•					•	•					•	
Japan-Mozambique BIT (2013)	•	•	•		•	•	•	•					
Japan-Papua New Guinea BIT (2011)	•	•	•		•		•	•					
Japan-Peru BIT (2008)	•	•	•		•	•	•	•					
Japan-Philippines EPA (2006)	•	•	•			•	•	•	•	•			
Japan-Saudi Arabia BIT (2013)	•				•		•						
Japan-Singapore EPA (2002)	•					•							
Japan-Switzerland EPA (2009)	•	•		•	•		•						
Japan-Thailand EPA (2007)	•		•				•	•					
Japan-Uzbekistan BIT (2008)	•	•	•		•	•	•	•					

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Japan-Vietnam BIT (2003)	•				•	•	•						
Jordan-Austria BIT (2001)		•			•								
Jordan-Canada BIT (2009)	•					•	•				•	•	
Jordan-Finland BIT (2006)	•				•								
Jordan-India BIT (2006)	•					•					•		
Jordan-Kuwait BIT (2001)	•					•							
Jordan-Singapore BIT (2004)	•					•					•		
Jordan-United States BIT (1997)	•	•			•								
Korea-Belgium/Luxembourg BIT (2006)	•				•								
Korea-Chile FTA (2003)	•				•	•	•					•	
Korea-Colombia FTA (2013)	•		•		•	•			•		•	•	
Korea-India BIT (1996)	•					•							
Korea-India CEPA (2009)	•				•	•	•				•		
Korea-Japan BIT (2002)	•				•	•	•						
Korea-Peru FTA (2011)	•	•	•	•	•	•	•			•	•		
Korea-Rwanda BIT (2009)	•	•			•	•					•		
Korea-Singapore FTA (2005)	•					•							
Korea-Trinidad and Tobago BIT (2002)	•				•								
Korea-United States FTA (2007)	•	•	•		•	•	•		•	•	•	•	
Korea-Uruguay BIT (2009)	•	•			•	•					•		
Latvia-Canada BIT (1995)	•					•							
Latvia-Canada BIT (2009)	•					•	•				•		
Latvia-India BIT (2010)	•					•					•		
Lithuania-India BIT (2011)	•					•					•		
Lithuania-United States BIT (1998)		•			•								
Malaysia-Japan EPA (2005)	•						•						
Malaysia-New Zealand FTA (2009)	•	•			•	•					•		
Mexico-Austria BIT (1998)													•
Mexico-Bolivia FTA (1994)	•	•			•	•	•						
Mexico-Chile FTA (1998)	•	•			•	•	•					•	
Mexico-Colombia FTA (1994)	•	•			•		•						
Mexico-Costa Rica FTA (1994)	•	•			•	•	•						
Mexico-Cuba BIT (2001)	•					•							
Mexico-Japan EPA (2004)	•					•	•					•	
Mexico-Nicaragua FTA (1997)	•	•			•	•	•						
Mexico-Peru FTA (2011)	•					•	•				•	•	
Mexico-Switzerland BIT (1995)	•						•						
Mexico-Trinidad and Tobago BIT (2006)	•						•						
Mexico-United Kingdom BIT (2006)	•											•	
Mexico-Uruguay FTA (2003)	•					•							
Morocco-United States FTA (2004)	•	•	•		•	•	•		•	•		•	
Netherlands-Burundi BIT (2007)	•				•								

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Netherlands-Dominican Republic BIT (2006)	•				•								
Netherlands-Mozambique BIT (2001)	•	•			•								
Netherlands-Namibia BIT (2002)	•	•			•								
Netherlands-Oman BIT (2009)	•	•			•								
Netherlands-Suriname BIT (2005)	•				•								
Netherlands-United Arab Emirates BIT (2013)	•					•							•
New Zealand-Argentina BIT (1999)	•					•							
New Zealand-Australia (ANZCERTA Investment Protocol) (2011)	•				•	•					•		
New Zealand-China BIT (1988)	•					•							
New Zealand-China FTA (2008)	•	•			•	•				•	•		
New Zealand-Hong Kong, China BIT (1995)	•					•							
New Zealand-Malaysia FTA (2009)	•	•			•	•					•		
New Zealand-Singapore CEPA (2000)	•					•							
New Zealand-Thailand CEPA (2005)	•	•			•	•							
Peru-Belgium/Luxembourg BIT (2005)	•	•			•	•	•		•	•			
Peru-Canada BIT (2006)	•					•	•				•	•	
Peru-Canada FTA (2008)	•	•	•	•	•	•	•	•	•	•			•
Peru-Chile FTA (2006)	•				•	•				•	•	•	
Peru-China FTA (2009)	•	•			•					•			
Peru-Colombia BIT (2007)	•					•	•				•	•	
Peru-Costa Rica FTA (2011)	•					•	•				•	•	
Peru-Guatemala FTA (2011)	•	•			•	•	•				•	•	
Peru-Japan BIT (2008)	•	•	•		•	•	•	•					
Peru-Korea FTA (2011)	•	•	•	•	•	•	•			•	•		
Peru-Mexico FTA (2011)	•					•	•				•	•	
Peru-Panama FTA (2011)	•	•			•	•	•				•	•	
Peru-Singapore FTA (2008)	•					•					•		
Peru-United States FTA (2006)	•	•	•		•	•	•	•	•	•	•		
Poland-United States BIT (1990)		•			•								
Romania-Canada BIT (1996)	•					•	•				•		
Romania-Canada BIT (2009)	•					•	•				•		
Romania-Mauritius BIT (2000)	•					•							
Romania-United States BIT (1992)		•			•								
Russian Federation-Hungary BIT (1995)	•					•							
Russian Federation-Sweden BIT (1995)	•					•							
Russian Federation-United States BIT (1992)		•			•								
Saudi Arabia-Japan BIT (2013)	•				•		•						
Slovakia-Canada BIT (2010)	•					•	•				•		
Slovakia-United States BIT (1991)		•			•								
Slovenia-Austria BIT (2001)		•			•								
Slovenia-India BIT (2011)	•					•					•		
South Africa-Canada BIT (1995)	•					•							

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Spain-Libya BIT (2007)	•				•	•	•						
Sweden-Georgia BIT (2008)	•				•								
Sweden-Mauritius BIT (2004)	•				•								
Sweden-Russian Federation BIT (1995)	•					•							
Switzerland-Egypt BIT (2010)	•				•								
Switzerland-El Salvador BIT (1994)	•					•							
Switzerland-Japan EPA (2009)	•	•		•	•		•						
Switzerland-Kosovo BIT (2011)	•	•	•		•								•
Switzerland-Madagascar BIT (2008)	•				•	•							
Switzerland-Mauritius BIT (1998)	•					•							
Switzerland-Mexico BIT (1995)	•						•						
Switzerland-Mozambique BIT (2002)	•				•								
Switzerland-Syria BIT (2007)	•				•								
Switzerland-Trinidad and Tobago BIT (2010)	•				•								
Switzerland-Tunisia BIT (2012)	•				•								
Tunisia-Switzerland BIT (2012)	•				•								
Turkey-Nigeria BIT (2011)	•	•			•	•							
United Kingdom-Colombia BIT (2010)	•					•					•		
United Kingdom-Mexico BIT (2006)	•											•	
United States-Albania BIT (1995)	•	•			•								
United States-Argentina BIT (1991)		•			•								
United States-Armenia BIT (1992)		•			•								
United States-Australia FTA (2004)	•	•			•	•	•		•	•	•		
United States-Azerbaijan BIT (1997)	•	•			•								
United States-Bahrain BIT (1999)	•	•			•								
United States-Bolivia BIT (1998)	•	•			•								
United States-Bulgaria BIT (1992)		•			•								
United States-Chile FTA (2003)	•	•			•	•	•		•	•	•	•	
United States-Croatia BIT (1996)	•	•			•								
United States-Czech Republic BIT (1991)		•			•								
United States-Ecuador BIT (1993)		•			•								
United States-El Salvador BIT (1999)	•	•			•								
United States-Estonia BIT (1994)		•			•								
United States-Georgia BIT (1994)	•	•			•								
United States-Honduras BIT (1995)	•	•			•								
United States-Jamaica BIT (1994)		•			•								
United States-Jordan BIT (1997)	•	•			•								
United States-Kazakhstan BIT (1992)		•			•								
United States-Korea FTA (2007)	•	•	•		•	•	•		•	•	•	•	
United States-Kyrgyzstan BIT (1993)		•			•								
United States-Lithuania BIT (1998)		•			•								
United States-Moldova BIT (1993)		•			•								

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	Environment	Labour	Corruption	Human Rights	Preamble language	Preserving policy space	Not lowering standards for the purpose of attracting investment	Commitment to act in the fight against corruption	Commitment to internationally recognized standards	Commitment to cooperate on SD/RBC matters	Non-discriminatory environmental regulation does not constitute indirect expropriation	ISDS relation to SD/RBC issues	Reference to RBC standards (e.g. the OECD Guidelines)
United States-Mongolia BIT (1994)		•			•								
United States-Morocco FTA (2004)	•	•	•		•	•	•		•	•		•	
United States-Mozambique BIT (1998)	•	•			•								
United States-Nicaragua BIT (1995)	•	•			•								
United States-Oman FTA (2006)	•	•	•		•	•	•		•	•	•	•	
United States-Peru FTA (2006)	•	•	•		•	•	•	•	•	•	•		
United States-Poland BIT (1990)		•			•								
United States-Romania BIT (1992)		•			•								
United States-Russian Federation BIT (1992)		•			•								
United States-Rwanda BIT (2008)	•	•			•	•	•				•	•	
United States-Singapore FTA (2003)	•	•	•		•	•	•		•	•		•	•
United States-Slovakia BIT (1991)		•			•								
United States-Sri Lanka BIT (1991)		•			•								
United States-Trinidad and Tobago BIT (1994)	•	•			•								
United States-Ukraine BIT (1994)		•			•								
United States-Uruguay BIT (2005)	•	•			•	•	•		•	•	•	•	
United States-Uzbekistan BIT (1994)	•	•			•								

ANNEX 2. EXAMPLES OF SD/RBC LANGUAGE INSERTED IN INTERNATIONAL INVESTMENT AGREEMENTS BY THEIR FUNCTION

This annex presents examples of SD/RBC language inserted in IIAs, by their function and purpose in the treaty: (i) preamble language; (ii) language on preserving policy space; (iii) not lowering standards language; (iv) language establishing that, in general, environmental measures taken in order to protect public welfare objectives do not constitute indirect expropriation; (v) language establishing commitment to cooperate on SD/RBC matters; (vi) language establishing a relation between SD/RBC matters and ISDS, (vii) language establishing commitment to maintain or implement certain internationally recognized standards; (viii) language establishing commitment to act in the fight against corruption and (vi) language encouraging the respect of RBC standards.

(i) Preamble language

The Preamble of the 2010 Austria-Tajikistan BIT reads as follows : "[t]he REPUBLIC OF AUSTRIA and the REPUBLIC OF TAJIKISTAN, hereinafter referred to as 'Contracting Parties', […] REAFFIRMING the commitments under the 2006 Ministerial declaration of the UN Economic and Social Council of Full Employment and Decent Work, REFERRING to international obligations and commitments concerning respect for human rights; RECOGNISING that investment, as an engine of economic growth, can play a key role in ensuring that economic growth is sustainable; COMMITTED to achieving these objectives in a manner consistent with the protection of health, safety, and the environment, and the promotion of internationally recognised labour standards; EXPRESSING their belief that responsible corporate behaviour, as incorporated in the OECD Guidelines for Multinational Enterprises, can contribute to mutual confidence between enterprises and host countries; EMPHASISING the necessity for all governments and civil actors alike to adhere to the UN and OECD anti-corruption efforts, most notably the UN Convention against Corruption (2003); TAKING note of the principles of the UN Global Compact; ACKNOWLEDGING that investment agreements and multilateral agreements on the protection of environment, human rights or labour rights are meant to foster global sustainable development and that any possible inconsistencies there should be resolved without relaxation of standards of protection; HAVE AGREED AS FOLLOWS […]".

The Preamble of the 2011 Switzerland-Kosovo BIT reads as follows: « [l]e Conseil fédéral Suisse et le Gouvernement de la République du Kosovo […]en vue de promouvoir la prospérité économique et le développement durable des deux Etats, convaincus que ces objectifs sont réalisables sans porter atteinte aux normes d'application générale relatives à la santé, à la sécurité, au travail et à l'environnement, visant à encourager les investisseurs au respect des normes et principes de responsabilité sociale des entreprises internationalement reconnus, sont convenus de ce qui suit […] ».

(ii) Language on preserving policy space

Article 2 of the 1995 Hungary-Russian Federation BIT entitled "Promotion and Reciprocal Protection of Investments" reads as follows: "l. Each Contracting Party shall encourage and create favourable conditions for investors of the other Contracting Party to make investments in its territory and shall admit such investments in accordance with its laws and regulations. 2. Investments of investors of one Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party. 3. This Agreement shall not preclude the application of

either Contracting Party of measures, necessary for the maintenance of defence, national security and public order, protection of the environment, morality and public health."

Article 1114 of NAFTA entitled "Environmental measures" reads as follows: "1. Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns […]".

(iii) Not lowering standards language

The Preamble of the 2002 Finland-Namibia BIT reads as follows: "The Government of the Republic of Finland and the Government of the Republic of Namibia, hereinafter referred to as the 'Contracting Parties' […] AGREEING that these objectives can be achieved without relaxing health, safety and environmental measures of general application […]"

Addendum No. 3 of the Protocol to the 1995 Mexico-Switzerland BIT reads as follows: « [l]es Parties reconnaissent qu'il n'est pas approprié d'encourager l'investissement en assouplissant les mesures nationales qui se rapportent à la santé, à la sécurité ou à l'environnement. En conséquence, une Partie ne devrait pas renoncer ou déroger, ni offrir de renoncer ou de déroger à de telles mesures dans le dessein d'encourager l'établissement, l'acquisition, l'accroissement ou le maintien d'un investissement d'un investisseur sur son territoire. Une Partie qui estime que l'autre Partie a offert un tel encouragement pourra demander des consultations. Les Parties reconnaissent que l'entrée et l'accroissement des investissements des investisseurs de l'autre Partie sur leur territoire doivent être soumis aux instruments pertinents de l'Organisation de coopération et de développement économiques (OCDE) en matière d'investissements internationaux. »

Article 16.2 of the 2004 Morocco-United States FTA entitled "Application and Enforcement of Labor Laws" reads as follows: "[…] 2. Each Party recognizes that it is inappropriate to encourage trade or investment by weakening or reducing the protections afforded in domestic labor laws. Accordingly, each Party shall strive to ensure that it does not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such laws in a manner that weakens or reduces adherence to the internationally recognized labor rights referred to in Article 16.7 as an encouragement for trade with the other Party, or as an encouragement for the establishment, acquisition, expansion, or retention of an investment in its territory."

(iv) Language establishing that, in general, environmental measures taken in order to protect public welfare objectives do not constitute indirect expropriation

Article 3 of the Annexure entitled "Interpretation of 'Expropriation' in Article 5 (Expropriation)" of the 2009 India-Mozambique BIT reads as follows: "[e]xcept in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives including health, safety and the environment concerns do not constitute expropriation or nationalization."

Article 4.5 of the 2009 Korea-Rwanda BIT entitled "Expropriation" reads as follows: " [e]xcept in rare circumstances, such as, for example, when an action or a series of actions are extremely severe or disproportionate in light of their purposes or effects, non-discriminatory regulatory actions by a Contracting Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, the environment, and real estate price stabilization, do not constitute indirect expropriations."

(v) Language establishing commitment to cooperate on SD/RBC matters

Article 19.8 of the 2006 Peru-United States FTA entitled "Cooperation in International Fora" reads as follows: "1. The Parties recognize the importance of regional and multilateral initiatives to prevent and combat corruption, including bribery, in international trade and investment. The Parties shall work jointly to encourage and support appropriate initiatives in relevant international fora. 2. The Parties reaffirm their existing rights and obligations under the 1996 Inter-American Convention Against Corruption and shall work toward the implementation of measures to prevent and combat corruption consistent with the 2003 United Nations Convention Against Corruption."

Article 14.9 of the 2007 Costa-Rica-Singapore FTA entitled "Labour Cooperation" reads as follows: "1. The Parties recognize the importance of labour matters, which must go hand in hand with economic development, and share a similar commitment to uphold labour standards in the context of global economic development and trade liberalization. 2. The Parties reaffirm their commitment to a high standard of labour laws, policies and practices and to seek to cooperate in the promotion of employment and better understanding and observance of the principles embodied in the International Labour Organization Declaration of Fundamental Principles and Rights at Work and its Follow-up (1998). Accordingly, the Parties agree to cooperate on labour matters of mutual interest and benefit, taking into account their national priorities and available resources. Cooperative activities may be in areas including, but not limited to: (a) skills development and employability; (b) occupational safety and health; (c) industrial relations and labour-management cooperation; and (d) strengthening of institutional capacities."

(vi) Language establishing a relation between SD/RBC matters and ISDS

Article 25 of the 2000 Austria-Uzbekistan BIT entitled "Nullification" reads as follows: "(1) Either Party to the dispute may request the annulment of an award, in whole or in part, on one or more of the following grounds, that: (a) the tribunal was not properly constituted; (b) the tribunal has manifestly exceeded its powers; (c) there was corruption on the part of a member of the tribunal or on the part of a person providing decisive expertise or evidence; (d) there has been a serious departure from a fundamental rule of procedure; or (e) the award has failed to state the reasons on which it is based."

Article 100 of the 2007 Chile-Japan EPA entitled "Expert Report" reads as follows: "[w]ithout prejudice to the appointment of other kinds of experts where authorized by the applicable arbitration rules, a Tribunal, at the request of a disputing party or, except as the disputing parties agree otherwise, on its own initiative, may appoint one or more experts in the fields of environmental, health, safety or other scientific matters to report to it in writing on any factual issue concerning matters of their expertise raised by a disputing party in a proceeding, subject to such terms and conditions as the disputing parties may agree."

(vii) Language establishing commitment to maintain or implement certain internationally recognized standards

Article 19.2 of the 2007 Korea-United States FTA entitled "Fundamental Labor Rights" reads as follows: "1. Each Party shall adopt and maintain in its statutes and regulations, and practices thereunder, the following rights, as stated in the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up (1998) (ILO Declaration): (a) freedom of association; (b) the effective recognition of the right to collective bargaining; (c) the elimination of all forms of compulsory or forced labor; (d) the effective abolition of child labor and, for purposes of this Agreement, a prohibition on the worst forms of child labor; and (e) the elimination of discrimination in respect of employment and occupation."

Article 12 of the 2009 Belgium/Luxembourg-Barbados BIT entitled "Travail" reads as follows: « 1. Reconnaissant que chaque Partie contractante a le droit de fixer ses propres normes de protection du travail

et d'adopter ou de modifier en conséquence ses lois ad hoc, chacune des Parties contractantes veillera à ce que sa législation fixe des normes de travail conformes aux normes internationales du travail énoncées au paragraphe (d) de l'Article 1 et n'aura de cesse d'améliorer lesdites normes. [...] 3. Les Parties contractantes réaffirment leurs obligations en tant que membres de l'Organisation internationale du Travail ainsi que leurs engagements en vertu de la déclaration de l'OIT relative aux principes et droits fondamentaux du travail et de son suivi. Les Parties contractantes veilleront á ce que lesdits principes et les normes internationales du travail énoncées au paragraphe (d) de l'Article 1 soient reconnus et protégés dans leur législation nationale. » Article 1(d) to which Article 12 refers provides as follows: « 'législation du travail' désigne: toute législation des Parties contractantes en vigueur á la date de signature du présent Accord ou adoptée après cette date, ou toute disposition contenue dans cette législation, qui vise à mettre en application les normes de protection du travail énumérées ci-dessous telles que définies par l'Organisation internationale du travail: (i) le droit d'association; (ii) le droit d'organisation et de négociation collective; (iii) l'interdiction de recourir à quelque forme de travail forcé ou obligatoire que ce soit; (iv) un âge minimum d'admission des enfants à l'emploi; (v) des conditions de travail acceptables en ce qui concerne le salaire minimum et la durée du travail, ainsi que la sécurité et la santé des travailleurs. »

(viii) Language establishing commitment to act in the fight against corruption

Article 10 of the 2008 Japan-Lao People's Democratic Republic BIT entitled "Measures against Corruption" reads as follows: "[e]ach Contracting Party shall ensure that measures and efforts are undertaken to prevent and combat corruption regarding matters covered by this Agreement in accordance with its laws and regulations."

Article 1908 of the 2008 Canada-Peru FTA entitled "Anti-corruption Measures" reads as follows: "1. Each Party shall adopt or maintain the necessary legislative or other measures to establish, in matters affecting international trade or investment, as criminal offences when committed intentionally: (a) the solicitation or acceptance by a public official, directly or indirectly, of an undue advantage for the official himself or another person or entity, in order that the official act or refrain from acting in the exercise of his official duties; (b) the promise, offering or giving to a public official, directly or indirectly, of an undue advantage for the official himself or another person or entity, in order that the official act or refrain from acting in the exercise of his official duties; (c) the promise, offering or giving to a foreign public official or an official of a public international organization, directly or indirectly, of an undue advantage for the official himself or another person or entity, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other undue advantage in relation to the conduct of international business; and (d) aiding, abetting or conspiring to commit any of the offences described in subparagraphs (a) through (c). 2. Each Party shall adopt such measures as may be necessary to establish its jurisdiction over offences committed in its territory. 3. Each Party shall make the commission of an offence covered by this Agreement liable to sanctions that take into account the gravity of that offence. 4. Each Party shall adopt such measures as may be necessary, consistent with its legal principles, to establish the liability of enterprises for participation in the offences covered by this Agreement. In particular, each Party shall ensure that enterprises held liable in accordance with this Article are subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions. 5. Each Party shall consider incorporating in its domestic legal system at the national level appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with this Agreement."

(ix) Language encouraging the respect of RBC standards

Article 816 of the 2008 Canada-Colombia FTA entitled "Corporate Social Responsibility" reads as follows : "[e]ach Party should encourage enterprises operating within its territory or subject to its

jurisdiction to voluntarily incorporate internationally recognized standards of corporate social responsibility in their internal policies, such as statements of principle that have been endorsed or are supported by the Parties. These principles address issues such as labour, the environment, human rights, community relations and anti-corruption. The Parties remind those enterprises of the importance of incorporating such corporate social responsibility standards in their internal policies."

Article 2 of the 2013 Netherlands-United Arab Emirates BIT entitled "Promotion of Investments" reads as follows: "1. Each Contracting Party shall, within the framework of its laws and regulations, promote economic cooperation through the protection in its territory of investments of nationals of the other Contracting Party. Subject to its right to exercise powers conferred by its laws or regulations, each Contracting Party shall admit such investments. 2. Both Contracting Parties recognize the right of each Contracting Party to establish its own level of domestic environmental protection and its own sustainable development policy and priorities, and to adopt or modify its environmental laws and regulations and shall strive as far as possible to continue to improve their laws and regulations. 3. Each Contracting Party shall promote as far as possible and in accordance with their domestic laws the application of the OECD Guidelines for Multinational Enterprises to the extent that is not contrary to their domestic laws."

ANNEX 3. USE OF RBC-RELATED INTERNATIONAL AGREEMENTS IN INVESTMENT ARBITRATION CASES

This annex presents the international agreements relating to (i) environmental; (ii) human rights; (iii) anti-corruption and (iv) miscellaneous issues relevant to SD/RBC, referenced in investment arbitration cases. No labour-related international agreement is included in the table as no such agreement seems to have been referred to in investment arbitration cases to date.

(i) Environmental Agreements

REFERENCE OF DOCUMENT	JURISDICTIONAL BASIS	ARTICLES OF THE AGREEMENT CITED	RELEVANT EXTRACT
AARHUS PROTOCOL ON PERSISTENT ORGANIC POLLUTANTS TO THE UNECE CONVENTION ON LONG-RANGE TRANSBOUNDARY AIR POLLUTION OF 1979 (1998)			
Crompton (Chemtura) Corp. v. Government of Canada, Award, 2 August 2010 (paras. 135-137)	NAFTA	General reference to the Protocol as a whole and to its annex II	"Irrespective of the state of the science, however, the Tribunal cannot ignore the fact that lindane has raised increasingly serious concerns both in other countries and at the international level since the 1970s. […] In 1998 **the Aarhus Protocol on Persistent Organic Pollutants to the UNECE Convention on Long-Range Transboundary Air Pollution of 1979** was adopted by some 30 countries, including the United States, Canada, and most countries of Western and Eastern Europe (this Protocol restricted the use of lindane to six specific uses and required a reassessment of lindane). […] This broader factual context is relevant in assessing the first point raised by the Claimant, namely whether the PMRA undertook the Special Review as a result of a trade irritant and not as a part of its mandate as a regulatory agency or as part of an international commitment undertaken by Canada under **the Aarhus Protocol to the LRTAP Convention**. Although the Claimant has avoided formulating this allegation in such terms, the underlying idea is that the PMRA acted in bad faith and launched a review process for reasons unrelated to its mandate and to the international obligations of Canada. The burden of proving these facts rests on the Claimant, in accordance with well-established principles on the allocation of the burden of proof, and the standard of proof for allegations of bad faith or disingenuous behaviour is a demanding one."
BASEL CONVENTION ON THE CONTROL OF TRANS-BOUNDARY MOVEMENTS OF HAZARDOUS WASTES AND THEIR DISPOSAL (1989)			
S.D. Myers, Inc. v. Government of Canada, UNCITRAL, Partial Award, 13 November 2000 (paras. 105-109, 201-215, 221, 255)	NAFTA	General reference to the Convention as a whole	"**The Basel Convention** also requires appropriate measures to ensure the availability of adequate disposal facilities for the environmentally sound management of hazardous wastes that are located within it (Article 4(2)(b)). It also requires that the trans-boundary movement of hazardous wastes be reduced to the minimum consistent with the environmentally sound and efficient management of such wastes and be conducted in a manner that will protect human health and the environment (Article 4(2)(d)). […] This was the regulatory and policy background that confronted SDMI in 1990 when it began its efforts to obtain the necessary approvals to import electrical transformers and other equipment containing PCB wastes into the USA from Canada. […] The next step is for the Tribunal to review the other international agreements to which the Parties adhere […] Chronologically, the next instrument to be reviewed is **the Basel Convention**. […] Even if **the Basel Convention** were to have been ratified by the NAFTA Parties, it should not be presumed that CANADA would have been able to use it to justify the breach of a specific NAFTA provision because …where a party has a choice among equally effective and reasonably available alternatives for complying….with **a Basel Convention** obligation, it is obliged to choose the alternative that is …least inconsistent… with the NAFTA. If one such alternative were to involve no inconsistency with **the Basel Convention**, clearly this should be followed."

REFERENCE OF DOCUMENT	JURISDICTIONAL BASIS	ARTICLES OF THE AGREEMENT CITED	RELEVANT EXTRACT
S.D. Myers, Inc. v. Government of Canada, UNCITRAL, Separate Opinion by Dr. Bryan Schwartz, Concurring Except with Respect to Performance Requirements, in the Partial Award of the Tribunal, 12 November 2000 (paras. 101-106)	NAFTA	General reference to the Convention as a whole	"**The Basel Convention** on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal was signed by 105 states in 1989. It came into force in May 1992, when twenty states had ratified it. Canada has become a party to it. The United States had not. […] It would be fair to say that **the Basel Convention** is not as strong as the Transboundary Agreement in emphasizing the potential that transboundary movement has for achieving economies and better protecting the environment. Article 4(2)(d) of Basel does, however, acknowledge that the environmentally sound and efficient management of waste is not necessarily accomplished by avoiding transboundary shipments. Furthermore, Article 11 expressly allows parties to enter into bilateral or multilateral agreements for the transboundary movement of waste, provided that these agreements do not undermine Basel's own insistence on environmentally sound management of waste. As far as Canada and the United States were concerned, Article 11 "made room" for the continuation of the Transboundary Convention with its clear emphasis on including transboundary movements as a means to be considered in achieving the most cost-effective and environmentally-friendly solution to hazardous waste problems. The framers of NAFTA considered which earlier environmental treaties would prevail over the specific rules of NAFTA in case of conflict. Article 104 provided that **the Basel Convention** would have priority if and when it was ratified by all the NAFTA parties. The United States had not done at the time of the export ban by Canada. The United States was not, therefore, required to comply with **Basel rules** as such and Canada could not, in a NAFTA dispute, argue that a particular NAFTA rule must be subordinate to Basel. Even if Basel had been ratified by all three NAFTA parties, Canada would not be able to use it freely as a shield against a specific NAFTA obligation. Rather, according to Article 104 of NAFTA, 'where a party has a choice among equally effective and reasonable available alternatives for complying' with a **Basel obligation**, it must choose the one which is least inconsistent with NAFTA. If a party can find a way to comply with both NAFTA and Basel at the same time – as it appears Canada likely could have done here – it must do so."
ESPOO CONVENTION ON ENVIRONMENTAL IMPACT ASSESSMENT IN A TRANS-BOUNDARY CONTEXT (1991)			
Emilio Agustín Maffezini v. Kingdom of Spain, ICSID Case No. ARB/97/7, Award (Merits), 13 November 2000 (fn. 17 and related para. 67)	Argentina-Spain BIT	General reference to the Convention as a whole	"The Tribunal has carefully examined these contentions, since the Environmental Impact Assessment procedure is basic for the adequate protection of the environment and the application of appropriate preventive measures. This is true, not only under Spanish and EEC law, but also increasingly so under international law [See for example **the Convention on Environmental Impact Assessment in a Trans-boundary Context, Espoo**, February 25, 1991]."
NORTH AMERICAN AGREEMENT ON ENVIRONMENTAL COOPERATION (1993)			
S.D. Myers, Inc. v. Government of Canada, UNCITRAL, Partial Award, 13 November 2000 (paras. 217-221)	NAFTA	General reference to the Agreement as a whole	"The **NAAEC**'s Statement of Objectives include both: - Article 1(d) - support for the environmental goals and objectives of the NAFTA, and - Article 1(e) - avoidance of new barriers of distortions in cross-border trade . Article 3 of the **NAAEC** states that: Recognizing the right of each Party to establish its own levels of domestic environmental protection and environmental development policies and priorities, and to adopt or modify accordingly its environmental laws and regulations, each Party shall ensure that its laws and regulations provide for high levels of environmental protection and shall strive to continue to improve those laws and regulations. The **NAAEC** mandates the creation of a Commission for Environmental Cooperation. The Council of the Commission is authorized to strengthen cooperation on environmental laws and regulations. Without reducing levels of environmental protections, the Council is to consider ways to render technical requirements more compatible (NAAEC, Article 93). The Preamble to the NAFTA, the **NAAEC** and the international agreements affirmed in the NAAEC suggest that specific provisions of the NAFTA should be interpreted in light of the following general principles: - Parties have the right to establish high levels of environmental protection. They are not obliged to compromise their standards merely to satisfy the political or economic interests of other states; - Parties should avoid creating distortions to trade; environmental protection and economic development can and should be mutually supportive. In the Tribunal's view, these principles are consistent with the express provisions of the Transboundary Agreement and the Basel Convention. A logical corollary of them is that where a state can achieve its chosen level of environmental protection through a variety of equally effective and reasonable means, it is obliged to adopt the alternative that is most consistent with open trade. This corollary also is consistent with the language and the case law arising out of the WTO family of agreements."

REFERENCE OF DOCUMENT	JURISDICTIONAL BASIS	ARTICLES OF THE AGREEMENT CITED	RELEVANT EXTRACT
S.D. Myers, Inc. v. Government of Canada, UNCITRAL, Separate Opinion by Dr. Bryan Schwartz, Concurring Except with Respect to Performance Requirements, in the Partial Award of the Tribunal, 12 November 2000 (paras. 96-97, 130, 216-220 and 247)	NAFTA	General reference to the Agreement as a whole	"**The NAAEC** was entered into by the parties as one of the conditions that President Clinton stipulated for approval by the United States of the main NAFTA agreement. The side-by-side creation of the two agreements in itself suggests that the parties viewed open trade and environmental protection as compatible goals, and the reference to the Rio Declaration makes it clearer that the goals can be viewed as mutually supportive. The Vienna Convention on the Law of Treaties confirms the importance of **the NAAEC** to the interpretation of the provisions of NAFTA. […] **The NAAEC**'s Statement of Objectives include […]: Article 1(d) – support for the environmental goals and objectives of the NAFTA […] […] In my view, the legal context for Article 1102 (National Treatment) includes the various provisions of NAFTA, its companion agreement **NAAEC** and principles, including those of the Rio Declaration, that are affirmed by **the NAAEC**."
OSPAR CONVENTION - CONVENTION FOR THE PROTECTION OF THE MARINE ENVIRONMENT OF THE NORTH-EAST ATLANTIC (1992)			
Grand River Enterprises Six Nations, Ltd., et al. v. United States of America, UNCITRAL, Award, 12 January 2011 (para. 71 and fn. 8)	NAFTA	Reference to a decision rendered in application of the Convention	"The Tribunal understands the obligation to 'take into account' other rules of international law to require it to respect the Vienna Convention's rules governing treaty interpretation. However, the Tribunal does not understand this obligation to provide a license to import into NAFTA legal elements from other treaties, or to allow alteration of an interpretation established through the normal interpretive processes of the Vienna Convention. This is a Tribunal of limited jurisdiction; it has no mandate to decide claims based on treaties other than NAFTA. As the Methanex Tribunal warned, 'interpreting Article 1131(1) to create a jurisdiction extending beyond Section A of Chapter 11 would indeed be to transform it ... 'into an unqualified and comprehensive jurisdictional regime, in which there would be no limit ratione materiae to the jurisdiction of a tribunal established under' Chapter 11 NAFTA.'' [referring to Methanex Corp. v. United States, Final Award on Jurisdiction and Merits (Aug. 3, 2005), ("Methanex Final Award"), Part II, Chapter B, ¶ 5, quoting Access to Information under Article 9 of **the OSPAR Convention** (Ireland v. United Kingdom)] The Tribunal is particularly mindful in this regard of the Free Trade Commission's directive that a violation of an obligation under another treaty does not give rise to a breach of Article 1105."
Crompton (Chemtura) Corp. v. Government of Canada, Award, 2 August 2010 (para. 135)	NAFTA	General reference to the agreement as a whole	"Irrespective of the state of the science, however, the Tribunal cannot ignore the fact that lindane has raised increasingly serious concerns both in other countries and at the international level since the 1970s. […] At the same time, a number of European countries added lindane to the List of Chemicals for Priority Action under **the OSPAR Convention for the Protection of the Marine Environment of the North-East Atlantic**, further signalling international concern about the human health and environmental effects of lindane."
Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic, ICSID Case No. ARB/97/3, Award, 20 August 2007 (para. 7.4.3 and fn. 323)	Argentine-France BIT	Reference to a decision rendered in application of the Convention	"As was noted by the tribunal in Methanex, Article 31(1) of the Vienna Convention is comprised of three separate principles. The first, good faith, requires no further explanation. As to the second, interpretation in accordance with the ordinary meaning of a term, scholars have noted that this is not merely a semantic exercise in uncovering the literal meaning of a term. As to the third, the term is not to be examined in isolation or in abstracto, but in the context of the treaty and in the light of its object and purpose. One result of this third general principle is that, as noted by the International Tribunal for the Law of the Sea in The MOX Plant Case (as also applied in the **OSPAR Case**): 'the application of international rules on interpretation of treaties to identical or similar provisions of different treaties may not yield the same results, having regard to, inter alia, differences in their respective contexts, objects and purposes, subsequent practice of parties and travaux préparatoires' [referring to The MOX Plant Case (Ireland v. United Kingdom), Order on Provisional Measures, 3 December 2001, 51, 41 ILM 405 at 413 quoted in Access to Information Under **Article 9 of the OSPAR Convention** (Ireland v. United Kingdom)]."
Methanex Corporation v. United States of America, UNCITRAL, Final Award, 3 August 2005 (Part II, Chapter B, para. 5)	NAFTA	General reference to the Convention as a whole	"[…] the Tribunal does not construe Article 1131 NAFTA as creating any jurisdiction to decide on alleged violations of the GATT. Moreover, Methanex's ultimate position in oral argument was that such violations were not necessarily relevant to the Tribunal's decision on the merits of Methanex's claim under Chapter 11 NAFTA. As interpreted by the Tribunal, its jurisdiction is here limited by Articles 1116-1117 NAFTA to deciding claims that the USA has breached an obligation under Section A of Chapter 11 (there being no allegation of any breach of Article 1503(2) or 1503(3)(a) in this case). There is no specific "envoi" to the GATT in any of the provisions of Section A, namely Articles 1102, 1105 and 1110 NAFTA, in respect of which Methanex alleges breach by the USA. In the Tribunal's view, interpreting Article 1131(1) to create a jurisdiction extending beyond Section A of Chapter 11 would indeed be to transform it, as unwarranted under NAFTA as it was held to be under **the OSPAR Convention**, 'into an unqualified and comprehensive jurisdictional regime, in which there would be no limit ratione materiae to the jurisdiction of a tribunal established under' Chapter 11 NAFTA. From the language of Chapter 11, there is every indication that this was not the intention of the NAFTA Parties; and accordingly the Tribunal here disclaims any power to decide Methanex's allegations that the USA has violated provisions of the GATT."
RESOLUTION ADOPTED BY THE GENERAL ASSEMBLY: 1803 (XVII). PERMANENT SOVEREIGNTY OVER NATURAL RESOURCES (1962)			
Desert Line Projects LLC v. Republic of Yemen, ICSID Case No. ARB/05/17, Award, 6 February 2008 (para. 157)	Oman-Yemen BIT	General reference to the Resolution as a whole	"Although the present case does not involve an investment in natural resources, it seems relevant to observe that **the 1962 United Nations General Assembly Resolution on Permanent Sovereignty over Natural Resources** provides that agreements with foreign investors should be respected insofar as they are 'freely' concluded […] The drafters may have been particularly concerned with asymmetrical agreements in favour of prior colonial powers, but the principle is naturally applicable without discrimination. Indeed, it should hardly be necessary to point out that where consent is vitiated, it is a universal norm that the agreement cannot be enforced against the victim of coercion."
Yaung Chi Oo Trading PTE Ltd. v. Government of the Union of Myanmar, ASEAN I.D. Case No. ARB/01/1, Award, 31 March 2003 (para. 21)	ASEAN Agreement for the Promotion and Protection of Investments	General reference to the Resolution as a whole	"It may be recalled that, whereas all the original ASEAN Members voted in favour of **General Assembly Resolution 1803(XVII), proclaiming the principle of Permanent Sovereignty over Natural Resources**, they all abstained on Resolution 3281(XXIX), the Charter of Economic Rights and Duties of States, in view of its Article 2(2), which effectively denies the existence of any international standard of compensation for expropriation. ASEAN States from the beginning appear to have taken a more moderate collective position with regard to the protection of foreign investments, at any rate as concerns direct foreign investments coming from within ASEAN. Hence the purpose of the 1987 ASEAN Agreement, which applied specifically to investments among ASEAN Member States."

REFERENCE OF DOCUMENT	JURISDICTIONAL BASIS	ARTICLES OF THE AGREEMENT CITED	RELEVANT EXTRACT
RIO DECLARATION ON ENVIRONMENT AND DEVELOPMENT (1992)			
LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006 (paras. 252-253 and fn. 74)	US-Argentine BIT	Reference to Principle 15: "In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation."	"James Crawford has stated that no opinion may be offered a priori of 'essential interest,' but one should understand that it is not the case of the State's 'existence', since the 'purpose of the positive law of self-defense is to safeguard that existence.' Thus, an interest's greater or lesser essential, must be determined as a function of the set of conditions in which the State finds itself under specific situations. The requirement is to appreciate the conditions of each specific case where an interest is in play, since what is essential cannot be predetermined in the abstract. The interest must be threatened by a serious and imminent danger. The threat, according to Roberto Ago, 'must be 'extremely grave' and 'imminent.'' In this respect, James Crawford has opined that the danger must be established objectively and not only deemed possible. […] In fact, this is so reflected in Principle 15 of **the Rio Declaration on Environment and Development, adopted by the United Nations' Conference on Environment and Development in 1992**."
S.D. Myers, Inc. v. Government of Canada, UNCITRAL, Partial Award, 13 November 2000 (para. 247)	NAFTA	General reference to the Declaration as a whole	"The Tribunal considers that the legal context of Article 1102 includes the various provisions of the NAFTA, its companion agreement the NAAEC and principles that are affirmed by the NAAEC (including those of **the Rio declaration**). The principles that emerge from that context, to repeat, are as follows: - states have the right to establish high levels of environmental protection. They are not obliged to compromise their standards merely to satisfy the political or economic interests of other states; - states should avoid creating distortions to trade; - environmental protection and economic development can and should be mutually supportive."
S.D. Myers, Inc. v. Government of Canada, UNCITRAL, Separate Opinion by Dr. Bryan Schwartz, Concurring Except with Respect to Performance Requirements, in the Partial Award of the Tribunal,, 12 November 2000 (paras. 94-96 and 130)	NAFTA	General reference to the Declaration as a whole	"A more detailed look at the environmental agreements that bear on this case will, I believe, substantiate the broader ideas just proposed. In 1992, before NAFTA came into being, Canada, the United States and Mexico all adopted **the Rio Declaration on the Environment and Development**. It recognizes that open trading systems and environmental protection can be mutually supportive. **Principle 12 of the Rio Declaration** is as follows: […] At the same time as NAFTA was entered into, the three parties also agreed to 'The North American Agreement on Environmental Cooperation' (NAAEC). In it, the parties "reaffirm" the Stockholm Declaration on the Human Environment of 1972 and **the Rio Declaration on the Environment and Development**. […] The side-by-side creation of the two agreements in itself suggests that the parties viewed open trade and environmental protection as compatible goals, and the reference to the Rio Declaration makes it clearer that the goals can be viewed as mutually supportive. […] In my view, the legal context for Article 1102 (National Treatment) includes the various provisions of NAFTA, its companion agreement NAAEC and principles, including those of **the Rio Declaration**, that are affirmed by the NAAEC."
STOCKHOLM CONVENTION ON PERSISTENT ORGANIC POLLUTANTS (2001)			
Crompton (Chemtura) Corp. v. Government of Canada, Award, 2 August 2010 (paras. 135-137)	NAFTA	General reference to the Convention as a whole	"Irrespective of the state of the science, however, the Tribunal cannot ignore the fact that lindane has raised increasingly serious concerns both in other countries and at the international level since the 1970s. […] Moreover, in May 2009, lindane was included in the list of chemicals designated for elimination under **the Stockholm Convention on Persistent Organic Pollutants** or POPS."
STOCKHOLM DECLARATION ON THE HUMAN ENVIRONMENT (1972)			
S.D. Myers, Inc. v. Government of Canada, UNCITRAL, Separate Opinion by Dr. Bryan Schwartz, Concurring Except with Respect to Performance Requirements, in the Partial Award of the Tribunal,, 12 November 2000 (para. 96)	NAFTA	General reference to the Declaration as a whole	"At the same time as NAFTA was entered into, the three parties also agreed to 'The North American Agreement on Environmental Cooperation' (NAAEC). In it, the parties "reaffirm" the **Stockholm Declaration on the Human Environment of 1972** and the Rio Declaration on the Environment and Development."
UNESCO CONVENTION CONCERNING THE PROTECTION OF THE WORLD CULTURAL PROPERTY AND NATURAL HERITAGE (1972)			
Glamis Gold, Ltd. v. The United States of America, UNCITRAL, Final Award, 8 June 2009 (paras. 83-84)	NAFTA	General reference to the Convention as a whole	"The United Nations Educational, Scientific and Cultural Organization ("UNESCO") has adopted several conventions and declarations regarding the protection and preservation of cultural property, since the 1960s. Its 1968 Recommendation concerning the Preservation of Cultural Property Endangered by Public or Private Works, for instance, recommends member States to take whatever legislative or other steps are necessary, as well as bringing the recommendation to the attention of authorities responsible for public and private works and conservation, in order to preserve, salvage, or rescue cultural property. Any measures for preservation or salvage enacted are to be both preventive and corrective, per the recommendation. The recommendation additionally instructs that, '[a]t the preliminary survey stage of any project involving construction in a locality recognized as being of cultural interest … several variants of the project should be prepared' and considered. **The World Heritage Convention**, adopted by UNESCO in 1972, ratified by the United States and incorporated into the NHPA, recognized that the destruction of any cultural site impoverishes 'the heritage of

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			all the nations of the world.' Member States to the convention commit 'to adopt a general policy which aims to give the cultural and natural heritage a function in the life of the community and to integrate the protection of that heritage into comprehensive planning programmes,' and also to enact 'appropriate legal, scientific, technical, administrative and financial measures necessary' for the identification, protection, conservation, presentation and rehabilitation of this heritage.' The convention additionally calls for the establishment of a World Heritage Committee to maintain an international register of sites of cultural heritage."
UNITED NATIONS CONVENTION ON THE LAW OF THE SEA (1982)			
Abaclat and Others (Case formerly known as Giovanna a Beccara and Others) v. Argentine Republic, ICSID Case No. ARB/07/5, Dissenting Opinion, Georges Abi-Saab, 28 October 2011 (fn. 36)	Argentina-Italy BIT	General reference to the Convention as a whole	"The argument raised at one point by the Claimants, but not taken up by the majority award (though occasionally it seems to imply it), that collective mass claims actions are mere multi-party actions as there is no recognized threshold that separates them, is extremely tenuous, verging on the absurd. International law knows several such situations. For example, up to now there is no agreed or generally recognized threshold that separates air space, which is part of the territory of the State, from outer-space which is a res communis. Similarly, until **the Montego Bay UN Convention on the Law of the Sea of 1982**, there was no general agreement on the width of the territorial sea, i.e. on the threshold that separates that sea, which is part of the territory of the State, from the high seas. But here again, the absence of an agreed threshold did not mean that these two areas did not have, or prevented them from having two radically different legal status. In any case, whatever the threshold that separates, or the criterion for distinguishing, multi-party actions from collective mass claims actions, it is obvious that 60.000 claims fall on the side of collective mass claims actions."
Mobil Corporation and others v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/27, Decision on Jurisdiction, 10 June 2010 (paras. 169-171 and related fn. 107)	Netherlands-Venezuela BIT (and investment law)	Reference to Article 187: "The Seabed Disputes Chamber shall have jurisdiction under this Part and the Annexes relating thereto in disputes with respect to activities in the Area falling within the following categories: […] (b) disputes between a State Party and the Authority concerning: […] (ii) acts of the Authority alleged to be in excess of jurisdiction or a misuse of power […]".	"The Tribunal first observes that in all systems of law, whether domestic or international, there are concepts framed in order to avoid misuse of the law. Reference may be made in this respect to 'good faith' ('bonne foi'), 'détournement de pouvoir' (misuse of power) or 'abus de droit' (abuse of right). The principle of good faith has been recognized by the International Court of Justice as 'one of the basic principles governing the creation and performance of legal obligations'. It has been recognized in the law of treaties and has been referred to by a number of courts and tribunals including the Appellate Body of the World Trade Organisation and ICSID tribunals. The concept of détournement de pouvoir (misuse of power) has also been relied upon in international law, in particular in **the law of the sea**, the law of international organisations, and in European Community law."
Waste Management Inc. v. United Mexican States [II], ICSID Case No. ARB(AF)/00/3, Decision on Mexico's Preliminary Objection concerning the Previous Proceedings, 26 June 2002 (para. 49)	NAFTA	Reference to Article 294(1): "A court or tribunal provided for in article 287 to which an application is made in respect of a dispute referred to in article 297 shall determine at the request of a party, or may determine proprio motu, whether the claim constitutes an abuse of legal process or whether prima facie it is well founded. If the court or tribunal determines that the claim constitutes an abuse of legal process or is prima facie unfounded, it shall take no further action in the case"	"It is not necessary to decide whether NAFTA Chapter 11 tribunals possess any inherent power to dismiss a claim on grounds of abuse of process, or what circumstances might justify the exercise of any such power. No specific provision of Chapter 11, or of the ICSID Convention or Rules, confers such a power – by contrast, for example, with **Article 294 (1) of the United Nations Convention on the Law of the Sea of 1982**. It may be inferred that if such a power exists, it would only be for the purpose of protecting the integrity of the Tribunal's processes or dealing with genuinely vexatious claims. In the Phosphate Lands case, the International Court dealt with an objection related to abuse of process rather summarily, although without denying that there might be some inherent power in the matter."
UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE (1992)			
Guaracachi America, Inc. and Rurelec PLC v. Plurinational State of Bolivia, PCA Case No. 2011-17, Award, 31 January 2014 (para. 128)	Bolivia-United Kingdom BIT Bolivia-United States BIT	General reference to the Convention as a whole	"The last technological project undertaken by EGSA was the CCGT. This project began in 2007 and was scheduled to start operations in May 2010. However, it was then postponed to November, which deadline was not met either. The purpose of the project—apart from obtaining better economic and financial results—to enhance the sustainable development of Bolivia through the development of state-of-the-art combined cycle technology, in accordance with **the United Nations Framework Convention on Climate Change**. This project resulted in a series of financial benefits for EGSA, which, according to the Claimants, would be shared with the State (through the Vice-Ministry of Environment and Territorial Planning) in 2007, in accordance with the applicable rules."
UNITED STATES - MEXICO TREATY RELATING TO THE UTILIZATION OF WATER (1944)			
Bayview Irrigation District and others v. United Mexican States, ICSID Case No. ARB(AF)/05/l, Award, 19 June 2007 (paras. 120-122)	NAFTA	General reference to the Treaty as a whole	"The Tribunal can find no evidence in **the 1944 Treaty** to suggest that this imaginative interpretation of the Treaty, whose legal coherence and practical operability are open to considerable doubt, was intended by the Parties. The ordinary reading of the Treaty is that it is an agreement to apportion such waters as arrive in the international watercourse - the Rio Bravo/Rio Grande between Mexico and the United States; and the Tribunal sees no reason whatever to doubt the correctness of that reading. Any improper diversion of river flows prior to the flow joining the main flow of the Rio Bravo / Rio Grande is a different matter. If such a diversion were to occur, it mayor may not amount to a breach of **the 1944 Treaty**. That would be a matter for the two States, who are the only Parties to that Treaty. If the interests of US nationals were thought to be prejudiced by any action alleged to amount to a violation of the Treaty, that is an issue which could be taken up by the US Government under the dispute resolution procedures in **the 1944 Treaty**. But **the 1944 Treaty** does not create property rights amounting to

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			investments within the meaning of the NAFTA which US national themselves may protect by action under NAFTA Chapter Eleven. The Tribunal expresses no views on the interpretation or application of the 1944 Treaty in the circumstances of this case."

(ii) Human Rights Agreements

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CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION (2000)			
Eureko B.V. v. Slovak Republic, UNCITRAL, PCA Case No. 2008-13, Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010 (para. 261)	Netherlands-Slovak Republic BIT	Reference to Article 17(1): "Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest"	"Similarly, the protection in Article 5 of the BIT against expropriation is by no means covered by the EU freedom of establishment. While it certainly overlaps with the right to property secured by **Article 17 of the EU Charter of Fundamental Rights** (and the First Protocol to the ECHR, as applied under EU law), the BIT provision on expropriation is not obviously co-extensive with it. Both the considerable body of jurisprudence on indirect takings that has emerged in the context of BITs, and also the fact that the BIT protects "assets" and "investments" rather than the arguably narrower concepts of "possessions" and "property" protected by **the EU Charter on Fundamental Rights**, give rise to the possibility of wider protection under the BIT than is enjoyed under EU law."
CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE (1948)			
Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Decision on Jurisdiction, 2 July 2013 (paras. 145-147)		Reference to a decision rendered in application of the Convention	"The domestic litigation requirement had not been satisfied at the time this arbitration was instituted. The present case differs from the other cases where jurisdiction has been denied due to the absence either of a dispute expressed in legal terms or of any actions by the investor to address its claims to the domestic court before resorting to arbitration. Nonetheless, even if the requirement were regarded as jurisdictional, the Tribunal concludes that it could be, and was, satisfied by actions occurring after the date the arbitration was instituted. The Tribunal notes that the ICJ's decisions show that the rule that events subsequent to the institution of legal proceedings are to be disregarded for jurisdictional purposes has not prevented that Court from accepting jurisdiction where requirements for jurisdiction that were not met at the time of instituting the proceedings were met subsequently (at least where they occurred before the date on which a decision on jurisdiction is to be taken). As held by the ICJ, 'it is not apparent why the arguments based on the sound administration of justice, which underpin the Mavrommatis case jurisprudence, cannot also have a bearing in a case such as the present one. It would not be in the interest of justice to oblige the Applicant, if it wishes to pursue its claims, to initiate fresh proceedings. It is preferable except in special circumstances, to conclude that the condition has, from that point on, been fully met' [referring to Case Concerning Application of **the Convention on the Prevention and Punishment of the Crime of Genocide** (Croatia v. Serbia), Preliminary Objections, Judgment, 18 November 2008, ICJ Reports 2008, pp. 441-442, para. 87.] In the Mavrommatis case the Permanent Court of International Justice had found that jurisdictional requirements which were not satisfied at the time of instituting legal proceedings could be met subsequently. The Court stated: 'Even if the grounds on which the institution of proceedings was based were defective for the reason stated, this would not be an adequate reason for the dismissal of the applicant's suit. The Court, whose jurisdiction is international, is not bound to attach to matters of form the same degree of importance which they might possess in municipal law. Even, therefore, if the application were premature because the Treaty of Lausanne had not yet been ratified, this circumstance would now be covered by the subsequent deposit of the necessary ratifications'. The Tribunal agrees with and accepts this reasoning. It also notes that the same reasoning applies regardless how Article 10(2)'s domestic litigation requirement is characterized. Whether regarded as jurisdictional, admissibility or procedural, the considerations identified in the Mavrommatis case apply fully."
Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic, ICSID Case No. ARB/09/1, Decision on Jurisdiction, 21 December 2012 (para. 135 and fn. 133)	Argentina-Spain BIT	Reference to a decision rendered in application of the Convention	"Finally, while Claimants concede that the 18-month local court period had not lapsed at the time they filed their Request for Arbitration, they are correct to note that 18 months have subsequently passed, and the local suit remains pending. As such, the core objective of this requirement, to give local courts the opportunity to consider the disputed measures, has been met. To require Claimants to start over and re-file this arbitration now that their 18 months have been met would be a waste of time and resources. [See, e.g., Application of the **Convention on the Prevention and Punishment of the Crime of Genocide** (Bosnia and Herzegovina v. Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II), at 613, ¶ 26 ('For the purposes of determining its jurisdiction in this case, the Court … need only note that, even if it were to be assumed that the Genocide Convention did not enter into force between the Parties until the signature of the Dayton-Paris Agreement, all the conditions are now fulfilled to found the jurisdiction of the Court ratione personae. It is the case that the jurisdiction of the Court must normally be assessed on the date of the filing of the act instituting proceedings. . . . The present Court applied this principle in the case concerning the Northern Cameroons (I.C.J. Reports 1963, p. 28), as well as in Nicaragua Jurisdiction, when it stated: 'It would make no sense to require Nicaragua now to institute fresh proceedings based on the Treaty, which it would be fully entitled to do.' (I.C.J. Reports 1984, pp. 428-429, para. 83.)'); Application of the **Convention on the Prevention and Punishment of the Crime of Genocide** (Croatia v. Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008, p. 412 (hereinafter 'Croatia v. Serbia') ¶ 85, Exhibit C-579 ('The Court observes that as to the first of these two arguments, given the logic underlying the cited jurisprudence of the Court deriving from the 1924 Judgment in the Mavrommatis Palestine Concessions case (Judgment No. 2, 1924, P.C.I.J., Series A, No. 2), it does not matter whether it is the applicant or the respondent that does not fulfil the conditions for the Court's jurisdiction, or both of them — as is the situation where the compromissory clause invoked as the basis for jurisdiction only enters into force after the proceedings have been instituted. What matters is that, at the latest by the date when the Court decides on its jurisdiction, the applicant must be entitled, if it so wishes, to bring fresh proceedings in which the initially unmet condition would be fulfilled. In such a situation, it is not in the interests of the sound administration of justice to compel the applicant to begin the proceedings anew— or to initiate fresh proceedings — and it is preferable, except in special circumstances, to conclude that the condition has, from that point on, been fulfilled.')]".

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ICS Inspection and Control Services Limited (United Kingdom) v. Argentine Republic, PCA Case No. 2010-9, Award on Jurisdiction, 10 February 2012 (para. 281 and fn. 308)	Argentina-United Kingdom BIT	Reference to decisions rendered with regard to the Convention	"This principle [pursuant to which jurisdiction shall be declined when a claimant fails to prove the State's consent with sufficient certainty] follows from the lack of a default forum for the presentation of claims under international law. Whereas the inherent jurisdiction or hermetic division of competence over claims before general courts is a common feature of municipal judicial systems, the default position under public international law is the absence of a forum before which to present claims. The absence of a forum before which to present valid substantive claims is thus a normal state of affairs in the international sphere. A finding of no jurisdiction should not therefore be treated as a defect in a treaty scheme that runs counter to its object and purpose in providing for substantive investment protection [The ICJ made this clear in Democratic Republic of the Congo v. Rwanda even in respect of erga omnes and peremptory norms in international law: The Court will begin by reaffirming that 'the principles underlying **the [Genocide] Convention** are principles which are recognized by civilized nations as binding on States, even without any conventional obligation' and that a consequence of that conception is 'the universal character both of the condemnation of genocide and of the co-operation required 'in order to liberate mankind from such an odious scourge' (Preamble to the Convention)' (Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951, p. 23). It follows that 'the rights and obligations enshrined by the Convention are rights and obligations erga omnes' (Application of the **Convention on the Prevention and Punishment of the Crime of Genocide** (Bosnia and Herzegovina v. Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II), p. 616, para. 31). The Court observes, however, as it has already had occasion to emphasize, that 'the erga omnes character of a norm and the rule of consent to jurisdiction are two different things' (East Timor (Portugal v. Australia), Judgment, I.C.J. Reports 1995, p. 102, para. 29), and that the mere fact that rights and obligations erga omnes may be at issue in a dispute would not give the Court jurisdiction to entertain that dispute. The same applies to the relationship between peremptory norms of general international law (jus cogens) and the establishment of the Court's jurisdiction : the fact that a dispute relates to compliance with a norm having such a character, which is assuredly the case with regard to the prohibition of genocide, cannot of itself provide a basis for the jurisdiction of the Court to entertain that dispute. Under the Court's Statute that jurisdiction is always based on the consent of the parties.]"
Impregilo S.p.A. v. Argentine Republic, ICSID Case No. ARB/07/17, Concurring and Dissenting Opinion of Professor Brigitte Stern, 21 June 2011 (para. 31)	Argentina-Italy BIT	General reference to the Convention as a whole and to its Article IX: "Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or any of the other acts enumerated in Article 3, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute."	"[i]t must be admitted that rights and means of protecting rights are two different 'legal animals'. For example, while there is no possibility to make a reservation to the substantive obligations accepted by States in the **Genocide Convention**, it is possible to make a reservation to the jurisdiction of the ICJ provided for in **Article IX of the Convention** to decide on the responsibility of States for the violation of the substantive rules, which demonstrates a clear distinction between substantives rules and jurisdictional rules. Also, everybody is familiar with the severability of the arbitration clause in a contract, which also points to a different legal nature of the substantive obligations undertaken in a contract and the jurisdictional means to have these obligations enforced. Not to mention the fact that in numerous treatises on investment law, the chapter related to treatment does not include developments on the dispute settlement mechanisms, which are dealt with in a distinct chapter."
Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A. v. Republic of Peru, ICSID Case No. ARB/03/4, Decision on Annulment, 5 September 2007 (para. 86 and fn. 11)	Chile-Peru BIT	Reference to a decision rendered in application of the Convention	"The principle of res judicata is not only a characteristic feature of most domestic legal systems but is also an important principle of international law. In the recent judgment of the International Court of Justice ("ICJ") in the Case Concerning the Application of **the Convention on the Prevention and Punishment of the Crime of Genocide**, the ICJ emphasised the fundamental character of that principle and pointed out that its underlying character and purposes are reflected in the judicial practice of the Court. However, the analysis in that judgment concerned the res judicata status of previous ICJ judgments and not of judgments rendered at national level [referring to the Case Concerning the Application of the **Convention on the Prevention and Punishment of the Crime of Genocide** (Bosnia and Herzegovina v. Serbia and Montenegro), ICJ Judgment of 26 February 2007, paras. 115-116]."
United Parcel Service of America Inc. v. Government of Canada, UNCITRAL, Award on the Merits, 24 May 2007 (para. 43)	NAFTA	Reference to a decision rendered in application of the Convention	"The essential differences between the parties relate to the application to particular provisions of NAFTA of the law reflected in article 31 of the Vienna Convention rather than to the authority, relevance and understanding of that statement which, as the International Court of Justice has recently affirmed, is well recognized as part of customary international law: Case Concerning the Application of the **Convention on the Prevention and Punishment of the Crime of Genocide** (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment (26 February 2007), paragraph 160."
Mondev International Ltd. v. United States of America, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002 (para. 86 and fn. 22)	NAFTA	Reference to a decision rendered in application of the Convention	"Having regard to the distinctions drawn between claims brought under Articles 1116 and 1117, a NAFTA tribunal should be careful not to allow any recovery, in a claim that should have been brought under Article 1117, to be paid directly to the investor. There are various ways of achieving this, most simply by treating such a claim as in truth brought under Article 1117, provided there has been clear disclosure in the Article 1119 notice of the substance of the claim, compliance with Article 1121 and no prejudice to the Respondent State or third parties. International law does not place emphasis on merely formal considerations, nor does it require new proceedings to be commenced where a merely procedural defect is involved [referring to Cf. Mavrommatis Palestine Concessions (Jurisdiction), PCIJ Ser. A No. 2 (1924) at p. 34; Case concerning Application of **the Convention on the Prevention and Punishment of the Crime of Genocide** (Bosnia & Herzegovina v. Yugoslavia) (Preliminary Objections) ICJ Reports 1996 p. 595 at pp. 613-614 (para. 26)]."
			EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS
The Rompetrol Group N.V. v. Romania, ICSID Case No. ARB/06/3, Award, 6 May 2013 (paras. 154, 168-170, 172, 206-261)	Netherlands-Romania BIT	General reference to the Convention as a whole	"Leaving aside for the moment the issues of local law, which will be dealt with below so far as relevant, the Tribunal's own view of the matter is as follows. The Tribunal starts from the elementary proposition that it is not called upon to decide any issue under **the ECHR**, whether the issue in question lies in the past or is still open. Its function is solely to decide, as between TRG and Romania, 'legal dispute[s] arising directly out of an investment' and to do so in accordance with 'such rules of law as may be agreed by the parties,' which in the present case means essentially the BIT, in application of the appropriate rules for its interpretation. **The ECHR** has its own system and functioning institutional structure for complaints of breach against States Parties. If either Mr. Patriciu or Mr. Stephenson – or any of their colleagues – feels that the conduct of a Romanian authority in his regard violates his Convention rights as an individual, a Convention remedy is available him, ultimately before the only judicial body that has the power to give an authentic and binding decision on the interpretation of Convention rights and their application. Those remedies will continue to be available and will be unaffected by whatever decision the Tribunal gives in the present case. Convention rights, with their associated remedies, might also be available in appropriate circumstances to corporate entities in respect of their presence or activities within the jurisdiction of a State Party.

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			[…] It seems to follow automatically that much of the detailed argument about the application of specific provisions of **the ECHR** in the jurisprudence of the European Court of Human Rights, interesting and illuminating as it has been, is beside the point when it comes to the issues under the Netherlands-Romania BIT which form the subject of the dispute before the Tribunal. The Tribunal's conclusions in this regard march with its conclusions above in respect of denial of justice and local remedies, and can be summarized in condensed form as follows: i. The Tribunal is not competent to decide issues as to the application of **the ECHR** within Romania, either to natural persons or to corporate entities; ii. The governing law for the issues which do fall to the Tribunal to decide is the BIT, and notably its requirements for fair and equitable treatment and non-impairment of, and full protection and security for, the investments of investors of one Party in the territory of the other Party; iii. The category of materials for the assessment in particular of fair and equitable treatment is not a closed one, and may include, in appropriate circumstances, the consideration of common standards under other international regimes (including those in the area of human rights), if and to the extent that they throw useful light on the content of fair and equitable treatment in particular sets of factual circumstances; the examination is however very specific to the particular circumstances, and defies definition by any general rule […]".
Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic, ICSID Case No. ARB/09/1, Decision on Jurisdiction, 21 December 2012 (fn. 285)	Argentina-Spain BIT	General reference to the Convention as a whole	"Respondents also cite to European Court of Human Rights case law. […] However, these cases involve an adjudication of a shareholder's rights under a specific instrument—**the ECHR**—that is simply not comparable to an investment treaty."
Quasar de Valors SICAV S.A. et al. (Formerly Renta 4 S.V.S.A et al.) v. Russian Federation, SCC Case No. 24/2007, Award, 20 July 2012 (paras. 42, 158)	Russian Federation-Spain BIT	General reference to the Convention as a whole and to its Protocol No. 1	"As summarised below, the overall chronology of which the liquidation auctions form part, casts them and their outcome in a particular light. After careful consideration of the entire record, the Tribunal concludes that, as with the preceding events, the liquidation auctions were part of the same overall scheme of confiscation. In this regard, the Tribunal's findings are consistent with those of the RosInvest Tribunal. The ECHR's finding to the contrary - i.e., that Yukos failed to prove that the Russian Federation 'had misused those [enforcement] proceedings with a view to destroying the company and taking control of its assets' - must be understood as based on a heightened requirement of 'incontrovertible and direct proof,' given the 'wide margin of appreciation' a State enjoys under Protocol No. I to **the European Convention on Human Rights**."
Spyridon Roussalis v. Romania, ICSID Case No. ARB/06/1, Award, 7 December 2011 (paras. 312, 364 and 495)	Greece-Romania BIT	General reference to the Convention as a whole and to its Protocol No. 1	"The Tribunal does not exclude the possibility that the international obligations of the Contracting States mentioned at Article 10 of the BIT could include obligations deriving from multilateral instruments to which those states are parties, including, possibly, **the European Convention of Human Rights and its Additional Protocol No.1**. But the issue is moot in the present case and does not require decision by the Tribunal, given the higher and more specific level of protection offered by the BIT to the investors compared to the more general protections offered to them by the human rights instruments referred above. Consequently Article 10 of the BIT cannot, in its own terms and in the instant case, serve as a useful instrument for enlarging the protections available to the Claimant from the Romanian State under the BIT."
El Paso Energy International Company v. Argentine Republic, ICSID Case No. ARB/03/15, Award, 31 October 2011 (para. 598, fn. 164)	Argentina-US BIT	Reference to Article 15: "(1) In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law […]".	"**Article 15 of the 1950 European Convention on Human Rights** allows States Parties, in time of war or other public emergency threatening the life of the nation, to derogate from their obligations under the Convention – except regarding Articles 2,3,4(1) and 7 – to the extent strictly required by the exigencies of the situation, provided that such derogations are not inconsistent with the Parties' other obligations under international law. A similar clause can be found in Article 27 of the 1969 American Human Rights Convention. The **case-law of the European Court of Human Rights** shows that these provisions, despite their being emergency clauses, are far from being self-judging. In concrete cases brought before the Court and involving derogations formulated on the basis of those provisions, it is the European Court which determines whether they meet the conditions provided for in Article 15."
Ioannis Kardassopoulos v. Georgia, ICSID Case No. ARB/05/18, Decision of the ad hoc Committee to Suspend the Annulment Proceeding, 21 March 2011 (para. 16)	Georgia-Greece BIT Energy Charter Treaty	General reference to the Convention as a whole	"The admissibility of the Application for Revision, much less its outcome, are no questions for the Committee to consider in light of the above developments on the distinct character of the two post-award remedies offered by the ICSID Convention. The alleged violation of **the European Convention on Human Rights** by Georgia in relation to Mr. Fuchs' arrest is a matter of no relevance, in spite of Georgia's assertions to the contrary, in the context of deciding whether to suspend the annulment proceeding pending the revision proceeding under the ICSID Convention system, and Georgia's suggestions to introduce evidence in this regard are not accepted."
Ron Fuchs v. Georgia, ICSID Case No. ARB/07/15, Decision of the ad hoc Committee to Suspend the Annulment Proceeding, 21 March 2011 (para. 16)	Georgia-Israel BIT	General reference to the Convention as a whole	"The admissibility of the Application for Revision, much less its outcome, are no questions for the Committee to consider in light of the above developments on the distinct character of the two post-award remedies offered by the ICSID Convention. The alleged violation of **the European Convention on Human Rights** by Georgia in relation to Mr. Fuchs' arrest is a matter of no relevance, in spite of Georgia's assertions to the contrary, in the context of deciding whether to suspend the annulment proceeding pending the revision proceeding under the ICSID Convention system, and Georgia's suggestions to introduce evidence in this regard are not accepted."

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Total S.A. v. Argentine Republic, ICSID Case No. ARB/04/01, Decision on Liability, 27 December 2010 (paras. 128-129 and 163)	Argentina-France BIT	General reference to the Convention as a whole and to its Protocol No. 1	"Since the concept of legitimate expectations is based on the requirement of good faith, one of the general principles referred to in Article 38(1)(c) of the Statute of the International Court of Justice as a source of international law, the Tribunal believes that a comparative analysis of the protection of legitimate expectations in domestic jurisdictions is justified at this point. While the scope and legal basis of the principle varies, it has been recognized lately both in civil law and in common law jurisdictions within well defined limits. In domestic legal systems the doctrine of legitimate expectations supports 'the entitlement of an individual to legal protection from harm caused by a public authority retreating from a previous publicly stated position, whether that be in the form of a formal decision or in the form of a representation'. This doctrine, which reflects the importance of the principle of legal certainty (or rule of law), appears to be applicable mostly in respect of administrative acts and protects an individual from an incoherent exercise of administrative discretion, or excess or abuse of administrative powers. The reasons and features for changes (sudden character, fundamental change, retroactive effects) and the public interest involved are thus to be taken into account in order to evaluate whether an individual who incurred financial obligations on the basis of the decisions and representations of public authorities that were later revoked should be entitled to a form of redress. However it appears that only exceptionally has the concept of legitimate expectations been the basis of redress when legislative action by a State was at stake. Rather a breach of the fundamental right of property as recognized under domestic law has been the basis, for instance, for the European Court of Human Rights to find a violation of the **First Protocol to the European Convention on Human Rights** protecting the peaceful enjoyment of property."
Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines, ICSID Case No. ARB/03/25, Decision on the Application for Annulment of Fraport AG Frankfurt Airport Services Worldwide, 23 December 2010 (para. 202)	Germany-Philippines BIT	Reference to Article 6 of the Convention: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law […]"	"The right to present one's case is also accepted as an essential element of the requirement to afford a fair hearing accorded in the principal human rights instruments [referring to Article 10 of the Universal Declaration of Human Rights; Article 14 of the International Covenant on Civil and Political Rights,; **Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms**]. This principle requires both equality of arms and the proper participation of the contending parties in the procedure, these being separate but related fundamental elements of a fair trial. The principle will require the tribunal to afford both parties the opportunity to make submissions where new evidence is received and considered by the tribunal to be relevant to its final deliberations. It is no answer to a failure to accord such a right that both parties were equally disadvantaged."
Ioannis Kardassopoulos v. Georgia, ICSID Case No. ARB/05/18, Decision of the ad hoc Committee on the Stay of Enforcement of the Award, 12 November 2010 (para. 30)	Georgia-Greece BIT Energy Charter Treaty	Reference to Article 6 of the Convention (see above)	"The object and purpose of the Enforcement Law of 16 April 1999 are chiefly the modalities concerning execution against assets of court judgments and awards in Georgia and the authority of enforcement agents. This analysis is buttressed by the Recommendations of the Council of Europe which, as an introduction, call for the necessity of the implementation of judicial decisions to conform with the fair trial standards of **Article 6 of the European Convention on Human Rights**, a concern which does not fall within the obligations undertaken by Georgia under the ICSID Convention."
Ron Fuchs v. Georgia, ICSID Case No. ARB/07/15, Decision of the ad hoc Committee on the Stay of Enforcement of the Award, 12 November 2010 (para. 30)	Georgia-Israel BIT	Reference to Article 6 of the Convention (see above)	"The object and purpose of the Enforcement Law of 16 April 1999 are chiefly the modalities concerning execution against assets of court judgments and awards in Georgia and the authority of enforcement agents. This analysis is buttressed by the Recommendations of the Council of Europe which, as an introduction, call for the necessity of the implementation of judicial decisions to conform with the fair trial standards of **Article 6 of the European Convention on Human Rights**, a concern which does not fall within the obligations undertaken by Georgia under the ICSID Convention."
Frontier Petroleum Services Ltd. v. Czech Republic, UNCITRAL, Final Award, 12 November 2010 (para. 338)	Canada-Czech Republic BIT	General reference to the Convention as a whole	"With respect to Claimant's argument that by operation of Articles III(3) and III(4) of the BIT, Claimant was entitled to the same right to expeditious proceedings before a court in the Czech Republic as are persons entitled to such treatment under **the ECHR**, the Tribunal notes that rights under **the ECHR** accrue to everyone, regardless of nationality. This obviates Claimant's need to rely on the BIT to invoke such rights. The Parties have not pleaded the jurisprudence of **the ECHR** in these proceedings, therefore this Tribunal makes no finding as to whether any standard set by **the ECHR** is applicable here and has been breached."
Eureko B.V. v. Slovak Republic, UNCITRAL, PCA Case No. 2008-13, Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010 (para. 261)	Netherlands-Slovak Republic BIT	General reference to the first protocol of the Convention	"Similarly, the protection in Article 5 of the BIT against expropriation is by no means covered by the EU freedom of establishment. While it certainly overlaps with the right to property secured by Article 17 of the EU Charter of Fundamental Rights (and **the First Protocol to the ECHR**, as applied under EU law), the BIT provision on expropriation is not obviously co-extensive with it. Both the considerable body of jurisprudence on indirect takings that has emerged in the context of BITs, and also the fact that the BIT protects "assets" and "investments" rather than the arguably narrower concepts of "possessions" and "property" protected by the EU Charter on Fundamental Rights, give rise to the possibility of wider protection under the BIT than is enjoyed under EU law."
RosInvestCo UK Ltd. v. Russian Federation, SCC Case No. V079/2005, Final Award, 12 September 2010 (para. 614)	Russian Federation-United Kingdom BIT	General reference to the Convention as a whole	"As Claimant points out, the treatment of Yukos and of Mr. Khodorkovsky changed dramatically after the latter had publicly criticized the Putin administration and after several projects suggested by Yukos seem to have been understood as threatening the government's control over the Russian petroleum resources. The Russian authorities arrested Mr. Khodorkovsky on 25 October 2003 on charges primarily stemming from the 1994 privatization of Apatit (a company unrelated to Yukos), even though the General Prosecutor's Office of the Russian Federation, in its letter to President Putin had, towards the end of the letter, concluded that there were —no grounds for it to take action. (CM-423) (In this context, the Tribunal has taken note of the Decision of the European Court of Human Rights accepting the Application of Mr. Khodorkovsky complaining against his treatment (CM-381), but in view of the different criteria established by **the European Convention of Human Rights** this Tribunal does not consider this decision as relevant for the present case based on the IPPA.)"

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The Rompetrol Group N.V. v. Romania, ICSID Case No. ARB/06/3, Decision of the Tribunal on the Participation of a Counsel, 14 January 2010 (paras. 14-20)	Netherlands-Romania BIT	Reference to Article 6 of the Convention (see above)	"It is common ground between the Parties that the rules governing the present arbitration proceedings, i.e. the ICSID Convention and Arbitration Rules, contain no provision allowing in terms for a challenge to the appointment by a Party of counsel to represent it in an ICSID arbitration. Some other source for such a challenge must therefore be found, which the Respondent seeks to do by implication from the general tenor of the Arbitration Rules, and by invoking an inherent general power on the part of any tribunal to police the integrity of its proceedings. […] The importance of the interests at stake can readily be illustrated by reference to **Article 6 (right to a fair trial) of the European Convention on Human Rights**. It is not simply that that Article provides, in its paragraph (1), that '[i]n the determination of his civil rights and obligations ..., everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law', but also that the same Article lays down in its paragraph (3), as one of the individual's basic rights in this connection, the right 'to defend himself in person or through legal assistance of his own choosing'. Admittedly, this is put in the context of defence against criminal charges, but that arises from the overall context of the Convention, and there is no room for any suggestion that the provision is not simply one illustration of a more fundamental principle still about a litigant's basic rights in pursuing or defending legal proceedings. The fact that the two elements appear side by side in the same Article shows that each goes hand in hand with the other as essential elements of what constitutes a fair trial. The Tribunal is not therefore convinced that there is any necessary tension between the two basic principles: the independence and impartiality of the tribunal (coupled with the associated principle of the immutability of a tribunal duly established) vs. the litigant's right to be represented by persons of his or her own free choice."
Cementownia "Nowa Huta" S.A. v. Republic of Turkey, ICSID Case No. ARB(AF)/06/2, Award, 17 September 2009 (para. 98)	Poland-Turkey BIT	General reference to the Convention as a whole	"Furthermore, CEAS and Kepez together with Kemal Uzan and Rumeli Elektrik have brought an action against the Republic of Turkey before the European Court of Human Rights (ECHR) for breach of the **European Convention for Human Rights** and seeking damages therefor in relation to CEAS and Kepez […] These proceedings are legally independent of each other. However, the Arbitral Tribunal reserves the right to consider declarations made in such other proceedings if they are adduced as evidence in the present one."
Toto Costruzioni Generali S.p.A. v. Republic of Lebanon, ICSID Case No. ARB/07/12, Decision on Jurisdiction, 11 September 2009 (paras. 154-157)	Italy-Lebanon BIT	Reference to Article 6 of the Convention (see above)	"The Treaty sanctions not only breaches of specific Treaty provisions, such as Article 3.1, but also breaches of any rule of international law (Article 7.3). The Treaty thus covers also a denial of justice under international law. It has to be conceded that international law has no strict standards to assess whether court delays are a denial of justice. As a matter of principle, the failure to render justice within a reasonable period of time may constitute a breach of international customary law […] **Article 6 of the ECHR** certainly covers the question to which extent lengthy court proceedings are a breach of the right to due process and to a fair and equitable trial. This matter has been extensively subject of decisions from domestic courts and from the European Court of Human Rights. However, as Lebanon is not party to **the ECHR** and lies outside the territorial scope of the ECHR, these decisions are not relevant in this case."
Azurix Corp. v. the Argentine Republic, ICSID Case No. ARB/01/12, Decision on the Application for Annulment of the Argentine Republic, 1 September 2009 (para. 128)	Argentina-United States BIT	General reference to the Convention as a whole and to Article 1 of its Protocol No. 1: "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law."	"Argentina also has referred by analogy to **the European Convention on Human Rights** and NAFTA. As the extent of the protections afforded by an investment protection treaty depends in each case on the specific terms of the treaty in question, the Committee regards comparison with differently-worded treaties as of limited utility, especially treaties outside the field of investment protection. It is noted that the European Court of Human Rights has held that (subject to possible exceptions) a shareholder in a company does not have standing to bring a claim for violation of the company's rights under **Article 1 of Protocol No. 1 of the European Convention on Human Rights**, and that the mere fact that there has been a violation of the company's rights under Article 1 of Protocol No. 1, does not of itself mean that there has been a violation of the shareholders rights under that provision. However, such an approach does not inform the situation where a law or a treaty might confer certain rights directly on a shareholder which would be violated by an injury to the company, or answer the question whether the shareholder could have standing to bring a claim in that event."
Continental Casualty Company v. Argentine Republic, ICSID Case No. ARB/03/9, Award, 5 September 2008 (paras. 276-277 and fn. 406 and 407)	Argentina-United States BIT	Reference to Article 1 of Protocol No. 1 (see above)	"It is appropriate to distinguish those Measures adopted by Argentina that appear to be legitimate under the BIT, from those which are carved out because of the application of Art. XI. As a starting point we refer to the distinction generally accepted in international law and spelled out in some treaties, notably in recent BITs, between two types of encroachments by public authorities on private property: (i) On the one hand, there are certain types of measures or state conduct that are considered a form of expropriation because of their material impact on property, and which are legitimate only if adopted for public purpose, without discrimination, and against the payment of compensation according to the general or specific applicable standards. One may distinguish between: (a) outright suppression or deprivation of the right of ownership, usually by its forced transfer to public entities; (b) limitations and hampering with property, short of outright suppression or deprivation, interfering with one or more key features, such as management, enjoyment, transferability, which are considered as tantamount to expropriation, because of their substantial impact on the effective right of property. Both of these types of measures entail indemnification under relevant international treaties, as well as under most constitutions which respect fundamental human rights. (ii) On the other hand, there are limitations to the use of property in the public interest that fall within typical government regulations of property entailing mostly inevitable limitations imposed in order to ensure the rights of others or of the general public (being ultimately beneficial also to the property affected). These restrictions do not impede the basic, typical use of a given asset and do not impose an unreasonable burden on the owner as compared with other similarly situated property owners. These restrictions are not therefore considered a form of expropriation and do not require indemnification, provided however that they do not affect property in an intolerable, discriminatory or disproportionate manner [See Art. 1, First Protocol to the ECHR]. It is well known that the distinction is not always easy, that in different historical and social contexts the line has been drawn differently and that different international tribunals, including arbitration tribunals under various BITs, have relied on different criteria and have given different weight to them, such as those recognizing the public interest on the one side and those protecting the integrity of property rights on the other. Different tribunals have come to different evaluations as to the definition of a specific measure brought forward for their decision and its classification in the first or second category […] The Tribunal notes that other international tribunals have also denied that in most instances of devaluation an expropriation of private property under international standards is present, except in extreme

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			situations of improper conduct by the State. This is the consistent jurisprudence of the ECHR under **Protocol 1 to the ECHR protecting private property**."
Perenco Ecuador Limited v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador, ICSID Case No. ARB/08/6, Decision on Provisional Measures, 8 May 2009 (paras. 69-70)	Ecuador-France BIT	General reference to the Convention as a whole	"Shortly after the decision in LaGrand, the European Court of Human Rights addressed the issue of interim measures under **the European Convention for the Protection of Human Rights and Fundamental Freedoms**: see Mamatkulov and Askarov v Turkey [GC], Nos 46827/99 and 46951/99, ECHR 2005-1 (Judgment of 4 February 2005). In concluding that Turkey, by not complying with interim measures 'indicated' to it, had breached the Convention, the Court noted that in LaGrand the 'ICJ brought to an end the debate over the strictly linguistic interpretation of the words 'power to indicate' in the first paragraph of Article 41 and 'suggested' in the second paragraph by concluding, with reference to the Vienna Convention, that provisional measures were legally binding': see para 117. The ECHR adopted the ICJ's conclusions and reinforced them with the views of several other international courts and adjudicative bodies, drawing attention to the near-universal agreement on the importance of interim measures in ensuring the 'effective exercise' of the right of individual petition. The Court stated: '123. … in the light of the general principles of international law, the law of treaties and international case-law, the interpretation of the scope of interim measures cannot be dissociated from the proceedings to which they relate or the decision on the merits they seek to protect. The Court reiterates in that connection that Article 31 § 1 of the Vienna Convention on the Law of Treaties provides that treaties must be interpreted in good faith in the light of their object and purpose, and also in accordance with the principle of effectiveness. 124. The Court observes that the International Court of Justice, the Inter-American Court of Human Rights, the Human Rights Committee and the Committee against Torture of the United Nations, although operating under different treaty provisions to those of the Court, have confirmed in their reasoning in recent decisions that the preservation of the asserted rights of the partie sin the face of the risk of irreparable damage represents an essential objective of interim measures in international law. Indeed it can be said that, whatever the legal system in question, the proper administration of justice requires that no irreparable action be taken while proceedings are pending'. It is clear from the above that provisional measures have a significant role in the administration of public international law. "
Víctor Pey Casado and President Allende Foundation v. Republic of Chile, ICSID Case No. ARB/98/2, Award, 8 May 2008 (paras. 659-662)	Chile-Spain BIT	Reference to Article 6 of the Convention (see above)	«Sur la première question, la réponse ne peut être que positive, au regard des faits établis et déjà retenus par le Tribunal arbitral, l'absence de toute décision par les tribunaux civils chiliens sur les prétentions de M. Pey Casado s'analysant en un déni de justice. En effet, l'absence de décision en première instance sur le fond des demandes des parties demanderesses pendant sept années, c'est-à-dire entre septembre 1995 et le 4 novembre 2002 (moment de l'introduction de la demande complémentaire dans la présente procédure) doit être qualifié comme un déni de justice de la part des tribunaux chiliens. En fait, des délais procéduraux importants constituent bien une des formes classiques de déni de justice. […] La Cour européenne des droits de l'homme s'est également prononcée dans le même sens, en estimant que les sept ans que les juridictions étatiques ont mis pour examiner une demande en compensation à la suite d'une expropriation étaient bien supérieurs à un délai raisonnable, ce qui constitue une violation de l'**article 6-1 de la Convention européenne des droits de l'homme** qui compte, au rang de ces droits fondamentaux, le droit d'être entendu 'dans un délai raisonnable' ».
Limited Liability Company Amto v. Ukraine, Arbitration No. 080/2005, Final Award, 26 March 2008 (para. 71)	Energy Charter Treaty	General reference to the Convention as a whole and to Article 1 of Protocol No. 1 (see above)	"This is a case of an international tribunal and a supra-national court having concurrent jurisdiction over a dispute arising out of similar facts. However, the parties and the causes of action are different in these two proceedings. With regard to the parties, EYUM-10 is not a party to the present arbitration and AMTO is not a party to the ECHR proceedings. With respect to the causes of action, the present arbitration is based on alleged breaches of the ECT, while proceedings before the ECHR are based on **Article 6(1) of the European Convention and its Protocol No. 1, Article 1**. These circumstances are sufficient to disqualify the Respondent's lis pendens objection."
Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States, ICSID Case No. ARB(AF)/04/5, Concurring Opinion of Arthur W. Rovine Issues of Independent Investor Rights, Diplomatic Protection and Countermeasures, 21 November 2007 (paras. 39-41)	NAFTA	Reference to Article 1 of Protocol No. 1 (see above)	"Mention should also be made of human rights treaties which, of course, differ in significant ways from Chapter Eleven and BITs, but nevertheless are further examples of direct grants of individual rights by treaty to be enforced against the States Parties to the treaty […] There are some respects in which a human rights treaty may be analogous to Chapter Eleven or to a BIT. Claimants point out, as an example, that **Article 1 of Protocol 1 of the European Convention on Human Rights** protects both individuals and companies from an unlawful expropriation of property by a contracting government. A private party may bring a claim against a breaching government before the European Court of Human Rights, challenging the expropriation. Governments may also challenge the actions of another State Party to the European Convention. So there exists within the European Convention a dual system of government and private party enforcement, somewhat similar to NAFTA."
Siemens A.G. v. Argentine Republic, ICSID Case No. ARB/02/8, Award, 6 February 2007 (para. 354)	Argentina-Germany BIT	Reference to Article 1 of Protocol No. 1 (see above)	"Argentina has pleaded that, when a State expropriates for social or economic reasons, fair market value does not apply because otherwise this would limit the sovereignty of a country to introduce reforms in particular of poor countries. Argentina has not developed this argument, nor justified on what basis Argentina would be considered a poor country, nor specified the reforms it sought to carry out at the time. Argentina in its allegations has relied on Tecmed as an example to follow in terms of considering the purpose and proportionality of the measures taken. The Tribunal observes that these considerations were part of that tribunal's determination of whether an expropriation had occurred and not of its determination of compensation. The Tribunal further observes that **Article I of the First Protocol to the European Convention on Human Rights** permits a margin of appreciation not found in customary international law or the Treaty."
International Thunderbird Gaming Corporation v. United Mexican States, UNCITRAL, Separate Opinion, 01 December 2005 (para. 141)	NAFTA	General reference to the Convention as a whole	"The judicial practice most comparable to treaty-based investor-sate arbitration is the judicial recourse available to individuals against states under **the European Convention on Human Rights**; again, states have to defray their own legal representation expenditures, even if they prevail."

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Mondev International Ltd. v. United States of America, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002 (paras. 138, 144 and 150)	NAFTA	Reference to Article 7 of the Convention: "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed […]"	"The European Court of Human Rights has given some guidance on th[e]question [of the retrospective application of a new decisional law] under **Article 7 of the European Convention** in the context of criminal proceedings, where the effect of a new judicial decision is to impose a criminal liability which did not, or arguably did not, exist when the crime was committed. If there is any analogy at all, it is much fainter in civil cases. Assuming, for the sake of argument, that standards of this kind might be applicable under Article 1105(1), in the Tribunal's view there was no contravention of any such standards in the present case. […] These decisions concern the "right to a court", an aspect of the human rights conferred on all persons by the major human rights conventions and interpreted by the European Court in an evolutionary way. They emanate from a different region, and are not concerned, as Article 1105(1) of NAFTA is concerned, specifically with investment protection. At most, they provide guidance by analogy as to the possible scope of NAFTA's guarantee of "treatment in accordance with international law, including fair and equitable treatment and full protection and security". But the Tribunal would observe that, as soon as it was decided that BRA was covered by the statutory immunity (a matter for Massachusetts law), then the existence of the immunity was arguably to be classified as a matter of substance rather than procedure in terms of the distinction under **Article 6(1) of the European Convention**. […] The Claimant argued that comparative reviews of the position in non-NAFTA States, and decisions of the European Court of Human Rights, were irrelevant to the question of the extent of NAFTA protection. NAFTA provided its own standard for full protection and security. The conferral on a public employer such as BRA of a blanket immunity from suit for tortious interference infringed that standard, and did so irrespective of whether the conduct immunized was itself a breach of NAFTA. According to the Claimant, Article 1105(1) requires that there be a remedy 'when a State breaches its own laws in a manner that is aimed directly at and interferes with a foreign investment.' In any event, the conferral of a general immunity for intentional torts would be disproportionate under Article 6(1) as applied by the European Court, and a fortiori under the more explicit standard of full protection afforded by NAFTA."
S.D. Myers, Inc. v. Government of Canada, UNCITRAL, Separate Opinion by Dr. Bryan Schwartz, Concurring Except with Respect to Performance Requirements, in the Partial Award of the Tribunal, 12 November 2000 (para. 229)	NAFTA	General reference to the Convention as a whole	"In the last fifty years, international law has increasingly recognized the right of individuals to complain about mistreatment by their own governments. Under some arrangements, like the **European Convention of Human Rights** or the Optional Protocol to the International Covenant on Civil and Political Rights, individuals have been given standing to make claims against their own governments. In many situations, however, nationals remain without international remedies in the face of domestic injustice."
INDIGENOUS AND TRIBAL PEOPLES CONVENTION NO. 169 (1989)			
Grand River Enterprises Six Nations, Ltd., et al. v. United States of America, UNCITRAL, Award, 12 January 2011 (para. 59)	NAFTA	General reference to the Convention as a whole	"Pursuant to NAFTA Article 1128, Canada submitted a statement of its views regarding the interpretation of NAFTA's Article 1105 on January 19, 2009. Canada's submission stated, inter alia, that (1) pursuant to the Free Trade Commissions July 31, 2001 Notes of Interpretation, a violation of the Jay Treaty as alleged by the Claimants does not establish a violation of NAFTA Article 1105(1); and (2) **ILO Convention 169** and the U.N. Declaration on the Rights of Indigenous Peoples do not constitute customary international law, and so do not fall within the ambit of Article 1105(1)."
INTER-AMERICAN CONVENTION ON HUMAN RIGHTS (1969)			
El Paso Energy International Company v. Argentine Republic, ICSID Case No. ARB/03/15, Award, 31 October 2011 (paras. 592-598)	Argentina-US BIT	Reference to Article 27: "(1) In time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law and do not involve discrimination on the ground of race, color, sex, language, religion, or social origin […]".	"Treaty provisions allowing for exceptions to the rights guaranteed in the same treaty must be attributed the ordinary meaning resulting from their text, without reading self-judging clauses into them, especially when the treaty contains compromissory clauses, as is the case here. This clearly results from the case-law and from international practice. […] Article 15 of the 1950 European Convention on Human Rights allows States Parties, in time of war or other public emergency threatening the life of the nation, to derogate from their obligations under the Convention – except regarding Articles 2,3,4(1) and 7 – to the extent strictly required by the exigencies of the situation, provided that such derogations are not inconsistent with the Parties' other obligations under international law. A similar clause can be found in **Article 27 of the 1969 American Human Rights Convention**. The case-law of the European Court of Human Rights shows that these provisions, despite their being emergency clauses, are far from being self-judging. In concrete cases brought before the Court and involving derogations formulated on the basis of those provisions, it is the European Court which determines whether they meet the conditions provided for in Article 15."
Sempra Energy International v. Argentine Republic, ICSID Case No. ARB/02/16, Award, 28 September 2007 (paras. 331-	Argentina-United States BIT	General reference to the Convention as a whole	"The discussion about institutional survival and preservation of the constitutional order has also been related to the provisions of the **Inter-American Convention on Human Rights**, to which Argentina is a party. At the hearing, Counsel for the Respondent put the following question to a legal expert: '[W]ould Argentina have been compelled because of the Inter-American Convention to maintain its constitutional order towards the end of 2001, 2002, and afterwards?' The answer from Professor Reisman was '[y]es.' This debate raises the complex relationship between investment treaties, emergency and the human rights of both citizens and property owners. Yet, the real issue in the instant case is whether the

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332)			constitutional order and the survival of the State were imperilled by the crisis, or instead whether the Government still had many tools at its disposal to cope with the situation. The Tribunal believes that the constitutional order was not on the verge of collapse, as evidenced by, among many examples, the orderly constitutional transition that carried the country through five different Presidencies in a few days' time, followed by elections and the reestablishment of public order. Even if emergency legislation became necessary in this context, legitimately acquired rights could still have been accommodated by means of temporary measures and renegotiation."
INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION (1965)			
Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Decision on Jurisdiction, 2 July 2013 (paras. 141-142)	Uruguay-Switzerland BIT	Reference to a decision rendered in application of the Convention	"The position in international law generally is stated by the ICJ. In Georgia v. Russia, the Court explained the legal character of procedural preconditions as follows: 'To the extent that the procedural requirements of [a dispute settlement clause] may be conditions, they must be conditions precedent to the seisin of the court even when the term is not qualified by a temporal element' [referring to Case Concerning Application of **the International Convention on the Elimination of all Forms of Racial Discrimination** (Georgia v. Russian Federation), Judgment on Preliminary Objections, 1 April 2011, para. 130] […] In the present case, the Tribunal does not consider it necessary to characterize the 18-month domestic litigation requirement as pertaining to jurisdiction or to admissibility. Even if that requirement were considered as pertaining to admissibility, its compulsory character would be evident. This conclusion is confirmed by the object and purpose of the requirement in question which is aimed at offering the host State the opportunity to redress the violations of the BIT alleged by the investor. The objective pursued by the Respondent when negotiating the domestic litigation requirement was made clear during the Uruguayan Parliamentary debate leading to the approval of the BIT. The Claimants do not dispute that this was the Respondent's objective when providing for this requirement in the BIT."
Ambiente Ufficio S.P.A. and Others (Case formerly known as Giordano Alpi and Others) v. Argentine Republic, ICSID Case No. ARB/08/9, Dissenting Opinion of Santiago Torres Bernardez, 2 May 2013 (paras. 410 and fn. 329,331)	Argentina-Italy BIT	Reference to Article 22: "Any dispute between two or more States Parties with respect to the interpretation or application of this Convention, which is not settled by negotiation or by the procedures expressly provided for in this Convention, shall, at the request of any of the parties to the dispute, be referred to the International Court of Justice for decision, unless the disputants agree to another mode of settlement."	"The fact that **Article 22 of the Convention on the Elimination of All Forms of Racial Discrimination** (CERD) is not drafted in mandatory terms did not prevent the Court to dismiss the case for non-compliance by claimant of the two alternative preconditions to judicial settlement set out in the said Article 22, namely negotiations or referral to procedures expressly provided for in CERD. […] I conclude, therefore, that the extent of consent to international arbitration contained in the Argentine Republic's offer of the BIT does not cover the international arbitration proceeding instituted by Claimants in the instant case. This conclusion of mine is based upon the text of Article 8(1) of the BIT in the context of paragraphs (1)-(3) of the Article as a whole. It is furthermore conformed to the established jurisprudence of the ICJ on the matter, as well as to a number of arbitral decisions in ICSID case-law. As declared by the ICJ in its Judgment in **the Case concerning Application of the CERD** (Georgia v. Russian Federation): 'Manifestly, in the absence of evidence of a genuine attempt to negotiate, the precondition of negotiation is not met. However, where negotiations are attempted or have commenced the jurisprudence of this Court and of the Permanent Court of International Justice clearly reveals that the precondition of negotiation is met only when there has been a failure of negotiations, or when negotiations have become futile or deadlocked'. The ICJ dismissed the above case by lack of jurisdiction because Georgia was unable to prove that in fact it sought to commence good faith negotiation or the other settlement method provided for in Article 22 of CERD as preconditions for the seisin of the Court."
Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey, ICSID Case No. ARB/11/28, Decision on Bifurcated Jurisdictional Issue, 5 March 2013 (paras. 61-62 and 84-87)	Netherlands-Turkey BIT	Reference to a decision rendered in application of the Convention	"In Case Concerning Application of the **International Convention on the Elimination of All Forms of Racial Discrimination** (Georgia v Russian Federation) the ICJ addressed the function of a 'compromissory' provision of this sort in terms : > '[I]t is not unusual in compromissory clauses conferring jurisdiction on the Court and other international jurisdictions to refer to resort to negotiations. Such resort fulfills three distinct functions. In the first place, it gives notice to the respondent State that a dispute exists and delimits the scope of the dispute and its subject-matter… In the second place, it encourages the Parties to attempt to settle their dispute by mutual agreement, thus avoiding recourse to binding third-party adjudication. In the third place, prior resort to negotiations or other methods of peaceful dispute settlement performs an important function in indicating the limit of consent given by States.' The Tribunal adds a fourth aspect, namely, that it sees that such a requirement also fulfils the policy function of conferring upon the State Party an opportunity to address a potential claimant's complaint before it becomes a respondent in an international investment dispute. […] The second requirement in Article 8(2) is that the parties seek to engage in consultations and negotiations in good faith. Respondent relies on decisions by the ICJ in Armed Activities (DRC v. Rwanda) case and Case Concerning Application of the **International Convention on the Elimination of All Forms of Racial Discrimination** (Georgia v Russian Federation) to emphasize that negotiations must be referable to the treaty dispute. In the latter case, the ICJ said: > … to meet the precondition of negotiation in the compromissory clause of a treaty, these negotiations must relate to the subject-matter of the treaty containing the compromissory clause. In other words, the subject-matter of the negotiations must relate to the subject-matter of the dispute which, in turn, must concern the substantive obligations contained in the treaty in question. […] The Tribunal agrees with the above statement of the ICJ and considers that the subject matter of the consultations and negotiations to be engaged must relate to the subject matter of the investment dispute brought before this Tribunal under the BIT. It is not necessary for the parties to make express reference to the treaty in their consultations or negotiations."

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Ambiente Ufficio S.P.A. and Others (Case formerly known as Giordano Alpi and Others) v. Argentine Republic, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility, 8 February 2013 (para. 570, fn. 288)	Argentina-Italy BIT	Reference to Article 22: "Any dispute between two or more States Parties with respect to the interpretation or application of this Convention, which is not settled by negotiation or by the procedures expressly provided for in this Convention, shall, at the request of any of the parties to the dispute, be referred to the International Court of Justice for decision, unless the disputants agree to another mode of settlement." The tribunal also refers to article 29 of the Convention on the Elimination of all Forms of Discrimination Against Women	"In Application of the **International Convention on the Elimination of all Forms of Racial Discrimination** (Georgia v. Russia), Preliminary Objections, Judgment, 1 April 2011, para. 141, the negotiation requirement in Art. 22 of the Convention was considered a precondition to be fulfilled before the seisin of the Court, i.e. a precondition to the exercise of the Court's jurisdiction. […] Both Parties have drawn the Tribunal's attention to numerous authorities and cases in which legal issues which they deemed comparable to those in the present dispute were at stake. In particular, the International Court of Justice, relying on its case-law on the matter, recently qualified negotiation requirements stemming from **Art. 29 of the Convention on the Elimination of all Forms of Discrimination against Women** as affecting its jurisdiction. In contrast, the Tribunal in the Abaclat case – which had the same BIT before it as the present Tribunal – concluded that Art. 8(1)-(3) of the Argentina-Italy BIT were requirements of admissibility rather than jurisdiction. Further examples could be added at will. The major conclusion to be drawn for them, however, is that there has not been a consistent approach on these matters by investment treaty tribunals, let alone in international law more generally."
ICS Inspection and Control Services Limited (United Kingdom) v. Argentine Republic, PCA Case No. 2010-9, Award on Jurisdiction, 10 February 2012 (para. 250)	Argentina-United Kingdom BIT	General reference to the Convention as a whole	"Moreover, the trend in public international law has clearly favoured the strict application of procedural prerequisites. For example, in the recent case of Georgia v. Russia before the ICJ, despite the absence of mandatory language, a majority of the ICJ found that the phrase 'dispute…which is not settled by negotiation or by the procedures expressly provided for in this Convention' established a precondition to resort to negotiations or to the procedures expressly provided for under the **International Convention on the Elimination of All Forms of Racial Discrimination** (CERD), prior to the seisin of the ICJ."
Daimler Financial Services AG v. Argentine Republic, ICSID Case No. ARB/05/1, Award, 22 August 2012 (para. 194 and fn. 348)	Argentina-Germany BIT	Reference to a decision rendered in application of the Convention	"Since the 18-month domestic courts provision constitutes a treaty-based pre-condition to the Host State's consent to arbitrate, it cannot be bypassed or otherwise waived by the Tribunal as a mere 'procedural' or 'admissibility-related' matter [referring to Case Concerning Application of **the International Convention on the Elimination of All Forms of Racial Discrimination** (Georgia v. Russian Federation), Preliminary Objections (Decision of 1 April 2011), […] (finding that the relevant treaty's requirement of good faith negotiations between the parties constituted a procedural condition for the seisin of the Court and further finding that the Court had no jurisdiction because this precondition had not been met)]."
HOCHTIEF Aktiengesellschaft v. Argentine Republic, ICSID Case No. ARB/07/31, Separate and Dissenting Opinion of J. Christopher Thomas, Q.C., 24 October 2011 (para. 77 and related fn. 48)	Argentina-Germany BIT	Reference to a decision rendered in application of the Convention	"[The fact that 'prior recourse' provision are jurisdictional in nature] has been reaffirmed as recently as April of 2011, when the ICJ found that the preconditions established in Article 22 of the International **Convention on the Elimination of All Forms of Racial Discrimination** 'establish preconditions before the seisin of the Court' [Article 22 of the Convention states: 'Any dispute between two or more States Parties with respect to the interpretation or application of this Convention, which is not settled by negotiation or by the procedures expressly provided for in this Convention, shall, at the request of any of the parties to the dispute, be referred to the International Court of Justice for decision, unless the disputants agree to another mode of settlement.' Case concerning Application of the **International Convention on the Elimination of All Forms of Racial Discrimination** (Georgia v. Russian Federation), Judgment of 1 April 2011]."
Impregilo S.p.A. v. Argentine Republic, ICSID Case No. ARB/07/17, Concurring and Dissenting Opinion of Professor Brigitte Stern, 21 June 2011 (paras. 82-83 and fn. 54)	Argentina-Italy BIT	Reference to a decision rendered in application of the Convention	"Are all conditions shaping the State's consent to be treated in the same manner or is there a distinction to be made between conditions of admissibility and conditions of jurisdiction? A delicate question needs however to be raised here, i.e. whether a distinction should be made between the different conditions shaping the State's consent to international arbitration. This raises the issue of a possible distinction between conditions of admissibility and conditions of jurisdiction. There appears to be no legal reason to treat differently these two types of requirements that condition the State's consent [This has been confirmed less than a month ago by the ICJ in the case concerning Application of the **International Convention on the Elimination of All Forms of Racial Discrimination** (Georgia v. Russian Federation), Judgment of 1 April 2011. The Court had to interpret Article 22 of the International Convention on the Elimination of All Forms of Racial Discrimination ('CERD') of 21 December 1965, which reads : 'Any dispute between two or more States Parties with respect to the interpretation or application of this Convention, which is not settled by negotiation or by the procedures expressly provided for in this Convention, shall, at the request of any of the parties to the dispute, be referred to the International Court of Justice for decision, unless the disputants agree to another mode of settlement.' The Court considered that the terms of Article 22 'establish preconditions before the seisin of the Court.']".
INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (1966)			
Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines, ICSID Case No. ARB/03/25, Decision on the Application for Annulment of Fraport AG Frankfurt Airport Services Worldwide, 23 December 2010 (paras. 189, 202,	Germany-Philippines BIT	General reference to the Covenant as a whole	"The principle nullum crimen sine lege encapsulates a fundamental human rights principle in the construction of criminal law for the protection of the accused that '[n]o one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed.' […] But it would be a distortion of the important function of the principle to consider it applicable in the present context as a fundamental rule of procedure. The maxim 'in dubio pro reo' also encapsulates an important human rights protection that '[e]veryone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.' But such a principle cannot be applied in the context of international arbitral proceedings instituted by an investor against a state. Indeed, the application of such a presumption could itself, in the context of ICSID proceedings, amount to a failure of due process since it may unbalance the essential equality between the parties.

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fn. 308)			[…] "The right to present one's case is also accepted as an essential element of the requirement to afford a fair hearing accorded **in the principal human rights instruments**. This principle requires both equality of arms and the proper participation of the contending parties in the procedure, these being separate but related fundamental elements of a fair trial."
The Rompetrol Group N.V. v. Romania, ICSID Case No. ARB/06/3, Decision of the Tribunal on the Participation of a Counsel, 14 January 2010 (paras. 14-20 and related fn. 7)	Netherlands-Romania BIT	Reference to Article 14: (1) "All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children […]".	"It is common ground between the Parties that the rules governing the present arbitration proceedings, i.e. the ICSID Convention and Arbitration Rules, contain no provision allowing in terms for a challenge to the appointment by a Party of counsel to represent it in an ICSID arbitration. Some other source for such a challenge must therefore be found, which the Respondent seeks to do by implication from the general tenor of the Arbitration Rules, and by invoking an inherent general power on the part of any tribunal to police the integrity of its proceedings. […] The importance of the interests at stake can readily be illustrated by reference to Article 6 (right to a fair trial) of the European Convention on Human Rights. It is not simply that that Article provides, in its paragraph (1), that '[i]n the determination of his civil rights and obligations ..., everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law', but also that the same Article lays down in its paragraph (3), as one of the individual's basic rights in this connection, the right 'to defend himself in person or through legal assistance of his own choosing' […]. Admittedly, this is put in the context of defence against criminal charges, but that arises from the overall context of the Convention, and there is no room for any suggestion that the provision is not simply one illustration of a more fundamental principle still about a litigant's basic rights in pursuing or defending legal proceedings [Cf. also the exactly similar provisions in **Article 14 of the International Covenant on Civil and Political Rights of 16 December 1966]** The fact that the two elements appear side by side in the same Article shows that each goes hand in hand with the other as essential elements of what constitutes a fair trial."
Toto Costruzioni Generali S.p.A. v. Republic of Lebanon, ICSID Case No. ARB/07/12, Decision on Jurisdiction, 11 September 2009 (paras. 158-160)	Italy-Lebanon BIT	Reference to Article 14 of the Covenant (see above) and to its Optional Protocol	"The Treaty sanctions not only breaches of specific Treaty provisions, such as Article 3.1, but also breaches of any rule of international law (Article 7.3). The Treaty thus covers also a denial of justice under international law. It has to be conceded that international law has no strict standards to assess whether court delays are a denial of justice. As a matter of principle, the failure to render justice within a reasonable period of time may constitute a breach of international customary law […] On the other hand, Lebanon is a party to **the ICCPR, Article 14.1** which requires the right to a fair hearing: 'All persons shall be equal before the courts and tribunals. In the determination of... his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law ....' The right to a fair hearing entails a number of requirements, including the requirement that the procedure before the national tribunals be conducted expeditiously. Under **the Optional Protocol to the ICCPR**, a State may accept that individual persons file a complaint against the State before the ICCPR Commission, which then gives its opinion. However, Lebanon has not ratified this Protocol and thus cannot be summoned before the Commission. Nevertheless, the decisions of the Commission are relevant to interpret the scope of **Article 14 of the ICCPR**. To assess whether court delays are in breach of the requirement of a fair hearing, the ICCPR Commission takes into account the complexity of the matter, whether the Claimants availed themselves of the possibilities of accelerating the proceedings, and whether the Claimants suffered from the delay. The ICCPR Commission thus decided that a two-and-a-half-year delay in the proceedings to annul an administrative order was acceptable. Likewise, a two-year period to obtain a judgment from an administrative tribunal against a dismissal was equally acceptable. On the other hand, a delay of seven years to obtain a judgment for someone who asked to be reinstated in his position and an additional delay of two-and-a-half years to get this judgment implemented was considered unacceptable. Likewise, eleven years of proceedings to obtain a final judgment regarding custody of and access to the claimant's children was unreasonable."
United Parcel Service of America Inc. v. Government of Canada, UNCITRAL, Decision of the Tribunal on Petitions for Intervention and Participation as Amici Curiae, 17 October 2001	NAFTA	Reference to Article 14 of the Covenant (see above)	"We do not consider that the broader international law arguments assist the Petitioners. As they indeed acknowledge, international law and practice and related national law and practice have either ignored or given very low priority to third party intervention […]. Of the treaty provisions they cite, the one which is nearest to being applicable – **article 14 of the International Covenant on Civil and Political Rights** – is about persons whose rights and obligations in a suit at law are being determined by a court or tribunal. That is not the present case. The Petitioners' rights and obligations are not engaged in that way or indeed at all."

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(para. 40)			
S.D. Myers, Inc. v. Government of Canada, UNCITRAL, Separate Opinion by Dr. Bryan Schwartz, Concurring Except with Respect to Performance Requirements, in the Partial Award of the Tribunal, 12 November 2000 (para. 229)	NAFTA	General reference to the Covenant as a whole and to its optional protocol	"In the last fifty years, international law has increasingly recognized the right of individuals to complain about mistreatment by their own governments. Under some arrangements, like the European Convention of Human Rights or the Optional Protocol to **the International Covenant on Civil and Political Rights**, individuals have been given standing to make claims against their own governments. In many situations, however, nationals remain without international remedies in the face of domestic injustice."
INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS (1966)			
Antoine Goetz and others v. Republic of Burundi [I], ICSID Case No. ARB/95/3, Award (containing the Tribunal's decision on jurisdiction and liability and the Parties' settlement agreement), 10 February 1999 (para. 121)	Belgium-Luxembourg-Burundi BIT	Reference to Article 2: (2) "The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."	"Le Tribunal ne juge pas utile, à cet égard, de s'attarder sur l'allégation, avancée par les requérants, d'une violation par la République du Burundi de ses obligations en vertu de **l'article 2, paragraphe 2, du Pacte international relative aux droits économiques, sociaux et culturels**, auquel le Burundi et la Belgique sont tous deux parties. Cette disposition se lit comme suit : 'Les Etats parties au présent Pacte s'engagent à garantir que les droits qui y sont énoncés seront exercés sans discrimination aucune fondée sur la race, la couleur, la langue, la religion, l'opinion politique, l'origine nationale, la fortune, la naissance ou toute autre situation.' Une discrimination suppose un traitement différencié appliqué à des personnes se trouvant dans des situations semblables ; or il n'est pas allégué par les requérants que les investisseurs belges requérants aient été traités plus mal que d'autres investisseurs se trouvant dans une situation similaire. A supposer même que les investisseurs belges requérants puissent se prévaloir du Pacte, le Tribunal ne voit pas en quoi la décision de mettre fin au certificat d'entreprise franche octroyé à AFFIMET pourrait tomber sous le coup de cette disposition."
RESOLUTION ADOPTED BY THE GENERAL ASSEMBLY: 61/295 UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES (2007)			
Grand River Enterprises Six Nations, Ltd., et al. v. United States of America, UNCITRAL, Award, 12 January 2011 (paras. 59 and 210-211)	NAFTA	General reference to the Declaration as a whole and to its Article 19: "States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them."	"It may well be, as the Claimants urged, that there does exist a principle of customary international law requiring governmental authorities to consult indigenous peoples on governmental policies or actions significantly affecting them. […] As pointed out by the Claimants, the duty of states to consult with indigenous peoples is featured in the **UN Declaration of the Rights of Indigenous Peoples, particularly in its Article 19** as well as in several other articles. In its Counter-Memorial the Respondent maintained in sweeping terms that the Declaration does not represent customary international law, as did Canada in its non-disputing party submission. However, when questioned by the Tribunal on this point at the hearing, the Respondents' counsel stated that some parts of the Declaration could reflect fundamental human rights principles and emerging customary law. In any event, any obligations requiring consultation run between the state and indigenous peoples as such, that is, as collectivities bound in community. **Article 19 of the U.N. Declaration** provides that 'States shall consult with indigenous peoples through their own representative institutions'. It would go well beyond any articulation of the indigenous consultation norm, as well as far beyond its conceptual foundations as understood by the Tribunal, to hold that the norm obliges consultations with individual investors such as Arthur Montour […]."
UNIVERSAL DECLARATION OF HUMAN RIGHTS (1948)			
EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic, ICSID Case No. ARB/03/23, Award, 11 June 2012 (paras. 193	Argentina-France BIT Argentina-Belgium-Luxembourg BIT	General reference to the Declaration as a whole	"Respondent argues Claimants' rights under investment treaties should not be deemed absolute to the detriment of the Argentine population's entitlement to universal human rights enshrined in international instruments such as **the 1948 U.N. Universal Declaration of Human Rights**, the 1966 U.N. International Covenant on Civil and Political Rights, the 1989 U.N. Convention on the Rights of the Child, and the 1969 American Convention on Human Rights. See Respondent's Rejoinder at paragraphs 205, 209. Respondent posits these latter multilateral pacts proscribe the abrogation or suspension in any situation of those rights contained thereunder; hence, the non-derogable nature of such rights is said to be conclusive evidence that they are tantamount to jus cogens. […] It is common ground that the Tribunal should be sensitive to international jus cogens norms, including basic principles of human rights. As defined by Article 53 of the Vienna Convention, such norms include standards —accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted. The Parties, however, disagree over the application and scope of those norms. In Respondent's view, the Emergency Tariff Measures guaranteed free enjoyment of certain basic human rights such as life, health, personal integrity and education, which were directly threatened by the socio-economic crisis suffered by Argentina. By contrast, Claimants argue that no jus cogens norms were threatened. According to Claimants, commonly recognized examples of jus cogens norms include prohibitions against genocide or slave trading, not a right of Argentine citizens to consume electricity at reduced prices. The Tribunal does not call into question the potential significance or relevance of human rights in connection with international investment law. However, regardless of any political wisdom in a temporary pesification or provisional freeze of tariffs during the period of crisis, no showing has been made that Argentina was not able to comply with the relevant treaty provisions later, through a rectification of the economic equilibrium which had been disrupted by the Emergency Measures. In short, no evidence persuades the Tribunal that Respondent's failure to re-negotiate tariffs in a timely fashion, so as to re-establish the economic equilibrium to which Claimants were entitled under the Concession Agreement's Currency Clause, was necessary to guarantee human rights."

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Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines, ICSID Case No. ARB/03/25, Decision on the Application for Annulment of Fraport AG Frankfurt Airport Services Worldwide, 23 December 2010 (paras. 189 and 202 and fn. 308)	Germany-Philippines BIT	General reference to the Declaration as a whole	"The principle nullum crimen sine lege encapsulates a fundamental human rights principle in the construction of criminal law for the protection of the accused that '[n]o one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed.' […] But it would be a distortion of the important function of the principle to consider it applicable in the present context as a fundamental rule of procedure. The maxim 'in dubio pro reo' also encapsulates an important human rights protection that '[e]veryone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.' But such a principle cannot be applied in the context of international arbitral proceedings instituted by an investor against a state. Indeed, the application of such a presumption could itself, in the context of ICSID proceedings, amount to a failure of due process since it may unbalance the essential equality between the parties. […] "The right to present one's case is also accepted as an essential element of the requirement to afford a fair hearing accorded **in the principal human rights instruments**. This principle requires both equality of arms and the proper participation of the contending parties in the procedure, these being separate but related fundamental elements of a fair trial."
Ioan Micula, Viorel Micula and others v. Romania, ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility, 24 September 2008 (paras. 87-88)	Romania-Sweden BIT	Reference to Article 15 of the Declaration: "(1) Everyone has the right to a nationality; (2) No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality."	"The Parties disagree as to the role of international law in the Tribunal's interpretation of Article 1 of the BIT with respect to nationality. The Tribunal is of the opinion that in interpreting the BIT, i.e., an instrument between two sovereign States, it may take into account, as directed by Article 31(3)(c) of the Vienna Convention on the Law of Treaties, any relevant rules of international law. The Tribunal is also mindful of the role of international law when nationality is acknowledged for international purposes. Indeed, it is well established that the acquisition of nationality must not be inconsistent with international law […]. In making its determination, the Tribunal will be mindful of **Article 15 of the Universal Declaration of Human Rights** according to which everyone has the right to a nationality, and that no one shall be arbitrarily deprived of his nationality nor denied of the right to change his nationality."

(iii) Anti-corruption Agreements

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AFRICAN UNION CONVENTION ON PREVENTING AND COMBATING CORRUPTION (2003)			
Metal-Tech Ltd. v. Republic of Uzbekistan, ICSID Case No. ARB/10/3, Award, 4 October 2013 (para. 291)	Israel-Uzbekistan BIT	General reference to the Convention as a whole	"In addition to early bilateral treaties providing for extradition in cases of corruption, manifestations of the fight against corruption are found at the multilateral level in the Vienna Convention of the Law of Treaties and in the ICSID Convention […] The international community of States has thereafter sought to address the issue of corruption with a targeted effort to eliminate corrupt practices in the public service sector and criminalize corruption in domestic legal orders […] [A] number of international agreements were adopted mainly seeking to criminalize corruption, but also dealing with administrative and civil law aspects relating to the fight against corruption. These include the 1996 Inter-American Convention against Corruption; the 1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions; the 1999 Council of Europe Civil Law Convention on Corruption; the 1999 Criminal Law Convention on Corruption and the 1999 Civil Law Convention on Corruption, both adopted under the aegis of the Council of Europe; **the 2003 African Union Convention on Preventing and Combating Corruption**; and the 2004 UN Convention against Corruption."
COUNCIL OF EUROPE CIVIL AND CRIMINAL LAW CONVENTIONS ON CORRUPTION (1999)			
Metal-Tech Ltd. v. Republic of Uzbekistan, ICSID Case No. ARB/10/3, Award, 4 October 2013 (para. 291)	Israel-Uzbekistan BIT	General reference to the Conventions	"In addition to early bilateral treaties providing for extradition in cases of corruption, manifestations of the fight against corruption are found at the multilateral level in the Vienna Convention of the Law of Treaties and in the ICSID Convention […] The international community of States has thereafter sought to address the issue of corruption with a targeted effort to eliminate corrupt practices in the public service sector and criminalize corruption in domestic legal orders […] [A] number of international agreements were adopted mainly seeking to criminalize corruption, but also dealing with administrative and civil law aspects relating to the fight against corruption. These include the 1996 Inter-American Convention against Corruption; the 1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions; **the 1999 Council of Europe Civil Law Convention on Corruption; the 1999 Criminal Law Convention on Corruption and the 1999 Civil Law Convention on Corruption, both adopted under the aegis of the Council of Europe**; the 2003 African Union Convention on Preventing and Combating Corruption; and the 2004 UN Convention against Corruption."
OECD CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS (1997)			
Metal-Tech Ltd. v. Republic of Uzbekistan, ICSID Case No. ARB/10/3, Award, 4 October 2013 (para. 291)	Israel-Uzbekistan BIT	General reference to the Convention as a whole	"In addition to early bilateral treaties providing for extradition in cases of corruption, manifestations of the fight against corruption are found at the multilateral level in the Vienna Convention of the Law of Treaties and in the ICSID Convention […] The international community of States has thereafter sought to address the issue of corruption with a targeted effort to eliminate corrupt practices in the public service sector and criminalize corruption in domestic legal orders […] [A] number of international agreements were adopted mainly seeking to criminalize corruption, but also dealing with administrative and civil law aspects relating to the fight against corruption. These include the 1996 Inter-American Convention against Corruption; **the 1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions**; the 1999 Council of Europe Civil Law Convention on Corruption; the 1999 Criminal Law Convention on Corruption and the 1999 Civil Law Convention on Corruption, both adopted under the aegis of the Council of Europe; the 2003 African Union Convention on Preventing and Combating Corruption; and the 2004 UN Convention against Corruption."
Sistem Muhendislik Insaat Sanayi ve Ticaret A.S. v. Kyrgyz Republic, ICSID Case No. ARB(AF)/06/1, Award, 9 September 2009 (para. 42)	Kyrgyz Republic-Turkey BIT	Reference to Article 1: "Each Party shall take such measures as may be necessary to establish that it is a criminal offence under its law for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business."	"**The OECD Convention**, to which the Respondent refers, defines bribery as the offer, promising or giving of 'undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.' The Tribunal regards that as a reasonable and useful definition."
International Thunderbird Gaming Corporation v. United Mexican States, UNCITRAL, Separate Opinion, 1 December 2005 (para. 112)	NAFTA	General reference to the Convention as a whole	"It is generally very difficult to prove bribery as there is usually little if any paper trail. However, arbitral tribunals and courts, in particularly of more recent and under the influence of the authoritative international conventions (mainly, but not exclusively **the OECD anti-bribery convention**) have been read to use presumptions rather than full-fledged and hard to obtain full evidence. If a transaction creates enough suspicion so that – in the practice of the US Foreign Corrupt Practices Act – a 'red flag' should show up on the face of the transaction, it is sufficient to require the party in control of such a transaction to prove that it was contrary to 'red flag' indicators a proper one."

REFERENCE OF DOCUMENT	JURISDICTIONAL BASIS	ARTICLES OF THE AGREEMENT CITED	RELEVANT EXTRACT
UNITED NATIONS CONVENTION AGAINST CORRUPTION (2003)			
Metal-Tech Ltd. v. Republic of Uzbekistan, ICSID Case No. ARB/10/3, Award, 4 October 2013 (para. 291)	Israel-Uzbekistan BIT	General reference to the Convention as a whole	"In addition to early bilateral treaties providing for extradition in cases of corruption, manifestations of the fight against corruption are found at the multilateral level in the Vienna Convention of the Law of Treaties and in the ICSID Convention […] The international community of States has thereafter sought to address the issue of corruption with a targeted effort to eliminate corrupt practices in the public service sector and criminalize corruption in domestic legal orders […] [A] number of international agreements were adopted mainly seeking to criminalize corruption, but also dealing with administrative and civil law aspects relating to the fight against corruption. These include the 1996 Inter-American Convention against Corruption; the 1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions; **the** 1999 Council of Europe Civil Law Convention on Corruption; the 1999 Criminal Law Convention on Corruption and the 1999 Civil Law Convention on Corruption, both adopted under the aegis of the Council of Europe; the 2003 African Union Convention on Preventing and Combating Corruption; and **the 2004 UN Convention against Corruption.**"

(iv) Miscellaneous agreements

REFERENCE OF DOCUMENT	JURISDICTIONAL BASIS	ARTICLES OF THE AGREEMENT CITED	RELEVANT EXTRACT
JAY TREATY (1794)			
Grand River Enterprises Six Nations, Ltd., et al. v. United States of America, UNCITRAL, Award, 12 January 2011 (paras. 141-143)	NAFTA	General reference to the Treaty as a whole	"The 'conduct' of the United States pointed to by the Claimants as giving rise to reasonable expectations of immunity from MSA measures is U.S. federal Indian law and **the Jay Treaty**. Ordinarily, reasonable or legitimate expectations of the kind protected by NAFTA are those that arise through targeted representations or assurances made explicitly or implicitly by a state party. Even accepting that cited U.S. federal Indian law and **the Jay Treaty** might serve as sources of reasonable or legitimate expectations for the purposes of a NAFTA claim, the Tribunal finds that they do not in this case. […] "Similarly, the Tribunal declines to resolve the opposing interpretations of **the Jay treaty** in relation to Arthur Montour's commercial activities. The Tribunal affirms the importance of the principle of pacta sunt servanda and acknowledges the significant and constructive roles treaties may have in securing the rights of indigenous peoples. The Tribunal also acknowledges the importance **of the Jay Treaty** for protecting cross-border movement and trade among indigenous peoples in North America. However, Mr. Montour asserts an absolute immunity from state regulation for commercial activities involving cross-border trade at a significant scale, and in doing so relies on an interpretation of **the Jay Treaty** that is not plainly supported by the text or easily and readily derived from application of accepted rules of treaty interpretation. What is readily apparent, instead, are the ambiguities in the meaning of the text in respect of the far-reaching claimed immunity, especially in light of the understandings and practice of the contemporary treaty parties, Canada and the United States, which are contrary to the Claimants' interpretation and which must be taken into account. […] Given the circumstances—including the unresolved questions involving **the Jay Treaty** and U.S. domestic law, and the practice of heavy state regulation of sales of tobacco products—the Tribunal holds that Arthur Montour could not reasonably have developed and relied on an expectation, the non-fulfilment of which would infringe NAFTA, that he could carry on a large-scale tobacco distribution business, involving the transportation of large quantities of cigarettes across state lines and into many states of the United States, without encountering state regulation."
GAMI Investments, Inc. v. Government of the United Mexican States, UNCITRAL, Final Award, 15 November 2004 (paras. 39-40)	NAFTA	General reference to the Treaty as a whole	"As the Umpire put it in the Selwyn case decided in 1903 by the British-Venezuelan Commission: 'International arbitration is not affected jurisdictionally by the fact that the same question is in the courts of one of the nations. Such international tribunal has power to act without reference thereto, and if judgment has been pronounced by such court, to disregard the same so far as it affects the indemnity to the individual, and has power to make an award in addition thereto or in aid thereof as in the given case justice may require. Within the limits prescribed by the convention constituting it the parties have created a tribunal superior to the local courts.' This century-old holding was itself based on venerable authority. **The Jay Treaty** of 1794 between the US and Great Britain was concluded to resolve acute controversies in the wake of the American Revolution. International commissions were established to rule on claims brought by individuals. Some such claims involved citizens of one country dissatisfied with their treatment by the courts of the other. The British commissioners took the view that the decisions of English courts were final. The US commissioners were able to secure a majority decision to the contrary. One of them (William Pinckney) put it as follows in The Betsy (1797): 'neither the United States nor the claimants its citizens are bound to take for just the sentence of the lords, if in fact it is not so; … the affirmance of an illegal condemnation, so far from legitimating the wrong done by the original seizure and precluding the neutral from seeking reparation for it against the British nation, is peculiarly that very act which consummates the wrong and indisputably perfects the neutral's right of demanding that reparation through the medium of his own government.' 89 years later Francis Wharton wrote that this 'is now accepted law.' The Umpire in Selwyn expressly relied on this statement by Wharton."

ANNEX 4. METHODOLOGY

I. Methodology for the International Investment Agreements Survey

The sample for this survey consists of 2,094 international investment agreements (IIAs), in large majority bilateral investment treaties (BITs), plus a limited number of bilateral free trade agreements (FTAs) and economic partnership agreements (EPAs) including provisions on investment protection. The sample covers the investment agreements that the 54 countries that participate in the Freedom of Investment Roundtables have concluded with any other country.[1] The sample includes the IIAs that were publicly available by mid-March 2014. The available treaties have been included regardless of whether they are in force, or – in a limited number of cases – whether the Parties have signed the documents.

The analysis of treaty texts also covers 13 multilateral investment agreements, including, among others, NAFTA and the Energy Charter Treaty.

The analysis sought to identify any kind of reference to SD/RBC concerns, i.e. language that is commonly associated with the protection of the environment, labour and human rights, as well as with the fight against corruption. The survey technique involves (i) searching for this language in IIAs through key word searches carried out manually and via search engines; (ii) identifying the main characteristics of the SD/RBC language contained in the treaties and (iii) analysing statistically the references identified pursuant to the previously established categorization and the treaties' features. Accordingly, unusual language relating to SD/RBC concerns might have been omitted.

Participants in the FOI Roundtables include Argentina, Australia, Austria, Belgium, Brazil, Bulgaria, Canada, Chile, China, Colombia, Costa Rica, Czech Republic, Denmark, Egypt, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, India, Indonesia, Ireland, Israel, Italy, Japan, Jordan, Korea, Latvia, Lithuania, Luxembourg, Malaysia, Mexico, Morocco, Netherlands, New Zealand, Norway, Peru, Poland, Portugal, Romania, Russian Federation, Saudi Arabia, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, Tunisia, Turkey, United Kingdom, and United States.

II. Methodology for the Investment Arbitration Cases Survey

The sample for this survey consists of arbitral decisions, awards and separate opinions rendered by arbitrators and annulment committees. It does not include parties' briefs or amicus curiae submissions.

The sample covers proceedings undertaken pursuant to IIAs but do not include documents from contract-based arbitration proceedings.

The sample includes the dispute documents available on the Investor State Law Guide subscription database as well as on the publicly available Investment Treaty Arbitration website. The documents were included if they were available by mid-March 2014.

[1] The term "country" is used for linguistic ease. Its use does not imply any judgement by the OECD as to the legal or other status of any territorial entity. Belgium and Luxembourg have concluded treaties considered in this document jointly as Belgium-Luxembourg Economic Union; while they constitute a joint treaty partner, this report counts the Belgium-Luxembourg Economic Union as *two* countries.

The survey technique involves (i) identifying language that is commonly associated with the protection of the environment, labour and human rights, and with the fight against corruption as well as the main characteristics of the language contained in the title of the international agreements dealing with the same issues and (ii) searching for this language in the decisions through key word searches carried out manually and via search engines.

The sample selection and the key word search may be subject to a number of errors, omissions or biases:

- *Not finding references because they use non-standard language.* The key word search – which is based on a standard set of key words for each type of issue or international SD/RBC agreement – assumes a certain amount of standardisation in references to issues or agreements. Therefore, some decisions might not be included if they refer to an issue in a non-standard way or if an international agreement is referred to in in a way that differs from its official name.
- *Decisions are not publicly available.* The fact that ISDS dispute documents are not always publicly available presents challenges for legal research in this field. For the present study (which is based on all publicly available documents), it may introduce sample selection bias. This is because some decisions – for example, those referring to corruption issues – might be less likely to be made publicly available and would therefore not be included in the sample.

The international agreements surveyed are the following:

i) Environmental Agreements

- Aarhus Protocol on Persistent Organic Pollutants to the UNECE Convention on Long-Range Transboundary Air Pollution of 1979 (1998)
- Basel Convention on the Control of Trans-boundary Movements of Hazardous Wastes and their Disposal (1989)
- Cartagena Protocol on Biosafety to the Convention on Biological Diversity (2000)
- Convention on Biological Diversity (1992)
- Convention on International Trade in Endangered Species of Wild Flora and Fauna (1963)
- Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (1972)
- Espoo Convention on Environmental Impact Assessment in a Transboundary Context (1991)
- Kyoto Protocol to the United Nations Framework Convention on Climate Change (1997)
- Montreal Protocol on Substances that Deplete the Ozone Layer (1987)
- North American Agreement on Environmental Cooperation (1993)
- OSPAR Convention - Convention for the Protection of the Marine Environment of the North-East Atlantic (1992)
- Resolution adopted by the General Assembly: 1803 (XVII). Permanent sovereignty over natural resources (1962)
- Rio Declaration on Environment and Development (1992)
- Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (1998)
- Stockholm Convention on Persistent Organic Pollutants (2001)
- Stockholm Declaration on the Human Environment (1972)
- UNESCO Convention concerning the Protection of the World Cultural Property and Natural Heritage (1972)
- United Nations Convention on the Law of the Sea (1982)
- United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa (1994)

- United Nations Framework Convention on Climate Change (1992)
- United States - Mexico Treaty Relating to the Utilization of Water (1944)
- Vienna Convention for the Protection of the Ozone Layer (1985)

(ii) Human Rights Agreements

- Charter of Fundamental Rights of the European Union (2000)
- Convention on the Prevention and Punishment of the Crime of Genocide (1948)
- European Convention on Human Rights - Convention for the Protection of Human Rights and Fundamental Freedoms (1950)
- Indigenous and Tribal Peoples Convention No. 169 (1989)
- Inter-American Convention on Human Rights (1969)
- International Convention on the Elimination of All Forms of Racial Discrimination (1965)
- International Covenant on Civil and Political Rights (1966)
- International Covenant on Economic, Social and Cultural Rights (1966)
- Resolution adopted by the General Assembly: 61/295 United Nations Declaration on the Rights of Indigenous Peoples (2007)
- Universal Declaration of Human Rights (1948)

(iii) Anti-corruption Agreements

- African Union Convention on Preventing and Combating Corruption (2003)
- Council of Europe Civil and Criminal Law Conventions on Corruption (1999)
- Inter-American Convention against Corruption (1996)
- United Nations Convention Against Corruption (2003)
- OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997)

(iv) Labour Agreements

- Convention concerning Discrimination in Respect of Employment and Occupation (1958)
- Convention concerning Forced or Compulsory Labour (1930)
- Convention concerning Freedom of Association and Protection of the Right to Organize (1948)
- Convention concerning Labour Clauses in Public Contracts (1949)
- Convention concerning Minimum Age for Admission to Employment (1973)
- Convention concerning Occupational Safety and Health and the Working Environment (1981)
- Convention concerning Safety and Health in Agriculture (2001)
- Convention concerning Safety and Health in Construction (1988)
- Convention concerning Safety in the Use of Chemicals at Work (1990)
- Convention concerning the Abolition of Forced Labour (1957)
- Convention concerning the Application of the Principles of the Right to organise and to Bargain Collectively (1949)
- Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (1999)
- Convention concerning the Promotion of Collective Bargaining (1981)
- Convention concerning Tripartite Consultation to Promote the Implementation of International Labour Standards (1976)

(v) Miscellaneous Agreements

- Jay Treaty (1794)

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