

# Integrating Environmental Obligations into BIT Interpretation: Interpretive Approaches for Arbitral Tribunals

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## Abstract

Today, there is much debate about the regulatory space provided by Bilateral Investment Treaties (BIT) to adopt the climate change mitigation and adaptation measures. These treaties typically provide substantive and procedural protections to investor and his investment, including protection against expropriation, fair and equitable treatment (FET), full protection and security, non-discrimination and the right to bring claims before international tribunals. However, the protection of foreign investment can sometimes conflict with the principles of sustainable development (POSD) and protection of environment. The investor who has invested millions of dollars in industries which causes harmful effect to the environment bring disputes related to conflict between investor protection and environmental protection under the dispute settlement provision in BIT. The dispute settlement provisions under the BIT provide direct access to investors to institute the claim in Investor-State Dispute Settlement (ISDS) tribunals. Direct access to tribunals without any intervention from state of nationality has caused considerable hinderance to the measures adopted by state for climate mitigation and adaptation. The tribunals deciding these cases often decide in favour of investor due lack of provisions of environmental protection in BITs. But these tribunals often overlook the interpretation tools they could use to interpret the provisions of BIT to uphold the measures adopted by state for protection of environment. There is lack of considerable debate on the interpretation tools which can be adopted to interpret the old-generation BIT rather than making ineffective textual amendments in the BITs. This paper discusses those interpretive tools which an arbitration tribunal could utilise to integrate the international environmental protection obligations with the obligation provided under BITs.

## Tests of Expropriation in Context of Sustainable Development

The concept of indirect expropriation has been a subject of debate in international investment law for several years. Lack of universally acceptable definition of '*indirect expropriation*' is a major reason for proliferation of legal disputes between the investors and the states. It poses a major challenge for the investors to prove that the state's action or policy caused indirect expropriation of their investment. Generally, indirect expropriation refers to a situation in which a state takes actions that, while not formally amounting to expropriation, effectively deprive the investor of the use, enjoyment, or significant economic value of their property.

States take measures for the protection of environment but these measures may be detrimental to the investment of an investor who has invested millions of dollars to exploit the resources for profits. In such cases, the investor can approach ISDS tribunal under BIT against such measures alleging indirect expropriation. It shows the existence of conflict between state's right to regulate for public purpose and investors right of protection of his property. The conflict causes the state to not take certain regulatory measures which are taken to uphold POSD because states could lose millions of dollars in arbitration. Thus, it becomes necessary to look into the tests of '*indirect expropriation*' for the purpose of finding out which test is most compatible with the sustainable development. In Indirect expropriation we have three tests: sole test, police power test, and the proportionality test.

## Sole Test

The sole effects test is a legal doctrine used to determine whether a state's actions constitute indirect expropriation. The test is relied on the assumption that a state's actions are tantamount to expropriation if the effects of those actions result in the deprivation of the investor's property or its economic value. The test was first introduced in the *Methanex vs USA*<sup>1</sup>, where the tribunal stated that '*a measure that has an effect equivalent to direct expropriation without formal transfer of title or outright seizure should be considered as indirect expropriation*'.<sup>2</sup>

The test focuses on evaluating the impact of a measure, specifically whether it results in significant loss of control, monetary value, or reduced returns on investment. The test does not consider the nature or purpose of the measure, but solely focuses on its effect. The sole effect test is primarily used in *Metalclad vs Mexico*<sup>3</sup> and *Santa Elena vs Costa Rica*<sup>4</sup> cases, where a strict interpretation of investment law was adopted to protect the investor's property. However, this approach restricts the state's ability to take measures in support of sustainable

development. If this test is applied to interpret the expropriation clauses in investment treaties, it would not be suitable as it could result in indirect expropriation even when the state's measures are intended for sustainable development. The test solely focusses on the impact of the measure, neglecting the intention or purpose behind it, which is crucial in determining expropriation. Therefore, this test is unsuitable for assessing the expropriatory nature of state's measures where environmental measures are challenged.

## Police Power Test

The test is based on the assumption that a state has certain powers i.e., known as '*police powers of the state*', which fall within the ambit of customary international law. If a state takes an action in good faith which is not discriminatory and was made in accordance with '*due process of law*', no obligation to pay compensation to the investor arises. The '*police powers of the state*' refers to the measures a state can take in its jurisdiction to improve the environment, safety, or health of people, according to the rules and principles of international law. There are four requirements to be fulfilled to be covered under this test:

- That the measure taken is for public purpose;
- That it should be non-discriminatory;
- That it should be taken in '*good faith*'; and
- Made in accordance with '*due process of law*'.

If the above four requirements are fulfilled by a state while taking any measure for the protection of environment, it would be considered legal, and no compensation has to be paid to the investor. Therefore, the character and purpose of the state's actions would be crucial in determining that whether it amounts to lawful expropriation or not. In the *Methanex vs USA*<sup>5</sup> case, the tribunal ignored the sole effects test and instead used the police power test to decide whether there was expropriation of property or not. The Tribunal held that it is the prerogative of a state to safeguard the environment and the well-being of citizens.<sup>6</sup> Implementation of measure by a state for the protection of environment should not be adjudicated as indirect expropriation

1 Final Award on Jurisdiction and Merits, UNCITRAL (2005) 44 ILM 1345

2 *Ibid.*

3 ICSID (ARB(AF)/97/1).

4 ICSID (ARB/96/1).

5 *Supra* note 1.

6 *Ibid.*



because it will have a chilling effect of states legislature or government to amend its laws in favor of the protection of environment.<sup>7</sup>

Therefore, under this test more emphasis is placed on the state's right to regulate as compared to the protection of the property of the investor. More emphasis on POSD through the *police powers doctrine* will ensure that state has more policy space to enact laws on for the protection of the environment. However, the test doesn't consider all the three components of sustainable development that is economic, environment and social concern. Moreover, this test gives more preference to the state's right to regulate, resulting in an imbalance between the state's right and the investor's right to protect their property. Therefore, the most appropriate test would be the one that achieves a perfect balance between these conflicting situations.

## Proportionality Test

International investment law recognizes both the right of the investor to protect its property in a foreign country (host state) and the right of a state to regulate the affairs of a state within its jurisdiction. But the problem arises in making a proper balance between these rights. Another test to balance this conflict is the proportionality test which seeks to balance the competing rights of state and investor. The test follows the principle of public interest objective (PIO) of a state with the necessary safeguards of non-discrimination and proportionality of the measure with the so-called PIO.

Proportionality tests involve a multi-step analysis that considers the nature and purpose of the government measure, the extent to which it interferes with the investor's rights, and the availability of the other possible measures available that could fulfil the PIO without harming or having proportional effect on investor's rights.

One commonly used proportionality test is the three-pronged test, which involves assessing the legality, necessity, and proportionality of the government measure. The legality prong requires that the measure is taken in accordance with

domestic law and international law. The necessity prong requires that the measure is necessary to achieve a legitimate PIO. The proportionality prong requires that the measure is proportionate to the PIO pursued i.e., no to be excessive or arbitrary in nature. The three stages of the *proportionality test* are:

- in the first stage it is determined whether the measure taken was actually in Public Interest or not (suitability).
- 'Whether the measure is necessary to achieve the public interest'<sup>8</sup> i.e., the objectives which are determined under the public interest (necessity).
- the third stage is the valuation of the effects of the measures in comparison with the investors right. (*proportionality strictosensu*).

The three conditions ensure to maintain a balance between the *economic impact of the state's measure* and the public interest it wants to achieve. *Techmed vs Mexico*<sup>9</sup> was the first case where the tribunal used the above test to analyse the effective impact of the measure on the property of the investor.<sup>10</sup> The test is considered suitable for reconciling two opposing interests, and its objective is not to determine whether the interest of the host state or that of the foreign investor is more important, rather it aims to evaluate whether the state's actions are reasonable and appropriate, taking into account the adverse impact on the investor's property. The test takes into account the economic, social, and environmental interests of both parties.

## Interpreting the BIT's in context of Sustainable Development.

### Introduction

BITs have traditionally focused on promoting foreign investment and protecting the rights of foreign investors. However, there is growing recognition that BITs need to give due consideration to the interests and needs of the host country and its citizens. This includes promoting sustainable development and protecting the environment.

<sup>8</sup> Alec Stone Sweet & J. Mathews, "Proportionality Balancing and Global Constitutionalism" 47 *Columbia Journal of Transnational Law* 72 (2008).

<sup>9</sup> ICSID (ARB/AF/00/2), May 29, 2003.

<sup>10</sup> *Supra* note 9.

<sup>7</sup> *Ibid.*

Why BITs should be interpreted in context of sustainable development can be understood through three reasons i.e., first, sustainable development is necessary for long-term economic growth and development. The depletion of natural resources of a country could severely affect its economy in the long term. Second, sustainable development is necessary to ensure that the benefits of foreign investment are shared fairly among all stakeholders, including the host country and its citizens. Third, sustainable development is necessary to protect the rights of future generations and ensure that they are able to enjoy the same opportunities and resources as the current generation.

The interpretation of a particular treaty is dependent on the characteristics of the regime under which the Treaty is made. To interpret a treaty concerning human rights the tools of interpretations would be different as compared to the tools of interpretation of the trade treaties.<sup>11</sup> Different rules of interpretation for different treaties is necessary because every regime has different purposes, nature, structure and dispute settlement mechanism.<sup>12</sup> Therefore, to interpret the treaties in investment law we require different tools of interpretation.

*International investment law* combines elements of both *public international law* and private enforcement through investor-state arbitrations. When a state enters into a BIT with another state, there is a public interest at stake pertaining to the economic development of the country. This public interest is also involved while interpreting an investment treaty for settlement of investment disputes.

To discuss how the Tribunal would interpret the BIT, it is important to also consider how the Tribunal has evolved in its interpretation of BITs over time. Traditional BITs included specific provisions for protecting investments, such as safeguards against uncompensated expropriation or the Fair and Equitable Standard or the Most Favored Nation Standard. Due to the high level of protection granted to investors through these provisions, many investment disputes were resolved in favor of the investor. However, in the past decade, the Tribunal's

approach has shifted towards a harmonious approach keeping in view the public interest involved in the disputes.

## Why BIT's need to be Sustainable Development Friendly?

Sustainable development is that form of development that meets the needs of the present while also ensuring that future generations have the necessary resources and opportunities to develop themselves.<sup>13</sup> For this we should use resources in a manner which shall not harm the opportunities for future generations to develop. The possibilities of development are dependent on the resources a state has. The primary resources for any society to develop are the resources which are directly or indirectly provided by the environment. Therefore, it is necessary for any state to develop in a sustainable manner. The international society has first recognized the *principle of Sustainable development in 1992 Earth Summit in Rio de Janeiro*.<sup>14</sup>

In 2015 the *United Nations General Assembly (UNGA) adopted the 'Sustainable Development Goals'*<sup>15</sup> (2015 to 2030) and explained how the goals are integrated and indivisible to achieve sustainable development. The UNGA's adopted 17 goals were ambitious objectives, including elimination of poverty, inequality, climate change, environmental degradation, peace, and justice etc.,

The *United Nations World Commission on Environment and Development* (1987) published a document i.e., *Our Common Future*, commonly called the '*Brundtland Report*'<sup>16</sup>. It provides the definition of 'sustainable development' as:

*"Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs. It contains two key concepts within it"*<sup>17</sup>

<sup>13</sup> UN General Assembly, "Report of the World Commission on Environment and Development Our Common Future", 1987 UNGA A/42/427(31 March 2022).

<sup>14</sup> United Nations Framework Convention on Climate Change 1992.

<sup>15</sup> UN General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, UNGA A/RES/70/1 (25 September 2015).

<sup>16</sup> *Supra* note 13.

<sup>17</sup> *Ibid.*

<sup>11</sup> Manjiao Chi, "Sustainable Development Provisions in Investment Treaties", United Nations Publication (2018).

<sup>12</sup> *Ibid.*



"The concept of 'needs', in particular, the essential needs of the world's poor, to which overriding priority should be given"<sup>18</sup>; and "The idea of limitations imposed by the state of technology and social organization on the environment's ability to meet present and future needs"<sup>19</sup>.

The three basics of achieving sustainable development are, the environment, the economy, and society.<sup>20</sup> For this, it is necessary that all three pillars coexist in balance. If any one of the pillars is absent or inadequate, it is right to say that sustainable development is not achieved. Therefore, adherence to the POSD requires an approach that would integrate and consider all the needs of all three elements.

There are numerous global agreements focused on protecting the environment and promoting sustainable development, which obligate states to take certain actions. In order to align with these obligations and benefit the general population, it is important to establish *international investment agreements* that also align with POSD. Currently, the framework for investment protection does not prioritize POSD, and therefore there we have to revise the current stock of BITs to ensure they adhere to the POSD.<sup>21</sup> The issue is further compounded by ISDS tribunal cases, which prioritize investor protection through a strict interpretation of BITs, often at the expense of sustainable development principles

In existing investment regime, the investor companies are raising disputes before arbitration tribunals claiming compensation from States for measures taken by the state in interest of sustainable development or climate change. For instance, the measures taken by the government to control expansion of pipelines or taxing the fossil fuel industry or phasing out coal-fired power generation are raised before arbitral tribunals as amounting to indirect expropriation.<sup>22</sup> The tribunals on the basis

of literal interpretation of the treaty has granted compensation to investors thereby hindering the actions taken by the government for the protection of environment. Thus, the existing regime is not in favor of sustainable development so as to consider the objective of environmental protection.

The treaties which were enacted before any public awareness regarding climate change, ignore the aspect of sustainable development. Therefore, the investor used to go to the tribunals against the measures adopted by State, claiming indirect expropriation of their property. However, tribunals have been more inclined to protect the investors' property rights rather than the state's regulatory power in their territory. This has led to huge awards in some cases, causing a regulatory chill on the state. As a result, states are now hesitant to take measures for sustainable development. Denmark, France, and New Zealand have openly admitted their inability to meet environmental convention requirements due to potential claims from investors if they implement regulatory measures for environmental protection.

The tribunal has frequently ruled in favor of investors, even if it meant disregarding measures taken to protect the environment or public health. This pattern has enabled investors engaged in non-renewable energy production to use the threat of legal action to intimidate host states from implementing regulatory measures that could harm their interests. The table (Table 1) provides cases where investors have successfully made claims against the state.

The government should terminate the current BITs that don't have provisions related to sustainable development and replace them with new BITs that include provisions for safeguarding the environment, public health, and safety. The new BITs should have provisions that interpret them as per POSD.

## Role of General Principles of Public International Law

Investment treaties are interpreted as per the 'general rules of interpretation' outlined in Article 31<sup>23</sup> and Article 32<sup>24</sup> of the *Vienna Convention on the Law of Treaties* (VCLT). Most BITs state that the

<sup>18</sup> *Ibid.*

<sup>19</sup> *Supra* note 13.

<sup>20</sup> *Supra* note 13.

<sup>21</sup> Rudolf Dolzer and Christoph Schreuer, *Principles Of International Investment Law* (OUP, 2nd edn, 2012)

<sup>22</sup> Lorenzo Cotula, "Reconciling Regulatory Stability and Evolution of Environmental Standards in Investment contracts: Towards a Rethink of Stabilization Clauses" *J World Energy Law Bus* 176 (2008).

<sup>23</sup> Vienna Convention on the Law of Treaties, arts 31–32.

<sup>24</sup> *Id.* art. 32.

**Table 1:** ISDS Cases Related to Measures Aimed at Mitigating or Adapting to Climate Change<sup>1</sup>

Case name	Treaty	Project details	Amount claimed	Outcome	Challenged policy measure
Vattenfall v. Germany II <sup>2</sup> (2012)	Energy Charter Treaty (ECT)	Two nuclear power plants in Germany	5.14 billion USD	Settled. Germany paid total of 2.5 billion USD to four energy companies	Germany's plan for nuclear phase-out by 2022.
Vattenfall v. Germany <sup>3</sup> (2009)	ECT	Moorburg coal-fired power plant	1.4 billion USD	Settled	New administration imposes stricter water use requirements and mandates construction of fish ladder
Rockhopper v. Italy <sup>4</sup> (2017)	ECT	Oil exploration in Ombrina Mare field located six miles offshore.	N/A	Settled. Italy to pay over 190 million USD	Italian Government ban on oil and gas exploration within 12 nautical miles of coastline
Lone Pine v. Canada <sup>5</sup> (2013)	North American Free Trade Agreement (NAFTA)	Hydraulic fracturing (fracking) under St. Lawrence River	109.8 million USD	Pending	Quebecois government moratorium on oil and gas activity in certain ecologically vulnerable areas leads to revoked petroleum and natural gas exploration permits.
TransCanada v. United States <sup>6</sup> (2016)	NAFTA	Keystone XL Pipeline.	15 billion USD	Settled.	U.S. President's cancellation of pipeline citing climate change concerns
Uniper v. the Netherlands <sup>7</sup> (2021)	ECT	One of the Netherlands' largest coal-fired power plant.	Est 1.06 billion USD	Discontinues	Dutch government plan to shutdown shut down all coal-fired power plants by 2030
TC Energy v. United States II <sup>8</sup> (2021)	NAFTA Legacy Provision	Keystone XL Pipeline.	15 billion USD	Notice of intent.	Executive order revoking pipeline's construction permits.
RWE v. the Netherlands <sup>9</sup> (2021)	ECT	Two coal-fired power plants	Est. 2.96 billion USD	Pending	Dutch government plan to shutdown shut down all coal-fired power plants by 2030
Alberta PMC v. United States <sup>10</sup> (2022)	NAFTA	Province-owned Alberta. Petroleum Marketing Commission	Unknown	Notice of dispute	U.S. President's cancellation of Keystone XL pipeline.

<sup>1</sup> Columbia Center on Sustainable Investment, *International Investment Governance and Achieving a Just Zero-Carbon Future*, Briefing, (August 2022).

<sup>2</sup> ICSID Case No. ARB/12/12.

<sup>3</sup> ICSID Case No. ARB/09/6.

<sup>4</sup> ICSID Case No. ARB/17/14.

<sup>5</sup> ICSID Case No. UNCT/15/2.

<sup>6</sup> ICSID Case No. ARB/16/21.

<sup>7</sup> ICSID Case No. ARB/21/22.

<sup>8</sup> ICSID Case No. ARB/21/63.

<sup>9</sup> ICSID Case No. ARB/21/4.

<sup>10</sup> ICSID Case No. UNCT/23/4.

treaty should be interpreted in accordance with applicable rules of international law. Article 31 of the VCLT provides that interpretation should be made in accordance with the objective and purposes mentioned in the Preamble of the treaty. However,

interpreting a BIT in accordance Article 31 and Article 32 has led to excessive protection of investors' property rights, without considering the state's action for POSD. The role of article 31 and article 32 of the VCLT is very limited in context of investment



law because the dispute is considered to be more of a contractual nature.

## Contextual Interpretation

This method of interpretation provides that we not only had to look the language of the provision we had to look into the 'context' in which it is used. This method is an intent-based method of interpretation rather than literal interpretation of provisions in the treaty. In order to determine the intended meaning, this method of interpretation examines the object and purpose of the BIT, which is enshrined in the preamble, annexes, or other provisions of the treaty. For instance, in *CMX vs Argentina*<sup>25</sup> the Tribunal resorted to the protocol attached to the 1991 US-Argentina<sup>26</sup> BIT for determining whether the economic emergency is qualified to be an 'essential security interest' under the treaty.

In old-generation BITs the Preamble generally mentions it to be a treaty 'to protect' and 'to promote' investment. For this reason, the tribunals interpreted the BITs considering these objectives in preamble and generally decided in favor of investor. However, modern BITs now include additional considerations in their Preamble, such as environmental or public health, that caused a shift in how these treaties are interpreted. For instance, '2008 Rwanda – US BIT'<sup>27</sup> provides a good example in this respect. While the treaty aimed to 'promote greater economic cooperation between them with respect to investment,' the preamble also stresses the parties' desire 'to achieve these objectives in a manner consistent with the protection of health, safety, and the environment, and the promotion of internationally recognized labor rights.' Environmental and social concerns are also incorporated in other parts of the treaty, e.g. Article 12 entitled '*Investment and Environment*'.<sup>28</sup> Therefore, the inclusion of objectives related to protecting health safety or environment prevents

25 ICSID (ARB/01/8).

26 Treaty Between United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment 1991.

27 Treaty Between the Government of The United States of America and the Government of The Republic of Rwanda Concerning the Encouragement and Reciprocal Protection of Investment 2008.

28 *Id. at* art. 12.

one sided interpretation of Treaty obligations. These objectives help state to justify the measures it has adopted for the protection of health, safety, and the environment.

## Evolutionary Interpretation

To adapt to changing economic conditions, it's necessary to use an evolutionary interpretation method when interpreting BITs. This approach considers the language of the BIT as it has developed over time. However, this method is only suitable for interpreting certain terms in the BIT that are subject to change due to developments in the economy or circumstances surrounding BIT when it was made. For instance, in *Kuwait vs Aminoil*<sup>29</sup> the Tribunal approached in a dynamic way to interpret the 'stabilization clause' in the Treaty. The Tribunal took into account the modifications that have taken place since the signing of the BIT in 1948.<sup>30</sup> The Tribunal acknowledged that the nature of the agreement had evolved over time or as a result of the conduct of the parties involved.<sup>31</sup> The Tribunal considered the alterations that had been made to the terms of the contract, such as an increase in the host government's control over the management structure, which the investor had accepted.<sup>32</sup> Therefore, the Tribunal after considering the changes in obligations that parties have agreed over time, decided in favor of the host state.<sup>33</sup>

*International Centre for Settlement of Investment Disputes* (ICSID) tribunals has also recognized the doctrine of evolutionary interpretation in *LG&E vs Argentina*<sup>34</sup>. The Tribunal interpreted the provision of FET in an 'evolutionary manner with respect to the specific circumstances of the case'.<sup>35</sup> Thus, the basic concept behind evolutionary interpretation is that there are certain terms in a treaty which are evolutionary in nature. The meaning such terms changes as per the facts and circumstances or as per the judicial trend. Therefore, to align with the current emphasis on sustainable development, the interpretation of BIT should also be in line with the

29 [1982] 66 ILR 518; 21 ILM 976.

30 *Ibid.*

31 *Ibid*

32 *Ibid*

33 *Ibid.*

34 ICSID Case No. ARB/02/1.

35 *Id. at* para 22.

sustainable development goals which is possible through the evolutionary interpretation of BIT.

The term *indirect expropriation* should be interpreted in a way that recognizes the state's authority to regulate for the POSD, health, and safety while also respecting the investor's right to protect their investment. It is important to take into account the evolving international environmental standards, the advancement of environmental practices, and the increasing attention to climate change while interpreting a BIT to determine whether a state's measure amounts to expropriation or not.

## Article 31(3)(c) of the Vienna Convention.

The concept of "systematic integration" refers to the inclusion of non-investment rules and obligations from international environmental agreements as one of the criteria to be consider when interpreting a BIT. It means in allegation of expropriation; a tribunal should give due consideration to the obligations of a state under different environmental treaties it has ratified. We can trace this principle of 'systematic integration' from the language of article 31(3)(c)<sup>36</sup> of the VCLT. For instance, in *Parkerings vs Lithuania*<sup>37</sup> a contract was awarded to a Norwegian investor for erecting a multi-storey car park (MSCP) in a United Nations Educational, Scientific and Cultural Organization (UNESCO) protected site. This contract was subsequently transferred to a foreign investor of other country.<sup>38</sup> Norwegian investor contented that it violated the MFN clause under 1992 Lithuania-Norway<sup>39</sup> BIT.<sup>40</sup> The host state contending that the site is a UNESCO protected site and for the archaeological preservation the project must be cancelled.<sup>41</sup> The Tribunal while considering the breach of FET standard and interpreting the "like circumstances" of both the investors, held that:

*"The historical and archaeological preservation and environmental protection could be and in this*

<sup>36</sup> *Supra* note 33.

<sup>37</sup> ICSID Case No. ARB/05/8, Award, 11 September 2007

<sup>38</sup> *Ibid.*

<sup>39</sup> Agreement between the Government of the Kingdom of Norway and the Government of the Republic of Lithuania on the Promotion and Mutual Protection of Investments, Norway-Lithuania, 1992 art. IV.

<sup>40</sup> *Supra* note 47.

<sup>41</sup> *Ibid.*

case were a justification for the refusal of the project. The potential negative impact of the project in the Old Town was increased by its considerable size and its proximity with the culturally sensitive area of the Cathedral. Consequently, MSCP in Gedimino was not similar with the MSCP constructed by (the other investor)".<sup>42</sup>

Distinguishing both projects, the Tribunal considered the environmental effect on the UNESCO protected site. The tribunal recognized the relevance of application of non-investment rules which are identified in international environmental conventions to determine whether the actions of the state amounts to expropriation or not.<sup>43</sup> The Tribunal expressly recognized the obligations, through systematic integration, under World Heritage Convention<sup>44</sup> to justify the state's measures.<sup>45</sup>

Further, in case of, *Chemtura vs Canada*<sup>46</sup>, Canada banned the manufacturing of an agricultural pesticide. The investor went to NAFTA Tribunal contending that the ban on the manufacture of pesticide constitutes indirect expropriation investor's property.<sup>47</sup> The Tribunal justified the regulatory measures (i.e. banning the concerned agricultural pesticide) through obligations of a state under International environmental conventions.

Thus, where an investment dispute involves social or environmental dimensions and one of the parties contends that measure is taken for the environmental protection. The tribunals should consider the obligations under existing environmental conventions to which state is a party. The tribunals should integrate the goals, under environmental conventions, with the goals of investment to uphold the POSD.

## Sustainable Development and Investment Tribunals

One of the important cases where the Tribunal considered the goal of sustainable development while considering the question of investment

<sup>42</sup> *Id.* at para 392.

<sup>43</sup> *Supra* note 47.

<sup>44</sup> Convention Concerning the Protection of the World Cultural and Natural Heritage 1972.

<sup>45</sup> *Supra* note 47.

<sup>46</sup> ICGJ 464 (PCA 2010), 2nd August 2010, Permanent Court of Arbitration.

<sup>47</sup> *Ibid.*



protection is *S.D. Myers v. Canada*<sup>48</sup>. The Tribunal referred to various International environmental agreement and conventions to determine the allegations of indirect expropriation.<sup>49</sup> The tribunal referred to 1986 'US Canada Agreement Concerning the Transboundary Movement of Hazardous Wastes'<sup>50</sup> (*Transboundary Agreement*), the '1989 *Basel Convention*',<sup>51</sup> the '1994 North American Agreement on Environmental Cooperation'<sup>52</sup> (NAAEC) and the environmental agreements mentioned in the NAAEC.<sup>53</sup> The tribunal tried to reconcile the objectives of NAFTA with the need of environmental protection.<sup>54</sup> The tribunal assessed the provisions of *Transboundary Agreement* related to sustainable development and found that there is no absolute power conferred on the state to ban the import or export of hazardous waste through any regulatory measure.<sup>55</sup> Further, the tribunal examined *Basel Convention* in relation to the provisions of NAFTA.<sup>56</sup> In Article 104 of NAFTA, it is provided that the *Basel Convention* would have priority if it is ratified by the NAFTA parties.<sup>57</sup> The priority given to *Basel Convention* does not confer power on a state to take any sort of measure which may be covered under indirect expropriation. In cases where the state has an alternative option that is consistent with both NAFTA and the *Basel Convention*, it should choose the option that complies with both the treaties.

After considering the preamble to the NAFTA, and the NAAEC, the tribunal held that certain provisions of NAFTA should be interpreted keeping in view the below three principles;<sup>58</sup>

- The parties are free to grant high level of protection to environment, health and safety.
- Parties should not make hindrances in free flow of trade.
- Harmonies constructions of provisions related to environment protection and economic development.

The Tribunal instructed the state to select a measure that is in line with sustainable development and economic interests, from a range of possible measures.<sup>59</sup> This approach is believed to be the most suitable for achieving the objective of sustainable

<sup>51</sup> *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal* 1989.

<sup>59</sup> *Supra* note 58, at para 280.

development. The Tribunal concluded that if there is an effective and reasonable way to promote environmental protection that does not excessively impede trade, then the state should opt for that option in order to balance the goals of trade and environmental protection.<sup>60</sup>

## CONCLUSION

We have discussed six interpretative methods which could be used for interpreting the provisions of the BIT while considering the issues related to sustainable development. The analysis of these interpretative methods leads to the conclusion that by interpreting a BIT by using a particular method of interpretation we can harmonize conflict between sustainable development and investment protection. The *contextual interpretation* tool creates a balance between sustainable development and investment protection. The context here means the Preamble, the annexes or subsequent agreement or conduct of the parties. The *evolutionary interpretation* with the use of *contextual interpretation* appears to be most viable option to interpret the provisions related to *environmental protection* or *environmental measures* thereby adhering to the modern technical, scientific and legal developments.

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