

**THE RELEVANCE OF FRUSTRATING FOREIGN INVESTORS'
LEGITIMATE EXPECTATIONS IN THE CONTEXT OF INDIRECT
EXPROPRIATION**

Rafik Nahli

Affiliated Institute: Guanghai Law School, Zhejiang University, Hangzhou, Zhejiang Province 310008, China

ABSTRACT: *The notion of legitimate expectations can be used in two different contexts. In the context of treatment of investment, the host state is required to treat the investor in a fair and equitable manner, so the legitimate expectations of an investor must be protected. In the context of investment protection, the frustration of foreign investors' legitimate expectations plays the main role as a criterion that may result in indirect expropriation. The elements used to describe indirect expropriation started to be identified by States while revising their BITS. As a result, the notion of legitimate expectations was found to play an important role. Hence, this article will try to analyze the relevance of legitimate expectations as a criterion for indirect expropriation in the context of protection of investment,*

KEYWORDS: legitimate expectations, indirect expropriation, frustration of foreign investors' legitimate expectations.

INTRODUCTION

Most of investment treaties offer good protection to foreign investors¹. As far as the concept of legitimate expectations is concerned, certain parties tend to analyze it in the light of its relationship with the principle of Fair and Equitable Treatment², that is to say only in the context of the treatment of investment. However, the study of recent jurisprudence prevents this kind of simplification³. Because, any regulatory changes, done for public interest, which may harm the investment of foreign investors and gives rise to what is called violation of "Legitimate Expectations", usually, leads to direct or

¹ Michael Charles Pryles, Michael J. Moser, 'Asian Leading Arbitrators' Guide to International Arbitration' (JurisNet, LLC, 2007), p.494.

² Teerawat Wongkaew, 'Protection of Legitimate Expectations in Investment Treaty Arbitration: A Theory of Detrimental Reliance' (Cambridge University Press), p.13-14; See also: Separate Opinion of Mr. Thomas Wälde, International Thunderbird Gaming Corporation v. The United Mexican States, Arbitral Award, Jan 26, 2006, ICSID, Para.30.

³ Florian Dupuy, 'La Protection de l'Attente Légitime des Parties au Contrat : Étude de Droit International des Investissements a la Lumière du Droit Compare', (Université Panthéon-Assas, Paris 2007) p.259.

indirect expropriation⁴. This article is going to show, how arbitral tribunals rely on legitimate expectations to determine if the host state has frustrated foreign investors' legitimate expectations. In other words, it will focus on the frustration caused by the host state's measures that lead to indirect expropriation of investment. Because indirect expropriation is usually a result of the frustration of legitimate expectations.

Consequently, what is the role of legitimate expectations when trying to characterize host state's measure as indirect expropriation? Can it be considered as a main criterion when characterizing a measure as indirect expropriation?

Thus, before that, it is important to explain and give a clear explanation of the concept of indirect expropriation and present its different forms. So, what is meant by indirect expropriation?

The Meaning of Indirect Expropriation

Almost all investment treaties contain a provision relating to indirect expropriation or measures having equivalent effect to expropriation.⁵ However, indirect expropriation was never defined by BITs. Therefore, failing to find the elements that describe indirect expropriation in investment treaties,⁶ it is necessary to rely on arbitral awards. The most famous formula on this subject comes from *Metalclad* award, in which the tribunal defines indirect expropriation as a:

“...covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State.”⁷

According to this description, any measure which has the effect of reducing the profits of investors, which could reasonably be expected, would be considered as equivalent to expropriation and give rise to adequate compensation⁸.

⁴ M. Pascal Schonard, *La Protection Internationale des Investisseur Étrangers : Quel Impact sur la Politique Publique des Etats d'Accueil*, Master en Administration public Promotion Romain Gary 2003-2005.

⁵ Leon Trakman & Nicola Ranieri, *Regionalism in International Investment Law* (Oxford University Press, 2013) p.331.

⁶ Aniruddha Rajput, *Regulatory Freedom and Indirect Expropriation in Investment Arbitration* (Wolters Kluwer 2018).

⁷ *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB (AF)/97/1, Award, 30 August 2000, Para. 103.

⁸ Michael Charles Pryles & Michael J. Moser, *Asian Leading Arbitrators' Guide to International Arbitration* (JurisNet, LLC, 2007) p 495.

Another definition which relied on a narrow perspective of the concept can be shown in *Lauder Award*:

“In general, expropriation means the coercive appropriation by the State of private property, usually by means of individual administrative measures. Nationalization involves large-scale takings on the basis of an executive or legislative act for the purpose of transferring property or interests into the public domain. The concept of indirect ("de facto" or "creeping") expropriation is not clearly defined. Indirect expropriation or nationalization is a measure that does not involve an overt taking, but that effectively neutralizes the enjoyment of the property.”⁹

This definition can be less clear but more restrictive than the one of *Metalclad*. Because the terms used in the definition of *Metalclad* are general terms with no examples, which can include almost anything that may have a slight resemblance to an expropriation, which is not right in all cases.

These were some of the main attempts of arbitral tribunals to define indirect expropriation, where most of the given definitions are revolving around describing indirect expropriation as having the effect of an expropriation but without involving an overtaking of the property. However, can the effect of a measure be considered as the only criterion?

The Effect of the Measure as a Central Criterion of its Expropriating Character

To understand the role of legitimate expectations in identifying indirect expropriation, it must be first remembered that it is the effect of the incriminated measure that constitutes the central criterion. As C. Schreuer¹⁰ notes, in fact:

“Judicial practice indicates that the severity of the economic impact is the decisive criterion when it comes to deciding whether an indirect expropriation or a measure tantamount to expropriation has taken place.”¹¹

In the same sense, we can quote R. Dolzer, who writes:

⁹ *Ronald S Lauder v. The Czech Republic*, UNCITRAL Arbitration Rules. 3 September 2001, para 200.

¹⁰ Christoph Schreuer has spent most of his academic career at the Department of International Law of the University of Salzburg, Austria. From 1992 to 2000 he was the Edward B. Burling Professor of International Law and Organization at the Paul H. Nitze School of Advanced International Studies (SAIS) of the Johns Hopkins University in Washington, D.C. From October 2000 to September 2009 he was Professor of International Law at the University of Vienna, Austria. Since March 2015 he is Of Counsel with the law firm Zeiler. Partners in Vienna. He is currently working as an independent expert and arbitrator in investment cases.

¹¹ Christoph Schreuer, 'The Concept of Expropriation under the Energy Treaty Chart and other Investment Protection Treaties' (2005), *TDM 5 (2005)*, in *Investor-State Disputes - International Investment Law* <https://www.univie.ac.at/intlaw/pdf/csunpublpaper_3.pdf> p.28.

“No one will seriously doubt that the severity of the impact upon the legal status, and the practical impact on the owner’s ability to use and enjoy his property, will be a central factor in determining whether a regulatory measure effects a taking.”

Indeed, most awards provide for the criterion the effect of the predominant role. In *Tecmed*, for example, the tribunal considered that:

“The government’s intention is less important than the effects of the measures on the owner of the assets or on the benefit arising from such assets affected by the measures. And the form of the deprivation measure is less important than its actual effects.”¹²

Therefore, the doctrine and the jurisprudence agree that the determining criterion is the effect of the measure, not the State’s act or intention nor the form of the deprivation measure, and this approach is not new. The Iran-US tribunal had already adopted this approach.¹³

The question that needs to be asked here is, how to determine the effect that qualifies a measure as "indirect expropriation"?

Determining the Effect that Qualifies a Measure as ‘Indirect Expropriation’

The question here is to know which effect carries the qualification of indirect expropriation, it should be remembered that the usual effect of expropriation, namely the dispossession or transfer of property, is by definition absent. Hence, to what degree can a measure be considered as indirect expropriation?

Arbitral tribunals are unanimous in considering that the main criterion is the annihilation of the investment (that is its economic value), or at least the loss of control of his investment. For example, in *Tecmed*, the tribunal begins by recalling that:

“To establish whether the Resolution is a measure equivalent to an expropriation under the terms of section 5(1) of the Agreement, it must be first determined if the Claimant, due to the Resolution, was radically deprived of the economical use and enjoyment of its investments, as if the rights related thereto- such as the income or benefits related to the Landfill or to its exploitation- had ceased to exist”¹⁴.

¹² *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, May 29, 2003, para.116.

¹³ *Iran-US Claims Tribunal, Tippetts, Abbett, McCarthy, Stratton v. TAMS-AFFA*, Award No. 141-7-2, 6 IRAN-U.S. C.T.R., p. 219 and p.225.

¹⁴ *Tecmed*, Award, para. 115. In the same meaning, *Ronald S. Lauder v. the Czech Republic*, UNCITRAL Arbitration Rules, 3 September 2001, para. 200: “Indirect expropriation or nationalization is a measure that does not involve an over taking, but that effectively neutralized the enjoyment of property.” For

Therefore, as long as the investor can continue his activity, it will be considered that there is no indirect expropriation.

The doctrine confirms this criterion:

“The decisive element in an indirect expropriation is the substantial loss of control or economic value of a foreign investment without physical taking.”¹⁵

However, the criterion of investment annihilation does not seem sufficient. Certain measures that offset foreign investments may be considered perfectly reasonable, justified and necessary. The resulting effect is, therefore "normal" and the measure does not give rise to compensation. The award of *Methanex v. USA*¹⁶ is an example, this case concerns a Canadian investment, affected by the entry into force of a ban on certain additives for fuels. The tribunal decided that this prohibition did not constitute indirect expropriation, even though it acknowledged that the investment had been annihilated.¹⁷ This decision is justified by the fact that:

“...[the ban was] motivated by the honest belief, held in good faith and on reasonable scientific grounds, that MTBE¹⁸ [the controversial additive] contaminated groundwater and was difficult and expensive to clean up¹⁹.”

Therefore, the *Methanex* award shows that the mere recognition of the loss of investment due to the host state measure is often not enough to condemn it to the payment of compensation for indirect expropriation.²⁰

more examples of awards refusing to qualify a state measure of indirect expropriation because of the absence of this criterion: *Pope & Talbot v. Canada*, 10 APRIL 2001, 7 ICSID Reports 102 (para.102) *Generation Ukraine, Inc. v. Ukraine*, 16 September 2003 (ICSID Case No. ARB / 00/9) (para 20.32); *GAMI Investment, Inc. v. The United Mexican States*, UNCITRAL Rules, Final Award, 16 November 2004 (para 133); *CMS Gas Transmission Company v. Argentina*, Final Award 25 May 2005 (ICSID Case No. ARB / 01/08) (para.262)

¹⁵ Christoph Schreuer, *The Concept of Expropriation under the ETC and other Investment Protection Treaties*, May 2005, p.5. See also I. Brownlie, *Principles of Public International Law* 534 (5th ed., 1998); R. Higgins, *The Taking of Property by the State: Recent Developments in International Law and Treaty Provisions by Arbitrators*, 4 *The Journal of World Investment* 542, 464 (2003); UNCTAD Series on issues in International investment agreements, *Taking of Property* 4, 41 (2000).

¹⁶ *Methanex Corporation v. United States of America*, UNCITRAL Rules, Final Award, 5 August 2005.

¹⁷ *Methanex* award, Part IV, Chapter D, para. 15.

¹⁸ Methyl Tert-Butyl Ether (MTBE) is a blending component of gasoline, used as an oxygenate to raise the octane number and to replace tetraethyllead (TEL). Its use is controversial in some parts of the world, such as the US, because of contamination of groundwater, which was followed by legislation favoring ethanol.

¹⁹ *Methanex Award*, Part III, Chapter A, para. 102.

²⁰ Jan Paulsson, *Indirect expropriation: is the right to regulate at risk?* (Contribution to the Symposium co-organized by ICSID, OECD and UNCTAD: "Making the most of international investment agreements: a common agenda". 12 December 2005, Paris, available on : <www.oecd.org/dataoecd/5/52/36055332.pdf> p.3.

The recognition of the annihilation of the investment gives the first indication that the measure could be equal to indirect expropriation. What is missing is the measuring instrument which makes it possible to detect the effect which ceases to be normal, which becomes excessive and justifies the imposition of an obligation on the host State to compensate the investor. It seems that this instrument has been discovered in the notion of legitimate expectations.

Legitimate Expectations as a Measurement Tool for the Effect of the Regulatory Measure

It is precisely through the notion of legitimate expectations that the research instrument appeared. The measuring instrument makes it possible to distinguish between the normal effect of a regulatory measure, and the excessive effect, assimilating it to expropriation and obliging the host state to compensate the investor.

It is the awards of *Goetz v. Burundi*²¹ and *Metalclad* that have been the first to explicitly take investor's expectations as a criterion for indirect expropriation. In the first one, the tribunal considered it as a measure equivalent to expropriation because it: "...deprived the investment of all utility and deprived the claimant investors of the benefit which they could have expected from their investments..."²²

The award that actually made the starting point of the jurisprudence of indirect expropriation based on legitimate expectations is *Metalclad* award. In a formula repeated and commented many times, the tribunal stated that:

"Thus, expropriation under NAFTA includes not only open, deliberate and acknowledge takings of property, such as outright seizure or formal or obligatory transfer of title in favour of the host State, but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessary to the obvious benefit of the host State²³."

Thus, according to the tribunal, indirect expropriation is analyzed based on the host State's measure that interferes with the enjoyment of the property, and it results from it; whether the deprivation of the owner from the enjoyment of his property, entirely or partially or to deprive him only from the economic benefits to which he could legitimately expect.

²¹ *Goetz and Others v. Republic of Burundi*, 2 September 1998 (ICSID Case No. ARB/95/3), 6 ICSID Reports 5.

²² *Goetz v. Burundi*, Award, para. 124.

²³ *Metalclad*, award, para. 103.

What can be deduced from this excerpt is that having resort to the concept of "legitimate expectations"²⁴ responds to the lack of criteria that arbitrators suffer from when being in front of the question of whether a measure constitutes an expropriation, even though that the main criterion is absent (which is the transfer of the property ownership to the state). Since the main criterion is absent, an arbitrator is in the need to resort to other criteria.

The *Metalclad* tribunal provides an answer to this question. It first recalls that the missing criterion is to be sought in the effect of the measure in question: if it has an effect equivalent to that of an expropriation (without formally constituting one), then it must be considered that there is an indirect expropriation. This is not new. But the innovation lies in the characterization of this effect: the characteristic effect of the expropriation can be analyzed during a deprivation, whether it is the whole or a large part, of the economic benefit which the investor can legitimately expect.²⁵

The tribunal's definition of indirect expropriation is extremely broad, since it includes all state's measures that frustrate investor's legitimate expectations of the profits that can be derived from the expropriation of his property. It should also be noted that *Metalclad* award was subject to a lot of criticism for this reason, so by adopting an overly broad definition of expropriation, it favored the investor in an excessive manner.

Moreover, there is more room for further jurisprudence, which refuses to take the frustration of the legitimate expectations of the investor as the unique and self-sufficient criterion of indirect expropriation. Even if this criterion continues to be used and plays an important role, it can only play a cumulative role with other criteria.

Precise Role and Nuance of the Notion of Legitimate Expectations in *Tecmed* Award

In *Tecmed*²⁶ award, the tribunal had a different approach to the *Metalclad* case. In addition to its claim for the breach of fair and equitable treatment, *Tecmed* claimed that the refusal to renew the license was an indirect expropriation of his investment, and again, the tribunal resorted to the notion of legitimate expectations to answer this question. However, the tribunal did give support to the famous *Metalclad*²⁷ passage. It proposed a less radical and more nuanced use of the notion.

The originality of *Tecmed* award in the context of expropriation resides in two ideas. The first idea is the one in which the characteristics of a measure equivalent to expropriation is its disproportionate nature, If the effects appear to be disproportionate

²⁴ The tribunal refers rather to the 'reasonable expectation', but as previously seen, that these two terms are used in an undifferentiated manner.

²⁵ An example can be seen in *Metalclad* Award, para. 107.

²⁶ *Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States*, 29 May 2003 (ICSID Case No. ARB(AF)/00/2).

²⁷ *Metalclad* Award para. 103.

comparing to the purpose, then it is an additional clue²⁸ that shows that it is an indirect expropriation.²⁹ Inspired by the jurisprudence of the European Court of Human Rights³⁰ (ECHR), the tribunal introduces a proportionality control between the effects of the measure taken on the investment and its purpose.

The second idea consists of estimating the extent of the effect (which later will be measured according to the aim of the public interest, in order to determine the proportioned character of the state measure) based on the frustration of foreign investor's legitimate expectations. In other words, to determine whether the action of the authority was proportional to the public interest and the protection granted to foreign investments³¹.

Thus, the notion of legitimate expectations becomes an instrument of a proportionality control rather than an autonomous criterion. The tribunal concludes that this was an indirect expropriation. Relying on an extremely careful examination of the legitimate expectations of *Tecmed* and *Cytrar* and the effect of their frustration³², in one hand, and the degree of the necessary measures taken by the Mexican authorities to relieve the crisis related to the operation of the reprocessing plant, on the other hand.

According to what has been presented, it seems that the notion of legitimate expectations plays an important role in determining whether there was an indirect expropriation or not. Therefore, does the frustration of legitimate expectations lead always to indirect expropriation? Can this element be considered as necessary and enough by itself to determine indirect expropriation?

Relevance of the Frustration of Legitimate Expectations as a Criterion in the Context of Indirect Expropriation

The evaluation of the frustration of foreign investors' legitimate expectations in the context of indirect expropriation has been used in many cases, the more recent was in

²⁸ The tribunal first recalled, as in previous awards, that the clue is the annihilation of the investment.

²⁹ *Gus Van Harten, Sovereign Choices and Sovereign Constraints: Judicial Restraint in Investment Treaty Arbitration* (Oxford University Press 2013) p.101. See also *Tecmed* Award, para. 122.

³⁰ See the judgment in the of *Matos e Silva, Lda., and Others v. Portugal*, Judgment of September 16, 1996, 92, p.19. <http://hudoc.echr.coe.intx>.

³¹ Caroline Henckels, *Proportionality and Deference in Investor-State Arbitration: Balancing Investment Protection and Regulatory Autonomy* (Cambridge University Press 2015) p.108; See also the statement to these two ideas are expressed in the following passage: *Tecmed* Award, para. 122, what *Tecmed* expected from the investment, stresses by the tribunal, was not the possession of real estate as an end in itself, but the creation of means for the exploitation of an industrial waste reprocessing plant in the long term, in order to make a profit. But, this expectation, of course, is frustrated by the measure of the cancellation of the license.

³¹ *Tecmed*, award, para. 88

³² *Tecmed*, award, para. 88

*Azurix v. Argentina*³³, where the claimant relied on *Tecmed* jurisprudence, which observed that certain acts that frustrated the investor's expectations were attributable to the State.³⁴

Consequently, to what extent the criterion of legitimate expectations is important to the concept of indirect expropriation? Because certain recent tribunals dealt with this matter without giving any reference to the notion of legitimate expectations.

This is the case in *CMS* award, where the tribunal never relied on the notion of legitimate expectations, even though it was invoked by the claimant:

“The Claimant argues that the measures adopted by the Argentine Government during the period 2000-2002 resulted in indirect and creeping expropriation of acquired rights in the form of legal commitments, assurances and guarantees expressly offered to the investor. The Claimant says that as a result, it can no longer rely on the basic conditions that were critical for its decision to undertake the project; that the value of its assets has been wiped out; and that it cannot enjoy the economic benefits reasonably expected of the investment.”³⁵

He also reminded that:

“The essential question is, therefore, to establish whether the enjoyment of the property has been effectively neutralized. The standard that a number of tribunals have applied in recent cases where indirect expropriation has been contended is that of substantial deprivation.”³⁶

Same thing in the award of *Saluka*, there is no reference to the notion in the context of expropriation. The tribunal simply considers that the state authorities did not expropriate:

“...when, in the normal exercise of their regulatory powers, they adopt in a non-discriminatory manner bona fide regulations that are aimed at the general welfare³⁷.”

In this award, and along with the *Methanex* award³⁸, the criterion applied is the one concerning the host State intention rather than the effect.

³³ *Azurix Corp. v. Argentine Republic*, 14 July 2006 (ICSID Case No. ARB/01/12). Argument of the plaintiff restored by the tribunal in para. 286 of *Azurix* award.

³⁴ *Azurix* Award, para. 316.

³⁵ *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8 (19 Aug 2013), Award, para. 256.

³⁶ *CMS* Award, para. 262.

³⁷ *Saluka* Award, para. 255

³⁸ *Methanex Corporation v. United States of America*, UNCITRAL Rules, Final Award, 5 August 2005, para.275.

Indeed, if the criterion of legitimate expectations is not necessary, the awards mentioned show the practical interest, which constitutes an instrument that allows arbitrators to measure the ‘reasonableness’ of a measure as regard to what is ‘normal’ to expect in a well-defined factual context. It allows, also, arbitrators to consider the matter of indirect expropriation with greater flexibility, thus, allowing a balance of interests rather than a rigid application of the criterion (the one of the naturalizations of the investment) that may appear simplistic.

Nevertheless, it must be admitted that the criteria of legitimate expectations cannot be sufficient in itself and that it intervenes only as an additional criterion. The study of *Tecmed* award has shown, the question of frustrating legitimate expectations is not the central criterion of indirect expropriation, it is only one of the steps in the reasoning. This was stated by the tribunal in *Waste Management*.³⁹ Therefore, what are the other criteria?

Additional Criteria

Some awards suggest that the measure of the host State, in addition to producing the effects of an expropriation, must present some features in order to be qualified as indirect expropriation⁴⁰. Thus, in *S.D. Myers award*, the tribunal was obliged to stress on the permanency which characterizes any measure of expropriation: “An expropriation usually amounts to a lasting removal of the ability of an owner to make use of its economic rights⁴¹.”

The same criterion is found in *Tecmed* award: “...it is understood that the measures adopted by a State, whether regulatory or not, are an indirect de facto expropriation if they are irreversible and permanent...”⁴²”

Thus, the permanence of the effect of the host state’s measure, which prevents the investor from enjoying his property right or annihilate his investment profits, is another important criterion for characterizing a measure as indirect expropriation.

Moreover, in the *Consortium RFCC v. Morocco*⁴³ award, the tribunal has found that the effects of the measures taken must be of such intensity that they can be described as measures equivalent to expropriation.⁴⁴ Considering that this intensity was attained

³⁹ See: *Waste Management Inc. v. United Mexican States*, 30 April 2004 (ICSID Case No. ARB(AF)/00/3), para. 159.

⁴⁰ Florian Dupuy, ‘La Protection de l’Attente Légitime des Parties au Contrat : Étude de Droit International des Investissements a la Lumière du Droit Compare’, (Université Panthéon-Assas, Paris 2007), p.305.

⁴¹ *S.D. Myers Inc. v. Government of Canada*, UNCITRAL Rules, Partial Award 13 September 2000, para. 283

⁴² *Tecmed* Award, para.116.

⁴³ *Consortium RFCC v. Morocco*, ICSID Case No. ARB/00/6, Arbitration Award, (22 December 2003).

⁴⁴ *Ibid*, para. 67

when these reduce and/or eliminate the benefits legitimately expected from the expropriation of the rights that are the subject of the measure to such an extent that they render the detention of these rights unnecessary.⁴⁵

In addition to that, it was suggested that the motivation or the reasons behind the measure could play a role in the qualification of indirect expropriation. Once again, the tribunal in *Tecmed* award considered that it was necessary to ask, from the point of view of the State, whether the measure was reasonable and legitimate in the light of the objectives pursued:

“...the Arbitral Tribunal will consider, in order to determine if they are to be characterized as expropriatory, whether such actions or measures are proportional to the public interest presumably protected thereby and to the protection legally granted to investments, taking into account that the significance of such impact has a key role upon deciding the proportionality...”⁴⁶

Therefore, the state intention should serve the benefit of the public interest and this criterion should be added when trying to evaluate a measure as equivalent to expropriation or not.

All the useful criteria that help in distinguishing regulatory measures from indirect expropriation has been summarized and categorized as follow: “the degree of interference (the extent, gravity and duration of the deprivation), and the character of the governmental measure (i.e. the purpose and the context of the governmental measure). Principles like proportionality, reasonableness, non-discrimination and due process of law are seen as interpretative tools in assessing whether a regulatory measure amounts to a taking.”⁴⁷

This passage collected important elements used in describing a regulatory measure that has the effect of expropriation, overlooking the frustration of foreign investors’ legitimate expectation.

CONCLUSION

Eventually, even with the development of the jurisprudence in the process of determining indirect expropriation, and whatever are the criteria relied on when examining a case with a presumed indirect expropriation, the frustration of legitimate expectations will still be the main criterion. Because whatever is the form of an expropriation it will always frustrate foreign investors' legitimate expectations.

⁴⁵ Ibid. para. 69

⁴⁶ *Tecmed* Award, para. 122.

⁴⁷ Valentina Vadi, *Cultural Heritage in International Investment Law and Arbitration*, (Cambridge University Press 2014) p.65.