# Exposé

**Dissertation Title:**

‘Interest Rates in International Investment Arbitration - How Far is Harmonisation Possible?’

**Doctoral Candidate:**

Richard Henry Davies (A0909628)

**Supervisor:**

Univ-Prof August Reinisch

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# (I) Overview and Explanation of the Topic

The scope and complexity of investment arbitration has grown substantially over the last fifty years and is now truly international. This reflects the increasing globalisation of world affairs. The vast majority of nation states prioritise the pursuit of economic prosperity. However, relying on indigenous resources to fund initiatives limits prospects within an increasingly globalised world. These mutually beneficial partnerships make it easier for countries to spread their knowledge, ideas, services, products, and investments across the globe. In this respect, an agreed investment framework is helpful to regularise interactions. However, investment arbitration may have different stakeholders with differing perspectives and interests across the world. Thus, securing consensus may not be an easy task.

Investment law substantive provisions, investment law formulation methodology and investment law dispute resolution solutions, all demonstrate the different components of investment arbitration. However, like any system of law, investment arbitration must evolve to guarantee that it meets the needs of a wider range of countries and investors and changing circumstances Therefore, even more diversity is possible. One idea is that instead of BITs, limited to two states, a greater number of countries group together to agree a common legislative framework. The key issue is whether there are currently such wide differences in nations' views in investment arbitration that it would be impossible for them to come together and accept joint legislation? Operating a system with more stakeholders could lead to a broader range of demands. Nevertheless, in its favour, harmonisation could mean that states could apply agreed rules and strengthen their position as a group. In addition, a multi state system can lead to increased co-operation in respect of investment treaties. An example of this idea is the investment provisions in the NAFTA treaty which were negotiated between the USA, Canada and Mexico.

The question of whether multi state solutions are legally possible is one issue. A related question is whether harmonisation is beneficial on economic grounds. For example, would a member state lose a competitive advantage if the rules on interest rates in investment arbitration were harmonised? The aim of this dissertation is to evaluate how much harmonisation is possible. This approach is amplified below.

However, to reflect on the question of harmonisation for the whole of international investment arbitration would be a monumental undertaking and beyond the remit of this

dissertation. Hence, it is necessary to apply the harmonisation model to discrete areas of international investment arbitration. Investment arbitration can be split up into different fields of legal analysis. There are certain areas such as 'fair and equitable treatment' and 'expropriation'. However, other topics in international investment arbitration have not been subject to the same level of scrutiny. One example is the field of damages and compensation within investment arbitration. Certain analytical studies have already taken place in the form of several excellent publications. However, these have not been carried out to the same degree as the topics of 'fair and equitable treatment' and 'expropriation'. This is reflected through various sources. For example:

*"although the collated material is much less of a problem today, and numerous international damages awards have been rendered.....this has not made the topic of the assessment of damages any easier."*[1]

Another source states that

*"a common perception in the investment law community is that there is a lack of a coherent and systematic approach to compensation issues,"*[2]

as well as the realisation that

*"the issue of calculation has traditionally attracted relatively little attention in legal writing and practice."*[3]

This leaves many areas of damages and compensation without widespread analysis. However, a dissertation of this length would need to focus in on a specific area of damages and compensation. Damages and compensation can be split into two broad subjects: There are the pure legal issues that include topics such as 'investment valuation' and the different 'heads of damage'. Equally, there are quantum issues which cover such topics as interest rates, currency issues, and taxation which also have legal implications. In the past, quantum issues have been allocated less analysis than the substantive issues. Out of the quantum issues, the topic of interest rates is the most substantial area. However, the issue has been neglected in relation to whether it is possible to harmonise the rules on interest rates as

[1] Whiteman, MM., Damages in International Law, Vol I, (1937)
[2] Rubins, N., and Kinsella, NS., International Investment, Political Risk and Dispute Resolution: A Practioner's Guide, 258 (2005)
[3] Marboe, I., Calculation of Compensation and Damages in International Investment Law, 1 (2009)

*"to date, arbitral tribunals have failed to adopt a rational and uniform approach for evaluating interest claims."*[4]

This is the reason why interest rates form the substance of this dissertation. There is no agreed universal approach for interest rates. The critical question, which combines the theme of harmonisation and the theme of quantum damage, is how far would it be possible to harmonise the different laws on interest rates into one system to be used for investment arbitration? Hence the dissertation is entitled *"Interest Rates in International Investment Arbitration – How Far is Harmonisation Possible?"* To provide a platform to answer this challenge, it is important to clearly map out the detailed research areas as set out below.

## (II) Detailed Research Questions

Topic One – The Issues Involved with Interest Rates

The issue of interest rates does not sit in isolation. However, before exploring the links between interest rates and other quantum issues, it is necessary to identify important interest rate issues that are repeatedly decided upon by arbitral tribunals. They can be classified as two types of interest.

Firstly, there is the pre award interest. This is the interest that the arbitral tribunal states should be paid to cover the investor's loss that has occurred before the date on which the arbitral tribunal render their award. In this respect, several crucial questions exist.

One of the important issues is to precisely define what the function of interest is. Two principles are important in this regard. On the one hand is the aim is to compensate the investor for the fact that access to their money has been unreasonably restricted during the dispute. The award of interest corrects the original harm that the investor has suffered. However, the second principle of importance is that the host state could make profit through their actions by obtaining the money illegally and in addition to any profits that they might make on top of the money that was illegally obtained.

[4] Gotanda, J., Awarding Interest in International Arbitration, 90 American Journal of International Law, 40, 40 (1996)

The next important issue is to determine what rate of interest should be applied and how this is reflected in the end payment of the principal awarded. The main problem in this regard is to decide whether or not to apply a rate set out in statute or to take a market linked rate which can change over time.

Equally important is the date for which the interest period is set. The difficulty does not come from setting the end date as this is clearly when the award is rendered. However, there are difficulties in determining the start date for the interest payment. It is crucial to debate this legal point as a decision on the date could cost the host state millions more in interest if the date is set at an earlier date than they expected.

An additional question is the technical matter of whether interest should be simple or compound. The difference is whether interest should be earned on just the principal sum or should interest be earned as well on top on existing interest. This debate is not limited to just two issues since there are numerous forms of compounding linked to different economic calculations.

Secondly, there is the issue of post award interest. This is the interest that occurs from the date of the award until the date on which the compensation is rendered to the investor. If the award is properly responded to, post award interest should not feature as the debtor will have met their responsibilities. However, there will be occasions whereby the money that is owed is not paid on time so further measures will be needed. This is where post award interest is relevant because it is an effective measure to encourage the debtor to pay their debts promptly. Post award interest creates similar concerns to pre award interest. Namely, what is the purpose of post award interest; what should the applicable interest rate be; on which date should post award interest begin to commence and whether post award interest should be paid as simple or compound interest. However, there is an additional question of importance with regard to post award interest. Namely, how could a stay of enforcement, which is involved with potential post award proceedings such as a revision or an annulment, affect post award interest?

Establishing what the basic issues within interest rates are and the similarities and differences within these basic issues allows for us to ask the first research question which is:

> **“Are the legal topics on interest rates within international investment arbitration suitable for harmonisation, and if so, to what extent?”**

Topic Two – A Geographical Approach to Interest Rates

A strategy of harmonisation cannot work just in theory. It must reflect reality to have any relevance to practitioners in different jurisdictions. Therefore, a study of the laws on interest rates in different countries around the world in terms of their application to investment arbitration is needed. Domestic law is difficult to use within investment law because practice in international investment arbitration and in purely domestic matters varies widely. For this reason, certain prominent examples from around the world have been chosen for analysis.

The first is the European Union (EU). The EU has already taken steps to harmonise its investment policy in new laws dedicated exclusively to investment arbitration. The Lisbon Treaty provided an opportunity for this because it made changes to the common commercial policy which includes foreign investment policy. The major change was to move investment policy from a member state approach to a collective approach. Based on these treaty changes, the European Union Commission produced two documents. These were a Regulation and Commission Communication.

The key issue was how to fit existing laws, where states give priority to the conditions that are already agreed upon in their BITs, into an EU wide system. The best method is use a pro active policy to change the member states' BITs at the moment that they are enacted or if they already exist as soon as possible so that any conflict between national and EU law is eliminated. At the moment these changes are procedural relating to processes to which member states must abide by in relation to their BITs. Nevertheless, it does lay the groundwork for substantive changes in the future to be made which might include interest rates. Linked to this, the EU has also taken other substantive steps relating to interest rates in other areas of its legislation. These changes will also be examined to see if they could be adopted into a new investment law on interest rates.

The second topic is the North Atlantic Free Trade Agreement (NAFTA) which has already harmonised provisions for investment law in Chapter 11 NAFTA. The important question in this respect is to analyse how consistent these NAFTA investment provisions are.

The third example is in respect of Islamic countries. The main reason for this is that they do not allow for the application of the principle of interest rates. However, there are methods that have been used to circumvent this problem.

The final section looks at other interesting examples of the use of laws on interest rates and how they might affect international investment arbitration. This will lead to the second research question which is:

> **"if the legal aspects of interest rates, referred to in question one, are amenable to harmonisation, how far is this compatible with different rules, regulations and guidance that currently exist in different countries and regional systems around the world?"**

Topic Three – Other Quantum Issues

In the first two research questions the dissertation only focuses on the issue of interest rates. However, the rules on interest do not exist in isolation as they would be regularly affected by other issues of quantum: currency, taxation and insurance.

In relation to currency, the key issue is what appropriate currency to pay the award, and subsequently the interest, in. Linked to this, there is the question of what will happen if the currency depreciated and who should bear the risk if the currency depreciates. The benefits of using a national currency or using a community currency such as the euro will also be discussed.

On the matter of taxation, there are two key questions. The first is whether the interest should be taxed. The second question is if the interest is to be taxed, which state should be able to tax the award. If it was the host state of the investment that could tax the interest then this may allow the host state to circumvent their payment obligations and take back some of the award that they have to pay out. Alternatively, if the award is taxed in the home state of the investor, then it may be unfair because the investment was originally located in a different state.

Finally, in respect of insurance, current insurance schemes are reviewed to see if they contain coverage for interest payments. If not, the question is asked if it is possible to insure interest and, if so, who should pay the premiums for this system? Should it be the responsibility of the host state or the investor? In addition, should it be possible to allow for a retainer to be maintained and if so, what level should the retainer be at?

Therefore, it is necessary to study these issues in order to establish the subtopics within the issues of currency, taxation and insurance. This leads to the refinement of the third research question, namely,

> **'How do other quantum issues affect the interest rate relating to a particular investment?'**

## (III) Methodlogy/Time Plan/Finance

I will collect the resources from the University of Vienna library as well as online on certain websites dedicated to investment law such as http://www.investmentclaims.com/ and http://italaw.com/alphabetical_list.htm. I have already commenced substantial research for the dissertation and thus predict that the dissertation will be finished by Spring 2012. The dissertation will be financed with my own funds.

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**Treaties**

The dissertation contains information from two main types of treaties.

Firstly, there are bilateral investment treaties which are concluded between two states. Examples include:

Agreement between the Government of Australia and the Government of the Arab Republic of Egypt on the Promotion and Protection of Investments, 5 September 2002

Treaty with the Czech and Slovak Federal Republic concerning the Reciprocal Encouragement and Protection of Investment, 19 December 1992

Treaty between the United States of America and the Republic of Cameroon concerning the Reciprocal Encouragement and Protection of Investment, 6 April 1989

The second type are multilateral treaties. Examples include:

Convention on the Recognition and Enforcement of Foreign Arbitral Awards, United Nations Treaty Series 3, 10 June 1958

Convention on the Settlement of Investment Disputes between States and Nationals of other States, 18 March 1965

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