The Investment Treaty Arbitration Review

Third Edition

Editor
Barton Legum

The Law Reviews

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PREFACE

The past year has confirmed the usefulness of *The Investment Treaty Arbitration Review*'s contribution to its field. The biggest challenge for practitioners and clients over the past year has been to keep up with the flow of new developments and jurisprudence in the field. There was a significant increase in the number of investment treaty arbitrations registered in the first years of this decade. These cases have come or are now coming to their conclusions. The result today is more and more awards and decisions being published, making it hard for practitioners to keep up.

Many useful treatises on investment treaty arbitration have been written. The relentless rate of change in the field rapidly leaves them out of date.

In this environment, therefore, *The Investment Treaty Arbitration Review* fulfils an essential function. Updated every year, it provides a current perspective on a quickly evolving topic. Organised by topic rather than by jurisdiction, it allows readers to access rapidly not only the most recent developments on a given subject, but also the debate that led to and the context behind those developments.

This third edition adds new topics to the *Review*, increasing its scope and utility to practitioners. It represents an important achievement in the field of investment treaty arbitration. I thank the contributors for their fine work in developing the content for this volume.

Barton Legum
Dentons
Paris
April 2018

Part V

DAMAGES

Chapter 24

THE DETERMINATION OF FINANCIAL INTERESTS IN INVESTMENT ARBITRATION

Mikaël Ouaniche[1]

The question of interest is fundamentally linked to the time lags that exist in all arbitration proceedings.

The date of expropriation and the date of the arbitration decision never coincide, and neither do the date of the arbitration decision and that of effective payment of compensation.

The time elapsed between these dates represents a value for the parties that can be measured by financial interests.

I PRE-AWARD INTEREST

Pre-award interest concerns the period from the date of expropriation to the date of the arbitration decision. It applies to sums of which the investor has been unjustly deprived and requires the application of a market rate.

Quantifying pre-award interest therefore implies determination of the basis (i.e., the basis for calculating the interest) and the interest rate applicable to this basis. These two parameters are examined below.

i Determination of the basis

Determination of the basis for calculating interest requires an examination of what the investor's financial position would have been if the alleged acts had not occurred.

This question requires a distinction to be made between two situations:

a The expropriation is unlawful only because of the absence of fair or prior compensation. In the absence of the alleged acts, the investor would certainly have been expropriated, but would have received fair and prior compensation in exchange. The interest base, therefore, corresponds to the amount of compensation that should have been received on the date of expropriation.

b The expropriation is unlawful because of a series of violations not limited to the sole absence of fair and prior compensation. In the absence of the alleged acts, the investor would not have been expropriated: consequently, he or she would not have received any compensation. He or she would, however, have kept his or her property and generated funds from its operation that would have been available to him or her between the

1 Mikaël Ouaniche is chairman of the OCA.

date of expropriation and the date of the decision. Consequently, the interest base corresponds to these funds between the date of expropriation and the date of the arbitration decision.[2]

ii Determination of the applicable rate

In the context of the limits set by the bilateral investment treaties, arbitration tribunals may have a wide range of possibilities available to them in choosing the interest rate to be applied. The choice of interest rate may significantly change the total amount of compensation awarded to the investor. Adopting the interest rate is therefore neither simple nor easy for the arbitration tribunal.

The payment of pre-award interest must compensate the investor for the financial loss suffered as a result of the deprival of funds of which he or she was a victim by putting the investor in the position in which he or she would have been if the event that generated the loss had not occurred. To decide on the interest rate, arbitration tribunals must thus determine the use the investor would have made of the sums of which he or she was deprived had they been available to him or her between the date of expropriation and the date of the decision.

Several questions must therefore be asked:

a Would the investor have used all or part of these funds to clear his or her debts or avoid falling into debt?

b Would he or she have invested these sums in liquid assets?

c Would he or she instead have used these funds to make alternative investments? If so, which ones?

d Would he or she have invested them in his or her own business?

According to the responses given to these questions by the tribunal (depending on the investor's claims and the proof provided), different approaches may be considered, which can be divided into two broad categories: approaches in terms of costs incurred and approaches in terms of lost profit.

Approach in terms of costs incurred

This approach consists of considering that, in the absence of harmful events, the investor could have avoided resorting to debt in the amount that he or she should have received if the event that generated the loss had not occurred. The purpose of pre-award interest is, therefore, to compensate for the cost of the additional debt resulting from the loss of funds of which the investor was a victim. The financial loss is therefore analysed as a cost incurred. In this context, the interest rate to be adopted is logically the interest rate relative to the investor's additional debt.

Two approaches may then be considered: an approach via the rate of the investor's own debt and an approach via market debt rates.

Approach via the interest rate of the investor's own debt

The interest rate of the investor's own debt is that corresponding to the investor's borrowings between the date of expropriation and the date of the arbitration decision.

2 Unless the claimant opts for compensation according to the fair compensation standard that always constitutes a compensatory floor for unlawful expropriation.

Since this is an incurred financial cost, it is up to the investor to provide proof of the interest rate that he or she actually had to pay as a result of the harmful event.

If the investor had several outstanding loans during the period, it seems logical to adopt the highest interest rate, i.e., a marginal interest rate rather than an average interest rate over the period. Indeed, if the investor had the funds of which he or she was deprived at his or her disposal, he or she would reasonably have used them in such a way as to avoid falling into debt or to clear his or her debt with regard to the mostly costly loan instalments.

In practice, however, arbitration tribunals do not seem to refer to this approach, which nevertheless seems to be the most appropriate for calculating the financial costs incurred by the investor.

Approach via market debt rates

In practice, tribunals predominantly have recourse to LIBOR, EURIBOR or EONIA as a rate of reference.[3] These average rates are those at which banks can borrow from other banks on the London interbank market (for LIBOR) or on the Eurozone interbank market (EURIBOR, EONIA).

The advantage of these rates is that they are published daily for different maturities[4] and currencies and are recognised as a calculation base for different interest rates.

Tribunals customarily add a premium to these rates, most often in the order of 2 per cent, in order to extend the rate towards that at which the investor borrowed money to fund his or her activities.

In the *Lemire v. Ukraine* case, the six-month average US-dollar LIBOR rate was used as the rate of reference to which the arbitration tribunal added a 2 per cent margin, a margin considered 'adapted' in reference to Article III(1) of the bilateral investment treaty that was in force for this case:

> *Since the compensation is expressed in USD, the appropriate rate of reference for the calculation of interest should be the LIBOR rates for six month deposits denominated in USD, calculated as of the date of delivery of this Award. The rate shall be adjusted every six months thereafter, to reflect changing market conditions.*[5]

In the *M Meerapfel Söhne AG v. Central African Republic* case, the tribunal adopted simple interest at the one-year EURIBOR rate, to which it added two points:

> *However, the tribunal adopts simple interest at the one-year Euribor rate + 2 points, which it considers likely to ensure adequate and full compensation for the prejudice suffered by the Claimant.*[6]

3 *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award, 28 March 2011; *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB (AF)/11/2, Award, 4 April 2016; *Patrick Mitchell v. Democratic Republic of the Congo*, ICSID Case No. ARB/99/7, Award, 9 February 2004; *M Meerapfel Söhne AG v. Central African Republic*, ICSID Case No.ARB/07/10, Award, 12 May 2011.

4 For example, we refer to a one-week EURIBOR or a three-month EURIBOR.

5 *Joseph Charles Lemire v. Ukraine*, prev. note 5, § 353.

6 *M Meerapfel Söhne AG v. Central African Republic*, prev. note 5, § 406.

Finally, in the *Crystallex v. Venezuela* case, the tribunal also opted for the six-month average US-dollar LIBOR rate as the rate of reference, to which it added a margin of 1 per cent per year:

> *In the Tribunal's view, taking into account the circumstances of the case, the most appropriate interest rate which will adequately compensate Crystallex is the 6-month average U.S. dollar LIBOR plus 1 per cent per year at the valuation date. In the tribunal's view, this approach approximates a commercially reasonable rate and provides adequate compensation for the financial loss caused to a company engaged in international business.*[7]

In certain cases, tribunals have used another rate of reference from the money market: the central banks' marginal lending rate (marginal lending facility). The marginal lending rate corresponds to the rate at which central banks lend liquidities to commercial banks. This is the highest rate at which the latter can finance themselves (since interbank lending rates are necessarily lower than or equal to this rate). In the *Mitchell v. Congo* case, the arbitration tribunal adopted the FED's marginal lending rate (called the prime lending rate):

> *The Claimant considered that the interest rate to be applied to this amount is the prime lending rate of the "Federal Reserve Board of Governors Bank", which was at 7.75% in March 1999. . . . The tribunal is of the opinion that the rate indicated by the Claimant is appropriate and, consequently, the sum of USD 750,000 bears interest at the rate of 7.75% per year as from 6 March 1999.*[8]

However, the reliability of interbank rates may be questionable: the scandals involving manipulation of these interbank rates, particularly in 2012, may have led certain arbitration tribunals, as in the *Cyprus v. Russia* case, to question the use of these rates, which are suspected to have been manipulated by banks:

> *1646. In response to a question by the Chairman whether Claimants "still rely on LIBOR", counsel for Claimants noted that he had "avoided making any comment on the reliability of LIBOR."*
>
> *1679. LIBOR, as Claimants' counsel implicitly recognized during the Hearing, has been discredited . . . .*[9]

Above all, the recourse to rates of reference by arbitration tribunals poses a real conceptual difficulty. The interbank lending rates are effectively average market lending rates, which do not correspond to the rates at which banks actually lend to investors. In an attempt to come close to them, tribunals adapt the market rates to the investor's profile by applying premiums. This very approximate approach is never clearly documented.

There is, however, no reason to have recourse to average market rates when it is up to the investor to quantify the amount of financial interest he or she was effectively forced to pay

7 *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, prev. note 5, § 934.

8 *Patrick Mitchell v. Democratic Republic of Congo*, prev. note 5, § 94. This decision was subsequently invalidated on 1 November 2006 by the Ad Hoc Committee on procedural grounds.

9 *Veteran Petroleum Limited (Cyprus) v. The Russian Federation*, UNCITRAL, PCA Case No. AA 228, Award, 18 July 2014, § 1646 and 1679.

as a result of the debt to which he or she was exposed during the period from expropriation to the date of the decision. The use of rates of reference by tribunals thus falls short of our sense of economic foundation insofar as it leads to approximations.

Approach in terms of lost profit

In certain particular cases, the investor may not have been forced to borrow or maintain his or her debt to compensate for the loss of cash suffered as a result of expropriation. In these situations and in the absence of the alleged acts, the investor could consequently have been able to place or invest the sums of which he or she was deprived in order to derive interest from them for which he or she is henceforth entitled to obtain compensation.

If it is considered that the funds would simply have been deposited in the investor's bank account, the approach based on the remuneration rate for bank deposits will be adopted.

Several other approaches may be adopted according to whether it is considered that the funds would have been invested by the investor between the date of expropriation and the date of the decision:

a in risk-free assets: approach based on the risk-free rate;

b in certain well-identified projects: approach based on the rate of return on an alternative investment;

c in the expropriating state's debt bonds: forced loan approach; and

d in the investor's general activities: approach based on the average return on capital employed.

Approach based on the remuneration rate for bank deposits

Considering that the investor would have been able to place the funds in a deposit account, his lost profit must be calculated with reference to the remuneration rate for the investor's bank deposits. These rates vary according to the currency and maturity of the deposits in question.

However, this hypothesis is rarely adopted insofar as the remuneration of bank deposits is low and that an investor, in theory, does not keep his or her liquidities, but rather invests them to increase the return on his or her funds.

Thus, the scenario according to which the investor would have invested this money in an alternative investment is more frequently adopted.

Approach based on the rate of return on an alternative investment

The approach based on the return on an alternative investment is based on the logic according to which the investor would have used the sums that he or she was deprived of to make investments other than those that were the subject of the expropriation proceedings.

This approach was adopted by majority opinion in the *Sylvania Technical Systems v. Iran* case:

> *[T]he tribunal will derive a rate of interest based approximately on the amount that the successful claimant would have been in a position to have earned if it had been paid in time and thus had the funds available to invest in a form of commercial investment in common use in its own country.*[10]

10 *Sylvania Technical Systems v. Iran*, Award, 27 June 1985, Iran-U.S. Claims Tribunal Reports, § 298 and 320; Ripinsky, S., & Williams, K. (2008). Damages in international investment law. BIICL, p. 368.

The difficulty with this approach consists of determining what the nature of this alternative investment would have been and the rate of return that would have been associated with it.

In theory, a rational investor's interests will always lie in using his or her money in such a way as to maximise his or her expected gains, while at the same time taking into account the probability of the investment's failure. Although this approach is based on a theoretical principle – the rationality of investors – that is not exempt from criticism, it does have the merit of allowing the establishment of an operational decision rule for the appraiser and subsequently for the tribunal.

Among the possible alternative investments offered to the investor, it would therefore be necessary, in the application of this rule, to adopt the highest interest rate from among those possible, on the condition that the investor has submitted a request to this effect and provided proof of the existence of these alternative investment opportunities. This may prove to be complicated when the alternative investment appears too uncertain or the causal link to the harmful event is not sufficiently established. For example, in the *Crystallex v. Venezuela* case, the tribunal rejected the interest rate proposed by the investor because the latter was unable to prove that he would have used the amount of the monetary compensation to invest in the bonds indicated (causal link not proven). The tribunal preferred to use the six-month average US-dollar LIBOR rate plus 1 per cent per year. It considered that this rate was a more accurate reflection of a 'commercially reasonable' interest rate:

> *With regard to the interest rate, the tribunal is unable to accept the Claimant's proposed rate, i.e. 8% per annum based on the coupon rate of bonds used by PDVSA. In the tribunal's view, the Claimant has not proven that either pre- or post-award Crystallex would have used any awarded amounts to purchase or invest in PDVSA bonds or, for that matter, any instrument or investment producing a similar return.*
>
> *In the tribunal's view, taking into account the circumstances of the case, the most appropriate interest rate which will adequately compensate Crystallex is the 6-month average U.S. dollar LIBOR plus 1 per cent per year at the valuation date. In the tribunal's view, this approach approximates a commercially reasonable rate and provides adequate compensation for the financial loss caused to a company engaged in international business. At the hearing, experts of both sides confirmed that LIBOR plus a certain percentage constituted a normal commercial rate in the circumstances.*[11]

In the same vein, in the *M Meerapfel Söhne AG v. Central African Republic* case, it is specified:

> *The OHADA law, while providing for the principle of payment of interest on sums due, does not include indications relative to the applicable rate. CAR law does not include any further indications relative to this matter either. The tribunal considers that the rate of 12% claimed by MMS has no basis whatsoever, no more than the capitalisation of interest, which is also claimed. MMS did not provide proof that it could have invested the sums claimed at a rate of 12% with capitalisation of interest, particularly in CAR. However, the tribunal adopts simple interest at the one-year Euribor rate + 2 points, which it considers will ensure adequate and full compensation for the loss suffered by the Claimant.*[12]

11 *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, prev. note 5, § 933.

12 *M Meerapfel Söhne AG v. Central African Republic*, prev. note 5, § 405.

The alternative investment approach is thus frequently rejected by tribunals because of insufficient demonstration of the existence and expected return of these investment opportunities and the causal link to the harmful event.

Forced loan approach

The 'forced loan' approach consists of resorting to use of the expropriating state's lending rate. The investor's loss of funds as a result of the harmful event implicitly forces him or her to lend money to the expropriating state insofar as the state has been in possession of the funds that should have been in the hands of the investor during the period from the expropriation to the date of the decision. In this context, the investor finds him or herself exposed to the risk of the expropriating state failing to reimburse this 'forced loan' so that the interest rate should include this default risk.

The interest rate associated with the forced loan is thus measured by the rate at which the expropriating state effectively borrowed on the financial markets during the period in question (i.e., from the date of expropriation to the date of the decision). This rate includes a risk premium, which compensates for the risk of the sovereign state defaulting on its financial commitments.

Certain authors have reproached this logic for taking into account the state's default risk when this risk no longer exists on the date of the decision.[13]

This approach suffers, above all, from a methodological bias since it boils down to noting the retrospective existence of the compensatory amount due on the date of occurrence of the harmful event.

Approach based on the risk-free rate

Tribunals have sometimes resorted to risk-free lending rates, such as the American Treasury bond rate. The reasoning adopted consists of considering that the premium for the risk with which the investor is faced is already taken into account by the arbitration procedure on the date of the decision. The investor should not receive compensation for risks he or she no longer bears. Recourse to the risk-free rate therefore consists of simply adopting the value of the compensation on the date of the decision in order to take the monetary erosion linked to elapsed time into consideration.

This approach seems inappropriate for several reasons. Firstly, it may be argued that the monetary erosion linked to elapsed time can only be measured by the rate of inflation. In the logic adopted by the tribunal, the sole objective of calculating interest is to express the amount of compensation in constant currency. However, there may be differences between the rate of inflation in a particular country and the rate of return on state bonds.

Secondly, if the risk with which the investor was confronted between the date of expropriation and that of the decision concerns a period elapsed on the date of appraisal, the fact remains that the investor may not necessarily have invested his or her money in risk-free assets during this period.

13 In this context, see Irmgard Marboe, Calculation Of Compensation And Damages In International Investment Law (2009).

Approach based on the average return on capital employed

This approach consists of considering that the investor would have used the sums of which he or she was deprived to invest in his or her own activity. To measure the corresponding financial interest, tribunals frequently adopt the weighted average cost of capital (WACC) indicator for the investor.

This cost measures the average rate of return expected by the investor's capital providers – i.e., shareholders on the one hand and financial creditors on the other. The WACC therefore simultaneously measures:

a the investor's financing cost on the debt and capital market; and

b the return expected by the investor on the investment of his or her resources.

This measurement could therefore be used both for an approach in terms of costs incurred and an approach in terms of lost profit. However, we consider that the WACC is not appropriate for implementation of the approach in terms of costs incurred, which implies recourse to an interest rate directly linked to the investor's debts.

Similarly, recourse to the WACC for implementation of the approach in terms of lost profit poses a problem because this indicator measures a rate of return expected and hoped for by the capital providers (shareholders and creditors) and not a rate of return necessarily realised.

To measure the effective return on the capital invested by the investor, it is necessary, in our opinion, to adopt the return on the capital invested in the past. The return on capital employed (ROCE) rate corresponds to the ratio of the after-tax operating result for the sum of the investor's equity and financial debts.

Recourse to the investor's ROCE nevertheless presents a major difficulty with regard to its implementation. If the return on the capital invested by the investor is calculated for the period from the date of expropriation to the date of the decision, it will quite logically be negatively affected by the expropriation for which compensation is claimed by the investor. It will therefore be up to the appraiser to calculate the return on the capital invested as it would have been noted with the investor in the absence of the alleged acts.

Although this exercise is theoretically possible, it may often be faced with insufficient proof or an insufficiently supported causal link. A more operational solution will consist of adopting the average return on capital invested in the investor's sector of activity during the period from the date of expropriation to the date of the decision.

Where appropriate, it may be justified to take into account a premium or discount according to the proven past capacity of the investor to outperform or underperform the market.

Summary of applicable interest rates

It is up to the arbitration tribunal to determine the appropriate interest rate for each case according to the proof provided by the investor to support the existence of a causal link between the financial loss calculated and the event that generated the loss.

Ripinsky and Williams favour the use of the approach via return on alternative investments except when expropriation forced the investor to resort to a loan, in which case the lending rate of the latter will be more appropriate:

> *In most cases, the 'alternative investment' approach would thus best meet the objective of fully compensating a claimant for the loss of the use of money as well as give much-needed uniformity to*

> *the practice and predictability of the parties. However, in situations where the debtor's actions force the claimant to borrow funds, it would be correct to award interest at the claimant's actual borrowing rate, in order to place the claimant in a position it would have been in the absence of the breach.*[14]

In other words, when it is proved that, in the absence of a harmful event, the investor could have avoided falling into debt or maintaining his or her debt, the corresponding financial costs are analysed as a compensable incurred cost. It is therefore necessary to calculate the financial cost incurred on the basis of the funding rates that the investor effectively had to face, which must lead to excluding recourse to interbank rates of reference.

On the contrary, when it is proved that, in the absence of a harmful event, the investor would have placed or invested the sums of which he or she was deprived, the corresponding financial products are analysed as compensable lost profit.

As such, recourse to approaches in terms of forced loan or risk-free assets to determine pre-award interest appear to lack any economic foundation and, moreover, appear contrary to the principle of full compensation for the investor's loss.

However, the approach in terms of 'return on alternative investments' or 'average return on capital employed by the investor' appears more appropriate than that based on the rate of remuneration of bank deposits if the rationality of investors principle is accepted.

In the context of the approach based on returns on capital, we have reservations concerning use of the WACC because this indicator is based on a return expected by the markets and not on the return the investor would have actually realised from his or her investments.

To determine the rate of return on capital invested that the investor could have obtained in the absence of a harmful event, recourse to the ROCE rate appears to be the most appropriate indicator. In practice, determination of the internal ROCE rate that the investor could have realised in the absence of the alleged acts may prove to be very complicated to implement. As an alternative, reference could be made to the rate of return observed in the investor's sector of activity for the period from expropriation to decision. This rate could be adjusted upwards or downwards, as the case may be, according to the investor's past recorded individual performance compared with that of his or her sector of activity.

Finally, let us note that it is essential to determine the applicable interest rate in line with the currency into which the compensation will be converted. An economic relationship effectively exists between the interest rate and the exchange rate. A fall in the interest rate on loans and deposits in a country, in theory, brings about a depreciation of the currency in the country in question. Thus, it is essential to choose the interest rate in line with the currency used for payment of the monetary compensation. For example, if the monetary compensation is expressed in American dollars, the interest rate to use must itself be relative to American assets, loans or deposits.

iii Compound interest or simple interest

Interest is called simple when it is not added to the capital at the end of each term. The initial capital therefore generates interest alone during each period.

14 Ripinsky, S., & Williams, K. (2008), prev. note 12, p.373.

Interest is called compound when it is added to the capital at the end of each term. The interest itself generates interest during the following period. Consequently, the amount of interest generated during the following periods is higher than the interest generated during the preceding periods.

Calculation of compound interest thus leads to higher amounts than that of simple interest. Is it therefore more appropriate to have recourse to one method of calculation rather than another?

Remember that pre-award interest compensates the investor's financial loss resulting from not being able to use the funds of which he or she was deprived. Had he or she had this cash at his or her disposal, he or she would either have put it to work by placing or investing it (approach in terms of lost profit) or used it to clear his or her debt or avoid falling into debt (approach in terms of costs incurred). At the end of each term, the investor would either have obtained the financial products of his or her placement or investment – interest that he or she would have invested again – or he or she would have avoided having to pay interest to his or her bank – interest that, more often than not, is subject to capitalisation.

In our opinion, only the recourse to compound interest makes it possible to respect the full compensation principle because it puts investors back in the financial position they would have been in if the alleged acts had not taken place.

In the lost profit approach, using compound interest is tantamount to acknowledging that an investor never lets his or her money 'sleep' in an account without receiving interest. This calculation method is thus realistic and in keeping with the business world.

Moreover, compound interest compensates for the unjustified enrichment of the state, which has had the opportunity to put the money of which it deprived the investor to work in order to generate interest.

Although the approach predominantly followed has been that of simple interest, over the past 20 years we have nevertheless observed a progressive change in the practice of tribunals, which now increasingly opt for compound interest. The *Costa Rica v. Santa Elena*[15] case marks a major turning point with the decision of the arbitration tribunal to compound interest semi-annually.

Following the date of this decision, many arbitration decisions have taken the side of compounding due interest annually. For example, in the *Metalclad v. The United Mexican States* case, it is specified: 'So as to restore the Claimant to a reasonable approximation of the position in which it would have been if the wrongful act had not taken place, interest has been calculated at 6% p.a., compounded annually.'[16]

In the *Crystallex v. Venezuela* case, the pre-award interest is also compounded: 'Thus, for the reasons stated above, the tribunal awards interest on the principal sum awarded, compounded annually, at the rate of the 6-month average U.S. Dollar LIBOR plus one percent, which shall accrue from 13 April 2008 until the date of the Award.'[17]

15 *Compañia del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Award, 17 February 2000.

16 *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB (AF)/97/1, Award, 30 August 2000, § 128.

17 *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, prev. note 5, § 938.

However, the discretionary powers of tribunals in this matter remain intact. It may thus be regretted that, in the famous *Yukos v. Russia* case, the arbitration tribunal, while acknowledging that compound interest was now the subject of *jurisprudence constante*, decided to resort to simple interest for the pre-award interest:

> *As to whether the interest awarded should be simple or compound, while the tribunal recognizes that the awarding of compound interest under international law now represents a form of "jurisprudence constante" in investor-state expropriation cases, the tribunal has concluded that, in the circumstances of this case, it would be just and reasonable to award Claimants simple pre-award interest and post-award interest compounded annually if Respondent fails to pay in full to Claimants the damages for which it has been held liable before the expiry of the grace period hereinafter granted.*[18]

II POST-AWARD INTEREST

This interest applies from the date of the arbitration decision until the date of effective payment of the monetary compensation. In practice, the tribunal may grant a grace period starting on the date of the decision, a period during which interest does not run. This was decided in the *Yukos v. Russia* case:

> *In the circumstances of the present case, in view of the significant amount of damages which Respondent owes Claimants as a result of this Final Award, the Tribunal considers it reasonable to grant to Respondent a grace period of 180 days following the date of the Award before interest will accrue if not paid in full to Claimants by then.*[19]

A more accurate qualification of post-award interest lies in the term 'default interest'. It is 'intended to compensate for the loss resulting from lateness in executing an obligation'.[20] In the *Aucoven v. Venezuela* case, the arbitration tribunal considered: 'post-award interest is intended to compensate the additional loss incurred from the date of the award to the date of final payment.'[21]

Post-award interest therefore differs fundamentally from pre-award interest insofar as post-award interest aims to favour execution that is fast or within the deadlines imposed by the arbitration decision. In practice, we nevertheless note that pre-award interest is rarely dissociated from post-award interest by tribunals, which, more often than not, adopt an identical rate and calculation method.[22]

18 *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, UNCITRAL, PCA Case No. AA 227, Award, 14 July 2014, § 1689.

19 *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, UNCITRAL, PCA Case No. AA 227, Award, 18 July 2014 § 1691.

20 G. Cornu, Vocabulaire juridique, 10th ed., Quadrige, PUF, 2014, v° Moratoire.

21 *Autopista Concesionada de Venezuela, C.A. (Aucoven) v. Bolivarian Republic of Venezuela*, ICSID Case n° ARB/00/5, Award, 23 September 2003, § 380.

22 *Swisslion DOO Skopje v. The Former Yugoslav Republic of Macedonia*, ICSID Case No. ARB/09/16; *Dunkeld International Investment Ltd. v. The Government of Belize* (Number 1), PCA Case No. 2010-13, UNCITRAL; *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB (AF)/97/1; *Compañia del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1; *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB (AF)/11/2.

Although this practice certainly has the advantage of ensuring greater simplicity in decisions, it has the major disadvantage of maintaining confusion between two very different logics: one, economic (pre-award interest calculated in application of the full compensation principle) and the other, legal (post-award interest aiming to favour fast execution of arbitration decisions).

As for pre-award interest, tribunals have a certain amount of discretion when awarding post-award interest, whether it be the interest rate adopted or its method of calculation. There are effectively no rules specifically established in the matter apart from those established in the context of bilateral investment treaties.

i Applicable interest rate

A possible approach for determining the post-award interest rate is the forced loan approach described above. Between the date of the decision and the date of payment, the investor is exposed to a risk of default by the expropriating state with regard to effective payment of the monetary compensation. An investor who is the holder of a compensatory debt obligation by virtue of an arbitration decision effectively becomes a creditor of the state in the same way as holders of treasury bonds, and it seems, therefore, logical to consider that the interest rate relative to his or her debt must include a premium covering the default risk of this state.

ii Compound interest or simple interest

For the reasons indicated above, when post-award interest is pronounced, it seems to us preferable to adopt compound interest. This was particularly the case in *Crystallex v. Venezuela*:

> *The Respondent shall thus pay post-award interest on the total amount of damages, compounded annually, at the rate of the 6-month average U.S. Dollar LIBOR plus one percent, from the date of the Award until full payment.*[23]

In the *Cyprus v. Russia* case, the arbitration tribunal also decided to compound the post-award interest fully:

> *In the event that Respondent fails to pay in full to Claimants the costs awarded to them in Part XIII of the present Award before the expiry of the grace period, post-award interest will accrue on any outstanding amount, compounded annually.*[24]

Finally, it seems necessary to compound interest in line with the post-award interest rate adopted. For example, if the treasury bonds held in the expropriating state generate interest every six months, it is necessary to compound the post-award interest over the same period (i.e, over six months).

23 *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, prev. note 4, § 940.

24 *Veteran Petroleum Limited (Cyprus) v. The Russian Federation*, UNCITRAL, PCA Case No. AA 228, § 1690.

Appendix 1

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Mikaël Ouaniche is chairman of OCA, where he specialises in damage valuation, business valuation, bankruptcy and forensic matters. He is judicial expert at the Court of Appeal of Paris and at the International Criminal Court.

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Mikaël Ouaniche regularly appears as an expert in arbitration proceedings under the authority of International Arbitration Centres, such as the ICC International Court of Arbitration and the World Bank International Centre for Settlement of Investment Disputes (ICSID).

He has been retained as an expert to address issues relating to valuations, contract disputes, commercial damages litigations and shareholder disputes, as well as investment arbitration (expropriation cases).

He intervened at the request of states, investors and corporate clients in disputes in many sectors, including mining and port concessions, railway projects and infrastructure construction.

Mikaël Ouaniche is often appointed by French courts in the context of civil, commercial and criminal matters.

Mikaël Ouaniche is chartered accountant, French-certified legal auditor and graduate of EMLYON Business School. He is responsible for training at the Sciences Po Law School and the French National School of Judges.

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