

2020 **WAW**



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ARBITRATION WEEK

**WAW**

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## **Alternative Approaches to Valuing Early Stage Investments in Investor-State Arbitration (1:00pm - 2:30pm)**

Depending on the type of claim, damages experts and tribunals may favor computing damages using the income approach, the market approach, or the cost approach. Each of these approaches entails different valuation methodologies. The industry in which the investment was made and the extent of development of the investment project may determine a particular approach and valuation methodology.

The income approach is based on the principle that the asset's capability to generate future income determines the value of an asset, which is equal to the present value of the anticipated profits or income that such asset is expected to generate in the future. This approach commonly uses the discounted cash flow (DCF) method, which consists of estimating the string of expected future cash flows that the asset can reasonably be expected to generate, and then 'discounts' those cash flows to the date of assessment of damages by using a discount rate. The market approach assesses the value of an asset by comparing it to a similar asset that has been sold or transacted in the market. The variables used to calculate value with this approach include publicly traded companies, transaction multiples and the stock market.

Under the asset or cost approach, the value of an asset is equal to the cost of replacing its components. The valuation on a cost approach is sometimes equated to the book value of the assets, which reflects its acquisition cost net of accumulated depreciation. Certain of the aforementioned approaches and valuation methodologies may be more appropriate than others depending on the characteristics of the investment in a particular case, such as (i) whether the investment project was only a legally recognized right to develop an investment project or a start-up project, (ii) whether an investment that was made and was already operating and making limited profits, and (iii) whether an investment project was established and operating for a significant number of years.

This Panel will explain the various approaches to calculating damages with regard to the various methodologies and will assess which approach may be the most appropriate according to the industry and the extent of the development and implementation of the investment project.

### **Borzu Sabahi**



Borzu Sabahi is Partner in the International Arbitration Group at the Washington D.C. office of Curtis Mallet-Prevost Colt & Mosle. Borzu advises governments and state-owned entities in investment treaty arbitration, international commercial arbitration and public international law matters. Recognized by Legal 500, International Who's Who of Commercial Arbitration Lawyers and Who's Who Legal. Borzu is a leading practitioner in the arbitration field.

### **Garrett Rush**

Garrett Rush is a founding partner of Versant Partners, a specialized dispute consulting firm that provides financial and economic expertise in international arbitrations and helps clients quantifying damages in legal disputes. Garrett has been appointed as an expert in US courts and in many arbitral forums. He has advised an equal balance of claimant and respondent clients facing critical and time-sensitive challenges for over 20 years and across six continents.



## Speakers

### Miguel Nakhle



Miguel A. Nakhle is a Senior Vice President at Compass Lexecon. He has 15 years of experience in economic and financial consulting. Mr. Nakhle has provided written and oral testimony or expert advice in over 40 treaty and commercial cases under ICSID, UNCITRAL, ICC, ICDR, LCIA, and other venues, as well as US litigation proceedings.

### Mark Kantor

Until he retired from Milbank, Tweed, Hadley & McCloy, Mark Kantor was a partner in the Corporate and Project Finance Groups of the Firm. He currently serves as an arbitrator and mediator. He teaches as an Adjunct Professor at the Georgetown University Law Center (Recipient, Fahy Award for Outstanding Adjunct Professor). Mr. Kantor is a member of the World Bank Group Sanctions Board. Additionally, he is Editor-in-Chief of the online journal Transnational Dispute Management.





## **Moderator**

### **Christina Beharry**



Christina is Counsel in Foley Hoag's International Litigation and Arbitration Department in Washington, D.C. Her practice focuses on public international law, investor-State and commercial arbitration, and trade and investment policy. Prior to joining Foley Hoag, she practiced in the Trade Law Bureau of the Department of Foreign Affairs and International Trade where she represented the Government of Canada in investor-State disputes brought under NAFTA Chapter 11 and assisted in the negotiation of bilateral investment treaties. Ms. Beharry works extensively with experts on complex financial matters relating to the valuation of businesses, environmental damage, and compensation for adverse human health impacts. She has repeatedly assumed responsibility for damages arguments in high-stakes disputes with claims in excess of US\$ 1 billion. In addition, Ms. Beharry publishes regularly on compensation and valuation topics and has recently edited a book entitled *Contemporary and Emerging Issues on the Law of Damages and Valuation in International Investment Arbitration* (Brill Nijhoff, 2018).



## **WAW Founders and Executive Committee**



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