

TENTATIVE PROGRAMME

Investment Law & Investor-State Mediator Training

15 - 21 October 2018

(The course will be conducted in English)

Day 1: 15 October 2018 (Monday)

08:30 – 12:30	The Fundamentals of Investment Arbitration: From Expropriation to Engaging State Responsibility	Ms Olga Boltenko
12:30 – 14:00 (Lunch)	The lecture is designed to give a brief introduction to investment treaty law and investor-State arbitration, with particular focus on investment protection, history of investment law, substantive protections under investment treaties, sources of investment law, as well as on treaty interpretation, State responsibility and attribution, and a number of other aspects of Investor-State Dispute Settlement Mechanisms. The lecture will be interspersed with a case study dealing with expropriation and/or Fair and Equitable Treatment challenges in Southeast Asia.	Professor Jeffrey Waincymer
14:00 – 18:00		



Olga Boltenko is a partner with Fangda Partners in Hong Kong. She is an investment and trade lawyer with over 10 years' experience representing investors and sovereign states in investor-state disputes and in investment advisory matters. She has acted as counsel in investor-state arbitration proceedings under the auspices of the World Bank, the Permanent Court of Arbitration, as well as under the LCIA, SCC, ICC auspices and in UNCITRAL and ad hoc proceedings. Olga advises Chinese and international clients on investment structuring from the international law protection point of view, as well

as on investment recovery and dispute avoidance matters. Olga is qualified to practice law in the Russian Federation and is experienced in Russia-related contentious and non-contentious work. Olga is an adjunct lecturer at the University of Hong Kong where she teaches a post-graduate programme in arbitration and dispute resolution. She is listed as arbitrator on the HKIAC, SIAC, CIETAC, and AIAC panels, and she is registered as a foreign lawyer in Hong Kong.



Jeffrey Waincymer is a qualified legal practitioner, arbitrator and mediator, practicing solely in the fields of arbitration, international trade and investment, customs law, trade remedies and mediation. He is also currently an adjunct Professor at the Faculty of Law, National University of Singapore. He is on the HKIAC, SIAC, KLRCA and ICDR arbitration panels and is an honorary Fellow of CI Arb. Jeff was previously an Australian Government Nominee as a panelist for the WTO and ICSID. He has also been a consultant to the Australian Law Reform Commission, the Administrative Review Council, and a number of Federal and State Departments and agencies. He is the author of Procedure and

Evidence in International Arbitration (Kluwer); WTO Litigation: Procedural Aspects of Formal Dispute Settlement (Cameron May), and Australian Income Tax: Principles and Policy (2nd ed Butterworths) and a joint author of A Guide to the New UNCITRAL Arbitration Rules (Cambridge University Press), A Practical Guide to International Commercial Arbitration (Oceana) and International Trade Law: Commentary and Materials (2nd ed Law Book Company) as well as numerous scholarly articles.

Day 2: 16 October 2018 (Tuesday)

08:30 – 12:30	ISDS: Overview and Reform Directions While investment arbitration has become one of the most conspicuous international dispute settlement forums, recently it has faced ever-increasing criticisms, which have resulted in proposals for its radical redesign. Against this background, this lecture first provides an overview of the existing ISDS system. It then proceeds to explain the major concerns over the system and reform proposals, with a particular focus on: (a) the proposed investment court system and (b) the proposals for amendment of the ICSID rules (issued August 2018). The lecture also deals with the issue of counterclaims in the ISDS context.	Dr Tomoko Ishikawa
12:30 – 14:00	Lunch	
	Damages and Costs in Investment Treaty Arbitration Revisited Matthew Hodgson will make a presentation on his latest study concerning the practice of investment treaty arbitrations, which includes an analysis of its costs, the length of the arbitration process, success rates, the apportionment of costs by tribunals and amounts recovered. The current study interprets data from a total of 324 publicly available awards and 52 annulment decisions. It is a comprehensive update of Matthew's original 2012 study.	Mr Matthew Hodgson
14:00 – 18:00	Corruption This session will cover the definition of corruption, the burden of proof for corruption, legality requirements and other corruption-related provisions in investment treaties, whether corruption should be a jurisdictional or merits issue in investment treaty arbitration. The session will also review the main investment treaty cases that involved corruption by either the investor, the State or third parties. It will specifically examine different tests used by investment tribunals to deal with allegations of corruption. Finally, the session will conclude with a survey anti-corruption initiative.	Mr Romesh Weeramantry



Tomoko Ishikawa is Associate Professor at Nagoya University in Japan. She is a member of the ICSID Panel of Conciliators, appointed by the Chairman of the ICSID Administrative Council, a member of the Legal Advisory Committee of the Energy Charter Treaty and a member of Investment Treaty Forum of the British Institute of International and Comparative Law. Her professional experiences include serving as a Judge at Tokyo District Court and holding the position of Deputy Director at the International Legal Affairs Bureau of the Ministry of Foreign Affairs of Japan, where she worked on bilateral/trilateral investment treaties, Free Trade Agreements and WTO dispute settlement. Her recent publications include: *Asia's Changing International Investment Regime: Sustainability, Regionalization, and Arbitration* (Springer 2017, co-edited with Julien Chaisse and Sufian Jusoh); *The Protection of Energy Investments under the ECT: an extra-EU country's perspective*, 2 *European Investment Law and Arbitration Review* (2017); Case Comment: *Marco Gavazzi and Stefano Gavazzi v. Romania - A New Approach to Determining Jurisdiction over Counterclaims in ICSID Arbitration?* *ICSID Review* (2017); *Restitution as a 'Second Chance' for Investor-State Relations: Restitution and Monetary Damages as Sequential Options*, 3 *McGill Journal of Dispute Resolution* (2016-2017) and *Provisional Application of Treaties at the Crossroads between International and Domestic Law*, 31(2) *ICSID Review* (2016).



Matthew Hodgson specialises in international arbitration. Since joining Allen & Overy in 2005, he has acted as counsel and advocate in commercial arbitrations under all major arbitral rules. He is qualified as a solicitor in England & Wales and Hong Kong, and as an attorney in New York. Matthew has particular experience of disputes relating to energy and infrastructure / construction projects, joint ventures, distribution agreements, financial instruments and post M&A matters, and has represented clients in a large number of investment treaty disputes worldwide including several claims valued in excess of US\$1 billion. On the investor side, he acted for Deutsche Bank in its successful claim against Sri Lanka and Belgian dredging company, BDC, in the first successful ICSID claim against the Philippines. States he has represented include Azerbaijan, the Kyrgyz Republic, Pakistan and Poland.



Romesh Weeramantry works at Clifford Chance in Singapore. He specializes in investment treaty disputes and cross-border commercial arbitrations. His previous positions involved work at the United Nations Compensation Commission (Geneva) and at the Iran-United States Claims Tribunal (The Hague). His publications include *Treaty Interpretation in Investment Arbitration* (Oxford UP 2012); and *International Commercial Arbitration: An Asia-Pacific Perspective* (Cambridge UP 2011). He is a General Editor of the *Asian Dispute Review*, a General Arbitration Editor of the *Hong Kong White Book* and is a Visiting Research Consultant at the Centre for International Law, National University of Singapore. He also serves on the Editorial Board of the *ICSID Review* and the IBA Subcommittee on Investment Treaty Arbitration.

Day 3: 17 October 2018 (Wednesday)

08:30 – 12:30	Investor-State Dispute Settlement Procedures	Ms Meg Kinnear
12:30 – 14:00 (Lunch)	Participants will be provided with an overview of ICSID arbitration, reviewing the broader context of investor-State disputes and investor-State mediation.	Ms Frauke Nitschke
14:00 – 18:00		Dr Alejandro Carballo-Leyda



Meg Kinnear is currently the Secretary-General of the International Centre for Settlement of Investment Disputes (ICSID) at the World Bank. She was formerly the Senior General Counsel and Director General of the Trade Law Bureau of Canada, where she was responsible for the conduct of all international investment and trade litigation involving Canada, and participated in the negotiation of bilateral investment agreements. In November 2002, Ms. Kinnear was also named Chair of the Negotiating Group on Dispute Settlement for the Free Trade of the Americas Agreement. From October 1996 to April 1999, Ms. Kinnear was Executive Assistant to the Deputy Minister of Justice of Canada. Prior to this, Ms. Kinnear was Counsel at the Civil Litigation Section of the Canadian Department of Justice (from June 1984 to October 1996) where she appeared before federal and provincial courts as well as domestic arbitration panels. Ms. Kinnear was called to the Bar of Ontario in 1984 and the Bar of the District of Columbia in 1982. She received a Bachelor of Arts (B.A.) from Queen's University in 1978; a Bachelor of Laws (LL.B.) from McGill University in 1981; and a Master of Laws (LL.M.) from the University of Virginia in 1982. Ms. Kinnear has published numerous articles on international investment law and procedure and is a frequent speaker on these topics. She is a co-author of *Investment Disputes under NAFTA* (published in 2006 and updated in 2008 & 2009). She also co-authored texts on Canadian legal procedure including *Federal Court Practice* (1988-1990, 1991-1992, and 1993-2009 annually) and *1995 Crown Liability and Proceedings Act Annotated* (1994).



Frauke Nitschke is a senior counsel at the International Centre for Settlement of Investment Disputes (ICSID). Frauke serves as the team lead for ICSID staff handling proceedings conducted in English. Frauke also serves as Secretary of tribunals, conciliation commissions and *ad hoc* committees in investor-State proceedings conducted pursuant to the ICSID Convention and the ICSID Additional Facility Rules involving a variety of economic activities and legal instruments. Frauke further leads ICSID's investor-State mediation activities, including the drafting of the proposed Additional Facility Mediation Rules. Prior to joining ICSID in 2003, Frauke served in the World Bank's Legal Vice Presidency and the Inspection Panel. Frauke is admitted to the D.C. and New York State Bar and holds a law degree from the Freie Universität Berlin, an LLM from Georgetown University Law Center, and a Master's Degree in Psychology from the FernUniversität Hagen.



Alejandro Carballo-Leyda is the General Counsel of the International Energy Charter and head of its Conflict Resolution Centre, which provides good offices and mediation support to investors and governments. He coordinates the discussions on the Model Investment Dispute Management Protocol and the modernisation of the Energy Charter Treaty. Alejandro participated in the working groups of UNIDROIT Principles of International Commercial Contracts and Hague Conference Principles on Choice of Law in international contracts. Alejandro was the Rapporteur of the ILA Study Group on The Use of Domestic Law Principles in the Development of International Law. He edited the book on *Asian Conflict of Laws* (Wolters Kluwer, 2015).

Day 4: 18 October 2018 (Thursday) Investor-State Mediator Training (Day 1)

08:30 – 18:00	Day 1 of the Investor-State Mediator Training will first provide an overview of the context of Investor-State Disputes, following up on the lecture on the previous day. Participants will then explore specific process considerations for Investor-State Mediation and process design options. Participants will work through a number of process considerations. Using a role play approach, participants will also engage as mediator with a party to design an appropriate mediation process. The principle of co-mediation and its application in the context of Investor-State Mediation will also be reviewed.	Ms Frauke Nitschke James South Dr Alejandro Carballo-Leyda Wolf von Kumberg Danny McFadden
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Day 5: 19 October 2018 (Friday) Investor-State Mediator Training (Day 2)

08:30 – 18:30	Day 2 of the Investor-State Mediator Training will explore further aspects of Investor-State Mediation. The first part of the day will be devoted to stakeholder analysis and mapping. Participants will undertake a stakeholder mapping analysis for several case studies. Subsequently, intercultural competency will be explored, including culturally-shaped preferences and expectations. Participants will also review a cultural competency framework and the skills necessary to assist disputing parties in addressing cultural aspects arising between them. Participants will focus on core mediator skills and approaches to mediating Investor-State Disputes, such as managing the investor-State dynamic, exploring the range of possible interventions, facilitating the making of offers, addressing barriers to settlement and facilitating 'breakthrough'. Ethical issues and mediator conduct in the context of Investor-State mediation will also be addressed. Participants will review conflict of interest situations and the role of the mediator in subsequent or parallel arbitration or court proceedings. The course will also explore approaches to addressing allegations of fraud or corruption and compliance with relevant national anti-bribery and corruption laws.	Ms Frauke Nitschke James South Dr Alejandro Carballo-Leyda Wolf von Kumberg Danny McFadden
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Day 6: 20 October 2018 (Saturday) – Investor-State Mediator Training (Day 3)

08:30 – 17:30	Day 3 of the Investor-State Mediator Training course will provide participants with an opportunity to practice the skills and knowledge acquired during the previous days. Using a roleplay approach, each participant will act as mediator and receive customized feedback from experienced trainers. Participants will also have the chance to observe a variety of mediator styles.	Ms Frauke Nitschke James South Dr Alejandro Carballo-Leyda Wolf von Kumberg Danny McFadden
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(Depending on the number of participants)

Day 7: 21 October 2018 (Sunday) – Investor-State Mediator Training (Day 4)

08:30 – 17:00	Day 4 of the Investor-State Mediator Training course will provide participants with an opportunity to practice the skills and knowledge acquired during the previous days. Using a roleplay approach, each participant will act as mediator and receive customized feedback from experienced trainers. Participants will also have the chance to observe a variety of mediator styles.	Ms Frauke Nitschke James South Dr Alejandro Carballo-Leyda Wolf von Kumberg Danny McFadden
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James South is the Managing Director of the Centre for Effective Dispute Resolution (CEDR). As a mediator, facilitator, consultant and trainer, James has amassed 20 years of experience of working with individuals, organisations and public institutions to prevent, manage and resolve conflict effectively. James is known as an expert in mediating disputes between individuals and organisations or in disputes where there is a perceived or actual power imbalance and a difficult relationship between the parties. James is a fluent Spanish speaker and trains in cross-cultural issues in mediation. He is also experienced in mediating cross-border and cross-cultural disputes most notably related to international development projects. In addition to his mediating experience, James combines his mediating, training and consultancy skills to provide facilitation and neutral chairing services particularly for groups, which find themselves in conflict. With experience of working in approximately 40 countries, James' recent clients have included the World Bank Group, European Bank for Reconstruction and Development and the Council of Europe. James is admitted as a Barrister and Solicitor of the High Court of New Zealand and holds a Master's degree in Dispute Prevention and Resolution.



Wolf von Kumberg brings over 30 years of international legal and business experience to the practice of ADR. Having served as Legal Director and Assistant General counsel to Northrop Grumman Corporation and before that to Litton Industries Inc., he has unique knowledge related to the Aerospace, Defense and High Tech Industries. His practice involved most regions of the World and included, commercial, government and state entities. He is now applying this accumulated knowledge to the field of global commercial conflict avoidance and resolution. Wolf is a certified CEDR mediator and an arbitration Fellow of the Chartered Institute of Directors. He has mediated numerous types of commercial disputes and has been involved in a variety of domestic and international arbitrations. He sits on the mediation panels of CEDR, KLRCA and the AAA/ICDR. In addition, he is a member of arbitration panels at AAA/ICDR, KLRCA, LCIA and the DIFC. He is a founding panelist of the Aerospace/Security panel of the AAA and has assisted in the development of Investor State Mediation Guidelines for the Energy Charter Treaty Secretariat.



Danny McFadden is CEDR Director and is dually qualified as a lawyer both in Australia and the United Kingdom. He has been involved in negotiation, conflict resolution training, mediation and international business for over 20 years. After completing his Masters in Commercial Law, he specialized in dispute resolution and international trade. Danny speaks Mandarin Chinese fluently and mediates regularly in Hong Kong and China using both English and Mandarin. He has worked with people of all nationalities and has a clear understanding of the dynamics of mediating and arbitrating across national boundaries.