

(draft paper, not for citation)

The Inclusion of Investment Court System into the EU-China BIT: Problems and Implications for Investor-State Arbitration

Chi-Chung Kao*

Abstract

With the ambitious purpose to improve ISDS, the EU has made expressed commitment to incorporate the ICS into existing and future treaty negotiations. The ICS has been stipulated in negotiated CETA and EU-Vietnam FTA, as well as been proposed in the EU version of the TTIP. For the EU-China BIT currently under negotiation, it is also likely that EU brings the ICS to the negotiating table. The ICS is designed to bring procedural reform to investor-state arbitration. It contains an appellate procedure which could increase legal correctness, consistency, and predictability of awards. In addition, arbitrators are pre-installed by the Contracting States to avoid bias in favor of the investor, a departure from common practices. Furthermore, procedural transparency of the ICS is enhanced with the mandatory application of UNCITRAL Transparency Rules, under which confidential or protected information is nevertheless exempt from disclosure. Finally, as far as the allocation of costs is concerned, a 'loser pays' principle is introduced to prevent abuse of the proceedings. these innovative features make it possible for china to accept the ICS. However, the underlying policy considerations for the pre-installation of arbitrators by the Contracting States are unpersuasive and unjustifiable, as the integrity of an arbitrator has nothing to do with the way he or she is appointed, and the deprivation of the investor right would jeopardize the depoliticization of ISDS.

Keywords: ISDS, ICS, TTIP, EU-China BIT, UNCITRAL Transparency Rules

* Associate Professor, Department of Ocean and Border Governance, National Quemoy University, Kinmen, Taiwan; PhD in Law, University of East Anglia, UK. Associate, Chartered Institute of Arbitrators, UK. This paper is to be presented at the Asia FDI Forum II: China's Investment Three-Prong Strategy: Bilateral, Regional, and Global, 29-30 November 2016, Hong Kong, organised by Faculty of Law, the Chinese University of Hong Kong.

I. Introduction

In November 2013 the launch of negotiations for an EU-China bilateral investment treaty (EU-China BIT) was announced at the 16th EU-China Summit and the first round of talks began in January 2014.¹ EU and China are two of the biggest economies in the world; in terms of trade in goods and services, EU and China are among top trading partners with each other, trading more than one billion euro per day.² However, with respect to foreign direct investment (FDI), merely 2 to 3 percent of European FDI flows into China, whilst Chinese investments in the EU accounts for an even lower percentage of its overall investments abroad.³ Once the EU-China BIT is concluded, one can expect restrictions regarding investments to be lifted and access to market further widened in both directions.

As it is agreed by the G20 countries, access to effective mechanisms for the settlement of disputes between investors and host states is one of the fundamental principles concerning investment protection.⁴ Investor-state dispute settlement (ISDS) is a mechanism providing redress to an investor against the host state, therefore a crucial element in the EU-China BIT currently under negotiations. Past treaty practice suggests that ISDS procedures normally consist of consultation or direction negotiations between the disputing parties, followed by investor-state conciliation or arbitration if the parties fail to settle by themselves. Investor-state arbitration by far is the mostly invoked mechanism; depending on the specific provisions of a given treaty, request for arbitration may be submitted to the International Center for Settlement of Investment Disputes (ICSID) established by the Convention on Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention), or other arbitration institutions; arbitration may also be conducted ad hoc in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL Arbitration Rules). Investor-state arbitration provides an international forum for the investor to sue the host state, and its decision, the award, on the merits is final and binding on the parties, and generally enforceable against the host state in the case of monetary compensation awarded in favor of the investor.⁵

¹ European Commission, Press release, EU and China begin investment talks (20 January 2014), http://europa.eu/rapid/press-release_IP-14-33_en.htm (visited 20 September 2016).

² *Ibid.*

³ *Ibid.*

⁴ G20 Guiding Principles for Global Investment Policymaking (14 September 2016), III, http://www.g20.org/English/Documents/Current/201609/t20160914_3464.html (visited 20 September 2016).

⁵ Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (Oxford University

Despite its prevalence, investor-state arbitration has faced a number of criticisms, including, inter alia, arbitrators being biased in favor of investors, arbitral proceedings lacking transparency, and arbitral awards imposing chilling effect on state regulatory power over public interests. Responding to such criticisms, EU in late 2015 proposed an Investment Court System (ICS) to correct the alleged shortcomings of investor-state arbitration; the ICS is intended to be incorporated in all ongoing and future investment treaty negotiations, including the Transatlantic Trade and Investment Partnership (TTIP) between the EU and the US.⁶ In other two recently negotiated agreements, namely, the Comprehensive Economic and Trade Agreement between Canada and the EU (CETA),⁷ and the Free Trade Agreement between the EU and Vietnam (EU-Vietnam FTA),⁸ mechanisms similar to the ICS have also been included, although it is in the EU's proposed text of TTIP that the term 'ICS' appears formally for the first time.⁹ For the convenience of discussion, this paper will use the term 'ICS' collectively to encompass the relevant provisions of the EU's proposed text of TTIP, the CETA, and the EU-Vietnam FTA, unless mentioned specifically.

The ICS contains certain procedural innovations as compared to past treaty practice. First of all, the ICS is designed as a two-tier system, consisting of a tribunal of first instance (TFI) and an appellate tribunal (AT).¹⁰ Secondly, the TFI and AT are comprised of arbitrators appointed by special committee with fixed term of office,¹¹

Press, 2nd eds., 2012), p.236-37.

⁶ European Commission, Press release, Commission proposes new Investment Court System for TTIP and other EU trade and investment negotiations (16 September 2015), http://europa.eu/rapid/press-release_IP-15-5651_en.htm (visited 30 May 2016). The EU's negotiating text of the TTIP, referred hereinafter, is as of November 2015, http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153955.pdf (visited 10 July 2016).

⁷ Negotiation for CETA has been completed in August 2014. A legal review of the text has also been finished. The CETA is currently pending signatures of the Contracting Parties before its entry into force. See EU, In Focus: CETA, <http://ec.europa.eu/trade/policy/in-focus/ceta/> (visited 30 May 2016). The text of the CETA referred hereinafter is the official version provided by the EU, as of July 2016, http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf (visited 10 July 2016).

⁸ Negotiation for the EU-Vietnam FTA has been finished and the treaty is pending legal revision and ratification as of January 2016. see EU, News Archive: EU-Vietnam FTA: Agreed Text as of January 2016, <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1437> (visited 30 May 2016). The text of the EU-Vietnam FTA referred hereinafter is the official version provided by the EU, as of July 2016, http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154210.pdf (visited 10 July 2016).

⁹ In the EU-Vietnam FTA, it is called the 'Investment Tribunal System.' See EU-Vietnam FTA, Chapter 8: Trade in Services, Investment and E-Commerce, Chapter II: Investment (Investment Chapter of EU-Vietnam FTA), Section 3, sub-section 4.

¹⁰ CETA, art.8.28.1; Investment Chapter of EU-Vietnam FTA, Section 3, art.13.1; the EU's TTIP proposal, Trade in Services, Investment and E-Commerce, Chapter II - Investment (Investment Chapter of TTIP), Section 3, art.10.1.

¹¹ CETA, art.8.27.2-5; Investment Chapter of EU-Vietnam FTA, Section 3, art.12.2-5, art.13.2-5; Investment Chapter of TTIP, Section 3, art.9.3-5. art.10.2-5. Although the text of the Agreements does

whilst individual cases are to be heard by divisions consisting of arbitrators appointed by the head of the tribunals.¹² Thirdly, transparency is enhanced in the ICS proceedings with the mandatory application (with modification) of the UNCITRAL Transparency Rules.¹³ Finally, the adoption of 'loser pays all costs' principle serves to deter unfounded or frivolous claims.¹⁴

By mid-January 2016, the development of the EU-China BIT has entered into the phase of specific text-based negotiations.¹⁵ Considering the proximity in time between the introduction of the ICS and the negotiations of the EU-China BIT, as well as the EU's commitment to implement ICS in all ongoing treaty negotiations, it is highly likely that EU will bring out the ICS at the negotiating table. If the ICS is accepted and included in the EU-China BIT, it would signalize a new direction for future practice of ISDS, given EU and China's economy scale and their respective FDI flows into each other. It is therefore necessary for the second part of this paper to discuss the procedural innovations of the ICS. Based on the findings of the second part, the third part will analyze the likelihood of China's acceptance of the ICS. The fourth part will deal with the rules concerning the pre-selection of arbitrators that this paper considered as problematic.

II. The main procedural features of the ICS

A. The appellate mechanism

Under most circumstances, investment-state arbitration proceeds for one instance only. An award made by the tribunal on the merits of the dispute is final and binding

not use the term 'arbitrator' (under the ECTA and the EU-Vietnam FTA the term 'Members of the Tribunal' is used, whilst the term 'Judges' is used in the TTIP), the wording of certain provisions indicates the resemblance of the ICS proceedings to arbitration. For example, under the CETA, dispute may be submitted under specific arbitration rules (CETA, art.8.23.2); the respondent consents in writing to the settlement of dispute by the ICS, as required by Article 25 of the ICSID Convention and Article II of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) (CETA, art.8.25); the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (UNCITRAL Transparency Rules) is applicable to the ICS proceedings (CETA, art.8.36.1); final award issued by the tribunals of the ICS is deemed to fall with the scope of the New York Convention (CETA, art.8.41.5). Accordingly, this paper considers the ICS proceedings as arbitral proceedings in essence, and uses the term 'arbitrator' when referring to the adjudicators under the ICS.

¹² CETA, art.8.27.6-7; Investment Chapter of EU-Vietnam FTA, Section 3, art.12.6-7, art.13.8-9; Investment Chapter of TTIP, Section 3, art.9.6-7, art.10.8-9.

¹³ CETA, art.8.36.1; Investment Chapter of EU-Vietnam FTA, Section 3, art.20.1; Investment Chapter of TTIP, Section 3, art.18.1.

¹⁴ CETA, art.8.32, 8.33, 8.39.5.

¹⁵ European Commission, EU and China agree on scope of the future investment deal (15 January 2016), <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1435> (visited 15 October 2016).

on the parties, not subject to appeal. Generally speaking, the finality of the awards has predominance over the correctness of the awards.¹⁶ Review of the awards is not completely barred, but only allowed under exceptional and limited grounds. For ICSID arbitration, an award is not subject to any judicial review by domestic courts; it may only be challenged in accordance with the ICSID's internal annulment procedure,¹⁷ which serves merely to deal with serious procedural irregularity, rather than substantive issues, of the award.¹⁸ For non-ICSID proceedings, the common practice to question an award's validity, thus to resist enforcement, is to initiate proceedings in domestic courts to set aside the award.¹⁹ In this regard, the UNCITRAL Model Law on International Commercial Arbitration (UNCITRAL Model Law), which many jurisdictions have their arbitration legislation modeled on,²⁰ provides a limited number of instances for setting aside an award; the grounds include the invalidity of the arbitration agreement, lack of proper notice of the arbitral proceedings, a decision in the award beyond the scope of submission to arbitration, improper composition of the arbitral tribunal, the subject matter not capable of settlement by arbitration under the law of the seat, as well as the award in conflict with the public policy of the seat.²¹ It can be said that substantive issues such as wrongful application of law or mistake of facts do not fall within the scope of review for both ICSID and non-ICSID awards.

On the other hand, the ICS, as contained in the concluded CETA and the EU-Vietnam FTA, and the proposed TTIP, open the access to a full scale appellate procedure. For example, under the EU's proposed text of TTIP, a disputing party is allowed to appeal an award of the TFI on the ground that the TFI has erred in the interpretation or application of the applicable law; that the TFI has manifestly erred in the finding of facts (including the appreciation of relevant domestic law);²² grounds for annulment under Article 52 of the ICSID Convention are also incorporated by reference.²³ Clearly the appellate procedure aims at not only curing an award's

¹⁶ Dolzer and Schreuer, *supra* note 5, p.300.

¹⁷ ICSID Convention, art.53(1).

¹⁸ *Ibid*, art.52(1). See also Dolzer and Schreuer, *supra* note 5, p.302.

¹⁹ Dolzer and Schreuer, *supra* note 5, p.300. See also Gary B. Born, (Wolters Kluwer, 2012), p.438; Nigel Blackaby, et al., *Redfern and Hunter on International Arbitration* (Oxford University Press, 5th eds., 2009), p.591.

²⁰ As of October 2016, legislation based on the UNCITRAL Model Law has been adopted in 72 States in a total of 102 jurisdictions. See UNCITRAL Model Law, Status, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html (visited 15 October 2016).

²¹ UNCITRAL Model Law, art.34(2). Note that under the UNCITRAL Model Law setting aside is the only remedy available against an arbitral award. *Ibid*, art.34(1).

²² Investment Chapter of TTIP, Section 3, art.29(1)(a), (b).

²³ *Ibid*, art.29(1)(c).

serious procedural irregularity, but also correcting an award's substantive errors concerning applicable law or facts.

An appeal against the TFI's award to the AT may be made with 90 days of its issuance.²⁴ The award becomes final if no appeal is made within that period,²⁵ or, despite the award is appealed, the appeal is rejected or dismissed by the AT.²⁶ If the AT finds the appeal to be well founded (for example, the TFI's award is procedurally defective or erroneous in substantive issues), it shall 'modify or reverse the legal findings and conclusions' in the appealed award 'in whole or part;' the AT's decision shall 'specify precisely how it has modified or reversed the relevant findings and conclusions of the Tribunal.'²⁷ Furthermore, the TFI is also required to revise its appealed award to 'reflect the findings and conclusions' of the AT, since the findings made by the AT is binding on the TFI; the TFI shall 'seek to issue its revised award within 90 days of receiving the report' of the AT, and the award shall become final 90 days after its issuance.²⁸ Here, the TTIP's approach (as proposed by the EU) is to have the appealed matters referred back to the TFI, and the TFI is bound to reissue a revised award of first instance. such award becomes final if not appealed again.

The EU-Vietnam FTA adopts a different approach regarding the disposition of the appealed matters by the AT. Under the ICS of the EU-Vietnam FTA, if the AT finds the appeal well founded, the legal findings and conclusions in the award of the TFI can be modified or reversed by the AT. The AT is to in its decision specify precisely how it has modified or reversed the relevant findings and conclusions of the TFI.²⁹ However, if the facts established by the TFI in the first instance are considered sufficient and no more fact-finding is needed, the AT is allowed to 'apply its own legal findings and conclusions to such facts and render a final decision on the matter.'³⁰ On the contrary, if the established facts presented before the AT in the appellate proceedings do not permit a final decision by the AT, and more fact-finding is necessary, the AT shall refer the matter back to the TFI.³¹ So the appellate procedure of the ICS under the EU-Vietnam FTA allows the AT to choose between making its own decision on the merits of the appealed matters and referring the case back the TFI, depending on the gathered facts surrounding the disputed matters. The EU-Vietnam

²⁴ *Ibid*, art.29(1).

²⁵ *Ibid*, art.28(6).

²⁶ *Ibid*, art.29(2).

²⁷ *Ibid*.

²⁸ *Ibid*, art.28(7).

²⁹ Investment Chapter of EU-Vietnam FTA, Section 3, art.28.3

³⁰ *Ibid*, art.28.4

³¹ *Ibid*.

FTA's method seems more flexible and appropriate as it may save the case from being shuffled back and forth between the TFI and the AT.

An important advantage that might be brought by the appellate mechanism under the ICS is that, by allowing the decision of the TFI to be challenged on the grounds of mistakes of law or facts, the judicial control over the quality and legal correctness of the award could be improved; in particular, because of the AT's competency to review whether there is erroneous interpretation or application of the applicable law made by the TFI, and the binding effect of the AT's modification or reversal of the legal findings and conclusions on the TFI, consistency of the interpretation of treaty provisions (at least under the same BIT) could be significantly enhanced, which in turn might increase the overall predictability of the results of investor-state arbitration in general. Such changes might gradually reduce the general public's distrust, and ultimately rebuild their confidence in and acceptability towards ISDS.

B. The appointment of arbitrators and composition of tribunals

With regard to the appointment of arbitrators and composition of tribunals, the general principle is to have arbitrators appointed by the disputing parties, unless the parties agreed otherwise. Under the ICS the rules are different. Take EU's proposed text of TTIP for example, the TFI is comprised of fifteen arbitrators, including five nationals of the Member States of the EU, five nationals of the US, and five nationals of third countries. These arbitrators are installed by a special Committee upon the entry into force of the TTIP.³² The pre-installed arbitrators will hold their office for a fixed six-year term, renewable once.³³ The TFI will have a President, appointed by the same Committee from among the five arbitrators of third country nationality.³⁴ The TFI will hear individual cases in divisions consisting of three arbitrators, of whom one shall be a national of an EU Member State, one national of the US, and one from a third country; the arbitrators serving in the divisions will be appointed by the President of the TFI on a rotation basis; only the arbitrator from the third country can chair the division.³⁵ The disputing parties may also agree to have their case heard by a sole arbitrator of third country nationality; the sole arbitrator shall also be appointed by the President.³⁶

³² Investment Chapter of TTIP, Section 3, art.9.2.

³³ *Ibid*, art.9.5.

³⁴ *Ibid*, art.9.8.

³⁵ *Ibid*, art.9.6-7.

³⁶ *Ibid*, art.9.9. It is emphasized that, 'the respondent shall give sympathetic consideration to such a request from the claimant, in particular where the claimant is a small or medium-sized enterprise or the compensation or damages claimed are relatively low.' *Ibid*. Clearly this is out of the considerations

The remuneration of the arbitrators includes a fixed monthly retainer fee of approximately €2000, as they are required to be 'available at all times and on short notice,' and to 'stay abreast of dispute settlement activities under this Agreement.'³⁷ By direct reference to Regulation 14(1) of the ICSID's Administrative and Financial Regulations, the remuneration also includes other fees and expenses that the arbitrators might incur when sitting in divisions hearing cases; such fees and expenses include a daily fee for participating in division meetings, travel expenses for such meetings, a fee for other works performed in connection with the proceedings, and a per diem allowance.³⁸ The remuneration, including the retainer fee and other fees and expenses, may be permanently transformed into a regular salary, in which case the arbitrators will be serving on a full-time basis, meaning that, arbitrators will no longer be permitted to engage in any occupation, whether gainful or not, unless exemption is exceptionally granted by the President of the Tribunal.³⁹ For the AT, the methods concerning composition and appointment of the arbitrators are basically the same, except that the AT consists of six arbitrators only.⁴⁰ Arbitrators sitting in the AT also receive remuneration, which is limited to a retainer fee of €7000 per month and a fee for days worked in connection with the appellate proceedings.⁴¹

Note that, under the ICSID Convention, the Contracting Parties and Chairman of the Administrative Council are allowed to designate persons to form a Panel of Arbitrators,⁴² but arbitrators can be appointed by the parties from outside the Panel to constitute a tribunal.⁴³ So, in ICSID proceedings, the disputing parties' choice of arbitrators is not confined to the candidates designated to the Panel of Arbitrators, as long as the appointees possess the same qualification required by the ICSID Convention.⁴⁴

As stated above, under the ICS it is for the special Committee to preselect the arbitrators and appoint the President of the TFI/AT, and for the President to appoint arbitrators sitting in individual divisions. Given the fact that such Committee is to

to lessen a small or medium-sized enterprise (SME) claimant's financial burden, as well as to draw a balance between the cost of arbitral proceedings and the awarded compensation or damages.

³⁷ *ibid*, art.9.11, 9.12.

³⁸ *ibid*, art.9.14. See also ICSID, Administrative and Financial Regulations, Regulation 14(1).

³⁹ Investment Chapter of TTIP, Section 3, art.9.15.

⁴⁰ *ibid*, art.10.2, 10.5, 10.6, 10.8, 10.9.

⁴¹ *ibid*, art.10.12.

⁴² ICSID Convention, art.13.

⁴³ *ibid*, art.40.(1).

⁴⁴ *ibid*, art.40.(2).

consist of government officials representing the Contracting States to the treaty,⁴⁵ the arbitrators hearing individual cases are essentially appointed by the Contracting States in an indirect manner via the President of the TFI/AT. This new approach simply deprives the investors of their right to appoint arbitrator. One possible advantage of this approach is that, the composition process under the ICS is more simplified and efficient, as compared to conventional investor-state arbitration, where the parties get to elect their arbitrators. For cases before the TFI, the division hearing an individual case shall be constituted within 90 days of the submission of the claim.⁴⁶ This can be easily achieved since the President merely needs to appoint 3 out of the 15 arbitrators pre-installed by the special Committee, on a rotation basis with attention to the nationality arrangement.

On the contrary, appointment of arbitrators and composition of tribunal in the context of conventional investor-state arbitration is less straight-forward. In ICSID arbitration, for example, if at the time of the registration of the request for arbitration the parties have not agreed upon the number of arbitrators and the method of their appointment, the requesting party may make relevant proposals to the other party, the other party may accept such proposals or make its own proposals; if the other party replies with its own proposals, then it's the requesting party's turn to decide whether to accept or not such proposals; if no agreement has been reached after 60 days from the registration of the request for arbitration, the appointment procedure of Article 37.2.(b) of the ICSID Convention becomes applicable at either party's option.⁴⁷ In this case, each party appoints one arbitrator and the third arbitrator, as the president of the tribunal, is appointed by agreement of the parties.⁴⁸ To achieve this, either party shall nominate two persons, one as the arbitrator appointed, the other as the proposed third arbitrator to be agreed as the president; the other party shall in its reply appoint its arbitrator, and agree to the third arbitrator as president, or propose another third arbitrator, in which case it's the initiating party's turn to decide whether to accept or not.⁴⁹ Although the term 'promptly' constantly appears in the text of the provisions, there is no time limits in this second phase of appointing arbitrators. It only leads to a

⁴⁵ For example, under the EU-Vietnam FTA, it is the Trade committee that is in charge of appointing the arbitrators. See Investment Chapter of EU-Vietnam FTA, Section 3, art.12(2), 34(2)(a). The Trade Committee under the EU-Vietnam FTA comprises government officials representing EU and Vietnam respectively. See Chapter 17 of the EU-Vietnam FTA, art.17.1. Similarly, the CETA Joint Committee is empowered to appoint the arbitrators. See CETA, art.8.27.2. Like the Trade Committee under the EU-Vietnam FTA, the CETA Joint Committee also consists of government representatives of the EU and Canada respectively. See CETA, art.26.1.1.

⁴⁶ Investment Chapter of TTIP, Section 3, art.9.7.

⁴⁷ ICSID Rules of Procedure for Arbitration Proceedings, Rule 2.

⁴⁸ ICSID Convention, art.37.(2).(b).

⁴⁹ ICSID Rules of Procedure for Arbitration Proceedings, Rule 3.

third stage if the tribunal has not been constituted within 90 days after the dispatch by the ICSID of notice of registration of the request for arbitration; in this phase, either party may ask the Chairman of the Administrative Council of the ICSID to appointing arbitrator or designate the president of the tribunal for the parties in order to complete the composition of the tribunal, which shall be done within another 30 days.⁵⁰ Accordingly, the constitution of an ICSID tribunal may be as late as 120 days after the registration of the request for arbitration. By contrast, the 90-day time-limit of composition of the division under the ICS could be considered as more streamlined and efficient.

C. The enhancement of procedural transparency

Procedural transparency has been one of the focuses regarding how investor-state arbitration should be reformed. The UNCITRAL Transparency Rules is an example of the international endeavors to address the transparency issues. According to Article 1 of the UNCITRAL Transparency Rules, for investor-state arbitration initiated pursuant to a BIT concluded on or after 1 April 2014, if the disputing parties agree to apply the UNCITRAL Arbitration Rules, their agreement encompasses the application of the UNCITRAL Transparency Rules as well, unless the BIT in question has provided otherwise.⁵¹ For arbitration conducted in accordance with the UNCITRAL Arbitration Rules under a BIT concluded before 1 April 2014, the UNCITRAL Transparency Rules may be also applicable, if the disputing parties or the Contracting States to the BIT in question so agree.⁵² As a result, the applicability of the UNCITRAL Transparency Rules is conditional, rather than comprehensive.

The ICS, however, endorses the UNCITRAL Transparency Rules with provisions demanding its mandatory and unconditional application, regardless of the application of the UNCITRAL Arbitration Rules or not. For example, under the EU's proposed text of TTIP, it is stated that ' The "UNCITRAL Transparency Rules" shall apply to disputes under this Section, with the following additional obligations.⁵³ Similar provisions can be found in the CETA and EU-Vietnam FTA.⁵⁴ Pursuant to the UNCITRAL Transparency Rules, transparency issues in ISDS is addressed in the following areas:

⁵⁰ Ibid, Rule 4.

⁵¹ UNCITRAL Transparency Rules, art.1.1.

⁵² Ibid, art.1.2.

⁵³ Investment Chapter of TTIP, Section 3, art.18.1.

⁵⁴ CETA, art.8.36.1; Investment Chapter of EU-Vietnam FTA, Section 3, art.20.1.

First, the public is granted access to information relating to the arbitral proceedings. The information that are bound to be disclosed include: documents prepared by the disputing parties, such as the notice of arbitration, written statements or submissions, tables listing exhibits; documents submitted by non-disputing Parties to the treaty and by third persons; documents made by the tribunal, such as transcripts of hearings, orders, decisions and awards.⁵⁵ In addition, expert reports and witness statements may be made available to the public upon request by any person to the tribunal.⁵⁶ Furthermore, the arbitral tribunal may decide, on its own initiative or upon request from any person, and after consultation with the disputing parties, whether and how to make available exhibits and any other documents.⁵⁷ The disclosure and making public of the above information is with exceptions weighed by the need to protect confidential or sensitive information, as well as the integrity of the proceedings; accordingly, the tribunal has the power to make necessary arrangements to prevent, restrict, or delay the disclosure of such information.⁵⁸

Secondly, under the requirement that the arbitral proceedings not being disrupted or unduly burdened, or that the disputing parties not being unfairly prejudiced,⁵⁹ third parties may be allowed to submit written statements relating to matters in the dispute,⁶⁰ whilst non-disputing Parties to the treaty may be permitted to submit statements on issue of treaty interpretations.⁶¹ The written submissions must comply with certain formality requirements, such as the third person's self-description, disclosure of connection with any disputing party, the third person's interest in the dispute, issues to be addressed, and the submission being concise.⁶² In order to safeguard their interest, the disputing parties are given reasonable opportunity to present their observations on any submission made by a third person or a non-disputing Party.⁶³

Thirdly, subject to the need to protect confidential information or to uphold the integrity of the arbitral proceedings, hearings for the presentation of evidence or for oral argument are open to the public in principle; hearings may be held partially in private where protected information or the integrity of the proceedings is concerned.⁶⁴

⁵⁵ UNCITRAL Transparency Rules, art.2, 3.1.

⁵⁶ *Ibid*, art.3.2.

⁵⁷ *Ibid*, art.3.3.

⁵⁸ *Ibid*, art.7.

⁵⁹ *Ibid*, art.4.5, 5.4.

⁶⁰ *Ibid*, art.4.1.

⁶¹ *Ibid*, art.5.1.

⁶² *Ibid*, art.4.2.

⁶³ *Ibid*, art.4.6, 5.5.

⁶⁴ *Ibid*, art.6.1, 6.2.

The tribunal is responsible for logistical arrangements to facilitate the public access to open hearings; private hearing might also be allowed if public access to an open hearing is infeasible due to logistical reasons.⁶⁵

The ICS has not been put into practice yet, but there are instances in which the provisions of the UNCITRAL Transparency Rules were applied and implemented in investor-state arbitration proceedings. In *BSG Resources v. Guinea*,⁶⁶ for example, the applicable arbitral rules were those of the ICSID,⁶⁷ but the tribunal ruled that the UNCITRAL Transparency Rules were applicable as agreed by the disputing parties, with amendments made by the tribunal.⁶⁸ With regard to hearings, the tribunal ruled that Rule 32(2) of the ICSID Arbitration Rules was not applicable, so the hearings in the present proceedings were in principle to be held in public, regardless of the parties' objection.⁶⁹ To satisfy the required 'logistical arrangements to facilitate the public access to hearings' under Article 6.3 of the UNCITRAL Transparency Rules, the tribunal ordered that:

- (i) The hearings will be broadcast and made publicly accessible by video link on the ICSID website. An audio-video recording will also be made of hearings. For logistical reasons, physical attendance by third persons at hearings shall be subject to the Tribunal's approval.⁷⁰
- (ii) In order to protect potential confidential or protected information, the broadcast will be delayed by 30 minutes;⁷¹
- (iii) At any time during the hearings, a Party may request that a part of the hearing be held in private and that confidential, that the broadcast of the hearing be temporarily suspended or that protected information be excluded from the video transmission. To the extent possible, a Party shall inform the Tribunal before raising topics where confidential or protected information could reasonably be expected to arise. The Tribunal will then consult the Parties. Such consultations shall be held *in camera* and the transcript shall be marked "confidential". After consultation with the Parties, the Tribunal will decide whether to exclude the information in question from the broadcast and the

⁶⁵ *Ibid*, art.6.3.

⁶⁶ *BSG Resources v. Guinea*, ICSID Case No. ARB/14/22.

⁶⁷ *BSG Resources*, Procedural Order No.1 (13 May 2015), para. 1, <http://www.italaw.com/sites/default/files/case-documents/ITA%20LAW%207001.pdf> (visited 15 October 2016).

⁶⁸ *BSG Resources*, Procedural Order No.2 (17 September 2015), paras. 9-10, 12, <http://www.italaw.com/sites/default/files/case-documents/italaw4400.pdf> (visited 15 October 2016).

⁶⁹ *Ibid*, para. 13.

⁷⁰ *Ibid*, para. 14(i).

⁷¹ *Ibid*, para. 14(ii).

relevant portion of the transcript shall be marked “confidential”. The transcript made public by the Repository shall redact those portions of the hearing marked “confidential”.⁷²

The above case demonstrates that, with technological support, transparency can be pursued without infringing confidential information. Through appropriate logistic arrangements, arbitral proceedings can be as transparent insofar as the need to protect confidential information is also being taken care of.

In addition to the UNCITRAL Transparency Rules, the ICS takes a step further by stipulating its own extra obligations of transparency. For example, under the UNCITRAL Transparency Rules, publication of exhibits is at the discretion of the tribunal, but under the ICS exhibits are included as documents that must be made public;⁷³ a disputing party's notice to challenge an arbitrator and the decision on such challenge are also expressly included as documents available to the public;⁷⁴ the right of submission by a third party is granted natural persons who can establish a direct and present interest in the result of the dispute.⁷⁵ With the compulsory application of the UNCITRAL Transparency Rules, and the ICS's additional requirements, the level of transparency in ICS proceedings can be expected to be raised substantially.

D. The 'loser pays' rule

The high costs generated in relation to arbitral proceedings is one of the major problems of investor-state arbitration. According to statistics, the average cost in arbitral proceedings is 8 million US dollars for each side of the disputing parties; in some extreme cases, the total amount of costs spent by the parties reached more than 30 million US dollars.⁷⁶ For example, in *Abaclat*, the tribunal in its jurisdictional decision of August 2011 noted that the claimants had already spent some 28 million US dollars on their case, whilst Argentina, the respondent, had spent about 12 million US dollars;⁷⁷ and the case is still ongoing as of November 2016. As for a concluded

⁷² Ibid, para. 14(iii).

⁷³ CETA, art.8.36.3; Investment Chapter of TTIP, Section 3, art.18.3.

⁷⁴ CETA, art.8.36.2; Investment Chapter of TTIP, Section 3, art.18.2; Investment Chapter of EU-Vietnam FTA, Section 3, art.20.2.

⁷⁵ Investment Chapter of TTIP, Section 3, art.23.1.

⁷⁶ David Gaukrodger and Kathryn Gordon, *Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community*, OECD Working Papers on International Investment (March 2012, OECD Publishing), p.19, http://www.oecd.org/daf/inv/investment-policy/WP-2012_3.pdf (visited 15 October 2016).

⁷⁷ *Abaclat v. Republic of Argentina*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (4 August 2011), paras. 683, 685,

case, the award in *Libananco v. Turkey* might have set a record with combined costs for both parties at 60 million US dollars.⁷⁸ Regarding the components of the costs, it is suggested that the predominant portion of the costs involves the fees and expenses for legal counsel and experts, which could correspond to approximately 82% of the total cost of a case; the average remunerations for arbitrators amount to 16%, while the institutional costs, such as the fees of registration and administration of the dispute, and charges for secretarial services, make up the remaining 2%.⁷⁹ Such high costs, especially the fees and expenses for legal representation and assistance in millions of US dollars, might be a financial barrier a claimant must overcome before it can have recourse to arbitration. For investors that are SMEs, such cost might simply be unaffordable, thus constituting a denial of access to arbitration.⁸⁰

For the responding host states and the claimants who could manage to afford the high costs, a question subsequently emerged as to how the costs are to be allocated between the disputing parties. For ICSID arbitration, this issue is to be dealt with by the tribunal's discretion, unless the parties agree otherwise.⁸¹ For arbitration conducted in accordance with the UNCITRAL Arbitration Rules, the costs shall in principle be borne by the unsuccessful party; however, splitting the costs proportionately between the parties is allowed if the tribunal finds apportionment reasonable under circumstances of a case.⁸² In practice, tribunals' decision on the attribution of costs is far from uniform. There are quite a few tribunals finding that fees and expenses of the arbitral institution and of the arbitrators were to be divided equally between the parties, whilst each party was to pay its own legal fees and expenses.⁸³ Such approach could be problematic for an investor-claimant in a

<http://www.italaw.com/sites/default/files/case-documents/ita0236.pdf> (visited 15 October 2016).

⁷⁸ *Libananco v. Turkey*, ICSID Case No. ARB/06/8, Award (2 September 2011), paras. 558-9,

<http://www.italaw.com/sites/default/files/case-documents/ita0466.pdf> (visited 15 October 2016).

⁷⁹ Gaukrodger and Kathryn, *supra* note 75. See also Dolzer and Schreuer, *supra* note 5, pp.298-99.

⁸⁰ For further discussion on how the high cost might affect SMEs' access to investor-state arbitration, see Lee M. Caplan, Making Investor-State Arbitration More Accessible to Small and Medium-Sized Enterprises, in Catherine A. Rogers and Roger P. Alford (eds.), *The Future of Investment Arbitration* (2009, Oxford University Press), p.297. See also Stephan Wilske, *Collective Action in Investment Arbitration to Enforce Small Claims – Justice to the Deprived or Death Knell for the System of Investor-State Arbitration*, 5(2) *Contemporary Asia Arbitration Journal* 165-203 (2012).

⁸¹ 'In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.'

ICSID Convention, art.61(2).

⁸² UNCITRAL Arbitration Rules (2013), art.42(1).

⁸³ Dolzer and Schreuer, *supra* note 5, p.299, footnote 370 (citing cases from as early as *Adriano Gardella v. Ivory Coast*, ICSID Case No. ARB/74/1, Award (29 August 1977), para. 4.12, <http://internationalinvestmentlawmaterials.blogspot.tw/2011/09/adriano-gardella-spa-v-cote-divoire.html> (visited 15 October 2016), to the more recent *Brandes v. Venezuela*, ICSID Case No. ARB/08/3,

situation where the claimant prevails in the final award, with compensation or damages ordered by the tribunal, but the tribunal decides that the claimant, although being a winning party, is to bear its own legal fees and expenses and to share equally the procedural costs, which total substantially close to the amount of compensation or damages awarded. This is what actually happened in the case of *Tza Yap Shum*, in which the claimant was awarded just over one million US dollars for compensation with interest, but was ordered to bear its own costs for around 930,000 US dollars.⁸⁴ This kind of result renders the arbitral proceedings fruitless and meaningless as it leaves the claimant with nearly nothing but a prevailing party in name.

The practice of ordering each party to bear its own legal costs is also inherently unfair for the responding host states. A unique characteristic of investor-state arbitration is that, generally the investors get to decide whether to submit the dispute to arbitration, with the host states constantly cast as the defending respondent. If, irrespective of winning or losing the case, each party is bound to pay its own legal fees and expenses, such method of costs allocation (i.e., not ordering the losing party to pay for all costs) might create an incentive for a reckless investor to try its luck by filing unmeritorious even frivolous claims, causing the host state to spend millions of US dollars in defending itself. For respondents that are developing countries, such expenditure of government funds could have been used elsewhere that promotes public welfares.⁸⁵

On the contrary, there is also the parallel development of the 'loser pays' principle, under which the tribunals ordered costs to be borne by the unsuccessful party.⁸⁶ In this case, the prevailing party could have its costs, including legal fees and expenses, reimbursed by the losing party. In *ADC v. Hungary*, for example, the tribunal stated that:

Award (2 August 2011), para. 120,

<http://www.italaw.com/sites/default/files/case-documents/ita0101.pdf> (visited 15 October 2016)).

⁸⁴ *Tza Yap Shum v. Peru*, ICSID Case No. ARB/07/6, Award (7 July 2011) (in Spanish), paras. 293, 302, and p.120 (section VIII: Decision),

<http://www.italaw.com/sites/default/files/case-documents/ita0881.pdf> (visited 15 October 2016).

⁸⁵ Pia Eberhardt and Cecilia Olivet, *Profiting from Injustice: How Law Firms, Arbitrators and Financiers Are Fuelling an Investment Arbitration Boom* (2012), p.15, published by Corporate Europe Observatory (CEO) and Transnational Institute (TNI),

<http://corporateeurope.org/sites/default/files/publications/profitting-from-injustice.pdf> (visited 15 October 2016).

⁸⁶ Dolzer and Schreuer, *supra* note 5, p.300, footnote 373 (citing cases from as early as *AGIP v. Congo*, ICSID Case No. ARB/77/1, Award (30 November 1979), 1 ICSID Reports 309, at 329, to the more recently *AFT v. Slovakia*, ad hoc arbitration under UNCITRAL Arbitration Rules, Award (5 March 2011), paras 260-70, <http://www.italaw.com/sites/default/files/case-documents/ita0027.pdf> (visited 15 October 2016).).

it can be seen from previous awards that ICSID arbitrators do in practice award costs in favour of the successful party and sometimes in large sums ... In the present case, the Tribunal can find no reason to depart from the starting point that the successful party should receive reimbursement from the unsuccessful party ... Were the claimants not to be reimbursed their costs ... it could not be said that they were being made whole.⁸⁷

The approach of allocating costs in accordance with the results is also endorsed by international community. the United Nations Conference on Trade and Development (UNCTAD), for example, considered the 'loser pays' method as an option to reform investor-state arbitration.⁸⁸ Indeed, if the parties are faced with the consequence of having to bear not only their own costs, but also those of their opponent, they might probably think twice and reevaluate their relative strength and weakness of standpoints, and have the dispute settled in the negotiation or consultation phases, rather than letting the dispute being submitted to arbitration. More importantly, the 'loser pay' principle could serve to deter an investor from filing claims that are unmeritorious, unfounded, or frivolous, as the investor would very much likely to be sanctioned with a decision ordering it to pay for all the costs, including the costs spent by the responding host state.

The ICS expressly adopts the 'loser pays' rule with regard to the allocation of costs. For example, Article 28.4 of the EU's proposed text of the TTIP provides that, costs of the proceedings, as well as costs of legal representation and assistance, shall be ordered by the tribunal to be borne by the unsuccessful disputing party; only under exceptional circumstances can the allocation of such costs be adjusted and apportioned between the parties; in a situation where the claims are partially successful, the costs shall be allocated proportionately according to the number or extent of the successful part of the claims; the 'loser pays' principle applies to both the TFI and AT proceedings.⁸⁹

It is worth noting that, under the ICS, the arbitrator's retainer fee for TFI proceedings is to be paid equally by the Contracting States of the treaty, not by the

⁸⁷ *ADC v. Hungary*, ICSID Case No. ARB/03/16, Award (2 October 2006), paras 531. 533, <http://www.italaw.com/sites/default/files/case-documents/ita0006.pdf> (visited 15 October 2016).

⁸⁸ UNCTAD, World Investment Report 2015, p.148, http://unctad.org/en/PublicationsLibrary/wir2015_en.pdf (visited 10 July 2016).

⁸⁹ CETA, art.8.39.5; Investment Chapter of TTIP, Section 3, art.28.4; Investment Chapter of EU-Vietnam FTA, Section 3, art.27.4.

disputing parties;⁹⁰ in the AT proceedings, the retainer fee, plus other remunerations that an arbitrator can receive, are also borne by the Contracting States of the treaty.⁹¹ As a result, the costs a losing party may be ordered to pay is discounted. But, considering that the bulk of the costs is comprised of fees for legal representation and assistance, which are to be borne by the unsuccessful party under the 'loser pays' rule, the ICS's approach can still serve to promote settlement between the disputing parties, and to deter abuse of the arbitral proceedings by a claimant in bad faith.

III. China's willingness to approve the ICS

The ICS proposed by the EU contains certain innovative mechanisms, as discussed in the preceding section. The question is, would China agree to include the ICS, with the aforementioned mechanisms, into the EU-China BIT? Due to the following considerations, the answer might be affirmative, in the author's humble opinion.

First, regarding the appellate mechanism, if it is included into the EU-China BIT, the disputing parties will be allowed appeal the provisional award of the TFI before the AT, on the grounds of mistakes of law or facts, in addition to serious irregularity. As a result, not only the integrity of the arbitral proceedings, but also the legal correctness of the award can be expected to be enhanced. To be more specific, the AT has the power to modify or reverse the legal findings and conclusions of the award made by the TFI, and, in the case of the ICS under TTIP, refers the case back to the TFI. The TFI is bound to follow the AT's instructions with regard to the modifications or reversals of the legal findings and conclusions. In the case of the ICS under the EU-Vietnam, the AT can, if circumstances permit, even render a final award with its own legal findings and conclusion, replacing those in the TFI's provisional award. Under these rules, the appellate mechanism is likely to produce awards with more consistency, in terms of treaty interpretation and application. The consistency of decisions would in turn improve the predictability of the result of arbitration. This predictability can make the disputing parties consider with more prudence their respective strength and weakness in legal standings. In particular, the predictability of the arbitration, combined with the 'loser pays' rule, could persuade an investor with a weak case to reconsider its chance of success before filing its claim or appeal. Likewise, a responding host state could also be encouraged to settle a case which it might not be able to defend successfully. In the end, abuse of the arbitral proceedings

⁹⁰ For example, see Investment Chapter of TTIP, Section 3, art.9.13.

⁹¹ Investment Chapter of TTIP, Section 3, art.10.12, 10.13.

could be reduced and significant amount of costs could be saved.

Secondly, in respect of the appointment of arbitrators, the ICS's rules depart from the conventional approach of party appointment, by reassigning such power to a special Committee. If such rules are incorporated into the EU-China BIT, an investor will lose its right to appoint arbitrator. On the other hand, suppose the special Committee is to be composed with government representatives from EU and China, and suppose that all the arbitrators (of EU, Chinese, and third-country nationality) are to be installed by mutual consent of the two sides, then such installation is effectively made by the Contracting States. Furthermore, considering that individual cases under the ICS are to be heard by divisions consisting of arbitrators appointed by the President of TFI/AT, and that the position of the President and the Chair of a division can only be taken by a third-country arbitrator, the arbitrators sitting in an individual division hearing a specific case is also indirectly appointed in advance by the Contracting States. Under these rules, China, as a Contracting State to the EU-China BIT, would have more control (jointly with the EU) over the selection of arbitrators in the capacity of the responding host state, whilst the investor-claimant has none.

Thirdly, with regard to the enhancement of procedural transparency, suppose the UNCITRAL Transparency Rules are to be expressly incorporated into the EU-China BIT, it would result in disclosure of and public access to documents and information relating to arbitral proceedings, open hearings, and third party participation by written submissions. However, such requirements on transparency should not constitute serious threat to China, as Article 7 of the UNCITRAL Transparency Rules provides exceptions, under which protected or confidential information is not required to be open to the public. For instances, if under Chinese legislation, certain information is protected from being made available to the public, then such information is precluded from disclosure under the UNCITRAL Transparency Rules;⁹² if public access to certain information would impede the Chinese government's law enforcement, then such information is also excluded from disclosure.⁹³ Furthermore, the UNCITRAL Transparency Rules allow the Contracting States to agree on what information not to be disclosed to the public under the treaty,⁹⁴ so under the EU-China BIT China can negotiate with EU regarding the information it considers inappropriate to be made publicly available, and have such information stipulated into provisions concerning exceptions to the transparency requirements.

⁹² UNCITRAL Arbitration Rules, art.7.2(c).

⁹³ *Ibid*, art.7.2(d).

⁹⁴ *Ibid*, art.7.2(b).

Finally, as far as allocation of costs is concerned, the ICS expressly adopts the 'loser pays' principle. Given that arbitral proceedings are in general initiated by the investor against the host state, not *visé versa*, an investor requesting for arbitration with a relatively weak case would face the risk of being ordered to pay huge amount of legal fees for both itself and the responding host state, should the investor fail to convince the arbitrators with its claims. In such a case it would make the investor think twice before resorting to arbitration. Accordingly, if the 'loser pays' rule is stipulated in the EU-China BIT, it could be expected that certain investors would be deterred from filing unfounded, unmeritorious, or frivolous claims against the host state. On the other hand, for a host state facing an investor's claim that stands a fair chance to prevail in arbitration, the 'loser pays' rule could also encourage the host state to settle the case before it is submitted to arbitration, saving the host state from being ordered to pay all the costs, including costs spent by the claimant.

Due to the appellate mechanism of the ICS, foreseeing the result of arbitration in a specific case is not impossible, as consistency of the interpretation and application of treaty provisions could be significantly improved by the AT's competence to review, correct, even override the TFI's decisions. In the context of the EU-China BIT, the 'loser pays' rule, combined with the increased predictability of results of arbitration, could allow a Chinese investor with a relatively strong case to put pressure on the host state to settle. An European investor might also be discouraged from submitting a weak case to arbitration against China. Accordingly, the author finds no reason for China to refuse the adoption of the 'loser pays' principle.

IV. The problematic rules regarding the pre-installation of arbitrators by the Contracting States

The aforementioned procedural characteristics of the ICS are each with its own underlying policy considerations. The appellate mechanism aims at strengthening legal correctness and consistency of decisions in the arbitral awards; the incorporation of the UNCITRAL Transparency Rules is to increase the public's trust in arbitral proceedings; the allocation of costs by the 'loser pays' principle is meant to deter abuse of arbitral proceedings. This paper concurs with these consideration and agrees that the inclusion of the above features into the EU-China BIT would bring improvements to the ISDS thereof. However, with regard to the appointment of arbitrators, it is alleged that the conventional practice of arbitrators being appointed by the disputing parties would create a financial incentive for the appointees to act in

favor of the parties, in particular, the investor-claimant; such arbitrators are unable to perform their duty impartially and independently.⁹⁵ As a result, depriving an investor of its right to appoint arbitrator and transferring such right to the Contracting States can serve to uphold and preserve the impartiality and independence of the arbitrators. This is the implied consideration under the ICS to have arbitrators appointed by the Contracting States.⁹⁶ From the author's viewpoint, such consideration is unfounded. It could cause problems to the future development of ISDS, rather than bringing improvement to it.

A. The pro-investor fallacy

As stated above, the ICS precludes investor-claimants from appointing arbitrators. Such approach is based on the presumption that financial incentives can be generated for the appointed arbitrator to rule in favor of the claimant, thus jeopardizing the integrity of the arbitral proceedings. This 'pro-investor' allegation is, nevertheless, unsound from a logical point of view. In the case of a tribunal consisting of three arbitrators, if the appointment of an arbitrator by the investor could result in that arbitrator's bias in favor of the investor for future financial gains (such as re-appointment in future disputes), the very same incentive would apply equally to the arbitrator appointed by the host-state to appease the latter. Such biases might just offset each other. As for the Chair, the third arbitrator, who is either to be jointly appointed by mutual consent of the disputing parties or the two appointed arbitrators, or selected independently by an appointing authority (such as the arbitration institution administering the dispute), there would be no motive for such jointly or independently appointed arbitrator to favor either party, as he or she is not unilaterally installed. As for arbitral proceedings conducted by a sole arbitrator, the appointment is either made by the agreement of the disputing parties, or by an appoint authority, thus creating no incentive for the sole arbitrator to favor either party as well. Accordingly, from a logical perspective, the conventional approach concerning the composition of

⁹⁵ See, for example, Kyla Tienhaara, *Investor-State Dispute Settlement in the Trans-Pacific Partnership Agreement* (19 May 2010), p.5,

http://dfat.gov.au/trade/agreements/tpp/submissions/documents/tpp_sub_tienhaara_100519.pdf (visited 25 October 2016); See also Eberhardt and Olivet, *supra* note 85, pp.35-36;

⁹⁶ See European Commission, *Concept Paper, Investment in TTIP and Beyond - The Path to Reform: Enhancing the Right to Regulate and Moving from Current Ad Hoc Arbitration towards An Investment Court* (5 May 2015), pp.6-7, http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF (visited 25 October 2016). See also European Commission, *Reading Guide, Draft Text on Investment Protection and Investment Court System in the Transatlantic Trade and Investment Partnership (TTIP)* (16 September 2015) (stating that the new rules proposed for the ICS are an effective way to insulate judges from any real or perceived risk of bias), http://europa.eu/rapid/press-release_MEMO-15-5652_en.htm (visited 25 October 2016).

an arbitral tribunal does not affect the integrity of the tribunal.

Additionally, if the 'arbitrators being biased in favor of the investor-claimants' argument stands as true, there should have been the results that investor-claimants, as a whole, won more cases than responding host states did. In fact, statistics from empirical study suggests the very opposite. For example, according to an UNCTAD research, it is found that, by 2013, among 274 concluded cases, approximately 43% of the cases were decided in favor of the host-state, whilst 31% in favor of the investor, and the remaining 26% settled.⁹⁷ By the end of 2014, out of 405 concluded cases, around 36% were ruled in favor of the host-state (all claims dismissed on jurisdictional grounds or on the merits), while 27% ended in favor of the investor (compensation awarded), with an additional 2% of the cases where the host state was found in breach of treaty obligation but no compensation was awarded to the investor; about 26% of the cases were settled.⁹⁸

ICSID statistics also demonstrate that, for cases administrated by the ICSID and concluded in 2014, merely 35% were decided fully or partially in favor of the investor, whilst 65% were ruled in favor of the host state (30% rejecting jurisdiction and 35% dismissing all claims).⁹⁹ For ICSID awards rendered in 2015, 47% were ruled (fully or partially) in favor of the investor, the other 53% were decided in favor of the host state (20% declining jurisdiction and 33% dismissing all claims).¹⁰⁰ By the end of 2015, the overall outcome shows 36% of the cases being settled, whilst 64% being decided by the tribunals; among the 64% decided cases, only 46% ruled (fully or partially) in favor of the investor, while 53% decided in favor of the host-state (24% rejecting jurisdiction and 29% dismissing all claims), with the remaining 1% considered as manifestly without legal merits.¹⁰¹ The UNCTAD and ICSID statistics reveal a steady trend of host states winning more cases than investors, a fact rebutting the allegation that arbitrators are biased in favor of the investor-claimants.

B. The wrongful presumption of inappropriateness for commercial

⁹⁷ UNCTAD, *World Investment Report 2014*, p.126,

http://unctad.org/en/publicationslibrary/wir2014_en.pdf (visited 10 July 2016).

⁹⁸ UNCTAD, *World Investment Report 2015*, p.116 (the remaining 9 percent of the cases were discontinued for reasons other than settlement or unknown reasons).

⁹⁹ ICSID, *The ICSID Caseload - Statistics (Issue 2015-1)*, p.26,

[https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/ICSID%20Web%20Stats%202015-1%20\(English\)%20\(2\)_Redacted.pdf](https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/ICSID%20Web%20Stats%202015-1%20(English)%20(2)_Redacted.pdf) (visited 10 July 2016).

¹⁰⁰ ICSID, *The ICSID Caseload - Statistics (Issue 2016-1)*, p.28,

[https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/ICSID%20Web%20Stats%202016-1%20\(English\)%20final.pdf](https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/ICSID%20Web%20Stats%202016-1%20(English)%20final.pdf) (visited 10 July 2016).

¹⁰¹ *Ibid*, pp.13-14.

arbitrator to handle BIT disputes

Another criticism accompanying the appointment of arbitrators by the disputing parties is that, the arbitrators appointed by the disputing parties (in particular, by the investor-claimant) are usually of commercial background, lacking expertise in issues in relating to international law. It is argued that, such commercial arbitrators are not in a position to hear disputes arising out of an international treaty, such as a BIT; these commercial arbitrators would look after the corporate interests of the investor-claimant, rather than the public interests asserted by the responding host state.¹⁰² It is presumably the reason under the ICS to have the arbitrators selected by the Contracting States of the BIT from candidates qualified to hold judicial office in their respective countries.¹⁰³ Under such hypothesis, an arbitrator who formerly served as a state judge is more capable than one that is a commercial lawyer to hear a dispute arising out of a BIT. If such argument stands as true, it should be seen in actual cases that an investor's claims were either upheld by arbitrators with commercial background, or dismissed by arbitrators from public office.

In fact, the allegation of a commercial arbitrator's inappropriateness to sit in a tribunal under a BIT is a false one, as many of the decisions in investor-state arbitration have demonstrated. Arbitrators with commercial background have dismissed claims made by investors. In *Methanex*, for example, the investor asserted that the environmental regulation of the host state infringed its investment interests; such claim was nevertheless dismissed by the tribunal chaired by V.V. Veeder, an arbitrator well-known for his commercial expertise.¹⁰⁴ In *Vigotop Limited v. Hungary*, the investor's claims were considered as of contractual nature rather than treaty-based, thus dismissed by the tribunal chaired by Klaus Sachs, another prestigious

¹⁰² See, for example, US Senator Elizabeth Warren, Opinion: The Trans-Pacific Partnership Clause Everyone Should Oppose, Washington Post (25 February 2015), https://www.washingtonpost.com/opinions/kill-the-dispute-settlement-language-in-the-trans-pacific-partnership/2015/02/25/ec7705a2-bd1e-11e4-b274-e5209a3bc9a9_story.html (visited 25 October 2016). Senator Warren contended that 'highly paid corporate lawyers would go back and forth between representing corporations one day and sitting in judgment the next. Maybe that makes sense in an arbitration between two corporations, but not in cases between corporations and governments. If you're a lawyer looking to maintain or attract high-paying corporate clients, how likely are you to rule against those corporations when it's your turn in the judge's seat?' Ibid.

¹⁰³ Stephen M. Schwebel, The Outlook for the Continued Vitality, or Lack Thereof, of Investor-State Arbitration, 32 *Arbitration International* 1 (2016), at p.12. See also Investment Chapter of TTIP, Section 3, art.9.4; CETA, art.8.27.4; Investment Chapter of EU-Vietnam FTA, Section 3, art.12.4.

¹⁰⁴ *Methanex v. United States*, Arbitration under NAFTA and UNCITRAL Arbitration Rules, Final Award of the Tribunal on Jurisdiction and Merits (3 August 2005), part VI, p.1, <http://www.italaw.com/sites/default/files/case-documents/ita0529.pdf> (visited 25 October 2016).

commercial arbitrator.¹⁰⁵ On the contrary, there are instances where arbitrators previously holding judicial office with expertise in international law have approved the investor's claims against the host state, even in controversial cases involving environmental issues. For example, in *Clayton/Bilcon v. Canada*, the claimants asserted that the host state arbitrarily denied them a permit to construct a quarry in a sensitive maritime environment; the claim was approved by the tribunal chaired by Bruno Simma, former judge of the International Court of Justice (ICJ).¹⁰⁶ Furthermore, the distinction between commercial arbitrators and arbitrators from other background is absurd, as many of the esteemed and experienced arbitrators are practitioners and academics at the same time. In the recently decided two Philip Morris tobacco cases, namely, *Philip Morris v. Australia* and *Philip Morris v. Uruguay*, the arbitrators sitting in the tribunals included Karl-Heinz Böckstiegel, Gabrielle Kaufmann-Kohler, Donald M. McRae, for the Australian case, and Piero Bernardini, Gary Born, James Crawford, for the Uruguayan case. Among them, only James Crawford holds judicial office as a judge of the ICJ, the others are all practitioners, who also engage actively in academic activities, and are widely recognized with their achievements in various areas of law, such as international investment, international business transaction, and international arbitration. Such mixed backgrounds did not hinder these arbitrators from performing their duty independently and impartially to determine issues relating to public interests, such as tobacco control and public health, as the investor's claims were either rejected on jurisdictional grounds,¹⁰⁷ or dismissed on merits.¹⁰⁸ These cases demonstrate that the result of arbitration has nothing to do with the arbitrators' background, and that arbitrators appointed by the parties (including the investor-claimant) can be competent to decide cases involving important public interests. Accordingly, the allegation concerning a commercial arbitrator's inappropriateness to handle investment disputes is, as proven, an invalid assertion. Therefore, the shifting of power of appointing arbitrators from disputing parties to the Contracting States based on such allegation is unpersuasive and unjustifiable.

¹⁰⁵ *Vigotop Limited v. Hungary*, ICSID Case No. ARB/11/22, Award (1 October 2014), paras. 634, 640, <http://www.italaw.com/sites/default/files/case-documents/italaw4047.pdf> (visited 25 October 2016).

¹⁰⁶ *Clayton/Bilcon v. Canada*, Arbitration under NAFTA and UNCITRAL Arbitration Rules, PCA Case No. 2009-04, Award on Jurisdiction and Liability (17 March 2015), para. 742, <http://www.pccases.com/web/sendAttach/1287> (visited 25 October 2016).

¹⁰⁷ *Philip Morris v. Australia*, UNCITRAL Arbitration Rules (2010), PCA Case No. 2012-12, Award on Jurisdiction and Admissibility (17 December 2015), paras. 585-88, p.186, http://www.italaw.com/sites/default/files/case-documents/italaw7303_0.pdf (visited 25 October 2016).

¹⁰⁸ *Philip Morris v. Uruguay*, ICSID Case No. ARB/10/7, Award (8 July 2016), paras. 552-81, 590, <http://www.italaw.com/sites/default/files/case-documents/italaw7417.pdf> (visited 25 October 2016).

C. The violation of 'presumed impartial and independent' principle

The deprivation of the disputing parties' right under the consideration of preventing arbitrators from being biased poses another problem. In criminal proceedings there is the 'presumption of innocence' doctrine, under which a defendant who enters trial is presumed to be innocent of the accused crime; this presumption holds until the defendant is proven to be guilty of the crime during investigation; the prosecutor bears the burden of proving the defendant guilty in court.¹⁰⁹ In short, a defendant is presumed innocent unless proven guilty. This doctrine is universally accepted and followed, as it is regard, not just a legal right, but also an international human right under Article 11 of the UN's Universal Declaration of Human Rights.¹¹⁰ Applying such doctrine by analogy to arbitral proceedings, it could be said that arbitrators should be presumed impartial and independent unless their bias is proven. In other words, no arbitrator should be seen as being biased in favor of or against particular party unless proved so. However, by depriving the investor of the right to appoint arbitrator, the ICS seems to build its method concerning the composition of the tribunals/divisions on the presumption that arbitrators will have a bias in favor of the appointing investors. This is a 'presumed biased' fallacy, which is simply untrue, as previously demonstrated.

In conventional investor-state arbitration, where parties appoint the arbitrators, the allegation of the lack of impartiality and independence of arbitrators in general based on the pro-investor argument has been proven illogical and unsupported. However, it does not mean that, in a particular case, the parties cannot question an arbitrator's integrity. The challenge mechanism is included in domestic arbitration legislation, institutional arbitral rules, and international instruments. Under the ICSID Convention, for example, high moral character and the ability to exercise independent judgment are, among other things, required qualifications of arbitrators.¹¹¹ If an appointed arbitrator seems to fail to meet such requirements, a party is given the right to challenge by proposing to the tribunal the disqualification of such arbitrator, on account of any fact indicating a manifest lack of the required qualifications.¹¹² It

¹⁰⁹ The Law Dictionary (featuring Black's Law Dictionary Free Online Legal Dictionary 2nd Ed.), <http://thelawdictionary.org/presumption-of-innocence/> (visited 25 October 2016).

¹¹⁰ 'Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.' UN, The Universal Declaration of Human Rights, art.11(1), <http://www.un.org/en/universal-declaration-human-rights/> (visited 25 October 2016).

¹¹¹ ICSID Convention, art.14.(1).

¹¹² *Ibid*, art.57. The procedure of the disqualification has been further explained in Rule 9 of the ICSID Rules of Procedure for Arbitration Proceedings.

indicates that, an arbitrator is presumed impartial and independent unless he or she is proven through the challenge process to be contrary. Similar provision can be seen from the United Nations Commission on International Trade Law Arbitration Rules (UNCITRAL Arbitration Rules), which states that '[a]ny arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence.'¹¹³

With regard to the criteria for the determination of lack of impartiality or independence, the International Bar Association's Guidelines on Conflicts of Interest in International Arbitration (IBA Guidelines) serve to provide uniform standards.¹¹⁴ Briefly speaking, the IBA guidelines consist of two parts. The first part introduces general standards of impartiality, independence, and duty of disclosure, with useful explanations. For example, 'justifiable doubts' to the impartiality or independence of an arbitrator is interpreted as a situation under which 'a reasonable third person, having knowledge of the relevant facts and circumstances, would reach the conclusion that there is a likelihood that the arbitrator may be influenced by factors other than the merits of the case as presented by the parties in reaching his or her decision.'¹¹⁵ The second part is titled 'Practical Application of the General Standards.' It provides users with three lists containing instances of potential conflicts of interest that may possibly undermine an arbitrator's impartiality or independence. First, there are the Non-Waivable Red List (NWRL) and the Waivable Red List (WRL), on which are instances that give rise to justifiable doubts from the viewpoint of a reasonable third person as to the arbitrator's impartiality or independence.¹¹⁶ The difference between the NWRL and the WRL is that, situations described under the NWRL are more serious than that under the WRL, so the former cannot be waived even if accepted by the disputing parties, whilst the latter can be cured by the parties' expressed willingness to have such a person act as arbitrator.¹¹⁷ Examples of the NWRL include the arbitrator being an employee of the disputing party, or the arbitrator having significant financial interest in the outcome of the case;¹¹⁸ instances of the WRL include the arbitrator having prior involvement in the dispute, or the arbitrator being a lawyer in the same law firm as the counsel to a party.¹¹⁹ Secondly, there is the Orange

¹¹³ UNCITRAL Arbitration Rules (2013), art.12.1.

¹¹⁴ IBA Guidelines (2014), Introduction, http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx (visited 10 July 2016).

¹¹⁵ *Ibid*, Part I, (2) Conflicts of Interest: (c).

¹¹⁶ *Ibid*, Part II, 2.

¹¹⁷ *Ibid*.

¹¹⁸ *Ibid*, Part II, 1. Non-Waivable Red List, 1.1, 1.3.

¹¹⁹ *Ibid*, Part II, 2. Waivable Red List, 2.1.2, 2.3.3.

List (OL) containing situations that may, from the disputing parties' perspective, give rise to doubts as to the arbitrator's integrity, but the parties are deemed to have accepted the arbitrator if, after disclosure of such situations described by the OL, no timely objection is made.¹²⁰ Examples of the OL include that the arbitrator has been repeatedly appointed by the same party within the past three years, or that the arbitrators are from the same law firm.¹²¹ Finally, on the Green List (GL) are instances where no appearance and no actual conflicts of interest exists from an object point of view,¹²² Examples of the GL include that the arbitrator and one of the party's counsel have previously served together as arbitrator in another case, or that the arbitrator holds an insignificant amount of share in a party.¹²³

The ICS, as proposed by the EU, also allows the parties to challenge the arbitrators,¹²⁴ despite that the arbitrators are pre-installed by a special committee consisting of representatives from the Contracting States of the treaty. Although the ICS has not commenced its operation, the effectiveness of the challenge mechanism in previous arbitral proceedings can be observed. For instance, in recent ICSID cases, such as *Caratube v. Kazakhstan*,¹²⁵ *Blue Bank v. Venezuela*,¹²⁶ and *Burlington Resources, Inc. v. Ecuador*,¹²⁷ the challenged arbitrators either resigned or were disqualified. These examples demonstrate that, if an arbitrator is found to be biased, the removal of such arbitrator can be done through the challenge procedure. The inclusion of the challenge mechanism in the ICS evidences that, irrespective of how the arbitrators are appointed, there is still the potential risk of an arbitrator being biased; in other words, the deprivation of the parties' right to appoint arbitrators cannot guarantee the integrity of the arbitrators, otherwise there would be no need for the challenge mechanism. It is the challenge procedure, not the deprivation of the parties' right to appoint arbitrators, that serves to effectively safeguard the ICS proceedings from corrupt arbitrators. In short, the best policy to ensure the integrity of the arbitrators is to include the challenge procedure in arbitral proceedings, rather than

¹²⁰ Ibid, Part II, 3.

¹²¹ Ibid, Part II, 3. Orange List, 3.1.3, 3.3.1.

¹²² Ibid, Part II, 7.

¹²³ Ibid, Part II, 4. Green List, 4.3.2, 4.4.2.

¹²⁴ Investment Chapter of TTIP, Section 3, art.11.2.

¹²⁵ *Caratube v. Kazakhstan*, ICSID Case No. ARB/13/13, Decision on the Proposal for Disqualification of Mr. Bruno Boesch (20 March 2014), <http://www.italaw.com/sites/default/files/case-documents/italaw3133.pdf> (visited 10 July 2016).

¹²⁶ *Blue Bank v. Venezuela*, ICSID Case No. ARB/12/20, Decision on the Parties' Proposal to Disqualify a Majority of the Tribunal (12 November 2013), <http://www.italaw.com/sites/default/files/case-documents/italaw3009.pdf> (visited 10 July 2016).

¹²⁷ *Burlington Resources, Inc. v. Ecuador*, ICSID Case No. ARB/08/5, Decision on the Proposal for Disqualification of Professor Francisco Orrego Vicuña (13 December 2013), <http://www.italaw.com/sites/default/files/case-documents/italaw3028.pdf> (visited 10 July 2016).

to presume all arbitrators being biased upon their appointment by the parties. The abolishment of the appointment of arbitrators by the parties is a breach of the presumed impartial and independent principle, and an overkill, in terms of the goal it attempts to achieve.

D. The potential risk of setback to the depoliticization of ISDS

If the dispute between the foreign investor and the host state is to be filed before a domestic court of the latter, it is then to be heard by judges pre-installed by the responding state; furthermore, state judges are experts in domestic law, but are not necessarily familiar with specialized areas of international investment law; as a result, it is only natural for the investor-claimant to be suspicious of a domestic court's impartiality and independence, as well as its competence in dealing with international claims arising out of BITs.¹²⁸ Investor-state arbitration, on the contrary, not only provides a neutral forum where the dispute can be adjudicated and decided, more importantly, it also allows the disputing parties, the investor-claimant in particular, to select and agree on the arbitrators. Such rules concerning appointment give the investor claimant (and also the responding state) the right to choose or consent to candidates of arbitrator with considerations based on legal expertise, professional experience and knowledge in accordance with the circumstances of a specific dispute. Accordingly, in each investor-state arbitration proceedings the tribunal is specifically composed by the parties with the sole purpose to decide the presented case. The fact that such arbitrators are not unilaterally appointed by the responding state can build up the claimant's confidence in the tribunal.

Under the ICS, however, the investor-claimant is deprived of the right to appoint and consent to arbitrators. A division of the TFI/AT hearing an individual case is constituted by arbitrators who are essentially indirectly appointed by the responding state in its capacity as one of the Contracting States of the treaty. Despite ethic standards may be stipulated in treaty provisions, requiring such arbitrators to be insulated from any political influence or interference from the states, and to act impartially and independently,¹²⁹ there is the possibility that a claimant's confidence in the tribunal is weakened, to a certain extent, due to the severance of linked trust that could have been established between the claimant and the tribunal through the former's appointment or agreement on the latter. Without the right to appoint or

¹²⁸ Dolzer and Schreuer, supra note 5, p.235.

¹²⁹ For example, see CETA, art.8.30.1; Investment Chapter of TTIP, Section 3, art.11.1; Investment Chapter of EU-Vietnam FTA, Section 3, art.14.1.

consent on the arbitrator, and with less confidence in the unilaterally pre-installed division, the investor's willingness to resort to arbitration under the ICS could be undermined. Such development could be detrimental to the international community's endeavors to depoliticize treaty disputes between foreign investors and host states. If the investor and the host state cannot settle their dispute by direct negotiations, consultations, or mediation, and the investor is unwilling to submit the dispute to arbitration, there is the risk that the investor might turn to its home state, demanding the latter to step in and intervene. This would not necessarily constitute a resurrection of diplomatic protection, but it could pose as a potential threat to the depoliticization of ISDS.¹³⁰

The above findings suggest that the ICS's rules concerning the unilateral pre-selection and appointment of the arbitrators by the Contracting States are problematic. The presumption that an investor-appointed arbitrator is biased in favor of the appointing investor is proven by empirical statistics as untrue; the allegation that party-appointed commercial arbitrators are not capable of handling claims involving public interest is equally unfounded. In addition, actual cases have demonstrated that the integrity of the arbitral proceedings can be upheld by the challenge mechanism, under which a potentially partial or biased arbitrator can be removed. The deprivation of the investor's right to appoint arbitrator is a disproportionate measure in this regard. Finally, investors might lose their confidence in arbitration if arbitrators under the ICS are pre-installed by the Contracting States. Investors might feel unwilling to have recourse to arbitration, and turn to their home state for intervention instead. This could cause a setback in the depoliticization of ISDS. Due to the above reasons, there is nothing fundamentally wrong with the conventional approach of parties appointing arbitrators. The ICS's rules in this regard bring only harms, rather than reforms, to ISDS. If the EU-China BIT does incorporate the ICS, it should do so by retaining the parties' right of appointment.

V. Conclusion

With the ambitious purpose to improve ISDS, the EU has made expressed commitment to incorporate the ICS into existing and future treaty negotiations. The

¹³⁰ Note that, take the EU's proposed TTIP for example, the Contracting States are prohibited to bring international claims against each other if the dispute between an investor and the host state has been proceeded in accordance with the ISDS mechanisms, but a Contracting State is not precluded from intervening if the dispute is not submitted to arbitration; moreover, the Contracting States are allowed to 'exchange information' with each other in order to facilitate a settlement of the dispute. Investment Chapter of TTIP, Section 3, art.26.

ICS has been stipulated in negotiated CETA and EU-Vietnam FTA. It has also been proposed in the EU version of the TTIP. For the EU-China BIT currently under negotiations, there is no reason for the EU not to bring the ICS on the negotiation table. The ICS contains certain procedural innovations: the appellate mechanism could increase legal correctness, consistency, and predictability of awards; the pre-installation of the arbitrators by the Contracting States is intended to uphold the integrity of the arbitrators; the mandatory application of the UNCITRAL Transparency Rules could reinforce the ICS's legitimacy by making its proceedings more transparent; the allocating of costs by the 'loser pays' principle could serve to deter the investor-claimant from filing frivolous or unmeritorious claims and encourage both parties to settle. As a result, it is likely that such innovative features would be accepted and approved by China to be included in the ISDS provisions of the EU-China BIT.

This paper concurs with the EU on the proposed ICS aiming at reforming ISDS. However, among the procedural innovations under the ICS, the pre-installation of arbitrators by the Contracting States at the price of depriving the investor of its right of appointment is not so much an improvement, as it has been proven that the impartiality, independence, and integrity of the arbitrators have nothing to do with whether the arbitrators are appointed by the disputing parties (particularly the investor-claimant), or what background the appointees are from. The most effective way to ensure the integrity of the arbitral tribunal is to allow an arbitrator to be challenged and removed if he or she fails to meet the ethical requirements. The preclusion of an investor from appointing an arbitrator would only result in the investor's confidence in the ICS being undermined, which in turn might lower the investor's willingness to resort to arbitration. Should the investor be left with no choice but to turn to its home state for intervention, such development could endanger the depoliticization of the ISDS. ICS is a decent proposal containing innovative ideas, except for the part concerning how the arbitrators are to be appointed. If the ICS is to be incorporated into the EU-China BIT, it should be modified to apply the conventional approach of party appointment, not pre-installation by the Contracting States.