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Legal aspects of investment facilitation of the Shanghai Cooperation Organization member states

One of the main goals of the Shanghai Cooperation Organization (SCO) is to implement economic and trade cooperation on the basis of equal partnership. Frequent events on economic and trade cooperation between the SCO member states not only contribute to the process of trade and investment facilitation, but also put forward higher requirements for the simplification of investment procedures in the economy and trade. The “Declaration on the Establishment of the Shanghai Cooperation Organization proposed to start negotiations on the simplification of investment procedures, the “Charter of the Shanghai Cooperation Organization” facilitated the process of simplifying investment procedures, and the signing of memoranda and protocols, etc. jointly contributed to the simplification of investment procedures in the form of soft laws. However, the main content of the SCO investment facilitation is reflected in international soft law documents. The lack of simplification of procedures at the stage of access to investments and the inability of the existing mechanism for settlement of investment disputes to meet the needs of the SCO limit the development of economic and trade cooperation of the SCO. Therefore, it is recommended to draw lessons from the experience of facilitating simplification of procedures, according to which member States should review or negotiate bilateral investment treaties, gradually introduce a model of a preliminary national regime plus a negative list, create a mechanism for resolving SCO investment disputes and support the establishment of SCO economic and trade cooperation.

Keywords: Shanghai Cooperation Organization; investment facilitation; investment access; investment dispute settlement mechanism.

Introduction

In June 2001, the “Declaration on the Establishment of the Shanghai Cooperation Organization” proposed to launch a program of negotiations on investment facilitation. In June 2022, the “Charter of the Shanghai Cooperation Organization” facilitated the investment facilitation process. In September 2015, the Economic and Trade Ministers of the SCO member states at the 14th meeting approved the establishment of a trade facilitation working group, which for the first time established a special working mechanism to promote trade facilitation, and made promoting the level of trade facilitation a key task of regional economic cooperation. The SCO member states have promoted the process of economic and trade investment facilitation in customs, finance, transportation and other aspects, and also strengthened practical cooperation in agriculture, energy, science and technology and other fields. While promoting the process of trade and investment facilitation, it also puts forward higher requirements for economic, trade and investment facilitation. This article aims to study the trade facilitation of the SCO from the perspective of international law, improve the level of regional economic and trade investment facilitation, and promote the continuous broadening of investment cooperation fields among member states and the continuous deepening of regional economic and trade cooperation.

Materials and methods

In the process of writing the article, the methods of historical analysis, literary and comparative legal analysis were used. The main purpose is to analyze the current difficulties in SCO investment facilitation through relevant documents, laws and regulations, resolve the conflicts and contradictions in the process of economic and trade cooperation from the perspective of international law, and promote the development of economic, trade and investment facilitation among the SCO member states.

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This article uses a series of important documents of the SCO, including the Memorandum and the Outline of Multilateral Economic and Trade Cooperation of the SCO Member States. At present, the research on trade facilitation mainly focuses on two aspects. One is how to evaluate the level of trade facilitation. The second is to explore the impact of trade facilitation on trade scale and economic benefits. Provide a reference and a basis for this study. This paper also makes a comparative analysis of the laws of the SCO member states to find more effective legal ways to improve the convenience of investment among the SCO member states.

Results and discussion

Legal basis for SCO investment facilitation. Investment facilitation was clearly stated for the first time in the “Investment Facilitation Action Plan (IFAP)” published by the Asia-Pacific Economic Cooperation (APCE) in 2008, defining it as: “To achieve the goal of attracting foreign investment, a number of measures are taken at all stages of the investment cycle to maximize effective management and effectiveness” [1]. In 2001, the Shanghai Cooperation Organization was established. Kazakhstan, China, Kyrgyzstan, Russia, Tajikistan and Uzbekistan jointly signed the “*Declaration on the Establishment of the Shanghai Cooperation Organization*”. Article 9 stipulates that the “Shanghai Cooperation Organization” will make use of the cooperation between member states. There are huge potential and extensive opportunities for mutually beneficial cooperation in the field of economy and trade, and we strive to promote the further development of bilateral and multilateral cooperation and the diversification of cooperation among member states. To this end, the trade and investment facilitation negotiation process will be launched within the framework of the “Shanghai Cooperation Organization”, a long-term multilateral economic and trade cooperation outline will be formulated, and relevant documents will be signed [2]. In 2002, Article 3 of the SCO Charter “Direction of Cooperation” stipulates that various forms of regional economic cooperation should be supported and encouraged, and trade and investment facilitation should be promoted to gradually realize the free flow of goods, capital, services and technology [3]. The declaration of the heads of state of the SCO has repeatedly emphasized the issue of investment facilitation.

The SCO cooperation mechanism for trade and investment facilitation. The SCO has successively established a variety of official mechanisms, including the Prime Minister's Meeting Mechanism and the Economic and Trade Ministers' Meeting Mechanism. These official institutional constructions provide an important foundation for the formulation of standards related to trade and investment facilitation [4]. In the customs field, member states have strengthened cooperation and coordination on issues such as customs mutual assistance, customs statistics, and simplified transit procedures. In the field of technical regulations, standards and conformity assessment procedures, member states have established information exchange procedures and mechanisms for technical regulations, sanitary and phytosanitary measures. In the field of e-commerce, member states have launched the “*Shanghai Cooperation Organization Regional Economic Cooperation Network*” and conducted regular maintenance. In the field of transportation, member states discussed and signed the “*Intergovernmental Agreement on the Facilitation of International Road Transport among the Member States of the Shanghai Cooperation Organization*” and identified and implemented priority projects for road and railway interconnection in the region. In the financial field, the six countries established the SCO Banking Consortium. Currently, it is actively carrying out bilateral and multilateral financial pragmatic cooperation, expanding bilateral local currency settlements among member countries, and further promoting the development of regional trade and investment. In addition, member states have also established industrialist committees to promote cooperation between member states' enterprises in the fields of economy and trade, financial credit, science and technology, energy, transportation, communications, agriculture and other fields [5].

Domestic legislative practices on investment facilitation among SCO member states. The 1999 “*Foreign Investment Law of the Russian Federation*” has been revised eight times. On the one hand, the federal government formulates an outline aimed at attracting foreign direct investment and guarantees its implementation. On another hand, it formulates measures to attract international indirect investment, including seeking international financial organizations and foreign investors. Loans that can finance the Russian Federation's development budget and federal-level investment projects [6]. In addition, Pakistan's *Foreign Private Investment (Promotion and Protection) Law* of 1976, the Investment Law of the Republic of Tajikistan, the *Foreign Investment Law* of the Republic of Uzbekistan, the *Investment Law* of the Republic of Kazakhstan, and the *Foreign Investment Law* of the Kyrgyz Republic have clarified. The legislative purpose is to attract foreign investment. As the first element of investment facilitation, attracting foreign investment is a priority

consideration for SCO member states. The purpose of attracting foreign investment is not only to protect investment, but also to ensure that foreign investment is beneficial to the sustainable development of the host country, taking sustainable development as the bottom line for attracting foreign investment.

Legal dilemmas in SCO investment facilitation. The main content of the SCO's investment facilitation is reflected in international soft law documents. In September 2001, the member states signed the "*Memorandum of Understanding among the Governments of the SCO Member States on the Basic Objectives and Directions of Regional Economic Cooperation and the Launch of the Process of Trade and Investment Facilitation*" (referred to as the "Memorandum"), and in May 2002 Sign its protocol [7]. The main contents include: carrying out investment facilitation on the basis of referring to World Trade Organization (WTO) rules to improve the economic development level of SCO member states; starting the investment facilitation process is an important task for the SCO to carry out regional economic cooperation at this stage; investment facilitation has passed. This can be achieved by removing trade and investment barriers step by step, expanding information exchange on laws and regulations, and attracting and protecting mutual investment. In September 2003, the prime ministers of the six countries signed the "*Outline for Multilateral Economic and Trade Cooperation among the Member States of the Shanghai Cooperation Organization*" (referred to as the "Outline"). The outline proposes to implement trade and investment facilitation as the goal of economic and trade cooperation (before 2010). The mid-term task is to implement trade and investment facilitation within the framework of the SCO, including jointly formulating stable, predictable and transparent rules and procedures and other plans. In the short term, we will actively promote the process of trade and investment facilitation, including jointly drafting multilateral agreements and a list of legal measures and a catalog of demonstration projects; according to the 2001 Memorandum of Understanding, we will fully reflect the economic complementarity of the SCO member states in energy, transportation, and other fields to promote direct investment and cooperation between enterprises. In order to implement the goals and tasks stipulated in the "Outline", in September 2004, the SCO Prime Ministers' Meeting adopted 9 resolutions including the Plan of Implementation Measures for the "Outline". In September 2015, China submitted a letter of acceptance to the WTO for the Protocol to the Trade Facilitation Agreement. The entry into force and implementation of the Protocol will help to create a convenient customs clearance environment and boost the confidence of import and export enterprises, thereby further promoting the development of foreign trade and enabling Kazakhstan has closer economic ties with Russia, China, Central Asia and even other countries, with deeper mutual cooperation and broader development space. The 2019 new version of the "Outline". In view of the great obstacles in the advancement of the 2003 "Outline", in order to better implement investment facilitation, the SCO launched a new version of the 2019 Outline, which is more specific and more operable. Although the SCO's soft law on investment facilitation is fragmented and unsystematic, it is consistent with the APEC Investment Facilitation Action Plan and RCEP in terms of attracting foreign investment, increasing transparency, predictability and simplifying procedures. However, it coincides with the statement of the APEC Investment Facilitation Action Plan and the RCEP. However, most of the above framework documents are expressed in the form of soft laws such as declarations, Memorandums and Outlines, and have no specific rights and obligations and lack legal effect.

Insufficient facilitation at the investment access stage. Covering all stages of the investment cycle including investment admission, investment operations and investment withdrawal. Judging from the legislative orientation of foreign investment laws in the SCO member states, the latter two are obviously more important than the former. Under public international law, states are not obliged to open their borders to foreigners, goods or capital. It was not until the start of national treatment for investment access, that is, the creation of a negative list, that the host country's concerns about granting free and convenient access to foreign investment changed to a large extent. Some SCO member states have adopted negative lists. Currently, the SCO member states that have adopted a negative list include China, India, Russia, Pakistan, Uzbekistan and Tajikistan [8]. In October 2007, Russia passed the Law on the Access of Foreign Investments in Strategic Economic Sectors, creating legal conditions for foreign investors to participate in investments in its economic sectors. Kyrgyzstan implements a completely open foreign investment access model [9]. There is no need to issue any negative list. In contrast, Kazakhstan still follows a relatively backward approval method. This means that investors cannot enjoy national treatment under bilateral investment treaties. It is worth noting that among the bilateral investment agreements signed between China and other member states of the SCO, only the bilateral investment agreements between China and Russia, China and India, and China and Ukraine stipulate national treatment clauses. This means that between China and Kazakhstan, investors cannot enjoy national treatment in accordance with the bilateral investment agreement.

The existing investment dispute settlement mechanism cannot meet the needs of the SCO. The International Center for the Settlement of Investment Disputes (ICSID) is currently the only international arbitration institution that resolves investment disputes between foreign investors and host governments. However, since Tajikistan has not yet joined, the SCO cannot directly stipulate the arbitration rules applicable to ICSID. Similarly, since some member states have not yet joined the WTO, the WTO dispute settlement mechanism cannot be applied. Therefore, the SCO currently does not have a corresponding dispute settlement mechanism. If a dispute arises between investors and cannot be resolved in an effective way, it will lead to friction and loss of investment confidence in each other.

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Experience in promoting facilitation worth learning from. Based on international organizations, only APEC's "*Investment Facilitation Action Plan*" puts forward a clear definition of investment facilitation and proposes 8 principles, of which transparency, predictability, procedural simplification and regional economic integration cooperation are the core elements. The SCO's facilitation of investment facilitation provides a sample and reference. Among the members of the SCO, China and Tajikistan have opened a "Single Window" for international investment, providing technical support to maximize the effectiveness and efficiency of investment management behaviors. In August 2020, China Hainan International Investment "Single Window" was officially launched, providing investors with "One-Stop" services, demonstrating the service function of maximizing efficiency [10]. The "Investment Law of the Republic of Tajikistan" stipulates 2 articles in the general provisions, and even specifically sets up Article 23 "Single Window" to Provide Assistance to Investors [11]. This legislative model is worth learning from by other SCO member states.

Legal advice on promoting investment facilitation in the SCO. Conduct revision or negotiation of bilateral investment treaties. Before the SCO launches a regionally integrated investment facilitation agreement, it can conduct bilateral investment treaty revisions or negotiations as a transition. In particular, regarding the sustainable development of attracting foreign investment and the regulatory procedures of the host country, bilateral investment treaties that simply emphasize attracting investment have become a thing of the past, and the signing of balanced treaties is becoming more and more common. The United Nations Conference on Trade and Development (UNCTAD) mentioned that an increasing number of countries have made it clear in the preambles of their treaties that the objectives of investment facilitation and protection must not be at the expense of other key public policy objectives [12]. Since there are differences in the application of these standards among the SCO member states, the expressions in the preamble of the bilateral investment treaty should be as unified as possible. The SCO member states should recognize each other and uniformly stipulate procedural simplification clauses in the bilateral investment treaty, which will benefit the host country. The sustainable development of investment is also in line with the fundamental interests of the home country of investment. In addition, the practices of China's Hainan Free Trade Port and the international investment "Single window" provisions of the Investment Law of the Republic of Tajikistan can be borrowed from the SCO's bilateral investment treaty.

Gradually establish a model of access country treatment plus a negative list. Pre-Establishment National Treatment refers to the treatment given to foreign investors and their investments that are no less favorable than domestic investors and their investments during the stages of enterprise establishment, acquisition, and expansion [13]. Its core is to grant foreign investment access rights. The Negative List refers to a list of all management measures for foreign investment that are inconsistent with national treatment and most-favored-nation treatment [14]. The implementation of this model is of great significance to the SCO. When formulating the negative list, it is impossible to fully foresee major technological innovations in the economic and trade field in the future. Therefore, it can be gradually reformed to allow more flexible investment methods.

Establish an SCO investment dispute settlement mechanism. Establish a permanent establishment. Currently, there are two permanent institutions of the SCO, namely the secretariat in China and the anti-terrorist agency in Uzbekistan. Therefore, it is recommended to establish a permanent institution dedicated to the settlement of investment disputes. The investment dispute settlement mechanism needs to comprehensively stipulate the scope of application of dispute settlement, including disputes arising from investments between

member states, between member states and private individuals of their own or other member states, and between private individuals of different member states. Any disputes arising from the rights and obligations stipulated in the relevant agreements and future documents of the SCO investment field between the parties can be resolved through it. In terms of enforcement, we can refer to the WTO's "Reverse Unanimous" voting method and the award enforcement model in the EU Free Trade Area dispute settlement mechanism, requiring member states to take necessary measures to recognize or enforce the award.

Conclusions

The level of economic, trade and investment facilitation of the SCO will directly affect the degree of its regional cooperation. The SCO member states have both merits and deficiencies in promoting the legislative process of investment facilitation. First, the above-mentioned framework documents are mostly expressed in the form of soft laws such as Declarations, Memorandums, and Outlines, without specific rights and obligations, and lack legal effect. Second, although the investment laws of member states are very clear in terms of the legislative purpose of attracting foreign investment, in fact only investments that are in line with the sustainable development of the host country will be truly protected. Third, in the investment access stage, China, India, Russia, Pakistan, Uzbekistan and Tajikistan, as representatives, implement the national treatment plus negative list system, but there are still ambiguities in the design of the list. At present, Kazakhstan's access method, which has the lowest degree of convenience. China's Hainan Free Trade Port took the lead in creating a single window for international investment that maximizes efficiency. The "Investment Law of the Republic of Tajikistan" stipulates special provisions, providing pilot experience for other member states of the SCO. Based on the above issues, members of the SCO can first revise or negotiate bilateral investment treaties, establish "Single Window" clauses for international investment, and add procedural simplification clauses. Secondly, it is recommended to design national treatment plus negative list clauses with the purpose of attracting foreign investment. Finally, build the SCO investment dispute settlement mechanism. Through the above measures, legal protection will be provided to achieve the goals of economic and trade cooperation of the SCO.

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Шанхай ынтымақтастық ұйымына мүше мемлекеттердің инвестицияларына жәрдемдесудің құқықтық аспектілері

Шанхай ынтымақтастық ұйымының (ШЫҰ) негізгі мақсаттарының бірі – тең құқылы серіктестік негізінде экономикалық және сауда ынтымақтастығын жүзеге асыру. ШЫҰ-ға мүше мемлекеттер арасындағы экономикалық және сауда ынтымақтастығы жөніндегі жиі іс-шаралар сауда мен инвестициялар рәсімдерін оңайлату үдерісіне ықпал етіп қана қоймайды, сонымен қатар экономика мен саудаға инвестициялар рәсімдерін оңайлатуға жоғары талаптар қояды. «Шанхай ынтымақтастық ұйымын құру туралы» Декларация инвестициялау рәсімдерін оңайлату жөніндегі келіссөздерді бастауды ұсынды, «Шанхай ынтымақтастық ұйымының» Хартиясы инвестициялау рәсімдерін оңайлату процесіне ықпал етті, ал меморандумдар мен хаттамаларға қол қою және т.б. жұмсақ заңдар түрінде инвестициялау рәсімдерін жеңілдетуге бірлесіп ықпал етті. Алайда ШЫҰ инвестициялық көмегінің негізгі мазмұны халықаралық жұмсақ құқық құжаттарында көрсетілген. Инвестицияларға қолжетімділік сатысында рәсімдерді оңайлатудың болмауы және инвестициялық дауларды шешудің қолданыстағы тетігінің ШЫҰ қажеттіліктерін қанағаттандыруға қабілетсіздігі ШЫҰ-ның экономикалық және сауда ынтымақтастығын дамытуды шектейді. Демек, мүше мемлекеттер екіжақты инвестициялық шарттарды қайта қарауы немесе олар бойынша келіссөздер жүргізуі, алдын ала ұлттық режим моделін және теріс тізімді біртіндеп енгізуі, ШЫҰ-ның инвестициялық дауларын реттеу тетігін құруы және ШЫҰ-ның экономикалық және сауда ынтымақтастығын жолға қоюда қолдау көрсетуі тиіс рәсімдерді оңайлатуға жәрдемдесу тәжірибесінен сабақ алу ұсынылады.

Кілт сөздер: Шанхай ынтымақтастық ұйымы, инвестицияларға жәрдемдесу, инвестицияларға қол жеткізу, инвестициялық дауларды реттеу механизмі.

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Правовые аспекты содействия инвестициям государств-членов Шанхайской организации сотрудничества

Одной из основных целей Шанхайской организации сотрудничества (ШОС) является осуществление экономического и торгового сотрудничества на основе равноправного партнерства. Часть мероприятий по экономическому и торговому сотрудничеству между государствами-членами ШОС не только способствуют процессу упрощения процедур торговли и инвестиций, но и выдвигают более высокие требования к упрощению процедур инвестиций в экономику и торговлю. «Декларация о создании Шанхайской организации сотрудничества» предложила начать переговоры по упрощению процедур инвестирования, «Хартия Шанхайской организации сотрудничества» способствовала процессу упрощения процедур инвестирования, а подписание меморандумов и протоколов способствовало упрощению процедур инвестирования в виде мягких законов. Однако основное содержание содействия инвестициям ШОС отражено в международных документах мягкого права. Отсутствие упрощения процедур на этапе доступа к инвестициям и неспособность существующего механизма урегулирования инвестиционных споров удовлетворить потребности ШОС ограничивают развитие экономического и торгового сотрудничества ШОС. Следовательно, рекомендуется извлечь уроки из опыта содействия упрощению процедур, согласно которому государствам-членам следует пересмотреть двусторонние инвестиционные договоры или провести переговоры по ним, постепенно внедрять модель предварительного национального режима плюс негативный список, создать механизм урегулирования инвестиционных споров ШОС и оказывать поддержку в налаживании экономического и торгового сотрудничества ШОС.

Ключевые слова: Шанхайская организация сотрудничества, содействие инвестициям, доступ к инвестициям, механизм урегулирования инвестиционных споров.

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