INVESTMENT DISPUTE RESOLUTION IN THE SHANGHAI COOPERATION ORGANIZATION: INSTITUTIONAL DESIGN AND PROCEDURAL COORDINATION

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INVESTMENT DISPUTE RESOLUTION IN THE SHANGHAI COOPERATION ORGANIZATION: INSTITUTIONAL DESIGN AND PROCEDURAL COORDINATION

SU Pan*

Abstract:

The Shanghai Cooperation Organization (SCO) has emerged as a pivotal platform for China to shape the practice of international organizational law, particularly in the context of regional security and economic integration. Despite the SCO Charter's commitment to peaceful resolution of disputes, the absence of a dedicated mechanism for investment disputes settlement poses a growing challenge. As cross-border investments among SCO member states expand, the frequency, complexity, and financial stakes of disputes have risen accordingly. Such disputes often involve sensitive issues such as energy infrastructure, sovereign guarantees and regulatory expropriation, necessitating a structured yet flexible resolution framework. This study argues that the SCO should establish a multi-tiered dispute resolution system tailored to the shared legal traditions and economic priorities of its member. First, the mechanism should prioritize consultation and mediation consistent with the consensus-driven ethos of the SCO. Second, it should incorporate quasi-judicial procedures to address high-stakes claims while avoiding the politicization associated with traditional investor-state arbitration. Crucially, the system must harmonize domestic judicial remedies with international procedural norms, ensuring enforceability without undermining state sovereignty. Furthermore, the paper examines procedural coordination challenges, including forum selection, parallel proceedings and post-award enforcement. It proposes institutional reforms to mitigate conflicts between domestic laws of SCO members and emerging international investment rules. For China, proactive engagement in shaping this mechanism aligns with its strategic priorities in regional economic governance and reinforce the SCO's role as a rule-maker in the international legal order.

Key Words: Shanghai Cooperation Organization, investor-state dispute settlement, diversified resolution mechanism, procedural coordination

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I. INTRODUCTION

The Shanghai Cooperation Organization ("SCO"), as a significant platform for China to lead in the practice of international organizational law, is the largest transregional multilateral comprehensive organization in terms of population and geographical coverage. It has also long been committed to regional security cooperation, trade and investment facilitation, and economic exchange. From 2001 to 2020, China's trade with other member states of the SCO expanded 20-fold.[1] By the end of 2023, China's outward foreign direct investment stock in other SCO member states had reached $39 billion.[2] With the increase in investment, a growing number of disputes have arisen and are likely to continue among SCO countries.[3]

Against this background, it is necessary to establish a mechanism resolving investment disputes within the SCO. First and foremost, such a mechanism would serve as a pivotal safeguard for economic development and regional security—objectives that are explicitly enshrined in the SCO Charter. Secondly, effective settlement of investment disputes is crucial for the SCO, as a regional organization, to enhance its own credibility and cohesion. Lastly, a systematic dispute resolution mechanism is an indispensable element of the rule-of-law-oriented framework in international organizations, as evidenced by the fact that the EU, USMCA, ASEAN, and RCEP have all integrated internal dispute resolution mechanisms into their legal structures.

At present, the SCO Charter merely mandates in Article 22 that "in case of disputes or disagreements relating to interpretation or application of this Charter the member States shall settle them through consultations and negotiations". It does not contain any specific provisions on investment dispute settlement. While SCO countries have extensively concluded bilateral and multilateral investment treaties, with investment arbitration mechanisms being widely utilized, the existing investor-state dispute settlement (ISDS) mechanism is inefficient. Moreover, it faces significant challenges in achieving effective procedural coordination.

By establishing a diversified investment dispute resolution mechanism that takes into account the practical imperatives of

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1 *See China-SCO trade expands 20-fold in 2 decades: Ministry*, CHINA DAILY (Sep. 17, 2021), https://www.chinadaily.com.cn/a/202109/17/WS61449972a310e0e3a6822698.html (last visited Dec. 10, 2025).

2 MINISTRY OF COMMERCE OF THE PEOPLE'S REPUBLIC OF CHINA (中华人民共和国商务部), NATIONAL BUREAU OF STATISTICS OF THE PEOPLE'S REPUBLIC OF CHINA (中华人民共和国国家统计局) & STATE ADMINISTRATION OF FOREIGN EXCHANGE OF THE PEOPLE"S REPUBLIC OF CHINA (国家外汇管理局), 2023 NIANDU ZHONGGUO DUIWAI ZHIJIE TOUZI TONGJI GONGBAO (2023 年度中国对外直接投资统计公报) [STATISTICAL BULLETIN OF CHINA"S OUTWARD FOREIGN DIRECT INVESTMENT, 2023] 143–146 (China Commerce and Trade Press 2024).

3 *See* the analysis of Part II.

SCO countries and is seamlessly integrated with existing frameworks, the SCO can address investment disputes more effectively. Such an approach not only helps to maintain the unity and cooperation within the organization but also promotes regional peace, stability, and co-development. Moreover, it presents an important opportunity for China, as the initiator and a leading member of the SCO, to engage in the reform of international investment governance, thereby enhancing China's discourse power in global rule-making.

II. ANALYZING INVESTMENT DISPUTES IN SCO COUNTRIES

By the end of 2024, the SCO had comprised ten member states, namely Belarus, China, India, Iran, Kazakhstan, Kyrgyzstan, Pakistan, Russia, Tajikistan, and Uzbekistan; two observer states, namely Afghanistan and Mongolia; and fourteen dialogue partners, namely Azerbaijan, Armenia, Bahrain, Cambodia, Egypt, Kuwait, Maldives, Myanmar, Nepal, Qatar, Saudi Arabia, Sri Lanka, Turkey, and the United Arab Emirates.

With respect to dispute resolution in the SCO countries, the SCO Charter provides only a general principle that disputes should be resolved through consultation among state parties. Despite the absence of a unified and detailed quasi-judicial mechanism, disputes among SCO countries are resolvable through the existing frameworks of bilateral and multilateral agreements, with international investment arbitration constituting the most emblematic approach.

A. EXAMINATION OF INVESTMENT AGREEMENTS AND ARBITRATION CASES IN SCO COUNTRIES

International investment agreements serve as the legal foundation for initiating ISDS proceedings, with international investment arbitration being the distinctive and predominant mechanism for resolving investment disputes. The United Nations Conference on Trade and Development (UNCTAD) has compiled statistics on international investment agreements (IIAs), which include bilateral investment agreements (BITs) and treaties with investment provisions (TIPs), as well as international investment arbitration cases. Table 1 provides an overview of the pertinent circumstances for SCO countries.

Table 1 International Investment Agreements and Arbitration Cases of SCO Countries[4]

4 *See* UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT [hereinafter UNCTAD], https://investmentpolicy.unctad.org/international-investment-agreements, https://investmentpolicy.unctad.org/investment-dispute-settlement (last visited Dec. 8, 2025). The status for investment agreements includes "in force", "signed (not in force)", and "terminated".

SCO Countries		BIT with China (Year)	Investment Agreements		Investment Arbitration Cases	
			BIT	TIP	As Respondent	As Home Sate
Member States	China	/	148	31	9	20
	Belarus	1993	75	9	5	2
	India	2006 (Terminated)	88 (77 Terminated)	19	29	12
	Iran	2000	75	2	1	6
	Kazakhstan	1992	53	12	19	7
	Kyrgyzstan	1992	39	9	18	0
	Pakistan	1989	53	7	12	0
	Russia	Old: 1990 New: 2006	85	6	31	26
	Tajikistan	Old: 1993 New: 2024	44	7	2	0
	Uzbekistan	Old: 1992 New: 2011	57	4	9	1
Observer States	Afghanistan	None	5	5	0	0
	Mongolia	1991	44	4	6	0
Dialogue	Azerbaijan	1994	52	3	7	1

SCO Countries		BIT with China (Year)	Investment Agreements		Investment Arbitration Cases	
			BIT	TIP	As Respondent	As Home Sate
Partners	Armenia	1992	44	8	7	0
	Bahrain	1999	41	12	4	1
	Cambodia	1996	27	20	1	0
	Egypt	1994	116	19	47	7
	Kuwait	1985	93	12	7	9
	Maldives	None	1	2	0	0
	Myanmar	2001	11	17	2	0
	Nepal	None	6	4	1	0
	Qatar	1999	68	12	3	9
	Saudi Arabia	1996	26	13	11	6
	Sri Lanka	1986	30	7	5	0
	Turkey	Old: 1990 New: 2015	140	26	18	51
	UAE	1993	116	24	7	12

In the realm of international investment agreements, China stands out with the highest number of BITs, totaling 148, followed by Turkey with 140, Egypt with 116, and UAE with 116. With the exception of Afghanistan, Maldives and Nepal, all SCO countries have entered into BITs with China. Notably, India unilaterally terminated its BIT with China in 2018,[5] deviating from the mainstream trend where the majority of countries automatically

5 According to the Article 16 of the India-China BIT 2006, the Agreement shall continue to be effective for a further period of fifteen years from the date of its termination in respect of investments made or acquired before the date of termination of this Agreement.

extend their BITs with China upon expiration. Russia, Tajikistan, Uzbekistan, and Turkey are among those that have renewed their agreements. Regarding international investment arbitration cases, all SCO countries except Afghanistan and Maldives have been involved as respondent states in investment arbitration. Particularly, member states such as Russia, India, Kazakhstan, and Kyrgyzstan, along with dialogue partners like Egypt and Turkey, have been parties to the most disputes.

B. CHARACTERISTICS OF SCO INVESTMENT DISPUTES AND EMERGING PRACTICAL IMPERATIVES

In investment arbitration cases involving SCO countries, a number of disputes arise between investors of one SCO country and another SCO country. For example, Chinese investors have sought arbitration against Mongolia as evidenced in PCA Case No. 2010-20. Russian investors have initiated arbitration proceedings against Belarus, Kyrgyzstan, India, and Mongolia. Similarly, Turkish investors have experienced disputes with Kazakhstan, Uzbekistan, Pakistan, Azerbaijan, Kyrgyzstan, and Iran. These cases highlight the active involvement of SCO countries in investment arbitration and present several distinct characteristics.

Firstly, the arbitration methods for dispute resolution within the SCO countries are notably diverse. Except for Russia (signed but not in force), India, Tajikistan, Iran, Maldives and Myanmar, the remaining SCO countries have ratified the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the Washington Convention). Therefore, the arbitration methods available for SCO countries include not only institutional arbitration by the International Centre for Settlement of Investment Disputes (ICSID), but also ad hoc arbitration established according to the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL), with the Permanent Court of Arbitration (PCA) usually serving as the administering institution. Additionally, commercial arbitration institutions, such as the Arbitration Institute of the Stockholm Chamber of Commerce (SCC), the International Chamber of Commerce International Court of Arbitration (ICC), and the Moscow Chamber of Commerce and Industry Arbitration Centre (MCCI), are also part of the dispute settlement landscape for SCO countries.

Secondly, the disputes are primarily centered on natural resources and market development issues involving neighboring states or developed countries. For instance, Ukrainian investors had 11 disputes against Russia, and nearly every SCO country has encountered arbitration claims from investors in European developed countries. The sectors in dispute are predominantly oil, gas, mineral exploration, real estate development, manufacturing, and finance, which reflect the regional focus of SCO countries in attracting investments in natural resources and emerging markets.

The core matters at issue often pertain to government taxation, license revocation, and administrative or judicial measures that lead to allegations of direct or indirect expropriation, breaches of fair and equitable treatment, violations of most-favored-nation treatment (MFN), and impediments to capital transfers. The legal frameworks underpinning these disputes are primarily based on BITs, but they also encompass TIPs, such as the Energy Charter Treaty, as exemplified in Nissan v. India (PCA Case No. 2017-37).

Thirdly, an increasing number of disputes have involved substantial compensation claims. In the landmark case of White Industries v. India in 2011, for instance, India was for the first time ordered to pay an investor $4.1 million, marking a pivotal moment in the country's investment treaty history. Subsequently, India faced a series of compensation, culminating in Cairn v. India (PCA Case No. 2016-7), where it was ordered to pay investors over $1.2 billion. The rulings have cast a shadow over India's approach to international investment, prompting its new BIT model to shift towards the Calvo Doctrine which advocates for the right of the host country to control dispute procedures.[6] Russia has also found itself entangled in high-profile cases like Yukos, where it has been ordered to pay investors compensation in tens of billions of dollars. A prominent example is Hulley Enterprises v. Russia (PCA Case No. 2005-03/AA226), where Russia was mandated to pay a staggering $40 billion in damage. More recently, in Oschadbank v. Russia (PCA Case No. 2016-14), Russia was ordered to compensate Ukrainian investors to the tune of $1.1 billion.

Despite the rise in disputes, economic cooperation remains fundamental for establishing a stable regional framework, enhancing the internal cohesion of the SCO, and ensuring sustainable development.[7] Even amidst an increase in arbitration cases, Russia's foreign investment in 2021 still ranked among the top ten globally.[8] Likewise, India's large-scale unilateral termination of BITs and the introduction of a new model to reassert the host state's regulatory rights have not deterred investment flows. In fact, India's foreign direct investment and outward direct investment have consistently ranked among the

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6 For a detailed analysis, *see* Tao Lifeng (陶立峰), *Yindu Touzi Tiaoyue Zhi Touzi Zhe Yu Guojia Zhengduan Jiejue Jizhi De Zuixin Fazhan Yu Zhongguo De Yingdui* (印度投资条约之投资者与国家争端解决机制的最新发展与中国的应对) [*The Latest Development of Investor-State Dispute Settlement in Indian Investment Treaties and China"s Suggested Countermeasures*], 12 SHEHUI KEXUE (社会科学) [JOURNAL OF SOCIAL SCIENCES] 100 (2017).

7 Mo Hongxian (莫洪宪), *Shanghai Hezuo Zuzhi Cunzai De Wenti Ji Woguo De Duice* (上海合作组织存在的问题及我国的对策) [*Shanghai Cooperation Organization: Problems & Chinese Measures*], 6 WUHAN DAXUE XUEBAO (ZHEXUE SHEHUI KEXUE BAN) (武汉大学学报(哲学社会科学版)) [WUHAN UNIVERSITY JOURNAL(PHILOSOPHY & SOCIAL SCIENCE)] 743 (2005).

8 *See* UNCTAD, WORLD INVESTMENT REPORT 2022: INTERNATIONAL TAX REFORMS AND SUSTAINABLE INVESTMENT 9 (2022), https://unctad.org/system/files/official-document/wir2022_en.pdf.

top eight worldwide since 2016.[9] This demonstrates the enduring appeal of SCO countries for economic investment.

However, the persistence of such disputes underscores the urgency of establishing an effective dispute resolution mechanism. Its purpose is not to promote investment directly, but rather to provide a stable and predictable institutional framework for managing and resolving the inevitable frictions in investment relations, thereby safeguarding the sustainability of long-term cooperation. The outbreak of the Russia-Ukraine War has further intensified the need for such institutional development. Extreme measures triggered by the conflict, such as sanctions, asset freezes, and expropriations, have generated novel and complex investment disputes, exposing the limitations of existing mechanisms in addressing geopolitical disruptions and reinforcing the importance of a dedicated SCO approach to dispute resolution.

III. INSTITUTIONAL DESIGN: A DIVERSIFIED MECHANISM FOR SCO INVESTMENT DISPUTE RESOLUTION

To address the practical imperatives of SCO investment disputes, the current ISDS mechanism is found to have certain deficits. A more suitable approach for resolving investment disputes within the SCO framework would be a diversified mechanism incorporating procedures at various levels.

A. INADEQUACIES OF THE CURRENT ARBITRATION-CENTRIC MODEL IN ADDRESSING CHALLENGES

The international investment arbitration system is confronted with a legitimacy crisis due to inherent tension between its autonomous nature and the national character of investment disputes. This crisis is notably reflected in the concern noted by Professor Susan Franck that, the legitimacy of national policy is assessed by arbitrators, which is not inherently justifiable.[10] Rooted in commercial arbitration, the ISDS mechanism is often perceived as favoring investors. Empirical evidence indicates that while investors are more likely to succeed at the jurisdictional stage, the final awards are not unequivocally in their favor.[11]

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9 *See* UNCTAD, WORLD INVESTMENT REPORT 2024: INVESTMENT FACILITATION AN D DIGITAL GOVERNMENT 158 (Annex table 1 (FDI flows, by region and economy, 2 018–2023)) (2024), https://unctad.org/system/files/official-document/wir2024_en.pdf.

10 *See* Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521 (2005). For instance, in Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7 (formerly FTR Holding SA, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay), a tribunal was tasked with evaluating whether Uruguay"s stringent tobacco packaging regulations, enacted to protect public health, constituted an indirect expropriation or a breach of fair and equitable treatment. While the state ultimately prevailed, the very process subjected its core public health policy to external commercial arbitration.

11 *See* Susan D. Franck, *Empirically Evaluating Claims about Investment Treaty*

UNCTAD data reveals that as of July 31, 2024, out of 1014 concluded cases, excluding settlements and terminations, 385 (38%) resulted in rulings for host countries, and 286 (28%) in favor of investors.[12] Nonetheless, it is evident that developing countries face higher claims compared to developed countries, with less advanced host states particularly disadvantaged.[13] Several SCO nations have also encountered substantial compensation awards as indicated above.

Additionally, the arbitration mechanism is fraught with issues such as high costs, protracted processes, arbitrator bias, lack of transparency in proceedings, insufficient award publicity, and inconsistent outcomes, all of which threaten the stability and fairness of the investment legal framework. In response to these systemic weaknesses and a consequent lack of trust in arbitral awards, SCO countries frequently resort to the remedy of subsequent procedures. This practice not only reflects the inadequacies of the current arbitration-centered mechanism but also highlights a particular strategy adopted by respondent states. When arbitration awards are unfavorable to the respondent state,[14] particularly in cases involving substantial compensation, the state often initiates follow-on revocation or domestic judicial review procedures, leading to the revocation of some awards. For instance, in 15 cases where investors won awards against Russia, 12 cases proceeded to further judicial review, among which 5 awards were either partially or fully revoked.[15] Similarly, in response to 8 unfavorable outcomes, Kyrgyzstan initiated 7 domestic judicial review proceedings, resulting in the revocation of 4 arbitration awards.[16] A representative case is Rumeli v. Kazakhstan (ICSID Case No. ARB/05/16), where Turkish investors alleged that the Kazakh government unlawfully

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Arbitration, 86 N. C. L. REV. 1, 48–55 (2007).

12 There were 26 cases decided in favor of neither party (liability found but no damages awarded). *See* UNCTAD, https://investmentpolicy.unctad.org/investment-dispute-settlement (last visited Jun. 20, 2025).

13 Daniel Behn et al., *Poor States or Poor Governance: Explaining Outcomes in Investment Treaty Arbitration*, 38 NW. J. INT"L L. & BUS. 333 (2018).

14 Arbitration awards involving SCO countries do not unequivocally favor one party over the other. For example, in arbitrations where Kazakhstan was the respondent, the outcomes have been evenly split, with seven awards favoring the host state and seven favoring the investor. A number of disputes have been resolved through settlement, as was the nine arbitrations against India that were settled prior to 2010. In some instances, arbitral awards have resulted in a decision that favors neither party, finding liability without awarding damages, as exemplified in the case of Agility for Public Warehousing Company K.S.C. v. Islamic Republic of Pakistan, ICSID Case No. ARB/11/8.

15 *See, e.g.*, Yukos Universal Limited (Isle of Man) v. Russian Federation, UNCITRAL, PCA Case No. 2005-04/AA227; Hulley Enterprises Limited (Cyprus) v. Russian Federation, UNCITRAL, PCA Case No. 2005-03/AA226; Veteran Petroleum Limited (Cyprus) v. Russian Federation, UNCITRAL, PCA Case No. 2005-05/AA228.

16 *See, e.g.*, OKKV (OKKB) and others v. Kyrgyz Republic; Lee John Beck and Central Asian Development Corporation v. Kyrgyz Republic; Stans Energy Corp. and Kutisay Mining LLC v. Kyrgyz Republic (I), MCCI Case No. A-2013/29.

terminated their telecommunication investment contract. The arbitration tribunal found Kazakhstan in breach of the indirect expropriation and fair and equitable treatment under their BIT, resulting in an award of $125 million in compensation to the investors. Kazakhstan attempted to annul the arbitration award through a follow-on proceeding, but the committee finally upheld the original award.

B. KEY FEATURES AND COMPARATIVE ADVANTAGES OF A MULTILAYERED MECHANISM

To promote deeper economic cooperation and minimize dispute resolution costs, it is desirable to methodically develop the investment dispute resolution mechanisms among SCO nations. In the long term, the establishment of an internal dispute resolution center within the SCO, supplemented by mechanisms tailored to the unique demands of SCO countries, would be a strategic step. In the short term, the SCO should apply a multi-level, diversified dispute resolution framework that not only integrates existing mechanisms but also effectively addresses procedural coordination challenges.[17] This approach will offer greater flexibility and better alignment with the current practical imperatives of the states.

A comprehensive and diverse system should encompass approaches across both international and domestic dimensions, including consultative, diplomatic, quasi-judicial, and judicial mechanisms. Such a system possesses several key features and offers comparative advantages over the current arbitration-centered ISDS mechanism.

Firstly, the mechanism incorporates the SCO Charter's emphasis on amicable consultation as a primary dispute resolution method, reflecting the Charter's initiative to prioritize harmonious dialogue in addressing conflicts. Consultation and negotiation between investors and host states, along with mediation and similar procedures, constitute vital alternative dispute resolution (ADR) mechanisms, offering the benefits of flexibility, efficiency, and cost-effectiveness. These methods are led and managed by the disputing parties, embodying a non-confrontational approach that aligns with the ideology of valuing reconciliation and peace, thus

17 The investment dispute resolution system does not preclude the application of alternative mechanisms. Advocates propose a shift from the prevailing power-based cooperation to a rule-based model, with the incorporation of the WTO"s dispute resolution mechanism to address economic and trade disputes within the SCO, *see* Meng Qi (孟琪), *WTO Zhengduan Jiejue Jizhi Zuowei "Shanghai Hezuo Zuzhi" Jingmao Zhengduan Jiejue Jizhi De Kexing Xing Yanjiu* (WTO 争端解决机制作为"上海合作组织"经贸争端解决机制的可行性研究) [*On the Feasibility of Using the WTO Dispute Settlement Mechanism as the Economic and Trade Dispute Settlement Mechanism for the "Shanghai Cooperation Organization"*], 3 SHANGHAI DUIWAI JINGMAO DAXUE XUEBAO (上海对外经贸大学学报) [JOURNAL OF SHANGHAI UNIVERSITY OF INTERNATIONAL BUSINESS AND ECONOMICS] 43 (2019).

fostering the ongoing investment cooperation between investors and host countries.

Secondly, the proposed approach responds to the imperatives of SCO nations as previously discussed. The disputes between investors and states demand a dual-layered framework—both domestic and international—for remedy. Additionally, the disputes are inherently asymmetrical, arising from conflicts between private entities and sovereign states, thereby blending commercial interests with sovereign prerogatives. Accordingly, the resolution mechanism for investment disputes must diversify to effectively tackle these distinctive traits. For one thing, arbitration methods such as those of the ICSID and UNCITRAL should continue to be utilized because the existing investment treaties, which advocate for arbitration, have laid a robust groundwork for developing an intra-organizational mechanism within the SCO. For another, it is essential to place greater emphasis on domestic remedies to address the concerns reflected in the innovative BIT models in several SCO countries,[18] including the resurgence of nationalism and the demand to balance competing interests between investors and host states.

Lastly, the mechanism pays particular attention to the coordination of different procedures. It should address the need of SCO states to extensively utilize the subsequent review procedures after arbitration. The application of follow-on proceedings has become a common strategy for respondent SCO states to seek review of arbitral awards. To ensure a thorough and effective resolution process, the SCO investment dispute resolution mechanism should design specific steps to incorporate post-arbitration procedures. Furthermore, it is necessary to coordinate investor-state dispute settlement with state-state dispute resolution. Although Article 22 of the SCO Charter limits the methods of settling disputes over interpretation or application of the Charter to consultations and negotiations, the SCO shall not preclude the application of arbitration and diplomatic protection over state-state disputes as outlined in investment treaties between SCO countries.[19] Nevertheless, due to the rare practice of inter-state arbitrations, the SCO's investment dispute resolution framework is fundamentally anchored in the investor-state mechanism.

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18 After 2015, SCO countries such as India, Russia, Turkey, and Azerbaijan have advanced new BIT models.

19 Article 14 of the SCO Charter stipulates that the rights and obligations of the member States under other international treaties to which they are parties shall not be affected. An example that coordinates the two procedures is the China-Sri Lanka BIT (1986). Its Article 13(11) mandates that the provisions of the investment disputes shall not prejudice the contracting parties from using the procedures specified in Article 14 (Disputes between the Contracting Parties) where a dispute concerns the interpretation on application of the Agreement.

IV. PROCEDURAL COORDINATION: ENSURING COHERENCE IN THE SCO DIVERSIFIED MECHANISM

The efficacy of the proposed diversified mechanism depends on the establishment of clear, coordinated procedural pathways. These pathways must guide disputing parties—accounting for the dual roles of China and other SCO members as both capital-exporting and capital-importing states—from dispute avoidance to final resolution. To achieve an equilibrium framework that balances the interests of investors and host states, the mechanism must ensure coherence across three critical stages: pre-arbitral procedures, the management of potential parallel proceedings, and post-award procedures. This coordination require attention to two fundamental aspects at each stage: the logical sequence for initiating procedures and the definitive legal effects of procedural choices, thereby preventing fragmentation and ensuring predictability throughout the dispute resolution process.

A. PRE-ARBITRAL PHASE: EMPHASIZING DISPUTE AVOIDANCE AND AMICABLE SETTLEMENT

The SCO Charter, read in conjunction with multilateral and bilateral agreements, has established a consensus among its member states on prioritizing amicable consultations. [20] It is noteworthy that China, along with other SCO countries, has predominantly incorporated consultation clauses into their BITs. In line with this inclination towards consultation and the organization's ongoing pursuit of regional security and economic collaboration, it is essential to institute amicable consultation as a mandatory initial step in SCO investment dispute resolution.

Firstly, the mechanics of consultation should be thoroughly designed. Investors should initiate the process by providing a written notice, with the consultation location defaulting to the host state's capital.[21] The form of consultations should accommodate investors' participation, including the possibility of video conferences.[22] To facilitate the consultations, contracting parties must establish an information exchange mechanism in advance, detailing the names and contact addresses of government agencies in charge of liaison, thereby enabling investors to effectively issue notifications. Investors should list the facts and legal grounds of the dispute in their notice.[23] If the investor's

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20 In addition to Article 22, Article 2 of SCO Charter also sets the peaceful settlement of disputes between member states as a core principle.

21 This provision is drawn from the 2015 Indian Model BIT and the 2016 Azerbaijani Model BIT.

22 The 2016 Comprehensive Economic and Trade Agreement between the EU and Canada (CETA) includes detailed consultation provisions in Article 8.19.3 of its investment chapter, which can serve as a reference.

23 The consultation request should specifically include the investor"s name and address, the representative"s name, address, and authorization credentials, the subject matter of the

notice lacks the above information or is not directed to the designated government agency of the host country, it shall be deemed not to have been timely submitted.

Secondly, consultation should be consensual. Once the disputing parties agree, the consultation process can commence at any time, suspending other procedures. Considering that the BITs between SCO nations generally set a six-month consultation period, this waiting period can be retained. To balance the need for structured dialogue with the protection of access to justice, consultation should be a mandatory procedural step rather than a jurisdictional hurdle. This means parties are obligated to engage in good-faith consultations before resorting to arbitration. However, a party's unjustified refusal to consult, or the mere failure of consultations to resolve the dispute, does not extinguish the right to proceed to arbitration. This design ensures that the power imbalance between investors and host states is not exploited to block access to final dispute resolution, while still prioritizing amicable settlement where possible. [24] To encourage the prompt exercise of rights, the consultation requirement should be time-bound, such as within two years from the date when the investor becomes, or should have become, aware of the dispute.[25] Given that consultation requires sincere communication and confidentiality of each party, statements made during the consultation should not be used as evidence in subsequent procedures.

Thirdly, consultation should encompass mediation procedures, which involve a neutral third-party mediator to facilitate negotiations.[26] To uphold the autonomy of the parties, mediation should begin with mutual consent and can be initiated at any dispute stage. However, if a party withdraws, the process should promptly transition to, or resume, other applicable procedures. Mediation confidentiality must also be maintained, and parties' rights to seek other remedies should not be compromised. To enhance efficiency, the disputing parties should strive to reach a mediation agreement within a specified timeframe, such as six

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dispute, the disputed measures by the host country, the relevant clauses of the investment agreement, an estimate of damages, and the desired remedy or resolution. This provision is drawn from the fifth chapter of the 2016 Russia Model BIT.

24 There is debate over whether the waiting period pertains to admissibility or jurisdiction in investment arbitration, *see Jurisdiction and Admissibility in Investment Arbitration*, *in* THE LAW AND PRACTICE OF INTERNATIONAL COURTS AND TRIBUNALS 43 (2017). Some awards hold that a good faith effort by disputing parties to reach a settlement satisfies consultation requirements, *see, e.g.*, Tradex Hellas S.A. v. Republic of Albania, ICSID Case No. ARB/94/2; Consortium RFCC v. Royaume du Maroc, ICSID Case No. ARB/00/6. Conversely, other cases rule that failure to fulfill a pre-set waiting period for consultation deprives the tribunal of jurisdiction, *see, e.g.*, Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. ARB/01/3.

25 For reference, *see* Article 51 of the 2016 Russia Model BIT.

26 In the 2011 New China-Uzbekistan BIT, the consultation process includes the application of mediation procedures. For academic discussion on mediation, *see* Nancy Welsh, *Mediation of Investor-State Conflicts*, 127 HARV. L. REV. 2543 (2014).

months from the commencement of mediation.[27] To recognize the effect and enforceability of mediation agreements within the SCO,[28] two approaches can be considered. The first is to incorporate provisions in separate agreements mandating formal certification procedures, such as notarization by an independent SCO-authorized body, to confer binding force upon the disputing parties. The second is to transform the agreements into arbitration awards for recognition aligned with the ICSID and UNCITRAL rules.

B. ARBITRATION PHASE: HANDLING PARALLEL PROCEEDINGS WITH THE FORK-IN-THE-ROAD CLAUSE

Ensuring the autonomy of investors to invoke international arbitration is a crucial element of the ISDS framework. However, states retain the prerogative to determine the conditions under which local remedies must be exhausted prior to arbitration. The provision allowing parties to opt for either international arbitration or local remedies, with their choice being definitive, is characteristic of a fork-in-the-road clause. The judicious integration of the principle of local remedies exhaustion with the fork-in-the-road clause facilitates a smooth transition between domestic and international remedies.

a. Local Remedies as the Initial Frontier

The principle of "exhaustion of local remedies" is a cornerstone in customary international law, embodying deference to the territorial jurisdiction of the host state. [29] This principle can be articulated in investment treaties, thereby establishing a precondition for investors to pursue international remedies. It requires investors to seek relief before competent authorities according to the local laws of the host state, and only upon exhaustion of such remedies can international arbitration be invoked. Meanwhile, customary international law sets exceptions to the exhaustion of local remedies, which are crucial for the

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27 Considering that BITs among SCO countries typically provide six months for consultations, adopting a comparable timeframe for mediation is appropriate.

28 The United Nations Convention on International Settlement Agreements Resulting from Mediation (Singapore Mediation Convention), formally came into effect on September 12, 2020. This convention, for the first time at the level of international law, endowed commercial mediation agreements with enforceability. However, there is uncertainty regarding the applicability of this convention to investment mediation.

29 The concept of "exhaustion of local remedies" or "priority of local remedies" is recognized as one of the safety valves in BITs, *see* Chen An (陈安), *Zhongwai Shuangbian Touzi Xieding Zhong De Si Da "Anquan Fa" Buyi Maoran Chaichu–Mei, Jia Xing BITs Tanpan Fanben Guanjian Xing "Zhengduan Jiejue" Tiaokuan Pouxi* (中外双边投资协定中的四大"安全阀"不宜贸然拆除——美、加型 BITs 谈判范本关键性"争端解决"条款剖析) [*Four Great Safeguards in Bilateral Investment Agreements Shouldn"t be Rashly Dismantled during Sino-foreign Negotiation – Comments on of Critical Provisions concerning Dispute Settlement in the U.S. and Canada"s Model BITs text*], 1 GUOJI JINGJI FA XUEKAN (国际经济法学刊) [JOURNAL OF INTERNATIONAL ECONOMIC LAW] 3 (2006).

balanced operation of ISDS.[30] In practice, private investors may perceive unfavorable rulings from the host's local courts as "unfair treatment", prompting them to seek international arbitration.[31] Therefore, the design of the ISDS within the SCO regarding the exhaustion of local remedies should take into account these nuances to ensure a fair and efficient process.

Firstly, requiring investors to first exhaust local remedies is a principle that aligns with the provisions of recent BITs between China and other SCO countries, as well as in various updated BIT models. For instance, Azerbaijan's 2016 Model BIT, under Article 12, precludes investors from submitting disputes to international arbitration without first pursuing administrative or judicial avenues in the host state.[32] The ISDS mechanism within the SCO should integrate a standardized and symmetric approach to the exhaustion of local remedies. A few BITs have implemented a tailored model, permitting one party to unilaterally require investors to exhaust local remedies when it serves as the host state, while the other party lacks such a requirement.[33] Considering its asymmetric nature, this model should not be adopted within the unified framework of the SCO, unless specific countries provide explicit declarations.[34]

Secondly, to effectively manage the sequence between local remedies and international arbitration, the mechanism must define the scope of local remedies, usually including administrative and judicial options. SCO BITs address the "exhaustion" requirement in two main approaches. The first entitles investors to opt for either administrative or judicial remedies, as indicated in India's 2015 Model BIT (Article 15) and Azerbaijan's 2016 Model BIT (Article 12(3)), highlighting the alternative nature of these two methods. The second approach refers exclusively to administrative remedies if the host state specifies such a requirement, as in the 2011 China-Uzbekistan BIT

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30 These exceptions include the respondent state"s waiver of such requirements, unreasonable delay in providing local remedies by the respondent state, the absence of a connection between the investor and the respondent state, the ineffectiveness of local remedies in the respondent state, and the respondent state"s denial of access to local remedies, etc. *See* United Nations International Law Commission, Draft Articles on Diplomatic Protection, art. 15 (2006).

31 *See, e.g.*, Loewen Group, Inc. and Raymond L. Loewen v. United States of America, ICSID Case No. ARB(AF)/98/3. The arbitral tribunal deemed that the judgment of the U.S. local court violated the principle of due process. Scholars criticized the dispute resolution arrangements within NAFTA, arguing that subjecting U.S. domestic judiciary to the re-examination of international arbitration bodies represents a sacrifice of U.S. sovereignty. *See* William S. Dodge, *Loewen v. United States: Trials and Errors under NAFTA Chapter Eleven*, 52 DEPAUL L. REV. 563 (2002).

32 Similarly, India"s 2015 Model BIT mandates the exhaustion of local remedies under Article 15 as a precondition for investors to initiate international arbitration proceedings.

33 *See, e.g.*, China-Germany BIT, China-Germany, art. VI, Dec. 1, 2003.

34 To persuade states that currently benefit from such clauses, the SCO framework would offer a superior form of protection: a standardized, transparent rule that safeguards all parties" regulatory space equally, enhances systemic predictability, and prevents a destabilizing "race to the bottom" in future bilateral negotiations.

(Article 12(2)). The latter approach is preferable in the SCO to balance host state and investor interests by treating the exhaustion of domestic remedies as an option rather than a mandatory prerequisite for international arbitration, depending on discretion of the host state. Moreover, administrative procedures are generally more efficient than judicial ones,[35] thus minimizing the time costs before resorting to international arbitration.

Lastly, the time frame for local remedies should consider its interface with subsequent procedures because it can significantly impact the arbitration tribunal's jurisdiction.[36] Within the SCO, the timeframe for local remedies should be reasonably designed to allow investors to enter into consultation procedures within six months from the date they become aware of the dispute. Should the consultation not yield a resolution, investors would then proceed to domestic administrative review procedure, which should be completed within a maximum of six months from the submission of the re-examination application. Failure to complete the administrative review within this timeframe would activate the fork-in-the-road clause, affording investors the option to pursue either domestic litigation or international arbitration.

b. Design of the Fork-in-the-Road Clause

The fork-in-the-road clause reflects a compromise between the host state's exercise of territorial jurisdiction and the investor's quest for international remedies. It accords investors the right to select between domestic judicial remedies and international arbitration, with the provision that their selection is definitive. If the definitive nature of the investor's selection is not explicitly articulated, there persists a risk of parallel proceedings, which could undermine the efficacy of the chosen resolution mechanism.

The SCO fork-in-the-road clause can be designed to afford disputing parties the option to select from three avenues—domestic litigation, ICSID arbitration, or ad hoc arbitration—with the selection precluding recourse to alternative procedures.[37] Given the similarity in duration and procedure between domestic judicial remedies and international arbitration, it is appropriate to present these as parallel options.[38] Allowing international arbitration post-domestic judgment would undermine the host country's judicial sovereignty and contravene

35 For instance, decisions by regulatory bodies on permits, licenses, or tax assessments can often be appealed to a higher administrative tribunal or a specialized commission within a matter of months, whereas navigating a court system to a final, appealable judgment can take years.

36 *See, e.g.*, Ansung Housing Co., Ltd. v. People"s Republic of China, ICSID Case No. ARB/14/25.

37 This provision is drawn from the third-generation BITs between China and other SCO states such as the 2006 China-Russia BIT and the 2011 China-Uzbekistan BIT.

38 *See, e.g.*, Hela Schwarz GmbH v. People"s Republic of China, ICSID Case No. ARB/17/19.

the principle of res judicata in international law.[39] Delaying international arbitration until domestic judicial processes conclude would also prolong dispute resolution, averaging around 3 years for ICSID arbitration,[40] thus jeopardizing investor rights. However, prior to arbitration, the host country may demand that investors exhaust domestic administrative review procedures.

The fork-in-the-road clause, embodying the "no double jeopardy" principle, necessitates an irrevocable choice from investors, highlighting the importance of determining whether disputes constitute "the same dispute" to ensure the exclusive application of dispute resolution procedures. ICSID arbitration has thus established the "triple identity test", which activates the fork-in-the-road clause when the subjects (parties), objects (disputes), and causes of action (legal bases) are identical, precluding alternative procedures. Otherwise, investors retain the option to pursue local remedies and international arbitration sequentially or concurrently. The application of this standard has evolved from a formalistic to a substantive approach.[41] The SCO's dispute settlement mechanism should specify that disputes stemming from the same measure, with substantially identical facts, trigger the clause. Such design prevents the unwarranted expansion of arbitral jurisdiction and mitigates the risk of parallel proceedings.

Regarding the specific provisions of the SCO mechanism, it should clearly define the time limit for dispute submission, such as within three years from the investor's awareness of the dispute. Arbitrable matters are legal disputes directly arising from the investment.[42] Arbitration should be limited to treaty breaches, excluding non-breaches, i.e., disputes not caused by violations of investment agreements are not arbitrable.[43] Countries with specific concerns over environmental and labor protection, public health, or financial security may issue declarations. Acceptable arbitration rules include the Washington Convention, ICSID

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39 RICHARD HAPP & NOAH RUBINS, DIGEST OF ICSID AWARDS AND DECISIONS: 1974-2002, 329–330 (Oxford University Press 2013).

40 David Gaukrodger & Kathryn Gordon, *Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community* (OECD Working Papers on International investment 2012/3),https://www.oecd.org/en/publications/investor-state-dispute-settlement_5k46b1r85j6f-en.html.

41 *See, e.g.*, CMS Gas Transmission Company v. The Republic of Argentina, ICSID Case No. ARB/01/8; Toto Costruzioni Generali S.p.A. v. The Republic of Lebanon, ICSID Case No. ARB/07/12.

42 Previously, China"s BITs with other SCO states often stipulate that disputes over quantitative issues, such as the amount of compensation for expropriation, are eligible for international arbitration, whereas qualitative disputes are reserved for domestic resolution mechanisms. The new BITs expand the arbitration scope to any legal dispute related to the investment. However, disputes arising from fraudulent means or illegal activities such as false statements, concealment, corruption and money laundering are non-arbitrable.

43 In cases where one or both parties to a dispute have not entered into an investment agreement, the dispute may be submitted to arbitration pursuant to a separate agreement to that effect.

Additional Facility Rules, UNCITRAL Arbitration Rules, and others. In addition, the arbitration process should detail the appointment of arbitrators, procedures, burden of proof, applicable law, costs, and the award's finality, limiting awards to monetary compensation or restoration, excluding punitive or moral damages, injunctions, etc. Finally, to prevent investors circumventing the SCO's provisions on exhausting local remedies, it is necessary to clarify that the MFN clause does not extend to dispute resolution and procedural matters, unless expressly agreed by the parties in writing.[44]

In summary, the joint application of the exhaustion of local remedies principle and the fork-in-the-road clause transforms parallel procedures into a cohesive process. This integration avoids procedural conflicts and double compensation, merging domestic remedies with international arbitration into a unified dispute resolution mechanism.

C. POST-ARBITRAL PHASE: FACILITATING REVIEW AND ENFORCEMENT

The linkage of dispute resolution mechanisms is as much a legal technicality as it is a critical component of institutional design for balancing interests. The increasing trend of nations seeking post-arbitration oversight and rectification of awards underscores an extensive demand for subsequent remedies. Therefore, the SCO's investment dispute settlement framework should aim not only to enhance the clarity of its rules and facilitate the initiation of subsequent procedures but also to actively institutionalize support for the recognition and enforcement process itself.

Regarding the legal basis for the enforcement of arbitration awards, most investment agreements typically mandate that the contracting parties enforce awards rendered by arbitration tribunals in accordance with their domestic laws. If the contracting parties are parties to specific international conventions, then those conventions bind them as well. Awards made by ICSID arbitration tribunals are subject to enforcement under the Washington Convention, and domestic judicial review procedures

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44 The applicability of MFN clause from substantive rights to procedural rights is a matter of debate in both theory and practice. Arbitral tribunals that support the expansion of MFN to procedural matters include the case of Emilio Agustín Maffezini v. The Kingdom of Spain, ICSID Case No. ARB/97/7; and RosInvestCo UK Ltd. v. The Russian Federation, SCC Case No. V079/2005. The primary rationale is that procedural issues are equally deserving of protection as substantive matters, and applying the MFN clause can broaden the protection of investors, aligning with the purpose of the MFN clause. In contrast, tribunals that oppose this expansion, such as Plama Consortium Limited v. Republic of Bulgaria, ICSID Case No. ARB/03/24; and Sanum Investments Limited v. Lao People"s Democratic Republic, UNCITRAL, PCA Case No. 2013-13, argue that determining which treatment is more favorable presents a challenge. The selective incorporation of clauses can lead to confusion in treaty application, and it exceeds the original intent of the host state"s consent to submit to investment arbitration.

should not be applied. Only Article 55 of the Washington Convention, which establishes sovereign immunity, can serve as an exception to the enforcement of arbitral awards. However, given the sensitivity of this issue, the implementation should take into account whether the property subject to enforcement is state-owned and how to handle diplomatic affairs.[45]

For arbitration awards rendered by other institutions, the initial consideration is the applicability of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention). If the states have ratified the New York Convention without a commercial reservation, the Convention takes direct effect. However, if a commercial reservation is in place, excluding its application to investor-state disputes, the situation becomes complex.[46] In China, scholars have proposed either withdrawing the reservation or interpreting investment arbitration as a "commercial relationship" to invoke the New York Convention. [47] Given that many countries, including the US, Canada (except Quebec), and South Korea, have made such reservations, maintaining them better safeguards against the erosion of the international investment legal system by unilateralism and protectionism.[48] A pragmatic approach within the SCO could be to adopt a harmonized interpretative statement confirming that awards under the SCO framework are deemed to arise from a "commercial legal relationship" for enforcement purposes, thereby providing clarity and predictability across member states.

In terms of ad hoc arbitration awards, their international validity and enforceability must be upheld in deference to the investment agreements concluded between states, regardless of whether domestic laws recognize ad hoc arbitration. The first-generation Sino-foreign BITs mandate the establishment of

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45 *See* Zhang Liang (张亮) & Ning Kunhua (宁昆桦), *Guojia Huomian Dui Guoji Touzi Zhongcai Caijue Youxiao Zhixing De Yingxiang Ji Qi Kefu* (国家豁免对国际投资仲裁裁决有效执行的影响及其克服) [*The Influences of State Immunity on the Effective Execution of International Investment Arbitration Award and the Countermeasures*], 1 ZHENGZHI YU FALÜ (政治与法律) [POLITICAL SCIENCE AND LAW] 96 (2021).

46 The SCO countries that have made commercial reservations under the New York Convention include China, India, Afghanistan, Iran, Mongolia, Armenia, Nepal, Turkey, and Bahrain, *see Status: Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the "New York Convention"),* UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2 (last visited Jun. 20, 2025).

47 *See* Xiao Fang (肖芳), *Guoji Touzi Zhongcai Caijue Zai Zhongguo De Chengren Yu Zhixing* (国际投资仲裁裁决在中国的承认与执行) [*Recognition and Enforcement of International Investment Arbitration Award in China*], 6 FAXUE JIA (法学家) [THE JURIST] 94 (2011).

48 *See* Wang Bei (汪蓓), *Lun Chengren Yu Zhixing Guoji Touzi Zhongcai Caijue Mianlin De Tiaozhan Yu Chulu–Jiyu Shangsu Jizhi Gaige De Fenxi* (论承认与执行国际投资仲裁裁决面临的挑战与出路——基于上诉机制改革的分析) [*Challenges and Countermeasures of the Recognition and Enforcement of Investment Arbitration Awards: An Analysis Based on Appellate Mechanism Reform*], 5 ZHENGFA LUN CONG (政法论丛) [JOURNAL OF POLITICAL SCIENCE AND LAW] 151 (2021).

ad hoc tribunals for individual cases and declare their awards to be final and binding. For example, China and other SCO nations had a series of ad hoc arbitration cases under the UNCITRAL rules. The enforcement of these awards can be grounded in the law of the award's seat,[49] aligning with the prevailing practice in post-arbitration processes.

Beyond clarifying these legal pathways and timelines, the SCO can play a vital facilitative role. Specifically, it could establish a designated contact point or committee within the Secretariat to serve as a neutral forum for consultation if enforcement delays occur, offering procedural guidance without adjudicating the merits. Further, the SCO could develop non-binding model procedural guidelines for domestic courts in member states to streamline the documentation and ex parte recognition process for SCO-covered awards, reducing inconsistent national practices.

In formulating the conditions under which disputing parties may seek enforcement of arbitration awards, the SCO mechanism should integrate elements from BITs among SCO nations,[50] with the following specific provisions. (1) For awards rendered under the Washington Convention, enforcement may be sought if more than 120 days have elapsed since the award was issued and no party has requested revocation, or if such procedures have been completed. (2) For awards rendered under the ICSID Additional Facility Rules, UNCITRAL Arbitration Rules, or other similar rules, enforcement may be sought if more than 90 days have passed since the award was issued and no party has initiated procedures to revoke the award, or if a court has rejected the revocation without further appeal by the disputing party.

V. CHINA'S ROLE IN ENHANCING SCO INVESTMENT DISPUTE RESOLUTION FRAMEWORK

The international investment rule system is in flux. States are bolstering their treaty oversight mechanisms to mitigate the encroachment on national sovereignty by international investment arbitration and to decrease their entanglement in disputes.[51] In this context, China should vigilantly monitor the evolution of global investment practices and actively engage in enhancing the ISDS mechanism within the SCO framework. Concurrently,

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49 In current practice, China distinguishes the enforcement of commercial arbitration based on the standards of arbitration management institutions. If the foreign-related arbitration award is made by a Chinese arbitration institution, it is reviewed for enforcement in accordance with domestic laws (Civil Procedure Law, Arbitration Law, etc.); if the award is made by a foreign arbitration institution, it is reviewed based on international treaties and the principle of reciprocity.

50 The 2015 Indian Model BIT and the 2011 China-Uzbekistan BIT both stipulate specific conditions under which disputing parties may seek enforcement of arbitration awards.

51 *See* RODRIGO POLANCO, THE RETURN OF THE HOME STATE TO INVESTOR-STATE DISPUTES: BRINGING BACK DIPLOMATIC PROTECTION? (Cambridge University Press 2019).

China should focus on strengthening its own institutional and capacity-building efforts at both the domestic and international levels. This dual-track approach will ensure that China remains at the forefront of shaping the international investment landscape, while also fortifying its domestic legal and regulatory frameworks to better navigate the complexities of global investment disputes.

A. TRACKING THE EVOLUTION OF INTERNATIONAL INVESTMENT ARBITRATION RULES

The evolution of international investment rules is trending towards diversification, yet the overarching movement is a recalibration of liberal policies. China should vigilantly monitor the evolving landscape and assess the implications and potential impacts of the reforms.

A notable player in the international investment rule system is Latin America. As the cradle of Calvoism, it has witnessed a revival of this doctrine amidst economic crises that challenge neoliberalism and prompt a reassertion of national regulatory rights.[52] Beyond the traditional North-South split, however, it is crucial to consider the positional disputes indicated by capital flows, especially the shifts in the roles of capital-importing and capital-exporting countries and the practical interests that emerge from these changes. The direction of capital flow is a dominant factor in the transformation of some developed countries" approaches to the ISDS mechanism, moving from an "offensive" to a "defensive" stance.[53] For example, Australia, with its stance on investment rule reform closely tied to its capital flows and arbitration cases, has become more cautious after Philip Morris Asia Limited v. Australia (PCA Case No. 2012-12). It has taken a tailored approach to exclude investment arbitration in agreements with New Zealand and Malaysia, yet retains such provisions in its FTA with China and the CPTPP.[54]

Against this backdrop, China should maintain a pragmatic approach to advocate for refining the existing investment arbitration system. It should propose suggestions aimed at preventing investor abuse of litigation, curbing the expansion of arbitration tribunal jurisdiction, enhancing the consistency of

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52 *See* Han Xiuli (韩秀丽), *Zailun Ka Er Wo Zhuyi De Fuhuo–Touzizhe-Guojia Zhengduan Jiejue Shijiao* (再论卡尔沃主义的复活——投资者—国家争端解决视角) [*Revisiting the Revival of Calvo Doctrine: From the Perspective of Dispute Settlement between Investor and State*], 1 XIANDAI FAXUE (现代法学) [MODERN LAW SCIENCE] 121 (2014).

53 *See* Wang Yan (王燕), *Quyu Jingmao Fazhi De "Guize Zhili" Yu "Zhengce Zhili" Moshi Tanxi* (区域经贸法治的"规则治理"与"政策治理"模式探析) [*Exploring the "Rule Governance" and "Policy Governance" Models in Regional Economic and Trade Rule of Law*], 2 FA SHANG YANJIU (法商研究) [STUDIES IN LAW AND BUSINESS] 161 (2016).

54 Protocol to the Australia-New Zealand Closer Economic Relations Trade Agreement, Aust.-N.Z., Feb. 17, 2011; Malaysia-Australia Free Trade Agreement, Mal.-Aust., May 22, 2012; China-Australia Free Trade Agreement, China-Aust., June 17, 2015; Comprehensive and Progressive Agreement for Trans-Pacific Partnership, Mar. 8, 2018.

award outcomes, capping excessive compensation for investors, and improving arbitration transparency.[55] These efforts are designed to bolster the legitimacy of the arbitration mechanism and refine existing investment dispute settlement rules.

Particularly, China should prudently approach the emergence of investment courts and appellate mechanism. This EU-led mechanism has been implemented in trade and investment agreements with Canada, Vietnam, and Singapore, etc.,[56] but its practical application remains to be observed.[57] The EU"s advocacy for establishing a judicialized investment court and appeal system reflects its discontent with the current arbitration framework. SCO countries have not yet engaged in the establishment of such mechanisms, with the exception of India"s 2015 Model BIT, which outlines an arbitration award appeal system.[58] Given the uncertainties surrounding the arbitration appeal system, the investment dispute settlement mechanism within the SCO should not immediately incorporate a multilateral arbitration appeal mechanism. Moreover, arbitration practices involving SCO countries suggest that the current emphasis should be on improving the existing award revocation and domestic review mechanisms, and promoting procedural convenience and transparency.

B. PROMOTING SYNERGISTIC INTERACTION AND COLLABORATIVE GOVERNANCE BETWEEN DOMESTIC AND INTERNATIONAL RULE OF LAW

In the dynamic and competitive realm of international investment rule-setting, it is essential for China to cultivate the synergistic interaction and co-governance between domestic and international rule of law.

Firstly, China should actively promote consensus within the SCO to institutionalize dispute prevention mechanisms. This approach emphasizes the prevention and resolution of disputes through communication and dialogue rather than confrontation, aiming at identifying and resolving grievances before they escalate

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55 In October 2019, China submitted to the UNCITRAL Working Group III its "Su ggestions on the Reform of Investor-State Dispute Settlement Mechanisms", https://un citral.un.org/sites/uncitral.un.org/files/wp177c.pdf (last visited Dec. 8, 2025). However, t he content is relatively simplistic, and China should further engage deeply in the ref orm of international investment rules.

56 EU-Canada Comprehensive Economic and Trade Agreement, Can.-EU, October 30, 2016; EU-Singapore Investment Protection Agreement, EU-Sing., October 15, 2018; EU-Vietnam Investment Protection Agreement, EU-Viet., June 30, 2019.

57 Although the establishment of a permanent investment court and an appellate mechanism could help address the challenges of inconsistent arbitral awards, lack of remedies, and weak enforceability, there are also arguments that such judicialization efforts are unnecessary or unfeasible. *See* Barry Appleton, *The Song Is Over: Why It's Time to Stop Talking about an International Investment Arbitration Appellate Body*, 107 AM. SOC'Y INT'L L. PROC. 23 (2013).

58 India's provision aims to foster consistency and coordinated development in treaty interpretation, but it offers only broad guidance without establishing a specific system.

into formal legal disputes. It encompasses a range of proactive, state-led diplomatic and administrative tools, such as inter-governmental policy dialogue, early-warning systems, and facilitated communication. A joint committee composed of representatives from the host state and the investor's home government can be established to oversee treaty implementation and facilitate the amicable resolution of investment disputes.[59] In a particular case, a foreign investor attempted to initiate ICSID arbitration against the Chinese government due to issues with approval procedures in a business reorganization. The Ministry of Commerce of China convened a special hearing and granted exceptional approval, allowing the foreign investor to proceed with the reorganization without official seals or licenses.[60] This case exemplifies the broader practice of dispute prevention, where the Chinese government adeptly manages demands of the foreign investor without violating legal principles, effectively averting potential disputes. China should promote the integration of investment dispute prevention mechanisms, which could include involving the investor's home state in communication. This would help reinforce the central role of states in treaty interpretation and management of foreign investment.

Secondly, it is necessary for China to review and update its BITs with other SCO countries based on the need for flexibility and modernization in investment agreements. This process includes joint interpretations to clarify treaty provisions, revising specific clauses through annotations or protocols, and signing new investment agreements for comprehensive amendments, etc. By renewing BITs, China can help promote a cohesive mechanism for investment disputes settlement within the SCO. Additionally, China's accession to the Regional Comprehensive Economic Partnership (RCEP) provides valuable insights. Although the RCEP investment chapter does not specify a dispute settlement mechanism, it agrees to hold special discussions within two years of the agreement's entry into force. This approach will serve as a significant reference for the future establishment of a unified investment dispute settlement mechanism within the SCO. Such a mechanism could be created through separate treaties or annexes, drawing on the experiences and approaches of agreements like the RCEP.

Lastly, China should further optimize its investment environment. This includes enhancing investment facilitation

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59 Brazil has been at the forefront of designing dispute prevention mechanisms, as exemplified in its Model Cooperation and Facilitation Investment Agreement (2015). The SCO could draw lessons from relevant experience in this regard.

60 *See* Ke Lang Man Huagong (Wu Han) Youxian Gongsi Su Yun Nan Cheng Jiang Tian Chen Linfei Youxian Gongsi Jianshe Gongcheng Shigong Hetong Jiufen An (科朗曼化工（武汉）有限公司诉云南澄江天辰磷肥有限公司建设工程施工合同纠纷案) [Kelangman Chemical (Wuhan) Co., Ltd. v. Yunnan Chengjiang Tianchen Phosphate Fertilizer Co., Ltd, A Dispute over Construction Project Contract] (Sup. People's Ct. July 13, 2015).

measures, improving administrative and judicial governance, and strengthening the ability to resolve foreign-related investment disputes, etc. In particular, China should encourage its domestic arbitration institutions to actively participate in international investment arbitration. While several Chinese commercial arbitration institutions have revised their rules to accept international investment cases,[61] practical implementation has yet to be fully observed. It is crucial to promote legislative recognition of investment arbitration conducted by Chinese commercial arbitration institutions and ad hoc arbitration tribunals. The Supreme People's Court should be designated as the final reviewing agency for investment arbitration awards. This would enhance China's autonomy and discourse power in the field of investment arbitration, ensuring that its domestic legal framework and institutions play a more central role in resolving international investment disputes involving Chinese entities.

VI. CONCLUSION

The establishment of the SCO represents a significant political and legal decision by China in response to the evolving landscape of international relations and the pressing need for global governance reform. This initiative marks a strategic departure from China's previous practice of "socialization" in international organizational law, indicating a more proactive role in shaping the international order.[62] Strengthening cooperation and exchange will remain a critical ongoing agenda for the SCO.

This study contends that the SCO needs a multi-tiered dispute resolution mechanism designed to reflect the shared legal heritage and economic priorities of its member states. First, the system should emphasize consultation and mediation, in keeping with the SCO's commitment to consensus-based decision-making. Second, it should integrate quasi-judicial procedures to handle high-stakes disputes while circumventing the politicization often associated with traditional investor-state arbitration. A critical objective is to harmonize domestic judicial remedies with international procedural standards, ensuring enforceability without infringing on state sovereignty. To ensure coherence and balance between

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61 *See, e.g.*, Zhongguo Guoji Jingji Maoyi Zhongcai Weiyuan Hui Guoji Touzi Zhengduan Zhongcai Guize (Shixing) (中国国际经济贸易仲裁委员会国际投资争端仲裁规则(试行)) [China International Economic and Trade Arbitration Commission International Investment Arbitration Rules (For Trial Implementation)] (promulgated by the China International Economic & Trade Arbitration Commission, Sep. 12, 2017, effective Oct. 1, 2017), CLI.6.302452(EN) (Lawinfochina).

62 *See* Cai Congyan (蔡从燕), *Guoji Guanxi Geju Bianqian Yu Zhongguo Guoji Zuzhi Fa De Xin Shijian–Shanghai Hezuo Zuzhi He Yazhou Jichu Sheshi Touzi Yinhang De "Diyuan Falü" Fexi* (国际关系格局变迁与中国国际组织法的新实践——上海合作组织和亚洲基础设施投资银行的"地缘法律"分析) [*The Evolution of International Relations and New Practices in China's International Organization Law: A Geopolitical Legal Analysis of the Shanghai Cooperation Organization and the Asian Infrastructure Investment Bank*], 3 ZHONGGUO FALÜ PINGLUN (中国法律评论) [CHINA LAW REVIEW] 150 (2021).

investor and state interests, the mechanism must establish clear procedural sequencing and definitive legal effects at each stage: pre-arbitration, management of parallel proceedings, and post-award enforcement. This structured coordination prevents fragmentation and enhances predictability across the entire dispute resolution process.

China must actively cultivate a multi-tiered and coordinated investment dispute settlement framework within the SCO, ensuring a delicate balance between investment liberalism and the regulatory prerogatives of host states. Building on this foundation, it is crucial to consider integrating the SCO's investment dispute resolution mechanism with that of the Belt and Road Initiative (BRI), leveraging the China-SCO Local Economic and Trade Demonstration Zone as a new platform for international cooperation under the BRI. This integration will facilitate the development of the New Eurasian Land-Sea Economic Corridor within the BRI framework. A unified regional investment dispute resolution mechanism is anticipated to provide robust institutional support for advancing SCO economic and trade cooperation, as well as for facilitating broader implementation of the BRI.[63] This strategic approach will not only bolster regional economic integration but also contribute to the global governance structure, reflecting China's commitment to a more equitable and inclusive international order.

63 *See* Shi Jingxia (石静霞) & Dong Nuan (董暖), *"Yi Dai Yi Lu" Changyi Xia Touzi Zhengduan Jiejue Jizhi De Goujian* ("一带一路"倡议下投资争端解决机制的构建) [*The Construction of Investor-State Dispute Settlement Mechanism under ""The Belt and Road"" Initiative*], 2 WU DA GUOJI FA PINGLUN (武大国际法评论) [WUHAN UNIVERSITY INTERNATIONAL LAW REVIEW] 1 (2018).