

Analysis of the Construction of Investor-state Investment Dispute Settlement under RCEP

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Abstract

On January 1, 2022, the Regional Comprehensive Economic Partnership Agreement (RCEP) officially entered into force, marking the official landing of the world's most populous, largest economic and trade scale and most promising free trade area, which fully reflects the confidence and determination of all parties to jointly uphold multilateralism and free trade and promote regional economic integration, which will contribute to regional and global trade and investment growth, economic recovery and prosperity. It will make an essential contribution to regional and international trade and investment growth, economic recovery and prosperity. Under RCEP, investment activities between China and ASEAN (Association of Southeast Asian Nations) countries will be further opened up and developed more deeply, which will inevitably lead to some disputes between investors and host countries will inevitably arise. However, RCEP puts aside the discussion on the investment dispute settlement mechanism between investors and governments. Although the RCEP currently proposes an alternative way for investors to seek redress in the dispute settlement chapter of Chapter 19, its implementation still needs to be improved in terms of protection. The existing dispute settlement mechanism still needs to efficiently and comprehensively protect and balance the reasonable rights and interests of investors and host countries. The RCEP parties shall jointly explore the construction of dispute prevention, consultation, mediation, arbitration, litigation, etc. A dispute settlement mechanism between the investor and the host country that integrates dispute prevention, negotiation, mediation, arbitration, and litigation is excellent.

Keywords

RCEP; Dispute Settlement; ISDS; Mechanism Construction.

1. Introduction

RCEP, as the highest-standard free trade agreement signed by China, is a milestone in regional economic and trade cooperation. It integrates a number of '10+1' FTAs signed between ASEAN and China, Japan, South Korea, Australia, and New Zealand, as well as the FTA partnerships established between China, Japan, South Korea, Australia, and New Zealand. Establishes a new FTA between China, Japan and Japan, and South Korea. Meanwhile, RCEP also covers new issues of the times, such as trade in goods, trade in services, trade remedies, intellectual property rights, digital trade, finance, e-commerce, etc., which has greatly contributed to the further prosperous development of trade and investment among RCEP member countries. In this context, frequent interactions will inevitably lead to friction and disputes, and how to resolve disputes between investors and countries will become a problem that cannot be efficiently resolved by the RCEP agreement and balance the legitimate interests of both sides. The research on this topic will provide support for the construction of investor-state dispute

settlement mechanisms in the context of RCEP, and help RCEP parties to better conduct trade and investment exchanges.

At present, RCEP puts the construction of the investment dispute settlement mechanism between investors and host countries on hold until two years after the entry into force of the agreement, and the obvious limitations of the dispute settlement in the RCEP agreement will lead to the legitimate rights and interests of both parties not being effectively safeguarded. This work will mainly focus on the necessity of constructing ISDS (Investor-State Dispute Settlement) in RCEP and put forward constructive opinions on how to construct ISDS. Through studying and learning from other relevant regional economic and trade agreements, it will propose feasible solutions for the construction of ISDS in RCEP. It is hoped that this will promote the further development of trade and investment among ASEAN countries.

2. Practical Dilemmas of Investor-state Investment Dispute Settlement Mechanisms in RCEP

At present, the RCEP does not explicitly provide for international investment agreements between investors and host countries among the Contracting Parties in its Treaty, which stipulates in Chapter X, Article 18 that the Contracting Parties will discuss the issue of "the settlement of investment disputes between a Contracting Party and an investor of another Contracting Party" no later than two years after the date of entry into force of this Agreement. The discussion will take place two years after the date of entry into force of this Agreement. Therefore, as of today, the Contracting Parties have not yet agreed on the terms of the investor-state investment dispute settlement mechanism (hereafter referred to as the ISDS mechanism), and it is still debatable for discussion as to which ISDS the RCEP will eventually adopt.

Some scholars argue that there is no need to create a specialized ISDS mechanism for the RCEP because the RCEP was initially established to create a free and flexible regional trade model. In addition, they believe that the existing provisions of the RCEP are sufficient to resolve disputes and give investors maximum freedom in dispute resolution. However, the author holds the opposite view on this issue. The current provisions have created an ineffective balance between the interests of investors and the host country, which made it difficult for investors to seek redress for their rights.

Under the current mechanism of RCEP, the host country does not provide direct compensation to the investor. However, under the ISDS mechanism, investors affected by the host country's actions can seek redress directly (mainly in the form of monetary compensation) from the host country. Although the RCEP currently provides an alternative route through which an investor can seek redress in the dispute settlement chapter of Chapter XIX, the level of protection could be improved. In Chapter XIX, the RCEP states that if a Party violates the relevant obligations in the investment chapter, the investor can support its claim with diplomatic protection from the home state, which may bring a lawsuit against the host state pursuant to Article 3(1) of Chapter XIX. In short, this means that under the current dispute settlement mechanism of RCEP, if an investment dispute arises, the investor must first convince its home state, and then the home state will make a claim to the host state. However, suppose the amount involved in the investor's share is small or due to other political considerations. In that case, the investor's home country may not be incentivized to file such a dispute resolution request. At the same time, the home state's initiative and voice in the process are significantly reduced when the home state brings the claim through, for example, diplomatic protection. Given this situation, investors may not frequently choose to apply the RCEP dispute resolution mechanism to resolve disputes under the agreement when they realize that their rights and interests cannot be protected to the fullest extent and promptly under the current RCEP. Therefore, there is a

great need to build an effective ISDS mechanism for the RCEP recognized by the parties and can contribute to the prosperity of inter-regional economic exchanges.

3. The Need to Build the ISDS in RCEP

3.1. Reasons Why RCEP is Currently Shelving the ISDS

The RCEP's inclusion of the ISDS mechanism in the work plan, to be discussed within two years of the agreement's entry into force, can be seen as a prelude and consideration by the parties to reform international investment arbitration. Regarding the establishment of the ISDS mechanism under RCEP, only China, Japan, and South Korea supported the inclusion of the ISDS mechanism in international investment arbitration and considered the introduction of an appellate review mechanism during the 2015 negotiations[1]. In this case, we must ponder why they are hesitant about the ISDS and find ways to improve it.

Since its inception in the 1980s, the ISDS mechanism has resolved thousands of investment disputes. However, in practice, it has also shown its shortcomings, with inconsistent decisions calling into question its authority and causing widespread dissatisfaction among respondent countries. The lack of uniform provisions in the existing investment agreements and the different interpretations of the ISDS provisions can easily lead to other decisions by the arbitral tribunal on the same case, making the arbitration outcome highly uncertain and making the fairness and independence of the arbitration outcome highly questionable.

In addition, the neglect of the public interest of the host country is also a significant problem in the existing ISDS. As we all know, in the current ISDS, only foreign investors are generally allowed to bring arbitration to the host country. The host country is often repeatedly sued by some basic principles of law. The host country is often repeatedly sued by investors in international investment arbitration tribunals because of some basic law principles. They may even be liable for high damages if they lose the case. In the context of the new epidemic this has undoubtedly brought about, this has certainly dealt a massive blow to the host country's economic and social development, and some countries have advocated reforming or abandoning the ISDS. Some countries support reforming or leaving the ISDS mechanism. The RCEP has many member countries, including both developed and developing countries. The economic situation between countries is complicated. The financial crisis is complex and requires the RCEP parties to formulate. RCEP parties must adopt a more inclusive attitude in developing the ISDS mechanism provisions. At the same time, the ISDS mechanism is expensive and time-consuming, which is also one of the reasons why many parties refuse to apply it. Regarding litigation proceedings, arbitration is a significant expense for the investor and the host government.

In summary, many investors and host countries currently refuse to apply the ISDS due to the inconsistency of arbitration awards, the lack of transparency and fairness, and the high cost and time-consuming nature of the arbitration.

3.2. Current Trends in ISDS Changes

According to the shortcomings that the ISDS has, there are several trends about how to improve it. Different countries advocate different trends based on their national interests and positions [2].

Developed countries, such as the United States, still consider commercial arbitration as the most appropriate way to resolve investor-State disputes. Meanwhile, the EU (United Nations) completed and improved the ISDS mechanism by establishing the investment tribunal system, which is through the signing of BIT (Bilateral Investment Agreements). To a certain extent, it corrects some defects of the existing ISDS and enhances the transparency of the process. And the third trend is because of the return of Calvoism, upholding the principle of national

sovereignty and advocating the principle of equal treatment of foreigners and natives. The principle of equal treatment of foreigners and nationals, the rejection of the privileged status of foreigners, and the insistence on the integrity of the state. The integrity of the territorial jurisdiction of the state. Therefore, some Latin American countries advocate the abandonment of ISDS due to the time-consuming and costly problem.

Based on the above trends, we can see that ISDS is actually being shelved in RCEP mainly because of the different positions of countries, and it is difficult to reconcile them. Therefore, when constructing the ISDS mechanism in RCEP, we should fully consider the national conditions of different countries and strive to find a solution that can effectively balance the interests of multiple parties, so as to better promote the prosperous development of regional trade. In conclusion, how to build an ISDS mechanism that meets the interests of RCEP members is a question worth studying, which means it is a challenging issue worth studying and a great challenge for RCEP members.

3.3. The Necessity of Constructing ISDS under RCEP

The initial objective and guiding principle of the RCEP negotiations on investment issues was "to create a free, facilitative and competitive investment environment in the region, and the RCEP investment negotiations will cover the four pillars of promotion, protection, facilitation, and liberalization." The construction of the ISDS mechanism can help RCEP parties to resolve investment and trade disputes between investors and host countries in a more efficient and fair manner. This provides a clear and unified model for how to resolve investment disputes and avoid unfairly affecting the outcome of dispute resolution based on the strength of the country and the economic capacity of the investor. This is fully consistent with the purpose for which RCEP was established.

First of all, throughout the existing international FTAs (Free Trade Agreement), the vast majority of them have incorporated ISDS mechanisms in their investment sections, and thus ISDS has proven to be effective in resolving various foreign investment disputes in practice. For instance, the USMC (The United States-Mexico-Canada Agreement), NAFTA (North American Free Trade Agreement), and TPP (Trans-Pacific Partnership Agreement) all specify the time used for investors to bring ISDS arbitrations in their agreements on the statute of limitations. Second, from the current international discussion, the major powers in the RCEP agreement (including China) support the establishment of the ISDS mechanism. And the development of the ISDS mechanism is also in the work plan of the dispute settlement mechanism of the RCEP Agreement, which shows that there is a general trend for the parties to incorporate the ISDS mechanism into the agreement.

At the same time, for the reason that the current international situation is complex, and countries are affected by the epidemic which leads to some difficulties in economic development, investment in the RCEP region may face political, social, legal, or other risks. Coupled with the RCEP Agreement in the investment chapter of the most-favored-nation clause expressly excludes the application of other international dispute settlement procedures and mechanisms under the present or future international agreements, the lack of ISDS mechanism provisions leaves a huge pitfall for investors investing in the RCEP region.

In addition, considering that most of the RCEP parties are underdeveloped countries, if an investor from a stronger country sues a weaker country with more human, financial, and national resources, the weaker country will have difficulty deploying extra resources to respond to the lawsuit and face the risk of losing the case. Therefore, it is difficult for most individual countries in the RCEP agreement to effectively resolve international investment disputes by their own strength, and the establishment of a fair and reasonable ISDS mechanism can protect the interests of most host countries.

4. Countermeasures for Constructing ISDS in RCEP

4.1. References and Lessons for ISDS in Relevant Regional Integration Agreements

Some scholars believe that the China-Japan-ROK Trilateral Investment Agreement can be used as a reference for the ISDS mechanism in RCEP[3]. This is because China, Japan, and South Korea are already the main influential countries in RCEP, and the ISDS mechanism in this agreement is set up as a framework, which has flexibility, variability, and more room for free agreement. At the same time, the provisions of the agreement, such as "friendly consultation" and "host country shall provide relief", are in line with the cultural thought of East Asian countries that "peace is precious" and better fit the values of RCEP countries. The agreement is also in line with the values of RCEP countries. Indeed, the overall tone of the China-Japan-Korea Trilateral Investment Agreement is consistent with the ACIA (ASEAN Comprehensive Investment Agreement), which is easy to be recognized and implemented by ASEAN countries. The 10 ASEAN countries account for more than 2/3 of the RCEP parties' members.

In addition, the appeals tribunal system proposed by the EU in CETA (Comprehensive Economic and Trade Agreement) is also a path that can be followed, for the reason that China is now becoming more flexible in its approach to the ISDS mechanism and has introduced an appeal review mechanism in the China-Australia FTA. The EU and its member states have incorporated the ICS (Investment Court System) in the mixed investment agreements concluded with third countries, which is a systematic reform of the traditional investment arbitration approach, replacing the investment arbitration system with the ICS and establishing an appellate tribunal[4]. ICS has become the template for the EU and its member states in all future investment agreement negotiations. Therefore, we can also learn from the EU's investment court system when negotiating and constructing the RCEP investment dispute prevention and settlement mechanism. The investment court system was set up by the EU to establish an independent dispute prevention and settlement mechanism suitable for the characteristics of the region covered by the RCEP. Although China and Japan do not agree with the appellate tribunal system in previous ISDS cases, it can be applied in an adjusted and selective manner in order to address the lack of fairness and transparency of the ISDS mechanism.

4.2. Balancing the Rights and Interests of Host Countries and Investors

As the RCEP, which takes into account the interests of all parties in terms of investment rules and standards, should also balance the rights and interests of both parties in the construction of the investment dispute prevention and settlement mechanism. The US-Mexico-Canada Agreement, a regional trade agreement that entered into force in July 2020, has returned to the importance of national regulatory power in the investment dispute settlement mechanism. It should also focus on the balance of interests of both sides, reflecting not only the protection of the legitimate rights and interests of investors, but also the maintenance of the regulatory power of the host country.

How to balance the right and interests of host countries and investors is also one of the key points in whether or not we should construct the ISDS mechanism in the RCEP. If we can reach an agreement on this question and the answer can meet the needs of all parties to the greatest extent, the ISDS mechanism in the RCEP can be built successfully.

4.3. Building a Diversified Dispute Settlement

First of all, establishing a permanent appellate body is necessary. Currently, RCEP members reject the ISDS mechanism. The main reason for the current rejection of the ISDS mechanism by RCEP members is the inconsistency of ISDS decisions, the lack of stable expectations, and the unpredictability of ISDS decisions. consistency, lack of stable expectations, instability, and

unpredictability. The ISDS mechanism has been rejected by RCEP members mainly because of the inconsistency of ISDS decisions, lack of stable expectations, instability and unpredictability. And countries as "defendants" are often sued because of domestic policy changes affecting investors' interests. The ISDS mechanism has been rejected by members mainly because of the inconsistency of ISDS decisions, lack of stability, unpredictability and unpredictability. If there is an ISDS appeal mechanism in RCEP, once the arbitrator realizes that his or her award may be reviewed or set aside, he or she will try to improve the consistency and accuracy of the arbitration results, improve the quality of the arbitration, and make the arbitration results stable. On the other hand, when the ISDS mechanism is stable and consistent, countries can reasonably expect to rely on precedent based on stability and are no longer constrained in making policy changes. There is no longer a fear of investment arbitration that would deter domestic regulation of public matters. For those members of the RCEP that reject ISDS, an ISDS appeals mechanism is a good option to address the current shortcomings of the ISDS mechanism.

Second, the modification of ICSID (International Centre for Settlement of Investment Disputes) is applicable. The ISDS mechanism established by the Washington Convention, which entered into force in 1966, together with ICSID, constitutes the international investment dispute settlement system, and ICSID is the world's first institution established specifically for the settlement of international direct investment disputes, including mediation and arbitration, and is by far the most important and widely used international investment dispute settlement mechanism. Although ICSID investment arbitration has increasingly revealed its crisis of legitimacy, inconsistent arbitration results have led to reduced recognition, and it is increasingly opposed by many countries, and most contracting states and organizations are looking for its reform path, ICSID is still the most widely used and mature international investment dispute resolution mechanism, which can be directly used as an alternative model for dispute resolution in RCEP investment agreements. This mechanism can be directly incorporated into the investment agreement to facilitate the settlement of investment disputes, or it can be updated, supplemented or improved by adding content that needs to be amended according to regional characteristics, and it can also be used as an international investment dispute settlement treaty to propose reform ideas and practices[5].

Third, RCEP parties should construct an ISDS mechanism with an organic blend of multiple approaches. Although the traditional ISDS mechanism includes a variety of dispute resolution methods such as consultation, mediation, host country local remedies, and arbitration, they all do not pay enough attention to consultation, mediation, and host country local remedies, which are more flexible ways of dispute resolution, but pay more attention to arbitration. The timing is also very simple and crude in the formulation of the provisions of the former modes, while the arbitration provisions are relatively specific and well formulated, with the result that investors are disguisedly encouraged to resort to arbitration. Investment arbitration has played a huge role in the resolution of investor-state disputes, but the current resort to arbitration alone or mainly has increasingly shown its obvious inadequacy, and the reform of the investor-state dispute resolution mechanism is mainly to go beyond traditional investment arbitration and explore a more flexible and diverse investor-state dispute resolution mechanism. Investor-State disputes are not simply a matter between the host government and the foreign investor, let alone a commercial dispute between the two, but a dispute involving the public policy of the host country, the rights and interests of other stakeholders in the host country, and the long-term relationship between the investor and the host country and its stakeholders.

5. Conclusion

Therefore, according to the current situation, it is significant and necessary to construct the ISDS mechanism in the RCEP, because only then can promote the development of regional economic and trade prosperity. However, the ISDS mechanism in RCEP is still in the stage of negotiating whether and how to build it. For this, we should look at the reasons why they put it on hold to find the solution to this problem. The current trend of ISDS reform is inevitable, and the specific construction of ISDS needs consensus and careful consideration by all parties. As one of the RCEP parties, the construction of ISDS involves China's interests, and China can actively advocate its own opinions during the negotiation process and can respond to the development of the dispute settlement mechanism of RCEP investor countries by adjusting the application of the ICISD mechanism, establishing a permanent appellate body, and introducing diversity dispute resolution.

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