

The Application Dilemma and Optimization Path of RCEP Dispute Settlement Mechanism

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Abstract: On January 1, 2022, the Regional Comprehensive Economic Partnership Agreement (RCEP), one of the world's largest free trade agreements, came into force. In order to breakthrough the dilemma faced by the current WTO dispute settlement mechanism, Chapter 19 of the RCEP sets up a particular international dispute settlement mechanism, providing global trade governance. This has injected new vitality into global trade governance. However, due to various reasons, the RCEP dispute settlement mechanism still has applicable dilemmas including the absence of a dispute management body, the inadequacy of dealing with disputes in the digital economy, and the absence of a special investor-state investment dispute settlement (ISDS) mechanism. Meanwhile, the participation of third parties in disputes may also bring problems in the actual operation and affect the efficiency of dispute settlement. These problems will affect the accomplishment of the RCEP objectives. Through the legal norm analysis method, specific solution measures are proposed for the optimization path of RCEP dispute settlement mechanism. There have some useful measures for parties to improve the dispute settlement mechanism, such as strengthening the governance in regional trade agreements, decreasing the differences in the interpretation and focusing on setting up a dispute management body.

Keywords: RCEP, digital economy dispute settlement mechanism, ISDS

1. Introduction

The RCEP has an international dispute settlement mechanism that has been established in Chapter 19 in response to the suspension of the WTO dispute settlement mechanism. The dispute settlement mechanism is an inheritance from the WTO dispute settlement mechanism and a further innovation. The RCEP dispute settlement mechanism adopts a hybrid model, emphasizing consistency with the WTO and fully incorporating the features of the existing ASEAN+ FTA dispute settlement mechanism, fully demonstrating autonomy and efficiency, while being more friendly to developing countries and LDCs. The paper focuses on the dilemmas and optimization paths of the international dispute settlement mechanism under the RCEP framework. Meanwhile, it proposes solutions to address the lack of regulation or further improvement of the RCEP dispute settlement mechanism in terms of dispute management bodies, third-party participation, digital economy disputes and even investment disputes. In recent years, many scholars have studied in RCEP dispute settlement mechanism and come up with some suggestions. The first is the Exploration of the Dispute Settlement Mechanism of the RCEP Agreement, in which it elaborates the characteristics of the RCEP dispute

settlement mechanism and proposes the improvement strategies for China [1]. The Second is elaborating on the necessity of constructing the RCEP dispute settlement mechanism, the basis for constructing the RCEP dispute settlement mechanism, China's expectations and options for constructing the dispute settlement mechanism [2]. The third one is that RCEP adopts a hybrid model with Asia-Pacific characteristics and is more friendly to underdeveloped and developing countries [3]. The fourth one gives suggestions on the operation and subsequent updating of the RCEP dispute settlement mechanism [4]. The fifth one is a study on the innovation and improvement of the international trade dispute settlement mechanism under the framework of RCEP [5]. The sixth one is about making an in-depth elaboration on ISDS and proposed to have a dispute settlement mechanism for investors and states under the framework of RCEP [6]. The seventh point focus on putting forward specific proposals on the shortcomings of the RCEP dispute settlement mechanism in dealing with digital economy disputes and the objectives, key areas of settlement and the implementation path of the RCEP digital economy dispute settlement mechanism [7]. Since the implementation of RCEP is still relatively short, and there is no relevant case practice, the author intends to use the legal normative analysis method and comparative research method to discuss the characteristics, shortcomings and optimization path of RCEP dispute settlement mechanism. State parties should actively study the institutional norms of RCEP dispute settlement mechanism, use the dispute settlement mechanism to protect their interests, and strive to promote the systematization and standardization of dispute settlement mechanism.

2. Background of RCEP

On January the first, 2022, RCEP came into force and was implemented, which is the FTA with the largest population, the most diversified membership structure and the largest development potential in the world. Ten ASEAN countries, along with China, Japan, South Korea, Australia, and New Zealand, are participating in the agreement, which aims to strengthen economic growth, promote equitable development, and advance economic cooperation by expanding and deepening economic integration in the region. In addition to going beyond existing multilateral and regional free trade agreements in terms of substantive rules, Chapter 19 of the RCEP breaks through the dilemma faced by the current WTO dispute settlement mechanism and injects new vitality into global trade governance.

Since 2017, the U.S. made repeated setbacks in the selection of judges for the WTO Appellate Body by using the "veto" 29 times in two years. As of December 2019, the WTO Appellate Body has only one judge and completely paralyzed. In order to solve the crisis faced by the WTO Dispute Settlement Body, in March 2020 a ministerial statement was signed to establish the Multi-Party Interim Appeal Arbitration Arrangement ((hereinafter referred to as MPIA) by 19 WTO members, including China and the EU. The aim of MPIA was to resolve the problem of prolonged cases caused by the suspension of the Appellate Body through arbitration [8]. However, MPIA is not a permanent solution. In the end, RCEP was successfully signed in November 2020, under the context of regionalization and integration of economic development. During the negotiation process, the parties had different ideas about the design of the dispute settlement mechanism. Finally, RCEP adopted a hybrid settlement model, which is based on the full assessment of the degree of economic ties, power disparity and willingness of each member party. At the same time, it has borrowed from the ASEAN+ FTA dispute settlement mechanism and formed its own unique features and innovations, such as the RCEP dispute settlement mechanism pays more attention to the role of consultation, fully demonstrates autonomy and efficiency, and is friendlier to developing countries and LDCs.

It should be highlighted that RCEP has been in effect for only one year and its mechanism for resolving disputes has not been implemented yet. Moreover, certain aspects of the agreement require further refinement and enhancement, such as the absence of an investor-state dispute settlement

mechanism (known as ISDS) and inadequacies in addressing disputes related to the digital economy. The author believes that in the process of RCEP implemented, international trade and investment disputes in the region are destined to increase. Conducting a comprehensive analysis of RCEP's dispute resolution mechanism would provide Chinese enterprises and the government with valuable insights to effectively engage in international trade. It is crucial for China to capitalize on RCEP's opportunities, tackle its challenges, mitigate the uncertainties arising from the complexity of the regional economy, enhance external openness, and strive towards creating a new development model that promotes domestic and international double-cycle mutual promotion.

3. Current Situation and Shortcomings of RCEP Dispute Settlement Mechanism

3.1. The Current Situation of RCEP Dispute Settlement Mechanism and Its Characteristics

Although the dispute settlement mechanism of RCEP draws on the dispute settlement mechanism settings of other agreements, it is more set up according to its own situation, and the following are some of the advantages and characteristics listed. Firstly, the RCEP dispute settlement mechanism adopts a mixed model. The dispute settlement mechanism can be divided into three types: political mode, legal mode and mixed mode. One of the characteristics of RCEP dispute settlement mechanism is that it clearly belongs to the mixed mode, which combines the political mode and legal mode, and usually uses the political mode as a precursor to the legal mode. The RCEP parties include developed countries, developing countries and LDCs, and the level of economic development and comprehensive national power vary greatly, so the adoption of the hybrid model is able to take into account the needs of all parties to the greatest extent possible, and give each party a higher degree of freedom and flexibility to properly resolve disputes, and also in line with the current development trend of regional cooperation dispute settlement.

A second point of consideration is ensuring consistency with the World Trade Organization (WTO) and expanding the dispute settlement mechanism of the current ASEAN+ free trade agreement. RCEP has adopted many WTO agreements, and because ASEAN is the initiator and leader of the RCEP negotiations, the ASEAN dispute settlement mechanism influences the RCEP dispute settlement mechanism inevitably. Whether in terms of the panel system, the emphasis on mutually agreed dispute settlement, or even the scope of application of the dispute settlement mechanism, it continues the characteristics of the ASEAN+ FTA dispute settlement mechanism [4].

Thirdly, the RCEP dispute settlement mechanism shows more autonomy and efficiency. RCEP pays more attention to the internal will of the parties and highlights the autonomy and efficiency during the process of designing and structuring the dispute settlement mechanism, avoiding the lessons of the WTO Appellate Body being "stalled" due to unilateral obstruction and deliberate sabotage by individual countries, in the process of, pays special attention to the internal will of the parties to the dispute, highlights the autonomy and efficiency. For example, the RCEP dispute settlement mechanism gives the parties to a dispute the right to exclude the application of dispute settlement mechanisms by agreement, the right to choose the forum for settlement, and the option to reach a solution through alternative dispute resolution such as good offices, mediation, and conciliation at any stage of the proceedings as long as the parties to the dispute reach mutual agreement; in addition, even if In addition, even during the panel process, the parties to the dispute enjoy full autonomy, and each party has the right to agree on the scope of the panel's functions, the qualification and composition of experts, and the time limit for dispute resolution. In particular, the RCEP has shortened the duration of the various stages of dispute settlement and eliminated the establishment of the appellate body and the appeal process, which have improved the efficiency of the dispute settlement mechanism.

Finally, RCEP is more friendly to developing countries and LDCs. RCEP requires that parties should exercise appropriate restraint in raising matters involving LDC parties in the dispute settlement process, and specifically provides that the panel report should indicate the form of consideration of special and differential treatment provisions raised by LDC parties in the dispute settlement process. At the same time, it is also proposed in the preamble that taking into account the different levels of development of the Parties, special and differential treatment is provided especially to Cambodia, Laos, Myanmar and, where appropriate, Vietnam, and that the special and differential treatment of RCEP is in line with the trend of development of international law and is a manifestation of the pursuit of substantive fairness, as well as the requirements of the right to national development[9].

3.2. Problems of RCEP Dispute Settlement Mechanism

Generally speaking, the RCEP dispute settlement mechanism is relatively sound and basically meets the needs of member states with different levels of economic development and different historical and cultural backgrounds and religious backgrounds to settle disputes, and takes into account fairness and efficiency, but it is not perfect and there are still several points that can be further improved as follows.

One of the problems facing by the RCEP dispute settlement mechanism is not having a dispute management body with coordination inside. The temporary core group of experts will disband once the final report is completed, as per the provisions. However, if parties in dispute on the implementation measures reconvene, an implementation review group of experts will be established to resolve the issue. This process may take up to 15 days from the proposed establishment of the implementation review group to the submission of the final report. This incurs significant time, human, and material costs, which is not beneficial for the effective functioning of the dispute resolution mechanism or for saving resources.

The participation of third parties in dispute settlement can pose problems. As an illustration, if a Party has a significant stake in the issues under scrutiny by the panel, it can inform the disputing parties of its interest while simultaneously presenting pertinent statements to the panel.

However, there are some problems with the provisions on third parties in the agreement that need to be further clarified, such as the importance of "substantive interest" to third parties, but the agreement does not provide a clear definition of "substantive interest", and the excessive participation of third parties may cause procedural delays and affect the efficiency of dispute resolution. The excessive participation of third parties may cause procedural delays and affect the efficiency of dispute resolution, and the independence of the panel may be compromised [10].

The RCEP dispute settlement mechanism still has inadequacies to deal with disputes in the digital economy. Firstly, RCEP parties can not directly resort to the RCEP dispute settlement mechanism for digital economy disputes. Article 17(3) of Chapter XII of the RCEP, "Electronic Commerce," provides that "no Party shall have recourse to the RCEP dispute settlement mechanism in respect of any matter arising under this Chapter v. Chapter XIX "Dispute Settlement", unless the Parties expressly agree to it. This provision indicates that Chapter XII of the RCEP, Electronic Commerce, is in principle not subject to the RCEP dispute settlement procedure, but allows Member States to opt in. This raises the question of whether member states should recognize the justiciability of the provisions of the e-commerce chapter of the RCEP, and how disputes in the digital economy should be resolved in the event of a dispute. Secondly, the RCEP dispute settlement mechanism has a narrow scope of application. In terms of its personal jurisdiction, the RCEP dispute settlement mechanism has a narrow scope of application, which is applicable between the parties, but not for disputes between a party and another party's enterprises, private citizens, etc. Therefore, even if all parties to a dispute agree to submit a digital economy dispute to the RCEP dispute settlement procedure, it can only resolve digital economy disputes between the parties, but not between other subjects.

The RCEP dispute settlement mechanism is lack of ISDS. As a result of divergent opinions among the Parties on the establishment of an investor-state dispute settlement mechanism (ISDS), there are issues arising from its practical implementation [11]. Such as challenges in ensuring decision consistency, protecting investor interests, and bearing high costs, the current investment dispute resolution mechanism in the RCEP is non-existent. The Parties have only agreed to discuss the matter no later than 2 years after RCEP's entry into force. The discussion will be held within two years from the date of entry into force of the agreement, and the outcome of the discussion shall be agreed by all parties, and the parties shall conclude the discussion within three years from the commencement of the discussion.

The absence of ISDS, investors will face the lack of investment protection mechanisms, thus reducing investor confidence in investment. There will still be problems if other dispute settlement mechanisms are applied, such as through other BITs or mutually participatory multilateral investment agreements and the resolution of investor-state disputes in Chapter XIX, Article 3, paragraph 1 of RCEP.

Without the ISDS mechanism, foreign investors who believe their rights under the RCEP have been violated will not be able to seek legal help through international arbitration. Rather, they would have to turn to and rely on the judicial institutions of the particular member state. It is not an ideal option for investors to choose this method of dispute resolution over the more proactive and egalitarian method of international investment arbitration.

4. Reasons

RCEP brings opportunities and challenges to the member states, as to the reasons for the above dilemmas, what are the considerations based on the negotiation process by the party members, resulting that the RCEP dispute settlement mechanism is still inadequate or needs to be improved. The reasons list mainly as follows.

Firstly, the main reason of RCEP dispute settlement mechanism did not establish a dispute settlement body is the consideration of enhancing efficiency factors. The RCEP dispute settlement mechanism provides for the establishment of a RCEP panel of experts to resolve disputes to break the crisis faced by the WTO. Although WTO has a permanent appellate body which is influenced by the unilateral obstruction of the U.S. and into a state of suspension.

Secondly, the participation of non-disputing parties in the dispute settlement mechanism as third parties is mainly to protect the interests of parties with "substantial interests" as third parties. However, the lack of a clear definition of "substantive interest" and the lack of detailed regulations on the threshold of third-party participation may also lead to procedural delays due to excessive third-party participation, which may affect efficiency.

Thirdly, the features of wide scope, rapid turnover and unpredictable market prospect in digital economy make the management more complex and difficult [12]. The construction of a digital economy dispute resolution mechanism requires countries to draw experience in practice. Both Consultation and negotiation are the important points to its improvement. This is also the reason why Chapter 12 of RCEP "Electronic Commerce" is not applicable to the RCEP dispute settlement mechanism in principle, unless the parties explicitly agree to it.

Finally, as for the absence of ISDS mechanism, due to the divergence of parties on whether to set up ISDS mechanism and the fact that ISDS has also given rise to a series of problems in practice, such as the complexity of investment treaties and their ISDS mechanisms among parties, the difficulty in ensuring the consistency of adjudication results, the preference for safeguarding the interests of investors, and the high procedural costs, RCEP has temporarily shelved the ISDS mechanism.

5. Optimization path

5.1. Continue to Improve the Third-party Provisions

The Parties may consider a clear definition of substantive interests, which can be adopted in the subsequent negotiations. At the same time, in order to avoid the low threshold of the third party, the efficiency of dispute resolution and the independence of the panel, the parties can take the following measures to improve and refine the third-party provisions. Firstly, the parties should regulate the third-party participation rights as needed. The third-party must submit to the panel's control over the entire process. Secondly, the scope of third-party opinions should be strictly limited to the interpretation of the treaty and should not interfere or interfere with the panel's determination of evidence and judgment of facts. Thirdly, third-party participation should be limited to the extent that it does not destroy the balance of interests of the parties to the dispute, otherwise it should not be allowed [5].

5.2. Improve the Digital Trade and Investment Dispute Mechanism

The digital economy dispute settlement mechanism is an important part of the digital economy rules and governance system, and the digital economy dispute settlement mechanism under the RCEP framework will have an important impact on the development of the digital economy in the region. The sustainable and healthy development of the digital economy in each member country needs to be guaranteed by building an inclusive and perfect digital economy dispute settlement mechanism.

Firstly, the parties should give full play to the role of alternative dispute resolution (hereinafter referred to as ADR) mechanism in the digital economy. For ex ante dispute prevention, the International Commercial Dispute Prevention and Settlement Organization (hereinafter referred to as ICDPASO) can be strengthened as a platform for ex ante international commercial dispute prevention mechanism in the digital sector. As far as ex post mediation of disputes is concerned, mediation as an amicable ADR has obvious advantages in reducing dispute resolution costs, maintaining business partnerships, and promoting the package settlement of disputes [13].

Secondly, the parties should draw on the digital economy dispute settlement mechanisms of other free trade agreements. For example, the Digital Economy Partnership Agreement (hereinafter referred to as DEPA), to which China has applied for accession, provides for dispute settlement provisions on e-commerce. Therefore, the digital economy dispute settlement mechanism of other free trade agreements such as DEPA can be reasonably borrowed to build the RCEP digital economy dispute settlement mechanism which is adapted to the development of digital economy and the characteristics of digital economy disputes.

Thirdly, the parties should Enhance the rule-based digital economy dispute settlement mechanism under the RCEP framework. In order to ensure the certainty and predictability of the digital economy dispute settlement mechanism under the RCEP framework, a "rule-based" approach should be established when constructing the digital economy dispute settlement mechanism under the RCEP framework.

Moreover, the parties should continue to complete the ISDS negotiations. In order to better protect the interests of investors and countries in the region, it is very important to construct the ISDS mechanism in RCEP. For smooth progress, the ISDS mechanism in the RCEP can be referred to [14]. Given that many disputes between FTA parties arise from the parties' different interpretations of the relevant rules [15]. Based on this practical consideration, when constructing the ISDS mechanism in RCEP, the parties should always follow high standards and consider using the ISDS mechanism in existing regional integration agreements as a reference.

5.3. Strengthen the Governance of the Dispute Settlement Mechanism of the RTA

First of all, the Parties should strengthen its own governance. It is necessary to ensure the transparency of intra-regional trade legal policies. Transparency is a key factor governing the cost of operating the FTA dispute settlement mechanism. Generally speaking, given other variables, the more transparent the parties are in releasing information, the more open the information channels of other parties will be, and thus the lower the costs and the less likely disputes will occur. Even if disputes do arise, the greater the likelihood that they will cooperate with each other in resolving them. Secondly, it is important to reduce the uncertainty in the operation of the dispute settlement mechanism. In terms of the governance of the RCEP dispute settlement mechanism, uncertainty refers to the state of uncertainty in the degree of governance brought about by the number of parties and the different degrees of information received by the parties from each other. Under the given condition that the number of parties is fixed or even increasing, the role of the RCEP Joint Committee and its related committees should be fully utilized in order to reduce the uncertainty of the degree of governance caused by the different degrees of information received by the parties from each other. Finally, the parties should set up focal points as required by RCEP and fully play their role. Experience shows that the parties communicate timely and effectively, which can not only prevent the occurrence of disputes but also enable many disputes to be resolved.

Secondly, RCEP stipulates that the parties shall review, update and improve the agreement every five years after the RCEP entering into force, so in the negotiations among the parties, the scope of application of the RCEP dispute settlement mechanism shall be gradually expanded to include more types of disputes. At the same time, the RCEP dispute settlement mechanism needs constant efforts to overcome its shortcomings. In response to the lack of a dispute management body in the RCEP dispute settlement mechanism, the parties can consider setting up a special dispute management body in future negotiations, such as a dispute settlement management committee, or a permanent dispute settlement body and secretariat based on the DSU, to coordinate disputes between parties and promote more efficient dispute resolution. This will not only increase the chance of peaceful dispute resolution, save the cost and resources of the parties, but also greatly enhance the credibility and authority of the RCEP dispute settlement mechanism.

6. Conclusion

RCEP as the world's newest regional free trade agreement has received a lot of attention and high expectations. The RCEP dispute settlement mechanism has been innovated and improved on the basis of the WTO dispute settlement mechanism, which is more flexible, efficient and gives more autonomy to state parties.

However, the RCEP dispute settlement mechanism is subject to the serious imbalance in the level of economic development of the parties. The differences between countries on the investment dispute settlement mechanism and the inclusiveness of the parties on the construction of digital economy disputes are not in place, and there are still shortcomings that need further revision and improvement.

In view of the problems of RCEP, the article puts forward a specific and operable optimization path. Firstly, the parties should actively study its institutional norms. Secondly, the parties should use the dispute settlement mechanism to protect their interests. Finally, the parties should strive to promote the further refinement and improvement of the dispute settlement mechanism of RCEP such as improving the third-party provisions.

The thesis conducting an in-depth and systematic study in the use of dispute settlement mechanism by RCEP parties. The background of this thesis is consisting of RCEP entering into force for one year and no formal practice on RCEP dispute settlement mechanism. It is hoped that the study can actively promote the gradual improvement of the dispute settlement mechanism of RCEP, and actively explore

the construction of an interstate dispute settlement method integrating dispute prevention, consultation, mediation, arbitration and litigation. So as to jointly promote the development of the world economy and regional economy in the direction of openness, cooperation and win-win situation.

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