

# *The Construction of International Trade Dispute Settlement Mechanism in the Context of RCEP and China's Positioning*

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**Abstract:** With the regional economic integration and economic globalization, RCEP was enacted and entered into force, and its dispute settlement mechanism provides a more efficient and convenient way and platform for FTA members to resolve trade frictions against the background of WTO dispute settlement mechanism's difficulties. The paper adopts the research methods of textual analysis and comparative analysis and concludes that the RCEP dispute settlement mechanism adopts a hybrid model with more comprehensive provisions in terms of basic settings and procedural construction; compared with the WTO dispute settlement mechanism, RCEP has obvious advantages in terms of autonomy, timeliness and fairness. Meanwhile, the paper proposes that China, as an important member of RCEP, should further strengthen Asia-Pacific region's economic and trade corporation in the process of building an open, free and rule-based multilateral trading system to help the construction of "One Belt, One Road" and enhance China's influence and discourse power as a practitioner.

**Keywords:** Dispute settlement mechanism, RCEP, WTO, International trade

## **1. Introduction**

As the process of global economic integration accelerates, the international community is increasingly calling for trade liberalisation. Countries all around the globe are focusing more and more on the use of various mechanisms to coordinate and settle various forms of trade disputes as they develop a new system of international trade norms. Whether it is a multilateral free trade system under the leadership of the World Trade Organization (WTO) or a regional free trade system under the Regional Trade Agreement (RTA), the dispute settlement mechanism is an essential component.

The birth of a free trade area with the largest population, the most diversified membership, and the greatest growth potential in the world is marked by the Regional Comprehensive Economic Partnership's (RCEP) coming into effect. Compared with other FTAs, RCEP is more inclusive and open. It will not only inject new vitality into China's domestic economic transformation and

upgrading, but will also have far-reaching implications for the trade development of the Asia-Pacific region. Apart from expanding on the substantive provisions of current multilateral and regional FTAs, Chapter 19 of the RCEP also establishes a customized system for resolving international trade disputes. This is not only a cornerstone for maintaining harmonious and close economic cooperation among the parties, but will also bring new life to global trade governance against the backdrop of the existing WTO system which is in difficulty.

As a product of the organic combination of the 21st Century Maritime Silk Road and the Belt and Road Initiative, the RCEP offers a whole new platform for China to take part in the next wave of globalization. How to seize and apply this opportunity of development has become a key issue as China continues to expand its opening up to the outside world at a higher level and build a new development pattern with a double cycle at home and abroad.

## **2. Model Options for RCEP Dispute Settlement Mechanism**

### **2.1. RCEP Dispute Resolution Mechanism in a Hybrid Model**

International trade dispute settlement mechanism (DSMs) can be divided into political model, judicial model and hybrid model. The political model refers to the traditional political and diplomatic settlement methods to resolve disputes occurring among RTA members, mainly including consultation, good offices, mediation and conciliation [1]. The judicial model is usually found only in RTAs pursuing high economic integration, i.e., a permanent judicial body is established to hear and adjudicate transnational trade disputes [2]. The hybrid model, on the other hand, uses the political model as the antecedent procedure, and the disputing parties may file an application for establishing an arbitral tribunal or a panel of experts if their problem cannot be settled through the judicial paradigm. The hybrid model absorbs the advantages of the political model and the judicial model and provides a certain degree of flexibility while resolving the dispute without damaging the friendly relationship between the disputing parties as much as possible.

The RCEP DSM adopts a hybrid model. On the basis of establishing a panel review mechanism, it gives full opportunities to apply alternative dispute settlement methods such as consultation, good offices, mediation or conciliation, etc. The RCEP parties include developed, developing and least developed countries, with widely different levels of economic development and comprehensive national power, so the adoption of the hybrid model can consider the needs of all parties to the maximum extent possible [3]. The adoption of the hybrid model can maximize the balance between the needs of all parties and give each party a higher degree of freedom and flexibility to properly resolve disputes, and is also in line with the current trend of regional cooperation in dispute resolution.

### **2.2. Factors Affecting the Choice of RCEP Dispute Resolution Mechanism Model**

First, economic factors. Generally speaking, the difference in the size of economic power is inversely proportional to the level of legalization of dispute settlement [4]. The political model, such as consultation and good offices, is more conducive to strong countries using their power to force the other side of the dispute to make more concessions; while giving more in exchange for using a judicial mechanism, such as arbitration, which enables the weaker party to protect its trade interests more effectively.

RCEP members are complex in composition, including less developed countries like Laos and Cambodia; developed countries like Japan, Australia and New Zealand; and emerging economies like China and India. The hybrid model allows the disputing parties to resolve disputes amicably through consultations and other means, and also provides arbitration to decide disputes fairly, which is an effective model to balance the interests of all parties.

Second, political factors. As such, it has long been believed that domestic political systems are the primary factor influencing global trade policies. [5]. A decision to enter into a FTA between countries is only possible when there is political mutual trust. Therefore, without basic mutual trust, there will be no FTA between the two states, let alone a dispute settlement mechanism.

ASEAN's long-standing and stable internal political relations, as well as the consideration of further relations with major powers in the region, have laid a certain political foundation for the construction of the RCEP DSM. At the same time, what impact the changing international political landscape will have on the future operation of the RCEP DSM is also an issue that requires continued attention.

Third, the number of member countries and the level of proposed integration. The more the number of member states, the more complex the relationship among them, the higher the probability of trade disputes, and the political approach may not be effective in solving the problem. There are 15 members of RCEP, which is the world's most populous FTA, therefore the hybrid model is undoubtedly more suitable for solving the complex trade disputes among member states and improve efficiency.

In addition, the higher the level of economic integration an RTA propose to achieve, the more likely it is that a DSM with a higher level of legalization will be adopted [4]. Deeper economic integration requires judicial decisions with international legal effect to guarantee the obligations of the agreement. In recent years, ASEAN's economic integration has been deepening, and RCEP may not have the same economic integration objectives as ASEAN, but the growing economic ties and interdependence among members have increased, requiring a stable and flexible dispute settlement mechanism [6].

### **2.3. RCEP Dispute Settlement Mechanism's Basic Setup and Procedural Construction**

#### **2.3.1. Foundation Settings**

The RCEP has integrated the five ASEAN 10+1 Free Trade Agreements on the basis of clear attitudes and demands of the parties to the dispute settlement mechanism. Meanwhile, it has absorbed the general orientation of the design of the ASEAN dispute settlement mechanism and the tortuous path it has taken, which also provides useful experience for the construction of the overall framework of the RCEP dispute settlement mechanism. It also provides useful experience for the construction of the overall framework of RCEP Dispute Settlement Process.

Section 3 of Chapter 19 of RCEP stipulates the scope of application of the dispute settlement mechanism. With respect to the precise content, the extent of the RCEP dispute resolution process has expanded far beyond the conventional domain of commerce to a comprehensive economic and trade dispute settlement mechanism covering a broad spectrum of fields [7]. However, while the dispute settlement mechanism is broad in nature, it still excludes the possibility of application to a variety of disputes [8].

In addition, Chapter 19 Article 4 of RCEP provides general principles for dispute settlement. First, interpretation pursuant to habitual rules of public international law. Second, respect for the parties and emphasis on the interests of the parties to the dispute. Third, focus on the rigor of the procedure, emphasizing the written form. Fourth, the importance of consistency with the WTO.

#### **2.3.2. Program Construction**

The RCEP dispute settlement mechanism is comprised of three main stages. In stage one, consultations are held. Talking about the second stage, the prosecuting party notifies the respondent party and calls for an expert committee. In the second stage, a panel of experts will be established in compliance with the procedures outlined in the RCEP; and an interim report is issued within a

specified time limit. The last stage is the final award stage. In other words, this is the time when the expert committee shall issue a final report to all the parties to the present dispute. It is worth pointing out that in order to resolve the dispute quickly, RCEP has created a "one-judgment-final" panel, so that the panel's decision is binding on all parties and cannot be appealed.

Since the report of the panel of experts in the RCEP procedure will directly affect the direction and implementation of the dispute, the RCEP has set up a number of special provisions in the establishment and hearing of the panel of experts with extra care. First, the qualification of the panel members varies according to the different ways of selection. Second, when a party to a dispute does not cooperate with the selection of panel members, the WTO should select them instead. Third, the selected panelists shall not have the nationality or habitual residence of any of the parties to the dispute. These provisions can, to a certain extent, ensure the neutrality of the panel's positioning and prevent possible conflicts of interest, thus guaranteeing the professionalism of dispute settlement and strengthening the credibility of RCEP dispute settlement activities [9].

### **3. Features and Innovations of the RCEP Dispute Settlement Mechanism from a WTO Perspective**

#### **3.1. High Degree of Autonomy and Timeliness**

The central dispute settlement body in both the WTO and RCEP dispute settlement mechanisms is the panel of experts. However, the difference lies in the WTO's establishment of a permanent appellate body, which has formed a "two-trial-final" model with judicial characteristics. Although this appellate mechanism is to a certain extent conducive to maintaining the impartiality of the decision, there are cases where the entire dispute settlement process is stalled due to the unilateral obstruction of individual countries [9]. Additionally, ministerial meetings and meetings of government officials are intimately related to the selection of judges to the WTO Appellate Body, which can easily lead to political conflicts.

In contrast, the RCEP does not provide for an appellate body, but rather for a panel of experts with a "one-decision-final" model. The procedure is based on contractuality, efficiency, compliance with the internal will of the parties to the dispute and the exclusion of impediments from other parties. In other words, the RCEP dispute settlement mechanism emphasises timeliness, while at the same time highlighting autonomy, which is manifested in the following ways [10].

##### **3.1.1. Autonomy**

The following four categories demonstrate the significant autonomy that the RCEP Parties have in the dispute resolution procedure.

First, the parties to a dispute own the right of exclusion when it comes to applying RCEP Articles. During the settlement of a particular dispute, if the parties to the dispute have agreed by agreement that certain Articles shall not apply to solve the matter then they won't be used.

Second, where the RCEP, WTO, CPTPP or other international dispute settlement bodies share jurisdiction over international trade disputes in specific cases, the RCEP gives the complaining party the right to choose its own forum for dispute settlement.

Third, the RCEP encourages parties to make every effort to reach consensus on dispute settlement through consultation at every stage, and provides that any party may request consultation with another party, emphasizing the effect of consultation in assisting in the construction of relationships between the parties to a conflict. While in the WTO the consultation process is a prerequisite to the request for the creation of an expert panel, the exploitation of the "mandatory" need results in an exaggeration of the procedural function, which in turn undermines the substantive value of consultation in dispute resolution [9].

Fourth, after consultation, the disputing parties are entitled to come to a decision regarding the make-up of the panel of experts, including terms of reference, qualifications, choice of members and the time limits. Moreover, the parties to the dispute have the option to modify the timeline specified in the agreement without affecting the rights of other parties and to use alternative conflict resolution techniques like good offices, mediation, or conciliation at any point in the process [10].

### 3.1.2. Timeliness

First, according to the RCEP, the respondent must reply to a consultation request within seven days of receiving it, which is three days shorter than the relevant WTO deadline. Second, the RCEP adds a special time limit of 20 days for the establishment of a panel in an emergency. In addition, the time limit for the publication of the RCEP Expert Group's interim report is approximately 2 months earlier than the WTO. In exceptional cases where publication is delayed, the time limit will be reduced by approximately 4 months compared to the WTO.

In particular, the RCEP has adopted the first-instance final review system of the panel of experts, which declares that the panel of experts' final report is conclusive and enforceable against the disputing parties. This has enhanced the independence and centrality of the panel, shortened the deliberation time and improved the efficiency [10]. In contrast, the WTO Appellate Body deals with numerous cases while the number of members is insufficient, causing a lack of efficiency. Additionally, matters will invariably go through the appeals process because there is no right to check the admissibility of appeals. As a result, the losing side frequently uses the appeals process to put more weight on the winning party and strengthen its own negotiating position [11].

### 3.2. Greater Focus on Equity

The RCEP includes both highly developed and least developed countries (LDCs), with uneven levels of economic development and widely divergent interests among its members. In view of this complex situation, the RCEP stipulates in the "Special and Differential Treatment for Least Developed Country Parties" clause that the LDC Parties shall be given special consideration in the dispute settlement process, and that other parties must exhibit appropriate restraint when dealing with LDC Parties [12]. This provision demonstrates that the RCEP is both inclusive and developmental in nature, while pursuing substantive fairness.

Furthermore, the RCEP provides that the Expert Group should identify the specific implementation of the SDT provision and indicate details about how the provision will be applied in its report. This will provide a more precise, effective and operational approach to the application of the S&D treatment provisions than the WTO's relevant provisions in the DSU.

### 3.3. Effectiveness of the Consultation Process

#### 3.3.1. Procedural Aspects

The first issue is about whether the consultation procedure is mandatory. According to Article 6(2) of the DSU, the consultation process is a pre-requisite and mandatory procedure for initiating a panel in the WTO dispute settlement mechanism. However, the agreement between ASEAN and the four countries does not make the consultation process "mandatory" in the RCEP controversy resolution mechanism. In view of this, this regime does not particularly emphasize the "mandatory" consultation procedure.

The impact of these two different approaches to the effectiveness of dispute settlement is also of considerable discussion. From the perspective of the necessity of setting up, in WTO cases, panels and the Appellate Body have also held that neither the lack of consultation nor the inadequacy of



consultation can affect the jurisdiction of the panel in the proceedings [7]. In view of this, it is still debatable whether the WTO has overemphasized the requirement of "mandatory consultation" and whether its consultation procedure is only a constitutional tool rather than an independent and valuable provision.

Second, on the issue of third-party participation, the five agreements on which RCEP is based are not unified on the issue of whether to accept third-party participation during the consultation phase, but RCEP still makes basic guarantees. The consultation process established by RCEP is rigorous and not closed. Where a third party considers that the consultations are of substantial commercial interest to it, it will be permitted to join the consultations after completing a copy of the request in strict accordance with the time and procedural requirements, and obtaining the consent of the parties involved directly in the issue. In the reform of WTO's dispute settlement mechanism, the parties are basically unanimous on this topic, and all take a positive approach to the issue of expanding the rights of third parties.

### **3.3.2. Functional Aspects**

Paragraph 4 of Article 19.4 of RCEP reflects the value orientation and attitude of RCEP towards the countries in dispute. The provision on the obligation to consult in good faith when the dispute is released reflects the principle of good faith that encourages full mutual understanding and accommodation among the parties.

First, in order to ensure efficiency, the RCEP provides that the respondent party shall give due consideration to the consultation request of the prosecution, communicate carefully, and send appropriate personnel to participate, so as to facilitate the orderly conduct of consultations. In addition, the party making the consultation request should clarify the factual and legal bases for its reasons and thereby ensuring the effectiveness of consultation among them.

Second, it provides the guarantee of transparency and fairness. According to the relevant provisions of RCEP, the parties involved in the consultation shall provide adequate information as part of the consultation procedure in good faith, in order to review the matters in dispute. Besides, the parties shall keep not reveal the confidential or property information known during the consultation process [8].

## **4. The Remained Issue and China Orientation of the Dispute Settlement Mechanism of RCEP**

### **4.1. The Remained Issue of the Dispute Settlement Mechanism of RCEP**

Comparing with the DSB of the WTO, it has been innovated and optimized to some extent, but the settlement mechanism to the investment disputes targeted to manage the conflict caused by investment between the country and the investors has not been set up yet, while there is only a discussion for the work plan to relevant issue, stated that there is a need for the contracting party to have further discussion on investment disputes. Besides the dispute settlement in Chapter 19 could only be applied to the situation when the parties to the dispute are both contracting parties, in that case when the dispute comes out between investors and contracting party the settlement could not be put into use, which means that the DSB of RECP is not suitable for the international investment dispute. However, the establishment of the investment dispute settlement mechanism of RCEP also in a dilemma since the existing Investor-State Dispute Settlement (ISDS) began to refactor.

Despite to take the evolutionary ISDS mechanism into consideration, other specific factors like the large gap between the level of economic development and the total amount of investment among member states, together with the different attitudes towards ISDS mechanism also have to attach great importance [13]. If the investment dispute settlement mechanism, especially the ISDS mechanism, is

not established in a timely manner in line with the regional characteristics of RCEP, the investor will not be able to get relief when the legal rights of the investor are infringed upon by the party violating the investment provisions, which will also affect the total investment amount of RCEP and the subsequent membership of the RCEP [13]. In that case, China has the obligation to promote the start of the discussions on relevant issue as soon as possible based on this situation.

For the settlement of disputes under competition policy, RCEP chooses to apply negotiation to settle competition policy disputes. This method is relatively flexible because it is not mandatory and RCEP does not make specific requirements on the substantive content of consultation procedures [14]. Although the consultation method can guarantee the full discretion of both parties and bring convenience to the settlement of RCEP disputes, it is too simple to guarantee the settlement of competition policy disputes in terms of procedure. At the same time, too much discretion on both sides of the dispute often makes the outcome of the dispute settlement affected by the political and economic strength gap between the two sides, which is not conducive to creating a fair competition environment and ensuring the stability of the RCEP competition policy consultation process [15].

#### **4.2. Support the Belt and Road Initiative and Enhance Economic and Trade Cooperation in the Asia-Pacific Region**

The RCEP dispute settlement mechanism may provide new ideas for the current Belt and Road trade dispute settlement. Since the Belt and Road to participate in the national wide coverage area, while before joining “the Belt and Road”, these countries belonging to different economic organizations, members of the identity of the overlap between regional economic organization, the legislation, the difference of development level of the existent trade dispute settlement mechanism has been insufficient to cope with all the way “area” actual demand from country to country. As the largest free trade area in the world, the RCEP covers a wide area and has similar problems with the construction of the Belt and Road Initiative. Therefore, the dispute settlement mechanism of the RCEP is of certain reference value.

As an exoteric regional cooperation initiative, most of the agreements it signed are Bilateral Investment Treaty (BIT), while a large scale of the cooperation initiatives are also reflected through memorandums, declarations and joint statements. Cooperation is mostly carried out through bilateral and multilateral mechanisms of existing economic as there is no specific mechanism for the Belt and Road at present, besides some of the cooperation initiatives also actively participating in the RCEP. So from the perspective of the degree of convergence of member states, it would be conducive to the stable development of world trade cooperation to take the RCEP dispute settlement mechanism as reference to establish it for the Belt and Road. The RCEP dispute settlement mechanism is also friendly to developing countries while most of the countries among the Belt and Road currently use “local remedy” as a means of dispute settlement [16]. The implementation of this mechanism in developing countries is often not conducive to fair and reasonable legal remedies for investors. As for the countries along the “Belt and Road”, China plays the role as a “capital exporter” and has more investment in these countries. Due to the low level of legalization in the host country and the opacity of the market, investors could not get enough legal remedies under the use of this policy.

The RCEP dispute settlement mechanism continues the DSU consultation - panel review framework of the original WTO dispute settlement mechanism. Although it does not emphasize “necessary”, it stipulates the obligation of all member states to consult in good faith. The establishment of the panel also effectively ensures the efficiency of dispute settlement. The dispute settlement mechanism, which is designed according to the characteristics of RCEP and developing countries in the Asia-Pacific region, is an innovation and development of the WTO dispute settlement mechanism [17]. Compared with the original WTO dispute settlement mechanism, it provides Asia-Pacific member states with a settlement mechanism more in line with the needs of national interests,

pays more attention to fairness, and has significant timeliness advantage and larger application space, which can also reduce member states' dependence on the original WTO dispute settlement mechanism.

### 4.3. Enhance China's Influence and Discourse Power as a "Practitioner"

In the past 19 years since its accession to the WTO, China has accumulated a lot of experience from being a passive victim of litigation to skillfully using the dispute settlement mechanism to safeguard its legitimate interests. In actively promoting the construction of the RCEP dispute settlement mechanism, China's unique views on the use of the dispute settlement mechanism and the development of the FTA dispute settlement mechanism are also reflected. In China's legal tradition, legislators and their permanent bodies interpret laws and regulations, which is also reflected in Article 18.3 (1) of the RCEP [17].

At the very beginning of the establishment of the RCEP mechanism, China has made great efforts to make its position clear and proposed a "Chinese solution" to the dispute settlement so that the RCEP mechanism can effectively resolve disputes and better meet the needs of development. At present, the RCEP does not have a specific mechanism targeted at resolving investment disputes between investors and countries, and only a work plan on relevant issues has been discussed. However, both the "local remedy" and the temporary arbitration have some problems. Therefore, China should actively promote the further discussion and study of the relevant issues.

## 5. Conclusion

The establishment of the RCEP dispute settlement mechanism provides a new solution for dispute settlement in the multilateral trading system bases on the WTO. Compared with the original WTO dispute settlement mechanism, the trade dispute settlement mechanism under the background of RCEP attaches more importance to the adjudication efficiency. At the same time, the dispute between the parties strengthening and expert group selection requirement for qualification of independent participation, also in part reflect the RCEP in modernization of dispute settlement mechanism to make improvements, although its dispute settlement mechanism is still there are some problems, but the RCEP dispute settlement mechanism reflects the position and more developing countries in east Asia regional characteristics. It has a profound influence on promoting the development of international trade. China should also effectively make use of this mechanism to safeguard its interests and learn from experience to help advance the Belt and Road Initiative and its judicial construction while improving and refining the RCEP dispute settlement mechanism.

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