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Absence of and Options for Investor-State Dispute Settlement Mechanisms in Regional Comprehensive Economic Partnership Agreements

Zhengrong Chen, Suhaimi Ab Rahman, Hanna Ambaras Khan
School of Business and Economics, Universiti Putra Malaysia

Abstract
The RCEP dispute settlement mechanism lacks an investor-state dispute settlement mechanism, which will result in the limitation of low level of entity protection in the field of investment.The Regional Comprehensive Economic Partnership Agreement (RCEP) came into force on January 1, 2022.Chapter 19 of the RCEP agreement provides for a separate dispute settlement provision, showing the importance of the RCEP agreement to dispute settlement, but with the further entry into force of the level of regional cooperation However, as the level of regional cooperation further takes effect, the gradually expanding level of investment will require a more sound mechanism for remedy and protection of investment rights, for which the RCEP is incomplete without an investor-state dispute settlement mechanism, and the subsequent negotiations of the RCEP can follow the existing mechanism of the RCEP, invoke other international investor dispute mechanisms, and establish the RCEP's own investment tribunal to resolve investor-state disputes. In order to seek to form a multi-modality investor dispute settlement mechanism that integrates dispute prevention, consultation, mediation or arbitration.

Keywords: Mediation, Investment Dispute， Panel, Third Party, Investment Dispute Settlement Mechanism, RCEP

Introduction

The American scholar Michael S. Valihola once said, "The key condition for the successful implementation fulfillment of an international treaty is the operation of the dispute settlement mechanism therein." The investment chapter and other relevant chapters and articles of RCEP reflect both investment agreements (including bilateral investment treaties, investment chapters of free trade agreements or investment agreements under the framework of free trade agreements) in terms of investment access and liberalization, investment promotion and facilitation, investment protection, and host country regulatory powers. In Chapter 19 specifically agreed to dispute settlement provisions, as more investors participate in the framework agreement of RCEP, the dispute settlement mechanism lack of investor-state dispute settlement mechanism, then for investors is incomplete, but also affect the investor's investment needs. From the viewpoint of legal economics, the development of

the system to prevent disputes in advance is a kind of ex ante preventive regulation, which is conducive to reducing transaction costs and maximizing economic efficiency. Investors investing internationally will take the remedy of rights in case of disputes and the exit of capital as an important reference of a country's business environment, and this factor will also influence the development of investor dispute settlement mechanism. At present, the RCEP mechanism will set aside the investor-state dispute settlement mechanism for subsequent discussion, and the design and development of the investor-state dispute settlement mechanism in the RCEP mechanism is a practical need for theory and reality.

Current Status of Investor-State Dispute Settlement Mechanism in RCEP Mechanism

The objective of RCEP is to establish a modern, comprehensive, high-quality, and mutually beneficial large-scale regional free trade agreement to promote the expansion of regional trade and investment and contribute to global economic growth and development. In the field of investment, "modern" means that the investment provisions include dispute settlement applicable to the main international investment environment, "comprehensive" in openness should be able to solve the problems of countries and even investors, "high quality The meaning of "high quality" is to combine the current international mainstream World Trade Organization framework and the investment measures agreed in the "ASEAN+1" free trade agreement, and gradually adapt to the actual needs of different RCEP member countries. The impact of "anti-globalization", "new crown epidemic", "Russia-Ukraine war" and other factors have made countries opposed to the inclusion of investor and inter-state dispute settlement in the framework of RCEP. The scope of the RCEP. So how should the RCEP investor-state dispute settlement mechanism be developed? These questions need further analysis and discussion.

Impact of the absence of the RCEP Investor-State Dispute Settlement Mechanism

The jurist Petersmann once said, "A common feature of all civilized societies is the need for a set of rules and procedures for the peaceful settlement of international disputes that apply and interpret the rules, The RCEP investment chapter covers four main areas: investment liberalization, including investment protection, investment promotion and investment facilitation measures. Specifically, the chapter contains investment protection provisions such as fair and equitable treatment, expropriation, foreign exchange transfer, and compensation for losses, as well as investment facilitation provisions such as dispute prevention and coordinated settlement of foreign complaints. the period of negotiation and signing of RCEP was a time when the traditional investor-state arbitration (ISA) mechanism was under attack and challenged. Investment agreement arbitration was repeatedly initiated by investors in Canada and developed European countries in the NAFTA and ECT mechanisms.

Numerous countries in the international investment arena have joined in reforming, limiting or replacing traditional investor-state arbitration mechanisms. The absence of an investor-state arbitration mechanism in the RCEP agreement is detrimental to dispute resolution in investment, and investors are faced with diverse options in the investment process, which can lead to procedural and formal uncertainty. The lack of an investor-state dispute mechanism requires the use of or reference to other procedures to choose from when dealing with disputes, which can easily lead to the "Spaghetti Bowl Phenomenon" of diverse choices between international trade agreements. Due to the lack of dispute settlement mechanism between investors and countries, in the actual outbound investment process, investors and host countries need to choose other dispute settlement procedures and forms or through

local remedies of host countries; for local remedies investors are bound to worry that host countries may be suspected of violating investment agreement obligations such as fair and equitable treatment, indirect expropriation and compensation in the field of investment when exercising regulatory power. In this process, investors need to invoke the third-party investment dispute settlement mechanism. At the same time, there are various BIT provisions, regional trade agreement provisions, and international dispute settlement mechanism provisions among RCEP member states, and these dispute settlement mechanisms include investor-state arbitration mechanisms. It is worth noting that Article 11 of Chapter 17 of RCEP does not exclude all matters involving foreign investment access review decisions from the national dispute settlement mechanism, but those that do not involve foreign investment access review decisions or foreign investment access review conditions still fall within the scope of Chapter 19 interstate dispute settlement.

Content of RCEP Dispute Settlement Mechanism

In view of the above problems in the dispute settlement mechanism in international trade, during the RCEP negotiations, the parties put forward different ideas around the design of the dispute settlement mechanism, which scholars summarized as political settlement model, judicial settlement model, and mixed settlement model. Chapter 19 of RCEP adopts a hybrid settlement model combining consultation and mediation, with the value choices of valuing efficiency and ex ante mediation interspersed throughout the agreement. Since the RCEP mechanism was first established by the 10 ASEAN countries, it inherits and develops the advantages of the ASEAN dispute settlement mechanism; the establishment of RCEP further takes into account the different legal practices and economic environment among different member countries, and designs the dispute settlement procedures with the value choice of flexibility and efficiency in a targeted manner; taking the "transaction cost" in legal economics The RCEP dispute settlement mechanism takes "transaction costs" in legal economics as the entry point and forms a set of general rules and special rules as well as dispute prevention and dispute settlement.

The RCEP dispute settlement mechanism places consultation as the most central position in this dispute settlement mechanism, in order to reflect the development of the agreement to maintain autonomy, efficiency and flexibility, while always focusing on consultation and prior coordination in the operation of the various dispute settlement procedures. The jurisprudence behind this provision also provides a glimpse of the principles of convenience and efficiency that have always permeated the entire process of the dispute settlement mechanism.RCEP attaches importance to the principles of ex ante prevention and efficiency and flexibility by providing for a characteristic panel system, which provides that if a contracting party (the prosecuting party) fails to consult on the resolution of a dispute over the respondent's measure discrepancies or failure to meet its obligations under the investment chapter, it may resort to the panel mechanism, and if the respondent loses, it shall Chapter 19 of the RCEP contains 21 articles devoted to specific dispute settlement provisions.

Content of RCEP Investment Dispute Settlement Mechanism

In view of the above problems in the dispute settlement mechanism in international trade, during the RCEP negotiations, the contracting parties put forward different propositions around the design of the dispute settlement mechanism, which were summarized by scholars as the political settlement model, judicial settlement model, and hybrid settlement model. Chapter 19 of RCEP adopts a hybrid settlement model combining consultation and mediation,

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Chapter 10 of the RCEP has an investment clause and Chapter 19 has a dispute settlement clause, but not all investment-related dispute settlements can be invoked under the relevant clauses. For example, the national treatment clause in Chapter 10, Article 4 of the RCEP agreement stipulates that the national treatment granted by a party shall not be less favourable than that granted to other investors or investments under the type of central government, and there is no explicit dispute resolution method for "national treatment". According to the process of international treatment of national treatment, it can be seen that foreign investment is subject to the jurisdiction of a country, first of all, the remedy is sought under domestic law, and then after the exhaustion of local remedies under domestic law, the home country will seek diplomatic protection. The "most-favored-nation" treatment under Chapter 10 specifically excludes investors from Cambodia, Laos, Myanmar and Vietnam. Both "most-favored-nation" and "national treatment" are disputes in which specific investment measures of the host country violate the agreement and cause injury to specific foreign investors, both of which conflict with national jurisdictions and are based on the principle of exhaustion of local remedies. 19 dispute settlement mechanism can be on the investment chapter related to disputes arising from the interpretation and application of the provisions, or disputes over contracting measures of the parties, such as investment treatment and compensation for damages incompatible with the investment chapter, and disputes arising from the failure of the parties to meet such obligations. More importantly for investment disputes such as violations of tariff and non-tariff measures for trade market access, national treatment and the MFN principle, the main remedy is the actual performance of obligations such as the modification or elimination of non-conforming measures by the obligated party to bring them into conformity with the obligations of the agreement or the adoption of measures to fulfill the obligations of the agreement; rather than the remedy of an FTA-independent investment agreement as in the case of monetary damages. Under the RCEP interstate dispute settlement mechanism, even if the host country does not comply with the panel ruling and decision, it is the central government level organ of a country that enters into a compensation agreement with the home country, and under such measures the host country only pays damages to the relevant central government of the home country, and not to the investor. This reflects an important difference between the interstate dispute settlement mechanisms of FTA investment chapters or investment agreements in the framework of FTAs and those of stand-alone investment agreements. In Chapter 10, Article XIII of the RCEP, compliance with the legal and administrative procedures of the Parties is required before compensation can be paid in an expropriation. Thus, we can find that national disputes in inter-investment involve administrative and judicial procedures of a country, and external independent judicial procedures can conflict with the internal administrative and judicial procedures of a country, so the following dispute settlement methods are agreed in Chapter 19 of RCEP:

Consultation has become the most efficient way to resolve international disputes in international economic and trade relations due to its high efficiency and flexible handling. Guided by the principle of efficiency, Chapter 19 of the RCEP encourages the parties to a dispute to consult at every stage of the dispute to reach a mutually agreed solution to the dispute. It also provides that "a respondent Party shall give due consideration to requests for consultations made by the other respondent Party and shall give such consultations an adequate opportunity to be considered", reflecting the fact that any Party may request the other Party to consult on its dispute. The consultation process also gives both parties greater authority to resolve issues in the area of investment, and different definitions of the same terms between the disputing parties will lead to different interpretations of the functional concept of "measures" in the area of investment in Chapter 10 of the RCEP. If limited to the scope of the legislative acts of the host country, while the host country violates the investment agreement and damages the rights and interests of investors, although there are also abstract legislative acts, limited to the scope of specific administrative acts, this limitation is equivalent to the largest number of acts that may damage the rights and interests of investors excluded from its scope of application. This is not reasonable for the solution of investors' problems. The Agreement interprets "adequate protection and security" as "ordinary protection" of investments of investors from other countries, while the protection of security in the field of investment security should not be ordinary security protection of other countries, but should be based on the principles of commercial equality and investment reciprocity. It should be a commercial protection model based on the principles of commercial equality and investment reciprocity. The purpose of the agreement is to provide for all measures to facilitate consultations between states, so that the parties can sort out the conflicts as much as possible during the consultations, and furthermore to give the function of participation of relevant third parties in the consultation process. Chapter 10 of the RCEP sets forth strict criteria for efficient requirements in the area of investment, and there is no specific agreement on the definition of levy in the area of investment, the factors to be considered and the criteria for justification of investment for consultation in the verification of intervention, except that The dispute settlement provisions of RCEP stipulate that the parties to a dispute may at any time agree to voluntarily use good offices, mediation and conciliation as alternative methods of dispute settlement to resolve their disputes, so consultation and mediation procedures can also be applied in the field of investment.

In the RCEP dispute settlement mechanism, the Panel of Experts shall make an objective assessment of the matters before it, including the facts of the case, the applicability of the provisions of this Agreement invoked by the parties to the dispute, whether the measures at issue are inconsistent with the obligations under this Agreement, and whether the Respondent has failed to meet its obligations under this Agreement. The Agreement also provides that the Referral Panel shall consult with the parties to the dispute on a regular basis and shall provide the parties to the dispute with ample opportunity to work out a mutually agreeable solution. At the same time, it shall review the matters referred to in the request for the establishment of the Panel, in accordance with the relevant provisions of this Agreement, and make determinations and decisions in accordance with the provisions of this Agreement. The panel shall include in its report a summary of the descriptive parts of the arguments of the parties to the dispute and of third parties, its determination of the facts of the case and of the applicability of the provisions of this Agreement, its determination of whether the measures at issue are inconsistent with its obligations under this Agreement, its determination of whether the Respondent has failed to comply with its obligations under this

Agreement, and the reasons for the determinations and decisions referred to. The RCEP panel process has a "quasi-judicial" function, and strict requirements have been set for the procedures and time requirements for the establishment of the panel, as well as for the confidentiality and recusal of the process. The procedural process for the establishment of a panel of experts within the scope of the dispute is that the prosecuting party may request the establishment of a panel if one of the parties to the consultation fails to respond within seven days, or fails to resolve the dispute through consultation within the time limit. From the perspective of the specialized investment tribunals around the world, they all have strict regulations on their procedures and processes, and the panel can refer to the process of investment tribunals to resolve investment disputes. In this point and the WTO panel requirements are inconsistent, in the WTO dispute settlement mechanism is to set up a panel of experts by the DSB decision to set up, while in the RCEP agreement is the request for the establishment of a panel of experts from here for the requested party, in this level of comparison found that the RCEP panel of experts procedures to intervene earlier, the use of more flexible form. The RCEP sets up the obligation to set up a panel of experts for both parties (mainly for the respondent). The RCEP panel procedure is also characterized by the fact that the panel's decision is final and binding on the parties to the dispute.

Existing Investor-State Dispute Settlement Mechanism

RCEP was established by the 10 ASEAN (ASEAN) countries as the main initiator, in addition to regional and bilateral trade and investment between RCEP member countries such as China-Japan, China-Korea, China-Australia, and China-New Zealand in the field of investment, it also includes the Investor-State Dispute Settlement (ICSID) mechanism, the China-ASEAN Dispute Settlement Mechanism Agreement between China and ASEAN countries, etc. RCEP Chapter 20, Article 2 of the RCEP also provides for the interpretation of provisions in case of conflict between the RCEP and other agreements, clearly emphasizing that each RCEP member state intends to make the RCEP and its existing international investment agreements co-exist, and that the relationship between the RCEP and its existing international agreements, such as bilateral investment treaties and free trade agreements, "shall be determined on a case-by-case basis. The choice is between Chapter 19 of the RCEP, the China-ASEAN Dispute Settlement Agreement, the bilateral investment treaties between China and the Contracting Parties, the regional free trade agreements between China and the Contracting Parties, and the respective interstate dispute settlement mechanisms contained therein.

Investor State Dispute Settlement (ICSID)

New ICSID reform rules came into force on July 1, 2022, primarily to overcome the cumbersome, time-consuming and costly nature of the ICSID process. New expedited arbitration procedures, new distributed arbitration rules, and the ability of arbitral tribunals to determine the timing of such procedures at their own discretion were further introduced. The dispute resolution system is also a common way to depoliticize the field of international investment disputes and a beneficial addition to host countries in attracting foreign investment. It mainly focuses on the resolution of investment disputes between investors and contracting states. The ICSID applies to any legal dispute between a Contracting State and a national of another Contracting State arising from an investment, provided that the dispute mechanism is agreed to in writing by both parties and submitted to ICSID. Therefore, in terms of applicable law and jurisdiction, the choice of law applies with more emphasis on the autonomy of the parties, and the subject matter is emphasized between the Contracting State

and the national of the other Contracting State, to the exclusion of the Contracting State and the other Contracting State. Article 42 of the Convention specifically provides for the choice of applicable law, "A dispute shall be decided in accordance with such rules of law as may be agreed upon by the Parties". Thus, the scope of application of the ICSID and its prerequisites must be in the field of investment and where both parties are members of Contracting States (only States and individuals), and subject to the autonomy of both parties. With respect to the enforcement of investment awards, the Convention obliges any Contracting State to recognize and enforce the award. According to Article 54 of the ICSID Convention, any Contracting State shall recognize an award made under this Convention as binding and shall enforce it in its territory as if it were a final judgment of a court of that State. For awards made under arbitration rules other than ICSID, investors may invoke the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) to seek recognition and enforcement of the award in a Convention Member State.

China-ASEAN Free Trade Area (CAFTA)

On November 29, 2004, China and ten ASEAN countries signed the Agreement on Dispute Settlement Mechanism (DSM). The Dispute Settlement Mechanism provides detailed provisions for the purpose of liberalization and facilitation of trade and investment disputes between China and the ten ASEAN countries, from settlement methods and steps, etc. In particular, the Dispute Settlement Mechanism provides dispute settlement methods for both parties to the dispute, in addition to the traditional dispute settlement methods such as diplomacy and consultation. Among them, the consultation procedure is the mandatory and primary procedure for dispute settlement in the China-ASEAN Free Trade Area. For more than a decade of the ASEAN Dispute Settlement Mechanism, the RCEP provisions follow many elements of the ASEAN Dispute Settlement Mechanism to a practical extent, and are more predictable and normative for the parties. The scope of disputes accepted by the agreement is also specified in detail, which also overcomes the various problems arising from the different legal systems of member states within the ASEAN framework.

As far as the ASEAN investment dispute mechanism is concerned, the China-ASEAN Investment Agreement deals with a restricted interpretation of the scope, its content does not include the negative list and investment access provisions, and for protective provisions also cannot resort to the investor-state dispute settlement mechanism. As the most active individuals in economic activities, if enterprises and individuals encounter international civil and commercial disputes in cross-border trade or investment and have to solve them through political or other judicial means, it is decided that there is not enough match in the process of investors' going out. In the provisions of expropriation and compensation, the China-ASEAN Investment Agreement makes detailed provisions for investors, which can better serve as individual investors in terms of applicable ability compared with the RCEP agreement.

BIT (Bilateral Investment Treaty)

Most BITs do not provide for dispute settlement mechanisms in detail, and part of them will invoke other dispute settlement mechanisms such as ICSID to resolve disputes between investors and countries, and another part will adopt the principle of territorial jurisdiction for investment disputes . In the case of the BIT between China and Malaysia, for example, if the dispute is not settled amicably within six months, the parties will need to choose the administrative authority or agency of the contracting party where the investment is made and seek relief; or file a lawsuit with the court of jurisdiction of the contracting party where the

investment is made; and only if the dispute regarding the amount of compensation is mutually agreed to be submitted to an international arbitration tribunal. Specifically China and Myanmar, China and Cambodia agreed in the BIT to invoke the ICSID Convention for arbitration, and for bilateral investments of other countries only to a specially established arbitration. The China-Thailand BIT does not provide for an investor-state arbitration mechanism but only for inter-state arbitration, while all other BITs between contracting states include an investor-state arbitration mechanism, the China-Brunei BIT and the China-Myanmar BIT favor investor protection with broad and virtually unlimited investment protection entity provisions and dispute resolution provisions allowing any investment dispute to be submitted to arbitration. The other scope BITs are biased toward protecting the host country. Only a relatively small number of substantive provisions for investment protection are provided in these protection provisions, and only the procedural provisions invoke dispute resolution by way of arbitration for the content of investment disputes. In contrast, the China-Philippines BIT provision allows for the submission of investment-related disputes to arbitration, a formulation that could be interpreted to mean that the entire expropriation dispute could be submitted to arbitration. The RCEP also includes in its scope not only disputes arising out of the interpretation of the Agreement between the Parties, but also disputes arising out of the breach of obligations under the Agreement between the Parties.

International Arbitration Tribunals

Common dispute resolution predecessors in international investment arbitration include amicable settlement between the parties, exhaustion of local remedies, and third-party selection. International investment arbitration is a mechanism for resolving disputed issues arising between an investor and a host country concerning an investment pursuant to an international investment treaty. The jurisdiction of an investment tribunal is based on the consent of the host country and the investor, and is the dispute resolution mechanism chosen by mutual consent, unlike other arbitration procedures where the absence of a contractual relationship between the investor and the host country does not affect the creation of an international investment arbitration. As long as there is a contractual continuing legal relationship between the parties, the investment treaty concluded between them on a jurisprudential basis is a continuing offer of arbitration by the host country, and the initiation of arbitration proceedings by the investor is considered a commitment to the host country's offer, and the basis of the consent is formed from there. The initiation of international investment arbitration is considered to be an exclusive right created by the investment treaty for the investor. The investor can initiate arbitration proceedings at any time, while the host country can only respond passively. The problem applied by international arbitral tribunals in jurisprudential practice is that investor-State disputes can present competing jurisdictions between investment tribunals and domestic courts; the need to overcome the investment tribunal's self-expansion of jurisdiction can further limit the narrowing of the scope of application of investment arbitration in the event of a conflict with the host country's judicial system. Investment tribunals tend to make interpretative conclusions that favor an expansive interpretation of jurisdiction ratione personae, ratione materiae, and ratione temporis, and the applicable interpretation of investment treaties also shows an expansive interpretation. The use of international arbitral tribunals in the RCEP mechanism requires not only clarification of the conditions for commencement and the identity of the investor, but more importantly, the scope of jurisdiction and precise interpretation of the investment involved,

and clear authorization of investment arbitration within the scope of the corresponding consent.

Development Path of Investor-State Dispute Settlement Mechanism in the Context of RCEP

From the development path of international investment agreements, the development of investment agreements has been increasingly integrated with trade agreements in addition to the development according to bilateral investment treaties, which is also confirmed in terms of the formulation characteristics of RCEP, so the investment chapters under trade agreements or investment agreements under the free trade framework influence and integrate with each other, and the Chapter 10 investment chapter of RCEP is also integrated into the overall The investment chapter of Chapter 10 of the RCEP is also integrated into the overall free trade framework.

For investment facilitation disputes, since the RCEP can invoke third parties, it is possible to consider applying the types of dispute settlement procedures currently available to individual investors and national investors. Disputes arising from anti-dumping and countervailing measures that may give rise to "political or diplomatic" considerations are excluded from the scope of application of the dispute settlement mechanism, as is the application of the dispute settlement mechanism to disputes arising from the enforcement of any conditions or requirements that must be met for an investment to be approved or recognized by a governmental authority of a Party, including a foreign investment authority. Any dispute arising from the enforcement of any condition or requirement for the approval or recognition of an investment made by a governmental authority of a Party, including a foreign investment authority. This is because these areas are highly susceptible to political considerations that affect the efficiency of the dispute settlement process and reflect the progressive nature of the RCEP's dispute settlement provisions.

Due to the lack of investor-state dispute settlement mechanism in the RCEP mechanism, it is necessary to draw on investment bilateral treaties between RCEP contracting parties in the specific investment process. The complexity and diversity of current BITs and agreements such as the China-ASEAN Investment Agreement (CAIA) among the Contracting Parties have led to the "spaghetti bowl effect" due to their overlapping fragmentation. The RCEP agreement enhances the certainty and predictability of dispute settlement jurisdiction, but for investors involved in the expropriation of compensation payments can only be submitted to arbitration, ignoring the role of preliminary consultations.

The most important considerations for investors in choosing dispute settlement mechanism in the process of going global are efficiency and cost, while the RCEP dispute settlement mechanism emphasizes the role of consultation and panel of experts, and the procedures of RCEP dispute settlement mechanism can be referred to in the investment field under the autonomy of both parties' intention. It also provides that the parties to a dispute may at any time agree to voluntarily use the alternative dispute resolution methods of consultation, good offices, mediation and conciliation to resolve their dispute. Disputes in the investment field can also be resolved through negotiation. Even if there is no contractual agreement between the parties to a dispute, the practice of pre-negotiation is very efficient in international trade. Negotiation emphasizes flexibility in dealing with dispute resolution and coincides with the principles of RCEP dispute resolution. Since the RCEP mechanism encourages every effort to resolve disputes, there is no need to be confined to a fixed procedure in the area of investment and the flexibility to choose mediation allows the parties to a dispute to establish the best solution to the conflict on their own. Mediation is less costly,

faster, confidential, and helps preserve the business relationship between the parties. When parties to a conflict decide to engage in mediation, the process helps them reach an agreement. This initiative saves time and process for both parties and eliminates the need for the extensive process work involved in "quasi-judicial proceedings" and "judicial proceedings," which is in keeping with the spirit of the RCEP dispute resolution mechanism.

Developing the use of the RCEP investment dispute settlement mechanism on the basis of the RCEP

As the provisions of the RCEP investment dispute settlement are still under specific discussion, various Contracting States hold different positions on the investor-state dispute settlement mechanism, and the practices in the current Chapter 19 dispute settlement mechanism can be appropriately invoked in the currently missing investor-state dispute settlement mechanism. In practice, the development of the ISDS mechanism has shown flexibility and diversity, and RCEP should actively refer to Chapter 19 in the subsequent negotiations. RCEP emphasizes the importance of prompt dispute resolution, and in invoking Chapter 19 to solve problems, investors should focus on whether both parties are parties to the agreement in the process of going out. In order to limit dispute resolution to a reasonable interpretation, RCEP explicitly provides for a forum selection clause, which excludes the right to appeal the same dispute to dispute resolution bodies under other treaties, avoiding the reduction of efficiency in use due to unclear agreement or different interpretations. At the same time, it also gives the parties the right to exclude the application of dispute settlement mechanisms by agreement in the settlement of disputes, and the relevant provisions of the RCEP may be excluded by the parties if the parties to the dispute agree that this article does not apply to the settlement of a particular dispute.The RCEP provides for a treaty conflict clause between the RCEP and other agreements, clearly emphasizing that the RCEP parties intend to make the RCEP and its existing international agreements "The relationship between the RCEP and existing international agreements, such as bilateral investment treaties and free trade agreements, is "case-by-case". In the process of signing various contracts, investors can also choose the dispute settlement method through the agreement of autonomy in the content of the RCEP, and the RCEP dispute settlement procedure is based on the following steps: prevention → consultation → panel procedure → implementation and enforcement, which can also be referred to in the settlement of investment disputes. Since the panel procedure has a certain "quasi-judicial" function, there is room for applying the panel to the settlement of investor investment disputes, and the role of the existing third-party mechanism of the RCEP mechanism can also be used. parties to the dispute to participate in the dispute settlement process as third parties. In this procedure, allowing third parties to participate in dispute settlement among investments is consistent with the principles on which the RCEP was founded and reflects efficiency and flexibility for both parties to the dispute.

In the past, the traditional investor-state dispute settlement mechanism did not pay enough attention to consultation, mediation, and local remedies in the host country, but more to arbitration. The reform of the ISDS mechanism is mainly to go beyond the shortcomings of traditional investment arbitration and explore a more flexible and diverse ISDS mechanism. Adopting the role of pre-litigation prevention and pre-litigation mediation, such as consultation and expert panels, the ISDS mechanism has developed a diverse and integrated path of both consensual and contractual prevention, consultation, mediation and litigation, in which both investors can make consensual choices. Investor-state disputes are not simply a matter between the host government and the foreign investor, but can involve

disputes over 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. Therefore, in the process of agreement booking, both parties to the agreement should clearly agree on the settlement procedures in the scope of investment under the framework of RCEP, and resolve a series of investment issues arising from the absence of investor-state dispute settlement mechanism under the framework of RCEP by integrating prevention, consultation and expert group provisions in the agreement.

Effective interface with other investor-state dispute mechanisms

ICSID is an important tool for resolving international investment disputes between states and nationals of other states, and the ICSID dispute settlement mechanism is an important part of international investment law. Among the RECP members, all countries except Laos, Myanmar and Vietnam are parties to ICSID, which makes it possible for the RCEP mechanism to be applied to the ICSID mechanism through two main mechanisms: mediation and arbitration. The Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (hereinafter referred to as "Rules of Institution") (IR), the Rules of Conciliation Procedure (hereinafter referred to as "Rules of Conciliation") (hereinafter referred to as "Rules of Conciliation") Rules of Procedure for Conciliation Proceedings (CR), and Rules of Procedure for Arbitration Proceedings (AR). The Washington Convention, which entered into force in 1966, provides for the "Replacement and Disqualification of Conciliators and Arbitrators" in Chapter V. Conciliation and arbitration are two parallel methods of investor-host country dispute settlement. In 2011, for the first time, ICSID appointed 10 separate mediators and included them in the roster of mediators, whereas in the past, the roster of arbitrators and the roster of mediators of ICSID were the same.

RCEP member states are required to meet the following conditions when applying the ICSID mechanism: The subject matter jurisdiction of the ICSID requires that the arbitration claimant not only meet the "investor" element of the underlying IIAs, but also meet the specific jurisdictional elements of the ICSID provisions. More importantly, the Bilateral Investment Treaty (BIT) between the two countries does not expressly exclude the application of ICSID. There are several prerequisites for the application of ICSID: first, the subject of the dispute should be a national of one Contracting State and the other Contracting State; second, the dispute should fall within the scope of the "investment" provision of ICSID. Third, no other agreement explicitly excludes the application of ICSID rules. It is worth noting whether bilateral or regional texts, such as Bilateral Investment Treaty (BIT), have any prior procedures for consultation or arbitration, and whether local remedies need to be exhausted first. agreed to be governed by ICSID. However, the scope of the disputes agreed to be governed is limited to investment disputes arising from the breach of "obligations under investment agreements relating to national treatment, most-favored-nation treatment, investment treatment, expropriation, compensation for loss, transfer and repatriation of profits, and loss or damage caused to investors through the management, administration, operation, sale or other disposition of an investment". At the same time, the ISDS mechanism has also revealed many system disadvantages such as erosion of the host country's regulatory power, inconsistent arbitration awards and lack of error correction mechanisms, and expensive. This has directly led some countries to withdraw from the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention).The RCEP agreement entered into force on January 1, 2022, while the ICSID member states approved the amendment of the relevant resolution on March 21, 2022, to remedy the problems in the

application of the ICSID in the past application process, making it possible for the RCEP to further apply the ICSID mechanism.

Attempt to establish a permanent investment tribunal under the RCEP framework

At present, the current practice of the international counterparts in dispute settlement initiated by the RCEP Contracting States on the violation of the host country's obligations under the investment agreement to give specific foreign investors caused by the damage, the home state form of diplomatic protection first, should be very consistent with the premise of the exhaustion of local remedies before the exercise of diplomatic protection. The establishment of its own investment tribunal under the RCEP framework is to avoid the impact on the judicial sovereignty of the host country due to the expansion of the jurisdiction of investment tribunals in the past. To further control the tendency of investment tribunals to interpret investment treatment in an expansive manner, and in time to prevent the tribunal's decisions from regulating the judicial and regulatory powers of the host country's investment and forming a "dilemma" with the judicial system of a country.

The application of arbitration procedures is based on the consent of both parties, which is reflected in the tendency of arbitral tribunals in practice to expand the interpretation of the scope of personal, subject matter and temporal jurisdiction and to restrict the interpretation of the preconditions for arbitration in order to expand their jurisdiction, which is reflected in the expansion of the scope of personal jurisdiction and the expanded interpretation of the definition of investment, including "disputes concerning the amount of compensation for expropriation The interpretation of the definition of "expropriation" as any dispute relating to expropriation, as well as the tendency to use "most-favored-nation treatment" as a tool for jurisdictional expansion. The jurisdiction of investment tribunals derives primarily from the commitments of States in investment treaties. To resolve investment disputes, the tribunal needs to interpret and apply the investment treaty to confirm its jurisdiction, examine whether the host state has breached its treaty obligations, and whether it should be held liable.

In the RCEP's attempt to establish its own investment tribunal, two issues are of primary concern: one concerns the investment tribunal's power of interpretation; the second is the establishment of an appeal mechanism. The expansion of the tribunal's jurisdiction relies on an expanded interpretation of investment treaties. For this reason, it is important to clearly agree on the scope of investment before establishing an investment tribunal, so as to reduce the ambiguity of the provisions, limit the interpretation space and jurisdictional boundary of the tribunal, and mitigate the conflict with the judicial sovereignty of the host country. In the case of SGS v. Philippines, the arbitral tribunal circumvented the jurisdictional limits of the host country by interpreting such clauses flexibly, which will certainly cause a country's attitude toward the application of the investment tribunal. In this regard, RCEP must grasp the following points in the process of establishing investment arbitration tribunals: First, the interpretation of the provisions should strike a balance between the purpose of the treaty text and the meaning of the treaty text, and should not go beyond the meaning of the text. Second, a balance should be pursued between the protection of the rights and interests of investors and the interests of the host country, not exclusively interpreted in favor of investors. Third, striking a balance between invoking other treaties and the RCEP agreement, references beyond the scope will lead to multiple meanings, not to mention the great differences in language, culture and legal systems among the RCEP parties. the RCEP mechanism has the characteristics of inherited ASEAN mechanism, for example, Article 40 of

the ASEAN Comprehensive Investment Agreement provides that the arbitral tribunal shall, on its own initiative or at the request of a party to the dispute, request the parties to A joint interpretation of the disputed treaty provision. The decision of the Contracting States on the joint interpretation of the treaty provisions shall be binding on the arbitral tribunal. Any award made by the arbitral tribunal shall be consistent with that joint interpretation decision. Further precise formulation may be made for this purpose on the basis of ASEAN. In the interpretation and formulation of investment, it is necessary to pay attention to several key interpretations: first, the scope of the interpretation of "investor" one is to adopt the control standard and reject the grant clause to clarify the scope of its effect. For example, Article 72 of the FT of Japan and Singapore, a party to the RCEP, provides that "a company of the other Contracting State" means a company incorporated under the law of the other Contracting State, except for a company controlled by a national of a non-Contracting State and not carrying out substantial business operations in the other Contracting State.

Second, to limit the scope of "investment," RCEP parties may impose requirements on investment characteristics and exclude specific assets from the scope of investment. Third, limiting the scope of "investment disputes". Contracting States can clarify both positively and negatively what investment disputes an investor can submit to arbitration and what they cannot. For example, Contracting States could authorize investors to submit to arbitration only on specific investment protection clauses, while excluding arbitrability on specific policy matters such as financial measures and tax measures.

The appellate mechanism was first introduced into investment tribunals in 2016 by the EU-Canada FTA and the EU-Vietnam FTA, unlike the traditional monopsony where an appellate tribunal can uphold, modify or overturn a first instance tribunal award. One of the challenges of introducing an appellate mechanism is how to achieve the transition from a bilateral to a multilateral model. An appellate body established through a multilateral treaty is more capable of achieving consistency and legitimacy in investment dispute resolution. The development path of the appellate mechanism includes two main types: first, the establishment of a multilateral investment court of a judicial nature containing both first and second instance procedures and using the second instance mechanism of the court as the appellate mechanism; second, the establishment of a single permanent multilateral appellate mechanism creating an initial and an appellate tribunal. The special features of the appellate mechanism include two-trial arbitration, permanent institution, mechanism for appointing arbitrators, and code of conduct for arbitrators. Bilateral appellate bodies have been very difficult to develop on the ground in practice, and the attempts to establish bilateral appellate bodies in the EU-Vietnam FTA and the EU-Canada FTA have become significant explorations and breakthroughs. However, the establishment of an investment arbitration mechanism within the scope of RCEP requires the unanimous agreement of all contracting states and the comprehensive coordination of bilateral investment treaties and regional trade agreements among RCEP member states. Reference can be made to the current practice of European bilateral investment arbitration tribunals, and the first intra-regional investment arbitration tribunal mechanism can be gradually mapped out. In this process, one is to avoid the conflict between the existing agreements and the appeal mechanism, and the other is to determine the coordination with other legal systems when the appeal mechanism makes a decision, because the current investment tribunal is a preliminary exploration in the bilateral context, and the multilateral and regional exploration requires further study and negotiation and gradual establishment by all parties. In general, the establishment of investment tribunals is

to provide strong protection and a sound system of rights protection for each member country's deep level of investment in the RCEP agreement.

Summarize

Investors involved in international trade and economic activities should not only be good at identifying business opportunities to achieve their business objectives, but also make good use of the rules and take advantage of the applicable opportunities to make them work for them. On the one hand, it is their own needs in dispute settlement, and on the other hand, it is good at using the rules to prepare for dominating them in a wider context. Setting up an investor-state dispute settlement mechanism is not only a need for investment dispute settlement procedures within RCEP, but also the most important safeguarding factor for deepening the level of investment to ensure the interests of investors. multiple types of bilateral investment treaty dispute settlement provisions between RCEP member states, free trade agreement investment settlement provisions, or other forms of investment dispute settlement agreements under the free trade system, can be achieved by choosing The existing settlement mechanism of RCEP, the investor dispute settlement mechanism with other countries, and the establishment of RCEP's investment tribunal to resolve investor disputes in investment, it is necessary to gradually build RCEP's own investor-state dispute settlement mechanism under the framework of RCEP. Among the many investment dispute settlement mechanisms, investors will definitely choose the most favorable solution for themselves in consideration of economic costs. Therefore, RCEP parties should refer to the new developments and experiences in the reform of investor-state dispute settlement mechanism, and actively explore the construction of a new model that covers dispute prevention functions, as well as consultation, mediation and arbitration "mixed mode" procedures combined with the experience of mainstream investor dispute settlement mechanism. Summarize

Starting from the actual blank of the investor-state dispute settlement mechanism in RCEP, the theoretical hypothesis is based on the positive role of the dispute settlement system in international trade. To make up for the shortcomings of the RCEP mechanism in dispute resolution by improving the system construction, to fill the new challenges and new opportunities that RCEP faces in the investment field that is growing in the future, and to propose a possible solution for the dispute resolution of RCEP member states in the investment field Realistic path of operation. Among the existing RCEP mechanism research, the main focus of the RCEP investment dispute settlement is the investment dispute settlement between countries, and the determination and negotiation of the investor-state dispute mechanism are currently in a critical period for the establishment of RCEP follow-up treaties and agreements . Therefore, it is necessary to study the RCEP agreement on the investor-state investment dispute settlement mechanism and the specific operability measures, and continue to deepen the original RCEP19 chapter on the development of the investment dispute settlement mechanism and the cooperation with other investor-state dispute mechanisms. It is of great significance to effectively connect and try to establish a permanent investment arbitration tribunal under the RCEP framework to deepen economic cooperation among member states and promote high-quality development in the economic and investment fields of RCEP member countries.

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