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APPROACHES TO THE INVESTOR-STATE DISPUTE SETTLEMENT MECHANISM UNDER THE REGIONAL COMPREHENSIVE ECONOMIC PARTNERSHIP

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Abstract

The Regional Comprehensive Economic Partnership (RCEP), which went into effect on January 1, 2022, is regarded by key trading partners as part of efforts to promote deep integration of the global supply chain following the COVID-19 pandemic. The absence of Investor-State Dispute Settlement (ISDS) provisions in the RCEP is a significant obstacle, which might be at odds with current ISDS protocols under other treaties. This article analyzes the contexts, causes, and impacts of the RCEP's lack of ISDS regulations, explores the potential for a new ISDS model, and discusses participating countries' challenges in resolving international investment disputes within the RCEP framework.

Keywords: *International investment disputes, ISDS, RCEP, ASEAN*
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1. Absence of Investor-State Dispute Settlement clause in the Regional Comprehensive Economic Partnership

1.1. Negotiation context and reasons for the absence of an Investor-State Dispute Settlement clause in the Regional Comprehensive Economic Partnership

The Association of Southeast Asian Nations (ASEAN) and six partners began FTA negotiations on 9 May 2013, leading to the Regional Comprehensive Economic Partnership (RCEP) signed by all but India on 15 November 2020.[1] The RCEP, effective 1 January 2022, aims to eliminate 92% of import tariffs in 20 years and includes national treatment and most-favored nation provisions, but lacks Investor-State Dispute Settlement (ISDS) mechanisms.[2] Is this absence a significant omission that participating countries have overlooked in the FTA negotiation process? With a large-scale FTA like the RCEP, the absence of an ISDS mechanism in this agreement is not an omission or lack of effort by the participating countries. Although there is limited official information about the negotiating rounds, there is still some

1 Ministry of Industry and Trade (2022), 'Hôm nay, Hiệp định RCEP bắt đầu có hiệu lực' [Today, the RCEP Agreement comes into effect], *Ministry of Industry and Trade*. Retrieved from: https://moit.gov.vn/tin-tuc/thi-truong-nuoc-ngoai/hiep-dinh-rcep-se-chinh-thuc-co-hieu-luc-tu-ngay-01-thang-01-nam-2022.html [accessed 15 September, 2023].

2 Articles 8.4, 8.6, 10.3, 10.4 of the RCEP.

"side" information showing that the parties have made proposals on ISDS within the RCEP framework.[3] Accordingly, China, Japan and Korea have also made efforts to submit proposed documents on the ISDS mechanism during the negotiation process. The detailed text, making up over a third of the 2015 draft document at 26 pages, had no alternative proposals and faced objections to ISDS from remaining parties, resulting in the exclusion of the ISDS clause in the final document.[4]

Most ASEAN countries oppose ISDS, which lets foreign investors sue host states for actions affecting protected investments under international investment agreements (IIAs). Facing investment disputes, these nations find ISDS mechanisms burdensome. For example, Indonesia's termination of many BITs shows the strain ISDS places on its environmental protection policies, seen as dispossession acts requiring compensation.[5] It is worth mentioning that even Australia also opposes the ISDS arbitration mechanism. The reason comes from the country becoming a defendant in the Philip Morris lawsuit,[6] which resulted in a 7-year legal battle costing 24 million Australian dollar, of which the Australian government was able to recover only half from Philip Morris.[7] Differing opinions among participating countries prevented agreement on an ISDS provision for the RCEP, so it was excluded from the final agreement.

Research by several scholars highlights valid criticisms of the arbitration mechanism under current IIAs. First, arbitral decisions are inconsistent, lacking systematic interpretation of IIA provisions.[8] For instance, *Metalclad v. Mexico*[9] and *S.D. Myers v. Canada*[10] show differing interpretations of the

3 Martin, P. (2016), 'And you thought the TPP was secret. The RCEP is even worse', *Sydney Morning Herald*. Retrieved from: https://www.smh.com.au/opinion/and-you-thought-the-tpp-was-secret-the-regional-comprehensive-economic-partnership-is-even-worse-20161104-gsiaaw.html [accessed 15 September 2023].

4 Gao, H. (2022), 'The investment chapter in the Regional Comprehensive Economic Partnership: Enhanced rules without Enforcement mechanism', in Kimura, F., Urata, S., Thangavelu, S., and Narjoko, D. (ed.) (2022), *Dynamism of East Asia and RCEP: The framework for regional integration*, Jakarta: Economic Research Institute for ASEAN and East Asia, p. 214.

5 Widiatedja, I. G. N. P and Wairocana, I. G. N (2017), 'The lack of the environmental concern in indonesia's bilateral investment treaties', *Hasanuddin Law Review*, Vol. 3, No. 3, pp. 239, 240. See: Price, D. (2016), 'Indonesia's bold strategy on bilateral investment treaties: Seeking an equitable climate for investment?', *Asian Journal of International Law*, Vol. 7, No. 1, pp. 124–151.

6 *Philip Morris Asia Limited v. The Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012-12, Award on jurisdiction dated 17 December 2015, pp. 5-8.

7 Ranald, P. (2019), 'When even winning is losing: The surprising cost of defeating Philip Morris over plain packaging'. Retrieved from: https://phys.org/news/2019-03-defeating-philip-morris-plain-packaging.html [accessed 16 September 2023].

8 Dung, T. V. (2018), 'The dispute resolution mechanism between investors and the state in the EVFTA - The formation of an International Investment Court?', in Dung, T. V. and Huong, N. T. L. (Eds.) (2018), *International Investment Dispute Resolution: Legal and Practical Issues in the Context of Integration*, Vietnam National University Publishing House, Ho Chi Minh City, p. 63.

9 *Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/97/1 (2000), Award of 30 August 2000.

10 *S.D. Myers, Inc. v. Government of Canada,* UNCITRAL, Partial Award dated 30 November 2000.

"fair and equitable treatment" (FET) standard under the same Article 1105 of NAFTA, making future outcomes unpredictable.[11] Second, the lack of objectivity and independence in ISDS arbitration, where arbitrators may favor appointing parties, undermines legitimacy. Third, confidentiality in ISDS lacks transparency, especially on public interest issues like national security and environmental protection.[12] Finally, ISDS arbitration can be ineffective, with disputes dragging on for years and incurring high costs, as seen in Australia's legal battle with Philip Morris.[13]

From a broader perspective, if looking at the special context of the RCEP in which ASEAN is the core, the absence of ISDS also reflects an important approach to interactions between member states under the ASEAN Way, which favors consensus rather than confrontation.[14] The ASEAN Way includes a transnational code of conduct as well as a decision-making process based on consultation and consensus among member states.[15] Establishing an ISDS mechanism like the current one will create a complex, even confrontational, context and weaken the consensus needed to promote the early completion of the RCEP. For China, the RCEP helps rebuild disrupted regional value chains, for Japan, it counters China's influence by involving countries like Australia and New Zealand, and for South Korea, it avoids missing another opportunity like with the CPTPP.[16] The rejection of ISDS does not necessarily mean that the RCEP is hindering regional integration, as ASEAN, both at the individual and collective member levels, remains active in signing trade and investment agreements. But instead of rushing, the parties chose to move forward slowly but surely, which is a better approach to prevent possible backlash due to the ISDS issue.[17]

1.2. The impact of the absence of Investor-State Dispute Settlement and the basis for its application on investors in the Regional Comprehensive Economic Partnership bloc

The absence of ISDS in the RCEP does not preclude future negotiations. Article 10.18 outlines a plan to discuss investor-state dispute settlement within

11 Benedetti, J. P. (2019), 'The proposed Investment Court System: Does it really solve the problems?', *En Revista Derecho del Estado*, Universidad Externado de Colombia, No. 42, Bogotá Jan./Apr. 2019, p. 92.

12 Ruiz, A. M. (2016), *Dispute settlement mechanisms in international investment agreements: Is there a new way towards the future*?, Master's thesis, Major in International Business Law, Tilburg University, Netherlands, p. 16.

13 Ranald, P. (2019), *supra* note 7.

14 Woon, W. (2012), 'Dispute settlement the ASEAN Way', *Centre for International Law*, National University of Singapore. Retrieved from: https://cil.nus.edu.sg/wp-content/uploads/2010/01/WalterWoon-Dispute-Settlement-the-ASEAN-Way-2012.pdf [accessed 15 September 2023].

15 Padmakumara, S. C. (2021), 'A Conceptual Analysis on 'ASEAN Way' as a normative approach for conducting regional affairs', *Faculty of Graduate Studies - Colombo Journal of Multi-Disciplinary Research*, Vol. 6, No. 1, pp. 1 - 12.

16 Gao, H. (2022), *supra* note 4, p. 218.

17 *Ibid*.

five years, with neutral wording that allows discussions without guaranteeing a consensus on an ISDS mechanism, and investors cannot initiate proceedings until then.

From an investment protection perspective, the absence of ISDS in the RCEP creates doubts about its ability to protect investors. Article 17.11 stipulates that the RCEP's dispute resolution mechanism does not apply to decisions by competent authorities on foreign investment proposals. The state-to-state dispute resolution mechanism under Chapter 19 of the RCEP, while unique,[18] is not ideal for investors who must rely on their own country to resolve disputes.[19] Thus, it is necessary to be cautious in clarifying the legal relationship between RCEP and current FTAs/BITs (intra-ASEAN, ASEAN+1, or bilateral agreements between the RCEP participating countries). Given the nature of ASEAN agreements, the RCEP will likely cover intra-ASEAN investment protection alongside ACIA and intra-ASEAN BITs. Therefore, if RCEP participating countries decide to eliminate ISDS, they should coordinate between the related investment dispute settelement provisions, to prevent investors from picking and choosing treaties benefitting them at the expense of the RCEP participating countries.

2. Evaluation of some proposed Investor-State Dispute Settlement models for the Regional Comprehensive Economic Partnership in the future

Based on Article 10.18 of the Investment Chapter, the RCEP participating countries will negotiate a suitable ISDS model for settlement of investment disputes. While the outcome will shape future ISDS solutions, this article explores potential models for the absence of ISDS mechanisms, selected from proposed or practical models of the RCEP participating countries.

2.1. Appellate mechanism

According to UNCTAD's observation of IIAs in 2018, there are five basic approaches to ISDS mechanisms, but three reform-oriented approaches were pursued across various groups of countries at different levels of development and from different geographical regions.[20] However, among these three approaches, only the establishment of a permanent/appellate mechanism represents the most innovative reform option. Countries in the Asia-Pacific region have also begun seeking to improve the ISDS system through this approach. The China-Australia Free Trade Agreement (ChAFTA) stipulates: "Within three years

18 Jingyuan, Zh. (2020), 'An important step forward and a delicate balance – Observations on the Regional Comprehensive Economic Partnership', *ASIL Insights*, Vol. 24, No. 30.

19 Riley, J. (2021), 'A multilateral approach to investor-state dispute settlement issues in the Asia - Pacific Region', *Journal of East Asia and International Law*, Vol. 14, No. 147, pp. 158–159.

20 UNCTAD (2019), 'Reforming Investment Disputes Settlement: A stocktaking', *IIA Issue Note International Investment Agreements*, pp. 1, 2. The remaining two approaches are maintaining the status quo and not including provisions on ISDS.

after the date of entry into force of this Agreement, the Parties shall commence negotiations to establish an appellate mechanism to review awards made".[21] A significant and more defined step forward for this approach is the proposal for the Investment Court System (ICS) by the EU. The ICS has also been accepted by Vietnam and Singapore – key members of ASEAN and also participating countries of the RCEP – in the "new generation" FTAs signed with the EU, namely the EU-Vietnam Investment Protection Agreement (EVIPA) and the EU-Singapore Investment Protection Agreement (EUSIPA).

The ICS mechanism is conceived and shaped with new features to ensure the balanced rights of all parties, revolving around four constituent elements such as consistency, transparency, independence of the tribunal members, and fixed timeframes for each type of dispute,[22] as demonstrated in the following points:

First, The ICS under the EVIPA features a dual-level adjudication system. The first-instance tribunal handles complaints and issues final awards, while the appellate tribunal adjudicates appeals.[23] The EVIPA Committee[24] can adjust tribunal member numbers to maintain balance.[25] Presidents and vice presidents, appointed from third-country nationals, draft and submit working procedures for the Commission's approval.[26] Disputes and appeals are resolved by tribunals with members from a third country, the EU, and Vietnam.[27]

Second, to ensure the effective and impartial operation of the ICS dual-level system, strict regulations govern member selection and appointment. Both levels' members are chosen by a specialized body, like the EVIPA Committee, addressing traditional ISDS limitations by involving investors in appointing adjudicators.[28] Presidents and vice presidents are from third countries, ensuring impartiality. Rotating appointments ensures random and fair selection.[29] In agreements like the Canada-EU Comprehensive Economic and Trade Agreement (CETA),[30] appellate tribunal members are randomly selected by the Joint Committee, promoting fairness and equality.[31]

21 Article 9.23 of the ChAFTA.

22 Dung, T. V. (2019), 'Discussion on the Dispute Settlement Mechanism between Investors and States within the framework of the EVFTA and CPTPP Agreements', *Journal of State and Law*, No. 4, Vol. 372, p. 82.

23 Paragraph 1, Article 3.38 of the EVIPA.

24 Article 4.1 of the EVIPA. The Committee comprises the representatives of the EU Party and Viet Nam.

25 Paragraph 1, Article 3.39 of the EVIPA.,

26 Paragraph 3, Article 3.38 and Paragraphs 5 and 8 Article 3.39 of the EVIPA.

27 Paragraphs 5, 6 and 8, Article 3.38 and Paragraphs 5 and 6, Article 3.39 of the EVIPA.

28 Point a Article 4.1 of the EVIPA. See: Pantaleo, L. (2016), 'Lights and Shadows of the TTIP Investment Court System', in Pantaleo, L., Douma, W., and Takács, T. (eds.), *Tiptoeing to TTIP: What kind of agreement for what kind of partnership?*, The Hague: CLEER, pp. 80-81.

29 Reinisch, A. (2016), 'Will the EU's Proposal concerning an Investment Court System for CETA and TTIP lead to Enforceable Awards?', *Journal of International Economic Law*, Vol. 19, p. 764.

30 Article 26.1 of the CETA. The Joint Committee comprises the representatives of the EU Party and Canada.

31 Paragraph 5, Article 8.28 of the CETA.

Additionally, disputing parties have the right to claim or object if they suspect conflicts of interest or question the qualifications of members, potentially resulting in their removal from the respective levels. Furthermore, to ensure members' continued presence and freedom from economic influence, the Commission has the authority to manage, appoint responsibility for payment, maintenance costs, and daily expenses for members or convert them into regular salaries.[32] Therefore, the ICS ensures that disputing parties have no influence over the individual components of the adjudication council and mitigates the risk of conflicts of interest, addressing a key limitation of arbitration. According to the EC's Reading Guide, this is "a fundamental change compared to the old ISDS system" and provides "an effective way to insulate judges from any real or perceived risks of bias."[33]

Third, the ICS mechanism resolves investor claims if: (i) the measure allegedly breaches investment protection provisions, and (ii) causes loss or damage to the claimant or their locally established company.[34] Claims are not accepted if investors have previously filed a lawsuit regarding the same measure unless withdrawn. Multiple claims on the same issue from related claimants are not allowed,[35] preventing "chain" lawsuits.[36] The ICS limits forum shopping, reduces financial burdens on states, and encourages conciliation and negotiation at any time.[37]

Notably, since the ICS is not a national court system, its rulings can be more readily recognized and enforced in relevant countries, which, according to the initial proposal, involves enforcing rulings under the conditions of the ICSID Convention and/or the 1958 New York Convention.[38] The ICS final award is binding and not subject to appeal, review, annulment, or any other remedy, making it stricter than the ICSID Convention or CPTPP, which allow modifications or annulments. The ICS can only rule on (i) monetary damages and applicable benefits, and (ii) compensation for assets.[39] The first instance tribunal may order the litigation costs to be borne by the losing party.[40]

32 Sections 14 – 18, Article 3.38 and Sections 14 – 18 of Article 3.39 of the EVIPA.

33 European Commission (2015), *Reading Guide 16 September 2015 for draft text on Investment Protection and Investment Court System in the Transatlantic Trade and Investment Partnership (TTIP)*, p. 1.

34 Section 1, Article 3.27 of the EVIPA.

35 Sections 1 – 3, Article 3.34 of the EVIPA.

36 Huong, N. T. L. (Coordinator) (2019), 'Dispute Resolution Mechanisms between foreign investors and host countries - Some recommendations for Vietnam', *University-Level Scientific Research Topic*, Ho Chi Minh City University of Law, p. 112.

37 Article 3.31, Appendix 9 of the EVIPA.

38 Reinisch, A. (2016), 'The EU and investor-state dispute settlement: WTO litigators going "investor-state Arbitration" and back to a permanent "investment court"', *CIGI, Investor-State Arbitration Series*, Paper No. 2, pp. 25–27.

39 Compensation for assets does not necessarily mean compensation for the physical aspect of goods, but it also means that the respondent may compensate in cash equivalent to the market value of the assets, especially in cases of expropriation.

40 Section 4, Article 3.53 of the EVIPA. Legal costs include (a) reasonable costs paid to advisors or other support that the first instance needs, and (b) travel expenses and reasonable expenses for witnesses that the first instance approves.

Another progressive aspect of the ICS mechanism is allowing parties to agree on a tribunal with only one member. This would be suitable for claimants who are small and medium-sized enterprises (SMEs) concerning litigation costs and disputes of small value.[41]

The ICS is a breakthrough mechanism addressing ISDS limitations, favored by China, Australia, and India, and accepted by ASEAN members like Vietnam and Singapore, making it a viable alternative for RCEP discussions.

2.2. Continuing the Investor-State Dispute Settlement arbitration mechanism with improvements

The ISDS arbitration is absent in the RCEP but remains a potential outcome if no better alternative is found.[42] Improvements to the ISDS mechanism, like those in ChAFTA between China and Australia, offer detailed rules and stricter tribunal limitations, balancing interests amid ISDS criticisms, and Australia considers ISDS provisions on a case-by-case basis.

First, ChAFTA ensures that contracting parties have more control over ISDS, or in other words, limit the basis for ISDS litigation, through provisions on the scope of claims/compensation requests, selection and requests for arbitrators, as well as interpretations and guidelines of the participating parties. ISDS arbitration under ChAFTA is limited to violations of national treatment principle.[43] Regarding the interpretation of investment rules, ChAFTA parties can also proactively interpret the rules or interpret upon request.[44]

Second, ChAFTA addresses public concerns about ISDS by enhancing transparency, interpretive rules, consolidating arbitration procedures, and potentially adding appellate mechanisms. It allows public disclosure of (i) pleadings, memorials, and summaries, (ii) hearing transcripts or records, and (iii) written submissions by non-disputing parties, if certain conditions are met.[45] Moreover, both participating countries (i.e., China and Australia) agree that within one year from the effective date of the FTA, they will seek opinions on the application of UNCITRAL Rules on Transparency in ISDS under ChAFTA.[46]

Third, ChAFTA also enhances investment protection through ISDS provisions prioritizing investors in selected areas. It allows investors to seek interim injunctive relief in the administrative or judicial courts of the respondent "in accordance with the law of the respondent, "provided that the action is

41 Section 9, Article 3.38 of the EVIPA.
42 Dymond, T., Lim, J. J. và Sim, C. (2020), 'Investment Treaty Arbitration in the Asia-Pacific', *Global Arbitration Review*. Retrieved from: https://globalarbitrationreview.com/review/the-asia-pacific-arbitration-review/2021/article/investment-treaty-arbitration-in-the-asia-pacific#endnote-011 [accessed September 19, 2023].
43 Article 9.12.2 of the ChAFTA.
44 Articles 9.19.1-3 of the ChAFTA.
45 Article 9.17.2 of the ChAFTA.
46 According to the Supplementary Letter on transparency rules applicable to dispute settlement between investors and the state in ChAFTA exchanged between the two trade ministers of Australia and China.

brought for the sole purpose of preserving the claimant's or the enterprise's rights and interests during the pendency of the arbitration."[47]

Fourth, ChAFTA introduces a provision for a list of ISDS arbitrators and a code of conduct. Within two years of the agreement's effective date, the ChAFTA Investment Committee will establish a tribunal list of at least 20 members. Each country will select at least five individuals, and jointly select at least ten presiding arbitrators who are not citizens of either ChAFTA party.[48] Arbitrators must have expertise in international public law, trade law, investment rules, or dispute resolution, be independent, act individually, and not receive instructions from any organization or government.

During RCEP negotiations, the selection of arbitrators was proposed, with a draft of the Investment Chapter recognizing this.[49] The draft suggested a committee to establish a list of experienced and independent arbitrators, eliminating the traditional unilateral appointment system.[50] However, these provisions did not appear in the final RCEP version. There are viewpoints suggesting that such a method of selecting a panel of arbitrators is ineffective and adds complexity to the ISDS mechanism, which is already facing significant criticism.[51] The independence of arbitrators would depend on specific provisions for their appointment. The pre-selection system only transfers conflict from the commencement of arbitration to the time of panel selection, rather than resolving it entirely.[52] But if arbitrators are "loyal" to the state that nominated them, it means that they are neither more independent from these states nor impartial when they will have to act as judges.

2.3. Replacing Investor-State Dispute Settlement with dispute prevention mechanisms

In addition to the two proposed models mentioned above, participating countries to the RCEP can also consider mechanisms for dispute prevention. This is also a focal point in the ISDS reform led by UNCITRAL Working Group III (WG). Many countries have incorporated various dispute prevention methods into their IIAs, such as Brazil and notably South Korea, another participating country of the RCEP.

First, establishing an Ombudsman to address investor complaints before they escalate into legal disputes is an effective prevention solution, especially with frameworks that coordinate government levels and communicate with foreign investors. Enhanced cooperation among participating countries via

47 Article 14.4.4 of the ChAFTA.

48 Articles 9.15.5-6 of the ChAFTA.

49 James Love (2016), '2015 Oct 16 Version: RCEP draft text for investment chapter', *Kei Online: James Love's BLOG*. Retrieved from: https://www.keionline.org/23065 [accessed 18 September 2023].

50 Karr, S. (2017), 'A battle for choice: Selecting investor-state arbitrators under the RCEP', *Temple Law Review*, Vol. 90, No. 1, p. 146.

51 *Ibid.*, p. 146.

52 *Ibid.*, p. 152.

joint committees also supports this mechanism. South Korea, one of the first countries to establish the Office of the Foreign Investment Ombudsman (OFIO), serves as a prime example of the Ombudsman system assisting foreign investors with various issues.[53] The OFIO performs three closely related functions. It initially provides support and advice to foreign investors through the OFIO's personal advisory teams, acting as a liaison and ready to support them through on-site visits to the investor's facilities. The second function of the OFIO is to address complaints or issues raised by foreign investors regarding their investments, covering issues related to labor, information technology, customs, environmental regulations, and construction.[54] Although the OFIO does not have formal authority to compel other agencies to comply with its recommendations, those agencies must at least provide a written response to the recommendation.[55] In cases where the agency in question does not implement the recommendation, the OFIO may request that the issue be referred to the Foreign Investment Commission, which is a high-level policy-coordinating body under the Ministry of Trade, Industry, and Energy. Thus, the Commission provides a way to escalate unresolved concerns to the political level.[56] The OFIO's third function is to recommend legal changes based on its work with foreign investors, ensuring their opinions are heard at the highest policy level, institutionalized in 2010 with the Ombudsman's role as Chair of the Presidential Regulatory Reform Commission.[57]

In terms of practical outcomes, statistics show that South Korea's OFIO has operated very effectively, resolving 90% of all disputes from 2007 to 2011.[58] Many other countries have established national agencies to address complaints from foreign investors to prevent ISDS disputes, including some RCEP participating countries like Myanmar and Vietnam. Source in 2006, China established the National Complaints Center for Foreign Enterprises (NCCFE), which functions similarly to an ombudsman agency, which aims to resolve conflicts in a friendly manner and has also been incorporated into China's newly enacted Foreign Investment Law in 2019.[59]

Second, another method of preventing disputes is to enhance cooperation between countries through joint committees aimed at dispute prevention at

53 Levashova, Y. (2020), 'Prevention of ISDS disputes: From early resolution to limited access', in Chaisse, J. et al. (eds.) (2020), *Handbook of international investment law and policy*, Springer, p. 6.

54 Ombudsman, 'FAQ'. Retrieved from: https://ombudsman.kotra.or.kr/ob-en/bbs/i-2638/list.do [accessed 20 September 2023].

55 Article 15.2.(4)-(6) of the 2017 Korean Foreign Investment Promotion Act.

56 Bonnitcha, J. and Williams, Z. P. (2022), 'Investment dispute prevention and management agencies: Toward a more informed policy discussion', *International Institute for Sustainable Development*, p. 27.

57 *Ibid*., p. 28.

58 Vididal, G., Stevens, B. (2018), 'Brazil's new model of dispute settlement for investment: return to the past or alternative for the future?', *Journal of World Investment & Trade*, Vol. 19, p. 488.

59 Levashova, Y. (2020), *supra* note 53, p. 6.

an early stage. South Korea have proposed that one of the main objectives of such a center should be to advise developing countries on conflict avoidance by providing education on dispute prevention and management of potential disputes, along with other issues.[60] Similarly, Thailand emphasizes that such a center would be a tool to support developing countries lacking resources and institutional capacity in resolving investment disputes.[61] Some IIAs have established joint committees to exchange information and resolve conflicts early, such as Brazil's Cooperation and Facilitation Agreement (CIFA) and NAFTA. Efforts to prevent disputes also include discussions in the UNCITRAL reform process about establishing an International Investment Law Advisory Center. Modeled after the WTO Advisory Center, this would support least developed and developing countries lacking resources for managing ISDS complaints and preparing for arbitration. Success depends on countries coordinating strategies for resolving foreign investment issues.[62]

Overall, both solutions present a new mechanism to protect foreign direct investment, excluding ISDS and establishing a system that combines dispute prevention mechanisms rather than arbitration. It even endeavors to establish substantive obligations for investors, institutionalizing efforts to ensure corporate social responsibility.[63] Based on South Korea's practical experience and the trend among many countries and multilateral organizations like UNCITRAL, the RCEP participating countries should consider applying dispute prevention mechanisms in their deliberations on the future of ISDS within the agreement.

3. Implications for participating countries of the Regional Comprehensive Economic Partnership

The signing of the RCEP is a significant milestone amid the COVID-19 pandemic's disruption of supply chains and the rise of trade protectionism. With increased investment flows, the likelihood of disputes between investors and states rises. The absence of ISDS in the RCEP highlights the complexities of international investment and dispute resolution. Participating countries must evaluate policy-level solutions, balancing bloc-wide and national interests. Careful navigation of ISDS criteria under different IIAs is crucial, thus, the RCEP countries should contribute thoughtfully to ISDS discussions, learning from other regional agreements to shape a fair and effective dispute resolution mechanism, fostering a stable and attractive investment environment in the region. ●

60 *Ibid*., p.10. *See also*: UNCITRAL Submission from the Republic of Korea (2019).

61 *Ibid*. *See also:* UNCITRAL Submission from the Government of Thailand (2019).

62 Sauvant, K. (2019), 'An Advisory Centre on International Investment Law: Key features academic forum on ISDS', *Paper 2019/14,* 10 September 2019.

63 Vidigal, G. and Stevens, B. (2018), 'Brazil's new model of dispute settlement for investment: Return to the past or alternative for the future?', *The Journal of World Investment & Trade*. Retrieved from: https://brill.com/view/journals/jwit/19/3/article-p475_6.xml?language=en&ebody=citedby-67985 [accessed 21 September 2023].

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Author Contribution

All authors contributed to the study conception and design. All authors read and approved the final manuscript.

Declarations

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