CPTPP adding legal layers to foreign investment protection

Investment is a key driving force for economic growth and competitiveness as it spurs innovation, creates jobs, and connects investors to global value chains. The Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) provides a strong, rule-based framework through which to grow investment relations with key Asia-Pacific economies. Quan Phan, senior associate of ACSV Legal Vietnam, outlines how the CPTPP benefits investors, and the terms and conditions to ensure that investment procedures will be easier and more transparent for foreign funders.

The Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) is an ambitious trade agreement to connect key markets in Asia and Latin America through the 11 member nations of Australia, Canada, Brunei, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Vietnam. Once fully implemented, it will form a trading bloc representing 495 million consumers and 13.5 per cent of global GDP – worth a total of $10.6 trillion. The CPTPP was concluded in January last year and officially signed two months later. Vietnam became the seventh country to ratify the CPTPP and the agreement entered into force nationally on January 14 this year.

For the members of the CPTPP, a new era has opened up, promoting an accessible, transparent, and rules-based business environment. The majority of the agreement deals with a comprehensive tariff elimination for participating nations. Specifically, Vietnam will benefit from a 97-100 per cent tariff reduction on exports to other CPTPP countries. Furthermore, establishing new multilateral free trade agreements (FTAs) to Canada, the world's third-largest economy, along with Mexico and Peru, will open up new export destinations for Vietnam's key sectors such as textiles, agriculture, wood, and seafood. Last but not least, the agreement also promotes a commitment to sustainable economic development, such as in government procurement, trade remedies, labour law reforms, and clean energy. As a result, the CPTPP has widened the circulation of goods and services, benefiting both consumers and producers in participating countries.

The CPTPP also sets out terms and conditions to ensure that the investment procedure will be easier and more transparent for foreign investors. Chapter 9 specifies this matter by describing the mechanisms to protect foreign investment into CPTPP countries. Under the CPTPP, an investment is defined to include every asset that an investor owns or controls, directly or indirectly, through a commitment of capital or an expectation to gain or profit.

In particular, the agreement requires a contracting country to treat investors from other contracting countries in a fair and equitable manner regarding the establishment, acquisition, expansion, management, operation or sale of the investments. For instance, an enterprise, shares, bonds, tangible or intangible property are examples of the investment that foreign investors own. Chapter 9 of the CPTPP deals specifically with dispute resolution between foreign investors and contracting states. In the event that the invested properties are subject to expropriation or nationalisation, the CPTPP requires the authority to compensate an amount equivalent to the fair market value immediately before the expropriation took place. Moreover, compensation must be prompt and adequate to cover the loss incurred.

If a foreign investor is dissatisfied with the compensation, they are entitled to initiate lawsuits according to the Investor-State Dispute Settlement Clause (ISDS) under the CPTPP if they believe the nation's regulations or actions directly lead to loss regarding the investment. The CPTPP encourages parties first to attempt dispute resolution, such as appealing to consultations, negotiations, or non-binding third-party participation procedures. If after six months the dispute is still not resolved, the affected investor may unilaterally submit its claim to arbitration under the premise that the state has breached the CPTPP leading to damage on the investor's part. Here, the investor, as the complaining party, can select the forum to settle the dispute. In setting up the panel, the funder will also be able to select one out of three arbitrators, unless agreed otherwise. Moreover, they can negotiate which relevant rules to apply and set up guidance to ensure the arbitrators' independence and impartiality regarding their case. To ensure this will not negatively impact the investor's interest, the claimant may seek interim injunctive relief as long as it does not involve payment of monetary damages.

Hence, the CPTPP has indeed strengthened the litigation process by giving overseas investors more leeway and channels to protect their offshore investment. The consultant circle is also expanded to avoid building up political tensions that may occur as a result of the dispute.

Foreign funders that originate from a CPTPP nation will receive the aforementioned benefits as written in Chapter 9 if they invest in Vietnam. If disputes arise between a foreign investor (or the Vietnamese enterprise that he owns) and the state authority of Vietnam, that investor can appeal to good offices, conciliation or mediation for consultation and negotiation, or submit the dispute to arbitration. However, it is important to note that there are certain exceptions applicable to Vietnam to which foreign investors need to pay attention.

First, the financier will lose the right to initiate a lawsuit under ISDS if they have complied with the complaint proceedings in the Vietnamese courts. The choice to settle at a Vietnamese tribunal shall be definitive and exclusive, preventing the investor from submitting the claim to any other arbitration tribunal. Hence, to avoid nullification of their benefits under the CPTPP, investors should carefully consider which arbitration forum they wish to settle the dispute before filing their complaints.

Examples of international forums that investors can choose from are the ICSID Convention, the ICSID Rules of Procedure for Arbitration Proceedings, the ICSID Additional Facility Rules, the UNCITRAL Arbitration Rules, or another arbitration institution that both parties agree to. In setting up the panel, the foreign investor will select one panellist and review all three before the resolution procedure begins to make sure that arbitrators are free of bias. Each arbitrator's expertise shall also be examined by both parties.

Additionally, guidelines and other relevant rules can also be submitted for the arbitrators to comply to on top of the applicable international rules. When the tribunal makes the final award, it may award monetary damages or restitution of property and any applicable interest in lieu of restitution only for the loss that has incurred to the investment. Hence, the investor will be responsible for proving that the breach on Vietnam's part was the cause of his damage. Costs and attorney's fees incurred by investors may also be remedied. Finally, if the tribunal rules in favour of the investor, but Vietnam refuses to carry out the decision, the foreign investor may appeal to his CPTPP home country to request suspensions of benefits for Vietnam until the country eliminates non-conformity, nullification or expropriation.

On the other hand, in the case that the investor does not agree to the tribunal's decision, the investor may submit written comments to address any problem they see in the decision within the 60-day comment period after the proposed decision is issued.

Under certain CPTPP bilateral agreements, there are some digressions from the main mechanisms that the CPTPP sets out for ISDS system. For example, New Zealand and Vietnam agreed not to recourse to dispute settlement against the governments of each addressing country under Section B of Chapter 9 (Investor-State Dispute Settlement) unless the government specifically consents the application of such dispute. This bilateral agreement restricts some freedom on investors' part to file disputes for arbitration. In this case, investors from New Zealand can still resort to another mechanism in accordance with the law of Vietnam or other treaties to which Vietnam and New Zealand are contracting parties.

Overall, investors now benefit from a comprehensive set of protection provisions, including protections against discrimination, expropriation without due process, and compensation together with the mechanism to resolve disputes between states and investors. When fully enforced, the CPTPP will add another layer of legal protection for prospective foreign investors wishing to invest in Vietnam. However, Vietnam would also need to prepare to deal with disputes between the state and foreign investors in the future.■