Tilleke & Gibbins

Vol. 7 No. 1 February 2016

Informed Counsel

Analysis of Recent Legal Developments in Southeast Asia

contents

Investment Protections in Vietnam under the TPP

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On February 4, 2016, Vietnam and 11 other countries signed the Trans-Pacific Partnership (TPP). The TPP includes Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, the United States, Vietnam, and Singapore. According to the World Bank, the TPP represents 36 percent of global GDP and more than 25 percent of world trade. Assuming that the treaty is ratified by its various participants, it will significantly impact business in Asia.

Vietnam's economy is expected to benefit greatly from the TPP, which lowers tariffs and nontariff trade barriers. The World Bank predicts that the TPP could add 8 percent to Vietnam's GDP over the next 20 years. Lower tariffs will translate into higher exports for Vietnam. This will lead to higher inflows of foreign investment. And importantly, three of Vietnam's key economic partners—Japan, Singapore, and the United States—are TPP members.

The TPP encourages investment through its investment protections. The protections aim to give investors confidence that they and their investments will be treated fairly by a host state. The TPP also contains an Investor-State Dispute Settlement (ISDS) section that allows investors to bring arbitration claims against TPP member states. The ISDS is especially important for Vietnam, where it is generally difficult to sue the government.

Investment Protections

Almost all forms of foreign investments are covered by the TPP. Investments are defined as everything from enterprises to contracts to intellectual property rights. For a party to be eligible for the TPP's investment protections in Vietnam, the investor must be from another TPP member state that is attempting to make, is making, or has made an investment in Vietnam (TPP Investor). Investments covered by the TPP (Covered Investments) mean an investment in Vietnam that already exists when the TPP becomes effective, or is set up, acquired, or expanded after the TPP enters into force.

National treatment and most-favored nation treatment. The TPP requires Vietnam to treat TPP Investors in the same way as it would treat domestic investors in similar circumstances. In other words, Vietnam is required to give "national treatment" to TPP investors. In addition, Vietnam must treat Covered Investments in the same way as it would locally-owned projects. The TPP also requires Vietnam not to discriminate against any foreign investor.

Exceptions exist to these national treatment and most-favored nation obligations. Vietnam and other member states have negotiated various "non-conforming measures." The measures consist of sectors where national treatment obligations do not apply. In other words, Vietnam can restrict foreign investment in these areas without violating the TPP.

The restricted sectors are divided into two annexes. Annex I measures cannot be amended by Vietnam to become more restrictive, though they can be made more open. These measures generally cover services (e.g., education and transportation) and nationally sensitive areas such as electricity production. The Annex II measures fall out of the TPP's scope altogether. Examples of Vietnam's Annex II measures include prohibitions on investment in land, agriculture, and the media.

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Expropriation. The TPP prohibits member states from expropriating investments. However, expropriation is allowed if it is for a "public purpose." Under the TPP, Vietnam can expropriate land if it is for a purpose sanctioned by domestic law. Vietnam must promptly provide compensation to the investor equivalent to market value. The TPP further mandates that any expropriation is done without discrimination.

Minimum standard of treatment. Covered Investments must be granted a minimum standard of treatment under the TPP. Vietnam must therefore ensure that all Covered Investments receive equitable treatment and full protection. Equitable treatment means that Vietnam cannot deny a TPP Investor due process in criminal, civil, or administrative proceedings, among other things. The protection requirement obliges Vietnam to provide the necessary level of police protection under international law.

Transfers. Transferring money across borders is a key requirement for foreign investors. Under the TPP, Vietnam must allow investors to freely make all such transfers related to a Covered Investment. Most transfers are included in this provision. Examples include capital contributions; profits and dividends; interest; various types of fees; royalties; sale proceeds (from the sale of an investment project); payments under a contract; and payments resulting from a dispute.

Investor-State Dispute Settlement

Scope. A TPP Investor can bring a claim against Vietnam under the ISDS when: (1) the government has breached an investment obligation in the TPP, an investment authorization, or an investment agreement; and (2) the investor has incurred damage from the breach. An investment authorization is the permission given by the regulatory authority in relation to a Covered Investment. The TPP defines an investment agreement as a contract between an authority at the central level of government and a Covered Investment or TPP Investor.

Initially, the parties must attempt to resolve the dispute through negotiations. If the dispute is not resolved within six months, the investor can submit an arbitration claim. An investor cannot bring a claim if the matter is already being heard in a Vietnamese court or administrative tribunal. Time limitations apply to filing a claim. Claims must be submitted within three years and six months from when the claimant knew of the breach and that damages were incurred.

Arbitration. The TPP allows for arbitration under the World Bank's ICSID, ICSID Additional Facility Rules, UNCITRAL Arbitration Rules, and any other arbitral institution or rules agreed by the parties. However, because Vietnam is not a party to the ICSID, only the UNCITRAL rules or other agreed arbitral institutions or rules can be used. Arbitral proceedings can therefore take place anywhere on agreement by the parties.

Arbitral tribunals consist of three arbitrators, unless otherwise agreed by the parties. Each party can choose one arbitrator, and the third is appointed by agreement. Arbitrators are bound by a special Code of Conduct under the TPP. The arbitrators must follow this code of ethics, as well as the applicable arbitral rules.

The governing law of the arbitration is the TPP itself and applicable international law. For claims arising from an investment authorization or investment agreement, the law cited in the agreement or governing the authorization would apply. In most cases, this would be Vietnamese law. The parties can also agree on the governing law.

Awards. An arbitration award can be monetary damages and interest, or restitution of property (or monetary damages in lieu of restitution), or both. Costs and attorney's fees can also be awarded. If the arbitration tribunal determines that a claim is frivolous, a respondent can be awarded reasonable costs and attorney's fees. Punitive damages are not permitted in the ISDS.

The TPP also contains enforcement provisions. A losing party must promptly abide by the award. The TPP also requires that Vietnam provide for the enforcement of an award in its territory. The claimant can enforce the award under the New York Convention for the Enforcement of Foreign Arbitral Awards, of which Vietnam is a member. However, enforcement of foreign arbitral awards in Vietnam is challenging.

The TPP has an interesting mechanism to handle situations where a member state does not comply with an arbitral award. If a state fails to comply, the investor's home country can ask a special panel to issue a determination that the losing state has breached its TPP obligations. The panel can also recommend that the losing state comply with the award. In other words, a failure by Vietnam to abide by an award can result in an official rebuke by the TPP's special panel.

Thailand and the TPP

Thailand is not a member of the TPP but may join in the future. Thai government officials have indicated some interest. According to news reports, a high-ranking official told an audience in Japan that Thailand is interested to join.

Like Vietnam, Thailand has an export-driven economy, so it would likely benefit from the reduced tariffs that the TPP will bring. Moreover, Thailand has strong economic links to TPP member states, including Japan and the United States. And not joining may cause Thailand to lose out on investment opportunities.

There are challenges to Thailand joining the TPP. Domestic markets would have to be opened up. And the investor-state dispute mechanism, which allows foreign investors to haul governments before an independent arbitration tribunal, may be viewed as a challenge to sovereignty.

Thailand has currently adopted a "wait-and-see" approach. Investors should expect more news later this year.

Outlook

The TPP is expected to create new business opportunities in Vietnam. The investment protections will reduce risk and increase confidence, which will add to investment inflows. Perhaps most importantly, the TPP's investment protections, and especially the ISDS, can help the development of Vietnam's own legal infrastructure. Regulatory authorities will have to be mindful of the TPP when making investment-related decisions. And by making the state accountable, the ISDS can help ensure that the TPP's investment protections and benefits are complied with. This has the potential to help further develop the rule of law, which will have economic benefits to both investors and Vietnam.