THE U.S.-CHINA BILATERAL INVESTMENT TREATY’S POTENTIAL TO UNLOCK SIGNIFICANT BUSINESS OPPORTUNITIES

THE U.S.-CHINA BILATERAL INVESTMENT TREATY NEGOTIATIONS IN CONTEXT

The United States and China continue to make progress in their negotiations toward a bilateral investment treaty (“BIT”)—a government-to-government agreement that establishes binding rules on the treatment of foreign investors and their investments. In 2013, a major breakthrough occurred when China signaled its willingness to provide market access to foreign investors on a national treatment basis in all sectors and industries, except where explicitly excluded on a “negative list.” At this year’s U.S.-China Strategic and Economic Dialogue in Beijing, the U.S. and China announced their intent to reach agreement on key elements of the BIT text by year-end and launch negotiations on the “negative list” in early 2015. This timetable solidifies the commitment on both sides to intensify negotiations and reflects the mutual priority of concluding the BIT in the near-term. It also provides immediate opportunities for companies and associations to engage with policymakers on both sides to ensure their interests are advanced in the BIT. All of this takes place against the backdrop of Chinese plans for economic liberalization unveiled last fall, and points to strong prospects for a BIT that promotes greater two-way investment.

THE U.S.-CHINA BIT’S POTENTIAL TO INCREASE TWO-WAY INVESTMENT

A U.S.-China BIT would, among other things, provide U.S. investors with non-discriminatory access to the Chinese market and ensure that U.S. companies are competing with their domestic competitors on a level playing field. It would restrict the imposition of performance requirements, such as requiring a certain level of local content in a product, as a condition for establishing or expanding an investment. Under the “negative list” approach, all sectors would be open for investment except those explicitly excluded, as negotiated between the two parties. The protections and opportunities provided by a successfully concluded BIT are expected to accelerate two-way investment, including by encouraging more U.S. investment in China—which currently is outpaced by new Chinese investment in the U.S.—and in a broader range of industries. The BIT also would provide recourse to investors through an established process for settlement of investment disputes.

THE U.S.-CHINA BIT IS A VEHICLE FOR ADVANCING BUSINESS PRIORITIES IN CHINA

Understanding China’s “negative list” will be essential to understanding the operation of the BIT and the investment framework it creates. China currently has a range of legal measures and administrative practices that restrain foreign investment and, in order for China to maintain such measures and practices, it would need to detail them in its “negative list.” The U.S. and China are targeting negotiations on this part of the BIT for early next year, once both sides produce their proposals, and each side is interested in receiving a “negative list” that is short and transparent. In July, China issued a revised “negative list” for the Shanghai Free Trade Zone (“FTZ”), a pilot project intended as a testing ground for economic reforms that may ultimately be implemented throughout China. While the revised “negative list” for the Shanghai FTZ is shorter than the original list (e.g., enumerating fewer activities where foreign investment is restricted), the loosening has not extended to sectors or activities of major interest to foreign investors. If the Shanghai FTZ “negative list” is a harbinger of what China will put forward in connection with the BIT negotiations, a challenging negotiation process will need to ensue to trim the list to an acceptable length.
Given the strong interest in proceeding briskly with the U.S.-China BIT negotiations that was affirmed during the U.S.-China Strategic and Economic Dialogue this summer, it is clear that the two governments are attaching considerable importance to these negotiations, and that the negotiations will provide a once-in-a-generation opportunity to address barriers that U.S. and other foreign firms face in investing and doing business in China. Input from the business community and other stakeholders on China’s restrictions and practices will be instrumental to helping the U.S. government formulate its negotiation priorities.

**EXTENSIVE BIT EXPERIENCE TO ASSIST COMPANIES AS NEGOTIATIONS PROCEED**

Covington has extensive experience counseling clients on U.S.-China trade and investment issues, including the negotiation and arbitration of disputes under BITs. On behalf of the European Commission Directorate-General for Trade, Covington recently authored a report, “Measures and Practices Restraining Foreign Investment in China,” which assessed more than 250,000 Chinese-language documents to identify regulations and practices that restrict foreign companies’ abilities to invest and operate in China.

This report complements an earlier report drafted by Covington on behalf of the U.S. Chamber of Commerce regarding China’s investment approval process. These reports are intended to inform ongoing BIT negotiations between Europe and China and the United States and China, respectively.

Our diverse trade policy teams in Washington and Beijing, which include several senior former government officials, are uniquely positioned to provide thoughtful strategic advice to clients interested in the U.S.-China BIT, including working with companies to identify priorities for the BIT “negative list” negotiations. We count among our ranks:

- **Marney Cheek**, a former Associate General Counsel in the Office of the United States Trade Representative (USTR), has significant experience litigating investor-state disputes and advising clients on international trade negotiations.
- **Alan Larson**, a former Under Secretary of State for Economic, Business and Agricultural Affairs, recently served as a private sector co-chair of the Obama Administration’s 2009 Model BIT Advisory Committee.
- **Timothy Stratford** served as the Assistant USTR for China Affairs when the BIT negotiations were first launched in 2008. He has significant “on the ground” experience and perspective from his nearly 30 years working in China in both the public and private sectors.
- **John Veroneau** served as Deputy USTR when U.S.-China BIT negotiations were first launched in 2008. Having also served as USTR’s General Counsel, he has worked on a wide range of trade and investment agreements.
- **Gina Vetere** served as Senior Policy Advisor at USTR when the U.S.-China BIT negotiations were first launched and subsequently, as Director for Intellectual Property and Innovation at USTR.

If you would be interested in learning more about how Covington can advise your organization on issues related to the U.S.-China BIT negotiations, please contact the following members of our team:

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