

## CLIENT ALERT

### Benefiting from the Investment Rules in a Transatlantic Free Trade Agreement

Jul.10.2012

As the United States and European Union potentially undertake the hard work of negotiating a high-standard and commercially meaningful investment agreement in the context of a comprehensive U.S.-EU free trade agreement (FTA), companies with a stake in either market have the opportunity to realize significant and varied benefits, for example in the following areas:

**Market access:** One of the core issues in a U.S.-EU investment negotiation would relate to market access, *i.e.*, the extent to which either side permits the other side's companies to invest in sectors that have been largely closed in the past. For example, both sides would have to decide whether to permit greater foreign ownership in certain key services sectors, such as maritime transportation and aviation for the United States and audiovisual services for the EU. The United States would also come under pressure to identify and remove investment restrictions at the state and local government level, which previously have not been subject to negotiation. Increased market access in these and other sectors could mean substantial new investment opportunities for companies investing across the Atlantic.

**Regulatory transparency:** A critical factor affecting companies' decisions to invest across borders is whether the "rules of the road" are clear and understandable. While both the United States and the EU currently have good levels of regulatory transparency, binding bilateral investment rules could improve transparency even further for transatlantic investors (and third country investors as well, who would likely also benefit from improved rules). A U.S.-EU investment agreement would likely require both sides to publish investment-related regulations in advance of their going into force, allowing companies to anticipate changes to the regulatory environment and have opportunities to provide comments. Such advance notice would be especially valuable for U.S. companies investing throughout an EU of 27 member states, many of which still have their own domestic transparency standards.

**Enforcement of rights:** U.S.-EU investment rules would almost certainly provide for "investor-State arbitration," a powerful tool allowing companies to directly enforce their rights against host governments in binding and neutral international arbitration. While both the United States and EU have high-standard judicial systems that generally operate fairly and expeditiously, companies would benefit greatly from this additional remedy. A European company that grew concerned about how it was being treated by a state or local government in the United States would have an additional point of leverage. And a U.S. firm investing in an EU member state with a less favorable track record for judicial efficiency could hold the EU itself to account for a failure to protect its rights.

Investment is fundamental to the U.S.-EU economic relationship, and European and American firms have invested in each others' markets smoothly and successfully for decades. Nevertheless, a transatlantic agreement on investment could create important additional benefits for internationally engaged companies. Along with the many other areas of a U.S.-EU FTA where their interests would be affected, companies should ensure that they fully appreciate how newly negotiated investment rules could influence their business plans.

**This is the second** in a series of alerts on U.S.-EU trade and investment issues, a major focus of our work. One recent International Trade Alert discussed the prospects for negotiating a comprehensive bilateral FTA and the need for companies to understand how such an agreement could affect their business objectives. More to come.

With this Alert we also introduce our newest colleague, **Josh Kallmer**, and share our excitement about his coming to Crowell & Moring. Josh was formerly Deputy Assistant U.S. Trade Representative for Investment, where he was responsible for negotiating with foreign governments to secure greater market access and better treatment for U.S. investors abroad and, more generally, managing a broad range of legal and political risks posed by governments to internationally engaged companies. Josh will be leading our efforts on international investment under international agreements, and he is counseling global businesses on investment strategy and the growing convergence of international trade and investment.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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