WHITE & CASE

White & Case LLP
General Trade Report - JETRO

December 2013

In This Issue

Table of Contents

Contacts:
Scott Lincicome, Esq.
701 13th Street NW, Washington, DC 20005
slincicome@whitecase.com

Samuel Scoles
8 Marina View, #27-01, Singapore, 018960
sscoles@whitecase.com

UNITED STATES

GENERAL TRADE POLICY

China and the United States Conclude 24th Session of JCCT

Summary

US and Chinese officials held the 24th session of the US-China Joint Commission on Commerce and Trade (JCCT) in Beijing, China from December 19-20, 2012. US Trade Representative (USTR) Michael Froman, US Secretary of Commerce Penny Pritzker, and Chinese Vice Premier Wang Yang co-chaired the meeting. Talks between the United States and China ("parties") at the 2013 JCCT on a wide range of trade and investment issues resulted in a number of commitments. In the context of the Third Plenum of the 18th Chinese Communist Party having concluded shortly prior, new lead negotiators for both the United States and China achieved wide-ranging progress on one top concern of US companies—intellectual property rights (IPR). However, progress in other areas was modest, characterized by incremental steps in government procurement, standards and conformity assessments and agriculture.

Analysis

The JCCT, established in 1983, is the principal bilateral forum for addressing trade and investment issues and for promoting commercial opportunities between the United States and China. The parties began expanding the mechanism in 1997 to address specific issues on an ongoing basis, including those relating to IPR-related matters, the regulation of medical devices, pharmaceuticals, and high-tech and strategic trade matters.

At the conclusion of the 2013 JCCT, the Office of the United States Trade Representative (USTR) published the "24th US-China Joint Commission on Commerce and Trade Fact Sheet" ("Fact Sheet").[1] The Fact Sheet outlines key achievements secured by the United States through the JCCT. The document also outlines cooperative activities to which the United States and China have committed, including: (i) US-China IP Cooperation and Technical Assistance; (ii) exchanges on administrative licensing rules; (iii) the US-China Legal Exchange; (vi) a dialogue on enforcement against counterfeit semiconductors; and (v) exchanges on bad faith trademark registrations. USTR Ambassador Froman indicated that the most recent JCCT results build on the progress made during Vice President Biden's recent visit to China, as well as positive announcements resulting from China's Third Plenum on promoting the reform and opening of China's economy. He also noted that

[1] The Fact Sheet is available here: http://www.ustr.gov/about-us/press-office/fact-sheets/2013/December/JCCT-outcomes

Contacts:

Scott Lincicome, Esq.
701 13th Street NW, Washington, DC 20005
slincicome@whitecase.com

Samuel Scoles
8 Marina View, #27-01, Singapore, 018960
sscoles@whitecase.com

both Parties still face many challenges, but they could use the JCCT as a key tool for resolving important trade and investment issues.

Both governments sent senior-level delegations to this year's JCCT. The Chinese delegation included Minister of Commerce Gao Hucheng and senior officials at or above the vice-minister-level from, *inter alia*, the Ministry of Commerce (MOFCOM), Ministry of Finance (MOF), Ministry of Agriculture (MOA), and the Ministry of Industry and Information Technology (MIIT). Besides three Cabinet-level officials, with Secretary of Agriculture Tom Vilsack joining USTR Froman and Secretary Pritzker, the US delegation also included outgoing US Ambassador to China Gary Locke, US Trade and Development Agency (USTDA) Director Leocadia Zak, and senior representatives from such key cabinet Departments as State and Treasury.

I. SPECIFIC OUTCOMES

The US government secured several key commitments from the Chinese government during the 2013 JCCT. Below we highlight several of these commitments, based on information provided in the Fact Sheet and comments provided by US officials:

IPR

- **Trade Secrets.** The Chinese delegation affirmed that trade secrets protection would be a priority item for their National Leading Group on Combating IPR Infringement and the Manufacture and Sales of Counterfeit and Substandard Goods in 2014, and agreed to draft and publish an "action program" for trade secrets protection and enforcement. These enforcement efforts include concrete actions and public awareness programs, and require strict compliance with trade secret-related laws and regulations. In addition, the two sides agreed to cooperate in 2014 on proposals to amend trade secret-related laws and regulations. However, it remains unclear what form legislative reforms might take, as several stakeholders from both sides have called for drafting a separate trade secrets law, while others have focused on revising the existing Anti-Unfair Competition Law, which underwent an update most recently in 1993;

- **Pharmaceutical Patents.** During VP Biden's visit in early-December 2013, Chinese officials confirmed that patent applicants would have permission to submit supplementary test data under existing patent examination guidelines. China re-affirms that the Chinese Patent Guidelines permit patent applicants to file additional data after filing their patent applications, and that the Guidelines ensure that pharmaceutical inventions receive patent protection; this interpretation is currently in effect for patent examinations, re-examinations, and representations before the Courts;

- **Legitimate Sales.** Both sides reaffirmed their commitment to develop a better IP protection environment by combating IPR infringement (*e.g.*, counterfeit goods), with the result of facilitating the sales of legitimate IP-intensive goods and services. However, they did not formally agree to any specific actions to boost these efforts. The two sides also agreed to enhance efforts on counterfeit semiconductors and bad-faith trademark registrations;

- **Procedural Improvements to Enhance Civil IP Enforcement.** Both sides committed to

Contacts
Scott Lincicome, Esq.
701 Thirteenth Street NW, Washington, DC 20005
slincicome@whitecase.com
Samuel Scoles
8 Marina View, #27-01, Singapore, 018960
sscoles@whitecase.com

discuss civil IP enforcement systems, including through the JCCT IPR Working Group. The United States will raise issues, including such enhancements to the civil IP enforcement system as access to courts, discovery methods, evidence and asset preservation, and transparency for court decisions in IPR cases; and

- **Graphical User Interfaces.** China's State Intellectual Property Office (SIPO) released draft Guidelines for public comment in October 2013 to extend design-patent protection to such graphical user interfaces (GUIs) as graphics, icons and other visual components of modern computer operating systems. This has been a priority for US software companies operating in China.

Government Procurement

China committed to accelerate its negotiation on accession to the WTO Agreement on Government Procurement (GPA), and submit a revised offer in 2014 that will be in line with other GPA members' existing commitments. The commitment comes after China's 2013 Strategic & Economic Dialogue pledge to submit a revised offer by the end of 2013 that would lower thresholds and increase coverage to provincial and local government procurement. In addition to the GPA, China also committed to eliminate two sets of regulations[2] relating to the procurement of official government vehicles. These regulations would have largely excluded the procurement of vehicles produced by foreign companies and foreign-invested companies in China.

Standards and Conformity Assessment

- **ZUC[3] Encryption Algorithm.** China committed to instructing the Ministry of Industry and Information Technology (MIIT) not to require that applicants disclose source code or other sensitive business information during the testing and network access license approval processes for 4G devices; and

- **CCC Mark Testing and Certification.** China reaffirmed a key commitment made at the 2012 JCCT to apply the same conditions to both domestic and foreign-invested conformity assessment bodies when those groups apply to conduct services relating to the China Compulsory Certification (CCC). The specific implementation of this commitment will take place by spring 2014.

Export Controls

Both sides reaffirmed commitments to help facilitate high-technology trade and simplify export controls. The United States and China agreed to actively promote the US-China High Technology

[2] The two regulations are the *2012 Draft Party and Government Organ Official Use Vehicle Selection Catalogue* and the *2011 Detailed Rules on the Administration of Optional Official Vehicle Catalogue for Party and Government Organs*.

[3] ZUC is a new set of cryptographic algorithms that are proposed for inclusion in the "4G" mobile standard called LTE (Long Term Evolution).

Contacts
Scott Lincicome, Esq.
701 Thirteenth Street NW, Washington, DC 20005
slincicome@whitecase.com
Samuel Scoles
8 Marina View, #27-01, Singapore, 018960
sscoles@whitecase.com

Trade Key Sectors Cooperation Action Plan, an agreement reached during the 2011 JCCT to help facilitate high-technology trade and improve the export control process. Both sides agreed to promote exports for civilian use in such areas as civil aviation, information technology, and oil and gas exploration. During VP Biden's trip to Beijing in December 2013, both sides specifically mentioned technical equipment used for deep-sea oil and gas exploration. Finally, both sides agreed to encourage Chinese civilian end-users to apply for the United States' Validated End-User program, which simplifies export control licensing for US exporters who ship designated items to pre-approved entities.

Agriculture

Both sides affirmed that they will strive for the resumption of Chinese market access for US beef by July 2014 on the basis of mutually agreed conditions. In December 2010, China agreed to move toward lifting several import restrictions on US beef from cattle under 30 months old, but it did not fully lift its 2003 ban on US beef products due to concerns over so-called "mad cow" disease.

Both sides also agreed to promote China's exports of cooked poultry, which remains a top concern for Chinese companies seeking access to the US market. Since an outbreak of avian flu in 2004, China has slowly lifted bans on poultry from individual US states.

Travel and Tourism

The parties agreed to expand the US-China Tourism Memorandum of Understanding (MOU) to include two additional provinces (Gansu and Qinghai), bringing the total number of provinces where Chinese citizens can buy US leisure travel packages to 34. At the 2011 JCCT meeting, both sides agreed to open three additional provinces, and did not further open the market at the 2012 JCCT meeting.

II. OTHER JCCT ENGAGEMENT

The parties signed several MoUs, including (i) on establishing a US-China commercial match-making program (CMP), (ii) in support of intellectual property rights training, and (iii) in support of US-China energy cooperation program (ECP), and a work plan on the foreign direct investment (FDI) statistics for US–China Statistics Working Group.[4] The 24th JCCT also provided a venue for US and Chinese non-governmental entities to engage and achieve future cooperation commitments.[5]

---

[4] A listing of other JCCT engagement is available here: http://www.ustr.gov/about-us/press-office/fact-sheets/2013/December/JCCT-Signings.

[5] *E.g.*, those (i) on green data centers standards development, (ii) on the clean air industrial emission reduction technical assistance program, (iii) establishing a partnership to deploy electricity demand side management (DSM) technologies in the Changning District of Shanghai, (iv) on a smart grid technology pilot project to showcase the capabilities, data integration, data management, (v) concerning the execution of a safety executive training program geared towards Chinese construction SOEs, (vi) on the provision of architectural planning and concept design advisory services, (vii) the sale of aeronautical equipment, (viii) on a business framework for the future development of Ocean Thermal Energy Conversion (OTEC) technology.

Contacts
Scott Lincicome, Esq.
701 Thirteenth Street NW, Washington, DC 20005
slincicome@whitecase.com

Samuel Scoles
8 Marina View, #27-01, Singapore, 018960
sscoles@whitecase.com

Outlook

The 24th session of the JCCT took place shortly after the Third Plenum of the 18th Chinese Communist Party. With these economic reforms in China, the new Chinese leadership and a renewed post-2012 election Obama Administration[6] may be at an initial stage from which to address lingering and newly-emerged bilateral trade tensions. According to China's Foreign Ministry spokeswoman Hua Chunying, China seeks from the United States practical measures in terms of (i) a relaxing of limitations in US export control policies key to China's high-tech industries, (ii) fair and equitable treatment for Chinese investment in the United States, and (iii) strengthening cooperation in such areas as, *inter alia*, IPR protection, agro-foodstuff inspection and quarantine, trade remedy investigations, energy trade. From the US perspective, the 24th JCCT outcomes constitute modest progress; while the United States and China took a step forward specifically in regard to IPR and biotechnology approval process issues in China, US private sector groups point to a lack of progress in such areas as China's alleged (i) use of its anti-monopoly law against foreign firms, (ii) lingering so-called "indigenous innovation" policies, and (iii) hesitancy to expedite an opening of its services sector to foreign participation.

The value of JCCT deliverables will depend on meaningful implementation of the commitments. Both sides need to implement those commitments through follow-up discussions and in forthcoming JCCT working group meetings.

US General Trade Policy Highlights

USTR Publishes 2014 and 2015 US Dollar Thresholds for Government Procurement Commitments

On December 18, 2013, the Office of the United States Trade Representative (USTR) published a notice in the Federal Register, updating the United States' application of its government procurement-related (GP) commitments under several US bilateral free trade agreements (FTAs) and the WTO Agreement on Government Procurement (GPA). Specifically, the notice establishes the 2014 and 2015 US dollar thresholds for government procurement, contracts above which are subject to GP disciplines contemplated under the agreements. The updated 2014 and 2015 threshold values are slightly higher than the 2012 and 2013 values.

The bilateral agreements covered in in the *Federal Register* notice (78 FR 76700) include the (i) US-Australia FTA, (ii) US-Bahrain FTA, (iii) US-Chile FTA, (iv) US-Colombia Trade Promotion Agreement (TPA), (v) Dominican Republic-Central American-US FTA (DR-CAFTA), (vi) US-Morocco FTA, (vii) North American Free Trade Agreement (NAFTA), (viii) US-Oman FTA, (ix) US-Panama TPA, (x) US-Peru TPA, and (xi) US-Singapore FTA. USTR adjusts the threshold values every two years, such that the next adjustment should occur in late-2015.

[6] The 24th JCCT constitutes the first of such meetings USTR Froman and Secretary Prtizker have co-chaired.

Contacts
Scott Lincicome, Esq.
701 Thirteenth Street NW, Washington, DC 20005
slincicome@whitecase.com

Samuel Scoles
8 Marina View, #27-01, Singapore, 018960
sscoles@whitecase.com

A principal aim of government procurement provisions in trade agreements is to ensure that government entities, including at the national- and subnational-levels, treat overseas tenders no less favorably than local tenders, *i.e.*, national treatment. Executive Order 12260 delegates to USTR the authority to waive discriminatory procurement requirements that would otherwise be inconsistent with international agreements.

Click here for 78 FR 76700 and here for government entities in the United States subject to government procurement obligations under trade agreements.

President Obama to Nominate Sen. Max Baucus as Next Ambassador to China; Congressional Prospects for TPA and TPP Now Uncertain

President Obama will reportedly nominate Senate Finance Committee Chairman Max Baucus (D-MT) as the next US Ambassador to China. As Senate Finance Committee Chairman, Sen. Baucus is highly involved in crafting US trade policy as it emanates from Congress; his departure from the Senate makes uncertain the prospects for certain forthcoming pieces of trade-related legislation.

It remains unknown whether Sen. Baucus will abandon the Senate before Congress considers legislation to renew Trade Promotion Authority (TPA), and neither the Obama Administration nor Sen. Baucus' office has issued an official announcement with specific dates. Senate Finance and House Ways and Means Committee lawmakers, until recently, had expected to unveil TPA renewal legislation in January 2014; however, if Sen. Baucus leaves the Senate, and thus his post as Senate Finance Committee Chairman, before Congress passes legislation to renew TPA, prospects for near-term passage of such bill become uncertain. Sen. Baucus' likely successor as Senate Finance Committee Chairman is Sen. Ron Wyden (D-OR), who has different trade negotiating priorities for inclusion in TPA legislation, and is less focused on trade liberalization as he is on trade rules enforcement. Sen. Charles Schumer, who is a strong supporter of addressing currency misalignment in trade agreements, is another possible candidate.

President Obama's reported decision to send Sen. Baucus to serve as US Ambassador in China also calls into question the Obama Administration's commitment to advancing such free trade initiatives as the Trans-Pacific Partnership (TPP); TPP member countries could possibly conclude negotiations toward the Agreement during the first quarter of 2014, and the Obama Administration would need TPA in force in order to pass clean TPP implementing language in Congress. That President Obama has offered to send Sen. Baucus, a strong proponent of TPA and TPP, to China suggests that the Obama Administration assigns less importance to TPP and similar agreements as pro-growth initiatives than it does to appeasing a free trade-skeptic Democratic Party base.

In the 1990s, Sen. Baucus was a key supporter of the US effort to bring China into the WTO, and to extend Permanent Normal Trade Relations (PNTR) to China. If confirmed by Senate lawmakers, Sen. Baucus will replace Ambassador Gary Locke, the former Secretary of Commerce, who has served in this position since August 1, 2011. Ambassador Gary Locke announced his resignation in November 2013, and aims to depart China in early-2014.

Contacts
Scott Lincicome, Esq.
701 Thirteenth Street NW, Washington, DC 20005
slincicome@whitecase.com

Samuel Scoles
8 Marina View, #27-01, Singapore, 018960
sscoles@whitecase.com

Brazil Again Launches Public Consultations on Retaliation in Intellectual Property Rights against the United States over WTO Cotton Dispute

The Brazilian Chamber of Foreign Trade (*Câmara de Comércio Exterior* (CAMEX)) published Resolution No. 105 on December 19, 2013, re-launching public consultations as a preparatory step for trade retaliation in intellectual property (IP) rights against the United States. This preparatory step occurs in the context of the WTO dispute *United States — Subsidies on Upland Cotton (DS 267)*.

According to Resolution No. 105, public consultations begin on January 2, 2014, and interested parties may present submissions no later than January 31, 2014. Technically, this is the re-launch of the consultations initiated in 2010 aimed at suspending obligations toward the United States relating to IP rights worth approximately USD 238 million, as authorized by the World Trade Organization (WTO). Interested parties must fill out a form indicating the measures they would like the Brazilian government to take, individually or combined with other measures, involving certain IP rights, and the corresponding remuneration, with a view to target applicants or owners of IP rights who are United States natural or legal persons, or with domicile or commercial presence in that country. Annex III of CAMEX Resolution No. 16 of March 12, 2010 lists the types of possible measures.

The re-launch of the proceedings aimed at suspending obligations relative to IP rights targeting the United States comes as a result of a report prepared by *GT-Retaliação*, a technical group established by CAMEX on October 3, 2013 to identify, evaluate and formulate proposals of authorized countermeasures in response to the failure of the United States to make payments to the Brazilian cotton producers' fund. The United States, in order to avoid retaliation, agreed in a April 20, 2010 Memorandum of Understanding (MoU) to make contributions to a fund designated by Brazil for technical assistance and capacity building.

On the basis of the report cited above, Resolution No. 105 also directs *GT-Retaliação* to continue its work with a view to reach a decision by February 28, 2014 regarding the suspension of concessions in the goods sector. Likewise, *GT-Retaliação* may also decide on other measures in the IP and services sectors.

Although this action does not translate into an actual retaliation, which would certainly impact bilateral trade relations between the United States and Brazil, it paves the way from a legal and institutional perspective in Brazil to do so if the need arises in the future. Some sources see this proceeding as an effective tool for pressuring the United States to implement appropriate changes to its Farm Bill or comply with the MoU by restarting payments to the Brazilian cotton producers' fund.

Click here for a copy of Resolution No. 105, and here for a copy of CAMEX press release (both in Portuguese).

Contacts
Scott Lincicome, Esq.
701 Thirteenth Street NW, Washington, DC 20005
slincicome@whitecase.com

Samuel Scoles
8 Marina View, #27-01, Singapore, 018960
sscoles@whitecase.com

FREE TRADE AGREEMENTS

Free Trade Agreement Highlights

Korea Announces Interest in TPP; Next Steps Remain Uncertain

On November 29, 2013, a Korean Ministry of Strategy and Finance (MOSF) press statement formally communicated Korea's interest in joining the Trans-Pacific Partnership (TPP). In response, US Trade Representative (USTR) Michael Froman declared the United States' willingness to consult with Korea regarding its TPP entry at an "appropriate time," which would include discussions on "outstanding bilateral issues." Such outstanding issues likely refer to commitments Korea undertook on market access for US automotive goods prior to the entry into force of the Korea-US (KORUS) free trade agreement (FTA). However, USTR Froman added that TPP parties are currently focusing on concluding negotiations toward TPP and not on expanding the Agreement's membership. USTR Froman further asserted that "any new member [to TPP] would need to complete bilateral consultations with current TPP members and those members would need to complete domestic processes." For example, prior to Mexico, Canada and Japan joining the TPP negotiations, the Obama Administration followed normal practice of notifying the US Congress of USTR's intention to enter into negotiations with these countries at least 90 days before doing so. Also, Korea will consult over the next month with other Pacific Rim TPP members about its prospects for joining the agreement. In light of these bilateral consultations and internal processes that lie ahead for Korea and current TPP members, USTR Froman foresees that Korea's possible entry would occur after current TPP members conclude negotiations.

Korea's November 29 announcement is the first step in the process toward joining TPP. The announcement appears to fit the broader Korean economic and trade policy of actively pursuing FTAs with its trade partners. Korea expects the commitments members assume under TPP to largely reflect those Korea already assumed under KORUS, which could ease Korea's TPP accession and further strengthen its alliance with the United States. However, according to Senior Korean Presidential Secretary for Economic Affairs Cho Won-dong, Korea already has bilateral FTAs with four current TPP negotiating members[7] and has launched negotiations toward FTAs with six other current TPP members.[8] The successful conclusion of these ongoing Korean FTA negotiations could limit the benefits for Korea of TPP. Korea is also concerned over the liberalization of trade in certain goods; beef and dairy products are sensitive goods for Korea, and could face increased import competition from Australia and New Zealand were Korea to enter TPP. In contrast, Korea perceives access to the Japanese market as one of the key benefits of joining TPP, since recent political tensions between the two countries have undermined negotiations toward

[7] Chile, Peru, Singapore, and the United States.

[8] Australia, Canada, Japan, Mexico, New Zealand, and Vietnam.

Contacts
Scott Lincicome, Esq.
701 Thirteenth Street NW, Washington, DC 20005
slincicome@whitecase.com

Samuel Scoles
8 Marina View, #27-01, Singapore, 018960
sscoles@whitecase.com

a bilateral FTA.

Click here for a copy of USTR Froman's remarks.

TPP Ministers Extend Negotiations into 2014; "Landing Zones" Identified

On December 10, 2013, TPP Ministers concluded four-day negotiations in Singapore, but were unable to conclude the Agreement. A USTR press release notes that the Ministers plan to reconvene in January 2014, and that negotiators will continue over the remainder of December and early-January to work toward closing gaps within so-called "landing zones" on key outstanding issues. In effect, the TPP parties will miss the self-imposed 2013 deadline to conclude the TPP negotiations.

Although the USTR press release does not discuss the specific state of negotiations, informed sources note that TPP Ministers met in small groups, roughly four participants in each, to discuss a broad range of issues, including state-owned enterprises (SOEs), environment, investment, e-commerce, and market access. In regard to the momentum of negotiations, sources largely noted that the United States continues to push for strong commitments and their broad application across various chapters, such as for the applicability of a dispute settlement mechanism to labor- and environment-related commitments.

Meanwhile, WikiLeaks published on December 9, 2013 two documents allegedly written at approximately the time of the TPP Chief Negotiators' meeting in Salt Lake City from November 19-24, 2013, although WikiLeaks does not disclose which TPP member country or countries authored the documents. One document summarizes the state of negotiations, notably detailing strong pressure exerted by the United States in certain chapters, while the other documents the negotiating positions of each country in such areas as (i) market access, (ii) rules of origin, (iii) government procurement, (iv) customs, (v) sanitary and phytosanitary measures, (vi) technical barriers to trade, (vii) competition, (viii) investment, (ix) services, (x) e-commerce, (xi) environment, (xii) labor, (xiii) legal issues, and (xiv) intellectual property rights. If these documents are authentic, they show the wide gaps that remain between countries' respective positions; the author of the summary document frequently comments on the "very little progress" made and that "much work remains."

Considering these developments, it remains unlikely that the TPP parties can arrive at an agreement in principle by the end of 2013, much less produce a final TPP text. In comments to reporters on December 9, 2013, Mexican Economy Secretary Ildefonso Guajardo stated, "what I think [TPP Ministers] can do is give a clear sense of direction to negotiators." Cross-referencing the intelligence provided by sources, the leaked TPP documents, and comments from TPP parties, it appears likely that the most useful outcome of the Singapore meeting is that the TPP Ministers were able to identify compromises in certain outstanding issues, and tasked their respective negotiators to undertake the technical work necessary to reconcile the differences.

Click here for the press release, and here for the documents published by WikiLeaks.

Contacts
Scott Lincicome, Esq.
701 Thirteenth Street NW, Washington, DC 20005
slincicome@whitecase.com

Samuel Scoles
8 Marina View, #27-01, Singapore, 018960
sscoles@whitecase.com

USTR Releases 2013 Report to Congress on China's WTO Compliance

On December 24, 2013, the Office of the United States Trade Representative (USTR) published its 12th statutorily-mandated annual report to Congress on China's compliance with its World Trade Organization (WTO) obligations ("2013 Report"). The report examines China's practices in nine categories, namely: (i) trading rights; (ii) import regulation; (iii) export regulation; (iv) internal policies affecting trade; (v) investment; (vi) agriculture; (vii) intellectual property rights (IPR); (viii) services; and (ix) legal framework. While USTR reports broad progress on the part of China, significant issues relating to market access and non-tariff measures (NTMs) remain.

USTR's priority issues in regard to the US-China trade relationship are as follow:

- **Intellectual Property Rights (IPR).** While China has introduced laws and regulation aimed at protecting IPR, the 2013 Report notes that effective enforcement remains a challenge. In 2013, USTR further urged China to amend its 1993 Law against Unfair Competition to better protect trade secrets. China reportedly committed to adopt an action plan on trade secrets protection in 2014, which preliminarily includes enforcement actions, public awareness campaigns, and compliance education;

- **Industrial Policies.** The 2013 Report asserts that China remains steadfast in implementing policies that benefit state-owned enterprises (SOEs) and favor domestic companies over their foreign counterparts. These policies largely stem from China's goal of fostering so-called "indigenous innovation;" USTR aims to expand China's present commitment to delink such indigenous innovation from policies beyond the area of government procurement;

- **Export Restrictions.** The 2013 Report finds that China continues to deploy such restraints on exports as quotas, license restrictions, and minimum export prices, particularly in industries where it holds leverage as the leading global supplier of a certain commodity;

- **Government Procurement.** The United States, in addition to other parties to the WTO Government Procurement Agreement (GPA), continue to press China to present a better revised coverage offer to accelerate China's accession to the GPA. USTR expects that the revised offer should, at a minimum, present commitments commensurate with those of the current GPA parties;

- **Investment.** The 2013 Report notes that China's practices that go beyond written law and procedures result in a restrictive investment regime. These practices reportedly include informally requiring a foreign company to conduct research and development locally, transfer technology, and use local content as an unwritten condition for securing investment approvals;

- **Services.** While China has nominally implemented a large number of its WTO services commitments, the 2013 Report asserts that a USTR priority issue in China is ensuring that foreign service providers are able to gain market access in practice. As a result, USTR identifies such remaining Chinese NTMS as informal bans on entry, high capital requirements, and branching restrictions;

Contacts
Scott Lincicome, Esq.
701 Thirteenth Street NW, Washington, DC 20005
slincicome@whitecase.com

Samuel Scoles
8 Marina View, #27-01, Singapore, 018960
sscoles@whitecase.com

- **Agriculture.** The 2013 Report notes that China continues to block imports of US beef and beef products, despite these products' safety as declared by the World Organization for Animal Health based on international scientific guidelines. Similarly, China continues to maintain several state-level bans on poultry due to concerns over the spread of Avian Influenza. Furthermore, China continues to delay approvals for biotechnology agriculture products, which has resulted in uncertainties for US corn exports; and

- **Transparency.** Although China has committed to use a single official journal for the publication of all trade-related laws and regulations, USTR notes that the Chinese government adopts a limited interpretation on trade-related measures for publication.

Despite these challenges, USTR remains optimistic that China has placed itself on a track to eventually meet its WTO obligations. Since the Third Plenum of the 18th Central Committee of the Chinese Communist Party in November 2013, China announced that market forces shall be "decisive" and "dominant." Consequently, the United States aims to capitalize on this domestic momentum to reduce government intervention in the Chinese market, and provide further market access openings for foreign goods and services. Despite this political progress and external reform pressure by the United States, it appears that any meaningful steps towards achieving market reform must come internally from within China.

Click here for a copy of the report.

Contacts
Scott Lincicome, Esq.
701 Thirteenth Street NW, Washington, DC 20005
slincicome@whitecase.com

Samuel Scoles
8 Marina View, #27-01, Singapore, 018960
sscoles@whitecase.com

MULTILATERAL

MULTILATERAL

Trade Ministers Adopt Bali Package

Summary

During the December 7, 2013 closing session of the 9th Ministerial Conference, World Trade Organization (WTO) Members formally adopted the so-called "Bali package." The package includes (i) a Ministerial Decision and related Agreement on Trade Facilitation, (ii) a set of Ministerial Decisions on agriculture, (iii) a Ministerial Decision on cotton, and (iv) a set of Ministerial Decisions on development and least-developed country (LDC) issues. It also includes a set of Ministerial Decisions pertaining to the regular work under the General Council. We provide below detailed analysis of the decisions and agreements in each area.

The agreement in Bali is the first multilateral agreement in the WTO since its creation in 1995, and the first positive result in the Doha Development Agenda, which has been moribund since 2008. It was critically important that the Bali Conference not fail, and its success is regarded as a major personal achievement for the new WTO Director-General Roberto Azevedo.

Analysis

I. TRADE FACILITATION

The Ministerial Declaration in regard to Trade Facilitation contains (i) a Ministerial Decision concluding the negotiation of an Agreement on Trade Facilitation ("Trade Facilitation Agreement" or TFA), establishing a Preparatory Committee on Trade Facilitation and setting a timeframe for the steps to be taken to allow the TFA to enter into force; and (ii) the Trade Facilitation Agreement itself, annexed to the Ministerial Decision.

The TFA contains two sections. Section I establishes Members' rights and obligations in regard to (i) the publication and availability of customs and administrative information relating to the importation and exportation of goods, (ii) the opportunity for traders and interested parties to comment and have access to information on import-related measures before these enter into force, and to hold consultations with border agencies, (iii) advance rulings, (iv) appeal or review procedures, (v) miscellaneous measures to enhance impartiality, non-discrimination and transparency, (vi) disciplines on fees and charges relating to importation and exportation, (vii) the release and clearance of goods, (viii) cooperation between border agencies, (ix) the movement of goods intended for import within the territory of a party under control of its customs authority, (x) several formalities relating to the importation, exportation and transit of goods, (xi) freedom in regard to traffic in transit, (xii) cooperation between parties' customs authorities, and (xiii) institutional arrangements, *i.e.*, the establishment of trade facilitation committees. Section II establishes special

Contacts
Scott Lincicome, Esq.
701 Thirteenth Street NW, Washington, DC 20005
slincicome@whitecase.com
Samuel Scoles
8 Marina View, #27-01, Singapore, 018960
sscoles@whitecase.com

and differential treatment provisions in regard to Section I commitments for developing and least-developed country Members.

Section I

- **Publication and Availability of Information.** The TFA requires Members to promptly make publicly available to governments, traders and other interested parties in a non-discriminatory and easily accessible manner information relating to (i) import, export and transit procedures; (ii) applied duty and tax rates; (iii) import, export and transit fees and charges; (iv) classification and valuation rules; (v) rules of origin (ROOs) laws, regulations and/or rulings; (vi) import, export or transit restrictions or prohibitions; (vii) penalties for violations; (viii) procedures for appeals; (ix) import-, export- or transit-related agreements; and (x) tariff-rate quotas (TRQs). Members must also make available through the internet and regularly update (i) a description of their import, export and transit procedures, including for appeals; (ii) required import, export and transit documentation; and (iii) enquiry points. The TFA also (i) requires Members to maintain one or more enquiry point(s) to answer reasonable enquiries from governments, traders and other interested parties within a reasonable timeframe, and (ii) limits the fees enquiry points may charge for their services. Additionally, Members must notify the Trade Facilitation Committee of the location of relevant published information, the URLs of relevant websites, and the contact information of the enquiry points.

- **Opportunity for Traders and Interested Parties to Comment and Have Access to Information on Import-Related Measures before These Enter into Force, and to Hold Consultations with Border Agencies.** The TFA requires Members, with few exceptions, to provide traders and other interested parties with opportunities and an appropriate period of time to comment on and become acquainted with proposed measures relating to the movement, release and clearance of goods. Members must also provide for regular consultations within their territory between border agencies and, *inter alia*, traders;

- **Advanced Rulings.** The TFA requires Members to issue advance rulings in a reasonable, time-bound manner to applicants who have submitted a complete written request. Members must promptly explain to the applicant the rationale for any decision not to approve an advance ruling. According to the TFA, (i) advance rulings shall remain valid for a reasonable period of time after issuance unless the underlying law, facts or circumstances change; and (ii) Members must explain to applicants the rationale behind any revocation, modification or invalidation of advanced rulings. The TFA also states that advance rulings shall be binding upon the issuing Member and, possibly, upon the applicant. Members must make publicly available advance ruling application requirements, the timeframe for advance ruling issuance, and the advance ruling period of validity. Additionally, the TFA requires Members to provide requesting applicants with opportunities for review of advance rulings or decisions to revoke, modify or invalidate advance rulings;

- **Appeal or Review Procedures.** The TFA requires Members to provide persons having received an administrative decision from corresponding customs authorities the right to a non-discriminatory administrative appeal or review of the decision's issuance, and/or a judicial appeal or review of the decision. Additionally, Members must ensure that petitioners have further

Contacts
Scott Lincicome, Esq.
701 Thirteenth Street NW, Washington, DC 20005
slincicome@whitecase.com
Samuel Scoles
8 Marina View, #27-01, Singapore, 018960
sscoles@whitecase.com

administrative or judicial recourse where appeal or review decisions experience impermissible delays;

- **Measures to Enhance Impartiality, Non-Discrimination and Transparency.** The TFA imposes disciplines on the issuance, termination or suspension of notifications or guidance given by Members to their concerned authorities for enhancing the level of controls or inspections at the border in respect of foods, beverages or feedstuffs for the purpose of protecting human, animal or plant life or health. The TFA requires Members to issue such notifications or guidance based on risk, and to apply them uniformly only to those points of entry where the sanitary and phytosanitary (SPS) conditions relevant to the notification or guidance exist. Members must promptly terminate or suspend the notification or guidance when the underlying circumstances change, and publish such suspension or termination in a non-discriminatory and easily accessible manner, or otherwise inform the exporting Member or the importer. In case of inspection by customs or competent authorities, the TFA requires Members to inform the carrier or importer promptly of the detention of goods stemming therefrom. In regard to test procedures, Members (i) may grant and must consider secondary tests where primary testing results in an adverse finding, and (ii) must make available in a non-discriminatory and easily accessible manner information on approved laboratories;

- **Disciplines on Fees and Charges Relating to Importation and Exportation.** The TFA (i) requires Members to publish information on fees and charges, *e.g.*, the reason for the fees and/or charges, the responsible authority, and payment procedures, (ii) prohibits Members from applying updated fees and charges without allowing for an adequate time period between the publication and the entry into force of the same, and (iii) requires Members to periodically review the number and diversity of their respective fees and charges. Members must largely limit fees and/or charges to the approximate cost of services rendered. In regard to penalty disciplines, the TFA requires that Members (i) only impose penalties for a customs breach on person(s) responsible for the breach, (ii) impose penalties commensurate with the degree and severity of the breach, (iii) maintain measures to avoid conflicts of interest in the assessment and collection of penalties and duties, and (iv) provide the infractor with the rationale behind the penalty;

- **Release and Clearance of Goods.** In regard to pre-arrival processing, the TFA requires Members to (i) allow for the submission of import documentation prior to the arrival of goods; and (ii) provide for advance storage of documents in electronic format. Members must also largely allow for electronic payment of import- and export-related duties, taxes, fees and charges. In regard to the release of goods and the final determination of customs duties, taxes, fees and charges, Members must allow for the release of goods prior to such final determination if the relevant authority does not issue the determination prior to or upon arrival of the goods, or as rapidly as possible after arrival, although conditions apply. Members must also (i) maintain a risk management system in such a manner as to avoid arbitrary or unjustifiable discrimination, or disguised restrictions to international trade, (ii) concentrate controls on high risk consignments,

Contacts
Scott Lincicome, Esq.
701 Thirteenth Street NW, Washington, DC 20005
slincicome@whitecase.com

Samuel Scoles
8 Marina View, #27-01, Singapore, 018960
sscoles@whitecase.com

and (iii) base risk assessment on appropriate selectivity criteria.[9] The TFA also requires Members to (i) maintain risk-based and transparent post-clearance audit procedures; and (ii) use the result of post-clearance audit in applying risk management. Members must also provide additional trade facilitation measures[10] to authorized operators, or offer such facilitation measures to all operators. In regard to expedited shipments, Members must allow for expedited release of goods entered through air cargo facilities to requesting persons, although conditions apply. Members must also release perishable goods in a timely manner, and allow for the provision of proper storage for such goods;

- **Border Agency Cooperation.** The TFA requires Members to ensure that their respective border authorities and agencies cooperate with those of other Members, and coordinate their activities in order to facilitate trade. Additionally, the TFA includes agency cooperation requirements for Members sharing a border;

- **Movement of Goods under Customs Control Intended for Import.** The TFA allows for the free movement of goods intended for import between customs offices of a Member before release or clearance;

- **Importation, Exportation and Transit Formalities.** The TFA requires Members to review formalities and documentation requirements, and ensure that they (i) contribute to rapid release and clearance, (ii) aim to reduce processing time and compliance cost, (iii) minimize trade restrictiveness, and (iv) are necessary. The TFA also (i) requires a Member to ensure that its agencies accept a paper or electronic version of a necessary document from another of its agencies holding the original of the document, and (ii) imposes other limitations on documentation requirements. The TFA requires the Trade Facilitation Committee to develop procedures for the sharing of relevant information and best practices on international standards. Members must also limit documentation requirements where traders submit paperwork through a single window system. With respect to pre-shipment inspections, the TFA prohibits Members from requiring the use of such inspections in relation to tariff classification and customs valuation. Additionally, Members (i) must not make mandatory the use of customs brokers, (ii) must notify and publish their measures on the use of customs brokers, and (iii) must apply transparent and objective customs broker licensing rules. Also concerning border procedures and documentation requirements, Members must apply throughout their respective territories common customs procedures and uniform documentation requirements, although conditions apply. Members must also allow importers to re-consign or return rejected goods to exporters or other persons where competent authorities reject the goods for import due to their failure to comply with applicable SPS or technical regulations. The TFA requires Members to allow for duty-free temporary admission of goods, as well as for the inward and outward processing of goods;

---

[9] *e.g.*, Harmonized System (HS) code, nature and description of the goods, country of origin, country from which the goods were shipped, value of the goods, compliance record of traders, and type of means of transport.

[10] *i.e.*, (i) low documentary and data requirements as appropriate; (ii) low rate of physical inspections and examinations as appropriate; (iii) rapid release time as appropriate; (iv) deferred payment of duties, taxes, fees and charges; (v) use of comprehensive guarantees or reduced guarantees; (vi) a single customs declaration for all imports or exports in a given period; and/or (vii) clearance of goods at the premises of the authorized operator or another place authorized by customs.

Contacts
Scott Lincicome, Esq.
701 Thirteenth Street NW, Washington, DC 20005
slincicome@whitecase.com

Samuel Scoles
8 Marina View, #27-01, Singapore, 018960
sscoles@whitecase.com

- **Freedom of Transit.** The TFA prohibits Members from (i) maintaining traffic in transit rules where the original underlying circumstances have changed, (ii) applying such rules as a disguised restriction on traffic in transit, (iii) condition traffic in transit on the collection of any fees or charges, although conditions apply, (iv) seeking, taking or maintaining voluntary restraints or similar traffic in transit measures, (v) making more burdensome than necessary traffic in transit formalities, documentation requirements and customs controls, (vi) applying many technical regulations and conformity assessment procedures to goods in transit, and (vii) subjecting goods in transit to any customs charges or unnecessary delays or restrictions until such goods reach destination. Additionally, Members must (i) accord fair treatment to products in transit through the territory of other Members, (ii) allow and provide for advance filing and processing of transit documentation and data prior to the arrival of goods, (iii) terminate transit operations after satisfaction of transit requirements once traffic in transit has reached the customs office where it exits a Member's territory, (iv) limit traffic in transit sureties, deposits or other guarantees to ensure satisfaction of requirements arising from such traffic in transit, (v) discharge guarantees following satisfaction of traffic in transit requirements, (vi) allow for guarantees, including those for multiple transactions of the same operators, or for renewals of guarantees without discharge for subsequent consignments, and (vii) make publicly available information used to set guarantees;

- **Customs Cooperation.** Where there are reasonable grounds to doubt the truth or accuracy of documentation, the TFA requires Members to exchange, *inter alia*, information contained on certain import/export documents, in addition to a description of the protection and confidentiality level the requesting Member requires. The TFA establishes guidelines for requests of such information, in addition to Members' rights and obligations in regard to the provision of the requested information; and

- **Institutional Arrangements.** The TFA establishes a Trade Facilitation Committee to, *inter alia*, periodically review the operation and implementation of the Agreement. The TFA also requires Members to maintain national committees on trade facilitation to facilitate domestic coordination and implementation of the TFA provisions;

Section II

Section II of the TFA contains special and differential treatment (S&DT) provisions for developing and least-developed country Members regarding these countries' implementation of their trade facilitation commitments. The TFA creates three categories of provisions, representing the categories under which a developing or least-developed country Member may classify its TFA commitments in relation to its respective implementation capacities.[11]

[11] (i) Category A relates to those provisions that a developing country or a least-developed country Member designates for implementation upon entry into force of the Trade Facilitation Agreement or, in the case of a least-developed country Member, within one year after entry into force; (ii) Category B relates to those provisions that a developing country or a least-developed country Member designates for implementation on a date after a transitional period of time following the entry into force of the agreement; and (iii) Category C relates to those provisions that a developing country or a least-developed country Member

Contacts Scott Lincicome, Esq.
701 Thirteenth Street NW, Washington, DC 20005
slincicome@whitecase.com

Samuel Scoles
8 Marina View, #27-01, Singapore, 018960
sscoles@whitecase.com

In regard to capacity, the TFA states that Members should provide assistance and support for capacity building to help developing and least-developed country Members implement the provisions of the agreement, and that least-developed country Members must only "undertake commitments to the extent consistent with their individual development, financial and trade needs or their administrative and institutional capabilities."

Finally, the TFA includes language providing a grace period for developing and least-developed country Members in regard to the application of the Understanding on Rules and Procedures Governing the Settlement of Disputes as it concerns the commitments contemplated under the TFA. Also, the TFA urges Members to "exercise due restraint in raising matters under the Understanding on Rules and Procedures Governing the Settlement of Disputes involving least developed country Members."

II. COTTON

In the Draft Ministerial Decision on cotton ("Cotton Decision"), the Ministers express the importance of advancing the work on cotton, in connection with the revised December 2008 draft agriculture modalities. In particular, the Ministers agreed that the mandate set forth in the 2005 Hong Kong Ministerial Declaration to address cotton "ambitiously, expeditiously and specifically" within the agriculture negotiations remains a useful basis.

To provide better monitoring of the trade-related aspects of cotton, the Ministers agreed to hold dedicated biannual discussions in the context of the Committee on Agriculture in Special Session. The discussions will largely focus on developments relating to market access, domestic support, and export competition, based on the data compiled by the WTO Secretariat from WTO Members' notifications. Notably, the discussions will focus acutely on (i) export subsidies for cotton and other measures with equivalent effect, (ii) domestic support for cotton, and (iii) measures, tariff and non-tariff, applied to cotton exports from least developed countries (LDCs) in markets of interest to such countries.

In addition, the Ministers committed to continue engagement in the Director-General's Consultative Framework Mechanism on Cotton. Largely supported by Benin, Burkina Faso, Chad and Mali ("Cotton-4"), the consultations aim to allow participants to exchange and track information on aid and trade reform relating to the cotton sector. The Ministers also urged development partners of LDCs to leverage existing aid-for-trade mechanisms.

III. AGRICULTURE

The Draft Ministerial Declaration as it concerns Agriculture is comprised of four separate Ministerial Decisions, namely: (i) General Services; (ii) Public Stockholding for Food Security Purposes; (iii)

---

designates for implementation on a date after a transitional period of time following the entry into force of the agreement and requiring the acquisition of implementation capacity through the provision of assistance and support for capacity building.

Contacts Scott Lincicome, Esq.
701 Thirteenth Street NW, Washington, DC 20005
slincicome@whitecase.com

Samuel Scoles
8 Marina View, #27-01, Singapore, 018960
sscoles@whitecase.com

Understanding on Tariff Rate Quota Administration Provisions of Agricultural Products, as Defined in Article 2 of the Agreement on Agriculture; and (iv) Export Competition.

Decision on General Services

This Decision reaffirms Members' commitments to General Services Programs, which contribute to rural development, food security, and poverty alleviation, particularly in developing countries. General Services Programs are exempted from the general reduction commitments made by each Member regarding domestic agricultural support measures, so long as they are maintained in conformity with Annex 2, paragraph 2 of the Agreement on Agriculture ("AoA"). The Decision lists additional General Services Programs that Members note "could be" considered to fall within the scope of Annex 2: (i) land rehabilitation; (ii) soil conservation and resource management; (iii) drought management and flood control; (iv) rural employment programs; (v) issuance of property titles; and (vi) farmer settlement programs. This decision therefore creates an understanding that Members' domestic support programs that fall into these categories will be excluded from a Member's domestic reduction commitments and will not be included in the calculation of the annual level of support provided to agricultural producers in that country.

Decision on Public Stockholding for Food Security Purposes

This Decision establishes an interim mechanism for the monitoring of current food security programs and requires Members to negotiate a "permanent solution" applicable to all developing country Members regarding public stockholding for food security purposes. It also establishes a commitment that, until a permanent solution is found, Members "shall refrain" from challenging via WTO dispute settlement developing Members' support programs for traditional food crops as part of food stockholding programs, so long as they are maintained in accordance with this Decision and certain provisions of the AoA. In accordance with the Decision, the following requirements must be met:

i) Members must notify the Committee on Agriculture if, as result of their public food stockholding programs, they are exceeding or at risk of exceeding their bound limits with respect to the levels of support provided to agricultural producers;

ii) Members must have fulfilled their domestic support notification requirements under the AoA in accordance with certain conditions;

iii) Members must provide, and continue to provide on an annual basis, additional information by completing the template contained in the Decision's Annex, for each public stockholding program that it maintains for food security purposes; and

iv) Members must provide any additional relevant statistical information described in the Statistical Appendix to the Annex as soon as possible after it becomes available.

In addition, the Decision stipulates that in order for a food stockholding program to avoid a WTO challenge, it must not distort trade or adversely affect the food security of other Members.

The Committee on Agriculture is tasked with monitoring information provided in accordance with the above requirements. The Decision also obligates benefiting developing countries to hold

Contacts
Scott Lincicome, Esq.
701 Thirteenth Street NW, Washington, DC 20005
slincicome@whitecase.com
Samuel Scoles
8 Marina View, #27-01, Singapore, 018960
sscoles@whitecase.com

consultations with other Members, upon request, regarding the operation of such programs. Finally, the Decision obligates Members to establish a work program, undertaken by the Committee on Agriculture, to seek a permanent solution regarding the consistency of food stockholding programs under the AoA. The General Council will report any progress made to the 10th Ministerial Conference, and Members will aim to conclude the program no later than the 11th Ministerial Conference.

Decision establishing an Understanding on Tariff Rate Quota Administration Provisions of Agricultural Products, as Defined in Article 2 of the Agreement on Agriculture

The Understanding on Tariff Rate Quota Administration Provisions of Agricultural Products Decision sets out a number of "agreements" reached by the Members with respect to the disciplines applicable to tariff rate quota administration:

- Tariff rate quota administration shall constitute "import licensing" within the meaning of the Uruguay Round Agreement on Import Licensing Procedures, and the obligations in that Agreement shall apply in full;
- Publication of relevant information must occur at least 90 days prior to the opening date of the tariff quota concerned, and advance notice must be given for any related application process;
- Applications related to tariff rate quotas must be directed to one administrative body only;
- Applications must be processed within 30 days for "as and when received" cases and no longer than 60 days for "simultaneous" consideration cases. Licenses must be issued no later than the effective opening date of the tariff quota concerned, unless there has been an extension;
- Tariff quota "fill rates" shall be notified to the WTO;
- Licenses for scheduled tariff quotas shall be issued in economic quantities. Unfilled tariff quota access must not be attributable to administrative procedures that are more constraining than an "absolute necessity" test would demand;
- If licenses are less than fully utilized for any reason not of a "normal commercial operator," the Member shall "give this due weight" when considering the underutilization and allocation of new licenses;
- Where a private operator is under-utilizing a tariff quota for no reasonable commercial reason, Members must ask those operators whether they would be prepared to make the unused entitlements available to other potential users;
- Members must make available the contact details of those importers holding licenses, in accordance with confidentiality requirements and/or with the consent of those importers;
- The Committee on Agriculture will review and monitor the implementation of this Understanding;
- Members must provide for an effective re-allocation mechanism for tariff rate quotas in

Contacts
Scott Lincicome, Esq.
701 Thirteenth Street NW, Washington, DC 20005
slincicome@whitecase.com
Samuel Scoles
8 Marina View, #27-01, Singapore, 018960
sscoles@whitecase.com

accordance with Annex A to the Decision;

- The operation of the Decision shall be reviewed within four years of adoption, with the objective being to promote continuing improvement in the utilization of tariff rate quotas. The General Council is required to make recommendations to the 12th Ministerial Conference as to whether, and how, the Annex should be re-affirmed or modified with respect to tariff quota re-allocation administration methods, providing for special and differential treatment;

- Paragraph 4 of the Annex concerning tariff quota re-allocation administration methods will expire after the 12th Ministerial Conference unless Members decide to extend that paragraph. However, in the event of non-extension, all Members except Barbados, Dominican Republic, El Salvador, Guatemala, and the United States shall continue to apply those quota re-allocation administration methods.

Decision on Export Competition

The Draft Decision on Export Competition broadly reaffirms that export competition remains a key priority of the agriculture negotiations in the context of ongoing reform, and restates the Members' commitment, as set out in the 2005 Hong Kong Ministerial Declaration, to eliminate all forms of export subsidies, and to maintain disciplines on all export measures with equivalent effect. The Decision further states that the December 2008 revised draft modalities for agriculture remain an important basis for a final agreement on export competition.

The Decision emphasizes that the recent trend toward a decreased use of export subsidies is not a substitute for the final objective of eliminating such measures. The Decision notes that Members will "exercise utmost restraint" with respect to their future use of export subsidies and all export measures with equivalent effect. Members are encouraged to undertake, maintain and/or advance their domestic reform processes, and maintain the level of export subsidies and other export measures with equivalent effect significantly below Members' export subsidy commitments.

Members also commit to work actively for "further concrete progress" on this matter "as early as feasible" and agree to hold annual dedicated discussions in the Committee on Agriculture to examine developments. For purposes of this examination, the Decision calls upon Members to submit timely notifications in the form of responses to a questionnaire, which is set out in the Decision's Annex. Members agree to review the situation regarding export competition at the 10th Ministerial Conference and agree that the Decision does not affect the rights and obligations of Members under the covered agreements.

IV. DEVELOPMENT AND LDC ISSUES

The Ministerial Declaration as it concerns Development and LDCs is comprised of four separate Ministerial Decisions, namely: (i) Preferential Rules of Origin for Least-Developed Countries; (ii) Operationalization of the Waiver Concerning Preferential Treatment to Services and Service Suppliers of Least-Developed Countries; (iii) Duty-Free and Quota-Free Market Access for Least-Developed Countries; and (iv) Monitoring Mechanism on Special and Differential Treatment.

Contacts Scott Lincicome, Esq.
701 Thirteenth Street NW, Washington, DC 20005
slincicome@whitecase.com

Samuel Scoles
8 Marina View, #27-01, Singapore, 018960
sscoles@whitecase.com

Decision on Preferential Rules of Origin for Least-Developed Countries

This Decision calls upon Members to "endeavor to develop or build on" domestic rules of origin arrangements applicable to LDC imports in accordance with a set of guidelines provided in the Decision. Those guidelines "provide elements upon which Members may wish to draw" in order to develop their preferential rules of origin. This Decision is in part based on Annex F of the Hong Kong Ministerial Declaration, "Decision on Measures in Favour of Least-Developed Countries." The "elements" are as follow:

- Preferential rules of origin should be as transparent, simple and objective as possible;
- Members recognize that origin can be conferred by "substantial" or "sufficient" transformation, defined as: (a) *ad valorem* percentage criterion; (b) change of tariff classification; and (c) specific manufacturing or processing operation. Further guidance is set out for each of these definitions; and
- The Decision states that the objective of cumulation is to allow LDCs to combine originating materials without losing the originating status of the materials, and to jointly share materials or product. As such, cumulation should be considered as a feature of non-reciprocal preferential trade arrangements, perhaps through (i) bilateral cumulation (*i.e.*, cumulation with the respective preference-granting country), (ii) cumulation with other LDCs, or (iii) cumulation among GSP beneficiaries of a given preference-granting country and/or among developing country Members forming part of a regional group as defined by the preference-granting country.

Documentation requirements for purposes of compliance with rules of origin should also be simple and transparent, and the Decision suggests that self-certification could be used as a means of determining origin, and mutual customs cooperation and monitoring could be used to complement compliance and risk-management. Finally, the Decision stipulates that preferential rules of origin for LDCs "shall be notified," in accordance with established procedures, as set out in the Transparency Mechanism for Preferential Trade Arrangements (PTAs) and the Agreement on Rules of Origin. The Committee on Rules of Origin is tasked with conducting an annual review of relevant developments and is required to report to the General Council. The Secretariat is required to annually provide a report on the outcome of that review to the Sub-Committee on LDCs.

Decision on the Operationalization of the Waiver Concerning Preferential Treatment to Services and Service Suppliers of Least-Developed Countries

This Decision reaffirms and advances the December 2011 waiver granting "Preferential Treatment to Services and Service Suppliers of Least-Developed Countries" which, the Decision notes, has not been used since its adoption at the 2011 Geneva Ministerial.

With this in mind, the Decision instructs the Council for Trade in Services to (i) initiate a process aimed at promoting the "expeditious and effective operationalization" of the 2011 waiver, (ii) periodically review the operation of the waiver, and (iii) make recommendations on steps to enhance its operationalization. The Decision seeks to accelerate the process of securing meaningful preferences for LDC's services and service suppliers through a high-level meeting six months after

Contacts
Scott Lincicome, Esq.
701 Thirteenth Street NW, Washington, DC 20005
slincicome@whitecase.com
Samuel Scoles
8 Marina View, #27-01, Singapore, 018960
sscoles@whitecase.com

the submission of an LDC collective request identifying the sectors and modes of supply of particular export interests to such LDCs. At that meeting, developed and developing country Members are instructed to indicate sectors where they intend to provide preferential treatment to LDC services and service providers. Members are also encouraged to extend preferences to LDCs' services and services suppliers which have commercial value to LDCs, in accordance with the 2011 waiver. Preferences may also be similar to those already embodied in preferential trade agreements to which a granting Member is party, subject to certain conditions.

Technical assistance and capacity building are underscored in order to operationalize the 2011 waiver. Finally, LDCs are invited to include their services-related needs in their respective national development strategies and in their dialogues with development partners, and partners are urged to respond adequately to those needs.

Decision on Duty-Free and Quota-Free Market Access for Least-Developed Countries

This Decision recognizes that Members have made significant progress towards the goal of providing duty-free and quota-free (DFQF) market access on a lasting basis for all products of LDC origin, with developed-country Members providing either full or nearly full DFQF market access to LDC products, and developing-country Members also granting a significant degree of DFQF market access. The Decision calls upon developed-country Members that do not yet provide DFQF market access for at least 97 percent of products of LDC origin to improve coverage and provide increasingly greater market access to LDCs before the next Ministerial Conference. Developing-country Members that declare themselves able to do so shall also seek to provide DFQF market access for LDC products, or improve existing DFQF coverage for such products.

DFQF schemes must be notified pursuant to the Transparency Mechanism for Preferential Trade Arrangements, and the Secretariat is tasked with preparing a report on Members' DFQF market access for LDCs at the tariff line-level based on notifications. The Committee on Trade and Development is required to continue its annual review process of the steps taken to provide DFQF market access to LDCs, and report to the General Council. The General Council is instructed, in turn, to report on the implementation of this decision to the next Ministerial Conference, and provide any relevant recommendations.

Decision on the Monitoring Mechanism on Special and Differential Treatment

This Decision sets out the scope, functions, terms of reference and operation of the Monitoring Mechanism on Special and Differential Treatment (S&DT) that was originally adopted by the General Council in July 2002.

- **Scope.** The Mechanism shall cover all S&DT provisions contained in multilateral WTO Agreements, Ministerial and General Council Decisions;

- **Functions / Terms of Reference.**

    - **Review.** The Mechanism is the focal point to analyze and review the implementation of all aspects of S&DT provisions, but will not replace other relevant review mechanisms or

Contacts
Scott Lincicome, Esq.
701 Thirteenth Street NW, Washington, DC 20005
slincicome@whitecase.com
Samuel Scoles
8 Marina View, #27-01, Singapore, 018960
sscoles@whitecase.com

processes in other WTO bodies;

- **Recommendations.** The Mechanism must not alter Members' rights and obligations under the WTO Agreements, Ministerial or General Council Decisions, or interpret their legal nature, but it may make recommendations to relevant WTO bodies for initiating negotiations on the S&DT provisions that have been reviewed under the Mechanisms; and

- **Operations.** The Mechanism shall operate in Dedicated Sessions of the Committee on Trade and Development, and meet twice a year with additional meetings, as appropriate. The Committee will monitor S&DT provisions in the Mechanism on the basis of written inputs or submissions by Members, as well as reports received from other WTO bodies. Where a matter falls within the purview of another WTO body, the Mechanism will bring it to the attention of that body so that input can be provided.

The Mechanism will be reviewed every three years after its first formal meeting, or otherwise when necessary.

Outlook

The Bali Package has given a welcome boost to the Doha Round of trade negotiations, and has sent a positive political signal that the WTO is still able to perform its functions as a global trade negotiating body; however, the agreement reached in Bali is limited in scope and its importance therefore lies in what it has achieved politically, rather than on the substance. WTO Members have expressed political will toward the completion of the Doha Round by instructing, in the Ministerial Declaration, the Trade Negotiations Committee to prepare within the next 12 months "a clearly defined work program on the remaining Doha Development Agenda issues." The Declaration stresses that "[i]ssues in the Bali Package where legally binding outcomes could not be achieved will be prioritized." However, the difficulties still lying ahead should not be underestimated.

The Ministerial Declaration and the Ministerial Decisions have all been validly adopted at the Ministerial Conference.[12] The TFA remains subject to the adoption procedures of Article X: 3 of the WTO Agreement, as specified in paragraph 3 of the Ministerial Decision on Trade Facilitation. This means that the Agreement, in order to enter into force, will need to be accepted by at least two thirds of the WTO Members, and will then enter into force for those Members having accepted it. To that effect, the Draft Ministerial Decision provides that the General Council shall (i) meet no later than July 31, 2014 to adopt a protocol which shall be drafted by the Preparatory Committee on Trade Facilitation, and (ii) open the Protocol for acceptance until July 31, 2015.

Another noteworthy aspect of the TFA is the level of flexibility it introduces for developing and LDC Members, which can self-elect the extent and the pace of the implementation of their respective commitments. This is unprecedented and likely to raise practical - if not legal - issues, especially in

[12] Although the currently publically available documents are designated as "draft", they have been formally adopted and will be replaced in due course by final versions.

Contacts Scott Lincicome, Esq.
701 Thirteenth Street NW, Washington, DC 20005
slincicome@whitecase.com

Samuel Scoles
8 Marina View, #27-01, Singapore, 018960
sscoles@whitecase.com

terms of the future enforcement of the TFA via the Understanding on Rules and Procedures Governing the Settlement of Disputes ("Dispute Settlement Understanding" or DSU).

A distinction should therefore be made between the entry into force of the TFA and the flexibilities granted to developing and least-developed countries establishing the pace and extent of the implementation of their respective commitments. To summarize:

- The TFA is not expected to produce legal effects until it is accepted by at least two thirds of the WTO Membership. This should occur at the latest by July 31, 2015;

- Once it has been accepted by at least two thirds of WTO Members, the TFA will then enter into force for these Members having accepted it, in accordance with Article X: 3 of the WTO Agreement. This implies that the TFA will be an integral part of the multilateral agreements on trade in goods contained in Annex 1A to the WTO Agreement, and, as such, subject to the provisions of the Dispute Settlement Understanding; and

- There exist many unknowns in regard to the enforceability of TFA provisions against certain countries. These unknowns result from (i) the self-designation by developing and least developed WTO Members with respect to categories A, B and C (*see: TRADE FACILITATION: Section II, above*), and the differentiated modalities for implementation that result therefrom; (ii) the explicit recognition that the extent and timing of implementing the provisions of the TFA shall be related to the implementation capacities of developing and least-developed country Members; and (iii) the "grace periods" defined in the TFA for the application of the DSU against developing and least developed country Members.

The implementation of the TFA, and the determination of the extent to which its obligations apply to a particular WTO Member, will thus require a careful case-by-case analysis based on the status of this WTO Member, in addition to the classification of its TFA commitments, as will be notified to the WTO.

Click here for a copy of the "Bali Package."

Contacts
Scott Lincicome, Esq.
701 Thirteenth Street NW, Washington, DC 20005
slincicome@whitecase.com

Samuel Scoles
8 Marina View, #27-01, Singapore, 018960
sscoles@whitecase.com