

U.S. FARM SUBSIDIES AND THE EXPIRATION OF THE WTO'S PEACE CLAUSE

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1. INTRODUCTION

The broad objective of the World Trade Organization ("WTO") is "progressive liberalization" — i.e., the gradual reduction of trade barriers over the course of successive rounds of trade negotiations. Consistent with this goal, the WTO's Agreement on Agriculture identifies as one of its primary objectives the "substantial progressive reduction" in trade-distorting farm subsidies.¹ In the Doha Round of trade negotiations, however, the United States has been attempting to *deliberalize* some of its commitments under the currently applicable rules on agriculture subsidies while at the same time seeking further concessions on agricultural tariffs from its trading partners. This posture by the United States, as much as any other factor, is responsible for the current impasse in the Doha Round negotiations, which were suspended indefinitely in July 2006.²

During the Uruguay Round trade negotiations, which were completed in 1994, the United States agreed to reduce its overall level of trade-distorting "Amber Box" subsidies to \$19.1 billion. Perhaps more significantly, the United States also agreed to subject its farm supports to the generally applicable restrictions on subsidies contained in the Agreement on Subsidies and Countervailing Measures ("SCM" Agreement) after the expiration of the Agreement on Agriculture's so-called "Peace Clause" at the end of 2003.³ As a result of that expiration, all trade-distorting farm subsidies can be challenged under the SCM Agreement, including marketing loan program payments, counter-cyclical payments, and, to a lesser extent, direct payments.⁴ The WTO's Dispute Settlement Body has already ruled against U.S. subsidies for upland cotton in a case brought by Brazil; similar challenges against supports for other major U.S. export commodities (e.g., corn, wheat, rice and soybeans) appear likely.

¹ Agreement on Agriculture, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 410, *reprinted in THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS* 43 (1999), *available at* http://www.wto.org/English/docs_e/legal_e/14-ag.pdf [hereinafter Agreement on Agriculture].

² *See infra* Section 4.

³ *See infra* Sections 3.1.1. & 3.1.3.

⁴ *See infra* Section 5.3.2.1.

In the Doha Round, however, the negotiating position of the Office of the United States Trade Representative (“USTR”) has reflected more the significant pressure from Congress to protect farm subsidies than the substantial commitments that the United States has already made during the Uruguay Round. The USTR has sought to minimize the reductions that the United States would be required to make in Amber Box subsidies and to offset any reductions by reclassifying programs under “Blue Box” and “Green Box” categories that are not subject to the \$19.1 billion limit. Moreover, the USTR has been pushing—unsuccessfully—for a new Peace Clause to protect farm subsidies from challenge under the SCM Agreement.⁵ Although the USTR had made some limited progress in winning acceptance for its box-shifting strategy before the collapse of negotiations, there appears to be virtually no support for a new Peace Clause among the other 148 Member Nations of the WTO.⁶ Accordingly, U.S. commodity subsidy programs are likely to remain vulnerable to challenges under the SCM Agreement regardless of the eventual outcome of the Doha Round.

A more viable strategy for addressing the potential for conflict between U.S. farm supports and the WTO subsidy disciplines would focus not on attempting to negotiate a relaxation of the relevant rules but rather on drafting a new Farm Bill that concentrates funding for a wide range of programs—including rural development, infrastructure, conservation, alternative energy, and food programs—that are not subject to challenge under the SCM Agreement. This approach would avoid further WTO disputes over U.S. agricultural subsidies while permitting Congress to maintain the current baseline of Farm Bill funding.

Section 2 of this Article discusses the evolution of the U.S. system of farm supports and describes the primary subsidy programs in the current Farm Bill. Section 3 provides a brief overview of the relevant WTO rules on agricultural subsidies contained in the Agreement on Agriculture and the SCM Agreement and suggests two relatively simple criteria for predicting whether a particular subsidy program is likely to be found to be impermissibly trade distorting. Section 4 examines the United States’ strategy for protecting farm subsidies in the Doha Round negotiations and ex-

⁵ See *infra* Section 4.4.

⁶ See *id.*

plains why it is unlikely to succeed. Section 5 provides broad guidelines for drafting a WTO-compliant Farm Bill and identifies some existing Farm Bill programs that satisfy these guidelines.

2. SUBSIDY PROGRAMS UNDER THE FARM BILL

2.1. Pre-1996 Farm Subsidy Programs

From the 1930s through the 1990s, U.S. farm policy focused on maintaining the stability of commodity prices through a system of production restrictions and price-linked loan and payment programs.⁷ The production restrictions, such as payments to farmers to remove land from production, limited supply and accordingly supported prices. The loan programs effectively guaranteed producers of certain commodities a set price by providing them with "non-recourse loans." These loans allowed farmers to forfeit their crop to the government's Commodity Credit Corporation in lieu of repayment if market prices were below a pre-set target price for the relevant commodity.⁸ The deficiency payment program paid farmers when market prices were lower than the target price contingent upon their compliance with an acreage reduction program, which limited the number of acres that could be planted with a given commodity.⁹

In the mid-1990s, the U.S. approach to agricultural subsidies changed dramatically as Congress attempted to adapt its farm policy to new pressures and opportunities presented by international trade. In 1994, Congress approved the results of the Uruguay Round negotiations, which created the WTO and for the first time subjected U.S. agricultural subsidies to significant restrictions under global trade rules.¹⁰ Most conspicuously, the United States agreed to reduce its domestic support subsidies to \$19.1 billion.¹¹

⁷ See Jon Lauck, *After Deregulation: Constructing Agricultural Policy in the Age of "Freedom to Farm,"* 5 *DRAKE J. AGRIC. L.* 3, 9-19 (2000) (providing a history of pre-1996 farm policy in the United States).

⁸ See *id.* at 13.

⁹ See ECON. RESEARCH SERV., U.S. DEP'T OF AGRIC., *AGRIC. INFO. BULL. NO. 624, PROVISIONS OF THE FOOD, AGRICULTURE, CONSERVATION, AND TRADE ACT OF 1990*, at 6-7, 9 (1991) available at <http://www.ers.usda.gov/Publications/aib624/aib624a.pdf>.

¹⁰ See WTO Secretariat, *WTO Agriculture Negotiations – The Issues, and where we are now* 5 (Dec. 1, 2004), http://www.wto.org/english/tratop_e/agric_e/agnegs_bkgrnd_e.pdf (explaining agricultural issues negotiated at the WTO between 2000

2.2. The 1996 Farm Bill

The Federal Agriculture and Improvement and Reform Act of 1996 ("1996 Farm Bill") was designed to keep U.S. subsidies under \$19.1 billion by continuing the non-recourse loan program¹² but eliminating deficiency payments and replacing them with fixed payments that would gradually decrease over a period of seven years. These "production flexibility contract" ("PFC") payments were made available to owners and farmers of cropland covered under the previous farm bill, with most of the money going to producers of wheat, corn, upland cotton, and rice.¹³ Payments were based upon 85% of the contract acreage and gradually reduced over a seven-year period ending in the 2002 fiscal year.¹⁴ Under the PFC program's "planting flexibility" provisions, recipients of PFC payments were not required to produce any particular commodity but were restricted from producing fruits or vegetables on the contract acreage.¹⁵ The United States Department of Agriculture ("USDA") projected that this new approach to farm subsidies would keep the United States far below the \$19.1 billion limit.¹⁶

Much of the support in Congress for this approach to farm subsidies was based on the belief that the reduction in subsidy payments would be more than offset by the revenues from the increased exports of commodities that were expected to result from

and 2004). Some provisions in the General Agreement on Tariffs and Trade ("GATT") did apply to agriculture products prior to the Uruguay Round, including, to a limited degree, GATT Article XVI. See Fabian Delcros, *The Legal Status of Agriculture in the World Trade Organization*, 36(2) J. WORLD TRADE 219, 223-25 (2002).

¹¹ See *infra* Section 3.1.1; see also Federal Agriculture and Improvement and Reform Act of 1996, Pub. L. No. 104-127, §§ 111-113(b), 110 Stat. 888 (1996). [hereinafter 1996 Farm Bill].

¹² See ECON. RES. SERV., U.S. DEP'T OF AGRIC., THE 2002 FARM BILL: TITLE I COMMODITY PROGRAM 5-6, <http://www.ers.usda.gov/Features/farmbill/titles/titlecommodities.htm> (last visited Dec. 7, 2006) (outlining non-recourse loan program under the 1996 and 2002 Farm Bills) [hereinafter U.S. DEP'T OF AGRIC., TITLE I COMMODITY PROGRAM].

¹³ 1996 Farm Bill §§ 111 & 113(b).

¹⁴ *Id.* § 113(a).

¹⁵ *Id.* § 118.

¹⁶ See Frederick Nelson, *U.S. Ag Policy – Well Below WTO Ceilings on Domestic Support*, AGRIC. OUTLOOK, Oct. 1997, at 26, 26-32, available at <http://www.ers.usda.gov/publications/agoutlook/oct1997/ao245h.pdf>.

the Uruguay Round.¹⁷ The projections concerning increased export revenues for U.S. farmers, however, proved to be inaccurate. Commodity prices collapsed in the late 1990s, and Congress responded with a series of supplemental bills that provided market loss assistance ("MLA") payments to producers of the same commodities that were eligible for PFC payments.¹⁸

2.3. *The 2002 Farm Bill*

Congress continued to increase farm subsidies in the Farm Security and Rural Investment Act of 2002 ("2002 Farm Bill").¹⁹ The bulk of the subsidies are provided under three programs: (1) marketing loan program payments, (2) direct payments, and (3) counter-cyclical payments.²⁰ The marketing loan program continues in much the same form as it did in previous farm bills.²¹ Direct

¹⁷ See Lauck, *supra* note 7, at 24–31.

¹⁸ See ECON. RES. SERV., U.S. DEP'T OF AGRIC., FARM AND COMMODITY POLICY: 1996–2001 COMMODITY PROVISIONS—EMERGENCY AND SUPPLEMENTAL ASSISTANCE, <http://www.ers.usda.gov/briefing/FarmPolicy/1996emerge.htm> (last updated Oct. 18, 2006); see also Panel Report, *United States—Subsidies on Upland Cotton* ¶ 7.1301, WT/DS267/R (Sept. 8, 2004) ("The United States has acknowledged that MLA payments were paid in light of low commodity prices.") [hereinafter Upland Cotton Panel Report].

¹⁹ See Farm Security and Rural Investment Act of 2002, Pub. L. No. 107–171, 116 Stat. 134 (2002) [hereinafter 2002 Farm Bill]; U.S. DEP'T OF AGRIC., 2007 FARM BILL THEME PAPERS, RISK MANAGEMENT 20 (2006), <http://www.usda.gov/documents/Farmbill07riskmgmtrev.doc> ("The 2002 Farm Bill was developed under a budget that permitted spending to increase by about \$8 billion per year above the levels projected under a continuation of the 1996 Farm Bill.") [hereinafter U.S. DEP'T OF AGRIC., RISK MANAGEMENT PAPER]; see also Daniel A. Sumner, *Boxed In: Conflicts Between U.S. Farm Policies and WTO Obligations*, in TRADE POL'Y ANALYSIS NO. 32, at 4 (CATO Institute 2005), at 4 (noting that farm subsidies were increased in the 2002 Farm Bill).

²⁰ Producers of just five commodities—upland cotton, corn, rice, wheat and soybeans—receive about 93% of the subsidies under these programs. See *infra* note 168 and accompanying text. There are also subsidy programs that benefit other commodities—most significantly the sugar and dairy programs. Both programs function primarily by supporting the market price of the commodity rather than by providing direct payments to farmers. The sugar program functions through a system of price-support loans to sugar processors and tariff rate quotas that limit the access of foreign producers to U.S. sugar market. See 2002 Farm Bill § 1401. Milk prices are supported through a system of government purchases of "cheese, butter, and nonfat dry milk produced from the milk." 2002 Farm Bill § 1501.

²¹ 2002 Farm Bill §§ 1201–09; U.S. DEP'T OF AGRIC., TITLE I COMMODITY PROGRAM, *supra* note 12; see JIM MONKE, CONG. RESEARCH SERV., CRS REPORT

payments – the successor to the PFC program – are fixed payments available for owners of “base acres” that were planted during the period from 1998 to 2001 with certain crops, including corn, wheat, upland cotton, rice, and soybeans.²² The payments are calculated by multiplying a “payment rate” for each commodity by the “payment acres” (85% of the base acres) and the “payment yield” for the relevant commodity.²³ As with PFC payments, owners of base acres have “planting flexibility” but are restricted from planting fruits, vegetables or wild rice.²⁴

Counter-cyclical payments replaced MLA payments in the 2002 Farm Bill. Counter-cyclical payments are provided to owners of the same base acres as direct payments but are based upon the difference between a target price established for each commodity and the “effective price” for the commodity (the higher of either the average market price or the marketing loan rate added to the direct payment rate for the commodity.)²⁵ As with direct payments, no production on the base acres is required for counter-cyclical payments, but the same planting flexibility restrictions apply.²⁶

3. THE PRINCIPLE WTO AGREEMENTS APPLICABLE TO FARM SUBSIDIES: THE AGREEMENT ON AGRICULTURE AND THE AGREEMENT ON SUBSIDIES AND COUNTERVAILING MEASURES

The Uruguay Round of trade negotiations resulted in the adoption of two agreements imposing significant new restrictions on agricultural subsidies: (1) the SCM Agreement and (2) the Agreement on Agriculture. As discussed in detail below, the SCM Agreement contains rules that apply to subsidies in all sectors of the economy and generally forbids both export subsidies and other subsidies that can be shown to have trade-distorting effects. The Agreement on Agriculture contains specific provisions regarding

RS21604, MARKETING LOANS, LOAN DEFICIENCY PAYMENTS, AND COMMODITY CERTIFICATES 2-3 (2004) (explaining the marketing loan program).

²² 2002 Farm Bill §§ 1001(4) & 1103. Producers of grain sorghum, barley, oats and “other oilseeds” are also eligible for direct payments. *Id.* Other “oilseeds” include “sunflower seed, rapeseed, canola, safflower, flaxseed, [and] mustard seed” *Id.* § 1001(9).

²³ *Id.* § 1103(c).

²⁴ *Id.* § 1106.

²⁵ *Id.* § 1104.

²⁶ *Id.* § 1106.

agricultural subsidies, including the Peace Clause, which protected some agricultural subsidies from challenge under the SCM Agreement during a nine-year implementation period.

3.1. *The Agreement on Agriculture*

The Agreement on Agriculture distinguishes between two types of subsidies: (1) "domestic support" and (2) "export subsidies."

3.1.1. *Domestic support*

Domestic support refers to agricultural subsidies that, although not directly linked to exports, can nonetheless encourage overproduction of agricultural products and suppress prices. Domestic support is categorized in three "boxes" – the Amber Box, the Blue Box, and the Green Box – although the term "boxes" is not actually used in the Agreement on Agriculture.

The Amber Box. The Agreement on Agriculture requires most WTO Member nations to reduce their domestic farm support from the base level they provided between 1986 and 1988, known as the "Total Aggregate Measurement of Support" ("Total AMS").²⁷ These subsidies are commonly referred to as Amber Box subsidies and are considered the most trade-distorting form of domestic support. The limit on Amber Box subsidies for the United States at the end of a six-year implementation period was approximately \$19.1 billion.²⁸ Payments authorized under the 2002 Farm Bill that qualify as Amber Box subsidies include counter-cyclical payments and marketing loan program payments.²⁹ In addition to the capped level of Amber Box payments, the Agreement on Agriculture also permits a country to make certain *de minimis* payments. For a developed country, these payments include product-specific support that does not exceed 5% of the value of the country's production for that product or non-product-specific support that does

²⁷ See Agreement on Agriculture arts. 6–7 & Annex 3.

²⁸ *Domestic Support: Total Ams Commitments*, United States Schedule of Concessions in Goods, Annexed to Marrakesh Protocol, G/MA/W/23/Rev.3 Schedule XX, Part IV § I (last updated May 16, 2006), available at http://www.wto.org/english/tratop_e/schedules_e/goods_schedules_table_e.htm.

²⁹ See Appellate Body Report, *United States—Subsidies on Upland Cotton*, ¶ 763(c)(i), WT/DS267/AB/R (Mar. 3, 2005) [hereinafter Upland Cotton Appellate Body Report].

not exceed 5% of the total value of the country's agricultural production.³⁰

The Blue Box. Blue box subsidies are payments to farmers made in exchange for limiting production of the subsidized product.³¹ Blue Box subsidies are considered less trade-distorting than Amber Box subsidies because they limit rather than encourage production, and therefore are less likely to artificially suppress prices. Accordingly, the Agreement on Agriculture did not require countries to limit their Blue Box payments. The United States abandoned the use of production limiting subsidies in the 1996 Farm Bill but is currently attempting to negotiate the creation of a new category of Blue Box subsidies that would shield counter-cyclical payments.³²

The Green Box. Green Box subsidies include various categories of government expenditures that are considered to be non- or minimally trade-distorting because they do not function as price supports and do not encourage production. Green Box payments include both general provisions of government services, such as infrastructure and research, and certain direct payments to farmers, including payments under environmental and conservation programs.³³ As with Blue Box payments, the Agreement on Agriculture did not cap Green Box payments.

3.1.2. Export Subsidies

Export subsidies are subsidies that are provided only for exported products.³⁴ The Agreement on Agriculture required WTO Member nations to reduce the amount of agricultural export subsidies they provided and the quantities of agricultural products they subsidized.³⁵ Developed countries such as the United States were required to make deeper and more rapid reductions than developing countries.³⁶ The poorest ("least developed") countries were not

³⁰ Agreement on Agriculture art. 6.4.

³¹ *Id.* art. 6.5.

³² See discussion *infra* Section 4.1.-2.

³³ Agreement on Agriculture Annex 2.

³⁴ *Id.* art. 1(e) ("export subsidies" refers to subsidies contingent upon export performance . . .").

³⁵ See *id.* arts. 3.3 & 8-9.

³⁶ Developed countries were required to reduce the amount of export subsidies by 36% and the quantities of subsidized agricultural products by 21% over a

required to make any reductions,³⁷ although these countries typically do not have the financial resources to provide significant subsidies.

3.1.3. *The Peace Clause*

Article 13 of the Agreement on Agriculture—known as the “Peace Clause”—prohibited most challenges to agricultural subsidies under the SCM Agreement as long as countries complied with their obligations under the Agreement on Agriculture and did not exceed the level of support they provided to a specific commodity in 1992.³⁸ However, the Peace Clause applied only “during the implementation period,”³⁹ which expired on January 1, 2004.⁴⁰

Accordingly, *all agricultural subsidies are now subject to challenge under the provisions of the SCM Agreement—regardless of whether they are categorized as export subsidies or Amber, Blue, or Green Box domestic support.*⁴¹ Note that this does not necessarily mean that all farm

six-year period. Developing countries were required to reduce the amount of export subsidies for agricultural products by 24% and the amount of products subsidized by 14% over a ten year period.

³⁷ Agreement on Agriculture art. 15.2.

³⁸ *Id.* art. 13. The Peace Clause did not preclude all challenges to agricultural subsidies. Amber and Blue Box subsidies, for example, were subject to countervailing duty actions if a “determination of injury or threat thereof” from the subsidy was made, though Members were required to exercise “due restraint” in bringing actions of this kind. *See id.* art. 13(b)(i).

³⁹ *Id.* art. 13.

⁴⁰ For the purposes of the Peace Clause, the implementation period “means the nine-year period commencing in 1995.” *Id.* art. 1(f). The United States has suggested that the implementation period for the Peace Clause should be calculated by reference to the 1995 marketing year for affected commodities, not the calendar year. Under this interpretation, the Peace Clause expired for different commodities on different dates in 2004. *See U.S., EU Question Expiration of Peace Clause on Agriculture Suits*, INSIDE US TRADE (October 10, 2003).

⁴¹ *See* Richard H. Steinberg & Timothy E. Josling, *When the Peace Ends: The Vulnerability of EC and US Agricultural Subsidies to WTO Legal Challenge*, 6 J. INT'L ECON. L. 369, 388 (2003) (“[E]xport subsidies, Amber Box, Blue Box, and Green Box measures . . . are [all] actionable . . . upon expiry of the Peace Clause . . .”). *See also* Raj Bhala, *World Agricultural Trade in Purgatory: The Uruguay Round Agriculture Agreement and its Implications for the Doha Round*, 79 N.D. L. REV. 691, 824–25 (2003) (“Assuming [the Peace Clause] is not extended during the Doha Round, WTO Members will not enjoy legal security simply by complying with their commitments under the Agriculture Agreement Their programs will be subject to scrutiny, and cleansing via WTO litigation, under the SCM Agreement.”) (emphasis in original); Matthew Newell, Note, *Cotton, U.S. Domestic Policy, and Trade Wars: The Future of WTO Agricultural Negotiations*, 14 MINN. J. GLOBAL TRADE

programs within these categories are illegal under the SCM Agreement—subsidies generally must be proven to have trade-distorting effects in order to be found to violate the SCM Agreement.⁴² The expiration of the Peace Clause, however, does mean that government payments to farmers are no longer protected from challenge simply because they are classified within the Green or the Blue Box, or because the United States has not exceeded its \$19.1 billion Amber Box limit.

It has been suggested that agricultural subsidies are still protected from challenge under the SCM Agreement despite the expiration of the Peace Clause. This argument is based primarily on the contention that the Agreement on Agriculture's specific provisions on agricultural subsidies should prevail over the general subsidy rules of the SCM Agreement if the two conflict.⁴³ Proponents of this position also point to Article 21 of the Agreement on Agriculture, which states that other multilateral WTO agreements—which include the SCM Agreement—apply subject to the provisions of the Agreement on Agriculture.⁴⁴

Yet neither the principle that the more specific treaty governs in the event of a conflict nor Article 21 support the proposition that agricultural subsidies continue to be protected from challenge under the SCM Agreement. Instead, they merely indicate that the Agreement on Agriculture prevails in the event of any conflict with the SCM Agreement. The relevant questions, therefore, are which provisions of the Agreement on Agriculture purport to protect ag-

301, 313 (2005) (“As a result [of the expiration of the Peace Clause], the full substantive and legal apparatus of the WTO is, for the first time, available to member countries for challenging EU and U.S. agricultural subsidies.”).

⁴² Export subsidies are prohibited under Article 3 of the SCM Agreement without any need to demonstrate that they have trade-distorting effects, at least to the extent that they exceed a Member's scheduled commitments. See discussion *infra* Section 3.2.2.

⁴³ See Didier Chambovey, *How the Expiry of the Peace Clause (Article 13 of the WTO Agreement on Agriculture) Might Alter Disciplines on Agricultural Subsidies in the WTO Framework*, 36(2) J. WORLD TRADE 305, 310 (2002) (“[T]he specificity of the [Agreement on Agriculture's] rules on subsidies indicates that its object and purpose are to create a distinct legal regime, tailor-made for agricultural products, and that the general rule (the SCM Agreement) simply does not suit the particular conditions of agriculture.”).

⁴⁴ See Delcros, *supra* note 10, at 249–51; see also Agreement on Agriculture art. 21.1 (“The provisions of GATT 1994 and of other Multilateral Trade Agreements in Annex 1A to the WTO Agreement shall apply subject to the provisions of this Agreement.”).

ricultural subsidies from challenge under the SCM Agreement, and what is the scope and (more importantly) duration of that protection?

The only article of the Agreement on Agriculture that refers to the SCM Agreement is the Peace Clause. The introductory phrase of the Peace Clause states that it only protects agricultural subsidies from challenge "[d]uring the implementation period," which ended January 1, 2004. Consequently, the protections afforded to subsidies under the Peace Clause no longer apply. An alternative reading of the Agreement on Agriculture holding that it continues to shield farm subsidies from challenge under the SCM Agreement despite the expiration of the Peace Clause would render the Peace Clause redundant, thus violating the principle of "effective interpretation" pursuant to which treaties are to be interpreted to give effect to all of their provisions.⁴⁵

The WTO's Appellate Body applied this doctrine in the *Upland Cotton* dispute when it addressed the relationship between the Agreement on Agriculture and the SCM Agreement in the context of evaluating the legality of payments to users of domestically-produced cotton under the "Step 2" program.⁴⁶ The Appellate Body rejected the argument made by the United States that because these payments were consistent with the Agreement on Agriculture's provisions on domestic support, they were exempt from Article 3.1(b) of the SCM Agreement's prohibition on import substitution subsidies (i.e. "subsidies contingent . . . upon the use of domestic over imported goods").⁴⁷ The Appellate Body observed that:

[A] treaty interpreter must read all applicable provisions of a treaty in a way that gives meaning to *all* of them, harmoniously. . . . Article 3.1(b) of the *SCM Agreement* can be read together with the *Agreement on Agriculture* provisions relating to domestic support in a coherent and consistent man-

⁴⁵ See Steinberg & Josling, *supra* note 41, at 375; Chambovey, *supra* note 43, at 309.

⁴⁶ See *Upland Cotton Appellate Body Report*, *supra* note 29, ¶¶ 529–52.

⁴⁷ Agreement on Subsidies and Countervailing Measures art. 3.1(b), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 33 I.L.M. 1125 (1994), reprinted in LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND 164 (1994), available at http://www.wto.org/english/docs_e/legal_e/24-scm.pdf [hereinafter SCM Agreement].

ner which gives full and effective meaning to all of their terms.⁴⁸

Giving “full and effective meaning” to the Peace Clause would presumably require avoiding an interpretation that makes its time-limited protection from challenges under the SCM Agreement redundant. Accordingly, given the expiration of the Peace Clause, the most relevant rules governing the current WTO legality of farm subsidies are not those contained in the Agreement on Agriculture but rather those contained in the SCM Agreement.

3.2. *The Agreement on Subsidies and Countervailing Measures*

The SCM Agreement applies to a subsidy in any economic sector if that subsidy is “specific”⁴⁹—i.e., if eligibility for the subsidy is limited “to an enterprise or industry or group of enterprises or industries . . .”⁵⁰ Like the Agreement on Agriculture, the SCM Agreement distinguishes between export subsidies and subsidies *not* based on whether a product is exported. This latter category is referred to as “actionable” or “yellow light” subsidies.

3.2.1. *Actionable Subsidies*

In order to be considered illegal, actionable subsidies must be shown to be trade-distorting—i.e., to cause “adverse effects to the interests of other Members.”⁵¹ Although there are a variety of ways in which a WTO Member country can demonstrate that another country’s subsidies are illegally trade-distorting, the most important standard is whether the subsidies cause “serious prejudice.”⁵² Serious prejudice can be proven by demonstrating that the

⁴⁸ Upland Cotton Appellate Body Report, *supra* note 29, ¶ 549 (internal quotation marks omitted).

⁴⁹ SCM Agreement art. 1.2 (“A subsidy . . . shall be subject to the provisions of Part II [“Prohibited Subsidies”] or subject to the provisions of Part III [“Actionable Subsidies”] or V [“Countervailing Measures”] only if such a subsidy is specific in accordance with the provisions of Article 2.”).

⁵⁰ *Id.* art. 2.1. Some subsidies, such as prohibited “red light” subsidies, are treated as automatically specific. *See id.* art. 2.3 (“Any subsidy falling under the provisions of Article 3 shall be deemed to be specific.”).

⁵¹ *Id.* art. 5.

⁵² *Id.* art. 5 (“No Member should cause, through the use of any subsidy . . . adverse effects to the interests of other Members . . .”). Three types of “adverse effects” are identified in Article 5: “(a) injury to the domestic industry of another Member; (b) nullification or impairment of benefits accruing directly to other

subsidies either permit a country to take a portion of the complaining country's market share for a particular commodity⁵³ or by demonstrating that the subsidies have an adverse effect on prices for the commodity, including by causing "significant price suppression."⁵⁴

Although the *Upland Cotton* dispute involved subsidies that were provided from 1999 to 2002—prior to the expiration of the Peace Clause—the Panel and Appellate Body held that the Peace Clause did not protect the domestic support subsidies from challenge under the SCM Agreement because the level of support provided to producers of upland cotton during those years exceeded the level provided in 1992.⁵⁵ Accordingly, the *Upland Cotton* dispute provides useful insights into how the provisions of the SCM

Members under GATT 1994 . . . [and] (c) serious prejudice to the interests of another Member." For an explanation of the difficulties involved in prosecuting "injury to domestic industry" or "nullification and impairment" claims, see Steinberg & Josling, *supra* note 41, at 379–85. In addition to bringing actions based on "adverse effects" suffered, WTO Members may also impose countervailing duties on subsidized imports pursuant to the provisions of Article VI of the GATT and Part V of the SCM Agreement.

⁵³ See SCM Agreement art. 6.3

Serious prejudice in the sense of paragraph (c) of Article 5 may arise in any case where one or several of the following apply:

(a) the effect of the subsidy is to displace or impede the imports of a like product of another Member into the market of the subsidizing Member;

(b) the effect of the subsidy is to displace or impede the exports of a like product of another Member from a third country market;

...

(d) the effect of the subsidy is an increase in the world market share of the subsidizing Member in a particular subsidized primary product or commodity as compared to the average share it had during the previous period of three years and this increase follows a consistent trend over a period when subsidies have been granted.

⁵⁴ *Id.* art. 6.3(c) (stating that serious prejudice may arise where "the effect of the subsidy is a significant price undercutting by the subsidized product as compared with the price of a like product of another Member in the same market or significant price suppression, price depression or lost sales in the same market.").

⁵⁵ Upland Cotton Panel Report, *supra* note 18, ¶¶ 7.415–.608; Upland Cotton Appellate Body Report, *supra* note 29, ¶¶ 345–94. See also Agreement on Agriculture art. 13(b) ("[D]omestic support measures . . . shall be . . . exempt from actions based on . . . Articles 5 and 6 of the [SCM] Agreement, provided that such measures do not grant support to a specific commodity in excess of that decided during the 1992 marketing year . . .") (emphasis added).

Agreement regarding actionable subsidies will apply to agricultural subsidies in general now that the Peace Clause has expired.

The Appellate Body affirmed the Panel's finding that four price-contingent subsidy programs—marketing loan program payments, counter-cyclical payments, market loss assistance payments, and Step 2 payments—caused significant price suppression in the world market for upland cotton.⁵⁶ The Appellate Body noted that the Panel had considered a variety of arguments and a “voluminous evidentiary record . . . including several economic studies and substantial data” in reaching this conclusion.⁵⁷ Arguably, however, two attributes of these programs were particularly significant: (1) the magnitude of the subsidies⁵⁸ and (2) the degree to which the subsidies were linked to the price of upland cotton.⁵⁹

⁵⁶ See Upland Cotton Appellate Body Report, *supra* note 29, ¶ 496. The Panel addressed the “significant price suppression” analysis as being comprised of three separate inquiries: (1) whether price suppression “exists; if so, (2) whether it is “significant”; and (3) whether it is the “effect” of the subsidies. Upland Cotton Panel Report, *supra* note 18, ¶¶ 7.1275–7.1315 (“price suppression”); ¶¶ 7.1316–7.1333 (“significant”); ¶¶ 7.1334–7.1363 (“effect of the subsidy”).

⁵⁷ Among the other factors considered by the Panel (and approved by the Appellate Body) were (1) the “substantial proportionate influence” that the United States had on the world market for upland cotton due to its high levels of production and export of cotton, Upland Cotton Appellate Body Report, *supra* note 29, ¶¶ 419 & 449 (discussing the relevance of the magnitude of United States production and export of upland cotton in evaluating whether there has been “price suppression” and whether it has been “significant”); (2) the “temporal co-occurrence of suppressed world market prices’ and the price-contingent subsidies,” *id.* ¶ 419 & 451 (quoting Upland Cotton Panel Report, *supra* note 18, ¶ 7.1351); and (3) the “divergence between United States producers’ costs of production and revenue from sales of upland cotton,” *id.* ¶ 452 (quoting Upland Cotton Panel Report, *supra* note 18, ¶ 7.1353). The Panel’s analysis was less than a model of clarity, and although the Appellate Body upheld its findings regarding serious prejudice, it criticized the Panel’s explanation of its analytical methodology:

[W]e believe that, in its reasoning, the Panel could have provided a more detailed explanation of its analysis of the complex facts and economic arguments arising in this dispute. The Panel could have done so in order to demonstrate precisely how it evaluated the different factors bearing on the relationship between the price-contingent subsidies and significant price suppression.

Upland Cotton Appellate Body Report, *supra* note 29, ¶ 458. See also Richard H. Steinberg, *United States – Subsidies on Upland Cotton*, 99 AM. J. INT’L L. 852, 860 (2005) (“[T]he Panel’s causation analysis . . . lacked rigor and specificity, which may diminish the persuasiveness and effectiveness of the opinion.”).

⁵⁸ See discussion *infra* Section 3.2.1.1.

⁵⁹ See discussion *infra* Section 3.2.1.2.

3.2.1.1. *Magnitude of the subsidies*

The Panel cited the “readily available evidence of the order of magnitude of the subsidies” in concluding that the subsidies caused price suppression that was “significant.”⁶⁰ The Appellate Body also stressed the importance of this (intuitively obvious) factor, observing that:

[I]n assessing whether “the effect of the subsidy is . . . significant price suppression”, and ultimately serious prejudice, a panel will need to consider the effects of the subsidy on prices. *The magnitude of the subsidy is an important factor in this analysis. A large subsidy . . . is likely to have a greater impact on prices than a small subsidy . . .* All other things being equal, the smaller the subsidy for a given product, the smaller the degree to which it will affect the costs or revenue of the recipient, and the smaller its likely impact on the prices charged by the recipient for the product.⁶¹

The Appellate Body rejected the argument made by the United States that the Panel had erred in failing to quantify the amount of subsidies (as would have been required in a countervailing duty action), concluding that “[a] precise, definitive quantification of the subsidy is not required.”⁶² The Appellate Body did concede, however, that “the Panel could have been more explicit and specified what it meant by ‘very large amounts’” when discussing the magnitude of the subsidies.⁶³

The failure of both the Panel and the Appellate Body to provide guidance on what magnitude subsidies must reach in order to cause significant price suppression has been criticized as depriving WTO Members of guidance on what levels of farm subsidies are permissible.⁶⁴ However, a case can be made that any rate of sub-

⁶⁰ See Upland Cotton Panel Report, *supra* note 18, ¶ 7.1332 (“[G]iven . . . the readily available evidence of the order of magnitude of the subsidies, we are certainly not, by any means, looking at an insignificant or unimportant world price phenomenon.”).

⁶¹ Upland Cotton Appellate Body Report, *supra* note 29, ¶ 461 (emphasis added).

⁶² *Id.* ¶ 467.

⁶³ *Id.* ¶ 468.

⁶⁴ As recently noted by Stephen J. Powell and Andrew Schmitz:

What the Panel and the Appellate Body have overlooked . . . is that their failure to devise a quantitative standard for serious prejudice leaves

sidization exceeding 5% should be considered potentially trade-distorting.

Article 6.1 of the SCM Agreement identifies certain categories of subsidies—known as “Dark Amber” subsidies—which are presumed to cause serious prejudice, including those subsidies that exceed 5% of a product’s value.⁶⁵ Although Article 6.1 expired at the end of 1999,⁶⁶ several WTO Members have supported a renewal of the Dark Amber provision.⁶⁷ The United States has gone even further, proposing to reinstate the 5% threshold not just as the basis for a rebuttable presumption that serious prejudice has occurred but as a new category of prohibited “red light” subsidy under Article 3 of the SCM Agreement⁶⁸ (although this proposal was

WTO Members completely without guidance on how to bring their agricultural support programs into WTO compliance. . . . [T]he lack of quantification in effect tells Members to do nothing, because further dispute settlement litigation will be required before any rule may emerge that is capable of implementation.

See Stephen J. Powell & Andrew Schmitz, *The Cotton and Sugar Subsidies Decisions: WTO’s Dispute Settlement System Rebalances the Agreement on Agriculture*, 10 DRAKE J. AGRIC. L. 287, 309 (2005).

⁶⁵ SCM Agreement art. 6.1(a). Article 6.1 also created a presumption of serious prejudice for the following types of subsidies:

- (b) subsidies to cover operating losses sustained by an industry;
- (c) subsidies to cover operating losses sustained by an enterprise, other than one-time measures which are non-recurrent and cannot be repeated for that enterprise and which are given merely to provide time for the development of long-term solutions and to avoid acute social problems;
- (d) direct forgiveness of debt, i.e. forgiveness of government-held debt, and grants to cover debt repayment.

SCM Agreement art. 6.1(b)–(d). The presumption may be rebutted by demonstrating that the subsidy did not result in any of the market displacement or price effects identified in art. 6.3. See *id.* art. 6.2 (providing that prejudice will not be found if the subsidy did not result in the outcome listed in paragraph 3).

⁶⁶ See *Id.* art. 31 (stipulating that the provisions in Articles 6.1, 8, and 9 apply for five years from the date of entry into force of the WTO Agreement).

⁶⁷ See Proposal from the United States, *United States – Expanding the Prohibited “Red Light” Subsidy Category*, TN/RL/GEN/94, n.7 (Jan. 16, 2006) (“We . . . note that other Members have called for the reinstatement of the ‘dark amber’ category of subsidies under the lapsed provisions of Article 6.1.”) [hereinafter Proposal from the United States].

⁶⁸ *Id.* at 2 (“[P]ractices similar to those listed in the now-lapsed ‘dark amber’ provisions of Article 6.1 of the Subsidies Agreement should be the first candidates for inclusion in an expanded prohibited category of subsidies.”). See also Com-

made "without prejudice to any new subsidy rules developed in the agriculture negotiations").⁶⁹

The Agreement on Agriculture also supports the significance of the 5% threshold, providing both that subsidies at or below 5% of the value of a Member's production of an agricultural product and non-product-specific subsidies at or below 5% of the total value of a Member's agricultural production shall be treated as *de minimis* and exempted from the calculation of its Amber Box support.⁷⁰ The United States has even proposed reducing the *de minimis* threshold to 2.5%.⁷¹

The United States routinely provides commodity subsidies that exceed the 5% threshold to producers of at least four commodities. According to the USDA, the ratio of subsidies to market value averaged 63% for rice producers, 50% for cotton producers, 23% for corn producers, and 17% for wheat producers during the crop years 2002–2005.⁷² It should be stressed that the 5% threshold does not currently constitute a bright-line threshold for identifying subsidies that conflict with the SCM Agreement. It is, however, a useful indicator of whether subsidies for a given commodity may be subject to challenge, particularly when considered in conjunction with an assessment of the extent to which the subsidies are price-contingent.

munication from the United States, *United States – Subsidies Disciplines Requiring Clarification and Improvement*, TN/RL/W/78 (Mar. 19, 2003) (identifying a range of issues that the Rules Group could address).

⁶⁹ Proposal from the United States, *supra* note 67, at 2 n.4.

⁷⁰ Agreement on Agriculture art. 6(4)(a). The *de minimis* threshold for developing Members countries is 10%. *Id.* art. 6(4)(b).

⁷¹ See Press Release, U.S. Dept. St., U.S. Offers Plan on Agriculture for Hong Kong Trade Talks (Oct. 10, 2005), available at <http://usinfo.state.gov/ei/Archive/2005/Oct/11-639505.html> (proposing that "product-specific and non-product-specific *de minimis* [be] cut by 50%.") [hereinafter U.S. Agriculture Proposal]; Cover Letter Unofficial Draft from the WTO Chairman of the Committee on Agriculture, Special Session to the Chairman of the [WTO] Trade Negotiations Committee, *Draft Possible Modalities on Agriculture*, ¶ 62, JOB(06)/199 (June 22, 2006) (suggesting that the *de minimis* threshold could be reduced by as much as 80%) [hereinafter 2006 *Draft Possible Modalities*].

⁷² U.S. DEP'T OF AGRIC., RISK MANAGEMENT PAPER, *supra* note 19, at 10. The USDA estimated an *ad valorem* rate of only 4% for soybeans during the same period. *Id.* Daniel Sumner, however, has projected that soybean subsidies for 2006 will increase to 27.4% of market value. See Sumner, *supra* note 19, at 15.

3.2.1.2. *Price contingency*

In addition to the magnitude of the subsidies provided, the Panel and the Appellate Body also stressed the importance of examining whether certain subsidies are price-contingent in evaluating whether those subsidies cause significant price suppression.⁷³ The Panel distinguished between two categories of subsidies: “those that are directly price-contingent, and those that are not. . . . [T]his distinction is critical for the purposes of our price suppression analysis in terms of the nexus which the subsidies have to any price suppression and to the subsidized product at issue.”⁷⁴ The Panel addressed four price-contingent subsidy programs—the marketing loan program, Step 2 user marketing payments, MLA payments, and counter-cyclical payments. The Panel concluded that these programs encouraged U.S. producers to maintain or increase production of cotton when prices were low, thus suppressing prices in the world market by increasing supply.⁷⁵

However, the Panel found that non-price-contingent subsidies—direct payments (as well as the PFC payments they replaced) and crop insurance subsidies—did not contribute to significant price suppression. The Panel acknowledged that direct payments “enhance producer wealth and investment potential, including lowering of risk aversion”⁷⁶ and that crop insurance subsidies

⁷³ See Upland Cotton Panel Report, *supra* note 18, ¶ 7.1190 (“A massive (‘inefficient’) subsidy of a certain design may have relatively miniscule effects, whereas a smaller subsidy of a different nature may have relatively greater effects.”).

⁷⁴ *Id.* ¶ 7.1289.

⁷⁵ *Id.* ¶ 7.1308 (“[S]everal of the United States subsidies are directly linked to world prices for upland cotton, thereby numbing the response of United States producers to production adjustment decisions when prices are low.”); see also *id.* ¶ 7.1309 (“Neither party . . . disputes the proposition that suppressed world prices may follow from an increased supply being infused on the world market, over and above existing available world supply of fungible upland cotton.”).

⁷⁶ Moreover the report observes:

PFC payments and [direct payments] mean higher cash flow and higher wealth in terms of net worth for United States upland cotton producers. United States producers that enroll under the PFC and [direct payment] programmes obtain an entitlement to receive future payments which increases their net wealth. This will have various predictable effects, including enhanced investment prospects due to better access to loans (as the producers are perceived as having a lower risk of default); ability to pay existing loans and other debt; a lowered aversion to risk which may allow a producer to assume riskier planting strategies; and an income-stabilizing effect as a producer may make production decisions taking

“have positive ramifications for producer wealth and investment and economic stability.”⁷⁷ Nonetheless, the Panel concluded that because these subsidies are not price-contingent they are “more concerned with income support than directly with world price effects”⁷⁸ and held that they did not contribute to price suppression in the world market for upland cotton.

Given the Panel’s recognition that non-price contingent subsidies could contribute both to a farmer’s capacity and his inclination to increase production by increasing wealth and lowering risk aversion, it is difficult to explain its conclusion that these subsidies did not contribute to price suppression as anything other than a formalistic distinction based on their lack of price contingency.⁷⁹ Moreover, even if the Panel found that the non-price contingent subsidies by themselves did not cause significant price suppression, it is not clear why it declined to aggregate them with the price contingent subsidies in its price suppression analysis. In contrast, the Panel concluded that it *was* appropriate to aggregate the price contingent subsidies⁸⁰ and even noted that the potential that direct payments could affect production decisions was greater when they were “considered in conjunction” with price-contingent payments.⁸¹

The Appellate Body agreed with the Panel regarding the “important role”⁸² of price contingency in the significant price suppression analysis but noted that it “d[id] not exclude the possibility that challenged subsidies that are not ‘price-contingent’ . . . could

into account this government revenue stream of income.

Id. ¶ 7.1305 n.1417.

⁷⁷ *Id.* ¶ 7.1306.

⁷⁸ *Id.* ¶ 7.1350; *see also id.*, ¶ 7.1307 (“The particular facts and circumstances of this dispute . . . indicate[] . . . that these particular [non-price-contingent] subsidies are more directed at income support.”).

⁷⁹ *See* Steinberg, *supra* note 57, at 860 (“[D]eeper economic analysis could have been used [by the Panel in the *Upland Cotton* dispute] to determine whether the challenged non-price-contingent subsidies caused price suppression and to estimate the extent to which each of the challenged subsidies—whether price-contingent or not—caused price suppression.”).

⁸⁰ *See* Upland Cotton Panel Report, *supra* note 18, ¶ 7.1194 (“To the extent a sufficient nexus exists between certain subsidies and any suppression of prices of the subsidized product, we aggregate these subsidies and their effects.”).

⁸¹ *See id.* ¶ 7.1305, n.1417.

⁸² Upland Cotton Appellate Body Report, *supra* note 29, ¶ 450.

have some effect on production and exports and contribute to price suppression."⁸³ A significant body of economic literature—including analysis by the USDA—supports the Appellate Body's suggestion that non-price contingent subsidies could have trade-distorting effects.⁸⁴

In a future dispute, a Panel could apply a less formalistic approach and conclude that non-price-contingent subsidies contribute to price suppression, particularly if the magnitude of the subsidies is great enough or if the Panel determines that it is appropriate to aggregate the effects of price contingent and non-price contingent subsidies.⁸⁵ Moreover, aggregation of all actionable subsidies would most likely be required if the United States is successful in its proposal to reinstate the 5% *ad valorem* threshold as a new category of prohibited subsidy.⁸⁶

⁸³ *Id.* ¶ 450, n.589.

⁸⁴ As recently noted by Westcott and Young:

[S]ince PFC payments raise farmers' income and financial well-being, they can potentially affect agricultural investment and thereby enhance production. Lenders are more willing to make loans to farmers with higher guaranteed incomes and lower risk of default. Greater loan availability facilitates additional agricultural production. Increased income from PFC payments also allows farmers, particularly those constrained by debt or limited liquidity, to more easily invest in their farm operation. The resulting increased investment in farming operations contributes to higher agricultural production in the long run . . . Government crop insurance subsidies are likely to alter producer behavior because they lower the cost of purchasing coverage. The cost reduction represents a benefit to producers that raises expected returns per acre and provides an incentive to expand area in crop production.

Paul C. Westcott & C. Edwin Young, *US Farm Program Benefits: Links to Planting Decisions and Agricultural Markets*, AGRIC. OUTLOOK, Oct. 2000, at 10, 11, available at <http://www.ers.usda.gov/publications/agoutlook/oct2000/ao275e.pdf>. But see ECON. RESEARCH SERV., U.S. DEP'T OF AGRIC., AGRIC. ECON. REP. NO. 838: DECOUPLED PAYMENTS IN A CHANGING POLICY SETTING (2004), at 17, available at <http://www.ers.usda.gov/publications/aer838/aer838.pdf> ("Despite a variety of potential indirect effects of decoupled programs on farmers' decisions, production effects are likely smaller than direct effect of price- and production-linked coupled programs such as marketing loans."). See also *id.* at 24 (concluding that production increases attributed to decoupled payments are "negligible").

⁸⁵ Daniel Sumner suggests aggregating the effects of non-price contingent subsidies with the effects of price-contingent supports in calculating the overall effect of subsidy programs on commodity prices, with allowances made for "the relatively lower stimulus that non-price-contingent subsidies provide for production" See Sumner, *supra* note 19, at 22.

⁸⁶ As noted *supra* note 69 and accompanying text, it is not clear whether the 5% threshold would be applicable to agriculture.

3.2.2. *Prohibited subsidies*

Under Article 3 of the SCM Agreement, export subsidies and import substitution subsidies⁸⁷ are prohibited (sometimes referred to as “red light” subsidies) without any need to demonstrate that they have trade distorting effects. As illustrated by the *Upland Cotton* dispute, agricultural export subsidies that exceeded a Member country’s scheduled commitments were subject to the prohibition on export subsidies even when the Peace Clause was in effect. The Appellate Body found that Step 2 payments for exporters of cotton—an unscheduled product—violated both the Agreement on Agriculture’s prohibition on export subsidies for agricultural products and the SCM Agreement’s prohibition on export subsidies.⁸⁸ The Appellate Body similarly held that export credit guarantees that violated scheduled commitments under the Agreement on Agriculture violated Article 3 of the SCM Agreement.⁸⁹

Arguably, export subsidies that do *not* exceed a Member’s scheduled commitments are also prohibited under the SCM Agreement now that the Peace Clause has expired. The Peace Clause states that during the implementation period export subsidies that conform to a Member country’s scheduled commitments are exempt from challenge under either the SCM Agreement’s provisions regarding prohibited subsidies or its provisions regarding “actionable” subsidies.⁹⁰ Presumably, now that the Peace

⁸⁷ See *supra* note 47 and accompanying text.

⁸⁸ See *Upland Cotton Appellate Body Report, supra* note 29, ¶ 583 (“We uphold the Panel’s findings . . . that . . . in providing [Step 2 payments to exporters of cotton] the United States has acted inconsistently with its obligations under Articles 3.3 and 8 of the Agreement on Agriculture.”); *id.* ¶ 584 (“We uphold the Panel’s findings . . . that Step 2 payments provided to exporters of United States upland cotton . . . are inconsistent with Articles 3.1(a) and 3.2 of the SCM Agreement.”).

⁸⁹ *Id.* ¶ 574 (“[W]e uphold the Panel’s findings . . . that these export credit guarantee programs are export subsidies for purposes of Article 3.1(a) of the SCM Agreement and are inconsistent with Articles 3.1(a) and 3.2 of that Agreement”). The holding regarding export credit guarantees applies not just to cotton but to the provision of export credit guarantees to certain other unscheduled commodities and one scheduled commodity (rice). *Id.* ¶¶ 677-78; see also *Upland Cotton Panel Report, supra* note 18, ¶ 8.1(d) (concluding that “United States export credit guarantees under the General Sales Manager (“GSM”) 102 and 103 and SCGP export credit guarantee programmes: (i) in respect of exports of upland cotton and other unscheduled agricultural products supported under the programmes, and in respect of one scheduled product (rice)”).

⁹⁰ See Agreement on Agriculture art.13(a) (“During the implementation pe-

Clause has expired, that protection has also expired.

Some commentators, however, have taken the position that agricultural export subsidies within scheduled limits are not prohibited, but are merely actionable.⁹¹ This interpretation is based on Article 3 of the SCM Agreement and Article 8 of the Agreement on Agriculture.⁹² Article 3 of the SCM Agreement states that export subsidies are prohibited "except as provided in the Agreement on Agriculture." Article 8 of the Agreement on Agriculture indicates that Member countries may not provide export subsidies that do not conform to their scheduled commitments. The interaction of these two provisions, it is argued, indicates that agricultural export subsidies that are in conformity with scheduled commitments are not subject to the prohibition of Article 3 of the SCM Agreement, although they are actionable.⁹³

The difficulty with this argument is that Article 8 of the Agreement on Agriculture does not address the status of export subsidies after the expiration of the Peace Clause or provide any exemption from the requirements of the SCM Agreement. Instead, it simply states that Members may *not* provide export subsidies except as provided in the Agreement on Agriculture and their schedules. As with domestic support, the only provision in the Agreement on Agriculture that explicitly protects export subsidies from

riod, notwithstanding the provisions of GATT 1994 and the Agreement on Subsidies and Countervailing Measures domestic support measures that conform fully to the provisions of Annex 2 to this Agreement shall be non-actionable subsidies for purposes of countervailing duties . . .").

⁹¹ See Steinberg & Josling, *supra* note 41, at 378 ("[A]fter the peace period, agricultural export subsidies that conform with the Agriculture Agreement will be legal, although they may be regulated and actionable . . ."); Chambovey, *supra* note 43, at 348 (noting that "it is extremely difficult to conceive how, after the lapsing of the Peace Clause, a treaty interpreter could conclude that URAA [Agreement on Agriculture] consistent export subsidies are prohibited under the SCM Agreement," but conceding that "there are some distinguishable features of export subsidies that may ease the task of a complainant to back up its allegations of serious prejudice, and thus enhance the prospects for a successful WTO action"); Delcros *supra* note 10, at 250 n.69 ("[E]xport subsidies that are authorized in Members' commitments benefit from a permanent exception to the application of Article 3 [of the SCM Agreement].").

⁹² See Steinberg & Josling, *supra* note 41, at 377-78; Chambovey, *supra* note 43, at 347.

⁹³ See Chambovey, *supra* note 43, at 346 n.102 ("The use of agricultural export subsidies beyond such scheduled limits is in effect prohibited by Article 3.3, Article 8 and Article 10 of the Agreement on Agriculture.").

the prohibition contained in Article 3 of the SCM agreement is the Peace Clause, specifically Article 13(c)(ii). This provision, like the other sections of the Peace Clause, is qualified by the introductory phrase "[d]uring the implementation period." This presumably means that after the implementation period this provision is no longer operative, and agricultural export subsidies are subject to the prohibition of Article 3 of the SCM Agreement. Moreover, if export subsidies as scheduled under the Agreement on Agriculture were still protected from challenge under Article 3 of the SCM Agreement, the language in Article 13(c)(ii) would be superfluous, violating the doctrine of effective implementation.⁹⁴

The Appellate Body's report in the *Upland Cotton* dispute appears to support a narrow reading of the "except as provided in the Agreement on Agriculture" qualification of Article 3 of the SCM Agreement. The Appellate Body observed that this language "makes it clear that the *Agreement on Agriculture* prevails over Article 3 of the *SCM Agreement*, but only to the extent that the former contains an exception."⁹⁵

Regardless of which interpretation is correct, it is fair to say that all agricultural export subsidies are currently either prohibited or actionable under the SCM Agreement.

4. THE UNITED STATES' STRATEGY FOR PROTECTING FARM SUBSIDIES IN THE DOHA ROUND OF WTO NEGOTIATIONS

Pursuant to a mandate contained in Article 20 of the Agreement on Agriculture, negotiations began in 2000 on further liberalization of agricultural trade beyond the commitments made in the Uruguay Round.⁹⁶ Those negotiations were subsumed into the

⁹⁴ See *id.* at 348 ("Under the preceding reasoning it is obvious that such an exemption is superfluous and tautological. The relevant portion of the Peace Clause would then be reduced to inutility or redundancy, an event that would be dissonant with the principle of effectiveness in the interpretation of treaties.").

⁹⁵ Upland Cotton Appellate Body Report, *supra* note 29, ¶ 530 (emphasis added).

⁹⁶ See Agreement on Agriculture art. 20 ("Recognizing that the long-term objective of substantial progressive reductions in support and protection resulting in fundamental reform is an ongoing process, Members agree that negotiations for continuing the process will be initiated one year before the end of the implementation period. . . ."). The implementation period—for purposes other than the Peace Clause—expired at the end of 2000. See *id.*, art. 1(f) ("'implementation period' means the six-year period commencing in the year 1995 . . .").

broader Doha Round trade negotiations, launched in Doha, Qatar in November 2001.⁹⁷

In the Doha Round negotiations, the United States has been attempting to protect its farm subsidy programs by making limited concessions regarding the permissible levels and classifications of subsidies under the Agreement on Agriculture while securing a new Peace Clause that would limit challenges to farm subsidies under the SCM Agreement. The success of this effort is dependent on the completion of negotiations, which were suspended in July 2006 primarily because of broad disagreements over agriculture.⁹⁸ The wide range of issues that remain to be resolved was reflected in the *2006 Draft Possible Modalities on Agriculture*, which was released by the Chairman of the WTO's Committee on Agriculture in late June 2006. The draft contained over 700 sections of bracketed text addressing a multitude of issues, including the basic formulas for reducing both subsidies and tariffs.⁹⁹

Even if the negotiations are resumed and the impasse over agricultural trade is broken, Member nations must agree on numerous other issues in order to complete the Doha Round, including tariffs on industrial goods and trade in services.¹⁰⁰ The negotiators have missed a series of deadlines—most recently an April 30, 2006 deadline to establish the detailed outlines of final agreements known as “modalities” and a July 31, 2006 deadline for “comprehensive draft schedules” of tariff and subsidy commitments.¹⁰¹

⁹⁷ See World Trade Organization, Ministerial Declaration of 14 November 2001, ¶¶ 13–14, WT/MIN(01)/DEC/1, 41 I.L.M. 746 (2002) [hereinafter *Doha Declaration*].

⁹⁸ See *Doha Round Suspended Indefinitely After G-6 Talks Collapse*, BRIDGES—WEEKLY TRADE NEWS DIGEST, July 26, 2006, available at <http://www.ictsd.org/weekly/06-07-26/story1.htm> (“The Doha Round of trade negotiations was put into deep freeze on 24 July, after a meeting of ministers from six key trading nations collapsed over divisions on how to cut farm subsidies and tariffs.”).

⁹⁹ See Special Session of the Committee on Agriculture, *2006 Draft Possible Modalities on Agriculture*, TN/AG/W/3 (July 12, 2006).

¹⁰⁰ See Negotiating Group on Market Access, *Towards NAMA Modalities*, TN/MA/W/80 (July 19, 2006).

¹⁰¹ See World Trade Organization, Ministerial Declaration of 18 December 2005, ¶ 10, WT/MIN(05)/DEC [hereinafter *Hong Kong Declaration*] (setting deadlines for agriculture negotiations); *id.* ¶ 23 (setting deadlines for non-agricultural market access negotiations). The Doha Declaration originally established a deadline of March 31, 2003 to reach agreement on modalities for agriculture. See *Doha Declaration*, *supra* note 97, ¶ 14 (“Modalities for the further com-

Given the suspension of negotiations, the Doha Round was not completed by the end of 2006, making it impossible to conclude negotiations in time to submit the agreement to Congress before the President's "trade promotion authority" expires on July 1, 2007.¹⁰²

Moreover, in addition to the general difficulty in completing the Doha Round, the United States faces significant resistance on its proposals concerning agricultural subsidies. The negotiating strategy of the United States regarding farm supports has four core elements: (1) creating a new category of Blue Box payments that can be used to shield counter-cyclical payments; (2) preserving the ability to classify direct payments within the Green Box; (3) agreeing to reduce the permissible level of its Amber Box support only to a degree that can be largely offset by Blue Box, Green Box, and *de minimis* payments; and (4) obtaining a new Peace Clause that would protect agricultural subsidies from challenge under the SCM Agreement.

4.1. *The Blue Box*

In the negotiations leading up to the *July 2004 Framework*, the United States succeeded in obtaining tentative consent to create a new category of Blue Box subsidies that would not require farmers to limit production.¹⁰³ Under this Framework, the total amount of both conventional Blue Box subsidies and the new category of non-production-limiting Blue Box payments would be capped at no more than 5% of the average total value of agricultural production by a country during a base period to be agreed upon.¹⁰⁴ The United States hopes to use a new category of Blue Box payments to shield counter-cyclical payments from challenge.¹⁰⁵

mitments, including provisions for special and differential treatment, shall be established no later than 31 March 2003.").

¹⁰² See Trade Act of 2002, 19 U.S.C. § 3803(a)(1)(A)(ii) (2002) [hereinafter Trade Act of 2002]. Trade promotion authority, previously known as "fast track" authority, allows the President to submit a proposed trade agreement to Congress for an up or down vote without amendments and with limited debate. See *id.* § 3805(a)(1).

¹⁰³ See General Council, *Doha Work Programme*, Annex A, ¶ 13, WT/L/579, (Aug. 2, 2004) [hereinafter *July 2004 Framework*] ("Members may have recourse to . . . payments that do not require production . . .").

¹⁰⁴ *Id.* ¶ 15.

¹⁰⁵ OFFICE OF U.S. TRADE REPRESENTATIVE, DOHA DEVELOPMENT AGENDA POLICY

It is unclear whether this strategy will be successful. In response to concerns expressed by many countries that this new Blue Box provision could permit the United States to avoid making meaningful reductions in its overall levels of domestic support, the *July 2004 Framework* indicates that additional criteria will be negotiated to ensure that Blue Box payments are less trade-distorting than Amber Box subsidies.¹⁰⁶

There has been little progress in reaching an agreement on what the "additional criteria" for the new category of Blue Box payments should be.¹⁰⁷ The United States has proposed limiting total Blue Box spending to 2.5% of the total value of a country's agricultural production.¹⁰⁸ If accepted, this proposal would permit the U.S. to provide approximately \$5 billion in counter-cyclical payments each year.¹⁰⁹

However, the United States has encountered resistance to its Blue Box strategy from the most influential block of developing nations—the "Group of 20" ("G20") led by India and Brazil. The G20 has indicated that it would not accept the new category of Blue Box payments unless the payments are subject to two restrictions: (1) limits on how much of the gap between market and target prices can be covered by the payments (i.e., "limits to price-gaps differentials")¹¹⁰ and (2) limits on the total level of subsidies that could be provided from all programs—including Blue Box payments—for each agricultural product (i.e., "product-specific caps").¹¹¹

The Chairman of the WTO's Committee on Agriculture has in-

BRIEF: IMPLICATIONS OF THE U.S. AGRICULTURE PROPOSAL ON TRADE-DISTORTING DOMESTIC SUPPORT 2 (2005), http://www.ustr.gov/assets/Document_Library/Fact_Sheets/2005/asset_upload_file414_8527.pdf [hereinafter USTR, IMPLICATIONS]. Counter-cyclical payments, like direct payments, are based on historic production and do not require current production of any specific commodity for eligibility. See *supra* note 26 and accompanying text.

¹⁰⁶ See *July 2004 Framework*, *supra* note 103, ¶ 14.

¹⁰⁷ See Hong Kong Declaration, *supra* note 101, ¶ 9 ("There is important and significant convergence on moving beyond (i.e. further constraining) Blue Box program[] payments envisaged in the July 2004 Framework. However, the technique for achieving this remains to be determined.").

¹⁰⁸ See U.S. Agriculture Proposal, *supra* note 71.

¹⁰⁹ See USTR, IMPLICATIONS, *supra* note 105, at 2.

¹¹⁰ See GROUP OF 20, DRAFT ELEMENTS FOR DISCUSSION—BLUE BOX (2005), http://www.sagpya.mecon.gov.ar/new/00/programas/negociaciones/Omc/g20_06.pdf, at 1.

¹¹¹ *Id.* at 1-2.

licated that there is broad support for a lower cap on Blue Box payments, as proposed by the United States.¹¹² However, the proposals for commodity-specific caps remain controversial, although the Chairman has suggested that there may be room to reach agreement on rules that would limit the ability of governments to concentrate their Blue Box payments on particular commodities.¹¹³

The 2006 *Draft Possible Modalities on Agriculture* reflects continuing demands from developing countries for restrictions on Blue Box spending beyond the proposed 2.5% *ad valorem* limit.¹¹⁴ The bracketed proposals for additional Blue Box restrictions include caps on the amount of Blue Box support that can be provided to a specific commodity based on a percentage of either (1) the overall level of Blue Box spending or (2) the market value of the commodity,¹¹⁵ limits on price-gap differentials,¹¹⁶ and a limit on provision of Blue Box payments by a country has not complied with its obligations to provide the WTO with accurate and timely information regarding its subsidy programs.¹¹⁷ Adoption of any of these measures would severely compromise attempts by the United States to reclassify counter-cyclical payments within the Blue Box.

4.2. *The Green Box*

In addition to attempting to negotiate an amendment of the Blue Box that would permit it to shield counter-cyclical payments, the United States will likely attempt to classify direct payments—which currently total over \$5 billion a year¹¹⁸—as Green Box payments.¹¹⁹ There are several reasons to question whether this strat-

¹¹² See SPECIAL SESSION OF THE COMMITTEE ON AGRICULTURE, CHAIR'S REFERENCE PAPER: BLUE BOX (2001), http://www.wto.org/English/tratop_e/agric_e/ref_paper_bluebox_e.pdf, ¶1.

¹¹³ *Id.* ¶ 3.

¹¹⁴ 2006 *Draft Possible Modalities on Agriculture*, *supra* note 71, ¶ 65–77.

¹¹⁵ *Id.* ¶ 70.

¹¹⁶ *Id.* ¶ 71.

¹¹⁷ *Id.* ¶¶ 75–76.

¹¹⁸ See ECON. RESEARCH SERV., U.S. DEP'T OF AGRIC., FARM INCOME AND COSTS: FARM SECTOR INCOME FORECAST, (2006), available at http://www.ers.usda.gov/Briefing/FarmIncome/Data/GP_T7.htm.

¹¹⁹ Secretary of Agriculture Mike Johanns has stated that “we know we can make direct payments without running afoul of WTO rules,” presumably based on the belief that direct payments can still be notified within the Green Box. *Johanns Signals U.S. Subsidies Must Change in New Farm Bill*, INSIDE US TRADE (Sept. 23, 2005). The USTR's explanation of the United States' October 2005 agriculture

egy will be successful. Most obviously, the Appellate Body in the *Upland Cotton* dispute upheld a ruling by the Panel that direct payments do *not* fit within the Green Box because of the planting flexibility restrictions.¹²⁰ The Appellate Body concluded that the restrictions on planting fruits and vegetables violated the requirement that “decoupled income support” payments within the Green Box should “not be related to . . . the type or volume of production . . . undertaken by the producer”¹²¹

Legislation has been introduced in Congress that would remove the planting flexibility restrictions, therefore presumably allowing direct payments to be classified as Green Box payments.¹²² This legislation, however, is opposed by fruit and vegetable growers, who are concerned that it could depress prices for specialty crops and force them to compete with farmers producing on subsidized acreage.¹²³

Moreover, even if the efforts to remove the planting flexibility restrictions are successful and direct payments may be classified within the Green Box, Green Box programs are no longer exempt

proposal similarly indicates that direct payments will not be included in the United States' calculation of Amber Box support. USTR, *IMPLICATIONS*, *supra* note 105, at 2.

¹²⁰ See *Upland Cotton Appellate Body Report*, *supra* note 29, ¶ 342.

¹²¹ Agreement on Agriculture Annex 2, ¶ 6(b). See *Upland Cotton Appellate Body Report*, *supra* note 29, ¶¶ 310–42.

¹²² See The Farming Flexibility Act of 2005, S. 1038, 109th Cong. (1st Sess. 2005).

¹²³ See, e.g., *Statement Before the Subcomm. On Conservation, Credit, Rural Development & Research of the H. Comm. on Agric.* (2006) (testimony of John K. Shafer, Specialty Crop Producer) available at <http://agriculture.house.gov/hearings/109/h60501wb.pdf>:

Growers of specialty crops need continued protection when competing against producers of “program crops” who receive a subsidy whether or not that program crop is planted. The planting restriction for fruits and vegetables has acted as a safety net for specialty crop producers who do not receive direct payments. Researchers have predicted that even a one percent increase in fruit and vegetable planting would result in no less than a four percent decrease in prices.

See also Review of the Specialty Crop Industry Before the Subcomm. on Livestock and Horticulture of the H. Comm. on Agric., 109th Cong. 82 (2005) (statement of Matt McInerney, Executive Vice President, Western Growers) (“Western Growers remains committed to ensuring that the fundamentally fair policy of prohibiting subsidized growers from competing against growers who do not participate in federal farm programs in the production of fruits and vegetables remains the law of the land in the next farm bill . . .”).

from challenge under the SCM Agreement due to the expiration of the Peace Clause.¹²⁴ Accordingly, the ability of the United States to protect direct payments from challenge will depend upon the completion of Doha Round and the agreement of the other WTO Members to a new Peace Clause that applies to the Green Box.

The G20, however, is unwilling to accept renewed protection for Green Box programs unless the Green Box is amended to remove what it considers to be the trade-distorting effects of direct payments.¹²⁵ The *July 2004 Framework* states that the "Green Box criteria will be reviewed with a view to ensuring that Green Box measures have no, or at most minimal, trade-distorting effects or effects on production."¹²⁶ The "clarifications" that the G20 has proposed pursuant to this mandate include restricting eligibility for direct payments to low income farmers and capping the aggregate amount of direct payments, Blue Box payments, and Amber Box payments for each commodity.¹²⁷ The United States rejects these proposals and insists that there should be "no material changes in [the] Green Box, specifically no expenditure caps."¹²⁸ Nonetheless, the G20's proposals were included as bracketed text in the *2006 Draft Possible Modalities on Agriculture*.¹²⁹ Accordingly, although it is unclear whether the G20's proposals will eventually be accepted as part of a broader deal in the Doha Round, it would be unwise for Congress to assume that it will be able to shield unlimited amounts of direct payments from challenge within the Green Box.

4.3. *The Amber Box and Total Trade-Distorting Support*

The *July 2004 Framework* proposed reductions in each country's Amber Box limit¹³⁰ and the "overall base level of all trade-distorting domestic support," defined as the Amber Box limit "plus permitted *de minimis* level and the level agreed . . . for Blue Box

¹²⁴ See *supra* Section 3.1.3.

¹²⁵ See G20, *Review and Clarification of Green Box Criteria*, at 7-8, G20/DS/Greenbox (Feb. 6, 2005) (explaining the framework for direct payment structures and decoupled income support).

¹²⁶ *July 2004 Framework*, *supra* note 103, Annex A, ¶ 16.

¹²⁷ See *Review and Clarification of Green Box Criteria*, *supra* note 125, at 7-8.

¹²⁸ U.S. Agriculture Proposal, *supra* note 71.

¹²⁹ See *2006 Draft Possible Modalities on Agriculture*, *supra* note 71, Annex H.

¹³⁰ *July 2004 Framework*, *supra* note 103, Annex A, ¶ 9.

payments."¹³¹

The reductions are to be made according to a tiered formula under which the countries with higher levels of domestic support would be required to make deeper cuts.¹³² Overall trade-distorting domestic support would be cut by a minimum of 20% in the first year.¹³³

The negotiations leading up to the December 2005 Ministerial Conference in Hong Kong resulted in agreement on the basic parameters for reducing domestic support. Countries would be divided into three "bands" according to their current levels of permitted Amber Box support, with the European Union in the highest band, the United States and Japan in the middle band, and all other countries in the bottom band.¹³⁴ Each country would be required to reduce its Amber Box spending and overall trade-distorting domestic support by specified percentages, with the countries in higher bands making deeper cuts.¹³⁵

However, the WTO Members were unable to reach agreement on the actual percentage reductions that would be required. The United States proposed a formula under which Total AMS would be reduced by 83% for the top band, by 60% for the middle band, and 37% for the bottom band.¹³⁶ The United States also proposed a reduction of overall trade-distorting support by 75% for the top band, 53% for the middle band, and 31% for countries in the bottom band.¹³⁷

¹³¹ *Id.* at Annex A, ¶ 7. See also 2006 Draft Possible Modalities on Agriculture, *supra* note 71, at 1 ("Overall Trade-Distorting Domestic Support" means the sum of (i) the Final Bound Total AMS plus (ii) permitted *de minimis* level expressed in monetary terms plus (iii) the Blue Box level . . .").

¹³² See July 2004 Framework, *supra* note 103, Annex A, ¶¶ 7 & 9 (stating the tiered approach of agriculture modalities). The 2001 Doha Ministerial Declaration was arguably ambiguous on this point, indicating that the objective of the negotiations with regard to trade-distorting domestic support was "substantial reductions," but not identifying the baseline from which those reductions would be made. Doha Declaration, *supra* note 97, ¶ 13 (explaining the objectives of the 2000 Agreement on Agriculture).

¹³³ July 2004 Framework, *supra* note 103, Annex A, ¶ 7.

¹³⁴ See Towards NAMA Modalities, *supra* note 100, at 26 (providing specific proposals for small, vulnerable economies).

¹³⁵ *Id.*

¹³⁶ See U.S. Agriculture Proposal, *supra* note 71 (outlining the suggested reductions of AMS).

¹³⁷ *Id.* The United States proposed that these reductions be made during a five year implementation period, and that all trade distorting support be elimi-

The European Union has proposed AMS reductions of 70% for itself, 60% for the middle band, and 50% for the bottom band, with similar reductions for overall trade-distorting support.¹³⁸ Not surprisingly, the G20 has proposed the most dramatic reductions: 80%, 70%, and 60% for AMS and 80%, 75%, and 70% for overall trade-distorting support.¹³⁹ The 2006 *Draft Possible Modalities on Agriculture* reflects this range: AMS reductions of 70–83% for the top band, 60–70% for the middle band, and 37–60% for the bottom band¹⁴⁰ and total trade-distorting support reductions of 70–80% for the top band, 53–75% for the middle band, and 31–70% for the bottom band.¹⁴¹

An analysis conducted at the request of the United States, the EU, and several other WTO Members indicates that the U.S. proposal—although producing a dramatic cut in “final bound” AMS to \$7.6 billion—would still permit the United States to provide over \$22 billion in total trade-distorting support.¹⁴² Other WTO Members have argued that accepting the U.S. proposal would actually permit the United States to *increase* its level of trade-

nated in fifteen years. See also USTR, *IMPLICATIONS*, *supra* note 105, at 2 (briefing the policies and implications of the Doha Development Agenda).

¹³⁸ See *EU Proposal on Making Hong Kong a Success: Europe's Contribution*, at 3 (Oct. 28, 2005) available at http://www.abcdoha.org/agriculture/pdfs/EU_Proposal.pdf (outlining the EU's commitment to reducing domestic supports for agricultural products).

¹³⁹ See Report to WTO Trade Negotiations Committee, *G-20 Proposal on Domestic Support*, ¶¶ 8, 12 (October 12, 2005) available at http://www.g-20.mre.gov.br/conteudo/proposals_domesticupport.pdf (proposing reductions in aggregate measure of support).

¹⁴⁰ See 2006 *Draft Possible Modalities*, *supra* note 71, ¶ 50.

¹⁴¹ *Id.* ¶ 79.

¹⁴² See Special Session of the Committee on Agriculture, *Agriculture Negotiations: Agriculture Domestic Support Simulations*, JOB(06)/151, at 15–16 (May 22, 2006) [hereinafter *Agriculture Domestic Support Simulations*] (projecting a U.S. limit on total trade distorting support of \$22.665 billion using 1995–2000 as base years and \$22.438 billion using 1999–2001 as base years”). Yet despite the skepticism of its trading partners, it appears that the U.S. proposal would require significant restructuring of current farm subsidy programs. Most conspicuously, it would be impossible to accommodate the current level of Amber Box spending within the proposed cap of \$7.6 billion. Under the Agreement on Agriculture, the AMS calculation for market price support programs is based on the difference between the target price for the commodity and the world market price in the years 1986–1988. See Agreement on Agriculture Annex 3, ¶¶ 8–9. Using this methodology, the price support programs for dairy and sugar collectively account for about \$6 billion of Amber Box space. See U.S. DEPT OF AGRIC., *RISK MANAGEMENT PAPER*, *supra* note 19, at 21.

distorting domestic support and have indicated that the Doha Round negotiations cannot be successfully concluded unless the United States significantly improves its offer on domestic support.¹⁴³ However, the United States has refused to alter its domestic support offer without new concessions on market access from the EU and developing countries.¹⁴⁴

It is unclear when and on what terms a compromise might be reached concerning the classification and permissible levels of subsidies within the various boxes of the Agreement on Agriculture.¹⁴⁵ Yet even if the United States is somehow able to negotiate an outcome that permits it to accommodate its current subsidy programs within the Agreement on Agriculture's boxes, U.S. farm subsidies will remain highly vulnerable to challenge under the SCM Agreement without a new Peace Clause.¹⁴⁶

4.4. *The Peace Clause*

The United States has long sought—until fairly recently with the support of the European Union—to obtain a new Peace Clause through the Doha Round negotiations.¹⁴⁷ However, it appears that the United States has become increasingly isolated on this issue. In early 2006, the EU reportedly dropped its demand for a new Peace Clause,¹⁴⁸ and there is no reference to a new Peace Clause in the

¹⁴³ See Chambliss Says U.S. Could Reduce Farm Support To Spur Doha Deal, INSIDE U.S. TRADE, July 14, 2006 (“Overall, the U.S. has proposed to limit its total trade-distorting support to no more than \$22.6 billion [] per year, which the EU and other trading partners argue is not enough since they say it is a higher ceiling than current U.S. spending on trade-distorting support.”).

¹⁴⁴ See U.S. Lowers Ag Market Access Demands for Potential Doha Deal, INSIDE U.S. TRADE, June 23, 2006 (“The [USTR] statement concluded that the [United States] would not accept an outcome nor put forward a proposal falling short of creating new trade flows in agriculture, industrial market access, and services.”).

¹⁴⁵ There are various other outstanding issues that could complicate the United States' attempt to protect its farm subsidies from challenge under the Agreement on Agriculture, including proposals for commodity specific AMS limits and proposals to reduce permissible *de minimis* support by as much as 80%. See 2006 Draft Possible Modalities on Agriculture, *supra* note 71, at ¶ 62.

¹⁴⁶ See discussion *supra* Sections 3.1.3 and 3.2.

¹⁴⁷ See, e.g., U.S. Agriculture Proposal, *supra* note 71 (requesting “[I]tigation protection (‘peace clause’) for subsidy programs that stay under the new limits or conform to ‘green box’ criteria.”).

¹⁴⁸ See Daniel Pruzin, Agriculture: EU Signals Flexibility on Peace Clause In WTO Ag Talks, Despite U.S. Position, INT’L TRADE DAILY, Feb. 1, 2006 (“The European Union has signaled it may be prepared to accept a Doha Round agreement on agri-

July 2004 Framework, the Hong Kong Ministerial Declaration, or the 2006 Agriculture Modalities Draft.¹⁴⁹ Although the USTR continues to request a Peace Clause as part of any new deal on agricultural subsidies, U.S. trade officials appear to understand that a new Peace Clause is unlikely given the opposition from the vast majority of WTO Members.

During her confirmation hearings in May of 2006, United States Trade Representative Susan Schwab acknowledged that no Member of the WTO has supported the U.S. request for a new Peace Clause and declined to state that this was a non-negotiable demand.¹⁵⁰ The USTR continues to express support for a new Peace Clause but refuses to describe it as an essential element of a deal on agricultural subsidies.¹⁵¹ Arguably, given both the strong opposition to a new Peace Clause from many developing countries¹⁵² and the USTR's reluctance to describe the issue as a deal-breaker, continuing expressions of support for a new Peace Clause are better understood as attempts to appear responsive to the demands of politically powerful commodity groups than as reflections of what the USTR thinks is achievable in the Doha negotiations.

In the absence of a new Peace Clause, any agreement concerning the permissible levels and classification of subsidies under the Agreement on Agriculture will provide only limited protection to U.S. farm supports. Actionable subsidies would still be subject to challenge under the SCM Agreement—on a commodity-by-commodity basis—if they can be shown to cause serious prejudice or other form of “adverse effect” to another WTO Member, regard-

culture without a ‘peace clause’ to shield its farm subsidy programs from future WTO dispute settlement challenges.”).

¹⁴⁹ See generally *July 2004 Framework*, *supra* note 103; *Hong Kong Declaration*, *supra* note 101; *2006 Draft Possible Modalities on Agriculture*, *supra* note 71.

¹⁵⁰ See *Written Responses to Senate Finance Committee Questions for the Record 36* (May 17, 2006) (statement of Honorable Susan Schwab) (“No Member has yet indicated its support for the U.S. proposal. However, the United States will continue to push for its October proposal in the negotiations.”).

¹⁵¹ See, e.g., *Awaiting Draft Modalities Text, Members Still Divided on Ag Market Access*, BRIDGES—WEEKLY TRADE NEWS DIGEST, June 21, 2006, at 1 (noting that a USTR spokesman “indicated that a new ‘peace clause’ was still an ‘important’ objective for the US, though he declined to comment on whether this would be one of Washington’s basic conditions for a deal.”).

¹⁵² See *Mammoth Task Awaits Ministers as Ag Chair Tables Blueprint for Modalities Deal*, BRIDGES—WEEKLY TRADE NEWS DIGEST, June 28, 2006, at 3 (noting that many WTO members have “strenuously opposed” a new Peace Clause).

less of whether they violate any new limit on Amber Box support or are categorized as Blue or Green Box support.

For example, assume that a deal in the Doha negotiations was reached establishing a limit of \$20 billion in overall trade-distorting support for the United States and permitting counter-cyclical payments to be reclassified within the Blue Box.

Without a new Peace Clause, if world market prices for corn fell significantly and, as a result, counter-cyclical and marketing loan payments to U.S. corn farmers rose to a level that caused serious prejudice to other WTO Members, those subsidies could be successfully challenged under the SCM Agreement even if the United States stayed within its limits for Amber Box and overall trade-distorting support. Accordingly, any deal on Boxes and limits under Agreement on Agriculture that does not include a new Peace Clause will leave the current U.S. farm program highly vulnerable to challenge.

5. GUIDELINES FOR DRAFTING A WTO-COMPLIANT FARM BILL THAT MAINTAINS THE CURRENT BASELINE

Although it appears unlikely that USTR will be able to negotiate a new Peace Clause, the United States has at least three other options for responding to the threat posed to U.S. commodity programs under the SCM Agreement: (1) continue the existing programs and accept the resulting sanctions that would be authorized through the WTO's dispute settlement process; (2) eliminate or significantly reduce the relevant subsidy programs and accept the resulting reduction in the baseline of federal spending on rural communities; or (3) maintain the current baseline of Farm Bill spending by shifting funding into programs that are not vulnerable to challenge under the SCM Agreement.

The first option, while not an improbable outcome in the short term given the strong support for the commodity programs in Congress, is unlikely to provide a durable solution. The service and industrial sectors of the U.S. economy—which collectively account for 99% of gross domestic product¹⁵³—will not be able to advance their agendas within the WTO negotiations until the impasse

¹⁵³ See CENTRAL INTELLIGENCE AGENCY, THE WORLD FACTBOOK 584 (2006). Agriculture accounts for only 1% of U.S. gross domestic product, as compared with 20.7% for industry, and 78.3% for services.

over agricultural subsidies is resolved. At some point, these sectors will begin to exert pressure on Congress to bring U.S. farm subsidy programs into compliance with the relevant WTO disciplines.

Non-agricultural sectors will have further incentives to lobby for subsidy reform if, as appears likely, the dispute settlement process results in "cross sectoral retaliation" —i.e., the imposition of trade sanctions on other sectors of the economy in retaliation for illegal U.S. farm subsidies. Brazil is already pursuing this approach in the *Upland Cotton* dispute, indicating that it will target the intellectual property rights of U.S. corporations (including copyrights, trademarks and patents) and U.S. service industries (including business, communications, and financial services).¹⁵⁴ Similar challenges involving other commodities are likely to follow, most likely beginning with a challenge to U.S. rice subsidies by Uruguay.¹⁵⁵ Presumably, at some point the industries affected by these sanctions will have a strong incentive to lobby Congress to reform the offending subsidy programs.¹⁵⁶

The second option—the elimination or significant reduction of farm subsidies with a corresponding reduction of Farm Bill spending—would address the potential for trade conflict but is unlikely to be politically acceptable. There is a strong perception in Congress that the United States is being asked to make dramatic reductions in farm subsidies while the EU and developing countries refuse to make comparable reductions in agricultural tariffs.¹⁵⁷

¹⁵⁴ See Communication, *United States – Subsidies on Upland Cotton, Recourse to Article 7.9 of the SCM Agreement and Article 22.2 of the DSU by Brazil*, WT/DS267/26 (Oct. 7, 2005).

¹⁵⁵ See David Haskel, *Agriculture: Uruguay Gives More Time for Talks with U.S. Over Rice Dispute, Delays WTO Panel Request*, INT'L TRADE DAILY, Oct. 26, 2005 (giving more time to resolve dispute over American rice subsidies before going to WTO).

¹⁵⁶ See Jerry Hagstrom, *Glickman Back To Farm Policy In Urging WTO Compliance*, CONGRESS DAILY (May 8, 2006) (quoting Dan Glickman, President of the Motion Picture Association of America, as noting that "[i]f . . . the worst came to pass and countries begin to retaliate, it would begin to bring non-agricultural industries into the making of agricultural policy in a negative way") (noting that a Brazilian suspension of concessions and other obligations on impacts of U.S. goods would be neither practicable nor effective.").

¹⁵⁷ In response to press reports in late June 2006 that the United States was considering offering further reductions in its farm subsidies, fifty-seven Senators wrote to President Bush urging him to reject any "unbalanced" deal that would require further cuts in U.S. farm subsidies without comparable reductions in other

However, there is little indication that U.S. demands on market access will be met in the near future.¹⁵⁸ Accordingly, Congress is unlikely to approve a dramatic reduction in trade-distorting subsidies in the next farm bill unless, under option three, that reduction is offset by funding for other programs that benefit rural and agricultural communities.

As discussed below, three guidelines can be used to identify the types of programs that might be included in future farm bills without risk of trade conflict: (a) eliminate or reduce price-contingent programs; (b) avoid concentrating benefits on a limited number of commodities; and (c) support "non-specific" programs, including rural development, infrastructure, conservation, and nutrition programs.

5.1. Eliminate or Limit Price-Contingent Programs

The reports of the Panel and the Appellate Body in the *Upland Cotton* dispute indicate that price-contingent subsidies are particu-

countries' agricultural tariffs. See Press Release, Kent Conrad, United States Senator, North Dakota, Majority of Senators Join Conrad on Trade: Conrad Letter Calls on White House to Reject Unfair WTO Deal (June 23, 2006), available at <http://conrad.senate.gov/~conrad/releases/06/06/2006623933.html>. There is some merit to the charge that the United States is being asked to accept an "unbalanced" deal on agriculture given that the European Union is insisting on the right to maintain much higher levels of both subsidies and tariffs for agricultural products. Under the EU's proposed formula for reducing agricultural subsidies, it would be able to provide between \$42-43 billion in total trade-distorting support, while the United States would only be allowed about \$19 billion in total trade-distorting support. See *Agriculture Domestic Support Simulations*, supra note 142, at 15-16. Similarly, the EU has proposed a tariff formula that would permit it to maintain an average bound tariff rate of 13.16%, as compared with an average bound rate of only 7.46% for the United States. See Special Session of the Committee on Agriculture, *Applied Tariff Simulations - Agriculture, Summary of Results*, JOB(06)/152 at 2 (May 22, 2006). However, the United States is at a tactical disadvantage in insisting on substantial new market access concessions in exchange for further reductions in U.S. domestic support. As long as the WTO Members fail to reach agreement in the Doha Round, countries with high agricultural tariffs may maintain those tariffs while U.S. farm subsidies remain vulnerable to challenge under the SCM Agreement.

¹⁵⁸ See, e.g., Press Release, Government of India, Ministry of Commerce & Industry, India Sticks to its Guns in WTO Talks: Kamal Nath Says Trade Inequalities Unacceptable (July 24, 2006), http://www.heindia-av.org/nc_images/july06_release.pdf ("Developing countries cannot allow their subsistence farmers to lose their livelihood security and food security to provide market access to agricultural products from developed countries.").

larly vulnerable to significant price suppression claims under the SCM Agreement.¹⁵⁹ Accordingly, the most obvious principle for Congress to follow in order to minimize the risk of trade conflict is to eliminate or at least significantly reduce price-linked commodity subsidies. This could be accomplished in a variety of ways, including completely eliminating counter-cyclical and marketing loan program payments, lowering the target prices for these programs, or imposing more stringent payment limitations for individual farmers.¹⁶⁰

However, reducing or eliminating counter-cyclical and marketing loan program payments would be of limited value in addressing the risk of trade conflict if these payments were replaced by other price-contingent subsidies, as the USDA has recently proposed. In May 2006, the USDA identified, as a possible alternative to counter-cyclical and marketing loan payments, a program that would guarantee farmers a certain level of revenue in order to protect them from fluctuations in crop yield or market price.¹⁶¹ The USDA apparently believes that this type of program could be consistent with the relevant WTO subsidy disciplines because paragraph 7 of the WTO's Green Box Annex provides for "income insurance and income safety-net programmes."¹⁶²

There are, however, a variety of problems with this approach. It is questionable whether a revenue guarantee program could be enacted that would satisfy the provisions of paragraph 7, which includes a requirement that the payments be available to *all* producers who suffer more than a 30% loss in income, regardless of what

¹⁵⁹ See Upland Cotton Appellate Body Report, *supra* note 29, at 395; see also Section 3.2.1.2.

¹⁶⁰ Under the 2002 Farm Bill, direct payments are capped at \$40,000 per person, counter-cyclical payments at \$65,000 per person, and some marketing loan program payments at \$75,000 per person. See 2002 Farm Bill § 1603. However, these limits may be doubled under loopholes that allow spouses to be treated separately and that permit a person to receive payments through three separate business entities. See *MONKE*, *supra* note 21, at 3. In addition, commodity certificate gains under the marketing loan program are not limited. *Id.*

¹⁶¹ See U.S. DEP'T OF AGRIC., RISK MANAGEMENT PAPER, *supra* note 19, at 24–26.

¹⁶² Agreement on Agriculture Annex 2, ¶ 7(a). See also U.S. DEP'T OF AGRIC., RISK MANAGEMENT PAPER, *supra* note 19, at 25 (discussing potential for an income guarantee program to fit within the Green Box's "income safety net" provisions). However, the USDA appears to be ambivalent about the WTO-compliance potential of this approach. See *id.* at 3 (noting that "WTO concerns may be reduced but not eliminated" by replacing counter-cyclical and marketing loan payments with an income guarantee program).

crop(s) they produce.¹⁶³ Accordingly, a revenue guarantee program would need to be available to all U.S. farmers, which could make such a program both burdensome to administer and extremely expensive, unless the revenue guarantee was set at a level low enough to fit within the Green Box.¹⁶⁴

Moreover, even if an income guarantee program could be designed that complied with the terms of paragraph 7 and was therefore excluded from the calculation of the United States' AMS limit,¹⁶⁵ it would do nothing to prevent challenges under the SCM Agreement in the absence of a new Peace Clause.¹⁶⁶ Because commodity prices are one of the major variables that determine farmers' income and therefore affect eligibility for payments, such a program would presumably be considered price-contingent and therefore likely to be trade-distorting.¹⁶⁷

5.2. Avoid Concentrating Benefits on a Few Commodities

Another relatively simple guideline that Congress could use to draft a WTO-compliant Farm Bill would be to avoid programs that

¹⁶³ See Agreement on Agriculture Annex 2, ¶ 7(a) ("Any producer [suffering a 30% income loss] shall be eligible to receive the payments . . ."); see also *id.* ¶ 7 (b) ("the amount of such payments shall relate solely to income; it shall not relate to the type or volume of production . . . undertaken by the producer . . .").

¹⁶⁴ See U.S. DEP'T OF AGRIC., RISK MANAGEMENT PAPER, *supra* note 19, at 24 (noting potential record keeping burden of a revenue guarantee program that covered all commodities); *id.* at 26 (discussing cost implications of a revenue guarantee program that extended to commodities not covered under current subsidy programs).

¹⁶⁵ See *supra* Section 3.1.1.

¹⁶⁶ See *supra* Section 3.1.3. USDA's risk management paper discusses the classification of subsidies within the boxes of the Agreement on Agriculture but does not mention the Peace Clause and only briefly discusses the threat of serious prejudice challenges under the SCM Agreement. See U.S. DEP'T OF AGRIC., RISK MANAGEMENT PAPER, *supra* note 19, at 20-22.

¹⁶⁷ Admittedly, the text of paragraph 7 of the Green Box Annex suggests that it is possible to implement an income guarantee program that would not be price contingent, stating that "the amount of such payments shall relate solely to income; it shall not relate to . . . [commodity] prices, domestic or international . . ." Agreement on Agriculture Annex 2, ¶ 7(c). Given that the market price of the commodities grown by a farmer is a major factor determining the farmer's income, it is not clear how a payment program based on income would not also be "related to" the relevant commodity prices. In any event, in the absence of a new Peace Clause an income guarantee program would be vulnerable to challenge under the SCM Agreement regardless of whether it conformed to the relevant Green Box criteria.

concentrate their benefits on a small number of commodities. During the years 2002–2005, USDA estimates that 93% of the commodity program payments went to producers of upland cotton, rice, corn, soybeans and wheat.¹⁶⁸ This concentration of payments on a few crops results in high *ad valorem* rates of subsidization, making those payments vulnerable to serious prejudice claims under the SCM Agreement.¹⁶⁹

It has been suggested that Congress could continue to funnel a comparable level of farm supports to these commodities and avoid trade conflicts by simply moving the payments into non-price contingent programs such as direct payments.¹⁷⁰ Shifting funding to direct payments would presumably reduce the threat of trade conflict given the emphasis placed by both the Panel and the Appellate Body in the *Upland Cotton* dispute on the relationship between price-contingency and significant price suppression.¹⁷¹

Nonetheless, there are serious problems with this approach, both in terms of reducing the risk of challenges under the SCM Agreement and threatening the negotiating position of the United States in the Doha Round. Although the Appellate Body upheld the Panel's determination that direct payments to upland cotton farmers did not cause serious prejudice, it indicated that non-price contingent programs could contribute to serious prejudice.¹⁷² A finding that direct payments cause serious prejudice would be particularly likely if a Panel were to aggregate the effects of both price-contingent and non-price contingent programs or if the WTO were to reinstitute the 5% Dark Amber threshold for a presumption of serious prejudice.¹⁷³

Moreover, even in the absence of new dispute settlement proceedings, the G20 has made it clear that it views direct payments as potentially trade-distorting and has proposed various changes to the Green Box, such as limiting direct payments to low-income farmers and imposing product-specific caps, that would make it extremely difficult to significantly increase the level of direct pay-

¹⁶⁸ See U.S. DEP'T OF AGRIC., RISK MANAGEMENT PAPER, *supra* note 19, at 19.

¹⁶⁹ See *supra* Section 3.2.1.1.

¹⁷⁰ See *supra* note 119.

¹⁷¹ See *supra* Section 3.2.1.2.

¹⁷² See *supra* note 84 and accompanying text.

¹⁷³ See *supra* notes 85–86 and accompanying text.

ments for eligible commodities.¹⁷⁴ Accordingly, any attempt to shift counter-cyclical and marketing loan program funds into direct payments for the same commodities would be likely to further complicate the United States' efforts to conclude the Doha Round negotiations.

As discussed below, there is an alternative approach that would allow Congress to maintain the current baseline of farm bill spending without significant risk of trade conflict: shifting funds from subsidy programs that benefit only a few commodities to "non-specific" programs that benefit all agricultural producers or other elements of the rural economy.

5.3. Support "Non-Specific" Rural Development and Environmental Programs

In order to be subject to the SCM Agreement, a subsidy program must be "specific" to certain enterprises or industries.¹⁷⁵ There are a variety of existing programs that would not meet the SCM Agreement's definition of specificity, most obviously programs designed to promote development of the rural economy in general rather than the production of certain commodities. For example, the Rural Development title of the 2002 Farm Bill includes a variety of non-specific programs such as the Rural Strategic Investment Program, which authorized funding for creating and implementing regional development strategies.¹⁷⁶ The Rural Development title also provides support for various types of infrastructure in rural communities that would be considered non-specific and therefore not actionable, including electricity, broadband internet, and waste-disposal facilities.¹⁷⁷

¹⁷⁴ See *Review and Clarification of Green Box Criteria*, *supra* note 125, at 1-2.

¹⁷⁵ See SCM Agreement art. 2.1.

¹⁷⁶ See 2002 Farm Bill § 6030. Congress, however, never appropriated funds to implement the Rural Strategic Investment Program. See U.S. DEP'T. OF AGRIC., 2007 FARM BILL THEME PAPERS – RURAL DEVELOPMENT at 32 (2006), available at <http://www.usda.gov/documents/Farmbill07ruraldevelopment.pdf> (indicating that three initiatives, which included the Regional Strategic Investment Program were not funded.) [hereinafter U.S DEP'T OF AGRIC., RURAL DEVELOPMENT PAPER].

¹⁷⁷ See 2002 Farm Bill § 6101 (grants for water and wastewater facilities); *id.* § 6101 (loan guarantees for rural electrification projects); *id.* § 6103 (loans and loan guarantees for broadband service). In addition to being non-specific, infrastructure projects—to the extent that they are "general infrastructure"—do not even constitute subsidies as defined in the SCM Agreement. See SCM Agreement art. 1.1(a)(iii) ("a subsidy shall be deemed to exist where . . . a government provides

In addition to general rural development programs, even programs designed to benefit the farm sector could be considered non-specific if they are available to all agricultural producers.¹⁷⁸ Under Article 2 of the SCM Agreement, a subsidy must be limited to "an enterprise or industry or group of enterprises or industries"¹⁷⁹ in order to be considered specific; programs available throughout the *entire* farm sector are therefore unlikely to be considered to be specific.¹⁸⁰

There are a variety of provisions in the Conservation Title of the 2002 Farm Bill that would also be considered non-specific because they are available to all agricultural producers. For example, the Conservation Reserve Program pays farmers to take highly erodible cropland and other environmentally sensitive lands out of production¹⁸¹ and the Conservation Security Program provides farmers with financial support for implementing conservation

goods or services *other than general infrastructure . . .*") (emphasis added). Infrastructure projects are also listed in Annex 2 of the Agreement on Agriculture as a permissible category of Green Box programs. See Agreement on Agriculture Annex 2, para. 2(g).

¹⁷⁸ In addition, conservation programs that meet applicable criteria may be classified within the Green Box and are therefore exempt from Amber Box reduction commitments. See Agreement on Agriculture, Annex 2, para. 10 ("structural adjustment assistance provided through resource retirement programs"); para. 12 ("payments under environmental programmes").

¹⁷⁹ SCM Agreement art. 2.1.

¹⁸⁰ See Chambovey, *supra* note 43, at 321 ("[A] subsidy would not be regarded as specific because it is only available to the agricultural sector."); Alan O. Sykes, *The Economics of WTO Rules on Subsidies and Countervailing Measures*, at 20 (University of Chicago, Working Paper No. 186, 2003) ("[A] program that gave assistance to all farmers regardless of what they grow would not be specific."). This interpretation of specificity is supported by United States countervailing duty regulations. See 19 C.F.R. § 351.502(d) (2006) ("(d) *Agricultural subsidies*. The Secretary will not regard a subsidy as being specific . . . solely because the subsidy is limited to the agricultural sector . . ."). However, a program that is formally available to the entire agricultural sector, but that in practice concentrates its benefits on producers of a particular commodity or group of commodities, could be found to be specific. See SCM Agreement art. 2.1(c) (indicating factors that a subsidy may be specific include "use of a subsidy programme by a limited number of certain enterprises, predominant use by certain enterprises, the granting of disproportionately large amounts of subsidy to certain enterprises, and the manner in which discretion has been exercised by the granting authority in the decision to grant a subsidy").

¹⁸¹ See 2002 Farm Bill § 2101. Conservation Reserve Program contracts are available for both cropland and pasture land. 16 U.S.C. § 3831(b).

practices on working agricultural lands.¹⁸²

Similarly, there are numerous provisions in other titles of the 2002 Farm Bill that are non-specific to particular commodities. Examples include a program in the Energy Title that provides “farmers, ranchers, and rural small businesses” with up to 25% of the cost of purchasing renewable energy systems or improving the energy efficiency of their operation¹⁸³ and a provision in the “Nutrition Programs” title that provides support for community food projects without any restrictions concerning eligible commodities.¹⁸⁴

By shifting funds from subsidies that benefit producers of only a few commodities to non-commodity specific programs such as these, Congress could maintain—or in theory even increase—the current baseline of Farm Bill spending without risk of trade conflict.

6. CONCLUSION

The collapse of the Doha Round negotiations eliminates, at least for the foreseeable future, the possibility that the USTR will be able to protect farm subsidy programs from challenge by negotiating a new Peace Clause. It is unclear how Congress will respond. The conventional wisdom appears to be that the failure to complete the Doha Round will encourage Congress to continue the current subsidy programs rather than “unilaterally disarming” on agricultural trade.¹⁸⁵ Yet given the expiration of the Peace Clause, this approach is likely to result in new challenges to farm subsidies and the imposition of sanctions on non-agricultural sectors of the U.S. economy. Accordingly, any continuation of the current farm subsidy programs would be best understood not as a viable long-term solution but rather as a short-term political response, driven both by the influence of the commodity producers and Congress’s

¹⁸² See *id.* §§ 2001–06. . Producers of “any crop or livestock” may participate in the Conservation Security Program. *Id.* § 3838(9)(A).

¹⁸³ *Id.* § 9006.

¹⁸⁴ *Id.* § 4125.

¹⁸⁵ See Statement by Bob Stallman, President, American Farm Bureau Federation, Regarding Need to Extend Farm Bill TPA in Light of Suspension of Doha Round (July 27, 2006), available at <http://www.fb.org/index.php?fuseaction=newsroom.newsfocus&year=2006&file=nr0727.html> (asserting that the current farm program should be continued for one more year, given the lack of progress in the Doha Round).

apparent lack of understanding of the precarious status of U.S. subsidy programs under the SCM Agreement.

A more durable solution would be for Congress to enact a new Farm Bill that shifts funding from subsidies that are concentrated on a few crops to a wide array of non-specific rural development, infrastructure, conservation and nutrition programs. This approach would enable the United States to maintain its current baseline of Farm Bill spending while eliminating the threat of trade complaints and removing U.S. farm subsidies as an obstacle to the completion of the Doha Round.