C.E.D.R.

European Council for Agricultural Law
Comité Européen de Droit Rural (C.E.D.R.)
Europäisches Agrarrechtskomitee

XXIV European Congress and Colloquium of Agricultural Law – Caserta (Naples) – 26-29 September 2007

XXIVe Congrès et Colloque Européens de Droit Rural – Caserta (Naples) – 26-29 septembre 2007

XXIV Europäischer Agrarrechtskongress mit Kolloquium – Caserta (Neapel) – 26-29 September 2007

Commission I

National Report – Rapport national – Landesbericht

United States of America

Margaret Rosso Grossman
Professor and Bock Chair in Agricultural Law
University of Illinois

XXIV European Agricultural Law Congress and Colloquium
European Council for Agricultural Law
Caserta (Naples), Italy, 26-29 September 2007

Commission I

Agricultural Policy, New Rules of WTO, and Regional Equilibrium*

Prof. dr. Margaret Rosso Grossman
Bock Chair in Agricultural Law
University of Illinois, USA

I. Agriculture and Trade in the United States

Agricultural policy in the United States promotes both production of food and fiber and trade in agricultural products. Much of the nation's land is devoted to agriculture, and many US farm products are sold or donated in other countries. US agricultural policy is set out in comprehensive Farm Bills enacted every five years and in other legislation. Those laws, and their accompanying regulations, authorize financial and other support for producers, help to protect farmers from the vagaries of nature and other risks, encourage conservation, and adopt other policies.

This report briefly presents information about land use, agricultural production, and trade in the US, and it describes some of the legislation that governs support for producers and agricultural trade. The report then focuses on US agricultural support and the World Trade Organization (WTO), in particular the 2005 cotton case and its possible implications. The report discusses several important Regional Trade Agreements and their impact in the US. Finally it addresses two important, concurrent negotiations -- the WTO Doha Development Round negotiations on the Agreement on Agriculture and deliberations in the US Congress on the 2007 Farm Bill.

A. Land

The United States has a total land area of about 2.3 billion acres (one hectare is 2.469 acres). The federal government owns about 28% of US land (635 million acres, most in Alaska and the West). State and local governments own about 9%, and the Bureau of Indian Affairs holds about 2%. More than 60% of US land is privately owned, as is 99% of US cropland.[1]

The Economic Research Service (ERS), part of the US Department of Agriculture (USDA) has compiled estimates of major land uses since 1922, with consistent data compiled since 1945. In 2002, the latest year for which data are available, the ERS calculated that about 1.2 billion acres (almost 52% of total land) was used for all agricultural purposes. This includes cropland, grassland pasture and range, grazed forest land, and land in farm homes, roads, and lanes. In the 48 contiguous states, forest-use land constituted 29.5% of total land; grassland

[1] Lubowski, Ruben N. et al., *Major Uses of Land in The United States, 2002*, at 35-36, ERS, USDA, EIB 14 (2006). Almost 1.4 million acres are privately owned.

* This material is based on work supported by the Cooperative State Research, Education and Extension Service, US Department of Agriculture, under Project No. ILLU-470-309. Thanks to Jessica John Bowman for research assistance.

pasture and range, 30.8%; and cropland, 23.3%. Urban uses accounted for only 3% of total US land.[2]

B. Production

Agriculture adds significant value to the US economy. In 2004, the value added from the US agricultural sector was $279 billion; the value of crop production was $124 billion; livestock, $124.6 billion.[3]

The US is the world's largest producer of many agricultural commodities. In 2005, the US ranked first in world production of corn and soybeans and third in wheat production. The US was the largest producer of cattle, chicken, pig, and turkey meat, as well as other commodities. It ranked in the top three world producers in 44 commodities, including many fruits and vegetables, as well as grains and animal products.[4] US farmers raise a large share of the world's grain commodities. In 2005, for example, the US produced 282 million metric tons of corn for grain, 41.1% of world production. The 84 million metric tons of soybeans were 37.9% of world production. Wheat production of 57 million metric tons was only 9.2% of world production.[5]

C. Trade

For many years, the US was the world's largest exporter of agricultural products[6] and, as a sector, often has a trade surplus. US agricultural products help to feed the 96% of world consumers who live in other nations.[7] The value of agricultural exports in 2005 was almost $63 billion. Grain and feed ($16.5 billion) and oilseeds and their products ($10.3 billion) together accounted for over 42% of total agricultural exports. Exports of animals and their products were $12.2 billion, 19.4% of total US agricultural exports. Exports of corn and soybeans in 2005 (52 and 24.5 million metric tons) were 68.2% and 36.9% of world exports. Wheat exports of 27.5 million metric tons were 24.9% of world exports. The European Union accounted for 10.9% of 2005 US agricultural exports ($6.8 billion). Asia received 35.7% of total agricultural exports ($22.5 billion); Latin America (7.1%) and Mexico (14.9%), together 21% ($13.8 billion). Canada accounted for 16.8% ($10.6 billion). Africa purchased only 4.4% of the total ($2.8 billion).[8]

Though much of US production is exported through commercial markets, some products are exported in the form of food aid. The US supplied over 60% of worldwide tons of food aid in the period from 2000-2002.[9]

The US imports agricultural commodities, too. In 2005, total agricultural imports were $59.3 billion. Fruits and vegetables account for 22.6% of these imports; meat products, grains, coffee, cocoa, wines, and malt beverages are also imported. The European Union provided

---

[2] See generally *id.*

[3] US Census Bureau, *Statistical Abstract of the United States,* at 535 (table 812) (2007).

[4] Food and Agriculture Organization of the United Nations, Statistics Division, Major Food and Agricultural Commodities and Producers (2006), http://www.fao.org/es/ess/top/country.html.

[5] US Census Bureau, *supra* note 3, at 540 (table 823).

[6] According to a July 2007 DG-Agri publication, 2005 EU agricultural exports were higher than those of the US. In part, "the growth of EU exports reflects the strengthening of the euro against the dollar. . . . [but] regardless of currency the position of the EU as the largest exporter does not change." DG- Agri, European Commission, The Changing Face of EU Agricultural Trade, at 2, Monitoring Agri-trade Policy No. 02-07 (July 2007).

[7] Foreign Agricultural Service [FAS], USDA, The Importance of Agricultural Trade (Fact Sheet, Feb. 2006).

[8] US Census Bureau, *supra* note 3, at 541 (tables 826, 827).

[9] Shahla Shapouri & Stacey Rosen, *Fifty Years of U.S. Food Aid and Its Role in Reducing World Hunger*, 2(4) AMBER WAVES 38, 40, 43 (Sept. 2004).

22.5% of agricultural imports; Canada and Mexico, 20.7% and 14.1%.[10] Other individual countries represented less than 5% of imports.[11]

The Foreign Agricultural Service, part of USDA, noted that agricultural trade is critical to the US: "Compared to the general economy, U.S. agriculture is twice as reliant on overseas markets."[12] Bulk commodities have long been sold abroad; more recently, exports have been critical for high value products, like cattle hides, fruits, almonds and other nuts. Not surprisingly, major agricultural states rely most on exports. Trade is important for Midwest states that produce grain and soybeans, as well as for California, Washington, and Texas. Nationwide, each dollar of exports creates $1.48 in supporting business activities, so that 2005 agricultural exports of about $62.4 billion generated an additional $92 billion.[13]

II. US Agricultural Legislation

The United States has a long tradition of support for agriculture. Starting in the 1930s, US laws authorized financial support, especially price and income support, but also programs to encourage conservation. For many years, an important goal of agricultural policy was to ensure that farm income was comparable with income of urban workers. In more recent years, several policy objectives support government involvement in agriculture. Self sufficiency in food is one rationale, though domestic food supply may not depend on agricultural policy. Reduction of various types of risk is probably more important. Drought, flood, and other natural causes often threaten farmers, but reducing risk also includes measures to ensure stability in the industry, in light of large capital investments, and price stability for farm commodities. Conservation of farmland and agricultural sustainability also drive agricultural policy.[14]

The Agricultural Adjustment Act of 1938 and the Agricultural Act of 1949, much amended, continue to govern many aspects of agricultural policy. Congress enacts a major Farm Bill every few years (e.g., 1985, 1990, 1996, and 2002, with another expected in 2007), and supplementary legislation addresses specific needs. Sometimes these laws make only minor adjustments in federal policy. On other occasions, the Farm Bill signals a more significant change of direction.[15] Agencies of the USDA implement most federal farm programs; the Farm Service Agency and the Natural Resources Conservation Service play major roles.

Commodity programs are a core component of US domestic support for agriculture and, since 1985,[16] have become more market oriented. The 1996 Farm Bill,[17] enacted after agreement of the Uruguay Round Agreement on Agriculture (URAA), took important steps toward market orientation and cost control by introducing production flexibility contracts that decoupled important income support from production. It based payments on enrolled acreage and allowed producers to plant most crops on contract land.[18] Thereafter, low commodity prices

---

[10] The North American Free Trade Agreement, between the US, Canada, and Mexico, helps to explain the level of trade. See *infra* text accompanying notes 75-87.

[11] US Census Bureau, *supra* note 3, at 539 (tables 821, 822).

[12] FAS, *supra* note 7.

[13] *Id*.

[14] Otto Doering & Joe L. Outlaw, *The Evolution of the Rationale for Government Involvement in Agriculture*, 21(4) CHOICES 221, 223-24 (2006).

[15] For more information on US farm legislation, see the resources provided by the USDA Economic Research Service, available at http://www.ers.usda.gov.

[16] Food Security Act, Pub. L. 99-198, 99 Stat. 1354 (1985).

[17] Federal Agricultural Improvement and Reform Act (FAIR) of 1996, Pub. L. 104-127, 110 Stat. 888 (1996).

[18] FAIR ended deficiency payments (price-sensitive payments based on target prices) and authorized production flexibility contracts for wheat, feed grains (corn, grain sorghum, barley, oats) rice, and upland cotton. Eligible producers entered contracts for a 7-year period (1996-2002), and total

and declines in farm incomes led to enactment of emergency assistance measures, including market loss assistance.[19]

Under the 2002 Farm Bill,[20] drafted during a period of budget surplus, farm subsidies increased,[21] and commodity programs account for a majority of agricultural spending. Three high-profile income support programs for major commodities are direct payments, counter-cyclical payments, and marketing assistance loans.[22] Producers have few limitations on their choice of crops,[23] but fruits, most vegetables, tree nuts, and wild rice are prohibited, unless destroyed before harvest. Program land must remain in agricultural (or fallow) uses. Participation in farm programs is voluntary, but many producers depend on these programs. Farms that receive some type of government payment (including conservation payments) operate on 86% of US cropland.[24] In 2005, about 43% of farms received government payments, but the majority of payments (59.5%) went to about 9.7% of the largest farms, in gross receipts. Government payments were 7.6% of gross cash income for all farm types in 2005.[25]

Direct payments, at a fixed rate for each commodity, replaced the production flexibility contracts of prior law. Traditional farm program crops -- feed grains, wheat, rice, and cotton -- qualify, as do oilseeds and peanuts. Direct payments depend on the farm's payment acres (85% of acreage base)[26] and historical yields; they are decoupled from current production or market prices.[27] *Counter-cyclical payments* (CCPs) provide a safety net when the "effective price" (the sum of the direct payment rate plus the higher of the national average market price or loan rate) for a commodity is less than the pre-determined target price. The payment rate is the difference between the statutory target price and the effective price. Payments are not tied to current production, but are based on the farm's payment acres and historical yields.[28] CCPs

payments were over $35 billion. For more detail, see Paul C. Westcott et al., The 2002 Farm Act: Provisions and Implications for Commodity Markets, at 2-3, ERS, USDA, AIB 778 (2002).

[19] See 7 USC § 1421 note.

[20] Farm Security and Rural Investment Act (FSRIA), Pub. L. 107-171, 116 Stat 134 (2002).

[21] Daniel A. Sumner, Boxed In: Conflicts between U.S. Farm Policies and WTO Obligations, at 4 (Center for Trade Policy Studies, TPA No. 32, 2005).

[22] The 2002 Farm Bill also includes commodity programs for peanuts, sugar, and dairy.

[23] 7 USC § 7916. Lentils, mung beans, and dry peas are permitted. The Farming Flexibility Act of 2005, S. 1038, 109th Cong., 1st Sess., would have ended the restrictions, but was not enacted. Fruit and vegetable growers, who do not receive commodity payments, opposed the change. See Matthew C. Porterfield, *U.S. Farm Subsidies and the Expiration of the WTO's Peace Clause*, 27(4) U. PA. J. INT'L ECON. L. 999, 1027 (2006).

[24] Roger Claassen et al., Environmental Compliance in U.S. Agricultural Policy: Past Performance and Future Potential, at 4-5, ERS, USDA, AER 832 (2004).

[25] ERS, USDA, Government Payments and the Farm Sector: Who Benefits and How Much?, http://www.ers.usda.gov/Briefing/FarmPolicy/gov-pay.htm (updated 23 Apr. 2007).

[26] Producers had a one-time opportunity to update their acreage base for direct and counter-cyclical payments, 7 USC §§ 7911, 7912, but only about 37% of producers did so. ERS, USDA, Updating base acres and payments yields (June 2003), http://www.ers.usda.gov/Briefing/farmpolicy/updating.htm.

[27] 7 USC § 7913. Representative rates: wheat, $0.52/bushel; corn, $0.28/bushel; soybeans, $0.44/bushel. Direct payments are equal to the product of the payment rate, payment acres (85% of base), and payment yield for the commodity. Direct payments were expected to be about $5 billion per year. Mary E. Burfisher & Jeffrey Hopkins, eds., Decoupled Payments: Household Income Transfers in Contemporary U.S. Agriculture, at 9, ERS, USDA, AER 822 (2003).

[28] 7 USC § 7914. Counter-cyclical payments "institutionalize the market loss assistance payments" of prior years. Westcott et al., *supra* note 18, at iv.

help to insulate farmer from market fluctuations.[29] *Marketing assistance loans* are nonrecourse interest-bearing loans from the federal government, at rates specified by statute, with harvested crops as collateral. When market prices drop below the loan rate, marketing assistance loan gains result if farmers retain the crop and repay the loan at a lower rate (permitted by statute) or forfeit the crop to the government.[30] Alternatively, loan deficiency payments (equal to marketing assistance loan gains) can be paid to qualified farmers who do not have loans.[31]

Some trade measures also support commodity prices. As USDA explains, "tariffs and tariff-rate quotas support commodity prices by limiting imports of lower priced products. The United States has among the lowest average tariffs on agricultural products of all [WTO] members, with average bound tariffs on agricultural goods of 12 percent."[32] Higher tariffs apply to dairy, sweeteners, and tobacco. Tariff rate quotas (limits on imported goods, with a higher tariff for quantities above the limit) apply to some commodities. Export subsidies facilitate sale of commodities at prices below US market price to specific countries by awarding cash payments or commodity certificates to exporters. Export subsidies are rare. The Export Enhancement Program has applied to "small amounts of poultry exports" for only three years since 1996, and the Dairy Export Incentive Program applied until 2004 at a WTO-negotiated ceiling.[33]

The Trade Act of 2002 included a special program of trade adjustment assistance for farmers and fishermen who have been harmed by competition from imports.[34] The program provides technical assistance and a cash payment up to $10,000 annually. Producers must submit a petition that demonstrates that the national average price for their commodity is less than 80 percent of the national average of the past 5 marketing years, and that increased imports contributed "importantly" to the price decline. Individual producers may receive cash benefits if requirements are met, including a net farm income lower than in the previous year.[35] Relatively few producers have received assistance under the program.[36]

US legislation governs other aspects of agricultural policy. The 2002 Farm Bill, for example, also governs conservation, trade, nutrition programs (e.g., food assistance), rural development, energy, forestry, crop insurance, disaster assistance, credit, and agricultural research. Cross compliance provisions link receipt of many farm payments to conservation of highly erodible land and protection of wetlands. The 2002 Farm Bill increased funding for voluntary conservation programs, especially on working lands.

---

[29] DG-Agri, European Commission, [no title], at 5, Monitoring Agri-trade Policy No. 01-05 (Mar. 2005). The Commission suggests that CCPs distort trade less than loan payments, but influence production decisions by "reducing revenue variability and risk." *Id.*

[30] 7 USC §§ 7931-7934.

[31] *Id.* §§ 7935-7936. Special provisions apply to cotton. The European Commission characterizes loan deficiency payments as a program to "boost income stability at the expense of market stability and . . . an increasingly expensive method of trade-distorting support. DG Agri, *supra* note 29, at 5.

[32] ERS, USDA, Farm and Commodity Policy: Basics of U.S. Agricultural Policy, http://www.ers.usda.gov/Briefing/FarmPolicy/BasicsOfPolicy.htm (updated March 2007).

[33] *Id.*

[34] Pub. L. 107-210, 116 Stat. 933 (2002). Among other provisions, the law provided the US President with trade promotion authority, effective until 1 July 2007, and specified objectives for trade negotiations.

[35] *Id*. §§ 141-143, codified at 19 USC §§ 2401-2401g.

[36] Government Accountability Office, Trade Adjustment Assistance: New Program for Farmers Provides Some Assistance, But Has Had Limited Participation and Low Program Expenditures, at 3 (GAO-07-201, Dec. 2006). Only about 8,000 cash payments have been made, and about 13,000 producers received technical assistance from USDA.

Provisions of the 2002 Farm Bill expire 30 September 2007, and negotiations for the 2007 Farm Bill were underway during Spring and Summer 2007. Negotiations have been influenced by several factors, including high commodity prices (caused in part by increased production of ethanol), federal budget constraints (significant annual deficits), and the concurrent WTO negotiations.[37] The WTO cotton case, discussed below, and the recent Canadian WTO challenge to US farm subsidies[38] may also influence deliberations.

III. US Agricultural Support and the WTO

WTO agreements finalized in 1994 have "constrained" US farm policy "to some degree."[39] The Uruguay Round Agreement on Agriculture (URAA) includes provisions on market access, domestic support, and export subsidies. It is intended in part to reduce various farm subsidies that distort trade. The Agreement on Subsidies and Countervailing Measures (SCM Agreement) identifies "prohibited" and "actionable" subsidies. Export subsidies and import substitution subsidies are prohibited. Actionable subsidies distort trade and cause serious prejudice to other WTO Members. Both can be challenged under the Dispute Settlement procedure, but until 2004, the Peace Clause of the URAA limited challenges to agricultural subsidies under the SCM Agreement.[40]

Under the URAA, the US, like other countries, agreed to disciplines on trade-distorting domestic support[41] under a commitment to reduce its Aggregate Measure of Support (AMS -- the Amber Box). US Amber Box support decreased significantly in 1995-1997, but increased in response to low market prices in 1999-2001; during those years the US reported Amber Box support below its commitment of $19.1 billion. Minimally distorting domestic support (Green Box payments) increased. These include direct commodity payments under the 2002 Farm Bill, as well as conservation payments, and general services (research, extension, pest and disease control). Food assistance payments, rather than payments to farmers, make up the majority of Green Box payments.[42]

WTO commitments continue to apply under the 2002 Farm Bill, though the US has not submitted notifications to the WTO since 2001. The 2002 Farm Bill included a provision intended to keep domestic support within the permitted AMS under the URAA. If the Secretary of Agriculture determines that support payments will exceed those limits, after reporting to Congress, the Secretary shall "to the maximum extent practicable" adjust the amount of expenditures to keep them within limits.[43]

---

[37] See, e.g., Timothy Josling, The Farm Bill, Doha, the Budget (and Ethanol!) (IPC Policy Focus, Farm Bill Series No. 1, Mar. 2007).

[38] WTO, United States -- Subsidies and Other Domestic Support for Corn and Other Agricultural Products, WT/DS357/11 (8 June 2007).

[39] See Stephanie Mercier & Vince Smith, *Domestic Farm Policy for 2007: Forces for Change*, 21(4) CHOICES 209, 209 (2006).

[40] The Peace Clause is URAA, art. 13 (due restraint), which protected countries with URAA-compliant subsidies from challenge under other WTO agreements. The Peace Clause did not protect prohibited subsidies -- those contingent on export performance or on use of domestic over imported goods (WTO Agreement on Subsidies and Countervailing Measures (SCM), art. 3). For more detail, see Porterfield, *supra* note 23.

[41] For more detail on domestic support, see Margaret Rosso Grossman, *The Uruguay Round Agreement on Agriculture and Domestic Support*, chap. 2 in Michael N. Cardwell et al., AGRICULTURE AND INTERNATIONAL TRADE: LAW, POLICY AND THE WTO (2003).

[42] ERS, Government Payments, *supra* note 25.

[43] 7 USC § 7991.

The EU has expressed concern about the effect of direct and indirect support to farmers under the 2002 Farm Bill and other laws, and alleged that the law "increases significantly the trade-distorting effect of U.S. farm subsidies."[44]

A. The Cotton Case

Since the expiration of the URAA Peace Clause, and especially after Brazil's successful challenge to provisions of the US upland cotton program,[45] US commodity subsidies may be vulnerable to WTO challenge.

Brazil's case against the US support program for upland cotton was the first WTO dispute alleging that agricultural domestic support violated the URAA.[46] This dispute resulted in findings that seem to have implications for US farm programs: that Peace Clause violations had occurred, that several types of subsidies had caused serious prejudice, and that the Step 2 cotton program and export credit guarantees were prohibited subsidies. In May 2005, the Dispute Settlement Body (DSB) adopted the Appellate Body (AB) report (and the Panel report, as amended by the AB).[47]

To determine if the Peace Clause applied to prevent Brazil's suit, the Panel examined US cotton payments. The Panel concluded that direct payments under the 2002 Farm Bill, as well as production flexibility contract payments under the 1996 Farm Bill, did not fit into the Green Box; they were not decoupled support because of planting restrictions on fruits, vegetables, and wild rice. Moreover, payments that do not fit in the Green Box cannot provide support to a specific commodity in excess of support in the 1992 marketing year. Cotton payments exceeded that amount in relevant years. Therefore, the Peace Clause did not apply, and the Panel could address Brazil's complaints.

The cotton case determined that the price-contingent subsidies challenged by Brazil caused significant price suppression and therefore serious prejudice to Brazil. These included marketing loan program payments, Step 2 (user marketing) payments,[48] marketing loss assistance payments (no longer used), and counter-cyclical payments.[49] The case also determined that Step 2 payments to domestic users of cotton were prohibited domestic subsidies. Moreover, both Step 2 payments to exporters and export credit guarantees for cotton and some other commodities were prohibited export subsidies. It was recommended the US stop prohibited subsidies by 21 July 2005 and actionable subsidies by 21 September 2005. In response, the US ended the Step 2 subsidy program, effective 1 August 2006, and amended the export credit regulations.[50]

In August 2006, alleging that US measures failed to comply with the WTO, Brazil requested establishment of a Compliance Panel. In late July 2007, the Panel issued a

[44] European Commission, United States Barriers to Trade and Investment: Report for 2007, at 13 (Feb. 2007).

[45] United States -- Subsidies on Upland Cotton, Report of the Appellate Body, 3 Mar. 2005 (WT/DS267/AB/R).

[46] Mercier & Smith, *supra* note 39, at 211.

[47] For a summary of the dispute settlement and the current state of implementation, see http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds267_e.htm

[48] This program reimbursed US cotton mills for buying US cotton (at higher than world prices) and US exporters for buying US cotton and selling it abroad at (lower) world prices.

[49] Other domestic support -- production flexibility contract payments, direct payments, and crop insurance -- did not cause serious prejudice because Brazil failed to prove the causal link between the payments and price suppression.

[50] Pub. L. 109-171, § 1301, 120 Stat. 4, 5 (2006), codified at 7 USC § 7937. The law repealed the authority to issue cotton user marketing certificates. See also FAS, USDA, Export Credit Guarantee Program (Fact Sheet, Mar. 2007). Fee rates, based on risk, replace the 1% cap that the WTO Panel identified as a subsidy.

confidential interim ruling that favored Brazil. If the final ruling, which may be issued in September, agrees, Brazil will be able to retaliate against the US through trade sanctions, including increased tariffs.[51]

B. Implications of the Cotton Case

The DSB finding that direct payments under the 2002 Farm Bill are not fully decoupled and therefore do not qualify as Green Box payments may have implications beyond cotton. The finding suggests that these payments should be categorized as Amber Box payments,[52] with the result that the US may have exceeded its $19.1 billion AMS limit. Though the US has notified domestic support under URAA only for the years 1995-2001, USDA data sources provide information about subsidy levels under various programs. At least one scholar has calculated possible Amber Box subsidies that exceed the URAA limit.[53]

Moreover, now that the Peace Clause has expired, fewer obstacles will prevent the claim that US farm programs have caused serious prejudice to trade in other commodities, perhaps leading to challenge, specific to commodities, under the WTO SCM Agreement. That Agreement prohibits subsidies that cause adverse effects, including "serious prejudice," to the interests of other Members (art. 5). Serious prejudice occurs when the subsidy displaces or impedes exports or imports, causes price suppression, depression, or lost sales, or increases world market share of the subsidizing country (art. 6.3). Both the magnitude of support and its causal connection with adverse market effects help to determine if adverse effects and serious prejudice have occurred and subsidies are vulnerable to WTO challenge.[54]

Subsidies for most US program commodities have averaged more than 10% of market cash receipts during fiscal years 1996 through 2005, and in some years for some commodities, subsidies were far higher. For some crops, subsidies cover an important part of production costs.[55] Moreover, crops (except milk) that receive the highest subsidies are the largest agricultural exports and a significant share of world exports. These include corn, soy, wheat, cotton, rice, sorghum, and peanuts.[56] Some economic analyses indicate that agriculture support policies in the US (and in other developed countries) "negatively influence international market prices and tend to disadvantage third-country trade of non-subsidized 'like' products."[57]

Indeed, in June 2007, Canada filed a request that the WTO Dispute Settlement Body establish a panel to consider alleged US violations. In particular, Canada alleged that the US

---

[51] Bradley S. Klapper, WTO Largely Rules Against US Cotton Aid, Assoc. Press, 27 July 2007.

[52] The Panel implied that these payments should be reported in the Amber Box, which raises an "obvious vulnerability" in the US farm program if direct payments must be notified as Amber Box payments. The decision "establishes a precedent for interpreting the notification status of U.S. direct payments." Randy Schnepf & Jasper Womach, Potential Challenges to U.S. Farm Subsidies in the WTO, at 10 (CRS Rep. RL33697, Oct. 2006).

[53] See Sumner, *supra* note 21.

[54] Schnepf & Womach, *supra* note 52, at 22. This report is a "primer on the issue of the vulnerability of domestic farm programs to WTO challenges." *Id*. at 2.

[55] *Id*. at 22-25. Direct payments are the largest subsidies; counter-cyclical payments and marketing loan payments are large only when market prices are low. Federal subsidies support crop insurance, with most subsidies for corn, wheat, soy, cotton, and sorghum. *Id*. at 26-27.

[56] *Id*. at 31. Oxfam argues that subsidies on corn, rice, and sorghum may trigger cases against the US in the WTO Dispute Settlement Body. EU subsidies on a number or products are also vulnerable. Oxfam International, Truth or consequences: Why the EU and the USA must reform their subsidies, or pay the price (Oxfam Briefing Paper 81, Nov. 2005).

[57] Schnepf & Womach, *supra* note 52, at 13, with studies summarized in Appendix A, at 38-45. One study, for example, suggested that US support of corn, rice, and sorghum is vulnerable to WTO challenge. See also Sumner, *supra* note 21, who asserted that US farm programs may have suppressed market prices.

total AMS for the years 1999-2002 and 2004-2005 exceeded its commitment under the URAA and that the US export credit program and guarantees operate as export subsidies that violate both the URAA and the SCM Agreement.[58] The US blocked the WTO investigation of Canada's complaint, but WTO rules permit the US to block investigation only once. If Canada renews its complaint, the DSB must accept the case.

In July 2007, Brazil requested consultations with the US, by communication to the WTO Dispute Settlement Body. Other countries, included The EU, Canada, and Mexico, have requested to joint the consultations.[59] Brazil alleged that US domestic agricultural subsidies during most years between 1999 and 2005 exceeded its Amber Box commitment under the URAA. In addition, Brazil alleged that export guarantees violate the URAA and the SCM Agreement. The Brazilian Foreign Ministry initiated the WTO process during US congressional negotiation of the 2007 Farm Bill, in part to encourage US legislators to reduce subsidies to US farmers.[60]

IV. Regional Trade Agreements

Regional Trade Agreements (RTAs) or Free Trade Agreements (FTAs) are "an exception to the basic legal principle of nondiscrimination in international trade."[61] FTAs are permitted under the WTO under certain conditions; they must be reported to the WTO to ensure that they comply with WTO requirements.[62] In 2003, more than 150 FTAs were in effect among WTO Members and accounted for about 43% of international trade.[63] Some argue that, viewed from an institutional perspective, RTAs "tend to undermine the development of a multilateral trade system . . [and] pose an institutional threat to the WTO."[64] Others suggest that they advance trade liberalization by providing competition that can encourage multilateral negotiators under the WTO to reach agreement and perhaps set an example of effective measures for WTO negotiation. From an economical perspective, they can help US exporters gain market share and help developing countries implement economic development.[65]

The US has pursued FTAs actively, especially since Congress passed trade promotion authority in 2002.[66] FTAs with the US are often attractive to other nations, because the US is

---

[58] WTO, WT/DS357/11, *supra* note 38. WTO consultations between the US and Canada (with the EU and 7 other countries as third parties) in February 2007 failed to resolve Canada's concerns.

[59] WTO, WT/DS365/1 (17 July 2007). If Brazil and the US do not reach agreement in 60 days, Brazil may request a WTO dispute settlement panel. Brazil Requests Consultations on U.S. Farm Subsidies, INFORMA ECON. POL'Y REP., 13 June 2007, at 5. See also WT/DS365/5 (27 July 2007) (EU request).

[60] Brazil sees WTO case as leverage on U.S. farm policy, INFORMA ECON. POL'Y REP., 13 July 2007, at 2.

[61] Daniel T. Griswold, Free Trade Agreements: Steppingstones to a More Open World, at 3 (Center for Trade Policy Studies, TBP No. 18, 2003).

[62] Pascal Lamy, *The Place of the WTO and its Law in the International Legal Order,* 17(5) EUR. J. INT'L L. 969, 969 (2006).

[63] Griswold, *supra* note 61, at 3. Article XXIV of the GATT applies. But see Colin B. Picker, *Regional Trade Agreements v. The WTO: A Proposal for Reform of Article XXIV to Counter This Institutional Threat*, 26 U. PA. J. INT'L ECON. L. 267 (2005), which analyzes Picker's proposal for making RTAs consistent with the WTO.

[64] Picker, *supra* note 63, at 270. The institutional perspective, "considers how RTAs drain states' enthusiasm for multilateral trade negotiations, create conflicts between RTAs and the WTO, and divert resources from the WTO to the RTA process." *Id*. at 271.

[65] Griswold, *supra* note 61, at 4-6. Griswold discusses the US FTAs with Chile and Singapore.

[66] *Id*. at 2.

the world's largest market. Some FTAs are regional;[67] others are bilateral.[68] In addition to FTAs, USDA agencies have entered bilateral agreements. The Foreign Agricultural Service, for example, has agreements -- often in the form of memoranda of understanding or consultative committees -- that focus on specific areas (e.g., plant and animal health, trade development, conservation).

A USDA study considered the connection between RTAs and domestic farm policy. RTAs may interact with domestic farm policy; prices will tend to be more unified in an RTA, "making members' efforts to use farm support programs to maintain different price levels either ineffective or costly."[69] RTAs often push members to "reduce, decouple, or harmonize"[70] agricultural support; payments that influence production are often inconsistent with RTAs. Further, decreased farm support and greater market orientation have "reduced the inherent conflicts between farm support and free trade."[71] Reform of farm policy can increase the gains from RTAs, but other policy reforms often make it difficult to determine the trade effects of RTAs.[72] Nonetheless, it has been noted that "no FTA has directly obligated the U.S. Government to make changes in domestic farm programs."[73] US negotiators prefer to resolve these issues in the WTO.

Trade agreements have increased agricultural exports significantly. The Economic Research Service estimated that since 1985, $3.5 billion per year in export gains can be traced to liberalized trade.[74]

A. NAFTA

The North American Free Trade Agreement (NAFTA)[75] established a free trade area among its members, the US, Canada, and Mexico. One of the first FTAs to include provisions on agriculture, it was designed, among other purposes, to eliminate barriers to trade, promote fair competition, and increase investment opportunities.[76] NAFTA entered into force in January 1994, and its implementation will be complete in 2008.

When fully implemented, NAFTA will eliminate most barriers to agricultural trade, with some exceptions for Canada. NAFTA included provisions of the 1988 US-Canada Free Trade Agreement, [77] which had already removed most agricultural tariffs between the US and Canada. Other provisions govern bilateral agricultural (and other) trade between Mexico and the US and between Canada and Mexico. Nontariff barriers and many tariffs with Mexico were eliminated in

---

[67] Regional agreements include Central America-Dominican Republic-United States FTA (CAFTA-DR), North America Free Trade Agreement (NAFTA). Under negotiation are the US-Southern African Customs Union (SACU) and the Free Trade Area of the Americas (FTAA). FAS, USDA, Free Trade Agreements, http://www.fas.usda.gov/itp/ftas.asp

[68] Country FTAs, including those still under negotiation, involve Australia, Bahrain, Chile, Colombia, Israel, Jordan, Korea, Malaysia, Morocco, Oman, Panama, Peru, and Singapore. http://www.fas.usda.gov/itp/ftas.asp. Others have been initiated.

[69] Mary E. Burfisher & Elizabeth A. Jones, eds., Regional Trade Agreements and U.S. Agriculture, at 2, ERS,USDA, AER 771 (1998).

[70] *Id*. at 13.

[71] *Id*. at 14.

[72] *Id*. at 13-15.

[73] Mercier & Smith, *supra* note 39, at 213.

[74] FAS, *supra* note 7.

[75] North American Free Trade Agreement, 32 I.L.M. 289 (1993). Chapter 7 covers Agriculture and Sanitary and Phytosanitary Measures. NAFTA countries have also entered RTAs with other nations.

[76] NAFTA, art. 101. Each country must treat foreign investors no less favorably than domestic investors.

[77] 27 I.L.M. 281. Canada may have agreed to NAFTA at least in part to retain its access to the US market under the 1988 US-Canada FTA. Picker, *supra* note 63, at 275.

1994, and other trade restrictions will be phased out by 2008. Special safeguards protect sensitive crops.[78] Among other provisions, NAFTA imposes disciplines on sanitary and phytosanitary measures, which may not be used as disguised restrictions on trade, but may apply scientifically-based measures to protect consumers, crops, and livestock. [79] NAFTA preserves the right of each member to establish domestic agricultural policies. Though agricultural policies differ, similarities have developed since 1994; the three NAFTA countries provide decoupled income support and use counter-cyclical programs for support when farm revenue or commodity prices are low.[80]

For agriculture, NAFTA has resulted in both increased trade and enhanced integration of North American markets.[81] Farmers in all three nations have benefited from NAFTA. Between 1993 and 2004, two-way trade between the US and Mexico had increased 149%; between the US and Canada, 112%.[82] By 2001, Canada and Mexico imported $15.3 billion in agricultural products from the US, more than the European Union and Japan together.[83] Indeed, by 2006, NAFTA had accounted for 55% of all growth in US agricultural exports since 1994.[84]

NAFTA has had a significant impact on the agricultural economies of the US, Canada, and Mexico, particularly in market integration. Grain markets have become more integrated, and US exports to Mexico and Canada have doubled since 1994. Trade in meat (pork, poultry) has increased; livestock production is also becoming more integrated, though the discovery of cows infected with BSE in Canada and the US has slowed integration. Sales of fruits and vegetables and processed foods have also benefited from NAFTA. Some trade barriers continue to exist -- e.g., tariffs and quotas that affect dairy and poultry trade between the US and Canada, and US-Mexico issues about sugar and sweeteners.[85]

NAFTA countries will continue to seek additional integration, even after full implementation of NAFTA in 2008. In 2005, they signed the Security and Prosperity Partnership of North America, designed to develop new avenues of cooperation. Under that agreement, a Food and Agriculture Working Group will, among other endeavors, "work towards creating a safer and more reliable food supply while facilitating agricultural trade by pursuing common approaches to enhanced food safety."[86] Moreover, USDA officials have noted that market integration could be enhanced by further efforts to coordinate regulatory measures, trade remedies, and farm labor policies.[87]

B. CAFTA-DR

The US-Central American-Dominican Republic Free Trade Agreement,[88] ratified by the US and five other members in 2005 and 2006,[89] removed most (but not all) trade barriers

---

[78] FAS, USDA, North American Free Trade Agreement (NAFTA) (Fact Sheet, Mar. 2006).

[79] *Id.*

[80] Steven Zahniser, NAFTA at 13: Implementation Nears Completion, at 10-11, ERS, USDA, WRS-07-01 (Mar. 2007).

[81] See *id*. Market integration is "the extent to which one or more formerly separated markets have combined to form a single market." *Id*. at 3.

[82] FAS, Benefits of NAFTA (May 2005).

[83] FAS, *supra* note 7.

[84] Office of the US Trade Representative, NAFTA: A Strong Record of Success (Trade Facts, Mar. 2006).

[85] Steven Zahniser, *North America Moves Toward One Market*, 3(3) AMBER WAVES 19, 19-25 (June 2005).

[86] SPP, Prosperity Working Groups, linked from http://www.spp.gov.

[87] Zahniser, *supra* note 80, at 29-30.

[88] CAFTA (5 Aug. 2004), 43 ILM 514 (draft). See also text at http://www.ustr.gov/Trade_Agreements/Bilateral/CAFTA/CAFTA-DR_Final_Texts/Section_Index.html

between its member countries.[90] Even before CAFTA, most imports to the US from Central America were already duty-free, and CAFTA made many US consumer and industrial exports duty-free.[91] The US exports over $15 billion per year to these countries, which are important trading partners.

US agricultural exports to CAFTA countries were $1.6 billion in 2003; imports to the US in 2002 were more than $2 billion (e.g., coffee, tropical fruits). Removal and reduction of trade barriers offer opportunity for increased agricultural exports. Over half of US agricultural products can be exported duty-free; many other tariffs will be phased out over a 15-year period. Some agricultural products are subject to tariff-rate quotas. The Agreement also pledges that members will work to resolve meat and poultry inspection issues that hinder trade.[92]

The influential American Farm Bureau Federation expected a $1.5 billion increase in farm exports under CAFTA, which offers expanded market access for grains, meats, fruits, vegetables, and processed products.[93] Agriculture industry representatives from animal, dairy, fruit and vegetable sectors endorsed CAFTA.[94]

C. Free Trade Area of the Americas

Discussion of the Free Trade Area of the Americas began in December 1994, with a meeting of Heads of State and Government of 34 democracies in the Americas. Formal negotiations began in April 1998 and were to be completed by 2005. The third draft of the FTAA Agreement has been available since 2003,[95] but little progress has been made.[96]

The FTAA would consolidate the "spaghetti bowl" of some 30 RTAs in the Western Hemisphere. These RTAs often disadvantage countries that are not members. The FTAA was expected to eliminate tariffs and nontariff barriers, expand market opportunities and increase exports of US agricultural products, and lead to productivity gains in Latin American countries. It would also consolidate The FTAA would ensure that parties apply SPS measures that are consistent with WTO requirements. FTAA negotiators hoped to make the agreement consistent with the WTO.[97]

---

[89] CAFTA was more controversial than other FTAs (e.g., with Chile and Singapore in 2003; Australia and Morocco in 2004), in part because of a perception that the agreement had weak labor and environmental standards for Central America. Daniel Griswold & Daniel Ikenson, The Case for CAFTA: Consolidating Central America's Freedom Revolution, at 2 (Center for Trade Policy Studies, TBP No. 21, 2004).

[90] These include Costa Rica, El Salvador, Guatemala, Honduras, and Nicaragua ("Central America"), plus the Dominican Republic. All the members except Costa Rica were following CAFTA rules; as of April 2007, Costa Rica planned a referendum on the FTA.

[91] Sugar and apparel are excepted from complete trade liberalization. Increased sugar market access for US production is only 1.5 teaspoons/week per American. Increased access to the US market will grow to only 1.7% of current consumption in 15 years. Office of the US Trade Representative, Sugar: A Spoonful a Week (CAFTA Policy Brief, Feb. 2005). The US sugar industry opposed CAFTA. Mercier and Smith, *supra* note 39, at 213.

[92] Office of the US Trade Representative, Free Trade With Central America and the Dominican Republic (CAFTA Policy Brief, Feb. 2005).

[93] Office of the US Trade Representative, Opportunities for Agriculture (CAFTA Policy Brief, Feb. 2005).

[94] Griswold & Ikenson, *supra* note 89, at 8.

[95] FTAA, Third Draft Agreement, FTAA.TNC/w/133/Rev.3 (21 Nov. 2003), http://www.ftaa-alca.org/FTAADraft03/Index_e.asp [hereinafter 2003 Draft].

[96] See generally, Paul Rynerson, Comment, *The Free Trade Area of the Americas: Dead Before It Was Ever Born*, 13 LAW & BUS. REV. OF THE AMERICAS 183 (2007).

[97] Mary Burfisher & John Link, *Free Trade Area of the Americas: What Are the Benefits For U.S. Agriculture?,* AGRIC. OUTLOOK 15, 15-19 (Apr. 2000).

Agriculture would play a large role in the FTAA. The FTAA Negotiating Group on Agriculture established objectives in 1998. These included the objectives of the general Market Access Negotiating Group, but also focused on eliminating export subsidies, identifying and bringing other trade-distorting practices under greater discipline, and ensuring that sanitary and phytosanitary measures do not result in trade discrimination.[98]

In the 2003 Draft Agreement, Chapter IX on Agriculture uses the WTO definition of agricultural products[99] and includes provisions on export subsidies and domestic support.[100] In FTAA negotiations, however, the US has argued that the WTO, rather than the FTAA, is the proper forum for agreements on agricultural subsidies.[101]

USDA economists estimated that FTAA would increase annual US agricultural exports by $1.4 billion and imports by $900 million, and that agricultural trade in the Western Hemisphere would increase by $4 billion (about 20% of total trade expansion due to FTAA). FTAA, however, would have little effect on US agricultural production (less than 1% per commodity).[102] Developing countries would benefit under FTAA, particularly through gains in productive capacity due to links between liberalized trade and economic growth.[103]

For now, however, the FTAA seems to be at an impasse, and it is uncertain whether the FTAA will be established.[104]

D. Bilateral FTAs

The US has several bilateral FTAs in effect, and others are under negotiation. Those with Chile and Singapore were implemented in 2004, with Australia in 2005, and with several other countries in 2006. As an example, the US-Australia FTA is discussed briefly.

The US-Australia FTA entered into force 1 January 2005.[105] Australia is a major producer of important agricultural products, and agriculture plays a prominent role in the FTA, as do services and investment. In the Agreement, the US and Australia pledged to work together to reach an agreement on agriculture in the WTO and to consult on WTO agricultural issues (art. 3.1). Neither Party may introduce or maintain export subsidies. Australia eliminated tariffs on many agricultural products from the US. The US eliminated some tariffs and will phase out other tariffs; preferential tariff-rate quotas (TRQs), some already subject to the WTO, apply for some products (e.g., beef, dairy, cotton, peanuts, tobacco). Some US agricultural products (beef, horticultural products) are protected by safeguard measures, which apply when Australian prices decrease. The FTA incorporates provisions of the WTO Sanitary and Phytosanitary Agreement and commits the parties to work to eliminate SPS barriers to agricultural trade.[106]

---

[98] FTAA, Fourth Trade Ministerial, Ministerial Declaration of San Jose, Annex II (19 Mar. 1998), http://www.ftaa-alca.org/NGROUPS/ngag_e.asp.

[99] FTAA, 2003 Draft, *supra* note 95, chap. XI, art. 2.1; URAA, Annex I.

[100] FTAA, 2003 Draft, *supra* note 95, chap. IX. See especially arts. 7 & 11. On these provisions, see William Petit, *The Free Trade Area of the Americas: Is It Setting the Stage for Significant Change in U.S. Agricultural Subsidy Use?*, 37 TEX. TECH L. REV. 127, 161-64 (2004).

[101] Rynerson, *supra* note 96, at 202-03.

[102] Mary E. Burfisher, ed., U.S. Agriculture and the Free Trade Area of the Americas, at iii, 12, ERS, USDA, AER 827 (2004).

[103] *Id*. at 12.

[104] See generally, David A. Gantz, *The Free Trade Area of the Americas: An Idea Whose Time Has Come -- And Gone?*, 1 INT'L L. REV. 179 (2003). See also Zahniser, *supra* note 80, at 29 (noting that FTAA negotiations have stalled.)

[105] US-Australia Free Trade Agreement, http://www.ustr.gov/Trade_Agreements/Bilateral/Australia_FTA/Final_Text/Section_Index.html

[106] FAS, USDA, U.S.-Australia Free Trade Agreement (Fact Sheet, Mar. 2006).

The US-Australia FTA has enhanced the parties' trade relationship. During the first year of implementation, the US exported about $555 million in agricultural products to Australia, with record exports of some products, and imported about $2.5 billion in agricultural products from Australia.[107] Twenty-two percent of Australian exports to the US are agricultural products. Since the agreement entered into force, dairy, lamb, mutton, and orange exports to the US have increased significantly.

E. The Effect of Regional Trade Agreements

RTAs "complicate the international trading system"[108] and are therefore subject to criticism. Though much of the concern about RTAs has focused on “their economic impact on the world trade system,”[109] at least one commentator has suggested that RTAs may pose “institutional threats” that have slowed the development of the WTO.[110] These include possible conflicts arising from application of different systems of legal rules (e.g., RTA and WTO) to trade issues; conflicts may arise in the negotiation or implementation of RTAs.[111] RTAs may also divert resources (e.g., the efforts of government officials) from the WTO system[112] and help to diminish “enthusiasm” for facing the many challenges of the WTO.[113]

Despite these concerns, RTAs “can produce compensating benefits by opening domestic markets to fresh competition, encouraging economic liberalization abroad, cementing important foreign policy and security ties, integrating regional economies, opening markets to . . . . exports, and providing healthy institutional competition for multilateral negotiations."[114] The most successful RTAs will provide new export opportunities for US products and enhance competition in US markets. Agreements with agricultural countries, e.g., the FTA with Australia, can help to accomplish these goals.[115]

Of course, the US has long advocated the multilateral liberalization of global trade through the WTO. For the US, however, RTAs are an important alternative, especially when multilateral trade negotiations falter.[116] A USDA researchers indicated that

> U.S. pursuit of regionalism complements its pursuit of multilateralism [in the WTO]. Both strategies reinforce the same principles of trade liberalization, with regionalism offering an opportunity to achieve deeper reforms on key issues with some partners and multilateralism providing the venue for more comprehensive and inclusive, but likely more gradual trade liberalization.[117]

RTAs can create freer trade among their members, but sometimes at the risk of diverting trade from non-member producers. On balance, though, RTAs create net trade, especially in agriculture.[118] RTAs may affect multilateral trade negotiations, though their effects are

---

[107] *Id.*

[108] Griswold, *supra* note 61, at 14.

[109] Picker, *supra* note 63, at 285. Picker acknowledges that RTAs are important for world trade. *Id*. at 311.

[110] *Id*. at 287, 318.

[111] *Id*. at 287-294. Picker gives an example: ”concessions on agricultural protections in the RTA, while holding firm against any such reductions within the multilateral process.” *Id*. at 289 n.90.

[112] *Id.* at 294-300.

[113] *Id.* at 300-305.

[114] Griswold, *supra* note 61, at 14.

[115] *Id*.

[116] Burfisher & Jones, *supra* note 69, at 1-2.

[117] Burfisher, *supra*, note 102, at 24.

[118] Burfisher & Jones, *supra* note 69, at 1, 3. In 1998, these USDA economists noted, “Only the EU has resulted so far in net agricultural trade diversion.” *Id*. at 3.

uncertain – encouraging progress or thwarting global agreement. The US view is that regionalism and multilaterialism are "mutually reinforcing."[119]

V. WTO Trade and US Farm Bill Negotiations

During Spring and Summer 2007, both US agricultural legislation and WTO measures have been the subject of negotiation. Numerous domestic and international concerns may influence provisions of the 2007 US Farm Bill, which should be (but might not be) enacted by the time current legislation expires, 30 September 2007. WTO negotiations under the Doha Development Round, launched in November 2001, had foundered, but renewed efforts to reach agreement on agricultural provisions may yet be successful. Though it is impossible to predict the outcome of these negotiations, some observations may be helpful.

A. WTO

1. Background

As a policy expert noted recently, "[t]he objective of the WTO trade negotiations is not to reduce the overall support given to agriculture, but to reduce the share of that support that is linked to production of specific commodities, i.e. to move support from the amber box to the green box."[120]

In October 2005, the US submitted a proposal for the WTO Agriculture Negotiations,[121] which focused on all three pillars of the agricultural negotiation -- export competition, market access, and domestic support. Its overall goal was to reduce total trade-distorting support by 53% for the US and by 75% for the EU. A two-stage plan, it would reduce trade-distorting support measures, tariffs, and export subsidies over five years. After a five year interlude, the remaining trade-distorting agricultural policies would be eliminated over the next five years. In terms of domestic support, the proposal would lower the US AMS (Amber Box) cap by 60%, reducing the current $19.1 billion to $7.6 billion per year.[122] The Blue Box would be capped at 2.5% of the value of total agricultural production; *de minimis* support would be reduced by 50%. The Green Box would remain uncapped, and the Peace Clause would be reinstated for subsidies that respect the new limits or fit in the Green Box. A critical analysis of the US position indicated that in the Doha round negotiations, the US Trade Representative 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 the Blue or Green Boxes.[123]

---

[119] *Id*. at 1, 3.

[120] Robert Thompson, US Farm Policies and Developing Countries, Q&A with Robert Thompson (June 2007), www.agritrade.org/pressroom/documents/Reuters_Thompson_QA.pdf.

[121] Office of the US Trade Representative, US Proposal for WTO Agriculture Negotiations, 10 Oct. 2005. See U.S. Offers Plan on Agriculture for Hong Kong Trade Talks, linked from http://usinfo.state.gov/.

[122] AMS cuts would depend on bound levels; countries with bound AMS above $25 billion would face 83% reduction; $12-25 billion, 60%; $0-12 billion, 37%. US Proposal, *supra* note 121. For an analysis of the US, EU, and G-20 proposals, see Lars Brink, *WTO Constraints on U.S. and EU Domestic Support in Agriculture: The October 2005 Proposals*, 7(1) ESTEY CEN. J. INT'L L. & TRADE POL'Y 96-109, 110-115 (2006).

[123] Porterfield, *supra* note 23, at 1001. That analysis identified four elements in the US negotiating strategy:

> (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

Much has changed since 2005, and negotiations have moved beyond formal proposals submitted by the US and other Members in 2005. Moreover, it seems unlikely that the Doha round will result in a new Peace Clause. Thus it will be important that the 2007 Farm Bill be drafted to meet the limits negotiated under a new WTO agreement and to avoid actionable subsidies that cause serious prejudice to other Members under the SCM Agreement.[124]

Until 1 July 2007, the US President enjoyed trade promotion authority, which required Congress to accept or reject international trade agreements without amendment. Unless this fast-track provision is reenacted (and by the end of June, it had not been), future agreements risk subsequent renegotiation if Congress demands changes.

2. Summer 2007

After significant delays and disagreements, WTO negotiations under the Doha Development Round have resumed, with the goal of a final agreement by the end of 2007. Negotiations on the Agreement on Agriculture have proved particularly contentious.

In April and May 2007, Crawford Falconer, Chair of the agricultural negotiating group, issued two installments of a "Challenge" paper, which addressed various issues.[125] The paper, offered as a "precursor" to a negotiating text, outlined Falconer's view of the "centre of gravity" for some issues and offered his suggestions for others. On the issue of domestic support, for example, Falconer noted that "It is frankly inconceivable that the US will come out of this negotiation with an entitlement to spend more on overall trade distorting domestic support than it had when it came in."[126] After some rumination about the possibilities, he suggested that the US limit on overall trade distorting domestic support (OTDS) might be below the current $19 billion and above the low teens.[127] As another example, a brief discussion of the Green Box identified a few possible amendments (e.g., concerning direct payments and base periods) and the need for more effective monitoring of Green Box programs.[128]

In July 2007, the WTO released Chair Falconer's Draft Modalities for Agriculture.[129] Because WTO Members link agriculture and non agricultural market access, the WTO released the Draft Modalities for Non-agricultural Market Access (NAMA) on the same date.[130] The Modalities documents are not proposals, but instead represent the authors' judgment about "what governments might be able to agree -- based on what members have proposed and debated in over seven years of negotiations and their responses to the chairs' previous papers."[131]

The Draft Modalities for Agriculture is in the form of a draft text designed as the basis for negotiation. Falconer noted that some painful compromise will be necessary: "[A]ll Members

---

(4) obtaining a new Peace Clause that would protect agricultural subsidies from challenge under the SCM agreement.

Id. at 1024.

[124] See *id.* at 1031-33.

[125] Crawford Falconer, Communication from the Chairman of the Committee on Agriculture, Special Session, [First Instalment], 30 April 2007; Second Instalment, 25 May 2007.

[126] *Id*. (30 April 2007), at 5.

[127] *Id*. at 6. Amber Box payments make up much of OTDS.

[128] *Id*. (25 May 2007), at 6-7. On the Green Box, see David Blandford & Timothy Josling, Should the Green Box Be Modified?, (IPC Discussion Paper, Mar. 2007).

[129] Crawford Falconer, Committee on Agriculture, Special Session, Draft Modalities for Agriculture, JOB(07)128 (17 July 2007), http://www.wto.org/english/tratop_e/agric_e/agchairtxt_17july07_e.pdf.

[130] Don Stephenson, Negotiating Group on Market Access, Draft NAMA Modalities, JOB(07)/126 (17 July 2007), http://www.wto.org/english/tratop_e/markacc_e/namachairtxt_17july07_e.pdf.

[131] WTO, Farm and non-farm talks' chairs circulate revised blueprints of final deal (17 July 2007), http://www.wto.org/english/news_e/news07_e/ag_draft_modalities_july07_e.htm

know that any agreement requires compromise. And that can only be achieved by movement from established and preferred positions." The document takes all Members "out of their comfort zones," but spreads the "pain" of compromise in a "reasonably balanced way."[132] For example, the Draft asks the US to reduce OTDS by 73% or 66%, to $13 or $16.4 billion -- a deeper cut than the reduction to $22.5 billion that the US had offered formally or the $17 billion it had offered informally; US Amber Box payments would be reduced by 60%.[133] Special provisions for cotton would require an 82% reduction in US cotton subsidies. Similarly, the Draft asks the EU to reduce its OTDS by 85% or 75% (to €16.5 or €27.6 billion), possibly more than the EU offer of 75%, and to reduce its highest tariffs by 66%-73%, more than the 60% reduction that the EU had offered. The Draft offers detailed provisions on domestic support, market access, and export competition, as well as proposed amendments of the Green Box (URAA Annex 2), disciplines on international food aid, and other measures.

Immediate reaction to Falconer's text (as well as the accompanying NAMA modalities document) was cautious. EU spokesmen, for example, called the texts "a useful step forward," but noted that "there are points on which we have important concerns and other significant issues in the negotiations that are not included in these texts."[134] A US spokeswoman called the texts "wide-ranging and complex," and indicated that the texts are "a single step" toward the establishment of modalities, "the detailed negotiating framework" required for final negotiations.[135] Initial discussions on the Draft Modalities were scheduled for late July, with intensive negotiations to resume in September, followed by "an inevitable revision."[136]

B. US Farm Bill

1. Background

US farm subsidies and trade barriers affect both US citizens and those in other nations, especially developing countries. Reform of US farm policy would offer numerous benefits, both in the US and internationally. Researchers, writing in 2005, identified six important reasons for reducing both subsidies and trade barriers.[137] These include lower food prices in the US; lower costs and increased exports for US companies, both agricultural and nonagricultural; lower costs and increased fairness for US taxpayers; fewer environmentally harmful practices; increased export opportunities from more open markets; and higher global agricultural prices and increased incomes in developing countries, which would lead to a "more hospitable climate abroad" for US foreign policy.[138]

---

[132] Falconer, *supra* note 129, at 1, 2. COPA & COGECA disagree about balance. See Press Release, Falconer's new trade paper makes WTO dance to tune of USA, CDP(07)48-1e (18 July 2007) (stating that the draft "has been specifically designed to fit the new US Farm Bill"). The Farm Bill, however, had not been enacted by the time of this comment.

[133] See Ag, NAMA Chairs Release Draft Agreements, Point Way to Doha Compromise, 11(26) BRIDGES WKLY TRADE NEWS DIG., 18 July 2007. A low OTDS cap and the 60% Amber Box reduction might "entail at least some restructuring of farm subsidy programmes" for the US. *Id.*

[134] EU reaction to WTO Chairmen's texts on Agriculture and NAMA, 17 July 2007, http://ec.europa.eu/trade/issues/newround/doha_da/pr170707_en.htm (statement of Peter Power and Michael Mann).

[135] Office of the US Trade Representative, Statement from Gretchen Hamel, 17 July 2007, linked from http://www.ustr.gov/. A later response criticized the significant cuts in cotton subsidies proposed in the Draft Modalities. Bradley S. Klapper, U.S. rejects WTO proposal on slashing cotton subsidies, SAN DIEGO UNION-TRIB., 24 July 2007.

[136] Falconer, *supra* note 129, at 2.

[137] Daniel Griswold, Stephen Slivinski & Christopher Preble, Ripe for Reform: Six Good Reasons to Reduce U.S. Farm Subsidies and Trade Barriers (Center for Trade Policy Studies, TPA No. 30, 2005)

[138] *Id*. at 11.

In terms of world trade, US farm subsidies affect world markets for commodities with “a large market share and high subsidy rates.”[139] Indeed, as one expert suggested, a compelling reason to modify current Farm Bill provisions is “to bring them in line with existing WTO commitments and ensure that the United States is not forced to adjust its programs in response to WTO challenges.”[140] Another expert insisted that the farm policy should be reformed to mitigate its adverse impacts on farmers in developing countries. Current high commodity prices, especially for corn, make 2007 an ideal time for reform because "high prices would couch the impact of reform."[141]

A recent article identified two possible options for a WTO-compliant Farm Bill: "eliminate or significantly reduce the relevant subsidy programs and accept the resulting reduction in the baseline of federal spending on rural communities . . . or . . . maintain the current baseline of Farm Bill spending by shifting funding into programs that are not vulnerable to challenge under the SCM Agreement."[142] Further, the article provided guidelines to ensure that agricultural legislation does not violate trade agreements: "eliminate or reduce price-contingent programs; . . . avoid concentrating benefits on a limited number of commodities; and . . . support 'non-specific'[143] programs, including rural development, infrastructure, conservation, and nutrition programs."[144] The third of these alternatives may be most successful, especially when producers across the whole farm sector qualify. Conservation programs are a good example.[145]

Yet another plan for reform, from the Center for Trade Policy Studies, recommended a "first-best solution" of ending farm programs entirely when the current Farm Bill expires, but also recognized the political infeasibility of this approach.[146] Alternatively, the plan recommended an "up-front buyout program in place of existing subsidies and price supports" under which farmers would receive a lump sum in exchange for elimination of "subsidies, quotas, and tariffs."[147] Repeal of agricultural legislation and enforceable contracts with farmers would ensure that producers remain ineligible for federal subsidies. Payments, perhaps paid over several years, would be decoupled from production and therefore fit within the Green Box.[148]

Of course, many others have made recommendations for minor or more radical amendments to US agricultural legislation. As the 2007 Farm Bill takes shape, however, radical reform of US farm policy seems unlikely.

---

139 Daniel A. Sumner, US Farm Bill Subsidies and World Commodity Markets (IPC Policy Focus, Farm Bill Series No. 2, Apr. 2007). A Congressional Budget Office report noted "As a percentage of agricultural output, U.S. subsidies in the [Amber Box] category are high enough to significantly distort production and trade but much lower than those of some other countries, most notably the EU." Bruce Arnold, Agricultural Trade Liberalization, at 4 (CBO Economic and Budget Issue Brief, Nov. 2006).

140 Josling, *supra* note 37, at 4.

141 US Farm Bill: Impacts Beyond US Borders, 16(3) AGRI-TRADE FORUM (July 2007) (reporting on remarks of Robert L. Thompson). Reform is "the right thing to do," but it will also lead to increased export markets.

142 Porterfield, *supra* note 23, at 1033. Another, less viable option is to keep current subsidies and accept sanctions under WTO cases. Because agriculture is only 1% of the US gross domestic product, the industrial and service sectors may lobby for agricultural reform, both to avoid a WTO impasse and to avoid trade sanctions from illegal farm subsidies. *Id*. at 1033-34.

143 Only "specific" subsidies are subject to challenge under the SCM Agreement. *Id*. at 1039.

144 Porterfield, *supra* note 23, at 1035. For details, see *id*. at 1035-1041.

145 *Id.* at 1040-41.

146 Sallie James & Daniel Griswold, Freeing the Farm: A Farm Bill for All Americans, at 1 (Center for Trade Policy Studies, TPA No. 34, 2007). Reform must be WTO compatible, and it must decrease market distortions (decoupled, no price support), "challenge the implied compulsion to spend" on farm policy, and "benefit the nation as a whole." *Id*. at 6.

147 *Id.* at 7.

148 *Id*. at 8, 14. James and Griswold provide more details and rationale for their proposal.

2. Negotiations

In the months leading up to legislative consideration of the 2007 US Farm Bill, agricultural, environmental, and other sectors[149] of the US economy have expressed opinions. While some have pressed for a continuation of current policies, others -- including some agricultural organizations -- have demanded reform. Indeed, one policy expert referred to a "ground swell of support for real reform coming from an unprecedented number and diversity of interest groups across the country."[150] As Congress develops the Farm Bill, legislators are faced with pressure from these interest groups, along with serious budget uncertainties and high commodity prices. The concurrent WTO negotiations form a background to the Farm Bill negotiations.

In 2006, US Secretary of Agriculture Johanns expressed the intention of the Administration to make US farm programs under the 2007 Farm Bill "beyond challenge" under the WTO.[151] In January 2007, Johanns proposed Farm Bill provisions, most intended to make domestic support more market oriented and less trade-distorting. In response to the cotton decision, the Secretary proposed to increase direct payments, but to eliminate restrictions that prohibit planting of fruits, vegetables, and wild rice on program land.[152]

Congress, rather than the Secretary of Agriculture, writes the Farm Bill. In the House of Representatives, the Agriculture Committee approved its version on 19 July 2007. The House passed a Farm Bill, H.R. 2419, on 27 July 2007, after defeating an amendment designed to reform farm subsidies. H.R. 2419 would continue most domestic support, including direct payments, non-recourse marketing assistance loans,[153] and counter-cyclical payments. It would, of course, make some amendments in current programs -- for example, changes in target prices and loan rates, as well as payment caps and income limitations. Most conservation programs would be continued or expanded, but annual caps would limit payments to individual farmers. The bill would also reform export credit guarantee programs to comply with WTO agreements. Among many other provisions, the bill would support and encourage expansion of production of renewable energy.

---

[149] For example, the National Catholic Rural Life Conference advocated Farm Bill provisions to protect family farmers and the environment. See Rich Heffern, *Green Acres*, NAT'L CATH. REP., 6 July 2007.

[150] Thompson, *supra* note 120.

[151] Mike Johanns, Transcript of Remarks, 31 August 2006 (Release No. 0333.06). Secretary Johanns preferred a strategy of "being the authors of future farm policy, [instead of] being in the audience as WTO challenges pull the safety net out from underneath our producers" and dismantle farm programs.

[152] Emily Alpert, *How Does the USDA Farm Bill Proposal Measure Up*?, 11(1) BRIDGES 3 (Mar. 2007). For most commodities the increase would be small; for cotton, a larger increase would compensate for loan deficiency payments.

The WTO cotton case precipitated consideration of fruits and vegetables in the 2007 Farm Bill. Planting restrictions on base acres under the 2002 law led the WTO Panel and Appellate Body to conclude that direct payments cannot be considered minimally trade distorting subsidies that fit in the Green Box and are exempt from WTO obligations. Elimination of these restrictions would allow land to be shifted to fruit and vegetable production, expanding supply but also reducing grower prices. Edwin Young et al., *Relaxing Fruit and Vegetable Planting Restrictions*, 5 AMBER WAVES 12, 14 (Feb. 2007). About 12.5 million acres (of 434 million) produce fruits and vegetables, and lifting planting restrictions on base acreage may lead to more production in some regions. ERS analysis concluded, though, that "[m]arket effects of eliminating planting restrictions are likely to be limited and confined to specific regions and commodities. Supply shifts would be more likely in regions where the land and climate are suitable for vegetable production and nonbase acreage is in limited supply." *Id*. at 17.

[153] According to Secretary of Agriculture Johanns, the proposal, which would increase loan rates for some commodities, could increase Amber Box payments and make the US more vulnerable to WTO challenges. Peterson Optimistic on Chances for Committee's Farm Bill, INFORMA ECON. POL'Y REP., 23 July 2007, at 8, 9.

The House bill is controversial. If it were to be adopted in its present form, the Bush Administration, which has expressed concern about its cost, would consider a veto. The Administration prefers real reform of agricultural policy, including stricter payment limits, lower subsidies, and consolidation of some conservation programs.[154]

The House Agriculture Committee bill does not represent a drastic reform of US agricultural policy. In contrast, members of the Senate Agriculture Committee have called for significant changes, including reform of the direct payment program and stricter limits on farm payments. The Senate Agriculture Committee is expected to address the Farm Bill in September, with debate in the full Senate to follow. In light of slow progress to date and the August congressional recess, some doubt that Congress can agree on a new Farm Bill by 30 September 2007, when current legislation expires.[155]

VI. Conclusion

With negotiations in progress on both the WTO Agreement on Agriculture and the 2007 US Farm Bill, accurate predictions about the relationship of US agricultural policy and international trade are impossible. In late July 2007, WTO Members were prepared to negotiate intensively on the basis of the Draft Modalities published by Crawford Falconer. Members of the US House of Representatives and Senate will continue their deliberations on the Farm Bill. New developments in the negotiations are reported every day. It is clear that both processes will require painful compromise!

By September 2007, these negotiations may have concluded, though many observers do not expect agreement by that date. Only when WTO Members have revised the Agreement on Agriculture and the US Farm Bill has been enacted and signed by the President will the picture be more complete.

[154] Allison Winter, White House weighs farm bill veto, GREENWIRE, 25 July 2007. According to Secretary Johanns, "the bill . . . paints a bulls-eye on farmer' backs . . . by increasing trade-distorting support." Statement by Agriculture Secretary Mike Johanns Regarding Farm Bill Legislation Advanced by House Subcommittees, 19 June 2007 (Release No. 0171.07).

[155] House, Senate Farm Bills Taking On Significantly Different Shapes, INFORMA ECON. POL'Y REP., 28 June 2007, at 9.