

**Committee on Agriculture
Special Session**

WTO DOHA AGRICULTURE NEGOTIATIONS – DOMESTIC SUPPORT

**GREEN BOX - DIRECT PAYMENTS IN THE CHAIRMAN'S DRAFT MODALITIES IN
ANNEX B OF TN/AG/W/4/REV.3**

Communication by Argentina

The following communication, dated 21 November 2008, is being circulated at the request of the Delegation of Argentina.

I. INTRODUCTION

1. Since the first draft produced by the Chairman in July 2007 on the clarification of the Green Box (Annex 2 of the Agreement on Agriculture) developing countries have opposed any weakening of the disciplines on the Direct Payments of the Green Box, whose main users are developed Members¹.

2. The reason for this opposition is that such flexibility is contrary to the Mandate, where it is agreed that:

“GREEN BOX CRITERIA WILL BE REVIEWED AND CLARIFIED WITH A VIEW TO ENSURING THAT GREEN BOX MEASURES HAVE NO, OR AT MOST MINIMAL, TRADE-DISTORTING EFFECTS OR EFFECTS ON PRODUCTION. SUCH A REVIEW AND CLARIFICATION WILL NEED TO ENSURE THAT THE BASIC CONCEPTS, PRINCIPLES AND EFFECTIVENESS OF THE GREEN BOX REMAIN AND TAKE DUE ACCOUNT OF NON-TRADE CONCERNS. THE IMPROVED OBLIGATIONS FOR MONITORING AND SURVEILLANCE OF ALL NEW DISCIPLINES FORESHADOWED IN PARAGRAPH 48 BELOW WILL BE PARTICULARLY IMPORTANT WITH RESPECT TO THE GREEN BOX”².

3. It is obvious that weakening the existing disciplines of the Green Box, in this case those of Direct Payments, is not a way to ensure that these payments have "no or, at most, minimal trade-distorting effects or effects on production". This document shows how the current modalities draft (Annex B in TN/AG/W/4/Rev.3) would be a serious step backwards on the existing disciplines of direct payments applied to developed Members. This would mean going in the opposite direction of the process of agricultural reform initiated in the Uruguay Round.

II. DISCIPLINES ON DIRECT PAYMENTS IN THE GREEN BOX.

4. The Chairman's draft weakens the existing disciplines in different ways, allowing more policy space for most developed members, in particular the USA, but also the EC:

¹ Argentina supports the draft of the Chairman (Annex B in TN/AG/W/4/Rev.3) as regards the changes to Annex 2 of the Agreement introduced on Special and Differential Treatment.

² Paragraph 16 of the "2004 Framework" (Annex A in WT/L/579).

A. Allowing the updating of base periods for direct payments in paragraphs 6, 11 and 13 of Annex 2 of the Agreement.

5. Under the current rules agreed in the Uruguay Round, updating of base periods is not allowed, because the base period is "defined and fixed". The meaning of "fixed" is "not moveable"³, "predetermined or inflexibly held"⁴, "not changeable"⁵ or "unchanging"⁶. The exceptional updating of base periods is allowed in the Chairman's draft⁷. Even if this would be associated with strict conditions it would still be a concession by developing countries to developed ones, since these payment are used mainly by developed Members.

B. No strict conditions for the updating of the base period in paragraphs 6, 11 and 13 of Annex 2 of the Agreement.

1. Budgetary neutrality:

6. This could have been a strict condition to balance the updating of the base period and ensuring that the updating would have no or, at most, minimal distorting effect. This option existed in the initial July 2007 modalities draft⁸. It was removed in the February 2008 draft⁹ despite explicit opposition of developing countries in the Chairman's consultations at that time. Then, as the G-20 opposed this elimination¹⁰, the budgetary neutrality was reintroduced in the May draft of the Chairman¹¹, but finally it was eliminated, despite the opposition of some G-20 members. So, without budgetary neutrality, the updating of base periods is allowed with insufficient conditions, almost unconditionally, because these other conditions associated to this flexibility are in the wrong direction and may be easily circumvented. This is an enormous concession.

2. The conditions for updating:

a) Condition "(a)":

Chairman's Draft: CONDITION "(A)":

"...(A) ENSURING THAT ANY UPDATED BASE PERIOD IS NOT ONLY A SIGNIFICANT NUMBER OF YEARS IN THE PAST (1) BUT IS ALSO DETERMINED AND PROMULGATED BY THE ADMINISTERING AUTHORITY IN SUCH A WAY THAT THE UPDATED BASE CONCERNED COULD NOT HAVE BEEN REASONABLY ANTICIPATED BY PRODUCERS SUCH THAT THEIR PRODUCTION DECISIONS COULD BE MATERIALLY ALTERED;..."

FOOTNOTE 1: "WHERE A MEMBER HAS, AT THE TIME OF ENTRY INTO FORCE OF THIS AGREEMENT, MORE THAN ONE TYPE OF DIRECT PAYMENTS WITHIN THE SAME SYSTEM OF DECOUPLED INCOME SUPPORT, IT SHALL BE POSSIBLE TO DECIDE, WITHIN A PERIOD OF NO MORE THAN FIVE YEARS FROM THE DATE OF ENTRY INTO FORCE OF THIS AGREEMENT, TO MOVE FROM ONE TO ANOTHER TYPE OF DIRECT PAYMENTS FOR ALL OR PART OF THE TERRITORY OF THAT MEMBER, INCLUDING THE USE OF A CHANGED BASE PERIOD. THIS DECISION SHALL BE TAKEN ONCE AND FOR ALL FOR EACH PART OF THE TERRITORY OF THE MEMBER CONCERNED. WHERE A MEMBER INTENDS TO EXERCISE THIS POSSIBILITY, IT SHALL NOTIFY ITS DECISION TO THE COMMITTEE ON AGRICULTURE WITHIN 180 DAYS OF THE ENTRY INTO FORCE OF THIS AGREEMENT."

³ Longman's Dictionary of English Language and Culture, 2nd Edition, 1998, page 490.

⁴ Oxford Dictionary: www.askoxford.com.

⁵ Longman's Dictionary of English Language and Culture, 2nd Edition, 1998, page 490.

⁶ Oxford English-Spanish and Spanish-English Dictionary, Oxford University Press, 1994, page 1126.

This dictionary provides also the meaning in English of English words.

⁷ Annex B in TN/AG/W/4/Rev.3.

⁸ Annex A in TN/AG/W/4.

⁹ Annex B in TN/AG/W/4/Rev.1.

¹⁰ G-20 informal talking points of 9/4/08.

¹¹ Annex B in TN/AG/W/4/Rev.2.

7. The reasons why these conditions are not effective to ensure absence of or minimum levels of distortion per payments are:

(i) "...SIGNIFICANT NUMBER OF YEARS IN THE PAST...": There is no measure of how many the significant number of years must be. In case of disagreement the period should be decided on a case by case basis by the Dispute Settlement Body (DSB). With the following problems: First, a DSB decision is necessary, which means deciding this in the future, but agreeing to modalities in the present. Second, even if the DSB would define a big number of years deemed to be "significant", there would still be an impact on expectations of farmers in the immediate previous years to the year where updating will occur. Third, such DSB decision will not be applied to other cases on which "significant" could be more or less years. In fact there is nothing that improves the current disciplines; In fact what happens is a weakening of disciplines; it worsens them.

(ii) "... COULD NOT HAVE BEEN REASONABLY ANTICIPATED BY PRODUCERS SUCH THAT THEIR PRODUCTION DECISIONS COULD BE MATERIALLY ALTERED...": It is very difficult, if not impossible, to determine factually if the member's decision to update the base period could not have been anticipated by producers and be "materially" altered. This could require a burdensome empiric survey on the decisions of producers, which could deliver evidence that in the best case would be inconclusive. The problem is not the concept in itself, but that, in practical terms, it does not really oblige members, because it is difficult to verify¹².

(iii) The Footnote Nr. 1 is tailored for the EC to allow a more flexible administration of their programmes under their current CAP reform. It shows the need they have to adapt the current multilateral rules to their domestic policy. This also means that the EC is a *demandeur* of change in the Green Box. If the EC does not intend to update base periods, it does not need this change.

b) Condition "(b)":

Chairman's Draft: CONDITION "(B)":

"...(B) THAT SUCH UPDATING IS NOT MADE IN CONJUNCTION WITH, OR OTHERWISE AMOUNTS DE FACTO TO, A DECISION TO INCREASE THE UNIFORM UNITARY RATE PER CROP (2);..."

FOOTNOTE (2): "THIS SHALL MEAN THE RATE USED TO CALCULATE THE SUPPORT PER RECIPIENT ON THE BASIS OF CRITERIA SUCH AS AREA OR YIELDS."

(i) "...MADE IN CONJUNCTION...": It is not easy to determine when a provision is "in conjunction" with something. Is this at the same time or with the same national measure, or in the same production year? This could be easily circumvented by establishing the updating and the increase in the uniform rate per crop in different national measures at different points of time.

(ii) "...UNIFORM UNITARY RATE PER CROP...": The text as it is drafted may imply the assumption that an increase in the "uniform unitary rate per crop" is consistent with the Green Box disciplines of the Uruguay Round. There is no provision that has established that. This could allow interpreting that those increased rates are legal, if they are not linked to updating. This is not necessarily the case, because this would mean that decoupled payments could be greater than the trade distorting subsidies they may be substituting in an agricultural reform process¹³. Conceptually, there is confusion: The fact that there is no quantitative limit on the amount spent with Green Box direct payments, does not mean that a particular programme of decoupled payments can increase its amount, because it could be more distortive. In other words, if a decoupled payment increases its unitary payments rates, it could

¹² A panel would need to analyze what is "reasonably", when or how the producers can anticipate an updating, if decisions have been "materially" altered, etc.

¹³ This is without prejudice to the question if such "boxshifting" may be considered genuine reform.

be more distorting than the previous distortive programme it is replacing. This is a way of undoing the reform undertaken before, when trade distorting support was transformed in a Green Box direct payment under a reform process.

8. This could also reduce to irrelevancy the prohibition to update base periods, because an increase of the unitary payment amount in a particular decoupled programme has an effect on farmer's expectations similar to updating.

9. In any case, Members interested in the increase of unitary payment rates, should recognize at least that this issue is not clear from the point of view of current rules, in which case there is no need to force now a decision in one direction, especially in the opposite direction of the Mandate. On this particular issue, if there is no agreement on the interpretation of current rules, they should not be changed and this could be decided, as necessary, by the DSB.

c) Condition "c": The reference to Paragraph 1 of the Green Box:

Chairman's Draft: CONDITION "(C)":

"(C) THAT THIS UPDATING SHALL NOT, IN ITSELF OR OTHERWISE BY REASON OF ITS INTRODUCTION, HAVE THE EFFECT, DIRECTLY OR INDIRECTLY, OF CIRCUMVENTING THE OBLIGATIONS REGARDING DOMESTIC SUPPORT MEASURES AND PRICE SUPPORT TO PRODUCERS PURSUANT TO PARAGRAPH 1."

10. By establishing a condition that the criteria of paragraph 1 of the Green Box rules of the Uruguay Round apply, the draft text implies that this critical paragraph does not apply to the other direct payments or programmes. It amounts to an exemption for other Direct Payments paragraphs in Annex 2 of the Agreement of the following conditions: (i) that the Green Box programmes must be a governmental programme (no direct transfers from consumers to producers) and (ii) no price support.

11. This is a very serious loophole for the current disciplines. It entails far reaching changes in the structure of Green Box that are equivalent to reopening the Green Box negotiation of the Uruguay Round, because it would imply that Green Box subsidies, except those of paragraph 6, 11 and 13, could then be trade distorting, because they are not subject to Paragraph of 1 of Annex 2.

3. Allowing the circumvention of the updating conditions with "substantially different" programmes.

Chairman's Draft:

"THIS IS WITHOUT PREJUDICE TO THE POSSIBILITY FOR MEMBERS TO ESTABLISH APPROPRIATE BASE PERIODS FOR SUBSTANTIALLY DIFFERENT DECOUPLED INCOME SUPPORT IN ACCORDANCE WITH THE CONDITIONS LAID DOWN IN THIS PARAGRAPH."

12. This is another flexibility, because it is very difficult to distinguish a "substantially different" decoupled programme from one that claims this with the sole purpose of updating its base period. Proving updating is made more difficult, almost an impossible demonstration.

C. Disaster payments – Paragraph 8 of Annex 2 of the Agreement. Allowing self-selection of the base period for determining the production level requisite.

13. Under current paragraph 8(a) of Annex 2 of the Agreement, disaster payments may only be made if the production loss is more than 30% of an average production of three years. This average is clearly defined and there is no possibility to adapt the average so that the payment fits the production loss criteria.

14. Following a proposal by Canada and the USA, now the new paragraph 8(a)ii in Annex B of the modalities draft¹⁴ allows that the period to calculate the average production will be "actuarially appropriate". This is self-selection and is identical to erasing the requisite to trigger the payments subject to a loss production higher than 30%. The payments would be now triggered in a much easier way with no limitation, as the average is no longer multilaterally established, but will be unilaterally ("actuarially") determined by the Member.

15. The proponents argued that "actuarially appropriate" periods for the calculation of the production average would result in lower payments. Following this argument, the response to have both criteria for the base period (the three year average and the actuarial one), but subject to a condition to apply whichever results in the lower payment, did not receive support from the proponents.

16. A possible reason for this flexibility is that the new US Farm Bill uses the concept of "actuarially sound" for some of its crop insurance programmes¹⁵. This means again, adapting multilateral rules to domestic policy needs, instead of doing the contrary.

D. Conclusion:

17. The current Green Box disciplines on Direct Payments mostly used by developed members are insufficient and with the additions of current modalities draft much weaker. This means:

- (i) from the negotiating procedure perspective, it is introducing in the text only the demands of developed members, as the G-20 proposals of June 2005 never were taken into account, not even in brackets. This means adapting multilateral rules to the domestic policy needs of some developed members, particularly the US and the EU.
- (ii) from the perspective of the Mandate, a plain contradiction with Paragraph 16 agreed in the 2004 Framework.
- (iii) from the DSB perspective, proving the inconsistency of these payments is made even more difficult.

III. THE IMPLICATIONS OF NEW FLEXIBILITIES.

18. The outcome proposed by the current modalities draft in programmes of developed Members erodes the effectiveness of the cuts in OTDS, the product-specific caps and any positive outcome in cotton. "Boxshifting" is difficult to prevent with current Green Box disciplines. With this draft, "boxshifting" is institutionalized. This increases the policy space for some developed members.

19. *Corollary for developing members:* Many flexibilities from the Uruguay Round design would remain, but aggravated by additional flexibilities of this Round. This is even more serious due to the fact that these flexibilities are unlikely to be used by developing members, in particular those having low-income resource poor farmers, as these farmers generally can not receive direct payments, because they do not even have a bank account to make a money transfer (It is not feasible to make direct payments in paper cash to millions of farmers).

¹⁴ TN/AG/W/4/Rev.3.

¹⁵ See in www.usda.gov the new Farm Bill, text as in H.R. 6124, Section 12025 (a).

20. **Corollary for cotton:** Since the current Green Box direct payments do not ensure that they will be, at most, minimally trade-distortive, aggravated by the fact that the requisites are proposed to be further softened, the trade distortive cut for cotton¹⁶ seems to be somewhat irrelevant, as any cut may be compensated by Green Box Direct Payments, which, at the end of the day will be trade distortive.

IV. THE WAY OUT OF THE STALEMATE:

21. Most of developed Members never gave the chance to discussing the G-20 proposal of June 2005 in the negotiation. Instead they pressed with their own proposals inconsistent with the Mandate. We have to reiterate, as we have been saying for more than one year, that such outcome, as in the current modalities draft, is unacceptable.

22. Since the G-20 proposals on direct payments have so far not been accepted, a second best solution would be the following:

- (i) Leave the disciplines in the Green Box as they were written in the Uruguay Round (Annex 2 of the Agreement);
- (ii) Add to those disciplines the special and differential treatment provisions included in Annex B of Falconer's draft;
- (iii) Harmonize the drafting in the Blue Box with the one of the Green Box text of the Uruguay Round, so that in both boxes the bases are defined as "fixed". This would require eliminating "unchanging" in paragraph 35 (Blue Box); and
- (iv) Recognize that the Mandate of paragraph 16 of the 2004 Framework has not been fulfilled, due that some developed members did not agree to the clarification of the Green Box disciplines so that they should be no or, at most, minimally trade distorting. Also they did not accept budgetary neutrality.

¹⁶ Part I-G in TN/AG/W/4/Rev.3.