

DIRECTORATE FOR SCIENCE, TECHNOLOGY AND INDUSTRY

Cancels & replaces the same document of 23 April 2004

**OECD Special Meeting at High-Level on Steel Issues**

**STEEL AGREEMENT ISSUES**

*Attached is a document describing some of the key issues that the High-Level Group will be addressing at its meeting on 17-18 June 2004.*

*In addition to this document, please note that the Secretariat will be drafting a second paper containing ideas on how consensus could be achieved. In support of this second paper, suggestions from delegations (formal or informal) would be appreciated, by 14 May, at the latest.*

Contact : Division of Transport & Steel Unit, Mr. Wolfgang Hübner, tel: +33 1 45 24 91 32;  
fax: +33 1 44 30 62 63; e-mail: wolfgang.hubner@oecd.org

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## SUMMARY

1. In his letter of 14 April, the Chairman of the High-Level Group, Mr. Schlögl, indicated that the Secretariat would prepare a short document providing a factual assessment of where we stand in the steel negotiations. This document contains such a summary. It describes the status of the negotiations, Article by Article, and identifies the key issues that the High-Level Group will likely address at its meeting on 17-18 June.

2. With respect to the three priority areas highlighted in Mr. Schlögl's letter, the document notes the following:

### *Exceptions (Article 3)*

3. The principal issues concern the *(i)* scope of exceptions, where proposals for exceptions for environment and research and development have been made, and *(ii)* the possibility of introducing "caps" on the amount of subsidies that could be provided for each exception and/or a "cap" on the total amount of subsidies that could be provided for all exceptions.

### *Special and differential treatment for developing economies (Article 4)*

4. The December 2002 Communiqué of the High-Level Group states that the negotiations should take the needs of developing economies into account. The Disciplines Study Group has debated how this might be addressed, but progress has been limited as the current text is heavily bracketed and contains multiple options on many points. The principal issues concern: *(i)* eligibility; *(ii)* the mechanism (*e.g.*, "cap" or list" approach); *(iii)* degressivity of "caps"; *(iv)* graduation criteria; and *(v)* treatment of transition economies.

### *Countervailing measures (Article 10)*

5. At issue is whether the Steel Agreement should contain provisions which would limit or otherwise modify the terms and conditions under which a Party could take countervailing measures under Part V of the ASCM, or actions under Part III of that Agreement. Another issue which has arisen concerns the inclusion of provisions in the Steel Agreement relating to antidumping remedies.

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6. In addition to this document, Mr. Schlögl has since asked the Secretariat to prepare a second paper containing ideas on how consensus on an agreement could be achieved. This document is to be completed and circulated to delegates several weeks prior to the June High-Level meeting. In support of this second paper, we in the Secretariat would warmly welcome suggestions from the participants in the negotiations. These suggestions could be provided informally, or as formal submissions that would be distributed to all parties. We would ask that such suggestions be provided to us as soon as possible, but not later than 14 May.

## STEEL AGREEMENT ISSUES

### I. Priority areas

#### *Article 3 – Exceptions*

7. Work towards an agreed text on exceptions for (i) permanent closures and (ii) natural disasters has advanced, and there do not appear to be any major issues to be addressed.

8. Language on proposed exceptions for (i) research and development and (ii) environment has been refined, but there are significant differences as to whether such exceptions should be permitted. The contribution that these subsidies could make to achieving goals that would be in the public interest and/or in the interest of the industry are being weighed by participants against the potential loopholes that could be created, and the distortions that the subsidies could cause in competition between those firms that might receive the subsidies, and those that did not. In addition, a number of developing economies have noted that these two exceptions principally serve the interests of the developed world, since most developing economies do not have resources for funding these types of activities.

9. A number of other exceptions have also been proposed in the following areas:

- privatisation (as a general exception, or as an exception for developing economies and economies in transition);
- training;
- disadvantaged workers;
- small and medium enterprises;
- *de minimis*; and
- disadvantaged regions.

10. Views on the need for these “other” exceptions vary. Advocates have noted that most of the items would support social and economic objectives while not detracting from the objectives of the Agreement; others have urged that, where possible, the issues should be addressed through generic programmes, thereby avoiding the creation of loopholes that could undermine the Agreement. As generic programmes are not “specific”, they would fall outside the scope of the Agreement.

11. In addition to identifying the types of subsidies that might be excluded from a blanket prohibition, considerable attention has been made to provisions for “capping” the amounts of support that could be given for exceptions. As discussed, this could include (i) individual caps for each exception and/or (ii) a “global” cap which the sum of all individual exceptions could not exceed. Support for caps varies, with some parties preferring to restrict subsidies to specified percentages of costs, without any overall restrictions on the sums that could be provided.

Key issues:

- *To what extent should the scope of exceptions be extended beyond assistance for permanent closures and natural disasters?*
- *Should exceptions be subject to “caps”? If so, should they be tailored to each exception, and/or should a global cap for all exceptions be established?*

**Article 4 – Preferential treatment**

12. How the needs of developing economies could be addressed continues to receive considerable attention. Issues include (i) how eligibility would be established, (ii) whether transition economies should be included, (iii) the nature and modalities of any preferential treatment, (iv) whether, and under what conditions, preferential treatment should be degressive over time, and (v) the mechanism under which eligible Parties could eventually “graduate” from preferential treatment.

13. On *eligibility*, proposals include (i) a list, based on self-election, (ii) eligibility based on macro-economic criteria (i.e., GDP per capita), (iii) eligibility based on dual criteria, including macro-economic performance and steel-specific indices, and (iv) a mechanism which integrates elements of (i), (ii) and (iii). Whether such eligibility should be extended to *transition economies*, or whether such economies should receive preferential treatment under a separate Article, is an open issue.

14. Concerning the *nature and modalities* of preferential treatment, some would prefer that developing economy needs be addressed on a case-by-case basis. However, most, if not all, developing economies have expressed their preference for more generic provisions, around which two approaches are being developed – (i) a “cap” approach that would permit eligible Parties to provide a limited monetary amount of prohibited subsidies beyond the general exceptions provided for in Article 3, and (ii) a “list” approach that would essentially expand the list of specific exceptions provided for in Article 3. Consideration has also been given to an “amalgamated” approach that would combine elements of (i) and (ii), and a “hybrid approach”, but these alternatives have attracted little support.

15. The appeal of the “cap” approach lies in the flexibility that it would afford eligible Parties to tailor subsidies to meet their specific needs and interests (which a number of developing economies would like), while providing assurances that such subsidies would not be excessive. There are however a number of important technical issues that would have to be addressed if this approach is pursued. In particular, it is apparent that considerable work would have to be undertaken to develop guidelines for calculating subsidy levels and for allocating benefits over time (in instances where benefits from a subsidy are realised over a multi-period time span).

16. The appeal of the “list” approach lies in its specificity – permitted subsidies would be restricted to a number of narrowly defined measures, to which certain terms and conditions would apply. The problems that have been identified with such an approach relate to the number and types of items that might be included on such a list, and, if there were no caps, the potential magnitude of the permitted subsidies. It has also been noted that an inclusive list that met the needs and interests of all developing economies could be too broad, thereby weakening the Agreement’s objective to reduce subsidies.

17. *Degressivity* has been discussed principally in the context of the “cap” approach, where there appears to be general, but not universal, support for reducing the scope of preferential treatment as eligible economies advance. The degressivity would be based on macroeconomic performance and/or on milestones reached in steel.

18. There is also broad, but not universal, support for *graduation* provisions under which preferential treatment would cease, or be phased out, when certain macroeconomic and/or steel criteria were reached. As an alternative, it was proposed to address issues related to eligibility at the time the whole Agreement was reviewed.

Key issues:

- *How should eligibility for preferential treatment be established?*
- *Should preferential treatment be based on the “cap”, “list” or some other approach?*
- *If the “cap” approach is pursued, should the “caps” be degressive?*
- *Should there be criteria for graduating Parties from preferential treatment? If so, what should the criteria be based on?*
- *How should transition economies be treated under this Article?*

**Article 10 – [Antidumping and] Countervailing Measures**

19. Views differ as to whether the Steel Agreement should limit or otherwise modify the ability of a Party to introduce countervailing duty measures under Part V of the ASCM. Some have proposed making subsidies “non-countervailable” under this provision, when the subsidies have been found to meet the “exceptions” criteria established under Articles 3 and 4 of the Steel Agreement. Some, however, would further stipulate that the subsidies would have to have been “pre-notified” to be non-countervailable. There is also a proposal to extend this “non-actionability” provision to Part III measures. Parties that are opposed to introducing “non-countervailability” into the Agreement have pointed out that the inability to take action against subsidies that were having adverse effects would be contrary to the principles underlying the ASCM and would therefore be contrary to making the Agreement a “WTO-plus” instrument.

20. In addition to countervailing duty measures, a number of parties have proposed including provisions related to antidumping remedies in the Agreement. The language seeks to expand on that contained in WTO antidumping provisions. Parties opposed to this have pointed out that inclusion of antidumping provisions would, *inter alia*, not be germane as the Agreement addresses government practices, while the focus of antidumping is the actions of private firms.

Key issues:

- *Is there scope for making certain subsidies (i.e., exceptions) “non-actionable” in the Steel Agreement? If so, under what terms and conditions this could be acceptable?*
- *Is there scope for including provisions related to dumping in the Steel Subsidy Agreement? If so, what should the character of those provisions be?*

**II. Other areas**

**Preamble**

21. Relatively little attention has been paid to the Preamble in recent months. Its structure and content are likely to be addressed more fully once the text has advanced in the “operational” areas of the Agreement.

**Article 1 – Scope**

22. There is consensus that the scope of the Agreement should be based on product definitions, as set forth in the Harmonized Commodity Description and Coding System that is maintained by the World Customs Organization.

23. The range of products to be covered has not, however, been established. While there is consensus on coverage of almost all items in HS 72.06 to 72.29, some participants would include a number of “upstream” products that are integral to steelmaking, such as pig iron and coke. In addition, there is also significant interest in extending coverage to certain “downstream” products, such as pipes and tubes, rails and related railway materials, and advanced wire products.

24. Opponents of inclusion of “upstream” products are concerned that industries outside steel – notably foundries – would be unnecessarily captured by a subsidy ban. Opponents of “downstream” products have alluded to the administrative problems associated with enforcement as the “downstream” producers include a relatively large number of small firms.

Key issue:

- *To what extent should “upstream” and “downstream” products be covered?*

**Article 2 – Prohibited subsidies**

25. It is generally agreed that the WTO definition of “subsidy” and of “specificity”, as set forth in the Agreement on Subsidies and Countervailing Measures, should be used in the Steel Agreement.

26. While some participants continue to express their preference for a list of prohibited subsidies, it appears that most could eventually support a blanket prohibition of all specific subsidies to the steel industry, under which a limited number of narrowly defined exceptions would be permitted.

27. The precise way that the prohibition would be formulated has not been firmly established, as there are concerns that slight variations in phraseology could affect the impact of the ban, and the way that the prohibition would be implemented. The issues raised are addressed in SG/STEEL(2003)10, and are being reviewed in light of WTO jurisprudence.

28. In brief, the issue is whether the prohibition should apply to benefits that are conferred to a *manufacturer* of steel products, or to the *manufacture* of steel products. If the former, there are questions on the extent to which specific subsidies provided to third parties, such as raw materials and transportation suppliers would be banned. Some have noted that WTO rulings have established that the subsidies would be covered, to the extent that a “pass-through” of benefits to the steel manufacturer occurred. A second issue concerns whether, or how, the prohibition would apply to divisions of conglomerates that are not involved in steel.

29. The alternative phraseology (*i.e.*, benefits conferred to the manufacture of steel products) has raised concerns among some participants as it is seen as potentially increasing the scope of the prohibition by extending it to service centres, energy suppliers, etc. There are also concerns that such a formulation would deviate from WTO practice, as jurisprudence has established that the recipient of a subsidy benefit must be a natural or legal person, as opposed to productive operations.

30. Another issue to be clarified is whether export credits for steel products under paragraph (k) of ANNEX I of the ASCM should remain permitted or should be prohibited.

Key issues:

- *Can further work focus on refinement of the “blanket prohibition”?*
- *Should the formulation of the prohibition be structured in terms of a benefit conferred to a “manufacturer of steel products”, or to the “manufacture of steel products”?*

- *Should export credits for steel products be prohibited, or should they remain permitted?*

#### **Article 6 – (Committee on Steel) and Article 7 (Notifications)**

31. There are no major issues to be addressed in these Articles. While some would like to require that notifications be made prior to a subsidy measure being taken, others have indicated that it would not be feasible in their jurisdictions.

#### **Article 8 – Review**

32. There has been interest in exploring enforcement approaches that would simplify and accelerate the processes and procedures used in the WTO. Significant interest, for example, has been expressed in a “binding arbitration” approach, under which the Steel Committee would, at the request of a Party, review a measure to determine whether or not it was consistent with the Agreement. In the absence of consensus, the matter would, upon request of a Party, be referred to an arbitration body, for a final decision. It was thought that such an approach might be advantageous in instances where the only issue under consideration was whether or not a subsidy qualified as an exception. If there were other issues concerning, for example, whether or not a measure was in fact a subsidy, or whether or not a subsidy was specific, a number of parties felt that more traditional WTO procedures (*i.e.*, consultation-panel-appeal) would be more appropriate.

33. The role that the Committee could play in reviewing subsidies and subsidy programmes is, however, controversial. While some believe that the Committee should play a major role in examining measures and providing decisions on the compatibility of such measures with the Agreement, others have urged caution, noting that decisions would be better made by technical experts, not a political body.

34. In addition to the “binding arbitration approach”, the current draft contains a second option that closely parallels the “panel/appeal” approach used in the WTO.

35. Some parties indicated that there may be value in developing a third approach that combines the “binding arbitration” and “panel/appeal” schemes.

36. Under both of the approaches described above, the Committee could make determinations, if there were consensus. Such determinations could, however, eventually be challenged under arbitration or panel procedures if a Party subsequently alleged that a given subsidy was not consistent with the Agreement.

#### Key issues:

- *What should the purpose of reviews be? What effect should determinations have on the grant or maintenance of a subsidy?*
- *What types of measures should be subject to review (i.e., pre-notified, post-notified, and/or non-notified)?*
- *Are there aspects of the “binding arbitration” approach that can be pursued, perhaps combined with elements of the more traditional “panel/appeal” approach?*
- *Who should conduct reviews (i.e., the Committee, experts, etc.)?*

## **Article 9 – Dispute Settlement and Remedies**

37. With respect to arbitration/panel rulings, some participants would like to go beyond the WTO prescription that a Party be required to withdraw a prohibited subsidy without delay, by stipulating that, in addition to withdrawal, subsidies that had already been disbursed should be partially or totally repaid. This proposal has, however, raised a number of legal concerns, with some parties also observing that this would deviate too much from current WTO practice to be acceptable. The notion of allowing a Party to modify a measure to bring it in conformity with the Agreement (as opposed to requiring withdrawal) has also been examined.

38. The issue of countermeasures – that is, what to do in the event a subsidising Party does not comply with an adverse ruling – has also been explored. Such countermeasures could be restricted to duties or quantitative restrictions on steel products, but, it was pointed out, this would create problems in instances where the subsidising Party exported relatively small quantities of steel – in such cases a broader range of countermeasures would be needed. The possibilities for Parties which were not parties to the dispute to adopt countermeasures have also been examined.

39. In addition to countermeasures (*i.e.*, as an “add-on” to countermeasures), it has been proposed that Parties be permitted to apply countervailing duties on imports of steel from Parties that did not abide by dispute settlement, without having to establish injury.

40. Finally, attention has been paid to problems that could occur if the Steel Agreement is a stand-alone instrument that is outside the WTO “family”. First, the application of countermeasures would raise concerns with respect to their compatibility with WTO obligations. One way to avoid this might be to have any waivers made by Parties in the Steel Agreement be recognised by the WTO through some form of acknowledgment of the Agreement by the WTO Ministerial Conference/ Council.

### Key issues:

- *Is a “stand-alone” Steel Subsidy Agreement outside the WTO viable? If not, what the prospects are for integrating such an agreement into the WTO?*
- *Should Parties that were not party to a proceeding be authorised to take countermeasures?*

## **Article 11 – Existing measures**

41. There is agreement that existing programmes should be phased out, either within a time period that is specified in the Agreement, or according to individual timetables tailored to each measure. Whether such programmes should be integrated into a list that would be part of the negotiated Agreement, or simply be subject to notification with a certain number of days after the Agreement came into force, is under discussion.

### Key issue:

- *What time frames should be specified for terminating existing programmes which are inconsistent with the Agreement, or otherwise modifying such programmes to bring them into conformity with the Agreement?*

## **Article 17 – Other Final Provision(s)**

42. One proposal has been made under which Parties would make a commitment not to take trade measures towards another Party that are stricter than those taken towards any other Party.

**Article 18 – Transition to the WTO**

43. Transition language has been proposed in the event a “stand-alone” Steel Agreement is eventually to be integrated into the WTO. .

**Articles 12-16 and Article 19 have not been fully discussed, but no major issues are foreseen.**

44. These articles have not been fully discussed, but no major issues are foreseen.