

11 September 2012

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**FOR PUBLIC RECORD**

Mr John Bracic  
Director Operations 1  
International Trade Remedies Branch  
Australian Customs and Border Protection Service  
5 Constitution Avenue  
CANBERRA ACT 2601

Dear Mr Bracic

**Alleged Dumping of Hot Rolled Coil Steel (HRC) from Japan  
Submission on Causation**

We act for JFE Steel Corporation, Kobe Steel, Ltd. and Nisshin Steel Co., Ltd. (**the Co-Defence**) in relation to the current investigation by the Australian Customs and Border Protection Service (**Customs**) into alleged dumping of HRC exported from Japan, following an application lodged by Bluescope Steel Limited (**the Applicant**).

**A. INTRODUCTION**

The primary purpose of this submission is to demonstrate that, there are no grounds on which the CEO can conclude that any material injury has been caused by either exports from Japan or cumulated exports from all nominated sources. While any decision on the application of the cumulation provision set out in s.269TAE(2C) of the *Customs Act 1901* (Cth) (**the Act**) will determine the focus of a causation analysis, the Co-Defence submits that it cannot alter the ultimate conclusion that there is no causal link between material injury and exports from the nominated sources. We also wish to draw the attention of Customs to the impact in this matter of market segmentation not only on the issue of causation but also on the calculation of cost to make an sell (**CTMS**), the analysis of ordinary course of trade sales (**OCOT**) and the proper assessment of normal values, export prices and non-injurious prices.

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**B. EXECUTIVE SUMMARY****1. Market Segmentation**

- a. *This investigation involves a heterogeneous product and discrete market segments - automotive (Auto), pipe and tube (P&T), and general manufacturing (GM) - , which feature specification and price differentiation.*
- b. *Goods specifications and customer requirements for each of those segments are generally specific to the particular segment and there is no significant substitutability or competition between the segments.*
- c. *There is evidence of substantial cost and price differentials between products destined for different market segments.*
- d. *In the absence of inter-segment substitutability and competition, import phenomena occurring in relation to one segment cannot be said to be causing injury in another segment.*
- e. *The absence of substitutability and competition between segments has legal consequences for the identification of like goods, the appropriateness of cumulation, the analysis of causation, the calculation of CTMS, the analysis of OCOT and the assessment of variable factors. Consideration of each of those matters must be undertaken separately for each segment.*

**2. Like Goods**

- a. *While the applicant does produce HRC for each of the three identified sectors, there is no evidence to support a finding that goods produced by the applicant for use in one segment of the market are 'like goods' to those produced for use in another segment.*
- b. *In fact, the available evidence relating to competition, specifications, performance characteristics and price supports the contrary conclusion that the goods under consideration (GUC) nominated by the Applicant do not constitute a single category of goods but three separate such categories.*

**3. Cumulation**

- a. *Domestic law and international obligations mandate that the default approach in analysing causation is to focus on whether exports from a particular nominated country are themselves causing material injury to the production by Australian industry of like goods.*

- b. *In the present matter, in relation to Japan, this means three separate assessments of the impact of exports from that country on the economic performance of the Applicant in each of the identified segments. Similar assessments must be undertaken in respect of each other nominated country of export.*
- c. *Departure from the default approach by taking account of the cumulative effect of exports from different countries is only permissible where, having regard to certain conditions of competition, it is reasonable to conclude that it is 'appropriate' to do so.*
- d. *Having regard to the conditions of competition in this matter there are no grounds to support a reasonable conclusion that it would be appropriate to cumulate exports from different countries.*
- e. *Even if a decision was made, unlawfully, to cumulate exports, separate causation assessments would still have to be undertaken in respect of cumulated exports to each market segment.*

**4. Causation**

- a. *'Other factors', including market conditions, imports of finished products, plant closures, margin compression, quality issues, unavailability of a full product range and exports from undumped sources, are the primary causes of any material injury to the Applicant.*
- b. *The impact of 'other factors' on the economic performance of the applicant is so great that any additional impact caused by allegedly dumped exports cannot be described as material.*
- c. *During the investigation period exports from Japan to each of the market segments have reduced dramatically in volume and value, while unit prices have increased substantially. There are no reasonable grounds on which those exports could be found to have caused material injury.*
- d. *The applicant has not provided a single example of price undercutting, price depression or price suppression concerning Japanese exports to the Auto and GM segments. The example of price undercutting asserted by the Applicant in the P&T segment is rebutted by the evidence provided by the exporter of export prices for the particular specification and the complementary evidence provided during the visit by Customs to the relevant importer.*

- e. *Exports from Japan to the GM sector are so negligible that any claim that such exports caused material injury to the Applicant in respect of its production for that sector can be summarily dismissed.*
- f. *Combined exports from Japan and Korea to the Auto and P&T segments have reduced dramatically and the Applicant's share of those segments has increased. As the Applicant's overall market share and volumes have remained constant its performance in the GM sector must have deteriorated. As exports from Japan and Korea to the GM segment are insignificant the Applicant's competition comes from Taiwan and un-nominated countries, particularly the Applicant's subsidiary producer in New Zealand.*
- g. *Applying the coincidence analysis technique favoured by Customs<sup>1</sup> demonstrates that, relative to the injury factors claimed by the applicant, there is a negative correlation both with the volume, value and unit price of HRC exports from Japan to each segment and also with the volume, value and unit price of cumulated HRC exports to the P&T segment on the one hand and the Auto segment on the other.*

## C. ANALYSIS

### 1. Market Segmentation

There is no dispute that there are three discrete segments of the overall HRC Steel market – pipe and tube [P&T], automotive [Auto] and general manufacturing [GM]. However the unsupported assertion by the Applicant that ... *locally produced and imported HRC are used interchangeably across the main end-use applications identified above<sup>2</sup>...* is plainly unsustainable. Because of the specific requirements of users for such things as particular performance characteristics or mechanical and chemical properties<sup>3</sup>, each segment is substantially insulated from the others and there is no evidence of significant substitutability between segments. In addition to product differentiation, price differentiation is most apparent in the Auto sector where evidence provided to Customs<sup>4</sup> reveals price premiums amounting to over 35% compared to pricing to the P&T segment, reflecting in turn higher production costs. (It should be noted that the cost of pickling and oiling for the Auto segment is only a minor part of

<sup>1</sup> *Customs Manual* (August 2012) – p.122-123

<sup>2</sup> *Public Record*: #003 – p.70

<sup>3</sup> *Ibid.*, #051 – p.148; #025 – p.17-15.

<sup>4</sup> JFF: -- Attachment B.4 to Exporter Questionnaire response of 25 July 2012.  
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that substantially higher cost/price profile for HRC that is attributable largely to a range of performance characteristics demanded by vehicle manufacturers.)

When a market consists of clearly defined and largely insulated segments, the consequences for causation analysis are obvious. It would be patently untenable for such an analysis to be conducted in a manner that assumed that the sale of products specifically produced for one segment could be characterised as causing injury to production for another segment. A lawful examination of causation in the present matter can only be conducted by reference to the dynamics applying within each segment.

In addition to the issue of causation, market segmentation involving clear product and price differentiation also has consequences for the identification of 'like goods', the appropriateness of cumulation, CTMS calculations, OCOT analysis and the assessment of variable factors. Consideration of each of those matters must be undertaken on a segmental basis.

## 2. Like Goods

In *EC – Asbestos*, after observing that Article III of the GATT 1994 is concerned with competitive relationships, the Appellate Body found that a determination of like products under that article ... *is, fundamentally, a determination about the nature and extent of a competitive relationship between and among products*<sup>5</sup>. The fundamental rationale of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (ADA)* is also about the existence and effects of competition between products. Absent competition between GUC and like goods produced by an applicant, publication of a dumping notice can never be justified because the twin criteria of section 269TG of the Act - that dumping has taken place and ...*because of that...* material injury has occurred - cannot be satisfied.

The lack of competition between sectors (examined below in relation to cumulation) is evidenced by end-use differentiation related to specifications, performance characteristics and price. Specifications for HRC for use in the two largest segments – P&T and Auto – are mutually exclusive and while there may be isolated examples of a particular specification used in both the P&T and GM segments, the incidence of

<sup>5</sup> *European Communities – Asbestos* - WT/DS135/AB/R, p.238  
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common end-use is negligible<sup>6</sup>. Blends of performance characteristics such as hardness and strength, and processing requirements such as bending, pressing, drawing, roll forming, welding, painting and galvanising are largely specific to particular segments<sup>7</sup>.

All the available evidence supports the conclusion that, for the purposes of Part XVB of the Act, the GUC nominated by the Applicant do not constitute a single category of goods but three separate such categories and that the Applicant's production of HRC falls within the same separate categories.

### 3. Cumulation

In any anti-dumping investigation where it is alleged that dumped exports are being sourced from more than one country of export, no lawful causation analysis can be undertaken by reference to the total exports from all nominated sources, unless a thorough assessment has been completed of the application of s. 269TAE(2C) to the facts of the case. As the Panel observed in *EC – Tube & Pipe Fittings* the cumulation requirement:

*...precludes an investigating authority from simply assuming that the cumulative assessment is appropriate. Rather, an investigating authority must consider the facts before it and make a reasoned finding that cumulation is appropriate on the basis of the particular circumstances<sup>8</sup>*

In the present matter this mandatory threshold requirement has not been addressed or even mentioned by either the Applicant or Customs. This omission from the Consideration Report and the acceptance of the application by the delegate of the CEO is contrary to both relevant domestic law and a binding international agreement and as a result the remaining investigation process is tainted.

When analysing causation the default position under the *Act* and the *ADA* is that the effect on an Australian industry of exports from a nominated country should be considered separately in determining whether the publication of a dumping notice under the terms of s.269TG of the Act is justified. Section 269TAE(2C) relevantly provides that:

In determining ... the effect of the exportations of goods to Australia from different countries of export, the Minister should consider the cumulative effect of those exportations only if the Minister is satisfied that:

<sup>6</sup>Public Record: #051 – loc.cit.

<sup>7</sup>Ibid., #025 – loc. cit.

<sup>8</sup>EC – Tube & Pipe Fittings: WT/DS219/R – p.7.239

(a) – (d) ...

(e) it is appropriate to consider the cumulative effect of those exportations, having regard to:

- (i) the conditions of competition between those goods; **and**
- (ii) the conditions of competition between those goods and like goods that are domestically produced. [Emphasis added]

This default position, which reflects the requirements of Article 3.3 of the *ADA*, cannot be abandoned unless there is evidence that the competitive conditions applying between the exports from different countries **and** the competitive conditions applying between those exports and Australian produced like goods make it 'appropriate' to undertake a cumulative assessment of causation. As a matter of construction, the terms of both the *Act* and the *ADA* make it clear that the default approach to a causation analysis requires consideration of the link between exports and material injury on a country by country basis, unless competitive conditions make a cumulative approach more appropriate. Examples of when this exception to the default approach might be considered to be established is where there is no evidence of market segmentation, where exports from all nominated sources are substantially homogeneous and in competition with each other and Australian production shares that homogeneity and is part of that competitive environment.

A WTO Panel has construed the term 'appropriate' as something which is fitted to a particular purpose<sup>9</sup>. In the case of cumulation the relevant purpose is the assessment of causation and the question is whether in the present case a reasonable person could conclude that, in making that assessment, it is appropriate to cumulate exports from different sources. In light of the uncontested evidence of market segmentation and the consequent absence of substitutability and competition between the segments the answer must be a resounding negative. All the available evidence supports the view that the default position of country by country analysis must be applied and that to do otherwise would be inappropriate, unlawful and contrary to Australia's international obligations.

Exports from all four of the nominated sources are not represented in significant quantities in any of the market segments – a situation which in itself is inimical to any

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<sup>9</sup> *EC – Tube & Pipe Fittings* – p.7.240  
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proposal to cumulate exports for the purpose of analysing causation. Further, overseas supplies of HRC to the P&T and Auto markets are sourced overwhelmingly from Japan and Korea and there is no evidence<sup>10</sup> in recent years of the frequent changes of overseas sourcing that are a feature of competitive environments.

In the Auto segment this stability reflects such unique features as the demanding product qualification processes and the significant constraints on sourcing changes during model lives which frequently extend beyond five years<sup>11</sup>. In the P&T segment there are only two significant end users and again the demanding processes of negotiating specifications and product testing are obvious restraints on sourcing changes, particularly in circumstances where quantities imported by each of the users are minimal and essentially a hedge against the potential for disruption to supplies from the Applicant. In the remaining GM segment imports from Taiwan are about sixteen times greater than those from Malaysia and the impact of cumulation on a causation analysis would obviously be insignificant. If there is any substantial competition between export sources to the GM segment it is between Taiwan on the one hand and the Peoples Republic of China and New Zealand on the other. As the latter two countries are not included in the current application, no issue of cumulation arises under section 269TAE(2C).

A market environment without significant inter-segment product substitutability and competitiveness or intra-segment competitiveness between the nominated export sources cannot possibly sustain a finding by a decision maker that, pursuant to subsection 269TAE(2C)(e), it is appropriate in this case to assess causation by reference to cumulated exports.

#### **4. Causation – Exports From Japan**

##### ***(a) Pipe & Tube Segment***

The P&T market is the largest of the three segments and accounts for slightly less than half the Australian HRC market. Local pipe and tube manufacture is undertaken by Australian Tube Mills (ATM) and Orrcon, both of whom purchase an overwhelming proportion of their HRC requirements from the Applicant. In common with the automotive manufacturers both end-users, in order to ensure continuity of supply

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<sup>10</sup> *Public Record*: #025 – loc.cit

<sup>11</sup> *Ibid*: #025 – p.17  
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through periods of disruption<sup>12</sup>, are committed to dual sourcing<sup>13</sup>. ATM sources its imports from Japan in such modest volumes<sup>14</sup> that there is no plausible ground on which the Applicant could claim that they have caused material injury in the P&T market, especially in circumstances where, in the period of investigation, the volume and value of Japanese HRC grades for the Australian P&T market declined by over 60% and unit values increased by over 10%. Applying the coincidence analysis favoured by Customs to establish causation reveals not just the absence of coincidence between Japanese exports to the P&T segment and injury indicators claimed by the Applicant but a negative correlation. To sustain a finding of a causal link in these circumstances Customs acknowledges<sup>15</sup> that there must be a compelling evidence based explanation and the Appellate Body has upheld a Panel observation that the absence of a coincidence finding *...would create serious doubts as to the existence of a causal link.*<sup>16</sup> No evidence or explanation has been put forward in this case to overcome those doubts.

The only specific claim of injury advanced by the Applicant in relation to this market segment is an assertion of price undercutting of Japanese sourced 2.95 x 1200 product. JFE's response to the exporter questionnaire clearly demonstrates that the level of export price for that product specification could not provide a basis for price undercutting and the Co-Defence understands that in the course of a visit from Customs that the Australian importer comprehensively rebutted the Applicant's assertion. Even if the assertion was correct, no question of injury of a material character arises as the volume of exports of the particular product constituted less than █% of the Australian P&T market and total exports of P&T product from Japan during the period of investigation amounted to only about █% of that market segment.

**(b) Automotive segment**

Japanese Steel Mills have been supplying Australia's car manufacturers for over 50 years. That tradition is based on four factors:

- an absolute commitment by vehicle producers to dual sourcing of their steel requirements to ensure security of supply;
- the need for sourcing decisions to be made at the product development stage and significant commercial pressures to maintain such decisions

<sup>12</sup> Ibid: #022 -- p.272

<sup>13</sup> Ibid: #022 - p.275; #010 – p.61

<sup>14</sup> Public Record: #022 – p.274;

<sup>15</sup> Customs Manual (August 2012) – p.123

<sup>16</sup> Argentina Footwear (EU) – WT/DS121/R: paras: 8-238

throughout a model life that, in the Australian context, is at least five years.

- the undisputed quality and fitness for purpose of Japanese automotive steel; and
- gaps in the production capability of the Applicant in terms of both quality and specifications.<sup>17</sup>

It is these factors, rather than price, that influence the sourcing decisions of Australia's vehicle producers. Of course, reflecting their more efficient production processes<sup>18</sup>, Japanese automotive steels are price competitive but at the premium price end of particular specifications. It is significant that the Applicant has not cited a single example of price undercutting, price depression or price suppression involving automotive steels exported from Japan during the investigation period. The absence of examples is hardly surprising where, again evidencing a negative correlation with claimed injury factors, the volume and value of such exports from Japan in that period compared to the previous 12 month period reduced by about 50% and 40% respectively and unit export selling prices rose by around 18%. In the same period Australian vehicle production declined by only 2% and as there was no significant increase in exports from Korea the Applicant must have achieved a substantial increase in market share in the segment during the period of investigation.

In the absence of any evidence of injury being suffered by the Applicant in the automotive segment of its business during the period of investigation, the issue of causation does not arise. However even if such evidence did exist, the above analysis and consideration below of the variety of other factors impacting on the Applicant would require a finding that any material injury was not caused by allegedly dumped automotive HRC exports from Japan.

<sup>17</sup>Public Record: #012 - p.84; #014 - p.88; #016 - p.113; #025 - p.17-15.

<sup>18</sup> Ibid: #012 - p.83.

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**(c) GM Segment**

Exports from Japan to the GM sector are so negligible that any claim that such exports caused material injury to the Applicant in respect of its sales to that sector can be summarily dismissed.

**5 Causation – Cumulated Exports by Market Segment****(a) P&T Segment**

Cumulated exports from Japan and Korea to the P&T segment constitute less than 10% of that segment and are clearly insufficient to sustain a claim that they have caused material injury to the Applicant. This is particularly so in circumstances where during the investigation period the Applicant has been the price leader<sup>19</sup>, has increased market share beyond its own target<sup>20</sup>, where the volume and values of cumulated exports to the segment demonstrate a negative correlation with claimed injury factors and where, again, any injury being suffered is manifestly attributable to factors other than declining exports from the two nominated countries.

In addition to the general factors, examined below, that have impacted on the Applicant's overall performance, there are a number of factors specific to the P&T segment. Obviously the decline in the commercial and residential building market<sup>21</sup> has had a significant impact on the Applicant's sales to the P&T segment, but the primary adverse influence is the volume of imported finished tubular product which has an estimated HRC content 10 times greater than the volume of HRC imported by Australia's P&T manufacturers. Apart from the general downward pressure exerted on volumes and prices in the P&T segment by this factor, it has also led to specific instances of injury to the Applicant through closures, or reductions in production at a number of Australian P&T manufacturing facilities.<sup>22</sup> There have also been adverse market conditions for a range of steel products for which HRC is the substrate, thus contributing further negative pressure on the Applicant's performance in this segment.<sup>23</sup>

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<sup>19</sup> *Public Record*: - #010 p.61

<sup>20</sup> *Ibid* - #022 p.273

<sup>21</sup> *Ibid* - #051 - p.165

<sup>22</sup> *Ibid* - #022 p.271

<sup>23</sup> *Ibid* - loc. cit.

The enormous impact of these specific factors alone 'crowd out' any possibility that the insignificant volume of imports by P&T manufacturers could have caused material injury.

**(b) Automotive Segment**

Even if exports of automotive HRC from Japan and Korea are cumulated for the purpose of analysing causation in the segment, the conclusion of no causation remains unaltered. In particular, cumulated exports to the segment have reduced substantially, the previously discussed negative correlation is again present, the Applicant's market share in the Auto sector has increased, no evidence has been presented of price undercutting, depression or suppression and again there are a range of general and specific other factors impacting on the Applicant's performance in the sector.

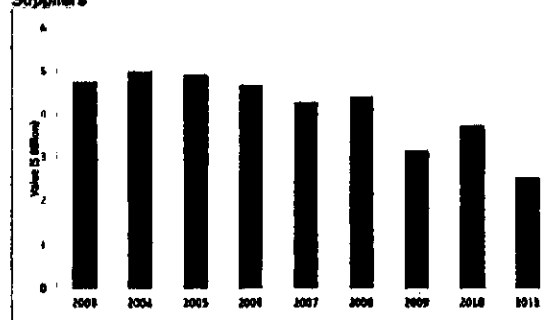
**Australian Automotive Industry - Monthly Production Volumes**

The specific factors include a reduction of over 30% in the domestic production of motor vehicles since the beginning of the injury investigation period, ongoing reductions in local content as component manufacturers move offshore or exit the industry<sup>24</sup>, the tendency to stasis in supply arrangements<sup>25</sup> and the inability of the applicant to supply certain grades and qualities of automotive steel<sup>26</sup>.

	2012	2011	2010	2009	2008	2007	2006
January	14,161	12,498	12,086	11,941	21,152	18,666	14,044
February	22,751	18,600	23,047	20,404	32,303	29,376	28,276
March	19,323	20,155	25,738	21,310	26,393	29,433	30,802
April	15,241	16,195	20,239	12,792	28,721	22,633	25,870
May	21,385	17,898	23,589	16,842	35,180	33,274	33,630
June	19,419	21,780	21,794	18,674	29,884	29,195	23,568
July	21,241	20,413	18,558	17,864	33,121	31,813	22,643
August		24,320	20,888	16,988	29,397	27,713	34,224
September		16,814	21,364	20,924	28,511	28,563	28,944
October		13,600	19,369	23,551	24,119	33,320	33,020
November		19,855	19,594	22,622	20,659	29,746	31,536
December		17,247	13,007	19,442	14,678	21,940	20,403
<b>Total</b>	<b>133,581</b>	<b>219,376</b>	<b>239,443</b>	<b>223,354</b>	<b>324,118</b>	<b>334,777</b>	<b>326,960</b>

Source: Federal Chamber of Automotive Industries

**Figure 2.2.1 Value of Components Sourced From Australian Suppliers**



Even before taking account of the other general factors enumerated below, such a range of specific other factors impacting negatively on the applicant's performance in the segment makes it impossible to sustain an argument that injury, if any, attributable to cumulated exports from the two countries could be described as material.

<sup>24</sup> DIISR, *Key Automotive Statistics 2011* – p.10  
<sup>25</sup> *Public Record*: #025 – p.15  
<sup>26</sup> *Ibid* #012 - p.84; #014 - p.88; #016 - p.113; #025 – p.17-15.  
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**(c) GM Segment**

Exports to this sector from Japan are negligible and from Korea they are only sporadic<sup>27</sup>. The primary sources of imports are Taiwan, the PRC and New Zealand. Exports from both the latter countries have been characterised as price leaders<sup>28</sup> in the segment and in the case of New Zealand, where the exporter is a subsidiary of the Applicant, the goods may be dumped into Australia free from any concerns about anti-dumping action due to the exclusion provision of NAFTA. A major importer from Taiwan has identified the New Zealand product as the primary competitor in the segment.<sup>29</sup> With prices in the segment being driven by exports from a source excluded from the application as well as by exports from the Applicant's own subsidiary, a claim of material injury in the GM segment can only be characterised as disingenuous.

**6. Other Injury Factors – General**

Senior members of the applicant company have acknowledged a 'perfect storm'<sup>30</sup> of three factors impacting negatively on the overall operations of the organisation – the rise in the Australian dollar, the increase in raw material prices and the decline in demand for steel. The Application itself acknowledges the GFC, an overall reduction in demand for HRC, competition from imported finished products and the scale back of export sales as factors influencing its economic performance. There is no acknowledgement, however, of the impact on unit costs of the reduction in iron production and the closure of the Westernport Mill, the issue of global margin compression, lack of competitiveness,<sup>31</sup> the significance of exports from other than the nominated countries and from the Applicant's own New Zealand subsidiary, the specification gaps in production capability and issues of quality and fitness for purpose.

The multiplicity and seriousness of these general factors together with the segment specific factors identified above can leave no doubt that, when carefully assessed and persuasively analysed, they have caused material injury to the Applicant to such a degree that injury, if any, attributable to allegedly dumped imports cannot be judged to be material, particularly when the default requirement of establishing causation by coincidence analysis cannot be met.

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<sup>27</sup> Ibid #047 - 93

<sup>28</sup> Ibid: #045 – p.9 and #047 – p.93

<sup>29</sup> Ibid: #047 – p.93

<sup>30</sup> Public Record #009 – p.37

<sup>31</sup> Ibid #012 – p.83

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## 7 Variable Factors

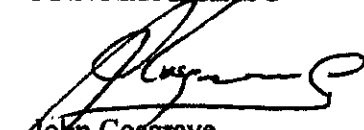
HRC price and cost evidence provided to Customs by exporters and the Applicant will demonstrate that there are significant variations between segments. For example Customs has evidence that export prices from Japan for automotive steels exceed export prices of HRC for the P&T market by over 35%. Consequently calculations of CTMS, identification of OCOT sales and assessments of normal values, export prices and non-injurious prices must be undertaken separately for each segment.

### D. Conclusion

In conclusion the Co-Defence refers to its earlier submission of 19 July 2012 that there are no grounds on which any material injury can be claimed to have been caused by exports from Japan and consequently the current investigation, in so far as it relates to Japan, must be terminated forthwith.

Yours sincerely

**MINTER ELLISON**



**John Cosgrave**  
Director, Trade Measures

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