Australian Government
Anti-Dumping Review Panel

# Application for review of a Commissioner's decision

***Customs Act 1901 s 269ZZQ***

This is the approved[1] form for applications made to the Anti-Dumping Review Panel (ADRP) on or after 20 May 2019 for a review of a reviewable decision of the Commissioner of the Anti-Dumping Commission.

Section 269ZZO *Customs Act 1901* sets out who may make an application for review to the ADRP of a review of a decision of the Commissioner.

All sections of the application form must be completed unless otherwise expressly stated in this form.

**Time**
Applications must be made within 30 days after the applicant was notified of the reviewable decision.

**Conferences**
The ADRP may request that you or your representative attend a conference for the purpose of obtaining further information in relation to your application or the review. The conference may be requested any time after the ADRP receives the application for review. Failure to attend this conference without reasonable excuse may lead to your application being rejected. See the ADRP website for more information.

**Further application information**
You or your representative may be asked by the Member to provide further information in relation to your answers provided to questions 10, 0, 12 and/or 13 of this application form (s269ZZQA(1)). See the ADRP website for more information.

**Withdrawal**
You may withdraw your application at any time, by following the withdrawal process set out on the ADRP website.

[1] By the Senior Member of the Anti-Dumping Review Panel under section 269ZY *Customs Act 1901*.

## Contact

If you have any questions about what is required in an application, refer to the ADRP website. You can also call the ADRP Secretariat on (02) 6276 1781 or email adrp@industry.gov.au.

## PART A: APPLICANT INFORMATION

### 1. Applicant's details

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|---|
| Applicant's name:<br>InfraBuild (Newcastle) Pty Ltd (formerly, Liberty OneSteel (Newcastle) Pty Ltd) |
| Address:<br>Level 28, 88 Phillip Street, SYDNEY NSW 2000 |
| Type of entity (trade union, corporation, government etc.):<br>Corporation |

### 2. Contact person for applicant

| |
|---|
| Full name:<br>[redacted] |
| Position:<br>Senior Trade Measures Manager |
| Email address:<br>[redacted] |
| Telephone number:<br>[redacted] |

### 3. Set out the basis on which the applicant considers it is entitled to apply for review to the ADRP under section 269ZZO

The applicant for review was the applicant in relation to an application under subsection 269TB(1) of the *Customs Act 1901*[2] that led to the making of the reviewable decision – being a member of the Australian industry producing like goods.

### 4. Is the applicant represented?

**Yes** ☒ **No** ☐

If the application is being submitted by someone other than the applicant, please complete the attached representative's authority section at the end of this form.

***It is the applicant's responsibility to notify the ADRP Secretariat if the nominated representative changes or if the applicant become self-represented during a review.****

[2] All legislative references in this application are to the *Customs Act 1901*, unless otherwise stated.

## PART B: REVIEWABLE DECISION TO WHICH THIS APPLICATION RELATES

**5. Indicate the section(s) of the *Customs Act 1901* the reviewable decision was made under**

☐Subsection 269TC(1) or (2) – *a negative prima facie decision*

☒Subsection 269TDA(1), (2), (3), (7), (13), (13A), (14) or (14A) – *a termination decision*

☐Subsection 269X(6)(b) or (c) – *a negative preliminary decision*

☐Subsection 269YA(2), (3), or (4) – *a rejection decision*

☐Subsection 269ZDBEA(1) or (2) – *an anti-circumvention inquiry termination decision*

**6. Provide a full description of the goods which were the subject of the reviewable decision:**

The goods the subject of the reviewable decision are:

The goods are hot-rolled deformed steel reinforcing bar whether or not in coil form, commonly identified as rebar or debar, in various diameters up to and including 50 millimetres, containing indentations, ribs, grooves or other deformations produced during the rolling process. The goods include all steel reinforcing bar meeting the above description regardless of the particular grade, alloy content or coating.

Goods excluded from this application are plain round bar, stainless steel and reinforcing mesh.

**7. Provide the tariff classifications/statistical codes of the imported goods:**

Goods identified as steel reinforcing bar, as described in section 6 (above), are classified to the following tariff subheadings in schedule 3 to the *Customs Tariff Act 1995*:

- 7213.10.00 statistical code 42;
- 7214.20.00 statistical code 47;
- 7227.90.10 statistical code 69;
- 7227.90.90 statistical code 01, 02 and 04;
- 7228.30.10 statistical code 70;
- 7228.30.90 statistical code 40;
- 7228.60.10 statistical code 72.

8. **If applicable, provide the Anti-Dumping Notice (ADN) number of the reviewable decision:**

| |
|---|
| Anti-Dumping Notice (ADN) number:<br>2019/80 |
| Date ADN was published:<br>20 June 2019 |

9. **Provide the date the applicant received notice of the reviewable decision:**

| |
|---|
| 20 June 2019 |

***Attach a copy of the notice of the reviewable decision to the application***

A copy of the notice of the reviewable decision is attached as Appendix A to this application.

## PART C: GROUNDS FOR YOUR APPLICATION

If this application contains confidential or commercially sensitive information, the applicant must provide a non-confidential version of the application that contains sufficient detail to give other interested parties a clear and reasonable understanding of the information being put forward.

Confidential or commercially sensitive information must be marked '**CONFIDENTIAL**' (bold, capitals, red font) at the top of each page. Non-confidential versions should be marked '**NON-CONFIDENTIAL**' (bold, capitals, black font) at the top of each page.

- Personal information contained in a non-confidential application will be published unless otherwise redacted by the applicant/applicant's representative.

For lengthy submissions, responses to this part may be provided in a separate document attached to the application. Please check this box if you have done so: ☒

10. **Set out the grounds on which the applicant believes that the reviewable decision is not the correct or preferable decision:**

| |
|---|
| A. The reviewable decision was not the correct or preferable decision because the Commissioner's determination of the normal value for the verified exporters from Turkey (being, Çolakoğlu Metalurji A.Ş. (**Colakoglu**), Habaş Sinai ve Tibbi Gazlar Istihsal Endüstrisi A.Ş. (**Habas**), Kroman Celik Sanayii A.S. (**Kroman Celik**) and Diler Demir Celik Endustri ve Ticaret A.S. (**Diler**)), under s.269TAC(2)(c), which formed the basis of the decision to terminate Investigation 495 because of allegedly negligible dumping margins, was not authorised by the terms of paragraphs (a) or (b) of s.269TAC(2).<br><br>B. Further, the Commissioner's determination of the normal value for 'all other exporters' of the goods exported to Australia from Turkey under s.269TAC(6) was not the correct |

or preferable decision to the extent that it relies on the normal value determined for the verified exporters, incorrectly under s.269TAC(2)(c).

C. Alternatively, even if the Commissioner did correctly determine the normal value for Habas under s.269TAC(2)(c), he nevertheless failed to make proper adjustment to that exporter's normal value under s.269TAC(9) to account for inland transport to ensure fair comparison of the level of trade between the normal value (at the ex-works level) and the export price (at the free-on-board level).

D. Further, to the extent that the normal value for Habas ought properly be determined under s.269TAC(1), then any adjustment to that exporter's normal value to account for inland transport to ensure fair comparison of the level of trade between the normal value and the export price be properly made under s.269TAC(8).

E. The reviewable decision was not the correct or preferable decision because the Commissioner's decision to terminate under s.269TDA(2) was based on an incorrect calculation and determination of negligible level of subsidies under s.269TDA(16).

F. The reviewable decision was not the correct or preferable decision because the Commissioner's determination that no subsidy was provided under Program 22 in respect of the goods during the investigation period was determined incorrectly as to what constituted a benefit received as defined under s.269T(1).

G. The reviewable decision was not the correct or preferable decision because the Commissioner's calculation and attribution of the subsidy under Program 5 was incorrect in that it included the value of all exports to all countries in the respective calculations for the exporters from Turkey.

H. The reviewable decision was not the correct or preferable decision because the Commissioner's calculation of the subsidy under Program 17 was done with not having regard to the effect of the repayment of loans in the exporters' currency of choice.

I. The reviewable decision was not the correct or preferable decision because the Commissioner's attribution of the subsidies under Programs 5, 8, 22, 23 and 25 was done with not having regard to the tax free element and effect of the subsidy.

J. The reviewable decision was not the correct or preferable decision because the Commissioner's calculation of the subsidy under Program 17 was done with not having regard to the differences in short-term and long-term interest rates.

**11. Identify what, in the applicant's opinion, the correct or preferable decision (or decisions) ought to be, resulting from the grounds raised in response to question 10:**

The correct or preferable decision would have been for the Commissioner to find that:

- the normal values for each of the verified exporters from Turkey, be determined under s 269TAC(1);

- the normal value for 'all other exporters' from Turkey be re-ascertained under s.269TAC(6);
- that an adjustment be made to the normal value of the exporter from Turkey, Habas, to account for differences in the level of trade between the normal value and the export price, either under s.269TAC(8) or s.269TAC(9), as the case may be;
- that the subsidy under Program 22 be correctly assessed and calculated as being provided in relation to the goods exported during the investigation period;
- that the subsidy under Program 5 be correctly assessed against the value of exports that were eligible for the subsidy rather than all exports; and
- that the benefit of the subsidies under Programs 5, 8, 22, 23 and 25 be correctly attributed by having regard to the tax free nature of the subsidies;
- that the subsidy under Program 17 be correctly assessed by having regard to the differences in short-term and long-term interest rates; and
- that the subsidy under Program 17 be correctly assessed by having regard to whether to the effect of the repayment of loans in the exporters currency confers a benefit.

**12. Set out how the grounds raised in question 10 support the making of the proposed correct or preferable decision:**

Elaboration of the grounds raised in question 10 can be found at Appendix B, attached.

**13. Set out the reasons why the proposed decision provided in response to question 0 is materially different from the reviewable decision:**

*Only answer question 13 if this application is in relation to a reviewable decision made under subsection 269X(6)(b) or (c) of the Customs Act 1901.*

Not applicable.

**14. Please list all attachments provided in support of this application:**

Appendix A : Anti-Dumping Notice (ADN) number 2019/80.

Appendix B : Elaboration of the grounds raised in question 10.

CONFIDENTIAL ATTACHMENT 1 : Calculations of subsidy amounts

## PART D: DECLARATION

The ~~applicant/~~the applicant's authorised representative *[delete inapplicable]* declares that:

- The applicant understands that the Panel may hold conferences in relation to this application, either before or during the conduct of a review. The applicant understands that if the Panel decides to hold a conference *before* beginning to conduct a review, and the applicant (or the applicant's representative) does not attend the conference without reasonable excuse, this application may be rejected; and
- The information and documents provided in this application are true and correct. The applicant understands that providing false or misleading information or documents to the ADRP is an offence under the *Customs Act 1901* and *Criminal Code Act 1995*.

Signature: [redacted]……

Name: [redacted]

Position: Senior Trade Measures Manager

Organisation: InfraBuild (Manufacturing) Pty Ltd

Date: 19 / 07 / 2019

## PART E: AUTHORISED REPRESENTATIVE

*This section must only be completed if you answered yes to question 4.*

**Provide details of the applicant's authorised representative**

| |
|---|
| Full name of representative: [redacted] |
| Organisation: InfraBuild (Manufacturing) Pty Ltd |
| Address: [redacted] |
| Email address: [redacted] |
| Telephone number: [redacted] |

**Representative's authority to act**

***A separate letter of authority may be attached in lieu of the applicant signing this section***

The person named above is authorised to act as the applicant's representative in relation to this application and any review that may be conducted as a result of this application.

Signature: [redacted] ……
(Applicant's authorised officer)

Name: [redacted]

Position: [redacted]

Organisation: InfraBuild (Newcastle) Pty Ltd

Date: 19 / 07 / 2019

Australian Government
Department of Industry, Innovation and Science

Anti-Dumping Commission

*Customs Act 1901 – Part XVB*

# ANTI-DUMPING NOTICE NO. 2019/80

## Steel Reinforcing Bar

## Exported to Australia from the Republic of Turkey

## Termination of Investigation No. 495

***Public notice under subsection 269TDA(15) of the Customs Act 1901***

On 16 November 2018, I, Dale Seymour, the Commissioner of the Anti-Dumping Commission, initiated an investigation into the alleged dumping and subsidisation of steel reinforcing bar (rebar, the goods) exported to Australia from the Republic of Turkey (Turkey), following an application lodged by Liberty OneSteel (Newcastle) Pty Ltd[1] (Liberty Steel, the applicant) under subsection 269TB(1) of the *Customs Act 1901* (the Act).

Public notice of my decision to not reject the application and to initiate the investigation was published on the Anti-Dumping Commission's (Commission) website on 16 November 2018. The Anti-Dumping Notice (ADN No. 2018/175) is available at www.industry.gov.au.

As a result of the Commission's investigation, I am satisfied that:

- in relation to Çolakoğlu Metalurji A.Ş. (Colakoglu), Diler Demir Celik Endustri ve Ticaret A.Ş (Diler), Habaş Sinai ve Tibbi Gazlar Istihsal Endüstrisi A.Ş. (Habas), Kroman Çelik Sanayii A.Ş. (Kroman) and the category of 'all other exporters', there has been no dumping by those exporters of any of those goods the subject of the application. I have therefore terminated the investigation in accordance with subsection 269TDA(1) of the Act so far as it relates to these exporters;

- the total volume of goods that have been exported to Australia over a reasonable examination period (being the investigation period) from Turkey that have been dumped from all Turkish exporters is negligible, as defined by subsection 269TDA(4) of the Act. I have therefore terminated the investigation so far as it relates to Turkey in accordance with subsection 269TDA(3) of the Act; and

- in relation to Colakoglu, Diler, Habas, Kroman and the category of 'all other exporters', countervailable subsidies have been received in respect of some or all of the goods, but the countervailable subsidy never, at any time during the

[1] Liberty Steel's application includes production data from two other related party rebar producers, OneSteel NSW Pty Ltd and The Australian Steel Company (Operations) Pty Ltd. Both related party producers provided letters of support for the application.

investigation period, exceeded the negligible level of countervailable subsidy under subsection 269TDA(16). I have therefore terminated the investigation in accordance with subsection 269TDA(2) of the Act so far as it relates to these exporters.

The effect of the above decisions is that the dumping and subsidy investigations are terminated in their entirety.

In making the decisions to terminate, I have had regard to the application, submissions from interested parties, the *Anti-Dumping Commission Statement of Essential Facts No. 495* (SEF 495), submissions in response to SEF 495 and other relevant information as outlined in the *Anti-Dumping Commission Termination Report No. 495* (TER 495).

TER 495 sets out reasons for the termination decisions, including the material findings of fact or law upon which the decisions are based, and has been placed on the Commission's public record at www.industry.gov.au.The applicant may request a review of the decisions to terminate the investigation by lodging an application with the Anti-Dumping Review Panel in the approved form and manner within 30 days of the publication of this notice.

Enquiries about this notice may be directed to the Case Manager on telephone number +61 3 8539 2418 or investigations3@adcommission.gov.au.

Dale Seymour
Commissioner
Anti-Dumping Commission

20 June 2019

APPENDIX B

Elaboration of the grounds raised in question 10

A. **The reviewable decision was not the correct or preferable decision because the Commissioner's determination of the normal value for the verified exporters from Turkey under s.269TAC(2)(c)[1], which formed the basis of the decision to terminate Investigation 495 because of allegedly negligible dumping margins, was not authorised by the terms of paragraphs (a) or (b) of s.269TAC(2)**

BACKGROUND

1. In the case of each verified exporter, the Commission determined those domestic sales that were in the ordinary course of trade (**OCOT**). The testing and identification of relevant domestic sales suitable for the determination of the normal value under s.269TAC(1) found that for Çolakoğlu Metalurji A.Ş. (**Colakoglu**) and Habaş Sinai ve Tibbi Gazlar Istihsal Endüstrisi A.Ş. (**Habas**), domestic sales of all models satisfied the OCOT test by having unprofitable and unrecoverable sales not exceeding 20 per cent for the particular model (as identified under the Model Control Codes (**MCCs**).[2] In the case of the remaining two verified exporters - Kroman Celik Sanayii A.S. (**Kroman Celik**) and Diler Demir Celik Endustri ve Ticaret A.S. (**Diler**)[3] – the majority of models sold domestically satisfied the OCOT test. In the case of Kroman Celik, 26 out of a total 31 models sold domestically were in OCOT,[4] and for Diler, 8 out of 9 models were sold to domestic customers in the ordinary course of trade.[5]

2. Having determined 'relevant' domestic sales suitable for the normal value of any goods exported to Australia under s.269TAC(1), that is, "like goods" that are sold in OCOT, the Commission then proceeded to test the sufficiency of those domestic sales, firstly under s.269TAC(14), and then on a model-by-model basis.

3. The Commissioner was satisfied that for each of the verified exporters, there were sufficient sales of like goods sold in OCOT as a percentage of the goods exported to Australia, i.e. greater than 5 per cent.[6] However, when testing the volume of like goods sold in OCOT on a model-by-model basis, the Commissioner concluded that in the case of all but two models sold in OCOT were in insufficient volumes when compared to the comparable models exported to Australia, i.e. less than 5 per cent.[7]

4. TER 495 reveals the following process of reasoning. First, the Commissioner accepted that all the verified exporters made domestic sales of like goods at arms length. Secondly, he found that some of those domestic sales were unprofitable and unrecoverable and therefore should be ignored for the purpose of calculating normal value under subs 269TAC(1). Thirdly, he appeared satisfied that

[1] All legislative references are to the *Customs Act 1901*, unless otherwise specified.
[2] EPR Folio No. 495/028 at [5.3] and EPR Folio No. 495/029 at [5.3].
[3] The 'verified exporters' refer to Colakoglu, Habas, Kroman Celik and Diler, subject to context, either individually or jointly.
[4] EPR Folio No. 495/026 at [7.2].
[5] EPR Folio No. 495/027 at [7.2].
[6] TER 495, p. 39.
[7] EPR Folio No. 495/026 at p. 18 (for export MCCs P-C-S-B-2 and P-C-S-C-2).

the remaining domestic sales of like goods in OCOT were in sufficient volumes when compared to the volume of goods exported to Australia in the investigation period. Fourthly, the Commissioner appeared satisfied that there were insufficient domestic sales of comparable models to determine normal values under subs 269TAC(1) except in the case of two domestic models.[8] Finally, in the case of all but the two models in respect of which the domestic sales were insufficient in volume to establish normal values under subs 269TAC(1), he considered it appropriate to construct normal values under subs 269TAC(2)(c) which included an amount for profit.

5. The applicant for review considers that the Commissioner's determination of the normal values for the verified exporters under s.269TAC(2)(c), which formed the basis of the decision to terminate Investigation 495 because of allegedly negligible dumping margins, was not authorised by the terms of paragraphs (a) or (b) of s.269TAC(2) and was not therefore the correct or preferable decision.

CONDITIONS PRECEDENT TO DETERMINATION OF NORMAL VALUE UNDER S.269TAC(2)(c)

6. Section 269TAC establishes a hierarchy of measures of normal value of which the primary measure is s.269TAC(1):

> Subject to this section, for the purposes of this Part, the normal value of any goods exported to Australia is the price paid or payable for like goods sold in the ordinary course of trade for home consumption in the country of export in sales that are arms length transactions by the exporter or, if like goods are not so sold by the exporter, by other sellers of like goods.

7. In order for the Commissioner to recommend the Minister to depart from the primary measure of normal value under s.269TAC(1), and instead determine the normal value under s.269TAC(2)(c), the Minister must first be satisfied of a number of conditions set out, alternatively, under s.269TAC(2)(a) or (b), that is that:

> (a) is satisfied that:
> (i) because of the absence, or low volume, of sales of like goods in the market of the country of export that would be relevant for the purpose of determining a price under subsection (1); or
> (ii) because the situation in the market of the country of export is such that sales in that market are not suitable for use in determining a price under subsection (1);
>
> the normal value of goods exported to Australia cannot be ascertained under subsection (1); or
>
> (b) is satisfied, in a case where like goods are not sold in the ordinary course of trade for home consumption in the country of export in sales that are arms length transactions by the exporter, that it is not practicable to obtain, within a reasonable time, information in relation to sales by other sellers of like goods that would be relevant for the purpose of determining a price under subsection (1).

8. The question of what constitutes the "low volume, of sales of like goods in the market of the country of export" is resolved by reference to s.269(14)(c):

> (c) [where] the volume of sales of like goods for home consumption in the country of export by the exporter or another seller of like goods is less than 5% of the volume of goods the subject of the application that are exported to Australia by the exporter;

[8] EPR Folio No. 495/026 at p. 18 (for export MCCs P-C-S-B-2 and P-C-S-C-2).

> the volume of sales referred to in paragraph (c) is taken, for the purposes of paragraph (2)(a), to be a low volume unless the Minister is satisfied that it is still large enough to permit a proper comparison for the purposes of assessing a dumping margin under section 269TACB.

9. It is not possible under the construction of the s.269TAC, for the Minister to use the normal value measure under s.269TAC(2)(c) unless she is first satisfied of one of the three alternate conditions under sub-paragraphs (a)(i) or (ii), or paragraph (b) of s.269TAC(2).

10. Applied here, TER 495 reports that the volumes of domestic sales of like goods by each of the exporters from Turkey were greater than 5% of the volume of goods exported to Australia by each exporter:

> In this investigation, the ratio of domestic sales of like goods to export sales of the goods under consideration for each **exporter exceeded five per cent** and subsection 269TAC(14) was not enlivened.[9] [**emphasis** added]

11. The Commission wrongly justified its decision to depart from the determination of normal values for named exporters under s.269TAC(1), and instead use the normal value measure under s.269TAC(2)(c), on the basis that it does not first need to satisfy any of the alternate conditions under s.269TAC(2)(a) or (b):

> However, subsection 269TAC(14) does not prevent the Minister from constructing a normal value under subsection 269TAC(2)(c) for some or all domestic sales in circumstances where the overall volume of domestic sales is greater than five per cent of the overall volume of export sales. That is, subsection 269TAC(14) does not require the Minister to ascertained the normal value for all models under subsection 269TAC(1) where the volume is above the five per cent threshold in subsection 269TAC(14).[10]

12. In so concluding, the Commission, although finding that there was **no evidence of low volume sales** of like goods in the market of the country of export by any of the named exporters, nevertheless proceeded to determine the normal values under s.269TAC(2)(c), without any findings of fact that the other conditions permitting normal value determination under that provision having been first satisfied.

13. The Commission's primary defence of this approach is an expansive interpretation of s.269TAC(14):

> The model-by-model sufficiency assessment uses the same five per cent ratio as subsection 269TAC(14). The Commission considers a five per cent ratio is appropriate because it ensures there is **a representative volume of domestic sales of a particular model that would be relevant for the purpose of determining a price under subsection 269TAC(1)** and assessing a dumping margin under section 269TACB. The Commission also **considers it is appropriate to use a five per cent ratio to be consistent with subsection 269TAC(14)**[11]

and reference to practice outlined in the Manual[12]:

> In assessing whether there are sufficient sales made in the ordinary course of trade, the following tests are performed:

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[9] TER 495, p. 39.
[10] TER 495, p. 40.
[11] TER 495, p.40.
[12] *Anti-dumping Commission*, 'Dumping and Subsidy Manual' (November 2018) (**the Manual**)

> - calculate whether the aggregate volume of all domestic ordinary course of trade sales of the like goods is 5 per cent or more of the overall export sales volume to Australia from that country; and
> - **if** the aggregate volume is **greater** than 5 per cent, and where comparable models exist, the test is applied individually for each model or type of like goods in the ordinary course of trade. [original fn 61] ([original] emphasis added)[13]

14. Firstly, there is no support in domestic law for the Commission's practice. Subsection 269TAC(1) refers to 'like goods' in the broadest sense. Similarly, s.269TAC(14) also refers to 'like goods' in the broadest sense, and in fact sets out a test for 'low volume' that compares *all* 'like goods' to the "volume of goods the subject of the application that are exported to Australia by the exporter".

15. Subsection 269TAC(2)(a)(i) does not narrow the test beyond 'like goods' in the broadest sense, and does not provide a gateway to the normal value measure under s.269TAC(2)(c) by imposing the greater than 'low volume' standard to a further class of goods; identified by Commission practice, as "models".

16. Therefore, the applicant for review contends that the Commission ought not to have determined the normal values for the verified exporters under s.269TAC(2)(c), and that the correct or preferable decision is to determine the normal values for the verified exporters under s.269TAC(1).

**B. The Commissioner's determination of the normal value for 'all other exporters' of the goods exported to Australia from Turkey under s.269TAC(6) was not the correct or preferable decision to the extent that it relies on the normal value determined for the verified exporters, incorrectly under s.269TAC(2)(c)**

17. In the event that the Review Panel recommends that the normal values for the verified exporters were incorrectly determined under s.269TAC(2)(c), then the Review Panel will further need to recommend that the determination of the normal value for all other exporters of the goods under s.269TAC(6) be again ascertained to take into account the new normal values determined for the verified exporters, to the extent necessary.

C. **Alternatively, even if the Commissioner did correctly determine the normal value for Habas under s.269TAC(2)(c), he nevertheless failed to make proper adjustment to that exporter's normal value under s.269TAC(9) to account for inland transport to ensure fair comparison of the level of trade between the normal value (at the ex-works level) and the export price (at the free-on-board level).**

18. TER 495 incorrectly concludes that the Commissioner has properly:

> … compared Habas' normal value and export price at the same level of trade, enabling a fair comparison[14]

[13] TER 495, p. 39.
[14] TER 495, p. 48.

and therefore has… *not made an adjustment to the normal value under subsection 269TAC(9) to account for export inland transportation costs*.[15]

19. The Commissioner appears to base this decision on a misinterpretation of s.269TAC(9), specifically that in order for the provision to be invoked, the adjustment must have affected the comparison between the export price and normal value:

> The Commission does not consider that the above has affected the comparison between export price and normal value because:
> • any export inland transportation cost to be captured in the export price was likely to be immaterial; and
> • no corresponding upwards adjustment was made under subsection 269TAC(9) to the normal value constructed for Habas under subsection 269TAC(2)(c).[16]

20. Article 2.4 and ss.269TAC(8) and (9) refer to the comparison of export price and normal value, i.e., the calculation of the dumping margin, and in particular, require that such a comparison shall be 'fair'.

    The second sentence of the Article elaborates on considerations pertaining to the 'comparison', namely level of trade and timing of sales on both the normal value and export price sides of the dumping margin equation. The third sentence of the Article has to do with allowances for 'differences which affect price comparability'.

21. Adjustments for inland transport come with the obligation[17] to ensure fair comparison of the level of trade between the normal value (in this case, constructed, and necessarily at the EXW-level) and the export price (determined at the FOB-level). Therefore, it is not open to the Commissioner to dismiss making the adjustment based on the conclusion that the absence of export inland transportation costs would not have "affected the comparison between export price and normal value". This is an irrelevant consideration under either subsection 269TAC(8) or (9), and would be inconsistent with an interpretation of Article 2.4.

D. **Further, to the extent that the normal value for Habas ought properly be determined under s.269TAC(1), then any adjustment to that exporter's normal value to account for inland transport to ensure fair comparison of the level of trade between the normal value and the export price be properly made under s.269TAC(8)**

22. In the event that the Review Panel recommends that the normal value for the exporter from Turkey, Habas, was incorrectly determined under s.269TAC(2)(c), then the Commissioner will further need to make any adjustment to the normal value so determined under s.269TAC(1) in accordance with s.269TAC(8) to account for inland transport to ensure fair comparison of the level of trade between the normal value and the export price (if any).

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[15] TER 495, p. 48.
[16] TER 495, p. 48.
[17] In *US – Hot-Rolled Steel*, the Appellate Body considered that "the obligation to ensure a 'fair comparison'" under Article 2.4 "lies on the investigating authorities" (Appellate Body Report, *US – Hot-Rolled Steel* at [178]).

E. **The reviewable decision was not the correct or preferable decision because the Commissioner's decision to terminate under s.269TDA(2) was based on an incorrect calculation and determination of negligible level of subsidies under s.269TDA(16).**

23. The incorrect calculation and determination of the level of the subsides the subject of Investigation 495 resulted in the incorrect decision of the Commissioner being satisfied that the countervailable subsidy never, at any time during the investigation period, exceeded the negligible level of countervailable subsidy for each exporter under s.269TDA(16).

24. This in turn resulted in the incorrect decision of the Commissioner to terminate the investigation in accordance with s.269TDA(2) so far as it relates to the exporters of the goods.

25. Had the level of the subsidies been determined correctly such subsidies would have exceeded the negligible level of countervailable subsidy for each exporter under s.269TDA(16) as evidenced in the information before the Commissioner at the time he made his decision.

26. This would have resulted in the Commissioner being unable to terminate the investigation in accordance with s.269TDA(2) and being required to assess whether such subsides had caused material injury to the Australian industry.

27. The applicant for review contends that the Commissioner being satisfied that the countervailable subsidy never, at any time during the investigation period, exceeded the negligible level of countervailable subsidy for each exporter under s.269TDA(16) and to terminating the investigation in accordance with s.269TDA(2) was incorrect, and that the correct or preferable decision is to find that the level of countervailable subsidies for each exporter exceeds the negligible level and to resume the investigation to determine whether such subsidies have caused material injury to the Australian industry.

**F. The reviewable decision was not the correct or preferable decision because the Commissioner's determination that no subsidy was provided under Program 22 in respect of the goods during the investigation period was determined incorrectly as to what constituted a benefit received under s.269T(1)**

28. The Commissioner appears to have incorrectly determined that a subsidy had to be received during the investigation period for such subsidy to be countervailable.

29. This is evidenced by the table of the assessments of subsidies at Section 5.4 of TER 495 under the heading "Countervailing Subsidy Received Yes/No", for Program 22, "No" is the Commission's entry[18]. Whether a countervailing subsidy has been received is not the correct test under Australian domestic law and WTO jurisprudence.

30. This is further reinforced by the statement in TER 495 that:

> While the Commission considers it likely that there may be a financial contribution under this program to the exporters at some time in the future (but in what amount and in what timeframe is unknown at this stage), it is the

[18] TER 495, p. 62.

> Commission's view that in this investigation, there has been no financial contribution under this program which has conferred a benefit in relation to the goods exported to Australia – the particular goods being rebar exported to Australia from Turkey during the investigation period."[19]

31. In its assessment of Program 22 at Appendix A of TER 495 the Commission states that… *[f]rom the information provided by the GoT and exporters, the Commission has determined that Colakoglu, Diler and Kroman have each received a financial contribution under this program, and that the contribution is a contribution by a private body directed to carry out a government function.*

32. However, the Commission found that for all three exporters the subsidies received were for investigations relating to other goods exported to other countries.[20]

33. The Commission concluded that… *In light of the above, the Commission has determined that no subsidy was provided under this program in respect of the goods during the investigation period.*[21]

    This approach and conclusion remains unchanged from SEF 495[22].

34. Liberty Steel submitted in its response to SEF 495, that the Commission's approach was incorrect, noting that:

> The evidence provided in the exporter submissions, GoT questionnaire and exporter verifications is clear that the exporters are entitled to and will receive a subsidy of USD 200,000 that is directly related to the exports of the goods the subject of the current investigation. That the subsidy has not yet been received, or applied for, is irrelevant. What is relevant is that the exporters have received such subsidies for similar investigations and all the available evidence supports that the exporters will receive subsidies for the current investigation.[23]

35. Liberty Steel further noted in its submission in response to SEF 495[24] that it is clear that:
    - the companies (exporters) cannot apply for the subsidy until after the closure of the investigation;
    - the investigation is still current; the exporters would not have been able to apply for the subsidy whilst the investigation is still current;
    - the subsidy in respect of the goods exported to Australia has not been received as the exporters could not as yet apply for such subsidy;
    - all four exporters have engaged representation for this investigation; and
    - all four exporters have previously applied for and received the subsidy in respect of similar investigations.

36. Liberty Steel further submitted that:

> based on the evidence above that it is reasonable to assume that the exporters will claim the full amount of the subsidy that they are entitled to in relation to this investigation once it has concluded.[25]

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[19] TER 495, p. 69.
[20] TER 495, p. 113.
[21] TER 495, p. 113.
[22] SEF 495, pp. 92-95.
[23] EPR Folio No. 495/033, p. 18.
[24] EPR Folio No. 495/033, p. 17.
[25] EPR Folio No. 495/033, p. 17.

and, further that:

> Financial support is granted per investigation by the Association. The Association may provide separate financial support for each investigation launched in the same country for the same product.[26]

37. Under s.269T(1), as subsidy is defined (reproduced in relevant part):

> ***subsidy***, in respect of goods exported to Australia, means:
> (a) a financial contribution:
> …
> (iii) by a private body entrusted or directed by that government or public body to carry out a governmental function;
> …
> (b) that involves:
> (iv) a direct transfer of funds from that government or body…

38. The definition under s.269T(1) reflects the definition in the WTO *Agreement on Subsidies and Countervailing Measures* (***SCM Agreement***) at Article 1.1, in relevant part:

> 1.1 For the purpose of this Agreement, a subsidy shall be deemed to exist if:
> (a)(1) there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as "government"), i.e. where:
> (i) a government practice involves a direct transfer of funds (e.g. grants, loans, and equity infusion), potential direct transfers of funds or liabilities (e.g. loan guarantees) …

39. The approach taken by the Commission in rejecting the subsidy under Program 22 as it had not been received by the exporters during the investigation period has been rejected under WTO jurisprudence. For example, in the WTO Disputes Settlement Panel in *Brazil – Aircraft* rejected the argument that a subsidy exists only when the transfer of funds had actually been effectuated:

> [A]ccording to Article 1:1(i) a subsidy exists if a government practice involves a direct transfer of funds or a potential direct transfer of funds and not only when a government actually effectuates such a transfer or potential transfer (otherwise the text of (i) would read: 'a government directly transfers funds … or engages in potential direct transfers of funds or liabilities') … As soon as there is such a practice, a subsidy exists, and the question whether the practice involves a direct transfer of funds or a potential direct transfer of funds is not relevant to the existence of a subsidy. One or the other is sufficient. If subsidies were deemed to exist only once a direct or potential direct transfer of funds had actually been effectuated, the Agreement would be rendered totally ineffective and even the typical WTO remedy (i.e. the cessation of the violation) would not be possible.[27]

40. Liberty Steel in its response to SEF 495 provided its estimates and calculations on the value and effect of the subsidy to the exporters that demonstrated, if treated correctly under Australian and WTO legislation, the level of the subsidy would be above negligible levels for each exporter.[28]

41. The applicant for review contends that the Commission ought not to have determined that a subsidy under Program 22 had not been received in respect of the exported goods, and that the correct or preferable decision is to determine that as Program 22 'involves' a direct transfer of funds the subsidy can be applied in respect of the goods exported and that the value of the subsidy should be assessed as the maximum value available for each exporter.

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[26] EPR Folio No. 495/033, p. 18.
[27] Panel Report, *Brazil – Aircraft*, at [7.13].
[28] CONFIDENTIAL ATTACHMENT 1, "Programs Other" Tab.

G. **The reviewable decision was not the correct or preferable decision because the Commissioner's calculation and attribution of the subsidy under Program 5 was incorrect in including the value of all exports to all countries in the calculations.**

42. In TER 495 the Commission apportioned the value of the subsidy to each unit of the goods using the value of all exports to all countries for each entity during the investigation period.[29]

43. The applicant for review contends this is incorrect as the subsidy is only applicable to certain exports as noted in the responses from the Government of Turkey[30]:

> Policy objective and/or purpose of the program.
>
> According to Article 40, Clause 1 of Income Tax Law No. 193 dated January 6, 1961, which was amended by Law No. 4108 dated June 2, 1995, all taxpayers may have an additional deduction of a lump sum amount from their gross income **resulting from exports, construction, maintenance, assembly and transportation activities abroad**. **This amount may not exceed 0.5 % of the proceeds they earned in foreign exchange from such activities**. This deduction is presumed to cover the expenditures without documentation but incurred from exports, construction, maintenance, assembly and transportation activities abroad[31]. (**emphasis added**)
>
> This support is an additional deduction of a lump sum amount from the gross income **resulting from exports, construction, maintenance, assembly and transportation activities abroad**[32]. (**emphasis added)**
>
> All taxpayers can receive this assistance provided that they generate an income **resulting from exports, construction, maintenance, assembly and transportation activities abroad**. However, the deduction amount may not exceed 0.5 % of the proceeds they **earned in foreign exchange** from such activities.[33] (**emphasis added**)

44. Apportioning the subsidy value over the value of all exports, where it is likely such exports may not fit the criteria specified by the Government of Turkey for the subsidy, would dilute the value of the subsidy as it applied to exports of the goods to Australia.

45. It is for the above reason that Liberty Steel submitted in response to SEF 495 that:

> The value of the subsidy should be calculated on the export price of the goods exported to Australia, multiplied by 0.5 per cent, multiplied by the applicable corporate tax. This method is in accordance with s.269TACD(1) which states "a countervailable subsidy has been received in respect of goods.[34]

46. The applicant for review contends that the Commission ought not to have apportioned the value of the subsidy under Program 5 using the value of all exports to all countries as doing so would likely dilute the value of the subsidy, and that the correct or preferable decision is to determine that the value of the subsidy be calculated on the export price of the goods exported to Australia, multiplied by 0.5 per cent, multiplied by the applicable corporate tax.

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[29] TER 495, p. 98.
[30] EPR Folio No. 495/013.
[31] EPR Folio No. 495/013, p. 32.
[32] EPR Folio No. 495/013, pp. 32-33.
[33] EPR Folio No. 495/013, p. 33.
[34] EPR Folio No. 495/033, p. 13.

H. **The reviewable decision was not the correct or preferable decision because the Commissioner's calculation of the subsidy under Program 17 was done with not having regard to the effect of the repayment of loans in the exporters currency of choice**

47. Liberty Steel submitted the following on the above effect in response to SEF 495:

> Liberty Steel observes that loans under this program may be repaid in Turkish Lira (TRY or TL) or foreign currency.
>
> Firms can repay either in as usage foreign currency or in TL equivalent amount of principal and interest by using exchange rate determined by Türk Eximbank.[35]
>
> Liberty Steel submits that the above provision allows for further benefits under this program to be provided to the exporter. It is unclear whether the repayment of the principal and interest in foreign currency or TRY references the amount originally set at the loan date or the amount at conclusion of the loan.
>
> By way of example in a situation where the TRY is declining against the USD where the loan amount was USD 250,000, with an exchange rate of 4.00 TRY to the USD, the amount due for repayment by the exporter is TRY 1,000,000.
>
> When the repayment falls due after the year, the exchange rate of the TRY to the USD may be 5.00 TRY to the USD. The exporter has the choice of repaying the loan amount in USD or TRY.
>
> Clearly, in such a situation it is in the exporter's interest to convert USD 200,000 currency obtained from the exports and repay the TRY 1,000,000 leaving the exporter with a surplus of USD 50,000 from the loan or TRY 250,000.
>
> Likewise, in a situation where the TRY is increasing against the USD for the same loan amount of USD 250,000, with an exchange rate of 5.00 TRY to the USD, the amount due for repayment by the exporter is TRY 1,250,000, When the repayment falls due after the year the exchange rate of the TRY to the USD may be 4.00 TRY to the USD.
>
> The exporter has the choice of repaying the loan amount in USD or TRY, clearly in such a situation it is in the exporter's interest to repay the loan in USD 250,000 currency obtained from exports as converting the USD held by the exporter to TRY would only realise TRY 1,000,000 leaving the exporter with a deficit of TRY 250,000 still due on the loan to repay.
>
> Liberty Steel requests that the Commission check any such repayments to assess whether such a benefit has been provided.[36]

48. The Commission responded to the submission in TER 495 noting:

> The Commission notes that Turk Eximbank determines the exchange rate for repayments. In order for there to be the benefit submitted by Liberty Steel, Turk Eximbank would have to choose an uncommercial rate.
>
> The Commission has seen no evidence that this is the case. The Commission further notes that no repayments on loans issued during the investigation period under this program were made by any exporter during the investigation period. It therefore did not observe any such benefit as described by Liberty Steel occurring.[37]

49. Liberty Steel notes that the above response does not indicate whether the Commission examined whether a benefit has been provided, or would be provided under the definition of a subsidy in s.269T(1).

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[35] EPR Folio No. 495/013.2 (Exhibits 20-37), pp. 2 & 11.
[36] EPR Folio No. 495/033, p. 20.
[37] TER 495, pp. 67-68.

50. That exporters could repay the loan in the currency of their choice was noted in the application.[38]

51. That the Turkish Lira (**TRY**) had devalued significantly against the US Dollar (**USD**) was also raised as an issue in the application with the chart showing the TRY had fallen from approximately 3.5 TRY to the USD to approximately 5.5 TRY to the USD.[39]

52. The size of such a devaluation approximates 50% and represents a significant benefit to the exporter where the exporter can repay a loan issued under Program 17 in the currency of their choice.

53. The applicant for review contends that the Commission ought to have made further inquiries over the benefit conferred whereby the exporter can repay the loan in the currency of their choice, in order to accurately assess the value of the subsidy under Program 17. The applicant contends that the correct or preferable decision is to determine that the value of the subsidy be calculated after seeking clarification and evidence from the Government of Turkey and the exporters on this issue. The applicant contends that on the submissions and evidence provided by Liberty Steel the Commission should have sought an extension to the Final report to clarify the issue given the size and relevance of the potential subsidy. The applicant contends that in any resumption of Investigation 495 such information and evidence should be sought by the Commission from the Government of Turkey and the exporters.

**I. The reviewable decision was not the correct or preferable decision because the Commissioner's attribution of the subsidies under Programs 5, 8, 22, 23 and 25 was done with not having regard to the tax free element and effect of the subsidy.**

54. Liberty Steel's submission in response to SEF 495 noted that the benefits received under the above programs are effectively tax-free subsidies and need to be grossed up to apply the actual effect of the subsidies received. The revenue forgone is the tax forgone, but the net benefit to the exporter is higher. The subsidy should be apportioned to the export price based on the grossed up value of the subsidy. That is the value of the subsidy calculated above divided by a ratio calculated as *1 minus the applicable corporate tax rate*.[40]

55. The approach is in accordance with the *SCM Agreement* which states:

> The term "countervailing duty" shall be understood to mean a special duty levied for the purpose of offsetting any subsidy bestowed directly or indirectly upon the manufacture, production or export of any merchandise, as provided for in paragraph 3 of Article VI of GATT 1994.

56. Apportioning the benefit based solely on the revenue forgone understates the value of the subsidy to the exporter and would not offset the subsidy bestowed on the exporter.

57. The effect of the tax subsidy is to increase the exporters' after-tax profit. This can mean a higher profit where the exporter maintains its price. However, crucially, it means the exporter can sell at a

[38] EPR Folio No. 495/001, p. 111.
[39] EPR Folio No. 495/001, p. 102.
[40] EPR Folio No. 495/033, pp. 13 and 24-25.

lower price and achieve the same after-tax return where the subsidy is in place. The stated aim of many of the Government of Turkey's subsidy programs is to make exports more competitive:

> The **facilities aim to increase the competitiveness of Turkish exporters in foreign markets**[41]…
>
> **aiming at increasing the competitiveness of Turkish exporters in international markets** by enabling them to sell Turkish goods on deferred payment terms and eliminating overseas risks; thereby **encouraging them to enter into new and target markets**.[42]
>
> The program aims at **increasing the competitiveness of Turkish exporters in foreign markets**[43]…
>
> **increase of exporters' share in international trade, to increase their competitiveness** and security in international markets.[44]
>
> **Main objectives are to increase the market share of Turkey in international trade, enhance the competitiveness of Turkish exports** [45]

Providing a subsidy that enables exporters to reduce prices whilst still achieving the same profit after tax achieves this.

58. The Commission stated in TER 495 that:

> In this case, the Commission has not been provided with any evidence which would suggest that this approach would not most accurately represent the benefit received the exporters. To gross-up the benefit as submitted by Liberty Steel would also not be preferable because it would reflect a scenario where the exporter would be paying additional tax on top of the tax it would normally have to pay if the deduction did not exist.[46]

59. This is incorrect, Liberty Steel provided worksheets to the Commission in its attachments to its submission to the SEF demonstrating the effect of the tax-free nature of the subsidies.[47]

60. The applicant for the review contends that the Commission ought to have had regard to the tax-free nature of the subsidies under the above programs and that the correct or preferable decision is to take into account the tax-free nature of such subsides in determining the level of interim countervailing duties that should be applied to offset the subsides bestowed on the exporters.

## J. The reviewable decision was not the correct or preferable decision because the Commissioner's calculation of the subsidy under Program 17 was done with not having proper regard to the differences in short-term and long- term interest rates.

61. Liberty Steel submitted the following in response to SEF 495:

> Liberty Steel provides the following observations on the loans provided by Turk Eximbank (Eximbank or TE).
>
> a. Term of loans

[41] EPR Folio No. 495/013, p. 71.
[42] EPR Folio No. 495/013, pp. 73-74.
[43] EPR Folio No. 495/013, p. 74.
[44] EPR Folio No. 495/013.1, p. 286.
[45] EPR Folio No. 495/013, p. 121.
[46] TER 495, pp. 65-66.
[47] EPR Folio 495/033 (Non-Confidential Attachment 1).

> The period of 360 days is treated as a full year.
> The calculation of interest rates is based on 360 full days per year.[48]

Liberty Steel submits that it is clear that any comparison of loans should be for loans on a full year and not lesser periods as shorter-term loans of six or nine months would likely incur lower rates.[49]

62. The Commission responded to the submission in TER 495 noting:

> The Commission has used interest rate data from privately owned banks and government owned banks operating on a commercial basis for short-term loans (as each loan provided under the program must be repaid within 360 days),[50]
>
> The Commission considers that short-term loans provide a better comparison (for the purposes of establishing a benchmark) than long term loans in this investigation because they are similar in duration to loans provided under this program. [51]
>
> Further, Liberty Steel has provided no evidence for its contention regarding the relative interest rates of short and long term loans,[52]

63. The loans from the TE bank are for a period of 1 year… *the period of 360 days is treated as a full year… the calculation of interest rates is based on 360 full days per year.*

64. A comparison of loans for less than one full year as stated by the Commission is not a proper comparison of loans.

65. The statement that Liberty Steel provided no evidence regarding the relative interest rates is incorrect. In its submission (dated 17 April 2019), in response to *Exporter* and *Foreign Government Questionnaires*, Liberty Steel noted the following responses and information:

> The 1 Year bond rate is the appropriate rate as it reflects the 1 year terms offered to the exporters. The 1 Year bond rate reflects the cost to the GOT of Turkey in borrowing the money it provided to the exporters. Details of the 1 Year Government bond rate are attached. The bond rates ranged from 13.33% to 27.51% during the investigation period which is substantially above the effective rate of 4.17% applicable to Program 17.[53]

Liberty Steel considered that bond rates were a good indication of the cost of borrowing that would reflect the cost of lending. As the bond rates have moved over the year by over 14% in a period of volatility for interest rates it would be expected that there would be differences in rates offered for shorter periods of time.

66. This was evidenced in the above submission where Liberty Steel further noted that:

> Available deposit interest rates in September 2018 in Turkey were 16.25% for one month and 17.75% for one year.[54]

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[48] EPR Folio No. 495/013.2 (Exhibits 20-37) at p. 45.
[49] EPR Folio No. 495/033, p. 20.
[50] TER 495, p. 104.
[51] TER 495, p. 67.
[52] TER 495, p. 67.
[53] EPR Folio No. 495/030, p. 11.
[54] EPR Folio No. 495/030, p. 11.

This represents a not insignificant difference of 1.5% in interest rates for a loan of one year as compared to a shorter term loan of one month.

67. Liberty Steel provided in the above submission movements in the Turkish interest rates over the period from 8% to 24% over the course of the year.[55]

    The volatility in the scale of interest rate changes over the period would be reflected in differences in interest rates over different terms.

68. Liberty Steel also provided evidence of differences in deposit interest rates of one year and deposit rates for terms of 1 month, 3 months, 6 months and one year.[56]

    The difference between rates for six months and one year was a not insignificant 0.75 per cent. Such differences in shorter term deposit rates and one year rates would be reflected in shorter term borrowing rates and one year rates.

69. Liberty Steel also provided evidence of differences in loan terms of one year compared to five years in its submission to the SEF at Confidential Attachment 1.

70. Liberty Steel also provided a link to Libor rates for 2018 in its Confidential Attachment to its submission to the SEF that evidenced not insignificant differences in 1 month, 3 month, 6 month and one year Libor rates. Such changes in Libor rates would be reflected in changes to borrowing rates.

71. The evidence that Liberty Steel provided demonstrated differences in shorter term interest rates compared to one year terms, yet it is apparent that the Commission has done an incorrect comparison of loans using shorter term rates versus one year rates.

72. The applicant for the review contends that the that the Commission ought not to have compared shorter term loans from commercial banks to the one year loans from the TE bank under Program 17, and that the correct or preferable decision is to compare loans from commercial banks and the TE bank issued under the same terms of one year.

[55] EPR Folio No. 495/030 (Confidential Attachment 2) at p. 2.
[56] EPR Folio No. 495/030 (Confidential Attachment 2) at p. 11.