Oral Liquid Paracetamol from the Republic of Ireland

Non-Confidential

Anti-Dumping Duties Report

Dumping and Countervailing Duties Act 1988

Dumping Investigation

Tariff Policy and Trade Rules Group

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Abbreviations

The following abbreviations are used in this Report:

Act	Dumping and Countervailing Duties Act 1988 (and its subsequent amendments)
AFT	AFT Pharmaceuticals Limited
Agreement	World Trade Organisation Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
CLO	Crown Law Office
DHB	District Health Board
DV	Discretionary Variance
EC	European Commission
€	Euros
Final Report	*Final Report Oral Liquid Paracetamol from the Republic of Ireland*
FOB	Free on Board
Ireland	The Republic of Ireland
Minister	Minister of Commerce of New Zealand
Ministry	Ministry of Economic Development of New Zealand
mg	Milligram
ml	Millilitre
NV(VFDE)	Normal Value (Value for Duty Equivalent)
OLP	Oral liquid paracetamol
OTC	Over the counter
PHARMAC	New Zealand's Pharmaceutical Management Agency
Pinewood	Pinewood Healthcare Limited
POI	Period of investigation, being the year ended 31 August 2004
PSM	PSM Healthcare Limited (trading as Healthcare Manufacturing Group New Zealand)
WTO	World Trade Organisation (WTO)

1. Executive Summary

Introduction

1. The purpose of this report is to set out the issues that need to be considered by the Minister of Commerce (Minister), in making a decision pursuant to the Dumping and Countervailing Duties Act 1988 (the Act), on whether or not to impose anti-dumping duties on oral liquid paracetamol (OLP) imported from the Republic of Ireland (Ireland).

Proceedings

2. On 30 March 2005, the then Minister made a final determination that imports of OLP from Ireland were being dumped and threatening to cause material injury to the New Zealand industry manufacturing OLP.

3. The Minister deferred the decision on whether or not to impose duties until the outcome of 2004 tender for OLP by the Pharmaceutical Management Agency of New Zealand (PHARMAC) was known, or any other change occurred that affected OLP supply in the dispensary market segment. The Minister deferred the decision regarding duties, as imposing duties at the time of the final determination would have remedied injury caused by factors other than the dumped OLP for the remaining period of the existing PHARMAC supply arrangements.

4. Market changes mean that the Minister now needs to consider the imposition of duties, being that on 30 June 2005 the previous supply arrangements between PHARMAC and the importer of the Irish OLP expired. This was followed by an announcement on 29 July 2005 of new supply arrangements between PHARMAC and the importer of Irish OLP resulting from the 2004 tender.

5. The Minister has made a determination that the Irish OLP is dumped and threatens to cause material injury to the New Zealand industry. The purpose of this report is solely, therefore, to consider first whether duties should now be imposed, particularly in light of the tender results announced by PHARMAC, and if so, the rate or amount and timing of their implementation.

6. An *Interim Report* was circulated to interested parties on 3 November 2005 to enable them to comment on the proposals. Submissions from interested parties in response to the *Interim Report* have been included in the analysis in this report.

Should Duties be Imposed?

7. During the investigation submissions were made that, as the importation of Irish OLP also involves supply subject to PHARMAC agreements, it was inappropriate that anti-dumping duties be imposed. PHARMAC considered that the Minister should utilise the discretion available under the Act and refuse to impose duties in these circumstances. The Ministry considers that the explicit remedies made available to the industry via the Act, overrides other public interest considerations when determining whether or not an anti-dumping duty should be imposed, including PHARMAC's involvement with the product. (Discussion on the extent of

the Minister's discretion to impose duties under the Act, can be found in Section 3 of this report.)

8. The Ministry considers that the anti-dumping duties will be effective in preventing injury when the current supply contracts expire and cannot conclude that the duties would not be effective prior to that point. Not to impose duties would also frustrate the purpose of the Act. The Ministry considers therefore that duties should be imposed and are in fact required by the Act.

Method and Level of Duty Imposition

9. This report recommends that the Minister impose anti-dumping duties on OLP from Ireland by way of a normal value (value for duty equivalent) reference price mechanism for Pinewood Laboratories Limited set at the levels of [redacted] Euros for the 120mg 1000ml presentations and [redacted] Euros for the 250mg 1000ml presentations.

10. The same rates of duty are recommended for any other exporters of OLP from Ireland. No duties are proposed for other size presentations of OLP because they are either not dumped, or were held not to be contributing to the threat of injury to the New Zealand industry.

Date of Implementation of Duties

11. Duties would normally be applied from the day after the date of the Minister's final determination, in this case 31 March 2005.

12. However, in the current case the dumped OLP was not the cause of the material injury suffered by the New Zealand industry prior to 1 July 2005. Having regard to Pinewood's advice that it raised its prices to non-dumped levels prior to 1 July 2005 and the time required make recommendations to the Minister, the Ministry is recommending that duties apply from the day after the date the Minister makes a decision on duties.

2. Background

13. On 30 March 2005, the Minister of Commerce (Minister) made a positive final determination in accordance with Section 13 of the Dumping and Countervailing Duties Act 1988 (the Act), concerning oral liquid paracetamol (OLP) from the Republic of Ireland (Ireland).

14. The Minister determined that most of the OLP imported from Ireland during the period of investigation (POI), being the year ended 31 August 2004, was dumped and by reason thereof material injury to the New Zealand industry was threatened. The determination also concluded that material injury had been caused to the New Zealand industry by factors other than the dumped goods (see paragraph 30). The Minister deferred the decision on whether or not to impose duties, because if duties had been imposed at the time of the final determination this would have resulted in the duties remedying injury caused by factors other than the dumped OLP.

15. Details of the background to the Minister's decision can be found in a report prepared by the Ministry of Economic Development (the Ministry) entitled *Oral Liquid Paracetamol from the Republic of Ireland* (*Final Report*).

16. In making the final determination, the Minister agreed that a decision on anti-dumping duties should be made when the outcome of PHARMAC's 2004 tender for OLP was known, or when any other change occurred that affected supply in the dispensary market.

17. As the Minister has made a final determination that there is dumping and that material injury is threatened, the purpose of this report is solely to assess whether duties should be imposed on imports of Irish OLP, and if so, the type, rate, timing and amount of anti-dumping duty. In considering whether duties should be imposed, this report examines their potential impact and ability to be effective.

18. An *Interim Report* was circulated to interested parties on 3 November 2005 to enable them to make submissions upon its proposals. Submissions were received from all interested parties being; the New Zealand Pharmaceutical Management Agency (PHARMAC); Pinewood Healthcare Limited (Pinewood) the manufacturer and exporter from Ireland; PSM Healthcare Limited, trading as Healthcare Manufacturing Group New Zealand (PSM) the New Zealand manufacturer; AFT Pharmaceuticals Limited (AFT) the importer of the OLP from Ireland, and the European Commission (EC). The submissions have been incorporated into the analyses in this report.

2.1 Availability of Information

19. The Ministry uses its public file system to make available non-confidential versions of all correspondence relating to an anti-dumping investigation. This complies with section 10 of the Act and Article 6 of the World Trade Organisation Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the Agreement).

20. While the final determination for OLP was made on 30 March 2005 and the investigation into dumping and injury has been completed, the Ministry has continued the public file for the investigation and will do so until the decision on duties has been made.

2.2 The Market

21. The Irish OLP enters New Zealand under tariff items and statistical keys 3003.90.09.10K and 3004.90.19.19G of the New Zealand Tariff and is described as:

> *Oral liquid paracetamol in various strengths and pack sizes excluding: elixirs and paracetamol in other forms.*

22. The New Zealand OLP market has two major segments; the dispensary market segment (comprised of community pharmacies and District Health Board (DHB) hospitals); and the over-the-counter (OTC) market segment. The dispensary portion of the market uses 500 millilitre (ml) and 1000ml presentations, from which OLP is dispensed to end-users. The 500ml presentation is exclusive to the hospital market and the 1000ml presentation is exclusive to the community pharmacy market. Neither product can be sold into the other market. The OTC portion of the market is based on 100ml and 200ml presentations. All presentations are available in both 120 milligram (mg) and 250mg strengths.

23. PSM was the only New Zealand manufacturer of OLP during the period of investigation (POI). PSM's application for a dumping investigation was based on the injury it suffered due to the loss of sales to dumped Irish goods. These sales were lost as a result of the award by PHARMAC of supply arrangements in the New Zealand dispensary market segment and the undercutting of its prices by the Irish OLP in the over-the-counter (OTC) market segment.

24. PHARMAC negotiates prices and runs tenders for products sold into the dispensary market segment on behalf of the Government and operates the New Zealand Pharmaceutical Schedule, which lists the Government subsidy or DHB purchase price for certain pharmaceuticals. The dispensary market segment also has a residual amount of dispensing by pharmacists to customers without prescriptions and to private hospitals and rest homes.

25. The dispensary portion of the market, which is subject to PHARMAC supply arrangements, accounts for approximately 75 percent by volume of the total New Zealand OLP market. Of this 75 percent, about 10 percent is accounted for by DHB hospitals with the remainder supplied through community pharmacies.

26. Community pharmacies are covered by Section B of the Pharmaceutical Schedule. As part of the way that Section B operates, some pharmaceuticals are only subsidised for a supplier that has been granted sole supply status. This means community pharmacies must purchase the listed brand of the pharmaceutical in order to claim the subsidy for dispensing the product.

27. DHB hospitals are covered by Section H of the Pharmaceutical Schedule, which lists the prices at which DHB hospitals can purchase pharmaceuticals paid for

from their own budgets. Some pharmaceuticals, such as OLP, have hospital supply status, which is similar to the sole supply status for community pharmacies, except that a specified discretionary variance (DV) amount may apply. The DV means that DHB hospitals can purchase pharmaceuticals from suppliers, other than the supplier with hospital supply status, up to the specified percentage of its total purchases for that product. The DV amount for OLP during the POI was 20 percent of the annual purchases of OLP by a DHB.

2.3 Basis for the Minister's Final Determination

28. The *Final Report* concluded that the loss of sales volume incurred by PSM was caused by contractual arrangements for supply to the dispensary market between AFT, the importer of the Irish OLP, and PHARMAC. Supply to community pharmacies was covered by sole supply status awarded to AFT and 80 percent of the DHB hospitals OLP volume was also granted to AFT, via hospital supply status.

29. PSM's multi-supplier prices were the prices at which PSM was prepared to use to compete with in the market, at the time the arrangements were awarded to AFT. PSM did not enter either of PHARMAC's 2001 two competitive tender processes for the award of supply of OLP to the dispensary market segment, from which the arrangements with AFT resulted.

30. The dumped goods were found not to have caused material injury to PSM, because the potential savings to PHARMAC through non-dumped prices from AFT, were significant enough, that if non-dumped prices had been offered, PHARMAC would likely have accepted them. That is, the Ministry concluded that, if PSM had entered a tender bid, against a non-dumped tender bid from AFT, PSM's prices were not sufficiently low enough for PHARMAC not to have accepted non-dumped prices from AFT. Therefore, if AFT had offered non-dumped prices to PHARMAC, PSM would likely still have been excluded from the majority of the OLP market with the same consequent loss of sales volume.

31. While the dumping was not found to be the cause of the injury to PSM, its prices were undercut, depressed and suppressed due to the loss of access to the majority of the market volume. Consequently, PSM suffered significant declines in sales volume, revenue, market share, profits, productivity, return on investments, capacity utilisation and cash flow.

32. The determination of a threat of material injury was based on PHARMAC's 2004 tender round, for which bids closed on 28 February 2005, combined with the (then) impending expiry of the existing supply arrangements on 30 June 2005. Both AFT and PSM entered bids for the 2004 tender. The Ministry notes that the level of PSM's bids while not successful were of a competitive nature and cannot be characterised as un-competitive in the manner that its 2001 market multi-supplier prices were, when compared to a likely un-dumped AFT bid.

33. The Minister deferred the decision on duties due to the unusual market circumstances caused by PHARMAC's supply arrangements, the timing of the 2004 tender and because the material injury affecting PSM (at the time of the final

determination) was being caused by factors other than the dumped goods. If anti-dumping duties had been imposed on 30 March 2005 when the Minister made the final determination, they would have only served to be punitive to AFT (for a certain period) if levied from that date, as the injury suffered by PSM was caused by factors other than the dumped goods. The dumping did, however, threaten to cause material injury and the threat became operative from the point of expiry of 2001 supply arrangements.

34. The decision of whether or not to impose duties on the dumped OLP was deferred by the Minister until the outcome of the PHARMAC tender was known, or any other change occurred that affected supply in the dispensary market segment.

35. The *Final Report* found dumping margins (reported as Table 4.2 of the *Final Report)* as shown in Table 1.1 below.

Table 1.1: Established Dumping Margins

Presentation and Strength		Normal Value (€)	Export Price (€)	Dumping Margin (€)	Dumping Margins as Percentage of Export Price: Range of Transaction-to-Transaction Margins	Dumping Margins as Percentage of Export Price: Weighted-Average of the Range of Margins
100ml	120mg	[redacted]	[redacted] - [redacted]	[redacted] to [redacted]	[redacted] to [redacted] %	[redacted]%
	250mg	[redacted]	[redacted] - [redacted]	[redacted] to [redacted]	[redacted] to [redacted] %	[redacted]%
200ml	120mg	[redacted]	[redacted] - [redacted]	[redacted] to [redacted]	[redacted] to [redacted] %	[redacted]%
	250mg	[redacted]	[redacted] - [redacted]	-[redacted] to -[redacted]	Not Dumped	[redacted]%
500ml	120mg	[redacted]	[redacted] - [redacted]	-[redacted] to -[redacted]	Not Dumped	[redacted]%
	250mg	[redacted]	[redacted] - [redacted]	-[redacted] to -[redacted]	Not Dumped	[redacted]%
1000ml	120mg	[redacted]	[redacted] - [redacted]	[redacted] to [redacted]	[redacted] to [redacted] %	[redacted]%
	250mg	[redacted]	[redacted] - [redacted]	[redacted] to [redacted]	[redacted] to [redacted] %	[redacted]%

Interim Report Submissions

European Commission

36. The European Commission (EC), in response to the *Interim Report*, again questioned the basis on which the Minister made a positive final determination that there was dumping threatening to cause material injury to the New Zealand industry.

37. The EC noted that the Ministry calculated a weighted-average dumping margin for all exported OLP during the POI that was under 2 percent and argued that was

de minimis within the meaning of Article 5.8 of the Agreement and therefore the investigation should have been terminated. The *de minimis* rule requires that an investigation be terminated immediately if the margin of dumping is less than 2 percent, expressed as a percentage of the export price. During the investigation the Ministry considered the meaning of Article 5.8 and considered that when using transaction-to-transaction methodology the "margin of dumping" cannot be interpreted as being anything other than individually computed transaction-to-transaction dumping margins and uses a weighted average margin based on the transactions for reporting purposes only.

38. The EC stated that as the overall dumping margin for OLP was *de minimis*, and that even when analysing the dispensary market segment (the 500ml and 1000ml presentations) in isolation, the dumping margin based on the Ministry's own calculations remains *de minimis,* so the investigation should be terminated without the imposition of measures.

39. The EC also submitted that the Ministry had incorrectly distinguished "between two major market segments and the presentations sold therein", being the dispensary and OTC portions of the market.

40. The EC stated that "[i]t must be assumed that there is a high degree of inter-changeability between the 500ml and 1000ml presentations" within the dispensary part of the market and therefore "there is no basis in the Anti-Dumping Agreement for calculating several separate margins of dumping for the same like product that was done in the current case (one margin for each of the presentations concerned)." As noted in paragraph 22, the 500ml and 1000ml OLP are not interchangeable, which is due to the peculiarities of the Pharmaceutical Schedule and the relevant regulations.

41. The EC submitted that decisions by the World Trade Organisation (WTO) Appellate Body are clear and mean that the Ministry is "obliged to calculate one single margin of dumping for the product as a whole" and "must offset the "positive" amounts of dumping against the "negative" dumping amounts, since all fall under the same like product definition. Failure to do so consists of zeroing including on a model basis, which has consistently found to be in breach of WTO rules." The Ministry notes that the Appellate Body has stated in its decisions in its relevant cases that relate to the weighted-average to weighted-average methodology only and not to transaction-to-transaction method.

42. It should be noted, that subsequent to the *Final Report*, the *United States - Final Dumping Determination on Softwood Lumber From Canada, Recourse to Article 21.5 of the DSU by Canada* WTO Panel decision has been released. The Ministry notes that the panel ruled that when using the transaction-to-transaction methodology calculating dumping margins by either disregarding any negative dumping margins or bringing those negative margins to zero (zeroing) was not inconsistent with the WTO rules. Although the two cases are not exactly the same, for example, in the way that the OLP market is segmented, the Panel decision supports the approach taken by the Ministry in the *Final Report* as the Ministry included all the dumping margins in the range of matched sales to result in transaction-to-transaction dumping margins, both those that are positive and

negative. In fact the recent decision would support the calculation of dumping margins via a method that would result in higher dumping margins through either zeroing or disregarding non-dumped transactions.

Pinewood

43. Pinewood also made submissions on the wider investigation process in response to the *Interim Report*. Pinewood submitted that the investigation process "lacked consistency throughout, moving from transaction-to-transaction methodology to weighted averages, from facts to unsubstantiated opinion. Relevant facts have been omitted and illogical conclusions reached. Our submissions have not been addressed in a factual manner." Pinewood added that it had spent an inordinate amount of time correcting errors and that MED "finally accepted our stance on this … The Ministry has made so many non-evidenced based judgements in favour of PSM on areas such as threat of injury, and statements such as 'the Ministry believes that there is a strong likelihood that AFT will bid on the basis of dumped prices'."

44. The Ministry notes that the transaction-to-transaction methodology was used in the investigation to establish whether the goods were dumped and the weighted average to weighted average methodology was not used to calculate dumping margins at any stage during the investigation.

45. Pinewood also said that "the investigation should not have been initiated as the complainant PS[M] failed to enter a tender bid to P[HARMAC]. As a result of this they lost the business. There is no causal link between the alleged injury and the alleged dumping. The investigation should have been terminated when it was established by MED that the weighted average dumping margin was *[de minimis]*". Pinewood argued that because the different models investigated were "like goods" this implied that the Ministry intended to treat the product range as a whole. "If this had been done in a consistent and fair manner the investigation should have been terminated." Pinewood added that "in order to find against Pinewood, MED separated the different presentations and market segments thus finding dumping of 4 [percent] when looking at 1000ml in isolation." Pinewood referred to the Agreement and stated that non-dumped imports can be used to offset dumping on other imports and that the Ministry is not entitled to disregard these.

46. The Minister has made a final determination on the investigation, the basis for which is set out in detail in the *Final Report*. The basis for that determination cannot be re-visited in this report that has to assess whether anti-dumping duties should be imposed as a result of that determination and if so at what amount.

47. The Ministry notes, however, that the submissions outlined above reiterate in all material respects submissions made during the investigation which were addressed in the *Final Report,* in particular from paragraph 292 of the *Final Report*, and need not be repeated in this report.

2.4 Recent Market Changes

48. The previous PHARMAC supply arrangements expired on 30 June 2005. The threat of material injury determined by the Minister therefore became operative at the point the previous supply arrangements expired on 30 June 2005. PHARMAC announced the results of the 2004 tender for OLP on 29 July 2005. Sole supply status for community pharmacies and 80 percent of the DHB hospital volume (through hospital supply status) was awarded to AFT, replicating the previous arrangements.

49. The Ministry reported to the Minister on the OLP market changes and advised that the Ministry's consideration of the issues surrounding whether or not to impose duties would commence following the 30 June expiry of supply arrangements for OLP. The draft of the report to the Minister (the Interim Report) was released to interested parties and noted that interested parties would be given the opportunity to comment on the Ministry's findings and conclusions, by way of an *Interim Report*, before recommendations were made to the Minister.

50. The new subsidy levels for community pharmacies are shown in Table 2.1. The sole supply brand is the Irish OLP, as under the previous arrangements that resulted from the 2001 tender.

Table 2.1 Changes for Supply of 1000ml OLP to Community Pharmacies

Strength	Previous subsidy	New subsidy	Sole supply brand (supplier)	Date subsidy changes	Date sole supply begins
120mg/5ml	NZD7.29	NZD6.99	Junior Parapaed (AFT)	01-09-05	01-12-05
250mg/5ml	NZD7.70	NZD7.25	Six Plus Parapaed (AFT)	01-09-05	01-12-05

51. Table 2.2 shows the new purchase prices for DHB hospitals. The hospital supply status and the DV brands are the same as listed under the previous arrangements, with the Irish OLP holding hospital supply status. PSM, the New Zealand manufacturer is able to sell its OLP under the DV, as its Paracare brand is one of the listed DV brand suppliers.

Table 2.2 Changes for Supply of 500ml OLP to DHB Hospitals

Strength	Previous price levels	New price levels	Hospital supply brand (supplier)	DV Limit	Date subsidy changes	Date DV limits begin	DV Brands (supplier)
120mg/5ml	NZD5.50	NZD4.55	Junior Parapaed (AFT)	20%	1-09-05	1-11-05	*
250mg/5ml	NZD5.60	NZD4.55	Six Plus Parapaed (AFT)	20%	1-09-05	1-11-05	**

*Paracare junior suspension (HMG)
*PSM paracetamol eilxir paediatric (HMG)
*Pamol (Pfzier)
*Amcal
*Douglas

**Paracare double strength suspension (HMG)
**Amcal
**Douglas
**Pamol (Pfzier)

3. Anti-Dumping Duties

52. Following the Minister's positive final determination that the Irish OLP was dumped and threatening to cause material injury to the New Zealand industry, and recent market changes, the Minister must now decide whether or not to impose anti-dumping duties; and if so the rate or amount, and timing of those duties.

53. The relevant parts of the Act relating to the imposition of anti-dumping duties are set out below:

> **14. Anti-Dumping and Countervailing Duties**
>
> (1) At any time after the Minister makes a final determination under section 13(1) of this Act in relation to goods, the Minister may give notice of the rate or amount of duty determined under subsection (4) of this section (which notice may be given simultaneously with, or at any time after, the notice given under section 13(2) of this Act) and there shall, with effect on and from the applicable date referred to in section 17 of this Act, be imposed,–
>
> (a) In respect of those goods that are dumped, a duty to be known as anti-dumping duty:
>
> …
>
> (2) Anti-dumping duty … imposed under subsection (1) of this section, shall be collected and paid on the demand of the Collector on and from the day after the date on which the notice under subsection (1) of this section is published in the Gazette.
>
> …
>
> (4) The anti-dumping duty … in the case of goods to which this section applies shall be a rate or amount determined by the Minister,–
>
> (a) In the case of dumped goods, not exceeding the difference between the export price of the goods and their normal value; and
>
> …
>
> (5) In exercising the discretion under subsection (4) of this section, the Minister shall have regard to the desirability of ensuring that the amount of anti-dumping … duty in respect of these goods is not greater than is necessary to … remove the threat of material injury to an industry …
>
> …
>
> (7) The Minister may, by notice, terminate, in whole or in part, the imposition of any anti-dumping or countervailing duty imposed under this section, with effect from the date specified in the notice, which date may be prior to the date of the notice.
>
> …
>
> **17. Retrospective measures**
>
> [(1) Except as provided in this section, the day on and from which anti-dumping duty or countervailing duty is payable on goods to which section 14 of this Act applies shall be,—
>
> …
>
> (b) … the day after the date that the Minister makes a final determination under section 13(1) of this Act.]

54. In addition Paragraph 1 of Article 9 of the Agreement states:

> The decision whether or not to impose an anti-dumping duty in cases where all the requirements for the imposition have been fulfilled, … are decisions to be made by the authorities of the importing Member. It is desirable that the imposition be permissive in the territory of all Members…

55. The Act refers to the duties as being permissible, not mandatory, a position that the Agreement states as preferable. This implies that discretion as to whether or not duties should be imposed must exist and therefore must be considered. In New Zealand the Act confers that decision-making responsibility upon the Minister, who takes into consideration the advice received from officials and all other relevant matters.

3.1 Extent of Minister's Discretion Not to Impose Duties

56. During the investigation PHARMAC raised the issue of the extent of the Minister's discretion to impose duties, in particular, that the Minister should decline to impose duties due to PHARMAC's involvement with the supply of OLP to the New Zealand market. Therefore before considering anti-dumping duties any further, the Minister's discretion to impose duties, given that a positive final determination has been made, must be considered.

57. The *Final Report* addressed the nature and extent of the Minister's discretion from page 145. The Ministry had sought Crown Law Office (CLO) advice on the nature and extent of the Minister's discretion to impose duties under the Act on two prior occasions, once in 1991 and again in 1998. Copies of the full 1991 and 1998 opinions were released to the interested parties during the investigation and placed on the public file. In addition, further advice was sought from CLO by the Minister on the extent of his discretion having regard to the particular circumstances of the OLP investigation.

58. The Ministry considered that the advice it had previously received, although the factual circumstances of the dumping and countervailing investigations were different, held strong precedent value. All the CLO advice was consistent in its analysis of the nature and extent of the Minister's discretion.

59. The CLO advice considered that due to the permissible nature of the wording of the Act regarding duty imposition and the common law principles surrounding the exercise of an administrative power, namely that no power is absolute, the Minister has discretion whether or not to impose duties. However, like all discretion utilised in the exercise of a statutory power, the discretion is not unfettered but is limited to what is appropriate in the context of the legislation. That is, the discretion must be exercised in a way that is consistent with, and is limited to, the scheme and purpose of the Act.

Submissions by PHARMAC

60. During the investigation PHARMAC made submissions on the Minister's discretion to impose duties and these are summarised below.

61. PHARMAC submitted that, as it was not in existence at the time of the 1991 CLO opinion, its statutory obligations are precisely the public interest considerations

that could not be foreseen in the 1991 opinion but should be a relevant consideration in the Minister's decision of whether or not to impose a duty.

62. PHARMAC considered that the national interest is a relevant consideration to which the Minister should have regard when exercising discretion relating to duties. PHARMAC stated that "…the national interest in acting consistently with free trade principles, such that a dumping remedy does not unduly protect the New Zealand industry at the expense of a foreign industry, is a relevant consideration to which the Minister should have regard when exercising his discretion."

63. PHARMAC further submitted that the Minister should decline to impose duties due to the difficulties in establishing a normal value and the assessment of injury in the OLP investigation.

64. PHARMAC also provided a submission from LECG (an economic consulting group) in support of its view that duties should not be imposed because of the public interest. LECG stated that "a forward looking cost benefit analysis" should be undertaken before duties are imposed, arguing that the precedent of imposing anti-dumping duties "may also have more widespread impacts in other industries all ensuring that consumers in New Zealand lose the benefits of increased international competition in the form of lower prices and more innovative products and services."

65. PHARMAC referred to *Carlton v Minister of Customs*[1], asserting that this established that the purpose of the Act was to "protect New Zealand industry by requiring fair competition". PHARMAC was concerned that the imposition of anti-dumping duties would be seen by foreign pharmaceutical companies as unfairly protecting the New Zealand industry and inhibiting importers' ability to compete in PHARMAC tenders. PHARMAC also considered that the competitive processes it carries out are sufficient to effect the "fair competition interests of the dumping legislation…"

66. The LECG submission also focused on the increase in costs for PHARMAC that it assumed an anti-dumping duty would bring.

67. In response to the *Interim Report* PHARMAC also raised the question of the increased cost of OLP as a result of the dumping action. PHARMAC considered that "…the investigation has already inflated the price of paracetamol oral liquid pricing to District Health Boards, as the threat of duties would have encouraged any bidding supplier of imported product to offer a higher price to allow for the risk of duties. It also provides no incentive for local suppliers to become more efficient, adopt economies of scale, or bid their most competitive price. DHB's are now required to bear that cost at the expense of other medicines they could subsidise instead." PHARMAC added that "the taxpayer of New Zealand will have comparatively less subsidised healthcare for the sake of an uncertain dumping margin, and duty that whether or not applied, will have no effect on the local industry in question."

[1] *Carlton v Minister of Customs* [1986] 1 NZLR 423

68. In response to PHARMAC's submissions that duties should not be imposed on goods which are subject to PHARMAC supply arrangements, PSM stated that there is no leeway in the Act to apply differing standards between industries. PSM stated that, if the Minister took into account the impact on PHARMAC's costs that any anti-dumping duties may have, it would be placing an additional test upon the pharmaceutical industry, to that placed on other industries when considering whether or not duties should be imposed.

69. In response to the *Interim Report* PSM added that "[t]he existence of PHARMAC does not, of itself, change the way the Act is administered."

Crown Law Advice

70. The Minister sought advice from the CLO on the extent of his discretion not to impose anti-dumping duties prior to making his final determination, which will be referred to as the 2005 opinion.

71. The 2005 opinion specifically considered whether the existence and involvement of PHARMAC in the investigation constituted a relevant public interest that should be taken into account. The advice concurred with that previously presented by the CLO on the Minister's discretion regarding the imposition of anti-dumping duties and its conclusions are summarised below.

72. The purpose of the Act is to protect New Zealand industries from unfair competition. The Act's purpose is important in resolving the central question of whether it is proper to decide not to impose anti-dumping duties due to the public interest in PHARMAC's continuing to desire to secure cheap and possibly dumped pharmaceuticals, particularly OLP.

73. As in the exercise of any legislative discretion, the Minister must take all relevant considerations into account and ignore any irrelevant considerations. In determining what matters are relevant and which are irrelevant, the purpose of the Act should guide the decision maker. The 2005 opinion considered matters which could properly be given consideration included:

- the position of New Zealand providers of like goods;
- the promotion of fair competition as between foreign exporters into New Zealand and local industry within the New Zealand market;
- whether the harm to domestic producers is threatened or actual and whether it is historic or likely to continue into the future; and
- New Zealand's international relations, including applicable international obligations under the World Trade Organisation and the General Agreement on Tariffs and Trade.

74. In answering the central question of whether the Minister could decline to impose anti-dumping duties, preferring to maintain low cost pharmaceuticals for PHARMAC and ultimately New Zealand citizens, the 2005 opinion stated that any reasons for not imposing a duty would have to be consistent with the overall

purpose of the Act. This means that the Minister could not decline to impose anti-dumping duties by reasoning that a greater weight should be given to the interests of lower priced pharmaceuticals for PHARMAC, than to the interests of the domestic industry.

Ministry's Consideration of the Issues Raised

National/Public Interest

75. While a small number of foreign jurisdictions have a public interest test in their anti-dumping legislation, no such provision exists in the New Zealand legislation. Therefore there is no express mandate in the Act for the consideration of the public interest in an anti-dumping investigation. As discussed in the 1998 CLO opinion, a foreign owned manufacturer is treated the same under the Act as a domestically owned manufacturer, which may not be the case if a national or public interest test existed.

76. The 1998 CLO opinion addresses the Act's lack of a specific public interest test and states at paragraph 11:

> "that Parliament has deliberately eschewed national interest in favour of international interests. If domestic interests are now advanced as grounds for not imposing anti-dumping duty, there is a danger that a court would hold that the Minister had unlawfully thwarted the purpose of the legislation."

77. The Ministry considers in light of the specific exclusions from Part 2 of the Commerce Act 1986 given to PHARMAC in section 53 of the New Zealand Health and Disability Act 2000, that if Parliament had intended an exclusion for PHARMAC from New Zealand's anti-dumping regime then it would have been specifically legislated for.

78. Advice from the CLO indicates that the Minister's discretion regarding the imposition of duties needs to be exercised in an appropriate manner. Any discretion cannot be so broad as to overturn the scheme and purpose of the Act. It is worth noting that, if it was intended that the Minister's discretion take account of national or public interest, it could be argued that the point at which this should be considered is prior to the initiation of an investigation, before further resources are expended. The 1991 CLO opinion considered the discretion to initiate an anti-dumping investigation and came to the conclusion that given the specific scheme and purpose of the Act, it could not envisage a situation where refusing to initiate an investigation citing public interest as the reason, would be appropriate.

79. The 1991 CLO opinion at paragraph 7.4 states that:

> It is possible to envisage circumstances in which, although satisfied of the matters set out in section 14(1)(a) and (b), the Minister might decline to impose duty. However, I consider that the circumstances would be restricted to where the imposition of duty would not necessarily cure the injury, or the injury is no longer being caused or has otherwise been satisfactorily remedied. Again, it may be possible that circumstances where public interest considerations in not imposing a duty outweigh the need to remedy the industry. However, given the nature of the legislative commitment to protect New Zealand industry and the extensive process that has been undertaken to

bring the Minister to this point, I cannot envisage circumstances where that may arise.

80. The advice received from CLO does not rule out that there may be public interest considerations outweighing the need to protect the New Zealand industry, however, it indicates that these other considerations should not counter the purpose of the Act, particularly given the strength of the legislative commitment made by Parliament. The Ministry considers that PHARMAC's existence (and its corresponding legislative obligations) is unlikely to be, of itself, enough to warrant overriding the purpose of the Act.

81. The CLO advice states that in order for duties to be considered, the Minister must first have been satisfied that there was dumping and that it has caused, or threatens to cause, material injury to the New Zealand industry. The Ministry considers that the CLO advice regarding the Minister's discretion to decline duties, limits it to situations where "the imposition of the duty would not necessarily cure the injury, or the injury is no longer being caused, or has been otherwise satisfactorily remedied". These issues are explored further from paragraph 98.

82. LECG's submission that the imposition of an anti-dumping duty would result in increased costs for PHARMAC necessarily assumes that the cost of anti-dumping duties would be passed onto PHARMAC; either directly, or indirectly through increased tender bids and ignores other possibilities. It may be, that in some cases, PHARMAC's costs may increase due to accepting non-dumped tender bids. However, the purpose of the Act allows the interests of a domestic industry to supersede the benefits of lower costs to consumers when goods are dumped and cause, or threaten to cause, material injury to the New Zealand industry. *Carlton v Minister of Customs*[2] addressed this very point of how anti-dumping duty impacts upon consumer costs stating that "[t]his is expected to be achieved by bringing about increases in the cost to importers of the goods bought into New Zealand", with the Court of Appeal indicating that in order to ensure fair competition where there is dumping, an increase in prices would be expected.

Unfair Competition

83. During the investigation PHARMAC stated that the imposition of anti-dumping duties would be seen by foreign pharmaceutical companies as unfair to them and as affecting an importer's ability to compete in PHARMAC tenders. PHARMAC, in support of its contention that the purpose of the Act was to prevent the New Zealand industry being disadvantaged by unfair competition in the New Zealand domestic market, drew upon an excerpt from *Carlton v Minister of Customs*[3] that stated the purpose of the Act was to "protect New Zealand industry by requiring fair competition". PHARMAC asserted that its own processes are sufficient to effect the fair competition embodied in the Act.

84. The Ministry notes that dumping, by definition, is unfair competition by foreign manufacturers when they compete at different price levels in their domestic and international markets. The Act's purpose is to allow for remedial action where unfair

[2] *Ibid*
[3] *Ibid*

competition (via price discrimination between a manufacturer's domestic prices and its export prices to New Zealand) causes, or threatens to cause, material injury to a New Zealand industry. PHARMAC has stated that its own processes would ensure the fair competition embodied in the Act. It is unlikely, however, that PHARMAC's current tender process (for example) would ensure that a foreign tenderer does not discriminate between its domestic and New Zealand export markets.

85. PHARMAC's tender processes are designed to ensure that any tender competition within the New Zealand market is fair to the extent that every supplier has an equal opportunity to compete in the tender process. However, the Ministry is not aware of any mechanism within PHARMAC's processes to ensure that injurious dumping does not occur. In fact PHARMAC's tender processes exist to drive prices down and may increase the potential for dumped prices to be tendered. For the fair competition purpose of the Act to be fulfilled by PHARMAC's competitive processes, it would require PHARMAC to only accept non-dumped prices. Further, if PHARMAC's processes did ensure that dumped prices were not accepted this could be against the national interest, as only dumping that causes, or threatens to cause, material injury to an industry is actionable via anti-dumping duties and when material injury is not being caused, or threatened, to an industry, dumped prices are acceptable. A blanket non-dumped prices rule implemented by PHARMAC could unnecessarily increase PHARMAC's costs when the dumping is not injuring a New Zealand industry. The Ministry considers that the most appropriate and efficient method of dealing with the fair competition element of the Act is via an anti-dumping investigation.

86. The imposition of anti-dumping duties would not prevent a pharmaceutical supplier from participating in any of PHARMAC's competitive processes, as the duties are not a quantitative or restrictive measure.

87. Many countries have similar anti-dumping regimes to New Zealand, including Ireland. India and the United States of America, considered to be global leaders in the pharmaceutical sector, both have strong trade remedies regimes. Of the reported 231 World Trade Organisation member's anti-dumping investigations initiated in 2003[4], India accounted for approximately 20 percent and the United States of America for approximately 16 percent, respectively being the largest and second largest users of anti-dumping in that year. Therefore foreign manufacturers should not view the imposition of anti-dumping duties as being unfair competition, as they are entitled to and sometimes seek similar remedies in their own countries.

88. Further, there are protections in the Act to ensure that the remedial action does not unduly protect the New Zealand industry and to ensure that the competition remains fair. For example, sub-section 14(4) of the Act requires that the rate of any duty imposed must not exceed the difference between the export price of the goods and their normal value. Sub-section 14(5) also requires the Minister to have regard to the desirability of ensuring that the amount of anti-dumping duty is not greater than is necessary to prevent, or remove, the material injury to an industry.

[4] www.wto.org/english/tratop_e/adp_e/adp_stattab2_e.xls

89. The interests of the Irish exporter are protected by the requirements in the Act and the Agreement, in that any anti-dumping duty must not exceed the dumping margin and regard must be given to the desirability of a lesser duty. In this respect the imposition of an anti-dumping duty is only to ensure that the competition is fair and the exporter does not sell goods to New Zealand at a price lower than it would accept in its home market, or sells at, or above, a price that is not injurious to the New Zealand industry.

90. It is important to note that the Act specifically provides a mechanism for remedying injurious dumping, but does not prohibit dumping and is part of the legislative framework of New Zealand's open economy where imports and domestically manufactured goods compete side by side. Where dumping does not cause, or threaten to cause, material injury to a New Zealand industry, it is allowed and the cost benefits that can accrue from dumping are able to be passed onto New Zealand businesses or consumers.

Normal Values

91. PHARMAC also argued that the Minister should exercise the discretion not to impose duties because some presentations of OLP were not sold on the Irish domestic market and because of this normal values had to be constructed for those presentations, as permitted under the Act and the Agreement.

92. In response to the *Interim Report* PHARMAC further submitted that it had "some concerns about the application of the Act in this case. We are particularly concerned at the lack of responsiveness to the advice from LECG to make allowance for error in constructed values. Given that we understand the magnitude of the final dumping margin was small, and being a constructed value many assumptions were used to derive it, it is reasonable to believe the margin of error is larger than the calculated dumping margin. In such a scenario there can be no certainty dumping was occurring at all."

93. PHARMAC also stated "[w]e note the Ministry stated in paragraph 313 of the *Final Report*, that it considers it is not under any obligation to determine the level of uncertainty within the calculation of dumping margins, however, we consider the importer's right to a fair investigation requires a robust a calculation as the Ministry is able to perform. The apparent normalcy of less robust calculations indicated in paragraph 73 [now paragraph 95 of this report] would be of concern to importers in all industries".

94. The Ministry reiterates that neither the Act nor the Agreement require obtaining perfect information and co-operation from all interested parties as a pre-requisite to imposing duties and the use of best information available is permitted.

95. For the Minister to decline to impose a duty because interested parties have not supplied all of the requested information, or some aspect of a dumping margin was difficult to determine, would likely render the anti-dumping regime ineffective. The Ministry also considers that, relative to other investigations it has undertaken, the establishment of normal values for OLP from Ireland was not accompanied by any extraordinary degree of difficulty. The Ministry does not accept that the calculations

it performed in the OLP investigation were anything less than the most "robust calculation as the Ministry is able to perform." The level of certainty is due in large part to the quality and availability of information provided to the Ministry, with equal care and due scepticism applying to calculations both of dumping (affecting importers and exporters) and injury (affecting the New Zealand producers).

Conclusion

96. The Minister has discretion not to impose duties under section 14 of the Act, following a positive final determination pursuant to section 13 of the Act. This discretion, however, is limited to the scope and the purpose of the Act, which is to provide remedies to New Zealand industries suffering from injurious dumping. In this context the national or public interest would only be relevant if it was consistent with the scheme and purpose of the Act.

97. In this case dumping has been found to threaten material injury to a New Zealand industry. The national or public interest consideration claimed by PHARMAC is based on increased costs to the government when purchasing OLP and the implications this has for increasing PHARMAC's costs in the long term. The Ministry considers that if the Minister were to make a decision not to impose duties because of the potential increased cost to PHARMAC this would be contrary to the scheme and purpose of the Act and outside the scope of the Minister's discretion.

3.2 Impact and Effectiveness of Proposed Duties

98. As mentioned above, one of the reasons that the Minister may legitimately decline to impose anti-dumping duties is when they face no prospect of being effective. PHARMAC has asserted that any anti-dumping duties imposed would not be effective, as its supply arrangements would still stand and therefore the injury caused by lack of access to a large proportion of the market would not be remedied. Before addressing the impact and effectiveness of any potential duties we must first consider what duties are being proposed.

99. The Ministry normally sets duties for individual models of dumped goods, where there are differences in dumping margins or prices, to ensure that any anti-dumping duty imposed fairly reflects the level of dumping found for each model. Alternate methods are sometimes used where there is inter-changeability between models and the potential for circumvention of duties exists if duties were imposed on a model by model basis.

100. The *Final Report* illustrated the method and level of duties that would likely apply, should duties be imposed, concluding that:

- the 1000ml presentation was dumped and that if a duty was imposed it would likely be in the form of a reference price mechanism;

- the 200ml and 500ml presentations were not dumped and therefore no duties were proposed;

- no duties were proposed on the 100ml presentations because these presentations did not significantly contribute to the threat of material injury (as the volumes of the Irish OLP sold in New Zealand were so small) and given that [redacted] of 100ml stock [redacted] imports will occur [redacted].

101. The Ministry does not consider that it has created any legitimate expectations that anti-dumping duties would not be applied to Irish OLP, rather it has created expectations to the contrary by detailing in the *Final Report* and more specifically in the *Interim Report* indicative levels of duty that would likely apply should the Minister decide to impose duties. Also, given that the Act's purpose is to remedy dumping causing or threatening to cause material injury, duty imposition is likely following a positive final determination.

OTC Market Segment (100ml and 200ml)

102. No duties are proposed for the 200ml OLP presentations because they were not dumped.

103. No duties are proposed for the 100ml presentations as they were not held to be contributing significantly to the threat of material injury, because the volume of sales of the dumped 100ml presentations to date has been small and the Ministry considers that they are only likely to increase slowly over a long period of time.

104. Any injury caused by the 100ml OLP is only likely to be incurred over an extended period of time as a result of the crossover effects from the dispensary to the OTC market segment. This crossover is caused by increased brand awareness generated through PHARMAC supply arrangements in the dispensary segment, as community pharmacies must dispense the sole supply brand to claim the subsidy for filling prescriptions. This means that the dumped OLP gradually gains a presence in community pharmacies, presenting the opportunity to build relationships and thereby sell more 100ml and 200ml OLP, which, over time, could influence the volume of sales in the OTC market segment.

105. The dumped OLP first entered the market in 2003 when AFT won PHARMAC supply arrangements, yet the lack of any substantial crossover effect to date is shown by the low sales volumes of Irish OTC presentations, and by the [redacted]. AFT claimed that the low sales were primarily due to its [redacted]. PSM claimed that there were also possible problems with the flavour of the 120mg strength Irish OLP, which is primarily used for young children. Given the above, the Ministry considered in the *Final Report* that even if AFT gained sole supply status in the 2004 tender (which it subsequently did) that the 100ml OLP was not likely to contribute to the threat of material injury. The Ministry has not been presented with any new evidence in response to the *Interim Report* on this issue.

106. The Ministry proposes that no duties be applied to 100ml OLP, despite the potential cross over effects, as it believes the current low level of sales and

[redacted] means that the dumped 100ml OLP does not and will not contribute to the threat of material injury in the near future.

Dispensary Market Segment

500ml

107. No duties are proposed for the 500ml OLP presentations because they were found not to be dumped.

1000ml

108. The 1000ml OLP presentations were found to be dumped at [redacted] percent of the export price. It is therefore proposed that an anti-dumping duty be applied on the 1000ml OLP. Approximately 90 percent of the volume of OLP sold in the dispensary market is in 1000ml size presentations. In considering the imposition of a duty on the 1000ml presentations, the impact and effectiveness of anti-dumping duties must be considered, as there would be little point in imposing duties if they had no impact in remedying injurious dumping or would never be effective.

109. In most situations where duties are recommended there is little need to consider in depth the effectiveness of duties, unless evidence is presented that the duties could not be effective. However, in the present case the effect duties would have if they were imposed, needs to be considered because of the existence of the PHARMAC supply arrangements, which cover the majority of supply to the dispensary market segment for a three year period.

110. The question regarding the potential for the anti-dumping duties to be effective, given the existence of the PHARMAC supply agreements, is could the anti-dumping duties remedy the threat of material injury to the domestic industry? This is distinct from, and in contrast with, the question of whether the duties will definitely be effective and the future behaviour of market participants is unknown.

111. The Ministry considers that it is appropriate to recommend the imposition of anti-dumping duties to the Minister where there is the potential for them to be effective and is not required to positively prove, in any case, that the duties will be effective, as the effectiveness of duties relies on several matters outside the Ministry's control.

112. PSM, in response to the *Interim Report*, commented that it did "…not believe that the Ministry could predict what the effect of an anti-dumping duty would be". PSM further stated that "the Act does not contain provisions for assessing the effectiveness of a remedy. The imposition of a remedy should be based on the facts as required within the legislation".

Possible Effects of the Imposition of Duties

113. The *Interim Report* outlined several possible outcomes following the imposition of duties on 1000ml OLP, as set out below.

AFT Absorbs cost of Anti-Dumping Duties or Withdraws from Contract

114. One possibility, if duties are imposed, is that they would have to be absorbed by the importer. If AFT could absorb this cost within its profit margin then it would not have to take any immediate action that would affect the selling prices or that would affect the volumes sold by the New Zealand industry. This, however, is not necessarily different from any other dumping investigation and the ability to absorb anti-dumping duties alone is not evidence that the duties could never be effective. In cases where the anti-dumping duty is able to be absorbed into the importer's profit margin this situation is normally a short term one, as when other costs rise, putting more pressure on the margin, there may be a consequential need to restore profit levels by increasing prices.

115. If AFT could not absorb the costs of an anti-dumping duty then it may have to withdraw from its supply agreement with PHARMAC. This could result in increased access to the dispensary market segment by other OLP suppliers, including the New Zealand industry, which could remedy the material injury.

116. The community pharmacies' subsidy levels and the DHB purchase prices announced as a result of the 2004 tender (which became effective on 1 September 2005) are considerably lower than the subsidy levels from the previous tender, as illustrated in Table 3.1.

Table 3.1 Changes in PHARMAC's supply arrangements for OLP

Presentation size	Presentation strength	2001 level	2005 level	Change	Change as percentage of 2001 level
1000ml	120mg/5ml	NZD7.29	NZD6.99	NZD0.30	-4%
	250mg/5ml	NZD7.70	NZD7.25	NZD0.45	-5.8%
500ml	120mg/5ml	NZD5.50	NZD4.55	NZD0.95	-17.3%
	250mg/5ml	NZD5.60	NZD4.55	NZD1.05	-18.75%

117. The ability of AFT to absorb the costs of any anti-dumping duty will be dependent upon what proportion of the decrease in the 1000ml subsidy levels is due to a decrease in AFT's purchase price (and related costs) and what proportion of it relates to a reduction in its profit margin, or a combination of the two.

118. The Ministry does not know what the decrease in AFT's price levels reflects and as noted in paragraph 114 above, considers that the ability of AFT to absorb any anti-dumping duties is not decisive in considering the effectiveness that any anti-dumping duties may have.

PHARMAC Incurs Anti-Dumping Duty Costs or Withdraws from Contract

119. Another possible consequence to the imposition of duties is that, due to the terms of the contractual agreement between AFT and PHARMAC, AFT may be able to pass the costs of the anti-dumping duties onto PHARMAC. The supply contract

between AFT and PHARMAC is not available to the Ministry, however, the standard PHARMAC agreement, which is publicly available, does allow for suppliers to pass on selected types of costs in certain circumstances, such as sharing the impact of exchange rate movements as a condition of a tender bid.

120. There may not, however, be an agreed clause passing the cost of any anti-dumping duties onto PHARMAC because it could increase the uncertainty for PHARMAC of the cost of securing OLP. If there was no such clause, or if PHARMAC was not prepared to accept the full cost of the anti-dumping duties, this may put some level of risk on the security of supply of OLP if PHARMAC were to withdraw from the supply contract. There are other potential sources of supply, however, as OLP is a generic drug which is widely available, including sources in New Zealand and Australia that are already supplying OLP to other parts of the New Zealand OLP market.

121. The *Final Report* included an indicative level of potential duties therefore this information was available for AFT to estimate the costs of any anti-dumping duties prior to submitting its tender bid. The fact that AFT and PHARMAC were aware of the likely use and level of a reference price mechanism to impose any anti-dumping duties would have provided them with the opportunity to include a clause in the supply contract that allowed the passing on, or sharing of anti-dumping duties costs.

122. The consequence of PHARMAC bearing the full costs of the anti-dumping duties could be that the duties would be unlikely to remedy the injury threatened to the domestic industry, as AFT would remain the primary supplier in the dispensary portion of the market. However, if a clause exists that allows PHARMAC to carry the cost of anti-dumping duties its effect would be considered in conjunction with other relevant information when considering the potential for effectiveness that any duties may have and would not alone be determinative.

Responses to the Interim Report

123. Following the *Interim Report,* AFT stated "…the proposed action [the imposition of anti-dumping duties] will not alter our supply of liquid paracetamol to the current PHARMAC tender. However, it will certainly add an administrative burden which is a concern." AFT further stated "…given that the action would not be remedial…the proposed imposition of duties seems to be merely punitive which we understand is outside the aim in the conclusion of providing a remedy. In short given that we are still to supply the tender with or without duties the proposed imposition of the duty is punitive. For these reasons, we believe that the Minister should not impose duties".

124. PHARMAC disputed the conclusion in the *Interim Report* that there "is a strong possibility that the anti-dumping duties could be effective". PHARMAC submitted "…that application of a duty will have no effect whatsoever on PSM Healthcare's access to the subsidised market."

125. PHARMAC said the Ministry was in error by stating that the contract between it and AFT was not available to it and referred to the terms and conditions of the pro forma contract on the public file. PHARMAC said that the standard contract "…made it clear that the terms for Sole Supply Status (Schedule 6) and Hospital

Supply Status (Schedule 5) do not allow AFT to withdraw OLP from supply under any circumstance during the term of the agreement. Any such withdrawal by AFT would be in breach of the terms of its agreement with PHARMAC."

126. PHARMAC added that "[e]ven if anti-dumping duties were large enough to have a significant impact on the profitability of AFT's subsidised OLP sales in New Zealand, we consider it highly unlikely that AFT would withdraw 1000 ml OLP from supply. This is because such action would mean that AFT would be liable for all additional costs incurred by PHARMAC in securing and subsidising an alternative to AFT's brand of OLP under the indemnity and liquidated damages provisions…These costs would include PHARMAC's administrative and operational costs associated with the failure to supply; and the difference between the subsidy that PHARMAC would have paid for AFT's brand of OLP, had it been available for supply, and the increased subsidy that PHARMAC would have to pay for the alternative brand of OLP. As these costs are likely to be substantially greater than any dumping duties imposed, we consider it extremely unlikely that AFT would elect to withdraw its brand of OLP from supply due to the cost of any anti-dumping duties imposed." PHARMAC stated it had been assured by AFT following the *Interim Report*, that "…the proposed duty would not affect [AFT's] ability to supply OLP" and understood that AFT had made the same comments to the Ministry.

127. The Ministry, following PHARMAC's submission asked for further information to support the above comment with regard to the security of AFT's supply. PHARMAC reiterated its previous statements noting that AFT had also advised the Ministry directly. PHARMAC added that "AFT had indicated to PHARMAC at the time of its tender bid that its bid took account of the reference price duty in the Essential Facts and Conclusions Report, and discussions with MED at the time regarding what an un-dumped [i]mport [p]rice would be assuming the Ministry's calculation was correct." PHARMAC stated that "AFT had confirmed this advice to us since the Interim Duties Report that [redacted], proposed by the MED if it were to apply a duty."

128. In relation to the Ministry's comments that AFT might be able to pass on the costs of the anti-dumping duty to PHARMAC, or if AFT could not do this or PHARMAC was not prepared to accept this cost, that PHARMAC may withdraw from the contract with AFT, PHARMAC stated that the terms of the contract on the public file make it clear that PHARMAC could not do this, except in circumstances where termination was required following clinical advice or Crown direction, neither of which would apply as a result of imposition of duty.

129. PHARMAC outlined the situations which would permit termination, using its sole discretion, to withdraw Hospital Supply Status and/or Sole Supply Status. These were if:

- the supplier has failed to maintain all relevant consents;
- the supplier has failed to supply the pharmaceutical for a period of 30 days;
- the supplier has failed to notify PHARMAC of a potential out of stock situation;

- in the case of Hospital Supply Status, the supplier has failed to comply with clause 7 of Schedule 5 in the event of a pharmaceutical recall; or

- the supplier has otherwise failed to supply the pharmaceutical in accordance with the agreement.

130. PHARMAC stated that "[a] duty would have no effect on whether or not the medicine supplied by AFT is safe, its ability to maintain consents, its ability to notify of a potential out of stock or its ability to comply with the agreement in the case of recall. PHARMAC reiterated that AFT had indicated that the application of a duty would not affect its ability to supply under the agreement, and that it would be more costly for AFT to withdraw supply due to the indemnities in the agreement, than to absorb the proposed duty.

131. PHARMAC argued that "[a]s the duty is not able to increase the likelihood of any of the grounds for termination or removal of exclusivity under the agreement, the proposed duty cannot provide PSM with any relief from its alleged damage. It would only serve to be punitive, if not financially, then through the administrative requirements that would be placed on AFT". PHARMAC quoted the 1991 Crown law advice referred to in the *Interim Report*, which outlines that the Minister can decline to impose duties where a duty "would not necessarily cure the injury..." . PHARMAC stated that "[i]mposing duties in this case would in no way be remedial. Therefore we consider that it is consistent with the scope and purpose of …[the Act] which is to provide remedies to New Zealand industries suffering from injurious dumping, for the Minister to use her discretion to decline to impose duties in this case."

132. The Ministry asked PHARMAC about its response to the *Interim Report* that the contracts with AFT were standard contracts and queried whether elements of the actual contracts had varied or not. PHARMAC replied that in the Invitation to Tender, "…Schedule Three, which describes the process to be followed in relation to the tender and provides instructions on how to submit a tender bid… does include some provision for limited negotiation" but stated that "this would rarely add or remove contractual terms from Schedule Five or Schedule Six" (which set out the terms applying if a bid is accepted for Hospital Supply Status or Sole Supply Status in the community supply market).

133. PHARMAC stated that it "would normally not disclose whether limited negotiations occurred with respect to a particular tender agreement, as this information is confidential under the invitation. However, following consultation with AFT, we can confirm that in relation to the 1000ml OLP pack that was awarded Sole Supply Status, and is supplied under the terms of Schedule Six, [redacted].

134. PHARMAC stated that "given the duty would be unlikely to have a significant financial impact on AFT, (if there is an impact at all), it is unlikely to affect AFT's willingness to continue with the agreement. Even in the event that the Ministry constructs a scenario whereby AFT would be less willing to continue with the

agreement, for the reasons outlined… AFT would not have grounds to terminate the agreement, and the consequences of failing to supply under the agreement would be more costly to AFT than paying any duty. No rational company would intentionally stop supplying when to do so would result in greater costs than continuing to supply".

Ministry's Consideration of the Issues

135. The evidence from both AFT and PHARMAC is that the imposition of duties will not result in either AFT withdrawing from the contract or in PHARMAC terminating the contract. Given the relatively low level of duty that would be imposed and the cost to AFT of withdrawing from the contract, Ministry considers that this evidence from AFT and PHARMAC is likely to be correct.

136. The evidence therefore indicates that for the term of the current supply arrangements the imposition of anti-dumping duties is unlikely to provide a completely effective remedy for the injury suffered by the New Zealand industry in that it will not enable the New Zealand industry to compete with imports of the subject goods at non-dumped prices for a sole supply contract, at least for the duration of the current contract.

137. The current sole supply contracts awarded to AFT run until 30 June 2008. Anti-dumping duties expire five years from the date of the Minister's final determination (in this case the expiry date would be 30 March 2010) unless a review initiated before the expiry date found that the duties should remain in place. The Act allows an interested party to request a review of the continued need for the duties at any time after they were imposed, but in most cases anti-dumping duties stay in place for at least five years. The likely duration of any duties would therefore extend beyond the expiry date of the current contracts and would allow the New Zealand industry to compete in any re-tendering process, or in any other supply arrangements, with non-dumped goods. The profit margin made by AFT on the dumped goods in the interim could impact upon the level of its next tender bid.

138. The Ministry notes that while it is likely that the imposition of duties will not allow the New Zealand industry to compete with non-dumped goods for a sole supply contract for the duration of the current contracts, the Ministry cannot be certain either that the imposition of duties will not result in an earlier termination of the contracts or that for some other reason the current contracts will not run for their full term. There is therefore also a possibility that the duties could provide an effective remedy before the scheduled end of the current supply contracts. This is in addition to their being effective when the goods are next tendered.

139. Evidence has been provided that AFT is now purchasing the subject goods from Pinewood [redacted]. The calculation of any anti-dumping duty is a simple process when entering the goods into New Zealand. The imposition of duties on a reference price basis is therefore unlikely to be either financially or administratively punitive for AFT as put forward by PHARMAC.

140. In addition to the matters canvassed above, the Ministry notes that the submissions by PHARMAC are essentially to the effect that once it has awarded a sole supply contract to a supplier who has tendered at dumped prices, the imposition of anti-dumping duties can never provide an effective remedy for the duration of the contract, unless the cost of the duties exceeded the cost of withdrawing from the contract. In other words the act of granting a sole supply contract to dumped goods simultaneously causes the injury to the New Zealand industry and removes the possibility of providing an effective remedy to dumping.

141. To state that anti-dumping duties will never be effective in a case where a tender has been awarded for the continuing supply of a product would restrict the Act's application to only certain types of business transactions. This can be contrasted with a one off supply situation, where to otherwise impose duties may be ineffective. As mentioned above, the period for which anti-dumping duties could apply extends beyond the duration of the current tender. There is also no guarantee (despite the penalty provisions that apply) that the sole supply contract will run its full term or an event, other than anti-dumping duties being imposed, may affect supply of OLP to the dispensary market. Therefore the Ministry does not consider that the existence of sole and hospital supply agreements, alone, is a reason that duties should not be imposed.

142. The Ministry considers that to accept the argument in paragraph 140 would effectively remove PHARMAC's sole supply tender processes from the scope of the Act and would therefore frustrate the purpose of the Act by denying even the possibility of a remedy to New Zealand industry injured by dumped imports. The Ministry is also mindful that not to impose duties on the basis of PHARMAC's argument may also encourage tender bids at dumped prices of other pharmaceuticals where there is a New Zealand manufacturer of like goods, in the expectation that the New Zealand industry could not obtain a remedy where such dumping had caused material injury. There is thus a broader public policy consideration in a decision not to impose duties in an individual case. The Ministry is aware that a very large proportion of the drugs listed in the Pharmaceutical Schedule are not manufactured in New Zealand and therefore the possibility of anti-dumping action being taken is restricted to a small proportion of the goods in the Pharmaceutical Schedule.

143. The Act does not specifically require the Minister to consider whether the imposition of duties will provide an effective remedy. When the Minister has made a final determination that the goods are dumped and have caused or threaten to cause material injury to a New Zealand industry (as in this case) then the Minister may impose anti-dumping duties. The CLO's advice is that the Minister's discretion whether to impose duties must be exercised in a way that is consistent with the scheme and purpose of the Act. The Ministry considers that in exercising her discretion in this way, the Minister may legitimately consider the effect of not imposing duties in this case would have both on frustrating the purpose of the Act and on the broader implications for the right of New Zealand manufacturers to seek a remedy from injurious dumped imports.

Conclusions on Impact and Effectiveness of Duties

144. The Ministry concludes that the imposition of duties will provide an effective remedy for the New Zealand industry when the current supply contract expires. The Ministry cannot be certain that duties would not provide an effective remedy prior to the scheduled expiry date of the current PHARMAC supply arrangements, and cannot be certain that the contract will run its full term. It is possible that the duties may be effective earlier.

145. The Ministry further concludes that not to impose duties would frustrate the purpose of the Act both in the current case and in any future cases relating to the dumping of pharmaceuticals in situations involving PHARMAC sole supply tenders where there is a New Zealand industry producing like goods.

146. The Ministry therefore proposes that anti-dumping duty should be imposed on the dumped 1000 ml presentations of OLP.

3.3 Method of Imposing Duty

147. There are a number of ways in which anti-dumping duty can be imposed as a rate or amount, including any rate or amount established by a formula. The basic approaches used by the Ministry are:

- a specific amount per unit;
- an *ad valorem* rate; or
- a reference price approach, which is a mechanism that is applied so that duties are imposed only when the goods are imported at dumped or injurious prices.

148. The objective of an anti-dumping duty is to remove the injurious impact of dumping. In deciding on the form the duty will take, considerations relating to the ability to ensure the dumping margin is not exceeded, fairness between parties, predictability and ease of administration, all need to be taken into account. The objective of the anti-dumping duty is to remove injury attributable to dumping, and is not to punish the exporter or importer, or to provide protection to an industry beyond the impact of the dumping.

149. Sub-section 14(4) of the Act provides that the Minister must not impose a duty that exceeds the dumping margin and sub-section 14(5) of the Act requires that the Minister has regard to the desirability of ensuring the amount of duty is not greater than is necessary to prevent material injury to the New Zealand industry. Given this, the Ministry's preferred approach is to adopt a form of duty that minimises the possibility of exceeding the dumping margin.

Specific Duty

150. A specific duty is a set per unit amount based on the monetary value of the dumping margin. It has the advantages of being convenient to apply, is impossible to evade by artificially inflating the value for duty and clearly indicates the amount of

duty payable. However, difficulties can arise when: there is a wide range of goods involved; exchange rates fluctuate to the extent that the dumping margin will be exceeded without constant reassessments of the duty; or where the exporter otherwise changes prices so that the duty is either greater than the established dumping margin, or less than the established dumping margin.

151. A specific duty can only really operate effectively when prices and exchange rates are consistent and stable and where the transaction-to-transaction comparison does not result in a range of different dumping margins. In the present case exchange rates between the New Zealand Dollar and the Euro (€) were fairly constant over the period of investigation and a weighted-average of the transaction-to-transaction dumping margins for each strength 1000ml presentation has been established.

152. An alternative approach to deal with the limitations of a specific duty is to express a specific duty as a formula, being the difference between the set normal value and the set export price. When those elements of the formula are expressed in terms of the currency of each transaction, the problem of exchange rate movements can be dealt with. However, a formula approach does not deal with the problem of changes in export prices for reasons other than exchange rate movements or movements in normal values such as a price change and for this reason does not necessarily achieve the goal of avoiding collecting any duty in excess of the dumping margin.

Ad Valorem Duty

153. An *ad valorem* duty is a duty based on the dumping margin, expressed as a percentage of the export price, and is applied as a percentage of the value for duty. An *ad valorem* duty is convenient to apply and is not substantially affected by exchange rate movements. However, collusion between exporters and importers can lead to the manipulation of the invoice value of the goods concerned. *Ad valorem* rates are often appropriate where there is a large range of goods or where new models appear, provided that the transaction-to-transaction comparison does not result in a range of different dumping margins. In the present case there is a limited range of goods and new models are unlikely to appear frequently given the registration process required for new pharmaceuticals in New Zealand.

154. Because an *ad valorem* duty is imposed proportionate to the export price of the goods, a particularly low export price (and therefore a potentially more injurious export price) will result in a proportionately lower amount of duty, which may not be sufficient to remedy the injury caused by the dumping. Conversely, a particularly high export price (and therefore likely to be less injurious), will attract a proportionately higher amount of duty, which may be higher than is necessary to remove the injury caused by the dumping.

155. While an *ad valorem* rate gives a clear indication of the level of the duty, it does not target the dumping as accurately as other forms of duty and can result in the duty collected exceeding the dumping margin.

Reference Price

156. Using a reference price mechanism, the duty payable is the difference between the export price and a reference price. The reference price is normally based on the normal value, via a Normal Value (Value for Duty Equivalent) (NV(VFDE)) amount, or alternatively can be based upon the non-injurious price (a price at which imports would not cause injury to the New Zealand industry). The reference price is set at either a Free on Board (FOB) or cost, insurance and freight level and represents the un-dumped value of the goods at that level.

157. A reference price mechanism has the advantage that it is best able to deal with movements in the export price and exchange rates (if the NV(VFDE) is expressed in the normal value currency, in this case Euros) and is also suitable if a lesser duty is applicable. However, it can be argued that a reference price mechanism is more easily evaded than the other forms of duty, by overstating the value for duty of the goods.

158. A particular advantage of a reference price is that it only collects duty when the goods are priced below the non-injurious or un-dumped reference price. The mechanism therefore results in duty only being collected when goods are dumped.

Conclusion

159. The imposition of a reference price mechanism is essentially the fairest way of imposing an anti-dumping duty because a duty is only payable when the goods are dumped and is not payable if goods are imported at non-dumped prices. The Ministry prefers to impose duties through the use of reference price mechanisms where appropriate, for the reasons outlined above, primarily because this method ensures that the duty collected does not exceed the dumping margin, and only impose duty if the goods are imported at dumped or injurious prices.

160. The Ministry proposes that a reference price mechanism be used for the imposition of anti-dumping duties on 1000ml presentations of OLP imported from Ireland.

3.4 Level and Timing of Duty

Timing of Duties

161. While the Minister deferred the decision to impose anti-dumping duties, in accordance with section 17 of the Act, anti-dumping duties would normally apply retrospectively from the day after the date of the Minister's final determination (in this case 31 March 2005). However, as acknowledged in the *Final Report* any duties imposed at that time would have remedied injury caused by factors other than the dumped goods.

162. Sub-section 14(7) of the Act allows the Minister by notice to terminate, in whole or in part, duties that would normally apply from the day after the date of the final determination and this can cover a period prior to the date of such notification. In

the current circumstances the Ministry needs to consider for what period of time, if any, duties should be terminated.

163. As the Minister determined that PSM suffered material injury caused by factors other than the dumped OLP, to impose anti-dumping duties for any of the period covered by the 2001 PHARMAC supply arrangements would, therefore, be attempting to remedy injury not caused by the dumped goods.

164. The Minister also determined that there was a threat of material injury from dumped imports, from the date of the impending expiry of the 2001 PHARMAC supply arrangements resulting from the 2004 tender for supply to the dispensary market in the market at that time.

165. The period up to 30 June 2005, the date at which the supply arrangements resulting from the 2001 tender expired, is the period in which factors other than the dumped OLP were held to be the cause of the injury suffered by the New Zealand industry. Therefore, the threat of material injury arose from the date when the previous tender arrangements expired.

166. PHARMAC indicated to the Ministry that from 1 July 2005 until the commencement of the new supply arrangements resulting from the 2004 tender (the results were not announced until 29 July), all brands of OLP were eligible to be sold in the dispensary portion of the market with no quantitative restrictions, if listed in the relevant part of the Pharmaceutical Schedule. For brands that were not already listed in the relevant part of Pharmaceutical Schedule this required an application and consultation process to occur before listing could be granted. From 30 June 2005, therefore, PSM and other suppliers were not prevented from competing in any part of the dispensary portion of the market by any PHARMAC supply arrangements and consequently from that date threat of material injury became operative. The Ministry understands, however, that PHARMAC did not list any other brands for supply to the community pharmacy market and only the dumped Irish OLP was listed but all of the listed DV brands could compete (as could the incumbent hospital supply status brand) in the hospital portion of the market.

167. Alternatively it could be argued that the threat of material injury only commenced following PHARMAC's announcement of the OLP tender results on 29 July 2005 and therefore any remedy considered should be imposed from that date. However, between 30 June and 29 July 2005 access by suppliers, other than AFT, to community pharmacies was as under the previous PHARMAC supply arrangements, as no other brands of the 1000ml OLP were listed in the Pharmaceutical Schedule, and consequently only the incumbent brand, being the dumped Irish OLP, was able to be sold in that market.

168. Given the present circumstances where the Minister deferred the decision on the imposition of duties until the outcome of the PHARMAC tender was known (or any other change occurred that affected OLP supply in the dispensary market segment) and the time taken for a recommendation to be made to the Minister regarding the imposition of anti-dumping duties, it could be considered unfair to impose duties retrospectively, as outlined in the two scenarios above. A further

alternative is therefore to impose duties from the day after the date that the Minister makes a decision to impose the duties.

169. In response to the *Interim Report* PSM stated that the imposition of duties should be from 30 June 2005 "…as this is the date that the supply arrangements resulting from the 2001 Tender expired."

170. Both Pinewood and AFT in response to the *Interim Report* stated that the duties would be punitive and would not remedy the injury caused to PSM if it were to be imposed from 1 July 2005 because Pinewood has set its current prices to AFT at non-dumped levels.

171. The *Interim Report* concluded that duties should apply from the day after the date the previous supply arrangements expired, that is from 1 July 2005, on the basis that this was the date from which the threat of injury became operative.

Conclusion on Timing of Duties

172. The Ministry considers that the earliest anti-dumping duties could be imposed is 1 July 2005 as prior to this date the injury suffered by PSM was not caused by the dumped OLP.

173. Pinewood has advised it raised the price of its OLP to AFT to a non-dumped level prior to 1 July 2005. This means that if this price has actually applied to all imports since 1 July 2005, an effective self-imposed non-dumped reference price has applied from the date of this price increase. Any retrospective application of a reference price duty would have no effect. The Ministry is also mindful that the Minister deferred the decision to impose duties until the outcome of the PHARMAC tender was known and of the length of time required to make recommendations to the Minister.

174. The Ministry therefore concludes that in the circumstances of this case, should duties should be imposed, from the day after the date of the Minister's decision on duties.

Level of Duties

Consideration of a Lesser Duty

175. As outlined in the *Final Report* the Ministry is unable, due to lack of information, to calculate a price at which the dumped goods would not injure the New Zealand industry for the purpose of assessing whether an anti-dumping duty should apply at a rate less than the full margin of dumping. PSM's distribution costs, which were required to calculate a non-injurious price are unable to be separately identified.

176. Another way to determine a price level that is not injurious to the New Zealand industry may be to find a dumped price, above which no injury would be caused by dumping. This would require determining a dumped price at which PHARMAC would not accept AFT's tender bids. The Ministry does not have sufficient information that would allow it to identify the exact level at which PHARMAC would

no longer have accepted dumped tender bids from AFT in the 2001 or 2004 tender rounds.

177. A further option, in the absence of this information could be to use import parity prices. However, these cannot be used to estimate non-injurious prices either, because prices of other non-Irish imported OLP were higher than PSM's prices prior to both the tenders and to use them would create an artificially high non-injurious price level. The unsuitability of the pre-2001 tender prices is reinforced by the fact that the 2001 tender was the first time that PHARMAC had tendered OLP, therefore the entire market situation is not comparable with the present one.

Calculation of NV(VFDE) Amount

178. The Ministry proposes setting rates of duty that will apply to all exporters from Ireland. The duty rates are proposed to be based on Pinewood's normal values, as Pinewood was the only exporter from Ireland over the period of investigation.

179. In response to the *Interim Report* Pinewood expressed its surprise that the Ministry proposed that duties apply to two different strengths of 1000ml OLP as the *Final Report* proposed that only a single rate of duty apply to both strengths of 1000ml OLP. Pinewood said this change was unjust. Pinewood stated that it adjusted its selling prices to AFT to €[redacted] for both strengths to avoid any accusation of dumping based on the *Final Report* and has had goods delivered since 1 July 2005, and has goods in transit, at this price. Pinewood stated the "we would hope that you would take the [normal value] average in this period which is [€][redacted]

180. The Ministry notes that it now proposes that duties take effect from the day after the date of the Minister's decision on duties and therefore shipments that have already entered New Zealand will not be affected. The Ministry considers that the difference between the prices of the different strengths of 1000ml OLP (before Pinewood changed the basis on which it priced the product) was sufficiently large that separate rates of duty should apply for each strength. It is likely that any new exporter from Ireland of 1000ml OLP would set prices at different levels for the two strengths. Pinewood is also able to [redacted]. It is likely that there would be very few shipments, if any, that would be exported to New Zealand between the Minister making a decision and Pinewood having the opportunity to adjust its prices.

181. NV(VFDE) amounts are calculated by adding onto normal values the costs incurred by exporters between the ex-factory and FOB levels (as normal values are ex-factory amounts), therefore representing a non-dumped price at the FOB level.

182. The NV(VDFE) amount begins with the ex-factory weighted-average normal values (calculated from the constructed normal values used in determining the transaction-to-transaction dumping margins for each transaction over the POI). Additions made to the weighted-average normal value to adjust it to the FOB level are amounts for: inland freight; bill of lading; and cost of credit.

183. The costs are specific to the 120mg and 250mg 1000ml presentations, where possible, and the cost of credit used is the average cost of credit extended to AFT

over the POI. Tables 3.1 and 3.2 show the calculations of the NV(VFDE) amounts, in Euros on the basis set out above.

Table 3.2: Calculation of 120mg 1000ml NV(VFDE) Amount (€)

Weighted-average normal value	[redacted]
Plus costs from ex-factory to FOB:	
- Inland Freight	[redacted]
- Bill of Lading	[redacted]
- Cost of Credit	[redacted]
NV(VFDE) € for 1000ml	[redacted]

Table 3.3: Calculation of 250mg 1000ml NV(VFDE) Amount (€)

Weighted-average normal value	[redacted]
Plus costs from ex-factory to FOB:	
- Inland Freight	[redacted]
- Bill of Lading	[redacted]
- Cost of Credit	[redacted]
NV(VFDE) € for 1000ml	[redacted]

184. The above NV(VFDE) reference prices mean that if 1000ml OLP was imported into New Zealand at a value for duty NV(VFDE) amount equal to or above €[redacted] for the 120mg presentation or €[redacted] for the 250mg presentation, the importer would not pay any anti-dumping duty, as the goods would effectively be entering New Zealand at non-dumped levels. Any duty payable on imports that are priced below the NV(VFDE) amounts will be converted into New Zealand dollars using the relevant New Zealand Customs Service exchange rates as at the date of import.

185. The Ministry had proposed the inclusion of an amount for the bunker adjustment fee in calculating the NV(VFDE) amounts in the *Final Report* but has reconsidered the issue of the bunker adjustment fee in the light of the arguments presented by AFT. AFT considered that the bunker adjustment fee should not be included in the calculations as it relates to a fuel surcharge for ocean freight, a cost that occurs after the goods have passed the ship's rail and is the responsibility of the importer. AFT provided comments from an ocean freight company to this effect. While the fee is an adjustor amount relating to ocean freight it is part of the payment that must be made in order for the goods to be loaded onto the ship and it was on this basis

that the Ministry had proposed to include it in the NV(VFDE) amounts. On further consideration the Ministry accepts AFT's argument that the bunker adjustment fee should not be included in the NV(VFDE) calculation as it relates to costs after the FOB point.

186. The inclusion of an adjustment relating to the cost of credit was also raised by AFT, because AFT considered that it also should not be an element of a NV(VFDE) when the normal value had been constructed. In constructing an ex-factory normal value the domestic cost of credit was subtracted from the overhead costs allowed. In order to calculate the cost of exporting the goods, the cost of credit for those exports is one element that needs to be added onto the ex-factory normal value to build up the cost to the FOB level.

187. AFT also commented on the inland freight adjustment used in the NV(VFDE) calculation. Domestic freight was excluded from the calculation of the constructed value, as it was identifiable and therefore as it was not part of the ex-factory normal value needs to be added onto the ex-factory normal value to build up the cost to the FOB level.

3.5 OLP Presentations without duties

188. As the Ministry is proposing anti-dumping duties be imposed on the 120mg and 250mg 1000ml presentations only, it is aware that there is the potential for circumventing this duty, for example, by importing 500ml presentations for use in community pharmacies and for which no anti-dumping duties are proposed.

189. The Ministry considers the likelihood of circumvention of the duty occurring is reduced by the existence of PHARMAC supply arrangements that list specific size presentations to be supplied. However, if trade was transferred to the 500ml presentations and a new application was received by the Ministry for these goods a new investigation covering 500ml OLP may be initiated. Should an investigation find that the goods were dumped and had caused or threatened to cause material injury, given the circumstances of this case, the Ministry would consider recommending to the Minister the application of retrospective measures if the relevant criteria were satisfied.

190. The Minister may impose anti-dumping duties retrospectively under sub-section 17(3) of the Act, the relevant parts of which are set out below.

> (3) Where the Minister determines-
>
> (a) In respect of dumped goods-
>
> (i) Either that there is a history of dumping causing material injury or that the importer was or should have been aware that the goods were dumped and that such dumping would cause injury;…
>
> (ii) That the material injury is caused by substantial dumped imports of a product in a relatively short period to such an extent that in order to preclude it recurring the Minister is of the opinion that it appears necessary to [[impose]] an anti-dumping duty retrospectively:

> the Minister may impose an anti-dumping…duty…on goods…not more than 60 days prior to the application of provisional measures.

191. The Ministry notes that the price levels for the 500ml presentations under the 2005 PHARMAC supply agreements are considerably lower (18.8 and 20.9 percent lower) than the previous levels at which the associated imports were found not to be dumped. The Ministry, however, does not know to what extent there may have been corresponding changes in normal values and therefore does not know if these prices are dumped. The Ministry notes that normal values for the 500ml presentations were constructed on underlying costs and then adding a profit margin to those costs.

192. A decision not to impose duties on the 500ml, 200ml and 100ml presentations does not preclude PSM from applying for a new investigation involving these presentations by providing sufficient evidence of dumping causing injury.

4. Conclusions

193. The Minister's discretion to impose duties must be exercised in a manner consistent with the scheme and the purpose of the Act. The Ministry considers that the public interest represented by the operation of PHARMAC and of the containment of its costs, does not provide a valid reason for the Minister to decline to impose duties as to do so would be contrary to the scheme and purpose of the Act. This position is supported by several CLO opinions on the matter.

194. The Ministry considers that the anti-dumping duties will be effective when the current supply contracts expire and cannot conclude that the duties would never be effective prior to this. Not to impose duties would also frustrate the purpose of the Act. The Ministry concludes therefore that duties should be imposed and are in fact required by the Act.

195. The Ministry proposes that anti-dumping duties be imposed on the 120mg and 250mg 1000ml OLP presentations imported from Ireland by way of reference price mechanisms, which will result in no duties being payable if 1000ml OLP enters New Zealand at non-dumped prices. The Ministry is proposing establishing one rate for each strength of the 1000ml presentation that will apply to all exporters of Irish OLP.

196. If anti-dumping duties are imposed they become effective from the day after the date of the Minister's final determination for the investigation, in this case 31 March 2005. The Ministry considers that duties should not apply for the period from 31 March to the date that the Minister makes the present decision on whether anti-dumping duties apply. To achieve this, the duties will be terminated in part under sub-section 14(7) of the Act for the intervening period.

5. Recommendations

197. It is recommended that the Minister:

- **Note** that a final determination was made on 30 March 2005 pursuant to section 13 of the Act, that OLP imported from Ireland is dumped and threatens to cause material injury to the New Zealand industry;

- **Agree,** pursuant to section 14 of the Act, to impose anti-dumping duties on imports of 120mg and 250mg 1000ml presentations of OLP from Ireland in the form of NV(VFDE) amounts of ▒▒▒ and NV(VFDE) ▒▒▒ Euros respectively;

- **Agree** that anti-dumping duties should not be imposed on imports of 100ml, 200ml and 500ml presentations of OLP from Ireland;

- **Agree,** pursuant to section 14(7) of the Act, to terminate the anti-dumping duty imposed for the period on and from 31 March 2005 to the date of your decision on the imposition of duties;

- **Sign** the attached notice for publication in the *Gazette*.

Investigating Team
Trade Remedies Group