

Plasterboard from Thailand
Non-Confidential
Final Report
Dumping and Countervailing Duties Act 1988

November 2002

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ABBREVIATIONS

The following abbreviations are used in this Report:

Act (the)	Dumping and Countervailing Duties Act 1988
Anti-Dumping Agreement	WTO Agreement on Implementation of Article VI of the GATT 1994
Applicant	Winstone Wallboards Limited
BAF	Bunker Adjustment Factor
BGC	Buckeridge Group of Companies
Chief Executive	Chief Executive of the Ministry of Economic Development
CIF	Cost, Insurance and Freight
CTS Direct	CTS Direct Limited
CTS Quality	CTS Quality Building Supplies Limited
CSM	Cementhai Sales and Marketing Co Ltd
EBIT	Earnings Before Interest and Tax
Elephant Plasterboard	Elephant Plasterboard New Zealand Limited
FCL	Full Container Load
FOB	Free on Board
IPP	Import Parity Price
LDC	Less Developed Countries
LLDC	Least Developed Countries
m ²	Square Metres
Ministry (the)	Ministry of Economic Development
NIFOB	Non-Injurious Free on Board
NIP	Non-Injurious Price
NVE	Normal Value Equivalent
NV(VFDE)	Normal Value (Value for Duty Equivalent)
Pac	Forum Island Members of the South Pacific Regional Trade and Economic Cooperation Agreement

POI	Period of Investigation
PSC	Port Service Charges
Rikki	Rikki Merchants Ltd
SCT	SCT Co Limited
Settlement Agreement	An Agreement made on the 5 th day of August 1997 between Winstone Wallboards Ltd and the Minister of Commerce
S&A expenses	Selling and administration expenses
SG&A expenses	Selling, general and administration expenses
Siam Gypsum	The Siam Gypsum Industry Co Ltd
TG Plasterboard	TG Plasterboard Ltd
Thai Gypsum	Thai Gypsum Products Public Company Limited
TPV	Thai Producer Value
VFD	Value for Duty
Winstone	Winstone Wallboards Limited
WTO	World Trade Organisation
XXXX	Denotes confidential information
	Denotes confidential information

1. Proceedings

1.1 Proceedings

1. On 14 November 2001 the Chief Executive, acting pursuant to s14(6) of the Act, formally initiated a reassessment of the anti-dumping duty on *standard plasterboard with dimensions of nominal thickness from, but not including 6mm, and up to, but not including 12mm, of any width or length*.
2. The initiation of the reassessment followed an application by the New Zealand industry, the application being made on the basis that there had been a change in normal values in Thailand and [REDACTED]
3. It should be noted that this report provides a summary only of the information, analysis and conclusions relevant to this reassessment, and should not be accorded any status beyond that.

Background

History of Anti-Dumping Action

4. Since anti-dumping duties were first imposed on plasterboard in 1989, there have been a number of reviews, investigations and reassessments. These arose in response to matters such as the coverage of goods subject to the duties, the basis for collecting duties, changed import arrangements, and matters arising from the settlement of judicial review proceedings. Significant events are summarised below.
5. The Minister of Commerce first imposed anti-dumping duties on plasterboard (9 or 9.5mm) from Thailand in December 1989 in the form of a specific amount of duty per square metre.
6. Following a reassessment, the basis for collecting duty was changed in April 1991 to a non-injurious price level mechanism.
7. Anti-dumping duties were again reassessed in February 1996 following a review. The review concluded that dumped imports threatened "further material injury additional to that found in the original investigation". The Non-Injurious Free on Board (NIFOB) anti-dumping remedy for standard plasterboard (9 or 9.5mm) was increased.
8. Following investigations, the NIFOB was extended to cover various lengths of 9 or 9.5mm plasterboard in March 1996 and was also imposed on 10mm plasterboard in July 1996.
9. An interim reassessment in July 1996 took account of a reduction in the rate of normal duty and the NIFOB value was increased.
10. A further reassessment in January 1997 took account of changes in the values of the elements of the formula used to determine the NIFOB price and the NIFOB value was again increased.
11. An application for judicial review of the February 1996 review and reassessment decision was followed in August 1997, by a Settlement Agreement and initiation of a further reassessment which recommended that anti-dumping duties be based on a reference price formula, which allowed the calculation of the margin of dumping for each shipment. This recommendation was challenged by the New Zealand industry. Crown Law Office confirmed the Ministry's interpretation of the Act in December 1998.

12. In September 1999, the duties were reassessed on 9, 9.5 and 10mm standard plasterboard to the full margin of dumping on the basis of a normal value equivalent (NVE) mechanism. The reassessment report noted that dumping margins had increased significantly. The Report also considered that the level of injury could only be reconsidered as part of a review.

13. Such a review was initiated in September 1999 and completed on 27 March 2000. This review concluded that the continued imposition of anti-dumping duties was necessary to prevent a recurrence of injury to the New Zealand industry and recommended that there should be a reassessment of the anti-dumping duty following the completion of the review.

14. A reassessment was initiated on 5 April 2000 following the review completed on 27 March 2000. On 19 November 2000 the Minister of Commerce reassessed the rate of anti-dumping duty payable on imports of *standard plasterboard of a thickness between 8.75mm to 10.25mm of any length or width from Thailand*. The reassessment found, except for imports from SCT Co Limited by importers other than Sigma Agencies Ltd, that anti-dumping duty should be reassessed to a rate at less than the margin of dumping by using a NIFOB mechanism for the current Thai exporters. For imports from SCT Co Ltd by importers other than Sigma Agencies Ltd the duty was reassessed to the full margin of dumping using a NVE mechanism. The residual rate of anti-dumping duty for other suppliers was reassessed to 58 percent *ad valorem*.

15. The Secretary [now Chief Executive] also initiated on 5 April 2000 an investigation into the alleged dumping of *standard plasterboard with dimensions of any width or length and up to, but not including a nominal thickness of 12mm (other than those dimensions already subject to anti-dumping duty)*. During the course of the investigation, the definition of the subject goods was narrowed to *standard plasterboard with dimensions of a nominal thickness from, but not including 6mm, and up to, but not including 12mm, of any width or length*. On 27 September 2000, the Minister made a final determination in relation to the investigation that the subject goods were being dumped and by reason thereof material injury to an industry was being threatened. Duties were imposed at the same level as that at which duties referred to in the preceding paragraph were reassessed.

1.2 Interested Parties

New Zealand Industry

16. The industry consists of Winstone Wallboards Limited (Winstone), wholly owned by Fletcher Building Holdings Limited, the sole New Zealand producer of plasterboard.

Thai Producers and Exporters

17. The following companies have been identified by the Ministry as producers and exporters of the subject goods exported to New Zealand.

The Siam Gypsum Industry Co Ltd and SCT Co Ltd

18. The Siam Gypsum Industry Co Ltd (Siam Gypsum) is part of the Siam Cement Group of companies, and manufactures plasterboard for both the Thai domestic market and for export. Siam Gypsum has its headquarters in Bangkok and operates two plants elsewhere in Thailand. Siam Gypsum plasterboard is marketed under the "Elephant Board" brand.

19. Export sales are made through the subsidiary company SCT Co Limited (SCT) and domestic sales through the subsidiary company Cementhai Sales and Marketing Co Ltd (CSM).

20. Boral Lafarge Plasterboard JV in Asia announced in August 2001 that it had finalised the acquisition of 71% shareholding of Siam Gypsum.

Thai Gypsum Products Public Co Ltd

21. Thai Gypsum Products Public Company Limited (Thai Gypsum) manufactures for the Thai domestic market and exports plasterboard to a number of countries throughout the world. Thai Gypsum has its headquarters in Bangkok and operates one plant in Laem Chabang. Thai Gypsum plasterboard is marketed under the "Thai Board" brand. Thai Gypsum is also involved in the manufacture of a range of other building products, some of which are exported. Exports are made directly by Thai Gypsum.

22. Thai Gypsum is a majority owned subsidiary of BPB Pcl. BPB Pcl and its local investment partner Thaigips Holdings, an investment company in Thailand, have a total shareholding of 70.5 percent of Thai Gypsum.

Importers

23. From 1 November 2000 to 31 October 2001 Elephant Plasterboard New Zealand Limited (Elephant Plasterboard) imported the subject goods from Siam Gypsum and CTS Direct Limited (CTS Direct) imported the subject goods from Thai Gypsum. No other importers of the subject goods were identified from Customs documentation. Details of the importers are set out below.

Elephant Plasterboard New Zealand Ltd

24. Elephant Plasterboard has been the only importer from Siam Gypsum since January 2000. SCT issues and dates the invoice on the day the goods are shipped. The basis of the purchase price is FOB in [REDACTED] and there are no terms offered to Elephant Plasterboard other than the details on the invoice.

25. Both Siam Gypsum and Elephant Plasterboard have advised that Elephant Plasterboard has the sole right to control imports into New Zealand of Siam Gypsum plasterboard. Since January 2000 Elephant Plasterboard has been the only importer but if Elephant Plasterboard wished to nominate another importer then Siam Gypsum said it would sell to that importer. There is no written agreement to this effect, only a verbal agreement, but both parties have advised that this arrangement is borne out by a business relationship over a lengthy period.

26. Elephant Plasterboard sells only to companies which on-sell to end-users, i.e. Elephant Plasterboard does not sell direct to end-users. One of the companies to whom Elephant Plasterboard on-sells is Rikki Merchants Ltd (Rikki) which has the same shareholder as Elephant Plasterboard. In the last investigation and reassessment the Ministry was satisfied that Elephant Plasterboard operated separately from Rikki and that all sales to Rikki were made at arm's length. The Ministry is satisfied that this has continued to be the case over the period covered by this reassessment.

27. Sigma Agencies Ltd changed its name to Elephant Plasterboard (New Zealand) Limited on 1 June 2001. The name was changed to reflect the brand of plasterboard the company sold and promoted. No other change to the company took place. In terms of section 23 (4)(b) of the Companies Act 1993 a change of name of a company does not affect rights or

obligations of the company. Imports by Elephant Plasterboard are therefore assessed for anti-dumping duty as though the imports are made by Sigma Agencies Ltd.

CTS Direct Ltd

28. While CTS Direct is recorded in Customs data as the importer, it primarily acts as the financier for a company called TG Plasterboard Ltd (TG Plasterboard). CTS Direct on-sells all of its imports of the subject goods to TG Plasterboard which in turn on-sells to its customers

29. Thai Gypsum ships the subject goods to the port nearest to the end customer and the goods are delivered directly from the wharf to that customer. Thai Gypsum invoices CTS Direct on a CIF basis, the invoice being dated the day the plasterboard leaves the factory. The importing, selling and distribution arrangement is discussed in more detail under “Level of Trade” below.

30. Both Thai Gypsum and CTS Direct have advised that CTS Direct is the sole agent in New Zealand for Thai Gypsum plasterboard.

1.3 Goods Subject to Anti-dumping Duty

31. The goods which are the subject of the application, hereinafter referred to as “standard plasterboard”, or “subject goods”, are:

Standard plasterboard with dimensions of a nominal thickness from, but not including 6mm, and up to, but not including 12mm, of any width or length

32. The New Zealand Customs Department has stated that plasterboard enters under the following tariff classification:

6809		Articles of plaster or of compositions based on plaster:
	-	Boards, sheets, panels, tiles and similar articles, not ornamented
6809.11.00	10D - -	Faced or reinforced with paper or paperboard only

33. Applicable duty rates are:

Normal	6.5%
Australia	Free
Canada	Free
LDC	5%
LLDC	Free
Pac	Free

34. The subject goods fall under the same tariff item as all other standard plasterboard.

1.4 Reassessment Details

35. In tables, column totals may differ from individual figures because of rounding. The term VFD refers to value for duty for Customs purposes.

36. The period of investigation (POI) for the examination of dumping is 1 November 2000 to 31 October 2001.

1.5 Exchange Rates

37. Article 2.4.1 of the WTO Agreement provides as follows:

When the comparison under paragraph 4 [of Article 2] requires a conversion of currencies, such conversion should be made using the rate of exchange on the date of sale⁸, provided that when a sale of foreign currency on forward markets is directly linked to the export sale involved, the rate of exchange in the forward sale shall be used. Fluctuations in exchange rates shall be ignored and in an investigation the authorities shall allow exporters at least 60 days to have adjusted their export prices to reflect sustained movements in exchange rates during the period of investigation.

⁸Normally, the date of sale would be the date of contract, purchase order, order confirmation, or invoice, whichever establishes the material terms of sale.

38. In this report normal values are expressed in Thai baht. Export transactions took place in  and  dollars.

39. As in the last investigation and reassessment, the Ministry used the invoice date to establish the date of sale and the rate of exchange for each transaction. The exchange rates used are interbank rates listed by the OANDA currency conversion site on the Internet (<http://www.oanda.com/converter/classic>).

1.6 Disclosure Of Information

40. The Ministry of Economic Development makes available all non-confidential information to any interested party through its Public File system.

41. Article 6.7 of the Anti-Dumping Agreement provides as follows:

In order to verify information provided or to obtain further details, the authorities may carry out investigations in the territory of other Members as required, provided they obtain the agreement of the firms concerned and notify the representatives of the government of the Member in question, and unless that Member objects to the investigation. The procedures described in Annex I shall apply to investigations carried out in the territory of other Members. Subject to the requirement to protect confidential information, the authorities shall make the results of any such investigations available, or shall provide disclosure thereof pursuant to paragraph 9, to the firms to which they pertain and may make such results available to the applicants.

42. Verification visits were made to the following exporters/producers:

- The Siam Gypsum Industry Co Limited
- Thai Gypsum Products Public Company Limited

43. Copies of Verification Reports were provided to the exporters visited, and non-confidential copies placed on the Public File.

44. Article 6.8 of the Agreement provides as follows:

In cases in which any interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation,

preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available. The provisions of Annex II shall be observed in the application of this paragraph.

45. Information was requested, but was not received to the extent required from Elephant Plasterboard, TG Plasterboard and Thai Gypsum. Elephant did not provide reliable information on its sales volumes (refer paragraph 443 below). TG Plasterboard did not provide any information. Thai Gypsum did not provide updated information on the cost of freight from its factory to the warehouse (refer paragraph 92 below). In view of the failure to provide all of the necessary information decisions relating to these companies have been made on the basis of the facts available.

46. On 7 August 2000, an Interim Report was sent to all interested parties to allow them to defend their interests. Comments received from Winstone and Elephant Plasterboard in response to the Interim Report were taken into account in preparing this Final Report.

2. Dumping

47. Section 3(1) of the Act states:

Dumping, in relation to goods, means the situation where the export price of goods imported into New Zealand or intended to be imported into New Zealand is less than the normal value of the goods as determined in accordance with the provisions of this Act, and 'dumped' has a corresponding meaning:

2.1 Export Prices

48. Export prices are determined in accordance with section 4 of the Act, which provides as follows:

Subject to this section, for the purposes of this Act, the export price of any goods imported or intended to be imported into New Zealand which have been purchased by the importer from the exporter shall be—

(a) Where the purchase of the goods by the importer was an arm's length transaction, the price paid or payable for the goods by the importer other than any part of that price that represents—

(i) Costs, charges, and expenses incurred in preparing the goods for shipment to New Zealand that are additional to those costs, charges, and expenses generally incurred on sales for home consumption; and

(ii) Any other costs, charges, and expenses resulting from the exportation of the goods, or arising after their shipment from the country of export; or

The Siam Gypsum Industry Co Ltd

49. Siam Gypsum is part of the Siam Cement Group of companies, and manufactures plasterboard for both the Thai domestic market and for export. Exports to New Zealand are made through the subsidiary company SCT.

50. Exports to New Zealand of the subject goods were made directly from SCT to Elephant Plasterboard. Siam Gypsum made to order for the New Zealand market and invoiced Elephant Plasterboard on an FOB basis. Elephant Plasterboard [REDACTED]. The Ministry is satisfied that the sales from SCT to Elephant Plasterboard were arm's length transactions.

Base Prices

51. The actual transaction values for all shipments made over the POI were used as base prices for export price calculations. There were [REDACTED] shipments of the subject goods by SCT over the POI, totalling [REDACTED] square metres. All shipments were invoiced in [REDACTED], on an FOB basis and base prices are the invoiced FOB prices.

Adjustments

Export Packing

52. An adjustment has been made on the basis of verified information for the additional cost of packing for export sales to New Zealand.

Freight to Wharf

53. Since the last investigation and reassessment the cost of cartage per tonne from the factory to the wharf has increased. An adjustment was made on a per square metre basis according to the verified freight to wharf costs.

Document Costs, Customs Clearance and Cargo Handling

54. An adjustment has been made on a per square metre basis for cargo handling and Customs clearance, including documentation charges, based on information verified.

Bill of Lading Fee

55. An adjustment has been made by allocating the verified bill of lading fee per square metre on the basis of the number of square metres in each shipment.

Cost of Credit

56. An adjustment has been made for the difference in the days of credit extended to Elephant Plasterboard and the customer used to establish normal values. As the greater length of credit was extended to Elephant Plasterboard, an adjustment has been made to the export price.

Export Price Calculation

57. Export prices were calculated for each shipment to New Zealand during the period of reassessment by deducting the adjustments above from the base prices.

Thai Gypsum Products Public Co Ltd

58. Thai Gypsum manufactures for the Thai domestic market and exports plasterboard to a number of countries throughout the world, including New Zealand.

59. Exports of the subject goods to New Zealand are made directly from Thai Gypsum to CTS Direct.

60. Thai Gypsum made to order for the New Zealand market and invoiced CTS Direct on a CIF basis. The Ministry is satisfied that the sales from Thai Gypsum to CTS Direct were arm's length transactions.

Base Prices

61. The actual transaction values for shipments made over the POI were used as base prices for export price calculations. Over the POI [REDACTED] square metres of the subject goods were exported to New Zealand by Thai Gypsum. Shipments were invoiced in NZ and US dollars, on a CIF basis. Shipments invoiced in NZ dollars were converted to US dollars at the date of the invoice to allow the deduction of the costs of sea freight and insurance, which were paid in US dollars. The resulting US dollar FOB price was then converted to Thai baht at the date of the invoice. Shipments invoiced in US dollars were converted to Thai baht at the date of the invoice. Base prices are the invoiced CIF prices.

Adjustments

Inland Freight and Insurance

62. An adjustment has been made for the cost of inland freight and insurance, based on the information verified.

Export Packing

63. An adjustment has been made for export packing material and additional labour costs, based on verified information.

FCL Term Holding Charge

64. An adjustment has been made on the basis of verified information, for FCL term holding charges, which cover terminal handling charges and port fees.

Bill of Lading Fee

65. An adjustment has been made by allocating the verified bill of lading fee per square metre on the basis of the number of square metres in each shipment.

Cost of Credit

66. An adjustment has been made for the difference in the days credit was extended to CTS Direct and the customer used to establish normal values. As the greater length of credit was extended to CTS Direct, an adjustment has been made to the export price.

Sea Freight and Emergency BAF Surcharge

67. An adjustment for the emergency BAF surcharge and sea freight has been made based on the information verified.

Overseas Insurance

68. An overseas insurance adjustment has been made based on the information verified.

Export Prices Calculation

69. Export prices were calculated for each shipment to New Zealand during the POI by deducting the adjustments above from the base prices.

2.2 Normal Values

70. Normal values are determined in accordance with section 5 of the Act. Sections 5(1), and (3) of the Act provide as follows:

- (1) Subject to this section, for the purposes of this Act, the normal value of any goods imported or intended to be imported into New Zealand shall be the price paid for like goods sold in the ordinary course of trade for home consumption in the country of export in sales that are arm's length transactions by the exporter or, if like goods are not so sold by the exporter, by other sellers of like goods.

- (3) Where the normal value of goods imported or intended to be imported into New Zealand is the price paid for like goods, in order to effect a fair comparison for the purposes of this Act, the normal value and the export price shall be compared by the [Chief Executive]—
- (a) At the same level of trade; and
 - (b) In respect of sales made at as nearly as possible the same time; and
 - (c) With due allowances made as appropriate for any differences in terms and conditions of sales, levels of trade, taxation, quantities, and physical characteristics, and any other differences that affect price comparability.

The Siam Gypsum Industry Co Ltd

71. CSM is the marketing arm of the Siam Cement Group and sells and markets plasterboard on the domestic market. The selling price from Siam Gypsum to CSM is calculated back from CSM's net selling price to its customer by deducting from the net selling price a [redacted] percent "marketing charge". The marketing charge is designed to cover CSM's operating costs and provide for a margin for CSM.

72. The Ministry is satisfied, on the basis of verified information that sales by Siam Gypsum made through CSM over the POI were not made at a loss.

73. The Ministry is satisfied that sales to all of Siam Gypsum's customers are made on an arm's length basis.

Level of Trade

74. No adjustment was required for differences in level of trade.

Base Prices

75. Normal values were established on the basis of sales to an exclusive dealer called [redacted]. This is the same customer used to establish normal value in the last investigation and reassessment. Siam Gypsum provided copies of invoices for sales to [redacted] as near as possible to the same date as each export sale to Elephant Plasterboard. The variance between the date of the export sale and the corresponding sale to [redacted] used to establish normal values ranged from zero (i.e. the date of the export and normal value sale were the same) to 15 days.

76. Base prices are the actual invoice prices to [redacted] for sales made as near as possible to the same date as each export sale to Elephant Plasterboard over the POI.

Adjustments

Discounts and Rebates

77. An adjustment has been made for discounts at the actual discount amount shown on each invoice used to establish base normal values.

78. In addition, [redacted] was eligible for a monthly volume rebate. An adjustment has been made for this rebate on the basis of verified information.

79. An adjustment has also been made for a loyalty rebate given to [redacted], on the basis of verified information.

Duty Drawback

80. An adjustment for duty drawback has been made on the basis of verified information.

Physical Characteristics

81. An adjustment has been made on the basis of the verified information for the difference in the amount of gypsum used to produce the 9mm board sold on the domestic market and the 9.5mm and 10mm board exported to New Zealand. The effect of the adjustment is to increase the normal value.

Normal Value Calculation

82. Normal values were calculated by deducting the adjustments above from the base prices, except for the physical difference adjustment, which was added to the base prices.

Thai Gypsum Products Public Co Ltd

83. Thai Gypsum sells to two types of customer, distributors and contractors, the majority of its sales being made to distributors.

84. The Ministry is satisfied that sales by Thai Gypsum on the domestic market over the POI were not made at a loss. Thai Gypsum does not have any ownership in any of its distributors or contractors and all sales are made at arm's length.

Level of Trade

85. No adjustment for differences in the level of trade was required.

Base Prices

86. Normal values were established on the basis of sales to a distributor called [REDACTED]. This is the same domestic customer used to establish normal values in the last investigation and reassessment. Thai Gypsum only provided a limited sample of invoices (six in all) spread over the POI for sales to [REDACTED] that related to the sale of plasterboard of the type subject to anti-dumping duty. From the invoices to [REDACTED] that were made available the Ministry selected the invoice closest to the date of each export sale to establish the normal value. The variance between the date of the export sale and the date of the corresponding sale to [REDACTED] used to establish normal values ranged from zero (i.e. the date of the export and normal value sale were the same) to 158 days. Base prices are the actual invoice prices to [REDACTED] shown on these invoices. These prices are ex-warehouse prices.

87. While there was as much as 158 days between the date of the export sale and the date of the domestic sale used to establish normal values, evidence provided by Siam Gypsum shows there was no significant change in normal values over the period between these dates. As Thai Gypsum and Siam Gypsum are competing against each other in the Thai domestic market, the Ministry considers it unlikely there would have been any significant change in Thai Gypsum's normal values over this period.

Adjustments

Discounts and Rebates

88. An adjustment has been made for the actual discount shown on the invoice used to establish base prices.

89. An adjustment has also been made for a volume rebate give to [REDACTED], on the basis of verified information.

Distribution Costs

90. In the last investigation and reassessment an adjustment was made for the cost of freighting plasterboard from the factory to the warehouses. These costs were incurred to get the plasterboard in a position where it could be sold and there was therefore a direct relationship between the freight costs and the sale of the board. The adjustment was based on the average cost of freighting plasterboard to all of Thai Gypsum's warehouses.

91. In the last investigation and reassessment [REDACTED] collected the plasterboard from the warehouse and was charged a nominal delivery fee. The delivery fee was netted off the average freight cost to calculate the final amount of the adjustment.

92. The domestic market is now supplied from the plant in Laem Chabang only. Thai Gypsum has not provided the Ministry with an updated calculation of the average freight cost from the factory to the warehouse. In the absence of any updated information the freight cost verified during the last verification visit has been used to make an adjustment. The delivery cost charged to [REDACTED] on each invoice used to establish normal values has been netted off this amount. There has been a substantial increase in the delivery fee charged to [REDACTED] since the last investigation and reassessment such that the fee exceeds the freight cost from factory to warehouse. The effect of the adjustment is therefore to increase the normal value.

Duty Drawback

93. In the last investigation and reassessment an adjustment was made for duty drawback at [REDACTED] percent of the FOB value of the goods exported. The Ministry is satisfied that the rate of duty drawback has not changed since the last investigation and reassessment. An adjustment has therefore been made at [REDACTED] percent of the FOB value of the goods exported.

Physical Characteristics

94. In the last investigation and reassessment no adjustment was made for the physical difference between the 9mm board sold on the Thai market and the 10mm and 10.5mm board exported to New Zealand as there was no significant difference in the cost of producing each type of board. This situation still applies and therefore no adjustment has been made for physical difference.

Board of Investment Privilege

95. In the last investigation and reassessment Thai Gypsum stated that it had been granted an exemption from corporate tax on that part of its taxable income earned on export sales, by the Thai Board of Investment. Thai Gypsum claimed that the existence of this tax exemption

2.4 Conclusions Relating To Dumping

103. The Ministry concludes that the standard plasterboard exported from Thailand by Siam Gypsum over the POI was dumped.

104. The Ministry concludes that 18 percent of the transactions relating to the export of standard plasterboard from Thailand by Thai Gypsum were dumped, but in all of those cases the dumping margins were *de minimis*. The remainder of the standard plasterboard exported by Thai Gypsum over the POI was not dumped.

105. The Ministry notes that the existence or otherwise of dumping established in a situation where anti-dumping duties are in place is not necessarily indicative of the likely dumping margins should duties be removed as export prices may be influenced by the existence of the duty. The likelihood of a continuation or recurrence of dumping should anti-dumping duties be removed can only be established by way of a review.

3. Anti-dumping duties

3.1 History of Anti-Dumping Duties

106. Anti-dumping duty in the original investigation in 1989 was imposed against plasterboard (9 or 9.5mm) from Thailand in the form of a specific amount of duty per square metre. The basis for collecting anti-dumping duty changed in April 1991 following a reassessment to a NIFOB mechanism. In the reassessment of February 1996 the NIFOB increased. In March 1996 the NIFOB was extended to include various lengths of plasterboard and in July 1996 the NIFOB increased and the description of subject goods was extended to include 10mm plasterboard.

107. A reassessment in January 1997 took account of changes in the values of the elements of the formula used to determine the NIFOB amount and consequently the NIFOB increased. In September 1999 the duties were reassessed on the basis of a NVE mechanism meaning the anti-dumping duty was imposed at the full margin of dumping. Except for imports from Siam Gypsum by importers other than Elephant Plasterboard, in September 2000 the anti-dumping duty was reassessed to a rate at less than the margin of dumping for exports using a NIFOB mechanism. Concurrently with the September 2000 reassessment, the anti-dumping duty was extended, following an investigation, at the same rates, to cover a wider range of thickness of plasterboard. Existing duties are described below.

3.2 Existing Duty

108. The anti-dumping duties in place are in the form of:

- A NIFOB amount of NZ\$2.84 per square metre for exports by Thai Gypsum;
- A NIFOB amount of NZ\$1.71 per square metre for imports by Elephant Plasterboard from SCT/Siam Gypsum;
- A NVE amount of ████████ baht per square metre for imports from SCT/Siam Gypsum by importers other than Elephant Plasterboard;
- A residual *ad valorem* rate of 58 percent for other exporters.

109. Both NIFOBs and NVEs are reference prices. The NIFOBs are a lesser duty (i.e. the duty is set at less than the margin of dumping). The NVE is set at the full margin of dumping.

3.3 Settlement Agreement

110. As noted in section 1.1 the New Zealand industry lodged an application for judicial review of the review and reassessment completed in February 1996. In August 1997 the Ministry entered into a Settlement Agreement which suspended the judicial review action.

111. The Settlement Agreement records the agreement of the New Zealand industry and the Ministry as to the general principles which are applicable to the correct application of section 8 of the Act in any assessment of material injury caused by the dumping of plasterboard from Thailand.

112. In considering whether lesser duty should apply, the Ministry has taken into account the provisions of the Settlement Agreement. The Ministry does not, however, consider that in

this area the Settlement Agreement requires it to undertake anything additional to what it is required to do in terms of the Act.

3.4 Methods of Imposing Duty

113. The main objective of an anti-dumping duty is to remove the injurious impact of dumping. In deciding on the form of duty, considerations relating to ease of administration, ability to ensure the dumping margin is not exceeded, fairness between parties, and predictability are matters the Ministry takes into account. The objective of the anti-dumping duty is to remove injury attributable to dumping, and is not to punish the exporter or to provide protection to an industry beyond the impact of the dumping.

114. Section 14(4)(a) of the Act provides that the Minister must not impose a duty that exceeds the margin of dumping for the dumped goods. The Solicitor-General has advised that the references to “export price” and “normal value” in this section are to be read as a reference to the export price and normal value established in the reassessment or to the values at the time the goods subjected to the duty are imported¹. Given this, the Ministry’s approach is to adopt a form of duty that minimises the possibility of exceeding the margin of dumping on shipments subsequent to the imposition of the duty by the Minister. Where the duty imposed has exceeded the margin of dumping, Article 9.3.2 of the Agreement and section 14(10) of the Act provide for refunds of the difference between the duty paid and the lower duty imposed as a result of the reassessment.

Submission by Winstone

115. Winstone notes that a specific duty per unit of product is convenient and simple, difficult to avoid by incorrectly stating the value for duty and gives a clear indication to the importer of the amount of duty payable. Winstone said that because a specific duty is based on historic values it is not suitable where there are fluctuations in the export price (which is not the case here) or exchange rates. Winstone notes, however, that exchange rates can be dealt with by a specific duty formula, being the difference between equivalent prices to the normal value and export price of a particular shipment, with values for the normal value and export price being fixed and expressed in terms of the currency of each transaction. (In making this statement Winstone referred back to the same point made by the Ministry in the Final Report on the last reassessment). Winstone observes that the problem with a specific duty is that as prices change, the amount becomes out of date.

116. Winstone said an alternate form of remedy is the reference price approach. This form of remedy, Winstone notes, also clearly signals to the exporter and importer what level of price is undumped or non-injurious. Winstone said a reference price mechanism also offers the ability to update the remedy for fluctuations in export price and exchange rates. Winstone notes, however, that it is easier to evade than other methods if the value for duty is incorrectly declared to Customs, although this risk may be reduced if the duty is carefully described.

117. Winstone notes that the Ministry favours a reference price method and acknowledges that a reference price method has the advantage of dealing with movements in export price and exchange rates (if set in the correct currency).

¹ Plasterboard from Thailand, Reassessment, September 1999.

118. Winstone also made submissions concerning the way in which CTS Direct and TG Plasterboard operate in the market place. Because these submissions are largely directed at the need for duty to be imposed at the full margin of dumping, they are recorded below under amount of anti-dumping duties in section 3.5 of this report. However, the Ministry believes that these submissions are also relevant to the method for imposing duty and are also considered in this part of the report.

Ministry's Consideration of the Issues

119. Anti-dumping duties can be applied in a number of ways and can be imposed as a rate or amount, including any rate or amount established by a formula. The basic approaches are:

- a. A specific amount per unit of product;
- b. An *ad valorem* rate; and
- c. A reference price approach.

120. A specific duty, based on the monetary value of a margin of dumping, has the advantages of being convenient to apply and impossible to evade by incorrectly stating the value for duty. A specific rate clearly indicates to the importer the amount of duty payable. However, difficulties can arise where there is a wide range of goods involved, where exchange rates fluctuate to the extent that the margin of dumping will be exceeded without constant reassessments of the specific amount, or where the exporter otherwise changes prices so that the duty is either greater than the margin of dumping or less than the margin of dumping previously established.

121. A specific duty expressed as a monetary amount can really operate only 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. An alternative approach to deal with this problem is to express a specific duty as a formula with the values for the normal value and export price being fixed in the currency in which they were established. Those fixed amounts are then converted into New Zealand dollars at the time of importation (or date on which the shipment was invoiced) to determine the amount of the specific duty for each importation. In this way the problem of exchange rate movements can be dealt with. However, such an approach does not deal with the problem of changes in export prices for reasons other than exchange rate movements or movements in normal values because the normal value and export price amounts are fixed and can only be changed by way of a reassessment.

122. An *ad valorem* duty, based on the dumping margin expressed as a percentage of the export price, and itself expressed, as a percentage of the dutiable value is convenient to apply and is not so affected by exchange rate movements. However, it can be affected by false statements about the value of the goods. *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. An *ad valorem* rate gives an indication of the impact of the duty, but is not as clear an indication as the other forms of duty.

123. Under the reference price approach, the duty payable is the difference between the transaction price and the reference price. The reference price would normally be based on the normal value, by means of Normal Value (Value for Duty Equivalent) (NV (VFDE)) amounts, or on the NIP, by means of NIFOB amounts. A reference price duty has advantages in that it is best able to deal with movements in the export price and exchange rates (if expressed in the currency of the normal value), and is particularly appropriate for dealing with

situations where a lesser duty is applicable. However, it has been argued that it is more easily evaded than the other forms of duty, by overstating the value for duty of the goods. Nevertheless, a reference price does have the advantage that it clearly signals to the exporter and importer what level of price is undumped or non-injurious, and provided it is carefully described the problem of evasion can be dealt with.

124. The foregoing considerations, when related to the circumstances of this case, suggest that a reference price remains the most appropriate method for imposing anti-dumping duties in this case. However, in the case of imports by CTS Direct from Thai Gypsum, the Ministry notes the concerns expressed by Winstone (see section 3.5 below) about the possibility of an allowance being received by CTS Direct or some related company from the Thai exporter. The Ministry also notes that Mr Tully (as owner of TG Plasterboard) has not co-operated with this reassessment. Mr Tully (as owner of CTS Quality Building Products Ltd) also did not co-operate with the last investigation and reassessment, or with the review that preceded that reassessment.

125. As noted above, a specific duty is impossible to evade by incorrectly stating the value for duty. While a specific duty would not prevent an allowance being paid to an importer by an exporter, it would either make the payment of an allowance more costly to an exporter or would involve higher costs to an importer. On the basis of these considerations, the Ministry was initially of the view that imports by CTS Direct from Thai Gypsum should be subject to a specific duty. However, when the Ministry compared Thai Gypsum's most recent export prices over the POI with the proposed new NVE amount (see section 3.7 below), those export prices were [REDACTED] the proposed NVE. The Ministry does not consider it has sufficient evidence of Thai Gypsum's likely export prices in the absence of anti-dumping duties that could reasonably form the basis of a specific duty. Even if the Ministry was able to reliably estimate the likely prices in the absence of anti-dumping duty, a specific duty would still present the difficulties outlined in paragraphs 120 and 121 above. The Ministry consequently considers the duty for Thai Gypsum should remain in the form of a reference price.

Conclusion

126. The Ministry concludes that a reference price method remains the most appropriate method of imposing anti-dumping duties in this case.

3.5 Amount of Anti-Dumping Duties

Submissions by Winstone

127. Winstone submits that applying the correct legal principles in a case such as this, a remedy at the full margin of dumping is required, irrespective of the Ministry's conclusion on level of trade. Winstone argues this is so because every cent of dumping is injurious (even if not in terms of price) and hence a lesser duty is inappropriate [section 14(5) of the Act requires the Minister to consider the desirability of a lesser duty].

128. Winstone refers to its reassessment application of October 2001 where it estimates the market share of dumped imports increased to record levels in the period May to September 2001. Winstone said after the Minister last fixed the remedy for Elephant Plasterboard in November 2000, it was able to make a number of changes to its operations. Winstone notes that the company re-named and re-branded itself as Elephant Plasterboard, introduced a range of technical literature and other forms of market support and undertook an expansion of its warehouse at Glendene.

129. As an example of the threat it faces Winstone cites an approach made last year by Elephant Plasterboard to a key group of building supplies distributors known as the [REDACTED]. Winstone said it understands that Elephant made a special arrangement with this group that included a price discount and it therefore suffered injury in the form of price undercutting and lost sales.

130. Winstone claims it was [REDACTED] in order to reclaim the business of this group. Winstone claims these events demonstrate that the lesser duty is not working. Winstone asserts that “time and again” it suffers such injury before it is able to react and sales are lost even if it is subsequently able to reclaim the customer. Furthermore, Winstone states that each price reduction deal that it is forced to offer in response to dumped imports becomes a permanent feature that is never later recovered. Winstone claims the lesser duty remedy therefore acts like a ratchet to force or hold down its price in the market below that which the market would dictate if it competed with undumped goods, i.e., it is not in the position it would be in “but for” the dumping.

131. Winstone argues there is a further problem in that the level of duty is not adjusted to take into account this additional price undercutting and volume loss until much later, when a reassessment has been completed (with no prospect of a retrospective uplift to cover material injury already suffered).

132. Winstone claims that the same or similar events to those described above are certain to recur in future while a lesser duty is in place, particularly given Elephant Plasterboard’s re-branding and expansion. Winstone submits that material injury from dumped imports in the future will only be avoided if the duty is at the full margin of dumping.

133. Winstone said its concerns with the inadequacy of a lesser duty remedy can be summarised as follows:

- *Volume Effects:* Aside from the price effects the remedy needs to take into account volume effects in the form of lost sales and market share. Winstone considers section 8 of the Act clearly requires consideration of the economic impact of the dumped goods on the New Zealand industry and such impact is not limited to price. Winstone said although the Ministry considers volume effects in their investigations the remedy in the case of imports by Elephant Plasterboard is set using a NIFOB reference price formula which deducts from the NIP costs and margin after FOB to Sigma’s ex-store price, hence the remedy takes no account of volume injury. Winstone claims the Ministry pays lip service to volume injury by a remedy based solely on price.
- *Time Delay:* Winstone claims that the Ministry needs to take into account the fact that when it suffers increased injury through price undercutting or lost volume there is a substantial delay before this can be reflected in the remedy. Winstone said the Ministry could perhaps reasonably contemplate imposing a lesser duty if reassessments were of shorter duration or if it could increase duties provisionally or retrospectively, but Winstone notes these options do not seem to be available under the Anti-Dumping Agreement or in the Act. Winstone argues therefore that when setting the level of duty, the primary objective under the Act, to prevent material injury caused by dumping, must not be compromised by the so-called lesser duty rule, which provides merely for the “desirability of ensuring that the amount of anti-dumping or countervailing duty in respect of those goods is not greater than is necessary to prevent the material injury”. Winstone claims where the Minister is not satisfied on reasonable grounds that the lesser duty proposed will prevent the material injury the lesser duty should not be imposed. Winstone notes that where a reassessment results in a reduced duty, the Ministry affords the importer a refund whereas the reverse does not apply.

- *Elephant Plasterboard Structure:* Winstone claims a lesser duty is also inappropriate in this case given the combined effect of the time delay referred to above and the history of Elephant Plasterboard's many changes in trading structure to avoid or minimise anti-dumping duty. Winstone notes the Ministry has previously said it should base its conclusions on the structure presently existing. Winstone said while this is accepted to a point, there comes a time where it is clear that in Elephant Plasterboard's case change is the only constant. Winstone said it understands Elephant Plasterboard has changed its import structure again since the last reassessment and referred to its submission on level of trade. Winstone asserts that unless the Ministry has reasonable grounds to be satisfied that a lesser duty will be adequate to prevent material injury in future, when the import structure may well change, the Ministry must not impose such a lesser duty.

134. Winstone also said Elephant Plasterboard continues to sell plasterboard ex-wharf and makes all of its sales outside of Auckland on an ex-wharf basis. Winstone provided copies of documents relating to such an ex-wharf sale which it claims show that Elephant Plasterboard offers an [REDACTED] discount [REDACTED]. Winstone claims this is clear evidence, in contradiction of Elephant Plasterboard's previous statements to the Ministry, that it is making ex-wharf sales at prices below the ex-store price. Winstone said that commercially, the Ministry should not expect Elephant Plasterboard's customers to be so naïve that they pay for warehousing and freight that is not incurred.

135. Winstone claims the lower price of ex-wharf sales also demonstrates that Elephant Plasterboard is continuing to undercut it on price in the market. Winstone submits this is further evidence of the inadequacy of the current lesser duty in preventing material injury.

136. Winstone also made submissions on the way in which CTS Direct, TG Plasterboard and related companies operate in the market place and these submissions are set out below.

137. Winstone said Mr Tully's supply/fix/stop business, CTS Interiors Ltd, is competing for jobs at quoted prices that must involve CTS Direct selling board to end users at less than the NIP. [Mr Tully is a shareholder and director of a number of companies that are, or have been, involved for many years in the importation, distribution and sale of plasterboard. More details of Mr Tully's companies and their operation are given under level of trade in section 3.6 below]. Winstone said that CTS Interiors Ltd inspects a house or plan, quotes for supply/stop/fix and then sub-contracts out the stop and fix component at market rates. Winstone said this business is growing daily with [REDACTED] houses currently being done [REDACTED] using [REDACTED] fixers/stoppers sub-contracted to CTS Interiors Ltd, with more being recruited to support business growth.

138. Winstone said it has received complaints from [REDACTED] who are being undercut in the market by CTS contractors that use Thai Gypsum board. Winstone claims that CTS Interiors Ltd hides the price of the board from fixers/stoppers by inspecting and quoting directly to the developer/builder for the complete job. Based on prices quoted by CTS Interiors Ltd, Winstone claims that if the board was purchased from merchants buying at the NIP, the labour component would need to be supplied below cost. Based on a calculation of rates for fix and stop, Winstone argues it is evident that CTS Interiors Ltd is supplying board to contractors at no more than [REDACTED] per square metre. Winstone said as they are supposedly importing at prices higher than this, and the supply of board is the only source of revenue to pay for all the business costs of CTS Interiors Ltd, it follows that either:

- CTS [it is assumed this a generic reference to all of the companies owned and operated by Mr Tully] is cross-subsidising the board business with ceiling tiles; and/or
- CTS or a related entity is receiving some allowance from the exporter enabling it to sell at what would otherwise be a loss; and/or
- CTS is building this business at a loss in anticipation of being placed at the same level of trade as Winstone and hence obtaining the additional allowance out of the dumping margin.

139. Given Mr Tully's involvement in the import structure, Winstone said the Ministry must verify which of these possible explanations is correct. Winstone said that the evidence suggests that the true export price calculated under section four of the Act may be lower than presently calculated. Winstone argues the arrangements also highlight the injury to Winstone caused and further threatened in the market even with a duty at the full margin of dumping and notes that the position highlights that duty at less than the margin of dumping should not be imposed.

140. Winstone considers the proper approach in this case is to set a duty by reference to the lower of the NVEs of the two Thai producers. To the extent of the difference between the two NVEs, Winstone said a lesser remedy is appropriate for imports from the producer with the higher NVE.

141. Winstone argues the reference price should then use a mechanism such as that provided to the Ministry previously which adds to the lower NVE the costs between FOB and the NZ wharf gate (i.e. freight, PSC and Customs duty) irrespective of the Ministry's level of trade conclusion. Winstone said these costs could easily be plugged into the mechanism by Customs as they are declared on the import entry. Winstone said these costs can be converted into NZ\$ at the date of importation and then added to the Thai Producer Value (TPV) (together with the actual Customs duty) to calculate the TPV adjusted to the NZ wharf gate. Winstone states the difference between the TPV adjusted to the NZ wharf gate and the lower NVE adjusted to NZ wharf gate is the duty. [The TPV is a Thai producer's FOB price exclusive of any agent's or reseller's fees, margins, or commissions, or other similar charges].

142. Winstone said the Ministry's claim in the last investigation and reassessment² that this formula cannot ensure that the duty collected does not exceed the dumping margin is incorrect and reflects a misunderstanding of the proposed mechanism. Winstone claims the Ministry was incorrect because in calculating the anti-dumping duty the lower of the undumped ex-wharf cost or [REDACTED] is used. Winstone said the method it provided uses current costs for both the undumped ex-wharf cost and the ex-wharf cost for a particular invoice in assessing whether dumping duty is payable. If these costs declined significantly Winstone said this would be reflected in the duty calculation. Winstone said if the undumped ex-wharf cost became lower than [REDACTED] then this amount would then be used for comparison with the ex-wharf cost for a particular invoice in assessing duty. Winstone notes that with the removal of [REDACTED] the mechanism becomes simpler still.

² Duty Report, paragraph 1.4.54 and Final Reassessment Report November 2000 page 74 paragraph 3.4.79

143. Winstone provided an analysis of Thai export statistics relating to plasterboard for calendar year 2001. Winstone notes that these statistics show that New Zealand currently has the highest FOB export price compared with the other top ten export destination countries. Drawing on these statistics, Winstone further notes the countries with export volumes closest to New Zealand are Malaysia and South Africa and has calculated the average export price to these countries as follows:

New Zealand	US\$ [REDACTED]
Malaysia	US\$ [REDACTED]
South Africa	US\$ [REDACTED]

144. Winstone states that the Ministry must take this information into account in analysing price undercutting for the purposes of the reassessment.

Submissions by Elephant Plasterboard

145. Elephant Plasterboard states that the likely NIFOB will again be below its purchase price from Siam Gypsum, so there is no logical basis for any anti-dumping remedy, unless it is asserted that in the absence of remedies Siam Gypsum “threatens” to sell below that NIFOB. Elephant Plasterboard argues that threat must be proven and refers to *Joined cases T-163/94, NTN Corporation v Council, and T-165/94 Koyo Seiko v Council, [1996] ERC II – 1381*, where the EC Court said: “. . . a determination of a threat of material injury shall be based on facts and not merely on allegation, conjecture or remote possibility.”

146. Elephant Plasterboard said that Article 3.7 of the Anti-Dumping Agreement requires that the change in circumstances that would create a situation in which the dumping would cause injury must be clearly foreseen and imminent. Elephant Plasterboard claims that there is still no scrap of evidence of any threat by Siam Gypsum to sell below the NIFOB. The threat allegation, according to Elephant Plasterboard, is based only on conjecture. Elephant Plasterboard said the actual evidence is in the form of Elephant Plasterboard and Siam Gypsum’s track record, i.e., Siam Gypsum does not sell below the NIFOB and Elephant Plasterboard does not undercut.

147. In referring to the analysis of Thai plasterboard export statistics provided by Winstone, Elephant Plasterboard said Winstone is inviting the Ministry to speculate that in the absence of a duty (a) Siam Gypsum would reduce its price to Elephant Plasterboard, and (b), Elephant Plasterboard would utilise such a price drop to undercut Winstone’s NIP. Elephant Plasterboard said that even in the event of Siam Gypsum lowering its price, it would not use the lower price to undercut Winstone for two reasons. Firstly Elephant Plasterboard said it is acutely aware of the ramifications of undercutting Winstone (when the service level is identical). Secondly, Elephant Plasterboard said it [REDACTED]

148. Elephant Plasterboard notes that since a lesser duty was reintroduced in November 2000 Siam Gypsum’s price has been [REDACTED] the NIFOB, i.e., it chooses to make the most of a high price market. Elephant Plasterboard said the evidence is that Siam Gypsum would not reduce its prices in the absence of duties, as Winstone’s analysis of Thai export statistics is presumably suggesting. Elephant Plasterboard submits that this analysis by Winstone constitutes no more than the conjecture/speculation that has been put up in the past.

149. In response to the Interim Report, Elephant Plasterboard repeated its earlier submission that there is no legal basis to increase the remedy from \$1.71 to [REDACTED] [the level proposed in the Interim Report]. Elephant Plasterboard said no undercutting analysis has been done in the reassessment, presumably on the basis that section 14(6) of the Act does not require it. However, Elephant Plasterboard said section 14(6) of the Act empowers the Secretary [now Chief Executive] to reassess the rate determined under section 14(4). Elephant Plasterboard said that granted section 14(4) does not specifically refer to the lesser duty rule, but section 14(5) makes it clear that in exercising the discretion under section 14(4) the Minister shall have regard to the lesser duty rule.

150. Accordingly, Elephant Plasterboard considers that an undercutting analysis is required on a reassessment. Elephant Plasterboard said whether a specific undercutting analysis is required or not, it submits that in the absence of actual evidence of undercutting the Ministry is not in a position to raise the remedy.

Ministry's Consideration of the Issues

151. In determining the rate or amount of anti-dumping duty, the Minister is required, by section 14(5) of the Act, to have 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. In the view of the Ministry this requirement is in the Act because of the adverse impact on trade, competition and general economic efficiency that a duty that is higher than is necessary would have.

152. The Ministry does not agree with Winstone that this requirement is in any sense a "mere" direction in the Act because of the use of the word "desirability". Section 14(5) of the Act requires the Minister to have regard to the desirability of ensuring the amount of duty is not greater than is necessary to prevent material injury. The direction in the Act to the Minister to have regard to this matter is consequently of significance given the adverse effects that may arise if a higher duty is imposed.

153. The Ministry does not consider the fact that Elephant Plasterboard has changed its name to be of any significance to the issue of the level of anti-dumping duty. This is a matter that any company has a right to do. It is unclear what Winstone is trying to convey by referring to Elephant Plasterboard being "re-branded" as it is continuing to sell the same brand of plasterboard it has always done. The introduction of a range of technical literature does not appear to be of any relevance to the issue at hand. Rather, it is something that could normally be expected in a competitive market place and its absence would be more remarkable than its presence.

154. The example provided by Winstone of the customer ([REDACTED]) which it lost (and later recovered) to imported plasterboard does not in the view of the Ministry on its own provide a compelling reason to impose duty at the full margin of dumping. At the time those sales were temporarily lost there was a NIFOB duty in place based on Winstone's actual selling price (which was taken as the NIP). This duty was designed to ensure that imports on-sold into the New Zealand market place by Elephant Plasterboard, after adding its costs and reasonable profit margin, would at a minimum sell at the equivalent of Winstone's selling price.

155. The Ministry notes that the actual purchase price paid by Elephant Plasterboard at that time was well above the minimum non-injurious purchase price set by the duty. This indicates that factors other than price (and therefore not something that could be attributed to injurious dumping) were more likely to be the cause of these temporarily lost sales. The Ministry also notes the claim by Elephant Plasterboard that Winstone convinced the

██████████ to switch back to Gib at the same price as that at which Elephant Plasterboard had agreed to sell.

156. The Ministry also observes that in setting a NIFOB it cannot guarantee that a New Zealand industry will be exempt from all price-based competition. The calculation made to establish the NIFOB includes a reasonable importer's profit margin, but a NIFOB mechanism cannot guarantee (and nor should it) that this exact margin will be taken on every sale made by importers in the New Zealand market place. The cut and thrust of every day competition will mean that in some sales a lesser margin will be taken and in some sales a higher margin will be taken. To expect an importer to always sell at the same price would be similar to an expectation that Winstone always sell at the NIP.

157. Winstone argues that the Ministry has not taken account of volume effects in setting a NIFOB, notes that in setting a NIFOB it takes into account only non-injurious price levels and hence the remedy takes no account of volume injury. The Ministry has difficulty following the reasoning behind this argument. If Winstone is unable to compete with imported plasterboard priced at a non-injurious level then it is unlikely that any lost sales could be attributed to injurious dumping. It is far more likely that lost sales in these circumstances are due to other factors such as service and quality for which anti-dumping duty cannot provide a remedy. The argument by Winstone is effectively demanding that all competition (and therefore lost sales volume) must be eliminated before a remedy could be considered effective. The Ministry notes that anti-dumping duty is designed to ensure fair competition by remedying the injury caused by dumping.

158. The Ministry also notes that the volume effects referred to by Winstone are more relevant in a new investigation or a review which examines the volume and price effects of dumped imports and their consequent economic impact to determine if an industry has suffered or is threatened with material injury. If dumped imports have caused or threaten to cause material injury, the level of duty will then be considered on the basis of prices as reflected in the level of price undercutting related to the margin of dumping. While volume effects are significant in determining whether an industry has suffered material injury, the level of duty can only be practically determined by reference to price levels. In the case of plasterboard, which is a commodity product sold largely on the basis of price and for which demand is inelastic, an anti-dumping duty that remedies the injurious price effects of dumped imports will as a result address the injurious volume effects.

159. The Ministry considers that in carrying out a reassessment, it is not required to undertake a full injury investigation. That can only be considered in a review, which would examine if Winstone had suffered any actual injury, by an examination of its full financial results (not just an examination of examples of alleged injury) and the likelihood of a recurrence of dumping causing injury, should duties be removed. If Winstone wishes to apply for a review and provides sufficient positive evidence justifying the need for it, then the Ministry is required to carry one out.

160. The Ministry does not consider the time delay referred to Winstone between lodging an application and the completion of a reassessment is sufficient grounds not to have a lesser duty if all other evidence shows that a lesser duty is appropriate. As Winstone notes, the Act does not provide for retrospective application of increased rates of duty resulting from a reassessment. At the same time the Act does require the Minister to have regard to the desirability of a lesser duty. The Act therefore does not contemplate the fact of carrying out a reassessment, with its inevitable delay, as being sufficient on its own to rule out a lesser duty.

161. The Ministry has not changed its view from the last reassessment that it must base its conclusions on the structure currently in place. The Ministry is unable to locate any reference to a change in import structure since the last reassessment. The Ministry's own investigation has shown that the import and distribution structure operated by Elephant Plasterboard has not changed from that in place at the time of the last reassessment. As noted in the last reassessment Final Report, the Ministry does not consider that the changes in Elephant Plasterboard's import structure have in fact been that frequent and do not constitute any reason to impose duty at the full margin of dumping.

162. The Ministry's investigation has established that Elephant Plasterboard has continued to sell on an ex-wharf basis. The Ministry has been unable to locate any statements by Elephant Plasterboard that it sold on an ex-wharf basis at the same prices at which it sold ex-store. In the last reassessment, Elephant Plasterboard did make submissions that in selling ex-wharf it was serving the same distributor level function and it therefore considered that it was selling at the equivalent of the ex-store level when selling ex-wharf.

163. The Ministry's investigation shows that only [REDACTED] percent of Elephant Plasterboard's sales over the year ended 31 October 2001 were made ex-wharf. The investigation also shows that over the year ended 31 October 2001 Elephant Plasterboard sold at a discount ex-wharf (when compared with its ex-store price), the weighted average ex-wharf price being [REDACTED] percent less than the weighted average ex-store price. Elephant Plasterboard has provided evidence in the form of a letter from the accountants for a reseller customer that the cost involved to such a customer of purchasing ex-wharf on the terms offered by Elephant Plasterboard to be as much as [REDACTED] percent of the purchase price. This evidence indicates that the [REDACTED] percent discount at which Elephant Plasterboard sells ex-wharf below its normal price is unlikely to represent actual price undercutting when account is taken of the additional costs faced by customers purchasing ex-wharf.

164. Winstone itself said, in referring to sales ex-wharf, that customers would not expect to pay for warehousing and freight that is not incurred. The costs referred to by Winstone are those not incurred by Elephant Plasterboard while the costs referred to by Elephant Plasterboard are additional costs incurred by its customers when purchasing ex-wharf. However, Winstone appears to accept that prices ex-wharf could be lower simply because some costs are not incurred when selling ex-wharf in the same way presumably that Winstone would sell at a lower price ex-factory compared to its delivered price.

165. For the reasons referred to in the two paragraphs above, the Ministry does not consider the fact that a relatively small proportion of Elephant Plasterboard's sales are made on an ex-wharf basis and are made at a discount below its normal selling price, constitutes sufficient reason to impose duty at the full margin of dumping.

166. In considering the submissions by Winstone on the operation of CTS Direct, T G Plasterboard and related companies in the market place, the Ministry notes that a similar situation applies to that observed in relation to Winstone's submission about losing (and regaining) the [REDACTED] as a customer. There was a NIFOB duty in place and the actual purchase price paid by CTS Direct over the POI was above (and over most of the period well above) the non-injurious level set by the duty. If, in spite of this, CTS Interiors Ltd is able to undercut Gib approved contractors as submitted by Winstone, this may indicate that the effectiveness of the duty is being subverted by the payment of an allowance by the exporter. However, Winstone itself has noted that the ability of CTS Interiors Ltd to undercut Gib approved contractors may have two other explanations, i.e., there is some cross-subsidisation by other related companies or the business is being run at a loss in anticipation of a reduction in the duty. The Ministry also notes that Thai Gypsum

advised in writing in response to an exporters questionnaire, that its prices to CTS Direct were “. . . not subject to direct or indirect reimbursement . . .”.

167. As indicated above under methods of imposing duty, the Ministry's preferred option for dealing with the possibility that the exporter is paying a compensatory allowance, particularly given the lack of co-operation by TG Plasterboard, is the imposition of a specific duty. The Ministry concluded above, however, this was not practicable in the circumstances of this case. The inability to impose a specific duty then raises the issue of whether the imposition of duty at the full margin of dumping on exports by Thai Gypsum can be justified on the basis of the evidence put forward by Winstone, bearing in mind the statement made by Thai Gypsum that it has not made any reimbursing payments. In considering the balance of the evidence available, the Ministry does not consider that it justifies the imposition of duty at the full margin of dumping on exports by Thai Gypsum, if a comparison of the NIFOB with the NVE shows that a lesser duty should apply.

168. In considering Winstone's analysis of Thai export statistics, the Ministry notes that it does not intend to carry out a price undercutting analysis, but rather to undertake a comparison of NIFOBs with NVEs to determine if a lesser duty should apply (see below). The analysis required to determine if a lesser duty should apply is not dependent on the actual export price (or likely price in the absence of duty). If duty is imposed by way of a reference price, that price will ensure the imported goods are lifted to either a non-injurious or undumped price (whichever is appropriate). The reference price will perform this function regardless of the actual export price of the goods. The Ministry therefore does not consider that the analysis of Thai export statistics provided by Winstone, and the related submission that prices to New Zealand are likely to drop if duties are removed, is relevant to the issue at hand.

169. The Ministry has considered the submissions made by Elephant Plasterboard that there is no justification for any remedy because Siam Gypsum's prices are [REDACTED] the present NIFOB and are likely to be above any new NIFOB. The Ministry notes that in the last reassessment similar arguments were made by Elephant Plasterboard. At that time the Ministry concluded that it was not possible to terminate the duty under section 14(6) of the Act (being that part of the Act that provides for reassessments of duty). The Ministry's view on this matter has not changed since the last reassessment.

170. The Ministry has also considered Elephant Plasterboard's submission in response to the Interim Report that a price undercutting analysis is required and, in its absence, it is not possible to increase the rate of duty. The Ministry agrees that in reassessing the rate of duty the Minister is required to have regard to the lesser duty rule. The Ministry does not agree, however, that having regard to the lesser duty rule means a price undercutting analysis be carried out. The Act does not specify how the desirability of a lesser duty is to be assessed. As noted above and explained below, the Ministry does not consider that a price undercutting analysis is the best way to assess whether a lesser duty is appropriate when anti-dumping duty is in place. Rather, as explained below, it is better assessed by way of a comparison of a NIFOB with an NVE.

171. On the basis of the considerations above the Ministry concludes that it must proceed with an examination of whether a reference price in the form of either a lesser duty (which would remove material injury to the industry while allowing some dumping to continue) or duty at the full margin of dumping (which would remove dumping in its entirety), should apply. Because of this conclusion, the Ministry has not at this stage examined Winstone's argument concerning the imposition of duty at the full margin of dumping by reference to the lower of the NVEs.

172. The most common reference price methods used in New Zealand are NV(VFDE) amounts, to collect the full margin of dumping and, NIFOB amounts, to collect a lesser duty. In both cases the duty collected is the amount by which the value for duty (in the case of a NV(VFDE) amount or FOB (in the case of a NIFOB) is less than the reference price.

173. Another reference price approach to imposing anti-dumping duty at the full margin of dumping is the use of NVE amounts. This is currently the method used to collect anti-dumping duty for imports from SCT or Siam Gypsum by importers other than Elephant Plasterboard. This method has also been used in the past on plasterboard from Thailand when duty was imposed at the full margin of dumping on all imports. The NVE amount is a fixed amount in Thai baht and was based on the latest normal value in the last review and reassessment POI with adjustments made for costs from ex-factory to value for duty excluding agents or re-sellers margins or commissions. Agents or reseller's margins or commissions were excluded to ensure they did not inflate the export price and thereby hide any possible dumping margin.

174. An indication of whether duty should be applied at the full margin of dumping, or at a lesser rate or amount, is gained by revisiting the price undercutting analysis and observing what happens when the margin of dumping is added on to the prices of the dumped imports (in effect creating undumped prices for the imported goods). If the undumped prices are found to be still undercutting the prices of the domestic industry, duty may be applied at the full margin of dumping. If the undumped prices are found to exceed the prices of the domestic industry, a duty at the full margin of dumping will exceed the level required to remove the price undercutting and, therefore, a lesser duty needs to be considered.

175. In the situation of a reassessment, an analysis of the need for a lesser duty based on the level of price undercutting related to the margin of dumping, may not be useful because of the influence that duties may have had on export prices. The current duties have been in place on a reference price basis for some years and this situation is likely to have resulted in an increase in export prices. To overcome this problem in establishing whether a lesser duty should apply, the Ministry has decided to calculate and compare duties both at the full margin of dumping and at a lesser duty.

176. The Ministry has, therefore, approached the issue by calculating NIFOBs and NVEs for Siam Gypsum and Thai Gypsum and checking whether or not the NIFOB has exceeded the NVE. The NIFOBs are based on Winstone's NIP. If the NIFOB is less than the NVE, then the NIFOB amount (which is the form of lesser duty) will apply. If the NIFOB is greater than the NVE then the NVE will apply, i.e. duty will be imposed at the full margin of dumping.

177. In order to calculate a NIFOB it is first necessary to establish a NIP for Winstone, i.e., the price at which it could sell plasterboard for in the absence of dumped imports. The calculation of such a NIP is considered below.

3.6 Calculation of the NIP

Background

178. In the 1996 review and reassessment, the Ministry calculated the non injurious price (NIP) on the basis of the pre-dumping level of profitability (in 1988), adjusted for inflation and with allowance made for efficiencies and one-off costs. This method of calculating the NIP was the subject of extensive expert evidence provided on behalf of both Winstone and the Ministry during the judicial review proceedings of February 1996. The expert evidence provided on behalf of both Winstone and the Ministry was to the effect that the approach

adopted by the Ministry in the 1996 review and reassessment could not be justified on economic grounds.

179. This was primarily because of the length of time that had elapsed since 1988 and the extensive changes that had taken place in the New Zealand economy since then, and the existence of other competitive pressures that constrained the extent to which Winstone could increase its prices. In a report prepared in 1995 for Winstone by Mr Anthony Frankham, an independent financial expert (also largely reiterated in affidavits given during the judicial review proceedings), it was argued that Winstone's price will only be constrained by:

- Price thresholds which would be established by imported goods offered at non-dumped prices.
- Excessive profit margins conducive to the investment of capital so as to establish local competition, notwithstanding capital investment barriers to entry which may exist.
- Broad economic guidelines derived from annual inflationary increases generally acceptable in the community.

180. At the time of the 1996 review and reassessment, and in the judicial review proceedings that followed it, Winstone argued that its NIP should be calculated using an "import parity approach". The basis of this approach is that competition from prices of undumped imports will set a price limit for Winstone. In the review completed in March 2000 the Ministry agreed that the NIP should be based on an import parity price. In the reassessment following that review, the NIP was therefore established using the import parity approach. An import parity approach bases the NIP on the lowest price of undumped board available or potentially available in the New Zealand market.

181. Elephant Plasterboard said in its submission that it wishes to record its "strenuous and oft repeated objections" to the import parity price methodology for establishing the NIP. Elephant Plasterboard said this method is flawed and simply establishes a monopolist's premium price. The Ministry firstly notes that while Winstone is the only producer in New Zealand, it does not have a monopoly of the New Zealand market as it is subject to import competition which establishes price thresholds in the market. The Ministry does not consider the brief statement above by Elephant Plasterboard constitutes sufficient evidence for it to reconsider the approach to setting the NIP. For this reassessment a NIP was therefore calculated on an import parity approach, based on the lowest price of undumped board available or potentially available in the New Zealand market.

Level of Trade

Background

182. In establishing an import parity price, it is necessary to establish the level of trade at which undumped board competes with plasterboard produced by Winstone. The most obvious source of undumped plasterboard in the NZ market is that imported by Elephant Plasterboard and CTS Direct from the Thai producers. The Ministry has therefore firstly considered the level of trade at which these importers compete with Winstone.

183. At the time of the last investigation and reassessment the issue of the level of trade at which imported plasterboard competed with plasterboard sold by Winstone, was the subject of extensive submissions by Winstone and Elephant Plasterboard. The Ministry considered these submissions at length in the Final Reports on both the investigation and the concurrent reassessment. Because of further lengthy submissions made by Winstone in this

reassessment on this subject, the situation found, the submissions made, and the findings of the last investigation and reassessment are summarised below in order to place in context the latest submissions by Winstone.

Last Investigation and Reassessment

Elephant Plasterboard

184. Elephant Plasterboard restructured its operation with effect from 1 January 2000 such that it became an importer selling only to companies which on-sold to end-users. One of the companies to which Elephant Plasterboard on-sold was Rikki Merchants Ltd (Rikki), which had the same owner as Elephant Plasterboard. Rikki was Elephant Plasterboard's [REDACTED], although in total Elephant Plasterboard's sales to other customers were [REDACTED] to Rikki, its sales to other customers representing [REDACTED] percent of total sales over a recent two month period.

185. Elephant Plasterboard provided evidence from its accountant that Elephant Plasterboard and Rikki operated as independent companies. Elephant Plasterboard also provided evidence that the terms on which it sold to Rikki were the same as those on which it sold to its other customers. Rikki [REDACTED]

186. Elephant Plasterboard advised that it had sole rights to manage the import process into New Zealand, i.e., it had the sole right to decide who could import, but did not have an arrangement that required it to be the only importer. Siam Gypsum advised that Elephant Plasterboard had the sole right to import its plasterboard into New Zealand. There was no written agreement between Elephant Plasterboard and Siam Gypsum concerning this arrangement.

187. Elephant Plasterboard submitted that any distributor wishing to purchase Elephant brand board had to purchase from it and therefore the choice facing a distributor is that of purchasing ex-factory from Winstone or ex-store from Elephant Plasterboard.

188. Elephant Plasterboard also submitted that whether it sold ex-store (in Auckland) or ex-wharf (e.g. in Wellington) it served the same distributor level function. Elephant Plasterboard therefore considered that it was selling at the equivalent of the ex-store level when selling ex-wharf.

CTS Quality Building Products Ltd

189. Over the POI covered by the last investigation and reassessment a company called CTS Quality Building Products Ltd (CTS Quality) was the only importer from Thai Gypsum. CTS Quality refused to co-operate with either the investigation or reassessment (or the review that preceded the reassessment) and the Ministry based its finding on level of trade on the facts available.

190. Thai Gypsum advised that while CTS Quality was its only customer in New Zealand, it had no exclusive distribution/sole supply contracts in any of the countries it exported to. Thai Gypsum provided a chart showing that CTS Quality sold to retailers, subcontractors, builders and original equipment manufacturers. Thai Gypsum also advised that CTS Quality undertook all marketing and distribution functions for Thai Gypsum in New Zealand.

191. Near the end of the last investigation and reassessment, Mr Stephen Tully a director of CTS Quality advised the Ministry that it had ceased being the importer of Thai Gypsum plasterboard as from 1 April 2000. Mr Tully also advised that the new importer was a company called TG Plasterboard Ltd (TG Plasterboard) and that the imports were financed by a company called CTS Direct Ltd (CTS Direct). CTS Quality also advised that it was unrelated to both TG Plasterboard and CTS Direct and that it was only one of a number of resellers who purchased plasterboard from TG Plasterboard.

Submissions by Winstone

192. Winstone noted that its selling price to distributors is clearly the first point at which its product enters the New Zealand market and this would be taken at the ex-factory level. Winstone stated that distributors, when they evaluate supply options, are the entities who make the first competitive choice between the domestic industry and imported product. Winstone submitted that the first point at which imports compete with Winstone's sales is when Elephant Plasterboard and CTS Quality (which was then the importer from Thai Gypsum) place orders with Siam Gypsum or Thai Gypsum rather than with Winstone. Winstone submitted that this competition occurs at the latest at the border, hence the first point of competition in the New Zealand market is at the wharf gate.

193. Winstone gave a number of examples to support its conclusion above:

- Distributors of Winstone plasterboard have the choice of purchasing from the domestic industry or purchasing imported product, and given their sales volume large distributors would very likely be able to purchase direct from a Thai manufacturer.
- A selection of Winstone distributors also re-sold plasterboard to resellers.
- CTS Quality was another distributor which operates a warehouse and sold plasterboard to installers and to a number of small resellers.
- CTS Quality had previously purchased all of its plasterboard requirements from Winstone, but had changed to purchasing Thai plasterboard. In making this purchase decision they had the economic value choice between the cost of imports (ex-wharf) or the cost of domestic product (ex-plant).
- The enmeshed Elephant Plasterboard/Rikki operation made the majority of their sales to installers rather than to resellers. Like other distributors Elephant Plasterboard/Rikki operated a warehouse and carried out marketing and advertising. Like Carters [a large Winstone distributor] and CTS Quality they have a choice between buying imported product and goods from the domestic industry, and therefore the point of economic comparison is ex-factory versus ex-wharf. The changes made by Elephant Plasterboard/Rikki to have one entity as the importer and one as the retailer are cosmetic in nature only.

194. Winstone also highlighted the fact that Rikki did not hold inventory and was therefore supplying its customers on an indent basis, i.e., arranging for supply direct from a supplier to a customer without physically handling the goods.

195. Winstone also submitted that in considering whether sales from Elephant Plasterboard to Rikki were at arm's length, the Ministry misdirected itself by applying the definition of arm's length transactions in section 3(2) of the Act. In Winstone's submission that definition applied to the calculation of the export price when goods are purchased by an importer from an exporter under section 4 of the Act. Winstone submitted that the definition in section 3(2)

of the Act is not directed to assessing material injury under section 8 of the Act and related level of trade questions, which are essentially matters of fact and commercial reality.

196. Winstone went on to argue that Elephant Plasterboard and Rikki were effectively one entity with identical ownership and overall management control. Winstone cited various ways in which the two companies' operations were intertwined. Winstone also noted that it was all the more unreasonable for the Ministry to treat Rikki as an unrelated entity having regard to the numerous changes in import structures over the years which it considered had invariably had the effect of avoiding or minimising payment of anti-dumping duty.

197. Winstone submitted that even if it were appropriate to consider whether transactions between Elephant Plasterboard and Rikki were at arm's length in terms of section 3(2) of the Act, the Ministry could not properly conclude that such sales were at arm's length. Winstone provided detailed argument that such sales were not at arm's length because Elephant Plasterboard and Rikki are related persons in terms of section 3(4) of the Act. In addition, Winstone argued that the owner of Elephant Plasterboard and Rikki would receive a benefit from the profit on the sale, rendering the sales non-arm's length in terms of section 3(2)(c) of the Act.

198. Winstone also noted that the proportion of sales to retailers other than Rikki had materially declined, indicating that prices unattractive to independent retailers remain attractive to Rikki by reason of it being intertwined with Elephant Plasterboard. Winstone also submitted that the terms of sale to Rikki differ as there is no freight component.

199. Winstone said if Elephant Plasterboard was a true importer in the sense that it was not intertwined with a related retail operation, and it had sole rights to import, and sold only to independent retailers, then the approach would be to treat it as being at the same level of trade as Winstone (i.e. competing with Winstone for sales to the retailer/distributor level).

Ministry's Findings

200. In relation to CTS Quality, the Ministry noted that it had been unable to verify the apparent change in import structure that was claimed to have come into effect from 1 April 2000. The Ministry therefore examined level of trade on the basis that CTS Quality was an importer selling direct to end users. The Ministry noted that as an importer and a seller to end-users, CTS Quality was faced with an economic choice of buying from either the domestic industry ex-factory or from Thai Gypsum and bearing the import costs to the ex-wharf level. The Ministry therefore concluded that the relevant level of trade for CTS Quality was at the ex-wharf level.

201. In relation to Elephant Plasterboard, the Ministry noted that the import and distribution structure operated by Elephant Plasterboard since 1 January 2000 was like that more normally encountered by the Ministry in an investigation, i.e., there is an importer who on-sells to other companies, who sell to end-users.

202. The Ministry also noted that while Rikki was [REDACTED] of Elephant Plasterboard, [REDACTED] of its sales were to other customers, and therefore Winstone's concerns about the enmeshed nature of Elephant Plasterboard and Rikki did not apply to [REDACTED] of Elephant Plasterboard's sales. The Ministry also noted that Elephant Plasterboard and Rikki were closely associated through having the same owner and director, operating from the same premises, and through [REDACTED]. The Ministry considered, however, that Elephant Plasterboard had provided evidence that it and Rikki operated as separate entities, [REDACTED].

██████████ The Ministry noted that Elephant Plasterboard had also provided evidence that the terms on which it sold to Rikki were the same as those on which it sold to its other customers.

203. The Ministry considered it entirely legitimate that the owner of Elephant Plasterboard and Rikki wished to remain in the business of retailing plasterboard through Rikki. The Ministry was of the view that ownership of a retail business should not of itself automatically and forever preclude Elephant Plasterboard being at the same level of trade as Winstone. The Ministry was also of the view that the economic advantage that Winstone submitted was held by Rikki over all other Elephant Plasterboard customers through not holding stock and not incurring inwards freight costs, was a natural result of the way in which Elephant Plasterboard and Rikki structured their import and distribution system.

204. In considering the application of section 3(2) of the Act to sales by Elephant Plasterboard to Rikki, the Ministry noted that section 3(2) stated that “For the purposes of this Act”, indicating that section 3(2) applied to all of the Act, not only to the calculation of export prices under section 4 of the Act. The Ministry also noted that footnote 11 to Article 4.1 of the Anti-Dumping Agreement contains a definition of when the domestic industry is deemed to be related to exporters and importers, i.e., the definition in footnote 11 was not given in the context of whether exporters were related to importers for the purpose of establishing an export price. The Ministry also noted that the definition in footnote 11 is reflected in section 3(4) of the Act, indicating that this section and the related section 3(2) had a general application to the entire Act.

205. The Ministry therefore considered that in determining whether sales from Elephant Plasterboard to Rikki were at arm’s length, it should apply the definition in section 3(2) of the Act, taking into account the provisions concerning related persons in section 3(4).

206. The Ministry agreed with Winstone that Elephant Plasterboard and Rikki were related in terms of section 3(4) of the Act. The Ministry concluded, however, that the relationship between Elephant Plasterboard and Rikki had not influenced the price between them.

207. The Ministry considered, having concluded that the price from Elephant Plasterboard to Rikki was not influenced by the relationship between the two companies, it would be unreasonable to accept that the profit arising from that sale would constitute a “benefit” in terms of section 3(2)(c) of the Act. The Ministry did not consider there was any convincing evidence that Rikki was being subsidised by Elephant Plasterboard. The Ministry noted that even if this was the case there was no evidence that any such subsidy was related to the price paid by Rikki.

208. On the basis of the above considerations, the Ministry concluded that the sales from Elephant Plasterboard to Rikki were arm’s length transactions in terms of section 3(2) of the Act.

209. The Ministry did not accept Winstone’s claim that Elephant Plasterboard’s existing sole rights to import would be overridden if a large Winstone distributor sought to buy directly from Siam Gypsum. In relation to Winstone’s comments about the frequent changes in import structures, it was noted by the Ministry that it must apply the provisions of the Act to whatever import structure was in place over the POI.

210. Based on the foregoing considerations the Ministry concluded that the major economic choice facing a potential buyer at the first point of entry of the goods into the New Zealand market, were those of purchasing ex-factory from Winstone or purchasing ex-store from Elephant Plasterboard.

Considerations Relating to Current Reassessment

Background Information Relating to Elephant Plasterboard NZ Ltd

211. Elephant Plasterboard's import and distribution structure has not changed since January 2000. Details of Elephant Plasterboard's operation are shown in section 1.2 above.

Background Information Relating to CTS Direct/TG Plasterboard

212. As noted in section 1.2 above, while CTS Direct is recorded in Customs data as the importer from Thai Gypsum, it primarily acts as a financier for TG Plasterboard. Because of this the Ministry sought additional information from TG Plasterboard relating to its general operation, distribution channels, costs, profit margin and selling prices, and its relationship with CTS Direct and its customers (including CTS Quality). No response was received from TG Plasterboard. The structure of the importing and distribution system set out below is based on information provided by CTS Direct.

213. Orders for plasterboard originate with customers of TG Plasterboard (referred to below as the "end customers"), [REDACTED]
[REDACTED]
[REDACTED] CTS Direct advised that CTS Quality is one of the end customers of TG Plasterboard.

214. To place an order TG Plasterboard sends a completed order form to CTS Direct for approval. The order form shows port of discharge, volume requested and the delivery address of TG Plasterboard's customer. CTS Direct approves the order by signing the order form and returns it to TG Plasterboard. TG Plasterboard then faxes the order to Thai Gypsum.

215. Thai Gypsum ships the order to the port nearest the end customer and invoices CTS Direct on a CIF basis. CTS Direct pay for the import duty, customs and port fees. CTS Direct also arranges and pays for delivery direct from the wharf to the end customer.

216. CTS Direct sells all of the imported plasterboard to TG Plasterboard on a free-into-end-customer-store basis. CTS Direct sells to TG Plasterboard at a price designed to yield a profit margin on the costs referred to above of approximately [REDACTED]
[REDACTED] TG Plasterboard then on-sells to the end customer on a FIS basis.

217. CTS Direct advised that the [REDACTED] margin was negotiated with TG Plasterboard at the time the present structure was set up. CTS Direct said that its sales to TG Plasterboard are at arm's length and advised that CTS Direct and TG Plasterboard are separately-owned companies with no common ownership.

218. TG Plasterboard is responsible for marketing the plasterboard to the end customers and also provides quality assurance services (e.g., testing of the plasterboard to meet standards and completion of insurance claims for damaged board). Under this structure neither CTS Direct nor TG Plasterboard physically hold or handle the plasterboard, other than CTS Direct arranging for the cartage of the plasterboard from the wharf to the end customer.

219. The level of trade at which CTS Direct consider its product first competes on the New Zealand market is at the free-into-end-customer-store level.

Submissions by Winstone

220. As noted above, Winstone made further lengthy submissions concerning level of trade and these are recorded below.

Imports by Elephant Plasterboard

221. Winstone submits that the correct level of trade comparison with its ex-factory price is the ex-wharf cost of imports, for imports from both Thai Gypsum and Siam Gypsum. Winstone considers that calculating a lesser duty based on a different point of comparison results in a duty that is inadequate to prevent material injury to the New Zealand industry caused by dumping.

222. Winstone submits that the Ministry is in error if it compares Winstone's ex-factory price with a constructed ex-store value for Sigma, now renamed and re-branded Elephant Plasterboard NZ Ltd for two key reasons:

- a. It is not reasonable for the Ministry to conclude that Elephant has the sole legal right to import Siam Gypsum board into New Zealand solely on the basis of Mr van Hest's [the owner of both Elephant Plasterboard and Rikki] unsubstantiated claim that there is a "verbal agreement" to that effect with SCT. Winstone refers to Siam Gypsum's letter of 4 January 2002 (document #51) which states "there is no written agreement between Sigma and SGICO/SCT" and does not refer to let alone purport to confirm any verbal agreement. Winstone said the verification report refers to past practice and comments that past practice is not evidence of future obligation. Winstone submits the fact that Mr van Hest has not been able to obtain a written exclusive distribution agreement indicates that Siam Gypsum is not prepared to commit to such exclusivity.
- b. It is not a reasonable conclusion that Elephant acts as an importer but not as a distributor of board to end users³ based on the following:
 - Sigma not only changed its name to Elephant Plasterboard NZ Ltd but also re-branded itself accordingly. It introduced a range of technical literature and other forms of market support. The company also undertook an expansion of its warehouse at Glendene. In the retail plasterboard market, end users perceive Elephant as the supplier - it markets the product. One of Elephant Plasterboard's customers says Rikki and Sigma are one as far as they are concerned. They have the same telephone number and the same number is shown for both on the signage at their joint premises.
 - It makes no difference that the invoice for end users is provided in the name of Rikki. This is simply an internal paper transaction or transfer price achieved no doubt by journal entry in the accounts. The product does not move even within the joint premises. The same staff carries out promotion and sale.

223. Winstone claims that contrary to Elephant Plasterboard's assertion in the last reassessment, it does not sell to Rikki on the same terms and conditions as other customers. Winstone said Elephant Plasterboard makes ex-wharf sales to third parties with [REDACTED]

³ Winstone maintain that the Ministry's level of trade conclusion in the last reassessment for imports by Elephant (then known as Sigma) from January 2000 is wrong and continues to reserve its position.

discount. To substantiate this claim Winstone provided a copy of an Elephant Plasterboard invoice to [REDACTED] dated [REDACTED]

224. Winstone submits that the Ministry must take account of the combined and interrelated operations of Elephant Plasterboard and Rikki and said in summary, Elephant Plasterboard and Rikki have:

- The same premises.
- The same telephone number.
- The same signage.
- The same staff.
- The same computer system.
- The same marketing information.
- The same Elephant board.
- The same sole director.
- The same sole shareholder.

225. Winstone submits that if the Ministry is prepared to ignore this factual and commercial reality it means that any distributor who imports (who the Ministry accepts should not be treated at the same level of trade as a New Zealand manufacturer) can persuade the Ministry that it is not at the distributor level of trade simply by incorporating a separate company and calling one the importer and one the distributor with the appropriate journal entries amounting to sales from one to the other. Winstone said it is not right or reasonable for the Ministry to conclude that such notional distinctions created on paper have any bearing on the practical outcome and the reality.

226. Winstone submits that the Ministry misdirects itself in law by applying section 3(2) of the Act to its consideration of whether transactions between Elephant Plasterboard and Rikki are at arm's length. Winstone claims that definition applies to the calculation of the export price of goods purchased by the importer from the exporter under section 4 of the Act. Winstone refers to the Ministry's interpretation recorded in the last Reassessment Final Report that section 3(2) of the Act applies to the entire Act [see details above under "Last Investigation and Reassessment"]. Winstone argues that this is a serious error of law by the Ministry.

227. Winstone claim it is an error of law for the following reasons:

- When a term is defined "for the purposes of this Act", the definition applies wherever, but only wherever, the defined term appears in the Act.
- The defined term is used in the Act only in the context of sales by the exporter (in relation to export price or normal value – refer sections 4, 5 and 10).
- The term is not used in the context of material injury to the New Zealand industry in section 8 of the Act. The legal definition is not directed to assessing material injury

under section 8 of the Act and related level of trade questions and has no relevance to it at all.

- It is misconceived to regard the related party definition in footnote 11 to Article 4.1 of the Anti-Dumping Agreement, relevant to the definition of domestic industry, as indicating that section 3(2) has a general application to all of the Act. New Zealand has not even incorporated that footnote into the Act's definition of domestic industry. Moreover, while the footnote may have been reflected in the section 3(4) related party definition, which in turn appears in the definition of arm's length transaction, it does not follow at all that section 3(2) has any application other than where the defined term "arm's length transaction" is used in the Act.

228. Winstone argues that questions of assessing material injury and the related level of trade are essentially matters of fact and commercial reality, as is clearly reflected in section 8 of the Act and in the extensive expert evidence it has provided from five independent experts. [The Ministry assumes the reference to independent experts relates to evidence provided during the 1997 judicial review proceedings]. Winstone said that the Ministry must consider issues related to injury and in doing so adopt a factually correct view of the market, the commercial operations of the importer and the correct levels of trade. According to Winstone, the Ministry is not constrained in forming a correct view about these matters by section 3(2) of the Act, which is applicable to an entirely separate transaction.

229. Winstone notes that even if its legal submissions concerning the application of section 3(2) of the Act are incorrect, the Ministry was not correct in law to conclude in the last investigation and reassessment that sales from Elephant Plasterboard to Rikki could be treated as arm's length transactions in terms of section 3(2). Winstone's reasons for this are as follows:

- Sections 3(2)(b) and (c) of the Act incorporate the concept of "related persons", which is defined in subsection 4. Plainly, Elephant Plasterboard and Rikki are related persons in that both of them are directly or indirectly controlled by Mr van Hest.
- Contrary to the Ministry's conclusion in the last investigation and reassessment, Elephant Plasterboard does not sell to Rikki on the same terms and conditions as it does to its other customers. The terms of sale differ in at least the following respects:
 - i. there is no freight component in the sales to Rikki;
 - ii. there is no delay in delivery – Rikki has instant supply;
 - iii. Elephant Plasterboard makes ex-wharf sales to third parties with an ex-wharf volume discount below its ex-store price.
- In terms of section 3(2)(c) of the Act Rikki will receive a benefit because part of its operation is subsidised by Elephant Plasterboard. It is wrong for the Ministry to reject this argument simply because Rikki may not be undercutting other Elephant Plasterboard customers. It is the fact that Rikki would have to increase its price in the absence of subsidisation from Elephant Plasterboard that counts.

230. Winstone submits that the statutory regime and the law require the Ministry to make adequate enquiries to test the position of Elephant and Rikki. Winstone asserts that the Ministry cannot simply reject its legitimate concerns by saying that it has not proved its case. Winstone considers that to accept that Elephant is truly acting solely as an importer and not as a retailer (by subsidising its sister company Rikki) the Ministry would need to be satisfied

that there is no subsidisation and that the two entities would act in the same way if they were not related.

231. Winstone notes that Elephant Plasterboard and Rikki are two private companies with identical ownership and overall management control. Winstone submits this is a crucial point and separate accounting treatment is no answer to it. Winstone argues that to accept Elephant Plasterboard is truly acting solely as an importer and not as a retailer (by subsidising Rikki) the Ministry would need to be satisfied that there is no subsidisation and that the two entities would act in the same way if they were not related. Winstone considers this is clearly not the case as the relationship is symbiotic - Rikki does not have sufficient substance to stand alone and does not in fact stand alone.

232. Winstone said that Rikki has an economic advantage over all other Elephant customers through being co-located with Elephant as Rikki does not incur any freight cost into store, because there is no physical movement of the goods. Winstone submits that the Ministry was wrong in the last investigation and reassessment to dismiss this aspect as an irrelevant "natural result" of the way Elephant Plasterboard and Rikki structure their import and distribution system. Winstone claims there is effectively subsidisation of Rikki by Elephant in the form of cost sharing which means that Elephant is not solely acting as importer - it is contributing to the retailer function. Winstone also claims Rikki has the further advantage of preferred access to Elephant Plasterboard's stock on-site.

233. Winstone said that Rikki does not have completely separate sales staff, that Elephant Plasterboard's staff also work for Rikki's benefit and that Elephant Plasterboard continues to subsidise Rikki's cost of sales and carries out retail functions. Winstone argues that the Ministry was wrong in the last investigation and reassessment to reject this simply by saying that Winstone provided no basis for this assertion. Winstone claims that it is the Ministry which has the legal obligation to properly investigate the position relating to the staff costs of Elephant Plasterboard and Rikki and it must do so before concluding that Elephant Plasterboard acts solely as an importer. In the view of Winstone, the re-naming and re-branding of Sigma as Elephant Plasterboard is a further indication of Elephant Plasterboard's role in the retail market.

234. Winstone provided a report completed by [REDACTED], forensic accountants, showing their estimates of the cost of operating Elephant Plasterboard and Rikki. One part of the report shows the estimated cost of operating Elephant Plasterboard and Rikki with costs allocated between the two companies on the basis that Winstone thinks was likely used to calculate the current NIFOB, i.e., with costs more heavily loaded onto Elephant Plasterboard than Winstone consider is reasonable. Another part of the report shows the estimated cost of operating Elephant Plasterboard and Rikki with costs allocated between the two companies on the basis that [REDACTED] consider reflects the costs that would be incurred if the companies had an independent arm's length relationship. Winstone said the extent of subsidisation between Elephant and Rikki is seen in the report. Winstone notes that the [REDACTED] report concludes that the current structure would not be possible if the entities were trading independently and at arms length.

235. Winstone submits that it is all the more unreasonable for the Ministry to treat Rikki as a separate and unrelated entity having regard to the history and conduct of these importers (Mr van Hest, Elephant Plasterboard and Rikki). Winstone said while it was correct in the last investigation and reassessment for the Ministry to apply the Act to whatever import structure was in place for the POI there is nothing in the Act or on the facts to support the Ministry's current view about the point of level of trade comparison for the purposes of determining the level of material injury.

236. Winstone states that contrary to the Ministry's conclusion in the last investigation and reassessment, the Elephant Plasterboard/Rikki operation is not like that of a "normal" importer situation where an importer on-sells to other companies who sell to end-users. Winstone claims that in this case, an end-user of Elephant plasterboard may be approached by, or approach, Elephant Plasterboard directly and agree to purchase board. Winstone said Mr van Hest can simply choose whether to invoice in the name of Elephant Plasterboard or Rikki, depending on the status of the customer. Winstone also claims that in any event such additional levels of distribution are becoming less normal in a competitive market.

237. Winstone asserts that Elephant Plasterboard's use of Rikki as a nominal seller specifically to ensure that Elephant Plasterboard is placed at the same level of trade as Winstone is no more than a device to avoid the proper level of anti-dumping duty and by recognising the device instead of ignoring it, the Ministry is failing to prevent material injury caused by dumping.

238. Winstone states that it is not legally correct or reasonable for the Ministry to disregard the combined and interrelated operations of Elephant Plasterboard/Rikki. The only reasonable conclusion, in Winstone's opinion, on the facts is that the importer (Elephant Plasterboard) is also involved at the retail level for the bulk of its transactions.

239. Winstone concludes its submission on level of trade by arguing that the correct approach for the purpose of calculating a remedy is as follows:

- a. the Ministry having corrected the level of trade error, should conclude that a remedy at the full margin of dumping is required;
- b. if a lesser duty were required, then the Ministry, having calculated the NIP at the ex-wharf level, should only deduct from the NIP those costs which are incurred from wharf to wharf in order to set the remedy at a FOB level (i.e., a NIFOB).

240. Winstone claims this would involve the Ministry properly recognising that the commercial operations of Elephant Plasterboard and Rikki are intertwined and together they operate at the distributor/retailer level of trade. Winstone argues this would ensure that the buyers of Elephant board at that level cannot purchase it at less than the equivalent of the factory gate NIP and that costs and margins cannot be manipulated or distorted by reason of the importer operating through more than one corporate entity.

Imports by CTS Direct Ltd

241. Winstone submits that the correct level of trade is at the ex-wharf level and that calculating a lesser duty based on a different level of trade results in a duty that is inadequate to prevent material injury.

242. Winstone notes that Mr Tully and Mr Perrin [owner and director of CTS Direct] have not co-operated with the reassessment because:

- Having initially indicated that he would respond to the importer's questionnaire, Mr Tully indicated that as TG Plasterboard was not the importer, it did not have, or did not have access to, the information requested and therefore could be of no assistance.
- On the contrary, the subsequent verification visit to CTS Direct indicates that TG Plasterboard is involved in the preparation of orders and deals directly with Thai Gypsum.
- TG Plasterboard has not been verified.

- Mr Perrin/CTS Direct did not complete an importer's questionnaire. Mr Perrin agreed on 28 November 2001 to a visit by the Ministry but it took until 28 March 2002 before the Ministry could actually visit. [The Ministry notes that Mr Perrin was not available for a visit in January and because of the verification visit to the Thai producers in February, the verification visit was delayed until March].

243. Given the lack of co-operation and the lack of verification of TG Plasterboard and CTS Quality, Winstone said the importer's assertion that the level of trade has changed cannot be reasonably accepted by the Ministry.

244. In addition, Winstone submits that the Ministry cannot accept the level of trade has changed, for two key reasons:

- There is no evidence that CTS Direct has the sole legal right to import Thai Gypsum board into New Zealand. There is no written agreement conferring sole rights to distribute Thai Gypsum plasterboard in New Zealand. A letter provided by Thai Gypsum dated 13 March 2000 was written when CTS Quality was still the named importer and limits those rights to the North Island.
- The evidence shows that in reality, and for all practical purposes, Mr Tully is still responsible for the importation, distribution and sale of board to end-users. The recent creation and use of elaborate corporate structures does not change the reality.

245. Winstone notes that it is TG Plasterboard which prepares the order and, after it is approved by CTS Direct, faxes it directly to Thai Gypsum.

246. Winstone observes that CTS Direct has asserted that it and TG Plasterboard are separately owned companies with no common ownership and that all sales to TG Plasterboard are made at arm's length. Winstone submits, however, that this assertion cannot be accepted in circumstances where sales occur at a price designed to yield some set profit margin and the parties have refused to disclose the relevant written agreement.

247. Winstone also submits that sales from CTS Direct to TG Plasterboard cannot be at arm's length in light of the available evidence of the close connections between all relevant companies. Winstone provided diagrams constructed from Companies Office records showing the shareholders, directors, registered offices of the various companies related to CTS Direct and TG Plasterboard and the debentures held by some of these companies against some of the other companies. Winstone provided this information for the structure prior to 1 April 2000 and for the current structure.

248. The following table shows the current shareholders, directors and registered offices of CTS Direct and TG Plasterboard and that of companies related to those companies, as provided by Winstone.

Company Name	Shareholders	No. of Shares Held	Directors	Previous Name(s)	Date Name Changed
CTS Direct Ltd	Angel Holdings Ltd	100	C Perrin	Lamination Technologies Ltd	15/2/00
				CTS Manufacturing	18/4/96

				Ltd	
Angel Holdings Ltd	Theatre Promotions (Three) Ltd	100	C Perrin	N/A	N/A
Theatre Promotions (Three) Ltd	Zilgra Trust	100	C Perrin	N/A	N/A
Sandakan Enterprises Ltd	Akoustikos Holdings Ltd	100	C Perrin	N/A	N/A
Akoustikos Holdings Ltd	Jangles Productions Ltd	100	C Perrin	N/A	N/A
Jangles Productions Ltd	Theatre Promotions (Three) Ltd	100	C Perrin	N/A	N/A
Perrin Consultancy Ltd	Theatre Promotions (Three) Ltd	100	C Perrin	N/A	N/A
TG Plasterboard Ltd	E Tully	1	C Perrin	Albion Consultants Ltd	22/4/02
	S Tully	99	S Tully		
TGP 2000 Ltd	E Tully	500	S Tully	TG Plasterboard Ltd	11/4/02
	S Tully	500			
CTS Quality Building Products Ltd	E Tully	50	S Tully	Ceiling Tile Solutions Ltd	15/2/99
	S Tully	50	G Tully		
CTS Interiors Ltd	E Tully	50	G Tully	Ceiling Tile Solutions Ltd	15/4/02
	S Tully	50	S Tully		
Ceiling Tile Solutions Ltd	E Tully	50	E Tully	CTS Interiors Ltd	15/2/99
	S Tully	50	S Tully		

249. Winstone notes that prior to 1 April 2000 there was a clear relationship between CTS Direct, TG Plasterboard and various other companies through common directorships and shareholdings (directly or indirectly).

250. Winstone said that it appears this inter-locking ownership has been separated through:

- Mr Tully's resignation as a director of CTS Direct.
- The transfer of Albion Consultants Ltd's (now renamed TG Plasterboard) 50 percent share of CTS Direct to Angel Holdings Ltd.

- Mr Perrin's resignation as a director of CTS Quality and Ceiling Tile Solutions Ltd.
- The transfer of Angel Holdings Ltd's 50 percent share in CTS Quality to Mr and Mrs Tully.

251. Winstone notes, however, that throughout there has been a financial connection through a debenture over CTS Quality in favour of Sandakan Enterprises Ltd, another company of which Mr Perrin is the sole director with ownership traced back to the Zilgra Trust.

252. Winstone states that the similarity of company names is itself indicative of a connection between the various CTS companies, including CTS Direct. Winstone notes that without agreement, use of similar names in connection with the supply of the same or similar goods and services would amount to passing off and a breach of the Fair Trading Act.

253. Winstone said that the position is obscured further as several companies have changed their names to the very names previously used by other companies. Winstone notes that Ceiling Tile Solutions Ltd is now called CTS Interiors Ltd, which is the entity quoting in the market for "supply/fix/stop" business. Winstone also notes that the Tullys have a new company called Ceiling Tile Solutions Ltd, that TG Plasterboard Ltd is now named TGP 2000 Ltd, and that Albion Consultants is now named TG Plasterboard Ltd. Furthermore, Winstone points out that Mr Perrin has now joined Mr Tully as a director of the company now called TG Plasterboard Ltd.

254. Winstone submits that the purported separation of activities by Mr Tully with "imports" by TG Plasterboard's financier CTS Direct, is obviously nothing more than a device to create artificial levels of trade which disguise the reality. CTS Direct, Winstone submits, is a nominal importer acting on behalf of Mr Tully or his companies.

255. Winstone argues that the Act requires the Ministry to address material injury caused by dumping and that dumped goods undercutting its NIP are no less injurious because parties working co-operatively together use a web of interrelated companies and paper transactions.

256. Winstone asserts that, as with Elephant Plasterboard, if the Ministry were to accept such devices and to ignore the factual and commercial reality the consequence is that any distributor who imports can persuade the Ministry that it is not at the distributor level of trade simply by incorporating another company, or by using an agent or nominee, and calling one the importer and one the distributor. Winstone argues that it is not reasonable for the Ministry to conclude that such nominal distinctions have any bearing on the practical effect and reality, they merely create artificial levels of trade.

257. Winstone reiterated its submissions concerning the application of section 3(2) of the Act, which are set out in detail under "Imports by Elephant Plasterboard" above.

Submissions by Elephant Plasterboard

258. Elephant Plasterboard said that Winstone's submission repeats its previously stated position concerning level of trade and notes that Winstone's objection is based on the relationship between Elephant Plasterboard and Rikki. Elephant Plasterboard said it will not re-canvas its past submissions as to the relationship between it and Rikki, but emphasises that Winstone's relationship based argument conveniently avoids the most important point about how its board competes with Winstone's board in the real market.

259. Elephant Plasterboard observes that Winstone's argument seeks to show that an "intertwined" Elephant/Rikki operation is able to compete with Winstone by purchasing at a

wharf gate level of trade and by Mr van Hest simply “choosing” whether to sell as a distributor or retailer. Elephant Plasterboard said that the implication is that Mr van Hest simply pockets the margin where he “chooses to sell through Rikki”. Elephant Plasterboard claims that Winstone goes too far where they accuse Mr van Hest of “manipulation”. Elephant Plasterboard said “Mr van Hest would be happy to have such wide sweeping and magical powers. If so, he, Elephant and Rikki would have made profits in the subject period. Sadly, however they have no such powers, and they both made losses in the subject period.”

260. Elephant Plasterboard states that “Winstone’s assertion that Mr van Hest simply “chooses” his level of trade is, as they know, ludicrous.” Elephant Plasterboard said that the reality is that it perceives (correctly) that it has no “choice” as to level of trade, rather it must attempt to sell in the same manner Winstone does because Winstone offers such a high quality of service. Elephant Plasterboard argues that if it does not strive to match Winstone’s service, it does not make sales, at least not in the medium to long term.

261. In response to Winstone’s submission concerning the lack of a written agreement between it and Siam Gypsum, Elephant Plasterboard said, notwithstanding the lack of a written agreement, Siam Gypsum has given it exclusivity for 14 years, which is the best indication you can have that exclusivity will continue. Elephant Plasterboard said written exclusive distributorship agreements in any event seldom give more than three (maximum five) year terms.

262. The arrangement between it and Siam Gypsum is so long standing, Elephant Plasterboard argues that by law it could only be terminated by “reasonable” notice, which would need to take into account its very significant investment by way of having conducted this precarious trade since 1988. Elephant Plasterboard said reasonable notice would be a period in excess of 12 months, potentially up to 18 months to two years. Elephant Plasterboard also notes that Winstone is protected by the current determination, which requires that any importer buying from Siam Gypsum other than Elephant Plasterboard must pay duty at the full margin of dumping.

Ministry’s Consideration of the Issues

263. The Ministry considers that in the case of the New Zealand industry its ex-factory selling price to its distributors is clearly the point at which its product first enters the New Zealand market. The relevant level of trade for the importers has therefore been considered in relation to the point at which the imported product first competes with Winstone’s ex-factory price in the New Zealand market.

264. In the last investigation and reassessment the level of trade was considered separately for the two importers, as there were distinct issues that needed to be addressed for each importer. This report follows the same principles as the same situation applies.

Elephant Plasterboard NZ Ltd

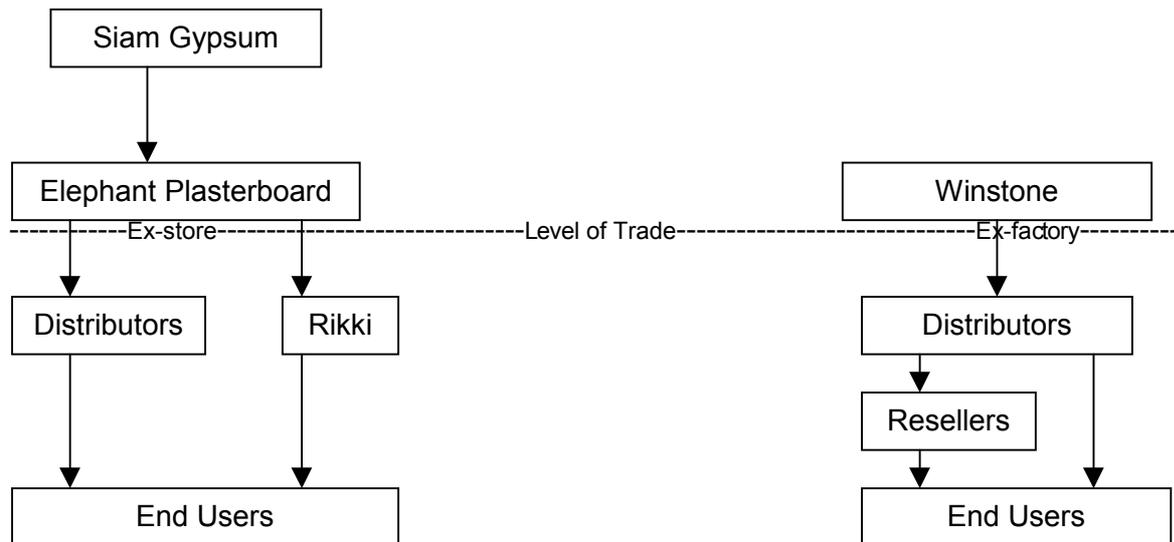
265. Following the submissions from Winstone the Ministry carried out a second visit to Elephant Plasterboard and Rikki specifically to examine in greater depth the issues raised by Winstone concerning the extent to which Elephant Plasterboard and Rikki operate as distinct entities. The Ministry’s consideration of issues related to level of trade therefore includes the findings of that second visit as well as the findings of the first visit.

266. The information available to the Ministry shows that the way in which Elephant Plasterboard operates its import and distribution system has not changed from that which led the Ministry to conclude that ex-store was the relevant level of trade at the last investigation and reassessment.

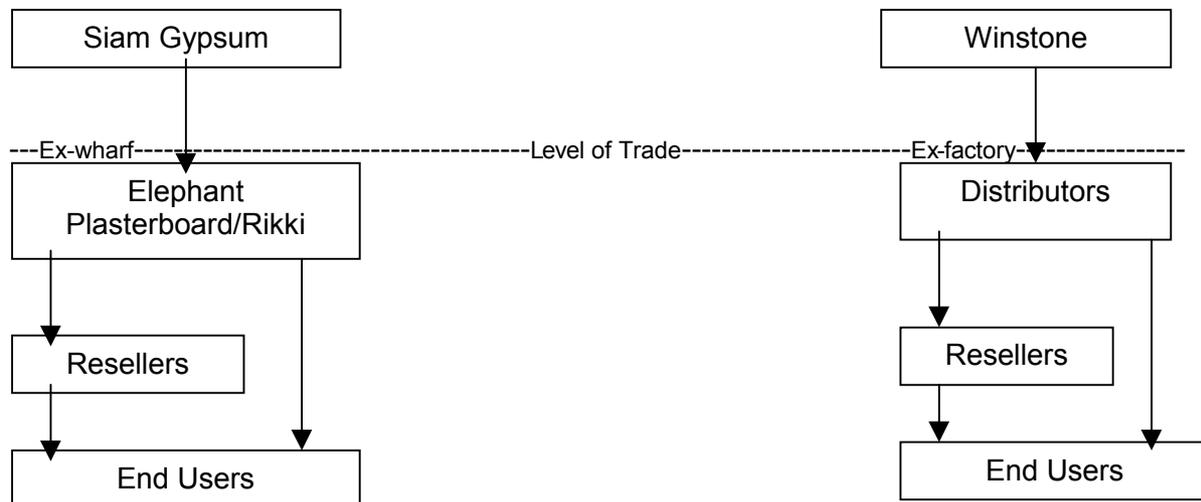
267. Much of the argument put forward by Winstone reiterates the submissions made at the last investigation and reassessment. However, in order to properly consider the submissions made by Winstone, the Ministry has fully evaluated all submissions made in this reassessment.

268. By way of introduction to this issue, the Ministry believes that the positions of Elephant Plasterboard and Winstone on level of trade can be represented diagrammatically as set out below.

Level of Trade as Viewed by Elephant Plasterboard



Level of Trade as Viewed by Winstone



269. In determining the relevant level of trade for the purposes of price undercutting and establishing a NIP, the Ministry examines the point at which the imported goods first compete on the New Zealand market with goods produced by the New Zealand industry. In doing so the Ministry normally looks for the first point of competition before the goods are distributed to ensure that any cost elements relating to the distribution of goods do not confuse the impact of dumping. The Ministry would normally consider the first point of competition to be

the point at which the first potential buyer in the New Zealand market is faced with the economic choice of purchasing either the imported goods or the goods produced in New Zealand.

270. The Ministry considers the significant issues that need to be determined are:

- Whether Elephant Plasterboard and Rikki are operating as distinct and separate entities in an economic sense. This will include the extent to which the selling prices of each of these companies reflect the level of trade at which they are said to be operating. In considering this issue it must be established if sales from Elephant Plasterboard to Rikki are at arm's length.
- What proportion of Elephant Plasterboard's sales are made to customers other than Rikki and to what extent do such sales affect consideration of level of trade?
- Whether Elephant Plasterboard has an effective sole right to import, or to manage the imports, of plasterboard from Siam Gypsum into New Zealand.

271. Each of the above issues is considered below.

The Operation of Elephant Plasterboard and Rikki

272. In considering the operation of Elephant Plasterboard and Rikki and whether transactions from Elephant Plasterboard to Rikki are at arm's length, the Ministry has firstly examined Winstone's arguments concerning the application of section 3(2) of the Act to these transactions.

273. The Ministry notes that in the last investigation and reassessment it was necessary to reach a conclusion on level of trade because section 8(2)(b) of the Act requires that it examine if the prices of the imported goods are significantly undercutting the New Zealand industry's prices "at the relevant level of trade". The level of trade established for price undercutting purposes was also used to establish the NIP and the NIFOB amounts for each Thai exporter. Winstone argued at that time (and continues to do so) that because there was no real difference between Elephant Plasterboard and Rikki the transactions between them should be disregarded and consequently the relevant level of trade was ex-wharf.

274. Both the Act and the Anti-Dumping Agreement are silent as to how the relevant level of trade should be determined. The Ministry decided at that time that since Winstone's argument was essentially that Elephant Plasterboard and Rikki were not operating on an arm's length basis, the definition of "arm's length transaction" in section 3(2) of the Act could be used to examine this issue.

275. After examining Winstone's legal argument on the application of section 3(2) of the Act, the Ministry accepts that Winstone is correct and that the Ministry was in error by stating in the last investigation and reassessment reports that the definition of arm's length transaction in section 3(2) in effect applied to section 8(2)(b).

276. Although the last investigation and reassessment reports were incorrect in stating that section 3(2) of the Act had a general application to all of the Act, the Ministry considers it is not unreasonable nevertheless to be guided by the statutory definition in section 3(2). The Ministry has therefore referred to the definition of arm's length transaction in section 3(2) as it provides useful and relevant guidance in determining whether transactions between Elephant Plasterboard and Rikki are at arm's length. The Ministry emphasises that it is using section 3(2) for guidance only and therefore is not limited to the matters set out in that section in its examination of whether sales from Elephant Plasterboard to Rikki are at arm's length.

277. Section 3(2) of the Act states as follows:

For the purposes of this Act, a purchase or sale of goods shall not be treated as an arm's length transaction if—

- (a) There is any consideration payable for or in respect of the goods other than their price; or
- (b) The price is influenced by a relationship between the buyer, or a related person, and the seller, or a related person; or
- (c) In the opinion of the Secretary, the buyer, or a person related to the buyer, will, directly or indirectly, be reimbursed, be compensated, or otherwise receive a benefit for, or in respect of, the whole or any part of the price.

278. The Ministry has examined the evidence against the three criteria in section 3(2) in the order those criteria are listed in that section, as set out below.

279. There is no evidence that there is any consideration payable in respect of the sale of the goods from Elephant Plasterboard to Rikki other than their price. The guidance provided by section 3(2)(a) therefore does not apply.

280. The Ministry notes that Companies Office records show that Elephant Plasterboard and Rikki have the same shareholder (Mr van Hest), the same director (Mr van Hest) and the same registered office. It is clear that Mr van Hest has effective control over each of these companies. Elephant Plasterboard and Rikki are therefore clearly related parties.

281. Elephant Plasterboard advised that nearly all of its sales to Rikki are made on a delivered to end-user basis, i.e., the board is delivered directly from Elephant Plasterboard's warehouse to Rikki's customer. The Ministry's examination of Elephant Plasterboard's records confirms this to be the case. Elephant Plasterboard's sales records over the POI show that the majority (██████ percent) of Elephant Plasterboard's sales to customers other than Rikki are also made on a delivered direct to end user basis. Elephant Plasterboard maintains that the situation would be similar for sales made by Winstone to its distributors, i.e., for the majority of sales delivery is made directly from Winstone to the end user rather than to the distributor's warehouse.

282. Elephant Plasterboard's records show that over the POI its weighted average selling price to Rikki on a delivered to end-user basis was not significantly different to its weighted average price to other resellers on a delivered to end-user basis. The credit terms extended on sales to Rikki are the same as those to other customers where the sales are made on a delivered or ex-store basis (ex-wharf sales made on ██████████ basis).

283. Winstone has submitted that Elephant Plasterboard's terms of sale to Rikki differ from those to other customers because: there is no freight component in the sales to Rikki, there is no delay in delivery to Rikki, and ex-wharf sales are made at discount below its ex-store price. As noted above, nearly all of Elephant Plasterboard's sales to Rikki are made on a delivered to end-user basis and consequently those sales made by Rikki ex-store for which it does not incur freight, or where it has "instant delivery", are negligible.

284. Elephant Plasterboard's records show that it does sell ex-wharf at a discount. The Ministry notes, however, that this discount is the same relative to Elephant Plasterboard's sales to both Rikki and other customers sold to on a delivered basis. This discount therefore does not differentiate sales to Rikki from other sales to other customers, rather it differentiates ex-wharf sales from other sales (including those to Rikki).

285. The Ministry concludes that apart from a negligible volume of sales not made on a delivered basis, sales from Elephant Plasterboard to Rikki are made on the same terms and

conditions as comparable sales (i.e. sales made on a delivered to end user basis) to other customers. The guidance provided by section 3(2)(b) therefore does not apply.

286. Winstone has submitted that Rikki receives a benefit in terms of section 3(2)(c) because part of its operation is subsidised by Elephant Plasterboard. The Ministry has examined the basis on which significant costs were allocated between Elephant Plasterboard and Rikki, where those costs are common to both companies, over the financial year ended 30 June 2001 (this being the financial year closest to the POI). This examination found that some costs allocated to Elephant Plasterboard should have been allocated to Rikki and some costs allocated to Rikki should have been allocated to Elephant Plasterboard. The net effect of this misallocation was that \$[REDACTED] had been incorrectly allocated to Rikki that should have been allocated to Elephant Plasterboard.

287. The Ministry observes that the misallocated expenditure is insignificant in relation to total company expenditure, the net misallocation representing [REDACTED] percent of Elephant Plasterboard's total expenditure. The Ministry is satisfied that costs have been reasonably allocated between the two companies and therefore that Elephant Plasterboard is not subsidising the operation of Rikki in terms of the cost allocations between the two companies.

288. Winstone has noted that the report by the forensic accountants concludes that the current structure (i.e. the Elephant Plasterboard and Rikki operation) would not be possible if the entities were trading independently and at arm's length. The Ministry has examined the accountant's report. In the view of the Ministry that part of the report which estimates the operating costs of Rikki as if it was a stand alone operation misunderstands the nature of Rikki's operation. The report assumes that Rikki would be operating a significant warehousing operation with all of the costs attendant on that operation. As noted above, nearly all of Rikki's sales are made on a delivered to end-user basis and would therefore not require the overheads of the magnitude estimated by the accountants. The Ministry considers that the costs allocated to Elephant Plasterboard and Rikki (with some very minor adjustments as noted above) reasonably reflect the actual costs that would be incurred if those companies were stand-alone operations.

289. The Ministry consequently does not consider that Rikki's operation is subsidised to any significant extent by Elephant Plasterboard. The guidance provided by section 3(2)(c) therefore does not apply.

290. Using the criteria in section 3(2) of the Act for guidance, the considerations outlined above suggest that the sales from Elephant Plasterboard to Rikki are at arm's length. In addition to using the section 3(2) criteria for guidance the Ministry has examined the other evidence available on the "arm's length" issue that has not already been considered above.

291. The Ministry is satisfied through its own investigations that both Elephant Plasterboard and Rikki operate from the same premises, have the same computer system (although the records for each company are clearly separated in that system), have the same technical marketing information and have some staff that carry out work for both companies. The Ministry has, in the course of a visit to Elephant Plasterboard and Rikki, observed signage at the entrance to their joint premises advertising Rikki and recording that it is the registered office of Sigma Agencies Ltd. The Ministry has also observed that the warehouse has a large sign on its side advertising Elephant Plasterboard.

292. In considering the matters referred to in the paragraph above, the Ministry notes the information largely confirms what has been obvious since the current structure was set up, i.e., that the two companies are closely associated. The Ministry does not consider, however, that the factors referred to go to the heart of whether transactions from Elephant

Plasterboard to Rikki are at arm's length. In particular the Ministry considers that having the same technical marketing information is not of significance as both companies sell the same brand of plasterboard and would expect a similar situation to apply to Winstone and its distributors.

293. Elephant Plasterboard has provided evidence that it and Rikki operate separately in the following respects:

- Separate financial accounts are maintained.
- Separate general ledgers are maintained.
- Separate tax returns are filed.
- Each company has its own overheads.
- Separate bank accounts are maintained.
- Separate debtors and creditors ledgers are maintained.
- Separate wages and PAYE records are maintained.

294. The Ministry is also satisfied that Elephant Plasterboard and Rikki have separate telephone numbers, although in practice either company can be contacted through either of the phone numbers. The Ministry also notes that each company issues its own invoices and when Elephant Plasterboard sells to Rikki it issues invoices to Rikki rather than recording such sales by journal entry.

295. In addition to examining the sales records of Elephant Plasterboard the Ministry has examined Rikki's sales records over the POI. These records show that Rikki's weighted average selling price is significantly above its purchase price from Elephant Plasterboard and is significantly higher than Elephant Plasterboard's comparable selling prices (i.e., those sold on a delivered to end user basis). Rikki's selling prices into the market therefore clearly reflect the different level of trade at which it sells. This evidence indicates that while Mr van Hest may be in a position to control each company, the selling price between each company is clearly differentiated and reflects the different level of trade at which each sale is made.

296. After considering all of the evidence above, the Ministry concludes that sales from Elephant Plasterboard to Rikki are at arm's length, the selling prices at which Elephant Plasterboard and Rikki sell reflect the level of trade at which they operate and therefore each company is operating as a distinct entity in an economic sense, which is supported by information relating to the cost of operating each company (see below under non-injurious price).

Elephant Plasterboard's Sales to Customers other than Rikki

297. The Ministry has established that for the year ended 31 October 2001 Elephant Plasterboard's sales to Rikki represented [REDACTED] percent by value of its total sales. A large majority of Elephant Plasterboard's sales are therefore made to customers other than Rikki. At the time of the last investigation and reassessment the equivalent figure was [REDACTED] percent showing that the proportion of Elephant Plasterboard's sales to Rikki has declined significantly.

298. While the majority of Elephant Plasterboard's sales are made to customers other than Rikki, the Ministry understands that Winstone is arguing that this is not relevant because what it views as the combined Elephant Plasterboard/Rikki entity can choose to sell to either resellers or end users in the same way that Winstone's own distributors make sales to both end users and resellers.

299. The Ministry considers, however, that if the majority of Elephant Plasterboard's sales are made to customers other than Rikki then the issue of whether Elephant Plasterboard's sales to Rikki are at arm's length becomes less significant as an issue. In this situation even if sales from Elephant Plasterboard to Rikki were not at arm's length, and Elephant Plasterboard/Rikki was considered to be one entity, then it could be argued that ex-store was still the relevant level of trade.

300. This is so because the point at which the goods first compete on the New Zealand market, for the majority of sales, could be considered to be the decision by distributors/resellers to purchase either from Elephant Plasterboard/Rikki or to purchase from Winstone. This argument depends on whether Elephant Plasterboard has the sole right to import (or to authorise imports) from Siam Gypsum. If a distributor could purchase directly from Siam Gypsum (rather than ex-store from Elephant Plasterboard) then the level of trade would likely change to ex-wharf. Elephant Plasterboard's import rights are considered below.

Elephant Plasterboard's Import Rights

301. During the verification visit carried out by the Ministry to SCT and Siam Gypsum, SCT advised that Elephant Plasterboard continues to be the sole importer of Elephant gypsum board. This is confirmed by Customs data. SCT further advised that under this arrangement it would not sell directly to any other importer in New Zealand but if Elephant Plasterboard wished to nominate another importer, it would sell to that importer. SCT said that the arrangement between it and Elephant Plasterboard is not in writing but it considered that the business relationship over the last 10 years implies these conditions exist.

302. During a verification visit carried out by the Ministry to Elephant Plasterboard and Rikki, Elephant Plasterboard advised that it does not have a written agreement with SCT showing it has the sole right to import plasterboard but said there is a verbal agreement to this effect which is borne out by its business relationship over the last 14 years with SCT.

303. Winstone argues that past practice is not evidence of future obligation and submits that the absence of a written exclusive distribution agreement indicates that Siam Gypsum is not prepared to commit to such exclusivity. The fact that Elephant Plasterboard and Siam Gypsum have not entered into a written exclusive importer arrangement may imply that Siam Gypsum is not prepared to commit to such exclusivity but it also may imply that both parties consider there is no need to enter into a written agreement as the business relationship to date has been of a standard acceptable by both parties.

304. The Ministry considers that it must give more weight to the advice from both Siam Gypsum and Elephant Plasterboard that Elephant Plasterboard has the sole rights to manage imports into New Zealand than to the argument from Winstone that past practice does not create a future obligation. Both Siam Gypsum and Elephant Plasterboard have clearly stated that such an arrangement is in place. The Ministry considers such clear statements constitute a stronger statement of intent than would be the case if the parties simply pointed to past practice.

305. The Ministry considers that the evidence available shows that Elephant Plasterboard does in practice have the sole rights to manage the import of Siam Gypsum plasterboard into New Zealand.

Conclusion on Level of Trade for Elephant Plasterboard

306. The Ministry is satisfied that Elephant Plasterboard and Rikki are operating as distinct economic entities, that sales by Elephant Plasterboard to customers other than Rikki constitute a large majority of Elephant Plasterboard's total sales and that Elephant Plasterboard has the sole rights to manage the import of Siam Gypsum plasterboard into New Zealand.

307. The first potential purchaser of Siam Gypsum plasterboard in the New Zealand market is a distributor/reseller. A distributor/reseller cannot purchase directly from Thai Gypsum and is therefore faced with the economic choice of purchasing ex-store from Elephant Plasterboard or ex-factory from Winstone.

308. The Ministry therefore concludes that the relevant level of trade for Elephant Plasterboard is at the ex-store level.

CTS Direct Limited

309. Because TG Plasterboard did not respond to a request for information about its operation, the Ministry has examined level of trade on the basis of the information available. The information available includes that supplied by CTS Direct, Thai Gypsum and Winstone.

310. While CTS Direct is recorded in NZ Customs' data as the importer, its role is largely that of a financier. Orders are placed directly with Thai Gypsum by TG Plasterboard (after approval by CTS Direct) and CTS Direct on-sells all of its imports to TG Plasterboard after the addition of a fixed margin in accordance with an agreement between the two companies. Consequently, while the sale from CTS Direct to TG Plasterboard is the first sale by the importer in New Zealand, it is not a sale to a buyer who appears to be in the position to contemplate purchasing from Winstone as an alternative to purchasing from CTS Direct.

311. It is difficult for the Ministry to establish if the sales from CTS Direct to TG Plasterboard are at arm's length because CTS Direct does not sell to any customer other than TG Plasterboard. It is therefore not possible to compare prices and other terms and conditions of sale between sales to TG Plasterboard and other customers. The agreement between CTS Direct and TG Plasterboard under which sales are made may have assisted in establishing if sales are at arm's length, but this agreement has not been made available.

312. CTS Direct advised that CTS Quality is one of the customers of TG Plasterboard. Companies Office records show that CTS Quality and TG Plasterboard have the same shareholders. Because of a lack of information from TG Plasterboard the Ministry does not know if sales from TG Plasterboard to CTS Quality are at arm's length or what proportion of TG Plasterboard's sales are made to CTS Quality. At the last investigation and reassessment Mr Tully advised that CTS Quality was a reseller to end-users and the Ministry assumes this is likely to still be the case.

313. The Ministry also notes the information provided by Winstone that a company now called CTS Interiors Ltd (previously Ceiling Tile Solutions Ltd), with the same shareholders as TG Plasterboard, is quoting in the market for supply/fix/stop business, i.e. is supplying plasterboard to end-users. The Ministry considers it likely that CTS Interiors Ltd purchases plasterboard from TG Plasterboard. Again, because of a lack of information from TG Plasterboard, the Ministry does not know if sales from TG Plasterboard to CTS Interiors Ltd are at arm's length or what proportion of TG Plasterboard's sales are made to CTS Interiors Ltd.

314. The Ministry also notes that Mr C Perrin, the sole director of CTS Direct, is also one of two directors of the company now called TG Plasterboard (this company was previously named Albion Consultants Ltd and changed its name to TG Plasterboard on 22 April 2002). Mr Perrin confirmed that this company is the company to which CTS Direct sell all of its imports.

315. There is therefore a direct connection between CTS Direct, TG Plasterboard, CTS Quality and CTS Interiors Ltd through either common shareholders or directors.

316. At the time of the last reassessment and investigation Thai Gypsum advised that it had no exclusive distribution or sole supply contracts. During the current reassessment, in contradiction of its earlier advice, Thai Gypsum advised that that it had in fact changed to CTS Quality (at that time this company was the importer rather than CTS Direct) being its sole distributor in New Zealand sometime before the last reassessment and investigation.

317. Thai Gypsum advised it has no written agreement with CTS Direct showing that CTS Direct has the sole rights to distribute its plasterboard in New Zealand. Thai Gypsum did, however, provide a copy of a letter to CTS Direct dated 13 March 2000 in which it advised that CTS Direct has the right to distribute Thai Gypsum plasterboard in the North Island. The letter does not state that CTS Direct has the sole right to distribute TGP plasterboard, and, as noted, limits distribution rights to the North Island. The Ministry also notes that this letter is addressed to CTS Direct although it is dated at a time when CTS Quality was still the importer from Thai Gypsum. The Ministry further observes that, unlike Siam Gypsum and Elephant Plasterboard, there is no extended history of CTS Direct having sole rights to import or control the import of plasterboard from Thai Gypsum.

318. The Ministry cannot be satisfied, on the basis of the information available, that sales from CTS Direct to TG Plasterboard and from TG Plasterboard to CTS Quality and CTS Interiors Ltd are at arm's length. When this is considered in conjunction with:

- the effective direct ordering of plasterboard by TG Plasterboard from Thai Gypsum;
- the sale of all of CTS Direct's imports to TG Plasterboard; and
- a lack of information on the proportion of TG Plasterboard's sales made to CTS Quality and CTS Interiors Ltd;

the Ministry considers that it should treat CTS Direct/TG Plasterboard/CTS Quality/CTS Interiors Ltd as effectively one entity importing plasterboard and on-selling it to end-users. In this situation, as an importer and a seller to end-users, this entity is faced with an economic choice of buying from either the domestic industry ex-factory or from Thai Gypsum and bearing the import costs to ex-wharf.

319. The Ministry considers there is some uncertainty about the right of CTS Direct to be the sole distributor of Thai Gypsum plasterboard. In any event, the Ministry notes that even if there were no doubt that CTS Direct had sole rights to distribute Thai Gypsum plasterboard, its conclusion concerning the economic choice facing CTS Direct/TG Plasterboard/CTS Quality/CTS Interiors Ltd would not change. The sole right to distribute Thai Gypsum plasterboard would not disbar this entity from deciding to purchase from Winstone so the economic choice facing it would therefore still be the same.

Conclusion on Level of Trade for CTS Direct

320. The Ministry therefore concludes that the relevant level of trade for CTS Direct is at the ex-wharf level.

Plasterboard Available or Potentially Available from Other Suppliers

321. When establishing a NIP, consideration must be given to the price of plasterboard potentially available in the New Zealand market from suppliers other than the two Thai Producers. Undumped plasterboard may be available or potentially available at prices lower than that available from the Thai producers, and if so, would lower the NIP.

322. The Ministry examined the Customs data over the POI in respect of imports of plasterboard from countries other than Thailand. This data showed that plasterboard was also imported from Indonesia. The importer advised the Ministry that the plasterboard it imports is of seconds quality and sold solely into that market, in which it specialises. The Ministry considers this product does not compete in the same market as those products sold by Winstone and therefore cannot be used for the purpose of establishing a NIP.

323. In the last investigation and reassessment the potential for plasterboard from Australia to enter the New Zealand market at prices lower than undumped board from Thailand was considered. At that time the Ministry concluded that imports from Australia were not likely in the near term. The Ministry has seen no evidence concerning potential imports from Australia that would lead it to change its conclusion from the last investigation and reassessment.

Non-Injurious Price

General Submissions

Submissions by Elephant Plasterboard

324. Elephant Plasterboard said it perceives that there has been an assumption, at least since the Ministry adopted the import parity approach to calculating the NIP, that prospective purchasers decide between imported and domestic board based on a crude comparison of the [prices of] boards themselves. Elephant Plasterboard notes that the competing boards are similar in quality and specification and there is no need to adjust for the kind of technical differences that are often encountered in anti-dumping cases. Elephant Plasterboard argues, however, “. . . that “Gib” [Winstone’s board] is not simply a commodity, it is a product and a service.” Elephant Plasterboard claims that “quality” differences have a direct bearing on whether an imported product is undercutting the domestic producer’s NIP.

325. Elephant Plasterboard notes this is a not infrequent issue in anti-dumping cases and has been the subject of quite frequent comment. In support of this contention, Elephant Plasterboard has referred to the examples in Vandebussche and Wauthy, “*European Anti-Dumping Policy and Firms’ Strategic Choice of Quality*”, January 15, 1999 pages 4 – 5 and Vandebussche and Weverbergh, “*Strategic Behaviour under European Anti-Dumping Duties*”, page 5. Elephant Plasterboard argues that the reality of the branding and marketing of many modern products, including Gib, is that quality differences include not only differences in physical characteristics and technical specifications, but also the sales and (if applicable) after sales service.

326. Elephant Plasterboard said the key components of Winstone’s service to its resellers are:

- a. Providing a full range of types and sizes of plasterboards, never running out of stock size or type.
- b. Providing the reseller with a “picked” order, ready to deliver to the end customer’s site.

- c. Providing next day or same day service.
- d. Having board available on any working day.
- e. Providing a “delivered to site” service.
- f. Eliminating any damaged or faulty board.
- g. Providing full technical backup.
- h. Providing normal and extended trading terms.
- i. Providing a rebate system that makes it almost impossible for distributors to offer both brands to the trade.

327. Elephant Plasterboard states that Winstone’s range of boards is a very important aspect of the service which it employs to compete in the 10mm standard board market. Elephant Plasterboard notes that the Winstone range of board has grown exponentially and now comprises 71 different types and sizes of board and 27 sizes and types of 10mm standard board (as opposed to only 13 in 1988). Elephant Plasterboard said that in order to compete with Winstone to sell the now 27 types and sizes of 10mm standard board, it must be able to provide the full range of types and sizes of board (i.e., now 71).

328. According to Elephant Plasterboard the customer now expects to be able to receive a packaged up order comprising a mix of any of the boards in the Winstone range. Elephant Plasterboard said this means it and its resellers must carry the costs of stocking that entire range. Elephant Plasterboard notes that the stocking cost is higher for the reseller of imported product because of the re-order times, i.e., if a Gib reseller runs out of stock it can get next day delivery, but an Elephant stockist must always maintain at least two weeks of stock of the entire range, all the while predicting demand over the next six weeks because the lead time from re-order to delivery is six weeks.

329. Elephant Plasterboard argues that because Winstone’s service to resellers includes cobbling together (“picking”) the end-customer’s precise order of different types and sizes of board, it must match that “picked ready to deliver to end customer” service. Elephant Plasterboard said this involves a substantial cost, not least in labour and machinery to “pick” and handle board for delivery. Elephant Plasterboard claims that Winstone also provides extensive terms and a subtle rebate system which forces those that want to stock Elephant board to switch completely to Gib. Elephant Plasterboard argues the cost to it of striving to match the Winstone “service” is significant, and therein lies the cost (and margin) build up from wharf to ex-Elephant Plasterboard’s store.

330. In Elephant Plasterboard’s view the same issue can also be examined from its (and Winstone’s) customer/prospective customer’s point of view. Elephant Plasterboard argues that resellers and customers value up the service elements very accurately when making their rational economic choice between competing suppliers. Elephant Plasterboard said that no doubt different buyers have different cost structures and so attribute different levels of value to the “service” elements, but it is clear that the “value” involved is substantial.

331. Elephant Plasterboard provided a copy of a letter from the accountants for a reseller company in ██████████ that purchased Elephant board and then switched back to Gib. In that letter Elephant Plasterboard notes that the accountants “valued up” the stocking cost (to maintain the necessary range) at ██████ percent. The additional costs making up this ██████ percent are detailed as follows:

Cost per square metre	\$ [REDACTED]
Stock funding costs versus normal trading terms	[REDACTED] %
Damaged stock and dumping costs	[REDACTED] %
Wharf charges and delivery costs	[REDACTED] %
Next size up due to uneven demand	[REDACTED] %
Total	[REDACTED] %

332. The accountant's letter goes on to state that a time and motion study shows that the cost of annual wages for stacking, pulling and loading of Elephant board to be [REDACTED]. The letter also notes that the area required to house Elephant board equates to a rental cost of [REDACTED]. The letter states that these fixed costs amount to an additional [REDACTED] percent of the purchase cost of \$ [REDACTED] per square metre, meaning the total additional costs incurred by its client through purchasing Elephant board (as opposed to purchasing from Winstone) amount to [REDACTED] percent of the purchase price.

333. Elephant Plasterboard also highlights those parts of the letter which:

- (a) refer to an [REDACTED]; and
- (b) refer to the [REDACTED]

334. Elephant Plasterboard said [REDACTED]

335. Elephant Plasterboard said that whilst it is able to at least strive to match Winstone's "service" level in the greater Auckland area (its only store being in Auckland), it cannot match the Winstone "service" outside of this area. Elephant Plasterboard said outside the greater Auckland area the only way it can make sales is to sell at the wharf gate, but at a price sufficiently below Winstone's ex-factory price so as to compensate the reseller for the loss of the value of the "service" it could obtain by switching back to Gib. Elephant Plasterboard notes that in the case of the [REDACTED] customer referred to above that difference is [REDACTED] percent and [REDACTED]

336. Elephant Plasterboard said this is the reason why the Elephant board has failed to attract any substantial market share outside of the greater Auckland area even after 14 years of developing the brand. Elephant Plasterboard states that unless it could establish stores in (say) Auckland, Wellington and Christchurch, it will only ever make sporadic progress in gaining and losing resellers outside of the greater Auckland area. Contrary to Winstone's assertions Elephant Plasterboard said Winstone was successful in convincing the [REDACTED] to switch back to Gib [REDACTED], so all those resellers had to do was the kind of exercise carried out by the accountants of the [REDACTED] customer referred to above.

337. Elephant Plasterboard claims that Winstone's success in winning back the [redacted] was, in practical terms, just an exercise in predatory pricing, [redacted] Elephant Plasterboard said it had [redacted] Elephant Plasterboard said it now has no material sales outside of the greater Auckland area and has practically been eliminated from that geographical market.

338. Elephant Plasterboard notes that Winstone regards any lost sale as "injury". However, Elephant Plasterboard argues that unless that sale is lost to an Elephant Plasterboard sale which undercut Winstone's NIP, there is no injury by reason of dumping, rather the sale is lost simply by competition and the Ministry must make that distinction. Elephant Plasterboard asserts that Winstone maintains a price which (taking into account its service levels and rebates) is lower than the NIP, and it does this not in order to avoid injury caused by dumping/undercutting, but to eliminate competition.

339. Elephant Plasterboard said Winstone is no doubt well aware of how its customers (and Elephant Plasterboard's customers) "value up" the Winstone service elements, and are accordingly well aware that if the Winstone price outside of the coverage of Elephant Plasterboard's Auckland store [redacted] In Elephant Plasterboard's view the result is that even by selling at the NIP, Winstone is in effect engaging in predatory pricing. Elephant Plasterboard claims that Winstone is seeking to eliminate it from those markets outside of the greater Auckland area, and it has succeeded.

340. Based on the above, Elephant Plasterboard submits that the Ministry's approach to the NIFOB must, to comply with the lesser duty rule, take account in the [price] undercut margin, of the fact that as regards Elephant Plasterboard:

- (a) The legitimate cost and margin build up from wharf to ex-Elephant Plasterboard store must be enough to enable it to compete with Winstone's "service".
- (b) Outside of Auckland, Elephant Plasterboard must be able to sell at the wharf gate level, at a price that compensates for its inability to match the Winstone "service".
- (c) If the Ministry insists that the NIP should equal the import parity price, then the import parity price must have all other cost elements added to it to get to the ex-store "picked" order stage, therefore increasing the import parity price and so increasing the NIP.

341. In the Interim Report the Ministry calculated a NIP which included an adjustment for service elements relating to ex-wharf sales, on the basis of the above submission by Elephant Plasterboard. The NIP calculated in the Interim Report was higher than Winstone's current selling price. The Interim Report noted that for the purposes of the report the Ministry had assumed Winstone would be in a position to increase its price to the level of the NIP in the near future. The Ministry also noted in the Interim Report that if Winstone advises that it is unable to do this, and if submissions on the report do not result in any change to the Ministry's approach to calculating the NIP, the Ministry would need to cap the NIP at the level of Winstone's current price or at such amount as Winstone is able to increase its prices to in the near future.

342. In response to the Interim Report Elephant Plasterboard notes that the Interim Report asks whether Winstone can and will increase its price to the proposed new NIP and submits that Winstone should be required to give a water tight assurance. Elephant Plasterboard also submits that the Ministry must check Winstone's actual prices to customers, which

include rebates. Elephant Plasterboard refers in particular to the rebates which are not put through Winstone's debtor's ledger, but through its creditor's ledger. Elephant Plasterboard claims these rebates enable Winstone to "cheat" on the NIP, and accordingly to undercut Elephant Plasterboard, whilst at the same time being able to assert that Elephant Plasterboard is undercutting the NIP. Elephant Plasterboard submits this is not fair, and the answer is for the Ministry to monitor Winstone's actual prices, which will certainly be a range of prices.

Submissions by Winstone

343. Winstone has made a submission in response to the Interim Report, which included the submission above by Elephant Plasterboard, and this is summarised below.

344. Winstone referred to the Settlement Agreement (see section 3.3 above) for what it calls the correct principles agreed between the Ministry and Winstone and quotes paragraphs 18 – 21 of that agreement which state as follows:

"NIFOB" (non-injurious FOB value)

Calculation of NIP and NIFOB

18. In order to calculate a NIFOB Commerce must first calculate a non-injurious price ("NIP") for the New Zealand "industry".
19. The NIP for the industry is the price at which the industry would or would likely sell its like goods in the market but for the dumping. Hence, the NIP is to be calculated by Commerce in accordance with the general principles referred to in paragraphs 1 - 3 above.
20. The NIFOB is then calculated by deducting from the NIP so determined, various costs, expenses or margins ("cost elements") which the relevant importer either incurs or is properly entitled to an allowance for, between the point in the market at which the imported goods compete with the industry's NIP (hereinafter "the same level of trade") and the FOB point for the imported goods.
21. The purpose of correctly identifying the same level of trade for the imported goods is to ensure that the NIFOB for the imported goods is calculated so that the dumped goods when imported at that NIFOB price will not undercut the industry's NIP so determined.

345. Winstone referred to a statement by the Ministry in the Interim Report that "Using the import parity approach the NIP is calculated by adding to the most recent normal value in the POI the costs and, if relevant, a reasonable importer's profit margin, required to get the plasterboard into the New Zealand market place at the level at which it competes with board produced by Winstone." Winstone said that in referring to import parity in this fashion, the Ministry has misunderstood it, approaching it too narrowly by defining it rigidly.

346. Winstone said that the import parity approach is simply a shorthand description of how, in general terms, it sets its price in the market "but for the dumping". Winstone referred to and quoted from one of its earlier submissions, dated 7 December 1994, where it explained its approach to setting prices. This 1994 submission is summarised below.

347. Winstone noted that it must establish selling prices using factors such as the prices of comparable non-dumped imports and the prices at which its customers can buy substitute

products. Using these parameters, Winstone said it has established internationally competitive *parity prices*, which together with local economic trends and market conditions, are then used to set the company's *unsuppressed market target prices*.

348. Winstone said it also takes into account the additional value it provides distributor, specifier and end-user customers, both directly and indirectly through a variety of market support mechanisms. Winstone said these include on-demand stock availability through an extensive network, and technical advice and support through specialist technical literature, a nation-wide technical representative structure and an 0800 customer service line.

349. Returning to its current submission, Winstone said the question of assessing its market price but for the dumping (the NIP) is essentially a factual assessment to be determined on the evidence. Winstone notes that it is neither just, nor precisely, the mathematical calculation of the undumped price of Thai board at a particular time. Winstone comments that neither is it a mathematical calculation which takes that figure and adds on other amounts calculated for "premium" or "service". Winstone said that "premium" and "service" are sometimes able to be reflected in the unsuppressed price and sometimes not at all.

350. Winstone notes that the NZ dollar value of the cheapest undumped Thai board could, and probably does, vary frequently over any period of time, particularly because of exchange rate movements. Winstone said the price it would charge will not change in such precise dollar terms and while its own calculation of the potential undumped competition is a factor, it does not literally dictate the price. Winstone said its policy, clear from the evidence, is that it takes into account import parity and then also has regard to economic trends and market conditions in order to set its unsuppressed selling price.

351. Winstone submits that the question is what does the evidence show would be its price in the absence of dumped product. Winstone submits that the evidence of that in the current reassessment is its evidence provided to the Ministry that it would set its average selling price at [REDACTED]. Winstone said that even if the Ministry is able to calculate one component, the undumped cost to ex-wharf, at a lower level than its current price of [REDACTED], as a result of exchange rate fluctuations, this does not necessarily change what would be its unsuppressed selling price. Winstone notes that the Ministry's import parity calculation is confidential and it must act on the basis of its own estimate of import parity. Winstone also notes that when looking forward it would not use an average of historic exchange rates as the Ministry did in the Interim Report.

352. Winstone said it confirms that despite the Ministry's calculation of import parity (by Winstone's estimate) at less than [REDACTED] [before any adjustment for the value of "service elements"], it still assesses that its unsuppressed selling price would remain at [REDACTED] taking into account not only import parity but also other relevant economic and market factors, including the price levels actually established in the market for the last 10 months. Winstone said its evidence is that in the present market it could maintain its established market price of [REDACTED] but [REDACTED]

353. Winstone submits that even if it were to base its unsuppressed market selling price on an import parity price around the level apparently calculated by the Ministry, it would also have regard to the following factors when assessing its unsuppressed selling price:

- "Premium" for local supplier. Winstone's knowledge and experience of this market, and the operation of markets generally, indicates that for certainty and timeliness of supply available from a local supplier (as compared with undumped imports available ex-wharf

directly from a Thai manufacturer) some customers will pay a premium of [REDACTED]

- Other on-costs associated with purchasing direct from a Thai manufacturer.
- An adjustment to reflect an average price rather than the lowest price.

354. Expanding on the bullet points above, Winstone submits that the commercial reality of its unsuppressed price assessment relative to theoretical ex-wharf pricing needs to be approached carefully. The perceived value of its product and service offer, including warehousing, pre-picking and delivery options, compared to an ex-wharf bulk purchase, Winstone argues, is difficult to quantify as it is spread along a value perception continuum, i.e.:

- (a) As noted above, some customers will pay a premium for local supplier of [REDACTED]
- (b) Other customers do not value this aspect of the Winstone offer nearly as much or even at all, and make economic choices based on comparative cost only. Winstone said as its service costs are mostly recovered in market share stability rather than in premium pricing, the perceived value of this service to a customer is untested. However, Winstone estimates that direct on-costs covering devanning costs, damaged board, inventory holding costs and credit terms adjustment are [REDACTED] per square metre to provide an economic break even in terms of the marginal cost for a customer purchasing ex-wharf from a Thai manufacturer. Winstone submits that freight would not be a factor as the per square metre cost of transporting a container of board is equivalent to the ex-store per square metre delivery cost. Winstone also argues that neither would store handling, storage and picking/administration be taken into account because some customers have spare warehousing, staff and equipment.
- (c) As noted above, a final adjustment would be made to reflect an average price rather than the lowest price.

355. Winstone said the perceived benefit to customers of purchasing ex-wharf in container lots versus purchasing ex-Winstone store at some price premium is untested and it does not know what the percentage spread of customers at various perceived economic breakeven values is. However, Winstone submits that what is certain from past commercial experience is that if the Winstone price premium over an ex-wharf deal exceeds a certain perceived value, customers will choose to switch some or all of their business to cheaper imported product.

356. Winstone said that the behaviour of the first [REDACTED] of customers choosing to switch to ex-wharf sales will in the long run determine the Winstone price. Winstone said customers paying a lower ex-wharf price may choose to trade some or all of the value difference in the market which will place price pressure on Winstone from its own merchants, with the net effect that it will have to reduce prices.

357. Based on commercial reality and past experience, Winstone states it is confident that:

- (a) A Winstone price premium of [REDACTED] per square metre may not result in an incremental market share loss via customers choosing to switch to an ex-wharf purchase.

- (b) A Winstone premium of [REDACTED] per square metre or more would certainly cause [REDACTED] of customers to switch some or all of their purchases to the ex-wharf option

358. Winstone notes that the range between these two points is less clear but estimates that about [REDACTED] per square metre of real marginal cost is incurred by a customer purchasing ex-wharf versus ex-store. Winstone provided a breakdown of the component costs making up this amount which is as follows (all costs per square metre):

Devanning costs	[REDACTED]
Inventory holding costs	[REDACTED]
Damaged board	[REDACTED]
Credit term adjustment	[REDACTED]

359. Winstone also recalled its earlier submission that the average customer would be prepared to pay a premium for local supply of up to [REDACTED] percent or a further [REDACTED] per square metre. At a premium of [REDACTED] ([REDACTED] + [REDACTED]), Winstone said its judgement is that most of its customers would not switch to an ex-wharf purchase.

360. Winstone said that if it were to calculate its unsuppressed market selling price on the basis of an import parity price around the level apparently calculated by the Ministry [prior to any adjustment for service premium], its unsuppressed selling price would be [REDACTED] per square metre. Winstone emphasises that this calculation supports an assessment primarily based on judgement and market experience. Winstone notes that direct sales from a Thai manufacturer to its customers has never been the manner in which Thai board has been sold in any quantities into the New Zealand market place.

361. Winstone said that while it calculated an unsuppressed selling price of [REDACTED] as above, this was not the basis on which it assessed its unsuppressed market selling price when it requested the reassessment in October 2001. At that time, Winstone said it assessed that, having regard to its then estimate of import parity and market conditions, it could only move its unsuppressed selling price to [REDACTED]. Winstone said, in other words, given market conditions prevailing at that time, it did not expect that it could [REDACTED]. Winstone notes that the increase of its price to [REDACTED] already [REDACTED].

362. However, Winstone submits, having made this [REDACTED] it is confident that if the market were unaffected by dumped goods the price so established could be maintained notwithstanding that it might technically involve a “premium” over the different import parity price apparently calculated by the Ministry, due primarily to exchange rate fluctuations. Indeed, Winstone notes that over recent years its price has been variously at, above and below import parity. Winstone argues that it is not correct to conclude as a matter of principle that an upward adjustment should be made for the value of “service elements” when assessing its NIP.

363. Equally, Winstone argues that the Ministry would be wrong in the present reassessment to use its own most recent confidential calculation of import parity, exclude “service elements” and conclude that the NIP should be lowered. Winstone said whether or not “service elements” are included in its NIP depends on market conditions at the particular time. Winstone emphasises that its calculation of an unsuppressed selling price of [REDACTED] as above with the inclusion of “service elements” is simply a cross check as to the

relationship of such a “premium” to perceived value – to confirm that the current NIP [i.e. its current selling price] is not too high.

364. Winstone submits that what its cross check also shows is that the Ministry has plainly allowed [REDACTED] its calculated import parity price to get a NIP of \$4.98 [in the Interim Report]. Winstone said this is a totally unrealistic assessment. Winstone notes that the Ministry has used a notional costing done by an accountant on behalf of a buyer, apparently done to “justify” to Elephant Plasterboard a decision not to buy from it at the price quoted. Winstone submits that it is thus not only a notional but also a rather self-serving costing as well and inapplicable for the reasons set out below.

365. Winstone submits that the perceived value of the “service” to Winstone’s customers in the market must not be confused with the cost to an importer (let alone the cost to the importer’s customer) of providing the service. Winstone said customers do not ‘cost up’ in that way. Winstone notes that the additional cost referred to by the accountant does not even purport to be the relevant cost for present purposes, namely the cost to a Winstone customer of buying ex-wharf directly from the Thai manufacturer. Winstone also notes the “service” being valued is for the supply of standard board, not performance boards. Winstone said by its own estimate the Ministry has added a premium of some [REDACTED] to its NIP calculation. Winstone states that, for the reasons already given, and on the basis of its knowledge and experience of the market, it advises the Ministry categorically that it could not expect to achieve such a premium. Winstone said if the “premium” for its board is too large as a matter of market perception, buyers will buy the alternative.

Ministry’s Consideration of the Issues

366. As a general point of principle the Ministry agrees that in making a comparison of prices for price undercutting purposes an adjustment should be made for differences in quality between the imported product and that produced by the domestic industry, and any other differences, provided such differences affect the price comparability of the products. While the Ministry is not carrying out a price undercutting comparison in this reassessment, the same general principle would apply to the costs to be used to compile a NIP and to calculate a NIFOB.

367. The Ministry has examined the papers referred to by Elephant Plasterboard. In Vandenburg and Wauthy, *European Anti-Dumping Policy and Firms’ Strategic Choice of Quality*⁴, the authors consider the situation of a vertically integrated European industry where an anti-dumping investigation has resulted in a price undertaking by the foreign producer. The authors find that where the imported product is of a lower quality, price undertakings provide an incentive for the foreign firm to increase its quality and for European firms to reduce quality. In the long run the authors conclude this can be to the disadvantage of European producer surplus and welfare. The paper, however, does not address the issue of the circumstances in which adjustments should be made for quality differences between the imported and domestic products or how any such adjustment should be made. Rather the paper examines the impact of a price undertaking where no adjustment is made for quality differences. The paper therefore does not appear to be of any direct assistance in considering these issues.

⁴ Discussion Paper No. 2624, November 2000 (ISSN 0265-8003)

368. In Vandebussche and Weverbergh [and Pauwels], *Strategic Behaviour under European Anti-Dumping Duties*⁵, the authors examine the effects of European anti-dumping duties on the behaviour of the European industry and the impact on domestic welfare. The authors also compare this with the impact of United States' anti-dumping duties on industry behaviour and domestic welfare. In referring to price undercutting, the paper briefly notes that in the case of differentiated products price differences may be justified by differences in quality and notes that when calculating the injury margin, authorities must somehow determine that the two products are sufficiently similar in quality. As with the previous paper, this paper does not specifically address the issue of the circumstances in which adjustments should be made for quality differences between the imported and domestic products or how any such adjustment should be made. This paper also does not appear to be of any direct assistance in considering these issues.

369. In considering the evidence from both Elephant Plasterboard and Winstone, it is clear that the difference in service arises only in relation to imports sold on an ex-wharf basis. When selling ex-store to its customers in the Auckland region Elephant Plasterboard provides a similar service to its resellers. Indeed Elephant Plasterboard itself states that it must strive to match the service provided by Winstone in order to remain competitive.

370. In calculating a NIP for imports by Elephant Plasterboard from Siam Gypsum, the Ministry uses Elephant Plasterboard's actual costs, with some minor adjustments as noted. The costs to Elephant Plasterboard of providing similar services to those provided by Winstone will therefore be reflected in those costs. Those customers that Elephant Plasterboard services from its Auckland warehouse (and in the year ended 31 October 2001 that was 80 percent of all sales), are therefore also the recipients of services similar to those provided by Winstone. Such customers would therefore not be expecting to purchase board at a lower price from Elephant Plasterboard to compensate them for a difference in the "service". Any adjustment for the difference in "service elements" or "premium" would therefore only be made in relation to sales made on an ex-wharf basis and would consequently only be relevant where the level of trade is at the ex-wharf level.

371. The evidence from both Elephant Plasterboard and Winstone shows that there is a value to the service elements provided by Winstone to its customers and that a customer purchasing ex-wharf, whether direct from a Thai producer or through an importer, would incur additional costs because of the absence of those service elements when purchasing on this basis.

372. The Ministry, however, finds Winstone's evidence relating to these service elements somewhat contradictory. On the one hand Winstone said that in setting its unsuppressed market target prices it takes into account the additional value it provides its customers through a variety of market support mechanisms, noting that the extent to which this can be taken into account will depend on market conditions. Winstone has also said that if it were to base its unsuppressed selling price on the import parity price around the level apparently calculated by the Ministry it would have regard to the premium for local supplier, other on-costs associated with purchasing direct from a Thai supplier and an adjustment to reflect an average rather than lowest price. On the other hand Winstone has submitted that it would not be correct as a matter of principle that an upward adjustment should be made for service elements when assessing its NIP.

⁵ (a) University of Antwerp, Belgium (b) Belgian Foundation for Scientific Research and CEPR, London
JEL-Classification : F13,K2,C72

373. At the same time Winstone has submitted that the evidence shows that its unsuppressed selling price in the absence of dumped imports is its current actual selling price of [REDACTED] which [REDACTED]. Winstone's evidence is that this assessment of its current unsuppressed selling price is based on economic trends and market conditions and that it [REDACTED]. Winstone's evidence further is that its selling price does not change in response to every change in normal values in Thailand or in response to every change in costs to land board in New Zealand or in response to every change in exchange rates.

374. In calculating a NIP on which to base the calculation of the level of duty, the Ministry will not use a NIP which is higher than the price at which Winstone will actually sell in the market. To do so would result in a level of duty that would push the price of imported plasterboard above Winstone's actual price and therefore provide a remedy higher than is necessary to prevent injury resulting from dumped imports. [REDACTED]

375. While Winstone has said the NIP should be its actual selling price (which is based on its own assessment of import parity and economic and market factors), the Ministry considers that it must nevertheless carry out its own calculation of the NIP to ensure that Winstone's current selling price is reasonable having regard to information provided by the Thai producers and New Zealand importers on normal values and costs to land and sell the board in New Zealand.

376. The Ministry has therefore considered the extent to which, if any, an adjustment should be made for service elements to reflect the extent to which Winstone can charge a premium on board purchased on an ex-wharf basis. The Ministry considers that the evidence from both Elephant Plasterboard and Winstone shows there is a value to these service elements which is potentially recoverable in Winstone's price. The Ministry therefore considers that in checking on the reasonableness of Winstone's current unsuppressed selling price it must include an adjustment for service elements. In doing so the Ministry notes that it is only for the purpose of checking the reasonableness of Winstone's current selling price (an exercise that Winstone itself carried out in its own submission). The extent to which such an adjustment should be made is considered below.

377. The Ministry notes that when Winstone considers the extent to which it could allow for a premium for service elements in setting its unsuppressed selling price, it does so on the basis of the costs likely to be incurred by one of its own customers importing board directly from Thailand. This is not the same situation that exists with either CTS Direct whose level of trade is at the ex-wharf level, or with those ex-wharf sales made by Elephant Plasterboard. In the case of both CTS Direct and Elephant Plasterboard they are interposed between the Thai producer and the New Zealand distributors, and the distributors to whom they sell and operate on a smaller scale than do Winstone's large distributors.

378. Because of the way in which Winstone makes an allowance (if any) for service elements in its calculation of its unsuppressed selling price, it has submitted that store handling, storage and picking/administration should not be taken into account because some customers have spare warehousing, staff and equipment. In addition Winstone has noted that some customers will pay a premium for local supplier and that a final adjustment would be made to reflect an average price rather than the lowest price.

379. Because of the factors mentioned in the two paragraphs above, there is a significant difference between the way in which Winstone and Elephant Plasterboard calculate any adjustment for service elements. The Ministry also has taken note of Winstone's submission that the costing relied on in Elephant Plasterboard's submission was done by a firm of accountant's to justify a decision not to purchase Elephant board, could therefore be self-serving, and is not presented from the point of view of a Winstone customer considering purchasing direct from a Thai producer. The Ministry also notes that the evidence provided by Elephant Plasterboard is from one customer only, noting Winstone's evidence that the extent to which customers perceive the value of the service elements varies considerably.

380. On the basis of the above considerations the Ministry considers that the adjustment made in the Interim Report for service elements may have been too high. However, given that by its nature any adjustment is an estimate which could be based on information from a variety of sources, the Ministry considers that it should apply a range of adjustments based on evidence from Elephant Plasterboard and Winstone and use the resulting range of NIPs to assess the reasonableness of Winstone's current selling price.

381. The evidence from Elephant Plasterboard is that an adjustment should be made at 10 percent of the landed cost. The additional costs identified by Elephant Plasterboard include wharf charges and delivery costs. These charges are included in the calculation of an ex-wharf cost and have therefore been excluded, reducing the adjustment to 5 percent. The evidence from Winstone shows a possible premium of 10 percent (taken as 10 percent for this exercise), 10 percent and 10 percent per square metre. An adjustment has been made below for service elements using the preceding percentage and amounts for imports by CTS Direct from Thai Gypsum (CTS Direct being at the ex-wharf level of trade).

382. In making an allowance for service elements the Ministry notes that in any future reviews or investigations an adjustment may need to be made in a price undercutting comparison for service elements if an ex-wharf cost was to be compared with Winstone's NIP. Any such adjustment would either reduce Winstone's NIP or increase the ex-wharf cost of the imported board in order to ensure a fair comparison is made. Any decision on the need for such an adjustment would of course depend on the circumstances of the case and the evidence available.

383. In the Interim Report calculations were shown of the undumped price for imports by Elephant Plasterboard from Siam Gypsum and for imports by CTS Direct from Thai Gypsum. Because CTS Direct is at the ex-wharf level of trade, imports by CTS Direct from Thai Gypsum are priced significantly lower than imports by Elephant Plasterboard from Siam Gypsum, and this is the case regardless of whether an adjustment is made for service elements. For this Final Report the Ministry has therefore shown only the calculation of the undumped ex-wharf cost of imports by CTS Direct from Thai Gypsum.

384. The Ministry considered the exchange rates that should be used to convert the normal value and costs denoted in baht to NZ dollars. The Ministry would normally seek to use the most recent exchange rate available as it would provide the most up-to-date estimate of the cost of landing undumped plasterboard in New Zealand and would consequently provide a remedy that reflected the most recent costs available in NZ dollars. It was for this reason that in the last investigation and reassessment the exchange rate used was the most recent rate available at the date the report was written. The Ministry also notes Winstone's submission that it would not use an average of historic exchange rates (as the Ministry used in the Interim Report). The Ministry observes, however, there have been some significant variations in the NZ dollar to baht exchange rate in recent months. It is difficult to discern any long term trend in those rates to date that would allow the Ministry to use the most recent

exchange rate with the confidence that it would be likely to represent a reasonable approximation of the future exchange rate in the medium term.

385. However, bearing in mind Winstone's submission that it would use a current exchange rate, and to assess the impact of using current exchange rates compared to using average exchange rates, the Ministry firstly calculated the cost to wharf using the exchange rates at the time this report was written (26 September 2002). The relevant interbank exchange rates, taken from the OANDA internet site, on this date were one NZ dollar equals 0.47132 US dollars and one NZ dollar equals 20.42984 Thai baht. These exchange rates yield a cost to the wharf in New Zealand of [REDACTED] per square metre. Adjusting this amount for service elements of [REDACTED], [REDACTED], and [REDACTED] per square metre and at [REDACTED] percent of the landed cost results respectively in the following NIPs: [REDACTED], [REDACTED], [REDACTED] and [REDACTED]. Three of these NIPs are below Winstone's current selling price of [REDACTED] and one is higher.

386. The use of an average exchange rate will smooth out the fluctuations in the exchange rate and may therefore be more likely to represent a reasonable approximation of the future exchange rate in the medium term. To compare the results of an average exchange rate with those obtained above using current rates, the Ministry considers the average exchange rate should be taken over a period that is as up-to-date as possible at the time this report was written so that the average is as current as possible but which at the same time has fluctuations smoothed out. After examining movements in the exchange rate the Ministry considers that an average over the most recent one year period will provide a reasonable exchange rate.

387. The Ministry has therefore obtained from the OANDA currency conversion site on the internet the average NZ dollar to baht interbank exchange rate for the period from 27 September 2001 to 26 September 2002, which was one NZ dollar equals 19.19434 baht. This rate was used to convert the normal value and those costs denoted in baht into NZ dollars. The costs of importing from Thai Gypsum also include significant costs denoted in US dollars. There has been a similar pattern of significant variations in the NZ dollar to US dollar exchange rate as was evident in the NZ dollar to baht exchange rate. For the reasons set out above, the Ministry has used the average NZ dollar to US dollar interbank exchange rate over the period from 27 September 2001 to 26 September 2002 obtained from the OANDA currency conversion site on the internet, to convert US dollar costs to NZ dollars. This average exchange rate was one NZ dollar equals 0.44378 US dollar.

388. The following table shows the undumped price ex-wharf calculated on the basis outlined above before any adjustment for service elements and using the average exchange rates recorded above.

Table 3.1: Undumped Price for Board from Thai Gypsum

Latest Normal Value in POI (baht)	[REDACTED]
Plus Costs from Ex-Factory to FOB (baht):	
- Export Packing	[REDACTED]
- Freight to Wharf & Insurance	[REDACTED]
- Bill of Lading Fee	[REDACTED]
- FCL Term Holding Charge	[REDACTED]
Cost to FOB (baht)	[REDACTED]
Plus Costs from FOB to Wharf in NZ (baht):	
- Cost of Credit	[REDACTED]
Sub-Total (baht)	[REDACTED]
Baht/NZ\$ Exchange Rate	19.19434
Sub-Total (NZ\$)	[REDACTED]

Plus Costs from FOB to Wharf in NZ (US\$):	
- Sea Freight & BAF	
- Insurance	
Sub-Total (US\$)	
US\$/NZ\$ Exchange Rate	0.44378
Sub-Total (NZ\$)	
Plus Costs from FOB to Wharf in NZ (NZ\$):	
- Port Service Charges and Customs Fees	
- Duty @ 5%	
Sub-Total (NZ\$)	
Cost to Wharf in NZ (NZ\$)	

389. Adjusting the cost to wharf in Table 3.1 for service elements at [REDACTED], [REDACTED], and [REDACTED] per square metre and at [REDACTED] percent of the landed cost, results respectively in the following NIPs: [REDACTED], [REDACTED], and [REDACTED]. All except one of these NIPs is higher than Winstone's current selling price of [REDACTED], and the NIP that is below Winstone's current selling price is below it by only a small amount.

390. The Ministry notes that Winstone set its current selling price in November 2001 when exchange rates were significantly different from current rates. Winstone has observed that the NZ dollar value of the cheapest undumped Thai board could and probably does vary frequently over time, particularly because of exchange rate movements and has noted that its prices do not change in such precise dollar terms. The interbank exchange rates at 1 November 2001 yield a cost to the wharf in New Zealand of NZ\$ [REDACTED], which is higher than Winstone's current selling price even before any adjustment is made for service elements.

391. The greatly differing results that are obtained from using the exchange rates at 1 November 2001 and 26 September 2002 demonstrate the vagaries that can arise from exchange rate movements. The Ministry consequently considers that an average exchange rate is better able to provide results against which the reasonableness of Winstone's current selling price for use as the NIP can be tested.

392. The various NIPs calculated above using average exchange rates, three of which are below Winstone's current selling price, indicate that Winstone's selling price is reasonable and can be used as the NIP.

393. The Ministry has also considered Elephant Plasterboard's submission that Winstone be required to give a water tight assurance concerning the price at which it will sell and that the Ministry should check and monitor Winstone's actual selling prices. The Ministry does not consider that the purpose of an anti-dumping remedy is to impose a form of rigid price control on the participants in the New Zealand market. Rather, an anti-dumping remedy is designed to ensure fair competition by removing the injurious impact of dumping on the New Zealand industry. The Ministry has noted previously in this report that a NIFOB cannot guarantee that a New Zealand industry will be exempt from all price-based competition. The same is true of importers, i.e., a NIFOB cannot guarantee that importers will be exempt from all price based competition.

Conclusion

394. The Ministry concludes that the NIP should be set at [REDACTED] per square metre.

3.7 Calculation of NIFOBs

Currency in Which NIFOB Set

Submission by Winstone

395. Winstone states that in the last reassessment the Ministry concluded that for Elephant Plasterboard imports from Siam Gypsum and for Thai Gypsum exports, the remedy should be set in the form of a reference price mechanism with a NIFOB in New Zealand dollars, based on cost deductions from the NIP. Winstone notes that the quantum of these cost deductions is historic, based upon the cost data the Ministry obtained for each company for the previous reassessment period. Winstone further notes that anti-dumping duty is payable in the event that the export price for a particular importation is less than the NIFOB.

396. Winstone said the Ministry's formula therefore updates export prices (which it understands do not change regularly) in the sense that the duty is struck on the transaction price or Thai Producer Value (TPV) albeit compared with an historic normal value fixed in the last reassessment a year or more before. Winstone argues, however, that by setting the reference price in New Zealand dollars rather than Thai baht, the Ministry has removed the exchange rate advantage available with a reference price duty mechanism. Furthermore, Winstone claims the NIFOB mechanism fails to update changes to the post-FOB costs, which are equally as important to the level of injury caused by the dumping.

397. Winstone argues the Ministry is wrong to claim that its NIFOB formula does not run the risk of exceeding the dumping margin. Winstone submits that if the normal value itself or even the Thai baht declines to the extent that the undumped price falls below the NIP set by the Ministry in the previous reassessment then the duty will be in excess of the actual dumping margin. Conversely, Winstone submits that the remedy runs the risk of being inadequate to prevent material injury if the normal value or exchange rate move in the opposite direction.

398. Winstone said, without prejudice to its submission that a lesser duty is legally and factually unjustifiable in this case, in the event that the Ministry nevertheless decides upon a lesser duty remedy, then the form of remedy adopted must at the very least be expressed with the NIFOB fixed in Thai baht, and with only reasonable cost deductions. Otherwise Winstone considers the remedy will continue to be inadequate in preventing material injury due to movement in exchange rates.

399. Winstone claims the Ministry is wrong to apply a hybrid remedy that uses the historic exchange rate applying at the time of the reassessment report to calculate the NIFOB for subsequent comparison with current export prices.

400. Winstone notes that the Ministry concluded in the last reassessment that there should not be a separate remedy for sales made by Elephant Plasterboard ex-wharf. Winstone observes that this conclusion was based on the perceived small difference in actual costs of selling ex-wharf as opposed to ex-store and the practical administrative difficulties of enforcing a separate remedy. Winstone considers the Ministry underestimated the cost difference between ex-wharf and ex-store sales. Winstone said, however, the issue is academic, as is the need for a separate duty for ex-wharf sales, provided Elephant Plasterboard's total reasonable costs are allocated across all sales, not only ex-store sales, to obtain the correct cost per square metre used to calculate the NIFOB.

Ministry's Consideration of the Issues

401. NIFOB's are calculated by deducting from the industry's NIP those costs and importer's margin arising after FOB up to the level of trade at which the imported product first competes with the New Zealand industry's product. The relevant level of trade at which the goods first compete on the New Zealand market was determined to be ex-factory for Winstone, ex-store for Elephant Plasterboard and ex-wharf for CTS Direct.

402. The purpose of a NIFOB is to ensure that the price of the imported product, when considered at the FOB level, is such that when the plasterboard is either landed at the wharf or sold ex-store (depending on the level of trade), its cost or sale price equates to the NIP.

403. Winstone has referred to the Ministry removing the "exchange rate advantage" by setting the current NIFOB reference prices in NZ dollars rather than Thai baht. The Ministry notes there is a potential problem with significant changes in exchange rates whether the NIFOB is set in New Zealand dollars or in baht. If a NIFOB is set in Thai baht and the currency in which the goods are invoiced to NZ importers (whether in US or NZ dollars) appreciates significantly against the baht, the amount of the remedy will diminish even if the export price has not changed. The reverse will apply if the currency in which the goods are invoiced depreciates significantly against the baht.

404. The following example shows the impact of significant exchange rate movements on the level of the remedy where the reference price is set in baht (the amounts are for the purposes of the example only and bear no relationship to actual transaction values).

Example 1

NIFOB amount in Thai baht = 100 baht/unit

This NIFOB has been set on the basis of an exchange rate of 1NZ\$ = 20 baht and is therefore designed to ensure that at an FOB price of NZ\$5/unit the price when sold at the relevant level of trade will not undercut the New Zealand industry's NIP.

Export price in NZ dollars = NZ\$4/unit

Export price in baht = 80 baht/unit

Anti-dumping duty payable = 20 baht/unit

Assume the baht depreciates against the NZ dollar to 1NZ\$ = 30 baht and the export price in NZ dollars stays the same at NZ\$4/unit.

Export price in baht = 120 baht/unit

Anti-dumping duty payable = nil

With an exchange rate of NZ\$1 = 30 baht, the export price in NZ dollars could drop to as low as NZ\$3.33/unit before anti-dumping duty would be payable.

Assume the baht appreciates against the NZ dollar to 1NZ\$ = 10 baht and the export price in NZ dollars stays the same at NZ\$4/unit.

Export price in baht = 40 baht/unit

Anti-dumping duty payable = 60 baht/unit

405. At this exchange rate the effect of the duty is to push the export price of the goods to NZ\$10/unit, which is well above the level needed to prevent injury to the New Zealand industry.

406. If a NIFOB is set in NZ dollars and the exporters adjust their prices to take account of exchange rate movements, or if the currency in which prices are invoiced is in a currency other than NZ dollars, then the efficacy of a NIFOB in NZ dollars will not be affected by exchange rate movements.

407. The following example shows the impact of significant exchange rate movements on the level of the remedy where the reference price is set in NZ dollars (the amounts are for the purposes of the example only and bear no relationship to actual transaction values).

Example 2

NIFOB amount in NZ dollars = NZ\$5/unit

Assume this NIFOB has been set on the basis of an exchange rate of 1NZ\$ = 20 baht and is therefore designed to ensure that at an FOB price of NZ\$5/unit the price when sold at the relevant level of trade will not undercut the industry's NIP.

Export price in NZ dollars = NZ\$4/unit

Anti-dumping duty payable = NZ\$1/unit

Assume the baht depreciates against the NZ dollar to 1NZ\$ = 30 baht and the exporter reduces its price in NZ dollars to NZ\$2.67/unit in order to maintain the same return in baht.

Export price in NZ dollars = NZ\$2.67/unit

Anti-dumping duty payable = NZ\$2.33/unit

In this case the remedy has continued to be effective in ensuring that export price of the goods is increased to the non-injurious level.

Assume the baht appreciates against the NZ dollar to 1NZ\$ = 10 baht and the exporter increases its price in NZ dollars to NZ\$8/unit in order to maintain the same return in baht.

Export price in NZ dollars = NZ\$8/unit

Anti-dumping duty payable = nil

408. In this case the effect of the exchange rate movement is to increase the export price well above the New Zealand industry's NIP. This is not, however, as a direct result of the level at which the duty is set, but as a result of a decision of the exporter to increase prices to compensate for exchange rate movements. In any event, it is unlikely that an exporter would change its prices this directly in response to exchange rate movements as it would need to keep competitive.

Example 3

Assume that the NIFOB in example 2 of NZ\$5/unit applies but the goods are invoiced in US dollars and the exchange rate is 1NZ\$ = US\$0.42.

Export price in US dollars = US\$1.68/unit

Export price in NZ dollars = NZ\$4.00/unit

Anti-dumping duty payable = NZ\$1.00/unit

Assume that the NZ dollar depreciates against the US dollar to 1NZ dollar = US\$0.35 and the price in US dollars remains the same.

Export price in NZ dollars = NZ\$4.80/unit

Anti-dumping duty payable = NZ\$0.20/unit

In this case the duty has continued to be effective in ensuring that export price of the goods is increased to the non-injurious level.

Assume that the NZ dollar appreciates against the US dollar to 1NZ dollar = US\$0.48 and the price in US dollars remains the same.

Export price in NZ dollars = NZ\$3.50/unit

Anti-dumping duty payable = NZ\$1.50/unit

409. In this case the duty has also continued to be effective in ensuring that export price of the goods is increased to the non-injurious level.

410. The examples above demonstrate that a NIFOB established in NZ dollars is better able to provide an effective remedy in the face of significant movements in exchange rates. It does so by ensuring that the price of the imported goods is not increased above the level required to remedy injury caused by dumping or reduced below the New Zealand industry's NZ dollar NIP.

411. The Ministry notes that the NIP is based on the normal value which is denominated in baht, and the NIP is therefore (when expressed in NZ dollars) established on the basis of the exchange rates prevailing at the time it is calculated. In addition, some of the costs added to the normal value to calculate the NIP are incurred in baht and US dollars and are also fixed in NZ dollars at the exchange rates existing at the time the NIP is calculated. Consequently when the NIFOB is set in NZ dollars it does not take account of movements in exchange rates which affect the amount of the normal value (and other costs added to it) since the date it was established, when expressed in NZ dollars.

412. The Ministry considers, however, that the advantages of setting a NIFOB in NZ dollars outweigh the disadvantages of the NIP (and consequently the NIFOB) not reflecting changes in its NZ dollar value due to exchange rate movements. Winstone does not adjust its price to reflect changes in the NZ dollar value of the NIP each time there is a change in the baht/NZ dollar exchange rate and it would not be practical for it to do so.

413. By setting the NIFOB in NZ dollars the Ministry considers that it is more accurately reflecting the reality that Winstone's prices do not change frequently while at the same time providing importers with the assurance that anti-dumping duty will not increase their import

prices to uncompetitive levels because of exchange rate movements. It also ensures that importers are not able to undercut the New Zealand industry's NIP as a result of a depreciation of the baht.

414. The Ministry therefore concludes that any NIFOB should be set in NZ dollars.

415. The Ministry acknowledges, however, that as submitted by Winstone, there is a risk of a NIFOB set in NZ dollars exceeding the dumping margin as a result of a depreciation of the baht against the NZ dollar. This can be illustrated in the example below.

Example 4

416. The NIFOB is NZ\$5/unit and the normal value, when calculated at the FOB level, is 130 baht/unit. The exchange rate is 1NZ\$ = 20 baht. At this exchange rate the normal value is equivalent to NZ\$6.50 and the NIFOB is therefore below the normal value.

417. Assume the baht depreciates against the NZ dollar to 1NZ\$ = 30 baht. At this exchange rate the normal value is equivalent to NZ\$4.33 and the NIFOB is therefore higher than the normal value. The NIFOB would therefore impose duty at a rate above the margin of dumping.

418. As anti-dumping duty cannot be imposed at a rate or amount greater than the dumping margin, the Ministry proposes that a cap, which is equal to the normal value when calculated at the FOB level, be set on any NIFOB. Such a cap would be set in baht and would require that the normal value amount be converted into NZ dollars for each importation to check that the NZ dollar NIFOB did not exceed the NZ dollar normal value (at the FOB level). If the NIFOB did exceed the normal value, then the normal value amount would be used to calculate any duty. This is also consistent with the approach taken in the reassessment of the anti-dumping duty on canned peaches from South Africa completed in June 2002.

Service Elements

Submission by Winstone

419. In the Interim Report, in calculating NIFOBs for Thai Gypsum and Siam Gypsum, the Ministry made a deduction for service elements related to additional costs associated with ex-wharf sales (as discussed above under calculation of the NIP). In the case of CTS Direct's imports from Thai Gypsum the deduction was made at the same amount as that added when the NIP was calculated. In the case of Elephant Plasterboard's imports from Siam Gypsum only a partial deduction was made based on the proportion of Elephant Plasterboard's sales that were made on an ex-wharf basis. Winstone has made the following submission in response to these adjustments made in the Interim Report.

420. Winstone said the Ministry is wrong in principle to make an adjustment for service elements when calculating a NIFOB. Winstone submits the correct approach for the calculation of the NIFOB is through the Ministry's deduction from the NIP of actual (and reasonable) costs incurred by the importer which is quite a separate matter from the calculation of Winstone's NIP. Winstone said it is not proper for the Ministry to calculate a NIFOB on the basis of deducting a calculated cost of one customer of one importer and the Ministry has no justification whatsoever for saying that these are costs of the importer. Winstone said the Ministry's suggested approach is artificial and wrongly reduces the NIFOB by allocating costs that do not in fact exist.

421. Furthermore, Winstone argues that an additional allowance (i.e. on top of Elephant Plasterboard's costs right through to the ex-store level) relating to Elephant Plasterboard's

ex-wharf sales is inconsistent with the Ministry's level of trade conclusion that Elephant Plasterboard's ex-wharf sales should be ignored and the level of trade taken at the ex-store level. Winstone submits no additional deduction relating to ex-wharf sales should be made in the case of Elephant Plasterboard.

422. Winstone said it accepts that the NIFOB for an importer selling ex-wharf should include a deduction for the importer's on-costs (delivery, damaged board, inventory holding costs and any difference in credit – where they in fact exist). Winstone said, however, that any "premium" which might be factored in to assess its NIP based on the cost of a Winstone customer buying ex-wharf directly from the Thai manufacturer must not be confused with or used to justify an amount for the costs of an importer selling ex-wharf. Winstone said the Ministry should note further that the [REDACTED] "premium" it referred to in relation to calculating the NIP is for a local supplier compared with a customer purchasing directly from a Thai manufacturer. Winstone said this is not applicable to purchases from a local importer.

423. Winstone submits that in calculating the NIFOB the Ministry must take account of paragraph 20 of the Settlement Agreement which states:

The NIFOB is then calculated by deducting from the NIP so determined, various costs, expenses or margins ("cost elements") which the relevant importer either incurs or is properly entitled to an allowance for . . ."

424. Winstone argues the reference to "or is properly entitled to an allowance for" is of course a reference to the relevant importer's reasonable profit margin and could not justify inclusion of a customer's costs.

Ministry's Consideration of the Issues

425. The logic behind a NIFOB mechanism is that if an importer purchases plasterboard at an FOB price equal to the NIFOB amount, then after adding its costs and (depending on the level of trade) margin, an importer's ex-wharf cost or ex-store selling price will equal the New Zealand industry's NIP. The Ministry has accepted above that the NIP should be set at Winstone's current selling price. That current selling price of [REDACTED] is, however, higher by [REDACTED] than the ex-wharf cost, calculated using only the actual costs incurred by the Thai exporter (Thai Gypsum) and the New Zealand importer (CTS Direct), of [REDACTED].

426. If a deduction is made in calculating a NIFOB for the [REDACTED] difference between Winstone's current selling price and the NIP calculated using exporter's and importer's actual costs, when CTS Direct's actual costs are added to an FOB price equal to the NIFOB so calculated, its ex-wharf cost is [REDACTED] below Winstone's NIP of [REDACTED]. Such an adjustment would therefore allow CTS Direct to land board on the wharf at a cost below Winstone's selling price. It would therefore recognise the principle that there is a premium associated with Winstone's selling price as a result of the additional service it provides as opposed to that which customers purchasing ex-wharf would receive.

427. Winstone itself said that in calculating its unsuppressed selling price it may take into account such a premium, depending on market and economic conditions at the time. (Winstone's evidence, [REDACTED] At the same time the Ministry notes that Winstone's assessment of such a premium is based on the possibility of one of its distributors purchasing directly from a Thai manufacturer.

428. The Ministry notes that the operation of CTS Direct and TG Plasterboard differs significantly from that of a Winstone distributor. As outlined under level of trade above, CTS Direct primarily acts as a financier for TG Plasterboard which appears to sell to end users

through CTS Quality and CTS Interiors Ltd and possibly direct to other customers off the wharf. As noted previously, it is not known what proportion of TG Plasterboard's sales are actually made directly off the wharf and what proportion are made through CTS Quality and CTS Interiors. (The way in which TG Plasterboard operates is unclear because TG Plasterboard did not co-operate with the reassessment). The evidence from CTS Direct is that neither it nor TG Plasterboard operate a warehouse and operate on a smaller scale than most Winstone distributors. Neither CTS Direct nor TG Plasterboard made any submissions in response to the Interim Report and have not therefore provided any evidence that its customers take into account the impact of service elements when negotiating prices with TG Plasterboard for ex-wharf sales.

429. Taking the factors above into account the Ministry does not consider that a deduction should be made for a premium relating to service elements in calculating a NIFOB for imports by CTS Direct from Thai Gypsum.

430. The level of trade for Elephant Plasterboard has been set at the ex-store level. However, over the year ended 31 October 2001 Elephant Plasterboard made [REDACTED] percent of its sales on an ex-wharf basis. Elephant Plasterboard incurs lower costs for those ex-wharf sales in that it does not incur the costs of freight from wharf to store and warehousing costs. Those lower costs will therefore be reflected in the actual Elephant Plasterboard costs to be used to calculate the NIFOB thereby resulting in a higher NIFOB than would be the case if all of Elephant Plasterboard's sales were made ex-store.

431. It is clear from the evidence that Elephant Plasterboard's customers purchasing directly from the wharf expect to pay a lower price than purchasing from Winstone (although the extent to which this is so probably varies from customer to customer and may not be as much as claimed by Elephant Plasterboard). The Ministry considers, however, that the [REDACTED] difference between Winstone's current selling price and the NIP calculated using exporter's and importer's actual costs represents a reasonable estimate of this amount. This amount is significantly below the amount that Elephant Plasterboard estimated to be the value of the service elements.

432. The Ministry considered whether it should make a deduction based on this amount to take account of those Elephant Plasterboard sales made ex-wharf. The Ministry notes that the relevant level of trade for Elephant Plasterboard is ex-store and the NIFOB remedy is therefore designed to ensure that when board is purchased at an FOB price at least equal to the NIFOB, the ex-store selling price will on average equal the NIP. As noted above, the existence of ex-wharf sales has the effect of increasing the NIFOB and therefore the existence and impact of such sales is reflected in the remedy even though the remedy is designed to ensure that sales at the ex-store level are non-injurious. The Ministry therefore considers that an adjustment to recognise the premium resulting from service elements can be made in a remedy designed to provide a remedy at the ex-store level.

433. Because Elephant Plasterboard's ex-wharf sales are only [REDACTED] percent of its total sales, the Ministry considers the adjustment should be apportioned using the same percentage. An adjustment has therefore been made at [REDACTED] percent of [REDACTED] which is [REDACTED].

434. The Ministry has considered Winstone's argument that the reference in paragraph 20 of the Settlement Agreement to "or is properly entitled to an allowance for" to an importer's reasonable profit margin. The Ministry considers that paragraph 20 can also be interpreted to mean expenses to which an importer is properly entitled to an allowance for and the deduction relating to service elements is therefore within the bounds of the agreement.

Calculation of NIFOB for Imports by Elephant Plasterboard from Siam Gypsum

Sea Freight, PSC and BAF

435. The cost of transport from wharf to store, sea freight, BAF and PSC have also been established on the basis of the actual verified costs [REDACTED]. The costs for export packing, freight to wharf, bill of lading fee, shipping charges and cost of credit are the verified costs provided by Siam Gypsum.

Import, Warehousing and Selling and Administration Expenses

436. Winstone claims the Ministry must assess the reasonableness of Elephant Plasterboard's costs. If the Ministry does not do this Winstone considers that Elephant Plasterboard is provided with an incentive to fund additional SG&A expenses out of the dumping margin that would not otherwise be possible. Winstone said the NIFOB remedy provides Elephant Plasterboard with the same profit margin per sale, and insofar as the SG&A expenses are fixed rather than variable costs, Elephant Plasterboard therefore obtains an inflated cost deduction when its sales volume increases. Winstone considers Elephant Plasterboard consequently has an artificial incentive to increase sales volumes through greater SG&A activity.

437. Winstone made submissions on the need for the Ministry to ensure that only reasonable cost deductions are made for Elephant Plasterboard's SG&A expenses when calculating a NIFOB. Winstone argued that the Ministry must verify Elephant Plasterboard's costs and compare them against reasonable industry costs for the purposes of calculating Elephant Plasterboard's NIFOB.

438. Winstone argues the Ministry's assessment must take into account the subsidisation of Rikki by Elephant Plasterboard and ensure that the costs allowed to be deducted by Elephant are limited to the true costs of an importer and not those of a distributor/retailer.

439. As noted above under level of trade those submissions included a report by a firm of forensic accountants which, amongst other things, gave an estimate of the cost of operating Elephant Plasterboard if it was operated as a stand-alone entity. The cost estimates provided by the forensic accountants itemised the operating costs and broke them down into warehousing and selling and administration expenses.

440. It appears from the types of costs itemised by the accountants that the warehousing costs include the costs of distributing plasterboard to customers. (In calculating an undumped price and a NIFOB, distribution costs are excluded because the relevant level of trade is at the ex-store level). According to a letter from the accountants the cost estimates were "Based on the size of the premises and the staff complement observed . . .". It is not stated how these observations were conducted but the Ministry assumes they were done on a covert basis.

441. The estimated costs provided by the accountants total [REDACTED] for warehousing (and presumably distribution) and [REDACTED] for selling and administration. The accountants have calculated these costs on a per square metre basis to be respectively [REDACTED] and [REDACTED]. Although the total sales volume on which the per square metre costs have been calculated is not explicitly stated, dividing the total costs by the cost per square metre gives a total sales volume for warehousing and selling and administration expenses respectively of [REDACTED] square metres and [REDACTED] square metres. It is unclear why a different sales volume was used to calculate the per square metre cost for each category of expenditure.

442. Winstone claims that these cost estimates represent the reasonable warehousing and selling and administration expenses that could be justifiably claimed by Elephant Plasterboard for a NIFOB calculation. However, in later correspondence related to a request by Elephant Plasterboard that Winstone release the forensic accountant's report, Winstone stated that it "... provided this information to the Ministry not as a factual submission but to demonstrate a basis for the legitimacy of its concerns concerning the Elephant/Rikki operation and hence the need for the Ministry to investigate these matters."

443. Winstone also provided another estimate of Elephant Plasterboard's warehousing and distribution costs in the form of a quote for the storage and distribution of plasterboard from an independent company quoting contract or managed warehouse services. This quote was for a total of [REDACTED] which Winstone has converted into a cost per square metre of [REDACTED]. This cost per square metre represents a sales volume or throughput of [REDACTED] square metres. Referring to this quote, Winstone said that even making a generous allowance for lack of expertise, the maximum cost the Ministry should allow for warehousing and distribution costs is [REDACTED] per square metre.

444. Under level of trade above, the Ministry was satisfied that for the year ended 30 June 2001, costs were properly allocated between Elephant Plasterboard and Rikki (except for some very minor adjustments that are required). Under level of trade the Ministry also considered that the costs attributed to Elephant Plasterboard and Rikki reasonably reflect the actual costs that would be incurred if those companies operated as stand-alone entities.

445. The Ministry considers that it must use an importer's actual costs to calculate undumped prices (and NIFOBs) if it is satisfied that those are the costs actually incurred in the importation and sale of the subject goods. It is not for Winstone to establish the level of efficient operating costs that an importer must achieve before those costs can be taken into account. The Ministry has nevertheless compared the warehousing and distribution quote and the accountant's cost estimates against Elephant Plasterboard's costs for the year ended 30 June 2001.

446. Elephant Plasterboard's accounting system does not allocate all of its costs between warehousing, selling and administration and distribution costs. To enable a comparison to be made of Elephant Plasterboard's expenditure in these categories against the cost estimates provided by Winstone (and to ensure distribution costs after ex-store are excluded) Elephant Plasterboard provided an estimate of the proportion of its costs which fell within each category. (Elephant Plasterboard's costs were also adjusted for the minor misallocation of costs between Elephant Plasterboard and Rikki referred to under level of trade above).

447. Elephant Plasterboard's costs for the year ended 30 June 2001 in each category were estimated to be: warehousing [REDACTED], selling and administration [REDACTED] and distribution [REDACTED]. (It should be noted that only the allocation of costs between these three categories is an estimate, the costs in total being Elephant Plasterboard's actual expenditure). Elephant Plasterboard was unable to provide its sales volume for the year ended 30 June 2001, the nearest period for which its sales volume was available being for the year ended 31 March 2002.

448. The Ministry initially considered using the sales volume for the year ended 31 March 2002 in order to calculate the per square metre costs for the year ended 30 June 2001. The use of these sales volume figures was contemplated on the basis that there some overlap between the two periods and the sales volume figure was for a full year so any seasonal variation in sales volume would be accounted for. The Ministry, however, could not be satisfied that the sales volume figures provided by Elephant Plasterboard for the year ended

31 March 2002 were reliable. This was so because the sales volume figures provided by Elephant Plasterboard differed significantly from its import volumes for the year ended 31 March 2002, even when an allowance was made for possible variances due to damaged board and opening and closing inventories. The Ministry consequently asked Elephant Plasterboard to check its sales volume figures. Elephant Plasterboard advised a check had shown that the sales volume figures it had provided were incorrect. Elephant Plasterboard said it would provide amended sales volume figures but had not done so at the time this report was written.

449. To estimate Elephant Plasterboard's sales volume for the year ended 30 June 2001, the Ministry consequently took Elephant Plasterboard's import volumes for the year ended 30 June 2001 and deducted [REDACTED] percent to account for damaged board which could not be sold. The deduction for damaged board was based on the estimate for this cost provided in a letter from the accountants for a reseller firm, as referred to in section 3.5 above. The sales volume estimated on this basis is [REDACTED] square metres. Using this estimated sales volume, Elephant Plasterboard's costs per square metre for warehousing, selling and administration and distribution are respectively [REDACTED], [REDACTED] and [REDACTED].

450. The estimates of expenditure provided by Winstone are [REDACTED] than Elephant Plasterboard's actual expenditure in respect of warehousing and distribution and [REDACTED] in respect of selling and administration expenses. The estimate of total expenditure (warehousing/distribution plus selling and administration) provided by Winstone is [REDACTED] than Elephant Plasterboard's actual expenditure. As the undumped price (and NIFOB) is determined by the total expenditure (when calculated on a per square metre basis) the comparison of total expenditure is of far more significance and indicates that Elephant Plasterboard's total expenditure is reasonable. However, the various volume figures used by Winstone to calculate costs per square metre are all [REDACTED] than Elephant Plasterboard's estimated sales volume, meaning that Winstone's estimated costs are [REDACTED] than Elephant Plasterboard's actual costs per square metre. Winstone's estimates of Elephant Plasterboard's costs on a per square metre basis are significantly different from Elephant Plasterboard's actual costs that were verified by the Ministry. The comparative figures are summarised in the table below.

	Forensic Accountants	Managed Warehousing Quote	Elephant Plasterboard Actual
Warehousing & Distribution	[REDACTED]	[REDACTED]	[REDACTED]
Selling & Administration	[REDACTED]	N/A	[REDACTED]
Total	[REDACTED]	N/A	[REDACTED]
Sales Volume	[REDACTED] &	[REDACTED]	[REDACTED]
Warehousing & Distribution/m2	[REDACTED]	[REDACTED]	[REDACTED]
Selling & Administration/m2	[REDACTED]	N/A	[REDACTED]

Total Costs Per m2

N/A

451. The Ministry is satisfied that the sale volume figures estimated on the basis set out above for Elephant Plasterboard are more accurate than the various quantities estimated by Winstone and should therefore be used to calculate an undumped price (and any NIFOB). The Ministry has therefore used a warehousing cost of [REDACTED] per square metre (i.e. [REDACTED] less distribution costs) and a selling and administration cost of [REDACTED] per square metre.

452. As noted above the Ministry is satisfied that the costs that it has calculated for Elephant Plasterboard's import costs fairly reflect the actual costs incurred by Elephant Plasterboard to operate its import and distribution operation. As also noted above, the Ministry does not consider that it is for Winstone to establish what should be an efficient operating level for an importer. The NIFOB calculation has therefore been made using the actual costs incurred by Elephant Plasterboard.

453. The Ministry agrees with Winstone that Elephant Plasterboard's per unit costs will decrease if its sales volume increases above the level at which the SG&A expenses have been calculated, because a significant part of those costs are fixed. To the extent that this may occur then the NIFOB will be lower than is necessary to prevent injury. The Ministry notes that the reverse will be the case should Elephant Plasterboard's sales volume decrease, i.e., the NIFOB will be higher than is required to prevent injury. If either situation occurs such as to have a material effect on the efficacy of the remedy, the Ministry considers this could only be addressed by way of a further reassessment.

454. The Ministry does not believe that SG&A expenses should be artificially reduced by in effect capping the sales volume that Elephant Plasterboard is "permitted" by Winstone to achieve. Such an approach would impose an unacceptable, and possibly illegal, restriction on competition.

455. The Ministry notes that Elephant Plasterboard's per square metre SG&A expenses have been calculated by using all of its sales volume, not just its ex-store sales. Winstone's concerns on this point have therefore been addressed.

Reasonable Importer's Profit Margin

Original Submission by Elephant Plasterboard

456. During the verification visits to Elephant Plasterboard, that company made verbal representations that in calculating a NIFOB (and the same principle would apply to calculating an undumped price) an adjustment should be made for reasonable importer's profit using a gross margin based on that achieved in the building industry, for example Winstone's gross margin. Elephant Plasterboard said that a gross margin rather than a net margin should be used because volume of turnover affects the net margin.

457. Elephant Plasterboard subsequently lodged a written submission which further addressed the issue of a reasonable importer's profit margin for use in calculating a NIP and a NIFOB. This submission is recorded below.

458. Elephant Plasterboard submits that the four percent profit margin allowed in the last reassessment is not adequate and that its inadequacy can be illustrated in a number of ways. Elephant Plasterboard argues that a logical approach is by analogy with the calculation of "reasonable profit" margin when calculating a constructed normal value pursuant to section 5 of the Act and Article 2.2 of the Anti-Dumping Agreement. Elephant

Plasterboard refers to and quotes the provisions of Article 2.2.2(i) (which it considers is the preferred method).

459. Elephant Plasterboard refers to documents on the public file in which the Ministry obtained information from Waikato University from its business benchmarking survey on wholesale and retail margins in New Zealand. Elephant Plasterboard submits that the Ministry “. . . commits a serious error of law in applying a distribution industry average, along the lines of that obtained in your exchange of emails with the University of Waikato . . .” Rather, Elephant Plasterboard argues, an approach based on the method set out in Article 2.2.2(i) of the Anti-Dumping Agreement is the correct one, i.e., identify and analyse the profit margins of closely similar industries in New Zealand. Elephant Plasterboard said the Ministry needs to take into account the practical realities facing businesses in those industries and the method in Article 2.2.2(i) recognises this by requiring the use of actual profit margins that have automatically taken account of those practical realities.

460. Elephant Plasterboard said that applying the method in Article 2.2.2(i) to the plasterboard situation in the New Zealand market, two points stand out like beacons which the Ministry cannot ignore:

- (a) the domestic industry’s profit margin; and
- (b) Elephant Plasterboard’s precarious position.

461. Elephant Plasterboard refers to Fletcher Building’s Annual Results Presentation dated 22 August 2001 and notes that the Building Products and Steel division’s EBIT for the 12 months ended 2000 and 2001 represented a return on funds respectively of 17.1 and 13.2 percent. Elephant Plasterboard comments that the published accounts do not show the results for Winstone separately but said the Ministry can access those figures. Elephant Plasterboard estimates that Winstone’s net profit to be of the order of 35 percent or 26 percent return on funds and sets out the basic figures on which these estimates are based. As against that “magnificent profit level” Elephant Plasterboard said the Ministry is proposing to allow it a mere four percent based on some national average that bears no relationship with either the plasterboard industry or even the building industry.

462. As well, Elephant Plasterboard said it is competing with a domestic manufacturer that is (via the dumping remedy) being permitted to maintain monopolist’s price premium. Adopting a “rational economic behaviour” model, Elephant Plasterboard asks why any other participants in the market, especially one at the same level of trade as Winstone, should expect any lesser net profit, if it is expected (indeed required) to charge at the monopolist’s price level. Elephant Plasterboard states “To put it bluntly, that competitor would be a damn fool not to benefit from the monopolist’s price, so would expect to make a net profit of the same order as the monopolist.” Elephant Plasterboard claims that the “IPP [import parity price] “methodology” must cut both ways, and this is one of the respects in which that flawed methodology must cut back on Winstone.”

463. Elephant Plasterboard said it is in a precarious position in competing against Winstone because:

- (a) It is a small-medium sized business.
- (b) It is facing a competitor that is one of New Zealand’s biggest industrial empires.
- (c) Is selling a building product and therefore is subject to the notorious fluctuations in the New Zealand building industry.

- (d) It imports “. . . so is always facing exchange rate uncertainty because of the precarious trajectory of our beloved NZ\$.”
- (e) It faces unusual overheads on account of the anti-dumping case, including legal costs, management downtime, and the continual risk of suffering from “erroneous decisions”. (Elephant Plasterboard considers that the worst example was the decision to impose duty at the full margin of dumping for an entire year until November 2000).
- (f) It faces intense price competition from Winstone for sale of a price inelastic commodity.

464. In consequence, Elephant Plasterboard claims it needs a much higher “buffer” of profit margin than four percent to compensate for the swings, and risk of swings, in profitability arising out of the factors listed above. Elephant Plasterboard gave an example showing how a drop in sales of [REDACTED] percent could reduce its profit [REDACTED]

465. Elephant Plasterboard set out in summary its actual financial performance as follows:

- (a) For the year ended 30 June 2001:
- Sales [REDACTED]
 - Direct costs of sale [REDACTED]
 - Gross Profit [REDACTED] ([REDACTED]%)
 - Overheads [REDACTED]
 - Net loss [REDACTED]
- (b) For the nine months ended 31 March 2002:
- Sales [REDACTED]
 - Direct costs of sale [REDACTED]
 - Gross profit [REDACTED] ([REDACTED]%)
 - Overheads [REDACTED]
 - Net profit [REDACTED]

466. Referring to these results Elephant Plasterboard said that it is not difficult to see that a rational proprietor of a business in its position, competing in the same market and at the same level of trade as Winstone, would require a net profit of at least [REDACTED] percent and would see a net profit of four percent as manifestly inadequate. Elephant Plasterboard argues that a four percent margin does not even constitute a buffer against the prospect of loss by reason of the “precarious” factors, as listed above, which are always present. If the Ministry was adopting a strictly fair approach, Elephant Plasterboard submits that a profit margin well in excess of [REDACTED] percent would be allowed. However, Elephant Plasterboard said that a margin of [REDACTED] percent must be regarded as a “bottom line” in its costs and margin build-up from ex-wharf to ex-store.

467. Elephant Plasterboard submits that using the margin as part of the cost build-up and cost breakdown in calculating the NIFOB is grossly unfair. Elephant Plasterboard said that if it increases its price and/or reduces its overheads and therefore increases its margin, then the NIFOB would rise on the next review. Elephant Plasterboard said this is a ridiculous situation and contradicts the aim of any commercial operation to increase profits and shareholder return on investment. Elephant Plasterboard claims this is one more illustration of its point that the import parity price method is fundamentally flawed.

Submission by Elephant Plasterboard in Response to Interim Report

468. In the Interim Report the Ministry concluded that an allowance for a reasonable importer's profit margin should be made at the rate of five percent (as a percentage of sales). The five percent rate was based on statistics obtained from a Waikato University business benchmarking survey. Elephant Plasterboard has made further submissions in response to the Interim Report and these are summarised below.

469. Elephant Plasterboard notes that in the Interim Report the Ministry accepts its earlier submission that it should use profit margin information that:

- (a) relates to the building industry; and
- (b) hones in on the particular part of the building industry that operates at the same or a similar level and type of activity as Elephant Plasterboard.

470. Elephant Plasterboard said the Ministry did not quite say so in the Interim Report, but submits that the relevant "level and type" of activity is:

- (a) Type: plasterboard and accessories.
- (b) Level: importer selling to distributors.

471. Elephant Plasterboard refers to a comment by the Ministry that the margins achieved in manufacturing would not necessarily be comparable to those achieved in buying and selling and claims that the only reasons given by the Ministry for that distinction are:

- (a) Statistics NZ's sector operating surplus before tax statistics showing the profit rates for the manufacturing sector and wholesale trade sector respectively of 7.3 percent and 2.4 percent.
- (b) That the domestic plasterboard industry would likely have higher profit margins because it does not have to pay high costs of importing, particularly shipping costs

472. Elephant Plasterboard said that neither of the above points is any good reason for rejecting Winstone's profit margin as the "prime comparable" for assessing Elephant Plasterboard's reasonable profit margin. In critiquing the Ministry's reasoning, Elephant Plasterboard submits that:

- (a) Winstone and Elephant Plasterboard sell precisely the same ranges of products.
- (b) Winstone and Elephant Plasterboard sit at the same level of trade in the New Zealand market, i.e., selling to distributors.
- (c) While the Ministry accepts that it is important to examine margins in the building industry, and to hone in on the plasterboard industry, the Statistics NZ figures are not even specific to the building industry, let alone the plasterboard industry, so the

use of them immediately contradicts the Ministry's own theory. Statistics NZ figures may only be used to establish the outside parameters of what is a reasonable profit margin for Elephant Plasterboard.

- (d) Winstone is not only a manufacturer, it is also an importer and reseller of many of its lines.
- (e) Winstone imports virtually all of the raw material for its plasterboard production (gypsum and paper), which puts it even closer to EPB on any manufacturer-importer spectrum.
- (f) Granted that an importer like Elephant Plasterboard pays a freight cost (of approximately ██████████ per square metre) which a manufacturer does not pay. However, Winstone imports its gypsum and paper from Australia, i.e. across the Tasman Sea, which is notorious as being the most expensive piece of shipping water in the world.
- (g) More importantly, Winstone pays a very substantial cost to own and run its own plasterboard manufacturing plant. That plant represents an investment of probably around \$150 million, and that is just the ownership cost, it does not count the cost of running the plant. Elephant Plasterboard pays no such cost. By purchasing from Siam Gypsum (and electing to pay the ██████████ freight cost) Elephant Plasterboard entirely avoids the cost of owning and running its own plant. If the Ministry says a manufacturer should make more profit because it avoids the freight cost, the Ministry has to acknowledge that Elephant Plasterboard should make more profit because it does not have to own and operate a plant. A cost is a cost, it makes no difference whether it is a manufacturing cost or a freight cost, what matters is the amount of it.

473. Elephant Plasterboard recalled its earlier submission that it is competing with a domestic manufacturer that is (via the dumping remedy) being permitted to maintain a monopolist's price premium. Elephant Plasterboard claims that a monopolist's price enables Winstone to make a net profit of the order of 35 percent or more. Elephant Plasterboard also claims that Winstone holds about 95 percent of the New Zealand market. Accordingly, Elephant Plasterboard submits that the profit expectations in this industry (sale of plasterboard to distributors) is not driven by participant's acceptance of some "manufacturing sector" or "wholesale trade sector" averages. Elephant Plasterboard submits "It is driven by the fabulously high price WB [Winstone] can get, because that price is notched to the Thai domestic price of plasterboard."

474. Elephant Plasterboard observes that the reason New Zealand customers have the highest price of any country in the world that has a domestic plasterboard manufacturing industry is that the price of the board goes up every time the price in Thailand increases, notwithstanding that the Thai price increase may have absolutely nothing to do with the conditions and factors bearing on Winstone's costs in New Zealand. Elephant Plasterboard submits that because Winstone can obtain such a high price, it (correctly) expects to make profit margins which are very substantially higher than any "manufacturing sector" or "wholesale trade sector" or "building industry" average levels.

475. There is no reason, Elephant Plasterboard argues, why a competitor of Winstone, selling the same product and range of products at the same level of trade, would not expect the same or a similar level of profit. Elephant Plasterboard submits the Ministry must accept that Winstone obtains these very high profit margins because of the application of the import parity price mechanism, and this means it can obtain an artificially high price. Elephant Plasterboard said Winstone's profit is driven by its price and submits that a new competitor

moving into a truly competitive New Zealand plasterboard market would normally have two pricing options available to it:

- (a) drop its price below the competitor in an effort to get market share; or
- (b) price at the same artificially high level as its competitor, getting only modest market share but enjoying extremely high profit margins.

476. Elephant Plasterboard said if it had that choice it would be happy to maintain around five percent market share but enjoy high margins (as Winstone does) by charging the same price as Winstone, or marginally more. Elephant Plasterboard said, however, that it has no choice. While the dumping remedy is in place Elephant Plasterboard claims it cannot price below Winstone's NIP. Accordingly, Elephant Plasterboard argues it is required (in effect required by law) to take the benefit of Winstone's artificially high price and does not have the choice to pass any of that profit on to its customers in the form of a lower price but is "forced" to keep the profit. Elephant Plasterboard said while this is a rotten outcome for the New Zealand consumer, it is an extremely good outcome for Winstone, and it would be extremely good for Elephant Plasterboard, but for the Ministry's suggestion that it is not allowed to earn more than five percent net profit. Elephant Plasterboard also notes that it may be possible to look at profit margins in other New Zealand markets controlled by monopolies, but it is unable at present to point to one.

477. Elephant Plasterboard said there are other ways of illustrating just how ridiculous it would be to use a five percent profit margin. For example, Elephant Plasterboard said if it becomes more efficient (and all businesses should) it is unable to pass any benefit of that efficiency onto its customers. Elephant Plasterboard said it cannot reduce its prices, so is "forced" to take all of the benefit of that efficiency as extra profit, only to have the Ministry come along and say: "You are only entitled to a 5% profit so your reward for obtaining greater efficiency is that we are going to increase the NIFOB". Elephant Plasterboard comments that this would be a very bizarre outcome, but it is the logical result of the wholesale trade sector average approach that the Ministry has adopted in the Interim Report. Elephant Plasterboard claims that the Ministry is practically telling it that it might as well increase its costs as much as it likes because the maximum profit it is going to be allowed is five percent. Elephant Plasterboard urges the Ministry to think very carefully about this "because it is illogical to the point of being bizarre".

478. Elephant Plasterboard said the price of plasterboard in Australia is about NZ\$2.80 per square metre. Elephant Plasterboard has estimated that Australian manufacturer's profit margins are around 12.5 percent (as a percentage of sales) based on this selling price and its estimates of their costs. Based on a selling price in New Zealand of NZ\$[REDACTED], and on its estimates of Winstone's costs, Elephant Plasterboard estimates Winstone's net profit margin to be 35 percent (as a percentage of sales).

479. Elephant Plasterboard claims, however, that Winstone presently sells into Australia at NZ\$1.80 per square metre, i.e., it dumps (legally) because they have excess capacity in New Zealand. Elephant Plasterboard said Winstone can do this because it has such a high price buffer on its New Zealand sales, so sales at those dumped prices in Australia still add to its bottom line. Elephant Plasterboard argues that looked at from its viewpoint it has to compete with a New Zealand competitor that has such a high profit buffer that it can dump (by a very substantial margin) into an overseas market. Elephant Plasterboard asks how can it expect to face off against such a competitor if it is not permitted (is basically prohibited by effect of the dumping law) from having any buffer at all built into its profit margin.

480. Elephant Plasterboard submits that another reason why it must (like Winstone) build in a profit margin buffer is the expected impact of the Buckeridge Group of Companies (BGC)

entry into the Australasian market. Elephant Plasterboard said BGC is currently constructing a plasterboard manufacturing plant in Perth. Elephant Plasterboard notes that BGC is not part of the Australian group of companies that have to date declined (whether as a result of independent decisions or otherwise) to enter the New Zealand market. Elephant Plasterboard said BGC will no doubt initially buy some market share in Australia, slightly reducing the Australian price from the current NZ\$2.80. However, Elephant Plasterboard claims that BGC will certainly also aim at the New Zealand market precisely because of the fabulous price it can obtain here.

481. Elephant Plasterboard said BGC could land plasterboard in New Zealand at approximately NZ\$3 per square metre as against the current Winstone NIP of \$4.98 [this is the NIP calculated in the Interim Report only and is therefore not the current NIP]. Elephant Plasterboard submits if BGC came into the New Zealand market at (say) NZ\$3.98 (representing a very high profit margin for them compared with Australia) that will have a major impact on Winstone's profit. Elephant Plasterboard said it will also have a major impact on its profit and unlike Winstone it does not have the ability to withstand that kind of cut in profit, because the effect of the dumping remedy has been to reduce its profit margin to something akin to a New Zealand wholesale trade average level.

482. Elephant Plasterboard submits that the above two illustrations (Winstone dumping into Australia and possible BGC entry into New Zealand) well support its earlier submission that the Ministry has to take into account both Winstone's profit margins and Elephant Plasterboard's precarious position. Referring to a comment by the Ministry in the Interim Report that fluctuating exchange rates are a common factor in business and do not on their own provide a compelling reason for a higher rate of profit, Elephant Plasterboard notes that exchange rates affect only importers.

483. Elephant Plasterboard said the Ministry appears to have ignored in the Interim Report its earlier submission that its profit volatility is a further reason why it needs a higher profit margin buffer. Elephant Plasterboard recalled its earlier submission in which it drew an analogy of a horticulturist being asked to accept say a four percent profit margin when he knows in any season he runs the risk of the crop being wiped out by frost or hail. Elephant Plasterboard said in any particular year it runs the risk of making a loss, a point illustrated by the [REDACTED] loss it made last year. Elephant Plasterboard submits it must expect to make a [REDACTED] profit in any given year, if only to avert the prospect of making the kind of loss it suffered last year. Elephant Plasterboard claims the risk of such losses is all the greater in its case because its business is so closely controlled by the precarious trajectory of the dumping remedy.

484. Elephant Plasterboard submits that the appropriate profit for it is in the order of 25 percent and notes this figure cannot be perfect unless the Ministry accepts Winstone's profit margin entirely. Elephant Plasterboard argues it is therefore a matter of taking a common sense approach which takes into account the range of margins that may be considered and identifies the most appropriate point on that range to call its reasonable profit margin. Elephant Plasterboard submits that the outside parameters have already been identified, i.e.:

- (a) At the low end, the Statistics NZ wholesale trade average figure of 2.4 percent and the manufacturing sector average of 7.3 percent.
- (b) At the high end, Winstone's margin of 35 percent.

485. Elephant Plasterboard argues that 2.4 percent is not (as stated above) a relevant figure, so the bottom end of the range should be somewhere between the 2.4 percent and the 7.3 percent, say the five percent figure the Ministry identified in the Interim Report. Accordingly, Elephant Plasterboard said the range is five to 35 percent. In deciding where it should sit on

this extremely wide range, Elephant Plasterboard argues that the Ministry needs to take into account the point that Winstone is entitled to charge a monopoly price, and Elephant Plasterboard is legally required to charge the same or more, so increasing the profit that Winstone's competitor reasonably could expect.

486. Elephant Plasterboard submits the appropriate way to factor this in is to make an adjustment as between the manufacturing sector average compared with Winstone's actual margin of 35 percent, and the like comparison with a blended manufacturing sector average/wholesale sector average, i.e.:

- Winstone's 35% margin \div manufacturing sector average 7.3%
 \therefore Winstone's margin is 4.79 times the average
- Elephant Plasterboard \therefore 5% $[=7.3\%+2.4\%\div 2] \times 4.79$
 \therefore Elephant Plasterboard reasonable margin is 23.97%, say 24%

487. According to Elephant Plasterboard the same kind of result emerges regardless of exactly how you approach the exercise of establishing and then identifying the point on the range of margins. Elephant Plasterboard gives the following example:

- Winstone's margin of 35%
- Elephant Plasterboard's margin as per the paragraph above of 24%
- Manufacturing sector average of 7.3%
- Wholesale trade sector average of 2.4%
- Blended manufacturing and wholesale trade sectors $[7.3\% + 2.4\%] \div 2 =$ say 5%
- Overlay Winstone's 35% margin on the manufacturing sector [i.e. $35\% \div 7.3\% = 4.79\%$] and apply to wholesale trade sector $[2.4\% \times 4.79\%] = 11.5\%$
- Winstone's 35% less the difference between the manufacturing and wholesale sector averages, i.e. 35% less $4.9\% =$ say 30% for Elephant Plasterboard
- Average of the above $[35 + 24 + 7.3 + 2.4 + 11.5 + 30 = 110.2 \div 6] = 18.3\%$

488. Elephant Plasterboard notes that the average margin moves significantly up or down depending on how many high end (Winstone end) or low end (industry average end) figures you insert. However, Elephant Plasterboard submits that simply illustrates the point that Winstone's high profit is price driven, and a competitor that is able (indeed legally required) to charge that price can reasonably expect profit levels well above any industry or "all sector" averages. Accordingly, Elephant Plasterboard submits a profit somewhere between 18 to 30 percent is well justified.

489. Elephant Plasterboard said that Winstone could immediately if it so chose drop its prices by five percent and still make a 30 percent net profit. Elephant Plasterboard said it would have to do the same in order to compete, but this would wipe out all of its profits. Elephant Plasterboard observes that Winstone could chose to work on a 12.5 percent net profit as the Australian manufacturers do and so drop its prices by 22.5 percent at any

moment. Elephant Plasterboard notes it would need a 27.5 percent net profit now if it was to be left with a five percent profit after such a price cut.

Ministry's Consideration of the Issues

490. Following the submissions made by Elephant Plasterboard and having concluded that Winstone's actual current selling price can reasonably be used as the NIP, the Ministry has re-examined the issue of a reasonable importer's profit margin.

491. In a new investigation the Ministry would normally base an importer's reasonable profit margin, for the purpose of calculating a NIFOB, on the actual margin achieved by an importer on the product under investigation.

492. Elephant Plasterboard's actual results show it made a loss for the year ended 30 June 2001 and a [REDACTED] profit for the nine months ended 31 March 2002. (The Ministry notes that Elephant Plasterboard's financial statements for the nine months ended 31 March 2002 show a net profit of [REDACTED] before extraordinary items, and sales of [REDACTED], rather than the net profit of [REDACTED] and sales of [REDACTED] stated in Elephant Plasterboard's submission). The profit made in the nine months ended 31 March 2002 represents [REDACTED] percent of sales and relates to the purchase and sale of all types of plasterboard not just the type subject to anti-dumping duty.

493. The Ministry notes that anti-dumping duty was reassessed to a rate at less than the margin of dumping (from being imposed at the full margin of dumping) in November 2000. Elephant Plasterboard's results for the year ended 30 June 2001 would have reflected any benefit from the reassessment of the duty for only part of that period, while the results for the nine months ended 31 March 2002 would have shown any benefit for the whole of the period. The rate of profitability for the nine months ended 30 June 2002 was, however, [REDACTED]. Elephant Plasterboard's actual results for the nine months ended 30 June 2002 are therefore not likely to represent a reasonable rate of profit.

494. In the last investigation and reassessment Elephant Plasterboard was [REDACTED].

495. In the Interim Report the Ministry noted that the domestic plasterboard industry is always likely to achieve profit margins higher than those of an importer importing plasterboard from Thailand because of the high costs (particularly for shipping) relative to the value of the board, of getting the plasterboard to New Zealand. To illustrate this, in the Interim Report the Ministry adjusted Winstone's financial results for the costs of getting plasterboard from ex-factory in Thailand to the wharf in New Zealand.

496. The Ministry notes Elephant Plasterboard's submissions concerning the costs faced by Winstone in manufacturing plasterboard in New Zealand, including costs to import raw materials. The Ministry has therefore compared the costs incurred by Winstone to get plasterboard to the ex-factory point (the point at which it competes with Elephant Plasterboard) with Elephant Plasterboard's costs to ex-store (the point at which it competes with Winstone).

497. The Ministry has not obtained updated financial information from Winstone since the last investigation and did not consider it necessary for the purposes of this illustrative exercise. The most recent financial results available for Winstone are those for the year ended 30 June 2000. These show that Winstone's total costs (cost of production plus S&A

expenses) were [REDACTED] (all costs are shown on a per square metre basis). Even if these costs are adjusted by the movement in the producer price index for manufacturing from June 2000 to June 2002 (eight percent) the total costs are only [REDACTED].

498. Information provided by Elephant Plasterboard can be used to calculate its costs (using the NZ dollar to Thai baht exchange rate at 26 September 2002 for the one cost in baht) to ex-store (but excluding a profit margin) as follows:

Table 3.2: Elephant Plasterboard’s Costs to Ex-Store

Current FOB Purchase Price (NZ\$)	[REDACTED]
Baht/NZ\$ Exchange Rate	20.42984
Plus Costs after FOB:	
- Cost of Credit (baht)	[REDACTED]
- Cost of Credit (NZ\$)	[REDACTED]
- Sea Freight, BAF, PSC (NZ\$)	[REDACTED]
- Duty @ 5% (NZ\$)	[REDACTED]
- Freight Wharf to Warehouse (NZ\$)	[REDACTED]
- Warehousing and S&A Expenses (NZ\$)	[REDACTED]
Total Costs to Ex-Store (NZ\$)	[REDACTED]

499. The figures above show that Elephant Plasterboard’s costs are significantly higher than those of Winstone. Given that both Elephant Plasterboard and Winstone can be assumed to be selling into the market at about the same price on average, the Ministry does not consider that Elephant Plasterboard, with a significantly higher cost structure, can reasonably expect to achieve the same profit margin as Winstone.

500. The cost information above can also be used to calculate the profit margin that Elephant Plasterboard will achieve with an average selling price of [REDACTED], i.e., the difference between [REDACTED] and the total costs to ex-store of [REDACTED] gives a profit margin of [REDACTED] or [REDACTED] percent of the selling price. The Ministry considers this margin fairly reflects the margin likely to achieved by Elephant Plasterboard given the constraints of its current cost structure and selling price.

501. The Ministry has considered Elephant Plasterboard’s submission concerning the impact of efficiency gains on the calculation of the NIFOB if the duty is reassessed in future. Elephant Plasterboard claims that any efficiency gains it makes will result in a compensating increase in the NIFOB. The Ministry does not accept that this is necessarily the case. If efficiency gains result in a higher profit margin (assuming the efficiency gains are not used to undercut the NIP) then this may constitute evidence for an adjustment to the profit margin to reflect those efficiency gains. Any adjustment to the profit margin in any future reassessment will of course depend on the circumstances and evidence available at the time.

502. The Ministry has also considered Elephant Plasterboard’s submission on the expected impact of the entry of BGC into the New Zealand market on plasterboard prices. The Ministry does not consider it can take into account in calculating a NIFOB an event that may or may not happen in the future. If BGC does enter the New Zealand market and this has a significant impact on prices this could only be addressed by a further reassessment initiated following a request by an interested party.

503. Based on the above considerations an allowance for reasonable profit margin has been made at [REDACTED] percent (as a percentage of sales).

504. The Ministry notes that Elephant Plasterboard has in its submissions variously stated that it is “required by law” to take the benefit of Winstone’s high price by being “forced” to

keep profits and is “legally required” to charge the same price as Winstone. The Ministry does not believe submissions of this nature correctly represent the purpose of the anti-dumping regime as embodied in the Act. As noted earlier in this report, an anti-dumping remedy is designed to ensure fair competition by removing the injurious impact of dumping on the New Zealand industry. As also noted earlier in this report a remedy imposed through a NIFOB mechanism cannot guarantee that either the New Zealand industry or importers will be exempt from all price-based competition. The cut and thrust of every day competition will mean that in some sales a lesser margin will be taken and in others a higher margin. There is no requirement in the Act that an importer assessed for anti-dumping duty by way of a NIFOB mechanism always sell at the level of the non-injurious price.

Damaged Board

505. Following the release of the Interim Report, Elephant Plasterboard made a submission concerning the allowance that should be made for damaged board. Elephant Plasterboard said importers face a higher incidence of damaged board than do local manufacturers because the board has been handled more times, i.e., out of the foreign plant by local transport to the port, sea freighted, and loaded and devanned at the New Zealand store.

506. Elephant Plasterboard said [REDACTED] percent of its board would be completely lost through destruction and a further [REDACTED] percent is damaged in some way that requires discounting in order to sell. Elephant Plasterboard said this “slightly damaged board” must be sold at about [REDACTED] percent less than normal board in order to liquidate it. Elephant Plasterboard said this is equivalent to a further [REDACTED] percent loss, making a total loss from damaged board of [REDACTED] percent.

507. Elephant Plasterboard submits there are other costs resulting from damaged board, i.e.:

- (a) Dumping of damaged board.
- (b) Labour costs and warehouse costs to filter out and handle damaged board.
- (c) Labour costs to cut out the damage in a board to the next size down.
- (d) Remedying customer complaints about damaged board arriving on site. This requires extra transport costs as well as loss of reputation.

508. Elephant Plasterboard notes it would be interesting to compare this to Winstone’s waste factor. Elephant Plasterboard said if this is say one percent and its board is handled only once between manufacture and delivery while imported board is handled no less than 12 times it would surely be reasonable for the Ministry to understand that [REDACTED] percent is not unreasonable. Furthermore, Elephant Plasterboard said Winstone send out only “perfect” board but it often has to take the risk with imperfect board. Elephant Plasterboard said if it adopted the same “perfect board to client” policy as Winstone, then the waste factor would be even higher. However, Elephant Plasterboard said it cannot afford to do that as it would accumulate mountains of board it would have to discount. Elephant Plasterboard said this has the added risk of lowering the overall market rates and so further affecting both Winstone’s and Elephant Plasterboard’s profits.

509. The Ministry notes that in its submission on whether service elements should be included in the calculation of the NIP, Winstone estimated the cost of damaged board to one of its customers purchasing ex-wharf directly from a Thai manufacturer at [REDACTED] percent of its value. Winstone said this estimate includes an allowance for some B grade sales to offset disposal costs.

510. The evidence provided by Elephant Plasterboard in the form of letter from a firm of accountants, concerning the inclusion of service elements in the calculation of the NIP, included an allowance for damaged board of 10 percent. The Ministry has previously made an adjustment for damaged board using a rate of damage of 10 percent, which was established during the 1996 review.

511. The Ministry notes that Elephant Plasterboard has in previous cases claimed that the rate of damaged board is higher than the 10 percent allowed since the 1996 review. In those previous cases the Ministry has declined to increase the allowance rate for damaged board because Elephant Plasterboard was unable to provide any evidence to substantiate a higher rate. In this case Elephant Plasterboard has provided details breaking down its claim of a 15 percent cost resulting from damaged board, into the cost resulting from total destruction and the cost resulting from partially damaged board, details of which have not previously been provided. However, as in previous cases Elephant Plasterboard has not provided any evidence from its own records which is capable of verification to substantiate the claim.

512. The Ministry considers that evidence provided by Elephant Plasterboard should be that which most closely equates to the actual costs resulting from damage board because it is the company actually importing and selling the board. At the same time the 15 percent claimed by Elephant Plasterboard is considerably higher than the amounts estimated by Winstone and the firm of accountants. In particular the Ministry notes that the damage rate estimate in the letter from the firm of accountants was provided in a context where the customer had a vested interest in claiming a damage rate as high as possible.

513. On balance the Ministry considers that the submission provided by Elephant Plasterboard does not contain sufficient evidence to warrant an allowance for damage of 15 percent. The Ministry considers, however, that the evidence provided by the firm of accountants is sufficient to increase the allowance for damage to 10 percent. However, because this adjustment has been partly accounted for in the adjustment relating to the 10 percent of sales made ex-wharf, an adjustment for the remaining 5 percent of sales has been made at 10 percent of 5 percent, which is equal to 0.25 percent.

Other Matters

514. The amount for reasonable profit margin has been calculated at 5 percent of the NIP and the amount for import duty has been calculated at five percent of the NIFOB amount. The calculations have been made in this way because the profit and duty should reflect the amounts that would be payable if plasterboard was purchased at an FOB price equal to the NIFOB amount.

515. The adjustments outlined above have been deducted from the NIP to derive the NIFOB as set out in the table below:

Table 3.3: NIFOB Calculation Ex-Store Level

	NZ\$/m2
Winstone Ex-Factory NIP	██████████
Less Costs and Margin after FOB to Ex-Store:	
- Sea Freight, BAF, PSC	██████████
- Duty @ 5%	██████████
- Freight Wharf to Warehouse	██████████
- Warehousing and S&A Expenses	██████████
- Additional Costs Related to Ex-Wharf Sales	██████████
- Damaged Board	██████████
- Reasonable Profit Margin	██████████
NIFOB	██████████

Calculation of NIFOB for Imports by CTS Direct from Thai Gypsum

516. Amounts for sea freight, BAF, insurance, PSC and Customs' fees were established on the basis set out under calculation of NIP above. An amount for duty has been calculated at five percent of the NIFOB amount, as for Elephant Plasterboard above.

517. The adjustments outlined above have been deducted from the NIP to derive the NIFOB as set out in the table below:

Table 3.4: NIFOB Calculation Ex-Wharf Level

	NZ\$/m2
Winstone Ex-Factory NIP	██████████
Less Costs and Margin after FOB to Ex-Wharf:	
- Sea Freight, BAF and Insurance	██████████
- Port Service Charges and Customs Fees	██████████
- Duty @ 5%	██████████
NIFOB	██████████

3.8 Calculation of NVE Amounts

518. A NVE is calculated by adjusting the normal value to the FOB level. The costs incurred between the level at which normal values were established (ex-factory) and FOB, which were used to calculate the NVEs, are the latest such costs in the POI.

519. The following tables show the NVE calculated for exports by Thai Gypsum and Siam Gypsum.

Table 3.5: NVE Calculation Siam Gypsum

	Baht/m ²
Latest Normal Value in POI	
Plus Costs from Ex-Factory to FOB:	
- Export Packing	
- Freight to Wharf	
- Shipping Charges	
- Bill of Lading Fee	
- Cost of Credit	
Normal Value Equivalent (baht)	
Normal Value Equivalent (NZ\$)	

Table 3.6: NVE Calculation Thai Gypsum

	Baht/m ²
Latest Normal Value in POI	
Plus Costs from Ex-Factory to FOB:	
- Export Packing	
- Freight to Wharf & Insurance	
- FCL Term Holding Charge	
- Bill of Lading Fee	
- Cost of Credit	
Normal Value Equivalent (baht)	
Normal Value Equivalent (NZ\$)	

520. The NVEs in NZ dollars in the tables above were calculated using the average interbank exchange rate for the period 27 September 2001 to 26 September 2002 taken from the OANDA internet site.

3.9 Comparison of NIFOB and NVE Amounts

521. A comparison of the NIFOBs with the NVEs shows that for Siam Gypsum the NIFOB is the lower amount, and for Thai Gypsum the NIFOB is the higher amount. The Ministry therefore considers that a lesser duty in the form of a NIFOB should apply to exports by Siam Gypsum when imported by Elephant Plasterboard (except where a NIFOB would exceed the NVE when converted to NZ dollars) and duty at the full margin of dumping in the form of a NVE should apply to exports by Thai Gypsum.

3.10 Other Importers from Siam Gypsum

522. In the last investigation and reassessment Elephant Plasterboard advised that it had the sole right to manage imports from Siam Gypsum, i.e. that it could authorise other importers to import from Siam Gypsum. Elephant Plasterboard stated at that time that it would not import on indent, but to cover this possibility it suggested a separate remedy be put in place. Consequently a separate rate for imports from Siam Gypsum by importers other than Sigma Agencies Ltd (now Elephant Plasterboard) in the form a NVE amount was established.

523. During this reassessment Siam Gypsum advised that it would sell to other importers if this was authorised by Elephant Plasterboard. The Ministry therefore considers that a

separate rate for importers from Siam Gypsum other than Elephant Plasterboard should stay in place in the form of a NVE at the amount calculated in the table above for Siam Gypsum.

3.11 Other Exporters

524. The current residual rate for exporters other than Thai Gypsum and Siam Gypsum is 58 percent *ad valorem*. This rate was based on the highest most recent dumping margin over the POI established for either Thai Gypsum or Siam Gypsum.

525. The Ministry now considers that a separate residual *ad valorem* rate based on the margin of dumping is not appropriate as the existing levels of anti-dumping duties may have influenced export prices. The Ministry notes that it is possible to calculate a residual *ad valorem* rate for other suppliers based on the margin of dumping in a normal investigation as the margins of dumping are unaffected by any anti-dumping duties.

526. The Ministry is of the view that a residual rate for other suppliers should be imposed at the full margin of dumping as a NVE amount.

527. The Ministry notes that if a new exporter and/or importer decided to export or import plasterboard out of Thailand, Article 9.5 of the Agreement and section 14(6) of the Act would allow for an expedited reassessment of the levels of anti-dumping duty rate if the exporter and/or the importer considers that the amount of duty is overstated in relation to their cost and profit margin structure and that a lesser duty should apply.

528. The Ministry considers that the residual rate should be established at the higher of the NVEs calculated for Thai Gypsum and Siam Gypsum, i.e., at ████████ baht per square metre.

3.12 Proposed Levels of Duty

529. The following is a summary of the levels of anti-dumping duty calculated as set out above.

Thai Gypsum	NVE of ████████ baht per square metre
SCT/Siam Gypsum	
- Imports by Elephant Plasterboard	NIFOB of NZ\$ ████████ per square metre
- Importers other than Elephant Plasterboard	NVE of ████████ baht per square metre
Other Exporters	NVE of ████████ baht per square metre
Alternative Duty*	
SCT/Siam Gypsum	
- Imports by Elephant Plasterboard	NVE of ████████ baht per square metre

* Note: An alternative duty in the form of an NVE amount should be applied instead of the NIFOB rate where the NIFOB duty amount calculated exceeds the NVE amount due to exchange rate fluctuations.

530. The present level of duty for exports by Thai Gypsum is a duty at less than the margin of dumping in the form of a NIFOB set in NZ dollars. At current exchange rates the rate of anti-dumping duty proposed for Thai Gypsum is lower than the present level of duty even though the proposed rate is at the full margin of dumping. The reduction in the level of duty results from the depreciation of the Thai baht against the NZ dollar.

531. By contrast, the NIFOB proposed for imports by Elephant Plasterboard from Siam Gypsum is higher than the current NIFOB. In this case the depreciation of the Thai baht against the NZ dollar (and an increase in some costs and the profit margin) has been more than offset by the increase in the NIP and a lower deduction being made for warehousing and S&A expenses than was made for this item at the last reassessment.

3.13 Developing Country Considerations

532. Article 15 of the Anti-Dumping Agreement provides as follows:

It is recognized that special regard must be given by developed country Members to the special situation of developing country Members when considering the application of anti-dumping measures under this Agreement. Possibilities of constructive remedies provided for by this Agreement shall be explored before applying anti-dumping duties where they would affect the essential interests of developing country Members.

533. Thailand is considered to be a developing country. The Ministry considers the constructive remedies referred to in Article 15 of the Anti-Dumping Agreement are price undertakings as provided for in Article 8 and the desirability of imposing duty at less than the margin of dumping (if such a lesser duty would be adequate to remove injury to the domestic industry) as provided for in Article 9.1.

534. Price undertakings are provided for in section 15 of the Act but only in the context of an investigation initiated pursuant to section 10 of the Act. Reassessments are carried out pursuant to section 14(6) of the Act. Price undertakings cannot therefore be considered during a reassessment.

535. As noted elsewhere in this report, section 14(5) of the Act requires the Minister to have regard to the desirability of ensuring that anti-dumping duty is not greater than is necessary to prevent material injury. The Minister is required to do so in all cases, not just in the case of a developing country. The Ministry has already considered the need for a lesser duty and concluded that such a lesser duty should apply in the case of exports by Siam Gypsum when imported by Elephant Plasterboard.

536. To the extent that it is able to do so by the Act, the Ministry considers that it has explored the possibilities of the constructive remedies provided for by Article 15 of the Anti-Dumping Agreement.

3.14 Effective Date of Application of New Duties

537. The Act does not specifically provide for a date from when the new reassessed duties take effect, but the Ministry's practice has been that the new duty is payable and collectable on demand "on and from" the day after the date on which the notice is published in the *Gazette* (section 14(2) of the Act), but is due and payable from the day after the date the Minister determines the new rate under section 14(6) of the Act.

3.15 Refunds of Anti-Dumping Duty

538. The Act allows for refund of duties under certain conditions. Section 14(10) of the Act states as follows:

Without limiting the ability of the Minister to require refunds in other circumstances, where a reassessment under subsection (6) of this section results in a lower duty being imposed on any goods, the Minister may require the [Collector of Customs] to refund,

with effect from the date of initiation of the reassessment (or, in the case of a reassessment carried out under paragraph (c) of that subsection, from the date of initiation of the review referred to in that paragraph), the difference between the duty paid and the lower duty.

539. The proposed level of duty for Thai Gypsum, when converted to NZ dollars, is lower than the existing duty. The reassessment was initiated on 14 November 2001. Any anti-dumping duties paid since the reassessment was initiated, that exceed the proposed amounts, may be refunded if the Minister agrees.

3.16 Impact of Anti-Dumping Duties

540. The proposed level of anti-dumping duty for Thai Gypsum and for imports from Siam Gypsum by Elephant Plasterboard, are below the most recent prices paid by CTS Direct and Elephant Plasterboard for imports from these companies.

541. The proposed levels of anti-dumping duty may therefore not result in any increase in the import price of standard plasterboard. The NIP is based on Winstone's current selling price which has been in place since November 2001. Winstone has advised that [REDACTED]. The reassessment of the duties to the levels proposed is therefore unlikely to result in any increase in prices.

542. However, Winstone increased its price in November 2001 in anticipation of a reassessment of the duty. At that time Winstone increased its price by [REDACTED] percent. The effective impact of the reassessment therefore took place at the time Winstone increased its prices in November 2001.

4. Conclusions

543. It is concluded that:

- a. on the basis of the comparison of the NIFOB and NVE amounts, the rate of anti-dumping duty on exports by Thai Gypsum should be reassessed to the full margin of dumping using a NVE mechanism;
- b. on the basis of the comparison of the NIFOB and NVE amounts, the rate of anti-dumping duty on exports by Siam Gypsum, when imported by Elephant Plasterboard, should be reassessed but remain at a rate at less than the margin of dumping using a NIFOB mechanism. The rate of anti-dumping duty on exports by Siam Gypsum, when imported by importers other than Elephant Plasterboard, should be reassessed and remain at a rate at the full margin of dumping using a NVE mechanism; and
- c. the residual *ad valorem* rate of anti-dumping duty for other exporters should be reassessed to the full margin of dumping using a NVE mechanism.

5. Recommendations

544. It is recommended that the Minister should:

- (a) reassess, on the basis of the information obtained during the reassessment, the anti-dumping duty on imports of standard plasterboard from Thailand on the basis outlined in this report;
- (b) agree that any anti-dumping duties paid since the initiation of this reassessment on 14 November 2001 that are in excess of the duties which would have been applicable if the proposed duties were in place, should be refunded to the extent of such excess; and
- (c) sign the attached Gazette notice, and give notice of the reassessment to interested parties in accordance with sections 9 and 14 of the Act.

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Investigating Team
Trade Remedies Group