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Proposal for a

**COUNCIL IMPLEMENTING REGULATION**

**imposing a definitive anti-dumping duty on imports of certain prepared or preserved citrus fruits (namely mandarins, etc.) originating in the People's Republic of China**

## EXPLANATORY MEMORANDUM

### 1. CONTEXT OF THE PROPOSAL

#### **Grounds for and objectives of the proposal**

This proposal concerns the application of Council Regulation (EC) No 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community ('the basic Regulation') in the anti-dumping proceeding concerning imports of certain prepared or preserved citrus fruits (namely mandarins, etc.) originating in the People's Republic of China.

#### **General context**

This proposal is made in the context of the implementation of two judgements of the General Court on the implementation of the basic Regulation and is the result of two investigations which were carried out in line with the substantive and procedural requirements laid out in the basic Regulation.

#### **Existing provisions in the area of the proposal**

Definitive measures were imposed by Council Regulation (EU) No 1355/2008 (OJ L 350, 30.12.2008, p. 35.).

#### **Consistency with other policies and objectives of the Union**

Not applicable.

### 2. RESULTS OF CONSULTATIONS WITH THE INTERESTED PARTIES AND IMPACT ASSESSMENTS

#### **Consultation of interested parties**

Interested parties concerned by the proceeding have had the possibility to defend their interests during the investigation, in line with the provisions of the basic Regulation.

#### **Collection and use of expertise**

There was no need for external expertise.

#### **Impact assessment**

This proposal is the result of the implementation of the basic Regulation.

The basic Regulation does not contain provisions for a general impact assessment but contains an exhaustive list of conditions that have to be assessed.

### 3. LEGAL ELEMENTS OF THE PROPOSAL

#### **Summary of the proposed action**

On 3 December 2011 and, again, on 19 June 2012, the Commission announced by a notice ('notice of partial reopening'), published in the *Official Journal of the European Union*, the partial reopening of the anti-dumping investigation concerning imports of certain prepared or preserved citrus fruits (namely mandarins, etc.) originating in China.

The first reopening was triggered by the annulment by the General Court of the Council Regulation (EC) No 1355/2008 in so far as it concerned the Chinese exporting producers Zhejiang Xinshiji Foods Co., Ltd. and Hubei Xinshiji Foods Co. Ltd. and the second reopening was triggered by the annulment by the General Court of the same Council

Regulation, but for different reasons, in its entirety. In line with Article 266 of Treaty on the Functioning of the European Union, the institutions of the European Union are obliged to comply with the judgment of the General Court. Consequently, the European Commission initiated the partial re-openings of the anti-dumping investigation, initially, on 3 December 2011, in so far as it concerns the two above mentioned Chinese exporting producers and eventually, on 19 June 2012, as concerns all parties.

The enclosed Commission proposal for a Council Regulation re-imposing the anti-dumping duty on all imports concerned is made upon the interested parties having been given sufficient time to provide comments to the final disclosure document of 6 December 2012.

It is proposed that the Council adopt the attached proposal for a Regulation which should be published in the *Official Journal of the European Union* as soon as possible.

#### **Legal basis**

Council Regulation (EC) No 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community.

#### **Subsidiarity principle**

The proposal falls under the exclusive competence of the European Union. The subsidiarity principle therefore does not apply.

#### **Proportionality principle**

The proposal complies with the proportionality principle for the following reasons:

The form of action is described in the above-mentioned basic Regulation and leaves no scope for national decision.

Indication of how financial and administrative burden falling upon the Union, national governments, regional and local authorities, economic operators and citizens is minimized and proportionate to the objective of the proposal is not applicable.

#### **Choice of instruments**

Proposed instruments: regulation.

Other means would not be adequate for the following reason:

Other means would not be adequate because the basic Regulation does not provide for alternative options.

#### **4. BUDGETARY IMPLICATION**

The proposal has no implication for the Union budget.

Proposal for a

## **COUNCIL IMPLEMENTING REGULATION**

### **imposing a definitive anti-dumping duty on imports of certain prepared or preserved citrus fruits (namely mandarins, etc.) originating in the People's Republic of China**

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Council Regulation (EC) No 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community<sup>1</sup> ('the basic Regulation'), and in particular Article 2(7)(a) and Article 9 thereof,

Having regard to the proposal submitted by the European Commission ('the Commission') after having consulted the Advisory Committee,

Whereas:

#### 1. PROCEDURE

- (1) On 20 October 2007 the Commission announced by a notice published in the Official Journal of the European Union the initiation of an anti-dumping proceeding concerning imports into the Community of certain prepared or preserved citrus fruits (namely mandarins, etc.) originating in the People's Republic of China ('PRC')<sup>2</sup>. On 4 July 2008, the Commission, by Regulation (EC) No 642/2008<sup>3</sup> ('the provisional Regulation') imposed a provisional anti-dumping duty on imports of certain prepared or preserved citrus fruits originating in the PRC.
- (2) The proceeding was initiated as a result of a complaint lodged on 6 September 2007 by the Spanish National Federation of Associations of Processed Fruit and Vegetables ('FENAVAL', previously named 'FNACV') ('the complainant') on behalf of producers representing 100 % of the total Community production of certain prepared or preserved citrus fruits (namely mandarins etc.). The complaint contained evidence of dumping of the product concerned and of material injury resulting there from, which was considered sufficient to justify the initiation of a proceeding.
- (3) As set out in recital (12) of the provisional Regulation, the investigation of dumping and injury covered the period from 1 October 2006 to 30 September 2007 ('investigation period' or 'IP'). The examination of trends relevant for the assessment of injury covered the period from 1 October 2002 to the end of the investigation period ('period considered').
- (4) On 9 November 2007, the Commission made imports of the same product originating in the PRC subject to registration by Regulation (EC) No 1295/2007<sup>4</sup>.

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<sup>1</sup> OJ L 343, 22.12.2009, p. 51.

<sup>2</sup> OJ C 246, 20.10.2007, p. 15.

<sup>3</sup> OJ L 178, 5.7.2008, p. 19.

<sup>4</sup> OJ L 288, 6.11.2007, p. 22.

- (5) It is recalled that safeguard measures were in force against the same product until 8 November 2007. The Commission imposed provisional safeguard measures against imports of certain prepared or preserved citrus fruits (namely mandarins, etc.) by Regulation (EC) No 1964/2003<sup>5</sup>. Definitive safeguard measures followed by Regulation (EC) No 658/2004 ('the safeguard Regulation')<sup>6</sup>. Both the provisional and definitive safeguard measures consisted of a tariff rate quota i.e. a duty was only due once the volume of duty free imports had been exhausted.
- (6) By Regulation (EC) No 1355/2008<sup>7</sup> ('the original Regulation') the Council imposed a definitive anti-dumping duty on imports of certain prepared or preserved citrus fruits (namely mandarins, etc.) originating in the People's Republic of China.
- (7) The range of the definitive anti-dumping duty was between 361,4 and 531,2 EUR/tonne net product weight.

#### 1.1. Xinshiji judgment

- (8) By judgment of 17 February 2011 in case T-122/09 - Zhejiang Xinshiji Foods Co. Ltd and Hubei Xinshiji Foods Co. Ltd v Council of the European Union supported by European Commission<sup>8</sup> - ('the Xinshiji judgment') the General Court annulled the original Regulation in so far as it concerns the applicants Zhejiang Xinshiji Foods Co., Ltd. and Hubei Xinshiji Foods Co. Ltd.
- (9) The General Court's judgment was based on the grounds that the Commission breached the rights of defence by not providing the information necessary for the applicants to determine whether, in the light of the structure of the market, the adjustment of export price to the ex-work level of the importer was appropriate in that it made it possible to compare the export price and the Union industry price at the same level of trade. The General Court also considered that the Commission infringed the duty to state reasons as the reasons for a measure must appear in the actual body of the measure and may not be stated in written or oral explanations given subsequently when the measure is already the subject of proceeding brought before the European Union Courts.
- (10) In April 2011 the Commission lodged an appeal (C-195/11P) seeking to set aside the Xinshiji judgment. Following the declaration of invalidity of the original Regulation by the Court of Justice of the European Union ('the Court') on 22 March 2012 (see recital (16) below), the Commission withdrew its appeal as it became without object.
- (11) On 3 December 2011 the Commission published a notice<sup>9</sup> partially reopening the anti-dumping investigation ('the first reopening Notice') in order to implement the General Court's Xinshiji judgment. The re-opening was limited to determine whether, in the light of the structure of the market, the adjustment of export price to the ex-work level of the importer was appropriate in that it made it possible to compare the export price and the Union industry price at the same level of trade.
- (12) Simultaneously, all interested parties received a disclosure document with its enclosures explaining the reasons behind the adjustment of the post-importation costs

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<sup>5</sup> OJ L 290, 8.11.2003, p. 3.

<sup>6</sup> OJ L 104, 8.4.2004, p. 67.

<sup>7</sup> OJ L 350, 30.12.2008, p. 35.

<sup>8</sup> OJ C 103, 2.4.2011, p. 21.

<sup>9</sup> OJ C 353, 3.12.2011, p. 15.

which had been taken into account in calculating the price of products originating in the People's Republic of China.

- (13) Interested parties were given the opportunity to make their views known in writing and to be heard within the time limit set out in the notice.
- (14) All parties which so requested within the above time-limit and which demonstrated that there were particular reasons why they should be heard were granted the opportunity to be heard.
- (15) The two applicant exporters, eight importers, two associations of importers and one association of producers came forward as interested parties.

#### 1.2. Analogue country judgment

- (16) On 22 March 2012, in Case C-338/10 – Grünwald Logistik Service GmbH (GLS) v Hauptzollamt Hamburg-Stadt ('the analogue country judgment') – the Court declared the original Regulation invalid<sup>10</sup>.
- (17) The Court held that since the Commission and the Council had determined the normal value of the product concerned on the basis of the prices actually paid or payable in the European Union for a like product, without taking all due care to determine that value on the basis of the prices paid for that same product in a market economy third country, they had infringed the requirements of Article 2(7)(a) of the basic Regulation.
- (18) On 19 June 2012 a notice<sup>11</sup> ('the second reopening Notice') was published in the Official Journal of the European Union. In the notice parties were informed that, in view of the above-mentioned judgment of the Court, imports into the European Union of certain prepared or preserved citrus fruits (namely mandarins, etc.) originating in the People's Republic of China were no longer subject to the anti-dumping measures imposed by the original Regulation, and that definitive anti-dumping duties paid pursuant to that Regulation for the product concerned should be repaid or remitted.
- (19) The notice also partially reopened the relevant anti-dumping investigation concerning imports of certain prepared or preserved citrus fruits (namely mandarins, etc.) originating in the People's Republic of China in order to implement the above judgment of the Court.
- (20) The notice set out that the reopening was limited in scope to the selection of an analogue country, if any, and the determination of the normal value pursuant to Article 2(7)(a) of the basic Regulation to be used for the calculation of any margin of dumping.
- (21) Moreover, by the same notice, interested parties were invited to make their views known, submit information and provide supporting evidence regarding the availability of market economy third countries which could be selected to determine normal value pursuant to Article 2(7)(a) of the basic Regulation, including with regard to Israel, Swaziland, Thailand and Turkey.
- (22) The Commission directly informed the Union industry and their association, the exporting producers, suppliers and importers and their associations known to be concerned, and the authorities of the third countries concerned. Interested parties were

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<sup>10</sup> Judgement of the Court (third chamber) of 22 March 2012 in case C-338/10, GLS v Hauptzollamt Hamburg-Stadt.

<sup>11</sup> OJ C 175, 19.6.2012, p. 19

given the opportunity to make their views known in writing and to be heard within the time limit set out in the notice.

(23) All parties which so requested within the above time-limit and which demonstrated that there were particular reasons why they should be heard were granted the opportunity to be heard.

(24) Eight importers and one association of importers came forward as interested parties.

## 2. PROCEDURE AFTER DISCLOSURE OF PROVISIONAL MEASURES

(25) Following the imposition of provisional anti-dumping duties on imports of the product concerned originating in the PRC, several interested parties submitted comments in writing. The parties who so requested were also granted the opportunity to be heard.

(26) The Commission continued to seek and verify all information it deemed necessary for its definitive findings. In particular, the Commission completed the investigation with regard to Union ("Community") interest aspects. In this respect, verification visits were carried out at the premises of the following unrelated importers in the Union:

- Wünsche Handelsgesellschaft International (GmbH & Co KG), Hamburg, Germany,
- Hüpeden & Co (GmbH & Co), Hamburg, Germany,
- I. Schroeder KG. (GmbH & Co), Hamburg, Germany,
- Zumdieck GmbH, Paderborn, Germany,
- Gaston spol. s r.o., Zlin, Czech Republic.

(27) All parties were informed of the essential facts and considerations on the basis of which it was intended to recommend the imposition of a definitive anti-dumping duty on imports of the product concerned originating in the PRC and the definitive collection of the amounts secured by way of the provisional duty. They were also granted a period of time within which they could make representations subsequent to this disclosure.

(28) Some importers proposed a joint meeting of all interested parties, pursuant to Article 6(6) of the basic Regulation; however the request was refused by one of them.

(29) The oral and written comments submitted by the interested parties were considered and taken into account where appropriate.

## 3. PRODUCT CONCERNED AND LIKE PRODUCT

(30) Subsequent to the imposition of provisional measures, two unrelated Union importers argued that certain types of mandarins should be excluded from the definition of the product concerned either because of their sweetness level or because of their packing when exported. In this respect, it is noted that these claims were not accompanied with any type of verifiable information and data proving that these types have characteristics that differentiate them from the product concerned. It is also noted that differences in packing cannot be considered as a critical element when defining product concerned, especially when formats of packing were already taken into account when defining the product concerned as set out in recital (16) of the provisional Regulation. These arguments are therefore rejected.

(31) The measures were imposed on the product defined in the original Regulation as follows: prepared or preserved mandarins (including tangerines and satsumas), clementines, wilkings and other similar citrus hybrids, not containing added spirit,

whether or not containing added sugar or other sweetening matter, and as defined under CN heading 2008, currently falling within CN codes 2008 30 55, 2008 30 75 and ex 2008 30 90 (TARIC codes 2008 30 90 61, 2008 30 90 63, 2008 30 90 65, 2008 30 90 67 and 2008 30 90 69) and originating in the People's Republic of China.

- (32) In this regard, in the analogue country judgement the Court interpreted the statistics communicated by the Commission to the Court on 27 July 2011 as data relative solely to the product concerned. However, it should be noted that such statistics have a broader scope than the product under measures, since they included full CN codes 2008 30 55, 2008 30 75 and 2008 30 90. The statistical data only covering the product concerned or like product for CN codes 2008 30 55 and 2008 30 75, for the above mentioned countries during the investigation period are as follows:

Country	Volume of imports (tonnes)
People's Republic of China	49,791.30
Thailand	666.10
Turkey	151.20
Israel	4.80
Swaziland	0

- (33) Under CN code 2008 30 90, the statistics included products other than the product concerned. As a consequence, no conclusions can be drawn on imports of the like product with regard to this CN code. Therefore, contrary to what the Court held in paragraph 33 of the analogue country judgement, it cannot be derived from the statistics that the like product was imported during the investigation period in significant quantities from either Israel or Swaziland.

#### 4. SAMPLING

##### 4.1. Sampling for exporting producers in the PRC

- (34) Two unrelated EU importers disputed that the Chinese exporting producers selected for the sample represented 60 % of the total exports to the Union. Nevertheless, they were not able to provide any verifiable information that could undermine the accuracy of the sampling information submitted by the cooperating Chinese exporting producers and largely confirmed in the course of the further investigation. This argument is therefore rejected.
- (35) Three Chinese cooperating exporting producers submitted representations claimed that their related companies were exporting producers of the product concerned and should therefore be included in the Annex of cooperating exporting producers. These claims were considered warranted and it was decided to revise the relevant Annex accordingly. One unrelated EU importer argued that exports made to the Union through traders should automatically be allowed to benefit from the measures applicable to the Chinese exporting producers. In this respect, it is noted that anti-dumping measures are imposed on products manufactured by exporting producers in the country under investigation that are exported to the Union (irrespective of which company trades them) and not to business entities engaged only in trading activities. The claim was therefore rejected.

#### 5. DUMPING

##### 5.1. Market economy treatment (MET)

(36) Following the imposition of provisional measures, no comments were submitted by the Chinese cooperating exporting producer with respect to the MET findings. In the absence of any relevant comments, recitals (29) to (33) of the provisional Regulation are hereby confirmed.

## 5.2. Individual treatment

(37) In the absence of any relevant comments, recitals (34) to (37) of the provisional Regulation concerning individual treatment are hereby confirmed.

## 5.3. Normal value

### 5.3.1. Comments of interested parties following the second reopening notice

(38) Certain importers argued that Chinese imports would be necessary to cover Union demand, although one importer indicated that Spanish and Turkish production together would be sufficient to cover the Union market needs. One importer remarked that imposition of anti-dumping duties would have resulted in significant increases in the price of the product concerned. Increase in prices were also mentioned by other importers. Different factors were identified as cause for such increase like the decreasing availability of Chinese mandarins in the Union due to internal demand and demand from other markets, crop failures and labour shortage in China. Another factor indicated was the reduced competition in the Union (it is estimated that currently there are only three Union producers, while in 2000 there were eight). One importer complained that anti-dumping measures would favour large trading companies instead of the traditional ones, which have been trading the product concerned with China for decades. This importer defends the existence of a license system based on pre-2001 data.

(39) A group of importers claimed that the Union institutions should initiate a whole new investigation instead of partially reopening the anti-dumping investigation which had resulted in the imposition of measures which had been in force until the analogue country judgment. This claim was based on the fact that those importers did not see sufficient evidence for dumping or injury in the present situation of the market.

(40) Other importers submitted that they disagreed with the possible use of the IP data if a new dumping margin would needed to be calculated. According to those importers most recent data should be used and in particular the periods 2010-11 and 2011-12 were suggested.

(41) A group of importers considered that the partial reopening of the investigation is in breach of Article 266 of the Treaty on the Functioning of the European Union. According to those importers, the case-law<sup>12</sup> mentioned in the second reopening Notice should be recalled only if measures are annulled or declared invalid due to an erroneous injury determination. In their own words, "the Community institutions did not blunder at the stage of determining injury, but as early as assessing whether the products concerned were dumped at all". As in this case the original Regulation was declared invalid due to the determination of normal value, the importers claimed that such case-law does not apply.

(42) Finally, several importers recommended Turkey to be used as analogue country. At a hearing, one importer suggested contacting the authorities of Japan and Korea, as also

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<sup>12</sup> Case T-2/95 *Industrie des poudres sphériques (IPS) v Council* [1998] ECR II-3939 and Case C-458/98 *P Industrie des poudres sphériques (IPS) v Council* [2000] ECR I-08147.

in those countries there would also be companies which manufactured the like product during the IP.

### 5.3.2. Analysis of comments following the second reopening notice

- (43) As regards the many claims summarized under recital (38) above it should be underlined that the Commission decided to re-open the initial investigation in a limited manner, restricted to the possible identification of an analogue country. It did not define a new investigation period, contrary to the approach followed in the case that led to the judgment in *Industrie des poudres sphériques v Council* (Case C-458/98 P [2000] ECR I-8147). This was based on the consideration that given that antidumping duties had been in place, any data collected during a new investigation period would have been distorted by the existence of these antidumping duties, in particular with regards to the establishment of injury. The Commission considers that the points raised by the parties on the alleged absence of dumping at the present point in time can be more appropriately discussed in the framework of an interim review pursuant to Article 11 (3) of the basic Regulation. Whereas in the initial investigation, the analysis on the existence of injury is carried out *ex post* for the investigation period, the analysis of injury during an interim review is done in a prospective manner, as the injury observed during the investigation period of the review is likely to be influenced by the fact that an antidumping duty is in place.
- (44) The parties concerned are reminded that if an importer or another party wants the measures to be fully reviewed, it has the possibility to request the initiation of an interim review, as prescribed in Article 11(3) of the basic Regulation. The parties concerned have that possibility at any time as the one year period since the imposition of definitive measures referred to in Article 11(3) has elapsed. Any party that had lodged a request for review pursuant to Article 11(3) prior to the analogue country judgement will be contacted by the Commission services to determine whether it wishes to pursue its request.
- (45) Concerning the alleged illegality of the partial reopening, it should be noted that the mentioned case-law does not imply that a partial reopening might take place only if it concerns determination of the injury suffered by the Union industry. What is clarified in case T-2/95 and case C-458/98 P is that "in the case of an act concluding an administrative proceeding which comprises several stages, its annulment does not necessarily entail the annulment of the entire procedure prior to the adoption of the contested act regardless of the grounds, procedural or substantive, of the judgment pronouncing the annulment"<sup>13</sup>. Therefore it is irrelevant whether the annulment or the declaration of invalidity of a regulation relates to the determination of injury or the determination of the normal value.
- (46) In respect of the use of IP data, it should be recalled that the second reopening Notice concerned a partial reopening of the original investigation and not a new investigation. Therefore, only data from the IP could be relevant and should be examined, even more so as the export prices used in the comparison would also be pertaining to that period. The claims for the use of more recent data, therefore, have to be dismissed.

### 5.3.3. Investigation following the second reopening notice

- (47) In the judgement referred to in recital (16) above, the Court specifically referred to four countries from which, according to Eurostat data, there would have been

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<sup>13</sup> Case T-2/95 *Industrie des poudres sphériques (IPS) v Council* [1998] ECR II-3941.

significant imports into the Union under the CN codes 2008 30 55, 2008 30 75 and ex 2008 30 90. These countries are Israel, Swaziland, Thailand and Turkey. In view of this, the Commission contacted the authorities of these countries via their Missions to the European Union. They were all contacted before the partial reopening of the investigation and again at the time of reopening. The Missions concerned, as well the Delegations of the European Union to those four countries, were requested to identify possible domestic producers of the like product and, if any, to assist in obtaining their cooperation.

- (48) Although been contacted twice, no replies were received from the Missions of Swaziland and Thailand to the European Union. Replies were received from the Missions of Israel and Turkey. The Turkish Mission provided addresses of six alleged producers, while the Israeli Mission informed the Commission services that there had been no production of the like product in Israel during the IP (nor that would be any such production at the moment).
- (49) All six Turkish producers were contacted, five of them twice. Three did not reply at all and the other three informed the investigators that they were not producing the like product during the IP. Therefore, although these companies offered to cooperate, they were not in a position to provide the Commission with the necessary data. This finding was corroborated by a submission received from a German importer with producing interests in Turkey, which stated that during the investigation period there was no production of the like product in Turkey.
- (50) Despite the absence of a reply from the Mission of Thailand, two Thai companies, from which updated addresses were obtained via the European Union Delegation in Bangkok, were also contacted, twice each. Those two producers had already been contacted during the original investigation – but at the time, this had not resulted in their cooperation. Also this time, one of the producers did not reply at all to the two requests while the other replied it did not intend to cooperate in the investigation.
- (51) Despite the efforts of the Commission via the Mission of Swaziland to the European Union and the Delegation of the European Union in Swaziland, it has not been possible to identify one or several producers in Swaziland.
- (52) In view of the suggestion referred to in recital (42) above, cooperation was also requested from the authorities of Japan and the Republic of Korea and in parallel the Delegations of the European Union in those countries were requested to identify local producers of the like product, if any. The Korean authorities did not reply, but the Commission managed, through the Delegation of the European Union to the Republic of Korea, to obtain a name and address of a possible producer of the like product in the Republic of Korea. This producer was contacted once but it did not reply to the request for cooperation.
- (53) The Japanese authorities contacted possible Japanese producers, however, according to the Japanese authorities, these companies did not want to cooperate in the proceeding and also did not want their identities to be forwarded to the Commission.

#### 5.3.4. Conclusion on the investigation following the second reopening notice

- (54) Account taken of the comments made by the parties, the analysis thereof and, in spite of significant efforts by the Commission services, the lack of cooperation from potential third country producers, it was concluded that a normal value on the basis of the price or constructed value in a market economy third country as prescribed by Article 2(7)(a) of the basic Regulation could not be determined.

#### 5.3.5. Comments of interested parties following the imposition of provisional measures

- (55) It is recalled that the normal value determination was based on the data provided by the Union Industry. This data was verified at the premises of the cooperating Union producers.
- (56) Following the imposition of provisional measures, all three Chinese sampled cooperating exporting producers and two unrelated Union importers questioned the use of Union industry prices for the calculation of normal value. It was submitted that normal value should have been calculated on the basis of the PRC production costs account taken of any appropriate adjustments relating to the differences between the EU and the PRC markets.

#### 5.3.6. Analysis of comments following the imposition of provisional measures

- (57) In this respect it is noted that the use of information from a non-market economy country and in particular from companies which have not been granted MET would be contrary to the provisions of Article 2(7)(a) of the basic Regulation. This argument is therefore rejected. It was also argued that data on prices from all other importing countries or relevant published information could have been used as a reasonable solution account taken of the lack of analogue country cooperation. However, such general information, in contrast to the data used by the Commission, could not have been verified and cross checked with regard to their accuracy in line with the provisions of Article 6(8) of the basic Regulation. This argument is therefore rejected. No other argument was submitted that could cast doubt on the fact that the methodology used by the Commission is in line with the provisions of Article 2(7)(a) of the basic Regulation and, in particular, the fact that it constitutes in this particular case the only remaining reasonable basis for calculation of normal value.

#### 5.3.7. Conclusion on normal value

- (58) In the absence of any other comments and the fact that despite the significant efforts of the Commission services to identify a cooperating producer in an analogue country, it has not been possible to obtain data from an analogue country producer for the investigation period, recitals (38) to (45) of the provisional Regulation are hereby confirmed.

#### 5.4. Export price

- (59) Following the imposition of provisional measures, one Chinese sampled cooperating exporting producer submitted that its export price should be adjusted in order to take into account certain cost elements (in particular ocean freight). In this respect it is noted that this issue was dealt with during the on-the-spot verification both with regard to this company as well with regard to the other companies in the sample. On that occasion, each company submitted information with regard to the costs in question. The amount claimed now by the company is considerably higher than the amount originally reported. It is noted that this new claim is based simply on a declaration by a freight forwarder and does not reflect data relating to a real transaction. None of the other sampled exporting producers questioned the figures used with respect to ocean freight. Moreover, given the late submission, this claim cannot be verified. In particular, the adjustment requested does not relate to any data already on the file. Following this claim the Commission has nevertheless reviewed the amount of the cost in question account taken of the importance of this particular cost to the EU export transactions reported by the company. As a consequence, the Commission came to the conclusion that it is more appropriate to use the average ocean freight cost

verified on-the-spot for all the sampled Chinese companies. Consequently, the company's export price was adjusted accordingly.

- (60) One other Chinese sampled cooperating exporting producer highlighted two computation errors on the calculation of its export price related to its submitted export listings. The claim was considered warranted and the producer's relevant export price was revised accordingly.
- (61) In the absence of any other comments in this respect, recital (46) of the provisional Regulation is hereby confirmed.

#### 5.5. Comparison

- (62) In the absence of any comments in this respect, recitals (47) and (48) of the provisional Regulation are hereby confirmed.

#### 5.6. Dumping margins

- (63) In light of the above, the definitive dumping margins, expressed as a percentage of the CIF Union frontier price duty unpaid, are the following:
- Yichang Rosen Foods Co., Ltd, Yichang, Zhejiang: 139,4 %,
  - Huangyan No 1 Canned Food Factory, Huangyan, Zhejiang: 86,5 %,
  - Zhejiang Xinshiji Foods Co., Ltd, Sanmen, Zhejiang and its related producer Hubei Xinshiji Foods Co., Ltd, Dangyang City, Hubei Province: 136,3 %,
  - Cooperating exporting producers not included in the sample: 131 %,

All other companies: 139,4 %.

## 6. IMPLEMENTATION OF THE XINSHIJI JUDGMENT

### 6.1. Comments of interested parties

#### 6.1.1. Premature reopening

- (64) The exporters concerned and a group of importers argued against the partial reopening prior to the delivery of the judgment in case C-338/10. It was argued that reopening the investigation while the validity of the original Regulation was challenged and, in the opinion of the parties concerned, the act was likely to be declared void, breached the principles of proportionality and of good administration in the light of Article 41 of Charter of Fundamental Rights of the European Union as it unnecessarily placed an undue burden on the parties concerned to devote significant financial and personal resources to the reopened procedure.
- (65) In addition, the same parties also argued that reopening the investigation before the judgment in the appeal case C-195/11P was premature and contrary to Articles 266 and 264 TFEU and Article 60(2) of Statute of the Court of Justice alleging that the Commission was anticipating the success of its own appeal. Such initiation contradicted the relationship between, on the one hand, the Commission and the Council and on the other, the Court and it impaired the right to an effective court remedy. The importers concerned requested that the Commission first await the final decision of the Court before it reopens the anti-dumping proceeding to implement the judgment in question.
- (66) The exporters concerned and a group of importers argued that the reopening violated Article 3 of the basic Regulation as it was based on the data collected during the

investigation period (i.e. 1 October 2006 – 30 September 2007) and not during a more recent period.

- (67) A group of importers challenged the fairness and impartiality of the Commission's conduct pursuant to Article 41(1) of the Charter of Fundamental Rights of the European Union on the grounds that the Commission allegedly rejected an application by the Union importers to launch a full interim review, even though the official Eurostat data already showed an increase on a sustained and lasting basis of the import price.

#### 6.1.2. Retroactivity

- (68) The exporters concerned and a group of importers argued that the reopening was destined to fail for the reason that the infringement of the rights of defence and the failure to state reasons in case of a definitive anti-dumping Regulation cannot be rectified in isolation and retroactively. In particular, it was argued that the rights of defence of the interested parties were to be protected during the on-going anti-dumping proceeding, i.e. before adoption of the measure, and the proper statement of reasons for the definitive anti-dumping regulation was to be provided no later than at the adoption of the original Regulation.

- (69) It was also argued that a legal act based on an inadequate statement of reason is, and remains, ineffective from the start and the intended measure can only become effective by adopting a new legal act with a proper statement of reasons.

#### 6.1.3. Inadequate disclosure

- (70) The exporters concerned and a group of importers claimed that the disclosure was not sufficient to remedy the legal errors identified by the General Court for the reasons set out below.

- (71) The exporters concerned together with a group of importers argued that the violation of EU law found by the General Court affected the entirety of the findings and the outcome of the injury margin calculation, which required a new process to be launched taking into account the most recent injury data.

- (72) Furthermore, the same parties argued that the Commission failed to recognise correctly the scope and consequences of its infringement. It was argued that, contrary to the Commission's interpretation, the legal infringements established by the General Court did not relate exclusively to the calculation of the 2% uplift of the import costs of the Chinese products (post-importation costs) and the transport costs of the products produced by Union producers. The importers concerned argued that those infringements related at the very least to the entire determination of the injury margin.

- (73) In this context it was argued that the disclosure sent at the reopening failed to address the question of the comparability of the level of trade and how the method chosen by the Commission for the comparison of the import and Union prices was justified against the background of the market environment concerned, i.e. whether the products produced by Union producers and the imported goods are in fact in competition with each other 'in the warehouse of the Hamburg importers'. The exporters concerned and a group of importers argued that the information on the level of trade determination provided at the time of reopening remained far too general to enable the parties to understand why the comparison of the import price and the Union industry price was done at the same level of trade and it largely left unexplained the factors which emerged from the investigation on which that calculation was based. It did not deal with the issue why the 2% uplift in question, which contained neither the

operating and administrative expenses (SG&A) nor a profit margin of the importers, was appropriate to achieve comparability of the selling prices of the Union producers with the import prices of the exporting Chinese producers.

- (74) The same parties argued that no findings of any kind were made regarding the assumption that the Union producers sold the goods exclusively via importers. Also, it was argued that the underlying reasoning for the selected level of trade that the Union producers sold exclusively to importers was refuted since according to the disclosed information only 62% of the sales of Union producers went to the independent importers. The parties argued that the Commission appeared to ignore the fact that allegedly 38% of the Union production had not been sold through importers, meaning that in respect of these sales imported products were competing at a different level of trade. For this part of sales, it was argued, the method used by the Commission to determine the injury margin was inappropriate as the importers' prices should have been adjusted by adding post-importation costs, selling, general and administrative expenses and an appropriate profit margin of the independent importer. In the light of these corrections the injury margin would have been reduced for 38% of the Union goods, which would lead to an overall reduction in the injury margin and a following substantial reduction in the anti-dumping duties.
- (75) As a result, the parties argued that the Commission failed to develop an appropriate method to determine the injury margin for all imports which would have taken account of the actual market conditions. It was argued that there was a need for differentiated consideration of the sales of the products of the Union producers for the determination of the injury margin in view of the different distribution channels of the Union producers.
- (76) The parties called for the Commission to provide a detailed description and analysis of the evidence verified in respect of trade flows and related volumes supporting its findings and to disclose that relevant information, which was not confidential.
- (77) A group of importers also contested the "stereotype reference" to the confidentiality of the data as a result of which the exporting producers and Union importers were barred from access to relevant sources necessary for them to determine whether, in the light of the structure of the market, the adjustment in dispute was appropriate in that it made it possible to compare the export price and the Union industry price at the same level of trade. The importers concerned argued that this claim was upheld by the General Court in para 86 of the Xinshiji judgment.

#### 6.1.4. Transport costs

- (78) The exporters concerned opposed the increase of the Union industry's ex-works selling price to include the costs of delivering to the importer's warehouse on the grounds that it goes against the concept of internal market and that the trade defence measures are not meant to remedy cost disadvantages of the Union industry due to the location of its production facilities.
- (79) The exporters concerned and a group of importers argued that the Commission should have taken into account the fact that the importers had higher transshipment costs because the Chinese products were delivered in containers, while the products produced by Union producers were palletized for transportation by truck and therefore could immediately be re-expedited to customers without any further manipulation, which reduced the handling charges by 50% or 7 EUR/tonne.

- (80) A group of importers argued that the Commission overlooked, for a percentage of the Union industry products which were in fact distributed via an importer, that the transport costs for the Union industry goods to the importers' warehouse were incurred only if the preserved mandarins had been 'physically' made available in the warehouse of the importer concerned. In fact, however, the bulk of the products sold by the Union producers via importers were delivered directly by the Union producers to the importers' customers. This was claimed to procure a considerable cost advantage for the Union producers compared to imported products and, if it had been properly taken into consideration, a smaller injury margin would have resulted than that determined on the basis of the Commission's calculation method.
- (81) The association of importers and some importers objected to the figure (90 EUR) used as a basis for the calculation of the transport costs. The parties claimed that the transport costs chosen were too high, referring probably to transport by truck. However, according to the information of the parties, the majority of goods was transported by vessels, which is a much cheaper mode of transport.
- (82) The parties asked for an explanation concerning the inclusion of terminal handling charges and the costs for trucking to the importer's premises in the post-importation costs.

## 6.2. Analysis of comments

- (83) In respect of the argument that the investigation should not have been reopened while the validity of the original Regulation had been challenged in case C-338/10 (recital (64)), the Commission explained that it acted under the presumption of legality.
- (84) In respect of claims concerning the premature reopening subject to the pending appeal case C-195/11P (recital (65)) the Commission considers the argument without object, given that the re-opening was based on the findings of the General Court. Furthermore, the appeal has in the meantime been withdrawn.
- (85) In respect of the claims for a new investigation it has to be underlined that the partial reopening has as its objective to remedy only of the violation of the rights of defence identified by the General Court, not to reopen the entire proceeding. However, the Commission will advise the parties concerned that they have the possibility to request the initiation of an interim review, as prescribed in Article 11(3) of the basic Regulation, if they want the Institutions to verify their claim that on the basis of more recent data, there is no more injury.
- (86) With regards to the claim that the injury analysis should be based on more recent data (recital (66)), it is observed that any more recent data will be influenced by the fact that an antidumping duty has been in place. Therefore, the appropriate instrument to analyse more recent data is an interim review as prescribed in Article 11(3) of the basic Regulation, and not a new investigation (see also recital (43) above).
- (87) As regards the doubt concerning the impartiality and fairness of the proceeding (recital (67)), this is based on a misunderstanding that the Commission rejected the request for an interim review. The Commission's Services informed the respective parties by letter of 6 September 2011 that on the basis of the information provided to that date no decision could be taken whether or not a review could be initiated. The points which required further clarification or evidence were outlined. The parties were informed about this at the hearing of 29 February 2012 and were invited to continue the discussion with the relevant Commission service. The Commission services will inform them that they can pursue their request as of the date of entry into force of this

Regulation. The one-year period foreseen in Article 11 (3) of the basic Regulation does not apply in the case at hand, as this would run counter its objective, which is that there should be a minimum amount of time between the initial investigation period and an interim review. In the present case, this minimum amount of time has been observed.

- (88) As regards the argument concerning the retroactive remedy of the breach of rights of defence (recital (68)) the Commission considers that as a consequence of the judgement of the General Court, the investigation has been re-opened at the point where the illegality occurred. The parties have now a possibility to exercise their rights to the extent they were prevented from doing as established by the General Court. Furthermore, the duties will be imposed only for the future. Against this background the Commission considers that there is no issue of retroactive remedy as claimed by the parties and this argument of the parties has to be therefore dismissed.
- (89) As regards the argument concerning the inadequate statement of reasons (recital (69)), the very purpose of the reopening is to remedy the lack of reasoning and to base the new legal act on a complete statement of reasons. It is therefore considered that this argument of the parties is addressed.
- (90) In respect of the scope of the judgment (recital (72)) the purpose of the reopening is to establish the appropriate level of trade, and in particular to clarify why the post-importation cost adjustment of the CIF export price was necessary to ensure that the comparison of the export price and of the Union industry price was done at the same level of trade. The argument of the parties has to be, therefore, dismissed.
- (91) As regards the claims concerning the deficiency of the disclosure document of 5 December 2011 in respect of the explanation of level of trade applied in this case (in particular, recitals (73) to (76)), the parties were provided with additional information and explanation at several occasions, namely in points 4 and 5 of the disclosure document of 5 December 2011 as well as during the hearings of 29 February 2012.
- (92) For the sake of full clarity on this point, the findings concerning the level of trade are summarised as follows: (i) The investigation showed that the canned mandarins are only produced in one Spanish region (Valencia) and are mainly sold in Germany and United Kingdom. The proportion of Union sales to Germany and United Kingdom was established to represent 62% of the total Union sales. (ii) On the basis of the verified data it was established that during the IP the Union producers and the Chinese exporters sold essentially to the same customers, i.e. to traders or distributors. (iii) For these reasons, the price comparison between the imports from the exporting producers and the sales of the Union producers was made for the exporting producers at frontier level (CIF) and for the Union producers at factory level (ex-works) adjusted to the importers' warehouses. (iv) This methodology required the following adjustments: on the one hand, a post-importation costs adjustment of the Chinese CIF export prices to bring the goods from the port to the importers' warehouses; this adjustment, fixed at 2%, was based on the collected and verified invoices and the respective calculation was disclosed to the interested parties in the annex to the disclosure document of 5 December 2011. On the other hand, the Union ex-works prices were increased to reflect the cost of freight to bring the goods from the producers (Valencia) to the importers' premises (Germany and United Kingdom). This freight adjustment was calculated based on the established transport costs from Valencia to Hamburg. Given that not all sales of Union producers were delivered to Germany and United Kingdom,

this average was lowered in proportion of the share of sales to Germany and United Kingdom (62%) and in proportion of direct sales.

- (93) As regards the proportion of direct sales of the Union producers, it has been in a range of between 2% and 12% during the IP. The precise percentage cannot be disclosed for confidentiality reasons.
- (94) Furthermore, it was argued that a differentiated approach in determination of the appropriate level of trade in respect of the direct sales of the Union producers (recital (72)) should have been developed. In this respect it is to be noted that based on the verified findings none of the Chinese imports were sold directly during the IP. Since there were not matching direct sales on the side of the Chinese exports, it was not possible to develop a differentiated approach for establishing a level of trade for the proportion of direct sales of Union producers. Instead, for the purpose of the injury margin calculation, the direct sales of Union producers were adjusted back to the ex-works level and subjected to the freight adjustment described in recital (92) point (iv) above. Against this background, the respective claim of the parties has to be dismissed.
- (95) As regards the claim of the parties that the adjustment of the CIF export price should have included the SG&A and a reasonable profit margin (recital (73)) it is noted that had the Commission adjusted the export CIF price by adding SG&A and profit, it would have brought the sales of imported goods to the retailer level. In such case the comparison between the Chinese export prices and the Union sales prices would have been carried out at different levels of trade. For this reason, the claim of the parties has to be dismissed.
- (96) As regards the argument of the parties that it stems from the disclosure document of 5 December 2011 that 38% of sales of Union producers in the IP were direct sales (recital (74)), it was explained to the parties at the hearings of 29 February 2012 that this conclusion was mistaken. The figure of 62% of Union industry sales that were made in Germany and United Kingdom relates to the geographical distribution of the sales and has no relevance as regards the identification of the type of customer, and thus as regards the identification of direct sales. It may only be deduced from this fact, and it is confirmed, that the remaining 38% of the sales of Union producers were made outside Germany and the United Kingdom. Since the parties' assumption on the level of trade of 38% of sales of Union producers is incorrect, the subsequent claim based on this assumption concerning the need to recalculate the injury margin has to be also dismissed.
- (97) Regarding the claim on detailed disclosure of trade flow and related volumes (recital (76)), it is recalled that the facts and figures underlying the choice of methodology to determine the level of trade in this case have been addressed in the points 3 to 7 of the disclosure document of 5 December 2011. The parties are referred to this information as well as the explanation provided at the hearings of 29 February 2012. For sake of clarity, the underlying trade flows are explained in detail in recital (92) above.
- (98) As regards the argument on a 'stereotype reference to confidentiality' (recital (77)), the Commission considers that the information that was kept confidential related to the (i) percentage of direct sales and (ii) the information used for the calculation of the 2% uplift based on invoices and data gathered during the verification visit. In this respect it is noted that the invoices constitute information confidential by nature. The non-confidential summary of the latter has been provided in the annex to the disclosure document of 5 December 2011. As regards the direct sales the Hearing Officer at the

joint hearing of 29 February 2012 confirmed that actual figures about direct sales are confidential information and offered to examine on request of the interested parties how the actual data in the confidential file was used by the Commission services responsible for the investigation and to inform the parties whether in his view the data were correctly reflected in the findings. The parties did not request it. For these reasons the Commission considers that the requirement to disclose all but confidential information was met. Furthermore, given that the data under assessment is more than 5 years old, the Commission considers that it can disclose at this stage that the percentage of direct sales is between 2% and 12%.

- (99) Concerning the objection of the parties to the freight adjustment of the Union ex-works selling price (recital (78)) the Commission considers the adjustment in question was made to bring the goods to the importer's warehouse, i.e. to the same level of trade as the Chinese exports. This adjustment was based on the specific circumstances of the relevant market where the canned mandarins are only produced in one Spanish region (Valencia) and are mainly sold in Germany and United Kingdom. It was made to achieve the fair comparison between export price and the Union price at the same level of trade, not to offset the claimed cost disadvantage of the Union producers due to the location of their production facilities. The argument of the parties is therefore dismissed.
- (100) Concerning the argument that the Commission should have taken into account the higher costs of importers because the Chinese products were delivered in containers while the Union industry products were palletised which resulted in the reduction of handling charges by the Union producers (recital (79)), it is noted that the adjustments made covered only the cost of bringing the goods to the importer's warehouse. The subsequent costs incurred in the context of the shipment of the goods to the retailers are to be borne after the defined level of trade and cannot be therefore taken into account. For this reason the argument of the parties is dismissed.
- (101) Concerning the argument that the transport costs of the Union producers should have been reduced to take into account cases where the products were delivered directly to the customers of importers as claimed by the latter (recital (80)), it is recalled that the freight adjustment of the Union ex-works sales price was based on the established costs of physical delivery to the warehouse in Hamburg (90 EUR) based on collected invoices, because the warehouse Hamburg is the appropriate level of trade for comparing export price and prices of the Union product. The freight adjustment is not justified on the ground that it includes total transport costs between the Union producer and the retailer (which would be higher than the costs for delivery to the warehouse), but on the ground that in the light of the specificities of the market for the product concerned, the warehouse in Hamburg is the appropriate level of trade. In this context, the argument raised by the parties appears immaterial.
- (102) The parties claimed that the applied freight adjustment was too high because it was based on the transport costs by truck (recital (81)). In this context, it is recalled that the freight adjustment was based on the established costs of physical delivery to Hamburg, which included both truck and boat. Therefore, the adjustment requested by the parties had already been included in the calculation of freight cost to Hamburg. It was therefore not necessary to verify the data submitted by the parties during the hearing, as during the original investigation, the costs for delivery to Hamburg had been established on the basis of the verified data of the EU producers.

(103) Regarding the comment made by the applicant concerning the calculation of the post-importation cost (recital (82)), it was stated that, as explained in paragraph 9 of the disclosure document sent on 5 December 2011, both terminal handling charges and the costs for trucking to the importer's premises were included in the calculation. No ocean or insurance freights were included in terminal handling charges as these costs were already included in the CIF price gathered and verified during the on-spot verifications at the exporter's premises. Thus, if the Commission had included those costs in the calculation of the post-importation costs this would have implied double-counting.

### 6.3. Procedure

(104) On 5 December 2011 the Commission submitted a disclosure document with facts and figures relating to the grounds on which the General Court annulled the measures. All interested parties were invited to comment.

(105) On 29 February 2012 the Commission held hearings with all parties that requested so, including a joint hearing with the Hearing Officer of the exporters concerned and a group of importers.

(106) On 26 March 2012 one of the interested parties informed the Commission that in view of the judgment in case C-338/10 it considered the partial reopening concerning post-importation cost without purpose.

(107) On 17 July 2012 the Commission responded that in the light of the reopening of 19 June 2012 it was considered that both partial reopenings are still pending and none of these investigations had become without purpose.

### 6.4. Conclusion

(108) The Xinshiji judgment of General Court has been implemented by providing additional reasoning, information and explanation to the parties on the reopened point of the original investigation. The parties were given opportunity to comment and to be heard. All arguments raised have been addressed and duly taken into account.

(109) Account taken of the comments made by the parties and the analysis thereof it was concluded that the arguments and facts raised by the interested parties did not show a need to modify the contested injury margin calculation.

(110) Therefore, the injury margin determined in the original investigation is hereby confirmed.

(111) On the basis of the above it was concluded that the implementation of the Xinshiji judgment should take the form of re-imposing the definitive anti-dumping duty for the applicants in the case in question.

## 7. INJURY

### 7.1. Union production and Union industry

(112) In the absence of substantiated comments, the findings set out in recitals (52) to (54) of the provisional Regulation are confirmed.

### 7.2. Union consumption

(113) One of the exporting parties argued that there is a discrepancy between the level of the consumption set out in the safeguard Regulation No 658/2004 and the level set in the provisional Regulation. It is underlined that the difference in the level of consumption was basically due to the different product scope in the current investigation and to the

different number of Member States in those two investigations. No further and substantiated information was received in this respect. The findings set out in recitals (55) to (57) of the provisional Regulation are therefore confirmed. As a corollary, the subsequent parts of the analysis which draw on consumption are also confirmed in this respect.

### 7.3. Imports from the country concerned

#### 7.3.1. Volume and market share of imports of the product concerned

(114) In respect of the market share some interested parties opposed the Commission statement set out in recital (58) of the provisional Regulation that indicated an increase of the market share of the dumped imports. They argued that contrary to the Commission findings the market share of imports from China decreased. The evaluation of imports from the PRC in volume and market share was verified. As set out in said recital there was only one year where the market share of the Chinese imports decreased. For the rest of the period examined the market share of imports from China remained consistently high. Therefore the findings presented at the provisional stage are confirmed.

(115) Some parties argued that post-IP volumes should also be examined to assess whether Chinese imports are increasing. It is to be noted that trends on imports from China were evaluated for the period 2002/2003 to 2006/2007 and a clear increase was observed. In accordance with the provisions of the basic Regulation, post-IP events are not taken into account, except in exceptional circumstances. In any event, as stated below in recital (136) the level of imports post-IP was examined and was found to be significant.

#### 7.3.2. Price undercutting

(116) Three cooperating exporting producers contested the Commission's findings on undercutting. One contested the methodology used to calculate undercutting and requested an adjustment to reflect costs borne by traders for their indirect sales. Where justified, calculations were adapted. The revised comparison showed that, during the IP, imports of the product concerned were sold in the Union at prices which undercut the Union industry's prices by a range of 18,4% to 35,2% based on the data submitted by the sampled cooperating exporting producers.

### 7.4. Situation of the Union industry

(117) Two importers and the importers' association contested the duration of the packing season indicated in recital (79) of the provisional Regulation. They argued that the packing season in Spain lasts only three months instead of four to five as indicated in the provisional Regulation. However this allegation is linked to the crop (variable by nature) and to the quantity produced and in any case has no impact on the injury factors as analysed by the Commission services.

(118) In the absence of any other substantiated information or argument concerning the situation of the Union industry, recitals (63) to (86) of the provisional Regulation are hereby confirmed.

### 7.5. Conclusion on injury

(119) Following disclosure of the provisional Regulation, some importers and some exporting producers claimed, with reference to recitals (83) to (86) of the provisional Regulation, that data used by the Commission to establish the injury level was neither

correct nor objectively evaluated. They argued that almost all injury-related indicators showed positive trends and that therefore no evidence of injury can be found.

- (120) In this regard, it is noted that even if some indicators show small improvements, the situation of the Union industry has to be evaluated as a whole and in consideration of the fact that safeguard measures were in place until the end of the investigation period. This matter was explored at length in recitals (51) to (86) of the provisional Regulation. The deep restructuring process which these measures allowed for, resulting in a large reduction in production and capacity, would have under normal circumstances led to a significant improvement in the Union producers' overall situation, including production, capacity utilisation, sales, and price/cost differentials. Instead, volume indicators have remained weak, stocks have increased substantially and financial indicators have continued to be in the red—some even worsening.
- (121) On this basis, it is considered that the conclusions regarding the material injury suffered by the Union industry as set out in the provisional Regulation are not altered. In the absence of any other substantiated information or arguments, they are therefore definitively confirmed.

## 8. CAUSATION

### 8.1. Effect of the dumped imports

- (122) Some parties argued that the volume of the Chinese imports had been stable since 1982 and that therefore they could not have caused injury as explained in the provisional Regulation (see recital (58)). Indeed, as explained above in recital (114), imports from China during the period examined have increased significantly to the detriment of the EU industry market share. Moreover, the argument refers to the trend in imports that exceed well above the period in question therefore the argument is rejected.
- (123) As mentioned in recital (116) above, it is definitively concluded that during the IP, the prices of imports from the sampled Chinese exporting producers undercut the average Union industry prices by percentages ranging from 18,4% to 35,2%. The revision of the undercutting margin leaves unaffected the conclusions on the effect of the dumped imports set out in recitals (100) and (101) of the provisional Regulation.

### 8.2. Exchange rate fluctuations

- (124) After the imposition of the provisional duties some importers further argued the negative influence of the exchange rate on the price level. They argued that the exchange rate level is the main factor that caused injury. Nevertheless, the Commission's assessment refers merely to a difference between price levels with no requirement to analyse the factors affecting the level of those prices. As a consequence a clear causal link between the high dumping level and the injury suffered by the Union industry was found and therefore recital (95) of the provisional Regulation can be confirmed.

### 8.3. Supply and price of raw materials

- (125) Some interested parties argued that injury is not caused by dumped imports but rather by the scarce supply of fresh fruit i.e. the raw material for canned mandarins.
- (126) However, official data from the Spanish Ministry for Agriculture confirm that the quantity available for the canning industry is more than sufficient to cover all the production capacity of the Spanish producers.

- (127) Producers compete to a certain extent for fresh fruit with the direct fresh produce consumer market. However, this competition does not break the causal link. A clear, significant reason for the Union industry's relatively low production, sales and market share is rather to the pressure of the massive imports from China at very low prices. In this situation, and considering that the market price is dictated by the imports covering more than 70% of the market, which engage in price undercutting, suppression and depression, it would be uneconomic to produce more without reasonable expectations for selling the product at prices allowing for a normal profit. Therefore the Spanish industry could reasonably provide significantly higher quantities under the condition that the market price would not penalise their economic results.
- (128) Another fact confirming this analysis is the consistent existence of a significant amount of stocks by Union producers, underlining that the Union industry's injurious situation occurred not because of insufficient production, but due to production that cannot be sold due to the pressure of Chinese imports.
- (129) As an agricultural product, the price of the raw material is subject to seasonal fluctuations due to its agricultural nature. Nevertheless, in the five-year period analysed, which included harvests with lower and higher prices, the Commission observes that injury (e.g. in the form of financial losses) occurs irrespectively of these fluctuations and therefore the economic results of the Union industry are not directly correlated to such seasonal fluctuations.

#### 8.4. Quality differences

- (130) Some parties claimed that the Chinese product was of a higher quality than the Union production. However, any price differences resulting therefrom were not sufficiently substantiated, and there is no evidence that the alleged consumer preference for Chinese products would be so intense as to be the cause of the deteriorated situation for the Union industry. In any case such alleged price differences would favour the Chinese product, increasing the undercutting/underselling level. In the absence of any further new and substantiated information or argument, recital (99) of the provisional Regulation is hereby confirmed.

#### 8.5. Cost increases

- (131) Some parties argued that extraordinary cost increases by some producers were at the root of the injury. These allegations were not sufficiently substantiated. The Commission analysis did not detect any such events which could reverse the assessment of causation or affect the calculation of the injury elimination level.
- (132) Some parties submitted comments on the increased costs of production and inability of the Union industry to reduce them. Certain cost items (such as energy) have increased, but their impact is not such as to break the causal link in a context where a very significant amount of dumped Chinese exports are depressing sales and production (thereby increasing the Union industry's unit costs) and suppressing and depressing Union industry prices.

#### 8.6. Aid schemes

- (133) It was alleged that the EC aid schemes caused artificial growth of processing in the EC and then encouraged reduced levels of raw material supply for the product concerned. This allegation was of a general nature and was not sufficiently substantiated. In any event, the schemes in question were modified in 1996 when the aid was allowed to the farmers instead than to the processors of the product concerned. The Commission's analysis has not detected any residual effects during the investigation period which

could break the causal link. Regarding supply, reference is made to recitals (128) and (129) above.

#### 8.7. Conclusion on causation

(134) In the absence of any further new and substantiated information or arguments, recitals (87) to (101) of the provisional Regulation are hereby confirmed.

(135) In the light of the above, the provisional finding of the existence of a causal link between the material injury suffered by the Union industry and the dumped Chinese imports is confirmed.

### 9. UNION INTEREST

#### 9.1. Developments after the investigation period

(136) As from 9 November 2007 imports from the PRC were subject to registration pursuant to the Commission Regulation (EC) No 1295/2007 of 5 November 2007 making imports of certain prepared or preserved citrus fruits (namely mandarins, etc.) originating in the People's Republic of China subject to registration ('Registration Regulation').<sup>14</sup> This was done with a view to the possible retroactive imposition of anti-dumping duties. Consequently and exceptionally, developments after the IP have also been analysed. Eurostat data confirms that imports from China remain significant and this has been corroborated by certain importers. The volume for the last ten months after the IP reached a level of 74.000 tonnes at stable low prices.

#### 9.2. Ability of Union producers to supply the Union market

(137) A number of parties commented on the low level of the Spanish production, which they claimed is unable to fully supply the Union market. While it is correct to state that in the present situation the Union industry does not supply the overall EU market, it should be noted that this fact is linked to the effect of injurious imports, as explained above. In any event, the intended effect of the measures is not to close the Union market to Chinese imports, but to remove the effects of injurious dumping. Given *inter alia*, the existence of only two sources of supply of these products, it is considered that in the event definitive measures are imposed, Chinese products would continue to enjoy a significant demand in the Union.

#### 9.3. Interest of the Union industry and suppliers

(138) One importers' association alleged that any anti-dumping measures without any limitation of quantities would not help protect the Spanish industry but would automatically trigger illegal trading activities. This is an argument which rather points to the need for the institutions to ensure proper monitoring of the enforcement of measures, rather than against the benefit measures could have for Union producers.

(139) Another importer argued that imposition of anti-dumping measures would not improve the situation of the Spanish producers, due to the existence of large stocks built by the importers in the EU, which would be able to satisfy the market demand in the nearest future. The size of the stocks and the phenomenon of stockpiling were supported by another importer. These comments confirm the Commission analysis in the provisional Regulation and elsewhere in this Regulation. However, it is recalled that measures are intended to provide relief from injurious dumping over a period of five years—not only one.

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<sup>14</sup> OJ L 288 6.11.2007, p. 22.

(140) In the absence of any other new and substantiated information or argument in this respect, the conclusion made in recitals (103) to (106) and (115) of the provisional Regulation regarding the interest of the Union industry are hereby confirmed.

#### 9.4. Interest of unrelated importers/traders in the Union

(141) Cooperating importers expressed a general interest in maintaining two sources of supply of the product concerned, namely Spain and China, in order to maintain the security of supply at competitive prices.

(142) Nevertheless the majority of the importers, should definitive measures be imposed, would prefer a measure which contains also quantitative elements. This is not considered adequate, as explained below in recital (156).

(143) Data from the sampled cooperating importers were verified and confirmed that the canned mandarins sector represents less than 6% of their total turnover and that they achieved, on average, a level of profitability exceeding 10% during both the investigation period and the period of 2004-2008.

(144) The foregoing underlines that, on balance, the potential impact of measures on importers/traders would not be disproportional to the positive effects emanating therefrom.

#### 9.5. Interest of users/retailers

(145) One user, representing less than 1% of consumption, submitted generic comments on the reduced availability of mandarins in the EU and on the superior quality of the Chinese product. He was invited to further cooperate providing individual data but declined and did not substantiate his allegations. Another retailer, a member of the main importer's association, generally opposed a price increase. No other submission concerning the interest of users/retailers was received in the course of the investigation. In this situation and in absence of any substantiated comments from users/retailers, the conclusions made in recitals (109) to (112) of the provisional Regulation are hereby confirmed.

#### 9.6. Interest of consumers

(146) Contrary to what was claimed by one importer, the interest of consumers was taken into consideration at the provisional stage. The Commission's findings were outlined in recitals (113) and (114) of the provisional Regulation. Other parties suggested that the impact on consumers would be significant. However, no information was provided that could cast doubt on the findings in the aforementioned recitals. Even if duties were to lead to an increase in consumer prices, no party has disputed the fact that this product is a very small part of household food expenditure. Therefore in the absence of any comments from consumers and of any further new and substantiated information these recitals are confirmed.

#### 9.7. Conclusion on Union interest

(147) The additional analysis above concerning the interests at stake has not altered the provisional conclusions in this respect. Data of the sampled cooperating importers were verified and confirmed that the canned mandarins sector represents for them less than 6% of their total turnover and that they achieved, in average terms a comfortable result during both the investigation period and the period of 2004-2008 examined, so the impact of the measures on importers will be minimal. It has been also ascertained that the financial impact on the final consumer would be negligible, considering that marginal quantities per capita are bought in the consumer countries. It is considered

that the conclusions regarding the Union interest as set out in the provisional Regulation have not changed. In the absence of any other comments, these conclusions set out in the provisional Regulation are therefore definitively confirmed.

## 10. DEFINITIVE MEASURES

### 10.1. Injury elimination level

(148) One importer claimed that the profit margin at the level 6,8% used as reference at the provisional stage is overestimated. In this respect it should be noted that the same level was used and accepted for safeguard measures as the actual profit achieved by the Union industry in the period 1998/ 99 to 2001/02. It refers to profits of the Union producers in a normal trading situation before the increase in imports which led to injury in the industry. The argument is therefore rejected.

(149) Union producers claimed that provisional duties did not take into account the peculiar situation of the canned mandarins market, where the production is concentrated in only one country and the vast majority of sales and of imports are concentrated in another European country. For that it was requested that final calculations take into account the transport cost from the producer country to the consumer country. The claim was justified and warranted and calculations were adapted accordingly to reflect the concentration of sales in the relevant areas of the Union.

(150) One party made comments on the undercutting and underselling calculation. Where warranted adjustments were made at definitive stage.

(151) The resulting injury margins, taking into account, when warranted, the requests from interested parties, expressed as a percentage of the total cif import value of each sampled Chinese exporter were less than dumping margins found, as follows:

- Yichang Rosen Foods Co., Ltd., Yichang, Zhejiang: 100,1%,
- Huangyan No. 1 Canned Food Factory, Huangyan, Zhejiang: 48,4%,
- Zhejiang Xinshiji Food Co., Ltd., Sanmen, Zhejiang and related producer Hubei Xinshiji Foods Co., Ltd., Dangyang City, Hubei Province: 92,0%,
- Co-operating exporting producers not included in the sample: 90,6%,

All other companies: 100,1%.

### 10.2. Retroactivity

(152) As specified in recital (4), on 9 November 2007 the Commission made imports of the product concerned originating in the PRC subject to registration on the basis of a request by the Union industry. This request has been withdrawn and therefore the matter has not been further examined.

### 10.3. Definitive measures

(153) In view of the conclusions reached with regard to dumping, injury, causation and Union interest, and in accordance with Article 9(4) of the basic Regulation, a definitive anti-dumping duty should be imposed at the level of the lowest of the dumping and injury margins found, in accordance with the lesser duty rule. In this case, the duty rate should accordingly be set at the level of the injury found.

(154) On the basis of the above and in line with corrigendum published in the Official Journal L 258<sup>15</sup> the definitive duty should amount as follows:

- Yichang Rosen Foods Co., Ltd., Yichang, Zhejiang: 531,2 Eur/ton,
- Huangyan No.1 Canned Food Factory Huangyan, Zhejiang:361,4 Euro/ton,
- Zhejiang Xinshiji Foods Co., Ltd., Sanmen, Zhejiang and its related producer Hubei Xinshiji Foods Co., Ltd., Dangyang City, Hubei Province: 490,7 Euro/Ton,
- Co-operating exporting producers not included in the sample: 499,6 Euro/Ton,

All other companies: 531,2 Euro/Ton.

#### 10.4. Form of the measures

(155) A number of parties requested measures which combined price and quantity elements, whereby for an initial import volume no duty or a reduced duty would be paid. In certain cases, this was linked to a license system.

(156) This option was considered but rejected for, in particular, the following reasons. Anti-dumping duties are imposed because the export price is lower than the normal value. The amounts exported to the Union are relevant for the analysis whether dumped imports cause injury. However, these amounts are, normally, irrelevant for the level of the duty that should be imposed. In other words, if it is found that dumped imports cause injury, the dumping may be offset by a duty which applies as of the first shipment imported after the entry into force of the duty. Finally, to the extent that it would be found that it is in the Union's interest that during a certain period, products may be imported without imposing anti-dumping duties, Art. 14(4) of the basic Regulation allows for suspension under certain conditions.

(157) Some parties have alleged that any form of measures without a quantitative limitation will lead to duty avoidance. Parties made reference again to the stockpiling which occurred in the wake of the enlargement of the European Union on 1st May 2004. The Commission services' analysis has confirmed that this was a clear attempt to avoid the duties. Given these statements and the facts described in the provisional Regulation in recitals (123) and (125), the Commission will monitor developments in order to take the necessary actions to ensure proper enforcement of measures.

(158) Other parties have argued that measures should exclude volumes already subject to existing sales contracts. This would in practice amount to an exemption of duties which would undermine the remedial effect of measures, and is therefore rejected. Reference is also made to recitals (138) and (139) above.

(159) The provisional Regulation imposed an anti-dumping duty in the form of a specific duty for each company resulting from the application of the injury elimination margin to the export prices used in the calculation of the dumping during the IP. This methodology is confirmed at the level of definitive measures.

#### 10.5. Undertakings

(160) At a late stage in the investigation several exporting producers in the PRC offered price undertakings. These were not considered to be acceptable given the significant price volatility of this product, the risk of duty avoidance and circumvention for this

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<sup>15</sup> OJ L 258, 26.9.2008, p. 74.

product (see recitals (124) and (125) of the provisional Regulation), and the fact that no guarantees were contained in the offers on the part of the Chinese authorities to allow for adequate monitoring in a context of companies not having been granted market economy treatment.

#### 11. REGISTRATION

- (161) Imports of the product concerned were made subject to registration by Regulation 572/2012. That registration should cease. The possibility of collecting retroactive duties will be decided upon at a later stage, when full statistical data will be available.

#### 12. DISCLOSURE

- (162) All parties were informed of the essential facts and considerations on the basis of which it was intended to impose a definitive anti-dumping duty on imports of the product concerned originating in the People's Republic of China. The parties were also granted a period within which they could make representations subsequent to the disclosure. The parties who so requested were granted the opportunity to be heard. Two groups of importers requested and were afforded hearings in the presence of the Hearing Officer of the Directorate-General for Trade.

- (163) As regards the Xinshiji judgment, the arguments brought forward had already been analysed and addressed in the general disclosure document. None of these arguments led consequently to the alteration of the essential facts and considerations on the basis of which it was decided to confirm the injury margin determined in the original investigation. With regard to the analogue country judgement, a group of importers repeated comments already made during the investigation regarding the scope of the partial reopening, the use of IP data and the determination of the normal value. Those comments are addressed, respectively, in recitals (43), (46) and (54) above. The same group of importers expressed the view that they were in favour of a system of safeguard measures with quotas instead of anti-dumping duties. The reason for rejecting a quota system is explained above in recital (156). Furthermore it should be noted that safeguard measures can only be imposed in certain situations with very specific conditions, in compliance with Council Regulation 260/2009 of 26 February 2009. It is considered that anti-dumping duties are the most appropriate way of addressing injurious dumping. This group of importers also pointed out that, in relation with the issues raised in recital (44) and (85) above, the Commission did not open an interim review when requested to do so. It is reiterated that, as of the date of the analogue country judgement, it was no longer possible to conduct an interim review, as there was no more duty in force. The Commission should resume the analysis of the pending request for interim review as of the date of entry into force of this Regulation. If the analysis of the request shows that the conditions set out in Article 11(3) of the basic Regulation are respected, an interim review should be initiated as soon as possible.

- (164) In summary, after having considered all the comments after disclosure to interested parties of the findings of the investigation, it was concluded that none of them was of such a nature as to change the conclusions reached during the investigation.

#### 13. DURATION OF MEASURES

- (165) In derogation of Article 11 (2) of the basic Regulation, this Regulation shall expire 5 years after the entry into force of the original Regulation.

HAS ADOPTED THIS REGULATION:

*Article 1*

1. A definitive anti-dumping duty is hereby re-imposed on imports of prepared or preserved mandarins (including tangerines and satsumas), clementines, wilkings and other similar citrus hybrids, not containing added spirit, whether or not containing added sugar or other sweetening matter, and as defined under CN heading 2008, currently falling within CN codes 2008 30 55, 2008 30 75 and ex 2008 30 90 (TARIC codes 2008 30 90 61, 2008 30 90 63, 2008 30 90 65, 2008 30 90 67 and 2008 30 90 69) and originating in the People's Republic of China.

2. The amount of the definitive anti-dumping duty applicable for products described in paragraph 1 produced by the companies below shall be as follows:

Company	EUR/tonne net product weight	TARIC additional code
Yichang Rosen Foods Co., Ltd., Yichang, Zhejiang	531,2	A886
Huangyan No.1 Canned Food Factory, Huangyan, Zhejiang,	361,4	A887
Zhejiang Xinshiji Foods Co., Ltd., Sanmen, Zhejiang and its related producer Hubei Xinshiji Foods Co., Ltd., Dangyang City, Hubei Province	490,7	A888
Co-operating exporting producers not included in the sample as set out in the Annex	499,6	A889
All other companies	531,2	A999

*Article 2*

1. In cases where goods have been damaged before entry into free circulation and, therefore, the price actually paid or payable is apportioned for the determination of the customs value pursuant to Article 145 of Commission Regulation (EEC) No 2454/93<sup>16</sup> the amount of anti-dumping duty, calculated on the basis of Article 1 above, shall be reduced by a percentage which corresponds to the apportioning of the price actually paid or payable.

2. Unless otherwise specified, the provisions in force concerning customs duties shall apply.

*Article 3*

The customs authorities are hereby directed to cease the registration of imports carried out pursuant to Article 1 of Regulation (EU) No 572/2012.

<sup>16</sup> OJ L 253, 11.1.1993, p. 3.

*Article 4*

This Regulation shall enter into force on the day following its publication in the *Official Journal of the European Union*.

*Article 5*

This Regulation shall expire, in derogation from Article 11 (2) of the basic Regulation, on 31.12.2013.

*Article 6*

Requests for review shall be admissible, in derogation from Article 11 (3) of the basic Regulation, as of the entry into force of this Regulation.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels,

*For the Council*  
*The President*

## ANNEX

Co-operating exporting producers not included in the sample (TARIC additional code A889)

Hunan Pointer Foods Co., Ltd., Yongzhou, Hunan

Ningbo Pointer Canned Foods Co., Ltd., Xiangshan, Ningbo

Yichang Jiayuan Foodstuffs Co., Ltd., Yichang, Hubei

Ninghai Dongda Foodstuff Co., Ltd., Ningbo, Zhejiang

Huangyan No.2 Canned Food Factory, Huangyan, Zhejiang

Zhejiang Xinchang Best Foods Co., Ltd., Xinchang, Zhejiang

Toyoshima Share Yidu Foods Co., Ltd., Yidu, Hubei

Guangxi Guiguo Food Co., Ltd., Guilin, Guangxi

Zhejiang Juda Industry Co., Ltd., Quzhou, Zhejiang

Zhejiang Iceman Group Co., Ltd., Jinhua, Zhejiang

Ningbo Guosheng Foods Co., Ltd., Ninghai

Yi Chang Yin He Food Co., Ltd., Yidu, Hubei

Yongzhou Quanhui Canned Food Co., Ltd., Yongzhou, Hunan

Ningbo Orient Jiuzhou Food Trade & Industry Co., Ltd., Yinzhou, Ningbo

Guangxi Guilin Huangguan Food Co., Ltd., Guilin, Guangxi

Ningbo Wuzhouxing Group Co., Ltd., Mingzhou, Ningbo