

Comments by Caterpillar (Xuzhou) Ltd. on the Statement of Essential Facts

Investigation No. AS0046 - Subsidy investigation into certain excavators imported into the United Kingdom from the People's Republic of China

On 21 September 2023, the Trade Remedies Authority (“TRA”) received an application from JCB Heavy Products Ltd (“JCB”) alleging that certain excavators imported into the UK from the People’s Republic of China (“China”) are subsidized and that the importation of such excavators has caused injury to the UK industry. On 15 November 2023, TRA initiated the subsidy investigation.

In accordance with regulation 62(1) of the Trade Remedies (Dumping and Subsidisation) (EU Exit) Regulations 2019 (“Regulations”), before making a final affirmative determination for the purpose of paragraph 11(5) of Schedule 4 to the Taxation (Cross-border Trade) Act 2018 (“the Act”), the TRA must publish a Statement of Essential Facts (“SEF”) that sets out the intended final determination, a summary of the facts considered during the investigation, and a summary of those facts that formed the basis of the intended final determination. On 12 December 2024, the TRA published the SEF that determined that Self-propelled track-laying (i.e. tracked) excavators with a 360° revolving superstructure and with an operating weight of 11,000 kg (i.e., 11 tonnes) or more but less than 80,000 kg (80 tonnes) (“relevant goods”) have been or are being imported into the UK from China and are subsidised, and that the importation of the subsidised relevant goods has caused injury to UK industry in those goods. The TRA determined that the application of a countervailing measure it intends to recommend to the Secretary of State meets the Economic Interest Test (“EIT”). The TRA determined that the residual countervailing duty should be set at the level of 2.93%.

Caterpillar (Xuzhou) Ltd. (“CXL”) is a producer and exporter of the relevant goods originating in China. CXL should be registered in the investigation as an interested party. Given that CXL’s export of relevant goods amount to [Confidential]% of the total volume of Chinese imports into the UK, the TRA should also sample CXL and set a reasonable deadline for CXL to provide a questionnaire response such that an individual subsidy and injury margin can be calculated for it. No facts available and no residual subsidy duty could be applied to imports of excavators manufactured by CXL before the company is given the opportunity to provide the information required by the TRA.

CXL also considers that conditions for the application of countervailing measures are not met, since the complaint and, by extension, the SEF failed to consider for the purpose of relevant allegations and determinations imports of Cat-branded excavators manufactured by CXL. Based on the price analysis performed by CXL, prices by unaffiliated, independently-owned dealer Finning (UK) Ltd. of Cat-branded excavators do not undercut, undersell or suppress prices of the complainant. In addition, CXL did not benefit from above the minimal subsidization. On that basis, and since CXL exports amount to [Confidential]% of the total volume of imports of relevant goods into the UK, in the POI Chinese imports overall did not undercut, undersell or suppress prices of the UK industry and thus imports from China did not cause material injury to the UK industry.

CXL, furthermore, kindly requests that the impact of anti-subsidy duties on Cat-branded excavators and UK end-customers of the same should be considered when making an Economic Interest Test determination.

Finally, to the extent that the TRA denies CXL’s request for the inclusion into the sample and thus for an individual countervailing duty and to the extent that TRA makes a positive final determination and recommends imposition of definitive countervailing duties, CXL requests that the scope of definitive countervailing duties should be brought in line with the scope of the TRA’s subsidy and injury determinations. Namely, definitive countervailing duties should be applied solely to the relevant goods *dispatched* from China, but not to the relevant goods *originating* in China.

1. CXL should be registered and sampled

CXL is a producer and exporter of the relevant goods originating in China. When exporting relevant goods to the UK, CXL sells them to an affiliated company located in [Confidential], that in turn re-sells them to an unaffiliated dealer in the UK, Finning (UK) Ltd. that acts as an importer and re-seller to end-users. Finning (UK) Ltd. is an independently-owned, Caterpillar -authorised distributor of products manufactured by the Caterpillar Group who transacts in its own business interests and at its own risk, meaning that it establishes terms and conditions (including pricing) on which it sells the products to the customers at its own discretion.

Based on the sampling form that CXL submitted to the TRA on 7 January 2025, its sales destined into the UK of relevant goods in July 2022 – June 2023 (“POI”) amounted to [Confidential] units with a weight of [Confidential] tons. Based on the total volume of imports from China in the POI of 15,958 tons,¹ imports of relevant goods manufactured by CXL constitute [Confidential]% of the total volume of imports from China, thus making CXL by far the largest Chinese exporting producer.

CXL appreciates that the deadline to submit a sampling form was initially set for 30 November 2023. However, CXL was not notified about the initiation of the investigation and was therefore not invited to register and submit a sampling form. While paragraph 35 of the SEF mentions that TRA notified “interested parties” about the initiation of the investigation and thus Chinese exporting producers, CXL never received the notification concerned.²

Under regulation 40 of the Regulations, the TRA may do anything it considers appropriate in connection with the exercise of any of its functions, including to consider information supplied to it by any person; set time limits for responses to its requests and vary such time limits; and to accept information supplied to it outside any applicable time limit. Given a very significant impact that CXL data has on the determinations to be made by the TRA in this investigation, CXL kindly requests the TRA to exercise its discretion to register CXL and to accept its sampling form as well as to sample CXL and to set a reasonable deadline for CXL to provide a questionnaire response.

2. CXL should be given the opportunity to provide the information required by the TRA before the TRA resorts to facts available

CXL’s request to be registered, sampled and subjected to an individual countervailing duty, if any, is furthermore supported by the WTO rules, under which, an exporter shall be given the opportunity to provide the information required by the investigating authority *before* the latter resorts to facts available that can be adverse to the exporter's interests.

Article 6.8 and Annex II of the WTO Antidumping Agreement that apply by analogy in subsidy investigations and which inform the UK trade remedies legislation govern application of facts available when making determinations in the context of investigations. The last sentence of Article 6.8 provides that the provisions of Annex II shall be observed in the application of that paragraph. Under the second sentence of paragraph 1 of Annex II, the investigating authorities should “ensure” that an interested party is “aware” that, if the required information is not supplied within a reasonable time, “the authorities will be free to make determinations on the basis of facts available, including those contained in the application for the initiation of the investigation by the domestic industry.” The second sentence of paragraph 1 of Annex II conditions the use of facts available on making the interested party “aware” that, if the information is not supplied by it within a reasonable time, the investigating authority will be free to resort to these facts available. In other words, an exporter shall be given the opportunity to provide the information required by the investigating authority *before* the latter resorts to facts available

¹ SEF, Table 11.

² Regulation 2 of the Regulations mentions that overseas exporters are covered by the definition of “interested parties”.

that can be adverse to the exporter's interests. Accordingly, an investigating authority that uses the facts available against an exporter that was not given notice of the information the investigating authority requires, acts in a manner inconsistent with paragraph 1 of Annex II to the Anti-Dumping Agreement and, therefore, with Article 6.8 of that Agreement.³ Similarly, under paragraph 11(4) of the Act, the TRA is obligated to give to interested parties such as CXL an adequate opportunity to provide information regarding the investigation before the TRA can make a final determination.

As follows from the Table 1 of the SEF, the TRA proposes to apply to all other overseas exporters/producers - that include CXL - a residual anti-subsidy duty of 2.93%. Paragraph 630 of the SEF explains that the level of this duty has been calculated by taking the higher of the two subsidy amounts determined for each countervailable subsidy that was identified in the present investigation. Thus, the TRA proposes to apply facts available to calculate CXL subsidy margin.

However, as discussed, WTO rules condition the use of facts available on making the interested party "aware" that, if the information is not supplied by it within a reasonable time, the investigating authority will be free to resort to these facts available. In other words, an exporter shall be given the opportunity to provide the information required by the investigating authority before the latter resorts to facts available that can be adverse to the exporter's interests. An exporter that is not notified of the information required to be submitted to the investigating authority is denied such an opportunity. Accordingly, an investigating authority that uses the facts available against an exporter that was not given notice of the information the investigating authority requires, acts in a manner inconsistent with the relevant rules.

On that basis, CXL shall be given the opportunity to provide the information required by the TRA before the latter applies to its exports a residual anti-subsidy duty.

3. Subsidy complaint is manifestly deficient

Regulation 50(2) of the Regulations provides that an application made by an applicant in the UK industry for the initiation of a subsidization investigation must contain as much of the information listed in paragraph 2 of Schedule 1 as is *reasonably available* to them, namely:

- A description of the goods in relation to which the applicant UK industry is requesting an investigation;
- Details of all known overseas exporters of the goods identified;
- Details of all known importers in the United Kingdom of the goods identified;
- Information that the goods identified have been or are being subsidized;
- Information on the volume of importation of the goods identified;
- Information that the importation of the goods identified has caused or is causing injury to the UK industry.

CXL notes that the complaint does not refer to CXL and Caterpillar as a major player, [*Confidential*] in the UK market for subject excavators. The complaint furthermore does not identify CXL or Caterpillar as a major supplier of Chinese-origin excavators and Finning (UK) Ltd. as their importer and does not discuss Caterpillar or Cat-branded excavators when describing the product scope and technical characteristics of Chinese imports. Furthermore, the complaint does not provide evidence of

³ Appellate Body report, *Mexico – Definitive Anti-Dumping Measures on Beef and Rice*, Complaint with Respect to Rice, WT/DS295/AB/R, adopted 20 December 2005, DSR 2005:XXII, p. 10853. Paragraph 259.

subsidization for Cat-branded excavators and does not discuss their volume, prices and impact on the domestic industry in the context of the material injury and causal link allegations.

At the same time, it is not credible that the complainant does not have *reasonably available* information that Caterpillar is its major competitor and that Caterpillar supplies the UK market primarily with relevant goods originating in China. In fact, the origin of Caterpillar's excavators is clearly identified on each Cat excavator plate:



Caterpillar's web-site explicitly identifies CXL as a producer of Caterpillar's full range of excavators:⁴

Caterpillar China Facilities

XUZHOU

Primary Functions: Manufacturing

Industries: Construction

Brands: Cat

Products Currently Produced: Excavators (full range), Paving (Soil Compactors, Asphalt Compactors, Pneumatic Compactors and Pavers), undercarriage products and components, hose and coupling manufacturing and assembly

Xuzhou is one of the important locations for the production of Cat brand construction machines and components as well as supply locations for Caterpillar.

On that basis, the complaint that led to the initiation of this investigation is materially deficient, contrary to Regulation 50(2) of the Regulations, while the present investigation was initiated without there being sufficient evidence of subsidization and injury caused by imports from China.

⁴ <https://www.caterpillar.com/en/company/global-footprint/apd/china/china-facilities.html>

4. SEF material injury determination is incomplete and inaccurate

SEF material injury determination rests on the calculation of price undercutting and price suppression by means of imports from China:⁵

The TRA has holistically assessed and verified, all the evidence provided to date by the parties registered to the case. It has been concluded that the UK industry has suffered injury during the injury period which is caused by the imports of the relevant goods... The TRA determined that in the POI there had been significant price undercutting of 22.51% by the subsidised imports of the goods concerned when compared with the price of the like goods produced in the UK... The TRA obtained evidence of price suppression and determined that this was caused by the considerably lower priced subsidised PRC imports. Throughout the injury period UK industry was selling its like goods at a loss while the average PRC import price continued to be significantly below that of the UK industry's domestic sales price".

The SEF furthermore calculates price underselling margins by means of Chinese imports by comparing import prices with the target price of the UK industry.⁶ Injury margins calculated on that basis range from 66.08% to 79.07%.⁷

CXL performed the same injury margin calculation using customer prices for imports by Finning (UK) Ltd. into the UK. To ensure fair comparison with the sales prices of the complainant and acting by analogy by reference to Regulation 16 of the Regulations, CXL determined (for purposes of these Comments) prices at the level of sales prices of relevant goods by Finning (UK) Ltd. to end-users. On that basis, price underselling by means of CXL is [Confidential]:⁸

[Confidential]

On that basis, and since CXL-related exports amount to [Confidential]% of the total volume of imports of relevant goods into the UK in the POI, Chinese imports did not undercut, undersell or suppress prices of the UK industry and thus imports from China did not cause material injury to the UK industry. Injury analysis in the SEF appears to be vitiated by the same erroneous exclusion of CXL exports as is the case with the complaint.

5. CXL exports are not subsidized

CXL reviewed the methodology by the UK TRA in the SEF. CXL then collected data on the financial contributions that the company received in the POI. CXL then calculated a subsidy margin on the basis of the data collected and in line with the SEF methodology.⁹

In particular, as follows from **Annex 1** [Annex 1 is fully confidential] to these comments, during the POI CXL received the following financial contributions:

[Confidential] the resulting subsidy margin is [Confidential]%.

[Confidential] results in the subsidy margin of [Confidential]%.

⁵ SEF, paragraphs 799-803.

⁶ SEF, Table 30.

⁷ SEF, Table 31.

⁸ Average target prices has been calculated based on the average of the ranges disclosed in Table 30 of the SEF.

⁹ This is without prejudice that CXL disagrees with the TRA's findings regarding the existence of financial contribution, benefit or specificity with regard to the subsidy programs that the SEF countervails. Regardless, however, as explained below, CXL subsidy margin is de minimis.

[*Confidential*] the resulting subsidy margin [*Confidential*] amounts to [*Confidential*]%.

[*Confidential*], the company obtained no benefit from this program.

On that basis, the total subsidy margin of CXL in the POI amounted to [*Confidential*]%. Since under Regulation 2 of the Regulations a subsidy margin below 2% is considered minimal margin, CXL should be assigned in this investigation a zero countervailing duty.

6. Impact of anti-subsidy duties on Caterpillar and its UK customers should be considered when making an Economic Interest Test Determination

In accordance with paragraph 25 of Schedule 4 to the Act, the Economic Interest Test (“EIT”) is met in relation to the application of an anti-subsidy measure, if the application of the measure is in the economic interest of the UK.

CXL kindly requests the TRA to consider the following additional facts that relate to the effect that anti-subsidy duties will have on Cat-branded excavators and end customers in the UK of the same.

First, based on the volume and value of sales of CXL relevant goods by Finning (UK) Ltd. in the POI, additional cost of the already imposed 64.17% antidumping duty as well as of the proposed anti-subsidy duty of 2.93% for the UK end users would amount to GBP [*Confidential*] by far outweighing the benefits to the UK industry of GBP 13.4m - 19.8m in the antidumping investigation¹⁰ and GBP 1m in the anti-subsidy investigation.¹¹

Second, relevant goods produced by CXL represent a significant portion of UK [*Confidential*] market and support a number of large UK infrastructure projects. For example, [*Confidential*] has [*Confidential*] active Cat machines, including [*Confidential*], which were delivered between [*Confidential*] and [*Confidential*]. This also includes a total of [*Confidential*] manufactured by [*Confidential*] facility. Other large UK infrastructure projects supported by Cat equipment include [*Confidential*] and [*Confidential*]. Caterpillar and Finning have also continually been serving the waste and recycling industry as well as the quarrying and extraction segments across the country (e.g. [*Confidential*]).

If, as a result of the proposed antidumping and anti-subsidy duties being implemented, Finning (UK) Ltd. is no longer in a position to competitively participate in the premium end of sales for these relevant goods, i.e., provide top-tier product with unique technologies for improved performance, efficiency, and safety features on key infrastructure projects similar to the ones listed above and overall UK customers, this is likely to materially reduce customer choice and a healthy competitive dynamic in a key UK industry segment.

Third, Cat-branded excavators are made to function as a system with hauling products, including the [*Confidential*] built at [*Confidential*]. Application of antidumping and anti-subsidy duties recommended by the TRA is expected to have a ripple effect on sales of [*Confidential*] in the range of [*Confidential*] units per year or GBP [*Confidential*] of revenue, negatively impacting Caterpillar's manufacturing operations in the UK.

Fourth, if Caterpillar and Finning cannot compete for excavator sales in the UK, its unique technology offering would not be available, and competitors would likely not be incentivized to invest at the same pace. An example below of a selling guide for a [*Confidential*] highlights in green some of the unique operator, technology and safety features offered by Cat-branded excavators built by CXL that are not offered by competitors' offerings:

¹⁰ SEF, in the antidumping investigation, paragraph 565.

¹¹ SEF, paragraph 892.

[*Confidential*]

Finally, in the next 6 months, the recommended duties could impact over [*Confidential*] excavators manufactured by CXL that are planned to arrive in the UK for customers involved in strategic infrastructure projects. The duty will drive increased prices, due to which Caterpillar believes there is serious risk that customers may well cancel their signed contracts with Finning (UK) Ltd., whose current workforce includes [*Confidential*] employees for the UK. Should Cat-branded excavators from CXL become uncompetitive, a significant portion of the Finning (UK) Ltd. machines sales may be jeopardized. The overall Cat machine population would also be reduced in the short term, impacting negatively Finning (UK) Ltd.'s future parts and services revenue and machine rebuilds currently in the range of [*Confidential*] units in the last [*Confidential*] years across all product line-up.

7. **Anti-subsidy duties should only apply to relevant goods dispatched from China**

Alternatively, if the TRA denies CXL's request for the inclusion into the sample and thus for an individual anti-subsidy duty and if the TRA makes a positive provisional and/or final determination and recommends imposition of anti-subsidy duties, CXL requests that the scope of anti-subsidy duties should be brought in line with the scope of the TRA's subsidy and injury determinations. Namely, anti-subsidy duties should be applied solely to the relevant goods *dispatched* from China, but not to the relevant goods *originating* in China:

- The TRA is under an obligation to objectively examine trends in imports of relevant goods from China and third countries as part of an overarching obligation to objectively examine positive evidence regarding the existence of material injury to the UK industry and the causal link between such injury and targeted imports.
- Table 11 of the SEF analyses developments in imports of relevant goods from China based on "HMRC OTS data". Pursuant to paragraph 642 of the SEF, such OTS data "*refers to the country where the last commercial transaction took place. This is not necessarily the country of origin/manufacture or the last country from which the goods were shipped to the UK*".
- That being the case, conclusions on the existence of injury as well as of a causal link in Section G.4 of the SEF all rest on the existence of an increased imports from China and on their magnitude based on the volume of imports *dispatched* from China and not based on the volume of imports *originating* from China.
- Moreover, in Section G.2 and in particular in paragraph 798 the SEF determines that imports of relevant goods *dispatched* from Japan, Belgium and the Netherlands, do not injury the UK industry and thus should not be subject to any anti-subsidy duties.

On that basis, and since the scope of anti-subsidy duties should mirror the scope of the subsidy, injury and causality findings, provisional as well as definitive anti-subsidy duties, if any, shall apply only to the relevant goods *dispatched* from China as opposed to relevant goods dispatched from other countries, regardless as to whether they originate in China or not.

8. **Conclusion**

Based on the foregoing, CXL respectfully submits that by omitting CXL exports of relevant goods to the UK that in the POI amounted to [*Confidential*] % of the total volume of imports from China, the complaint and, as a result the SEF, do not provide sufficient evidence neither to initiate the subsidy investigation concerned nor to determine the existence of material injury or causal link. Conditions for the imposition of the anti-subsidy duties at this stage therefore are not met and the TRA is kindly requested to abstain from imposing any provisional or definitive anti-subsidy measures and from applying any duties retroactively.

Since CXL was not notified about the initiation of the investigation and since the company was therefore deprived of an opportunity to defend itself, the TRA should exercise its powers to sample CXL and to set an individual anti-subsidy duty for imports of CXL produced goods, if any. The TRA should not apply to CXL produced goods a 2.93% residual anti-subsidy duty before the company was given a right to provide the information required by the TRA.

Finally, the TRA is kindly requested to consider an impact of anti-subsidy duties on Cat-branded excavators and end customers in the UK of the same when making an Economic Interest Test Determination. And regardless, anti-subsidy duties, if any, shall apply only to the relevant goods *dispatched* from China.

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