

NON-CONFIDENTIAL

Your Ref:

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Date:

1 March 2024

Subject: AD0047 – Anti-dumping investigation concerning certain excavators imported into the United Kingdom from the People's Republic of China – Comments on particular market situation ("PMS") and appropriate representative country by the Sany Group

Dear Madam, Sir,

We refer to the Notice of Initiation of 15 November 2023, whereby the Trade Remedies Authority ("TRA") initiated the above-mentioned investigation and informed interested parties that, once registered, they could "*submit comments on any issues relevant to the investigation through the Trade Remedies Service*".¹ We also refer to: (i) the application for the initiation of the present investigation ("Application") filed by JCB Heavy Products Limited ("Applicant");² and (ii) the Note to the File of 20 February 2024, by which TRA invited interested parties to submit comments on its proposal to use Brazil as an appropriate representative country, should it be determined that "*a PMS exists and that the effect of the PMS on the domestic sales price prevents a proper comparison between that and the export price*".³ The deadline to submit these comments is today, 1 March 2024.

As an interested party duly registered in this proceeding, our client – the Sany Group – is most grateful for the opportunity to present its views on any issues relevant to the investigation. As one of the most important players in the Chinese excavator industry, the Sany Group is also uniquely placed to share with the TRA an insight into the market situation of excavators in China.

However, the Sany Group is currently somewhat limited in providing meaningful comments concerning the TRA's provisional choice of appropriate representative third country at this time due to the absence of relevant data in the open file. For example, neither the values for the factors

¹ Notice of Initiation, Certain Excavators imported into the United Kingdom from the People's Republic of China, Initiation of an Investigation into Alleged Dumping – Investigation No. AD0047 (15.11.2023), available at <<https://www.trade-remedies.service.gov.uk/public/case/AD0047/submission/7e8441ed-2b57-4c8e-90f9-9ea431ef2412/>>.

² Application Form AD (19.11.2023), available at <<https://www.trade-remedies.service.gov.uk/public/case/AD0047/submission/1992247b-4aca-4434-b9ff-df4e3b24f143/>>.

³ Note to public file – proposed appropriate representative third country (20.02.2024), available at <<https://www.trade-remedies.service.gov.uk/public/case/AD0047/submission/6deaec1f-7036-469f-bed3-66e2afc27932/>>.

of production in Brazil nor information concerning manufacturing overheads, SG&A and profits seem to be available in the open file. In that connection, the Sany Group notes that the Complainant has only alleged distortions for a limited number of factors of production, some of which have been treated as non-distorted by other jurisdictions. For example, when establishing the ex-works export price, the European Union deducts actual shipping and logistics costs incurred by Chinese companies, thereby confirming that there are no distortions for such expenses.

In addition, from a legal perspective, the Sany Group considers that the TRA should first establish the existence of a PMS within the meaning of Article 2.2. of the of the Anti-Dumping Agreement ("ADA"); provide an adequate explanation on how the possible particular market situation could negatively affect a proper price comparison between domestic sales in China and export sales to the UK; and only then look for alternatives to calculate the normal value in an anti-dumping proceeding. The Sany Group respectfully requests the TRA to address priorities in a sequential manner. By inviting comments on the selection of a potential appropriate representative third country prior to having established the existence of a PMS, the TRA is putting the cart before the horse.

The Sany Group notes that, as of the current stage of the investigation, there has not been any analysis of the existence of a possible PMS, let alone any explanation about the potentially negative affect on proper price comparison thereof. By using a constructed value or representative export prices to a third country to determine the normal value, the TRA would thus deviate from international and domestic laws. On this basis, the Sany Group respectfully requests the TRA to determine the normal value based on a comparable price of like goods in the Chinese market.

For the reasons given above, our client wishes to reserve its rights to provide further comments should more information become available.

Notwithstanding the above, the Sany Group still wishes to provide the following general observations.

First, the Sany Group submits that the Applicant's claim that Chinese domestic prices for excavators cannot be used for the purposes of calculating the normal value in the present proceeding should be rejected on the grounds that it is not supported by sufficient evidence.

In this connection, the Sany Group recalls that Article 2.2 of the ADA and Regulation 7(2) of The Trade Remedies (Dumping and Subsidisation) (EU Exit) Regulations 2019 permit the construction of normal value in three situations, namely (1) in the case of no domestic sales of the like product in the ordinary course of trade; (2) insufficient (less than 5%) domestic sales of the like product; or (3) when a particular market situation exists in the domestic market. This list is exhaustive and

does not permit any additions such as the one envisaged by the Applicant, *i.e.*, an alleged distortion of domestic input costs.

As concerns the term "particular market situation", the panel recognized in *Australia – A4 Copy Paper* that an undefined variety of particular market situations may exist, but noted these will only become relevant insofar as they affect price comparability.⁴ A particular market situation does not, by itself, automatically allow using third country costs. It only allows a departure from domestic prices/costs, insofar as this market situation is the reason a proper price comparison is not possible. The panel concluded that the effects of a particular market situation on export prices must be examined (and adequately explained) to determine whether a "proper comparison" of the domestic and export prices for the calculation of dumping margin is possible.⁵ The existence of a particular market situation in and of itself is not sufficient. The burden of proving the link between the particular market situation and price comparability is on the party claiming the existence of a particular market situation.

The Sany Group notes that neither the Applicant nor the investigating authority have provided an explanation as to why price comparability would have been affected. In fact, it appears that the comparability issue the Applicant has identified relates to a comparison charged by Chinese exporters and prices charged by UK producers ("*Chinese Excavator manufacturers benefit from artificially low, distorted costs for all cost areas. In contrast, UK Excavator manufacturers pay higher, undistorted costs. This cost advantage gives Chinese Excavator manufacturers a competitive advantage when selling Excavators to the UK market, allowing Chinese Excavator manufacturers to undercut UK Excavator manufacturers while maintaining profitability*"⁶). That is not, however, the price comparison issue addressed by the Panel in *Australia – A4 Copy Paper*.

In any event, the proposed approach of the Applicant – using third country costs and thereby not using the costs of production of exporting producers even if these cost of production records are GAAP-consistent and reflect the recorded input costs associated with the production of the product under consideration as they existed – is inconsistent with Article 2.2.1. and 2.2 of the ADA. This was confirmed by the Appellate Body in *EU – Biodiesel (Argentina)* and by the Panel in *EU – Biodiesel (Indonesia)*.⁷ Indeed, the use of a cost adjustment methodology was ruled "*inconsistent with the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement, by providing for the rejection of the costs reflected in the records of the exporter or producer under investigation in a manner inconsistent with the second condition in the first sentence of Article 2.2.1.1 of the Anti-*

⁴ Panel Report, *Australia – Anti-Dumping Measures on A4 Copy Paper*, WT/DS529/R, para. 7.27.

⁵ *Ibid.*, para. 7.75.

⁶ See Appendix E.2.1.001: Methodology for calculating normal value, page 25.

⁷ See: Appellate Body Report, *European Union – Anti-Dumping Measures on Biodiesel from Argentina*, WT/DS473/AB/R, paras. 6.3 – 6.57; and Panel Report, *European Union – Anti-Dumping Measures on Biodiesel from Indonesia*, WT/DS480/R, paras. 7.17 – 7.28.

*Dumping Agreement" and "inconsistent with Article 2.2 of the Anti-Dumping Agreement, by providing for the use of out-of-country input price information without establishing whether or explaining how such information is adequate to reflect or represent the costs of production in the country of origin."*⁸

Ultimately, since the determination of whether a particular market situation that affects Chinese domestic prices exists will affect the dumping methodology and calculations, the Sany Group recalls that such a determination must be based on positive evidence, must be adequately investigated and must be properly evaluated. Nevertheless, other than general accusations and some allegations concerning the steel and labour costs, the Applicant has not provided any evidence – let alone sufficient or positive evidence – for other cost factors.

Second, the Sany Group's position is that the production, sales and marketing of Chinese excavators are fully market oriented. Chinese producers of excavators operate in the context of an open and competitive market, where the costs and prices of all factors of production are determined by market forces (*i.e.*, demand and supply, market competition, and cost of products/procurement).

In this context, it is also worth noting that the Sany Group is a 100% privately-owned group of companies. Neither the Government of China ("GOC") nor any other public body are involved in the company group's operations or management. None of the Sany Group's business decisions are subject to the approval or influence of the GOC. On the contrary, all such decisions are made in reaction to the market situation, with the goal of maximizing the Sany Group's profit and long-term development.

More in general, to the Sany Group's best knowledge, neither the GOC nor any other public body or agency intervene in the Chinese excavator market. Manufacturers of excavators in China are free from any government interferences; they are totally free to decide whether to import or purchase inputs material domestically, choose their suppliers, arrange the timing and quantities of their purchases and sales, and negotiate their terms of transactions for both purchases and sales.

Based on the above, the Sany Group submits that, contrary to the Applicant's allegations, actual Chinese domestic sale prices and/or costs should be used for the purposes of determining the normal value in the present case.

Third, should the TRA nevertheless decide to use a comparable price of the like product when exported to an appropriate third country, the Sany Group respectfully requests that data reflecting as accurately as possible the actual costs incurred by Chinese producers of excavators be used.

⁸ Panel Report, *European Union – Cost Adjustment Methodologies and Certain Anti-Dumping Measures on Imports from Russia (Second complaint)*, WT/DS494/R, para. 8.1.

In this connection, the Sany Group notes that – other than the availability of reliable information and the existence of significant exports – the Note to the File of 20 February 2023 provides no explanation as to why only Brazil is being considered as an appropriate representative country. The Sany Group thus respectfully asks the TRA to clarify why Brazil was preferred over other countries that were identified by the TRA such as Columbia, India, Indonesia, Malaysia, Mexico, Peru, South Africa, Thailand, Türkiye and Vietnam. These countries are at a similar level of economic development as China, and several of these countries have in the past been selected as appropriate representative countries by other investigating authorities (*e.g.*, the European Commission)⁹ in anti-dumping cases against Chinese imports; thereby evidencing that reliable publicly available information can be obtained.

It is recalled that, in making a dumping determination, the investigating authority's establishment of the facts must be proper, and its evaluation of those facts must be unbiased and objective.¹⁰ This means that the investigating authority should conduct its own assessment of the facts underpinning the case at hand. An investigating authority would not be acting in accordance with its obligations if it were to accept a complainant's allegations and proposals without cross-checking the reliability of the information submitted and without gathering the necessary facts and evidence to reach a determination. The Sany Group thus trusts that the TRA will not limit its analysis to the Applicant's allegations and proposals, and that it will instead consider the appropriateness of other potential representative countries.

In summary, the Sany Group respectfully submits that:

- Logically, a finding of the existence of a particular market situation needs to be established prior to examining potential alternative sources;
- No particular market situation affecting the Chinese excavators market exists and, therefore, actual domestic sales prices and/or costs of Chinese producers of excavators should be used for the purposes of determining the normal value for the dumping margin calculations; and

⁹ *See*, for example: Commission Implementing Regulation (EU) 2023/2659 of 27 November 2023 imposing a provisional anti-dumping duty on imports of certain polyethylene terephthalate originating in People's Republic of China; Commission Implementing Regulation (EU) 2020/1336 of 25 September 2020 imposing definitive anti-dumping duties on imports of certain polyvinyl alcohols originating in the People's Republic of China.

¹⁰ ADA, Article 17.6(i).

- Should the TRA nevertheless decide to use price or cost data from a third country, the TRA should not only consider Brazil as an appropriate representative country but also other countries at a similar level of economic development as China.

We thank you for your consideration of these comments.

Please do not hesitate to contact us should you have any questions and/or comments.

Yours faithfully,

