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NON-CONFIDENTIAL

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Subject: AD0047 – Anti-dumping investigation concerning certain excavators imported into the United Kingdom from the People's Republic of China – Comments on the Statement of Essential Facts by the Sany Group

Dear Madam, Sir,

In the context of the above-mentioned investigation, we refer to the Statement of Essential Facts ("SEF") of 25 November 2024, by which the essential facts and considerations on the basis of which the Trade Remedies Authority ("TRA") intends to recommend the imposition of anti-dumping ("AD") duties were disclosed to our client, *i.e.*, Sany Heavy Machinery Ltd. ("Sany Kunshan"), Shanghai Sany Heavy Machinery Co., Ltd. ("Sany Shanghai"), and Sany Heavy Machinery (UK) Ltd. ("Sany UK"), collectively referred to as "the Sany Group". For the Sany Group, the established dumping margin is 33.03% and the injury margin is 66.08%. Thus, the rate of AD duty proposed for the Sany Group is 33.03%.

We also refer to (i) your email of 15 November 2024, by which our client was provided with a non-confidential version of the TRA's dumping and injury calculations underpinning the TRA's findings in the SEF; and (ii) the meeting we had with the Case Team on 11 December 2024. In this regard, our client would like to express its gratitude for the opportunity it had to discuss the dumping calculations with the Case Team.

In these comments, the Sany Group will address the following issues:

1. The rejection of the Sany Group's requests to exclude XXL excavators and electric-powered excavators from the product scope of the investigation;
2. Finding of a particular market situation ("PMS") in China;
3. Determination of the normal value, and more specifically the profit determination to construct the normal value;
4. Comments on injury and causation; and
5. Request for [CONFIDENTIAL].

1. Comments on product scope

To start on a positive note, the Sany Group welcomes – and appreciates – the TRA's decision to exclude XXXL excavators (*i.e.*, excavators with an operating weight of 80 tonnes or above) from the scope of the present investigation and proposed AD measures.¹ The Sany Group, however, has some comments concerning the TRA's decision not to exclude:

- a. XXL excavators (*i.e.*, excavators with an operating weight between ≥ 55 tonnes and < 80 tonnes); and
- b. electric-powered excavators ("electric excavators").

a. **XXL excavators**

In the SEF, the TRA concluded that "*a(n) XL excavator [i.e., an excavator with an operating weight between ≥ 30 tonnes and < 55 tonnes] produced in the UK and a XXL excavator imported to the UK from the PRC will share physical and commercial characteristics closely resembling one another and could therefore be substitutable or interchangeable for one another.*"² However, as held by the WTO Appellate Body, finding that two products are "*like*" (*i.e.*, "*share physical and commercial characteristics closely resembling one another*") is not a sufficient basis for finding that such products are "*substitutable or interchangeable for one another*".³

The Sany Group thus maintains its position that there is no legal or factual basis for imposing measures on XXL excavators because (i) the UK industry, as defined in the SEF,⁴ does not produce excavators with an operating weight of more than 40 tonnes;⁵ and (ii) excavators with an operating weight of 11-40 tonnes are *not* substitutable or interchangeable for excavators with an operating weight of 55 tonnes or more.⁶ Therefore, there can be no injury to the UK industry on account of imports of XXL excavators from China.

Indeed, even if there were "*some competition*" in the UK market between XL and XXL excavators (*quod non*),⁷ such competition would be extremely limited, and not a sufficient justification for imposing measures on product categories not produced by the UK industry that can cause no injury to the UK industry. To avoid repetitions and for the sake of conciseness, the Sany Group hereby incorporates by reference its comments filed on 22 July 2024, which detail the reasons in support of this submission. In short: (i) duties on excavators with an operating weight between 11 and 55 tonnes

¹ Case AD0047 - Certain excavators from China, Statement of Essential Facts, paras. 62-63.

² Case AD0047 - Certain excavators from China, Statement of Essential Facts, para. 83. See also para. 61.

³ Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.263, referring to Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1120.

⁴ Case AD0047 - Certain excavators from China, Statement of Essential Facts, para. 99.

⁵ Case AD0047 - Certain excavators from China, Statement of Essential Facts, para. 66.

⁶ Sany Group, Comments on change to PCN (22 July 2024), pp. 2-5.

⁷ Case AD0047 - Certain excavators from China, Statement of Essential Facts, para. 81.

shall be more than sufficient to protect an industry that produces excavators with a maximum operating weight of 40 tonnes; and (ii) by contrast, duties on excavators with an operating weight up to 80 tonnes would be disproportionate and unjustified.

b. Electric-powered excavators

In the SEF, the TRA also concluded that it was not required to exclude electric-powered excavators from the scope of the present investigation because "*UK produced goods, with an internal combustion engine, still have characteristics closely resembling those of an electric-powered excavator from the PRC [...] including physical characteristics and end use*";⁸ and (ii) electric excavators "*are intended to be a direct substitute for those powered by internal combustion*."⁹ The Sany Group disagrees with these findings for the following reasons.

First, there is a clear dividing line between the markets for electric excavators and excavators with internal combustion engines ("ICE excavators"), and thus limited competition between these two product categories. Indeed, the TRA itself "*accepted that an electric excavator may not always be an alternative to an internal combustion excavator in various settings, based on battery life and the need to recharge*".¹⁰

In this connection, the Sany Group notes that, while the SEF states that the circumstances in which electric excavators are not an alternative option "*are sufficiently rare that they are not likely to be a deciding factor in purchasing decisions of downstream users*",¹¹ such circumstances are not at all "*rare*" in the UK, where the infrastructures necessary for electric machinery are currently lacking.¹² Moreover, the SEF does not take into consideration that the price of an electric excavator is normally twice the price of an ICE excavator,¹³ and this is undoubtedly "*a deciding factor in purchasing decisions of downstream users*" along with infrastructure availability and operating conditions. Indeed, electric excavators currently cater to niche markets with specific environmental and operational requirements, distinguishing them from ICE models. For example, Sany UK's [CONFIDENTIAL] is quoted at [CONFIDENTIAL], while [CONFIDENTIAL] is quoted at [CONFIDENTIAL].

Additionally, the Sany Group notes that, in the near future, ICE excavators will not be a viable alternative to electric excavators because of the UK Government's plan to achieve a net-zero-emission

⁸ Case AD0047 - Certain excavators from China, Statement of Essential Facts, para. 86.

⁹ Case AD0047 - Certain excavators from China, Statement of Essential Facts, para. 87.

¹⁰ Case AD0047 - Certain excavators from China, Statement of Essential Facts, para. 85. [Emphasis added]

¹¹ Case AD0047 - Certain excavators from China, Statement of Essential Facts, para. 87.

¹² Climate Change Committee, "2024 Progress Report to Parliament", available at <<https://www.theccc.org.uk/publication/progress-in-reducing-emissions-2024-report-to-parliament/>>.

¹³ See, for example, Luc Bernard, "European dealers weigh the benefits of buying Chinese EV equipment" (16 August 2024, available at: <<https://www.internationalrentalnews.com/news/european-dealers-weigh-the-benefits-of-buying-chinese-ev-equipment/8037542.article>>: "*Van Klaveren says that the larger machines cost around €470,000. This compares with a similar diesel machine which would probably cost around €250,000 – effectively making the electric machine double the price.*"

economy.¹⁴ For example, starting from 1 January 2040, only zero-emission machinery will be allowed within Greater London.¹⁵ Moreover, the Lower Thames Crossing – *i.e.*, the largest construction project envisaged in the UK for the next 6 years that will create a new road and tunnel to double capacity across the river Thames east of London – plans to remove 20 million litres of diesel from its worksites.¹⁶ This will involve replacing all ICE construction equipment machines with zero-emission machines. The project should start in 2026, but the Planning Inspectorate should make a recommendation to the Secretary of State for Transport to authorize the building and operation of the new crossing already in March 2025, and a final decision is expected in May/June 2025.

Second, as also partially acknowledged in the SEF,¹⁷ any injury allegedly suffered by the UK industry could not have been caused by imports of electric excavators because (i) there were no sales of these excavators in the UK during the period of investigation ("POI") and (ii) the UK industry does not produce these products. Since "*the very purpose of an anti-dumping duty is to counteract the material injury caused, or threatened to be caused, by "dumped imports" to the domestic industry producing a "like product"*",¹⁸ the Sany Group submits that there is no legal or factual basis for imposing measures on product categories (i) for which there is no evidence of dumping and (ii) that did not cause – and in fact could not have caused – any injury to the UK industry.

Third, in any event, measures on imports of electric excavators would run against the UK interest. Contrary to what the Applicant claims, the request to exclude electric excavators from the scope of the measures is not "*hypothetical and moot*".¹⁹ In fact, even though there were no sales of electric excavators in the UK during the POI, such sales started around 12 months ago, and the market for electric excavators is set to expand considerably over the coming years.²⁰ Moreover, the Sany Group is aware that the UK industry is behind schedule in developing hydrogen-powered excavators (and as noted above does not produce electric excavators at all). Therefore, any AD measure on imports of electric excavators would sit very uneasily with the UK's legally binding objective to meet net zero by 2050.²¹ Ultimately, any such measure would run counter to the UK interest because the prices of all electric excavators available on the UK market will be higher on account of the duties, and it will be the UK government (with the UK citizens' taxes) that will pay for such duties because electric

¹⁴ House of Commons Library, "The UK's plans and progress to reach net zero by 2050", available at <<https://researchbriefings.files.parliament.uk/documents/CBP-9888/CBP-9888.pdf>>.

¹⁵ Mayor of London, London Assembly, "London's Low Emission Zone for Non-Road Mobile Machinery", available at <<https://www.london.gov.uk/programmes-and-strategies/environment-and-climate-change/pollution-and-air-quality/nrmm?ac-226887=226870>>.

¹⁶ National Highways, "Lower Thames Crossing first major UK infrastructure project to be awarded Gold by the Carbon Literacy Project", available at <<https://nationalhighways.co.uk/our-roads/lower-thames-crossing/news-and-media/carbon-literacy-project-gold-award/>>.

¹⁷ Case AD0047 - Certain excavators from China, Statement of Essential Facts, para. 70.

¹⁸ Appellate Body Report, *US – Continued Zeroing*, para. 284.

¹⁹ Case AD0047 - Certain excavators from China, Statement of Essential Facts, para. 70.

²⁰ Construction Equipment Association, PPT Members' Forum 11 July 2024, attached as **Annex 1 – CONFIDENTIAL**.

²¹ House of Commons Library, "Research briefing: The UK's plans and progress to reach net zero by 2050", available at <[https://commonslibrary.parliament.uk/research-briefings/cbp-9888/#:~:text=Policy%20developments%20in%202023,period%20between%202033%20and%202037\).>](https://commonslibrary.parliament.uk/research-briefings/cbp-9888/#:~:text=Policy%20developments%20in%202023,period%20between%202033%20and%202037).>).

excavators will be used in the context of government-funded projects (such as the Lower Thames Crossing mentioned above).

2. Comments on the finding of a PMS in China

a. Finding of PMS not based on positive evidence

In the SEF, the TRA "*concluded that a PMS exists in the domestic excavator market in the PRC, as the price of excavators reflect[s] non-commercial factors as a result of government influence and control in steel and key excavator component costs.*"²² The Sany Group notes that this finding is essentially based on facts available and that, based on this finding, the TRA constructed the normal value with adjustments for some of the Sany Group's costs of production.

As confirmed by several WTO reports, in the application of facts available, the "*alternative facts*" used by an investigating authority (i) must "*reasonably replace*" the allegedly missing information,²³ and (ii) must be correct information, as the authorities are required to reach an "*accurate*" determination.²⁴ The Sany Group respectfully submits that the facts underpinning the TRA's finding of a PMS are neither accurate nor correct. Furthermore, such a finding seems to be based on mere assumptions or on general policies, some of which are no longer in place. To recall, every determination by an authority has to be based on "*facts [...] not mere inferences*".²⁵ When applying facts available, an authority is not at liberty to "*assume a lot from very little*".²⁶

Against this background, as further elaborated below, the Sany Group respectfully submits that (i) there is essentially no evidence of the existence of a PMS for excavators in China, and (ii) to the extent that there is evidence, it points in the opposite direction, *i.e.*, it shows that there is no PMS affecting the Chinese producers' market costs and prices.

i. Finding of PMS based on assumptions and unrelated policies

The TRA's finding of a PMS is based on supposed government support to (and supposed state influence and control over) Chinese producers of excavators. However, these considerations do not appear to be based on facts and positive evidence.

First, the SEF erroneously relies on general infrastructure, public policy laws and regulations as a basis for finding the existence of a PMS. For instance, the SEF states that "*the GoC supports many of*

²² Case AD0047 - Certain excavators from China, Statement of Essential Facts, para. 123.

²³ Panel Report, *US – Anti-Dumping and Countervailing Duties (Korea)*, para. 7.41. See also: Appellate Body Report, *US – Carbon Steel (India)*, para. 4.416, citing Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 294; and Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.178.

²⁴ Appellate Body Report, *US – Carbon Steel (India)*, para. 4.416, citing Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 293; and Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.178.

²⁵ Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.80.

²⁶ Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.109.

the industries that supply the inputs for the manufacture of excavators in accordance with their national industrial strategy",²⁷ such as the 14th Five-Year Plan for Economic and Social Development (2021-2025), the Made in China 2025 strategy, and the 14th Five-Year Plan for Development of Raw Materials Industries.²⁸ However, these are non-binding documents setting out general development goals like the UK's "Advanced Manufacturing Plan",²⁹ Policy paper "Construction Sector Deal",³⁰ and "Industrial Strategy: Building a Britain fit for the future".³¹ The table below provides some examples that support this position:

China		UK	
14 th Five-Year Plan for Economic and Social Development (2021-2025)	" <u>R</u> educe the production and operating <u>c</u> osts of enterprises, and <u>e</u> nhance the rootedness and <u>c</u> ompetitiveness of the manufacturing industry"	Advanced Manufacturing Plan	"As part of our Advanced Manufacturing Plan we are prioritising: a) investing in the long-term future of manufacturing; b) cooperating internationally and building supply chain resilience; and c) <u>r</u> educing <u>c</u> osts and <u>r</u> emoving barriers to <u>b</u> oost <u>c</u> ompetitiveness."
	"We will promote the clean, low-carbon, safe, and efficient use of energy and <u>a</u> dvance the <u>l</u> ow-carbon <u>t</u> ransformation of <u>i</u> ndustry, construction, and transportation in an in-depth manner."		"At Autumn Statement 2023, the Government announced it is providing support to <u>h</u> elp <u>i</u> ndustry <u>t</u> ransition to a <u>r</u> esilient, <u>l</u> ow-carbon, and <u>c</u> ompetitive future. This includes spending £185 million on the Industrial Energy Transformation Fund (IETF) to support industrial sites with investment in more energy efficient and low-carbon technologies."
	"We will <u>p</u> romote an <u>o</u> ptimal <u>a</u> llocation of scientific research <u>p</u> ower and the <u>s</u> haring of <u>r</u> esources among research institutes, institutions of higher education, and enterprises. We will <u>s</u> upport the development of <u>n</u> ew types of innovative entities, such as new types of research universities and new types of <u>r</u> esearch and development (R&D) <u>i</u> nstitutions, and <u>p</u> romote the <u>d</u> iversification of investors, the modernization of management systems, the marketization of operating mechanisms, and the	Policy Paper "Construction Sector Deal"	"The Transforming Construction programme will <u>d</u> rive <u>i</u> nnovation and <u>c</u> ollaboration in the sector through <u>i</u> nvesting in research and technology centres that can support this, and <u>f</u> unding R&D and demonstration projects that will enable the development and testing of digitally designed and manufactured buildings and infrastructure. This is already an area of strength for the UK, with organisations like SPECIFIC in Swansea using the latest in digital and offsite technology to build an office capable of generating more energy than it uses."

²⁷ Case AD0047 - Certain excavators from China, Statement of Essential Facts, para. 235.

²⁸ Case AD0047 - Certain excavators from China, Statement of Essential Facts, paras. 157 and 160.

²⁹ UK Department for Business & Trade, "Advanced Manufacturing Plan", available at <<https://assets.publishing.service.gov.uk/media/65788f51095987000d95df34/advanced-manufacturing-plan.pdf>>.

³⁰ UK Department for Business, Energy & Industrial Strategy, "Policy paper "Construction Sector Deal", available at <<https://www.gov.uk/government/publications/construction-sector-deal/construction-sector-deal#:~:text=Government%20action%20to%20support%20construction&text=Attract%2C%20retain%20and%20develop%20the,by%202022%20%5Bfootnote%2022%5D.>>>.

³¹ UK HM Government, "Industrial Strategy: Building a Britain fit for the future", available at <<https://assets.publishing.service.gov.uk/media/5a8224cbcd915d74e3401f69/industrial-strategy-white-paper-web-ready-version.pdf>>.

China		UK	
	<p>flexibility of employment mechanisms"</p> <p>"We will <u>improve the market-oriented mechanisms for technological innovation</u>, strengthen the status of enterprises as the principal entities of innovation, promote the concentration of various innovation factors in enterprises, and form a market-oriented technological innovation system characterized by enterprises as the main entities and the in-depth integration of industry, academia, research institutes, and users."</p>		<p>"The application of innovative technologies and digital data will <u>help drive transformation</u> in the business models and productivity of the sector, and will also link <u>the Transforming Construction programme with other Industrial Strategy Challenge Fund supported programmes</u>, including the Buildings Mission and Clean Growth Grand Challenge, the Artificial Intelligence and Data Driven Economy Grand Challenges, <u>as well other programmes funded by UK Research and Innovation on data science, manufacturing technologies, the built environment and energy and the Information Management Landscape (IML).</u>"</p>
Made in China 2025 strategy	<p>"Coordinate the layout and <u>promote the R&D</u> and industrialization"</p>		<p>"The [Transforming Construction] programme will deliver: an <u>increase in R&D funding</u> aligned with strategic industry priorities such as those identified in the Infrastructure Industry Innovation Platform (i3P) Technology Roadmap"</p>
National Development and Reform Commission	<p>"Promoting the great rejuvenation of the Chinese nation through a Chinese path to modernization is the goal of China's economic development, and bringing prosperity for all is an important feature of Chinese modernization. [...] <u>Economic development is the central task of the Party</u>, and the Party should lead all aspects of economic work. [...] Since the 18th CPC National Congress [2012], the Party Central Committee with Comrade Xi Jinping at its core has stayed true to our fundamental purpose of [...] a] fully enhanced top-level design and overall layout for major work in the economic field."</p>	Industrial Strategy: Building a Britain fit for the future	<p>"That is why <u>one of my first actions as Prime Minister was to begin the development of a modern Industrial Strategy that would help businesses to create high quality, well paid jobs right across the country</u>. This document is a vital step in delivering that vision. <u>More than just a set of announcements, it heralds a new approach to how government and business can work together to shape a stronger, fairer economy</u>. At its heart it epitomises my belief in a <u>strong and strategic state that intervenes decisively</u> wherever it can make a difference. It is rooted in the conviction that a successful freemarket economy must be built on firm foundations: the skills of its workers, the quality of the infrastructure, and a fair and predictable business environment. And where these are missing <u>it takes energy and partnership between government and the private sector to address the problems.</u>"</p>

While the SEF states that "the 14th FYP is not just a guidance document, but something that is understood as a set of requirements by the main PRC excavator industry body",³² the Sany Group notes that such a finding rests purely on (machine-translated) press statements of the CCMIA and the Liugong Group³³ – which, for the sake of clarity, the Sany Group contests. Similarly, the Sany Group's and Liugong Group's statements that they intend "to work towards the objectives laid out by the GoC"

³² Case AD0047 - Certain excavators from China, Statement of Essential Facts, para. 154.

³³ Case AD0047 - Certain excavators from China, Statement of Essential Facts, para. 150.

cannot be taken as evidence that such plans and policies are mandatory.³⁴ Moreover, and in any event, the fact remains that there is no penalty for entities that do not implement or follow the documents listed above. Therefore, such documents cannot be used as a basis for determining the existence of government control, much less the existence of a PMS for excavators in China.

Second, the SEF acknowledges that the policies in question "*are generally phrased in terms of aims and ambitions for the GOC rather than explicit actions*",³⁵ but then asserts that "*they form the basis for government support in the PRC*", without adducing any evidence in support of this assertion.³⁶ The contradiction is stark and puzzling: indeed, how can policies that do not envisage any "*explicit action*" result (concretely) in any "*government support*"? In this regard, the Sany Group would like to emphasise that there is nothing "*distinct, individual, single, specific*" about the situation of the excavators' industry or producers in China for it to be classified as a PMS.³⁷

In any event, there is nothing connecting the TRA's analysis in the SEF to the excavator industry. The statements that (i) the Catalogue of Industrial Base Innovation and Development (2021) "*lists excavator parts in its list of products needed for “upgrading the industrial base and modernizing the industrial chain, and to implement the task requirements of the Party Central Committee and the State Council”*"; (ii) the 14th Five-Year Development Plan for the Construction Machinery Industry "*refers to the need to develop “high-end [construction machinery] parts”*" while listing "*over 119 kinds of products, parts, and technologies from the construction machinery industry which should be encouraged*"; and (iii) "*[t]here are also a multitude of [state-owned enterprises “SOEs”] which manufacture excavator parts*" are an inadequate basis for a finding of state support allegedly affecting the prices and costs of the Chinese producers of excavators.³⁸ There is no link between the GOC policies discussed in the SEF and the excavator sector and/or the costs and prices of the Chinese producers of excavators.

In this regard, the Sany Group notes that the WTO Anti-Dumping Agreement ("ADA"), particularly the text of Article 5.2, makes a clear difference between evidence and assertions in stating that "*simple assertion, unsubstantiated by relevant evidence*" is insufficient to meet the requirements of that provision. Thus, the "evidence" for a determination on a specific issue, *i.e.*, a PMS for excavators in the domestic market, needs to be more than mere assertions and statements and needs to include material information and data establishing the factual issue.³⁹ Evidence must have probative value,⁴⁰ and be related to the specific aspect, *i.e.*, a PMS for the excavator domestic market.

³⁴ Case AD0047 - Certain excavators from China, Statement of Essential Facts, para. 152.

³⁵ Case AD0047 - Certain excavators from China, Statement of Essential Facts, para. 160.

³⁶ Case AD0047 - Certain excavators from China, Statement of Essential Facts, para. 160.

³⁷ Panel Report, *Australia – Anti-Dumping Measures on Paper*, para. 7.22.

³⁸ Case AD0047 - Certain excavators from China, Statement of Essential Facts, paras. 169-170.

³⁹ Panel Report, *Pakistan – BOPP Film (UAE)*, para. 7.19.

⁴⁰ Panel Report, *Morocco – Definitive AD Measures on Exercise Books (Tunisia)*, para. 7.352.

Third, the finding that "government influence causes the price of excavators to reflect non-commercial factors" does not seem properly substantiated.⁴¹ Such a finding rests on "evidence that government influence is present within both SOEs and private organisations, including the sampled exporters".⁴² However, to begin with, there is no evidence that the GOC's shareholding in the Liugong Group makes it state-controlled and state-influenced, *i.e.*, the effect of share-holding and ownership in terms of state control has not been established. Other than looking at state ownership, the SEF does not address or establish whether state ownership affected the activities and operations of the Group, particularly concerning excavators, *i.e.*, there is no assessment of whether the GOC in fact exercised control over the Liugong Group and its conduct. The SEF appears to simply assume that the GOC influence "is clearest in SOEs such as the Liugong Group" because such a group "actively promotes its alignment with government policy".⁴³

As confirmed by WTO case law in anti-subsidy cases, government ownership is not evidence of meaningful control by the government over an entity⁴⁴ or of entrustment or direction. Indeed, with regard to private entities, notwithstanding governmental ownership, there must be "evidence of an affirmative act of delegation or command before a finding of entrustment or direction may be made".⁴⁵ As in the case of anti-subsidy investigations, to consider that the GOC "influences" a private entity, the TRA is required to demonstrate "evidence of entrustment and direction", which – as held by the Panel in *US – Countervailing Duty Investigation on DRAMs* – "must in all cases be probative and compelling".⁴⁶ Government influence cannot be assumed to exist.

Moreover, even if one sampled producer that is exporting excavators is wholly state-owned, this is not evidence of control or influence by the GOC over all other producers of excavators such that the whole excavator sector's costs and prices would be influenced by non-commercial factors thereby reflective of a PMS. Thus, there seem to be several legal and factual gaps in the TRA's analysis.

With regard to the Sany Group, the evidence relied upon by the TRA to determine the existence of state influence is that "*there was at least one leading PRC politician and a senior member of the GoC either holding a director position or being a member of the board.*"⁴⁷ On this basis, the TRA concluded that "*the influence of the GoC also extends to the private sector*".⁴⁸ However, even in this context, there is no evidence of actual control of the GOC shareholders on the Sany Group's operations, conduct and activities.

⁴¹ Case AD0047 - Certain excavators from China, Statement of Essential Facts, para. 157.

⁴² Case AD0047 - Certain excavators from China, Statement of Essential Facts, para. 157.

⁴³ Case AD0047 - Certain excavators from China, Statement of Essential Facts, para. 145.

⁴⁴ Appellate Body Report, *US – Carbon Steel (India)*, paras. 4.36-4.43.

⁴⁵ Panel Report, *Korea – Commercial Vehicles*, para. 7.406. [Emphasis added]

⁴⁶ Panel Report, *US – Countervailing Duty Investigation on DRAMs*, para. 7.35. [Emphasis added]

⁴⁷ Case AD0047 - Certain excavators from China, Statement of Essential Facts, para. 145.

⁴⁸ Case AD0047 - Certain excavators from China, Statement of Essential Facts, para. 145.

The Sany Group hereby recalls that, according to Articles 36 and 46 of the Chinese Company Law, the Board of Shareholders is the authority of the company, and the Board of Directors is in charge of executing the resolutions passed by the Board of Shareholders. According to the Chinese Company Law, the GOC cannot interfere with the operations of companies. The Sany Group thus strongly disagrees that the Chinese Company Law "*is precisely what guarantees that a third party can in fact intervene in the operation of their, or any other, company operating within the PRC*",⁴⁹ irrespective of whether companies "*must "provide necessary conditions to facilitate the activities of the [Chinese Communist] Party*"."⁵⁰

In addition, the SEF seems to assume the existence of state influence because one of the companies within the Sany Group supposedly enhanced its international competitiveness by "*going global*" and because its 2021 Corporate Social Responsibility Report states that the Group intends to implement the GOC's strategies of digitalization, electrification and internationalization.⁵¹ However, this is insufficient to conclude that the Sany Group is under government control.

Fourth, the fact that the finding of a PMS is based on assumptions rather than actual evidence is also reflected in the choice of the TRA's words throughout the SEF. For example:

- (i) To support the conclusion that the prices of key inputs for the production of excavators reflect non-commercial factors, the SEF states that:
 - Yongsheng Heavy Industry's statements concerning the company's party branch "*indicate a high likelihood of prices reflecting non-commercial factors*";⁵² and
 - it is "*unlikely that a PRC based producer of engines would not benefit from GoC intervention in this market*";⁵³
- (ii) To support the conclusion that the "*GoC influence in the finance market results in prices which reflect non-commercial factors*",⁵⁴ the SEF states that:
 - it is "*likely that the Liugong Group, as an SOE, benefits from preferential financial arrangements*";⁵⁵ and

⁴⁹ Case AD0047 - Certain excavators from China, Statement of Essential Facts, para. 156.

⁵⁰ Case AD0047 - Certain excavators from China, Statement of Essential Facts, para. 144.

⁵¹ Case AD0047 - Certain excavators from China, Statement of Essential Facts, paras. 151-152.

⁵² Case AD0047 - Certain excavators from China, Statement of Essential Facts, para. 171. [Emphasis added]

⁵³ Case AD0047 - Certain excavators from China, Statement of Essential Facts, para. 176. [Emphasis added]

⁵⁴ Case AD0047 - Certain excavators from China, Statement of Essential Facts, para. 259.

⁵⁵ Case AD0047 - Certain excavators from China, Statement of Essential Facts, para. 218. [Emphasis added]

- the fact that a commercial bank is part of the Sany Group "*increases the likelihood that the Sany Group has access to preferential financial arrangements*";⁵⁶

(iii) In the context of assessing whether excavator producers in China receive any tax benefits, the SEF states that "*it is likely that [the 14th FYP] has resulted in a corporate tax reduction for excavator producers in the PRC*".⁵⁷

Fifth, the SEF acknowledges that "*there is a clear distinction between the production of steel and [other] various excavator components*"⁵⁸ but then concludes that "*even if there was no other evidence of state intervention in the excavator component market, it becomes difficult to see how the prices of these inputs could not reflect non-commercial factors due to the high proportion of steel present in these inputs*".⁵⁹ The SEF thus simply *assumes* that, if steel prices reflect non-commercial factors, then the prices of any component made of steel also reflect non-commercial factors, and ultimately the prices of the excavators reflect non-commercial factors because they are made of such components. However, as held in the context of subsidy cases by the Appellate Body, if duties are to be imposed on "*a processed product (and not the input product), it is not sufficient for an investigating authority to establish the existence of a financial contribution only for the input product and the conferral of a benefit to the input producer*".⁶⁰ The Sany Group thus respectfully submits that, in the absence of any pass-through analysis, such a conclusion constitutes an assertion that is not supported by any positive evidence and that, therefore cannot support a finding of a PMS for the excavator sector in China.

In sum, the Sany Group respectfully submits that it has not been established on the basis of positive evidence that (i) "*government influence is present within both SOEs and private organisations, including the sampled exporters*"; and (ii) "*government influence causes the price of excavators to reflect non-commercial factors*".⁶¹

ii. *Excessive reliance on previous investigations, past findings of the European Commission and outdated information*

The Sany Group notes that the assessment of a PMS in the SEF, particularly that "*prices of finance, land, energy, R&D, and labour reflect non-commercial factors, due to government intervention and policies*"⁶² – is largely based on outdated information, past and unrelated findings of the TRA in other investigations and (very) old findings of the European Commission ("Commission") (that were moreover made on the basis of adverse inferences and that too for unrelated products).

⁵⁶ Case AD0047 - Certain excavators from China, Statement of Essential Facts, para. 219. [Emphasis added]

⁵⁷ Case AD0047 - Certain excavators from China, Statement of Essential Facts, para. 225. [Emphasis added]

⁵⁸ Case AD0047 - Certain excavators from China, Statement of Essential Facts, para. 167.

⁵⁹ Case AD0047 - Certain excavators from China, Statement of Essential Facts, para. 167.

⁶⁰ Appellate Body Report, *US – Softwood Lumber IV*, para. 142. [Emphasis added]

⁶¹ Case AD0047 - Certain excavators from China, Statement of Essential Facts, para. 157.

⁶² Case AD0047 - Certain excavators from China, Statement of Essential Facts, para. 236.

For example, the findings that the land, energy and labour markets in China reflect non-commercial factors are based on the TRA's past findings in Case AD0021 Optical Fibre Cables, which was in turn entirely based on the Commission's historical AD investigations concerning imports of (i) certain organic coated steel products from China pertaining to 2013, (ii) certain filament glass fibre products from China completed in 2014, and (iii) aspartame from China completed in 2016. The most recent of these investigations was, therefore, concluded in 2016 and the oldest was concluded as far back as 11 years ago, in 2013. The SEF does not mention how the findings in those cases (or Case AD0021 Optical Fibre Cables) relate to the POI of the present case. Additionally, those investigations concerned completely different products. The conclusions reached by the TRA and the Commission in those investigations are, therefore, totally irrelevant for the purposes of the present proceeding, which concerns a different product and entirely different factual and legal circumstances. Indeed, all the above investigations concern different markets and different products that have no connection with the product under consideration. Moreover, all findings in those cases were based on adverse inferences.

The Sany Group hereby recalls that it is for the TRA to determine, on the basis of positive evidence and through an objective examination, the existence of a PMS pursuant to Regulation 7(4) of the Trade Remedies (Dumping and Subsidisation) (EU Exit) Regulations 2019 ("UK basic Regulations")⁶³ and Article 2.2 ADA. Mere references to old and unrelated investigations (also conducted by a different investigating authority) cannot substitute the requirement imposed on the TRA to make determinations based on positive evidence.

Similarly, the TRA's reliance on the Commission's Working Document on Significant Distortions in the Chinese Economy ("EC Working Document") is misplaced.⁶⁴ Aside from the various analytical and methodological problems in the EC Working Document, the latter is an erroneous and historical view of certain Chinese policies, market conditions and supposed government intervention in certain sectors. Moreover, that document is based on decades-old information. The EC Working Document does not even contain any discussion of the excavator sector. It cannot be concluded on the basis of such a document that all inputs used in the production of excavators and excavator sales prices in China are influenced by non-commercial factors.

Likewise, the reliance on the general, countrywide 14th FYP and Made in China 2025 plan is irrelevant and does not support the finding of distortions of excavators' raw material costs or other costs of production. In fact, (i) as is clear from the use of the terms "*right*" and "*may*" (as opposed to "*obligation*" and "*shall*"), the cited governmental policies have no binding effect;⁶⁵ and (ii) just like

⁶³ S.I. 2019/450, as amended.

⁶⁴ Case AD0047 - Certain excavators from China, Statement of Essential Facts, paras. 186, 219 and 224.

⁶⁵ Case AD0047 - Certain excavators from China, Statement of Essential Facts, paras. 217 and 220.

the Liugong Group, the Sany Group has no knowledge of interest rates being influenced by non-market forces.⁶⁶

Finally, the Sany Group notes the misplaced reliance in the SEF on outdated sources. For example:

- (i) To support its finding that "*a PMS exists in the energy market in the PRC at a national and local level, causing prices to be artificially low*",⁶⁷ the TRA relied on:
 - The Trade Policy Review of the PRC, which was published in 2021 and based on pre-2020 data;⁶⁸ and
 - The "Notice on the on-grid electricity price and general industrial and commercial electricity price", which was published in 2015 (and not 2021 as incorrectly stated in the SEF).⁶⁹ In 2021, the National Development and Reform Commission published a different public notice, which strives to deepen the electricity market reform by explicitly encouraging "*all industrial and commercial participants to enter the market*" and cancelling "*the industrial and commercial catalogue sales electricity prices*."⁷⁰
- (ii) To support its finding that "*the labour market reflects non-commercial factors*",⁷¹ the TRA has relied on:
 - A press release published on 17 January 2019;⁷²
 - Some unspecified "*Reports from 2013-2015*";⁷³ and
 - Some "*more recent research from 2022*", which is nevertheless based on a *survey* conducted in 2018.⁷⁴

⁶⁶ Case AD0047 - Certain excavators from China, Statement of Essential Facts, para. 220.

⁶⁷ Case AD0047 - Certain excavators from China, Statement of Essential Facts, para. 179.

⁶⁸ WTP, Trade Policy Review: China, available at <https://www.wto.org/english/tratop_e/tpr_e/tp515_e.htm>, cited in para. 179 of the SEF.

⁶⁹ National Development and Reform Commission, Notice on Reducing the On-Grid Electricity Price for Coal-fired Power Generation and the Electricity Price for General Industrial and Commercial Use (Fagai Jiajia [2015] No. 3105), available at <https://www.ndrc.gov.cn/xxgk/zcfb/tz/201512/t20151230_963541.html>, cited in para. 180 of the SEF.

⁷⁰ National Development and Reform Commission, Notice on Further Deepening the Market-Oriented Reform of On-Grid Electricity Prices for Coal-Fired Power Generation (Fagai Jiajia [2021] No. 1439), available at <https://www.ndrc.gov.cn/xxgk/zcfb/tz/202110/t20211012_1299461.html>.

⁷¹ Case AD0047 - Certain excavators from China, Statement of Essential Facts, para. 183.

⁷² China Briefing, "China's Hukou System: What it is and How it Works" (17 January 2019), available at <<https://www.china-briefing.com/news/chinas-hukou-system/>>, cited in paras. 187 and 189 of the SEF.

⁷³ Case AD0047 - Certain excavators from China, Statement of Essential Facts, para. 187.

⁷⁴ Chuangxin Zhao and Manping Tang, "Research on the Influence of Labor Contract on the Urban Integration of Migrant Workers: Empirical Analysis Based on China's Micro Data" (15 September 2022), available at

(iii) To support its finding that "*the land market in the PRC reflects non-commercial factors*",⁷⁵ the TRA has relied on:

- "*Research published in August 2023*" which is nevertheless based on papers dated as far back as 1996;⁷⁶ and
- "*[R]esearch conducted by CEPR and the Becker Friedman Institute for Economics*",⁷⁷ which is based on "*data on land sales from 2007 to 2019*".⁷⁸

(iv) To support its finding that it is "*likely that the Liugong Group, as an SOE, benefits from preferential financial arrangements such as fiscal and credit support*",⁷⁹ the TRA relied on a paper published in 1999.⁸⁰

iii. Finding of PMS contradicted by evidence available to the TRA

The assumptions underpinning the finding of a PMS in the SEF are also contradicted by the data submitted by the Sany Group and the TRA's own findings. This is particularly relevant in the context of the TRA's conclusions concerning finance, labour, R&D and energy costs reflecting alleged non-commercial factors.

The Sany Group recalls that, in applying facts available, an authority must take into account "*all substantiated facts on the record*".⁸¹ All facts that are properly before an authority must be considered when it selects the appropriate replacement facts.⁸² Thus, an authority cannot "*ignore*" any "*relevant and available information*" or "*improperly close[] its eyes to information before it*".⁸³

Against this background, the Sany Group has seven points to make.

<https://pmc.ncbi.nlm.nih.gov/articles/PMC9517089/#:~:text=About%2047.7%25%20of%20the%20migrant.of%20ab out%2041%20years%20old.>, section 3.1, cited in para. 190 of the SEF.

⁷⁵ Case AD0047 - Certain excavators from China, Statement of Essential Facts, para. 209.

⁷⁶ Mao Qiliang, Liu Linlu and Ji Wenyan, "Industrial policy and spatial arrangement of land leasing in China: A case of Jiangsu Province" (August 2023), available at <https://www.sciencedirect.com/science/article/abs/pii/S0264275123002135>, cited in para. 211 of the SEF.

⁷⁷ Case AD0047 - Certain excavators from China, Statement of Essential Facts, para. 213.

⁷⁸ CEPR, "Industrial land discount in China: A public finance perspective" (16 December 2022), available at <https://cepr.org/voxeu/columns/industrial-land-discount-china-public-finance-perspective/>. See also: Becker Friedman Institute for Economics, "Is There an Industrial Land Discount in China? A Public Finance Perspective" (15 February 2022), available at <https://bfi.uchicago.edu/insight/research-summary/is-there-an-industrial-land-discount-in-china-a-public-finance-perspective/>.

⁷⁹ Case AD0047 - Certain excavators from China, Statement of Essential Facts, para. 218.

⁸⁰ Sakura Institute of Research, Inc., "Three Reforms" in China: Progress and Outlook" (September 1999), available at <https://www.jri.co.jp/english/periodical/rim/1999/RIMe199904threereforms/> cited in para. 218 of the SEF.

⁸¹ Appellate Body Report, *US – Carbon Steel (India)*, para. 4.419. See also: Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.178 and Appellate Body Report, *US – Anti-Dumping Methodologies (China)*, para. 5.172.

⁸² Panel Report, *US – Anti-Dumping and Countervailing Duties (Korea)*, para. 7.302.

⁸³ Panel Report, *US – Supercalendered Paper*, paras. 7.182-7.185.

First, as regards the alleged distortion of labour and R&D costs, the TRA's findings that such costs are in fact higher than Brazilian and UK prices, respectively,⁸⁴ is clear evidence that no PMS for the excavator sector exists in China.

Second, by its own admission, "*whilst the TRA has concluded that finance costs reflect non-commercial factors, it has not determined that these costs are artificially low*",⁸⁵ which again proves that no PMS exists.

Third, the TRA's finding of the low materiality of the tax, energy and land costs⁸⁶ also reflects that even if there were non-commercial factors at play (*quod non*), they had no impact on the production and sales of excavators by the exporting producers and, therefore, cannot be evidence of a PMS.

Fourth, with regard to the alleged distortion of labour costs, the Sany Group further notes that the TRA's final determination in Case AD0012 Aluminium Extrusions provides completely opposite findings, even though the same country-wide situation is under consideration in the present case. In *Aluminium Extrusions*, the TRA determined that:

*"The TRA assessed relevant legislation including the Labour Law of the PRC. We did not identify any evidence to suggest that employers in the relevant market do not act as independent entities when hiring and dismissing employees. During verification of the sampled overseas exporters we did not identify any evidence to suggest that government influence had led to the hiring or dismissal of employees for those companies. The TRA did not identify any evidence to suggest the cost of labour was distorted in the relevant market. Minimum wage requirements are set out in the Labour Law of the PRC, and there is evidence of an increase in annual wages in manufacturing during the POI. The TRA determined that whilst the Trade Union Law of the PRC permits the existence of trade unions, these cannot operate independently and do not permit strike action. Although this is the case, there have been incidences of strike action occurring in the manufacturing industry for metallic products within the PRC. We have therefore determined that **we do not have evidence to demonstrate that the Trade Union Laws impact labour costs or the final price of the Goods Concerned.**"*⁸⁷ [Emphasis added and footnotes omitted]

In the present investigation, however, the TRA has reached the opposite conclusions in Section F2.1.5 of the SEF, despite having relied on the same sources for the same countrywide analysis as in the Aluminium Extrusions investigation. This inconsistent approach appears to lack objectivity (particularly in consideration of the fact that the Aluminium Extrusion Case was used to support the finding of PMS in other sections of the SEF).

⁸⁴ Case AD0047 - Certain excavators from China, Statement of Essential Facts, paras. 280 and 281.

⁸⁵ Case AD0047 - Certain excavators from China, Statement of Essential Facts, para. 259.

⁸⁶ Case AD0047 - Certain excavators from China, Statement of Essential Facts, para. 259.

⁸⁷ Case AD0012 - Certain excavators from China, Final Determination, paras. 149-151.

Fifth, the SEF acknowledges that the historical *hukou* registration system (which used to separate the population into agricultural and non-agricultural workers) was reformed in 2020.⁸⁸ However, it then asserts that *"even with recent reforms, the same structure still applies"* on the grounds that the reformed system *"only forms a recommendation"*.⁸⁹ The contradiction here is stark in that, while governmental policies and guidance are treated as binding laws, the labour legally-binding reform is considered irrelevant.

Sixth, as alluded to above, the SEF assumes that there would be a difference in pay between agricultural and non-agricultural workers on the basis of (i) a press release published on 17 January 2019;⁹⁰ (ii) some unspecified *"Reports from 2013-2015"*;⁹¹ and (iii) some *"more recent research from 2022"*, which is nevertheless based on a *survey* conducted in 2018.⁹² Clearly, such outdated documents do not – and cannot – constitute positive evidence of a situation that does not exist anymore. In Case AD0012 Aluminium Extrusions, the TRA had correctly found that Article 48 of the Chinese Labour Law sets out minimum wage requirements for all kinds of workers. Yet, in the case at hand, the TRA contradicts its own previous finding without providing sufficient evidence, explanation or reasoning.

In this connection, it is noted that the TRA dismissed the Liugong Group's submission that the GOC *"has been promoting market-oriented reforms, breaking up monopolies, promoting competition and regulating economic activities on the basis of the market mechanism" with labour prices being exclusively determined by the market* on the basis that *"[p]romotion of such reforms is also not the same as implementing them, and [...] there is evidence that such reforms have been watered down by local governments in the PRC."*⁹³ However, as noted above, such evidence is actually based on data pertaining to years *before* the law reform. Therefore, it cannot be relied upon. Moreover, even though this topic was not addressed during the on-the-spot verification, the Sany Group hereby submits that its workers have the right to participate in labour unions and can stage activities.

Finally, the SEF acknowledges that at least *"80 percent of electricity [prices ...] are set by the market"*.⁹⁴ Therefore, the conclusion that energy prices in China reflect non-commercial factors is contradicted by the facts on the record.⁹⁵

⁸⁸ Case AD0047 - Certain excavators from China, Statement of Essential Facts, para. 187.

⁸⁹ Case AD0047 - Certain excavators from China, Statement of Essential Facts, para. 187.

⁹⁰ China Briefing, "China's Hukou System: What it is and How it Works" (17 January 2019), available at <https://www.china-briefing.com/news/chinas-hukou-system>, cited in paras. 187 and 189 of the SEF.

⁹¹ Case AD0047 - Certain excavators from China, Statement of Essential Facts, para. 187.

⁹² Chuangxin Zhao and Manping Tang, "Research on the Influence of Labor Contract on the Urban Integration of Migrant Workers: Empirical Analysis Based on China's Micro Data" (15 September 2022), available at <https://pmc.ncbi.nlm.nih.gov/articles/PMC9517089/#:~:text=About%2047.7%25%20of%20the%20migrant,of%20about%2041%20years%20old.>, section 3.1, cited in para. 190 of the SEF.

⁹³ Case AD0047 - Certain excavators from China, Statement of Essential Facts, paras. 192-193.

⁹⁴ Case AD0047 - Certain excavators from China, Statement of Essential Facts, para. 181.

⁹⁵ Case AD0047 - Certain excavators from China, Statement of Essential Facts, para. 236.

iv. *Interim conclusion*

For the reasons given above, the Sany Group respectfully submits that the TRA's finding of a PMS seems to be based on assertions and not supported by positive evidence. Furthermore, the TRA's finding appears to be contradicted by the evidence on the record of this case as well as the TRA's own findings in Case AD0012 Aluminium Extrusions. Accordingly, the Sany Group respectfully requests the TRA to review and modify its findings, as there is no PMS for excavators in the Chinese market.

b. Even if there was a PMS, *quod non*, this would not prevent a proper comparison between the normal value and export price

To disregard domestic sales for the determination of the normal value on account of the existence of a "*particular market situation*", an investigating authority has not only to demonstrate the existence of a PMS, but it must also prove that a PMS "*do[es] not permit a proper comparison*" between the normal value and export prices. Indeed, as per Regulation 7(2)(b) of the UK basic Regulations and Article 2.2 of the ADA, an investigating authority has to demonstrate that the inability to conduct a "*proper comparison*" between home and foreign prices is "*because of*" the existence of a PMS. This was expressly noted by the WTO Panel in *Australia – Anti-Dumping Measures on Paper*⁹⁶ and by the GATT Panel in *EEC – Cotton Yarn*.⁹⁷ Particularly, in *Australia – Anti-Dumping Measures on Paper*, the Panel held that:

*"While the proper comparison in Article 2.2 refers to the comparison between the domestic and export prices, a purely numerical comparison between the two prices may not reveal anything about whether the domestic price can be properly compared with the export price. Rather, it is necessary to conduct a **qualitative comparison** of the domestic and export prices. The phrase "**because of the particular market situation**" makes clear that the qualitative assessment of whether the domestic and export prices can be properly compared **should focus on how the particular market situation affects that comparison**. We therefore consider that the "*proper comparison*" language calls for an assessment of the relative effect of the particular market situation on **domestic and export prices**. We understand that, in certain circumstances, as a result of this assessment, the investigating authority may conclude that the particular market situation has no effect on the export prices."⁹⁸ [Emphasis added].*

However, in the present investigation, the TRA seems to have omitted this step of the legal analysis, which requires an assessment of how the PMS affected that price comparison. The SEF indeed focuses on the alleged differences in "*conditions of competition*" between the UK and Chinese

⁹⁶ Panel Report, *Australia – Anti-Dumping Measures on Paper*, paras. 7.63-7.73.

⁹⁷ GATT Panel Report, *EEC – Cotton Yarn*, paras. 478-479.

⁹⁸ Panel Report, *Australia – Anti-Dumping Measures on Paper*, para. 7.75.

markets.⁹⁹ The Sany Group respectfully submits that, apart from being irrelevant, this assessment is flawed.

First, the situation of the UK market is irrelevant to the issue of a PMS in China. Rather, what is relevant, is the domestic market, *i.e.*, (only) the Chinese market, as also confirmed by the Panel in *Australia – Anti-Dumping Measures on Paper*. The Panel in that case held that "the word "market" in "the particular market situation" refers to the "market of the exporting country", i.e. the domestic market."¹⁰⁰

Second, without prejudice to the fact that the UK market is irrelevant for a PMS finding, no two markets are alike. Thus, if the standard to demonstrate an impossibility to compare normal value and export prices in the country of origin could rest only on the identification of any difference in competitive conditions between the exporting country and third country markets, Article 2.2 ADA would be rendered *inutile*, and an investigating authority could satisfy this step for about any product by comparing it to any random market. In fact, there are bound to be differences in competitive conditions between any two markets.

The TRA also overlooks that the UK itself subsidises electricity and provides cheap loans to producers (including JCB).¹⁰¹ Moreover, while the SEF emphasises the "*high level of competition coming from imports*" in the UK market,¹⁰² it fails to adequately capture or give weight to the fact that the number of excavator producers in the Chinese market is much higher compared to the UK, where, according to the SEF, there are only two producers, *i.e.*, JCB and Komatsu.

In any event, as noted above, the question is not whether there are differences in the conditions of competition between the UK and Chinese markets. Rather, the issue is about a proper price comparison in the country of origin. As noted by the Panel in *Australia – Anti-Dumping Measures on Paper*:

*"Turning to the assessment of whether "a proper comparison" is not permitted because of the particular market situation, we note that the focus of the analysis is on whether the effect of the particular market situation is such that a proper comparison between domestic sales prices and export prices under examination is not permitted. In other words, the investigating authority must examine the domestic sales in order to determine whether a proper **comparison***

⁹⁹ Case AD0047 - Certain excavators from China, Statement of Essential Facts, paras. 124-134.

¹⁰⁰ Panel Report, *Australia – Anti-Dumping Measures on Paper*, para. 7.38. [Emphasis added]

¹⁰¹ See, for example: UK Government, "Guidance Energy Bill Relief Scheme: help for businesses and other non-domestic customers" available at <<https://www.gov.uk/guidance/energy-bill-relief-scheme-help-for-businesses-and-other-non-domestic-customers>>; and JCB, "Building a greener future", available at <<https://www.jcb.com/en-gb/campaigns/road-to-zero>>, where JCB states that, in 2023, "*The UK government has given JCB special dispensation, which allows us to test and use our world-first hydrogen-powered backhoe loader on UK roads. The world's first digger, powered by a hydrogen combustion engine, will soon be on UK roads and building sites, helping to decarbonise the UK's construction industry and create hundreds of jobs.*"

¹⁰² Case AD0047 - Certain excavators from China, Statement of Essential Facts, para. 127.

between the two prices is permitted in spite of the effect of the particular market situation. The point is to determine if there is a comparable domestic price (i.e. if there is "the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country" in the sense of GATT 1994 Article VI:1(b) and Article 2.1 of the Anti-Dumping Agreement)."¹⁰³ [Emphasis added].

This assessment is necessarily "fact-specific" and needs to be made on a case-by-case basis to ascertain "the effect of particular market situation on the domestic price in relation to the effect on the export price, if any."¹⁰⁴

In the present investigation, the TRA did not undertake such an analysis and does not appear to have established this legal step, as a result of which the construction of the normal value in the present case is inconsistent with Article 2.2 ADA. Indeed, a similar approach adopted by Australia was found to be WTO-inconsistent by the Panel in *Australia – Anti-Dumping Measures on Paper* :

*"We find that Australia did not examine whether domestic sales permitted a **proper comparison between the domestic prices** found to be affected by the decreased cost of pulp with the export **prices** for which the pulp cost was presumably equally decreased, despite assertions in the underlying proceeding which called for such an examination. In reviewing the ADC's determination, we are not to conduct a de novo review of the evidence, nor substitute our judgment for that of the investigating authority. As such, we make no determination whether the domestic sales permitted a proper comparison of the domestic prices and the export prices. Rather, we conclude that the ADC was obligated to undertake the **necessary additional examination** to determine whether, **because of the particular market situation, the domestic sales of the individual exporters do not permit a proper comparison of the domestic prices and the export prices.**"¹⁰⁵ [Emphasis added]*

Third, the TRA's assessment does not seem to support its eventual conclusion. For example, the raw material cost issues identified by the TRA impact both domestic and export sales equally. Thus, the SEF seems to acknowledge that, if the same raw materials are used and the same producer sells in both the home and export markets, then costs will be affected on both sides of the equation. Therefore, there will be no impact on the comparison of normal value and export price on account of a PMS.

This said, if the TRA were to take the position that it did undertake the required examination as discussed above, the SEF fails to provide a "reasoned and adequate" explanation of its assessment. The Sany Group hereby recalls that an authority must provide a "reasoned and adequate explanation" as to "(i) how the evidence on the record supported its factual findings; and (ii) how

¹⁰³ Panel Report, *Australia – Anti-Dumping Measures on Paper*, para. 7.76.

¹⁰⁴ Panel Report, *Australia – Anti-Dumping Measures on Paper*, para. 7.76. [Emphasis added]

¹⁰⁵ Panel Report, *Australia – Anti-Dumping Measures on Paper*, para. 7.89.

those factual findings supported its overall determination".¹⁰⁶ The Appellate Body in *US – Softwood Lumber VI (Article 21.5 – Canada)* has adeptly explained what is expected of the investigating authorities:

*"A panel must examine whether, in the light of the evidence on the record, the conclusions reached by the investigating authority are **reasoned and adequate**. ... The panel's scrutiny should test whether the **reasoning of the authority is coherent and internally consistent**. The panel must undertake an in-depth examination of **whether the explanations given disclose** how the investigating authority treated the facts and evidence in the record and whether there was positive evidence before it to support the inferences made and conclusions reached by it. The panel must examine **whether the explanations provided demonstrate** that the investigating authority took proper account of the complexities of the data before it, and that it **explained why** it rejected or discounted alter-native explanations and interpretations of the record evidence. [...]*

This task may also require a panel to consider whether, in analyzing the record before it, the investigating authority evaluated all of the relevant evidence in an objective and unbiased manner, so as to reach its findings "without favoring the interests of any interested party, or group of interested parties, in the investigation."¹⁰⁷ [Emphasis added]

Indeed, the Panel in *Australia – Anti-Dumping Measures on Paper* also held that, "[i]f the investigating authority finds that because of a particular market situation a proper comparison of the domestic price and the export price is not permitted, it is required to give a **reasoned and adequate explanation** of its conclusion."¹⁰⁸

The Sany Group thus trusts that the TRA will address the issue of domestic prices and the impact of a PMS on price comparability in its preliminary or final determination.

c. The rejection of the Sany Group's actual costs and prices as well as the adjustment of its steel and other raw material costs is WTO-inconsistent

The Sany Group respectfully submits that the rejection of its actual costs and prices as well as the adjustments of its costs of production is WTO-inconsistent for the following reasons.

First, the rejection of its domestic sales prices (as well as the adjustment of its production costs for the determination of profits and the construction of the normal value) on the basis of a country-wide assessment of non-commercial factors supposedly affecting excavators' costs of production is

¹⁰⁶ Appellate Body Report, *US – Countervailing Duty Investigation on DRAMs*, para. 186; and Appellate Body Report, *US – Lamb*, para. 103.

¹⁰⁷ Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93, referring to Appellate Body Report, *US – Lamb*, para. 106; and Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 97, referring to Appellate Body Report, *US – Hot-Rolled Steel*, para. 193.

¹⁰⁸ Panel Report, *Australia – Anti-Dumping Measures on Paper*, para. 7.76. [Emphasis added]

inconsistent with the concept of "dumping" which, as noted by the Appellate Body, concerns the pricing behaviour of individual exporters/foreign producers.¹⁰⁹

Second, by rejecting and adjusting only those costs which (if accepted) would result in a lower normal value does not constitute an objective approach (*i.e.*, adjustments made for steel inputs and other key components, but not for labour costs because these were found to be higher compared to Brazilian costs).

Third, the Sany Group considers that the rejection of its recorded steel and other raw material costs is inconsistent with the first sentence of Article 2.2.1.1 ADA.

The SEF notes that the Sany Group's records are GAAP-consistent and reasonably reflect costs associated with the production and sale of excavators in China,¹¹⁰ but then concluded that those recorded costs "*reflect non-commercial factors, which is reflected in a PMS in the excavator market.*"¹¹¹ Since these were considered not to be "*normal circumstances*", the TRA decided to adjust some of the Sany Group's costs of production.¹¹²

However, the TRA's own findings show that: (i) the Sany Group's reported labour costs were higher than the Brazilian labour costs selected as a benchmark,¹¹³ neither its finance costs nor its actual R&D costs appeared to be artificially low;¹¹⁴ and (iii) "*tax, energy and land costs are not significant in this case.*"¹¹⁵ Thus, any supposed lack of normal circumstances with regard to these factors could not have affected the excavators' production costs and domestic sales prices of the Sany Group.

With regard to the steel and other raw material costs of the Sany Group, the TRA does not seem to have assessed those costs in relation to the sales prices of excavators in China. To recall, the SEF narrowly looks only at general supposed plans concerning the steel manufacturing industry and supposed support available to SOEs. The mere comparison to the Brazilian producers' steel costs to prove non-commercial factors is doing the analysis the other way around, *i.e.*, resorting to a benchmark before proving a PMS. However, as detailed above, the finding of PMS and its impact on price comparability and inability to use domestic prices should emanate from the domestic market. The finding of the supposed non-commercial factors for steel and other key components by comparison to the Brazilian producers' steel costs thus seems incorrect and result-oriented.

¹⁰⁹ Appellate Body Report, *US –Stainless Steel from Mexico*, para. 86.

¹¹⁰ Case AD0047 - Certain excavators from China, Statement of Essential Facts, para. 244.

¹¹¹ Case AD0047 - Certain excavators from China, Statement of Essential Facts, para. 245.

¹¹² Case AD0047 - Certain excavators from China, Statement of Essential Facts, para. 245.

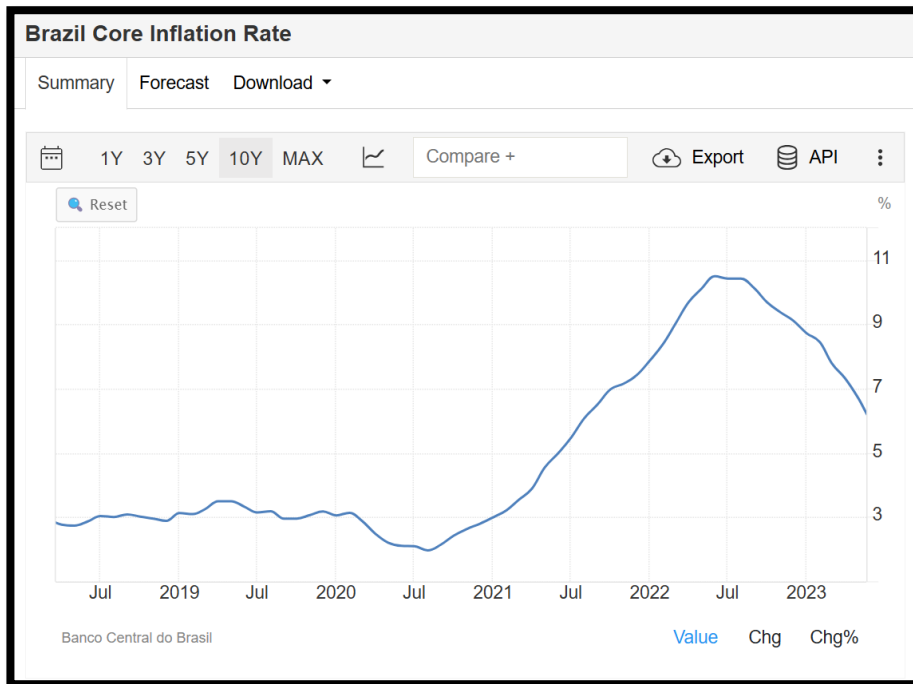
¹¹³ Case AD0047 - Certain excavators from China, Statement of Essential Facts, para. 280.

¹¹⁴ Case AD0047 - Certain excavators from China, Statement of Essential Facts, paras. 259 and 281.

¹¹⁵ Case AD0047 - Certain excavators from China, Statement of Essential Facts, para. 259.

As a starting point, the approach of using the costs of the Applicant's related company in Brazil as a benchmark does not seem objective or reasonable, as JCB Brazil necessarily has a strong interest in presenting its data in a result-oriented manner.

Next, the SEF does not establish that the Brazilian steel and Chinese steel production and costs are comparable in terms of technologies, scale, and inputs, among others. In this connection, the Sany Group notes that the steel production costs in Brazil would be significantly affected by inflation and currency devaluation during the POI:



Trading Economics, Brazilian Real Inflation Rate, available at <<https://tradingeconomics.com/brazil/core-inflation-rate>>



Trading Economics, British Pound Sterling Brazilian Real, available at <<https://tradingeconomics.com/gbpbrl:cur>>

The Sany Group also understands from publicly available information that Brazilian producers mainly import steel from China. In contrast, the Sany Group purchases steel domestically. Furthermore, there are several trade remedy measures currently enforced on the import of steel materials and steel products into Brazil. According to the WTO database, Brazil has implemented anti-dumping and/or countervailing measures on various steel products, such as hot-rolled steel, heavy plates, steel wire, steel flat bars, carbon steel tubes, stainless steel tubes, copper tubes, and cold-rolled stainless-steel sheet.¹¹⁶ Clearly, the Brazilian steel industry enjoys significant protection, which leads to artificially elevated steel prices on the Brazil market.

Finally, the Sany Group notes that, compared to Brazil, China has highly advanced technologies, as well as a large number of companies operating in the steel and excavator markets and benefiting from economies of scale.

Fourth, Article 2.2 ADA provides that:

"When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation or the low volume of the sales in the domestic market of the exporting country, such sales do not permit a proper comparison, the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to an appropriate third country, provided that this price is representative, or with the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits." [Emphasis added]

The last phrase of Article 2.2 of the ADA is essentially the umbrella provision or chapeau (to be read along with Articles 2.2.1.1 and 2.2.2 ADA)¹¹⁷ for the establishment of the normal value and cannot be disregarded in the construction of the normal value as done by the TRA.

As noted by the Appellate Body in *EU – Biodiesel (Argentina)* and *Ukraine – Ammonium Nitrate*, an investigating authority cannot simply substitute costs from outside the country of origin for the cost of production in the country of origin for the investigated product.¹¹⁸ The fundamental and mandatory rule remains that an investigating authority has to determine the cost of production in the country of origin.

¹¹⁶ WTO, Trade Remedies Data Portal, Database of Anti-Dumping Measures, available at <<https://trade-remedies.wto.org/en/antidumping/measures>> and Database of Countervailing Measures, available at <<https://trade-remedies.wto.org/en/countervailing/measures>>.

¹¹⁷ Appellate Body Report, *Ukraine – Ammonium Nitrate*, para. 6.84: "Articles 2.2.1, 2.2.1.1, and 2.2.2 of the Anti-Dumping Agreement elaborate on various aspects of Article 2.2. ... For its part, Article 2.2.1.1 deals with "costs" while Article 2.2.2 concerns the determination of the amounts for administrative, selling and general costs and for profits."

¹¹⁸ Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.73; and Appellate Body Report, *Ukraine – Ammonium Nitrate*, para. 6.83.

Therefore, when relying on any out-of-country information to determine the cost of steel and other key inputs, pursuant to the requirement in Article 2.2 ADA, an investigating authority has to ensure that such information is used to arrive at the cost of production in the country of origin.¹¹⁹

In particular, the Appellate Body in *EU – Biodiesel (Argentina)* noted as follows:

"Indeed, Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 make clear that the determination is of the "cost of production [...] in the country of origin". Thus, whatever the information that it uses, an investigating authority has to ensure that such information is used to arrive at the "cost of production in the country of origin". Compliance with this obligation may require the investigating authority to adapt the information that it collects."¹²⁰ [Emphasis added]

The Appellate Body in *Ukraine – Ammonium Nitrate* further confirmed and clarified as follows:

"With regard to the construction of normal value, the fact that "the cost of production" is that "in the country of origin" defines the parameters of that inquiry. This phrase indicates that whatever information or evidence is used to determine the "cost of production", it must be apt to yield or capable of yielding a cost of production "in the country of origin". Therefore, an investigating authority must ensure that the information it collects is used to arrive at the "cost of production in the country of origin", and compliance with this obligation may require the investigating authority to adapt that information."¹²¹ [Emphasis added]

Against this background, the Sany Group notes that the TRA does not seem to have considered the aspect of adapting the Brazilian producers' steel and other key components costs by making adjustments for the facts that the Chinese excavator producers, contrary to the Brazilian producers, do not import steel and also do not have the related into-factory costs of inter-national transport, import clearance and post importation costs, among others. Thus, the TRA seems to have used the into-factory steel costs of the Brazilian producers without making any adjustments.

Additionally, the TRA does not seem to have assessed whether the Brazilian producers purchased steel from related parties inside/outside of Brazil and whether those prices were not excessive on account of profit-shifting activities between related companies and influenced by the relationship between the related parties involved (if any).

Likewise, the TRA does not seem to have assessed if the Brazilian producers' steel costs had to be adjusted for other factors in comparison to the Sany Group's costs if the steel was produced by the Brazilian producers in Brazil. Indeed, in July 2022, inflation in Brazil reached a peak of 10.5% and, more generally, has been dramatically above the typical inflation rate that Brazil experienced in

¹¹⁹ Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.73.

¹²⁰ Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.73.

¹²¹ Appellate Body Report, *Ukraine – Ammonium Nitrate*, para. 6.83.

previous years.¹²² Thus, the Brazilian steel costs were bound to be affected by the high inflation and correspondingly higher costs.

With regard to the raw material costs of the Brazilian producers, the TRA also does not seem to have considered that the Brazilian and Chinese markets for the materials used in the production of excavators are incomparable. The number of producers in China making key components for excavators, the economies of scale of those producers, and the technological advancement at those companies resulting in lower costs are all factors that – the Sany Group submits – the TRA should have considered and adjusted for when using the Brazilian producers' costs as the benchmark.

Thus, the use of the Brazilian producers' raw material costs as a benchmark and replacing the Sany Group's raw material costs (or increasing the Sany Group's raw material costs to the level of the Brazilian producers' costs) is inconsistent with Article 2.2 ADA.¹²³

d. Conclusion on the finding of a PMS in China

In summary, the Sany Group respectfully submits that (i) the finding of a PMS in China for the excavator market is not based on positive evidence and actually contradicted by the evidence on the record; (ii) even if there was a PMS in China (*quod non*), this would not prevent a proper comparison between the normal value and export price; and (iii) the rejection of the Sany Group's actual costs and prices as well as the adjustment of its steel and other raw material costs is WTO-inconsistent.

3. Comments on the profit determination to construct the normal value

As discussed during the meeting that took place on 11 December 2024, with regard to the profit determination to construct the normal value, the Sany Group has identified three issues, namely that:

- a. [CONFIDENTIAL];
- b. It appears that the 80% test to determine whether the Sany Group's sales were profitable was not properly applied; and
- c. [CONFIDENTIAL].

¹²² Trading Economics, Brazilian Real Inflation Rate, available at <<https://tradingeconomics.com/brazil/core-inflation-rate>>.

¹²³ Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.23. In para. 6.24, the Appellate Body further noted as follows: "... in our view, Article 2.2 of the Anti-Dumping Agreement concerns the establishment of the normal value through an appropriate proxy for the price of the like product in the ordinary course of trade in the domestic market of the exporting country when the normal value cannot be determined on the basis of domestic sales. The costs calculated pursuant to Article 2.2.1.1 of the Anti-Dumping Agreement must be capable of generating such a proxy. This supports the view that the "costs associated with the production and sale of the product under consideration" in Article 2.2.1.1 are those costs that have a genuine relationship with the production and sale of the product under consideration. This is because these are the costs that, together with other elements, would otherwise form the basis for the price of the like product if it were sold in the ordinary course of trade in the domestic market." [Footnotes omitted]

As will be shown below, the result of these three issues is that the profit applied to construct the normal value is substantially overstated.

a. One profit margin for all PCNs is not appropriate

The Sany Group notes that, for constructing the normal value, the TRA has [CONFIDENTIAL]. [CONFIDENTIAL].

As can be observed from Table 1 below, that [CONFIDENTIAL]. For sales to the UK, however, [CONFIDENTIAL]. [CONFIDENTIAL].

Table 1 – [CONFIDENTIAL]¹²⁴

Given [CONFIDENTIAL], the Sany Group [CONFIDENTIAL].

The Sany Group therefore requests the TRA to [CONFIDENTIAL]. The Sany Group notes that this is also the practice of most other jurisdictions and [CONFIDENTIAL].

b. 80% test not properly applied

As a second comment with respect to the profit determination, the Sany Group notes that the 80% test may not have been applied properly.

As can be observed from Table 2 below, [CONFIDENTIAL].

Table 2 – [CONFIDENTIAL]¹²⁵

Therefore, [CONFIDENTIAL]. The profit margin to be applied therefore needs to be [CONFIDENTIAL]% and not [CONFIDENTIAL]% if [CONFIDENTIAL].

If [CONFIDENTIAL], only [CONFIDENTIAL]. [CONFIDENTIAL]. [CONFIDENTIAL].

c. Profit should be [CONFIDENTIAL]; not [CONFIDENTIAL]

As a final comment regarding the determination of the reasonable profit, the Sany Group notes that the profit has been [CONFIDENTIAL]. As can be observed from Table 3 below, this has resulted in an inflated profit that was added.

Table 3 – [CONFIDENTIAL]¹²⁶

¹²⁴ See Annex 2 – CONFIDENTIAL for the source data.

¹²⁵ See Annex 2 – CONFIDENTIAL for the source data.

¹²⁶ See Annex 2 – CONFIDENTIAL for the source data.

Indeed, [CONFIDENTIAL]. Similarly, [CONFIDENTIAL].

The reason for these differences is that [CONFIDENTIAL]. This calculation methodology therefore [CONFIDENTIAL]. [CONFIDENTIAL].

The Sany Group therefore requests the TRA to [CONFIDENTIAL]. Such an approach would also align with the TRA's approach of [CONFIDENTIAL].

d. Conclusion on profit determination

Based on the arguments above, the Sany Group requests the TRA to recalculate the profit to be added to the cost of production and the SGA. For the TRA's convenience, we hereby provide in Table 4 below the correct profit amount [CONFIDENTIAL] and how this profit amount has been calculated.

Table 4 – [CONFIDENTIAL]¹²⁷

4. Comments on injury and causation

a. Violation of Articles 3.1, 3.2, 3.4 and 3.5 ADA by failing to adjust the HMRC statistics to reflect the product scope

The injury and causation assessments in the SEF are based on HMRC OTS data for code 8429 5210 pertaining to the injury investigation period (*i.e.*, July 2019 to June 2023).¹²⁸ However, such data does not reflect the product scope of the present investigation, as it includes excavators with an operating weight of less than 11 tonnes and more than 80 tonnes. The import data used by the TRA, therefore, does not qualify as "*positive evidence*" within the meaning of Article 3.1 ADA.

To recall, Article 3.1 ADA mandates that a determination of injury be based on "*positive evidence*", which has been defined by the Appellate Body in several WTO cases as evidence that is "*affirmative, objective, verifiable, and credible*."¹²⁹ The term "*positive evidence*", therefore, implies a higher standard than the "*sufficient evidence*" standard required under Article 5.3 ADA to initiate an investigation,¹³⁰ which in turn requires a complaint/application to be based on "*accurate*" and "*adequate*" evidence.¹³¹

¹²⁷ See **Annex 2 – CONFIDENTIAL** for the source data.

¹²⁸ Case AD0047 - Certain excavators from China, Statement of Essential Facts, Tables 7, 8, 9, 10 and 25.

¹²⁹ See, for example, Panel Report, *Pakistan – BOPP Film (UAE)*, para. 7.258, citing Appellate Body Reports, *US – Hot-Rolled Steel*, para. 192 and *China – GOES*, para. 126.

¹³⁰ Panel Report, *Colombia – Frozen Fries*, para. 7.12.

¹³¹ Pursuant to Article 5.2 ADA, a complaint must be supported by evidence of (a) dumping, (b) injury, and (c) causal link between the dumped imports and the alleged injury and a "[s]imple assertion, unsubstantiated by relevant evidence, cannot be considered sufficient to meet the requirements of this paragraph." Article 5.3 ADA stipulates that investigating authorities have the obligation, before initiating an investigation, to "*examine the accuracy and adequacy of the evidence provided in the complaint, to determine whether there is sufficient evidence to justify the initiation of an investigation.*" [Emphasis added].

The Sany Group respectfully submits that the import data relied upon by the TRA for the purposes of its injury and causation analyses are neither accurate nor adequate.

In this connection, the Sany Group refers to the Panel Report in *Mexico – Steel Pipes and Tubes*, where it was concluded that:

"[A]n unbiased and objective investigating authority, in relying on the evidence in question, i.e., the official statistics of total imports under the two tariff lines concerned, as evidence of the volume of dumped imports – without cross-checking (even in an approximate manner) the proportion of those tariff line import data that corresponded to the product under investigation – could not properly have determined that there was sufficient evidence of injury to justify the initiation of an anti-dumping investigation in relation to the product under investigation. The fact that, during the course of the investigation, it was ultimately confirmed that the investigated product ... appeared to account for a substantial portion of the imports under the two tariff lines is not relevant to our examination under Article 5.3".¹³²
[Emphasis added]

Since, in *Mexico – Steel Pipes and Tubes*, the investigating authority was found to have violated Article 5.3 ADA by relying on import data that included imports outside of the scope of the investigation for the purposes of initiating the investigation, the data relied upon by the TRA in the present case clearly cannot meet the higher standard required under Article 3.1 ADA for the purposes of making preliminary findings of injury and causation.

This issue affects the entirety of the TRA's injury and causation analyses, and the violation of Article 3.1 ADA results in a consequent violation of Articles 3.2, 3.4 and 3.5 ADA (as well as Regulations 30, 31, 32, 33 and 35 UK basic Regulations).¹³³

¹³² Panel Report, *Mexico – Anti-Dumping Duties on Steel Pipes and Tubes from Guatemala*, para. 7.60.

¹³³ As held in numerous WTO cases, Article 3.1 ADA is an "overarching provision" that sets forth a Member's fundamental, substantive obligation with respect to the determination of injury. Article 3.1 ADA informs the more detailed obligations in succeeding paragraphs. These obligations concern the determination of the volume of dumped imports, and their effect on prices (Article 3.2 ADA), the impact of dumped imports on the domestic industry (Article 3.4 ADA), and causality between dumped imports and injury (Article 3.5 ADA). The focus of Article 3 is thus on substantive obligations that a Member must fulfil in making an injury determination. (See, for example, Appellate Body Report, *Thailand – H-Beams*, paras. 106 and 192-193 and Panel Report, *China – Broiler Products*, para 7.409). In other words, "[t]he various paragraphs of Article 3 contemplate a logical progression in the investigating authority's inquiry leading to an ultimate determination of whether dumped imports are causing material injury to the domestic industry." (See, for example, Appellate Body Reports, *China – HP-SSST (Japan and EU)*, para. 5.203). Therefore, where an investigating authority has failed to conduct an objective examination based on positive evidence as required by Article 3.1 ADA, that error permeates the investigating authority's analyses of market share, price effects, impact, and causation under Articles 3.2, 3.4, and 3.5 ADA, respectively.

In a spirit of good cooperation, the Sany Group hereby provides as **Annex 3 - CONFIDENTIAL** detailed sales data extracted from the Systematics Database, which would allow the TRA to distinguish between subject- and non-subject-goods.

b. Violation of Articles 3.1, 3.4 and 3.5 ADA by failing to take into account Komatsu's market share

Without prejudice to the above, the Sany Group further notes that the TRA defined the "the UK industry" as comprising JCB only because Komatsu – *i.e.*, the sole other UK producer of excavators – decided not to cooperate in the investigation.¹³⁴ However, while JCB alone may indeed meet the required definition under paragraph 6(1)(b) of Schedule 4 of the Taxation (Cross-border Trade) Act 2018 and Article 4.1 ADA, the failure to gather (or at least reasonably estimate) and evaluate any data pertaining to Komatsu renders the TRA's injury and causation analyses inconsistent with Articles 3.1, 3.4 and 3.5 ADA.

To recall, Article 3.1 ADA requires investigating authorities to conduct an "*objective examination*" based on positive evidence of the impact of the allegedly dumped imports on the status of the UK industry.¹³⁵ As held by the WTO Panel in *Mexico – Olive Oil*, "*an examination can only be "objective" if it is based on data "which provide an accurate and unbiased picture of what it is that one is examining.*"¹³⁶

In the present case, according to the SEF, "*UK consumption was established on the basis of import volumes of excavators from all countries (using HMRC OTS data) and domestic sales volumes of the UK industry*".¹³⁷ However, this methodology necessarily leads to an inaccurate estimate of the total UK consumption because it does not take into account Komatsu's sales in the UK market. Since the UK consumption data is in turn used to determine the market share of JCB and those of the subject- and non-subject imports, the failure to gather (or at least reasonably estimate) and consider Komatsu's sales in establishing the total UK consumption of excavators affects the accurateness and lawfulness of the entire injury analysis. In other words, by failing to rely on "*accurate*" consumption data, the TRA also failed to conduct an "*objective examination based on positive evidence*" of the impact of the allegedly dumped imports on the status of the UK industry, as required under Articles 3.1 and 3.4 ADA (as well as Regulations 30(2)(c) and 33 of the UK basic Regulations).

¹³⁴ Case AD0047 - Certain excavators from China, Statement of Essential Facts, para. 99.

¹³⁵ The term "*objective*" has been interpreted as requiring the examination to "*conform to the dictates of the basic principles of good faith and fundamental fairness.*" (See, for example, Appellate Body Report, *US – Hot-Rolled Steel*, para. 193).

¹³⁶ Panel Report, *Mexico – Olive Oil*, para. 7.255. [Emphasis added]

¹³⁷ Case AD0047 - Certain excavators from China, Statement of Essential Facts, para. 347.

In addition, the TRA should have considered, in the context of its non-attribution analysis pursuant to Articles 3.1 and 3.5 ADA and Regulation 35 of the UK basic Regulations, whether JCB lost any market share to Komatsu during the injury investigation period.

The TRA is clearly aware of the intra-competition between JCB and Komatsu in the UK market. Therefore, this other potential known factor should have been featured in the TRA's causation and non-attribution analysis.¹³⁸ In this connection, the Sany Group recalls that in *China – Autos (US)*, the Panel found that an investigating authority fails to conduct a proper non-attribution analysis if it disregards evidence showing that the domestic industry had lost market share to producers not part of the domestic industry.¹³⁹

Likewise, in *EU – PET (Pakistan)*, the Panel found that the EU had acted inconsistently with Article 15.5 of the WTO Agreement on Subsidies and Countervailing Measures (*i.e.*, the parallel provision of Article 3.5 ADA) with respect to its analysis of competition from non-cooperating producers because "*the increase in market share of the non-cooperating producers [...] warranted more specific examination.*"¹⁴⁰ In that case, the Panel noted that: (i) "*the magnitude of the rise in market share of non-cooperating producers [...] was, at least in absolute terms, similar to the drop in market share the Commission observed pursuant to the end-point-to-end-point analysis*"; (ii) the rise in market share of the non-cooperating producers coincided with, *inter alia*, a drop in the market share of the domestic industry; and (iii) "*the domestic industry's loss of market share during the period considered was a significant consideration in the Commission's finding that the domestic industry had suffered injury.*"¹⁴¹

The Sany Group thus respectfully requests the TRA to (i) collect relevant sales data from Komatsu (or otherwise estimate such data on the basis of a reasonable methodology and publicly available macro data); and (ii) evaluate such data in its injury and causation analyses to comply with the requirement to conduct an objective examination based on positive evidence. For the purposes of these analyses, the Sany Group hereby refers to the detailed sales data extracted from the Systematics Database provided as **Annex 3 – CONFIDENTIAL**, which would allow the TRA to identify Komatsu's market share.

c. Violation of Article 3.5 ADA by failing to properly consider third-country imports and other known potential causal factors in the non-attribution analysis

Without prejudice to the above, the Sany Group respectfully submits that the SEF does not properly assess the potential injurious effect of third-country imports and other known causal factor in its

¹³⁸ As noted by the Panel in *China – GOES*, once a factor other than the dumped imports becomes known to the authorities, they come under an obligation to investigate the impact of that factor. See: Panel Report, *China – GOES*, para. 7.636.

¹³⁹ Panel Report, *China – Autos (US)*, paras. 7.331-7.332.

¹⁴⁰ Panel Report, *EU – PET (Pakistan)*, para. 7.150.

¹⁴¹ Panel Report, *EU – PET (Pakistan)*, paras. 7.150-7.152.

non-attribution analysis, which may have contributed to the injury allegedly suffered by the Applicant (if any).

First, as can be observed from the table below,¹⁴² during the injury investigation period, imports from third countries other than China consistently accounted for approximately [CONFIDENTIAL] of the total UK market for excavators with an operating weight of more than 10 tonnes. During the same period, the combined market share of the UK producers (*i.e.*, JCB and Komatsu) ranged steadily between [CONFIDENTIAL]% and [CONFIDENTIAL]%. In comparison, Chinese products sold by Sany UK, Liugong, and Sunward collectively accounted for a mere [CONFIDENTIAL]% of the market share in 2020, rising only to [CONFIDENTIAL]% in the first half of 2023.

Origin	01.01.2020 - 31.12.2020		01.01.2021 - 31.12.2021		01.01.2022 - 31.12.2022		01.01.2023 - 30.06.2023	
	Units sold	Share %	Units sold	Share %	Units sold	Share %	Units sold	Share %
China	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]
Other third countries	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]
UK	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]
Total	[CONFIDENTIAL]	100%	[CONFIDENTIAL]	100%	[CONFIDENTIAL]	100%	[CONFIDENTIAL]	100%

These figures show that Chinese imports are dwarfed by third-country imports, indicating the need to investigate further the role of third-country competitors in the alleged displacement of UK producers.

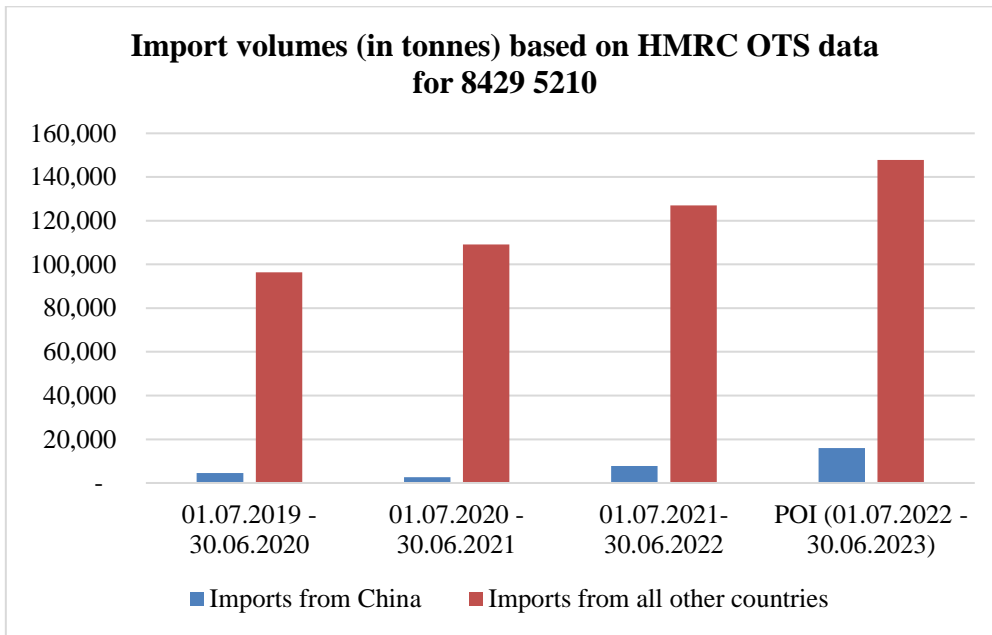
In particular, it should be considered that Chinese imports gained most of their market share (*i.e.*, [CONFIDENTIAL]%) in 2022, *i.e.*, when the UK producers also gained market share but to a much greater extent (*i.e.*, [CONFIDENTIAL]%). Moreover, during the first half of 2023, when the UK producers appear to have lost most of their market share (*i.e.*, a mere [CONFIDENTIAL]%), the Chinese imports gained only [CONFIDENTIAL]% in market share. It follows that the Chinese imports were not – and in fact could not have been – the cause of any injury allegedly suffered by JCB.

Third-country imports (and potentially Komatsu's UK sales), on the other hand, are undoubtedly the dominant factor in shaping the competitive landscape for UK excavators. Without examining whether these imports and Komatsu's sales displaced JCB's products, the SEF's attribution of injury to Chinese imports is incomplete.

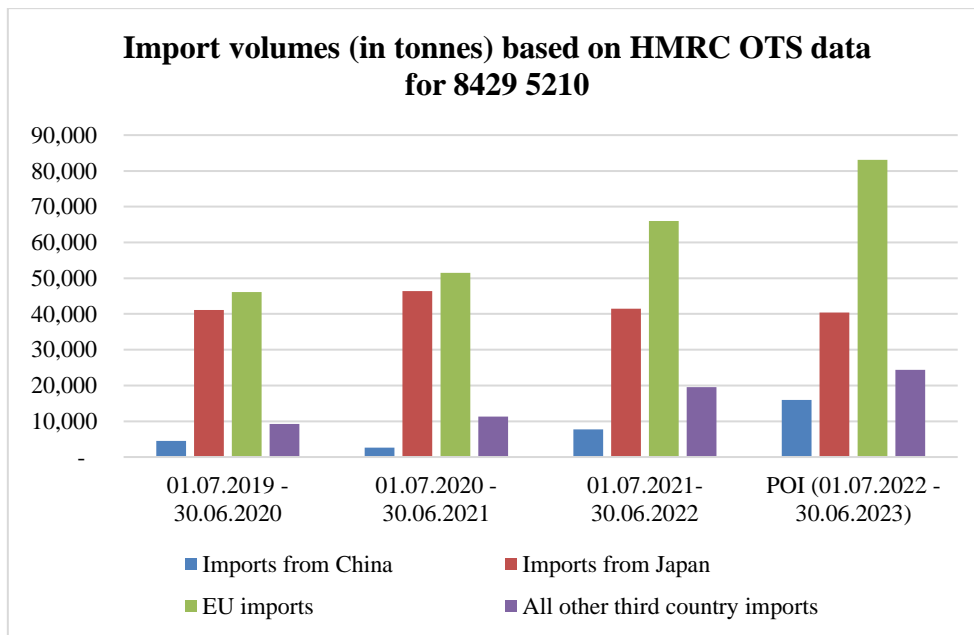
Second, even taking into consideration the (inaccurate and inadequate) import data relied upon by the TRA, it is apparent that imports from other third countries could have caused injury to the UK industry – and, in fact, are more likely to have done so in comparison to Chinese imports.

¹⁴² For the source data, please refer to **Annex 3 – CONFIDENTIAL**.

As is clear from the graph below, during the injury investigation period, imports from China were much more minuscule in absolute volumes compared to imports from other third countries:



Even when compared to imports from the EU and Japan, Chinese imports remain much smaller:



Moreover, imports from countries other than China, Japan and the EU were imported at much higher volumes and much lower prices compared to Chinese imports:

Imports based on HMRC OTS data for 8429 5210	01.07.2019 - 30.06.2020			01.07.2020 - 30.06.2021			01.07.2021- 30.06.2022			POI (01.07.2022 - 30.06.2023)		
	Value (£)	Net Mass (tonnes)	Price (£/kg)	Value (£)	Net Mass (tonnes)	Price (£/kg)	Value (£)	Net Mass (tonnes)	Price (£/kg)	Value (£)	Net Mass (tonnes)	Price (£/kg)
Imports from China	20,738,855	4,537	4.57	11,320,648	2,587	4.38	44,632,007	7,716	5.78	87,020,515	15,958	5.45
Imports from Japan and the EU	398,571,180	87,203	4.57	472,451,840	97,885	4.83	577,224,856	107,455	5.37	750,875,631	123,421	6.08
All other third-country imports	34,543,719	9,224	3.75	45,025,620	11,304	3.98	89,389,301	19,538	4.58	111,437,387	24,413	4.56
Total imports	453,853,754	100,963	4.50	528,798,108	111,775	4.73	711,246,164	134,709	5.28	949,333,533	163,792	5.80

The Sany Group thus disagrees with the TRA's conclusion that "*PRC import prices were below that of imports from third countries throughout the injury period and in particular in the POI.*"¹⁴³

Third, going forward, in addition to the above, the Sany Group respectfully asks the TRA to take into account in its non-attribution analysis (i) the macroeconomic challenges and supply chain disruptions, which have likely played a role in the declining profitability of UK producers; and (ii) shifts in consumer demand for specific features, such as hybrid or compact excavators. In fact, preliminary industry analyses indicate a rising preference for excavator types often supplied by third-country exporters, further diminishing the causal link between Chinese imports and domestic injury.¹⁴⁴

For the above reasons, the Sany Group respectfully requests the TRA to: (i) conduct a deeper analysis of external economic and market factors; (ii) provide a detailed breakdown of domestic market share trends by product type to ascertain whether shifts in consumer preferences, rather than imports, were the primary cause of injury; and (iii) examine the competitive dynamics of third-country imports and their role in the displacement of UK producers, independently of the impact of Chinese imports.

5. Request for [CONFIDENTIAL]

As a final point, Sany UK would like to express its deep concerns as regards [CONFIDENTIAL]. These concerns stem from the fact that [CONFIDENTIAL]. [CONFIDENTIAL].

For this reason, SANY UK would be most grateful if the TRA could please explore the possibility of [CONFIDENTIAL].

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,

[CONFIDENTIAL]

[CONFIDENTIAL]

¹⁴³ Case AD0047 - Certain excavators from China, Statement of Essential Facts, Tables 7, 8, 9, 10 and 25.

¹⁴⁴ Please kindly refer to: the Sany Group's PPT prepared for the meeting that took place on 11 December 2024; and Construction Equipment Association, PPT Members' Forum 11 July 2024, attached as **Annex 1 – CONFIDENTIAL**.