



UK TRA Anti-Dumping and Anti-Subsidy Investigations:
Certain Excavators from the People's Republic of China
(AD0047 and AS0046)

CCCME Reply to JCB Comments dated 11 October 2024

Submitted on Behalf of
China Chamber of Commerce for Import and Export of
Machinery and Electronic Products
("CCCME")

1 November 2024



CCCME Reply to JCB Comments dated 11 October 2024

I. INTRODUCTION

- [1] As mandated by the China Chamber of Commerce for Import and Export of Machinery and Electronic Products (“CCCME”), we hereby submit the CCCME’s Reply to the JCB “Comments on China Chamber of Commerce for Import and Export of Machinery and Electronic Products’ submission”, dated 11 October 2024 (hereinafter the “JCB Comments”)¹. This CCCME Reply to the JCB Comments shall apply equally as regards both the AD0046 and AS0047 investigations.
- [2] This CCCME Reply addresses the JCB Comments relating to 1) the alleged “out of time” filing of the “Comments of the CCCME” which addressed multiple aspects of these investigations and was submitted to the TRA on 2 August 2024 (hereinafter the “CCCME Submission of 2 August”)², 2) insufficiency of non-confidential data submitted by the Applicant JCB throughout these investigations, and 3) existence of “other causal factors” accounting for JCB’s alleged injury. CCCME affirms its PMS comments set out in its CCCME Submission of 2 August.

II. CCCME REPLY TO JCB COMMENTS

1. Alleged Out-of-Time filing of CCCME Submission of 2 August

- [3] JCB appears to think that the CCCME Submission of 2 August comprised the CCCME’s first-time submission of any comments on these investigations and cites certain WTO Appellate Body findings to support its out-of-time claim. Both elements of this JCB claim are unfounded, in fact and law, and should thus be rejected by the TRA.
- [4] To recall, following the TRA Notices of Initiation of these investigations on 15 November 2023, the CCCME timely submitted, on 29 November 2023, its registration of interest in both cases. In that context, the CCCME responded on the several substantive issues raised in the TRA Registration Form and further concluded that, “CCCME reserves the right to present its views on the absence of injurious status of UK producers of the like goods, absence of causal link between any such alleged injury and imports of the goods concerned from China and other elements of the present investigation such as the product scope subject to the investigations, PCN structure, absence of particular market situation

¹ Published in both the TRA AS0046 and AD0047 public files on 15 October 2024.

² The CCCME Submission was dated 1 August 2024 but was formally filed to the TRA the following day, on 2 August 2024 (TRA acknowledgement of receipt 2 August 2024). The TRA placed the CCCME Submission in the AD0047 public file not until 20 September 2024, and placed them in the AS0046 public file on 15 October 2024 – on the same date that the JCB Reply appeared.



Version: Non-Confidential

or subsidisation to the Chinese industry of the goods concerned, once more information is available to it.” (emphasis added)

- [5] In addition, the CCCME responded to the TRA’s respective investigation Questionnaires for Contributors. As regards the injury and causation issues raised in these Questionnaires, the CCCME’s substantive comments were identical. Central to the CCCME’s comments overall was its strong criticism of multiple defects in the Applicant’s methodology and the insufficiency of the data set out in the non-confidential version of the Application as regards the JCB allegations of both injury and of causation thereof by the imports from China. Moreover, in response to the respective Questionnaires’ request for any other information which may be relevant to the TRA’s investigation, the CCCME replied, “On behalf of its members, CCCME is willing to provide further information when requested and reserves its right to comment further in the course of this proceeding.” (emphasis added)
- [6] In fact, the CCCME Submission of 2 August did further elaborate the CCCME’s concerns and contentions as were set out in its original and timely Registration Form and Questionnaire Reply for these respective investigations, precisely as CCCME had initially reserved the right to do so.
- [7] As regards relevant indications from the WTO, JCB’s reference to findings of the Appellate Body in *US - Oil Country Tubular Goods* (hereafter “*US – OCTG*”)³ is only partial and is therefore highly misleading. The whole of the Appellate Body’s conclusion makes clear that JCB’s claim that the CCCME Submission of 2 August is out-of-time is wholly unfounded.
- [8] While it is correct that the Appellate Body in *US – OCTG* noted that Articles 6.1 and 6.2 ADA do not provide for “indefinite” rights for interested parties to give evidence and defend their interests, the context of that indication must be taken into account. The Appellate Body was having regard specifically to instances where the US had denied certain parties the right to make submissions later in the respective sunset investigations where they had either failed completely to respond to the US notice of initiation of the investigations or had made timely but incomplete submissions. The Appellate Body specified firstly and broadly that, “Articles 6.1 and 6.2 require that the opportunities afforded interested parties for presentation of evidence and defence of their interests be “ample” and “full”, respectively. In the context of these provisions, these two adjectives suggest there should be liberal opportunities for respondents to defend their interests.”⁴ (own emphasis)

³ Appellate Body Report, *US – Oil Country Tubular Goods*, WT/DSS268/AB/R.

⁴ *US – OCTG*, Para 241.



Version: Non-Confidential

- [9] As regards the specific two above-noted instances where the US in its OCTB investigation had denied parties the right to make submissions after the deadline⁵ for submission of questionnaires, the Appellate Body clearly distinguished these two instances. As regards the situation where no initial submission had been made:

“In our view, the rights to present evidence and request a hearing cannot be said to be "denied" to a respondent that is given an opportunity to submit an initial response to the notice of initiation simply because it must do so by a deadline that is conceded to be reasonable. We do not see it as an unreasonable burden on respondents to require them to file a timely submission in order to preserve their rights for the remainder of the sunset review. Indeed, even an incomplete submission will serve to preserve those rights. Accordingly, we are of the view that, if a respondent decides not to undertake the necessary initial steps to avail itself of the 'ample' and 'full' opportunities available for the defence of its interests, the fault lies with the respondent, and not with the [US'] deemed waiver provision.⁶” (CCCME emphasis)

As regards the second referenced instance in *US – OCTB* where an initial submission, even an incomplete submission, is in fact made by the interested party, the Appellate Body determined that the US had acted inconsistently with its obligations under Article 6.1 and 6.2 to provide full and ample opportunities for interested party to defend its rights⁷. It is consequently evident that JCB has misleadingly only partially quoted the Appellate Body determinations in *US – OCTB*. Now, in these AD and AS investigations before the TRA in which the CCCME timely made initial submissions and indeed expressly reserved rights to make later submissions on the issues raised in these investigations, it must therefore be determined that the CCCME Submission of 2 August was not out-of-time and JCB's claim to this effect must be wholly rejected.

- [10] CCCME would also highlight with regard to timeliness claims that the due process requirements of Article 6.1 and 6.2 ADA are also directly relevant to other ADA provisions, such as Article 6.4, which requires that interested parties are provided with timely opportunities to see information relevant to their interests and which is not

⁵ CCCME notes that Article 6.1.1 ADA and Article 12.1.1 SCM reference an “at least” 30 day time limit for the initial response to questionnaires calling for detailed and specific information on key aspects of the investigation. However, the Appellate Body has confirmed that this time period “is not necessarily absolute and immutable” and that, “[A]ccording to the express wording of the second sentence of Article 6.1.1, investigating authorities must extend the time-limit for responses to questionnaires ‘upon *cause shown*’, where granting such an extension is ‘*practicable*’. This second sentence, therefore, indicates that the time-limits imposed by investigating authorities for responses to questionnaires are *not* necessarily absolute and immutable.” Appellate Body Report, *US – Corrosion-Resistant Steel*, paras. 73-74. To the CCCME's understanding, the TRA has properly applied these concepts relating to deadlines.

⁶ Para. 252.

⁷ Para. 253 – “Therefore, with respect to respondents that file incomplete submissions in response to the USDOC's notice of initiation of a sunset review, we uphold the Panel's findings, in paragraphs 7.128 and 8.1(a)(iii) of the Panel Report, that Section 351.218(d)(2)(iii) of the USDOC Regulations is inconsistent, as such, with Articles 6.1 and 6.2 of the Anti-Dumping Agreement.”



Version: Non-Confidential

confidential⁸ within the meaning of Article 6.5. CCCME sets out in below in part II.2 detailed discussion relating to JCB's rejection of the CCCME requests from the very start of these investigations to provide CCCME and other interested parties substantial additional non-confidential information. In other words, JCB was on notice already from CCCME's initial submissions at the start of these investigations that JCB needed to provide the important additional non-confidential information, and any serious delays now in the investigation are due rather to JCB's own failure, to date, to submit the information necessary for CCCME and others to duly exercise their rights of defence.

2. Need for Supplemental Data and Significantly Greater Transparency Relating to the Non-Confidential Version of JCB's Injury/Causation Claims

- [11] The CCCME's earliest submissions in these investigations highlighted the lack of transparency and/or bias in the methodology applied by the Applicant/JCB in providing data allegedly in support of the claims set out in its Application. As indicated in the CCCME Submission of 2 August, the CCCME presumed at the time of submitting its initial comments that important supplemental data would be submitted by the Applicant in order to provide essential transparency, notably substantial relevant non-confidential data relating to the alleged factual foundation allegedly supporting JCB's injury/causation claims. The CCCME Submission of 2 August explained and specified in great detail what additional information is relevant and necessary in order for CCCME to adequately exercise its rights of defence in these regards.
- [12] To date, JCB has failed to provide any further transparency/supplemental data. Its Comments of 11 October simply assert (para. 15) that "the Applicant has submitted sufficient non-confidential data throughout the Investigation" and follows this with three short supporting statements. This JCB refusal to provide, even partially, the non-confidential data requested by CCCME thus raises a fundamental question regarding the respective obligations of both JCB and the TRA in these regards. As JCB elsewhere refers to relevant guidance from the WTO, the CCCME feels compelled to highlight the respective obligations on JCB as the Applicant, and on the TRA as the UK's investigating authority, to provide the information requested by the CCCME. These obligations are set out in the ADA under Articles 6.4 and 6.5, relating to information that must be disclosed and treatment of confidential information, respectively. Please excuse the extensive reference to the relevant WTO determinations on these points, but JCB's intransigence appears to make this necessary.
- [13] Article 6.4 ADA provides that, "The authorities shall whenever practicable provide timely opportunities for all interested parties to see all information that is relevant to the

⁸ See detailed discussion in part II.2 herein concerning the CCCME's multiple requests from the very start of these investigations for JCB to provide substantial additional relevant and meaningful non-confidential information and the unsubstantiated JCB claims rejecting these CCCME requests.



Version: Non-Confidential

presentation of their cases, that is not confidential as defined in paragraph 5, and that is used by the authorities in an anti-dumping investigation, and to prepare presentations on the basis of this information.” Relevant guidance from successive Panel and Appellate Body Reports makes clear the wide breadth of information that is required to be disclosed to other interested parties under Article 6.4:

- “In our view, this clearly indicates that the term ‘information’ within the meaning of Article 6.4 does not in any way limit the type or nature of information that an interested party is entitled to see under that provision. Accordingly, ‘all’ information that is relevant and used by the investigating authority, with the exception of confidential information, may be seen by interested parties in the investigation.”⁹
- “The Appellate Body has found that Article 6.4 refers to ‘provid[ing] timely opportunities for all interested parties to see all information that is relevant to the presentation of their cases’, and that the possessive pronoun ‘their’ clearly refers to the earlier reference in that sentence to ‘interested parties’. Therefore, it is the interested parties, rather than the authority, who determine whether the information is in fact ‘relevant’ for the purposes of Article 6.4....The interested parties’ right under Article 6.4, therefore, is to see all non-confidential information relevant to the presentation of their cases and used by the investigating authority. Article 6.4 thus applies to a broad range of information that is used by an investigating authority for purposes of carrying out a required step in an anti-dumping investigation.”¹⁰

[14] Article 6.5¹¹ ADA addresses the protection – non-disclosure – of information which is confidential in nature. Importantly, Panel and Appellate Body guidance on interpretation of Article 6.5 must be taken into account when assessing what JCB and the TRA are bound to do regarding JCB’s claims of confidentiality.

- “As we have explained above, Article 6.5 prescribes a showing of ‘good cause’ by the party requesting confidential treatment of its information as a condition precedent for an investigating authority to accord such treatment. The treatment of information as confidential is, therefore, the legal consequence that flows from the establishment of good cause, as determined pursuant to an objective assessment by the authority reviewing a party’s request for the confidential treatment of its information. Hence, in the absence of good cause being shown by the party submitting information, as determined pursuant to an objective assessment by the authority, there is no legal basis for the authority to accord confidential treatment to that information....Conversely, if information has been accorded

⁹ Panel Report, *Dominican Republic – AD on Steel Bars (Costa Rica)*, para. 7.401.

¹⁰ Appellate Body Report, *EC – Fasteners (China)*, paras. 479-480, and 485 (Appellate Body summing up past decisions on the scope of information that must be disclosed under Article 6.4).

¹¹ “Any information which is by nature confidential (for example, because its disclosure would be of significant competitive advantage to a competitor or because its disclosure would have a significantly adverse effect upon a person supplying the information or upon a person from whom that person acquired the information), or which is provided on a confidential basis by parties to an investigation shall, upon good cause shown, be treated as such by the authorities. Such information shall not be disclosed without specific permission of the party submitting it.”



Version: Non-Confidential

confidential treatment under Article 6.5 in a manner that does not conform to the requirements of that provision, there is no legal basis for according confidential treatment and such information would, for the purposes of Article 6.4, be considered as information 'that is not confidential as defined in paragraph 5'.¹² (emphasis added)

- “‘Good cause’ must be assessed and determined objectively by the investigating authority and cannot be determined merely based on the subjective concerns of the submitting party...In making its [good cause] assessment, the investigating authority must seek to balance the submitting party’s interest in protecting its confidential information with the prejudicial effect that the nondisclosure of the information may have on the transparency and due process interests of other parties involved in the investigation to present their cases and defend their interests.... If information is treated as confidential by an authority without such a ‘good cause’ showing having been made, the authority would be acting inconsistently with its obligations under Article 6.5”.¹³

[15] Further with regard to the required JCB showing of good cause and objective TRA assessment of the confidentiality claim, it should also be clear that a “bald assertion” of confidentiality, e.g., “disclosure will provide advantage to our competitor” – as frequently resorted to by JCB in its Application and subsequent submissions including key elements of its Questionnaire reply, may not suffice. In such circumstances, the authority must be able to point to record evidence demonstrating that the claimant has substantiated or explained why this is a potential risk or why the competitive advantage that allegedly could materialise from disclosure would be “significant” within the meaning of Article 6.5.¹⁴ To the CCCME’s view, a competitive advantage is not sacrificed by disclosure of non-current company data or of the very substantial information that is put forward by JCB which is otherwise publicly available from industry expert publications for a fee. The CCCME cannot be expected to expend large sums to purchase such publications in order to properly defend its interests in these investigations.¹⁵

[16] In the event that a party shows good cause and the authority has objectively examined that claim and determined that the information in question should be treated as confidential, then the obligations of Article 6.5.1 (non-confidential summaries) apply. Article 6.5.1 specifies that, where data claimed to be confidential is submitted and is properly assessed by the authority to be confidential, then “Article 6.5.1 obliges the investigating authority to require that a non-confidential summary of the information be furnished, and to ensure that the summary contains ‘sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence’. The sufficiency of the summary provided will therefore depend on the confidential information at issue, but it must permit a reasonable understanding of the substance of

¹² Appellate Body Report, *EC – Fasteners (China) (Article 21.5 – China)*, paras. 5.101-5.102.

¹³ Appellate Body Report, *EC – Fasteners (China)*, paras. 537, 539.

¹⁴ See Appellate Body Report, *EC – Fasteners (China) (Article 21.5 – China)*, para. 5.56

¹⁵ CCCME has already suggested reasonable means to secure all such information presently claimed to be subject to copyright. See especially para. 19 *et seq* and footnotes 7-12, CCCME Submission of 2 August.



Version: Non-Confidential

the information withheld in order to allow the other parties to the investigation an opportunity to respond and defend their interests.”¹⁶

- [17] Further, a claim that confidential information “is not possible to summarise”, as JCB frequently asserts and notably relating to important injury-related data set out in its Questionnaire reply, can be accepted under Article 6.5.1 only in “exceptional circumstances”. Moreover, a simple statement of impossibility is not sufficient – the party is “required to provide a statement of reasons why summarization is not possible.” (emphasis added) A high bar is established in this regard. If such statements have been provided, the investigating authority “must scrutinize such statements to determine whether they establish exceptional circumstances, and whether the reasons given appropriately explain why, under the circumstances, no summary that permits a reasonable understanding of the information’s substance is possible.”¹⁷
- [18] To the CCCME’s knowledge, JCB has not submitted to the TRA a statement of reasons relating to each of the numerous instances in its respective submissions where JCB has identically claimed “impossibility” to avoid any summarization of the specific deleted information. To be very clear, such repetitive recitation of the identical confidentiality claim for multiple data types, as JCB does, does not satisfy Article 6.5.1. Regarding such repetitive claims, the Panels in *China – HP-SSST (Japan) / China – HP-SSST (EU)*, determined that these “[do] not provide the reasons why the particular information is not susceptible of summary. In addition, the statement does not relate to any specific information for which it was not possible to provide a non-confidential summary. Our understanding is supported by the fact that the exact same statement is repeatedly used with respect to a large number of different pieces of information. Guided by the Appellate Body’s findings in *EC – Fasteners*, we do not consider that the repetition of this single statement can serve as a valid statement of the reasons why summarization of a number of different pieces of information is not possible.” (emphasis added)
- [19] Especially in light of the practice of other investigating authorities, for example the European Commission, as regards requirements for submission of meaningful non-confidential summaries for data types and categories the same as which JCB in these TRA investigations claims “impossibility” to summarise, it is highly doubtful that JCB could in fact provide adequate reasons why it cannot provide a summary giving a reasonable understanding of the deleted information’s substance.
- [20] Again, the CCCME has already provided detailed explanations, including examples, of how key confidential injury and causation data can be provided in meaningful non-confidential form and regarding which JCB continues to claim is either impossible to summarise and has provided nothing at all (e.g., concerning cost of production/sales data), or has only provided a limited, non-meaningful summary (e.g., solely indexation of a data trend which by itself is meaningless for analysing injury and causation without specifying the related absolute - or ranged near-absolute - values, such as concerning UK

¹⁶ Appellate Body Report, *EC – Fasteners (China)*, para. 542.

¹⁷ Quotations from Appellate Body Report, *EC – Fasteners (China)*, para. 544.



Version: Non-Confidential

consumption, market shares, etc.). For example, JCB contends (para. 16 of its 11 October Comments) that providing solely indices for injury indicators is sufficient. To the contrary, the Panel in *China – Broiler Products* has specifically determined that “because providing year-over-year changes in percentage terms without a non-confidential summary of what constitutes the baseline does not allow a reasonable understanding of the magnitude of the change.”¹⁸ (emphasis added)

- [21] The CCCME therefore considers it incumbent on the TRA to now ensure that JCB urgently provides all the requested data in meaningful non-confidential form as necessary for protection of the CCCME’s rights of defence.
- [22] Finally, to be very clear and relating back to JCB’s first claim that CCCME’s submissions (apparently including CCCME’s contentions relating to inadequate provision of meaningful non-confidential summaries) are out-of-time, the CCCME has contended from the very first of its submissions in these investigations that JCB’s disclosure of data is inadequate for purposes of enabling CCCME to duly exercise its rights of defence. As explained above in this section, the relevant WTO obligations in these regards clearly place these obligations firstly on the party, here JCB, which seeks confidential treatment of its data, and secondly on the investigating authority, to ensure that the confidentiality claims are objectively examined and properly justified and, if so, to ensure that meaningful non-confidential summaries are provided for other interested parties. It is therefore essential that these obligations are respected in any event and even whether or not the CCCME or other interested parties have actually raised complaints.

3. Existence of “other causal factors” accounting for JCB’s alleged injury

- [23] The JCB Comments of 11 October, once again with full bluster, contend (para. 24) that JCB has “already rebutted the CCCME and other interested parties’ claims on injury and causation.” This is hardly the case. Indeed, JCB’s own data indices as set out in the Application as regards each of the cited injury indicators except profitability and return on investment - thus on JCB’s production, capacity utilisation, sales, market share, productivity and average sales price - all show positive trends¹⁹ over the period of the injury investigation and thus contradict JCB’s injury claim.

¹⁸ Panel Report, *China – Broiler Products*, paras. 7.62-7.63.

¹⁹ In detail and as specified in CCCME’s Submission of 2 August:

- Applicant’s production and capacity utilisation increased significantly (23% and 24% respectively) over the injury period overall (temporary drops in 2020 and 2021 confirmed to be due to Covid-related own measures, very significant lost downstream customer orders and continuing component supply chain constraints mixed with rising raw material prices);
- Total UK excavator industry sales followed the same strong positive trend, with an increase of 23% over the injury period (Application figures);
- Applicant’s average sales price on the UK market increased by 14% over the injury period (Application figures) - the CCCME notes that while the UK inflation rate was higher in the same time period, as highlighted by the Applicant, the high inflation in the UK in this period clearly had nothing to do with excavator imports from China);



Version: Non-Confidential

- [24] The disparity between these overall positive trends for JCB and JCB's single negative profitability trend, solely in 2022/POI, is precisely what requires proper analysis under the heading of "other causal factors" and which is reliant on still-missing data transparency from JCB relating, notably, to the evolution of its costs of production/sales in 2022/POI. Of course, also negatively impacting JCB profitability in 2022/POI would be JCB's major increase in its labour costs and astronomical increase in its finance costs in 2022/POI (see indices in Application Tables 12 and 13, respectively), but clearly most important as regards impact on profitability would be the missing JCB data on its costs of production/sales. If the facts for JCB are anything like the huge increases seen in costs of production/sales across other industries in the UK and Europe in this same time period, that will be more revealing about profitability impact than the imports from China. As indicated in part II.2 above, CCCME has requested and still awaits meaningful non-confidential disclosure of this and all other specified JCB data relating to injury and causation.
- [25] For the sake of completeness, the CCCME would also comment on JCB's three specific points concerning the existence of other causal factors. First, JCB's comment (para. 26) about the imprecision of the statistics cited by CCCME under HS code 8429 52 10 (i.e., coverage of both in-scope and out-of-scope excavators) applies equally to the UK import statistics cited by JCB. JCB indicates that it has used UK import data only "to collaborate other more precise data" but fails to disclose that other more precise data. JCB also references the trade data on page 56 of its Application, but that table only concerns the value of imports and obviously a relative increase over time of large and very large excavators (i.e., significantly more expensive than out-of-scope mini-excavators) would significantly skew the interpretation.
- [26] It also remains for JCB to clearly explain how it derives only in-scope excavators from any of the available international trade data. Even more important, it remains for JCB to explain away CCCME's trade data²⁰ which shows that the growth of imports from China into the UK was very substantially less than the decrease of imports of excavators from the EU in the same time period, also that the average price of excavator imports from the Netherlands, the largest exporter from the EU, was less than the price of the imports from China²¹. All of these points bear directly on the issue of causation of the alleged injury

-
- The UK excavator industry's UK market share increased by 12% over the injury period (Application figures);
 - Applicant's profitability rose strongly to 2021 (+26%) but then dropped in 2022/first half of 2023. While the causation of this single negative injury indicator is attributed by the Applicant solely to low-priced imports from China, the actual and predominant cause of the drop in profitability towards the end of the injury period is clearly in major doubt given the continuing significant impact on profitability of the energy price crisis due to the Russia/Ukraine conflict, high inflation, rapidly rising interest rates and, not least, the documented serious downturn in the UK construction equipment market overall and for crawler excavator sales in particular (-9% and -18%, respectively) in 2023.

²⁰ See CCCME Submission of 2 August, Tables 1 and 2.

²¹ See Table 3 of CCCME Submission of 2 August.



Version: Non-Confidential

by other factors than imports from China and require further explanation and supporting data from JCB.

- [27] Second, JCB makes several comments (paras. 27-30) that the CCCME's claims about Komatsu UK are irrelevant. To the contrary and notwithstanding the facts that Komatsu UK is not cooperating in these investigations and that JCB alone has standing, Komatsu UK is the sole other UK producer of excavators and, just like JCB, produces excavators in the UK in very large part for international sales. Also, it appears that, for both UK producers, their excavator sales in the UK comprise a relatively small proportion of their international sales. Further, both producers appear to have quite similar sales and market shares in the UK. Moreover, both producers' production and pricing of sales in the UK market face the same UK domestic market factors, whether these be the increasing local UK labour costs or the soaring UK energy pricing and inflation in 2022/POI, as well as competition in the form of quality and prices of imports from actually a good number of supplier countries other than China.
- [28] Additionally, it appears that both JCB and Komatsu have significant imports from Japan (JCB in the form of major costly components²²), which means that both producers' results would have been significantly affected by the supply chain constraints and high shipping costs from Asia, particularly from Japan, following the Covid epidemic and start of the Ukraine conflict. CCCME therefore does not accept JCB's assertion that Komatsu UK's production experience in the UK is not a fair comparison when assessing the causation of JCB's alleged injury. Last but not least, it is interesting that JCB cites Komatsu UK's pre-tax profitability when JCB itself refuses to provide its profitability data on a pre-tax basis. CCCME recalls that it has requested all profitability data in these investigations to be disclosed on a pre-tax basis.
- [29] Third, JCB contends (para. 31) that CCCME is wrong that the injury suffered by JCB "is caused by supply chain and demand constraints caused by the COVID-19 pandemic and the Russian invasion of Ukraine." This statement is a highly simplistic, selective and thus misleading summary of CCCME's Submission of 2 August. CCCME would suggest that JCB carefully review the whole of CCCME's Submission and respond to all of CCCME's evidence and contentions showing that the actual and principal cause of the alleged JCB injury was not the imports from China.

III. CONCLUSIONS

The CCCME is pleased to Reply to the Applicant/JCB's Comments of 11 October 2024. With respect to the key issues raised by the JCB Comments, this CCCMC Reply addresses

²² See footnote 12 of CCCME Submission of 2 August.



Version: Non-Confidential

three issues in turn. Please note that these summary conclusions are not exhaustive, so the details of the CCCME Reply are essential reading:

1. Regarding the JCB contention that the CCCME's Submission of 2 August is out of date, it is important that JCB read the whole of the WTO Appellate Body Report cited by JCB in support of its contention (*US – Oil Country Tubular Goods Sunset Reviews*). That Appellate Body Report, in fact, contradicts JCB's conclusion that the CCCME Submission of 2 August is out of date, meaning that the JCB contention is not legally founded. Indeed, the CCCME responded to the initiation of both these investigations with registrations as an interested party and timely substantive comments and indications that it would comment further during the course of the investigations - CCCME expressly reserved the right to comment further. In these circumstances, all of CCCME's subsequent submissions must therefore be duly taken into account. For its part as the investigating authority, the relevant WTO guidance makes clear that the TRA has the obligation towards all interested parties who timely responded to the initiation of the investigations to provide "full" and "ample" opportunities for all these interested parties to make submissions during the investigation and notably to exercise their rights of defence.
2. As regards JCB's claim that it has provided sufficient non-confidential information to other interested parties, this CCCME Reply extensively cites WTO Panel and Appellate Body determinations which clearly indicate that, in all regards, the non-confidential information that JCB has provided to date in these investigations falls very substantially short of JCB's obligations. It appears that JCB has not even met its up front obligations as the submitter of information for which it seeks confidential treatment, such as the necessary showing of good cause and need to explain why the different types of information for which it has requested confidential treatment is or is not susceptible to meaningful non-confidential summary. The respective WTO determinations also make clear that the counterpart to JCB's obligations is the obligation on the TRA as the investigating authority to objectively assess the validity of JCB's confidential claims and to counterbalance JCB's claims with the clear right of other parties to receive all information, at least in meaningful non-confidential form, which is relevant to their rights of defence in these investigations. The CCCME expressly requests the TRA to actively fulfil its obligations to ensure that JCB urgently provides to the CCCME and other interested parties substantial additional meaningful non-confidential summaries of all data already specified by the CCCME as bearing directly on the key issues of injury and causation thereof.
3. This CCCME Reply also responds in detail to JCB's contention that JCB has already fully proven that it has suffered serious injury solely as a result of excavator imports from China. Simply put, the JCB injury claim is inconsistent with the series of positive indicators that JCB has already provided in these investigations and, as regards the



Version: Non-Confidential

sole negative injury indicator (profitability), JCB has so far refused to provide essential underlying data (such as concerning costs of production and sales for the critical period) which would enable an objective assessment of the reasons for that reduced profitability. In short, JCB asserts to have made its case but refuses to provide the key data which would help support that claim, or not. For its part, the CCCME has already provided data and cited numerous economic factors prevailing during the time period in question which substantially undercut JCB's injury and causation claims.

* * *

The CCCME stands ready to reply to any TRA questions in follow-up to this CCCME Reply to the JCB Comments of 11 October and looks forward to urgently receiving, and commenting on, the requested additional non-confidential data from the Applicant.

Submitted on behalf of the CCCME:

[Name withheld by request of TRA]

Searles & Associates

[Name withheld by request of TRA]

East & Concord Partners