

11 October 2024

Trade Remedies Authority
North Gate House
21-23 Valpy Street
Reading
Berkshire
RG1 1AF

via UK Trade Remedies Services

OPEN

Dear Mesdames,
Dear Sirs,

Re: AD0047 – Comments on China Chamber of Commerce for Import and Export of Machinery and Electronic Products' submission
Our client: JCB Heavy Products Limited ("Applicant")

We refer to the China Chamber of Commerce for Import and Export of Machinery and Electronic Products' ("**CCCME**") submission ("**Submission**") published on 20 September 2024 in the public file of the captioned anti-dumping investigation ("**Investigation**") into imports of certain excavators ("**Excavators**") originating in China.¹

In the Submission, the CCCME comments on the application ("**Application**") and the initiation of the Investigation. Although the out-of-time Submission contains no new information, for the sake of completeness, the Applicant hereby submits its comments on the Submission.

In sum, the Applicant submits that:

- The Trade Remedies Authority ("**TRA**") should disregard the Submission as it was filed out of date.
- The Applicant provided sufficient evidence of a particular market situation ("**PMS**") in the Chinese Excavator industry.
- The Applicant has submitted sufficient non-confidential data throughout the Investigation.
- There is no factor other than UK imports of Chinese Excavators that causes injury to the Applicant.

1. The TRA should disregard the Submission as it was filed out of date

1. The TRA should disregard the Submission in its entirety because it was filed out of date.
2. Interested parties are not entitled to participate in an anti-dumping or anti-subsidy investigation "as and when they choose."² There is no indefinite right for an interested

¹ AD0047: CCCME, Comments of the CCCME, 1 August 2024.

² Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, WT/DS268/AB/R, para. 241; Panel Report, *EU – Footwear (China)*, WT/DS405/R, para. 7.604.

party to make submissions,³ as this right ceases to exist at some point.⁴

3. The deadline for filing comments such as those in the Submission was, at the latest, the deadline for the CCCME's questionnaire response on 28 February 2024.⁵ The Submission was filed on 1 August 2024. This is five months after the deadline to file the CCCME's questionnaire response lapsed.
4. There is no reason why the CCCME could not have filed the Submission earlier, as the Submission relates to the Application, which has been available to the CCCME since 15 November 2023.⁶
5. Thus, the CCCME's right to comment on the initiation of the Investigation on 15 November 2023 lapsed well before the Submission was filed on 1 August 2024.⁷ On that basis, the TRA should reject the Submission in its entirety.⁸
6. This is all the more so because it is imperative that the TRA promptly finalise its provisional findings. The CCCME should not be allowed to attempt to further delay the case timeline by filing the out-of-date Submission.
7. In sum, the TRA should disregard the Submission in its entirety.
- 2. The Applicant provided sufficient evidence of a particular market situation in the Chinese Excavator industry**
8. Contrary to what the CCCME claims,⁹ the Applicant provided sufficient evidence of a PMS in the Chinese Excavator industry.
9. As an initial point, the Applicant already rebutted an identical claim by other interested parties months before the Submission was filed.¹⁰
10. For the sake of completeness, the Applicant makes two comments on the CCCME's claim.
11. First, the CCCME claims that key economic plans are not binding and that the Government of China ("**GOC**") does not intervene in Chinese companies' decision-making.¹¹ This claim is contradicted by the facts:
 - Contrary to what the CCCME claims, the 14th Five-Year Plan ("**FYP14**") is a mandatory government policy that is legally binding. Part 19 of FYP14 outlines its binding nature and outlines implementation modalities.¹²

³ Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 241.

⁴ Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 242.

⁵ AD0047: CCCME, Contributor questionnaire, 1 May 2024; AD0047: TRA, Extensions – Note to Public File, 2 May 2024.

⁶ The CCCME makes one reference to the Applicant's comments published on 25 June 2024 and one reference to the Applicant's deficiency questionnaire response published on 3 May 2024.

⁷ It is irrelevant that the CCCME "reserved its rights" to file further comments. See CCCME, Submission, paras. 2, 4. The CCCME cannot "reserve its rights" beyond the instructions from the TRA and what is reasonable in view of the case timeline.

⁸ See also AD0047: Applicant, Comments on submissions and questionnaires, 15 May 2024, Section 4.

⁹ CCCME, Submission, Section 1. The Applicant has already addressed similar comments from other interested parties. See

¹⁰ AD0047: Applicant, Comments on submissions and questionnaires, 15 May 2024, Section 2.2.

¹¹ CCCME, Submission, para. 10.

¹² See AD0047: Applicant, Application, Appendix E.2.1.007.

Investigating authorities in other jurisdictions, such as the European Union and the United States, have also found that FYP14 imposes binding obligations on Chinese companies and individuals.¹³

- The CCCME claims that the Machinery Plan "only indicates that a certain sector is encouraged by the government plan."¹⁴ But what the CCCME omits is that the GOC heavily intervenes to support "encouraged" industries, such as the Chinese Excavator industry.¹⁵
 - Despite the CCCME's assertions, it is well established that the GOC controls state-owned and privately-owned companies in China.¹⁶ In essence, companies are required to pursue a number of goals that are not based on commercial considerations.
12. Second, the CCCME erroneously claims that the Applicant failed to provide evidence of how the PMS affects prices and costs of Chinese Excavators, referring to TRA's findings in *Aluminium extrusions from China*.¹⁷
 13. The CCCME confuses the burden on the Applicant to bring initial evidence,¹⁸ which the Applicant did,¹⁹ with the burden on the TRA to make findings, as the TRA did in *Aluminium extrusions from China*. The Applicant logically does not have access to the same data from Chinese Excavator producers as the TRA. The Applicant is thus also not held to the same evidentiary standard concerning other companies' data as the TRA.
 14. In sum, the TRA should reject the CCCME's claim that the Applicant did not provide sufficient evidence of a PMS in the Chinese Excavator industry.
- 3. The Applicant has submitted sufficient non-confidential data throughout the Investigation**
15. Contrary to what the CCCME asserts,²⁰ the Applicant has submitted sufficient non-confidential data throughout the Investigation. In this regard, the Applicant makes three comments.
 16. First, the Applicant has provided indices for the injury indicators requested in the Application. The CCCME's ask to see "trends" has thus already been satisfied.²¹
 17. Second, the Applicant is the sole cooperating UK Excavator producer, so that absolute data concerning the Applicant have to be treated with additional care for its

¹³ European Commission, Commission Staff Working Document on Significant Distortions in the Economy of the People's Republic of China for the Purposes of Trade Defence Investigations, SWD(2024) 91 final, 10 April 2024 ("**EU Significant Distortions Report**"), available [here](#), pp. 93-96 (updated version of Appendix E.2.1.002 to the Application); Office of the U.S. Trade Representative, 2023 Report to Congress on China's WTO Compliance, February 2024, available [here](#), p. 68.

¹⁴ CCCME, Submission, para. 10.

¹⁵ EU Significant Distortions Report, p. 90. See also e.g., AS0022: TRA, *Optical fibre cables from China*, Statement of Essential Facts, 20 June 2023, paras. 199-200, 202, 208, 265 and 282.

¹⁶ See, e.g., EU Significant Distortions Report, pp. 43-55.

¹⁷ CCCME, Submission, paras. 11-12.

¹⁸ According to Article 5.2 of the *Anti-dumping Agreement*, the application must contain relevant evidence of dumping, injury and causation. The term 'evidence' in this context means information as is reasonably available to the applicant. See Panel Report, *Mexico – Corn Syrup*, WT/DS123/R, para. 7.76; Panel Report, *Thailand – H-Beams*, WT/DS122/R, paras. 7.75-7.77.

¹⁹ AD0047: Applicant, Application, Appendices E.2.1.001, Section 4.2.

²⁰ CCCME, Submission, Section 2.

²¹ CCCME, Submission, para. 17.

confidentiality. In these circumstances, appropriate business confidentiality is achieved in practice by providing indices only.²² The Applicant has done precisely that.

18. The Applicant cannot be required, as the CCCME wants it, to provide "tightly ranged" absolute data.²³ That would be tantamount to sharing with competitors highly business-sensitive data that is protected from such disclosure by the applicable rules,²⁴ as well as by the TRA's practice.²⁵
 19. Third, the UK market data on which the Applicant relies is copyrighted,²⁶ and the indices provided by the Applicant permit the CCCME to exercise its rights of defence (as the CCCME is doing).
 20. What the CCCME tries to ignore, however, is the key fact that the market share of Chinese Excavator producers increased by 562% in the relevant period, while the Applicant's market share shrunk.²⁷ This remarkable increase in market share in the mature UK Excavator market is due to one single reason: unfair trading practices.²⁸ As one Chinese Excavator producer's UK dealer aptly put it, a Chinese Excavator "is distinguished due to its extremely low purchase price."²⁹
 21. In this regard, the CCCME's claim that the Application is "bluster" is directly contradicted by the facts.³⁰ In the Application, the Applicant significantly underestimated the import volumes and market share of Chinese Excavators. Data from Chinese Excavator producers shows that the situation is, in reality, much worse.³¹
 22. In sum, the TRA should reject the CCCME's claim that the Applicant did not provide sufficient non-confidential data.
- 4. There is no factor other than UK imports of Excavators from China that causes injury to the Applicant**
23. Contrary to what the CCCME again claims,³² the injury to the Applicant is caused by imports from China and not by any other factor.

²² AD0021: TRA, *Optical fibre cables from China*, Final Determination, 23 October 2023, para. 96. See also e.g., Commission Implementing Regulation (EU) 2015/787 of 19 May 2015 imposing a provisional anti-dumping duty on imports of acesulfame potassium originating in the People's Republic of China as well as acesulfame potassium originating in the People's Republic of China contained in certain preparations and/or mixtures, OJ L 125, 21.5.2015, p. 15; Commission Regulation (EC) No 492/2008 of 3 June 2008 imposing a provisional anti-dumping duty on imports of monosodium glutamate originating in the People's Republic of China, OJ L 144, 4.6.2008, p. 14.

²³ CCCME, Submission, para. 18.

²⁴ See Article 6.5 of the *Anti-Dumping Agreement* and Regulation 46 to the *Trade Remedies (Dumping and Subsidisation) (EU Exit) Regulations 2019*.

²⁵ For example, in *Aluminium extrusions from China*, the UK producers did not provide any data in the non-confidential versions: AD0012: Hydro Aluminium, *Aluminium extrusions from China*, Application, pp. 61-67; AD0012: Hydro Aluminium, *Aluminium extrusions from China*, Pre-sampling questionnaire, 14 July 2021; AD0012: Garner Aluminium Extrusions, *Aluminium extrusions from China*, Questionnaire, 17 December 2021; AD0012: Aluminium Shapes, *Aluminium extrusions from China*, Questionnaire, 17 December 2021.

²⁶ AD0047: Applicant, Application, Section D.2, response to Question 2, p. 24.

²⁷ AD0047: Applicant, Comments on submissions and questionnaires, 15 May 2024, paras. 40, 44.

²⁸ See also Applicant, Additional evidence of injury caused by imports of Chinese Excavators, 12 September 2024.

²⁹ AD0047: Applicant, Comments on submissions and questionnaires, 15 May 2024, para. 45.

³⁰ CCCME, Submission, para. 16,

³¹ AD0047: Applicant, Comments on submissions and questionnaires, 15 May 2024, para. 40.

³² CCCME, Submission, paras. 21-41.

24. As an initial point, the Applicant has already rebutted the CCCME and other interested parties' claims on injury and causation.³³ The Applicant has shown that it is suffering injury based on all major indicators: sales volumes, sales prices, market shares, profitability, cash flow, and return on investments.³⁴ The underlying data for these claims was verified by the TRA.³⁵
25. For the sake of completeness, the Applicant makes three comments on the CCCME's claims.
26. First, the CCCME's reliance on import statistics under HS code 8429 52 10 to make claims about volumes and prices of UK imports is of no use because this HS code contains out-of-scope products.³⁶ For this reason, the Applicant only used import statistics to corroborate more precise data about the market for in-scope Excavators.³⁷
27. Second, the CCCME's claims about Komatsu UK are irrelevant.³⁸ Komatsu UK is not cooperating in this investigation and the Applicant alone has standing.
28. In any event, the CCCME fails to point out that Komatsu UK is a "limited risk contract manufacturer" for Komatsu Europe International, a Belgian entity, and it sells Excavators exclusively to Komatsu Europe International at "pricing set to generate a return on cost."³⁹ This means that Komatsu UK uses "the 'cost plus' based transfer pricing" for 100% of its sales.⁴⁰ In other words, the accounts for Komatsu UK say nothing about prices on the UK or any other Excavator market.
29. What is more, Komatsu Excavators sold on the UK market are not just Excavators made in the UK by Komatsu UK, but also Excavators made in Japan.
30. Finally, although superabundant, the Applicant notes that, contrary to what the CCCME implies, Komatsu UK's profitability was far below the 11.0% target profit throughout the injury period. Its pre-tax profit margin was 2.6% for the period 1 April 2022-31 March ("FY") 2023,⁴¹ 2.1% for FY 2022,⁴² 2.3% for FY 2021,⁴³ and 2.1% for FY 2020.⁴⁴
31. Third, the CCCME is wrong that the injury suffered by the Applicant is caused by supply chain and demand constraints caused by the COVID-19 pandemic and the Russian invasion of Ukraine.⁴⁵ The point is that absent dumped Chinese Excavator imports, the Applicant would be able to increase its prices to sustainable levels. The only factor stopping the Applicant from doing so is the extreme price pressure exerted by Chinese

³³ AD0047: Applicant, Comments on submissions and questionnaires, 15 May 2024, Section 3.2. The Applicant also already addressed some claims made by the CCCME in the Submission. E.g., the CCCME claims that increased sales in 2022 suggest a "good sales year." See CCCME, Submission, para. 36. As the Applicant explained, "Production rebounded from a pandemic-induced low in 2020, reflecting a strategy of lowering net prices to loss-making levels in an attempt to avoid losing market share to the dumped and subsidised imports from the PRC." See AD0047: Applicant, Application, p. 46.

³⁴ AD0047: Applicant, Application, pp. 49-68.

³⁵ AD0047: TRA, Verification Report – JCB Heavy Products, 20 September 2024, pp. 18-21.

³⁶ CCCME, Submission, footnote 25.

³⁷ AD0047: Applicant, Application, p. 56.

³⁸ Komatsu UK, Annual report 31 March 2023, p. 1.

³⁹ Komatsu UK, Annual report 31 March 2023, p. 12.

⁴⁰ Komatsu UK, Annual report 31 March 2023, p. 2.

⁴¹ Komatsu UK, Annual report 31 March 2023, p. 12.

⁴² Komatsu UK, Annual report 31 March 2023, p. 12.

⁴³ Komatsu UK, Annual report 31 March 2021, p. 11.

⁴⁴ Komatsu UK, Annual report 31 March 2021, p. 11.

⁴⁵ CCCME, Submission, para. 41.

Excavator producers who are selling ever-increasing numbers of Excavators in the UK.⁴⁶ As the TRA has repeatedly found, such price pressure from Chinese imports forces the UK industry – in this case the Applicant – to reduce prices to levels that are unsustainable.⁴⁷ This makes the price pressure from Chinese imports "the major factor" or cause of injury.⁴⁸

32. Further, for the sake of completeness, the Applicant notes [*Sensitive information removed – Applicant's confidential business information*].
33. In sum, the TRA should reject the CCCME's claims that the Applicant is not injured and that the injury suffered by the Applicant is not caused by Chinese Excavator imports.

5. Conclusion

34. In sum, the Applicant submits that the TRA should:
 - Disregard the Submission in its entirety.
 - Reject the CCCME's claim that the Applicant did not provide sufficient evidence of a PMS in the Chinese Excavator industry.
 - Reject the CCCME's claim that the Applicant did not provide sufficient non-confidential data.
 - Reject the CCCME's claims that the Applicant is not injured and that the injury suffered by the Applicant is not caused by Chinese Excavator imports.

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⁴⁶ See, e.g., Applicant, Additional evidence of injury caused by imports of Chinese Excavators, 12 September 2024.

⁴⁷ AD0021: TRA, *Optical fibre cable from China*, Final determination, 23 October 2023, paras. 438 and 505; AS0022: TRA, *Optical fibre cable from China*, Final Determination, 23 October 2023, paras. 432 and 499.

⁴⁸ AD0012: TRA, *Aluminium extrusions from China*, Final determination, 16 December 2022, paras. 388 and 428.