Neutral Citation Number: [2025] EWHC 1124 (Admin)

Case No: AC-2025-LON-000523

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/05/2025

Before :

THE HONOURABLE MR JUSTICE SAINI

- -

Between :

THE KING **on the application of** **CATERPILLAR (XUZHOU) LTD**	**Claimant**
- and –	
(1) SECRETARY OF STATE FOR BUSINESS AND TRADE **(2) TRADE REMEDIES AUTHORITY**	**Defendants**
- and –	
FINNING (UK) LTD	**Interested Party**

- -
- -

Ewan West KC and **Alfred Artley** (instructed by **Mayer Brown International LLP**) for the **Claimant**
Sir James Eadie KC, **Malcolm Birdling** and **Jagoda Klimowicz** (instructed by **Government Legal Department**) for the **First Defendant**
Victoria Wakefield KC, Tim Johnston and **Alessandro Forzani** (instructed by **Fieldfisher LLP**) for the **Second Defendant**

Hearing dates: 29 & 30 April 2025

- -

Approved Judgment

This judgment was handed down remotely at 10am on 9 May 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

THE HONOURABLE MR JUSTICE SAINI

Judgment Approved by the court for handing down.

MR JUSTICE SAINI :

This judgment is in 11 main parts as follows:

I. Overview

1. This case is about the "dumping" of Chinese manufactured excavators onto the United Kingdom market. In broad terms, "dumping" is a form of unfair competition which involves the exporting of a product at an artificially lower price than the exporter's normal price on its own home market, thereby causing material injury to those operating in the competing domestic industry. The claim before me is a "rolled-up" and expedited judicial review claim brought by the Claimant company ("Caterpillar") against decisions of the First Defendant, the Secretary of State for Business and Trade ("the SSBT"), and the Second Defendant, the Trade Remedies Authority ("the TRA"). Directions were given for a "rolled-up" hearing to be heard on 29 and 30 April 2025, with judgment to be given on or before 9 May 2025, if possible. That date is said to be significant because, as I describe in more detail below, the SSBT is obliged to make a final statutory decision in relation to the dumping issue (and any associated trade defence measures) by 15 May 2025, and it is said that the legality of the decisions challenged in this claim will affect the SSBT's final decision.

2. Caterpillar is a company registered under the laws of China. It is part of the Caterpillar Group ("the Group"), which is well-known as one of the world's leading manufacturers of construction and mining equipment. The Group is headquartered in the United States and listed on the NYSE. Caterpillar has operations in Jiangsu and elsewhere in China, and manufactures excavators there for onward sale. These excavators are shipped from the point of manufacture in China via third countries and then onto the UK market. Caterpillar's excavators are imported into the UK by Finning (UK) Ltd ("Finning"), which is the only distributor of these excavators in the UK. Finning is an independent company.

3. On 28 September 2023, another well-known manufacturer of excavators, JCB Heavy Products Ltd ("JCB"), submitted a complaint to the TRA alleging that certain excavators imported into the UK from China had been, or were being, dumped onto the market at unrealistically low prices, thereby causing injury to UK industry. The TRA is an executive non-departmental public body established by the Trade Act 2021 and sponsored by the Department for Business and Trade ("the DBT"). The TRA is independent of the SSBT, and provides the SSBT with advice, support and assistance

in connection with the conduct of international trade disputes, and assistance in relation to his responsibilities relating to trade. As part of the TRA's functions it investigates trade remedies relating to dumping, subsidies and safeguards. The SSBT has statutory powers to approve, reject, or vary the TRA's recommendations in relation to anti-dumping duties. I will describe the legal framework in more detail in **Sections II and III** below.

4. The judicial review challenge arises in the context of the ongoing anti-dumping investigation initiated by the TRA on 15 November 2023 ("the Investigation"), following the JCB complaint. A Notice of Initiation of the Investigation was published on the TRA's public file on that day and the TRA issued a targeted press release to a number of construction publications (several of whom covered the launch of the Investigation). The TRA also notified the three Chinese exporters identified by JCB and the Government of China of the Investigation. Following that process of publication, various interested parties registered their interest in the Investigation. However, neither JCB nor any of the other interested parties identified Caterpillar as an interested party in the Investigation. Caterpillar was not identified by the TRA from the outset because it held data that identified it as exporting from the United States of America. Later in the Investigation, the TRA learnt that Caterpillar's excavators are exported to an affiliate based in Switzerland before they are sold into the UK market.. Nor did Caterpillar come forward itself and apply to register as an interested party.

5. Caterpillar's absence as an interested party in the Investigation (and responsibility for this) is the issue at the core of this claim. Caterpillar says it should have been notified of the Investigation as an interested party and the fault lies with the TRA in failing to meet statutory obligations to notify it. At the time the claim was started and until shortly before the hearing before me it was Caterpillar's position that it was <u>not</u> aware of the Investigation until late 2024 (when the TRA was far advanced in the Investigation). That fundamental factual foundation for its claim collapsed shortly before the expedited hearing - the collapse followed probing in correspondence by the Defendants. Caterpillar now accepts, without qualification, that it in fact knew about the Investigation on or around 16 November 2023. I will return to this point after some more of the introductory background.

6. Having conducted the Investigation over some months, on 12 September 2024, the TRA made what is called a Provisional Affirmative Determination ("the PAD" - a statutory decision) setting out its provisional recommendation that anti-dumping measures should be implemented in respect of the relevant imported Chinese excavators. This was sent to the SSBT on 19 September 2024. In summary, the TRA in the PAD found that self-propelled track-laying (tracked) excavators manufactured in China with a 360º revolving superstructure and with an operating weight of 11,000 kg or more but less than 80,000 kg (the "Relevant Goods") had been or were being dumped in the UK and recommended the imposition of a requirement on those intending to import the Relevant Goods to put in place a guarantee in the amount of the additional duty. Caterpillar was caught by the PAD and recommendation as a major manufacturer and exporter of the Relevant Goods. Caterpillar's excavators imported into the UK became liable to pay a "anti-dumping amount" of 64.17% (the highest rate so-called "residual rate"). That rate was imposed without reference to Caterpillar's specific position and data (given that it had not participated in the Investigation).

7. On 15 November 2024, about 11 months after the window for registering as an interested party had closed, Caterpillar contacted the TRA and formally inquired for the first time about the possibility of being registered as an interested party. In due course, they also asked for an individual rate to be calculated specific to Caterpillar. These requests were refused. In short, the TRA said it was too late.

8. The judicial review claim was issued on 20 February 2025. The decisions which are the targets of the claim are the PAD of 20 December 2024 (finding that Relevant Goods were being dumped in the UK and recommending the imposition of a guarantee) and the SSBT's decision by a notice published on 20 December 2024 accepting the TRA's recommendation ("the Guarantee Decision"). As I have said, this latter decision requires importers of the relevant excavators to provide a guarantee in respect of anti-dumping duties which might become due following the conclusion of the Investigation. This importer is Finning, but I am told that it has not provided a guarantee. Finning did not participate in this claim.

9. Although the judicial review claim had been issued, events did not stand still. Having been alerted to Caterpillar's interest, on 10 December 2024 the TRA confirmed that Caterpillar would be able to provide information to assist with the Investigation, but that the weight to be attached to it would depend on what information was provided, whether it was verifiable and operational time constraints to complete any review. Caterpillar provided comments on the Statement of Essential Facts ("SEF") on 16 December 2024 and on the PAD on 3 January 2025. The TRA further explained, in January 2025, that it would not calculate an individual rate for Caterpillar. The TRA's view at the time was formed by reference to factors including how very far advanced the process was - it was said to be simply too late to include Caterpillar's data, bearing in mind the time limits which apply to dumping investigations. There was political lobbying by Caterpillar at the highest levels. And, ultimately, the TRA changed its view on this issue - it treated Caterpillar as an interested party, received and took into account data from it, and under some considerable pressure of time an individual anti-dumping amount for Caterpillar has been calculated. That is a radically reduced margin of 28.37% (which will apply on a backdated basis).

10. Ewan West KC and Alfred Artley appeared for Caterpillar. Sir James Eadie KC, Malcolm Birdling and Jagoda Klimowicz appeared for the SSBT. Victoria Wakefield KC, Tim Johnston and Alessandro Forzani appeared for the TRA. I am grateful to Counsel for their well-structured and concise written submissions and to the wider legal teams for their work in preparing the substantial documentary materials for the expedited hearing (particularly the excellent Core Bundle). I was assisted by oral submissions from Mr West KC, Mr Artley, Sir James, Ms Wakefield KC and Mr Johnston.

11. 10 grounds of judicial review in total are pursued by Caterpillar: Grounds 1-4 and 10 against the SSBT (in relation to the Guarantee Decision), and Grounds 5-9 against the TRA (in relation to the PAD). As I said in argument, the grounds against the TRA should logically be considered first and that is the way in which I will address them below. It is not clear that Caterpillar reviewed the 10 grounds after having received the Defendants' evidence. Some of the grounds are obviously based on a factual misunderstanding, but unfortunately no ground was formally withdrawn by Mr West KC. For that reason, I will need to address each ground in some detail below. I will at

this stage provide a high level overview of the nature of the complaints and the responses.

12. As to the SSBT, Caterpillar says that he misdirected himself in law when exercising his powers under Schedule 4 of the Taxation (Cross-border Trade) Act 2018 ("the 2018 Act") to make the Guarantee Decision, wrongly considering that it was only if the TRA were to recommend definitive measures that he needed to consider whether the measure was in the public interest. It is further said that he simply "rubber-stamped" the TRA's recommendation and failed to exercise his discretion and/or take into account relevant considerations. It is also argued that there was no rational basis for his decision. As I observed at the hearing, many of these Grounds against the SSBT are repetitive and overlap, or are simply different legal formulations of the same underlying complaint. Ground 10 is an exception to this - it raises a free-standing point.

13. As to the TRA, the complaint, although again put in a number of ways, is essentially that its decision in the PAD to recommend a guarantee was unlawful because Caterpillar had not been given notice and the opportunity to participate in the Investigation as an interested party. Mr West KC fairly and realistically accepted that each of his 5 grounds of complaint against the TRA were different legal formulations of this particular complaint. Caterpillar says that given its significance as the leading exporter of the Relevant Goods, the TRA failed in its obligation to notify Caterpillar of the Investigation. It is said that the TRA's later refusal to let Caterpillar participate in the Investigation was both irrational and procedurally unfair, and having failed to consider evidence from Caterpillar, the TRA could not reasonably have made the PAD and recommended a guarantee (in circumstances omitting data from the main manufacturer of the Relevant Goods). In the witness evidence from Mr Goldspink (Caterpillar UK's Country Manager and Vice President and General Manager of Caterpillar's Global Medium Industrial Engine business) he says that the failure of the TRA to inform Caterpillar of the Investigation was "… remarkable given Caterpillar was the largest exporter from China of the subject excavators into the UK".

14. For their part, the Defendants not only resist these grounds as unarguable, but they further say that the claim has now become academic because Caterpillar's representations and data have in fact now been considered and an individual rate has been calculated, as I described above. So, on 18 February 2025, the TRA agreed to calculate an individual anti-dumping amount for Caterpillar and so treat it as an interested party. The outcome of that process was communicated to Caterpillar on 10 April 2025. Accordingly, the rates complained of in the PAD will no longer apply to Caterpillar. When a rate is varied between the PAD and the final determination, the TRA adopts the lower of those two rates and applies that to the period governed by the PAD. It is said that in this case, the lower Caterpillar rate will be applied retrospectively, with the result that Caterpillar has secured the outcome it sought. The decisions under challenge are in these circumstances said by the Defendants to have been overtaken, the relief sought is moot and the claim should be withdrawn.

15. The Defendants also argue that the new evidence from Caterpillar shows, contrary to what was implied in the Pre-Action Protocol letter sent on its behalf and in the Claim Form and Statement of Facts and Grounds, that it in fact had actual knowledge of the Investigation as long ago as November 2023. They say that despite that knowledge it made no effort to make itself known to the TRA, in accordance with what the Defendants say the statutory regime requires of those who say they are an interested

party. So, they argue, the responsibility for the absence of Caterpillar as a participant in the Investigation (and the original lack of consideration of its data) is to be laid at its own door. This knowledge of the Investigation in November 2023 should, they argue, have been disclosed much earlier and was "dragged out" of Caterpillar's Solicitors following the issue of proceedings and after several rounds of correspondence. The Defendants say that this was a serious failure of disclosure and a breach of the duty of candour on the part of Caterpillar. They argue that the overriding procedural unfairness complaint underlying each of its grounds to the effect that Caterpillar did not know of the Investigation (and was therefore unfairly not able to participate) is robbed of all force by the late disclosure of actual knowledge of the Investigation (followed by deliberate inaction and a decision not to participate) from 16 November 2023. I deal with the candour issue in **Section X.**

16. For completeness, I should note that following the Defendants' Detailed Grounds of Resistance ("the DGRs"), Caterpillar served a Reply dated 17 April 2025 ("the Reply"). By this date, an individual margin had, as requested by Caterpillar, been calculated by the TRA under serious pressure of time. Caterpillar has sought permission by way of an Application Notice to serve this pleading, although the CPR does not contemplate such a responsive statement of case in judicial review proceedings. The other parties did not object and I gave permission for it to be served. That is subject to a rider which I made plain to Mr West KC at the hearing. The relevant target decisions in this claim remain the same. There has been no application to amend to challenge any aspect of the later decision to give Caterpillar its own individual anti-dumping rate. In particular, insofar as the Reply asserts, for example, that there was no dumping, or that the individual dumping rate now calculated for Caterpillar is incorrect, these are not target decisions and are not matters before this court. Equally, complaints in its reply evidence from Ms Xiaokui Katie Shan, Associate General Counsel of Caterpillar Inc. about "procedural unfairness" arising out of the compressed timetable within which the TRA calculated Caterpillar's individual margin, are not within the pleaded judicial review claim form before the court. Mr West KC fairly accepted that he could not pursue these new complaints within this judicial review.

II. The International Legal Framework

17. Although the applicable legislation in this claim is a UK statute (and related secondary legislation) these laws were made, and fall to be applied, in the context of a well-established international law framework governing trade remedies including anti-dumping measures. Prior to 31 January 2020, anti-dumping investigations in respect of goods being placed on the UK market were conducted by the European Commission, as part of the EU's common external commercial policy under which external tariffs are set at the EU level. The legal framework for the conduct of anti-dumping investigations in the UK following Brexit is provided for by the Taxation (Cross-border Trade) Act 2018 and the Trade Remedies (Dumping and Subsidisation) (EU Exit) Regulations 2019 (as amended) ("the 2019 Regulations"). The 2019 Regulations are made in the exercise of the power in ss. 13, 32, 51 and 56, as well as Schedule 4 of the 2018 Act. Also relevant are the regulations governing reconsiderations and appeals: the Trade Remedies (Reconsideration and Appeals) (EU Exit) Regulations ("the Appeal Regulations"). I will return to the UK primary and secondary legislation after summarising the international law instruments.

The GATT and the ADA

18. The 2018 Act and the 2019 Regulations together implement, among other things, the UK's obligations under Article VI of the General Agreement on Tariffs and Trade ("GATT"), as implemented by the WTO Agreement on the Implementation of Article VI of the GATT (the "Anti-Dumping Agreement" or "ADA"). So, the Explanatory Memorandum to the 2019 Regulations explains [6.3] that:

> "The [2018 Act] sets out the framework for the UK's trade remedies system, and provides for the detail to be set out in secondary legislation. The framework is intended to be compatible with the standards and requirements set out in the WTO Agreements, while also meeting Government's commitments to creating a system that is impartial, proportionate, efficient and transparent. The framework is also very similar to the current EU rules, although changes have been made to ensure that it works for the UK."

19. In approaching the domestic legislation, I will proceed on the basis of two principles which I consider uncontroversial. First, the principle that although our courts must interpret legislation that implements an international agreement primarily by reference to the words of the domestic statute, they will also take account of the content and meaning of that international agreement, when construing relevant domestic law. In practical terms this means that domestic legislation passed to give effect to an international treaty should be construed in a manner consistent with that international treaty, where it is reasonably capable of bearing that meaning: Garland v British Rail Engineering Ltd [1983] 2 AC 751 at [771] and, more recently, N3 v Secretary of State for the Home Department [2025] UKSC 6 at [68]. Second, the principle that it is appropriate for our courts to consider and have regard to decisions of other courts such as the CJEU, which interpret EU law that seeks to give effect to the same international agreement. As to these principles: see Dicey, Morris and Collins, *Conflict of Laws* (16th Ed.) at [7-021]. Mr Artley for Caterpillar and Ms Wakefield KC for the TRA, each relied on WTO case law in support of their submissions as to construction of the domestic legislation. As one works through the ADA one can readily identify that the draftsperson of the UK legislature has sought to replicate many of the international law provisions in crafting the domestic analogue (and generally using the same language).

20. The ADA sets out the circumstances in which, and the procedures by which, Members of the WTO are entitled to impose anti-dumping duties on foreign products that are being dumped on their market and causing injury to domestic industry. I will set out the principal relevant provisions and associated WTO case law.

21. Article 5.2(ii) of the ADA requires that a written application for an investigation, by or on behalf of domestic industry, must include such information as is reasonably available to the applicant in relation to "*the identity of each known exporter or foreign producer and a list of known persons importing the product in question*".

22. Article 5.10 of the ADA provides that: "*Investigations shall, except in special circumstances, be concluded within one year, and in no case more than 18 months, after their initiation*" ("the Time Limit"). The WTO panel has found that investigations that extend past the Time Limit are liable to be rendered invalid. In Morocco – Anti-

Dumping Measures on Certain Hot-Rolled Steel from Turkey (18-6808; 31 October 2018; WT/DS513/R), the investigation was extended by 22 days to take into account "*interested parties' requests for additional time for their submissions or additional meetings as well as the MDCCE's need to review additional information that the respondents allegedly submitted 'very late' in the investigation*." The panel concluded at [7.76] – [7.77]:

> "We note that the panel in *Mexico – Olive Oil* clearly found that requests from interested parties during the investigation proceedings did not justify a delay beyond 18 months in concluding the investigation. We agree. In *Mexico – Olive Oil*, similar to the case at hand, the respondent had argued before the panel that the delay in concluding the investigation was justified by requests for extension from interested parties, and additional information that the investigating authority considered interested parties had submitted at allegedly "late" stages in the investigation. In our view, an investigating authority may consider such requests from interested parties as part of its due process obligations under Article 6 of the Anti-Dumping Agreement; however, as the Appellate Body has recognized, the investigating authority's need to "'control the conduct' of its inquiry and to 'carry out the multiple steps' required to reach a timely completion" of the proceeding circumscribes its due process obligations. The Appellate Body noted, in particular, that Article 5.10 "requires" that investigations be completed in no more than 18 months, and that consonant with that requirement, Article 6.14 of the Anti-Dumping Agreement states that none of the procedures set out under Article 6 is intended "to prevent the authorities of a Member from proceeding expeditiously" in reaching their determinations. Therefore, we consider that an investigating authority must plan and conduct its investigation in such a way that it will conclude the investigation within the time limits set out in Article 5.10. In doing so, the investigating authority must, throughout the investigation, balance the interested parties' due process interests with the need to control and expedite the investigating process. More specifically, an investigating authority has the obligation as Turkey argues, to balance the granting of requests for additional time with the strict obligation to conclude the investigation within the maximum time limit.""

23. Article 6.1 of the ADA provides that "*all interested parties in an anti-dumping investigation shall be given notice of the information which the authorities require and ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation in question*". There is WTO case law on this provision: see the *Beef and Rice* case cited in more detail at [27] below. In that case, the Appeal Body held that the 'interested parties' for the purposes of Article 6.1 were those "known" to the authorities. It explained that Article 6.1 is to be interpreted in the light of Article 6.1.3.

24. Article 6.1.3 of the ADA provides that "*as soon as an investigation has been initiated, the authorities shall provide the full text of the written application received under paragraph 1 of Article 5 to the known exporters and to the authorities of the exporting Member and shall make it available, upon request, to other interested parties involved*" (emphasis added).

25. Article 6.11 of the ADA provides that "*for the purposes of this Agreement, "interested parties" shall include (a) an exporter or foreign producer or the importer of a product subject to investigation, or a trade or business association a majority of the members of which are producers, exporters or importers of such product*".

26. Article 12.1 of the ADA requires that "*when the authorities are satisfied that there is sufficient evidence to justify the initiation of an anti-dumping investigation pursuant to Article 5, the Member or Members the products of which are subject to such investigation and other interested parties known to the investigating authorities to have an interest therein shall be notified and a public notice shall be given.*" (emphasis added).

27. The Appeal Body of the WTO has provided guidance as to whether the Article 12.1 obligation to notify extends to companies that the Member could reasonably have been identified. It has held that it does not. So, in Mexico – Definitive Anti-Dumping Measures on Beef and Rice (295ABR; 29 November 2005; WT/DS295/AB/R) ("*Beef and Rice*") the Appellate Body explained at [247]:

> "The Panel found that the term "interested parties known to the investigating authorities" in Article 12.1 covers not only the exporters known to the investigating authority, but also the exporters of which "it can reasonably obtain knowledge". In our view, the extensive interpretation given by the Panel to this term is incorrect. The text of Article 12.1 is not ambiguous: the investigating authority is under the obligation to notify the initiation of the investigation to the exporters known to it at the time it is satisfied that there is sufficient evidence to justify the initiation of the investigation. Nothing in the text of Article 12.1 suggests that the notification requirement applies to importers other than those of which the investigating authority had actual knowledge at that time."

28. In the *Beef and Rice* case, the Appeal Body also considered the text of Article 6.1 and held at [249]-[251]:

> "249. We move now to Article 6.1 of the *Anti-Dumping Agreement*. Under this provision, "[a]ll interested parties in an anti-dumping investigation shall be given notice of the information which the authorities require". This element of Article 6.1 should be read in the light of Article 6.1.3, which provides... This provision requires investigation authorities to "provide the full text of the written application... to the *known exporters*". (emphasis added) We see no reason why there should be asymmetry between Articles 6.1 and 6.1.3. In our view, exporters that were given notice of the required information

> under Article 6.1 should be understood to be the same exporters entitled to receive the text of the application under Article 6.1.3, namely, the "known" exporters.
>
> 250. Thus, the explicit reference in Article 6.1.3 to "known exporters" supports the view that the exporters that shall be given notice of the required information under Article 6.1 are the exporters known to the investigating authority. These exporters include not only those referred to in the application, but also the exporters who might have made themselves known to the investigating authority following the issuance of the public notice required by Article 12.1 of the *Anti-Dumping Agreement*, and those that otherwise might have become known to it subsequent to the notice of initiation.
>
> 251. The Panel found that, under Article 6.1, the investigating authority has a duty to give notice of the required information to exporters of which "it can reasonably obtain knowledge". As we explained above, Article 6.1 requires the investigating authority to give notice to the exporters known to it. Extending the duty to give notice under Article 6.1 to exporters of which the investigating authority does not know, but of which it might have obtained knowledge, would imply that, under Article 6.1, the investigating authority is subject to a duty to undertake an inquiry, which may be extensive, to identify the exporters. We cannot find, in Article 6.1 or anywhere else in the *Anti-Dumping Agreement*, any legal basis for such an obligation, which in some circumstances could be onerous. Accordingly, in our view, Economía was not obliged under Article 6.1 to give notice of the required information to exporters of which it did not know but of which it could have obtained knowledge.
>
> 252. In this case, Economía sent a questionnaire to each of the two exporters mentioned in the application, Producers Rice and Riceland. Two other exporters, The Rice Company and Farmers Rice, as well as an industry association, the USA Rice Federation, came forward on their own initiative. Economía also sent them each a questionnaire. Thus, we are satisfied that Economía gave notice of the required information to all the exporters of which it had actual knowledge, and that, accordingly, Mexico did not act inconsistently with Article 6.1 of the *Anti-Dumping Agreement*."

EU law

29. The procedure for anti-dumping investigations in EU law is set out in Regulation (EU) 2016/1036 ("the Basic Regulation"). Article 5 provides, insofar as relevant (with my underlining):

> "(10) The notice of initiation of proceedings shall announce the initiation of an investigation… <u>It shall state the periods within</u>

> which interested parties may make themselves known, present their views in writing and submit information if such views and information are to be taken into account during an investigation…
>
> (11) The Commission shall advise the exporters, importers and representative associations of importers or exporters known to it to be concerned, as well as representatives of the exporting country and the complainants, of the initiation of the proceedings…"

30. It is established in EU law that the duty to notify interested parties does not extend to parties unknown to the Commission. In Case T-254/18, China Chamber of Commerce for Import and Export of Machinery and Electronic Products v European Commission (EU:T:2021:278) the General Court explained at [436]:

> "It is apparent from the basic regulation, and in particular from Article 5(10) thereof, that, since the institutions are unable to identify all the undertakings which may be interested in an anti-dumping proceeding and thereby to determine to whom information the disclosure of which is permitted ought to be disclosed, it is for the interested parties to make themselves known and to state their interest in being informed and in participating in the investigation."

31. In Case C 478/21 P China Chamber of Commerce for Import and Export of Machinery and Electronic Products v Commission (EU:C:2023:685), the CJEU approved this reasoning on appeal, finding that the exercise of the procedural rights of interested parties in investigations is "subject to certain requirements" such that "under Article 6(5) …. The interested parties are required… to make themselves known" under the Article 5(10) procedure ([213]). I note however that the central question in that case was not whether the interested party had made itself known (but whether it fell within the definition of an interested party at all).

32. Where interested parties have failed to make themselves known to the Commission by the deadline set out in the initiation notice, the CJEU has held that the Commission does not have to take their evidence into account. In Case T-459/07 Hangzhou Duralamp Electronics v Council (EU:T:2013:369) ("Hangzhou"), an interested party was granted permission to participate at a late stage. However, the Commission was reasonably entitled to refuse their request to reopen the question of the relevant Reference State. It explained at [161]:

> "As the Council rightly pointed out in its written submissions, when an interested party makes itself known to the Commission after the prescribed time-limit, it must accept the procedure at the stage it is, and as it stands, at the time it joins it, and the Commission has a broad discretion as to the appropriateness of allowing that party to submit written and/or oral observations and of taking those observations into consideration. In particular, the Commission may refuse to take such observations into account if to do so would prolong unduly the procedure."

33. Caterpillar argued that Hangzhou is limited to the EU law concept of rights of the defence. Ms Wakefield KC was right to submit that this is a misreading of these paragraphs of the judgment, which (as part of considering the requirements of the rights of the defence in this context) concern the critical fact that the EU regime (like the UK regime) has a registration period for interested parties to make themselves known, after which point the interested parties should not expect to be able to wind the clock back. That is on point in the present case.

III. The Domestic Legal Framework

34. As appears below, the structure of the domestic trade remedies regime (particularly as regards process) closely follows the international law framework. The powers of the SSBT to impose import duties are provided by the 2018 Act. My references below to sections are to the provisions that Act, and where I use the designation "§" that is a reference to paragraphs of Schedule 4 to the Act.

35. Section 1(1) provides: "A duty of customs (to be known as "import duty") is charged in accordance with provision made by or under this Part by reference to the importation of chargeable goods into the UK. Section 13(1) provides that "functions relating to import duty are conferred on" the TRA by Schedule 4 (as to dumping and foreign subsidies causing injury to UK industry). The TRA is an independent arms-length body and the DBT does not intervene in the exercise of its functions, other than in the exercise of statutory powers conferred on the SSBT, as summarised below.

36. Schedule 4 to the 2018 Act provides for the TRA's powers to investigate. In summary:

(1) The TRA has the power to investigate (i) whether goods are being dumped in the UK causing injury to a UK industry in those goods (§8(1)) and (ii) whether goods imported into the UK are subsidised and causing injury to a UK industry in those goods (§8(3)).

(2) Goods are "dumped" in the UK if "(a) they are imported into the United Kingdom, and (b) their export price is less than their normal value" (§1(1)). "Normal value" is defined by reference to like goods sold in the exporting foreign country (§1(2)), and "export price" is the price of goods sold either to an importer in the UK or a third party outside of the UK for export to the UK (§1(3); reg 15(1) of the 2019 Regulations. The margin of dumping is the difference between the export price and the normal price (§2). Part 2 of the 2019 Regulations contain more detailed provisions as to the TRA's calculation of these amounts and Part 4 sets out how the TRA is to determine injury and causation.

(3) §9 sets out the process for initiation of a dumping or subsidisation investigation. The TRA may initiate an investigation upon application by UK industry (a defined term) if it is satisfied that there is sufficient evidence that the goods are being dumped in the UK and have caused injury to UK industry, or the goods are subsidised and have caused injury (subject to a *de minimis* threshold as to volume of goods, margin of dumping or amount of subsidy under §9(1)(c), and a market share requirement under §9(1)(d)). The TRA must notify the SSBT of any applications received from UK industry within 2 working days (§9(3A)).

(4) The SSBT may publish a notice of goods which are the subject of an investigation and to which an anti-dumping amount may be applied. HMRC must register goods in respect of which such a notice is published (§29). This is relevant to the Trade Notice in this case: see [74] below.

37. The 2019 Regulations were issued by the SSBT under powers contained in section 13 and Schedule 4. These provide to the TRA a procedural discretion to "do anything it considers appropriate in connection with the exercise of any of its functions" (in reg 40), including to "(a) consider information supplied to it by any person; (b) request that any person supply information to it; (c) set time limits for responses to its requests and vary such time limits; (d) specify the format or structure of responses to its requests; (e) accept information supplied to it outside any applicable time limit". Under reg 54(5): "Where an interested party or a contributor makes themselves known to the TRA after the end of the registration period, the TRA may issue a questionnaire to that person".

38. The TRA may use a "sampling" procedure set out in reg 56, where it limits its examination of the dumping of goods to a sample of overseas exporters, importers or categories of goods, based on either "(a) the largest volume of exports from the exporting country or territory to the United Kingdom that the TRA is reasonably able to investigate; or (b) a statistically valid method." Unless impracticable, the TRA must consult with exporters and importers about the proposed sample and obtain their consent where possible. An overseas exporter who is not sampled "may request that the TRA calculate an individual margin of dumping provided that the overseas exporter has supplied the necessary information in time for that information to be considered during the course of the investigation" and the TRA must accept the request "unless the number of exporters is so large that individual examinations are unduly burdensome and would prevent the timely completion of the investigation." (regs 56(6)-(7)).

39. Pursuant to section 28(1), in exercising their functions under Part 1 of the 2018 Act (including those under ss.1 and 13) the SSBT and the TRA must have regard to relevant international arrangements to which the UK is party. These include the international arrangements which I have summarised above.

Procedural requirements as to "interested parties"

40. §9(5) is a central provision in this case. It provides that if the TRA initiates a dumping investigation, it must take the following steps in the following order: (a) "accept the application"; (b) "notify the governments of the relevant foreign countries or territories"; (c) "initiate the investigation"; (d) "publish notice of its decision to initiate the investigation"; and (e) "notify the Secretary of State and interested parties (see paragraph 32(3)) accordingly". This last provision is the focus of Caterpillar's complaint that there was the breach of a statutory duty to notify of the Investigation. That gives rise to a dispute between the parties as to how §9(5)(e) is to be construed.

41. Before I come to that issue, I underline the importance of giving notice to the government of the foreign country and giving public notice. In my judgment, within this scheme, these are the important and effective routes by which an entity such as Caterpillar would normally come to learn of the Investigation. Indeed, as I identify below, in this case the TRA (i) specifically asked the Chinese Government to share information about the Investigation with any companies that it considered to have an interest and (ii) accompanied the public notice on the gov.uk website and the TRA's

social media platform with a media campaign on initiation. And in fact we now know that Caterpillar did in fact come to know of the Investigation at the time of these general notifications.

42. §9(5)(e) refers to "interested parties" which is defined in §32(3) as "the governments of such foreign countries or territories, or such other persons, as may be specified in regulations". Reg 2 of the 2019 Regulations defines "interested party" as including "an overseas exporter or importer".

43. It is clear that this is a bespoke and comprehensive procedural regime governing how interested parties can become involved in the investigation. Specifically, I accept the submissions of the Defendants that the TRA is not under a positive duty of result: that is, a duty to ensure interested parties are notified of the investigation. Rather, the structure and language of the 2019 Regulations envisages that interested parties will make themselves known to the TRA (during a registration period), and that the TRA will issue questionnaires to them insofar as it is practicable to do so. In line with what was said in the *Beef and Rice* case, the regime does not impose an obligation of "inquiry" on the part of the TRA. So, reg. 54 provides (with my underlining):

> "(1) Where the TRA has made a determination to initiate an investigation, it must set a period during which interested parties and any other person may make themselves known to the TRA (a "registration period").
>
> (2) In a dumping investigation, the TRA must, as far as practicable, issue a questionnaire (see regulation 55) to—
>
> (a) all interested parties, other than the government of the relevant foreign country or territory, who have made themselves known to the TRA during the registration period;
>
> (b) all UK producers, importers and overseas exporters (or associations thereof) which the applicant UK industry has identified in their application; and
>
> (c) all contributors who have made themselves known to the TRA during the registration period."

44. Aside from the language, this construction (requiring positive approach by interested parties to make themselves known to the TRA during the registration period) is consistent with Article 6.1 and Article 12.1 of the ADA as interpreted in the *Beef and Rice* case. This construction is also consistent with the remainder of the statutory regime, including the contemporaneous and limited obligation under reg. 53(3)(a) (the equivalent of Article 6.1.3 of the ADA) requiring the TRA to provide copies of the application to "*overseas exporters known to it and the government of the relevant foreign country or territory*" (subject to a practicality override where the TRA can opt to just notify the government of the relevant foreign country or territory). It is clear that the identity of the relevant exporting country is critical to which goods are relevant. It is also obvious that the "*overseas exporters*" referred to in reg. 53(3)(a) are those of the relevant goods.

45. I turn then to the argument made by Caterpillar as to the construction of §9(5)(e) which they say imposed an obligation on the TRA to notify Caterpillar which was breached. Caterpillar accepts that the notification obligation applies only to interested parties known to the TRA but it made an argument about what being known to the TRA means. I found the arguments made orally in relation to Caterpillar's construction of this provision at the hearing seemingly contradictory and difficult to follow. In order to deal with the argument as I understood it, I will set out how it was put in the Reply where the following was said (with my underlining):

> "Under paragraph 9(5)(e) of Schedule 4 of the 2018 Act, once the TRA has initiated an investigation, it "*must ... notify the Secretary of State and interested parties accordingly*." The TRA contends that this obligation "*is limited to those interested parties known to the TRA at that time*" on the grounds of consistency with WTO Rules and the wider domestic statutory scheme. That however begs the questions as to what is meant by "*interested parties known to the TRA at that time*". Caterpillar's position is that once the authority has subjectively identified an exporter in the course of its investigation which is objectively an interested party, it has the requisite knowledge, even if it has not subjectively identified the exporter as an interested party."

46. I found this submission difficult to follow. In particular, I had some difficulty following what was intended by the *subjective* and *objective* references. I prefer to simply read what the provision says without a gloss (either the TRA knows of the exporter or it does not- a binary issue). Ms Wakefield KC was right to submit that Caterpillar's argument is not supported by the language of the legislation and indeed it makes little sense. In this case, the Investigation related to certain excavators exported from China into the UK. The fact that the TRA was aware from data that showed Caterpillar produced excavators in the United States, and imported them into the UK from the US, does not make the TRA "subjectively aware" of Caterpillar in any relevant sense. As I explored in oral submissions with Mr Artley, the TRA was also aware of, for example, Volvo as a foreign producer of the relevant excavators in countries other than China, which imported those excavators into the UK. Plainly this does not translate into the TRA being "subjectively aware" of Volvo as an interested party in the Investigation, still less an obligation to notify Volvo (as appears to be being contended for in the Reply as set out above) or an obligation to "test" whether all exporters of the relevant goods, from anywhere in the world other than China, may in fact be exporters from China (a form of investigatory obligation). I reject Caterpillar's submission. The notification obligation in §9(5)(e) concerns interested parties known to the TRA.

47. It is significant that even where an interested party has been identified within the registration period, they do not necessarily have the right to have input in the investigation: per reg. 54(4), where the TRA uses the sampling procedure described above, "the TRA may limit the issuing of a questionnaire to those interested parties included in that sample".

48. Further, reg. 49 of the 2019 Regulations provides (with my underlined emphasis) that:

> "(1) Where the TRA determines that an interested party has failed to cooperate with an investigation or has otherwise

> significantly impeded the progress of an investigation (a "non-cooperative party"), it may disregard the information supplied by that party.
>
> (2) For the purpose of paragraph (1), the TRA must not determine that an interested party is a non-cooperative party where it—
>
> (a) determines that that interested party has acted to the best of their ability to cooperate with an investigation; or (b) has accepted that compliance with any request for information to be supplied in a particular form would be unreasonably burdensome to that party."

Stage 1: provisional affirmative determinations and guarantees

49. Given the nature of the challenge in this case, it is important to underline that there are two distinct types of determination the TRA may make following the initiation of a dumping investigation. They are a *provisional* determination, and a *final* determination. First, as to provisional determinations, Schedule 4 provides as follows.

    a. Per §11(1), an "*affirmative determination*" in relation to a dumping investigation is the determination that goods are being dumped in the UK and that the dumping has or is causing injury to UK industry.

    b. §§11(3)-(4) provides for the TRA's power to make a provisional affirmative determination ("PAD") at any time during an investigation:

    > "(3) At any stage during a dumping or a subsidisation investigation, the TRA may make an affirmative determination, based on the evidence then before it, in relation to goods which are the subject of the investigation (referred to in this Schedule as "a provisional affirmative determination").
    >
    > (4) But the TRA may only make such a determination if it is satisfied that interested parties (see paragraph 32(3)) have been given an adequate opportunity to provide information to it regarding the investigation."

    c. §13(3), entitled "TRA's duty to recommend requiring guarantees", provides that where the TRA makes a PAD, it "may recommend" to the SSBT that, for a dumping investigation, all importers of the relevant goods:

    > "should be required to give a guarantee in respect of any additional amount of import duty which would have been applicable, or potentially applicable, to the goods under section 13 if an anti-dumping amount had been applied to the goods based on the provisional affirmative determination ("an estimated anti-dumping amount")".

The guarantee may be provided in the form of cash, a bond or a bank guarantee (§14(2)).

d. The TRA may only make such a recommendation where it is satisfied that requiring a guarantee "is necessary to prevent injury being caused during the investigation to a UK industry in the relevant goods" (§13(4)(a)). Where it makes such a recommendation, the TRA must advise the SSBT as to whether (and why) it considers that requiring a guarantee would meet the economic interest test ("EIT") (§13(8A)). Under §25(2), the economic interest test is met if the application of an anti-dumping remedy is in the economic interest of the UK. The test is presumed to be met unless the TRA or the SSBT is satisfied that it is not met under §25(3). Under §25(4), when considering the test the TRA or the SSBT must take into account the following factors (so far as relevant) (and such other matters as they consider relevant):

> "(i) the injury caused by the dumping of the goods, or the importation of the subsidised goods, to a UK industry in the goods and the benefits to that UK industry in removing that injury,
>
> (ii) the economic significance of affected industries and consumers in the United Kingdom,
>
> (iii) the likely impact on affected industries and consumers in the United Kingdom,
>
> (iv) the likely impact on particular geographic areas, or particular groups, in the United Kingdom, and
>
> (v) the likely consequences for the competitive environment, and for the structure of markets for goods, in the United Kingdom".

e. The estimated anti-dumping amount to be guaranteed cannot exceed the margin of dumping or the amount necessary to remove the injury to UK industry, if less than the margin of dumping (§14(3)). Detailed provision is made as to how the TRA is to calculate an estimated or final anti-dumping amount in Part 5 of the 2019 Regulations. In particular:

    i. Where the TRA has calculated an individual amount for a sampled exporter under reg 56(7), that is the anti-dumping amount determined for that exporter (reg 37(5)).

    ii. Reg 37(1) defines a "non-sampled overseas exporter" as one that "cooperated with the TRA's investigation" and was not sampled under reg 56 (discussed above). The non-sampled overseas exporters are levied with an amount which is the "weighted average of the amounts determined for the overseas exporters in the sample" (reg 37(3)), disregarding amounts applied to non-cooperating exporters (reg 37(4)).

iii. Under reg 38, where no individual amount has been calculated, an exporter which has been deemed to be non-cooperating pays the "residual amount", which the TRA can determine "using any reasonable means", taking into account:
"(a) information contained in the application;

(b) information received from other interested parties during the investigation including other overseas exporters;

(c) published price lists;

(d) official import statistics or customs returns;

(e) relevant data pertaining to the world market or other representative markets."

f. The SSBT has no independent power to impose a guarantee. Rather, he can only act upon the TRA's recommendation: per §15(1), where the TRA makes a recommendation, the SSBT must decide whether to accept or reject it. The SSBT may only reject the recommendation if he "is satisfied that it is not in the public interest to accept it" (§15(2)), and per §15(3), "In considering that, the Secretary of State must have regard to the TRA's advice on whether requiring a guarantee in accordance with the recommendation would meet the economic interest test".

g. In the context of this case, it is significant that if the SSBT accepts the recommendation and a guarantee is taken from importers, it is not called upon unless a final affirmative determination is made and an anti-dumping amount is actually imposed by the SSBT in accordance with the process I will summarise below. Under §15(5), where he accepts the recommendation the SSBT must publish notice of the TRA's PAD and recommendation, publish notice of the requirement to give a guarantee and notify interested parties.

h. If the SSBT decides to reject the recommendation, he may impose a guarantee requirement other than that recommended by the TRA under §15(3B) if he considers it in the public interest to do so, but subject to the same limitations as those applicable to the TRA's powers:

"(3A) Sub-paragraph (3B) applies if the recommendation is rejected.

(3B) If the Secretary of State considers that it is in the public interest to do so, the Secretary of State may decide that importers of relevant goods should be required to give a guarantee other than in accordance with the recommendation.

(3C) But the Secretary of State may make a decision under sub-paragraph (3B) only if a recommendation under paragraph 13(3) to the same effect as the decision (ignoring any restrictions in paragraph 13 on the ability of the TRA to make

such a recommendation) would have complied with the requirements set out in paragraph 14."

i. Before exercising his power under §15(3B), the SSBT may request further assistance (including e.g. investigation and reports on specified matters) from the TRA under §22B.

Stage 2: final determinations and the SEF

50. As to final determinations in dumping investigations, Schedule 4 provides:

(1) Per §§11(5) and (6), the TRA must make a final determination in relation to the goods it investigates, which may be a final affirmative determination, or "if the TRA determines that it cannot make an affirmative determination in relation to the goods", a final negative determination.

(2) Under reg 62 of the 2019 Regulations, before making a final determination (whether affirmative or negative), the TRA must publish a "statement of essential facts" (referred to as "the SEF") which sets out the final determination that it intends to make, summarises the facts considered during the investigation and which of those facts form the basis of its intended determination. The SEF must specify a period during which the TRA will consider comments from interested parties or any person who supplied information to it.

(3) Where the TRA makes a final affirmative determination, the TRA must recommend to the SSBT an additional amount of import duty to be applicable for a specified period to the relevant goods, and set out how that amount is to be determined (§17(3)). The TRA must advise the SSBT why it considers applying that amount meets the economic interest test (§17(8E)). The recommended amount cannot exceed the margin of dumping or the amount adequate to remove the injury to UK industry (whichever is lesser): §18(6), and the provisions of the 2019 Regulations set out above apply to the final amount as to the estimated amount. The TRA may also recommend the acceptance of an undertaking from exporters to revise prices or cease exports (§23).

(4) Where the TRA recommends an anti-dumping amount following a final affirmative determination, under §20(1) the SSBT may "(a) decide whether to accept or reject the recommendation, or (b) request that the TRA reassess the recommendation" by reference to specified matters "with a view to amending or replacing the recommendation". As with the TRA's recommendations relating to provisional measures, the SSBT may only reject a final recommendation if he is "satisfied that it is not in the public interest to accept it" (§20(2)) and he must have regard to the TRA's advice as to the application of the economic interest test (§20(3)).

(5) The SSBT may only request reassessment under §20(1)(b) if he considers that (i) the TRA did not take into account relevant information; (ii) the TRA made an error in relation to its recommendation or (iii) exceptional circumstances make the request appropriate (§20(5A)), and must consult the TRA before doing so (§20(5B)). The TRA must comply with the request and take into account any particular considerations specified by the SSBT when reassessing its

recommendation (§20(5C)). (The power to request reassessment is available only for final recommendations and not at the provisional stage set out above).

(6) If he accepts the TRA's recommendation, the SSBT must publish notice of the TRA's final affirmative determination, its recommendation and his acceptance of it; he must make provision by public notice to give effect to the recommendation, and notify any interested party (§20(5)).

(7) §20A provides that, where the SSBT rejects a final recommendation under §20, he may decide to apply an anti-dumping amount other than in accordance with the TRA's recommendation where he considers that it is in the public interest to do so (but limited to the same requirements as the TRA's powers under §18). The SSBT may request further assistance from the TRA before making a decision as to whether to do so (§22B).

Post-final determination

51. §12 of Schedule 4 provides that the investigation terminates either upon a final negative determination from the TRA, or upon the date of publication of the SSBT's public notice accepting or rejecting a final affirmative determination from the TRA. That is the end point for the purposes of the WTO Time Limit.

52. After an anti-dumping amount has been applied by the SSBT, there are various types of review that may be initiated under Part 7 of the 2019 Regulations (see reg 66). One type of review is an "early review" to vary or revoke the application of an anti-dumping amount (reg 68A(1)), which the SSBT may request within 60 days of the application of an anti-dumping amount (reg 67(A1)), if the SSBT considers that: (a) the TRA did not take into account relevant information in its investigation; (b) the TRA made an error in relation to its recommendation; or (c) "exceptional circumstances make the request appropriate" (reg 67(C1)). The SSBT must consult the TRA before making the request. The TRA must comply with the request (reg 67(E1)) and have regard to any particular considerations identified by the SSBT (reg 68A(2)).

53. Independently of any review or recommendation by the TRA, the SSBT may revoke the application of an anti-dumping amount where he considers it in the public interest to do so under §22A of Schedule 4.

Statutory reconsideration and appeal

54. Parliament has established a statutory regime by which any final recommendation on the part of the TRA to the SSBT, recommending the imposition of anti-dumping measures, may be challenged. Such a recommendation, to impose a final anti-dumping amount, would be an "*original decision*", for the purposes of reg. 9(6) of the Appeal Regulations and para. 17 of Schedule 4 to the 2018 Act. Original decisions are amenable to challenge by way of an application for reconsideration made within one month of the publication or communication of the decision to the applicant (reg. 10 of the Appeal Regulations). When a compliant application for reconsideration is made, the TRA must reconsider its recommendation and will ultimately vary or uphold the original recommendation, so making a "*reconsidered decision*." Reconsidered decisions are themselves amenable to appeal on judicial review grounds to the Upper Tribunal (reg. 16(1) of the Appeal Regulations).

55. Caterpillar may also, in parallel, challenge any final decision of the SSBT to accept a recommendation of the TRA that imports should be subject to an anti-dumping amount. In such a case, Caterpillar may appeal directly to the Upper Tribunal without first seeking a reconsideration (see para. 20 of Schedule 4 to the 2018 Act and reg. 17(1) and para. 1 of Schedule 2 to the Appeal Regulations).

IV. The Facts

56. My narrative is drawn in part from the witness statements submitted by each of the parties and in part from the documents. But I have relied principally on the exhibited contemporaneous documentary evidence. For the avoidance of doubt, where I refer to what is said by a witness, I accept that evidence as accurate unless I indicate expressly to the contrary. I was taken in oral submissions to a large number of documents including many internal email exchanges. I have taken into account those documents, including those I was referred to for "my note" to read "in my own time". Having completed the 2 days of Essential Reading "homework" requested of me, and having had the benefit of 2 days of oral argument (with a need to provide this judgment within a matter of days) I did not, with respect to Counsel, find it helpful to be asked to consider yet further documents in this way (the Essential Reading is the place to identify essential documents). Although I have to address the facts in some detail, in order to keep this judgment within a reasonable length and bearing in mind the time constraints under which it has had to be produced, I will not set out each such additional document. The documents I identify below provide a clear and sufficient picture of events over the material period (September 2023-April 2025) insofar as relevant to the pleaded challenges and in order to understand my conclusions.

57. Save in one significant respect (concerning the knowledge of Caterpillar of the Investigation in March/April 2024), by the end of the hearing there did not seem to me to be any relevant dispute of fact. In this regard, the additional evidence accompanying the Reply (Mr Goldspink's second witness statement) (and a lengthy footnote in Caterpillar's skeleton for the hearing) are significant because they appear to present the historic state of knowledge within Caterpillar as to the existence of the Investigation in a wholly different light to the impression given in the claim as originally pleaded. Given the importance the issue of Caterpillar's knowledge of the Investigation assumed at the hearing, and in order not to break up the narrative, I have dealt with this is a distinct factual matter in **Section V** below.

JCB's complaint

58. On 27 September 2023, JCB submitted an application requesting an anti-dumping and anti-subsidy investigation to the TRA ("the Application"). JCB said in the Application that it was "*significantly affected by imports of dumped and subsidised Chinese Excavators*" and that they were causing material injury to the UK excavator industry. The Application concerned "*imports of self-propelled track-laying (i.e., tracked) excavators with a 360 degree revolving superstructure and with an operating weight of 11,000 kg (i.e., 11 tons) or more*" from "*the PRC*". I will not address the anti-subsidy aspect of the Application further given that it is not in issue before me. JCB identified a suggested period of investigation (POI) covering the dates 1 July 2022 – 30 June 2023. I note that the relevant application form requires an applicant to provide information on (a) other 'UK producers' (which the applicant should contact to

determine whether they support or oppose the application) as well as (b) other 'parties' including "*all known producers/exporters in the exporting country or producer/exporter associations in the exporting country*" and "*all known importers of the goods in the UK or any associations of importers in the UK*". JCB identified the following 'producers': (a) SANY Heavy Industry Co. Limited ("Sany"); (b) Guangxi LiuGong Machinery Co. Limited ("LiuGong"); and (c) Sunward Equipment Group ("Sunward"). JCB also identified their respective UK importers – 'Sany UK', 'LiuGong UK' and 'J Mac' (or 'Sunward UK').

59. However, JCB did not identify Caterpillar or Finning in this section of the application form. Nor were Caterpillar or Finning listed in the detailed appendices to JCB's Application (which contained the source material on which JCB relied). The Application did refer to 'Caterpillar' on one occasion. So, in the price analysis section, it stated "*Comparing SANY to Caterpillar, the same dealer said that 'SANY's heavy equipment line is considerably less expensive, sometimes ringing in at half the price of Caterpillar equipment'*". The implication of this statement was that Caterpillar's sales in the UK were being adversely affected by dumping of Chinese manufactured excavators and that it was not itself a PRC based manufacturer. JCB also submitted confidential import data sourced from a third-party data provider, Systematics International Ltd ("the Systematics Data"). I was taken to this material by Ms Wakefield KC. This data "*showed imports of excavators into the UK covering years 2019 to 2021* [and identified] *13 companies … with only two companies exporting from the PRC to the UK (Sany and Liugong)*". I note that the Systematics Data identified the 'Caterpillar Group' but not as a PRC exporter. Rather, the Group was listed as a US exporter to the UK through Finning.

60. I accept the TRA's submission that it relies on information provided by applicants because they are likely to have considerable knowledge and expertise of the relevant UK market, their overseas competitors and domestic importers and suppliers.

Initiation of the Investigation

61. Following receipt of the Application, the TRA undertook a review of the materials provided to determine whether they contained sufficient material to initiate an investigation. That decision was ultimately taken by the TRA's Chief Executive Officer, Mr Oliver Griffiths ("Mr Griffiths"), following advice from the TRA's 'Senior Leadership Panel' ("SLP") at a 'quality control gate' meeting (the "QC Gate 1 Meeting"). Prior to the QC Gate 1 Meeting, the case team undertook a 'desk review' (or 'desktop search') using open-source resources to identify other companies that exported from the PRC as well as UK importers. Part of the purpose of this process was to identify interested parties, who might wish to participate in any investigation.

62. I accept the TRA's evidence that there are limitations in the data concerning the import of excavators into the United Kingdom. I will identify some of these limitations. On 18 October 2023, employees of the TRA met with representatives of Baker McKenzie ("BM") (the lawyers acting for JCB). During the course of that meeting, the TRA asked about the Systematics Data used in the Application. BM stated that JCB had "*used the Systematics data to determine the imports …* [and that] *the Applicant use*[d] *this data source to understand their market position*". When asked if this data was the *"only source of information*" available, BM stated that it was, and that this was because the excavator market was "*so niche*". HMRC's import data only identifies the country of

dispatch, not the country of origin of any imported goods. On 23 October 2023, TRA commenced its EIT analysis. The EIT analysis focused on whether applying duties would lead to costs for the UK economy which are disproportionate to the benefits for UK producers. The TRA identified, at that point, the limitations of the HMRC imports data: "[it is] *based on the country of dispatch of imports and not country of origin of imports*". So, if an item was shipped via a third country, the country of origin was not recorded. Caterpillar extractors are shipped via third countries and so their origin in the PRC was not recorded in this data.

63. An initiation briefing paper was prepared for the TRA's SLP in advance of the QC Gate 1 Meeting. Amongst other matters, the paper outlined the types of excavators that would be within the scope of the Investigation. At that stage, these ranged from those with a basic operating weight of below 15 tons to those with a weight above 30 tons (these parameters were subsequently revised to include excavators above 11,000 kg and below 80,000 kg). The paper also set out certain risks which the case team had identified – one of which was the limitations with the HMRC data set. This was considered a "fairly low risk" and the case team committed to exploring "alternative data sources such as Systematics which is used by industry". The paper identified three PRC producers (Sany, LiuGong and Sunward), three UK importers (Sany UK, LiuGong UK and J Mac) as well as a number of UK dealers which were JCB's "*first independent customers*". The team did not identify either Caterpillar as an exporter of PRC-manufactured excavators or Finning as an importer of PRC- manufactured excavators. The QC Gate 1 Meeting minutes noted that the limitations in the HMRC import data were discussed. The risks identified were within the SLP's risk tolerance, and it was "*content to support the decision to initiate*" the investigation. Mr Griffiths accepted this recommendation, and formal approval was given on 3 November 2023.

Communications by the TRA

64. In early November 2023, the TRA communications team began to develop the TRA's strategy (which had already been considered in part in the pre-initiation phase). The plan outlined that the TRA would issue a press release "*to our wide database of contacts*" as well as a "*targeted pitch*" to construction outlets, Politico, the FT and BBC news. TRA would also issue social media posts and a news story on gov.uk. In addition, there would be 'stakeholder engagement' including, in particular, with industry via the Construction Equipment Association ("CEA") (of which JCB and Caterpillar were members). I accept the TRA's evidence that a key part of the purpose of this broad communication strategy was to ensure that as many interested parties as possible were made aware of the Investigation and were in a position to respond, if they wanted to.

65. On 9 November 2023, Mr David George ("Mr George") (Lead Investigator at the TRA for the Investigation) wrote to Ms Luo Jin, the Director-General of the Ministry of Foreign Affairs of the PRC informing her of the fact of JCB's Application and the TRA's view that the Application was "*properly documented and that the evidence is sufficient to justify initiating an investigation*". He indicated that the TRA would therefore "*initiate a dumping investigation on 15 November 2023 into the importation of certain types of excavators from the People's Republic of China*".

The Investigation proceeds

66. The Investigation was initiated on 15 November 2023 by way of a public notice of initiation posted on the Trade Remedies Service website ("the Notice"). The Notice states "*Anyone who wants to participate in the investigation can register their interest through the Trade Remedies Service … by 30 November 2023… Anyone registering their interest after 30 November 2023 may not be able to participate fully in the investigation process*". The Notice indicated that the period of investigation would be from 1 July 2022 to 30 June 2023, and the period for the examination of the assessment of injury would be from 1 July 2019 to 30 June 2023. As I have set out above, reg. 54 of the 2019 Regulations provides that the TRA shall conduct a registration period during which interested parties "*may make themselves known to the TRA*." The TRA has said that a registration period of 15 days is "*standard*" for investigations of this type and no issue was taken with this by Caterpillar.

67. Once initiated, the time period within which the SSBT would be required to make a final determination started to run. As I have explained above, the WTO agreement provides that an investigation should be completed within a year, and in any event within 18 months. The TRA says, and I accept, that it was obliged to have regard to the Time Limit even though no hard time limit appears in the domestic legislation. As the investigation was initiated on 15 November 2023, a final decision would need to have been taken by the SSBT by 15 May 2025.

68. On 15 November 2023, the TRA formally notified the Ministry of Commerce of the People's Republic of China ("MOFCOM") of the Investigation. As part of this notification, the TRA indicated that it would make "*every effort to identify and contact businesses with an interest in this case*" but encouraged MOFCOM to "*share this information with any companies you consider are likely to have an interest*". MOFCOM notified the Chinese Chamber of Commerce for Import and Export of Machinery and Electronics ("CCCME"). As explained by Ms Manson (one of the TRA Heads of Investigation), as part of this notification process, the TRA regularly asks the foreign government to pass on details of the Investigation to any known exporters or interested parties in its country. It is usually the foreign government who will then alert the trade bodies to register. Ms Manson explains that this is what happened in this case: the CCCME registered without having been notified of the Investigation by the TRA.

69. I pause here to note that Caterpillar (within China) now accepts that it became aware of the Investigation in or around this time (16 November 2023). One can readily infer that this knowledge arose from the above wider notifications of MOFCOM and the CCCME (although Caterpillar's late evidence does not explain *how* it came to know of the Investigation - an omission which I find rather surprising).

70. On 16 November 2023, the TRA issued a press release to a number of major news outlets. It also notified the CEA directly of the investigation. Following this, a number of publications featured articles on the initiation of the investigation: constructionenquirer.com (16 November 2023), constructionbriefing.com (16 November 2023), constructionindex.co.uk (16 November 2023), globalhighways.com (17 November 2023), constructionmanagement.co.uk (20 November 2023).

71. Also at this time pre-sampling questionnaires ("PSQs") and contributor registration forms were made available on the TRA website. I note that these documents allowed "*interested parties and contributors to register their interest and provide a summary of the relevant information required by the TRA*". They also included a section entitled

'*Other interested parties*' in which the TRA specifically asked existing interested parties to identify "*organisation name and website details*" of other potential interested parties or contributors to the investigation.

72. On 30 November 2023, the registration period closed. As set out above, the TRA has a statutory discretion to extend or vary a time limit that it has imposed (reg. 40(2) 2019 Regulations). In this regard, the TRA granted LiuGong an extension until 5 January 2024. A further PRC exporter (which had not initially been identified by JCB), Xu Zhou Construction Machinery Group Import & Export Co., Ltd. ("XCMG"), came forward and was granted an extension to the registration deadline until 8 December 2023. Both LiuGong and XCMG sought their respective extensions prior to 30 November 2023.

73. Neither Caterpillar nor Finning made themselves known to the TRA as an interested party or registered themselves by the deadline, nor indeed at any time (until Caterpillar enquired about late registration in November 2024, one year later). Nor were they identified by other interested parties or contributors as potential interested parties or contributors that should be contacted in the Investigation. As I have said, Caterpillar did however have knowledge of the Investigation from 16 November 2023 through a route which it has not identified.

The SSBT's March 2024 Trade Notice

74. JCB's Application had requested that the SSBT publish a trade notice requiring HMRC to register imports of excavators subject to the Investigation ("In-Scope Excavators") from the date on which the TRA initiated the Investigation. This notice would require all UK importers of those machines to use an additional commodity code on the import declarations so that they could be identified.

75. On 18 December 2023, Ms Manson wrote to the SSBT enclosing a letter from Mr Griffiths explaining this point and asking for publication of such a notice to "*facilitate an investigation into the importation of certain excavators from the PRC, as this would allow the TRA to recommend applying a measure retrospectively if the investigation found sufficient justification at the point of final determination*".

76. On 6 March 2024, the SSBT published a Trade Notice ("the Trade Notice") to this effect. At this time the TRA also published a notice on its public file which identified that the goods were "*subject to investigation*".

77. I pause again here to indicate that there were communications between the DBT and Caterpillar in the period March/April 2024 arising in the context of the Trade Notice. I deal with this in **Section V** below. These communications go to the issue of Caterpillar's knowledge of the Investigation at that time (although this issue is of less relevance given Caterpillar's recent disclosure that it had knowledge of the Investigation from 16 November 2023).

The Sampling Exercise

78. On 11 June 2024, the TRA published a 'Notification of Sampling Approach'. This notification said that, given the number of responses the TRA had received to its Investigation, it would not examine all of the data from exporters and importers as that "*would be unduly burdensome and would prevent timely completion of the*

investigation". The sampling decision was made to ensure that the TRA's timeframe for publication of its SEF was met. As I have set out in **Section III** above, a sampling approach is anticipated in the 2019 Regulations. The TRA decided to sample data from the two largest exporters who had registered at the time (Sany and Liugong) as well as their respective UK importers (Sany UK and Liugong UK). Data provided by XCMG and Sunward were not selected and those exporters (as well as XCMG's UK importer) were designated as "non-sampled and cooperating". Non-sampled cooperating exporters were told that they could apply to the TRA for calculation of "an individual anti-dumping amount" but that might be refused if they had not provided information in time or the calculation of all the individual tariffs would "*be unduly burdensome and prevent the timely completion of the investigation*".

Preparation and submission of the PAD

79. Following the decision to conduct a sampling exercise, the TRA undertook significant work to analyse whether there was dumping of In-Scope Excavators which caused injury to the UK market within the POI. This work formed the basis for the PAD. The TRA's evidence provides some detailed examples of this work but it is not necessary for the purposes of the claim to set this out, save as to note that I am satisfied that it shows a thorough and conscientious approach to this exercise.

80. The PAD was finalised by 6 September 2024. This is a detailed document but I can summarise the main conclusions in broad terms as follows. The TRA found that there was dumping of In-Scope Excavators. Further:

    i) Due to the existence of a "particular market situation" ("PMS"), it was necessary to construct a "normal" value based on the following assumptions: (a) costs of production, (b) administrative, selling and general costs and (c) a reasonable level of profits.

    ii) Having compared the weighted average normal value and the weighted average export value, there was a 'dumping margin'. The TRA was satisfied that the majority of economic factors indicated that UK industry has suffered injury by showing negative developments in absolute and/or relative terms.

    iii) It also concluded that the injury was not caused by other factors such as (a) the COVID-19 pandemic, (b) demand reduction, (c) inflation and/or (d) prices of imports from other third countries.

    iv) The TRA's provisional recommendation was that importers of In-Scope Excavators should give a guarantee in respect of an additional anti-dumping duty (essentially, as Sir James accurately described it, an "anti-avoidance" measure). Before making such a recommendation, the TRA had to consider the wider impact of such a measure on UK industry and the economy (the EIT threshold described above). The TRA concluded that the EIT threshold was met in this case.

81. The PAD recommended that an anti-dumping duty be imposed as follows: (a) on sampled exporters (Sany/LiuGong at rates of 35.32 and 56.77%, respectively); (b) on non-sampled but cooperating exporters (XCMG / Sunward at a rate of 44.33%); and (c)

other exporters (who would fall into a 'residual dumping category' with a rate charged at 64.17%).

82. My understanding of the PAD is that the residual rate was a figure calculated by adopting the highest applicable rate within the range that the TRA could properly impose, in light of the data before it. The TRA says it used this approach as a way to encourage interested parties to notify themselves to the TRA; and to encourage continued cooperation from those that have registered. The TRA's evidence was that this is the only mechanism it has to compel parties to engage in the investigations process. That appears correct and logical.

83. On 19 September 2024, the TRA submitted the PAD to the SSBT (the document was entitled "*Provisional Affirmative Determination and Recommendation of Guarantee*"). This was materially the same as the PAD Report later published by the TRA on 20 December 2024. The TRA also provided a submission setting out the Guarantee Recommendation to the SSBT. I was taken to that submission in oral argument.

Caterpillar appears on the scene

84. On or around 9 October 2024, Ms Denise Peet ("Ms Peet"), Caterpillar's UK Head of Government Relations, met with Mr Harradence of the DBT. There are issues in dispute as to whether the Investigation was discussed at all at this meeting and whether Ms Peet informed him that Caterpillar was aiming to register as an interested party with the TRA. This includes a dispute as to whether Ms Peet said that this failure was Caterpillar's "fault". I do not need to, and will not seek to, resolve these disputes.

85. On 15 November 2024, Ms Peet contacted Mr George at the TRA for the first time. This was about one year after the Investigation was initiated, 11 months after the window for registration closed, two months after the PAD was submitted to the SSBT, five days before the PAD was accepted by DBT Ministers, and ten days before the publication of the SEF. Ms Peet wrote she was "*Just reaching out to you to understand if there is scope for us to register interest for the investigation at this stage*". Mr George's evidence is that he was unsure of the "*reason for Ms Peet contacting* [him] *at that point of the Investigation … as she was provided with* [his] *contact details in March 2024*". Mr George forwarded Ms Peet's email to Mr Matt Gass (Senior Trade Remedies Lawyer at the TRA) stating "*Here is the email from Caterpillar. To note, they have only sent it to the Subsidy mailbox*" (this was a reference to the generic mailbox maintained by the TRA for the related subsidy investigation and provided to Caterpillar by the DBT in March 2024). There was an internal discussion about Ms Peet's email. On 19 November 2024, Mr George asked, amongst others, Mr Gass and Ms Manson if he could "*simply notify them that the investigation had progressed to an advanced stage, and they cannot be included as an interested party … I don't know what their interest is but we certainly wouldn't have time to register their interest in the case …*".

86. On 5 December 2024, Ms Peet emailed Mr George again. She noted that (i) the SEF had been published and that Caterpillar therefore understood that "*a residual 83.5% anti-dumping duty will apply to Caterpillar excavators made in China*"; (ii) that would have "*a significant impact on Caterpillar and our Dealer*"; and (iii) she concluded by asking what options were open to Caterpillar to reduce the residual duty that would apply and, if that was an option, the timeline in which that could be achieved. She also

asked whether the "UK dealer" (a reference presumably to Finning) could register as an interested party.

87. Mr George forwarded Ms Peet's email to Mr Gass and Ms Manson. He suggested the following response: "*We can confirm there will be scope for your client to provide information … We will duly consider any information we receive … although we cannot confirm at this time the precise weight that will be placed on this. This will depend on what information is provided, whether it is verifiable and our operational time constraints … as your client is not registered on our TRS system, it may send its submissions by email*". Mr George suggested a deadline of 16 December 2024.

88. Ms Manson responded agreeing with Mr George's approach and reiterated that the registration window had closed (on 30 November 2023). However, she stated that "*technically I think we can accept parties up until the SEF is published but not after*". Mr George therefore responded to Ms Peet's original email on 10 December 2024 using substantially the same text he had sent to Mr Gass and Ms Manson. He also added that "*Caterpillar have missed the registration deadline which was set as 30 November 2023. As such Caterpillar will be unable to register as an Interested Party*".

89. Nonetheless, Caterpillar submitted a PSQ on 13 December 2024 seeking registration as an interested party. It explained that during the period under investigation it had exported 12,947,000 kg of In-Scope Excavators to the UK. It also identified Finning as an interested party.

90. On 16 December 2024, Caterpillar submitted comments on the SEF. The nub of its submission was that it shipped its PRC-manufactured excavators through a third country and suggested that these products represented a substantial percentage of the market in imported PRC excavators into the UK. It sought an individual assessment of its appropriate duty amount.

91. I accept the TRA's evidence that this was the first time that the TRA became aware of the routes through which Caterpillar's goods entered the UK.

92. On 16 December 2024, Finning submitted its comments on the SEF. On 3 January 2025, Caterpillar and Finning provided their comments on the PAD. Caterpillar reiterated its request for an individual assessment.

93. The TRA initially formed the view it would not accede to Caterpillar's request for an individual assessment. The TRA's reasons were as follows:

(1) The TRA had already done a considerable volume of work to reach that stage of the Investigation. Calculating an individual rate for Caterpillar would have (without significant resource redeployment) seriously impacted TRA's ability to meet the Time Limit. It would ordinarily take six months to calculate an individual rate in a case of this complexity and the request for an individual assessment was not made until early December 2024.

(2) The TRA was concerned that calculating an individual rate might set an adverse precedent that encouraged overseas exporters to sit back and then engage in the investigation if they did not like the residual rate set out in the SEF.

(3) The TRA was concerned that other entities might be unhappy about the decision to calculate an individual rate at this late stage, in particular XCMG, which had requested to be included in the sample but was not.

(4) The resourcing implications of acceding to Caterpillar's request would have been considerable. Resources would have to be diverted from other investigations, that would suffer as a consequence. The Investigation was already running behind schedule and overall Ms Manson did not consider that this was an appropriate case in which to extend time.

94. There is evidence before me about internal discussions within the TRA about agreeing to Caterpillar's request, including the fact that Caterpillar had approached the SSBT and No 10 about the matter. In particular, the TRA was made aware that the SSBT's office was keen for the TRA to consider options that might enable it to calculate an individual margin for Caterpillar. I will not set out all of this evidence. I was taken to it by Sir James and Mr West KC. I will address particular points on the evidence in relation to these interactions below. Overall, however, I am satisfied that the SSBT and his staff were, within the constraints of the statutory regime and division of responsibilities, making substantial efforts to assist Caterpillar in addressing the situation it found itself in.

The SSBT's decisions

95. On 11 November 2024, the Minister for Trade Policy and Economic Security ("the Minister") received a submission from the DBT Trade Remedies Team advising him to accept the TRA's decision in principle, as no reasons of public interest to reject it had been identified, and to write to the Chancellor and Foreign Secretary asking for their views. On 19 November 2024, the Minister made a decision in principle, as recommended. On 26 November 2024, the DBT Trade Remedies Team sent letters to the Foreign Secretary and the Chancellor seeking their views as to whether there were any reasons in the public interest to reject the TRA's recommendation. On 2 and 6 December 2024 respectively, the Foreign Secretary and the Chancellor confirmed that no such reasons had been identified.

96. In the meantime, Caterpillar had continued to make representations to the SSBT regarding the TRA's Investigation. The relevant chronology on the basis of the documents before me was as follows:

(1) The TRA published the SEF on 25 November 2024, which set out their intention to recommend an anti-dumping duty which would apply to Caterpillar at the high residual rate (as a non-cooperating party).

(2) Following the SEF's publication, Caterpillar raised concerns with the SSBT, in a meeting on 5 December 2024 and in letters dated 9 December 2024 and 17 December 2024. In these communications, Caterpillar requested that either (i) it be permitted to provide information to the TRA so that an individual dumping duty could be calculated for it, or (ii) that the SSBT request that the TRA initiate an "early review". Caterpillar also requested that the TRA abstain from imposing any provisional or definitive trade measures.

(3) DBT made enquiries with the TRA as to Caterpillar's concerns. Following responses from the TRA, DBT officials provided an update to the SSBT on 18 December 2024, concluding that there was no "viable solution" to alleviating the situation. In this update, the officials said:

> "The TRA has urgently reviewed Caterpillars concerns in relation to the conduct of both investigations and their request for an individual duty. The TRA has confirmed that there is insufficient time to calculate an individual duty for the business without breaching the 18-month WTO investigation timeframe. Breaching this would likely significantly increase the risk of a successful challenge at the WTO (by China) on any future definitive measures. The TRA publicised the initiation of both investigations widely in November 2023. This included a press notice, a social media campaign and notifications to the Chinese government to help identify Chinese producers. The business was not identified by the TRA from the outset because they export their excavators to an affiliate based in Switzerland before they are sold into the UK market. In March 2024, the TRA reached out to Caterpillar on both investigations, inviting them to participate, however Caterpillar did not do so. Having now identified Caterpillar as a Chinese producer, the TRA subsequently deemed Caterpillar as 'non-cooperative' due to their failure to engage - this means that they are subject to the residual non-cooperative proposed definitive 83.5% dumping duty and 79.07% subsidy amount."

97. The SSBT made a final decision to accept the Guarantee Recommendation because he did not consider that it was in the public interest to reject it. Mr Willis (Co-Director of Trade Defence at the DBT) has provided a detailed witness statement describing the matters taken into account and the process leading to this decision. I reject the submission of Mr West KC that I should approach this evidence with "caution" given that it is not supported by contemporaneous documents. In fact there is support in the documents for the substance of what is said, and there was no proper basis advanced for me not to accept the truth and accuracy of what Mr Willis says. As I said in oral arguments, I did not understand what asking me to approach evidence with "caution" can mean in the context of this case other than an invitation to reject the evidence as untruthful. Mr West KC confirmed however that he was not making any such submission. I proceed on the well-established basis that I should accept the evidence on behalf of the SSBT unless it can be shown to be internally contradictory, implausible, or inconsistent with other incontrovertible evidence.

98. The matters taken into account by the SSBT in making his decision were as follows: (i) the content of the PAD Report, including the TRA's assessment that the relevant excavators were being dumped in the UK and that dumping was causing injury to UK industry; (ii) the TRA's advice that the guarantee requirement was necessary to prevent further injury and that it was in the UK's overall economic interest; (iii) that no reasons of public interest against the recommendation had been identified by his officials, the Chancellor or the Foreign Secretary. As to concerns raised by Caterpillar, the SSBT

considered that these were not a sufficient reason in the public interest not to accept the recommendation, because:

(1) Caterpillar had been afforded sufficient opportunity to engage with the TRA's Investigation. The SSBT considered that Caterpillar (by its own omission) had missed the launch of the Investigation, despite its wide publication in the media, and later chose not to get in contact with the TRA despite being encouraged to do so by the DBT during the Investigation (this refers to the March/April 2024 interactions which I address below). Further, Caterpillar still had the opportunity to comment on the SEF.

(2) The TRA had advised DBT that there was insufficient time to calculate an individual duty for the business without breaching the Time Limit - the consequence of failing to meet this timeframe would be a significant increase in the risk of a successful challenge at the WTO to any final measures.

99. On 20 December 2024, the SSBT published a public notice, taking effect the following day (21 December 2024), accepting the Guarantee Recommendation and imposing a requirement to provide a guarantee in respect of the estimated anti-dumping duty on importers of "*certain excavators originating from the People's Republic of China and exported to the UK*". On the same day, the PAD Report was published on the TRA's public file.

100. On 20 December 2024, SSBT sent a letter in response to Caterpillar's representations made in letters earlier that month, stating that:

> "Following receipt of your letters, I asked my officials to look into your concerns. The TRA acts as the UK's independent body responsible for the conduct of trade remedies investigations, doing so in line with World Trade Organization (WTO) rules. As such, I cannot intervene in their investigations whilst they remain ongoing. Upon conclusion of the investigations, should the TRA recommend definitive measures it would be for me to take a decision on its recommendations. It is at this stage that I would consider the evidence within the investigations and relevant wider matters in the UK's public interest. Whilst both are investigations continuing, I would urge you to engage the TRA. But I want to reassure you that the Department has acknowledged your concerns and will give due consideration to the matter at the conclusion of the investigation, should the TRA recommend that definitive measures be imposed."

101. As explained by Mr Willis, the purpose of this letter was to respond to Caterpillar's specific requests, which sought intervention by the SSBT in the TRA's Investigation. Mr Willis rightly observes that such intervention is not permitted by the statutory framework, as this letter sought to explain. Since the SSBT had already made the Guarantee Decision, the next stage at which he would be able to consider Caterpillar's representations would be the conclusion of the Investigation.

Preparation of the SEF

102. I have referred to the SEF above but I add a little more detail here. The SEF is a summary of facts considered during an investigation which does not go through the same approval process with the SSBT. The SEF contains the TRA's intended final recommendation and is the final chance for interested parties to provide comments and submissions to the TRA. The SEF was published by the TRA on 25 November 2024. In this case, the PAD was published after the SEF, on 20 December 2024. The evidence is that this was a consequence of the length of time that it took to secure approval from the SSBT. The PAD reflected an earlier estimate of the appropriate anti-dumping amounts (rightly described by Ms Wakefield KC as a "snapshot" at a position in time). The TRA's analysis had moved on at the point in time at which it finalised the SEF.

The TRA's change of stance: the decision to calculate an individual rate

103. Caterpillar's lobbying efforts with the SSBT continued and ultimately bore fruit as I describe below.

104. On 13 February 2025, Ms Smith (Investigations Delivery Director of the TRA) wrote to Mr Pettitt of the DBT. She noted that, following "*our chat yesterday evening, we have explored the idea of moving Caterpillar to the nonsampled* [sic] *cooperating rate. Whilst we think that we technically have the discretion to do so and it would be legal under our regulations, we consider that this would set a precedent of a company being able to secure a cooperative rate through lobbying and without providing the required evidence*". Ms Smith also noted that such an approach "*may still not be the remedy Caterpillar are seeking; they would move from the residual rate (46.42%) to the non-sampled cooperating rates (25.02%) for the period of the provisional measures and during the period of any early review. We would be eroding our key incentive for cooperation and increasing our risk of challenge by other parties for potentially little gain*".

105. On 14 February 2025, Mr Griffiths asked for further information on whether the TRA had used "*cooperative non-sampled rates in the past*". Ms Smith and Ms Manson responded that this had been done on previous occasions and that, in the present investigation, XCMG and Sunward would receive these rates as they "*didn't make it into our sample as we chose to select the two largest groups of exporters to the UK [known to the TRA at that time]*".

106. On 17 February 2025, Caterpillar filed the present claim.

107. On 17 February 2025, the TRA's SLP held a meeting with Mr Griffiths to discuss a proposal to calculate an individual rate for Caterpillar. This meeting was convened to assist Mr Griffiths in his discussions with the TRA's Board the following day. Mr Nick Baird ("Mr Baird"), Chair of the TRA Board, had decided that it was necessary for the Board to meet in order to reach a final decision in relation to how the TRA should respond to the situation with Caterpillar. Mr Baird was aware from his conversations with DBT colleagues that Caterpillar had been lobbying No.10 to find a solution to their concerns, and that there had been interest in the case at ministerial level. He explains in his evidence that this was an important issue in respect of which the TRA needed to take a careful, strategic decision. The SLP meeting of the previous day set out for the Board its assessment of whether it was operationally feasible under the circumstances – as a question of practicalities – to deliver what Caterpillar was asking for. That is, an individual assessment of the appropriate anti-dumping amount. The Board met the

following day. Mr Baird explains that the issue before the Board, in simple terms, was whether to take account of Caterpillar's data – provided very late in the Investigation – and so conduct afresh some of the calculations and assessments that had been carried out. Mr Baird says that the TRA saw this was an opportunity to demonstrate that it was an "*agile*" organisation, that was capable of responding rapidly in a fast changing and complicated environment. The Board recognised the real risk that it would not be possible to calculate an individual rate for Caterpillar. That was particularly the case if Caterpillar failed to provide the necessary evidence in response to what would have to be very short timelines. If the process could not be completed, the TRA would not allow the calculation of an individual rate to imperil the 18-month Time Limit. The Board's conclusion was that an individual rate should be calculated, if it could be, because of the "exceptional nature" of this case. That was communicated to Caterpillar on 20 February 2025.

108. Finning was required to complete an anti-dumping questionnaire about the excavators it imported from Caterpillar. It completed this questionnaire and submitted it on 3 March 2025, and the TRA completed the process of calculating an individual rate for Caterpillar within a very short timeframe. The process involved a reconsideration of a number of earlier steps in the TRA's reasoning. These included the PMS, EIT and injury analyses. As the TRA's evidence explains, the overall outcome of each of those steps was the same, when Caterpillar's data was taken into account: there was dumping of Chinese excavators causing injury on the UK market. On 26 March 2025, the TRA informed Mayer Brown (Solicitors for Caterpillar) that it was in principle "*possible to calculate an individual rate for Caterpillar*" and they would aim to do so by 11 April 2025.

109. In due course, on 10 April 2025 the TRA provided Caterpillar with its individual rate at 28.37%. I note that the inclusion of Caterpillar's data has affected the non-sampled rate (which is a weighted average of the individual sampled rates). The non-sampled rate has fallen considerably since the publication of the PAD in light of the submissions and evidence received in relation to both the SEF and the PAD. However, the effect of the inclusion of the Caterpillar data has been to increase what would have been the final figure by around 7 percentage points. The same trajectory applies to the residual rate. In particular, it is considerably reduced from the figures set out in the PAD, but the effect of the inclusion of the Caterpillar rate has been to increase that final figure by around 3 percentage points.

110. I now return to the issue of Caterpillar's knowledge of the Investigation.

V. Caterpillar's knowledge of the Investigation

111. I deal with this issue separately from my main factual narrative because as I indicated above there is a factual dispute as between the DBT and Ms Peet as to what passed between them in March/April 2024, and also because the factual position on the issue of knowledge generally has developed substantially following late disclosure by Caterpillar of actual knowledge of the Investigation from 16 November 2023. I will begin with the March/April 2024 position because that was the subject of the original evidence. I will then turn to the November 2023 knowledge.

Knowledge in March/April 2024

112. There is a dispute between Caterpillar and the Defendants as to the state of its knowledge as to the Investigation in the March/April 2024 period. In his first witness statement Mr Goldspink said:

> "I understand there is a duty of candour owed by parties to judicial review proceedings before the English court. As a matter of full and frank disclosure, although I did not become aware of the TRA investigation until November 2024, I have discovered that certain employees in the Caterpillar group did have some awareness of the investigation, if not the wider context prior to this date. In particular, in March 2024 a Caterpillar logistics team based in Belgium was asked by Finning to add a reference number concerning the weight of the products to certain labels for excavators from China (which would be suggestive of an investigation). As mentioned above, the request was referred to during the course of routine meetings between DBT officials and the Caterpillar Government Affairs team on 26 March 2024 and 23 April 2024. However, I am informed by Ms Peet that at this stage it was understood these matters concerned safeguarding measures (not anti-dumping investigations) and she was told to wait for the TRA to issue its Statement of Essential Facts in November 2024 in order to respond and provide relevant information. I am also aware that a US based global trade adviser had some broader awareness of an investigation".

113. Ms Peet's recent witness statement (responding to the DBT's evidence - to which I refer further below) essentially confirms this position. So, her evidence is that she understood Caterpillar could wait for the SEF. Ms Peet's evidence includes the following:

(1) That she was asked a question by a "*trade team member in the global group*" in November 2023 about a "*UK anti-dumping investigation into excavators imported from China*".

(2) An acceptance that, although in March 2024 she was sent the Trade Remedies Notice 2024/01 (which specifically referenced the TRA and the investigation) by colleagues, she did not open this document or do any related research; and

(3) An acceptance that the anti-dumping investigation was mentioned to her in a meeting on 23 April 2024, but she is 'unsure' whether she appreciated its relevance given that "*Caterpillar is a global enterprise and I am not familiar with the manufacturing operations of other parts of the business and their supply chains*".

114. The DBT's evidence is from Mr Willis. His evidence is to the following effect:

(1) On 26 March 2024, Ms Peet informed Michael White ("Mr White") of the "*implications*" of the Trade Notice for Caterpillar. Mr White contacted the TRA and received confirmation that the TRA would be "*happy to have a conversation with Caterpillar to explain why the TRA requested the goods are registered*". Mr White then emailed Ms Peet to advise Caterpillar to speak to the TRA.

(2) On 23 April 2024, Mr White and Mr Harradence of the DBT met in person with Ms Peet. The meeting minutes before me record: "*The ruling in cases brought by JCB would affect non-Chinese companies importing into the UK - including Caterpillar. MW [Mr White] had put DP [Ms Peet] in touch with the lead official at TRA - but she had not made contact*". Mr White has confirmed that, to his recollection, these minutes are a full and accurate record of the discussion as to the TRA's Investigation. I note that Ms Peet does not suggest that the minutes are not accurate. Her evidence is that she does not recollect what is recorded as having been discussed in the meeting, which was about many other matters.

115. The SSBT's contemporaneous records do not support the assertion made in the witness statement of Ms Peet that on 23 April 2024, Ms Peet was told by DBT officials to wait for the TRA to issue its SEF in November 2024 before responding and providing relevant information. Mr Willis says that the DBT has not found any reference to such a communication in the documentation, and it is contrary to the recollection of DBT officials and the recorded references in the minutes to encouraging Caterpillar to contact the TRA. I also consider that it would have been an odd thing to say within the procedural framework governing anti-dumping investigations which have provisional and final stages.

Knowledge in November 2023

116. At the time of the DGRs, the Defendants' understanding was that Caterpillar knew of the Investigation from at least March/April 2024 (based on what I have set out above). In Mr Goldspink's reply evidence (his second witness statement served more recently on 17 April 2025) he said that he is now aware that "*a handful of members of the Caterpillar group in different jurisdictions including China learnt of the investigation on or around 16 November 2023. However, no action appears to have been taken to register Caterpillar*." He adds that "*…it is not clear why, but it may have been because Caterpillar believed that if it were impacted, the TRA would have notified it of the investigation or because the implications of the investigation were not fully understood at the time. The relevant materials are covered by legal professional privilege but, in accordance with the duty of candour, I wanted to update my statement. I was not aware of this earlier knowledge (i.e. November 2023) at the time I signed my first witness statement".*

117. The TRA wrote to Caterpillar on 20 April 2025 seeking clarification in respect of the points made in Mr Goldspink's second statement. A response was received on 23 April 2025. There are two significant aspects of this exchange:

(1) First, the TRA asked whether Caterpillar itself had knowledge of the Investigation. Before I turn to the answer given to that question in correspondence, it is not clear to me why Mr Goldspink could not have said in plain and simple terms "*yes, Caterpillar - the Claimant in this claim - had actual knowledge in November 2023*". Unfortunately, this request did not receive a direct answer. Instead, Caterpillar's Solicitors said: "*It is accepted that the Caterpillar group had knowledge of the investigation from on or about 16 November [2023]. Caterpillar is not seeking to draw a distinction between knowledge of any members of the wider Caterpillar group and Caterpillar (Xuzhou) Ltd*". This was a rather roundabout way of answering a simple question. It was only when I pressed Mr West KC at the start of the hearing that he took instructions and orally confirmed in unqualified terms that

the Claimant company itself had actual knowledge of the Investigation on 16 November 2023.

(2) Secondly, Caterpillar's Solicitors stated in their letter that "*the possible reasons for non-registration in November 2023 are not relevant to the issues between the parties*". I find this a somewhat surprising statement. For example, if a tactical decision not to make itself known as an interested party was made by Caterpillar that would cast a rather different light on the merits of its complaints of unfairness on the part of the TRA in not notifying it of the Investigation (and a claimed inability to participate in something that Caterpillar had no idea was going on). Equally, even if someone within Caterpillar had simply "*dropped the ball*" and not identified the importance of the Investigation, that would also be relevant. These matters go to the heart of the merits of its complaints of procedural unfairness which imply that Caterpillar had been left in the dark about an investigation with potentially substantial financial consequences for its business and then given no opportunity to make representations when it became aware.

118. To complete the picture, I should refer to a lengthy footnote to Caterpillar's skeleton argument for the hearing before me. The following was said in that footnote (omitting bundle references):

> "Since this claim was issued, it has come to light that certain members of the wider Caterpillar group learned of the investigation in November 2023 (not from the TRA). It is unclear why no action was taken at the time, but it may be that the implications of the investigation were not fully understood at the time (Goldspink 2 §14). A notice published by the TRA in relation to the investigation was also discussed in March 2024 by Denise Peet of Caterpillar and Michael White of DBT. However, this was in relation a technical query on amendments to invoices and at this stage Ms Peet understood the investigation related to safeguard measures (Peet 1 §§17-20). Furthermore, when Finning raised a query with the TRA concerning this same issue, it was referred to HMRC…The investigation was also discussed briefly at a further meeting between Ms Peet and DBT in April 2024, but at that stage Ms Peet had not fully appreciated its relevance to Caterpillar and was told that Caterpillar could provide information to the TRA once it had published its decision later in the year (Peet 1 §§30-34)".

119. As I said in oral submissions to Mr West KC it was not satisfactory that Mr Goldspink has put forward *a theory* as to why no action was taken to register as an interested party once Caterpillar knew of the Investigation on 16 November 2023 but also to avoid explaining why *in fact* no action was taken (by invoking legal advice privilege). By way of reminder, he asserted the inaction "*... may have been because Caterpillar believed that if it were impacted, the TRA would have notified it of the investigation or because the implications of the investigation were not fully understood at the time*". Having taken instructions Mr West KC withdrew this part of Mr Goldspink's statement; and when the hearing finished matters were left on the basis that Caterpillar would not

disclose anything further in relation to this knowledge and action/inaction (including as to why it took no action despite knowledge), relying on legal advice privilege.

120. Although Ms Wakefield KC argued that Caterpillar may well have waived privilege by a partial deployment (see *Phipson on Evidence* (20th Edition) at [26-05]-[26-06] in relation to so-called "*Cherrypicking*") neither she nor Sir James pressed for further disclosure. This was a sensible course given the substantial number of other issues that need to be resolved on an expedited basis.

121. They each argued that the court could properly infer a "deliberate" decision was made not to register. Mr West KC did not accept I could infer anything about why Caterpillar did not register. That was because the reasons could range along a spectrum between tactical or cynical decision not to register, dropping the ball, or a simple innocent failure to appreciate the significance of the Investigation.

Conclusions as to knowledge

122. Based on the evidence I have summarised above, I find that Caterpillar had actual subjective knowledge of the Investigation from its initiation in November 2023 (and further in March/April 2024). As to the November 2023 knowledge, I draw no inference as to why it took no action to register. It is sufficient for this case for me to conclude it had actual knowledge and that if it wished to it could have participated from the outset as an interested party.

123. As to March/April 2024, I consider the minutes of the 23 April 2024 meeting (to which Ms Peet was a party) are to be relied upon as an accurate record of Caterpillar's knowledge as opposed to Ms Peet's memory. I accept Ms Peet may well not have appreciated the significance of what she was being told but there was notice.

124. So, in conclusion, I find that Caterpillar had the opportunity to make themselves known to the TRA as an interested party at each of these stages. As I said to Mr West KC during these submissions, I remain puzzled as to why the Caterpillar witnesses (Mr Goldspink and Ms Peet) have not been able to assist the Court with what (purely factually) Caterpillar decided to do when it became aware in November 2023 that the Investigation had been initiated. Caterpillar has sought to draw a veil of legal advice privilege over this issue but I find it hard to see why the decisions as to what to do about participating in the Investigation would be privileged. That said, in a case which has already led to substantial time and cost expenditure by the Defendants, they have sensibly decided not to probe this matter further.

125. I turn to the first main issue in dispute - whether the claim is academic given that an individual anti-dumping amount has now been calculated for Caterpillar and a final determination is due in a matter of days.

VI. Is the claim academic?

126. Although Caterpillar does not accept its claim is academic, the principles on which the court operates in considering whether to decline to hear claims on the basis that they are academic were not in dispute. They are set out in the *Administrative Court Guide* (2024) at [6.3.4.2]. In summary, in "exceptional circumstances", the court may exercise its discretion to determine a claim even though the outcome has become academic for

the claimant. Examples of where a court might proceed are where a number of similar cases exist or are anticipated, and the decision will not be fact-sensitive. I confess that I do not find the "exceptional circumstances" criterion easy to apply in any discretionary context including the present. Everyone thinks their case is exceptional. A more structured approach is perhaps to consider whether on the facts before the court there is a wider public interest in resolving the issues. One of the underlying policy reasons why courts do not usually decide academic issues is because limited judicial resources should be used on deciding real issues in dispute, particularly when there are substantial pressures on the list in the Administrative Court. A good reason needs to be identified for not following this policy imperative.

127. This issue (is the claim academic?) would normally arise at the permission stage, where a knock-out blow can be administered by a defendant. However, as I said to Counsel, given this is a "rolled-up" hearing where I have undertaken 2 days of pre-reading, and had the benefit of 2 days of oral argument on all the issues, it is rather artificial or odd to be considering whether I should decline to decide issues on the basis that they are no longer live. Counsel suggested, and I agreed, that I should consider whether the issues are academic, but (whatever I decide on that matter) also go on to consider the issues of permission/substantive merits of each ground. That is principally because I have heard all the arguments. I turn to the main submissions.

128. Mr West KC argued that, contrary to the Defendants' submissions, the claim is not in fact academic because the TRA has purported to calculate an individual anti-dumping margin for Caterpillar. He made a number of points in this regard. First, he said that the guarantee remains in place and continues to have what he called a "chilling effect" on Caterpillar's business, even at the reduced rate of 28.37%. This point about the guarantee remaining in place turned out to be wrong: when I asked Mr West KC if Finning had given a guarantee he first suggested they had but having taken instructions he confirmed that they had not. So this point essentially became one about market conditions/behaviour having been affected by the relevant decision (and a related "chilling effect") even though now there are only a few days left of these conditions. Secondly, he argued that my determination in relation to the decisions under challenge will "inform" the TRA's final determination in the Investigation and the SSBT's decision whether or not to accept it. Thirdly, he said the "unfairness" in failing to notify Caterpillar of the Investigation and then not allowing it to register once the TRA became aware that it had been overlooked has not been remedied by giving Caterpillar a very short window to provide information and they would have had additional material information to submit with more time.

129. Although these submissions were attractively and forcefully presented, I was not persuaded that the Court should have entertained the claim (had this not been a "rolled-up" hearing where all the arguments on the grounds have been fully developed). In essence, I accept the submissions on this issue made on behalf of the SSBT and the TRA. In my judgment, on the facts specific to this claim and given the nature of the pleaded challenge to the two target decisions (the PAD and the Guarantee Decision) the claim is plainly academic. I am also not satisfied that given the highly specific nature of the dispute in this case that there would have been a public interest or good reason in determining it. I will outline my reasons in brief terms.

130. As to the PAD, the Claimant seeks a quashing of the PAD in its original pleading. It attacks, by way of its grounds, the decision not to register it as an interested party and

calculate an individual rate for Caterpillar. As I have described above, on 20 February 2025 Caterpillar was informed that the TRA would conduct an individual assessment in respect of its data. This involved preparing a new PMS assessment and EIT. It has resulted in the calculation of a new residual rate and a new non-sampled rate. That individual assessment was completed and its results communicated on 10 April 2025. The practical consequence of this is that the findings in the PAD will have no legal effect. As the TRA has correctly submitted, where the duty rates fall between the PAD and the Final Affirmative Determination ("FAD"), the anti-dumping duty that is actually paid is calculated by reference to the lower of those two figures. The figures set out in the PAD – as they applied to Caterpillar – are therefore moot. What will have effect is the new individual duty rate finding which is not the subject of a challenge.

131. As to Caterpillar's grounds of challenge against the Guarantee Decision, they rely on Caterpillar (on its case) not having had the opportunity to provide information to the TRA, with the effect that the economic interest test did not take into account Caterpillar's relevant excavators and Caterpillar was subject to the residual duty. In my judgment, these matters have now been overtaken by the calculation of an individual duty against Caterpillar. As I have noted, Caterpillar sought in its Reply to make new arguments challenging the TRA's individual calculation on the basis that it is incorrect and that due to a compressed timetable, Caterpillar did not have sufficient opportunity to provide information in respect of it. They are not part of the present challenge to the Guarantee Recommendation and the Guarantee Decision. This is not and should not become some form of 'rolling' judicial review: see eg R (Dolan) v Secretary of State for Health and Social Care [2021] 1 WLR 2326 at [118]. Mr West KC accepted he could not challenge the individual rate. It is open to Caterpillar to launch a fresh claim against the TRA's individual calculation, if it wishes to do so.

132. As to Caterpillar's reliance on a supposed "chilling effect" on its business, any such chilling effect cannot resurrect, so as to render non-academic, a now superseded decision. In any event, any such chilling effect can no longer be linked to the Guarantee Decision. No guarantee was given. Any chilling effect simply derives from the expectation of the market that an anti-dumping amount will shortly be imposed on Caterpillar. It is the SEF and the TRA's individual duty calculation which now indicate that likelihood – and will continue to do so irrespective of the Guarantee Decision.

133. As I have said, Caterpillar claims that TRA's future final affirmative determination will be "based on" the Guarantee Recommendation and the Guarantee Decision. In fact, the provisional stage has now been overtaken. In circumstances where the TRA has calculated an individual duty for Caterpillar, any final recommendation will be based on that duty (and on the analysis contained in the SEF, where that analysis has not been overtaken by the individual calculation, in addition to the responses to the SEF the TRA has received). Further, the SSBT's final decision will be based on the recommendation put before him, and not on previous recommendations or decisions. Mr West KC accepts that his client has a right of appeal to the Upper Tribunal in respect of the final decision which is to be provided in a matter of days.

134. Mr West KC submitted that Caterpillar's claim for declaratory relief can hardly be considered academic where the TRA has not conceded that it has breached its obligations, and his client is entitled to pursue that relief. The purpose of the court considering a refusal of permission on the basis a claim is academic is to avoid the court's resources being used on deciding whether a defendant has acted unlawfully. His

submission assumes, wrongly, that a litigant has the right to use the court's resources just because a defendant does not concede it has acted unlawfully even though the claim is academic.

135. For these reasons, I would have refused permission to apply for judicial review in respect of the two target decisions (the PAD and the Guarantee Decision) on the basis that the pleaded challenges are academic. I will now go on to consider the merits of the grounds on an historic and artificial basis, that is, as if matters had stood still at the time the Claim Form was issued (which means ignoring the calculation of an individual margin for Caterpillar, as it requested). As stated above, it appears more logical to me to deal with the challenges to the TRA before those made against the SSBT.

VII. The overarching fairness and legality complaint against the TRA

136. Grounds 5-9 against the TRA concern the PAD. Before I deal with these grounds, I consider it helpful to step back and consider whether when the facts and legal framework are considered there was any element of unlawfulness in the general approach that the TRA took in making the PAD. In this Section, I am seeking to address the overarching complaint made most clearly in Caterpillar's Reply and developed by Mr West KC and it is appropriate that I address this head on (although it reappears in various forms in the Grounds and part of what I say will dispose of those Grounds).

137. I begin by underlining 3 points which emerge from the basic statutory scheme (which I have addressed in more detail in **Section III** above):

    i) An 'affirmative determination' is a determination that goods are being, or have been, dumped, and that this has caused or is causing injury to UK industry.

    ii) At any stage during a dumping investigation the TRA is able to make a 'provisional affirmative determination' (or PAD) on the evidence *then* before it. However, the TRA may only make such a PAD if it is satisfied that interested parties have been given "*an adequate opportunity to provide information to it regarding the investigation*".

    iii) When making a PAD the TRA may recommend to the SSBT "*in the case of a dumping investigation, in respect of all the relevant goods, all importers of those goods should be required to give a guarantee in respect of any additional amount of import duty which would have been applicable, or potentially applicable, to the goods under section 13 if an anti-dumping amount had been applied to the goods based on the provisional affirmative determination*".

138. At the time the PAD was made by the TRA and submitted to the SSBT (that is, between 6-19 September 2024), Caterpillar had not come forward and had not asked to be registered as an interested party. It did not do so for a further two months (15 November 2024). In my judgment, the facts I have set out in **Section IV** demonstrate that the TRA had done all that was required of it by the legislation to notify interested parties of the Investigation. I find that the TRA was right to be satisfied, when making the PAD, that it had provided interested parties with adequate opportunity to come forward. This assessment is of course vindicated by the fact that Caterpillar did in fact know about the Investigation. As I have said, I readily infer that it was as a result of the TRA's

actions to extensively publicise the Investigation that Caterpillar came to know of the Investigation in November 2023.

139. As I understood Mr West KC's overarching submission, it is said that once Caterpillar emerged on 15 November 2024, or at least once it had made its comments on the SEF on 16 December 2024, the TRA should have taken steps to re-open the PAD and its recommendation in order to accommodate Caterpillar and its data.

140. I consider that submission to be without merit:

i) Caterpillar's engagement with the Investigation was enormously late. A late-emerging interested party should not have the expectation that it will be treated as if it had made itself known earlier. I refer to and adopt what was said in Hangzhou by the General Court. But one does not need EU law to support what is a matter of common sense.

ii) The TRA considered, in the round, whether Caterpillar should be able to register as an interested party, and submit information, in particular with a view to having an individual rate calculated for it, at this late stage in the Investigation. That was a multi-factorial and evaluative decision. Applying principles of procedural fairness within this bespoke regime, I consider there was no unfairness in the TRA deciding not to re-open the PAD when Caterpillar emerged. I should underline that this is not a conclusion that the decision was merely rational but my own decision as to what procedural fairness in this context demanded when the operating environment for the TRA is taken into account. I will isolate a number of points which have persuaded me in this regard. First, the PAD had already been made by the TRA some two or three months previously and was with the SSBT. The disruption in halting or revoking this process was obvious. Secondly, it is inherent in the nature of a PAD that it is provisional and that the state of knowledge of the TRA will change. Further, it is also inherent in the regime that there will be a delay between the TRA making a PAD and accompanying recommendation, and the SSBT deciding whether to accept that recommendation or not. This means that very often the PAD will be published at the same time as the SEF (or even, as in this case, after the SEF), despite the fact that the SEF is materially different to the PAD. Thirdly, this feature of the regime is counterbalanced by the retrospective capping of the provisional measures by reference to the final anti-dumping duties imposed. In the present case, that means that – if the lower rate set out in the SEF Addendum is adopted in the FAD (or indeed any other lower rate) – that lower rate will be applied retrospectively to the guarantee period.

iii) Finally, and in any event, in my judgment, the precondition for the making of a PAD – namely that interested parties had an adequate opportunity to provide information – remained satisfied after Caterpillar emerged on 15 November 2024. The mere fact that Caterpillar made itself known so very late in the day does not mean that it had not had adequate opportunity to provide its information earlier on in the Investigation. The true position is that Caterpillar had had exactly the same opportunity as any other interested party which is not individually notified by the TRA, and it simply failed to take that opportunity. Caterpillar's position is plainly all the more to be deprecated now that it is

apparent it had actual subjective knowledge of the Investigation at its very inception and could have registered in the normal way.

141. Accordingly, in my judgment, the TRA's making of the PAD, and the associated recommendation of a guarantee, were unimpeachable. It was not obliged in law to reopen or revoke the PAD and in declining to do so it acted lawfully, rationally and in a procedurally fair manner. I turn to the specific grounds.

VIII. Grounds 5-9 (against the TRA)

Ground 5

142. Mr West KC argued that the TRA could only make a PAD if it was satisfied that interested parties had been given an adequate opportunity to provide information to it regarding the Investigation. He said that by the time of the PAD Decision (at least), the TRA was aware that Caterpillar had sought to be registered with the TRA and included in the sampling exercise; but the TRA refused to permit this. He also said that the TRA was aware that Caterpillar had not been notified of the Investigation and ought to have been aware its failure to do so was in breach of its obligations under §9(5)(e) of Schedule 4 to notify interested parties. As such, his submission was that the TRA could not reasonably have been satisfied that the threshold requirement in paragraph 11(4) of Schedule 4 was met.

143. This ground is not arguable. I refer back to my reasons above but will summarise the position. The TRA complied with all its statutory obligations in relation to notification and indeed in my judgment it went further than was needed. Further, this ground is wholly unmeritorious given that it has emerged that Caterpillar did in fact know about the Investigation from its inception. Its non-participation was the result of its own inaction. The fact that its data was not included is because it failed to participate despite having ample opportunity and not as a result of any unlawful act by the TRA.

Ground 6

144. Under this ground, Mr West KC argued that it was irrational to exclude Caterpillar from the Investigation given it was responsible for manufacturing the substantial majority of Relevant Goods imported into the UK. He referred to the fact that the stated methodology for the Investigation was to sample the largest exporters of excavators, but Caterpillar (the largest exporter of all) was excluded. I reject the ground as unarguable. The test for irrationality is a high one. I have set out above the TRA's reasons for excluding Caterpillar as a late entrant. The TRA identified relevant factors, weighed them in the balance, and came to a view which was rationally open to it.

Ground 7

145. Mr West KC argued under this ground that in breach of the requirements of "natural justice", Caterpillar was given no meaningful opportunity to participate in the Investigation prior to an adverse decision being made against it. He said subsequent events have shown that it was perfectly possible to calculate an individual anti-dumping rate for Caterpillar on an expedited basis.

146. I reject this ground as unarguable. It is essentially a re-packaging of Ground 6, but by reference to alleged procedural fairness entitlements rather than rationality. The common law requirements of procedural fairness must be moulded to the statutory context. In my judgment, the TRA complied with its statutory notification obligations and Caterpillar had a meaningful opportunity to participate in the Investigation, most obviously by registering in the usual way when it became aware of the Investigation in November 2023. When Caterpillar ultimately came forward, very late indeed in proceedings, it did not have a procedural entitlement to be treated as if it had 'registered' timeously, nor to have an individual dumping rate calculated for it. Although, ultimately, the TRA did provide Caterpillar with those benefits, this was a discretionary decision and not an entitlement. In short, there was no procedural unfairness. I would add that the fact that the TRA, through huge efforts and diversion of resources from other investigations, was in due course able to provide an individual rate does not show that the earlier refusal was procedurally unfair. In my judgment, that was a benefit which the TRA could have lawfully denied to Caterpillar.

Ground 8

147. In its skeleton, Caterpillar argued that "compounding the unfairness" of its exclusion from the Investigation, Caterpillar was then wrongly treated as a non-cooperating party and therefore subject to the highest (residual) rate of duty. It submitted that although Caterpillar was not expressly notified that it would be considered non-cooperating or expressly identified as such in the PAD, it is clear from the TRA's internal documents that Caterpillar was considered to be non-cooperating. It relied on a "Caterpillar decision paper" dated 29 January 2025: "*While the TRA has not needed to formally designate Catrepillar* [sic] *as 'non-cooperating' under Reg 49 we note that manifestly it has failed to cooperate with the investigation. (Reg 49(1))*". Although not developed in oral submissions by Mr West KC, the written arguments were to the effect that treating Caterpillar as non-cooperating was unreasonable and unfair in circumstances where (i) Caterpillar had not been notified of the Investigation post initiation and (ii) the TRA had subsequently refused to let Caterpillar participate and submit data so that an individual anti-dumping amount could be calculated for it.

148. Although it was not clear to me that Mr West KC was still pursuing this ground, I will address it. In short, I reject it as unarguable. The statutory scheme is that:

i) Unless the TRA uses a sampling approach, it will calculate an individual anti-dumping amount for each overseas exporter which has registered as an interested party (either during the registration period or, if the TRA so permits, subsequently) and provided information to it accordingly.

ii) If the TRA decides to use a sampling approach, pursuant to reg. 56:

a) Overseas exporters who are sampled will have an individual rate calculated for them;

b) Reg. 37 addresses the determination of the anti-dumping amount for non-sampled overseas exporters. It applies to a "*non-sampled overseas exporter*", which is defined as one which "*co-operated with the TRA's investigation*" and "*was not sampled*": reg. 37(1). The "*non-sampled overseas exporter amount*" applied to those exporters, which is the

"*weighted average of the amounts determined for the overseas exporters in the sample*".

c) Alternatively, non-sampled exporters can request that an individual rate be calculated for them (reg. 56(6)). The TRA must accede to this request provided that the non-sampled exporter has supplied the necessary information timeously, "*unless the number of exporters is so large that individual examinations are unduly burdensome and would prevent the timely completion of the investigation*" (reg. 56(7)).

iii) Pursuant to reg. 38, the TRA must also calculate a "*residual amount*", which applies to all exporters where (a) the TRA has not determined an individual anti-dumping amount for them, and (b) the exporter is not a non-sampled overseas exporter within the meaning of reg. 37. The TRA may determine this amount using any reasonable means (reg. 38(3)). As set out in the TRA's evidence, it seeks to impose a high residual rate in order to encourage interested parties to make themselves known to the TRA and to cooperate in the investigation. That plainly makes sense.

iv) Finally, and distinctly, under reg. 49, "*where the TRA has determined that an interested party has failed to cooperate with an investigation or has otherwise significantly impeded the progress of an investigation (a 'non-cooperative party'), it may disregard the information supplied by that party*". This will have the effect that the interested party, despite having registered timeously, will receive the "*residual amount*".

149. At the time of making the PAD, Caterpillar was subject to the residual rate because it had not notified itself to the TRA. Subsequently, when Caterpillar came forward in November 2024, it made no difference whether or not it was designated as non-cooperative. The statutory language of reg. 49 was simply not engaged because it was not an interested party that had been registered to the Investigation. Ms Manson fairly accepts in her witness statement that, in some of its internal documents, certain TRA staff members referred to Caterpillar as 'non-cooperative'. As she explains, and which I accept, this is not strictly speaking the correct terminology, but such references would have been understood internally as a shorthand for the fact that Caterpillar was receiving the residual rate because it had not participated in the Investigation at all. The operative decision – on the part of the TRA – was whether or not to extend time for Caterpillar to be registered as an interested party and to take into account its data, for the purposes of calculating an individual sampled rate for Caterpillar. Accordingly, Ground 8 adds nothing to Caterpillar's other grounds of challenge. The assignment of the correct rate to Caterpillar flows from the consequences of Caterpillar's (non) participation. In my judgment, the TRA acted lawfully when it did not accommodate Caterpillar's extraordinarily late evidence for the reasons already given. As a consequence, Caterpillar received the residual rate. But this does not follow from any freestanding arguable legal error raised by Ground 8.

Ground 9

150. Mr West KC argued that the TRA could not reasonably reach the factual conclusions set out in the PAD (including in relation to the economic interest test) without considering and evaluating the facts and evidence concerning Caterpillar. He repeated

the point that Caterpillar was the most significant exporter of Relevant Goods from China and the TRA knew its data had not been taken into account; as such, it should have been obvious to the TRA that the dumping and injury calculations performed to date would not be robust, but the TRA proceeded to publish the PAD Decision regardless.

151. I reject this ground as unarguable. The PAD was made in September 2024, before Caterpillar had made itself known, by reference to the evidence before the TRA at that time. In my judgment, it is inherent in the statutory scheme that the analysis, and rates set, in the PAD may (and almost always will) be different from the analysis and rates in the final decision. The TRA does not reopen a PAD on that basis. Further, the TRA's consideration of Caterpillar's general request to participate in the Investigation in November-December 2024 (including by registering as an interested party and providing its information) was lawful and applied *a fortiori* to the PAD.

152. I refuse permission on each of the Grounds advanced against the TRA.

IX. Grounds 1-4 and 10 (against the SSBT)

Ground 1

153. Under this first ground, Caterpillar argues that the SSBT, in his 20 December 2024 letter (which I have quoted at [100] above), misdirected himself in law. It is said that he wrongly considered that it was only if the TRA were to recommend definitive measures that he would "*consider the evidence within the investigations and relevant wider matters in the UK's public interest.*" Mr West KC submitted that this indicates that the SSBT did not consider that he was required to take into account the matters brought to his attention by Caterpillar. He argued that the 20 December 2024 letter makes no reference to either the public interest or the EIT Nor does the public notice indicate that those matters were considered or, if so, in what manner. In response to the SSBT's evidence that he did consider the public interest and, as part of that, the concerns raised by Caterpillar, Mr West KC said that there is no contemporaneous record of any such consideration.

154. I reject this ground as unarguable. First, the letter of 20 December 2024 was not a fully reasoned legal response to Caterpillar's complaints but a short letter from the Minister correctly explaining the SSBT's limited role at this stage. Second, by reference to the evidence I have referred to above from Mr Willis, I am satisfied that the SSBT directed himself properly as to the extent of his discretion in relation to the Guarantee Decision, i.e. any matters relevant to the public interest. This included the concerns raised by Caterpillar in its representations, which were duly considered. The SSBT was not required to undertake his own determination as to whether the EIT is met. The 2018 Act self-evidently does not impose such a requirement, which Mr West KC accepted. Rather, under §15(3) of Schedule 4, the SSBT is required to have regard to the TRA's advice as to the EIT. The SSBT was not required independently to carry out his own economic calculations. Rather he rationally relied on the analysis of the TRA, an expert body on which Parliament has conferred the function of considering the economic interests of the UK.

Ground 2

155. It is not clear that this ground was in fact being pursued by the time of the hearing. Mr West KC did not however formally withdraw it so I will deal with it as pleaded. Caterpillar's case is that on the basis of the matters known to Caterpillar when it issued its application for judicial review, there was no evidence that the SSBT exercised his discretion in taking his decision under § 15 of Schedule 4. Mr West KC acknowledged however that from the disclosure, there was some contact between the TRA and DBT leading up to the publication of the notice on 20 December 2024 whereby the SSBT accepted the TRA's recommendation to impose a guarantee.

156. When the evidence is taken into account, Caterpillar's pleaded assertion that the SSBT "*rubber-stamped*" the TRA's recommendation is untenable, and it is surprising that this contention was apparently maintained. The only piece of evidence on which it is based is the publication of the PAD Report on the same day as the Guarantee Decision. But before me it was not disputed that the SSBT had in fact received the PAD Report 3 months previously. I am satisfied that he gave it careful consideration, including by seeking views from the Chancellor and the Foreign Secretary. The SSBT had regard to the TRA's advice as to the economic interest test, as required by the 2018 Act. Ground 2 is not arguable.

Ground 3

157. Mr West KC submitted that there is an overlap between this ground and Ground 1. Caterpillar's position is that on the basis of the 20 December 2024 letter the SSBT failed to take the public interest and the EIT into account because he misdirected himself. I reject this ground as unarguable for reasons already given. In short, this ground is based on Caterpillar's misunderstanding of the SSBT's letter of 20 December 2024. The SSBT had regard to these matters as required by the 2018 Act. The SSBT has a wide discretion to determine where the public interest lies under §15 of Schedule 4. The courts will be slow to intervene in that determination in the trade remedies context. This is a paradigm decision falling within the macro-political or macro-economic field. Second, Caterpillar contends that the SSBT failed to take into account Caterpillar's specific position. That is wrong in fact. As I have set out, the SSBT met with Caterpillar. He sought further advice from officials (who in turn consulted with the TRA) as to Caterpillar's representations and was advised by his officials in relation to the matters raised. The weight to be accorded to particular factors in the exercise of discretion is a matter for the decision-maker, subject only to rationality. I repeat, the SSBT was not obliged to conduct his own economic analysis and was entitled (subject to rationality) to rely on the TRA's expertise. The SSBT was entitled to conclude that Caterpillar's representations were not a sufficient reason in the public interest not to accept the Guarantee Recommendation. That is so in particular because of Caterpillar's failure to engage with the Investigation, and where the TRA's advice was that calculating an individual rate for Caterpillar at the time it chose to come forward was not possible without risking a breach of the Time Limit. Third, Caterpillar argues that the SSBT failed to take into account that it was not notified of the TRA's Investigation and did not participate in it. The SSBT also took into account that the TRA had publicised the Investigation widely, that the reason the TRA had not identified Caterpillar as an interested party is that its excavators were imported via Switzerland and not directly from China (and so Caterpillar was not named on any data available to the TRA), and that Caterpillar had several opportunities to engage in the investigation yet had failed to do so (in fact the position against Caterpillar is now stronger - it clearly knew of the

Investigation as long ago as November 2023 and elected (for reasons it will not disclose) to take no action). This ground is not arguable.

Ground 4

158. This is another repackaging of the earlier grounds. It is said that on the basis of the facts and matters known to Caterpillar when this application for judicial review was issued, there was no evidence that the SSBT had exercised his discretion or taken into account relevant factors and therefore there was no rational basis for the Guarantee Decision. Caterpillar repeats its complaint about the lack of contemporaneous record of the reasons for the SSBT's decision and reliance on later evidence. I reject that as unarguable for reasons I have already given.

Ground 10

159. This is a freestanding ground which was attractively presented by Mr Artley. He submitted that the essence of this Ground is an inconsistency between the data considered by the TRA for the purposes of the PAD Decision and the scope of the guarantee requirement imposed by the SSBT. He argued that the SSBT acted irrationally in targeting excavators which originate in China, rather than excavators which are directly imported from China, in circumstances where the TRA used HMRC import data as a basis of its calculations in the PAD Report, and that data is based on the country of dispatch rather than the country of origin.

160. I reject Ground 10 as unarguable. As explained in Mr Willis' evidence, the SSBT (rightly) understood the TRA's recommendation to be in respect of certain excavators originating in China (on the basis of the PAD Report, §§5, 10, 40). Accordingly, the SSBT merely accepted the Guarantee Recommendation as put to him. It is not open to the SSBT to take a different decision to that recommended to him unless he first identifies reasons in the public interest to reject the TRA's recommendation. The SSBT identified no such reasons in circumstances where HMRC import data was only one source of data amongst others used by the TRA and the TRA recognised its limitations and used that data with caution: see PAD Report, §§333, 336, 340, 337. The SSBT was in my judgment entitled to defer to the TRA's expertise in assessing the utility of such data.

161. Further, I note that the SSBT agreed with the TRA's assessment that the guarantee requirement as currently formulated is required to remedy the material injury to UK industry identified by the TRA in the PAD Report. I accept that this is consistent with the UK's standard practice as to trade remedy measures: they are generally applied on the basis of country of origin (and this was not disputed by Caterpillar). This approach enables the trade remedy measure to be applied effectively by targeting the dumped goods causing injury. It is a matter of common sense that if only those goods that were "dispatched" from China were within scope, this would undermine the effectiveness of the trade remedy measure and may lead to foreign producers exporting to a foreign subsidiary before then exporting the goods to the UK as a method of circumvention.

162. I refuse permission on all the Grounds against the SSBT.

X. The Duty of Candour

163. Sir James and Ms Wakefield KC submitted that Caterpillar was in "serious" breach of the duty of candour in failing to disclose, until shortly before the hearing (17 April 2025) that it had actual knowledge of the Investigation from 16 November 2023. Sir James' oral submissions were adopted by Ms Wakefield KC. They acknowledged that the Court already had a substantial number of other matters to deal with, but nevertheless asked me to address this candour complaint. Mr West KC recognised that the allegations of breach of duty were serious. He said that although the allegations had not been "trailed" in the skeletons, he took no point on that because the issue was now "live" and his client had to deal with it. In fact, I note the point was raised in substance in the TRA's skeleton at [12(a)], which described the failure to acknowledge the fact of the November 2023 knowledge before now as "extraordinary". Mr West KC did not suggest that he needed any further time to address the allegations but I gave him the opportunity, if he needed it, to take specific instructions from those sitting behind him. He underlined in particular that Mr Goldspink's first statement indicated how seriously his clients took the duty of candour.

164. As explained in the *Administrative Court Guide* (2024), Part 15, in judicial review proceedings there is a special duty which applies to all parties: the "duty of candour". This requires the parties to assist the Court by ensuring that information relevant to the issues in the claim is drawn to the Court's attention, whether it supports or undermines their case. A claimant is under a duty to make full disclosure to the Court of material facts and known impediments to the claim. This duty is a continuing one: it applies throughout the judicial review procedure. It applies both to the parties and their legal representatives as Officers of the Court. The reason the duty is so important is that unlike ordinary civil proceedings, the parties are not obliged by the CPR to undertake a discovery/disclosure process. The system of public law works on the basis that both sides will be open and transparent in disclosing all material facts and documents. The Court reposes substantial trust in the parties in this regard.

165. On 17 April 2025, Caterpillar disclosed for the first time that it had knowledge of the Investigation in or around 16 November 2023 (I will call this "the Information"). It follows in my judgment that the assertions (express and implied) in its Pre-Action Protocol Letter ("the PAP") of 7 February 2025, and in the Statement of Facts and Grounds ("the SFG"), of unfairness on the part of the TRA in undertaking the Investigation, without Caterpillar having had notice of it and the chance to participate, were made on a false basis. I deal with the way the case was put in more detail below.

166. Sir James was right to submit that the underpinning of most of the grounds against the SSBT was the factual allegation that the SSBT failed to take into account the fact, as it was asserted to be, that Caterpillar had not been notified of the TRA's Investigation and thus had not had a fair or proper opportunity to participate in it with the consequential unfairness that its position was neither properly nor fairly considered. He said that the case presented by Caterpillar was not merely that there was a statutory notification obligation on the TRA, which was not complied with. Sir James was right to argue that the case went substantially further than that - it was in substance being asserted that as a result of what is said to be the failure of notification, Caterpillar did not in fact know of, and could not therefore, participate in the Investigation. I agree with Sir James that the plain inference to be drawn from the way the case was put in the PAP was that Caterpillar had not understood that the Investigation either was happening or related to it.

167. I was taken to the PAP where the complaint was framed as follows: "Denying Caterpillar a meaningful opportunity to participate in the investigation and fact-finding process was plainly procedurally unfair. Caterpillar was not notified contrary to statutory requirements about the initiation of the investigation and, thus, was not able to register on time" (my underlining). The Defendants were right to submit that Caterpillar was clearly linking the allegation about a failure to notify with the inability to register and to make representations. This was an inaccurate presentation of the facts. In the SFG at [55] it was pleaded that "As set out above, Caterpillar was not notified of the TRA's investigation and only became fully aware of it in November 2024" (my underlining). The underlined statement was not true: it is now acknowledged that Caterpillar was fully aware from 16 November 2023. Mr West KC did not seek to qualify the knowledge of 16 November 2023 in any way. I am sorry to say that I find that the Court and the Defendants were misled.

168. Mr West KC in responding to the allegations of breach of duty did not, rightly in my judgment, seek to quarrel with how Sir James described the way Caterpillar's case was being put expressly or impliedly in the PAP and the SFG.

169. I would add that the Information did not merely go to some marginal issue in this claim: lack of knowledge of the Investigation was at the heart of the complaints. I add however that I do not suggest that those who pleaded and signed the SFG (Mr West KC and Mr Artley) or their Instructing Solicitors, Mayer Brown (who sent the PAP), did anything other than act honestly and in accordance with what I am sure they in good faith believed to be the factual position, based on the instructions officers of the Caterpillar Group gave to them (I deal below with the date the legal representatives became aware of the Information).

170. Mr West KC frankly and properly accepted that the Information was relevant and disclosable (indeed that is no doubt why Mr Goldspink referred to it in his second statement). Mr West KC did not however accept there was any breach of the duty. He maintained the legal case that the TRA was itself under a statutory obligation to notify his client even if they had come to know about the Investigation through some other means.

171. Unfortunately, the disclosure of the Information was eventually made after repeated reminders by the GLD and the TRA of the duty of candour. Having been taken to the correspondence, I am satisfied that Sir James was right to submit that the Information had been "dragged out" of Caterpillar.

172. As appears from my judgment, when the Information is added to the factual picture, the apparent and prima facie merits of the claim rapidly diminish. I doubt, had there been disclosure of the Information when the Judge made urgent directions for a "rolled up" expedited hearing, any such directions would have been granted.

173. At the conclusion of the hearing, I asked Mr West KC when the Solicitor and Counsel legal team for Caterpillar had become aware of the Information. He said he was constrained by privilege from disclosing this. Mayer Brown however helpfully wrote to me the next day, 1 May 2025, stating, without waiver, that the legal teams had first become aware of the Information on 9 April 2025. Although there was a short delay between that date and the Information being disclosed to the Defendants on 17 April 2025, I do not consider there can be criticism of the Solicitor or Counsel teams. There

is no basis for a referral of the legal representatives to the designated *Hamid* judge under the process described in the *Administrative Court Guide* (2024), Part 18. This was a matter of client responsibility.

174. I am satisfied that Caterpillar committed a breach of the duty of candour. Something went very wrong in the preparation and presentation of evidence for this case. Without any explanation having been provided of how this situation arose, I can do no more than infer that those within the Caterpillar Group that instructed the UK lawyers did not undertake a proper investigation of the facts.

175. This is all the more concerning given that the Group is a substantial and well-resourced multi-national entity. Undertaking proper factual investigation and equipping one's lawyers with accurate information is a basic requirement of all litigation, but it has a particular importance in public law litigation given the demanding duties which are owed to the Court in such cases.

176. At the hearing, Mr West KC did not offer any explanation of why the Information had not been disclosed earlier. I infer from his interactions with his clients and Solicitors in court and from his declining to answer my questions that this was because his client was invoking some form of privilege. Any litigant who finds themselves in such a situation is, as a minimum, expected by the Administrative Court to provide an explanation (and usually an apology). That does not involve a violation of privilege. However, I would have expected more than some form of oral explanation from Mr West KC. A substantial and respected international entity such as the Caterpillar Group should have recognised the error and provided, through a senior officer or General Counsel, a witness statement with a full and proper explanation as to how the failure to disclose came about.

177. Unfortunately, I was left in a position where there has been no explanation offered as to how the error arose, or any attempt to mitigate the seriousness of the breach. Having expressed these conclusions, it is for the parties to make submissions as to the consequences, if any, of my finding.

178. Had I not refused permission to apply for judicial review because of the lack of merit in the grounds and their academic nature, the seriousness of the breach of the duty of candour would have in itself justified a refusal of permission.

XI. Conclusion

179. For the reasons I have given above, I refuse permission to apply for judicial review on all the grounds. These grounds are academic and in any event are not arguable. The PAD and the Guarantee Decision are unimpeachable. I find that Caterpillar was in breach of the duty of candour in not disclosing (until a very late stage) the fact that it had actual knowledge of the TRA's Investigation on 16 November 2024 while relying on its lack of knowledge of the Investigation (and related inability to register) as one of the foundations for its claims.

180. I understand that as at the date of handing down of this judgment, the TRA's final determination will have already been provided to the SSBT. The SSBT's final decision as to whether to accept that decision is due a few days later on 15 May 2025. As I have described above, Caterpillar is entitled to seek a reconsideration of any

recommendation of the TRA that a final anti-dumping amount be imposed by the SSBT (if that indeed is the recommendation). If Caterpillar is unhappy with the outcome of that internal reconsideration, it may appeal the TRA's reconsidered decision to the Upper Tribunal. If Caterpillar has any complaint about the SSBT's final decision of 15 May 2025, it also has the right to challenge that before the Upper Tribunal. That is the appropriate forum for any further litigation in relation to dumping issues raised in these proceedings.