



# Trade & Customs

in 20 jurisdictions worldwide

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Law Offices of Gary N Horlick

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Caroline Rawson  
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### Editor-in-chief

Callum Campbell

### Publisher

Richard Davey

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87 Lancaster Road  
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# China

**Eric C Emerson and Henry Cao**

Steptoe & Johnson LLP

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## Overview

**1** What is the main domestic legislation as regards trade remedies?

The main domestic legislation regarding trade remedies includes:

- the Foreign Trade Law of the People's Republic of China, promulgated and amended by the Standing Committee of the National People's Congress, effective as of 1 July 2004;
- the Anti-dumping Regulations of the People's Republic of China, promulgated and amended by the State Council, effective as of 1 June 2004;
- the Countervailing Duty Regulations of the People's Republic of China, promulgated and amended by the State Council, effective as of 1 June 2004; and
- the Safeguard Regulations of the People's Republic of China, promulgated and amended by the State Council, effective as of 1 June 2004.

**2** In general terms what is your country's attitude to international trade?

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## Trade defence investigations

**3** Which authority or authorities conduct trade defence investigations and impose trade remedies in your jurisdiction?

The Ministry of Commerce (MOFCOM) (<http://english.mofcom.gov.cn>) is responsible for conducting trade defence investigations. Within MOFCOM, the Bureau of Fair Trade for Imports and Exports (BOFT) (<http://gpj.mofcom.gov.cn>) is responsible for determining whether imports have been unfairly traded (in anti-dumping investigations) or subsidised (in countervailing duty investigations), and the Bureau of Industry Injury Investigations (BIII) (<http://dcj.mofcom.gov.cn>) is responsible for determining whether the domestic industry has been injured by subject imports. If agricultural products are involved, the injury investigation is conducted by both MOFCOM and the Ministry of Agriculture (<http://english.agri.gov.cn>). The General Administration of Customs (GAC) (<http://english.customs.gov.cn/publish/portal191>) is responsible for collecting anti-dumping and countervailing duties on imports at time of entry.

**4** What is the procedure for domestic industry to start a trade remedies case in your jurisdiction? Can the regulator start an investigation ex officio?

Trade remedy proceedings begin in China with the submission of a petition to MOFCOM by a domestic industry, a legal person, a natural person or a relevant organisation on behalf of a domestic industry. The petition must be in written form and should include the name, address and relevant information of the petitioner, the information regarding the product subject to investigation, the

information of like products in the domestic market, an explanation of the quantity and value of similar domestic products, and the effect of the imported product's quantity and price on the domestic industry. The petition must also provide evidence of dumping, subsidisation, or both; injury to the domestic industry; and the causal relationship between dumping or subsidisation and injury.

Before initiating an investigation, MOFCOM must determine that the petition has the necessary support of the domestic industry. Consistent with WTO norms, MOFCOM must conclude both that more than 25 per cent of domestic producers of the domestic like producer support the petition, and that more than 50 per cent of domestic producers of the like product expressing an opinion support the petition. MOFCOM must decide whether to initiate an investigation within 60 days of the receipt of the petition. MOFCOM may self-initiate an investigation even if it has not received a petition from the domestic industry if it has sufficient evidence of dumping, injury and a causal link between the two.

**5** What is the procedure for foreign exporters to defend a trade remedies case in your jurisdiction?

If MOFCOM decides to initiate an investigation, MOFCOM will normally notify the exporting country's embassy in China before the initiation is publicly announced. If the case involves imports from Taiwan, MOFCOM will convey the message to Taiwan through the WTO.

All foreign producers intending to participate in the investigation must register with both the BOFT and the BIII within 20 days of the date of initiation. To register, foreign producers whose imports are under investigation must submit (i) forms reporting basic information on production, sales and exports for the product during the relevant time period being investigated, (ii) properly authenticated copies of business organisation documents and (iii) a power of attorney. A failure to register will preclude a company from participating in the investigation and can subject an exporter to substantially higher duty liability.

When these registration documents are submitted, parties may also submit comments on the scope of the investigation. These are often useful to clarify what products are subject to the investigation, and to identify possible products to be excluded from the case.

Where the number of respondents exceeds MOFCOM's ability to examine each individually, MOFCOM has used statistical sampling methods to select respondents for individual examination.

Approximately 30 days after initiation, the BOFT will issue questionnaires to respondents, and the BIII will issue questionnaires to both petitioners and respondents. Parties are given 37 days to respond to these questionnaires. Extensions of seven days are possible; further extensions are rare. Thereafter, the BOFT often issues supplemental questionnaires to respondents, with relatively short deadlines. The BOFT will conduct on-site verifications of the respondents' questionnaire responses, at which counsel may be pre-

sent. Parties may submit briefing materials to the BOFT and the BIII on relevant issues, and may also participate in public hearings if held.

Investigations are to be completed within 12 months of initiation, though this deadline can be extended to 18 months. In most cases, MOFCOM issues its preliminary determination between six and nine months after initiation, although it has taken closer to one year in some more complicated cases.

If an affirmative preliminary determination is issued, importers of the subject merchandise must pay cash deposits to the GAC at the rates specified in the preliminary determination. If an affirmative final determination is issued, importers of the merchandise are required to pay final duties – not deposits – at the rates specified in the final determination. If the final determination is negative, importers can apply for refunds of cash deposits paid from the time of the preliminary determination to the time of the final determination.

**6** Are the WTO rules on trade remedies applied in national law?

China became a party to the WTO on 11 December 2001. Since international rules, including the WTO rules on trade remedies, are not directly applied under domestic law, China promulgated trade remedy laws and regulations to comply with its WTO obligations. Nevertheless, like many countries, China's trade remedy decisions have been challenged in dispute settlement proceedings before the WTO.

China does not treat any country as a 'non-market economy'. China does not apply a 'lesser duty' rule, but instead applies the anti-dumping/countervailing duty margins as calculated.

**7** What is the appeal procedure for an unfavourable trade remedies decision? Is appeal available for all decisions? How likely is an appeal to succeed?

There are two, non-mutually exclusive procedures to appeal an unfavourable trade remedies decision: administrative reconsideration and administrative litigation. Administrative reconsideration is governed by the China's Administrative Reconsideration Law and is not required by the WTO rules; administrative litigation is judicial review required by WTO trade remedies rules. Appeal is available for final determinations, refund determinations, new shipper review determinations, interim review determinations and sunset review determinations.

For administrative reconsideration, the appealing party must file an application with MOFCOM within 60 days of its knowledge of the decision. Within MOFCOM, the Bureau of Treaty and Law is responsible for reviewing the application. MOFCOM usually makes a decision within 60 days from acceptance of the case. For complicated cases, the time may be extended by no more than 30 days with the approval of the minister of commerce. After examining the case, MOFCOM may sustain, repeal, or amend its previous determination. If the appealing party is dissatisfied with the MOFCOM reconsideration decision, it may choose to appeal either to a Chinese court or to the State Council for a final ruling. The ruling of the State Council is final and is not subject to judicial review.

Administrative litigation can be initiated under two scenarios. First, as noted above, if the appealing party chooses the administrative reconsideration procedure first and is dissatisfied with the reconsideration decision, it shall file for administrative litigation at the competent Chinese court within 15 days of receiving the administrative reconsideration decision. Second, the appealing party can bring a suit directly in a Chinese court within three months from the day that it is aware of the administrative decision. The court usually makes a first-instance judgment within three months from the date of accepting the case. If the party is dissatisfied with the first-instance judgment, it may further appeal to the higher level court within 15

days from the date of first-instance judgment. The appellate court usually makes final judgment within two months of receiving the appeal.

MOFCOM does not publish information about administrative reconsideration, though it is believed that some decisions have been modified as a result of administrative reconsideration. Also, while there is anecdotal evidence that judicial appeals of trade remedy determinations have been filed, there is no record of a decision by a Chinese court regarding a trade remedy proceeding.

**8** How and when can an affected party seek a review of the duty or quota? What is the procedure and time frame for obtaining a refund of overcharged duties? Can interest be claimed?

Affected parties have various channels to seek a review of an anti-dumping/countervailing duty order to seek reduction or elimination of their additional duty liability:

**Interim review**

Foreign producers may file a request with MOFCOM for an interim review within thirty days of the anniversary of the relevant final determination. With this request, the foreign producer must explain to MOFCOM why circumstances have changed such that a review to recalculate the applicable anti-dumping or countervailing duty margin is warranted. The decision whether to initiate an interim review rests within MOFCOM's discretion, and in practice, few interim reviews are initiated.

**New shipper review**

A new shipper review is available for foreign producers whose products are covered by an anti-dumping duty order but who did not export the subject merchandise during the period examined in the original investigation (and thus were not eligible for individual examination). Under certain conditions, a new shipper may file a request for review with MOFCOM to obtain its own anti-dumping margin no later than three months after the actual export. If the exports were made after the original period of investigation and before the final determination, the request shall be filed within three months from the final determination.

**Sunset review**

Consistent with WTO rules, MOFCOM is required to revoke an anti-dumping/countervailing duty order five years after its imposition unless it determines that the revocation of the order would lead to the continuation or recurrence of dumping/subsidisation or injury to the domestic industry. To conduct these proceedings, known as sunset reviews, MOFCOM usually publishes a notice on its official website approximately six months before the scheduled expiry of the relevant order. The notice seeks to solicit information and views from interested parties. On the basis of information received, MOFCOM then makes its determination. To date, relatively few anti-dumping/countervailing duty orders have been revoked through the sunset review process.

**Duty refunds**

The only statutory rules regarding the refund of over-collected duties in trade remedies proceedings are the Provisional Rules on Refund of Anti-dumping Duties. MOFCOM requires importers to apply for any anti-dumping duty refund within three months of paying the duties. For the imports after the initiation of the investigation and before the final determination, the refund request shall be made within three months of the final determination. MOFCOM rules do not specify whether interest on overcharged duties may be claimed, and there is no precedent to be followed on this issue.

- 9 What are the practical strategies for complying with an anti-dumping/countervailing/safeguard duty or quota?

Because the chances of success for revising or eliminating an anti-dumping/countervailing duty order under the available administrative options are relatively low, foreign producers are advised to restructure their commercial transactions so as to avoid the most significant impacts of the order. This may include moving production or finishing facilities onshore into China to service domestic consumers or seeking alternative markets for export. Foreign producers subject to order are also advised to maintain positive and active government relations efforts in China even after an order is imposed, as it may be possible to reach agreement with the Chinese government, the petitioning industry, or both to remove or mitigate the impact of an order through an ad hoc agreement after the order is imposed.

### Customs duties

- 10 Where are normal customs duty rates for your jurisdiction listed? Is there a binding tariff information system or similar in place?

Tariff information, including customs duty rates, value-added tax rates and consumption tax rates, are available from the official website of GAC ([www.customs.gov.cn/publish/portal0/tab9409](http://www.customs.gov.cn/publish/portal0/tab9409)).

- 11 Where are special tariff rates, such as under free trade agreements or preferential tariffs, and countries that are given preference listed?

The GAC publishes special tariff rates and lists of countries and regions that are given preference on its official website: <http://english.customs.gov.cn/publish/portal191>.

- 12 How can GSP treatment for a product be obtained or removed?

China does not give GSP treatment to any countries or regions.

- 13 Is there a duty suspension regime in place? How can duty suspension be obtained?

The GAC permits duty suspension for certain temporary imports. According to the Regulations of Import and Export Duties, the GAC may grant duty suspension for the following categories of goods:

- goods for display or use at exhibitions, fairs, meetings or similar events;
- goods for performance or contest in cultural or sports exchange;
- apparatus, equipment or items for press, cinematography or television programmes;
- apparatus, equipment or items for scientific research, pedagogical or medical activities;
- means of transport and special purpose motor vehicles for functions specified in the above items;
- samples;
- apparatus and tools for installation, adjustment or test of equipment;
- containers of goods;
- other goods intended for non-commercial purposes approved by GAC.

To obtain duty-free treatment for these imports, prior approval must be obtained from the GAC. Importers must also pay a security deposit for the temporarily imported goods, and the goods must be re-exported from China within six months of date of entry. If additional time is required to re-export the merchandise, an extension application must be filed with the GAC at least 30 days prior to the original re-export deadline.

- 14 Where can customs decisions be challenged in your jurisdiction? What are the procedures?

Decisions of the GAC may be challenged through administrative reconsideration or administrative litigation.

Under administrative reconsideration, an appealing party may file an application with the GAC at the agency level immediately above the level that made the contested decision within 60 days of the date the party learns of the decision. If the appealing party is not satisfied with the administrative reconsideration decision, it may file suit with the relevant court within 15 days of receiving the administrative reconsideration decision.

If the appealing party directly brings a suit to court, it shall make the filing within three months from the date the party learns of GAC's decision. The court usually makes a first-instance judgment within three months from the date of accepting the case. If the party is dissatisfied with the court's first-instance judgment, it may further appeal to the higher-level court within 15 days from the date of first-instance judgment. The appellate court usually makes final judgment within two months of receiving the appeal.

### Trade barriers

- 15 What government office handles complaints against trade barriers in the WTO or under other agreements?

Within MOFCOM, the BOFT is responsible for handling complaints against and investigations into foreign trade barriers. Also within MOFCOM, the Department of Treaty and Law (<http://tfs.mofcom.gov.cn/>) is responsible for dispute settlement proceedings before the WTO and similar proceedings under other international agreements.

- 16 What is the procedure for filing a complaint against a trade barrier?

Domestic enterprises or industries that are directly connected with the manufacturing of products or provision of services affected by a foreign trade barrier may file a petition with MOFCOM to start an investigation. Individuals, legal persons or other organisations may also file a petition with MOFCOM on behalf of domestic enterprises or industries.

The petition must be in written form and should include the name, address and relevant information of the petitioner, the information of the barrier into which the investigation is applied for, the information of the products or services affected by the barrier, basic information of the relevant domestic industry, an explanation of negative trade effects caused by the barrier, and any other information deemed necessary by the petitioner.

MOFCOM must decide whether to initiate an investigation within 60 days of receiving the petition. MOFCOM may self-initiate an investigation without receiving a petition if it deems it necessary to do so.

- 17 What will the authority consider when deciding whether to begin an investigation?

According to the Investigation Rules of Foreign Trade Barriers (Trade Barriers Rules), MOFCOM shall initiate an investigation if the petitioner submits the required information in written form; the information submitted by the petitioner is not obviously inconsistent with the facts; the measures or practices applied to be investigated meet the standards specified in article 3 of the Trade Barriers Rules, which state that if a measure or practice adopted or supported by a foreign government (or region) involves any of the following circumstances, it shall be deemed to constitute a trade barrier:



- violating economic trade treaties or conventions concluded or jointly participated in by China and the foreign government, or failing to fulfil the obligations stipulated in such economic trade treaties or conventions; or
- causing any of the following negative trade effects:
  - obstruction or restrictions to the access of Chinese products or services to the markets of the foreign country or any third country;
  - damage to the competitiveness of Chinese products or services in the markets of the foreign country or any third country; or
  - obstruction or restrictions to the export of products or services of the foreign country (region) or any third country (region) to China.

**18** What measures outside the WTO may the authority unilaterally take against a trade barrier?

MOFCOM does not take any unilateral measures outside the WTO against a trade barrier. According to the Trade Barrier Rules, if MOFCOM concludes that a measure or practice constitutes a trade barrier, MOFCOM may conduct bilateral negotiations, initiate a multilateral dispute-solving mechanism, or take other appropriate measures.

**19** What support does the government expect from the private sector to bring a WTO case?

Depending on the nature of the matter, MOFCOM may request relevant domestic enterprises and industries to provide necessary support before bringing a WTO case, though there are no specific requirements to do so.

**20** What other notable trade barriers does your country impose?

China grants trading rights for the importation of certain goods, such as petroleum and sugar, only to state-owned trading companies. In addition, China restricts the importation and distribution of certain publications and audiovisual entertainment products such as journals, books, newspapers and films, for cultural reasons. China also requires an 'automatic' import licence for the importation of a wide range of products, ostensibly for statistical purposes.

#### **Export controls**

**21** What general controls are imposed on exports?

China may restrict or forbid the export of goods or technology in the following circumstances:

- for the purpose of maintaining state security, social welfare or public morality;
- for the purpose of protecting human health or security, the life or health of any animal or plant, or the environment;
- for the purpose of governing the import or export of gold or silver;
- to conserve any exhaustible natural resources that are in short supply or subject to effective protection;
- due to the limited market capacity of the destination country or region;
- due to the serious disorder of export management; and
- any other circumstance as provided for in those international treaties or agreements to which China has acceded.

Regarding the non-proliferation of weapons of mass destruction, Chinese law provides that the state may, for the purpose of defending state security, take any necessary measures for managing the export of any fissile material or any material used in the production

of fissile material, as well as the export of any weapon, ammunition, or any other military supply. During times of war or for purposes of maintaining international peace and security, the state may also take any necessary measures in relation to the export of any goods or technology.

China applies a quota and licensing system to goods and technologies subject to export restrictions. Export quotas for each year are promulgated by MOFCOM in or about October of the preceding year. Applications for quota for the following year are submitted in November, and licences are usually issued in December. Exports of goods and technologies subject to licence must strictly follow the specific rules of the licence during its period of validity.

China imposes quotas, licensing and duties restraints on the export of certain strategic raw materials ostensibly for purposes of environmental protection. Some of these restraints have been found inconsistent with China's WTO obligations.

**22** Which authorities handle the controls?

China's export control laws and regulations are generally administered by the following agencies:

- MOFCOM, Department of Mechanical, Electronic and Hi-Tech Industry, and the Department of Foreign Trade ([www.mofcom.gov.cn](http://www.mofcom.gov.cn));
- Ministry of Foreign Affairs, Department of Arms Control and Disarmament Affairs ([www.fmprc.gov.cn](http://www.fmprc.gov.cn));
- GAC, Policy and Regulations Department ([www.customs.gov.cn](http://www.customs.gov.cn)); and
- China Atomic Energy Authority ([www.caea.gov.cn](http://www.caea.gov.cn)).

**23** Are separate controls imposed on specific products? Give details.

The following products are subject to special export control:

#### **Military exports**

Military exports refer to export of any equipment, special manufacturing facilities and other related materials, technologies and services that are used for the military purposes. Special approval and licence are required to be obtained for the export of those items described in the List of Military Export Control issued by the then Commission on Science, Technology and Industry for National Defence (now dismissed) and the People's Liberation Army General Armament Department. Additionally, only military trading companies licensed by the central government are allowed to engage in such export business. The state generally prohibits any individual from exporting military products.

#### **Guided missiles and related items and technologies**

No entity or individual may, without approval and licence, export any of the items described in the List of Guided Missiles and Related Items and Technologies Subject to Export Control issued by the State Council.

#### **Dual-use nuclear equipment and related technologies**

The Chinese government exercises strict control over the export of nuclear dual-use equipment and relevant technologies so as to fulfil its international obligations on non-proliferation and anti-terrorism. Special approval and licence are required to export any of these items described in the List of Dual-use Nuclear Equipment and Related Technologies Subject to Export Control jointly issued by MOFCOM and the China Atomic Energy Authority.

#### **Dual-use biological products and related equipment and technologies**

The export of dual-use biological products and related technology is also subject to control. A special licence system is implemented with regard to the export of the items described in the List of Dual-Use

**Update and trends**

China continues to be an active user of trade remedy proceedings. While the majority of China's anti-dumping/countervailing duty proceedings involve chemical products, in 2012, China initiated its largest anti-dumping/countervailing duty investigation to date involving polysilicon from Korea and the United States. In recent years, China has been accused of using its trade remedy proceedings as a means of retaliation for trade actions taken against China abroad. While this is clearly not true for all cases initiated by MOFCOM, certain cases do suggest a retaliatory element. Moreover, in some cases MOFCOM has failed to issue its determinations within the normal time schedule,

allegedly because of internal political pressures from interested parties. If true, these facts suggest that China may be using its trade remedy proceedings in a somewhat political manner.

Regarding China's export control regime, the lack of published enforcement decisions by relevant agencies makes it difficult for parties to understand the nature and extent of China's implementation of its export control system. Nevertheless, it is believed that enforcement actions do occur, and for that reason, an awareness of all aspects of China's export control system should be an element of the trade compliance programme for any company operating in China.

Biological Products and Related Equipment and Technologies Subject to Export Control issued by MOFCOM.

**Chemical products and related equipment and technologies**

The Chinese government restricts the export of relevant chemical products and affiliated equipment and technologies so as to prevent any of these items from being used for the purpose of producing chemical weapons. Special licences are required to export the items and technologies described in the List of Chemical Products and Related Equipment and Technologies Subject to Export Control jointly issued by MOFCOM and the GAC.

In addition to the above categories, the MOFCOM and the Ministry of Science and Technology also publish the Catalogue of Technologies Subject to Export Prohibition and Restrictions specifying the technologies that are prohibited or restricted from exporting.

**24** Has your jurisdiction implemented the WCO's SAFE Framework of Standards. Does it have an AEO programme or similar?

China has implemented the SAFE Framework of Standards to Secure and Facilitate Global Trade formulated by the World Customs Organization (WCO). On 15 November 2010, the GAC issued the Measures of the Customs of the People's Republic of China on Classified Management of Enterprises, which took effect on 1 January 2011. These Measures generally incorporate the principal provisions set forth in the authorised economic operator programme of the WCO.

**25** Where is information on countries subject to export controls listed?

China does not publish a list of countries that are subject to export controls. However, relevant domestic authorities handling export controls may from time to time issue administrative regulations to

restrict or prohibit export of certain products to specific countries. For example, in 2005, MOFCOM imposed special approval and licensing requirements on the exporters of precursor chemicals to Burma and Laos. As a permanent member of the United Nations Security Council, China generally implements UN resolutions on export of certain sensitive products to specific countries, such as Iran and North Korea.

**26** Does your jurisdiction have a scheme imposing controls for exports to named persons and institutions? Give details.

China does not have a system for imposing export controls on specific named persons and institutions. Nevertheless, as mentioned in the answer to question 25, China generally implements the resolutions of the United Nations Security Council, which may include trade sanctions against specific foreign individuals and institutions.

**27** What are the possible penalties for violation of export controls?

Under Chinese law, transporting, carrying, or mailing out of the territory of China any goods that are prohibited or restricted from export shall constitute an illegal act of smuggling. For any smuggling act, the GAC may confiscate the smuggled goods as well as any illegal gains and impose a fine. The amount of the fine shall not exceed 1 million renminbi in the case of exporting any prohibited goods, and shall not exceed 30 per cent of the value of the goods in the case of exporting restricted goods. If the smuggling act has constituted a crime under the PRC Criminal Law, the relevant offender can be subject to criminal fines, forfeiture of property and up to a life sentence or even the death penalty, depending on the seriousness of the offence.

Anyone who exports any technology that is prohibited or restricted from being exported shall be ordered by MOFCOM to rectify the wrongful acts, and shall be subject to a fine in the range

# Steptoe

STEPTOE & JOHNSON LLP

**Eric C Emerson**  
**Henry Cao**

**eemerson@steptoe.com**  
**hecao@steptoe.com**

China Central Place, Tower 2, 29/F  
79 Jianguo Road, Chaoyang District  
Beijing 100025  
China

Tel: +86 10 5834 1000  
Fax: +86 10 5969 6099  
www.steptoe.com

of two to five times the illegal gains, and the illegal income shall be confiscated. Where there are no illegal gains or the illegal gains are below 10,000 renminbi, the offender shall be subject to a fine in the range of 10,000 renminbi to 50,000 renminbi. Likewise, if the illegal conduct has constituted a crime under the PRC Criminal Law, the offender can be subject to criminal fines, forfeiture of property and up to a life sentence or the death penalty, depending on the seriousness of the offence.

In addition to the above penalties, as of the effective date of the decision on any administrative sanctions, MOFCOM or other relevant authorities may also, within a period of three years, refuse to accept the offender's applications for export quotas or licences, or prohibit the offender from engaging in the export of relevant goods or technology for a period of one to three years.

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#### **Trade embargoes**

**28** What government offices impose trade sanctions?

China generally does not impose trade embargoes. However, China generally implements the resolutions of the UN Security Council, which may contain trade sanctions against specific foreign individuals and institutions. Under these circumstances, the relevant domestic implementing bodies are MOFCOM, the Ministry of Foreign Affairs, the GAC, and the Ministry of Transport.

**29** What countries are currently the subject of trade embargoes by your country?

None.

**30** Are individuals or specific companies subject to financial sanctions?

None.

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#### **Miscellaneous**

**31** Describe any trade remedy measures, import or export controls not covered above that are particular to your jurisdiction.

As a result of its accession to the WTO, China's import and export restrictions are generally consistent with its obligations under the WTO Agreements. For that reason, China does not maintain any country-specific import or export restrictions.



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