



7-3-2018

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# China's Non-Tariff Measures and Consequent Obstacles to Trade

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**ABSTRACT**

China has more than one billion consumers, constituting a huge market for U.S. exporters. However, China's non-tariff measures, including its standard system, technical regulations and compulsory conformity assessment, result in obstacles to trade and difficulties for U.S. exporters to enter into the market. The obstacles to trade could violate existing requirements of the World Trade Organization (WTO). China needs to make changes in its non-tariff measures to remove inappropriate obstacles to trade, not only to comply with the WTO's requirements but also to promote its domestic economy and public safety. However, it is too optimistic to believe that China will remove all obstacles to trade, given its public policy to protect national industries.

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## I. INTRODUCTION

Since China became a member of the WTO in 2001, the extraordinary growth of trade between China and the United States has had a dramatic effect on the U.S. economy. According to the U.S. Census Bureau, exports to China increased by 3,103% from 1980 to 2013.<sup>1</sup> Figure 1 shows the annual exports to China from 2008 to 2014, where the exports value in 2014 is estimated based on the exports from January to September in 2014.<sup>2</sup> As demonstrated in Figure 1, U.S. exports to China have maintained beyond \$100 billion since 2012.

As provided by the U.S. Department of Commerce, exports to China supported 11.3 million jobs in 2013.<sup>3</sup> With its large population, rapidly growing middle class, and long list of infrastructure goals, China will continue to be a major export market for U.S. goods and services and a key contributor to U.S. economic growth.

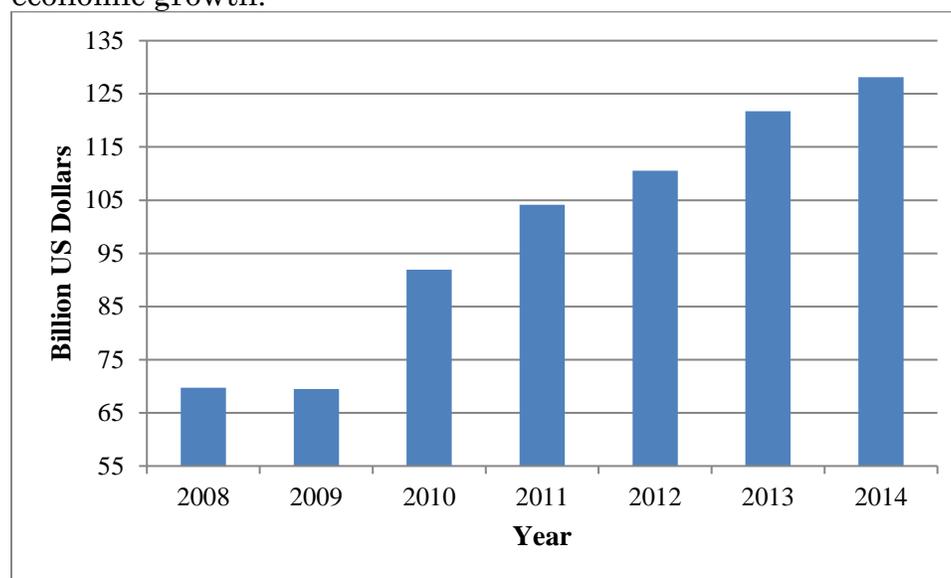


Figure 1. The annual exports to China from 2008 to 2014

Despite the growing U.S.-China commercial trade, U.S. exporters have been facing a number of obstacles due to China's non-tariff measures. Non-tariff measures are in the forms of technical regulations, standards, and conformity assessment procedures.<sup>4</sup> As the WTO regulations limit tariff barriers and

<sup>1</sup> *Trade in Goods with China*, UNITED STATES CENSUS BUREAU, <https://www.censUS.gov/foreign-trade/balance/c5700.html> (last visited Oct. 2014).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *The WTO Agreements Series: Technical Barriers to Trade*, WTO at 11, [https://www.wto.org/english/res\\_e/publications\\_e/tbttotrade\\_e.pdf](https://www.wto.org/english/res_e/publications_e/tbttotrade_e.pdf), (amended 2014).

traditional non-tariff barriers to trade, non-tariff measures become a safe and efficient method to discriminate against imports in order to protect domestic industries.<sup>5</sup>

This paper will discuss China's non-tariff measures and consequent obstacles to trade. First, Section II will introduce the standards system, technical regulations, and conformity assessment in China. It will also provide the relevant laws and general principles of each category as a guideline for U.S. exporters. Next, Section III will look into the obstacles to trade caused by the non-tariff measures, as well as the conformity of the non-tariff measures to the WTO's requirements. Further, it will discuss the reasons and/or possibilities of removing those obstacles to trade.

## II. CHINA'S NON-TARIFF MEASURES

### A. *Standards System*

The standards system in China is governed by the Standardization Law of the People's Republic of China ("China Standardization Law") that was enacted on April 1, 1989.<sup>6</sup> In April 1990, the central government enacted the "Regulations for the Implementation of the China Standardization Law" as a guidance to implement the China Standardization Law.<sup>7</sup>

The standards system in China is administered at the top level of the government by the General Administration of Quality Supervision, Inspection and Quarantine (AQSIQ)<sup>8</sup> and headed primarily by the Standardization Administration of China (SAC).<sup>9</sup> In addition, other governments and private sector

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<sup>5</sup> Zheng Qiang Feng, *The New System and Their Function Mechanism in Current International Trade*, 10 J. CENT. SOUTH UNIV. (SOCIAL SCIENCE) 460, 460 (Aug. 2004), <http://www.zndxsk.com.cn/downloadPage.asp?softID=1064&urlID=1983&action=down>.

<sup>6</sup> Biao zhun hua fa (标准化法) [China Standardization Law] (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 29, 1988, effective Apr. 1, 1989), [http://www.npc.gov.cn/wxzl/gongbao/1988-12/29/content\\_1481259.htm](http://www.npc.gov.cn/wxzl/gongbao/1988-12/29/content_1481259.htm) (全国人民代表大会).

<sup>7</sup> Biao zhun hua fa shi shi tiaoli (标准化法实施条例) [Regulations for the Implementation of the Standardization Law of The People's Republic of China] (promulgated by the State Council, Apr. 6, 1990, effective Apr. 6, 1990), <http://fgk.chinalaw.gov.cn/article/xzfg/199004/19900400268228.shtml> (国务院法证办公室).

<sup>8</sup> GEN. ADMIN. OF QUALITY SUPERVISION, INSPECTION AND QUARANTINE, <http://www.aqsiq.gov.cn/> (last visited Dec. 18, 2014).

<sup>9</sup> STANDARDIZATION ADMIN. OF THE PEOPLE'S REPUBLIC OF CHINA, <http://www.sac.gov.cn/> (last visited Dec. 18, 2014).

organizations provide input and participate in the standards process.<sup>10</sup>

China's standards system covers requirements for products from the top five industries of U.S. exports to China—transportation equipment, crop production, computers and electronics, chemicals, and machinery.<sup>11</sup> Under Article 2 of the China Standardization Law, standards shall be formulated for the following technical requirements that need to be unified:

- (1) varieties, specifications, quality, and grades of industrial products or requirements pertinent to safety and hygiene;
- (2) methods for design, production, experimentation, examination, packing, storage, transportation, and utilization of industrial products or requirements pertinent to safety and hygiene in the course of production, storage, and transportation;
- (3) various technical requirements and methods for examination concerning environmental protection;
- (4) technical requirements and methods for surveying, designing, construction, examination, and acceptance in building projects;
- (5) technical terms, symbols, codes, drafting methods, and requirements for conversion and coordination concerning industrial production, project construction, and environmental protection;
- (6) varieties, specifications, quality, grades, examination, packing, storage, transportation, and requirements for production technology and management expertise concerning agricultural products (including seeds, seedlings, breeding stock and breeding poultry, and those in forestry, animal husbandry, and fishery; the same below); and
- (7) technical requirements concerning information, energy, resources, and transport.<sup>12</sup>

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<sup>10</sup> *PRC Standard System: Standards Used in China*, AM. NAT'L STANDARDS INST. (2018), [http://www.standardsportal.org/USa\\_en/prc\\_standards\\_system/standards\\_Used\\_in\\_china.aspx](http://www.standardsportal.org/USa_en/prc_standards_system/standards_Used_in_china.aspx) [hereinafter *Standards Used in China*].

<sup>11</sup> See *US Exports to China by State*, US-CHINA BUS. COUNCIL (2014), <https://www.uschina.org/sites/default/files/2013%20US%20Exports%20to%20China%20by%20State.pdf>.

<sup>12</sup> Regulations for the Implementation of the China Standardization Law of The People's Republic of China, art. 2.

Chinese standards can be either mandatory or voluntary.<sup>13</sup> Mandatory standards are required by the Chinese governments.<sup>14</sup> Foreign products that fail to comply with mandatory standards are prohibited from importing into China.<sup>15</sup> Products sold in the Chinese market are generally required to have a label indicating which standard or standards have been followed.<sup>16</sup> Importers of non-conforming products can be subject to administrative punishment or criminal prosecution.<sup>17</sup>

In contrast, voluntary standards are encouraged or recommended, but are not compulsory.<sup>18</sup> However, voluntary standards can be adopted by the governments and become mandatory. Also, voluntary standards can carry force in law if it is written into enforceable contracts.<sup>19</sup>

The China Standardization Law authorizes four categories of standards: national standards, industry standards, local standards, and enterprise standards.<sup>20</sup> The following will introduce each category.

### 1. National Standards

Where the technical requirements need to be unified nationwide, the Department of Standardization Administration under the State Council formulates national standards.<sup>21</sup> National standards are often referred to as “GB standards.” GB is the initial of Guo Biao (国标), which means national standards in Chinese.

Chinese national GB standards can be identified by their prefix code as mandatory, voluntary, or guiding, as indicated below:

Code	Content
GB	Mandatory National Standards
GB/T	Voluntary National Standards
GB/Z	National Guiding Technical Documents

<sup>13</sup> China Standardization Law, art. 7.

<sup>14</sup> *Id.* art. 14.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* art. 20.

<sup>18</sup> *Id.* art. 14.

<sup>19</sup> Regulations for the Implementation of the China Standardization Law of The People’s Republic of China, art. 15.

<sup>20</sup> China Standardization Law, art. 6.

<sup>21</sup> *Id.*

Each national standard has a corresponding catalogue number, including the prefix code, the serial number, and the year when the standard was enacted. For example, GB 5768.1-2009 is a mandatory national standard for traffic signs and markings that was enacted in 2009.<sup>22</sup>

In addition to the three types of national standards, in 1998 China adopted national guiding technical documents (“NGTD”) in order to meet the needs of fast growing industries.<sup>23</sup> NGTD are voluntary and carry no force in law; they serve only as technical references.<sup>24</sup> NGTD can be enacted only in the following two situations.<sup>25</sup> First, NGTD can be enacted if the technology is under development and requires relevant standardized documents to guide its development; or if it is valuable to standardize the technology, but is not eligible to be enacted to a standard. Second, NGTD can be enacted if the project is using technical reports of the International Organization for Standardization (ISO), International Electrotechnical Commission (IEC), or other international organizations.<sup>26</sup>

NGTD provides an opportunity for foreign suppliers to become involved in the enactment of Chinese national GB standards, and also creates a venue for Chinese government to adopt ISO and IEC standards into Chinese national mandatory standards. As of 2006, nearly half of all Chinese national GB standards were adoptions of international standards and “advanced foreign standards.”<sup>27</sup> Accordingly, NGTD eliminates some obstacles to trade and makes it easier for U.S. exporters to enter into China’s market.

Despite falling into any category of national standards mentioned above, a national standard has a term of five years.<sup>28</sup>

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<sup>22</sup> See *Traffic Signs and Marks Section 1: General Rules*, 工标网, <http://www.csres.com/detail/204290.html> (工标网) (last visited Oct 16, 2015).

<sup>23</sup> See *Guojia Biaozhunhua Zhidaoxing Jishu Wenjian Guanli Guiding* (国家标准化指导性技术文件管理规定) [Provisions on Implement of Standardization Guiding Technical Documents] (promulgated by The State Bureau of Quality and Technical Supervision, Dec. 24, 1998, effective Dec. 24, 1998), [http://www.sac.gov.cn/zwgk/flfg/gnflfg/201012/t20101210\\_56220.htm](http://www.sac.gov.cn/zwgk/flfg/gnflfg/201012/t20101210_56220.htm) (中国国家标准管理化委员会).

<sup>24</sup> *Id.* art. 2, 4.

<sup>25</sup> *Id.* art. 3.

<sup>26</sup> *Id.*

<sup>27</sup> *Standards Used in China*, *supra* note 10.

<sup>28</sup> *Guojia Biaozhun Guanli Banfa* (国家标准管理办法) [State Standards Management Guidance] (promulgated by The State Bureau of Technical Supervision, Aug. 24, 1990, effective Aug. 24, 1990), art. 27,

National standards may be amended, added, or abandoned according to changes in industries, commercial trade, and governmental policy.<sup>29</sup> Thus, it is necessary for U.S. exporters to check the most recent GB standards when considering entry into the Chinese market.

## 2. Industry Standards

Industry standards are often referred to as “professional standards.”<sup>30</sup> They are developed and applied when no national GB standard exists, but where a unified technical requirement is needed for a specific industry sector in China.<sup>31</sup> Industry standards can be either mandatory or voluntary.<sup>32</sup> However, industry standards automatically become obsolete when national standards for the same industry are enacted.<sup>33</sup>

Opposite from what the name suggests, industry standards are not private or up to the corresponding industries. Instead, they are all enacted by corresponding administrative departments of the China State Council.<sup>34</sup> An administration department of the State Council is the highest government agency that directly administrates an industry sector.<sup>35</sup> The major responsibility of an administration department is to drive the development of the corresponding industry sector.<sup>36</sup> This responsibility inevitably involves controlling the quality and quantity of imported products.<sup>37</sup> Industry standards are an effective tool to facilitate the control.

The table below lists all the current mandatory industry standards as well as their administration departments and corresponding industry sectors.<sup>38</sup> The catalogue number of an industry standard includes the standard code, the serial number and the year when the standard was enacted. For example, the

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[http://www.sac.gov.cn/zwgk/flfg/gnflfg/201012/t20101210\\_56221.htm](http://www.sac.gov.cn/zwgk/flfg/gnflfg/201012/t20101210_56221.htm) (中国国家标准化管理委员会).

<sup>29</sup> *Id.*

<sup>30</sup> China Standardization Law, art. 6.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* art. 7.

<sup>33</sup> *Id.* art. 6.

<sup>34</sup> *Id.*

<sup>35</sup> See *The State Council of The People's Republic of China*, CENT. PEOPLE'S GOV'T OF THE PEOPLE'S REPUBLIC OF CHINA, [http://www.gov.cn/test/2013-03/16/content\\_2355707.htm](http://www.gov.cn/test/2013-03/16/content_2355707.htm) (last visited Dec. 18, 2014).

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> DEP'S OF INT'L: COOPERATION, SCI. AND TECH., <http://www.chinawater.net.cn/guifan/dh.htm> (中华人民共和国行业标准代号).

mandatory industry standard for 200 mA X-ray medical machines that was enacted in 1900 is “YY 0007-1990.”<sup>39</sup> The codes of voluntary industry standards have “/T” added after the codes. For example, the code for agricultural voluntary standards is “NY/T.”<sup>40</sup>

No.	Industry Sector	Code	Administration Agency
1	Packaging	BB	China National Packing Industry Corporation
2	Ship	CB	State Commission of Science and Technology for National Defense Industry
3	Surveying	CH	National Administration of Surveying, Mapping, and Geoinformation
4	Urban construction	CJ	Ministry of Housing and Urban-Rural Development
5	Press and Publication	CY	State Administration of Press, Publication, Radio, Film and Television
6	Archives	DA	National Archives and Records Administration
7	Earthquake	DB	Earthquake Administration
8	Power	DL	State Economic and Trade Commission
9	Geology mineral	DZ	Ministry of Land and Resources
10	Nuclear Industry	EJ	State Commission of Science and Technology for National Defense Industry
11	Textiles	FZ	State Bureau of Textile Industry
12	Public Security	GA	Ministry of Public Security
13	Radio, Film & TV	GY	State Administration of Press, Publication, Radio, Film and Television
14	Aviation	HB	State Commission of Science and Technology for National Defense Industry
15	Chemical Industry	HG	National Bureau of Petroleum and Chemical Industry
16	Environmental Protection	HJ	State Environmental Protection Administration
17	Customs	HS	General Administration of Customs
18	Ocean	HY	State Oceanic Administration
19	Machinery	JB	State Administration of Machinery Industry
20	Building Materials	JC	State Bureau of Building Materials

<sup>39</sup> See *Standards in Medicine Industry*,

[http://www.csres.com/sort/industry/002026\\_1.html](http://www.csres.com/sort/industry/002026_1.html) (工标网) (last visited Dec. 10, 2014).

<sup>40</sup> See DEP'S OF INT'L: COOPERATION, SCI. AND TECH., *supra* note 38.

<b>No.</b>	<b>Industry Sector</b>	<b>Code</b>	<b>Administration Agency</b>
21	Construction Industry	JG	Ministry of Housing and Urban-Rural Development
22	Finance	JR	People's Bank of China
23	Communication	JT	Ministry of Transport
24	Education	JY	Ministry of Education
25	Tourism	LB	National Tourism Administration
26	Labor and Labor Safety	LD	Ministry of Labor and Social Security
27	Forestry	LY	State Forestry Administration
28	Civil Aviation	MH	Civil Aviation Administration
29	Coal	MT	State Coal Industry Bureau
30	Civil Affairs	MZ	Ministry of Civil Affairs
31	Agriculture	NY	Ministry of Agriculture
32	Light Industry	QB	State Light Industry Bureau
33	Automobiles	QC	State Administration of Machinery Industry
34	Space	QJ	State Commission of Science and Technology for National Defense Industry
35	Meteorology	QX	China Meteorological Administration
36	Commerce	SB	State Internal Trade Bureau
37	Water Product	SC	Ministry of Agriculture
38	Petrol Chemical Industry	SH	National Bureau of Petroleum and Chemical Industry
39	Electronics	SJ	Ministry of Information Industry
40	Water Resources	SL	Ministry of Water Resources
41	Commodity Inspection	SN	Entry-Exit Inspection and Quarantine Bureau
42	Petroleum Gas	SY	National Bureau of Petroleum and Chemical Industry
43	Railways Transportation	TB	Ministry of Railways
44	Land Administration	TD	Ministry of Land and Resources
45	Sport	TY	General Administration of Sport
46	Goods	WB	State Internal Trade Bureau
47	Culture	WH	Ministry of Culture
48	Civil Products from Arms Industry	WJ	State Commission of Science and Technology for National Defense Industry
49	Foreign Trade	WM	Ministry of Foreign Trade and Economic cooperation

No.	Industry Sector	Code	Administration Agency
50	Hygiene	WS	Ministry of Health
51	Rare Earth	XB	Rare Earth Office of The National Plan Commission
52	Ferrous Metallurgy	YB	National Bureau of Metallurgical Industry
53	Tobacco	YC	State Tobacco Monopoly Administration
54	Telecommunication	YD	Ministry of Industry and Information Technology
55	Non-Ferrous Metallurgy	YS	State Bureau of Nonferrous Metals
56	Medicine	YY	Food and Drug Administration
57	Posts	YZ	State Post Bureau

### 3. Local Standards

Local standards are developed when neither national standards nor industry standards are available, but unified requirements for products are needed within a local area.<sup>41</sup> A local area means a province, an autonomous region, or a municipality directly under the central government.<sup>42</sup>

A local government may enact local standards within the following three categories: (1) safety and hygienic requirements of industrial products; (2) requirements on medicine, animal remedies, food hygiene, environmental protection, energy saving, seed; and (3) other requirements regulated by laws and rules.<sup>43</sup> For example, in 2014, the City of Beijing enacted “Code for Safety Risk Assessment of Urban Rail Transit Engineering Design” to regulate the design of the city’s urban rail transit system.<sup>44</sup>

Local standards are either mandatory or voluntary.<sup>45</sup> The codes for local standards are shown below. DB is the initial for “defang” (meaning “local”) and “biao zhun” (meaning “standard”).

<sup>41</sup> China Standardization Law, art. 6.

<sup>42</sup> *Id.* art. 2.

<sup>43</sup> Difang Biaozhun Guanli Banfa (地方标准管理办法) [Administrative Guidance for Local Standards] (promulgated by the State Bureau of Technical Supervision, Sep. 6, 1990, effective Sep. 6, 1990), art. 2, [http://www.slgsw.gov.cn/E\\_ReadNews.asp?NewsID=511](http://www.slgsw.gov.cn/E_ReadNews.asp?NewsID=511) (工商管理行政法规).

<sup>44</sup> Code for Safety Risk Assessment of Urban Rail Transit Engineering Design, *Local Standards of the City of Beijing*, DB11/ 1067-2014, [http://202.106.162.203/outerApp/trsSearchAction.do?method=viewDetail&id=1827498&standard\\_code=DB11/%201067-2014](http://202.106.162.203/outerApp/trsSearchAction.do?method=viewDetail&id=1827498&standard_code=DB11/%201067-2014) (last visited Oct. 19, 2015).

<sup>45</sup> Administrative Guidance for Local Standards, art. 3.

The two digits right after DB represents the province code as defined by the ISO 3166-2:CN and GB 2260/T.<sup>46</sup> For example, the code of a local voluntary standard in Beijing starts with DB11/T.<sup>47</sup> The three digits in the middle are the serial number of a standard.<sup>48</sup> The last two digits is the year when the local standard was enacted.<sup>49</sup>

Code	Content
DB××/×××-××	Mandatory local standards
DB ××/T×××-××	Voluntary local standards

The term of local standards, same as national standards, is no more than five years.<sup>50</sup> After the term expires, the government is required to review its local standards to determine whether the standards should be confirmed, amended, or voided.<sup>51</sup> Moreover, when national standards or industry standards are enacted in the same field, the corresponding local standards automatically become obsolete.<sup>52</sup>

Local standards, even though holding lower priority, are the most complicated category. China has twenty-three provinces, five autonomous regions, and four municipalities directly under the Central Government.<sup>53</sup> Therefore, there are thirty-two governments in total that can enact local standards. There is no legal or regulatory limitation on the number of local standards each government can enact. Consequently, U.S. exporters face a huge number of local standards. As of June 2014, the City of Beijing by itself had 1,350 local standards.<sup>54</sup>

U.S. exporters sometimes have to deal with the local standards of most, if not all, areas. China is known to be crowded.

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<sup>46</sup> *Id.* art. 10.

<sup>47</sup> Beijing Shi Difang Biaozhun Guanli Banfa (北京市地方标准管理办法) [Administrative Guidance for Local Standards of the City of Beijing] (promulgated by Beijing Municipal Administration of Quality and Technology Supervision, Feb. 1990, effective Apr. 1, 2013), art. 54, <http://www.bjtsb.gov.cn/infoview.asp?ViewID=386>.

<sup>48</sup> Administrative Guidance for Local Standards, art. 10.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* art. 11.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* art. 13.

<sup>53</sup> *Administrative Areas in China*, CENT. PEOPLE'S GOV'T OF CHINA, [http://www.gov.cn/test/2005-06/15/content\\_18253.htm](http://www.gov.cn/test/2005-06/15/content_18253.htm) (last visited Dec. 2, 2014).

<sup>54</sup> Local Standards of the City of Beijing, <http://202.106.162.203/outerApp/trsSearchAction.do?method=specialSearch> (last visited Oct. 19, 2015).

Even in provinces that are considered “under-developed,” the population is always much more than 10 million,<sup>55</sup> constituting a market large enough that U.S. exporters do not want to ignore. Local standards of different areas can vary a lot because of the disparities in economic development and natural environment. Local standards provide a legal venue to implement regional protection policy. It is recommended that U.S. exporters comply with the strictest applicable local standard to cover the biggest marketplace.

#### 4. Enterprise Standards

Enterprise standards may be developed and used by an individual company in China in cases where national standards, industry standards and local standards are not available.<sup>56</sup> Foreign companies doing business in China are encouraged to use the other three categories of standards where they are available.<sup>57</sup> Enterprise standards are used as references for manufacturing and managing.<sup>58</sup> Enterprise standards must be reported to and recorded by the standardization department of the local government and relevant administrative departments.<sup>59</sup> Thus, enterprise standards are not completely private.

An enterprise standard, if widely adopted, can be recognized by the government and transformed into a local, industry, or even national standard.<sup>60</sup> U.S. exporters, therefore, have a disadvantage competing with national suppliers in terms of influencing the standards system.

#### **B. Technical Regulations**

In addition to national and local standards, Chinese administrative agencies also issue technical regulations for

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<sup>55</sup> *The Population Distribution in China*, CHINA CULTURE, [http://www.chinaculture.org/gb/cn\\_zggk/2004-06/28/content\\_56028.htm](http://www.chinaculture.org/gb/cn_zggk/2004-06/28/content_56028.htm) (last visited Nov. 29, 2014).

<sup>56</sup> China Standardization Law, art. 6.

<sup>57</sup> *Standards Used in China*, *supra* note 10.

<sup>58</sup> China Standardization Law, art. 6.

<sup>59</sup> *Id.*

<sup>60</sup> *Common Problems of Enterprise Standards, Exploring Quickly Writing Methods and Analysis of Filing Procedures*, CHINA CONSTRUCTION MACHINERY ASSOCIATION (Dec. 2013), <http://info.cncma.org/2013/12/06141617321.shtml>.

products and services in the Chinese market.<sup>61</sup> Both the central government and local governments have authority to enact technical regulations.<sup>62</sup> Some national regulations render the power of implementation to local governments.<sup>63</sup> In that case, the local governments can enact downstream local regulations that also apply to U.S. exporters.

For example, the State Council enacted “Regulation on the Supervision and Administration of Medical Devices” in February 2014.<sup>64</sup> According to Article 2 of the regulation, the registration of medium-risk medical devices shall be submitted to the corresponding local governments. In October 2014, the Food and Drug Administration Bureau of Beijing published announcements regarding the registration of medical devices at the city of Beijing.<sup>65</sup> The very beginning of the announcement states that the purpose of the announcement is to facilitate implementation of “Regulation on the Supervision and Administration of Medical Devices.”<sup>66</sup> Thus, U.S. exporters should pay attention to this type of dual-system regulation and should not stop limit their search to national regulations. The national regulations provide avenues to find and interpret downstream local regulations.<sup>67</sup>

In addition to AQSIQ, other ministries under the State Council frequently issue regulations affecting products and services.<sup>68</sup> The following is a list of those ministries. This list is not comprehensive, but is intended to provide information on the most frequently active agencies:

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<sup>61</sup> *PRC Resources: Chinese Ministries and Agencies that Issue Regulations*, AM. NAT’L STANDARD INST.,

[http://www.standardsportal.org/usa\\_en/prc\\_standards\\_system/chinese\\_ministries.aspx](http://www.standardsportal.org/usa_en/prc_standards_system/chinese_ministries.aspx) (last visited Oct. 20, 2015) [hereinafter *Chinese Ministries and Agencies*].

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> Yiliao Qixie Jiandu Guanli Tiaoli (医疗器械监督管理条例) [Provision on Supervision and Management of Medical Devices] (promulgated by the State Council, Mar. 7, 2014, effective June 1, 2014), [http://www.sda.gov.cn/WS01/CL0784/97814\\_2.html](http://www.sda.gov.cn/WS01/CL0784/97814_2.html) (国家食品药品监督管理总局).

<sup>65</sup> Beijingshi ShipinYaopin Jiandu Guanli Ju Guanyu Yiliao Qixie Chanpin Zhuce Gongzuo Youguan Shiyi De Tonggao (北京市食品药品监督管理局关于医疗器械产品注册工作有关事宜的通告) [Announcement on Things About Registration of Medical Devices] (promulgated by the Food and Drug Admin. Bureau of Beijing, Oct. 10, 2014, effective Oct. 1, 2014), [http://www.bjda.gov.cn/publish/main/2/29/34/2014/20141014092532498642373/20141014092532498642373\\_.html?%2b%d8%fa%29%b8](http://www.bjda.gov.cn/publish/main/2/29/34/2014/20141014092532498642373/20141014092532498642373_.html?%2b%d8%fa%29%b8) (北京食品药品监督管理局).

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> See *Chinese Ministries and Agencies*, *supra* note 61.

(1) Ministry of Agriculture

Areas of responsibility include agriculture and environmental issues relating to agriculture, fishery, animal husbandry, horticulture, animal welfare, foodstuffs, hunting, and game management.

(2) Ministry of Environmental Protection

Responsible for enforcing environmental policies and regulations, and also serves as China's nuclear safety agency (sometimes referred to as the State Environmental Protection Administration or SEPA).

(3) Ministry of Health

Areas of responsibility include public health, disease prevention and treatment, quality of foods, and cosmetics.

(4) Ministry of Human Resources and Social Security

Areas of responsibility include national labor laws, policies, and standards, and managing social security.

(5) Ministry of Water Resources (MWR)

Areas of responsibility include laws, regulations, and standards for the management of water areas, including rural water resources, economic regulatory measures for the water industry, and development of policies and laws regarding national water resources. MWR is not responsible for water pollution or sewage issues.

(6) State Administration of Radio, Film, and Television

Key areas of responsibility include regulation of China's television, radio, and internet content.<sup>69</sup>

### ***C. Conformity Assessment***

Conformity assessment is a term used to describe steps taken by both manufacturers and independent third parties to evaluate whether products, processes, systems, services, or personnel adhere to the requirements identified in a specified

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<sup>69</sup> *The State Council of The People's Republic of China: The Departments in the State Council*, CENT. PEOPLE'S GOV'T OF CHINA, [http://www.gov.cn/guowuyuan/gwy\\_zzjg.htm](http://www.gov.cn/guowuyuan/gwy_zzjg.htm) (last visited Nov. 30, 2014).

standard.<sup>70</sup> Conformity assessment activities such as testing, certification, and accreditation are closely associated with standards and provide the consumer or end user with a measure of confidence in the products and services being purchased.<sup>71</sup> For this reason, conformity assessment has become a critically important aspect of conducting business in the global marketplace and is often made visible through product marking or other marketing and promotional efforts.<sup>72</sup>

### 1. China Compulsory Certification

The most important conformity assessment in China is the China Compulsory Certification introduced in 2001. In December 2001, the AQSIQ published “Regulations Concerning Management of Compulsive Product Certification.”<sup>73</sup> From then on, China Compulsory Certification has replaced certifications of the “China Import and Export Commodity Inspection Bureau (CCIB)” and the “China Commission for Conformity Certification of Electrical Equipment (CCEE),” thereby significantly simplifying foreign trade with China and creating a “level playing field” for all market participants.<sup>74</sup>

China Compulsory Certification is usually referred to as the CCC certification or 3C certification.<sup>75</sup> It applies to imported goods as well as to Chinese products.<sup>76</sup> Products that require certification may only be imported, sold, and/or used in business activities in China after the CCC mark has been obtained.<sup>77</sup>

The Chinese quality and safety mark and the conformity assessment system are administered by AQSIQ.<sup>78</sup> AQSIQ

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<sup>70</sup> *What is Conformity Assessment?*, INT’L ORG. OF STANDARDIZATION, <http://www.iso.org/iso/home/about/conformity-assessment.htm> (last visited on Dec. 2, 2014).

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> Qiangzhixing Chanpin Renzheng Guanli Guiding (强制性产品认证管理规定) [Reg. Concerning Mgmt. of Compulsive Product Certification] (promulgated by Gen. Admin. of Quality Supervision, Inspection and Quarantine, Dec. 3, 2001, effective Sep. 1, 2009), <http://www.lawinfochina.com/display.aspx?lib=law&id=2213&CGid=> (北大法律英文网) (effective version was promulgated on Jul. 3, 2009, following the expiration of the initial regulation).

<sup>74</sup> *Introduction to CCC Mark – Your Key to China Market!*, CHINA COMPULSORY CERTIFICATION, <http://www.ccc-mark.com/chinese/> (last visited Oct. 20, 2015).

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> Qiangzhixing Chanpin Renzheng Guanli Guiding (强制性产品认证管理规定) [Reg. Concerning Mgmt. of Compulsive Product Certification] (promulgated by AQSIQ, Jul. 3,

authorizes the Certification and Accreditation Administration of the People's Republic of China (CNCA) to fulfill the certification and accreditation duties.<sup>79</sup> CNCA is the primary government agency responsible for supervision of all certification and accreditation activities throughout China, including oversight of the China National Accreditation Service for Conformity Assessment (CNAS) and the CCC mark.<sup>80</sup>

With the introduction of CCC certification in 2001, the certification authorities AQSIQ and CNCA announced the "The First Catalogue of Products Subject to China Compulsory Certification".<sup>81</sup> This catalogue of products requiring certification was subject to continuous changes and has expanded since its first issue.<sup>82</sup> The CCC certification must therefore be conducted for the product groups appearing in the catalogue and other announcements of AQSIQ and CNCA.<sup>83</sup>

Failure to comply with the CCC regulations will lead to imported goods being detained at the border or returned to the sender.<sup>84</sup> Likewise, improper use of the CCC certification or printing the CCC mark on products without certification will also result in fines and penalties.<sup>85</sup>

There are, however, limited cases where goods subject to the CCC certification requirement may qualify for an exemption. Two announcements issued by China's Certification and Accreditation Administration (CNCA) address exemptions under certain specialized circumstances: AQSIQ Announcement No. 3

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2009, effective Sep. 1, 2009), art. 1,  
<http://www.cnca.gov.cn/cnca/rdht/qzxcprz/flfg/193003.shtml>.

<sup>79</sup> *Id.* art. 7.

<sup>80</sup> *Introduction to the Certification and Accreditation Administration of the People's Republic of China (CNCA)*, CHINA NAT'L CERTIFICATION AND ACCREDITATION, [http://www.cnca.gov.cn/xxgk/xxgkml/dwj/201304/t20130417\\_14937.shtml](http://www.cnca.gov.cn/xxgk/xxgkml/dwj/201304/t20130417_14937.shtml) (last visited Oct. 20, 2015).

<sup>81</sup> *Diyiping Shishi Qiangzhixing Chanpin Renzheng De Chanpin Mulu* (第一批实施强制性产品认证的产品目录) [The First Catalogue of Products Subject to China Compulsory Certification] (promulgated by Certification and Accreditation Admin., Dec. 3, 2001, effective May 1, 2002), <http://www.cnca.gov.cn/cnca/rdht/qzxcprz/rzml/36247.shtml> (国家认证认可监督管理委员会).

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> Reg. Concerning Mgmt. of Compulsive Product Certification, art. 5.

<sup>85</sup> *Id.*

in 2005<sup>86</sup> and Announcement No. 38 in 2008.<sup>87</sup> Under those announcements, the following products are exempted from CCC certification: products for scientific purposes and product testing; products to be displayed at trade fairs; products to build a production line; products processed in China and, as part of a larger product, exported again; spare parts to be used by the consumer; and small volume exemption under specific preapproved circumstances.<sup>88</sup>

Application for exemption is made to the local CIQ (China Inspection & Quarantine Services) office by the importer, and is usually required for each shipment.<sup>89</sup> Product tests can be requested.<sup>90</sup> CIQ review of the exemption request can last from a few days to several weeks.<sup>91</sup> Exemption application is especially well suited for a small amount of industrial spare parts shipped for maintenance or for building a production line in China.<sup>92</sup> Therefore, the exemption is not a benefit to the regular business of most U.S. exporters.

## 2. Application for the CCC Mark

Application for the CCC mark shall be filed with the China Quality Certification Center (CQC), which is designated by the CNCA to process CCC mark applications.<sup>93</sup> The application requires submission of numerous technical documents, testing at accredited laboratories in China, and an on-site factory inspection by Chinese officials at the applicant's expense.<sup>94</sup> Generally, self-certification or third-party testing results are not accepted.<sup>95</sup>

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<sup>86</sup> 2005 Nian Di San Hao Gonggao (2005 年第 3 号公告) [Announcement No. 3 in 2005] (promulgated by Certification and Accreditation Admin., Mar. 3, 2005, effective April 1, 2005), <http://www.cnca.gov.cn/cnca/rdht/qzxcprz/myblrzzm/4734.shtml> (国家认证认可监督管理委员会).

<sup>87</sup> 2009 Nian Di Sanshiba Hao Gonggao (2008 年第 83 号公告) [Announcement No. 38 in 2008] (promulgated by Certification and Accreditation Admin., Dec. 11, 2008, effective Dec. 11, 2008), [http://www.cnca.gov.cn/ywzl/rz/qzxcplz/myblrzzm/201403/t20140314\\_15400.shtml](http://www.cnca.gov.cn/ywzl/rz/qzxcplz/myblrzzm/201403/t20140314_15400.shtml) (国家认证认可监督管理委员会).

<sup>88</sup> See *supra* notes 73 and 74.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> Certification and Accreditation Admin., *supra* note 87, art. 2.

<sup>93</sup> See CERTIFICATION & ACCREDITATION ADMINISTRATION OF THE PEOPLE'S REPUBLIC OF CHINA, <http://www.cnca.gov.cn/> (last visited Dec. 2014).

<sup>94</sup> *Flow Chart of CCC Certification*, CHINA COMPULSORY CERTIFICATION ONLINE SERVICE CENTRE, <http://www.ccc-cn.org/ccccertifiprocess.htm> (last visited Dec. 19, 2014).

<sup>95</sup> *Id.*

The major steps of the application process are listed as follows:

1. application
  - a. the supplier contacts a CCC agency and submits an application,
  - b. the CCC agency assigns a unique plant code to each manufacturing facility upon application,
  - c. the supplier applies for “CCC mark usage plan” to the CCC agency;
2. testing
  - a. the supplier provides test samples to a CCC agency designated test laboratory in China,
  - b. the authorized lab conducts certification testing;
3. evaluation
  - a. the CCC agency reviews and approves the test results (or the failure and retesting);
4. plant inspection
  - a. the supplier requests initial inspection by the CCC agency of the plants where affected parts are manufactured,
  - b. the CCC agency conducts the initial inspection,
  - c. the CCC agency requests to re-inspect the plant every 12-18 months to maintain the parts certification;
5. CCC logo approval
  - a. the CCC agency issues CCC certificate documentation approving supplier plant(s) and parts,
  - b. upon receipt of CCC certificate, the supplier submits a “CCC usage plan” application to the CCC agency; and
6. final approval (plant and logo usage)
  - a. parts can be legally marked,
  - b. parts can be ordered and used for their intended purpose.<sup>96</sup>

The success of the certification depends on diligently following Chinese regulations.<sup>97</sup> The results of product testing and factory inspection are checked by Chinese authorities and will be accurately compared with previously submitted forms.<sup>98</sup>

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<sup>96</sup>*Id.*

<sup>97</sup> *CCC Certification Process*, CHINA CERTIFICATION, <http://www.china-certification.com/en/certification-process> (last visited Dec. 2, 2014).

<sup>98</sup> *Id.*

In the case of errors or faults, the certification may be denied or delayed.<sup>99</sup> Re-applying after denial is possible but involves additional costs and time.<sup>100</sup>

The CCC certificate and subsequent permission of printing for the CCC mark must be renewed annually as part of a follow-up certification, which includes a factory audit.<sup>101</sup> The proceedings of the follow-up certification are comparable with those of the initial certification, but overall much shorter, simpler, and less costly.<sup>102</sup> Typically, no additional product testing in China is required and the audit usually takes only one day.<sup>103</sup> Five years after the initial CCC certificate is issued, the follow-up audit usually takes two days and tests in China is requested.<sup>104</sup>

### III. OBSTACLES TO TRADE

The non-tariff measures in China give rise to obstacles to trade, causing various challenges for U.S. exporters. Those obstacles to trade violate WTO's requirements, in particular, the Technical Barriers to Trade Agreement (hereinafter "the TBT Agreement"). This section will introduce the obstacles to trade as a consequence of China's non-tariff measures and analyze the conformity of China's non-tariff measures with the TBT Agreement. Further, it will discuss the policy reasons behind China's non-tariff measures and anticipations or recommendations for whether China would or should remove the inappropriate non-tariff measures.

The TBT Agreement entered into force with the establishment of the WTO on January 1, 1995 and is binding on all members of the WTO.<sup>105</sup> It aims to help governments "achieve a balance between upholding legitimate regulatory policy objectives and respecting the key disciplines of multilateral trade under WTO rules, including avoiding the creation of unnecessary obstacles to international trade."<sup>106</sup>

The TBT Agreement establishes rules and procedures regarding the development, adoption, and application of

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<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *CCC Certification Process*, CHINA CERTIFICATION, <http://www.china-certification.com/en/certification-process> (last visited Dec. 2, 2014).

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> WORLD TRADE ORG., *supra* note 4, at 11.

<sup>106</sup> *Id.*

standards, technical regulations, and certification procedures.<sup>107</sup> Its key principles include use of international standards, non-discrimination, and avoidance of unnecessary barriers to trade.<sup>108</sup>

### A. *Use and Non-Use of International Standards*

Under the TBT Agreement, WTO members shall use relevant international standards, guides, or recommendations as a basis for their standards and technical regulations.<sup>109</sup> Annex 3, paragraph F of the TBT Agreement provides:

[W]here international standards exist or their completion is imminent, the standardizing body shall use them, or the relevant parts of them, as a basis for the standards it develops, except where such international standards or relevant parts would be ineffective or inappropriate, for instance, because of an insufficient level of protection or fundamental climatic or geographical factors or fundamental technological problems.<sup>110</sup>

This requirement is based on the presumption that “a technical regulation does not create an unnecessary obstacle to international trade if it is prepared in accordance with ‘relevant’ international standards.”<sup>111</sup> The adoption of international standards can eliminate the costs of both product redesign and conformity assessment associated with each market that suppliers intend to enter.<sup>112</sup>

China has made positive developments to use international standards. The China Standardization Law provides that China encourages use of international standards.<sup>113</sup> National standards have been amended to conform to relevant, existing international standards. For example, in May 2015, the Ministry of Industry and Information Technology (MIIT) of China published an amended draft of “Administrative Measures of Restriction on Usage of Hazardous Substances in Electrical and Electronic

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<sup>107</sup> *Technical Barriers to Trade*, WORLD TRADE ORG., [http://www.wto.org/english/tratop\\_e/tbt\\_e/tbt\\_e.htm](http://www.wto.org/english/tratop_e/tbt_e/tbt_e.htm) (last visited Dec. 18, 2014).

<sup>108</sup> WORLD TRADE ORG., *supra* note 4, at 15.

<sup>109</sup> Agreement on Technical Barriers to Trade, art. 2.4-5.4-annex 3, ¶ F, Jan. 1, 1995, 1868 U.N.T.S. 120 [hereafter TBT Agreement].

<sup>110</sup> TBT Agreement, annex 3, ¶ F, Jan. 1, 1995, 1868 U.N.T.S. 120.

<sup>111</sup> WORLD TRADE ORG., *supra* note 4, at 21.

<sup>112</sup> WORLD TRADE ORG., *supra* note 4, at 22.

<sup>113</sup> China Standardization Law, *supra* note 6, art. 4.

Products” for public comments.<sup>114</sup> In this draft, the scope of the measures was amended to be consistent with the relevant standard adopted by European Union, “The Restriction of the Use of Certain Hazardous Substances in Electrical and Electronic Equipment.”<sup>115</sup> Also, the Standardization Admission of China amended the national standard for toy safety in 2014.<sup>116</sup> One of the significant amendments is made to conform to the ISO 8124 standard.<sup>117</sup> The new standard, GB 6675-2014, went into effect in 2016.<sup>118</sup>

It is foreseeable that China would use more international standards to update its non-tariff measures for the following three reasons. First, it benefits public health and safety. An important purpose of standards and technical regulations is to protect public health and safety.<sup>119</sup> In this area, there are valuable international standards that are well-developed and widely used.<sup>120</sup> The adoption and implement of the international standards have proved their effectiveness. China can avoid the cost of developing standards by itself if it adopts international standards that are easily accessible.

Second, the use of international standards promotes innovation and technology development. International standards codify scientific and technical knowledge on the global level.<sup>121</sup> Thus, use of international standards disseminates knowledge.<sup>122</sup> Also, the use of international standards can constitute a technological foundation, based on which the domestic industry can foster further innovation.

Third, use of international standards can eliminate advance exportation of Chinese goods into the global market. There have been recalls of Chinese exported goods due to failure to comply with standards.<sup>123</sup> Assuming that international

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<sup>114</sup> 检测通 [Technical Barrier Resource Network], 工信部发布新版中国 RoHS 征求意见稿 [Ministry of Industry and Information Releases New China RoHS Consultation Draft], CHINA TBT RES. CTR. (May 28, 2015), <http://tbt.testrust.com/news/detail/16783.html>.

<sup>115</sup> *Id.*

<sup>116</sup> 检测通, 《国家玩具安全技术规范》新旧标准差异分析 [Analysis of the Differences Between the Old and New Standards: National Standards of Toy Safety], CHINA TBT RES. CTR. (Aug. 14, 2015), <http://tbt.testrust.com/law/detail/16987.html>.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> WORLD TRADE ORG., *supra* note 4, at 15.

<sup>120</sup> CHINA TBT RES. CTR., *supra* note 116.

<sup>121</sup> WORLD TRADE ORG., *supra* note 4, at 22.

<sup>122</sup> *Id.*

<sup>123</sup> See 召回资讯 [Recall Information], CHINA TBT RES. CTR., <http://tbt.testrust.com/recalls/news-1.html> (last visited Oct. 25, 2015).

standards are adopted widely, use of international standards in China will prevent those recalls. Also, if China's non-tariff measures are consistent with relevant international standards, Chinese suppliers, doing business both domestically and globally, do not need to redesign their products or build separate production lines. Therefore, China will very likely make more positive developments as to use of international standards.

In spite of those positive developments mentioned above, China continues to implement national standards inconsistent with the corresponding international standards that already exist.<sup>124</sup> For example, electrical safety standards of audio and video products as provided in Chinese national standard GB8898-2001 is different from the International Electrotechnical Commission (IEC) standard.<sup>125</sup> Such a difference mandates U.S. exporters to go through two different certification procedures. Plausibly, a U.S. exporter of audio and video products also has to incorporate a different design of its products to meet the Chinese safety standard. The cost of development, manufacturing, and qualification could be significantly increased in this case.

The non-use of the international standard is not technologically necessary. GB8898-2001 requires that the highest operating voltage shall not exceed 1.1 times the rated voltage versus a requirement of 1.06 times in the IEC standard.<sup>126</sup> As the IEC provides a more rigid standard, there is no technical reason why it is not adopted in China unless the non-use is to protect China's domestic industry. Non-use of the international standards can help Chinese suppliers compete with foreign suppliers in the domestic marketplace, especially when they are not technologically ready to meet more rigid international standards and consequently are at a disadvantage when competing with foreign suppliers.

Additionally, non-use of international standards can promote domination of Chinese suppliers in the global market, by driving foreign suppliers to adopt Chinese standards instead. China has more than one billion consumers, constituting the biggest market of a single country that no international business wants to lose. It is likely that the market out of China is smaller.

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<sup>124</sup> OFF. OF THE U.S. TRADE REPRESENTATIVE, 2015 NAT'L TRADE ESTIMATE REP. ON FOREIGN TRADE BARRIERS: CHINA 81 (2015) [hereafter NAT'L TRADE ESTIMATE REP.].

<sup>125</sup> 第四章 音视频产品的安全与电磁兼容国际标准与我国标准的差异[*Chapter IV Differences between International Standards for Safety and Electromagnetic Compatibility of Audio and Video Products and Chinese Standards*], MINISTRY OF COMMERCE OF CHINA, <http://policy.mofcom.gov.cn/export/avideo/c3.action#b41> (last visited Dec. 18, 2014).

<sup>126</sup> MINISTRY OF COMMERCE OF CHINA, *supra* note 125.

Therefore, foreign suppliers would be inclined to comply with the Chinese standards, even if they have to depart from international standards or the standards of their country.

However, in order to get access to China's standards, foreign suppliers may have to acquire or license intellectual property rights from relevant Chinese suppliers, which have the opportunity to set up mandatory standards. Enterprises standards in China can be adopted as national or industry standards.<sup>127</sup> The use of Chinese standards by both Chinese and foreign suppliers can further promote adoption of the standards globally. Thus, Chinese suppliers, by controlling access to standards, can dominate the global market.

With technology development in China, it is anticipated that there will be less non-use of international standards driven by avoiding competition with foreign suppliers in the domestic market, but more non-use for promoting domination of Chinese suppliers in the global market.

### ***B. Discrimination Against Foreign Suppliers***

Under the TBT Agreement, governments must ensure that non-tariff measures do not discriminate against foreign suppliers, e.g., in favor of national suppliers.<sup>128</sup> However, China's current conformity assessment procedures violate the corresponding provisions of the TBT agreement.

Article 5.1 of the TBT Agreement provides:

Members shall ensure that, in cases where a positive assurance of conformity with technical regulations or standards is required, their central government bodies apply the following provisions to products originating in the territories of other Members: conformity assessment procedures are prepared, adopted and applied so as to grant access for suppliers of like products originating in the territories of other Members under conditions no less favorable than those accorded to suppliers of like products of national origin or originating in any other country, in a comparable situation; access entails suppliers' right to an assessment of conformity under the rules of the procedure, including, when foreseen by this procedure, the

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<sup>127</sup> China Construction Machinery Association, *supra* note 60.

<sup>128</sup> *Id.*

possibility to have conformity assessment activities undertaken at the site of facilities and to receive the mark of the system.<sup>129</sup>

China's compulsory conformity assessment is not prepared to grant access for foreign suppliers no less favorable than national suppliers. The conformity assessment includes on-site inspection that discriminates against foreign exporters.<sup>130</sup> CNCA requires only two and a half auditor days for inspecting a domestic company, but six auditor days for inspecting a foreign company.<sup>131</sup> Because eligible auditors are employees of the CCC agency and live in China, the travel and lodging expenses of the auditors are significant. U.S. exporters must also consider the cost of an interpreter and the cost of the products sent for testing, as well as the employee time that it takes to prepare and handle the certification process. U.S. exporters encounter a heavier financial burden to finish China's compulsory conformity assessment procedures.

Additionally, China's conformity assessment grants favorable access to foreign suppliers over national suppliers. As discussed in Section II, China requires the CCC mark for any Chinese and foreign goods sold in China.<sup>132</sup> However, U.S. exporters report that China is "applying the CCC mark requirements inconsistently," and that "many goods produced in China continue to be sold without the mark."<sup>133</sup> In contrast, in order to export any products into China, foreign suppliers have to acquire the CCC mark in advance.<sup>134</sup> Therefore, the requirement for CCC marks is executed in a way to discriminate foreign products.

Moreover, China adopts in-country testing for imported products and at the same time refuses foreign test results and conformity assessment certifications,<sup>135</sup> infringing foreign "suppliers' right to . . . the possibility to have conformity assessment activities undertaken at the site of facilities and to receive the mark of the system."<sup>136</sup> Up until September 2015,

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<sup>129</sup> Agreement on Technical Barriers to Trade, art. 5.1.

<sup>130</sup> See, CCC 产品认证收费标准 [CCC Product Certification Fees], CHINA COMPULSORY CERTIFICATION ONLINE SERV. CTR., <http://www.ccc-cn.org/costlist.htm> (last updated Jul. 20, 2012).

<sup>131</sup> COMPULSORY CERTIFICATION ONLINE SERV. CTR., *supra* note 130.

<sup>132</sup> Reg. Concerning Mgmt. of Compulsive Product Certification, art. 2.

<sup>133</sup> OFF. OF THE U.S. TRADE REPRESENTATIVE, 2014 REP. ON TECHNICAL BARRIERS TO TRADE 56 (2014) [hereafter REP. ON TECHNICAL BARRIERS TO TRADE].

<sup>134</sup> Reg. Concerning Mgmt. of Compulsive Product Certification, art. 2.

<sup>135</sup> NAT'L TRADE ESTIMATE REP., *supra* note 124, at 81.

<sup>136</sup> Agreement on Technical Barriers to Trade, art. 5.1.

China has authorized 168 Chinese labs to perform tests<sup>137</sup> and 22 Chinese certification bodies to certify products qualifying for the CCC mark.<sup>138</sup> China does not recognize laboratories accredited by International Laboratory Accreditation Cooperation (ILAC) Mutual Recognition Arrangement (MRA) signatories or foreign conformity assessment bodies.<sup>139</sup> China also has limitations on in-country foreign-invested conformity assessment bodies.<sup>140</sup> China has not developed any “alternative, less trade restrictive approaches to third party certification, such as recognition of a supplier’s self-certification.”<sup>141</sup>

As all testing and assessment relevant for the CCC mark must be conducted in China, U.S. exporters, compared with national suppliers, have to spend more time, effort, and money to sell the same products in the Chinese market. More importantly, as part of the assessment procedure, U.S. exporters are often required to submit their product samples to eligible Chinese laboratories for tests that “may be unwarranted or have already been performed abroad.”<sup>142</sup> “U.S. companies in some sectors continue to express concerns about duplication of safety certification requirements, particularly for radio and telecommunications equipment, medical equipment, and automobiles.”<sup>143</sup> The current conformity assessment procedures in China give rise to obstacles to global trade.

China should make changes in its conformity assessment procedures to remove the discrimination against foreign suppliers. As a member of WTO, China should follow the requirement of non-discrimination under the TBT agreement.<sup>144</sup>

The measures causing the discrimination against foreign suppliers also negatively influence China at the same time. It is within China’s benefit and intention to strictly apply the CCC mark requirement with Chinese goods.<sup>145</sup> The failure to do so is

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<sup>137</sup> *Catalog of Designated Compulsory Conformity Assessment Labs*, CERTIFICATION AND ACCREDITATION ADMIN. OF CHINA, <http://www.cnca.gov.cn/tzgg/ggxx/ggxx2014/201408/W020140812321092436303.pdf> (last visited Oct. 24, 2015).

<sup>138</sup> 承担强制性产品认证工作的认证机构及其业务范围 [*Catalog of Compulsory Conformity Assessment Bodies*], CERTIFICATION AND ACCREDITATION ADMIN. OF CHINA, <http://www.cnca.gov.cn/cnca/rdht/qzxcprz/jcgggljg/4731.html> (last visited Oct. 24, 2015).

<sup>139</sup> REP. ON TECHNICAL BARRIERS TO TRADE, *supra* note 133, at 57.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 56.

<sup>144</sup> WORLD TRADE ORG., *supra* note 4, at 18.

<sup>145</sup> QIU Yeliang, 3C 认证执法监督延期原因国家认监委总工裘亦良答记者问 [*Reasons for Delayed Enforcement of 3C Certification Law Enforcement Supervision*],

not a purposefully designed non-tariff measure in favor of domestic suppliers.<sup>146</sup> Instead, the failure mostly results from purposeful violation by some Chinese suppliers and weak inspection by the government.<sup>147</sup> Exported goods are strictly inspected because it is easier to implement inspection at entry ports. China ought to enhance its inspection of the CCC mark; otherwise, it not only violates the TBT Agreement but also cannot achieve a goal of compulsory conformity assessment, e.g., to protect public safety.

While inconsistencies in the application of the CCC mark requirement is unintentional, the restricted access for foreign conformity assessment bodies is definitely intentional. China refused to accept foreign conformity assessment bodies accredited by ILAC MRA signatories unless ILAC MAR signatories negotiate MRAs with China.<sup>148</sup> China also does not authorize any third party certification.<sup>149</sup> The United States has raised concerns to China and pressed China to remove its restriction on foreign invested conformity assessment bodies.<sup>150</sup> However, the progress is minimal.<sup>151</sup> It implies that China intends to exercise more control over conformity assessment procedures than the internationally recognized level of control.

The exclusion of foreign conformity assessment bodies has no legitimate reason and harms China's image in global trading.<sup>152</sup> Foreign suppliers have concerns that their intellectual property is infringed when their products are sent to China for safety testing.<sup>153</sup> China would be able to exercise sufficient control over conformity assessment procedures by requiring foreign conformity assessment bodies to operate in the way appropriate to China. The discriminative procedures in China's CCC certification are unnecessary to China and harmful to global trading.

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CHINA COMPULSORY CERTIFICATION ONLINE SERV. CTR., <http://www.ccc-cn.org/3ccertifi.htm> (updated Jan. 20, 2018).

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> REP. ON TECHNICAL BARRIERS TO TRADE, *supra* note 133, at 57.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> NAT'L TRADE ESTIMATE REP., *supra* note 124, at 75.

<sup>152</sup> *Id.*

<sup>153</sup> REP. ON TECHNICAL BARRIERS TO TRADE, *supra* note 133, at 56.

### C. *Unnecessary Barriers to Trade*

Even if a non-tariff measurement is non-discriminatory, it may still violate the TBT Agreement if it restricts trade unnecessarily.<sup>154</sup> The TBT Agreement forbids any non-tariff measures that restrict global trading without a legitimate objective.<sup>155</sup> Legitimate objectives include “national security requirements, the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment.”<sup>156</sup> It is in the discretion of WTO members to determine the appropriate level of protection for their citizens under a legitimate objective.<sup>157</sup>

China has adopted a group of technical regulations and standards in the areas of mobile device and wireless network, triggering disputes on whether those regulations and standards cause unnecessary barriers to trade.<sup>158</sup> In June 2007, the Ministry of Public Security and MIIT issued the Multi-Level Protection Scheme (MLPS).<sup>159</sup> The MLPS regulations require that information systems labeled as grade level three and above must solely contain products developed by Chinese information security companies and their key components must bear Chinese intellectual property.<sup>160</sup> To date, the MLPS regulations only apply to government agencies, firms in China’s financial sector, Chinese telecommunications companies, Chinese companies operating the domestic power grid, educational institutions, and hospitals in China.<sup>161</sup> However, if China implements the regulations to commercial sector networks and IT infrastructure, U.S. information security technology providers will confront significant obstacles to trade in China.<sup>162</sup>

Another issue that concerns U.S. exporters is that since 2009, China has required that its WLAN (Wireless Local Area Networks) Authentication and Privacy Infrastructure (WAPI) standard must be used in mobile devices.<sup>163</sup> MIIT, which controls mobile devices in China, refuses to approve any Internet-enabled

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<sup>154</sup> WORLD TRADE ORG., *supra* note 4, at 18.

<sup>155</sup> *Id.*

<sup>156</sup> Agreement on Technical Barriers to Trade, art. 2.2.

<sup>157</sup> WORLD TRADE ORG., *supra* note 4, at 18.

<sup>158</sup> REP. ON TECHNICAL BARRIERS TO TRADE, *supra* note 133, at 58.

<sup>159</sup> *Id.* at 59.

<sup>160</sup> *Id.* at 59-60.

<sup>161</sup> *Id.* at 60.

<sup>162</sup> *Id.*

<sup>163</sup> Owen Fletcher, *Years on, China Pushes WAPI in Mobile Phones*, CIO (May 8, 2009), <http://www.cio.com/article/2428329/infrastructure/years-on--china-pushes-wapi-in-mobile-phones.html>.

mobile devices or similar wireless devices where WLAN is not enabled.<sup>164</sup> In the Chinese market, there has been commercial success of Internet-enabled mobile devices that comply with the internationally recognized Wi-Fi standard.<sup>165</sup> U.S. exporters have concerns for the obstacles to trade created by the requirement of using the WAPI standard.<sup>166</sup>

The United States has raised these issues bilaterally and in WTO TBT Committee meetings.<sup>167</sup> On the one hand, implementation of those regulations can significantly restrict trade into China. The standards adopted by China are often only disclosed to Chinese companies or only hardware produced by Chinese suppliers can be used.<sup>168</sup> Even if foreign suppliers can enter into the market, they may have to disclose trade secrets to Chinese corporations.<sup>169</sup>

On the other hand, under the TBT Agreement, China can argue that the restriction on trade comes with a legitimate objective, e.g., protection of national security. Moreover, the TBT Agreement gives WTO members the right to determine the appropriate level of protection for their citizens under a legitimate objective.<sup>170</sup> That gives China a lot of room to make a strong argument. Thus, it could be hard to argue unnecessary barrier to trade.

#### IV. CONCLUSION

In sum, it is foreseeable that China would update its national standards to be more consistent with relevant international standards. However, driven by the motive to dominate in the global market, China, as the biggest market in the world, will continue to adopt unique national standards. The current TBT Agreement allows WTO members to implement regulations if national security is at stake, especially in the area of wireless networks.

Despite unclear development with China's technical regulations and standards, China should and probably would remove discrimination against foreign suppliers in its compulsory

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<sup>164</sup> *Id.*

<sup>165</sup> REP. ON TECHNICAL BARRIERS TO TRADE, *supra* note 133, at 57.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* at 57-58.

<sup>168</sup> *See id.* at 58.

<sup>169</sup> *See* NAT'L TRADE ESTIMATE REP., *supra* note 124, at 70 (asserting that Trade secrets are typically stolen and not willingly disclosed).

<sup>170</sup> Agreement Technical Barriers to Trade, art. 2.2.

conformity assessment system to promote public safety domestically and trade in the global market.