

Assessing the CAI's standardisation clause

No harm, but how much good for the EU?

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In 2012, leaders of the European Union (EU) and the People's Republic of China (PRC) agreed at their annual summit to negotiate a Comprehensive Agreement on Investment (CAI). From January 2014, both sides determined the scope of the agreement by arriving at a joint negotiation text in January 2016. This included, among a wide range of subjects, technical standardisation.¹ Although most bilateral investment treaties do *not* cover technical standardisation², the EU proposed the inclusion of technical standardisation in the CAI.³ Almost eight years after the launching of discussions on the CAI, the EU and the PRC announced they had reached an agreement "in principle" in December 2020.⁴ Although the CAI is not signed and its ratification by the European Parliament is uncertain, it is time to review the (potential) implications of the released draft agreement's provisions on technical standardisation.

The CAI's technical standardisation clause is virtually absent from the public debate. This probably is because other provisions of the CAI are less technical and more high profile because of the promises they make. The clauses on technical standardisation will do no harm to the EU (see below). However, the CAI's article covering technical standardisation is also less impactful than it might appear at first glance. If implemented, the provisions on technical standardisation would provide better options for European companies to influence technical standardisation in China, but the progress should not be overestimated.

Technical standards and their importance for investments

Technical standards are of enormous importance to investors. A survey among European corporations in China conducted for a forthcoming study to be jointly published in December 2021 by the European Chamber of Commerce in China (EUCCC) and The Swedish Institute of International Affairs (UI) is indicative of this. The vast majority of European companies considers standardisation important to their investment decisions.⁵ The assessment of European companies in China is plausible because technical standards can impact market access and ongoing business operations in China.

In Europe,⁶ technical standards are – with few exceptions – voluntary. However, even Europe's voluntary technical standards regularly unfold enormous impact. For example, technical standards can be referenced in legally binding regulations. The technical standard remains voluntary, but compliance turns out to be the most efficient method to prove conformity with the regulation providing market access to the EU. The same mechanism applies in the PRC alongside two additional ones.

First, the PRC explicitly publishes *mandatory* standards, known as *Guóbìāo* or GB standards. These mandatory standards exist alongside *voluntary* or *recommended* standards, *Guóbìāo tuījìàn* or GB/T standards in Chinese terminology. In contrast to Europe, market access in China requires compliance

¹ Information according to author interviews with EU officials, March 2019-July 2021, Brussels and telephone interviews. The joint negotiation text is not public.

² For example, none of the bilateral investment treaties of the United States with EU member states (i.e., treaties with Bulgaria, Croatia, Czech Republic, Estonia, Latvia, Lithuania, Poland and Romania) entail clauses on technical standardisation. Equally, the Investment Protection Agreements of the EU and Vietnam or Singapore do not cover technical standardisation. However, the CAI is also not the EU's only trade and investment agreement that includes a standardisation clause. The most recent example is the economic partnership agreement between the EU and Japan.

³ Information according to author interviews with EU officials, March 2019-July 2021, Brussels and telephone interviews.

⁴ European Commission, "EU-China Comprehensive Agreement on Investment. The Agreement in Principle. 30 December 2020," *European Commission*, accessed: 2021-07-20, at: https://trade.ec.europa.eu/doclib/docs/2020/december/tradoc_159242.pdf.

⁵ Forthcoming (December 2021) study of the European Union Chamber of Commerce in China and the Swedish Institute of International Affairs.

⁶ This paper refers to "Europe" or "European standardisation" as standardisation in the EU.

with mandatory technical standards.⁷ Second, certification enshrined in voluntary Chinese technical standards is at times made explicitly mandatory for market access. While remaining voluntary technical standards on paper, compliance is not just the most efficient option for conformity with regulation but mandatory.⁸ Furthermore, technical standards are important for the placement of new products, technologies, and services as well as public and commercial procurement.

Hence, the inclusion of technical standards in the CAI is reasonable given their implications for investment in China. So, what did both sides agree on? Will the provisions, if implemented, significantly improve European business and investment operations in the PRC?

The text: the technical standardisation clause in the CAI

CAI's technical standardisation clause, enshrined in article 7 of Section III "Regulatory Framework", Sub-section 2 "Transparency", contains two main paragraphs. The first paragraph requires both parties to guarantee full and non-discriminatory access to technical standardisation bodies under national government bodies.

Each Party shall allow enterprises that are covered enterprises⁹ of the other Party, to participate in the development of standards by its central government bodies, including related standardisation working groups and technical committees at all levels,¹⁰ on terms no less favourable than those it accords to its own enterprises, including its covered entities.¹¹

The clause further includes more detailed provisions on transparency and timely notification.

The list of such standardisation working groups and technical committees, as well as their members, shall be made publicly available. This shall include publication of the setting up of standardisation working groups and technical committees. Each Party shall make available to covered enterprises of the other Party, the requirements for application procedures to the standardisation bodies in a timely and transparent manner, including the conditions for access and requirements for each membership type. On the request, in writing, of covered enterprises of the other Party, relevant standardisation bodies shall inform such an applicant of the status of its application, without undue delay. If the competent authority requires additional information from such an applicant, it shall notify this applicant without undue delay.¹²

Article 7, paragraph 1 reads favourably to the EU. On a range of subjects, the PRC promises non-discriminatory access to technical standardisation under national government bodies and an increase in transparency. Since European technical standardisation is not carried out under national government bodies the first paragraph has *no consequences* to current practices of technical standardisation in the EU. In the EU, private standard developing organisations (SDOs) write technical standards. These organisations are not affected by paragraph 1.

⁷ SAC, "强制性国家标准查询," SAC, accessed: 2021-02-05, at:

http://openstd.samr.gov.cn/bzgk/gb/std_list_type?p.p1=1&p.p90=circulation_date&p.p91=desc.

⁸ Information according to author telephone interviews with European firms operating in China, July 2021.

⁹ "Covered enterprise" is an entity that is set up in the territory of one party by an investor of the other party. A detailed definition is provided in CAI's article 2 of section 1 ("objectives and general definitions").

¹⁰ Technical standards are developed in a hierarchical set of different groups often referred to as Technical Committees, Subcommittees, and Working Groups. This wording implies that the provisions apply to all these groups.

¹¹ European Commission, "EU-China Comprehensive Agreement on Investment. Section III: Regulatory Framework," *European Commission*, accessed: 2021-07-20, at: https://trade.ec.europa.eu/doclib/docs/2021/january/tradoc_159344.pdf.

¹² European Commission, "EU-China Comprehensive Agreement on Investment. Section III: Regulatory Framework," *European Commission*, accessed: 2021-07-20, at: https://trade.ec.europa.eu/doclib/docs/2021/january/tradoc_159344.pdf.

The second paragraph of the CAI's technical standardisation clause, in contrast, generally applies to both parties since it explicitly addresses SDOs and local standardisation. More concretely, the second paragraph requires the EU and the PRC to recommend equal access to private SDOs and local technical standardisation bodies.

Each Party shall recommend that local and non-governmental standardising bodies in its territory allow enterprises that are covered enterprises of the other Party to participate in the development by those bodies of standards and related conformity assessment procedures, on terms no less favourable than those they accord to its own enterprises, including its covered entities.¹³

In contrast to the first paragraph, the second one is not enforceable because it requires only recommendations and is not more than a statement of intent. It is difficult to imagine that this second paragraph will be impactful for the technical standardisation regimes in either Europe or China. In Europe, Chinese firms have already better access to technical standardisation than their European counterparts operating in the PRC. Just like the previous provision, paragraph 2 of article 7 requires *no action* on the part of the EU and will not change technical standardisation practices in Europe.

This generally positive finding is not challenged by two explicit exceptions enshrined in paragraph 3 of article 7. The first two paragraphs do not apply to sanitary and phytosanitary measures as defined in the World Trade Organization's (WTO) Agreement on the Application of Sanitary and Phytosanitary Measures as well as to purchasing specifications of governmental bodies for production or consumption. These exceptions are congruent with the WTO's Agreement on Technical Barriers to Trade (TBT) as they fall under the Agreement on Government Procurement. Paragraph 4 explicitly prescribes that the terminology of the CAI is consistent with the TBT Agreement.¹⁴

The analysis: how momentous is the technical standardisation clause?

At first glance, the CAI's provisions on technical standardisation read positive to EU actors. However, a closer analysis reveals that the CAI provisions will hardly have significant impact on China's technical standardisation regime and improvements will be minor for European businesses.

1.) To what extent do China's concessions exceed existing Chinese law?

While the CAI's article 7 reads positive to European firms, a comparison with China's new Foreign Investment Law (FIL) that has taken effect on 1 January 2020 puts the achieved progress into perspective. Article 15 of the FIL reads remarkably similar to the CAI.

The State shall guarantee that foreign-funded enterprises can equally participate in setting standards in accordance with the law, and enhance information disclosure and social supervision on standard setting. The compulsory standards formulated by the State shall equally apply to foreign-funded enterprises.¹⁵

Like the CAI, the FIL of China guarantees European actors equal access to technical standardisation and promises improved information disclosure. On the one hand, the CAI is more concrete and therefore potentially better enforceable than the FIL. On the other hand, paragraph 1 of article 7 of the CAI is explicit in its sole application to national government standardisation. An advantage of the

¹³ European Commission, "EU-China Comprehensive Agreement on Investment. Section III: Regulatory Framework," *European Commission*, accessed: 2021-07-20, at: https://trade.ec.europa.eu/doclib/docs/2021/january/tradoc_159344.pdf.

¹⁴ European Commission, "EU-China Comprehensive Agreement on Investment. Section III: Regulatory Framework," *European Commission*, accessed: 2021-07-20, at: https://trade.ec.europa.eu/doclib/docs/2021/january/tradoc_159344.pdf.

¹⁵ Ministry of Commerce, "Foreign Investment Law of the People's Republic of China," *MOFCOM*, accessed: 2021-07-20, at: <http://mg2.mofcom.gov.cn/article/policy/China/201909/20190902898870.shtml>.

CAI over the FIL for European firms is that the former is a bilateral agreement and therefore subject of international law while the latter is a unilateral law that can be amended by China at any time.

Furthermore, the recent release of the FIL and its provisions on technical standardisation are indicative of China's general willingness to gradually open its technical standardisation regime to foreign invested companies, at least selectively. It is likely that the improved access under the CAI will be granted to European firms with or without the ratification of the agreement. Whether the promises will be fully implemented remains to be seen.

2.) Are the CAI's provisions on technical standardisation tackling the most severe challenges that European firms face?

The CAI's text addresses concerns that are often voiced by European companies operating in China. This includes difficulties to obtain information about standard developing technical committees (TCs) and standardisation procedures, access barriers to such committees, the lack of responsiveness of Chinese authorities to applications and inquiries of European firms, lack of voting rights in TCs or missing opportunities to serve as a drafter of technical standards.¹⁶ If properly implemented, the first paragraph of CAI's article 7 combined with other clauses of CAI on transparency could solve these concerns for national government standardisation.

Author interviews with more than 30 European companies operating in China over the course of 2021 indicate that European industry generally sees the standardisation clause in the CAI as a positive addition to the text. However, most firms are either not even aware of the clause or do not expect the CAI to bring substantial improvements to its technical standardisation efforts.¹⁷ One reason is that many hurdles for European participation in Chinese technical standardisation are informal. For example, technical standard development does not always take shape in formal sessions of TCs and their subordinate bodies. Particularly in sensitive sectors, prior consultations among Chinese participants are no exception. At the extreme, technical standardisation drafts jointly developed can even be changed to the favour of influential Chinese actors without consultation before publication of a draft standard. Once published, drafts are widely regarded as a "national consensus" that is not effectively challenged anymore. It is certainly true that such informal hurdles can hardly be addressed by a technical standardisation clause in an investment agreement. However, the existence of informal challenges alongside formal ones implies that the CAI provisions on technical standards are less momentous in practice than they appear on paper. Furthermore, European companies rightly argue that the composition of TCs and its subordinate organs hardly changes in the short-term. A turn in participation does require more than application procedures but is by default taking place only once every several years.¹⁸

3.) What are the implications of the CAI's distinction between national government standards and private/local standards?

As summarised above, the CAI distinguishes between national government standardisation (paragraph 1) on the one hand and local and non-governmental standardisation (paragraph 2) on the other hand. Decisively, the enforceable provisions for non-discriminatory access and transparency of

¹⁶ Information of European companies' concerns from author interviews conducted in China, Europe and in telephone interviews, November 2018-July 2021.

¹⁷ Author interviews with European-invested firms operating in China through 2021. For a more detailed discussion, see the forthcoming (December 2021) study of the European Union Chamber of Commerce in China and the Swedish Institute of International Affairs.

¹⁸ Information obtained from author interviews conducted in China, Europe and in telephone interviews since 2018.

paragraph 1 apply only to government-led standardisation on the national level. In practice, this includes two types of technical standards in China, namely *national standards* and *sector standards*.¹⁹ Both types of technical standards are similarly developed in TCs and its subordinate organs with participation of industry and research institutions under the institutional umbrella of state ministries. In the case of *national standards*, the relevant ministry is the State Administration of Market Regulation (SAMR) of which the Standards Administration of China (SAC) is a part. *Sector standards*, in turn, are developed in the same way under the umbrella of other national ministries such as the Ministry of Industry and Information Technology (MIIT) or the Ministry of Ecology and Environment (MEE). In China, *all mandatory* technical standards are either national or sector standards (mostly the former). Insofar as mandatory technical standards are decisive for market access, the CAI fully covers European concerns. As of 26 July 2021, 39,777 national standards of which 2,116 are mandatory, and 75,285 sector standards exist in the PRC.²⁰

National and sector standards are the most important technical standards for business operations of European firms in China. More than three quarters of all European companies in China perceive national standards as the most crucial followed by sector standards. More than half of European firms engaging in technical standardisation in China are also active participants in the development of national and sector standards in the PRC with another quarter of them being observers, according to a forthcoming survey.²¹

The importance of national and sector standards does not imply that local technical standards and those developed by private SDOs in China can be neglected. Since the latest reform of China's technical standardisation law in 2018, all local technical standards are voluntary on paper. However, interviews with both Chinese and foreign-invested companies indicate that local technical standards are often incorporated in procurement processes in the PRC.²² The usage of local technical standards does not necessarily serve protectionist purposes but can address local specificities. Local technical standards are developed similarly to national and sector standards in China, but under the umbrella of local governments. As of 26 July 2021, 52,992 local standards exist in China.²³

Only a very low share of European firms surveyed for a forthcoming study jointly published by the EUCCC and UI indicate that local standards are the most important of all technical standard types in the PRC. However, almost half of all European firms follow local standardisation, but only a minority seeks to actively shape them.²⁴

Local standards do not fall under the enforceable provisions of paragraph 1 of the CAI's article 7. Instead, China only promises to recommend granting equal access to local standardisation for European firms. The same applies to technical standards developed by non-state actors. Such technical standards, in China referred to as *association standards*, were newly introduced by the technical standardisation reform of 2018. Since then, the Chinese party-state actively encourages industry as-

¹⁹ Sector standards are sometimes also referred to as industry standards.

²⁰ Official data obtained from the Seconded European Standardisation Expert for China (SESEC).

²¹ Forthcoming (December 2021) study of the European Union Chamber of Commerce in China and the Swedish Institute of International Affairs.

²² Information obtained from author interviews with Chinese and foreign-invested companies conducted in China, Europe and in telephone interviews since 2018.

²³ Official data obtained from the Seconded European Standardisation Expert for China (SESEC).

²⁴ Forthcoming (December 2021) study of the European Union Chamber of Commerce in China and the Swedish Institute of International Affairs.

sociations and companies to develop technical standards providing reputational and financial incentives to association standards development.²⁵ As of 26 July 2021, more than 4,000 industry associations have registered no less than 26,922 association standards in China's official registry.²⁶ Association standards are the fastest growing technical standard type in China. Association standards are meant to be of higher quality and a driver of China's attempt to move up the global value chain.

In light of the rapid development and growing relevance of association standards, it is no wonder that European firms rate association standards as the third most important technical standard type for their business in China. Strikingly, almost half of the respondents actively participate in the development of association standards; more than another third of the European companies are observers in association standards. Only roughly one fifth is not participating in association standardisation.²⁷

These findings indicate that while the CAI's standardisation clause addresses the most important standard types in China (national and sector standards), for the most dynamic standard type, association standards, only "recommendations" apply that will be ineffective. There are good reasons for the European Commission not to apply paragraph 1 to private SDOs. Legally binding commitments for association standards would have required careful considerations for their reciprocal implications on European SDOs. Already today, access of Chinese companies to SDOs in the EU, particularly to the European Telecommunications Standards Institute (ETSI), is controversial. The best solution from the EU's perspective would have been a reciprocal opening of Chinese SDOs along the lines of the most prudent approach of all major European SDOs. This would have been delicate and complex in drafting. Instead, the European Commission decided to avoid any risks and exempt private SDOs from binding rules. The exclusion of local standards from the enforceable parts of the CAI is more surprising. Since hardly any standardisation under local governments exists in the EU it would have been less important for European firms operating in China but also harmless for the EU. The European Commission argues that it has no legal authority to make commitments for local standards. This interpretation has surprised experts from the European standardisation community given that the European Commission has made legal commitments for other bodies at subordinate levels.

4.) Does the CAI's standardisation clause hinder party-state discrimination against European-invested companies?

Distinguishing governmental and non-governmental standards as the two paragraphs of the CAI does not fully cover the extent of the party-state reach in China. On paper, association standards are supposed to be purely market driven without interference from the Chinese party-state. In reality, party-state institutions continue to have a significant influence.²⁸ Some influential national industry associations used to be departments of national ministries. Its employees are former party-state officials and continue to be in close contact with policymakers. Reports show that informal guidance is common practice.²⁹ In some cases, national ministries actively approach specific industry associations and

²⁵ See for example: CBLFTA, "团体标准纳入各地财政补贴范围," *CBLFTA*, accessed: 2021-04-09, at: http://www.cblfta.org.cn/cblftaorg/wap_doc/15603295.html.

²⁶ Official data obtained from the Seconded European Standardisation Expert for China (SESEC).

²⁷ Forthcoming (December 2021) study of the European Union Chamber of Commerce in China and the Swedish Institute of International Affairs.

²⁸ Tim Rühlig, *Technical Standardisation, China and the Future International Order. A European Perspective*, Brussels, EU Office of the Heinrich Böll Foundation, 2020.

²⁹ Information according to author interviews with Chinese and European invested firms operating in China conducted in China, Europe and in telephone interviews, June 2019-July 2021.

request the development of a certain standard.³⁰ Furthermore, membership of state-owned enterprises (SOEs) or state-supported national champions are widely perceived as indicators for an industry association's importance. Similarly, industry associations that the party-state granted the right to develop technical standards in a pilot phase before the standardisation reform are still seen as being more relevant.³¹ A reform proposal entitled "China Standards 2035" currently under review by the Chinese central government is expected to suggest more party-state guidance for association standards.³²

Association standards can also be referenced in national regulation with implication for market access and procurement that is decisive for European investments. The inclusion of the "best efforts" clause on market-led standards does show that the European Commission was aware of the situation but was constrained and thus did not choose to propose stronger language (see above). If the distinction between government and non-governmental standards is thought to prevent party-state discrimination against European firms, however, it falls short of achieving this goal.

5.) Is the CAI's technical standardisation clause ultimately enforceable?

The conclusions of treaties with the PRC often come with doubts whether China will comply with its commitments and enforcement. China has given reason for such concerns in the past. The CAI contains a dispute settlement mechanism for cases when enforcement conflicts cannot be solved within a joint high-level commission tasked with implementation. The standardisation provisions are no exception to this mechanism. However, since the second paragraph does not entail any enforceable requirements, enforcement by means of a dispute settlement mechanism is limited to paragraph 1. How effective the dispute settlement mechanism will be is beyond the scope of this paper.³³ Positive is that European companies can refer to CAI when negotiating accession to Technical Committees in China.

Conclusion

The inclusion of technical standardisation does no harm to European interests since they do not require adapting the European standardisation approach. However, while improving access to standardisation in China the commitments are less momentous than one might think. The CAI hardly offers more than what is enshrined in article 15 of China's FIL. Instead, it turns these unilateral provisions into a bilateral agreement subject to international law. Informal hurdles necessarily fall outside of the CAI's scope which will leave European firms with a series of challenges even after the CAI's ratification. Addressing the most important standard types of China no substantial rules are prescribed for the most dynamic standard type, namely association standards. The distinction between government and non-government standards does not hinder the party-state to discriminate against European-invested companies. General concerns over enforcement of the CAI apply to technical standardisation as well. Most of these shortcomings are not the result of poor negotiation on the part of the European Commission. Standardisation was hardly ever meant to be the centrepiece of the CAI.

³⁰ Green product design association standards that were requested by MIIT were incorporated in MIIT's official list: MIIT, "绿色设计产品标准清单 (2021年5月更新)", *MIIT*, accessed: 2021-08-03, at: http://gxt.guizhou.gov.cn/ztlz/lzz/lstdt/202105/t20210531_68336251.html.

³¹ Information according to author interviews with Chinese and European invested firms operating in China conducted in China, Europe and in telephone interviews, June 2019-July 2021.

³² SAC, *Introduction of "China Standards 2035" Project*. October 23rd 2019, Beijing, SAC, 2019.

³³ Damian Wnukowki and Marek Wąsiński, "EU-China Comprehensive Agreement on Investment: Political and Economic Implications for the European Union," *PISM*, accessed: 2021-04-24, at: https://reinhardbuetikofer.eu/wp-content/uploads/2021/04/CAI_Report_Final.pdf.