Historical Evolution of National Treatment in China

WEI WANG*

I. Introduction

National treatment and most-favoured-nation (MFN) treatment are two types of non-discriminatory treatment. The purpose of MFN treatment is to ensure equal competition opportunities provided by one country are available to other countries, whereas the fundamental purpose of national treatment is to ensure equal treatment between a host country and foreign countries. Georg Schwarzenberger called MFN "foreign parity" and national treatment "inland parity." This paper focuses only on the latter.

Historically and internationally, national treatment originates from treaties, which is also the case for China. In the search for an understanding of national treatment in modern China, an exploration of the history of national treatment, especially in China's treaties, can be of immense value. Through such a historical analysis, one can discover the origins

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* Wei Wang is counsel at Jiangsu Tianhao Law Firm, People's Republic of China, and a member of the Chinese Bar Association. He has served as a legal advisor to a great number of Chinese import and export corporations and a consultant on several projects of the Asian Development Bank. Mr. Wang is currently doing research as the John and Joan Jackson Scholar at the Centre for Commercial Law Studies, University of London. He can be contacted via email at w.wang@qmul.ac.uk.

1. GEORGE SCHWARZENBERGER, INTERNATIONAL LAW AND ORDER 157 (Stevens & Sons, 1971).
2. Id. at 130 (stating that national treatment and MFN clauses first appeared in the commercial treaties concluded during the twelfth century between England and Continental Powers). See also H. NEUFELD, THE INTERNATIONAL PROTECTION OF PRIVATE CREDITORS FROM THE TREATIES OF WESTPHALIA TO THE CONGRESS OF VIENNA (1648-1815) 112-13 (1971) (mentioning several early treaties containing national treatment—the Treaty of Nijmegen of 1679, the Treaty of France with the Cities of the Hanseatic League of 1716, the Treaty of France with Hungary and Bohemia of 1766, the Pinckney Treaty of 1795 between the United States and Spain, the Russian-Swedish Treaty of 1801, and the Swedish-Danish Treaty of 1809). Additionally, a national treatment clause also appeared in a treaty between the United States and Britain. See Convention to Regulate the Commerce between the Territories, U.S.-U.K., July 3, 1815, art. II, para. 2, 1815 U.S.T. LEXIS 5 (stating that no higher or other duties or charges shall be imposed in any of the ports of one country on vessels of the other country than those in the same ports on vessels of the home country).

and the evolution of national treatment in China and the reasons for its fall and rise, thus developing a historical interpretation of the revival of national treatment in China's present age.

Section II attempts to seek out the emergence of national treatment in China during the late Qing Dynasty. Section III narrates the rise of national treatment during the Republican period, while the fall of national treatment is covered by section IV. Section V delves into the revival of national treatment in China's laws and treaties post-1979, and is followed by concluding remarks in Section V.

II. Emergence Of National Treatment In China: 1840-1911

1840 is a watershed year in China's history. It was the beginning of modern Chinese history and the end of traditional relations between China and foreign countries. Prior to 1840, the relationship between China and foreign countries was a tribute [chaogong] relationship: China was the receiver of foreign tribute, foreign countries were the tributary countries, and foreigners were usually considered barbarians [yl]. The last feudal dynasty in Chinese history, the Qing [Ch'ing] Dynasty (1644-1911), regarded itself as superior to foreign states and foreigners under the "closed-door" policy, and was not willing to provide equal treatment to foreign states and foreigners. The Qing Dynasty, which was able to support itself in an autarky system, reformulated many strict rules to restrain foreigners and foreign trade.

A. Prerogative Treatment

In 1840, the First Opium War (1840-1842) broke out between China and Britain. After China's defeat, foreign countries were unwilling to provide equal treatment to China. The Western powers obtained a large number of prerogatives in China through a series of unequal treaties with the Qing Dynasty. For example, the Treaty of Nanjing [Nanking] (1842) provided that China should negotiate with Britain regarding China's tariffs and charges. Under these "negotiated tariffs" [xieding guanshu], China was deprived of its tariffs autonomy. Furthermore, China partly lost its jurisdiction by the imposition of "consular
jurisdiction” [lingshi caipanquan], or extraterritoriality. In most situations, foreign defendants in China were not subject to China’s laws and jurisdiction, but to that of their home state, and foreign-related litigation was dealt with by foreign consuls in China or by mixed courts [huishen gongxie] composed of foreign consuls and Chinese judges. Britain and the United States even established courts in China (i.e., His Britannic Majesty’s Supreme Court for China (1865) and the United Stated Court for China (1906)). Under the unequal treaty system, China’s superior status under the old tribute system was reversed completely. For over eighty years, foreigners in China enjoyed prerogatives beyond Chinese law and were, in most cases, granted more favourable treatment than that accorded to the native Chinese.

B. UNILATERAL NATIONAL TREATMENT

Throughout the Qing Dynasty, there were few national treatment articles in sino-foreign treaties, and a clear concept of national treatment had not been developed. For instance, the term “national treatment” does not appear in the authoritative book on the status of foreigners in China during the late Qing Dynasty. It nearly was unnecessary for foreigners to demand equal status with the Chinese because of their already superior position. Nevertheless, the superior status of foreigners was not absolute or omnipresent, and neither the extraterritoriality nor the “negotiated tariffs” forbade the Chinese government to levy inland taxes and charges on foreigners in China. As an offset of the prerogatives enjoyed by foreigners, the Qing Dynasty tried to restrict the activities of foreigners as much as possible. For example, although the Western powers obtained the inland navigation right in China, China levied more taxes on cargoes carried by foreign commercial ships on China’s inland rivers than on cargoes carried by Chinese domestic ships. Thus, the Western powers found that, under some special circumstances, they needed to obtain equal rights with the Chinese.


14. Chinese judges’ roles in the mixed courts were only nominal. See CHINESE LEGAL HISTORY 349 (Zhang Jinfan et al. eds., 1982).


17. FEI, supra note 15, at 10-11.

As Western powers requested the revision of treaties, national treatment emerged. First, according to the Sino-British Treaty for the Extension of the Commercial Relations [Zhongying Xuyi Tongshang Xingchuan Tiaoyue] (1902) and the Sino-Japan Treaty for the Extension of the Commercial Relations [Zhongri Tongshang Xingchuan Xuding Xiaoyue] (1903), houses and small piers rented by British merchants and Japanese merchants were to be taxed on an equal footing with the Chinese. Second, according to the Sino-U.S. Treaty for the Extension of the Commercial Relations [Zhongmei Tongshang Xingchuan Xuding Tiaoyue] (1903), “machine-made cotton yarn and cloth manufactured in China, whether by foreigners or by Chinese, was to be taxed on an equal footing. Third, in the Sino-British Conditions on Banning Opium, concluded in 1911 before the final elimination of the opium trade, there was an article about uniform taxation of the opium trade that required the tax on the British opium trade be the same as the tax on the Chinese domestic opium trade.

The three main characteristics of the emergence of national treatment in the late Qing Dynasty can be summarized as follows. First, the scope of national treatment was very narrow. Each article only concerned one specific item (e.g., cotton yarn and cloth, houses and small piers, or the opium trade). Second, the national treatment obligations in the three treaties were all unilateral and binding only on China—not on foreign countries. Under such unilateral national treatment, China promised that foreigners in China could enjoy some form of national treatment, but the Western states did not promise that the Chinese in foreign countries could obtain the same treatment. During the nineteenth century, the general practice of national treatment obligations in treaties was bilateral and reciprocal, but this was not the case for China’s treaties during the nineteenth century and at the


23. Id. at 420.

24. Old Sino-foreign Treaties, supra note 19, at 711-714. For the background of 1911 Sino-British Conditions on Banning Opium, see 3 Morse, supra note 6, at 465.


beginning of the twentieth century. The unilaterality of national treatment also indicates that the treaties were unequal.\textsuperscript{27} Third, national treatment was imposed by Western powers—not granted by the Qing Dynasty on a voluntary basis. The conclusion of the three treaties on extension of the commercial relations with Britain, the United States, and Japan was the direct consequence of the unequal Boxer Protocol [Xinhou Tiaoyue] (1901)\textsuperscript{28} that resulted from the war of the eight Western powers against China for the Boxer Movement.\textsuperscript{29} This characteristic can also be illustrated with the negotiations of the Sino-U.S. Treaty for the Extension of the Commercial Relations.\textsuperscript{30} For example, the U.S. representative, John Goodnow, asked China to exempt all export taxes on machine-made cotton yarn and cloth manufactured in China.\textsuperscript{31} To keep the right to levy the export taxes, China was forced to make a compromise by agreeing to levy the taxes on an equal footing.\textsuperscript{32}

\section*{III. Rise Of National Treatment In China: 1912-1949}

\subsection*{A. Bilateral National Treatment in the 1920s and the 1930s}

The Qing Dynasty was overthrown by the 1911 Xinhai Revolution [Xinhai Geming]\textsuperscript{33} led by Dr. Sun Zhongshan [Sun Yat-Sen].\textsuperscript{34} On January 1, 1912, the Republic of China (ROC) [Zhonghua Minguo] was founded, and the new government, in exchange for recognition from Western powers,\textsuperscript{35} succeeded to all treaties between the Qing Dynasty and foreign states.\textsuperscript{36} After the First World War (1914-1918), China, as a victor of the war,\textsuperscript{37} proposed to repeal foreign state prerogatives, such as negotiated tariffs and consular jurisdiction, at

\begin{itemize}
\item \textsuperscript{27} While for most part the unilateral obligation was imposed by Western powers, it also partly resulted from the Qing Dynasty's ignorance of the world outside China. See Li Hongzhang's annotations and commentaries on the draft of the Sino-Japan Commerce and Navigation Agreement (Li Hongzhang was in charge of China's diplomacy for a long period in the late Qing Dynasty), in Ermin Wang, Wang Jing Shangyue Waijiao [The Diplomacy of the Commercial Treaties Between China and Foreign Powers During the Late Qing Dynasty] 113-14 (1998).
\item \textsuperscript{28} The Boxer Protocol was concluded between China and eleven foreign states (Germany, Austria, Belgium, Spain, the United States, France, Britain, Italy, Japan, Holland and Russia) in Beijing on September 7, 1901. \textit{Unequal Treaties}, supra note 13.
\item \textsuperscript{29} For the history of the Boxer Movement (1899-1901), see 2 Lin, supra note 5, at 480-550.
\item \textsuperscript{30} For the negotiating history of the treaties, see \textit{Commercial Treaty Negotiations}, supra note 18.
\item \textsuperscript{31} Id. at 163, 166.
\item \textsuperscript{32} Id. at 177-78.
\item \textsuperscript{33} For the history of the Xinhai Revolution, see Xinhai Geming Shi [The Xinhai Revolution History], Vols. I, II, & III (Zengping Lin eds., 1980-1981).
\item \textsuperscript{34} See generally Mingxuan Shang, Sun Zhongshan Biography (2d ed. 1981).
\item \textsuperscript{35} Wang Liangbin, Zhonghua Minguo Jianli Zhichu guanyu Chengren Wenti de Jiaoshe [Negotiations on Recognition Issue During the Early Days of the Founding of the ROC], in Jindai Zhongguo Waijiao Yu Guojia [Diplomacy in Modern China and International Law] 93-110 (Cheng Duode ed., 1993).
\item \textsuperscript{36} Waijiaobu guanyu Minguo Tongyi Linshi Zbengfu Chengli Zhi ge Waijiao Daibiao bing Wajiao Baohehui Tongdian [Open Telegram of the Foreign Ministry of the ROC to Diplomatic Representatives of Foreign States and the International Peace Conference on the Establishment of the Interim Government of the ROC], in Zhonghua Minguo Shangli Shijia Huibian [Compilation of Archives of the History of the Republic of China], 26 (The Second Historical Archives of China ed., 1991) [hereinafter History of the ROC].
\item \textsuperscript{37} China declared war against Germany and Austria on August 14, 1917. See Waijiaobu guanyu Zhongguo Canzhan zhi Gejue Congshi Zhuhui [Note of the Foreign Ministry of the ROC on China's Entering the War Addressed to the Ambassadors], in History of the ROC, supra note 36, at 393.
\end{itemize}
the Washington Conference (1921-1922).\textsuperscript{38} But the Washington Conference did not satisfy China’s demands.\textsuperscript{39}

1. **Sino-German Treaty (1921)**

Although China failed to repeal consular jurisdiction at the Washington Conference, China did repeal Germany’s prerogative of consular jurisdiction after the end of the First World War through the Sino-German Treaty (\textit{Zhongde xieyue}).\textsuperscript{40} Paragraph 2 of article 3 of the Sino-German Treaty states that

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\text{[l]ife and property of the people of the two parties shall be under the jurisdiction of the place where they are located. The people of the two parties shall abide by the law of the place where they are located. Taxes and charges that one party levies on the people coming from another party shall not exceed what it should levy on its own people.}\textsuperscript{41}
\]

Unquestionably, the last sentence of the paragraph could be regarded as a national treatment clause.

Moreover, in 1925, China and Austria signed the Sino-Austrian Commercial Treaty,\textsuperscript{42} providing national treatment to one another with respect to court access rights,\textsuperscript{43} labour protection,\textsuperscript{44} inland taxes and charges,\textsuperscript{45} heritage taxes,\textsuperscript{46} housing taxes,\textsuperscript{47} etc.

Compared to the rudimentary form and the narrow scope of national treatment articles in treaties signed during the late Qing Dynasty, the national treatment articles in the 1921 Sino-German Treaty and the 1925 Sino-Austrian Commercial Treaty have a relatively broader scope and more closely resemble a modern national treatment clause. Moreover, unlike the unilateral national treatment obligation in the treaties signed during the late Qing Dynasty, the national treatment obligation in the Sino-German Treaty and the Sino-Austrian Commercial Treaty was bilateral and reciprocal, so the national treatment clauses in the two treaties were equal clauses. Indeed, the Sino-German Treaty is generally recognized as the first equal treaty between China and a foreign country after the First Opium War.\textsuperscript{48}

2. **Tariffs Treaties (1928)**

In order to regain tariff-setting autonomy from the Western powers, in 1928, the ROC signed seven tariff treaties [\textit{Guanshui Tiaoyue}] with the United States, Germany, Norway, Holland, Sweden, Britain, and France, all of which contained bilateral national treatment

\begin{thebibliography}{99}
\bibitem{38} Guomin Waijiao Lianzheng Huashengdun Huiyi Zhongguo Ti'An zhi Yijian [Opinions of the National Diplomacy Association on China’s Proposals at Washington Conference], in \textit{3 History of the ROC}, supra note 36, at 456.
\bibitem{40} Sino-German Treaty, signed on May 20, 1921, in \textit{3 History of the ROC}, supra note 36, at 954-55; also available in \textit{3 Waijiao Wenda [Diplomatic Documents]} 963-964 (2004).
\bibitem{41} \textit{Id.} art. 3.2.
\bibitem{42} Sino-Austrian Commercial Treaty, in \textit{3 Old Sino-foreign Treaties}, supra note 19, at 570-73.
\bibitem{43} \textit{Id.} art. 4.
\bibitem{44} \textit{Id.} art. 5.
\bibitem{45} \textit{Id.} art. 8.
\bibitem{46} \textit{Id.} art. 10.
\bibitem{47} \textit{Id.} art. 11.
\bibitem{48} \textit{Yan}, supra note 25, at 150; see also \textit{Ye}, supra note 11, at 77.
\end{thebibliography}

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articles. China agreed to provide national treatment to foreign states in the tariff treaties in exchange for recognition of China’s tariff autonomy that had been forfeited after the First Opium War. The inclusion of national treatment in the treaties was criticized by some Chinese, such as Zhou Gengsheng, a famous public international law scholar, who mainly argued that Chinese economic strength was not as great as that of the Western powers. Indeed, from the outset of national treatment in the ROC, the criticism did not stop because of its potential impact on the national economy and the people’s livelihood.


It is interesting to note a dispute on national treatment between the ROC central government and one of the local governments. In 1931, the Xinjiang provincial government signed the Interim Commerce Measure with the Union of the Soviet Socialist Republics (U.S.S.R. or the Soviet Union) [Xinjiang yu Sulian Linsi Tongshang Banfa] that included a unilateral national treatment article where the Xinjiang provincial government promised to levy tariffs and other taxes and charges on the Soviet people “not higher or heavier than those on Chinese merchants and people.” The ROC central government reprimanded this unilateral national treatment article because it did not have a reciprocal paragraph for the Soviet Union to provide national treatment to the Chinese people. Although the 1931 Interim Commerce Measure was not recognized by the ROC, in 1939 the ROC and the

49. See, e.g., The Treaty Between the United States and China Regulating Tariff Relations, July 25, 1928, U.S.-ROC, art. 1, in CHINA WHITE PAPER, supra note 22, at 445-46 reads

The nationals of neither of the High Contracting Parties shall be compelled under any pretext whatever to pay within the territories of the other Party any duties, internal charges or taxes upon their importations and exports or other or higher than those paid by nationals of the country or by nationals of any other country.


51. GENGSHENG ZHOU, GEMING DE WiijiAo [REVOLUTIONARY DIPLOMACY] 186 (Shanghai Pacific Bookshop 3d ed. 1929) (arguing that China could not be endlessly bound by the national treatment principle and it was questionable whether China should recognized national treatment in treaties).


54. 1931 Interim Commerce Measure between Xinjiang Province and the U.S.S.R., art. 5, in 5 (1) HISTORY OF THE ROC, supra note 36, at part II, 1417-1418.


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Soviet Union concluded the Sino-U.S.S.R. Commerce Treaty [Zhongsu Tongbang Tiaoyue] that contained a relatively mature and reciprocal national treatment article. Article 4 of the 1939 Sino-U.S.S.R. Commerce Treaty stated that one party should accord imported products from the other party the same treatment as like products of its own country with respect to all local taxes and charges.

In addition to the seven tariff treaties and the Sino-U.S.S.R. Commerce Treaty, China also concluded eight friendship and commerce treaties with Belgium and Luxembourg (1928), Italy (1928), Denmark (1928), Portugal (1928), Spain (1928), Poland (1929), Greece (1929), and Czechoslovakia (1930) during the 1920s and the 1930s, all of which included bilateral national treatment articles with respect to taxation. From the denial of the unilateral national treatment obligations to the support of the bilateral obligations in the 1920s, China began to attach great importance to the equal and reciprocal principle when considering providing national treatment to foreigners. In fact, the equal and reciprocal principle was applicable not only to national treatment clauses, but also to other clauses (e.g., MFN clauses) in the treaties China concluded in the 1920s and the 1930s. From then on, the unilateral national treatment clause in China was gone, never to return.

B. Extension of National Treatment in the 1940s


Although in the 1920s and the 1930s there were some treaties containing national treatment clauses, they mainly were concerned with tariffs and taxes. The extension of national treatment in China occurred in the 1940s, accompanied by the final and complete repeal of consular jurisdiction. During the Second World War, China, as a United States ally,


58. The prevalence of national treatment in China during the 1940s synchronized with the extensive application of national treatment in the United States' treaties. See Robert R. Wilson, Postwar Commercial Treaties of the United States, 43 Am. J. Int'l L. 262, 265 (1949).

59. The ROC government had tried to unilaterally repeal the consular jurisdiction under the influence of revolutionary diplomacy. It did announce the repeal of consular jurisdiction on December 28, 1929, without negotiation with relevant foreign states, and issued the first law governing foreigners in China (i.e., Implementation Regulation on Governing Foreigners in China) [Guanxia Zaihua Waiguoren Shishi Tiaoli]. Nevertheless, this trial was stopped by Japan's invasion of China on September 18, 1931 (the Mukden Incident). See Special Order of the Republican Government [Guomin Zhengfu Teling] (December 28, 1929), in 5(1) HISTORY OF THE ROC, supra note 36, at part 1, 52; The Announcement of Repealing some Treaties of the Ministry of Foreign Affairs of the Republic of China [Waiguo fuwuyu Feiyue de Xuanyan] (December 30, 1929), in 5(1) HISTORY OF THE ROC, supra note 36, at part 1, 52-53; The Official Letter from the Civilian Office of the Republican Government concerning the General
proposed to revise the treaties based on the principles of equality and reciprocity. This proposal received a positive response from the United States. And in 1943, China and the United States signed the Sino-U.S. New Treaty [Zhongmei Xinyue]]. Its main aim was to relinquish the United States’ extraterritorial rights (i.e., consular jurisdiction) in China. The 1943 Sino-U.S. New Treaty also contained a national treatment article as follows:

[each of the two Governments will endeavor to have accorded in territory under its jurisdiction to nationals of the other country, in regard to all legal proceedings, and to matters relating to the administration of justice, and to the levying of taxes or requirements in connection therewith, treatment not less favourable than that accorded to its own nationals.

A similar national treatment article was incorporated in the Sino-British New Treaty [Zhongying Xinyue] (1943). With coverage for both nationals [renmin] and companies [gongsi], the scope of national treatment in the Sino-British New Treaty was broader than that in the Sino-U.S. New Treaty.

In addition, from 1943 to 1947, in order to relinquish extraterritorial rights of other Western powers, China concluded a series of “New Treaties” with Belgium and Luxembourg (1943), Norway (1943), Canada (1944), Sweden (1945), Holland (1945), France (1946), Switzerland (1946), Denmark (1946), and Portugal (1947), most of which contained national treatment articles that granted “no less favourable treatment” to nationals or companies of both sides.


63. Id. at art. 5, 516.


65. Sino-Belgian New Treaty, Belg.-ROC, art. 5, in 3 Old sino-Foreign Treaties, supra note 19, at 1278-82; Sino-Norwegian New Treaty, Nor.-ROC, art. 4, in 3 Old sino-Foreign Treaties, supra note 19, at 1282-85; Sino-Canadian New Treaty, Can.-ROC, art. 5, in 3 Old sino-Foreign Treaties, supra note 19, at 1292-95; Sino-Swedish Treaty, Sve.-ROC, art. 4, in 3 Old sino-Foreign Treaties, supra note 19, at 1307-09; Sino-Dutch New Treaty, Holland-ROC, art. 6(2), in 3 Old sino-Foreign Treaties, supra note 19, at 1314-17; Sino-French New Treaty, Fr.-ROC, art. 6(2), in 3 Old sino-Foreign Treaties, supra note 19, at 1362-67; Sino-Danish New Treaty, Den.-ROC, art. 3, in 3 Old sino-Foreign Treaties, supra note 19, at 1390-94. There was no national treatment clause in the Sino-Swiss New Treaty, Switz.-ROC, in 3 Old sino-Foreign Treaties, supra note 19, at 1375-76, or the Sino-Portuguese New Treaty, Port.-ROC, in 3 Old sino-Foreign Treaties, supra note 19, at 1475-77, but both treaties contained MFN treatment, which could be interpreted to indirectly include national treatment of other New Treaties. Also available in 5(2) HISTORY OF THE ROC, supra note 36, at 707-15, 722-25, 733-35, 740-43.
Ironically, one day before the signing of the Sino-U.S. New Treaty, the puppet regime headed by Wang Jingwei [Wang Ching-Wei] but supported by Japan that claimed that it was the official ROC government, also signed an agreement with Japan under which the latter would “agree” to abandon its extraterritoriality rights in China, and, as an exchange, the former would “give” national treatment to the Japanese. This puppet treaty became defunct with the collapse of the puppet regime following the surrender of Japan at the end of the Second World War. When comparing the puppet treaty with the “New Treaties,” one can find that the former had a unilateral national treatment article that favoured only Japan, while the latter had bilateral national treatment articles that favoured both China and foreigners.

In the “New Treaties,” China compromised by accepting national treatment in order to repeal consular jurisdiction, which was what China had done fifteen years before when it had granted national treatment to seven states in return for tariff autonomy. China did not initiate the incorporation of national treatment in the “New Treaties.” Rather, the original drafts of the Sino-U.S. New Treaty and the Sino-British New Treaty were presented by the United States and Britain, both of which contained national treatment articles. Although China argued that the national treatment articles should be replaced by MFN treatment articles, China had to accept the opinions of the United Sates and Britain. Thus, national treatment was added to the “New Treaties” in exchange for the abolition of consular jurisdiction.

66. The ROC government led by Jiang Iieszhi (Chiang Kai-Shek) was forced to move to Chongqing [Chungking] in November 1937, and one month later, Nanjing fell into Japan’s hands. The puppet regime was established in Nanjing on March 30, 1940. See 2 Zhongguo Xindeishi [China Contemporary History] 23, 42, 90 (Teaching and Research Group on China’s Contemporary History of the Department of History of Beijing Normal University eds., 1983).


71. The exchange of national treatment for the abolition of consular jurisdiction was not unique to China. For example in 1937, Egypt signed a treaty with a few countries, mainly with the Western powers, under which Egypt had to promise, as the price of the abolition of the capitulations in Egypt, that it would not discriminate against foreigners or foreign-funded companies. See Convention Regarding the Abolition of Capitulations in Egypt, Protocol, and Declaration by the Royal Egyptian Gov’t, May 8, 1937, art. 2, http://www.austlii.edu.au/au/other/dfat/treaties/1938/11.html.
Nevertheless, the inclusion of national treatment in the “New Treaties” should not be
deemed an imposition like the treaties signed by the late Qing Dynasty. First, the national
treatment articles in the “New Treaties” were bilateral and contained the word “endeavor”
(jinli) as a limit to national treatment, meaning that the national treatment articles in the
treaties were by no means unconditional. With this limit, China reserved the right to set
off potentially disadvantageous implications of national treatment. Moreover, throughout
the negotiation of the “New Treaties,” China insisted on the exclusion of business from the
scope of national treatment. For example, in the drafts made by the United States and
Britain, business was in the scope of national treatment. China, however, strongly opposed
the inclusion of business in the scope of national treatment—the final text of the “New
Treaties” did not contain business in the scope of national treatment. The last reservation
made by China was to exclude the coasting trade and inland navigation from national
treatment. With these limitations and reservations on national treatment, China reduced
the potential negative impact of national treatment on the Chinese domestic business and
industry sectors.

2. Sino-U.S. FCN Treaty (1946)

According to article VII of the 1943 Sino-U.S. New Treaty, China and the United States
would enter into negotiations for a modern treaty of friendship, commerce, and navigation
after the end of the Second World War. In 1946, the Treaty of Friendship, Commerce and
Navigation Between the United States of America and the Republic of China (Sino-U.S.
FCN Treaty) [Zhongmei Youhao Tongshang Hanghai Tiaoyue] was concluded and contained
national treatment clauses to provide no less favourable treatment than that accorded or to
be accorded to its own nationals, corporations, and associations with respect to inland taxes,
sales, distribution of goods from the other party, as well as legal procedures and legal
protection for copyrights, patents, and trademarks. Such national treatment clauses were
an extension of the national treatment article in the 1943 Sino-U.S. New Treaty. One
characteristic of the 1946 Sino-U.S. FCN Treaty is that it supplemented the national treat-
ment article in the 1943 Sino-U.S. New Treaty by granting national treatment to both
nationals and corporations of the two contracting parties. The second characteristic of
the Sino-U.S. FCN Treaty is its general adherence "to the principle of national treatment." Such wording, which stresses the importance of national treatment, had never been used in any prior treaty. The third characteristic of the Treaty was the exclusion of finance from the scope of national treatment. In the draft of the Sino-U.S. FCN Treaty, the United States proposed to incorporate finance into the treaty as an aspect to be covered by the national treatment obligations, but China categorically refused this proposal. As a result, finance was deleted from the final version of the Sino-U.S. FCN Treaty.

In the 1940s, China also concluded eleven friendship treaties with Dominica (1940), Iraq (1942), Cuba (1942), Afghanistan (1944), Costa Rica (1944), Mexico (1944), Ecuador (1946), Thailand (1946), Saudi Arabia (1946), Philippines (1947), and Italy (1949), four of which contained national treatment articles. In short, the concept of national treatment was gradually accepted by China during the 1920s to the 1940s through bilateral treaties.

3. Appearance of Multilateral National Treatment in China: GATT 1947

In 1947, China became one of the twenty-three original contracting parties of the General Agreement on Tariffs and Trade (GATT). Thus, the national treatment obligations in the GATT became applicable to China as multilateral treaty obligations. The ROC government paid special attention to the national treatment article (i.e., GATT article III) because it realized that "national treatment may impede the protection of domestic industry and commerce." In spite of the apprehension, the ROC government accepted the GATT because it recognized that "the advantages exceed the disadvantages." From then on, China's national treatment obligations evolved into a mixture of bilateral and multilateral obligations.

By analyzing the national treatment clauses in the ROC's treaties, one can find that the scope of national treatment during that period became broader and broader, that is, from only one aspect, taxes and charges, to many aspects, such as legal proceedings, administration of justice, and finally to patent, copyright, trademark, and business rights. Moreover, the beneficiaries of national treatment were extended to include legal persons (companies). Meanwhile, the ROC government realized the importance of limiting national treatment in order to protect domestic interests and to balance the broad scope of the national treatment clauses. As a result, national treatment changed from an unconditional national

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79. Sino-U.S. FCN Treaty, supra note 76, art. 3(3).
81. The four Friendship Treaties are Sino-Brazilian Friendship Treaty, Braz.-ROC, art. 4, para. 2, in 3 OLD SINO-FOREIGN TREATIES, supra note 19, at 1276-77; Sino-Thailand Friendship Treaty, Thail.-ROC, art. 5, in 3 OLD SINO-FOREIGN TREATIES, supra note 19, at 1333-54; Sino-Philippine Friendship Treaty, Phil.-ROC, art. 7, in 3 OLD SINO-FOREIGN TREATIES, supra note 19, at 1478-80; Sino-Italian Friendship Treaty, Italy-ROC, art. 6, in 3 OLD SINO-FOREIGN TREATIES, supra note 19, at 1653-55.
84. Id. at 43.
85. For example, article 7 of the Sino-Czech. Friendship and Commerce Treaty (1930) states that "such taxes and charges [paid by nationals of one party in the other party] shall not be higher than those paid by nationals of the other party."
treatment with a narrow scope to a conditional national treatment with a broad scope. These changes, together with the evolution from unilateral treatment to bilateral and multilateral treatment, reflect, to some extent, that China awakened after a sleep of over eighty years in the bondage of unequal treaties.86

IV. Fall Of National Treatment In China: 1949-1978

After winning the war against the Chinese Nationalist Party (KMT) (Guomindang or Kuomintang), the leading party of the ROC government, the Chinese Communist Party (CCP),87 established the Government of the People’s Republic of China (PRC government) in October 1949. According to the 1949 Common Creed (Gongtong Gangling),88 an interim constitutional document of the PRC, the PRC government examined treaties concluded by the ROC government with foreign countries in order to determine whether to recognize or repeal them, implying that the PRC government did not necessarily succeed to treaties of the ROC government.89 Obviously, the PRC government did not recognize those treaties signed by the ROC government from the 1920s to the 1940s that granted foreigners national treatment, especially the 1946 Sino-U.S. FCN Treaty.90 The CCP’s hostile attitude towards the treaties signed by the ROC government was demonstrated in a declaration made by the CCP in 1947.91 In fact, the hostility was not directed at the ROC treaties or the national treatment articles in those treaties, but rather at the then enemies of the CCP (i.e., the so-called U.S. imperialism and the KMT-controlled ROC government).92 Owing

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86. It must be noted that some Chinese historians view the 1946 Sino-U.S. FCN Treaty as an unequal treaty due to a wide economic gap between China and the United States, notwithstanding the apparent equality. See Wu, supra note 80, at 689; WENZHAO TAo, ZHONGMEI GUANXI SHI [HISTORY OF THE SINO-U.S. RELATIONS] (1911-1949) 320 (2004).

87. For the general history of the Chinese Nationalist Party, see ZHoNGvuo GUOmINDANG DANGSHI [CHINESE NATIONALIST PARTY HISTORY] (Chun Song ed., 1990).


89. See id. art. 55.


91. Zhonggong Zhongyang Guanyu Bu Chengren Jiang Zhengfu Yiqie Maiguo Xieding de Shengming [Declaration of the Central Committee of the CCP on Disavowal of All Traitorous Agreements Made by Jiang’s Government], February 1, 1947, http://www.people.com.cn/BIG5/33831/33836/34138/34257/2569028.htm (stating that the CCP would never recognize or undertake responsibility for any treaty made by the ROC Government, humiliating the nation and forfeiting its sovereignty and other similar agreements concluded after January 10, 1946). Although the CCP declared that it would never recognize treaties made after January 10, 1946, it did not imply that it would recognize treaties concluded before that date.

92. During the short period of cooperation between the CCP and the KMT (1936-1945) for the common purpose of defense against Japan’s aggression, the CCP once recognized and even acclaimed the 1943 Sino-U.S. New Treaty and the 1943 Sino-British New Treaty, without indicating any dissenting opinion against the national treatment clauses in the two New Treaties. See Zhonggong Zhongyang guanyu Qingshu Zhongmei Zhongying jian Feicu Buqipeng Tiaoyue de Shengming [Decision of the Central Committee of the CCP on Celebrating the Abolition of the Unequal Treaties Between China and the United States, China and the Britain], Jan. 18, 1943.
to political reasons, the PRC government did not succeed to the national treatment clauses in ROC's bilateral treaties.

The national treatment article in the GATT 1947 was not applicable to the PRC after 1949. In 1950, the ROC Government, which had moved to Taiwan Island, notified GATT of its withdrawal (in the name of China) from the GATT.93 Because some Western countries, especially the United States, imposed an embargo on goods originating from the PRC after the outbreak of the Korean War in 1950,94 the PRC opposed the United States95 and relevant international trade and financial organizations, such as the IMF and the GATT that the PRC government deemed to be in the hands of the United States. The embargo was one of the reasons the PRC government neither challenged the legality of Taiwan's withdrawal from the GATT nor showed any interest in the GATT during that period,96 although some contracting parties of the GATT questioned the legality of Taiwan's withdrawal.97 Therefore, the PRC government did not succeed to the GATT obligations. Consequently, the national treatment obligations of the GATT 1947 were not applicable to China.

Moreover, the PRC government claimed that the prerogatives enjoyed by imperialist countries would be purged.98 This is the so-called policy of "starting all over again" [lingqi luezao].99 For this reason, it was believed that it was necessary to clean up imperialist remains in China, which is the so-called policy of "cleaning out the house before inviting a guest" [dasao ganjing wuzi zai qingke].100 As a result, the number of foreign enterprises in China was sharply reduced, from 1104 in 1949 to sixty-six in 1956.101

The normal trade relations with foreign states were also interrupted after the establishment of the PRC in 1949. From 1949 to 1978, the PRC government adopted the "protectionism trade policy" and strictly controlled foreign trade.102 After the establishment of the PRC, China's main trading partners were socialist countries such as the Soviet Union.103 From the beginning of the 1960s, the warm relations with some socialist countries were cooled down due to the political disputes between China and the Soviet Union.104 Under the hostile relations with most imperialist countries and some socialist countries, the PRC government overemphasized the self-reliance principle so that a normal and necessary foreign economic transaction was labelled "an act of worship to foreigners" [chongyang meiwat].105

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96. Yang, supra note 82, at 298; Rhodes, supra note 93, at 499.
97. For example, Czechoslovakia raised this question. See Guohua, supra note 82, at 298.
98. Common Creed, supra note 88, at art. 3.
100. Id. at 320.
101. Id.

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Although the PRC government may disagree, it indeed adopted another round of “closed-door” policy from 1949 to 1978. This “closed-door” policy was also reflected in China’s laws. The PRC government had enacted three constitutions within thirty years from 1949 to 1978—the 1954 Constitution, the 1975 Constitution, and the 1978 Constitution—none of which provided any protection or treatment to foreigners in China.

Under the PRC’s political and economic environment from 1949 to 1978, granting general national treatment to foreign countries, especially the United States, was out of the question. Thus, national treatment became a victim of the political struggles.

V. Revival Of National Treatment In China: Post-1979

A. National Treatment in PRC’s Laws

PRC’s “closed-door” policy was replaced by a “reform and open” [gaike kaifang] policy adopted in the end of 1978. China’s relations with the United States were normalized on January 1, 1979. Also in 1979, China promulgated the Sino-Foreign Equity Joint Venture Law [Zhongwai Hezi Jingying Qiyefa] to encourage and protect foreign investment in China. The 1979 Sino-Foreign Equity Joint Venture Law itself did not contain a national treatment article, but it did provide legal protection to foreign investors for the first time in PRC’s legislative history and laid the foundation for subsequent national treatment legislation.

The history of national treatment legislation in the PRC shows that national treatment legislation began from procedural law and was extended to substantive law; within substantive law, national treatment was extended from civil law to trade law. Indeed, PRC’s national treatment legislation started from court access rights of foreigners, rather than equal trade rights of foreigners. PRC’s first law with a clear national treatment article is the Interim

107. For the 1954 Constitution, see ZHONGHUA RENMIN GONGHEGUO XIANFA Lict XIUZHENG DUZHAO BIAO (COMPARATIVE TABLE OF EACH AMENDMENT TO THE PRC CONSTITUTION) 142-64 (2004).
108. For the 1975 Constitution, see id. at 132-141.
109. For the 1978 Constitution, see id. at 113-131.
Civil Procedure Law promulgated in 1982\textsuperscript{114} that stated that foreigners should have the same litigation rights and obligations as Chinese citizens.\textsuperscript{115} Yet foreign enterprises and institutions should have the litigation rights provided by the Interim Civil Procedure Law.\textsuperscript{116} From the different expressions, it seems that China only granted national treatment with respect to civil procedure to foreign individuals, not to foreign enterprises or institutions. This discrimination between foreign individuals and foreign enterprises was gradually eliminated after the enactment of the 1982 Constitution\textsuperscript{117} that allowed foreigners and foreign enterprises to invest in the territory of China and provided legal protection to both foreign individuals and enterprises.\textsuperscript{118} From then on, national treatment got a new lease on life in China.

In 1989, China promulgated the Administrative Procedure Law.\textsuperscript{119} Paragraph 1 of article 71 of the Administrative Procedure Law states that "[foreigners, stateless persons and foreign institutions that are engaged in administrative suits in the PRC shall have the same litigation rights and obligations as citizens and institutions of the PRC." This law grants national treatment to both foreign individuals and institutions with respect to administrative court access rights. In 1991, the Civil Procedure Law replaced the Interim Civil Procedure Law and broadened the beneficiaries of national treatment to include foreign individuals, stateless persons, foreign enterprises, and foreign institutions.\textsuperscript{120} In addition to the above national treatment concerning procedural rights, some Chinese substantive laws also apply to foreigners in the territory of China,\textsuperscript{121} despite a lack of wording that would seem necessary to grant them, such as "the same rights and obligations."

In the PRC's legislative history, the term "national treatment" first appeared in the Foreign Trade Law.\textsuperscript{122} Article 6 of the Foreign Trade Law states that

\begin{itemize}
  \item \textsuperscript{114} Interim Civil Procedure Law (promulgated by the Standing Comm. Nat'l People's Cong., Mar. 8, 1982, effective Oct. 1, 1982) \textsuperscript{182} Falü Huijian 283-324 (P.R.C). However, some scholars argue that article 12 of the Invention Encouragement Regulation \textsuperscript{[Faming Jiangli Tiaoli]}, issued by the State Council on December 28, 1978 (\textsuperscript{116} Guofa No. 279, 1978, revised in 1984, 1993, repealed in 1999), available at http://www.gdstc.gov.cn/zhenge/three1.htm, was a national treatment article, which provided that foreigners could apply for an invention and be awarded in China. See \textit{PRIVATE INTERNATIONAL LAW} 107 (Han Depei et al. eds., Wuhan Univ. Press rev. ed. 1989).
  \item \textsuperscript{115} Interim Civil Procedure Law, \textit{supra} note 114, art. 186, ¶ 1.
  \item \textsuperscript{116} Id. art. 186, ¶ 2.
  \item \textsuperscript{117} \textit{XIANFA [CONSTITUTION]}, (1982) (P.R.C.), in \textit{supra} note 107.
  \item \textsuperscript{118} Id. arts. 18, 32.
  \item \textsuperscript{120} Civil Procedure Law of the People's Republic of China, art. 5 (promulgated by the Standing Comm. Nat'l People's Congress, Apr. 9, 1991, effective Apr. 9, 1991) 1995 \textit{STANDING COMM. NAT'L PEOPLE'S CONG. GAZ.} 82-105 (P.R.C.).
\end{itemize}
the People's Republic of China shall, under international treaties or agreements to which the People's Republic of China is a contracting party or a participation party, grant the other contracting parties or participating parties, or on the principles of mutual benefit and reciprocity, grant the other party most-favoured-nation treatment or national treatment within the field of foreign trade. (Emphasis added)

Article 24 of Foreign Trade Law is specifically applicable to international trade in services, which directly stipulates that

[with respect to international trade in services, the People's Republic of China, pursuant to the commitments made in international treaties or agreements to which the People's Republic of China is a contracting party or a participating party, grants the other contracting parties and participating parties market access and national treatment.]

The contemporary attitude of the PRC government toward foreign trade is exemplified by the allowance for national treatment in the Foreign Trade Law. The first understanding is that national treatment should be based on treaties or agreements, which means that China has no duty to grant national treatment to foreigners without a treaty or an agreement. The second understanding is that national treatment must, at the very least, be based on the principle of reciprocity, implying the impossibility of unilateral national treatment. The third understanding is that China's national treatment is not unconditional, but rather subject to China's reservations under treaties or agreements.

B. National Treatment In PRC's Treaties

PRC's early commerce and shipping agreements with some socialist countries emphasized MFN treatment. In regard to national treatment, the PRC was fairly prudent in making such a commitment. Arguably, one article in the 1979 Agreement on Trade Relations between the People's Republic of China and the United States was a national treatment article, despite lacking the term "national treatment" or other symbolic words such as "no less than" or "the same." On March 19, 1985, China became a member of the Paris Convention for the Protection of Industrial Property (Paris Convention). As a result, the national treatment article in the multilateral treaty (i.e., article 2 of the Paris Convention) has been applicable to China since that date.

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123. It must be noted that article 24 of the Foreign Trade Law (amended 2004) is the same as article 23 of the Foreign Trade Law (1994).
124. The Commerce and Shipping Treaty between the PRC and the U.S.S.R. (1958), supra note 110, art. 2; The Commerce and Shipping Treaty between the PRC and the Democratic Republic of Germany (1960), supra note 110, art. 2; The Commerce and Shipping Treaty between the PRC and Albania (1961), supra note 110, art. 2; The Commerce and Shipping Treaty between the PRC and the People's Democratic Republic of Korea (1962), supra note 110, art. 2; The Commerce and Shipping Treaty between the PRC and the Democratic Republic of Vietnam (1963), supra note 110, art. 2.
125. Agreement on Trade Relations, U.S.-P.R.C., art. 6, ¶ 2, July 7, 1979, 31 U.S.T. 4651.
126. Private International Law, supra note 114, at 107.

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1. National Treatment in China’s BITs

During the 1980s, China began to enter into Bilateral Investment Treaties (BITs) with foreign states, providing for fair and equitable treatment [gongping heli daiyu] and MFN treatment. In contrast to the U.S. BITs launched at the end of the 1970s, which included a model text containing a standard national treatment clause, China does not have a BIT model text that includes a standard national treatment clause. China’s first BIT was signed in 1982, but a national treatment clause was not introduced into China’s BITs until four years later by the conclusion of the Sino-British BIT (1986). As of June 2005, the PRC had signed BITs with 110 countries, among which thirty-nine are in Asia, thirty-six in Europe, twenty-one in Africa, five in North America, six in South America, and three in Oceania. Of these 110 BITs, national treatment clauses appear in at least twenty-seven BITs. The twenty-seven BITs are shown in the following table:

2. Return of GATT National Treatment to China

After the “open and reform” policy, China became more and more interested in the GATT. In 1982, China, as an observer, attended the thirty-eighth GATT Conference. And in 1984, China became a member of the Committee on Textiles of the GATT, while in July 1986, China applied to resume its contracting party status in the GATT. Unfortunately, China did not reach an agreement with the GATT by the end of 1994, so it had to initiate the process to regain access to the WTO in 1995.

The decision of China’s WTO accession was made by a consensus at the Doha Ministerial Conference on November 10, 2001. The PRC government accepted the China Accession Protocol after only one day, and China became a WTO member on December 11, 2001. From then on, national treatment obligations of the WTO, together with other WTO obligations, began to bind China as international law obligations. Thus, national treatment of the GATT returned to China after half a century.

3. Changes of National Treatment in China’s BITs in the Twenty-first Century

It is interesting to note that China’s BITs can be divided at the year 2002. From 1982 through the end of 2001, the PRC entered into about 100 BITs, among which only nineteen
### Table. National Treatment Clauses in China's Twenty-seven BITs

<table>
<thead>
<tr>
<th>Number</th>
<th>BIT Description</th>
<th>National Treatment Clause</th>
<th>Year</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Sino-British BIT</td>
<td>art. 3(3)</td>
<td>1986</td>
</tr>
<tr>
<td>2</td>
<td>Sino-Japanese BIT</td>
<td>arts. (2) &amp; 4</td>
<td>1988</td>
</tr>
<tr>
<td>3</td>
<td>Sino-Czechoslovakian BIT</td>
<td>art. (2)</td>
<td>1991</td>
</tr>
<tr>
<td>4</td>
<td>Sino-Korean BIT</td>
<td>art. (2) &amp; 4</td>
<td>1992</td>
</tr>
<tr>
<td>5</td>
<td>Sino-Spanish BIT</td>
<td>art. (4)</td>
<td>1992</td>
</tr>
<tr>
<td>6</td>
<td>Sino-Slovenia BIT</td>
<td>art. (2)</td>
<td>1993</td>
</tr>
<tr>
<td>7</td>
<td>Sino-Icelandic BIT</td>
<td>art. (3)</td>
<td>1994</td>
</tr>
<tr>
<td>8</td>
<td>Sino-Moroccan BIT</td>
<td>art. (1)</td>
<td>1995</td>
</tr>
<tr>
<td>9</td>
<td>Sino-Yugoslavian BIT</td>
<td>art. (2)</td>
<td>1995</td>
</tr>
<tr>
<td>10</td>
<td>Sino-Saudi Arabian BIT</td>
<td>art. (2)</td>
<td>1996</td>
</tr>
<tr>
<td>11</td>
<td>Sino-Cameroonian BIT</td>
<td>art. (1)</td>
<td>1997</td>
</tr>
<tr>
<td>12</td>
<td>Sino-Nigerian BIT</td>
<td>art. (2)</td>
<td>1997</td>
</tr>
<tr>
<td>13</td>
<td>Sino-Macedonian BIT</td>
<td>art. (3)</td>
<td>1997</td>
</tr>
<tr>
<td>14</td>
<td>Sino-Gabonese BIT</td>
<td>art. (3)</td>
<td>1997</td>
</tr>
<tr>
<td>15</td>
<td>Sino-South African BIT</td>
<td>art. (3)</td>
<td>1997</td>
</tr>
<tr>
<td>16</td>
<td>Sino-Yemeni BIT</td>
<td>art. (1)</td>
<td>1998</td>
</tr>
<tr>
<td>17</td>
<td>Sino-Botswana BIT</td>
<td>art. (2)</td>
<td>2000</td>
</tr>
<tr>
<td>18</td>
<td>Sino-Irani BIT</td>
<td>art. (1)</td>
<td>2000</td>
</tr>
<tr>
<td>19</td>
<td>Sino-Sierra Leonean BIT</td>
<td>art. (2)</td>
<td>2001</td>
</tr>
<tr>
<td>20</td>
<td>Sino-Bosnia-Herzegovinian BIT</td>
<td>art. (1)</td>
<td>2002</td>
</tr>
<tr>
<td>21</td>
<td>Sino-Cote d'ivoire BIT</td>
<td>art. (2)</td>
<td>2002</td>
</tr>
<tr>
<td>22</td>
<td>Sino-Guyanese BIT</td>
<td>art. (2)</td>
<td>2003</td>
</tr>
<tr>
<td>23</td>
<td>Sino-German BIT</td>
<td>art. (2)</td>
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</tr>
<tr>
<td>24</td>
<td>Sino-Beninese BIT</td>
<td>art. (1)</td>
<td>2004</td>
</tr>
<tr>
<td>25</td>
<td>Sino-Latvian BIT</td>
<td>art. (2)</td>
<td>2004</td>
</tr>
<tr>
<td>26</td>
<td>Sino-North Korean BIT</td>
<td>art. (2)</td>
<td>2005</td>
</tr>
<tr>
<td>27</td>
<td>Sino-Finnish BIT</td>
<td>art. (2)</td>
<td>2005</td>
</tr>
</tbody>
</table>

BITs have national treatment clauses. But from January 2002 to June 2005, the PRC signed eight BITs, all of which contained national treatment clauses. This trend likely indicates that more and more BITs to be concluded by China with foreign countries will contain national treatment clauses. The change is reflected in not only the increase in number of BITs that include national treatment clauses, but also in the decrease of limitations on national treatment clauses.

In the twenty-seven BITs with national treatment clauses, there are a variety of limitations on the application of national treatment. First, in the Sino-British BIT, the Sino-Slovenia BIT, the Sino-Icelandic BIT, the Sino-Yugoslavian BIT, and the Sino-Macedonian BIT, national treatment is based on the conditions of "endeavour" and "in accordance with its laws and regulations." Such limitations could downgrade national treatment obligations to best-effort duties and subject national treatment obligations in the bilateral treaties to domestic laws. Second, in the Sino-Moroccan BIT, the Sino-Saudi Arabian BIT, the Sino-Spanish BIT, the Sino-Cameroonian BIT, the Sino-Nigerian BIT, the Sino-Irani BIT, the Sino-Gabonese BIT, and the Sino-Yemeni BIT the limitation on national treatment is "in accordance with its laws and regulations." Third, in the Sino-Botswana BIT, the Sino-Sierra Leonean BIT, and the Sino-North Korean BIT, the limitation on national treatment is "without damaging its laws and regulations." Fourth, in the Sino-Cote d'ivoire BIT, the Sino-Guyanese BIT, the Sino-Beninese BIT, and the Sino-Latvian BIT, all of which were
concluded after 2002, the limitation on national treatment is “without being inconsistent with its laws and regulations.” Finally, although the Sino-Japanese BIT, the Sino-Korean BIT, the Sino-Czechoslovakian BIT, the Sino-Bosnia-Herzegovinian BIT and the Sino-German BIT do not uniformly contain direct limitations on national treatment, the Protocols of the BITs do include some limitations on national treatment.135

Strictly speaking, the national treatment clauses with the limitations of “endeavour” are only nominal and lack legally binding force. This conclusion may also apply to those clauses with the limitation of “in accordance with its laws and regulations” because it implies that there will be no national treatment obligations without relevant domestic laws and regulations.136 However, with the beginning of the 21st century, and especially after China’s entry to the WTO, there have been fewer limitations on national treatment in China’s BITs, which have also become less imposing. If national treatment in China’s pre-WTO BITs was not attractive to foreign investment,137 the post-WTO national treatment in China’s BITs is evolving to be an attractive factor because all of China’s BITs contain MFN treatment clauses. These clauses allow pre-WTO BITs without national treatment clauses to incorporate such clauses and pre-WTO BITs with heavily limited national treatment clauses to incorporate national treatment clauses with relaxed limitation. This is the MFN’s automatic adaptation function or, in other words, automatic generalization.138

VI. Concluding Remarks

The treatment of foreigners during the Qing Dynasty and the ROC period progressed as follows: from inferior treatment to prerogative treatment, from prerogative treatment to national treatment, from unilateral national treatment to bilateral national treatment, and then finally, to multilateral national treatment. The movement from inferior treatment to prerogative treatment was the result of, at least in part, China’s unwise “closed-door” policy and China’s arrogant attitude towards the outside world, as well as the aggression of Western powers. The movements from prerogative treatment to national treatment, along with the movement from unilateral national treatment to bilateral national treatment and multilateral national treatment, reflect the Chinese people’s revolution from a semi-colony [banzimind] and semi-feudal [banfengjian] country to an independent and modern country. Also reflected is the development of a Western civilization that gradually recognized that the opium trade, consular jurisdiction, negotiated tariffs, and the like, were in violation of human civilization. Thus, the historical evolution of national treatment in Modern China (1840-1949) is a miniature of the history of modern China and the history of Western civilization.

135. Article 3 of the Protocol of Sino-Japanese BIT states that a party may provide discriminatory treatment when necessary, in accordance with its laws and regulations, for the purpose of maintaining public order, national security, or national economic development. See also article 2 of the Protocol of Sino-Korean BIT; article 1 of the Protocol of Sino-Czechoslovakian BIT; article 4 of the Protocol of the Sino-German BIT, and the Protocol of the Sino-Bosnia-Herzegovina BIT.

136. See Vandevelde, supra note 129, at 661.


The early development of national treatment in China was not the direct result of eliminating or reducing the barriers of trade to foreigners, but rather the consequence of repealing the prerogatives of foreigners codified by a series of unequal treaties or, in other words, the price that China had to pay in exchange for repealing those unequal treaties made by the late Qing Dynasty, to which the ROC Government succeeded. From the Chinese perspective, the national treatment was not voluntarily accepted—rather it was imposed. And it was the lesser of two evils. Indeed, compared with foreigners' prerogatives, such as consular jurisdiction, national treatment of foreigners represented progress in the history of relations between China and foreign countries. Chinese suspicion of national treatment, however, continued from the establishment of the ROC to the end of the 1940s due to historical reasons. This attitude was not altered by the change of the Chinese government in 1949. It is unbelievable that the PRC government, led by the CCP, which considered itself the liberator that emancipated China from oppression of imperialism and feudalism, would grant the Western powers national treatment embodied in those “traitorous treaties” [maiguo tiaoyue]. The long-hostile and suspicious attitude towards national treatment in China’s modern history was not because China was unwilling to give equal treatment to foreign countries, but because national treatment, as well as MFN, was closely connected with the dark age of Chinese history in which Chinese people were humiliated by the Western powers through a series of wars, including the First Opium War (1840-1842), the Second Opium War (1856-1860), the Sino-France War (1884-1885), the Sino-Japan Jiawu War (1894-1895), and the war triggered by the Boxing Movement (1900). China suffered serious defeats in those wars and was forced to cede territory (e.g., Hong Kong Island to Britain in 1842 and Taiwan Island to Japan in 1895), pay indemnities, and lease land. Therefore it is not difficult to understand the Chinese xenophobia during that period. Unfortunately, national treatment was introduced in China under this background, which doomed it to a rough road in China. When national treatment started to be gradually accepted under the principle of reciprocity and equality in the 1940s, it was adversely influenced by the change of China’s political situation as the CCP came to power in mainland China. The concept of national treatment disappeared from the scene for more than three decades. Only after the CCP adopted the “open and reform” policy in the end of the 1970s did it receive new life. With the development of China’s economy and frequent contacts with people of other countries, the Chinese people’s psychological response to national treatment had been fundamentally changed. National treatment is no longer seen as a big stick wielded by the Western powers to infringe upon China, but rather as a tool that can be used by all parties to create a level playing field for international trade.
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I certify that the statement made by me above are correct and complete.

(signed) Bryan Kay, Director, ABA Publishing