

2005

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### Recommended Citation

Wei Wang, *Historical Evolution of National Treatment in China*, 39 INT'L L. 759 (2005)  
<https://scholar.smu.edu/til/vol39/iss3/7>

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# 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."<sup>1</sup> This paper focuses only on the latter.

Historically and internationally, national treatment originates from treaties,<sup>2</sup> 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.<sup>3</sup> Through such a historical analysis, one can discover the origins

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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).

3. But the study of the history of national treatment in China's treaties has long been neglected. Indeed, the study of the history of MFN treatment in China's treaties outweighs that of national treatment. For the history of MFN treatment in China's treaties, see Huang Jing, *Zuibuiguo Tiaokuan zhi Youlai yu Bianqian [Origin and Evolution of the MFN Clause]*, in 6 *MINGUO FAXUE LUNWEN JINGCUI: GUOJI FALU PIAN [THE CREAM OF LEGAL PAPERS OF THE REPUBLICAN PERIOD: INTERNATIONAL LAW]* 411-22 (He Qinhua & Li Xiuqing eds., 2004); WANG TIEYA, 1943 *Nian Zhongmei Xinyue yu Zuibuiguo Tiaokuan [1943 Sino-U.S. New Treaty and the MFN Clause]*, in WANG TIEYA WENXUAN [SELECTED PAPERS OF WANG TIEYA] 594-99 (Deng Zhenglai ed., 2003); Wang Yi, *Zhonghua Renmin Gongheguo zai Guoji Maoyi zhong de Zuibuiguo Daiyu Wenti [The People's Republic of China's MFN Treatment in International Trade]*, in 1990 *CHINESE Y.B. INT'L L.* 125-51 (1991).

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 [*yi*].<sup>4</sup> 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.<sup>5</sup> The Qing Dynasty, which was able to support itself in an autarky system, reformulated many strict rules to restrain foreigners and foreign trade.<sup>6</sup>

### A. PREROGATIVE TREATMENT

In 1840, the First Opium War (1840-1842) broke out between China and Britain.<sup>7</sup> After China's defeat, foreign countries were unwilling to provide equal treatment to China.<sup>8</sup> 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.<sup>9</sup> Under these "negotiated tariffs" [*xieding guanshui*], China was deprived of its tariffs autonomy.<sup>10</sup> Furthermore, China partly lost its jurisdiction by the imposition of "consular

4. For the ancient tribute system relations between China and foreign countries, see Gretchen Harders-Chen, *China MFN: A Reaffirmation of Tradition or Regulatory Reform?*, 5 MINN. J. GLOBAL TRADE 381, 383-87 (1996).

5. The "closed-door" policy originated from the Ming Dynasty (1368-1644) and was succeeded by the Qing Dynasty. See CHAO ZHONGCHEN, MINGDAI HAIJIN YU HAIWAI MAOYI [BAN ON MARITIME TRADE AND OVERSEAS TRADE DURING THE MING DYNASTY] (2005); LIN ZENGPI, ZHONGGUO JINDAI SHI [THE HISTORY OF MODERN CHINA] 17-18 (1979); BAINIAN ZHONGGUO DUIWAI GUANXI: 1840-1940 [CHINA'S FOREIGN RELATIONS OF THE ONE HUNDRED YEARS: 1840-1940] 6-10 (Zong Chengkang ed., 1993).

6. For example, foreign merchants could not employ Chinese servants and foreigners could not ride in a sedan chair (an ordinary transportation mode for people at that time). More importantly, foreign merchants could not decide the price of their goods and they were also blackmailed by government officials. See HOSEA BALLOU MORSE, ZHONGHUA DIGUO DUIWAI GUANXISHI [THE INTERNATIONAL RELATIONS OF THE CHINESE EMPIRE] 78-81, 89, 98-99 (Zhang Huiwen et al. trans., Shanghai Bookstore Press 2000) (1910).

7. For the history of the First Opium War, see LIN, *supra* note 5, at 1-61.

8. JIANG TINGFU, ZHONGGUO JIN DAI SHI [MODERN HISTORY OF CHINA] 9 (1999).

9. See ZHENG QIN, ZHONGGUO FAZHISHI GANGYAO [OUTLINE OF CHINESE LEGAL HISTORY] 287 (2001).

10. *Id.*

jurisdiction" [*lingshi caipanquan*],<sup>11</sup> or extraterritoriality.<sup>12</sup> 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<sup>13</sup> or by mixed courts [*huishen gongxie*] composed of foreign consuls and Chinese judges.<sup>14</sup> Britain and the United States even established courts in China (i.e., His Britannic Majesty's Supreme Court for China (1865) and the United States Court for China (1906)).<sup>15</sup> 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.<sup>16</sup> 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.<sup>17</sup> 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.<sup>18</sup> Thus, the Western powers found that, under some special circumstances, they needed to obtain equal rights with the Chinese.

11. The concept of "consular jurisdiction" was first described in the Jiangnan Shanhou Zhangcheng [Jiangnan Agreement Dealing with Problems Arising from the Treaty of Nanjing] (1842). See GUO WEIDONG, ZHUAN ZHE: YI ZAO QI ZHONG YING GUAN XI HE "NANJING TIAO YUE" WEI KAO CHA ZHONG XIN [A TURNING POINT: FOCUSING ON THE EARLY SINO-BRITISH RELATIONS AND THE TREATY OF NANJING] 482-83 (2003). Nineteen countries enjoyed "consular jurisdiction" in China. See ZUHAO YE, FEI CHU BU PING DENG TIAO YUE [ABOLISHING THE UNEQUAL TREATIES] 40 (1971).

12. Generally speaking, there is little difference between "consular jurisdiction" and "extraterritoriality." See I GENSHENG ZHOU, GUO JI FA [PUBLIC INTERNATIONAL LAW] 296-98 (1976).

13. See, e.g., Sino-British Commerce Agreement of the Five Ports, art. XIII, October 8, 1843, in ZHONGGUO JINDAI BUPINGDENG TIAOYUE XUANBIAN YU JIESHAO [COMPILATION AND INTRODUCTION OF THE UNEQUAL TREATIES OF MODERN CHINA] 28-30 (Liang Weiji & Zheng Zemin eds., 1993) [hereinafter UNEQUAL TREATIES]; The Treaty of Wanjia (Wanghia), U.S.-China, art. XXI, July 3, 1844, 1844 U.S.T. LEXIS 4.

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

15. FEI CHENGKANG, ZHONGGUO ZU JIE SHI [THE HISTORY OF CONCESSION IN CHINA] 127 (1991); LIMIN WANG, SHANGHAI FA ZHI SHI [A HISTORY OF SHANGHAI LOCAL LEGAL SYSTEM] 275 (1998).

16. See VI KYUIN WELLINGTON KOO, THE STATUS OF ALIENS IN CHINA (1912).

17. Fei, *supra* note 15, at 10-11.

18. See XINCHOU HEYUE DINGLI YIHOU DE SHANGYUE TANPAN [COMMERCIAL TREATY NEGOTIATIONS POST THE BOXER PROTOCOL] 24-25, 33-34, 116-18, (PRC Customs General Administration Research Office ed., 1994) [hereinafter COMMERCIAL TREATY NEGOTIATIONS] for arguments on the differential treatment of foreign ships and Chinese domestic ships during the negotiations of the Sino-British Treaty for the Extension of the Commercial Relations.

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)<sup>19</sup> and the Sino-Japan Treaty for the Extension of the Commercial Relations [*Zhongri Tongshang Xingchuan Xuding Xiaoyue*] (1903),<sup>20</sup> houses and small piers rented by British merchants and Japanese merchants were to be taxed on an equal footing with the Chinese.<sup>21</sup> Second, according to the Sino-U.S. Treaty for the Extension of the Commercial Relations [*Zhongmei Tongshang Xingchuan Xuding Tiaoyue*] (1903),<sup>22</sup> “machine-made cotton yarn and cloth manufactured in China, whether by foreigners” or by Chinese, was to be taxed on an equal footing.<sup>23</sup> Third, in the Sino-British Conditions on Banning Opium, concluded in 1911 before the final elimination of the opium trade,<sup>24</sup> 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.<sup>25</sup>

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,<sup>26</sup> but this was not the case for China’s treaties during the nineteenth century and at the

19. The Sino-British Treaty for the Extension of the Commercial Relations, U.K.-China, Sept. 5, 1902, in 2 *ZHONG WAI JIU YUE ZHANG HUI BIAN* [COMPILATION OF OLD SINO-FOREIGN TREATIES AND AGREEMENTS] 101-114 (Tieya Wang ed., Joint Publishing House 1959) (1982) [hereinafter OLD SINO-FOREIGN TREATIES].

20. The Sino-Japanese Treaty for the Extension of the Commercial Relations, Japan-China, Oct. 8, 1903, in OLD SINO-FOREIGN TREATIES, *supra* note 19, at 192-200.

21. *Id.* at 195; The Sino-British Treaty for the Extension of the Commercial Relations, U.K.-China, art. 3, annex 3, in OLD SINO-FOREIGN TREATIES, *supra* note 19, at 113.

22. Sino-U.S. Treaty for the Extension of the Commercial Relations, U.S.-China, Oct. 8, 1903, in U.S. DEPARTMENT OF STATE, THE CHINA WHITE PAPER, AUGUST 1949 417-426 (1967).

23. *Id.* at 420.

24. 2 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.

25. For the 1911 opium-banning agreement see 2 OLD SINO-FOREIGN TREATIES, *supra* note 19, art. 6, at 712. See also ZHIQI CHEN, *ZHONGGUO JINDAI WAIJIAOSHI* [FOREIGN RELATION HISTORY OF MODERN CHINA] 1167 (1993); HUIQING YAN, *YAN HUIQING ZIZHUAN: YIWEI MINGUO YUANLAO DE LISHI JIYI* [EAST-WEST KALEIDOSCOPE 1877-1944: AN AUTOBIOGRAPHY BY W. W. YEN] 84 (Wu Jianyong et al. trans., 2003).

26. See, e.g., Treaty of Amity, Commerce and Navigation, Colom.-U.K., Apr. 18, 1825, art. V, available at <http://www.austlii.edu.au/au/other/dfat/treaties/1901/120.html>; Convention of Commerce and Navigation, Nor-Swed.-U.K., Mar. 18, 1826, art. XI, available at <http://www.austlii.edu.au/au/other/dfat/treaties/1901/78.html>; Treaty of Friendship and Commerce, Liber.-U.K., Nov. 21, 1848, art. III, available at <http://www.austlii.edu.au/au/other/dfat/treaties/1901/67.html>; Treaty of Friendship, Commerce and Navigation, Peru-U.K., Apr. 10, 1850, art. V, available at <http://www.austlii.edu.au/au/other/dfat/treaties/1901/83.html>; Treaty of Commerce and Navigation, Russ.-U.K., Jan. 12, 1859, art. VI, available at <http://www.austlii.edu.au/au/other/dfat/treaties/1901/92.html>; Treaty of Commerce and Navigation, Italy-U.K., June 15, 1883, art. VI, available at <http://www.austlii.edu.au/au/other/dfat/treaties/1901/65.html>; Treaty of Commerce and Navigation, Japan-U.K., July 16, 1894, art. X, available at <http://www.austlii.edu.au/au/other/dfat/treaties/1901/66.html>.

beginning of the twentieth century. The unilaterality of national treatment also indicates that the treaties were unequal.<sup>27</sup> 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 [*Xinchou Tiaoyue*] (1901)<sup>28</sup> that resulted from the war of the eight Western powers against China for the Boxer Movement.<sup>29</sup> This characteristic can also be illustrated with the negotiations of the Sino-U.S. Treaty for the Extension of the Commercial Relations.<sup>30</sup> 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.<sup>31</sup> 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.<sup>32</sup>

### III. Rise Of National Treatment In China: 1912-1949

#### A. BILATERAL NATIONAL TREATMENT IN THE 1920S AND THE 1930S

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

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, *WANQING SHANGYUE WAJIAO* [THE DIPLOMACY OF THE COMMERCIAL TREATIES BETWEEN CHINA AND FOREIGN POWERS DURING THE LATE QING DYNASTY] 113-14 (1998).

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. *UNEQUAL TREATIES*, *supra* note 13.

29. For the history of the Boxer Movement (1899-1901), see 2 LIN, *supra* note 5, at 480-550.

30. For the negotiating history of the treaties, see *COMMERCIAL TREATY NEGOTIATIONS*, *supra* note 18.

31. *Id.* at 163, 166.

32. *Id.* at 177-78.

33. For the history of the Xinhai Revolution, see XINHAIGEMING SHI [THE XINHAIGEMING HISTORY], Vols. I, II, & III (Zengping Lin eds., 1980-1981).

34. See generally MINGXUAN SHANG, *SUN ZHONGSHAN BIOGRAPHY* (2d ed. 1981).

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 WAJIAO YU GUOJIFA [DIPLOMACY IN MODERN CHINA AND INTERNATIONAL LAW] 93-110 (Cheng Daode ed., 1993).

36. *Waijiaobu guanyu Minguo Tongyi Linshi Zhengfu Chengli Zhi ge Waijiao Daibiao bing Wanguo Baobehui 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 3 ZHONGHUA MINGUOSHU DANG'AN ZILIAO 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].

37. China declared war against Germany and Austria on August 14, 1917. See *Waijiaobu guanyu Zhongguo Canzhan zhi Geguo Gongsbi Zhaobui* [Note of the Foreign Ministry of the ROC on China's Entering the War Addressed to the Ambassadors], in 3 HISTORY OF THE ROC, *supra* note 36, at 393.

the Washington Conference (1921-1922).<sup>38</sup> But the Washington Conference did not satisfy China's demands.<sup>39</sup>

### 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 (*Zhongde xieyue*).<sup>40</sup> Paragraph 2 of article 3 of the Sino-German Treaty states that

[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.<sup>41</sup>

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,<sup>42</sup> providing national treatment to one another with respect to court access rights,<sup>43</sup> labour protection,<sup>44</sup> inland taxes and charges,<sup>45</sup> heritage taxes,<sup>46</sup> housing taxes,<sup>47</sup> 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.<sup>48</sup>

### 2. *Tariffs Treaties (1928)*

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

38. *Guomin Waijiao Lianbehui duiyu Huashengdun Huiyi Zhongguo Ti'An zhi Yijian* [Opinions of the National Diplomacy Association on China's Proposals at Washington Conference], in 3 HISTORY OF THE ROC, *supra* note 36, at 456.

39. Jiang Xiangze, *Zhongguo he Huashengdun Huiyi* [China and the Washington Conference], in ZHONGMEI GUANXISHI LUNWENJI [TREATISES ON THE SINO-U.S. RELATION HISTORY] 272, 272-88 (1985).

40. Sino-German Treaty, signed on May 20, 1921, in 3 HISTORY OF THE ROC, *supra* note 36, at 954-55; also available in 3 WAIJIAO WENDU [DIPLOMATIC DOCUMENTS] 963-964 (2004).

41. *Id.* art. 3.2.

42. Sino-Austrian Commercial Treaty, in 3 OLD SINO-FOREIGN TREATIES, *supra* note 19, at 570-73.

43. *Id.* art. 4.

44. *Id.* art. 5.

45. *Id.* art. 8.

46. *Id.* art. 10.

47. *Id.* art. 11.

48. YAN, *supra* note 25, at 150; see also YE, *supra* note 11, at 77.

articles.<sup>49</sup> 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.<sup>50</sup> The inclusion of national treatment in the treaties was criticized by some Chinese, such as Zhou Gengsheng, a famous public international law scholar,<sup>51</sup> who mainly argued that Chinese economic strength was not as great as that of the Western powers.<sup>52</sup> 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.<sup>53</sup>

### 3. *Sino-U.S.S.R. Commerce Treaty (1939)*

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 Linsbi 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."<sup>54</sup> 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.<sup>55</sup> 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 exportations other or higher than those paid by nationals of the country or by nationals of any other country.

Strictly speaking, this article is a mixture of national treatment and MFN treatment. *Id.* See also Sino-German Tariff Treaty, Aug. 17, 1928, Germany-ROC, art. 1, in 3 OLD SINO-FOREIGN TREATIES, *supra* note 19, at 630-31; Sino-Norwegian Tariff Treaty, Nov. 12, 1928, Nor.-ROC, art. 1, in 3 OLD SINO-FOREIGN TREATIES, *supra* note 19, at 641-42; Sino-Dutch Tariff Treaty, Dec. 19, 1928, Holland-ROC, art. 1, in 3 OLD SINO-FOREIGN TREATIES, *supra* note 19, at 653-54; Sino-Swedish Tariff Treaty, Dec. 20, 1928, Swed.-ROC, art. 1, in 3 OLD SINO-FOREIGN TREATIES, *supra* note 19, at 668-69; Sino-British Tariff Treaty, Dec. 20, 1928, U.K.-ROC, art. 2, in 3 OLD SINO-FOREIGN TREATIES, *supra* note 19, at 661-62; Sino-French Tariff Treaty, Dec. 22, 1928, Fr.-ROC, art. 2, in 3 OLD SINO-FOREIGN TREATIES, *supra* note 19, at 670-71.

50. Tan Shaohua, *Tan Shaohua Ni Woguo xiang Yingmei Liangguo Tichu Xiuyue zhi Jingguo yu Yuezhong Zhongyao Wenti zhi Tantaoyao* [The History of China's Initiation to Revise Treaties with Britain and the United States and the Discussion of Important Issues in Those Treaties by Tan Shaohua] (May 15, 1934), in 5 (1) HISTORY OF THE ROC, *supra* note 36, at part I, 73, 80, 83 (1994).

51. GENGSHENG ZHOU, GEMING DE WAIJIAO [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 recognize national treatment in treaties).

52. Yu Beijing Zhengfu Tongyi Bikong Chuqi de Dangguo Waijiao [Party-Nation Diplomacy, Breathing Through the Same Nostrils with the Beijing Government], in FLORILEGIUM OF CHINESE MODERN FOREIGN RELATION HISTORY: 1840-1949, Vol II, part 1, at 166-170 (Modern History Unit of the History Department of Fudan University ed., Shanghai People's Publishing House 1977).

53. Tan Shaohua, *supra* note 50.

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.

55. Waijiaobu Duiyu Xinsu Linsbi Tongshang Xieding zhi Yijian [Opinions of the Foreign Ministry on the Interim Commerce Agreement between Xinjiang Province and the U.S.S.R.] (November 4, 1933), in 5 (1) HISTORY OF THE ROC, *supra* note 36, at 1421, 1423.



Soviet Union concluded the Sino-U.S.S.R. Commerce Treaty [*Zhongsu Tongshang Tiaoyue*] that contained a relatively mature and reciprocal national treatment article.<sup>56</sup> 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.<sup>57</sup>

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

### 1. *Sino-U.S. New Treaty and Sino-British New Treaty (1943)*

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,<sup>58</sup> accompanied by the final and complete repeal of consular jurisdiction.<sup>59</sup> During the Second World War, China, as a United States ally,

56. Sino-U.S.S.R. Commerce Treaty, June 16, 1939, ROC-U.S.S.R., in 5 (2) HISTORY OF THE ROC, *supra* note 36, at 275-82.

57. Sino-Belgium and Luxembourg Friendship and Commerce Treaty, Belg.-ROC, art. 13, in OLD SINO-FOREIGN TREATIES, *supra* note 19, at 642-43; Sino-Italian Friendship and Commerce Treaty, Italy-ROC, art. 1, in 3 OLD SINO-FOREIGN TREATIES, *supra* note 19, at 646-47; Sino-Danish Friendship and Commerce Treaty, Den.-ROC, art. 1, in 3 OLD SINO-FOREIGN TREATIES, *supra* note 19, at 649-50; Sino-Portuguese Friendship and Commerce Treaty, Port.-ROC, art. 1, in 3 OLD SINO-FOREIGN TREATIES, *supra* note 19, at 655-56; Sino-Spanish Friendship and Commerce Treaty, Spain-ROC, art. 1, in 3 OLD SINO-FOREIGN TREATIES, *supra* note 19, at 675-76; Sino-Polish Friendship, Commerce and Navigation Treaty, Pol.-ROC, art. 5, in 3 OLD SINO-FOREIGN TREATIES, *supra* note 19, at 719-24; Sino-Greek Friendship and Commerce Treaty, Greece-ROC, art. 3, in 3 OLD SINO-FOREIGN TREATIES, *supra* note 19, at 726-27; Sino-Czechoslovakia Friendship and Commerce Treaty, Czech Rep.-ROC, arts. 7, 12, in 3 OLD SINO-FOREIGN TREATIES, *supra* note 19, at 766-69.

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 Zaibua 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 I, 52; *The Announcement of Repealing some Treaties of the Ministry of Foreign Affairs of the Republic of China* [*Waijiaobu guanyu Feiyue de Xuanyan*] (December 30, 1929), in 5(1) HISTORY OF THE ROC, *supra* note 36, at part I, 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.<sup>60</sup> This proposal received a positive response from the United States.<sup>61</sup> And in 1943, China and the United States signed the Sino-U.S. New Treaty [*Zhongmei Xinyue*].<sup>62</sup> 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:

[e]ach 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.<sup>63</sup>

A similar national treatment article was incorporated in the Sino-British New Treaty [*Zhongying Xinyue*] (1943).<sup>64</sup> With coverage for both nationals [*renmin*] and companies [*gongs*], 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.<sup>65</sup>

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*Application of Chinese Law of All Foreigners in China* [*Guomin Zhengfu Wenguanchu wei Zaibua Wairen Yifu Shiyong Zhongguo Falü zhi Xingzhenyuan Gongban*] (December 30, 1929), in 5(1) HISTORY OF THE ROC, *supra* note 36, at part I, 53. See also ENHAN LI, JINDAI ZHONGGUO WAJIAO SHISHI XINYAN [NEW STUDY OF THE DIPLOMACY HISTORY OF MODERN CHINA] 276-77 (2004).

60. *Telegram of the ROC Foreign Minister on the Discussion of Making a New Treaty to the Secretary of State of the United States, April 29, 1941*, in 3 ZHONGHUA MINGUO ZHONGYAO SHILIAO CHUBIAN: DUIRI KANGZHAN SHIQI [INITIAL COMPILATIONS OF IMPORTANT HISTORY MATERIALS OF THE REPUBLIC OF CHINA: PERIOD OF ANTI-JAPAN WAR], 707 (Qin Xiaoyi ed., 1981) [hereinafter COMPILATIONS OF HISTORY MATERIALS OF THE ROC].

61. *Telegram of Exchange of Notes on Repealing the Unequal Treaty between China and the United States (May 25, 1941)*, in COMPILATIONS OF HISTORY MATERIALS OF THE ROC, *supra* note 60, at 708-10.

62. Treaty Between the United States and China for the Relinquishment of Extraterritorial Rights in China and the Regulation of Related Matters, U.S.-ROC, Jan. 11, 1943 in UNITED STATES RELATIONS WITH CHINA, *supra* note 22, at 514-517.

63. *Id.* at art. 5, 516.

64. See Sino-British New Treaty, ROC-U.K., art. 6, Jan. 11, 1943 in 37 SUPPLEMENT TO AM. J. INT'L L. 57-62 (1943) (English version). The full title of the Sino-British New Treaty is the "Treaty Between Great Britain and China for the Relinquishment of Extraterritorial Rights in China and the Regulation of Related Matters," signed at Chongqing [*Chungking*]; also available in 3 OLD SINO-FOREIGN TREATIES, *supra* note 19, at 1262-1266 (Chinese version).

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, Swe.-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. 5, 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,<sup>66</sup> 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.<sup>67</sup> 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.<sup>68</sup> 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 as part of the price it paid 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.<sup>69</sup> Although China argued that the national treatment articles should be replaced by MFN treatment articles,<sup>70</sup> China had to accept the opinions of the United States and Britain. Thus, national treatment was added to the “New Treaties” in exchange for the abolition of consular jurisdiction.<sup>71</sup>

66. The ROC government led by Jiang Jieshi (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 XIANDAISHI [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).

67. *RiWang Guanyu Jiaobuan Zujie ji Chefei Zhiwai Faquan zhi Xieding* [Treaty on Returning Leased Territories and Repealing Extraterritoriality Right Between Japan and Wang Jingwei Government], Jan. 9, 1943, art. 7, in 2(2) ZHONGGUO JINDAI DUIWAI GUANXISHI ZILIAO XUANJI 1840-1949 [SELECTED MATERIALS OF CHINA'S MODERN FOREIGN RELATION HISTORY 1840-1949] 196-97 (Teaching and Research Group on China's Modern History of the Department of History of Fudan University eds., 1977). Also available in WANGWEI ZHENGQUAN [WANG PUPPET REGIME] 871-72 (The Central Archives of China & The Second Historical Archives of China & Jilin Province Social Academy eds., 2004). It is noteworthy that Japan shifted the planned signature date (January 15, 1943) of the treaty with the Wang Jingwei regime to an earlier date (January 9, 1943) in order to conclude the agreement ahead of the conclusion of the agreement between the United States/Britain and the Jiang Jieshi government with a provisional capital at Chongqing. See Fei, *supra* note 15, at 417.

68. Japan declared its surrender in the middle of August 1945. See *The Imperial Edict on Armistice issued by Japanese then Emperor Hirohito on August 14, 1945*, in RIBEN DIGUO ZHUYI DUIWAI QINLUE SHILIAO XUANBIAN 1931-1945 [COMPILATION OF THE HISTORICAL MATERIALS ON JAPANESE IMPERIALISM AGGRESSION 1931-1945] 549-50 (Japanese History Group of the Department of History of Fudan University eds., trans., 1975).

69. Draft of Sino-U.S. Relation Treaty, art. 5, in COMPILATIONS OF HISTORY MATERIALS OF THE ROC, *supra* note 60, at 716-19; Draft of Sino-British Relation Treaty, art. 6, in COMPILATIONS OF HISTORY MATERIALS OF THE ROC, *supra* note 60, at 752-56.

70. Opinions of the ROC Foreign Ministry on the Draft of the Sino-U.S. Relation Treaty, in COMPILATIONS OF HISTORY MATERIALS OF THE ROC, October 30, 1942, *supra* note 60, at 722-24; Opinions of the ROC Foreign Ministry on the Draft of the Sino-Britain Relation Treaty, December 7, 1942, in COMPILATIONS OF HISTORY MATERIALS OF THE ROC, *supra* note 60, at 768-70.

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" [*jīnlǐ*] as a limit to national treatment,<sup>72</sup> 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.<sup>73</sup> China, however, strongly opposed the inclusion of business in the scope of national treatment<sup>74</sup>—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.<sup>75</sup> 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 Youbao Tongshang Hanghai Tiaoyue*] was concluded<sup>76</sup> 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.<sup>77</sup> 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 treatment article in the 1943 Sino-U.S. New Treaty by granting national treatment to both nationals and corporations of the two contracting parties.<sup>78</sup> The second characteristic of

72. Sino-U.S. New Treaty, U.S.-ROC, art. 5, in 3 OLD SINO-FOREIGN TREATIES, *supra* note 19, at 1256-59; Sino-British New Treaty, ROC-U.K., art. 6, in 3 OLD SINO-FOREIGN TREATIES, *supra* note 19, at 1262-66; 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-Dutch New Treaty, Neth.-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.

73. See Article 5 of the Draft of Sino-U.S. Relation Treaty, *supra* note 69; Article 6 of the Draft of Sino-British Relation Treaty, *supra* note 69.

74. *Id.* at 771.

75. See Letter of Secretary Hull to the Chinese Ambassador (Wei Tao-ming), (January 11, 1943), in UNITED STATES RELATIONS WITH CHINA, *supra* note 22, at 517-18.

76. Treaty of Friendship, Commerce, and Navigation Between the United States of America and the Republic of China, U.S.-ROC, Nov. 4, 1946, in 43 SUPPLEMENT TO AM. J. INT'L L. 27-51 (1947) [hereinafter the Sino-U.S. FCN Treaty]. (The Chinese version can be found in 3 OLD SINO-FOREIGN TREATIES, *supra* note 19, at 1429-51.)

77. *Id.* at arts. 4(2), 9, 13, 16(2), 18(1)(2), 19(3), 24(1).

78. The Sino-U.S. FCN Treaty is the first commercial treaty in which U.S. corporations gained the right to conduct business in other countries on a national treatment basis. See Todd S. Shenkin, *Trade-Related Investment Measures in Bilateral Investment Treaties and the GATT: Moving Toward a Multilateral Investment Treaty*, 55 U. PITT. L. REV. 541, 571 (1994).

the Sino-U.S. FCN Treaty is its general adherence "to the principle of national treatment."<sup>79</sup> 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.<sup>80</sup> 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.<sup>81</sup> 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).<sup>82</sup> 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."<sup>83</sup> In spite of the apprehension, the ROC government accepted the GATT because it recognized that "the advantages exceed the disadvantages."<sup>84</sup> 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,<sup>85</sup> 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

79. Sino-U.S. FCN Treaty, *supra* note 76, art. 3(3).

80. A DIPLOMATIC HISTORY OF CHINA: THE PERIOD OF THE REPUBLIC OF CHINA 1911-1949, 692 (Dongzhi Wu ed., 1990).

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 1353-54; 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.

82. General Agreement on Tariffs and Trade, pmbl., Oct. 30, 1947, T.I.A.S. No. 1700. See also Yang Guohua & Cheng Jin, *The Process of China's Accession to the WTO*, 4(2) J. INT'L ECON. L. 297 (2001).

83. *Guanyu Shijie Maoyi Xianzhang Cao'An ji Guanshui ji Maoyi Zongxieding zhi shuotie* [Introduction of International Trade Charter Draft and the General Agreement on Tariffs and Trade], REPUBLICAN ARCHIVES 40, 41 (Issue No. 2, 2003).

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.<sup>86</sup>

#### 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),<sup>87</sup> established the Government of the People's Republic of China (PRC government) in October 1949. According to the 1949 Common Creed [*Gongtong Gangling*],<sup>88</sup> 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.<sup>89</sup> 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.<sup>90</sup> The CCP's hostile attitude towards the treaties signed by the ROC government was demonstrated in a declaration made by the CCP in 1947.<sup>91</sup> 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).<sup>92</sup> Owing

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 ZHONGGUO GUOMINDANG DANGSHI [CHINESE NATIONALIST PARTY HISTORY] (Chun Song ed., 1990).

88. *The Common Creed*, passed by the First Plenary of the Chinese People's Political Consultancy Conference [*Zhongguo Renmin Zhengzhi Xieshang Huiyi*] on 29 September 1949, in 7 ZHONGGONG DANGSHI CANKAO ZILIAO [REFERENCE MATERIALS ON THE HISTORY OF THE CCP] 17-27 (Teaching and Research Section of the CCP History Office of the China Communist Party School eds., 1980) [hereinafter MATERIALS ON THE HISTORY OF THE CCP].

89. See *id.* art. 55.

90. The 1946 Sino-U.S. FCN Treaty was viewed by the CCP as "a hypocritical smokescreen" and "an utterly unequal treaty." Ping Jiangmei Shangyue [*Comment on Jiangmei Commerce Treaty*], an editorial of the *Liberation Daily* [*Jiefang Ribao*] on 26 November 1946, in 6 MATERIALS ON THE HISTORY OF THE CCP, *supra* note 88, at 190-92 (1979). The United States also considered that the 1946 Sino-U.S. FCN Treaty did not control the relationship between the United States and Mainland China after 1949. See 59 AM. J. INT'L L. 390, 391 (1965).

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.html> (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 Qingzhu Zhongmei Zhongying jian Feichu Bupingdeng Tiaoyue de Jueding* [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.<sup>93</sup> 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,<sup>94</sup> the PRC opposed the United States<sup>95</sup> 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.<sup>96</sup> although some contracting parties of the GATT questioned the legality of Taiwan's withdrawal.<sup>97</sup> 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.<sup>98</sup> This is the so-called policy of "starting all over again" [*lingqi luzao*].<sup>99</sup> 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*].<sup>100</sup> As a result, the number of foreign enterprises in China was sharply reduced, from 1104 in 1949 to sixty-six in 1956.<sup>101</sup>

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.<sup>102</sup> After the establishment of the PRC, China's main trading partners were socialist countries such as the Soviet Union.<sup>103</sup> 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.<sup>104</sup> 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 meirwai*].<sup>105</sup>

93. Yang & Cheng, *supra* note 82, at 298. See also Sylvia A. Rhodes & John H. Jackson, *United States Law and China's WTO Accession Process*, 2(3) J. INT'L ECON. L. 497, 499 (1999).

94. COMPILATIONS OF SINO-U.S. RELATION DOCUMENTS: 1940-1976 83-84 (Hong Kong 70's Monthly, 1977).

95. *Zhengwuyuan guanyu Guanzhi Meiguo zaibua Caiban Dongjie Meiguo zaibua Cunkuan de Mingling* [Decree of the PRC Government Administration Council on Controlling American Properties in China and Freezing American Deposits in China] on Dec. 28, 1950, in 7 MATERIALS ON THE HISTORY OF THE CCP, *supra* note 88, at 118.

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.

99. Zhou Enlai, *Our Foreign Policies and Missions*, in 1 DIPLOMATIC CHRONICLES OF THE PEOPLE'S REPUBLIC OF CHINA, annex 5, 318 (Enfan Song & Jiasong Li eds., 1997).

100. *Id.* at 320.

101. ZHANG HANFU BIOGRAPHY 146-51 (Writing Group of Zhang Hanfu Biography eds., 2003).

102. Common Creed, *supra* note 88, at art. 37.

103. ZHANG ZHENGXIONG, *DUIWAI MAOYI JICHU ZHISHI* [BASIC KNOWLEDGE OF FOREIGN TRADE] 14 (1988).

104. For information on the Sino-Soviet split, see IMMANUEL C. Y. HSÜ, *THE RISE OF MODERN CHINA* 671-87 (6th ed. 2000).

105. GUOJI JINGJIFA ZONGLUN [GENERAL REVIEW OF INTERNATIONAL ECONOMIC LAW] 70-71 (Chen An ed., 1991).

Although the PRC government may disagree, it indeed adopted another round of "closed-door" policy from 1949 to 1978.<sup>106</sup> 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,<sup>107</sup> the 1975 Constitution,<sup>108</sup> and the 1978 Constitution<sup>109</sup>—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.<sup>110</sup> 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" [*gaige kaifang*] policy adopted in the end of 1978.<sup>111</sup> China's relations with the United States were normalized on January 1, 1979.<sup>112</sup> Also in 1979, China promulgated the Sino-Foreign Equity Joint Venture Law [*Zhongwai Hezi Jingying Qiyefa*] to encourage and protect foreign investment in China.<sup>113</sup> 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

106. JOHN KING FAIRBANK, *THE UNITED STATES AND CHINA* 306 (Zhang Lijing trans., 4th ed. 2003).

107. For the 1954 Constitution, see *ZHONGHUA RENMIN GONGHEGUO XIANFA LICI XIUZHENG DUIZHAO 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.

110. In early commerce and shipping treaties with a few socialist countries, national treatment was only applicable in special circumstances (i.e., salvage at sea). See Article 9 of the Commerce and Shipping Treaty between the PRC and the U.S.S.R. (1958), <http://www.gdgs.gov.cn/wto/wto1/d2bf/d2p314.htm>; Article 10 of the Commerce and Shipping Treaty between the PRC and the Democratic Republic of Germany (1960), <http://www.gdgs.gov.cn/wto/wto1/d2bf/d2p316.htm>; Article 10 of the Commerce and Shipping Treaty between the PRC and Albania (1961), <http://www.gdgs.gov.cn/wto/wto1/d2bf/d2p319.htm>; Article 9 of the Commerce and Shipping Treaty between the PRC and the People's Democratic Republic of Korea (1962), <http://www.gdgs.gov.cn/wto/wto1/d2bf/d2p318.htm>; Article 9 of the Commerce and Shipping Treaty between the PRC and the Democratic Republic of Vietnam (1963), <http://www.gdgs.gov.cn/wto/wto1/d2bf/d2p312.htm>.

111. *Communiqué of the Third Plenum of the Eleventh Central Committee of the CCP, Dec. 22, 1978*, 1 SHIYIJI SANZHONG QUANHUI YILAI ZHONGYAO WENXIAN XUANDU [SELECTIONS OF IMPORTANT DOCUMENTS SINCE THE THIRD PLENUM OF THE ELEVENTH CENTRAL COMMITTEE OF THE CCP] 1-14 (Document Study Office of the Central Committee of the CCP ed., 1987).

112. Joint Communiqué on Establishment of Diplomatic Relations between the United States of America and the People's Republic of China, (Dec. 15, 1978), 18 I.L.M. 272 (1979).

113. Sino-Foreign Equity Joint Venture Law (promulgated by the Standing Comm. Nat'l People's Cong., July 1, 1979, effective July 1, 1979), 1985 Falü Huibian 168-71 (P.R.C.), available at, <http://www.chinajnbook.com/business/sfejv.htm>. Amended in 1990 and 2001, Falü Huibian 2001, at 58-62 (People's Publishing House 2002).



Civil Procedure Law promulgated in 1982<sup>114</sup> that stated that foreigners should have the same litigation rights and obligations as Chinese citizens.<sup>115</sup> Yet foreign enterprises and institutions should have the litigation rights provided by the Interim Civil Procedure Law.<sup>116</sup> 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<sup>117</sup> that allowed foreigners and foreign enterprises to invest in the territory of China and provided legal protection to both foreign individuals and enterprises.<sup>118</sup> From then on, national treatment got a new lease on life in China.

In 1989, China promulgated the Administrative Procedure Law.<sup>119</sup> Paragraph 1 of article 71 of the Administrative Procedure Law states that “[f]oreigners, 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.<sup>120</sup> In addition to the above national treatment concerning procedural rights, some Chinese substantive laws also apply to foreigners in the territory of China,<sup>121</sup> 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.<sup>122</sup> Article 6 of the Foreign Trade Law states that

114. Interim Civil Procedure Law (promulgated by the Standing Comm. Nat’l People’s Cong., Mar. 8, 1982, effective Oct. 1, 1982) 1982 Falü Huibian 283-324 (P.R.C.). However, some scholars argue that article 12 of the Invention Encouragement Regulation [*Faming Jiangli Tiaoli*], issued by the State Council on December 28, 1978 (*Guofa* No. 279, 1978, revised in 1984, 1993, repealed in 1999), available at <http://www.gdstc.gov.cn/zhengce/three1.htm>, was a national treatment article, which provided that foreigners could apply for an invention and be awarded in China. See PRIVATE INTERNATIONAL LAW 107 (Han Depei et al. eds., Wuhan Univ. Press rev. ed. 1989).

115. Interim Civil Procedure Law, *supra* note 114, art. 186, ¶ 1.

116. *Id.* art. 186, ¶ 2.

117. XIANFA [CONSTITUTION], (1982) (P.R.C.), in *supra* note 107.

118. *Id.* arts. 18, 32.

119. Administrative Procedure Law (promulgated by the Standing Comm. Nat’l People’s Congress., Apr. 4, 1989, effective Oct. 1, 1990) 1989 Falü Huibian 23-39 (People’s Publishing House 1990).

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 STANDING COMM. NAT’L PEOPLE’S CONG. GAZ. 82-105 (P.R.C.).

121. See, e.g., General Principle of Civil Law of the People’s Republic of China, art. 8 (promulgated by the Standing Comm. Nat’l People’s Cong., Apr. 12, 1986, effective Jan. 1, 1987) 1987 Falü Huibian 24-56 (P.R.C.); Corporation Law of the People’s Republic of China, art. 18 (promulgated by the Standing Comm. Nat’l People’s Cong. Dec. 29, 1993, effective July 1, 1994) 2004 Standing Comm. Nat’l People’s Cong. Gaz 485-506 (P.R.C.).

122. Foreign Trade Law of the People’s Republic of China (promulgated by the Standing Comm. Nat’l People’s Cong. May 12, 1994, effective July 1, 1994) 1994 STANDING COMM. NAT’L PEOPLE’S CONG. GAZ. 423-29 (P.R.C.); Foreign Trade Law of the People’s Republic of China (promulgated by the Standing Comm. Nat’l People’s Congress, Apr. 6, 2004, effective July 1, 2004) 2004 STANDING COMM. NAT’L PEOPLE’S CONG. GAZ. 247-53 (P.R.C.).

[t]he 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

[w]ith 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.<sup>123</sup>

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.<sup>124</sup> 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<sup>125</sup> was a national treatment article, despite lacking the term "national treatment" or other symbolic words such as "no less than" or "the same."<sup>126</sup> On March 19, 1985, China became a member of the Paris Convention for the Protection of Industrial Property (Paris Convention).<sup>127</sup> 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.

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.

127. For the Paris Convention, see [http://www.wipo.int/treaties/en/ip/paris/trtdocs\\_wo020.html](http://www.wipo.int/treaties/en/ip/paris/trtdocs_wo020.html). For the Chinese version of the Paris Convention, see 1 ZHONGHUA RENMIN GONGHEGUO DUOBIAN TIAOYUE JI [COLLECTION OF THE MULTILATERAL TREATIES OF THE PEOPLE'S REPUBLIC OF CHINA] 10-41 (The Department of Treaty and Law of the Ministry of Foreign Affairs of the PRC ed., 1987).

### 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 beli daiyu*] and MFN treatment.<sup>128</sup> In contrast to the U.S. BITs launched at the end of the 1970s,<sup>129</sup> which included a model text containing a standard national treatment clause,<sup>130</sup> 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.<sup>131</sup> Of these 110 BITs, national treatment clauses appear in at least twenty-seven BITs. The twenty-seven BITs are shown in the following table:<sup>132</sup>

### 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.<sup>133</sup>

The decision of China's WTO accession was made by a consensus at the Doha Ministerial Conference on November 10, 2001.<sup>134</sup> 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

128. Li Shishi, *Lun Zhongguo Dijie de Shuangbian Touzi Baobu Xieding* [On Bilateral Investment Protection Treaties Entered by China with Other Countries], 1990 CHINESE Y.B. INT'L L. 109, 115-16 (China 1991). See also Chen Xuebin, *Towards Post-establishment National Treatment of Foreign Investment Enterprises in China—From BITs to TRIMs*, in *THE WTO AND THE DOHA ROUND: THE CHANGING FACE OF WORLD TRADE* 187, 189 (Ross P. Buckley ed., 2003).

129. Kenneth J. Vandeveld, *U.S. Bilateral Investment Treaties: The Second Wave*, 14 MICH. J. INT'L L. 621, 624 (1993).

130. 1984 Revised United States Model Bilateral Investment Treaty, art II, sec. 1, in 1 BASIC DOCUMENTS OF INTERNATIONAL ECONOMIC LAW 657 (Stephen Zamora & Ronald A. Brand, eds, 1990).

131. Chinese BIT Statistics, <http://search.mofcom.gov.cn/site/siteSearch.jsp/ac=d&no> (last visited Sept. 12, 2005). This website provides the official statistics regarding BITs as of December, 2003 (i.e., 106 BITs). According to the author's statistics, from January 2004 to June 2005, China signed four BITs. Therefore, the number of China's BITs is up to 110.

132. National Treatment Clauses in China's Twenty-seven BITs, <http://tfs.mofcom.gov.cn/column/chinawto.xml> (last visited Sept. 12, 2005).

133. In December 1995, China applied for accession to the WTO according to Article XII of the WTO Agreement. Communication from China, WT/ACC/CHN/1 (Dec. 7, 1995).

134. Accession of the People's Republic of China, WT/L/432 (Nov. 23, 2001).

Table. National Treatment Clauses in Chinas Twenty-seven BITs

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

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.<sup>135</sup>

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.<sup>136</sup> 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,<sup>137</sup> 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.<sup>138</sup>

## 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 [*banzhimindi*] 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 Vandeveld, *supra* note 129, at 661.

137. ZENG HUAQUN, LIN ZHONG & XU CHONGLI, GUOJI TOUZI FAXUE [INTERNATIONAL INVESTMENT LAW] 432-35 (Zheng Huaqun ed., 1999).

138. George Schwarzenberger, *The Most-Favoured-National Standard in British State Practice*, 1945 BRIT. Y.B. INT'L L. 96, 99, 119. See also NEUFELD, *supra* note 2.

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.

## Statement of Ownership, Management and Circulation

(Act of August 12, 1970: Section 3685, Title 39, United States Code)

1. Title of publication: *International Lawyer* (ISSN: 0020-7810). 2. Publication number: 581-860. 3. Date of filing: 10-01-05. 4. Issue frequency: Quarterly. 5. Number of issues published annually: Four. 6. Annual subscription price: \$12.00. 7. Complete mailing address of known office of publication: 321 North Clark Street, Chicago, Cook County, IL 60610-4714. 8. Complete mailing address of headquarters or general business office of publisher: 321 North Clark Street, Chicago, IL 60610-4714. 9. Full names and complete mailing addresses of publisher, editor, and managing editor: Publisher: American Bar Association, 321 North Clark Street, Chicago, IL 60610-4714; Editor: Christine M. Szaj, SMU Dedman School of Law, P.O. Box 750116, Dallas, TX 75275; Managing Editor: None. 10. Owner: American Bar Association, 321 North Clark Street, Chicago, IL 60610-4714. 11. Known bondholders, mortgagees, and other security holders owning or holding 1 percent or more of the total amount of bonds, mortgages or other securities (if there are none, so state): None. 12. Not applicable. 13. Publication title: *International Lawyer*. 14. Issue date for circulation data below: Spring 2005, 39:1. 15. Extent and nature of circulation. A. Total no. copies printed (net press run): Average no. copies each issue during preceding 12 months: 13,460; No. copies of single issue published nearest to filing date: 12,985. B. Paid and/or requested circulation: 1. Paid/requested outside-county mail subscriptions: Average no. copies each issue during preceding 12 months: 9,660; No. copies of single issue published nearest to filing date: 8,159. 2. Paid in-county subscriptions: Average no. copies each issue during preceding 12 months: 0; No. copies of single issue published nearest to filing date: 0. 3. Sales through dealers and carriers, street vendors, counter sales, and other non-USPS paid distribution: Average no. of copies each issue during preceding 12 months: 0; No. copies of single issue published nearest to filing date: 0. 4. Other classes mailed through the USPS: Average no. of copies each issue during preceding 12 months: 0; No. copies of single issue published nearest to filing date: 0. C. Total paid and/or requested circulation (sum of 15b(1), (2), (3), and (4)): Average no. of copies each issue during preceding 12 months: 9,660; No. copies of single issue published nearest to filing date: 8,159. D. Free distribution by mail (samples, complimentary, and other free): 1. Outside-county: Average no. of copies each issue during preceding 12 months: 1,199; No. copies of single issue published nearest to filing date: 2,259. 2. In-county: Average no. of copies each issue during preceding 12 months: 0; No. copies of single issue published nearest to filing date: 0. 3. Other classes mailed through the USPS: Average no. of copies each issue during preceding 12 months: 0; No. copies of single issue published nearest to filing date: 0. E. Free distribution outside the mail (carriers or other means): Average no. of copies of each issue during preceding 12 months: 0; No. copies of single issue published nearest to filing date: 0. F. Total free distribution (sum of 15d and 15e): Average no. copies of each issue during preceding 12 months: 1,199; No. copies of single issue published nearest to filing date: 2,259. G. Total distribution (sum of 15c and 15f): Average no. of copies of each issue during preceding 12 months: 10,859; No. copies of single issue published nearest to filing date: 10,418. H. Copies not distributed: Average no. of copies each issue during preceding 12 months: 2,601; No. copies of single issue published nearest to filing date: 2,567. I. Total (sum of 15g and 15h): Average no. copies each issue during preceding 12 months: 13,460; No. copies of single issue published nearest to filing date: 12,985. J. Percent paid and/or requested circulation: Average no. of copies each issue during preceding 12 months: 88%; No. copies of single issue published nearest to filing date: 78%.

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