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China MFN: A Reaffirmation of Tradition or Regulatory Reform?

Gretchen Harders-Chen*

In 1980, China began its bid to reenter the General Agreement on Tariffs and Trade (GATT)¹ and the World Trade Organization (WTO).² China then promulgated many new trade regulations³ in an attempt to meet GATT criticisms concerning the lack of transparency in its trade laws.⁴ On May 12, 1994 China enacted its most notable response to GATT criticism: the Foreign Trade Law.⁵

China's Foreign Trade Law sets forth general principles of trade. Article 6 grants most-favored-nation (MFN) treatment to certain foreign nations.⁶ The most-favored-nation principle of

* The author would like to thank Austin Chen and Bin Zhao for their input in the translation of Chinese language materials referenced herein.

1. General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. pts. 5, 6, T.I.A.S. No. 1700, 55 U.N.T.S. 187 [hereinafter GATT].

2. The World Trade Organization Agreement was signed at Marrakesh on April 15, 1994. Agreement Establishing the World Trade Organization, Doc. MTN/FA, Part II, pp. 1-14, of Dec. 15, 1993; *reprinted in* WORLD TRADE ORGANIZATION, THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 5 (1995); 33 I.L.M. 13 [hereinafter WTO Agreement].

3. Since 1978, China has implemented economic reform policies complemented by a vigorous effort at legal reform. PITMAN B. POTTER, FOREIGN BUSINESS LAW IN CHINA: PAST PROGRESS AND FUTURE CHALLENGES 3 (1995). Chinese efforts to enter GATT have given rise to additional reforms. *Id.*

4. HAROLD K. JACOBSON & MICHEL OKSENBERG, CHINA'S PARTICIPATION IN THE IMF, THE WORLD BANK AND GATT: TOWARD A GLOBAL ECONOMIC ORDER 90-92 (1990).

5. Foreign Trade Law of the Peoples' Republic of China, Act of May 12, 1994, 8 CHINA L. & PRAC. 20, 20 (1994) (hereinafter Foreign Trade Law).

6. "The Peoples' Republic of China grants Most Favored Nation treatment or national treatment in the field of foreign trade to opposite concluding or acceding parties in accordance with international treaties or agreements concluded or acceded to, or on the basis of the principles of mutual benefit and reciprocity." *Id.* at art. 6.

This Note addresses several permutations of MFN. China MFN refers specifically to the MFN provision of Article 6 of China's Foreign Trade Law; GATT MFN references GATT, Article I:1. The U.S. extension of MFN to China arises under The Jackson-Vansk Agreement. MFN generally appears in reference to a treaty clause, although MFN as a broader principle is frequently discussed.

non-discrimination in trade is the cornerstone of the GATT.⁷ By adopting a most-favored-nation clause during its bid to enter the GATT, China appears to demonstrate the compliance required for successful reentry.⁸

The MFN principle adopted by China, however, does not simply reflect the GATT understanding of non-discrimination.⁹ China's interpretation of MFN must be examined in the context of the history of MFN in China, the recent debate between the United States and China over China's MFN status, and the changing role of law in Chinese economic reforms. China's interpretation of MFN will affect the enforcement of GATT principles if China becomes a member of the WTO.

In analyzing China's MFN clause, this Note interprets the historical meaning of MFN in China. Part I addresses the implicit usage of MFN in China during the tribute system, which was in place from 1368 to 1912. Part II considers the effect of explicit MFN adoption in the unequal treaties of 1843 to 1923. Part III discusses China's continued use of MFN from 1923 to 1970 in politics and treaties. Part IV outlines China's adoption of MFN in its Foreign Trade Law of May 12, 1994. Part V discusses the implications China's history may have on China's modern day interpretation of MFN and GATT/WTO membership.

This Note concludes that adoption of an MFN principle by China appears to be a genuine political effort to comply with the

7. SENATE COMM. ON FINANCE, SUBCOMM. ON INT'L TRADE, EXECUTIVE BRANCH GATT STUDY NO. 9: THE MOST-FAVORED-NATION PROVISION, 93d Cong., 1st Sess. 133 (Comm. Print 1973) [hereinafter EXECUTIVE BRANCH GATT STUDIES].

8. Xiao Wang, *Trade Law Meets International Standards*, BUS. WKLY. (CHINA DAILY SUPP.), Aug. 15, 1994, at 1.

9. The MFN principle as currently applied in GATT developed primarily from European history.

The concept embodied in the MFN clause has been traced to the 12th century, although the phrase "most-favored-nation" did not appear until the end of the 17th century. The emergence of the MFN provision is largely attributable to the growth of world commerce in the 15th and 16th centuries. At that time England and Holland were competing with Spain and Portugal, and the French and the Scandinavians were challenging the Hanseatic League and the Italian Republics. Each country, seeking maximum advantage for its trade, found itself [compelled to grant concessions in return. The role of the MFN provision] was to link commercial treaties through time and between states. At first the MFN provision applied to concessions granted only to specified states, but gradually the clause became generalized to apply to concessions granted to all countries.

EXECUTIVE BRANCH GATT STUDY, *supra* note 7, at 133-35.

GATT. Nevertheless, adoption of MFN must be analyzed in the context of Chinese history, the prior usage of MFN in Chinese treaties, Chinese traditions of foreign policy and the domestic debate in China over GATT membership. These factors indicate that in construing the requirements imposed by GATT/WTO membership China will most likely apply MFN according to its unique perspective on foreign relations.

I. HISTORY AND APPLICATION OF THE MOST-FAVORED-NATION PRINCIPLE IN CHINA: THE TRIBUTE SYSTEM (1362-1912)

The concept of MFN has historical significance in China dating back several hundred years.¹⁰ From the Chinese Ming dynasty (1368-1644) through the Manchu Qing dynasty (1644-1912), Chinese foreign relations were based upon the tribute system.¹¹ The tribute system combined trade and military defense into one system of foreign relations.¹² Countries located beyond China's political frontier dispatched tribute bearing missions to Peking and, in return, these missions received patents of office for foreign rulers as tributaries to China's emperor.¹³ Between 1662 and 1911, over five hundred tribute missions arrived at Peking from sixty-two different countries.¹⁴ The tribute system acted as a boundary between the barbarian world and Confucian China,¹⁵ and as a vehicle for foreign relations.¹⁶

10. 1 JOHN KING FAIRBANK, *TRADE AND DIPLOMACY ON THE CHINA COAST, THE OPENING OF THE TREATY PORTS 1842-1854*, 198-99 (1953).

11. MARK MANCALL, *CHINA AT THE CENTER: 300 YEARS OF FOREIGN POLICY* 13 (1984).

China developed a system for the conduct of its foreign relations that was the institutional expression of its social ideology, on the one hand, and, on the other, the direct reflection and consequence of the political and economic needs of Chinese society and the technological level that that society has reached. This system, which evolved through the centuries, reached its classical form in the Ming and Qing dynasties. The so-called tribute system functioned and functioned well, until the middle of the nineteenth century, when economic, social, technological, and ideological changes in the world outside China reached a point where the system had to give way before them.

Id. at 12.

12. *Id.* at 15.

13. *Id.*

14. *Id.*

15. *Id.* at 15-16. While borders would shift as the outside world impinged upon China, the fluctuations were due to the dynasty's loss of the mandate of heaven, not China's view of itself as the central kingdom. *Id.*

16. FAIRBANK, *supra* note 10, at 30.

The tribute system embodied Chinese and Confucian concepts and summarized patterns of behavior long practiced in Chinese civilization.¹⁷ "[T]he tribute system was a total system for the conduct of *all* international relations. The intermeshing of China and the surrounding communities took place on several levels: ideological, ritual and economic."¹⁸ China viewed itself as superior, not just materially, but culturally.¹⁹ Barbarians could come to appreciate the superiority of the Chinese culture if they recognized the unique position of China as the central kingdom exercising the mandate of heaven.²⁰ The tribute system illustrates China's traditional view of foreign relations:

Neither China nor Chinese civilization existed from the Confucian point of view. There was only civilization and barbarism, which were conceptually related in that they defined each other. Civilization was 'an empire without neighbors.' In this sense the Chinese state was not a state in the conventional Western mold; rather, it was the administration of civilized society *in toto*. . . .²¹

Thus, traditional Chinese foreign relations did not fully recognize foreign countries as sovereigns.

Tribute took place through ceremonial rituals established by the Chinese government.²² Once a country paid tribute, China allowed it the opportunity for trade.²³ The tributary country gave objects of value to Peking, while Peking gave gifts in exchange which served to subsidize the costs of the mission.²⁴ Tribute missions included merchants who brought goods that could be sold at the frontier or transported duty free to the capital where they would be sold at a special market closely super-

17. A summary of the tribute system may be found in MANCALL, *supra* note 11, at 13-39.

18. *Id.* at 20.

19. FAIRBANK, *supra* note 10, at 26.

20. *Id.* at 27. China (Zhongguo [中国]), means literally central kingdom. The Emperor calls himself the Son of Heaven (tianzi [天子]), and tianxia [天下] describes China as the land below Heaven.

21. MANCALL, *supra* note 11, at 22 (quoting Vadime Elisseeff, 42 *DIOGENES* 60-64 (Summer, 1963)).

22. *Id.* at 27. The tributary missions were regulated as to size and lodging, and they were under constant surveillance. FAIRBANK, *supra* note 10, at 28-29. The tributary missions underwent court ceremonies that involved an exchange of courtesies; the Chinese rulers provided numerous banquets and the foreign participants performed kowtow, kneeling and bowing their heads to the ground. *Id.* at 29. This served to confirm China's superior status and acknowledged the universal order of Confucian ideology. *Id.*

23. MANCALL, *supra* note 11, at 32.

24. *Id.* at 41.

vised by Chinese authorities.²⁵ Trade outside of the official market was strictly prohibited.²⁶

During the Ming dynasty, the tributary relationships were supervised under the Board of Rites, which maintained the correct implementation of rituals central to Chinese social practice.²⁷ The Manchu Qing dynasty altered this system by establishing the Li-fan Yuan, properly translated as the Barbarian Control Office.²⁸ Under both systems, the tributary mission itself involved an economic exchange. Tribute did away with conflict and allowed trade to take place with the tributary country. In this sense, tribute was a sanction for commercial activity.²⁹

It is important to note that trade in the tribute system was always connected with politics. "[W]hile both the presentation of tribute and the exchange of goods in the marketplace appeared voluntary, in reality they were distinctly obligatory for each side, under the sanction of warfare or natural disaster."³⁰ Because China's tradition of haggling occasionally erupted in wider conflict, tribute was often used to reduce tensions.³¹ "To misread tribute as a cover for trade and to understand trade as a purely commercial activity is to distort the nature of the traditional institutions of the sinocentric international order."³²

Though China did not view its neighbors as separate nations, China developed diverse economic and diplomatic relations with its neighbors. "The tribute system was a bilateral, never a multilateral, relationship, in which one partner was always the ruler of China."³³ Though Confucian China viewed trade as subordinate to tribute, foreign trade grew within the

25. FAIRBANK, *supra* note 10, at 32.

26. *Id.*

27. MANCALL, *supra* note 11, at 16-17.

28. *Id.* at 17. This institution performed the same rituals as the traditional Chinese system. *Id.* Xinjiang, Tibet and Mongolia were included under the Li-fan Yuan, rather than the Board of Rites. *Id.* While the Ming dynasty was formed under the difference between China and non-China, the Manchu view was more complex. *Id.* at 18. The societies of the East, Southeast and South Asia were governed under the Board of Rites, while the northern crescent was governed under the Li-fan Yuan. *Id.* at 17-19.

29. *Id.* at 42. Though Russia did not present tribute to China, China chose to assume that the Russian individuals who did present tribute were envoys from the Russian court. *Id.*

30. *Id.* at 43.

31. *Id.* at 43-44.

32. *Id.* at 44.

33. *Id.* at 23.

ancient tributary framework, especially maritime trade.³⁴ China traded with Portugal through Macao, Britain through Canton, the Koreans on the Korean border and the Russians at Kyakhta.³⁵ China also traded discretely with caravans that travelled along established routes to Peking that did not seem to compete with each other.³⁶

Two conflicting views of bilateral trading relationships arise from the tribute system. On the one hand, China treated all barbarians alike. "The most-favored-nation clause had its origin partly in the Confucian monarch's inveterate benevolence to all barbarians alike, the better to use them against one another."³⁷ This supports the idea of non-discrimination. For example, tax and tribute were functionally and economically indistinguishable in China's pre-modern economy.³⁸ China did not need to distinguish between countries paying tribute to grant trading privileges.

On the other hand, China had a tradition of "using the barbarian to control the barbarian."³⁹ China created tensions between inferior members of the hierarchy without endangering the hierarchy itself.⁴⁰ Unequal treatment furthered the aims of maintaining the supremacy of Chinese civilization. The tribute system ideologically embodied the inherent contradictions of

34. FAIRBANK, *supra* note 10, at 33-38.

35. MANCALL, *supra* note 11, at 54-55.

36. *Id.* at 55. The trade included gift trade in the form of tribute-gift exchange, market trade that did not appear until Western nations competed with each other at Canton and the main type, administered trade. *Id.* Administered trade required trading with a fixed entity and developed on the ports. *Id.* at 55-56. While ports of trade were generally the product of universal experience, China articulated this institution within its traditional pattern of commercial behavior. *Id.* at 56-57. The licensed traders at Kyakhta, the designated "hong merchants" of Canton, and the caravan merchants of Inner Asia officially recognized for trade at Peking were all participants in an administered trade within the context of a pre-market economy. *Id.* at 57-59.

37. FAIRBANK, *supra* note 10, at 466. The relationship between the barbarian and emperor was reciprocal. *Id.* at 27. The emperor functioned by being compassionate and generous and the humble submission of the foreigner appropriately responded to imperial virtue. *Id.* at 27-28. "His 'tender cherishing of men from afar' (huai-jou yuan-jen) is one of the cliches in all documents on foreign relations." *Id.* at 27.

38. MANCALL, *supra* note 11, at 60.

39. *Id.* at 32. This policy was used to defend a weak dynasty through diplomatic maneuvers. *Id.*

40. *Id.* at 32. The distribution of gifts was a kind of protection money intended to buy off potential barbarian predators. *Id.*

equal treatment and strategic unequal treatment to barbarians.⁴¹

Unequal or non-reciprocal treatment in trade policy dates back to the tribute system. The countries tributary to China offered tribute not simply in exchange for trade, but also under the sanction of war.⁴² Tribute was used to ease tensions and China was generally recognized as superior to its tributary countries.

The development of MFN in Europe has a different historical context. MFN first appeared in European treaties in the seventeenth century as a tool for dealing between different sovereigns and proved to be effective in trade conflicts between multiple sovereigns.⁴³

The Chinese tribute system, in contrast, relied on different assumptions of sovereignty. The concept of multiple sovereign nations did not exist under the tribute system where China was the superior party in bilateral relationships. The tributary country deferred politically to China.⁴⁴ Thus, the European recognition of separate sovereigns underlying the most-favored-nation clause is not reflected in Chinese history.

Under the tribute system, the moral value of tribute was important to China's rulers, whereas the material value of trade was important to the barbarians.⁴⁵ China was therefore unprepared to accommodate the changes of trade brought about by maritime relations. Even at the designated trading ports, the bilateral negotiation was predicated on paying tribute in some form.⁴⁶ The complexities of Chinese negotiation under the tribute system mirror some aspects of negotiation between multiple sovereigns, but it did not extend beyond the basic assumption that Chinese administration encompassed civilized society and could not bend to other institutional structures.

41. This illustrates the complexity and sophistication of Chinese civilization under the tribute system. While the emperor treated the barbarians with benevolence, the emperor also used the barbarians against one another to prevent attacks against China's dynasty. *Id.* at 23, 32.

42. FAIRBANK, *supra* note 10, at 24.

43. See EXECUTIVE BRANCH GATT STUDY, *supra* note 7; JOHN JACKSON, *WORLD TRADE AND THE LAW OF GATT* 249-50 (1969).

44. See *supra* notes 17-21 and accompanying text.

45. FAIRBANK, *supra* note 10, at 33.

46. See *supra* notes 33-36 and accompanying text.

II. EXPLICIT ADOPTION OF THE MFN PRINCIPLE IN CHINA: THE UNEQUAL TREATIES (1843-1923)

The nineteenth century brought significant changes to the tribute system. Under the tribute system, China was primarily a redistributive internal economy and entered bilateral contract-like relationships in trade,⁴⁷ until the Europeans presented themselves at the China coast.

The tribute system could be modified and stretched as an intermeshing mechanism but only to a point; beyond that point its destruction was implicit in any further adjustment to the institutional peculiarities of the non-Chinese partner. This point of tension was reached when economic institutional expectations of the English in the nineteenth century passed beyond the ability of the tribute system to mediate between English concepts of free trade and traditional Chinese concepts of the proper economic organization of the universe.⁴⁸

Though trade had developed at Canton with the British under the tributary system, the system at Canton began to break down with corruption of Chinese officials, corruption of private traders and a flourishing opium trade.⁴⁹ These factors, combined with the differences between Chinese and British trade policies, led to war in the middle of the nineteenth century.⁵⁰ After China lost the First Opium War (1839-1842), the tribute system gave way to the treaty system.⁵¹

On October 8, 1843, China and Britain signed the "Supplementary Treaty" to set up a system of treaty law at Canton.⁵²

[The British] objectives were simple: to give the British merchant access to a free market and to protect him by law in his exploitation of it. . . . It was equally important that trade should be free to expand within agreed limits and that the law should expand with it to see that it remained free.⁵³

The victory won by Britain was expanded multilaterally under "the neatest diplomatic device of the century,"⁵⁴ the most-favored-nation clause.

47. MANCALL, *supra* note 11, at 55.

48. *Id.* at 44.

49. FAIRBANK, *supra* note 10, at 57. The opium trade arose out of the disparities of increasing Chinese exports of tea and silk and no equivalent British commodity. *Id.* at 59-60.

50. MANCALL, *supra* note 11, at 44. "One fundamental cause of the crisis at Canton after 1834, and so of the first Anglo-Chinese war in 1840-42, was the expansion of trade beyond the limits of the ancient Canton system of regulation." FAIRBANK, *supra* note 10, at 65.

51. MANCALL, *supra* note 11, at 118.

52. FAIRBANK, *supra* note 10, at 104.

53. *Id.*

54. JOHN KING FAIRBANK, *THE UNITED STATES AND CHINA* 169 (1983).

MFN first appeared explicitly in the Supplementary Treaty of October 8, 1843 to the Nanking Treaty with Britain.⁵⁵ Article VIII of the Supplementary Treaty sets forth the first MFN clause in China: ". . . [I]t is further agreed, that should the Emperor hereafter, from any cause whatever, be pleased to grant additional privileges or immunities to any of the subjects or Citizens of such Foreign Countries, the same privileges and immunities will be extended to and enjoyed by British Subjects; but it is to be understood that demands or requests are not, on this plea, to be unnecessarily brought forward."⁵⁶ Any privilege or immunity granted to other foreign nations were to be extended automatically to Great Britain. In other words, Great Britain obtained unconditional MFN status. Though this first treaty does not use the term MFN specifically, MFN appears in subsequent treaties with Great Britain.⁵⁷ MFN also appeared in China's treaties with the United States and France in 1844.⁵⁸

55. Supplementary Treaty, Oct. 8, 1843, Gr. Brit.-China, *reprinted in 1 TREATIES, CONVENTIONS, ETC. BETWEEN CHINA AND FOREIGN STATES* 390 (2d ed. 1917) [hereinafter 1 CHINA TREATIES].

56. *Id.* at 393, art. VIII.

57. See Treaty of Tientsin, June 26, 1858, Gr. Brit.-China, art. LIV, *reprinted in 1 CHINA TREATIES, supra* note 55, at 404, 419:

The British Government and its subjects are hereby confirmed in all privileges, immunities, and advantages conferred on them by previous Treaties; and it is hereby expressly stipulated that the British Government and its subjects will be allowed free and equal participation in all privileges, immunities, and advantages that may have been or may be hereafter granted by his Majesty the Emperor of China to the Government or subjects of any other nation.

See also Supplementary Convention To The Treaty of Commerce and Navigation, Oct. 3, 1869, Gr. Brit.-China, art. II, *reprinted in 1 CHINA TREATIES, supra* note 55, at 478, 479 ("The Consuls so appointed shall respectively be entitled to the treatment accorded to the most favoured nation."); Commercial Treaty, Sept. 5, 1902, Gr. Brit.-China, sec. 14, *reprinted in 1 CHINA TREATIES, supra* note 55, 543, 554 ("The condition on which the Chinese Government enter into the present engagement is that all Powers entitled to most favoured nation treatment in China enter into the same engagements as Great Britain with regard to the payment of surtaxes and other obligations. . . .").

58. See Treaty of Wang-Hea, July 3, 1844, U.S.-China, art. II, *reprinted in 1 CHINA TREATIES, supra* note 55, at 677:

Citizens of the United States resorting to China for the purpose of commerce will pay the duties of import and export prescribed by the Tariff which is fixed by and made a part of this Treaty. They shall in no case be subject to other or higher duties than are or shall be required of the people of any other nation whatever.

See Treaty of Whampoa, 1844, Fr.-China, art. VI, *reprinted in 1 CHINA TREATIES, supra* note 55, at 771, 774:

À l'égard du Tarif, aussi bien que pour toute stipulation introduite ou à introduire dans les Traités existants ou qui seraient ultérieurement conclus, il demeure bien et dûment établi que les négociants, et, en

These treaties set forth the system known as the "unequal treaties."⁵⁹ The main features of the treaties were Chinese grants of extraterritoriality and the establishment of a treaty tariff.⁶⁰ Extraterritorial provisions created areas in China which were governed by foreign law and policed by foreign military.⁶¹

Peking was now required to establish a treaty tariff [that was fixed by foreign powers] on all imported goods, which meant the imposition of free trade theories that were the core of the expanding capitalist world-economic system. This regulation, in turn, was reinforced by the treaty prohibition against the organization of trade on the Chinese side.⁶²

China did not receive any equivalent grant of MFN from Great Britain.⁶³ Hence, the unequal treaties required China to impose tariffs fixed by treaty obligations without any equivalent tariff concessions. These tariff obligations were automatically extended multilaterally through the MFN obligation in direct contravention of China's history under the tribute system of negotiating tariffs through limited bilateral agreements at designated ports of trade or the custom of taxation by tribute.⁶⁴

Foreign powers rushed to obtain the advantages of the unequal treaties. MFN was granted in bilateral treaties between China and the United States,⁶⁵ Russia,⁶⁶ Belgium,⁶⁷ Sweden,⁶⁸

général, tous les citoyens français en Chine, auront droit, toujours et partout, au traitement de la nation la plus favorisée.

See also Treaty of Tientsin, June 27, 1858, Fr.-China, art. LV, reprinted in 1 CHINA TREATIES, *supra* note 55, at 814, 834.

59. MANCALL, *supra* note 11, at 118. The term "unequal treaties" first formally appeared in the Kuomintang Manifesto. Charlotte Ku, *Abolition of China's Unequal Treaties and the Search for Regional Stability in Asia, 1919-1943*, 12 CHINESE Y.B. OF INT'L L. AND AFF. 67, 80 (1992-94); LI CHIEN-NUNG, *THE POLITICAL HISTORY OF CHINA 1840-1928*, 447 (1956).

60. FAIRBANK, *supra* note 54, at 167-69.

61. MANCALL, *supra* note 11, at 119. The MFN clause extended this privilege automatically to nationals of any other country maintaining a treaty with China. *Id.*

62. *Id.*

63. See 1 CHINA TREATIES, *supra* note 55; Treaty of Tientsin, *supra* note 57; Supplementary Convention to the Treaty of Navigation and Commerce, *supra* note 57; Commercial Treaty, *supra* note 57.

64. See notes 34-38 and accompanying text.

65. Treaty of Tientsin, Dec. 21, 1858, U.S.-China, art. XXX, reprinted in 1 CHINA TREATIES, *supra* note 55, at 713, 726:

The contracting parties hereby agree that should at any time the Ta-Tsing Empire grant to any nation, or the merchants or citizens of any nations, any right, privilege, or favour connected either with navigation, commerce, political or other intercourse which is not conferred by this Treaty, such right, privilege, and favour shall at once freely enure

Germany,⁶⁹ Portugal,⁷⁰ Denmark,⁷¹ the Netherlands,⁷² Spain,⁷³

to the benefit of the United States, its public officers, merchants, and citizens.

Article VI and Article VII also apply equal treatment to Chinese and United States subjects under most-favored-nation. Additional Articles to the Treaty, June 18, 1858, U.S.-China, art. VI, art. VII, *reprinted in* 1 CHINA TREATIES, *supra* note 55, at 729, 732.

It is expressly agreed, however, that citizens of the United States shall at no time pay other or higher duties than those paid by the citizens or subjects of the most favored nation. Conversely, Chinese subjects shall not pay higher duties on their imports into the United States than those paid by the citizens or subjects of the most favored nation.

Commercial Treaty, Oct. 8, 1903, U.S.-China, art. V, *reprinted in* 1 CHINA TREATIES, *supra* note 55, at 745, 750.

66. Treaty of Tientsin, 1858, Russia-China, art. XII, *reprinted in* 1 CHINA TREATIES, *supra* note 55, at 85, 90.

Tous les privilèges politiques, commerciaux ou autres, qui pourraient dans la suite être acquis par les États les plus favorisés par le Gouvernement chinois seront étendus en même temps sur la Russie sans que cela nécessite des négociations préalables.

Id.

67. Treaty of Peking, Nov. 2, 1865, Belg.-China, art. XLV, *reprinted in* 2 TREATIES, CONVENTIONS, ETC. BETWEEN CHINA AND FOREIGN STATES 4, 21 (2D ED. 1917) [HEREINAFTER 2 CHINA TREATIES].

Il est convenu entre les Hautes Parties contractantes qu'il sera accordé à la Belgique et aux Belges participation pleine et égale à tous les privilèges, immunités et avantages qui ont été accordés ou seront concédés dorénavant par Sa Majesté l'Empereur de la Chine au gouvernement ou aux sujets d'une autre nation quelconque.

Id.

68. Treaty of Peking, July 2, 1908, Swed.-China, art. II, *reprinted in* 2 CHINA TREATIES, *supra* note 67, at 97, 98.

The Diplomatic Representatives thus accredited shall enjoy all the prerogatives, privileges, and immunities accorded by international usage to such Representatives, and they shall also in all respects be entitled to the treatment extended to similar Representatives of the most favoured nation.

Id.

69. Treaty of Tientsin, Sept. 2, 1861, Germany-China, art. 40, *reprinted in* 2 CHINA TREATIES, *supra* note 67, at 115, 134.

Die contrahirenden Theile kommen überein, dass den Deutschen Staaten und ihren Unterthanen volle und gleiche Theilnahme an allen Privilegien, Freiheiten und Vortheilen zustehen soll, welcher von Seiner Majestät dem Kaiser von China der Regierung oder den Unterthanen irgend einer andern Nation gewährt sind oder noch gewährt werden mögen.

Id.

70. Treaty of Tientsin, Aug. 13, 1862, Port.-China, art. LII, *reprinted in* 2 CHINA TREATIES, *supra* note 67, at 251, 271; Treaty of Peking, Dec. 1, 1887, Port.-China, art. X, *reprinted in* 2 CHINA TREATIES, *supra* note 67, at 274, 278.

71. Treaty of Tientsin, July 13, 1863, Den.-China, art. LIV, *reprinted in* 2 CHINA TREATIES, *supra* note 67, at 313, 329.

72. Treaty of Tientsin, Oct. 6, 1863, Neth.-China, art. XV, *reprinted in* 2 CHINA TREATIES, *supra* note 67, at 339, 350.

Italy,⁷⁴ Austria-Hungary,⁷⁵ Japan,⁷⁶ Peru,⁷⁷ Mexico,⁷⁸ and Korea.⁷⁹ Though Chinese-Manchu negotiators introduced the MFN principle as a bargaining tool for China, the numerous bilateral treaties had the opposite effect of destroying China's bargaining power.

It is ironic that the Chinese-Manchu policy of equal treatment of the Western nations, although intended to keep them divided and facilitate playing off one against another, had the opposite effect of consolidating them. Because China was the weaker side and on the defensive, the most-favored-nation clause proved to be a one-way street — any concession or privilege gained by one Western power at once accrued to all. China could never reverse the tide and, by abolishing the privileges of one power, eliminate those of others. Treaty privileges steadily accumulated against her interest.⁸⁰

Thus, the unequal treaties greatly weakened Chinese institutional structure.⁸¹

The unequal treaties had a serious negative impact on China, both psychologically and materially.⁸² The Chinese viewed the unequal treaties as according least favored nation status to China.⁸³ The most significant complaint about the un-

73. Treaty of Tientsin, Oct. 10, 1864, Spain-China, art. L, *reprinted in 2 CHINA TREATIES*, *supra* note 67, at 359, 375 [*English version* at 386].

74. Treaty of Peking, Oct. 26, 1866, Italy-China, art. LIV, *reprinted in 2 CHINA TREATIES*, *supra* note 67, at 403, 419 [*English version* at 449].

75. Treaty of Peking, Sep. 2, 1869, Aus.-Hung.-China, art. XLIII, *reprinted in 2 CHINA TREATIES*, *supra* note 67, at 457, 475 [*English version* at 504].

76. Treaty of Commerce and Navigation, July 21, 1896, Japan-China, art. IX, *reprinted in 2 CHINA TREATIES*, *supra* note 67, at 604, 607-08; Supplementary Treaty of Commerce and Navigation, Oct. 8, 1903, Japan-China, art. I, *reprinted in 2 CHINA TREATIES*, *supra* note 67, at 617, 618.

77. Treaty of Tientsin, Aug. 7, 1874, Peru-China, art. XVI, *reprinted in 2 CHINA TREATIES*, *supra* note 67, at 798, 805-06.

78. Treaty of Washington, Dec. 14, 1899, Mex.-China, art. VIII, *reprinted in 2 CHINA TREATIES*, *supra* note 67, at 833, 837.

79. Treaty of Seoul, Sept. 11, 1899, Korea-China, art. III, *reprinted in 2 CHINA TREATIES*, *supra* note 67, at 864, 865-66.

80. FAIRBANK, *supra* note 10, at 198.

81. "After the disintegration of the tribute system and the conceptual structures that institutional complex implied, the unequal treaty system left the Empire with neither the institutions to protect its own interests nor the means to modify the conceptual world in which it interacted with the foreign powers." MANCALL, *supra* note 11, at 128.

82. WILLIAM L. TUNG, CHINA AND THE FOREIGN POWERS: THE IMPACT OF AND REACTION TO UNEQUAL TREATIES 9 (1970).

83. *Id.* at 127.

Evidently, it was not equity and justice but power and self-interest that governed the policies of most of the foreign powers toward China throughout the nineteenth century. Although new treaties later concluded by China with other powers adhered to the principles of equality and reciprocity, it almost took a century for the Chinese people to

equal treaties was the lack of reciprocity in negotiations.⁸⁴ The lack of reciprocity attained by the MFN clause in the unequal treaties is reflected in China's modern day concern for reciprocity in foreign relations.

There are several similarities between the tribute system and the unequal treaty system:

Like the tribute system before it, the unequal treaty system was multinational. Its basic forms and structures were established in one bilateral treaty, but various diplomatic mechanisms were used to extend these features to other nations through a whole series of bilateral treaties; the same structural relationships established with one country were replicated in relationships with others. The unequal treaty system was also like the tribute system in that it described a set of unequal relationships except that now the Oikoumene [Western countries] was superior to the Empire [China].⁸⁵

Both the tribute system and the unequal treaty system use only bilateral relationships which requires viewing other nations as equal in their relationship to each other and as unequal in their relationship to China. The unequal treaties differed from the tribute system in that they did not grant China the power to treat foreign nations differently and establish a reciprocal bilateral relationship.

When China participated in MFN through the unequal treaties, China's position in the international world order was turned upside down. While China exploited and manipulated tributary countries under the tribute system, China became the subject of manipulation under the unequal treaties.⁸⁶ This suggests a historical justification for China to be cautious in granting MFN to other nations.⁸⁷ China may be more inclined to limit its grants of MFN status to ensure that a bloc of nations do not encroach upon China's sovereignty, as European nations did through the unequal treaties.⁸⁸ At the very least, China will be concerned that its concessions are reciprocated by other nations.

abolish the inequitable terms of early treaties, which accorded, in turn, the least favored nation treatment to them.

Id.

84. *Id.* at 126. "In conclusion, many rights and privileges acquired by foreigners in China were legitimate. Nor were the general provisions of the most-favored-nation clause unreasonable. Complaints by the Chinese were, however, centered on the lack of [reciprocity] [sic]." *Id.*

85. MANCALL, *supra* note 11, at 118.

86. *See supra* notes 80-85 and accompanying text (outlining the disadvantages of the unequal treaty system).

87. *See supra* notes 82-85 and accompanying text.

88. *See supra* note 83 and accompanying text (noting European exploitation of Chinese trade through the use of MFN in the unequal treaties).

Like the tribute system before it, the unequal treaty system combined trade and politics. Coercive politics played a significant role in China's adoption of the MFN principle in the unequal treaties. It was Britain's victory over China in the Opium Wars that created the unequal treaties.⁸⁹ The psychological and economic damage of the unequal treaty system did not disappear after the treaties were reversed.⁹⁰ The unequal treaties remain a memory of China's ineffective policies in its relationships with Western powers accomplished by means of the MFN clause.

III. CHINA'S CONTINUING USE OF MFN: THE KUOMINTANG AND COMMUNIST CHINA (1923-1970)

MFN continued to appear in Chinese politics even after the unequal treaty system began to fail. In 1911 the Kuomintang (KMT) overthrew the Manchu regime and in 1926-28, they unified China.⁹¹ Dr. Sun Yat-sen, the founder of the KMT, set forth the ideological basis of the KMT rule in China.⁹² His lectures and writings included detailed criticism of the unequal treaty system and implicitly MFN. "Other nations meet foreign economic pressure and check the invasion of economic forces from abroad by means of a tariff which protects economic development within these countries. . . . [China's] custom duties are fixed by the foreign powers. . . ." ⁹³ In 1923 the KMT formally introduced into the Chinese national consciousness the term "unequal treaties" in their Manifesto.⁹⁴ The KMT used the abolishment of the unequal treaties as a rallying cry to help bring them into power in China.⁹⁵ China did not want to fully abro-

89. See *supra* notes 49-54 and accompanying text (detailing origins of the unequal treaty system).

90. TUNG, *supra* note 82, at 249-74 (outlining China's diplomacy in peace and war for the abolition of the unequal treaties).

91. CHINESE MINISTRY OF INFORMATION, CHINA HANDBOOK, 1937-1943, A COMPREHENSIVE SURVEY OF MAJOR DEVELOPMENTS IN CHINA IN SIX YEARS OF WAR 39 (1943) [hereinafter CHINA HANDBOOK].

92. *Id.* at 40. The highest guiding principles in China were nationalism, people's rights, and people's livelihoods. *Id.*

93. *Id.* at 68. Dr. Sun Yat-sen claims China had sustained an annual loss of \$1.2 billion due to invasion of foreign goods, invasion of foreign paper money into China's money market, freight charges on exports and imports, taxes, rents and land sales on ceded property, special privileges for foreign business, and speculation business. *Id.*

94. Ku, *supra* note 59, at 80.

95. *Id.* at 81.

gate the treaties, and instead sought to eliminate the unequal elements of the treaties.⁹⁶

As part of its platform, in 1924 the KMT offered MFN treatment to any foreign nation which voluntarily surrendered its rights as part of its platform.⁹⁷ "China shall recognize all states which voluntarily relinquish their special rights and voluntarily renounce treaties detrimental to Chinese sovereignty as most-favored nations."⁹⁸ The KMT thus used the MFN principle as both a political principle and as a diplomatic tool. The movement to wipe out the unequal treaties resulted in some modifications during the Washington Conference in 1922 and by 1930, the KMT recovered tariff autonomy.⁹⁹ These negotiations ceased from 1931-1932 when Japanese aggression gave both China and the Europeans a common interest to preserve European presence in China.¹⁰⁰

In 1949, the Chinese Communist Party defeated the KMT and marshaled in a new era of economic and diplomatic relations.¹⁰¹ The history of unequal treaties combined with Marxist ideology led China to de-emphasize trade in the twentieth century.¹⁰² "Marxism viewed trade between developing and industrialized countries primarily as a form of exploitation."¹⁰³

Interestingly, the most-favored-nation principle did not disappear. China continued to grant MFN status, but only to friendly nations. In the 1950's and 1960's, China granted MFN status to Yemen,¹⁰⁴ the Soviet Union,¹⁰⁵ Albania,¹⁰⁶

96. *Id.*

97. The Kuomintang's Political Program (adopted by the First Party National Congress in Jan. 1924) reprinted in CHINA HANDBOOK, *supra* note 91, at 57.

98. *Id.*

99. FAIRBANK, *supra* note 54, at 248.

100. *Id.*

101. DENIS TWITCHETT & JOHN K. FAIRBANK, 14 THE CAMBRIDGE HISTORY OF CHINA 51 (1987).

102. JACOBSON & OKSENBERG, *supra* note 4, at 143.

103. *Id.*

104. Sino-Yemeni Treaty of Commerce, Jan. 13, 1958, Yemen-P.R.C., art. 2, reprinted in GRANT F. RHODE & REID E. WHITLOCK, TREATIES OF THE PEOPLE'S REPUBLIC OF CHINA, 1949-1978, 119 (1980) hereinafter P.R.C. TREATIES]. "The government of both parties shall grant each other the most favored nation treatment in respect of commodities imported into the territory of one party from that of the other." *Id.*

105. Treaty of Commerce and Navigation, Apr. 23, 1958, U.S.S.R.-P.R.C., art. 8, reprinted in P.R.C. TREATIES, *supra* note 104, at 123, 125. "The vessels and the cargoes on vessels of either of the contracting parties shall be accorded in the ports of the other party most-favored-nation treatment in all that concerns entering, clearing or stationing." *Id.*

Mongolia,¹⁰⁷ Korea,¹⁰⁸ and Vietnam.¹⁰⁹ Though the unequal treaties represented inequality obtained through use of the MFN principle, China applied the MFN principle in treaties with its allies as a valid concept regulating trade. By granting MFN only to its close allies, China limited the use of MFN and used it to create strategic alliances.

The history of MFN in China lends itself to an argument that China has to some extent accepted the validity of the concept of MFN and intends to implement MFN. Conversely, the use of MFN by the KMT and by Communist China in treaties with its allies illustrates the connection between MFN and politics. The KMT used MFN as a diplomatic tool to gain political power.¹¹⁰ Chinese communism purposefully merged trade and politics.¹¹¹ In China's history, trade and politics have been interwoven from the earliest times, and may so continue.

IV. CHINA'S 1994 FOREIGN TRADE LAW ADOPTS MFN

Today, the most-favored-nation principle in China has been influenced by GATT analysis and application of MFN.¹¹²

106. Treaty of Commerce and Navigation, Feb. 2, 1961, Alb.-P.R.C., art. 2, *reprinted in* P.R.C. TREATIES, *supra* note 104, at 128, 129. "The contracting parties shall grant each other most favored nation treatment in respect of all questions relating to commerce, navigation and all other aspects of economic relations between the two countries." *Id.*

107. Treaty of Commerce, Apr. 23, 1958, Mong.-P.R.C., art. 2, *reprinted in* P.R.C. TREATIES, *supra* note 104, at 133, 134.

The contracting parties shall grant each other most-favored-nation treatment in respect of all questions relating to the customs, particularly the following: customs duties and other duties; storage of goods in the custody of the customs office; regulations and formalities applicable while the goods are in the custody of the customs office.

Id.

108. Treaty of Commerce and Navigation, Apr. 23, 1958, Korea-P.R.C., art. 2, *reprinted in* P.R.C. TREATIES, *supra* note 104, at 137, 138. "The contracting parties shall grant each other most-favored-nation treatment in respect of all questions relating to commerce, navigation and all other economic relations between the two countries." *Id.*

109. Treaty of Commerce and Navigation, Dec. 5, 1962, Vietnam-P.R.C., art. 2, *reprinted in* P.R.C. TREATIES, *supra* note 104, at 142, 143. "The contracting parties shall grant each other most-favored-nation treatment in respect of all questions relating to commerce, navigation and all other economic relations between the two countries." *Id.*

110. *See supra* notes 97-100 and accompanying text (noting KMT's use of MFN to gain support).

111. *See supra* notes 102-03 and accompanying text (noting the impact of Marxist ideology on MFN).

112. General Most-Favored-Nation Treatment: "With respect to customs duties and charges . . . any advantage, favour, privilege or immunity granted by

Though China was formerly a member of the GATT, China went through a period of withdrawal and must reapply to become a participating member.¹¹³ Since 1980, China has negotiated with GATT members¹¹⁴ and on July 14, 1986, China formally sought resumption of status as a member of the GATT.¹¹⁵ GATT membership would afford China many advantages.¹¹⁶ China needs to implement further reforms in order to become a full-fledged member of the GATT/WTO.¹¹⁷

Today, China is actively negotiating GATT membership.¹¹⁸ China stands to lose between seven and fifteen billion U.S. dollars in exports if the United States does not grant MFN status.¹¹⁹ This may in part help explain China's motivation to become a member of the GATT/WTO.¹²⁰

any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product. . . ." GATT, *supra* note 1, at art. I:1. National Treatment: "The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements . . . should not be applied to imported or domestic products so as to afford protection to domestic products." *Id.* at art. III:1.

113. China was one of the founding members of the GATT. When China became the People's Republic of China in October, 1949, it was unable to assume its seat in the GATT. The Republic of China occupied the seat until 1950, when it withdrew. China considers the Republic of China's withdrawal invalid. The history of China's status in the GATT from 1950 to 1971 is summarized in JACOBSON & OKSENBURG, *supra* note 4, at 59-66.

114. *Id.* at 83-92.

115. *Id.* at 92.

116. The Chinese government anticipated many benefits from full participation in the GATT. GATT membership would symbolize China's acceptance as part of the international economy. China would have greater defenses against protectionism and discriminatory practices of developed countries. GATT membership would reinforce China's right to receive unconditional MFN treatment and China would receive preferential tariff treatment under U.S. G.S.P. treatment. Furthermore, China would have access to GATT/WTO dispute settlement mechanisms, could organize against protectionism and China's participation might hinder developed countries' internal protectionism influences. From the Chinese reformist's point of view, the international obligations of the GATT would reinforce reforms. *Id.* at 92-93.

117. *Id.* at 94.

118. *Chinese WTO Proposals Called Positive, but Many Details Lacking, Officials Say*, 12 Int'l Trade Rep. (BNA) 1344 (Aug. 9, 1995).

119. *Cost to China of U.S. Withdrawing MFN at Least \$7 Billion, World Bank Says*, 11 Int'l Trade Rep. (BNA) 541 (Apr. 6, 1994).

120. Although GATT membership does not automatically ensure China would be granted unconditional MFN status from the United States, GATT/WTO participation would strengthen China's bid to secure MFN treatment. Monica Hsiao, *China and the GATT: Two Theories of Political Economy Explaining China's Desire for Membership in the GATT*, 12 UCLA PAC. BASIN L.J. 431, 436 (1994).

Chinese economists have recently begun to research and support the concept of comparative advantage,¹²¹ which is the underlying economic principle supporting the MFN concept in the GATT.¹²² "The acceptance of Ricardo's theory of comparative advantage by many Chinese economists put in place a common foundation for dialogue between them and Western economists."¹²³ Several policy institutions have been created in China specifically to study the GATT and its policies.¹²⁴ Modern day GATT policies underlying the MFN principle include achieving comparative advantage, encouraging multilateral trade liberalization, aspiring to trade equality between nations, greater simplicity and transparency, and governmental restraint.¹²⁵ Though historically some nations pursued a "conditional MFN" policy, GATT MFN is unconditional.¹²⁶ The increased focus on GATT policies and Western economic theory, however, must be analyzed in the context of the traditional Chinese tribute system and China's bitter history of unequal treatment with the most-favored-nation principle.

121. JACOBSON & OKSENBERG, *supra* note 4, at 143.

122. Comparative advantage is a theory developed by David Ricardo more than 150 years ago. He posited that a country would export the product in which it had the greater advantage, or a comparative advantage, and import the commodity in which it had a comparative disadvantage. CHARLES P. KINDELEBERGER, *INTERNATIONAL ECONOMICS* 17-21, 27, 33 (5th ed. 1973).

123. JACOBSON & OKSENBERG, *supra* note 4, at 143. China has shown an openness to complying with GATT principles and appears to be learning and applying GATT principles. *Id.* at 96-98 (describing China's response to more than 1,200 questions and answers during 1987-1988 negotiations on China's request to reenter GATT). Although key negotiators may support GATT principles, full attention must be paid to political opposition and China's historical context for they will undoubtedly influence the effectiveness of GATT reforms.

124. Research groups on GATT have been established by the University of International Business and Economics in Beijing, sponsored by the Ministry of Foreign Economic Relations and Trade, and Shanghai University of Finance and Economics. *Id.* at 98.

125. *Main Trends and Issues in International Trade: Outstanding Policy Problems*, INT'L TRADE 1983/84, 18, 20. MFN also promotes the transparency of protective measures. Loretta F. Smith, *The GATT and International Trade*, 39 BUFF. L. REV. 919, 984 (1991).

126. "Under conditional MFN, when country A grants a privilege to country C while owing MFN to country B, then country A must grant the equivalent privilege to B — but only after B has given A some reciprocal privilege to 'pay for it.'" JOHN H. JACKSON, *THE WORLD TRADING SYSTEM*, 137 (1989). Unconditional MFN requires A to grant the equivalent privilege to country B without receiving anything in return. *Id.* "GATT MFN is clearly unconditional." *Id.*

A. DEVELOPMENT AND ENACTMENT OF CHINA'S NEW FOREIGN TRADE LAW

In the process of China's application to the GATT/WTO, China has been criticized for the lack of transparency of its laws.¹²⁷ China published many trade regulations in an effort to comply with the GATT.¹²⁸ Chinese officials seem to have a greater interest in developing laws and regulations affecting foreign trade.¹²⁹ China's increased publication of trade laws may be motivated both by a desire to join the GATT and a desire to nationalize its laws and regulations.¹³⁰ The preliminary development of the Foreign Trade Law indicates that the role of law is increasing in economic reforms.¹³¹

Prior to publication of the Foreign Trade Law, China made a copy available to the GATT Working Party on China.¹³² On May 12, 1994, China promulgated its new Foreign Trade Law.¹³³ The Foreign Trade Law sets forth a most-favored-nation clause in its general provisions.¹³⁴ The Foreign Trade Law

127. JACOBSON & OKSENBERG, *supra* note 4, at 99. See also Donald C. Clarke, *GATT Membership for China?*, 17 U. PUGET SOUND L. REV. 517, 528 (1994).

128. Bing Wang, *China's New Foreign Trade Law: Analysis and Implications for China's GATT Bid*, 28 J. MARSHALL L. REV. 495, 495-96 (1995). "Chinese Vice-President Rong Yiren has reaffirmed that China will continue to deepen its reforms in finance, taxation, foreign trade. . . ." *Rong: Reforms to be Deepened*, CHINA DAILY, Feb. 14, 1994, at 1.

129. Prior to publication of China's new Foreign Trade Law, several articles and editorials were published outlining the need for judicial or legal implementation of economic regulations. "A leading Chinese official [Luo Gan, Secretary-General of the State Council] yesterday called on the legal sector to play a more active role in ensuring smooth implementation of reform policies." Ma Chenguang, *Better Legal Services Sought*, CHINA DAILY, Jan. 5, 1994, at 1. New reforms may create new social problems and some groups may not be happy with the new measures. *Id.* The judicial sector should play a greater role in improving the socialist market economy. *Id.*

Jurist Guo Daohui argues that the market economy needs a legal base and such legislation should regulate and limit government power and intervention. *Market Economy Needs Legal Base*, CHINA DAILY, Jan. 14, 1994, at 4.

130. Clarke, *supra* note 127, at 518.

131. Wang, *supra* note 128, at 537.

132. "An early draft of the Foreign Trade Law was apparently made available to the GATT Working Party on China, but was never, to my knowledge, openly published in China until its formal passage and promulgation in May 1994." Clarke, *supra* note 127, at 529.

133. Foreign Trade Law, *supra* note 5.

134. "The People's Republic of China grants Most Favored Nation treatment or national treatment in the field of foreign trade to opposite concluding or acceding parties in accordance with international treaties or agreements concluded or acceded to, or on the basis of the principles of mutual benefit and reciprocity." *Id.* at art. 6.

was enacted at the same time China and the United States were battling over U.S. MFN status,¹³⁵ and while China was negotiating its accession to the GATT.¹³⁶ Article 7 of the Foreign Trade Law takes these political influences into account.¹³⁷ Article 7 reserves to China the ability to retaliate against any country not willing to abide by the Chinese MFN principle.¹³⁸

China also retains administrative control throughout the entire Foreign Trade Law.¹³⁹ "[T]he foreign trade law continues to use licensing and quotas to protect domestic industries, to safeguard its international monetary standards, and to maintain a balance of international payments."¹⁴⁰ China views these controls as necessary to implementing reform and maintaining social stability.¹⁴¹

The GATT community responded favorably to China's new trade law.¹⁴² China must still meet more obligations to become

135. *Clinton Meets Chinese Officials; Expresses Human Rights Concerns*, 11 Int'l Trade Rep. (BNA) 706 (May 4, 1994).

136. *GATT Chief Sutherland to Visit China to Put Entry Negotiations on Track*, 11 Int'l Trade Rep. (BNA) 707 (May 4, 1994).

137. "If any country or region takes sanctions, restrictions or other similar measures of a discriminatory nature against the People's Republic of China with respect to foreign trade, the People's Republic of China may take corresponding measures against such country or region in line with actual circumstances." Foreign Trade Law, *supra* note 5, at art. 7.

138. Although the Foreign Trade Law applies principles of equality and mutual benefit in trade relations in Article 5, and grants Most Favored Nation treatment in Article 6, Article 7 allowing sanctions modifies the effect of Articles 5 and 6. See Foreign Trade Law, *supra* note 5. GATT similarly provides various exceptions to application of the MFN, however, the WTO now sets forth a dispute resolution procedure which may make it less necessary to apply these exceptions. GATT contracting parties must also notify the other parties in writing if they intend to take unilateral action in denying MFN status. GATT, *supra* note 1, at art. XIX:2. China's Foreign Trade Law allows unilateral action without a mechanism of accountability to the contracting party.

139. *Ji Jiang Shi Xing De "Wai Mao Fa" You Na Xie Zhu Yao Nei Rong He Te Dian* [The Incoming Foreign Trade Law: Main Content & Major Characteristics], SHANGHAI FA ZHI BAO, June 20, 1994, at 3 [available in Chinese]. See Wang, *supra* note 128, at 525-31 (explaining how China's Foreign Trade Law reflects China's desire for developing nation status, the transitional nature of China's economic system, the inefficiency of China's market mechanism and lack of genuine independence of Chinese enterprises).

140. Wang, *supra* note 128, at 527.

141. The foreign trade law is based on the Chinese situation and closer to international trade practice. *The Incoming Foreign Trade Law: Main Content & Major Characteristics*, *supra* note 139, at 3. The system of Chinese self supervision is not perfect because the economic enterprise transition is not complete. *Id.* If China completely abandons the foreign trade enterprise permission, it will cause disorder or chaos of the foreign trade order. *Id.*

142. See *China's First Foreign Trade Law Seen Speeding Its Re-entry into GATT*, 11 Int'l Trade Rep. (BNA) 770 (May 18, 1994).

a full-fledged member of GATT/WTO, however.¹⁴³ The United States wants conditional MFN status for China,¹⁴⁴ but may be forced to accept unconditional MFN status for China in the GATT.¹⁴⁵ China desires developing country status to allow it the flexibility to retain control over economic reforms.¹⁴⁶ Under GATT Article XVIII, developing country status would allow China to raise tariffs on products to protect infant industries, use quantitative restrictions in its balance of payments, or use any measure necessary to promote a particular industry.¹⁴⁷

B. IMPLEMENTATION OF CHINA'S FOREIGN TRADE LAW

There have been no Chinese cases interpreting the Foreign Trade Law to date. During the recent sanctions implemented by

143. *China, Special Report: 1996 Trade Outlook*, 13 Int'l Trade Rep. (BNA) 134 (Jan. 24, 1996).

Talks on China's accession to the World Trade Organization are scheduled to resume in March. These negotiations made little progress over 1995, despite the U.S. presentation of a "road map" of the types of economic reform necessary for becoming a member of the world trade body.

Among issues of concern for U.S. industry are China's investment regime, which U.S. officials have said is being modified to allow for more, rather than less, state control over investment; state trading companies; export subsidies; industrial subsidies; and safeguards. In addition, U.S. firms want China to be more explicit on its offers regarding trading rights, including how the issue of national treatment will be handled. . . . Among the issues, the United States wants to see China adopt a "standstill obligation" barring them from erecting market barriers to replace ones that are dismantled.

Id.

144. The United States opposes unconditional MFN for China in WTO and instead supports conditional MFN. *Talks Scheduled in Geneva on China WTO Accession*, 12 Int'l Trade Rep. (BNA) 1185 (July 12, 1995).

145. Unconditional MFN status is included in a draft protocol for China accession to the WTO. *Negotiators on China Accession Agree to Reconvene in October*, 12 Int'l Trade Rep. (BNA) 1317 (Aug. 2, 1995).

146. "China should enjoy all Gatt rights, including those offered to developing nations, and that its obligations should not be more than those incumbent on other developing nations." *Beijing Demands Gatt Rights*, CHINA DAILY, July 4, 1994, at 2; "By insisting on being treated as a developing nation, China is not seeking to dodge Gatt obligations. Moftec officials insist. 'We just want fairness,' they say." Jin Man, *Sides Dig In on Gatt Question*, BUS. WKLY. (CHINA DAILY), July 25, 1994, at 1.

147. GATT *supra* note 1, at art. XVIII.

1. [C]ontracting parties the economies of which can only support low standards of living and are in the early stages of development
- 2(a). [T]o maintain sufficient protection required for the establishment of a particular industry and (b) to apply quantitative restrictions for balance of payments purposes
3. [T]o grant the governmental assistance required to promote the establishment of particular industries[.]

Id.

the United States under Section 301 of U.S. trade law,¹⁴⁸ China applied the general principles of its Foreign Trade Law. As soon as the United States invoked sanctions against China, China threatened to retaliate under the authority of Article 7 of its Foreign Trade Law.¹⁴⁹ The Foreign Trade Law also sets forth China's general principles of foreign trade, which emphasize equality and mutual benefit.¹⁵⁰

Once China becomes a member of the GATT, China will have to abide by GATT provisions and settle trade disputes through the WTO. China grants MFN status unilaterally in China's Foreign Trade Law to concluding or acceding parties to treaties.¹⁵¹ If China becomes a member of the WTO, China's MFN clause will apply multilaterally to all contracting parties of the GATT.¹⁵² Chinese officials recognize the requirement imposed by the GATT of multilateral unconditional MFN.¹⁵³ A question remains over whether China will interpret GATT MFN as the contracting parties intended.

148. *China Cited July 1 under Special 301 law; Copyright Protection Criticized*, 11 Int'l Trade Rep. (BNA) 1066 (July 6, 1994).

149. *U.S., China Announce Trade Sanctions Over Copyright Protection*, 12 Int'l Trade Rep. (BNA) 250 (Feb. 8, 1995).

In Beijing, a spokesman for the Chinese Ministry of Foreign Trade and Economic Cooperation said Feb. 4 that in light of unilateral U.S. sanctions, China would counter-retaliate under Article 7 of its Foreign Trade Law. That provision allows China to take 'corresponding measures' toward any similar action, the ministry said, according to Xinhua.

Id.

150. "The People's Republic of China promotes and develops trade relations with other countries on the basis of principles of equality and mutual benefit." Foreign Trade Law, *supra* note 5, at art. 5.

151. "The Peoples' Republic of China grants Most Favored Nation treatment or national treatment in the field of foreign trade to *opposite concluding or acceding parties in accordance with international treaties or agreements* concluded or acceded to, or on the basis of the principles of mutual benefit and reciprocity." *Id.* at art. 6 (emphasis added). MFN applies to countries on an individual basis in accordance with treaties with China or to those countries which also grant reciprocal MFN.

152. Once China becomes a member of the WTO, the language in Article 6, "to opposite or concluding parties in accordance with international treaties or agreements," indicates that MFN will be applied to all contracting parties of GATT. *Id.*

153. "China hopes to obtain unconditional most-favoured-nation (MFN) treatment equivalent to that accorded to all other contracting parties by participating in Gatt. It is important to point out that this is the fundamental international principle applied universally. . . ." Wang Yong, *Denial by Gatt Wouldn't be Fatal, Moftec Official Says*, CHINA DAILY, Apr. 4, 1994, at 1 (quoting Li Zhongzhou, Deputy Director General for International Relations at the Ministry of Foreign Trade and Economic Co-operation (MOFTEC)).

C. U.S.—CHINA DEBATE OVER U.S. EXTENSION OF MFN TO CHINA

China's MFN clause cannot be examined without taking into account the recent heated debate between the United States and China over U.S. extension of MFN status to China. This high profile political debate plays an important role in understanding China's interpretation of MFN. U.S. negotiations with China over MFN are limited because the President must evaluate most-favored-nation status for non-market economies in successive twelve month periods under the Jackson-Vanik Amendment.¹⁵⁴ Since 1980, the United States has granted MFN treatment to China every year.¹⁵⁵ After the violent crack-down on pro-democracy demonstrators in Tiananmen Square in 1989, the renewal of MFN status has engendered much controversy. On May 28, 1993, President Clinton renewed China's MFN status for one more year subject to conditions set forth in an Executive Order.¹⁵⁶

China has a tremendous economic incentive to maintain MFN status in the United States, but MFN status has been subject to high profile debate and controversy. In 1994, the United States resumed the debate on whether China had met the condi-

154. Trade Act of 1974 §§ 402-05; 19 U.S.C. §§ 2431-32 (1988 & Supp. V 1993).

155. H. Con. Res. 204, 96th Cong., 1st Sess. (1980); Presidential Determination No. 83-7, 48 Fed. Reg. 26,585 (1983); Presidential Determination No. 84-9, 43 Fed. Reg. 24,107 (1984); Presidential Determination No. 86-10, 51 Fed. Reg. 22,057 (1986); Presidential Determination No. 88-10, 53 Fed. Reg. 21,407 (1988); Presidential Determination No. 39-14, 54 Fed. Reg. 26,943 (1989); Presidential Determination No. 90-21, 55 Fed. Reg. 23,183 (1990); Presidential Determination No. 91-36, 56 Fed. Reg. 26,757 (1991); Presidential Determination No. 92-29, 57 Fed. Reg. 24,539 (1992); Presidential Determination No. 93-23, 58 Fed. Reg. 31,329 (1993); Presidential Determination No. 94-26, 59 Fed. Reg. 31,103 (1994); Presidential Determination No. 95-23, 60 Fed. Reg. 31,047 (1995).

156. Exec. Order No. 12,850, 58 Fed. Reg. 31,327 (1993).

[T]he Secretary shall also determine whether China has made overall, significant progress with respect to the following:

- taking steps to begin adhering to the Universal Declaration of Human Rights;
- releasing and providing an acceptable accounting for Chinese citizens imprisoned or detained for the non-violent expression of their political and religious beliefs. . .
- ensuring humane treatment of prisoners. . .
- protecting Tibet's distinctive religious and cultural heritage; and
- permitting international radio and television broadcasts into China.

Id.

tions of the Executive Order for MFN renewal.¹⁵⁷ China reacted angrily to U.S. linkage of MFN status with human rights because it viewed the United States as meddling in its internal affairs.¹⁵⁸ Various U.S. business interests lobbied for extension of MFN status to China.¹⁵⁹ China lobbied for continuation as well.¹⁶⁰ Finally, President Clinton granted continued MFN status to China and decided to delink conditional MFN from human rights.¹⁶¹ Though several Congressional representatives lobbied to overturn the renewal,¹⁶² and delinking MFN and human

157. *Sen. Johnston Says Administration Wants to Extend China's MFN Status*, 11 Int'l Trade Rep. (BNA) 51 (Jan. 12, 1994); *Bentsen Says China Needs More Progress on Human Rights Before MFN is Renewed*, 11 Int'l Trade Rep. (BNA) 51 (Jan. 12, 1994); *Baucus Says Annual Review of China MFN is Anachronism, Urges Unconditionality*, 11 Int'l Trade Rep. (BNA) 170 (Feb. 2, 1994); *U.S. Report Says China Falls Short of International Human Rights Norms*, 11 Int'l Trade Rep. (BNA) 169 (Feb. 2, 1994); *China Needs More Human Rights Progress for Clinton to Renew MFN, Official Says*, 11 Int'l Trade Rep. (BNA) 334 (Mar. 2, 1994); *Christopher Sees Progress with China, But Clinton Voices Disappointment*, 11 Int'l Trade Rep. (BNA) 406 (Mar. 16, 1994).

158. "Referring to MFN trade status, many deputies said the US should stop interfering in other country's internal affairs by using trade as a weapon." *Deputies Call for Re-entry in Gatt, Blast US Politics*, CHINA DAILY, Mar. 16, 1995, at 2; "China and the US have different concepts about human rights and these differences will exist for a long time to come. It's futile and damaging to exert pressure on the issue[.]" Zhang Ping, *Sino-US Relations Will Develop Despite Difficulties*, Qian Says, CHINA DAILY, Mar. 15, 1994, at 1 (quoting Vice-Premier Qian Qishen). See also Randall Green, *Human Rights and Most-Favored-Nation Tariff Rates for Products from the People's Republic of China*, 17 U. PUGET SOUND L. REV. 611, 621 (1994).

159. *California Business Coalition to Urge Continued MFN for China*, 11 Int'l Trade Rep. (BNA) 385 (Mar. 9, 1994); *US-China Policy Flawed, Business Representative Says*, 11 Int'l Trade Rep. (BNA) 450 (Mar. 23, 1994); *AT&T Chief Calls for MFN Renewal*, CHINA DAILY, Apr. 6, 1994, at 4.

160. *China Sends Buying Mission to US; Discussions on MFN Renewal Expected*, 11 Int'l Trade Rep. (BNA) 538 (Apr. 6, 1994); *Chinese Diplomat Urges End to Trade-Human Rights Linkage*, 11 Int'l Trade Rep. (BNA) 747 (May 11, 1994).

161. Presidential Determination No. 93-23, 58 Fed. Reg. 31,329 (1993); Exec. Order No. 12,850, 58 Fed. Reg. 31,327 (1993). *Clinton Reverses China MFN Policy; Mitchell to Introduce China Measure*, 11 Int'l Trade Rep. (BNA) 844 (June 1, 1994).

162. *Gephardt, Mitchell Introducing Bills Revoking MFN for Some Chinese Goods*, 11 Int'l Trade Rep. (BNA) 992 (June 22, 1994).

rights is controversial,¹⁶³ conditional MFN treatment was granted to China.¹⁶⁴

The Chinese perceive the U.S. yearly debate over MFN as an insult.¹⁶⁵ In traditional Chinese fashion: ". . . matters of legality take a back seat to matters of loyalty, legal rights and wrongs give way to personal relationships, or, at the national level, to questions of who is regarded as a 'friend of China's' and who is not."¹⁶⁶ This interpretation of the MFN clause in U.S.-China relations may well reflect popular sentiment in the debate. By viewing application of the U.S. MFN principle as a personal insult, China may be inclined to view the nondiscrimination principle of its own MFN clause as a vehicle for retaliation.

The debate over linking MFN to human rights remained a hot topic in 1995.¹⁶⁷ President Clinton recommended renewal of MFN trade status¹⁶⁸ and MFN was granted on June 2, 1995,¹⁶⁹ but the debate still continues.¹⁷⁰ The focus in the United States

163. Robbyn Reichman-Coad, *Human Rights Violations in China: A United States' Response*, 15 N.Y.L. SCH. J. INT'L & COMP. L. 163 (1994) (arguing for conditioning China's U.S. MFN status on human rights improvements). *But see* Green, *supra* note 158, at 625.

164. *House Ways and Means Rejects Bill Revoking MFN for China*, 11 Int'l Trade Rep. (BNA) 1068 (July 6, 1994); *Clinton China Policy is Endorsed by House*, 11 Int'l Trade Rep. (BNA) 1243 (Aug. 10, 1994).

165. *China Demands End to US Yearly MFN Trade Review*, REUTERS, June 4, 1995, available in LEXIS, News library, REUTERS file; *US Spokesman Urged to Reverse Annual Review of China's MFN Status*, XINHUA NEWS AGENCY, June 6, 1995, available in LEXIS, News library, XINHUA file.

166. Professor John Head's experience teaching law in China sheds some light on the Chinese view of the debate between the United States and China over China's MFN status. John Head, *A Fulbright Lecturer's Experience Teaching International Law in China*, ASIL NEWSLETTER, Sept. 1994, available in LEXIS, Intlaw library, ASIL file. Many of his students viewed the MFN debate as a personal insult and often asked why President Clinton dislikes China. *Id.* Although Professor Head explained the legal debate in favor of and in opposition to the U.S. position on MFN, he determined that his law students at Renmin University were not concerned about the role of law in society. *Id.*

167. *Human Rights, Labor Issues and Trade are Still Linked, U.S. Official Says*, 12 Int'l Trade Rep. (BNA) 259 (Feb. 8, 1995).

168. *Clinton Recommends Renewal for China of Most-Favored-Nation Trade Status*, 12 Int'l Trade Rep. (BNA) 977 (June 7, 1995).

169. *Clinton Renews Favored Trade Status for China*, REUTERS WORLD SERVICE, June 2, 1995 available in LEXIS, News library, REUWLD file.

170. *Ways and Means Adversely Reports Disapproval Resolution for China MFN*, 12 Int'l Trade Rep. (BNA) 1055 (June 21, 1995); *Human Rights Group Blasts White House for Breaking Promises on China, Trade*, 12 Int'l Trade Rep. (BNA) 1186 (July 12, 1995); *Clinton Waiting for Congress to Act on China MFN Amid Concern for Dissident*, 12 Int'l Trade Rep. (BNA) 1212 (July 19, 1995); *China MFN Renewal Draws Fire for Rights Abuses*, REUTER EUROPEAN BUS.

on MFN renewal affects U.S. policy toward WTO membership for China. China, in turn, must continue to respond to U.S. MFN challenges.

V. CHINA'S NEW MFN CLAUSE REFLECTS REGULATORY REFORM WITHIN THE HISTORICAL CONTEXT

China's history of trade illustrates the difficulties China may have in adapting to the GATT/WTO. The tribute system used a bilateral contract-like relationship with its trading powers.¹⁷¹ While the unequal treaty system was unilateral, it still consisted of two parties, the European nations as one trading power achieving concessions unilaterally through MFN, and China.¹⁷² Communist China similarly perceived itself as a representative of communism which should avoid any trade with capitalist economies.¹⁷³ Today, the multilateral trading system of the GATT presents new challenges of economic integration for both China and the WTO.

A. CHINA'S MFN CLAUSE REFLECTS HISTORICAL CONCERN FOR RECIPROCITY

The unequal treaty system of the nineteenth century illustrates China's historical concern over achieving reciprocity in trade relations. The unequal treaty system changed China psychologically and materially.¹⁷⁴ China specifically objected to the lack of reciprocity in the treaty negotiations.¹⁷⁵

This recurrent Chinese concern over reciprocity¹⁷⁶ appears explicitly in China's MFN clause. Article 5 of the Foreign Trade

REP., June 2, 1995, available in LEXIS, News library, REUEUB file; *Helms Seeks Bar on China Trade Privileges*, REUTERS NORTH AMERICAN NEWS, July 12, 1995, available in LEXIS, News library, REUNA file; Joyce Barrett, *China MFN Status Gets Reprieve; House Tables the Issue*, DAILY NEWS REC., July 21, 1995, available in LEXIS, News library, DNR file.

171. See *supra* notes 33-41 and accompanying text (outlining China's bilateral trading relationships in the tribunal system).

172. See *supra* notes 59-79 and accompanying text (describing the unequal treaty system).

173. See *supra* notes 101-03 and accompanying text (noting Communist China's view of trade in light of Marxist ideology).

174. See *supra* notes 82-84 and accompanying text.

175. See *supra* note 84 and accompanying text.

176. China has a proverbial saying, "li shang wang lai," [礼尚往来] courtesy demands reciprocity. WU JINGRONG, THE PIN YIN CHINESE-ENGLISH DICTIONARY 417 (1985). China's Foreign Trade Minister, Wu Yi, recently responded to U.S. threats of sanctions over copyright by stating that "courtesy

Law describes the principle by which China engages in foreign trade. "The People's Republic of China promotes and develops trade relations with other countries and regions *on the basis of the principles of equality and mutual benefit.*"¹⁷⁷ Hence, China sets forth the principle of mutual benefit or reciprocity as the overriding purpose of foreign trade.

The language of Article 6 similarly defines MFN as a function of reciprocity and mutual benefit. "The Peoples' Republic of China grants Most Favored Nation treatment or national treatment in the field of foreign trade to opposite concluding or acceding parties in accordance with international treaties or agreements concluded or acceded to, *or on the basis of the principles of mutual benefit and reciprocity.*"¹⁷⁸ In basing MFN on reciprocity and mutual benefit, the text of Articles 5 and 6 imply that MFN should be limited to the extent it may impinge on principles of reciprocity. This is consistent with the historical tribute system of China and China's treaties granting MFN in the 1950's and 1960's to its allies. China MFN also addresses concerns of maintaining equal and reciprocal relationships arising from the historical experience of China under the unequal treaties.

Once China becomes a member of the GATT, the concerns over reciprocity may subside because China will have achieved equal footing with other contracting parties. GATT MFN allows some flexibility in equal treatment by allowing countries to bargain for preferences, thus supporting an element of reciprocity in tariff negotiations. By stating that reciprocity is a basis for MFN status,¹⁷⁹ China has signified an intention to interpret MFN as a reciprocal concept. At the same time, China is lobbying for unconditional MFN and will be required to grant unconditional MFN to GATT members. These contradictions in foreign policy reflect inner political debate over the efficacy of GATT membership as well as the larger issue of China's status in world economic policy.

In China, there are three main approaches to GATT membership.¹⁸⁰ One approach is to view GATT membership as a

demands reciprocity." Guy de Jonquieres & Peter Montagnon, *China Refuses to Kow-Tow on Tariff Reform*, FIN. TIMES, Feb. 15, 1996, at 4.

177. Foreign Trade Law, *supra* note 5, at art. 5 (emphasis added).

178. *Id.* at art. 6 (emphasis added).

179. *Id.* at art. 5.

180. Dai Weicheng, "Wo Dui Zhong Guo Fu Guan Qian Jing Bao Le Quan Tai Du" *Fang Zhu Ming Guan Mao Zhuan Jia Wang Yao Tian Jiao Shou* ["I'm optimistic of China's prospects returning to GATT"] Interview with Professor

wolf which should never arrive.¹⁸¹ The practical difficulties of economic reform in China create political opposition to GATT membership. China is still criticized for failing to implement necessary reforms to enter the GATT/WTO.¹⁸² China's ability to implement the MFN principle is affected by its ability to enforce such rights. Currently, trade quotas and nonpublished regulations in China interfere with the nondiscrimination principle required by the GATT.¹⁸³

Another approach is that GATT membership is inevitable, therefore China should just wait for it, and industry should rely upon the state.¹⁸⁴ In fact, Chinese scholars have supported creative interpretation of GATT provisions to protect national enterprises.¹⁸⁵ China is also creating new barriers to replace old ones, in clear contravention of the non-discrimination principle of GATT MFN.¹⁸⁶

Wang Yaotian, Dean of GATT Research Institute], SHANGHAI FA ZHI BAO, May 3, 1995, at 1 [available in Chinese].

181. *Id.*

182. See *supra* notes 139-41 and accompanying text (describing limitations of Foreign Trade Law and concerns over adequacy of Chinese reforms).

183. Recent Chinese policies regarding investment, the automobile electronics industries, and taxes have moved China away from WTO norms. *China Will Eliminate Tariff Exceptions for Foreign Firms' Capital Goods Imports*, 12 Int'l Trade Rep. (BNA) 1994 (Dec. 6, 1995).

184. Dai Weicheng, *supra* note 180, at 1.

185. Yan Lingchang, *Dui "Fu Guan" Hou Wo Guo Min Zu Gong Ye Fa Lu Bao Hu De Si Kao* ["Some Thoughts About Legal Protection of Our National Industry After the Return to GATT"], 10 FA HSUEH 164 (Oct. 1994) [available in Chinese]. "This article would like to approach from legal perspective and the study of GATT articles on how to make full use of various legal mechanisms of GATT and international precedents in the hope of providing insight on seeking legal and legitimate protection measures for our national enterprise after accession to GATT." *Id.* Yan Lingchang's article outlines various areas which allow protection by means of the GATT articles. Yan Lingchang analyzes tariffs, quantity restrictions, Art. XIX on emergency measures, Art. VI on anti-dumping and subsidies, Art. XXIII and Art. XXV on duty exemptions, exceptions, including Art. XX on exceptions, Art. XXI on national security, Art. XXIV on border trade, tariff unions and free trade areas, and Art. XXXVI on developing countries. *Id.* at 164-169. He also outlines how Western nations take advantage of these articles to impose trade restrictions on China and how China will also take advantage of these articles.

Yan Lingchang's article may be looked at as an effort to respond to domestic opposition to GATT by explaining legal and legitimate protections allowed under the GATT. It also demonstrates an effort to continue protecting Chinese national industry.

186. While China has lifted quotas and licenses on a wide range of imports, United States Trade Representative Charlene Barshefsky is concerned about new barriers taking the place of old barriers. *U.S. Sets Deadlines For China For Intellectual Property Compliance*, 12 Int'l Trade Rep. (BNA) 1994 (Dec. 6, 1995).

The third approach is that industries in China should begin now to make the necessary reforms for GATT membership to prepare for the challenge of the GATT.¹⁸⁷ Given the contradictory domestic industry view of WTO membership and the numerous reforms needed, entry into the WTO will not be a painless endeavor. There will be political pressure to limit grants of MFN to foreign nations, even though China will be required under the GATT to apply MFN unconditionally.

China's history of non-reciprocal trading relationships indicates that it will work within the multilateral structure of the GATT to secure favorable reciprocal relationships.¹⁸⁸ China has already refused to extend negotiated concessions with the United States to third parties.¹⁸⁹ This illustrates China's concern with requiring other countries to negotiate individually and reciprocally with China. Though the GATT addresses trade issues multilaterally, China has a unique historical perspective that may influence China to act bilaterally.¹⁹⁰

China also appears to be conscious of eliminating free riders in its economic negotiations. The unequal treaties of the nineteenth century illustrate an unprecedented free rider problem by according every concession to other treaty members.¹⁹¹ Similarly, one of the criticisms of GATT MFN is that it allows free riders to take advantage of negotiated concessions.¹⁹² As a result of the historical experience of China with free riders in the

187. Dai Weicheng, *supra* note 180, at 1.

188. Zuo Haicong, *Guan Mao Zong Xie Ding Zheng Duan Jue Tiao Kuan De Qi Yuan Ni Ding He Nei Rong Ping Xi* [The Origination of the Articles of Dispute Resolution of GATT, Drafting and Analysis], 7 FA HSUEH 180 (July 1995) [available in Chinese]. Zuo Haicong analyzes the history of the GATT articles of dispute resolution focusing on the history of reciprocity and bilateralism. Perhaps this historical basis lends legitimacy to the GATT by addressing China's concerns over reciprocity.

189. "Some Chinese concessions on intellectual property were not made available to other countries on an MFN basis. US negotiators say the Chinese insisted on these discriminatory provisions." THOMAS O. BAYARD & KIMBERLY ANN ELLIOTT, *RECIPROCITY AND RETALIATION IN U.S. TRADE POLICY* 320 n.5 (1994).

190. "There is an important policy issue in connection with the 'trade constitution's' [GATT's] principles of nondiscrimination, particularly the MFN principle. . . . It must be recognized that MFN policies have some costs as well as benefits. Thus the question arises, in connection with many trade measures, whether MFN principles should be observed or not. Closely related, but not identical, is the question of multilateralism versus bilateralism." JACKSON, *supra* note 126, at 306-07.

191. See *supra* notes 55-63 and accompanying text (outlining automatic MFN extension to Western nations under the unequal treaties).

192. JACKSON, *supra* note 126, at 136-38.

unequal treaties, China may be especially concerned about granting concessions unilaterally.

China argues that it is a developing country and some level of non-reciprocity under the GATT may be necessary to protect its interests.¹⁹³ Nonetheless, China has the largest economy of any developing nation.¹⁹⁴ When China becomes part of the WTO, China must automatically and unconditionally grant MFN to contracting parties of the GATT. As the second largest U.S. trading partner, the United States and other European nations view China's export surge potential as a barrier to WTO membership.¹⁹⁵ By refusing to treat China as a developing country, China views the WTO as creating a non-reciprocal trading relationship. Concerns over Chinese history will provide a strong argument to Chinese opponents of WTO membership.¹⁹⁶ China's history of non-reciprocity in trade helps provide an understanding of why China so adamantly desires developing country status. Historical influences in Chinese foreign policy cannot be underestimated.¹⁹⁷

193. MOFTEC officials insist that China be treated as a developing country and be assured of a balance of rights and obligations. Jin Man, *supra* note 146, at 1; Li Zhongzhou, Director-General MOFTEC "asserted that China does not want to be a second class citizen within Gatt. For example, the particular member [United States] has insisted that 'China cannot invoke many Gatt articles, especially those that apply to developing nations.' Li said this has never happened in Gatt history." Wang Yong, *China Plans Tough Gatt Stance: Last Offer Coming: 'Take It or Leave It,'* BUS. WKLY. (CHINA DAILY), July 11, 1994, at 1.

194. Joseph Kahn, *Dragon Flies China Swiftly Becomes An Exporting Colossus, Straining Western Ties*, WALL ST. J., Nov. 13, 1995, at A1.

195. *Id.*

196. Chinese politicians often refer to WTO membership with language evidencing concern over China's unequal status. Wang Yong, *supra* note 193, at 1 (quoting Li Zhongzhou, Director-General MOFERT). See also Jonquieres & Montagnon, *supra* note 176, at 4.

197. MANCALL, *supra* note 11, at 498-501 (discussing history as a source of Chinese foreign policy).

China views the world in terms of dichotomies that are mutually contradictory, and it defines broad and specific policies in terms of these dichotomies. Furthermore, China views history as a progression through dichotomies. Regardless of whether history has an end or an objective, as some Marxists would insist it has, history *is* process, in the Chinese view, and correct policy is that which contributes to the forward movement of history or uses history to achieve history's more immediate objectives. . . . The best policy uses history to achieve this justice. Consequently all policy, and ultimately, all judgments are relative to the immediate moment in which history, as process and structure, presents itself.

Id. at 500.

B. CHINA'S MFN CLAUSE EMBODIES CHINA'S POLITICAL TRADITIONS

China has never differentiated the regulation of trade from politics. The tribute system allowed trade as a consequence of paying tribute under a political relationship.¹⁹⁸ The unequal treaties came into being as a result of military concessions.¹⁹⁹ MFN was similarly inextricably linked to politics by the KMT²⁰⁰ and Communist China.²⁰¹ Though China currently desires the benefits offered by the GATT and especially covets unconditional MFN status in the United States, China may have particular difficulties differentiating regulatory trade from politics.

China MFN is inextricably linked to politics as China attempts to achieve WTO membership. By employing protectionism in its new Foreign Trade Law and maintaining some of its bureaucratic controls, China has not fully complied with standards necessary to enter the WTO.²⁰² The United States has used China's desire to enter the WTO as a bargaining chip to encourage changes in Chinese trade regulation.²⁰³ China appears, however, to have become impatient with its outsider status and while desiring the benefits of WTO membership, China downplays its importance.²⁰⁴ In fact, recent Chinese policies have moved away from WTO norms.²⁰⁵ If China downplays the importance of WTO membership, then U.S. incentives for supporting Chinese membership may lose their force. China MFN is therefore dependent upon the political importance attributed to WTO membership.

Article 7 of the Foreign Trade Law links China MFN to current politics by allowing China to retaliate for failures of other contracting parties to abide by MFN.²⁰⁶ This calls into question the full effect of Article 6 granting MFN treatment. The ability of China to take unilateral, retaliatory action allows it to avoid the guarantee of MFN in the GATT. This is not a problem

198. See *supra* notes 30-32 and accompanying text (describing the overriding political nature of tribute in securing trading relationships).

199. See *supra* notes 47-51 and accompanying text.

200. See *supra* notes 91-98 and accompanying text (noting the prominence of MFN in KMT's efforts to abolish the unequal treaties).

201. See *supra* notes 104-109 and accompanying text (outlining Chinese grants of MFN to create strategic alliances).

202. Wang, *supra* note 128, at 527.

203. BAYARD & ELLIOTT, *supra* note 189, at 317-22.

204. China will not rejoin GATT at the cost of future prospects. Wang Yong, *supra* note 193, at 1; Hsiao, *supra* note 120, at 431-32.

205. See *supra* note 186 and accompanying text.

206. Foreign Trade Law, *supra* note 5, at art. 7.

unique to China. U.S. policies under Section 301 have been similarly criticized.²⁰⁷ Many other countries also implement retaliatory actions against other nations for failing to abide by non-discrimination principles in trade.²⁰⁸ Widespread usage of domestic retaliatory actions outside the WTO may undermine the effectiveness of the GATT.²⁰⁹

What differentiates China's use of retaliation under MFN from Western nations is that China has never historically regulated trade as a distinct entity apart from politics. China continues to assert it will retaliate immediately.²¹⁰ By threatening withdrawal of MFN status for China based on human rights, the United States bolsters the conceptual connection of MFN to politics. China believes the U.S. position violates proper notions of reciprocity and mutual benefit.²¹¹ Once China becomes a member of the GATT/WTO, it seems unlikely that Chinese foreign policy will abide by unconditional, automatic MFN when it becomes politically expedient to achieve other goals.

VI. CONCLUSION

By adopting an MFN clause in its Foreign Trade Law, China has not simply adopted and incorporated the GATT's MFN principle. For China MFN is a principle that has played a significant role in its foreign trade history. China's interpretation of MFN will be influenced by this historical experience.

The ancient tributary system paints a picture of China's experience applying non-discriminatory treatment in unequal relationships to its tributaries. When Western nations introduced MFN in the unequal treaties, China's position as the superior was turned upside-down. The MFN clause of the unequal treaties allowed Western nations to acquire tariff concessions without granting any reciprocal concessions to China. The KMT and Communist China subsequently condemned the unequal treaty system as commercial exploitation. China's history thus explains why China may be particularly concerned about achieving reciprocity in trade negotiations.

207. BAYARD & ELLIOTT, *supra* note 189, at 317-22.

208. *Id.*

209. *Id.*

210. In response to U.S. threats over copyright sanctions, China's Foreign Trade Minister Wu Yi says China will defend itself if attacked by the United States. Jonquieres & Montagnon, *supra* note 176, at 4.

211. See *supra* notes 165-66 and accompanying text (describing the Chinese view of the debate over U.S. extension of MFN to China).

While China's MFN clause represents regulatory reform, China's history of trade, at the very least, indicates inexperience in differentiating the regulation of trade from politics. During the tribute system, trade was always linked to the political act of tribute. Similarly, the unequal treaties regulated trade by eliminating China's bargaining power. Communist China likewise granted MFN to its allies in the 1950's and 1960's to create strategic alliances. Though China attempted to implement regulatory reform in its new Foreign Trade Law, China enacted its MFN clause in the midst of a heated political debate over U.S. extension of MFN to China. Given China's inexperience in separating trade from political actions, it seems likely China will have considerable difficulty applying MFN unconditionally when political expediencies arise.

Though China has a powerful incentive to comply with GATT MFN, the complexity of economic reform will make compliance difficult. China will interpret MFN in the context of its historical experience, political views and cultural understanding.²¹² The history of MFN in China explains China's incentive to limit application of MFN and request developing country status in the GATT/WTO. China's undeniable presence in the world economy presents a perplexing puzzle for the GATT and the WTO. The difficulties attendant to China's interpretation of MFN illustrate the complexities facing the GATT in fully integrating diverse historical and political views in a global economic constitution.

212. China's approach to the role of law in foreign trade may cause it to misinterpret trade policies of other nations. POTTER, *supra* note 3, at 20. "While China's participation in GATT and the [WTO] may well militate against many of the mercantilist policies of the past, this. . . will require fundamental changes in policies and attitudes." *Id.* at 21.

