

THE MERGER OF TWO SYSTEMS: CHINESE ADOPTION AND WESTERN ADAPTATION IN THE FORMATION OF MODERN INTERNATIONAL LAW

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The nation that is best equipped with powerful cannons and fast battleships can devour any large portion of territory at will, and thus all this talk of international law is sheer nonsense.<sup>1</sup>

## I. INTRODUCTION

The treaty port system established by the Treaty of Nanking in 1842 demonstrates the merger of two regional systems of law and constitutes the formation of modern international law.<sup>2</sup> Prior to 1842 and the first Opium War between Great Britain and China, two systems of international law and relations existed: the Chinese system in Asia and the European system in the West. The treaty port system with its most-favored-nation clause applied across a broad, multilateral, and truly global group of states and represents a new type of legal institution characteristic of models of cooperative governance found in modern international law.<sup>3</sup> This Note will discuss the merger of two regional legal systems into a new system representative of our modern system of international law.<sup>4</sup>

In the mid-nineteenth century, Western theories of natural law combined with existing positive law to form a body of law which applied to relations between and among Western states.<sup>5</sup> Where non-Western states merited inclusion in this body of rules, they most often became objects or prizes to be divided among Western states.<sup>6</sup> The law of war and the law of peace existed

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<sup>1</sup> THE EUROPEAN DIARY OF HSIEH FUCHENG: ENVOY EXTRAORDINARY OF IMPERIAL CHINA 13 (Helen Hsieh Chien trans., 1993) [hereinafter THE EUROPEAN DIARY OF HSIEH FUCHENG]. Hsieh, ambassador to England, France, and Italy, comments on the Turkish view that Britain violated Turkey's sovereignty by interfering with its Egyptian colony. *Id.* at 19.

<sup>2</sup> The treaty ended the first Opium War (1839-42) and established the first "unequal treaty" of the treaty port system, granting one-sided trade rights to Great Britain at China's expense. Treaty of Nanking, Aug. 29, 1842, China-Gr. Brit., 93 Consol. T.S. 465.

<sup>3</sup> See generally David Kennedy, *International Law and the Nineteenth Century: History of an Illusion*, 17 QUINNIPIAC L. REV. 99 (1997) (discussing the differences in international law in the beginning of the nineteenth century versus at the end of the century).

<sup>4</sup> See, e.g., Statute of the International Court of Justice, June 26, 1945, art. 38, 59 Stat. 1055, 1060 (listing the sources of international law the International Court of Justice uses to resolve disputes); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102 (1987) (listing sources of international law).

<sup>5</sup> See Kennedy, *supra* note 3, at 112-16 (discussing nineteenth century thinking on natural law and positive law).

<sup>6</sup> Kennedy, *supra* note 3, at 128-29 (describing natives as "neither refusing civilization nor part of a different civilization"). See also *id.* at 124-26 (discussing the lack of an enforcing body for treaties and the questionable nature of treaty obligations at the beginning of the nineteenth

as tools of imperialism and diplomacy.<sup>7</sup> War remained a viable and even legal means of attaining state goals, and non-Western states had few, if any, rights.<sup>8</sup> Determined to force the opening of Asia, Western states found their law of peace sufficient to the task of maintaining relations between themselves, but found their law of war too costly in its application to a land so far removed from Europe.<sup>9</sup>

While European forces held an advantage sufficient to guarantee conquest, the commercial advantages gained through such conquest in Asia proved insufficient to meet the political and economic costs of constant warfare.<sup>10</sup> In order to maintain advantages gained through gunboat diplomacy, Western states required a new institution and a new means of maintaining peaceful order with only occasional applications of force.<sup>11</sup> They found the basic elements of this institution already in existence in China—the treaty port.<sup>12</sup> Taking the bilateral treaty port familiar and acceptable to the Chinese, Western states expanded this solitary institution into a multilateral, living system and thus participated in the creation of a new type of institution of global proportions: the treaty port system.<sup>13</sup>

In the mid-nineteenth century China a less formal but similar system of natural law existed in concert with bilateral treaties. Having consolidated its holdings on the Asian mainland, China dominated the region both culturally and materially. Chinese concepts parallel to, but significantly different from, European natural law effectively represented Asia's ideas, customary practice, relationships, and treaties.<sup>14</sup> China faced Western incursion with an array of

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century).

<sup>7</sup> Alfred P. Rubin et al., *History of International Law*, 82 AM. SOC'Y INT'L L. PROC. 25, 29-31 (1988).

<sup>8</sup> Note that warfare and use of force remained, into the twentieth century, legitimate tools for use by states enforcing laws or seeking to change their status. See, e.g., SHARON KORMAN, *THE RIGHT OF CONQUEST: THE ACQUISITION OF TERRITORY BY FORCE IN INTERNATIONAL LAW AND PRACTICE* 179 (1996).

<sup>9</sup> See JOHN KING FAIRBANK, *TRADE AND DIPLOMACY ON THE CHINA COAST: THE OPENING OF THE TREATY PORTS, 1842-1854*, at 72-73 (1953).

<sup>10</sup> See *id.* at 72-132.

<sup>11</sup> See *id.*

<sup>12</sup> One example, is the case of Kokand where a similar treaty port was established in 1835. See JOHN KING FAIRBANK, *CHINA: A NEW HISTORY* 197-98, 200-01 (1992); *infra* p. 701-03.

<sup>13</sup> Here the distinction is drawn between bilateral treaties and the multitude of treaties containing most-favored-nation clauses which created a treaty port "system."

<sup>14</sup> Examples include Japanese and Korean use of Confucianism and tributary state relationships.

traditional institutions and tactics but remained unable militarily to successfully resist foreign aggression.<sup>15</sup>

Forced by Great Britain to grant a degree of autonomy and control over trade to a foreign power, the Qing government extended these same rights to other states through a series of bilateral treaties containing most-favored-nation clauses.<sup>16</sup> The bilateral treaty port system thus became the multilateral treaty port system, inclusive of a wide array of Western states and, eventually, Japan. While this regime largely contained the foreign presence, it discouraged competition among foreign powers and led to an ever-expanding foreign presence in China supported by a combination of treaties connecting the major states of the world and binding their interests together by law and treaty.<sup>17</sup>

The novelty of this treaty port system lay in the collective effect of bilateral treaties containing most-favored-nation provisions. As a native institution significantly modified and expanded by foreign demand, the treaty port system satisfied elements of both the Chinese and Western legal traditions.<sup>18</sup> Two seemingly exclusive universalistic systems merged into a new form that both could claim and neither could effectively deny authoring. The nineteenth century treaty port system in China represents a great change in the concept of international law from a law of coexistence to a law of cooperation and may be seen as the first truly global institution of its kind whose heirs may include the League of Nations, the United Nations, and the World Trade Organization. As the first global regime of cooperative governance, the treaty port system represents the birth of modern international law.

## II. BACKGROUND: MERGER OF TWO SYSTEMS

Contrary to traditional accounts depicting China as a passive recipient of European international law, the West adapted Chinese legal forms and institutions, such as the treaty port, to form modern international law. The traditional account of China's nineteenth century contact with European states and America describes the Western introduction of international law to

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<sup>15</sup> See generally FAIRBANK, *supra* note 12.

<sup>16</sup> See, e.g., Treaty of Peace, Amity and Commerce, July 3, 1844, U.S.-China, 8 Stat. 592 [hereinafter Treaty of Wanghsia] (granting the United States rights similar to Great Britain).

<sup>17</sup> Eighteen states held treaty rights prior to World War I. Philip R. Abbey, Treaty Ports & Extraterritoriality in 1920s China, Apr. 9, 2005, at <http://www.geocities.com/treatyport01/TREATY01.html>.

<sup>18</sup> See, FAIRBANK, *supra* note 9, at 439.

China.<sup>19</sup> In this view, Imperial China merely accepted Western trade demands and the introduction of concepts of international law by modern Western nation-states.<sup>20</sup> China's initial response took the form of refusal based either in xenophobia or a sense of cultural superiority<sup>21</sup> until the West used gunboat diplomacy to pry open the gates to Chinese markets.<sup>22</sup>

Gunboat diplomacy first established a British treaty port at Guangzhou in 1842.<sup>23</sup> Scholars hail this moment as the beginning of the end for the Chinese tributary state system and the introduction of Western international legal institutions.<sup>24</sup> The term "treaty port," however, is as much an English translation of a Chinese institution as is the term "Son of Heaven" or "Middle Kingdom," and holds only the same sort of approximate meaning as any translation. "Treaty port" simply describes in Western terms a Chinese institution that already existed—a means China used to deal with intransigent barbarians who failed to understand or grasp the tributary state system.<sup>25</sup> The treaty port system in China constituted a new legal institution which reflected the traditions of both East and West meeting in a context new to both.

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<sup>19</sup> See, e.g., Onuma Yasuaki, *The Birth of International Law as the Law of International Society*, 94 AM. SOC'Y INT'L L. PROC. 44 (2000). "One example is the prevailing expression of 'admission of Turkey, China etc., to international society.'" *Id.*

<sup>20</sup> SSU-YU TENG & JOHN K. FAIRBANK, CHINA'S RESPONSE TO THE WEST: A DOCUMENTARY SURVEY, 1839-1923, at 163 (1979).

<sup>21</sup> Li Zhaojie, *Legacy of Modern Chinese History: Its Relevance to the Chinese Perspective of the Contemporary International Legal Order*, 5 SING. J. INT'L & COMP. L. 314, 314-18 (2001).

<sup>22</sup> William P. Alford, *Law, Law, What Law? Why Western Scholars of China Have Not Had More to Say About Its Law*, in THE LIMITS OF THE RULE OF LAW IN CHINA 45, 51 (Karen G. Turner et al. eds., 2000).

<sup>23</sup> The Opium War ended with the Treaty of Nanking which ended the previous cohong system and instituted the treaty port system. See Treaty of Nanking, *supra* note 2.

<sup>24</sup> See, e.g., W.G. BEASLEY, JAPANESE IMPERIALISM, 1894-1945, 41-48 (1987). Part of the problem with this view is treating the tribute system as China's singular trade institution or foreign policy when, in fact, China instituted a variety of strategies of "barbarian management" including wall building, the tribute system, the cohong system, and the treaty port system. See, e.g., ARTHUR WALDRON, THE GREAT WALL OF CHINA 171-73 (1990) (discussing Ming wall building and tribute system strategies among foreign policy alternatives).

<sup>25</sup> The case of Kokand, where a treaty port was established in 1835, is an example. See FAIRBANK, *supra* note 12, at 197-98, 200-01; PETER WARD FAY, THE OPIUM WAR 1840-1842, at 29-40 (1975); *infra* p.18. See generally JAMES L. HEVIA, CHERISHING MEN FROM AFAR: QING GUEST RITUAL AND THE MACARTNEY EMBASSY OF 1793 (1995) (explaining the apparent Western failure to grasp the tribute system); GEORGE MACARTNEY, AN EMBASSY TO CHINA: BEING THE JOURNAL KEPT BY LORD MACARTNEY DURING HIS EMBASSY TO THE EMPEROR CH' IEN-LUNG, 1793-1794 (1950).

At least initially, the treaty port system reflected a means previously used by the Qing government to assuage barbarians demanding trade concessions and offering a credible armed threat.<sup>26</sup> As time went on, the introduction of other nations into a regime of bilateral treaties containing most-favored nation clauses<sup>27</sup> created an institution characteristic of developing international law rather than a child of either the European or Chinese contexts alone.<sup>28</sup> The creation of the treaty port system in China represented not the Chinese adoption of Western international law, but rather the Western adaptation of an existing Chinese legal institution and the birth of modern international law.<sup>29</sup> The West did not introduce the concept of a treaty port to China; it seized upon the existing institution and altered it through a series of treaties into a multilateral regime, which constituted a new legal institution altogether—perhaps born Chinese but raised to maturity by cooperative effort.<sup>30</sup>

Scholars view customary practices and treaties among China and Asian states as elements of Chinese domestic law<sup>31</sup> rather than international law since

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<sup>26</sup> See FAIRBANK, *supra* note 12; see also R. Randle Edwards, *Imperial China's Control Law*, 1 J. CHINESE L. 33, 33-34 (1987) (remarking that the record "reveals a complex mixture of rules and practices, some reflecting the hierarchal presuppositions of the tribute model, others representing ad hoc working compromises between China and other countries").

<sup>27</sup> The most-favored-nation clause found Chinese support in traditional concepts of treating all barbarians equally and Western support in competitive but informal empire-building goals. See FAIRBANK, *supra* note 9, at 194-97. Western states used bilateral most-favored-nation clauses, but the regime in China established a new multilateral form. See generally Chester Lloyd Jones, *The American Interpretation of the "Most Favored Nation" Clause*, 32 ANNALS AM. ACAD. POL. & SOC. SCI. 119-29 (1908).

<sup>28</sup> See BARBARA J. BROOKS, *JAPAN'S IMPERIAL DIPLOMACY* 79 (2000) (indicating the Japanese were forced to adhere to the treaty port system rules in China); FREDERIC WAKEMAN, JR., *THE FALL OF IMPERIAL CHINA* 137-39 (1975). See generally PETER WESLEY-SMITH, *UNEQUAL TREATY 1898-1997* (rev. ed. 1998).

<sup>29</sup> Although individual ports may have been nominated by treaty as ports for exchange in treaties by and among Western powers, no system of widespread, multilateral participation like the one which developed in China had existed. See generally Andrew Caplin & Kala Krishna, *Tariffs and the Most-Favored Nation Clause: A Game Theoretic Approach*, 1 SEOUL J. ECON. 267 (1988) (discussing effect of most-favored-nation on trade). Adoption in this context refers to the alleged wholesale importation of Western law into a void in China. Adaptation refers to Western use of existing ideas and institutions as the starting point and the process of changing these institutions to meet Western needs.

<sup>30</sup> See, e.g., Treaty of Wanghsia *supra* note 16.

<sup>31</sup> Some go so far as to even characterize China as having no law or at least no private law, most notably John King Fairbank. Teemu Ruskola, *Legal Orientalism*, 101 MICH. L. REV. 179, 181-83 & n.18 (2002) (noting Fairbank, Jenner, and Barlow as among those prominent scholars).

the rules and traditions of China are viewed as reflecting a single state's laws and not a system of laws developed through competition among and discourse between independent states.<sup>32</sup> Nineteenth century states denied China's law in order to justify its colonization.<sup>33</sup> It is unclear why contemporary legal scholars continue this practice.<sup>34</sup>

Understanding the present Chinese attitude toward international law is necessary in developing meaningful laws and achieving cooperation among modern states.<sup>35</sup> A firm understanding of ritual and the disparity between official attitudes and practices in historical and modern China is crucial to the meaningful development of modern international law, and the key to this understanding lies in historical analysis. "Confucian scholar-officials . . . in fact made regular use of the law, even as they denigrated it as an unworthy instrument through which to discharge their responsibilities."<sup>36</sup> Both the Chinese perspective and the Confucian context continue to inform modern developments in international law.<sup>37</sup>

Although scholars note the existence of various aspects of international law such as the protection of Overseas Chinese and Prince Gong's creation of the Zongli Yamen in 1861,<sup>38</sup> the study of international law in China during the latter half of the nineteenth century requires deeper analysis.<sup>39</sup> Legal scholars hold that Qing China's hierarchical tributary system evidenced a lack of international law in China,<sup>40</sup> and that the creation of the treaty port system to replace the tribute system marked the introduction of Western international

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*See also* FAIRBANK, *supra* note 12, at 185-86.

<sup>32</sup> LORI F. DAMROSCH ET AL., INTERNATIONAL LAW, at xxvii (4th ed., 2001).

<sup>33</sup> Ruskola, *supra* note 31, at 183.

<sup>34</sup> In studying the history of international law, definitions should be used to clarify and explain rather than to exclude illuminating elements.

<sup>35</sup> *See generally A Strong Chinese Economy Grounds China's Acceptance of Its Responsibilities as a Member of the World Community*, METROPOLITAN CORPORATE COUNSEL, Dec. 2004, at 47, available at <http://www.metrocorp-counsel.com/pdf/2004/December/47,48.pdf>.

<sup>36</sup> Alford, *supra* note 22, at 49.

<sup>37</sup> Li, *supra* note 21, at 315.

<sup>38</sup> *See* TENG & FAIRBANK, *supra* note 20, at 150.

<sup>39</sup> *See generally* PAUL A. COHEN, DISCOVERING HISTORY IN CHINA: AMERICAN HISTORICAL WRITING ON THE RECENT CHINESE PAST (1984); Alford, *supra* note 22. *But see* Edwards, *supra* note 26, at 33 (illustrating "the dynamic process of interstate law-making in China's relations with some of its East Asian neighbors in the later imperial era").

<sup>40</sup> Confucianism (with its social hierarchy) dominated the development of Chinese legal thought after 206 B.C. Wejen Chang, *Foreword* to THE LIMITS OF THE RULE OF LAW IN CHINA, *supra* note 22, at vii, x. This system has been widely characterized as inconsistent with contemporary international law and legal relationships.

law. Just as recent scholarship has proven that civil law existed in Qing China,<sup>41</sup> a careful examination of China's international relations from 1839-1895 demonstrates the existence of a Chinese system of international law.<sup>42</sup> Closer scrutiny reveals application of principles and concepts consistent with contemporary Western international law and crucial to the development of modern international law. The birth of modern international law involved the clash of two universalistic systems: the European and the Chinese.

### A. Meeting of Two Systems

Confucian ritual served as the means of negotiation between China and foreign states.<sup>43</sup> Westerners also used ceremony and ritual as negotiation techniques but denied the validity of China's ritual as such.<sup>44</sup> The ritual itself constituted communication between states and a foreign embassy could be assessed through its ability or willingness to participate in court ritual, whether in China or in England.<sup>45</sup> Both the European and Chinese systems of thought provided a universalistic explanation of the world and their own place within it. Neither system allowed for the existence of a competing ideal and both placed themselves in the single leadership position.

Confucianism views the family as the basic unit of society<sup>46</sup> and orders relationships within the family by the status of the participants.<sup>47</sup> By refusing to participate in the Chinese tribute system or to acknowledge the emperor's status, Westerners relegated themselves to the status of "uncivilized peoples" in the Chinese models of positive and natural law.<sup>48</sup> China conceived itself as

<sup>41</sup> See Kathryn Bernhardt & Philip C.C. Huang, *Civil Law in Qing and Republican China: The Issues*, in CIVIL LAW IN QING AND REPUBLICAN CHINA, 1, 2 (Kathryn Bernhardt & Philip C.C. Huang eds., 1994); see also T'UNG-TSU CH'Ü, LOCAL GOVERNMENT IN CHINA UNDER THE CH'ING 118-19 (1969) (describing civil law administered locally by magistrates). See generally PHILIP C.C. HUANG, CIVIL JUSTICE IN CHINA: REPRESENTATION AND PRACTICE IN THE QING (1996). Note, however, that it was previously believed that during this period, China had only criminal law, with little or no civil law. See generally *id.*; TENG AND FAIRBANK, *supra* note 20, at 185.

<sup>42</sup> See Alford, *supra* note 22, at 49.

<sup>43</sup> HEVIA, *supra* note 25, at 210-12.

<sup>44</sup> *Id.* at 212.

<sup>45</sup> *Id.* at 210-14 (referencing reaction to British inability to understand Qing ritual).

<sup>46</sup> Edwards, *supra* note 26, at 35.

<sup>47</sup> See YU-LAN FUNG & DERK BODDE, A SHORT HISTORY OF CHINESE PHILOSOPHY 21-22 (1997).

<sup>48</sup> In fact, the term "tributary state system" is a Western concept used to describe the hierarchical Confucian relationship between China and those who acknowledged its hegemony



the "Middle Kingdom" and the center of the world, bearing the burden of leading civilized peoples and asserting dominion over uncivilized peoples. Applied to the international arena, Confucian principles placed China in the position of "head of the family."<sup>49</sup> The Chinese viewed the emperor as the elder brother of other monarchs and leaders, and in this model equated states with their rulers.<sup>50</sup>

Korea, Japan, and much of Asia embraced Confucianism<sup>51</sup> and as a result, Confucian relationships and ideals formed the basis of commonly held metaphysical principles and customs.<sup>52</sup> "Korean kings, Annamese monarchs, and Japanese emperors all ruled in their own right, but within the Confucian hierarchy they were ranked as younger brothers of the Chinese emperor, who was expected to ratify their investitures."<sup>53</sup> Customary relationships among societies and the agreements made between them form the basis of positive law in Asia just as in Europe. In Asia, natural law, derived from metaphysical principles, reflected the Confucian, Taoist, and Buddhist systems of thought rather than Christian principles.<sup>54</sup>

Whereas Christianity united the major European states and philosophers (even in protest), Confucian, Buddhist, and Taoist philosophers expounded the principles upon which the Asian concept of natural law was based and carried on their own heated debates.<sup>55</sup> Just as Christianity spread across Europe, Confucianism spread across Asia. Each heavily influenced the development of regional legal systems through the spread of culture, custom, and social norms. Both traditions created international law. In this case, scholars misunderstand the effect of Confucian ritual on Chinese policy. This effect did not significantly differ from contemporary Christian beliefs' effects on European and American foreign policy.<sup>56</sup> In no case did a state turn a blind eye

through the offer of tribute. It is used here and throughout because the essential point is not to examine the system itself but Western denial of its validity and status.

<sup>49</sup> See Jerome Alan Cohen, *China and Intervention: Theory and Practice*, 121 U.P.A.L. REV. 471, 475 (1973) (noting that the idea of a family of nations was a Western concept).

<sup>50</sup> DAMROSCH, *supra* note 32, at xxvii. In fact, one should place less importance on the concept of states as geo-political entities than on the identity of the states' rulers.

<sup>51</sup> JOHN M. STEADMAN, *THE MYTH OF ASIA*, 71-75 (1969) (discussing Asia's belief systems, the adoption of Buddhism across East Asia, and its incorporation into existing, shared beliefs).

<sup>52</sup> Not only did these beliefs center around the family, but they also focused on society as a whole, not limited to a particular nation or people. *Id.* at 74-75.

<sup>53</sup> WAKEMAN, *supra* note 28, at 111.

<sup>54</sup> *Id.* at 67-78.

<sup>55</sup> See FUNG & BODDE, *supra* note 47, at 20-22, 27-38, 65-80, 87-91, 99-104, 151-90.

<sup>56</sup> See MAX WEBER, *THE RELIGION OF CHINA* 226-49 (Hans H. Gerth trans., 1951)

to its own interests in favor of its traditional rhetoric. In China as in the West, reference to traditional beliefs should be viewed as necessitated by state action rather than the reverse.

The Confucian notion that the emperor of China is the elder brother of all other rulers holds no less legitimacy as natural law than European notions of law based upon Christian beliefs. Both evidence the influence of regional metaphysical principles on the formation of regional custom. Thus, the "Middle Kingdom" idea that China is the center of the civilized universe was far from pure xenophobia or cultural hubris<sup>57</sup>—it was a universalistic view similar to Manifest Destiny and other Western Christian ideals.<sup>58</sup> China's legal status among nations had been established through customary practices and relationships—"the derivation of norms from basic metaphysical principles."<sup>59</sup> A cursory comparison between European Christian beliefs and Chinese Confucian beliefs reveals more similarities than differences.<sup>60</sup>

Europeans dealt differently with each other as civilized nations and with others as uncivilized peoples, using a two-tiered system of foreign relations. It is not surprising that nineteenth century Europeans had difficulty understanding Confucianism as applied to the international arena and considered China among the uncivilized. "That the Chinese leaders had not comprehended in the 1870s that the tributary relationship had no status in Western international law may seem incredible."<sup>61</sup> Nor is it surprising that the Chinese considered the Europeans uncivilized for their lack of understanding: "[P]eoples who failed to observe the Confucian rites of monarchy were placed much lower in the hierarchy, so that like a great ladder of being the entire world order descended from higher civilization to the lower rungs of barbarism."<sup>62</sup>

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(comparing Protestantism and Confucianism); cf. FUNG & BODDE, *supra* note 47, at 147 (discussing traditional attitudes toward business and law in contrast with European attitudes and the opposite effect of these attitudes on the development of capitalism in both societies).

<sup>57</sup> See Edwards, *supra* note 26, at 37-38.

<sup>58</sup> See, e.g., HEVIA, *supra* note 25, at 210-15.

<sup>59</sup> DAMROSCH, *supra* note 32, at xxxi (defining custom). See also Edwards, *supra* note 26, at 34-35. "[T]hese notions were fundamental in the evolution of what might be termed an indigenous East Asian system of international law." *Id.*

<sup>60</sup> See, e.g., STEADMAN, *supra* note 51, at 69.

<sup>61</sup> Edwin Pak-wah Leung, *Li Hung-chang and the Liu-ch'iu (Ryukyu) Controversy, 1871-1881*, in LI HUNG-CHANG AND CHINA'S EARLY MODERNIZATION 172 (Samuel C. Chu & Kwang-Ching Liu eds., 1994).

<sup>62</sup> WAKEMAN, *supra* note 28, at 111; see also Cohen, *supra* note 49, at 476.

Nineteenth century Europeans denied Chinese ritual and discounted the legal validity of the Chinese tribute system (as opposed to the treaty port system). Their incentive to do so is abundantly clear. By denying the legal status of the tributary state system, Western powers could ignore China's claim of suzerainty over states in Asia and press their own imperialist claims.<sup>63</sup> Since the Western powers competed among themselves, an outright denial of the force of international law in Asia would detract from the defensibility of their own claims as against each other.<sup>64</sup> In asserting their own legal claims and denouncing the validity of Chinese legal claims, Western powers could hope to seize by force and retain by law those rights and territories they desired in Asia.<sup>65</sup> Modern scholars must recognize this motivation and reconcile their analysis of the tributary state system as an element of international law on its own merits rather than employ this convenient tool of nineteenth century European imperialism.<sup>66</sup>

In studying China, scholars often resort to portraying traditional attitudes and phrases as reasons behind policy decisions rather than as justifications of those decisions. Scholars' fascination with the "Middle Kingdom" or "Central Realm" idea remains the clearest example of this phenomenon. Scholars use colorful terms such as "Middle Kingdom" and "Son of Heaven," rather than more utilitarian terms such as "China," "emperor," or "ruler," to emphasize the alien and antiquated attitudes of the Chinese in the nineteenth century.<sup>67</sup>

What remains somewhat surprising is that modern scholars sometimes disregard the parallel between China's regard for the West and the West's regard for China. According to Chinese thought, Westerners were barbarians;<sup>68</sup> according to Western thought, China was uncivilized. To the Europeans, China represented the "Far East," whereas to the Chinese, Westerners came from the "Far West."<sup>69</sup> Both societies had created formalities, rituals, and rules reflecting a universalistic view. As these two systems

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<sup>63</sup> See BEASLEY, *supra* note 24, at 17-20.

<sup>64</sup> See generally *id.*

<sup>65</sup> See *id.*

<sup>66</sup> See HEVIA, *supra* note 25, at 14, 18 (discussing the tribute system as an element of a Chinese foreign policy focused on practical means of defense against foreign intrusion).

<sup>67</sup> Cf. W. SCOTT MORTON, CHINA: ITS HISTORY AND CULTURE 143 (1st ed. 1980) (discussing early Jesuit translations and their effect on foreign attitudes).

<sup>68</sup> Cf. TENG & FAIRBANK, *supra* note 20, at 19-20 (detailing Qing law with regard to foreign envoys and the inappropriateness of the British gifts in a 1793 response to a British request to send a trade representative to Beijing).

<sup>69</sup> FUNG & BODDE, *supra* note 47, at xvi-xvii, 319-42.

combined, they competed to determine where the center of this new universe would lie. Chinese adoption of Western forms of legal argument need not imply wholesale adoption of Western international law; rather, it should be seen as an effort to translate traditional Chinese ideas and institutions into ideas Westerners might understand and even value. In China, the Western powers faced a large, dense society removed from Europe spatially and culturally—as a colonial enterprise, a logistical nightmare. In the West, China faced a united coalition of well-armed, hostile aliens determined to exact trade rights—as a defensive action, a losing proposition.<sup>70</sup> In order to arrive at a solution to their problems, the Chinese adopted Western language and argument while the Westerners adapted existing Chinese institutions to fit their needs.<sup>71</sup>

### *B. Formation of a Single System*

European international law became important to the Qing dynasty as Great Britain, France, Russia, and the United States began to increase their exploration and trade efforts in the East in the nineteenth century. Precisely because China's armed forces proved ineffective against Western might, diplomacy became China's last great hope for defending its hegemony and maintaining its sovereignty in the face of increasing Western and, later, Japanese aggression.<sup>72</sup>

The Opium War (1839-1842) marked the beginning of the demise of traditional practices in China as British gunboats forced concessions from the Qing government.<sup>73</sup> These concessions led to the establishment of the treaty port system and foreign spheres of influence in China.<sup>74</sup> Prior to the signing of the Treaty of Nanking ending the first Opium War in August 1842, the Qing

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<sup>70</sup> "The most immediate danger confronting the Chinese government during the crisis of 1859-61 was foreign aggression." ARTHUR F. WRIGHT, *CONFUCIANISM AND CHINESE CIVILIZATION* 222 (1959).

<sup>71</sup> Rather than trying to create or impose an entirely novel system of governance, Westerners used the existing forms of commerce China reserved for particularly determined invaders.

<sup>72</sup> Li, *supra* note 21, at 317; see also Karen G. Turner, *Introduction to THE LIMITS OF THE RULE OF LAW IN CHINA*, *supra* note 22, at 1, 11; BEASLEY, *supra* note 24, at 58-59 (noting that the tone of discussions between Japanese and Li Hungchang indicated Western power disapproval and not Chinese strength influenced Japan's negotiations following the Sino-Japanese War of 1894-1895 and that the Liaotung Peninsula was removed from Japan's demands at their insistence).

<sup>73</sup> FAIRBANK, *supra* note 12, at 198-200.

<sup>74</sup> See *id.*

government maintained control over foreign trade through the *cohong* (or Canton) system in Guangzhou wherein Chinese *hong* merchants acted as go-betweens in the foreign trade.<sup>75</sup>

“But 1842 began a new era—the opening of China to Western commercial exploitation.”<sup>76</sup> Both sides were forced to make accommodations in order to work toward their separate goals<sup>77</sup> and the new system of rules and institutions they created became what we now call international law. Traditional Chinese practices and attitudes did not give way to purely Western ideas, but instead to entirely new adaptations of both Western and Eastern laws and institutions, which constituted a break from tradition for the Europeans and Chinese alike.

In the latter half of the nineteenth century, China found itself firmly lodged between Western nations seeking concessions and trade rights on the one hand, and the voracious Japanese on the other. The Sino-Japanese War of 1894-1895 resulted in a humiliating defeat for China.<sup>78</sup> China lost its hold over Korea but maintained its territorial integrity as a result of European intervention (the Tripartite Intervention).<sup>79</sup>

Shortly after losing the Sino-Japanese war, China also lost its last major tributary state, Korea.<sup>80</sup> The last major distinguishing characteristic of China’s international legal system, the tributary state system, disappeared as an institution.<sup>81</sup> It appears to many modern scholars that at this point, “European international law became international law without the qualification of ‘European.’”<sup>82</sup>

<sup>75</sup> See generally *id.* Note that Guangzhou is the modern transliteration of the city name Latinized in the nineteenth century as Canton.

<sup>76</sup> FAIRBANK, *supra* note 9, at 3.

<sup>77</sup> The Chinese had to placate the aggressive, militarily superior West and the West sought to minimize the cost of administration through informal empire. See generally FAIRBANK, *supra* note 12.

<sup>78</sup> EDWIN O. REISCHAUER, *THE UNITED STATES AND JAPAN*, at 19-22, 26-28, 112 (1951). See generally BEASLEY, *supra* note 24, at 55-68 (noting the remarkable ease and rapidity with which Japan defeated China).

<sup>79</sup> Also called the Triple Intervention. Germany, France, and Russia intervened to prevent Japan from attaining a foothold on the mainland (the Liaotung Peninsula), but China ceded Taiwan to Japan by the Treaty of Shimonoseki in 1895. BEASLEY, *supra* note 24, at 57-59.

<sup>80</sup> China lost Taiwan in 1895; Korea became a Japanese protectorate in 1905 and a colony in 1910. BEASLEY, *supra* note 24, at 6.

<sup>81</sup> Onuma, *supra* note 19, at 44.

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

Hence, the Chinese made serious efforts to bring international law into full play in their struggle to shake off the yoke of the unequal treaty regime [wherein China was forced to sign treaties favorable to Western powers and non-reciprocal in nature] and to create and maintain a strong and unified China, that is no longer the 'central realm' based on Confucian culturalism but a nation state—with a rightful place in the family of nations.<sup>83</sup>

This dividing line, whether seen as the point at which European international law became the only international law or the point at which international law became truly international, remains important to the study of the history of international law as the point at which the European system and the Chinese system merged to produce a single body of law used by both Eastern and Western states.<sup>84</sup> Going forward, Japan used international law in its expansionist efforts, China used international law in its struggle for survival, and the West was forced to accept Asian states into its ranks and to apply international law to its own relations with non-European states.<sup>85</sup>

### III. ANALYSIS: ADOPTION VERSUS ADAPTATION

#### A. *Chinese Adoption of Western Legal Language and Argument*

China's system of international law incorporated specific territorial boundaries and explicitly addressed issues of sovereignty in the definition of interstate relationships through both treaty and custom.<sup>86</sup> Nineteenth century China expended a great deal of effort in maintaining its territorial sovereignty. When Western gunboat diplomacy made a military defense clearly impractical, China turned to diplomacy in hopes of maintaining its sovereignty. This diplomacy involved the invocation of principles of fairness and reciprocity common to both the European and Chinese systems of international law, but was expressed in Western legal terms since China petitioned in the face of Western military might.

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<sup>83</sup> Li, *supra* note 21, at 317. Regarding unequal treaties, see BEASLEY, *supra* note 24, at 14-23.

<sup>84</sup> See Onuma, *supra* note 19.

<sup>85</sup> See generally BEASLEY, *supra* note 24.

<sup>86</sup> See generally Edwards, *supra* note 26, at 33.

China asserted its own territorial sovereignty through protests to Western incursions on its possessions.<sup>87</sup> A 1793 response to British requests for the cession of trade rights specifically states that “[e]very foot of land in the Celestial Empire belongs to a territorial district with precisely demarcated boundaries.”<sup>88</sup> Qing control over its own territory and populace required clear definition of and control over the boundaries between China and foreign states. Chinese reliance on these boundaries demonstrates a respect for the legality of established geographic and political boundaries—at least in times of peace.<sup>89</sup>

In the mid-1870s China’s Sinkiang region was in the hands of Moslem rebels.<sup>90</sup> Chinese officials feared that the Sinkiang rebellion might spread from Outer to Inner Mongolia and threaten Beijing. Priority was given to attempts to bring Sinkiang under control and the majority of state revenues during the latter half of the 1870s went toward the effort.<sup>91</sup> China restored control over Sinkiang in 1878 but the Ili Valley remained under Russian control until 1881.<sup>92</sup> The efforts of the Zongli Yamen and Qing diplomats in Europe were rewarded by the return of Ili by the Treaty of St. Petersburg of 1881.<sup>93</sup> This is viewed as a major diplomatic victory and a successful employment of contemporary (Western) international law by the Qing government but was in fact the employment of traditional Chinese strategy expressed through Western legal language.

The Ili valley in Sinkiang<sup>94</sup> was a strategic point of contention between Russia and China.<sup>95</sup> As a peaceful settlement with the Russians appeared near

<sup>87</sup> *Id.* at 36 (citing protests to British intrusion in Macao).

<sup>88</sup> *Id.* at 37 (quoting 23 YUE HAIGUAN ZHI [GAZETTEER OF GUANGDONG MARITIME CUSTOMS] (photo reprint) 10a-b (1968)).

<sup>89</sup> See Edwards, *supra* note 26, at 37. Of course this is not to say that China did not engage in conquest, but that during times of peace, boundaries and demarcations were respected. Note nineteenth century Western concepts of a law of war and a law of peace.

<sup>90</sup> FAIRBANK, *supra* note 12, at 151.

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

<sup>92</sup> *Id.* at 154.

<sup>93</sup> JONATHAN D. SPENCE, *THE SEARCH FOR MODERN CHINA* 220-21 (1990). The diplomats were Marquis Zeng, minister to Britain and his successor, Hsieh Fucheng, Ambassador to England, France, and Italy. See *THE EUROPEAN DIARY OF HSIEH FUCHENG*, *supra* note 1, at 49-51.

<sup>94</sup> For general information on the importance of Ili to Qing Inner Asia, see SPENCE, *supra* note 93, at 97.

<sup>95</sup> Key-Hiuk Kim, *The Aims of Li Hung-chang’s Policies Toward Japan and Korea, 1870-1882*, in *LI HUNG-CHANG AND CHINA’S EARLY MODERNIZATION* 145, 151 (Samuel C. Chu & Kwang-Ching Liu eds., 1994).

in 1880, Li Hung-chang<sup>96</sup> advocated establishing a relationship with the Russians as part of his strategy to manage foreign state relations by encouraging competition among the foreign states.<sup>97</sup> In 1894, Hsieh Fucheng<sup>98</sup> noted ongoing negotiations with the Russians over border disputes and the threat communicated through Britain that Russia would resort to the use of force if negotiations failed.<sup>99</sup> China played upon the rivalry between Britain and Russia to regain control over the Ili Valley through legal argument and treaty negotiations.<sup>100</sup>

This was not the employment of Western balance-of-power strategy but the use of a traditional Chinese barbarian management technique—just as the tribute, *cohong*, and treaty port systems represented institutionalization of traditional barbarian management techniques. China's use of Western legal arguments must be seen for what it was: the employment of diplomacy as an alternative to a military solution. Just as the Chinese learned the language of the foreigners to better communicate, they also employed terminology familiar to the barbarians.

#### *B. Western Adaptation of Chinese Legal Forms and Institutions*

The clearest example of Western adaptation of Chinese legal forms and institutions remains the creation of a multilateral treaty port system with rights of extraterritoriality and the most-favored-nation clause. None of these institutions and customs were new by themselves but the resulting regime represented a significant diversion from the past practices of both East and West. As an emerging power seeking equal status with the West, Japan gained most-favored-nation status with China formally through the Treaty of Shimonoseki in 1895. But China had been "expanding the advantages offered to Japan under international law" even earlier through the efforts of its Foreign Ministry.<sup>101</sup> Recognizing the dangers of most-favored-nation clauses, Li Hung-chang avoided such provisions in earlier negotiations with the Japanese over

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<sup>96</sup> Li Hung-chang was a senior Chinese official and a major figure in formation and implementation of Chinese foreign policy. *See generally id.*

<sup>97</sup> Leung, *supra* note 61, at 168-70.

<sup>98</sup> Hsieh Fucheng was Ambassador to England, France, and Italy during the 1890s. *See THE EUROPEAN DIARY OF HSIEH FUCHENG, supra* note 1, at 19.

<sup>99</sup> *Id.* at 195-96.

<sup>100</sup> *See* Kim, *supra* note 95, at 152-54.

<sup>101</sup> *See* BROOKS, *supra* note 28, at 80.



Korea.<sup>102</sup> With the inclusion of Japan among the Western powers (primarily England, France, the United States, and Russia) who negotiated concessions as a result of the Opium Wars, China faced a serious problem.

As the Qing government feared, foreign trade increased illegal activity among Chinese pirates along the coast and their associated secret societies. The words of Hsieh Fucheng, Ambassador to England, France, and Italy during the 1890s summarize the Chinese concerns:

Hong Kong has become a haven for criminals from both Fujian and Guangdong provinces as the local Chinese officials lack the jurisdiction to arrest them. Several of my predecessors have fought vigorously for our right to install a consulate there, but to no avail. I must keep this in mind and strive again at the appropriate time for our legal rights as a nation.<sup>103</sup>

Extraterritoriality and consular relations were not traditionally goals of Chinese foreign policy or elements of Chinese international law. China traditionally used a tribute system to establish relations with territories beyond practical reach and subjugated others.<sup>104</sup> As China applied traditional notions of reciprocity to the actions of the Western aggressors, however, establishment of foreign consulates became a goal.

As foreign pressure increased, the Qing dynasty attempted to accommodate trade while containing its influence. In 1759 Guangzhou (Canton) was made the official port for trade with foreigners through Chinese brokers (the *cohong* system).<sup>105</sup> In 1793 a British mission visited Beijing bearing examples of manufacturing technology and requesting greater trade rights for British merchants.<sup>106</sup> The Qing government refused both the requests of 1793 and a similar mission in 1816; the government's chief concern was to concentrate on preserving its authority within China and its control over tributary states.<sup>107</sup>

China's hegemony in the nineteenth century included important inner-Asian possessions and tributary states. Chinese Turkestan was invaded by inner-Asian Moslems from Kokand in 1826. Although order was restored by Qing

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<sup>102</sup> Kim, *supra* note 95, at 154-55.

<sup>103</sup> THE EUROPEAN DIARY OF HSIEH FUCHENG, *supra* note 1, at 4 (recording a journal entry from January 14, 1890).

<sup>104</sup> One example of this is Kashgar and Kodor. See Edwards, *supra* note 26, at 33.

<sup>105</sup> FAIRBANK, *supra* note 12, at 195.

<sup>106</sup> *Id.* at 196-97.

<sup>107</sup> *Id.*

reinforcements in 1827, concessions were made to neighboring Kokand, a tributary state.

[Qing officials established] "an administrative settlement which by 1835 provided that (1) Kokand should station a political representative at Kashgar with commercial agents under him at five other cities; (2) these officials should have consular, judicial, and police powers over foreigners in the area (most of whom came from Kokand); and (3) they could levy customs duties on the goods of such foreigners."<sup>108</sup>

Rather than characterize the Turkestan settlement as a treaty, John King Fairbank characterized it as "an exercise in barbarian management."<sup>109</sup> Phrased in Western terms, however, the Turkestan settlement created a treaty port.<sup>110</sup> The Turkestan settlement demonstrates the transformation of a tributary state relationship to a treaty port relationship, all without the involvement of European legal minds.

Western powers dealt with their colonies and each other in entirely different fashions. Ignoring or refusing the requests of petty states regarding the conduct of colonization could fairly be said to have been the West's own policy. Ideologically, Chinese treatment of foreign powers centered on a commitment to the superiority of the Emperor among leaders of the world, as well as the superiority of China among nations.<sup>111</sup> Functionally, Chinese treatment of foreign powers reveals a system of laws designed to promote internal stability and prosperity through a variety of tactics and institutions.

#### IV. CONCLUSION

Qing China faced serious internal challenges to its authority, such as the Taiping Rebellion, as well as confrontation on its borders both in the West in Inner Asia and on its eastern coasts.<sup>112</sup> In the late eighteenth century even the recently established United States traded with China,<sup>113</sup> but the loss of the

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<sup>108</sup> FAIRBANK, *supra* note 12, at 198. Note that Kashgar was located in Chinese Turkestan.

<sup>109</sup> *Id.* at 198.

<sup>110</sup> See JOANNA WALEY-COHEN, *THE SEXTANTS OF BEIJING* 7 (1999).

<sup>111</sup> *Cf.* Edwards, *supra* note 26, at 37-38.

<sup>112</sup> TENG & FAIRBANK, *supra* note 20, at 191-98.

<sup>113</sup> THE FEDERALIST NO. 4 (John Jay) ("In the trade to China and India, we interfere with more than one nation, inasmuch as it enables us to partake in advantages which they had in a manner

Opium Wars and imposition of the treaty port system in 1842 forced a reevaluation of foreign relations and a transformation of the process for dealing with Western states and their trade.<sup>114</sup> Instead of relegating the barbarians to trade at a single point during specific trading seasons, the Qing government was forced to negotiate a settlement similar to its earlier treaty with Kokand. The Western powers then adapted the Chinese treaty port to their own purposes through a series of treaty re-negotiations that created the treaty port system. The creation of the treaty port system reflected the Western adaptation of existing Chinese international law and diplomacy.

The treaty port system began as a Chinese institution but evolved through treaty negotiation into an entirely new legal structure comprising extraterritoriality, most-favored-nation clauses, spheres of influence, and other aspects of modern international law. Although the Western states had made use of treaty ports in other imperialist efforts, the evolution of the treaty port system in China created a cooperative, governing institution: one of the first legal forms of the new, global international law.

As the West sought to force open trade with China in the mid-nineteenth century, two systems of foreign relations law came into conflict: the European system and the Chinese system. These two regional systems allowed no accommodation for competing systems and were forced to merge as neither could subsume the other: China faced a militarily superior West and the West faced a daunting economic and technological challenge in administering an empire at such a remote distance, over such a large civilization. The single system of international law resulting from the merger of these two systems involved Western adaptation of existing Chinese institutions and Chinese adoption of Western legal language and argument. The treaty port system grew out of the merger of these two systems and with its most-favored-nation clause and multilateral nature, constitutes a cooperative, governing legal institution characteristic of modern international law.

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monopolized, and as we thereby supply ourselves with commodities which we used to purchase from them.”)

<sup>114</sup> The Treaty of Nanking ended the Opium War and China's *cohong* system, opening ports to trade and creating the treaty port system. See Treaty of Nanking, *supra* note 2. “[T]he Emperor of China agrees to . . . permit them [British merchants] to carry on their mercantile transactions with whatever persons they please.” *Id.*, 93 Consol. T.S. at 467.

