The Chinese Trademark Law of 1904:
A Preliminary Study in Exterritoriality, Competition, and Late Ch'ing Law Reform

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(Heidelberg)

"Perhaps for no market in the world is it more necessary that the trademarks upon our productions should be jealously safeguarded."

Manchester Guardian, June 2, 1904.

"The eager competition in trade of Western Countries is called commercial war. In what way should China endeavour to form a plan for opposing it?"

Question for the Civil Service Examination, held at Peking in September 1902.
North China Herald, Oct. 8, 1902.

Outline

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In July 1904 the Chinese Government promulgated "Experimental Regulations for the Registration of Trademarks"1, to be put into operation on the following October 23. A Trademark Code was intended to be compiled at some future time after initial experience with these provisional regulations. It was the first time that a Chinese government had been concerned with such a law and economy related subject; it marked a break with the traditional approach in regard to the relationship between government and society, and the role of law and legislation2. The promulgation of trademark regulations took place at the very beginning of a process which is usually referred to as the westernization of Chinese law3. The attempted introduction of trademark regulations, even more than in regard to the Chinese law reform in general, was a response to a challenge expressed by the specific foreign relations system then imposed on China: the system of the unequal treaties. In these treaties with western nations and Japan, China had surrendered the right, generally recognized in international law, which gives a sovereign state jurisdiction over the person and property of foreigners within its territorial limits. As a consequence, the foreigners and their property were exempt from the operation of Chinese laws, and were as much under the jurisdiction of their respective nations just as if not in China.

* The main source — esp. for sections 2 and 3 — is the correspondence between British diplomats and consuls in China and the Foreign Office, series F.O. 405 (Confidential).

I am grateful to Welshi Sung Harvard Radcliffe College, and Michael Luskin, Harvard Law School, for having reduced the shortcomings of my English.

1 Shang-piao chu-ts’e shih-pan chang-ch’eng

2 The new policy had been initiated with the famous Imperial Edict of April 22, 1903, by which the drafting of a commercial code was ordered. The edict says: "Commerce and the encouragement of industries have ever been from ancient times to the present matters of real importance to governments, but according to an old tradition, WE have looked upon industries and commerce as matters of the last importance. That the policy of the Government and the labor of the people result in the daily increasing poverty can have no other reason than this. It is most necessary, therefore, that changes be made that will be of general advantage, and greater attention than ever ought to be given to the matter. . . ." Translated from the Peking Gazette of April 22, 1903 by E. T. Williams, Recent Legislation Relating Commercial, Railway, and Mining Enterprises, Shanghai 1904, p. 1. — See also "Lun Chung-kuo i pao-hu shang-wu" in Tung-lang Isu-chi, September 1904, and "Lun shang-pu yu shang-ye chih kuan-hsi" in ibid., Febr. 1905. — An Imperial Edict of July 5, 1898 had already dealt with the protection of patents and copyrights, translated in A. Maybon, La Politique Chinoise, 1898–1908, Paris 1908, p. 87.

In September 1902 Great Britain, and a year later the U.S. and Japan, had promised in commercial treaties to abolish their extraterritorial rights if China were going to change its legal systems along western lines.

Art. XII of the treaty with Britain reads as follows:

"China having expressed a strong desire to reform her judicial system and to bring it into accord with that of Western nations, Great Britain agrees to give every assistance to such reform, and she will also be prepared to relinquish her extra-territorial rights when she is satisfied that the state of the Chinese laws, the arrangement for their administration, and other considerations warrant her in so doing."

Thus law reform in general was to become a means for "treaty revision", to serve the "rights recovering policy", i.e. the relinquishment of the foreign imposed limitations on sovereignty. As far as the trademark legislation was concerned, however, the treaty established a direkt obligation on the Chinese government to adopt regulations. This immediate reference to trademark regulations in these treaties was an expression of specific hopes, needs and concepts of those nations then following imperialistic policies in China.

1.1.

For more than half a century western countries had struggled for the China market. They struggled with one another, and, to a lesser degree, with the Chinese, whose methods of production and distribution still reflected pre-industrial conditions. Economic competition—well established in the home markets—flooded the Chinese ports. The "Chinese market" exerted an almost magical effect on the imagination of western exporters. They dwelled with particular emphasis upon the great consuming capacity of the Chinese. The purchasing power of this people, insignificant since the Taiping Uprising, was now assessed rather optimistically. "One of the chief reasons", wrote George E. Anderson, the United States Consul in Hangchou, in 1905, "why foreign trade is increasing so satisfactorily at the present time is the fact that the people, as a mass, are commencing to be able to buy and use foreign goods. To be sure, this purchasing power was necessarily limited to the cheapest goods. Besides opium, cotton cloth and food products were among the main articles exported to China prior to the 1910's. Of course, there had been some sceptical voices, marking clear the limits of this market. Robert Hart wrote that "the sanguine expectations which were expressed when treaties first regulated intercourse... have never been realized." And The Protectionist (Boston) even pointed out that "the
country is already an industrial one, and whatever we may now be able to
sell to them, the Chinese, with the introduction of modern methods directed
by foreign capital and enterprise, will soon be able to make for them­
selves... 8. On the other hand, the "prevalent craze for oriental markets"9
was inflamed by Chinese themselves. So, Wu Ting-fang, then Chinese
minister to the U.S., pointed out in July 1900: "That trade can be greatly
extended. Let the products of American farms, mills, and workshops once
catch the Chinese fancy, and America need look no farther for a market."10
China became a focus of the economic hopes of British, French, Russian,
German, American and Japanese merchants, all striving to secure the largest
possible share of this trade. The "open door" policy intended to ensure
competition; trade should be open to all the world and not be monopolized by
one country.

1.2.
This competition required means of restriction. The western nations were
quite familiar with the economic and legal problems involved. Gradually
over a century they became aware that trade could develop only
within the limits of fair competition. Accustomed to applying the law to
regulate social and economic processes they consequently created legisla­
tion for the protection of industrial and intellectual property, thus trying
to diminish what Herbert Spencer had called in 1859 a "commercial canni­
balism." Not surprisingly, western merchants tried to apply those legal
mechanisms to the situation in China.

A consular report of 1905 emphasised that the question of trademark "is
especially important to those [manufacturers] using the markets of China,
where the people are strongly wedded to custom, and where limited know­
ledge of progressive methods of the outside world makes them suspicious
of everything that is new, regardless of any merit that may be presented"12.
And according to an Austrian report on "Business Methods in Tientsin" the
Chinese "(hängen) mit großer Zähigkeit an den Fabrikmarken; alle und gut

8 The Protectionist, Febr. 1900, p. 597.
9 Ibid.
10 Wu Ting-fang, "Mutual Helpfulness between China and the United States",
reaching economic results were expected by an unfair competition legislation esp.
since the second half of the 19th century illustrates the pathetic formulation of
Josef Kohler, Das Recht des Markenschutzes, Würzburg 1884, pp. V ff.: "Wenn die
deutsche Jurisprudenz einst der Hydra der illoyalen Concurrenz ebenso mächtig
auf das Haupt tritt, wie die englische, die anglo-amerikanische, die französische und
jetzt auch die italienische Jurisprudenz; wenn jede dolosive Veranstaltung des
Verkehrs, durch welche sich der eine Producent in das Renomme, in das Ansehen und
in den geschäftlichen Erfolg seiner Concurrenten einzuschleichen sucht, in Deutsch­
land ebenso kräftig niedergestossen wird, wie in England und Frankreich, dann
wird auch die Zeit kommen, wo die deutsche Industrie ihr Haupt erhebt und als Welt­
macht auf den Markt tritt."
12 Department of Commerce and Labor, Bureau of Manufactures, Monthly Con­
sular and Trade Reports, December 1905, Washington 1905, p. 216.
eingeführte Fabrikzeichen genießen geradezu ein Monopol, da es fast unmöglich ist, sie durch neuere, auch noch so gute Waren mit anderen Marken zu verdrängen.13

1.3.

Traditionally the Chinese had not been without experience in putting marks on merchandise in order to distinguish it from others. Books on the history of porcelain and ceramics provide a good survey of the century-long practice of the use of such marks in one of the country's oldest industries.14 These institutions of commerce became also institutions of law insofar as the manufacturers were to some extent protected by legal means. It was said that "mao-pai, or imitating another man's trade mark, was liable to a penalty which, if not administered by the government would surely be inflicted by commercial organizations". But it is interesting to see that the Ta-Ch'ing Lü-li provided in broad terms against unfair economic behaviour, too. Besides false weights and measures the Ch'ing Code also dealt with monopolizing and unfair trading. In its typical criminal law approach also to subjects which are today regarded as to be mainly civil law matters, Section CLIII in Book VII ("Sales and Markets") of the Third Division ("Fiscal Laws") reads in part: "... if one [of the parties] by monopolizing or otherwise exercising undue influence in the market, seeks to obtain an unfair advantage ... he shall be liable to a punishment of eighty blows ... Any unfair profit derived from such practices shall be deemed a theft.15

Reports on falsification of foreign marks were increasing since the 1880's, and the demands for more effective protection became more urgent. La Propriété Industrielle, the official organ of the International Bureau of the Union for the Protection of Industrial Property at Berne, mentioned in its 1888 volume the report of an U.S. consul in Shanghai, according to which "on a découvert dans cette ville une système de falsification très raffiné, ayant pour objet la contrefaçon de marques américaines bien connues dans..."

15 The Chinese Economic Monthly, Oct. 1923, p. 1. — As far as I know, the by-laws of these organizations ("guilds") do not mention expressis verbis any function of this kind, no more than the literature on this subject. But it may be assumed that action against infringement in another person's mark was covered by the very comprehensive jurisdiction of the guilds as indicated e.g. by the "Rules of the Canton Merchant Guild at Pakhui" (German translation by A. H. BACH, in: 8 Mitteilungen des Seminars für orientalische Sprachen an der Universität Berlin, (1905), pp. 263–268). A more reliable view of traditional trademark protection would require an extensive study of these by-laws and — probably more important — reviews of the guilds' relevant arbitrations.
le commerce des colonnades. First attempts of the merchants in Shanghai to protect their trademarks had been undertaken by registration in the consulates of the respective countries. From the consulates the marks were transmitted to the customs house, where they were recorded by number. This kind of protection, however, was insufficient, because neither the consulate nor the record office had power to enforce compliance with its rules. In case of infringement by Chinese subjects it was possible to obtain injunctions by the Chinese authorities. The Mixed Court at Shanghai, for instance, dealt with such cases. Thus e. g. "un résortissant autrichien a réussi à obtenir un jugement contre un concurrent chinois qui avait contrefait sa marque". This judgement was based "sur la libre appréciation des juges", who consequently recognized an equitable right in the ownership of a trademark. It seems that the foreigners were quite satisfied with the protection thus achieved. The British minister mentioned in a despatch to the Foreign Office that "the Chinese Courts... as they have done in the past, afford substantial protection against imitation on the part of Chinese subjects."

1.4.

These conventional solutions, however, were not regarded as adequate dealing with the exigencies and volume of the China trade. The economic framework in which trademarks had to function had changed. When there were few middlemen, and when most of the business done was an exchange between manufacturer and consumer, the value of a trademark was not apparent; for the consumer knew whose goods he was purchasing, and if the manufacturer was known for the quality or quantity of merchandise sold for a fixed price, the consumer would do business with him again. Where, however, the goods were sold in quantities to middlemen or store-keepers, the consumer was unable to determine whose goods he was purchasing when there were no labels or trademarks affixed. Thus modern trademarks had to serve in an entirely different economic situation. B. Currie has pointed out: "What was once a device for fixing responsibility on the shoddy workman, or for establishing a claim to ship-wrecked goods, has become the cornerstone of the multi-billion-dollar advertising business, the foundation of marketing policies in consumer goods industries, a powerful influence on the buying habits and cultural pursuits of people all over the world, and a force to be reckoned with in evaluating the state of our competitive economy."

The trademark laws which came into existence during the first third of the nineteenth century reflected the need for protection of this new species of property, in expressing the principle that the unauthorized use of trademarks

18 British trademarks had been registered at the British consulate general at Shanghai since 1899.
19 16 La Propriété Industrielle (1900), p. 62.
20 F.O. 405/152, Confid. (8490), No. 6 (Peking, Nov. 18, 1903).
21 Brainerd Currie in his Foreword to 14 Law and Contemporary Problems (Spring 1949), p. 171.
is contrary to law and gives rise to a claim for damages as well as to criminal punishment.

In all the industrializing states there was no doubt about the need of such laws; but the views of individual countries as to what constituted ownership in a trademark differed from one to the other. As far as this difference is concerned, the trademark registration laws of practically all countries may be divided into three general classes. First there are laws which provide for the registration of any mark properly applied for, such registration constituting merely a claim to ownership of the mark registered. Second are those laws which provide for the registration of marks only after examination has been made to determine whether or not they are available for exclusive use by one manufacturer, by reason of their inherent qualities and prior established rights, and which registration constitutes merely evidence of title. Thus e. g. trademark rights in the U.S. are acquired by priority of adoption and use and do not depend upon registration. Finally, there are those laws which grant ownership of a trademark by means of registration after examination of the same nature as in the second class. These laws are based on the principle that ownership of a trademark, like that of a patent right, can only be acquired by sovereign grant. Countries with such a system allow a person to register a trademark that has not been registered before, irrespective of the fact that the (unregistered) mark has been in constant use by someone else in the country. This procedure is based on the principle that the owner of a mark should register it if he wants to protect it, and if he does not think it worthwhile to register, only he is to blame if some other person does so. As far as international trade goes, it is quite understandable that newcomers to the family of industrialized and trading nations found a more favorable starting point for international competition by acceding to this category of trademark laws. It met the desire of the newcomers to start anew on a basis of equal opportunities. Thus not only the trademark laws of most Latin-American countries but also those of Germany and Japan were (and are) of an "attributive" character as distinguished from the "declaratory" character of, e. g. the laws of the U.S., France, and (to a limited degree) Great Britain. The Japanese Trademark Law of April 1909 stated clearly: "A trademark rights comes into existence by registration" (Art. 5). It will be seen that Japanese merchants were thus enabled to claim priority of application and to proceed to register already used but unregistered trademarks as their own. A main problem of the Chinese legislation lay in the attempt to combine these different approaches to ownership of a trademark.

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22 The first modern trademark legislation was undertaken by France in 1803.
23 The superiority of common law rights thus acquired has not only found expression in innumerable court decisions but is embodied in the Federal Trademark Act of 1905, which provided in Art. 23: "Nothing in this act shall prevent, lessen, impeach, or avoid any remedy at law or in equity which any party aggrieved by any wrongful use of any trademark might have had if the provisions of this act had not been passed."
A first step in introducing modern trademark laws for protection of trademarks in China was undertaken by Great Britain and France who took advantage of their exterritorial privileges and concluded an agreement for the mutual protection of their marks in China. In August 1898 these two countries stipulated by an exchange of notes that "French nationals are enabled] to obtain protection in the British Consular Courts by registering their marks in this country in cases in which they can be properly registered under English law, and at the same time obtain for British nationals who registered their marks in France the protection of the French Consular Courts." 25

There is no evidence that there were any efforts to reach a similar agreement with Japan before the end of the century. Nevertheless the complaints of the *Journal of Commerce* (New York) of 1907 grew gradually more noticeable: "Japanese trade in China consists largely of Japanese imitations... of foreign goods. The trade is assuming the dimensions of a great national industry. China is being swamped with Japanese imitations..." 26

Western merchants, however, did not consider the protection on a basis of agreements for mutual protection as sufficient. Partly because they had some incorrect ideas about the working of the exterritorial regime in China, and partly because they believed in a modern state in their own image, they pressed their respective governments to use their influence in urging China to produce trademark legislation. The very weak position of China after the suppression of the Boxer Uprising seemed to be a suitable moment to carry through such — and other — demands. Originally it was planned that the "Peking Protocol" of 1901 should provide for the eventual conclusion of an agreement on the many commercial questions about which the foreign commercial communities had long been complaining. But in view of the complicated problems involved it was decided that it would be better to carry on the commercial negotiations separately. By Art. 11 of the Protocol China bound herself to negotiate such amendments to the existing commercial treaties as foreign powers might consider useful. 27

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25 MacMurray, op. cit., vol. 1, pp. 171 f. — An 1895 treaty between Great Britain and France on the same subject served as a model. The wording of the agreement concerning China begins as follows: "Your Lordship is not unaware that the arrangement effected in 1895 between the French and English Government, with a view to assuring the reciprocal protection in Morocco, of French trademarks regularly registered in England, and of English marks regularly registered in France, has brought the most satisfactory results in repressing counterfeits in the State of His Shereefian Majesty...." And for the agreement respecting China it was held: "... Your Lordship will prove conscious of the usefulness which such an agreement would possess, at a time when China, whose legislation assure no serious protection to trade-marks, is opening its markets more widely to the products of European industry."


In contrast to many other reforms which had been desired by British merchants the stipulation regarding trademarks was negotiated quite quickly. On January 13, 1902, Mackay, the British plenipotentiary, wrote to the Foreign Office that the Chinese commissioner "agreed that this [i.e. the registration and protection of trademarks] was a matter of great importance for the interest of trade, but asked that the British Government should undertake on its side to afford protection to the Chinese trademarks against infringement by British subjects; and it was declared to postpone the question pending an inquiry as to the precise state of British law on the subject."

The provision for the reciprocal treatment of British and Chinese trademark protection was successfully negotiated on the same day and approved by the Foreign Office some ten weeks later. Art. VII of the "Commercial and Navigation Treaty" of September 2, 1902 reads:

"Inasmuch as the British Government afford protection to Chinese trade-marks against infringement, imitation, or colourable imitation by British subjects, the Chinese Government undertake to afford protection to British trade-marks against infringement, imitation, or colourable imitation by Chinese subjects.

The Chinese Government further undertake that the Superintendents of Northern and of Southern Trade shall establish offices within their respective jurisdiction under control of the Imperial Maritime Customs where foreign trade-marks may be registered on payment of a reasonable fee."

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28 E.g. establishment of an uniform coinage, the recognition of the liability of Chinese shareholders in joint-stock companies, the removal of obstructions in Chinese rivers, the revision of China's mining regulations, etc. — The British minister felt bound to point out to Prince Ch'ing that "His Majesty's Government were deeply dissatisfied with the conduct of the Commercial Treaty negotiations in Shanghai by the Chinese Commissioners... So dilatory had the tactics of the Chinese Government been that after over four months' negotiation no settlement had been reached except with regard to points not of the first importance..."

29 That there was concluded a treaty at all seemed to many merchants unnecessary, as the North China Herald wrote on Sept. 18, 1902, p. 557: "Residents here... are rather inclined to the idea that China is a country on which foreigners should impose their will; and a treaty which is the result of negotiations in which the right of China to have a will of her own is recognized, seems to them ipso facto a weak concession."


31 Ibid., No. 51.

32 Ibid., Nos. 91 and 114.

33 MacMurray, op. cit., vol. 1, p. 344. — Similar (but not identical) stipulations were contained in the treaties with Japan and the U.S., both of Oct. 8, 1903. The former reads in Art. V: "Protection of Trademarks. The Chinese Government agree to make and faithfully enforce such regulations as are necessary for preventing Chinese subjects from infringing registered trademarks held by Japanese subjects. — Registration of Trademarks and Copyrights. It is further agreed that the Chinese Government shall establish registration offices where foreign trade-marks and copyrights, upon application for the protection of the Chinese Government shall be registered in accordance with the provisions of the regulations to be hereafter framed by the Chinese Government for the purpose of protecting trade-marks and copyrights. — It is understood that Chinese trade-marks and copyrights properly registered according to the provisions of the laws and regulations of Japan will receive similar protection against infringement in Japan." MacMurray, op. cit., vol. 1, p. 412. — The American treaty provided in Art. IX: "Protection of Trade-Marks. Whereas
The creation of a modern trademark legislation in this way became a treaty obligation, a kind of crystallization of the general request for legislation along western lines, and one of the foremost examples of a long series of statute-making endeavors.

2. The Regulations of 1904.

2.1.

Early in 1904 the matter was turned over to the Chinese Maritime Customs Office for administrative action. This office, for decades under the control of Sir Robert Hart, was well known for its effective bureaucracy, "the only honest administration yet created in China", as the London Economist commented. Organized under the Waiwupu (Foreign Ministry), it was in charge of many tasks, not all devoted to customs affairs. So it not only collected the revenues of the whole empire, governed the municipalities of about forty ports, issued the Daily Returns, the Quarterly Returns, and the Customs Gazette (a comprehensive statistical-economic information service), controlled a staff of about 1100 foreigners and 6000 Chinese, but also was entrusted by the Chinese government with the organization and implementation of international exhibitions. It was therefore not surprising that the trademark matter was passed to the Maritime Customs. Robert Bredon, then

the United States undertakes to protect the citizens of any country in the exclusive use within the United States of any lawful trade-marks, provided that such country agrees by treaty or convention to give like protection to citizens of the United States: Therefore the Government of China, in order to secure such protection in the United States for its subjects, now agrees to fully protect any citizen, firm or corporation of the United States in the exclusive use in the Empire of China of any lawful trade-marks to the exclusive use of which in the United States they are entitled, or which they have adopted and used, or intend to adopt and use as soon as registered, for exclusive use within the Empire of China. To this end the Chinese Government agrees to issue by its proper authorities, proclamations having the force of law, forbidding all subjects of China from infringing on, imitating, colorably imitating, or knowingly passing off an imitation of trademarks belonging to citizens of the United States, which shall have been registered by the proper authorities of the United States at such offices as the Chinese Government will establish for such purpose, on payment of a reasonable fee, after due investigation by the Chinese authorities, and in compliance with reasonable regulations. — MacMurray, op. cit., vol. 1, p. 428. — The most favoured nation clause contained in all of the treaties entered into by China with foreign powers gave the right of protection to all nations using trademarks in China.

May 12, 1906, p. 800. — For a more detailed description, see e.g. H. B. Morse, The Trade and Administration of the Chinese Empire, London 1908, pp. 352 ff., and — for a more recent work — Stanley W. Hart, Hart and the Chinese Customs, Belfast 1950.

In 1906 the Maritime Customs was subordinated (by Imperial Edict of May 9) to the Board of Customs Control, Shui-wu-ch'i [4], a purely Chinese organization, "with a view to closer supervision of the foreign administration of Chinese interests." See H. S. Brunnert and V. V. Hagedstrom, Present Day Political Organization of China, Shanghai 1912, p. 88.

Figures for 1903, according to l'Economiste Français, May 2, 1903.
Deputy Inspector-General, was commissioned to draw up a scheme. He kept close contact to the British commercial attache in Shanghai, J. W. Jamieson, and through him with the British Chamber of Commerce in order to keep informed of the desires of the merchants. Jamieson's influence proved quite strong. Bredon and his team were sometimes complaining that Jamieson was straining the interpretation of Art. VII of the treaty. For example, regarding the question whether so called "open chops" should also be provided for in the draft. These are marks, which although not registered in Britain, had been in current use in China for many years. Jamieson argued that by agreeing to Art. VII "a surrender of existing rights was surely never contemplated". He illustrated the danger of neglecting to protect such marks as follows: "For instance, a Chinese may import plain, unmarked goods, and affix thereto a ticket, exactly similar to that of an old established "open chop" the property of a British subject. As the Rules stand, such ticket might be accepted by the Registrar, in spite of protest by the original owner, because nothing is laid down with regard to his right to refuse registration of marks resembling other marks not previously registered. This interpretation of the treaty provision in favour of the "declaratory" doctrine prevailed. The final draft of the Customs also provided protection for the "open chops" (Art. 1 b, 4 and 8). The Custom's draft was submitted in March 1904 to the Waiwupu as "Recommandations of Sir Robert Hart, Inspector-General of Customs, to the Imperial Chinese Government". These recommendations consisted of twelve articles, "crisp, clear and easy to understand." It showed full awareness of the extraterritorial background in distinguishing yang p'ai (foreign marks), chuan p'ai (special marks, the "open chops"), and hua p'ai (Chinese marks). The Inspector-General suggested the establishment of registration offices at Tientsin and Shanghai, with the Commissioners of Customs as registrars. Thus the orderly treatment of applications for registrations would be ensured in an attempt to avoid one of the main obstacles for law reform in those days: the availability of trained personnel in administrative and judicial agencies.

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38 See F.O. 405/152, Confid. (8490.), No. 27. — That F. A. Ayclen, then Chief Secretary, was engaged in this matter, as pointed out by Wright op. cit., p. 805, is, however, not evidenced in the materials used here.

37 See Jamieson's report of Jan. 25, 1904, F.O. 405/152, Confid. (8490.), Enclosure 1 in No. 27.

39 The notion "open chops" or "open marks" was used not only in the sense of old marks, i.e. marks giving a right without registration according to the "declaratory" doctrine; they also were called chuan p'ai (special marks). "Open chops" also meant "free marks" (Freizeichen), i.e. marks which all or certain classes of traders were in the habit of using on goods of the same kind, and which by those engaged in trade were not considered as proprietary marks. They cannot be registered.

39 F.O. 405/152, Confid. (8490.), enclosure 1 in no. 27 (Jan. 23, 1904).


41 Wright, op. cit., p. 805.
Meanwhile the American minister had corresponded with the Waiwupu concerning the enforcement of the treaty provisions concerning trademarks, copyrights, and patents. On March 26, 1904, in explaining the further drafting procedure, Prince Ch'ing, the head of the board, answered: "On the receipt [of your inquiry] we at once addressed a communication to the Board of Commerce for their information. They have discussed the matter and now reply as follows:

The board of commerce, having special charge of trade affairs and being just now in the beginning of its work, has a great many matters on hand. In regard to registering trade-marks, making rules for the protection of new inventions, books etc., the board is just now considering satisfactory regulations and compiling specific rules. As soon as the rules have been drawn up in order, the board will memorialize the Throne asking for their official publication. Then the foreign board may communicate by dispatch with the foreign ministers of the various countries, who may instruct the foreign merchants to act accordingly.

Further information about the drafting process was contained in a letter to the American minister from Prince Ch'ing at the end of May. Prince Ch'ing quoted a statement made by the Shangpu (Ministry for Commerce) as follows:

"... Sir Robert Hart, the Inspector General of Customs, has drawn up twelve rules for the registration of trademarks, and this Board has proposed eight more. As we are now only making a beginning in this matter, the entire set of rules which we propose should be most carefully gone over and examined; they must be chosen to cover a wide field, and must prove thoroughly satisfactory; both Chinese and foreign merchants must obey the same rules. This Board has gone over the original proposed regulations and examined them with especial care. Moreover, we have made selections from the rules for registration used by various other countries, weighed their advantages and disadvantages, and decided to propose for a trial a set of twenty-eight regulations, and a supplementary list of twenty-three minor rules. Books of reference arranged according to subject, and the form for the Certificate of Protection have also been decided upon."
After having received these communications the western diplomats and merchants could look forward to satisfactory results from the Shangpu.

2.3.

This ministry, itself a creation of the efforts of modernize the bureaucracy of the state, was established just some months before. It was a loss that the London educated jurist Wu Ting-fang, who had practised law at Hong-Kong prior to his joining the diplomatic service, had left the vice-presidency of the Shangpu in January 1904, in order to be appointed junior vice-president of the Waiwupu. His post in the Shangpu was given to an official who had no comparable knowledge of western law. The Shangpu, however, had appointed Japanese law experts. This was not surprising because Japan had just a few years earlier drafted its own trademark law.

It seems that during the work in the Shangpu nobody outside the ministry was consulted. On June 9, the Waiwupu communicated to the British, American, and Japanese ministers a copy of the regulations as formulated by the Shangpu. The ministers were asked to examine the draft and reply promptly so that the Shangpu might be able to submit the regulations to the throne for approval in a memorial, proposed to be presented on June 15. The Japanese minister had found no difficulties. His British and American colleagues, however, felt unable to express their views on such a complicated topic in such a short time. They first wanted to consult their governments and get acquainted with the opinions of the merchants. Nevertheless, they gave the impression that the regulations appeared to them as basically acceptable. The British minister wrote to his Foreign Office: "I pointed out that, as the Regulations were stated to be provisional in character, and as, moreover, they formed a first step on the part of the Chinese Government towards the attainment of a very desirable end, I was not disposed to criticize them in any carping spirit ..." And on July 21, the American minister suggested to his consul general in Shanghai: "You know from our experience with the Treaty negotiations, that if we propose material change, other Representatives will propose others; this will suggest others to the Chinese, and great delay must occur. It seems to me, therefore, that since the others are willing, we also might consent to give them a trial." The

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45 This is often mentioned in the despatches, but without any specification regarding the personalities of the advisers.
46 The first Japanese trademark code was promulgated at March 1, 1899; see Hörei Zenšo III, No. 3, 1899, pp. 100—105. Respective regulations date back to the 1880's.
47 F. O. 405/153, Confid. (8568.), no. 58 (Aug. 8, 1904).
48 "Despatches from United States Ministers to China", op. cit. (note 43), enclosure no. 6 in despatch no. 1681.
consul general answered reporting a meeting with American merchants whose "feeling was quite strong that it was very desirable to have some regulations at the earliest possible moment." Only some minor changes should be asked for. The Shangpu did not see the necessity of any examination, and with blunt impatience it pressed for consent: "... it appears that request from commercial people for the registration of trademarks have accumulated in very large numbers, and this enquiring into the regulations is causing great delay. The regulations as decided upon by the Board of Commerce are merely trial regulations and there is no reason why they should not be changed or added to at any time, ... and it is very evident that this set of trial regulations are of a truth in accordance with the general usage of other countries, and are not partial in the lightest degree; we [the Board of Commerce] ought to prepare a memorial at once to present to the Throne, in order that notification of these regulations may be given, and that delay may be prevented...." The Chinese government did not hesitate. Without awaiting the answers of the ministers the Shangpu submitted a memorial asking for approval of the proposed regulations, to be put into operation experimentally. On August 12, Prince Ch'ing informed the American minister that the Shangpu had received Imperial sanction. Through the Waiwupu the ministers of foreign governments were provided with copies of the regulations "to be made known by them to the merchants of their various nationalities, that they might uniformly observe the same."
2.4.

What was the content of these regulations? In many respects they were different from Hart's recommendations. Formulated in complicated legal language, they required a highly specialized knowledge to understand their implications. There were twenty-eight articles, in which the conditions for registration, the contents of the trademark right ("exclusive use" — chuanyung), and the criminal, civil, and administrative consequences of infringement (Arts. 19, 21, 22) were clearly defined. But self-appreciation of the Shangpu, and what might be assumed to be Japanese interests coming through Japanese advisers, gave the regulations some specific qualifications different from the Maritime Customs's proposals.

(a) One of the first sections of the memorial expressed the self-assertion of the Shangpu as follows: "Today Your Ministry takes charge of the commercial matters, and attention to the complete protection of commerce is initiated step by step." Accordingly, in distinct contradiction to the treaty with Britain and Hart's recommendations, the regulations provided for the establishment of a Bureau of Registration (chu-ts'e-chü) under the Shangpu, while the Customs of Tientsin and Shanghai only had to serve as brand offices for receiving applications (Art. 2). The memorial explained that, we humbly find that when the treaty with England was signed in the year Kuanghsü 28 (1902) Your Ministry was not yet in existence. Consequently, there is in the treaty the permission that 'the Superintendents of Northern and Southern Trade shall establish offices within their respective jurisdictions under control of the Imperial Maritime Customs . . .'. (But) when the treaties with U.S. and Japan had been signed, Your Ministry had already been initiated; therefore (these two treaties) do not contain the same mentioning of the establishment of offices of Northern and Southern Trade. Now Your Ministry is discussing to make a proposal to care from now on for the matter of trademark regulations in a suitable way. Therefore, under Your Ministry was set up a general office, and special officers were appointed prepared to manage carefully; at the same time we order that the Customs at Tientsin and Shanghai establish registration branch offices."

Thus the trademark department — originally to be placed by the Waiwu pu in the hands of the Imperial Maritime Customs — should be centralized under the Shangpu in Peking. This was commented on by the generally

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54 Text at several places. Quoted here ibid. (note 33), 20b—22b. — Translations in western languages were published soon after the regulations had left the ministry in June; English translation e. g. in North China Herald, July 29, 1904, pp. 252/253. 55 See also "Shang-pu tzi Wai-wu-pu shang-piao chu-ts'e ying you Shang-pu kuan-li wen" (Official despatch of the Shangpu to the Waiwu pu that the registration of trademarks should be administered by the Shangpu), and "Shang-pu tzi Waiwu pu shang-piao you Shang-pu Kei chao chi pao-hu chu' nang-zi chu' chuan-chi chuan-lu' kul Shang-pu wen" (Official despatch of the Shangpu to the Waiwu pu that certificates for trademark should be granted from the Shangpu and that the protection of copyrights and patents also belongs to the Shangpu), in: Tung-tiang tsu-chih, March 1904, pp. 180—182.
sympathetic North China Herald as follows: "... the Shangpu wanted to know what their luxurious establishment existed for, and, were they not entitled to do the business and collect the fee? So the Waiwupu took the matter out of the hands of the capable and business-like Foreign Customs, and placed it in hands manifestly more deserving. Whether these hands are capable of guarding one's trademark from purloinment, time will show. So far it looks as if the needy Chinese officials, and later on the legal profession, would be the chief gainers 56.

(b) The Chinese regulations adhered to the "attributive" understanding of ownership in trademarks. That the Japanese advisers in the Shangpu had recommended this system may be taken as certain. It was in accordance with their own experience, and gave the Japanese traders a more favourable basis for competition with Europeans and Americans. But it also served the Chinese interests better than the "declaratory" system. Foreigners should register their marks in China; otherwise the Chinese merchants should not be prevented from using well known marks. Only registration would create certainly about the legal positions. And registration was to be undertaken by Chinese authorities. This marked the spirit of the regulations. Art. 1 stated that registration shall be compulsory if the right to the exclusive use of a trademark in China was desired, and Art. 6 made clear that if applications are made for the registration of similar marks (to be used upon the same sort of goods) "registration must be granted to the one first making application". On the legal consequences of prior use nothing was said. But according to Art. 8 c a trademark could not be registered if it was "identical with or similar to one already registered as belonging to another person, or which shall have been already in public use in China more than two years before the present application shall have been made ..." 57 This was a concession to the "declaratory" approach to trademark ownership. If, however, a registration violated this provision it could be annulled only during the three years following the registration (Art. 13). The character of the "attributive" system again became obvious in Art. 26, which recognized marks already registered (!) in foreign countries as entitled to precedence if within six months after the Chinese registration bureau had commenced operations application would be made for their registration. The division into different classes of marks, as proposed by the commissioners of customs, no longer appeared. But the extraterritorial regime was taken into consideration insofar as according to Art. 20, anyone, being a Chinese, who undertakes to sell goods with a fraudulent trademark was to be punished by the Chinese government, whereas foreign infringement was to be dealt with in consular courts. In summary, the regulations can be regarded as a well balanced combination of the different legal approaches, and of the different political and economic interests — Chinese, western, Japanese — involved. The European powers, however, had a very low opinion, which also was reflected

57 Emphasis added.
by contemporary scholarly assessment. Otto Franke retrospectively expressed the conviction that these Chinese regulations "würden den altbewährten Handelsmarken abendländischer, nicht zum wenigsten deutscher Häuser geradezu verhängnisvoll geworden sein" 58.


Since the publication of the draft, translations were circulating among the representatives of foreign importing firms. In meetings of the Shanghai General Chamber of Commerce, the China (British), American and German Associations, the regulations were discussed, and amendments proposed. The same was going on in the governmental and merchant circles in the several home-countries. Chambers of Commerce, business executives, attorneys, and government institutions engaged in lengthy and often contradictory discussions, not seldom influenced by inadequate translations of the Chinese text. As a kind of lone voice in a wilderness the North China Herald welcomed the regulations, saying that already the penalty article (21) "shows that the intention of the Chinese Government in putting forth these regulations, is to make them operative so as to satisfy the repeated demands of the foreign commercial community in China", and added, "this being the intention, the regulations should be welcomed, and carping criticism is alike undignified and unjust" 59. The general opinion, however, was different. Now emerged exactly that situation the American minister had intended to avoid 60. The merchants became more and more aware that the extraterritorial regime might actually frustrate their original expectations. Already in the fall of 1903, the British minister in Peking had felt bound to emphasize: "I beg to suggest that warning should be given to inquirers that registration under Article VII will not go far towards protecting British trademarks. Chinese subjects do not infringe them to any great extent, and protection is needed rather against imitations by foreigners of other nations..." 61. The merchants had urged trademark legislation in the belief that they would be protected against fraudulent use of their marks by persons of every nationality. But when they discovered that the protection was only against Chinese, that China could not legislate against foreigners - the real competitors on the China market — they concluded that the existing situation was preferable 62. And the British minister had communicated to the Foreign

60 See supra, note 45.
61 F. O. 405/141, Confid. (8201.), no. 189 (Nov. 21, 1903).
62 The unclear conception of the significance of the extraterritorial regime in this question may well be illustrated in the following dialogue, which arose at the end of a meeting of the Shanghai General Chamber of Commerce, Sept. 22, 1904 (F. O. 405/153, Confid. (8568.), enclosure 2 in no. 1127): 
Merchant: I am sorry to be late with it, but I should like to ask one question: What protection do I get by registering my trademarks under these new Regulations from the Chinese that I have not got already? Will the Chairman kindly give me an answer?
Office that it would be “desirable that the very limited application of these Regulations, and of the extremely slight advantage to be gained by registration of marks, should be clearly explained to the British proprietors of trademarks, lest they should unwittingly be led to incur great and useless expense in the payment of fees.” Subsequently there grew up an antipathy towards the whole project on the part of the western merchants, and a turn towards other methods for achieving the desired protection.

3.1.

The amendments the dissenting foreigners regarded as most important may be summarized as follows:

a) The Registrar General of the Shangpu should have at his side “qualified foreign advice”. The advisor “ought to be European”. The Shanghai and Tientsin offices, besides receiving applications, should have power to register and issue certificates. The Trademark Gazette should be published Chinese and English; applications ought to be accepted in English, and the Chinese government should issue an authorized English version of the regulations. There should be opportunity for an appeal against decisions of the registrar.

b) The fees for marks already registered abroad should be on a largely reduced scale.

c) There were doubts whether marks already in use without registration were protected by Art. 8 c; in other words, whether all marks in general use in China for the previous two years were entitled to protection without registration, as Jamieson’s opinion was. His interpretation was not gene-

Chairman: I am not in a position to give one, as I don’t quite understand the question.

(Merchant: Is that your answer?)

Chairman: Yes.

(Merchant: If you can explain that, you are pretty smart.)

Chairman: I don’t intend to try.

(Merchant: I want to know something about our position: I want to know, if I have already registered my mark in Manchester, or London, or Germany, or anywhere else, what extra protection I get by registering in China which I have not got now?)

Chairman: I will ask Mr. Jamieson to reply.

(Jamieson: ... under Regulation 8 certain marks therein enumerated cannot be registered, and those marks are those which derive protection from priority of use in China prior, that is to say, to the date of the signing of the British Treaty. If you had an article in use before that date, with a trademark, you are absolutely protected; if you imported an article subsequent to that date, you must register in China to get protection. In addition, you will now have rights against any Chinese who infringe your mark that you did not have before.

(Merchant: I have, let me presume, marks registered in Manchester or London. If I found my marks being infringed, I should proceed against the exporter. What will these Regulations do further in regard to that right?)

(Jamieson: That is not the question. The Chinese Government can only legislate for Chinese subjects.)

F. O. 405/163, Confid. (8642.), no. 85.

See in note 62.
rally understood as definitive by the members of the Shanghai Chamber of Commerce. But even those who shared Jamieson’s opinion opposed this provision on the ground that “it means that the proprietors of old marks must keep a constant watch, permanently, in order to see that their marks are not being infringed. The constant necessity of such vigilance would become an intolerable burden, but to adopt the alternative of registering all old marks would cost many older firms in Shanghai from 10 000 taels to 20 000 taels under the present scale of fees ...".

d) The exterritoriality system was brought into play by the request that marks heretofore registered in foreign countries should as a matter of course be registered in China, because the Chinese registrar was not supposed to have jurisdiction for examination. The recommendations of the Maritime Customs represented an attempt to avoid this problem by creating several classes of marks.

(e) There was strong opposition to the provision that a foreign owner had to produce a certificate proving that he was registered in his own country before registration in China would be allowed. The Trademark Owners’ Mutual Protection Association pointed out in a letter to the Foreign Office that, “this will place many British trademark owners in a very serious difficulty. Many hundreds of trademarks of great value in the Chinese trade and suitable only for the Chinese market are not registered, and cannot for a variety of reasons be registered in Great Britain under the present Trademark Laws. In this respect, British trademark owners are at a serious disadvantage compared with the subjects of other countries where similar restrictions on the registration of trademarks do not exist ..."

According to the evaluation of the contents of the draft by the European powers it was more favourable to the Japanese than to themselves. The British minister expressed this opinion when telegraphing to the Foreign Office that “I believe that the merchants of Shanghai now regret on the whole that they ever adopted the idea of the China Association for the registration of trademarks, and that they are actuated by a fear that the piracy of their marks by Japanese will be facilitated by the Regulations". It is doubtful whether this evaluation was based on a just assessment of the Chinese regulations. Had the western merchants agreed to consent to them, the available protection — i.e. the protection within the limits drawn by the exterritoriality regime — would have been ensured. But the merchants wanted for most of their marks protection without registration, and did not concede to the Chinese government any freedom of how to organize trademark protection. The western merchants did not want any financial burden, and above all were not willing to risk anything that might turn out to be a concession to a competitive Japan.

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85 F. O. 405/153, Confid. (8568.), enclosure 2 in no. 127 (Minutes of a meeting of the Shanghai General Chamber of Commerce, Sept. 22, 1904).
86 F. O. 405/153, Confid. (8568.), no. 69.
87 Ibid., no. 64 (Oct. 1, 1904).
It was the German government, backed by the French, Austro-Hungarian, and Italian governments, that pushed the protest, and demanded a postponement of the date on which the regulations were to come into operation. The China and American Associations joined the protest. It was alleged that the date fixed did not allow time for the full consideration of the issues involved, and postponement for six months from the 23rd of October was asked for. The British government identified without delay with the desires of their merchant subjects; the American government was reluctant to do the same.

The Waiwupu, usually anxious to meet the wishes of the ministers, refused the request for postponement, obviously under the pressure of the Japanese Minister, who had expressed himself strongly against any delay in putting the regulations into operation. On October 24, the British minister telegraphed to the Foreign Office that "it is represented by the Board of Commerce that all arrangements have been made for putting the regulations into force . . ." Still in the same month applications for registration of marks were received. The "Official Gazette" of the Japanese Foreign Ministry of September 6 had already contained the Chinese regulations, and by November, fifty Japanese applications for registry were filed at Shanghai. The European governments insisted on postponement. The China Association made clear that "it is from the possible action of Japanese merchants in applying for the registration of trademarks identical with or closely resembling existing trademarks belonging to British owners that the necessity of effective action to insure postponement exists, and the importance of immediate action is apparent from the fact that the Offices for receiving applications for registration were opened . . ., and certificates granting the monopoly of the use of the marks applied for many begin to be issued in few months". The matter became increasingly a contest between the west and Japan. The British minister pointed out that his French and German colleagues had emphasised that the question had a political as well as a commercial aspect, and that Japanese influence had of late increased very greatly, and a trial of strength between Japan and European countries was now in progress. Still by the middle of December the British minister in Tokyo had been unsuccessful with the representations he made in pursuance of the postponement. On December 23, 1904, however, the minister in Peking could wire to the Foreign Office that the Chinese government had addressed a note to the ministers "that no trademarks shall be registered until the amendments to be introduced into the regulations have been agreed upon". The registration offices, however, remained open — this as a harmless concession to the Chinese government for saving face.

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69 According to a telegram of the British minister in Tokyo to the Foreign Office, Nov 27, 1904, F. O. ibid., no. 119.
70 China Association to Foreign Office, Dec. 7, 1904, F. O. ibid., no. 133.
71 F. O. ibid., no. 102 (Nov. 7, 1904).
72 F. O. ibid., no. 147.
The American, British, and German Associations of Shanghai submitted their amendments, which were then forwarded to the ministers in Peking. After having formed a committee composed of five members of the diplomatic body, they in turn amended the amended draft and submitted it in a Chinese and a French version to the Waiwupu which referred is to the Shangpu. This draft contained most of the amendments mentioned above, and particular emphasis was placed on a distinct recognition of the principle which Jamieson contended underlied Art. 8c, that is to say, that foreign-owned marks be divided into two classes, pre- and post-treaty marks, the latter only to be registered, the former already protected without registration. Second, the draft stated: "The Board of Commerce being charged with all questions relating to the protection of industrial or commercial property, it will be the function of that Board to control the application of the present Regulations." But then it added: "The Board of Commerce will establish at Shanghai an office which will be charged with carrying out the registration of trademarks" (Art. 2). It was further pointed out that it would be possible to present applications "through the Imperial Maritime Customs Offices in the Treaty ports" (Art. 3) to the Registration Office. Third, the "declaratory" system should be taken into account in the case that several applications for similar marks were made, the mark of that applicant should be registered "who can prove the earliest lawful use" (Art. 6). Fourth, free marks should not be registered (Art. 8).

At the beginning of July, 1905, Prince Ch'ing submitted to the British minister the response of the Shangpu to the proposed amendments of the ministers. The Shangpu was eager to stress "that all points affecting the commercial interests of the various nations, as well as those affecting the sovereign rights of China, should be taken into consideration equally and regarded equally". This alleged well-balanced consideration of foreign and Chinese interests and rights was manifested in the "Amendments to Trademarks Regulations proposed by Chinese Board of Commerce" in a way which made it impossible for the European governments to continue the discussion of Chinese trademark regulations. The Chinese government did not accept the distinction of trademarks into two classes, nor did it follow the suggestion to establish the registration office in Shanghai. Furthermore, it even objected to the Maritime Customs as an application channel. It did not waver from the old position that branch offices should be established by the Shangpu in Tientsin and Shanghai. As regards the establishment of the registration office in Shanghai, the Shangpu pointed out that "the
practice of all other countries is to have the office in the capital, under the
management of the commercial or industrial Department of State. The
establishment of such an office at Shanghai would, it is submitted, be in
conflict with the general system of administration which prevails . . . " But
what provoked the utmost opposition of the European governments was the
attempt of the Chinese government to limit or to redefine the sphere of the
extraterritorial regime of the foreigners. The motives of the Chinese govern-
ment to attempt this highly sensitive move are not entirely clear from the
material presented here. An explanation is still more difficult to find, con-
sidering the fact that the relationship between the Chinese trademark regu-
lations and the consular jurisdiction was discussed in correspondence
between the British minister and Prince Ch'ing in August 1904. It was made
clear that Art. 20 of the regulations, which provided for judicial proceedings
in case of trademark infringement by foreigners and Chinese\textsuperscript{78} was to be
interpreted in the light of Art. 2 of the Chefoo Agreement of 1876\textsuperscript{79}. There
it was pointed out that as long as the laws of the two countries differed from
each other, there could be but one principle to guide judicial proceedings in
mixed cases in China, namely that the case would be tried by the official of
the defendant's nationality, the official of the plaintiff's nationality merely
attending to watch the proceedings in the interests of justice, and that the
law administered would be that of the nationality of the officer trying the
case. Prince Ch'ing assured the British minister that "in response to our
enquires the Board of Commerce has replied that the principle laid down in
sub-section 3, section 2 of the Chefoo Agreement with regard to judicial
proceedings in Mixed Cases, being in itself so eminently reasonable, should
of course be duly followed by both sides in question affecting Art. 20"\textsuperscript{10}. Was it frustration in being spurned by the powers, or was it a new evaluation
of contents and limit of the extraterritoriality system which caused the Chinese
government to reject its own statement of a year before? In its communica-
tion with Prince Ch'ing\textsuperscript{81} the Shangpu had declared that "Trademark Regu-
lations have hitherto formed no part of China's existing laws, but after they
have been discussed repeatedly with various powers so as to bring them
into general conformity with the legislation of other countries, it is evident
that the judicial proceedings affecting trademarks should be carried out in
accord with the general practice obtaining in other countries, in order that

\textsuperscript{78} This article, corresponding with Art. 20 of the minister's draft, reads: "In case
of a suit for the infringement of a trademark, if the defendant be a foreigner, the
local magistrate shall send a dispatch informing the Consul of defendant's nationality
and shall sit with him in a trial of the case. If the defendant be a Chinese, the Consul
concerned shall send a dispatch informing local magistrate and shall sit with him
in a trial of the suit. If both parties to the suit should be foreigners, or if both parties
should be Chinese, immediately upon information being given of the infringement,
the Court or officer having jurisdiction will take action as required, so that due
protection may be given."

\textsuperscript{79} G. HERTSLER, Treaties etc. Between Great Britain and China, 3rd ed., vol. 1,
London 1908, p. 73.

\textsuperscript{80} North China Herald, Sept. 16, 1904, p. 642. Emphasis added.

\textsuperscript{81} See supra, note 76.
an equal measure of justice may be assured. These considerations assumed concrete form when the Shangpu amended the articles of the foreign draft concerning judicial proceedings in case of trademark infringements. According to the draft of the ministers it was recognized (in Art. 20) that a foreigner could be pursued for infringement of another person's mark only before the consular court of his country. The Shangpu, however, proposed to enact that all cases of infringement, no matter what the nationality of the defendant, were to be tried by a Chinese court. The Chinese proposed Article reads:

"The owner of a trademark who has had his rights infringed by any person may bring a suit against such person before the Court of the Registration Office, and he may appeal against the decision of that Court to the Court of the Board of Commerce."

The "Memorandum by Chinese Board of Commerce respecting Trademarks" contained some explanations for this surprising step. There the Shangpu developed its new understanding of the consular jurisdiction. It pointed out the "the provisions of the old Treaties respecting the Consuls' judicial powers applied particularly to criminal offences, and cannot, we submit, be held to cover the decisions in respect to trademarks whereof there is no question". The old treaties had not contained any provision as to how judicial decisions were to be obtained respecting trademarks; the three recent commercial treaties, however, did:

"reciprocal protection of trademarks is provided for, and all these treaties declare that cases shall be investigated by Chinese officials in conformity with the Trademark Regulations to be made by China. If this idea is developed, then it follows that any trademark which enjoys the protection of the Trademarks Office of this Board falls naturally under the control of that office, and that disputes arising out of trademarks cannot be left for settlement to the various jurisdictions of the local officials. It is therefore obvious that the measures formulated with care and exactitude by this Board in the present draft Regulations in respect of judicial decisions in cases of infringement of trademarks, which vest the power of making such judicial decisions in the Trademarks Office, have merely for their object the centralization of all authority in one place, so that equitable decisions may be obtained, and that the interests of both Chinese and foreigners may be fully protected,"

To those fundamental considerations the Shangpu added those of a more practical nature by pointing out that

"with reference to Art. 20 in the foreign Representatives draft stipulating that in mixed cases between Chinese and foreigners the Consul is to be notified and asked to try the case in co-operation with the Chinese official, it must be borne in mind that China is to have only one Trademarks Office, while each port has its Consul and its local officials. It is

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81 See supra, note 77.
82 F. O. 405/164, Confid. (6670.), enclosure 2 in no. 79.
impossible that they should be familiar with all the affairs of the Trademarks Office and the circumstances attaching to any action which may be brought. Moreover, when the Regulations have brought into effect, the settlement of all cases in respect of infringement should be carried out in accordance therewith and no one but a legal specialist and, indeed, one thoroughly versed in the subject of trademarks is qualified to perform the function of Judge in an action of this nature. Among the present local officials men of such qualifications are rare, but when the Board establishes its Trademarks Court carefully drawn up rules will be issued separately, and every precaution will be taken to ensure thereby full protection to the interest of Chinese and foreigners in a manner fast superior to that afforded by a hearing before Mixed Court composed of a Consul and the local Official.\[84]\[84].

What might have been the main inducement for the new policy of the Shangpu in dealing with the exterritoriality question was perhaps the famous promise contained in the three commercial treaties. The Shangpu referred to this in pointing out that,

"by Art. XII of the British Commercial Treaty, Art. X of the American, and Art. XI of the Japanese Commercial Treaty provision is made for the abandonment of extraterritoriality when China has recast her laws. In the future, therefore when the new Chinese laws are completed, the various Powers engage to abolish the judicial functions of their Consuls in toto; so, why, when we have elaborated these particular measures respecting trademarks, which, by Treaty, are intended to be binding on all nationalities, should the Powers be unwilling to comply with them!"

It is obvious that these arguments of the Shangpu underlay an understanding of the abandonment-promise which may be called "piecemeal". A legal order was seen as a collection of individual isolated acts, rather than as an unified totality of corresponding and integral constituents.

From the very beginning the British minister was opposed to such an interpretation and wrote to his Foreign Office: "I do not hesitate to say that the present condition of Chinese legislation, the methods of conducting...

\[84]\[84] It is remarkable that "La Propriété Industrielle" in vol. 27 (1911), p. 172 made a similar statement: "Il arrive souvent que les tribunaux consulaires ne se trouvent pas compétents pour appliquer des lois régissant une matière spéciale, comme la propriété industrielle, par exemple." ("La Protection des Marques de Fabrique et la Juridiction Consulaire"). — A list of subjects for the study of future trademark registrars — published in Shang-wu kuan pao (11), no. 23, Sept. 5, 1907 — showed awareness of the main legal implications. In this "Brief Outline of the Lecture Given by an Official of the Trademark Office in a Discussion Session" (Shang-piao-chü-chü-yuan chuang-hai-su shuo-lue [14]) the following subjects were stressed as fundamental: comparative trademark law, history of trademark law, property rights, practice in investigation and in judicial decision making, trademark precedents of several countries, relationship between trademark law, civil, commercial, and criminal law, experiment of investigation and of decision making.

judicial business and the spirit which animates the whole of the Chinese mandarinate, is such that it is scarcely possible to assign a measurable period after which it would be practicable to leave the lives and property of foreigners to be adjudicated upon Chinese Tribunals.

In a short address to Prince Ch'ing the Chinese proposals were refused as impracticable, and the specified objections were referred to as "absolutely insurmountable". It was added that the discussions of points of lesser importance were to be avoided until an agreement should be reached on the fundamental points of difference. Not before November 1906 did the new British minister communicate to the Foreign Office that the Shangpu had redrafted the trademark regulations in October 1906. The minister wrote that

"the Chinese text bears evidence of having been drafted under Japanese auspices, and it is drawn up in a confused manner, with many obscurities, some passages being quite unintelligible. At the same time, there are certain concessions made by the Board of Commerce in amelioration of their former proposals. The fees are somewhat reduced, and provisions is made for exterritorial rights of foreigners; but there is no stipulation for the deposit of marks already in legitimate use in a 'special list', or for the prevention of registering 'open marks'."

The ministers declined to discuss these new rules, and pressed for further negotiations upon the draft prepared by them in April 1905. In the eyes of the foreigners the new Chinese proposals had the same shortcomings as the previous: No special provision was made against registration of free marks; nothing was said about old marks not having to be registered; the fees were still not "reasonable"; no Registration Bureau was to be established at Shanghai; no mention was made that the registrar should be British as long as British trade in China predominates, and nothing was said about the language of the "Trademarks Gazette". The conclusion was that "these Regulations, which have been drafted primarily to serve as a Trademarks Act for China and incidentally to embrace foreign trademarks by a sort of side-wind, are altogether unsatisfactory".

In November 1906, the Shangpu amended its draft again, and did not forward it to the foreign representatives concerned until May 1907. Notwithstanding the statement of the Board that the new regulations "were based upon

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\(88\) F. O. 405/164, Confid. (8670.), no. 79.
\(89\) F. O. 405/164, Confid. (8670.), enclosure 5 in no. 50.
\(90\) Since the Imperial Edict of the 6th Nov., 1906, Nung-kung-shang-pu (Board for Agriculture, Labour, and Commerce).
\(91\) F. O. 405/170, Confid. (9015.), no. 137.
\(92\) Report by a Subcommittee of the China Association, F. O. 405/177, Confid. (9233.), enclosure 1 in no. 55.
the draft Regulations drawn up by the Ministers in April 1905, and though
the order of them is in some respect different, yet in substance they come to
the same thing . . . "90, there was in fact not much difference in the Boards
draft of October 1906. One concession, however, was made. In case that
application be made by several parties for the registration of the same mark
which had been used in the past, registration should be accorded to the
earliest user of the mark.91 But this was not regarded as sufficient by the
ministers to justify a reconsideration of the draft of October 1906, or to
accept the new Chinese amendments as a basis for future negotiations.92

Instead, the foreigners became more and more eager to conclude a treaty
with Japan for mutual protection of trademarks. The China Association and
several local chambers of commerce addressed the Foreign Office on this
issue.93 "The attention of this Chamber", wrote the Bradford Chamber of
Commerce, "has been called to the fact that firms engaged in business with
China are constantly receiving complaints of the importation into that
country of Japanese goods barine flagrant imitations of European (chiefly
British) trademarks, to the serious detriment of British traders generally,
and to the owners of the trademarks which are imitated particularly." The
Japanese appeared to be unwilling to enter into such a treaty on the ground
that China should first undertake the registration of marks. They expressed
the hardly substantiated apprehension that the Chinese would take advan­t­
age of the postponement of trademark regulations in China to copy and
counterfeit the marks of Japanese goods.94 The anxiety of the Japanese
traders for an early issue of trademark regulations in China, however, seemed to be more due to the hope that as soon as these regulations came into
force they would be able to re-register and obtain proprietary rights for
marks — often imitated foreign marks — which had already been registered
in Japan, and were awaiting registration in China. Therefore it seemed
desirable for the Japanese merchants that the Chinese regulations should
precede a reciprocal trademark protection agreement, at least between
Japan and Great Britain. This was regarded as disastrous for the interests
of British traders.

As a result of this evaluations, negotiations with the Chinese government
were interrupted by a request from the Foreign Office as follows: "Pending
the decision on the draft Convention with the Japanese Government, you
need not proceed with the negotiations with the Chinese Government."95

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90 F. O. 405/177, Confid. (9233), enclosure 1 in no. 97.
91 Ibid., enclosure 2 in no. 97 (Art. 7).
92 Ibid., enclosure 3, 4, and 5 in no. 97.
93 See e. g. China Association to Foreign Office, July 25, 1907, F. O. 405/177,
Confid., (9233), no. 107, and the Bradford Chamber of Commerce to Foreign Office,
Aug. 2, 1907, ibid., no. 116.
94 According to a despatch of the British minister to the Foreign Office, F. O. 405
177, Confid. (9233), no. 111.
95 F. O. 405/177, Confid. (9233), no. 189 (telegram of Nov. 1, 1907).
At the end of 1907 the matter remained in status quo ante.³⁶

4. Conclusion.

The history of the first Chinese trademark regulations as described in chapters two and three, and seen in light of the legal-economic-political background as briefly outlined in chapter one, may be concluded under different aspects:

(a) In regard to the *drafting process* we observe a high inconsistency and a low communicative ability or willingness. The 1904 draft of the *Shangpu* hardly took into account the recommendations of the Maritime Customs; the Chinese draft of July 1905 — largely ignoring the minister’s draft of April 1905 — came up with a rediscussion of the sphere of exterritoriality that was cleared up eleven months before; the Chinese amendments of October 1906 abandoned its opinion respecting consular jurisdiction from the year before, but were as unresponsive to the ministers draft as the amendments of November 1906. It seems that there was a great fluctuation in the drafting staff, which made it necessary for the participants to learn the facts all over again. There was no evidence of progressive skill or refinement; no learning process was involved.

(b) This leads us to the role of the *Japanese advisers* in the *Shangpu*. The material presented here deals with this topic mostly in a subjective way. But it may be assumed ³⁷ that the Japanese advisers found it easy to convince the Chinese officials that reliance on the “attributive” systems respecting ownership in trademarks came closer to the interests of the modernizing Chinese economy than the “declaratory” approach. That such advise corresponded with the interests of Japan in the China market made the adviser suspect in the eyes of the West.

On the other hand, it is no mere speculation that, for instance, a British adviser had recommended the “declaratory” system. This would have been purely defensive of British economic interests, while Japanese advisers could at least combine the aims of their own country with the Chinese interests; both countries shared the fate of newcomers who had to compete with the established industrial and trading nations of Europe and North-America.

³⁶ At least as far as the creation of a Chinese trademark law for the whole country was concerned. There was some progress regarding local protection. In Sept. 1907, the Shanghai Tao-t’ai issued the following proclamation for the protection of America trademarks: “Jui, intendant of Susoongtai circuit, in the matter of issuing a proclamation, prohibiting the imitation of American goods. On the 7th day of the eighth moon, I received a letter from the American consulate-general, which reads as follows: (following complaints about imitation of well-known American brands of goods and a hint at the provision concerning trademarks in the commercial treaty). Besides having replied to the above letter and ordered all officials under my jurisdiction to forbid such imitations, I issue this proclamation for the information pp. 2193f. A similar proclamation was issued regarding British marks on Aug. 20, of people of all classes that no one is hereafter allowed to imitate the Standard Oil Company’s registered brand; should such case be discovered, punishment and fine will be imposed upon the impostor. “See 6 Patent and Trade-Mark Review (1907/08).
³⁷ See 23 *La Propriété Industrielle* (1907), p. 156.
³⁷ Any satisfying statement had to be based on Japanese Foreign Office materials.
(c) There was a growing nationalist feeling among the officials in the Shangpu, as reflected in the issue of location and control of the trademark registration and application offices.

(d) It is obvious that the extraterritoriality system made the Chinese legislation highly complicated. As mentioned, the views of the individual treaty powers as to what constitutes ownership in a trademark were different. Had China been a completely independent sovereign state she could have laid down a separate law of her own. Having however surrendered certain of her sovereign rights, her freedom of action was curtailed, and some means of satisfying conflicting interests of all who had trade with her had to be found. Thus extraterritoriality was not only an incentive for law reform but also an obstacle to it.

(e) As far as more long-term consequences of the failure are concerned, it may be pointed out that China had lost a chance to train herself in the handling of western-type trademark regulations. The often stressed "primitive conditions of organization under which the Chinese authorities exist and the lack of all previous training for such questions in the case of the officials" were thus perpetuated.

(f) It became clear that the promised assistance to law reform in China would never been realized when economic interests of the western powers were involved unfavorably against them. By September 30, 1904, the North China Herald (p. 737) had warned: "We shall certainly lose what influence we have with the Diplomatic Body at Peking and our Foreign Offices at home, if we get the reputation of being importunate in our demands for reforms and concessions, and chronically dissatisfied with them when we get them."

The first Chinese trademark regulations did not come into operation until 1923. Then the treaty powers showed readiness for concessions because China had developed an increasingly active economic, and was thus able to participate in more widespread infringement of trademarks than twenty years before. Economic interests had begun to coincide with the desire for law reform.