A Discussion of Some of the Questions Submitted by China to the Peace Conference at Paris

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A Discussion of Some of the Questions Submitted by China to the Peace Conference at Paris

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Introductory

On October 31, 1870, Prince Alexander Gorchakov, foreign minister of Russia, issued a circular note to the principal powers of Europe, announcing the repudiation of the clauses of the Paris Treaty of 1856, which neutralized the Black Sea. That treaty had been considered as one of the most sacred international documents, and, as it was expressly stipulated, could not be modified or revised without the consent of all the signatory powers. Yet Russia at one bold step denounced the most important provisions of that treaty, justifying her denunciation on the ground that the conditions under which the treaty was made had so vitally changed that, if she were compelled to observe her obligations under it, she would be only subject to great injustice and hardship. She mentioned as evidence for her contention the union of Wallachia and Moldavia in 1859 and the possibility of a swift attack from the newly-invented steamships on her undefended coast along the Black Sea. The powers afterwards acquiesced in Russia's
action by entering into a new treaty with her, amending those Articles of the Paris Treaty which she had repudiated.

Russia's case was thus justified upon the well-recognized principle, as old as international law itself—rebus sic stantibus. The reason for such a rule is based on another universally accepted principle, namely: cessante ratione, cessat lex ipsa. If these principles should be set at nought and denied their irrefutable truth and legal force, then there would be no longer honor, justice and law among nations, and the entire body of rules which are supposed to govern international relations to-day, would be a thing of sham in this world. And if these principles should be held applicable to one nation—say, Russia of 1870—and the same principles should be held inapplicable to another nation—say, China, who has nothing to blame except her military weakness—then equality of nations would be but a term pertaining to the angels' world and international law itself would not be worth the pen and the sword with which it has been propounded and fought out.

Fettered with the chain of international obligations which has as much hindered her political progress as retarded her economic growth, China has repeatedly appealed to the conscience of the world for an equitable revision of those oppressive treaties under which she has groaned many a day.
She has not followed the example set by Russia by taking outright the step of renouncing her treaty obligations without consulting the wishes of the powers interested. She has only asked the foreign states for a fair and unbiased discussion of the anomalous situation as resulting from her treaty obligations, and of the changed conditions which have been brought about since the making of those treaties; and in so doing she has relied upon such equity and justice as is understood by the civilized nations. But even this conscientious request has been as shamefully rejected as the treaty rights were wrested from her years ago.

At the close of the late war, acting upon the principle of justice, equality and respect for the sovereignty of nations as propounded by ex-President Wilson in his famous Fourteen Points, the Chinese Republic submitted, through its delegation, to the Peace Conference at Paris a series of questions for an honest discussion and an equitable readjustment. All those questions involve treaty rights—rights which are unjustifiable as possessed by the foreign states and at the same time derogatory of the complete sovereignty of China. They pertain to three of the characteristics of an independent nation, namely: territorial integrity, political independence, and economic autonomy.
M. Clemenceau, in accepting the memorandum from the Chinese delegation, informed them, on behalf of the Supreme Council of the Principal Allied and Associated Powers, that the Council fully recognized the important nature of the questions submitted, but that they considered as within the purview of the Peace Conference. He expressed the hope, however, that China would bring the questions to the attention of the Council of the League of Nations when it was in a position to perform its functions.

In the following pages it will be my endeavor to bring out in a brief way the clear aspects of some of the questions submitted to the Peace Conference, which are considered to be of some greater importance, pointing out the grounds upon which China's position rests, and outlining the proposals offered by the Chinese delegation in each case. Before I proceed, however, it may not be amiss to set forth the general arguments that may be advanced in support of the abrogation of all of China's anomalous treaties.

The Doctrine of Rebus Sic Stantibus

In the first place, as has been illustrated in the case of Russia denouncing the Black Sea clauses of the Paris Treaty, the doctrine of rebus sic stantibus is applicable to all the treaties to which China has sought the consent of the powers to revise. Those treaties were concluded at
a time when the conditions in China and the conditions of
the world were materially different from those of the pres-
ent day. China then was a nation over-proud of her own
intellectual civilization and unconscious of the progress
of the world. Being geographically isolated for ages from
other better situated countries whose rapid development
was largely due to circumstances resulting from close con-
tact with one another, China had felt contented with the
existing conditions within, and had failed to realize the
necessity of adapting herself to the conditions without.
Accordingly she had been and regarded as an old, decrepid
empire; and beginning with the Opium War with England,
humiliation came after humiliation, one outrage followed
upon another, until bound and gagged she was unable to
proceed with sufficient speed along the way of legitimate
development

But, in spite of the unjust treatment she has suffered
from without, China has during the last two decades made
marked progress within. She has successfully changed her
form of government from monarchical to republican; she has
remodelled her army and is attempting to rebuild her navy;
she has inaugurated a judicial system based on modern lines;
she has instituted in her land municipal governments cal-
culated to serve the direct needs of the people; and, above
all, she has adopted a kind of general education, one im-
portant result of which has been, not only the entire dis-
appearing of that anti-foreign feeling which was once prev-
alent among the people, causing not a few lamentable troubles
and incidents, but that foreigners are now generally treated
with such respect as is due to "strangers coming from afar."
China has certainly accomplished most wonderful reforms since
the first phase of her humiliation which awakened her to
her inherent weaknesses and the dangers to which she was
exposed. If there are unhappy facts which would seem to
disappoint our most optimistic hopes for the future of the
Republic, it should be borne in mind that they are but of a
temporary character and, in the course of things, are unavoi-
dable in such a transitional period as China is laboring
through. She is on the whole a regenerated nation, giving
promise of every success.

In view if what she has accomplished, is it reasonable
and justifiable to maintain on the part of the foreign powers
that the treaties which they have made with her during the
time of the latter's helplessness and on the score of those
conditions which then obtained, are and ought to remain such
valid and sacred compacts as are not permissive even of a
conscientious reconsideration? If China is not entitled to
the benefit of the rule of rebus sic stantibus, then what
she has signed are not treaties, and consequently she should
not be held to be bound by any of the engagements she has
made; for each treaty is made under the implied condition,
cessante ratione, cessat lex ipsa. If the doctrine of rebus
sic stantibus is applicable, as it should be, to all the
treaties China has made, she should now have the unquestion-
able right to submit them to the foreign states concerned
for an unbiased reconsideration toward their total abroga-
tion or an equitable revision, taking into account the new
circumstances which have arisen since the making of those
agreements.

Bismarck says: "All contracts between great states
cease to be unconditionally binding as soon as they are
tested by the struggle for existence." China is struggling
for existence, for advancement, and, what is still more im-
potent, for international peace and justice. But she cer-
tainly does not desire to take the unwise step of renouncing
outright her obligations under the existing treaties, as she
might do as in the case of Russia renouncing the Black Sea
clauses of the Paris Treaty and by further precedents. She

2. During the time of the French Revolution the United States
get aside its obligations imposed upon it by the two
treaties made with the French monarchy in 1778, and declared
its neutrality on the ground of self-preservation.
Again, the various treaties made by the European states
is only seeking the proper way—asking the consent of the foreign states—for avoiding obligations which have become unjust and unbearable to her.

Aside from the consideration of the changed conditions within China, the doctrine of rebus sic stantibus may be viewed from still another standpoint. Many of her treaties, as, for instance, those for territorial leases, and those giving rise to claims for the so-called spheres of influence, were made with the lust for gain and the desire for expansion on the part of the foreign powers. One seeking a means of check against the aggrandizement of the other, each fearing lest the other might become too strong, they vied with one another in seizing every opportunity of browbeating and robbing the unfortunate victim. Such past crimes—for such their actions certainly were, in the light of men's enlightened ideas of the present day—were committed, not out of any particular grudge against China, but in consequence of such international situation as then existed and such international morality as was then understood by the world. But men have emerged from the late war saner and wiser beings. Nations have come together and embraced each other with

in 1814 and 1815, which affected to settle the state of affairs arising out of the Napoleonic Wars, were either broken or set aside, all with acquiescence and impunity, as fast as any alteration in the general conditions took place.
brotherly love. They have buried their jealousies and their fears in four years' bitter conflict. From now on they profess to seek political and economic development along legitimate lines. Under such new world conditions, to maintain the old system of checks and balances among the powers would be without necessity and without reason. And if they have not bled in vain, they ought to have awakened to their past wrongs against China and to take immediate steps to redeem their wrongs by relinquishing the rights to which they have heretofore clung out of mutual jealousy and distrust.

**Force Majeure**

Another argument that may be advanced in support of the abrogation of China's unjust treaties is that, practically all of them are characterized by the element of force. Some were entered into after the defeat in war. Some were accepted under threat or duress. Whether the validity of a treaty is compromised by the circumstance of force majeure is a question upon which opinions do not seem to be uniform. However, according to the generally accepted view, it would appear that except in the case of personal restraint treaties which

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1. For example, the Treaty of Nanking, made at the close of the Opium War.
2. For example, the Treaty of March 6, 1898, granting the lease of Kiaochow to Germany; and the two Treaties of 1915 with Japan made subsequent to the acceptance of the twenty-one demands.
are made under force are regarded as valid in law, so long as war is a legitimate human institution. But it may be safely said that this principle is not founded on sound reason and justice; and the rigid maintenance thereof without careful consideration would be tantamount to the upholding of the vicious paradox, that Might rules over Right. If the powers, in considering an equitable revision of China's treaties, should take into account the trend of present world thought as well as the injustice and wrongs she has suffered, the fact can hardly escape their minds that the free exercise of will on the part of China was in most cases overborne by superior force.

The Covenant of the League of Nations

There is still another ground upon which China's position may be strengthened. It is the right she acquires under the covenant of the League of Nations. Article 20 of the covenant reads:

"The members of the League severally agree that this covenant is accepted as abrogating all obligations or understandings inter se which are inconsistent with the terms thereof."

It goes without saying that those treaties claimed to have created the various "spheres of influence," those establishing territorial leases, and those limiting the economic autonomy of the Chinese government, involve obligations which
are "inconsistent" with the terms of the covenant, since they impair either the territorial integrity or political independence of the Chinese Republic which the members of the League undertake to guarantee under Article 10. It may be certainly argued for China that by accepting the covenant all her unjust obligations have been abrogated ipso facto, and that it would be unnecessary to ask for reconsideration or readjustment. However, in order that the foreign nations interested might not entertain any unnecessary doubt as to the faith and honesty which has been characteristic of China's dealings with them, and that they might not mistake her as a nation which would regard its treaties as being no more valuable than scraps of paper, she still considers her treaty obligations as valid as ever, and will only exercise at an opportune time the right secured to her by the covenant of submitting her case to the wise judgment of the friendly nations.

1. See Article 11.
I.

Renunciation of Spheres of Influence or Interest

Spheres of Influence: Vague Meaning of the Term

The term "spheres of influence" is a vague and undefined one. It implies only a presumptive title, and, as a right, the claim has always no legal foundation. Thus we have seen no treaties by which one state expressly recognizes a part of its territory to be within the exclusive sphere of influence of another. Though there are international documents which have given rise to claims for spheres of influence or interest, yet such claims are based on an unwarranted interpretation of the documents.

As a matter of fact, however, such claims have led to much controversy and sometimes even bloodshed among the nations of the world, particularly during the time of the partition of Africa when the European powers having established protectorates on that continent claimed certain preferential or exclusive interests or advantages in the regions denominated the Hinterland.

Conditions of the Claims: Territorial Contiguity

The claim for a sphere of influence, if it is to be admitted, must be based on the theory of contiguity. A state
cannot exercise any rights whatever over places which are of no importance to it either politically or strategically. The claim may possibly arise when territories due to their geographical contiguity can be best and most advantageously administered by a state whose civilization has been sufficiently advanced for the purpose. The doctrine of contiguity was first propounded by Daniel Webster in his celebrated correspondence with the Peruvian government, in 1852, 1 with regard to the Lobos Islands controversy. It is more lucidly set forth in the work of the great English authority on international law, Hall, who says that the term of spheres of influence indicates "the regions which geographically are adjacent to or politically group themselves naturally with, possessions of protectorates, but which have not actually been so reduced into control that the minimum of powers which are implied in a protectorate can be exercised with tolerable regularity." Hence, the first condition on which a sphere of influence may be possibly claimed is the principle of territorial propinquity.

Same: For the Benefit of the Locality

Another limitation of the claim for a sphere of influence is that it must be exercised, not for the aggrandizement of

1. Moore, Digest, I., pp. 266-267.
the claimant state, but for the benefit of the people of the locality in question. It is for the welfare of those people who have not yet attained the high standards of civilization and for the common good of general humanity. As the same author who has just been quoted well points out, "the business of a European power within its sphere of influence is to act as a restraining and directing force. It endeavors to foster commerce, to secure the safety of traders and travellers, and without interfering with the native government, or with native habits and customs, to prepare the way for acceptance of more organized guidance."

The Mandatory System

Since the late war it may be safely asserted that all claims for spheres of influence have given way to the mandatory system devised by the League of Nations, which is founded on reason and justice. Article 22 of the covenant says:

"The best method of giving practical effect to this principle (the principle that the well-being and development of such peoples as are not yet able to stand by themselves form a sacred trust of civilization) is that the tutelage of such peoples should be extended to advanced nations who by reason of their

1. Ibid., p. 129.
resources, their experience, or their geographical position can best undertake this responsibility, and who are willing to accept it, and that this tutelage should be exercised by them as Mandatories on behalf of the League."

Sphere of Interest Distinguished from Spheres of Influence

Spheres of influence are usually of a political character, while spheres of influence are rather of an economic significance. When, for instance, a government grants the privilege of railroad construction to an alien corporation, the area of territory traversed by the railway is claimed to constitute a sphere of interest for the government to which the corporation belongs, which government is said to have the right of developing the industries or economic interests of that region. The claim is intended as establishing an economic monopoly, to the exclusion not only of other foreign governments which might desire to compete in the same interests, but of the territorial government as well.

Claims with respect to China: Declarations concerning Non-alienation of Territory

Having discussed the meaning of spheres of influence and interest in a general way, we shall now proceed to examine the circumstances by which the claims have arisen in China,

1. Hershey, Essentials of International Law, p. 192, n. 33.
and to show how far-fetched and unjustifiable they are.

The claims for spheres of influence or interest in China seem to have arisen from two kinds of international documents—one from declarations on China's own part, the other from agreements or understandings between two foreign countries to which China is not a party. Curiously enough, the question of non-alienation of territory in the Orient had its origin not with any engagements on the part of a foreign power. On December 1, 1887, the Peking Convention was signed between China and Portugal, by which the former ceded Macao in perpetuity to the latter who engaged in return "never to alienate Macao and its dependencies without agreement with China." But seven years later--on March 1, 1894--when Great Britain renounced in favor of China of all the sovereign rights in and over the States of Munglem and Kiang Hung, the renunciation was made conditional upon the proviso that "His Majesty the Emperor of China shall not, without previously coming to an agreement with Her Britannic Majesty, cede either Munglem or Kiang Hung, or any portion thereof, to any other nation." This was the first case in which China bound herself not to alienate a particular portion of her territory to any foreign power.

1. Treaties and Conventions between China and Other States (Shanghai, 1808), II., p. 1011.
2. Ibid., I., p. 329.
In 1897 and 1898 China made successively four declarations concerning the non-alienation of her territory. On March 3, 1897, when Kiaochow Bay was about to be leased to Germany, and Port Author and Talienwan were to Russia, M. Gerard, French minister at Peking, sent a note to the Tsung-li Yaman in which he informed the Chinese government that "France, considering the close friendly and neighborly relations maintained with China, attaches great importance to the island of Hainan never being either alienated or ceded by China to any other foreign power, either as final or temporary cession or as a naval station or coaling depot." On March 15, the Tsung-li Yaman in answer to the communication declared that the island of Hainan being part of her territory China alone could exercise over it the rights of sovereignty. "There are no grounds on which it should be ceded to any foreign nation. Neither has it been in fact temporarily leased to any foreign power."

By his despatch of February 11, 1898, Sir C. MacDonald, British minister at Peking, demanded of the Chinese government a definite assurance that "China will never alienate any

1. Foreign Office; its present name being Waichiaopu.
2. An island lying to the extreme southwest of Kwantung between the South Sea and the Gulf of Tongking.
3. Rockhill, Treaties and Conventions with or concerning China, p. 173.
4. Ibid.
territory in the provinces adjoining the Yangtse River to any other power, whether under lease, mortgage, or any other designation." The Tsung-li Yaman answered this note by declaring that the Yangtse region was of the greatest importance to the whole interests of China, and that it would be out of question that any territory in that region should be mortgaged, leased, or ceded to another power. Two months later a similar assurance was given to France respecting the provinces bordering on Tongking. In its note of April 10, 1898, the Chinese Foreign Office declared that those provinces should always be administered by China under her sovereignty.

In the same month the last-mentioned declaration was made, Japan represented to the Chinese government that "in view of the present state of affairs, the Government of Japan......must take proper measures to meet any situation that may arise," and requested an assurance that China would not cede or lease to any power any portion of her territory within the province of Fukien. On April 26, the assurance was given.

We now come to a more recent case in kind. In May, 1915, after the presentation of the well-known twenty-one demands

1. Ibid., p. 174.
2. Ibid., p. 178.
3. Ibid., p. 179.
4. Ibid., pp. 181-182.
upon China, Japan forced her to enter into two treaties, one respecting the province of Shangtung, the other respecting South Manchuria and Eastern Inner Mongolia. In the exchange of notes which followed the signing of the treaties, China was made to declare that "within the Province of Shangtung or along its coast no territory or island will be leased or ceded to any foreign Power under any pretext," and that she "has given no permission to foreign nations to construct on the coast of Fukien Province, dockyards, coaling stations for military use, naval bases or to set up other military establishments."

In each of the above-mentioned cases we find that China herself invariably made a declaration—omitting for the moment the consideration of duress or undue pressure—not to alienate a certain part of her territory, to which some power "attaches great importance." We shall now proceed to look into those instances where a sphere of influence or interest has been claimed, not by reason of any declaration on the part of China herself, but by reason of an agreement between two foreign powers to which she was not a party.

Agreements between Foreign Powers

The first instance of this kind may be found in the

1. English version of the Treaties of 1915 officially published at Tokyo on June 9, 1915.
arrangement made between Great Britain and Russia, in 1899, with regard to railway concessions in China, such arrangement being claimed to have created spheres of interest in favor of the two nations. According to the arrangement Great Britain engages not to seek for her own account, or on behalf of British subjects or of others, any railway concessions to the north of the Great Wall of China, and not to obstruct, directly or indirectly, applications for railway concessions in that region supported by the Russian government; and Russia, on her part, made a similar promise with regard to railway concessions in the basin of the Yangtse River.

On January 30, 1902, Great Britain and Japan signed at London their agreement for defensive alliance, by the first article of which the two powers mutually recognized their "special interests" in China. On March 3rd of the same year, Russia and France, being then allied countries, followed suit, making a common declaration in which they mutually engaged to guarantee their "special interests in the Far East."

There are many other agreements of a similar purport made between foreign powers, such as the Franco-Japanese ar-

1. Rockhill, Treaties, etc., pp. 183-184.
2. Ibid., pp. 97-98.
3. Ibid., p. 203.
rangement of June 10, 1907; and the convention between Great Britain and Russia of August 31, 1907, recognizing the former’s "special interest" in Thibet.

The Attitude of the United States

It is to be observed that when other foreign powers were vying with one another in demanding regional "assurances" from China, the United States not only held aloof from the situation, but the administration of President McKinley looked with dismay and apprehension on the creation of the various spheres of influence. After the Spanish War and the suppression of the insurrection in the Philippines, the American government took steps to recommend to the various powers an international policy, with respect to China, of equal commercial opportunity, known as the "open door" policy. The principle was embodied in a note of September 6, 1899, addressed by Secretary John Hay to the American ambassadors to England, France, Germany, Russia, Italy, and Japan, in which a formal assurance was requested from each power that all nations should enjoy perfect equality of treatment for their commerce and navigation within the so-called spheres of interest. All the powers gave the desired assurance.

States government has since on repeated occasions vigorously maintained the "open door" policy; and as late as 1917, four days after the delivery to China of the Japanese ultimatum containing the twenty-one demands, it formally protested against any arrangement that might impair the treaty rights of the United States and the long-espoused international policy relative to China.

The Lansing-Ishii Agreement

However, the United States has made one important departure from the rigid maintenance of her attitude regarding affairs in China. In October, 1917, during the visit to America of Viscount Ishii, head of a Japanese special mission, several notes passed between him and Secretary Lansing, the result of the correspondence being the recognition on the part of the United States of Japan's "special interests" in China, "particularly the part to which her possessions are contiguous." By "contiguous" territory the parties, as it was later announced, meant South Manchuria and Eastern Inner Mongolia. The Chinese government, on being formally apprised of the agreement, lodged at Washington and at Tokyo a declaration to the effect that China, having adopted toward friendly nations the principle of justice, equality and respect of treaty rights, would not permit herself to be bound by any agreement made between other nations.

Inadmissibility of the Claims

To clear and thoughtful minds the spheres of influence or interest which have been claimed by the foreign powers in China are only arbitral creations, which rest on no legal foundation, and the continual existence of such a system must be detrimental, not only to the welfare of China herself, but to the interests of all nations alike. China has insisted on the renunciation of the claims by the powers, and her renunciation is based on the following grounds.

Legal Grounds

1. As has been pointed out, the claims for spheres of influence or interest are clothed with no legality. They arise either from declarations emanating from the Chinese government, or from arrangements made between the foreign powers themselves. As regards the latter no arguments are needed to dispose of the claims, since such agreements to which China was not a party cannot bind her in whatever way and on whatever grounds. It is in the case of China's own declarations that there may seem to be some difficulty in refusing to admit the foreign claims. However, it is to be said that such declarations have only the negative effect of limiting as against China her otherwise free power of alienating her territory or granting economic rights. They do not create any positive rights for any power or powers,
even the one in whose favor they are supposed to have been made. In fact, the declarations are intended far less as a recognition, either express or implied, of any special interest of a particular country, than a general assertion as against all the world of the principle of territorial integrity. For while the foreign powers had each demanded an assurance not to alienate a certain part of territory to other powers, the Chinese government invariably used in its declarations the words "any foreign nation," or an expression equivalent in meaning. Legally speaking, therefore, such understandings are in reality for the benefit of China herself, and not in favor of any of the powers who have based upon them their claims for spheres of influence or interest.

2. Apart from the foregoing considerations, the claims appear to be inadmissible even when tested by the principle of territorial contiguity. The territories in question can hardly be described as adjacent to, or politically grouping themselves with the possessions or protectorates of the various states. The island of Hainan is some eighty miles from Kwangchow-wan; the coast of Shangtung is at its nearest point

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1. During the negotiation of the Treaties of 1915 with Japan, it was demanded of China to engage not to cede or lease to any other power any harbour, etc., along her coast. Upon China's insistent objection to such a dangerously ambiguous term, the Japanese government used the words "any power" in its ultimatum.

2. See supra, p. 13.
some fifty miles from Port Authur. But Port Arthur and
Kwangchow-wan are leased territories and are very different
from possessions and protectorates. The nearest possession,
in the case of the French claims, would be Tongking, the
nearest port of which is over 140 miles from Hainan. And in
the case of Japan, her only possessions near the Asiatic
coast are Korea, the nearest port of which is some 170 miles
from Chefoo, on the coast of Shantung, and about twice dis-
tant from Eastern Inner Mongolia; and Formosa, which is over
eighty miles from the nearest point on the coast of Fukien.
The least admissible case of propinquity is with the British
claim in respect to the Yangtse Valley, the nearest port
along the river being over 450 miles from the British posses-
sion of Hongkong.

3. China's position may be strengthened on still another
ground—and this is common to almost all the cases of injustice
to which she has been subject—I mean the lack of validity of
her engagements which were made under force majeure. Most of
the declarations concerning the non-alienation of territory
were exacted of her during the time of the "battle of conces-
sions," under circumstances excluding the free exercise of will.
As to the case of Japan with respect to Fukien and Shangtung,
the engagements were made only subsequent to the acceptance of
the ultimatum in May, 1915.
4. Thus far we have seen that all claims for the so-called spheres of influence or interest are inadmissible because they lack legal validity. But even admitting such claims on legal grounds, they are no longer tenable under the present world conditions; for all "spheres of influence" have surely been done away with by the mandatory system, devised by the League of Nations. It would be as much against common sense and reason to claim spheres of influence or interest in China as to call a full member of the League of Nations a country under another member's mandate.

**Political Grounds**

1. The policy of claiming spheres of influence or interest only serves as a great hindrance to China's economic development. It aims at a particular part of territory as a field for exclusive exploitation to the total disregard of the economic needs of the Chinese people. It usually happens that when one nation is unable to supply the necessary capital or the proper men for a particular enterprise in a region, it would refuse to allow the enterprise to be undertaken by other nations who could supply both the money and the men.

2. If the "open door" policy is sound in principle and beneficial to all nations, the maintenance of the claims for spheres of influence or interest is prejudicial to that policy in that it tends to vitiate the principle of equal opportunity
for the commerce and industry of all powers. As practice has shown, that power which claims its sphere of interest in a certain region, usually gains economic ascendency and gathers in its hands all the elements for economic domination over that region. The result would be the building-up within the domain of China of a number of rival economic areas which can only lead to undesirable political discord among the powers themselves.

China's Proposal

The Chinese government proposed through its delegation to the Peace Conference at Paris that each of the interested powers shall make a declaration disclaiming any spheres of influence or interest in the Republic of China, and promising a revision of such treaties or agreements as may be construed to have conferred on them any territorial advantages or preferential rights or privileges.
Abolition of the Consular Jurisdiction

Extraterritoriality once existed in Siam, in Japan, and

Erroneous Views of Extraterritoriality

Extraterritoriality, more properly called consular jurisdiiction, means that foreigners residing in a certain state are not subject to the territorial law but are governed by the law of their own country. In the eyes of unthinking persons who would judge of things only in a superficial way, this system appears to be nothing less than an extension to foreign citizens of certain rights, privileges and immunities which are usually enjoyed by diplomatic officers under the name of extraterritoriality. In fact, we have not infrequently seen the two terms used indiscriminately. The existence of extraterritoriality has also been erroneously regarded as the necessary result of a superior race coming into contact with an inferior one; and such system ought, therefore, (according to this mistaken idea) be maintained for the sake of the former's dignity. To thoughtful minds, however, the system of extraterritoriality is a derogation from the inherent rights of the territorial sovereign, and constitutes an anomaly, unreasonable as well as illogical, in the relations between civilized nations. It is at best to be considered as a modus vivendi to

1. References in here made only to Asiatic countries.
be observed until a better and more logical system could be agreed upon.

Conflict between Eastern and Western Civilization

Extraterritoriality once existed in Siam, in Japan, and still exists in China. It is the result of an unhappy conflict between the East and the West—between Oriental customs, manners and thought and Occidental customs, manners and thought—between a civilization of old type and a civilization of a new type. It did not originate, as many have erroneously supposed, from the lack of any legal system in any of the Oriental countries—least so in China; for Chinese law is old as, if not older than, Roman law, the model of all laws, and Chinese judicial courts were instituted as early as the first century of the Christian era.

Nor is the existence of extraterritoriality due to the inferiority of Oriental law. For every legal system is based on the peculiar customs and peculiar feelings of justice prevailing among those people whom it seeks to govern. Law only springs from society, and is modified and developed by its activities. So long as there are different types of society, there are different types of law; and so long as there is no perfect society, there is no perfect law. To say, therefore, that one legal system is better or superior to another, would be a falsity in logic due to a narrow and limited view of the

1. Reference is here made only to Asiatic countries.
origin of law itself. In days gone-by, when the East was East and the West was West, each lived on with its own standards of civilization and its own systems of law. It was only when one came in contact with the other that there arose great inconvenience caused by the diversity of the views of justice held between them. Naturally, then, there came up the question: which law shall prevail--the Eastern or the Western?

Now, the question of jurisdiction over foreigners seems to have undergone a development of three stages. The first is long past, and may be called the Roman stage. During that period two systems of law existed side by side; one for the nationals, the other for foreigners, called by the Romans jus civile and jus gentium, respectively. The reason for the existence of this dual-law was because the unexcelled military strength of the territorial state made it too proud to allow of the application of its own law to the "barbarians," and was sufficient to subject them to another law of its own making. The same conditions seem to have existed in the Ottoman Empire during its flourishing days, when the Turks thought it improper as well as unwise to extend their own law to the Christian people. The second stage would be that of extraterritoriality. In this stage it was not the territorial state which could overrule the foreigners; but it was the foreigners who, by superior force, could influence the will of the territorial
state. It was now the foreigners who thought it unwise to accept the territorial jurisdiction; and when bringing over their own languages and institutions to the territorial state, they brought withal their own laws and customs. This stage, that is, the territorial stage, is, also, and ought to be, a thing of the past, though it still lingers, apparently without reason and necessity, in that land of anomalous institutions, China. The last stage in the development of jurisdiction over foreigners is the present stage—that is—nationals and foreigners are subject to one and the same law, the territorial law.

Development of Extraterritoriality in China

In the very beginning—I mean in the 18th century—foreign jurisdiction in China existed, not by virtue of any treaty rights, but by an illegal assumption of the sovereign powers of the Chinese government. Before the Treaty of Nanking extraterritorial jurisdiction had been exercised to a considerable extent, in spite of the vigorous protests from the Chinese authorities. It might be said that the treaties in respect to the consular jurisdiction which China was later compelled to make, only gave a de jure aspect to a de facto practice.

It must be remembered, however, that when the adventurous Europeans first set foot on that strange land of the East, they
were subject neither to the territorial law nor to their own laws. The Chinese authorities, not understanding their customs and their moral standards, were either unable to govern them under the local law or loath to extend it to them for their protection. Neither did the foreigners recognize any one among themselves as having authorized control over their conduct in China, as there was no common organization in existence which could assume jurisdiction over them. Consequently, as one author aptly remarks, "they lived in China what the lawyers called 'a state of nature,' that is, governed by no rule but their own passions and interests."\(^1\)

However, such a situation could not last very long. As foreign intercourse developed, questions of a legal nature, involving the interests both of Chinese and foreigners, multiplied to such an extent that the Chinese government began to think it necessary to take cognizance thereof. "But while the subjects of all other nations usually yielded in the end and allowed the Chinese law to take its own course, the British, with the organized strength of the East India Company behind them, generally persisted to the last in their defiance to authority."\(^2\) And it was in criminal cases that they seem to

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1. Davis, China and the Chinese, I., p. 100.
2. Koo, Status of Aliens in China, p. 68.
have most tenaciously resisted the application of the Chinese law. The British merchants at Canton repeatedly accused the Chinese penal laws of being harsh and unreasonable in that they did not recognize the same punishment on accidental homicide as on wilful murder; and that they would punish a person for the acts of another under the doctrine of vicarious responsibility. The law of criminal procedure, especially the use of torture as a means of obtaining confession, was looked upon with general disfavor and even contempt.

True, many of the former legal principles of China would appear unreasonable and indefensible in the light of the juristic science of modern days. However, it must be noted that the allegations of the British people could have only originated either from a failure to make a deep and thorough study of the Chinese law, as it then obtained, or from their ignorance of the characteristics of Chinese society, as it then existed. They, while away from their own country and temporarily residing in a distant land, sought to escape from the operation of law of whatever kind; and when that was found impossible, they subjected themselves, though quite reluctantly, to their own legal system, while vigorously protesting against the application of the territorial law which they declared were unsuitable to their standards of civilization. In 1833 the British Parliament passed an Act providing for
the establishment of a court of justice in China. Thence-
forward judicial authority was definitely assumed by the
British; but this, until the Treaty of Nanking of 1842, was
without the consent or approval of the Chinese government.

In 1842, as part of price paid for the restoration of
peace and friendship, the Chinese government, through its
peace commissioners at Nanking, granted, for the first time,
extraterritorial rights to British subjects resident in China.
The first precedent having been established, all other states
which later came to negotiate with China treaties of general
peace and commerce, succeeded in obtaining the same rights
for their nationals; and thus all immigrants from such states
were accorded alike the privilege of bringing with them their
own respective laws.

The result of such a system has been the creation of a
most unique situation in China. Her treaty-states numbering
18 in all, there are, consequently, as many different systems
of foreign law simultaneously in operation in her land. Be-

1. This was before the war. By China's declaration of war
on Germany and Austria-Hungary in 1917, her treaties with
these two countries were either suspended or abrogated;
and consequently, consular jurisdiction with them does
not exist at present.
An unusual situation obtains with regard to Russia. In
October, last year, China withdrew its recognition which
had been accorded the diplomatic and consular representa-
tives of the former Russian government. Hence, jurisdic-
tion over Russian nationals has been taken over by Chinese
courts, though all treaties with Russia are supposed to
be still binding.
sides the various consular courts, Great Britain and the United States have even stepped beyond their right by setting up special judicial courts on Chinese soil. The most curious phase of the thing is that, while the Chinese government is on the one hand under duty to extend its full protection to the lives and property of foreign residents, it is on the other unable to hold them to account under its own jurisdiction for any wrongs on their part. Now, if such a system, anomalous as it is, can keep on working smoothly without doing harm either to the Chinese or to the foreigners themselves, then there seems to be no reason why it should not be tolerated and maintained. But the fact is, that the supposed advantages of the extraterritorial system are so overwhelmingly outweighed by its disadvantages—disadvantages to the Chinese and foreigners alike—that to uphold it on their account would be only to perpetuate a real evil, without any possible gains worth the sacrifice.

Rules Governing the Exercise of Extraterritorial Rights

Before I set forth the arguments for the abolition of the consular jurisdiction in China, it is necessary, I think, to acquaint the reader with the general principles in practice in connection with the subject.

There are four classes of judicial cases with which a foreigner or foreigners may be concerned. First, those con-
cerning aliens of one and the same nationality. Second, those affecting foreigners of different nationalities. Third, criminal cases between Chinese and foreigners. Fourth, civil suits between Chinese and foreigners.

With regard to the first class the rule is a simple one: all disputes between foreigners of the same nationality in regard to rights, whether of property or person, shall be subject to the jurisdiction of their own authorities. When, therefore, for example, one British subject shall have cause of complaint against another British subject, such suit should be brought in their own consular court, or the case may be settled in whatever way as the British law may provide.

As to the second class of cases—those arising from disputes between foreigners of different nationalities—they shall be settled according to the treaties existing between the foreign states themselves, "without the interference on the part of China."

As regards criminal cases—civil actions between Chinese and foreigners—the following rule is to be observed (to quote

1. Art. 15, British 1858; art. 39, French 1858; art. 27, American 1858; art. 15, Danish 1863; art. 6, Dutch 1863; art. 12, Spanish 1864; art. 20, Belgian 1865; art. 15, Italian 1866; art. 14, Peruvian 1874; art. 11, Brazilian 1881; art. 47, Portuguese 1887; art. 20, Japanese 1896; art. 15, Mexican 1899; art. 10, Swedish 1908.

2. This provision, except in the case of Great Britain, may be found in the same articles cited in the preceding note.
from the Treaty with Great Britain): "A British subject having reason to complain of a Chinese must proceed to the consulate and state his grievance. The consul will inquire into the merits of the case, and do his utmost to arrange it amicably. In like manner, if a Chinese have reason to complain of a British subject, the consul shall no less listen to his complaint, and endeavor to settle it in a friendly manner. If disputes take place of a such a nature that the consul cannot arrange them amicably, then he shall request the assistance of the Chinese authorities, that they may together examine into the merits of the case and decide it equitably."

It may be observed that in those mixed cases, either criminal or civil, between Chinese and foreigners, the one principle that guides judicial proceedings is that the case is always 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." "If the officer so attending be dissatisfied with the proceedings, it will be in his power to protest against them in detail. The law administered will be the law of the officer trying 1.

1. Art. 16, British 1858; art. 38, French 1858; art. 11, American 1858; art. 16, Danish 1863; art. 6, Dutch 1858; art. 13, Spanish 1864; art. 19, Belgian 1865; art. 16, Italian 1866; art. 13, Peruvian 1874; art. 10, Brazilian 1881; art. 48, Portuguese 1887; art. 22, Japanese 1896; art. 14, Mexican 1899; art. 10, Swedish 1908."
the case."

Foreign Courts

It is therefore clear that where Chinese are defendants they are to be tried by their national tribunals in accordance with their own law, and that foreign subjects are amenable to their own courts formed by their consuls. Such courts are not of a permanent nature but may be set up, for adjudicating any case that may arise, at any time and at any place where a foreign consul resides. Great Britain and the United States have each established a kind of supreme court at Shanghai to hear appeals from their respective consular courts. In the case of other nations, the appellate jurisdiction is reserved to their home or colonial tribunals.

If an alien should commit any offence in the interior where he may travel with a passport, he shall be handed over to the nearest consul for punishment, "but he must not be subjected to any ill-usage in excess of any necessary restraint."

In the foreign settlements at Shanghai a most unique system prevails. There a special court has been established, known as the Mixed Court. It is a Chinese tribunal and has

1. Art. 3, sec. II., British 1876.
2. Art. 9, British 1858; art. 8, French 1858; art. 9, Danish 1863; art. 3, Dutch 1863; art. 7, Spanish 1864; art. 10, Belgian 1865; art. 9, Italian 1866; art. 5, Peruvian 1874; art. 4, Brazilian 1881; art. 17, Portuguese 1887; art. 6, Japanese 1896; art. 4, Mexican 1899; art. 9, Swedish 1908.
jurisdiction over two classes of cases, namely: those purely affecting Chinese who are resident within the settlements and those between Chinese and foreign residents in which the Chinese are defendants. The court is incompetent to try capital and other grave offences which remain within the jurisdiction of the district court of Shanghai. If the cause to be tried concerns a foreigner, a consul or his deputy assessor may sit with him at the trial, otherwise the court shall adjudicate independently and the consuls shall not interfere. However, the authority of the court has been much usurped by the foreign consuls and instances are not infrequent where the assessors have attempted to interfere in cases entirely concerning Chinese citizens.

Disadvantages of Consular Jurisdiction

It has been mentioned elsewhere that the extraterritorial system is not based on any principle of international law but is a makeshift or a modus vivendi to serve a temporary purpose and to be eventually abolished. When, therefore, manifest defects and disadvantages should be found in the continuance of the system, it should be, in the interests of all concerned, immediately discarded and replaced by a more logical and serviceable arrangement. Now, it cannot be questioned that the maintenance of the consular jurisdiction in China has done

Rules governing mixed cases at Shanghai.
more harm than the good for which it was intended, and has resulted in serious defects and disadvantages both to Chinese and foreigners.

A. To the Chinese

1. First of all, the existence of the extraterritorial system constitutes a positive derogation from the territorial sovereignty; and, as such, it is not only a nominal disparagement to the national honor of China, but a substantial detraction of the indispensable powers of her government.

2. We have seen that according to the prevailing rule governing extraterritoriality, the jurisdiction of the court, as well as the law to be administered, is to be determined by the defendant's nationality. Thus civil claims or redress for criminal wrongs against British subjects must be presented or asked for in British courts; against French citizens in French courts; against Americans in American courts; and so forth. It will naturally occur, as it repeatedly did, that owing to the disparity of the laws existing among the different states, a similar case under similar circumstances may receive unequal treatment and be given an irreconcilable decision. Such a result is most intolerable, for nothing is more subversive of the principle of equity and justice.

3. Another objectionable point is that in many cases the Chinese whose rights have been injured or violated can...
obtain no redress or have no means of knowing whether due punishment has been inflicted on the guilty. In theory, of course, a Chinese may always have his redress against an alien in his consular court. In practice, however, he may not always be able to present his case to the proper court as he may live hundreds of miles away from its jurisdiction. Even if he should happen to reside near the consular court, there are those difficulties in the way of languages, differences in court procedure, and the strangeness of the laws to be applied, which may prevent him from seeking redress at all. Moreover, according to the practice with most consular courts, prisoners charged with grave offences will be sent home for final trial and punishment. In such case the sequel is generally unknown to the Chinese directly interested, and the belief becomes inevitable that such criminals have escaped unpunished.

4. That the Chinese court in trying a mixed case has no control over the foreign plaintiff or witness is no less a serious defect inherent in the system of consular jurisdiction. For neither the plaintiff nor a foreign witness is bound to appear in the Chinese court, and even he voluntarily does so, there is no way of imposing any punishment on him.

1. The British Supreme Court for China and the United States Court for China seem to have final jurisdiction in all cases.
should he be guilty of perjury or contempt of court. From such situation there necessarily arises another grave flaw in the system, and that is, the defendant is entitled to no relief should he make a counter-claim against the plaintiff; for all claims against him can only be made in his consular court.

5. Finally, impartial justice can hardly be expected of the consular courts trying cases in which Chinese are interested, and this for two reasons. First, foreign consuls are not necessarily trained lawyers. Their principal duties having to do with commercial matters, any lack of legal knowledge has not been thought as a serious impediment to their being qualified for the consular positions. It frequently happens that a consul in rendering a decision acts upon his own sense of justice, instead of looking to the law for the guidance of his opinion. Secondly, as the first duty of a consul is to protect the interests of his fellow-countrymen, it is but natural that his judicial responsibility cannot be always carried out without some bias towards those who are under his protection. As is well said by a recent writer, "only too often is the verdict of the extraterritorial court a formula as of course 'judgment for the defendant,' and the defendant has then every reason to be satisfied that he has an effective consular service." 

B. To Foreigners

1. The enjoyment of extraterritoriality by foreigners is not without consideration. Up to the present they can only trade and reside in the so-called treaty ports. The Chinese government is far from unwilling to open the entire country to foreign trade and residence; but so long as the foreign nationals remain outside the pale of the Chinese law or the control of the territorial government, it is hardly feasible to grant them the same privileges, in respect to the establishment of commerce and abode, as those enjoyed by foreign citizens in other countries. Thus the development of foreign commerce in China, which is desired by all countries, is to a considerable degree hindered by their adherence to the extraterritorial rights.

2. A more obvious disadvantage to the foreign states consists in the unnecessary maintenance of the consular courts and other tribunals by the foreign governments in the treaty ports of China. The expenses thus involved can, of course, be most advantageously saved.

3. Consular courts in China have frequently experienced the difficulty of obtaining evidence where a foreigner commits a crime in the interior. By the treaties, as we have seen, if a foreigner while travelling in the interior commits any offence against the law, he shall be handed over to the nearest
consul for punishment. This means that when a foreigner should commit a crime in the innermost part of the interior, he shall be required to go over a long distance, usually of hundreds of miles, and to await trial at a place where the "nearest consul" resides. Under such circumstances, the consul is necessarily faced with the great difficulty, if not absolute impossibility, of obtaining the actual facts of the case and thereby rendering impartial justice.

4. What has been said in respect to the lack of control over plaintiffs and witnesses as a disadvantage to the Chinese, applies mutatis mutandis in the case of the consular courts. And as regards the defendant being barred from making any counter-claims against the plaintiff, it was pointed out in an English case, The Imperial Japanese Government v. The Peninsula & Oriental Company, that such a rule was a necessary result of the immunity from process in the local courts. "It is the price for which they (Britons) must pay for this immunity. A British subject cannot claim the advantage of being amenable exclusively to his own consular court, and at the same time object to the limited jurisdiction which alone it possesses."

1. See supra, p. 41.
2. Cited in Tyau, Treaty Obligations between China and Other States, p. 54.
The Application of Rebus Sic Stantibus

Without doubt the system of consular jurisdiction has been only intended as a modus vivendi, as its abolition will follow, as a matter of course, the completion of China's judicial reforms. Thus it is expressly provided in the Sino-British Treaty of 1902 that "China having expressed a strong desire to reform her judicial system and bring it into accord with that of Western nations, Great Britain agrees to give every assistance to such reforms, and she will also be prepared to relinquish her extraterritorial rights when she is satisfied that the state of Chinese laws, the arrangements of their administration, and other considerations warrant her in so doing." Similar reservations have been made in treaties with other states. The question, then, to be considered is, whether or not the foreign states interested are satisfied with those judicial reforms which China has effected during the past ten years. Let us first briefly examine some of those reforms.

1. At the time of the founding of the Republic, a constitution in which the principles of the Magna Charta and the Petition of Rights as well as those of the modern constitutions are embodied.

2. China has promulgated a Criminal Code which is at present under revision, and also a part each of the Commercial Code, the Code of Civil Procedure, and the Code of Criminal

1. Art. 12.
Procedure. She has prepared a Civil Code, which is receiving
the most careful study and consideration among the lawyers in
the country. These different Codes, while being generally
modelled on those of the most advanced nations, have been made
adaptable to the conditions in China.

3. Three grades of new courts have been established,
namely: District Courts, High Courts or Courts of Appeals, and
the Taliyuan or the Supreme Court in Peking. Side by side
there has been established the system of procuratorates with
three corresponding grades.

4. Any persons, before they can hold any judicial offices,
are required to pass the most strict examinations and to under-
go a training of several years in the lowest courts. So, also,
those who want to practice the legal profession should meet
certain stringent requirements.

5. General improvements have also been made in legal pro-
ceedings as well as in the prison and police systems.

It can hardly escape the notice of even the most uncareful
observers that of all the reforms China has made, those along
judicial lines should be considered as the most successful.
Extraterritoriality in China only exists by reason of the ac-
cussed backwardness of her legal system. Now that she has
successfully brought it into accord with that of the most
advanced nations, thus fulfilling the conditions upon which
foreign jurisdiction is to be abolished; it behooves the foreign states concerned to relinquish their extraterritorial rights and to allow the Chinese law to take its natural course. To insist at present on the maintenance of the consular jurisdiction can only be imputed to a malicious intention on the part of the foreign governments to perpetuate an injustice towards Chinese sovereignty.

China's Proposals

China proposed to the Peace Conference at Paris that, before the actual abolition of the consular jurisdiction a new modus vivendi is to be agreed upon, namely:

1. That every mixed case, civil or criminal, where the defendant or accused is a Chinese be tried and adjudicated by Chinese courts without the presence or interference of any consular officer or representative in the procedure or judgment.

2. That the warrants issued or judgments delivered by Chinese Courts may be executed within the concessions or within the precincts of any building belonging to a foreigner, without preliminary examination by any consular or foreign judicial officer.
III.

Tariff Autonomy

The Conventional Tariff

The right of independent existence of a state implies the power of its government to levy taxes. For without that power a government can have no means of maintaining its revenue; without revenue the government cannot carry on its functions; and without government there can be no existence of a state. And the taxing power, in order to be effective, must be, theoretically at least, free and unrestricted. To limit it is to limit one of the inherent powers of the government.

However, there are countries whose general power of taxation is commensurable with the authority of their governments, but whose power to regulate the import and export duties is limited by treaties with other states. Such limitation gives rise to the name of a conventional tariff, as distinguished from that of a statutory tariff. A country is said to have a statutory tariff, when it may exercise its tariff-making power at its own will and by its own law, without any restriction by treaties with other states. By a conventional tariff is meant a tariff which is determined by treaties with foreign governments. There are very few countries which adopt a single statutory tariff, that is to say, whose tariff rates are com-
pletely fixed by its own legislative actions. The tariffs of most countries are partly statutory and partly conventional. For while many of the duties on imports and exports are regulated by their own laws, the taxes on some particular imports are limited to a certain maximum rates by special treaties with foreign states.

Now, the Chinese tariff is a most peculiar one. It is neither a single statutory tariff, nor partly statutory and partly conventional. It is a single conventional tariff. This conventional tariff is different from that of any other country in that it is limited, not to certain maximum rates with respect to some particular countries, but to a uniform rate, applicable in all cases and to all countries. True, with the extensive growth of international commercial relations in these days, the tariff-making power of any country cannot be always as free as might be imagined, but must be, in the nature of things, limited to some extent by treaty stipulations. But such unique limitation as is placed upon the tariff of China amounts to a derogation from her complete sovereignty; and, considering the ludicrously low rate of five per cent ad valorem, its practical effect if to deprive her government to a surprisingly large extent of that most necessary and important power, the power of maintaining its revenue.
Chinese Tariff History

The Chinese tariff system as it exists at present dates back to the Treaty of Nanking of 1842, which ended the Opium War with England. That Treaty, going into effect on July 27, 1843, inaugurated a new era in the Chinese tariff history, inasmuch as the duties to be thenceforth collected on goods imported from England, were fixed by specific rates calculated mostly on the basis of five per cent ad valorem of the values then current. It was also stipulated that British merchants might have their merchandise conveyed into any part of the interior of China on paying a further amount as transit dues not exceeding two and a half per cent ad valorem.

This tariff arrangement with Great Britain was, with more or less modification, incorporated into treaties with other powers who later entered into definite commercial relations with China. However, the rate of five per cent ad valorem had not yet been uniformly applied until in 1858, when several new treaties were concluded at Tientsin with Great Britain, France and the United States, whereby the tariff treaty of 1843 was so revised that the conventional rate was made uniform on all imported goods, with the exception of certain enumerated articles which were exempted from payment of any import tax. Such excepted articles were supposed to be for the sole consumption of foreign residents in China. Among those were gold and
silver bullion, flour, butter, preserved meats and vegetables, foreign clothing, wine, spirits, tobacco, cigars, jewelry, perfumery, soaps, candles, household stores, glass ware, etc.  

Those goods, though free from any import duty, were, if transported into the interior, liable to pay the transit tax which remained unchanged, being two and a half per cent ad valorem. Other countries who later entered or revised their commercial treaties with China took unfair advantage of the rule of the most-favored-nation treatment, and all adopted the tariff of 1858, enjoying the same exemptions.

When the Boxer troubles of 1900 were ended, China was obliged to pay the largest indemnity ever exacted of a defeated country. As she was unable to meet her obligation by cash payment, the powers naturally planned to draw upon the resources of the country. Of all its available assets, the customs revenue, a part of which was already under foreign management, seemed to be most tempting and easy of control. Germany, Russia, and some other powers, evidently with their own benefit in view, pressed for an effective ten per cent customs duty; but to this the British persistently objected, owing, undoubtedly, to the preponderance of their trade in China. Finally, an agreement was reached, whereby the imperial customs, the balance of which was accepted as one of the securities for the indemnity, were...

1. Art. 2, Treaty of Commerce with England; with France; with the United States, 1858.
to be raised to an effective five per cent.\footnote{1}

The treaties of 1858 contained stipulations for periodical revision, which were adopted in all the commercial treaties subsequently concluded with other powers. But up to 1901 there had been no revision of tariff, and consequently, with the rapid increase of the general prices during those intervening years, the specific duties had become, in most cases, almost a nominal charge. After the signing of the Peace Protocol of 1901, the tariff was for the first time revised. The revision was completed in June, 1902: the uniform rate was unchanged, but it was rendered "effective" by making a re-estimation of the values of the goods on the basis of the average prices of 1897-1899. After this revision the tariff again remained as it was for 16 years until in 1918, after the entry of China into the European war, another revision was carried through, this time based on the average prices of 1912-1916. But the uniform rate of five per cent has remained up to the present unaltered.

The Most-favored-nation Clause

The most-favored-nation clause, usually contained in commercial treaties, is a stipulation by virtue of which the contracting states may claim and enjoy the same favors or

\footnote{1. See U. S. Foreign Relations, 1901, Appendix, pp. 227-229, 244-247, 252-253.}
privileges accorded by the other state to any nation, which is thereby supposed to be its most favored one. The principle in itself is a simple enough, but with regard to its interpretation and application states have not maintained quite uniform views. Thus Great Britain has insisted that the most-favored-nation clause, unless otherwise agreed to, should be unconditional in its application in all cases; and that a privilege or advantage granted to one state should extend to all other states enjoying the most-favored-nation treatment. On the other hand, the attitude of the United States has always been in favor of a more strict interpretation of that frequently invoked clause. She has maintained that when concessions are granted by one state to another in consideration of the enjoyment of reciprocal advantages, those advantages should be a condition precedent for a third state desiring to secure the same benefits under the most-favored-nation clause. As Secretary Sherman put it, "the allowance of the same privileges......to a nation which makes no compensation, instead of maintaining destroys that equality of market privileges which the most-favored-nation clause was intended to secure. It concedes for nothing to one friendly nation what the other gets only for a price."

2. Moore, Digest, V., p. 278.
Undoubtedly, the American interpretation of the clause is more consonant with reason and also in accord with the intention of the parties making the engagement. However, as applied to the commercial relations of China, this clause bears its old, undignified meaning. Being invariably inserted in all the commercial treaties China has made, this clause has been and will be again invoked by all states for the benefit of their citizens, whenever China should grant to any one power any special rights or privileges in consideration of the latter's reciprocal treatment. True, some of the early treaties only contain the bare stipulation that one state will be allowed free and full participation in all privileges or advantages which may be granted by China to any other nation. And it was only in those treaties made at a later time, that the proviso was inserted that, in case grants to one nation are made upon certain conditions, they may not be enjoyed by the opposite party unless the conditions are complied with. However, a bare stipulation needs to be interpreted, and interpretation in such case must be guided by perfect reason and must be in favor of the party assuming the obligation.

1. Art. 30, American 1858; art. 54, Danish 1865; art. 15, Dutch 1863; art. 50, Spanish 1864; art. 45, Belgian 1865; art. 54, Italian 1866; art. 16, Peruvian 1874.
2. Art. 5, Brazilian 1881; art. 10, Portuguese 1887; art. 13, Swedish 1908.
It may be readily seen what a disadvantageous position China is placed in by taking an unreasonable and erroneous view of the most-favored-nation clause. For according to this view, any power is entitled to claim whatever rights or privileges which are granted to another power, but in return China receives no reciprocal treatment. Thus every treaty power enjoys the benefit of China's five per cent tariff but her goods entering the ports of those countries are not entitled to the corresponding benefit. This non-reciprocity is contrary to international usage according to which tariff concessions are always on a mutual and reciprocal basis.

Li-kin and the Transit Pass

Li-kin is a form of inland tax in China. Before it was introduced the revenue of the government had depended upon the land tax, the salt gabelle and other miscellaneous imposts. The exigencies of recent times, however, drove the government to devise new means of taxation, and, in 1853, the li-kin was for the first time imposed. In the beginning it was only a contribution of a thousandth, or one-tenth of one per cent, and was limited to goods being transported between a few large cities and over important routes. But gradually the tax was increased and the area in which it was leviable extended, until it now amounts to 15 to 20 per cent and is collected in all large towns and along all routes of trade.
Of course, the li-kin as it exists to-day constitutes a great obstacle to the development of foreign as well as domestic trade. Its evils are but too obvious to all. Though it may be justified on the ground of insufficiency of revenue—its example being found in the different kinds of levies on the inter-state commerce in Germany, even after the conclusion of the Zollverein—yet internal customs and tolls, in whatever form, are always inimical to the purposes of trade and their advantages will be greatly overbalanced by their disadvantages.

It is on this account that the foreign powers have repeatedly demanded the abolition of li-kin in China. When they negotiated their commercial treaties with her, none of them failed to insist upon the exemption of their goods from li-kin or taxes other of a similar nature. But China maintained that as li-kin was equally applied to all native goods, it would result in great injustice to the Chinese merchants, if goods imported from foreign countries should be allowed entire exemption therefrom. Finally, a compromise was arrived at, whereby the "transitpass" system was instituted. According to this system a foreign merchant, if he desires to dispose of his merchandise in an inland market or to repair to the

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interior and purchase native goods for exportation to foreign ports, may be exempted from various charges on his goods in an actual transit by the payment of a single duty which is calculated at the rate of 2½ per cent ad valorem, or a half-tariff duty.

By the various commercial treaties of 1902-1903, the Chinese government undertook to abolish the li-kin, and in return for its actual abolition the foreign governments engaged to allow a surtax of 7½ per cent, in addition to the tariff duty, on goods imported or to be exported. In other words, when the li-kin taxation shall be discarded, the duty on foreign goods and Chinese produce going to foreign countries will be raised to 12½ per cent. However, the compensation has been deemed by China inadequate, and inasmuch as li-kin constitutes one of the great sources of the revenue of her government, it cannot be abolished without entailing serious loss upon the exchequer. She now takes the position, and rightly, that the abolition can only be conditional upon a total revision of the existing tariff treaties so that the largest part of her revenue should be yielded from the customs duties.

Why China Asks For Revision

1. No Differentiation. In fixing the tariff rates it is the practice of all countries to differentiate between goods

1. Art. 8, British 1902; art. 4, American 1903.
which are considered as luxuries and those which are necessaries. This principle of differentiation is, undoubtedly, a just one, since it inures to the benefit not only of the national exchequer, but, incidentally, of the general public in their economic life. But China is unable to benefit herself by making use of this principle. On account of her uniform conventional tariff all goods imported, from luxuries to necessaries, are taxed at exactly the same rate. That this is at variance with the general practice in other countries may be readily seen from the following table:—

Import duty on luxuries collected by different countries in 1913

<table>
<thead>
<tr>
<th>Tobacco</th>
<th>Spirits</th>
</tr>
</thead>
<tbody>
<tr>
<td>England...</td>
<td>$1.60 per lb.</td>
</tr>
<tr>
<td>United States</td>
<td>3.70 per lb.</td>
</tr>
<tr>
<td>&amp; 25%</td>
<td></td>
</tr>
<tr>
<td>France.....</td>
<td>5.40 per lb.</td>
</tr>
<tr>
<td>Japan.......</td>
<td>355%</td>
</tr>
<tr>
<td>China.......</td>
<td>5%</td>
</tr>
</tbody>
</table>

The uniform 5 per cent tariff as it is applied at present is unfair as well as unscientific. Being in need of raw materials and machinery to develop her industries, China lacks the means of giving encouragement to the importation of such goods, so long as the existing tariff remains unchanged. For the same
reason she is at present unable to check the abnormal increase in the import of luxuries, which every other country has the right and power to do.

2. No Reciprocity. The lack of reciprocity with the Chinese tariff has been already pointed out in the discussion of the most-favored-nation clause. It only remains to add that such non-reciprocity may prove injurious to the interests of certain foreign countries as well as of China. For some particular country may desire to have certain kinds of its goods entering into Chinese ports enjoy entire exemption from tax, by giving reciprocal benefit to certain kinds of merchandise from China. But the existing tariff coupled with the most-favored-nation clause constitutes a bar to such special arrangement being effected.

3. Insufficiency of Revenue. The very purpose of having a tariff is to supply the government with revenue. Many governments depend for the largest part of their revenues on levies on foreign trade. Now, the Chinese tariff of five per cent ad valorem is obviously far lower than any tariffs existing in other countries, but even that rate is only nominal, as will be presently explained. Necessarily the import duty forms a very small percentage of the annual state revenue. For example, in 1914, the total ordinary revenue was 280,000,000 taels while the import duty only yielded 18,000,000 taels, thus forming
less than 7 per cent. The Chinese government, therefore, is forced to resort to other means of taxation, and such taxes as li-kin and others, though being condemned by Chinese and foreign merchants alike, have to be retained until she has been given tariff autonomy which will enable her to increase her revenue by incomes derived from foreign trade.

4. No Real Revision. The five per cent tariff was fixed in 1858. It has been maintained against the constant change of economic and industrial conditions inside as well as outside China in half a century's time. Even the periodical revision provided for in the treaties has never been carried out in due time, and when modification was spasmodically effected, the basis of valuation adopted was always lower than the actual value prevailing at the time; for in the revision of 1902 only the average prices of 1897-1899 were taken, and in the revision of 1918, those of 1912-1916. Thus, owing to the steady increase in the value of commodities imported, the actual duties paid at any given time are always lower than the current prices would demand. The time has now come for a thorough revision of the existing commercial treaties of China with the view to removing the bar to her economic autonomy.

China's Proposals

China submitted to the Peace Conference at Paris the fol-

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lowing proposals regarding the revision of her tariff treaties:

1. The present tariff shall be superseded in two years' time by the general tariff which is applied to the trade of non-treaty powers.

2. But in the meantime she is willing to negotiate with the treaty powers with a view to arranging new conventional rates for those articles in which they are specially interested, under the following conditions:
   a. Any favorable treatment thus arranged must be reciprocal.
   b. A differential scale must be established so that luxuries should pay more and raw materials less in respect than necessaries.
   c. The basis of the new conventional rate for necessaries must not be less than 12½ per cent in order to cover the loss of revenue resulting from the abolition of li-kin as provided for in the commercial treaties of 1902-1903.
   d. At the end of a definite period to be fixed by new treaties, China must be at liberty not only to revise the basis of valuation, but also the duty rate itself.

3. China disclaims any intention of adopting a system of protective tariff or over-taxing her foreign trade, though most of her infant industries do need protection.
The Origin of Concessions and Settlements

The topic we have now come to relates to another of the many unique situations in China resulting from her treaty relations. Practically in all countries there exist certain rules whereby any undesirable foreigners may be excluded or expelled, but it is also a universal rule that when a foreign subject has already been admitted by the country whither he has migrated, he will be treated, during his peaceful stay there, on the same footing as any of the native-born citizens in respect, at least, to matters of residence and trade.

In China, however, the case is just the opposite. The Chinese government has never enacted any laws excluding any class of foreigners from its territory, nor has it exercised the right of expelling any undesirable aliens out of the country. True, the right of giving or refusing hospitality to foreigners pertains to the sovereign power of a country and is the necessary corollary to the right of self-protection. In the absence of the right being limited or qualified by treaty stipulations, its exercise, in whatever form and under whatever conditions, cannot be questioned. But the fact is, that this right has never been made use of by the Chinese
government, though it has ample opportunity and perfect moral justice to resort to such right, if it desires to adopt a retaliatory policy against those countries whose governments have enacted laws either excluding or strictly regulating the admission of certain classes of Chinese immigrants.

Though foreigners have never been excluded or expelled by the Chinese government, yet while remaining within the Chinese territory they are not accorded the same treatment in regard to matters of residence and travel as in other countries. Generally they are not permitted to take up their abode anywhere they please, nor are they allowed to travel in any part of the interior, without passports or special licences. They can only reside and carry on their business in certain places designated by treaties and known as the Treaty Ports. Their right of locomotion is thus limited within the precincts of such ports, and outside all doors are closed to them.

The reason for assigning certain places to foreigners for purposes of residence and trade and excluding them from the

1. Art. 9, British 1858; art. 8, French 1856; art. 9, Danish 1863; art. 3, Dutch 1863; art. 7, Spanish 1864; art. 10, Belgian 1865; art. 9, Italian 1866; art. 5, Peruvian 1874; art. 4, Brazilian 1881; art. 17, Portuguese 1887; art. 6, Japanese 1896; art. 4, Mexican 1899; art. 9, Swedish 1906.

2. No passport is required, however, if a foreigner goes on excursions from any of the open ports to a distance not exceeding 33 miles, and for a period not exceeding five days.—See treaty provisions cited in the preceding note.
rest of the territory is not far to seek. The situation was at the beginning desired by both Chinese and foreigners. With the advent of the Western adventurers into China, there came an unheard-of influx from distant lands of different languages and customs and inharmonious religious beliefs. The incoming of such foreign civilization was looked upon by the Chinese, whose world horizon had not yet widened far beyond the "four seas", as an invasion of their own institutions and ideas. Out of the innocent but unnecessary fear of a possible eclipse of their own civilization by that of the strangers, there naturally grew the inclination of adopting a preventive policy by keeping the dangerous aliens as far from themselves as possible. As for the foreigners they were equally desirous of living apart from the native people and setting up communities of their own. They found that things in the East were so different from things in the West that they thought it absolutely impossible to assimilate themselves to the people with whom they had brought themselves into contact. Except where commercial opportunities might yield them profit and wealth, there was nothing to encourage them to enter into any relation with the Chinese.

From such common desire on the part of the Chinese and foreigners to shun each other's company, there originated the system of concessions and settlements. By the Treaty of Nan-
King five ports were opened to British trade. By Article 7 of the Supplementary Treaty of 1843, it was provided that "the Treaty of perpetual peace and friendship provides for British subjects and their families residing at the cities and towns of Canton, Foochow, Amoy, Ningpo and Shanghai without molestation or restraint. It is accordingly determined, that ground and houses—the rent or price of which is to be fairly and equitably arranged for, according to the rates prevailing amongst the people, without exaction on either side—shall be set apart by the local officers, in communication with the consul." Those states who later entered into treaty relations with China, all obtained for their citizens the right to reside and trade in those ports already opened to British subjects. Gradually more ports were opened either by treaties or of China's own will for the residence of the subjects of one nation or of aliens of all nationalities. But in all cases the sovereign power of China was expressly reserved, the effect of the treaties being only the assigning of certain special areas to foreign nationals for the purpose of leasing houses or carrying on trade.

Different Kinds of Concessions and Settlements

Between "concessions" and "settlements" there is, in reality, no clear distinction. It may be said that the former is a term from the viewpoint of the Chinese, while the latter
is the name applied by the foreign settlers. But practically it would seem that a concession granted by treaty is a piece of ground conveyed by deed of grant to a lessee state for the residence of its nationals, the same to be administered by it, "saving the sovereign rights of the Emperor of China."

Concessions of this kind are numerous: they exist, for instance, at Canton, Chinking, Hankow, Kiukiang, Newchwang and Tientsin, the last mentioned having as many as ten concessions distributed among six nations. A settlement is a site selected for the residence of all foreigners, within which they may organize themselves into a municipality for certain purposes and be governed by their elected representatives. Settlements as so defined exist in the port of Shanghai. In that port there were originally three settlements, but since 1864 the British and American have been merged into one single administration, and are known as the International Settlements, while the French settlement has been separated from them as a distinct concession.

Besides those concessions and settlements which are granted by treaties, there are two other kinds of concessions where foreigners are also permitted to reside and trade. The first kind consists of what we may call voluntary concessions

1. They are Great Britain, France, Italy, Russia and Belgium. The German and Austro-Hungarian concessions were taken over by the Chinese government during the war.
which exist in those ports spontaneously opened by China for the residence of all aliens. As the opening of such concessions was independent of any treaty obligations, the control of municipal administration and police thereof remains vested in the local authorities. Examples of such concessions are Yochow and Changsha. To the second kind belong what may be termed settlements by sufferance, or those within which the foreign residents have acquired, without any formal agreement on the part of the territorial sovereign, the tacit right to govern themselves as a municipality. An example of this would be found in Chefoo, where "they (foreigners) have assessed themselves and have expended their assessments through a headless committee, but have no official status as a self-governing administrative body." 2

Legal Status of Concessions and Settlements

Inasmuch as the setting apart of certain places as concessions or settlements is expressly for purposes of international residence and trade, such act is without doubt different from the transfer of a piece of land with its complete title. The land encompassed by a concession remains Chinese territory, and the powers granted to the foreign communities are necessarily personal, not territorial. With the exception of the enjoyment

1. See art. 10, Japanese 1903.
2. Morse, Trade and Administration of China, p. 222.
of extraterritorial rights which constitute another grant distinct by itself, foreign residents bear the same relation to the Chinese government as do the Chinese citizens. Thus foreign land holders are no less required to pay a land tax than are the Chinese.

What a "concession" really signifies is a concession of municipal powers over the foreign residents. Accordingly, they are governed either by the consul of the state to which the concession has been granted, or, as in the case of Shanghai, by a council elected by the foreign taxpayers. The consul or the council, as the case may be, administers in the interests of the concession, issues ordinances and regulations binding on all residents for the maintenance of public order, levies taxes for municipal purposes, erects public buildings, makes roads, and maintains a police force.

The powers and limitations of a foreign municipality are clearly set forth in the instructions of the Peking foreign representatives, August 6, 1863, to the ratepayers of the Shanghai settlements, and the words therein contained are worth quoting:

1. That whatever territorial authority is established shall be derived directly from the Chinese government, through

the ratepayers' ministers.

2. That such shall not extend beyond simple municipal matters, roads, police, and taxes for municipal objects.

3. That the Chinese not actually in foreign employ, shall be wholly under the control of Chinese officers, as much as in the Chinese City.

4. That each consul shall have the government and control of his own people, as now, the municipal authority simply arresting offenders against the public peace, handing them over, and prosecuting them, before their respective authorities, as the case may be.

5. That there shall be a Chinese element in the municipal system, to whom reference shall be made, and assent obtained to any measure affecting the Chinese residents.

But these principles have not always been strictly followed in the administration of the foreign concessions. The consuls or the councils have either inadvertently neglected or selfishly disregarded the interests of the Chinese who always constitute the bulk of the population in the foreign concessions, and who contribute by far the largest part of the revenue of the municipalities. They have sometimes even attempted to exclude the Chinese from the concessions. Thus, in 1908, the foreign consuls at Wuhu proposed to amend the regulations for the international settlement of that port to
debar the Chinese from residing therein. The amendments, when referred to the American government, were disapproved by Secretary Root, who maintained that "the exclusion of Chinese from these international settlements at the treaty ports would be unwarranted."

Again, though the powers they possess are only personal, and not territorial, the foreign municipal governments have not infrequently attempted to override the jurisdiction of the territorial sovereign over its own nationals residing in the concessions. For example, in 1863, the Shanghai local authorities attempted to enforce an impost upon the Chinese in the British settlement, and requested the assistance of the British consul. The latter refused, saying that it had always been a matter of understanding between the local authorities and his consulate that the former's jurisdiction over their own subjects living within those limits should only be exercised through the British consul. This attitude was later repudiated by the British government, Earl Russell remarking, "The lands situated within the limits of the British settlement are without doubt Chinese territory, and it cannot reasonably be held that the mere fact of a residence within those limits exempts Chinese subjects from fulfilling their


natural obligations."

That the "Chinese element" has been most surprisingly neglected in the foreign concessions is further evidenced by the unwavering but heretofore yet unsuccessful efforts of the Chinese residents in the Shanghai International Settlements in contending for their right of representation on the municipal council. The Chinese residents at Shanghai comprise over 95 per cent of its population, and bear pro tanto the burden of local taxation, and yet they have been denied the right of representation, even on matters affecting their own interests. Though they have been recently allowed to elect an advisory committee of three delegates, yet this concession falls far short of their real desire.

**Why China Demands Restoration**

1. As in all cases in which China demands either restitution or abolition of existing anomalous situations, the rule of rebus sic stantibus seems equally applicable to the system of concessions. This peculiar system bespeaks the days when the East was East and the West was West, neither orientals nor occidentals being accustomed to associate with the other. When China was first opened to foreign intercourse, the assigning of separate districts for the use of the foreign merchants was deemed on both sides as a special favor granted

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to meet expediency and mutual convenience. For by such arrange­ment the Chinese authorities were able to prevent any possible friction between Chinese and foreign subjects, while the consuls found themselves in a better position to exercise protection and control over their nationals. But time has wrought upon this world so many wonderful changes. The necessity for the maintenance of independent foreign municipalities in China, viewed from the present-day conditions, seems to be a thing belonging to the realm of history. In no part of the world to-day, do the people show a more genuine enthusiasm in extending hospitality to their unknown brethren than in that country which only two decades ago looked upon men from distant lands as strange trespassers. The system of separate residence now appears to us as unnat­ural and unnecessary as the way in which the ancient Romans treated the "barbarians." As an evidence of the growing affection between Chinese and foreigners, it may be mentioned that their harmonious relations to each other have never been marred by any unhappy friction, despite the internal troubles of the past several years which have affected, in no small measure, the tranquility of the nation. China is ready to throw open every nook and corner of her territory to foreign residence and trade, but it is up to the foreign states first to give up their concessions and settlements.
2. The maintenance of the foreign concessions was once deemed necessary also on account of the fact, so it was said, that China was unable to carry on municipal government. Be this true or not, she has certainly in recent years made remarkable progress in municipal governments. It may be mentioned in this connection that after China's declaration of war on Germany and Austria-Hungary in 1917, their concessions at Tientsin and Hankow were immediately taken over by the Chinese government and have since been administered by Chinese authorities, to the satisfaction of all people. China is prepared, upon the restoration of the concessions of other countries, to assume full responsibility for effective administration.

3. It goes without saying that the present system of concessions and settlements is a great hindrance to the development of international trade in China. Foreign merchants whose right of locomotion is limited within the precincts of the concessions, are obliged to deal only with those Chinese who happen to reside with them. They cannot go about in the country and establish their business wherever they wish. The expansion and development of foreign commerce in any country cannot be expected without first widening the range of association with the native people. And this will be impossible in China before the system of separate residence is done
away with.

4. The existence of foreign concessions and settlements virtually constitutes, in each case, "un petit etat dans l'estat." For example, Chinese troops are denied the right of passage through the concessions though they are part of Chinese territory; and Chinese residents therein cannot be arrested by Chinese authorities except with the approval of the consul in charge of the concession. It is true that such denial by the foreign municipalities of the exercise of its sovereign powers by the territorial government is devoid of treaty sanction, and that the assertion of exclusive authority and power would have been impossible if the Chinese government had in the beginning vigorously insisted upon the exercise of its unsurrendered rights. But, if we consider the practical side of the question, we will see how the maintenance of the system of concessions will inevitably lead to the most preposterous assumption of powers by the foreign municipal governments, which cannot but have the effect of an unhappy conflict with the vital interests of China.

China's Proposals

It was for the above-mentioned reasons that the Chinese government asked for the restoration of the existing concessions and settlements in 1919. However, as foreigners have considerable vested interests in those concessions and settle-
ments, which would be affected by the abolition of the present system, the Chinese government promised not to carry it out until at the end of five years from the date upon which the interested powers shall agree upon the abolition.

In the meantime, China proposed to make the following modifications in the existing regulations of the foreign concessions:

1. That Chinese citizens shall have the right to own land in all the concessions and settlements under the same conditions as foreigners.

2. That Chinese citizens residing in the concessions shall have the right to vote in the election of members of the municipal councils and to be elected thereto.

3. That warrants issued and judgments delivered by competent Chinese courts outside the concessions shall be executed in the concessions, without being subject to any revision whatever by the foreign authorities.

4. That in no foreign concessions shall a foreign assessor be allowed to take part in the trial or decision of cases wherein Chinese citizens alone are concerned.