Treaties, Unequal

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A. Concept and Basic Problems

1 The pejorative term ‘unequal treaties’ (or more polemical ones such as ‘coercive’, ‘predatory’, or ‘enslaving’ → treaties) refers primarily to the bilateral treaties concluded in the second half of the 19th and beginning of the 20th centuries mostly, but not exclusively, between European powers, the United States of America (‘US’), and even Latin-American States on the one hand and on the other hand mainly Asian States (→ China, Japan, Siam, → Korea and others), but also African ones. The concept thus symbolizes the division between the Western and the Non-Western, the ‘civilized’ and the ‘uncivilized’ world which pervaded international legal thinking in that historical period (→ Civilized Nations).

2 The legal key question pertaining to the concept of ‘unequal treaties’ is whether a treaty’s unequal character constitutes an independent ground for voidability (→ Treaties, Validity), facilitated review (→ Treaties, Amendment and Revision),

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In the 20th century, the term has been embedded in the context of imperialism, → hegemony, → colonialism, Eurocentrism, and connotes injustice or humiliation. This modern notion was developed in the 1920s by Chinese nationalists and later communists (see for a historical account Wang); and in parallel in the Soviet Union (see for the position of the Soviet government GI Tunkin [ed] International Law: A Textbook [Progress Publ Moscow 1986] 48–49; → History of International Law, World War I to World War II; see also → History of International Law, since World War II).

An unequal treaty is characterized by its unequal substance—imbalance of treaty obligations, non-reciprocity, extreme restriction of sovereignty—and/or by the unequal procedure of its conclusion—treaties signed under military, political, or economic coercion (see also → Reciprocity; → Sovereignty; → Treaties, Conclusion and Entry into Force). In its most radical (socialist law) version, the concept is applied even to those treaties which, although they lay down formally equal rights and duties, in fact create or perpetuate substantive inequality. In this perspective, whether or not a treaty is equal does not depend on the wording of its provisions, but depends on the character, the economic strength, and the overall relationship between the Contracting States. Taken to the extreme, any treaty between a capitalist, bourgeois State and socialist State would then be an unequal treaty or could become one when circumstances change (see Chiu 63–64 for this view with further references; see also → International Legal Theory and Doctrine).

Unequal treaties overlap with → capitulations, which existed until the beginning of the 20th century (see also → History of International Law, 1815 to World War I). Capitulations were granted by sultans of the Ottoman Empire and Shahs of Iran. They exempted foreign nationals from the territorial jurisdiction of the State of their dwelling (→ Jurisdiction of States) and placed them under the → consular jurisdiction administered by the → consul of their home State.

Scholarly interest in the problem of unequal treaties has varied. Overwhelmingly, legal and historical scholarship is concerned with the Chinese treaty experience. Since the 1920s, when China officially demanded the abolition of some treaties in international forums (→ Treaties, Termination), the issue has received world-wide attention. The question of unequal treaties was also debated in the long drafting processes of the law of treaties (→ Vienna Convention on the Law of Treaties [1969]) and of State succession in respect of treaties (→ State Succession in Treaties). Recently, new attention has been paid to the issue by critical international legal scholarship (→ Critical Theory; M Koskenniemi 'International Law and Imperialism' in D Freestone, S Subedi and S Davidson [eds] Contemporary Issues in International Law. A Collection of the Josephine Onoh Memorial Lectures [Nijhoff Leiden 2002] 197–218; G Simpson Great Powers and Outlaw States. Unequal Sovereigns in the International Legal Order [CUP Cambridge 2004] 243–47; Anghie 72–87, 240–42; Craven).

**B. The Historical Practice of Unequal Treaties**

**1. Historical Overview**

The practice of concluding unequal treaties with China and other East Asian States resulted from the competition among various rivalling European powers and the relative strength of the Asian → nations, which prevented the division and → annexation of territories and favoured an ‘open door policy’. Frequently, the treaties were dictated under the threats of naval bombardment (→ Naval Warfare) or → siege. All of these treaties were abrogated or revised before the close of World War II.
Many treaties concluded from the 16th to the 18th centuries between the representatives of European governments or newly founded States with indigenous peoples (→ Indigenous Peoples; → Indigenous Peoples, Treaties with) in the Americas, New Zealand, Australia and the Pacific might also be considered as unequal treaties, both on the grounds of substance and of the treaty making procedure.

(a) China

More than 1,000 treaties and agreements concluded by China with foreign States or corporations from 1842 to 1949 were considered ‘unequal’. Involved were 18 powers, namely 12 European States (the United Kingdom (‘UK’), France, Sweden/Norway, Prussia, Portugal, Denmark, the Netherlands, Spain, Belgium, Italy, Austria-Hungary, Switzerland) and → Russia, the US, Japan, Peru, Brazil, and Mexico. The backbone of the unequal treaty regime was → peace treaties concluded after Chinese defeats in five wars with Western powers from 1842 to 1901. The first historical unequal treaty was the Treaty of Peace between China and Great Britain (‘Treaty of Nanking’ [Nanjing]), concluded under threat of assault with the UK on 29 August 1842, which marked the end of the first opium war. The Treaty of Friendship, of Commerce and of Navigation between the King of China and the United States of America (‘Treaty of Wang Hiya’ [Wangheia]; [signed 3 July 1844, entered into force 10 January 1845] in C de Martens and F de Cussy [eds] Recueil manuel et pratique de traités, conventions et autres actes diplomatiques, sur lesquels sont établis les relations et les rapports existant aujourd'hui entre les divers états souverains du globe, depuis l'année 1760 jusqu'à l'époque actuelle [Brockhaus Leipzig 1849] vol V 395) formally introduced and defined the → extraterritoriality system (Arts XXI, XXV) which extended to all other treaty powers by the → most-favoured-nation clause. It became the model for the Treaty of Friendship, of Commerce and of Navigation between France and China (‘Treaty of Whampoa’ [Wampoa]; [signed 24 September 1844, entered into force 25 August 1845] in C de Martens and F de Cussy [eds] Recueil manuel et pratique de traités, conventions et autres actes diplomatiques, sur lesquels sont établis les relations et les rapports existant aujourd'hui entre les divers états souverains du globe, depuis l'année 1760 jusqu'à l'époque actuelle [Brockhaus Leipzig 1849] vol V 423). These treaties have been called the ‘Grand charter’ of the Western foreigner in China and formed the foundation on which the commercial and diplomatic relations were conducted (see also → Commercial Treaties; → Diplomatic Relations, Establishment and Severance). All other treaties merely extended and refined them. After the 1894–95 Sino-Japanese war, China had to conclude the Peace Treaty signed in Shimonoseki between China and Japan ([signed 17 April 1895] in F Stoerk [ed] Martens Nouveau recueil général de traités et autres actes relatifs aux rapports de droit international [1895–1908] series II vol 21, 642) in which it recognized the independence and autonomy of Korea (Art I of the treaty). In the Convention concerning the Extension of the Territory of Hong Kong between China and Great Britain ([signed 9 June 1898, entered into force 6 August 1898] in F Stoerk [ed] Martens Nouveau recueil général de traités et autres actes relatifs aux rapports de droit international [1895–1908] series II vol 32, 89), China leased the ‘New Territories’ including Kowloon as an extension of the British settlement on the island of → Hong Kong (established already by the Convention of Friendship between China and Great Britain [signed and entered into force 24 October 1860] 123 CTS 71) for 99 years. After the military crushing of the Anti-Western Boxer movement by the Western powers, the Final Protocol for the Settlement of the Disturbances of 1900 (‘Boxer’ Protocol) of 7 September 1901 was concluded. The protocol enabled 11 foreign powers to take control over Peking's diplomatic quarters and to station forces (→ Military Forces Abroad; see also → Armed Forces) between the capital and the coast (see also → Territorial Integrity and Political Independence). Because of its humiliating clauses—infliction of punishments on Boxer leaders and high indemnities—it is often regarded as the summit of the unequal treaties with China. At the onset of World War I, Japan profited from its status as an allied power to impose the ‘Twenty-one Demands’ of 1915—which resulted in the Treaty Respecting the Province of Shantung and the Treaty Respecting South Manchuria and Eastern Inner Mongolia—on China. Here Japan extracted various, notably territorial concessions from China with an → ultimatum under threat of war.

(b) Other Asian Nations

of Friendship and Commerce [signed 18 August 1858] 119 CTS 313), Russia (Treaty of Friendship and Commerce [signed 19 August 1858] 119 CTS 337), Great Britain (Treaty of Peace, Friendship and Commerce [26 August 1858] 119 CTS 401), and France (Treaty of Peace, Amity and Commerce [9 October 1858] 120 CTS 7). The Ansei treaties were followed by further unequal treaties with other European powers and Peru until 1874.

12 Siam was forced by military threat to sign the Treaty of Friendship and of Commerce between Great Britain and the Two Kings of Siam (‘Bowring Treaty’; [signed 18 April 1855, entered into force 5 April 1856] in C de Martens and F de Cussy [eds] Recueil manuel et pratique de traités, conventions et autres actes diplomatiques, sur lesquels sont établis les relations et les rapports existant aujourd'hui entre les divers états souverains du globe, depuis l'année 1760 jusqu'à l'époque actuelle [Brockhaus Leipzig 1849] vol VII 550). This treaty resembled the British treaties with China and Japan of a few years earlier. Between 1856 and 1870, the US and other European powers concluded treaties modelled on the Bowring Treaty and the Agreement supplementary to the Bowring Treaty ([signed 13 May 1856] in C de Martens and F de Cussy [eds] Recueil manuel et pratique de traités, conventions et autres actes diplomatiques, sur lesquels sont établis les relations et les rapports existant aujourd'hui entre les divers états souverains du globe, depuis l'année 1760 jusqu'à l'époque actuelle [Brockhaus Leipzig 1849] vol VII 559. Unequal treaties were also concluded among the Asian powers themselves, for instance the Treaty of Peace and Friendship of Kanghwa (Ganghwa) between Korea and Japan (signed 28 February 1876) in C de Martens and F de Cussy [eds] Recueil manuel et pratique de traités et conventions sur lesquels sont établis les relations et les rapports existant aujourd'hui entre les divers états souverains du globe, depuis l'année 1760 jusqu'à l'époque actuelle [Brockhaus Leipzig 1887] series II vol II 540) and the Treaty concerning the Incorporation of Korea in the Kingdom of Japan ([signed 22 August 1910] 212 CTS 43).

2. The Standard Contents of Unequal Treaties in Asia

13 The core feature of the historical unequal treaties was the establishment of an overtly non-reciprocal extraterritoriality regime. Nationals of the foreign treaty power were basically immune from local jurisdiction in criminal and also in civil matters. The foreigners were instead subordinated to the jurisdiction of consuls of their home country or special mixed institutions. Details depended on the → nationality of the parties to the proceedings. The foreign or mixed courts conducted proceedings in the language of the home country and applied Western law in procedure and substance. The extraterritoriality regime was not limited to litigation, but included the presence of foreign troops, the foreign administration of bureaucratic services, such as the customs, the postal service, tax agencies and railways (→ Governmental Activities on Foreign Territory). In some instances, foreigners were also exempt from certain taxes.

14 Linked to the extraterritoriality regime was the establishment of treaty ports open to foreign vessels and goods. These ports, such as Shanghai since 1842, sometimes grew into physically isolated enclave-like foreign settlements under foreign administration. In addition, the foreigners were granted numerous rights and privileges such as freedom of settlement and travel, the right to acquire real property, free exercise of religion and proselytism, freedom of coastal navigation (cabotage; → Navigation, Freedom of) and navigation in inland waters, establishment of educational institutions, and the like. Foreign enterprises were granted various → concessions for running railways, mining and telecommunications business.

15 Import duties were fixed at specified (low) levels, monopolistic local trade systems were abolished and diplomatic equality was established (→ Customs Law, International). Treaties concluded after wars imposed high indemnities on the defeated Asian parties.

16 Other typical elements of the treaties were cessions or lease of territory (→ Cession; → Territory, Lease). For example, China confirmed the ‘perpetual occupation and government’ of → Macau (Macao) by Portugal in Art. 2 Preliminary Protocol of Friendship ([signed 26 March 1887] in F Stoerk [ed] Martens Nouveau recueil général de traités et autres actes relatifs aux rapports de droit international [reprinted by Kraus Reprint Nendeln 1967] series II vol 18, 635), and Hong Kong and Kowloon were leased by China to Great Britain (see para. 10 above).

17 Finally, the historical unequal treaties contained a most-favoured-nation (‘MFN’) clause which extended all rights, concessions and privileges to all other non-European parties.

3. The Termination of Unequal Treaties in Asia

18 Revision of the historical unequal treaties was difficult, because most of them were concluded for an unlimited duration, did not contain revision or renunciation clauses, and because the MFN clauses tied all treaties with the various interested
powers together. In the time of the → League of Nations, Art 19 Covenant of the League of Nations was occasionally contemplated as a mechanism to at least ‘reconsider’ unequal treaties. However, the invocation of this provision never led to the revision of a treaty.

19 The Western powers conditioned review of the treaties on the attainment of a Western ‘standard of civilization’. This comprised the observance of international law, the establishment of diplomatic relations, law reform and codification, reform of the judicial system and the administration, the establishment of a constitutional government based on the separation of powers (→ Rule of Law), and the abolition of traditional institutions such as polygamy and → slavery.

20 These conditions were fully met by Japan by the end of the 19th century. The Meiji constitution, ([promulgated 11 February 1889, entered into effect 29 November 1890] in H Tanaka [ed] The Japanese legal system: Introductory Cases and Materials [University of Tokyo Press Tokyo 1984] 16) established Western structures of government, and legal codifications were carried out until 1898. The Treaty of Commerce and Navigation between the United Kingdom of Great Britain and Ireland and Japan (‘Aoki-Kimberley Treaty’), terminated extra-territorial rights of British nationals in Japan. This was the precedent for similar treaties concluded between Japan and the other Western powers shortly thereafter. Siam's unequal treaty regime resembled the regime imposed on Japan. It began to disintegrate in 1920 and was fully terminated by 1939.

21 The Western unequal treaty regime in relation to China was highly intrusive and complex, and was dismantled much more slowly. Chinese requests for revision at various conferences after World War I remained unheard (→ Conferences and Congresses, International). After a Western commission had recommended law reform in the Report of the Commission on Extraterritoriality in China in 1926, China adopted new legal codes beginning in 1928. Until 1932, agreements were concluded which restored tariff autonomy to China. But only in 1943 was China, which had become an ally of the US and the UK against the Japanese aggressor (→ Alliances), able to conclude treaties on the relinquishment of extraterritorial rights and privileges and of consular jurisdiction with the leading States (Treaty between His Majesty in Respect of the United Kingdom and India and His Excellency the President of the National Government of the Republic of China for the Relinquishment of Extra-Territorial Rights in China and the Regulation of Related Matters [signed 11 January 1943, 20 May 1943] 205 LNTS 69; Treaty between the Republic of China and the United States of America for the Relinquishment of Extra-Territorial Rights in China and the Regulation of Related Matters [signed 11 January 1943; entered into force 20 May 1943] 10 UNTS No 261). These were within a few years followed by all remaining Western powers. Hong Kong was returned on 1 July 1997.

22 The status of the unequal treaties between Russia and China is equally complex. Although the Soviet Union propagandistically claimed to renounce all unequal treaties concluded by the Tsarist government, it is disputed whether these treaties were indeed formally abrogated. In 1945, the Soviet Union concluded an unequal treaty with China in which the latter renounced control over Outer Mongolia. In the Treaty of Friendship, Alliance and Mutual Assistance between the Union of Soviet Socialist Republics and the People's Republic of China, the independence of Outer Mongolia was confirmed in 1950, but in exchange the Soviet Union relinquished various territorial rights. Only in 2005 were all remaining border disputes between China and Russia (as a successor to the Soviet Union) settled by → negotiation (→ Boundaries; → Boundary Disputes between China and Russia).

C. Historical Assessment

1. Political Perceptions of the Time

23 For the Western Contracting Parties, the historical treaties were primarily designed to procure commercial advantage by eliminating the impediments for free trade such as import quotas or bans, tariffs, and local monopolies (see also → World Trade, Principles). Linked to this objective was the intention to break down the Asian assumption of superiority in diplomatic and commercial relations, and to safeguard the → security of the merchants.

24 Notably, the extraterritoriality regime was considered necessary to protect life, liberty and property of the Western parties' nationals. The foreign police and military guarded the merchants from private attacks. Those were not always effectively sanctioned by the host States which were, in Western terms, weak or even failing. Consular jurisdiction shielded the foreigners from the host countries' laws and proceedings considered unfair and inhumane.

25 The victimized States' perceptions of the unfairness of the historical treaties changed over time. When the first treaties were concluded, the priority of the non-European parties was to retain control over certain cities and to minimize the physical intrusion into the land. The Asian actors were initially not concerned with tariff restrictions, extraterritoriality, consular jurisdiction and the MFN clause, because they did not have notions of sovereignty, territorial jurisdiction, and of protective tariffs. Only later, the standard reproach of the non-Western parties emerged that the special privileges
granted by the treaties significantly aggravated war-lordism and contributed to, if not caused, instability and governance problems in the host States. The artificially low tariffs deprived the Asian States of revenues.

26 Extraterritoriality was partly abused by the nationals of the Western powers to cloak illegal acts such as smuggling (see also → Abuse of Rights). While historically the consular courts were not generally biased, the multiple systems of consular jurisdiction operating at the same time caused practical problems. Also the level of lawyerly expertise was comparatively low. In political and psychological terms, extraterritoriality became the major Asian grievance, and a symbol for the unfairness of the treaties and of national humiliation.

2. Legal Standards of the Time

27 At the time of the conclusion of the historic unequal treaties in the second half of the 19th century, the international legal context differed greatly from present general international law. First of all, the use of force was not prohibited (→ Use of Force, Prohibition of; → Use of Force, Prohibition of Threat). Consequently, treaties could lawfully be concluded by means of or under threat of military force. Second, although European teachers of the law of nations and nature had firmly established the view that all States were sovereign and equal (→ States, Sovereign Equality), this principle was more theoretical than real.

28 After the re-ordering of Europe by the Congress of Vienna in 1815 (→ Vienna Congress [1815]), the notion of an international legal system confined to European States emerged. In parallel, a positivist approach to international law superseded the natural law theories (→ Positivism). An extreme 19th century view was that the relations between European and non-European entities occurred outside the realm of international law and that they were hence subject only to the ‘conscience’ of the European States or to ‘discretion’. In that perspective, treaty obligations between European States and non-European entities were only obligations of ‘honour’.

29 In contrast, the prevailing approach among European publicists was to apply international law, albeit with modifications. In this dominant view, non-European powers such as China or Japan were States, but only after constitutive recognition. (Before recognition, they were either considered as not ‘fully sovereign’, or not as members of an inner ‘family of nations’ or of the ‘international society’. See also → International Community.) → Recognition, express or implied, was granted to the non-European entities only when they fulfilled the Western standard of civilization. Somewhat inconsistently, the conclusion of the first (unequal) treaties was not considered to imply recognition.

30 On the other hand, the Asian powers themselves originally had different concepts of legal relations between States. The idea of inter-State treaties which at the same time presupposed and manifested the Contracting States’ sovereign equality was not accepted.

31 The result of the clash of different legal universes and of the European scholars' sophisticated, but ultimately inconsistent, classifications was that the non-European States were in a kind of legal limbo and were treated on a case by case basis. The relationships between non-European and European States were governed not by general international law (→ General International Law [Principles, Rules and Standards]), but exclusively by the treaty provisions which thus formed a → self-contained regime. The abrogation of the unequal treaties and the conclusion of new treaties, pre-conditioned on the attainment of a Western standard of civilization, marked the attainment of ‘full’ international personality and of ‘full’ membership in the inner circle of nations.

D. Legal Assessment under Current Public International Law

1. Viability of the Concept within the Matrix of Sources of Public International Law

(a) Treaty Law Aspects

32 The → Vienna Convention on the Law of Treaties (1969) (‘VCLT’) does not explicitly deal with unequal treaties. Nevertheless, the concerns of the unequal treaty doctrine can be brought to bear in a limited fashion within the framework of the VCLT. However, the VCLT’s personal and temporal scope is limited (Art. 4 VCLT). In particular, it is unclear whether the exclusivity principle of Art. 42 VCLT, according to which the invalidity or termination of a treaty can only be brought about in application of the VCLT, applies also to treaties which engage one or several non-parties to the said convention. For these reasons, it still matters whether a prohibition of unequal treaties exists as a rule of → customary international law.
A different approach is to define unequal treaties per se as a non-source of international law. In that view, frequently espoused in Soviet scholarship, an unequal treaty is by definition no treaty, and is therefore not protected by *pacta sunt servanda* (e.g. G Haraszti *Some Fundamental Problems of the Law of Treaties* [Akadémiai Kiadó Budapest 1973] 390; S Rosenne *The Law of Treaties* [Sijthoff Leiden 1970] 76). But this construction has not gained ground.

(b) Customary Law

The concept of unequal treaties might be recognized by customary international law. However, → *State practice* and official statements in this context are selective and inconclusive. There is no general, uniform and consistent practice of negating, abrogating or renegotiating unequal treaties. As far as the *opinio iuris* is concerned, the doctrine of unequal treaties was espoused notably by Asian States, by post-colonial States in Africa (see also → *Decolonization*), and by the Soviet Union until the demise of the socialist bloc, but not by the States of the north and the west. Statements by State organs and officials denouncing unequal treaties have been obviously controlled by political considerations. This fact in itself does not rule out the possibility of an *opinio iuris*, but suggests close scrutiny. China and the Soviet Union occasionally imposed unequal treaties on weak States, for instance the Treaty of Friendship and Mutual Non-Aggression between the People’s Republic of China and the Union of Burma ([signed 28 January 1960] in GF Rhode and RE Whitlock *Treaties of the People’s Republic of China, 1949–1978: An Annotated Compilation* [Westview Boulder 1980] 24) or the Soviet-Czechoslovak Treaty on Stationing of Soviet Troops ([signed 16 October 1968, entered into force 18 October 1968] [1968] 7 ILM 1334). Although the Soviet Union declared null many treaties concluded by Tsarist Russia, this practice was not consistently based on the general argument that unequal treaties were void, but rather on the consideration that the revolution had created a new State and had either severed prior treaty obligations or led to a fundamental change of circumstances, or that secret treaties (→ *Treaties, Secret*) were invalid.

(c) Teachings of Publicists: The Soviet and Chinese Doctrine of Unequal Treaties

The majority of academic writers does not qualify the idea of unequal treaties as a legal concept (P Reuter *Introduction au Droit des Traités* [3rd edn PUF Paris 1995] 272; Caflisch 65). However, the specific Chinese and Soviet doctrines of unequal treaties were genuine contributions to international legal scholarship and represented one of the major differences between the Western and the communist views on international law.

In Soviet scholarship, unequal treaties were a major topos for the periodization of the history of international law. Actually the majority of international treaties concluded by capitalist (imperialist) States, especially those with developing States and basically all treaties on military bases on foreign territory, economic and technical assistance, on credits and loans, and the treaties concluded on the basis of the Marshall and Truman plans, were considered to be unequal and void (see Il Lukashuk ‘The Soviet Union and International Treaties’ [1959] Soviet Yearbook of International Law 16–50, in Russian with English summary; AN Talalaev and VG Boyarshinov ‘Unequal Treaties as a Mode of Prolonging the Colonial Dependence of the New States of Asia and Africa’ [1961] Soviet Yearbook of International Law 156–70, in Russian with English summary; V Vasilenko ‘State Sovereignty and International Treaty’ [1971] Soviet Yearbook of International Law 60–79, in Russian with English summary). An important restriction of the Soviet doctrine was that it refused to characterize as unequal boundary treaties resulting from a historical process spread over a long period.

The Chinese concept was developed in an original fashion without knowledge of the older Western natural law publicists. Both Chinese nationalist and communist writers espoused the doctrine. In particular the communist doctrine interacted with the Soviet doctrine and tended to consider unequal treaties void, except those involving territorial questions. The contrary view that unequal treaties were (merely) reviewable through diplomatic negotiations was probably more popular among Chinese nationalist scholars (T Wang ‘International Law in China: Historical and Contemporary Perspectives’ [1990] 221 RdC 195, 237–50, 333–53; Chiu; for a useful comparison of the Chinese and Soviet doctrine JA Finkelstein ‘An Examination of the Treaties Governing the Far-Eastern Sino-Soviet Border in Light of the Unequal Treaties Doctrine’ [1979] 2 BCIntl&CompLRev 445, 452–56).

2. Doctrinal Arguments for Qualifying Certain Treaties as ‘Unequal’

(a) Inequality in Substance

The claim of inequality may relate to the substance or contents of a treaty.
(i) Lack of Reciprocity?

39 It has been argued that a treaty is unequal if it provides for imbalanced and/or non-reciprocal rights and duties (see, eg, H Chiu ‘Comparison of the Nationalist and Communist Chinese Views of Unequal Treaties’ in JA Cohen [ed] China’s Practice of International Law: Some Case Studies [Harvard University Press Cambridge 1972] 239, 249, quoting Ch’ien T’ai, Wang Shih-chieh, and Hu Ching-yu; V Vasilenko ‘State Sovereignty and International Treaty’ [1971] Soviet Yearbook of International Law 60, 79, in Russian with English summary; as an argument de lege lata I Detter ‘The Problem of Unequal Treaties’ [1966] 15 ICLQ 1069, 1086–87). However, a balance, equality or reciprocity of treaty obligations and rights is not essential to its validity. The definition of ‘treaty’ in Art. 2 (1) (a) VCLT does not mention reciprocity, exchange or consideration. Moreover, treaties which create objective orders in the public interest and which lack reciprocity are becoming increasingly important.

(ii) Infringement of Sovereignty?

40 A second argument relating to the treaty substance is that treaties are unequal if they violate the principle of sovereign equality as enshrined in Art. 2 (1) Charter of the United Nations (‘UN Charter’; → United Nations Charter; → United Nations [UN]) and are therefore void or voidable (eg AN Talalaev and VG Boyarshinov ‘Unequal Treaties as a Mode of Prolonging the Colonial Dependence of the New States of Asia and Africa’ [1961] Soviet Yearbook of International Law 156–70, in Russian with English summary). In fact, notably an extraterritoriality regime curtails the territorial sovereignty of the host State and establishes jurisdiction based on the principle of personality.

41 However, the principle of sovereign equality does not prescribe the ‘equality’ of treaty obligations. On the contrary, it is generally held that a State exercises its sovereignty by concluding treaties, and that sovereignty is not infringed if it freely agrees to unfavourable terms. The dominant, liberal view of sovereignty disregards power imbalances among States as long as they do not manifest themselves in military coercion against a State.

(iii) Violation of ius cogens?

42 The third argument relating mainly to treaty substance is that a treaty is unequal if it conflicts with existing or emerging peremptory norms of international law and is or may become void under Arts 53 and 64 VCLT (G Haraszti Some Fundamental Problems of the Law of Treaties [Akadémiai Kiadó Budapest 1973] 157–58). These provisions seem to constitute a progressive development of the law which has only gained customary status after the entry into force of the VCLT. Therefore, the provisions or the underlying principle do not apply to treaties before the entry into force of the VCLT. Indeed, the provisions or the underlying principle may not apply to treaties before the entry into force of the VCLT (cf Art. 4 VCLT).

43 Peremptory norms mentioned in this context are the principle of sovereign equality, the prohibition on the use of force, and the self-determination of peoples (see, eg, T Wang ‘International Law in China: Historical and Contemporary Perspectives’ [1990] 221 RdC 195, 337). However, the first mentioned principle, sovereign equality, is no absolute, non-derogatory principle and is therefore not generally considered to form part of ius cogens. Second, resort to force for concluding a treaty is a procedural aspect specifically prohibited by Art. 52 VCLT, whereas Art. 53 VCLT deals with the treaty’s substance only. In contrast, on the premise that the third principle, self-determination, has already acquired the status of ius cogens, a treaty concluded after 1980 which nullifies a people’s right to self-determination might be considered void in application of Art. 53 or Art. 64 VCLT and corresponding custom.

(iv) Conflict with Art 103 UN Charter?

44 Finally, it has been argued that a violation of sovereign equality, self-determination, or of the prohibition on the use of force constitutes a conflict with the UN Charter obligations (II Lukashuk ‘The Soviet Union and International Treaties’ [1959] Soviet Yearbook of International Law 16, 46, in Russian with English summary; H Chiu ‘Certain Legal Aspects of Communist China’s Treaty Practice’ [1967] 61 ASILPROC 117, 128). Art. 103 UN Charter does not invalidate a conflicting treaty, but merely renders it inapplicable. However, the provision of Art. 103 UN Charter does not exactly cover the situation of an ostensibly unequal treaty, but is rather directed against treaties in which the parties agree to violate UN Charter principles.

(b) Procedural Inequality

45 A different set of arguments relates to the conclusion of treaties. The proposition that certain treaties are legally defective on procedural grounds and are therefore unequal has been based on the following considerations.
(i) Lack of Consent or Treaty Making Capacity


47 This construction is irreconcilable with the principle of pacta sunt servanda, because the factors accounting for ‘genuine’ equality are too indeterminate. The same objection applies to the related proposition to require the ‘continuous consent’ for ‘potentially unequal treaties’, such as those establishing military bases (I Detter de Lupis International Law and the Independent State [2nd edn Gower Brookfield Vt. 1987] 195–219).

48 Another argument is that the extreme weakness of bargaining power of one party might engender the absence of its treaty making capacity (see, eg, F Nozari Unequal Treaties in International Law [PhD thesis Stockholm University 1971] 271). This would nullify a treaty concluded by such a party. However, current international law accords treaty making capacity to all States, without qualifications (→ Treaty Making Power).

(ii) Treaties Procured by Coercion

49 ‘Coerced’ or ‘imposed’ treaties under Arts 51 and 52 VCLT form the only subgroup of unequal treaties which international law doubtlessly regards as null and void (→ Treaties, Validity). However, the scope of the rule remains disputed.

50 Art. 51 VCLT holds that State consent procured by the coercion of a State representative is without any legal effect. This provision codifies an uncontroversial legal principle whose basic idea is that a State’s will, which can only be declared by its representative, is vitiated due to coercion. The ‘acts or threats’ of coercion must be directed at the person of the representative, and are not confined to physical force. The validity of historic unequal treaties has only rarely been called into question on the basis of this principle.

51 In contrast, the rule of Art. 52 VCLT is best understood not as a vitiation of consent, but as a corollary to the modern law prohibition on the use of military force. The provision holds that a treaty is void if its conclusion has been procured by the threat or use of force in violation of the international legal principles embodied in the UN Charter. The conventional rule itself is not retroactive. But Art. 4 VCLT allows the application of the principle which had emerged in the inter-war period. Because of its limited temporal scope, the rule enshrined in Art. 52 VCLT does not affect the historical unequal treaties concluded in the second half of the 19th century.

52 The meaning of ‘force’ in Art. 52 VCLT has not been defined in the VCLT itself, although the reference to the UN Charter seems to imply that ‘force’ means only military force in the sense of Art. 2 (4) UN Charter, as opposed to economic or political pressure. During the drafting process, numerous government delegates, notably those from socialist and some African States, argued for including a prohibition on economic and political pressure—eg Special Rapporteur MK Yasseen ‘Report on the Ninth Session of the Asian-African Legal Consultative Committee’ (1968) UN Doc A/CONF.39/11, 269–92, 328–29). The amendment met opposition by Western industrial countries. It was withdrawn before a formal vote in return for the approval of an additional declaration which forms part of the Final Act of the Vienna Conference (ibid 329). That declaration ‘condemns the threat or use of pressure in any form, whether military, political, or economic, by any State in order to coerce another State to perform any act relating to the conclusion of a treaty in
violation of the principles of the sovereign equality of States and freedom of consent’ (ibid). However, the declaration does not draw the conclusion that a treaty concluded under pressure is void.

53 Despite the compromise reached at the Vienna Conference, the divergence of views on the meaning of ‘force’ persists (see for the view that the prohibition of coercion goes beyond armed force (‘Report of the International Law Commission, 34th Session [3 May–23 July 1982]’ GAOR 34th Session Supp 10, 116; the reservation to Art. 52 VCLT by the Syrian Arab Republic, 1155 UNTS 332, 506, objected to by Egypt, Japan and the UK; ambiguously paras 8 and 11 UNGA Res 42/22 [18 November 1987] GAOR 42nd Session Supp 49 vol 1, 287 on the Enhancement of the Effectiveness of the Principle or Refraining from the Threat or Use of Force in International Relations). Proponents of the broad reading assume that ‘unequal’ treaties concluded under economic or political pressure are invalid under Art. 52 (see for the claim that the travaux préparatoires and subsequent practice have established a presumption in favour of the broad reading O Corten paras 19–26; for the contrary view SS Malawer ‘Imposed Treaties and International Law’ [1977] 7 CalWIntLJ 1, 155).

54 The Friendly Relations Declaration, UNGA Resolution 2625 (XXV) of 24 October 1970 recalls ‘the duty of States to refrain in their international relations from military, political, economic or any other form of coercion’ (recital 9). Regularly, UN General Assembly resolutions on unilateral economic measures as a means of political and economic coercion against developing countries (most recently UNGA Res 60/185 [31 January 2006]), and reports by the UN Secretary General on the same theme (most recently UNGA ‘Report of the Secretary General on Unilateral Economic Measures as a Means of Political and Economic Coercion against Developing Countries [12 August 2005] UN Doc A/60/226) have been issued. In all these documents, the UN organs urge the international community to eliminate the use of unilateral coercive economic measures against developing countries that are ‘inconsistent with the principles of international law’, but do not qualify economic coercion per se as a ground for invalidating treaties.

3. Legal Consequences of an Unequal Treaty

55 The unequal character of a treaty might have different legal consequences. An unequal treaty could be invalid, it could be voidable, the unequal character could be a ground for unilateral termination or suspension, or it could finally bolster a claim for revision. As far as revision is concerned, the rules on amendment and modification of treaties in Arts 39–41 VCLT do not foresee that a party may compel its partner to renegotiate simply by asserting that the treaty is unequal. The rules on voidability which must be invoked (Arts 48–50 VCLT) are not pertinent. The rules on invalidity under Art. 52 or 53 VCLT have already been discussed. Termination or withdrawal under Art. 62 VCLT deserves further exploration.

(a) Clausula rebus sic stantibus

56 Notably Chinese scholars have argued that unequal treaties could be unilaterally terminated or renegotiated on the basis of the clausula rebus sic stantibus (‘clausula’; → Treaties, Fundamental Change of Circumstances), which is now codified in Art. 62 VCLT (T Wang ‘International Law in China: Historical and Contemporary Perspectives’ (1990) 221 Recueil des Cours 195, 348–49; H Chiu ‘Comparison of the Nationalist and Communist Chinese Views of Unequal Treaties’ in JA Cohen (ed) China's Practice of International Law: Some Case Studies (Harvard University Press Cambridge 1972) 239, 267). In State practice, China declared a unilateral termination of the 2 November 1865 unequal treaty with Belgium (entered into force 27 October 1866) in Denunciation of the treaty of November 2nd, 1865, between China and Belgium [Annexe au Mémoire du gouvernement belge] PCIJ Rep Series C No 16, 25), relying on the political and commercial changes in both countries. Belgium applied to the → Permanent Court of International Justice (PCIJ), but later withdrew the action, so that the PCIJ did not have the occasion to rule on the applicability of the clausula.

57 Crucially, the clausula starts from a different point of departure than the concept of unequal treaties. The prohibition of unequal treaties covers a situation existing at the time of the conclusion of the treaty. By contrast, the clausula only applies to treaties which somehow became ‘unequal’ as a result of changed circumstances. Two arguments in that sense could be made, relating primarily to the Chinese unequal treaties. First, only from the 1870s onward did a sense of humiliation and inferiority surface in the writing of Chinese scholars and diplomatic officials. However, changes in attitudes and subjective assessments do not warrant the application of the clausula. Second, communist writers have argued that the foundation of the People's Republic of China (‘PR China’) was a fundamental change of circumstances, because the State has a class character radically different from that of the old China which concluded the treaties. However, outside the socialist international law doctrine it has not been admitted that a revolution changes a State's identity.

58 Overall, the clausula applies to unequal treaties just as to other treaties within its usual narrow confines. An important limitation is the non-applicability of the clausula to treaties establishing boundaries (Art. 62 (2) (a) VCLT). Afghanistan
and Morocco have filed reservations/declarations stating that Art. 62 (2) (a) VCLT does not apply to ‘unequal’ or ‘inequitable’ treaties (1155 UNTS 332, 496, 500, with objections by Algeria, Argentina, Chile, and Egypt). However, the view that unequal boundary treaties are, in contradistinction to ordinary boundary treaties, subject to the clausula, remains isolated. Ultimately, the clausula does not provide a specific additional argument for reviewing or renegotiating ostensibly unequal treaties.

(b) Unequal Treaties and State Succession

Because various historical unequal treaties have been concluded with dependent entities such as vassal States, protectorates, colonies, or mandates, the question of State succession arises. Some newly independent States, the PR China and the Soviet Union claimed a right to choose whether to continue existing treaty relationships (→ New States and International Law). However, a consistent practice of successor States to succeed only in equal treaties and to ignore the ones which they considered ‘unequal’ has not emerged. The Vienna Convention on Succession of States in Respect of Treaties ([done 23 August 1978, entered into force 6 November 1996] 1946 UNTS 3) does not mention unequal treaties as a special category. Besides, the doctrine that the principles of State succession apply to regime changes in China and Russia has not gained approval among non-socialist States.

E. Broader Implications of the Concept of Unequal Treaties

1. Contemporary Unequal Treaties?

Resort to economic and political pressure exploiting the extreme power disparities is a pervasive feature of inter-State relations (see also → Super Powers). The result is treaties which are in procedural or substantive terms imbalanced. Numerous treaties have therefore been denounced as unequal by interested political actors or academics.

Among these are multilateral treaties such as the Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and under Water ([signed 5 August 1963, entered into force 10 October 1963] 480 UNTS 43) or the Treaty on the Non-Proliferation of Nuclear Weapons ([opened for signature 1 July 1968, entered into force 5 March 1970] 729 UNTS 161) (→ Non-Proliferation Treaty [1968]). Also the Treaty of Versailles [signed 28 June 1919, entered into force 10 January 1920] [1981] 225 CTS 188 has been publicly condemned by the German Third Reich as an imposed and thus unequal treaty (→ Versailles Peace Treaty [1919]). Interestingly, the UN Charter which grants the permanent members of the UN Security Council a → veto power has never been argued to be an unequal treaty, probably because Russia and China hold a permanent seat (→ United Nations, Security Council). Some multilateral treaties allow for the positive discrimination of certain States in order to compensate for their economic weakness. The → General Agreement on Tariffs and Trade (1947 and 1994) provides for the special treatment of → developing countries, and post-Rio environmental treaties foresee differentiated responsibility (→ Common but Differentiated Responsibilities; see also → Climate, International Protection; → Environment, International Protection; → Stockholm Declaration [1972] and Rio Declaration [1992]). Because here the formally unequal obligations work in favour of the weaker contracting party, these treaties are not unequal treaties in a classical sense. On the contrary, they could be well accommodated with the doctrine of unequal treaties, because they seek to realize substantial equality.

Many bilateral agreements could be considered ‘unequal’. Oil concessions granted by developing States (see also → Oil Concession Disputes, Arbitration on), agreements relating to the access of armed forces, military bases (see also → Guantanamo Naval Base), training missions, or ‘visiting forces’ are probably particularly prone to inequality. The same applies to leases of territory. For example, Cuba leased Guantánamo Bay to the US in an ‘Agreement for the Lease of Lands for Coaling and Naval Stations’ ([signed 23 February 1903] in CI Bevans (ed) Treaties and Other International Agreements of the United States of America 1767–1949 [US Government Printing Office Washington 1968] vol 6, 1113), which was prolonged indefinitely in 1934. Art. II Agreement for the Lease of Lands for Coaling and Naval Stations allows the US to use the territory ‘for use as coaling or naval stations only, and for no other purposes’. Under Art. III of this Agreement, ‘the United States shall exercise complete jurisdiction and control over and within the said area …’. Since the communist revolution in Cuba, the State argues that the lease is an unequal treaty and does not accept the rent.

Finally, US military personnel in about 700 foreign military bases enjoy contractual exemptions from the jurisdiction of host States or international courts (→ International Courts and Tribunals, Jurisdiction and Admissibility of Inter-State Applications). The US currently acknowledges about 90 → Status of Armed Forces on Foreign Territory Agreements (SOFA). These provide that the US and not the foreign government has the primary right to exercise criminal jurisdiction over US personnel for offences arising out of the performance of official duty (see also → Criminal Jurisdiction of States under International Law). Similarly, around 100 bilateral immunity agreements between the US and weak, notably African States prohibit the transfer of current or former US government officials, military and other personnel to the
jurisdiction of the → International Criminal Court (ICC) (→ International Criminal Law). The latter agreements have been generally concluded under economic pressure (→ Economic Coercion), notably the threat to withdraw military aid. Although these and similar treaties may be in political terms 'unequal', this qualification has no legal effect under international law as it stands.

2. The Legal Repercussions of the Concept

Although unequal treaties are not recognized as a special legal category, reflection and practice relating to this concept have influenced the development of international law (see also → Codification and Progressive Development of International Law). First, the experience with unequal treaties decisively shaped the appropriation of international law by non-European countries. Treaties as such were an innovation for East Asian States. More importantly, the problems resulting from the application of the unequal treaties and the struggle for their abrogation triggered intense scholarly writing notably in China and Japan and thereby contributed to the spread of international law (see also → Teachings of the Most Highly Qualified Publicists [Art. 38 (1) ICJ Statute]). More specifically, the formulation of a legal case for treaty abrogation presupposed that non-European States absorbed the ideas of State sovereignty, of a people's (→ Peoples) right to → self-determination, and of individual rights to equal protection (→ Equality of Individuals; → Individuals in International Law; see also → Human Rights), which had before their contact with Europe played little or no part in their tradition. The abolition of the unequal treaties signified the admission of the victimized States into the family of nations. On a more profound level, the defeat of the unequal treaties led to the effacement of the distinction between full and partial membership of international society and thus contributed to the entrenchment of the principle of sovereign equality.

3. The Political Impact of the Concept

The doctrine of unequal treaties had important political effects (→ Doctrines). On the side of the non-European Contracting Parties, the political objective to get rid of the unequal treaties became a focal point for nascent nationalism and was a driving force for institutional and legal reform. Notably in China, the unequal treaties also functioned as a scapegoat for interior problems and backwardness. On the other hand, their abrogation became one of the aims of the Chinese revolution of 1911 and was one of the three ‘people's principles’ besides democracy and socialism. The treaty rhetoric has been integrated into the common heritage of Chineseness.

In the Soviet Union, the unequal treaty doctrine was associated with the elaboration of a distinct body of Soviet international law (→ Regional International Law). The annulment of Tsarist treaties with States such as Turkey and Persia was effective socialist propaganda. The doctrine initially helped to establish closer ties with China, until the boundary issues and divergences in the unequal treaty doctrine formed part of the Sino-Soviet rift.

In Japan, the revision of the unequal treaties was the driving engine of 40 years of economic, political, and social reforms which transformed Japan from a weak, backward, divided confederacy of fiefdoms into a modern industrialized nation.

The concept of unequal treaties equipped the newly independent States with a doctrinal tool to liberate themselves from imperialist bonds (→ New States and International Law). Today, the concept of unequal treaties still implies a critique of persistent, informal, trade-based imperialism despite formal decolonization.

4. Terms Control of Unequal Treaties de lege ferenda

A terms control of international treaties would have to strike the balance between the autonomy (sovereignty) of the Contracting Parties on the one hand and the objective to realize social justice on the other hand. Various considerations might support the idea of a fair and reasonable test of international treaties (→ Reasonableness in International Law).

First, such a test would protect the principle of free consent. However, the freedom of the will of States is as yet no requirement for the validity of international treaties, mostly because an international institution which could effectively secure the genuine voluntariness of consent is lacking. The absence of a prohibition of → duress against States
in all forms (beyond the threat of military force) is still a significant structural difference between the private law of contracts and the international law of treaties (H Kelsen Principles of International Law [2nd edn Holt New York 1962] 464). However, the admissibility of duress cannot survive in an organized international community (UN ILC Special Rapporteur H Lauterpacht ‘Law of Treaties’ (24 March 1953) UN Doc A/CN.4/463). It might even be argued that the emergence of a constitutionalized system is co-extensive with the redress of this anomaly of international treaties, compared to other contracts.

72 A related argument starts from the observation that inequalities of material wealth, but also of contractual obligations, are perceived as unjust only when they occur within a community. The more the international legal order is understood to constitute and to govern an international community, the less tolerable unequal treaties become. Finally, the non-recognition of grossly unfair treaties might foreclose attempts by the victims to redress injustice by violent means and thus might secure the long term stability of inter-State relations (→ Peace, Threat to; see also → Peace, Proposals for the Preservation of).

73 On the other hand, important jurisprudential arguments advise against the acceptance of an international terms control. The concept of a treaty is premised on the concept of contractual freedom (or in the inter-State context: sovereignty). By upholding unequal or otherwise unfair treaties, international law accepts the imbalances in social and political power that are reflected in international treaties.

74 The concept of a treaty presupposes that treaties are binding and must be observed. Exceptions to this inherent principle must be circumscribed narrowly so as not to endanger the predictability of legal relations. The peace and stability function is especially important with international law treaties, because they have a legislative function. A general terms control would introduce a major factor of instability in a legal order which is already less stable than domestic law (see also → International Law and Domestic [Municipal] Law).

75 The concept of unequal treaties is extremely vague. Both the prerequisites and the legal consequences of the inequality of a treaty are unclear. Which types of power or influence are relevant? How would they be measured? At what precise point would the inequalities in bargaining power and in the contents of the treaty be so intolerable as to flaw a treaty? Due to the lack of a comprehensive, compulsory dispute settlement mechanism, the identification of inequality (or rather of unfairness or inequity) falls on the Contracting Parties themselves. However, their views are naturally divergent. A Contracting Party could at any time paralyze the operation of a treaty by claiming its unfairness. Without the establishment of an international institution to determine authoritatively which treaties are egregiously inequitable, a fair and reasonable test for international treaties seems unworkable.

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