

**EQUAL OR UNEQUAL: SEEKING A NEW
PARADIGM FOR THE MISUSED THEORY
OF “UNEQUAL TREATIES” IN
CONTEMPORARY INTERNATIONAL LAW**

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I.	INTRODUCTION	466
II.	THE QUANDARY OF “EQUAL” OR “UNEQUAL” TREATIES ..	469
	A. <i>Substantive Inequality</i>	471
	B. <i>Procedural Inequality</i>	475
	C. <i>The Quandary</i>	478
III.	THEORETICAL ASSESSMENT OF THE CONCEPT OF UNEQUAL TREATIES	481
	A. <i>Pacta Sunt Servanda</i>	481
	B. <i>Sovereign Equality</i>	484
	C. <i>Rebus Sic Stantibus</i>	488
	D. <i>Reciprocity</i>	491
IV.	RE-CONSIDER THE THEORY OF “UNEQUAL TREATIES”	493
	A. <i>A New Paradigm</i>	493
	B. <i>Remaining Puzzles</i>	495
V.	CONCLUSION.....	498

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I. INTRODUCTION

The concept of “unequal treaty” (also labeled as leonine, unjust, inequitable, imposed, forced or coerced treaties in different contexts)¹ was introduced in the context of international law by Hugo Grotius.² It was first invoked by China after the First World War to challenge the validity of treaties imposed upon it since the mid-nineteenth century.³ Following the Second World War, more and more former colonial countries tried to invalidate similar treaties with colonial powers based on the theory of unequal treaties.⁴ Such practice attracted much attention on the issue of unequal treaties from the international community and awakened writers in international law during that period.⁵ Despite heated debates and plenteous writings on this issue since the nineteenth century, the meaning and scope of the term “unequal treaty” were never clearly delineated.

In addition, the international community has never reached a consensus on the legitimacy of the theory of unequal treaties under international law. Some scholars have argued that the concept of “unequal treaty” is meaningless⁶ and that such theory has never been accepted by international law.⁷ Some have even asserted that the problem of unequal treaties no longer exists in

1. Anne Peters, *Treaties, Unequal*, in 10 MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶ 1, at 38 (Rüdiger Wolfrum ed., 2012) [hereinafter MPEPIL]; Kirsten Schmalenbach, *Article 52 – Coercion of a State by the Threat or Use of Force*, in VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY 878 (Oliver Dörr & Kristen Schmalenbach eds., 2012) [hereinafter COMMENTARY].

2. HUGO GROTIUS, *THE RIGHTS OF WAR AND PEACE* 135-36 (A.C. Campbell trans., Batoche Books 1901) (1625).

3. FARIBORZ NOZARI, *UNEQUAL TREATIES IN INTERNATIONAL LAW* 112 (1971).

4. See, e.g., Ingrid Detter, *The Problem of Unequal Treaties*, 15 INT'L & COMP. L.Q. 1069, 1085-86 (1966) (referencing the delegate of Panama advocating for *rebus sic stantibus* to apply to “perpetual” treaties of an unequal nature).

5. NOZARI, *supra* note 3, at 110.

6. HANNIS TAYLOR, *A TREATISE ON INTERNATIONAL PUBLIC LAW*, 367 (Callaghan & Co. eds., 1901) (suggesting that the classification of unequal and equal treaties is “artificial and unfruitful”); Mathew Craven, *What Happened to Unequal Treaties? The Continuities of Informal Empire*, 74 J. INT'L L. 335, 335-36 (2005).

7. ANTHONY AUST, *HANDBOOK OF INTERNATIONAL LAW* 100 (2d ed. 2010).

contemporary international law.⁸ In contrast, other scholars have insisted upon the importance of the theory of unequal treaty for maintaining justice in international affairs⁹ and have even strongly promoted the development of the theory in economic settings in the contemporary international legal order.¹⁰ The effort to broaden the formulation of this theory to cover the use of economic force in treaty-making became a major tension in the development of the theory of unequal treaties.¹¹

Similarly, the international community is highly divergent on the consequence of categorizing a treaty as unequal, namely, whether unequal treaties can be invalidated under international law and what can be invoked as grounds for invalidity.¹² Also, although various arguments invoking unequal treaties were based on the theory of equality of sovereignty, the term “unequal” or the concept of “equality” or “inequality” was interpreted with great divergence.¹³

The ambiguity of the theory of unequal treaties has caused confusion when a problem occurs involving the issue of unequal treaties. Also, due to the lack of clarity and precision, international legal writers have used the term of unequal treaties incoherently and inconsistently. In the early days, the term was used mostly to refer to the nineteenth-century treaties between the western colonial power and weaker states.¹⁴ However, in the modern era of the twentieth and twenty-first centuries, some scholars began expanding the scope of unequal treaties and using

8. See, e.g., Craven, *supra* note 6, at 56 (citing P. REUTER, INTRODUCTION TO THE LAW OF TREATIES 269 (Jose Mico & Peter Hagenmacher trans., 1995) and Lucius Cafilisch, *Unequal Treaties*, 35 GER. Y.B. INT'L L. 52 (1992) to suggest that some scholars believe that the concept of unequal treaties is not current in international law).

9. NOZARI, *supra* note 3, at 298; see Cornelius Murphy, *Economic Duress and Unequal Treaties*, 11 VA. J. INT'L L. 51, 51-54 (1970) (stating that while the use of force may no longer be an issue in unequal treaties, economic duress is).

10. E.g., Murphy, *supra* note 9, at 53-66.

11. Stuart S. Malawer, *Imposed Treaties and International Law*, 7 CAL. W. INT'L L.J. 1, 7 (1977).

12. DONG WANG, CHINA'S UNEQUAL TREATIES 5 (2005).

13. See *id.* (stating that the meaning of “unequal treaties” is imprecise and there is not a consensus on what constitutes an “unequal treaty”).

14. ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 320 (2d ed. 2007).

the term to challenge the legality of some modern trade treaties,¹⁵ investment treaties,¹⁶ or other important international conventions.¹⁷ Such expansion added more uncertainty and contradiction in the area of international treaty law.

This paper, therefore, calls into question the ambiguity and misapplication of the theory of unequal treaties. By revisiting the concept of unequal treaties, the paper aims to shed light on the ambiguity and uncertainty caused by the existing interpretations of the theory of unequal treaties. It attempts to carefully analyze related legal theories, to examine the concept of unequal treaty, and to provide clearer answers to puzzles relating to unequal treaties. For example, what treaties are unequal? What elements can be considered as “unequal?” What are the boundaries of unequal treaties? Whether unequal treaties can be invalidated under international law, and, if so, what are the bases for invalidating unequal treaties? What are the implications of unequal treaties in modern international law?

To achieve this goal, Part I begins by assessing the nature of “inequality” in the context of treaties and proposes a division of

15. See MUCHKUND DUBEY, *AN UNEQUAL TREATY* 2-6, 132-33 (1996) (describing how developing countries were coerced to join the World Trade Organization by its members, who also wanted them to commit to complying with its rules while giving up autonomous control of their economies).

16. See, e.g., M. SORNARAJAH, *THE INTERNATIONAL LAW ON FOREIGN INVESTMENT* 178, 207-08 (2d ed. 2004) (stating bilateral investment treaties are made between parties who have unequal power placing the weaker power in a position of being a net exporter of capital, but, due to a lack of coercion, the weaker countries are not likely to be relieved from the terms by the unequal treaty doctrine); M. SORNARAJAH, *Bilateral Investment Treaties and Other Investment Treaties: Existence of Unequal Treaties*, in 2 *INTERNATIONAL LAW: ISSUES AND CHALLENGES* 31, 32-34 (R.K. Dixit ed., 2009) (discussing the disenfranchisement of poorer countries in the context of investment treaties as a result of Western states’ dominating the formation and interpretation of international standards); Jose E. Alvarez, *A BIT on Custom*, 42 *N.Y.U. J. INT’L L. & POL.* 17, 26 (2009) (comparing BITs to “unequal treaties” and emphasizing the unequal bargaining power between the parties).

17. See Shirley V. Scott, *The Problem of Unequal Treaties in Contemporary International Law: How the Powerful Have Reneged on the Political Compacts Within Which Five Cornerstone Treaties of Global Governance Are Situated*, 4 *J. INT’L L. & INT’L REL.* 101, 101-02 (2008) (arguing that the Charter of the United Nations, the Treaty on the Non-Proliferation of Nuclear Weapons, the Third United Nations Convention on the Law of the Sea, the General Agreement on Tariffs and Trade and Marrakesh Agreement establishing the World Trade Organization, and the United Nations Framework Convention on Climate Change are unequal treaties).

such treaties into substantive inequality and procedural inequality. Part II then evaluates the weight of substantive inequality and procedural inequality under the theoretical framework of international treaty law, including the principles of *pacta sunt servanda*, sovereign equality, *rebus sic stantibus*, and reciprocity. Based on such theoretical assessment, Part III attempts to classify unequal treaties into two major categories: treaties with substantive inequality and treaties with procedural inequality. In order to balance the need to preserve the sanctity of treaties and the demand for equality, this paper suggests that, under the general framework of the Vienna Convention on the Law of Treaties (VCLT), the validity of treaties with substantive and/or procedural inequality could be challenged only in very limited and exceptional situations.

II. THE QUANDARY OF “EQUAL” OR “UNEQUAL” TREATIES

As discussed above, the term “unequal treaty” was used inconsistently in state practice and scholarly writings. This situation could be attributed to ambiguity of the term itself. The uncertainty associated with the use of the term “unequal treaty” added difficulties to understanding the theory of unequal treaties. In order to promote clarity and consistency in international law, it is necessary to clarify the underlying meaning of the term and to delineate more clearly the scope of unequal treaties.

Unequal treaties have different origins. Some of them resulted from war. For example, most unequal treaties in China – such as the Treaty of Nanking (1842) and the Treaty of Tientsin (1858), which were models for other unequal treaties in China – came about when China was defeated militarily by western powers.¹⁸ Other unequal treaties had nothing to do with wars or the pressure of defeat. For example, the unequal treaties for

18. WANG, *supra* note 12, at 11-12 (explaining how the Treaty of Nanking was formed as a result of China’s defeat in the First Opium War); Renmin Ribao, *A Comment on the Statement of the Communist Party of the U.S.A.*, 4 PEKING REV. 58, 61 (1963) (listing the Treaty of Tientsin as one which was concluded as a result of Western imperialism in China); YU-HAO TSENG, *THE TERMINATION OF UNEQUAL TREATIES IN INTERNATIONAL LAW* 16 (1931).

Japan between 1854 and 1905¹⁹ and for Siam²⁰ did not concern the issue of war with western powers because neither country declared war against any western state before the Russo-Japanese conflict of 1904.²¹

In addition, the word “unequal” or “inequality” could denote different meanings. It could refer to both substantive inequality and procedural inequality embedded in a treaty.²² Substantive inequality, on one hand, could refer to the imbalance of the substantive rights or obligations conferred on the parties.²³ Substantive inequality could be inferred from the provisions of the treaties themselves and by analyzing whether the benefits exchanged between the two parties are balanced. The assessment of inequality caused by such imbalance need not look into the actual bargaining power or the underlying factors causing such imbalance.

On the other hand, procedural inequality could refer to inequality in the treaty decision-making process.²⁴ In this sense, inequality could result from the use of coercion or other pressure during the contracting process: the coerced party being forced to enter into a treaty because of outside pressure. Such decision-making mode undermines the true intent of the party and the fairness of the bargaining process. Also, in this situation,

19. See generally Shinya Murase, *The Most-Favoured-Nation Treatment in Japan's Treaty Practice During the Period 1854-1905*, 70 AM. J. INT'L L. 273, 280-81 (1976). The primary unequal treaties for Japan during this period include those with the United States (1858), Netherlands (1858), Russia (1858), Great Britain (1858), France (1858), Prussia (1861), Switzerland (1864), Belgium (1866), Italy (1866), Denmark (1867), Portugal (1868), Sweden-Norway (1868), Spain (1868), North German Confederation (1869), and Austria-Hungary (1869). Craven, *supra* note 6, at 343 n.25.

20. See Craven, *supra* note 6, at 343 n.26. The main unequal treaties for Siam were concluded with Britain (1855), the United States (1856), France (1856), Denmark (1856), Portugal (1859), the Netherlands (1860), Germany (1862), Sweden and Norway (1868), Belgium and Italy (1868), Austria-Hungary (1869), and Spain (1870). *Id.*

21. TSENG, *supra* note 18, at 16; see Murase, *supra* note 19, at 274-76 (discussing the purposes of specific treaties during this period as being purely economic); Ha-Joon Chang, *Policy Space in Historical Perspective – With Special References to Trade and Industrial Policies*, 41 ECON. & POL. WKLY. 627, 629 (2006) (listing Siam as one of many countries that signed unequal treaties which caused them to give up economic autonomy).

22. Peters, *supra* note 1, ¶¶ 38-48, at 44-46.

23. *Id.* ¶¶ 38-44, at 44-45.

24. *Id.* ¶¶ 45-48, at 45-46.

the treaty-making parties generally have unequal bargaining power, and it is more likely for the weaker state to accept unfavorable terms in exchange for benefits from the powerful state.

When revisiting the writings concerning unequal treaties, it could be noted that the debate over the theory of unequal treaties may reflect different perceptions of the meaning of equality or inequality. Generally speaking, earlier discussions of unequal treaties by classic international scholars focused mainly on substantive inequality of treaties but comingled some of the elements of procedural inequality by considering the effect of the use of force in treaty-making process.

Since the twentieth century, the focus tended to shift to procedural inequality by assessing the validity of treaties that resulted from coercion by the threat or use of force. In existing international law, procedural inequality has been addressed by the VCLT, but substantive inequality remains unaddressed. Ambiguity in how substantive inequality is treated under international law is the main cause of the uncertainty as to the use of the theory of unequal treaties generally.

A. *Substantive Inequality*

When the term “unequal treaty” was first introduced in the international context by Grotius, and then expounded by scholars in seventeenth and eighteenth centuries, it mainly implicated unequal obligations in treaties. Grotius differentiated “equal” and “unequal” treaties based on balancing the advantages obtained by contracting parties.²⁵ When the obligations and advantages for both parties are equal, treaties are equal; otherwise, they are unequal.²⁶ Under Grotius’s theory, a treaty could be unequal as to both the superior and the inferior powers; he called it an

25. GROTIUS, *supra* note 2, at 135-36 (“Treaties founded upon obligations added to those of the law of nature are either equal, or unequal. Equal treaties are those, by which equal advantages are secured on both sides.”); accord Jesse A. Finkelstein, *An Examination of the Treaties Governing the Far-Eastern Sino-Soviet Border in Light of The Unequal Treaties Doctrine*, 2 B.C. INT’L & COMP. L.J. 445, 449 (1979) (“Those treaties are unequal in which the same things or equivalents are not promised by each of the contracting parties . . .”).

26. GROTIUS, *supra* note 2, at 135-36.

unequal treaty when a superior party promised to provide assistance to an inferior party without gaining any benefit in return.²⁷

Other earlier international law scholars, such as Christian von Wolff, Samuel Pufendorf, and Emmerich de Vattel, adopted a similar approach when they defined unequal treaties. According to Wolff, “treaties are unequal in which the same things or equivalents are not promised by each of the contracting parties.”²⁸ And in a similar sense, Pufendorf stated, “Treaties are unequal when the things promised by the two parties are unequal, or when either party is made inferior to the other.”²⁹ Vattel also featured unequal treaties as “those in which the allies do not reciprocally promise to each other the same things, or things equivalent.”³⁰

This traditional dichotomy between equal and unequal is very problematic and potentially gives the term “unequal treaty” a very sweeping meaning.³¹ In international relations, treaties rarely involve the exchange of an apple for an apple; instead, it is more like an exchange of an apple for a banana. Accordingly, when evaluating the equality of advantages and obligations in the exchange, one must attempt to ascertain the measure by which the obligations are to be judged. The traditional equal-unequal division does not provide any guidance on such measurement method. In addition, the measurement of equal or unequal is subject to very subjective standards, and the superficial dichotomy does not capture the underlying incentives for a state to enter into a given treaty, which might look unequal on its face but confers benefits in other, less apparent ways. Also, it is hard to draw the equal-unequal line based solely on a facial reading of

27. *Id.*

28. 2 CHRISTIAN VON WOLFF, *JUS GENTIUM METHODO SCIENTIFICA PERPETRATUM* 206 (Joseph H. Drake trans., 1934).

29. SAMUEL VON PUFENDORF, *DE JURE NATURAE ET GENTIUM LIBRI OCTO* 1332 (Oldfather trans., 1964).

30. EMER DE VATTEL, *THE LAW OF NATIONS* 349 (Béla Kapossy & Richard Whatmore eds., Thomas Nugent trans., Liberty Fund ed. 2008) (1797).

31. For a discussion on the issues of “unequal treaties,” compare Murphy, *supra* note 9, at 64 (considering the lack of free will as a factor for unequal treaties), with Henry Wheaton, *Elements of International Law*, 18 L. MAG. OR Q. REV. JURIS. 31, 40, 41, 48 (1837) (discussing the factors of equity and politics in unequal treaties and their lack of effect on the binding nature of treaties).

the treaty provisions, because there might be other quid pro quo embedded in the treaty making process, which do not appear on the face of the treaty provisions.

In addition, the traditional theory of unequal treaty contains an inherent paradox.³² It tries to promote the theory that treaties should be equal and that treaties are unequal when imposing unbalanced advantages and obligations on contracting parties. But, at the same time, it does not provide clear guidance on how to evaluate the validity of the treaties deemed as unequal. Actually, most early writers who promoted the concept of unequal treaty seem to disfavor the idea of challenging the validity of unequal treaties. For example, von Wolff stated that “[t]reaties between nations are valid, if there is no inherent defect in the method of agreement, without consideration of the equity or inequity of the treaty.”³³ Also, Grotius supported the validity of unjust treaties imposed by victorious states upon defeated states.³⁴

Some writers in the nineteenth century even persisted in arguing that treaties concluded as a result of use of force or coercion remained valid and operative.³⁵ For example, Lassa Oppenheim concluded that the repudiation of any treaty, no matter whether the treaty is concluded by the threat or use of force, was unlawful repudiation, without discussing much about the policy reasons for not invalidating these treaties.³⁶ Irrespective of whether consent was obtained voluntarily or not

32. WANG, *supra* note 12, at 113-14.

33. WOLFF, *supra* note 28, at 213; *see also* Finkelstein, *supra* note 25, at 445, 449 (quoting WOLFF, *supra* note 28).

34. GROTIUS, *supra* note 2, at 137; Bradford W. Morse & Kazi A. Hamid, *American Annexation of Hawaii: An Example of the Unequal Treaty Doctrine*, 5 CONN. J. INT'L L. 407, 435 (1990).

35. Morse & Hamid, *supra* note 34, at 435 (citing EMER DE Vattel, *THE LAW OF NATIONS* 199 (Chitty ed., 1852)); DE Vattel, *supra* note 30, at 354-56; *see also* Lassa Oppenheim, *INTERNATIONAL LAW* 660 (Ronald F. Roxburgh ed., 3d ed. 1920) (“[A] state which was forced by circumstances to conclude a treaty containing humiliating terms has no right afterwards to shake off the obligations of such a treaty on the ground that its freedom of action was interfered with at the time.”).

36. *See* Oppenheim, *supra* note 35, at 31-32 (discussing that treaties establish the rules of international law and are legally binding on all parties); *see also* Malawer, *supra* note 11, at 17 (citing Oppenheim).

(even if one party was compelled to sign by force), the treaties should be regarded equally binding on the contracting parties.³⁷

This classic view was supported by the European powers, as this was consistent with their colonial interest and their *opinio juris* that it was lawful to employ armed forces in international relations.³⁸ For example, the advocate for the British Queen, Sir Robert Phillimore, stated in 1864, “[t]he distinction between just and unjust wars is wholly inadmissible to affect the question of the construction of the treaty, which, as to this subject, must be interpreted as considering all parties upon equal footing.”³⁹

This traditional doctrine evolved during a time when it was not prohibited to use force as an instrument of foreign or national policy.⁴⁰ During that period, most unequal treaties originated from the use of force or aftermath of wars.⁴¹ Therefore, even if it was accepted that treaties obtained through the use of force might be morally wrong, it was still argued that invalidation would jeopardize the peace secured by such treaties by bringing an end to hostilities.⁴²

In the early twentieth century, unequal treaties became a recurring topic in international politics when former colonial countries, such as China, started to invoke the theory to invalidate certain treaties concluded with western powers during the mid-nineteenth century.⁴³ Most of the treaties which were claimed as unequal treaties were capitulation treaties which gave rise to favorable conditions, such as extraterritoriality, leased territories, and judicial immunities, for the powerful, victorious countries.⁴⁴ Most of these claims challenged the substantive inequality of the treaty provisions themselves.

37. Schmalenbach, *supra* note 1, at 873.

38. *Id.*

39. LORD MCNAIR, *THE LAW OF TREATIES* 408 (1961).

40. IAN SINCLAIR, *THE VIENNA CONVENTION ON THE LAW OF TREATIES* 177 (2d ed. 1984).

41. See Peters, *supra* note 1, ¶¶ 1-27 (stating that historical differences in international law allowed treaties to arise from the threat or use of military force).

42. SINCLAIR, *supra* note 40, at 177.

43. TSENG, *supra* note 18, at 9; Craven, *supra* note 6, at 350-52, 368 (discussing general trends in and justifications given for the challenges to treaties by former colonial states).

44. TSENG, *supra* note 18, at 12; Schmalenbach, *supra* note 1, at 878.

B. Procedural Inequality

After the Second World War, when the debate over unequal treaties became lively, the international legal community began to shift the debate towards the procedural inequality of unequal treaties by advocating that forced treaties should be void under international law.⁴⁵ The international community got several chances to consider this issue but was never able to reach a consensus on how to treat the issue.⁴⁶

The International Law Commission (ILC), a body established by the U.N. General Assembly in 1947, was entrusted with the task of codifying treaty laws.⁴⁷ It was suggested to the ILC that the concept of unequal treaties should be included in its draft, but the ILC declined to address this issue directly.⁴⁸ Although Member States used the terms “unequal” or “unjust” in relation to treaties associated with coercion by the threat or use of force and the rules of *jus cogens*, the draft articles and the reports of the ILC did not mention the term unequal or unjust treaties.⁴⁹ Consequently, the VCLT, which was codified by the ILC,⁵⁰ does not contain any specific provision for “unequal treaties.”

Because the VCLT was regarded as a codification of pre-existing customary international law in treaties, some scholars naturally treat the absence of unequal treaties in the VCLT as evidence of the denial of the theory of unequal treaties in international law. For example, Anthony Aust insisted in his textbook on Modern Treaty Law and Practice that since the VCLT does not mention the concept of unequal treaties, the idea of invalidating unequal treaties “has never been accepted in

45. Schmalenbach, *supra* note 1, at 874.

46. *See id.* at 738-39, 878 (highlighting that even after many “unequal treaties” occurred and some countries voiced concerns with regard thereto, the Vienna Convention did not accept invalidation of treaties on such grounds).

47. Hersch Lauterpacht, *Codification and Development of International Law*, 49 AM. J. INT’L L. 16, 22 (1955).

48. NOZARI, *supra* note 3, at 115; Kerstin Odendahl, *Article 42 – Validity and Continuance in Force of Treaties*, in COMMENTARY, *supra* note 1, at 733, 738-39.

49. NOZARI, *supra* note 3, at 115; Kirsten Schmalenbach, *Treaties Conflicting with a Peremptory Norm of General International Law (“Jus Cogens”)*, in COMMENTARY, *supra* note 1, at 897, 903-04; Thomas Giegerich, *Article 62 – Fundamental Change of Circumstances*, in COMMENTARY, *supra* note 1, at 1067, 1078-81.

50. SINCLAIR, *supra* note 40, at 1.

international law.”⁵¹ In addition, some scholars have argued that the problem of unequal treaties no longer exists in contemporary international law.⁵²

However, close scrutiny of the VCLT reveals that it did, in fact, incorporate procedural inequality as a ground for invalidating treaties but declined to endorse substantive inequality. The VCLT recognizes that coercion of a representative of a contracting party (Article 51)⁵³ or coercion of a state by the use or threat of force (Article 52)⁵⁴ could be invoked as grounds for claiming treaties to be void or voidable. Although the two provisions are not drafted with specific reference to the term “unequal treaties,” they clearly address the “unequal” treaty caused by procedural inequality.

Article 51 applies to acts of threat or coercion directly imposed on a state’s individual representative in his or her own personal capacity⁵⁵ and Article 52 addresses exclusively the force directed to a state organ or the state’s representative in his or her official capacity.⁵⁶ Both articles address the influence on the treaty-making process through outside forces and stipulate that a treaty is void because of the proscribed method that concluded the treaty, irrespective of the subject matter of the treaty.⁵⁷ Therefore, when one tries to evaluate the validity of a treaty against the two provisions, what matters is the process by which the treaty was made, namely, whether the facts show that a party was forced to enter into a treaty involuntarily, through the use of outside force. In other words, even if a treaty includes provisions

51. AUST, *supra* note 14, at 320.

52. Craven, *supra* note 6, at 336; see Lucius Caflisch, *Unequal Treaties*, 35 GER. Y.B. INT’L L. 52, 79 (1992) (arguing that countries claim originally balanced treaties as “unequal” because of unforeseen changes in circumstances).

53. Vienna Convention on the Law of Treaties art. 51, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT] (“The expression of a State’s consent to be bound by a treaty which has been procured by the coercion of its representative through acts or threats directed against him shall be without any legal effect.”).

54. *Id.* art. 52 (“A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations.”).

55. *Id.* art. 51; Thilo Rensmann, *Article 51 – Coercion of a Representative of a State*, in COMMENTARY, *supra* note 1, at 857, 857.

56. VCLT, *supra* note 53, art. 52; Schmalenbach, *supra* note 1, at 872.

57. Schmalenbach, *supra* note 1, at 872.

that appear unequal, if there is no coercion or use of force, a party cannot invoke the principle of inequality to invalidate the treaty.

Nevertheless, there is still ambiguity in Articles 51 and 52, which might cause uncertainty when applied in practice. First, it is still unclear what the scope of “force” is. During the drafting process of the VCLT, arguments related to the quality of “force” were raised at the Vienna Conference.⁵⁸ But, the Conference chose to maintain the “open-ended” approach, leaving the term “force” to be interpreted through international practice.⁵⁹ The open-ended nature of the term “force” ignited strong debate as to whether the term refers to military force only or whether it also includes economic and/or political force.⁶⁰ Western nations advocated to restrict the word “force” to threat or use of military force so as to prevent developing states from easily avoiding treaty obligations, while many Asian and third-world states insisted that the term “force” should cover economic and political coercion as well.⁶¹

Second, it is still unclear whether Articles 51 and 52 require causality between the use of force or coercion and the conclusion of a treaty. The wording of the two articles and subsequent international practices do not provide any clarification on this point.⁶² It has been widely recognized by national legal systems that there has to be a causal link between the duress or use of force and the decision to enter into a contract before the contract may be deemed voidable.⁶³ This private law practice provides a useful analogy to assert a causality requirement in international treaty-making as well. However, the casual link in treaty relationships has to be considered based on the object and purpose of the VCTL itself and customary international law.⁶⁴

58. SINCLAIR, *supra* note 40, at 179.

59. Schmalenbach, *supra* note 1, at 877-78.

60. *See, e.g.*, THE OXFORD GUIDE TO TREATIES 569 (Duncan B. Hollis ed., 2012); Morse & Hamid, *supra* note 34, at 446; Murphy, *supra* note 9, at 52-54.

61. Katherine A. Greenberg, *Hong Kong's Future: Can The People's Republic of China Invalidate the Treaty of Nanking as an Unequal Treaty?*, 7 FORDHAM INT'L L.J. 534, 543 (1984).

62. VCLT, *supra* note 53, arts. 51-52; *see* Schmalenbach, *supra* note 1, at 878 (characterizing article 52 as vague and discussing interpretive solutions).

63. Schmalenbach, *supra* note 1, at 880.

64. *Id.* at 881.

The causality in customary international law is mainly discussed in the Law of State Responsibilities under the context of redress for damages, which requires that the casual link between wrongful acts and loss should not be “too remote.”⁶⁵ Such standard is vague itself, and also it serves a different purpose in the context of state responsibilities. With regard to the object and purpose of Articles 51 and 52, it is understood that the provisions mainly aim to safeguard the principles of consent and prevent the contracting parties from unfairly benefiting from their use of force.⁶⁶ Therefore, some scholars suggest that a treaty can be invalidated only when a state uses unlawful force against another state with a specific purpose to procure a treaty; however, if there is any other purpose behind the use of force, whether lawful or not, or if the force is used by a third party, the treaty should remain valid.⁶⁷

C. *The Quandary*

Although the theory of unequal treaties has been widely denied by international scholars, the close scrutiny of the VCLT does reveal that Articles 51 and 52 capture the procedural inequality, despite the existence of some ambiguities therein. However, scholarly writings as well as state practice generally do not distinguish between substantive inequality and procedural inequality when they invoke the theory of unequal treaties. On most occasions, states mainly relied on the theory of unequal treaties to challenge the substance of the treaty or mixed together arguments related to the inequality of substance and procedure. This has caused a misperception of the consequence of unequal treaties and unwanted expansion of the term. Countries that wanted to rely on the theory of unequal treaties to denounce certain treaties tend to invoke the concept in a broader sense

65. *Id.*

66. *Id.*

67. *See id.* at 881-82 (“[I]f unlawful force is applied by a State in order to bring about a specific treaty with another State, the treaty is void pursuant to [Article] 52”); HANS KELSEN, *PRINCIPLES OF INTERNATIONAL LAW* 326-27 (3d ed. 1959) (highlighting specific ways in which a treaty may be imposed by force). *Cf.* SINCLAIR, *supra* note 40, at 180 (noting the concern that Article 52 should apply as a general rule of international law to all countries, regardless of whether or not the country is a member of the United Nations).

whenever possible. However, the western powers tended to deny the theory in totality or tried to promote a narrower version by restricting “force” to the use or threat of military force.

For example, in 1926, the Chinese government tried to revise a treaty it entered into with Belgium in November 1865, which granted Belgium extraterritorial jurisdiction and special tariff schedules in China.⁶⁸ This treaty was the aftermath of the War of 1857, and China was forced to accept the terms.⁶⁹ The treaty contained no provisions concerning duration or termination and only one provision, Article 46, for possible modification, but the right to initiate such modification was given to Belgium exclusively.⁷⁰

When the Belgian government insisted on the application of Article 46 to continue to enforce the treaty, the Chinese government argued, “the point at issue between the two Governments is not the technical interpretation of Article 46 of the treaty of 1865, an article which is a striking symbol of inequalities in the entire instrument.”⁷¹ Rather, the real issue at stake was the “application of the equality of treatment in relations between China and Belgium.”⁷² The arguments by China mainly focused on the inequality of the treaty provisions themselves, namely, the unequal rights and obligations conferred on it, although it could have argued that the procedure for concluding the treaty was unequal, as it involved coercion by use of force.

In addition, since the term “unequal treaty” was not addressed by the VCLT, the international law community tends either to deny the theory of unequal treaty in its entirety, regardless of the substantive or procedural inequality, or tends to expand the term to cover all unequal or unjust situations in international treaties.⁷³ Since the impact of substantive inequality on a treaty was neither addressed by the VCLT nor

68. L. H. Woolsey, *China's Termination of Unequal Treaties*, 21 AM. J. INT'L L. 289, 289 (1927).

69. *Id.*

70. *Id.*

71. *Id.* at 292.

72. *Id.*

73. Murphy, *supra* note 9, at 52-55.

decided by an international tribunal, it still remains a mystery whether a treaty could be invalidated solely based on substantive inequality. The only chance for an international tribunal to rule on the issue of substantive inequality was when Belgium brought the dispute over the 1865 Sino-Belgium treaty to the Permanent Court of Justice.⁷⁴ But the court did not get a chance to decide this case because the two parties decided to reopen negotiations.⁷⁵

The fact that the theory of substantive inequality has never been tested in an international tribunal combined with the misunderstanding of inequality in substance versus procedure has contributed to the misconception of the theory of unequal treaties in the modern era. Some scholars in the twentieth and twenty-first centuries have used the theory to challenge widely accepted international treaties, such as the U.N. Charter, the General Agreement on Tariffs and Trade (GATT), and the Marrakesh Agreement establishing the World Trade Organization (WTO).⁷⁶ The main argument was centered on the unequal rights and obligations conferred on large and small states.

Opponents to such expansion claimed that the mere fact that a treaty, like the U.N. Charter, has the support of a majority of the states should “be presumed to be a sufficient justification for the acts they contemplate, unless it be shown that the provisions of the treaty constitute an unreasonable curtailment of the rights of an independent state not necessary for the peace and security of international society.”⁷⁷ However, such rebuttal is itself flawed, because it does not explain why acceptance by a majority of states should justify the validity of a treaty. Alternatively, a more plausible argument might be that a treaty, like the U.N. Charter,

74. NOZARI, *supra* note 3, at 114-15.

75. *Id.*

76. See Scott, *supra* note 17, at 101-04 (highlighting the power imbalance between nations negotiating the U.N. Charter); see also Chang, *supra* note 21, at 629 (arguing that the lack of reciprocity among WTO nations with unequal political power threatens the ability of weaker nations to achieve economic development).

77. ELLERY CORY STOWEL, INTERVENTION IN INTERNATIONAL LAW 445-46 (1921); see also J.W. Garner, *The Doctrine of Rebus Sic Standibus and the Termination of Treaties*, 21 AM. J. INT'L L. 509, 515-16 (suggesting that the doctrine of *rebus sic standibus* merely allows a dissatisfied party to petition the United Nations to invalidate the treaty, as opposed to automatic nullification).

was concluded with free consent by member states, without any procedural inequality, and, even though there might be some substantive inequality in its application, member states have voluntarily accented to such inequality and, thus, cannot challenge its validity based on such inequality.

III. THEORETICAL ASSESSMENT OF THE CONCEPT OF UNEQUAL TREATIES

Opponents of the theory of unequal treaties mainly employ the principles of *pacta sunt servanda* (promises must be kept) to rebut arguments in favor of adopting the theory of unequal treaties.⁷⁸ In contrast, proponents of the theory of unequal treaties predominantly base their arguments on the treaty being a violation of sovereign equality,⁷⁹ there having been a fundamental change of circumstances (*clausula rebus sic stantibus*)⁸⁰ or a lack of reciprocity between the contracting parties⁸¹ that renders the treaty inapplicable.⁸²

A. *Pacta Sunt Servanda*

The principle of *pacta sunt servanda* is recognized as one of the long-standing principles of international law and as a pillar

78. See, e.g., Josef L. Kunz, *The Meaning and the Range of the Norm Pacta Sunt Servanda*, 39 AM. J. INT'L L. 180, 197 (1945) ("*Pacta sunt servanda* . . . admits no exceptions."); Murphy, *supra* note 9, at 56 (describing the United States' opposition at the Vienna Convention to any wording of the VCLT that would derogate from the principle of *pacta sunt servanda*).

79. See, e.g., Morse & Hamid, *supra* note 34, at 434; Detter, *supra* note 4, at 1081 (arguing that a treaty relationship lacking reciprocity infringes on state sovereignty).

80. See NOZARI, *supra* note 3, at 152 (stating that according to most western writers, unequal treaties can be terminated under the doctrine of *rebus sic stantibus*).

81. TSENG, *supra* note 18, at 9-10 (defining unequal treaties as those by which "the things promised are neither the same nor equally proportioned" between the contracting parties); Morse & Hamid, *supra* note 34, at 442 (arguing that reciprocity is an essential element of a valid treaty, similar to consideration being necessary to form a valid contract).

82. See, e.g., TSENG, *supra* note 18, at 9-10; Detter, *supra* note 4, at 1081 (examining the validity of unequal treaties and arguing that a treaty relationship lacking reciprocity infringes on state sovereignty); Anthony Lester, *Bizerta and the Unequal Treaty Theory*, 11 INT'L & COMP. L. Q. 847, 851 (1962) (listing four possible grounds on which a treaty may be found void, favoring party equality).

of treaty law.⁸³ The principle can be traced back to Roman times⁸⁴ and is widely regarded as part of customary international law.⁸⁵ The requirement of strict observance of such rule was reflected in Vattel's writings:

The faith of treaties, that firm and sincere determination, that invariable steadfastness in carrying out our promises, of which we make profession in a treaty, is therefore held to be sacred and inviolable between the nations of the earth, whose safety and peace it secures[;] and if mankind be not willfully deficient in their duty to themselves, infamy must ever be the portion of him who violates his faith.⁸⁶

Currently, this principle has been codified in Article 26 of the VCLT, which stipulates “[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith.”⁸⁷ The principle codified in Article 26 was regarded as “the fundamental principle of international law on which all other treaty norms depend.”⁸⁸ The emphasis on the binding force of treaties upon the contracting parties and the requirement of good faith performance work to preserve the sanctity of treaty obligations.

Due to the wide acceptance of such principle over the years, when the ILC was codifying the VCLT, the negotiations over *pacta sunt servanda* did not generate much controversy.⁸⁹ The only substantial dispute was the question of the validity of unequal treaties claimed mainly by post-colonial states.⁹⁰

83. Kirsten Schmalenbach, *Article 26 – Pacta Sunt Servanda*, in COMMENTARY, *supra* note 1, at 427, 427-28.

84. *Id.* at 428.

85. *Id.* at 436; Kunz, *supra* note 78, at 190.

86. DE VATTEL, *supra* note 30, at 387.

87. VCLT, *supra* note 53, art. 26.

88. W. Paul Gormley, *Codification of Pacta Sunt Servanda by the International Law Commission: The Preservation of Classical Norms of Moral Force and Good Faith*, 14 ST. LOUIS U. L.J. 367, 370 (1969-1970); see KELSEN, *supra* note 67, at 314 (“This rule is the reason for the validity of treaties, and hence the ‘source’ of all the law created by treaties”); Anthony Aust, *Pacta Sunt Servanda*, in MPEPIL, *supra* note 1, ¶ 1, at 15 (“The *pacta sunt servanda* rule embodies an elementary and universally agreed principle fundamental to all legal systems.”).

89. Schmalenbach, *supra* note 83, at 430.

90. *Id.* at 431.

Although the post-colonial states demanded adding unequal treaty as an exception to this principle, such demand was rejected.⁹¹

In the existing VCLT, Part V (Articles 42-72) lays out the grounds for challenging the validity of, terminating, or suspending a treaty. These grounds were regarded as an exhaustive catalogue; in other words, the VCLT only recognizes these exceptions to the principle of *pacta sunt servanda*.⁹² Article 42 of the VCLT prescribes that impeaching the validity or consent of a treaty may only be based on the application of the VCLT.⁹³ Articles 46-53 delineate the specific rules governing the validity and invalidity of treaties, with Articles 46-52 dealing with the defects in a state's consent to be bound and Article 53 focusing on violation of *jus cogens* (peremptory norm of international law from which no derogation is permitted). Opponents of the theory of unequal treaties, therefore, insist that treaties could not be held invalid by invoking the theory of unequal treaties because such theory was not recognized by the VCLT as a ground to invalidate a treaty.⁹⁴

91. *Id.* at 431-32.

92. *See* SINCLAIR, *supra* note 40, at 162 (characterizing Part V of the VCLT as a "negative approach" to setting forth the conditions of treaty validity).

93. Article 42 of the VCLT prescribes:

1. The validity of a treaty or of the consent of a State to be bound by a treaty may be impeached only through the application of the present Convention.
2. The termination of a treaty, its denunciation or the withdrawal of a party, may take place only as a result of the application of the provisions of the treaty or of the present Convention. The same rule applies to suspension of the operation of a treaty.

VCLT, *supra* note 53, art. 42.

94. *See id.* arts. 46-53 (setting out explicit rules for treaty invalidation without any mention of unequal treaties); *see also* SINCLAIR, *supra* note 40, at 160, 169-77, 196-97 (describing each specific ground for treaty invalidation set out in Part V of the VCLT – error, fraud, corruption, coercion of a State representative, and coercion of a State by use or threat of force – and explaining the Commission's reasoning behind each one); Maria Frankowska, *The Vienna Convention on the Law of Treaties Before United States Courts*, VA. J. INT'L L. 281, 293 (describing the tension between developing nations' desire to protect themselves against unequal treaties and the Western nations' refusal to abandon *pacta sunt servanda*).

B. Sovereign Equality

The notion of unequal treaties is rooted deeply in the presumption of sovereign equality of states, and treaties are regarded as unequal mainly because they deviated from the concept of sovereign equality.⁹⁵ In 1825, Chief Justice Marshall of the U.S. Supreme Court stated in the *Antelope* case that “[n]o principle of general law is more universally acknowledged, than the perfect equality of nations.”⁹⁶

Despite the wide recognition of the need for equality between states, there is no consensus regarding its theoretical basis.⁹⁷ For example, Benedict Kingsbury summarized that there were three dominant justifications for the theory of equality: the naturalist approach (making an analogy between equality of individuals and states), the positivist approach (viewing equality as a logical corollary of sovereignty), and the realist approach (using reciprocity to explain international relations).⁹⁸

Earlier writers developed the doctrine of equality based on the theories of natural law and natural equality – the notion that states enjoy equal natural rights.⁹⁹ For example, when Oppenheim first introduced the doctrine of equality in his textbook on international law, he elaborated the concept as follows:

The equality before International Law of all members – States of the Family of Nations is an invariable equality derived from their International Personality. Whatever inequality may exist between States as regards their size, population, power, degree of

95. Peters, *supra* note 1, ¶ 40, at 45; *see also* DE VATTEL, *supra* note 30, at 349 (concluding that, most commonly, an unequal treaty will also be an unequal alliance which tips the inequality of power toward either a weaker or more powerful state).

96. *The Antelope*, 23 U.S. (10 Wheat.) 66, 122 (1825).

97. WANG, *supra* note 12, at 126.

98. Benedict Kingsbury, *Sovereignty and Inequality*, 9 EUR. J. INT’L L. 599, 603-04 n.9 (1998).

99. *See, e.g.*, NOZARI, *supra* note 3, at 80-81 (referring to Pufendorf as the first to introduce the doctrine of equality but highlighting scholarly disagreements about the origins of the doctrine of equality); OPPENHEIM, *supra* note 35, at 196 (indicating that equality, as an invariable quality of the States, is derived from each State’s International Personhood).

civilisation, wealth, and other qualities, they are nevertheless equals as International Persons.¹⁰⁰

Pufendorf described it by analogy. Individual humans in their natural state are equal. Countries, by the same token, operate on an equal plane in the natural state of the international community.¹⁰¹ This naturalist approach influenced many writers in the nineteenth century who continued to develop the concept of equality by proposing that it only refers to legal equality and does not encompass political equality.¹⁰²

These writers recognized that political inequality exists, as a matter of fact, on different grounds, such as wealth, size or population, that such political inequality is inevitable, and that the concept of state equality is not supposed to solve such kind of inequality. However, these early writers also argued that international law should play a role in achieving legal equality among states, meaning that states are regarded as equal in their legal capacity to engage in international relations and that such equality is derived from a state's sovereignty or independence.¹⁰³ The consequence of legal equality under international law, as maintained by many international scholars such as Fauchille, is that all states should enjoy the same rights and obligations.¹⁰⁴ Following such logic, even if there is inequality in terms of population, geographic size, or power, the states, possessing legal personality as members of international society, enjoy legal equality before international law.¹⁰⁵

100. OPPENHEIM, *supra* note 35, at 196.

101. See 8 SAMUEL VON PUFENDORF, OF THE LAW OF NATURE AND NATIONS 749-52 (Basil Kennett trans., 1729) (explaining that the law of nature providing equity to men underlies the responsibilities flowing from the equality of States); NOZARI, *supra* note 3, at 81 (suggesting that just as all persons in a state of nature are equal, all international persons, i.e. States, in a state of nature are also equal).

102. NOZARI, *supra* note 3, at 81.

103. *Id.* at 82; COLEMAN PHILLIPSON, WHEATON'S ELEMENTS OF INTERNATIONAL LAW 261 (5th ed. 1916).

104. See 1 PAUL FAUCHILLE, TRAITE DE DROIT INTERNATIONAL PUBLIC 461 (Rousseau & Co. eds., 1922) (stating that, as independent sovereigns, states enjoy legal equality); see also NOZARI, *supra* note 3, at 85 (discussing Fauchille's argument that legal equality is a real right for all States).

105. FAUCHILLE, *supra* note 104, at 461-62; see NOZARI, *supra* note 3, at 83 (citing PRADIER-FODÉRE, COURS DE DROIT DIPLOMATIQUE 55 (1881) as asserting that a state can

In the nineteenth century, the principle of sovereignty began to develop around the modern, centralized territorial states with identifiable borders and powers, which necessitated the principle of equality.¹⁰⁶ Due to the interplay between the principles of sovereignty and equality, the concept of “sovereign equality” emerged, which refers to the equality between sovereign states.¹⁰⁷

The principle of sovereignty demands that the states enjoy both internal sovereignty to determine internal affairs and external sovereignty to engage in international affairs according to the will of the sovereign.¹⁰⁸ States have “general freedom of action,” which, stated differently, gives states free will with regard to the exercise of their sovereign power without infringing other interests protected by international law.¹⁰⁹

All states are supposed to enjoy *suprema potestas* (supreme power) and are not subject to hierarchy, so, logically, the principle of sovereignty naturally demands the principle of equality.¹¹⁰ The principles of sovereignty and equality are intertwined within each other; the principle of sovereignty gives rise to the demand of the principle of equality, while the principle of equality, as “an expression of material justice,”¹¹¹ is indispensable to preserve the sovereignty of states.

In the treaty-making process, the theory of sovereign equality of states would seem to require that all treaties be made equally. Ideally, in order to achieve the material justice of equality in international relations, it seems to mandate that the states need

neither prevent another from acquiring rights that another State has nor free itself of an obligation that is imposed on all states).

106. Albert Bleckmann, *Article 2(1)*, in *THE CHARTER OF THE UNITED NATIONS: A COMMENTARY* 78 (Bruno Simma et al. eds., 1994) (“[T]he principle of sovereignty determines relations between [UN] member states. In addition, UN actions regulating legal relations between member states on the basis of the Charter are to be conducted in accordance with the principle of sovereign equality. UN organs must also treat states equally and must not infringe their sovereignty.”).

107. *Id.* at 79.

108. *See id.* (explaining the complementary and mutually dependent relationship of internal and external sovereignty).

109. *Id.* at 81.

110. *Id.* at 87.

111. *Id.* at 87-88.

to have equal bargaining power to conclude treaties.¹¹² Based on this logic, the proponents for the theory of unequal treaties seek to invalidate the agreements by inferring unequal positions of contracting parties.¹¹³

In international legal settings, however, it is impossible to achieve absolute legal equality because of the reality of the political inequality that exists between all states – each state has different levels of financial wealth, population, natural resources, etc. that put it on a better or worse footing than the country with whom it is negotiating a treaty.¹¹⁴ For example, even though the concept of sovereign equality is reaffirmed in Article 2 of the U.N. Charter,¹¹⁵ the Charter accorded permanent seats and veto rights in the Security Council to the five great powers only.¹¹⁶ The Charter also grants to the Security Council the power legally to impose treaties on other, usually less powerful, states under some circumstances.¹¹⁷

Even though it is impossible to achieve absolute equality, certain equality should still be respected and preserved in the context of treaty-making. As discussed above, the concept of equality consists the components of procedural equality and substantive equality. Here, the validity of treaties associated with the two types of equality will be discussed separately.

On one hand, it is important to preserve procedural equality to make sure that the treaty reflects the contracting parties' true consent. Any unlawful outside influence, such as coercion or use of force cannot be justified because it significantly distorts the actual intention and negates the consent of the parties. The

112. *See id.* at 88 (explaining that States still must treat each other as equals even though States may agree upon treaties with unequal treatment).

113. W. MICHAEL REISMAN ET AL., *INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE* 1306 (2d ed., 2004); *see* John Murray, *Unconscionability: Unconscionability*, 31 *PITT. L.R.* 1, 28 (1969) (discussing the belief that “no freedom of contract [exists] in the equal treatment of unequals”).

114. NOZARI, *supra* note 3, at 85 (citing E.D. DICKINSON, *THE EQUALITY OF STATES IN INTERNATIONAL LAW* 223-24 (1920)).

115. U.N. Charter art. 2(1) (declaring that “[t]he Organization is based on the principle of the sovereign equality of all its Members”). Furthermore, the preamble of the Charter reaffirms “the equal rights . . . of nations large and small.” U.N. Charter pmb.

116. U.N. Charter arts. 23, 27(3).

117. Malawer, *supra* note 11, at 8.

principle of free consent is regarded as a major pillar in treaty law, which underlies the whole VCLT; Articles 34, 48, 49, 51 and 52 of the VCLT all reflect strong emphasis on its importance.¹¹⁸ The free consent to enter into international treaties flows from the principle of sovereign equality.¹¹⁹

On the other hand, substantive inequality should be treated more carefully when states want to invoke it as a ground to invalidate treaties. Absent evidence of distortion in the treaty-making procedure, i.e. without proof of coercion or use of force, an attempt to invalidate a treaty should not be upheld unless such substantive inequality substantially affects the inherent integrity of a state's sovereignty. In other words, substantive inequality should be classified into two sub-categories – one category where the substantive inequality does not seriously affect a state's sovereignty and the other category where the substantive inequality seriously impairs a state's status as an independent sovereign and infringes a state's equal right to preserve its sovereignty. Examples of the latter category include unequal treaties ceding a state's territory or restricting its territorial jurisdiction. However, the restriction on a state's sovereignty shall not be interpreted too broadly. Such broad conception of restriction on sovereignty will invite frivolous claims to invalidate treaties based on political inequality. Instead, substantive inequality should only be applied with extreme carefulness in exceptional cases.

C. *Rebus Sic Stantibus*

The principle of *rebus sic stantibus* (the principle allowing a treaty to become inapplicable because of a fundamental change of circumstances) was invoked by many states as a ground for modifying or terminating treaties they deemed as unequal.¹²⁰ For example, China relied on this principle to nullify sixteen of its unequal treaties,¹²¹ including the Twenty-One Demands of 1915

118. Kirsten Schmalenbach, *Preamble*, in COMMENTARY, *supra* note 1, at 9, 12; VCLT, *supra* note 53, arts. 34, 48-52.

119. Frank Hoffmeister, *Art. 11 – Means of Expressing Intent to Be Bound by a Treaty*, in COMMENTARY, *supra* note 1, at 153, 153.

120. Garner, *supra* note 77, at 509.

121. *Id.*

signed with Japan¹²² and the 1865 Sino-Belgium Treaty.¹²³ It was invoked by Switzerland to demand a revision of its treaty of 1909 with Germany and Italy with regard to the Saint Gothard Railroad.¹²⁴ The Turkish government also defended its non-observance of the Treaty of London of 1913 with the Allied Balkan Powers by arguing that the Balkan States were no longer allies but at war with each other, and thus, Turkey did not need to observe the treaty any more.¹²⁵ The main argument for invoking such principle is that, because political, economic, or social changes which did not exist when the treaty was concluded have fundamentally altered a party's position, the obligations and benefits in the original treaty now benefit one party and disadvantage the other and continuing to operate under such an imbalance would work injustice.¹²⁶

This principle was reflected in Article 62 of the VCLT, which provides two justifications for invoking *rebus sic stantibus*: first, the circumstances, which were essential for the parties' consent to enter into the treaty, have changed since the treaty was entered into (subparagraph (a)); and second, the change of circumstances has had a significant effect on the obligations of the parties (subparagraph (b)).¹²⁷

Article 62 reflects the international community's recognition of the need to grant a state relief from certain procedural inequality as well as substantive inequality in treaty relationships. Article 62(a) implicates procedural inequality in that it allows states to invoke fundamental change of

122. WANG, *supra* note 12, at 122.

123. Woolsey, *supra* note 68, at 292.

124. Garner, *supra* note 77, at 509-10.

125. *Id.* at 510.

126. *Id.* at 512.

127. VCLT, *supra* note 53, art. 62(1) states:

(1) A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:

(a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and

(b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.

circumstances because the change contradicts a basic assumption upon which consent was given. Such a material change in circumstances undermines the assurance that the parties to the agreement entered into it with informed consent to its terms, because, had that change in circumstances been foreseeable, the parties would not have agreed to the terms as written. Article 62(b) focuses on substantive inequality in that it hinges on the parties' substantive obligations being substantially changed, causing an imbalance between the parties. Although the inequality does not directly result from the original provisions agreed upon by the parties, it is derived from the subsequent application of the provisions in a changed circumstance. However, the substantive inequality reflected in subparagraph (b) is based on a presumed lack of consent, namely, procedural inequality in subparagraph (a). Therefore, the focus of Article 62 is still on procedural inequality.

The formulation of Article 62 makes it clear that this Article will only apply to exceptional cases with "fundamental" change.¹²⁸ Such restriction reflects the tension between maintaining the stability of treaties, as required by the central principle of *pacta sunt servanda*, and allowing a treaty to be modified or voided to achieve equality and justice in light of fundamentally changed circumstances.¹²⁹ Also, this restriction gives rise to two corollaries: first, the Article shall be interpreted very strictly; and second, the party invoking the principle shall bear the burden of proving the existence of fundamental change of circumstances.¹³⁰

The International Court of Justice affirmed this restrictive approach in the *Fisheries Jurisdiction* case.¹³¹ While the court recognized that Article 62 of the VCLT "may in many respects be considered as a codification of existing customary law on the subject of the termination of a treaty relationship on account of change of circumstances,"¹³² it emphasized the need to limit the

128. *Id.*

129. Giegerich, *supra* note 49, at 1078.

130. *Id.*

131. *See Fisheries Jurisdiction (Ger. v. Ice.)*, Judgment, 1973 I.C.J. Rep. 49, ¶¶ 36-37 (Feb. 2) (finding unpersuasive Iceland's argument that a change in circumstances terminates a treaty because the change must be "fundamental").

132. *Id.* ¶ 36.

scope of its application by stating that “[t]he stability of treaty relations requires that the plea of fundamental change of circumstances be applied only in exceptional cases.”¹³³

D. Reciprocity

The concept of reciprocity originated in contract law.¹³⁴ When making an analogy between traditional international treaties (not human rights treaties) and contracts, a common feature is that there is “an exchange of commitments to the reciprocal advantage of the signing parties.”¹³⁵ The analogy implies that treaties, like contracts, were intended to obtain reciprocal exchanges of mutual benefits to the signing parties.¹³⁶ Accordingly, the principle of reciprocity produces a profound effect on treaties and is regarded as governing every international agreement.¹³⁷

The signing parties to a treaty had expectations of reciprocal benefits, i.e. a quid pro quo, and such reciprocity should be equal in substance.¹³⁸ Due to such expectations, when the treaty loses such balance, the party that is disadvantaged thereby has a strong incentive to challenge the validity of the treaty for lack of reciprocity. For example, when China tried to challenge the validity of the 1865 unequal treaty with Belgium, it insisted that treaties should be concluded on the basis of “equality and reciprocity.”¹³⁹ Reciprocity and quid pro quo were regarded as “requisite for a treaty between states.”¹⁴⁰ It was argued that a

133. Gabcikovo-Nagymaros Project (Hung./Slovk.), Judgment, 1997 I.C.J. Rep. 92, ¶ 104 (Sept. 25).

134. See *Reciprocity*, THE WOLTERS KLUWER BOUVIER LAW DICTIONARY (Compact ed. 2011) (defining reciprocity as the treatment of one party as it treats the other, and discussing reciprocity as an implied justification for the performance of contracts).

135. Lea Brilmayer, *From ‘Contract’ to ‘Pledge’: The Structure of International Human Rights Agreements*, 77 BRIT. Y.B. INT’L L. 163, 164 (2007).

136. *Id.* at 165.

137. Bruno Simma, *Reciprocity*, in MPEPIL, *supra* note 1, ¶ 4, at 652.

138. *Id.*

139. Woolsey, *supra* note 68, at 289-90.

140. 2 ROBERT JOSEPH PHILLIMORE, COMMENTARIES UPON INTERNATIONAL LAW 71 (2d ed. 1917).

treaty is unequal because the rights and duties conferred upon contracting parties were imbalanced and non-reciprocal.¹⁴¹

The argument based on the principle of reciprocity reflects the discontent with substantive inequality. As discussed above, the VCLT does not allow a state to challenge the validity of a treaty based solely on inequality of the substance. The realization of reciprocity and mutual benefits in terms of a treaty is more like a political aspiration in international negotiations, which is not strictly mandated by international law.¹⁴² Therefore, a treaty devoid of reciprocity in substance could not be invalidated solely because of the substantive deficiency, but its validity could be challenged if the deficiency is the result of procedural defects, such as through the use of force or coercion.¹⁴³

To provide a brief summary, this section's legal assessment of the theory of unequal treaties against principles of international law implicates: first, the principle of *pacta sunt servanda* should be observed strictly so as to preserve the sanctity of treaties and the certainty of international relations, but it does open doors for deviation in exceptional cases. Second, the principle of sovereign equality is the pivotal basis for the theory of unequal treaties, but not all inequality can be invoked as grounds for invalidating a treaty. A sensible division of inequality into procedural and substantive inequality shows that the VCLT does allow a state to invoke procedural inequality caused by use of force or coercion to challenge the validity of a treaty but disallows the use of substantive inequality arising out of the treaty provisions alone to invalidate a treaty. Third, the principle of *rebus sic stantibus* is a legal basis by which a state can challenge the validity of a treaty because of its procedural/substantive inequality caused by subsequent, fundamental changes of circumstances. However, such principle, as prescribed under the VCLT, can only be applied

141. See, e.g., Hungdah Chiu, *Comparison of the Nationalist and Communist Chinese Views of Unequal Treaties*, in CHINA'S PRACTICE OF INTERNATIONAL LAW 239, 249 (Jerome Alan Cohen ed., 1972) (detailing how Nationalist scholars describe unequal treaties as a term of general usage and stating that if only one party undertakes obligations but the other party enjoys rights, the treaty is naturally unequal).

142. Simma, *supra* note 137, ¶ 4.

143. See *supra* notes 53-57 and accompanying text; see also Simma, *supra* note 137, ¶ 4; Peters, *supra* note 1, ¶¶ 45-52, at 45-46.

in exceptional cases. Fourth, the principle of reciprocity, focusing on the substantive equality of reciprocal exchange in treaty relations, is not recognized as a ground for challenging the validity of a treaty in the current international law.

IV. RE-CONSIDER THE THEORY OF “UNEQUAL TREATIES”

As previously discussed, current international law provides neither a clear definition of the term “unequal treaties” nor a sensible delineation of its scope. This makes the term harder to understand and leads to uncertainty when states try to employ the theory of unequal treaties to engage in international relations. It is, therefore, desirable to seek a clearer framework for the theory of unequal treaties.

A. *A New Paradigm*

In the twentieth century, scholars have tried to solve such chaos by providing a more detailed classification for unequal treaties. But their classifications do not provide much guidance, especially for a state that wants to use the theory of unequal treaties. A widely cited¹⁴⁴ example of such classification is the one proposed by Malawer, which divided unequal treaties into the six categories, namely:

- 1) treaties containing formally equal treaty provisions, but in practice, unequal obligations which may occur as a result of unforeseen developments;
- 2) treaties containing formally unequal obligations, regardless of the actual effect of the treaty;
- 3) and 4) are identical to 1) and 2), except with either economic or military force threatened or used in order to conclude such agreements;
- 5) treaties not otherwise unequal, concluded through the use of economic force alone;
- 6) treaties not otherwise unequal, concluded through military force alone.¹⁴⁵

In essence, the six categories can be divided into two general groups, namely, one is the group of treaties which were concluded

144. *E.g.*, Morse & Hamid, *supra* note 34, at 438 (citing Malawer’s six categories of unequal treaties); S. AKWEENDA, INTERNATIONAL LAW AND THE PROTECTION OF NAMIBIA’S TERRITORIAL INTEGRITY 25 (1997).

145. Malawer, *supra* note 11, at 7.

without the threat or use of any form of force (categories 1 and 2), and the other is the group of treaties which were imposed by threat or use of force (categories 3-6). In order to further differentiate the two groups, Malawer used the term “imposed treaties” to define treaties concluded by threat or use of illegal military force, and he called the remaining treaties that did not fall within the scope of imposed treaties “unequal treaties.”¹⁴⁶

Such classification, although it provides some insight on how inequality could be generated from a treaty relationship, adds confusion when trying to understand the exact nature of unequal treaties, because it co-mingles substantive inequality and procedural inequality into the general category of “unequal.” In addition, its division of imposed treaty and unequal treaties is also confusing. First, the word “imposed” is restricted to only military force and, thereby, does not account for inequality produced by economic and political force. Second, the key issue here is not what we call or how we categorize the treaty inequality, but whether any type of inequality could be grounds to deviate from the stringent principle of *pacta sunt servanda*, and “the adjective denotation of the treaty bears no legal relevance.”¹⁴⁷

Based on the theoretical assessment of the theory of unequal treaties against principles of international law in Part II, this paper proposes that a more reasonable framework for unequal treaties should be based on the division of equality into substantive and procedural inequality, and a brief sketch of such framework may look as follows:

(1) *Treaties with procedural inequality*: the validity of a treaty can be challenged if the challenging party could prove that there is coercion or use of force (either on individual state representatives or on state organs) when entering into the treaty. If a challenging party successfully establishes the existence of illegal coercion or use of force, as prescribed under Article 51 and 52 of the VCLT, the treaty shall be deemed void, which means that the treaty retroactively loses all legal force from the date it was entered into.¹⁴⁸ And all the acts that have been performed by

146. *Id.*

147. Schmalenbach, *supra* note 1, at 878.

148. *See id.* at 888 (stating that treaties procured by use of threat or force are void and thus have no legal force on the international plane as a matter of law).

the coerced state in accordance with the treaty before challenging its validity should be treated as legally null and void in relation to the coercing party.¹⁴⁹ All other types of procedural inequality should not be claimed as grounds to challenge the validity of a treaty.

(2) *Treaties with substantive inequality*: such substantive inequality should be further divided into two subcategories: the first subcategory is substantive inequality that exists when the treaty is originally concluded. For treaties with such substantive inequality, in the absence of any procedural inequality, its validity should be challenged only when the substantive inequality severely impairs a state's existence as an independent sovereign and infringes upon its equal right to preserve its sovereignty. Otherwise, it is too easy for a state to invalidate a treaty of unequal provisions, even if it freely consents to such status of inequality in the first place. The second subcategory is substantive inequality that arises out of a fundamental change in circumstances. Treaties with such substantive inequality could be challenged only based on the rule stipulated under the VCTL.

With this new paradigm, a state wanting to challenge the validity of a treaty should first see whether there is any procedural inequality arising out of coercion or use of force. Then, it could assess whether there is substantive inequality that severely impairs its status as an independent sovereign, or whether the inequality was caused by a fundamental change in circumstances. Otherwise, the validity of a treaty should be preserved, despite the fact that there is residual procedural or substantive inequality. Preserving the sanctity of treaties is vital to maintaining stability and certainty in international relations, which have been built upon various treaties. Accordingly, only in exceptional cases of unequal treaties, can international law allow a state to deviate from the requirement of *pacta sunt servanda*.

B. *Remaining Puzzles*

Under this paradigm of substantive-procedural inequality, there are still unresolved puzzles. It is still unclear what the scope of "force" is, the use of which could trigger a right to challenge a

149. *Id.* at 889.

treaty's validity. In addition, the new paradigm is mainly based on the rules recognized in the VCLT, which cannot be retroactively applied to any treaty concluded before 1969, because of the intertemporal principle of international law.¹⁵⁰ Moreover, the paradigm still lacks a compulsory decision-maker that can decide whether the required procedural or substantive inequality is sufficient to support a claim of unequal treaties.

First, with respect to the puzzle relating to the interpretation of "force": the major dispute is whether "force" exclusively refers to military force, or should also include economic and political force. Currently, the dominant view is that only military force is contemplated, because the words "the threat or use of force" were copied from Article 2(4) of the U.N. Charter, and it has been widely recognized that "force" in Article 2(4) is limited to armed force.¹⁵¹ As a result, only the coercion or use of military force is recognized as coercion under the VCLT.

Also, there is concern that inclusion of economic and political pressure would substantially undermine the stability of treaty relations.¹⁵² As the Court of Arbitration in *Dubai-Sharjah Border Arbitration* observed, pressure of one sort or another is inevitable in international negotiations, but "[m]ere influences and pressure cannot be equated with the concept of coercion as it is known in international law."¹⁵³ If a state were permitted to use economic and political pressure as grounds to invalidate a treaty, many treaties might be potential targets for asserting a claim of unequal treaties.

Second, as to the intertemporal restraint of the new paradigm: according to the intertemporal principle of international law, the customary laws of treaties must be applied in manner that is consistent with the content and form of the rule

150. See Markus Kotzer, *Intertemporal Law*, in MPEPIL, *supra* note 1, ¶ 12, at 280 (explaining that treaties must be interpreted in light of the relevant international law at the time the treaty was enacted).

151. Albrecht Randelzhofer, *Article 2(4)*, in THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, *supra* note 106, at 112, 117; see Schmalenbach, *supra* note 1, at 887-88 (positing that mere intention to use force is not enough, the threat must be credible and the State asserting the threat must have the military and geographical capacity to actually put the threat into action).

152. THE OXFORD GUIDE TO TREATIES, *supra* note 60, at 569.

153. *Dubai-Sharjah Border, Award*, 91 I.L.R. 543, 571 (Ct. of Arb. 1981).

at the time the treaty was made.¹⁵⁴ Such principle is reflected in Article 4 of the VCLT, which stipulates that its provisions do not have retroactive effect and, thus, only apply to treaties concluded after the VCLT entered into force.¹⁵⁵ Therefore, for treaties that were concluded before 1969, a state challenging the validity of a treaty needs to prove that the rule supporting its challenge existed when the treaty was concluded.¹⁵⁶ Accordingly, for a treaty concluded before 1969, the effect of substantive and procedural inequality is a case-by-case analysis of the laws relevant at the time of the treaty-making. Nevertheless, since the VCLT is regarded as a codification of customary international law, it could be argued that the principles it contains existed before the VCLT as part of state practice and *opinio juris*.

Third, with regard to the issue of lacking a decision-maker to decide the issue of unequal treaties: the difficulty of challenging the validity of a treaty is intensified by “the absence of any general international system of compulsory jurisdiction.”¹⁵⁷ The VCLT sets forth a dispute resolution mechanism in Article 66, but it only grants compulsory jurisdiction to the International Court of Justice in disputes concerning the interpretation or application of Articles 53 and 64 (conflict between *jus cogens* and a treaty);¹⁵⁸ for other conflicts, there is no compulsory decision-maker. Therefore, when there is challenge against the validity of a treaty, it depends more on contracting parties’ political conciliation or negotiations, instead of relying on legal judgment. For example, in a claim of the fundamental change of circumstances, there is no common judge to determine whether there has been a fundamental change in circumstances and whether the relevant rules justify repudiating or modifying the treaty.¹⁵⁹

154. REISMAN ET AL., *supra* note 113, at 1308; *see also* MARK E. VILLIGER, CUSTOMARY INTERNATIONAL LAW AND TREATIES 258 (1985) (suggesting the intertemporal rule makes retroactive effect of conventional rules *qua* contrary).

155. VCLT, *supra* note 53, art. 4.

156. Kirsten Schmalenbach, *Article 4 – Non-Retroactivity of the Present Convention*, in COMMENTARY, *supra* note 1, at 81.

157. Giegerich, *supra* note 49, at 1068.

158. Heike Krieger, *Article 66 – Procedures for Judicial Settlement, Arbitration and Conciliation*, in COMMENTARY, *supra* note 1, at 1151, 1155-56.

159. Garner, *supra* note 77, at 513-14.

V. CONCLUSION

This paper revisits the concept of unequal treaties in international law. It reveals that the absence of a clear definition and delineation of its meaning and scope causes uncertainty and misapplication of the term in international law. Despite different adjectives (such as leonine, unjust, inequitable, imposed, forced or coerced) put before the word “treaty,” the underlying essential meaning of “inequality” could be attributed to substantive or procedural inequality. The effect of the two types of inequality on the validity of a treaty is treated differently under international law.

Based on theoretical assessment of the concept of unequal treaties under the principles of *pacta sunt servanda*, sovereign equality, *rebus sic stantibus*, and reciprocity, this paper proposes to classify unequal treaties into major two categories; one is treaties with substantive inequality, and the other is treaties with procedural inequality. In order to balance the need to preserve the sanctity of treaties and the demand for equity, this paper suggests that, as recognized by the VCLT, only in the exceptional situations should the validity of such treaties be challenged. The proposed paradigm will provide clearer guidance on the understanding and use of the theory of unequal treaty, so as to avoid frivolous challenges of the validity of treaties, like the U.N. Charter or other freely negotiated trade or investment treaties. Nevertheless, this new framework still cannot resolve the puzzles resulting from the intertemporal constraint of the treaty laws and the lack of a compulsory decision-maker to resolve disputes relating to unequal treaties.