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The Gentle Civilizer of the Far East – A Re-Examination of the Encounter between ‘China’ and ‘International Law’

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Abstract

The narrative of ‘imposition’, whereby ‘international law’ is said to have been imposed by Western powers on China, was shared by both English and Chinese literatures, albeit each holding contrasting views on the meaning and consequences of such ‘imposition’. This paper seeks to highlight the nuances in the shared ‘imposition’ narratives and challenge many of its presumptions through a chronological re-examination. First, by tracing the ‘encounter’ back to the 16th century, the unity and diversity between the Sinocentric and Eurocentric orders were re-examined. Second, by comparing the Chinese and English text of the Opium War Treaties, this paper reveals how the Qing Empire also sought to accommodate the Eurocentric order in its own term from 1842 to 1860. Third, by seeing the ‘encounter’ as an evolutionary rather than a revolutionary process, this paper demonstrates how the concept of ‘China as a state’ evolved from the Celestial Empire’s ‘encounter’ with ‘international law’.

Keywords

China – Tributary System – Eurocentrism – unequal treaties – East Asia – history of international law – imperialism

1 Introduction

Ever since Koskenniemi's *The Gentle Civilizer of Nations*,¹ there has also been a growing tendency within the circle of international legal scholars to review the structural biases of Eurocentrism in international law. As a result, the profoundly Eurocentric account on the history of international law was gradually replaced with the discourse of 'encounters between different jurisdictions or civilizations'.² Anghie also argued that international law, particularly the idea of sovereignty, cannot be seen as a mere geographical extension of the European concept, but was created through the encounter between the European and non-European societies.³ Similarly, d'Aspremont and Zhang stated that 'the encounter of international law with China through the treaty port system cannot be limited to a mere exercise of force but should also be read as a foundational event that made international law what it is'.⁴ This view was also shared by Herrick, who believed that international law only became 'international' following the Treaty of Nanking.⁵ These accounts departed from Sinologist John K. Fairbank's narrative, describing a transition from 'the Tributary System' to 'the Treaties System'. In Fairbank's model, the First Opium War was a collision between the 'Tributary System' and the 'Westphalian System', in which the latter triumphed over the former through the forceful conclusion of a series of peace treaties.⁶ As a result, the regional international order in East Asia was traditionally seen as static and reactionary, in which 'China' was further regarded as a passive actor, forced to transform into a 'Westphalian' state through series of 'imposed' treaties since 1842.

While trying to describe the encounter between the European and non-European societies as a two-way process, Anghie's account was mostly based on the colonial experiences of Africa and Latin America. The specificities of the colonial encounter in Far East Asia, particularly, the existence of a stable, organized, and self-sufficient non-European 'world order' was not sufficiently

1 See Koskenniemi, Martti. *The Gentle Civilizer of Nations. The Rise and Fall of Modern International Law 1870–1960* (Cambridge: Cambridge University Press, 2009).

2 See d'Aspremont, Jean and Zhang Binxin. 'China and International Law: Two Tales of an Encounter'. *Leiden Journal of International Law* 34 (2021) 899–914.

3 Anghie, Anthony. *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2005), 4–5.

4 d'Aspremont / Zhang, 'Two Tales' 2021 (n. 2), 905.

5 Herrick, Kevin. 'The Merger of Two Systems: Chinese Adoption and Western Adaptation in the Formation of Modern International Law'. *Georgia Journal of International & Comparative Law* 33(3) (2014), 685–703.

6 See Fairbank, John K. *Chinese World Order* (Cambridge: Harvard University Press, 1967), 257–276.

considered. As influenced by Wang Tieya's work, Anghie traced the 'colonial encounter' of 'China' from the Treaty of Nanking, the first 'unequal treaty'.⁷ This account ironically resembles Fairbank's description of the transition into a 'Treaty System',⁸ amounting to what d'Aspremont and Zhang described as the shared *eventualization and narrativization* of 'imposition' in the Chinese and English literatures.⁹ The 'imposition' thesis, unfortunately, ignored the long history of previous encounters between the Celestial Empires and the non-Anglophone Europe, in which the former remained active in assimilating the latter into the Sinocentric system until the mid-19th century. The misconstruction of the 'impact-response' paradigm was further pointed out by Svarverud, who theorized 'international law' not as a set of positive rules but also as a form of 'world order', in which 'China' was not merely a passive recipient but an active re-interpreter who entered this Euro-American dominated world order under her own terms and conditions.¹⁰

Another problem with the existing encounter discourse was overstating the importance of the Treaty of Nanking in 1842 as if it was a 'Grotian Moment'. This article argues that 'the turning point' misconception partly resulted from the exclusive focus on the English text of the Treaty of Nanking. By offering a parallel reading of the Chinese text, which was equally authentic and authoritative as the English text, this article argues that the Treaty of Nanking sought to reconcile the two contrasting world views by offering two different interpretations of the nature of the First Opium War and its consequences. In what was traditionally seen as a mere interlude between the two opium wars, the Eurocentric and Sinocentric world orders¹¹ fragily co-existed. The need for a precise and identifiable 'before' and 'after' the encounter arguably arose from the false assumption of a stable concept of 'international law'¹² if not also

7 Anghie, *Imperialism* 2005 (n. 3), 72–73.

8 For the similarities with the transition account, see, e.g., Wang, Tieya. 'International Law in China: Historical and Contemporary Perspectives'. *Recueil des cours de l'academie de droit international de La Haye* 221 (1990), 195–369, 251.

9 d'Aspremont / Zhang, 'Two Tales' 2021 (n. 2), 913.

10 Svarverud, Rune, *International Law as World Order in Late Imperial China: Translation, Reception and Discourse, 1847–1911* (Leiden: Brill, 2007), 16–18.

11 This article uses the word 'Eurocentric' and 'Sinocentric' systems to denote the world order that evolved and developed from essentially European and Chinese origins respectively. It seeks to avoid classifying one system as 'international' over the other prior to and during the encounter, which reinforces the belief that international law was a pre-established concept created in one geographical area and extended somewhere else in space. See *ibid.*

12 d'Aspremont / Zhang, 'Two Tales' 2021 (n. 2), 910.

'China'¹³ as the equivalent of any European state. The presumption of 'China' as a pre-determined historic 'constant', as in Fairbank's model, has now been challenged by historians,¹⁴ including the New Qing History School.¹⁵ The singular evolutionary view of Chinese history was referred to by Duara as a 'false unity of a self-same, national subject evolving through time' as traditionally produced by 'national' reading of history.¹⁶ However, the fact that 'China' only arose out of the continuous interaction between the Celestial Empire and the European states, meant that any transition in East Asian regional order could only be a continuous instead of a revolutionary process.

By tracing the encounter of successive Celestial Empires with different European colonial states back to the 16th century, this article seeks to debunk this myth of the Treaty of Nanking as the identifiable turning point. Instead, this article illustrates how the transition was a long and continuous process, beginning from Jorge Álvares' arrival in Tamão in 1514 until the signing of the Convention of Peking in 1860. Section 2 introduces the Sinocentric system as a regional international system that centered upon the cultural and moral superiority of the Middle State. Benefiting from recent research from Japan, Taiwan, and the New Qing History School, this article highlights the nuances not sufficiently addressed by Fairbank's account. Section 3 proceeds to examine the encounter between different European states with the Celestial Empires, with an emphasis on the unity and diversity between the Eurocentric and Sinocentric systems. Section 4 combines a textual comparative analysis of two Opium War treaties in the context of the transformation of East Asia's regional order. It is argued that the Treaty of Nanking in 1842, far from being a capitulation treaty of the Sinocentric system, sought to reconcile two different

13 I use 'China' to denote the evolving concept of 'China as a state' throughout the encounter.

14 Some recent examples are, Dirlik, Arif. 'Born in Translation: "China" in the Making of "Zhongguo"' (29 July 2015), available at: <https://www.boundary2.org/2015/07/born-in-translation-china-in-the-making-of-zhongguo/> (last accessed on 16 January 2024); Hayton, Bill. *The Invention of China* (New Haven: Yale University Press, 2020). Similarly, the concept of 'the West' is also fluid and situational dependent. For example, Russia and Japan were often included and excluded as part of 'the West' in Chinese discourses. In this article, 'the West' is connotated to mean only Western Europe and the United States of America.

15 See Millward, James A. *Beyond the Pass: Economy, Ethnicity, and Empire in Qing Central Asia, 1759–1864* (Stanford: Stanford University Press, 2016), 18; Esherick, Joseph W. 'How the Qing Became China', in *Empire to Nation: Historical Perspectives on the Making of the Modern World*, eds. Joseph W. Esherick, Hasan Kayali and Eric Van Young (Lanham: Rowman & Littlefield Publishers, 2006), 229–259.

16 Duara, Prasenjit. *Questioning History from the Nation: Questioning Narratives of Modern China* (Chicago: University of Chicago Press, 1995), 4. For the history of how 'Chinese history' was being used to facilitate Chinese nation-building, see Hayton, *Invention of China* 2020 (n. 14), 101–127.

international orders to co-exist in East Asia, with experiences borrowed from Qing's handling of the Inner Asian frontier. The current author places the turning point of any transition in the Convention of Peking in 1860, which forcefully put the Qing Empire into a subordinate position vis-à-vis European states in terms of the degree of civilization. The transformation of the Celestial Empire to the state of China was thereafter internalized through the utilization of Western languages of diplomacy and international law.

2 The Unity and Diversity of the Sinocentric and Eurocentric Systems

2.1 *The Middle State, China, and the Qing Empire*

Before this article proceeds to examine the structural difference of the international systems in East Asia and Western Europe, this article aims to highlight the differences between the concepts of the 'Middle State', 'China', and the 'Qing Empire'. Amongst the three, the term 'Middle State' (中國) has the longest historical origin as it could be traced back to the Western Zhou period in the 10th century BCE.¹⁷ 'Middle State'(中國) began as a geographical concept, as the city-state in the middle of the land beneath the Heaven.¹⁸ The concept of centrality was subsequently seen as a source of cultural legitimacy in the Sinocentric system, when various polities in the Zhou period began to refer themselves as the 'Middle State'(中國) to distinguish themselves from foreign barbarians that refused to adopt Zhou's rituals and institutions.¹⁹ The self-identification of 'Middle State'(中國) was subsequently adopted by various polities that successfully subdued and unified the cultural and geographical epicenter of the Sinocentric world order, including *daicing gurun* (ᡩᠠᡳᠴᡳᠩ ᡤᡠᡵᡠᠨ). The Manchurian name of the Qing Empire, *daicing gurun* (ᡩᠠᡳᠴᡳᠩ ᡤᡠᡵᡠᠨ), meant the state of warriors and was not a direct translation of the Middle State. The Great Qing State was in fact the English retranslation of the Chinese translation of *daicing gurun* as 大清國. The use of Daicing in Manchurian or Da Qing

17 Zhao, Gang. 'Reinventing China: Imperial Qing Ideology and the Rise of Modern Chinese National Identity in the Early Twentieth Century'. *Modern China* 32(1) (2006), 3–30, 6.

18 The original meaning of the 'Middle State' could be derived from the rubbing and transcription of He Zun (何尊), in which King Wu (武王) declared: 'I shall dwell in the Middle State, and from here govern the people.' (宅兹中或, 自之辟民). The term 'Middle State'(中或) here was sometimes translated as 'the central region' in English, see Pankenier, David W. *Astrology and Cosmology in Early China: Conforming Earth to Heaven* (Cambridge: Cambridge University Press, 2013), 229.

19 Zhao, 'Reinventing China' 2006 (n. 17), 6.

(大清) in Chinese as an official toponym corresponded to the practices of various Celestial Empires that retained the name of their founding polities, including 'Han' (漢) and 'Tang' (唐). Following Daicing's successful conquest of the central area of Great Ming, it also began to interchangeably refer to itself as *dulimbai gurun* (ᡩᠣᡵᠢᠮᡤᡠᡵᠠᠨ ᡤᡠᡵᠠᠨ), the Manchurian term for 'the Middle State', as could be seen from the Manchurian version of the Treaty of Nerchinsk in 1689.²⁰ Other foreign polities also did not call the 'Middle State' by its name. The Latin toponym of '*Imperii Sinici*', first used by the Jesuits in the Latin text of the Treaty of Nerchinsk, was believed to originate from the word *Cina* in Sanskrit, which arguably derived from the name of Qin (秦), the first Celestial Empire that 'unified' the warring states.²¹ The homophonic translation of *China* / *Chine* / *Cina* / *Sina* / *Shina* carried no connotation of any geographical and cultural centrality and was thus the preferred official toponym for states such as Japan, who wished to achieve sovereign equality with the Qing Empire, as well as for Qing reformists.²² From Qing's perspective, to accept 'China' as the toponym signified a loss of its cultural exceptionality, which rendered the 'Middle State' merely one among many states in the international community.²³

Despite their very different etymological differences, the three terms are often assumed to be interchangeable both contemporarily and historically. For instance, in Fairbank's famous account of the *Chinese World Order*, the 'Qing Empire' was directly referred to as 'China' and 'China' was assumed to bear a reciprocal meaning of the 'Middle State'. As Lydia Liu highlighted, translation between Chinese and foreign languages in the 19th century involved both linguistic and conceptual transfer, which made translation a creative rather than a pure interpretative process.²⁴ The translation of the 'Middle State' was no exception. This article demonstrates that the translation of 'China' was more than a mere translation: the creation of equivalence between the three concepts began from the Treaty of Nerchinsk in 1689 and was further consolidated through Qing's increasing diplomatic contact with Euro-American states, in

20 Ibid., 14.

21 There are different theories on Cina's etymology, see Hayton, *Invention of China* 2020 (n. 14), 15–16.

22 However, the Japanese toponym of Shina (支那) began to be viewed by the Chinese as derogatory during the Sino-Japanese War, which eventually led to its abandonment after 1945. Japan is now one of the few states that refer to China directly as the 'Middle State' (中国). See Fogel, Joshua A. 'New Thoughts on an Old Controversy: Shina as a Toponym for China' *Sino-Platonic Papers* 229 (2012), 2157–9679.

23 See the debates amongst late Qing intellectuals about the proper translation of 'China' in Hayton, *Invention of China* 2020 (n. 14), 22–33.

24 Liu, Lydia. *The Clash of Empires: The Invention of China in Modern World Making* (Cambridge: Harvard University Press, 2006), 36.

which 'China', 'Sina', or 'Chine' began to assume the role of Qing Empire's official designation in Indo-European languages, and hence, became the equivalence of 'the Middle State'.²⁵ The increasing interchangeable use of three concepts not only corresponded to the need for a fixed and common legal identity upon the arrival of 'international law'²⁶ but also reflected the subtle transition of how Qing Empire presented itself and thought of its position in the 'community of nations'. Since this article aims to illustrate this transition from 1689 to 1895, 'China' is referred to with brackets for the purpose of distinguishing it from the contemporaneous understanding of China as the historically self-same nation state.

2.2 *Fairbank's Model of 'Tributary System'*

Despite the charges of over-simplification and many of its shortcomings, Fairbank's model remained one of the most influential in describing the regional international system of Far East Asia before the 19th century. In Fairbanks' model, the 'Tributary System' was based on the Sinocentric world view of 'Tian-Xia' (天下), where the Celestial Empire (天朝) was seen as culturally superior and thus constituting the only legitimate international order underneath the Heaven.²⁷ At the apex of the Chinese world was the Son of Heaven (天子), who ruled Tian-Xia according to the Mandate of Heaven (天命) based on his all-wise example and virtue. This influence of the Son of Heaven knows no boundary and it spread continuously to all mankind albeit with decreasing efficacy²⁸ and proximities with the Chinese cultures:²⁹ the Sinic Zone (Korea, Vietnam, Ryukyu, Japan), the Inner Asian Zone (Mongolia, Tibet, nomadic tribes) and the Outer Zone (European states).³⁰ These vassals, also known collectively as tribute states, would have to present the Son of Heaven with 'tributes' (朝貢) on a regular basis in exchange for the legitimacy to rule over their territories.³¹ The relationship between the Son of Heaven and his tributaries was primarily regulated by 'rituals', also known as *li* (禮).³² The system of relationship between the Celestial Empire and the tributes was thus known as the Tributary System (朝貢體系).

25 Hayton, *Invention of China* 2020 (n. 14), 22, 34.

26 Zarrow, Peter G. *After Empire: The Conceptual Transformation of the Chinese State, 1885–1924* (Stanford: Stanford University Press, 2012), 93–94.

27 Fairbank, *Chinese World Order* 1967 (n. 6), 5.

28 *Ibid.*, 8.

29 *Ibid.*, 7.

30 *Ibid.*, 13.

31 *Ibid.*, 7–8.

32 *Ibid.*, 6.

An important feature of the Tributary System was that the Celestial Empire did not see itself as a 'state' within an international system but rather, it was responsible for 'the administration of civilized society' as a whole.³³ Here, the distinction between 'territory' and 'space' was significant, as the very nature of Sinocentric order of 'Tianxia' was that political power was radiated from center to periphery in different gradients without clear demarcation. This was distinguished from the modern 'Westphalian system', in which nation states co-existed within demarcated 'territories'.³⁴ While it is hard to equate 'rituals' with the modern understanding of 'international law', several Japanese and Korean scholars saw 'rituals' as the law of nations in East Asia.³⁵ Some of the important rituals are as follows:

1. The tributaries have to present tributes to the Son of Heaven according to the designated frequencies and routes (朝貢);³⁶ The envoys of the tributaries have to perform the appropriate ceremonies at the Qing's court, including the three kneeling and nine kowtows to the Son of Heaven (三跪九叩);³⁷ In return of the tributes, the Son of Heaven would present the envoys with gifts (回賜)³⁸ and would bestow upon the ruler the legitimacy to rule over their respective peoples.³⁹ This ceremony was comparable to the modern law of recognition.⁴⁰
2. The Son of Heaven would not interfere in the domestic affairs of the tributaries so long as they preserve the peace and harmony of the Sinocentric World.⁴¹ Similarly, those foreigners residing in the Inner World, they would be governed by their leaders who were given

33 Ibid., 63.

34 Matten, Marc A. *Imagining a Postnational World: Hegemony and Space in Modern China* (Leiden: Brill, 2016), 32–33.

35 See Kim, So Yeon. 'Making International Law Truly "International"?: Reflecting on Colonial Approaches to the China-Vietnam Dispute in the South China Sea and the Tribute System'. *Journal of the History of International Law* 24(2) (2021), 227–258, 239; Oh, Si Jin. 'Resolving the Misunderstood Historical Order: A Korean Perspective on the Historical Tributary Order in East Asia'. *Journal of the History of International Law* 21(3) (2019), 341–377, 347; Yanagihara, Masaharu. 'Significance of the History of the Law of Nations in Europe and East Asia'. *Recueil des cours de l'academie de droit international de La Haye* 371 (2014), 273–435, 298.

36 Fairbank, *Chinese World Order* 1967 (n. 6), 10–11.

37 Ibid., 10.

38 Ibid., 10.

39 Ibid., 10.

40 Kawashima, Shin. 'China', in *The Oxford Handbook of the History of International Law*, eds. Bardo Fassbender and Anne Peters (Oxford: Oxford University Press, 2012), 452–474, 455.

41 Ibid., 454–459.

commensurate government posts under extraterritoriality.⁴² However, foreigners who resided in the Capital would have to adopt the Chinese customs and cultures. They were also not allowed to communicate or return to their countries of origin;⁴³

3. The tributaries were granted certain privileges of trade at the frontier outside of tributary missions or at the capital during the tributary missions (朝貢).⁴⁴ Mutual trade without tributary relationships is sometimes allowed at the designated ports such as Canton and Macau (互市).⁴⁵ Nonetheless, states who failed to observe the Chinese customs were treated as barbarians (夷) and they were placed much lower in the hierarchy than the tributaries.⁴⁶

2.3 *Going beyond 'the Tributary System'*

What could be seen from the abovementioned examples is a strong connection between the domestic orders of the Celestial Empire with its system of external relations.⁴⁷ However, the realistic concerns of the Celestial Empire were often underestimated, which undermined the power of Fairbank's model in explaining the handling of Inner Asian affairs by the Manchurian dynasty.⁴⁸ It was only until recently that the lack of attention toward Qing's duality as the Inner Asia and Celestial Empire⁴⁹ has been supplemented by the New Qing History School.⁵⁰ As an example of the Celestial-Inner Asian duality, Qing's relationship with Russia was not managed by the Department of Rituals (禮部), the specific organ responsible for handling the 'tributary' relations with other European states. Rather, Qing-Russia relation was handled by Li-fan Yuan (理藩院), the same organ responsible for handling Qing's relations with

42 Ibid., 454–459.

43 See 'Emperor Qianlong: Letter to George III, 1793' cited in Backhouse, Edmund and John O. P. Bland. *Annals and Memoirs of the Court of Peking: From the 16th to the 20th Century* (Boston: Houghton Mifflin Company, 1914), 324–325.

44 Fairbank, *Chinese World Order* 1967 (n. 6), 11.

45 Kawashima, 'China' 2012 (n. 40), 456.

46 Herrick, 'Two Systems' 2014 (n. 5), 693–694.

47 De Lisle, Jacques. 'China's Approach to International Law: A Historical Perspective'. *Proceedings of the Annual Meeting (American Society of International Law)* 94 (2000), 267–275, 270.

48 Fairbank, *Chinese World Order* 1967 (n. 6), 224.

49 Ibid., 73.

50 See Millward, James A., Ruth W. Dunnell, Mark C. Elliot and Forêt, Philippe. *New Qing Imperial History: The Making of Inner Asian Empire at Qing Chengde* (Abingdon: Routledge, 2004).

the Inner Asian dependencies (藩部).⁵¹ While the Qing Empire rigidly separated its foreign relations into two bureaucratic organs, this did not prevent the experience gained from one from being transplanted to the other.

Qing's Inner Asia diplomacy exposed yet another shortcoming of Fairbank's model: its exclusive focus on tributary relations with the European states, being only one part of Qing's multiple diplomatic relations.⁵² To supplement the inadequacy in Fairbank's model, historians from Japan and Taiwan began to reevaluate Ming-Qing's regional order through the 'China-centric approach' since the 1980s.⁵³ In 1990, Takeshi Hamashita (浜下武志) argued that mutual trade could co-exist with the tributary relationship. Thus, he described the regional systems of the Ming-Qing Empires as the 'Tribute-Trade System' (互市體制).⁵⁴ To reconcile the tension between the two relationships, Hiroshi Danjo (寛壇上) proposed the concept of 'Celestial Empire's System' (天朝體系) as a form of superstructure.⁵⁵ In response to the scholarly attention in Qing's self-positioning, Chinese leading Qing's historian, Yang Nianqun (杨念群) resituated the Sinocentric system between 'Tianxia' (天下) and the 'Middle State' (中國) as 'the Grand Unity' (大一統), in which Qing's imperial authority was legitimized through its success in 'unifying' the Great Space between Han (漢) and Yi (夷) peoples.⁵⁶

Based on a study of Qing's official correspondence with different foreign states, Taiwanese scholar Liao Minshu (廖敏淑) supplemented the abovementioned models and further described the existence of three layers of relationships within the Sinocentric system: dependent states (屬國); equal states

51 Fairbank, *Chinese World Order* 1967 (n. 6), 72–73.

52 Perdue, Peter C. 'The Tenacious Tributary System'. *Journal of Contemporary China* 24(96) (2015), 1002–1014, 1007.

53 Liao, Minshu. 清代中國對外關係新論 (*A New Theory on Qing Dynasty's China Diplomatic Relations*) (Taipei: NCCU Press, 2017), 162.

54 See Takeshi, Hamashita. 近代中国の国際的契機—朝貢貿易システムと近代アジア (*Modern China's International Opportunity: The Tribute and Trade System and Modern Asia*) (Tokyo: University of Tokyo Press, 1990); Takeshi, Hamashita. 朝貢システムと近代アジア (*The Tribute System and Modern Asia*) (Tokyo: Iwanami Shoten, 2013).

55 Danjo, Hiroshi. '明清時代の天朝体制と華夷秩序' ('The System of Celestial Empire and Hua Yi Order in the Ming and Qing Periods'). 京都女子大学大学院文学研究科研究紀要. 史学編 12 (2013), 147–185, available at: <http://lib.kyoto-wu.ac.jp/opc/recordID/handle/11173/194> (last accessed on 16 January 2024).

56 Yang, Nianqun. "天命" 如何转移: 清朝 "大一统" 观再诠释 ('How "Mandate of Heaven" Transfers: Reinterpretation of Qing Dynasty's Concept of "Grand Unity"') 清华大学学报 (哲学社会科学版) 35(6) (2020), 21–46, 25–32; see also Yang, Nianqun. "天命" 如何转移: 清朝 "大一统" 观的形成与实践 ('How "Mandate of Heaven" Transfers: The Formation and Practice of Qing Dynasty's Concept of "Grand Unity"') (Shanghai: Shanghai People's Publishing House, 2022).

(與國); and mutually trading states (互市國). Dependent states referred to the tributaries and dependencies under Fairbank's model. Equal states referred to states who were formally recognized as equal to the Qing Empire, usually through the signing of a treaty. Mutually trading states referred to states who belonged to neither of the above categories, but nevertheless engaged in mutual trade with the Qing Empire through the informal relations between merchants.⁵⁷ Given the existence of multi-layer relationships between different polities and the Qing Empire, Liao similarly argued that Fairbank's normative framework overstated the importance of the First Opium War as a turning point. According to Liao, Britain was merely elevated from the status of a mutually trading state to an equal state following the two Opium Wars.⁵⁸ However, these new narrative frameworks remained largely unknown to scholars studying the history of international law, who continued to adopt Fairbank's model of 'Tributary System' in their analysis.⁵⁹ The current article adopted Liao's model and transcribed the three layers of relationships as three separate international legal personalities under 'the law of nations in East Asia'.

2.4 *The Westphalian Myth*

Before international law attained its modern form and content, territorial entities including free cities, the estates of imperial nobles, and ecclesiastical domain, co-existed with 'states' even after the Westphalian Peace.⁶⁰ Formal sovereign equality between different classes of rulers and entities remained largely mythical for a very long time after 1848. For example, around the same time period of Lord Macartney's mission in Peking, Britain also had no diplomatic legation in Vienna. This was because the Habsburg Kaiser refused to recognize the title of 'His Majesty' by the English King.⁶¹ As a result, the 'Law of Nations' that the Qing Empire encountered in the 19th century still resembled many medieval features, which are now commonly seen as pre-modern or non-Westphalian.

57 Liao, 新論 2017 (n. 53), 9, 82–84.

58 Ibid., 23–24.

59 See Onuma, Yasuaki. 'When Was the Law of International Society Born? – An Inquiry of the History of International Law from an Intercivilizational Perspective'. *Journal of the History of International Law* 2(1) (2000), 1–66; Kim, 'Making International Law' 2021 (n. 35); Oh, 'Misunderstood Historical Order' 2019 (n. 35).

60 Bodiford, Andrew. 'Cities in International Law: Reclaiming Rights as Global Custom'. *City University of New York Law Review* 23(1) (2020), 1–37, 16–20.

61 Horn, David B. *The British Diplomatic Service, 1689–1789* (London: Clarendon Press, 1961), 204–208.

The first anomaly relates to the existence of corporate sovereignty of trading companies, including *ius belli ac pacis* (the right to conduct war and conclude peace) and *ius legationis* (the right to receive and send ambassadors). Grewe argued that the trade companies served as a buffer to 'prevent the transfer of the concept of "state" to the non-European world',⁶² which was highly relevant in the present encounter. The second anomaly was the concept of divisible sovereignty. Arising out of the feudal conception, which saw territories as nothing but the private property of one or multiple sovereign(s),⁶³ the European practices of leasing territories through private contract⁶⁴ continued to exist in Europe until the late 19th century.⁶⁵ Eventually, private leases became an important legal method through which European powers establish certain rights in the designated 'treaty ports'.⁶⁶ Lastly, the medieval European practices of extraterritoriality and consular protection were asserted by European merchants in their dealing with the Qing Empire. Originated from the practices of the Hanseatic League in medieval Europe, consuls (*consules maris*) of the commercial league were posted to different commercial ports to protect their own merchants from extortion by the local rulers.⁶⁷ In the Qing-British encounter, this role was performed by the British Superintendent of Trade.

Unlike the traditional account describing the Sino-European encounter as the clash between the irreconcilable 'Tributary' and 'Westphalia' systems, there were some degrees of unity and diversity between the two. On one hand, the European law of diplomacy clearly conflicted with the Sinocentric worldview and its rituals, with the performance of 'kowtow' by European emissaries before the Son of Heaven being one of the many examples. On the other hand, the concept of divisible sovereignty, as evidenced in the presence of corporate sovereignty, territorial lease, and extraterritorial jurisdiction coincided with the practices of successive Celestial Empires in establishing 'foreign quarters' (藩坊),⁶⁸ where foreign traders were granted certain powers to self-govern according to their respective law and customs under a foreign headman (番長).⁶⁹ In this regard, Liao traced Qing Empire's practice of for-

62 Grewe, Wilhelm G. *The Epochs of International Law* (Berlin: de Gruyter, 2000), 302–304.

63 Strauss, Michael J. *Territorial Leasing in Diplomacy and International Law* (Leiden: Brill, 2015), 45, fn. 191 and 192.

64 Ibid., 54–58.

65 Ibid., 62–63, 70.

66 Ibid., 67–69.

67 Grewe, *Epochs* 2000 (n. 62), 59.

68 Chau, Ju-kua. *The Chinese and Arab Trade in the Twelfth and Thirteenth Centuries* (St Petersburg: Printing Office of the Imperial Academy of Sciences, 1912), 9–10.

69 Ibid., 16–17. Similar practices were also seen in the Silk Road cities, see Hansen, Valerie. 'Silk Road Cities and Their Co-Existing Legal Traditions', in *Handbook on International*

eign quarters (海舶) to that of the Sung Empire (市舶).⁷⁰ The separation of personal jurisdiction based on the civilizational differences of the subject, corresponded to the traditional Confucius belief that ‘the Majesty doesn’t govern the barbarians’ (王者不治夷狄). This cultural belief arguably provided the basis for the principle of separating personal jurisdiction over foreigners according to their different allegiances (各國各官各管各人).⁷¹ While sharing high similarity with the European concept of ‘extraterritoriality’, the creation of self-governing quarters within one’s territory, was gradually seen as incompatible with the Hobbesian understanding of sovereignty as absolute and indivisible. The following paragraphs demonstrate how the encounter between the Celestial Empires and different European states happened within this complex and dynamic relationship of unity and diversity.

3 Tian-Xia and the Barbarians

3.1 *Portuguese and Dutch as Tributaries* (屬國)

The Portuguese were the first group of Europeans who arrived and settled in the Chinese maritime frontier. In 1513 AD, Portuguese explorer Jorge Álvares arrived in Tamão, a land he claimed to have ‘discovered’ for the Portuguese crown.⁷² The Portuguese encroachment had been surprisingly tolerated until 1521. When the Portuguese began to fortify Tamão without the Emperor’s permission, the Ming Empire eventually decided to evict all the Portuguese.⁷³ Eventually, the Portuguese merchants acquired, through bribery, a lease of Macau, an island at the western side of the Canton River estuary.⁷⁴ Despite being acquired through bribery, the lease was eventually recognized by the Ming authority and the rent of 20,000 taels was even reduced to 500, in exchange for Portuguese assistance in suppressing piracy.⁷⁵ The payment of rent was arguably comparable to the annual tribute paid to the Emperors.⁷⁶ At the same time, the mandarins from Canton retained the right to collect

Law and Cities, eds. Helmut P. Aust and Janne E. Nijman (Cheltenham: Edward Elgar Publishing, 2021), 17–28.

⁷⁰ Liao, 新論 2017 (n. 53), 32, 94.

⁷¹ Ibid., ii, fn. 1.

⁷² Jin, Guoping, 西力東漸: 中葡早期接觸追昔 (*From the West to the East: Early Contact between China and Portugal*) (Macau: Macau Foundation, 2000), 21, fn. 11.

⁷³ Ibid., 1.

⁷⁴ Strauss, *Territorial Leasing* 2015 (n. 63), 58, fn. 262–264.

⁷⁵ Ibid., 59.

⁷⁶ Wang, Wensheng. *White Lotus Rebels and South China Pirates: Crisis and Reform in the Qing Empire* (Cambridge: Harvard University Press, 2014), 230.

customs in Macau.⁷⁷ In return, the Portuguese Jesuits were given exclusive access to the Ming Court. Here, the Portuguese failed to establish their own jurisdictional space within the Sinocentric order. Rather, the Portuguese presence was assimilated into the Sinocentric order, with Macau being the designated 'foreign port'. Arguably, the position of the Portuguese in Macau was more akin to tenants rather than colonizers.

The Dutch did not go anywhere further than the Portuguese. Following the conquest of Formosa (Taiwan) by exiled Ming loyalist Koxinga, the Dutch East India Company (VOC) sought Qing's assistance in retaking the island. The European law of diplomacy was brought to the attention of the Qing officials by the VOC employees from 1662 to 1690.⁷⁸ Regardless, it appeared that such assertion did not alter any custom or ritual as habitually imposed on the foreigners by the Qing Court. Historical records showed that the VOC representatives performed 'kowtow' in front of the Qing Emperor in 1667⁷⁹ whereas the 'Collected Statutes of Great Qing Empire' also put 'Holland' as one of Qing's many tributaries.⁸⁰ There was no doubt that the Dutch recognized their acquiescence implied submission, but for the employees of the VOC, 'profit not freedom of trade was their goal'.⁸¹ It could also explain why the differences in diplomatic ceremonies and rituals did not cause much trouble with the envoys of the VOC as compared to the British diplomatic missions in the 1830s.⁸²

3.2 *Russia as the Equal State* (與國)

Prior to the British, Russia was the only European state who successfully asserted its equal status with the Qing Empire. Mediated by Portuguese Jesuit Thomas Pereira, Qing and Russia signed the Treaty of Nerchinsk in 1689⁸³ to settle their territorial dispute over the Amur region. Pereira claimed that he had introduced to the Kangxi Emperor certain notions of 'European public law', such as sovereign equality and the meaning of signing treaties.⁸⁴ While it was unclear whether such principles were accepted by Emperor Kangxi himself

77 De Sousa, Trigo, *Regional Integration and Differentiation in a Globalizing China: The Blending of Government and Business in Post-Colonial Macau* (University of Amsterdam, PhD Thesis, 2009), 69, available at: <https://dare.uva.nl/search?identifier=bad60d4a-4d70-4368-9dbc-37eca7e3cdce> (last accessed on 16 January 2024).

78 Fairbank, *Chinese World Order* 1967 (n. 6), 248.

79 Ibid., 237.

80 Ibid., 11.

81 Ibid., 249.

82 Ibid.

83 Treaty of Nerchinsk, 7 September 1689, 18 CTS 503.

84 Sebes, Joseph and Pereira, Tomás. *The Jesuits and the Sino-Russian Treaty of Nerchinsk* (1689): *The Diary of Thomas Pereira* (Rome: Institutum Historicum SI, 1962), 115–120.

as 'international', the principle of sovereign equality was reflected in both the text and the formalities of the successive Qing-Russian treaties.⁸⁵

The Treaty of Nerchinsk of 1689 was the first international treaty signed by the Qing Empire. It was also the first treaty that delineated Qing's boundary with another state. In the subsequent Treaty of Kiakhta of 1727, Russia was further granted favorable terms of trade and the right to establish a religious mission with a language school in Peking.⁸⁶ Both treaties mutually granted the right to exercise extraterritoriality to Chinese consuls in the Russian trading ports and Russian consuls in Peking.⁸⁷ In 1729, Qing Empire dispatched the first ever diplomatic mission to Russia, in which the Qing envoy reportedly knelt before Tsarina Anna Ivanova.⁸⁸ Fletcher reported that the Qing envoys even performed 'kowtow' in front of the Russian Tsarina in Moscow (1731) and Saint Petersburg (1732).⁸⁹ Thus, before the Treaty of Nanking, Russia was the only state with whom the Qing Empire maintained treaty relations, the only 'European' state to which Qing sent diplomatic missions abroad, and the only foreign power that was granted religious, commercial, and educational privileges in the forbidden capital of Peking.⁹⁰ Russia was never listed as a tributary in any of the five collections of 'Collected Statutes of Great Qing Empire'.⁹¹ On this basis, Liao argued that Russia was the first equal state (與國) recognized by Qing.⁹² It is important to emphasize that neither the meaning of state in the term 'equal state' was equated with 'nation-state' in the Westphalian sense nor was the 'equal state' a conceptual equivalence to the modern understanding of 'sovereign equality' in international law. Qing's recognition of Russia as an 'equal state' was perhaps better translated as the acceptance of another empire as an equal force, instead of a confrontation with a nation-state. In this regard, Matten pointed out that the drawing of boundary in the Treaty of Nerchinsk 'both cartographically and physically (by the erection of boundary stones) did not mean that imperial China possessed a precise consciousness of homogenous and perennial territoriality'. He also added that the Treaty of Kiakhta of 1727 did not establish any boundary but rather a buffer zone between the

85 Kawashima, 'China' 2012 (n. 40), 457; Fairbank, *Chinese World Order* 1967 (n. 6), 224.

86 Hsü, Immanuel C. Y. 'Russia's Special Position in China during the Early Ch'ing Period.' *Slavic Review* 23(4) (1964), 688–700, 695.

87 Liao, 新論 2017 (n. 53), 317.

88 Ibid., 697.

89 Fairbank, *Chinese World Order* 1967 (n. 6), 224.

90 Hsü, 'Russia's' Special Position 1964 (n. 90), 689.

91 Ibid., 696.

92 Liao, 新論 2017 (n. 53), 82–91.

frontier of the two empires, which corresponded to the imperial logic of seeing land as 'space' instead of 'territory'.⁹³

Since the Russo-Qing encounter was essentially an encounter between two empires, Qing's concessions to Russia could be explained by the fact that Russian assistance was necessary for Qing to pacify the 'space' of Inner Asia,⁹⁴ a frontier which was seen by the Manchu conquerors as strategically more important than the coast.⁹⁵ Here, the Inner Asian nature of the Qing Empire must once again be re-emphasized. For instance, the Treaty of Nerchinsk was available in Latin, Russian, Mongolian, and Manchurian, but not in Chinese, the sole official language of communication in all tributary relationships.⁹⁶ Notwithstanding, the Inner Asian experiences of the Russo-Qing diplomacy still proved useful in Qing's future dealing with other European states arriving at the coast. This included the use of the self-referring term 'the Middle State' (中國 *Zhongguo*), and its translation as 'Sina/China',⁹⁷ even though Emperor Kangxi clearly had no intention to make it a precedent in 1689.⁹⁸ Although the two Russo-Qing treaties signified only the mutual recognition of two empires as equal force, the Treaty of Nerchinsk of 1689 still constituted the first partition of space by the Qing Empire, which laid the ultimate foundation in the future transformation of Qing, from a 'Celestial Empire' with unlimited reach in 'space' into an Empire (*Imperii Sinici*) limited by its frontiers, and eventually into the 'state of China' with a defined territory.

3.3 *Britain as a Mutually Trading State* (互市國)

Compared to Portugal and the Netherlands, Britain was a relative latecomer.⁹⁹ The East India Company (EIC) only started to trade in Canton from 1685.¹⁰⁰ From the 1720s onwards, the Qing Empire limited all the non-tributary mutual

93 Matten, *Postnational World* 2016 (n. 34), 64–65, 124.

94 Hsü, 'Russia's Special Position' 1964 (n. 89), 689.

95 Fairbank, *Chinese World Order* 1967 (n. 6), 82.

96 Frank, V. S. 'The Territorial Terms of the Sino-Russian Treaty of Nerchinsk, 1689'. *Pacific Historical Review* 16(3) (1947), 265–270, 265–269.

97 In the authentic Latin copy of the Treaty of Nerchinsk (n. 83), the Qing Emperor was referred to as *Sancti Sinarum Imperatoris*, the use of *Sinarum* was in genitive sense and *Imperatoris* was in Dative. It could mean 'Emperor of / over / in China'. In the Russian text, the Qing Empire is translated as Хинского государство (*Chinskogo gosudartsvo*), where 'Qing' (Хинского) was used as the modifier for 'state' (государство).

98 Hayton, *Invention of China* 2020 (n. 14), 20–21.

99 Tsang, Steve. *A Modern History of Hong Kong* (London: I. B. Tauris, 2007), 5.

100 Pritchard, Earl Hampton. *The Crucial Years of Early Anglo-Chinese Relations, 1750–1800* (London: Octagon Books, 1970), 114.

trades to the port of Canton.¹⁰¹ This was a result of the James Flint's incident (1759), in which an EIC employee broke Qing's protocol by directly complaining to Emperor Qianlong about corruption and extortion in Canton.¹⁰² Under the 'Canton System', all interactions with British merchants were delegated to the Hong merchants (行商).¹⁰³ Thus, any communication between British and Qing officials must pass through the Hong merchants as intermediaries. There was no direct official relationship because Britain was not yet 'recognized' as an 'equal' or as a 'dependent' state by Qing.¹⁰⁴ As a 'mutually trading' state, Britain could only establish commercial but not official diplomatic contact with the Qing Empire.

The Canton System was seen by Britain as a trade monopoly and responsible for its growing trade deficits.¹⁰⁵ Considering the inability of the EIC to change the unfavorable system in Canton, London decided to intervene by direct diplomacy.¹⁰⁶ In 1793, George Macartney, the former British ambassador to Russia, took charge of the first British diplomatic mission to Peking.¹⁰⁷ His instructions embodied nearly all the diplomatic objectives London sought to achieve through the two Opium Wars, which were in essence, to elevate Britain as an 'equal state' in the Sinocentric system:

- (1) To obtain one or two cession(s) of territories near to the tea and silk-producing and woolen-consuming areas, where English traders might reside, and where English jurisdiction might be exercised;
- (2) To negotiate, if possible, a commercial treaty for the opening of new ports under more favorable conditions than at Canton;
- (3) To establish a permanent diplomatic mission at Peking;
- (4) To abolish existing abuses and to obtain assurance that they would not be revived; and
- (5) To promote sales of British manufactures in China.¹⁰⁸

However, Macartney's mission soon went into conflict with the Qing officials on the issue of diplomatic rituals. While both the Dutch and the Portuguese

101 Kawashima, 'China' 2012 (n. 40), 457.

102 Liao, 新論 2017 (n. 53), 97–101.

103 Carroll, John M. *A Concise History of Hong Kong* (Lanham: Rowman & Littlefield Publishers, 2007) 11.

104 Liao, 新論 2017 (n. 53), 357.

105 Fairbank, John. K. and Merle Goldman. *China: A New History, Second Enlarged Edition* (Cambridge: Harvard University Press, 2006), 196.

106 Wang, *White Lotus* 2014 (n. 76), 234.

107 Ibid.

108 Pritchard, *Crucial Years* 1970 (n. 100), 307.

acquiesced to the ritual of 'kowtow', Earl Macartney insisted that he would only do so if a Qing official of the same rank performed kowtow before a portrait of King George III.¹⁰⁹ After the meeting, Emperor Qianlong sent a letter to the English King which, apart from thanking him for his 'tributes', denied all his requests.¹¹⁰ Qianlong explained that if such requests were granted, it would encourage other tributaries to follow, which would at the end, substantially alter the Sinocentric system.¹¹¹ In 1816, the second British mission, led by Earl Amherst, was denied audience to the Emperor for Amherst's refusal to perform 'kowtow'.¹¹² As a result, Britain remained a 'mutually trading state', which was not officially 'recognized' in the Sinocentric system.

Following the end of the EIC's monopoly, the change of diplomatic representation from the EIC to the Superintendent of Trade increased the importance of reciprocity even at the local level. Instead of relying on the monopoly of a trade company, the British commercial interests in Canton were jointly represented by the Chief Superintendent of Trade (夷目), a diplomatic official instructed by London.¹¹³ In 1833, First Superintendent Lord Napier attempted to communicate directly to Qing's Viceroy in Canton, Lu Kun (盧坤). Lu, however, rejected any direct correspondence from Napier, arguing that Napier should continue to communicate with him via the Hong merchants as intermediaries.¹¹⁴ Failing to obtain any concession from Lu, the use of force against the Qing Empire was recommended by Napier to Foreign Secretary, Lord Palmerston.¹¹⁵

The Anglo-Qing relation was further complicated by Britain's legally and morally problematic opium trade in Canton, a 'solution' proposed to cure Britain's trade deficit with the Qing Empire. When Peking decided to completely ban opium import in 1800, the decree was ignored by both the British government and the EIC. From Qing's perspective, while the decree was initially not strictly enforced, 'foreign opium' (洋烟) was eventually seen as

109 Peyrefitte, Alain. *The Immobile Empire* (New York: Vintage, 2013), 169–170.

110 Translated in Teng, Ssu-yü and John K. Fairbank. *China's Response to the West: A Documentary Survey, 1839–1923* (Cambridge: Harvard University Press, 1979), 19.

111 See Harrison, Henrietta. 'The Qianlong Emperor's Letter to George III and the Early-Twentieth-Century Origins of Ideas about Traditional China's Foreign Relations'. *American Historical Review* 122(3) (2017) 680–701.

112 Carroll, John M. 'The Amherst Embassy to China: A Whimper and a Bang'. *Journal of Imperial and Commonwealth History* 48(1) (2020), 15–38, 15.

113 Tsang, *History of Hong Kong* 2007 (n. 99), 7.

114 Liao, 新論 2017 (n. 53), 364.

115 Eitel, Ernest J. *Europe in China: The History of Hongkong from the Beginning to the Year 1882* (London: Luzac & Company, 1895), 56.

a problem disturbing the harmony and tranquility of the Celestial Empire.¹¹⁶ Emperor Daoguang eventually ordered a firm crackdown on all 'foreign opium'¹¹⁷ by appointing an anti-opium hard-liner, Lin Zexu, as the Special Imperial Commissioner in Canton.¹¹⁸ Upon assuming his role, Lin sent a 'letter of advice' to Queen Victoria, where he announced: 'Our Celestial Dynasty rules over and supervises the myriad states, and surely possesses unfathomable spiritual dignity. Yet the Emperor cannot bear to execute people without having first tried to reform them by instruction. ... The barbarian merchants of your country, if they wish to do business for a prolonged period, are required to obey our statutes respectfully and to cut off permanently the source of opium.'¹¹⁹

Carrai argued that Lin already developed an embryonic idea of sovereign rights (which Lin translated as 利 'Li', more akin to 'interests' or 'profits' in Chinese).¹²⁰ Carrai relied on the fact that Lin, in writing his letter, consulted the translated passages from Emerich de Vattel's *Le Droit des gens* (1758) with the help of US missionary doctor Peter Parker.¹²¹ Compared to the traditional understanding of divisible sovereignty by the Celestial Empires, Lin Zexu, under the influence of de Vattel's sovereigntist's stance,¹²² shared a surprisingly Hobbesian understanding of jurisdictional sovereignty. This conflicted with the goal of British Chief Superintendent Elliot, who sought to protect the opium traders with extraterritoriality. Eight days after his arrival in Canton, Lin ordered the foreign merchants to surrender all opium in their possession.¹²³ After confining all 350 foreigners to their factories and cutting off their supplies, the opium traders eventually gave up all the opium stocks,¹²⁴ before they were expelled from Canton.¹²⁵

The murder of a Chinese villager Lin Weixi by drunk British sailors in Kowloon and the subsequent attempt by Elliot to shield the suspects from

116 Polachek, James M. *The Inner Opium War* (Cambridge: Harvard University Asia Centre, 1991), 109–110.

117 *Ibid.*, 123–125.

118 *Ibid.*, 125.

119 Teng / Fairbank, *China's Response* 1979 (n. 110), 266–269.

120 Carrai, Maria A. *Sovereignty in China: A Genealogy of a Concept since 1840* (Cambridge: Cambridge University Press, 2019), 49–50.

121 *Ibid.*, 48–49.

122 For Vattel's understanding of sovereignty, see Beaulac, Stephane. 'Emer de Vattel and the Externalization of Sovereignty'. *Journal of the History of International Law* 5(2) (2003), 237–292.

123 Tsang, *History of Hong Kong* 2007 (n. 99), 7.

124 *Ibid.*

125 *Ibid.*, 10–11.

Qing's jurisdiction by trying them on a British flagship,¹²⁶ were arguably adding insult to injury. From the perspective of modern Chinese nationalists, Eliot's action would be seen as the first exercise of 'extraterritoriality' which encroached upon Chinese absolute and indivisible jurisdictional sovereignty.¹²⁷ Liao nonetheless stated that such a view was arguably modern anachronism. She argued that extraterritorial jurisdiction was a privilege long granted to recognized states. In the absence of Britain's recognition as either an 'equal state', which Qing withheld, or as a 'dependent state', which Britain refused to accept, the status of British officials was not recognized. In the absence of any competent official governing British subjects, Qing's law should by default apply to 'non-recognized' barbarians based on territorial jurisdiction.¹²⁸ This is the Sinocentric version of Lin Zexu's arguments.

If the Qing-British encounter could be described as a conflict between 'non-Westphalia's' and 'Westphalia's' international law, by insisting on absolute and indivisible sovereignty, Lin Zexu's letter represented a surprisingly 'Westphalian' understanding of territorial-based sovereignty as an exclusive form of political authority.¹²⁹ This new understanding was based on the logic of European nation-states and would be inherited by Qing's modern successors in denouncing extraterritoriality as a violation of Chinese sovereignty.¹³⁰ Ironically, it was Britain, a European power, who argued vividly in favor of the medieval concept of 'divisible sovereignty' and special privileges of the *consules maris* in the port of Canton. The fact that Lin Zexu pursued a more Westphalian understanding of sovereignty than Britain gave rise to a completely reversed and switched picture as traditionally depicted: It was not the non-compatibility of 'the Tributary System' with the Westphalian system that led to the First Opium War. Here, what we witnessed was something more complicated: Britain attempted to achieve formal equality in the Westphalian sense, but without acknowledging Qing's complete and indivisible sovereignty in its territories as a right pertaining to all 'nation states'. Rather, Britain wished

126 Hanes, Travis W. and Frank Sanello. *The Opium Wars: The Addiction of One Empire and the Corruption of Another* (Naperville: Sourcebooks, 2004), 61–62.

127 See also, Neff, Stephen C. *Justice among Nations: A History of International Law* (Cambridge: Harvard University Press, 2014), 317; Peters, Anne. 'Unequal Treaties', in *Max Planck Encyclopedia of Public International Law*, ed. Rüdiger Wolfrum (Oxford: Oxford University Press, 2018), 1, available at: <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1495> (last accessed on 16 January 2024).

128 Liao, 新論 2017 (n. 53), 378–379.

129 See Matten, *Postnational World* 2016 (n. 34), 66–67.

130 See Coleman, Andrew and Jackson N. Maogoto. "Westphalian" Meets "Eastphalian" Sovereignty: China in a Globalized World'. *Asian Journal of International Law* 3(2) (2013), 237–269.

to preserve and widen its spatial extension of power through the non-exclusive form of authority, as recognized in the Sinocentric practices of 'foreign quarters' and 'extraterritoriality'. Thus, the diplomatic objective of Britain was more accurately described as obtaining the status of an 'equal state' in the Sinocentric system. Reversely, Qing Empire's objective was to preserve the existing system of Sino-British mutual trade, in which the Qing Empire could keep the status of Britain as 'unrecognized' and exert criminal jurisdiction over British subjects, albeit justifying it in the Westphalian legal languages of 'territorial sovereignty'. In other words, both parties wished to 'reform' instead of 'rebuild' the Sinocentric system in opposite directions by invoking Westphalian legal concepts to their own benefit.

4 From the Celestial Empire to the State of China

4.1 *One Treaty Two Orders: A Re-Visit of the Treaty of Nanking*

Without a declaration of war, Britain justified the armed expedition as 'armed reprisals' against the incarceration of British nationals in their factories and the expropriation of 'opium' by force. Following the success of the British military expedition in the Yangtze River, the Qing Empire was forced to negotiate for peace with the British outside Nanking.¹³¹ On 29 August 1842, the Treaty of Nanking (南京條約) was signed between Britain and the Qing Empire.¹³² Two years later, the United States (US) further concluded the Treaty of Wangxia (望廈條約) with the Qing Empire,¹³³ in which the US was conferred the same privileges and benefits enjoyed by all other western states, including Britain through the Most Favored Nation (MFN) clause. It further provoked France and Sweden to conclude two separate treaties, the Treaty of Whampoa (1844) and the Treaty of Canton (1847), which contained the MFN clause.¹³⁴ Also known as 一體均沾 ('one body equal benefits') in Chinese, the MFN clause carried important significance: While the MFN was voluntarily offered by the Qing to dilute the gains of the British, it eventually became 'a tool for relegating systematically the Qing in an inferior position';¹³⁵ Britain became a vanguard,

131 Welsh, Frank. *A History of Hong Kong* (New York: HarperCollins, 1997), 122.

132 Treaty between China and Great Britain, 29 August 1842, 93 CTS 465.

133 Treaty of Peace, Amity, and Commerce Between the United States of America and the Chinese Empire, 3 July 1844, 8 Stat 592.

134 Treaty of Friendship, Commerce and Navigation between China and France, 24 October 1844, 97 CTS 375; Treaty of Peace, Friendship and Commerce between China and Sweden-Norway, 20 March 1847, 100 CTS 445.

135 See Carrai, *Sovereignty in China* 2019 (n. 120), 51.

who fought for the status of 'equal state' not only for itself but for every western state, including those who clearly had no capacity to wage war in the Far East, such as Sweden. At the same time, it also collectivized the interest of Britain as becoming the interest of 'the West', as the dichotomic counterpart of 'China'. It was perhaps from this institutional angle, the Treaty of Nanking began to be considered a turning point between 'the Treaty System' and 'The Tributary System'. This corresponded to the charge that the MFN clause was a typical provision in an 'unequal treaty'.¹³⁶ The problem with this understanding lies in its exclusive focus on the institutional significance of the MFN clause, a provision that came from a subsequent treaty between the US and the Qing Empire.

The Treaty of Nanking consisted of thirteen articles, with two versions in English and Chinese. The Treaty itself did not specify which language shall prevail in case of inconsistency. That allowed the co-existence of two depictions of the First Opium War, and in fact, two contrasting world views and ideologies, to co-exist in one treaty. For instance, the English version of the preamble stated that 'Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, and His Majesty the Emperor of China, being desirous of putting an end to the misunderstandings and consequent hostilities which have arisen between the two Countries, have resolved to conclude a Treaty for that purpose.' War was not specifically mentioned. In the Chinese text, 'the desirous of putting an end to the misunderstandings and consequent hostilities', was translated as 'desirous of explaining the recent showing of discord and putting an end to the provocation' (欲以近來不和之端解釋，息止肇衅). Instead of highlighting the misunderstandings between both 'states' and the need to put an end to the 'hostilities' as in the English text, the Chinese text referred to 'discord' and 'provocation' as the disturbances of harmony. Any misunderstanding between the two sovereigns was negated but there were 'showing of discord' that had to be explained between the two sovereigns. Here, the Chinese text of the preamble depicted a picture, in which the two sovereigns came together to resolve a dispute between their subjects and to restore the tranquility and harmony of the world.

Regarding the designation of the two sovereigns, the Emperor of the Da Qing in the Chinese text (大清大皇帝) was translated as the Emperor of 'China' in English, whereas the designation of 'the Queen' was replaced by the term, 'Monarch' (君主), in Chinese. The introduction of 'Monarch' could also be part of the British attempt to achieve equality in title, as the King (國王) or Queen (女王) were both seen as inferior in rank compared to the Emperor/Kaiser/Tsar (皇帝). In the Chinese text, the Middle State (中國) was used interchangeably

¹³⁶ Peters, 'Unequal Treaties' 2018 (n. 127), 17–18.

as 'the Chinese Empire'. For instance, 'in any part of the Chinese Empire' in article 8 was translated as 'anywhere administered by the Middle State' (中國所管轄各地方). This was evidence of the continuing evolutive process of the transformation from the Qing Empire to the Middle State in Chinese, and the state of China/Sina/Chine in foreign languages.

The English version of article 1 of the Treaty stated: 'There shall henceforward be Peace and Friendship between Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, and His Majesty the Emperor of China, and between their respective Subjects, who shall enjoy full security and protection for their persons and property within the dominions of the other.' The Chinese translation was relatively accurate except the Chinese text only mentioned 'eternal peace' between two sovereigns and 'friendship' between the two peoples: 嗣後大清大皇帝、大英君主永存平和，所屬人民華英彼此友睦，各住他國者必受該國保佑身家全安。

Article 2 stated that 'His Majesty the Emperor of China agrees, that British Subjects, with their families and establishments, shall be allowed to reside, for the purpose of carrying on their mercantile pursuits, without molestation or restraint, at the cities and towns of Canton, Amoy, Foochowfoo, Ningpo, and Shanghai.' The word 'agrees' in English was, however, translated as 'graciously allows' (恩准) in Chinese, which signified a certain degree of delegation from the Emperor himself, which reinforced the supreme position of the Emperor within the Sinocentric system. Using the languages of the Sinocentric system, the Treaty of Nanking created five 'foreign quarters' in Canton, Amoy, Foochowfoo, Ningpo, and Shanghai.

Article 2 of the treaty explicitly recognized the official status of British Superintendents, or Consular Officers, and their rights to reside at the 'foreign quarters' and to be the medium of communication between the Chinese Authorities.' The recognition of British officials conferred them the right to exercise extraterritoriality over British subjects residing in the five treaty ports. While acknowledging the grant of extraterritoriality is non-reciprocal, Liao argued that the Qing Empire did not foresee the possibility of Chinese residing in Western Europe¹³⁷ at a time when emigrating oversea was still a crime punishable by death under Qing's law.¹³⁸ This contrasted with Russia, with whom Qing shared a long common border. In the relatively equal Treaty of Nerchinsk, it was stated that the Russian consuls shall have personal jurisdiction over Russian in China, whereas Chinese consuls shall have personal jurisdiction

137 Liao, 新論 2017 (n. 53), 381–383.

138 Skeldon, Ronald. 'Migration from China'. *Journal of International Affairs* 49(2) (1996), 434–455, 435.

over Chinese in Russia.¹³⁹ Similarly, in the 1871 Sino-Japanese Treaty, a treaty whose terms were dictated by the Qing Empire, extraterritoriality was also mutually granted.¹⁴⁰ These examples weakened the arguments that extraterritorial jurisdiction was a feature of capitulation or 'unequal treaties' imposed by the West.¹⁴¹

Article 11 further provided perfect equality in communication between the British High Officers and their Chinese counterparts, under the term 'Communication' (照會), whereas the Subordinate British Officers and Chinese High Officers in the Provinces would address the officials in the Capital under the term 'Statement' (申陳), and the officials in the Provinces under the term 'Declaration' (簡行). However, merchants on both sides were still required to use the term 'Representation' (稟明) when addressing the officials of respective governments. Liao argued that the different layers of official correspondence reflected the official hierarchy of the Sinocentric system and such terms must be included by the Chinese, because the British only called for the official equality of all officials from both sides.¹⁴² From this perspective, while the Treaty conferred official recognition to British officials, the Sinocentric view of hierarchy was also reaffirmed in official communications.

In addition to the creation of 'foreign quarters', where the foreign traders could reside and trade, article 3 required the Qing Empire to 'cede' the Island of Hong Kong to Britain, which had the effect of forfeiting Qing's jurisdiction in Hong Kong completely: 'It being obviously necessary and desirable, that British Subjects should have some Port whereat they may careen and refit their Ships, when required, and Keep Stores for that purpose, His Majesty the Emperor of China cedes to Her Majesty the Queen of Great Britain, the Island of Hong-Kong, to be possessed in perpetuity by Her Britannic Majesty, Her Heirs, and Successors, and to be governed by such Laws and Regulations as Her Majesty the Queen of Great Britain, shall see fit to direct.' Here, the concept of cession, which describes the assignment of territory between two formally equal states, was non-existent in the Chinese language. Under the Sinocentric worldview, there is no sovereign who is equal to the Son of Heaven. As the Son of Heaven has the sole mandate to rule over all land underneath Heaven, it was unimaginable that he would alienate a part of his dominion in favor of another 'equal' sovereign. Thus, the alienation of Hong Kong Island had a different nature than the delineation of boundaries as in the Treaty of

139 Liao, 新論 2017 (n. 53), 381.

140 Ibid., 381–383.

141 Anghe, *Imperialism* 2005 (n. 4), 85; Wang, 'International law in China' 1990 (n. 9), 195.

142 Liao, 新論 2017 (n. 53), 366–367.

Nerchinsk, in which the word 'belongs to' could be used with reference to the natural boundaries identified.¹⁴³ To accommodate the non-existence of such concept in the Sinocentric world view, 'cession' was translated into 'imperial grant' between the Emperor and the British Monarch,¹⁴⁴ as could be seen from the Chinese version. There, article 3 stated that the 'Great Emperor *permits* the Island of Hong Kong *to be granted* to the Great British Monarch' (大皇帝准將香港一島給予大英君主).¹⁴⁵ From the reading of the Chinese text, the differences between the nature of creating the five 'foreign quarters' and the 'giving of Hong Kong' were only highlighted in the words describing the nature of British presence. In article 2, to reside was translated as 'sojourn' (寄居) in Chinese, indicating a non-permanent nature of the stay. In article 3, the British monarch was allowed to 'keep and govern [the Hong Kong Island] *for a very long time*' (常遠據守主掌). However, as compared to the original meaning of cession, which was later translated as 割讓 in Chinese, the Chinese version of article III 'lacks the sense of irrevocable alienation of the kind which would have been found in an ordinary Chinese contract for the sale of land of that period.'¹⁴⁶

Different from peace treaties as signed between 'civilized' European states in the 19th century, it is acknowledged that the Treaty of Nanking had two unusual features.¹⁴⁷ First, while it was common for victorious powers to impose heavy indemnities to punish the vanquished following the 19th century's 'legal wars',¹⁴⁸ article 6 of the Treaty of Nanking required the Qing Emperor to account of the Expenses incurred resulted from the British Expedition 'to demand and obtain redress for the violent and unjust Proceedings of the Chinese High Authorities.' The British were, however, not required to compensate for the destruction and death caused to the Qing Empire.¹⁴⁹ In contrast with 'indemnifications' in 'legal wars', which were not based on any attribution

143 See article I in Treaty of Nerchinsk (n. 83).

144 Dicks, Anthony. 'Treaty, Grant, Usage or Sufferance? Some Legal Aspects of the Status of Hong Kong'. *China Quarterly* 95 (1983), 427–455, 445.

145 Ibid.

146 Ibid.

147 Neff, Stephen C. *War and the Law of Nations: A General History* (Cambridge: Cambridge University Press, 2005), 230.

148 Tomuschat, Christian. 'The 1871 Peace Treaty between France and Germany and the 1919 Peace Treaty of Versailles', in *Peace Treaties and International Law in European History: From the Late Middle Ages to World War One*, ed. Randall Lesaffer (Cambridge: Cambridge University Press, 2004), 382–396, 391.

149 Neff, *War and the Law of Nations* 2005 (n. 147), 239; Fisch, Jörg. *Krieg und Frieden im Friedensvertrag. Eine universalgeschichtliche Studie über Grundlagen und Formelemente des Friedensschlusses* (Stuttgart: Klett-Cotta, 1979), 187.

or acceptance of unilateral responsibility of the war,¹⁵⁰ the account for military expenses fell under the language of 'just war', where a distinction was drawn between an unjust and just belligerent.¹⁵¹ In other words, by accepting article 6 of the Treaty of Nanking, the Qing Empire implicitly conceded to British *justa causa* and thus forfeited its own status as just belligerent. In this regard, the Treaty of Nanking was one of the rare instances in which the logic of 'just war' applied to the reparations prior to article 231 of the Treaty of Versailles in 1919.¹⁵² The utilization of 'just war' languages in the Treaty arguably related to the nature of the use of force, which was termed by Britain as an armed reprisal, a remnant from the 'just war' era. It corresponded to the fact that no declaration of war had ever been issued by Britain against the Qing Empire.¹⁵³ Second, article 10 of the Treaty of Nanking (and its Supplementary Treaty) fixed a tariff on the Qing Empire. Treaties signed between European states rarely involved the fixation of a certain tariff, which was widely considered as one of the sovereign affairs. A rare exception was the Strangeford Treaty of 1810 between Britain and the Portuguese government-in-exile in Brazil, in which Portugal agreed to a tariff favorable to Britain in exchange for the protection of Brazil by the Royal Navy during the Napoleonic War. The Strangeford Treaty was, however, widely viewed as putting Brazil in an inferior position.¹⁵⁴

However, these deviations were carefully masked and concealed by the Qing's mandarins when drafting the Chinese text of the Treaty of Nanking by downplaying the hostilities between Qing and Britain as a regional dispute between the British and the Viceroy of Canton, as arbitrated by the Qing Emperor. In the Chinese version of article 6 of the Treaty of Nanking, the term 'violent and unjust Proceedings of the Chinese High Authorities' was creatively translated as 'the unjust and forceful action by the Imperial Commissioner' (欽命大臣[...] 不公強辦), whereas the term 'to demand and obtain redress' was translated closer to a peasant's petition or appeal for reason and justice (討求伸理) through the sending of soldiers (致須撥發軍士). The comparison of 'appeal' was important here as an equivalent was arguably drawn between

150 Tomuschat, '1871 Peace Treaty' 2004 (n. 148), 391.

151 Lesaffer, Randall. 'Aggression before Versailles', *European Journal of International Law* 29(3) (2018), 773–808, 789; Neff, *War and the Law of Nations* 2005 (n. 139), 100, 115, 118.

152 See Fisch, *Krieg und Frieden* 1979 (n. 149), 208–211; Lesaffer, 'Aggression before Versailles' 2005 (n. 151), 789 (re Second Treaty of Versailles in 1757), 803–805 (re the major debates during the Paris Peace Conference on the question of Germany's full reparation).

153 Neff, *War and the Law of Nations* 2005 (n. 139), 103–104, 108 (re the requirement for the declaration of war), 226 (re general reprisals), 230 (re First Opium War).

154 DeWitt, John W. *Early Globalization and the Economic Development of the United States and Brazil* (Westport: Praeger, 2002), 96–98.

the British military expedition in 1842 and the 'direct complaint' by James Flint to Emperor Qianlong in 1759, which both essentially were complaints against the functioning of the 'Canton system'. Also, the 'account for the Expenses incurred' in English was termed 'the Great Emperor allows as compensation' (大皇帝准為償補) in Chinese.

This idea of 'legal war' had its foundation in the 19th century's idea of legal positivism and it presupposes sovereign equality, both of which were absent in the Sinocentric system. Compared to the English version, the Chinese text resembled rather a judgment rendered, in which the Emperor sits as the supreme arbitrator and heard the 'appeal' from the British against the 'unjust and forceful action by the Imperial Commissioner'. As a result, he 'allowed' a certain amount of compensation to be paid for the cost incurred by the British in sending the soldiers before the Emperor. For the fixing of tariff in article 10, the Chinese text of article 10 also omitted the part that 'the Emperor of China agrees' to establish a fair and regular Tariff of Export and Import Customs and other Dues. Rather, the Chinese text stated, with passive voice, that such tariff 'shall be negotiated on a fair and just basis' (均宜秉公議定). In this regard, the Chinese text depicted a vision in which the Emperor was not forced to agree on anything. Rather, he pronounced a general principle of 'fairness and justice', over which his subordinates shall follow in negotiating the tariff with the British. Notwithstanding its deviation from the peace treaties concluded between two 'civilized' European states engaged in a 'legal war', the Chinese text of the Treaty of Nanking continued to defend the Sinocentric order by interpreting the hostility as one between the disgruntled 'barbarians' and the Canton officers, in which the Qing Emperor served as the supreme and impartial arbitrator. This was partly consistent with the British interpretation, which viewed the war as an armed reprisal against the violation of British nationals by 'the Chinese High Authorities'. The only difference was, under the Sinocentric worldview, the Qing Emperor could neither be implicated in the 'wrongdoing' of his subordinates nor could he be involved in a 'legal war' waged by the British Monarch.

Through a careful comparison between the Chinese and the English text of the Treaty of Nanking, it was clear that both languages depicted two very different accounts of the Opium War. The English text sought to emphasize that Britain had the *justa causa* in resorting to armed reprisals against the violation of British nationals by the Chinese High Authorities, after which, the 'Chinese Emperor' *agreed* to a set of conditions proposed by Britain (emphasis added). The Chinese version, however, described a series of 'discord' (不和) and 'provocation' (肇衅) which had to be resolved by the Emperor, following British 'armed appeal' (撥發軍士討求伸理) against the Imperial Commissioner

(欽命大臣). In this regard, the Qing Emperor remained uninvolved and innocent. As the supreme arbitrator of the Sinocentric world, the Emperor rendered a judgment through the Treaty of Nanking, in which he 'graciously allowed' (恩准), 'agreed to give' (給予), and 'granted' (准) concessions to the British. Neither version of the Treaty mentioned anything as to 'opium', being the subject from which the dispute arose. From the Qing's perspective, the Treaty of Nanking was a piece of document to restore the Sinocentric order instead of being its death certificate. Interestingly, the Treaty of Nanking did not provide which language would prevail in case of discrepancy.¹⁵⁵ There was no obvious explanation why the Treaty of Nanking contained no provision determining which language version would prevail in case of inconsistency. Guo Weidong (郭卫东) argued that the missing 'authentic' clause was a result of gross negligence of the British negotiators, as they completely ignored the explicit instruction of Lord Palmerston to ensure that the English text of the peace treaty should be treated as authentic.¹⁵⁶ The result of this mistake allowed the Qing Empire to utilize its advantage in the Chinese language to re-define the concessions 'granted' by the Emperor and re-interpret the First Opium War in the languages consistent with the Sinocentric system.

4.2 *An Experience from Kokand Rebellion in 1830*

The Qing Empire learned from its experience in governing the Inner Asian frontier that proper concessions granted to the 'disgruntled barbarians' were necessary to maintain and reaffirm the Sinocentric system. In this regard, Herrick and Fletcher both noticed the striking similarities between the Treaty of Nanking of 1842 and Qing's concessions with the Khanate of Kokand in the 1830s, 10 years before the First Opium War.¹⁵⁷ Similar to the position of Great Britain in the maritime world, the Khanate of Kokand was a superior trading and military power that dominated the caravan trade in the steppe,¹⁵⁸ who equally did not see itself as a mere 'vassal state' of Qing.¹⁵⁹ In order to punish Kokand for harboring Muslim rebels, the Qing Empire arrested and expelled all Korkandian traders and confiscated their goods in 1828, similar to Lin's

155 Dicks, 'Treaty, Grant' 1983 (n. 147), 442.

156 Guo, Weidong. '晚清中外条约作准文本探析' (An Analysis of the Authorized Text of Sino-Foreign Treaties in the Late Qing Dynasty). *历史研究 (Historical Research)* 5 (2019), 61–74, 65–66.

157 Herrick, 'Two Systems' 2014 (n. 5), 701–702; Fletcher, Joseph. 'The Heyday of the Ch'ing Order in Mongolia, Sinkiang and Tibet', in *The Cambridge History of China*, ed. John K. Fairbank (Cambridge: Cambridge University Press, 1978), 351–408, 383.

158 Fletcher, 'Ch'ing Order' 1978 (n. 157), 351, 375.

159 Ibid., 367.

action in Canton against Elliot, who harbored the English opium traders.¹⁶⁰ In response, Kokand raided Yarkand and Kashgar in 1830,¹⁶¹ similar to British military expeditions against the Canton and Yangtze estuaries. Having failed to contain the Kokand incursion, the Qing Empire offered Kokand in 1832 a resumption of trade with the following term:¹⁶² (1) creation of extraterritoriality, (2) an indemnity to a foreign state, (3) negotiated tariff and direct foreign contact with the customs collectors, (4) the MFN treatment; (5) the freedom to trade with all comers without monopoly and (6) the opening of treaty ports.¹⁶³ Using Liao's analytical framework, this concession symbolized the elevation of Kokand from 'mutual trading state' to 'equal state'.¹⁶⁴ Coincidentally, ever since the course of the First Opium War turned unfavorable, Qing replaced most of the coastal commanders with those who had experienced in the Inner Asian affairs. The replacement of Lin Zexu with Yang Fang (楊芳), a veteran commander during the Kokand Rebellion, corresponded to the parallel being drawn.¹⁶⁵

The Qing court's decisions to 'pacify' the British and Kokandian were consistent with its Sinocentric worldview. In the Sinocentric system, the Son of Heaven was not merely the monarch of one state but the supreme ruler of the civilized world. His legitimacy to rule came directly from the Mandate of Heaven, which carried an inherent moral appeal including graciousness and impartiality. As long as the disgruntled barbarians did not attempt to challenge Emperor's legitimacy, they were seen as merely misguided and had the right to appeal to the Emperor for the mistreatment they suffered at the hands of local officials. Given that it was part of the Mandate of Heaven to preserve peace and order amongst all civilized subjects, the Emperor had a moral obligation of impartiality.¹⁶⁶ For example, the Qing Emperor had intervened in the Tay Son rebellion in Vietnam and decided to recognize the rebel king on the ground that the Le dynasty had lost its mandate of Heaven.¹⁶⁷

At the same time, local officials shared the responsibility of preserving the harmony of the imperial realm by pacifying the barbarians locally. However, if their actions escalated local incidents and thereby directly threatened the harmony and tranquility of Tianxia, such officials would be seen as 'incumbent'

160 Ibid., 367–368.

161 Ibid., 368–370.

162 Ibid., 377–379.

163 Ibid., 383–384.

164 Liao, 新論 2017 (n. 53), 384–389.

165 Fletcher, 'Ch'ing Order' 1978 (n. 157), 383.

166 Fairbank, *Chinese World Order* 1967 (n. 6), 260.

167 Ibid., 167, 172–173.

and must be punished. The discharge and forced exile of Lin Zexu and Qishan thus related to their failures to contain the British in Canton and let the situation escalate to the Yangtze River. In contrast to Lin's iron-fist approach, being gentle with distant people and lenient to barbarians is in line with the practices of the Celestial Empire, and this is also consistent with the image of the Emperor being benevolent and gracious not only to his subjects but also everyone who lives 'underneath the Heaven'.

Unlike what Fairbank has claimed, the Treaty of Nanking and the opening of five ports arguably did not mark the turning point for the transition from the Tributary System to the Treaties System. On the other hand, the impact brought by the Europeans was carefully contained in the treaty ports, where tariffs and customs were still collected by the Qing's mandarins.¹⁶⁸ In this sense, the 'granting' of 'treaty ports' was comparable to 'foreign quarters', a common practice of 'mutual trade'. Thus, the signing of the Treaty of Nanking merely elevated the status of Great Britain from a state of mutual trade' (互市國) to an equal state (與國), a state which enjoyed a formal diplomatic relationship with the Qing Empire.¹⁶⁹ This status was later obtained by France, the United States, and Sweden through the MFN clause. The existence of formal diplomatic recognition enjoyed by the Western states was, however, not comparable to that of Russia, as official contacts between the West and the Qing Empire remained provincial and were limited to the five designated treaty ports. Finally, compared to Lin's previous utilization of the European concept of sovereignty against the British, the granting of extraterritorial jurisdictions to five designated 'treaty ports' represented a reaffirmation to the traditional practices of 'foreign quarters'.¹⁷⁰ It was thus a victory of the Emperor's leniency toward the barbarians over the stubbornness of local official. Most importantly, nothing from the Treaty indicated any retreat from the Emperor's previous decree declaring opium as illegal. There was equally no evidence showing that the Emperor saw the treaty as null and void for being 'unequal'. On the contrary, Qing's historical records showed clearly that the Emperor ratified the Treaty in the best of faith and even personally ensured his subordinates followed the Treaty's provisions.¹⁷¹

From 1842 to 1856, two international world orders co-existed under the system of 'the mutual trade of five ports' (五口通商). However, the unity between the two systems was again threatened by those who sought to reform the other

168 Welsh, *History of Hong Kong* 1997 (n. 131), 127.

169 Liao, 新論 2017 (n. 53), 384–389.

170 Ibid., 380–382.

171 Welsh, *History of Hong Kong* 1997 (n. 131), 175.

system to their own ends. On one hand, the lack of explicit legalization of the opium trade dissatisfied many opium traders. The Western officials were also not contended with the existing channel of diplomatic communication. For example, Britain remained jealous and suspicious toward Russia's permanent presence in Peking.¹⁷² On the other hand, notwithstanding the official recognition of the 'equal state' status, Qing officials continued to view Westerners as 'barbarians' (夷) and addressed them as such in official documentations.¹⁷³ To reinforce the distinction between the 'civilized' and the 'barbarians', Qing officials remained stringent in limiting their contact with foreigners in the treaty ports. Relying on the discrepancy of translation in article 2 of the Treaty, the Viceroy of Canton only permitted Westerners to access the 'port' (港口) of Canton, instead of the 'cities and towns' (better translated as '市鎮' in Chinese) as per the English text.¹⁷⁴ That effectively prevented the British Superintendent of Trade¹⁷⁵ to have direct access to Canton officials based in the city.¹⁷⁶ This policy, to a certain, restored the old Canton system, in which official contacts were limited. In the absence of diplomatic mission in Peking, the Western states cannot circumvent the Canton official and 'appeal' directly to the Emperor.¹⁷⁷ The Treaty of Nanking, unlike the French and American counterparts, made no provision for future revisions.¹⁷⁸ As a result of all these factors, Britain was increasingly dissatisfied with its 'place' being offered by the Qing Emperor in the Sinocentric system, which eventually led to the Second Opium War.¹⁷⁹

4.3 *The Convention of Peking and the Capitulation of the Sinocentric System*

In April 1858, the Anglo-French forces forced the Qing Empire to sign the Treaty of Tien-tsin¹⁸⁰ with Britain, France, the US, and Russia in June 1858.¹⁸¹ There, the Qing Empire agreed to open up ten more ports to foreign traders,¹⁸² to

172 Kwok, Ting-yi. 近代中國史綱 (*An Outline of Modern Chinese History*) (Hong Kong: Chinese University of Hong Kong Press, 1979), 119.

173 Liao, 新論 2017 (n. 53), 371.

174 Tsang, *History of Hong Kong* 2007 (n. 99), 15.

175 Ibid., 29; Welsh, *History of Hong Kong* 1997 (n. 131), 203.

176 Tsang, *History of Hong Kong* 2007 (n. 99), 15.

177 Ibid.

178 Ibid., 28.

179 Ibid., 29.

180 Peace Treaty between the Queen of Great Britain and the Emperor of China, 26 June 1858, 119 CTS 163 ('Treaty of Tientsin').

181 Tsang, *History of Hong Kong* 2007 (n. 99), 33.

182 Carroll, *History of Hong Kong* 2007 (n. 103), 47.

abolish the use of the word 'barbarians' (夷) in reference to Europeans in official documentation,¹⁸³ and to grant the access of the entire Empire to the missionaries and the right of the four states to station permanent diplomatic legations in Peking.¹⁸⁴ By imposing a tariff on opium, the Supplementary Treaty of Tien-tsin also implicitly legalized opium trade.¹⁸⁵ While the Treaty of Tien-tsin was the second peace treaty signed by the Qing Empire, the treaty merely increased the extent of concessions granted in the Treaty of Nanking. The only revolutionary part of the treaty was the granting of entries to Westerners in Peking. Nonetheless, the Sinocentric worldview remained entrenched in the Qing Court and the change procured by the treaty was yet to be internalized. In his submissions to the Emperor, Guiliang, one of the signatories, claimed that '[t]he treaties of peace with Britain and France cannot be taken as real. These few sheets of article are simply a means to get troops and warships to leave the coast.'¹⁸⁶ Seeing Peking as the final fortress of the Sinocentric order, Emperor Xianfeng refused to let the Anglo-French ratification envoys enter Peking,¹⁸⁷ which violated the final article of the treaty.¹⁸⁸ The forceful landing of the armed convoy reignited the war. Following the breaking down of negotiation, Harry Parkes and a delegation of 39 men were captured and tortured by the Qing authorities, with 19 of them tortured to death.¹⁸⁹ In response, Lord Elgin decided to burn down the Emperor's Summer Place (圓明園), where the envoys were once imprisoned,¹⁹⁰ as a 'solemn act of retribution'.¹⁹¹ Qing's violation of the Convention of Tien-tsin and *jus in bello* during the Second Opium War strengthened the western stereotype that 'China' was an 'uncivilized state', who needed to be educated by the 'civilized' European.

With the Capital occupied and the Emperor forced into exile, the Qing Court had no other choice but to accept whatever terms proposed by Britain.¹⁹² Due to the unequal standings of the two negotiating parties and the conviction that the Qing Empire was a 'barbarian nation' who 'conducted warfare

183 Treaty of Tientsin (n. 180), art. LI.

184 Tsang, *History of Hong Kong* 2007 (n. 99), 33.

185 Carroll, *History of Hong Kong* 2007 (n. 103), 47.

186 Wang, Dong, *China's Unequal Treaties: Narrating National History* (Lanham: Lexington Books, 2005), 17.

187 Tsang, *History of Hong Kong* 2007 (n. 99), 33.

188 Hevia, James L. *English Lessons: The Pedagogy of Imperialism in Nineteenth-Century China* (Durham: Duke University Press, 2003), 39.

189 Hevia, *English Lessons* 2003 (n. 188), 45.

190 Welsh, *History of Hong Kong* 1997 (n. 131), 227.

191 Hevia, *English Lessons* 2003 (n. 188), 47–48.

192 Tsang, *History of Hong Kong* 2007 (n. 99), 36.

in uncivilized ways',¹⁹³ the terms of the Convention of Peking of 1860¹⁹⁴ were tilted way more in favor of the British than the Treaty of Nanking. For instance, article 1 of the Convention forced the Qing Emperor 'to express his deep regret at the misunderstanding [referring to the attack of the ratification convoys] so occurred' (大清大皇帝視此失好甚為惋惜). This greatly differed from the Treaty of Nanking, in which most blames were put on the Chinese High Authorities or the Imperial Commissioner (欽差大臣). The Convention of Peking did not leave any room for 'face saving' for the Emperor either. Compared to the use of 'allow' (准) or 'graciously allows' (恩准), the Chinese text of the Convention uniformly adopted the word '允' as a translation of 'shall' in the English text. 允, more accurately translated as 'to permit' or 'to assent', carried less implication of any superior delegation between the Emperor and the British Monarch. The Chinese text of article 3 of the Convention also used the Chinese equivalent of the word 'indemnity' (賠償) and directly referred to 'compensation for the military expenses' (軍需之費) of the expeditionary forces. The reintroduction of the 'just war' language, as reflected by the Chinese text, was another clear sign of Qing's capitulation.

Finally, the Convention of Peking abolished the remaining rituals of the Sinocentric order in favor of the Eurocentric 'Law of Nations'.¹⁹⁵ It was stated in article 2 that 'Her Britannic Majesty's Representative will henceforward, reside, permanently, or occasionally, at Peking, as Her Britannic Majesty shall be pleased to decide'. Compared to the Treaty of Tien-tsin, a territorial cession was added by the British at last minute.¹⁹⁶ Article 6 further required the Qing Empire to cede to Britain the land of the Kowloon Peninsula in perpetuity.¹⁹⁷ There, instead of using the word 'permitted ... to be granted', the Chinese text adopted the words '付與', which meant 'to handover' or 'to give'.¹⁹⁸ More importantly, it was stated that in Chinese that Kowloon Peninsula was 'to belong to the territory of the British dependency of Hong Kong' ('並歸英屬香港界內'), which not only confirmed the nature of the previous cession but also constituted a further boundary demarcation between the Qing Empire and British Hong Kong in China's continental landmass.

193 Rech, Walter. *Enemies of Mankind: Vattel's Theory of Collective Security* (Leiden: Brill Nijhoff, 2013), 112–127.

194 Convention of Friendship between China and Great Britain, 24 October 1860, 123 CTS 73 ('Convention of Peking').

195 Detter, Ingrid. 'The Problem of Unequal Treaties'. *International and Comparative Law Quarterly* 15(4) (1966), 1069–1089, 1075–1076.

196 Tsang, *History of Hong Kong* 2007 (n. 99), 35–46.

197 *Ibid.*, 35.

198 Dicks, 'Treaty, Grant' 1983 (n. 147), 446, fn. 70.

Similar to modern international law, in which some principles are seen as more fundamental than the others (*jus cogens*), Mitchell theorized that there were certain core sets of 'rituals' relating to how the Sinocentric order operated that were so central in de-fining the order itself, known as 'stateliness' (國體).¹⁹⁹ Instead of sovereignty or the universal idea of 'Tianxia', Mitchell demonstrated that the Qing Emperor and its officials focused much attention on the preservation of Qing's 'stateliness' at the expense of sacrificing authority, such as tariff autonomy or free passage of water way, which would be seen from Eurocentric lens as inherent to the concept of 'sovereignty'.²⁰⁰ Unlike the Treaty of Nanking, the Qing Empire was unable in 1860 to offer 'benevolence' in exchange for the preservation of its 'stateliness': foreign states became legally entitled to station diplomatic missions in Qing's most sacred capital and spread Christianity in all parts of the Empire without hinderance.²⁰¹ As a capitulation treaty, the Convention of Peking was neither a judgment rendered, nor a concession graciously granted by the Emperor. The Convention thus resembled closest to the modern imagination of 'an unequal treaty', in which the legitimacy of the Sinocentric system was directly challenged and undermined. Upon the signing of the Convention, the hierarchy of civilization in the Sinocentric system was openly and irreversibly reversed: The once Celestial Empire became a 'semi-civilized state' in a 'community of nations' dominated by European and American. Therefore, the Convention of Peking of 1860 was a tipping point in the balance of power between the Eurocentric and Sinocentric systems: Before the capitulation of Peking, the Qing Empire had successfully reconciled the incursion of European 'Law of Nations' through the Emperor's offering of 'benevolence' and Qing officials' Sinocentric interpretations of foreign incursions. In 1860, it was the Sinocentric system that conceded to the Eurocentric 'Law of Nations' and when 'Tianxia' replaced the 'international society' that was no longer centered upon the moral superiority of the 'Middle State'.²⁰² However, Qing Empire's capitulation in 1860 was not in any way a complete surrender of the Sinocentric international order: The old concept of 'stateliness' was still being invoked by Qing's diplomats in ceremonial matters and when interpreting the tributary relationship with Japan and

199 Mitchell, Ryan M. *Recentring the World: China and the Transformation of International Law* (Cambridge: Cambridge University Press, 2022), 13–15.

200 Ibid., 29, 33.

201 Ibid., 14, 27, 33.

202 Luo, Zhitian. 'From "Tianxia" (All under Heaven) to "the World": Changes in Late Qing Intellectuals' Conceptions of Human Society'. *Social Sciences in China*, 29(2) (2008), 93–105.

Ryukyu from 1860 to 1895.²⁰³ As next section shows, the Sinocentric system, reformed and relabeled in western imperialistic language, managed to co-exist with the Eurocentric ‘community of nations’ in Far East Asia at least until the Treaty of Shimonoseki in 1895, and in Inner Asia until Yuan Shikai’s provincialization of Mongolia and Tibet in 1912.

4.4 *China as a ‘State’ in the ‘Society of Nations’ and the End of the Sinocentric World Order*

The Convention of Peking in 1860 substantially altered the Sinocentric system as well as how the Qing Empire perceived its own position in the world. First, the once Celestial Empire was forcefully opened to most if not all existing states, who began to sign treaties with the Qing Empire and thereby acquired equal status.²⁰⁴ Amongst others, Qing’s former tributary of Japan also concluded a treaty with the Qing Empire, albeit on an unequal footing favoring Qing in 1871.²⁰⁵ Second, foreigners were no longer confined to the five designated ports but were allowed to visit, to trade, and to preach throughout the Qing Empire including the most sacred capital of Peking.²⁰⁶ Lastly, as a result of the Convention of Peking 1860, the Qing Empire was reduced from a Celestial Empire to the ‘state’ of China. As a semi-civilized state, the Qing Empire had to learn and to achieve ‘the European ideal’ of ‘civilization’²⁰⁷ before it could be fully admitted into the rank of ‘the international community.’²⁰⁸

The implication of ‘becoming civilized’ was that any transformation from the Qing Empire to ‘the state of China’ must go beyond the mere use of official designation but also be ‘internalized’ in its social and political structures.²⁰⁹ While the strategy of the Qing reformists was to ‘treat the Chinese learning as the core while to utilize Western learning as an instrument.’ (中學為體, 西學為用), that did not stop the rapid ‘internalization’ of Western notions such as ‘sovereignty’ by the ‘state of China’. An important part of the reform was the replacement of the Department of Ritual by Tsungli Yamen (總理各國事務衙門) as the official equivalent to the Western ‘Ministry of Foreign

203 Mitchell, *Recentering* 2022 (n. 199), 43, 54–55, 58–59, 72.

204 See Carrai, *Sovereignty in China* 2019 (n. 120), 57, fn. 39.

205 See Morita, Yoshihiko. ‘Sino-Japanese Amity Treaty and the East Asian World Order: The Triangle Relationship and Dual Visions, 1862–1871’. *International Relations* 139 (2004), 29–44, 40–42, available at: https://www.jstage.jst.go.jp/article/kokusaiseiji1957/2004/139/2004_139_29/_article/-char/en (last accessed on 16 January 2024).

206 Welsh, *History of Hong Kong* 1997 (n. 131), 210.

207 Anghie, *Imperialism* 2005 (n. 3), 37.

208 See also Detter, ‘Unequal Treaties’ 1966 (n. 195), 1075; Fisch, *Krieg und Frieden* 1979 (n. 149), 474, fn. 74.

209 Anghie, *Imperialism* 2005 (n. 3), 86.

Affairs'.²¹⁰ Tsungli Yamen studied and utilized the Chinese translation of Henry Wheaton's 'Elements of International Law' ('萬國公法', the Public Law of Ten Thousand States) as the new tool to defend Qing's imperial interests with some successes.²¹¹ In 1864, immediately after its translation, Wheaton's book was cited by Prince Gong in forcing Prussia to pay compensation for unlawfully seizing three Danish vessels anchored in a Chinese port.²¹² In 1879, Qing's diplomatic missions were dispatched to Russia, US, Japan, Germany, and France.²¹³ As a result of the westernized reforms, Qing Empire transformed from 'Tianxia' into a 'state' amongst the many in the 'society of nations', who only enjoyed 'sovereignty' over its respective realm.

However, the downgrading of Qing from a Celestial Empire to 'the state of China' did not mean that China 'ceased to have an independent existence; ... and only tenuously connected to its own identity'.²¹⁴ Rather, Qing was conscious to re-label the existing Sinocentric system into the western model of *imperium*, by reinterpreting tributary relations as one of suzerainty (屬邦).²¹⁵ The internalization of western imperial logics, altered the Qing's self-identification as 'a benevolent protector, who rarely intervened in domestic politics of the tributary states without a request for assistance from them'.²¹⁶ Rather, from the 1880s, 'gunboat diplomacy' was used to re-assert Qing's position as suzerain: In 1882, the Qing Empire militarily intervened in Korea and successfully obtained extraterritorial concessions in Incheon, Busan, and Wonsan.²¹⁷ In 1871, the Qing Empire successfully dictated most of the content in its first international treaty with Japan, including the mutual grant of extraterritoriality and that Chinese version of the treaty should be treated as authentic.²¹⁸ In 1886, it also secured a huge amount of reparation from Japan

210 Carrai, *Sovereignty in China* 2019 (n. 120), 59–60. Tsungli Yamen (總理衙門) was designed to handle all the diplomatic contacts of the Qing Empire. However, in practice, Western states and Japan mainly dealt with Li Hongzhang as the official contact person given his proper standing and influence in the Qing Court. Tsungli Yamen was forced to reform into the Ministry of Foreign Affairs (外務部) only after the Boxer Rebellion of 1900.

211 Ibid., 65–66.

212 Ibid., 65.

213 Ibid., 65.

214 Anghie, *Imperialism* 2005 (n. 3), 104.

215 Carrai, *Sovereignty in China* 2019 (n. 120), 74–77, 79–80.

216 Kim, 'Making International Law' 2021 (n. 35), 242.

217 Duus, Peter. *The Abacus and the Sword: The Japanese Penetration of Korea, 1895–1910* (Oakland: University of California Press, 1998), 54.

218 Cassel, Pär K. *Grounds of Judgment: Extraterritoriality and Imperial Power in Nineteenth-Century China and Japan* (Oxford: Oxford University Press, 2012), 103–105.

following the Nagasaki Incident.²¹⁹ The logic of the Qing's imperial action was, however, no longer justified under the Sinocentric world view, but rather, the western notions of 'national interest' and 'border security'.²²⁰ The reinterpretation of the Sinocentric order in western colonial languages, however, did not save such order from gradually collapsing.²²¹ Particularly, the defeat of the Qing Empire by its former tributary Japan in 1895, signified not only the failure of 'China' to become a 'civilized nation' as compared to Japan, but also the loss of all the Far East 'dependent states' (Korea and Ryukyu). Svarverud similarly argued that the Chinese discourse on international relations had entered a new phase following 1895, in which international law and the principle of sovereign equality finally replaced the 'Tribute System' as the framework exploited by Chinese intellectuals in establishing Qing's international identity.²²² Amongst others, the concept of sovereignty (主權), earlier introduced into Japan, was incorporated in the Treaty of Shimonoseki, and eventually replaced the discourse of 'stateliness' in Qing's diplomatic affairs.²²³ The general fear amongst Chinese intellectuals that 'China' would eventually be divided by the West and Japan, led to the rising belief that 'China' needed not to transform into a 'state' but also a 'nation'.²²⁴ With the rise of Chinese nationalism, Qing Empire became the imagined 'geo-body' of the 'Chinese Nation', an imagined community including both the Manchu conquerors and their Han subjects. In 1912, the newly established Republic of China (ROC) officially declared the former Inner Asian dependencies of Tibet and Mongolia as 'provinces' of the ROC.²²⁵ The assertion of Chinese sovereignty through the administrative redesignation effectively relinquished any remaining tributary or suzerainty relation in Qing's Inner Asia frontier. At this point, the Sinocentric System was officially terminated in favor of 'the Chinese Nation'.

219 Ibid., 135–141 (re Nagasaki Incident).

220 Carrai, *Sovereignty in China* 2019 (n. 120), 77.

221 Ibid., 78–79.

222 Svarverud, *International Law as World Order* 2007 (n. 10), 16.

223 Mitchell, *Recentering* 2022 (n. 199), 81, 97.

224 Carrai, *Sovereignty in China* 2019 (n. 120), 84–85.

225 Carrai, Maria A. 'Learning Western Techniques of Empire: Republican China and the New Legal Framework for Managing Tibet'. *Leiden Journal of International Law* 30(4) (2017), 801–824, 814.

5 Conclusion

A careful comparison of the English and Chinese texts of the Treaty of Nanking revealed also two different narratives over the same encounter: While the English version of the tale was popularly known through the shared 'imposition' narrative, the Chinese text of the Treaty recounted a story of how the Qing Emperor mediated a conflict between the disgruntled English barbarians with the Imperial Commissioner, in which he offered to properly place Britain within the Sinocentric system as concessions. In contrast with the modern nationalistic re-interpretation of the Treaty of Nanking as an 'unequal treaty' imposed upon by the British, the Chinese version of the treaty resembled a judgment or an award rendered by the Qing Emperor, as the neutral and innocent arbitrator sitting in the Middle State. In his judgment, the responsibility for the 'discord' and 'provocation' were attributed to Qing's Imperial Commissioner (欽命大臣), without naming Lin Zexu, instead of the Middle State or the Emperor Daoguang himself. Further, the use of the words 'allow' (准) or 'graciously allows' (恩准) emphasized that the opening of the five foreign ports, as well as the 'grant' of the remote island of Hong Kong to the British to 'keep and govern for a very long time' (常遠據守主掌) for the purposes of storage and ship repairation (以便修船及存守所用物料), were resulted from Emperor's benevolence alone and totally consistent with the essential characteristics of the Sinocentric system, grounded on Emperor's moral superiority. From the views of Emperor Daoguang and the Qing officials, the Treaty of Nanking, which was referred to as 'the peace treaty of ten thousand years' (萬年和約), was a benevolent concession to permanently establish harmony in Qing's maritime frontier with the 'maritime people' (洋人). From 1842 to 1860, the two international systems co-existed under the two interpretations offered by the Treaty of Nanking. This period of harmony challenged the traditional accounts of the encounter as a mere collision between two mutually irreconcilable world orders: if there was indeed a collision, the potential cohesion force as derived from the unity of the two systems, must not be ignored or underestimated in any historical account.

From the perspective of an international lawyer, the 'imposition' account at least suffered two major inadequacies. On one hand, the narrative of describing 'China' as a passive and reluctant recipient of international law corresponds to the charge of Orientalism by post-colonial scholars.²²⁶ This article,

226 For the concept of Orientalism, see Said, Edward. W. *Orientalism* (New York: Vintage Books, 1979); Said, Edward. W. *Culture and Imperialism* (New York: Knopf Doubleday Publishing Group, 1994). For a legal critic on orientalism, see Ruskola, Teemu. 'Legal Orientalism'. *Michigan Law Review* 101(1) (2002), 179–234.

by tracing the encounter back to the arrival of the Portuguese in the 16th century, demonstrated that for almost four centuries, the Celestial Empires had been active in 'assimilating' the European states into the Sinocentric world order, amongst which, Russia successfully obtained the status of 'equal state'. The Russo-Qing relationship challenged the basic presumption that equal recognition between two empires was incompatible with the Sinocentric worldview. It further undermined the British justification that war was necessary to forcefully procure equal treatment of Western states by 'China'. This article further demonstrates that extraterritoriality was mutually granted amongst 'equal states' in the Sinocentric system. This deviated from the dominating narrative that 'extraterritoriality' was 'created' by the Europeans to deprive the non-European states of their full sovereignty. Rather, the separate administration of subjects belonging to different 'civilizations' based on personal jurisdiction, was a unity between the Sinocentric and Eurocentric systems before 1860. What changed thereafter was the creation of a need for 'civilizational change' within 'China', when the Chinese civilization was no longer 'separate but equal' but rather subjected to the European civilization as the only applicable standard in the international system. Thereafter, the Hobbesian understanding of indivisible and absolute sovereignty was internalized by 'China' and became the goal 'China' strived for from the late 19th to early 20th century.

On the other hand, the imposition narrative strengthened the victim position portrayed by Chinese nationalists and antagonized 'international law' as the 'law of bandits' forcefully 'imposed' by Western imperialists. Corresponding to this view was the discourse of 'unequal treaty', which argued that the 19th century treaties were imposed by the West on 'China', in which the latter had little or no control over the terms and provisions of the treaties.²²⁷ This view was based on the anachronistic re-imagination of the Qing Empire as 'China', who was held to the same standard according to the 'Westphalian' idea of sovereignty as Qing's modern successors. It largely overlooked the perspective of the Qing Empire at the time of the encounter, including its attempt to reconcile the Opium War with the Sinocentric worldview and by reverting to the unity between the two systems to preserve harmony. It also underestimated the voluntary utilization of 'Western' legal languages by Qing imperial agents. The period of 1860 to 1895 demonstrated that international law was not always a tool exclusive to the Western power, but it could be utilized in the same way as Western science and military technologies by the Qing officials in defending the Great Space of Qing's *imperium*.

227 Wang, 'International Law in China' 1990 (n. 8), 251; Peters, 'Unequal Treaties' 2018 (n. 127), 10.

Finally, departing from the traditional presumption that 'China' was a stable, pre-established subject, this article showcases how international law and its encounter with 'the Celestial Empire' played a transformative role in Chinese state-building. Considering the active internalization and utilization of international law in the incorporation of the frontier regions of Tibet and Xinjiang, which closely resembled the western notion of 'civilization mission',²²⁸ it bears the question: to what extent should the need to address colonial injustice also consider the 'internalization' of Western colonial languages and strategies by the pre-colonial empires in their post-colonial nation-building. While the current account does not intend to cast any 'final word' on China's encounter with international law, it wishes to challenge the depiction of international law as either 'benign' or 'malignant', which arose from the shared narrative of 'imposition' in the English and Chinese literature. Rather, the current account seeks to provide a narrative foundation in which future depictions of China's encounter with international law could depart from the tendency to identify a perfect pair of 'villain' and 'victim', and to rescue Qing's history from the nationalistic anachronism.²²⁹

Bibliography

- Anghie, Anthony. *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2005).
- d'Aspremont, Jean and Zhang Binxin. 'China and International Law: Two Tales of an Encounter'. *Leiden Journal of International Law* 34 (2021) 899–914.
- Backhouse, Edmund and John O. P. Bland. *Annals and Memoirs of the Court of Peking: From the 16th to the 20th Century* (Boston: Houghton Mifflin Company, 1914).
- Bodiford, Andrew. 'Cities in International Law: Reclaiming Rights as Global Custom'. *City University of New York Law Review* 23(1) (2020), 1–37.
- Carrai, Maria Adele. 'Learning Western Techniques of Empire: Republican China and the New Legal Framework for Managing Tibet'. *Leiden Journal of International Law* 30(4) (2017), 801–824.
- Carrai, Maria Adele. *Sovereignty in China: A Genealogy of a Concept since 1840* (Cambridge: Cambridge University Press, 2019).

228 See Zhu, Yuan Yi. 'Suzerainty, Semi-Sovereignty, and International Legal Hierarchies on China's Borderlands'. *Asian Journal of International Law* 10(2) (2020), 293–320; Carrai, 'Learning Western Techniques' 2017 (n. 225), 803.

229 See Duara, *Questioning History* 1998 (n. 16).

- Carroll, John M. *A Concise History of Hong Kong* (Lanham: Rowman & Littlefield Publishers, 2007).
- Carroll, John M. 'The Amherst Embassy to China: A Whimper and a Bang'. *Journal of Imperial and Commonwealth History* 48(1) (2020), 15–38.
- Cassel, Pär K. *Grounds of Judgment: Extraterritoriality and Imperial Power in Nineteenth-Century China and Japan* (Oxford: Oxford University Press, 2012).
- Chau, Ju-kua. *The Chinese and Arab Trade in the Twelfth and Thirteenth Centuries* (St Petersburg: Printing Office of the Imperial Academy of Sciences, 1912).
- Coleman, Andrew and Jackson N. Maogoto. "Westphalian" Meets "Eastphalian" Sovereignty: China in a Globalized World'. *Asian Journal of International Law* 3(2) (2013), 237–269.
- Danjo, Hiroshi. '明清時代の天朝体制と華夷秩序' ('The System of Celestial Empire and Hua Yi Order in the Ming and Qing Periods'). 京都女子大学大学院文学研究科研究紀要. 史学編 12 (2013), 147–185, available at: <http://lib.kyoto-wu.ac.jp/opc/recordID/handle/11173/194> (last accessed on 16 January 2024).
- De Lisle, Jacques. 'China's Approach to International Law: A Historical Perspective'. *Proceedings of the Annual Meeting (American Society of International Law)* 94 (2000), 267–275.
- De Sousa, Trigo, *Regional Integration and Differentiation in a Globalizing China: The Blending of Government and Business in Post-Colonial Macau* (University of Amsterdam, PhD Thesis, 2009), 69, available at: <https://dare.uva.nl/search?identifier=bad60d4a-4d70-4368-9dbc-37eca7e3cdce> (last accessed on 16 January 2024).
- DeWitt, John W. *Early Globalization and the Economic Development of the United States and Brazil* (Westport: Praeger, 2002).
- Detter, Ingrid. 'The Problem of Unequal Treaties'. *International and Comparative Law Quarterly* 15(4) (1966), 1069–1089.
- Dicks, Anthony. 'Treaty, Grant, Usage or Sufferance? Some Legal Aspects of the Status of Hong Kong'. *China Quarterly* 95 (1983), 427–455.
- Dirlik, Arif. 'Born in Translation: "China" in the Making of "Zhongguo"' (29 July 2015), available at: <https://www.boundary2.org/2015/07/born-in-translation-china-in-the-making-of-zhongguo/> (last accessed on 16 January 2023).
- Duara, Prasenjit. *Questioning History from the Nation: Questioning Narratives of Modern China* (Chicago: University of Chicago Press, 1995).
- Duus, Peter. *The Abacus and the Sword: The Japanese Penetration of Korea, 1895–1910* (Oakland: University of California Press, 1998).
- Eitel, Ernest J. *Europe in China: The History of Hongkong from the Beginning to the Year 1882* (London: Luzac & Company, 1895).
- Esherick, Joseph W. 'How the Qing Became China', in *Empire to Nation: Historical Perspectives on the Making of the Modern World*, eds. Joseph W. Esherick, Hasan

- Kayali and Eric Van Young (Lanham: Rowman & Littlefield Publishers, 2006), 229–259.
- Fairbank, John K. *Chinese World Order* (Cambridge: Harvard University Press, 1967).
- Fairbank, John K. and Merle Goldman. *China: A New History, Second Enlarged Edition* (Cambridge: Harvard University Press, 2006).
- Fisch, Jörg. *Krieg und Frieden im Friedensvertrag: Eine universalgeschichtliche Studie über Grundlagen und Formelemente des Friedensschlusses* (Stuttgart: Klett-Cotta, 1979).
- Fletcher, Joseph. 'The Heyday of the Ch'ing Order in Mongolia, Sinkiang and Tibet', in *The Cambridge History of China*, ed. John K. Fairbank (Cambridge: Cambridge University Press, 1978), 351–408.
- Fogel, Joshua. A. 'New Thoughts on an Old Controversy: Shina as a Toponym for China' *Sino-Platonic Papers* 229 (2012), 2157–9679.
- Frank, V. S. 'The Territorial Terms of the Sino-Russian Treaty of Nerchinsk, 1689' *Pacific Historical Review* 16(3) (1947), 265–270.
- Guo, Weidong. '晚清中外条约作准文本探析' ('An Analysis of the Authorized Text of Sino-Foreign Treaties in the Late Qing Dynasty') *历史研究 (Historical Research)*, 5 (2019) 61–74.
- Grewe, Wilhelm G. *The Epochs of International Law* (Berlin: de Gruyter, 2000).
- Hamashita, Takeshi. 近代中国の国際的契機—朝貢貿易システムと近代アジア (*Modern China's International Opportunity: The Tribute and Trade System and Modern Asia*) (Tokyo: University of Tokyo Press, 1990).
- Hamashita, Takeshi. 朝貢システムと近代アジア (*The Tribute System and Modern Asia*) (Tokyo: Iwanami Shoten, 2013).
- Hanes, Travis W. and Frank Sanello. *The Opium Wars: The Addiction of One Empire and the Corruption of Another* (Naperville: Sourcebooks, 2004).
- Hansen, Valerie. 'Silk Road Cities and Their Co-Existing Legal Traditions', in *Handbook on International Law and Cities*, eds. Helmut P. Aust and Janne E. Nijman (Cheltenham: Edward Elgar Publishing, 2021).
- Harrison, Henrietta. 'The Qianlong Emperor's Letter to George III and the Early-Twentieth-Century Origins of Ideas about Traditional China's Foreign Relations'. *American Historical Review* 122(3) (2017), 680–701.
- Hayton, Bill. *The Invention of China* (New Haven: Yale University Press, 2020).
- Herrick, Kevin. 'The Merger of Two Systems: Chinese Adoption and Western Adaptation in the Formation of Modern International Law'. *Georgia Journal of International & Comparative Law* 33(3) (2014), 685–703.
- Hevia, James L. *English Lessons: The Pedagogy of Imperialism in Nineteenth-Century China* (Durham: Duke University Press, 2003).
- Horn, David B. *The British Diplomatic Service, 1689–1789* (London: Clarendon Press, 1961).

- Hsü, Immanuel C. Y. 'Russia's Special Position in China during the Early Ch'ing Period'. *Slavic Review* 23(4) (1964), 688–700.
- Jin, Guoping. 西力東漸: 中葡早期接觸追昔 (*From the West to the East: Early Contact between China and Portugal*) (Macau: Macau Foundation, 2000).
- Kawashima, Shin. 'China', in *The Oxford Handbook of the History of International Law*, eds. Bardo Fassbender and Anne Peters (Oxford: Oxford University Press, 2012), 452–474.
- Kim, So Yeon. 'Making International Law Truly "International"?: Reflecting on Colonial Approaches to the China-Vietnam Dispute in the South China Sea and the Tribute System'. *Journal of the History of International Law* 24(2) (2021), 227–258.
- Koskenniemi, Martti. *The Gentle Civilizer of Nations. The Rise and Fall of Modern International Law 1870–1960* (Cambridge: Cambridge University Press, 2009).
- Kwok, Ting-yi. 近代中國史綱 (*An Outline of Modern Chinese History*) (Hong Kong: Chinese University of Hong Kong Press, 1979).
- Lesaffer, Randall. 'Aggression before Versailles'. *European Journal of International Law* 29(3) (2018), 773–808.
- Liao, Minshu. 清代中國對外關係新論 (*A New Theory on Qing Dynasty's China Diplomatic Relations*) (Taipei: NCCU Press, 2017).
- Liu, Lydia. *The Clash of Empires: The Invention of China in Modern World Making* (Cambridge: Harvard University Press, 2006).
- Luo, Zhitian. 'From "Tianxia" (All under Heaven) to "the World": Changes in Late Qing Intellectuals' Conceptions of Human Society'. *Social Sciences in China* 29(2) (2008), 93–105.
- Matten, Marc A. *Imagining a Postnational World: Hegemony and Space in Modern China* (Leiden: Brill, 2016).
- Millward, James A. *Beyond the Pass: Economy, Ethnicity, and Empire in Qing Central Asia, 1759–1864* (Stanford: Stanford University Press, 2016).
- Millward, James A., Ruth W. Dunnell, Mark C. Elliot and Philippe Forêt. *New Qing Imperial History: The Making of Inner Asian Empire at Qing Chengde* (Abingdon: Routledge, 2004).
- Mitchell, Ryan M. *Recentring the World: China and the Transformation of International Law* (Cambridge: Cambridge University Press, 2022).
- Morita, Yoshihiko. 'Sino-Japanese Amity Treaty and the East Asian World Order: The Triangle Relationship and Dual Visions, 1862–1871'. *International Relations* 139 (2004), 29–44.
- Neff, Stephen C. *Justice among Nations: A History of International Law* (Cambridge: Harvard University Press, 2014).
- Neff, Stephen C. *War and the Law of Nations: A General History* (Cambridge: Cambridge University Press, 2005).

- Oh, Si Jin. 'Resolving the Misunderstood Historical Order: A Korean Perspective on the Historical Tributary Order in East Asia'. *Journal of the History of International Law* 21(3) (2019), 341–377.
- Onuma, Yasuaki. 'When Was the Law of International Society Born? – An Inquiry of the History of International Law from an Intercivilizational Perspective'. *Journal of the History of International Law* 2(1) (2000), 1–66.
- Pankenier, David W. *Astrology and Cosmology in Early China: Conforming Earth to Heaven* (Cambridge: Cambridge University Press, 2013).
- Peters, Anne. 'Unequal Treaties', in *Max Planck Encyclopedia of Public International Law*, ed. Rüdiger Wolfrum (Oxford: Oxford University Press, 2018), 1, available at: <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1495> (last accessed on 16 January 2024).
- Perdue, Peter C. 'The Tenacious Tributary System'. *Journal of Contemporary China* 24 (96) (2015), 1002–1014.
- Polachek, James M. *The Inner Opium War* (Cambridge: Harvard University Asia Centre, 1991).
- Pritchard, Earl Hampton. *The Crucial Years of Early Anglo-Chinese Relations, 1750–1800* (London: Octagon Books, 1970).
- Rech, Walter. *Enemies of Mankind: Vattel's Theory of Collective Security* (Leiden: Brill Nijhoff, 2013).
- Ruskola, Teemu. 'Legal Orientalism'. *Michigan Law Review* 101(1) (2002), 179–234.
- Said, Edward. W. *Orientalism* (New York: Vintage Books, 1979).
- Said, Edward. W. *Culture and Imperialism* (New York: Knopf Doubleday Publishing Group, 1994).
- Sebes, Joseph and Pereira, Tomás. *The Jesuits and the Sino-Russian Treaty of Nerchinsk (1689): The Diary of Thomas Pereira* (Rome: Institutum Historicum SI, 1962).
- Skeldon, Ronald. 'Migration from China'. *Journal of International Affairs* 49(2) (1996), 434–455.
- Strauss, Michael J. *Territorial Leasing in Diplomacy and International Law* (Leiden: Brill, 2015).
- Svarverud, Rune. *International Law as World Order in Late Imperial China: Translation, Reception and Discourse, 1847–1911* (Leiden: Brill, 2007).
- Teng, Ssu-yü and John K. Fairbank. *China's Response to the West: A Documentary Survey, 1839–1923* (Cambridge: Harvard University Press, 1979).
- Tomuschat, Christian. 'The 1871 Peace Treaty between France and Germany and the 1919 Peace Treaty of Versailles', in *Peace Treaties and International Law in European History: From the Late Middle Ages to World War One*, ed. Lesaffer, Randall (Cambridge: Cambridge University Press, 2004), 382–396.
- Tsang, Steve. *A Modern History of Hong Kong* (London: I. B. Tauris, 2007).

- Wang, Dong. *China's Unequal Treaties: Narrating National History* (Lanham: Lexington Books, 2005).
- Wang, Tieya. 'International Law in China: Historical and Contemporary Perspectives'. *Recueil des cours de l'academie de droit international de La Haye* 221 (1990), 195–369.
- Wang, Wensheng. *White Lotus Rebels and South China Pirates: Crisis and Reform in the Qing Empire* (Cambridge: Harvard University Press, 2014).
- Welsh, Frank. *A History of Hong Kong* (New York: Harper Collins, 1997).
- Yanagihara, Masaharu. 'Significance of the History of the Law of Nations in Europe and East Asia'. *Recueil des cours de l'academie de droit international de La Haye* 371 (2014), 273–435.
- Yang, Nianqun. "天命" 如何转移: 清朝 "大一统" 观再诠释' ('How "Mandate of Heaven" Transfers: Reinterpretation of Qing Dynasty's concept of "Grand Unity"') 清华大学学报 (哲学社会科学版) 35(6) (2020), 21–46.
- Yang, Nianqun. "天命" 如何转移: 清朝 "大一统" 观的形成与实践 ('How "Mandate of Heaven" Transfers: The Formation and Practice of Qing Dynasty's concept of "Grand Unity"') (Shanghai: Shanghai People's Publishing House, 2022).
- Zarrow, Peter. G. *After Empire: The Conceptual Transformation of the Chinese State, 1885–1924* (Stanford: Stanford University Press, 2012).
- Zhao, Gang. 'Reinventing China: Imperial Qing Ideology and the Rise of Modern Chinese National Identity in the Early Twentieth Century'. *Modern China* 32(1) (2006), 3–30.
- Zhu, Yuan Yi. 'Suzerainty, Semi-Sovereignty, and International Legal Hierarchies on China's Borderlands'. *Asian Journal of International Law* 10(2) (2020), 293–320.