

RECIPROCITY AND THE DEVELOPMENT OF INTERNATIONAL WATER LAW

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Reciprocity is at the heart of the international legal system. As a basic exchange of good for good and bad for bad, reciprocal exchange and expectations of reciprocal exchange create stable relationships between agents. As a principle of international law, reciprocity establishes a level playing field by ensuring that the conduct of one state is legally dependent on that of another state. In the law-making process, such reciprocity and expectations limit and moderate state claims, contributing to the establishment of law, particularly customary law. As international law has developed it has slowly moved from a system focused on the protection of the state, to a system which more closely aims to protect the interests of global and regional communities, interests that are of such great importance that it may be undesirable if reciprocity were to govern them. Such changes have altered the role of reciprocity; however, the principle is far from being abandoned. International water law has also witnessed such changes, particularly evident in the sovereignty claims through which international water law has developed. As such, this article traces the role of reciprocity in the development and future of international water law through sovereignty claims, including absolute territorial sovereignty, absolute territorial integrity, limited territorial sovereignty and the emerging claim of the community of interests. In so doing it will first clarify the content of reciprocity as a social, political and legal norm and its role within the establishment of customary law. It will then analyse the development and future of sovereignty claims in international water law and their subsequent principles through the lens of reciprocity.

1 INTRODUCTION

In late 2015, the international community came together to adopt the '2030 Transforming our world' document, thus adopting the 2030 Sustainable Development Agenda. This document, referring to itself as a 'charter for people and planet in the twenty-first century', contains 17 goals, complemented by 169 targets that the global community wishes to achieve by 2030. Sustainable Development Goal (SDG) 6, directly related to water, aims to 'ensure availability and sustainable management of water and sanitation for all'.¹ This goal becomes ever more challenging as climate change affects the hydrologic stationarity of the globe, which will 'change a vast array of visible and invisible parameters that define the very foundation of the world as we know it'.² As such, it is unclear whether water will be where we need it, when we need it in the future. As the world becomes ever more interconnected global

problems require global solutions, placing pressure on the very notion of sovereignty.³

International law is also witnessing a series of changes as two of its layers, one deeply rooted in state sovereignty and the other building on community interests, come together.⁴ International water law, which tackles some of these complex interconnected challenges, is also witnessing these changes as it incorporates aspects of environmental, human and economic concerns⁵ and shifts away from notions of sovereignty to incorporate more communal theories of management.

In spite of such changes in the international legal system, the document '2030 Transforming our world' reminds us that sovereignty is still foundational to the global legal and political regime. While devoting itself to win-win cooperation and a people-centred approach in the achievement of the SDGs, the document reaffirms sovereignty's role at the heart of the international system, stating that 'every state has, and shall freely exercise, full permanent sovereignty over all its wealth, natural resources and economic activity'.⁶ In a legal system firmly grounded on the sovereign equality of states, according to Article 2 of the UN Charter, reciprocity will play a pivotal role. As both an 'underlying condition of cooperation'⁷ and as a legal principle, reciprocity works to uphold a level playing field. As a legal principle it does so by ensuring that states who make claims must accept that others are also able to make the same claim and benefit accordingly, thus it is one reason why states would limit their claims. Such limitation of claims ensures that a state's claims are reasonable, thereby assisting with the development of customary international law.⁸

3 In his recent article, James Crawford wrote that, in reference to the 'bargain' between international law and its subjects: '[w]e are not (yet) at the depths of 1937: we have come a long way from the 'crude atomism' of *SS Lotus (Turkey v France)*, and the PCIJ's dictum that 'rules of law binding upon States emanate from their own free will' such that '[r]estrictions upon the independence of States cannot therefore be presumed'. See James Crawford 'Responsibility, fraternity and Sustainability in international law' (2015) 52 *Canadian Yearbook of International Law* 1, 24.

4 Eckart Klein 'Denunciation of human rights treaties and the principle of reciprocity' in Ulrich Fastenrath et al (eds) *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (Oxford University Press 2011) 486.

5 Paulo Canelas de Castro 'The evolution of international water law' (2015) 10 *International Journal of Sustainable Development Planning* 894.

6 UNGA 'Transforming our world' (n 1) art 18.

7 Christina Leb *Cooperation in the Law of Transboundary Water Resources* (Cambridge University Press 2013) 29.

8 Although reciprocity plays a role as a legal mechanism within treaties and as a mechanism of enforcement, this article will focus specifically on reciprocity's role in law-making, particularly in international customary law.

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1 United Nations General Assembly (UNGA) 'Transforming our world: the 2030 Agenda for Sustainable Development' (2016).

2 'Water cycle instability is here to stay posing major political and economic risks: UN experts' *EurekaAlert* (4 April 2016) www.eurekaalert.org/pub_releases/2016-04/tca-wci040316.php.

This article aims to survey the development of international water law⁹ through the lens of one of the factors of its development, reciprocity. In order to do so it will first briefly characterise reciprocity as a social and political norm, as well as a legal principle. It will then turn to a discussion of the development of international water law through the four primary sovereignty claims, including previous claims of absolute territorial sovereignty and absolute territorial integrity, current claims of limited territorial sovereignty which are recognised as custom, and the emerging claim of the community of interests.¹⁰ Although there is extensive literature on these four sovereignty claims, there is very little research on reciprocity's role in their development or on reciprocity's role within international water law in general.¹¹

2 THE DEVELOPMENT OF LAW AS A PROCESS OF RECIPROCATION

Members of communities often have norms and beliefs in common, and such beliefs are an important factor that helps to establish bonds between community members. Such shared norms and beliefs influence the operation of actions and relations between agents within communities.¹² The concept of reciprocity initially emerged as one such belief within social systems, where reciprocity acts as 'both a defining feature of social exchange and a source of societal cooperation and solidarity'.¹³ Of extreme importance, researchers have referred to reciprocity as 'the vital principle of society',¹⁴ stating that 'social equilibrium and cohesion could not exist without "the reciprocity of service and return service"'.¹⁵

Often discussed as an exchange between agents,¹⁶ reciprocity structures such actions and relations to include both rights and duties, driving people to help those who have

helped them, and not to injure those who have helped them.¹⁷ This 'mutually gratifying pattern of exchanging goods and services'¹⁸ establishes a mutual dependence among peoples¹⁹ and, as such, reciprocal exchange and the expectation of reciprocation assists in the establishment of groups and the emergence of future social exchange. Such interdependence between agents is also prevalent within the international community and, as such, reciprocity can be said to be common between individual agents as well as states.

For states,²⁰ reciprocity is also a process of exchange through which 'potential antagonistic nations are able to establish cooperation and reach mutually rewarding outcomes'.²¹ It can also, however, have the opposite effect, and may even lead to 'continuing and, possibly escalating, mutual conflict'.²² As a force of cooperation, states make concessions in good faith with the expectation that such concessions would be reciprocated. If such concessions are returned reciprocally, they can lead to further cooperation. If not, however, then good faith is frustrated and cooperation is unlikely to develop.²³ Over time, states' interests in sustained, mutually beneficial relations leads them to reciprocate consistently.²⁴ Even though the building blocks of cooperation and law are the same,²⁵ expectations of reciprocity, as discussed above, should be differentiated from reciprocity as a legal principle. Within highly developed legal systems, reciprocity 'has been absorbed and supplanted by specific norms and institutions'. The lower the level of 'institutionalization of a legal system, however, the more mechanisms of direct reciprocity' are present.²⁶

As a principle of international law,²⁷ a general normative proposition considered to be expressive of a series of more detailed rules,²⁸ reciprocity is an 'objective aspect of a given legal relationship',²⁹ which works to uphold a level playing field. Thus, the principle of reciprocity is a legal consequence of the equality of states,³⁰ which ensures that

9 Within this article, international water law is understood as the joint management of transboundary water resources through shared legal mechanisms. Although it may be considered as one aspect of international water law, this article will not discuss reciprocity's function within the human right to water, although it will occasionally be used as an example.

10 The goal of this article is not to debate whether or not a practice is currently considered as custom, but instead to explore the role that reciprocity has played within its development within the context of international water law. For this reason, sovereignty claims are chosen since the role of reciprocity is clear and limited territorial sovereignty is firmly established as custom. Thus it will be beyond the scope of this article to delve into the evidence for the customary and non-customary status of these norms.

11 Some recent publications discuss reciprocity as it relates to law more generally; however, there is very little research that focuses specifically on reciprocity in transboundary waters. The author is aware of one recent publication which discusses reciprocity specifically in the context of transboundary waters. This article, by Zhong et al, concludes that there is a need to discuss reciprocity as it relates to the United Nations Watercourse Convention (UNWC) due to overall engagement by downstream states, and overall disengagement with upstream states. The authors conclude that this implies that states in different geographical positions understand the application of the principles of the UNWC differently. For more information see Zhong, Yong et al, 'Rivers and reciprocity: perceptions and policy on international watercourses' (2016) 18 *Water Policy* 28.

12 Shahrad Nasrolahi Fard *Reciprocity in International Law: Its Impact and Function* (Kindle edn Routledge 2016) 4.

13 Linda D Molm 'The structure of reciprocity' (2010) 73(2) *Social Psychology Quarterly* 129.

14 Hobhouse as quoted by Molm (n 13) 119.

15 Simmel as quoted by Molm (n 13) 119.

16 Edwina S Uehara 'Reciprocity reconsidered: Gouldner's "moral norm of reciprocity" and social support' (1995) 12 *Journal of Social and Personal Relationships* 484.

17 Alvin W Gouldner 'The norm of reciprocity: a preliminary statement' (1960) 25 *American Sociological Review* 171.

18 *ibid* 170.

19 Bronislaw Malinowski as quoted by Gouldner (n 17) 169.

20 There are many different definitions of reciprocity in relation to political and legal relationships between states, not all of which can be discussed here. Andreas Paulus identifies four prominent sets of definitions, including: subjective/objective, positive/negative, formal/substantive, and legal/socio-political. For more information on these sets of definitions see Andreas Paulus 'Reciprocity revisited' in Ulrich Fastenrath et al (eds) *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (Oxford University Press 2011) 116-18.

21 Martin Patchen 'When does reciprocity in the actions of nations occur?' (1998) 3 *International Negotiations* 171.

22 *ibid* 171.

23 See Leeb *Cooperation in the Law of Transboundary Water Resources* (n 7) 29.

24 Christina Leeb 'One step at a time: international law and the duty to cooperate in the management of shared water resources' (2014) 40 *Water International* 2.

25 *ibid* 3.

26 Bruno Simma 'Reciprocity' in *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2008) para 1.

27 *ibid*. In James Crawford (ed) *Brownlie's Principles of Public International Law* (8th edn Oxford University Press 2012) 37, Crawford also refers to reciprocity as a general principle of international law, alongside consent, equality of states, good faith etc.

28 Andreas Zimmerman et al *The Statute of the International Court of Justice: A Commentary* (Oxford University Press 2012) 872.

29 See Simma 'Reciprocity' (n 26) para 2.

30 Michael Byers *Custom, Power and the Power of Rules: International Relations and Customary Law* (Cambridge University Press 2004) 89-90.

'conduct by one party is in one way or another juridically dependent upon that of the other party'.³¹ As such, expectations of reciprocity and reciprocity as a legal principle play a strong role within the limitation of state claims, contributing to the establishment of consistent and uniform state practice and, ultimately, customary law.

Given that water is a resource which is absolutely fundamental to the function of states and the livelihoods of citizens and that it is often transboundary in nature, cooperation is required so that everyone can meet their needs. With 276 transboundary river basins, 60 per cent of which do not have a common management framework,³² customary law will play a particularly important role. Customary law is particularly unique since it is not created by decision-makers, but by the overall practice of states.³³ As such it recognises the need for consent as well as the dual nature of states as both creators and subjects of international law. The establishment of custom relies on two conditions: rules of a norm creating character must have substantial state practice and *opinio iuris*. State practice must be widespread and uniform, pertaining especially to the specifically affected states.³⁴

Article 38c of the ICJ Statute indicates that customary law must be 'accepted as law', thus introducing the requirement of *opinio iuris*. Although controversial, this entails that states must believe that they are legally obligated to carry out such practice, ultimately consenting to such a practice.³⁵ Through acceptance or rejection states consent, or show their belief that the practice is accepted as law. Such consent is based on reciprocity, since states are unlikely to consent to a rule that is against their reciprocal interests.³⁶

Prior to increasing levels of development there was often enough water within shared basins such that the use of one state would not affect the uses or interests of their riparian neighbours. As states developed so too did their water usage, and as such so too did their impact on upstream or downstream riparians.³⁷ At the beginning of the

19th century, when water uses began to develop and states' water interests began to conflict, states had to rely upon general principles as the body of law surrounding transboundary waters was relatively underdeveloped.³⁸

Reciprocity in the formation of customary law is a process of cooperation or conflict, where either customary law forms as a result of overall agreement, or does not form owing to disagreement. Within the development of international customary law, reciprocity and expectations of reciprocity go hand-in-hand to 'moderate the claims put forward by a state initiating the law-making process', and 'facilitate the acceptance of such claims' from states who may wish to make similar claims in the future.³⁹

Within international law, 'a state basing a claim on a particular norm of international law must accept that rule as also binding upon itself'.⁴⁰ In other words, 'any state claiming a right under that law has to accord all other states the same right'.⁴¹ As such, reciprocity moderates state claims in three ways. First, the reciprocity of claims ensures that states will only claim things that they wish to see generalised.⁴² Secondly, if states see no potential benefit in the new claim then they may not support it, and may even oppose it by seeking to establish alternate claims.⁴³ Thirdly, reciprocity limits the benefits of being a persistent objector since other states can also claim such an objection.⁴⁴

3 FROM ABSOLUTE TERRITORIAL SOVEREIGNTY AND INTEGRITY TO LIMITED TERRITORIAL SOVEREIGNTY: RECIPROCITY AND THE GENERALISATION OF CLAIMS

In instances of state conflicts, upstream states often make claims of absolute territorial sovereignty, claiming that the water within their territory is their own and that they can do with it as they please. Downstream states, however, often make claims of absolute territorial integrity, claiming that the upstream state cannot take any action that would affect flows to the downstream state. When analysed through the lens of reciprocity, however, neither claim is tenable and may even harm the state's long-term interests. The interconnectivity of water brings states together in the name of cooperation, and thus also in the name of reciprocation. This section aims to trace the development of international water law through the sovereignty claims that have come to define it. In order to do so, it will analyse the claims of absolute territorial sovereignty in the *Rio Grande* dispute between the US and Mexico, and absolute territorial integrity in the *Trail Smelter* case between Canada and the US. When analysed through a lens of reciprocity, however, neither claim is acceptable,

31 See Paulus 'Reciprocity Revisited' (n 20) 117.

32 Adeel Zafar et al 'Water cooperation: views on progress and the way forward' (2015) <http://inweh.unu.edu/portfolio/water-cooperation-views-progress-way-forward/>.

33 Fard *Reciprocity in International Law* (n 12) 30.

34 This means that 'substantially uniform' state practice must be found in states throughout the world, not clumped in various regions. Such practice by those specifically affected states, those directly affected by the norm in question, is especially important for the establishment of custom. For more information see Crawford (ed) *Brownlie's Principles of Public International Law* (n 27) 24.

35 It is unclear whether *opinio iuris* is necessary to determine if a norm is considered customary law. Those who argue against its necessity claim that it is circular, or that the international courts have paid scant attention to proving its existence in certain cases. There are, however, multiple cases where the court has clearly indicated its necessity (such as the *Nicaragua Case (Nicaragua v United States of America)* ICJ Judgment 1986 and *North Sea Continental Shelf Case (Federal Republic of Germany/Netherlands)* Judgment 1969 ICJ Reports page 3), and other scholars point to it as necessary in order to provide customary law with legitimacy in the sense that it is through *opinio iuris* that states consent. For a brief discussion on the necessity of *opinio iuris* see Fard *Reciprocity in International Law* (n 12).

36 Fard *Reciprocity in International Law* (n 12) 35.

37 It is now commonly accepted that harm can flow both upstream and downstream. It flows downstream in the forms of pollution and limited water resources, while it flows upstream in the form of the foreclosure of use. For more information see Salman M A Salman 'Downstream riparians can also harm upstream riparians: The concept of foreclosure of future uses' (2010) 35 *Water International* (2010).

38 Stephen McCaffrey 'The Harmon doctrine 100 years later: buried, not praised' (1996) 36 *Natural Resources Journal* 550.

39 See Simma 'Reciprocity' (n 26) para 3.

40 *ibid* para 2. Clear examples of this can be found in both the Vienna Convention on the Law of Treaties (VCLT), as well as the Statute of the International Court of Justice. For example, the VCLT, which has an overall tone of reciprocity, stipulates that all states have the right to enter into treaties (art 6), with both rights and obligations that are equally binding on all parties. The jurisdiction of the ICJ (art 36) is also an example since it requires the consent of both parties, and thus only parties who reciprocate their consent towards the ICJ can bring cases before the Court.

41 See Byers, *Custom, Power and the Power of Rules* (n 30) 89.

42 *ibid* 90.

43 *ibid* 101.

44 *ibid* 103.

and international water law has ultimately settled on a claim in the middle as custom, namely limited territorial sovereignty.

Polar opposites: absolute territorial sovereignty and absolute territorial integrity

The most notable example of absolute territorial sovereignty is the Harmon Doctrine, elicited by Judge Harmon, an American attorney general in the late 19th century. A dispute arose between Mexico and the US owing to a diversion of the waters of the Rio Grande by farmers and ranchers in Colorado and New Mexico when the waters levels near Ciudad Juarez along the US-Mexico border were severely reduced.⁴⁵ The Mexican minister at Washington, in a letter to the Secretary of State outlining the urgency of the situation, claimed that the low water levels would threaten the existence of various communities south of the border.⁴⁶ The US Government claimed that it was uncertain if their actions were the cause, and ultimately referred the situation to the Attorney General, Judson Harmon.⁴⁷ Tasked with determining whether Mexico's claims were valid within the general body of international law,⁴⁸ Judge Harmon, citing the principle of sovereignty, claimed that 'all exceptions ... to the full and complete power of a nation within its own territories must be traced up to the consent of the nation itself'.⁴⁹ Thus, any right to waters within American territory by Mexico were inconsistent with the principle of sovereignty. Judge Harmon concluded that at the time the rules and principles of international law 'impose no liability or obligation upon the United States'⁵⁰ and that the principle of sovereignty provides states with 'full and complete power over a nation within its territory'.⁵¹

The most notable example of a claim of absolute territorial integrity is also from the United States. In 1925 when the Trail Smelter in British Columbia in Canada expanded production and increased the height of its smoke stacks, Washington state experienced increased crop scorching and forest loss owing to pollution drifting downwind.⁵² What started as a minor dispute quickly escalated and the case was referred to the International Joint Commission (IJC) through an Arbitral Commission.⁵³ In the dispute, the US State Department made claims of absolute territorial integrity when its legal adviser claimed that the principle of sovereignty ensures that 'a sovereign state is supreme within its own territorial domain and that it and its nationals are entitled to use and enjoy their territory and property without interference from an outside source'.⁵⁴

Given the reciprocal nature of claims within international law, states must be willing to accept the generalisation of their claims. As such, a state that makes a claim must

accept that other states can also make such claims and benefit accordingly. In so doing, reciprocity ensures that states will only claim things that they wish to see generalised.⁵⁵ Thus, if a state bases its claim on the principle of sovereignty and accepts that this entails absolute territorial sovereignty or integrity, then it must allow others to do so as well. Given the nature of water resources and the requirement of generalisation within international law, making claims to absolute territorial sovereignty or absolute territorial integrity is untenable. At their core, such extreme sovereignty claims hinder the ability of riparian states to utilise waters within their territories, ignoring the necessity of water utilisation and the interconnected nature of transboundary water resources. This harms the balance struck by the formal equality of states. Given that states are often both upstream and downstream, however, acceptance of such extreme claims are often not in the interests of states. Since many states are both upstream and downstream such a claim can provide benefits in one basin, but hinder the same state in another where they are in a different geographical position, as was the case of the United States in these disputes.

Interestingly, neither of these extreme claims to sovereignty was used in their resolution. Instead, both cases were resolved while recognising the rights of their riparian neighbours. In spite of Judge Harmon's opinion that the US had no legal obligations under international law, the US and Mexico proceeded with joint fact-finding, which recommended that a treaty be signed between the two countries distributing the waters equally through the construction of an American funded dam at El Paso, after which Mexico would abandon any claims of indemnity for previous unlawful uses of the shared water resources.⁵⁶ In spite of controversy surrounding the dam construction on the Rio Grande,⁵⁷ a dam was constructed on the river at Engle, New Mexico. The dispute was finally put to rest with the signing of the Convention between the United States and Mexico: Equitable Distribution of the Waters of the Rio Grande 1906, which cites the 'equitable distribution of the waters of the Rio Grande' as its intended purpose.⁵⁸

In this dispute, American actors walked a fine line between recognition of the rights of Mexico and maintaining their claim of absolute territorial sovereignty. Although the treaty aims to distribute waters in an equitable and reasonable manner between both riparians, the treaty maintains the American legal position of absolute territorial sovereignty by limiting its scope to the 'portion of the Rio Grande which forms the international boundary', and by stating that the US does not accept 'any legal basis for claims heretofore asserted or which may be hereafter

45 Stephen C McCaffrey *The Law of International Watercourses* (2nd edn Oxford University Press 2010) 113.

46 McCaffrey 'The Harmon doctrine 100 years later' (n 38) 553.

47 *ibid* 557.

48 *ibid* 557.

49 See McCaffrey *The Law of International Watercourses* (n 45) 114.

50 *ibid* 114 for a discussion on AG Judson Harmon's Opinion and a history of the Harmon doctrine.

51 *ibid* 114.

52 John D Wirth 'The *Trail Smelter* dispute: Canadians and Americans confront transboundary pollution' (1996) 1 *Environmental History* 35.

53 *ibid* 36.

54 See McCaffrey *The Law of International Watercourses* (n 45) 127.

55 See Byers *Custom, Power and the Power of Rules* (n 30) 90.

56 See McCaffrey 'The Harmon doctrine 100 years later' (n 38) 571–72.

57 At the time, a British company was planning the construction of a dam on the river within American territory. The US revoked its construction permit, claiming that the official who had provided it was not authorised to do so, and sued the company under the pretence that the dam would 'seriously obstruct the navigable capacity of the said river'. A dam was then constructed at Engle, which was to fulfil its obligation to Mexico in the resolution of this dispute, even though it was not the dam that was proposed. See McCaffrey 'The Harmon doctrine 100 years later' (n 38) 571–72.

58 US Department of State 'Convention between the United States and Mexico: Equitable distribution of the waters of the Rio Grande 1906' Proclamation.

asserted by reason of any losses incurred by the owners of land in Mexico due or alleged to be due to the diversion' of the river.⁵⁹ Furthermore, the United States did not 'in any way concede the establishment of any general principle or precedent by the concluding of this treaty'.⁶⁰

Thus, the US recognised the rights of Mexico to the utilisation of its waters by aiming towards 'equitable distribution' within the treaty. However, the treaty itself states that such practice does not support the establishment of a general principle. In spite of US officials arguing that sovereignty permits absolute control over transboundary resources within a nation's own territory, looking at the entirety of US state practice in this instance illustrates that the US did not believe they were legally permitted to follow through with such a claim.⁶¹ Although explicitly stating that these claims do not establish any form of precedent, reciprocity and the generalisation of claims may have been factors that effected its variations in practice. If the US were firmly to claim absolute territorial sovereignty over the Rio Grande, then it may be at a disadvantage and lead to problems in instances where it is downstream from its neighbours, as was the case in the *Trail Smelter* dispute.

Although American practice surrounding the Rio Grande dispute maintained a fine line between recognition of the rights of riparians and claims of absolute territorial sovereignty, the *Trail Smelter* dispute was more clearly resolved through recognition of the rights of both riparians to utilise their shared water resources. As stated earlier, the case was referred to the IJC and, after a series of fact-finding so as to determine the extent and seriousness of the damage,⁶² it was concluded that 'under the principles of international law, as well as the law of the United States, no state has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another'.⁶³ In the decision, the tribunal stated that each party

[h]as an equal interest that if a nuisance is proved, the indemnity to damaged parties for proven damage shall be just and adequate and each also has an equal interest that unproven or unwarranted claims shall not be allowed. For, while the United States' interests may now be claimed to be injured by the operations of a Canadian corporation, it is equally possible that at some time in the future Canadian interests might be claimed to be injured by an American Corporation.⁶⁴

Such 'reciprocity of risk' has been cited as one reason why the US was unwilling to enter into such deliberations,⁶⁵ since if Canada was to suspend operation of the Trail Smelter or owe an indemnity to the US, then it is highly likely that Canada could pursue the US in court regarding similar issues in the more highly developed eastern

portion of the US–Canadian border.⁶⁶ Furthermore, if the claims of absolute territorial integrity were upheld, third parties might then be able to claim damages through the precedent such a decision could establish. As such, American officials were treading carefully, given that claims on its northern border could also affect its southern border with Mexico.⁶⁷

Meeting in the middle: limited territorial sovereignty

As stated above, each of these theories of sovereignty concerning transboundary waters could have devastating impacts for either upstream or downstream riparians. That being said, they are often claimed as advocacy tools, and are often not reflections of the legal obligations that states believe they have.⁶⁸ As we saw in the *Rio Grande* and *Trail Smelter* disputes, state claims and actions were at times not aligned, and it appears that the US did not believe that a claim to absolute territorial sovereignty or absolute territorial integrity met its obligations concerning transboundary waters. The resolution of these two cases established a third claim of sovereignty, which has been accepted as customary international law, namely that of limited territorial sovereignty. Such a claim recognises the equal rights of all riparian states to usage of shared waters, and that riparian states must respect the claims of others on its shared watercourse.⁶⁹ Thus, a state claiming limited territorial sovereignty is more likely willing to generalise such a claim, since this would ensure mutual respect of the rights of both states, independent of their geographical position. State practice has also revolved around the acceptance of this claim, and has been recognised in the adoption of various treaties and subsequent state practice through the principles of equitable and reasonable use, as well as no-significant harm, which have also been accepted as custom⁷⁰ and codified, most notably in the Helsinki Rules (1966), as well as the United Nations Watercourses Convention 1997.

Although limited territorial sovereignty and the substantive rules that have emerged from it have been accepted as custom, there is a series of rules that are arguably not yet recognised as custom but could be considered to be moving closer towards recognition, namely the duty to conduct an environmental impact assessment (EIA) or the

66 John E Read 'The *Trail Smelter* dispute' (1963) 213 *Canadian Yearbook of International Law* (1963) 224–25. Read opined that if the case required the complete cessation of pollution that the use of land on either side of the border for industrial or urban purposes would be impossible. He stated that: 'the householder in Detroit or Buffalo or Niagara Falls cannot light a fire in his kitchen stove without contributing to a smoke cloud which may drift across the river to Ontario and cause damage'.

67 See Wirth 'The *Trail Smelter* dispute' (n 52) 39. Wirth cites an industry survey that was used by the US Bureau of Mines, which indicated concerns amongst industries along the southern border with Mexico.

68 See McCaffrey *The Law of International Watercourses* (n 45) 128.

69 *ibid* 136.

70 The customary status of equitable and reasonable use as well as no-significant harm have been confirmed in ICJ rulings. For example, in the *Gabcikovo-Nagymaros* case the ICJ referred to its previous advisory opinion in the *Legality of the Threat or Use of Nuclear Weapons*, stating that: 'The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment'. Furthermore, the court affirmed Hungary's 'basic right to an equitable and reasonable sharing of the resources of an international watercourse'. See *Case Concerning the Gabcikovo-Nagymaros Project (Hungary v Slovakia)* Judgment 1997 ICJ Reports para 7 paras 53, 78.

59 *ibid* art 5.

60 *ibid*.

61 See McCaffrey 'The Harmon doctrine 100 years later' (n 38) 581.

62 For more information regarding the processes involved on both the Canadian and American sides of the case see Wirth 'The *Trail Smelter* dispute' (n 52).

63 Reports of International Arbitral Awards *Trail Smelter* case (*United States v. Canada*) Volume III (1941) 1965.

64 Karin Mickelson 'Rereading the *Trail Smelter*' (1993) 219 *Canadian Yearbook of International Law* 228–29 (emphasis added).

65 *ibid* 228.

duty to suspend. Such procedural cooperative obligations flow from the concept of limited territorial sovereignty, and are often necessary in order to determine what is equitable and reasonable, and to prevent significant harm or determine instances where harm has occurred. Reciprocity may also play a role in their further development and eventual acceptance as customary law. For example, the duty to conduct a transboundary EIA is widely accepted and has been described as an 'emerging principle of international law'.⁷¹

Considered as a possible requirement under general international law in relation to projects which may have negative impacts within the *Pulp Mills* case,⁷² the duty to conduct an EIA is part of the process of consultation and notification. Even though it may be considered a part of general international law, the duty to conduct an EIA is highly context-dependent, leaving states considerable room to determine the content. Reciprocity may be one factor which assists states in determining the baseline content of such duties in like situations and thus work towards the crystallisation of these laws into custom. Through reciprocity, states will only make claims that they wish to see generalised, and thus states will act in their procedural duties in ways they wish their neighbours to act in hopes of reciprocation, possibly stimulating further cooperation.

At present there is very little guidance in relation to the content of EIA. However, Okawa has identified four basic components of a good assessment, including: (1) an EIA must be undertaken during the planning stage of the project so that the results can be taken into consideration prior to implementation; (2) that without consultation with the affected states the proposing state must not proceed with its project; and (3) that the EIA must identify the nature and consequences of the proposed project.⁷³ Reciprocation between parties will assist in ensuring that states conduct reasonable assessments that they would also find acceptable in the other situations.

4 BALANCING POSITIONS AND LIMITING BENEFITS: RECIPROCITY AND PERSISTENT OBJECTION

Although reciprocity will act to limit such claims in states who are both upstream and downstream, such a requirement of reciprocation may not be enough to limit state claims concerning transboundary waters in some situations. Although it is often difficult to categorise states into upstream or downstream states given the geographical contours of shared waters, some states are almost entirely upstream or downstream from their riparian neighbours. These states, particularly those that are upstream,⁷⁴ may

71 Owen McIntyre *Environmental Protection of International Watercourses under International Law* (Ashgate Publishing 2007) 239.

72 *Pulp Mills on the River Uruguay (Argentina v Uruguay)* Judgment 2010 ICJ Reports page 14 para 204.

73 See McIntyre *Environmental Protection of International Watercourses Under International Law* (n 71) 238 for a discussion of P N Okawa 'Procedural Obligations in International Environmental Agreements' in *British Yearbook of International Law* (Oxford University Press 1996) 67(1) 275.

74 Although it is widely accepted that harm flows downstream in terms of pollution, lack of water resources, etc., and upstream in terms of the foreclosure of use, it could be argued that the foreclosure of use is not a particularly strong leverage point for downstream states in order to motivate others to respect their claim of absolute territorial integrity. States who are entirely upstream, hypothetically speaking, could more easily develop their water resources as they wish in spite of downstream protest.

be in a geographical position to make and maintain claims of absolute territorial sovereignty or absolute territorial integrity without negative repercussions, thus potentially acting as a persistent objector. For example, China is upstream on almost all of its 40 shared watercourses⁷⁵ and is often labelled as a hydrohegemon, practising and maintaining some form of absolute territorial sovereignty with regard to its transboundary waters. These states may believe that they do not need to generalise such claims, since given their upstream position they are unlikely to feel many, if any, negative impacts in relation to transboundary waters.

Although this may be the case, reciprocity can act as one reason why states would not do so. First, even though states may be able to maintain such claims, being entirely upstream or downstream is not the only relevant factor states will take into consideration when making these decisions. Reciprocation does not need to occur in the same transaction or the same issue area⁷⁶ and in interconnected issue areas of common interest such as water, persistent objection will bring few benefits. Thus, if states do not recognise the rights of riparians to the use of their shared waters their neighbours may reciprocate negatively in other areas, potentially establishing a long-term path of negative reciprocation and cooperation between them. Secondly, such a disregard for the common interests shared with their neighbours may damage a state's reputation and thereby its ability to work together with neighbouring states in the future.

Reputation and reciprocity go hand-in-hand,⁷⁷ and a state that reciprocates positive behaviour will receive a positive reputation, whereas states that fail to reciprocate positive behaviour or return positive behaviour with negative behaviour will not. A reputation for complying with international law provides states with credibility and a reputation as a good partner, making it easier to enter into future cooperative agreements and receive more favourable concessions from their partners, ultimately making such cooperation more fruitful.⁷⁸ Thus, states are more likely to reciprocate and generalise claims in order to keep

75 Huiping Chen et al 'Exploring China's transboundary water treaty practice through the prism of the UN Watercourses Convention' (2013) 38 *Water International* 217.

76 For example, Keohane's concept of 'diffuse reciprocity' does not require reciprocity to take place in the same transaction and such reciprocation is unlikely to lead to further cooperation. If states were to reciprocate immediately then there would never be a debt or a credit and without this debt or credit between parties the sense of obligation is diminished. Furthermore, Dinar identifies areas of issue linkage that have been used to induce cooperation, including navigation, political concerns, and side payments such as in the 1987 Agreement over the Euphrates where Turkey guaranteed a minimum flow of water to Syria in exchange for concessions regarding smuggling of arms and narcotics into Turkish territory. Robert Keohane 'Reciprocity in international relations' (1986) 40(1) *International Organization* 1-27; Shlomi Dinar *International water treaties: negotiation and cooperation along transboundary rivers* (Routledge 2008) 21-28.

77 Reciprocity and reputation are often discussed as they relate to compliance with international law. Although the situation I discuss is not directly related to compliance with established law, it does relate to compliance with emerging norms that have been adopted by other states. Although not directly related to compliance, non-recognition of a riparian neighbour's right to a portion of shared waters is such a severe stance that it is likely to darken the perceptions of that state, making future cooperation difficult, if not impossible.

78 Andrew T Guzman *How International Law Works: A Rational Choice Theory* (Oxford University Press 2008) 34.

in good standing with their neighbours.⁷⁹ As there are very few states that would be able to maintain such claims in relation to their transboundary waters, its effect on state practice and *opinio iuris* may be minimal.⁸⁰

In spite of this, it could be argued that a few powerful states may have more influence on the creation of custom, and may even be able to influence the practice of other states. Such states may be able to absorb the reputational impact, while reaping greater benefits. Although this may be the case, in the context of transboundary waters there are instances where even powerful states who are primarily upstream or downstream have moved towards cooperation, and more often than not conflicting views result in compromise and cooperation instead of conflict. Returning to the previous example, China is upstream on the majority of its shared river basins and thus faces the 'upstream development dilemma'.⁸¹

Although it may be in a geographical position that would permit it to maintain and practise absolute territorial sovereignty, its state practice, however, illustrates that it does not. China is striving to create a reputation as a good neighbour,⁸² and is slowly moving towards recognition of its riparian neighbours.⁸³ As a signatory to approximately 50 treaties governing or related to transboundary waters,⁸⁴ China accepts the principles of equitable and reasonable use, as well as no-significant harm. Such principles are mentioned in many of its treaties; however, they are often underdeveloped within legal documents.⁸⁵ Although

79 Although there may be no exchange of actual goods or services between states in these instances, reputation may also act as a form of exchange. Such an exchange may include the exchange of benefits or services for positive reputation.

80 India is also a good example of a regional power which is upstream on the majority of its transboundary rivers, while also recognising the rights of its downstream neighbours. During the conflict prior to the signing of the Indus Waters Treaty 1960, India made claims of absolute territorial sovereignty. The rights of downstream Pakistan, however, were recognised within the treaty and the waters were divided equally between the two parties. This is most likely an instance where absolute territorial sovereignty was used as a tool of negotiation, and does not reflect the legal obligations states believe they must follow. In his article, Mark Zeitoun identifies one example that may go against this tendency, namely the River Tigris. On this river, Turkey, as the upstream power, claims absolute territorial sovereignty within its domestic law and has opposed international initiatives such as the UNWC. Although it claims absolute territorial sovereignty, it recognises equitable and reasonable use and no-significant harm within domestic legislation. This, Zeitoun argues, is part of a possible trend back towards absolute territorial sovereignty. For more information see McCaffrey *The Law of International Watercourses* (n 45) 115–116; see also Mark Zeitoun 'The relevance of international water law to later-developing upstream states' (2015) 40(7) *Water International* 11–13.

81 Patricia Wouters 'The Yin and Yang of international water law: China's transboundary water practice and the changing contours of sovereignty' (2014) 23 *RECIEL* 71.

82 This desire for good neighbourliness is exemplified through the Five Principles of Peaceful Coexistence, as agreed between India and China in 1958. These principles, which have often guided China's international practice, include: '(1) mutual respect for each other's territorial integrity and sovereignty, (2) mutual non-aggression, (3) mutual non-interference in each other's internal affairs, (4) equality and mutual benefit, and (5) peaceful co-existence'. See Agreement between the Republic of India and the People's Republic of China on Trade and Intercourse between Tibet Region of China and India 1958.

83 See Wouters 'The Yin and Yang of international water law' (n 81) 72.

84 Patricia Wouters, Huiping Chen, 'China's "soft-path" to transboundary water cooperation examined in the light of two UN global water conventions: exploring the "Chinese way"' (2013) 22 *Journal of Water Law* 232.

85 For more information regarding China's legal practice regarding its transboundary waters see also Yu Su 'Contemporary legal analysis of China's transboundary water regimes: international law in practice' (2014) 39 *Water International* 705–724.

China's approach to its transboundary waters has traditionally focused on bilateral relations, recent examples suggest that China may be more willing to cooperate on a larger scale. Although not a party to the Mekong Agreement 1995, in November 2015 China participated in the first foreign ministers' meeting, which officially launched the Lancang-Mekong River Cooperation Mechanism. Based on consensus, mutual benefit and equality, all parties, including representatives from Thailand, Vietnam, Myanmar, Laos, Cambodia and China, agreed on its future direction and to enhance cooperation concerning priority areas, including water.⁸⁶

In March, 2016 all riparian countries once again came together, resulting in the Sanya Declaration in which riparian states recognise that 'our security and development interests are closely inter-connected', and thus the parties devote themselves to increasing cooperation based upon 'equality, mutual consultation and coordination, voluntarism, common contribution and shared benefits, and respect for the United Nations Charter and international laws'.⁸⁷ It has yet to be seen how these latest developments and the resulting cooperative framework will unfold; however, this illustrates that China is more interested in working with its riparian neighbours than forging ahead on its own.

5 RECIPROCITY AND THE FUTURE DEVELOPMENT OF INTERNATIONAL WATER LAW: THE COMMUNITY OF INTERESTS?

As international law has developed, it has become gripped by the need to support universal moral beliefs, while also reflecting its political context.⁸⁸ Reciprocity is often associated with the bilateral political context, and thus Paulus notes that: 'if the obligation is strictly reciprocal between the states parties, reciprocity applies. If, however, the provision also serves the more general interest of the international community, or it benefits other, third persons, it goes beyond the bilateral relationship between parties and thereby also beyond reciprocity'.⁸⁹ Thus, as international law develops and moves from a system where bilateral relations between sovereign states are key and which aim to include and protect fundamental human values within the body of international law,⁹⁰ the importance of reciprocity is likely to change as well.

The development of international water law first began as primarily bilateral relationships, which were often facilitated by reciprocation between parties. However, as it has developed it too has witnessed the insertion of fundamental values, for example through the development of the human right to water,⁹¹ but also through the

86 Ministry of Foreign Affairs, People's Republic of China 'Five features of Lancang-Mekong River cooperation' (2016) www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1349239.shtml.

87 Ministry of Foreign Affairs, People's Republic of China 'Sanya Declaration of the first Lancang-Mekong cooperation (LMC) Leaders' Meeting' (2016) www.fmprc.gov.cn/mfa_eng/topics_665678/lkqcxboayzlt2016nnh/t1350039.shtml/.

88 Bruno Simma 'From bilateralism to community interest' (1994) 250 *Recueil de Cours* 217, 249.

89 See Paulus 'Reciprocity revisited' (n 20) 119.

90 See Simma 'From bilateralism to community interest' (n 88) 233–34.

91 The human right to water has been present in a series of rights documents over the past few decades, however has more recently come into form. In 2010 the Human Rights Committee released General

development of a fourth primary principle, the community of interests. Derived from the natural unity of watercourses,⁹² cooperation within the framework of the community of interests may contain one or more of the following five elements: (1) a promotion of a drainage approach; (2) a view of watercourses as common property; (3) mutual consent; (4) joint management of the shared water resources; and (5) sub-basin agreements and institutions.⁹³ Such a community of interests can be viewed as reinforcing claims of limited territorial sovereignty,⁹⁴ but it could also be said that it transcends sovereignty since states are members of the community due to their shared hydrologic system.⁹⁵ As such, the community of interests may transcend reciprocity as we know it; however, given that this theory is relatively underdeveloped the role that reciprocity will play is unclear.

Reciprocity is likely to play a role in the development of the community of interests, but once such a community has been established the role of reciprocity may move 'from the master to the slave'.⁹⁶ As cooperation continues through concessions in good faith followed by reciprocity states are able to identify their common interests, thus assisting with the formation of the community of interests. As the community of interests 'evokes the necessity of cooperation to ensure that competing interests do not stand in the way of one another',⁹⁷ such cooperation will be pushed by the common interests of riparians, not reciprocal exchange. Although this may be the case, reciprocity will not disappear, but will remain an important factor in enforcement. Treaties established under a community of interests act as a 'reciprocal promise' between states, since each state has an interest in the treaty being upheld by all parties.⁹⁸ If states violate a rule within a community of interest then its community members may be permitted to reciprocate in order to bring that state back into line.⁹⁹

Comment No 15 which sets out the content of the right. This was then adopted by the UNGA through Resolution 64/292, quickly followed by Human Rights Council Resolution 15/9. Such documents claim that the right is derived from the right to health and the right to an adequate standard of living. The right consists of responsibilities to respect, protect and fulfill which are primarily the responsibilities of states. Although it is still not recognised by all states, there is a general trend towards its acceptance.

92 See McCaffrey *The Law of International Watercourses* (n 45) 148.

93 Flavia Rocha Loures 'The dragon as part of transboundary basin "villages": community of interests and international law in China' (2015) 24 *Journal of Water Law* 220, 236.

94 See McCaffrey *The Law of International Watercourses* (n 45) 164.

95 See Leeb *Cooperation in the Law of Transboundary Water Resources* (n 7) 52.

96 See Paulus 'Reciprocity revisited' (n 20) 115.

97 See Leeb *Cooperation in the Law of Transboundary Water Resources* (n 7) 53.

98 See Paulus 'Reciprocity revisited' (n 20) 126.

99 In an early draft of the draft Articles on State Responsibility, article 40-2e 'Meaning of Injured State' defines an injured state in instances where the injury arises from a multilateral treaty or a rule of customary international law to be 'any other state party to the multilateral treaty or bound by the relevant rule of customary international law'. This permits enforcement of obligations towards the international community, particularly in instances where all states have an interest in others upholding certain obligations, for example obligations *erga omnes*. Article 54 concerning 'Countermeasures by States other than the injured State' (taken alongside art 49 - 'Invocation of responsibility by States other than the injured State') permitted enforcement of obligations towards the international community by third parties. Neither of these articles, however, was included in the final draft, where the scope of the definition of an injured state was narrowed, and mention of third party countermeasures was removed. As the duty to cooperate emerges as a potential *erga omnes* obligation, it is

Although reciprocity will not be a prime mover within the community of interests, it is too early to say that its role in the development of law will be lost, since such enforcement can also act as a mechanism of the development of law.

6 CONCLUSION

This article has analysed the role that reciprocity has played in the establishment and future of international water law, particularly customary law. As a prime mover within the international legal system, expectations of reciprocity and legal reciprocity have worked to maintain the balance we find today between member states. The international legal system has shifted away from sovereigns at its core, to one which aims to protect objective moral norms. The same can be said of international water law, where reciprocity has been one factor that has led us to the system and rules that we have today. Within the international legal system reciprocity requires that states make claims which they are willing to generalise. When looking through a lens of reciprocity claims of absolute territorial sovereignty or integrity are untenable since it would be to the detriment of all states if such claims were generalised. This has resulted in the system that we have today through limited territorial sovereignty and the rules that spring from it, including equitable and reasonable use and no-significant harm. These substantive principles are supported by a series of procedural rules which may be defined and refined through reciprocal exchange between parties.

As the fulcrum of cooperation shifts from national sovereigns to global communities,¹⁰⁰ however, reciprocity will be altered but not abandoned. As states move towards closer and deeper cooperation based on common interest, reciprocity will no longer be a prime mover, but it will continue to act as a mechanism of enforcement. Although reciprocity has been one factor that has assisted in the development of international water law, more research is needed to determine how reciprocity functions within its tenets as a legal mechanism, with the aim that further reciprocity can bring about further cooperation to manage this vital resource.

interesting to note that reciprocity may act as one aspect of, if not the foundation for, such a duty. Wouters and Tarlock argued that such a duty, beyond its overarching rule to cooperate, prohibits states from developing transboundary waters without taking into account their riparian neighbours (among other prohibitions). This prohibition, at first glance, sounds like an obligation to generalise their claims, and ultimately to reciprocate in good faith to protect their common interests; however, more research on reciprocity is needed. For more information see International Law Commission 'Documents of the Fifty-second Session: Vol. II, Part I (A/CN.4/SER.A/2000/Add.1 (Part 1))' (2000) *Yearbook of the International Law Commission*; United Nations General Assembly (UNGA) 'State Responsibility: draft Articles provisionally adopted by the Drafting Committee on Second Reading' A/CN.4/L.600 (2000); Patricia Wouters, A Dan Tarlock 'The third wave of normativity in global water law: the duty to cooperate in the peaceful management of the world's water resources: An emerging obligation erga omnes?' (2013) 23 *Journal of Water Law* 64.

100 Patricia Wouters, A Dan A Tarlock 'The third wave of normativity in global water law' (n 99) 59.