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The Harmon Doctrine One Hundred Years Later: Buried, Not Praised**

ABSTRACT

The "Harmon Doctrine" is perhaps the most notorious theory in all of international natural resources law. Based upon an opinion of Attorney General Judson Harmon issued a hundred years ago, the doctrine holds that a country is absolutely sovereign over the portion of an international watercourse within its borders. Thus that country would be free to divert all of the water from an international watercourse, leaving none for downstream states. This article looks closely at the Harmon Doctrine in historical context. An examination of the conduct of the United States during the dispute with Mexico over the Rio Grande that produced the Doctrine, as well as other contemporaneous and subsequent practice, demonstrates that the United States never actually followed the Doctrine in its practice. It is therefore highly questionable whether this doctrine is, or ever was, a part of international law.

I. INTRODUCTION

The law of international watercourses has developed in tandem with the evolution of human social organization and the intensification of use by human societies of fresh water.¹ Water is of course essential to human and other forms of life, but it also fuels industry and facilitates commerce. In terms of their relative importance to states, however, navigation held sway over other uses of watercourses until the late nineteenth and early twentieth centuries. "With the beginning of the industrial revolution water needs for irrigation, water-power, navigation, flood control and water supply experienced a sharp increase."² One region in which the growth of irrigation agriculture was especially

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** Portions of this article draw upon a forthcoming book by the author on the Law of International Watercourses.

1. See generally LUDWIK TECLAFF, *THE RIVER BASIN IN HISTORY AND LAW* (1967).

2. U.N. Dep't of Economic & Social Affairs, *Integrated River Basin Development*, Report of a Panel of Experts at 2, U.N. Doc. E/3066/Rev.1 (1970).

pronounced was the southwestern United States. Irrigated acreage in this area virtually doubled in the first thirty years of this century.³ Diversions for irrigation purposes had already increased sharply during the last twenty years of the 19th century.⁴ As the intensity of non-navigational uses of international watercourses grew, a body of law dealing with those uses began to develop. But the development of the law in this area did not keep pace with the intensification of non-navigational uses. Obviously, rules relating to navigation, which were well-developed and broadly accepted, could not simply be transplanted to the field of non-navigational uses.⁵ States therefore had to rely upon more general concepts, such as that of territorial sovereignty, to regulate their relations in this area.

But the fact that the water contained in international watercourses is in constant motion has made its non-navigational uses particularly challenging as a subject of international legal regulation. It is axiomatic, for example, that a state is sovereign within its territory.⁶ In this sense, "sovereignty" implies complete and exclusive authority over that

3. Teclaff, *supra* note 1 at 83, noting that irrigated land in the western United States increased from 7,543,000 acres in 1900 to 14,086,000 acres in 1930.

4. A 1896 report indicated that with regard to the Rio Grande alone an aggregate of 1,074 [diversion] canals taken out in Colorado and New Mexico prior to 1880 and 1,528 taken from the river and its tributaries at this date, showing an increase of 454 canals and of 196,000 acres irrigated in the State of Colorado and Territory of New Mexico. . . . There are no reliable records available showing the increase in the preceding years, but they were doubtless on a more rapidly increasing ratio.

Report of the International water Boundary Commission of Nov. 25, 1896, annexed to letter of 25 Nov. 1896 from Col. Anson Mills, Commissioner, to the Secretary of State, reprinted in *The Rio Grande Claim (U.S. v. Gt. Brit.)*, Am. & Brit. Claims Arb. 1910, Pleadings & Awards, vol. 22, Claim No. 83 (1923), Appendix to the Answer of the United States, 261, 265 (1923) [hereinafter U.S. Appendix].

5. To this effect, see Georges Sauser-Hall, *L'Utilisation Industrielle des Fleuves Internationaux*, 83 REC. DES COURS 465, 475, (1953-II) (referring to Charles Rousseau.) It may be, however, that certain principles are applicable to both kinds of uses. In particular, the reference of the Permanent Court of International Justice in the *River Order* case to a "community of interest of riparian States . . . in a navigable river," 1929 P.C.I.J. (Ser. A, No. 16), at 27, has been applied by commentators to problems involving non-navigational uses, even though the case itself involved navigation. See, e.g., Lucius Cafilisch, *Règles Générales du Droit des Cours d'Eau Internationaux*, 219 REC. DES COURS (1989-VII) 9, 60 (1992); JOHAN LAMMERS, *POLLUTION OF INTERNATIONAL WATERCOURSES* 507 (1984); JEROME LIPPER, *Equitable Utilization, in THE LAW OF INTERNATIONAL DRAINAGE BASINS* 15, 29 (Albert H. Garretson, et al., eds., 1967).

6. "[T]he jurisdiction of the state over its territory is called territorial sovereignty." Milan Sahović & William Bishop, *The Authority of the State: Its Range with Respect to Persons and Places*, in *MANUAL OF PUBLIC INTERNATIONAL LAW*, 311, 314 (Max Sørensen, ed., 1968). "[T]he jurisdiction of a state over its territory is the basis of its activity . . ." *Id.* at 313.

territory.⁷ However, does it necessarily follow that international law imposes no constraints upon a state's use within its territory of a river that flows into another state? Does a downstream state have no right to object to uses of a watercourse in an upstream state that result in harm to the former?⁸ And what of the sovereignty of the downstream state over its territory? Is it proper to regard that as having been infringed if actions in the upstream state unfavorably alter the characteristics of the portion of the watercourse in the downstream state?

These questions attracted the interest of scholars beginning early in the nineteenth century.⁹ Theories ranged from one extreme to the other. At one end of the continuum was the doctrine of "absolute territorial sovereignty," according to which a state could do virtually as it pleased with the portion of an international watercourse within its territory—at least short of changing its course so it entered the downstream state at a different location—irrespective of the harmful consequences in the downstream state. At the other extreme was the doctrine of "absolute territorial integrity," which held that the upstream state could do nothing to interfere with the natural flow of the river into the downstream state.¹⁰ While it seems obvious that neither of these extreme theories is suited to today's interdependent world, each was asserted at early stages of the development of the law in this field. Even today there are instances, albeit isolated and infrequent ones, in which states have taken positions that bear a striking similarity to these doctrines.¹¹

The doctrine of "absolute territorial sovereignty" is most often identified with an opinion prepared in 1895 by an Attorney General of the United States, Judson Harmon, in response to a request by the Department of State for advice concerning a dispute with Mexico over the use of waters of the Rio Grande. This opinion has become so synonymous with the doctrine of absolute territorial sovereignty that it now stands as the doctrine's cornerstone, if not its entire foundation. The centennial of the "Harmon Doctrine" invites a close examination of this theory with a view to determining its international legal status. This article will undertake only a portion of such an examination, focusing

7. *Id.* at 316.

8. A negative answer to this question is suggested by Sahović & Bishop: "[T]he territorial sovereignty of a state must not be exercised in a manner detrimental to other states but in good faith in compliance with international obligations and with international law in general." *Supra* note 6, at 316 (citing the *Corfu Channel* case, 1949 I.C.J. Rep. 22).

9. See generally the surveys of scholarly opinion in F. BERBER, *RIVERS IN INTERNATIONAL LAW* 11-40 (1959) (surveying scholarly opinion).

10. These and other theories are discussed in Berber, *supra* note 9; and Lipper, *supra* note 5, at 16-40.

11. See, e.g., Lipper, *supra* note 5, at 18-22; and Caflisch, *supra* note 5, at 16-40 (both surveying state practice).

upon the historical context in which the doctrine was articulated and its observance, or lack thereof, in subsequent United States practice. The dispute that formed the crucible of the doctrine serves as a valuable case study because it shows that a position formally taken by a state in a particular diplomatic exchange may reflect advocacy more than a detached view of the law, and thus may be a position the state would not be willing to abide by if its situation in that or a similar controversy were reversed. The article will conclude that if the United States ever embraced the doctrine, except as a matter of advocacy in a particular dispute, it has long since ceased to do so.

II. THE DISPUTE BETWEEN MEXICO AND THE UNITED STATES OVER UTILIZATION OF THE RIO GRANDE

A. *Introduction: The Rio Grande*

While no doubt an important river for the arid regions of southwestern United States and northeastern Mexico, the Rio Grande is not among the world's largest rivers, in terms of either length or runoff. The river rises in the United States and flows some 1,885 miles,¹² 1,240 of which form the border between the United States and Mexico, before emptying into the Gulf of Mexico. This qualifies the Rio Grande as the fifth longest river in North America.¹³ While estimates of its average runoff vary from 82 to 120 cubic meters per second,¹⁴ only a fraction of that of the Colorado,¹⁵ all studies agree that the river places at or near the bottom of the list of significant international watercourses in this category. From its source in the San Juan Mountains of southwestern Colorado, the Rio Grande flows for some 645 miles through Colorado and New Mexico before becoming the boundary between the United

12. 24 *ENCYCLOPEDIA BRITANNICA*, 1023 (1987). Like nearly all data, estimates of the length of rivers vary considerably. Thus the length of the Rio Grande has been placed at distances ranging from 2,870 to 3,034 kilometers. *WATER IN CRISIS* 153 (Peter H. Gleick, ed, 1993).

13. 24 *ENCYCLOPEDIA BRITANNICA*, *supra* note 12, at 1023.

14. *Water In Crisis*, *supra* note 12, at 146, 147. This volume presents data from different sources on this and other questions. The 82 figure is from a 1981 study by E. Czaya, while that of 120 is from one of 1982 by K. Szesztay. *Id.* at 145. A third study, by M. Meybeck (1988), places the Rio Grande's runoff at 100 cubic meters per second-again the lowest quantity on the list of, in the case of that study, 47 rivers. *Id.*

15. The same studies place the runoff of the Colorado at quantities varying from 580 (Szesztay) to 640 (Meybeck) cubic meters per second. *WATER IN CRISIS*, *supra* note 12, at 147, 148. However, Czaya estimates that river's flow at the U.S.-Mexico border to be a mere 168 cubic meters per second. *Id.*, at 146.

States and Mexico.¹⁶

B. The Events Leading Up To the Issuance of Harmon's Opinion

A controversy arose in the latter part of the 19th century over diversions of water from the Rio Grande in the United States.¹⁷ In October, 1894, the Mexican Minister at Washington, Matías Romero, sent a note to American Secretary of State W.Q. Gresham transmitting a copy of a communication to Romero from the consul of Mexico at El Paso. Romero emphasized that the communication

shows the urgent necessity that exists for a decision of the question relative to the taking of water from the Rio Bravo (Rio Grande) del Norte in the State of Colorado and the Territory of New Mexico, which has so seriously affected the existence of the frontier communities for several miles below Paso del Norte [Ciudad Juarez¹⁸] . . . and points out the danger lest otherwise those communities may be annihilated.¹⁹

The communication of the Mexican consul provides insight into the seriousness of the situation. The consul, José Zayas Guarneros, believed that the disposition of this question would decide "the existence or the disappearance of the frontier towns" of both Ciudad Juarez and El Paso, Texas. His letter gives a grim account of the economic straits of Ciudad Juarez and states that "[t]here remains no other recourse for the maintenance of tranquillity pending the settlement of the main question . . . than the equitable division of the waters of the river."²⁰ Minister Romero closed his note to the American Secretary of State by soliciting "an examination and decision of this grave question" by the State Department.²¹

16. Specifically, the river forms the boundary between the U.S. State of Texas and the Mexican States of Chihuahua, Coahuila, Nuevo León, and Tamaulipas.

17. For a description of the problems of this period between the United States and Mexico relating to international rivers, see James Simsarian, *The Diversion of Waters Affecting the United States and Mexico*, 17 TEX. L. REV. 27 (1939). See also Jacob Austin, *Canadian-United States Practice and Theory Respecting the International Law of International Rivers: A Study of the History and Influence of the Harmon Doctrine*, 37 CAN. BAR REV. 393, 405-411 (1959).

18. Ciudad Juarez is a Mexican community directly across the river from El Paso, Texas.

19. Letter from Minister Romero to Secretary Gresham (12 Oct. 1894), reprinted in *FOREIGN RELATIONS OF THE UNITED STATES*, 395 (1894). See also 1 MOORE DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW (hereinafter DIGEST) at 764.

20. Letter from Mr. Guarneros to Mr. Romero (4 Oct. 1894), reprinted in *FOREIGN RELATIONS OF THE UNITED STATES*, 395-96 (1894).

21. *Id.* at 395.

The Secretary of State responded just over two weeks later.²² He informed the Mexican Minister that he had referred the latter's earlier note of September 10 concerning the same question to the U.S. Department of Agriculture. He further informed the Minister that the Department of Agriculture was of the opinion that "it is by no means certain that the low state of the Rio Grande at Ciudad Juarez and vicinity is due to the utilization of water for irrigation along the upper course of the river to a greater extent than heretofore."²³ Secretary Gresham went on to observe that Ciudad Juarez had frequently experienced failures of water supply in the past, and opined that the current problem "is satisfactorily explained by the drought that has prevailed over the headwaters of the Rio Grande for the last two or three years, and over the territory around El Paso for six or eight years."²⁴ He then stated that "[t]he evidence in the possession of the Department of Agriculture does not show any material increase in the utilization of water for irrigation on the Upper Rio Grande for several years past."²⁵ Finally, Secretary Gresham informed Minister Romero that his note of October 12 had also been referred to the Secretary of Agriculture.²⁶

Thus, far from being a legalistic denial of any obligation to provide water to Mexico, the initial response of the U.S. Government to the Mexican complaint was a purely factual one. Furthermore, while Secretary Gresham did not give Minister Romero the kind of response the latter doubtless would have liked, neither did he in any way close the door to further discussions of the problem. A cooperative attitude is also reflected in the message to Congress delivered by President Cleveland in December of the same year, in which the President stated: "The problem of the storage and use of the waters of the Rio Grande for irrigation should be solved by appropriate concurrent action of the two interested countries."²⁷

The shortages of Rio Grande water experienced by Mexican communities in the vicinity of Ciudad Juarez had been called to the attention of the Department of War earlier, in an 1890 report from the U.S. Army officer in charge of the Department of Texas. The report described the alarm of the Mexicans along the Rio Grande at what they considered a violation of their riparian rights by American withdrawals

22. Letter from Secretary Gresham to Minister Romero (Nov. 1, 1894), printed in *FOREIGN RELATIONS*, *supra* note 20 at 397.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. President Grover Cleveland, Annual Message, Dec. 3, 1894, 1 *MOORE DIGEST*, *supra* note 19, at 764.

of water to irrigate the San Luis valley in Colorado, which was said to have left the Rio Grande a dry bed for 500 miles.²⁸

Evidencing a broad recognition of the seriousness of the situation even as early as 1890, the U.S. Congress in that year passed a concurrent resolution concerning the problem.²⁹ In its second preambular paragraph the resolution specifically acknowledged that upstream diversions from the Rio Grande were depriving those in the Juarez-El Paso area of water:

by means of irrigating ditches and canals taking the water from said river and other causes, the usual supply of water therefrom has been exhausted before it reaches the point where it divides the United States of America from the Republic of Mexico, thereby rendering the lands in its valley arid and unproductive, to the great detriment of the citizens of the two countries who live along its course³⁰

The resolution described these and other conditions³¹ as a "standing menace to the harmony and prosperity of the citizens of said countries, and the amicable and orderly administration of their respective Governments" ³² The two houses of Congress therefore resolved that the President be requested to enter into negotiations with Mexico with a view to resolving, *inter alia*, the Rio Grande water problems.

Mexico having received no satisfaction from the United States in response to its note of October, 1894, Minister Romero sent another note concerning the problem to the State Department dated October 21, 1895.³³ In this communication Romero carefully described the arid condition of the Ciudad Juarez region, demonstrating the dependence of farmers there on Rio Grande water for irrigation of their crops.³⁴ He stated that during the nearly 300-year existence of Ciudad Juarez, its inhabitants had irrigated their land with water from the Rio Grande.

28. Report of General Stanley to Secretary of War, Sept. 12 1889, quoted in "Irrigation of Arid Lands-International Boundary-Mexican Relations," H.R. Rep. No. 490, 51st Cong., 1st Sess. 3 (1890).

29. Concurrent Resolution of 29 Apr. 1890 "concerning the irrigation of arid lands in the valley of the Rio Grande River, the construction of a dam across said river at or near El Paso, Tex., for the storage of its waste waters, and for other purposes," 51st.Cong., 1st Sess., 21 CONG. REC. 3963, 3977 (1890); U.S. Appendix, *supra* note 4, at 145. This resolution is referred to in the opinion of Attorney General Judson Harmon, 21 Op. Att'y Gen. 274 (1895).

30. Concurrent Resolution of 29 Apr. 1890, *supra* note 29 at 3977.

31. The other conditions referred to were changes in course of the river due to flooding resulting in confusion as to the location of the boundary.

32. Concurrent Resolution of Apr. 29, 1890, *supra* note 29 at 3977.31.

33. Letter from Matias Romero, Mexican Minister, to Richard Olney, Secretary of State (Oct. 21, 1895), reprinted in U.S. Appendix, *supra* note 4, at 200, 202.

34. "[T]otal rainfall from August 15, 1893, to August 14, 1894, was 4.97 inches, or next to nothing at all." *Id.* at 200-01.

According to Romero, the city and districts within its jurisdiction did not need more than 20 cubic meters of water per second for their crops, which he described as "an almost infinitesimal portion of the amount of water which flowed down the river, even in times of severest drought"³⁵ He stated that they therefore "had sufficient water for their crops until about 10 years ago [*i.e.*, 1885], when a great many trenches were dug in the State of Colorado (especially in the St. Louis [San Luis] Valley), and in the Territory of New Mexico, through which the Rio Grande and its affluents flow."³⁶ Romero charged that because of these diversions the river's flow at El Paso had been diminished to such an extent that there was a scarcity of water from mid-June until March, "which is the very time when water is most needed for the crops."³⁷ He stated that in 1894 "the river became dried up entirely by the 15th of June," and that "[i]n that year the farmers were unable to raise any Indian corn, vegetables, or grapes, and the scarcity of water was such that even the fruit trees began to wither."³⁸ According to Minister Romero, this situation had led to a decrease in land values and a reduction of the population in the communities in the vicinity of Ciudad Juarez from 20,000 in 1875 to 10,000 in 1894.³⁹

Romero drew attention to the 1890 joint resolution of Congress calling upon the President to enter into negotiations with Mexico concerning the problem but stated that despite his efforts on behalf of the government of Mexico, it had not been possible "to make much progress in this matter."⁴⁰ Romero then outlined the legal position of Mexico. First, Mexico contended that the American diversions violated Article VII of the 1848 Treaty of Guadalupe Hidalgo, which provides in part: "the navigation of the [Rio Grande] below [the southern boundary of New Mexico] shall be free and common to the vessels and citizens of both countries; and neither shall, without the consent of the other, construct any work that may impede or interrupt, in whole or in part, the exercise of this right"⁴¹ Romero referred to an 1850 U.S. Army report indicating that an Army officer had traveled up the Rio Grande "with a vessel, reaching a point several kilometers above [El Paso], which shows that it was navigable at that time."⁴² According to Mexico, the irrigation ditches in Colorado and New Mexico fell within the treaty's prohibition

35. *Id.* at 201.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.* at 202.

41. Treaty of Guadalupe Hidalgo, Feb. 2, 1848, U.S.-Mex., at Art. VII, reprinted in 1 Malloy DIGEST at 1107, 1111.

42. *Id.*

of works that would interfere with navigation, since "nothing could impede it more absolutely than works which wholly turn aside the water of these rivers."⁴³ Minister Romero went on to say that even if the treaty did not apply to the problem,

the principles of international law would form a sufficient basis for the rights of the Mexican inhabitants of the bank of the Rio Grande. Their claim to the use of the water of that river is incontestable, being prior to that of the inhabitants of Colorado by hundreds of years, and, according to the principles of civil law, a prior claim takes precedence in case of dispute.⁴⁴

The note concluded by expressing Mexico's strong interest in negotiating with the United States an arrangement for the distribution of Rio Grande waters.

C. *The Harmon Opinion*

The U.S. Department of State did not at that time have its own, in-house legal adviser, but referred legal questions to the Department of Justice, headed by the Attorney General.⁴⁵ Secretary of State Richard Olney therefore referred Minister Romero's note of 21 October 1895 to Attorney General Judson Harmon.⁴⁶ Olney drew the Attorney General's attention to the concurrent resolution adopted by Congress in 1890 and stated that "[t]he negotiations with which the President . . . is charged by the foregoing resolution, can not be intelligently conducted unless the legal rights and obligations of the two Governments concerned and the responsibility of either, if any, for the disastrous state of things depicted in the Mexican Minister's letter are first ascertained."⁴⁷ He therefore requested Harmon to prepare an opinion on the soundness of Mexico's legal claims, asking specifically whether Article VII of the Treaty of Guadalupe Hidalgo was "still in force" and whether Mexico's claims

43. *U.S. Appendix*, *supra* note 4, at 202; also quoted in 21 Op. Att'y Gen. 274 (1895).

44. *Id.*

45. The position of Legal Adviser of the Department of State was not created until 1931. Act of Feb. 23, 1931, P.L. 71-715, 46 Stat. 1214 (codified at 22 U.S.C. § 2654 (1988)). Until that time, the chief legal officer of the State Department had been an official of the Department of Justice: the "Solicitor" from 1891-1930; and the Examiner of Claims from 1870 to 1891. UNITED STATES DEPARTMENT OF STATE, PRINCIPAL OFFICERS OF THE DEPARTMENT OF STATE AND UNITED STATES CHIEFS OF MISSION, 1778-1990 (1991).

46. Letter from Richard Olney, Secretary of State, to Judson Harmon, Attorney General (5 Nov. 1895), printed in *U.S. Appendix*, *supra* note 4, at 203. The relevant portions of the Secretary of State's letter are quoted in Harmon's opinion, 21 Op. Att'y Gen. 274, 275 (1895).

47. *U.S. Appendix*, *supra* note 4, at 204.

were supported by principles of international law independent of any treaty obligation.⁴⁸

The Attorney General's response addressed both of these questions.⁴⁹ As to the treaty, Harmon's view was that Article VII applied only to "the part of the Rio Bravo del Norte [Rio Grande] lying below the southern boundary of New Mexico,"⁵⁰ and "[i]t is that part alone which is made free and common to the navigation of both countries, and to which the various prohibitions apply."⁵¹ Thus Harmon interpreted Article VII to mean that any activities taking place north of the southern boundary of New Mexico—i.e., the point at which the Rio Grande becomes a contiguous watercourse—were outside the scope of the article, and therefore the treaty.⁵² This construction is by no means dictated by the terms of the article, and in fact seems strained by today's standards. The article merely provides that there shall be freedom of navigation for both countries on the Rio Grande below the New Mexico border, and that neither country is to construct any work that may interfere with this right

48. *Id.*

49. Letter to Judson Harmon, Attorney General, from Richard Olney, Secretary of State (Dec. 12, 1895), printed in *U.S. Appendix*, *supra* note 4, at 204. The Secretary of State's letter does not actually ask whether Art. VII of the 1848 Treaty of Guadalupe Hidalgo would provide a basis for Mexico's claims, only whether it was still in force as far as the Rio Grande was concerned (Harmon concluded it was). Nevertheless, the Attorney General responded to each of Mexico's legal claims, i.e., that the American diversions violated either the treaty or principles of international law independent of any special treaty or convention. *Id.*

50. 21 Op. Att'y Gen. 274, 277. Harmon quoted from Article VII of the treaty. He also noted that Article IV of the Gadsden treaty of Dec. 30, 1853 continued Article VII of the 1848 treaty in force only as to the Rio Grande below the point at which it became the boundary between the United States and Mexico as provided in the 1853 treaty. Gadsden Treaty, Dec. 30, 1853, U.S.-Mex., at Article IV, Represented in 1 MALLOY Digest 1121, 1123. However, Article IV was motivated not by a wish to ensure freedom to divert unlimited quantities of water from the Rio Grande north of the boundary, but by the fact that "[t]he provisions of the 6th and 7th articles of the treaty of Guadalupe Hidalgo [were] rendered nugatory for the most part by the cession of territory granted in the first article of this [i.e., the 1953] treaty" *Id.* Thus the portions of Article VII of the 1948 treaty that were "rendered nugatory" were those concerning the boundary in and freedom of navigation on the river Gila, which before the Gadsden Purchase constituted the boundary but after the Purchase lay entirely within the United States (now the State of Arizona). Understandably, Harmon does not pursue this point further.

51. 21 Op. Att'y Gen. 274, 277 (1895).

52. In fact, Harmon seemed to go even farther, arguing that the prohibition against works that might interfere with navigation applied only up to the "head of navigation" i.e., as far up the river as vessels could navigate. At one point the Attorney General claimed this was some 150 miles downstream of El Paso (rather than several kilometers upstream of El Paso as alleged by the Mexican Minister). 21 Op. Att'y Gen. 274, 276 (1895). At another point, however, he states, "[a]bove the head of navigation . . . the river would be wholly within the United States." *Id.*

without the other's consent. It does not say that neither country shall construct any work *on that stretch of the river* that may impede navigation. The notion that water could be withdrawn just above the southern border of New Mexico in sufficient quantities to make navigation impossible below the U.S.-Mexico border, and that this would not be contrary to both the letter and the spirit of Article VII, seems absurd on its face.⁵³ Such an interpretation is also inconsistent with the principle of effectiveness.⁵⁴

In support of his interpretation, Harmon referred to the fact that Article VII prohibits the two *countries* from constructing any of the specified works. "The prohibition was . . . made applicable to them alone, and not to the citizens of either . . ."⁵⁵ The explanation for this, in Harmon's view, is that such works could have been constructed on the navigable portions of the river only by one of the two countries, or under its authority, and not by its citizens. Conversely, in Harmon's view:

Above the head of navigation, where the river would be wholly within the United States, different rules would apply and private rights exist which the Government could not control or take away save by the exercise of the power of eminent domain, so that clear and explicit language would be required to impose upon the United States such obligations as would result from the construction of the treaty now suggested [by Mexico].⁵⁶

Thus Harmon seems to be saying that unless a provision is addressed in terms to the "citizens" of a country, it applies only to governments. But according to Harmon, a government would apparently be powerless to stop private citizens from diverting even all of the water of the Rio Grande, unless compensation were paid. This seems to follow from his statement that "private rights exist which the Government could not control or take away save by the exercise of the power of eminent

53. In Austin's view, "whatever merit [Harmon's] argument may have as an exercise in logic it has no relation to common sense What this article in fact says is that Mexicans have the right to navigate up to the boundary and nothing shall interfere with this right. Any other construction would reduce the clause to nonsense Attorney General Harmon in this case is guilty of serious error." Austin, *supra* note 17, at 407.

54. "When a treaty is open to two interpretations one of which does and the other does not enable the treaty to have appropriate effects, good faith and the objects and purpose of the treaty demand that the former interpretation should be adopted." Report of the International Law Commission on the Work of its Eighteenth Session, [1966] 2 Y.B. Int'l L. Comm'n 219, U.N. Doc. A/CN.4/SER.A/1966/Add.1. The principle of effectiveness is expressed in the maxim, *ut res magis valeat quam pereat*. See generally IAN SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES, 118 (2d ed. 1984).

55. 21 Op. Att'y Gen. 274, 277 (1895).

56. *Id.* at 277-78.

domain" While he does not explain this statement, it seems to be based upon a belief that the federal government has no authority to regulate private activities affecting international watercourses unless those activities involve navigation. He apparently assumes the diversions in Colorado and New Mexico do not involve navigation because (a) the Rio Grande is non-navigable in those stretches, and (b) the activities involved are non-navigational uses. It appears that in Harmon's view, such a "regulation" would in fact be an exercise of the power of eminent domain—a "taking" of property, which would have to be accompanied by the payment of compensation.

This line of reasoning calls for two comments. First, the notion that the conduct of a state's citizens would not be covered by a treaty provision unless it expressly required the state to regulate that conduct reflects a lack of understanding of international law. A treaty providing that "neither country shall construct any work that may impede the exercise of the right of navigation" would obligate each party to ensure that not only its government agencies but also its citizens refrained from the acts in question. If the municipal law of one or both of the parties required that some special measures be taken in order to implement the treaty obligation (such as payment of compensation under United States law), that would not affect the obligation itself.

Second, the idea that the United States government had no authority over activities of private citizens affecting the Rio Grande above the U.S.-Mexico border was challenged by the U.S. government itself shortly after Harmon delivered his opinion. Following continued Mexican complaints, in particular concerning the plan of the Rio Grande Dam and Irrigation Company, and the affiliated Rio Grande Irrigation & Land Co. (Ltd.), to construct dams and other works on the Rio Grande at Elephant Butte, New Mexico, the Secretary of State wrote the Secretary of the Interior requesting that any additional rights to build dams be denied, at least "until the negotiations now pending between Mexico and the United States have reached a final conclusion."⁵⁷ He further suggested an investigation of "the rights already granted to the Rio Grande Irrigation & Land Co. (Ltd.) . . . with a view to ascertaining whether there is any legal power to cancel those rights"⁵⁸ It later came to the attention of the Secretary of State that "the Rio Grande River in some parts above the international boundary line is, and has been used as, a waterway for navigation between the United States and Mexico"⁵⁹ The Secretary

57. Letter from Secretary Olney to David Francis, Secretary of the Interior (30 Nov. 1896), *reprinted in U.S. Appendix, supra* note 4, at 272, 274.

58. *Id.*

59. Letter from Secretary Olney to D. Francis, Secretary of the Interior (Jan. 11, 1897), *reprinted in U.S. Appendix, supra* note 4, at 292, 293.

of State therefore inquired of the Secretary of War, who had jurisdiction over the protection of navigable waters, whether a permit would not be required from the War Department for this work on the ground that the section of the Rio Grande in question was navigable within the meaning of the relevant U.S. statutes.⁶⁰ Thereafter, in May, 1897, none other than the Attorney General (Harmon had by this time been succeeded by Joseph McKenna) brought an action against the private companies, alleging, among other things, that: the object of the latter was "to obtain control of the entire flow of the ... Rio Grande" by constructing dams that would "create the largest artificial lake in the world"; the dry air in the region causes water to evaporate so rapidly that "but little water, after it is distributed over the surface of the earth, would be returned to the river"; the river was navigable "from El Paso to La Joya, about one hundred miles above Elephant Butte"; and "the impounding of the waters . . . at . . . Elephant Butte will so deplete and prevent the flow of water through the channel of said river below said dam . . . as to seriously obstruct the navigable capacity of the said river throughout its entire course from said point at Elephant Butte to its mouth."⁶¹ The United States then "set forth the treaty stipulations between the United States and the Republic of Mexico in reference to the navigability of the Rio Grande . . ."⁶² In other words, the Attorney General made the very argument that his predecessor, Judson Harmon, had rejected two years earlier when it had been made by Mexico.

The trial court dismissed the suit on the ground that the Rio Grande was not navigable within the limits of New Mexico and that the United States therefore lacked jurisdiction over the proposed project. The government appealed to the United States Supreme Court, which in 1899 reversed the judgment of the court below.⁶³ The Court found it unnecessary to consider the obligations of the United States under treaties and international law. Its obligation to preserve the navigability of navigable waters for its own citizens, said the Court, "is certainly as great as any arising by treaty or international law to other nations or their citizens, and if the proposed dam and appropriation of the waters of the Rio Grande constitute a breach of treaty obligations or of international duty

60. Letter from Secretary of State Richard Olney to Daniel Lamont, Secretary of War (Jan. 13, 1897), reprinted in *U.S. Appendix*, *supra* note 4, at 295, 297. Olney had earlier recognized that Harmon's opinion had "held that the river was not navigable above the boundary in the sense of the treaty between the United States and Mexico, but the question here is whether it is navigable within the meaning of the laws of the United States." Letter from Secretary Olney to the Secretary of the Interior (Jan. 11, 1897), printed in *U.S. Appendix*, *supra* note 4, at 292, 293.

61. *United States v. Rio Grande Irrigation Co.*, 174 U.S. 690, 691-92 (1899).

62. *Id.* at 692.

63. *Id.*

to Mexico, they also constitute an equal injury and wrong to the people of the United States."⁶⁴ Since there had been no trial on the issue, the Court assumed for purposes of the appeal that the defendants' appropriation of water would "seriously affect the navigability of the river where it is now navigable. The right to do this is claimed by defendants and denied by the Government"⁶⁵ Thus the United States government (per the Attorney General) claimed authority in this case that Harmon had denied it possessed in the opinion he had earlier prepared for the Secretary of State.

As Harmon had argued in that opinion, the defendants contended that the jurisdiction of the government under the applicable statute was limited to obstructions in the navigable portions of a navigable stream, and that the statute did not apply to the Rio Grande in New Mexico since it was not navigable.⁶⁶ But the Court rejected this reasoning, stating that statute extended to "anything, wherever done or however done, within the limits of the jurisdiction of the United States which tends to destroy the navigable capacity of one of the navigable waters of the United States"⁶⁷ The Court ruled that whether the act sought to be enjoined would actually diminish the navigable capacity of a stream was a question of fact. It therefore remanded the case to the lower court to determine whether the defendants' project on the Rio Grande would "substantially diminish the navigability of that stream within the limits of present navigability, and if so, to enter a decree restraining those acts to the extent that they will so diminish."⁶⁸

The case would go back to the U.S. Supreme Court on two additional occasions. But after the first Supreme Court decision the United States is reported to have offered not to continue to pursue the proceedings⁶⁹ if defendant companies would: "Recognize the prior right of the people of the valley at El Paso, Mexican as well as American, to a prior use of the waters of the Rio Grande"⁷⁰ The notion that Mexico

64. *Id.* at 701.

65. *Id.* at 702.

66. *Id.* at 708.

67. *Id.*

68. *Id.* at 710.

69. The British memorial states that the U.S. government offered "not to appeal from the trial court's dismissal of the said injunction." *The Rio Grande Claim, (U.S. v. Gr. Brit.), Am. & Brit Claims Arb. 1910, Pleadings and Awards, vol. 22, Claim No. 83 (1923), Memorial of Great Britain 15 (hereafter British Memorial)*. But at the stage at which the offer was made, the case was on remand from the U.S. Supreme Court, and the Supreme Court of New Mexico had issued a mandate to the trial court to set aside the decree of dismissal and proceed in accordance with the mandate of the U.S. Supreme Court. *U.S. Appendix, supra* note 4, at 43-44.

70. *British Memorial, supra* note 69, at 15.

has a "prior right" to Rio Grande waters, which was evidently embraced by the Justice Department,⁷¹ reflects a complete reversal of position from that stated in Attorney General Harmon's opinion. The subsequent proceedings resulted ultimately in an order permanently enjoining the defendant companies from constructing a dam at Elephant Butte.⁷² But the point of present interest is that the United States Supreme Court, in holding that the courts could restrain, at the instance of the federal government, any acts in New Mexico by private parties that could diminish the navigability of the navigable portions of the Rio Grande below El Paso, reached a result that was identical to that argued for by Minister Romero in his protest of October, 1895, and rejected at the time by Attorney General Harmon. While it did so on the basis of the obligations of the United States government under domestic law, there is nothing in the opinion that suggests the conclusion would have been different under applicable treaties or rules of international law. Indeed, in a dramatic reversal, the Attorney General argued in the case that the Elephant Butte project would put the United States in violation of its obligations under international law.⁷³

The portion of the Attorney General's 1895 opinion dealing with general principles of international law embodies passages that have since become known as the "Harmon Doctrine". These passages will be set forth below, but their essential message is that the United States is under no obligation to Mexico to restrain its use of the Rio Grande because its absolute sovereignty within its own territory entitles it to dispose of the water within that territory in any way it wishes, regardless of the consequences in Mexico. Harmon begins his discussion by stating: "An extended search affords no precedent or authority which has direct bearing."⁷⁴ It is true, as we have seen, that most of the law that had developed by the time Harmon wrote his opinion dealt with navigation. But in fact, there were by 1895 a number of authorities that addressed the question before Harmon and upon which he could have drawn, but did not. Some support the view of absolute sovereignty he espoused,⁷⁵ but others recognize rights in the lower riparian country.⁷⁶ The only

71. The settlement offer was made by Marsden C. Burch, Special Counsel of the Department of Justice, under instruction of the Attorney-General, John W. Griggs. *British Memorial*, *supra* note 69, at 15.

72. *United States v. Rio Grande Dam and Irrigation Co.*, 184 U.S. 416 (1902); *Rio Grande Dam and Irrigation Co. v. United States*, 215 U.S. 266 (1909).

73. *United States v. Rio Grande Dam and Irrigation Co.*, 174 U.S. at 700 (1899).

74. 21 Op. Att'y Gen. at 280.

75. See, e.g., KLÜBER, 1 *EUROPÄISCHES VÖLKERRECHT*, 128 (1821); AUGUST HEFFTER, *DAS EUROPÄISCHE VÖLKERRECHT DER GEGENWART*, 150 (1888). These authorities are discussed by Berber *supra* note 9, at 15-16.

76. See II HUGO GROTIUS, *DE JURI BELLI AC PACIS*, Lib. II, Cap. II, XII; the Decree of the

authorities Harmon cites that deal specifically with international watercourses address solely the theory of international servitudes. Harmon states that some authors believe a lower riparian country (the "servient" country) has an obligation to receive water from an upper riparian (the "dominant" country) because of a natural international servitude. But he also accepts that "[t]he dominant country may not divert the course of the stream so as to throw it upon the territory of the other at a different place."⁷⁷ This seems to be at least an implicit acceptance of the obligation not to cause harm to another riparian state.⁷⁸ Harmon distinguishes this situation from one in which the flow to the lower riparian country is *reduced*, which he characterizes as "a diminution of the servitude."⁷⁹ Perhaps unwittingly, Harmon thereby demonstrates the weakness of the servitude analogy in this context since his reasoning suggests that the lower riparian should actually *welcome* a reduction in flow. He nevertheless goes on to reason as follows: "[I]t is evident that what is really contended for is a servitude which makes the lower country dominant and subjects the upper country to the burden of arresting its development and denying to its inhabitants the use of a provision which nature has supplied entirely within its own territory."⁸⁰ Yet he finds that no writer with whom he is familiar would draw such a consequence from the doctrine of international servitude. In fact, de Martens, writing in 1883, did just that:

Dans le domaine des relations internationales la souveraineté territoriale se trouve déjà limitée par le fait de la coexistence et de l'association des Etats. La nature même de leurs relations de voisinage ne leur permet pas de disposer de leur territoire sans aucune restriction. De là sont nées les servitudes internationales naturelles auxquelles sont soumis tout les Etats par suite des conditions inévitables de leur existence physique

Provisory Executive Council of the French Republic of Nov. 16, 1792, cited in 2 P. PRADIER-FODÉRE, 2 TRAITÉ DE DROIT INTERNATIONAL PUBLIC EUROPÉEN ET AMÉRICAIN, (1885); CARATHEODORY, DU DROIT INTERNATIONAL CONCERNANT LES GRANDS COURS D'EAU, 32 (1861). These authorities are discussed in Berber, *supra* note 9, at 22-23, 26. The first edition of Oppenheim's classic work INTERNATIONAL LAW was published several years after Harmon conducted his research, but also recognized that a state has an obligation not to "alter the natural conditions of its own territory to the disadvantage of the natural conditions of a territory of a neighbouring state—for instance, to stop or to divert the flow of a river which runs from its own into a neighbouring territory." 1 LASSA OPPENHEIM, INTERNATIONAL LAW, 175 (1st ed. 1905).

77. 21 Op. Att'y Gen. 274, 280.

78. *Id.* He also accepts that "[t]he servient country may not obstruct the stream so as to cause the water to back up and overflow the territories of the other." *Id.*

79. *Id.*

80. *Id.* at 281.

les uns à côté des autres.⁸¹

But the work of this great figure in the field of international law evidently did not come to the attention of the Attorney General. It must be concluded that the servitude theory, especially as characterized by Harmon, seems almost entirely inapposite to the case at hand.⁸² Its principal utility in the context of the opinion seems to be as a straw man: an argument that is set up because it is easy to knock down.

Having found no authority specifically on point, Harmon turned to general principles of international law. He stated the doctrine that bears his name in the following words:

The fundamental principle of international law is the absolute sovereignty of every nation, as against all others, within its own territory. Of the nature and scope of sovereignty with respect to judicial jurisdiction, which is one of its elements, Chief Justice Marshall said (*Schooner Exchange v. McFadden*, 7 Cranch [U.S. Supreme Court Reports] p. [116, at] 136 [(1812)]): "The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validly from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction. 'All exceptions, therefore, to the full and complete power of a nation within its own territories must be traced up to the consent of the nation itself. They can flow from no other

81. ("In the domain of international relations, territorial sovereignty is limited by the fact of the coexistence and the society of states. The very nature of their neighborhood relations does not permit them to dispose of their territory without any restriction. From this are born international natural servitudes, to which all states are subject in consequence of the inevitable conditions of their physical existence, one beside the other.—"Author's translation) F. DE MARTENS, *TRAITÉ DE DROIT INTERNATIONAL* 479 (1883) (translated from Russian). See also Juraj Andrassy, *Les Relations Internationales de Voisinage*, 79 *RECUEIL DES COURS* 77, at 103 (1952).

82. This conclusion is reinforced by Oppenheim in his first edition, published ten years after Harmon rendered his opinion. This renowned work states: "State servitudes are those exceptional and conventional restrictions on the territorial supremacy of a State[.] . . . Servitudes must not be confounded with those general restrictions upon territorial supremacy which, according to certain rules of the Law of Nations, concern all States alike." Oppenheim, *supra* note 76, at 257-58 (footnotes omitted). As an example of such a general restriction upon territorial supremacy Oppenheim gives a state's obligation "to admit the free passage of foreign merchantmen through its territorial maritime belt." *Id.* at 258. This is one of the examples cited by the author earlier in the work, in the section on territorial supremacy. Another example given in that section, as noted elsewhere, is a state's obligation not "to stop or divert the flow of a river which runs from its own into neighbouring territory." *Id.* at 175.

legitimate source.⁸³

What is known as the "Harmon Doctrine" thus consists of a few rather short paragraphs in an opinion of some nine pages. And those paragraphs consist chiefly of a quotation from an opinion of the Supreme Court in a sovereign immunity case decided over eighty years earlier. Harmon did attempt to bolster this brief discussion by invoking the idea of self-preservation along with a further reference to servitudes:

[S]elf-preservation is one of the first laws of nations. No believer in the doctrine of natural servitudes has ever suggested one which would interfere with the enjoyment by a nation within its own territory of whatever was necessary to the development of its resources or the comfort of its people.⁸⁴

Harmon does not explain how this case, involving elective diversions that enriched developers, fits within the idea of self-preservation. No doubt, the doctrine of self-preservation itself was recognized by commentators at the turn of the century.⁸⁵ But, as Oppenheim pointed out as early as 1905, self-preservation was not a right, but an excuse:

If every State really had a *right* of self-preservation, all the States would have the duty to admit, suffer, and endure every violation done to one another in self-preservation. But such duty does not exist. On the contrary, although self-preservation is in certain cases an excuse recognized by International Law, no State is obliged patiently to submit to violations done to it by such other State as acts in self-preservation, but can repulse them. It is a fact that in certain cases violations committed in self-preservation are not prohibited by the Law of Nations. But they remain violations and can therefore be repulsed. Self-preservation is consequently an excuse⁸⁶

Oppenheim went on to state that it had become increasingly recognized that

violations of other states in the interest of self-preservation are excused in cases of *necessity* only. Such acts of violence in the interest of self-preservation are exclusively excused as are necessary in self-defence, because otherwise the acting State would have to suffer or have to continue to suffer a violation against itself.⁸⁷

83. 21 Op. Att'y Gen. at 281-82.

84. *Id.* at 282.

85. See Oppenheim's, *supra* note 76, at 177-81.

86. *Id.* at 178.

87. *Id.* (emphasis in original).

In other words, unless they are "necessary" to prevent "an imminent violation or the continuation of an already commenced violation," acts contrary to international law cannot be justified under the doctrine of self-preservation.

There are thus a number of problems with Harmon's use of self-preservation. First, there was no question of self-defense against any act by Mexico in violation of its obligations toward the United States, imminent or otherwise. Thus, the acts of the United States could not have been "necessary" in self-defense against a violation by Mexico. Second, the invocation of self-preservation in effect admits that the United States' diversions of Rio Grande waters were unlawful; self-preservation would operate, in effect, as an excuse. And third, even though the United States' violations might be excused as acts of self-preservation, there would be no requirement that those acts "patiently be suffered and endured by" Mexico. At the very least, Mexico would have a right to reparation for injuries caused. Finally, it should be noted that all of the examples of acts of self-preservation cited by Oppenheim⁸⁸ involve uses of force in the face of grave and imminent danger, demonstrating how inapposite the doctrine is to the facts of the Rio Grande case.

The closest contemporary analogy to the idea of self-preservation is probably the doctrine of "state of necessity." The International Law Commission has characterized this doctrine as a "circumstance precluding wrongfulness," that is, a circumstance that prevents what would otherwise have been an internationally wrongful act from being regarded as wrongful. A "state of necessity" is described by the Commission as "a situation of a State whose sole means of safeguarding an essential interest threatened by a grave and imminent peril is to adopt conduct not in conformity with what is required of it by an international obligation to another State."⁸⁹ Once again, in order to invoke this doctrine the United States would have to admit, in effect, that the diversions of Rio Grande waters would otherwise be unlawful. But in order to invoke the doctrine, the United States would have to establish that one of its "essential interests" was "threatened by a grave and imminent peril", something that the facts would not support. In addition, even if a "state of necessity" were found to exist, the fact that the wrongfulness of the United States' acts was precluded would not mean the United States would not be obliged to compensate Mexico for any harm caused.⁹⁰

88. *Id.* at 179-81.

89. [1980] Y.B. Int'l L. Comm'n, vol. 2, pt. 2, p. 34 (para. 1 of commentary to art. 33, "State of Necessity", of Part One of the ILC's draft articles on State Responsibility).

90. In this connection, see article 35 of Part One of the ILC's draft articles on State Responsibility, "Reservation as to Compensation for Damage." *Id.* at 61.

Having made the strongest case he could for complete freedom of action, irrespective of the consequences upon other nations, the Attorney General recognized that other factors might lead the Department of State to seek a less extreme solution:

The case presented is a novel one. Whether the circumstances make it possible or proper to take any action from considerations of comity is a question which does not pertain to the Department [of Justice]; but that question should be decided as one of policy only, because, in my opinion, the rules, principles, and precedents of international law impose no liability or obligation upon the United States.⁹¹

It is remarkable that Attorney General Harmon rested his entire case upon two brief paragraphs from an old Supreme Court decision that he did not proceed to apply to the facts before him. It is true that the Supreme Court's opinion was written by one of the greatest jurists ever to sit on the Court, Chief Justice John Marshall. But could such a great judge, even in the early years of the nineteenth century, have in fact intended to make pronouncements about sovereignty that are as absolute and inflexible as they appear to be in Harmon's opinion? Reading two sentences beyond the end of Harmon's quotation from the decision supplies the answer. Chief Justice Marshall wrote:

The world being composed of distinct sovereignties, possessing equal rights and equal independence, whose mutual benefit is promoted by intercourse with each other, . . . all sovereigns have consented to a relaxation in practice, in cases under certain peculiar circumstances, of that absolute and complete jurisdiction within their respective territories which sovereignty confers

A nation would justly be considered as violating its faith, although that faith might not be expressly plighted, which should suddenly and without previous notice, exercise its territorial powers in a manner not consonant to the usages and received obligations of the civilized world.⁹²

Marshall thus recognized that the realities of international intercourse and interdependence meant that states often did not insist upon "that absolute and complete jurisdiction within their respective territories which sovereignty confers." He also suggested that a nation that abruptly changed the manner in which it exercised its territorial powers—as had the United States through the greatly increased diversions in Colorado and New Mexico—"would justly be considered as violating its faith." And

91. 21 Op. Att'y Gen. at 283.

92. *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 136-37. (1812).

finally, the rule of absolute sovereignty stated in the passages excerpted by Harmon were not applied by the Court in the case itself: the Court held that the United States would *not* exercise jurisdiction over the Schooner *Exchange*, because it was a public armed vessel in the service of a foreign sovereign. It therefore seems that neither the decision nor its rationale supports the conclusion reached by Attorney General Harmon.

D. The Events Following the Issuance of Harmon's Opinion

In any event, the Secretary of State did not simply inform the Mexican Minister on the basis of Harmon's opinion that in the view of the United States it had no obligations toward Mexico and that nothing would be done about the problem. Instead, beginning with a conversation at the State Department on November 14, 1895, nearly a month before Harmon delivered his opinion, Secretary Olney sought a solution to the problem through discussions with Minister Romero.⁹³ That the United States took the matter quite seriously is attested to not only by the Joint Resolution of Congress of 1890 but also by the frequency of communications on the subject with Mexico.⁹⁴ These communications led the two governments to instruct the International Boundary Commission, which Mexico and the United States had established in 1889,⁹⁵ to ascertain the facts and report on its findings.⁹⁶

93. Letter from Minister Romero to Secretary Olney (Dec. 28, 1895), *printed in U.S. Appendix, supra* note 4, at 211-12, referring to "the conversation which we had on the 14th ultimo [November], at the Department of State, relative to the use of the water of the Rio Grande."

94. For example, the record reveals five recorded meetings or communications on the case between October 21 and December 28, and an additional eight communications between January and March of 1896. *Id.* at 200-23.

95. This commission had been established by the Convention between the United States and Mexico of March 1, 1889, *reprinted in* 1 Malloy DIGEST 1167; LEGISLATIVE TEXTS AND TREATY PROVISIONS CONCERNING THE UTILIZATION OF INTERNATIONAL RIVERS FOR OTHER PURPOSES THAN NAVIGATION, U.N. Doc. ST/LEG/SER.B/12, treaty No. 74 (1963) [hereinafter LEGISLATIVE TEXTS]; *Legal Problems Relating to the Utilization and Use of International Rivers: Report by the Secretary General* §§ 184-85, U. N. Doc. A/5409 (1963), *reprinted in* [1974] Y.B. INT'L L. COMM'N vol. 76, U.N. Doc. A/CN.4/SER.A/1974/Add.1(Part 2). A later treaty changed the name of this body to the "International Boundary and Water Commission, United States and Mexico," and vested new powers and duties in the Commission. See Treaty between the United States and Mexico relating to the Utilization of the Waters of the Colorado and Tijuana Rivers, and of the Rio Grande (Rio Bravo) from Fort Quitman, Texas, to the Gulf of Mexico, Feb. 3, 1944, U.S. Mex., 3 U.N.T.S. 314; LEGISLATIVE TEXTS, *supra*, treaty No. 77; *Legal Problems Relating to the Utilization and Use of International Rivers, supra*, § 212, at 80.

96. Protocol contained in note from Minister Romero to Secretary Olney (6 May 1896), *reprinted in U.S. Appendix, supra* note 4, at 225-26. Interestingly, Article V of the 1889 treaty provides for the Commission to examine cases in which works are allegedly being

Interestingly, the instructions included a direction to report on "[t]he best and most feasible mode . . . of so regulating the use of the waters of said river [i.e., the Rio Grande] as to secure to each country concerned and to its inhabitants their *legal and equitable rights and interests* in said waters."⁹⁷ This is a far cry from an assertion of absolute territorial sovereignty. Indeed, what is particularly striking about the documentary evidence of the United States' conduct following the delivery of Attorney General Harmon's opinion is that the opinion does not seem to have been referred to in any communications from the Secretary of State to Mexico for a full decade following its issuance.⁹⁸ In addition, the United States did not act on Harmon's advice. For example, it could simply have informed Mexico, on the basis of Harmon's opinion, that it had no obligation to halt the diversions or provide any other kind of relief to Mexico, and that it accordingly would not do so. Instead, the United States agreed to form a joint fact-finding commission with a view to reaching an equitable resolution of the matter. These two aspects of the conduct of the United States provide at least some indication that the U.S. government recognized Harmon's opinion for what it was: a piece of advocacy that might be useful as a negotiating device but hardly provided a basis for resolving concrete controversies.

The Commissioners submitted a remarkable joint report in November, 1896.⁹⁹ In his letter transmitting the report, the American commissioner stated: "It is certain . . . that they [Mexico] have been wronged pecuniarily to a very large extent, and the future will continue to entail more in a progressive ratio until the matter is settled."¹⁰⁰ In their report, the Commissioners stated as follows:

It is the opinion of the joint commission that Mexico has been wrongfully deprived for many years of a portion of her equitable rights in the flow of one-half of the waters of the Rio Grande at the time of the treaty of Guadalupe Hidalgo; and if there were no other evidence of that fact than the records and measurements above referred to, it is apparent to the eye of

constructed that are prohibited by Article VII of the 1948 Treaty of Guadalupe Hidalgo, and to decide whether the works are among those that are permitted or prohibited by that treaty. This is the very article that Attorney General Harmon declared to be inapplicable to the diversions in Colorado and New Mexico—the same diversions the two governments instructed the Commission to investigate.

97. *U.S. Appendix, supra* note 4, at 226 (emphasis added).

98. *Id.* at 503. As will be seen below, the Acting Secretary of State later cited Harmon's opinion in a note to the Mexican ambassador. But he then confirmed that the United States was prepared to deal with the matter "in accordance with the high principles of equity." *Id.*

99. Report of 25 Nov. 1896, *reprinted in U.S. Appendix, supra* note 4, at 264.

100. Letter from Col. Anson Mills, Commissioner, to Secretary Olney (25 Nov. 1896), *reprinted in U.S. Appendix, supra* note 4, at 261, 264.

any visitor to the locality, where can be witnessed the dying fruit trees and vines, the abandoned fields, and dry canals for the greatest portion that has heretofore been cultivated; and while we are considering the equitable rights of Mexico, this is also true of the United States side, where almost the same abandonment and destruction of former prosperous farms may be witnessed.¹⁰¹

Thus the Commissioners' joint report in effect validated the repeated protests that had been lodged by the Mexican Minister in Washington.¹⁰² The investigations disclosed "an increase of 454 [diversion] canals and of 196,000 acres irrigated in the State of Colorado and Territory of New Mexico" since 1880.¹⁰³ While the report was not a legal opinion per se, its dramatic factual findings highlighted the equity of Mexico's position. Further, the findings stressed that the American diversions effectively deprived Mexico of access to one-half of the flow of the Rio Grande as of the conclusion of the Treaty of Guadalupe Hidalgo in 1848. It should be emphasized that the report was fully concurred in by the American commissioner.

The report made two principal recommendations: that a storage dam be constructed at El Paso; and that a treaty be concluded to provide for the distribution of Rio Grande waters. On the first point the report concluded that the "legal and equitable rights and interests" of each country and its inhabitants to Rio Grande water could be ensured only by constructing a dam at El Paso to impound Rio Grande flood waters.¹⁰⁴ It found that the river's flow was insufficient to support dams at both El Paso and Elephant Butte,¹⁰⁵ and called upon the United States to "in some way

101. *Id.* at 268.

102. The report concluded that the flow of the river at El Paso has now been decreased by the taking of water for irrigation by canals constructed in the United States of America, about 1,000 second-feet for 100 days annually, equal to 200,000 acre-feet of water. It will be observed that this loss is distributed through the summer flow, which at best was not always sufficient before the diminution took place during dry seasons. *Id.* at 267.

103. *Id.* at 265.

104. The report observes that the great mass of [Rio Grande] waters, both before the construction of the canals [in the United States] and since, consists of flood waters carried down the river unused, being utterly unavailable without large reservoirs to hold it for the season of irrigation, the maximum flow lasting but a few days.

Id. at 267. The dam recommended would also "prevent the erosions and avulsions which have heretofore rendered the boundary line between the two countries so uncertain, unstable, and vexatious." *Id.* at 269.

105. *Id.* at 267. According to the report, the flow would be sufficient for a dam at Ele-

prevent the construction of any large reservoirs" in New Mexico; this was an indirect reference to the proposed Elephant Butte project, discussed above.¹⁰⁶ The Commissioners' second recommendation was that all questions concerning the distribution of Rio Grande waters be settled in a treaty that would provide for those waters to be divided equally between the two countries by means of a dam to be constructed at El Paso.¹⁰⁷ The Commissioners further recommended that the United States bear all expenses associated with the construction of the dam,¹⁰⁸ in exchange for which Mexico would "relinquish all claims for indemnity for the unlawful use of waters in the past, and accept the dam so constructed as an equitable distribution, past and future . . ."¹⁰⁹

While an agreement along the lines of that proposed by the Commission was acceptable to Mexico,¹¹⁰ Secretary Olney indicated to Minister Romero that the State Department, "in preparing to enter into negotiations, . . . found the subject embarrassed by greatly perplexing complications arising out of reservoir dams, etc., either already built or authorized through the concurrent action of the Federal and State authorities."¹¹¹ According to the Secretary of State, these problems would have to be "disposed of" before the United States would be in a position to negotiate.¹¹² Part of the history of the government's subsequent efforts to "dispose" of the problems has been discussed above.¹¹³ As indicated there, after writing the Mexican Minister, the Secretary of State requested that the Secretary of the Interior look into whether there were any legal means to cancel rights granted to the private companies. He later asked the Secretary of War whether a permit would be necessary for the construction of a dam at Elephant Butte, and if so, whether one had been granted. As it turned out, a permit had indeed been issued to the Rio Grande Dam and Irrigation Co.—by the Secretary of the Interior,

phant Butte as well as El Paso only if the company constructing the former were prevented from appropriating the quantity of water already utilized by inhabitants of the El Paso valley, in both Mexico and the United States. *Id.*

106. *Id.* at 270.

107. *Id.* at 270-271.

108. The total cost of the dam was estimated at \$2,317,113.36. *Id.* at 270. This amount was far short of the \$35,685,000 Mexico claimed to have suffered in loss of public and private wealth due to American diversions. Letter from Minister Romero to Secretary Olney (5 Jan. 1897), reprinted in *U.S. Appendix*, *supra* note 4, at 284.

109. *Id.* at 271.

110. Letter from Minister Romero to Secretary Olney (Dec. 19, 1896), reprinted in *U.S. Appendix*, *supra* note 4, at 280.

111. Letter from Secretary Olney to Minister Romero (Jan. 4, 1897), reprinted in *U.S. Appendix*, *supra* note 4, at 283.

112. *Id.*

113. See notes 57-73, *supra* and accompanying text.

on February 1, 1895.¹¹⁴ However, the Department of Justice concluded in April, 1897, that "the Secretary of the Interior had no power . . . to grant the rights claimed," and that the company had not received the requisite permission from the Secretary of War.¹¹⁵ This permission was required because of a finding by the Secretary of War that "the Rio Grande from a point above Elephant Buttes down is a navigable water of the United States"¹¹⁶—a finding that was not disputed by then Attorney General McKenna but must have come as something of a surprise to the company since former Attorney General Harmon had concluded precisely the contrary only two years earlier. The Secretary of War also found that the proposed dam "will check the flow of the water in the river at Elephant Butte entirely for a great portion, if not all, of the year and impound it, and also distribute it from that point for purposes of irrigation, so that the Rio Grande will be practically destroyed as a stream for many miles below Elephant Butte"¹¹⁷

The U.S. government therefore sued the Company and its British affiliate¹¹⁸ to prevent it from constructing a dam at Elephant Butte on

114. Letter from Secretary of the Interior Francis to Secretary of State Olney (19 Dec. 1896), reprinted in *U.S. Appendix*, *supra* note 4, at 277.

115. Letter from the Solicitor General to the Secretary of War, reprinted in *U.S. Appendix*, *supra* note 4, at 319, 323.

116. Letter from Secretary Sherman to the Mexican Minister (May 12, 1897), printed in *U.S. Appendix*, *supra* note 4, at 335, referring to finding of the Secretary of War mentioned in the letter from the Secretary of War to the Attorney General (Feb. 19, 1897), printed in *U.S. Appendix*, *supra* note 4, at 313, 314. This finding was apparently based at least in part on the fact that "from El Paso up to and including the site of the proposed dam, and a good many miles beyond that point, it [the Rio Grande] has been used to float logs for commercial and business purposes." *Id.* The Secretary of the Interior had given the original authorization on the basis of the act of March 3, 1891, which provided for

the location and selection of reservoir sites on the public lands of the United States and rights of way for irrigating ditches and canals. There is nothing in the act or its purposes which was intended to affect the control or supervision of the navigable rivers of the country. That by other . . . legislation is put in the Secretary of War.

Letter from the Solicitor General to the Secretary of War (Apr. 24, 1897), printed in *U.S. Appendix*, *supra* note 4, at 319, 321.

In other words, if the project would affect navigation, only the Secretary of War was competent to issue a permit. As noted, the Secretary of War found that the stretch of the Rio Grande in question was navigable, thereby making himself competent.

117. Letter from the Secretary of War to the Attorney General (Feb. 19, 1897), printed in *U.S. Appendix*, *supra* note 4, at 313, 314.

118. Suit was brought in the U.S. District court of the Third Judicial District of the Territory of New Mexico. See *United States v. The Rio Grande Dam & Irrigation Company*, 9 N.M. 292, 51 P. 674 (1898) (order granting temporary injunction May 18970, in *U.S. Appendix*, *supra* note 4, at 1; *United States v. Rio Grande Dam and Irrigation Co.*, 174 U.S. 690 (1899). The government amended its complaint to add the Rio Grande Irrigation and Land Company, Limited, as an additional defendant. While the Rio Grande Dam and

the grounds that the dam would "seriously obstruct the navigable capacity of the said river"¹¹⁹ and that the defendant had not been authorized to construct the dam by the U.S. government. The companies were ultimately enjoined permanently from constructing the dam at Elephant Butte.¹²⁰ This led to an arbitration between the United States and Great Britain in which Britain claimed compensation for the United States' allegedly having forced the British company into liquidation and destroyed the value of its shares by suing it in bad faith. Britain's position was that the United States' suit was in bad faith because it "was not instituted to protect navigation on the Rio Grande, as alleged . . . [but] with the object of destroying the defendant companies' Elephant Butte Dam Project . . . in order to make it practicable to build an International Dam on the Rio Grande."¹²¹ The Arbitral Tribunal dismissed the British claim in November, 1923, on the ground that it lacked jurisdiction because "the English Company took no valid rights whatever under the lease from the American Company [i.e., the Rio Grande Dam and Irrigation Co.], and possesses no interest on which a claim such as this can be founded."¹²²

Adding insult to injury—at least in what must have been the view of Great Britain and the private companies—the U.S. government had in the meantime, pursuant to a statute of February 25, 1905,¹²³ constructed a dam near Engle, New Mexico, approximately one mile below the Elephant Butte Dam site.¹²⁴ This was the "International Dam"

Irrigation Co. was organized under the laws of the Territory of New Mexico, the additional defendant was a British corporation. As the United States stated in its Answer in a subsequent arbitration with Britain concerning this affair: "[t]his litigation proceeded in regular course three times from the Territorial District Court for the Third Judicial District of New Mexico, via the Supreme Court of New Mexico, to the Supreme court of the United States." *The Rio Grande Claim (U.S. v. Gr. Brit.)*, Am. & Brit. Claims Arb. 1910, Pleadings & Awards, vol. 22, Claim No. 83 (1923). Answer of the United States 1 (hereafter *U.S. Answer*).

119. *Rio Grande Dam and Irrigation Co.*, 174 U.S. at 692.

120. *United States v. Rio Grande Dam and Irrigation Co.*, 184 U.S. 416 (1902); *Rio Grande Dam and Irrigation Co. v. United States*, 215 U.S. 266 (1909).

121. *British Memorial*, *supra* note 69, at 47.

122. *The Rio Grande Claim (U.S. v. Gr. Brit.)* Am. & Brit. Claims Arb. 1910, Claim No. 83, Award at 10 (1923) Interestingly, the reason the English company "took no valid rights" according to the tribunal, was that the U.S. Alien Land Law of March 3, 1887 prohibited aliens from owning rights or interests in real estate. *Id.* The English company's lease of the American company's rights, concessions and privileges constituted an interest in real estate, which was invalid under the Act.

123. Act of 25 Feb. 1905, 33 Stat. 814. The law was entitled "An Act Relating to the Construction of a Dam and Reservoir on the Rio Grande, in New Mexico, for the Impounding of the Flood Waters of Said River for the Purposes of Irrigation."

124. "During the last four years of the pendency of the said litigation [between the U.S. government and the Rio Grande Dam and Irrigation Co.] the Reclamation Service of the

referred to in the passage quoted above. Secretary of State Elihu Root described the purpose of the dam as follows:

It is . . . in accordance not only with the plans initiated by the United States Government for the reclamation of the arid land of the West, but in pursuance of the obligations incurred through a conventional arrangement with the Republic of Mexico, that the United States Reclamation Service is making the preliminary surveys looking toward the erection of an International Dam across the Rio Grande, near Engle, New Mexico.¹²⁵

The "conventional arrangement" was the 1906 treaty between the two countries, discussed below. The 1905 Act, however, made no mention of Mexico or obligations to that country. According to the British memorial in the arbitration discussed above, the U.S. government's dam was "virtually in all essential respects . . . the same Elephant Butte Dam project that the [private] Companies had planned to carry out . . .," except that the U.S. constructed "a higher storage dam" than the companies' plans had called for.¹²⁶

That the United States would, on its own initiative, undertake to construct a dam in New Mexico so similar to the private project that seemed to have been an obstacle to resolving the dispute, a project that the United States fought so hard to stop, must have been both confusing and alarming to the Mexican government. Such a reaction by Mexico would have been especially understandable in view of the recommendation in the Commissioners' report of a site that was much further downstream, at El Paso, and that would be under the joint control of the two countries. Indeed, a note from the Mexican Ambassador to the Acting Secretary of State of April 26, 1905, as much as expressed these sentiments. The note referred to the 1905 statute authorizing the Engle Dam, noting that this statute "differs from its predecessors relative to this same subject of an international dam, in which mention was always made of Mexico and Mexican rights, but in this act not a word is said [thereof]

United States was steadily engaged in carrying out the said Elephant Butte [Engle Dam] Project as a Government project." *British Memorial*, *supra* note 69, at 24-25.

125. Memorandum of Elihu Root, Secretary of State, to the British Government, as quoted in *British Memorial*, *supra* note 69, at 30, 31.

126. *British Memorial*, *supra* note 69, at 25. The memorial quotes from a speech by Senator Charles S. Thomas in the U.S. Senate in which the senator stated: "It is remarkable that a dam constructed by private enterprise should be an obstruction to navigation, while the same dam constructed by Government enterprise should not obstruct or interfere with such navigation." *Id.*

...¹²⁷ The note went on to state that Mexico was anticipating "recompense" for the harm it had suffered. That harm had been assessed in a note of June, 1904, from the Mexican Ambassador to the Secretary of State as having doubled since Minister Romero had made his estimate of \$35.6 million eight years earlier, putting the total at over \$70 million.¹²⁸

The State Department responded promptly, on May 1, to Mexico's note of 26 April.¹²⁹ Referring to "the question of any legal liability on the part of the United States to the Government of Mexico" for depriving Mexico of water through diversions in Colorado and New Mexico, the Acting Secretary of State declared that "the [State] Department is unable to find any grounds in international law upon which such liability could be based."¹³⁰ "Nevertheless," the note continued, "the Government of the United States is disposed to govern its action in the premises in accordance with the high principles of equity and with the friendly sentiments which should exist between good neighbors."¹³¹ The Acting Secretary went on to inform the Mexican Ambassador that the State Department was in the process of preparing a draft treaty "with a view to reaching an agreement . . . which shall adjust the question in accordance with the high principles of equity and comity which happily govern the relations between the United States and Mexico."¹³² He then offered the following explanation of the Engle Dam project:

Having in view the foregoing, the Executive is taking steps looking towards the construction of a dam on the Rio Grande at Engle, N. Mex., in accordance with the act of Congress of February 25, [1905]. In the opinion of the department, proceeding with this work will not stand in the way of, but will rather hasten, the satisfactory solution of the whole question between the two governments.¹³³

Thus, the U.S. government once again denied any legal liability yet demonstrated that it was willing to go to great lengths to resolve the dispute.

127. Letter from F. Gamboa, Chargé d'Affaires, to A. Adey, Acting Secretary of State (26 Apr. 1905), printed in *U.S. Appendix*, *supra* note 4, at 501.

128. Letter from Ambassador M. de Azpiroz to Secretary of State John Hay (June 3, 1904), printed in *U.S. Appendix*, *supra* note 4, at 485, 486.

129. Letter from Acting Secretary Adey to Chargé d'Affaires *ad interim* F. Gamboa (1 May 1905) printed in *U.S. Appendix*, *supra* note 4, at 502.

130. *Id.*

131. *Id.*

132. *Id.* at 503. The note also indicated that steps were being taken to draft a treaty for submission to Mexico concerning the Colorado River controversy between the two countries.

133. *Id.* at 503.

Mexico responded by note of August 11¹³⁴ which referred to legal authorities supporting liability of the United States, including the opinions of two Mexican jurists and citations to an American work upon which the Mexican authors based their positions.¹³⁵ The American study, by H.P. Farnham, stated in relevant part as follows:

A river which flows through the territory of several states or nations is their common property It is a great natural highway conferring, besides the facilities of navigation, certain incidental advantages, such as fishery and the right to use the water for power and irrigation. Neither nation can do any act which will deprive the other of the benefits of those rights and advantages. The inherent right of a nation to protect itself and its territory would justify the one lower down the stream in preventing by force the one further up from turning the river out of its course, or in consuming so much of the water for purposes of its own as to deprive the former of its benefit¹³⁶

Thus Farnham relied on a principle closely akin to that of self-preservation to support a conclusion that is the precise opposite of what Attorney General Harmon had derived from the same principle.

It should be emphasized at this point that the fact that Harmon and Farnham could derive diametrically opposed conclusions from the same general principle demonstrates the lack of utility of principles that allow a country to take virtually any action in the name of protecting itself against a peril that, according to its unilateral determination, confronts it.

The Mexican note concluded by stressing that country's "best disposition to bring an end to [the] question"¹³⁷ Secretary of State Elihu Root replied on December 19, 1905, that the United States was unable to accept the soundness of the Mexican legal position.¹³⁸ Secretary Root explained that since the opinions of the two Mexican authors had been based upon the American work, and since that work had cited no decision or text in support of its conclusion, inquiry had been made of the American author as to the basis of his position. Root reported that

134. Letter from F. Gamboa, *Chargé d'Affaires ad interim*, to Elihu Root, Secretary of State (11 Aug. 1905), printed in *U.S. Appendix*, *supra* note 4, at 503.

135. *Id.* at 504, citing 1 FARNHAM, *LAW OF WATERS AND WATER RIGHTS*, 29, 63 (1904). Mr. Gamboa's note of August 11, 1905, after referring to "the doctrine set up by H.P. Farnham," stated that "on that doctrine rest the opinions of the two Mexican jurists above named."

136. 1 H. P. Farnham, *Law of Waters and Water Rights* 29 (1904)

137. Letter from *Chargé d'Affaires ad interim* Gamboa to Secretary of State Root, Secretary of State (Aug. 11, 1905), printed in *U.S. Appendix*, *supra* note 5, at 505.

138. Letter from Secretary Root to Joaquin D. Casasus, Mexican Ambassador (Dec. 19, 1905), printed in *U.S. Appendix*, *supra* note 4, at 517.

"Mr. Farnham answered in substance that the expressions contained in the text were merely his personal opinions, deduced from a comparison of treaties, text writers, and decisions."¹³⁹ This is of course not unusual, since principles of customary international law must be deduced from a study of state practice and evidence of custom such as that contained in decisions and learned works. Secretary Root went on to state that he did not intend to "reopen any argument on the legal questions involved" but reaffirmed the United States position, "taken in accordance with the advice of Attorney General Harmon, of the nonliability of the United States Government for the claims for indemnity heretofore brought forward by Mexico on account of the aforesaid diversion of waters."¹⁴⁰ But, the Secretary continued, the question "appears to have become academic, since both Governments have announced their purpose to deal with the question on principles of the highest equity and comity between neighboring States."¹⁴¹ Secretary Root accordingly enclosed a copy of a letter from the Director of the U.S. Geological Survey (USGS) containing proposals for a treaty between the two countries, "which is intended to treat the question on a basis of absolute equity."¹⁴² He stated that if Mexico considered these proposals satisfactory, one country or the other could submit a draft treaty based thereon for the other's consideration.

It is worth noting that in a section of the letter from the Director of the USGS entitled "History of the Discussion," the Director quotes from Harmon's opinion but then states that notwithstanding that advice,

the public discussion of this matter has tended to the view that in the interests of international comity the question should not be decided upon its purely legal aspects, more particularly in view of the plans considered by the International (Water) Boundary Commission The effort of this commission has been to devise some means of obtaining a supply of water for the Mexican lands without unduly depriving lands within the limits of the United States.¹⁴³

The latter effort at achieving a balance between the interests of the United States and those of Mexico bears a striking similarity to the process of arriving at an equitable allocation of the benefits of the Rio Grande. The

139. *Id.* at 518.

140. *Id.*

141. *Id.*

142. *Id.* The letter from Chas. D. Walcott, Director of the U.S. Geological Survey to Secretary of the Interior E.A. Hitchcock (April 20, 1905), printed in *U.S. Appendix, supra* note 4, at 509; see also "Suggestions for a Treaty between the United States and Mexico" *Id.* at 516.

143. Letter from Chas. D. Walcott, Director of the U.S. Geological Survey to Secretary of the Interior E.A. Hitchcock (Apr. 20, 1905), printed in *U.S. Appendix, supra* note 4, at 511.

United States Supreme Court was to announce only two years later, in its 1907 decision in *Kansas v. Colorado*, that disputes between states of the United States over shared water resources were to be resolved in such a way as to achieve an equitable apportionment of those resources.¹⁴⁴ That decision was foreshadowed in an earlier phase of the case¹⁴⁵ in which the Court, in 1902, overruled the demurrer of Colorado, the upstream state. The Court held that disputes between U.S. states were governed by principles of international law, among others, and—contrary to Colorado's position of absolute territorial sovereignty¹⁴⁶—found that facts might exist that would justify its interposition.¹⁴⁷ It is not known to what extent this litigation may have influenced the U.S. government's position in the dispute with Mexico, or vice versa; but the end result in both cases was an effort to apportion the waters in question in an equitable manner.

E. The Settlement of the Dispute in the 1906 Convention

After the submission to Mexico of the draft prepared by the USGS, the two countries moved quickly to agreement. Mexico proposed three revisions in March, 1906,¹⁴⁸ but when these were rejected by the United States¹⁴⁹ Mexico accepted the draft essentially as originally submitted.¹⁵⁰ The Convention between the United States of America and Mexico concerning the Equitable Distribution of the Waters of the Rio Grande for Irrigation Purposes,¹⁵¹ the first treaty entered into by the United States that deals exclusively with international watercourses, was signed at Washington on May 21, 1906, by Ambassador Casasus and

144. *Kansas v. Colorado*, 206 U.S. 46, 27 S.Ct. 655 (1907).

145. *Kansas v. Colorado*, 185 U.S. 125, 22 S.Ct. 552 (1902) (on demurrer).

146. 185 U.S. at 143. Colorado argued that "she may absolutely and wholly deprive Kansas and her citizens of any use of or share in the waters of [the Arkansas] river," that "[t]he rule of decision . . . is the rule which controls foreign and independent States in their relations to each other; [and] that by the law of Nations the primary and absolute right of a State is self-preservation" *Id.*

147. *Id.* at 147.

148. Letter from Ambassador Casasus to Secretary Root (Mar. 28, 1906), printed in H.R. Doc. No. 359, 71st Cong., 2d Sess. at 410 (1930). The three proposed revisions concerned the amount of water to be furnished to Mexico, the place of delivery of the water, and the disposition of any excess water. *Id.*

149. Letter from Robert Bacon, Acting Secretary of State to Ambassador Casasus (1 May 1906), printed in H.R. Doc. No. 359, *supra* note 146, at 412.

150. Letter from Ambassador Casasus to Secretary Root (May 10, 1906), printed in H.R. Doc. No. 359, *supra* note 146, at 413.

151. Convention Concerning the Equitable Distribution of the Waters of the Rio Grande for Irrigation Purposes, May 21, 1906, U.S.-Mex., T.S. No. 455 (entered into force Jan. 16, 1907) [hereinafter *1906 Treaty*].

Secretary Root. It entered into force on January 16, 1907. The preamble of the treaty contains the following language:

The United States of America and the United States of Mexico being desirous to provide for the equitable distribution of the waters of the Rio Grande for irrigation purposes, and to remove all causes of controversy between them in respect thereto, and being moved by considerations of international comity, have resolved to conclude a Convention for these purposes.¹⁵²

The treaty provides that, after completion of the storage dam near Engle, New Mexico, the United States is to deliver 60,000 acre-feet of water to Mexico annually, in the bed of the Rio Grande, in accordance with an annexed schedule. The delivery of the water is to be without cost to Mexico. The treaty also provides that Mexico waives all claims arising out of diversions in the United States and that:

The United States, in entering into this treaty, does not thereby concede, expressly or by implication, any legal basis for any claims heretofore asserted or which may be hereafter 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 waters of the Rio Grande within the United States; nor does the United States in any way concede the establishment of any general principle or precedent by the concluding of this treaty. The understanding of both parties is that the arrangement contemplated by this treaty extends only to the portion of the Rio Grande which forms the international boundary¹⁵³

Thus the United States preserved its formal legal position in the treaty, while actually agreeing to apportion the water in a manner both parties considered "equitable."

The events reviewed above¹⁵⁴ demonstrate that it was extremely important to the United States to resolve its dispute with Mexico over Rio Grande waters. It was so important that the United States would initiate

152. *Id.* at preamble.

153. 1906 Treaty, *supra* note 151, art. V. The only change made in the text of the draft treaty originally submitted to Mexico was the substitution of "is" for the phrase "being that this action of the United States is prompted only by considerations of international comity and" after the words, "The understanding of both parties". See H.R. Doc. No. 359, *supra* note 148, at 403-09.

154. For a summary of these events, see W.L. GRIFFIN, U.S. DEPARTMENT OF STATE, LEGAL ASPECTS OF THE USE OF SYSTEMS OF INTERNATIONAL WATERS WITH REFERENCE TO COLUMBIA-KOOTENAY RIVER SYSTEM UNDER CUSTOMARY INTERNATIONAL LAW AND THE TREATY OF 1909, S. Doc. 118, 85th Congress, 2nd Sess. (1958) [hereinafter GRIFFIN MEMORANDUM].

and tenaciously pursue protracted litigation to halt a private dam project in order to be certain it could control the quantity of water delivered to Mexico. And it was so important that the United States would agree to pay the considerable costs of guaranteeing Mexico its share. The great lengths to which the United States was willing to go to in fulfillment of its "moral obligation"¹⁵⁵ to provide Mexico with a fair share of Rio Grande waters suggest that regardless of its formal reliance on the Harmon Doctrine it did not consider itself free to exhaust the flow of the Rio Grande before it reached Mexico. This conclusion is reinforced by the practice of the United States in other cases.

III. THE "HARMON DOCTRINE" IN THE CONTEXT OF OTHER UNITED STATES PRACTICE

In a number of instances the United States has taken positions inconsistent with the Harmon Doctrine. The arguments of the United States in these cases tend to reinforce the conclusion that the Harmon Doctrine represented advocacy in a particular case rather than a statement of what the United States objectively regarded as a principle of international law. We may begin this survey some eight months before Attorney General Harmon's opinion was issued, when the United States requested of Great Britain that "suitable measures . . . be taken to avert the threatened injury" from a dam, or "dyke", which a corporation of the Canadian Province of British Columbia planned to construct on Boundary Creek "where it crosses the boundary line, the result of which would be the overflow and washing away of the lands and improvement of settlers in the [U.S.] State of Idaho."¹⁵⁶ In the event, work on the dam proceeded, resulting in the apprehended injuries, whereupon the United States requested prompt "removal of the obstruction in the creek, and the payment of proper indemnity to those who had been injured . . ."¹⁵⁷ This case demonstrates that the United States, at least with regard to flooding, was not prepared to admit that a state was completely free to dispose of the portion of an international watercourse within its borders.

Indeed, even Attorney General Harmon's opinion itself technically does not deny that there is a duty on the part of one State to avoid causing injury to another State by means of actions wholly within the territory of the first State. This point—that a state's sovereignty over its rivers does not give it license to harm other states—was made by an American negotiator of the 1909 treaty concerning boundary waters

155. See note 99, and accompanying text.

156. Question as to Running Water, 2 Moore DIGEST § 226 at 451-452.

157. *Id.* at 451.

between the United States and Canada,¹⁵⁸ Chandler P. Anderson. In a communication to the then Secretary of State Elihu Root, Anderson wrote:

[A]bsolute sovereignty carries with it the right of inviolability as to such territorial waters, and inviolability on each side imposes a coextensive restraint upon the other, so that neither country is at liberty to so use its own waters as to injuriously affect the other. . . . [T]he conclusion is justified that international law would recognize the right of either side to make any use of the waters on its side which did not interfere with the coextensive rights of the other, and was not injurious to it
¹⁵⁹

The theoretical opposite of the Harmon Doctrine is the doctrine of absolute territorial integrity. That theory, when applied to international watercourses, would mean that an upstream state could do nothing that would interfere with the natural flow of the watercourse into the downstream state. Among the few states that have invoked this doctrine is, ironically, the United States. In a memorandum prepared for the United States Agent in the *Trail Smelter* arbitration,¹⁶⁰ a case involving transfrontier air pollution rather than use of an international watercourse, the Legal Adviser of the U.S. Department of State declared:

It is a fundamental principle of the law of nations 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.¹⁶¹

Interestingly, among the authorities the Legal Adviser cited in support of this proposition was the very U.S. Supreme Court case relied upon by Attorney General Harmon in support of the absolute territorial sovereignty doctrine, *The Schooner Exchange v. McFaddon*.¹⁶² The Legal Adviser opined that an international wrong had been committed in the *Trail*

158. Treaty Relating to the Boundary Waters and Questions Arising Along the Boundary between the United States and Canada, Jan. 11, 1909, U.S.-Can., 36 Stat. 2448, T.S. No. 548, 12 Bevans 319.

159. GRIFFIN MEMORANDUM, *supra* note 154, at 60-61.

160. *Trail Smelter* (U.S. v. Can.), was reported in 3 R.I.A.A. 1905, (1941); reprinted in 35 AM. J. INT'L L. 684 (1941).

161. Memorandum in Relation to the Arbitration of the Trail Smelter Case, (U. S. v. Can.), Aug. 10, 1937, prepared by Green H. Hackworth, Legal Adviser, for Swagar Sherley, Agent of the United States, printed in *Territorial Integrity*, 5 Whiteman, DIGEST at 183. Cf. the position advanced by Australia in the *Nuclear Tests Cases* of the early 1970s, that it had "decisional sovereignty" over whether nuclear fallout could be deposited on its territory, irrespective of whether Australia could prove that the fallout actually caused harm. *NUCLEAR TESTS* (N.Z. v. Fr.) 1978 I.C.J. 188 (Pleadings).

162. 11 U.S. (7 Cranch) 116, 136. (1812). See also note 84, *supra* and accompanying text.

Smelter case, consisting of "acts which deprive us of the free and untrammelled use of our territory in a manner which we as a sovereign state have an inherent and incontestable right to use it."¹⁶³ While *Trail Smelter* involved transfrontier air pollution, emanating from a smelter at Trail, British Columbia, Canada, and causing harm in the U.S. state of Washington, the Legal Adviser's memorandum drew no distinction between harm caused by putting something into another state, on the one hand, and withholding something, on the other. Indeed, both change the natural status quo and interfere with a state's ability to dispose of its territory as it sees fit. If and to the extent that the former is prohibited, the latter should be as well. Otherwise, not only wholesale diversions of international watercourses, but also such activities as weather modification to the detriment of another state would be legitimized—a result that promotes neither the reasonable sharing of common natural resources nor friendly relations between states.

The circumstances leading up to a subsequent treaty between the United States and Mexico shed further light on the U.S. position. In 1924 Congress passed an "Act providing for a study regarding the equitable use of the waters of the Rio Grande below Fort Quitman, Texas, in co-operation with the United States of Mexico."¹⁶⁴ The statute authorized the President to appoint three members of a joint commission to be formed with Mexico. The commission would study the "equitable use" of the waters of the Rio Grande. As Mexico was not willing to discuss the Rio Grande without dealing with the Colorado River as well, the scope of the commission's mandate was broadened by a joint resolution to include the Colorado.¹⁶⁵ The resolution provided that the American commissioners were "to cooperate with representatives of the Government of Mexico in a study regarding the equitable use of the waters of the lower Colorado Rivers . . ."¹⁶⁶ That the commissioners' mandate was broadened in this way is of interest because while the Rio Grande is a contiguous watercourse "below Fort Quitman, Texas," the Colorado is for the most part a successive river. (A "contiguous" watercourse forms the border between two states while a "successive" one crosses the border.)

The negotiations concerning the Colorado, in particular, proved difficult and became protracted. In a memorandum dated 26 May 1942

163. *Schooner Exchange*, 11 U.S. at 136. The tribunal in fact quoted Professor Eagleton approvingly to the effect that: "A State owes at all times a duty to protect other States against injurious acts by individuals from within its jurisdiction." *Trail Smelter*, 3 R.I.A.A. at 1963.

164. Law of May 13, 1924, ch. 153, § 1, 43 Stat. 118 (codified at 22 U.S.C. § 277 (1988)).

165. See generally Particular Rivers: Colorado, 3 Whiteman DIGEST § 13, at 945.

166. Law of Mar. 3, 1927, ch. 381, § 1, 44 Stat. 1403.

relating to these discussions, the Legal Adviser of the State Department¹⁶⁷ reviewed existing treaties regarding international rivers and lakes. He stated that the review

is by no means comprehensive but is believed to be sufficient to indicate the trend of thought concerning the adjustment of questions relating to the equitable distribution of the beneficial uses of such waters. No one of these agreements adopts the early theory advanced by Attorney General Harmon On the contrary, the rights of the subjacent state are specifically recognized and protected by these agreements.¹⁶⁸

In a second memorandum, written in November of the same year, the Legal Adviser addressed the rights of Mexico to water impounded by Boulder Dam in the United States:

The question with which we are confronted is what is Mexico entitled to, under all the circumstances, as her fair and equitable portion of the impounded waters of a stream which if left in the state of nature would afford a certain amount of water to both countries—insufficient for the needs of either at the lowest stage and more than can be utilized by either or both at flood stage. . . .

The rights of the United States and Mexico in this situation cannot be determined by fixed rules of law, nor can they be determined by the simple criterion that the water has its source in the United States and may be utilized in this country. Such a rule, if sound or if applied, would deprive all subjacent States of the normal and natural benefits of streams the world over. Our purpose should be to find a reasonable equation by which rights to the water may be equitably distributed.¹⁶⁹

In 1944, the United States and Mexico signed the agreement to which the foregoing statements relate, concerning the lower Rio Grande and Colorado Rivers.¹⁷⁰ The treaty provides for the allocation of the waters of the two rivers and the construction of works. When the treaty was being considered by the U.S. Senate Committee on Foreign Relations as part of the United States ratification process, an opponent testified that

167. As indicated in note 44, *supra*, the State Department did not have its own, in-house lawyer until the position of Legal Adviser of the Department of State was created by Act of Congress in 1931.

168. Memorandum of G. Hackworth, Legal Adviser of the Department of State (May 26, 1942), printed in *Particular Rivers: Colorado, 3 Whiteman DIGEST* § 13, at 950.

169. *Id.* at 953-954.

170. Treaty between the United States of America and Mexico relating to the utilization of the waters of the Colorado and Tijuana Rivers, and of the Rio Grande (Rio Bravo) from Fort Quitman, Texas, to the Gulf of Mexico, Feb. 3, 1944, U.S.-Mex., 3 U.N.T.S. 314.

Attorney General Harmon's opinion was a correct statement of the law as practiced by the United States. Three executive branch officials challenged this assertion. First, an Assistant Legal Adviser of the Department of State, after pointing out that the Harmon opinion was based primarily on language from the *Schooner Exchange* case, which did not involve the question of the allocation of waters of international rivers, stated as follows:

[T]he contention that . . . The United States can properly refuse to arbitrate a demand by Mexico for additional waters of the Colorado is, to say the least, extremely doubtful, particularly when the Harmon opinion is viewed in the light of the following:

- (a) The practice of states as evidenced by treaties between various countries, including the United States, providing for the equitable apportionment of waters of international rivers.
- (b) The decisions of domestic courts giving effect to the doctrine of equitable apportionment, and rejecting, as between the States, the Harmon doctrine.
- (c) The writing of authorities on international law in opposition to the Harmon doctrine.
- (d) The Trail Smelter Arbitration¹⁷¹

Second, then Assistant Secretary of State Dean Acheson made the following statement on the point under consideration:

The logical conclusion of the legal argument of the opponents of the treaty appears to be that an upstream nation by unilateral act in its own territory can impinge upon the rights of a downstream nation; this is hardly the kind of legal doctrine that can be seriously urged in these times.¹⁷²

And finally, Mr. Frank Clayton, counsel for the United States section of the International Boundary Commission, stated:

Attorney General Harmon's opinion has never been followed either by the United States or by any other country of which I am aware. . . . I have made an attempt to digest the international treaties on this subject [I]n all those I have been able to find, the starting point seemed to be the protection of the existing uses in both the upper riparian country and the

171. *Treaty with Mexico Relating to Utilization of Waters of Certain Rivers: Hearings before the Senate Committee on Foreign Relations*, 79th Cong., 1st Sess. 1751 (1945) (Testimony of Mr. Ben M. English, Assistant Legal Adviser of the Department of State).

172. *Id.* at 1762.

lower riparian country, without regard to asserting the doctrine of exclusive territorial sovereignty. Most of them endeavor to go further than that and to make provision for expansion in both countries, both upper and lower, within the limits of the available supply.¹⁷³

A fitting postscript to the conclusion of the 1944 treaty was provided by Secretary of State Edward R. Stettinius, Jr., who observed, upon the treaty's approval by the U.S. Senate, that it would allow Mexico and the United States to "cooperate as good neighbors in developing the vital water resources of the rivers in which each has an equitable interest."¹⁷⁴

In a dispute a few years later between the United States and Canada over the Columbia River,¹⁷⁵ the position of the United States was reversed. Here it was a downstream state, at the mercy of the upstream state but for any constraints imposed on the latter by international law. The dispute was ultimately resolved by the 1961 Columbia River Basin Treaty,¹⁷⁶ an agreement which one commentator characterized as having "ended one of the bitterest debates ever waged between Canada and the United States."¹⁷⁷ The Columbia rises in the Columbia Ice Field in British Columbia, Canada, flows across the U.S.-Canadian border into the state of Washington and empties into the Pacific Ocean at the border between the states of Washington and Oregon. It is joined in Canada by the Kootenay River, which originates in Canada then flows into the United States before returning to Canada and merging with the Columbia.

173. *Id.* at 97-98.

174. 12 DEP'T ST. BULL. 742 (1945). The President of the United States made the following statement concerning the approval by the Senate of the 1944 treaty:

In voting its approval of the water treaty with Mexico, the Senate today gave unmistakable evidence that it stands firmly in support of the established policy of our Government to deal with our good neighbors on the basis of simple justice, equity, friendly understanding, and practical cooperation. By this action of the Senate, the United States and Mexico join hands in a constructive, businesslike program to apportion between them and develop to their mutual advantage the waters of the rivers that are in part common to them.

Id.

175. See generally Particular Rivers: Columbia, 3 Whiteman DIGEST § 15, at 978 (1964); Ralph Johnson, The Columbia Basin, in INTERNATIONAL DRAINAGE BASINS, *supra* note 5, at 167; L. BLOOMFIELD & G. FITZGERALD, BOUNDARY WATERS PROBLEMS OF CANADA AND THE UNITED STATES 46 (1958); Charles Bourne, *The Columbia River Controversy*, 37 CAN. BAR REV. 444 (1959). The dispute was the subject of a reference to the International Joint Commission, United States and Canada. See BLOOMFIELD & FITZGERALD, *supra* at 164 (summary of Docket No. 51).

176. Treaty relating to Cooperative Development of the Water Resources of the Columbia River Basin, Jan. 17, 1961, U.S.-Can., 15 U.S.T. 1555.

177. Johnson, *supra* note 175, at 167.

While it took on a number of complexities before it was resolved, the dispute had its genesis in a 1951 U.S. proposal to construct Libby Dam on the Kootenay River in Montana. The reservoir behind the dam would have flooded 42 miles of Canadian territory and raised the water level some 150 feet at the border. The United States offered to compensate Canada for flooding the lands and the resulting dislocations, but not for the power benefits that the raised water level in Canada would have provided, both at Libby Dam itself and further downstream. Canada insisted on a share of the power benefits and indicated that it might divert the Kootenay into the Columbia, an action that would deny Libby and other Kootenay dams the diverted waters.¹⁷⁸ Canada later announced the possibility of diverting up to 15 million acre-feet annually from the Columbia into the Fraser River Basin,¹⁷⁹ which for present purposes may be considered as being situated entirely within Canada.

The two states ultimately agreed upon a comprehensive and integrated plan for the development of the resources of the Columbia River Basin. Canada agreed to construct large storage dams, which would benefit the United States by enhancing downstream power generation and protecting against floods. The United States agreed to provide Canada with one-half the additional power resulting from the Canadian projects and to pay Canada for flood control benefits.¹⁸⁰

During the course of the dispute the United States took positions that were very similar to those espoused by Mexico, and rejected by the U.S., in the earlier Rio Grande controversy. For example, in contesting the Canadian proposal to divert Columbia River waters into the Fraser River basin, the United States relied in part on the doctrine of "prior appropriation," under which "the appropriator who is first in time is first in right." The United States referred in this connection to the substantial investments that it had made in hydroelectric plants on the lower Columbia River and indicated that the proposed diversion would result in serious injury to these downstream interests.¹⁸¹ This position bears a striking similarity to that taken by Mexico in the dispute over the Rio Grande, when Mexico contended that the claim of Mexican farmers to Rio Grande water "is incontestable, being prior to that of the inhabitants of Colorado by hundreds of years"¹⁸² The United States further argued that

178. *Id.* at 198-99.

179. Particular Rivers: Columbia, 3 Whiteman DIGEST § 15, at 982.

180. Johnson, *supra* note 175, at 168.

181. Particular Rivers: Columbia, 3 Whiteman DIGEST § 15, at 982, (quoting from a statement of the Chairman of the United States Section of the International Joint Commission, Governor Len Jordan). See also Johnson, *supra* note 175, at 205-07, summarizing U.S. and Canadian arguments.

182. See note 45, *supra* and accompanying text.

Canada's reliance upon article II of the 1909 Boundary Waters Treaty¹⁸³ between the two countries was misplaced, because "the reservation of sovereign rights in article II is based on the Harmon Doctrine, which is not part of international law"¹⁸⁴—thus repudiating the extreme position it had taken in its dispute with Mexico.

While Canada had indeed argued that article II of the 1909 treaty embodied the Harmon Doctrine, in the end both sides agreed that this self-centered policy "was more in tune with the pre-industrial revolution era . . . than with the close economic, social and political ties that characterize our present, rapidly shrinking world."¹⁸⁵ The Harmon Doctrine thus "suffered an ignominious rout," while the principle of equitable apportionment of the benefits of an international watercourse "gained enormously in prestige and acceptance."¹⁸⁶

IV. CONCLUSIONS

A number of conclusions are suggested by the foregoing review of documentary evidence of the attitudes and behavior of the United States in relation to the "Harmon Doctrine." First, it is clear that the United States did take a formal legal position of absolute territorial sovereignty in its dispute with Mexico at the turn of the century concerning the Rio Grande. This position was first articulated in an opinion by Attorney General Judson Harmon in response to a request by the Secretary of State for legal advice concerning the dispute. Harmon's opinion was referred to at least twice by high State Department officials in communications with Mexico.

Second, it is not clear that the United States, in the context of the Rio Grande dispute, actually believed that the "Harmon Doctrine" of absolute territorial sovereignty represented an existing rule of international law governing the relations of states with regard to international

183. Treaty relating to the Boundary Waters and Questions Arising Along the Boundary between the United States and Canada, Jan. 11, 1909, U.S.-Can., 36 Stat. 2448, 12 Bevans 319. In essence, article II reserves to each of the two countries "the exclusive jurisdiction and control over the use and diversion . . . of all waters on its own side of the line which in their natural channels would flow across the boundary or into boundary waters." *Id.* It also provides that any diversion of these waters causing injury on the other side of the boundary "shall give rise to the same rights and entitle the injured parties to the same legal remedies as if such injury took place in the country where such diversion or interference occurs." *Id.* Canada argued that the latter provision made clear that the intent of the treaty was to permit the contemplated diversions but to permit private parties injured thereby to seek redress through the courts.

184. See Bloomfield and Fitzgerald, *supra* note 175 at 46.

185. See Johnson, *supra* note 175, at 235.

186. *Id.* at 235.

watercourses. If it had considered this to be the applicable rule, one would have expected its behavior, and its expectations of Mexico, to have conformed to a reasonable degree with the Doctrine's precepts. But rather than acting on the basis of Harmon's advice, the United States acceded to Mexico's demands and entered into an agreement that apportioned the waters in what the agreement described as an equitable manner. And perhaps even more tellingly, far from following the Doctrine by allowing its citizens free rein to divert Rio Grande waters, the United States government sued those citizens, among others, to prevent them from depriving Mexico of its fair share of Rio Grande waters. Indeed, Harmon's opinion stands out as an anomaly—albeit a rather dramatic one—when viewed in the context not only of the United States' conduct in the dispute, but also of other statements by the United States government itself. Arrayed against a solitary opinion of an Attorney General are a joint resolution of Congress, a statement of the President, and numerous conciliatory statements by State Department officials, all seeking to apportion Rio Grande waters fairly with Mexico.

And third, the practice of the United States in disputes subsequent to the Rio Grande controversy—even those (such as the controversies over the Colorado and Rio Grande leading to the 1944 treaty) in which the United States was in an upstream position—demonstrate that the United States has gone to great lengths to repudiate the Doctrine, and has even maintained that it never represented the law.

It might be thought that in the Rio Grande controversy the United States was in fact motivated principally by a desire to ensure that its citizens in upstream states (Colorado and New Mexico) did not deprive its citizens in downstream states (New Mexico and Texas) of Rio Grande water; and that Mexico was merely an incidental beneficiary of the U.S. government's efforts in this regard. Such a theory is not supported on the record, however. Perhaps curiously, there are very few references to American citizens in downstream states in the documents of the era concerning whether diversions in Colorado and New Mexico should be allowed to continue unchecked. But it is even more revealing that the private Elephant Butte dam project was halted not at the instance of the Bureau of Reclamation or any other agency concerned with domestic water supply, but at the instance of the Department of State. This strongly suggests that the United States government's chief concern was in fact being able to guaranty a sufficient flow of Rio Grande water for Mexico.

The question of exactly what Attorney General Harmon said in his opinion has also been the subject of close scrutiny. As one commentator has observed, the Harmon Doctrine itself is not necessarily a statement of the law of international watercourses but "an assertion that, there being no rules of international law which governed, states were free

to do as they wished."¹⁸⁷ And as a State Department memorandum has pointed out, "the truism that a state is sovereign in its territory does not lead to the conclusion that a state may legally make unlimited use of waters within its territory."¹⁸⁸ Since there are in fact two sovereignties involved—that of the downstream state as well as that of the upstream state—states riparian to an international watercourse operate under reciprocal constraints.¹⁸⁹ Moreover, while Harmon emphasized the complete freedom of a state as to portions of international watercourses situated within its territory, he did not deny—and in fact recognized—that there was a duty to refrain from harming other states.

In his influential work on international watercourses, Herbert Smith comments upon Harmon's view that the case was one of first impression: "Although authority in 1895 was not plentiful, the problem was not . . . entirely a novel one, and indeed Mr. Harmon's vague reference to 'precedents' seems inconsistent with the suggestion of novelty."¹⁹⁰ Smith goes on to remark that: "The opinion clearly rests upon an insufficient analysis both of principles and of practice . . .,"¹⁹¹ and concludes that "Mr. Harmon's attitude seems to have been merely the caution of the ordinary lawyer who is determined not to concede unnecessarily a single point to the other side."¹⁹²

In view of the foregoing examination of the practice of the United States, this latter statement is probably the most accurate way to characterize Attorney General Harmon's opinion. The United States did not follow the "Harmon Doctrine" in the dispute that gave birth to it, nor has it acted in accordance with the Doctrine in subsequent controversies

187. Lipper, *supra* note 6, at 22-23.

188. See the GRIFFIN MEMORANDUM, *supra* note 154, at 60-61. Interestingly, this document was prepared in response to a request by the U.S. Senate for a memorandum on the international law applicable to Canada's proposed diversions from the Kootenay River into the Columbia River (which flows into the United States) and from the Columbia into the Fraser River (which is an entirely Canadian river, emptying into the Strait of Georgia at Vancouver, B.C.).

The point made in the quotation was also recognized in a 1952 United Nations study: Each riparian State has a right of ownership over the section of the waterway which traverses it, and this right restricts the freedom of action of the others. Nevertheless, the fact that each State is obliged to respect the right of ownership of the other States in no way impairs its sovereign power.

U.N. ECONOMIC COMM'N ON EUROPE, LEGAL ASPECTS OF THE HYDRO-ELECTRIC DEVELOPMENT OF RIVERS AND LAKES OF COMMON INTEREST 209, U.N. Doc. E/ECE/136 (1952).

189. See the statement of Chandler P. Anderson in text accompanying note 160, *supra* and accompanying text.

190. Herbert Arthur Smith, *The Economic Uses of International Rivers* 42 (1931).

191. *Id.*

192. *Id.* at 145.

concerning international watercourses. States do not, and cannot, exist in isolation. This is all the more true with regard to their use of shared water resources, as the government officials quoted above have recognized. On the basis of policy as well as practice, therefore, the "Harmon Doctrine" of absolute territorial sovereignty should, one hundred years after it was enunciated, be laid to a richly-deserved rest.