

## SEPARATE OPINION OF JUDGE SKOTNIKOV

1. I voted in favour of most of the operative paragraphs of the Judgment. However, I do not share the Court's reasoning on a number of key points and disagree with some of its conclusions.

## INTERPRETATION OF THE TERM "COMERCIO"

2. I agree that Costa Rica's right of free navigation under the 1858 Treaty of Limits should not automatically be interpreted restrictively on the grounds that it represents a derogation from or limitation of the sovereignty over the San Juan River conferred by that Treaty on Nicaragua. Indeed,

"[w]hile it is certainly true that limitations of the sovereignty of a State over its territory are not to be presumed, this does not mean that treaty provisions establishing such limitations, such as those that are in issue in the present case, should for this reason be interpreted *a priori* in a restrictive way" (Judgment, para. 48.).

3. However, as was established by the P.C.I.J. in the *S.S. "Wimbledon"* case, the restrictive interpretation is in order in case of doubt:

"the fact remains that Germany has to submit to an important limitation of the exercise of the sovereign rights which no one disputes that she possesses over the Kiel Canal. This fact constitutes a sufficient reason for the restrictive interpretation, in case of doubt, of the clause which produces such a limitation. But the Court feels obliged to stop at the point where the so-called restrictive interpretation would be contrary to the plain terms of the article and would destroy what has been clearly granted." (*S.S. "Wimbledon"*, *Judgments, 1923, P.C.I.J., Series A, No. 1*, pp. 24-25.)

It is obvious that the restrictive interpretation in the present case would not be contrary to the plain terms of Article VI of the 1858 Treaty and would not destroy what has been clearly granted. The problem before the Court is precisely the lack of clarity as to how the term "comercio" should be interpreted.

4. In these circumstances, the Court should have examined the intentions of the Parties at the time of the conclusion of the Treaty, taking full

account of the well-established principle that limitations on the sovereignty of a State are not to be presumed.

5. No evidence submitted by the Parties showed that Nicaragua and Costa Rica intended at the time the Treaty was concluded to give an evolving meaning to the word “commerce”. Accordingly, the Court’s presumption should have been that Nicaragua, when concluding the 1858 Treaty, was unlikely to have intended to act against its own interest by granting Costa Rica navigational rights which were not in line with the contemporaneous meaning of the term “comercio” and which would evolve and expand over time along with the meaning of that term.

6. The Court’s finding that the term “commerce” should be interpreted in accordance with its present-day meaning is extraneous to interpretation of the Treaty per se. Neither the generic nature of the term “commerce” nor the unlimited duration of the Treaty and the perpetuity of the legal régime established by it (see Judgment, paragraph 67) excludes the possibility that the Parties’ intention was to grant Costa Rica navigational rights determined by the content of the notion “commerce” as it existed when the Treaty was concluded. The Court’s solution is based solely on the mechanical application of the jurisprudence which in a particular case favours the evolutive approach (see *Aegean Sea Continental Shelf (Greece v. Turkey)*, Judgment, I.C.J. Reports 1978, p. 3). It disregards the jurisprudence which in other cases favours interpretation based on the contemporaneous meaning of the term in question (see *Rights of Nationals of the United States of America in Morocco (France v. United States of America)*, Judgment, I.C.J. Reports 1952, p. 176; *Kasikilil Sedudu Island (Botswana/Namibia)*, Judgment, I.C.J. Reports 1999 (II), p. 1045). The specificity of the present case is not being addressed. The Court ignores the S.S. “*Wimbledon*” dictum (see paragraph 3 above) and related jurisprudence. Consequently, its conclusion runs counter to the principle that limitations on sovereignty are not to be presumed.

7. In 1858, and for decades to come, the commerce was confined to trade in goods. The principal definition in the 1852 edition of the *Dictionary of the Spanish Royal Academy* defines “comercio” as “[b]usiness and trafficking that is done by buying, selling or exchanging some things for others”. As late as 1897, the Alexander Award confirmed that the 1858 Treaty gave Costa Rica the right of free navigation “con objetos de comercio” so that it “would have an Atlantic outlet for the import and export of goods”. Other commercial treaties entered into at the time reveal themselves to be exclusively concerned with trade in goods (see, for example, the Volio-Zelaya Treaty of Commerce (Costa Rica-Nicaragua) of 1868). There is very good reason to assume that in 1858 the Parties understood the meaning of the word “comercio” as being limited to trade in goods.

8. However, this conclusion would have left open the question as to whether, at the present time, the transport of passengers and tourists is

covered by Article VI of the 1858 Treaty. To answer this question, the Court should have examined the practice of the Parties subsequent to the conclusion of the Treaty. As was recalled in the *Kasikili/Sedudu Island* case, “when called upon to interpret the provisions of a treaty, the Court has itself frequently examined the subsequent practice of the parties in the application of that treaty” (*Kasikili/Sedudu Island (Botswana/Namibia)*, *Judgment, I.C.J. Reports 1999 (II)*, p. 1076, para. 50).

9. Nicaragua submits evidence that at the time the Treaty of Limits was concluded and for more than 100 years thereafter, it alone controlled the commercial transport of passengers. Be that as it may, it is clear that Costa Rican-operated tourism on the San Juan River has been present for at least a decade, and to a substantial degree. Nicaragua has never protested. This is in contrast to Nicaragua’s treatment of police vessels, which it has repeatedly asserted have no right whatsoever to travel on the San Juan. Nicaragua has not only engaged in a consistent practice of allowing tourist navigation by Costa Rican operators, but has also subjected it to its regulations. This can be seen as recognition by Nicaragua that Costa Rica acted as of right. The common view of the Parties to that effect can be inferred from the Agreement of Understanding on the Tourist Activity in the Border Zone of the San Juan River between the Ministers of Tourism of the two countries, signed on 5 June 1994.

10. In my view, the subsequent practice in the application of the Treaty suggests that the Parties have established an agreement regarding its interpretation: Costa Rica has a right under the 1858 Treaty to transport tourists — that is, passengers who pay a price for the service provided. This right of Costa Rica necessarily extends to the transport of all other passengers who pay a price to the carriers.

#### ISSUES RELATED TO FREEDOM OF NAVIGATION

11. According to the Judgment, the Parties must be presumed to have intended to preserve for riparians living on the Costa Rican bank of the San Juan River a minimal right of navigation to meet their essential requirements. Therefore such a right can be inferred from the provisions of the Treaty as a whole (Judgment, para. 79). Furthermore, for the same reasons, it can be inferred from the Treaty that Costa Rica has the right of navigation on the San Juan with official vessels (including police vessels) that provide the population with what it needs in order to meet the necessities of daily life (*ibid.*, para. 84).

12. I am not at all convinced that any navigational rights have been established by the 1858 Treaty other than in its Article VI — the only article dealing with the issue of navigation.

13. Although I disagree with the majority that the riparians on the

Costa Rican bank have a right under the Treaty to navigate on the San Juan River, I do think that the Treaty left unaffected the practice of riparians to travel on the river to meet the requirements of their daily life. This is to be continued and respected by Nicaragua.

Given the historical background to the conclusion of the Treaty and its actual terms, it is very unlikely that in 1858 either Party had in mind the sparse indigenous population of that bank. The subsequent conduct by Nicaragua supports this conclusion. It shows that Nicaragua has never been concerned about the practice in question. The fact that Nicaragua did not extend its regulations, such as the visa requirement, to daily routine navigation by inhabitants of Costa Rica's bank of the San Juan is indicative of this practice being treated by Nicaragua as extraneous to the 1858 Treaty régime.

14. I see no justification for the Court's finding that Costa Rica has the right, albeit limited, to navigate with official vessels to provide services for the riparian communities.

Even if one accepts the Court's presumption that the Parties, when concluding the Treaty, intended to preserve a minimal right of navigation for riparians, but decided not to spell this out in the text, it is still difficult to see how this line of reasoning could lead to the conclusion that the Court reaches in respect of official vessels. No practice of using official vessels for the purpose of providing services for riparian communities existed at the time the Treaty was concluded. It is very difficult to imagine the Parties intending to preserve a right which is not derived from pre-existing practice.

It is clear that Costa Rica has certain needs calling for use of the San Juan River for non-commercial purposes by public vessels, including providing medical and other services to riparians. However, these needs do not translate into rights. The Parties should reach an arrangement on the subject on their own terms. It is not for the Court to do so on their behalf. As the Court has had occasion to note in the past, "[i]t is the duty of the Court to interpret the Treaties, not to revise them" (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Second Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 229).

#### ISSUES RELATED TO REGULATORY POWERS

15. I fully agree that the titleholder of the right of free navigation is Costa Rica. However, I cannot concur with the Court when it puts the owners and operators of Costa Rican vessels together with the passengers on those vessels, including non-Costa Ricans, in a single category of persons who benefit from that right (Judgment, para. 114). I certainly cannot accept that it is vessels themselves which are exercising the freedom of navigation (*ibid.*, paras. 113, 117, 120).

In my view, the right to freedom of navigation afforded to Costa Rica is exercised by persons — owners and operators of vessels navigating the San Juan River. It is the carrier that exercises the freedom to navigate.

Sellers or buyers of goods may benefit from the possibilities which are offered by Costa Rica's right to free navigation; they do not, however, exercise that right. Tourists and passengers are merely purchasing a service. The 1858 Treaty cannot be read as affording the perpetual right of free navigation for commercial purposes to those persons, who may be Costa Ricans, nationals of third countries or, conceivably, Nicaraguan citizens. Nor can it be interpreted as affording to them any other rights, such as exemption from Nicaragua's visa régime, by virtue of Costa Rica's right to freely navigate the San Juan River.

16. Imposing a visa requirement on tourists or passengers travelling on Costa Rican vessels is within Nicaragua's regulatory rights under the 1858 Treaty. It derives from Nicaragua's "exclusive *dominium* and *imperium* over the waters of the San Juan River" (Judgment, para. 44). This regulatory power is distinct from Nicaragua's powers to regulate navigation on the San Juan River. As the Court states, "the power of a State to issue or refuse visas is a practical expression of the prerogative which each State has to control entry by non-nationals into its territory" (*ibid.*, para. 113). This remains true, as was established in the *Right of Passage* case, even in cases where freedom of transit exists:

"In view of the tension then prevailing in intervening Indian territory, the Court is unable to hold that India's refusal of passage to the proposed delegation and its refusal of visas to Portuguese nationals of European origin and to native Indian Portuguese in the employ of the Portuguese Government was action contrary to its obligation resulting from Portugal's right of passage. Portugal's claim of a right of passage is subject to full recognition and exercise of Indian sovereignty over the intervening territory and without any immunity in favour of Portugal. The Court is of the view that India's refusal of passage in those cases was, in the circumstances, covered by its power of regulation and control of the right of passage of Portugal." (*Right of Passage over Indian Territory (Portugal v. India)*, *Merits, Judgment, I.C.J. Reports 1960*, p. 45.)

17. The visa requirement may affect the business interests of persons or entities engaged in the commercial activity of providing tourist or passenger transport. It may inconvenience individual tourists. But it is not inconsistent with Costa Rica's right to free navigation for commercial purposes. The exercise by Costa Rica of this right would certainly be impeded by Nicaragua's systematic refusal to issue visas to boatmen or

by its refusal to grant visas to a whole category of passengers, for example tourists. This, however, would have constituted a manifest abuse of the visa requirement. Any right can be abused. It is not a reason, however, to question a right, let alone to deny it. The Court itself acknowledges that the visa requirement imposed by Nicaragua has not impeded growth of Costa Rica's passenger transport on the San Juan River (Judgment, para. 116).

18. Following the Court's approach, the fact that the power of a State to issue or refuse a visa entails discretion is decisive in determining that Nicaragua may not impose a visa requirement on those persons who may benefit from Costa Rica's right of free navigation. "If that benefit is denied, the freedom of navigation would be hindered." (*Ibid.*, para. 115.) However, the Court accepts in paragraph 118 that Nicaragua can refuse entry (i.e., according to the Court's logic, deny the benefit of Costa Rica's right from free navigation) to a particular person if such action is justified in terms of relevant purpose, for example, law enforcement or environmental protection. Nicaragua "can do that at the point that the person identifies him or herself" (*ibid.*, para. 118). No breach of the freedom of navigation would be involved in that case. In other words, a denial of entry, for good reason, through application of the visa mechanism would, in the Court's view, constitute a breach of Costa Rica's Treaty right to free navigation, whereas a denial of entry on the spot for the very same reason would not. In my view, Costa Rica's right would not be breached in either case, since it is the same power which is being exercised and the nature of discretion it entails in both instances is the same.

Finally, should it be true that Costa Rica's freedom of navigation is hindered by the visa requirement, then it would follow that Nicaragua is breaching its own freedom of navigation by maintaining this requirement in respect of passengers on Nicaraguan boats. The Nicaraguan visa regulation applies to non-Nicaraguans irrespective of the nationality of the carrier. This alone, in my view, should have been reason enough for the Court to uphold Nicaragua's position on the subject.

19. The Court acknowledges that Nicaragua's regulation requiring Costa Rica's vessels to fly the Nicaraguan flag does not impede the freedom of navigation. However, the legal nature of this regulation remains unclear. Nicaragua suggested a wide variety of choices for the Court. It was referred to as being an attribute of Nicaragua's sovereignty and a matter of international custom and practice. No evidence of State practice was produced supporting Nicaragua's contentions. The Court finds that Nicaragua may impose this regulation simply "in the exercise of its sovereign powers" (*ibid.*, para. 132). The question is, however, whether the flag requirement meets other criteria set forth by the Court in respect of Nicaragua's regulatory powers (*ibid.*, para. 87). I do not think that Nicaragua succeeded in presenting a legitimate purpose that it is seeking

to pursue in imposing this requirement. Such a purpose would be evident should Nicaragua require Costa Rican vessels to fly the Costa Rican flag, since it shows the identity of the vessel. The Nicaraguan authorities may indeed be interested in distinguishing between its own and Costa Rican boats. By contrast, it seems that the sole purpose of requiring Costa Rican boats to fly the Nicaraguan flag is to reassert Nicaragua's sovereignty over the San Juan River. As Nicaragua puts it: "Flying the latter is a gesture of respect for the sovereignty of the host State." (Rejoinder of Nicaragua, p. 215, para. 4.93.) Given the fact that Nicaragua's sovereignty over the San Juan River is beyond doubt, I do not think that any practical purpose is achieved by imposing the requirement in question. However, I do believe that Costa Rica could have accepted Nicaragua's request as a matter of courtesy.

#### SUBSISTENCE FISHING

20. In my view, the 1858 Treaty, as in the case of the practice of riparians travelling on the river to meet the requirements of their daily life (see paragraph 13 above), left unaffected the practice of subsistence fishing by riparians from the Costa Rican bank of the San Juan River. I am not convinced that Nicaragua has a right to regulate this practice as such. However, the Parties should co-operate in making sure that this practice does not cross the threshold of fishing for commercial purposes.

*(Signed)* Leonid SKOTNIKOV.

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