

**176. CASE CONCERNING THE DISPUTE REGARDING NAVIGATIONAL AND RELATED RIGHTS (COSTA RICA v. NICARAGUA)**

**Judgment of 13 July 2009**

The International Court of Justice, on 13 July 2009, rendered its Judgment in the case concerning the *Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*.

The Court was composed as follows: President Owada; Judges Shi, Koroma, Al-Khasawneh, Buergenthal, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood; Judge *ad hoc* Guillaume; Registrar Couvreur.

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The operative paragraph (para. 156) of the Judgment reads as follows:

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The Court,

(1) As regards Costa Rica’s navigational rights on the San Juan river under the 1858 Treaty, in that part where navigation is common,

(a) Unanimously,

*Finds* that Costa Rica has the right of free navigation on the San Juan river for purposes of commerce;

(b) Unanimously,

*Finds* that the right of navigation for purposes of commerce enjoyed by Costa Rica includes the transport of passengers;

(c) Unanimously,

*Finds* that the right of navigation for purposes of commerce enjoyed by Costa Rica includes the transport of tourists;

(d) By nine votes to five,

*Finds* that persons travelling on the San Juan river on board Costa Rican vessels exercising Costa Rica’s right of free navigation are not required to obtain Nicaraguan visas;

IN FAVOUR: President Owada; Judges Shi, Buergenthal, Abraham, Keith, Bennouna, Cançado Trindade, Yusuf, Greenwood;

AGAINST: Judges Koroma, Al-Khasawneh, Sepúlveda-Amor, Skotnikov; Judge *ad hoc* Guillaume;

(e) Unanimously,

*Finds* that persons travelling on the San Juan river on board Costa Rican vessels exercising Costa Rica's right of free navigation are not required to purchase Nicaraguan tourist cards;

(f) By thirteen votes to one,

*Finds* that the inhabitants of the Costa Rican bank of the San Juan river have the right to navigate on the river between the riparian communities for the purposes of the essential needs of everyday life which require expeditious transportation;

IN FAVOUR: President Owada; Judges Shi, Koroma, Al-Khasawneh, Buergenthal, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood;

AGAINST: Judge *ad hoc* Guillaume;

(g) By twelve votes to two,

*Finds* that Costa Rica has the right of navigation on the San Juan river with official vessels used solely, in specific situations, to provide essential services for the inhabitants of the riparian areas where expeditious transportation is a condition for meeting the inhabitants' requirements;

IN FAVOUR: President Owada; Judges Shi, Koroma, Al-Khasawneh, Buergenthal, Abraham, Keith, Sepúlveda-Amor, Bennouna, Cançado Trindade, Yusuf, Greenwood;

AGAINST: Judge Skotnikov; Judge *ad hoc* Guillaume;

(h) Unanimously,

*Finds* that Costa Rica does not have the right of navigation on the San Juan river with vessels carrying out police functions;

(i) Unanimously,

*Finds* that Costa Rica does not have the right of navigation on the San Juan river for the purposes of the exchange of personnel of the police border posts along the right bank of the river and of the re-supply of these posts, with official equipment, including service arms and ammunition;

(2) As regards Nicaragua's right to regulate navigation on the San Juan river, in that part where navigation is common,

(a) Unanimously,

*Finds* that Nicaragua has the right to require Costa Rican vessels and their passengers to stop at the first and last Nicaraguan post on their route along the San Juan river;

(b) Unanimously,

*Finds* that Nicaragua has the right to require persons travelling on the San Juan river to carry a passport or an identity document;

(c) Unanimously,

*Finds* that Nicaragua has the right to issue departure clearance certificates to Costa Rican vessels exercising Costa Rica's right of free navigation but does not have the right to request the payment of a charge for the issuance of such certificates;

(d) Unanimously,

*Finds* that Nicaragua has the right to impose timetables for navigation on vessels navigating on the San Juan river;

(e) Unanimously,

*Finds* that Nicaragua has the right to require Costa Rican vessels fitted with masts or turrets to display the Nicaraguan flag;

(3) As regards subsistence fishing,

By thirteen votes to one,

*Finds* that fishing by the inhabitants of the Costa Rican bank of the San Juan river for subsistence purposes from that bank is to be respected by Nicaragua as a customary right;

IN FAVOUR: President Owada; Judges Shi, Koroma, Al-Khasawneh, Buergenthal, Abraham, Keith, Bennouna, Skotnikov, Cañado Trindade, Yusuf, Greenwood; Judge *ad hoc* Guillaume;

AGAINST: Judge Sepúlveda-Amor;

(4) As regards Nicaragua's compliance with its international obligations under the 1858 Treaty,

(a) By nine votes to five,

*Finds* that Nicaragua is not acting in accordance with its obligations under the 1858 Treaty when it requires persons travelling on the San Juan river on board Costa Rican vessels exercising Costa Rica's right of free navigation to obtain Nicaraguan visas;

IN FAVOUR: President Owada; Judges Shi, Buergenthal, Abraham, Keith, Bennouna, Cañado Trindade, Yusuf, Greenwood;

AGAINST: Judges Koroma, Al-Khasawneh, Sepúlveda-Amor, Skotnikov; Judge *ad hoc* Guillaume;

(b) Unanimously,

*Finds* that Nicaragua is not acting in accordance with its obligations under the 1858 Treaty when it requires persons travelling on the San Juan river on board Costa Rican vessels exercising Costa Rica's right of free navigation to purchase Nicaraguan tourist cards;

(c) Unanimously,

*Finds* that Nicaragua is not acting in accordance with its obligations under the 1858 Treaty when it requires the operators of vessels exercising Costa

Rica's right of free navigation to pay charges for departure clearance certificates;

(5) Unanimously,

*Rejects* all other submissions presented by Costa Rica and Nicaragua.

Judges Sepúlveda-Amor and Skotnikov appended separate opinions to the Judgment of the Court; Judge ad hoc Guillaume appended a declaration to the Judgment of the Court.

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The Court begins by recalling that, on 29 September 2005, the Republic of Costa Rica (hereinafter "Costa Rica") filed in the Registry of the Court an Application instituting proceedings against the Republic of Nicaragua (hereinafter "Nicaragua") with regard to a "dispute concerning navigational and related rights of Costa Rica on the San Juan River".

The Court observes that, in its Application, Costa Rica seeks to found the jurisdiction of the Court on the declaration it made on 20 February 1973 under Article 36, paragraph 2, of the Statute, as well as on the declaration which Nicaragua made on 24 September 1929 under Article 36 of the Statute of the Permanent Court of International Justice and which is deemed, pursuant to Article 36, paragraph 5, of the Statute of the present Court, for the period which it still has to run, to be acceptance of the compulsory jurisdiction of this Court. Costa Rica also seeks to found the jurisdiction of the Court on the Tovar-Caldera Agreement signed between the Parties on 26 September 2002. In addition, Costa Rica invokes as a basis of the Court's jurisdiction the provisions of Article XXXI of the American Treaty on Pacific Settlement, officially designated, according to Article LX thereof, as the "Pact of Bogotá".

The Court notes that in its final submissions, Costa Rica requests the Court to adjudge and declare that Nicaragua is in breach of its international obligations in denying to Costa Rica the free exercise of its rights of navigation and associated rights on the San Juan river. In particular, Costa Rica requests the Court to adjudge and declare that,

"by its conduct, the Republic of Nicaragua has violated:

(a) the obligation to allow all Costa Rican vessels and their passengers to navigate freely on the San Juan for purposes of commerce, including communication and the transportation of passengers and tourism;

(b) the obligation not to impose any charges or fees on Costa Rican vessels and their passengers for navigating on the River;

(c) the obligation not to require persons exercising the right of free navigation on the River to carry passports or obtain Nicaraguan visas;

(d) the obligation not to require Costa Rican vessels and their passengers to stop at any Nicaraguan post along the River;

(e) the obligation not to impose other impediments on the exercise of the right of free navigation, including timetables for navigation and conditions relating to flags;

(f) the obligation to allow Costa Rican vessels and their passengers while engaged in such navigation to land on any part of the bank where navigation is common without paying any charges, unless expressly agreed by both Governments;

(g) the obligation to allow Costa Rican official vessels the right to navigate the San Juan, including for the purposes of re-supply and exchange of personnel of the border posts along the right bank of the River with their official equipment, including service arms and ammunition, and for the purposes of protection as established in the relevant instruments, and in particular the Second article of the Cleveland Award;

(h) the obligation to facilitate and expedite traffic on the San Juan, within the terms of the Treaty of 15 April 1858 and its interpretation by the Cleveland Award of 1888, in accordance with Article 1 of the bilateral Agreement of 9 January 1956;

(i) the obligation to permit riparians of the Costa Rican bank to fish in the River for subsistence purposes.”

Further, Costa Rica requests the Court to adjudge and declare that by reason of the above violations,

“Nicaragua is obliged:

(a) immediately to cease all the breaches of obligations which have a continuing character;

(b) to make reparation to Costa Rica for all injuries caused to Costa Rica by the breaches of Nicaragua’s obligations referred to above, in the form of the restoration of the situation prior to the Nicaraguan breaches and compensation in an amount to be determined in a separate phase of these proceedings; and

(c) to give appropriate assurances and guarantees that it shall not repeat its unlawful conduct, in such form as the Court may order.”

Costa Rica also requests the Court to reject Nicaragua’s request for a declaration.

In its final submissions, Nicaragua requests the Court to adjudge and declare that the requests presented by Costa Rica

“are rejected in general, and in particular, on the following bases:

(a) either because there is no breach of the provisions of the Treaty of Limits of 15 April 1858 or any other international obligation of Nicaragua;

(b) or, as appropriate, because the obligation breach of which is alleged, is not an obligation under the provisions of the Treaty of Limits of 15 April 1858 or under general international law.”

Moreover Nicaragua requests the Court to make a formal declaration on the issues raised in its Counter-Memorial and its Rejoinder, and as reiterated at the hearings:

“(i) Costa Rica is obliged to comply with the regulations for navigation (and landing) in the San Juan imposed by Nicaraguan authorities in particular related to matters of health and security;

(ii) Costa Rica has to pay for any special services provided by Nicaragua in the use of the San Juan either for navigation or landing on the Nicaraguan banks;

(iii) Costa Rica has to comply with all reasonable charges for modern improvements in the navigation of the river with respect to its situation in 1858;

(iv) revenue service boats may only be used during and with special reference to actual transit of the merchandise authorized by Treaty;

(v) Nicaragua has the right to dredge the San Juan in order to return the flow of water to that obtaining in 1858 even if this affects the flow of water to other present day recipients of this flow such as the Colorado River.”

### *Reasoning of the Court*

## **I. GEOGRAPHICAL AND HISTORICAL CONTEXT AND ORIGIN OF THE DISPUTE**

Referring to the geographical and historical context of the case, the Court notes that the Governments of Costa Rica and Nicaragua reached agreement on 15 April 1858 on a Treaty of Limits, which was ratified by Costa Rica on 16 April 1858 and by Nicaragua on 26 April 1858. The 1858 Treaty of Limits fixed the course of the boundary between Costa Rica and Nicaragua from the Pacific Ocean to the Caribbean Sea. Between a point three English miles from Castillo Viejo, a town in Nicaraguan territory, and the Caribbean Sea, the Treaty fixed the boundary along the right bank of the San Juan river. It established Nicaragua’s dominion and sovereign jurisdiction over the waters of the San Juan river, but at the same time affirmed Costa Rica’s navigational rights “con objetos de comercio” on the lower course of the river.

Following challenges by Nicaragua on various occasions to the validity of the 1858 Treaty, the Parties submitted the question to arbitration by the President of the United States. The Parties agreed in addition that if the 1858 Treaty were found to be valid, President Cleveland should also decide whether Costa Rica could navigate the San Juan river with vessels of war or of the revenue service. In his Award rendered on 22

March 1888, President Cleveland held that the 1858 Treaty was valid. He further stated, with reference to Article VI of the 1858 Treaty, that Costa Rica did not have the right of navigation on the River San Juan with vessels of war, but that it could navigate with such vessels of the Revenue Service as may be connected to navigation “for the purposes of commerce”.

On 5 August 1914, Nicaragua signed a treaty with the United States (the Chamorro-Bryan Treaty) which granted the United States perpetual and “exclusive proprietary rights” for the construction and maintenance of an inter-oceanic canal through the San Juan river. On 24 March 1916 Costa Rica filed a case against Nicaragua before the Central American Court of Justice claiming that Nicaragua had breached its obligation to consult with Costa Rica prior to entering into any canalization project in accordance with Article VIII of the 1858 Treaty. On 30 September 1916, the Central American Court of Justice ruled that, by not consulting Costa Rica, Nicaragua had violated the rights guaranteed to the latter by the 1858 Treaty of Limits and the 1888 Cleveland Award.

On 9 January 1956 Costa Rica and Nicaragua concluded an Agreement (the Fournier-Sevilla Agreement) according to the terms of which the parties agreed to facilitate and expedite traffic in particular through the San Juan river and agreed to cooperate to safeguard the common border.

In the 1980s various incidents started to occur relating to the navigational régime of the San Juan river. During that period Nicaragua introduced certain restrictions on Costa Rican navigation on the San Juan river which it justified as temporary, exceptional measures to protect Nicaragua’s national security in the context of an armed conflict. Some of the restrictions were suspended when Costa Rica protested. During the mid-1990s further measures were introduced by Nicaragua, including the charging of fees for passengers travelling on Costa Rican vessels navigating on the San Juan river and the requirement for Costa Rican vessels to stop at Nicaraguan Army posts along the river.

In July 1998 further disagreements between the Parties regarding the extent of Costa Rica’s navigational rights on the San Juan river led to the adoption by Nicaragua of certain measures. In particular, on 14 July 1998, Nicaragua prohibited the navigation of Costa Rican vessels that transported members of Costa Rica’s police force. On 30 July 1998, the Nicaraguan Minister of Defence and the Costa Rican Minister of Public Security signed a document, known as the Cuadra-Lizano Joint Communiqué. The text allowed for Costa Rican armed police vessels to navigate on the river to re-supply their boundary posts on the Costa Rican side, provided that the Costa Rican agents in those vessels only carried their service arms and prior notice was given to the Nicaraguan authorities, which could decide on whether the Costa Rican vessels should be accompanied by a Nicaraguan escort. On 11 August 1998, Nicaragua declared that it considered the Cuadra-Lizano Joint Communiqué to be legally null and void. Costa Rica did not accept this unilateral declaration. Differences regarding the navigational régime on the San Juan river persisted between the Parties.

On 24 October 2001, Nicaragua made a reservation to its declaration accepting the jurisdiction of the Court, according to which it would no longer accept the jurisdiction of the Court in regard to “any matter or claim based on interpretations of treaties or arbitral awards that were signed and ratified or made, respectively, prior to 31 December 1901”. Under the Tovar-Caldera Agreement, signed by the Parties on 26 September 2002, Nicaragua agreed to a three year moratorium with regard to the reservation it had made in 2001 to its declaration accepting the jurisdiction of the Court. For its part, Costa Rica agreed that during the same three year period it would not initiate any action before the International Court of Justice nor before any other authority on any matter or protest mentioned in treaties or agreements currently in force between both countries.

Once the agreed three year period had elapsed without the Parties having been able to settle their differences, Costa Rica, on 29 September 2005, instituted proceedings before the Court against Nicaragua with regard to its disputed navigational and related rights on the San Juan river. Nicaragua has not raised any objections to the jurisdiction of the Court to entertain the case.

## **II. COSTA RICA’S RIGHT OF FREE NAVIGATION ON THE SAN JUAN RIVER**

The Court recalls that the Parties agree that Costa Rica possesses a right of free navigation on the section of the San Juan river where the right bank, i.e., the Costa Rican side, marks the border between the two States by virtue of the Treaty of Limits concluded between them on 15 April 1858. While it is not contested that the section of the river thus defined belongs to Nicaragua, since the border lies on the Costa Rican bank, with Costa Rica possessing a right of free navigation, the Parties differ both as to the legal basis of that right and, above all, as to its precise extent, in other words as to the types of navigation which it covers.

### **1. The legal basis of the right of free navigation**

The Court observes that it does not consider that it is required to take a position in this case on whether and to what extent there exists, in customary international law, a régime applicable to navigation on “international rivers”, either of universal scope or of a regional nature covering the geographical area in which the San Juan is situated. Nor does it consider, as a result, that it is required to settle the question of whether the San Juan falls into the category of “international rivers”, as Costa Rica maintains, or is a national river which includes an international element, that being the argument of Nicaragua. For the Court, the 1858 Treaty of Limits completely defines the rules applicable to the section of the San Juan river that is in dispute in respect of navigation. Interpreted in the light of the other treaty provisions in force between the Parties, and in accordance with the arbitral or judicial decisions rendered on it, that Treaty is sufficient to settle the question of the extent of Costa Rica’s right of free navigation.

The Court points out that the main provision which founds Costa Rica’s right of free navigation is contained in Article VI of the 1858 Treaty. This has been the focus of the arguments exchanged between the Parties as to the extent of the right of navigation on

the San Juan. Article VI, after conferring on Nicaragua full and exclusive sovereignty (“exclusivamente el dominio y sumo imperio”) over the whole of the San Juan, grants Costa Rica, on the section of the river which follows the border between the two States, a perpetual right (“los derechos perpetuos”) of free navigation “con objetos de comercio”, according to the terms of the Spanish version of the Treaty, which is the only authoritative one. In addition, Article VI gives vessels of both riparian countries the right to land freely on either bank without being subject to any taxes (“ninguna clase de impuestos”), unless agreed by both Governments.

The Court notes that other provisions of the 1858 Treaty, though of less importance for the purposes of the present case, are not without relevance as regards the right of navigation on the river. This applies in particular to Article IV, which obliges Costa Rica to contribute to the security of the river “for the part that belongs to her of the banks”, to Article VIII, which obliges Nicaragua to consult Costa Rica before entering into any agreements with a third State for canalization or transit on the river, and of course to Article II, which establishes the border as the Costa Rican bank on the section of the river which is at issue in this dispute.

In the opinion of the Court, besides the 1858 Treaty, mention should be made, among the treaty instruments likely to have an effect on determining the right of navigation on the river and the conditions for exercising it, of the agreement concluded on 9 January 1956 between the two States (known as the Fournier-Sevilla Agreement), whereby the Parties agreed to collaborate to the best of their ability, in particular in order to facilitate and expedite traffic on the San Juan in accordance with the 1858 Treaty and the Arbitral Award made by President Cleveland in 1888.

The above-mentioned treaty instruments must be understood in the light of two important decisions which settled differences that emerged between the Parties in determining their respective rights and obligations: the Arbitral Award made by the President of the United States on 22 March 1888 (known as the Cleveland Award); and the decision rendered, on the application of Costa Rica, by the Central American Court of Justice on 30 September 1916.

The first of these two decisions settled several questions concerning the interpretation of the 1858 Treaty which divided the Parties in that case; the second found that Nicaragua, by concluding an agreement with the United States permitting the construction and maintenance of an inter-oceanic canal through the San Juan river, had disregarded Costa Rica’s right under Article VIII of that Treaty to be consulted before the conclusion of any agreement of that nature.

Although neither of these decisions directly settles the questions that are now before the Court, they contain certain indications which it will be necessary to take into account for the purposes of the present case.

## **2. The extent of the right of free navigation attributed to Costa Rica**

The Court observes that the Parties disagree considerably over the definition of the field of application of the right of free navigation attributed to Costa Rica, i.e., as to the types of navigation which are covered by the “perpetual right” granted to Costa Rica by the 1858 Treaty. Their difference essentially concerns the interpretation of the words “libre navegación . . . con objetos de comercio” in Article VI of the Treaty of Limits; this brings with it a major disagreement as to the definition of the activities covered by the right in question and of those which, not being thus covered, are subject to Nicaragua’s sovereign power to authorize and regulate as it sees fit any activity that takes place on its territory, of which the river forms part.

### **(a) The meaning and scope of the expression “libre navegación . . . con objetos de comercio”**

The Court first gives the Spanish version of Article VI of the Treaty of Limits, together with its own translation of this provision into English, leaving aside the phrase which divides the Parties.

The English translation of Article VI reads as follows:

“The Republic of Nicaragua shall have exclusive dominium and imperium over the waters of the San Juan river from its origin in the lake to its mouth at the Atlantic Ocean; the Republic of Costa Rica shall however have a perpetual right of free navigation on the said waters between the mouth of the river and a point located three English miles below Castillo Viejo, [con objetos de comercio], whether with Nicaragua or with the interior of Costa Rica by the rivers San Carlos or Sarapiquí or any other waterway starting from the section of the bank of the San Juan established as belonging to that Republic. The vessels of both countries may land indiscriminately on either bank of the section of the river where navigation is common, without paying any taxes, unless agreed by both Governments.”

The Court notes that the Parties’ disagreement is greatest on the meaning of the words “con objetos de comercio”. For Nicaragua, the Spanish version of this expression, which is the only authoritative one, must be translated into French as “avec des marchandises de commerce” and into English as “with articles of trade”; in other words, the “objetos” in question here are objects in the concrete and material sense of the term. Consequently, the freedom of navigation guaranteed to Costa Rica by Article VI relates only to the transport of goods intended to be sold in a commercial exchange. For Costa Rica, on the contrary, the expression means in French “à des fins de commerce” and in English “for the purposes of commerce”; the “objetos” in the original text are therefore said to be objects in the abstract sense of ends and purposes. Consequently, according to Costa Rica, the freedom of navigation given to it by the Treaty must be attributed the broadest possible scope, and in any event encompasses not only the transport of goods but also the transport of passengers, including tourists.

**(i) Preliminary observations**

The Court points out that, in the first place, it is for it to interpret the provisions of a treaty in the present case. It will do so in terms of customary international law on the subject, as reflected in Articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties, as the Court has stated on several occasions (see *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, *I.C.J. Reports 2007*, pp. 109-110, para. 160; see also *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment, *I.C.J. Reports 1994*, pp. 21-22, para. 41).

Consequently, neither the circumstance that Nicaragua is not a party to the Vienna Convention on the Law of Treaties nor the fact that the treaty which is to be interpreted here considerably pre-dates the drafting of the said Convention has the effect of preventing the Court from referring to the principles of interpretation set forth in Articles 31 and 32 of the Vienna Convention.

In the second place, the Court is not convinced by Nicaragua's argument that Costa Rica's right of free navigation should be interpreted narrowly because it represents a limitation of the sovereignty over the river conferred by the Treaty on Nicaragua, that being the most important principle set forth by Article VI.

For the Court, while 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. A treaty provision which has the purpose of limiting the sovereign powers of a State must be interpreted like any other provision of a treaty, i.e., in accordance with the intentions of its authors as reflected by the text of the treaty and the other relevant factors in terms of interpretation.

In this respect, the Court notes that a simple reading of Article VI shows that the Parties did not intend to establish any hierarchy as between Nicaragua's sovereignty over the river and Costa Rica's right of free navigation, characterized as "perpetual", with each of these affirmations counter-balancing the other. Nicaragua's sovereignty is affirmed only to the extent that it does not prejudice the substance of Costa Rica's right of free navigation in its domain, the establishment of which is precisely the point at issue; the right of free navigation, albeit "perpetual", is granted only on condition that it does not prejudice the key prerogatives of territorial sovereignty.

The Court concludes that there are thus no grounds for supposing, *a priori*, that the words "libre navegación . . . con objetos de comercio" should be given a specially restrictive interpretation, any more than an extensive one.

Lastly, the Court observes that none of the points under examination in this case was settled by the Cleveland Award of 1888 or by the decision of the Central American Court of Justice of 1916. Each of the Parties has sought to use these previous decisions as

an argument to support its own case. However, these attempts do not convince the Court one way or the other.

The Cleveland Award confined itself to settling the questions of interpretation which the Parties had expressly submitted to the arbitrator. Those questions did not concern the meaning of the words “con objetos de comercio”; it is therefore futile to seek in the Award the answer to a question that was not put before the arbitrator. Consequently, while the Award declares that Costa Rica does not have the right, under the Treaty, to navigate on the San Juan with vessels of war, whereas it does have the right to do so with vessels of its revenue service, there is nothing to be inferred from this with regard to vessels belonging to the State and not falling into either of those two categories. Likewise, while the arbitrator used the words “for the purposes of commerce” and placed them in quotation marks, it may be supposed that this was simply because that was the English translation of the words “con objetos de comercio” which both Parties had supplied to the arbitrator, who did not wish, in his interpretation of the Treaty, to go beyond the questions which had been put before him.

As for the decision of the Central American Court of Justice of 1916, however important this might be, its operative part was based only on the application of the express provisions of Article VIII of the Treaty, which are not at issue in the present case.

**(ii) The meaning of the phrase “con objetos”**

The Court observes that the Spanish word “objetos” can, depending on its context, have either of the two meanings put forward. Having examined the context here, the Court is of the view that the interpretation advocated by Nicaragua cannot be upheld. The main reason for this is that ascribing the meaning “with goods” or “with articles” to the phrase “con objetos” results in rendering meaningless the entire sentence in which the phrase appears. By contrast, Costa Rica’s interpretation of the words “con objetos” allows the entire sentence to be given coherent meaning.

The Court adds that this finding is supported by three additional arguments which all point to the same conclusion.

First, “objetos” is used in another article of the 1858 Treaty, Article VIII, in which context it can only have the abstract meaning of “purposes” or “subjects”: “Nicaragua se compromete á no concluir otro (contrato) sobre los expresados objetos . . .” (“Nicaragua engages not to conclude any other contract for those purposes . . .”). It is reasonable to infer that the Parties tended to understand “objetos” in its abstract sense, or, at least, that this meaning was familiar to them in their treaty practice.

Second, a further indication may be deduced from the “Cañas-Martinez” Peace Treaty signed by the Parties on 8 December 1857 but which was never ratified and hence did not enter into force. On the question of navigation on the San Juan, this instrument, replaced by the 1858 Treaty of Limits, which repeats some of the earlier provisions, included the expression “artículos de comercio”, which undoubtedly translates as

“articles” or “goods” of commerce. This would tend to show that when the Parties at the time wished to refer to physical property giving rise to commercial transactions, they used a term other than “objetos de comercio”, a term having the advantage of being unambiguous.

Finally, the Court also considers it significant that in 1887, when the two Parties each submitted an English translation of the 1858 Treaty to President Cleveland for use in the arbitration proceedings he was asked to conduct, even though their translations were not identical on all points, they did use the same phrase to render the original “con objetos de comercio”: “for the purposes of commerce”.

It is therefore the meaning of “for the purposes of commerce” that is accepted by the Court.

### **(iii) The meaning of the word “commerce”**

The Court then examines the meaning of the word “commerce” in the context of Article VI. In Nicaragua’s view, for purposes of the Treaty, “commerce” covers solely the purchase and sale of merchandise, of physical goods, and excludes all services, such as passenger transport. It argues that even if the phrase is translated as “for the purposes of commerce”, the result is the same, because in 1858 the word “commerce” necessarily meant trade in goods and did not extend to services, the inclusion of services being a very recent development. Nicaragua contends that it is important to give the words used in the Treaty the meaning they had at the time the Treaty was concluded, not their current meaning, which can be quite different, because this is the only way to remain true to the intent of the drafters of the Treaty; and determining that intent is the main task in the work of interpretation.

Costa Rica argues that “commerce” as used in the Treaty takes in any activity in pursuit of commercial purposes and includes, inter alia, the transport of passengers, tourists among them, as well as of goods. For the Applicant, “commerce” includes movement and contact between inhabitants of the villages on the Costa Rican bank of the San Juan river, and the use of the river for purposes of navigation by Costa Rican public officials providing the local population with essential services, in areas such as health, education and security.

The Court finds that it can subscribe to neither the particularly broad interpretation advocated by Costa Rica nor the excessively narrow one put forward by Nicaragua.

In respect of the first, the Court observes that, were it to be accepted, the result would be to bring within the ambit of “navigation for the purposes of commerce” all, or virtually all, forms of navigation on the river. If that had been the intent of the parties to the Treaty, it would be difficult to see why they went to the trouble of specifying that the right of free navigation was guaranteed “for the purposes of commerce”, given that this language would have had virtually no effect.

In respect of the narrow interpretation advanced by Nicaragua, the Court notes that it is supported mainly by two arguments: the first is based on the Respondent's interpretation of the phrase "con objetos", which has just been rejected; the second is based on the assertion that "commerce" should be given the narrow meaning it had when the Treaty was entered into. The Court does not agree with this second argument.

It is true that the terms used in a treaty must be interpreted in light of what is determined to have been the parties' common intention, which is, by definition, contemporaneous with the treaty's conclusion. That may lead a court seized of a dispute, or the parties themselves, when they seek to determine the meaning of a treaty for purposes of good-faith compliance with it, to ascertain the meaning a term had when the treaty was drafted, since doing so can shed light on the parties' common intention. The Court has so proceeded in certain cases requiring it to interpret a term whose meaning had evolved since the conclusion of the treaty at issue, and in those cases the Court adhered to the original meaning (to this effect, see, for example, the Judgment of 27 August 1952 in the case concerning *Rights of Nationals of the United States of America in Morocco (France v. United States of America)* (*I.C.J. Reports 1952*, p. 176), on the question of the meaning of "dispute" in the context of a treaty concluded in 1836, the Court having determined the meaning of this term in Morocco when the treaty was concluded; the Judgment of 13 December 1999 in the case concerning *Kasikili/Sedudu Island (Botswana/Namibia)* (*I.C.J. Reports 1999 (II)*, p. 1062, para. 25) in respect of the meaning of "centre of the main channel" and "thalweg" when the Anglo-German Agreement of 1890 was concluded).

For the Court, however, this does not signify that, where a term's meaning is no longer the same as it was at the date of conclusion, no account should ever be taken of its meaning at the time when the treaty is to be interpreted for purposes of applying it.

On the one hand, the subsequent practice of the parties, within the meaning of Article 31 (3) (b) of the Vienna Convention, can result in a departure from the original intent on the basis of a tacit agreement between the parties. On the other hand, there are situations in which the parties' intent upon conclusion of the treaty was, or may be presumed to have been, to give the terms used – or some of them – a meaning or content capable of evolving, not one fixed once and for all, so as to make allowance for, among other things, developments in international law. In such instances it is indeed in order to respect the parties' common intention at the time the treaty was concluded, not to depart from it, that account should be taken of the meaning acquired by the terms in question upon each occasion on which the treaty is to be applied.

Thus, where the parties have used generic terms in a treaty, the parties necessarily having been aware that the meaning of the terms was likely to evolve over time, and where the treaty has been entered into for a very long period or is "of continuing duration", the parties must be presumed, as a general rule, to have intended those terms to have an evolving meaning. For the Court, this is so in the present case in respect of the term "comercio" as used in Article VI of the 1858 Treaty. First, this is a generic term, referring to a class of activity. Second, the 1858 Treaty was entered into for an unlimited

duration; from the outset it was intended to create a legal régime characterized by its perpetuity.

The Court concludes from this that the terms by which the extent of Costa Rica's right of free navigation has been defined, including in particular the term "comercio", must be understood to have the meaning they bear on each occasion on which the Treaty is to be applied, and not necessarily their original meaning. Thus, even assuming that the notion of "commerce" does not have the same meaning today as it did in the mid-nineteenth century, it is the present meaning which must be accepted for purposes of applying the Treaty.

Accordingly, the Court finds that the right of free navigation in question applies to the transport of persons as well as the transport of goods, as the activity of transporting persons can be commercial in nature nowadays. This is the case if the carrier engages in the activity for profit-making purposes. The Court sees no persuasive reason to exclude the transport of tourists from this category.

## **(b) The activities covered by the right of free navigation belonging to Costa Rica**

### **(i) Private navigation**

The Court considers that two types of private navigation are certainly covered by the right of free navigation pursuant to Article VI of the 1858 Treaty: the navigation of vessels carrying goods intended for commercial transactions; and that of vessels carrying passengers who pay a price other than a token price in exchange for the service thus provided.

The Court is further of the opinion that it cannot have been the intention of the authors of the 1858 Treaty to deprive the inhabitants of the Costa Rican bank of the river, where that bank constitutes the boundary between the two States, of the right to use the river to the extent necessary to meet their essential requirements, even for activities of a non-commercial nature, given the geography of the area. While choosing, in Article II of the Treaty, to fix the boundary on the river bank, the parties must be presumed, in view of the historical background to the conclusion of this Treaty and of the Treaty's object and purpose as defined by the Preamble and Article I, to have intended to preserve for the Costa Ricans living on that bank a minimal right of navigation for the purposes of continuing to live a normal life in the villages along the river. The Court considers that while such a right cannot be derived from the express language of Article VI, it can be inferred from the provisions of the Treaty as a whole and, in particular, the manner in which the boundary is fixed.

### **(ii) "Official vessels"**

For the Court, it is clear that the 1858 Treaty does not establish, in its Article VI, any special régime for "official" (or "public") vessels. The only criterion provided for by Article VI is based not on the public or private ownership of the vessel but on the purpose of navigation: either it is undertaken for the "purposes of commerce" and benefits from

the freedom established; or it is undertaken for purposes other than “commerce” and it does not.

The Court is of the opinion that, as a general rule, the navigation of Costa Rican vessels for the purposes of public order activities and public services with no object of financial gain, in particular police vessels, lies outside the scope of Article VI of the 1858 Treaty, with the exception of revenue service vessels, the question of which was settled by the 1888 arbitration.

Moreover, the Court considers that, in any event, Costa Rica has not proved its assertion that river transport is the only means to supply its police posts located along the river bank or to carry out the relief of the personnel stationed in them.

Nonetheless, the Court is of the opinion that the reasons given above with regard to private vessels which navigate the river in order to meet the essential requirements of the population living on the river bank, where expeditious transportation is a condition for meeting those requirements, are also valid for certain Costa Rican official vessels which in specific situations are used solely for the purpose of providing that population with what it needs in order to meet the necessities of daily life.

### **III. NICARAGUA’S POWER OF REGULATION OF NAVIGATION**

#### **1. General observations**

The Court observes that, in their written pleadings, the Parties disagreed about the extent or even the very existence of the power of Nicaragua to regulate the use of the river so far as Costa Rica was concerned. In the course of the oral proceedings that difference of positions largely disappeared. However, the Parties continue to disagree on the extent of the regulatory power of Nicaragua and on certain measures which Nicaragua has adopted and continues to apply. In particular, they disagree whether Nicaragua is obliged to notify Costa Rica about the regulations it has made or to consult Costa Rica in advance about proposed regulations.

#### **(a) Characteristics**

The Court is of the view that Nicaragua has the power to regulate the exercise by Costa Rica of its right to freedom of navigation under the 1858 Treaty. According to the Court, that power is not unlimited, being tempered by the rights and obligations of the Parties. A regulation in the present case is to have the following characteristics:

- (1) it must only subject the activity to certain rules without rendering impossible or substantially impeding the exercise of the right of free navigation;
- (2) it must be consistent with the terms of the Treaty, such as the prohibition on the unilateral imposition of certain taxes in Article VI;
- (3) it must have a legitimate purpose, such as safety of navigation, crime prevention and public safety and border control;

(4) it must not be discriminatory and in matters such as timetabling must apply to Nicaraguan vessels if it applies to Costa Rican ones;

(5) it must not be unreasonable, which means that its negative impact on the exercise of the right in question must not be manifestly excessive when measured against the protection afforded to the purpose invoked.

**(b) Notification**

The Court now turns to the question whether Nicaragua has a legal obligation to notify Costa Rica of the measures it adopts to regulate navigation on the river, or to give notice and consult with Costa Rica prior to the adoption by Nicaragua of such measures.

Although the 1858 Treaty imposes no express general obligation on either of the Parties to notify the other about measures it is taking relating to navigation on the river, the Court sees three factors as together imposing an obligation of notification of regulations in the circumstances of this case.

The first is to be found in the 1956 Agreement under which the Parties agreed to collaborate in order to facilitate traffic on the San Juan river and those transport services which may be provided to the territory of one Party by enterprises which are nationals of the other. The second lies in the very subject-matter of the regulations: navigation on a river in which two States have rights, the one as sovereign, the other to freedom of navigation. Such a requirement arises from the practical necessities of navigation on such a waterway. The third factor lies in the very nature of regulation. If the regulation is to subject the activity in question to rules, those undertaking that activity must be informed of those rules.

The Court concludes that Nicaragua is under an obligation to notify Costa Rica of the regulations which it makes regarding the navigational regime on the San Juan river. That obligation does not however extend to notice or consultation prior to the adoption by Nicaragua of such regulations.

**2. The legality of the specific Nicaraguan measures challenged by Costa Rica**

**(a) Requirement to stop and identification**

So far as the lawfulness of the obligation requiring Costa Rican vessels to stop at any Nicaraguan post along the river, and requiring their passengers to carry passports, the Court is of the opinion that Nicaragua, as sovereign, has the right to know the identity of those entering its territory and also to know that they have left. In its view the power to require the production of a passport or identity document of some kind is a legitimate part of the exercise of such a power. The Court notes that Nicaragua also has related responsibilities in respect of law enforcement and environmental protection. To that extent, the Nicaraguan requirement that vessels stop on entering the river and leaving it and that they be subject to search is lawful. The Court cannot, however, see any legal justification for a general requirement that vessels continuing along the San Juan river,

for example, from the San Carlos river to the Colorado river, stop at any intermediate point.

Accordingly, the Court concludes that Costa Rica's challenge to the requirement that vessels stop and their crew members and passengers register and carry identity documents fails.

**(b) Departure clearance certificates**

The Court considers that the purposes invoked by Nicaragua, i.e., navigational safety, environmental protection and criminal law enforcement, are legitimate ones. Further, the requirement for departure clearance certificates does not appear to have imposed any significant impediment on the exercise of Costa Rica's freedom of navigation.

For the Court, the question may also be asked whether in terms of the earlier practice the inspection and certification should be undertaken by the State of nationality of the boat operators, on the analogy of maritime navigation. There is however no suggestion from Costa Rica that it would be in a position to take up this responsibility. Nor does it point to a single case where navigation has been impeded by an arbitrary refusal of a certificate.

Accordingly Costa Rica's claim that Costa Rican vessels need not obtain departure clearance certificates cannot be upheld.

**(c) Visas and tourist cards**

The Court observes at the outset that a distinction must be drawn between requiring visas and requiring tourist cards. 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.

For the Court, the requirement that passengers on Costa Rican vessels exercising freedom of navigation, other than riparians and certain Costa Rican merchants, have visas issued to them raises the question of who is entitled to and who may benefit from the right of freedom of navigation for commercial purposes stated in Article VI of the 1858 Treaty. Under Article VI of the Treaty the titleholder of the right of free navigation is Costa Rica. Owners and operators of Costa Rican vessels benefit from that right when navigating on the San Juan river for commercial purposes. Passengers on vessels exercising Costa Rica's right of free navigation also benefit from that right, even if such passengers are not Costa Rican nationals.

The Court recalls that the power of a State to issue or refuse a visa entails discretion. However in the present case 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. In these circumstances, the Court is of the opinion that an imposition of a visa requirement is a breach of the right under Article VI of the Treaty.

The Court observes that in fact the number of tourists travelling on the river in Costa Rican vessels has increased in the period these requirements have been in force. Further, Costa Rica has provided no evidence of arbitrary refusals of visas to tourists and Nicaragua points out that it does not require nationals from countries which are the source of most of the tourists visiting the San Juan to obtain visas. Furthermore, it makes exceptions for residents of Costa Rican riparian communities and Costa Rican merchants who regularly use the river. This, however, does not affect the legal situation thus stated.

The Court concludes that Nicaragua may not require persons travelling on Costa Rican vessels which are exercising their freedom of navigation on the river to obtain visas. It would of course be another matter were they wishing to enter the land territory of Nicaragua from the river or to travel up the river beyond its shared part towards Lake Nicaragua.

Given that Nicaragua has the right to know the identity of those wishing to enter the river, for reasons, among others, of law enforcement and environmental protection, the Court is of the view that one measure which it may properly take to protect such interests is to refuse entry to a particular person for good reasons relating to that purpose. If such an action was justified in terms of the relevant purpose, no breach of the freedom would be involved.

With regard to the requirement by Nicaragua that tourist cards be obtained, this does not appear to be intended to facilitate its control over entry into the San Juan river. In the course of the proceedings Nicaragua did no more than give some factual information about the operation of the tourist cards and the exemptions already mentioned. It referred to no legitimate purpose as justification for imposing this requirement. The requirement that passengers wishing to travel on Costa Rican vessels which are exercising Costa Rica's freedom of navigation on the river must first purchase tourist cards is inconsistent with that right to freedom of navigation. The Court accordingly concludes that Nicaragua may not require persons travelling on Costa Rican vessels which are exercising Costa Rica's freedom of navigation on the river to purchase a tourist card.

#### **(d) Charges**

In the Court's view, the 1858 Treaty confers a right on the vessels of each Party to land on the bank of the other and provides that the exercise of that particular right is not to be the subject of an impost or tax. Just as the exercise of the right of navigation on the river is to be free and not the subject of any payment, so is stopping on the other bank.

As the Court understands the situation, Costa Rica does not challenge the right of Nicaragua to inspect vessels on the river for safety, environmental and law enforcement reasons. In the Court's opinion, that right would in any event be an aspect of Nicaraguan sovereignty over the river. But those actions of policing by the sovereign do not include the provision of any service to boat operators, and the payment must thus, in these circumstances, be seen as unlawful. Accordingly, Costa Rica's claim in respect of the

charge for the departure clearance certificate for those Costa Rican vessels which exercise the right of free navigation on the river must be upheld.

**(e) Timetabling**

The Court recalls that the exercise of a power to regulate may legitimately include placing limits on the activity in question. The limited evidence before the Court does not demonstrate any extensive use of the river for night time navigation. The Court thus infers that the interference with Costa Rica's freedom to navigate caused by the prohibition of night time navigation imposed by Nicaragua is limited and does not amount to an unlawful impediment to that freedom, particularly when the purposes of the regulation are considered.

**(f) Flags**

The Court considers that Nicaragua, which has sovereignty over the San Juan river, may, in the exercise of its sovereign powers, require Costa Rican vessels fitted with masts or turrets navigating on the river to fly its flag. This requirement cannot in any respect be considered an impediment to the exercise of the freedom of navigation of Costa Rican vessels under the 1858 Treaty. The Court observes, moreover, that it has not been presented with any evidence that Costa Rican vessels have been prevented from navigation on the San Juan river as a result of Nicaragua's flag requirement. Accordingly, in the view of the Court, Costa Rica's claim that Nicaragua has violated its obligation not to impose impediments on the exercise of the right of free navigation by establishing conditions relating to flags cannot be upheld.

**(g) Conclusion**

It follows from the above that Nicaragua has exercised its powers of regulation regarding the matters discussed under subsections (a), (b), (e) and (f) above in conformity with the 1858 Treaty; but that it is not acting in conformity with the obligations under the 1858 Treaty when it implements measures requiring visas and tourist cards and the payment of charges in respect of vessels, boat operators and their passengers exercising the freedom of navigation.

**IV. SUBSISTENCE FISHING**

With regard to Nicaragua's argument that Costa Rica's claim relating to subsistence fishing is inadmissible on the grounds that Costa Rica failed to include, even implicitly, the claim in its Application, the Court notes that the alleged interferences by Nicaragua with the claimed right of subsistence fishing post-date the filing of the Application. As to Nicaragua's second argument that the claim does not arise directly out of the subject-matter of the Application, the Court considers that in the circumstances of this case, given the relationship between the riparians and the river and the terms of the Application, there is a sufficiently close connection between the claim relating to subsistence fishing and the Application, in which Costa Rica, in addition to the 1858 Treaty, invoked "other applicable rules and principles of international law". In addition, the Court observes that, as appears from the arguments on the merits which the

Respondent has presented in the two rounds of written pleadings and in two rounds of oral hearings, Nicaragua has not been disadvantaged by Costa Rica's failure to give notice in the Application. Similarly, in terms of its responsibility for the due administration of justice, the Court does not consider itself to have been disadvantaged in its understanding of the issues by the lack of explicit reference to the claim in respect of fisheries in the Application. Accordingly, the Court finds that Nicaragua's objection to admissibility cannot be upheld.

In its consideration of the merits of Costa Rica's claim regarding subsistence fishing rights, the Court recalls that the Parties are agreed that all that is in dispute is fishing by Costa Rican riparians for subsistence purposes. There is no question of commercial or sport fishing. The Court also notes that the Parties have not attempted to define subsistence fishing (except by those exclusions) nor have they asked the Court to provide a definition. Leaving aside for the moment the issue of fishing in the river from boats, a point to which the Court will return, the Parties agree that the practice of subsistence fishing is long established. They disagree however whether the practice has become binding on Nicaragua thereby entitling the riparians as a matter of customary right to engage in subsistence fishing from the bank. The Court observes that the practice, by its very nature, especially given the remoteness of the area and the small, thinly spread population, is not likely to be documented in any formal way in any official record.

For the Court, the failure of Nicaragua to deny the existence of a right arising from the practice which had continued undisturbed and unquestioned over a very long period, is particularly significant. The Court accordingly concludes that Costa Rica has a customary right. That right would be subject to any Nicaraguan regulatory measures relating to fishing adopted for proper purposes, particularly for the protection of resources and the environment.

The Court does not however consider that the customary right extends to fishing from vessels on the river. There is only limited and recent evidence of such a practice. Moreover that evidence is principally of the rejection of such fishing by the Nicaraguan authorities. Accordingly, the Court concludes that fishing by the inhabitants of the Costa Rican bank of the San Juan river for subsistence purposes from that bank is to be respected by Nicaragua as a customary right.

## **V. THE CLAIMS MADE BY THE PARTIES IN THEIR FINAL SUBMISSIONS**

### **1. The claims of Costa Rica**

The Court declares that it will uphold, in the operative part of this Judgment, elements of the claim by Costa Rica for it to adjudge that Nicaragua has violated a certain number of obligations incumbent upon it with respect to Costa Rica to the extent that they correspond to the preceding reasoning and will dismiss the others. With regard to Costa Rica's submission that the Court should order Nicaragua to cease all the breaches of its obligations which have a continuing character, the Court considers that the obligation for the State concerned to put an end to such violations derives directly from the finding establishing their existence. As to Costa Rica's submission for the Court to

adjudge that Nicaragua should make reparation to Costa Rica for the injury caused to it by the breaches identified, in the form of the restoration of the prior situation and compensation in an amount to be determined at a later stage, the Court recalls that the cessation of a violation of a continuing character and the consequent restoration of the legal situation constitute a form of reparation for the injured State. It refuses to uphold the claim for compensation. Concerning the submission by Costa Rica for the Court to require Nicaragua to give assurances and guarantees that it will not repeat its unlawful conduct, the Court notes that, as a general rule, there is no reason to suppose that a State whose act or conduct has been declared wrongful by the Court will repeat that act or conduct in the future, since its good faith must be presumed. It thus refuses to uphold this claim.

## **2. The claims of Nicaragua**

The Court will uphold, in the operative part of this Judgment, the submission by Nicaragua for the Court to dismiss all of the claims of Costa Rica to the extent that it corresponds to the reasoning set out in the present Judgment in respect of Costa Rica's claims. As to Nicaragua's submission for the Court to make a formal declaration, the Court is, *inter alia*, of the opinion that the reasoning of the present Judgment is sufficient to respond to Nicaragua's wish that Costa Rica's obligations towards it should be stated by the Court.

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### **Separate opinion of Judge Sepúlveda-Amor**

In his separate opinion, Judge Sepúlveda-Amor declares that while he is in agreement with most of the findings in the operative part of the Judgment, he does not share the view that the imposition of visa requirements by Nicaragua on persons travelling on the San Juan river on board Costa Rican vessels exercising Costa Rica's right of free navigation would be contrary to Nicaragua's obligations under the 1858 Treaty. He further considers that the Court's reasoning as regards Costa Rica's claim relating to subsistence fishing should have been based on a different legal foundation.

As regards the question of the legality of visa requirements enacted by Nicaragua, Judge Sepúlveda-Amor is of the opinion that the Court has failed to take account of Nicaragua's legitimate interest in border and immigration control and to clarify accordingly the extent of Nicaragua's regulatory powers to that effect.

Judge Sepúlveda-Amor notes that the finding is not consistent with the Court's observations made in previous paragraphs of the Judgment, namely that Nicaragua as the sovereign State has the "primary responsibility for assessing the need for regulation", that Costa Rica has the burden of proof in respect of claims regarding the unreasonableness of Nicaragua's regulations, and that such claims need to be based on "[c]oncrete and specific facts" (paragraph 101). Judge Sepúlveda-Amor observes that, while the Court has followed this line of reasoning when examining the requirements to stop and identify,

to obtain departure clearance certificates and to fly the Nicaraguan flag, it has adopted a different approach with respect to the visa requirement. According to Judge Sepúlveda-Amor, Costa Rica has presented no evidence to support its contention that the visa requirements imposed by Nicaragua do not serve a legitimate purpose, are unreasonable or discriminatory and substantially impede the exercise of its right of free navigation, in violation of the conditions established in paragraph 87 of the Judgment. He notes that, on the contrary, evidence provided by Nicaragua shows that tourism on the San Juan river has considerably increased in the period since these requirements have been in force.

Judge Sepúlveda-Amor further believes that the prohibition to enact any visa requirements may involve a risk for Nicaragua's public safety and is contrary to the principle stated in the Judgment that "[t]he 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" (paragraph 113). Moreover, he indicates that Nicaragua would be in a position to challenge the Court's finding by invoking certain provisions of multilateral conventions, such as the American Convention on Human Rights and the International Covenant on Civil and Political Rights, as a legal basis for the imposition of a visa requirement for persons travelling on the San Juan river.

With regard to the legal basis of Costa Rica's right to subsistence fishing, Judge Sepúlveda-Amor observes that the Court's reasoning contradicts its previous jurisprudence on the recognition of rules of customary international law since, in his view, the clearly established requirements of practice and *opinio juris* are not fulfilled in the present case. According to Judge Sepúlveda-Amor, Nicaragua's lack of protest to the undocumented practice of subsistence fishing on the San Juan river cannot be interpreted as a conviction on the part of Nicaragua that it is conforming to a legal obligation to respect the said practice, especially in the light of the fact that Costa Rica has never claimed the existence of a customary right of subsistence fishing until the submission of its Memorial. Judge Sepúlveda-Amor further notes that, in any event, the practice of a local community of riparians cannot be equated with State practice.

Judge Sepúlveda-Amor considers that the Court could have recognized Costa Rica's claim of subsistence fishing on a more solid legal foundation, namely by having recourse to the principle of acquired or vested rights, as applied in a number of previous decisions, or by recognizing the binding character of the legal commitment undertaken by Nicaragua during the oral proceedings before the Court that it "has absolutely no intention of preventing Costa Rican residents from engaging in subsistence fishing" (CR 2009/5, p. 27, para. 48), in accordance with the Court's case-law on unilateral acts.

### **Separate opinion of Judge Skotnikov**

Judge Skotnikov voted in favour of most of the operative paragraphs of the Judgment. However, he does not share the Court's reasoning on a number of key points and disagrees with some of its conclusions.

He agrees 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 limitation of the sovereignty over the San Juan river conferred by that Treaty on Nicaragua. However, as was established by the Court's jurisprudence, the restrictive interpretation is in order in case of doubt. 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.

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 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.

In Judge Skotnikov's view, the subsequent practice in the application of the Treaty suggests that the Parties have established an agreement regarding its interpretation. Costa Rican-operated tourism on the San Juan river has been present for at least a decade, and to a substantial degree. 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, signed on 5 June 1994. Accordingly, 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.

Judge Skotnikov notes that, 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. 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 riparian population with what it needs in order to meet the necessities of daily life.

Judge Skotnikov is not 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.

Although he disagrees with the majority that the riparians on the Costa Rican bank have a right under the Treaty to navigate on the San Juan river, he is of the view 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.

He sees 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.

It is clear that Costa Rica has certain needs calling for use of the San Juan river for non-commercial purposes by public vessels. 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.

Judge Skotnikov emphasizes that the 1858 Treaty cannot be interpreted as affording to non-Nicaraguans exemption from Nicaragua's visa régime, by virtue of Costa Rica's right to freely navigate the San Juan river. 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. As the Court itself states, the power of a State to issue or refuse visas is a practical expression of the very broad prerogative which each State has to control entry by non-nationals into its territory. This remains true, according to the Court's jurisprudence, even in cases where freedom of transit exists. The visa requirement is consistent with Costa Rica's right to free navigation for commercial purposes. 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 his view, should have been reason enough for the Court to uphold Nicaragua's position on the subject.

Judge Skotnikov notes that the legal nature of the regulation requiring Costa Rica's vessels to fly the Nicaraguan flag remains unclear. There is no reference in the Judgment to any evidence of State practice supporting Nicaragua's contentions. However, Judge Skotnikov believes that Costa Rica could have accepted Nicaragua's request as a matter of courtesy.

Finally, in his 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, left unaffected the practice of subsistence fishing by riparians from the Costa Rican bank of the San Juan river.

### **Declaration of Judge *ad hoc* Guillaume**

In his declaration, Judge *ad hoc* Guillaume endorses many of the findings reached by the Court.

He makes various further points concerning the applicable law in this case and the effect of the passage of time on the interpretation of treaties.

He joins with the majority in considering that Article VI of the Treaty of 26 April 1858 gives Costa Rica a right of free navigation on the San Juan river for purposes of commerce. However, he takes the view that only boatmen are entitled to benefit from that right, and that the commercial or other activities of the persons transported have no bearing on the existence of the rights attributed to Costa Rica. He infers from this that all

navigation by vessels for non-profit-making purposes is excluded from the cases provided for by Article VI.

Judge *ad hoc* Guillaume also differs from the Court when it accords the inhabitants of the Costa Rican bank of the river the right to navigate between riparian communities in certain cases, and when it attributes a similar right to certain official vessels of Costa Rica. He observes that the Court has strictly circumscribed these rights, but considers that it has nonetheless thereby disregarded the provisions of the 1858 Treaty. In his view, it would have been preferable to encourage the Parties to negotiate an agreement on this subject.

Lastly, Judge *ad hoc* Guillaume agrees with the Court's Judgment when it recognizes that Nicaragua has the power to regulate Costa Rica's exercise of its right of free navigation, and in particular to require that Costa Rican vessels and their passengers stop at Nicaraguan border posts. However, he differs from the Court as regards the issuing of visas; unlike the Court, he takes the view that Nicaragua remains free to make access to its territory conditional on visas being issued. He notes that the Court has acknowledged that Nicaragua has the right to refuse access for reasons connected with the maintenance of public order or protection of the environment. But he considers it to have been necessary to go further by recognizing the lawfulness of a visa system which is organized in practice so as not to prejudice free navigation on the river.