national borders or making the interpenetration of national markets more difficult, in particular those aimed at preventing or restricting parallel exports, … be agreements whose object is to restrict competition", at [61].

In *The Antitrust Paradox: A Policy at War with Itself* (Free Press, 1993) Robert Bork famously asked whether competition law was "guided by one value or several?" He went on to argue for a unitary goal: competition law had to do less in order to be a rational, coherent, and effective means of achieving anything. The battle has been to restrict the use of competition law machinery to the task of tackling inefficiency. Modernisation seemed to accept this. Whilst the Court of First Instance took the Union within touching distance of an efficiency orientated competition law, the Court of Justice has put a single objective competition law beyond our grasp. With regard to agreements restricting market integration the Court of Justice confirms the long established legal presumption that competition is restricted, so that Article 101(1) TFEU (ex Article 81(1) EC) is automatically infringed. Whether competition is actually or likely to be restricted is never considered: whether a multi-goal Union competition law can ever be made to work in anything but an arbitrary manner remains to be seen.

OKEOGHENE ODUDU

THE FURTHER EVOLUTION OF THE EVOLUTIONARY APPROACH TO TREATY INTERPRETATION

THE Central American states of Costa Rica and Nicaragua share a border defined in part by the San Juan River. A treaty of 1858 fixed the relevant part of the border on the river's southern (Costa Rican) bank. Thus the whole of the San Juan is within the territory of Nicaragua but the Treaty guarantees to Costa Rica use of the river for certain specific purposes. Both states have promoted tourism on the San Juan and Nicaragua has sought to regulate Costa Rican river traffic in ways that Costa Rica claimed contravened its treaty rights. The matter went before the International Court of Justice ("ICJ") which issued a judgment in July 2009 (*Dispute Regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua)*) concerning the interpretation of the 1858 Treaty. Article VI of the Treaty provides that Costa Rica has a right of navigation on the San Juan for the objects of commerce ("*con objetos de commercio*" in Spanish, the language of the Treaty) and there was disagreement between Costa Rica and Nicaragua as to whether this included tourism and passenger carriage. *Objetos* can be translated into English in differing ways and Costa Rica contended that *objetos* means

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object in the sense of a purpose, aim or end and that this must encompass tourism as commerce is a wide-ranging concept that includes any use of the river by the inhabitants of its Costa Rican bank and "navigation by Costa Rican public officials providing… essential services… such as health, education and security." Nicaragua argued that, in the context of the Treaty, *objetos* means physical objects only, *e.g.* merchandise and other cargo that cannot include tourism or passenger traffic; or, in the alternative, that even if *objetos* meant "purpose", passenger services could not be considered as commerce as the term was understood in the mid-nineteenth century, and tourism specifically could not be classed as commercial under the Treaty as it was a concept unknown to the region in 1858.

The Court rejected both definitions but refrained from ruling on what commerce meant in 1858, choosing instead to ride the rapids of an evolutionary approach to treaty interpretation. The Court stated that whether the meaning of commerce had altered since 1858 is irrelevant, it is only the "present meaning" that matters. Commerce was described as a "generic term" in the context of the 1858 Treaty, and where states use such terms in a treaty they must be "necessarily… aware that the meaning of the terms was likely to evolve over time". Furthermore, when a treaty is "of continuing duration" (as is the case here) the Court can "presume" that the treaty parties "intended [generic] terms to have an evolving meaning". The judgment claims that this approach is in keeping with previous rulings of the Court such as *Aegean Sea Continental Shelf (Greece* v. *Turkey)* (Judgment, I.C.J. Reports 1978, p. 3), wherein it was held that the definition of "territorial status" in a treaty included the continental shelf even although that concept was unknown when the treaty was written. However, *Aegean Sea* involved generic terms of "general international law" and where their meaning evolved it was "to correspond with the meaning attached to the expression by the law in force at any given time". While "commerce" is indeed a "generic term" it has, unlike "territorial status", no general meaning attached to it by international law.

The Court could more easily have decided that in 1858 commerce encompassed the exchange of both goods and services, just as it did in 2009, and argued that the framers of the original Treaty would have accepted the inclusion of new goods and services (*e.g.* tourism) as commerce, despite their being unknown in 1858, as the basic definition of commerce would remain unaltered and to do otherwise could lead to a prohibition of the traffic of such merchandise as automobiles, computers or x-ray machines on the ground that they were all developed subsequent to the signing of the Treaty. Instead the Court decided that the Treaty's authors would still consider the commerce of 2009 to be such even if the very meaning of the term had changed.

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Furthermore, the Court went beyond even an evolutionary approach to treaty interpretation when it addressed the question of whether the Costa Rican citizens living on the San Juan's southern bank had a right to freedom of navigation when using the river for everyday purposes unconnected to commerce. The Court acknowledged that such use was not within the scope of Article VI but asked, nevertheless, "whether such a right does not flow from other provisions [of the Treaty] with a different purpose". The San Juan is often the only viable means of transport and communication for the inhabitants of the southern bank and, given such geographical factors, the court was "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… of the right to use the river to the extent necessary to meet their essential requirements" when they placed the San Juan entirely within the territory of Nicaragua.

Yet one can argue with equal vigour that the "necessary implication" to be drawn as to the authors' intentions is entirely the opposite: the same geographical factors existed in 1858 yet the Treaty makes no mention of freedom of navigation for any non-commercial purpose, and nor is there any customary international law guaranteeing such a use. This presumptive approach can be contrasted with the Court's reasoning in finding that the inhabitants of the Costa Rican bank have, independent of the 1858 Treaty, a customary right to fish the San Juan for subsistence purposes (defined, in the context of this case, only so far as not being commercial or sport fishing). This right is based specifically on long-standing local practice and only fishing from the bank (which does not necessarily require navigation of the river) is permitted.

At a time when there is frequent criticism of "interventionist" judges for ignoring the original intent of statutes and treaties we must wait to see whether the ICJ continues to use its ever-evolving evolutionary criteria, and presumptive approach, to make ageing treaties fit somehow with modern meanings and circumstances, and whether states will be happy to allow it such freedom to navigate treaty law in the future.

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