DISSENTING OPINION OF JUDGE SKOTNIKOV

1. I fully share Mexico's concerns regarding the scheduled execution of a Mexican national. I understand Mexico's frustration with the United States being hitherto unable to take measures which would ensure its compliance with the *Avena* Judgment. However, I voted against the Court's Order indicating provisional measures for the reasons which are explained below. I believe that the Court should have proceeded differently in order to support Mexico's ultimate goal of enforcement of the *Avena* Judgment.

2. The United States has stated before the Court that it unequivocally agreed with the interpretation of the *Avena* Judgment requested by Mexico, and in particular that that Judgment imposes an "obligation of result" on the United States. There is no disagreement between Mexico and the United States that no executions should be carried out unless and until the Mexican nationals in question have received review and reconsideration consistent with the *Avena* Judgment. The United States has also recognized that its failure to achieve this result would engage its responsibility under the principle of State responsibility.

3. For its part, Mexico in its concluding remarks no longer claimed that the United States itself understood paragraph 153 (9) of the *Avena* Judgment as imposing only an obligation of means. Rather, it stated that:

> "it is clear that *constituent organs* of the United States do not share Mexico's view that the *Avena* Judgment imposes an obligation of result. It is thus clearly established that there is a dispute between the United States and Mexico as to the meaning and scope of paragraph 153 (9) of said Judgment . . ." (CR 2008/16, p. 21; emphasis added.)

4. In response, the United States has pointed out that under international law it is responsible for the actions of its competent organs and political subdivisions, and that this would indeed be the case should the United States fail in its obligations under the *Avena* Judgment. Furthermore, the United States has stated that the provisional measures Order requested by Mexico in its final submissions "would do no more than restate the obligation to provide review and reconsideration in the cases at issue" (CR 2008/17, p. 14, para. 27). It follows that the United States has agreed with the statement contained therein that the United States must act "through all its competent organs and all its constituent subdivisions, including all branches of government and any official, state or federal, exercising government authority" (CR 2008/16, p. 22) to achieve

the result sought in the *Avena* Judgment. Finally, the United States has held that its competent organs and subdivisions do not speak on behalf of the United States, either under international law or under the United States Constitution, and that their positions are not attributable to the United States for the purposes of determining whether there is a dispute between the United States and Mexico as to the meaning or scope of the *Avena* Judgment.

5. It is clear, in my opinion, that even if a constituent organ of the United States does not share Mexico's view that the *Avena* Judgment imposes an obligation of result, it cannot be concluded that there is a dispute between Mexico and the United States, the latter accepting without reservations Mexico's interpretation of the *Avena* Judgment. The two Governments have not shown themselves as holding opposite views in regard to the meaning and scope of the *Avena* Judgment (see *Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów), Judgment No. 11, 1927, P.C.I.J., Series A, No. 13*, p. 10; *Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case concerning the* Continental Shelf (Tunisia/Libyan Arab Jamahiriya) *(Tunisia* v. *Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1985*, p. 218, para. 46).

6. However, the Court, after considering the views of the two Parties, has come to the conclusion that:

> "while it seems both Parties regard paragraph 153 (9) of the *Avena* Judgment as an international obligation of result, the Parties nonetheless apparently hold different views as to the meaning and scope of that obligation of result, namely, whether that understanding is shared by all United States federal and state authorities and whether that obligation falls upon those authorities" (Order, para. 55).

7. I disagree with the Court's finding that there is still an apparent dispute between Mexico and the United States for the following reasons.

8. According to the Rules of Court, it is for Mexico, not for the Court, to indicate "the precise point or points in dispute as to the meaning or scope of the judgment" (Art. 98, para. 2). In addition, in an interpretation case,

> "it is the duty of the Court not only to reply to the questions as stated in the final submissions of the parties, but also to abstain from deciding points not included in those submissions" (*Request for Interpretation of the Judgment of 20 November 1950 in the Asylum Case (Colombia/Peru), Judgment, I.C.J. Reports 1950*, p. 402; *Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case concerning the* Continental Shelf (Tunisia/Libyan Arab Jamahiriya) *(Tunisia* v. *Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1985*, p. 217, para. 44).

The Court cannot take the initiative in interpreting provisions of its judgments which are, under Article 60 of the Statute of the Court, "final and without appeal" and must speak for themselves. An interpretation is in order only if lack of clarity as to the meaning or scope of the binding provisions of a judgment impedes its execution. There is no such lack of clarity: Mexico insists and the United States accepts that no death penalties should be carried out unless and until the time the Mexican nationals in question receive review and reconsideration in accordance with the *Avena* Judgment. This is the result which the United States must achieve, "by means of its own choosing" (para. 153 (9) of the *Avena* Judgment), to comply with its obligations under the *Avena* Judgment. There is no ambiguity. There is no disagreement. There is nothing for the Court to interpret.

9. In my view, the Court should have taken judicial notice of the United States position that it agrees with the interpretation of the *Avena* Judgment requested by Mexico. The Court should have concluded that Mexico's Request for interpretation does not fall within the scope of Article 60 of the Statute of the Court, which is applicable only where a dispute exists with respect to the meaning or scope of a judgment of the Court. Furthermore, the Court should have used its inherent powers to request the United States to take all measures necessary, acting through its competent organs and authorities, state or federal, to ensure that no Mexican national entitled under the *Avena* Judgment to receive review and reconsideration consistent with that Judgment is executed unless and until such review and reconsideration has taken place.

10. Instead of thus reminding the United States of its duty to comply with the *Avena* Judgment, the Court has chosen to decide that the *Avena* Judgment might require clarification and has ordered provisional measures. These measures add nothing to the obligations of the United States under the Judgment and therefore serve no purpose. Moreover, these measures are to have effect only until the Court has given its decision on the interpretation of the *Avena* Judgment. Consequently, the Court's Order is not only redundant, it also contains a temporal limit which is inherent in the interim character of measures of protection but absent from the Judgment itself. This result is a clear indication that the Court has taken a wrong route.

11. The real issue is compliance with the Judgment rather than its interpretation. The United States admits that, because of internal difficulties, it has so far been unable to put in place a legal framework necessary to ensure compliance with the *Avena* Judgment. That is deeply regrettable. The United States must act to comply with the *Avena* Judgment.

(*Signed*) Leonid SKOTNIKOV.