

DISSENTING OPINION OF JUDGE *AD HOC* SKOTNIKOV

PROCEDURAL ISSUES

1. The range of procedural deficiencies and abnormalities in and of itself calls into question the credibility of any substantive findings of the Court, whatever they might be.

2. The Court does not deal with the present case as envisioned in its Statute (see Article 38, paragraph 1; Article 43, paragraphs 1 and 5; and Article 54, paragraph 1) and its Rules (see Article 31; Article 49, paragraph 4; Article 58, paragraph 1; Article 60, paragraph 1; and Article 61).

3. Article 43, paragraph 1, of the Statute provides that “[t]he procedure shall consist of two parts: written and oral”. In contrast, the oral proceedings in this case have been restricted to the discussion of two questions of pure law formulated by the Court.

4. Indeed, Article 61, paragraph 1, of the Rules indicates the approach that the Court ought to take where there are particular issues “it would like the parties specially to address” or when “it considers that there has been sufficient argument” on certain points. However, such possibilities stand in contrast to the present case, where the Court ordered the Parties to “exclusively” consider certain questions (Judgment, para. 14) without allowing for argument on any other points, including Nicaragua’s second and third submissions.

5. Thus, the Parties were deprived of the opportunity to complete their respective presentations of the case, which is inconsistent with Article 54, paragraph 1, of the Statute. This is made even clearer in the French text, which provides for the presentation by agents, counsel, and advocates of “tous les moyens qu’ils jugent utiles”.

6. The incompatibility between the absence of full oral proceedings and the Statute of the Court is further reflected in Article 43, paragraph 5, which requires the proceedings to include the hearing of experts, whom the Parties had engaged in this case but who were left unable to present their positions to the Court (see also Article 58, paragraph 1, of the Rules of Court).

7. Despite Article 60 of the Rules of Court, the Parties were not permitted to make oral statements to cover “what is requisite for the adequate presentation of that party’s contentions”. Indeed, the arguments did not cover all the issues that still divide the Parties. Instead, they were required to repeat argu-

ments that had been prepared in written proceedings and in oral proceedings in an earlier case between them.

8. No final submissions relating to the substance of the case, which in accordance with Article 60, paragraph 2, of the Rules of Court ought to be presented at the end of the oral phase, were allowed. Yet, the Court rules on these issues in the operative clause (Judgment, para. 104), including the issue manifestly unrelated to the questions of pure law formulated by the Court (*ibid.*, para. 104 (3)). The only oral submissions at the end of the hearings made by Nicaragua concerned these two questions and the “fix[ing of] a timetable to hear and decide upon all of the outstanding request[s] in Nicaragua’s pleadings”. This latter submission was rejected by the Court.

9. The source of all the irregularities mentioned above is the Court’s unprecedented Order of 4 October 2022, which was adopted in departure from Article 31 of the Rules of the Court without consultation of the Parties (see the joint declaration of Judges Tomka, Xue, Robinson, Nolte and Judge *ad hoc* Skotnikov).

SUBSTANTIVE ISSUES

10. The position taken by the Court in its Judgment of 19 November 2012 in the *Territorial and Maritime Dispute (Nicaragua v. Colombia)* case (hereinafter the “2012 Judgment”) and in the Judgment of 17 March 2016 on preliminary objections in the present case (hereinafter the “2016 Judgment”), when read together, leaves no doubt that the Court was ready to consider delimitation once Nicaragua had made full submissions to the Commission on the Limits to the Continental Shelf (hereinafter “CLCS”); all other issues raised by the Parties would have been dealt with in the course of the delimitation process.

11. In its 2016 Judgment, the Court clarified the content and scope of subparagraph 3 of the operative clause of the 2012 Judgment, taking into account the differing views expressed by the Parties on the subject:

“It has found that delimitation of the continental shelf beyond 200 nautical miles from the Nicaraguan coast *was conditional on* the submission by Nicaragua of information on the limits of its continental shelf beyond 200 nautical miles, provided for in paragraph 8 of Article 76 of UNCLOS, to the CLCS. The Court thus did not settle the question of delimitation in 2012 because it was not, at that time, in a position to do so.”¹

¹ *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v. Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, p. 132, para. 85 (emphasis added).

That was the only condition set forth by the Court for proceeding to delimitation. Incidentally, such delimitation would not necessarily affect Colombia's 200-nautical-mile continental shelf entitlement (see paragraph 19 below).

12. In its Judgment of 25 July 1974 in the *Fisheries Jurisdiction (United Kingdom v. Iceland)* case, the Court made it clear that,

“as an international judicial organ, [it] is deemed to take judicial notice of international law, and is therefore required in a case falling under Article 53 of the Statute, as in any other case, to consider on its own initiative all rules of international law which may be relevant to the settlement of the dispute. It being the duty of the Court itself to ascertain and apply the relevant law in the given circumstances of the case, the burden of establishing or proving rules of international law cannot be imposed upon any of the parties, for the law lies within the judicial knowledge of the Court.”²

13. The Court's approach in the 2012 and 2016 Judgments was consistent with that dictum, which cannot be said of its Order of 4 October 2022 and the present Judgment.

14. The discussion of the questions of pure law formulated by the Court shows that there is nothing in the United Nations Convention on the Law of the Sea (hereinafter “UNCLOS”), its *travaux préparatoires* or the circumstances surrounding its conclusion specifically dealing with the possibility or impossibility of delimitation between one State's extended continental shelf and the 200-nautical-mile continental shelf of another State. The Court's finding of a “suggest[ion] that the States participating in the negotiations assumed” a certain position concerning the extended continental shelf based on certain UNCLOS provisions (Judgment, para. 76) seems a tenuous basis for a legal determination, to say the least. The same is true about the characterization of UNCLOS as a “package deal” (*ibid.*, para. 48). There is nothing in this “package” relating to the question to which the Court tries to find an answer. Accordingly, there is nothing therein that could support the Court's conclusion on this matter.

15. The Court seems to rely on the importance of the role of the CLCS in the protection of the common heritage of mankind (Judgment, para. 76). However, that is not the sole mission of the CLCS (see paragraph 11 above). Relatedly, payments and contributions in respect of the exploitation of the extended continental shelf are irrelevant in the present case. Curiously, the Court here focuses its reasoning on the provisions of UNCLOS, which are manifestly not part of the applicable law in the present case, i.e. customary international law.

² *Fisheries Jurisdiction (United Kingdom v. Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 9, para. 17.

16. To support its conclusion, the Court refers to the submissions to the CLCS of States parties to UNCLOS (Judgment, para. 77). However, States, in their CLCS submissions, do not consistently refrain from extending a claim within 200 nautical miles from the baselines of another State. Even when they do, this practice is generally unaccompanied by *opinio juris*, which cannot be simply inferred from practice. In contrast to what the Court suggests in the present case, “[t]he frequency . . . of the acts is not in itself enough” for the identification of *opinio juris* (*North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, Judgment, I.C.J. Reports 1969, p. 44, para. 77; see also International Law Commission, Draft conclusions on identification of customary international law, UN doc A/73/10, p. 129 (Conclusion 3, comment 7)). The Court does not have “authority to ascribe to States legal views which they do not themselves advance” (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, I.C.J. Reports 1986, p. 109, para. 207). Indeed, for those submissions which do refrain from extending within 200 nautical miles from the baselines of another State, there are other, more plausible motivations, perhaps most notably the desire to avoid a dispute, since a dispute would preclude the CLCS from making recommendations³. In any event, it must be recalled that these submissions are made by States parties to UNCLOS within the specific treaty régime.

17. The existing jurisprudence does not support the Court’s conclusions either: in its 2021 Judgment in the *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)* case, the Court referred to a “possible grey area” (Judgment, I.C.J. Reports 2021, p. 277, para. 197), while ITLOS and an arbitral tribunal have both accepted the existence of such “grey areas” (*Bay of Bengal Maritime Boundary Arbitration (Bangladesh v. India)*, Award of 7 July 2014, United Nations, Reports of International Arbitral Awards (RIAA), Vol. XXXII, p. 147, para. 498; *Delimitation of the Maritime Boundary in the Bay of Bengal (Bangladesh/Myanmar)*, Judgment, ITLOS Reports 2012, p. 119, para. 463). More recently, in *Mauritius/Maldives*, the ITLOS Special Chamber did not question the possibility of a grey area (*Dispute concerning Delimitation of the Maritime Boundary between Mauritius and Maldives in the Indian Ocean (Mauritius/Maldives)*, Judgment of 28 April 2023, para. 275). The Court itself, ITLOS, and an UNCLOS Annex VII tribunal have thus all accepted the possibility of different jurisdictions dealing with the seabed and subsoil, on the one hand, and the water column, on the other. Moreover, another arbitral tribunal has held that there is neither priority nor hierarchy between the rule of distance and the rule of natural

³ Paragraph 5 (a) of Annex I of the Rules of Procedure of the Commission on the Limits of the Continental Shelf, 17 April 2008, UN doc. CLCS/40/Rev.1.

prolongation as regards an entitlement to a continental shelf (*Delimitation of the Maritime Boundary between Guinea and Guinea-Bissau (Guinea/Guinea-Bissau), Award of 14 February 1985, RIAA, Vol. XIX, p. 191, para. 116*). Even more importantly, the present Judgment directly contradicts the 2012 and 2016 Judgments.

18. Hence, the Court's finding that a State's entitlement to a continental shelf throughout the natural prolongation of its land territory to the outer edge of the continental margin may not extend within 200 nautical miles from the baselines of another State is not in accordance with existing rules of international law. In its attempt to legislate instead of interpreting and applying the existing law, the Court has disregarded its function, as provided in Article 38, paragraph 1, of the Statute. Indeed, it has ignored the fundamental principle, according to which "the Court, as a court of law, cannot render judgment *sub specie legis ferendae*"⁴.

19. The only legally sound conclusion that the Court should have drawn is that both UNCLOS and customary international law provide for an equitable solution as the guiding principle in maritime delimitations, which allows, *inter alia*, for consideration of delimitation of one State's extended continental shelf and the continental shelf of another State to a distance of 200 nautical miles from the baselines from which the breadth of its territorial sea is measured. The Court should have continued with the case in order to implement this principle.

(Signed) Leonid SKOTNIKOV.

⁴ *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland), Merits, Judgment, I.C.J. Reports 1974, p. 192, para. 45.*