JOINT DECLARATION OF JUDGES TOMKA, XUE, ROBINSON, NOLTE AND JUDGE *AD HOC* SKOTNIKOV

The Court's power under Article 48 of the Statute — Question whether the Court should divide the hearing on the merits into two separate parts — No precedent for such a procedure in the annals of the Court — No judicial economy — The Court's function to decide in accordance with international law such disputes as are submitted to it — The Court to rule on final submissions of the Parties, not on legal arguments advanced by each Party in support of its submissions.

1. With today's Order, the Court, for the first time in its history, has divided the oral proceedings on the merits of a case into two separate parts, and directed the Parties to confine their arguments only to two legal questions it has formulated. We are not convinced that this "innovation" was called for in the present case, and it raises delicate questions, the importance of which is not apparent from a perusal of the Order. We thus feel compelled to state our position and to offer some remarks.

2. Article 48 of the Statute provides that the Court "shall make orders for the conduct of the case". We accept that this provision is sufficiently broad to allow the Court to organize its procedure as it sees fit, provided that the procedural rights of both parties are respected. In the exercise of its power under Article 48, the Court has consistently and efficiently adapted its procedure in the interest of the sound administration of justice, while meeting the expectations of the parties appearing before it in a fair and timely manner, on occasion devising *ad hoc* procedures to solve specific issues not contemplated by the Rules of Court (see e.g. *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain), Order of 30 March 1998, I.C.J. Reports 1998*, pp. 243-246; *Order of 17 February 1999, I.C.J. Reports 1999 (I)*, pp. 3-7; and *Merits, Judgment, I.C.J. Reports 2001*, pp. 46-47, paras. 19-23)[1].

3. What the Court has not done, however, is split the hearings on the merits into two separate parts.

4. On several occasions, the Court has not seemed inclined to deal separately with certain issues said to be preliminary in character (see *Fisheries (United Kingdom* v. *Norway), Judgment, I.C.J. Reports 1951*, p. 126; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain), Order of 30 March 1998, I.C.J. Reports 1998*, pp. 243-246; *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 17, para. 12, *mutatis mutandis*). The Court's reluctant attitude on these occasions suggests that it will be slow to cut the hearings on the merits into parts. This is a wise judicial policy, for it is not always easy to tell which issues are of a preliminary character and which issues constitute an indivisible part of the substance of the case. This is well illustrated by the Court's Judgment in the *Fisheries* case *(United Kingdom* v. *Norway)*.

[1] In that case, Bahrain requested that the Court divide the written proceedings on the merits into two parts and hold separate hearings on the issue of certain documents, the authenticity of which had been challenged. For Bahrain, this issue was logically preliminary to, and severable from, the determination of the substantive effects of these documents on the merits. Qatar expressed the view that this issue was linked to the merits and therefore should be considered within the framework of the merits of the case. Qatar later maintained its position as to the indivisible nature of the proceedings on the merits. Instead of dividing the oral proceedings into two parts, the Court adopted a different course of action.

In that case, the United Kingdom suggested that the Court should give a ruling of principle only on certain legal issues in a judgment; while the second judgment, to be rendered subsequently, would decide on the concrete case. The Court did not entertain this suggestion. It stated that

> "Points 3 to 11 [of the United Kingdom's Conclusions] appear to be a set of propositions which, in the form of definitions, principles or rules, purport to justify certain contentions and do not constitute a precise and direct statement of a claim. *The subject of the dispute being quite concrete, the Court cannot entertain the suggestion* made by the Agent of the United Kingdom Government . . . *that the Court should deliver a Judgment which for the moment would confine itself to adjudicating on the definitions, principles or rules stated*, a suggestion which, moreover, was objected to by the Agent of the Norwegian Government . . . *These are elements which might furnish reasons in support of the Judgment, but cannot constitute the decision*." (*Fisheries (United Kingdom* v. *Norway), Judgment, I.C.J. Reports 1951*, p. 126; emphasis added).

5. To our mind, any decision to divide the hearings on the merits into two parts may be taken only if it is necessary for an efficient conduct of the proceedings, while respecting the procedural rights of the parties and ensuring that they can present their case as they deem appropriate.

6. For one thing, it does not appear from the Order that the views of the Parties with regard to the procedure were ascertained before it was adopted. That alone, in our view, is a matter of concern and regret.

7. In the present instance, we fail to see good reasons for dividing the oral proceedings into two separate parts, and no sound basis is given in the Court's Order. Although the Court states that it is necessary to decide on certain questions of law, after hearing the Parties, before proceeding to any consideration of the technical and scientific questions in relation to the delimitation of the continental shelf between them beyond 200 nautical miles from Nicaragua's baselines, we are not convinced. It should have been possible for the Court to prepare a proper examination of the technical and scientific evidence and then proceed to hearing the Parties thereon, together with all legal arguments relied upon by the Parties in support of their submissions.

8. Will today's Order serve the need for judicial economy? One may doubt it. It seems that the Court will have to resume or reopen the oral proceedings at least to pass upon Nicaragua's submissions that are not dependent upon the two questions identified in the Order[2]. These two questions do not govern the whole case, nor the fate of all of Nicaragua's submissions. The procedural route taken by the Court, therefore, is more of a detour than it is a shortcut.

[2] In its submission (2), Nicaragua asks the Court to adjudge and declare that "[t]he islands of San Andrés and Providencia are entitled to a continental shelf up to a line consisting of 200 nm arcs from the baselines from which the territorial sea of Nicaragua is measured connecting the points with the following co-ordinates" (Reply of Nicaragua, p. 209) [co-ordinates intentionally omitted]. In its submission (3), Nicaragua asks the Court to adjudge and declare that "Serranilla and Bajo Nuevo are enclaved and granted a territorial sea of twelve nautical miles, and Serrana is enclaved as per the Court's November 2012 Judgment" (*ibid.*, p. 210).

9. The Court's function is, under Article 38, paragraph 1, of the Statute, "to decide in accordance with international law such disputes as are submitted to it". In the exercise of its judicial function, the Court does not rule on legal arguments advanced by the parties in support of their claims; it must pass upon the parties' *submissions* (*Fisheries (United Kingdom* v. *Norway), Judgment, I.C.J. Reports 1951*, p. 126; *Right of Passage over Indian Territory (Portugal* v. *India), Merits, Judgment, I.C.J. Reports 1960*, p. 32). It is useful to recall what the Court said on arguments in the *Right of Passage* case:

> "It goes without saying that the Court would take such arguments into consideration in the reasons for its Judgment if it regarded any of them as likely to assist it in arriving at the decision it is called upon to take. But it is no part of the judicial function of the Court to declare in the operative part of its Judgment that any of those arguments is or is not well-founded." (*Right of Passage over Indian Territory (Portugal* v. *India), Merits, Judgment, I.C.J. Reports 1960*, p. 32.)

The Order adopted today by the Court is in tension with this well-established principle. It puts a magnifying glass on two legal questions formulated by the Court based on the arguments advanced by the Respondent in opposing the claims presented by the Applicant, while leaving the Applicant's submissions, upon which the Court is duty-bound to rule, out of sight.

10. It remains to be seen when and in what form the Court, once it has heard the Parties' arguments, will make its determinations on the questions it has put to them.

11. Under Article 61, paragraph 1, of the Rules of Court, the Court may, prior to the hearing, indicate any points or issues to which it would like the parties "specially to address themselves". We emphasize that Article 61 uses the word "specially", and not "exclusively" or "only". It does so for the fundamental reason that each party must be free to choose and follow its own judicial strategy and fully develop all its arguments. During the oral proceedings, the parties are moreover at liberty to present their case in a different light or to base it upon new arguments. Great caution must therefore be exercised when controlling the oral proceedings to avoid jeopardizing their rights[3].

12. We would have had an understanding for the Court indicating, in accordance with Article 61 of the Rules of Court, a point or a question it would like the Parties *specially* to address themselves, if that point or question, in the view of the Court, had not been sufficiently dealt with by the Parties in their pleadings and if the Court had considered that point or question relevant for adjudicating on the Parties' formal submissions. As it is, the Parties have addressed in their written pleadings, and have done so in some detail, the legal issues encompassed in the Court's questions[4]. The Court should have addressed these legal issues when considering Nicaragua's submissions, in particular the first one[5]. The Court is supposed to know the law *(iura novit curia)*.

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[3] Mohammed Bedjaoui, "The 'Manufacture' of Judgments at the International Court of Justice", 1991, *Pace Yearbook of International Law,* Vol. 3, p. 44; Eduardo Jiménez de Aréchaga, "The Amendments to the Rules of Procedure of the International Court of Justice", *American Journal of International Law,* 1973, Vol. 67 (1), p. 7.

[4] Memorial of Nicaragua, pp. 26-40; Counter-Memorial of Colombia, pp. 31-162; Reply of Nicaragua, pp. 9-25, 159-191; Rejoinder of Colombia, pp. 21-49, 51-96.

[5] Which reads: "The maritime boundary between Nicaragua and Colombia in the areas of the continental shelf which appertain to each of them beyond the boundary determined by the Court in its Judgment of 19 November 2012, follows geodetic lines connecting the points with the following co-ordinates" (Reply of Nicaragua, p. 209) [co-ordinates intentionally omitted].

13. Equally concerning is the possibility that the merits phase of this case may be completed by the Court in two different compositions. In our view, the indivisibility of the issues in the merits phase requires that, in the interests of justice, the composition of the Court should, barring reasons for a judge being unable to sit, remain the same.

14. In our view, the Court should have followed its established procedure and heard the Parties on the merits in full on the totality of the issues in dispute between them. There is no doubt that the Court has shown flexibility and inventiveness over the years in applying certain procedural rules, and, it might be said, with some success. We question, however, whether the "innovation" set out in today's Order corresponds to the Court's judicial function and serves the purposes of sound administration of justice and judicial economy.

(Signed) Peter TOMKA.

(Signed) XUE Hanqin.

(Signed) Patrick L. ROBINSON.

(Signed) Georg NOLTE.

(Signed) Leonid SKOTNIKOV.

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