

DECLARATION OF JUDGE ABRAHAM

[Original English Text]

1. I fully agree with the present Order, and with the Court's request that the Parties, at the forthcoming hearings, confine their arguments to the two questions outlined in the operative part of the Order.

2. However, given that the reasoning of the Order is particularly concise — not to say rather elliptical — I consider it necessary to further explain the reasons which, in my view, justify the present decision.

3. In its Application, Nicaragua requests the Court to determine “[t]he . . . course of the maritime boundary between Nicaragua and Colombia in the areas of the continental shelf which appertain to each of them beyond the boundaries determined by the Court in its Judgment of 19 November 2012”. The Court found that it had jurisdiction to entertain that request and declared it admissible (*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)*, pp. 139-140, para. 126).

4. According to Nicaragua, its entitlement to a continental shelf extends beyond the 200-nautical-mile limit from its own coasts (more precisely, the baselines from which the breadth of its territorial sea is measured) and encroaches on the area located within 200 nautical miles from Colombia's coasts. Thus, according to Nicaragua, there is an overlap between its own entitlement to an extended continental shelf and the entitlement of Colombia to a continental shelf within 200 nautical miles of its own coasts, which is in fact a component of the latter's exclusive economic zone.

Nicaragua contends that this overlap necessitates a delimitation of the areas over which the Parties' rights compete. Since, according to the Applicant, there is no rule establishing an order of priority between the entitlement of a State to an extended continental shelf and that of another State to a continental shelf within 200 nautical miles, Nicaragua proposes to the Court that the boundary should be established along a line that would divide the area of overlapping entitlements in a manner that is, in the Applicant's view, equitable.

5. In accordance with Article 76, paragraph 8, of the United Nations Convention on the Law of the Sea (UNCLOS), Nicaragua has submitted information to the Commission on the Limits of the Continental Shelf on the extended continental shelf that it claims. To date, the Commission has not issued any recommendation in this regard. The Court held, in its Judgment on preliminary objections, that such a lack of a recommendation did not constitute a legal obstacle for “a State party to UNCLOS [to] ask the Court to settle a dispute with another State over . . . a deli-

mitation” of the continental shelf beyond 200 nautical miles from the coasts of the Applicant (*I.C.J. Reports 2016 (I)*, p. 137, para. 114).

6. To rule on all elements of Nicaragua’s submissions as presented to the Court, the latter would have to determine the breadth of Nicaragua’s continental shelf beyond 200 nautical miles from its coasts, assuming that it does extend beyond such a limit, which Colombia contests.

To this end, the Court should apply the relevant criteria under customary law — since Colombia is not a party to UNCLOS — for the determination of the outer limits of a coastal State’s continental shelf beyond 200 nautical miles.

It is well known that Article 76, paragraphs 3 to 6, of UNCLOS define relatively precise and fairly complex criteria for the determination of such an outer limit. Irrespective of whether, at present, these criteria align with the applicable customary law or whether the latter departs from them to a greater or lesser degree, it is doubtful that the Court could determine the exact extent of Nicaragua’s continental shelf without the assistance of highly qualified experts. To that end, the Court could possibly implement the provisions of Article 67, paragraph 1, of its Rules.

7. However, apart from disputing the fact that Nicaragua’s continental shelf actually extends beyond 200 nautical miles, Colombia’s submission contains a legal argument which, if well-founded, would have the consequence of excluding the overlap of the Parties’ entitlements to a continental shelf and, consequently, depriving any request for a delimitation of its object.

Indeed, according to Colombia, the entitlement of a coastal State to a continental shelf within its own 200 nautical miles always and necessarily prevails over another State’s entitlement to an extended continental shelf, beyond its own 200 nautical miles. It therefore follows that, even if Nicaragua could establish that its continental shelf does extend beyond the 200-nautical-mile limit, the Applicant’s rights arising therefrom could only be exercised to the limit of Colombia’s exclusive economic zone and the corresponding continental shelf. There would be no grounds for delimitation and, consequently, no need for an expert opinion.

Nicaragua disputes this contention, arguing that the two entitlements at issue are of equal weight and that neither one has precedence over the other.

8. We are undoubtedly faced here with a question of a preliminary character, not from a procedural perspective, such as in the case of a preliminary objection to jurisdiction or admissibility, but rather from the perspective of the substantive examination of this case. Depending on the answer to this question, it will be determined whether there is a case for delimitation and, therefore, whether or not there is a point in determining, with the assistance of experts or otherwise, the extent of the continental shelf.

9. A wise judge does not enter into convoluted, lengthy and costly arrangements for an expert opinion without first ascertaining whether it is worthwhile. It would manifestly be contrary to the requirements of the proper administration of justice to enter into such arrangements and then rule on the matter with a statement of reasons revealing that the work of the experts, or the assistance of other specialists, proved to be of no benefit and could not have been for legal reasons. The legal question must therefore be decided first.

10. Of course, the Court could have let the Parties plead on all aspects of the case, legal and factual, without distinction, but this would have carried the risk, after the hearings and in the course of its deliberations, of the Court concluding that the dispute between the Parties could only be resolved with the assistance of experts; in which case it would have had to reopen the proceedings, arrange for an expert opinion and allow the Parties to state their views again. Such an approach would only have postponed the difficulty and risked prolonging the proceedings, without any additional advantages for the Parties. I therefore believe that the Court has acted wisely in deciding to examine the questions in turn.

11. Nothing in the Statute or Rules prevents the Court from examining the merits in several distinct stages, the first certain and the second potential. Given the very particular circumstances of the present case, the Court is fully justified in asking the Parties to confine their oral arguments to the two legal issues identified by it. Such a method is indeed unprecedented, but it is merely because identical circumstances have not arisen in previous cases. Moreover, in a different context, when the Court rules in two separate judgments on the respective issues of responsibility and compensation — which it does routinely and may do even in the absence of any request from the parties to that effect — it separates the examination of the merits into two distinct stages.

12. I do not take the present Order to mean or suggest in any way that the Court is adopting a novel approach to the examination of the merits of a case, in which questions of law are decided first and questions of fact left for a second phase, for which there would be no justification.

The two questions that the Court sets out in the operative part of the Order have not been singled out because they are questions of law, but because their resolution determines the further course of the proceedings.

13. The rights of the Parties thus remain intact; procedural equity is preserved; the requirements for the proper administration of justice are met.

(Signed) Ronny ABRAHAM.
