DECLARATION OF JUDGE DONOGHUE

1. In contentious cases, the Court settles disputes between States (Article 36, paragraph 2, and Article 38, paragraph 1, of the Statute of the Court). When the Court finds the absence of a dispute in respect of a claim contained in an application, the consequence is dismissal of the claim. However, the Statute of the Court does not define the term "dispute". Instead, the meaning of that term has been developed in the jurisprudence of this Court and its predecessor. Thus, the sound administration of justice calls for clarity in the criteria that the Court applies in determining whether there is a dispute and for consistent application of those criteria.

2. Beginning with the case concerning *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation)* (*Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, pp. 81-120, paras. 23-114), and continuing through the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal)* (*Judgment, I.C.J. Reports 2012 (II)*, pp. 441-445, paras. 44-55) and the case concerning *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia)* (*Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, pp. 26-34, paras. 49-79), the Court's inquiry into the existence of a dispute has been more exacting than it had been in the earlier jurisprudence of the Court and its predecessor. In my consideration of the Application in the present case, I have been guided by the reasoning of the Court in these recent cases, thus promoting procedural consistency.

3. As is well known, a dispute is "a disagreement on a point of law or fact, a conflict of legal views or of interests" (*Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 11) between two States. A dispute exists only if "the claim of one party is positively opposed by the other" (*South West Africa (Ethiopia* v. *South Africa; Liberia* v. *South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 328). The existence (or not) of a dispute is "a matter for objective determination by the Court" (paragraph 36 of today's Judgment).

4. Direct diplomatic exchanges between the parties prior to the filing of an application can provide clear evidence of one party's opposition to the other party's claim against it. There were no such exchanges in the present case, so the Marshall Islands asserts the existence of a dispute by relying on two key propositions. The first is the contention that the statements of parties during proceedings, taken alone, can suffice to demonstrate an opposition of views in respect of the claim underlying an application. The second proposition, on which the Marshall Islands places greater emphasis, is that the Court can infer the existence of a dis-

pute in the present case from the juxtaposition of the Marshall Islands' statements in multilateral fora, on the one hand, with the Respondent's conduct, on the other hand. I submit this declaration in order to comment on each of these points.

5. To support its contention that opposing statements of parties in proceedings before the Court (and thus after the application) can suffice to establish the existence of a dispute, the Marshall Islands relies in particular on three Judgments of the Court (see paragraph 50 of today's Judgment). Of these, the Judgment in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia)* provides the strongest support for the position of the Marshall Islands, because the Court there invoked statements in the proceedings in that case to support its conclusion that a dispute between the parties "persist[ed]", without citing any specific evidence that a dispute existed prior to the Application (*Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, pp. 614-615, paras. 27-29). However, in its subsequent Judgments (see cases cited in paragraph 2 above), the Court has not found the existence of a dispute based solely on the parties' statements in Court, but instead has adhered to the principle that the evidence must show that a dispute existed as of the date of an application, as it does today. This principle is sound. An application in a contentious case initiates proceedings to settle a dispute that is "submitted to [the Court]" (Article 38, paragraph 1, of the Statute of the Court). It is not a means to elicit a respondent's opposing views in order to generate a dispute during those proceedings.

6. I turn next to the Marshall Islands' contention that the Court should infer the existence of a dispute from the juxtaposition of the Marshall Islands' statements with the Respondent's conduct. With regard to this proposition, I offer some observations about the recent cases before the Court in which the respondent sought dismissal of the applicant's claims due to the absence of a dispute. In these cases, the Court has examined the content and context of statement(s) made by one party prior to the application, in comparison with any reaction by the other party, in order to determine whether there was, prior to the application, a difference of views on the matter that would later be presented to the Court in the application. Although the Court has used various formulations to describe its inquiry and, of course, the facts of each case differ, I see a great deal of consistency in the objective standard that the Court has applied to scrutinize the evidence presented to it.

7. In the case concerning *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation)*, the Court stated that exchanges between the parties must refer to the subject-matter of the claim made in the application "with sufficient clarity to enable the State against which [that] claim is made

to identify that there is, or may be, a dispute with regard to that subject-matter" (*Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 85, para. 30). It found a dispute to exist (as of August 2008), taking into account claims that the Applicant made directly against the Respondent, which were denied by the Respondent, in the United Nations Security Council (*ibid.*, pp. 118-119, para. 109 and p. 120, para. 113). In the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal)*, the Court found that diplomatic correspondence in which the Applicant set out its allegations that the Respondent had breached a treaty sufficed to establish the existence of a dispute as to the Applicant's claim of treaty breach by the Respondent. By contrast, the Court concluded that there was no dispute between the parties in respect of violations of customary international law that were also alleged in that Application, because there had been no mention in diplomatic correspondence between the parties of this claim. "Under those circumstances, there was no reason for Senegal to address at all in its relations with Belgium the issue of the prosecution of alleged crimes of Mr. Habré under customary international law." (*I.C.J. Reports 2012 (II)*, p. 445, para. 54.) When the Court concluded that there was a dispute concerning Colombia's alleged violation of Nicaragua's rights in maritime zones in the case concerning *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia)*, it observed that, in light of public statements by the highest representatives of the two States, the Respondent "could not have misunderstood" the position of the Applicant (*Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, p. 33, para. 73).

8. The Court's reasoning in these recent Judgments carries forward to the approach that the Court takes today. The essential question is not whether the Respondent knew of statements made by the Applicant; we can assume such knowledge, for present purposes. Instead, the Court asks whether the Applicant's statements referred to the subject-matter of its claim against the Respondent — i.e., "the issue brought before the Court" in the Application — with sufficient clarity that the Respondent "was aware, or could not have been unaware", of the Applicant's claim against it (paragraphs 38 and 48 of today's Judgment). If so, there would have been reason to expect a response from the Respondent, and thus, even in the absence of an explicit statement of the Respondent's opposition to the claim, there would have been a basis for the Court to infer opposition from an unaltered course of conduct. For the reasons set forth in the Judgment, however, the statements on which the Marshall Islands relies did not set out the Applicant's claim against the Respondent with sufficient clarity to allow the Court to draw such an inference. Accordingly, as of the date of the Application, there was no opposition of views, and thus no dispute, in respect of the claims against the Respondent contained in the Application.

(*Signed*) Joan E. DONOGHUE.