

## DECLARATION OF JUDGE DONOGHUE

This is a case in which neither Party's pleaded case convinced the Court. The Judgment concludes that the 1952 Santiago Declaration on the Maritime Zone did not establish a maritime boundary. However, the 1954 Agreement relating to a Special Maritime Frontier Zone, when considered together with the 1968-1969 lighthouse arrangements, provides "compelling evidence" of the existence of a maritime boundary running along the parallel that crosses Boundary Marker No. 1, meeting the standard that the Court has previously articulated (*Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment, I.C.J. Reports 2007 (II), p. 735, para. 253).

What, then, is the extent of this tacitly-agreed maritime boundary? To answer this question, the Court, in effect, reaches conclusions about the substance of an informal and unwritten agreement. However, because the Parties did not address the existence or terms of such an agreement, they did not present evidence focused specifically on the extent of a tacitly-agreed maritime boundary.

In addition, neither Party put forward the possibility that the initial segment of the maritime boundary had been settled by agreement of the Parties, but that delimitation seaward of that segment would proceed in accordance with customary international law. Other maritime boundary cases have involved such scenarios (see, e.g., case concerning the *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Judgment, I.C.J. Reports 2002, pp. 431-432, paras. 268-269 and pp. 456-457, para. 325 (points IV (B) and (C))). As the Court notes, however, in the present case, the agreed maritime boundary extends for a significant distance (80 nautical miles). This raises novel questions about how to assess proportionality in respect of the area delimited on the basis of equidistance. As with the extent of the agreed maritime boundary, the Court did not have the benefit of the Parties' views on this issue.

I voted in favour of this Judgment in all respects, because I believe it reflects a sound outcome in light of the applicable law and the evidence before the Court. I submit this declaration because the circumstances of this case serve as a reminder of procedural approaches that may offer advantages when issues that are important to the Court's conclusions have not been squarely addressed by the parties. For example, a court or tribunal has the option of asking the parties for additional legal briefing or evidence. Alternatively, by rendering an interim or partial decision, a court or tribunal can decide part of a case while seeking more focused input from the parties on remaining issues.

In recent judgments, the Court has shown increased openness to drawing on insights from other international courts and tribunals. By making use of procedural approaches such as those noted here, the Court could further enrich its practice and jurisprudence.

(Signed) Joan E. DONOGHUE.

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