DECLARATION OF JUDGE XUE

The aim of achieving an equitable result — Delimitation methodology cannot be pre-determined — Adjustment on the basis of a provisional median line is superficial and inappropriate given the geographic features and relevant circumstances of the present case — Concurrent use of different methods in the northern and southern sections is justified as long as an equitable solution can be achieved.

The interest of third States in the south — Potentially the maritime entitlements of three or even four States may overlap — The principle res inter alios acta *and Article 59 of the Statute are not sufficient to protect the interest of third States — The Court could have rested the boundary at Point 8 with an arrow pointing eastward consistent with its jurisprudence — Extent of Nicaraguan coastal projection depends on the maritime delimitation between Nicaragua and its adjacent neighbours — The consideration of the public order and stable legal relations — The boundary line in the south virtually invalidates the existing maritime agreements in the area — The Court could just point out the direction of the boundary between the Parties in this area, allowing enough space for the States concerned to first draw up their respective boundaries and then readjust their maritime relations.*

1. In regard to the maritime boundary between Nicaragua and Colombia (Part V of the Judgment), I have voted for the operative paragraph 4 on the single maritime delimitation of the continental shelf and the exclusive economic zones between the Parties because, in my view, the delimitation line on the whole has achieved the object of reaching an equitable solution to the disputes between the Parties in the case. This position is taken, however, with two reservations.

2. My first reservation relates to the three-stage methodology applied by the Court. Although in recent years, the Court, as well as other tribunals, have tried to develop a certain approach to provide for legal certainty and predictability for the process of delimitation, the guiding principle for maritime delimitation as laid down in Articles 74 and 83 of the Convention on the Law of the Sea has not been changed by this development; with the aim to achieve an equitable solution, whatever methodology that is used should be "capable of ensuring, with regard to the geographic configuration of the area and other relevant circumstances, an equitable result" (*Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America), Judgment, I.C.J. Reports 1984*, p. 300, para. 112). In other words, in order to ensure an equitable solution, it is the geographic features and relevant circumstances that determine the selection of method(s) for the delimitation. Methodology cannot be pre-determined. As the Court pointed out in the *Continental Shelf* case,

> "[a] finding by the Court in favour of a delimitation by an equidistance line could only be based on considerations derived from an evaluation and balancing up of all relevant circumstances, since equidistance is not, in the view of the Court, either a mandatory legal principle, or a method having some privileged status in relation to other methods" (*Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982*, p. 79, para. 110).

3. In the Judgment, the Court refers to the recent jurisprudence especially that laid out in the *Black Sea* case on the method of delimitation, according to which

> "the methodology which [the Court] will normally employ when called upon to effect a delimitation between overlapping continental shelf and exclusive economic zone entitlements involves proceeding in three stages (*Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, p. 46, para. 60; *Maritime Delimitation in the Black Sea (Romania* v. *Ukraine), Judgment, I.C.J. Reports 2009*, p. 101, paras. 115-116)" (Judgment, para. 190).

The first stage of that method is to construct a provisional median line between the opposite or adjacent territories of the parties, unless there are compelling reasons as a result of which the establishment of such a line is not feasible. With regard to such exceptional situations, the Court refers to the case between Nicaragua and Honduras in the Caribbean Sea (*Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007 (II)*, p. 745, para. 281).

4. Apparently the geographic features and the relevant circumstances of the present case are considerably incomparable to those of the cases, particularly the *Black Sea* case, where the three-stage methodology is applied. Having ascertained the scope of the relevant area that extends to the east side of the Colombian islands to the 200-nautical-mile line measured from the baselines of Nicaragua's territorial sea, the Court should have seen that, even though there indeed exist opposite coasts between the Parties, it is not appropriate and feasible to delimit the entire relevant area on the basis of "a median line" located to the west of the Colombian islands. Any subsequent "adjustment or shifting", however substantial, of the provisional median line in the western part would not be able to overcome the gross disproportion in the lengths of the coasts and the ratio of the relevant area between the Parties as determined by the Court, hence unable to achieve an equitable result. Despite its recognition of the unusual circumstances in the coastal relations between the Parties, the Court nevertheless proceeds to use the "standard method" by drawing up a provisional median line.

5. The provisional median line proves superficial and inappropriate in the delimitation process. The Court constructs the provisional median line from two sets of base points chosen from the opposite islands of the

Parties (see sketch-map No. 8: Construction of the provisional median line, p. 701). Considering the disparity in the lengths of the relevant coasts and the overall geographical context, the Court decides to construct the line by giving a weighting of one to each of the Colombian base points and a weighting of three to each of the Nicaraguan base points. As a consequence, the effect of some base points on the Nicaraguan side is "superseded". This line is further adjusted to the east, identified as a simplified weighted line (Judgment, paras. 234-235). This raises the question whether this is a shifting of the provisional median line or rather a reconstruction of a new line by 3:1 ratio between the base points of the Parties.

6. I agree that the provisional median line as constructed, if applicable for the western part of the relevant area, should be adjusted and shifted eastward, given the evident disparity in the lengths of the relevant coasts. Nevertheless, such adjustment or shifting should have been made on the basis of the provisional median line, for instance, giving it half or a quarter effect. The Court's approach is arguably an adjustment to the provisional median line. The Court may have directly selected a couple of outermost base points by equal number from each side of the Parties as the controlling points and drawn up the line by 3:1 ratio. The result would be just the same. The rationale of the 3:1 ratio method is based on the delimitation principle — to achieve an equitable solution. This method stands in its own right; it does not have to be mixed up with the provisional median line.

7. In order to avoid any cut-off effect to Nicaragua and in light of the remaining significant disparity in the shares of the relevant area between the Parties, the Court decides to adopt different techniques for the delimitation of the remaining area. In the northern part, it uses the parallel of latitude passing through the northernmost point on the 12-nautical-mile envelope of arc around Roncador, while enclaving Quitasueño and Serrana. In the southern part, the boundary runs along the 12-nautical-mile arcs drawn around the South Cay of Alburquerque Cays and East-Southeast Cays till its easternmost point and then continues its course along the parallel of latitude till the 200-nautical-mile limit of Nicaragua.

8. The boundary in these two sections is apparently drawn by different methods — enclaving and latitude line. It is hard to justify them as "adjustment of" or "shifting from" the provisional median line", if the latter does not mean total departure.

9. Of course, by no means do I disapprove of the concurrent use of these methods by the Court. On the contrary, they are justified as long as an equitable solution can be so achieved. The reservation I have is whether

it is necessary for the Court to proceed with the three-stage method in the present case simply for the sake of standardization of methodology. Although one may argue that in the western part the provisional median line is plausible between the opposite coasts of the Parties, the Court could have followed its reasoning by adjusting the provisional median line rather than replacing it by the simplified weighted line based on 3:1 ratio. I see an inconsistency there.

10. Notwithstanding the approach taken, the actual use of various methods by the Court throughout the whole process of delimitation in the present case, in my view, reaffirms the established jurisprudence as pronounced by the Court and other tribunals in the maritime delimitation that

> "The method of delimitation to be used can have no other purpose than to divide maritime areas into territories appertaining to different States, while doing everything possible to apply objective factors offering the possibility of arriving at an equitable result. Such an approach excludes any recourse to a method chosen beforehand." (*Arbitration Tribunal for the Delimitation of the Maritime Boundary between Guinea and Guinea-Bissau, Award of 14 February 1985,* 25 *ILM* 252 (1986), p. 294; see also *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969*, pp. 49-50; and Judgment by the International Tribunal for the Law of the Sea in the *Dispute concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar), Judgment of 14 March 2012*, ITLOS, p. 75, para. 235.)

11. My second reservation relating to the interest of third States is more serious in nature. It should be recognized that the Court has gone to great length in its reasoning to address the interest of third Parties in the region, both in the north and the south. In the light of the overall geographical context, I agree with the Court's reasoning and delimitation in the north, but have concern with the boundary in the south. In my view, the boundary should stop at Point 8 with an arrow pointing eastward. My consideration is three-fold.

12. In the first place, from Point 8 to further east, the boundary line will enter into the area where potentially the maritime entitlements of three or even four States may overlap, as coastal projections of Nicaragua and Colombia, as well as those of Costa Rica and Panama, all extend to that area. Regardless of being mainland coasts or islands, they all enjoy full and the same maritime entitlements under general international law. That Colombian entitlements do not go beyond the treaty boundaries with third States does not mean third States do not have interest against Nicaragua in that relevant area above the treaty boundaries. Costa Rica made that point clear in its request for permission to intervene. Even though Panama did not intervene, the same claim could also be made. It is up to the Court to take care of that concern.

13. Therefore, the coastal relationship between the Parties and the third States in the southern area requires special consideration. By restricting the coastal projections of Colombian islands against those of the Nicaraguan coast, the Court also unduly restricts the coastal projections of Colombian islands against those of the other two third States which, in my opinion, has gone beyond the jurisdiction of the Court in this case. The principle *res inter alios acta* and Article 59 of the Statute do not help in the present situation. The Court could have avoided that effect by resting the boundary at Point 8 with an arrow pointing eastward for the time being, a technique that the Court normally employs in the maritime delimitation for the protection of the interest of third States.

14. Secondly, in regard to the cut-off effect, one of the two considerations upon which the Court delimits the boundary in the north and the south, the coastal relationship between the three adjacent coastal States and Colombia in the south of the Caribbean Sea, as stated above, is a complicated one. To what extent the Nicaraguan mainland coast can project eastward against the coastal projections of Costa Rica and possibly those of Panama depends on the maritime delimitation between Nicaragua and its adjacent neighbour(s). Once that is decided, it would be more proper to determine how far the boundary between the Parties in the present case will run eastward from Point 8. This approach would better protect the interest of the third States.

15. Lastly, the consideration of the public order and stable legal relations should apply to the southern area as well. As is stated in the Judgment, the Court has to bear in mind that the delimitation has to be "both equitable and as practically satisfactory as possible, while at the same time in keeping with the requirement of achieving a stable legal outcome" (*Arbitration between Barbados and the Republic of Trinidad and Tobago, Tribunal Award of 11 April 2006, RIAA*, Vol. XXVII, p. 215, para. 244). The boundary line in the south would virtually produce the effect of invalidating the existing agreements on maritime delimitation that Colombia has concluded with Panama and Costa Rica respectively and drastically changing the maritime relations in the area. Even supposing that these agreements might have indeed infringed upon the maritime entitlements of Nicaragua in the area, it would be much better off for the maintenance of regional stability and public order if the Court just pointed out the direction of the boundary between the Parties in this area, allowing enough space for the States concerned to first draw up their respective boundaries and then readjust their maritime relations. I regret that the Court does not take that course.

(*Signed*) XUE Hanqin.