DISSENTING OPINION OF JUDGE XUE

To my deep regret, I dissent from the decision of the majority of the Court to exercise jurisdiction in this case. Since the matter bears on treaty interpretation and judicial propriety, I shall explain my position.

I. Relationship between Article 11, Paragraph 1, and Article 5, Paragraph 1, of the Interim Accord

The dispute before the Court between the former Yugoslav Republic of Macedonia (the Applicant) and Greece (the Respondent) over the name of the Applicant involves a long history of negotiations between the Parties under the auspices of the United Nations. The Parties' respective positions on the name issue during that period, both before and after the conclusion of the Interim Accord, constitute a substantial bulk of the evidence submitted to the Court. Any interpretation of the provisions of the Interim Accord in relation to the name issue should give due consideration to the interim nature of the Accord and the ongoing negotiations between the Parties aimed at the settlement of the name difference.

Under Article 21, paragraph 2, of the Interim Accord, "[a]ny difference or dispute that arises between the Parties concerning the interpretation or implementation of this Interim Accord may be submitted by either of them to the International Court of Justice, except for the difference referred to in Article 5, paragraph 1". The "difference" referred to there relates to the dispute between the Parties over the Applicant's name, as addressed in United Nations Security Council resolutions 817 (1993) and 845 (1993). The essential issue for the Court, therefore, in determining its jurisdiction, is whether the Respondent's disputed objection to the Applicant's membership in the North Atlantic Treaty Organization (NATO) at the 2008 Bucharest Summit relates to the interpretation or implementation of Article 11, paragraph 1, of the Interim Accord, or whether it is an issue precluded from the jurisdiction of the Court by virtue of Article 21, paragraph 2, of that treaty.

In its Judgment in the case, the Court, in establishing its jurisdiction, adopts a rather narrow interpretation of the term "difference" in Article 5, paragraph 1. In that regard, paragraph 35 of the Judgment reads:

> "Resolutions 817 and 845 (1993) distinguished between the name of the Applicant, in respect of which they recognized the existence of a difference between the Parties who were urged to resolve that difference by negotiation (hereinafter the 'definitive name'), and the provisional designation by which the Applicant was to be referred to for all purposes within the United Nations pending settlement of that difference. The Interim Accord adopts the same approach and extends it to the Applicant's application to, and membership in, other international organizations. Thus Article 5, paragraph 1, of the Interim Accord requires the Parties to negotiate regarding the difference over the Applicant's definitive name, while Article 11, paragraph 1, imposes upon the Respondent the obligation not to object to the Applicant's application to, and membership in, international organizations, unless the Applicant is to be referred to in the organization in question differently than in resolution 817 (1993)."

The Court further takes the view that the "difference" referred to therein, and which the Parties intended to exclude from the jurisdiction of the Court, is the difference over the permanent name of the Applicant, and not disputes regarding the Respondent's obligation under Article 11, paragraph 1.

It is based on this reading of Article 21, paragraph 2, of the Interim Accord that the Court finds that any connection which a dispute may have with the name difference is not sufficient to exclude that dispute from the jurisdiction of the Court. The Court concludes that "[o]nly if the Court were called upon to resolve specifically the name difference, or to express any views on this particular matter, would the exception under Article 21, paragraph 2, come into play" (Judgment, para. 37). Thus, the "difference" under Article 5, paragraph 1, is reduced to the *solution* of the final name, to be agreed on by the Parties at the end of the negotiations. Such an interpretation treats Article 11, paragraph 1, and Article 5, paragraph 1, as entirely separate issues, with no substantive connection to each other as regards the implementation of the Interim Accord. This interpretation, in my view, is questionable.

Given the nature of the dispute between the Parties over the name issue and the object and purpose of the Interim Accord, Article 11, paragraph 1, and Article 5, paragraph 1, constitute two of the key provisions in the agreement.

The Court's view on the scope of the term "difference" is, to a large extent, determined by its reading of Article 11, paragraph 1, which provides that:

> "Upon entry into force of this Interim Accord, the Party of the First Part [the Respondent] agrees not to object to the application by or membership of the Party of the Second Part [the Applicant] in

> international, multilateral and regional organizations and institutions of which the Party of the First Part is a member; however, the Party of the First Part reserves the right to object to any membership referred to above if and to the extent the Party of the Second Part is to be referred to in such organization or institution differently than in paragraph 2 of United Nations Security Council resolution 817 (1993)."

From the evidence before the Court, it is clear that the central issue of the dispute between the Parties on this Article lies in the so-called "dual formula", as allegedly pursued by the Applicant. In accordance with Article 11, paragraph 1, the Respondent agrees that, so long as the Applicant is provisionally referred to as "the former Yugoslav Republic of Macedonia" for all purposes in international organizations, it is obliged not to raise any objection to the application by or membership of the Applicant in such international organizations. The conditional terms in the second part of the clause, which allow the Respondent to raise objections, such as "if and to the extent" and "be referred to in such organization or institution", however, are the subject of different interpretations by the Parties; they particularly disagree as to whether the Applicant may use its constitutional name when referring to itself or when dealing with third States in international organizations.

In the years after the conclusion of the Interim Accord, the Parties, in maintaining their respective positions on the name issue, have consistently held different interpretations of the terms of Article 11, paragraph 1. As demonstrated by the evidence submitted by both Parties, the Applicant has insisted on using its constitutional name when referring to itself and when dealing with third States, while the Respondent has developed a general pattern of protests against such use, alleging that it is a breach of resolution 817 and of the Interim Accord.

The conclusion of the Interim Accord between the Parties, together with Security Council resolutions 817 and 845, recognizes the legal interests of both Parties in connection with the name issue. The temporary arrangement in respect of the name difference, under Article 11, paragraph 1, provides a means of ending the impasse between the Parties over the Applicant's membership in international organizations. The ambiguity of the conditional terms in Article 11, paragraph 1, with regard to whether, or to what extent, the Applicant's constitutional name can be used by the Applicant and third States in international organizations, shows that the Interim Accord, as a temporary measure for maintaining peace and good-neighbourly relations both in the region and between the Parties, requires a great deal of good faith and mutual trust from both

Parties in its implementation. Such uncertainty can only be explained and justified by the interim nature of the treaty and the pending settlement of the name issue. Therefore, the implementation of Article 11, paragraph 1, is intrinsically linked to the duty of the two Parties to settle the name dispute through negotiations, as required by Article 5, paragraph 1. Any issue relating to the negotiation process should fall within the scope of Article 5, paragraph 1.

Resolution 817 and the Interim Accord originally envisaged, or at least encouraged, a speedy settlement of the name difference between the Parties. In the 13 years from the conclusion of the Interim Accord to the 2008 Bucharest Summit, however, negotiations had still not come to fruition. Meanwhile, tensions between the Parties over the dual-name practice, particularly the so-called "dual formula", were on the rise.

The so-called "dual formula", as revealed in the proceedings, refers to the formula whereby, ultimately, the provisional name will be used only between the Respondent and the Applicant, while the Applicant's constitutional name is used with all other States. Although the Court rightly concludes that, by virtue of Article 11, paragraph 1, the Applicant is not precluded from using its constitutional name when referring to itself in international organizations under resolution 817 and the Interim Accord, such a "dual formula", whose implication for the pending negotiations does not seem immaterial, was obviously not contemplated by the Parties when they concluded the Interim Accord. Furthermore, when such a formula is allegedly pursued intentionally, the matter clearly has a bearing on the final settlement of the name issue. The question in the present case, therefore, is in essence not about the Respondent's position regarding the Applicant's membership in NATO under Article 11, paragraph 1, but about the difference in the negotiation process.

In the Judgment, the Court states that:

> "If the Parties had intended to entrust to the Court only the limited jurisdiction suggested by the Respondent, they could have expressly excluded the subject-matter of Article 11, paragraph 1, from the grant of jurisdiction in Article 21, paragraph 2." (Para. 35.)

This assumption is logical, but not persuasive. As stated above, the terms of Article 11, paragraph 1, are not as certain as they sound. The inherent ambiguity lies in the complexity of the name issue. This does not mean that the Respondent could unilaterally invoke any excuse and block at will the Applicant's membership in an international organization. The matter is subject to the determination of the Court, which decides whether

it falls within its jurisdiction or not: in other words, whether it falls under Article 11, paragraph 1, or Article 5, paragraph 1. In the present case, without looking into the so-called "dual formula", it would be impossible to examine fully the Respondent's actions at the Bucharest Summit in light of the object and purpose of the Interim Accord. If conducted, however, such an examination would inevitably have to address the "difference" under Article 5, paragraph 1, thereby going beyond the jurisdiction of the Court.

The Court confines its examination to the act of objection by the Respondent to the Applicant's membership in NATO. In doing so, it isolates Article 11, paragraph 1, from the context of the treaty as a whole, and from its object and purpose.

The intrinsic links between Article 11, paragraph 1, and the final settlement of the name dispute, the subject-matter of Article 5, paragraph 1, is unmistakeably confirmed by Mr. Nimetz, the Special Envoy of the United Nations Secretary-General, who was responsible for mediating the bilateral talks on the name issue for many years. In 2007, following an objection by the Respondent to the use of the Applicant's constitutional name by the President of the General Assembly, who happened to be a national of the Applicant, Mr. Nimetz was asked for his opinion on the incident. In reply, he made the remark that "what happened in the General Assembly yesterday demonstrates why a permanent solution is needed". This is telling. What seems to be purely a question of Article 11, paragraph 1, concerning the use of the Applicant's name in an international organization, cannot be examined in isolation. Article 11, paragraph 1, cannot be separated from Article 5, paragraph 1, when the settlement of the final name is involved. Indeed, in my view, paragraphs 133-138 of the Judgment touch on matters falling under Article 5, paragraph 1, of the Interim Accord.

II. Judicial Propriety

Even if, by a strict interpretation of Article 21, paragraph 2, the Court finds that it has jurisdiction in the case, in my view there are still good reasons for the Court to refrain from exercising it, since it bears on the question of judicial propriety. As the Court pointed out in the *Northern Cameroons* case, even if the Court, "when seised, finds that it has jurisdiction, the Court is not compelled in every case to exercise that jurisdiction. There are inherent limitations on the exercise of the judicial function which the Court, as a court of justice, can never ignore." (*Northern Cameroons (Cameroon* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1963*, p. 29.)

I agree with the Court's position that the issue before it is not whether NATO's decision may be attributed to the Respondent, but rather whether the Respondent has breached its obligation under the Interim Accord as a result of its own conduct. The Court's decision to pronounce only on the lawfulness of the single act of the Respondent, and to reject all the other submissions of the Applicant, renders the Judgment devoid of any effect on NATO's decision to defer its invitation to the Applicant to become a member of NATO. In its reasoning for this decision, the Court relies on two considerations, among others. First, it gives a narrow construction of the Applicant's request. It states in paragraph 50 of the Judgment that: "The Applicant is not requesting the Court to reverse NATO's decision in the Bucharest Summit or to modify the conditions for membership in the Alliance." Notwithstanding that statement, the Applicant, in its third submission, makes it clear that it is requesting the Court to

> "order that the Respondent immediately take all necessary steps to comply with its obligations under Article 11, paragraph 1, of the Interim Accord, and to cease and desist from objecting in any way, whether directly or indirectly, to the Applicant's membership of the North Atlantic Treaty Organization . . .".

From the proceedings, it is evident to the Court that the Applicant's major concern relates to NATO's decision of "no settlement, no invitation". As far as the Applicant's membership in NATO is concerned, with NATO's decision unchanged, there are only two possible ways for the Applicant to regain its status as a candidate for NATO: one is the settlement of the name issue between the Parties; the other is a reversal of NATO's decision. The Court's declaratory Judgment is apparently intended to eschew the latter.

The second consideration is a general one with regard to declaratory judgments. As the Court explained in the *Navigational and Related Rights* case, "[a]s a general rule, there is no reason to suppose that a State whose act or conduct has been declared wrongful by the Court will repeat that act or conduct in the future, since its good faith must be presumed" (*Dispute regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua), Judgment, I.C.J. Reports 2009*, p. 267, para. 150). Therefore, the Court does not consider it necessary to order the Respondent, as requested in the Applicant's third submission, to refrain from any future conduct that violates its obligation under Article 11, paragraph 1, of the Interim Accord. Its pronouncement that the Respondent has breached its obligation constitutes appropriate satisfaction.

With regard to declaratory judgments, the Court states in its jurisprudence that such a judgment serves to ensure "recognition of a situation at law, once and for all and with binding force as between the Parties; so

that the legal position thus established cannot again be called in question in so far as the legal effects ensuing therefrom are concerned" (*Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów), Judgment No. 11, 1927, P.C.I.J., Series A, No. 13*, p. 20). In the present case, it is doubtful that such a judgment would be able to fulfil that goal. In so far as NATO's decision remains valid, the Court's decision will have no practical effect on the future conduct of the Parties with respect to the Applicant's membership in that organization. In the *Northern Cameroons* case, the Court stated that its decision "must have some practical consequence in the sense that it can affect existing legal rights or obligations of the parties, thus removing uncertainty from their legal relations" (case concerning the *Northern Cameroons (Cameroon* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1963*, p. 34). That requirement does not seem to have been met in the present case.

The above point leads me to a second aspect of the judicial function in the settlement of international disputes, namely, the potential effect of the Judgment on the negotiation process between the Parties. By virtue of the Bucharest Declaration, the Parties' obligations in respect of the Applicant's application to and membership in NATO are no longer the same as those under Article 11, paragraph 1, of the Interim Accord. In refraining from granting the additional remedies requested by the Applicant, the Court is apparently aware of the potential effect of its Judgment on the negotiation process. Even so, the Court's decision is still likely to be used by the Parties to harden their positions in the negotiations.

Referring to the name issue, Mr. Nimetz pointed out in a press conference, following a meeting with the negotiators of the two Parties on the name issue in March 2008, "it's a very important question for the region . . . it affects the people of both countries and has a deep history . . . it's a very deep issue and a serious issue". The Court could not have failed to observe that an essential aspect of the case is that both Parties should negotiate and act in good faith, and that the current state of affairs should not jeopardize the negotiation process. Under the Interim Accord, and as also required by the Security Council resolutions, the Parties committed themselves to finding a solution to this name difference in a speedy manner. The imposition of a solution by a third party, or any direct or indirect involvement, even from this Court, is undesirable in this regard. As the Court pointed out long ago,

> "the judicial settlement of international disputes, with a view to which the Court has been established, is simply an alternative to the direct and friendly settlement of such disputes between the Parties; as consequently it is for the Court to facilitate, so far as is compatible with its Statute, such direct and friendly settlement" (case of the *Free Zones of Upper Savoy and the District of Gex, Order of 19 August 1929, P.C.I.J., Series A, No. 22*, p. 13).

While a speedy settlement of the name issue serves the best interests of both Parties, this judicial exercise, in my view, might render a service which is not conducive to the achievement of this objective.

(Signed) XUE Hanqin.