DECLARATION OF JUDGE XUE

1. With regard to Colombia's third counter-claim relating to the artisanal fishing rights of the inhabitants of the San Andrés Archipelago, I agree with the Court's conclusion that Colombia fails to prove the existence of its traditional practice of artisanal fishing that extends to the area that falls within Nicaragua's exclusive economic zone. In regard to traditional or historic fishing rights, however, I wish to make a few observations in this declaration.

2. First of all, traditional fishing rights are recognized and protected under customary international law. Under the law of the sea, traditional fishing generally refers to artisanal fishing that may have existed for centuries. Although there may be improvements in the techniques of navigation and communication or in the techniques of fishing, traditional fishing is distinct from habitual fishing and traditional industrial fishing. Traditional fishing rights are acquired from a long process of historical consolidation of socio-economic conditions and conduct, which reflects certain cultural patterns, local customs and traditions. Given their nature, substance and origin, the existence of traditional fishing rights must be examined and determined on a case-by-case basis.

3. At the Second United Nations Conference on the Law of the Sea, when the breadth of the territorial sea was being considered, fishery limits was one of the issues raised by States, as expansion of the breadth of the territorial sea from 3 nautical miles to 12 nautical miles would inevitably have a bearing on the fishing interests of States in coastal waters. It was realized, nevertheless, that there were diverse situations in different parts of the world and that it was impossible to take account of every special case (*Eighth Meeting of the Committee of the Whole, 30 March 1960*, UN doc. A/CONF.19/C.1/SR.8, paras. 6-12 (Brazil); *Fifteenth Meeting of the Committee of the Whole, 5 April 1960*, UN doc. A/CONF.19/C.1/SR.15, para. 12 (New Zealand); *Nineteenth Meeting of the Committee of the Whole, 7 April 1960*, UN doc. A/CONF.19/C.1/SR.19, paras. 34-36 (Lebanon)). Meanwhile the idea to set up an exclusive fishing zone, separate but adjacent to the territorial sea, to give the coastal State certain rights in respect of the exploitation of fishery resources in the zone so as to satisfy the growing needs of its people was gaining wide recognition, particularly among the developing countries (*Eighth Meeting of the Committee of the Whole, 30 March, 1960*, UN doc. A/CONF.19/C.1/SR.8, paras. 34 and 39-40 (Yugoslavia); *Fifteenth Meeting of the Committee of the Whole, 5 April 1960*, UN doc. A/CONF.19/C.1/SR.15, para. 24 (Ceylon); *Nineteenth Meeting of the Committee of the Whole, 7 April 1960*, UN doc. A/CONF.19/C.1/SR.19, para. 7 (Tunisia)).

4. At the Third United Nations Conference on the Law of the Sea, States held divergent views as to whether a coastal State should enjoy exclusive rights to exploit living resources in the exclusive economic zone and to what extent traditional fishing may be maintained. In this regard, both traditional artisanal fishing and long-established industrial and commercial fishing were mentioned.

5. In the present case, examples cited by Nicaragua, which refer to the positions taken by States such as Japan, the Soviet Union, Australia, New Zealand and the United States, on the protection of traditional fishing rights, largely concern the long-established industrial and commercial fishing. Contrary to Nicaragua's assertion that the developing countries "strenuously objected" to the protection of traditional fishing rights, these countries were actually very critical of foreign industrial and commercial fishing practices, particularly of those "prescriptive rights" acquired under colonialism (*Summary Records of Plenary Meetings, 23rd plenary meeting, 1 July 1974*, UN doc. A/CONF.62/SR.23, para. 53 (Argentina); *Summary Records of Meetings of the Second Committee, 22nd meeting, 31 July 1974*, UN doc. A/CONF.62/C.2/SR.22, para. 72 (Zaire); *Summary Records of Meetings of the Second Committee, 29th meeting, 6 August 1974*,

UN doc. A/CONF.62/C.2/SR.29, para. 3 (Burma)). They were mainly concerned about "leav[ing] the door open for the traditional distant-water fishing nations which had enjoyed and sometimes abused the freedom of fishing in a region *with which they had no geographical or economic connexion*" (*Summary Records of Meetings of the Second Committee, 22nd meeting, 31 July 1974*, UN doc. A/CONF.62/C.2/SR.22, para. 92 (Barbados) (emphasis added)). At the same time, they were sympathetic to the fishing interests of the developing countries whose economy depended on fisheries. In Conclusions in the General Report of the African States Regional Seminar on the Law of the Sea, a document to which Nicaragua refers in support of its claim, it is stated that "the 'historic rights' acquired by certain neighbouring African States in a part of the Sea which may fall within the exclusive jurisdiction of another State w[]ould be recognized and safeguarded" (*Report of the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction* (1972), UN doc. A/8721, Annex 3, p. 75). Apparently, traditional fishing rights have to be considered in each specific context.

6. The establishment of the exclusive economic zone régime is one of the major achievements of the Third United Nations Conference on the Law of the Sea, which largely responds to the general concerns of the coastal States over the exploitation of living resources by industrial and commercial fishing of foreign fleets in their coastal waters and the need to ensure optimum utilization of natural resources of the sea. Under Part V of the United Nations Convention on the Law of the Sea (hereinafter "UNCLOS"), the coastal State is entitled to establish a 200-nautical-mile exclusive economic zone beyond and adjacent to its territorial sea. It enjoys sovereign rights in the exploration, exploitation, conservation and management of the natural resources in the exclusive economic zone and has the jurisdiction with regard to the establishment and use of artificial islands, marine scientific research as well as the protection and preservation of the marine environment in that zone. It shall determine the allowable catch of the living resources and take conservation and management measures to ensure sustainable development and utilization of the living resources in the exclusive economic zone. This new régime has fundamentally changed the fishery limits in the sea and put an end to the freedom of fishing in the areas that fall within the exclusive economic zone of the coastal States.

7. Article 51, paragraph 1, of UNCLOS explicitly recognizes the traditional fishing rights of the immediately adjacent neighbouring States in the archipelagic waters. According to Nicaragua, this provision is the only exception, as a carve-out, that preserves traditional fishing rights under UNCLOS. The drafting history of Part IV on archipelagic States, however, does not support that interpretation. The *travaux préparatoires* show that Article 51, paragraph 1, is the outcome of the negotiations of States on the recognition of the status of archipelagic States. It was intended to maintain a balance of rights and interests between the archipelagic States and their regional neighbours whose fishing interests would be substantially jeopardized by the enclosure of the archipelagic waters (see *Summary Records of Meetings of the Second Committee, 36th meeting, 12 August 1974*, UN doc. A/CONF.62/C.2/SR.36; *Summary Records of Meetings of the Second Committee, 37th meeting, 12 August 1974*, UN doc. A/CONF.62/C.2/SR.37, on the positions taken by Singapore, Thailand, the Philippines, Indonesia and Japan). Confined to a special régime, Article 51, paragraph 1, concerns solely traditional fishing rights in the archipelagic waters. There is no legal basis in international law to preclude the existence of traditional fishing rights under other circumstances.

8. Article 62, paragraph 3, of UNCLOS provides a number of relevant factors for giving access to other States to the surplus of the allowable catch in the exclusive economic zone, among which is the need to minimize economic dislocation in States whose nationals have habitually fished in the zone. According to Nicaragua, by taking into account this "habitually fished" factor, the Convention has settled the relationship between the exclusive economic zone and traditional fishing rights; the former thereby supersedes the latter. This conclusion is apparently over-sweeping. Among all

relevant factors, Article 62, paragraph 3, highlights five factors for consideration, namely national interests of the coastal State, rights of land-locked States and geographically disadvantaged States, the requirements of developing States in the subregion or region, and the need to minimize economic dislocation in States whose foreign nationals have habitually fished in the zone or which have made substantial efforts in research and identification of stocks. Those factors reflect the principles of distributive justice and fairness that underlie the régime of the exclusive economic zone under UNCLOS. Habitual fishing may include certain types of traditional fishing activities carried out by individual fishermen of other States, but in the context of the Article, that factor alone cannot be taken to presume that all situations relating to traditional fishing rights are encompassed by that Article.

9. The advent of the régime of the exclusive economic zone, as set forth in UNCLOS, does not by itself extinguish traditional fishing rights that may be found to exist under customary international law. According to the settled jurisprudence of the Court, a treaty provision may "embod[y]" or "crystallize[]" a pre-existing or emergent rule of customary law (*Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982*, p. 38, para. 24), or may "constitute[] the foundation of, or has generated a rule which . . . has since passed into the general *corpus* of international law" (*North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969*, p. 41, para. 71). For pre-existing rights under customary international law, however, unless and until they are explicitly negated by treaty law or new customary rules, they continue to exist and apply under customary international law, even as regards States that are parties to the relevant treaty (see *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility*, *Judgment, I.C.J. Reports 1984*, p. 424, para. 73). The Court has also held that where the content of a customary rule is "confirmed and influenced by [a treaty referring to and embodying this rule]", the fact that the treaty "does not go on to regulate directly all aspects of [the] content" of the rule in question, "demonstrates that . . . customary international law continues to exist alongside treaty law. The areas governed by these two sources of law thus do not overlap exactly, and the rules do not have the same content." (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 94, para. 176.)

10. The existence of traditional fishing rights must be proved by evidence. As noted, such rights are derived from long, continuous and peaceful exercise of certain practices. In the absence of specific conventional provisions that expressly negate all traditional fishing rights, general international law will continue to govern on the matter, whenever a case arises. As the Preamble of UNCLOS affirms, "matters not regulated by this Convention continue to be governed by the rules and principles of general international law".

11. Indeed, States party to UNCLOS continue to recognize, through bilateral agreements, historic and traditional fishing rights that existed prior to the conclusion of the Convention. For example, in 1974 India and Sri Lanka agreed on the delimitation of historic waters of Palk Bay, where the traditional fishing rights of both States' fishermen are recognized and protected. Article 6 of the Agreement provides that "[t]he vessels of Sri Lanka and India will enjoy in each other's waters such rights as they have traditionally enjoyed therein" (1974 *Agreement between India and Sri Lanka on the Boundary in Historic Waters between the Two Countries and Related Matters*, United Nations, *Treaty Series (UNTS)*, Vol. 1049, p. 26). Likewise, the 1978 boundary agreement between Australia and Papua New Guinea acknowledges and protects the "traditional way of life and livelihood" of the local population, including traditional fishing, in the Protected Zone established (Article 10 (3) of the 1978 *Treaty between Australia and the Independent State of Papua New Guinea concerning Sovereignty and Maritime Boundaries in the Area between the Two Countries, including the Area Known as Torres Strait, and Related Matters, UNTS*, Vol. 1429, p. 215).

12. Traditional fishing rights are also recognized in international jurisprudence. For instance, in the *Continental Shelf* (*Tunisia/Libyan Arab Jamahiriya)* case, Tunisia claimed that it had had historic rights over sedentary and other fisheries in a certain zone since time immemorial, "deriv[ing] from the long-established interests and activities of its population in exploiting the fisheries of the bed and waters of the Mediterranean off its coasts" (*Judgment, I.C.J. Reports 1982*, p. 72, para. 98). Although the Court did not find it necessary to address Tunisia's claim, it clearly acknowledged that such rights exist under customary international law, notwithstanding the exclusive economic zone régime (*ibid.*, p. 74, para. 100).

13. In the *Eritrea/Yemen* arbitration, the issue was squarely addressed by the tribunal. It explicitly recognized the existence of traditional fishing rights of Eritrea's fishermen both within and beyond the territorial sea around the Yemeni islands (*Award of the Arbitral Tribunal in the first stage of the proceedings between Eritrea and Yemen (Territorial Sovereignty and Scope of the Dispute), Decision of 9 October 1998*, United Nations, *Reports of International Arbitral Awards (RIAA)*, Vol. XXII, pp. 329-330, para. 526; *Award of the Arbitral Tribunal in the second stage of the proceedings between Eritrea and Yemen (Maritime Delimitation), Decision of 17 December 1999, RIAA*, Vol. XXII, p. 361, para. 109). In reaching its conclusion regarding traditional fishing rights, the tribunal emphasized that "[i]n finding that the Parties each have sovereignty over various of the Islands the Tribunal stresses to them that such sovereignty is not inimical to, but rather entails, the perpetuation of the traditional fishing regime in the region" (*Award of the Arbitral Tribunal in the first stage of the proceedings between Eritrea and Yemen (Territorial Sovereignty and Scope of the Dispute), Decision of 9 October 1998, RIAA*, Vol. XXII, pp. 329-330, para. 526). On the relationship between the traditional fishing régime and UNCLOS, the arbitral tribunal observed:

> "By its very nature, [this traditional fishing régime] is not qualified by the maritime zones specified under the United Nations Convention on the Law of the Sea . . . The traditional fishing regime operates throughout those waters beyond the territorial waters of each of the Parties, and also in their territorial waters and ports . . . Accordingly, it does not depend, either for its existence or for its protection, upon the drawing of an international boundary by this Tribunal." (*Award of the Arbitral Tribunal in the second stage of the proceedings between Eritrea and Yemen (Maritime Delimitation), Decision of 17 December 1999, RIAA*, Vol. XXII, p. 361, paras. 109-110.)

14. The findings in *Eritrea/Yemen* were cited by the arbitral tribunal in the *Abyei* arbitration concerning the delimitation of land boundaries in the Abyei area between Sudan and South Sudan. That tribunal concluded that, according to general principles of law, "traditional rights, in the absence of an explicit agreement to the contrary, have usually been deemed to remain unaffected by any territorial delimitation" (*Arbitration regarding the Delimitation of the Abyei Area between the Government of Sudan and the Sudan People's Movement/Army, Final Award, 22 July 2009, RIAA*, Vol. XXX, pp. 408-410 and 412, paras. 753-760 and 766).

15. In the present case, Nicaragua refers to the case concerning *Delimitation of the Maritime Boundary in the Gulf of Maine Area* (*(Canada/United States of America), Judgment, I.C.J. Reports 1984*, p. 246) in support of its claim that traditional fishing rights have been extinguished by the establishment of the exclusive economic zone and that the coastal States now enjoy a "legal monopoly" over the living resources of the exclusive economic zone. This is a far-fetched claim. In the *Gulf of Maine* case, first of all, the dispute between the parties did not concern traditional fishing rights. The United States claimed a certain "predominance" of its fishing activities in the relevant area, which related to established industrial and commercial fishing. Secondly, the United States

invoked its preferential situation as a relevant circumstance for the purpose of equitable delimitation, which was rejected by the Chamber of the Court. Neither in law nor in fact is this case relevant to the issue of traditional fishing rights.

16. Two principal elements have been mentioned in jurisprudence for the establishment of traditional fishing rights: first, traditional fishing rights had to be borne out by "artisanal fishing", and secondly, such fishing activities continued consistently for a lengthy period of time (see *Award of the Arbitral Tribunal in the second stage of the proceedings between Eritrea and Yemen (Maritime Delimitation), Decision of 17 December 1999, RIAA*, Vol. XXII, p. 359, para. 103; *Award of the Arbitral Tribunal in the first stage of the proceedings between Eritrea and Yemen (Territorial Sovereignty and Scope of the Dispute), Decision of 9 October 1998, RIAA*, Vol. XXII, pp. 244-245, para. 129). As the *Eritrea/Yemen* tribunal stated, at the core of the traditional fishing activities is "the presence of deeply-rooted common patterns of behavior", which is often linked with local traditions and customs that continued consistently for a long time (*Award of the Arbitral Tribunal in the first stage of the proceedings between Eritrea and Yemen (Territorial Sovereignty and Scope of the Dispute), Decision of 9 October 1998, RIAA*, Vol. XXII, p. 244, para. 129). The first element is applied primarily to distinguish traditional fishing from industrial fishing, while the second element has to be assessed under the circumstances of each case. In principle, the duration of the fishing activities cannot be measured by a fixed number of years, but it has to be sufficiently long to reflect the existence of such tradition and culture. In this regard, certain flexibility with regard to the types of evidence and duration of time may be called for. In the present case, although the evidence adduced by Colombia is not considered sufficient to prove its claim, the statements of the Nicaraguan President do not deny the existence of traditional fishing of the inhabitants of the San Andrés Archipelago, particularly of the Raizales. In order to preserve the local tradition and custom of the San Andres Archipelago, an agreement on fisheries for the benefit of the Raizales community between the Parties, in my view, would contribute to a stable and co-operative relationship in the region.

(Signed) XUE Hanqin.

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