

DISSENTING OPINION OF JUDGE COT

1. With due respect, I cannot join the majority of my colleagues in the *M/V "Louisa" Case*. I do not see the slightest shred of evidence of prima facie jurisdiction in a case which, in a nutshell, is a challenge to the exercise of power by the police and the judiciary in ports under the *Juzgado de Instrucción* of Cadiz.

2. Let us recall that Part XV of the United Nations Convention on the Law of the Sea covers disputes between States Parties "concerning the interpretation or application of this Convention" (art. 279). Article 286, on the application of compulsory procedures entailing binding decisions, states:

Subject to section 3, any dispute concerning the interpretation or application of this Convention shall, where no settlement has been reached by recourse to section I, be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction under this section.

3. This wording specifically limits the jurisdiction of our Tribunal in this case which was introduced by unilateral application of Saint Vincent and the Grenadines under Part XV, section II, of the Convention.

4. Both Parties agree that the two vessels, the *M/V "Louisa"* and the "*Gemini III*", were in port when they were inspected and detained by officers of the *Guardia Civil* on 1 February 2006 in connection with the preliminary judicial investigation opened by Judge Luis de Diego Alegre, examining magistrate in the fourth chamber of the Cadiz Criminal Court, on 30 November 2005. The *M/V "Louisa"* had been docked since 2004 as it was too big a ship to conduct the research authorized by the Spanish authorities. It was the "*Gemini III*" that was used for research within the authorized area, which lies within the internal waters and territorial sea of Spain. The judicial investigation was opened in order to examine criminal activities allegedly conducted by the crew of these ships, under cover of scientific research, in order to plunder submarine archaeological objects in violation of the Spanish Criminal Code.

5. Acting on an anonymous tip, the ships were boarded and inspected by officers of the *Guardia Civil* who seized archaeological objects from the *M/V "Louisa"*, as well as weapons that had not been declared to the Spanish authorities and were hence possessed illegally in violation of Spanish laws and regulations.

6. The Spanish authorities then decided to detain the two ships, place them under seal and arrest the crewmembers, whose consulates were notified of their arrest on 3 February 2006 pursuant to article 42 of the Vienna Convention on Consular Relations of 24 April 1963. The members of the crew were released a few days later. Several months later, Mr Avella, the representative in Spain of the owner of the two ships, the Sage Group, was arrested in Portugal and held in pre-trial detention for 8 months.

7. On 27 October 2010, after completion of the preliminary judicial investigation, the examining magistrate indicted 18 persons who were accused of having organized the plundering of archaeological objects in the Bay of Cadiz, including Mr Foster, owner of the Sage Group, and Mr Avella, his representative in Spain. The directors of the Sage Group are specifically accused of having organized the operation. Sage had allegedly recruited American professional divers, an Italian specialist in underwater archaeology who was responsible for advising the principals on the probable location of shipwrecks, an art dealer in Algeciras, Morocco, who was in charge of selling the booty, a local Spanish civil servant and a firm specializing in deep-sea diving equipment.

8. The trial is scheduled to begin on 30 March 2011. The indictment is subject to interlocutory appeal within 3 days and to general appeal within 5 days. The Tribunal is not aware of any such appeals.

9. The complexity of the investigation and its international ramifications account for the length of the preliminary judicial investigation; it is therefore understandable that it has taken several years.

10. Clearly, it is not for the International Tribunal for the Law of the Sea to pass judgment on the indictment, but neither can it ignore the seriousness of the charges brought against the accused persons by the Spanish judicial authorities.

11. In the context of contentious proceedings under Part XV, section II, of the Convention, Saint Vincent and the Grenadines criticizes the lengthy judicial proceedings. In its application, it requests the release of the two ships, compensation in the amount of 10 million United States dollars, and payment by Spain of all fees and expenses related to the case. In other words, it asks the Tribunal to find in favour of the international responsibility of Spain, with all the consequences thereof.

12. The Kingdom of Spain could certainly be held responsible for misconduct by its police and judiciary, but this does not give rise to the *prima facie* jurisdiction of the Tribunal. The Applicant must also base its arguments on a specific provision of the United Nations Convention on the Law of the Sea. And this is the key issue.

13. The Parties agree that the police and judicial investigation by the Spanish authorities were conducted in the port of Cadiz, i.e., on Spanish territory or in internal Spanish waters. Article 2, paragraph 1, of the Convention states:

1. The sovereignty of a coastal State extends, beyond its land territory and internal waters and, in case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea.

Article 2, paragraph 3, adds:

3. The sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law.

14. While Part II of the Convention covers the territorial sea and contiguous zone, nowhere does the Convention address the issue of the legal regime for internal waters. Neither does it contain any provisions establishing obligations for port States, let alone provisions concerning the activities of the national police and judiciary in internal waters.

15. This is for a good reason. Internal waters are subject to the sovereignty of the coastal State, which enjoys full and exclusive jurisdiction pursuant to the rules of general international law on the scope of territorial jurisdiction.

16. Exclusive jurisdiction does not mean arbitrary jurisdiction. The coastal State is subject to certain international obligations but, within that framework, it has full and exclusive jurisdiction. Restrictions on the exercise of territorial jurisdiction are not lightly to be presumed; they require the prior explicit consent of the State.

17. Few general international conventions impose specific obligations on port States. The 1023 Geneva Statute on access to ports has been ratified by only a handful of States and its customary nature is in dispute. The port State does traditionally refrain from intervening in matters concerning the inner life of ships while moored. But that is a rule of comity, not an international obligation; it has never prevented the conduct of judicial investigations on board ships in port or internal waters.

18. It has been pointed out that Spain did not notify the authorities of Saint Vincent and the Grenadines of the arrest and detention of the M/V “Louisa” at the port of Cadiz. The Applicant has stated that the *note verbale* sent by Spain to Saint Vincent and the Grenadines on 15 March 2006, informing the Applicant of the entry and registration of the M/V “Louisa” for any necessary procedures, constituted insufficient notification. But I find no obligation to provide notification of such a procedure under international law, and certainly not under the Convention. Article 73, to which the Applicant refers, concerns the arrest and detention of fishing vessels in the Exclusive Economic Zone; it has no relation to the present case. Notification of the detention of the members of the crew and of Mr. Avella was provided in accordance with article 42 of the Vienna Convention on Consular Relations. The *note verbale* of 15 March 2006 simply provides information; it is not a formal notification and was sent as a diplomatic courtesy, not under an international obligation. It was up to the ship-owner to alert the authorities of Saint Vincent and the Grenadines if it wished to invoke the latter’s diplomatic protection. The Spanish authorities breached no rule of international law, and certainly no provision of the Convention on the Law of the Sea, in that respect.

19. Saint Vincent and the Grenadines relies in its application on articles 73, 87, 226, 245 and 303 of the Convention. But offering a handful of articles of the Convention does not amount to establishing *prima facie* jurisdiction. In the M/V “*Saiga*” (No. 2) Case, the Tribunal notes (para. 69) that

before prescribing provisional measures the Tribunal need not finally satisfy itself that it has jurisdiction on the merits of the case and yet it may not prescribe such measures unless the provisions invoked by the Applicant appear *prima facie* to afford a basis on which the jurisdiction of the Tribunal might be founded.

It states (para. 70) that “for the above reasons, the Tribunal finds that it has *prima facie* jurisdiction over the dispute.” This reasoning seems

somewhat succinct. I would have expected the Tribunal to examine each of the provisions invoked by the Applicant in support of its claim. If there is no article of the Convention to be interpreted, there is no possible interpretation and no plausible right under the Convention. Personally, I still fail to see any applicable article.

20. We have just seen that article 73 is not relevant in this case. Article 226 refers back to articles 216, 218 and 220 on penalties for pollution, which is also irrelevant here. Article 245 covers marine scientific research in the territorial sea, but the offences mentioned in the indictment do not concern marine scientific research. Article 303 simply states that the coastal State may presume that the removal of archaeological and historical objects would result in an infringement within its territory or territorial sea of its laws and regulations, but it provides no rules on declaration that an offence has been committed or on the opening of criminal proceedings.

21. Article 87 covers freedom of the high seas and, in particular, freedom of navigation. But the existence of a basic freedom does not prohibit the coastal State from exercising the powers of its police and judiciary in its own territory. It is as if the First Amendment of the United States Constitution, which guarantees the right of assembly, had prevented the police from arresting a gentleman suspected of bootlegging in 1930s Chicago because he was going to attend a peaceful meeting on prohibition.

22. The Parties argued about the location of the alleged criminal activities. Internal waters? Territorial sea? Exclusive Economic Zone? The Applicant maintained that its scientific research activities had been conducted within the area covered by the Spanish permit, i.e., the internal waters and the territorial sea. The Respondent did not dispute this. But is the issue truly relevant? If the arrest and diversion of the ship had taken place in internationally regulated waters, the rules concerning innocent passage and those covering arrest, search and diversion in the Exclusive Economic Zone might have been invoked. But such was not the case. No enforcement occurred outside the port, i.e., beyond internal waters.

23. On the other hand, the location of the alleged criminal activities is not an obstacle to prosecution within Spanish territory; otherwise, prosecution for any type of crime committed beyond internal waters – such as, for example, the many types of smuggling or trafficking in the territorial sea – would be

well-nigh impossible. In the classic *I'm Alone* case, the United Kingdom never challenged the right of the United States to enforce its legislation on the prohibition of alcoholic beverages in the internal waters or territorial sea of the United States; only beyond the territorial waters did the problem arise.

24. It is certainly for the Spanish judiciary to determine the location of the alleged criminal activities in order to identify the offence. But that is a question of fact, to be dealt with by the competent judicial authority. If the offence was committed in a location where the relevant Spanish legislation – in this case, the provisions of the Criminal Code concerning the possession of weapons of war and the plundering of Spain’s cultural heritage, particularly in its internal waters and territorial sea – is applicable, the Spanish judicial authorities may exercise criminal jurisdiction without infringing upon international law.

25. The relevant question is: are the provisions of the Spanish Criminal Code on the offences in question contrary to the United Nations Convention on the Law of the Sea or to other provisions of international maritime law? If such was the case, Saint Vincent and the Grenadines might be entitled to apply to this Tribunal on that basis. But neither of the Parties made such a claim during the written or oral proceedings. On the contrary, Spanish legislation on the protection of Spain’s cultural heritage is designed to implement the specific provisions of article 303 of the United Nations Convention on the Law of the Sea and of the UNESCO Convention on the Protection of the Underwater Cultural Heritage of 2 November 2001, to which Saint Vincent and the Grenadines recently became a Party.

26. Curiously, the Applicant argued for some kind of proportionality between the value of the archaeological objects seized on board the M/V “Louisa” and the expenses incurred by the detention of the ship. The Applicant tried to make an analogy with prompt release proceedings and evoked a relationship between reasonable bond and the value of the detained ship. This argument is quite confusing. The amount of a fine is proportional to the gravity of the offence, not to the value of the objects recovered. As to the criminal evidence, in this case the ship, considered as an instrument used for criminal purposes, its value has no relation whatsoever to the applicable fine and its detention during the criminal proceedings cannot be assigned a monetary value.

27. The Applicant’s request ultimately accuses the police and judiciary of the Kingdom of Spain of improper or delayed administration of justice. This accusation may be well-founded, but it bears no relation to the application or interpretation of the United Nations Convention on the Law of the Sea. Saint Vincent and the Grenadines may be entitled to offer its diplomatic protection to the owners of the M/V “Louisa” and to its crew. As noted by the

International Law Commission in its draft articles on diplomatic protection, adopted in 2006, and particularly in article 18 thereof, Saint Vincent and the Grenadines may, if appropriate, request peaceful settlement of the dispute by the legal avenues available to it, in conformity with Article 33 of the Charter of the United Nations. But in applying to our Tribunal, the Applicant has come to the wrong address. The International Tribunal for the Law of the Sea has no jurisdiction to examine a case that in no way concerns the interpretation and application of the United Nations Convention on the Law of the Sea.

28. For these reasons, I must disagree with the decision of the Tribunal to accept *prima facie* jurisdiction in the case. I naturally consider that the prescription of any provisional measures would not be appropriate. But that is not the question. I am therefore compelled to vote against any decision on provisional measures since I consider that the Tribunal has no jurisdiction to decide whether to prescribe provisional measures or not.

29. The decision of the Tribunal, taken in respect of an application made under article 290 of the Convention, concerns only the prescription of provisional measures. The Tribunal will no doubt return at length, at a later stage, to the question of its own jurisdiction, either at the request of one of the parties or *proprio motu*, as did the International Court of Justice in the *Anglo-Iranian Oil Company* case.

(signed) J.-P. Cot