SEPARATE OPINION OF JUDGE COT

(*Translation by the Registry*)

Preface.

I. Facts

The issue. The proceedings. Production of the Tupet contract. Terms of the contract.

II. Legal framework

Inherent power of the Tribunal. Applicable law. Precedents. Fundamental ethical principles. Agents. A code of conduct? Sanctions.

III. Was it fraud or not?

Appearance of fraud. Consequences for the conduct of the proceedings. Conclusion.

Preface

1. Fraud on the Tribunal? It is a fair question. I am echoing the provocative phrase recently used by Judge Schwebel in reference to the *Nicaragua* v. *United States* case decided by the International Court of Justice in 1986.[1]

2. The Tribunal did not focus on this aspect of the "Louisa" case. It confined itself to a brief expression of regret that the Tupet contract had been produced belatedly. It went on to set out the grounds for its lack of jurisdiction to dispose of the case on the merits. I subscribe to that conclusion. Nevertheless, I thought it helpful to elaborate upon the ethical problems raised in this case.

---

[1] S. Schwebel. *Celebrating a Fraud on the Court.* A.J.I.L., vol. 106 (2012), pp. 102-105, and the debate with Paul Reichler, Counsel for Nicaragua, in the same periodical, pp. 316-321 and pp. 582-583.

I. Facts

The issue

3. In the present case, the dispute brought before the Tribunal concerned the nature of the activities conducted by the Sage companies (Sage) on board the "Louisa" and the "Gemini III". Saint Vincent and the Grenadines (Saint Vincent), the flag State of the "Louisa", filed an Application against the Kingdom of Spain (Spain). Saint Vincent sought: the release of the vessels, which had been detained in the port of Cadiz by the Spanish authorities pursuant to court proceedings instituted against, among others, the managers of Sage; and reparation for the damage caused by the improperly brought prosecutions.

4. The "Louisa" and a smaller vessel, the "Gemini III", were moored in the port of Cadiz. They were conducting research in Spanish internal and territorial waters. To that end, Sage, the owner of the boats, had installed equipment including side-scan sonar on the vessels. The Applicant believed that the Bay of Cadiz could hold substantial oil and gas deposits. It is also the case that, as Cadiz was the port of embarkation and return for Spanish galleons sailing out to America to bring back gold and precious objects during the colonial period, the Bay of Cadiz is rich in Spanish shipwrecks dating back to that time.

5. Suspecting illegal archaeological plundering in its internal and territorial waters, Spain brought criminal proceedings against John Foster, the owner of Sage, and his representative in Spain, Mario Avella. The two men were accused of taking part in a complex operation involving the plundering and resale of archaeological objects found off the port of Cadiz. Counsel for Saint Vincent, the flag State of the "Louisa", claimed that neither Mr Foster nor Mr Avella was conducting archaeological research. Their only objective was to carry out a survey of the sea floor to determine whether oil and gas were present. True, Sage had agreed to take on board managers and divers from a Spanish company, Tupet, who were interested in archaeological finds. Sage however was not involved in these activities, which were secondary to oil and gas exploration.

6. The main issue in the proceedings was whether or not the activities conducted by Sage, its representatives and its employees were in compliance with the permits issued by the Spanish authorities. If so, it would seem that the prosecutions brought by the Spanish judicial authorities had no basis. On the other hand, if Messrs Foster and Avella had been taking part in the archaeological research

conducted by Tupet without having applied for the necessary permit, the Spanish judicial authorities would seem to have been justified in prosecuting them for damaging Spanish historical patrimony and for the crime of trafficking archaeological objects.

The proceedings

7. The proceedings, first written and then oral, focused on the nature of the activities conducted onboard and from the "Louisa" and the "Gemini III" in the Bay of Cadiz.

8. There were two thrusts to Saint Vincent's arguments. First, the managers of Sage were interested only in hydrocarbon exploration to the exclusion of any interest in archaeological expeditions. Second, if the Tupet managers on board the "Gemini III" were conducting archaeological research, that activity did not involve those running Sage, who were not aware of the procedures and believed in good faith that Tupet possessed the necessary permits.

9. Spain disputed both these assertions. It took the view that the vessels were equipped for archaeological research and that such equipment was not warranted for oil and gas exploration alone. The managers of Sage had to be aware of the archaeological research activities, as the vessel had been equipped for such. The seizure of archaeological objects on board the "Louisa" in the course of the initial search reinforced the Spanish authorities' suspicions and justified the opening of a criminal investigation.

10. During the oral proceedings, each Party called witnesses in support of its case.

11. With regard to the nature of the research conducted on board the "Gemini III", Saint Vincent called Mr Avella, Sage's representative in Spain, on the afternoon of 4 October, the morning of 5 October and the afternoon of 5 October. The examination was conducted by Mr Weiland and the cross-examination by Mr Aznar and Ms Escobar. Mr Avella clarified the nature of his dealings with the treasure hunters and stated that he had no relationship with Mr Valero or Mr Bonifacio. On the morning of 6 October Saint Vincent then called Mr McAfee, who has considerable experience in hydrocarbon exploration and oil drilling. He was questioned by Messrs Weiland and Aznar. He affirmed the suitability of the vessels' equipment, in particular the magnetometers and side-scan sonar. Mr Mersch, a public accountant for Sage, questioned by Ms Ford and Mr Aznar on 6 October, gave evidence to support the amount of compensation claimed by Saint Vincent. In answer

to a question, he stated that some divers were paid by Sage, while others were employed by Tupet.

12. Spain called Ms Martínez de Azagra Garde, a technical adviser at the Spanish Government's Directorate-General for Energy Policy and Mining. She was questioned on the afternoon of 8 October by Ms Escobar and Mr Weiland with a view to explaining what data are available in the Spanish archives for the purposes of oil and gas exploration. Then Mr Stow, a Professor at the Institute of Petroleum Engineering in Edinburgh and an expert in hydrocarbon exploration, was called on 9 October and questioned by Messrs Aznar and Weiland. He disputed that the equipment on board the "Gemini III" was suitable for oil and gas exploration. He pointed out, in particular, that oil did not have a magnetic signature and that the use of magnetometers was not justified. He doubted the usefulness of the research carried out to that end by Sage, as the possibility of finding viable deposits in the area was very low in his opinion. Mr James Delgado, an American archaeologist, was questioned by Messrs Aznar and Weiland on 9 October. He stated that the methods used by Sage were those of archaeological research and that the basic map used could well have been a map showing shipwreck locations in the Bay of Cadiz.

13. These lengthy examinations and cross-examinations allowed each Party to build its case: oil and gas exploration in Saint Vincent's eyes; archaeological plundering in Spain's.

14. Saint Vincent did not confine itself to producing witness testimony in support of its assertions. Counsel for Saint Vincent stated explicitly and repeatedly that neither Mr Foster, the owner of Sage, nor Mr Avella, his representative in Spain, was interested in archaeological research. Their only objective was oil and gas exploration.

15. A few statements recorded in the verbatim records of the hearings are telling in this regard. For example, on 5 October 2012 Counsel for Saint Vincent stated: "Neither Mario Avella nor John Foster were focused on 'treasure'; they were searching for potential gas deposits with expensive side-scan sonar on the Louisa that also, coincidentally, can sometimes show anomalies on the sea floor of possible interest to treasure-hunters". Counsel for Saint Vincent added: "Frankly, the managers of the Louisa made a mistake, in my view, in entering into a contract with treasure-seekers who represented that the same data Sage planned to gather about the sea floor near Cádiz might reveal possible treasure sites" (ibid.).

16. Counsel for Spain noted that Sage had concluded an agreement with Tupet, a company run by Messrs Valero and Bonifacio, two people with a certain reputation for looting archaeological artefacts. Saint Vincent stated that Sage was unaware of the illegality of Tupet's activities on board the "Gemini III". Sage's representative in Spain, Mr Avella, nevertheless admitted that Tupet was interested in archaeological "treasures".

Production of the Tupet contract

17. Saint Vincent did not produce the text of the Tupet contract during the written proceedings or the oral proceedings, even though Counsel for Saint Vincent were then claiming that those in charge of Sage were interested solely in exploring for oil. The Tribunal was obliged to request a copy of the contract on 11 October 2012.

18. The Tupet contract was provided to the Tribunal on 17 October 2012, one week after the end of the oral proceedings. The Agent of Spain was sent the contract for comment. In a letter of 18 October 2012, the Agent merely stated:

> In reference to the above mentioned letter, as Agent of the Kingdom of Spain I am bound to express my firm opposition to the blatant attempts by the Co-Agent of Saint Vincent and the Grenadines to submit new arguments to the Tribunal once the Oral Proceedings before that Honourable Tribunal have come to an end.

19. The Agent thus requested that a major piece of evidence supporting Spain's arguments, produced at the behest of the Tribunal, be struck from the record. She refrained from making any substantive comments.

20. The Co-Agent and Counsel for Saint Vincent was perfectly aware of the content and importance of the contract, as is shown by his statements during the final oral pleadings presented by Saint Vincent.

> The terms of the contract between Sage and Tupet are most interesting, and I must apologize to the Tribunal because when I saw the question, it made me go and check through our annexes because I was confident we had supplied the contract. It was certainly our intention to supply the Tupet-Sage contract. I can summarize the important terms and I will provide the Tribunal with a copy, I hope by tomorrow. I was not able to locate one in the last minutes before we began our session today.

Essentially, the Sage contract with Tupet was a joint venture agreement where Sage agreed to use the Tupet permit, and the contract has language about "If by happenstance some shipwreck is discovered then Tupet will take the necessary measures to acquire whatever permits are required by Spanish law." So, as you will hear in further argument this afternoon, we have never tried to conceal the dual interest here of Sage. They had a thing with Tupet. John Foster, as a beneficial owner of Sage, is in the oil business. He sees that Tupet has a permit that is going to, he thought, allow him to drag some sonar and magnetometer devices around an area that seemed to be one of the hottest oil and gas areas in the world, so they entered into a venture, and if anything was found, Tupet would go and acquire whatever additional permits were necessary. I will obtain the agreement and provide it to the Tribunal.

Terms of the contract

21. The agreement primarily concerns the conditions for the search for archaeological objects and the sharing of the hoped-for profits. In addition, Mr Foster undertakes to pay monthly compensation to the managers of Tupet and to their employees for the duration of the expedition.

22. The agreement relates exclusively to archaeological research, as can be seen from the full text, which is available on the Tribunal's website.[2] There is no mention of oil and gas exploration. The agreement is signed personally by John Foster, the owner of Sage.

23. Article I, section 1.01, of the agreement provides in part that Sage and the Contractors agree to conduct marine research and exploration for the purpose of studying marine geological formations. If by happenstance, during the course of marine research and exploration, the Contractors and Sage discover historical artefacts, sunken vessels, or any other lost items of value, the Contractors and Sage agree to pursue acquisition of those items or payment for the intrinsic value of those items under the law of the sovereign owner.

24. If the Contractors and Sage discover by happenstance a shipwrecked vessel, the parties agree to salvage that vessel and any other shipwrecked vessel discovered while conducting that salvage according to the law of the sovereign owner of the vessel(s). The Contractors represent and warrant that no other contracts, agreements, understandings or negotiations have been made or will be made with any other entity, individual or corporate, regarding salvage operations for

[2] The full text of the agreement is available on the Tribunal's website: http://www.itlos.org/index.php?id=148&L=0

these vessels. The Contractors agree during the term of the contract not to acquire "Finder's Rights" or salvage permits for any party other than Sage. During the term of the agreement, Sage will have the "First Right of Refusal" to conduct any salvage mission for shipwrecked vessels, historical artefacts or any other items of value discovered by the Contractors and Sage.

25. Section 1.04. of the agreement contains detailed provisions governing the apportionment of the results of the archaeological research. Nothing is left to chance. As we can see:

> (viii) Sage and Contractors agree that all recovered items of value, including items of purported Roman or Phoenician origin or any other foreign origin, found and identified during a salvage operation, will be included in the total assessed value for determination of the division of or payment for recovery. The recovered items shall include but not be limited to gold bars and discs, gold chains, two-, four- and eight-escudo gold coins, silver bars, wedges or barretones, silverware and gilded silverware, one-, two-, four- and eight-real silver coins, navigational instruments, loose and set precious stones . . ., jewelry . . ., religious artefacts . . ., bronze cannons, swords, muskets, daggers and all other materials of value.

26. In addition, section 1.03 provides that from the effective date of the contract, Sage agrees to pay monthly: 3 000 euros to Luis A. Valero de Barnabe Gonzales, 2 500 euros to Claudio Bonifacio, and 1 000 euros to each of two assistants for duties performed under the contract. The parties agree to an exchange rate of 1.3 US dollars to 1 euro. Sage is to pay the Contractors on the last business day of each month.

II. Legal framework

27. Thus far, departures from fundamental ethical principles have been rare in international courts and tribunals but, with globalization and the opening up of the international bar, I believe that they are likely to be more frequent in future. I will return to this point.

Inherent power of the Tribunal

28. The power of the Tribunal to decide the case is the first question. This is an inherent power of any court. Policing the written proceedings and the hearing is

necessary for the proper conduct of the work of the court, in particular to ensure respect for the principle of equality between the parties.

29. This inherent power of international courts and tribunals is longstanding. It has been affirmed since the dawn of modern international arbitration, in the *Bay of Fundy* case in 1814, wherein the President of the arbitral tribunal asked the agents to undertake to respect the elementary principles of loyalty in the debates (Moore, *International Adjudications*, vol. VI, p. 22). It was reaffirmed when the Statute of the Permanent Court of International Justice was adopted in 1920. It is founded on the elementary requirements of administration of justice and organization of the procedure, as has been underlined by Chester Brown ("The Inherent Powers of International Courts and Tribunals", *BYBIL*, vol. 66 (2005), pp. 195-244).

30. The International Court of Justice identified this inherent power in the *Nuclear Tests* (*Australia* v. *France*) case*:*

> 23. In this connection, it should be emphasized that the Court possesses an inherent jurisdiction enabling it to take such action as may be required, on the one hand to ensure that the exercise of its jurisdiction over the merits, if and when established, shall not be frustrated, and on the other, to provide for the orderly settlement of all matters in dispute, to ensure the observance of the "inherent limitations on the exercise of the judicial function" of the Court, and to "maintain its judicial character" (*Northern Cameroons, Judgment, I.C.J. Reports 1963*, at p. 29). Such inherent jurisdiction, on the basis of which the Court is fully empowered to make whatever findings may be necessary for the purposes just indicated, derives from the mere existence of the Court as a judicial organ established by the consent of States, and is conferred upon it in order that its basic judicial functions may be safeguarded. (*Nuclear Tests* (*Australia* v. *France*)*, Judgment, I.C.J. Reports 1974*, p. 253 at pp. 259-260)

31. This power has never been challenged before international courts or tribunals. It is a functional requirement without which administration of justice is impossible. The inherent power only comes into play in the absence of more specific rules, as is the case in a number of international courts and tribunals, including this Tribunal.

32. Does this inherent power encompass the authority to lay down rules of conduct and explicit sanctions for their breach? The question cannot be framed in such clear-cut terms. I would observe that international courts and tribunals have not hesitated to adopt practice directions. These are not compulsory. But the parties do respect them, as they well know the risks entailed should they not.

Applicable law

33. The Statute and the Rules of the Tribunal do not offer any guidance on respect for ethical rules by the parties to proceedings. The situation is like that at the International Court of Justice or the Permanent Court of Arbitration. Many more recently established specialized international courts and tribunals, by contrast, have adopted codes of conduct applicable to advocates and counsel. That is the case in the European Court of Human Rights and the International Criminal Court.

34. Alone among the main domestic codes of ethics, the British code of conduct requires members of the British bars to comply with its ethical rules before international fora. Does this mean that other advocates or counsel who are not members of a bar are free to act as they please? Certainly not! Even though not required to respect their own national rules, they are still obliged to respect the code of conduct of the international jurisdiction before which they appear. Where there is no such code – as in the case here – they must respect the rules of general international law applicable to them.

Precedents

35. International precedents are worth examining. Let us limit ourselves to comparable international fora: the International Tribunal for the Law of the Sea; the Permanent Court of International Justice; the International Court of Justice; inter-State arbitration tribunals. False or fraudulent statements are not unprecedented in international courts and tribunals. I would like to thank Dr Arman Sarvarian, who has allowed me to consult an advance copy of his work *Professional Ethics at the International Bar*, soon to be published by Oxford University Press, for the valuable information and analysis in this leading work on the subject.

36. The problem already arose back in the *Fur Seals in the Bering's Sea* case, decided by an arbitral tribunal in 1893. The Government of the United States had produced a set of Russian documents with translations embellishing the original text in a way buttressing its case. This "falsification", to use the term of the United Kingdom, appears to have taken place without the knowledge of the Agent of the United States. The good faith of the United States was not in question.

37. In the case of the *Franco-Hellenic Lighthouses* (*Judgment, P.C.I.J., Series A/B n° 62*, p. 4), one of the agents referred to a document but could not guarantee its authenticity. Upon questioning by the President of the Court, the agent declared that the document was not essential and withdrew it (*P.C.I.J., 16th report, Series E, n° 16*, p. 186).

38. The debate between Judge Schwebel, a former President of the International Court of Justice, and Paul Reichler, Counsel and Advocate for Nicaragua in the case between it and the United States of America, concerns an incident of a different nature. In an article entitled "Celebrating a Fraud on the Court" Judge Schwebel recently accused Nicaragua of fraudulent conduct in the 1986 proceedings. The Agent of Nicaragua had produced an affidavit asserting that Nicaragua had in no way assisted the Salvadoran opposition. That statement was shown to be untrue some years after the judgment had been delivered. Mr Reichler denied the accusation (*A.J.I.L., vol. 106, 2012*, pp. 102-105 (Schwebel), pp. 316-321 (Reichler), pp. 582-584 (Schwebel and Reichler)). Since the facts in this respect came to light too late, the Court was unable to take any action.

39. In the case between Qatar and Bahrain (*Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (*Qatar* v. *Bahrain*), *Merits, Judgment, I.C.J. Reports 2001*, p. 40), Qatar produced 82 false documents during the written proceedings in support of its claims. After Bahrain brought the issue to the attention of the President of the Court, Qatar withdrew the documents in question. The incident was thus resolved before the oral proceedings on the merits opened. It seems that Counsel for Qatar had not been aware of the fraud. But Bahrain insisted during the oral hearings that the incident had "polluted" the proceedings in a lasting way (see oral statement by Lauterpacht, 8 June 2000, pp. 11-15; *sep. op*. Fortier, p. 452, para. 4).

40. These precedents warrant several observations. Most of these cases involved falsified documents or documents of uncertain authenticity. In the *Fur Seals in the Bering's Sea*, *Franco-Hellenic Lighthouses* and *Qatar* v. *Bahrain* cases, the problem was solved before the closure of the proceedings. In the *Nicaragua* v. *United States* case, the alleged fraud was discovered some ten years after the judgment and is still denied by Mr Reichler. While these precedents do confirm the inherent jurisdiction of the court or tribunal to deal with the matter, they give no guidance as to the applicable rules of law.

41. The difficulty stems largely from the diversity of national legal traditions and, in particular, the opposition between the civil law or Romano-Germanic tradition on one hand and the common law tradition on the other. Some ethical rules are

opposed in the two traditions. That is the case with the rules on relations between lawyers and witnesses. In the civil law tradition, contact between witness and counsel before the hearing is strictly prohibited. Common law requires a party calling a witness to indicate the general sense of the testimony so as to allow the opposing party to prepare its cross-examination. Witness-proofing, i.e., counsel's preparation of the witness, is even compulsory in United States law. This would be considered a criminal offence in France!

42. The International Law Association (ILA) has taken up the problem. The ILA working group drafted a set of minimalist requirements published in 2010 under the title "The Hague Principles". These principles applicable to advocates and counsel follow on from the "Burgh House Principles" applicable to international courts and tribunals and judges on them. The principles are useful but they cannot be considered to be compulsory *per se*. Certain rules are very specific. Others are more general principles common to the major international legal systems. International courts and tribunals are invited to pick and choose elements from among these rules and principles for incorporation into codes of conduct they may see fit to adopt.

43. In the meantime, and in the absence of such a code of conduct for the Tribunal, does this mean that there is no applicable rule of international law? Article 293 of the Convention on the Law of the Sea calls upon the Tribunal to apply "this Convention and other rules of international law not incompatible with this Convention". Article 38 of the Statute of the International Court of Justice lays down the applicable rules, including "the general principles of law recognized by civilized nations" (Article 38(1)(c)). Some of these ethical principles can be found in all major legal systems of the world.

44. The Council of Bars and Law Societies of Europe (CCBE) has adopted a set of provisions which are relevant to the case at issue. The CCBE brings together European bars and law societies reflecting the two main traditions referred to above. It sets out the applicable rules in two separate documents: a Charter of Core Principles of the European Legal Profession and a Code of Conduct for European Lawyers.

45. The distinction is an important one. The Code of Conduct contains a set of precise rules the bars and law societies have agreed upon. By contrast, the core principles, which are broader in nature, are placed on record and officially proclaimed. "There are core principles which are common to the whole European legal profession, even though these principles are expressed in slightly different ways in different jurisdictions . . . European lawyers are committed to these

principles, which are essential for the proper administration of justice, access to justice and the right to a fair trial . . . Bars and Law Societies, courts, legislators, governments and international organizations should seek to uphold and protect the core principles in the public interest."

46. The Commentary on principle (i) of the CCBE Charter of Core Principles describes the lawyer as an "officer of the court" or a "minister of justice" and provides that a lawyer must never knowingly give false or misleading information to the court.

47. This is not a specifically European principle. It is found in each of the abovementioned codes of conduct, be it that of the International Bar Association, the International Law Association's "Hague Principles", the codes of conduct of the International Criminal Court, etc. It is a general principle of law within the meaning of article 38 of the Statute of the International Court of Justice and, as such, is applicable to the present case.

Agents

48. Do such principles apply to agents and co-agents or only to advocates and counsel? As the agent is the representative of a sovereign State, is it conceivable that he be subject to the authority of a court whose jurisdiction depends upon the consent of that State? Most jurisdictions that have adopted a code of conduct distinguish between agents on one hand and advocates and counsel on the other. For instance, the European Court of Human Rights demands of advocates and counsel that they be members of a bar. But the same is not required of agents, who are appointed in the discretion of sovereign States. Before general international courts and tribunals, such as this Tribunal or the International Court of Justice, the rule is that sovereign States are free to appoint counsel and agents without any specific qualification being required.

49. While this difference between the positions of agents on the one hand and advocates and counsel on the other stands to reason in respect of the qualifications needed to act as a State's representative before certain courts and tribunals, it cannot be sustained once the procedure is under way, for the overriding principle then becomes that of strict equality between the parties. For inter-State litigation, as in the present case, respect for the sovereignty of one party finds its limit in the threat to the equality of the rights – and thus to the sovereignty – of the opposing party. This holds in particular for respect for fundamental ethical principles. Moreover, I do not know of any statement by which a sovereign State has claimed a right to disregard these fundamental rules. On the contrary, as noted in respect

of the arbitration in 1814 in the *Bay of Fundy* case, the agents of the States willingly swore an oath of loyalty to the President of the arbitral tribunal.

50. Compliance by agents and co-agents with ethical principles and codes of conduct is all the more necessary today as globalization has brought about a sea change. When international litigation comprised a small number of cases brought to international arbitration or before the Hague Court, a well-defined profile characterized agents, being diplomats representing their States. Such is no longer the case. The proliferation of international tribunals and the diversification of legal disputes have opened up international litigation and substantially enlarged the international bar. Agents are no longer in all instances *de facto* subordinate to the sovereign authority of States, as they once were. Mixed litigation, semi-public and semi-private, is becoming more common. Agents and co-agents act more and more often for private parties, under the cover of inter-State litigation and the fig leaf of diplomatic protection.

51. This phenomenon is marked in the law of the sea by the development of flags of open registry or "flags of convenience". After granting their flags, open-registry States often have no interest in following subsequent events, in particular any international litigation that might arise. The Convention on the Law of the Sea has taken the situation into account in the prompt release procedure. Article 292(2) provides: "The application for release may be made only by or on behalf of the flag State of the vessel". The wording covers the case of open-registry States, permitting the shipowner to take legal action "on behalf" of the flag State in order to assert his rights and those of the crew.

52. In the present case, it is unlikely that the Saint Vincent authorities closely monitored the "Louisa" case. The Agent did not appear at the hearing. The Co-Agent, a national of Saint Vincent, left in the middle of the oral proceedings. The brunt of the proceedings, both written and oral, was shouldered by the other Co-Agent, an American lawyer who was also the personal lawyer of the shipowner, John Foster.

53. The problems arising from this kind of representation are not unprecedented. In *The "Grand Prince" Case* (*Belize v. France*), (*Prompt Release, Judgment, 20 April 2001, ITLOS Reports 2001*, p. 17, see *sep. op. Laing* and *decl. Cot*), the Tribunal confronted a similar difficulty. The representativeness of the agent was not all that clear. Governmental Departments of Belize seemed to have diverging views as to the conduct of the proceedings. But there was no issue of any breach of fundamental ethical principles.

A code of conduct?

54. Globalization of international justice is to be greeted as a sign of progress. The growth in and diversification of international litigation reflect the will to settle international and transnational disputes by the rule of law. The enlargement of the international bar is to be welcomed, as it is renewing the traditional "invisible bar", a bar with high standards, but a very restricted one.

55. The change in situation does however call for a change in the normative framework of international litigation. Objections once made to the explicit formulation of codes of conduct were valid in respect of the "invisible bar" (see, e.g., Berman in Zimmerman *et al.*, *The Statute of the International Court of Justice. A Commentary* (2006), art. 42, pp. 975-976). Such objections no longer hold given the appearance at the bar of lawyers who specialize in domestic law and are often quite ignorant of the special rules of international litigation.

56. It is no doubt a pity that the "international bar" does not have its own professional organization or disciplinary body to which this kind of problem could be referred. The absence of a code of conduct clearly setting out the rules to be observed complicates matters. Inter-State jurisdictions like the International Court of Justice, this Tribunal and arbitral tribunals have no explicit authority to apply fundamental principles recognized in all domestic legal systems, even when a principle as basic as that of the equality of parties is endangered by objectionable moves.

57. The difficulty is not legal but political. I consider that a jurisdiction has the inherent power to adopt a code of conduct and thus to clearly signal to the parties the norms applicable in the proceedings. A formal code of conduct would be most helpful. As far as the applicable procedure is concerned, it would allow the situation to be clarified with identifiable rules for the conduct of proceedings.

58. As we know, international litigation follows the adversary, not inquisitorial, tradition. But the rules on witness examination are fuzzy. They are modelled on the common-law rules but are not as rigorous. In the Anglo-American system, counsel asking a leading question must reformulate it. Such is not always the case in international courts. Judges and advocates are not necessarily familiar with procedural subtleties. In the *Louisa* case, the Spanish side did not object to the wording of questions put by the American counsel unless it considered the honour

of the Kingdom of Spain to be at stake . . . Such an imbalance clearly favours the party with full mastery of the techniques of adversary procedure.

59. However, there is strong opposition to the adoption of codes of conduct by international courts and tribunals. States parties fear a possible abridgement of their sovereign right to present their cases as they wish. In my opinion, this view is misguided in light of the globalization of international justice and litigation. States should be reassured by the spelling out of explicit rules designed to protect them from fraudulent conduct. But opposition is there and needs to be acknowledged.

60. As already seen, the absence of codified rules does not mean that fundamental ethical principles may be freely breached, but it does make implementation of those principles trickier. From the procedural perspective, the only possibility may be minor accommodations arranged by the president of the court or tribunal if time permits. If not, decisions may be taken without having been preceded by a proper adversarial debate allowing both parties a fair hearing on the alleged misconduct. Such was the case in this instance, where the alleged misconduct was unveiled after closure of the oral proceedings.

61. Such a situation is unfortunate for all concerned. The party injured by the alleged misconduct has no clear possibility of recourse and therefore cannot lay out its grievances. The party allegedly responsible for the misdeed cannot justify its conduct. The court or tribunal is in an awkward position. It cannot clearly establish the fact or not of the apparent or alleged misconduct.

62. The absence of a code of conduct also complicates the question of sanctions. Codes of conduct adopted by specialized courts and tribunals set explicit rules not only as to the proceedings, but also as to sanctions. There are no such rules in the absence of a formal text. The court or tribunal is thus unable to choose a formal sanction appropriate to the gravity of the breach.

Sanctions

63. Without a code of conduct notified in advance to the parties, it is difficult to impose formal sanctions. Violation of fundamental principles, where substantiated, nevertheless must bear consequences. There is a price to be paid. The misconduct obviously influences the deliberations. It stains the credibility of

the arguments advanced. If the court or tribunal comments on the misconduct, the reputation of the counsel involved is affected in the small world of international justice.

64. Other informal sanctions may be considered. A case may be referred to the national disciplinary body. This possibility, on the motion of the injured party, is provided for in certain codes of conduct and could be considered to fall within the inherent powers of the international court or tribunal. A State whose counsel has jeopardized the case by breaching fundamental principles may itself bring misconduct proceedings in its own domestic courts. The same applies in the case of a private party acting within the framework of diplomatic protection. Such a party may well bring proceedings for injury caused by fraudulent practices having resulted in a dismissal or adverse verdict in the main proceedings on account of gross misconduct of counsel (Sarvarian, op. cit.).

65. In the absence of a proper code of conduct, these stopgap measures are short of satisfactory. One can only hope that a time will come when general international courts and tribunals will adopt clear rules embodied in codes of conduct instead of confining themselves to implementing, piecemeal, fundamental principles which, though beyond challenge, lack precision by very reason of their general nature.

66. Judicial decisions are taken at a given time. The judge turns to the tools available. International judicial bodies should at least warn those appearing before them that there is a body of fundamental principles and that the court or tribunal is responsible for ensuring compliance with them. Insertion of a reference to these principles in the practice directions of this Tribunal would be a modest and useful step. Modest, as practice directions are not formally compulsory; useful, so that agents and counsel know full well that disregard of these fundamental ethical standards, implicit in all judicial proceedings, is not without consequences.

III. Was it fraud or not?

67. As already noted, in most of the cited precedents from international courts and tribunals, it was possible through the authority of the president to resolve the problem in the course of the proceedings. It was not so in the present case. The problem came to light after the end of the proceedings, thereby preventing the President of the Tribunal finding a solution. In fact, it would have been necessary to reopen the proceedings to allow the two Parties to present arguments on the terms of the contract, i.e. to recommence the oral proceedings, and that was out of the question.

Appearance of fraud

68. As the International Law Association states in its "Hague Principles on Ethical Standards for Counsel Appearing before International Courts and Tribunals" (2010):

> Counsel shall present evidence in a fair and reasonable manner and shall refrain from presenting or otherwise relying upon evidence that he or she knows or has reason to believe to be false or misleading.

69. The facts on their face militate in favour of fraud. Some Counsel for Saint Vincent might have been kept unaware of the contract, but the Co-Agent was fully informed about the content of the agreement between Sage and Tupet. He mentioned this on the last day of the oral pleadings by Saint Vincent.

70. What does the Tupet contract, uncovered by the Tribunal "by happenstance" (to use the term employed by the drafters of that contract), tell us? It shows that, throughout the oral proceedings, Counsel for Saint Vincent knowingly expounded an argument they knew full well to be false. They tried to make the Tribunal believe that the managers of Sage were not interested in archaeological research and that, in their eyes, the only purpose of the "Gemini III" expedition was oil and gas exploration.

71. However, the contract, devoted solely to archaeological research in the Bay of Cadiz and the sharing of proceeds between Sage and Tupet, is signed personally by John Foster. He undertakes to make substantial monthly payments to his associates, Messrs Valero and Bonifacio, and their employees. He makes equipment available to them for that research.

Consequences for the conduct of the proceedings

72. It would appear that Counsel for Saint Vincent tried knowingly to mislead the Tribunal. Furthermore, they created a serious imbalance in the proceedings and infringed the principle of equality between the Parties. There can be no doubt that, had Counsel for Spain been aware of the terms of the agreement between Sage and Tupet, they would have structured their oral argument differently, in particular their cross-examination of the witnesses produced by Saint Vincent.

73. In his statement, the Co-Agent of Saint Vincent does not mention the monthly compensation paid by Sage to Messrs Valero de Barnabe Gonzalez and Bonifacio and their assistants. The point is of some importance, as it indicates the link between the two contracting parties in relation to the search for archaeological objects. That substantial compensation indicates, at the very least, a link of active cooperation in the underwater archaeological search expedition between Mr Foster, on one hand, and Messrs Valero and Bonifacio, on the other, if not a relationship in which the latter were subordinate to the former.

74. Had the contract been provided before the hearing the next day, the other Party could have responded during the oral proceedings. But it was not; it was transmitted one week later, after the proceedings had been closed.

75. In the letter transmitting the Tupet contract, dated 17 October 2012, the Co-Agent points out that the contract contains numerous references to the "happenstance discovery of a shipwrecked vessel", "finder rights", the "first right of refusal", etc. He infers, somewhat surprisingly, that the shipowner could therefore have believed that the Tupet permit covered "data collection". It is difficult to believe that an experienced man like Mr Foster, having committed substantial sums to the venture, did not check whether or not the necessary permits existed. Moreover, the repeated references in the contract to "happenstance" discoveries give a clear indication of the nature of the operation: if a discovery is made, it will have been by chance and not as a result of a search duly authorized by the competent authorities.

76. The Tribunal was not able to shed light on the matter as it wished to do. One Judge asked a question about the status of the divers on board the "Gemini III": were they employed by Sage? By Tupet? By both? If the Tribunal had been aware of the Tupet contract, the Judge would have certainly expanded the question and asked whether the terms of the contract providing for monthly remuneration of the Tupet managers by Sage had been performed and why. The debates would have taken a different turn.

77. The belated production of the Tupet contract, after the end of the oral proceedings, completely destabilized the proceedings as regards the crucial issue of the nature of the activities conducted by Sage in the Bay of Cadiz and, consequently, the merit of the prosecutions brought by the Spanish judicial authorities. Had the Tupet contract been produced in good time, i.e. during the written proceedings, it would have given rise to an adversarial exchange permitting an assessment of its importance and its impact.

78. So, was it fraud or not? The Tribunal, in its wisdom, chose merely to regret that the Tupet contract had been produced belatedly (paragraph 47 of the Judgment) and to dismiss the Application submitted by Saint Vincent. It would have been difficult for it to go any further in the absence of adversarial proceedings held to allow the Co-Agent of Saint Vincent to explain the strategy adopted. Reopening the proceedings was not really conceivable, especially since the opposing party, Spain, had not reacted to the content of the contract and had not requested the Tribunal to take any particular measure.

79. Let it suffice to say, therefore, that it is regrettable that this "polluted the case", to use the expression of Sir Elihu Lauterpacht in the *Qatar* v. *Bahrain* case.

(*signed*) Jean-Pierre Cot