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INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

2019

Saturday, 22 June 2019, at 10 a.m.,
at the International Tribunal for the Law of the Sea, Hamburg,

President Jin-Hyun Paik presiding

THE M/T "SAN PADRE PIO" CASE

(Switzerland *v.* Nigeria)

Verbatim Record

Present:	President	Jin-Hyun Paik
	Vice-President	David Attard
	Judges	José Luís Jesus
		Jean-Pierre Cot
		Anthony Amos Lucky
		Stanislaw Pawlak
		Shunji Yanai
		James L. Kateka
		Albert J. Hoffmann
		Zhiguo Gao
		Boualem Bouguetaia
		Markiyan Kulyk
		Alonso Gómez-Robledo
		Tomas Heidar
		Óscar Cabello Sarubbi
		Neeru Chadha
		Kriangsak Kittichaisaree
		Roman Kolodkin
		Liesbeth Lijnzaad
	Judges *ad hoc*	Sean David Murphy
		Anna Petrig
	Registrar	Philippe Gautier

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as Agent;

and

Professor Lucius Caflisch, Professor Emeritus, Graduate Institute of International and Development Studies, Geneva,
Professor Laurence Boisson de Chazournes, Faculty of Law, University of Geneva,
Sir Michael Wood, Member of the Bar of England and Wales, Twenty Essex Chambers, London, United Kingdom,

as Counsel and Advocates;

Dr Solène Guggisberg, Faculty of Law, Economics and Governance, Utrecht University, The Netherlands,
Mr Cyrill Martin, Swiss Maritime Navigation Office, Directorate of International Law, Federal Department of Foreign Affairs,
Dr Flavia von Meiss, Directorate of International Law, Federal Department of Foreign Affairs,
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Ambassador Yusuf M. Tuggar, Head of Nigeria Mission, Berlin, Germany,

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and

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Ambassador Mobolaji Ogundero, Deputy Head of Mission, Berlin, Germany,
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Mr Ahmedu Imo-Ovba Arogha, Economic and Financial Crimes Commission, Abuja,
Lieutenant Iveren Du-Sai, Nigerian Navy, Abuja,
Mr Abba Muhammed, Economic and Financial Crimes Commission, Abuja,
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THE PRESIDENT: Good morning. The Tribunal will continue the hearing in the *M/T "San Padre Pio"* case. This morning we will hear the second round of oral arguments presented by Switzerland. I now invite the Agent of Switzerland, Madam Cicéron Bühler, to make her statement.

MS CICÉRON BÜHLER (*Interpretation from French*)**:** Mr President, distinguished Members of the Tribunal, during this second round I shall formulate some comments of a general nature which I deem necessary subsequent to the presentations made by counsel for Nigeria. I shall then touch upon two specific points. Then I shall respond to the first two questions posed by your Tribunal. Sir Michael Wood will deal with the third one.

First of all, my general comments. Maître Loewenstein asserted that all the allegations that Switzerland did not explicitly rebut have to be considered as accepted by my country. This is wholly incorrect. At this stage of the proceedings – and we would like to remind our opponents of this – this is an urgent incidental proceedings phase. Facts do not yet have to be definitively established. We thus restricted ourselves to giving a few examples of points made by Nigeria which we rebut. Our silence can in no way be seen as an overall acceptance of Nigeria's assertions.

Nigeria's approach is all the more inappropriate given that they themselves persist in submitting no evidence to buttress their serious allegations. It is surprising that Nigeria strives to attack Switzerland on the nature and quality of documents provided, whereas Nigeria itself has provided but very scanty documentation, and the majority of what Nigeria has presented are affidavits by State officials. Regarding the probative value of these statements that Nigeria reproaches us for not having submitted, the International Court of Justice noted – and you can see it on screen –

> that even affidavits will be treated "with caution" … In determining the evidential weight of any statement by an individual, the Court necessarily takes into account its form and the circumstances in which it was made.
>
> … The Court has thus held that it must assess "whether [such statements] were made by State officials or by private persons not interested in the outcome of the proceedings and whether a particular affidavit attests to the existence of facts or represents only an opinion as regards certain events" … On this second point, the Court has stated that "testimony of matters not within the direct knowledge of the witness, but known to him only from hearsay, [is not] of much weight"[1]

Nigeria has a tendency to distort what Switzerland says and to attempt to make us say what we clearly did not say. Given how excellent the interpretation is, I cannot think that it is simply due to our linguistic differences. Thus, regarding the alleged violations of the AIS, Nigeria, instead of submitting proof, puts words in my mouth which I never said.[2] This tendentious approach is extremely regrettable.

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[1] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Judgment, I.C.J. Reports 2015,* pp. 77-78, paras. 196-197; Judges' folder, tab 1 (second round).

[2] ITLOS/PV.19/C27/2, p. 9.

Furthermore, Nigeria announced its decision to only respond to all of our lines of argument this afternoon during the second round. Now, Nigeria's strategic choice puts Switzerland at a clear disadvantage. It will prevent us, should there be need, from responding to new allegations or to evidence un-submitted heretofore. So we request that, unless we say the contrary, these points should be considered as disputed by Switzerland.

Let me now come to two specific elements which I would like to deal with.

First, I would like to talk about the alleged liberty or freedom of movement of the four officers and the declarations of Nigeria aimed at providing assurance in this respect. Mr President, distinguished Members of the Tribunal, you clearly heard Nigeria assert that these persons enjoyed, subject to bail conditions, total freedom of movement in Nigeria. Mathematically speaking, it would suffice to provide one single occasion where this was not the case in order to be able to rebut it. And that is what we did, indisputably with the Nigerian judicial ruling presented during the first round of pleadings.[3] Thus, the different Nigerian State entities which play a part in our case do not seem to be able to sing from the same hymn sheet. Since Nigeria has not complied with bail conditions in the past, all the while trumpeting the opposite, how can we have any confidence in their purported new assurances? This is all the more true, given that the diplomatic note in which these purported assurances are to be found only arrived this week. Had Nigeria really wished it, it would have had numerous months to contact us and to clarify the situation. Now the presumption of good faith is important, but it should not run counter to the facts.

My second point is that Nigeria attacks the lawfulness of activities conducted by the "*San Padre Pio"*. They maintain that the petroleum was illicit on account of its quality and of its origin. Now regarding its origin, as always, Nigeria provides no solid evidence linked to the activities of the *"San Padre Pio"*. They simply refer to descriptions of more general problems in the region. And the conclusions that Nigeria draws from this can in no way bolster their assertions in the absence of real evidence. Regarding Togo, it is up to that country to refute the negative image that Nigeria attempts to attribute to it.

Mr President, distinguished Members of the Tribunal, as to the questions regarding the quality of the oil, Counsel for Nigeria is mixing up concepts which I have to admit are rather complicated. Marine gasoil is used for the operation of oil platforms. This marine gasoil complies with the world ISO specification under reference ISO 8217. The product purchased in Lomé, as you can see displayed on screen,[4] corresponded to this ISO standard, as indicated in the contract. This fuel is not the same as automobile diesel. Let me specify clearly, you have got marine-use gasoil and diesel for cars. The latter – the gasoil for cars – is probably imported into Nigeria for the car market. Now what can really confuse people is that the term AGO is used in the local documents as a generic term which covers a whole slew of different sorts of gasoil. In this context the tests conducted by the Nigerian authorities found that the gasoil on board the *"San Padre Pio"* did not comply with the technical specifications for

[3] Judges' folder, tab 11, incorporated 21 June 2019, Motion on Notice Court of Nigeria of 26 June 2018.
[4] Judges' folder, tab 2 (second round).

automobile gasoil, which are more stringent, but the gasoil onboard the *"San Padre Pio"* was not this product and was never claimed to be. Thus, the gasoil we are talking about is not bad quality AGO, but marine gasoil of a quality in conformity, complying with international standards for the maritime market.

Nigeria has also recently alleged that a number of times the officers falsified data. Now this serious accusation seems to be based on the amount of gasoil on board, figures which also seem to confuse Counsel for Nigeria. Now there are a number of bills of lading – *connaissements* as they are called in French – which are relevant with respect to the operations which interest us. There is nothing suspicious about that. The bill of lading of the load in Lomé was more or less 6,200 metric tonnes. That was the cargo that was bought, as you can see on screen now. This volume is added onboard ship to the approximately 450 metric tonnes left over onboard the ship from a previous shipment. Another bill of lading relates to the specific offloading in a region or a country; indeed, it would be inappropriate to obtain a permit for all of the cargo if only part of it corresponding to the contract is going to be offloaded in a country or region. The volume listed in the second document, 3,875 metric tonnes, is of course less than the amount figuring on the first document.[5] This practice is not only carried out by the *"San Padre Pio"*, it is used worldwide. It is an industry standard. It enables the vessel to use its capacity to the maximum.

Nigeria also asserts that the ship-to-ship transfer between the *"San Padre Pio"* and the PSV "*Lahama"* is in clear violation of Nigerian law, but on examination of applicable law the facts in issue do not necessarily lead to such a conclusion. Indeed, the Petroleum Act, though it prohibits in general nighttime transfers, also provides for exceptions. One of these is applicable in this case. Indeed, and I am quoting it in English (*Continued in English*), "the loading or discharging of petroleum spirit or ballast water and the rigging and disconnecting of hoses shall not be permitted between sunset and sun rise." (*Interpretation from French*) That is the principle. The exception:

(*Continued in English*)

> If illumination is provided on board the ship, the equipment used for such illumination is designed, constructed and maintained in accordance with Lloyd's Register of Shipping or other approved classification society's requirements in relation to the position in the ship in which it is installed.[6]

(*Interpretation from French*) As you can see, on the photo on screen, the *"San Padre Pio"* is indeed equipped with the required apparatus in order to be able to operate after sunset.[7]

Mr President, I do not hesitate to recognize that the facts in this case are complex and very technical. However, the public prosecutor's office in Nigeria has found nothing and the four officers, like other defendants, should benefit from the presumption of innocence. Furthermore, it is worthwhile rehearsing the general principles of law which apply both nationally and internationally as recognized in the

[5] Judges' folder, tab 3 (second round).
[6] Judges' folder, tab 4 (second round).
[7] Judges' folder, tab 5 (second round).

arbitral award in the *Duzgit Integrity* case. The penalties must be proportional to the seriousness of the violations.[8]

Mr President, distinguished Members of the Tribunal, I shall now respond to the first two questions that you posed yesterday evening. I shall start in English.

(*Continued in English*) Your first question is related to Nigerian law and Switzerland is not in the most adequate position to address it. Nevertheless, we will answer to the best of our knowledge. According to our information, the possibility of posting a bond only exists in civil proceedings. The law permits the release of a ship under arrest through the provision of a bond under Order 10 of Admiralty Jurisdiction Procedure Rules of 2011.

The vessel was arrested and charged as a defendant under Section 1(17) of the Miscellaneous Offences Act CAP M17 Professor the commission of an alleged crime. According to our understanding, under criminal law, the law provides for forfeiture of the vessel to the Nigerian Government upon conviction.

The only exception where properties subject to criminal proceedings are released on bond are properties of victims recovered during investigations. In such cases, the court would be empowered to exercise its discretion to release the property under the Administration of Criminal Justice Act of 2015. The scenario here is not the same. From what we have heard, in none of the cases where the vessels have been charged was any released on bond before the determination of the case.

(*Interpretation from French*) Let me now move to your second question on the course of events on 22 and 23 January 2018. During these two days the *"San Padre Pio"* was involved in ship-to-ship transfers. According to the logbook of the vessel,[9] preparations for the first operation of interest to us started on 22 January at 15:42 with an inspection of the holding tank. At 17:18 the first line was attached between the *"San Padre Pio"* and PSV *"Lahama"*, thus officially commencing the operation. At 17:36 the process of hooking up hoses to the PSV *"Lahama"* started. At 18:18 the bunkering itself started and this lasted until 01:42 in the morning. Activities were concluded at 03:06 with the departure of the PSV *"Lahama"*.

On 23 January in the morning, PSV *"Energy Scout"* in turn approached. At 07:18 the first line was attached between *"San Padre Pio"* and the small transport vessel. Bunkering itself started at 08:24 and then was suspended on the order of the navy at 08:42. NNS *"Sagbama"* of the Nigerian navy indeed approached the *"San Padre Pio"* and ordered this to be stopped. The navy demanded to see official documents, some of which were inapplicable to foreign flag vessels. After presenting the naval clearance and the vessel certificate of registry, bunkering continued. This activity was concluded at 13:12 and the PSV *"Energy Scout"* left at 14:30. It was at 15:30 that the Nigerian navy ordered the vessel to go to the Inner Bonny Anchorage. The NNS *"Sagbama"* escorted the *"San Padre Pio"* to that anchorage, where it arrived on 24 January.

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[8] *The Duzgit Integrity Arbitration (Malta v. São Tomé and Príncipe)*, Award 5 September 2016, para. 256, https://pcacases.com/web/sendAttach/1915

[9] Annex NOT/CH-14 for 23-24 January 2018. Switzerland will be happy to provide a copy of this document of 22 January if the Tribunal so wishes.

This brings me to the end of my presentation. Mr President, distinguished Members of the Tribunal, I would like to thank you for your kind attention and request that you call to the bar Professor Lucius Caflisch.

THE PRESIDENT: Thank you, Madam Cicéron Bühler.

I give the floor to Mr Caflisch to make the next statement on behalf of Switzerland.

MR CAFLISCH: Mr President, Members of the Tribunal. Speaking on jurisdictional issues, Dr Derek Smith claimed yesterday that there was no *prima facie* jurisdiction regarding Switzerland's claim with respect to the International Covenant on Civil and Political Rights and the Maritime Labour Convention. I shall be happy to attempt to clarify the issue.

Article 293, paragraph 1, of the Convention on the Law of the Sea, has this to say about the applicable law, and I quote: "A court or tribunal having jurisdiction under this section shall apply this Convention and other rules of international law not incompatible with this Convention."

The ICCPR and the MLC contain such other rules of international law. They are certainly compatible with the Convention and, as such, form part of the applicable law. They are treaties in force between the parties and give rise to rights and obligations.

This provision – that is article 293, paragraph 1 – should be viewed together with article 56, paragraph 2, of the Convention. Article 56, paragraph 2, provides that, when exercising its rights and performing its duties under the Convention – please note those words – the coastal State shall have due regard to the rights and duties of other States under international law. Note the absence here of the words "under this Convention", used for the coastal State. This can only mean that the flag State is not limited to the reference to the Convention. This is not a negligent omission by the drafters of the Convention, who knew perfectly what they were doing.

It follows logically that the flag State can make reference to law other than that contained in the Law of the Sea Convention, and that there is room in particular for provisions found in the ICCPR and in the MLC, as well as rules of customary international law.

This is true in particular for article 9 of the ICCPR, which provides, *inter alia*, and allow me to cite once again:

> 1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
>
> 2. Anyone who is arrested shall be informed at the time of arrest of the reasons for his arrest and shall be promptly informed of any charges against him.

It is submitted that these rules are likely to have been breached in the case of the crew of the *"San Padre Pio"* on account of the actions of the Nigerian authorities against the crew.

This does not in any way imply – contrary to what Dr Smith claims – that Switzerland seeks to apply this Convention to individuals. It seeks to do so because, through Nigeria's conduct, it has been deprived of its right as the flag State to ensure respect of its rights.

The situation is similar regarding the Maritime Labour Convention which provides, *inter alia*, that – and I cite again:

> 3. Every seafarer has a right to decent working and living conditions on board ship.
>
> 4. Every seafarer has a right to health protection, medical care, welfare measures and other forms of social protection.

In the present instance, the seafarers lost their right to such working and living conditions onboard ship, the respect of which the flag State can no longer ensure on account of Nigeria's conduct. In addition, it is tempting to ask how health protection and medical care have been assured in the present case.

Mr President, Members of the Tribunal, let me conclude. The references to the ICCPR and the MLC – to which I would add some rules of customary international law – are of high relevance to the flag State. It is therefore unsatisfying, according to the Swiss Government, to assert that the right of protection of the flag State resulting from these sources falls outside the framework of the dispute-settlement provisions of Part XV of the Law of the Sea Convention.

According to the Swiss Government, its claim relates to a right of a State Party to the Convention and therefore the Annex VII arbitral tribunal should have jurisdiction over that claim as well. Dr Smith also suggests that as a result of this construction, Switzerland's third claim has not had the opportunity to crystallize, but the alleged absence of crystallization would be the result of Nigeria's refusal to react to the Swiss attempts at settling the dispute or discussing the means of settlement. It would be unfair, therefore, to assign the responsibility of this state of affairs to Switzerland, which did a maximum to bring about a bilateral discussion about the case.

Finally, Dr Smith has claimed that Switzerland, in the exchanges with Nigeria regarding the dispute, had never raised issues concerning rules of international law other than those of the Convention. However, in its aide-mémoires Switzerland actually had referred to such other rules of international law.

For the same reason, the question has been asked whether the present issue can be considered plausible. I refer you to the first round of pleadings of Switzerland.

Mr President, Members of the Tribunal, that concludes what I have to say this morning. I would request that you now invite Professor Laurence Boisson de Chazournes to take the floor.

THE PRESIDENT: Thank you. I now give the floor to Ms Boisson de Chazournes to make the next statement.

MS BOISSON DE CHAZOURNES (*Interpretation from French*)**:** Mr President, Members of the Tribunal, in the time allocated to me today I will return, first of all, to the criterion of the plausibility of the rights invoked by Switzerland.

Mr President, our opponents shamelessly aver that the rights which Switzerland is claiming are not plausible because, and I quote Dr Smith, "a right is 'plausible' only if it is applicable to the factual situation at hand".[1] Our opponents offer their own interpretation of the facts and would like this Tribunal to move to the merits phase and to settle the claims of the Parties. That cannot be the case.

As your Tribunal has rightly said, at the provisional measures stage the Tribunal need only decide whether the rights claimed by the applicant are plausible.[2] Therefore, now is not the time, and here again I am citing your case law, "settle the claims of the Parties in respect of the rights and obligations in dispute".[3] The Special Chamber formed to hear the dispute between Ghana and Côte d'Ivoire is even more explicit:

> [B]efore prescribing provisional measures, the Special Chamber need not … concern itself with the competing claims of the Parties … it need only satisfy itself that the rights which Côte d'Ivoire claims on the merits and seeks to protect are at least plausible.[4]

Despite this, Nigeria has, throughout its oral arguments, kept on asking you to take a position. According to Nigeria, the rights claimed by Switzerland are not plausible because Nigeria acted in accordance with its sovereign right to enforce its laws and regulations concerning the management of non-living resources in its EEZ.[5] And according to Nigeria, the rights claimed by Switzerland are not plausible because Nigeria acted in accordance with its obligation under articles 208 and 214 to enforce its laws and regulations concerning pollution from seabed activities.[6] I could go on and on, and indeed I will come back to these various arguments I have just mentioned.

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[1] ITLOS/PV.19/C27/2, p. 18 (Derek C. Smith)
[2] *Detention of three Ukrainian naval vessels (Ukraine* v. *Russian Federation), Order of 25 May 2019*, para. 95; also, *"Enrica Lexie" (Italy* v. *India), Provisional Measures, Order of 24 August 2015, ITLOS Reports 2015*, p. 197, para. 84; *Delimitation of the maritime boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire), Provisional Measures, Order of 25 April 2015, ITLOS Reports 2015*, p. 158, para. 58.
[3] *"Enrica Lexie" (Italy* v. *India), Provisional Measures, Order of 24 August 2015, ITLOS Reports 2015,* p. 197, para. 83; *Delimitation of the maritime boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire), Provisional Measures, Order of 25 April 2015, ITLOS Reports 2015*, p. 158, para. 57.
[4] *Delimitation of the maritime boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire), Provisional Measures, Order of 25 April 2015, ITLOS Reports 2015,* p. 158, para. 58.
[5] ITLOS/PV.19/C27/2, pp. 18-19 (Derek C. Smith)
[6] ITLOS/PV.19/C27/2, p. 19 (Derek C. Smith)

Members of the Tribunal, these examples clearly highlight the inappropriate nature of Nigeria's arguments. Nigeria is asking you, in flagrant contradiction with your own case law, to settle the claims of the Parties.

In accordance with your Guidelines, I will not repeat what Switzerland said yesterday on the plausibility of rights.[7] Allow me, however, just to reiterate the conclusion. Whether it is the right to freedom of navigation or other internationally lawful uses of the sea, such as bunkering, the exercise by Switzerland of its exclusive jurisdiction as a flag State, or the rights of the crew whose protection is incumbent upon Switzerland as the flag State, they are all plausible in the instant case.

I shall now turn to the rights to freedom of navigation, and in particular the right to other internationally lawful uses of the sea, such as bunkering. Our opponents have made great play of Switzerland's reference to the *M/V "Norstar" Case* in an attempt to rebut Switzerland's arguments. But, like it or not, bunkering activities are part of the freedom of navigation which can be regulated only in certain very limited cases. This is what your Tribunal explained in the *M/V "Virginia G" Case*, and I quote:

> The Tribunal emphasizes that the bunkering of foreign vessels engaged in fishing in the exclusive economic zone is an activity which may be regulated by the coastal State concerned. The coastal State, however, does not have such competence with regard to other bunkering activities, unless otherwise determined in accordance with the Convention.[8]

In this context Nigeria wrongly suggests that article 56, paragraph 1(a), represents such a limitation,[9] as is indicated in the quotation I have just read out. That is, Mr President, a very selective reading of article 56, because article 56 includes a paragraph 3, which reads as follows: "the rights set out in this article with respect to the seabed and subsoil shall be exercised in accordance with Part VI." So even if the "*San Padre Pio*"'s activities were to be associated with the extraction of resources from the seabed and subsoil within Nigeria's EEZ,[10] and for that to be the case there would have to be the necessary direct link, so even if you could say that were possible, that would still not authorize Nigeria to exercise enforcement jurisdiction. This is because although Part V relating to the exclusive economic zone contains a special provision, namely article 73, allowing a coastal State to apply its laws and regulations in all matters relating to the exploration, exploitation, conservation or management of living resources, such a provision for non-living resources is absent from Part V on the exclusive economic zone and from Part VI on the continental shelf. Consequently, Members of the Tribunal, Nigeria's interpretation of article 56 has no basis in the Convention and cannot be used to rebut Switzerland's arguments on freedom of navigation and the bunkering related thereto.

Mr President, Members of the Tribunal, I will turn now to protection of the environment, in which Nigeria suddenly seems to be very interested. Switzerland is rather surprised by this, seeing this as legal quibble which has attached little importance to its dispute with Nigeria for more than a year. Nigeria has never

[7] ITLOS, PV19/C27, pp. 20-22 (Prof. Boisson de Chazournes)
[8] *M/V "Virginia G" (Panama/Guinea-Bissau), Judgment, ITLOS Reports 2014*, p. 70, para. 223.
[9] ITLOS/PV.19/C27/2, pp. 17-20 (Derek C. Smith)
[10] ITLOS/PV.19/C27/2, pp. 2-3 (Chinwe Uwandu)

previously mentioned protection of the environment as part of the charges filed by its authorities and courts against the "*San Padre Pio"*, the crew or the charterer. And yet Mr Smith loudly proclaimed yesterday that "it was pursuant to these laws and regulations that Nigeria arrested, detained, and initiated judicial proceedings against the "*San Padre Pio*" and its crew".[11] All of a sudden, we are talking about the protection of the marine environment. The accused had never been informed of this, so how can we have any confidence in the Nigerian judicial system? All this is part and parcel of the legal maze, already explained by the Agent for Switzerland, with which the officers have had to deal for nearly 17 months, as has the charterer more recently. Switzerland, as the flag State, has never been informed of charges relating to the environment.

Members of the Tribunal, Nigeria is resorting to protection of the marine environment as a basis for exercising rights to which it cannot be entitled. It invokes articles 208 and 214 of the Convention. As Switzerland said during the first round of oral argument, if these articles were applicable to this dispute, *quod non*, account would have to be taken of all the applicable provisions in Part XII. So what about the application of article 220, paragraphs 3, 6 and 7? What about article 230? Allow me to look for a minute at article 230. I will read out paragraphs 1 and 3 of this provision. Paragraph 1:

> Monetary penalties only may be imposed with respect to violations of national laws and regulations or applicable international rules and standards for the prevention, reduction and control of pollution of the marine environment, committed by foreign vessels beyond the territorial sea.

Paragraph 3: "In the conduct of proceedings in respect of such violations committed by a foreign vessel which may result in the imposition of penalties, recognized rights of the accused shall be observed."

These paragraphs speak for themselves. It is only a matter of monetary penalties subject to observance of the rights of the accused for offences concerning pollution of the marine environment.

I would also like to mention article 231 of the Convention. This stipulates in particular that the flag State should be notified promptly of any measures taken against a vessel flying its flag and that it should receive all official reports concerning measures in connection with marine pollution. Switzerland has not been notified and has not received any reports.

As you can see, Members of the Tribunal, Nigeria has given a very selective and tardy interpretation of Part XII on the Law of the Sea Convention to bolster its case. It has omitted to mention all the obligations by which it is nevertheless bound, in particular with respect to the flag State and the penalties which may be imposed.

Ladies and gentlemen, this concludes my oral arguments. Thank you for your attention. Mr President, can I now ask you to call Sir Michael Wood?

[11] ITLOS/PV.19/C27/2, p. 19 (Derek C. Smith)

THE PRESIDENT: Thank you, Ms Boisson de Chazournes. I now invite Sir Michael Wood to make the next statement.

MR WOOD: Mr President, Members of the Tribunal, this morning I shall respond to what Professor Akande said yesterday. I can be reasonably brief; for the most part Professor Akande did not add much to Nigeria's written statement, and – perhaps understandably – did not respond to what we had said earlier in the day. I should make it clear that we stand by all that we said yesterday – and I shall try to avoid repeating myself.

Mr President, I start with a general point. If the Tribunal were to follow the approach to article 290, paragraph 5, advocated by our friends opposite, that would gravely weaken the important provisional measures jurisdiction conferred upon the Tribunal by paragraph 5. They suggest that paragraph 5 is to be applied more stringently than paragraph 1. They suggest that somehow paragraph 5 provisional measures are subject to different and tougher requirements. That is, I would suggest, an unattractive proposition. It would significantly weaken the system of dispute settlement provided for in Part XV of UNCLOS. It would do so in a way that was surely not envisaged by those for whom effective dispute settlement provisions were an essential part of the overall package deal at the Law of the Sea Conference. In passing, I might mention that several persons in this room were personally involved in that. It would significantly weaken what has become an important development in international dispute settlement.

Mr President, yesterday Mr Akande develops a curious "three courts" theory to urge special caution upon you. In doing so he added nothing to his arguments – except perhaps a little confusion. He suggested that your Tribunal "will need to bear in mind the relationship between it and the Annex VII tribunal to be constituted". That is no doubt true, but – as I explained yesterday – it does not affect the way you reach your decisions on provisional measures under paragraph 5. Mr Akande suggests two reasons why it should. First, that there is a more stringent condition of urgency of timing; but this is no more than the basic premise of paragraph 5, that urgency is to be measured by reference to the time when the arbitral tribunal itself will be in a position to prescribe measures.

Second, he said that this Tribunal would wish to take particular care to ensure that the measures do not prejudge the merits, which are for a different tribunal. That, with respect, Mr President, is an assertion without basis in authority or logic. The test of non-prejudice of the merits is the same under paragraph 1 and paragraph 5, and under the law and practice of provisional measures in general.

In the same breath, Mr Akande asked you to bear in mind that the Nigerian domestic courts are involved. It was not clear what point he is trying to make here. Of course, Nigerian domestic courts are involved. They are part of the facts of this case. A key question, but a question for the merits, will be whether the domestic courts of the coastal State lawfully have jurisdiction over alleged offences by a foreign ship in the exclusive economic zone. Here, Mr Akande appeals to the need to respect Nigeria's rights and obligations in connection with the maintenance of law and order; but that simply begs the question: Nigeria can only enjoy its rights and fulfil its obligations in accordance with international law.

Mr Akande then turned to what he termed "three further reasons" why the Tribunal should not prescribe the provisional measures requested by Switzerland. I really have nothing to add to what I said yesterday on his second and third "reasons" (prejudging the final decision and prejudicing Nigeria's rights). I dealt with them fully yesterday, and Mr Akande, as I have said, has not really added to Nigeria's written statement on these points.

Mr Akande focused on the first of his "three further reasons" – urgency. He repeated Nigeria's arguments, already in their written statement, that there was none. He began with the crew. Here the Parties disagree, and disagree fundamentally, on the facts. Mr Akande painted a rather rosy picture of life on board the *"San Padre Pio"*. According to him, for the Master and three other officers it is life as normal at sea. He failed to note the extraordinary length of time the four crew members have been confined to an immobile ship, some 15 months, I think, after being moved there from prison. He failed to say anything serious about the dangers to life and limb faced on daily basis because of the risk of armed robbery or collisions (other than to blame the officers themselves and their employers for their predicament). He suggested that the four were free to come and go as they pleased, to visit the hotels within Nigeria etc., and rather implied that they did so pretty often. As the Agent for Switzerland has explained this morning, that is simply not the case.

Mr Akande based himself on affidavits given for the specific purpose of this hearing, by two interested Nigerian officials: the commanding officer of the base that has responsibility for the *"San Padre Pio"*; and the legal officer in the Economic and Financial Crimes Commission (EFCC). The Agent of Switzerland has already referred this morning to such affidavits. We are confident that the Tribunal will approach these and other similar affidavits presented by Nigeria with the utmost caution. International courts and tribunals, including the International Court of Justice, rightly place little, if any, reliance on such evidence. In fact, Mr President, the true picture on board the *"San Padre Pio"* is not rosy at all; it is bleak. Life for the Master and three officers, as for their families, is harsh, and has been for a very prolonged period of time.

Mr President, Members of the Tribunal, this might be a good moment to turn to the Tribunal's third question from yesterday evening, which was addressed to Switzerland. The question read:

> During the first round of its oral pleadings, Switzerland (Professor Boisson de Chazournes) referred to the possibility of Nigeria's continuing the criminal proceedings against the four accused persons, stated: (*Interpretation from French*) If need be, certain procedures exist for getting Ukrainian officers to return.
>
> *(Continued in English)* Could Switzerland elaborate on this?

Mr President, I also adverted to this matter yesterday when, in the context of not prejudging Nigeria's rights, I said

> The requirement not to prejudge the decision on the merits will surely be met, as Professor Boisson de Chazournes has just explained. In prescribing

> measures, the Tribunal will take care not to reach definitive conclusions on the facts and on the law that lie at the heart of the case. It may well expressly state that the Order is without prejudice to the merits. If necessary, the Tribunal could perhaps devise ways to ensure that the measures prescribed do not prejudice Nigeria's rights.

Mr President, as you can see, I was quite cautious. If the Tribunal were minded consider something along these lines, it would seem to us to be necessary to explore the matter with the Nigerian authorities, and perhaps also with the authorities of the State of nationality of the Master and three officers. Mutual legal assistance in criminal matters is a complex area, with many bilateral and multilateral treaties and arrangements. A change of bail conditions would presumably be needed. I would recall that the Nigerian courts have already imposed bail when they permitted the four to leave prison. The bail would presumably need to be adjusted to allow for their departure from Nigeria. One other possibility that occurred to me is that the Master and officers might be asked to give some sort of formal undertaking to the court to return under certain circumstances in light of the outcome of the arbitration.

Mr President, I now turn to the vessel and cargo. In suggesting that no harm will come to the vessel in the months before the arbitral tribunal is able itself to issue a provisional measures order, Mr Akande relied on an expert report that was at Annex 21 to their written statement; but he did so without referring to what I had said in the morning about that report. That report is of no assistance to Nigeria's case. I recommend that you read it; it is quite short. As I pointed out yesterday, the expert, Mr Tanner, has never visited the vessel; his report is based entirely on some documents passed to him by Nigeria. It is so heavily qualified as to be meaningless. As we explained yesterday, we have not been able to commission our own survey of the vessel because the Nigerian authorities did not permit this. In the circumstances, and given the rapidly declining condition of the vessel, it must, we say, be presumed that there is indeed great urgency for provisional measures if the vessel is to be saved.

Mr President, Members of the Tribunal, according to Nigeria, money can remedy everything. Financial reparation, they say, is sufficient for the loss of a ship or cargo. Yet in the modern world, with sustainable development and the environment at the centre of our concerns, money is not everything. There are higher values. A responsible and respected business does not simply allow its major assets to go to ruin and be content, at some distant time, with reparation when it can purchase a new ship or aircraft or whatever. Such is wasteful.

Mr President, Members of the Tribunal, we explained at paragraph 39 of our Request for provisional measures that most commercial vessels flying the Swiss flag, including the *"San Padre Pio"*, benefit from a guarantee from Switzerland. The system of guarantees, which was already established in 1958, ensures that Switzerland has available a critical mass of maritime shipping for economic supply of the country in case of crisis. If a ship benefiting from such guarantee suffers irreparable damage, Switzerland may be required to pay the guarantee. Such a scenario would have serious consequences for Switzerland, not only financial, but for the reputation of its maritime flag.

In addition, the manager, ABC Maritime, only manages two ships under Swiss flag. If it were to lose the *"San Padre Pio"*, there would be a great risk for the continued operation of the enterprise. Beyond the work places on board ship, we would also have to take into consideration those relating directly to the owner of the ship, to the management of the latter, and the charterer. The enterprises concerned would also suffer great loss of reputation. Thus, if the present situation were to continue, it would risk causing a cascade of bankruptcies.

Mr President, Members of the Tribunal, the last point I want to deal with concerns the diplomatic note sent by Nigeria to Switzerland, dated 18 June 2019, which Nigeria submitted to the Tribunal on Thursday and which is at tab 11 of Nigeria's Judges' folders. That note purports to give an assurance to Switzerland. Yesterday, Mr Akande said the following:

> If it was ever unclear whether the Master and the officers were detained on the vessel, this matter has now been clarified by the diplomatic note sent by Nigeria to Switzerland on 18 June 2019. In that note, "The Ministry of Foreign Affairs of the Federal Republic of Nigeria hereby provides its assurances to the Swiss Confederation that under the terms of their bail, the defendants… are not required to remain aboard the *M/T "San Padre Pio"* but rather may disembark and board the *M/T "San Padre Pio"* at their pleasure and are at liberty to travel and reside elsewhere in Nigeria."[1]

Mr President, Members of the Tribunal, I must be very clear. That so-called "assurance" adds nothing; and it commits Nigeria to nothing. In it, the Nigerian Foreign Ministry "provides its assurances" that, under the terms of their bail, the Master and three other officers are not required to remain aboard the *M/T "San Padre Pio"* etc. An assurance from the Ministry for Foreign Affairs as to the terms of bail is meaningless. We already know the terms of bail. But the terms of bail are not respected in the real world, where the Master and officers are confined to the vessels; and even if the terms were respected by the navy and others, the Master and officers would still be restricted to Nigeria. This so-called "assurance", which is no assurance, in no way meets the concerns that have brought us to your Tribunal seeking provisional measures.

Mr President, Members of the Tribunal, that concludes what I have to say this morning. I would request that you now invite the Agent of the Swiss Confederation, Ambassador Cicéron Bühler, to the podium to make the final submissions on behalf of Switzerland.

THE PRESIDENT: Thank you, Sir Michael. We have now reached the final stage of the oral arguments by Switzerland.

Article 75, paragraph 2, of the Rules of the Tribunal provides that at the conclusion of the last statement made by a party at the hearing its agent, without recapitulation of the arguments, shall read that party's final submissions. A copy of the written text of these, signed by the agent, shall be communicated to the Tribunal and transmitted to the other party.

[1] Diplomatic Note No. 749/2019 from Ministry of Foreign Affairs of the Federal Republic of Nigeria to the Embassy of Switzerland, dated 18 June 2019.

I now invite the Agent of Switzerland, Ms Cicéron Bühler, to make her concluding remarks and to present the final submissions of Switzerland.

MS CICÉRON BÜHLER (*Interpretation from French*)**:** Mr President, Members of the Tribunal, before bringing the presentation of Switzerland's oral arguments to an end with our final submissions, I would like to take this opportunity to thank, on behalf of Switzerland, the Registrar, Mr Philippe Gautier, and all the Registry staff for organizing these hearings and for their cooperation and their professionalism. I should also like to thank the President and each of the Members of your Tribunal for listening to us over these past two days and for the kind consideration that you will give to our request. I particularly wish to thank the interpreters for their vital and very reliable work. I would also like to thank all those who have worked for long hours in order to produce the verbatim records of the public hearings so swiftly; and I thank our Nigerian friends for their cooperation during these proceedings.

In the course of these two days our team has explained why the requested provisional measures are necessary in order to avoid irreparable harm to the rights of Switzerland. It has demonstrated that all the conditions laid down for the prescription of provisional measures under article 290, paragraph 5, of the Convention are met.

Mr President, Members of the Tribunal, in accordance with article 75, paragraph 2, of the Rules of the Tribunal, I will now, with your permission, present the final submissions of Switzerland. A copy of the written text of the submissions has been communicated to the Registry of the Tribunal and transmitted to Nigeria.

Switzerland requests the Tribunal to prescribe the following provisional measures:

Nigeria shall immediately take all measures necessary to ensure that the restrictions on the liberty, security and movement of the "*San Padre Pio*", her crew and cargo are immediately lifted to allow them to leave Nigeria. In particular, Nigeria shall:

(a) enable the "*San Padre Pio*" to be resupplied and crewed so as to be able to leave, with her cargo, her place of detention and the maritime areas under the jurisdiction of Nigeria and exercise the freedom of navigation to which her flag State, Switzerland, is entitled under the Convention;

(b) release the Master and the three other officers of the "*San Padre Pio*" and allow them to leave the territory and maritime areas under the jurisdiction of Nigeria;

(c) suspend all court and administrative proceedings and refrain from initiating new ones which might aggravate or extend the dispute submitted to the Annex VII arbitral tribunal.

This concludes Switzerland's oral arguments. Thank you, Mr President.

THE PRESIDENT: Thank you, Ms Cicéron Bühler.

This concludes the oral arguments presented by Switzerland. We will continue the hearing in the afternoon, at 4.30 p.m., to hear the second round of oral arguments of Nigeria.

The sitting is now closed.

(*The sitting closed at 11.08 a.m.*)