

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

YEAR 2019

6 July 2019

List of Cases:

No. 27

THE M/T “SAN PADRE PIO” CASE

(SWITZERLAND *v.* NIGERIA)

Request for the prescription of provisional measures

ORDER

Present: *President* PAIK; *Vice-President* ATTARD; *Judges* JESUS, COT, LUCKY, PAWLAK, YANAI, KATEKA, HOFFMANN, GAO, BOUGUETAIA, KULYK, GÓMEZ-ROBLEDO, HEIDAR, CABELLO, CHADHA, KITTICHAISAREE, KOLODKIN, LIJNZAAD; *Judges ad hoc* MURPHY, PETRIG; *Registrar* GAUTIER.

THE TRIBUNAL,

composed as above,

after deliberation,

Having regard to article 290 of the United Nations Convention on the Law of the Sea (hereinafter “the Convention”) and articles 21 and 25 of the Statute of the Tribunal (hereinafter “the Statute”),

Having regard to articles 89 and 90 of the Rules of the Tribunal (hereinafter “the Rules”),

Having regard to the “Notification under Article 287 and Annex VII, Article 1, of UNCLOS and Statement of Claim and Grounds on which it is based” (hereinafter “the Statement of Claim”), dated 6 May 2019, addressed by the Swiss Confederation (hereinafter “Switzerland”) to the Federal Republic of Nigeria (hereinafter “Nigeria”), instituting arbitral proceedings under Annex VII to the Convention in respect of a dispute concerning the arrest and detention of the *M/T “San Padre Pio”*, its crew and cargo,

Having regard to the request for provisional measures contained in the Statement of Claim submitted by Switzerland to Nigeria, pending the constitution of an arbitral tribunal under Annex VII to the Convention,

Makes the following Order:

1. On 21 May 2019, Switzerland submitted to the Tribunal a Request for the prescription of provisional measures (hereinafter “the Request”) under article 290, paragraph 5, of the Convention in a dispute between Switzerland and Nigeria concerning the arrest and detention of the *M/T “San Padre Pio”*, its crew and cargo. The case was entered in the List of Cases as Case No. 27 and named *The M/T “San Padre Pio” Case*.
2. On the same date, the Deputy Registrar transmitted copies of the Request electronically to the Minister of Foreign Affairs of Nigeria and to the Ambassador of Nigeria to the Federal Republic of Germany.
3. In a letter dated 9 May 2019, addressed to the Registrar, transmitted together with the Request, the Federal Councillor for Foreign Affairs of Switzerland notified

the Tribunal of the appointment of Ambassador Corinne Cicéron Bühler, Director of the Directorate of International Law of the Federal Department of Foreign Affairs, as Agent for Switzerland.

4. Since the Tribunal does not include upon the bench a member of Swiss nationality, Switzerland, in its Request, pursuant to article 17, paragraph 3, of the Statute, chose Ms Anna Petrig to sit as judge *ad hoc* in the case.

5. On 22 May 2019, a certified copy of the Request was transmitted to the Ambassador of Nigeria to the Federal Republic of Germany.

6. In accordance with article 24, paragraph 3, of the Statute, the Registrar notified the States Parties to the Convention of the Request by a note verbale dated 22 May 2019.

7. Pursuant to the Agreement on Cooperation and Relationship between the United Nations and the International Tribunal for the Law of the Sea of 18 December 1997, the Registrar notified the Secretary-General of the United Nations of the Request by a letter dated 22 May 2019.

8. On 28 May 2019, pursuant to articles 45 and 73 of the Rules, the President of the Tribunal held consultations by telephone with the Agent of Switzerland and Ms Stella Anukam, Director, International Law and Comparative Law, Federal Ministry of Justice of Nigeria, to ascertain the views of Switzerland and Nigeria with regard to questions of procedure.

9. By Order dated 29 May 2019, the President, pursuant to article 27 of the Statute and articles 45 and 90, paragraph 2, of the Rules, fixed 21 and 22 June 2019 as the dates for the hearing. The Order was communicated to the Parties on the same date.

10. By letter dated 31 May 2019, the Solicitor-General of the Federation and Permanent Secretary, Federal Ministry of Justice of Nigeria, notified the Registrar of the appointment of Ms Stella Anukam, Director, International and Comparative Law,

Federal Ministry of Justice, Mr Yusuf Maitama Tuggar, Ambassador of Nigeria to the Federal Republic of Germany, and Ms Chinwe Philomena Uwandu, Director of Legal Services, Ministry of Foreign Affairs, as Agents for Nigeria. By electronic communication of the same date, Ms Stella Anukam informed the Tribunal that she would act as Agent for Nigeria and Ambassador Tuggar and Ms Uwandu would be Co-Agents.

11. Since the Tribunal does not include upon the bench a member of Nigerian nationality, Nigeria, by letter dated 3 June 2019, pursuant to article 17, paragraph 3, of the Statute, chose Mr Sean David Murphy to sit as judge *ad hoc* in the case.

12. On 17 June 2019, Nigeria filed with the Registry its Statement in Response, a copy of which was transmitted electronically to the Agent of Switzerland on the same day.

13. On 20 June 2019, Switzerland submitted four additional documents and Nigeria submitted one additional document to the Tribunal. Copies of these documents were transmitted to the Agents of the respective other Party on the same day. Neither Party objected to the admission of the additional documents.

14. On the same date, the Registrar sent a letter to the Agent of Nigeria requesting the submission of more legible versions of two of the annexes attached to the Statement in Response. The requested documents were submitted by Nigeria on 29 June 2019.

15. Since no objection to the Parties' choice of judges *ad hoc* was raised by the respective other Party and no objection appeared to the Tribunal itself, Ms Petrig and Mr Murphy were admitted to participate in the proceedings as judges *ad hoc*, after having made the solemn declaration required under article 9 of the Rules at a public sitting of the Tribunal held on 20 June 2019.

16. In accordance with article 68 of the Rules, the Tribunal held initial deliberations on 20 June 2019 concerning the written pleadings and the conduct of the case.

17. Pursuant to paragraph 14 of the Guidelines concerning the Preparation and Presentation of Cases before the Tribunal, Switzerland and Nigeria submitted the required information to the Tribunal on 20 June 2019.

18. On the same day, in accordance with article 45 of the Rules, the President held consultations with the Agent of Switzerland and the Co-Agent of Nigeria with regard to questions of procedure.

19. Pursuant to article 67, paragraph 2, of the Rules, copies of the Statement in Response and documents annexed thereto were made accessible to the public on the date of the opening of the oral proceedings.

20. Oral statements were presented at a public sitting held on 21 and 22 June 2019 by the following:

On behalf of Switzerland: Ambassador Corinne Cicéron Bühler, Director of the Directorate of International Law, Federal Department of Foreign Affairs,

as Agent,

Mr Lucius Caflisch, Professor Emeritus, Graduate Institute of International and Development Studies, Geneva,

Ms 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,

as Counsel and Advocates;

On behalf of Nigeria: Ms Chinwe Uwandu, Director/Legal Adviser, Ministry of Foreign Affairs of Nigeria,

as Co-Agent,

Mr Dapo Akande, Professor of Public International Law, University of Oxford, United Kingdom,

Mr Andrew Loewenstein, Partner, Foley Hoag LLP,
Boston, Massachusetts, United States of America,

Mr Derek Smith, Partner, Foley Hoag LLP, Washington
D.C., United States of America,

as Counsel and Advocates.

21. In the course of the oral proceedings, a number of exhibits, including photographs and extracts from documents, were displayed by the Parties on video monitors.

22. On 21 June 2019, at the request of the Tribunal, the Registrar sent a letter to the Agent of Nigeria requesting the submission of additional documents. The Agent of Nigeria submitted the requested documents on 24 June 2019.

23. On 21 June 2019, the Registrar communicated to the Parties a list of questions which the Tribunal wished them to address during the second round of the oral proceedings on 22 June 2019.

24. During the hearing on 22 June 2019, both Parties responded orally to the questions referred to in the preceding paragraph.

25. On 22 June 2019, Switzerland submitted additional documents, copies of which were transmitted to Nigeria on the same day. Nigeria objected to the introduction of these documents. By a decision of the same date, the Tribunal authorized the production of the additional documents submitted by Switzerland, pursuant to article 71, paragraph 2, of the Rules.

* *

26. In paragraph 45 of the Statement of Claim, Switzerland requests the arbitral tribunal to be constituted under Annex VII to the Convention (hereinafter “the Annex VII arbitral tribunal”) to adjudge and declare that:

(a) Nigeria has breached Switzerland's rights under UNCLOS as follows:

- i. By intercepting, arresting and detaining the "*San Padre Pio*" without the consent of Switzerland, Nigeria has breached its obligations to Switzerland regarding the freedom of navigation as provided for in article 58 read in conjunction with article 87 of UNCLOS.
- ii. By intercepting the "*San Padre Pio*", by arresting the vessel and her crew and by detaining the vessel, her crew and cargo without the consent of Switzerland, Nigeria has breached its obligations to Switzerland regarding the exercise of exclusive flag State jurisdiction as provided for in article 58 read in conjunction with article 92 of UNCLOS.
- iii. By arresting the "*San Padre Pio*" and her crew, by detaining the vessel, her crew and cargo without the consent of Switzerland and by initiating judicial proceedings against them, Nigeria has breached its obligations to Switzerland in its own right, in the exercise of its right to seek redress on behalf of crew members and all persons involved in the operation of the vessel, irrespective of their nationality, in regard to their rights under the ICCPR [International Covenant on Civil and Political Rights] and the MLC [Maritime Labour Convention], and under customary international law.

(b) The aforementioned breaches of UNCLOS constitute internationally wrongful acts entailing Nigeria's international responsibility.

(c) These internationally wrongful acts entail legal consequences requiring Nigeria to:

- i. cease, forthwith, the internationally wrongful acts continuing in time;
- ii. provide Switzerland with appropriate assurances and guarantees that all the internationally wrongful acts referred to in subparagraph (a) above will not be repeated;
- iii. provide Switzerland full reparation for the injuries caused by all the internationally wrongful acts referred to in subparagraph (a) above.

27. In paragraph 53 of its Request, Switzerland requested the Tribunal to prescribe the following provisional measures:

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

28. At the public sitting held on 22 June 2019, the Agent of Switzerland made the following final submissions:

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.

29. At the public sitting held on 22 June 2019, the Co-Agent of Nigeria made the following final submissions, which reiterate the submissions contained in paragraph 4.1 of the Statement in Response: “The Federal Republic of Nigeria respectfully requests that the International Tribunal for the Law of the Sea reject all of the Swiss Confederation’s requests for provisional measures.”

30. The factual background underlying the Request which has been submitted to the Tribunal can be summarized as follows. On 23 January 2018, the Nigerian navy intercepted and arrested the *M/T "San Padre Pio"*, a motor tanker flying the flag of Switzerland, while it was "engaged in one of several ship-to-ship ('STS') transfers of gasoil." The gasoil "was intended to supply the Odudu Terminal", an oil installation located within Nigeria's exclusive economic zone and operated by the company Total. According to Switzerland, at the time of the arrest, the vessel "was approximately 32 nautical miles from the closest point of Nigeria's coast" and within the exclusive economic zone of Nigeria. Switzerland adds that the ship-to-ship transfers took place "outside any safety zone that Nigeria could have established in accordance with UNCLOS ... and well beyond the 200-metre area around installations to which Nigeria purports to extend its civil and criminal law."

31. According to Nigeria, the Nigerian naval vessel *NNS "Sagbama"* "encountered the *San Padre Pio* at the Odudu Oil Field at approximately 20:00 on the night of 22 January 2018, where it was bunkering a vessel." When the *NNS "Sagbama"* requested the *M/T "San Padre Pio"* to produce "regulatory approvals", it was presented with the bill of lading and a navy certificate, but "other required permits – the DPR Permit and the NIMASA [Nigeria Maritime Administration and Safety Agency] Certificate – were not shown." According to the report from the Nigerian navy, "the vessel had no proof of payment of the 3 per cent Import levy, sea protection and offshore oil reception facility levies at the point of arrest." Nigeria states that "[s]ubsequent investigation revealed that the NIMASA Certificate was obtained on 24 January 2018, that is, *after* the *San Padre Pio* had been arrested."

32. Switzerland states that "[b]efore entering into the EEZ of Nigeria, the vessel obtained a Naval Clearance from the Nigerian Navy dated 12 January 2018" and had all the necessary import permits and documents. It further refers to a letter of 6 February 2018 from the NIMASA to the Nigerian navy stating that "from the records available to our office, **MT SAN PADRE PIO** has conducted International voyages only and has complied with the payment of NIMASA Statutory Levies viz: 3% Levy, Sea Protection Levy and Offshore Waste Reception Levy" and that the navy "may therefore release her."

33. After the arrest, the Nigerian navy ordered the *M/T "San Padre Pio"* to proceed to Port Harcourt, Bonny Inner Anchorage, a Nigerian port, where the vessel, together with its crew members and cargo, was detained on 24 January 2018. According to Switzerland, on 9 March 2018, the vessel and the crew members were handed over to the Economic and Financial Crimes Commission of Nigeria (hereinafter "the EFCC") for preliminary investigation. On that day, the 16 crew members were moved to a prison. On 12 March 2018, the EFCC brought charges against the crew members and the vessel. According to Nigeria, they "were charged with conspiring to distribute and deal with petroleum product without lawful authority or appropriate license, and with having done so with respect to the petroleum product onboard."

34. On 19 March 2018, the charges were amended to apply only to the Master, three officers and the vessel. The amended charges read as follows:

AMENDED CHARGE

That you **VICTOR VASKOV ANDRIY, GARCHEV MYKHAYLO, SHULGA VLADYSLAV, ORLOVKYI LVAN AND MT. SAN PADRE PIO** on or about the 23rd day of January, 2018 at Odudu Terminal in Bonny area within the jurisdiction of this Honorable Court did conspire among yourselves to commit felony to wit: without lawful authority or appropriate licence distributes or deal with petroleum product and thereby committed an offence contrary to Section 3(6) and punishable under section 1(17) both of the Miscellaneous Offences Act CAP M17 of the Revised Edition (Law of the Federation of Nigeria) Act 20007.

COUNT 2

That you **VICTOR VASKOV ANDRIY, GARCHEV MYKHAYLO, SHULGA VLADYSLAV, ORLOVKYI LVAN AND MT. SAN PADRE PIO a.k.a EX TORM HELENE** on or about the 23rd day of January, 2018 at Odudu Terminal in Bonny area within the jurisdiction of this Honorable Court did without lawful authority or appropriate licence distributes or deal with petroleum product to wit: about 4998.343 Metric Tons of Automotive Gas conveyed (A.G.O) in **MT. SAN PADRE PIO** and thereby committed an offence contrary to section 1(17)(a) and punishable under Section 1(17) both of miscellaneous Offences Act CAP M17 of the Revised Edition (Law of the Federation of Nigeria) Act 2007.

According to Switzerland, the other crew members were released from prison and returned to the vessel on 20 March 2018, while the Master and the three officers "stayed in prison for a total of five weeks" before they were released from prison and returned to the vessel upon the provision of bail on 13 April 2018.

35. The bail had been granted by an order of the Federal High Court of Nigeria issued on 23 March 2018. The order states, *inter alia*, the following:

4. That the ... Defendants shall deposit their International Passport with the Registry of this Court.

5. That the ... Defendants shall not travel outside Nigeria without the prior approval or order of this Court.

36. Nigeria states that “[a]fter bail was granted, the master and officers were released, subject only to the requirement that they remit their passports”. Nigeria further states that the Nigerian navy was informed that “the crew should be allowed to disembark and board the *San Padre Pio* at will.”

37. On 15 April 2019, an armed attack against the *M/T “San Padre Pio”* took place at Bonny Inner Anchorage. According to Switzerland, “[t]he robbers were armed with machine guns, there was shooting, and one of the Nigerian Navy guards was wounded.” Nigeria states that the armed guards deployed by its navy on board the vessel “successfully prevented” the attack.

38. On 24 April 2019, new charges were brought before the Federal High Court of Nigeria “against the Master, the vessel and the charterer regarding the accuracy of documents handed over to the Navy in January 2018.”

39. On 18 June 2019, the Ministry of Foreign Affairs of Nigeria sent a note verbale to the Embassy of Switzerland in Abuja, in which it provided its assurance to Switzerland that “under the terms of their bail, the defendants in the aforementioned criminal proceedings are not required to remain onboard 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.”

40. During the hearing, Switzerland stated that “the terms of bail are not respected in the real world, where the Master and officers are confined to the vessel” and “are not free to move.” It further stated that they “have not been able to disembark to attend legal proceedings against them” and that they “have not been

allowed to disembark to receive urgent medical care”. With respect to the assurance contained in Nigeria’s note verbale, Switzerland stated that “[t]hat so-called ‘assurance’ adds nothing; and it commits Nigeria to nothing.”

41. At the hearing held on 22 June 2019, the Co-Agent of Nigeria stated that “the Federal Republic of Nigeria, including the Ministry of Foreign Affairs, the Nigerian navy, the Economic and Financial Crimes Commission and all of the governmental actors are committing to abide by the terms of the bail of the four individual defendants” and reiterated the assurance in its note verbale.

I. *Prima facie* jurisdiction

42. Article 290, paragraph 5, of the Convention provides:

Pending the constitution of an arbitral tribunal to which a dispute is being submitted under this section, any court or tribunal agreed upon by the parties or, failing such agreement within two weeks from the date of the request for provisional measures, the International Tribunal for the Law of the Sea ... may prescribe, modify or revoke provisional measures in accordance with this article if it considers that *prima facie* the tribunal which is to be constituted would have jurisdiction and that the urgency of the situation so requires.

43. Switzerland and Nigeria are States Parties to the Convention, having ratified the Convention on 1 May 2009 and 14 August 1986, respectively. Upon ratification of the Convention, Switzerland made the following declaration pursuant to article 287, paragraph 1, of the Convention: “The Tribunal for the Law of the Sea has been designated as the only competent organ for disputes concerning law of the sea matters.” Nigeria has not made a declaration pursuant to article 287, paragraph 1, of the Convention.

44. The Tribunal notes that Switzerland, by the Statement of Claim dated 6 May 2019, which included a request for provisional measures, instituted proceedings under Annex VII to the Convention against Nigeria in a dispute concerning “the interception of the “*San Padre Pio*” in Nigeria’s exclusive economic zone ..., the arrest of the vessel and her crew and the continuing detention of the vessel, her crew

and cargo in Nigeria.” The Tribunal further notes that, on 21 May 2019, after the expiry of the two-week time-limit provided for in article 290, paragraph 5, of the Convention, and pending the constitution of the Annex VII arbitral tribunal, Switzerland submitted the Request to the Tribunal.

45. The Tribunal may prescribe provisional measures under article 290, paragraph 5, of the Convention only if the provisions invoked by the Applicant *prima facie* appear to afford a basis on which the jurisdiction of the Annex VII arbitral tribunal could be founded, but need not definitively satisfy itself that the Annex VII arbitral tribunal has jurisdiction over the dispute submitted to it (see “*ARA Libertad*” (*Argentina v. Ghana*), *Provisional Measures, Order of 15 December 2012*, ITLOS Reports 2012, p. 332, at p. 343, para. 60; *Detention of three Ukrainian naval vessels (Ukraine v. Russian Federation)*, *Provisional Measures, Order of 25 May 2019*, para. 36).

Existence of a dispute concerning the interpretation or application of the Convention

46. Switzerland invokes articles 286 and 287 of the Convention as the basis on which the jurisdiction of the Annex VII arbitral tribunal could be founded. The question the Tribunal has to address is whether the dispute submitted to the Annex VII arbitral tribunal is a “dispute concerning the interpretation or application of this Convention” referred to in those articles.

47. Switzerland alleges that “there undoubtedly is a dispute” between the Parties “within the definition given by the Permanent Court of International Justice in the *Mavrommatis* case and confirmed by the International Court of Justice in the *East Timor* case.” It states that it “repeatedly objected to Nigeria’s conduct” whereas “Nigeria responded with a deafening silence.” Switzerland further states that Nigeria “was aware of Switzerland’s position, yet refused to modify its conduct”, for which “one can easily infer that the dispute existed, and continues to exist between the two States.”

48. Switzerland claims that the dispute between Switzerland and Nigeria relates

to the interpretation or application of the provisions of UNCLOS with respect to the rights and obligations of coastal States in their EEZ, and notably the asserted right to arrest and detain vessels flying the flag of a third State, as well as their crew and cargo.

It further claims that the “dispute concerns in particular the interpretation and application of Parts V and VII of UNCLOS, including articles 56, paragraph 2, 58, 87, 92 and 94.”

49. Switzerland contends that “the Annex VII arbitral tribunal will have *prima facie* jurisdiction over Switzerland’s claim based on the International Covenant on Civil and Political Rights and also the Maritime Labour Convention.” It refers, in this regard, to article 56, paragraph 2, of the Convention, which states:

In exercising its rights and performing its duties under this Convention in the exclusive economic zone, the coastal State shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of this Convention.

50. According to Switzerland, “the rights and duties of other States” are not limited to the provisions of the Convention but may include those under the International Covenant on Civil and Political Rights (hereinafter the “ICCPR”) and the Maritime Labour Convention (hereinafter the “MLC”). It argues in this context that “Nigeria has made it impossible for Switzerland, the flag State of the “*San Padre Pio*”, to discharge toward the crew its duties resulting from the International Covenant on Civil and Political Rights and the Maritime Labour Convention”, and adds that “[s]ome of these duties also result from customary law.”

51. In response to the argument that, in its exchange with Nigeria regarding the dispute, Switzerland had “never raised issues concerning rules of international law other than those of the Convention”, Switzerland claims that “in its aide-mémoires [it] actually had referred to such other rules of international law.”

52. In its Statement in Response, Nigeria states that “[a]t the present stage of the proceedings, [it] does not challenge the *prima facie* jurisdiction of the Annex VII

arbitral tribunal over Switzerland's first and second claims." Nigeria does, however, "challenge the Annex VII arbitral tribunal's *prima facie* jurisdiction over Switzerland's third claim" on Nigeria's alleged breach of its obligations to Switzerland relating to the ICCPR and the MLC.

53. In this respect, Nigeria notes that "[t]he Annex VII arbitral tribunal may have jurisdiction over Switzerland's third claim only if, *inter alia*, the alleged dispute 'concern[s] the interpretation or application of [the] Convention'" and states that

[t]he alleged dispute [regarding Switzerland's third claim] does not concern the interpretation or application of UNCLOS but rather the interpretation and application of the ICCPR and the MLC. It thus falls outside of the jurisdiction of the Annex VII arbitral tribunal.

54. Nigeria adds that "[a]rticle 56(2) does not grant Annex VII arbitral tribunals the jurisdiction to determine violations of instruments outside of UNCLOS."

55. Nigeria also states that "a further reason why the Annex VII tribunal would not have *prima facie* jurisdiction over the third claim is that at the time of the institution of the Annex VII arbitral proceedings, no dispute had crystallized between the Parties over this claim." In this context, Nigeria contends that no reference was made to article 56, paragraph 2, of the Convention, the ICCPR, or the MLC in the diplomatic exchanges between Switzerland and Nigeria.

* *

56. Article 288, paragraph 1, of the Convention provides that "[a] court or tribunal referred to in article 287 shall have jurisdiction over any dispute concerning the interpretation or application of this Convention which is submitted to it in accordance with this Part." The Tribunal accordingly has to determine whether, on the date of the institution of arbitral proceedings, a dispute appears to have existed between the Parties and, if so, whether such dispute concerns the interpretation or application of the Convention.

57. Although Nigeria did not respond to Switzerland's position that the interception, arrest and detention of the *M/T "San Padre Pio"* constituted a violation of the provisions of the Convention, its view on this question may be inferred from its conduct. As the International Court of Justice (hereinafter the "ICJ") stated in *Land and Maritime Boundary between Cameroon and Nigeria*:

[A] disagreement on a point of law or fact, a conflict of legal views or interests, or the positive opposition of the claim of one party by the other need not necessarily be stated *expressis verbis*. In the determination of the existence of a dispute, as in other matters, the position or the attitude of a party can be established by inference, whatever the professed view of that party.

(*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*, *Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 275, at p. 315, para. 89;

see also *M/V "Norstar" (Panama v. Italy)*, *Preliminary Objections, Judgment, ITLOS Reports 2016*, p. 44, at p. 69, para 100; and *Detention of three Ukrainian naval vessels (Ukraine v. Russian Federation)*, *Provisional Measures, Order of 25 May 2019*, para. 43)

58. The fact that the Nigerian authorities intercepted, arrested and detained the *M/T "San Padre Pio"* and commenced criminal proceedings against it and its crew members indicates that Nigeria holds a different position from Switzerland on the question whether the events that occurred on 22-23 January 2018 gave rise to the alleged breach of Nigeria's obligations under the Convention.

59. The Tribunal is thus of the view that a dispute appears to have existed between the Parties on the date of the institution of arbitral proceedings.

60. The Tribunal is further of the view that at least some of the provisions invoked by Switzerland appear to afford a basis on which the jurisdiction of the Annex VII arbitral tribunal might be founded.

61. The Tribunal accordingly considers that a dispute concerning the interpretation or application of the Convention *prima facie* appears to have existed on the date of the institution of the arbitral proceedings.

Article 283 of the Convention

62. The Tribunal will now proceed to determine whether the requirements under article 283 of the Convention relating to an exchange of views have been met.

63. Article 283, paragraph 1, of the Convention reads:

When a dispute arises between States Parties concerning the interpretation or application of this Convention, the parties to the dispute shall proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means.

64. Switzerland states that since 13 March 2018 it “has made regular and repeated attempts, through a range of channels and at various levels, to exchange views with Nigeria for the settlement of the dispute concerning the interception of the vessel, the arrest of the vessel and her crew and the detention of the vessel, her crew and cargo.” Switzerland further states that it “has made it clear that Nigeria’s actions were in breach of UNCLOS.”

65. Switzerland maintains that it submitted several diplomatic notes and four *aide-mémoires* to the Nigerian authorities, which indicate that “the actions of Nigeria in respect of the “*San Padre Pio*” characterize violations of the law of the sea” and also demonstrate “Switzerland’s willingness to resolve the dispute.” In this context, Switzerland draws the attention of the Tribunal to the *aide-mémoire* of 25 January 2019, which was handed over by the Minister of Foreign Affairs of Switzerland to the Minister of Industry, Trade and Investment of Nigeria. In it, Switzerland stated:

So far, efforts by Switzerland to solve this dispute through diplomatic means have been unsuccessful. In case no diplomatic resolution can be reached very shortly, Switzerland considers submitting the dispute to judicial procedure under the UN Convention on the Law of the Sea.

66. As regards its claims relating to rights under the ICCPR and the MLC contained in paragraph 40(c) and (d) of its Statement of Claim, Switzerland points out that, in its *aide-mémoires*, it made reference to rules of international law other than those of the Convention.

67. According to Switzerland, “[t]here has been no substantive response by the Nigerian authorities to the Swiss attempts to find a solution to the dispute through negotiations and to exchange views regarding the settlement of the dispute.” Switzerland states that “[i]t is clear that no settlement has been reached by recourse to section 1 of Part XV and that the obligation to exchange views has been met.”

68. Nigeria contends that “there had only been exchanges between the Parties concerning articles 58, paragraph 1, and 87 of UNCLOS, which concern the freedom of navigation.” It refers, in this regard, to the first and second *aide-mémoires* of Switzerland which “each specify the same two provisions” indicated above. Nigeria adds that “[t]he third and fourth do not specify any provisions of UNCLOS.”

69. Nigeria states that “[n]one of the *aide-mémoires*, nor any of the other exchanges between the Parties prior to the institution of arbitral proceedings, mention the International Covenant on Civil and Political Rights or the Maritime Labour Convention.” Nigeria further states:

[T]he Tribunal recently affirmed ... [that] the dispute in question needs to have crystallized “as of the date of the institution of arbitral proceedings”, and, when the dispute arose, the Parties must have “proceed[ed] expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means”.

* *

70. The Tribunal notes that Switzerland made repeated attempts to exchange views with Nigeria regarding the settlement of the dispute concerning the arrest and detention of the vessel, its crew and cargo, in particular by sending four *aide-mémoires* to the Nigerian authorities. In its *aide-mémoire* of 25 January 2019, transmitted at the ministerial level, Switzerland stated that “[i]n case no diplomatic solution can be reached very shortly, Switzerland considers submitting the dispute to judicial procedure” under the Convention.

71. In the view of the Tribunal, for the purpose of addressing the requirements under article 283 of the Convention, it is not relevant whether Switzerland referred to

any specific claim or rights under the ICCPR and the MLC in its communications with Nigeria regarding the settlement of the dispute.

72. The Tribunal observes that Switzerland received no response from the Nigerian authorities to its various communications relating to the alleged breach of the Convention and other rules of international law and that Nigeria therefore did not engage in an exchange of views with Switzerland. Under these circumstances, the Tribunal considers that Switzerland could reasonably conclude that the possibility of reaching agreement was exhausted.

73. In this regard, the Tribunal recalls that “a State Party is not obliged to continue with an exchange of views when it concludes that the possibilities of reaching agreement have been exhausted” (*MOX Plant (Ireland v. United Kingdom), Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001*, p. 95, at p. 107, para. 60; “*ARA Libertad*” (*Argentina v. Ghana*), *Provisional Measures, Order of 15 December 2012, ITLOS Reports 2012*, p. 332, at p. 345, para. 71; “*Arctic Sunrise*” (*Kingdom of the Netherlands v. Russian Federation*), *Provisional Measures, Order of 22 November 2013, ITLOS Reports 2013*, p. 230, at p. 247, para. 76; *Detention of three Ukrainian naval vessels (Ukraine v. Russian Federation), Provisional Measures, Order of 25 May 2019*, para. 87).

74. The Tribunal further recalls that “the obligation to proceed expeditiously to an exchange of views applies equally to both parties to the dispute” (*M/V “Norstar” (Panama v. Italy), Preliminary Objections, Judgment, ITLOS Reports 2016*, p. 44, at p. 91, para. 213; *Detention of three Ukrainian naval vessels (Ukraine v. Russian Federation), Provisional Measures, Order of 25 May 2019*, para. 88).

75. Accordingly, the Tribunal is of the view that these considerations are sufficient at this stage to find that the requirements of article 283 of the Convention were satisfied before Switzerland instituted arbitral proceedings.

76. In light of the foregoing, the Tribunal concludes that *prima facie* the Annex VII arbitral tribunal would have jurisdiction over the dispute submitted to it.

II. Urgency of the situation

Plausibility of rights asserted by the Applicant

77. The power of the Tribunal to prescribe provisional measures under article 290, paragraph 5, of the Convention has as its object the preservation of the rights of the Parties pending the constitution and functioning of the Annex VII arbitral tribunal. Before prescribing provisional measures, the Tribunal therefore needs to satisfy itself that the rights which Switzerland seeks to protect are at least plausible (see *Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire), Provisional Measures, Order of 25 April 2015, ITLOS Reports 2015*, p. 146, at p. 158, para. 58; *"Enrica Lexie" (Italy v. India), Provisional Measures, Order of 24 August 2015, ITLOS Reports 2015*, p. 182, at p. 197, para. 84; *Detention of three Ukrainian naval vessels (Ukraine v. Russian Federation), Provisional Measures, Order of 25 May 2019*, para. 91).

78. Switzerland maintains that the rights it seeks to protect are "the right to freedom of navigation and other internationally lawful uses of the sea, including bunkering, the exercise by Switzerland of its exclusive jurisdiction as a flag State and the rights of the crew, whose protection is incumbent on Switzerland as the flag State."

79. Switzerland states that at this stage of the proceedings

[w]hat is required is something more than assertion but less than proof; in other words, the party must show that there is at least a reasonable possibility that the right which it claims exists as a matter of law and will be adjudged [by the Tribunal] to apply to that party's case.

According to Switzerland, the existence of the rights invoked by it, their applicability to the facts of the present case and their violation “are more than ‘plausible’, they are indisputable.”

80. Switzerland claims that “Nigeria has violated Switzerland’s right to freedom of navigation and other internationally lawful uses of the sea related to this freedom in the EEZ under article 58 of UNCLOS, read in conjunction with article 87, including but not limited to the right to carry out STS [ship-to-ship] transfers between vessels.”

81. In this respect, Switzerland maintains that,

by intercepting the “*San Padre Pio*” in its exclusive economic zone, about 32 nm off the coast and outside any safety zone which Nigeria could have established under article 60, paragraph 4, of the Convention, Nigeria hampered the freedom of movement of the vessel. Accordingly, it infringed Switzerland’s freedom of navigation.

82. Switzerland further maintains that Nigeria “hinders the possibility for the vessel to carry out bunkering activities, which ... have been recognized by [the] Tribunal as being part of the freedom of navigation.”

83. Switzerland argues that “[t]he essential idea embodied in the principle of freedom of navigation is that of non-interference with the freedom of movement of the vessel in question.” It further argues that, in the *M/V “Norstar” Case*, the Tribunal “added ... the possibility of carrying out bunkering activities provided they are not connected with fishing.”

84. Switzerland also claims that “Nigeria has violated Switzerland’s right to exercise exclusive flag State jurisdiction over its vessels under article 58 of UNCLOS, read in conjunction with article 92.” In this respect, it argues that article 92 of the Convention “is applicable in the exclusive economic zone by virtue of article 58, paragraph 2”.

85. Switzerland contends that,

whether it be the interception of the vessel, its detention, the detention of its cargo, or the detention of its crew, at no time did Nigeria seek to obtain

the consent of Switzerland as the flag State. Nigeria has therefore not only disregarded the exercise by Switzerland of its exclusive jurisdiction as the flag State, but continues to disregard it.

86. In Switzerland's view, "there was no basis in international law for Nigeria to exercise enforcement jurisdiction against the vessel, her crew and cargo in respect of domestic laws in its EEZ and outside any safety zone established in accordance with international law."

87. With regard to Nigeria's invocation of article 56 of the Convention as a basis for its exercise of jurisdiction, Switzerland contends that "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." Switzerland adds that,

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 ... 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 ... 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.

88. With regard to Nigeria's invocation of articles 208 and 214 of the Convention as a basis for its exercise of jurisdiction, Switzerland argues that "[t]he provisions invoked are not applicable in this case, and even if they were, *quod non*, Nigeria would not have fulfilled its obligations as laid down in article 220, paragraphs 3, 6 and 7, article 228, paragraph 1, article 230 and article 231." Switzerland adds that "Nigeria has never 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."

89. Switzerland also claims that "Nigeria has failed, in breach of article 56(2) of UNCLOS, to have due regard to Switzerland's obligations under article 94, including its duties under the 2006 Maritime Labour Convention (**'MLC'**) towards seafarers on ships flying its flag."

90. In addition, Switzerland claims:

Nigeria has failed to have due regard, in breach of article 56(2) of UNCLOS, to

- i. the right of persons to liberty and security and the right not to be arbitrarily detained, as reflected in Article 9(1) of the 1966 International Covenant on Civil and Political Rights (**'ICCPR'**) and customary international law;
- ii. the other rights of persons in connection with criminal proceedings, as reflected in Article 9 of the ICCPR and customary international law.

91. Switzerland emphasizes that “[t]his does not in any way imply ... that Switzerland seeks to apply this Convention to individuals.” In its view, Switzerland, “through Nigeria’s conduct, ... has been deprived of its right as the flag State to ensure respect of its rights.” Switzerland adds that it “is not ... exercising diplomatic protection”; rather, “[w]hat Switzerland can and does do is protect its own rights, as a flag State”.

92. According to Nigeria, none of the rights whose protection Switzerland seeks “are plausible in the present case because they are not applicable to the situation at hand.” In this connection, Nigeria states that

a right is “plausible” only if it is applicable to the factual situation at hand. This does not mean that the Tribunal needs to examine the facts underlying the merits of the claim. But the Tribunal does need to undertake the limited examination of the facts that purport to establish the applicability of the right to the situation at hand.

93. Nigeria contends that,

[a]s regards to the first two rights alleged by Switzerland under Article 58 of the Convention, they are not plausible because Nigeria has the sovereign right and obligation under Articles 56(1)(a), 208 and 214 of the Convention to exercise its enforcement jurisdiction over the bunkering incident in question. With respect to the rights alleged under the ICCPR and the MLC, they are also not plausible because Switzerland does not allege facts that constitute a breach of the rights specified in these conventions.

94. Nigeria maintains that “Switzerland’s asserted right regarding the freedom of navigation and other internationally lawful uses of the sea is not ‘compatible with [these] other provisions of the Convention’ [and] is thus not applicable in the present

case and is therefore not a plausible basis upon which Switzerland can assert claims against Nigeria.”

95. Nigeria states that it “does not dispute that, in general, these freedoms apply to Nigeria’s EEZ”. It emphasizes, however, that “article 58 expressly provides that in the EEZ they are ‘subject to the relevant provisions of this Convention’.”

96. Nigeria further states that it “was exercising its sovereign right to enforce its laws and regulations concerning the conservation and management of the non-living resources in its EEZ when it arrested and initiated judicial proceedings against the *San Padre Pio* and its crew.”

97. Nigeria contends that

the exercise of the freedom of navigation and other internationally lawful uses of the sea in Nigeria’s EEZ is subject to the rules set out in Article 56(1)(a) of the Convention, which grants Nigeria, as the coastal State, the right to enforce its laws and regulations concerning the management of the natural resources in its EEZ.

In Nigeria’s view, “[t]his encompasses the enforcement activities that Nigeria took against the *San Padre Pio* and its crew.”

98. Nigeria contends that “[t]he “*San Padre Pio*” was bunkering facilities involved in the extraction of natural resources from the seabed and subsoil within Nigeria’s exclusive economic zone.” It argues that article 56, paragraph 1(a), of the Convention “makes clear that Nigeria, as a coastal State, has sovereign rights to exploit, conserve and manage the natural resources of the EEZ” and that “[t]his includes enforcement jurisdiction”.

99. Nigeria emphasizes that article 56, paragraph 1(a), of the Convention “applies to *both* living and non-living resources” and that “[a]s a result, the coastal State’s competence – including its ‘right to take the necessary enforcement measures’ – extends to the management of non-living resources in its EEZ.” Nigeria further emphasizes that article 56, paragraph 1(a), of the Convention “contains no specific

limitations” and that article 73 “makes no mention of, and does not affect, enforcement related to non-living resources.”

100. Nigeria further contends that articles 208 and 214 of the Convention “impose on Nigeria the obligation to enforce its laws and regulations concerning pollution from seabed activities in its EEZ, and as such, they serve as an independent basis for Nigeria to take the enforcement actions it did against the *San Padre Pio* and its crew.” Nigeria emphasizes in this regard that “bunkering carried out in connection with seabed activities is a major source of pollution of the marine environment.”

101. According to Nigeria, “the principle of exclusive flag State jurisdiction does not apply in the present case.” It argues that, “[i]f it did, then the sovereign and exclusive rights of the coastal State enshrined in Part V of the Convention could never be enforced against foreign flagged vessels without the consent of the flag State” and that “[t]his would make law enforcement in an environment like the Gulf of Guinea impossible.”

102. Nigeria further argues that articles 58 and 92 of the Convention “grant the flag State exclusive jurisdiction over the ship, but not if there is a provision in the Convention providing otherwise.”

103. With regard to Switzerland’s claim relating to the MLC and the ICCPR, Nigeria states that “[e]ven if there were *prima facie* jurisdiction with respect to Switzerland’s ICCPR and MLC claims, the rights asserted by Switzerland are not plausible because they are not applicable to the present case.” It emphasizes that “UNCLOS contains no ‘right to seek redress’ of breaches of other treaties.”

104. Nigeria further contends that “there is no question that the arrest, detention, and initiation of judicial proceedings against the crew of the *San Padre Pio* were not arbitrary or unlawful.” It also argues that “Switzerland does not cite to any specific right enshrined [in the MLC] that is called into question in the present proceedings” and that, “[i]ndeed, no such right is applicable to the present case.”

105. At this stage of the proceedings, the Tribunal is not called upon to determine definitively whether the rights claimed by Switzerland exist, but need only decide whether such rights are plausible (*Detention of three Ukrainian naval vessels (Ukraine v. Russian Federation)*, *Provisional Measures, Order of 25 May 2019*, para. 95; see “*Enrica Lexie*” (*Italy v. India*), *Provisional Measures, Order of 24 August 2015*, *ITLOS Reports 2015*, p. 182, at p. 197, para. 84).

106. The first two rights Switzerland seeks to protect are rights to the freedom of navigation and other internationally lawful uses of the sea related to this freedom in the exclusive economic zone under article 58 of the Convention, and rights to exercise exclusive flag State jurisdiction over its vessels under article 92 of the Convention, which applies to the exclusive economic zone by virtue of article 58, paragraph 2.

107. The Tribunal notes that Switzerland claims that bunkering activities carried out by the *M/T “San Padre Pio”* in the exclusive economic zone of Nigeria are part of the freedom of navigation and that it has exclusive jurisdiction as the flag State over the vessel with respect to such bunkering activities. The Tribunal further notes that Nigeria argues that it has sovereign rights and obligations under articles 56, paragraph 1(a), 208 and 214 of the Convention to exercise its enforcement jurisdiction over the bunkering activities in question in its exclusive economic zone.

108. In the Tribunal’s view, taking into account the legal arguments made by the Parties and evidence available before it, it appears that the rights claimed by Switzerland in the present case on the basis of articles 58, paragraphs 1 and 2, and 92 of the Convention are plausible.

109. The third right Switzerland seeks to protect concerns Nigeria’s obligation to have due regard to rights and duties of Switzerland in the exclusive economic zone of Nigeria under article 56, paragraph 2, of the Convention. Switzerland claims that those rights and duties include “its right to seek redress on behalf of crew members and all persons involved in the operation of the vessel, irrespective of their nationality, in regard to their rights under the ICCPR and the MLC”, and its “obligations under

article 94, including its duties under the 2006 Maritime Labour Convention ('MLC') towards seafarers on ships flying its flag.”

110. The Tribunal considers that the question of whether the third right asserted by Switzerland is plausible would have required the examination of legal and factual issues which were not fully addressed by the Parties in the proceedings before it. Having established that the first and second rights asserted by Switzerland are plausible, the Tribunal, therefore, does not find it necessary to make a determination of the plausible character of the third right at this stage of the proceedings.

Real and imminent risk of irreparable prejudice

111. Pursuant to article 290, paragraph 5, of the Convention, the Tribunal may prescribe provisional measures if the urgency of the situation so requires. Accordingly, the Tribunal may not prescribe such measures unless there is a real and imminent risk that irreparable prejudice may be caused to the rights of parties to the dispute before the constitution and functioning of the Annex VII arbitral tribunal (see “*Enrica Lexie*” (*Italy v. India*), *Provisional Measures, Order of 24 August 2015*, *ITLOS Reports 2015*, p. 182, at p. 197, para. 87). The Tribunal therefore has to determine whether there is a risk of irreparable prejudice to the rights of the Parties to the dispute and whether such risk is real and imminent (*Detention of three Ukrainian naval vessels (Ukraine v. Russian Federation)*, *Provisional Measures, Order of 25 May 2019*, para. 100).

112. Switzerland contends that the requirement of urgency under article 290, paragraph 5, of the Convention is met in respect of the provisional measures requested by Switzerland. It explains that urgency under this provision “means that the party requesting provisional measures needs to show that there is a real and imminent risk that irreparable prejudice may be caused before the constitution and functioning of the Annex VII arbitral tribunal.”

113. Switzerland underlines that what matters for the provisional measures proceedings under article 290, paragraph 5, of the Convention is “whether a risk will emerge between now and the time when the Annex VII arbitral tribunal is constituted

and is itself operational and able to prescribe provisional measures.” It denies the requirement of an exceptional level of urgency under that provision. In response to the argument of Nigeria that there is no urgency because of the time which had passed before Switzerland instituted proceedings, Switzerland states that “the Swiss Government cannot be blamed for having, assiduously and in good faith, sought a negotiated settlement and attempted to engage Nigeria in a discussion on how to settle this dispute”, while “[t]hese two steps are formally required by the Convention.”

114. Switzerland claims that serious prejudice has already been caused to its rights and that there is a real and imminent risk that further serious or irreparable prejudice will be caused to its rights until such time as the Annex VII arbitral tribunal has been constituted and is ready to exercise its functions. It further claims that “[a]s at the date of the present Request for Provisional Measures, the vessel, her crew and cargo are still detained, and have been for 16 months” and that “[t]his is causing serious risks to the vessel, her crew and cargo” whereas “[t]hese risks are real and imminent.”

115. Switzerland argues that the ongoing detention of the *M/T “San Padre Pio”* denies Switzerland “the right to freedom of navigation in respect of a vessel flying its flag, and the right to exercise jurisdiction over its vessel.” According to Switzerland, the denial of those rights “is not capable of purely monetary reparation.” Switzerland also argues that “[f]urther prolonging that detention would add to the continuing and irreparable injury that Switzerland is suffering.” It states that the ongoing detention “puts the vessel at a severe risk” that it may soon be unseaworthy “due to the impossibility to continue the highest levels of maintenance required.” Switzerland adds that “[t]he forced detention does indeed create risks for the vessel in terms of collision and in the event of rough weather conditions.”

116. Switzerland states that the Master and the three other officers “have been and continue to be deprived of their right to liberty and security as well as their right to leave the territory and maritime areas under Nigeria’s jurisdiction.” It further states that “[t]he damage suffered by the Master and the three other officers ... is clearly irreparable, as every day spent in detention is irrecoverable.” According to Switzerland, the ongoing detention puts at risk the safety and security of the Master

and the three other officers, who “remain at constant risk of being kidnapped, injured or even killed.”

117. In this context, Switzerland draws attention to a “piratical attack” against the *M/T “San Padre Pio”*, which took place on 15 April 2019. It states that it is conceivable that such an attack will be repeated and that this may happen “at any time before the Annex VII arbitral tribunal is in a position to act.” Switzerland further states that “[t]his permanent risk of physical and psychological harm to the crew underlines the gravity of the situation and the urgent need for provisional measures.” It adds that “in light of the piratical attacks in the region, a permanent risk exists that the vessel, together with her cargo, will be hijacked, with serious consequences for the persons concerned.”

118. Switzerland argues that the ongoing detention of the vessel also puts its cargo at risk, and that, “[i]n light of the recent extension of the charges to the charterer, the cargo appears at risk of being imminently seized.” According to Switzerland, the cargo is deteriorating and at risk of being lost since the vessel has been forced to use it for its own functioning. In addition, the “preservation of its quality cannot be guaranteed”.

119. Switzerland maintains that, “as a consequence of the actions taken by Nigeria in connection with the interception, arrest and detention of the *“San Padre Pio”*, persons involved or interested in the operation of that vessel have suffered and continue to suffer damages of a personal and economic nature.”

120. Nigeria contends that “Switzerland’s request for provisional measures should ... be rejected because it does not comply with the conditions of urgency and risk of irreparable harm required by article 290(5) of UNCLOS.” It states that this provision should “only be resorted to in ... extremely urgent circumstances when the alleged irreparable prejudice will likely materialize in the time between the request for provisional measures and the constitution and functioning of the Annex VII arbitral tribunal, which ordinarily only takes a few months.” For this reason, it alleges that “[p]rovisional measures under article 290, paragraph 5, are even more exceptional than ordinary provisional measures under article 290, paragraph 1.”

121. Nigeria maintains that “[t]he absence of urgency is clear” because it took Switzerland almost sixteen months from the arrest of the vessel to institute arbitral proceedings and request provisional measures.

122. Nigeria contends that “Switzerland has also failed to establish that urgent measures are needed to prevent harm to the vessel and its cargo.” As to the vessel, it states that its condition “will not materially change in the few months it will take to form the Annex VII arbitral tribunal” and that “the time required for repair of the vessel will remain materially unchanged between the present time and the composition of the Annex VII arbitral tribunal”.

123. Nigeria argues that “any alleged harm to the vessel, to the cargo, and to their owners is, or rather would be, economic only” and that “[r]eparation for any such harm, were it to occur, can easily be provided through the award of monetary compensation by the Annex VII tribunal.” It adds that “any loss that might be caused by damage to the vessel or the cargo ... cannot justify the indication of provisional measures by the Tribunal.”

124. With respect to the cargo, Nigeria is of the view that “there can be no situation of urgency ... since the Nigerian court has already issued an interim forfeiture order and authorized that it be sold and its economic value preserved, pending the hearing and determination of the charges.” In response to Switzerland’s argument concerning deterioration of the cargo, Nigeria states that such harm is “purely economic” and that “the Nigerian authorities have sought to take steps to prevent any economic damage”.

125. Nigeria contends that “Switzerland has failed to establish that the rights of the officers and crew ... are currently exposed to a risk of imminent irreparable prejudice.” It maintains that “[t]he current presence of the officers and crew on the vessel is voluntary” and that “the officers who are currently subject to criminal proceedings in Nigeria received bail, under the sole requirement that they do not leave the country.”

126. Nigeria maintains that “the conditions on the vessel are the same as the normal working conditions of those who man the vessel in its ordinary seafaring activities.” It further maintains that “the vessel is fully supplied with food, water and other necessities.” Nigeria adds that “there are no restrictions on the ability of the crew to communicate with persons not on board the vessel nor have the Nigerian authorities impeded medical professionals from visiting or scheduling appointments with the crew.”

127. Nigeria emphasizes that “[t]he vessel is under the protection of the Nigerian Navy, which has deployed armed guards on board the vessel since it was arrested.” As to the pirate attack of 15 April 2019, it contends that it was those armed guards that successfully prevented it and that “[s]ince that incident, the Nigerian Navy has increased the number of guards on the vessel and has stationed a gun boat in close proximity to the vessel.”

* *

128. The Tribunal notes that in the present case the *M/T “San Padre Pio”* was arrested and detained for bunkering activities it carried out in the exclusive economic zone of Nigeria. The Tribunal considers that, in the circumstances of the present case, such arrest and detention could irreparably prejudice the rights claimed by Switzerland relating to the freedom of navigation and the exercise of exclusive jurisdiction over the vessel as its flag State if the Annex VII arbitral tribunal adjudges that those rights belong to Switzerland. In the Tribunal’s view, there is a risk that the prejudice to the rights asserted by Switzerland, with respect to the vessel, cargo and crew – which constitute a unit – may not be fully repaired by monetary compensation alone.

129. The Tribunal notes that the *M/T “San Padre Pio”* has not only been detained for a considerable period of time but also that the vessel and its crew are exposed to constant danger to their safety and security. In this regard, the Tribunal takes note of the armed attack against the *M/T “San Padre Pio”* that took place on 15 April 2019, endangering the lives of those on board the vessel. The Tribunal further notes the report on piracy and armed robbery against ships (1 January – 31 March 2019) of

the International Chamber of Commerce-International Maritime Bureau, which states that the Gulf of Guinea accounts for 22 of 38 incidents of piracy and armed robbery against ships for the first quarter of 2019 and that 14 incidents are recorded for Nigeria. Thus, despite the measures to strengthen the security of the vessel taken by the Nigerian authorities following the armed attack, the Tribunal is of the view that the vessel and the crew and other persons on board appear to remain vulnerable. The Tribunal, accordingly, considers that the risk of irreparable prejudice is real and ongoing in the present case.

130. The Tribunal also considers that the threat to the safety and security of the Master and the three officers of the *M/T "San Padre Pio"*, and the restrictions on their liberty and freedom for a lengthy period, raise humanitarian concerns.

131. In light of the above circumstances, the Tribunal finds that there is a real and imminent risk of irreparable prejudice to the rights of Switzerland pending the constitution and functioning of the Annex VII arbitral tribunal. The Tribunal accordingly finds that the urgency of the situation requires the prescription of provisional measures under article 290, paragraph 5, of the Convention.

III. Provisional measures to be prescribed

132. In light of the above conclusion that the requirements for the prescription of provisional measures under article 290, paragraph 5, of the Convention are met, the Tribunal may prescribe "any provisional measures which it considers appropriate under the circumstances to preserve the respective rights of the parties to the dispute", as provided for in article 290, paragraph 1, of the Convention.

133. The Tribunal notes in this regard that, in accordance with article 89, paragraph 5, of the Rules, it may prescribe measures different in whole or in part from those requested.

134. Switzerland requests the Tribunal to prescribe provisional measures requiring Nigeria to immediately: enable the *M/T "San Padre Pio"* to be resupplied and crewed

so as to be able to leave, with its cargo, its place of detention and the maritime areas under the jurisdiction of Nigeria; release the Master and the three other officers of the *M/T "San Padre Pio"* and allow them to leave the territory and maritime areas under the jurisdiction of Nigeria; and suspend all court and administrative proceedings and refrain from initiating new ones.

135. Nigeria requests the Tribunal to reject Switzerland's requests for provisional measures. It argues that "granting the first measure requested by Switzerland would impermissibly require this Tribunal to prejudge the merits of this dispute." As to the second measure, Nigeria contends that an order requiring it "to permit the four persons presently free on bail who are on trial for violations of Nigeria's criminal laws to depart the country ... would irreparably harm Nigeria's sovereign right to enforce its laws against persons legally prosecuted for violations of Nigerian criminal law". In Nigeria's view, "custody of the defendants is essential for the successful continuation of those proceedings and Switzerland, not being the State of nationality or of residence of the Master and officers, nor their employer, is not in a position to assure their return to face the criminal charges in Nigeria."

136. Switzerland contends that "[t]he grant of the prescribed measures does not in any way constitute a pre-judgment on the merits" since they are "not the same as the requests on the merits." It underlines that, with the granting of its request, the "rights of both Parties would be protected" as Nigeria will retain its ability to prosecute and enforce its laws and Switzerland will continue to enjoy its rights under the Convention until such time as the arbitral tribunal gives its final decision. In addition, Switzerland states that

the release of the four officers ... would allow the preservation of the rights of both Parties to the proceedings because if Switzerland's case is not upheld on the merits, it will always be possible for Nigeria to resume its criminal proceedings against the Ukrainian officers.

* *

137. The Tribunal is of the view that, under article 290 of the Convention, it may prescribe a bond or other financial security as a provisional measure for the release

of the vessel and the persons detained (see “*Arctic Sunrise*” (*Kingdom of the Netherlands v. Russian Federation*), *Provisional Measures, Order of 22 November 2013*, *ITLOS Reports 2013*, p. 230, at p. 250, para. 93). The Tribunal notes in this regard that the release of a vessel upon the posting of bond is an option available under the “administrative procedure” in Nigeria, as stated by Counsel for Nigeria during the hearing in response to a question put by the Tribunal.

138. Having examined the measures requested by Switzerland, in order to preserve the rights claimed by it, the Tribunal considers it appropriate under the circumstances of the present case to prescribe provisional measures requiring Nigeria to release the *M/T “San Padre Pio”*, its cargo and the Master and the three officers upon the posting of a bond or other financial security by Switzerland and that the vessel with its cargo and the Master and the three officers be allowed to leave the territory and maritime areas under the jurisdiction of Nigeria.

139. The Tribunal determines, taking into account the respective rights claimed by the Parties and the particular circumstances of the present case, that the bond or other financial security should be in the amount of US\$ 14,000,000, to be posted by Switzerland with the competent authority of Nigeria, and that the bond or other financial security should be in the form of a bank guarantee, issued by a bank in Nigeria or a bank having corresponding arrangements with a bank in Nigeria. This bond is without prejudice to the amount posted under the terms of bail fixed by an order of the Federal High Court of Nigeria issued on 23 March 2018.

140. The issuer of the bank guarantee should undertake to pay Nigeria, if the Annex VII arbitral tribunal finds that the arrest and detention of the *M/T “San Padre Pio”*, its cargo and its crew by Nigeria do not constitute a violation of the Convention and, following that, if required by a final decision of the relevant domestic court in Nigeria, such sum up to US\$ 14,000,000 as may be determined by the relevant domestic court in Nigeria or by agreement of the Parties, as the case may be. The payment under the guarantee should be made promptly after receipt by the issuer of a written demand by the competent authority of Nigeria accompanied by certified copies of the decisions of the Annex VII arbitral tribunal and of the relevant domestic court in Nigeria.

141. The Tribunal is of the view that Nigeria needs to be assured unequivocally through an undertaking that the Master and the three officers will be available and present at the criminal proceedings in Nigeria, if the Annex VII arbitral tribunal finds that the arrest and detention of the *M/T "San Padre Pio"*, its cargo and its crew and the exercise of jurisdiction by Nigeria in relation to the event which occurred on 22-23 January 2018 do not constitute a violation of the Convention. In this regard, the Tribunal considers that posting of a bond, whilst effective, may not afford sufficient satisfaction to Nigeria. The Tribunal, therefore, decides that Switzerland shall undertake to ensure the return of the Master and the three officers to Nigeria if so required in accordance with the decision of the Annex VII arbitral tribunal, and that, for this purpose, the Parties shall cooperate in good faith in the implementation of such undertaking. The Tribunal recalls in this regard that the Parties have maintained close cooperation in various areas, including in the area of mutual legal assistance in criminal matters. The Tribunal also notes that, during the hearing, Counsel for Switzerland, in a response to a question put by the Tribunal, referred, *inter alia*, to mutual legal assistance in criminal matters as a means to secure the return of the Master and the three officers. The Tribunal considers that the undertaking to ensure the return of the Master and the three officers to Nigeria will constitute an obligation binding upon Switzerland under international law.

142. The Tribunal does not consider it necessary to require Nigeria to suspend all court and administrative proceedings and refrain from initiating new proceedings. However, the Tribunal considers it appropriate to order both Parties to refrain from taking any action which might aggravate or extend the dispute submitted to the Annex VII arbitral tribunal.

143. The Tribunal notes that, in accordance with article 290, paragraph 5, of the Convention, the Annex VII arbitral tribunal, once constituted, may modify, revoke or affirm any provisional measures prescribed by the Tribunal.

144. Pursuant to article 95, paragraph 1, of the Rules, each Party is required to submit as soon as possible a report and information on compliance with any provisional measures prescribed. Moreover, it may be necessary for the Tribunal to

request further information from the Parties on the implementation of the provisional measures prescribed and it is appropriate in this regard that the President be authorized to request such information in accordance with article 95, paragraph 2, of the Rules. In the view of the Tribunal, it is consistent with the purpose of proceedings under article 290, paragraph 5, of the Convention that the Parties also submit reports and information to the Annex VII arbitral tribunal, unless the arbitral tribunal decides otherwise.

145. The present Order in no way prejudices the question of the jurisdiction of the Annex VII arbitral tribunal to deal with the merits of the case, or any questions relating to the admissibility of Switzerland's claims or relating to the merits themselves, and leaves unaffected the rights of Switzerland and Nigeria to submit arguments in respect of those questions.

IV. Operative provisions

146. For these reasons,

THE TRIBUNAL,

(1) By 17 votes to 4,

Prescribes, pending a decision by the Annex VII arbitral tribunal, the following provisional measures under article 290, paragraph 5, of the Convention:

- (a) Switzerland shall post a bond or other financial security, in the amount of US\$ 14,000,000, with Nigeria in the form of a bank guarantee, as indicated in paragraphs 139 and 140;
- (b) Switzerland shall undertake to ensure that the Master and the three officers are available and present at the criminal proceedings in Nigeria, if the Annex VII arbitral tribunal finds that the arrest and detention of the *M/T "San Padre Pio"*, its cargo and its crew and the exercise of jurisdiction by Nigeria in

relation to the event which occurred on 22-23 January 2018 do not constitute a violation of the Convention. Switzerland and Nigeria shall cooperate in good faith in the implementation of such undertaking;

- (c) Upon the posting of the bond or other financial security referred to in (a) above and the issuance of the undertaking referred to in (b) above, Nigeria shall immediately release the *M/T "San Padre Pio"*, its cargo and the Master and the three officers and shall ensure that the *M/T "San Padre Pio"*, its cargo and the Master and the three officers are allowed to leave the territory and maritime areas under the jurisdiction of Nigeria.

FOR: *President* PAIK; *Vice-President* ATTARD; *Judges* JESUS, COT, PAWLAK, YANAI, HOFFMANN, KULYK, GÓMEZ-ROBLEDO, HEIDAR, CABELLO, CHADHA, KITTICHAISAREE, KOLODKIN, LIJNZAAD; *Judges ad hoc* MURPHY; PETRIG;

AGAINST: *Judges* LUCKY, KATEKA, GAO, BOUGUETAIA.

- (2) By 19 votes to 2,

Decides that Switzerland and Nigeria shall refrain from taking any action which might aggravate or extend the dispute submitted to the Annex VII arbitral tribunal.

FOR: *President* PAIK; *Vice-President* ATTARD; *Judges* JESUS, COT, PAWLAK, YANAI, HOFFMANN, GAO, BOUGUETAIA, KULYK, GÓMEZ-ROBLEDO, HEIDAR, CABELLO, CHADHA, KITTICHAISAREE, KOLODKIN, LIJNZAAD; *Judges ad hoc* MURPHY, PETRIG;

AGAINST: *Judges* LUCKY, KATEKA.

- (3) By 19 votes to 2,

Decides that Switzerland and Nigeria shall each submit the initial report referred to in paragraph 144 not later than 22 July 2019 to the Tribunal, and *authorizes* the President to request further reports and information as he may consider appropriate after that report.

FOR: *President* PAIK; *Vice-President* ATTARD; *Judges* JESUS, COT, PAWLAK, YANAI, HOFFMANN, GAO, BOUGUETAIA, KULYK, GÓMEZ-ROBLEDO, HEIDAR, CABELLO, CHADHA, KITTICHAISAREE, KOLODKIN, LIJNZAAD; *Judges ad hoc* MURPHY, PETRIG;

AGAINST: *Judges* LUCKY, KATEKA.

Done in English and in French, both texts being equally authoritative, in the Free and Hanseatic City of Hamburg, this sixth day of July, two thousand and nineteen, in three copies, one of which will be placed in the archives of the Tribunal and the others transmitted to the Government of Switzerland and the Government of Nigeria, respectively.

(signed)

Jin-Hyun PAIK
President

(signed)

Philippe GAUTIER
Registrar

Judges Cabello and Chadha append a joint declaration to the Order of the Tribunal.

Judge Kittichaisaree appends a declaration to the Order of the Tribunal.

Judge Kolodkin appends a declaration to the Order of the Tribunal.

Judge Heidar appends a separate opinion to the Order of the Tribunal.

Judge *ad hoc* Murphy appends a separate opinion to the Order of the Tribunal.

Judge *ad hoc* Petrig appends a separate opinion to the Order of the Tribunal.

Judge Lucky appends a dissenting opinion to the Order of the Tribunal.

Judge Kateka appends a dissenting opinion to the Order of the Tribunal.

Judge Gao appends a dissenting opinion to the Order of the Tribunal.

Judge Bouguetaia appends a dissenting opinion to the Order of the Tribunal.