DISSENTING OPINION OF JUDGE LUCKY

Introduction

1. I have found it difficult to concur with all the findings of the majority of the Tribunal. Consequently, I feel obliged to cast a negative vote on the operative part of the Order.

The Request

2. On 21 May 2019 the Swiss Confederation ("Switzerland") filed an action for the prescription of provisional measures in the dispute between Switzerland and the Federal Republic of Nigeria ("Nigeria") concerning the *M/T "San Padre Pio"* (the *"San Padre Pio"*), her crew and cargo.

3. In the Notification of the Request, which is also set out in its final submission, 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.

4. The final submission of Nigeria is as follows:

> 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.

Factual background

5. The *''San Padre Pio''* ("the vessel") is a motor tanker flying the flag of Switzerland. It is managed by ABC Maritime ("the owner") and chartered by Argo Shipping and Trading Company, which is linked to Augusta Energy SA, which is based in Switzerland.

6. On 23 January 2018, while the vessel was engaged in a ship-to-ship ("STS") transfer of gasoil, it was intercepted and arrested by the Nigerian navy. Switzerland submits that the arrest took place about 32 nautical miles from the Nigerian coast, within Nigeria's exclusive economic zone ("EEZ").

7. On 24 January, the Nigerian navy ordered the vessel to proceed to Port Harcourt and the Nigerian port of Bonny Inner Anchorage, where the 16 members of the crew were arrested and detained on board the vessel.

8. On 9 March 2018, the vessel and crew were handed over to the Nigerian Economic and Financial Crimes Commission ("the EFCC") for further investigation. On that day the crew members were relocated to a prison, where it is alleged that the detention conditions were "dire". (In support of this allegation Switzerland referred to an article of 2 February 2018, published in "This Day" in which the Vice President, Professor Yemi Osinbago, revealed that the prison was overcrowded.).

9. On 12 March 2018, the EFCC brought charges against the 16 crew members and the vessel for conspiring to distribute and deal in petroleum products without lawful authority or appropriate licence, and with having done so with respect to the petroleum product on board.

10. On 19 March 2018, the charges were amended to apply only to the Master and three officers of the vessel. The charges against the other 12 members of the crew were dropped.

11. On 20 March 2018, the 12 members of the crew were allowed to leave prison and return to the vessel. According to Nigeria "upon the crew's release they were at liberty to go anywhere of their choice without restraint", their passports were returned and they were allowed to leave Nigeria.

12. On 21 March 2018, the Master and officers applied to the Federal High Court for bail. The EFCC did not oppose the application; it asked that bail be granted on conditions that would make the defendants attend their trial.

13. On 23 March 2018, the Federal High Court granted bail with the following conditions: that the defendants deposit N10, 000,000 (approximately US$ 28,000) and provide a reliable security that could enter into a bond of an equivalent amount and swear to an affidavit of means. Nigeria submitted that the court imposed no restrictions on where the defendants could travel, other than requiring that they "do not travel outside Nigeria without the prior approval or order of the Court". It appears to me that in the light of the foregoing, it was open to, and the right of, the Master and the three officers to apply to the Federal Court for leave to travel outside Nigeria. Apparently, to date, no such application was made to the Court in Nigeria.

14. Nigerian law permits arrested vessels to be released upon the posting of a bond. The owner did not seek to exercise that right. In fact, to date, an application for the release of the vessel has not been made to the Federal Court in Nigeria.

15. I will refer to the foregoing later in this opinion to show why the request for provisional measures set out above should not be granted.

16. On 24 April 2018, the charges against the officers and vessel were amended to include additional counts for having provided a false bill of lading and false cargo manifest; in particular, that each of those documents had falsely stated that the vessel carried 4,625,865 cubic meters (CBM) of petroleum product although the bill of lading from Lomé, Togo, discloses that

the cargo actually contained 7,488,484 CBM. Switzerland does not agree with these figures.

17. After bail was granted, the Master and three officers were released subject only to the requirement that they remit their passports, which were given to the Deputy Chief Registrar of the Federal High Court for safekeeping. Nigeria submits that the Master and officers were free to leave the vessel whenever they wished and travel within Nigeria. A physician would be permitted to attend to the officers. However, Switzerland did not agree, because there were problems in that on one specified occasion the physician was not allowed permission to visit the vessel and left after a long wait.

18. On 26 September 2018, the Nigerian High Court issued an order for forfeiture of the cargo on board the vessel. On 18 October 2018, an application by way of motion was filed with the Federal Court of Nigeria with respect to verification of the cargo on board the vessel; for temporary forfeiture of the cargo to evacuate it to avoid an oil spill; and to sell the cargo and hold the funds in an interest-bearing account until matters were finally determined. In each instance the defendants were allowed their right to be heard. Augusta Energy SA – the charterer of the vessel - moved for an order to extend the time within which discharge of the court order of 26 September 2018 could be sought and to discharge the order of the court for the forfeiture and sale. Augusta claimed it was the owner of the cargo. On 25 January 2019, after hearing arguments from both sides, the court found that there was no merit in the motion and rejected the application. On 12 April 2019, Augusta filed a notice of appeal with the Federal Court of Appeal of Nigeria, asking that the Federal High Court order be set aside (Augusta Energy SA *v.* Federal Republic of Nigeria (Notice of Appeal (Court of Appeal of Nigeria, 12 April 2019)).

19. On 14 May 2019, Augusta filed a motion seeking to enjoin the cargo's sale and an order staying the execution of the ruling of the Federal High Court. This motion is pending before the Federal Court of Appeal.

20. Notwithstanding the foregoing, Switzerland, the flag State of the vessel, commenced proceedings for provisional measures (set out above) substantially involving matters similar to those before the Nigerian courts and could be determined by the said courts.

21. In other words, the essence of the request for provisional measures is that the Tribunal should prescribe measures in a dispute where the domestic courts of Nigeria and a proposed Annex VII tribunal are being called upon to adjudicate in similar circumstances. The Tribunal is being asked to interfere in the domestic judicial process of a sovereign State that recognizes the independence of the judiciary in its constitution.

The dispute

22. The dispute between Switzerland and Nigeria relates to the interception in Nigeria's EEZ of a vessel flying the Swiss flag , the arrest of the vessel and her crew and the continuing detention of the vessel, her crew and cargo in Nigeria.

23. Switzerland contends that the remaining four members of the crew and the vessel should be released because, *inter alia*, the safety of the vessel and crew ought to be given paramount consideration.

24. At 21:20 local time on 15 April 2019, the vessel was attacked by robbers armed with machine guns, shots were fired and one of the Nigerian navy guards was injured. Apart from that incident, the vessel was struck by another vessel which was drifting in the area, and the cargo on board was damaged. The consequent likelihood of harm being caused to the marine environment by a stationary vessel must also be considered.

25. Nigeria states that, since the incident, the navy has deployed more guards on board the vessel and has stationed a gunboat in close proximity to it. Switzerland contends that the vessel has to be maintained during the period of detention, otherwise it will depreciate in value. On the other hand,

Nigeria submits that 12 seamen were replaced by a new crew, which is rotated on a regular basis. Further, although the Master and three officers are free to leave the vessel on condition that they remain in Nigeria, they have not made use of that condition. They prefer to remain on board. The question as to whether or not the Master and officers have access to medical examination is also disputed. Switzerland claims that a medical doctor was refused permission to board the vessel. Nigeria maintains that this allegation is not accurate.

26. It is also disputed whether Parts V and VII, including articles 56, 57, 87, 92 and 94 of the United Nations Convention on the Law of the Sea ("the Convention") are applicable and whether Nigeria has breached any of these articles. With respect to its third claim, Switzerland contends that articles 9 and 12 of the International Covenant on Civil and Political Rights ("the ICCPR") and the Maritime Labour Convention ("the MLC") were violated by Nigeria. Nigeria affirms that it is not violating the human rights of the officers and crew of the vessel. In any event the rights enshrined in the ICCPR and the MLC belong to individuals and not the State.

27. In my opinion a wide and generous interpretation of article 56, paragraph 2, of the Convention does not and cannot include the provisions of the ICCPR and the MLC. The Master and crew are not in jail, they are on bail subject to the condition mentioned earlier that they remain in Nigeria. Switzerland argues that the delay in hearing and determining criminal trials in the Nigerian courts causes psychological harm and distress. However, Nigeria submits that any delay is caused by the respective individuals' challenging court rulings before a superior court in Nigeria.

28. Switzerland argued that the request was urgent. Nigeria submits that in the light of the circumstances the matter is not urgent.

Attempts to resolve the dispute

29. It must be noted that before the request for provisional measures was filed at the Tribunal, diplomatic efforts were made to settle the dispute, even while cases and motions were pending before the domestic courts of Nigeria. The domestic proceedings involve applications for bail and hearings for criminal offences.

30. The methods used through diplomatic efforts and judicial proceedings are different. The former is based on negotiations and discussions; in judicial proceedings the relevant law is applied to the facts found by the judge or judges (the court), the end result is a judgment. It should be noted that the objective of judicial pronouncements and decisions may at times be at variance with the demands of diplomatic discourse.

31. In the instant case, negotiations were not successful. Switzerland sent diplomatic notes to its Nigerian counterparts, including the Director of the EFCC, the Ministry of Industry, Trade and Investment, the Ministry of Foreign Affairs and the Ministry of Justice. However Nigeria did not respond to the notes verbales.

32. The Master of the *"San Padre Pio"*, three crew members and the vessel itself had been charged and indicted. The cases and motions for dismissal were and still are pending before the Nigerian courts. Questions of bail, release of the vessel and crew, and withdrawal of proceedings are still *sub judice*. However, notwithstanding the foregoing, the Applicant filed this application for provisional measures before the Tribunal, comprising 21 judges, pending the establishment of an Annex VII arbitral tribunal consisting of between three and five members.

33. This is an instance where there is, in my view, a conflict between international law and municipal law and an international tribunal and a municipal court, as well as between the procedure at a tribunal and a municipal court. In my view, international law is not superior to municipal law:

each is superior in its own sphere. Therefore, in my view, an international tribunal is not superior to a national court. Consequently, it seems apparent that in this case parallel systems are functioning.

34. The Tribunal is not an appellate court or a court of judicial review. It functions in accordance with its Statute and its Rules and determines matters accordingly.

Jurisdiction

35. It is accepted that

> 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 Annex VII arbitral tribunal could be founded, but need not satisfy itself that the Annex VII has jurisdiction over the dispute submitted to it
> [See *Detention of three Ukrainian naval vessels (Ukraine* v*. Russian Federation) Provisional Measures, order of 25 May 2019, para. 37; "ARA Libertad" (Argentina* v*. Ghana) Provisional Measures, Order of 15 December 2012, ITLOS Reports 2012, p. 332 at p. 343, para. 60*.]

36. In my view the significant words are:

> only if the provisions invoked by the Applicant prima facie appear to afford a basis on which the Annex VII arbitral tribunal could be founded, but need not satisfy itself that the Annex VII has jurisdiction over the dispute submitted to it.

37. This could only mean that there is no need for the Tribunal to satisfy itself on the question of jurisdiction. The threshold of proof in such circumstances is minimal or low. The words "need not satisfy itself" in this context could be superfluous if given an ordinary meaning but legally it may mean the Tribunal does not have to be convinced even in a limited way. Nevertheless, considering that the degree of satisfaction required is low and perhaps virtually non-existent, in my opinion, in view of the fact that the courts in Nigeria are seized of the proceedings and the cases are ongoing, the Annex VII tribunal would not have *prima facie* jurisdiction.

38. Nigeria stated that “at this stage of the proceedings Nigeria does not object to the jurisdiction of the Annex VII tribunal”. This statement is not specific. In any event Nigeria raised an issue which, in my view, ought to be considered when the question of jurisdiction is determined. I agree that States seeking provisional measures generally support their request with testimonial evidence, often in the form of oral evidence or affidavits.

39. It will be convenient to consider similar applications for provisional measures determined by the Tribunal because the following cases were cited and referred to by both sides. The circumstances in each case differ but the applicable principles are the same.

Recent requests for provisional measures before the Tribunal

40. In the *Three Ukrainian naval vessels case*, Ukraine submitted a declaration by counsel for the captain of one of the detained vessels. Russia did not participate in the oral proceedings; therefore, there being no objection or statement to refute the contents, the statement was considered. In the *“ARA Libertad” Case*, the captain of the vessel made a declaration that was annexed to the request for provisional measures. In the “*Arctic Sunrise” Case, (Kingdom of the Netherlands* v. *Russian Federation (ITLOS Case No. 22, Provisional Measures),* which was also cited in the instant case, the Applicant submitted a statement by the vessel’s operator and presented oral evidence at the hearing. This evidence was not challenged because Russia did not participate in the hearing. Switzerland presented no evidence, either in written form, on affidavit or from witnesses. During the oral submissions, statements were made by counsel with respect to the vessel’s owner, the charterer and the master. However, the statements or allegations mentioned by counsel were not supported by evidence. It is accepted that the submissions of counsel do not constitute evidence of facts. Where the need for evidence to support claims for such a request is “limited” and the threshold regarding the standard of proof “low”, some supporting evidence would have been helpful. More so in the light of the evidence on affidavits submitted by Nigeria. The submissions of counsel though articulate are not evidence on matters of fact.

41. The "*Enrica Lexie" Case* must be distinguished from the foregoing. In that case the marines were charged with murder, a non-bailable offence in India. However, the Supreme Court of India in those circumstances was indulgent in allowing one of the defendants, on special grounds, to return to Italy pending trial and the other to remain at the residence of the ambassador of Italy owing, among other things, to political and diplomatic intervention as well as the fact that the marines were also charged under Italian law. It is crucial to note that in the "*Enrica Lexie" Case,* the Supreme Court of India maintained its jurisdiction and upon request made the orders. In the instant case the cases in the criminal courts of Nigeria are ongoing. The defendants applied for and received bail with conditions.

42. In the application of Ukraine (Case No. 26), the officers on the vessel were charged with criminal offences and the matters are pending before the Russian courts. There was no evidence of applications for bail before the Russian courts.

43. Another factor for consideration before we can arrive at a conclusion is the fact that the essence of Switzerland's claim is that the Tribunal should prescribe measures in a dispute where the Tribunal and an Annex VII tribunal and the domestic courts of Nigeria are being asked to adjudicate in this dispute.

44. More importantly, the Tribunal is being asked to interfere in the work and functioning of the Nigerian domestic process which, according to Nigeria - and I agree -

> is engaged in the important task of maintaining law and order and combating a form of criminality that is dangerous to Nigeria as well as its neighbouring States in the Gulf of Guinea.

45. This case hinges on whether the Tribunal can make an order that interferes with the jurisdiction of a national court where judicial proceedings for criminal offences are pending and due to be heard and determined. The integrity of the Nigerian court system must be respected.

The evidence

46. Switzerland did not call any witnesses to testify and it provided no affidavits to support the contentions and allegations in the oral submissions. Switzerland submitted documentary evidence in 20 tabs which were given to the Tribunal and distributed to the judges for ease of reference during the oral submissions. Nigeria did not object to the submission of the documents.

47. Nigeria presented affidavits of Rear Admiral Ibikunle Taiwo Olaiya, Lieutenant Mohammed Ibrahim Hanifa, and Captain Kolawole Olumide Oguntuga.

48. In his affidavit, Admiral Olaiya referred to the route taken by the *"San Padre Pio"* and the fact that on that route vessels were engaged in "round tripping", a method of distributing illegally refined oil. Owing to a pattern of observed suspicious activity, including the switching-off of its automatic identification system ("AIS") signal and travel between sites associated with the illicit trade in petroleum products, the vessel was placed on a list of vessels of interest. The following paragraphs are important:

> 27. That upon being encountered by the NNS SAGBAMA Sagbama while undertaking bunkering at the Odudu Oil Field and requested to provide copies of the required permits, MT SAM PADRE PIO was unable to provide the necessary documentation and was arrested.
> 28. That the petroleum products that the MT SAN PADRE PIO was bunkering was subsequently determined by testing conducted by the Department of Petroleum resources to be sub standard.

49. It must be noted that Switzerland categorically denied that the vessel ever turned off its AIS. Counsel said that "the Master had in her terms denied having done so".

50. The submissions of counsel are not evidence. In any event, that they were told to counsel is a form of hearsay. I must add that the Master and officers could have given sworn affidavits to their lawyers to support the submissions of counsel. The Master and crew had given written statements to the legal officer. The proceedings reflect that the officers and crew and the

owner and charterer were represented by counsel in the matters before the Nigerian courts.

51. In his affidavit Lieutenant Mohammed Ibrahim Hanifa stated, *inter alia*:

> "4. That on 22 January 2018 at about 1300, my ship the NNS SAGBAMA received an information from the headquarters, Falcon Eye Centre, informing us that the MT SAN PADRE PIO (the vessel with IMO No. 9610339) was in the vicinity.
>
> 5 That the NNS SAGBAMA encountered the vessel SAN PADRE PIOO at the Odudu Oil Field.
>
> 6. That when we arrived MT SAN PADRE PIO location that night on 22 January 2018 at about 2000 the vessel was conducting a ship-to-ship bunkering transfer with the MT LAHOMA.
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> 7. That about o3.00 on 23 January 2018 MT LAHOMA disengaged from MT SAN PADRE PIOO and MT ENERGY SCOUT came alongside the SAN PADRE PIO and began a ship-to-shoo bunkering transfer.
>
> 8. That in order to engage in bunkering transfers in Nigeria's EEZ, Ships like the MT SAN PADRE PIO must have (1) a bill of lading; (2) the Nigerian Navy ship PATHFIMDER verification certificate to Receive/load/ and discharge Approved products (3) A Nigerian Maritime Administration and Safety Agency (NIMASA) cabotage trade licence; and a department of petroleum resources (DPR) licence.
>
> 10. That the Nigerian Navy Ship PATHFINDER Verification Certificate states that the operations are" to be conducted between Sunrise and Sunset "and that "if any of the vessels engaged is found violating the above conditions, it should be arrested and prosecuted.
>
> 11. That about 13.00 on 23 January 2018, without having received additional documentation, we escorted the MT SAN PADRE PIO to Forward Operating bas BONNY for furtherinvestigation.12. That on 24 January 2018 the SAN PADRE PIO was handed over to the Forward Operating base Bonny authorities."

52. Paragraph 13 states that the vessel was not boarded; and, paragraph 14 states that, when a vessel is boarded, a form is given to the captain for completion. No such form was given to the captain of the vessel.

53. I have set out the above because it is the evidence of an officer who was involved in the arrest of the vessel.

54. In a comprehensive and thorough affidavit, the legal officer of the EFCC set out the allegations giving rise to the arrest of the vessel: (1) it did not have the required approval licence from the NIMASA and Ministry of Resources; (2) the agent of the vessel presented the aforementioned certificate the day after the arrest of the vessel; (3) the manner and conduct relative to the arrest of the vessel and crew; (4) the Master of the vessel made both hand- and type-written statements; the other 15 members made written statements. Another important matter mentioned is the fact that the owners of the vessel did not at any time apply for the vessel's release. While the investigation was ongoing and charges filed in court against the Master and three other crew members, the law firm PUNUKA Attorneys informed the EFCC that it represented the charterers of the vessel and that the petroleum products on board the vessel were not of local origin but had been imported from abroad, and it appended correspondence relating to the matter. Among other relevant matters, it stated that, after the Master of the vessel and the officers had been granted bail, they returned to the vessel and voluntarily returned for court hearings; that on some occasions they stay in hotels of their choosing. The other 12 crew members were released on 18 March 2018 and their passports were returned through their lawyer.

Assessment of evidence

55. Jurisprudence of some national and international bodies provides that provisional measures (which are similar to injunctive relief in most national courts) are discretionary in nature and are only granted in exceptional and urgent circumstances specifically to guarantee, even temporarily, the rights of the applicant party. When there is a request for provisional measures, the Tribunal will not and should not deal with the merits of the case; to do so would be to usurp the function of the Annex VII tribunal, and, in the instant case, the function of the Nigerian domestic courts. Further, in an application for provisional measures which is heard *inter partes*, the parties would not have had the time nor would they, as in this case, have been able to provide *all* the evidence to prove or to refute the allegations. Consequently, the

Tribunal has to undertake a restricted examination of the facts presented to determine the applicability of the rights claimed and whether in applying a low threshold of proof, the rights are applicable and the measures requested should be granted.

56. Among the documents were photographs of the vessel and of an allegedly abandoned vessel, the "*Anuket Emerald"*, that Switzerland alleges was abandoned and drifted to shore. Referring to the photograph, Nigeria alleges that the vessel was not abandoned and lay at anchor. The other photograph is that of the *"San Padre Pio"*, apparently taken in 2016. It was referred to in the context of the vessel having overhead light for night-time STS bunkering.

57. It is accepted that the criteria for admitting photographs as persuasive evidence is that the photograph must be relevant. That of the *"San Padre Pio"* is not relevant to the date of arrest and detention. If it was taken about two years before its arrest, it could have had the equipment on board. Counsel for Nigeria did not object; in the circumstances it is admitted as evidence of the vessel's appearance at or about the time of its arrest. The photo of the "*Anuket Emerald"* has, in my view, two interpretations. Nigeria says that it shows an anchor chain leading into the water. Switzerland argues that it shows the vessel close to shore and apparently abandoned, such that it could have drifted into the *"San Padre Pio"*. In the absence of the photographer's evidence, I find it difficult to draw a conclusion one way or the other. As a result, the photo is not reliable and its weight in support of the contention of either side is negligible and is not proof of the allegation.

58. Switzerland did not provide any affidavits in response to those of Nigeria; nor did it ask leave to cross-examine the deponents, one of whom was in court for the hearing. Counsel asserts that the Tribunal should be cautious and consider that declarations on affidavit are made by State officials, who may have an interest in the outcome of the proceedings. They should also consider whether the contents of the affidavits relate to the existence of the facts. In the absence of evidence to the contrary, it must be

accepted that the proper method was used in taking the affidavits. Nevertheless, consideration of current jurisprudence suggests that in the absence of cross-examination and affidavits in evidence to refute what is deposed, the contents should still be carefully examined when evidential value is considered.

59. It is accepted that affidavits are a unique form of evidence, frequently used in common law jurisdictions (such as Nigeria). The evidence is given before a commissioner of affidavits or a notary public, as in the instant case, recorded by him/her in writing, and prepared in accordance with the principles of the national law of the deponent. In other words an affidavit is testimony in written form.

60. The deponents were clear and specific. Their accounts were of events that they personally observed. Realising that it is incumbent upon a judge to assess with caution and analyse the evidence carefully, I found that the evidence on affidavit substantially supported the submissions of counsel on the relevant issue. The deponents are officers of the Nigerian navy and administrative offices. They were the persons who were involved in the arrest and detention of the vessel and crew. Their depositions were taken in accordance with the law and the deponents would have been cautioned that, if their depositions were untrue, they could be charged with perjury. In my opinion the affidavits provide vital evidence contemporaneous with the period in question. Therefore, even if a high threshold of proof was applied, I am satisfied that they were truthful.

Urgency

61. Switzerland contends that there are several reasons why the situation is urgent. It maintains that

> By intercepting the “San Padre Pio” in its exclusive zone, about 32 m 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.

62. According to Switzerland, Nigeria hindered and is delaying the possibility for the vessel to carry out bunkering activities, which has been recognized by the Tribunal as being part of the freedom of navigation (see the *"Norstar" Case (Panama* v. *Italy)*); Nigeria did not obtain the consent of the flag State with respect to the detention of the cargo and crew, who are still detained; Nigeria has failed to have due regard under article 56, paragraph 2, of the Convention; and Nigeria never mentioned protection of the environment. Having regard to the foregoing and other reasons advanced, the rights claimed are plausible.

63. Nigeria disagrees and submits that none of the rights claimed by Switzerland are only plausible if applicable to the factual situation in question. Nigeria contends that it was exercising its 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 vessel and its crew. These judicial proceedings are in progress.

64. According to Nigeria - and I agree - 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. Switzerland contends that flag State jurisdiction is applicable. Article 94, paragraph 6 provides that:

> 6. A State which has clear grounds to believe that proper jurisdiction and control with respect to a ship have not been exercised **may** report the facts to the flag State. Upon receiving such a report, the flag State shall investigate the matter and, if appropriate, take any action to remedy the situation. (my emphasis)

65. In my opinion, the word "may" gives a coastal State, in this case, Nigeria, discretion. It is not compulsory to inform the flag State. It will certainly depend on the circumstances. In this case, the coastal State had to act immediately. Nigeria submits, and I agree, that

> the principle of exclusive flag State jurisdiction does not apply in this case. If 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 would make law enforcement in an environment like the Gulf of Guinea impossible.

66. The cases against the Master, the members of the crew and the vessel are pending. Counsel for Switzerland said in part:

> the proceedings instituted before the Nigerian courts against the vessel, its cargo and the crew are continuing. Furthermore, hearings have been postponed multiple times and apparently are set to be heard by the end of the year.

67. I find that the Nigerian courts are functioning in accordance with due process and the rule of law. Upon application, the Master and three crew members were granted conditional bail. In the circumstances, the owner can apply to the relevant court for bail for the vessel. The prosecutor applied to the court to seize the cargo, confiscate it and sell the cargo. If the application is granted, the funds will be placed in an interest-bearing account and will be disposed of in accordance with the order of the court at the end of the judicial proceedings. The owner has appealed. The appeal is pending. It is apparent that the proceedings against the vessel, its cargo and the crew are an integral part of the criminal proceedings and should be determined before the prosecution can proceed with the cases against the defendants. Therefore, in my opinion, the Nigerian courts are functioning in accordance with due process. In any event it seems as though the proceedings before the Nigerian courts would be completed before the Annex VII tribunal is established and commences functioning.

68. There is no evidence of delay in the criminal proceedings. It is accepted that, bearing in mind the principle that the prosecution must prove their case beyond reasonable doubt, and the presumption of innocence, proceedings before criminal courts require time.

69. Switzerland submits that the matter is urgent because the Master and three officers have been in custody pending trial. Although they have been granted bail, they are not permitted to leave Nigeria; they are not permitted visitors; they are deprived of being with their families; they are confined to the vessel in an area fraught with danger from pirates; and the hearing in the national court is taking a long time.

70. The cargo on board is deteriorating and the cargo and vessel itself, if not removed and maintained, could cause damage to the environment.

71. Nigeria argues that since the vessel was attacked by pirates, more guards have been assigned to the vessel and a gunboat is always near it to safeguard the vessel and those on board. In this context, paragraph 129 of the Order refers to a report on piracy and armed robbery against ships. It reads:

> 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.

72. It is argued that, under the Rules of the Tribunal, the Tribunal may seek elucidation or clarification on an issue by referring to reports of recognized international organizations. The reference was considered after the close of proceedings and neither Switzerland nor Nigeria had an opportunity to comment or refute. Nigeria led evidence on affidavit that measures to strengthen the security of the vessel were taken by the Nigerian authorities by deploying extra guards and having a naval gunboat in the vicinity of the vessel. On the basis of the report and the evidence provided by Nigeria, with respect and regretfully, I must consider this report as speculation in relation to the facts in the case, specifically in relation to the vessel. In the circumstances, I am convinced that the *M/T "San Padre Pio"* its crew and cargo are not vulnerable.

73. The vessel is maintained because, since the 12 members were released, the crew has been changed regularly.

74. Any delay complained of is as a result of the appeals by the defendants. The defendants are on bail and can leave the vessel whenever they chose to do so as long as they do not leave Nigeria.

75. Under Nigerian law, a bail application can be made on behalf of the vessel. Further, it is accepted that it is the right of a defendant to apply to the court for a reduction of bail and to reconsider the condition applicable to the granting of bail.

76. For the above reasons I find that the matter is not urgent and the rights claimed by Switzerland are not plausible.

77. In order to summarize, for the above reasons, I find that having regard to the submissions of counsel, the legal arguments and the evidence presented, the rights claimed by Switzerland are not plausible; the absence of urgency is apparent because Switzerland took about sixteen months to initiate this application, during which time the Nigerian courts dealt with relevant applications to ensure fairness to all the Parties, whereby rights were preserved. Further, and most importantly, if the provisional measures are granted it would result in interference in the Nigerian judicial system and irreparable harm to Nigeria's sovereign right to enforce its laws against the defendants, who are lawfully charged and indicted and are currently being prosecuted for violation of Nigerian laws and regulations. In these circumstances the Request is declined.

(signed) Anthony Lucky