DECLARATION OF JUDGE KITTICHAISAREE

1. In voting in favour of this Order, I wish to make some observations.

2. First, the event in this case concerned ship-to-ship ("STS") transfer of gasoil in Nigeria's exclusive economic zone. Although STS transfer operations and offshore bunkering have some similarities, there are a number of significant distinctions between the two, in particular with regard to their different purposes. In the case of offshore bunkering, the bunkering vessel transfers hydrocarbon to another vessel to be used as fuel for the recipient vessel's propulsion and operation. By contrast, hydrocarbon transferred in STS operations are received by the recipient vessel for the hydrocarbon to be carried further as cargo or stored offshore.[1] Some legal scholars contend that STS operations were not foreseen by the draftsmen of the 1982 United Nations Convention on the Law of the Sea ("the Convention"), and that they should, therefore, be covered by article 59 of the Convention,[2] which stipulates:

> In cases where this Convention does not attribute rights or jurisdiction to the coastal State or to other States within the exclusive economic zone, and a conflict arises between the interests of the coastal State and any other State or States, the conflict should be resolved on the basis of equity and in the light of all the relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole.

3. Despite the aforesaid differences between offshore bunkering and STS operations, the Parties in the present case have not resorted to article 59 of

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[1] Rainer Lagoni, "Offshore Bunkering in the Exclusive Economic Zone", in *Law of the Sea, Environmental Law and the Settlement of Disputes: Liber Amicorum Judge Thomas A Mensah* (Tafsir Malik Ndiaye and Rüdiger Wolfrum eds., Leiden, 2008), pp. 613 – 627, at p. 615; David Testa, "Coastal State Regulation of Bunkering and Ship-to-Ship (STS) Oil Transfer Operations in the EEZ: An Analysis of State Practice and of Costal State Jurisdiction under LOSC", *Ocean Development and International Law* (2019), pp. 1–24, at pp. 2, 15–16.

[2] E.g., Testa, above n. 1, at pp.16–17; Richard Collins, "Delineating the Exclusivity of Flag State Jurisdiction on the High Seas: ITLOS issues its ruling in the *M/V 'Norstar'* Case, *EJIL Talk!* (4 June 2019), available at <https://www.ejiltalk.org/delineating-the-exclusivity-of-flag-state-jurisdiction-on-the-high-seas-itlos-issues-its-ruling-in-the-m-v-norstar-case/#more-17250>, accessed 5 July 2019; cf. Alexander Proelss (ed.), *United Nations Convention on the Law of the Sea: A Commentary* , Online edition 2017, pp. 452–3.

the Convention as a basis for their claims, preferring to formulate their arguments on the basis of this Tribunal's case law on offshore bulking instead of venturing into the relatively unknown and unexplored terrain of article 59 of the Convention. The Tribunal has, therefore, confined itself to the provisions under the Convention as invoked by each of the Parties in relation to the activities of the *M/T "San Padre Pio"* in Nigeria's exclusive economic zone and reached the conclusion in paragraph 108 of this Order.

4. Second, according to Nigeria,

> [a]t the present stage of the proceedings, Nigeria 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 tribunal's *prima facie* jurisdiction over Switzerland's third claim.[3]

This concession by Nigeria with respect to the *prima facie* jurisdiction of the Annex VII arbitral tribunal over Switzerland's first and second claims is sufficient for this Tribunal to proceed to consider whether to prescribe provisional measures as requested by Switzerland, as affirmed in paragraphs 60, 71 and 76 of this Order.

5. It is true that Nigeria does challenge the plausibility of all three claims of Switzerland. As regards the first two rights alleged by Switzerland under article 58 of the Convention, Nigeria submits that they are not plausible because Nigeria has the sovereign right and obligation under articles 56, paragraph 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 International Covenant on Civil and Political Rights and the Maritime Labour Convention, Nigeria argues they are not plausible because Switzerland does not allege facts constituting a breach of the rights specified in these treaties, and the 1982 Convention contains no right to seek redress of breaches of other treaties.[4] However, having established that the first and second rights asserted by Switzerland are plausible, the Tribunal has, in

[3] Nigeria's Response, para. 3.45.
[4] Response, para. 3.9; ITLOS/PV.19/C27/2, p. 3, ll, 13–15 and p. 21, ll, 45–46.

paragraph 110 of this Order, correctly found it unnecessary to make a determination of the plausible character of the third right asserted by Switzerland at this stage of the proceedings.

6. Third, the dividing line between the judges in the majority and the dissenting judges regarding the provisional measures to be prescribed in this case reflects their respective perceptions of what the appropriate balance between the protection to be accorded to the plausible rights of Switzerland *vis-à-vis* the rights of Nigeria as the coastal State exercising enforcement jurisdiction in its exclusive economic zone should be. This must also be seen in the context of complicated situations, including the fact that the Master and the three officers are of Ukrainian nationality and Ukraine does not extradite its own nationals. Indeed, the rights of both Parties must be preserved, without also prejudging the merits of the dispute, since it will take several months from the date of this Order for the Annex VII arbitral tribunal to be constituted and discharge its mandate. The Tribunal also recognizes, in paragraph 128, that 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.

7. In paragraph 141 of this Order, the Tribunal considers that the undertaking by Switzerland as ordered by the Tribunal "will constitute an obligation binding upon Switzerland under international law". The Tribunal thus follows the Annex VII arbitral tribunal in *"Enrica Lexie" Incident (Italy* v. *India)*.[5] It should be noted that the said arbitral tribunal has added that once a State has made such a commitment concerning its conduct, its good faith in complying with that commitment is to be presumed.[6] This Tribunal has gone even further than the Annex VII arbitral tribunal in *"Enrica Lexie" Incident (Italy* v. *India)*, and rightly so, by requiring, in paragraph 141, that both Switzerland

[5] *Enrica Lexie Incident (Italy v. India)*, Order of 29 April 2016 (Provisional Measures), para. 129.
[6] Ibid., para. 130, citing *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia)*, Order of 3 March 2014 (Provisional Measures), ICJ Reports 2014, p. 147 at p. 158, para. 44.

and Nigeria shall cooperate in good faith in the implementation of such undertaking.

(signed) Kriangsak Kittichaisaree