INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

THE M/T "SAN PADRE PIO"

THE SWISS CONFEDERATION *v.* THE FEDERAL REPUBLIC OF NIGERIA

REQUEST FOR THE PRESCRIPTION OF PROVISIONAL MEASURES
OF THE SWISS CONFEDERATION,
UNDER ARTICLE 290, PARAGRAPH 5, OF THE UNITED NATIONS
CONVENTION ON THE LAW OF THE SEA

21 MAY 2019

REQUEST FOR PROVISIONAL MEASURES BY SWITZERLAND

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REQUEST FOR THE PRESCRIPTION OF PROVISIONAL MEASURES UNDER ARTICLE 290, PARAGRAPH 5, OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA

I. Introduction

1. Pursuant to Article 290, paragraph 5, of the United Nations Convention on the Law of the Sea ('**UNCLOS**' or '**Convention**'), the Swiss Confederation ('**Switzerland**') hereby requests that the International Tribunal for the Law of the Sea ('**Tribunal**' or '**ITLOS**') prescribe the provisional measures specified below in the dispute between Switzerland and the Federal Republic of Nigeria ('**Nigeria**') concerning the *M/T "San Padre Pio"* ('***"San Padre Pio"***' or '**vessel**'), her crew and cargo.

2. The dispute between Switzerland and Nigeria relates to the interception of the *"San Padre Pio"*, a vessel flying the Swiss flag, in Nigeria's exclusive economic zone ('**EEZ**'), the arrest of the vessel and her crew and the continuing detention of the vessel, her crew and cargo in Nigeria. Nigeria's actions in respect of the *"San Padre Pio"*, her crew and cargo are in breach of UNCLOS, to which both Switzerland and Nigeria are parties.

3. Switzerland submitted the dispute to arbitration under Annex VII of UNCLOS by a Notification and Statement of Claim, conveyed to Nigeria by diplomatic Note dated 6 May 2019 ('**Notification**') and transmitted to Nigeria on that day. A copy of the Notification is annexed to this Request for the prescription of provisional measures ('**Request**').[1]

4. In the Notification, Switzerland requested Nigeria to adopt provisional measures to the effect that, pending the final decision on the dispute by the Annex VII arbitral tribunal, Nigeria shall immediately take all measures necessary to ensure that 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.[2] Switzerland further indicated that, if such measures were not adopted and implemented within a period of two weeks from the date of the Notification, Switzerland reserved its right under article 290, paragraph 5, of UNCLOS to request the Tribunal to prescribe the relevant provisional measures.[3]

5. The time-limit of two weeks provided for in Article 290, paragraph 5, of the Convention has expired. Since Nigeria has not adopted the requested provisional measures within that time-limit, Switzerland hereby submits the present Request to the Tribunal.

6. This Request is structured as follows: Switzerland states the facts of the case (paras. 7-13), demonstrates that the jurisdictional conditions for the prescription of provisional measures are met (paras. 14-20), explains that the provisional measures requested are justified (paras. 21-49), identifies the Judge *ad hoc* that it has nominated (para. 50) and the Agent as well as the address for service (paras. 51-52) that it has designated and presents its submissions (para. 53).

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[1] Notification: **Annex PM/CH-1**. The Notification and Statement of Claim includes all its annexes, which will hereafter be referred to in the form "**Notification, Annex NOT/CH-XX**".
[2] Notification: **Annex PM/CH-1**, para. 43.
[3] Ibid., para. 44.

II. Statement of facts

7. The events that have given rise to the present dispute between Switzerland and Nigeria are set out in Section II of the Notification.[4]

8. In brief, the *"San Padre Pio"*, a motor tanker vessel flagged in Switzerland, was intercepted and arrested by the Nigerian Navy on 23 January 2018 while she was engaged in one of several ship-to-ship ('**STS**') transfers of gasoil. At the time, she was approximately 32 nautical miles from the closest point of Nigeria's coast. The STS transfers took place within Nigeria's EEZ, outside any safety zone that Nigeria could have established in accordance with UNCLOS (the breadth of which may not exceed 500 metres)[5] and well beyond the 200-metre area around installations to which Nigeria purports to extend its civil and criminal law.[6]

9. The Nigerian Navy ordered the vessel to proceed to Port Harcourt, Bonny Inner Anchorage, a Nigerian port, where the vessel, together with her crew and cargo, was detained on 24 January 2018. From that date, the 16 crew members were confined to the vessel.

10. On 9 March 2018, the vessel and her crew were handed over to the Nigerian Economic and Financial Crimes Commission ('**EFCC**') for detention and preliminary investigation.[7] On that day, the crew members were moved to a prison, where the detention conditions were harsh.[8] On 20 March 2018, 12 crew members were returned to the vessel, where they remained under armed guard, unable to leave Nigeria. The other four crew members (the Master and three officers) stayed in prison for a total of five weeks and were only able to return to the vessel on 13 April 2018, where they have since remained under armed guard.[9]

11. Six months after the arrest, on 23 July 2018, following difficult negotiations, the group of 12 crew members were allowed to leave Nigeria.[10] They were replaced by a new crew for the purpose of ensuring the necessary safety of the vessel.[11] However, the Master and the three other officers have not been permitted to leave Nigeria. They continue to be restricted, under armed guard, to the vessel. The vessel, her four officers and cargo have thus now been detained for 16 months.

12. The proceedings against the vessel and her crew in the Nigerian courts have hardly advanced since the first bail hearing on 23 March 2018. Hearings have regularly been adjourned for a variety of reasons.[12] The charges have been amended several times. In

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[4] Notification: **Annex PM/CH-1**, paras. 4-32.

[5] United Nations Convention on the Law of the Sea ('**UNCLOS**'), *UNTS*, vol. 1833, 397, article 60, paragraph 5, UNCLOS.

[6] Exclusive Economic Zone Decree No. 28 of 5 October 1978: **Notification, Annex NOT/CH-8**; see also Sketch-map 2, Development Area: **Notification, Annex NOT/CH-6**.

[7] Handover of MT San Padre Pio and 16 crewmen to the Zonal Head of EFCC, dated 9 March 2018: **Notification, Annex NOT/CH-19**.

[8] Email from Iain Marsh, local representative of the protection and indemnity agency of the vessel, dated 12 March 2018: **Notification, Annex NOT/CH-20**.

[9] Order of the Federal High Court of Nigeria in the Port Harcourt Judicial Division, dated 23 March 2018: **Notification, Annex NOT/CH-24**.

[10] Letter regarding the request for the release of 12 crew members, dated 11 May 2018: **Notification, Annex NOT-CH-26**; Letter regarding the request for replacement of 12 crew members, dated 29 June 2018: **Notification, Annex NOT/CH-27**; Email from ABC Maritime regarding disembarking of 12 crew members, dated 16 July 2018: **Notification, Annex NOT/CH-28**; Crew members' repatriation dates: **Notification, Annex NOT/CH-29**.

[11] Minimum safe manning document: **Notification, Annex NOT/CH-30**.

[12] Email from Babajide Koku, local lawyer of manager, dated 26 April 2018: **Notification, Annex NOT/CH-31**; Affidavit in support of motion on notice of the Federal High Court of Nigeria in the Port Harcourt Judicial

addition to the proceedings against the vessel and her crew, the prosecution filed a Motion for Interim Forfeiture of the cargo dated 15 May 2018.[13] One of the reasons given was that interim relief was necessary to evacuate the cargo in order to avoid spills and possible pollution due to the volume of gasoil on the vessel.[14] More than one year after the arrest, new charges regarding the accuracy of documents handed over to the Navy in January 2018 were brought against the Master, the vessel and also the charterer.[15] On 10 May 2019, a law enforcement agent pasted charges dated 18 Feburary 2019 on the vessel.[16]

13. While the facts relating to the vessel's activities and the legality of these activities under Nigerian law are disputed, there was plainly no basis in international law for Nigeria to exercise enforcement jurisdiction against the vessel, her crew and cargo, as will be developed in Section IV.

III. Jurisdiction

14. Article 290, paragraph 5, of UNCLOS reads:

> 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.

15. Accordingly, the Tribunal may only prescribe provisional measures if it considers that, *prima facie*, the arbitral tribunal to be constituted in accordance with section 2 of Part XV of UNCLOS would have jurisdiction.

16. Article 286 of UNCLOS reads:

> Subject to section 3, any dispute concerning the interpretation or application of this Convention shall, where no settlement has been reached by recourse to section 1, be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction under this section.

There is a dispute between Switzerland and Nigeria. It pertains 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. The dispute concerns in particular the

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Division, dated 26 June 2018: **Notification, Annex NOT/CH-32**; Email from Babajide Koku, local lawyer of manager, dated 26 February 2019: **Notification, Annex NOT/CH-33**; Email from Babajide Koku, local lawyer of manager, dated 8 March 2019: **Notification, Annex NOT/CH-34**.

[13] Motion on Notice of the Federal High Court of Nigeria in the Port Harcourt Judicial Division, dated 15 May 2018: **Notification, Annex NOT/CH-35**.

[14] Affidavit in support of Motion on Notice, dated 15 May 2018: **Notification, Annex NOT/CH-36**.

[15] Charges against the Master and the three other officers and the vessel, as well as against the Master, the vessel and the charterer, dated 24 April 2019: **Notification, Annex NOT/CH-39**.

[16] Picture of charges pasted on the vessel; charges against the Master and the three other officers and the vessel, as well as against the Master, the vessel and the charterer, dated 18 February 2019, summons to defendant, dated 9 April 2019: **Annex PM/CH-2**.

interpretation and application of Parts V and VII of UNCLOS, including articles 56, paragraph 2, 58, 87, 92 and 94. As described in the Notification, Switzerland has, for over a year (since March 2018), on numerous occasions and through a variety of channels, sought to reach a settlement of the dispute between it and Nigeria.[17]

17. Article 283, paragraph 1, of UNCLOS 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.

As described in the Notification, Switzerland has also attempted to exchange views on the settlement of the dispute. Switzerland has sent several diplomatic Notes to the Nigerian authorities, raised the matter in meetings with Nigerian representatives, including at the highest level, and set out its legal position in no less than four *aide-mémoires*.[18] In its *aide-mémoire* of 25 January 2019, Switzerland stated that

> 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.[19]

18. There 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. It 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.

19. Article 288, paragraph 1, of UNCLOS provides:

> 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.

20. By the Notification dated 6 May 2019, Switzerland submitted its dispute with Nigeria to arbitration under Annex VII of UNCLOS.[20] The arbitral tribunal, once constituted, will have jurisdiction over the dispute pursuant to article 287, paragraph 5, of UNCLOS, as explained in Section III of the Notification.[21]

IV. Statement of legal grounds and urgency

21. Article 290, paragraph 5, of UNCLOS, needs to be read in conjunction with article 290, paragraph 1.[22] Article 290, paragraph 1, provides as follows:

> If a dispute has been duly submitted to a court or tribunal which considers that *prima facie* it has jurisdiction under this Part ..., the

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[17] Notification: **Annex PM/CH-1**, paras. 24-26.
[18] Ibid.
[19] *Aide-mémoire* 4: **Notification, Annex NOT/CH-50**.
[20] Notification: **Annex PM/CH-1**.
[21] Ibid., paras. 33-39.
[22] *"Enrica Lexie" (Italy* v. *India), Provisional Measures, Order of 24 August 2015, ITLOS Reports 2015*, p. 182, at p. 195, para. 74.

> court or tribunal may prescribe any provisional measures which it considers appropriate under the circumstances to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment, pending the final decision.

22. The Tribunal has stated in its well-established case-law that

> the Tribunal may prescribe any provisional measures which it considers appropriate under the circumstances to preserve the respective rights of the parties, which implies that there is a real and imminent risk that irreparable prejudice could be caused to the rights of the parties to the dispute pending such a time when the Annex VII arbitral tribunal to which the dispute has been submitted is in a position to modify, revoke or affirm the provisional measures[23].

23. In the circumstances of the present case, for the reasons set out below, serious prejudice has already been caused to the rights of Switzerland and there is a real and imminent risk that further serious or irreparable prejudice will be caused to the rights of Switzerland until such time as the Annex VII arbitral tribunal has been constituted and is ready to exercise its functions.[24]

24. As explained in the case-law of the Tribunal, natural and juridical persons involved or interested in the operation of a vessel are all part of the unit represented by the vessel.

> [U]nder the Convention, the ship is to be considered as a unit "as regards the obligations of the flag State with respect to the ship and the right of a flag State to seek reparation for loss or damage caused to the ship by acts of other States" (*M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines* v. *Guinea), Judgment, ITLOS Reports 1999*, p. 10, at p. 48, para. 106).
> ...The Tribunal finds that the *M/V Virginia G* is to be considered as a unit and therefore the *M/V Virginia G*, its crew and cargo on board as well as its owner and every person involved or interested in its operations are to be treated as an entity linked to the flag State. Therefore, Panama is entitled to bring claims in respect of alleged violations of its rights under the Convention which resulted in damages to these persons or entities.[25]

25. In the present case, Switzerland is bringing claims–and is seeking reparation–in respect of alleged violations of its rights under the Convention which resulted in damages to the unit of vessel *"San Padre Pio"*, comprising the vessel herself, her crew and cargo as well as all persons involved or interested in the operation of the *"San Padre Pio"*.

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[23] See, most recently, *"Enrica Lexie" (Italy* v. *India), Provisional Measures, Order of 24 August 2015, ITLOS Reports 2015*, p. 182, at p. 197, para. 87; see also *M/V "Louisa" (Saint Vincent and the Grenadines* v. *Kingdom of Spain), Provisional Measures, Order of 23 December 2010, ITLOS Reports 2008–2010*, p. 58, at p. 69, para. 72.
[24] The term "irreparable" is used as in the Tribunal's jurisprudence, for example in *"Enrica Lexie" (Italy* v. *India), Provisional Measures, Order of 24 August 2015, ITLOS Reports 2015*, p. 182, at p. 197, para. 87.
[25] *M/V "Virginia G" (Panama/Guinea Bissau), Judgment of 14 April 2014, ITLOS Reports 2014*, p. 4, at p. 48, paras. 126-127.

A. The provisional measures requested

26. As set out in paragraph 53 below, Switzerland requests the Tribunal to prescribe, provisionally, that Nigeria immediately take all measures necessary to ensure that 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 as well as that Nigeria suspend all proceedings and refrain from initiating new ones.

B. Appropriateness of the provisional measures requested

27. As the Tribunal stated in *"Enrica Lexie"*,

> before prescribing provisional measures, the Tribunal does not need to concern itself with the competing claims of the Parties, and that it needs only to satisfy itself that the rights which Italy and India claim and seek to protect are at least plausible[.][26]

28. In the Notification, Switzerland requests the Annex VII arbitral tribunal to adjudge and declare, *inter alia*, 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 flag State's consent, 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 [1966 International Covenant on Civil and Political Rights ('**ICCPR**')] and the [2006 Maritime Labour Convention ('**MLC**')], and under customary international law.[27]

29. The existence of the rights invoked by Switzerland and their applicability to the facts of the present case are more than "plausible", they are indisputable. These rights concern the freedom of navigation and other internationally lawful uses of the sea, including bunkering,

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[26] *"Enrica Lexie" (Italy* v. *India), Provisional Measures, Order of 24 August 2015, ITLOS Reports 2015*, p. 182, at p. 197, para. 84.

[27] Notification: **Annex PM/CH-1**, para. 45; Maritime Labour Convention, *UNTS*, vol. 2952, 3: **Annex PM/CH-3**; International Covenant on Civil and Political Rights, *UNTS*, vol. 999, 171: **Annex PM/CH-4**.

which are applicable within the EEZ,[28] as well as the State's exercise of exclusive jurisdiction towards vessels flying its flag. The rights invoked also concern the rights of the crew under the MLC and under customary international law; and the right to liberty and security of the crew members, their right to leave the territory and maritime areas under the jurisdiction of a coastal State, as well as the rights of the persons interested in the vessel, under the ICCPR and under customary international law.

30. The violations of the rights invoked are more than "plausible", they are indisputable. Nigeria intercepted the *"San Padre Pio"* in its EEZ and outside of the safety zone of any artificial island, installation or other structure, arrested the vessel and her crew and detained the vessel, her crew and cargo without the prior consent of Switzerland. These actions are prohibited under the Convention, in particular Parts V and VII, notably articles 58, paragraph 2, 87 and 92. Exceptions to this prohibition must be explicit and cannot be implied. Any exceptions must be narrowly construed. Such exceptions are to be found in article 110, paragraph 1, (a) to (e), read together with article 58, paragraph 2. Specific exceptions for the EEZ are contained in articles 73, 220, paragraphs 3 to 8, and 226, paragraph 1. None of these apply in the present case. There is also no suggestion that Nigeria was purporting to exercise a right of hot pursuit.[29] Moreover, at no time did Nigeria seek the consent of the flag State, Switzerland, to the interception of the vessel, to the arrest of the vessel and her crew, or to the detention of the vessel, her crew and cargo. It is consequently submitted that Nigeria has breached its obligations owed to Switzerland in regard to its freedom of navigation and its right to exercise exclusive jurisdiction over the *"San Padre Pio"*.

31. Furthermore, the arrest and detention of the crew members as well as the detention and attempted confiscation of the cargo flowed directly from the interception of the vessel within Nigeria's EEZ. These acts constitute additional breaches of the obligations, owed by Nigeria to Switzerland, under article 56, paragraph 2, to have due regard both to the flag State's rights and duties, including its obligations under article 94 to respect the provisions of the MLC and to the rights of persons under the ICCPR.

C. Real and imminent risk of serious prejudice

32. The ongoing detention of the *"San Padre Pio"* continues to prevent both the exercise of the freedom of navigation by a vessel flying the Swiss flag and the exercise of jurisdiction by Switzerland over the vessel. Further prolonging that detention would add to the continuing and irreparable injury that Switzerland is suffering.

33. Moreover, 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. These natural and juridical persons are all part of the unit of vessel mentioned in paragraph 24. The ongoing detention of the vessel, her crew and cargo is causing irreparable prejudice to Switzerland's rights and will cause further such prejudice if the provisional measures requested are not prescribed and implemented. In particular, as the Tribunal ruled in *M/V "Saiga" (No. 2)*

> the rights of the Applicant would not be fully preserved if, pending the final decision, the vessel, its Master and the other members of the crew, its owners or operators were to be subjected to any judicial or administrative measures in connection with the incidents leading to the

[28] *M/V "Norstar" (Panama* v. *Italy), Judgment of 10 April 2019*, para. 219.
[29] UNCLOS, article 111.

> arrest and detention of the vessel and to subsequent prosecution and conviction of the Master[.][30]

34. The *"San Padre Pio"*, the Master and the three other officers, as well as other persons involved or interested in that vessel, are at precisely such risk.

35. For these reasons and as developed further below, the prescription of provisional measures is necessary to ensure that Switzerland's rights are fully preserved pending the establishment and entry into operation of the Annex VII arbitral tribunal.

36. As 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. This is causing serious risks to the vessel, her crew and cargo. These risks are real and imminent.

37. Since 24 January 2018, the *"San Padre Pio"* is anchored in Port Harcourt, Bonny Inner Anchorage, Nigeria. Notwithstanding several requests, it has been impossible to get access to the *"San Padre Pio"*, her crew and cargo in order to examine the condition of the vessel, the health of the Master and the three other officers, and the quality of the remaining gasoil.[31] Switzerland is thus unable to provide first-hand evidence of these elements. Nonetheless, inferences of fact and circumstantial evidence demonstrate the risk of irreparable and imminent prejudice that the prolonged detention of the vessel, her crew and cargo causes to Switzerland's rights. As stated by the International Court of Justice in the *Corfu Channel* case, when the central events occur in an area under the exclusive territorial control of another State, this "has a bearing upon the methods of proof available to establish the knowledge of that State as to such events".[32] The Court added:

> By reason of this exclusive control, the other State, the victim of a breach of international law, is often unable to furnish direct proof of facts giving rise to responsibility. Such a State should be allowed a more liberal recourse to inferences of fact and circumstantial evidence. This indirect evidence is admitted in all systems of law, and its use is recognized by international decisions. It must be regarded as of special weight when it is based on a series of facts linked together and leading logically to a single conclusion.[33]

38. While it has been impossible definitively to assess the condition of the *"San Padre Pio"*, it is nevertheless clear that the ongoing detention puts the vessel at a severe risk that she may soon be unseaworthy due to the impossibility to continue the highest levels of maintenance required. This is especially true when a vessel is immobilised without necessary precautions for a long time and when it is located in very humid climatic conditions. While ships can be laid up (usually for economic reasons) for long periods of time, maintenance guidelines exist,[34] which could not be followed in the present case due to lack of access to the vessel. It has also been nearly impossible to provide the vessel with all necessary spare parts

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[30] *M/V "Saiga" (No. 2) (Saint Vincent and the Grenadines* v. *Guinea), Provisional Measures, Order of 11 March 1998, ITLOS Reports 1998*, p. 24, at p. 38, para. 41.

[31] Letter of LOC London Offshore Consultants regarding the not-granted access to the *"San Padre Pio"*, dated 16 May 2019: **Annex PM/CH-5**; Report of Dr Felix Oresanya about the impossibility to examine the Master and the three other officers, dated 28 April 2019: **Notification, Annex NOT/CH-52**.

[32] *Corfu Channel* case, *Judgment of 9 April 1949, I.C.J. Reports 1949*, p. 4, at p. 18.

[33] Ibid.

[34] Bureau Veritas (classification company of the *"San Padre Pio"*), Guidance for Lay-Up of Ships, dated April 2009: **Annex PM/CH-6**.

to carry out proper maintenance. As of the beginning of 2019, the list of issues identified by the operator includes but is not limited to the following:

(a) The vessel's location and situation do not allow proper cleaning on the hull and other external parts.

(b) The vessel's location and situation do not allow for qualified service engineers to be present.

(c) The vessel's location and situation do not allow for safety/navigation equipment to be serviced and maintained.

(d) The vessel's location and situation have resulted in a falling off of the engine performance so that she is not able to move if in any danger from other vessels or adverse weather conditions.[35]

39. The *"San Padre Pio"* is also at risk of remaining in detention until she has lost all value. Whereas her book value was estimated to be around US $10.5 (ten-and-a-half) million in December 2017,[36] this amount has enormously decreased–and is constantly decreasing– due to the prolonged immobility she has been forced to endure for 16 months and the impossibility in these circumstances to proceed to maintenance operations. At this point in time, about 20 days of repairs would already be required in order to achieve full capability of functioning of the vessel again.[37] Further loss of value is clearly imminent and irreversible. It is also important to note that Switzerland is indirectly involved in the ownership of the vessel due to its guarantee for the *"San Padre Pio"*, as part of the Swiss merchant fleet, and that it would be affected by further depreciation. The foundation of the Swiss merchant fleet goes back to World War II. Its aim was to provide sufficient economic supplies for the country. A government guarantee system was created as an incentive for Swiss ship-owners to register their vessels under the Swiss flag. The *"San Padre Pio"* benefits from such a guarantee. In case of total loss of the vessel, Switzerland will most probably have to pay at least parts of the bank loan.[38] Hence, Switzerland may well suffer from a direct economic loss. Such prejudice to the rights of Switzerland must be prevented.

40. Moreover, the ongoing detention puts at risk the safety and security of the Master and the three other officers of the *"San Padre Pio"*. They have been confined, first on board the vessel, then in prison, and then once again on board the vessel, under armed guard, for 16 months (since January 2018). As mentioned in the Notification, it has even been difficult to get permission to see an urgently needed doctor.[39] The proceedings against them make little progress, with the additional uncertainties and psychological stress that are inevitably involved. The Master and the three other officers have been deprived of their right to be tried without delay. They 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.

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[35] Email from ABC Maritime regarding the problems facing the vessel, dated 9 May 2019: **Annex PM/CH-7**.
[36] Valuation of the M/T "SAN PADRE PIO" by Bayside Services: **Notification, Annex NOT/CH-51**. That valuation, which dates back to just before the detention of the vessel, cannot be compared to a current valuation, because the Nigerian authorities did not grant access to the vessel to experts.
[37] Email from ABC Maritime regarding expected repairs, dated 14 May 2019: **Annex PM/CH-8**.
[38] *Ordonnance sur le cautionnement de prêts pour financer des navires suisses de haute mer* of 14 June 2002: **Annex PM/CH-9**.
[39] Email exchanges regarding EFCC's refusal to authorise crew members to see a doctor, dated May-June 2018: **Notification, Annex NOT/CH-25**.

41. As the Tribunal has recognised, "considerations of humanity must apply in the law of the sea as they do in other areas of international law".[40] This is particularly so in respect of the Master, Andriy Vaskov, and the three other officers, Mykhaylo Garchev, Vladyslav Shulga and Ivan Orlovskyi, who have been detained for 16 months, separated from their wives and children, or their parents. The damage suffered by the Master and the three other officers *inter alia* in terms of loss of freedom, stress, humiliation, and damage to health as a result of this continuing state of affairs is clearly irreparable, as every day spent in detention is irrecoverable.[41] Such prejudice to the rights of Switzerland must be stopped at the earliest opportunity.

42. As explained in the Notification, piracy and armed robbery at sea are prevalent in the Gulf of Guinea.[42] The security threats to which the *"San Padre Pio"* has been subjected throughout her extended stay at the Bonny Inner Anchorage have recently materialised with a serious piratical attack against the vessel which took place at 21.20 local time on 15 April 2019, endangering the life of the crew and others on board. The robbers were armed with machine guns, there was shooting, and one of the Nigerian Navy guards was wounded.[43] Less than a week later, another tanker, identified by the media as the "*Apecus*",[44] which was anchored off Bonny Island, was attacked and six members of the crew were kidnapped.[45] There is no report that the six crew members have since been released. Confined to a vessel that has been immobile for 16 months in a zone prone to piratical attacks, the Master and the three other officers of the *"San Padre Pio"* remain at constant risk of being kidnapped, injured or even killed.

43. It is entirely conceivable that an attack such as that which took place on 15 April 2019 will be repeated. This may happen at any time before the Annex VII arbitral tribunal is in a position to act. The recent events demonstrate that the Nigerian authorities are not able to prevent such attacks. Should a similar or bigger raid occur, the safety of the vessel, her crew (the four charged officers, but also the additional crew members replacing the liberated original crew members) and cargo cannot be guaranteed. This permanent risk of physical and psychological harm to the crew underlines the gravity of the situation and the urgent need for provisional measures.[46] Such prejudice to the rights of Switzerland must be prevented.

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[40] *"Enrica Lexie" (Italy* v. *India), Provisional Measures, Order of 24 August 2015, ITLOS Reports 2015*, p. 182, at p. 204, para. 133, referring to *M/V "Saiga" (No. 2) (Saint Vincent and the Grenadines* v. *Guinea), Judgment of 1 July 1999, ITLOS Reports 1999*, p. 10, at p. 62, para. 155.

[41] As argued by the Netherlands in "*Arctic Sunrise*" and quoted by the Tribunal in *"Arctic Sunrise" (Kingdom of the Netherlands* v. *Russian Federation), Provisional Measures, Order of 22 November 2013, ITLOS Reports 2013*, p. 230, at p. 249, para. 87.

[42] International Chamber of Commerce – International Maritime Bureau (ICC-IMB), *Piracy and Armed Robbery Against Ships,* Report for the period 1 January – 31 March 2019, page 19: **Notification, Annex NOT/CH-53**.

[43] Statement report from the Master about the attack of 15 April 2019: **Notification, Annex NOT/CH-54**; ICC-IMB (Piracy Reporting Centre), *Piracy & Armed Robbery Attack Report*: **Notification, Annex NOT/CH-55**; Pictures following the pirate attack of 15 April 2019: **Notification, Annex NOT/CH-56**.

[44] FleetMon, "Tanker attacked, 6 crew kidnapped", dated 24 April 2019: **Annex PM/CH-10**.

[45] ICC Report of attack of 19 April 2019: **Notification, Annex NOT/CH-57**; News Central, "Nigerian pirates abduct six sailors from oil tanker -IMB", dated 25 April 2019: **Notification, Annex NOT/CH-58**.

[46] In *"ARA Libertad"*, the attempts by the Ghanaian authorities to board the warship and force it to move to another berth without authorisation by its Commander, and the possibility that such actions may be repeated, were considered by the Tribunal to demonstrate the gravity of the situation and underline the urgent need for provisional measures *("ARA Libertad" (Argentina* v. *Ghana), Provisional Measures, Order of 15 December 2012, ITLOS Reports 2012*, p. 332, at p. 349, para. 99). The same reasoning applies *mutatis mutandis* to a failure by the Nigerian authorities to protect the vessel, cargo and crew from the acts of third parties.

44. Additionally, the ongoing detention puts at risk the cargo of the *"San Padre Pio"*. In light of the recent extension of the charges to the charterer, the cargo appears at risk of being imminently seized. In any event, the prolonged detention has already forced the vessel to use nearly 525 MT of her own cargo for her basic functioning.[47] Moreover, even the remaining cargo may be lost; oil is an organic substance and the preservation of its quality cannot be guaranteed over such a long time and under the current conditions. Deleterious reactions undergone by gasoil during storage are inevitable but their rate depends *inter alia* on the concentration of oxygen, the amount of light and the storage temperature.[48] None of these factors can be controlled effectively in the current circumstances of storage.

45. More generally, the prolonged detention of the *"San Padre Pio"* has resulted in harm of an economic nature caused to persons involved or interested in the operation of the vessel. Nigeria's actions deprive the owner and charterer of their property, which, over such a long period of time, inevitably causes important losses of profits and business opportunities. Also, 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. Such prejudice to the rights of Switzerland must be stopped at the earliest possible date and the risk must be prevented that damage is further aggravated through seizure or hijacking of the vessel and/or the cargo.

46. Finally, it is far from clear that the vessel will remain in a sufficient condition so as to avoid causing environmental harm, in particular through continued contact of the vessel's paint with the water and lack of regular repainting. Also, in light of the piratical attacks in the region, a permanent risk exists that the vessel, together with her cargo, will be attacked and hijacked; this may lead to harm to the marine environment. Furthermore, once the judicial proceedings are concluded in Nigeria, and if the charges are upheld, there is a significant risk that the by-then-worthless vessel will be abandoned on a beach, left to pollute the area for generations to come. This has happened to a vessel in a similar predicament, the *"Anuket Emerald"*, which is now resting and rusting off the coast of Nigeria. The *"Anuket Emerald"* was arrested for alleged violation of Nigeria's petroleum laws, was forfeited at the end of the trial court's decision in March 2016 respectively the appeal court judgment in December 2017 and ended up wrecked on a beach.[49] Switzerland is unable to combat these risks of damage to the marine environment, except if it regains control over its vessel at the earliest possible date.

D. Consequences of a refusal to grant the present request

47. If the provisional measures requested are not ordered, most of the rights invoked by Switzerland will continue to suffer irreversible prejudice or damage. In particular, Switzerland has been deprived, for 16 months, of the exercise of freedom of navigation and other lawful uses of the sea and of jurisdiction in respect of a vessel flying its flag. The detention of the Master and three other officers, as well as the deprivation of property suffered by the vessel's owner and charterer persist. Nigeria's conduct is ongoing and the internationally wrongful acts set out in the Notification and in this Request, having a

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[47] See Notification: **Annex PM/CH-1**, para. 10; see also *"San Padre Pio"* – costs paid since 18 January 2018: **Notification, Annex NOT/CH-4**.

[48] Westbrook Steven R., "Fuels for Land and Marine Diesel Engines and for Non-Aviation Gas Turbines", in: Rand Salvatore J. (ed.), *Significance of Tests for Petroleum Products*, 7th edition 2003, pp. 73-74: **Annex PM/CH-11**.

[49] Picture of *"Anuket Emerald"* abandoned on the beach, taken on 18 July 2018: **Annex PM/CH-12**.

continuing character, will add to the injury already caused to the vessel, her crew, cargo and all other persons interested in the *"San Padre Pio"*.

48. Moreover, other rights of Switzerland would continue to be under a real and imminent risk of suffering irreparable prejudice or damage, aggravating the already existing prejudice or triggering new prejudice. In particular, when the *"San Padre Pio"* is rendered unseaworthy by the forced immobilisation, Switzerland will be in the unenviable position, as flag State of a wreck, to defend its theoretical right to freedom of navigation. Also, when the vessel or cargo has lost all value, this will add to the damage caused to the vessel owner and the charterer. Furthermore, piratical attacks risk causing new damage in the form of physical and mental harm to the crew and worsen the damage caused to persons interested in the vessel.

49. Finally, harm to the marine environment would likely occur due to the forced immobilisation of the vessel and sub-standard levels of maintenance caused by such detention, to risks of piratical attacks and to Nigeria's proven lack of due diligence towards vessels under its control.

V. Judge *ad hoc*

50. Switzerland chooses Professor Anna Petrig to act as a member of the Tribunal pursuant to Article 17 of the Statute of the Tribunal. Professor Anna Petrig is a Swiss citizen. She is Professor of international law and public law at the University of Basel, Switzerland.[50]

VI. Appointment of agent and address for service

51. In accordance with Article 56, paragraph 2, of the Rules of the Tribunal, Switzerland hereby designates Ambassador Corinne Cicéron Bühler, Director of the Directorate of International Law of the Federal Department of Foreign Affairs as Agent in the present proceeding before the International Tribunal for the Law of the Sea.[51] Ambassador Cicéron Bühler's contact details are as follows:

Corinne Cicéron Bühler
Directorate of International Law
Kochergasse 10
CH-3003 Berne

52. In accordance with Article 56, paragraph 1, of the Rules of the Tribunal, Switzerland hereby designates the following address for service in the capital of the country where the seat of the Tribunal is located:

Swiss Embassy to the Federal Republic of Germany
Otto-von-Bismarck-Allee 4A
10557 Berlin

[50] Brief biographical details of Professor Anna Petrig: **Annex PM/CH-13**.
[51] The nomination and legalisation of the signature of the agent is handed over to the Tribunal together with this request for the prescription of provisional measures.

VII. Submissions

53. For the reasons set out above, Switzerland requests that the Tribunal 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.

Berne,

21 May 2019

C. Cicéron Bühler

Corinne Cicéron Bühler

Ambassador, Director

Directorate of International Law

Federal Department of Foreign Affairs

Agent of the Swiss Confederation

VIII. Annexes to the Request for Provisional Measures of the Swiss Confederation

For ease of reference, page numbers have been added.