



INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA
TRIBUNAL INTERNATIONAL DU DROIT DE LA MER

Press Release

TODAY, 6 JULY 2019, THE TRIBUNAL DELIVERED ITS ORDER IN *THE M/T "SAN PADRE PIO" CASE (SWITZERLAND V. NIGERIA), PROVISIONAL MEASURES*

History of proceedings and factual background

On 6 May 2019, Switzerland instituted arbitral proceedings under Annex VII to the United Nations Convention on the Law of the Sea ("the Convention") against Nigeria in a dispute between Switzerland and Nigeria concerning the arrest and detention of the *M/T "San Padre Pio"*, its crew and cargo.

Pursuant to article 290, paragraph 5, of the Convention, pending the constitution of an arbitral tribunal, any party to the dispute may request the International Tribunal for the Law of the Sea to prescribe provisional measures to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment.

On 21 May 2019, Switzerland submitted a request to the Tribunal for the prescription of provisional measures under article 290, paragraph 5, of the Convention in relation to the dispute.

The factual background of the dispute may 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 transfers of gasoil" (paragraph 30 of the Order) in Nigeria's exclusive economic zone. The vessel was then ordered to proceed to Port Harcourt (Nigeria), where it is still detained. The 16 crew members were moved to a prison and 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" (paragraph 33 of the Order). The charges were later amended to apply only to the Master, three officers and the vessel (paragraph 34 of the Order). Thereafter, the other crew members were released from prison and returned to the vessel, while the Master and the three officers stayed in prison before they were released and returned to the vessel upon the provision of bail on 13 April 2018 (paragraph 34 of the Order). Under the bail conditions set by the Federal High Court of Nigeria, the Master and the three officers are not allowed to travel outside Nigeria without prior approval or order of the court (paragraph 35 of the Order).

The Tribunal held a hearing on 21 and 22 June 2019. In its final submissions, made on 22 June 2019, 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.”

On 22 June 2019, Nigeria made the following final submissions:

“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.”

Tribunal’s Order of 6 July 2019

I. *Prima facie* jurisdiction

The Tribunal first recalls that it “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” (paragraph 45 of the Order).

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

Switzerland 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” (paragraph 48 of the Order). It brought three claims before the Annex VII arbitral tribunal, the first and second of which concern Switzerland’s rights to freedom of navigation and exclusive flag State jurisdiction. The third claim is “based on the International Covenant on Civil and Political Rights and also the Maritime Labour Convention” (paragraph 49 of the Order).

In the proceedings before the Tribunal, Nigeria does not challenge the *prima facie* jurisdiction of the Annex VII arbitral tribunal over Switzerland’s first and second

claims, but it does, however, challenge such jurisdiction over Switzerland's third claim (paragraph 52 of the Order). In Nigeria's view, "at the time of the institution of the Annex VII arbitral proceedings, no dispute had crystallized between the Parties over this claim" (paragraph 55 of the Order) and "the alleged dispute [regarding Switzerland's third claim] does not concern the interpretation or application of UNCLOS" (paragraph 53 of the Order).

The Tribunal is of the view that, although Nigeria did not respond to Switzerland's position regarding the alleged violation of the Convention, the fact that the Nigerian authorities intercepted, arrested and detained the vessel and commenced criminal proceedings against it and its crew members "indicates that Nigeria holds a different position from Switzerland" (paragraph 58 of the Order). The Tribunal is also 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" (paragraph 60 of the Order). 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" (paragraph 61 of the Order).

Article 283 of the Convention

As to the requirements under article 283 of the Convention, the Tribunal notes that "Switzerland made repeated attempts to exchange views with Nigeria" (paragraph 70 of the Order). The Tribunal observes that Nigeria, however, "did not engage in an exchange of views with Switzerland" and that, under these circumstances, "Switzerland could reasonably conclude that the possibility of reaching agreement was exhausted" (paragraph 72 of the Order). 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" (paragraph 75 of the Order).

The Tribunal "concludes that *prima facie* the Annex VII arbitral tribunal would have jurisdiction over the dispute submitted to it" (paragraph 76 of the Order).

II. Urgency of the situation

Plausibility of rights asserted by the Applicant

The Tribunal states that, before prescribing provisional measures, it "needs to satisfy itself that the rights which Switzerland seeks to protect are at least plausible" (paragraph 77 of the Order) and that, at this stage of the proceedings, it "is not called upon to determine definitively whether the rights claimed by Switzerland exist" (paragraph 105 of the Order).

In this respect, the Tribunal notes Switzerland's argument 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,

however, also notes Nigeria's argument that "it has sovereign rights and obligations ... to exercise its enforcement jurisdiction over the bunkering activities in question in its exclusive economic zone" (paragraph 107 of the Order). 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 ... are plausible" (paragraph 108 of the Order).

Real and imminent risk of irreparable prejudice

The Tribunal notes that, pursuant to article 290, paragraph 5, of the Convention, it may not prescribe provisional 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 (paragraph 111 of the Order).

The Tribunal considers that, under the circumstances of the present case, the arrest and detention of the *M/T "San Padre Pio"* "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 ... may not be fully repaired by monetary compensation alone" (paragraph 128 of the Order). 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 security and safety (paragraph 129 of the Order)." In this regard, the Tribunal takes note of an armed attack against the vessel that occurred on 15 April 2019.

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" and "accordingly finds that the urgency of the situation requires the prescription of provisional measures under article 290, paragraph 5, of the Convention (paragraph 131 of the Order).

III. Provisional measures to be prescribed

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 (paragraph 132 of the Order). 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 (paragraph 133 of the Order).

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" (paragraph 138 of the Order). The Tribunal "determines that

the bond or other financial security should be in the amount of US\$ 14,000,000” (paragraph 139 of the Order).

Furthermore, 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, for this purpose, the Parties shall cooperate in good faith in the implementation of such undertaking” (paragraph 141 of the Order).

IV. Operative provisions (paragraph 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.

Judges Chadha and Cabello append a joint declaration to the Order; Judges Kittichaisaree and Kolodkin append a declaration to the Order; Judge Heidar and Judges *ad hoc* Murphy and Petrig append a separate opinion to the Order; Judges Lucky, Kateka, Gao and Bouguetaia append a dissenting opinion to the Order. The text of the Order, the declarations and opinions as well as a recorded webcast of the reading are available on the [website](#) of the Tribunal.

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The press releases of the Tribunal, documents and other information are available on the Tribunal's websites (<http://www.itlos.org> and <http://www.tidm.org>) and from the Registry of the Tribunal. Please contact Ms Julia Ritter or Mr Benjamin Benirschke at: Am Internationalen Seegerichtshof 1, 22609 Hamburg, Germany, Tel.: +49 (40) 35607-227; Fax: +49 (40) 35607-245; E-mail: press@itlos.org