

Joint Declaration of Judges Cabello and Chadha

1. The Tribunal may prescribe provisional measures under article 290, paragraph 5, of the Convention only if the provisions invoked by the Applicant *prima facie* appear to afford a basis on which the jurisdiction of the Annex VII arbitral tribunal could be founded and the urgency of the situation so requires.
2. We concur with the Tribunal's finding that *prima facie* the Annex VII arbitral would have jurisdiction over the present dispute and there is a real and imminent risk of irreparable prejudice to the rights of Switzerland pending the constitution and functioning of that tribunal; and urgency of the situation requires the prescription of provisional measures.
3. We have voted in favour of operative paragraph 1, although we have reservations about some elements of operative paragraph 1(c), as it has been drafted on the basis of the "vessel, cargo and crew as a unit" principle.
4. The Tribunal, in granting provisional measures, has to ensure that the rights of the two parties are equally preserved. Therefore, provisional measures may not be granted where they will cause irreparable harm to the rights of the party against which the measures are directed.
5. While being fully sensitive to considerations of humanity, in our opinion, the provisional measure prescribed in the Tribunal's Order that the Master and three officers of the vessel, who are currently on bail, be allowed to leave the territory and maritime areas under the jurisdiction of Nigeria, does not sufficiently protect the interests of Nigeria.
6. If the Annex VII tribunal rules in favour of Nigeria, it will be difficult for Switzerland to guarantee the presence of the accused in Nigeria for successful conduct of the prosecution as they are not Swiss nationals.

7. The undertaking stipulated by the Tribunal enjoining Switzerland to ensure that the Master and three officers are available and present in Nigeria, if the Annex VII tribunal finds that Nigeria has jurisdiction, in our view, is not sufficient in this case. Switzerland, despite its best efforts and good faith, may not succeed in securing the presence of the four accused persons before the Nigerian courts as it is not their State of nationality, or, as far as we are aware, their State of residence.

8. In this regard the Tribunal had addressed a specific question to Switzerland requesting it to elaborate its counsel's assertion that "procedures exist for securing the return of the Ukrainian officers". However Switzerland in its response failed to provide a satisfactory answer. In our view the involvement of a third State, which is not a party to the dispute, in any mutual legal assistance agreement, at the moment does not seem to have any legal basis.

9. In view of the above, in the present provisional measures proceedings, the ordering of the release of the indicted Master and the three officers would not equally preserve the rights of the Parties and may cause irreparable prejudice to Nigeria's rights to enforce its laws through criminal proceedings, as the presence of the defendants is essential for the successful continuation of those proceedings.

10. In our opinion, alternative measures were available before this Tribunal which would have preserved the rights of both Parties in a more balanced manner. The Tribunal could have ordered the release of the vessel and its cargo against the payment of a bond and the four indicted officers to remain in Nigeria in a safe location as the condition of their bail allows them to reside anywhere in Nigeria. This would have ensured their presence before the courts conducting criminal proceedings and also addressed the safety and security concerns.

(signed) Oscar Cabello

(signed) Neeru Chadha