Declaration of Judge Kolodkin

1. I share the findings of the Tribunal that *prima facie* the Annex VII arbitral tribunal which is to be constituted would have jurisdiction, and that the rights claimed by Switzerland in the present case on the basis of articles 58, paragraphs 1 and 2, and 92 of the United Nations Convention on the Law of the Sea (hereinafter "the Convention") are plausible.

2. I recognize that there is a risk of harm to these rights, involving the humanitarian and security concerns, which is behind the prescription that the four officers, together with the vessel and the cargo, be allowed to depart Nigeria. However, I am not totally convinced that the evidence is sufficient to satisfy the assertions that the risk is real and imminent and that the harm to these rights may be irreparable.

3. The measures prescribed by the Order reflect substantive efforts made by the Tribunal to preserve, as required by article 290, paragraph 1, of the Convention, the rights of both Parties. At the same time, I am not sure that these measures, prescribing in particular that Nigeria immediately release the four officers and ensure that they are allowed to leave its territory and maritime areas under its jurisdiction, even under the conditions established by the Order, sufficiently protect the right of Nigeria as a coastal State to exercise its criminal jurisdiction concerning the crimes allegedly committed by those officers in its exclusive economic zone (hereinafter "EEZ").

* * *

4. To demonstrate that "the risk of irreparable prejudice is real and ongoing" the Tribunal points in particular to "the armed attack against the *M/T "San Padre Pio"* that took place on 15 April 2019, endangering the lives of those on board the vessel".[1] However, this attack was repelled by the Nigerian armed guards, and Nigeria thereafter undertook the necessary measures to strengthen the protection of "*San Padre Pio"* and those on board.

1 Order, para. 129.

5. The Tribunal further notes the recent report on piracy and armed robbery against ships 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.[2] There is no reason to doubt these statistics. However, the dangers to which they point obviously have not prevented those involved in the management of the vessel to continuously employ it for "ship-to-ship transfers" or "bunkering" activities in the area.

6. Even if damage to the vessel and the cargo occurs within the relatively short period before the constitution and functioning of the Annex VII arbitral tribunal, it is hard to imagine that it would be irreparable by adequate financial compensation.

7. The humanitarian and security concerns with respect to the four officers are, of course, to be taken seriously. However, it must be noted that under the bail imposed by the Nigerian court, they are free to leave the vessel and move around the country. If doubts existed in this regard, they have been dispelled by the governmental assurances confirmed by Nigeria during the final round of oral pleadings.[3] Nothing prevents the flag State or the shipowner from assisting the accused, who are not restricted in communication and contacts with those not on board the vessel, in finding appropriate accommodation for these officers ashore in Nigeria.

8. The Tribunal considers, in the circumstances of the present case, that arrest and detention of *"San Padre Pio"* for bunkering activities it carried out in the EEZ of Nigeria

> 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.

2 Ibid.

3 ITLOS/PV.19/C27/4, pp. 16–17.

It is of the view, 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".[4]

9. I wonder whether in the present case there are arguments that are strong enough to support this view. In addition, just three months ago, in its Judgment in *The M/V "Norstar" Case*, the Tribunal, having ascertained the breach of article 87, paragraph 1, of the Convention and the violation of the right of the flag State to the freedom of navigation, repaired it with monetary compensation only.[5]

* * *

10. In my view, the coastal State's prerogative to enforce its sovereign rights for the purpose of exploiting, conserving and managing the non-living resources of its EEZ, asserted by Nigeria in particular under article 56, paragraph 1, of the Convention, are in this case no less plausible than the rights asserted by Switzerland under articles 58, paragraph 1, 87 and 92 thereof to exercise freedom of navigation and exclusive flag State jurisdiction in the EEZ of Nigeria. In accordance with article 290, paragraph 1, of the Convention, they must be appropriately protected by the provisional measures alongside the rights of Switzerland.

11. It is somewhat doubtful that the measures indicated by the Tribunal will adequately protect the right of Nigeria to exercise its criminal jurisdiction. The requirement of a bond or other financial guaranty to be posted by Switzerland and of an undertaking to be issued by it prior to the departure of the vessel, cargo and crew, including the four accused, does not legally guarantee that the accused, who are not Swiss nationals, will be available to Nigeria's courts and law enforcement authorities for ongoing prosecution. Thus, the rights of Switzerland seem to be protected to some extent at the expense of Nigeria.

12. Meanwhile, even if prescribing the release of the vessel and the cargo, the Tribunal could have indicated other measures in respect of the officers that

4 Order, para. 128.

5 *The M/V "Norstar" Case* (*Panama v. Italy*), *Judgment of 10 April 2019*.

would have taken into account, on the one hand, the humanitarian and security concerns, and, on the other, the plausible right of Nigeria to exercise its criminal jurisdiction in respect of the accused. For example, the Parties could have been prescribed to cooperate in order to safely accommodate, without delay, the officers accused at an appropriate location ashore in Nigeria pending the criminal proceedings. Regretfully, the opportunity to preserve the respective rights of both Parties in a more balanced way has been missed.

(*signed*) Roman A. Kolodkin