

Dissenting Opinion of Judge Gao

1. I voted against paragraph 146(1) (a) (b) (c) of the operative part of the Order. These paragraphs deal with the posting of a bond, undertaking to ensure, and the release of the *M/T "San Padre Pio"* and the Master and three officers, respectively. The reasons for my dissent are explained in the following paragraphs.
2. The facts of the case and arguments of both the Swiss Confederation ("Switzerland") and the Federal Republic of Nigeria ("Nigeria") are as stated in the Order.
3. The *M/T "San Padre Pio"* is a vessel flying the flag of Switzerland, owned by a Swiss company San Padre Pio Schiffahrt AG, and chartered by Argo Shipping and Trading Ltd, the Dubai-based chartering arm of Augusta Energy AS, a company incorporated in Switzerland.
4. At the time of her arrest on 22 to 23 January 2018, the vessel was engaged in ship-to-ship ("STS") transfers of gasoil within the exclusive economic zone ("EEZ") of Nigeria.
5. When the *M/T "San Padre Pio"* was intercepted by the Nigerian naval ship "*Sagbama*" at 8 p.m. on 22 January 2018, it was in the process of bunkering a vessel. It then proceeded to commence another STS fuel transfer with a different vessel at 3 a.m. the next day.¹
6. It was at this time that the vessel was arrested and escorted from the scene to a Nigerian port, Port Harcourt, where the vessel and her 16 crew members, together with the cargo on board, were detained and arrested.
7. Charges were subsequently brought by the Nigerian authorities against all 16 crew members and the vessel on 2 March 2018. The charges were amended on 19 March of the same year to apply only to the Master, three officers and the vessel.

¹ Affidavit of Lieutenant Mohammed Ibrahim Hanifa, Statement in Response, Vol. 11, Annex 6, paras. 6–7.

8. One of the principal means by which the navy ensures that bunkering is carried out in a safe and responsible manner is by requiring vessels – prior to engaging in bunkering – to secure from the navy a special permit known as a verification certificate.²

9. This certificate allows the vessel to lawfully receive, load, supply and discharge approved products. The applicant is required to disclose the names of the vessels, the locations of the loading and discharge points, the type of product and its quantity.

10. The Nigerian permit imposes clear mandatory conditions, including an express prohibition on the “lifting of illegally refined crude oil products”, and a requirement that bunkering must be “conducted between sunrise and sunset”. Any vessel “found violating” these “conditions” will be “arrested and prosecuted”.

11. Upon further investigation, it was discovered that information on various permits and documents submitted by the “*San Padre Pio*”’s agent and officers to the Nigerian authorities were falsified in material aspects, and the quantity and quality of the fuel carried by the “*San Padre Pio*” was different from what the ship master had declared to Nigerian officials. The ship was carrying more fuel than declared, and its quality was sub-standard, a tell-tale sign of illegally refined oil from Nigeria.³

12. These basic facts of the case are indisputable between the Parties. Switzerland candidly admits that the vessel was engaged in a ship-to-ship bunkering operation, transferring fuel for use in Total’s oil-production operations.⁴

13. In their final submission, Switzerland requests the Tribunal to prescribe the following provisional measures:

2 Nigerian Navy, Nigerian Navy Ship Pathfinder Verification Certificate to Receive/Supply/ Load/Discharge Approved Products, para. 12(d), Statement in Response, Vol. II, Annex 5.

3 Statement in Response, paras. 2.11–2.14.

4 Statement of Claim, para. 7.

Nigeria shall immediately take all measures necessary to ensure that the restrictions on the liberty, security and movement of the “San Padre Pio”, her crew and cargo are immediately lifted to allow 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.⁵

14. Nigeria requests “that the International Tribunal for the Law of the Sea rejects all of the Swiss Confederation’s Request for Provisional Measures.”⁶

15. In the present case, there appears to be a dispute between the two Parties on the jurisdiction over the *M/T “San Padre Pio”* and its bunkering operations in the EEZ of Nigeria. Further, the dispute concerns the interpretation and application of the United Nations Convention on the Law of the Sea (“UNCLOS” or “the Convention”).

16. Switzerland and Nigeria made claims. Switzerland claims in its Statement of Claim and Request for Provisional Measures that bunkering activities carried out by the *M/T “San Padre Pio”* in the EEZ of Nigeria belong to the freedom of navigation and that it has exclusive jurisdiction over the vessel and its bunkering activities.

⁵ ITLOS/PV.19/C27/3, p. 14, lines 1–15.

⁶ ITLOS/PV.19/C27/4, p. 17, lines 5–6.

17. Nigeria contends in its Statement in Response that it has sovereign rights and jurisdiction under article 56, paragraph 1(a) to exercise its enforcement jurisdiction over the bunkering activities carried out by a foreign flagged vessel in its EEZ.

18. After deliberation, the Tribunal prescribed the following provisional measures as requested by Switzerland in its Order of 6 July 2019:

Upon the posting of the bond or other financial security referred to under (a) above and the issuance of the undertaking referred to under (b) above, Nigeria shall immediately release the *M/T “San Padre Pio”* and the Master and the three officers who have been detained and shall ensure that the *M/T “San Padre Pio”* and the Master and the three officers are allowed to leave the territory and maritime areas under the jurisdiction of Nigeria.⁷

19. In my view, the provisional measures prescribed by the Tribunal in the Order are flawed in a number of aspects.

20. Article 290, paragraph 1, of the Convention, concerning provisional measures provides: “[T]he 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*” (emphasis added).

21. In order to “preserve the respective rights of the Parties”, the Tribunal needs, therefore, to examine whether the rights asserted by Switzerland and Nigeria would actually be applicable to the situation and facts of the dispute in the present case or, in other words, whether the respective rights claimed by both Parties are plausible.

22. As the Tribunal stated in *“Enrica Lexie” (Italy v. India)*:

⁷ *M/T “San Padre Pio” (Switzerland v. Nigeria), Provisional Measures, Order of 6 July 2019*, para. 146 (1)(c) (hereinafter Order).

[B]efore 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*. (emphasis added)⁸

23. It is clear from the jurisprudence that the rights of both the applicant and respondent need to be confirmed as plausible before provisional measures can be prescribed.

24. The test of plausibility is considered two-fold: successful presentation of the alleged right; and its applicability to the facts of the case, as Judge Greenwood opined in his separate opinion in the *Certain Activities* case before the International Court of Justice, that plausibility requires: “a reasonable prospect that a party will succeed in establishing that it has the right which it claims and that that right is applicable to the case”.⁹

25. On the plausibility of rights asserted by Switzerland, the Tribunal states in 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 on the basis of articles 58, paragraphs 1 and 2, and 92 of the Convention are plausible.¹⁰

26. Then, unexpectedly, the Tribunal stopped there, and failed to proceed to examine whether or not the rights asserted by the other Party are also plausible.

27. In the present case, the *M/T “San Padre Pio”* was bunkering facilities involved in the extraction of natural resources from the seabed and subsoil within Nigeria’s EEZ. Nigeria has the sovereign right under article 56, paragraph 1(a), of the Convention to exercise its enforcement jurisdiction against the *M/T “San Padre Pio”* and its crew engaged in illegal bunkering activities.

8 “*Enrica Lexie*” (*Italy v. India*), *Provisional Measures, Order of 24 July 2015, ITLOS Reports 2015*, p. 182, at p. 197, para. 84.

9 *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, *Provisional Measures, Order of 8 March 2011, I.C.J. Reports 2011*, p. 6, Declaration of Judge Greenwood (emphasis added).

10 Order, para. 108.

28. Article 56, paragraph 1(a), of the Convention provides that:

In the exclusive economic zone, the coastal State has: (a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone ...¹¹

29. This important article of the Convention, although not addressed at all by Switzerland in either its written or its oral proceedings, makes clear that Nigeria, as a coastal State, has sovereign rights to exploit, conserve and manage the natural resources in its EEZ.

30. This sovereign right includes enforcement jurisdiction, as expressly held by the Tribunal in the *M/V “Virginia G” Case*:

The Tribunal observes that article 56 of the Convention refers to sovereign rights for the purpose of exploring and exploiting, conserving and managing natural resources. The term “sovereign rights” in the view of the Tribunal encompasses all rights necessary for and connected with the exploration, exploitation, conservation and management of the natural resources, including the right to take the necessary enforcement measures.¹²

31. In short, a coastal State’s competence to take enforcement action against such bunkering “derives from the sovereign rights of coastal States to explore, exploit, conserve and manage natural resources”,¹³ as stipulated in article 56, paragraph 1(a).

32. In the present case, the *M/T “San Padre Pio”* and its crew were supplying fuel to a complex of installations built to extract petroleum from Nigeria’s EEZ. Article 56, paragraph 1(a), grants Nigeria the sovereign right to regulate and take enforcement measures with respect to the management of the natural

¹¹ UNCLOS, art. 56(1) (a).

¹² *M/V “Virginia G” (Panama/Guinea-Bissau), Judgment, ITLOS Reports 2014*, p. 4, para. 211 (emphasis added).

¹³ *Ibid.*, para. 222.

resources in its EEZ. Thus, the activities of the *M/T “San Padre Pio”* and its crew fall within the jurisdiction of Nigeria as the coastal State.

33. In my view, taking into consideration the facts of the case and the legal arguments made by the Parties, the rights asserted by Nigeria on the basis of article 56, paragraph 1(a), of the Convention are, beyond doubt, equally plausible, and indisputable.

34. That is to say, there exist two plausible rights of both the Applicant and Respondent in the present case.

35. In light of these circumstances, it would be difficult in the present case to consider plausible the rights alleged by Switzerland concerning the freedom of navigation and exclusive flag State jurisdiction because they are subject to the relevant provisions of the Convention, pursuant to which Nigeria was acting within her sovereign rights, as clearly recognized by the Convention.¹⁴

36. In this regard, it is beyond comprehension why the Tribunal shied away from following its own jurisprudence in the *M/V “Virginia G” Case* in upholding the rights of the coastal State under article 56, paragraph 1(a), in the present case; and why the lawful rights asserted by Nigeria under the Convention have not been dealt with on an equal footing and, thus, failed even to be tested in terms of their plausibility.

37. This part of the Order may be said to be flawed for a number of reasons. First, it does not conform to article 290, paragraph 1, of the Convention, which requires any provisional measures prescribed to “preserve the respective rights of the Parties”.

38. Second, it has negated almost completely the rights asserted by the Respondent under the Convention, let alone for a test of plausibility.

39. Third, it fails the obligation that the rights of both Parties be unharmed equally.

14 Statement in Response, paras. 3.9–3.22.

40. Fourth, it would cause unnecessary and irreparable harm to the rights of Nigeria as clearly recognized in the Convention.

41. The next major task before the Tribunal, at this stage of proceedings, is to determine: whether there is a risk of irreparable prejudice to the rights of the Parties to the dispute, and whether such a risk is real and imminent, as required by article 290, paragraph 5, of the Convention.

42. The Parties hold differing views on the issue at hand. Switzerland claims that serious prejudice has already been caused to its rights. It further contends that “... the vessel, her crew and cargo ... have been detained for 16 months” and that “[t]his is causing serious risks to the vessel, her crew and cargo”, and “[t]hese risks are real and imminent.”¹⁵

43. Nigeria contends that “Switzerland’s request for provisional measures should ... be rejected because it does not comply with the conditions of urgency and risk of irreparable harm required by article 290(5) of UNCLOS.”¹⁶ It further argues that “[t]he absence of urgency is clear.”¹⁷

44. It is quite obvious that whether there would be real and imminent risk to the *M/T “San Padre Pio”*, its crew and cargo is at the centre of the dispute between the Parties.

45. With regard to risk to the vessel, based on the facts and evidence from Nigeria and, not generally contested by Switzerland, “the vessel is fully supplied with food, water and other necessities”,¹⁸ and “the conditions on the vessel are the same as the normal working conditions of those who man the vessel in its ordinary seafaring activities.”¹⁹

46. According to evidence available in the case, Nigeria’s “law permits arrested vessels to be released upon the posting of a bond. However, the vessel’s owner did not seek to exercise that right.”²⁰ “[t]he vessel is under the

15 Request, para. 36.

16 Response, para. 3.36.

17 *Ibid.*, para. 1.4.

18 Response, para. 3.29.

19 ITLOS/PV.19/27/2, p. 27, II. 1–2.

20 Response, para. 2.19.

protection of the Nigerian Navy, which has deployed armed guards on board the vessel since it was arrested.”²¹ Since the pirate attack against the vessel on 15 April 2019, “the Nigerian Navy has increased the number of guards on the vessel and has stationed a gun boat in close proximity to the vessel”²² to protect the security and safety of the vessel.

47. Nigeria further maintains that, even if there were harm to the vessel and the cargo, not only is such harm only economic, and thus not irreparable, the harm is also not imminent.

48. With regard to risk to the cargo, according to the case materials, the Nigerian prosecutors applied for, and the Nigerian High Court granted on 26 September 2018,²³ an order for interim forfeiture of the cargo in order to preserve the economic value of the oil for the benefit of its owner. The money was to be placed in an interest-bearing account.

49. However, the charterers of the vessel have delayed, and continue to delay, this sale. First, they applied to the Nigerian courts for a stay of the execution of the order of 26 September 2018 on the grounds that they are the beneficial owner of the cargo and that they were not given notice of the application for forfeiture.

50. That application has been considered and was rejected, on 9 April of this year by the Nigerian court which found that the charterer had not, prior to the forfeiture order, disclosed that it has a beneficial interest in the cargo but, to the contrary, has asserted that the cargo belonged to another entity.²⁴

51. The charterers have appealed this decision, again delaying the sale and preservation of the cargo.²⁵

21 Response, para. 3.30.

22 *Ibid.*

23 Request for the Prescription of Provisional Measures of the Swiss Confederation, Annex 35–38.

24 Statement in Response of Nigeria, Annex 18.

25 *Ibid.*, annex 19.

52. Nigeria, therefore, contends that, if there has been any depreciation in the value of the cargo, not only can such be remedied by monetary compensation, but such depreciation is entirely the result of the actions of those entities involved in the operation of the vessel.

53. With regard to risk to the crew, shortly after their arrest, the defendants received bail granted by an order of the Federal High Court of Nigeria on 23 March 2018. Under the terms of bail, the crew may reside anywhere in Nigeria, the only condition being that they do not travel outside the country without prior approval.²⁶

54. In addition, as recognized by Switzerland in its Request, the large majority of the present crew is not the same as the personnel on board at the time of the events of 23 January 2018. The original crew had been replaced on 23 July 2018, upon the instruction of the ship owner, "by a new crew for the purpose of ensuring the necessary safety of the vessel."²⁷

55. As a matter of fact, members of the current replacement crew remain free to leave the vessel and Nigeria at any time.²⁸

56. According to Nigeria, the Master and the three officers are not confined to the vessel by the Nigerian authorities. They are free to travel elsewhere in Nigeria, as they apparently do from time to time. They are present on the vessel voluntarily or, more likely, at the direction of their employers.

57. More recently, Nigeria has formally extended reassurances to Switzerland in a note verbale from the Ministry of Foreign Affairs dated 18 June 2019, which was reconfirmed by the Co-Agent of Nigeria at the oral hearing held on 22 June 2019, that the Master and the three officers "under the terms of their bail, are not required to remain on board the *M/T "San Padre Pio"*, but rather may disembark and board the *M/T "San Padre Pio"* at their pleasure and are at liberty to travel and reside elsewhere in Nigeria."²⁹

26 Statement of Claim, para. 17 and Annex NOT/CH-24; see also Request, para. 10.

27 Request, para. 11, see also Notification, Annex NOT/CH-30.

28 Statement in Response of Nigeria, para. 3.27.

29 ITLOS/PV.19/C27/4, p. 16, l. 47- p. 17, l. 2.

58. Although during the oral hearings, Switzerland stated that “the terms of bail are not respected”,³⁰ and “[the] so-called ‘assurance’ adds nothing; and it commits Nigeria to nothing”,³¹ clearly, these statements are not supported by any evidence.

59. In view of these circumstances, a number of observations can be offered on the assessment of any real and imminent risk in the case.

60. First, it is clear that, under article 290, paragraph 5, of the Convention, the time within which the irreparable harm that justifies the measure occurs is the period before the constitution and functioning of the Annex VII tribunal. It is only if harm occurs within that period that the request for provisional measures would be justified.

61. Second, the time-frame for assessing urgency and a real and imminent risk in this case is very short. Pursuant to article 7 of Annex VII, the maximum period for the constitution of the tribunal is 104 days from the receipt of the notification of the request for arbitration. The time period began on 6 May 2019 and will end on 17 August of the same year. So the short time period between the reading of the Order on day 62 of the process and the date of the constitution of the Annex VII arbitral tribunal is about 42 days.

62. Third, many of the Applicant’s statements on real and imminent risk that caused irreparable prejudice to its rights under the Convention are of the nature of general allegations, and they have not been substantiated in detail.

63. Fourth, the allegation of violations by Nigeria of the rights of the crew is, generally speaking, not supported by evidence, witnesses and affidavits.

30 ITLOS/PV.19/C27/3, p. 13, II. 3–4.

31 ITLOS/PV.19/C27/3, p. 12, II. 46–47.

64. Fifth, the claim of imminent risk of irreparable harm does not appear convincing, because there is no evidence that the condition of the vessel and cargo will materially or significantly worsen in a short period of time before the constitution and functioning of the Annex VII tribunal.

65. Sixth, the applications for bail by the crew, for rotation of the crew members (except for the Master and the three officers) by the ship owner and for suspension of the order for interim forfeiture by the charterer have all been dealt with by Nigeria in a timely and efficient manner.

66. Seventh, the allegation against Nigeria's restrictions on the liberty, security and movement of the crew of the M/T "San Padre Pio" has not been sufficiently proven, as the facts of the case show that the Master and three officers have generally been free to leave and return to the vessel. Their liberty to travel and reside elsewhere in Nigeria has been officially assured. More importantly, most of the original crew have been replaced by a new team on a rotation basis. The new crew members are entirely free to leave the county at any time.

67. Eighth, the commencement of the trial was said to have been delayed, but by the application made by the crew themselves. In these circumstances, there is no reason to order suspension of the proceedings. So, generally speaking, there has been no delay in due process of law in this case.

68. Ninth, any alleged harm to the vessel, cargo and its owner is, or rather would be, economic only. Reparation for any such harm, were it to occur, can easily be provided through the award of monetary compensation by the Annex VII tribunal.³²

32 See, e.g., *Duzgit Integrity* (Malta v. São Tomé and Príncipe), PCA Case No. 2014-07, Award (5 September 2016), para. 342(d); *Arctic Sunrise* (Netherlands v. Russia), PCA Case No. 2014-02, Award on Compensation (10 July 2017), para. 128.

69. Tenth, the enforcement measures against the *M/T "San Padre Pio"* and her crew and cargo for alleged violation of Nigerian law on offshore bunkering, and the subsequent domestic legal proceedings against the Master and officers conform to both domestic legislation and the relevant provisions of the Convention. The actions taken by Nigeria are not arbitrary and excessive, but reasonable and lawful.

70. In light of these facts and circumstances, it is generally appreciated that there has been no urgency, at least, with regard to the vessel and her cargo.

71. Humanitarian and security considerations with respect to the Master and officers has, of course, always been a very important issue at hand. There does exist a certain degree of urgency with regard to the Master and officers, but this urgency is more in the nature of humanitarian concerns, rather than real and imminent risks, as the Tribunal also opines in the Order: "[T]hat the threat to the safety and security, and restrictions on the liberty and freedom of the Master and three officers of the *M/T "San Padre Pio"* for a lengthy period *raise humanitarian concerns* (emphasis added)."³³

72. Thus, there is little urgency or real and imminent risk of irreparable prejudice to the rights alleged by Switzerland under the Convention between now and the date of the constitution of the Annex VII arbitral tribunal.

73. Let us now deal with the issue of irreparable prejudice to the rights of the Respondent. As indicated, the assessment of irreparable prejudice should apply to the claimed respective rights of the Parties, that is to say, not only to the rights claimed by the Applicant, but also to those of the Respondent.

74. Under the provisional measures prescribed as requested by Switzerland, the *M/T "San Padre Pio"* and the Master and three officers will be allowed to leave Nigeria. Since the vessel and its officers will no longer be under the jurisdiction of Nigeria, the vessel would be able to resume exercising the freedom of navigation.

33 Order, para. 130, p. 37.

75. This is particularly likely given the fact that Switzerland is not their State of nationality, nor their State of residence or even their employer. There has been little genuine link between Switzerland and these crew members who are Ukrainian nationals. From a legal point of view, Switzerland is therefore not in a position to guarantee their return to Nigeria.

76. As a result, Nigeria would suffer irreparable harm because it may prove impossible to secure the presence of the released Master and officers, which is necessary for the successful conduct of the prosecution.

77. Such a result would irreparably harm the sovereign right of Nigeria to enforce its laws against the *M/T "San Padre Pio"* and its officers, who have been lawfully charged and are being prosecuted for violation of Nigerian law.³⁴

78. In the unfortunate event of such a development, Nigeria's rights to exercise her sovereign rights under article 56 of the Convention will be clearly impacted by the Order. In addition, it would also cause irreparable harm to its obligations to enforce its regulations on the protection of the marine environment from bunkering activities in connection with seabed exploration and exploitation activities under articles 56, paragraph 1(a), 208 and 214 of the Convention.

79. With respect to the issue of irreparable damage, it was well argued by the Applicant in its proceedings that "[t]he damage suffered by the Master and the three other officers ... is clearly irreparable, as every day spent in detention is irrecoverable."³⁵

80. The Tribunal also considers that the arrest of the *M/T "San Padre Pio"* and her crew and the exercise of criminal jurisdiction against them could irreparably prejudice the rights claimed by Switzerland to freedom of navigation and exclusive flag State jurisdiction, and "[t]he 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."³⁶

34 Statement in Response, paras. 3.42–3.44.

35 Request, para. 41.

36 Order, p. 37, para. 128.

81. Accordingly, the same logic should be applied equally to the rights claimed by Nigeria. Under the provisional measures prescribed as requested, Nigeria is ordered not only to release the Master and officers, but also to permit them to leave Nigeria, despite the fact that they are the subject of serious criminal charges under Nigerian law.

82. This would irreparably interfere with and prejudice the rights and obligations of Nigeria, including: the judicial right to enforce criminal law intended to maintain law and order and to combat criminality; sovereign rights and jurisdiction in the EEZ conferred by the Convention; and the international obligation to adopt laws to prevent, reduce and control pollution of the marine environment arising from or in connection with seabed activities subject to its jurisdiction under the Convention.

83. Clearly, these rights are of precisely such a character that prejudice to them is not capable of being repaired and fully compensated by financial means.

84. Just as the Special Chamber of this Tribunal stated in the *Ghana v. Côte d'Ivoire case* "there is a risk of irreparable prejudice where ... such modification cannot be fully compensated by financial reparations".³⁷ In short, violation suffered by Nigeria is not economic losses, and it is clearly irreparable, as each violation of its laws and obligations is irrecoverable.

85. We now proceed to the next issue of prejudging the merits. In the present case, the right to exercise freedom of navigation by the flag State is one of the central issues of the dispute in the merits phase. This is clear from Switzerland's Statement of Claim initiating proceedings before the Annex VII tribunal.

37 *Delimitation of the maritime boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire), Provisional Measures, Order of 25 April 2015, ITLOS Reports 2016*, p. 163, para. 89. Emphasis added.

86. The first submission made to that tribunal is to adjudge and declare that

By intercepting, arresting and detaining the “San Padre Pio” without the consent of Switzerland, Nigeria has breached its obligations to Switzerland regarding *freedom of navigation* as provided for in article 58 read in conjunction with article 87 of UNCLOS. (emphasis added)³⁸

87. The Request for Prescription of Provisional Measures made by Switzerland to this Tribunal replicates the essence of the above submission in its first request, by which Switzerland requests this Tribunal to order Nigeria to

[E]nable 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. (emphasis added)³⁹

88. Thus, this Tribunal’s granting of the first measure requested by Switzerland touches upon issues related to the merits of the case,⁴⁰ since the merits of the dispute – namely, the right to exercise freedom of navigation, to be determined by the Annex VII arbitral tribunal – are prejudged at this stage of the proceedings, as the vessel and its officers would no longer be in the jurisdiction of Nigeria, and the vessel would be able to resume exercise of the freedom of navigation.⁴¹

89. Another issue which deserves our attention is the international efforts undertaken against maritime crimes in the region. The West African coast has recently been plagued by maritime crime and piracy, which poses a threat to the region’s “peace, security and development”.⁴²

38 Statement of Claim of the Swiss Confederation, para. 45.

39 Request for the Prescription of Provisional Measures of the Swiss Confederation, para 53(a).

40 *Construction of a Road in Costa Rica along the River San Juan (Nicaragua v. Costa Rica)*, Order of 23 December 2013, *I.C.J. Reports 2013*, p. 404, paras. 20 and 21.

41 Statement in Response, para. 3.39.

42 UN Secretary-General, Activities of the United Nations Office for West Africa and the Sahel, UN Doc. S/2018/1175, available at <https://undocs.org/S/2018/1175> (28 December 2018) (last access: 16 June 2019), para. 21.

90. In this connection, the Secretary-General of the United Nations called upon States to address “maritime crime and piracy” “focusing on ‘bolstering the operational capacity of maritime agencies to patrol their waters and strengthening the capacity of the criminal justice chain to detect, investigate and prosecute cases of piracy and maritime crime.’”⁴³

91. In 2007 Nigeria and Switzerland, together with 26 other States, as well as the African Union, the European Union, the International Maritime Organization and other intergovernmental organizations, signed the G7++ Friends of The Gulf of Guinea Rome Declaration on illegal maritime activity, which committed coastal States to “enhance capacities to achieve prosecutions and prevent all criminal acts at sea”, and emphasized that the primary responsibility to counter threats and challenges at sea rests with the States of the region.⁴⁴

92. In light of these international efforts, the proceedings of the present case should strive to make a contribution to the rule of law in promoting stability and security in the Gulf of Guinea, and support Nigeria’s efforts to combat maritime crime, including the recognition of Nigeria’s sovereign rights and duty to regulate and exercise valid criminal jurisdiction over illegal activities associated with the extraction of resources from the seabed and subsoil within its EEZ.

93. Last but not least, Nigeria has vigorously defended, before this Tribunal, the case based on her sovereign right to exercise valid criminal jurisdiction over illegal activities associated with the extraction of resources from the seabed and subsoil within its EEZ, as recognized by the Convention.

94. For these reasons, the Order and the provisional measures do not seem to be reasonable and fair to Nigeria, which is a victim rather than a violator. Hence, they may be viewed by Nigeria as adding insult to injury.

43 *Ibid.*, para. 65.

44 G7++ Friends of the Gulf of Guinea, Rome Declaration (26–27 June 2017), paras. 9–10.

95. The provisional measures prescribed by the Tribunal, which orders immediate release of the vessel as a unit from the jurisdiction of Nigeria, may potentially carry legal and political implications, and are likely to cause concerns by Nigeria as well as other coastal States in the region and beyond.

96. These States will be alarmed and compelled to ponder, in light of the provisional measures, as to how to exercise their sovereign rights and jurisdiction in the EEZ under article 56 of the Convention, and discharge their obligations to adopt and enforce laws and regulations to combat marine environment pollution arising from seabed activities subject to their jurisdiction under articles 208 and 214 of the Convention.

97. In conclusion, my differences with the majority views arise in the matters of application of the test of plausibility to the rights of the Parties, and assessment of the urgency of the situation in the case.

98. As observed, the plausibility of the rights alleged by the Applicant can hardly be established, owing to the relevant EEZ provisions of the Convention, and the absence of urgency in the case is also clear, owing to the lack of any real and imminent risk.

99. For these reasons, I do not agree that, by arresting and detaining the M/T "*San Padre Pio*" and her crew and cargo, as well as instituting proceedings against the defendant, Nigeria violated the freedom of navigation and the exclusive flag State jurisdiction enjoyed by Switzerland under articles 58 and 92 of the Convention. More importantly, I do not think that the respective rights of the Parties in this case are duly preserved as required under article 290, paragraph 1, of the Convention and I am consequently against the Order in favour of the Applicant.

(signed) Zhiguo Gao