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By e-mail

Ms. Ximena Hinrichs Oyarce, Registrar
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Germany

Bern, 5 November 2020

Additional report of Switzerland pursuant to the Tribunal's Order in the M/T "San Padre Pio" Case (Switzerland v. Nigeria), Provisional Measures (Case No. 27)

Dear Registrar,

I have the honour to refer to the Tribunal's Order of 6 July 2019 in the *M/T "San Padre Pio" Case (Switzerland v. Nigeria), Provisional Measures (Case No. 27)* (hereinafter "the Order")

(1) Nigeria's repeated failure to engage in negotiations has prevented Switzerland from posting a bond in accordance with the Order

On 21 May 2019, Switzerland submitted a request for the prescription of provisional measures to the Tribunal for the purposes of securing the immediate release of the *M/T "San Padre Pio"*, its crew and cargo. The crew has now left Nigeria; the remaining four officers were finally able to leave on 30 November 2019, shortly after their acquittal by the Nigerian Federal High Court. However, more than 15 months after the Order, the vessel and its cargo remain detained in a dangerous location in Nigeria.

On 6 July 2019, the Tribunal issued the Order, granting, to a large extent, the provisional measures requested by Switzerland. The Tribunal ordered Nigeria to immediately release the *MT "San Padre Pio"*, its crew and cargo upon: (i) the posting of a bond by Switzerland with the competent authority in Nigeria, by way of a bank guarantee, in the sum US\$ 14,000,000; and (ii) the issuance of an undertaking in relation to the vessel's four officers.

Switzerland duly provided an undertaking in relation to the four officers on 25 October 2019 (prior to their acquittal). However, for the reasons explained below, Switzerland has not been able to post the bond.

As noted in its reports to the Tribunal dated 22 July, 16 August, 25 October, and 8 November 2019, Switzerland has taken numerous steps with the objective of promptly posting the bond pursuant to the

Order. These steps are set out in the chronology attached to this report and further detailed in the annexes.

Despite Switzerland's concerted efforts to negotiate a contract of guarantee, Nigeria has repeatedly failed to engage. As the chronology demonstrates, Switzerland prepared a draft interbank guarantee contract in conjunction with a Swiss bank, which was transmitted to Nigeria on 7 November 2019. During a telephone conference on 23 December 2019, Nigeria raised a number of issues with the draft contract, including that: (i) it should be unlimited in duration; (ii) permit multiple demands for payment; and (iii) not be subject to any independent expert determination on whether a payment should be made to Nigeria under the contract or whether the conditions for the expiry of the guarantee were fulfilled.

In an effort to accommodate Nigeria, and to secure the prompt release of the vessel and cargo, Switzerland drafted a modified interbank guarantee contract, the duration of which Nigeria could extend without limitation and which would permit multiple demands for payment. However, in light of the potentially significant financial burden, Switzerland insisted that there be an independent mechanism to determine whether or not the conditions for release of the guarantee were fulfilled. This modified proposal was delivered by hand to the Nigerian Ministry of Foreign Affairs and sent by email to Nigeria's agent on 10 and 11 March 2020 respectively. It was again transmitted to Nigeria's Agent and external counsel on 20 May 2020. Since that date, Nigeria has not agreed to Switzerland's proposals, has not proposed any amendments, and has not made any proposals of its own.

As a direct result of Nigeria's failure to engage in negotiations, it has been impossible for Switzerland to post a bond in accordance with the Order to secure the release of the *MT "San Padre Pio"* and its cargo.

(2) The situation today

Switzerland notes that the situation today has changed fundamentally since the Tribunal issued the Order on 6 July 2019.

On 1 December 2019, Switzerland learned that the Federal High Court in Port Harcourt had given judgment on 28 November 2019, acquitting the vessel and its four officers on all counts (hereinafter "the Judgment").¹

On 2 December 2019, Switzerland informed the President of the Tribunal about the Judgment. It was – and remains – Switzerland's understanding that following the Judgment, there is no basis under Nigerian domestic law for the continued detention of the vessel. While the Nigerian authorities have sought to appeal the Judgment, the Federal High Court struck out an application by the Nigerian authorities seeking a stay of execution of the Judgment.² On 27 January 2020, the Nigerian authorities again applied for an order to stay the execution of the Judgment, this time to the Nigerian Court of Appeal. However, on 19 March 2020 the Court of Appeal dismissed Nigeria's appeal on the basis that it was deemed "*abandoned*" and a "*non-diligent prosecution*."³

While there is now an appeal pending before the Nigerian Supreme Court against the decision of the Court of Appeal, there is no automatic stay of execution of the Judgment under Nigerian domestic law. To Switzerland's knowledge, Nigerian authorities have not requested a stay of execution, nor has such a stay been granted by the Nigerian Supreme Court or any other court.

It follows that the Judgment, by which the vessel was "*discharged and acquitted*", remains in effect and there are currently no grounds under Nigerian domestic law for the continued detention of the vessel and its cargo.

¹ The High Court Judgment can be found at **Annex CH/M-54** of Switzerland's Memorial in ITLOS Case No. 29. Despite repeated requests, Nigeria has never transmitted to Switzerland any documents relating to the High Court proceedings.

² See **Annex CH/M-91** of Switzerland's Memorial in ITLOS Case No. 29.

³ See **Annex CH/M-91** of Switzerland's Memorial in ITLOS Case No. 29.

Nevertheless, as of November 2020, almost one year after the acquittal of the vessel and its four officers, and eight months after the dismissal of proceedings by the Court of Appeal, Nigeria still refuses to release the vessel and its cargo.

(3) Conclusion

The situation can therefore be summarised as follows:

- (1) Nigeria has repeatedly failed to engage in negotiations with Switzerland in relation to the financial guarantee, as envisaged by the Tribunal in the Order. As a result, Switzerland has not been able to avail itself of the opportunity to post a bond to secure the immediate release of the vessel and its cargo.
- (2) Since the Tribunal issued the Order, there has been a fundamental change of circumstances:
 - a. All crew members were able to leave Nigeria following criminal charges against 12 crew members being dropped on 19 March 2018 and the acquittal of the four officers on 28 November 2019.
 - b. There remains no legal basis under Nigerian domestic law for the continued detention of the vessel and its cargo. Nigerian authorities should have permitted the release of the vessel, its crew and cargo following the Judgment on 28 November 2019, and the subsequent refusal by the Federal High Court and the Nigerian Court of Appeal to stay the execution of the Judgment.

In conclusion, Switzerland notes first, as a practical matter, that without co-operation from Nigeria, it has not been possible for Switzerland to post a bond. Second, as a matter of law, Nigeria does not have any legal rights that require preservation by way of a financial guarantee for the purposes of Article 290(1) of UNCLOS. In the view of Switzerland, there is no legal basis under Nigerian law to continue to prevent the vessel from leaving. Nigeria is acting unlawfully by not releasing the vessel in compliance with the judgement of the Federal High Court of 28 November 2019. From Switzerland's point of view and based on the foregoing, Nigeria's continuing refusal to engage in negotiations with regard to the financial guarantee, and the lack of any legal basis under Nigerian domestic law for the continued detention of the vessel and its cargo, have rendered the provisional measures ordered by the Tribunal moot.

Switzerland avails itself of this opportunity to renew to the Registrar the assurance of its highest consideration.

Respectfully yours,

Directorate of International Law



Corinne Cicéron Bühler
Director
Agent of the Swiss Confederation

CHRONOLOGY

- July-November 2019** Switzerland prepared a draft interbank contract in conjunction with a Swiss bank (hereinafter “the draft contract”). The draft contract anticipates that upon acceptance by all concerned parties (Nigeria, Switzerland, the Swiss bank and the nominated bank in Nigeria), the Swiss bank would enter into a direct relationship with the Nigerian bank for the purposes of posting the bond. The draft contract allows for Nigeria to make a demand for payment, either upon presentation of a letter from an independent legal expert or pursuant to agreement between the parties. The draft contract also provides that the guarantee would expire upon the earlier of: (i) six years following the issuance of the guarantee; or (ii) upon presentation of a letter from an independent legal expert or a final award rendered by an Annex VII arbitral tribunal or ITLOS.
- 7 November 2019** The draft contract was transmitted by Note Verbale to Nigeria’s Ministry of Foreign Affairs (copied to the Nigerian Federal Ministry of Justice), along with a letter explaining its terms and identifying two potential Nigerian banks with which the bond could be posted. (**Annex 1**)
- 18 November 2019** Having received no response from Nigeria to the Note Verbale of 7 November 2019, Switzerland sent a further Note Verbale to the Nigerian Ministry of Foreign Affairs (copied to the Nigerian Federal Ministry of Justice) with the same enclosures. (**Annex 2**)
- 27 November 2019** Switzerland received a letter from the Nigerian Federal Ministry of Justice, dated 26 November 2019, stating *inter alia* that:
- “*There are ... no arbitral proceedings under Annex VII between Nigeria and Switzerland ... Switzerland is therefore not in a position to comply with either the provisional measures directed to it by the Tribunal's Order of 6th July 2019, both of which require the existence of arbitral proceedings under Annex VII...*”
 - “*With respect to the proposed terms of the bank guarantee described in Switzerland's diplomatic note of 7th November 2019. Nigeria observes that Switzerland has not disclosed the identity of the Swiss bank that would provide the guarantee. Nigeria respectfully requests that Switzerland do so. Nigeria further observes that the proposed terms of the bank guarantee are not consistent with the Tribunal's Order of 6th July 2019.*” (**Annex 3**)
- 19 December 2019** In light of Nigeria’s concerns in relation to the terms of the draft contract, Switzerland proposed a telephone discussion between the two Agents. (**Annex 4**)

23 December 2019

A telephone conference was held, attended by the Agents of Switzerland and Nigeria, members of their respective administrations and external counsel for Nigeria. To ensure that swift progress could be made, Switzerland also invited a representative of the Swiss bank, which had been chosen to post the bond.

During the discussion, Nigeria raised the following issues with regard to the draft contract:

1. the proposed duration of the financial guarantee (Switzerland proposed a duration of six years);
2. the recourse to an independent third party (*i.e.* a legal expert) to determine whether or not the conditions for the payment, or expiry, of the guarantee are fulfilled; and
3. the restriction on making multiple demands for payment of the guarantee.

In response, it was explained by the Swiss bank representative that:

1. Nigerian banks approached by the Swiss bank had made clear that they would not accept a guarantee lasting longer than six years (it had already been very difficult for the Swiss bank to persuade any Nigerian bank to agree to a six-year guarantee);
2. recourse to independent legal experts was necessary in light of the potentially significant financial burden incurred; without an assessment by an independent legal expert, the Swiss bank would not be in a position to make its own determination; and
3. limiting the number of payment demands was desirable for the sake of certainty and finality.

In light of Nigeria's ongoing objections to Switzerland's proposals, it was agreed that Nigeria's external counsel would prepare and transmit a modified version of the draft contract. Switzerland never received this document.

10 & 11 March 2020

After not hearing from Nigeria following the teleconference of 23 December 2019, Switzerland sent a Note Verbale to the Nigerian Ministry of Foreign Affairs (copied to the Nigerian Federal Ministry of Justice) and an email to Nigeria's Agent. Switzerland proposed a modified guarantee contract taking into account Nigeria's purported concerns (hereinafter "the second draft contract"), accompanied by an explanatory letter. The second draft contract provided *inter alia* that:

1. the guarantee would be open-ended, allowing Nigeria to extend its duration without limitation (to allow for this, the guarantee would need to be posted with the Swiss bank);
2. Nigeria could make multiple demands for payment ; and
3. there would still be recourse to an independent legal expert (for the reasons explained during the teleconference of 23 December 2019).

Switzerland also proposed dates for the parties to discuss the second draft contract (23 or 24 March 2020). (**Annexes 5 & 6**)

- 23 March 2020** Switzerland sent a Note Verbale to the Nigerian Ministry of Foreign Affairs (copied to the Nigerian Federal Ministry of Justice) and an email to Nigeria's Agent and external counsel, reiterating the proposals made in the Note and email of 10 and 11 March 2020. Switzerland extended a further offer to have a telephone conference on 25 March 2020. (**Annexes 7 & 8**)
- 26 & 27 March 2020** Switzerland sent a follow-up Note Verbale to the Nigerian Ministry of Foreign Affairs (copied to the Nigerian Federal Ministry of Justice) and email to Nigeria's Agent and external counsel (**Annexes 9 & 10**)
- 27 March 2020** The Nigerian Solicitor General emailed a letter to Switzerland's Agent, stating that *"due to the current global scourge posed by the Corona Virus pandemic ... the proposed video conference may not hold as scheduled. Nigeria will formally convey to you another date for the video conference as soon as scourge of the virus subsides ... Any inconvenience that the cancellation may have caused you is highly regretted, please."* (**Annex 11**)
- 30 March 2020** By Note Verbale transmitted to the Swiss Embassy in Abuja, the Nigerian Ministry of Foreign Affairs acknowledged receipt of Switzerland's Note of 11 March 2020, stating that it had been *"forwarded to the Federal Ministry of Justice for necessary action."* (**Annex 12**)
- 30 March 2020** By Note Verbale to the Nigerian Ministry of Foreign Affairs (copied to the Nigerian Federal Ministry of Justice) and by email to Nigeria's Agent and external counsel, Switzerland acknowledged the difficulties caused by Covid-19 pandemic, both in Nigeria and in Switzerland. Switzerland stated that it was *"crucial for the parties to agree on the modalities of the bank guarantee"*. Switzerland proposed that *"in order to reach a prompt agreement"* Nigeria should transmit *"its comments in writing on [the second draft contract] ... by latest Monday, 6 April 2020."* (**Annexes 13 & 14**)
- 8 April 2020** By Note Verbale to the Nigerian Ministry of Foreign Affairs (copied to the Nigerian Federal Ministry of Justice), Switzerland transmitted an Aide Memoire to Nigeria noting that following the judgment of the Federal High Court on 28 November 2019, and the decision of the Nigerian Court of Appeal of 19 March 2020, *"there no longer appears to be any legal basis under Nigerian law to continue to prevent the vessel M/T San Padre Pio from leaving Bonny Anchorage, where it is currently held, and exiting Nigerian Waters. However, Switzerland was informed that the competent Nigerian authorities have still not issued the formal authorization for the vessel to leave Bonny Anchorage and the Nigerian Waters."* It was also noted that the location at which the M/T "San Padre Pio" is detained is dangerous and that several collisions had occurred. (**Annex 15**)
- 9 April 2020** The contents of the Aide Memoire of 8 April 2020 were reiterated during a phone call between the State Secretary of the Swiss Federal Department for Foreign Affairs and the Permanent Secretary of the Nigerian Ministry of Foreign Affairs.

- 16 April 2020** By Note Verbale to the Nigerian Ministry of Foreign Affairs (copied to the Nigerian Federal Ministry of Justice), Switzerland underscored that there exists no reason under Nigerian or international law to prevent the *MT "San Padre Pio"* from being released. Switzerland also informed Nigeria that failing to immediately release the vessel would result in the vessel owner suffering "*significant financial consequences*" which would have to be taken into account in Case No. 29. (**Annex 16**)
- 18 April 2020** External counsel for Nigeria sent an email direct to Switzerland's Agent, requesting a copy of the second contract, which had been transmitted to Nigeria on 10 March 2020.⁴ (**Annex 17**)
- 27 April 2020** By Note Verbale to the Nigerian Ministry of Foreign Affairs (copied to Nigerian Naval Headquarters), Switzerland transmitted a further Aide Memoire reiterating that there was no legal basis – either under Nigerian domestic law or under international law – for the continued detention of the *MT "San Padre Pio"*. Switzerland requested the Nigerian Ministry of Foreign Affairs to facilitate a telephone conversation between the Nigerian Chief of Naval Staff and the Swiss Brigadier General, Director of International Relations of the Swiss Armed Forces. (**Annex 18**)
- 4 May 2020** By Note Verbale to the Nigerian Ministry of Foreign Affairs (copied to Nigerian Naval Headquarters), Switzerland reiterated its request for a telephone call between the Nigerian Chief of Naval Staff and the Swiss Brigadier General, Director of International Relations of the Swiss Armed Forces. (**Annex 19**)
- 11 May 2020** By Note Verbale from the Swiss Armed Forces to the Nigerian Chief of Naval Staff, Switzerland again reiterated its request for a telephone call between the Nigerian Chief of Naval Staff and the Swiss Brigadier General, Director of International Relations of the Swiss Armed Forces. (**Annex 20**)
- 15 May 2020** External counsel for Nigeria sent an email direct to Switzerland's Agent, again requesting a copy of the second contract, which had been transmitted to Nigeria on 10 March 2020. External counsel for Nigeria stated that "*Nigeria had not been able to obtain that communication due to the shutdown of the Nigerian government caused by the COVID-19 pandemic.*" (**Annex 21**)

⁴ Switzerland's Agent did not reply to this email because it was not considered appropriate for Switzerland to bypass Nigeria's Agent and provide Nigeria's external counsel with documents that were already in the possession of his client.

- 20 May 2020** By email to Nigeria's Agent (copied to external counsel for Nigeria), Switzerland's Agent recalled that the second draft contract had been "*hand-delivered and received by the Nigerian Ministry of Foreign Affairs on 11 March 2020*" and also sent to Nigeria's Agent by email on the same day. Nevertheless, Switzerland's Agent again transmitted a copy of the second draft contract to Nigeria's Agent and to Nigeria's external counsel. It was recalled that there no longer appeared to be any legal basis under Nigerian law to continue to prevent the vessel from leaving. Switzerland's Agent invited Nigeria's external counsel to make direct contact with Switzerland's external counsel. No such contact was made. (**Annex 22**)
- 4 June 2020** During a telephone conversation between the Swiss Brigadier General, Director of International Relations of the Swiss Armed Forces and a Rear Admiral of the Nigerian Navy, Switzerland reiterated that the *MT "San Padre Pio"* should be released. Nigeria's Rear Admiral invited Switzerland to take up the matter with the Nigerian Federal Ministry of Justice.
- 5 June 2020** By Note Verbale to the Nigerian Ministry of Foreign Affairs (copied to the Nigerian Federal Ministry of Justice), Switzerland transmitted a further Aide Memoire for the attention of the Nigerian Solicitor General. Switzerland stated that it "*remains extremely concerned about this situation and wishes to reiterate that the vessel should be allowed to leave immediately.*" Switzerland reiterated the dangerous location of the *MT "San Padre Pio"*, the vessel's deteriorating condition and the plummeting value of the vessel's cargo. It was reiterated that: "*Switzerland, as the flag State of the vessel, the owner of the vessel, the charterer, the manager and the cargo owner have all suffered considerable financial losses. Switzerland will seek full reparation for these losses arising out of violations of international law on the part of Nigeria in the ongoing procedure on the merits before ITLOS (Case No. 29; The M/T "San Padre Pio" (No. 2) Case (Switzerland v. Nigeria)).*" (**Annex 23**)
- June 2020 to present** To date, Switzerland has not received any response from Nigeria in relation to the second draft contract, nor in relation the legal basis for the continued detention of the *MT "San Padre Pio"* and its cargo.