## SEPARATE OPINION OF JUDGE CHARLESWORTH

*Article IV, paragraph 2 — Criteria for the assessment of the exercise of regulatory powers in matters of unlawful expropriation — Reasonableness — A measure of discretion enjoyed by the domestic authorities/regulator — Article X, paragraph 1 — Broad interpretation of the freedom of commerce — Requirement for an "actual impediment" — Article X, paragraph 1, does not preclude regulatory measures with indirect or incidental effects on the freedom of commerce.*

1. I agree with much of the Court's reasoning in this case. In this separate opinion, I address two questions on which I differ from the majority.

2. When discussing Iran's claims concerning unlawful expropriation under Article IV, paragraph 1, of the Treaty of Amity, the Court's analysis is premised on sound criteria: that the bona fide non-discriminatory exercise of regulatory powers with a legitimate public welfare purpose does not give rise to compensation, and that such regulatory powers are not unlimited (Judgment, para. 185). Yet the Court does not then apply the criteria that it heralds and that are commonly applied in international practice. Instead, it turns its attention to an enquiry into the unreasonableness of the United States' measures. I have no doubt that "[r]easonableness is one of the considerations that limit the exercise of the governmental powers" (Judgment, para. 186). It does not follow, however, that (un)reasonableness should displace the elaborate criteria for the assessment whether State regulation amounts to unlawful expropriation.

3. The Court relies simply on the breach of Article IV, paragraph 1, to find a breach of Article IV, paragraph 2. In a few lines in paragraph 186, the Court explains that a finding of breach in the context of the obligation against unreasonable measures suffices for the conclusion that the obligation against unlawful expropriation has also been breached. In my view, it is not obvious that the applicable standard under the two obligations is identical, nor that breach of one will necessarily entail breach of the other. As the Court acknowledges in its discussion of the claim under Article IV, paragraph 1, reasonableness is highly contextual (Judgment, para. 146).

4. I note that international jurisprudence tends to recognize that the domestic regulator is vested with a measure of discretion in this connection. In the case of *Philip Morris* v. *Uruguay*, for example, the tribunal's finding that the impugned measures were adopted in good faith, directed at the legitimate public welfare aim of public health protection and capable of contributing to its achievement, was sufficient to defeat a claim of unlawful expropriation[1]. It is up to Iran to demonstrate that the United States' measures "'crosse[d] the line' that separates valid regulatory activity from expropriation"[2]. In my view Iran has not done so here.

5. I am also unable to agree with the Court's finding that a series of measures adopted by the United States violated its obligations under Article X, paragraph 1.

6. Article X, paragraph 1, of the Treaty of Amity provides: "Between the territories of the two High Contracting Parties there shall be freedom of commerce and navigation." I share the Court's

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[1] *Philip Morris Brands Sàrl, Philip Morris Products S.A. & Abal Hermanos S.A.* v. *Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award of 8 July 2016, para. 306.

[2] *Saluka Investments B.V.* v. *The Czech Republic, PCA Case No. 2001-4*, Partial Award of 17 March 2006, para. 264.

endorsement of the broad interpretation of Article X, paragraph 1, adopted in *Oil Platforms* (Judgment, para. 212). I would add that this provision prohibits not only acts impeding commerce but also any act that would impede the *freedom* of commerce[3].

7. The Court has also, however, identified limits on the scope of Article X, paragraph 1. In the merits phase of *Oil Platforms*, the Court insisted that there be evidence of "an *actual impediment* [une *entrave effective*] to commerce or navigation"[4]. It rejected the United States' claim of a breach of that provision for lack of evidence that there were actual breaches of commerce or navigation between the territories of the United States and Iran.

8. Following the same approach in this case, the question is whether the United States' measures created an actual impediment to commerce between the Parties. The Court points to three instances of legal interference with commerce between the Parties: Executive Order 13599's blocking of property and interests in property; the FSIA's subjection to attachment and execution of the assets of any Iranian company in which the State holds an interest; and the enforcement proceedings with respect to contractual debts in the telecommunications industry and in the credit card services sector (Judgment, paras. 220-222).

9. In my view, however, Iran did not produce adequate evidence to establish its claim. Many types of governmental action will affect the conduct of commerce in a multitude of ways. Article X, paragraph 1, cannot be taken to preclude activities that are a regular feature of commercial life, such as the enforcement of judgment debts. It can also not be taken to preclude any regulatory measure that may have indirect or incidental effects on commerce. As the Court held in the preliminary objections phase of the present case, "freedom of commerce cannot cover matters that have no connection, or too tenuous a connection, with the commercial relations between the States Parties to the Treaty"[5].

10. For that reason, I am not convinced by the Court's terse finding that Executive Order 13599 and Section 1610 *(g)* (1) of the FSIA constituted actual impediments to commerce "by [their] own terms" (Judgment, paras. 220-221). As my votes show, I think that the enactment of these measures violated other provisions of the Treaty of Amity. It does not follow, however, that those measures were also in breach of Article X, paragraph 1.

*(Signed)* Hilary CHARLESWORTH.

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[3] *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996 (II)*, p. 819, para. 50.

[4] *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Judgment, I.C.J. Reports 2003*, p. 217, para. 123 (emphasis in the original); see already *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996 (II)*, p. 819, para. 50: "the possibility must be entertained that [freedom of commerce] could *actually* be impeded as a result of acts . . ." (emphasis added).

[5] *Certain Iranian Assets (Islamic Republic of Iran* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 2019 (I)*, p. 34, para. 79.