SEPARATE OPINION, PARTLY CONCURRING AND PARTLY DISSENTING, OF JUDGE ROBINSON

1. In this opinion I explain my disagreement with paragraph 236 (1) of the Judgment, in which the Court upholds the

> "objection to jurisdiction raised by the United States of America relating to the claims of the Islamic Republic of Iran under Articles III, IV and V of the 1955 Treaty of Amity, Economic Relations, and Consular Rights, to the extent that they relate to treatment accorded to Bank Markazi and, accordingly, finds that it has no jurisdiction to consider those claims".

I also offer observations on other aspects of the Judgment.

THE DISSENT

2. By virtue of paragraph 236 (1) of the Judgment, the Court finds that Bank Markazi, Iran's Central Bank, is not a company within the meaning of Article III (1), and therefore, is not entitled to the protection afforded to companies by Article III, IV, and V of the 1955 Treaty of Amity, Economic Relations, and Consular Rights ("Treaty"). This finding is based on reasoning that is flatly contradicted by the Court's 2019 preliminary objections Judgment ("2019 Judgment") in this case.

3. In its third objection to jurisdiction, submitted at the preliminary objections phase of this case, the United States requested the Court to dismiss "as outside the Court's jurisdiction all claims of purported violations of Article III, IV, and V of the Treaty of Amity that are predicated on treatment accorded to the Government of Iran or Bank Markazi".

4. The opinion will examine, first, the dicta in the 2019 Judgment relating to characterization of an entity as a company under the Treaty, and then, the Court's reasoning in this Judgment. It is important to carry out this exercise because the approach taken by this Judgment conflicts with the 2019 Judgment, notwithstanding assertions to the contrary.

5. The Court's reasoning as to what determines the characterization of an entity as a company within the meaning of Article III (1) is set out in six phases in paragraphs 89 to 92 of the 2019 Judgment.

6. In paragraph 89, which reflects the first phase of the reasoning, the Court indicates that it will "determine[] whether, by the nature of its activities, Bank Markazi may be characterized as a 'company' according to the definition given by Article III, paragraph 1, read in its context and in light of the object and purpose of the Treaty of Amity". In this paragraph, the Court's objective is to determine whether the characterization of Bank Markazi as a company may be made on the basis of the nature of its activities. Notably, in its proposed analysis, apart from the nature of the activities of Bank Markazi, the Court makes no reference to any other factor, such as the Bank's function or purpose, as playing a role in determining its characterization as a company.

7. In paragraph 90, which sets out the second phase of the Court's reasoning, the Court rejects Iran's argument that the nature of the activities carried out by an entity is irrelevant for the purpose of characterizing it as a company, thereby reaffirming the significance of the nature of the activities in the characterization of an entity as a company.

8. In paragraph 91, which sets out the third phase of the reasoning, the Court proceeds to interpret the definition of a company in Article III (1) in its relevant context and in light of the object and purpose of the Treaty; such an interpretation, in the view of the Court, "points clearly to the conclusion that the Treaty is aimed at guaranteeing rights and affording protections to natural and legal persons engaging in activities of a commercial nature, even if this latter term is to be understood in a broad sense". What is noteworthy here is the Court's finding that the latter term, "activities of a commercial nature", is not to be interpreted narrowly, but broadly.

9. In the final section of paragraph 91, which sets out the fourth phase of the Court's reasoning, the Court concludes "that an entity carrying out exclusively sovereign activities, linked to the sovereign functions of the State, cannot be characterized as a 'company' within the meaning of the Treaty and, consequently, may not claim the benefit of the rights and protections provided for in Articles III, IV and V". Here, the Court arrives at a fairly obvious conclusion: if the entity is carrying out exclusively sovereign activities, linked to the sovereign functions of the State, then it is not engaging in activities of a commercial nature; it is in fact engaging in activities which attract sovereign immunity.

10. In light of the Court's determination in the 2019 Judgment that issues of sovereign immunity are not within its jurisdiction, the Judgment, in some parts, appears to flirt with that question without engaging with it; the first section of paragraph 91 of the 2019 Judgment is an example of this flirtation; another example is paragraph 65 of that Judgment.

11. In paragraph 92, which sets out the fifth phase of the reasoning, the Court states that notwithstanding the previous conclusion, as a matter of principle, nothing prevents an entity from engaging in activities of a commercial nature as well as sovereign activities.

12. In the second sentence of paragraph 92, which sets out the sixth and final phase of the Court's reasoning, the Court provides the answer to the issue raised in paragraph 89. The Court concluded that,

> "[i]n such a case, since it is the nature of the activity actually carried out which determines the characterization of the entity engaged in it, the legal person in question should be regarded as a 'company' within the meaning of the Treaty to the extent that it is engaged in activities of a commercial nature, even if they do not constitute its principal activities".

Two comments may be made on this very important paragraph. First, the phrase "in such a case" means that the Court is addressing the situation where an entity engages both in activities of a commercial nature and in sovereign activities. Second, the phrase "since it is the nature of the activity actually carried out which determines the characterization of the entity engaged in it" emphasizes that, for the Court, it is the nature of the activity in which an entity is engaged that determines whether it is a company. The word "determine" has a special significance. The *Concise Oxford Dictionary* gives the meaning of the word "determine" as "decide or settle". Therefore, by this finding, the Court concludes that it is the nature of the activity engaged in by an entity that settles the question whether that entity is a company within the meaning of the Treaty; the nature of the activity settles this question definitively. The Court makes no reference to the function of the entity or purpose of the activity. Moreover, the word "since" in the sentence "since it is the nature of the activity actually carried out which determines the characterization of the entity engaged in it" confirms that there is a causal relationship between the characterization of an entity as a company under the Treaty and the nature of the activities carried out by that entity. The statement that "it is the nature of the activity actually carried out which determines the characterization of the entity engaged in it" is categoric

and does not admit of any other determinant in the characterization of an entity as a company, such as links between the activities and any sovereign function or purpose to which they relate.

13. Against that background, the opinion now turns to the Court's Judgment in this phase of the proceedings. According to the Court, the 2019 Judgment "did not state that, in determining whether particular activities were of a commercial nature, there was no need to take into account any link that they may have with a sovereign function" (Judgment, para. 51). The Judgment adds that when an entity carries out a transaction or a series of transactions, that transaction — or series of transactions — must be placed in its context, "taking particular account of any links that it may have with the exercise of a sovereign function". To begin with, the Court did indeed hold in its 2019 Judgment that, in determining whether particular activities are of a commercial nature, account should not be taken of any link that such activities may have with sovereign activity. The Court so held when it stated that "it is the nature of the activity actually carried out which determines the characterization of the entity engaged in it". As stated before, a proper reading of the 2019 Judgment is that the Court concluded that the nature of the activity settles definitively the question whether an entity is a company within the meaning of the Treaty. In its present Judgment, the Court has moved away from its analysis and conclusions in its 2019 Judgment, and has introduced an element not to be found in the 2019 Judgment, i.e. links between the activity and a sovereign function or purpose.

14. In paragraph 47, the Court indicates that it would determine whether Bank Markazi is a company within the meaning of the Treaty of Amity, "following the line of reasoning it adopted in its 2019 Judgment". Regrettably, the Judgment did not follow that line of reasoning. Had it done so, its sole focus would have been on the nature of the activities carried out by Bank Markazi; such a focus would have led to the conclusion that Bank Markazi was a company since, by its nature, the purchase of the 22 security entitlements was a commercial activity.

15. Moreover, and one says this with respect, there would appear to be an element of disingenuousness in the last sentence of paragraph 52: "The Court nevertheless considers that the assertions made by Bank Markazi in the judicial proceedings in the *Peterson* case, which are cited above, accurately reflect the reality of the bank's activities." In the first place, a question of consistency arises, since in the first sentence of that paragraph, the Court indicated that it did not consider "the statements made in United States court proceedings by counsel for Bank Markazi and relied on by the United States . . . to be decisive". The Court's statement in the last sentence of this paragraph flies in the face of its earlier statement in the same paragraph. It could only conclude that the statements made by Bank Markazi in the *Peterson* case "accurately reflect the reality of the bank's activities" if it treated as consequential, and therefore decisive, the position taken by the bank in that case, that the purchase of the 22 security entitlements was a sovereign governmental function, entitled to immunity. The Court ought to have been more transparent by stating that both Parties changed their positions after the Court, in its 2019 Judgment, found that it had no jurisdiction in respect of the question of the sovereign immunity of the Bank. In the *Peterson* proceedings before the US district court, the bank argued that it had sovereign immunity and the United States contended that the purchase of the 22 security entitlements was a commercial act, a position with which the US district court agreed. However, in the present case on the merits, the bank has argued that the purchase of the 22 security entitlements was a commercial act, while the United States has contended that the purchase was a sovereign governmental function. The Court should not have joined this strategic, tactical and inconsequential interplay between the Parties.

16. In light of the foregoing, the Court should have confirmed its jurisdiction with regard to the third preliminary objection of the United States.

DENIAL OF JUSTICE

17. I do not agree with the conclusion, in paragraph 143 of the Judgment, that the United States' conduct does not "constitute a serious failure in the administration of justice amounting to a denial of justice".

18. In the *Peterson* enforcement proceedings (2013), the plaintiffs sought from the court orders to attach assets of Iran and Bank Markazi. During the course of these proceedings, the United States Congress passed legislation, the Iran Threat Reduction and Syria Human Rights Act of 2012 (ITRSHRA), which in Section 502 rendered subject to execution or attachment in aid of execution certain financial assets to satisfy judgments against Iran. The Act states that these assets are "the financial assets that are identified in and the subject of proceedings in the United States District Court for the Southern District of New York in *Peterson et al.* v. *Islamic Republic of Iran et al*.". In other words, the legislation was specifically enacted to influence what was an ongoing trial before the district court.

19. In its judgment, the district court, relying on the 2012 ITRSHRA, ruled that the financial assets should be turned over to the plaintiffs[1]. This was done despite the fact that Bank Markazi was not itself alleged to have been involved in any underlying terrorist activity. Following the judgment of the United States Court of Appeal upholding the decision of the district court, Bank Markazi appealed to the United States Supreme Court which, in a majority judgment of seven to two, found in favour of the plaintiffs. The majority found the introduction of the legislation in the middle of the case unobjectionable, on the basis that there was a domestic precedent that found that legislation enacted during ongoing cases was lawful; this legislation "applied to cases identified by caption and docket number"[2]. Chief Justice Roberts and Justice Sotomayor, the two dissenters, opined that Section 502 "chang[ed] the law — for these proceedings alone — simply to guarantee that respondents win"[3]. The law was changed by ITRSHRA because, up to the time of its enactment, it was not beyond question that Bank Markazi's financial assets were subject to execution or attachment to satisfy judgments against Iran. Indeed, the majority judgment of the United States Supreme Court itself observed that the legislation was enacted "[t]o place beyond dispute the availability of some of the Executive Order No. 13599-blocked assets for satisfaction of judgments rendered in terrorism cases"[4].

20. The intrusion of the legislature, Congress, in the middle of the proceedings to enact legislation that changed the law, which was done, in the words of the dissenters, "simply to guarantee that respondents win", was a raw exercise of legislative power that constitutes a denial of justice. Bank Markazi commenced its defence with the law in one place and ended it with the law in another. There was a denial of justice because the enactment of legislation during the proceedings interfered with its fairness in a manner that fundamentally affects the international rule of law by favouring one party over another in the proceeding. There was a denial of justice because the insertion of the law in the middle of the proceedings went beyond a "mere misapplication of the law" (see, for example, *Krederi Ltd.* v. *Ukraine*, ICSID Case No. ARB/14/17, paras. 468-472).

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[1] *Peterson et al.* v. *Islamic Republic of Iran et al.,* United States District Court, Southern District of New York, 28 February 2013, S.D.N.Y. 2013, p. 52.

[2] *Bank Markazi* v. *Peterson et al.*, United States Supreme Court, 20 April 2016, 578 U.S. 1 (2016), p. 19 (Memorial of the Islamic Republic of Iran (MI), Ann. 66).

[3] *Ibid.*, p. 34.

[4] *Ibid.*, p. 5.

21. The United States is correct in its contention "that there is a high threshold for demonstrating a denial of justice, requiring a notoriously unjust or egregious violation in the administration of justice which offends a sense of judicial propriety" (Judgment, para. 142). But it is not correct in its assertion that "there is nothing unjust or egregious about the measures in question" (para. 142). The introduction of legislation in the middle of an ongoing trial for the express purpose of assisting a party in that trial is quintessentially the kind of violation in the administration of justice that offends a sense of judicial propriety.

22. The dissenters in the *Peterson* case concluded that the effect of the introduction of the ITRSHRA in the middle of the case was that the decision in the case was made by the legislature, and not by the judiciary. Indeed, the interference brought about a miscarriage of justice. If the right to fair and equitable treatment ("FET") means anything, it must mean that an Iranian company involved in litigation in the United States has the right to a fair hearing. Fair and equitable treatment, in accordance with Article IV, calls for just, unbiased and equitable conduct in the treatment of nationals and companies engaging in trade and investment between the two countries. Moreover, a retroactive law, enacted without compelling reasons, violates the legal certainty that the FET standard would require.

23. The combined effect of Section 502 of ITRSHRA and the judgment of the district court, consequentially attaching the property of Bank Markazi, is that the enactment of legislation during the *Peterson* case was a denial of justice that breached the bank's right to fair and equitable treatment, to which, consistent with my dissent, it was entitled. The existence of a domestic precedent that would make such enactment lawful as a matter of US domestic law does not imply that such legislative action would be consistent with the international obligations of the United States as a party to a treaty. By virtue of Article 27 of the 1969 Vienna Convention on the Law of Treaties, which reflects customary international law, a State cannot invoke the provisions of its internal law as justification for its failure to perform its obligations under a treaty.

Unilateral economic sanctions

24. The views expressed on unilateral economic sanctions are in no way to be construed as a commentary on the merits of the present case, in which the applicable law is the Treaty of Amity and, more generally, the law of treaties. In this part of the separate opinion, I address sanctions under general international law.

25. It is accepted that the international community of States is disorganized. The hope that the post-Second World War era would usher in a period of international co-operation[5] has not been realized, and, regrettably, the principle of State sovereignty still prevails. In contrast to the position within a State, there is no single body that reigns supreme in the relationship between States. All the forces are centrifugal, and today it is debatable whether the international community of States is more organized, more unified than it was before 1945. Generally, each State insists upon the exercise of its sovereignty at the expense of international co-operation.

26. In its work on State responsibility, the International Law Commission ("ILC" or "Commission") addresses unilateral economic sanctions under the concept of countermeasures.

[5] Under Article 1 (3) of the Charter, one of the purposes of the United Nations is "to achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character".

Interestingly, Special Rapporteur Roberto Ago's proposed term "sanctions" was replaced by "countermeasures"[6].

27. Article 22 of the ILC's Articles on State Responsibility (the "ILC's Articles") addresses countermeasures as a circumstance precluding wrongfulness under Chapter V, as follows: "The wrongfulness of an act of a State not in conformity with an international obligation towards another State is precluded if and to the extent that the act constitutes a countermeasure taken against the latter State in accordance with chapter II of part three."

28. In the *Gabčíkovo-Nagymaros* case, the Court confirmed that the fundamental requirement for the lawfulness of a countermeasure is that it must be "taken in response to a previous internationally wrongful act of another State" and "directed against that State"[7]. This requirement is reflected in Article 49 of the ILC's Articles. Here, the Commission's conclusions are consistent with the Court's findings in *Gabčíkovo-Nagymaros*. Article 50 identifies certain obligations, such as those relating to the protection of fundamental human rights, that are not affected by countermeasures. Article 51 addresses the need for the countermeasures to be "commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question". Here again, the Commission's Articles are consistent with *Gabčíkovo-Nagymaros*. With regard to the conditions relating to resort to countermeasures, Article 52 of the Commission's Articles provides as follows:

> "1. Before taking countermeasures, an injured State shall:
>
> *(a)* Call upon the responsible State, in accordance with article 43, to fulfil its obligations under part two;
>
> *(b)* Notify the responsible State of any decision to take countermeasures and offer to negotiate with that State.
>
> 2. Notwithstanding paragraph 1 *(b)*, the injured State may take such urgent countermeasures as are necessary to preserve its rights.
>
> 3. Countermeasures may not be taken, and if already taken must be suspended without undue delay if:
>
> *(a)* The internationally wrongful act has ceased; and
>
> *(b)* The dispute is pending before a court or tribunal which has the authority to make decisions binding on the parties.
>
> 4. Paragraph 3 does not apply if the responsible State fails to implement the dispute settlement procedures in good faith."

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[6] The reason for this change is that the Commission reserved the term "sanctions" for

> "reactive measures applied by virtue of a decision taken by an international organization following a breach of an international obligation having serious consequences for the international community as a whole, and in particular for certain measures which the United Nations is empowered to adopt, under the system established by the Charter, with a view to the maintenance of international peace and security" (Draft Articles on State Responsibility, *Report of the Commission to the General Assembly on the work of its thirty-first session*, *Yearbook of the International Law Commission, 1979*, Vol. II, Part Two, United Nations, New York 1980, p. 121).

[7] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 55, para. 82.

29. It is not altogether clear whether the conditions relating to resort to countermeasures set out in Article 52 have a customary character.

30. Some may question whether any of the economic sanctions unilaterally imposed by States over the last sixty years meet the requirements set out in Articles 49, 50, 51 and 52. Certainly, there would be a question whether they meet the proportionality test in Article 51. Additionally, to the extent that unilaterally determined economic measures adversely affect the poor, the sick and the vulnerable in the State against which they are taken, there may be a question whether they meet the requirement in Article 50 (1) *(b)* for countermeasures not to affect "obligations for the protection of fundamental human rights".

31. In the 1986 *Military and Paramilitary Activities* case, the Court had to address Nicaragua's claim that the United States had violated the principle of non-intervention by the economic sanctions it imposed, including a cut-off of economic aid and a 90 per cent reduction in Nicaragua's sugar quota for imports into the United States. The Court concluded that it had "merely to say that it is unable to regard such action on the economic plane as is here complained of as a breach of the customary-law principle of non-intervention"[8].

32. An interesting question is whether, in light of the developments that have taken place since the 1986 *Military and Paramilitary Activities* Judgment, the Court would today respond in the way that it did in that case to a State's claim that unilaterally imposed sanctions are in breach of the principle of non-intervention. There is no question about the customary character of the principle of non-intervention; this is acknowledged by the Court itself in *Military and Paramilitary Activities*. The difficult question relates to the legality of unilaterally imposed sanctions. In that regard, there have been three important developments since 1986. First, in the *Gabčíkovo-Nagymaros* case, the Court held that Czechoslovakia's assumption of control of the Danube river did not respect the proportionality that is required by international law, and therefore the diversion of the Danube was not a lawful countermeasure. It is safe to say that the requirement of proportionality is now a part of customary international law.

33. The second development is the ILC's Articles on State Responsibility. In my view, even if there may be some doubt as to whether Articles 50 and 52 have customary status, there can be no doubt that Articles 49 and 51 reflect customary international law. Article 49 requires that countermeasures may only be taken against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations under Part Two of the ILC's Articles; and Article 51 requires proportionality in the imposition of unilaterally determined countermeasures.

34. The third development is the work of the United Nations Human Rights Council on the topic of human rights and unilateral coercive measures. Relying, *inter alia*, on the declarations contained in UNGA resolution 2131 (XX) and resolution 2625 (XXV), the United Nations Human Rights Council, on 26 September 2014 adopted resolution 27/21 and Corr. 1 on human rights and unilateral coercive measures. The most recent renewal of the resolution was on October 2020, HRC resolution 45/5. The resolutions of the United Nations Human Rights Council stress that unilateral coercive measures and practices are contrary to international law, international humanitarian law, the United Nations Charter and the norms and principles governing peaceful relations among States, and highlights that in the long term, these measures may result in social problems and raise humanitarian

[8] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 126, para. 245.

concerns in the States targeted. More specifically, in the resolution adopted on 26 September 2014, the United Nations Human Rights Council strongly objected to the extraterritorial nature of unilateral coercive measures "which . . . threaten the sovereignty of States" and condemned "the continued unilateral application and enforcement by certain powers of such measures as tools of political or economic pressure against any country".

35. In my view, these three developments since the 1986 *Military and Paramilitary Activities* signal a departure from the era of unfettered resort to unilateral economic sanctions. Indeed, when these developments are viewed in light of the United Nations General Assembly's past efforts to develop a norm prohibiting the use of economic sanctions as an instrument of political pressure or coercion, there is a case for concluding that unilateral economic sanctions which are disproportionate, or coercive, do not qualify as countermeasures within the meaning of the ILC's Articles and may be as violative of the customary principle of non-intervention as military measures. If today the Court were faced with the question that was posed in 1986, in making its determination, it would have to take into consideration the developments outlined.

36. In conclusion, the disorganization of the international community of States explains the phenomenon of unilaterally imposed sanctions. They are particularly objectionable when it is clear from the context in which they are imposed that they are performing a function that the United Nations Charter assigned to the Security Council. It is the dysfunctionality of the Security Council, resulting from the veto power of the five permanent members, that creates a void which States bent on asserting their sovereignty are only too ready to fill.

The inappropriate phraseology

37. In addressing the United States' objection to admissibility based on the failure to exhaust local remedies, the Judgment states that, "for the reasons set out below, the Court is *persuaded* that the companies in question did not have any effective means of redress, in the legal system of the United States, that they failed to pursue" (para. 67, my emphasis). In its analysis, the Court relied on the customary rule, set out in Article 15, paragraph *(a)*, of the ILC's Articles on Diplomatic Protection, that the requirement to exhaust local remedies is satisfied when there are no available local remedies providing the injured persons with a reasonable possibility of obtaining redress. The Court cites favourably Iran's submission that "according to settled United States jurisprudence, where there is an explicit inconsistency between a treaty and a statute adopted later than that treaty, the statute is deemed to have abrogated the treaty in United States law" (Judgment, para. 69). After noting that the United States did not attempt to contest the validity of that assertion, the Court cited the *Weinstein* proceedings as an example of a case in which a statute trumped the Treaty of Amity.

38. It is astonishing that in light of the clarity of this analysis, the Court could only conclude, in paragraph 72 of the Judgment, that "*it appears* to the Court that, in the circumstances of the present case, the companies in question had no reasonable possibility of successfully asserting their rights in United States court proceedings" (my emphasis). Bearing in mind that the Court is responding to a preliminary objection to admissibility, its conclusion should have been more categoric in this semi-final part of its analysis. Its reasoning may be criticized on two grounds. First, the weak, uncertain and hesitant finding, "it appears to the Court", conflicts with the earlier statement in paragraph 67 that the Court was "*persuaded* that the companies in question did not have any effective means of redress, in the legal *system* of the United States, that they failed to pursue" (my emphasis). This is a clear and categoric statement indicating that the Court was convinced that Iranian companies did not have any effective means of redress. Second, the weak, uncertain and hesitant finding, "it appears to the Court", does not provide a basis for the conclusion in paragraph 73: "For the foregoing reasons, the Court concludes that the objection to admissibility based on the failure to exhaust local

remedies cannot be upheld." This unambiguous conclusion cannot be derived from the hesitant formulation in the previous paragraph.

39. The Court ought to have found that, "[g]iven the combination of the legislative character of the contested measures and the primacy accorded to a more recent federal statute over the treaty in the jurisprudence of the United States", the Court is persuaded "that, in the circumstances of the present case, the companies in question had no reasonable possibility of successfully asserting their rights in United States court proceedings".

40. It is noteworthy that the Court does not employ a similar formulation, "it appears to the Court", in disposing of the United States' objection to jurisdiction or any of its defences on the merits. The Court does however use similar language when it makes an order indicating provisional measures[9]; however, in relation to an application for such measures, it is settled that the standard of proof is different. This is the problem with the language used by the Court in this case: it suggests that the party bearing the burden of establishing its case discharges that burden by a relatively low standard, and one which suggests that the Court need only have an impression that, in the circumstances of the present case, the companies in question had no reasonable possibility of successfully asserting their rights in United States court proceedings.

The unnecessary genuflection

41. The last sentence in paragraph 72 reads as follows: "The Court is not, by the above finding, making any judgment upon the judicial system of the United States, or on the distribution of powers between the legislative and judicial branches under United States law as regards the fulfilment of international obligations within the domestic legal system." Here, the Court appears to be in a state of genuflection and apology to the United States for its conclusion that the Iranian companies "had no reasonable possibility of successfully asserting their rights in United States court proceedings". In light of the Court's statement in paragraph 67 that it was "persuaded that the companies in question did not have any effective means of redress, in the *legal system* of the United States, that they failed to pursue" (my emphasis), the Court has indeed made a judgment on the legislative and judicial branches of government of the United States. In the circumstances of this case, the Court has every right and duty to arrive at such a conclusion, and there is no need to qualify it with some kind of disclaimer.

(Signed) Patrick L. ROBINSON.

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[9] For example, see *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine* v. *Russian Federation), Provisional Measures, Order of 16 March 2022*, para. 24: "The Court may indicate provisional measures only if the provisions relied on by the applicant appear, prima facie, to afford a basis on which its jurisdiction could be founded, but it need not satisfy itself in a definitive manner that it has jurisdiction as regards the merits of the case". The Court "conclude[d] that, prima facie, it [had] jurisdiction" to adjudicate the case (para. 48), without using the verb "appear". However, in light of the use of the word "appear" in paragraph 24, it is proper to interpret the conclusion as including the word "appear".