

PCA CASE NO. 2023-65

**IN THE MATTER OF AN ARBITRATION PURSUANT TO ARTICLE 27 OF THE
ENERGY CHARTER TREATY**

- between -

**THE REPUBLIC OF AZERBAIJAN
(CLAIMANT)**

- and -

**THE REPUBLIC OF ARMENIA
(RESPONDENT)**

ARMENIA’S REQUEST FOR BIFURCATION OF PRELIMINARY OBJECTIONS

23 December 2024

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1. Pursuant to Article 17 of Procedural Order No. 1 and the Amended Procedural Timetable of 8 November 2024, the Republic of Armenia (“**Armenia**”) respectfully submits this Request for Bifurcation (the “**Request**”).

I. INTRODUCTION

2. The Republic of Azerbaijan (“**Azerbaijan**”) has instituted this arbitration against Armenia (together with Azerbaijan, the “**Parties**”) under Article 27 of the Energy Charter Treaty (the “**ECT**” or the “**Treaty**”). In light of Azerbaijan’s Statement of Claim, the Tribunal should bifurcate these proceedings, resolving at the outset whether it has jurisdiction over Azerbaijan’s claims and whether they are admissible. The decision now before the Tribunal is not whether Armenia’s objections are valid but, rather, whether they should be decided at an early stage, as they are exclusively preliminary in character, and can thus be decided without trespassing on the merits.

3. Azerbaijan’s theory of jurisdiction in this case, concerning claims relating to Article 18 and Article 7 of the ECT, defies common sense and cannot withstand even cursory scrutiny.

4. *First*, Azerbaijan invokes the ECT—an agreement adopted to promote trade and investment in the energy sector—to invite the Tribunal to apply the “customary principle of permanent sovereignty over natural resources” to the Nagorno-Karabakh conflict. It argues that the Tribunal has jurisdiction to do so pursuant to Article 18—a “miscellaneous” provision¹—whereby the ECT’s “Contracting Parties recognise state sovereignty and sovereign rights over energy resources” and “reaffirm that these must be exercised in accordance with and subject to the rules of international law.”² For Azerbaijan, this provision vests the Tribunal with sweeping jurisdiction to decide its claims for USD 1.6 billion in “compensation” for what it alleges to be “Armenia’s denial of Azerbaijan’s access to the energy resources in the Occupied Territories for nearly 30 years, [and] exploitation of those resources for Armenia’s benefit.”³ Article 18 cannot be applied in this manner,

¹ The International Energy Charter, *Consolidated Energy Charter Treaty with Related Documents* (17 Dec. 1994) (CL-001) (“**Energy Charter Treaty with Related Documents**”), p. 66 (“Part IV: Miscellaneous Provisions”).

² Energy Charter Treaty with Related Documents (CL-001), ECT, Article 18.

³ Republic of Azerbaijan’s Statement of Claim (19 Nov. 2024) (“**Statement of Claim**”), para. 179.

let alone decades after the fact, to acts that are not attributable to Armenia, and which occurred in the context of an armed conflict.

5. *Second*, Azerbaijan alleges that the purported interruption in 1991 of a Soviet-era natural gas pipeline, during an armed conflict and years before the ECT entered into force, violates Article 7 of the ECT, concerning the facilitation of transit of energy materials. These separate claims—which were the subject of vague allegations made by Azerbaijan at the eleventh hour of the Parties’ negotiations over the Article 18 claims—are as temporally and procedurally defective as they are substantively unfounded. At the time Azerbaijan instituted these proceedings, there was not even a *dispute* between the Parties concerning Article 7, let alone any negotiations as required under Article 27. Nor, for that matter, could such a dispute be submitted to arbitration under Article 27, given that Article 7 provides for a distinct dispute-resolution mechanism.

6. In the end, Azerbaijan’s claims, which it is attempting to shoehorn into the ECT, cannot overcome the numerous jurisdictional and admissibility hurdles that they face. In this Request for Bifurcation, Armenia identifies several preliminary objections, and respectfully requests that they be decided in a bifurcated phase of the proceedings.⁴

7. **Section II** explains that the Rules of Procedure for this arbitration—the first inter-State arbitration under the ECT—establish a strong presumption in favor of bifurcation. According to the applicable standard, bifurcation is appropriate when, as here, objections are of an exclusively preliminary character and can therefore be decided without unduly trespassing on the merits. Considerations of efficiency also militate in favor of bifurcation when, as in the present case, a party’s preliminary objections have the potential to resolve the Parties’ dispute, or substantially reduce its scope by determining key threshold questions.

8. **Section III** summarizes Armenia’s preliminary objections. **Section III.A** explains that Article 18 of the ECT cannot serve as a basis for jurisdiction, and that the Tribunal accordingly lacks jurisdiction *ratione materiae* over Azerbaijan’s claims. **Section III.B** establishes that Azerbaijan’s Article 7 claims are likewise outside of the Tribunal’s jurisdiction *ratione materiae*

⁴ These objections will be set forth in full detail in Armenia’s Memorial on Preliminary Objections if bifurcation is granted. Armenia reserves all rights to adapt and develop, as appropriate, its preliminary objections. This Request for Bifurcation is also without prejudice to Armenia’s right to advance, at the appropriate juncture, additional objections to the jurisdiction of the Tribunal or the admissibility of Claimant’s claims that are not apt for preliminary treatment.

and *ratione voluntatis*. **Section III.C** shows that, even if Articles 18 and 7 could serve as bases for claims before the Tribunal (*quod non*), such claims are barred by temporal limitations to the Tribunal’s jurisdiction and/or are inadmissible on account of Azerbaijan’s unreasonable delay in asserting them. **Section III.D** demonstrates that, in all events, the essential security interest exception provided in Article 24(3)(a) precludes the Tribunal’s jurisdiction *ratione materiae* over Azerbaijan’s claims. Finally, as explained in **Section III.E**, Azerbaijan’s claims appear to be predicated on a flawed theory of attribution that should be clarified as a preliminary matter.

9. **Section IV** sets forth Armenia’s request for relief.

*

10. Armenia is compelled to note that, in addition to being outside of the Tribunal’s jurisdiction and inadmissible, Azerbaijan’s claims also constitute an abusive attempt to use these proceedings for cynical ends. They are premised on a selective, ahistorical, and often offensive retelling of the Nagorno-Karabakh conflict, to which Armenia will respond in full at the appropriate juncture. For present purposes, Armenia limits itself to drawing the Tribunal’s attention to five key points of context.

11. *First*, just as it has done on the ground in recent years, Azerbaijan seeks to erase all traces of Nagorno-Karabakh’s indigenous ethnic Armenian population from its Statement of Claim. It ignores their history, autonomy, and attempts to exercise their fundamental right of self-determination in the face of longstanding persecution at the hands of Azerbaijani authorities.

12. For millennia, ethnic Armenians have called Nagorno-Karabakh home, as evidenced by the region’s ancient Armenian churches, monasteries and monuments. Despite centuries of persecution of Armenians in their historic homelands, including the Ottoman Genocide of 1.5 million Armenians between 1915-1920, it is estimated that ethnic Armenians made up close to 90% of the population of Nagorno-Karabakh when the region came under Soviet rule in the 1920s.⁵ After an initial declaration that the region should be incorporated within the Armenian Soviet Socialist Republic (“SSR”), the Soviet authorities—in order to give effect to Stalinist policies of divide and

⁵ USSR All-Union Population Census of 1926 (translation from Russian) (extract) (**RE-008**), pp. 20-21.

rule—decided instead to incorporate Nagorno-Karabakh within the Azerbaijani SSR.⁶ The region was nevertheless ascribed a special autonomous status as the Nagorno-Karabakh Autonomous Oblast (“**NKAO**”), thereby enjoying regional self-governance.

13. This special status, however, did not protect ethnic Armenians from decades of persecution at the hands of the authorities of the Azerbaijani SSR.⁷ They endured discrimination in access to social services and economic resources, cultural and linguistic oppression, and overt attempts by Azerbaijani authorities to demographically engineer the region.⁸

14. With the collapse of the Soviet Union on the horizon, the people of Nagorno-Karabakh sought to assert their right to self-determination by pursuing independence for the region in the late 1980s. In response, the authorities of the Azerbaijani SSR meted out increasingly brutal violence against ethnic Armenians, perpetrating multiple pogroms across Azerbaijan and expelling Armenians from their homes. Upon the dissolution of the Soviet Union, the ethnic Armenians of Nagorno-Karabakh held a referendum and declared their independence as the Nagorno-Karabakh Republic (the “**NKR**”).⁹

15. Azerbaijan, which had by then declared its own independence, rejected the result of the referendum, and the spiraling violence in the broader region led to the outbreak of the First Nagorno-Karabakh War of 1991-1994 (the “**First War**”). The First War was characterized by countless atrocities perpetrated against ethnic Armenian civilians, mass displacement of populations—including approximately 400,000 ethnic Armenians—and widescale destruction in the region. In May 1994, representatives from Azerbaijan, Armenia, and the NKR signed the Bishkek Protocol and established a ceasefire, which took effect on 12 May 1994. Thereafter, the Minsk Group of the Organization for Security and Cooperation in Europe oversaw a dialogue

⁶ See G. Starovoitova, “Sovereignty After Empire: Self Determination Movements in The Former Soviet Union” (United States Institute of Peace, 1997) (**RE-0013**), pp. 23-24.

⁷ *Id.*, p. 24. See also Declaration on the Proclamation of the Nagorno-Karabakh Republic (2 Sep. 1991) (**RE-0010**) (“Taking into consideration that the policy of apartheid and discrimination pursued in Azerbaijan created an atmosphere of hatred and intolerance in this republic towards the Armenian people, which led to armed conflict, human casualties, mass deportation of the population from peaceful Armenian villages.”).

⁸ President of Azerbaijan Heydar Aliyev himself confirmed: “I tried to increase the number of Azeris there, and reduce the number of the Armenians in Nagorno Karabakh.” See “Aliyev admits Azerbaijan worked to boost number of Azeris in Artsakh”, *Horizon* (22 Nov. 2019) (**RE-0016**). See also “President: Under great leader Heydar Aliyev, percentage of Azerbaijani population in Karabakh increased sharply”, *Azerbaijan 24* (25 Nov. 2019) (**RE-0017**).

⁹ Declaration on the Proclamation of the Nagorno-Karabakh Republic (2 Sep. 1991) (**RE-0010**).

between Armenia and Azerbaijan with the aim of bringing about a peaceful resolution to the conflict. After numerous rounds of negotiations, Azerbaijan's recalcitrance and repeated violations of ceasefire arrangements undermined all efforts to agree on a proposed peace plan. As explained further below, Azerbaijan instead launched a full-scale war against Nagorno-Karabakh in 2020.

16. *Second*, Azerbaijan incorrectly alleges that, following the end of the First War, it was newly independent *Armenia* that purportedly controlled or “occupied” Nagorno-Karabakh and parts of the surrounding districts. This distorts the reality that, for nearly 30 years after the establishment of a fragile peace, the ethnic Armenians of Nagorno-Karabakh governed themselves through the independent democratic institutions of the NKR. They elected their own leaders, collected their own taxes, ran their own schools and churches, and used their own natural resources. At no point since its independence did Armenia seek the incorporation of Nagorno-Karabakh into its own territory. Nor were Nagorno-Karabakh's various ministries, authorities and institutions (the “**NKR Authorities**”) ever a part, whether *de facto* or *de jure*, of the Armenian State. Rather, the NKR Authorities governed the region independently, giving effect to the self-determination of its people.

17. *Third*, Azerbaijan fails to present key context concerning the status and use of the natural resources of Nagorno-Karabakh. Despite Azerbaijan's attempts to suggest otherwise, the resources at issue in Azerbaijan's claims have long served as a means of subsistence for Nagorno-Karabakh's population through decades of economic oppression by Azerbaijani authorities. The Azerbaijani SSR had a long history of appropriating the resources in Nagorno-Karabakh for use elsewhere, with even its water resources being tapped for the benefit of those outside the region and to the detriment of the local population.¹⁰ During the First War, Azerbaijan went as far as imposing an economic blockade on Armenia and Nagorno-Karabakh, cutting off the region completely and destroying facilities providing it with power and water. According to Human Rights Watch, by the winter of 1991–1992, “Nagorno-Karabakh was without fuel, [...] electricity, running water, functioning sanitation facilities, communications facilities, and most consumer goods.”¹¹

¹⁰ I. Ghaplanyan, “The Nerve of Armenian Politics – Nagorno-Karabakh”, in *Post-Soviet Armenia: The New National Elite and the New National Narrative* (2017) (RE-0015), p. 126.

¹¹ Human Rights Watch, *Bloodshed in the Caucasus: Escalation of the Armed Conflict in Nagorno-Karabakh* (Sept. 1992) (RE-0011), p. 12.

18. In its Statement of Claim, Azerbaijan now argues that the people of Nagorno-Karabakh somehow unlawfully exploited their own resources. In fact, the main energy resources that Azerbaijan mentions in its Statement of Claim are within the territory of the NKAO and areas that have always had a majority ethnic Armenian population. For example, the Tartar Hydropower Plant,¹² the “Chardaghli” Coalfield,¹³ and the six small hydropower plants allegedly operated by Artsakh HEK,¹⁴ are all located in the Martakert district, which had a population of 83.1% ethnic Armenians before the fall of the Soviet Union.¹⁵ For Azerbaijan to argue that the use of natural resources for the benefit of an indigenous population violates the principle of permanent sovereignty over natural resources ignores the content and historical development of this principle, as further explained below.

19. *Fourth*, Azerbaijan conveniently neglects to provide any explanation of why it *actually* instituted these proceedings 30 years after its purported loss of access. The clear reality, looking at the timing of these proceedings, is that they are no more than a cynical attempt to divert attention from human rights claims against Azerbaijan, which Armenia instituted following the Second Nagorno-Karabakh War of September-November 2020 (the “**Second War**”). In a single paragraph, Azerbaijan refers in passing to the Second War, claiming that “Azerbaijan liberated its territories through a *self-defense* operation.”¹⁶ This is blatantly false. In truth, reflecting Azerbaijani President Ilham Aliyev’s stated philosophy that “might is right,” Azerbaijan unilaterally renounced all peaceful means of settling the disputed status of Nagorno-Karabakh, and instead launched a full-scale armed attack with the stated purpose of extinguishing and expelling ethnic Armenians.¹⁷ Azerbaijan’s decision to bring full-scale war to the Caucasus was not spontaneous. Rather, it came

¹² Statement of Claim, para. 43, Figure 4.

¹³ *Id.*, paras. 105-106, Figure 17.

¹⁴ *Id.*, paras. 92-93, Figure 11.

¹⁵ Compilation of Census Data for Nagorno-Karabakh (translation from Russian) (RE-007), Extract of USSR All-Union Population Census of 1979.

¹⁶ Statement of Claim, para. 40 (emphasis added).

¹⁷ “‘Death to Armenians’: Thousands Rally in Baku Demanding War with Armenia”, *Asbarez* (15 July 2020) (RE-0018).

after years of Azerbaijani leaders' increased rhetoric, propaganda and overt efforts to stir up hatred of ethnic Armenians among Azerbaijan's population.¹⁸

20. The ensuing Second War was characterized by shocking brutality. Azerbaijani soldiers systematically murdered, tortured and abused ethnic Armenians. They beheaded captives alive.¹⁹ They tortured elderly civilians to death.²⁰ They executed helpless service members who had given up their weapons.²¹ Perhaps most shockingly, nearly one hundred such atrocities were filmed by the perpetrators themselves, and proudly circulated on social media. Through the war, Azerbaijan ethnically cleansed large swathes of Nagorno-Karabakh, expelling tens of thousands of ethnic Armenians from their homes. This campaign of ethnic cleansing is not denied, but proudly affirmed by Azerbaijan's leadership, including President Aliyev, who has stated that Azerbaijan's "main duty was to expel the Armenians from our lands" and that it "succeeded in doing that."²²

21. In the aftermath of the Second War, Armenia sought accountability for Azerbaijan's gross violations of ethnic Armenians' human rights by instituting proceedings in 2021 before the International Court of Justice ("ICJ") and European Court of Human Rights. Importantly, Armenia sought and was granted—by both courts—interim measures of protection for the ethnic Armenians who remained in the parts of Nagorno-Karabakh still under the control of the NKR Authorities.²³

¹⁸ See, e.g., "Ilham Aliyev visited military unit of Defense Ministry's Special Forces", *The President of the Republic of Azerbaijan Ilham Aliyev* (30 Apr. 2022) (**RE-0023**), [PDF] p. 2 ("We won this victory on the battlefield – not through negotiations, not concessions, but by shedding blood and losing martyrs. What was driving us forward? Our patriotism, love of country and hatred for the enemy! We have brought up the young generation in this spirit."). The ICJ accordingly unanimously ordered Azerbaijan to "prevent the incitement and promotion of racial hatred and discrimination, including by its officials and public institutions." See *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan), Provisional Measures, Order of 7 December 2021, I.C.J. Reports 2021 (RL-086)*, para. 92(b).

¹⁹ See, e.g., A. Roth, "Two men beheaded in videos from Nagorno-Karabakh war identified", *The Guardian* (15 Dec. 2020) (**RE-0020**).

²⁰ See, e.g., Amnesty International, *Last to Flee: Older People's Experience of War Crimes and Displacement in the Nagorno-Karabakh Conflict* (17 May 2022) (**RE-0025**), [PDF] pp. 18-23.

²¹ See, e.g., N. Waters, "An Execution in Hadrut", *Bellingcat* (15 Oct. 2020) (**RE-0019**).

²² "Residential complex for families of martyrs and war disabled inaugurated in Sabunchu district, Baku", *Azertac* (2 May 2022) (**RE-0024**).

²³ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan), Provisional Measures, Order of 7 December 2021, I.C.J. Reports 2021 (RL-086)*, pp. 392-393, para. 98 (ordering Azerbaijan to, *inter alia*, protect detainees from violence, prevent hate speech by its officials, and prevent and punish desecration of Armenian cultural heritage); *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan), Provisional Measures, Order of 22 February 2023, I.C.J. Reports 2023 (RL-094)*, p. 30, para. 67 (ordering Azerbaijan to "ensure unimpeded movement of persons, vehicles and cargo along the Lachin Corridor in both directions."); *Application of the International Convention on the*

It was only when Azerbaijan was faced with the prospect of accountability for its atrocities that it sought to bring its cynical claims under the ECT.

22. *Fifth*, while purporting to vindicate the principle of permanent sovereignty over natural resources through these proceedings, it was Azerbaijan that carried out a campaign to permanently expel the indigenous inhabitants of Nagorno-Karabakh, resettle their lands, and take over their resources. Beginning in December 2022, it implemented a nine-month total blockade of the remaining areas of Nagorno-Karabakh still under the control of the NKR after the Second War. Not only did Azerbaijan prevent food and medicine from entering the territory in contravention of a binding order of the ICJ,²⁴ it also cut the supply of gas and electricity to more than 120,000 people during a harsh winter.²⁵

23. Following its blockade, Azerbaijan implemented what it briefly and euphemistically describes in its Statement of Claim as an “operation” in September 2023.²⁶ As the Tribunal is by now aware,²⁷ through terror and violence, Azerbaijan forcibly expelled the entire remaining ethnic

Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan), Provisional Measures, Order of 17 November 2023, I.C.J. Reports 2023 (RL-096), p. 640, para. 74 (ordering Azerbaijan to, *inter alia*, ensure the safe return of ethnic Armenians to Nagorno-Karabakh and ensure that they would be “free from the use of force or intimidation that may cause them to flee.”); European Court of Human Rights, *Press Release issued by the Registrar of the Court*, “European Court decides to indicate interim measures in the ‘Lachin Corridor’” (21 Dec. 2022) (**RE-0027**) (reporting that Azerbaijan had been ordered to “ensure safe passage through the ‘Lachin Corridor’ of seriously ill persons in need of medical treatment in Armenia and others who were stranded on the road without shelter or means of subsistence.”).

²⁴ See, e.g., Human Rights Watch, *Azerbaijan: Ensure Civilians’ Rights in Nagorno Karabakh* (23 Sep. 2023) (**RE-0034**); International Committee of the Red Cross, *Azerbaijan/Armenia: Sides Must Reach “Humanitarian Consensus” to Ease Suffering* (25 July 2023) (**RE-0032**); Delegation of the European Union to the Council of Europe, *EU Statement on Recent Developments around the Lachin Corridor* (6 Sep. 2023) (**RE-0033**).

²⁵ See, e.g., European Parliament, *Resolution on the Humanitarian Consequences of the Blockade in Nagorno-Karabakh*, No. 2023/2504(RSP) (19 Jan. 2023) (**RE-0028**), para. C (“[T]his humanitarian crisis was further aggravated by Azerbaijan’s disruption of the natural gas supply to Nagorno-Karabakh, which left houses, hospitals and schools without heating.”); Amnesty International, *Azerbaijan: Blockade of Lachin Corridor Putting Thousands of Lives in Peril Must Be Immediately Lifted* (9 Feb. 2023) (**RE-0029**), [PDF] p. 2 (“Disruptions to the supply of electricity, natural gas and vehicle fuel add up to extreme hardship.”); European Union External Action Service, *Armenia/Azerbaijan: Statement by the Spokesperson on the gas supplies* (23 Mar. 2022) (**RE-0022**) (“The European Union is concerned about reports of a renewed disruption of the gas supply to Stepanakert/Khankendi [...] There is an urgent need to ensure the immediate resumption of the gas supply to the affected local population, in particular in the context of the dire weather conditions, and the EU calls on the authorities in control to allow this to happen.”).

²⁶ Statement of Claim, para. 41.

²⁷ See Letter from Armenia to the Tribunal (3 Oct. 2023) (**RE-0035**). See also Parliamentary Assembly of the Council of Europe, *The Humanitarian Situation in Nagorno-Karabakh*, Recommendation No. 2260 (12 Oct. 2023) (**RE-0036**) (noting “the exodus of almost the entire Armenian population of Nagorno-Karabakh and the critical humanitarian and human rights crisis affecting it in the months before and immediately after the military operation launched by Azerbaijan” and “a situation which seems, at the very least, to invite suspicions of many aspects of ethnic cleansing”).

Armenian population of Nagorno-Karabakh. In other words, during the pendency of these proceedings in which it advocates for the application of principles of resource sovereignty derived from self-determination, Azerbaijan expelled an entire people from their ancestral homeland.

II. THE LEGAL FRAMEWORK APPLICABLE TO BIFURCATION IN INTER-STATE PROCEEDINGS UNDER ARTICLE 27 OF THE ECT

24. In accordance with the strong presumption in favor of bifurcation under the Rules of Procedure and in inter-State dispute resolution more generally, bifurcation is warranted whenever an objection presents an exclusively preliminary character.

25. Article 17(4) of the Rules of Procedure provides that:

In general, the Arbitral Tribunal *should* rule on a plea concerning its jurisdiction as a preliminary question. However, the Arbitral Tribunal may proceed with the arbitration and rule on such a plea in its final award.²⁸

26. Pursuant to Article 27(3)(f) of the ECT,²⁹ this provision is modeled after Article 21(4) of the 1976 UNCITRAL Rules.³⁰ It is widely recognized that the 1976 UNCITRAL Rules, applied in any context, provide for a “presumption” in favor of bifurcating preliminary objections.³¹ In the context of an inter-State arbitration under the ECT, that presumption is even stronger.

27. When the ECT was adopted in 1994, bifurcation was nearly universal in proceedings involving States and would have been the Contracting Parties’ expectation in agreeing to Article 27. Even in investment arbitration, tribunals were guided by the “uncontroverted principle of

²⁸ Procedural Order No. 1 (16 Feb. 2024) (“**Procedural Order No. 1**”), Article 17(4) (emphasis added).

²⁹ Energy Charter Treaty with Related Documents (**CL-001**), ECT, Article 27(3)(f) (“In the absence of an agreement to the contrary between the Contracting Parties, the Arbitration Rules of UNCITRAL shall govern, except to the extent modified by the Contracting Parties parties to the dispute or by the arbitrators.”).

³⁰ UNCITRAL Arbitration Rules (1976) (**RL-029**), Article 21(4) (“In general, the arbitral tribunal should rule on a plea concerning its jurisdiction as a preliminary question. However, the arbitral tribunal may proceed with the arbitration and rule on such a plea in their final award.”).

³¹ See, e.g., *Mesa Power Group LLC (USA) v. Canada*, PCA Case No. 2012-17, Procedural Order No. 2 (18 Jan. 2013) (**RL-056**), para. 16 (“[W]hen a Party raises an objection to jurisdiction, the presumption is in favor of addressing the objection as a preliminary question.”); D. Caron & L. Caplan, “Objections to the Jurisdiction of the Arbitral Tribunal,” in *The UNCITRAL Arbitration Rules: A Commentary* (2nd Ed., OUP, 2013) (**RL-090**), p. 459 (“Article 23(3) [of the 2010 Rules] also replaces the express encouragement in original Article 21(4) [of the 1976 Rules] that the arbitral tribunal ‘should’ rule on a plea that it lacks jurisdiction as a ‘preliminary matter’ with a more neutral rule: the arbitral tribunal may rule on such a plea ‘as a preliminary question or in an award on the merits.’”); *Philip Morris Asia Limited v. Commonwealth of Australia*, PCA Case No. 2012-12, Procedural Order No. 8 (14 Apr. 2014) (**RL-059**), para. 101.

general international law” that “an international tribunal cannot exercise jurisdiction over a sovereign State without its consent.”³² As the tribunal in *SPP v. Egypt* stressed, “there is no presumption of jurisdiction—particularly where a sovereign State is involved.”³³

28. The consistent practice of resolving objections to jurisdiction and admissibility in a preliminary phase continues today in inter-State arbitration and adjudication. The rules of procedure of numerous inter-State arbitral tribunals reflect the strong presumption that such objections should be determined as a preliminary question.³⁴ Recently, the tribunal in the *Bern Convention Arbitration* initiated by Azerbaijan against Armenia also adopted bifurcation as the default position in its Rules of Procedure.³⁵ Applying this strong presumption in favor of bifurcation, inter-State tribunals have typically bifurcated proceedings where the respondent State raised objections to jurisdiction or admissibility and requested that they be dealt with in a preliminary phase.³⁶

29. In the inter-State context, considerations governing bifurcation are distinct from those applied in investor-State arbitrations. In the latter context, “[t]he overarching question is one

³² *Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Decision on Jurisdiction (14 Apr. 1988) (**RL-033**), para. 62.

³³ *Id.*, para. 63.

³⁴ See, e.g., *The ARA Libertad Arbitration (Argentina v. Ghana)*, PCA Case No. 2013-11, Rules of Procedure (31 July 2013) (**RL-014**), Article 13(3); *The Arctic Sunrise Arbitration (Netherlands v. Russian Federation)*, PCA Case No. 2014-02, Rules of Procedure (17 Mar. 2014) (**RL-015**), Article 20(3); *The South China Sea Arbitration (Philippines v. China)*, PCA Case No. 2013-19, Rules of Procedure (27 Aug. 2013) (**RL-016**), Article 20(3); *Arbitration under the Timor Sea Treaty (Timor-Leste v. Australia)*, PCA Case No. 2015-42, Rules of Procedure (9 Sep. 2016) (**RL-069**), Article 18(4); *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v. Russian Federation)*, PCA Case No. 2017-06, Rules of Procedure (18 May 2017) (**RL-071**), Article 10(4); *Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen (Ukraine v. Russian Federation)*, PCA Case No. 2019-28, Rules of Procedure (22 Nov. 2019) (**RL-080**), Article 11(3).

³⁵ See *Bern Convention Arbitration (Azerbaijan v. Armenia)*, PCA Case No. 2023-60, Rules of Procedure (29 Mar. 2024) (**RL-098**), Article 14(4) (“The Tribunal shall rule on any Preliminary Objection in a preliminary phase of the proceedings, unless the Tribunal determines, after inviting the views of the Parties, that such objection does not possess an exclusively preliminary character or otherwise shall only be ruled upon in conjunction with the merits.”). The procedural timetable therefore foresees Armenia submitting its Memorial on Preliminary Objections first, followed by Azerbaijan’s Opposition to Bifurcation, and Armenia’s Response to Opposition to Bifurcation. See *Bern Convention Arbitration (Azerbaijan v. Armenia)*, PCA Case No. 2023-60, Procedural Order No. 2 (Procedural Timetable) (15 May 2024) (**RL-099**).

³⁶ See, e.g., *South China Sea Arbitration (Philippines v. China)*, PCA Case No. 2013-19, Procedural Order No. 4 (21 Apr. 2015) (**RL-062**), para. 1.3; *Arctic Sunrise Arbitration (Netherlands v. Russian Federation)*, PCA Case No. 2014-02, Award on Jurisdiction (26 Nov. 2014) (**RL-060**), paras. 44-47; *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v. Russian Federation)*, PCA Case No. 2017-06, Procedural Order No. 3 (20 Aug. 2018) (**RL-074**), paras. 1-2; *Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen (Ukraine v. Russian Federation)*, PCA Case No. 2019-28, Procedural Order No. 2 (27 Oct. 2020) (**RL-084**) p. 5, para. 1; *Indus Water Treaty Arbitration (Pakistan v. India)*, PCA Case No. 2023-01, Procedural Order No. 1 (2 Feb. 2023) (**RL-093**), para. 1.2. In the *Chagos* and *Enrica Lexie* arbitrations, the tribunals rejected the respondent

of procedural efficiency,”³⁷ which reflects the participation of a private party for whom dispute resolution must be assured as speedily as possible. In contrast, when dispute resolution takes place between two States, State sovereignty is the overriding consideration.

30. For that reason, the tribunal in the *South China Sea* arbitration held, citing the ICJ, that “[t]he basic principle governing the handling of jurisdictional issues before an international tribunal is straightforward: a State ‘is not obliged to give an account of itself on issues of merits before an international tribunal which lacks jurisdiction or whose jurisdiction has not yet been established’.”³⁸ Indeed, the ICJ has confirmed that, “[a] Respondent’s right to raise preliminary objections, that is to say, objections which the Court is required to rule on before the debate on the merits begins [...], is a *fundamental procedural right*.”³⁹

31. Accordingly, as the ICJ has also emphasized, a party raising preliminary objections will “have these objections answered at the preliminary stage of the proceedings *unless the Court does not have before it all facts necessary to decide the questions raised or if answering the preliminary objection would determine the dispute, or some elements thereof, on the merits*.”⁴⁰

States’ requests for bifurcation, but the rules of procedure in those arbitrations did not contain the same presumption in favor of bifurcation as in the arbitrations cited above. See *Chagos Marine Protected Area (Mauritius v. United Kingdom)*, PCA Case No. 2011-03, Rules of Procedure (29 Mar. 2012) (RL-050), Article 11(3) (“The Arbitral Tribunal *may*, after ascertaining the views of the Parties, determine whether objections to jurisdiction or admissibility shall be addressed as a preliminary matter *or* deferred to the Tribunal’s final award.”) (emphasis added); *The ‘Enrica Lexie’ Incident (Italy v. India)*, PCA Case No. 2015-28, Rules of Procedure (19 Jan. 2016) (RL-066), Article 10(4) (“The Arbitral Tribunal, after hearing the Parties, shall rule on objections to jurisdiction or admissibility as a preliminary issue *or* in its final Award.”) (emphasis added). Cf., e.g., *South China Sea Arbitration (Philippines v. China)*, PCA Case No. 2013-19, Rules of Procedure (27 Aug. 2013) (RL-016), Article 20(3) (“The Arbitral Tribunal *shall* rule on any plea concerning its jurisdiction as a preliminary question, *unless* the Arbitral Tribunal determines, after seeking the views of the Parties, that the objection to its jurisdiction does not possess an exclusively preliminary character, in which case it shall rule on such a plea in conjunction with the merits.”) (emphasis added). The rules in *South China Sea* and the arbitrations cited in notes 34-35 above reflect a similar presumption as in Article 17(4) of the Rules of Procedure in this case (“the Arbitral Tribunal *should* rule on a plea concerning its jurisdiction as a preliminary question. However, the Arbitral Tribunal *may* [...]”) (emphasis added).

³⁷ *Emmis International Holding, B.V., et al. v. Republic of Hungary*, ICSID Case No. ARB/12/2, Decision on Bifurcation (13 June 2013) (RL-057), para. 37(2).

³⁸ *South China Sea Arbitration (Philippines v. China)*, PCA Case No. 2013-19, Award on Jurisdiction and Admissibility (29 Oct. 2015) (RL-065), para. 390, citing *Appeal Relating to the Jurisdiction of the ICAO Council, Judgment, I.C.J. Reports 1972 (RL-010)*, p. 56. See also Terry D. Gill, *Rosenne’s The World Court: What It Is and How It Works* (6th ed., M. Nijhoff, 2003) (RL-013), p. 81.

³⁹ *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Merits, Judgment, *I.C.J. Reports 2010 (RL-011)*, p. 658, para. 44 (emphasis added).

⁴⁰ *Territorial and Maritime Dispute (Nicaragua v. Colombia) Preliminary Objections, Judgment, I.C.J. Reports 2007 (RL-045)*, p. 852, para. 51 (emphasis added).

Thus, unless an objection *cannot* be addressed without trespassing on the merits, it should be heard in a preliminary phase. The ICJ Rules of Court and arbitral precedent reflect this consistent practice of deferring to the merits only objections that are not of an “exclusively preliminary character.”⁴¹

*

32. As demonstrated in Section III below, all of Armenia’s preliminary objections are of an exclusively preliminary character, and should therefore be bifurcated. They are based on strictly legal questions and concern the scope of the ECT provisions, which are prime examples of the type of objections that should be decided at the preliminary objections stage. The Tribunal has before it all necessary facts to determine those objections and doing so would not prejudice the merits.⁴²

33. Giving effect to a strong presumption in favor of bifurcation and Armenia’s fundamental procedural right is particularly important in the context of this arbitration, which was initiated for public consumption and to deflect attention from Armenia’s serious human rights claims in other international proceedings.⁴³

34. Although efficiency is not an overriding consideration in an inter-State proceeding, bifurcation in this arbitration would also ensure procedural efficiency. As a matter of principle, conducting a preliminary phase to address jurisdictional objections “is good practice to let the parties ‘know where they stand’ [...] at an early stage and not to impose the burden of full-fledged proceedings on a party that disputes being subject to arbitration.”⁴⁴ This is especially true where the

⁴¹ After the preliminary objections phase, the ICJ may declare that an objection, “in the circumstances of the case [...] does not possess an *exclusively preliminary character*” and may reserve decision on such an objection for a later phase of the proceedings. International Court of Justice, *Rules of Court* (1978) (**RL-009**), Article 79ter(4) (emphasis added).

⁴² Armenia does not accept that a different standard applies to the Tribunal’s determination of whether to grant bifurcation. If a different standard were to apply, however, each of Armenia’s objections meet that standard. In particular, they are *prima facie* serious and substantial, do not require prejudgment of the merits, and can dispose of all or an essential part of Azerbaijan’s claims. See, e.g., *Philip Morris Asia Limited v. Commonwealth of Australia*, PCA Case No. 2012-12, Procedural Order No. 8 (14 Apr. 2014) (**RL-059**), para. 109; *Glamis Gold Ltd. v. United States of America*, UNCITRAL, Procedural Order No. 2 (Revised) (31 May 2005) (**RL-043**), para. 12(c).

⁴³ Azerbaijan’s Agent in these proceedings declared in a public briefing that Azerbaijan would file claims against Armenia concerning “the illegal use and exploitation of natural resources by Armenia in the Azerbaijani territories during the occupation.” This statement was made barely a month after Azerbaijan notified its Article 18 claims and before the Parties had even begun negotiations. See C. Safarli, “Azerbaijan to file two lawsuits against Armenia in 2022 – MFA”, *Trend News Agency* (8 Dec. 2021) (**RE-0021**).

⁴⁴ *Mesa Power Group LLC (USA) v. Government of Canada*, PCA Case No. 2012-17, Procedural Order No. 2 (18 Jan. 2013) (**RL-056**), para. 16.

objections are capable of disposing of the claims in their entirety, as is the case here. Bifurcation will therefore avoid the need for the Parties to prepare and present extensive evidentiary materials, expert reports, and legal arguments on issues that are not even properly before the Tribunal, thus preventing unnecessary expenditure of time and resources.

35. Furthermore, in the unlikely event that Azerbaijan’s theory of its case under Articles 18 and 7 is upheld, Armenia will advance counterclaims. The viability and exact scope of those counterclaims, however, would depend on the Tribunal’s decision regarding the interpretation and application of those provisions. A decision on preliminary objections would thus provide clarity in this regard and avoid unnecessarily expanding the scope of the dispute between the Parties.

36. The resources freed up by bifurcation can be directed to other pressing matters. For Armenia, those matters include meeting the needs of the 120,000 refugees forcibly displaced when Azerbaijan ethnically cleansed Nagorno-Karabakh in September 2023, who are now primarily in Armenia and are in urgent need of basic services, including shelter, food, healthcare, and security.

III. ARMENIA’S OBJECTIONS THAT SHOULD BE DECIDED IN A PRELIMINARY PHASE

A. Azerbaijan’s Claims Under Article 18 of the ECT Are Outside of the Tribunal’s Jurisdiction and Should Be Examined in a Preliminary Phase

37. The main theory of Azerbaijan’s case—and indeed the only theory which it advanced during the Parties’ negotiations—is predicated on a contrived interpretation of Article 18 of the ECT. According to Azerbaijan, “Armenia’s conduct breached Articles 18(1) and Article 18(3) of the ECT and the underlying customary principle of permanent sovereignty over natural resources.”⁴⁵ Azerbaijan’s claims under Article 18, however, are outside of the Tribunal’s jurisdiction for at least three fundamental reasons:

38. *First*, when properly interpreted in accordance with international law, Article 18 does not contain an obligation that gives rise to a cause of action by one ECT Contracting Party against another. Rather, it is a “[m]iscellaneous” provision whereby the ECT’s Contracting Parties

⁴⁵ Statement of Claim, para. 181.

“recognise” and “reaffirm” basic principles of international law,⁴⁶ and that each State “continues to hold” certain pre-existing rights that do not have their source in the ECT (**Section III.A.1**).⁴⁷

39. *Second*, neither Article 18 nor any other provision of the ECT can be invoked to shoehorn into the Tribunal’s jurisdiction claims of the alleged breach of the “customary principle of permanent sovereignty over natural resources”⁴⁸ (**Section III.A.2**).

40. *Third*, even if Article 18 could give rise to a cause of action to litigate inter-State disputes concerning “permanent sovereignty over natural resources” (*quod non*), Azerbaijan misconstrues the principle and hence its allegations of breach are not capable of violating the ECT. They are therefore outside the Tribunal’s jurisdiction *ratione materiae* (**Section III.A.3**).

41. *Finally*, Armenia explains why preliminary treatment of these objections is warranted (**Section III.A.4**).

1. Article 18 of the ECT Does Not Give Rise to a Cause of Action

42. Article 18 of the ECT does not contain an obligation giving rise to an independent cause of action, and therefore cannot serve as the basis for the Tribunal’s jurisdiction.

43. It is well established in international law that even “where [a] treaty is in force, it does not ensue that all of its provisions establish rules imposing rights or obligations on the Parties.”⁴⁹ Some provisions, including those “in the operative part of certain treaties,” serve other purposes.⁵⁰ For example, some multilateral treaties “frequently contain articles that represent ideals

⁴⁶ Energy Charter Treaty with Related Documents (**CL-001**), ECT, Article 18(1), located in the “Miscellaneous Provisions” Part IV of the ECT (p. 66); Energy Charter Treaty with Related Documents (French Version) (17 Dec. 1994) (**RL-020**) (“*Dispositions diverses*.”).

⁴⁷ Energy Charter Treaty with Related Documents (**CL-001**), ECT, Article 18(3).

⁴⁸ Statement of Claim, para. 181.

⁴⁹ A. Pellet & D. Muller, “Article 38” in *The Statute of the International Court of Justice: A Commentary* (A. Zimmermann & C. Tams, eds., 2019) (3rd Ed., OUP) (**RL-075**), p. 894.

⁵⁰ *Id.*, pp. 894-895.

and aspirations which, being hortatory, are not considered to be legally binding.”⁵¹ Such provisions may instead serve to “throw light on the interpretation of the other [t]reaty provisions.”⁵²

44. However, as the ICJ held in the *Oil Platforms* case, such provisions “cannot, taken in isolation, be a basis for the jurisdiction” of an international court or tribunal.⁵³ In that case, Iran sought to bring claims against the United States for the latter’s allegedly unlawful use of force against Iran’s oil platforms in the Persian Gulf. As a basis for certain claims, Iran invoked Article I of the two States’ bilateral Treaty of Amity, Economic Relations and Consular Rights of 1955 (“**Treaty of Amity**”), which provides that “[t]here shall be firm and enduring peace and sincere friendship between the United States . . . and Iran.”⁵⁴ According to Iran, this provision “impose[d] upon the Parties ‘the minimum requirement . . . to conduct themselves with regard to the other in accordance with the principles and rules of general international law in the domain of peaceful and friendly relations.’”⁵⁵ As such, according to this interpretation, the Court was “said to have jurisdiction to evaluate the lawfulness of the armed actions of the United States in relation to the provisions of Article 1 of the Treaty of [Amity] and, accordingly, in relation to the rules of general international law thus ‘incorporated’ into the Treaty.”⁵⁶

45. The Court, however, rejected Iran’s expansive reading of Article I. Interpreting the Treaty of Amity in light of international law, it found that, *inter alia*, because “the object and purpose of the Treaty of [Amity] was not to regulate peaceful and friendly relations between the two States in a general sense [...] Article I [could] not be interpreted as incorporating into the Treaty

⁵¹ *Appeal Relating to the Jurisdiction of the ICAO Council, Judgment, Separate Opinion of Judge Dillard, I.C.J. Reports 1972 (RL-028)*, p. 107, note 1. See also R. R. Baxter, “International Law in Her Infinite Variety,” *International and Comparative Law Quarterly* Vol. 29, No. 4 (Oct. 1980) (RL-031), p. 553.

⁵² *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996 (RL-037)*, p. 815, para. 31.

⁵³ *Id.*

⁵⁴ *Id.*, p. 812, para. 24 (ellipsis in the original).

⁵⁵ *Id.*, p. 812, para. 25 (ellipsis in the original).

⁵⁶ *Id.*, p. 813, para. 25.

all of the provisions of international law concerning such relations.”⁵⁷ It therefore concluded that the provision could not be read to confer jurisdiction over Iran’s claims:

[T]he objective of peace and friendship proclaimed in Article I of the Treaty of [Amity] is such as to throw light on the interpretation of the other Treaty provisions [...] Article I is thus not without legal significance for such an interpretation, but cannot, taken in isolation, be a basis for the jurisdiction of the Court.⁵⁸

46. Determining whether a treaty provision may serve as the basis for an international tribunal’s jurisdiction *ratione materiae* requires interpreting the clause in accordance with international law. As Azerbaijan recognizes, “Articles 18(1) and (3) must be interpreted in accordance with customary international law on treaty interpretation, codified in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (“VCLT”).”⁵⁹ Article 31(1) in particular provides that treaties “shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”⁶⁰

47. A proper interpretation of Article 18 establishes that it cannot serve as an independent basis for this Tribunal’s jurisdiction. In particular, neither (i) the ordinary meaning of the text of Article 18, (ii) the object and purpose of the ECT, (iii) the context of Article 18, (iv) subsequent practice as to Article 18, nor (v) the *travaux* of the ECT can support Azerbaijan’s expansive interpretation of Article 18.

a. The Ordinary Meaning of the Terms of Article 18

48. Article 18’s plain text does not establish an obligation under the Treaty, let alone one that can be invoked as a standalone jurisdictional basis.

49. Articles 18(1) and 18(3) provide as follows:

(1) The Contracting Parties recognise state sovereignty and sovereign rights over energy resources. They reaffirm that these must be exercised in accordance with and subject to the rules of international law. [...]

⁵⁷ *Id.*, p. 814, para. 28.

⁵⁸ *Id.*, p. 815, para. 31.

⁵⁹ Statement of Claim, para. 183.

⁶⁰ Vienna Convention on the Law of Treaties (1969) (CL-011) (“VCLT”), Article 31(1).

(3) Each state continues to hold in particular the rights to decide the geographical areas within its Area to be made available for exploration and development of its energy resources, the optimisation of their recovery and the rate at which they may be depleted or otherwise exploited, to specify and enjoy any taxes, royalties or other financial payments payable by virtue of such exploration and exploitation, and to regulate the environmental and safety aspects of such exploration, development and reclamation within its Area, and to participate in such exploration and exploitation, *inter alia*, through direct participation by the government or through state enterprises.⁶¹

50. The first sentence of Article 18(1) simply provides that “[t]he Contracting Parties *recognise* state sovereignty and sovereign rights over energy resources.” This is a *recognition* of pre-existing concepts in international law—“state sovereignty and sovereign rights over energy resources”⁶²—that are not established by the ECT. In his commentary on the ECT (cited selectively by Azerbaijan for other purposes), Professor Hobér explains this sentence as follows:

Today *this is an uncontroversial statement*. No one disputes a State’s sovereign rights to natural resources, including energy resources, located within its territory. *This introductory statement* is probably to be seen against the sometimes fierce debates during the movement for Permanent Sovereignty over Natural Resources [...] States sometimes continue to insist that such sovereign rights be affirmed as a form of a *counterweight to obligations to respect the property of aliens and foreign investments*. This *affirmation* is thus found in the first sentence.⁶³

⁶¹ Energy Charter Treaty with Related Documents (CL-001), ECT, Articles 18; Energy Charter Treaty with Related Documents (French Version) (17 Dec. 1994) (RL-020), ECT, Article 18 (“1. Les parties contractantes reconnaissent la souveraineté nationale et les droits souverains sur les ressources énergétiques. Elles réaffirment qu’ils doivent être exercés en conformité et sous réserve des règles du droit international. [...] 3. Chaque Etat conserve en particulier le droit de décider des secteurs géographiques de sa zone qui sont destinés à être mis à disposition pour l’exploration et l’exploitation de ses ressources énergétiques, de l’optimalisation de leur récupération et du rythme auquel elles peuvent être extraites ou autrement exploitées, de déterminer et de percevoir les taxes, redevances ou autres paiements financiers qui sont payables au titre de cette exploration et de cette exploitation et de régir les aspects environnementaux et de sécurité de cette exploration, de cette exploitation et de cette mise en valeur dans sa zone, ainsi que de participer à cette exploration et cette exploitation, notamment par une participation directe de son gouvernement ou des entreprises d’Etat.”).

⁶² Energy Charter Treaty with Related Documents (CL-001), ECT, Article 18(1); Energy Charter Treaty with Related Documents (French Version) (17 Dec. 1994) (RL-020), ECT, Article 18(1) (“[L]a souveraineté nationale et les droits souverains sur les ressources énergétiques”).

⁶³ K. Hobér, *The Energy Charter Treaty: A Commentary* (OUP, 2020) (CL-059), p. 348 (emphasis added)

51. On its face, this “uncontroversial statement” or “affirmation” does not create obligations or rights. It simply points to the existence of an external principle that might, in some instances, serve as a “counterweight” to the application of the ECT’s provisions on trade and investment—that is, as an element of *interpretation* of those provisions.

52. The second sentence of Article 18(1) qualifies the affirmation of the first sentence by stating that the Contracting Parties “*reaffirm* that these [*i.e.*, state sovereignty and sovereign rights over energy resources] must be exercised in accordance with and subject to the rules of international law.” This does not expand the affirmation of the first sentence. Rather, it narrows its import by making clear that a reference to these principles does not allow States to disregard other obligations, such as those under the Treaty itself. Professor Kaj Hobér explains:

This is again an uncontroversial statement. It is generally accepted that one form of exercising state sovereignty is to enter into binding commitments—in the form of contracts, treaties, understandings, and other arrangements—with foreign States and foreign subjects. It is also widely accepted that once such commitments have been entered into, they are binding on the State: the principle of *pacta sunt servanda* is a *Grundnorm* in all legal systems, including public international law.⁶⁴

53. Professor Hobér concludes that “[r]eading the two sentences in subparagraph (1) together again illustrates one of the underlying philosophies of the ECT, *i.e.*, to strike a *reasonable and acceptable balance between the host States and Investors in the energy sector*.”⁶⁵ In other words, just as in *Oil Platforms*, Article 18(1) “is such as to throw light on the interpretation of the other Treaty provisions.”⁶⁶

54. That Article 18 serves only as a general interpretive principle is also clear from Article 18(3), which provides that “[*e*]ach State continues to hold” its pre-existing rights that derive from the principles of international law recognized in Article 18(1). As Professor Hobér observes, this is simply a reconfirmation of Article 18(1) and an elaboration of the pre-existing rights that

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Preliminary Objection, Judgment, I.C.J. Reports 1996 (RL-037), p. 815, para. 31.

each State generally (not just Contracting Parties) *continues to hold* with regard to its own resources:

By using the words “each state continues to hold [...]” [Article 18(3)] emphasizes that it *reconfirms* the contents of sovereignty with respect to energy resources.

*The generality of this confirmation is perhaps also to be seen in the fact that reference is made to ‘each state’ rather than to Contracting Parties.*⁶⁷

55. Azerbaijan does not share this straightforward interpretation of Article 18. Instead, citing a dictionary, it argues that “[t]he undertaking to ‘recognise’ imposes an obligation ‘to accept’ and act consistent with the exclusive legal authority of each State over its territory and resources.”⁶⁸

56. The only authority that Azerbaijan cites in alleged support of its sweeping interpretation is the *Territorial Dispute (Libya/Chad)* judgment, in which, according to Azerbaijan, “the International Court of Justice held that the term ‘recognize’ as used in the applicable treaty ‘indicates that a legal obligation is undertaken’ and confirmed that ‘[t]o recognize a frontier is essentially to ‘accept’ that frontier, that is to draw legal consequences from its existence, to respect it and to renounce the right to contest it in the future.’”⁶⁹

57. Plainly, the recognition⁷⁰ of a specific frontier by two States in a bilateral treaty is far removed from a general affirmation, by parties to a multilateral treaty, of the principle of State sovereignty and sovereign rights in a multilateral treaty. The treaty at issue in *Territorial Dispute* “specifically addressed [...] the question of frontiers,”⁷¹ which was not only the subject of the

⁶⁷ K. Hobér, *The Energy Charter Treaty: A Commentary* (OUP, 2020) (CL-059), p. 349 (emphasis added; ellipsis in the original).

⁶⁸ Statement of Claim, para. 187.

⁶⁹ *Id.* (citing *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment, I.C.J. Reports 1994 (CL-031), pp. 20-21, para. 39).

⁷⁰ In the context of the law on title to territory, the simple act of “recognition” has a specific meaning and specific legal consequences, as it is a source of acquisition of territory under international law. The word “recognize” in this context therefore does not imply other obligations to “act consistently with” as Azerbaijan suggests. See, e.g., J. Crawford, *Brownlie’s Principles of Public International Law* (9th Ed., OUP, 2019) (RL-076), p. 214 (explaining that title of sovereignty may exist on the basis of a treaty, “the treaty marking a reciprocal *recognition* of sovereignty in solemn form” (emphasis added)).

⁷¹ *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment, I.C.J. Reports 1994 (CL-031), p. 20, para. 37.

provision in question,⁷² but also of an entire annex referring to, *inter alia*, the work of a boundary demarcation commission and prior territorial agreements.⁷³ The ICJ was not purporting to decide what the term “recognize” means in all treaties (nor could it have done so, consistently with Article 31(1) of the VCLT), but in a specific treaty in light of its context and object and purpose.⁷⁴ As such, it was only once the ICJ had established “[t]he manifest intention of the parties” to finally decide their boundaries that it could attach the requisite significance to the term “recognize.”⁷⁵ Azerbaijan cannot thus hang its contrived textual interpretation of Article 18 on a single word—“recognise”—which is frequently employed in myriad treaties in different contexts with varying meanings.

58. In any event, Article 18 does not even speak about one State’s conduct with regard to another State’s sovereign rights. Rather, it is framed in terms of the (pre-existing and extrinsic) rights of States over *their own* resources. It says nothing about the conduct that the Contracting Parties owe to other Contracting Parties as far as the latter’s energy resources are concerned.

b. The Object and Purpose of the ECT

59. In *Oil Platforms*, the ICJ held that “a general formulation cannot be interpreted in isolation from the object and purpose of the Treaty in which it is inserted.”⁷⁶ The Court therefore concluded that, despite its broad title, the Treaty of Amity’s preamble and provisions made clear that it was devoted to economic and consular cooperation, not the use of force.⁷⁷

60. Here, the object and purpose of the ECT is to promote long-term cooperation in a specific economic sub-sector, energy, through the promotion of trade and investment. This is chiefly evidenced by Article 2, entitled “Purpose of the Treaty,” which provides that “[t]his Treaty

⁷² Treaty of Friendship and Good-Neighbourliness between the French Republic and the United Kingdom of Libya (1955) (RL-025), Article 3 (“Both High Contracting Parties recognize that the boundaries separating the territories of Tunisia, Algeria, French West Africa and French Equatorial Africa, on the one hand, from the territory of Libya, on the other hand, are those arising from the international instruments in force at the time of the formation of the United Kingdom of Libya, as defined in the attached exchange of letters (annex I).”).

⁷³ *Id.*, Annex I.

⁷⁴ *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment, I.C.J. Reports 1994 (CL-031), p. 26, para. 52 (“The object and purpose of the Treaty thus recalled confirm the interpretation of the Treaty given above, inasmuch as that object and purpose led naturally to the definition of the territory of Libya, and thus the definition of its boundaries.”).

⁷⁵ *Id.*, p. 24, para. 48.

⁷⁶ *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Preliminary Objection, Judgment, I.C.J. Reports 1996 (RL-037), p. 813, para. 27.

⁷⁷ *Id.*, pp. 813-814, paras. 27-28.

establishes a legal framework in order *to promote long-term cooperation in the energy field*, [...].”⁷⁸ The Treaty’s preamble further emphasizes the ECT’s character as an instrument to “catalyse economic growth by means of measures to liberalise *investment and trade* in energy.”⁷⁹ It is filled with references to the World Trade Organization,⁸⁰ trade and investment terms of art,⁸¹ and explicit statements of economic objectives, such as “the objective of progressive liberalisation of *international trade* and to the principle of avoidance of discrimination in *international trade*.”⁸²

61. Nothing signifies any other object and purpose, let alone to create or codify the sovereignty or sovereign rights of States over their energy resources. Indeed, outside Article 18, the ECT contains no reference whatsoever to sovereignty and sovereign rights over energy resources, let alone as matters that the drafters sought to govern through the Treaty. The ECT’s object and purpose is thus *not* to decide, govern, or regulate the sovereignty or territorial rights of the 50 or so States that adopted it in 1994, other than as they may be affected by according rights to foreign investors. Nor was it designed to regulate the implementation of the “concept of ‘permanent sovereignty over natural resources,’” which is itself a corollary of the principle of self-determination of peoples. These matters are squarely the subject of other international agreements and

⁷⁸ Energy Charter Treaty with Related Documents (**CL-001**), ECT, Article 2 (emphasis added).

⁷⁹ *Id.*, ECT, Preamble, p. 38 (emphasis added).

⁸⁰ *Id.* (“Having regard to the objective of progressive liberalisation of international trade and to the principle of avoidance of discrimination in international trade as enunciated in the Agreement Establishing the World Trade Organization and as otherwise provided for in this Treaty;” “Looking to the eventual membership in the World Trade Organization of those Contracting Parties which are not currently members thereof and concerned to provide interim trade arrangements which will assist those Contracting Parties and not impede their preparation for such membership.”).

⁸¹ *Id.*, ECT, Preamble, pp. 38-39 (*e.g.*, “national treatment,” “most favoured nation treatment,” “barriers to trade,” “abuse of dominant position”).

⁸² *Id.*, ECT, Preamble, p. 38 (emphasis added).

instruments, not least of which are the UN Charter,⁸³ the two International Covenants on Human Rights,⁸⁴ and key resolutions of the UN General Assembly.⁸⁵

62. Unable to point to a single supportive text within the ECT's preamble or other provisions evidencing that the Treaty's object and purpose is to govern matters of State sovereignty and sovereign rights, Azerbaijan refers instead to an entirely different instrument,⁸⁶ the political declaration of principles that comprises the 1991 European Energy Charter ("EEC"), which predated the signing of the ECT by some three years.⁸⁷ The relevant provision of the EEC, which Azerbaijan cites only in part, itself makes clear that principles relating to sovereignty and sovereign rights are not the subject of the EEC (nor would they be of the ECT), but rather serve as background context for a non-binding instrument addressing trade and investment in the energy sector:

*Within the framework of State sovereignty and sovereign rights over energy resources and in a spirit of political and economic cooperation, they undertake to promote the development of an efficient energy market throughout Europe, and a better functioning global market, in both cases based on the principle of non-discrimination and on market-oriented price formation, taking due account of environmental concerns.*⁸⁸

63. If anything, therefore, the EEC confirms that Article 18 simply serves the purpose of, in the words of the ICJ, "throw[ing] light on the interpretation of the other Treaty provisions."⁸⁹

⁸³ United Nations Charter (1945) (CL-006), Article 2(1) ("The Organization is based on the principle of the sovereign equality of all its Members"), Article 2(4) ("All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."), Article 1(2) ("The purposes of the United Nations are [...] [t]o develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples.").

⁸⁴ International Covenant on Civil and Political Rights (1966) (RL-027), Article 1; International Covenant on Economic, Social, and Cultural Rights (1966) (RL-026), Article 1.

⁸⁵ United Nations General Assembly, *Resolution 1803: Permanent Sovereignty Over Natural Resources*, UN Doc. A/RES/1803 (XVII) (14 Dec. 1962) (CL-002); United Nations General Assembly, *Resolution 3171 (XXVIII): Permanent Sovereignty Over Natural Resources*, UN Doc. A/RES/3171(XXVIII) (17 Dec. 1973) (CL-013).

⁸⁶ Statement of Claim, para. 194.

⁸⁷ Energy Charter Treaty with Related Documents (CL-001), EEC, p. 27.

⁸⁸ *Id.*, EEC, p. 29 (emphasis added).

⁸⁹ *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Preliminary Objection, Judgment, I.C.J. Reports 1996 (RL-037), p. 815, para. 31.

c. *The Context of Article 18*

64. In accordance with the customary principles of treaty interpretation set forth in the VCLT, “[t]he context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty.”⁹⁰

65. In the case of the ECT, the Contracting Parties expressly agreed at the time of its adoption on various understandings concerning its interpretation, some of which were adopted “with respect to the Treaty as a whole.”⁹¹ In one such understanding, the Contracting Parties expressly emphasized the limited scope of the ECT: “[t]he representatives underline[d] that the provisions of the Treaty have been agreed upon *bearing in mind the specific nature of the Treaty* aiming at a legal framework to *promote long-term cooperation in a particular sector* [...]”⁹²

66. Further context undermining Azerbaijan’s interpretation can be found in the title and contents of the part of the Treaty in which Article 18 is included: “Part IV: Miscellaneous Provisions.”⁹³ By definition, miscellaneous provisions of a treaty are not the subject of a treaty, and would not ordinarily be the source of freestanding obligations divorced from the main operative parts of the agreement. In the case of the ECT, these miscellaneous provisions are all geared toward the implementation of the ECT’s other parts, *i.e.*, “Part II: Commerce” and “Part III: Investment Promotion and Protection.” Some provide interpretive context and aspirational statements, such as Article 19 concerning “Environmental Aspects.”⁹⁴ Others are savings clauses or carveouts, such as those concerning “Taxation” or “Exceptions.”⁹⁵

⁹⁰ VCLT (CL-011), Article 31(2).

⁹¹ Energy Charter Treaty with Related Documents (CL-001), ECT, p. 37.

⁹² *Id.*

⁹³ *Id.*, ECT, p. 66.

⁹⁴ *Id.*, ECT, Article 19 (“In pursuit of sustainable development and taking into account its obligations under those international agreements concerning the environment to which it is party, each Contracting Party shall *strive* to minimise in an economically efficient manner harmful Environmental Impacts occurring either within or outside its Area from all operations within the Energy Cycle in its Area, taking proper account of safety.”) (emphasis added).

⁹⁵ *Id.*, ECT, Articles 21, 24.

d. Subsequent Practice

67. As Article 31(3)(b) of the VCLT provides, “there shall be taken into account [...] any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.”⁹⁶ The absence of State practice in support of an interpretation is instructive.⁹⁷ Crucially, in *Oil Platforms*, the ICJ supported its interpretation of Article 1 of the Treaty of Amity by noting the absence of relevant practice by the parties, which had never before invoked the provision, despite having had occasion to do so.⁹⁸

68. There is nothing in the subsequent practice of the dozens of Contracting Parties to the ECT—including Azerbaijan itself⁹⁹—that would support Azerbaijan’s radical interpretation of Article 18. Plainly, no other State has ever before invoked—or even suggested that it could invoke—Article 18 as a basis for the jurisdiction of an international tribunal to resolve disputes concerning State sovereignty. This is despite the fact that, since the ECT’s entry into force in 1998, there have been numerous ongoing sovereignty and territorial disputes among its signatories.¹⁰⁰

e. Travaux Préparatoires

69. Under Article 32 of the VCLT, recourse to the preparatory work of a treaty is permissible as a supplementary means of interpretation, either to confirm an interpretation under Article 31, or to determine a provision’s meaning when an interpretation pursuant to Article 31 leaves the meaning ambiguous or obscure, or “leads to a result which is manifestly absurd or unreasonable.”¹⁰¹ In *Oil Platforms*, the Court reinforced its interpretation of the Treaty of Amity by noting the absence of any *travaux préparatoires* favoring Iran’s interpretation, because “it may be

⁹⁶ VCLT (CL-011), Article 31(3)(b).

⁹⁷ See, e.g., *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (RL-036)*, p. 248, paras. 55-56 (finding that the absence of practice treating “poison or poisoned weapons” as referring to nuclear weapons supported the interpretation that the use of nuclear weapons was not prohibited by the provision at issue).

⁹⁸ *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996 (RL-037)*, p. 815, para. 30 (finding that “the practice followed by the Parties in regard to the application of the Treaty d[id] not lead to any different conclusions” than those the Court had reached).

⁹⁹ See *infra* Section III(C)(2).

¹⁰⁰ [REDACTED]

¹⁰¹ VCLT (CL-011), Article 32.

thought that, if that Article had the scope that Iran gives it, the Parties would have been led to point out its importance during the negotiations or the process of ratification.”¹⁰²

70. Unsurprisingly, Azerbaijan cannot point to a single material in the ECT’s *travaux préparatoires* to support its position that Article 18 should serve as a basis for inter-State disputes concerning State sovereignty. Moreover, while the meaning of Article 18 is far from ambiguous or obscure, and there is no need to have recourse to the Treaty’s *travaux* other than to confirm its meaning, Azerbaijan’s own interpretation would—as discussed in Section III.A.2 below—lead to manifestly absurd outcomes that cannot be entertained absent compelling support.

*

71. In sum, there is nothing to support Azerbaijan’s interpretation of Article 18 as enshrining a free-standing obligation that could serve as a cause of action, let alone for claims of the nature advanced by Azerbaijan.

2. Azerbaijan’s Claims Are Based on Principles of Customary International Law That Are Outside of the Tribunal’s Jurisdiction

72. Even if, despite the foregoing, Article 18 somehow contained an obligation that could serve as a cause of action (*quod non*), it cannot be interpreted to permit Azerbaijan’s attempt to import—wholesale—fundamental principles of customary international law into the ECT, thereby sweeping its claims into the ambit of the Tribunal’s jurisdiction under Article 27. Neither Article 18 nor Article 27 can be interpreted as vesting the Tribunal with jurisdiction over rules of customary international law that do not have their source in the ECT.

¹⁰² *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Preliminary Objection, Judgment, I.C.J. Reports 1996 (RL-037), p. 814, para. 29.

73. Azerbaijan relies on varying imprecise formulations to argue that Article 18 “applies,”¹⁰³ “link[s],”¹⁰⁴ “codifies,”¹⁰⁵ or is “informed by”¹⁰⁶ the “corresponding”¹⁰⁷ or “underlying”¹⁰⁸ “fundamental principle of permanent sovereignty over natural resources”¹⁰⁹ and “bundle of rights inherent to sovereignty.”¹¹⁰

74. Azerbaijan attempts to bolster its theory of Article 18 by referring to Article 27’s applicable law provision:

And Article 27(3)(g) provides that inter-State disputes, including those concerning Article 18, shall be “decide[d] [...] in accordance with this Treaty and applicable rules and principles of international law.” A breach of Article 18 *thus necessarily also violates* the corresponding principle of sovereignty over natural resources as recognized under customary international law.¹¹¹

75. This echoes Azerbaijan’s formulation of its case in its Notice of Arbitration, in which it argued that Article 27 somehow vested the Tribunal with jurisdiction over customary international law *tout court*: “[t]he various acts and omissions described above constitute multiple egregious breaches of Armenia’s obligations to Azerbaijan under the ECT *and corresponding customary international law applicable to this dispute under Article 27 of the ECT*.”¹¹²

¹⁰³ Statement of Claim, para. 193 (“Article 18 applies the customary international law rule of sovereignty specifically to a State’s sovereign rights over its ‘energy resources.’”).

¹⁰⁴ *Id.*, para. 192 (“The ECT travaux confirm that the Contracting Parties intended to link Article 18(1) to protected rights under customary international law.”).

¹⁰⁵ *Id.*, para. 182 (“This provision codifies a State’s inherent sovereign prerogatives.”).

¹⁰⁶ *Id.*, para. 9 (“By this conduct, Armenia breached its obligations under the ECT, including as informed by customary international law regarding sovereignty over natural resources.”).

¹⁰⁷ *Id.*, para. 192 (“A breach of Article 18 thus necessarily also violates the corresponding principle of sovereignty over natural resources as recognized under customary international law.”).

¹⁰⁸ *Id.*, para. 181 (“Armenia’s conduct breached Articles 18(1) and Article 18(3) of the ECT and the underlying customary principle of permanent sovereignty over natural resources.”).

¹⁰⁹ *Id.*, para. 180.

¹¹⁰ *Id.*, para. 199.

¹¹¹ *Id.*, para. 192 (emphasis added; ellipsis in the original).

¹¹² Republic of Azerbaijan’s Notice of Arbitration (27 Feb. 2023) (“**Notice of Arbitration**”), para. 49 (emphasis added). In contrast to its Statement of Claim, Azerbaijan’s Notice of Arbitration even contained a request for relief “[declaring] that Armenia has breached its international obligations under Articles 18 and 7 of the ECT, *as well as applicable rules of customary international law*.” *See id.*, para. 64(a) (emphasis added). Azerbaijan also consistently framed its claims in this manner in the context of the Parties’ negotiations. *See* Compilation of the Parties’ Pre-Arbitration Exchanges (CE-063).

76. But the Tribunal’s jurisdiction under Article 27 to hear a dispute “concerning the application or interpretation of [the ECT],”¹¹³ does not extend to the customary international law principles invoked by Azerbaijan. It is well established that “there is a cardinal distinction” between applicable law and the scope of a tribunal’s jurisdiction.¹¹⁴

77. This distinction has been underscored in the context of the United Nations Convention on the Law of the Sea (“UNCLOS”), of which Article 293(1) provides that tribunals hearing disputes under the Convention “shall apply this Convention and other rules of international law not incompatible with this Convention.”¹¹⁵ Relying on this provision, States have sought—to no avail—to advance claims based on rules of international law outside the scope of UNCLOS:

- In *Chagos Marine Protected Area*, Mauritius sought a determination by the tribunal as to which State, Mauritius or the United Kingdom, had sovereignty over the Chagos Archipelago. The tribunal declined jurisdiction,¹¹⁶ finding that “[w]here the ‘real issue in the case’ and the ‘object of the claim’ [...] do not relate to the interpretation or application of the Convention [...] an incidental connection between the dispute and some matter regulated by the Convention is insufficient to bring the dispute, as a whole, within the ambit of [the Convention’s dispute-resolution provision].”¹¹⁷
- In *Arctic Sunrise*, the Netherlands brought UNCLOS proceedings against Russia, arguing, *inter alia*, that Russia had breached its human rights obligations by detaining environmental activists aboard the MV Arctic Sunrise. The tribunal found that “Article 293(1) does not extend the jurisdiction of [the] tribunal” and is not, as the Netherlands had suggested, “a means to obtain a determination that some treaty other than the Convention has been violated.”¹¹⁸
- In *Duzgit Integrity*, Malta similarly argued, relying on Article 293(1), that São Tomé’s arrest of a ship’s crewmember violated “generally applicable rules of international law

¹¹³ Energy Charter Treaty with Related Documents (CL-001), ECT, Article 27(1).

¹¹⁴ *MOX Plant (Ireland v. United Kingdom)*, PCA Case No. 2002-01, Procedural Order No. 3 (24 June 2003) (RL-042), para. 19 (“[T]here is a cardinal distinction between the scope of its jurisdiction under article 288, paragraph 1, of the [OSPAR] Convention, on the one hand, and the law to be applied by the Tribunal under article 293 of the Convention, on the other hand.”).

¹¹⁵ United Nations Convention on the Law of the Sea (1982) (RL-032), Article 293(1).

¹¹⁶ *Chagos Marine Protected Area (Mauritius v. United Kingdom)*, PCA Case No. 2011-03, Award (18 Mar. 2015) (RL-061), para. 221 (“The Parties’ dispute regarding sovereignty over the Chagos Archipelago does not concern the interpretation or application of the Convention.”).

¹¹⁷ *Id.*, para. 220.

¹¹⁸ *Arctic Sunrise Arbitration (Netherlands v. Russian Federation)*, PCA Case No. 2014-02, Award on the Merits (14 Aug. 2015) (RL-063), paras. 188, 192-193.

related to fundamental human rights and humanitarian concerns.”¹¹⁹ The tribunal ruled that it did “not have jurisdiction to determine breaches of obligations not having their source in the Convention (including human rights obligations).”¹²⁰

78. There can thus be no question of Azerbaijan relying on the applicable law provision of Article 27(3)(g) to extend the Tribunal’s jurisdiction to rules of customary international law.

79. Azerbaijan’s attempt to use Article 18 to expand the Tribunal’s jurisdiction to external rules of international law is similarly misplaced. As explained above, there is not a single piece of interpretive evidence that would suggest any intention to expand the Tribunal’s jurisdiction over customary international law via Article 18.

80. The ICJ’s jurisdictional judgment in *Immunities and Criminal Proceedings* is also instructive. In that case, Equatorial Guinea alleged that France had failed to respect the immunities of a Guinean official and the inviolability of its diplomatic premises in Paris.¹²¹ As a basis for jurisdiction, Equatorial Guinea invoked Article 4 of the United Nations Convention against Transnational Organized Crime (the Palermo Convention), which provides in relevant part that “States Parties shall carry out their obligations under this Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States.”¹²² Much like Azerbaijan in this case, Equatorial Guinea “claim[ed] that the customary international rules on immunities of States and State officials, and on the immunity of State property from execution, are incorporated into Article 4 through the reference in that Article to the principles of sovereign equality and non-intervention.”¹²³

81. The Court rejected Equatorial Guinea’s theory of incorporation. It began its analysis by acknowledging that, unlike the provision at issue in *Oil Platforms*, Article 4(1) of the Palermo Convention could be construed as creating an obligation due to its use of the word “shall” (which,

¹¹⁹ *The Duzgit Integrity Arbitration (Malta v. São Tomé and Príncipe)*, PCA Case No. 2014-07, Award (5 Sep. 2016) (RL-068), para. 121(9).

¹²⁰ *Id.*, paras. 207, 210.

¹²¹ *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, *Preliminary Objections, Judgment*, I.C.J. Reports 2018 (RL-073), pp. 300-301, paras. 18-19.

¹²² *Id.*, p. 310, para. 54 (citing United Nations Convention Against Transnational Organized Crime and the Protocols thereto (2000), Article 4(1)).

¹²³ *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, *Preliminary Objections, Judgment*, I.C.J. Reports 2018 (RL-073), p. 320, para. 90.

as discussed below, is notably absent from Article 18 of the ECT).¹²⁴ Yet, despite the existence of an obligation, it noted the absence of indications that the Palermo Convention was intended to govern questions of State immunity, observing that its object and purpose was instead to promote cooperation in preventing and combatting transnational organized crime.¹²⁵ Therefore, “[t]he interpretation of Article 4 advanced by Equatorial Guinea, whereby the customary rules relating to immunities of States and State officials are incorporated into the Convention as conventional obligations, is unrelated to the stated object and purpose of the Palermo Convention.”¹²⁶ For the Court, the provision simply did “not impose, through its reference to sovereign equality, an obligation on States parties to act in a manner consistent with the many rules of international law which protect sovereignty in general, as well as all the qualifications to those rules.”¹²⁷

82. The same reasoning may be applied to Article 18 of the ECT. An isolated provision referring to a broad concept of international law such as sovereignty and sovereign rights cannot be used as a means of importing “the many rules of international law which protect sovereignty in general, as well as all the qualifications to those rules.”¹²⁸ Yet, Azerbaijan attempts to do exactly that, by proposing a reading of Article 18 that would lead the Tribunal to exercise jurisdiction over various interrelated and fundamental principles of the post-1945 legal order. It argues that Article 18’s reference to “state sovereignty and sovereign rights” incorporates a “bundle of sovereign rights,” which in turn includes “the concept of ‘permanent sovereignty over natural resources.’”¹²⁹ It refers in passing to the UN Charter and “various UNGA resolutions,” including Resolution 1803 (concerning “Permanent sovereignty over natural resources”).¹³⁰

83. What Azerbaijan fails to acknowledge, however, is that permanent sovereignty over natural resources is but a component of the principle of self-determination of peoples. For example, UNGA Resolution 1803 was adopted to give effect to “the status of permanent sovereignty over

¹²⁴ *Id.*, p. 321, para. 92.

¹²⁵ *Id.*, p. 321-322, paras. 94-95.

¹²⁶ *Id.*, p. 322, para. 95.

¹²⁷ *Id.*, p. 321, para. 93.

¹²⁸ *Id.*

¹²⁹ Statement of Claim, paras. 189-190.

¹³⁰ *Id.*

natural wealth and resources as a *basic constituent of the right to self-determination*.¹³¹ For their part, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights enshrine in their common Article 1 that:

All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.¹³²

84. Under Azerbaijan’s all-encompassing reading of Article 18, the Tribunal would have jurisdiction to adjudicate all the “recognized” components of the right to self-determination generally, and of permanent sovereignty over natural resources specifically. The Tribunal would have jurisdiction to decide, for example, whether the majority indigenous ethnic Armenians in Nagorno-Karabakh lawfully exercised their right to self-determination and to “freely dispose of their natural wealth.”¹³³ Moreover, the Tribunal would also have jurisdiction to entertain a counterclaim by Armenia that, by ethnically cleansing 120,000 indigenous ethnic Armenians from Nagorno-Karabakh in September 2023, Azerbaijan violated the permanent sovereignty of the people of Nagorno-Karabakh over their own natural resources.¹³⁴

85. There is, however, no basis for the Tribunal to decide these issues. Unlike Article 4 of the Palermo Convention, and as explained in Section III.A.1 above, Article 18 does *not* contain an obligation that Contracting Parties “*shall* carry out their obligations under th[e] [Treaty] in a manner consistent with” certain principles of customary international law. Rather, it simply recognizes the existence of such principles.

86. Azerbaijan’s claims under extrinsic customary international law cannot be shoehorned into the ECT, and therefore fall outside the Tribunal’s jurisdiction *ratione materiae*.

¹³¹ United Nations General Assembly, *Resolution 1803: Permanent Sovereignty Over Natural Resources*, UN Doc. A/RES/1803 (XVII) (14 Dec. 1962) (**CL-002**), p. 15 (emphasis added).

¹³² International Covenant on Civil and Political Rights (1966) (**RL-027**), Article 1(2); International Covenant on Economic, Social, and Cultural Rights (1966) (**RL-026**), Article 1(2).

¹³³ *Id.*

¹³⁴ For the avoidance of doubt, Armenia reserves its right to advance counterclaims as appropriate.

3. Even If Article 18 Could Serve as a Basis for the Tribunal’s Jurisdiction (*Quod Non*), Azerbaijan’s Allegations Concern Conduct That Is Not Capable of Constituting Violations Thereof

87. As established above, Article 18 does not contain an obligation that could serve as a basis for the jurisdiction of the Tribunal, let alone by incorporating extrinsic customary international law principles. But even if Article 18 could be interpreted in this manner, Azerbaijan’s claims would nevertheless still fall outside the scope of the Tribunal’s jurisdiction *ratione materiae*.

88. To determine whether it has jurisdiction *ratione materiae*, the Tribunal must ascertain “whether the alleged acts [...], if established, are capable of constituting violations of” the ECT.¹³⁵ To do so requires “bring[ing] a detailed analysis to bear.”¹³⁶ If the Tribunal is not “convinced that the alleged” acts would be “capable of constituting” a breach of Article 18, then the corresponding claims are outside of its jurisdiction.¹³⁷

89. While the jurisdictional analysis is a legal one in which it may be appropriate to “accept *pro tem* the facts as alleged by [Azerbaijan] to be true,”¹³⁸ the Tribunal is not prevented from analyzing and adopting its own characterization of such facts. This was the approach of the ICJ in its recent judgment declining jurisdiction *ratione materiae* over Azerbaijan’s claims that Armenia had breached the CERD through alleged acts of environmental harm in Nagorno-Karabakh. While stressing that “it is not to be excluded that conduct leading to harm to the environment may, in some cases, constitute an act of racial discrimination under CERD,”¹³⁹ the Court was simply not “convinced” that this could have been the case in Nagorno-Karabakh.¹⁴⁰ To reach its conclusion, the Court examined, *inter alia*, the likely motivation behind the impugned acts,

¹³⁵ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan)*, Preliminary Objections, Judgment, 12 November 2024 (RL-101), p. 23, para. 70.

¹³⁶ *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Preliminary Objection, Judgment, Separate Opinion of Judge Higgins, I.C.J. Reports 1996 (RL-038), p. 814, para. 29.

¹³⁷ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azerbaijan v. Armenia)*, Preliminary Objections, Judgment, 12 November 2024 (RL-102), p. 30, para. 99.

¹³⁸ *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Preliminary Objection, Judgment, Separate Opinion of Judge Higgins, I.C.J. Reports 1996 (RL-038), p. 856, para. 32.

¹³⁹ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azerbaijan v. Armenia)*, Preliminary Objections, Judgment, 12 November 2024 (RL-102), p. 28, para. 95.

¹⁴⁰ *Id.*, p. 29, para. 99.

the demographics of the area, and the ways in which the relevant resources were said to have been used.¹⁴¹ Azerbaijan's claims did not pass this threshold scrutiny.

90. The same is true in the case at hand for at least two reasons.

91. *First*, even assuming that Article 18 could be interpreted so as to incorporate into the ECT the customary obligation to respect the permanent sovereignty of peoples over their natural resources, such obligation does *not* apply in the context of an armed conflict. This was the holding of the ICJ in *Armed Activities in the Territory of the Congo*, in which the Democratic Republic of the Congo (“**DRC**”) alleged that Uganda had violated the principle of permanent sovereignty over natural resources in the context of the latter's occupation of Congolese territory:

The Court finds that it cannot uphold the contention of the DRC that Uganda violated the principle of the DRC's sovereignty over its natural resources [...] The Court recalls that the principle of permanent sovereignty over natural resources is expressed in General Assembly resolution 1803 (XVII) of 14 December 1962 and further elaborated in [other UNGA Resolutions]. While recognizing the importance of this principle, which is a principle of customary international law, *the Court notes that there is nothing in these General Assembly resolutions which suggests that they are applicable to the specific situation of looting, pillage and exploitation of certain natural resources by members of the army of a State militarily intervening in another State, which is the subject-matter of the DRC's third submission. The Court does not believe that this principle is applicable to this type of situation.*¹⁴²

92. In other words, as underscored by the Court in citing the very same UNGA Resolutions invoked by Azerbaijan,¹⁴³ this “principle of customary international law” cannot be considered as containing an obligation prohibiting the “exploitation of certain natural resources” in a situation of armed conflict.¹⁴⁴ It does not operate in situations governed by international humanitarian law and the law of occupation, and any obligation that may be derived from the principle in interstate relations does not exist in such situations. Rather, the principle functions in

¹⁴¹ *Id.*, pp. 27-30, paras. 90-100.

¹⁴² *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, I.C.J. Reports 2005 (RL-018), pp. 251-252, para. 244 (emphasis added).

¹⁴³ See Statement of Claim, para. 190.

¹⁴⁴ As explained below in Section III(D), it is not disputed that the alleged conduct would have taken place during a situation of armed conflict, which Azerbaijan characterizes as a “military occupation.”

other contexts, since it “has its roots in two main concerns of the United Nations, namely, economic development of developing countries and self-determination of colonized peoples.”¹⁴⁵

93. On Azerbaijan’s own case (the premise of which Armenia completely rejects), its claims concern the use of natural resources during what it alleges to be Armenia’s so-called “unlawful occupation of Azerbaijan’s sovereign territory.”¹⁴⁶ But the principle of permanent sovereignty over natural resources does not entail an obligation not to use natural resources in such circumstances.

94. *Second*, even if the Tribunal were to exercise jurisdiction over Azerbaijan’s claims under Article 18, many of those claims exceed the substantive scope of both the ECT and the principle of permanent sovereignty over natural resources.

95. To begin with, the ECT only applies to *energy*. That the Treaty is carefully circumscribed to apply exclusively to the energy sector is reflected—in addition to in its very title—in numerous provisions and the Contracting Parties’ agreed understandings, as already explained.¹⁴⁷ Moreover, Article 18 itself refers to “state sovereignty and sovereign rights *over energy resources*.”¹⁴⁸ It therefore strays beyond these clear terms for Azerbaijan to assert claims that “Azerbaijan would also have had the benefit of improved *water supply and irrigation* to over 250,000 hectares of land in Azerbaijan,” and to claim in damages “US\$ 202 million *related to the lost water supply and irrigation benefits*.”¹⁴⁹ Plainly, the ECT cannot serve as the basis for such claims, falling wholly outside “the energy field.”¹⁵⁰

¹⁴⁵ N. Schrijver, “Self-determination of peoples and sovereignty over natural wealth and resources” in *Realizing the Right to Development* (OHCHR, Dec. 2013) (**RL-058**), p. 95.

¹⁴⁶ Statement of Claim, para. 26.

¹⁴⁷ See Energy Charter Treaty with Related Documents (**CL-001**), ECT, p. 37, Understanding with respect to the Treaty as a whole (“The representatives underline that the provisions of the Treaty have been agreed upon bearing in mind the specific nature of the Treaty aiming at a legal framework to promote long-term cooperation in a particular sector.”); p. 40, Understanding with respect to Article 1(5) (“It is understood that the Treaty confers *no rights to engage in economic activities other than Economic Activities in the Energy Sector*.”) (emphasis added), Article 2 (“This Treaty establishes a legal framework in order to promote long-term cooperation *in the energy field*, based on complementarities and mutual benefits, in accordance with the objectives and principles of the Charter.”) (emphasis added), Annex EM I (describing covered Energy Materials and Products).

¹⁴⁸ Energy Charter Treaty with Related Documents (**CL-001**), ECT, Article 18(1) (emphasis added).

¹⁴⁹ Statement of Claim, paras. 268-269 (emphasis added). See also *id.*, paras. 17, 267; Expert Report of Dr. Boaz Moselle (12 November 2024) (**CER-1**), para. 124.

¹⁵⁰ Energy Charter Treaty with Related Documents (**CL-001**), ECT, Article 2 (“Purpose of the Treaty”).

96. Azerbaijan also asserts claims that do not even pertain to natural resources. It argues in passing that “[s]overeign rights over energy resources necessarily include rights over *energy assets*.”¹⁵¹ It therefore claims, *inter alia*, that Armenia “is also liable for costs to restore the damaged or destroyed infrastructure to the state it would be in but for Armenia’s occupation.”¹⁵² The problem, however, is that the term “energy assets” is not employed or defined anywhere in the ECT, and this invented term has nothing to do with permanent sovereignty over natural resources. Given that Azerbaijan’s allegations concern conduct that is not capable of violating Article 18, the Tribunal has no jurisdiction over this claim of Azerbaijan.

4. Armenia’s Objections to the Tribunal’s Jurisdiction *Ratione Materiae* Under Article 18 Warrant Preliminary Treatment

97. Armenia’s serious objections to the Tribunal’s jurisdiction to hear Azerbaijan’s claims under Article 18 warrant preliminary treatment in a bifurcated phase because they are of an exclusive preliminary character. As explained above, they concern purely legal questions concerning the interpretation of Article 18 that can be fully resolved without trespassing on the merits. With the exception of the second prong of Armenia’s objection set forth in Section III.A.3 above (concerning the exclusion of claims related to, *inter alia*, irrigation and infrastructure worth several hundred million dollars), all of Armenia’s objections based on Article 18 are capable of disposing of the totality of Azerbaijan’s claims under this provision. Upholding any one of these objections would result in at least a material reduction in the scope of the case, if not its entire dismissal, thereby also contributing to procedural efficiency.

B. Azerbaijan’s Claims Under Article 7 Are Outside of the Tribunal’s Jurisdiction and Should Be Examined in a Preliminary Phase

98. Likely aware of the fundamental weaknesses of its Article 18 claims, Azerbaijan decided at the eleventh hour of the Parties’ negotiations to allege a vague violation of Article 7 of the ECT. As presented in the Statement of Claim, these claims essentially concern an alleged suspension of the Yevlakh-Nakhijevan pipeline that crosses through the territory of Armenia

¹⁵¹ Statement of Claim, para. 196.

¹⁵² *Id.*, para. 260(c). *See also id.*, para. 277(c).

between two parts of Azerbaijan, which, according to Azerbaijan, would violate Article 7(1)-(3) and (5).¹⁵³ But this claim also falls outside of the Tribunal’s jurisdiction for at least four reasons:

99. *First*, Azerbaijan cannot show that a dispute as to Article 7 existed between Azerbaijan and Armenia at the time it initiated this arbitration (**Section III.B.1**). *Second*, even if a dispute existed and could have been brought to arbitration (*quod non*), Azerbaijan has not fulfilled the negotiations requirement for its Article 7 claims (**Section III.B.2**). *Third*, even if there were a dispute as to Article 7 (*quod non*), such a dispute should have been referred to Article 7(7)’s mandatory conciliation mechanism, not to arbitration under Article 27 (**Section III.B.3**). *Fourth*, in any event, the conduct alleged by Azerbaijan is not capable of constituting a violation of Article 7 (**Section III.B.4**). All these objections to the Tribunal’s jurisdiction over Azerbaijan’s Article 7 claims warrant Preliminary treatment in a bifurcated phase (**Section III.B.5**).

1. There Is No Dispute in Relation to Article 7

100. Azerbaijan has invoked Article 27 as the basis for the Tribunal’s jurisdiction. As explained in Section III.B.3 below, a purported dispute arising out of Article 7 should instead have been referred to conciliation under Article 7(7). Regardless, a tribunal constituted under Article 27 only has jurisdiction to hear “a dispute” concerning the application or interpretation of the ECT.¹⁵⁴ The existence of a dispute between the Parties is thus one of the conditions for the Tribunal’s jurisdiction *ratione materiae*.¹⁵⁵ Azerbaijan cannot establish the existence of a dispute between

¹⁵³ *Id.*, Section VI(B).

¹⁵⁴ Energy Charter Treaty with Related Documents (**CL-001**), ECT, Article 27 (“(1) Contracting Parties shall endeavour to settle disputes concerning the application or interpretation of this Treaty through diplomatic channels. (2) If a dispute has not been settled in accordance with paragraph (1) within a reasonable period of time, either party thereto may, except as otherwise provided in this Treaty or agreed in writing by the Contracting Parties, [...] upon written notice to the other party to the dispute submit the matter to an ad hoc tribunal under this Article.”); Energy Charter Treaty with Related Documents (French Version) (17 Dec. 1994) (**RL-020**) (“1. Les parties contractantes s’efforcent de régler les différends relatifs à l’application ou l’interprétation du présent traité par la voie diplomatique. 2. Lorsqu’un différend n’a pas été réglé conformément au paragraphe 1 dans un délai raisonnable, chaque partie au différend peut, à moins que le présent traité n’en dispose autrement ou que les parties contractantes en aient convenu autrement par écrit, [...] soumettre le différend à un tribunal d’arbitrage ad hoc en vertu du présent article, moyennant notification écrite adressée à l’autre partie au différend.”).

¹⁵⁵ See, e.g., *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Preliminary Objections, Judgment, I.C.J. Reports 2022 (**RL-088**), p. 502, para. 63; *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, I.C.J. Reports 2012 (**RL-051**), p. 442, para. 48.

Azerbaijan and Armenia concerning the application or interpretation of Article 7 at the time of commencement of these proceedings (*i.e.*, the critical date for jurisdictional purposes¹⁵⁶).

101. Under international law, a dispute is “a disagreement on a point of law or fact, a conflict of legal views or of interests” between parties.¹⁵⁷ The question of whether a dispute exists in a particular case “turns on the evidence of opposition of views.”¹⁵⁸ That is to say, “[i]t must be shown that the claim of one party is positively opposed by the other.”¹⁵⁹ As to disputes concerning the alleged violation of an obligation, “the two sides [must] hold clearly opposite views concerning the question of the performance or non-performance of certain international obligations.”¹⁶⁰

102. Whether a dispute exists is a matter of objective determination.¹⁶¹ In making such a determination, the Tribunal may consider “any statements or documents exchanged between the parties.”¹⁶² However, “a statement can give rise to a dispute only if it refers to the subject-matter of a claim with sufficient clarity to enable the State against which [that] claim is made to identify that there is, or may be, a dispute with regard to that subject-matter.”¹⁶³ In particular, the statements must “articulate[] an alleged breach” and the “particulars” of the conduct giving rise to it.¹⁶⁴

¹⁵⁶ See, e.g., *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, Preliminary Objections, Judgment, I.C.J. Reports 2016 (RL-067), p. 27, para. 52.

¹⁵⁷ *Mavrommatis Palestine Concessions*, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2 (RL-021), p. 11.

¹⁵⁸ *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom)*, Preliminary Objections, Judgment, I.C.J. Reports 2016 (RL-070), p. 855, para. 57.

¹⁵⁹ See, e.g., *id.*, p. 849, para. 37.

¹⁶⁰ See, e.g., *id.*; *Republic of Ecuador v. United States of America*, PCA Case No. 2012-5, Award (29 Sep. 2012) (RL-052), para. 212.

¹⁶¹ See, e.g., *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, Preliminary Objections, Judgment, I.C.J. Reports 2016 (RL-067), p. 26, para. 50.

¹⁶² See, e.g., *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom)*, Preliminary Objections, Judgment, I.C.J. Reports 2016 (RL-070), p. 849, para. 39.

¹⁶³ *Id.*, p. 853, para. 49.

¹⁶⁴ *Id.*, pp. 853-855, paras. 50-51, 57.

103. Importantly, a dispute must exist as to each separate claim.¹⁶⁵ Even when the underlying facts of distinct claims are connected, exchanges concerning one claim cannot demonstrate the existence of a dispute as to a separate claim that raises “different legal problems.”¹⁶⁶

104. Here, the facts show that, at the time of the Notice of Arbitration, there was no existing dispute between the Parties concerning Article 7.

105. On 8 October 2021, Azerbaijan sent its first notice of dispute under the ECT. The notice mentioned only Article 18 and *not* Article 7.¹⁶⁷ Nor did it mention the alleged suspension of the Yevlakh-Nakhijevan pipeline, any issues pertaining to the territory of Armenia, or anything to do with natural gas or transit. The same is true of its clarification of the scope of its notice of dispute two months later,¹⁶⁸ and all its correspondence during the year of negotiations that followed.¹⁶⁹

106. Only on 16 December 2022, *i.e.* 14 months later, did Azerbaijan raise for the first time—as an “[REDACTED]”—its allegations based on Article 7 and the alleged suspension of the pipeline. It did so in a cursory and cryptic fashion:



¹⁶⁵ See *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, Preliminary Objections, Judgment, I.C.J. Reports 2016 (RL-067), p. 31, para. 67 (“Nicaragua makes two distinct claims — one that Colombia has violated Nicaragua’s sovereign rights and maritime zones, and the other that Colombia has breached its obligation not to use or threaten to use force. The Court will examine these two claims separately in order to determine, with respect to each of them, whether there existed a dispute within the meaning set out [...] above at the date of filing of the Application.”) (emphasis added). In *Nicaragua v. Colombia*, after analyzing the dispute requirement for each claim separately, the Court found that a dispute existed as to Nicaragua’s first claim but *not* as to its second claim, and thus rejected jurisdiction over that claim. *Id.*, paras. 78-79.

¹⁶⁶ *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, I.C.J. Reports 2012 (RL-051), p. 444, para. 54.

¹⁶⁷ Compilation of the Parties’ Pre-Arbitration Exchanges (CE-063), [PDF] pp. 2-3, Azerbaijan’s Notice of Dispute of 8 October 2021.

¹⁶⁸ *Id.*, [PDF] pp. 9-10, Letter from Azerbaijan to Armenia (20 Dec. 2021).

¹⁶⁹ See generally, Compilation of the Parties’ Pre-Arbitration Exchanges (CE-063), [PDF] pp. 1-81.

[REDACTED]
[REDACTED]¹⁷⁰

107. This new claim, which came as a surprise at the time, appears to have been raised in reaction to Armenia's letter to the ICJ sent two days prior, on 14 December 2022.¹⁷¹ In that letter, Armenia pointed out that Azerbaijan had, since 13 December 2022, cut off the supply of gas to Nagorno-Karabakh, leaving tens of thousands of ethnic Armenians freezing in the winter cold.

108. On 16 January 2023, Armenia responded to Azerbaijan, noting that its new Article 7 allegations appeared "[REDACTED]" which had never been raised before. In light of the inchoate nature of Azerbaijan's allegations, Armenia requested more information in order to be able to formulate its views and respond accordingly.¹⁷² While reserving all rights under the ECT, Armenia did not express its views on the alleged breach of Article 7:

[REDACTED]

[REDACTED]

[REDACTED]
[REDACTED]¹⁷³

109. On 24 February 2023, Azerbaijan replied to Armenia's letter but failed to provide any additional information on its Article 7 claim. In fact, Azerbaijan's letter did not contain any

¹⁷⁰ *Id.*, [PDF] p. 82, Letter from Azerbaijan to Armenia (16 Dec. 2022).

¹⁷¹ Letter from Armenia to the Registrar of the ICJ (14 Dec. 2022) [CONFIDENTIAL] (**RE-0026**).

¹⁷² Compilation of the Parties' Pre-Arbitration Exchanges (**CE-063**), [PDF] p. 86, Letter from Armenia to Azerbaijan (16 Jan. 2023).

¹⁷³ *Id.*, [PDF] p. 86, Letter from Armenia to Azerbaijan (16 Jan. 2023) (emphasis added).

mention of the alleged interruption of the pipeline transit, nor Article 7, except in a short footnote alleging that the Article 7 claim somehow formed part of the Article 18 dispute.¹⁷⁴

110. The Parties had no more exchanges on this issue after that. Three days later, on 27 February 2023, Azerbaijan filed its Notice of Arbitration.

111. These exchanges cannot establish the existence of a dispute concerning Article 7 for at least three reasons.

112. *First*, Azerbaijan did not describe its claims with “sufficient clarity to enable” Armenia to “identify that there is, or may be, a dispute with regard to that subject-matter.”¹⁷⁵ Azerbaijan’s Letter of 16 December 2022, in which it raised an alleged breach of Article 7 for the first time, failed to provide the “[REDACTED]”.¹⁷⁶ It merely mentioned an alleged “[REDACTED]”, without providing specific dates, the location of the alleged interruption, or information about the specific type of transit.¹⁷⁷ Moreover, Azerbaijan did not identify or attempt to explain which of Article 7’s provisions Armenia had allegedly breached.

113. *Second*, and in any event, at the time of the Notice of Arbitration, Azerbaijan’s allegation of an undefined breach of Article 7 was not “positively opposed” by Armenia. As explained above, faced with a vague allegation purportedly implicating Article 7, Armenia “[REDACTED]”.¹⁷⁸ Instead of explaining its position and awaiting a response from Armenia, Azerbaijan provided no further information and

¹⁷⁴ See Compilation of the Parties’ Pre-Arbitration Exchanges (CE-063), [PDF] pp. 87-89, Letter from Azerbaijan to Armenia (24 Feb. 2023), note 8 (“[REDACTED]”).

[REDACTED]). As explained below, this characterization of the dispute is incorrect.

¹⁷⁵ *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom)*, Preliminary Objections, Judgment, I.C.J. Reports 2016 (RL-070), p. 853, para. 49.

¹⁷⁶ Compilation of the Parties’ Pre-Arbitration Exchanges (CE-063), [PDF] p. 82, Letter from Azerbaijan to Armenia (16 Dec. 2022).

¹⁷⁷ *Id.*, [PDF] p. 82, Letter from Azerbaijan to Armenia (16 Dec. 2022).

¹⁷⁸ Compilation of the Parties’ Pre-Arbitration Exchanges (CE-063), [PDF] pp. 86, Letter from Armenia to Azerbaijan (16 Jan. 2023).

proceeded to institute the present proceedings. By that point, Armenia had not expressed any views on Azerbaijan’s unspecific allegations, and was, in fact, never given an opportunity to do so.¹⁷⁹

114. *Third*, contrary to Azerbaijan’s assertion,¹⁸⁰ its new allegations under Article 7 had nothing to do with the Parties’ dispute concerning Article 18, and cannot now be subsumed within that dispute for the purpose of satisfying the jurisdictional requirements of Article 27. As explained, Azerbaijan’s claims under Article 18, an article located in the “Miscellaneous” Part IV of the ECT, concern what it describes as the “customary principle of permanent sovereignty over natural resources.”¹⁸¹ By contrast, Article 7 concerns the transit of energy and is located in the ECT’s Part II on “Commerce.” It imposes a distinctive and self-contained legal regime for Transit States (inspired by the trade-law regime of the General Agreement on Tariffs and Trade (“GATT”)),¹⁸² with its own dispute-resolution mechanism and its own definitions section.¹⁸³ Moreover, these two claims also have factual bases that do not overlap: Azerbaijan’s claims under Article 18 are based on Armenia’s alleged exploitation of resources (hydropower and coal) in Nagorno-Karabakh,¹⁸⁴ while the Article 7 claims allege conduct in relation to the Yevlakh-Nakhijevan natural gas pipeline within *Armenia’s* own territory.¹⁸⁵ These are thus separate claims that raise “different legal

¹⁷⁹ This is a far cry from a case in which the respondent failed to respond altogether “where a response was called for.” See *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom)*, Preliminary Objections, Judgment, I.C.J. Reports 2016 (RL-070), p. 850, para. 40. Even if that had been the case, the tribunal in *Ecuador v. United States* correctly noted that the inference of “positive opposition” from silence is warranted “only when all other reasonable interpretations of the respondent’s conduct and surrounding facts can be excluded.” *Republic of Ecuador v. United States of America*, PCA Case No. 2012-5, Award (29 Sep. 2012) (RL-052), para. 223. Here, even if Armenia’s correspondence of 16 January 2023 could be interpreted as “silence” (quod non), opposition could not be inferred from it as there would be another reasonable interpretation for this silence, which is that Armenia needed to obtain more information about Azerbaijan’s Article 7 claim before it could formulate an opinion.

¹⁸⁰ See Statement of Claim, paras. 175-176; Compilation of the Parties’ Pre-Arbitration Exchanges (CE-063), [PDF] pp. 87-89, Letter from Azerbaijan to Armenia (24 Feb. 2023), note 8.

¹⁸¹ Statement of Claim, para. 181.

¹⁸² See Energy Charter Treaty with Related Documents (CL-001), ECT, Article 7(1); K. Hobér, *The Energy Charter Treaty: A Commentary* (OUP, 2020) (CL-059), pp. 160-161.

¹⁸³ See Energy Charter Treaty with Related Documents (CL-001), ECT, Article 7(10). In particular, “Transit” is defined at Article 7(10)(a) as opposed to being defined with other defined terms in Article 1 of the ECT.

¹⁸⁴ See Statement of Claim, Section V.

¹⁸⁵ See *id.*, paras. 138 (alleging that “Armenia had terminated the supply of gas to Nakhchivan by cutting the Y-N Pipeline near the Armenia-Nakhchivan border,” i.e., in Armenia.) (emphasis added), 246-247 (“[B]y interrupting the flow of gas from Garabagh to Nakhcivan as it transited through Armenia [...]”) (emphasis added). Thus, this alleged conduct cannot, by Azerbaijan’s own definition, be relevant to Article 18.

problems,”¹⁸⁶ and the requirement of the existence of a dispute must be established “*with respect to each of them*.”¹⁸⁷

115. In sum, at the time of the Notice of Arbitration, a dispute as to Article 7 did not exist between the Parties. Therefore, the Tribunal lacks jurisdiction *ratione materiae* over that claim.

2. Even If It Existed, a Dispute Based on Article 7 Would Be Outside of the Tribunal’s Jurisdiction *Ratione Voluntatis* Because Azerbaijan Has Not Fulfilled the Requirement of Negotiations

116. Article 27(1) provides that the “Contracting Parties shall endeavour to settle disputes concerning the application or interpretation of this Treaty through diplomatic channels.” It is only “[i]f a dispute has not been settled in accordance with paragraph (1) within a reasonable period of time,”¹⁸⁸ that a party may submit the dispute to arbitration. Article 27 thus conditions the Parties’ consent to arbitration on this pre-requisite of diplomatic negotiations.¹⁸⁹

117. It is well established that to fulfill a negotiation requirement, there must be “a genuine attempt by one of the disputing parties to engage in discussions with the other disputing party, with a view to resolving the dispute,”¹⁹⁰ typically through several rounds of exchanges. Further, Article 27(1) requires parties to negotiate for a “reasonable period of time.” The determination of whether negotiations have been attempted for a “reasonable period of time” under Article 27 includes “an assessment of whether continued negotiations are meaningful, or rather futile.”¹⁹¹ As the ICJ has held, negotiations are considered to be futile when “no reasonable

¹⁸⁶ *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, I.C.J. Reports 2012 (RL-051), p. 444, para. 54.

¹⁸⁷ See *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, Preliminary Objections, Judgment, I.C.J. Reports 2016 (RL-067), p. 31, para. 67 (emphasis added).

¹⁸⁸ Energy Charter Treaty with Related Documents (CL-001), ECT, Article 27(1)-(2); Energy Charter Treaty with Related Documents (French Version) (17 Dec. 1994) (RL-020) (“1. Les parties contractantes s’efforcent de régler les différends relatifs à l’application ou l’interprétation du présent traité par la voie diplomatique. 2. Lorsqu’un différend n’a pas été réglé conformément au paragraphe 1 dans un délai raisonnable [...]”).

¹⁸⁹ See, e.g., *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary Objections, Judgment, I.C.J. Reports 2011 (RL-048), p. 124, para. 131 (“[P]rior resort to negotiations or other methods of peaceful dispute settlement performs an important function in indicating the limit of consent given by States.”) (emphasis added).

¹⁹⁰ See, e.g., *id.*, p. 132, para. 157.

¹⁹¹ K. Hobér, *The Energy Charter Treaty: A Commentary* (OUP, 2020) (CL-059), p. 479.

probability exists that further negotiations would lead to a settlement.”¹⁹² This may occur when one of the parties refuses to enter into negotiations,¹⁹³ fails to respond to an invitation to negotiate,¹⁹⁴ or when the parties’ respective positions have not evolved after several rounds of negotiations.¹⁹⁵

118. Here, even assuming *arguendo* that a dispute as to Article 7 existed, Azerbaijan would not have made a genuine attempt to resolve the purported dispute for “a reasonable period of time,” and there can be no question of negotiations being futile. As explained, while the Parties negotiated about Article 18 for over a year since October 2021, Azerbaijan did not bring up any gas pipeline or Article 7 until 16 December 2022, and with little specificity.¹⁹⁶ Armenia responded by asking Azerbaijan to elaborate on its factual and legal bases, and indicating that it stood “[REDACTED]”¹⁹⁷ Azerbaijan never provided the requested information, and instead initiated this arbitration three days later. Even then, Armenia offered to refer the matter to the ECT Secretariat’s good offices, but Azerbaijan refused.¹⁹⁸

¹⁹² *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, I.C.J. Reports 2012 (RL-051), p. 445, para. 57.

¹⁹³ See, e.g., *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, Judgment, I.C.J. Reports 1980 (RL-030), p. 27, para. 51 (“[The United States] attempts to negotiate with Iran in regard to the overrunning of its Embassy and detention of its nationals as hostages had reached a deadlock, owing to the refusal of the Iranian Government to enter into any discussion of the matter.”); *Appeal relating to the Jurisdiction of the ICAO Council under Article II, Section 2, of the 1944 International Air Services Transit Agreement (Bahrain, Egypt and United Arab Emirates v. Qatar)*, Judgment, I.C.J. Reports 2020 (RL-083), p. 204, para. 96 (“Senior officials of the Appellants stated that they would not negotiate with Qatar, recalling the demands that they had addressed to Qatar.”); *Dispute Concerning Delimitation of the Maritime Boundary between Mauritius and Maldives in the Indian Ocean (Mauritius/Maldives)*, ITLOS Case No. 28, Preliminary Objections, Judgment (28 Jan. 2021) (RL-085), p. 98, paras. 289-290 (“[T]he Maldives, for most of the time, refused to negotiate with Mauritius.”).

¹⁹⁴ See, e.g., *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident of Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)*, Preliminary Objections, Judgment, I.C.J. Reports 1998 (RL-012), p. 17, para. 21; *Dispute Concerning Delimitation of the Maritime Boundary between Mauritius and Maldives in the Indian Ocean (Mauritius/Maldives)*, ITLOS Case No. 28, Preliminary Objections, Judgment (28 Jan. 2021) (RL-085), p. 99, para. 291 (“In particular, by not responding to Mauritius’ invitation of 7 March 2019, to a second round of discussions following the Chagos advisory opinion, it became clear that there was nothing more that Mauritius could have accomplished in insisting on having delimitation negotiations with the Maldives.”).

¹⁹⁵ See, e.g., *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan)*, Preliminary Objections, Judgment, 12 November 2024 (RL-101), p. 21, para. 58.

¹⁹⁶ Compilation of the Parties’ Pre-Arbitration Exchanges (CE-063), [PDF] p. 82, Letter from Azerbaijan to Armenia (16 Dec. 2022).

¹⁹⁷ *Id.*, [PDF] p. 86, Letter from Armenia to Azerbaijan (16 Jan. 2023) (emphasis added).

¹⁹⁸ See Letter from Armenia to the Energy Charter Secretariat (27 Apr. 2023) (RE-0030); Letter from the Energy Charter Secretariat to the Parties (23 May 2023) (RE-0031).

119. The Parties' sole written exchange stands in stark contrast to cases in which the ICJ has found a "genuine attempt" to negotiate, which involved several months or even years of negotiations, many meetings between the parties, and detailed statements of the claims' factual and legal bases.¹⁹⁹ Nor is this a case in which Armenia failed to respond or refused to negotiate with Azerbaijan.

120. Contrary to what Azerbaijan suggests,²⁰⁰ negotiations about Article 18 claims cannot show that the negotiation requirement for Article 7 claims was fulfilled. It is well established that "the subject-matter of the negotiations *must relate to the subject-matter of the dispute* which, in turn, must concern the substantive obligations contained in the treaty in question."²⁰¹ As explained above, Azerbaijan's claims based on Articles 18 and 7 have different subject matters—*i.e.*, factual and legal bases—and would therefore form part of separate disputes. Thus, negotiations concerning Article 18 cannot fulfill the negotiation requirement for Article 7 claims.

3. Even If There Were a Dispute as to Article 7 (*Quod Non*), Azerbaijan's Claims Would Still Be Outside of the Tribunal's Jurisdiction Due to Article 7(7)'s Mandatory Dispute-Resolution Mechanism

121. Even assuming *arguendo* that a dispute existed at the time of the Notice of Arbitration, and had been subject to negotiations, such a dispute would in any event have been excluded from the scope of Article 27. Article 27 provides for disputes to be resolved by arbitration "except as otherwise provided in this Treaty,"²⁰² in which case, such disputes would fall outside the

¹⁹⁹ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan)*, Preliminary Objections, Judgment, 12 November 2024 (RL-101), pp. 20-21, paras. 53-58 (several rounds of negotiations, exchanges, and face-to-face meetings over several months); *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, Preliminary Objections, Judgment, I.C.J. Reports 2019 (RL-077), p. 603, para. 120 (two years of diplomatic correspondence and face-to-face meetings); *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, I.C.J. Reports 2012 (RL-051), p. 446, para. 58 (several exchanges and meetings over the course of several months).

²⁰⁰ Statement of Claim, paras. 175-176.

²⁰¹ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary Objections, Judgment, I.C.J. Reports 2011 (RL-048), pp. 124, 133, paras. 131, 161 (emphasis added). In *Georgia v. Russia*, the Court noted that while there was a possibility of future peace negotiations, these negotiations did not concern racial discrimination and thus could not satisfy the requirement of negotiations under CERD. *Id.*, p. 139, para. 180.

²⁰² Energy Charter Treaty with Related Documents (CL-001), ECT, Article 27(2); Energy Charter Treaty with Related Documents (French Version) (17 Dec. 1994) (RL-020), ECT, Article 27(2) ("[A] moins que le présent traité n'en dispose autrement.").

jurisdiction *ratione materiae* of a tribunal constituted under Article 27.²⁰³ Here, the purported dispute in relation to Article 7—if it existed (*quod non*)—falls outside Article 27’s scope because Article 7(7) provides for another dispute-resolution mechanism for transit disputes under Article 7.

122. Article 7(7) provides in relevant part that:

The following provisions shall apply to a dispute described in paragraph (6), but only following the exhaustion of all relevant contractual or other dispute resolution remedies previously agreed between the Contracting Parties party to the dispute or between any entity referred to in paragraph (6) and an entity of another Contracting Party party to the dispute.²⁰⁴

123. Article 7(7) applies to disputes “described in paragraph (6).” Article 7(6) in turn refers to a “dispute over *any matter arising from*” Transit through the Area of a Contracting Party.²⁰⁵ Article 7(10) defines “Transit”, *i.e.*, the subject of Article 7 as a whole, as including “the carriage through the Area of a Contracting Party of Energy Materials and Products originating in the Area of another Contracting Party and destined for the Area of that other Contracting Party.”²⁰⁶ Article 7(7) thus applies to any matter arising from such transit. Since the purported dispute would be over the alleged suspension of gas flow between Yevlakh (located in Azerbaijan) to Nakhijevan (Azerbaijan’s exclave) through the territory of Armenia,²⁰⁷ the dispute would have concerned “Transit” within the meaning of Article 7(10)(a)(ii), and thus fallen within the scope of Article 7(7).

124. Article 7(7) derogates from the general dispute-settlement provision of Article 27 by providing that its dispute-resolution provisions “*shall* apply to a dispute described in paragraph

²⁰³ K. Hobér, *The Energy Charter Treaty: A Commentary* (OUP, 2020) (CL-059), p. 480.

²⁰⁴ Energy Charter Treaty with Related Documents (CL-001), ECT, Article 7(7); Energy Charter Treaty with Related Documents (French Version) (17 Dec. 1994) (RL-020), ECT, Article 7(7), Chapeau (“Les dispositions qui suivent s’appliquent au différend décrit au paragraphe 6, mais uniquement après épuisement de tous les moyens contractuels ou autres de règlement des différends préalablement convenus entre les parties contractantes parties au différend ou entre toute entité visée au paragraphe 6 et une entité d’une autre partie contractante partie au différend.”).

²⁰⁵ Energy Charter Treaty with Related Documents (CL-001), ECT, Article 7(6) (emphasis added); Energy Charter Treaty with Related Documents (French Version) (17 Dec. 1994) (RL-020), Article 7(6) (“en cas de différend portant sur une question quelconque soulevée par ce transit [...]”).

²⁰⁶ Energy Charter Treaty with Related Documents (CL-001), ECT, Article 7(10); Energy Charter Treaty with Related Documents (French Version) (17 Dec. 1994) (RL-020), ECT, Article 7(10)(a)(ii) (“Aux fins du présent article [...] « Transit » désigne : [...] le transport, à travers la zone d’une partie contractante, de produits et matières énergétiques originaires de la zone d’une autre partie contractante et destinés à la zone de cette autre partie contractante, [...]”).

²⁰⁷ See, e.g., Statement of Claim, paras. 10, 31, 131-132, 134, 246.

(6).”²⁰⁸ The ordinary meaning of the word “shall” denotes that this is a mandatory dispute-resolution mechanism for transit disputes.²⁰⁹

125. That this mechanism is mandatory is confirmed by the purpose of Article 7(7), which was to provide a quick dispute-settlement method—conciliation—for transit-related disputes after many such disputes arose due to the break-up of the Soviet Union.²¹⁰ The dispute must first be referred to the Secretary General of the Energy Charter Secretariat,²¹¹ who must appoint a conciliator within 30 days of such a referral.²¹² The appointed conciliator must secure an agreement of the Parties for the resolution of the dispute within 90 days, failing which, the conciliator recommends “a resolution to the dispute or a procedure to achieve such resolution.”²¹³ By contrast,

²⁰⁸ Azerbaijan’s own legal authorities confirm this understanding. See A. Konoplyanik and T. Walde, “Energy Charter Treaty and its Role in International Energy” in *Journal of Energy & Natural Resources Law* (Volume 24, 2006) (CL-042), pp. 546-547 (“Article 27 of the ECT [...] applies to the application and interpretation of the Treaty as a whole — with very limited exceptions. Special provisions have been developed in the ECT for the resolution of inter-state disputes in the area of trade (Article 29, Annex D) and transit (Article 7). They derogate from the otherwise applicable general provisions on state-to-state dispute settlement.”) (emphasis added); Danae Azaria, “Energy Transit under the Energy Charter Treaty and the General Agreement on Tariffs and Trade in *Journal of Energy & Natural Resources Law* (Volume 27, 2009) (CL-045), pp. 563-564 (“The ECT [...] establishes compulsory dispute resolution mechanisms; two general and four special. The general forms are: (1) state-to-state arbitration concerning the application or interpretation of the ECT (Article 27) [...] The special forms comprise dispute settlement mechanisms for: 1. transit disputes (Article 7(7)).”).

²⁰⁹ This is the only possible conclusion, especially when read together with Article 7(6), which provides that parties to a dispute within its scope “shall not [...] interrupt or reduce, permit any entity subject to its control to interrupt or reduce, or require any entity subject to its jurisdiction to interrupt or reduce the existing flow of Energy Materials and Products prior to the conclusion of the dispute resolution procedures set out in paragraph (7), except where this is specifically provided for in a contract or other agreement governing such Transit or permitted in accordance with the conciliator’s decision.” Energy Charter Treaty with Related Documents (CL-001), ECT, Article 7(6). This necessarily presupposes that parties to such a dispute must refer it to the dispute-resolution mechanism of Article 7(7), otherwise, Article 7(6) would have no *effet utile*. To argue the opposite would lead to the absurd result whereby a party to such a transit dispute would *never* be allowed to interrupt or reduce transit even after the dispute was resolved by other means than through Article 7(7). Notably, in its Notice of Arbitration, Azerbaijan had originally alleged a violation of Article 7(6), claiming that it prohibited the “‘interrupt[ion] or reduc[tion]’ of ‘existing flow[s] of Energy Materials and Products’ pending resolution of ‘a dispute over any matter arising from that Transit.’” See Notice of Arbitration, para. 53(e) (emphasis added). In its Statement of Claim, Azerbaijan appears to have abandoned that argument. See Statement of Claim, paras. 246-249.

²¹⁰ See T. Wälde (ed.), *The Energy Charter Treaty: An East-West Gateway for Investment and Trade* (Kluwer, 1996) (RL-035), pp. 511-512; Letter from C. Bamberger to H. Steeg and J. Ferriter re: 24-26 March Plenary Session, European Energy Charter Treaty Negotiations (30 Mar. 1993) (CL-026), [PDF] p. 3 (discussing “a working group [...] to try to work out provisions to regulate ‘transit breakdowns’ in the former Soviet Union and Eastern Europe.”).

²¹¹ Energy Charter Treaty with Related Documents (CL-001), ECT, Article 7(7)(a).

²¹² *Id.*, ECT, Article 7(7)(b).

²¹³ *Id.*, ECT, Article 7(7)(c).

Article 27, which was not intended for transit disputes,²¹⁴ offers a more complex dispute-resolution mechanism that could take years to conclude.

126. Thus, since Azerbaijan’s purported dispute would fall within the scope of Article 7(7), it would be excluded from the Tribunal’s jurisdiction under Article 27. Azerbaijan should instead have raised the purported dispute when it first occurred and referred it to the conciliation mechanism of Article 7(7). Needless to say, at no point in time since the entry into force of the ECT did Azerbaijan even attempt to do so.

4. In Any Event, Azerbaijan’s Claims Are Outside of the Tribunal’s Jurisdiction *Ratione Materiae* Because Armenia’s Alleged Conduct Is Not Capable of Breaching Article 7

127. Article 27 limits the Tribunal’s jurisdiction to disputes “concerning the application or interpretation” of the ECT.²¹⁵ As explained, to determine whether Azerbaijan’s claims under Article 7 fall within the Tribunal’s jurisdiction *ratione materiae*, the Tribunal must ascertain “whether the violations of the Treaty [...] pleaded by [Azerbaijan] do or do not fall within the provisions of the [t]reaty.”²¹⁶ More specifically, the Tribunal must determine whether the impugned conduct, if proven, is “capable of constituting violations of obligations under the treaty.”²¹⁷

128. Azerbaijan alleges that Armenia violated Article 7 by “interrupting the flow of gas from Garabagh to Nakhchivan as it transited through Armenia”²¹⁸ sometime in December 1991.²¹⁹ As explained in more detail below, this event falls outside the scope of the Tribunal’s jurisdiction *ratione temporis*, as it occurred before the entry into force of the ECT for both Parties in 1998.²²⁰ Azerbaijan seeks to bypass this temporal limitation by arguing that Armenia “maintained this

²¹⁴ See K. Hobér, *The Energy Charter Treaty: A Commentary* (OUP, 2020) (CL-059), p. 170 (“Arbitration pursuant to Article 27 is not specifically intended for transit disputes, but rather for disputes in general concerning the interpretation and application of the ECT.”).

²¹⁵ Energy Charter Treaty with Related Documents (CL-001), ECT, Article 27(1).

²¹⁶ *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Preliminary Objection, Judgment, I.C.J. Reports 1996 (RL-037), p. 809, para. 16.

²¹⁷ *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation: 32 States Intervening)*, Preliminary Objections, Judgment, 2 February 2024 (RL-097), p. 54, para. 136.

²¹⁸ Statement of Claim, para. 246.

²¹⁹ *Id.*, para. 137.

²²⁰ See *infra* Section III(C).

disruption of transit throughout the occupation, well past the ECT's entry into force for both Parties in 1998.”²²¹ This factual allegation, even if it were true, is not capable of constituting the violations of Article 7 which Azerbaijan alleges. This is because Article 7 cannot be interpreted so as to create an obligation for a Contracting Party to allow transit that is not *already established* on its territory.²²²

129. In contrast to Article V of the GATT, Article 7 does not mandate an “unconditional” freedom of transit or the establishment of new transit on specific terms.²²³ Rather, Article 7(1) imposes only an obligation of conduct²²⁴ for States to:

[T]ake the necessary measures to facilitate the Transit of Energy Materials and Products consistent with the principle of freedom of transit and without distinction as to the origin, destination or ownership of such Energy Materials and Products or discrimination as to pricing on the basis of such distinctions, and without imposing any unreasonable delays, restrictions or charges.²²⁵

130. As commentators have interpreted it, this is only a due diligence obligation “to ensure that there is no interruption of transit and no discrimination, unreasonable restrictions, delays, or charges for transit, and also to facilitate transit by making sure that their respective domestic rules and regulations on transit meet the aforesaid requirements.”²²⁶ Such obligations can

²²¹ Statement of Claim, para. 247.

²²² See T. Wälde (ed.), *The Energy Charter Treaty: An East-West Gateway for Investment and Trade* (Kluwer, 1996) (RL-035), p. 500. Even the authority that Azerbaijan cites makes clear that Article 7 is concerned only with “established energy flows in transit.” See Danae Azaria, *Treaties on Transit of Energy Via Pipelines and Countermeasures* (OUP, 2015) (CL-052), pp. 62-63; see also *id.*, p. 73 (“Article 7 obliges transit ECT Contracting Parties to take the necessary measures to facilitate and secure transit (*of established energy flows*)”) (emphasis added). Azerbaijan cites this authority but omits this important qualification. See Statement of Claim, para. 245, note 471.

²²³ K. Hobér, *The Energy Charter Treaty: A Commentary* (OUP, 2020) (CL-059), p. 158; T. Wälde (ed.), *The Energy Charter Treaty: An East-West Gateway for Investment and Trade* (Kluwer, 1996) (RL-035), pp. 509, 512.

²²⁴ Danae Azaria, *Treaties on Transit of Energy Via Pipelines and Countermeasures* (OUP, 2015) (CL-052), p. 68.

²²⁵ Energy Charter Treaty with Related Documents (CL-001), ECT, Article 7(1); Energy Charter Treaty with Related Documents (French Version) (17 Dec. 1994) (RL-020), (“Chaque partie contractante prend les mesures nécessaires pour faciliter le transit des matières et produits énergétiques en conformité avec le principe de libre transit et sans distinction quant à l’origine, à la destination ou à la propriété de ces matières et produits énergétiques ni discrimination quant à une formation des prix faite sur la base de telles distinctions, de même que sans imposer de retards, de restrictions ou de taxes déraisonnables.”). By contrast, Article V of the GATT provides that “[t]here *shall be freedom of transit* through the territory of each contracting party [...]” See General Agreement on Tariffs and Trade (1947) (RL-022), Article V(2) (emphasis added).

²²⁶ K. Hobér, *The Energy Charter Treaty: A Commentary* (OUP, 2020) (CL-059), p. 158; see also Danae Azaria, *Treaties on Transit of Energy Via Pipelines and Countermeasures* (OUP, 2015) (CL-052), p. 68 (“[T]he obligation (as read in all authentic treaty texts) is *one of due diligence*. ECT Contracting Parties are obliged to show a degree of vigilance in adopting a regulatory framework within their domestic legal system, which facilitates transit without discrimination, unreasonable restrictions, delays, or charges, and in enforcing their relevant regulations on public and

by definition only apply to *established* transit at the time of the ECT's entry into force in the relations of the Parties; they do not imply a unilateral right for Azerbaijan to impose the establishment of *new* transit on the territory of Armenia, let alone in the context of an armed conflict. Therefore, the fact that Armenia did not establish new transit through the Yevlakh-Nakhijevan after the entry into force of the ECT is not an omission capable of breaching Article 7(1).

131. Azerbaijan also argues that Armenia breached Articles 7(2)(c), 7(3), and 7(5).²²⁷ But these provisions are no more at play here than Article 7(1).

132. *First*, Article 7(2)(c) obliges States to only “encourage relevant entities to cooperate in [...] measures to mitigate the effects of interruptions in the supply of Energy Materials and Products.”²²⁸ The provision does not entail an obligation to *ensure* that entities cooperate²²⁹—let alone an obligation to establish transit or to actually mitigate the effects of interruptions. As commentators have noted, Article 7(2)'s prescription is “soft” in nature²³⁰ and “serve[s] as general encouragement to co-operate on an international scale concerning transit issues.”²³¹ According to Professor Hobér, the provision “does not [...] demand very much of the Contracting Parties in terms of specific and concrete results of the co-operation.”²³² Azerbaijan has alleged no facts that, if

private operators of pipeline/cable systems within their jurisdiction.”) (emphasis added); T. Wälde (ed.), *The Energy Charter Treaty: An East-West Gateway for Investment and Trade* (Kluwer, 1996) (CL-035), p. 510.

²²⁷ Statement of Claim, paras. 248-249.

²²⁸ Energy Charter Treaty with Related Documents (CL-001), ECT, Article 7(2)(c); Energy Charter Treaty with Related Documents (French Version) (17 Dec. 1994) (RL-020) (“Les parties contractantes encouragent les instances compétentes à coopérer [...] aux mesures visant à compenser les effets des interruptions de l’approvisionnement en matières et produits énergétiques.”).

²²⁹ K. Hobér, *The Energy Charter Treaty: A Commentary* (OUP, 2020) (CL-059), p. 161; C. G. Stănescu, “Article 7, Transit,” in R. Leal-Arcas, *Commentary on the Energy Charter Treaty* (Elgar, 2nd Ed., 2023) (RL-092), para. 7.07; Danae Azaria, *Treaties on Transit of Energy Via Pipelines and Countermeasures* (OUP, 2015) (CL-052), p. 72.

²³⁰ K. Hobér, *The Energy Charter Treaty: A Commentary* (OUP, 2020) (CL-059), p. 161; *see also* A. Konoplyanik and T. Walde, “Energy Charter Treaty and its Role in International Energy” in *Journal of Energy & Natural Resources Law* (Volume 24, 2006) (CL-042), p. 543 (“Article 7 [...] creates [...] a *soft obligation* to favour the construction of new facilities.”) (emphasis added); Danae Azaria, *Treaties on Transit of Energy Via Pipelines and Countermeasures* (OUP, 2015) (CL-052), p. 72 (“This is an obligation of conduct, but of lower normative quality than the obligation to facilitate in paragraph 1 and to secure in paragraph 5.”).

²³¹ K. Hobér, *The Energy Charter Treaty: A Commentary* (OUP, 2020) (CL-059), p. 161.

²³² *Id.*

established, could amount to a violation of this obligation of conduct to encourage cooperation among relevant entities.²³³

133. *Second*, Azerbaijan mischaracterizes Article 7(3)’s obligation as a general obligation to treat transit in “no less favorable a manner” than comparable materials originating in or destined for its own territory.²³⁴ But the text of Article 7(3) contains no such obligation—rather, it only provides that each Contracting Party:

[U]ndertakes that *its provisions* relating to transport of Energy Materials and Products and the use of Energy Transport Facilities shall treat Energy Materials and Products in Transit in no less favourable a manner than *its provisions* treat such materials and products originating in or destined for its own Area, unless an existing international agreement provides otherwise.²³⁵

134. As commentators have explained, the prohibition of discrimination in Article 7(3) thus covers only “discriminatory treatments that would arise from *different legal regimes* applicable to energy materials and products or *legal regimes* governing the use of energy transportation facility.”²³⁶ Azerbaijan has alleged no facts relating to Armenia’s legal regime which, if established, could amount to a violation of this obligation.

135. *Third*, Article 7(5) enshrines the “core obligation” of Article 7²³⁷ that States must “secure *established* flows of Energy Materials and Products to, from or between the Areas of other

²³³ Azerbaijan has adduced no facts showing that it made efforts to encourage cooperation of relevant entities to mitigate the effects of the interruption of the pipeline transit, and that such efforts were “frustrated” by Armenia.

²³⁴ Statement of Claim, paras. 243, 249.

²³⁵ Energy Charter Treaty with Related Documents (CL-001), ECT, Article 7(3) (emphasis added); Energy Charter Treaty with Related Documents (French Version) (17 Dec. 1994) (RL-020), Article 7(3) (“Chaque partie contractante s’engage à ce que ses dispositions relatives au transport des matières et produits énergétiques et l’utilisation des équipements de transport d’énergie traitent les matières et produits énergétiques en transit d’une manière non moins favorable que les matières et produits originaires de sa propre zone ou destinés à celle-ci, à moins qu’un accord international existant n’en dispose autrement.”).

²³⁶ C. G. Stănescu, “Article 7, Transit,” in R. Leal-Arcas, *Commentary on the Energy Charter Treaty* (Elgar, 2nd Ed., 2023) (RL-092), para. 7.09 (emphasis added); see also K. Hobér, *The Energy Charter Treaty: A Commentary* (OUP, 2020) (CL-059), p. 162 (this only requires a State to “commit itself to ensure that its domestic legislation, regulations, and rules, meet a certain standard with respect to transport of energy materials and the use of transport facilities”).

²³⁷ K. Hobér, *The Energy Charter Treaty: A Commentary* (OUP, 2020) (CL-059), p. 166; see also C. G. Stănescu, “Article 7, Transit,” in R. Leal-Arcas, *Commentary on the Energy Charter Treaty* (Elgar, 2nd Ed., 2023) (RL-092), para. 7.27.

Contracting Parties.”²³⁸ Crucially, the obligation applies expressly only to “*established*” existing transit,²³⁹ an important nuance which Azerbaijan fails to grasp.²⁴⁰ As explained, since no transit in the Yevlakh-Nakhijevan pipeline existed at the time of the entry into force of the ECT and thereafter, Armenia was under no obligation to “secure” it.

136. In sum, Azerbaijan’s allegations based on Article 7, even if established, are not “capable of constituting violations of” the ECT,²⁴¹ and thus fall outside the Tribunal’s jurisdiction *ratione materiae*.

5. Armenia’s Objections to the Tribunal’s Jurisdiction Under Article 7 Warrant Preliminary Treatment

137. Armenia’s serious objections to the Tribunal’s jurisdiction to hear Azerbaijan’s Article 7 claims warrant preliminary treatment in a bifurcated phase because they are of an exclusive preliminary character. As explained above, they concern purely legal, jurisdictional issues that can be fully resolved without trespassing on the merits. Moreover, they are capable of disposing of the totality of Azerbaijan’s claims under Article 7, one of only two provisions on which it bases its claims. Upholding *any* one of these objections would therefore result in a material reduction in the scope of the case, thereby also contributing to procedural efficiency.

C. Azerbaijan’s Claims Under the ECT Are Precluded by Temporal Limitations, Which Should Be Examined in a Preliminary Phase

138. Not only are Azerbaijan’s claims outside of the Tribunal’s jurisdiction *ratione materiae*, but they are also precluded by temporal limitations. As explained below, Azerbaijan’s claims fall outside of the ECT’s temporal scope of application, placing them outside the Tribunal’s jurisdiction *ratione temporis* (**Section III.C.1**). Moreover, or in the alternative, Azerbaijan’s

²³⁸ Energy Charter Treaty with Related Documents (**CL-001**), ECT, Article 7(5) (emphasis added); Energy Charter Treaty with Related Documents (French Version) (17 Dec. 1994) (**RL-020**), ECT, Article 7(5) (“Les parties contractantes garantissent, sous réserve des paragraphes 6 et 7, le transit de flux *établis* de matières et produits énergétiques à destination ou en provenance des zones d’autres parties contractantes ou entre ces zones.”) (emphasis added).

²³⁹ K. Hobér, *The Energy Charter Treaty: A Commentary* (OUP, 2020) (**CL-059**), p. 165; C. G. Stănescu, “Article 7, Transit,” in R. Leal-Arcas, *Commentary on the Energy Charter Treaty* (Elgar, 2nd Ed., 2023) (**RL-092**), paras. 7.26-7.27.

²⁴⁰ Statement of Claim, para. 248.

²⁴¹ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan), Preliminary Objections, Judgment, 12 November 2024* (**RL-101**), p. 27, para. 90.

quarter-century delay in presenting its claims renders them inadmissible (Section III.C.2). Both objections are of an exclusively preliminary character and warrant bifurcation (Section III.C.3).

1. The Tribunal Lacks Jurisdiction *Ratione Temporis* over Azerbaijan's Claims

139. All of Azerbaijan's claims, namely, that Armenia allegedly (i) denied access to its energy resources in the so-called "Occupied Territories,"²⁴² (ii) expropriated those resources,²⁴³ and (iii) impaired Azerbaijan's development of its resources,²⁴⁴ crystallized when Azerbaijan lost access to the relevant territories in the early 1990s, years before the ECT entered into force between the Parties in 1998. Consequently, the alleged breaches—which correspond to the *status quo ante* that existed before the ECT's entry into force—are outside of the Treaty's temporal scope of application.

140. In an attempt to circumvent this clear jurisdictional limitation, Azerbaijan predictably argues that "Armenia's conduct constituted continuing wrongful acts or composite acts that crystallized into continuing breaches of the ECT upon or after the Treaty's entry into force for Armenia and Azerbaijan in 1998."²⁴⁵ But this confused argument cannot satisfy Azerbaijan's burden to establish the Tribunal's jurisdiction *ratione temporis*.

141. Azerbaijan characterizes the alleged breaches as "continuing wrongful acts or composite acts,"²⁴⁶ as if those two concepts were interchangeable, misrepresenting their distinct legal nature and ignoring the implication of each category under international law, in particular for the purposes of establishing jurisdiction *ratione temporis*.²⁴⁷ To make matters worse, Azerbaijan

²⁴² Notice of Arbitration, paras. 34, 43.

²⁴³ *Id.*

²⁴⁴ Statement of Claim, para. 15.

²⁴⁵ *Id.*, para. 170.

²⁴⁶ *Id.*

²⁴⁷ As stated by the ILC, "a continuing wrongful act is one which has been commenced but has not been completed at the relevant time." International Law Commission (ILC), *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, Report of the ILC on the work of its Fifty-third Session (2001) (RL-041), Commentary to Article 14, p. 60, para. 5. A composite act, in turn, constitutes "a series of acts or omissions defined in aggregate as wrongful." *Id.*, Article 15, p. 62. Although a composite act may give rise to a continuing breach, characterizing certain conduct as "continuing" or "composite" has distinct consequences. *See id.*, Commentary to Article 15, p. 63, para. 7 ("[A] consequence of the character of a composite act is that the time when the act is accomplished cannot be the time when the first action or omission of the series takes place. It is only subsequently that the first action or omission will appear as having, as it were, inaugurated the series. Only after a series of actions or omissions take place will the composite act be revealed, not merely as a succession of isolated acts, but as a composite act, i.e. an act defined in aggregate as wrongful."). Moreover, "[i]n cases where the relevant obligation did

fails to identify or define the specific acts allegedly constituting the “composite” or “continuing” acts that purportedly breached Articles 18 and 7 of the ECT. A sweeping catch-all “occupation” theory²⁴⁸—which is completely outside the ECT’s material scope of application and is unrelated to the obligations provided in Articles 18 and 7 of the ECT—does not satisfy such a burden.

142. But even applying Azerbaijan’s indiscernible theory of continuing or composite breaches, and accepting the facts as alleged by it, there is no basis for finding either a continuing act or a composite act within the law on State responsibility.

143. *First*, concerning the concept of a continuing act, Azerbaijan lost access to the “Occupied Territories” in the early 1990s, which is when the alleged seizure of resources or ending of transit—*i.e.* the purported wrongful conduct—took place.²⁴⁹ Any such wrongful acts were completed as of that time; they were not acts having a continuing character. The mere fact that the effects or consequences of losing access to the resources in question, or of no longer having transit of some kind, extended beyond the Treaty’s entry into force in 1998 does not place those allegedly wrongful acts within the Treaty’s temporal scope of application. As noted by the International Law Commission (“**ILC**”), “an act does not have a continuing character merely because its effects or consequences extend in time. It must be the wrongful act as such which continues.”²⁵⁰

144. *Second*, the concept of a breach consisting of a composite act requires that there be a series of actions or omissions that, standing alone, do not breach the rule that is at issue. It is only when, at a final stage, the acts or omissions in the aggregate violate the rule that a breach occurs. Yet, again, the allegedly wrongful acts complained of by Azerbaijan either are not composite in

not exist at the beginning of the course of conduct but came into being thereafter, the ‘first’ of the actions or omissions of the series for the purposes of State responsibility will be the first occurring after the obligation came into existence.” *Id.*, Commentary to Article 15, pp. 63-64, para. 11.

²⁴⁸ See, *e.g.*, Statement of Claim, paras. 169, 171.

²⁴⁹ Notice of Arbitration, paras. 34, 43.

²⁵⁰ International Law Commission (ILC), *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, Report of the ILC on the work of its Fifty-third Session (2001) (**RL-041**), Commentary to Article 14, p. 60, para. 6. (“In many cases of internationally wrongful acts, their consequences may be prolonged,” such as when “the economic effects of the expropriation of property continue [...]. Such consequences are the subject of secondary obligations of reparation, including restitution, as required by Part Two of the articles. The prolongation of such effects will be relevant, for example, in determining the amount of compensation payable. They do not, however, entail that the breach is a continuing one.”) Although the ILC also cites the “unlawful occupation of part of the territory of another State” as an example of a continuing wrongful act, Azerbaijan’s theory of Armenia’s occupation of territory does not fall within the scope of the ECT. Rather than complaining about the so-called “occupation,” Azerbaijan must establish that the *specific acts* of which it complains under the ECT were of a continuing character. It has not done so.

nature (e.g., the alleged interruption of transit) or at best are composite but crystalized as a breach during the early 1990s. Indeed, Azerbaijan claims that Armenia allegedly “engaged in the wide-scale expropriation of those resources for its own consumption.”²⁵¹ Under international law, an expropriation occurs when the claimant is deprived of its “ability to manage, use or control its property.”²⁵² While an expropriation can occur either directly or indirectly (including a “creeping” expropriation), it is still the case that the expropriation ultimately occurs at a single, definitive moment, once the acts depriving the owner of their rights have occurred.²⁵³

145. Under Azerbaijan’s own case, the physical seizure of, *inter alia*, the Tartar HPP, the Chardaghli Coalfield, and the Khudafarin and Giz Galasi project sites—which has to be considered the moment of expropriation (direct or indirect)—occurred in the early 1990s, even if its consequences extended over time. Accordingly, allegations pertaining to such alleged seizures and their effects—however formulated²⁵⁴—are outside the Tribunal’s jurisdiction *ratione temporis*.

146. As explained above, Claimant’s allegations concerning “Armenia’s Seizure of Azerbaijan’s Gas Infrastructure and Termination of Gas Supply to Nakhchivan” are also outside

²⁵¹ Notice of Arbitration, para. 34.

²⁵² See, e.g., *JSC DTEK Krymenergo v. Russian Federation*, PCA Case No. 2018-41, Award (1 Nov. 2023) (**RL-095**), p. 131, para. 662 (“Indirect expropriation occurs when the [...] owner is deprived of its ability to manage, use or control its property, without the legal title being affected.”); *9REN Holding S.a.r.l v. Kingdom of Spain*, ICSID Case No. ARB/15/15, Award (31 May 2019) (**RL-079**), para. 363 (“Arbitration tribunals that have interpreted the ECT have shown that, in order for Article 13(1) to characterize a measure as equivalent to expropriation, it must prevent the investor from continuing to enjoy its investment or from using it, or it must restrict some property right attaching to the investment in a severe and devastating manner.”); R. Dolzer, “Expropriation,” in R. Dolzer, U. Kriebaum and C. Schreuer, *Principles of International Investment Law* (3rd Ed., OUP 2022) (**RL-087**), p. 163.

²⁵³ See, e.g., *AES Summit Generation Limited and AES-Tisza Erőmű Kft. v. Republic of Hungary (II)*, ICSID Case No. ARB/07/22, Award (23 Sep. 2010) (**RL-047**), para. 14.3.1. See also UNCTAD, *Series on Issues in International Investment Agreements II*, Expropriation (2012) (**RE-0014**), p. 11 (As a sub-category of indirect expropriations, a creeping expropriation occurs when there is “incremental encroachment on one or more of the ownership rights of a foreign investor that eventually destroys (or nearly destroys) the value of its investment or deprives him or her of control over the investment”) (emphasis added).

²⁵⁴ The Tribunal is not bound by the Parties’ identification of the subject-matter of the dispute. As consistently held by the ICJ, “[t]he Court’s determination of the subject-matter of the dispute is made ‘on an objective basis.’” See *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, Preliminary Objection, Judgment, I.C.J. Reports 2015 (**RL-064**), p. 602, para. 26.

the temporal scope of the ECT. Under Azerbaijan’s own case, such acts occurred in 1991 and 1992,²⁵⁵ years before the ECT entered into force between the Parties.

2. Azerbaijan’s Undue Delay in Raising Its Claims Under the ECT Renders Them Inadmissible in Any Event

147. Despite the ECT having been in force for Armenia and Azerbaijan since 1998, Azerbaijan waited until 2021 to advance its claims arising, under its own case, from Armenia’s purported “Invasion and Decades-Long Occupation and Control of Azerbaijan’s Sovereign Territory.”²⁵⁶ Such an unreasonable delay prejudices Armenia’s right to defend itself and establish the relevant facts,²⁵⁷ and precludes Azerbaijan from raising any claims under the Treaty.²⁵⁸

148. In *Certain Phosphate Lands in Nauru*, the ICJ held that “even in the absence of any applicable treaty provision, delay on the part of a claimant State may render an application inadmissible.”²⁵⁹ Under this well-established principle of international law,²⁶⁰ in the absence of a time limit under the Treaty, the inadmissibility of a belated claim must be determined in light of the circumstances of each case, taking into account the effects of time on the equality of the parties.²⁶¹

149. Among such circumstances, two factors must be considered: “whether the respondent could have *reasonably* expected that the claim would no longer be pursued,” and the disadvantage suffered by the respondent in the event of a delayed claim.²⁶²

150. *First*, Armenia could not reasonably have expected that Azerbaijan would pursue the claims that it has now raised for the first time in these proceedings. Even if the Tribunal were to uphold Azerbaijan’s contrived interpretation of its provisions, the Treaty was not in force

²⁵⁵ Statement of Claim, para. 138, citing Witness Statement of Nazim Samadzade (12 November 2024) (CWS-1), para. 15 (“In January 1992, Aztransgaz received reports from Nakhchivan that Armenia had terminated the supply of gas to Nakhchivan by cutting the Y-N Pipeline near the Armenia-Nakhchivan border.”).

²⁵⁶ See Statement of Claim, Section III(B).

²⁵⁷ *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Preliminary Objections, Judgment, I.C.J. Reports 1992 (RL-034), p. 254, para. 36.

²⁵⁸ *Id.*, p. 253, para. 32.

²⁵⁹ *Id.*

²⁶⁰ A. R. Ibrahim, “The Doctrine of Laches in International Law”, Virginia Law Review, Vol. 83, No. 3 (1997) (RL-039), p. 650.

²⁶¹ J. Crawford, *Third report on State responsibility*, UN Doc. A/CN.4/507 (RL-040), p. 70, para. 259.

²⁶² *Id.*

between the Parties throughout the First War. When Armenia acceded to the ECT in 1998, it could not—and did not—reasonably expect that claims relating to the facts of the First War and its effects would be made by Azerbaijan under the Treaty. And certainly, it is not the case that Armenia could reasonably expect that Azerbaijan would formulate these claims only in 2021, 23 years later.

151. *Second*, Armenia is disadvantaged by Azerbaijan belatedly formulating its claims under the ECT. More than a generation has passed since the end of the First War, when Azerbaijan lost access to the territories in question. Many witnesses have passed and documentary evidence is sparse, if not lost or destroyed due to the passage of time, or now under Azerbaijan’s exclusive control following its alteration of the *status quo*.²⁶³ Under these conditions, it is impossible to conduct a fair procedure respecting the equality of the Parties. When, as here, the lateness of the claim causes serious evidentiary difficulties for one or even both parties, the “accomplishment of exact or even approximate justice [is] impossible”²⁶⁴ and the claim must be declared inadmissible.

3. Armenia’s Temporal Objections Warrant Preliminary Treatment

152. Armenia’s temporal objections to the Tribunal’s jurisdiction and the admissibility of Azerbaijan’s claims are of an exclusively preliminary character and warrant preliminary treatment. These objections raise discrete legal issues that do not require an extensive examination of factual matters and, if upheld, have the potential to resolve the entire purported dispute at this preliminary stage. Bifurcation would therefore serve the interests of procedural economy and ensure an efficient resolution of the proceedings.

D. In Any Event, the Essential Security Interest Exception in Article 24(3)(a) of the ECT Prevents Its Application and Should Be Examined in a Preliminary Phase

153. Even accepting Azerbaijan’s allegations as true and otherwise potentially falling within the jurisdiction of the Tribunal, the impugned conduct—if attributable to Armenia (*quod non*)—would constitute measures that Armenia would have considered necessary for the protection

²⁶³ See Letter from Armenia to the Tribunal (3 Oct. 2023) (RE-0035).

²⁶⁴ *Case of Ann Eulogia Garcia Cadiz (Loretta G. Barberie) v. Venezuela*, Opinion of the Commissioner, R.S.A., Vol. XXIX (RL-049), p. 298.

of its essential security interests under Article 24(3)(a) of the ECT. Azerbaijan's claims would therefore fall outside the jurisdiction of the Tribunal for that reason as well.

154. Article 24(3)(a) provides in relevant part that:

The provisions of this Treaty other than those referred to in paragraph (1) shall not be *construed* to prevent any Contracting Party from taking any measure *which it considers necessary*: (a) for the *protection of its essential security interests including those [...]* (ii) *taken in time of war, armed conflict or other emergency in international relations*.²⁶⁵

155. This provision thus precludes an interpretation of the ECT (including Azerbaijan's interpretation of Articles 18 and 7)²⁶⁶ that would prohibit a Contracting Party from taking measures that fall within the exception. As commentators and tribunals have recognized, when such an essential security exception is invoked, "the substantive obligations under the Treaty do not apply."²⁶⁷ In other words, Article 24(3) "excepts the measures taken by Respondent from the scope"

²⁶⁵ Energy Charter Treaty with Related Documents (**CL-001**), ECT Article 24(3) (emphasis added); Energy Charter Treaty with Related Documents (French Version) (17 Dec. 1994) (**RL-020**), Article 24(3)(a) ("Les dispositions du présent traité autres que celles visées au paragraphe 1 ne doivent pas être interprétées comme empêchant une partie contractante de prendre toute mesure qu'elle estime nécessaire : a) à la protection de ses intérêts essentiels en matière de sécurité, y compris les mesures qui [...] ii) sont prises en temps de guerre, en cas de conflit armé ou dans une autre situation d'urgence survenant dans les relations internationales.").

²⁶⁶ K. Hobér, *The Energy Charter Treaty: A Commentary* (OUP, 2020) (**RL-081**), p. 391 ("Article 7 of the ECT dealing with transit is not exempted from Article 24, which means, as a matter of principle, that a Contracting Party can stop the transit of energy products for the protection of its essential security interests, provided that the measure does not constitute a disguised restriction on the transit.").

²⁶⁷ See, e.g., *Deutsche Telekom v. India*, PCA Case No. 2014-10, Interim Award (13 Dec. 2017) (**RL-072**), para. 227; see also Danae Azaria, *Treaties on Transit of Energy Via Pipelines and Countermeasures* (OUP, 2015) (**CL-052**), p. 89 ("Measures taken under the exceptions are lawful, because there is no ECT obligation on Contracting Parties when these are applicable."); *id.*, p. 94 ("If a transit ECT Contracting Party undertakes conduct within the scope of ECT Article 24(3) [...], it has no obligation under [the] ECT.").

of the ECT.²⁶⁸ Because the measures at issue are therefore not “capable of constituting violations of obligations” under the ECT,²⁶⁹ the Tribunal lacks jurisdiction *ratione materiae*.²⁷⁰

156. Article 24(3)(a) of the ECT has never been interpreted or applied by an international tribunal. However, numerous international courts and tribunals have recognized that the expression “which it considers necessary” in similarly worded clauses indicates the self-judging character of the exception.²⁷¹ Commentators on the ECT agree.²⁷² Indeed, it is well known that Article 24(3)(a)

²⁶⁸ *Angel Samuel Seda and Others v. Republic of Colombia*, ICSID Case No. ARB/19/6, Award (27 June 2024) (**RL-100**), para. 741; *see also id.*, para. 734 (“The wording ‘Nothing in this Agreement shall be construed [...] to preclude’ [...] points to an exception to the overall scope of the TPA.”); *id.*, para. 633 (In *Seda*, the tribunal interpreted an essential security exception with almost identical language as Article 24(3)(a) of the ECT: “Nothing in [the TPA] shall be construed [...] to preclude a Party from applying measures that it considers necessary for [...] the protection of its own essential security interests.”). *See also Oil Platforms (Islamic Republic of Iran v. United States of America)*, *Preliminary Objection, Judgment, I.C.J. Reports 1996 (RL-037)*, p. 811, para. 20 (stating that an essential security interests exception “could be interpreted as excluding certain measures from the actual scope of the Treaty and, consequently, as excluding the jurisdiction of the Court to test the lawfulness of such measures.”). Ultimately, in *Oil Platforms*, the Court decided to treat the exception as a defense on the merits. However, the language of the exception at issue in *Oil Platforms* was different from Article 24(3)(a) of the ECT: It provided that the “Treaty shall not preclude the application of measures: [...] (d) necessary to fulfill the obligations of a High Contracting Party for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests” (emphases added). First, the exception did not preclude any “interpretation” of the treaty that would preclude such measures, like Article 24(3)(a) does, thereby rendering such measures incapable of violating the Treaty on a jurisdictional basis. Second, the exception was not self-judging, unlike Article 24(3)(a), as shown below. Thus, its invocation necessarily involved merits issues which do not arise here. Moreover, as listed *infra* in note 273, several tribunals have rejected the view that such exceptions act as defenses on the merits.

²⁶⁹ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan)*, *Preliminary Objections, Judgment, 12 November 2024 (RL-101)*, p. 28, para. 91.

²⁷⁰ *See, e.g., Angel Samuel Seda and Others v. Republic of Colombia*, ICSID Case No. ARB/19/6, Award (27 June 2024) (**RL-100**), paras. 682, 741, 801, 803 (treating an identical essential security interests exception as a jurisdictional objection and finding that because the exception was successfully invoked, the measures at issue were “outside the scope of the Treaty” and the tribunal thus lacked jurisdiction to hear the case); *Deutsche Telekom v. India*, PCA Case No. 2014-10, Interim Award (13 Dec. 2017) (**RL-072**) (treating the invocation of the essential security exception as a preliminary jurisdictional objection).

²⁷¹ *See, e.g., Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *Merits, Judgment, I.C.J. Reports 1986 (CL-016)*, paras. 222, 282 (“[B]y the terms of the Treaty itself, whether a measure is necessary to protect the essential security interests of a party is not [...] purely a question for the subjective judgment of the party; the text does not refer to what the party ‘considers necessary’ for that purpose.”); *Angel Samuel Seda and Others v. Republic of Colombia*, ICSID Case No. ARB/19/6, Award (27 June 2024) (**RL-100**), para. 638 (“Article 22.2(b) of the TPA explicitly states that ‘it’, i.e., the Contracting State applying the measures, ‘considers’ necessary, leaving no doubt that this provision is self-judging.”).

²⁷² *See, e.g., C. Grasso and G. Alvarez, “Article 24, Exceptions,” in R. Leal-Arcas, Commentary on the Energy Charter Treaty* (Elgar, 2nd Ed., 2023) (**RL-091**), para. 24.16; T. Wälde (ed.), *The Energy Charter Treaty: An East-West Gateway for Investment and Trade* (Kluwer, 1996) (**RL-035**), p. 22.

was inspired by the self-judging²⁷³ language of Article XXI of the GATT.²⁷⁴ Because the clause is self-judging, Armenia has discretion to determine which measures it considers “necessary” for the protection of its essential security interests.²⁷⁵ It is also well established that States have wide discretion in determining what they consider to be their essential security interests.²⁷⁶ Armenia’s discretion is only limited by its obligation to apply the ECT in good faith.²⁷⁷

157. The chapeau of Article 24(3)(a) (“The provisions of this Treaty [...] shall not be construed to prevent any Contracting Party from taking any measure which it considers necessary [...] for the protection of its essential security interests”) is followed by two subparagraphs (i) and (ii) introduced by the words “including those.”²⁷⁸ These introductory words indicate that the subparagraphs constitute an illustrative and non-exhaustive list of measures that could fall within

²⁷³ See, e.g., WTO Dispute Settlement Body, *United States – Origin Marking Requirement*, WT/DS597/R, Report of the Panel (21 Dec. 2022) (**RL-089**), paras. 7.160, 7.185; *Deutsche Telekom v. India*, PCA Case No. 2014-10, Interim Award (13 Dec. 2017) (**RL-072**), para. 231, note 219 (providing the example of Article XXI of the GATT as a self-judging exception because it has the words “which it considers necessary”).

²⁷⁴ K. Hobér, *The Energy Charter Treaty: A Commentary* (OUP, 2020) (**CL-059**), p. 390; C. Grasso and G. Alvarez, “Article 24, Exceptions,” in R. Leal-Arcas, *Commentary on the Energy Charter Treaty* (Elgar, 2nd Ed., 2023) (**RL-091**). See General Agreement on Tariffs and Trade (1947) (**RL-022**), Article XXI.

²⁷⁵ See, e.g., WTO Dispute Settlement Body, *Russia – Measures Concerning Traffic in Transit*, WT/DS512/R, Report of the Panel (5 Apr. 2019) (**RL-078**), para. 7.131; WTO Dispute Settlement Body, *Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights*, WT/DS567/R, Report of the Panel (16 June 2020) (**RL-082**), para. 7.249; WTO Dispute Settlement Body, *United States – Origin Marking Requirement*, WT/DS597/R, Report of the Panel (21 Dec. 2022) (**RL-089**), para. 7.160; *Angel Samuel Seda and Others v. Republic of Colombia*, ICSID Case No. ARB/19/6, Award (27 June 2024) (**RL-100**), paras. 638, 703-704; see also *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, *I.C.J. Reports 1986* (**CL-016**), p. 116, para. 222 (suggesting that a self-judging clause which contains the words “considers necessary” makes the question of whether a measure is necessary to protect the essential security interests of a State “purely a question for the subjective judgment of [that State]”) (emphasis added).

²⁷⁶ See WTO Dispute Settlement Body, *Russia – Measures Concerning Traffic in Transit*, WT/DS512/R, Report of the Panel (5 Apr. 2019) (**RL-078**), para. 7.131; WTO Dispute Settlement Body, *Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights*, WT/DS567/R, Report of the Panel (16 June 2020) (**RL-082**), para. 7.249; see also *Angel Samuel Seda and Others v. Republic of Colombia*, ICSID Case No. ARB/19/6, Award (27 June 2024) (**RL-100**), paras. 644, 646, 650.

²⁷⁷ WTO Dispute Settlement Body, *Russia – Measures Concerning Traffic in Transit*, WT/DS512/R, Report of the Panel (5 Apr. 2019) (**RL-078**), para. 7.132; WTO Dispute Settlement Body, *Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights*, WT/DS567/R, Report of the Panel (16 June 2020) (**RL-082**), para. 7.250; *Angel Samuel Seda and Others v. Republic of Colombia*, ICSID Case No. ARB/19/6, Award (27 June 2024) (**RL-100**), para. 650; see also *Case concerning rights of nationals of the United States of America in Morocco*, Judgment of August 27th, 1952: *I.C.J. Reports 1952* (**RL-024**), p. 212.

²⁷⁸ The International Energy Charter, *Consolidated Energy Charter Treaty with Related Documents* (17 Dec. 1994) (**CL-001**), ECT, Article 24(3); *Energy Charter Treaty with Related Documents (French Version)* (17 Dec. 1994) (**RL-020**), Article 24(3) (“[Y] compris.”).

the exception.²⁷⁹ Accordingly, a Contracting Party invoking the exception under Article 24(3)(a) is not *required* to demonstrate that the situation falls within one of those two subparagraphs. However, in this case, the situation *does* fall within subparagraph (ii) because the measures impugned were “taken in time of war, armed conflict or other emergency in international relations.”

158. The existence of war, armed conflict or emergency in international relations for this purpose can be determined based on the facts as alleged by Azerbaijan. Azerbaijan alleges that from the entry into force of the ECT in 1998 until at least 2020, a period which encompasses all the impugned measures, there was an armed conflict, which Azerbaijan describes as a “military occupation.”²⁸⁰ Thus, on Azerbaijan’s own case, the measures impugned fall within subparagraph (ii) of Article 24(3)(a).

159. That the situation falls within subparagraph (ii) means that those measures fall within the essential security interests exception. Moreover, on the face of Azerbaijan’s own allegations, the measures impugned were all necessary to protect essential security interests arising in the context of this armed conflict. As admitted by Azerbaijan itself, the alleged exploitation of resources was necessary to supply energy to the civilian population of the “Occupied Territories” or necessary to sustain a country in the midst of an armed conflict.²⁸¹ As to the alleged suspension

²⁷⁹ This is confirmed by the *travaux* of the ECT, which reveal that certain parties did not wish for the essential security interests exception to be “too restrictive” and that this is why the two subparagraphs were ultimately added only as an illustrative list. See Letter from J. Pierson to H. Steeg re: European Energy Charter Treaty Negotiations 14-18 December 1993 (20 Dec. 1993) (CL-030), p. 9. In this regard, Article 24(3)(a) differs from Article XXI of the GATT, which has similar subparagraphs, but which are not introduced by the words “including those,” suggesting that the list is exhaustive. See General Agreement on Tariffs and Trade (1947) (RL-022), Article XXI. As a result, WTO panels have interpreted Article XXI as *requiring* the invoking State to demonstrate that the situation falls within one of the three subparagraphs, *i.e.*, the subparagraphs are considered additional requirements for the exception to be invoked successfully, not as an illustration of the types of measures that would fall within it. See, *e.g.*, WTO Dispute Settlement Body, *Russia – Measures Concerning Traffic in Transit*, WT/DS512/R, Report of the Panel (5 Apr. 2019) (RL-078), para. 7.101; WTO Dispute Settlement Body, *Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights*, WT/DS567/R, Report of the Panel (16 June 2020) (RL-082), para. 7.242.

²⁸⁰ See, *e.g.*, Notice of Arbitration, paras. 3-4, 21, 27, 29, 31, 39, 40, 42, 44-45, 48, 52, 56; Statement of Claim, paras. 2-4, 12-13, 26-31, 35, 42, 54, 59, 61, 63, 70, 72, 85, 100-104, 108, 131, 143, 156, 161-162, 169, 175, 181, 202, 206, 208, 210, 216, 219, 223, 225, 231, 238, 247-248, 253, 262, 271-272. Under international humanitarian law, a military occupation falls within the definition of an international armed conflict and triggers the application of the law of armed conflict. See Geneva Convention Relative to the Protection of Civilian Persons in Time of War (12 Aug. 1949) (RL-023), Article 2.

²⁸¹ See Statement of Claim, paras. 46 (“In 1998, Armenia’s Installed Regime established the company ‘Artsakh Energo CJSC’ (‘Artsakh Energo’), registered in the Occupied Territories, to provide, distribute, and sell electricity throughout the Occupied Territories.”) (emphasis added), 50 (“Throughout that time, Artsakh HEK sold the electricity generated by the facility to Artsakh Energo for distribution in the Occupied Territories”) (emphasis added), 53 (“Armenia and its Installed Regime exploited it for consumption within the Occupied Territories.”) (emphasis added), 85 (“These facilities were built as part of an overarching State policy to ‘ensure the energy independence’ of the Occupied

of transit in the Yevlakh-Nakhijevan pipeline, this would plainly be an example of a military decision taken against a co-belligerent in the context of an armed conflict. There is thus no reason to suggest that the exception is not invoked in good faith, and Azerbaijan never suggested otherwise during the twenty-three years between the entry into force of the ECT and its 2021 notice of dispute.²⁸² In fact, during the drafting of the ECT, it was Azerbaijan itself that suggested the specific reference to “armed conflict” in the text of Article 24(3)(a).²⁸³ Given the timing of the negotiations (in 1993), and of Azerbaijan’s economic blockade imposed on Armenia at the time (which continues to this day),²⁸⁴ it can only be assumed that Azerbaijan had the Nagorno-Karabakh armed conflict in mind when it made that proposal.

160. In sum, assuming *arguendo* that Azerbaijan’s claims do not suffer from any of the defects mentioned in previous Sections, they would still be excluded from the scope of the ECT, and therefore the Tribunal’s jurisdiction, because of Armenia’s invocation of Article 24(3)(a).

*

161. This objection, too, warrants preliminary treatment in a bifurcated phase because it is of an exclusive preliminary character. As shown above, the Tribunal can decide whether the exception applies solely based on the law on essential security interests exceptions, and on the facts as alleged by Azerbaijan. In addition, this objection is capable of disposing of the totality of

Territories and Armenia.”), 153 (“Armenia also appropriated the Y-N Pipeline and associated gas distribution infrastructure to supply gas to the Occupied Territories.”), 155-156 (“Armenia had been using the Y-N Pipeline to supply gas imported from Russia and Iran to Armenia and the occupied Garabagh and Eastern Zangezur regions. Armenia reversed the flow of gas in the Y-N Pipeline to pump natural gas from Yerevan, down to Goris in southern Armenia, then into the Occupied Territories through Zabukh. [...] Artsakh Gas co-opted the section of the Y-N Pipeline from Asgaran to Lachin to supply gas to the Occupied Territories.”) (emphasis added), 248 (“Armenia [...] divert[ed] the Y-N Pipeline throughout the occupation to supply Russian and Iranian gas to the population in the Occupied Territories.”) (emphasis added).

²⁸² Cf. Danae Azaria, *Treaties on Transit of Energy Via Pipelines and Countermeasures* (OUP, 2015) (CL-052), p. 89 (mentioning that “during the armed conflict with Russia, Georgia reduced the transit of gas coming from Russia and destined for Armenia.” While Georgia did not formally invoke Article 24(3), the author notes that the fact that Armenia did not complain to Georgia about the reduced transit suggests it considered Georgia’s conduct as falling within the exception of Article 24(3)).

²⁸³ See Letter from J. Pierson to H. Steeg re: European Energy Charter Treaty Negotiations 14-18 December 1993 (20 Dec. 1993) (CL-030), p. 9 (“Rutten favored the US proposal - also with the Azerbaijan addition of ‘armed conflict’ in P3(a)ii.”).

²⁸⁴ See M. Parks, “Blockade Strangling Armenian Capital”, *Los Angeles Times* (28 Sep. 1989) (RE-009); R. Bonner, “War, Blockade and Poverty ‘Strangling’ Armenia”, *New York Times* (16 Apr. 1994) (RE-0012).

Azerbaijan's claims,²⁸⁵ with the resulting gains in efficiency. Should this case proceed to the merits, however, Armenia reserves the right to invoke other exceptions in Article 24 that are *not* self-judging, and which, for this reason, are less appropriately considered in isolation from the merits in a bifurcated preliminary objection phase.²⁸⁶

E. Azerbaijan's Claims Appear to Be Predicated on a Flawed Theory of Attribution That Should Be Clarified as a Preliminary Matter

162. It is a well-established principle of international law that a State can only be held responsible for an internationally wrongful act if the conduct in question is attributable to that State. In this case, however, Azerbaijan has failed to state—let alone substantiate—its theory that Armenia “effectively controlled” the so-called “Occupied Territories”²⁸⁷ and that the conduct of the Nagorno-Karabakh Authorities is thus attributable to Armenia under the applicable rules of international law on attribution.²⁸⁸ Armenia is left to decipher the legal grounds Azerbaijan intends to rely on to support such claims, impeding Armenia's ability to defend itself, including by advancing any applicable preliminary objections.

163. Instead of precisely stating the legal basis for its claims of attribution as required,²⁸⁹ Azerbaijan makes the blanket allegation that “Armenia maintained complete control over the

²⁸⁵ See, e.g., *Angel Samuel Seda and Others v. Republic of Colombia*, ICSID Case No. ARB/19/6, Award (27 June 2024) (**RL-100**), paras. 801, 803, 823 (finding that the essential security interests exception applied and dismissing the case in its entirety since “the Tribunal ha[d] no mandate to review further objections to its jurisdiction and the merits of the case.”).

²⁸⁶ See, e.g., Energy Charter Treaty with Related Documents (**CL-001**), ECT, Article 24(2) (“The provisions of this Treaty other than (a) those referred to in paragraph (1); and (b) with respect to subparagraph (i), Part III of the Treaty shall not preclude any Contracting Party from adopting or enforcing any measure (i) necessary to protect human, animal or plant life or health; (ii) essential to the acquisition or distribution of Energy Materials and Products in conditions of short supply arising from causes outside the control of that Contracting Party, provided that any such measure shall be consistent with the principles that (A) all other Contracting Parties are entitled to an equitable share of the international supply of such Energy Materials and Products; and (B) any such measure that is inconsistent with this Treaty shall be discontinued as soon as the conditions giving rise to it have ceased to exist [...]).”).

²⁸⁷ Statement of Claim, para. 35, note 43, citing *Chiragov and Others v. Armenia*, ECHR App. No. 13216/05 (GC), Judgment (**CL-004**), para. 186.

²⁸⁸ See International Law Commission (ILC), *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, Report of the ILC on the work of its Fifty-third Session (2001) (**RL-041**), Articles 4-11. These provisions reflect customary international law. See, e.g., *id.*, Commentary to Article 4, p. 40. See also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, *I.C.J. Reports 2007* (**RL-044**), pp. 207-208, paras. 398-399; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, *I.C.J. Reports 1986* (**CL-016**), pp. 64-65, paras. 115-116.

²⁸⁹ Under the applicable procedural rules, Azerbaijan had the burden of presenting the legal and factual grounds of its case in its Statement of Claim, which “shall include a *precise* statement of [...] (b) [...] the facts supporting the claim;

Occupied Territories for close to three decades through its sustained exertion of military force[,] [and] controlled the Installed Regime that purported to ‘govern’ those territories during the occupation period.”²⁹⁰ To support its contention, Azerbaijan appears²⁹¹ to rely solely on the *Chiragov v. Armenia* decision of the European Court of Human Rights (the “ECtHR”)²⁹² to claim that the conduct of the NKR Authorities is attributable to Armenia.²⁹³ A mere citation to *Chiragov*, however, does not satisfy Azerbaijan’s burden to state its theory of attribution.

164. First, the *Chiragov* decision cannot substitute this Tribunal’s determination of whether the alleged impugned conduct of the NKR Authorities is attributable to Armenia as a matter of general international law and, in any event, it is inapposite to the present case. The ECtHR in *Chiragov* did not conclude that the acts of the Nagorno-Karabakh authorities were attributable to Armenia. The Court’s findings were limited to its conclusion that Armenia “exercise[d] effective control over Nagorno-Karabakh and the surrounding territories” for the specific purpose of establishing its jurisdiction under Article 1 of the European Convention on Human Rights (the

[and] (c) [*the points at issue*]” (emphasis added). See Procedural Order No. 1, Article 14; UNCITRAL Arbitration Rules (1976) (RL-029), Article 18(2). See also D. Caron & L. Caplan, “Statements of Claim and Defence,” in *The UNCITRAL Arbitration Rules: A Commentary* (2nd Ed., OUP, 2013) (RL-055), p. 416 (“[T]he requirement concerning ‘the points at issue,’ which was already contained in original Article 18 [of the 1976 UNCITRAL Rules], presupposes explication of the legal arguments to some degree.”). Azerbaijan, however, does not identify the specific acts allegedly attributable to Armenia and purportedly constituting internationally wrongful acts; the actor or organ of the State committing such conduct; and the legal grounds to support its attribution allegations.

²⁹⁰ Statement of Claim, para. 35, note 43, citing *Chiragov and Others v. Armenia*, ECHR App. No. 13216/05 (GC), Judgment (CL-004), para. 186.

²⁹¹ Azerbaijan does not and plainly cannot claim that the NKR Authorities are Armenia’s *de jure* or *de facto* organs. To characterize an entity as a *de jure* organ of a State, an entity must have such status under the internal law of the State in question. See International Law Commission (ILC), *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, Report of the ILC on the work of its Fifty-third Session (2001) (RL-041), Commentary to Article 4, p. 42, para. 11; *Jan de Nul N. V. and Dredging International N. V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award (6 Nov. 2008) (RL-046), para. 160 (“To determine whether an entity is a State organ, one must first look to domestic law.”). To characterize an entity as a *de facto* organ of the State, the entity must act in “complete dependence on the State.” See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007 (RL-044), p. 205, paras. 392-393. See also *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, I.C.J. Reports 1986 (CL-016), p. 62, para. 110. None of these tests are satisfied in this case. The NKR Authorities were never organs of the Republic of Armenia under its domestic law. Nor did they act in “complete dependence” on Armenia, and Azerbaijan has not claimed otherwise.

²⁹² Statement of Claim, para. 35, note 43, citing *Chiragov and Others v. Armenia*, ECHR App. No. 13216/05 (GC), Judgment (CL-004), para. 186.

²⁹³ Statement of Claim, para. 35, note 43.

“ECHR”).²⁹⁴ As the ECtHR explicitly acknowledged in *Chiragov*, however, “the test for establishing the existence of ‘jurisdiction’ under Article 1 of the [ECHR] *has never been equated* with the test for establishing a State’s responsibility for an internationally wrongful act.”²⁹⁵ Judge Motoc emphasized this point in her Concurring Opinion, which noted that “[the ECtHR] [did] not examine the question of attribution and [did] not seek to establish the actual participation of the Armenian forces in the acts that resulted in the [purported breaches of the ECHR].”²⁹⁶

165. *Second*, as the ICJ has consistently held, the “effective control” test under customary international law for attributing the actions of a non-State actor to a State for purposes of international responsibility²⁹⁷ requires that the State exercised “effective control” over the non-State actor “in respect of *each operation* in which the alleged violations occurred, not generally in respect of the overall actions taken by the persons or groups of persons having committed the violations.”²⁹⁸ In this regard, the ILC has stressed that “[the] conduct [in question] will be attributable to the State *only* if it directed or controlled the *specific* operation and the conduct complained of was an *integral* part of that operation.”²⁹⁹ In contrast, “a general situation of dependence and support would be insufficient to justify attribution of the conduct to the State.”³⁰⁰ As explained, the ECtHR, on the other hand, applied a *lex specialis* standard in *Chiragov* that is specific to establishing jurisdiction

²⁹⁴ *Chiragov and Others v. Armenia*, ECHR App. No. 13216/05 (GC), Judgment (CL-004), para. 186.

²⁹⁵ *Id.*, para. 168, citing *Catan and Others v. Moldova and Russia*, ECHR App. Nos. 43370/04, 8252/05 and 18454/06 (GC), Judgment (19 Oct. 2012) (RL-053), para. 115 (emphasis added).

²⁹⁶ *Chiragov and Others v. Armenia*, ECHR App. No. 13216/05 (GC), Judgment (CL-004), p. 85.

²⁹⁷ International Law Commission (ILC), *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, Report of the ILC on the work of its Fifty-third Session (2001) (RL-041), Commentary to Article 8, pp. 47-49.

²⁹⁸ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007 (RL-044), p. 208, paras. 400-401 (emphasis added). See also *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, I.C.J. Reports 1986 (CL-016), pp. 61-64, paras. 105-115.

²⁹⁹ International Law Commission (ILC), *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, Report of the ILC on the work of its Fifty-third Session (2001) (RL-041), Commentary to Article 8, p. 47, para. 3.

³⁰⁰ *Id.*, para. 4.

under the ECHR, which is qualitatively different and less exacting than the “effective control” test established under customary international law for determining international responsibility.

166. In light of the above, Azerbaijan’s blanket assertion that Armenia “effectively controlled” the so-called “Occupied Territories” and that the alleged wrongful conduct by the NKR Authorities is attributable to Armenia based on the *Chiragov* case plainly falls short of meeting the requisite standard for identifying—let alone demonstrating—attribution under international law. Armenia therefore expects Azerbaijan to provide a precise statement of its position on attribution, clearly explaining the legal and factual grounds that form the basis of each element of its claim.³⁰¹ Should Azerbaijan insist that the conduct of the NKR Authorities is somehow automatically or presumptively attributable to Armenia—and that it therefore need not establish that Armenia exercised “effective control” over the NKR Authorities “in respect of *each operation* in which the alleged violations occurred”³⁰²—Armenia reserves its right to raise this issue as a preliminary objection³⁰³ in the interests of efficiency and because there would be no *prima facie* case of breach with respect to Azerbaijan’s claims relating to the conduct of the NKR Authorities. Armenia thus reserves its right to request leave to respond to any reformulation of Azerbaijan’s position on attribution set forth in its forthcoming Answer to Armenia’s Request for Bifurcation.

167. For the avoidance of doubt, Armenia in no way accepts that the NKR Authorities were under its control generally or with respect to specific operations,³⁰⁴ or that any of their conduct alleged by Azerbaijan to be wrongful is attributable to Armenia more generally.

³⁰¹ See Procedural Order No. 1, Article 14; UNCITRAL Arbitration Rules (1976) (**RL-029**), Article 18(2).

³⁰² *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007 (**RL-044**), p. 208, paras. 400-401 (emphasis added).

³⁰³ See *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic*, ICSID Case No. ARB/09/1, Decision on Jurisdiction (21 Dec. 2012) (**RL-054**), para. 271 (“Case law [...] support[s] the conclusion that matters of state attribution should be adjudicated at the jurisdictional stage when they represent a fairly cut-and-dry issue that will determine whether there is jurisdiction.”).

³⁰⁴ By way of example, the NKR Authorities and the Republic of Armenia are separate and independent entities. Since the 1990s until Azerbaijan’s forced displacement of the entire ethnic Armenian population from Nagorno-Karabakh in 2023, Nagorno-Karabakh operated as an independent entity, with its own governance structures, Constitution, and armed forces. The NKR Authorities raised their own taxes, enacted laws, and constituted their own government-owned enterprises to manage their operations. Furthermore, the Republic of Armenia never formally recognized the Republic of Artsakh as a sovereign State.

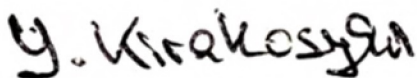
IV. REQUEST FOR RELIEF AND RESERVATION OF RIGHTS

168. For the foregoing reasons, Armenia respectfully requests that the Tribunal:

- a. Order that these proceedings be bifurcated to address and decide all or any of the foregoing objections as a preliminary matter; and
- b. Adopt the timetable provided in Scenario A of the Procedural Timetable in Procedural Order No. 1.

169. Armenia reserves all rights to expand or modify the preliminary objections identified herein as appropriate. Furthermore, Armenia's request for bifurcation of the objections identified herein is without prejudice to its right to raise, at the appropriate juncture, any other jurisdictional or admissibility objections that do not appear, at this stage, to be suitable for preliminary treatment. Finally, Armenia reserves the right to request, at the appropriate juncture, that the Tribunal order Azerbaijan to bear all costs incurred by Armenia in the preparation of this Request and any further briefing on bifurcation.

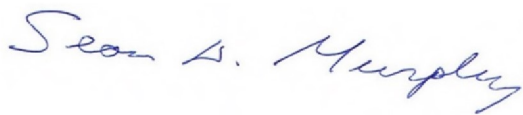
Respectfully submitted,



REPRESENTATIVE OF THE REPUBLIC OF ARMENIA ON
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