

**In the Arbitration under the Energy Charter Treaty and
the Arbitration Rules of the United Nations Commission on International Trade Law**

THE REPUBLIC OF AZERBAIJAN

Claimant

— v. —

THE REPUBLIC OF ARMENIA

Respondent

PCA Case No. 2023-65

**AZERBAIJAN'S OBSERVATIONS ON
ARMENIA'S REQUEST FOR BIFURCATION OF PRELIMINARY OBJECTIONS**

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I. INTRODUCTION

1. Claimant the Republic of Azerbaijan (“*Azerbaijan*”) respectfully submits these Observations on the Request for Bifurcation of Preliminary Objections dated 23 December 2024 (the “*Bifurcation Request*” or “*Request*”) submitted by the Republic of Armenia (“*Armenia*”).
2. Armenia’s sweeping Bifurcation Request should be denied in full. The Request presents a laundry list of meritless objections (ten in total, or eleven if one were to count the assertions made in respect of attribution). Armenia urges the Tribunal to decide all of these objections in an initial, bifurcated phase of the proceedings because they are “*exclusively preliminary in character, and can thus be decided without trespassing on the merits.*”¹
3. That contention is plainly wrong: the overwhelming majority of Armenia’s objections are far too closely linked to the merits or otherwise unsuitable for preliminary determination, and none of the remaining objections, even if granted, would dispose of all of Azerbaijan’s claims. This is a complex case of first impression, addressing the exploitation of numerous different energy resources over decades, and filed in the aftermath of an unlawful occupation—maintained over a wide swath of Azerbaijan’s sovereign territory, in violation of multiple UN Security Council resolutions²—that barred Azerbaijan from any access to or information about those resources for thirty years. Particularly in such circumstances, it would be neither fair nor efficient to address the objections that Armenia has raised on a preliminary basis. Instead, they should be joined to the merits and considered once the Tribunal has the benefit of the full record before it. That approach would best align with the Tribunal’s “*ultimate duty to protect the integrity of proceedings, including its ability to hear all appropriate evidence and to provide meaningful relief.*”³
4. As set out in **Section II** below, Armenia has mischaracterized the legal standard applicable to bifurcation in this arbitration, which turns on considerations of procedural fairness and efficiency. There is no “*stronger*” presumption in favor

¹ Respondent, the Republic of Armenia’s Request for Bifurcation of Preliminary Objections, PCA Case No. 2023-65, 23 December 2024 (“*Bifurcation Request*”), ¶ 2.

² See Azerbaijan’s Statement of Claim, dated 19 November 2024 (“*Statement of Claim*”), ¶ 3 (“Following Armenia’s invasion in 1991 and over the course of a three-year period of active hostilities in Azerbaijan . . . , the [UN Security Council] issued multiple resolutions reaffirming Azerbaijan’s sovereignty and territorial integrity and demanding the immediate withdrawal of the occupying forces.”); *id.* ¶ 6 (“Armenia ignored all of the demands of the UN Security Council and other States to withdraw from Azerbaijan’s territory.”). Unless otherwise defined, capitalized terms used in this submission bear the meaning defined in Azerbaijan’s Statement of Claim.

³ **CL-96**, *Gran Colombia Gold Corp. v. Republic of Colombia*, ICSID Case No. ARB/18/23, Procedural Order No. 3, Decision on the Respondent’s Request for Bifurcation, 17 January 2020, ¶ 27.

of bifurcation here simply because this is an inter-State case. Rather, the Tribunal should decline bifurcation if it will result in procedural unfairness or is “*unlikely to bring about increased efficiency in the proceedings*,” including because the objection is (1) insubstantial, (2) unlikely to materially reduce the scope of the next phase of proceedings if granted, or (3) intertwined with the merits of the case.⁴ Overall, “*the exercise is one of ‘weighing for both sides the benefits of procedural fairness and efficiency against the risks of delay, wasted expense and prejudice.’*”⁵

5. **Section III** below explains why each objection or set of objections put forth by Armenia is inappropriate for bifurcation when evaluated against the appropriate standard:
- a. Section III.A.1 explains why it would be neither fair nor efficient to bifurcate any or all of Armenia’s objections to the Tribunal’s jurisdiction under Article 18, because they largely raise issues that are intertwined with the merits of Azerbaijan’s claims or are otherwise unsuitable for bifurcation.
 - b. Section III.A.2 explains why it would be neither fair nor efficient to bifurcate any or all of Armenia’s objections to the Tribunal’s jurisdiction under Article 7. These objections also raise issues closely linked to the merits, or would not otherwise result in time or cost savings if granted because they are insubstantial and address only a small subset of Azerbaijan’s claims.
 - c. Section III.B explains why it would be neither fair nor efficient to bifurcate either or both of Armenia’s two temporal objections, because they require a fact-intensive, merits-linked analysis, or are insufficiently substantial to result in increased efficiency if bifurcated.
 - d. Section III.C explains that Armenia’s objection related to its invocation of the “*essential security interest*” exception in ECT Article 24(3)(a) should not be bifurcated because it requires determination of the merits of a substantive defense, or, alternatively, raises a jurisdictional question so linked to the merits that it is unsuitable for a preliminary determination.

⁴ **RL-43**, *Glamis Gold Ltd. v. United States of America*, UNCITRAL, Procedural Order No. 2 (Revised), 31 May 2005, ¶ 12(c).

⁵ **CL-96**, *Gran Colombia Gold Corp. v. Republic of Colombia*, ICSID Case No. ARB/18/23, Procedural Order No. 3, Decision on the Respondent’s Request for Bifurcation, 17 January 2020, ¶ 25 (quoting **CL-78**, *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Procedural Order Deciding Bifurcation and Non-Bifurcation, 25 January 2013, ¶ 10).

- e. *Finally, Section III.D responds to the additional objection relating to the attribution of conduct by Armenia’s Installed Regime to Armenia, which Armenia threatens to raise in response to “any reformulation of Azerbaijan’s position on attribution” set forth in these Observations.⁶ The precise nature of Armenia’s complaint in respect of attribution is unclear. It is also entirely unclear what issue, if any, Armenia is requesting be bifurcated. Either way, Armenia’s complaints regarding attribution will require a fact-intensive analysis of whether and on what basis the wrongful conduct alleged is attributable to Armenia—an assessment “best dealt with at the merits stage” and which in any event would not materially reduce the scope of proceedings if granted.⁷*
6. Armenia’s distorted and selective retelling of the facts in its Bifurcation Request further confirms that its objections are unsuitable for bifurcation. Azerbaijan disputes both the facts presented and the appropriateness of presenting such facts, which go to the merits of Azerbaijan’s claims, in a bifurcation request. Unlike Armenia, Azerbaijan is conscious that these bifurcation submissions are not the proper place to engage in debate over the facts underlying Azerbaijan’s claims. Azerbaijan will limit itself, therefore, to pointing out the incongruities in Armenia’s position regarding the contested and fact-intensive nature of its Request. Armenia argues that the Tribunal can decide certain of its objections on the facts as alleged by Azerbaijan on a preliminary basis, while at the same time presenting a six-page-long alternative iteration of the facts, which overlap with many of its objections. For instance, Armenia has asserted:
 - a. facts relevant to the question of essential security interest, including false allegations of discrimination and ethnic cleansing clearly intended to challenge the historical account of the First Garabagh War and ensuing occupation as set out in Azerbaijan’s Statement of Claim;⁸
 - b. facts relevant to the question of attribution, including the allegation that its illegally Installed Regime was an independent entity that was not effectively controlled by Armenia, in direct contradiction of Azerbaijan’s claims;⁹
 - c. facts relevant to the question of whether Azerbaijan’s claims can fall within the scope of Article 18, including allegations regarding the population of specific parts of the formerly Occupied Territories and the

⁶ Bifurcation Request, ¶ 166.

⁷ **CL-76**, *Gustav F W Hamster GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2010, ¶ 144.

⁸ *Compare* Bifurcation Request, ¶¶ 11–15, 22–23 *with* Statement of Claim, ¶¶ 3–6, 33–41.

⁹ *Compare* Bifurcation Request, ¶ 16 *with* Statement of Claim, ¶¶ 35–40.

purported historical use of energy resources there, which contradict or ignore the relevant facts set out in Azerbaijan’s Statement of Claim;¹⁰

- d. facts relevant to the question of delay, including the outrageous accusation that Azerbaijan launched these ECT proceedings seeking redress for decades of unlawful exploitation of its energy resources simply to “*divert attention*” from other claims brought by Armenia in other fora.¹¹ Azerbaijan has brought its own human rights claims against Armenia arising out of over thirty years of racial discrimination and ethnic cleansing in the same fora,¹² but does not seek to improperly raise or argue those claims before this Tribunal because they have no bearing on this case.
7. The fact that Armenia cannot avoid debating the facts underlying the merits of Azerbaijan’s claims, in what should be a request focused simply on the legal and procedural questions of bifurcation, underscores how closely intertwined its objections are with the merits of the case. It also demonstrates why it is important that the Parties’ claims and defenses be considered as a whole, in light of a fully developed factual record.¹³
8. Bifurcating these proceedings plainly would be inefficient and presents a serious risk that the Tribunal may be forced to prejudge the merits of the Parties’ claims and defenses. The most procedurally fair and efficient way for the Tribunal to address Armenia’s multitude of objections is to reject bifurcation and address all of them together at the merits stage. The Tribunal should accordingly reject Armenia’s Bifurcation Request in full.

¹⁰ Compare Bifurcation Request, ¶¶ 17–18 with Statement of Claim, ¶¶ 27–32.

¹¹ Bifurcation Request, ¶ 19.

¹² See **RL-68**, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azerbaijan v. Armenia)*, Application Instituting Proceedings, 23 September 2021; see also, *Azerbaijan v. Armenia*, ECtHR App 47319/20, filed 27 October 2020 (application not public but acknowledged in a press release from the Registrar of the ECtHR dated 27 October 2020, **CL-99**); *Azerbaijan v. Armenia (II)*, ECtHR App 39912/22, filed 18 August 2022 (application not public but acknowledged in a press release from the Ministry of Foreign Affairs of Azerbaijan dated 21 December 2022, **CL-104**).

¹³ See **CL-100**, *Patel Engineering Limited v. Republic of Mozambique*, PCA Case No. 2020-21, Procedural Order No. 3, Decision on the Motion for Bifurcation, 14 December 2020, ¶¶ 64–65 (declining to bifurcate proceedings because the respondent’s jurisdictional objection was “inextricably intertwined with the merits [given that] Claimant and Respondent hold[] opposing views as to the occurrence of the relevant facts. To properly adjudicate the First Objection, the Tribunal cannot simply rely on the facts as pleaded by Claimant but will have to review and analyze a significant amount of evidence, including witness and expert evidence, in order to make its own findings. In these circumstances, the Tribunal finds that a short, bifurcated procedure is not appropriate for the proper adjudication of the First Objection.”).

II. ARMENIA MISSTATES THE APPLICABLE LEGAL STANDARD FOR BIFURCATION.

9. Armenia’s Bifurcation Request is premised on a fundamental misconception about the applicable standard. There is no support for Armenia’s argument that, under the 1976 UNCITRAL Rules, there is an “*even stronger*” presumption in favor of bifurcation in an inter-State arbitration under the ECT.¹⁴ Instead, this Tribunal retains broad discretion to determine whether bifurcation is appropriate, based on whether it will increase the overall efficiency and fairness of the proceedings. The Tribunal is “*free to consider all factors that it considers relevant in the particular circumstances*” of this case, including whether the objection is sufficiently substantial, likely to result in a material reduction of the scope of proceedings if granted, and not intertwined with the merits of the case¹⁵—all in light of the Tribunal’s overarching obligations to protect the integrity of the proceedings.¹⁶

A. There Is No “*Even Stronger*” Presumption in Favor of Bifurcation Applicable to These Proceedings.

10. Contrary to Armenia’s arguments, the Rules of Procedure in this arbitration do not establish a “*strong*” presumption in favor of bifurcation.¹⁷ While Article 17(4) of the Rules of Procedure provides that the Tribunal “*in general . . . should rule on a plea concerning its jurisdiction as a preliminary question,*” it also empowers this Tribunal to “*proceed with the arbitration and rule on [jurisdictional pleas] in its final award.*”¹⁸
11. As Armenia accepts, this language follows that of Article 21(4) of the 1976 UNCITRAL Rules.¹⁹ But Armenia’s interpretation ignores the plain terms of the provision, which uses the permissive “*should*” in directing tribunals to consider the appropriateness of bifurcation, in place of stronger, mandatory, language. The tribunal in *Glamis Gold*—a leading authority on bifurcation under the 1976 UNCITRAL Rules—recognized as much when it noted that “*Article 21(4) does not require that pleas as to jurisdiction must be ruled on as*

¹⁴ Bifurcation Request, ¶¶ 24–26.

¹⁵ **CL-96**, *Gran Colombia Gold Corp. v. Republic of Colombia*, ICSID Case No. ARB/18/23, Procedural Order No. 3, Decision on the Respondent’s Request for Bifurcation, 17 January 2020, ¶¶ 25–26.

¹⁶ *Id.*, ¶ 27.

¹⁷ Bifurcation Request, ¶ 24.

¹⁸ Procedural Order No. 1 (Rules of Procedure & Procedural Timetable), PCA Case No. 2023-65, 16 February 2024, Article 17(4).

¹⁹ **RL-29**, 1976 UNCITRAL Arbitration Rules, 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.”).

preliminary questions. The choice not to do so is left to the tribunal's discretion."²⁰ Subsequent tribunals have emphasized the breadth of that discretion.²¹ Insofar as any presumption in 'favor' of bifurcation exists, then, that presumption is "*seldom decisive*";²² at most, the provision is read "*as an instruction to the Tribunal and clearly not as an absolute right of the requesting party.*"²³

12. Nor does the inter-State nature of this dispute reduce the discretion afforded this Tribunal regarding bifurcation. Armenia's assertion that State sovereignty is an overriding consideration in inter-State arbitration, militating in favor of bifurcation, does not hold water. States parties to treaties give standing consent to be bound by the dispute resolution mechanisms in those treaties, including as to disputes *between* States, in the absence of any specific reservations.²⁴ In giving

²⁰ **RL-43**, *Glamis Gold Ltd. v. United States of America*, UNCITRAL, Procedural Order No. 2 (Revised), 31 May 2005, ¶ 9 (emphasis added).

²¹ See, e.g., **CL-86**, *Cairn Energy Plc and Cairn UK Holdings Limited v. Republic of India*, PCA Case No. 2016-7, Procedural Order No. 4, Decision on the Respondent's Application for Bifurcation, 19 April 2017, ¶ 75 ("The Tribunal concludes that, under the 1976 Rules which apply to this case, it is required to give serious consideration to a request that an objection to its jurisdiction should be heard as a preliminary question. However, it retains full discretion to determine whether, in the circumstances of the case, that objection should be heard preliminarily or be joined to the merits."); **CL-88**, "*President Allende*" *Foundation, Victor Pey Casado, Coral Pey Grebe (Spain) v. The Republic of Chile*, PCA Case No. 2017-30, Procedural Order No. 2, 29 November 2017, ¶ 64 ("However, as accepted by Respondent, that presumption is not absolute. The Tribunal retains a significant degree of discretion when determining whether the efficient administration of the proceedings counsels in favor of hearing an objection to jurisdiction separately from, or joined to, the merits."); **CL-98**, *Carlos Sastre and others v. United Mexican States*, ICSID Case No. UNCT/20/2, Procedural Order No. 2, Decision on Bifurcation, 13 August 2020, ¶ 37 ("The Tribunal notes that, under both the 1976 and the 2010 UNCITRAL Rules, it has ample discretion to decide whether to deal with jurisdictional objections first or join them with the merits in view of the specific circumstances of this dispute. What is paramount in exercising this discretion is to conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the Parties' dispute."). See also **CL-84**, United Nations, *2016 UNCITRAL Notes on Organizing Arbitral Proceedings*, October 2016, ¶ 69 ("[T]he arbitral tribunal has the flexibility and discretion to determine the sequence of the arbitral proceedings and may deal with all the points at issue collectively or sequentially depending on the circumstances of the arbitration.").

²² **CL-101**, *Nord Stream 2 v. European Union*, PCA Case No. 2020-07, Procedural Order No. 4, Decision on Request for Preliminary Phase on Jurisdiction, 31 December 2020, ¶ 45.

²³ **RL-43**, *Glamis Gold Ltd. v. United States of America*, UNCITRAL, Procedural Order No. 2 (Revised), 31 May 2005, ¶ 11.

²⁴ **CL-105**, *Indus Waters Treaty Arbitration (Pakistan v. India)*, PCA Case No. 2023-01, Award on the Competence of the Court, 6 July 2023, ¶ 132 ("The Court recalls India's standing consent to be bound by the Treaty, including its dispute resolution provisions (to which India entered no reservation) India's consent includes the recognition that a court of arbitration possesses general interpretative competence over the Treaty, regulated only by the terms of the Treaty regarding recourse to the court, including what might be referred to as the conditions precedent to such recourse.").

that consent, “the State both exercises and relinquishes, in part, its sovereignty by accepting the court or tribunal’s power to resolve disputes.”²⁵

13. Here, Armenia has consented to inter-State arbitration under the ECT pursuant to the 1976 UNCITRAL Rules. It cannot now read a “*default position*” of bifurcation into those Rules where no such provision exists.²⁶ In fact, in both this case and the *Bern Convention* case Armenia references in its Request, Armenia has already made,²⁷ and already lost,²⁸ the argument that there should be some sort of “*mandatory preliminary treatment of objections*” simply because these are inter-State cases.
14. In citing inapposite decisions issued by the International Court of Justice (“*ICJ*”),²⁹ Armenia ignores that the ICJ Rules of Court *specifically* provide for the suspension of the merits proceedings if a State files an objection to jurisdiction.³⁰

²⁵ *Id.*, ¶ 147, n. 316 citing **CL-70**, *The Case of the S.S. “Lotus” (France v. Turkey)*, Judgment, 7 September 1927, PCIJ Reports Series A No. 10, at 18 (“The rules of law binding upon States . . . emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims.”). See also *id.*, ¶ 148 (“[B]y ratifying the Treaty, India exercised its sovereignty by accepting not just a set of rules concerning the waters of the Indus system of rivers, but also accepting compulsory dispute settlement for the interpretation or application of those rules, including the possibility of awards rendered by a court of arbitration that are final and binding upon both India and Pakistan. This exercise of India’s sovereignty secured important benefits for India, by imposing binding rules and dispute settlement procedures upon Pakistan, once it too exercised its sovereignty by ratifying the Treaty.”).

²⁶ Bifurcation Request, ¶ 28.

²⁷ Transcript, First Procedural Meeting, PCA Case No. 2023-65, 12 January 2024, at 96–97.

²⁸ See **RL-99**, *Republic of Azerbaijan v. Republic of Armenia*, PCA Case No. 2023-60, Procedural Order No. 2, 15 May 2024, at 5–6 (making clear that the *Bern* tribunal did not, in fact, adopt bifurcation as a “default position”; rather, the parties have to submit briefings on whether bifurcation is appropriate, and the tribunal will then decide the question after a short hearing).

²⁹ See **RL-11**, *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Merits, Judgment, I.C.J. Reports 2010, ¶ 44 (dealing with significantly different circumstance than whether jurisdictional objections raised should be addressed on a preliminary basis; rather, applicant Republic of Guinea had introduced new claim in its reply submission, which deprived respondent Democratic Republic of the Congo of ability to raise preliminary objections at all in respect of that claim); **RL-10**, *Appeal Relating to the Jurisdiction of the ICAO Council*, Judgment, I.C.J. Reports 1972, ¶¶ 9–10 (the ICJ’s jurisdiction was as a body of appeal from a decision of the ICAO Council; jurisdictional issue posed was therefore whether the ICAO had in fact rendered a decision that was ripe for appeal to the ICJ).

³⁰ **RL-9**, ICJ, *ICJ Rules of Court*, Art. 79bis(3) (“Upon receipt by the Registry of a preliminary objection, the proceedings on the merits shall be suspended and the Court, or the President if the Court is not sitting, shall fix the time-limit for the presentation by the other party of a written statement of its observations and submissions, which shall include any evidence on which the party relies.”).

There is no equivalent provision in either the ECT, the 1976 UNCITRAL Rules, or the Rules of Procedure for this arbitration. Armenia is thus incorrect to downplay the relevance of bifurcation practice in investor-State proceedings. Considerations of State consent grounded in State sovereignty apply equally in investor-State cases, in which States are almost always the respondent.³¹ There is no reason for a “*stronger*” presumption in favor of bifurcation in cases where the claimant, which has already consented to the Tribunal’s jurisdiction by choosing to file its claims, is also a State.

B. Bifurcation Should Be Denied if It Is Unlikely to Increase the Efficiency, or Risks Prejudicing the Fairness, of the Proceedings.

15. Instead of Armenia’s misconceived considerations of State sovereignty, questions of fairness and procedural efficiency are determinative in considering a bifurcation application.³² Accordingly, the Tribunal should “*consider carefully*” whether bifurcation “*is likely to save time and costs of the overall proceedings*”³³ and should “*decline [to bifurcate the proceedings] when doing so is unlikely to bring about increased efficiency.*”³⁴ In short, tribunals must weigh the “*benefits of procedural fairness and efficiency against the risks of delay, wasted expense and prejudice.*”³⁵

³¹ **CL-1**, Energy Charter Treaty (1988) (“*ECT*”), Art. 26(3), providing that Contracting Parties give their “unconditional consent to the submission of a dispute to international arbitration.” See e.g., **CL-73**, *Limited Liability Company Amto v. Ukraine*, SCC Case No. 080/2005, Final Award, 26 March 2008, ¶ 45 (“It is well established that arbitration pursuant to an investment treaty such as the ECT requires an arbitration agreement. However, this arbitration agreement is not created by a contemporaneous exchange of promises between the parties in the manner of a commercial arbitration agreement. Rather, often offer and acceptance are separated in time and form. The State parties make an open offer of arbitration to investors of the other party or parties in the Treaty itself, which can be accepted by an investor when a dispute arises. Only at this time is there mutual consent to arbitration and therefore the Arbitral Tribunal has jurisdiction over the dispute.”).

³² **CL-86**, *Cairn Energy Plc and Cairn UK Holdings Limited v. Republic of India*, PCA Case No. 2016-7, Procedural Order No. 4, Decision on the Respondent’s Application for Bifurcation, 19 April 2017, ¶ 78 (“As the tribunal in *Accession Mezzanine* stated and the Parties have expressly recognized, ‘an overarching question [is] whether fairness and procedural efficiency would be preserved or improved.’ These considerations – fairness and procedural efficiency – are the determining factors that should guide the Tribunal’s discretion. As noted above, these were the principles that guided the negotiations for the 1976 Rules.”).

³³ **CL-84**, United Nations, *2016 UNCITRAL Notes on Organizing Arbitral Proceedings*, October 2016, ¶ 70.

³⁴ **RL-43**, *Glamis Gold Ltd. v. United States of America*, UNCITRAL, Procedural Order No. 2 (Revised), 31 May 2005, ¶ 12(c).

³⁵ **CL-78**, *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Procedural Order Deciding Bifurcation and Non-Bifurcation, 25 January 2013, ¶ 10.

16. Hence, while the “*primary motive*” underlying Article 21(4) of the 1976 UNCITRAL Rules is “*to ensure efficiency*,”³⁶ tribunals must consider “*not only procedural efficiency but also fairness*” and “*strike a balance between the two*” in deciding bifurcation applications.³⁷ Fairness requires that parties be provided with “*an adequate opportunity to be heard and to put one’s case [, which] is fundamental to an arbitral proceeding*.”³⁸ Tribunals routinely weigh the requirements of “*procedural fairness*” along with considerations of efficiency when applying the 1976 UNCITRAL Rules.³⁹
17. The *Glamis Gold* tribunal undertook a close assessment of the drafting history of Article 21(4) and identified three key criteria for determining whether bifurcation is warranted:

³⁶ **RL-43**, *Glamis Gold Ltd. v. United States of America*, UNCITRAL, Procedural Order No. 2 (Revised), 31 May 2005, ¶ 11.

³⁷ **CL-97**, *Red Eagle Exploration Limited v. Republic of Colombia*, ICSID Case No. ARB/18/12, Decision on Bifurcation, 3 August 2020, ¶ 42. See also **CL-90**, *Glencore Finance (Bermuda) Limited v. The Plurinational State of Bolivia*, PCA Case No. 2016-39, Procedural Order No. 2, Decision on Bifurcation, 31 January 2018, ¶ 56 (“Nevertheless, the Tribunal recalls that the overarching principle is the fairness and efficiency of this process as a whole.”); **CL-80**, *Accession Mezzanine Capital L.P. and Danubius Kereskedőház Vagyonkezelő Zrt. v. Hungary*, ICSID Case No. ARB/12/3, Decision on Respondent’s Notice of Jurisdictional Objections and Request for Bifurcation, 8 August 2013, ¶ 38 (“With regard to the applicable standard, Claimants are in agreement with Respondent that the Tribunal shall consider as an overarching question whether fairness and procedural efficiency would be preserved or improved. The Tribunal agrees.”).

³⁸ **CL-81**, *Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia*, ICSID Case No. ARB/12/39, Decision on Bifurcation, 21 January 2015, ¶ 85. See also **CL-96**, *Gran Colombia Gold Corp. v. Republic of Colombia*, ICSID Case No. ARB/18/23, Procedural Order No. 3, Decision on the Respondent’s Request for Bifurcation, 17 January 2020, ¶ 27 (noting that “a tribunal always must be guided by its ultimate duty to protect the integrity of proceedings, including its ability to hear all appropriate evidence and to provide meaningful relief.”).

³⁹ See, e.g., **CL-98**, *Carlos Sastre and others v. United Mexican States*, ICSID Case No. UNCT/20/2, Procedural Order No. 2, Decision on Bifurcation, 13 August 2020, ¶ 37 (“The Tribunal notes that, under both the 1976 and the 2010 UNCITRAL Rules, it has ample discretion to decide whether to deal with jurisdictional objections first or join them with the merits in view of the specific circumstances of this dispute. What is paramount in exercising this discretion is to conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the Parties’ dispute.”); **CL-86**, *Cairn Energy Plc and Cairn UK Holdings Limited v. Republic of India*, PCA Case No. 2016-7, Procedural Order No. 4, Decision on the Respondent’s Application for Bifurcation, 19 April 2017, ¶ 78 (“As the tribunal in *Accession Mezzanine* stated and the Parties have expressly recognized, ‘an overarching question [is] whether fairness and procedural efficiency would be preserved or improved.’ These considerations – fairness and procedural efficiency – are the determining factors that should guide the Tribunal’s discretion. As noted above, these were the principles that guided the negotiations for the 1976 Rules.”); **CL-101**, *Nord Stream 2 v. European Union*, PCA Case No. 2020-07, Procedural Order No. 4, Decision on Request for Preliminary Phase on Jurisdiction, 31 December 2020, ¶ 45.

(1) whether the objection is substantial inasmuch as the preliminary consideration of a frivolous objection to jurisdiction is very unlikely to reduce the costs of, or time required for, the proceeding; (2) whether the objection to jurisdiction if granted results in a material reduction of the proceedings at the next phase (in other words, the tribunal should consider whether the costs and time required of a preliminary proceedings, even if the objecting party is successful, will be justified in terms of the reduction in costs at the subsequent phase of proceedings); and (3) whether bifurcation is impractical in that the jurisdictional issue identified is so intertwined with the merits that it is very unlikely that there will be any savings in time or cost.⁴⁰

18. These criteria are not exhaustive, nor are they intended to function as a rigid test, and this Tribunal should, of course, take all relevant circumstances into account in considering Armenia's Request.⁴¹ Nonetheless, the *Glamis Gold* factors are "highly relevant"⁴² and provide an instructive framework, frequently applied by tribunals constituted under the 1976 UNCITRAL Rules.⁴³ Each of these criteria will therefore be considered in turn.

⁴⁰ **RL-43**, *Glamis Gold Ltd. v. United States of America*, UNCITRAL, Procedural Order No. 2 (Revised), 31 May 2005, ¶ 12(c) (emphases added).

⁴¹ *Ibid.*, (underscoring that its list of three factors was non-exhaustive, by prefacing it with the phrase "[c]onsiderations relevant to this analysis include, inter alia") (emphasis added). See also **CL-101**, *Nord Stream 2 v. European Union*, PCA Case No. 2020-07, Procedural Order No. 4, Decision on Request for Preliminary Phase on Jurisdiction, 31 December 2020, ¶ 45; **CL-85**, *The Burmilla Trust, The Josias Van Zyl Family Trust and Josias Van Zyl v. The Kingdom of Lesotho*, PCA Case No. 2016-21, Procedural Order No. 1, Suspension, Bifurcation and Procedural Timetable, 3 November 2016, ¶ 46; **CL-96**, *Gran Colombia Gold Corp. v. Republic of Colombia*, ICSID Case No. ARB/18/23, Procedural Order No. 3, Decision on the Respondent's Request for Bifurcation, 17 January 2020, ¶ 26.

⁴² **CL-96**, *Gran Colombia Gold Corp. v. Republic of Colombia*, ICSID Case No. ARB/18/23, Procedural Order No. 3, Decision on the Respondent's Request for Bifurcation, 17 January 2020, ¶ 25.

⁴³ See, e.g., **CL-88**, *"President Allende" Foundation, Victor Pey Casado, Coral Pey Grebe (Spain) v. The Republic of Chile*, PCA Case No. 2017-30, Procedural Order No. 2, 29 November 2017, ¶ 66 ("The Parties agree and the Tribunal concurs that, in deciding whether to hear jurisdictional objections with priority or to join them to the merits, the following considerations are notably relevant: (a) whether the objections to jurisdiction are *prima facie* substantial and not frivolous; (b) whether bifurcation would result in substantial cost savings and efficiency gains and the sound administration of these proceedings; (c) whether the jurisdictional objections are closely intertwined with the merits of the case; and (d) whether bifurcation would preserve the Parties' procedural rights."); **CL-86**, *Cairn Energy Plc and Cairn UK Holdings Limited v. Republic of India*, PCA Case No. 2016-7, Procedural Order No. 4, Decision on the Respondent's Application for Bifurcation, 19 April 2017, ¶¶ 76–77; **CL-82**, *AI1Y LTD. v. Czech Republic*, ICSID Case No. UNCT/15/1, Procedural Order No.

19. **The Objection Must Be Substantial.** *First*, an objection must be *prima facie* sufficiently serious and substantial to warrant bifurcation. While ‘frivolous’ objections plainly do not meet that threshold, that does “*not mean that every jurisdictional objection that surpasses that low threshold presumptively warrants bifurcation.*”⁴⁴ An objection may be non-frivolous but still not be “*sufficiently serious and substantial as to justify bifurcation.*”⁴⁵ Put another way, “*between frivolous and serious there may be degrees of seriousness that do not carry the weight to justify bifurcation.*”⁴⁶
20. **The Objection Must Materially Reduce the Proceedings.** *Next*, granting the objection must result in a material reduction in scope of the next phase of proceedings.⁴⁷ To determine whether the objection, if successful, would dispose

2, Decision on Bifurcation, 5 October 2015, ¶¶ 56–58 (“In exercising its discretion, the Respondent invites the Tribunal to consider the criteria set out in [*Glamis Gold*]. The Respondent summarizes these criteria as follows: (i) Is the request substantial or frivolous? (ii) Would the request, if granted, lead to a material reduction in the proceedings at the next stage? (iii) Is the bifurcation impractical in the sense that the issues are too intertwined with the merits so that a reduction of time and costs cannot be expected? The Claimant, in its Response, refers to these criteria, and in particular, to the *Glamis Gold* decision, in support of its request that the Respondent’s request for bifurcation be denied. The Tribunal accepts the Parties’ submissions in this respect and will be guided, in its analysis, by these three criteria.”); **CL-98**, *Carlos Sastre and others v. United Mexican States*, ICSID Case No. UNCT/20/2, Procedural Order No. 2, Decision on Bifurcation, 13 August 2020, ¶ 39 (“[A]rbitral tribunals often consider the following three criteria in order to examine whether or not bifurcation would be more efficient: a) whether the request is substantial or the objection is *prima facie* serious and substantial; b) whether the request, if granted, would lead to a material reduction in the proceedings at the next stage, or whether the objection, if successful, will result in disposing of all or an essential part of the claims raised; and c) whether bifurcation is impractical in the sense that the issues are too intertwined with the merit that it is very unlikely that there will be any savings in time or cost or can the objection be examined without prejudging or entering the merits of the case.”).

⁴⁴ **CL-96**, *Gran Colombia Gold Corp. v. Republic of Colombia*, ICSID Case No. ARB/18/23, Procedural Order No. 3, Decision on the Respondent’s Request for Bifurcation, 17 January 2020, ¶ 27.

⁴⁵ **CL-90**, *Glencore Finance (Bermuda) Limited v. The Plurinational State of Bolivia*, PCA Case No. 2016-39, Procedural Order No. 2, Decision on Bifurcation, 31 January 2018, ¶¶ 42, 50, 51.

⁴⁶ **CL-97**, *Red Eagle Exploration Limited v. Republic of Colombia*, ICSID Case No. ARB/18/12, Decision on Bifurcation, 3 August 2020, ¶ 42. See also **CL-92**, *Eco Oro Minerals Corp. v. Republic of Colombia*, ICSID Case No. ARB/16/41, Procedural Order No. 2, Decision on Bifurcation, 28 June 2018, ¶ 51 (“[F]or an objection to be held to be ‘serious and substantial’ a higher threshold must be applied than merely requiring that the objection is not frivolous or vexatious.”); **CL-94**, *Mr. Edmond Khudyan and Arin Capital & Investment Corp. v. Republic of Armenia*, ICSID Case No. ARB/17/36, Procedural Order No. 3, Decision on the Respondent’s Request for Bifurcation, 5 December 2018, ¶ 41 (“This Tribunal finds that mere assertions are not sufficient to satisfy the required threshold and that, in order for this factor to weigh in favor of bifurcation, the Respondent’s jurisdictional objections must be supported by concrete factual allegations and the Respondent must make a *prima facie* showing of their potential success on their merits.”).

⁴⁷ **CL-101**, *Nord Stream 2 v. European Union*, PCA Case No. 2020-07, Procedural Order No. 4, Decision on Request for Preliminary Phase on Jurisdiction, 31 December 2020, ¶ 36; **RL-43**, *Glamis*

of all or an essential part of the claims raised, tribunals must assess whether bifurcation “*would reduce time and costs*,”⁴⁸ or whether the objection could dispose of the case entirely.⁴⁹

21. **The Objection Must Be Capable of Assessment Independently of the Merits.** *Finally*, a critical consideration for tribunals deciding if bifurcation serves the interests of procedural fairness and efficiency is whether the objections are closely related to or intertwined with the merits of the claims.⁵⁰ Tribunals considering requests for bifurcation must take claimants’ allegations as pleaded.⁵¹ If there is a risk that the objection cannot be examined without prejudging or entering into the merits of the case, then bifurcation is not appropriate. In particular, if “*the same or similar arguments and facts are likely to be relevant for both the procedural and the substantive determination*,” then bifurcation is unlikely to result in any savings of time or cost, and is thus unwarranted.⁵² The tribunal in *Mesa Power*, for example, discontinued bifurcation for this reason, even after the objections were fully briefed:

Having now had the benefit of the Claimant’s Answer on Jurisdiction, it appears to the Tribunal that it may not be possible to rule . . . in the abstract, without substantially engaging in the facts of the dispute. The Tribunal will likely need to establish certain facts and the connections between these facts. Such an inquiry will best be conducted together

Gold Ltd. v. United States of America, UNCITRAL, Procedural Order No. 2 (Revised), 31 May 2005, ¶ 12(c).

⁴⁸ **CL-98**, *Carlos Sastre and others v. United Mexican States*, ICSID Case No. UNCT/20/2, Procedural Order No. 2, Decision on Bifurcation, 13 August 2020, ¶ 41.

⁴⁹ *Ibid.* See also **CL-82**, *AIY LTD. v. Czech Republic*, ICSID Case No. UNCT/15/1, Procedural Order No. 2, Decision on Bifurcation, 5 October 2015, ¶ 60.

⁵⁰ See **CL-106**, *Amerra Capital Management LLC and others v. United Mexican States*, ICSID Case No. UNCT/23/1, Procedural Order No. 3, 3 November 2023, ¶¶ 14–19 (dismissing the respondent’s request for bifurcation because “several of Respondent’s jurisdictional objections may require the Tribunal to delve into matters connected to the merits of Claimants’ case”); **CL-101**, *Nord Stream 2 v. European Union*, PCA Case No. 2020-07, Procedural Order No. 4, Decision on Request for Preliminary Phase on Jurisdiction, 31 December 2020, ¶ 48 (declining to bifurcate the proceedings on the basis that the analysis “may . . . become intertwined with aspects of the merits”).

⁵¹ **CL-102**, *Tennant Energy, LLC v. Government of Canada*, PCA Case No. 2018-54, Procedural Order No. 9, Renewed Request on Bifurcation, 10 March 2021, ¶ 36 (“The Tribunal [must have] regard to the specific allegations of breach as pleaded by the Claimant. It is not for the Tribunal to consider at the bifurcated jurisdictional hearing whether there is merit to the Claimant’s pleaded allegations.”).

⁵² **CL-101**, *Nord Stream 2 v. European Union*, PCA Case No. 2020-07, Procedural Order No. 4, Decision on Request for Preliminary Phase on Jurisdiction, 31 December 2020, ¶ 50; **RL-43**, *Glamis Gold Ltd. v. United States of America*, UNCITRAL, Procedural Order No. 2 (Revised), 31 May 2005, ¶ 12(c).

with the merits phase, when the Tribunal will have the benefit of the entire record, including documents obtained through document production orders and witness evidence. It indeed anticipates at this stage that part of the facts, allegations, evidence, and arguments related to jurisdiction will overlap with the case on the merits.⁵³

22. The three *Glamis Gold* criteria are cumulative, in that objections that fail to meet *any one* of these criteria are unsuitable for bifurcation. Bifurcation of such objections may well result in unnecessary *increases* in costs and time of the proceedings, since it is likely that such objections would ultimately be rejected or would fail to dispose of the proceedings as a whole.⁵⁴
23. Contrary to Armenia’s assertions,⁵⁵ there is no reason that these considerations of procedural efficiency and fairness apply any less in these inter-State proceedings—where both State parties are expending public funds and have consented to the application of the same UNCITRAL Rule—than in investor-State proceedings.⁵⁶
24. Further, if numerous objections are raised that do not all have an exclusively preliminary character, procedural efficiency and fairness counsel against bifurcation even if the bifurcatable objection(s) could dispose of the entire case—and even more so if they could not.⁵⁷ Instead, in light of “*the overarching*

⁵³ **CL-79**, *Mesa Power Group, LLC v. Government of Canada*, PCA Case No. 2012-17, Procedural Order No. 3, 28 March 2013, ¶¶ 73, 77.

⁵⁴ **CL-93**, ICSID Secretariat, *Proposals for Amendment of the ICSID Rules – Working Paper 1* (Volume 3), Schedule 9: Addressing Time and Costs in ICSID Arbitration, 2 August 2018, at 899–902. *See also id.*, ¶ 393 (Working Paper 1 of the Proposals for Amendment of the ICSID Rules, noting that bifurcated proceedings upholding jurisdiction are, on average, longer and more expensive than non-bifurcated proceedings).

⁵⁵ Bifurcation Request, ¶ 33, n. 42; ¶ 34.

⁵⁶ *See, e.g.*, **RL-62**, *South China Sea Arbitration (Philippines v. China)*, PCA Case No. 2013-19, Procedural Order No. 4, 21 April 2015, recital 4 (“[T]he Arbitral Tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the Parties are treated with equality and that at any stage of the proceedings each Party is given a full opportunity to be heard and to present its case. The Arbitral Tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the Parties’ dispute.”); **RL-84**, *Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen (Ukraine v. Russian Federation)*, PCA Case No. 2019-28, Procedural Order No. 2, 27 October 2020, recital 28 (“WHEREAS the Arbitral Tribunal is conscious of its duty to ensure the fair and efficient administration of justice and to avoid unnecessary delay and expense.”).

⁵⁷ *See* **CL-90**, *Glencore Finance (Bermuda) Limited v. The Plurinational State of Bolivia*, PCA Case No. 2016-39, Procedural Order No. 2, Decision on Bifurcation, 31 January 2018, ¶¶ 44, 56 (declining to bifurcate although the bifurcatable objection would be dispositive if granted); **CL-89**, *Global Telecom Holding S.A.E. v. Canada*, ICSID Case No. ARB/16/16, Procedural Order No. 2, 14 December 2017, ¶ 110 (declining to bifurcate even where, had the respondent succeeded “on one or

*principle [of] the fairness and efficiency of this process as a whole,” all the objections should be joined to the merits and decided together at that stage.*⁵⁸

25. By declining to bifurcate under these circumstances, “*there would be less risk of substantial delay [. . . ;] there would be less risk of wasted expense for the Parties given that overlapping jurisdictional and liability issues need not be addressed twice (should the jurisdictional objections fail); and there would be no risk of inconsistent submissions by the Parties or prejudicial decisions by the Tribunal.*”⁵⁹ These considerations take on even greater importance in seminal, complex cases like the case at hand. The Tribunal’s decision could have “*significant implications*” for future disputes, warranting a “*cautious approach*,” where the Tribunal will benefit from a complete picture of the factual evidence and fully particularized legal claims and defenses before reaching any final decisions.⁶⁰

more of its non-dispositive objections in a preliminary jurisdictional phase, the subsequent merits phase would be somewhat reduced in scope [but the Tribunal] is not convinced that this would warrant the additional costs and time delays associated with a complete two-phase proceeding”).

⁵⁸ **CL-90**, *Glencore Finance (Bermuda) Limited v. The Plurinational State of Bolivia*, PCA Case No. 2016-39, Procedural Order No. 2, Decision on Bifurcation, 31 January 2018, ¶ 56 (“Nevertheless, the Tribunal recalls that the overarching principle is the fairness and efficiency of this process as a whole. With this principle in mind, the Tribunal considers that it would be more efficient to deal with all preliminary objections together with liability in a first phase, and leave issues of damages, if any, for determination in a second phase. This approach seems to the Tribunal more efficient in terms of time and costs than the alternative, which is to bifurcate just one issue but leave all other objections to a merits phase.”); *see also* **CL-100**, *Patel Engineering Limited v. Republic of Mozambique*, PCA Case No. 2020-21, Procedural Order No. 3, Decision on the Motion for Bifurcation, 14 December 2020, ¶¶ 65–66 (finding one of the respondent’s objections to be intertwined with the merits, and therefore electing to “join the remaining Objections to the merits”); **CL-89**, *Global Telecom Holding S.A.E. v. Canada*, ICSID Case No. ARB/16/16, Procedural Order No. 2, 14 December 2017, ¶¶ 106, 110 (denying respondent’s request for bifurcated proceedings even though one objection could be dispositive); **CL-78**, *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Procedural Order Deciding Bifurcation and Non-Bifurcation, 25 January 2013, ¶¶ 9–11 (holding that as a matter of “overall procedural fairness” the proceedings should not be bifurcated, and there would be no risk of “prejudicial decisions by the Tribunal”).

⁵⁹ **CL-78**, *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Procedural Order Deciding Bifurcation and Non-Bifurcation, 25 January 2013, ¶ 11.

⁶⁰ **CL-101**, *Nord Stream 2 v. European Union*, PCA Case No. 2020-07, Procedural Order No. 4, Decision on Request for Preliminary Phase on Jurisdiction, 31 December 2020, ¶ 48. *See also* **CL-87**, *Michael Ballantine and Lisa Ballantine v. Dominican Republic*, PCA Case No. 2016-17, Procedural Order No. 2, Bifurcation, 21 April 2017 (under the 2013 UNCITRAL Rules), ¶¶ 22, 28–30, where the tribunal refused to rule preliminarily on “a question of first impression” which was intertwined with the merits.

26. In sum:

- a. This Tribunal has broad discretion to refuse or grant bifurcation under Article 17(4) of the Rules of Procedure governing this arbitration (which follows Article 21(4) of the 1976 UNCITRAL Rules);
- b. In exercising that discretion, the Tribunal may look to the non-exhaustive list of efficiency-focused factors identified by the *Glamis Gold* tribunal, namely, (1) whether the objection is substantial; (2) whether the objection would lead to a material reduction, or a dismissal, of the proceedings; and (3) whether the objection can be determined without an assessment of the merits;
- c. In addition, procedural fairness independently requires that, where objections are highly fact-dependent or turn on contested facts, the Tribunal should resolve objections together with the merits on the basis of a fully developed record, so that it has the benefit of evidence submitted by both Parties, including documents obtained in the disclosure phase and witness testimony.

27. These considerations are heightened where, as here, most of the moving party's numerous objections are plainly unsuitable for bifurcation, none of the remaining objections would dispose of the case, and any potential reduction of scope is not worth the additional cost and delays—and is in any event outweighed by the overall fairness and efficiency of resolving the novel, complex issues raised by the case in a single undivided proceeding.

III. THE TRIBUNAL SHOULD DENY ARMENIA'S BIFURCATION REQUEST.

28. Armenia's Bifurcation Request puts forward ten objections—plus a threatened eleventh—to Azerbaijan's claims and requests consideration of *all* of these objections on a preliminary basis, in bifurcated proceedings. But almost all of Armenia's objections are closely linked to the merits of the dispute, requiring the same intensive inquiry into the factual points and legal arguments that the Tribunal will need to determine on the merits.

29. Additionally, while all of the objections are groundless, as Azerbaijan will explain further when the objections are briefed in full, a number of them are not even substantial as they misstate Azerbaijan's arguments or the relevant law. Considering those objections on a preliminary basis is "*very unlikely to reduce the costs of, or time required for, the proceeding.*"⁶¹ Others address only a small

⁶¹ **RL-43**, *Glamis Gold Ltd. v. United States of America*, UNCITRAL, Procedural Order No. 2 (Revised), 31 May 2005, ¶ 12(c).

subset of Azerbaijan's claims, and so would result in no material reduction in scope of the next phase of proceedings if bifurcated and decided in an initial phase.⁶²

30. Bifurcation is therefore not warranted, as it is “*highly unlikely to bring about increased efficiency*”⁶³ and risks prejudging the merits of the Parties' claims and defenses.⁶⁴ Instead of bifurcating just one or two objections, all of Armenia's objections should be joined to the merits and be considered together at that stage.

A. Armenia's Jurisdictional Objections Under ECT Articles 18 and 7 Are Predicated on Misstatements of Fact and Law, Intertwined with the Merits, or Otherwise Unsuitable for Bifurcation.

31. Armenia raises several objections regarding the Tribunal's jurisdiction under ECT Articles 18 and 7 in relation to Azerbaijan's claims. Armenia's arguments largely raise issues that are closely linked to the merits of the dispute, and bifurcating these objections would in any event not further the interests of procedural efficiency or fairness. These objections are therefore, overall, unsuitable for bifurcation.

1. Armenia's Objections Relating to Article 18

32. Armenia objects that Azerbaijan's Article 18 claims do not “*give rise to a cause of action*,”⁶⁵ are “*based on principles of customary international law that are outside of the Tribunal's jurisdiction*,”⁶⁶ and “*concern conduct that is not capable of constituting violations*” of Article 18.⁶⁷ While Armenia has sought to present these as three separate issues of “*an exclusively preliminary character*,”⁶⁸ they are in fact intimately interrelated. At its core, Armenia's objection is that Article 18 imposes no substantive treaty obligation that can be breached by the conduct Azerbaijan has alleged. Resolving that objection requires careful assessment of mixed questions of law and fact that are, by definition, inappropriate for preliminary determination on an incomplete record.
33. *First*, Armenia's attempt to have this Tribunal engage in an abstract exercise of determining whether Azerbaijan's case rests on customary principles or treaty

⁶² *Ibid.*

⁶³ *Ibid.*

⁶⁴ *See supra* n 50.

⁶⁵ Bifurcation Request, Section III.A.1.

⁶⁶ *Id.*, Section III.A.2.

⁶⁷ *Id.*, Section III.A.3.

⁶⁸ *Id.*, ¶ 32.

obligations purposely misses the point. There is no question that Azerbaijan's Article 18 claims allege violations of the terms of the ECT. Specifically, Azerbaijan has pleaded that:

Armenia committed ongoing and repeated violations of Azerbaijan's rights under Articles 18(1) and 18(3) of the ECT through a series of continuing and/or composite acts by which it:

- (i) Denied Azerbaijan access to its energy resources in its internationally recognized sovereign territory . . . ;
- (ii) Exploited those resources for Armenia's own economic and political benefit, without consent or compensation . . . ; and
- (iii) Impaired Azerbaijan's development of its own resources.⁶⁹

34. Azerbaijan has also pleaded specific violations of Article 18 regarding each energy resource in question, including violations of Azerbaijan's rights under Article 18(3) of the ECT to (i) determine the geographical areas in which it may explore and develop resources, and the rate of that exploitation, (ii) determine taxes or other financial payments in connection with those resources, and (iii) participate in their exploration or exploitation.⁷⁰

⁶⁹ Statement of Claim, ¶ 200. *See also id.*, ¶ 225 (“[T]hroughout the occupation, Armenia breached Azerbaijan's rights to decide where to explore and develop its coal resources by deciding to develop the Chardaghli coalfield for Armenia's own benefit.”); ¶ 233 (“Armenia breached Articles 18(1) and 18(3) of the ECT by obstructing Azerbaijan from developing the Khudafarin and Giz Galasi project sites and exploiting their hydropower resources, thereby denying and delaying Azerbaijan's full exercise of its sovereign rights over those resources.”).

⁷⁰ **CL-1**, ECT, Art. 18(3). *See, e.g.*, Statement of Claim, ¶ 212 (“As of the ECT's entry into force in 1998, Armenia had cut off the natural gas supply to Nakhchivan and had not restored supply, interfering with Azerbaijan's rights to determine how to exploit its gas resources and to receive financial benefits from such exploitation.”), ¶ 216 (“Throughout the duration of the occupation, Armenia breached Azerbaijan's rights to determine the rate at which the Sarsang Reservoir and Tartar HPP should be exploited, another right of sovereignty enshrined in Article 18(3).”), ¶ 217 (“Armenia breached Azerbaijan's right to specify and enjoy any taxes, royalties or other financial payments payable by virtue of the exploitation of Tartar HPP.”), ¶ 214 (“Armenia denied Azerbaijan the ability to participate in the exploitation of the Sarsang Reservoir to generate electricity through the Tartar HPP. Instead, Armenia decided to exploit the plant for its own benefit.”), ¶ 227 (“Armenia breached Azerbaijan's right to participate in the exploration and exploitation of the Chardaghli mine.”), ¶ 228 (“Armenia also breached Azerbaijan's right to determine the rate at which the coal resources would be exploited.”), ¶ 230 (“It was Armenia's conduct, therefore, which determined the rate of depletion of Azerbaijan's coal resources at Chardaghli based on demand from the Yerevan TPC, in violation of

35. As the Statement of Claim also makes clear, Azerbaijan’s argument is that the text of Article 18 clearly encompasses permanent sovereignty over natural resources, a concept with a longstanding history under customary international law.⁷¹ Azerbaijan’s uncontroversial position—consistent with Article 31(3)(c) of the Vienna Convention on the Law of Treaties—is therefore not only that the text of Article 18 codifies the customary rule, but also that the Tribunal’s interpretation of Article 18 of the ECT should take this principle “*into account*” as a “*relevant rule[] of international law applicable in the relations between the parties.*”⁷²
36. The authorities Armenia cites confirm as much: a party cannot seek to import unrelated international rules into a treaty on an entirely different subject matter,⁷³ but courts and tribunals may take account of customary principles to aid their treaty interpretation when deciding the merits of a claim.⁷⁴ The ECT expressly

Azerbaijan’s sovereign rights.”), ¶ 231 (“[D]espite the rapid depletion of Azerbaijan’s coal resources, Armenia never considered Azerbaijan’s right to taxes or other financial payments owed for the exploration or exploitation of those resources, contrary to Article 18(3). Azerbaijan enjoyed no benefits from the activities at the mine undertaken during the occupation. The main beneficiary of these activities was Armenia.”), ¶ 236 (“Armenia’s conduct not only breached Azerbaijan’s sovereign rights to develop and pursue construction works at the Khudafarin and Giz Galasi sites—and thereby exercise full sovereignty over its own hydropower resources—it also prevented Azerbaijan from participating in, enjoying the economic and financial benefits arising out of, or exercising any regulatory authority over such operations.”).

⁷¹ See Statement of Claim, ¶ 180 (“The ECT *thus codifies*, at Article 18, the fundamental principle of permanent sovereignty over natural resources, which is commonly understood as a state’s right to dispose of its natural resources as it sees fit.”) (emphasis added; internal quotation marks and citation omitted).

⁷² **CL-11**, Vienna Convention on the Law of Treaties, Article 31(3)(c). See also **CL-75**, E. Lauterpacht (ed.) “Hersch Lauterpacht: International Law – Collected Papers, 1. General Works” (2009), at 88 (noting the basic rule that “treaties . . . must be interpreted in the light of customary international law”).

⁷³ See Bifurcation Request, ¶¶ 77–81, citing **RL-61**, *Chagos Marine Protected Area (Mauritius v. United Kingdom)*, PCA Case No. 2011-03, Award, 18 March 2015, ¶¶ 211, 221; and **RL-73**, *Immunities and Criminal Proceedings, (Equatorial Guinea v. France)*, Preliminary Objections, Judgment, I.C.J. Reports 2018, ¶¶ 18-19, 54, 90-95.

⁷⁴ **RL-63**, *Arctic Sunrise Arbitration (Netherlands v. Russian Federation)*, PCA Case No. 2014-02, Award on the Merits, 14 August 2015, ¶¶ 197–198 (“The Tribunal considers that, if necessary, it may have regard to general international law in relation to human rights This would be to interpret the relevant Convention provisions by reference to relevant context. . . . In determining the claims by the Netherlands in relation to the interpretation and application of the Convention, the Tribunal may, therefore. . . have regard to the extent necessary to rules of customary international law, including international human rights standards, not incompatible with the Convention, in order to assist in the interpretation and application of the Convention’s provisions that authorise the arrest or detention of a vessel and persons.”); **RL-68**, *The Duzgit Integrity Arbitration (Malta v. São Tomé and Príncipe)*, PCA Case No. 2014-07, Award, 5 September 2016, ¶ 208 (holding that “in order properly to interpret and apply particular provisions of the Convention, it may be necessary for a tribunal to resort to foundational or secondary rules of general international law such as the law of treaties or the rules of

- contemplates this approach by tribunals exercising jurisdiction under Article 27, requiring arbitrators to decide these claims in accordance with the ECT “*and applicable rules and principles of international law.*”⁷⁵ Armenia’s arguments on this score are simply a thinly veiled attempt to manufacture a jurisdictional issue, and seek a separate preliminary phase, based on a willful mischaracterization of Azerbaijan’s claims and the applicable law.
37. The real question posed by Armenia’s objection is: what does it mean, in the circumstances of this case, to “*recognize state sovereignty and sovereign rights over energy resources*” under the ECT?⁷⁶ Even if the Tribunal declines to look outside the four corners of the ECT’s text to answer that question, it would still have to determine whether and to what extent all of the wrongful conduct alleged by Azerbaijan is capable of violating Article 18. As explained below, that exercise cannot be artificially divorced from the heated factual disputes the Tribunal will need to resolve on the merits. It would require an assessment of facts and arguments deeply intertwined with the merits, which is inappropriate at this stage.
 38. *Second*, Armenia’s Article 18 objections require the Tribunal to conduct a detailed assessment of mixed questions of law and fact that are, by definition, inappropriate for preliminary determination on an incomplete record.
 39. For example, relying on the ICJ’s merits judgment in the *Armed Activities (DRC v. Uganda)* case,⁷⁷ Armenia argues that the Tribunal should examine and adopt certain key facts and find that Azerbaijan’s claims fall outside the scope of Article 18, because the customary law principle of permanent sovereignty over natural resources “*does not operate*” in situations of armed conflict. But the ICJ’s ruling was highly fact-dependent and contextual. Contrary to Armenia’s assertions, the ICJ did not propound a blanket rule that the customary principle of permanent sovereignty over natural resources “*does not operate*” in “*a situation of armed conflict.*”⁷⁸ Instead, the ICJ found that principle did not apply to “*the specific situation*” before the Court, because the allegations did not relate to a “*governmental policy of Uganda directed at the exploitation of natural resources*”

State responsibility. In the case of some broadly worded or general provisions, it may also be necessary to rely on primary rules of international law other than the Convention in order to interpret and apply particular provisions of the Convention.”).

⁷⁵ CL-1, ECT, Article 27(3)(g) (emphasis added).

⁷⁶ CL-1, ECT, Article 18(1).

⁷⁷ Bifurcation Request, ¶ 92.

⁷⁸ *Id.*

but rather to “*looting, pillage and exploitation of certain natural resources*” by individual Ugandan soldiers.⁷⁹

40. The case set out in Azerbaijan’s Statement of Claim is, in fact, wholly consistent with the *Armed Activities* judgment: Azerbaijan has pleaded that there was a clear “*governmental policy*” to deny Azerbaijan access to its energy resources and exploit them for Armenia’s own benefit, devised and implemented by the Government of Armenia (not individual acts of looting or pillage).⁸⁰ Specifically, Azerbaijan asserts that:
- a. Armenia exploited the Tartar Hydropower Plant to create a so-called “*whole unified,*” “*domestic*” energy market across the Occupied Territories and Armenia.⁸¹
 - b. Armenia erected or permitted the construction of at least 32 small hydropower plants to “*ensure the energy independence*” of the Occupied Territories and Armenia, and to serve as “*an avenue of export*” to Armenia.⁸²
 - c. Armenia authorized and enabled the development of the Chardaghli coalfield to fuel a power plant in Yerevan, as part of its policy aimed at strengthening its energy security following the surging price of natural gas imported from Russia.⁸³
 - d. Further, Azerbaijan has pleaded claims relating not just to exploitation but also to denial of access to its energy resources because of Armenia’s “*sustained exertion of military force*” that barred Azerbaijan from accessing its resources in the Occupied Territories.⁸⁴
41. If the Tribunal is to apply the actual holding in *DRC v. Uganda* to this case, it will need to carefully analyze whether, for each alleged violation, Azerbaijan has sufficiently asserted a governmental policy of denial or exploitation. This inquiry would require consideration of heavily contested facts and the same evidence and

⁷⁹ **CL-41**, *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, I.C.J. Reports 2005, ¶¶ 242, 244 (emphasis added).

⁸⁰ Pillage in the context of an international armed conflict is generally defined as the forcible taking of property for the perpetrator’s own *private or personal use*. See **CL-107**, ICRC IHL Database, <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule52>; **CL-77**, International Criminal Court, Elements of Crimes, 2011, Art. 8(2)(b)(xvi).

⁸¹ Statement of Claim, ¶ 215.

⁸² *Id.*, ¶ 85.

⁸³ *Id.*, ¶ 226.

⁸⁴ *Id.*, e.g., ¶¶ 204, 208, 235.

- arguments underlying Azerbaijan’s merits claims, including what acts constitute the claimed denial or exploitation and who is responsible for those acts—and could turn in no small part on whether the Tribunal adopts the facts as set out by Azerbaijan, or Armenia’s version of events.
42. Armenia’s own submissions confirm that this Article 18 objection requires the determination of complex and contested facts. While Armenia states that it “*may be appropriate to ‘accept pro tem the facts as alleged by [Azerbaijan] to be true’*,” it nevertheless argues that “*the Tribunal is not prevented from analyzing and adopting its own characterization of such facts.*”⁸⁵ But if the Tribunal is to ‘analyze and adopt’ its own characterization of the facts required to determine whether Azerbaijan’s claims are capable of falling within the scope of Article 18, it necessarily means that the Article 18 objection is too closely linked to the merits to warrant bifurcation.
 43. Indeed, Armenia has highlighted the sort of facts it would have the Tribunal ‘analyze and adopt’ for the purpose of deciding this objection, referencing the ICJ’s decision on preliminary objections in the *Azerbaijan v. Armenia* case.⁸⁶ There, Armenia argues, the ICJ examined “*the likely motivation behind the impugned acts, the demographics of the area, and the ways in which the relevant resources were said to have been used.*”⁸⁷
 44. Whatever approach the ICJ has adopted in its own cases, arbitral tribunals considering bifurcation applications have been loath to reach such decisions at this early stage of a case, because conducting that analysis “*in all likelihood require[s] a detailed examination of the same evidence that will ultimately need to be examined at the stage of determining the merits.*”⁸⁸ For example, in its Request, Armenia:
 - a. contends that the exploited 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*”;⁸⁹

⁸⁵ Bifurcation Request, ¶ 89.

⁸⁶ *Id.*, ¶¶ 21, 89.

⁸⁷ *Id.*, ¶ 89.

⁸⁸ **CL-81**, *Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia*, ICSID Case No. ARB/12/39, Decision on Bifurcation, 21 January 2015, ¶ 93. See also **CL-79**, *Mesa Power Group, LLC v. Government of Canada*, PCA Case No. 2012-17, Procedural Order No. 3, 28 March 2013, ¶¶ 73, 76; **CL-101**, *Nord Stream 2 v. European Union*, PCA Case No. 2020-07, Procedural Order No. 4, Decision on Request for Preliminary Phase on Jurisdiction, 31 December 2020, ¶ 48.

⁸⁹ Bifurcation Request, ¶ 17.

- b. disputes that Armenia exploited the “*main energy resources*” alleged in Azerbaijan’s Statement of Claim, asserting that, for example, “*the Tartar Hydropower Plant, the ‘Chardaghli’ Coalfield, and the six small hydropower plants,*” were located in areas that Armenia contends “*have always had a majority ethnic Armenian population,*” and were purportedly used for the benefit of what Armenia calls the “*indigenous population*” there;⁹⁰ and
 - c. accuses Azerbaijan of “*carr[ying] out a campaign to permanently expel the indigenous inhabitants of Nagorno-Karabakh . . . and take over their resources.*”⁹¹
45. Armenia’s various factual allegations and assertions relate to political motivations, demographic patterns, and use of the resources, and do not merely entail a “*characterization*” of neutral or commonly accepted facts. Instead, Armenia’s objection is an outright rejection and rewriting of facts that form the *gravamen* of Azerbaijan’s claims.
46. In short, Armenia asks this Tribunal to “*substantially engag[e] in the facts of the dispute,*”⁹² so as to rule on Armenia’s Article 18 arguments. But in that case, the Tribunal cannot proceed on the basis of “*assumed facts*”; instead, the “*facts forming the basis of the Tribunal’s jurisdiction must be proven*”.⁹³ Those facts are disputed, and their resolution will ultimately depend on the development of a full factual record, including evidence yet to be submitted by Armenia, documents disclosed voluntarily or by Tribunal order in a disclosure phase, and additional evidence uncovered by Azerbaijan in its ongoing efforts to uncover the full extent of the devastation wrought by three decades of unlawful occupation.⁹⁴ As explained in the Statement of Claim, Azerbaijan has only been able to access the full extent of the formerly Occupied Territories since September 2023, and has accordingly reserved its rights to supplement, amend, or modify its claims as

⁹⁰ *Id.*, ¶ 18.

⁹¹ *Id.*, ¶ 22.

⁹² **CL-79**, *Mesa Power Group, LLC v. Government of Canada*, PCA Case No. 2012-17, Procedural Order No. 3, 28 March 2013, ¶ 73.

⁹³ *Id.*, ¶ 76 (emphasis added).

⁹⁴ Statement of Claim, ¶ 162; see **CL-79**, *Mesa Power Group, LLC v. Government of Canada*, PCA Case No. 2012-17, Procedural Order No. 3, 28 March 2013, ¶¶ 73, 76. See also, **CL-103**, *Mainstream Renewable Power and others v. Federal Republic of Germany*, ICSID Case No. ARB/21/26, Procedural Order No. 3, Decision on Bifurcation, 7 June 2022, ¶¶ 58–59 (rejecting a request for bifurcation where “the jurisdictional questions would be very much intertwined with the merits in this proceeding” and “the Respondent has not yet pleaded its defence on the merits”, because “[t]he majority of the Tribunal is concerned that this raises a risk that it will not be able to deal with the Respondent’s arguments . . . in a fair or full manner that properly affords a full right to be heard by both sides”).

additional information becomes available.⁹⁵ Further, the landmines deployed by Armenia during the occupation and Armenia’s destruction of materials continue to impede Azerbaijan’s access to the facts and evidence that would be relevant for both jurisdiction and the merits,⁹⁶ including information within Armenia’s exclusive control. Since resolving Armenia’s objection will require “*a greater understanding of the underlying facts . . . than is suitable for accelerated determination*,”⁹⁷ considerations of procedural fairness dictate that the Tribunal should reserve its judgment for the merits stage.

47. *Finally*, and in any event, determining Armenia’s Article 18 objections will neither dispose of Azerbaijan’s case nor otherwise lead to the efficient conduct of the proceedings.⁹⁸
48. This is clear, for example, with respect to Armenia’s objection that Article 18 does not “*give rise to an independent cause of action*.”⁹⁹ Even if the Tribunal were to find that Article 18 is merely a “*hortatory*”¹⁰⁰ provision—which is denied—this objection would not dispose of Azerbaijan’s substantive claims under Article 7 nor moot all of Armenia’s objections in relation to those claims. The Tribunal would still have to decide Armenia’s objections as to whether those claims are temporally barred, whether Armenia can avail itself of the essential security interest clause in Article 24(3)(a) of the ECT, and the extent to which conduct underpinning the Article 7 claims is attributable to Armenia. As explained in Sections III.B–D. below, those objections are intertwined with issues to be addressed at the merits stage, and therefore are not suitable for bifurcation.
49. It would be likewise inefficient to bifurcate Armenia’s argument that certain of Azerbaijan’s claims fall outside the scope of ECT Article 18 because they do not relate to energy resources.¹⁰¹ Again, determining this objection would require a detailed parsing of the facts of each alleged violation, to determine whether it

⁹⁵ Statement of Claim, ¶¶ 60, 160, 162, 262, 270, 272, 278.

⁹⁶ See **RL-43**, *Glamis Gold Ltd. v. United States of America*, UNCITRAL, Procedural Order No. 2 (Revised), 31 May 2005, ¶ 12(c); **CL-95**, *The Estate of Julio Miguel Orlandini Agreda and Compañía Minera Orlandini Ltda. v. The Plurinational State of Bolivia*, PCA Case No. 2018-39, Decision on the Respondent’s Application for Termination, Trifurcation and Security for Costs, 9 July 2019, ¶ 133 (“It will hardly be efficient if the same documents would have to be reviewed twice, the same witnesses would have to be heard twice, etc.”).

⁹⁷ **CL-96**, *Gran Colombia Gold Corp. v. Republic of Colombia*, ICSID Case No. ARB/18/23, Procedural Order No. 3, Decision on the Respondent’s Request for Bifurcation, 17 January 2020, ¶ 30.

⁹⁸ **CL-101**, *Nord Stream 2 v. European Union*, PCA Case No. 2020-07, Procedural Order No. 4, Decision on Request for Preliminary Phase on Jurisdiction, 31 December 2020, ¶ 50.

⁹⁹ Bifurcation Request, ¶ 40.

¹⁰⁰ *Id.*, ¶ 43.

¹⁰¹ *Id.*, ¶¶ 95–96.

relates to an “*energy resource*” as that term should be understood under Article 18. Notably, Armenia appears to raise this objection only in relation to Azerbaijan’s claims for damages related to gas infrastructure and irrigation—the latter of which is a head of damage arising from Azerbaijan’s hydropower claims, and not a separate basis for liability.¹⁰² As such, even if this objection were granted, it would not dispose of a substantial part of Azerbaijan’s claims. At best, it would preclude recovery with respect to the lost benefit of improved water supply and irrigation flowing from Armenia’s impairment of Azerbaijan’s development of the Khudafarin and Giz Galasi hydropower projects,¹⁰³ and in relation to Armenia’s destruction of gas transmission and distribution infrastructure in the Occupied Territories.¹⁰⁴

50. The Tribunal would still have to examine, in a separate phase, claims relating to:
(i) Armenia’s denial of access to and exploitation of the Tartar HPP;¹⁰⁵
(ii) Armenia’s impairment of Azerbaijan’s development of the Khudafarin and Giz Galasi hydropower projects with respect to the lost electricity volumes during the occupation period;¹⁰⁶ (iii) Armenia’s exploitation of Azerbaijan’s previously untapped hydropower resources in the Occupied Territories via small HPPs constructed and operated during the occupation period;¹⁰⁷ (iv) Armenia’s denial of access to and exploitation of Azerbaijan’s coal resources;¹⁰⁸ and (v) Armenia’s denial of access to and suspension of the Yevlakh-Nakhchivan Pipeline that transited across Armenia, resulting in Nakhchivan residents’ years-long deprivation of natural gas and the sourcing of more costly alternatives.¹⁰⁹ Bifurcating this objection would therefore not advance the interest of procedural efficiency, because it would not materially reduce the next phase of the proceedings.¹¹⁰
51. In these circumstances, procedural efficiency and considerations of fairness weigh heavily against bifurcation. Instead, all these objections should be joined to the

¹⁰² *Ibid.*

¹⁰³ Statement of Claim, ¶¶ 267–270.

¹⁰⁴ *Id.*, ¶ 211.

¹⁰⁵ *Id.*, ¶¶ 202–205.

¹⁰⁶ *Id.*, ¶¶ 233–237.

¹⁰⁷ *Id.*, ¶¶ 218–221.

¹⁰⁸ *Id.*, ¶¶ 222–232.

¹⁰⁹ *Id.*, ¶¶ 207–210, 212.

¹¹⁰ See **RL-43**, *Glamis Gold Ltd. v. United States of America*, UNCITRAL, Procedural Order No. 2 (Revised), 31 May 2005, ¶ 12(c).

merits and decided together at that stage.¹¹¹ It is vital that the Tribunal has the benefit of a complete picture of the claims and defenses, on a full and tested record, before making its final decision on jurisdiction.¹¹²

2. Armenia's Objections Relating to Article 7

52. Procedural efficiency and fairness also militate against bifurcation of Armenia's objections relating to Article 7. Armenia objects that there is no dispute in relation to Article 7 and, even if there were, Azerbaijan did not fulfill the negotiations precondition for such dispute;¹¹³ that Article 7(7)'s "mandatory" dispute resolution mechanism divests the Tribunal of jurisdiction over Azerbaijan's claims;¹¹⁴ and that Azerbaijan's Article 7 claims are "not capable" of constituting violations of that provision.¹¹⁵ All of these objections raise issues intertwined with the merits of the dispute or are otherwise unsuitable for bifurcation.

(a) *The Objection that Azerbaijan's Claims Are "Not Capable" of Breaching Article 7 Requires a Merits-Linked Analysis Unsuitable for Preliminary Determination.*

53. Addressing the last of these objections first: even taking the facts as pleaded by Azerbaijan—which Armenia has repeatedly signaled that the Tribunal should not actually do¹¹⁶—would require a detailed examination of the facts in relation to each claimed breach of Article 7 that substantially overlaps with the analysis that the Tribunal will have to do to determine liability at the merits stage.

¹¹¹ **CL-90**, *Glencore Finance (Bermuda) Limited v. The Plurinational State of Bolivia*, PCA Case No. 2016-39, Procedural Order No. 2, Decision on Bifurcation, 31 January 2018, ¶ 56 ("Nevertheless, the Tribunal recalls that the overarching principle is the fairness and efficiency of this process as a whole. With this principle in mind, the Tribunal considers that it would be more efficient to deal with all preliminary objections together with liability in a first phase, and leave issues of damages, if any, for determination in a second phase. This approach seems to the Tribunal more efficient in terms of time and costs than the alternative, which is to bifurcate just one issue but leave all other objections to a merits phase.")

¹¹² **CL-101**, *Nord Stream 2 v. European Union*, PCA Case No. 2020-07, Procedural Order No. 4, Decision on Request for Preliminary Phase on Jurisdiction, 31 December 2020, ¶ 48 (denying bifurcation on the basis that the analysis "may . . . become intertwined with aspects of the merits."); **CL-87**, *Michael Ballantine and Lisa Ballantine v. The Dominican Republic*, PCA Case No. 2016-17, Procedural Order No. 2, Bifurcation, 21 April 2017, ¶¶ 22, 28–30.

¹¹³ Bifurcation Request, Sections III.B.1 and III.B.2.

¹¹⁴ *Id.*, Section III.B.3.

¹¹⁵ *Id.*, Section III.B.4.

¹¹⁶ *Id.*, e.g., at, ¶¶ 10–23, 89.

54. For instance, Armenia disputes that the continued disruption of transit of natural gas through the Yevlakh-Nakhchivan Pipeline gave rise to a continuing breach of Article 7 because “*no transit . . . existed.*”¹¹⁷ But that runs contrary to the well-established international law principle that a continuing breach extends in time from the initial omission or action.¹¹⁸ Determining whether this alleged act is a continuing act capable of breaching Article 7 is a matter for the merits, as it would require “*consideration of the facts and context*” underlying the acts in question to determine whether they are completed or continuing.¹¹⁹ The same issue would arise in addressing Armenia’s argument that Azerbaijan has pleaded no facts capable of violating Article 7(5) because that Article requires States to secure “*established*” flows of energy.¹²⁰
55. Because the “*same or similar arguments and facts are likely to be relevant for both the procedural and the substantive determination,*” bifurcating this objection would not be procedurally efficient; it is too “*closely linked to the merits of the dispute, and not apt for bifurcation.*”¹²¹ Further, in light of the unique circumstances of this case, where Azerbaijan’s investigation of the damage wrought by thirty years of unlawful occupation remains ongoing, factual determinations critical to Azerbaijan’s Article 7 claim cannot be made now without compromising procedural fairness.¹²² Azerbaijan is still collecting evidence and assessing the extent of the damage to the Yevlakh-Nakhchivan Pipeline.¹²³ Certain overlapping facts pertaining to both jurisdiction and liability are within Armenia’s exclusive knowledge or control and thus best addressed at the merits stage after both Parties have presented their full case.¹²⁴ Accordingly, efficiency and fairness considerations strongly disfavor the bifurcation of this Article 7 objection.

¹¹⁷ *Id.*, ¶¶ 127–130, 135.

¹¹⁸ Statement of Claim, ¶ 170 n.353.

¹¹⁹ **CL-89**, *Global Telecom Holding S.A.E. v. Canada*, ICSID Case No. ARB/16/16, Procedural Order No. 2, 14 December 2017, ¶ 108(b); *see infra* ¶¶ 67–70.

¹²⁰ Bifurcation Request, ¶ 135.

¹²¹ **CL-101**, *Nord Stream 2 v. European Union*, PCA Case No. 2020-07, Procedural Order No. 4, Decision on Request for Preliminary Phase on Jurisdiction, 31 December 2020, ¶ 50.

¹²² *See, CL-95, The Estate of Julio Miguel Orlandini Agreda and Compañía Minera Orlandini Ltda. v. The Plurinational State of Bolivia*, PCA Case No. 2018-39, Decision on the Respondent’s Application for Termination, Trifurcation and Security for Costs, 9 July 2019, ¶ 134 (“At the jurisdictional stage, the Tribunal will need to make certain findings of fact. To the extent that the same facts are also relevant to liability, and if the Tribunal reaches that stage, the Tribunal may have prejudged some of the issues of fact without having heard (at the jurisdictional stage) all the relevant evidence, which will only become fully available to the Tribunal at the liability stage.”).

¹²³ Statement of Claim, ¶ 209.

¹²⁴ *Id.*, ¶¶ 162, 248.

(b) *Armenia’s Article 7 Ratione Materiae and Ratione Voluntatis Objections Would Result in Significant Procedural Inefficiencies if Bifurcated.*

56. Bifurcating Armenia’s objections that the Tribunal lacks jurisdiction over Azerbaijan’s Article 7 claims because Azerbaijan failed to satisfy the preconditions to the Tribunal’s jurisdiction under ECT Article 27 regarding those claims¹²⁵ would result in no material reduction in scope of the proceedings. On the contrary, it would prolong the dispute and needlessly multiply proceedings.
57. The absurdity of Armenia’s position is readily apparent: even if Armenia prevailed on its request to bifurcate these objections *and* on its arguments that Azerbaijan had failed to clear these procedural hurdles, that would not put an end to Azerbaijan’s claims. Azerbaijan would resend its Notice of Dispute and restart negotiations with Armenia on its Article 7 claims. Given Armenia’s failure to engage substantively in the diplomatic exchanges leading up to this arbitration, negotiations, as before, are unlikely to lead to an amicable resolution.¹²⁶ Azerbaijan will then be forced to re-file for arbitration of its Article 7 claims, delaying a resolution of those issues for potentially years to come.
58. In the meantime, the rest of these proceedings would continue apace, as granting this objection would have no impact on Azerbaijan’s Article 18 claims. There would not even be any material reduction in scope of these proceedings,¹²⁷ as the same facts that underlie Azerbaijan’s Article 7 claims also underlie Azerbaijan’s Article 18 claims in relation to the Yevlakh-Nakhchivan Pipeline and gas distribution infrastructure.¹²⁸ The Tribunal would thus have to examine and determine the same set of facts, regardless of whether this objection is granted. That outcome is the very antithesis of the obligation upon the Tribunal to conduct the proceedings efficiently.¹²⁹

¹²⁵ Bifurcation Request, ¶¶ 100–120; *see* **CL-1**, ECT Art. 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 . . . upon written notice to the other party to the dispute submit the matter to an ad hoc tribunal under this Article.”).

¹²⁶ *See* Statement of Claim, ¶¶ 176–177.

¹²⁷ **CL-101**, *Nord Stream 2 v. European Union*, PCA Case No. 2020-07, Procedural Order No. 4, Decision on Request for Preliminary Phase on Jurisdiction, 31 December 2020, ¶ 36; **RL-43**, *Glamis Gold Ltd. v. United States of America*, UNCITRAL, Procedural Order No. 2 (Revised), 31 May 2005, ¶ 12(c).

¹²⁸ *See* Statement of Claim ¶¶ 176, 206–212, 246–249.

¹²⁹ **RL-43**, *Glamis Gold Ltd. v. United States of America*, UNCITRAL, Procedural Order No. 2 (Revised), 31 May 2005, ¶ 11; **CL-80**, *Accession Mezzanine Capital L.P. and Danubius*

59. In addition, to assess whether Azerbaijan may now pursue its Article 7 claims before the Tribunal would require “*a greater understanding of the underlying facts, and the interrelationship between various events and measures, than is suitable for accelerated determination in advance of a merits phase.*”¹³⁰ As noted above with respect to Article 18, these Observations are not the appropriate forum to respond fulsomely to the substance of Armenia’s objections. Nonetheless, Azerbaijan rejects the suggestion that Azerbaijan did not meet the preconditions to arbitration set out in ECT Article 27. Azerbaijan has pleaded¹³¹—and Armenia accepts¹³²—that the Parties were engaged in diplomatic negotiations with respect to a dispute under the ECT for over a year prior to the filing of the Notice of Arbitration. Specifically, those negotiations concerned Armenia’s “*[REDACTED]*”¹³³ The concept of “*energy infrastructure*” plainly encompasses the Yevlakh-Nakhchivan Pipeline. Further, Azerbaijan consistently reserved its rights to pursue additional claims as it progressed its investigation into the extent of Armenia’s breaches.¹³⁴
60. Armenia also accepts that it received notice of Azerbaijan’s fuller articulation of its claim under Article 7 of the ECT, in respect of the Yevlakh-Nakhchivan Pipeline, *prior* to receiving the Notice of Arbitration.¹³⁵ Armenia makes the half-hearted assertion that “*there can be no question of negotiations being futile,*”¹³⁶ ignoring the plain fact that at no stage did negotiations yield any positive gains that could have led to an amicable resolution of Azerbaijan’s claims.¹³⁷
61. To resolve these disputed points and determine this objection, the Tribunal would need to tread too closely to the merits. As the *Gran Colombia Gold* tribunal reasoned in declining to bifurcate a comparable objection:

Addressing these issues would require the Parties to brief, and the Tribunal eventually to consider, the factual and legal

Kereskedőház Vagyonkezelő Zrt. v. Hungary, ICSID Case No. ARB/12/3, Decision on Respondent’s Notice of Jurisdictional Objections and Request for Bifurcation, 8 August 2013, ¶ 38; **CL-100**, *Patel Engineering Limited v. Republic of Mozambique*, PCA Case No. 2020-21, Procedural Order No. 3, Decision on the Motion for Bifurcation, 14 December 2020, ¶ 62.

¹³⁰ **CL-96**, *Gran Colombia Gold Corp. v. Republic of Colombia*, ICSID Case No. ARB/18/23, Procedural Order No. 3, Decision on the Respondent’s Request for Bifurcation, 17 January 2020, ¶ 30.

¹³¹ Statement of Claim, ¶¶ 175–178.

¹³² Bifurcation Request, ¶ 118.

¹³³ See, e.g., **CE-63**, at 2, 9, 87 (emphasis added).

¹³⁴ *Id.*, at 3, 10, 21, 30, 40, 49, 54, 60, 66, 70, 72, 89.

¹³⁵ Bifurcation Request, ¶ 118.

¹³⁶ *Ibid.*

¹³⁷ Statement of Claim, ¶¶ 175–178.

relationship between the events identified in the Notice of Intent and the events that were not. The Tribunal is not convinced that it would be procedurally efficient to examine these factual issues in a preliminary jurisdictional phase, considering that they may well overlap significantly with the factual issues the Tribunal would need to consider anyway in the merits phase which appears likely to proceed (at minimum) with respect to the originally noticed claims.¹³⁸

62. Bifurcating these objections would not materially reduce the scope of proceedings and would require making determinations of fact and law that overlap with the merits. Bifurcation of these objections should therefore be denied.

(c) *Bifurcating the Objection that Article 7(7)'s Dispute Resolution Mechanism Divests the Tribunal of Jurisdiction Would Not be Procedurally Efficient.*

63. Because Armenia's Article 7 objections are largely unsuitable for bifurcation, its objection that Article 7(7)'s dispute resolution mechanism is "*mandatory*," and therefore precludes Azerbaijan from bringing its Article 7 claims under Article 27 of the ECT, should also not be bifurcated.¹³⁹
64. Indeed, as explained above, this objection would not conclusively dispose of any of Azerbaijan's factual allegations, because Azerbaijan has alleged that the same unlawful conduct with respect to the Yevlakh-Nakhchivan Pipeline violates both Article 18 *and* Article 7.¹⁴⁰ The Tribunal would still have to examine and address those same allegations at the merits stage in considering whether they constitute breaches of Article 18.
65. Preliminary consideration of this objection would therefore not result in a sufficiently "*material reduction of the proceedings at the next phase*" to warrant bifurcation.¹⁴¹ Instead, keeping in mind that "*the overarching principle is the fairness and efficiency of this process as a whole*," it would be "*more efficient in terms of time and costs*" to join this objection to the merits along with Armenia's

¹³⁸ **CL-96**, *Gran Colombia Gold Corp. v. Republic of Colombia*, ICSID Case No. ARB/18/23, Procedural Order No. 3, Decision on the Respondent's Request for Bifurcation, 17 January 2020, ¶ 30.

¹³⁹ Bifurcation Request, ¶¶ 121–126.

¹⁴⁰ *See supra* ¶ 58.

¹⁴¹ **RL-43**, *Glamis Gold Ltd. v. United States of America*, UNCITRAL, Procedural Order No. 2 (Revised), 31 May 2005, ¶ 12(c).

other objections and “*deal with all preliminary objections together with liability*.”¹⁴²

B. Armenia’s Objections Relating to *Ratione Temporis* and Undue Delay Are Too Closely Linked to the Merits or Insufficiently Substantial To Warrant Bifurcation.

66. Armenia’s request that the Tribunal bifurcate its temporal objections should also be denied. These objections turn on the same argument: whether Azerbaijan has alleged continuing wrongful or composite acts that crystallized into breaches of the ECT after the Treaty’s entry into force as between the parties. That question is too closely linked to the merits and accordingly unsuitable for bifurcation.

1. The *Ratione Temporis* Objection Is Too Intertwined with the Merits To Be Bifurcated.

67. In requesting bifurcation of its temporal jurisdiction objection, Armenia once again mischaracterizes Azerbaijan’s claims and invites the Tribunal to consider matters closely linked to the merits.
68. As an initial matter, Azerbaijan has not pleaded Armenia’s alleged breaches of the ECT as “*both continuing wrongful acts or composite acts, ’ as if those two concepts were interchangeable*.”¹⁴³ Instead, Azerbaijan clearly distinguished between continuing acts and composite acts, and pleaded certain of Armenia’s breaches as continuing acts and others as composite acts:
- a. As to continuing acts, Article 14(2) of the ILC Articles provides that “[t]he breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation.”¹⁴⁴ Armenia’s wrongful acts, which began in the early 1990s but continued throughout the occupation period, well after the ECT’s entry into force in 1998, include: (i) denying Azerbaijan access to the Tartar HPP and the Sarsang Reservoir;¹⁴⁵ (ii) denying Azerbaijan access to parts of the Yevlakh-Nakhchivan Pipeline and related gas distribution

¹⁴² **CL-90**, *Glencore Finance (Bermuda) Limited v. The Plurinational State of Bolivia*, PCA Case No. 2016-39, Procedural Order No. 2, Decision on Bifurcation, 31 January 2018, ¶ 56.

¹⁴³ Bifurcation Request, ¶ 141.

¹⁴⁴ Statement of Claim, ¶ 170, n. 353 (citing **CL-38**, Articles on State Responsibility for Internationally Wrongful Acts, International Law Commission (2001), Art. 14; and **CL-39**, *Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America)*, Separate Opinion of Judge ad hoc Sepúlveda, I.C.J. Reports 2004, to explain the criteria in the ILC Articles defining a continuing breach).

¹⁴⁵ Statement of Claim, ¶¶ 202–205.

infrastructure;¹⁴⁶ (iii) maintaining the disruption of transit of natural gas through the Yevlakh-Nakhchivan Pipeline;¹⁴⁷ and (iv) precluding Azerbaijan's development of the Khudafarin and Giz Galasi project sites.¹⁴⁸

- b. In contrast, composite acts are addressed in Article 15 of the ILC Articles, which stipulates that such acts “*give rise to continuing breaches, which extend in time from the first of the actions or omissions in the series of acts making up the wrongful conduct.*”¹⁴⁹ Armenia's exploitation of Azerbaijan's energy resources constitute composite acts, comprised of a series of acts taking place both before and after the ECT's entry into force, including the (i) exploitation of the Tartar HPP and Sarsang Reservoir to power the Occupied Territories and export power to Armenia;¹⁵⁰ (ii) exploitation of hydropower energy through the construction of at least 32 small HPPs to power the Occupied Territories and export power to Armenia;¹⁵¹ and (iii) exploitation of coal from the Chardaghli coalfield to fuel a power plant in Yerevan.¹⁵²
69. For the Tribunal to rule on Armenia's objection, it would need to determine whether each of these acts are of a continuing or composite nature, or whether, as Armenia argues, Azerbaijan's losses were caused by “*completed,*” one-off acts committed during the First Garabagh War that merely had continuing effects.¹⁵³ On Armenia's own argument, then, the Tribunal will need to conduct a detailed examination of the facts underlying each alleged breach to determine the breach's one-off, continuing, or composite character. That inquiry cannot take place in a preliminary phase of proceedings, especially in circumstances where Armenia has not even produced a substantive response to Azerbaijan's allegations. It will only be possible at the merits stage, once the Tribunal has the benefit of all relevant factual (including documentary) evidence.

¹⁴⁶ *Id.*, ¶¶ 206–212.

¹⁴⁷ *Ibid.*

¹⁴⁸ *Id.*, ¶¶ 233–237.

¹⁴⁹ Statement of Claim, ¶ 170, n. 353 (citing **CL-37**, Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries, International Law Commission (2001), commentary to Art. 15, at 62; **CL-38**, Articles on State Responsibility for Internationally Wrongful Acts, International Law Commission (2001), Art. 15).

¹⁵⁰ Statement of Claim, ¶¶ 213–217.

¹⁵¹ *Id.*, ¶¶ 218–221.

¹⁵² *Id.*, ¶¶ 222–232.

¹⁵³ Bifurcation Request, ¶¶ 143–146.

70. As the tribunal in *Société Générale v. Dominican Republic* recognized, “[t]he actual determination of which acts specifically meet the continuing requirement is a matter for the merits because it is only then that it can be decided which acts amount to breaches and when this took place. At the jurisdictional stage only the principle can be identified. The same reasoning applies to composite acts.”¹⁵⁴ Similarly, the *Global Telecom* tribunal declined to bifurcate a temporal issue because it would “inevitably require a consideration of the facts and context underlying the specific measures in question to decide whether [they] should be considered cumulatively . . . or each separately as contended by the Respondent, which will then be revisited in a merits phase.”¹⁵⁵
71. Nor would bifurcating Armenia’s *ratione temporis* objection materially reduce the scope of proceedings; even if this objection were granted, it would not dispose of many of Azerbaijan’s claims. In articulating its temporal objections, Armenia omits any mention of the breaches alleged by Azerbaijan that occurred *well after* the ECT’s entry into force. For example, the exploitation of the Chardaghli coalfield or the construction of new HPPs on Azerbaijan’s territory did not commence until around 2010.¹⁵⁶ Indeed, in similar circumstances, the *Global Telecom* tribunal found that it did not matter whether the respondent was ultimately proven correct that some claims were time-barred; bifurcation was inappropriate because “even if certain breaches were not cumulative and fall outside the relevant time period, they are still background facts relevant to the analysis of alleged breaches that are clearly timely.”¹⁵⁷

2. The ‘Undue Delay’ Objection Is Too Insubstantial, and Too Intertwined with the Merits, To Warrant Bifurcation.

72. Armenia’s assertion that Azerbaijan unduly delayed its pursuit of these proceedings would require the same merits-based analysis as to when each wrongful act alleged by Azerbaijan began and ended. The contention is also as

¹⁵⁴ **CL-74**, *Société Générale in respect of DR Energy Holdings Limited and Empresa Distribuidora de Electricidad del Este, S.A. v. The Dominican Republic*, LCIA Case No. UN 7927, Award on Preliminary Objections to Jurisdiction, 19 September 2008, ¶¶ 90–91. See also **CL-72**, *Impregilo S.p.A. v. Islamic Republic of Pakistan (II)*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005, at ¶ 315, in which the Tribunal found that its temporal jurisdiction was limited to the time period after the relevant BIT entered into force, but nonetheless was “unable at this stage to make any final determinations as to which (if any) of Impregilo’s Treaty Claims are thereby excluded. This will have to await a full analysis of each of the claims, at the merits stage of these proceedings” (emphasis added).

¹⁵⁵ **CL-89**, *Global Telecom Holding S.A.E. v. Canada*, ICSID Case No. ARB/16/16, Procedural Order No. 2, 14 December 2017, ¶ 108(b).

¹⁵⁶ Statement of Claim, ¶¶ 85–100, 111–130, 226.

¹⁵⁷ **CL-89**, *Global Telecom Holding S.A.E. v. Canada*, ICSID Case No. ARB/16/16, Procedural Order No. 2, 14 December 2017, ¶ 108(b).

offensive as it is frivolous, given that it was Armenia's *own conduct* that impeded Azerbaijan's ability to pursue its claims. Equally frivolous are Armenia's arguments that it could not have reasonably expected Azerbaijan to pursue these claims, and that it is disadvantaged in responding to these claims.

73. Azerbaijan has alleged—and Armenia does not dispute¹⁵⁸—that it had no access whatsoever to the Occupied Territories until the fall of 2020, and it did not restore full access over all those territories until September 2023. Azerbaijan could therefore not have become aware of the alleged breaches of the ECT until late 2020 *at the very earliest*. Azerbaijan promptly filed a Notice of Dispute under the ECT in October 2021, at a time when it was still not aware of the full extent of Armenia's wrongful conduct during its 30-year occupation of the now-liberated territories, including the extent of exploitation of the Chardaghli coalfield, the scope of destruction of Azerbaijan's gas infrastructure, or the construction of at least 32 new HPPs without Azerbaijan's consent. Even after regaining access, Azerbaijan's fact-gathering efforts have been significantly impeded by the landmines Armenia peppered throughout the formerly Occupied Territories;¹⁵⁹ from the end of the Second Garabagh War in November 2020 to September 2023 alone, 61 Azerbaijanis were killed by landmines, including mines laid in civilian areas that had already been demined by Azerbaijan.¹⁶⁰ It is manifestly unreasonable for Armenia to suggest that Azerbaijan should have pursued its claims any earlier than it did and should now be barred from proceeding. Indeed, Armenia cannot at once create the circumstances that forced any delay through its wrongful conduct while simultaneously complaining that the delay is "*undue*."¹⁶¹
74. As for Armenia's ability to respond to these claims, setting aside the fact that the two States have been engaged in numerous legal proceedings in relation to the formerly Occupied Territories since 2020, Armenia has been on notice of this particular dispute since October 2021 at the very latest. Upon receipt of that Notice, Armenia should have taken immediate steps to preserve documentary and witness evidence, much of which was in its own exclusive possession or control. For example, Armenia undoubtedly holds information with respect to the energy volumes it imported from the Occupied Territories.¹⁶² Public reports also indicate that electronic records held by Armenia's Installed Regime were transferred to

¹⁵⁸ Bifurcation Request, ¶¶ 143, 151.

¹⁵⁹ See Statement of Claim, ¶ 38 (noting international confirmation of extensive contamination of formerly Occupied Territories with landmines and other unexploded ordnance).

¹⁶⁰ *Id.*, ¶ 41.

¹⁶¹ See, e.g., **CL-71**, *LaGrand (Germany v. United States of America)*, Judgment, I.C.J. Reports 2001, ¶¶ 56–57 (permitting Germany's claim against the USA to proceed on the grounds that Germany had only recently become aware of all the factual circumstances constituting a breach, notwithstanding the wrongful conduct having commenced over eight years prior).

¹⁶² See Statement of Claim, ¶¶ 95, 97.

Armenia in 2023.¹⁶³ Notably, Armenia has not provided any evidence of its alleged inability to respond to these claims.¹⁶⁴ In these circumstances, Armenia’s objection relating to ‘undue delay’ is not sufficiently substantial to warrant bifurcation.

C. Armenia’s Invocation of the Essential Security Interest Clause Is a Merits-Linked Determination that Cannot Be Decided on a Preliminary Basis.

75. Armenia next objects that the Tribunal lacks jurisdiction over Azerbaijan’s claims because the alleged acts fall within the scope of the “*self-judging*” essential security interest (“*ESI*”) clause in ECT Article 24(3)(a).¹⁶⁵ Armenia concedes that to uphold its invocation of the ESI clause, the Tribunal must assume that the alleged acts are attributable to Armenia. Setting aside the appropriateness of assuming key matters of fact and law that Armenia otherwise hotly contests,¹⁶⁶ this objection is unsuitable for bifurcation because it is too intertwined with the merits of Azerbaijan’s claims.
76. *First*, Armenia’s objection would require the Tribunal to make an actual determination on the merits of Azerbaijan’s claims. As the ICJ has reiterated in the *Oil Platforms* and *Military and Paramilitary Activities* cases, invocation of an ESI clause does not raise a jurisdictional question but rather provides a defense on the merits.¹⁶⁷

¹⁶³ See CE-171, “Artak Beglaryan: The Best Option for the Karabakh [‘]Government[’] is Armenia,” Caucasus Watch (1 January 2024), <https://caucasuswatch.de/en/interviews/artak-beglaryan-the-best-option-for-the-karabakh-government-is-armenia.html> (maintaining that “the main state-owned databases . . . have been transferred to Armenia, at least those that were in electronic form”), cited in Statement of Claim, ¶ 162 & n. 347.

¹⁶⁴ CL-91, *Veolia Propreté v. Arab Republic of Egypt*, ICSID Case No. ARB/12/15, Award, 25 May 2018, ¶¶ 131–134, dismissing Egypt’s arguments that the investor had lost its right to pursue a particular claim including because Egypt had not shown evidence of any prejudice.

¹⁶⁵ Bifurcation Request, ¶¶ 153–161.

¹⁶⁶ CL-79, *Mesa Power Group, LLC v. Government of Canada*, PCA Case No. 2012-17, Procedural Order No. 3, 28 March 2013, ¶ 76 (“[T]he Tribunal . . . has asked itself whether it could indeed rule on jurisdiction on assumed facts. It is, however, unable to do so. Unlike other types of preliminary ruling (e.g. a “strike out”), it cannot base its decision on jurisdiction on mere assumptions. A ruling on jurisdiction would be final and binding on the Parties and carry *res judicata* effect. The facts forming the basis of the Tribunal’s jurisdiction must be proven. If they are not, jurisdiction is not established. It would be needlessly problematic and unfortunate if facts assumed to be true for purposes of jurisdiction, were at a later stage found to be contrary to the record.”).

¹⁶⁷ RL-37, *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Preliminary Objection, Judgment, I.C.J. Reports 1996, ¶ 20 (“[The Court] accordingly takes the view that Article XX, paragraph 1 (d), does not restrict its jurisdiction in the present case, but is confined to affording the

77. Armenia’s attempt to distinguish the treaty language at issue in those ICJ cases from Article 24(3)(a) of the ECT is incoherent: there is no principled distinction between saying a treaty “*shall not preclude*” the application of measures versus saying a treaty “*shall not be construed to prevent*” the taking of measures necessary to protect essential security interests.¹⁶⁸ Either construction prevents an “*interpretation*” of the treaty that precludes such measures, and nothing in the language of the ECT transforms this merits defense to a jurisdictional bar.
78. *Second*, even assuming *arguendo* that Armenia’s invocation of Article 24(3)(a) raises a jurisdictional question, it requires a detailed analysis of facts too closely linked to the merits of Azerbaijan’s claims to be suitable for bifurcation. Even ESI clauses that are considered “*self-judging*” do not automatically divest a Tribunal of jurisdiction, and the cases cited by Armenia are not to the contrary.¹⁶⁹ Instead, the Tribunal must conduct a “*good faith*” review of the connection between the interest alleged and the measures taken.¹⁷⁰ This fact-intensive review is more appropriately conducted at the merits stage, after issues of jurisdiction and

Parties a possible defence on the merits to be used should the occasion arise.”); **CL-16**, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, I.C.J. Reports 1986, ¶ 222 (“This article cannot be interpreted as removing the present dispute as to the scope of the Treaty from the Court’s jurisdiction.”), and ¶ 271 (“[This ESI clause] poses no problem of jurisdiction in the present case.”).

¹⁶⁸ Bifurcation Request, ¶ 155, n. 268; **RL-37**, *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Preliminary Objection, Judgment, I.C.J. Reports 1996, ¶ 20 (“The Court notes in the first place that the Treaty of 1955 contains no provision expressly excluding certain matters from the jurisdiction of the Court. Indeed, Article XX, paragraph 1 (d), provides that: ‘1. The present 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.’”); **CL-1**, ECT, Art. 24(3)(a) (“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 (i) relating to the supply of Energy Materials and Products to a military establishment; or (ii) taken in time of war, armed conflict or other emergency in international relations.”).

¹⁶⁹ **RL-100**, *Angel Samuel Seda and others v. Republic of Colombia*, ICSID Case No. ARB/19/6, Award (27 June 2024), ¶ 728 (“[T]he Tribunal recognizes the self-judging nature of some of the elements of the ESI Provision – but is not convinced that that translates into depriving the Tribunal of its *Kompetenz-Kompetenz* entirely. The Tribunal may defer to the State for establishing whether the measures enacted are ‘*necessary*’ to further the declared security interest, but that is not the end of the inquiry.”); **RL-89**, WTO Dispute Settlement Body, *United States–Origin Marking Requirement*, WT/DS597/R, Report of the Panel (21 December 2022), ¶¶ 7.160, 7.185–7.186 (finding an ESI clause worded similarly to ECT Art. 24(3)(a) to be “not entirely self-judging” and that accordingly there was “some scope for review by a panel”); **RL-72**, *Deutsche Telekom v. Republic of India*, PCA Case No. 2014-10, Interim Award, 13 December 2017, ¶¶ 227–230; 240–291 (conducting a detailed analysis of the ESI clause’s application, finding that the “essential security interest defense” precluded liability under the treaty but did not operate as a jurisdictional bar).

¹⁷⁰ **RL-100**, *Angel Samuel Seda and others v. Republic of Colombia*, ICSID Case No. ARB/19/6, Award, 27 June 2024, ¶ 780.

- liability have been fully briefed. Tellingly, none of the cases cited by Armenia treat invocation of an ESI clause as a jurisdictional question that is suitable for determination on a preliminary basis; it is either characterized as a merits defense or decided after issues of liability were fully briefed as well.¹⁷¹
79. In the context of this complex case, a good-faith review necessarily requires an examination of arguments and facts closely linked to the merits. Armenia makes a blanket assertion that all of the wrongful conduct alleged by Azerbaijan falls within the ESI exception because it all took place during a period of “*military occupation*.”¹⁷² But a good faith-review requires more than that—the Tribunal must look at the specific interest or interests invoked, determine whether they constitute “*essential security interests*,” and then establish the nexus between each of the measures in question and the interest invoked.¹⁷³
 80. Even Armenia’s cursory attempt to invoke the ESI exception in its Request betrays the complicated analysis of underlying facts that a good-faith review would require in this case. Armenia concedes that the entire period spanning “*from the entry into force of the ECT in 1998 until at least 2020*” would be relevant to the Tribunal’s review.¹⁷⁴ Even with a “*light-touch*” review,¹⁷⁵ establishing whether the numerous wrongful acts over more than two decades set out in the Statement of Claim bear a plausible connection to Armenia’s alleged security objectives necessitates a detailed factual inquiry.
 81. Here too, while asserting that the Tribunal could decide this question “*on the facts as alleged by Azerbaijan*,” Armenia materially misstates those facts in attempting to demonstrate how this standard is met with respect to just a few of Azerbaijan’s

¹⁷¹ See, e.g., **RL-37**, *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Preliminary Objection, Judgment, I.C.J. Reports 1996; **CL-16**, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, I.C.J. Reports 1986; **RL-100**, *Angel Samuel Seda and others v. Republic of Colombia*, ICSID Case No. ARB/19/6, Award, 27 June 2024; note in particular the decision in **RL-72**, *Deutsche Telekom v. India*, PCA Case No. 2014-10, Interim Award, 13 December 2017, where the tribunal undertook a 22-page fact intensive analysis to determine whether the exception was properly invoked, ultimately concluding that it was not.

¹⁷² Bifurcation Request, ¶¶ 158–159.

¹⁷³ **RL-100**, *Angel Samuel Seda and others v. Republic of Colombia*, ICSID Case No. ARB/19/6, Award (27 June 2024), ¶¶ 784–795 (conducting a detailed factual analysis between the connection between the security interest of fighting organized crime and the measure); **RL-72**, *Deutsche Telekom v. India*, PCA Case No. 2014-10, Interim Award (13 December 2017), ¶ 288 (“In the Tribunal’s view, the phrase ‘to the extent necessary’ implies a more stringent nexus between the measure at issue and the interests pursued”).

¹⁷⁴ Bifurcation Request, ¶ 158.

¹⁷⁵ **RL-100**, *Angel Samuel Seda and others v. Republic of Colombia*, ICSID Case No. ARB/19/6, Award, 27 June 2024, ¶ 655.

numerous claims.¹⁷⁶ Nowhere did Azerbaijan “*admit*” that Armenia’s wrongful conduct was necessary to supply the Occupied Territories or Armenia itself with energy¹⁷⁷—particularly as, if not for Armenia’s conduct, Azerbaijan itself would have supplied energy to its own territory, as it did before the First Garabagh War. Indeed, Armenia’s argument amounts to an assertion that, although it launched an unlawful occupation, it can now claim an “*essential security interest*” with respect to the measures needed to sustain that unlawful occupation.

82. This objection thus requires consideration of complex factual issues that are intertwined with the merits of the dispute and should not be bifurcated, as doing so is “*unlikely to bring about increased efficiency in the proceedings*” and risks pre-judging the merits of Azerbaijan’s claims.¹⁷⁸

D. Armenia’s Threatened Objection Relating to Azerbaijan’s ‘Theory of Attribution’ Is Unsuitable for Bifurcation Because It Would Not Materially Reduce the Proceedings and Is Too Intertwined with the Merits

83. Finally, Armenia demands that Azerbaijan “*provide a precise statement of its position on attribution*” in these Observations, “*clearly explaining the legal and factual grounds that form the basis of each element of its claim.*”¹⁷⁹ Armenia then threatens to launch yet another preliminary objection, related to attribution of the conduct of its Installed Regime to Armenia, depending upon Azerbaijan’s response. It is unclear precisely what relief is sought in this respect; it appears to be an afterthought.
84. Nonetheless, Armenia seems to imply that any such future objection would be suitable for bifurcation.¹⁸⁰ Although Azerbaijan would need to see the objection articulated before responding in full, it is clear even on the vague assertions made to date that any such objection would be unsuitable for bifurcation. Even if granted, this objection would not materially reduce the scope of proceedings because it would not dispose of the many allegations of Armenia’s own direct conduct that Azerbaijan has pleaded. In addition, the legal arguments and

¹⁷⁶ See Bifurcation Request, ¶ 159, n. 281.

¹⁷⁷ *Id.*, ¶ 159.

¹⁷⁸ **RL-43**, *Glamis Gold Ltd. v. United States of America*, UNCITRAL, Procedural Order No. 2 (Revised), 31 May 2005, ¶ 12(c).

¹⁷⁹ Bifurcation Request, ¶ 166.

¹⁸⁰ *Ibid.* (“Armenia reserves its right to raise this issue as a preliminary objection 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.”).

competing factual allegations Armenia propounds in relation to attribution are far too intertwined with the merits to be decided on a preliminary basis.¹⁸¹

85. As an initial matter, it is well established that to establish the tribunal's jurisdiction, a claimant need only make out a *prima facie* case for attribution of the alleged conduct to the responsible State.¹⁸² Azerbaijan has sufficiently pleaded its *prima facie* case on attribution of the alleged breaches to Armenia, including numerous allegations of acts committed by Armenian state organs:
- a. Azerbaijan has pleaded facts establishing Armenia's direct responsibility for its continued denial of Azerbaijan's access to its energy resources in the Occupied Territories throughout the occupation period. Azerbaijan has pleaded far more than just a "*blanket allegation*"¹⁸³ in this regard. These include the critical fact that it was Armenia, not some other entity, that signed the Trilateral Statement after the Second Garabagh War committing to withdraw its forces from the Occupied Territories.¹⁸⁴ Azerbaijan has also proffered specific evidence of the physical barriers erected and enforced by the Armenian military as well as the Armenian government's control over entry and exit to the Occupied Territories with respect to Azerbaijan and third parties.¹⁸⁵
 - b. Azerbaijan has also pleaded conduct directly attributable to Armenia with respect to the exploitation of or interference with the various energy resources at issue, including Armenian government policies (*i*) to exploit Azerbaijan's hydropower resources in the Occupied Territories to create a "*whole unified system*" of electricity, as stated by Armenia's own Minister

¹⁸¹ See **CL-101**, *Nord Stream 2 v. European Union*, PCA Case No. 2020-07, Procedural Order No. 4, Decision on Request for Preliminary Phase on Jurisdiction, 31 December 2020, ¶¶ 49–50 (refusing to bifurcate *ratione personae* objection, noting that even if the relevant question of attribution presented "a discrete issue different from the issues raised on the merits, the same or similar arguments and facts are likely to be relevant for both the procedural and the substantive determination. Therefore, it is the Tribunal's view that this objection is closely linked to the merits of the dispute, and not apt for bifurcation.")

¹⁸² See, e.g., **CL-83**, *Mesa Power Group LLC v. Government of Canada*, PCA Case No. 2012-17, Award, 24 March 2016, ¶ 340 ("[A]ttribution is generally best dealt with at the merits stage. This is subject to a *prima facie pro tem* test being performed in the context of jurisdiction to ascertain that the acts alleged are susceptible of constituting treaty breaches. . ."); **CL-76**, *Gustav F W Hamster GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2010, ¶ 144 (citing "the usual *prima facie* test" for attribution at the jurisdictional level).

¹⁸³ Bifurcation Request, ¶ 163.

¹⁸⁴ See Statement of Claim, ¶¶ 36–40.

¹⁸⁵ *Ibid.*

of Energy Infrastructures and Natural Resources;¹⁸⁶ (ii) to develop the Chardaghli coalfield to fuel an Armenian State-owned power plant in Yerevan;¹⁸⁷ and (iii) to cut and maintain the suspension of natural gas flows to Nakhchivan via the Yevlakh-Nakhchivan Pipeline and reverse the flow of gas in the Pipeline (both of which could only have been done from within Armenia).¹⁸⁸

- c. As for the conduct of Armenia's Installed Regime, Azerbaijan has alleged that conduct is attributable to Armenia by virtue of Armenia's control over the Installed Regime.¹⁸⁹
86. These pleadings more than satisfy the standard to establish a *prima facie* case for Armenia's responsibility for the alleged conduct.¹⁹⁰ Bifurcating these proceedings to examine that question would not materially reduce their scope: as detailed above, Azerbaijan has not just alleged wrongful conduct attributable to Armenia by virtue of its Installed Regime; it has also alleged conduct unquestionably committed by Armenian state organs, such as the Armenian military.¹⁹¹ Any objection relating to attribution of the Installed Regime's conduct to Armenia, even if granted, would do nothing to dispose of those claims. As the *Teinver v. Argentina* tribunal found in deciding to join Respondent's objection on attribution to the merits,

it is not necessary for the Tribunal to attribute the acts [of third parties] to the Respondent in order for this Tribunal to have jurisdiction over the dispute. The Claimants allege

¹⁸⁶ Statement of Claim, ¶ 97 & n. 198, citing CE-37, Ministry of Energy Infrastructures and Natural Resources of the Republic of Armenia, "Minister Grigoryan Was in Artsakh on a Working Visit: An Agreement on Cooperation Has Been Signed Between the Two Ministries" (11 July 2018), <http://www.minenergy.am/en/article/1338>; see also Statement of Claim, ¶¶ 48 ("Armenia's Prime Minister at the time, Tigran Sargsyan, actively encouraged the Armenian diaspora to invest in Artsakh HEK."), 51–52 ("Artsakh HEK's IPO prospectus . . . explained to prospective shareholders that the Occupied Territories' 'electro energy system is part of [the] corresponding system of Armenia. . .'), 86–91, 95.

¹⁸⁷ Statement of Claim, Section III.C.4.

¹⁸⁸ *Id.*, Section III.C.5.

¹⁸⁹ *Id.*, ¶¶ 35, 201. See also generally, *id.* at 14–20.

¹⁹⁰ See CL-83, *Mesa Power Group LLC v. Government of Canada*, PCA Case No. 2012-17, Award, 24 March 2016, ¶ 340; CL-76, *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2010, ¶ 144; RL-54, *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 December 2012, ¶ 274 (declining to decide the objection related to attribution on a preliminary basis and instead joining it to the merits because "the fact-intensive nature of Claimant's allegations" required the tribunal to "postpone adjudication of this issue until the merits phase").

¹⁹¹ See *supra*, n. 186; see also Statement of Claim, ¶ 201.

actions by . . . government institutions contrary to the Treaty, whose attribution to the Respondent is not in dispute. Moreover, the issue of the attribution of the acts by [third parties] is not clear-cut.¹⁹²

87. Thus, since bifurcation on this ground offers neither “*reduc[tion in] time and costs*” nor “*dispos[al] of . . . an essential part the claims raised*,”¹⁹³ no version of Armenia’s threatened objection could possibly justify bifurcation.
88. Further, to determine which conduct is attributable to which entity and how Armenia is internationally responsible for the acts of that entity “*is a difficult and fact-intensive question*” that is more appropriately addressed at the merits stage.¹⁹⁴ This includes determination of the appropriate standard for deciding whether the alleged conduct of the Installed Regime is attributable to Armenia, whether that is “*effective control*” of “*each operation*,” as Armenia asserts—language drawn from ICJ cases relating to active hostilities that is not broadly applicable here¹⁹⁵—or “*control*” over the Regime’s operations as whole, as the European Court of Human Rights found and Azerbaijan has alleged, or some other theory that may only become apparent once Armenia has provided its Statement of Defense, fully pleaded jurisdictional objections, and document disclosure, for example under different provisions of the ILC Articles.¹⁹⁶ Deciding whether and how these standards apply inherently requires a detailed examination of facts (many of which can only be established after Armenia discloses documents and submits evidence) and legal arguments going to the merits of the case.

¹⁹² **RL-54**, *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 December 2012, ¶ 273.

¹⁹³ **CL-98**, *Carlos Sastre and others v. United Mexican States*, ICSID Case No. UNCT/20/2, Procedural Order No. 2, Decision on Bifurcation, 13 August 2020, ¶ 41.

¹⁹⁴ **RL-54**, *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 December 2012, ¶ 274; *see also* **CL-83**, *Mesa Power Group LLC v. Government of Canada*, PCA Case No. 2012-17, Award, 24 March 2016, ¶ 340; **CL-76**, *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2010, ¶ 144.

¹⁹⁵ Bifurcation Request, ¶¶ 165–166 (citing **RL-44**, *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 and **CL-16**, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, I.C.J. Reports 1986).

¹⁹⁶ *See* Statement of Claim, ¶ 35 & n. 43; *see also, e.g.*, **CE-114**, “‘Miatsum’ Movement Against the Territorial Cession to Azerbaijan is Founded in Yerevan,” *Armenia Today* (29 October 2008) (statement of Armenian military commander Zhirayr Sefilyan: “The whole world knows that the army of the NKR is a part of the armed forces of Armenia, that the budget of the NKR is financed from the budget of Armenia, the political leaders of the NKR are appointed from Yerevan.”).

89. For these reasons, as another arbitral tribunal has observed, where “*questions of attribution and questions of legality are closely intermingled, . . . it is then difficult to deal with the question of attribution without a full enquiry into the merits [A]s a practical matter, this question is usually best dealt with at the merits stage, in order to allow for an in-depth analysis of all the parameters of the complex relationship between certain acts and the State.*”¹⁹⁷ If Armenia does put forward its threatened objection relating to attribution, in the interests of procedural fairness and efficiency it should not be bifurcated, but instead addressed at the merits stage.

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¹⁹⁷ **CL-76**, *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2010, ¶¶ 142–144.

IV. REQUEST FOR RELIEF

90. For the reasons set out above, Azerbaijan respectfully seeks an order:
- a. Denying Armenia's Bifurcation Request in its entirety;
 - b. Adopting the timetable provided in Scenario B of the Procedural Timetable in Procedural Order No. 1, as amended;
 - c. Ordering Armenia to bear all costs incurred by Azerbaijan in the preparation of this Opposition to the Bifurcation Request and any further briefing on bifurcation; and
 - d. Ordering such other relief as the Tribunal deems just and necessary in the circumstances.

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