

PCA CASE NO. 2023-65

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

- between -

**THE REPUBLIC OF AZERBAIJAN
(CLAIMANT)**

- and -

**THE REPUBLIC OF ARMENIA
(RESPONDENT)**

ARMENIA’S MEMORIAL ON PRELIMINARY OBJECTIONS

3 April 2025

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1. Pursuant to the Tribunal’s Decision on Bifurcation of 13 February 2025 and the Amended Procedural Timetable of 8 November 2024, the Republic of Armenia (“**Armenia**”) respectfully submits this Memorial on Preliminary Objections in the proceedings instituted by the Republic of Azerbaijan (“**Azerbaijan**”) against Armenia (together with Azerbaijan, the “**Parties**”) under Article 27 of the Energy Charter Treaty (the “**ECT**” or the “**Treaty**”).

I. INTRODUCTION

2. As Armenia has emphasized since the institution of these proceedings, Azerbaijan’s claims constitute a clear misuse of the ECT. They do not concern the subject matter of the Treaty—*i.e.*, trade and investment in the energy sector. Rather, they concern a decades-long conflict relating to the status of Nagorno-Karabakh and the self-determination of its ethnic Armenian population. This case, which concerns events stretching back to the early 1990s, was brought as part of a transparent attempt to distract the international community from Azerbaijan’s armed attack on Nagorno-Karabakh in 2020 and Armenia’s efforts to seek accountability for Azerbaijan’s egregious human rights abuses. Worse yet, during the pendency of these proceedings, and in overt contempt of this and several other international courts and tribunals, Azerbaijan completed its ethnic cleansing of Nagorno-Karabakh by forcibly displacing its population of 120,000 ethnic Armenians.¹

3. In this context, Armenia welcomes the opportunity to brief the objections that the Tribunal decided it appropriate to hear at this preliminary phase.² As Armenia will show, the Tribunal lacks jurisdiction over Azerbaijan’s claims, and this case—which should never have been brought in the first place—can be put to a swift end.

4. Azerbaijan advances its untenable claims under just two provisions of the ECT: Articles 18 and 7.

¹ See Letter from Armenia to the Tribunal (3 Oct. 2023) (**RE-0035**). See also Parliamentary Assembly of the Council of Europe, *The Humanitarian Situation in Nagorno-Karabakh*, Recommendation No. 2260 (12 Oct. 2023) (**RE-0036**).

² Armenia maintains its reservation of rights to advance, at the appropriate procedural juncture, any and all additional objections to the Tribunal’s jurisdiction or the admissibility of Azerbaijan’s claims. See also Republic of Armenia’s Request for Bifurcation (23 Dec. 2024) (“**Request for Bifurcation**”), note 4 (“This Request for Bifurcation is also without prejudice to Armenia’s right to advance, at the appropriate juncture, additional objections to the jurisdiction of the Tribunal or the admissibility of Claimant’s claims that are not apt for preliminary treatment.”).

5. *First*, Azerbaijan invokes Article 18, a provision found in Part IV of the ECT setting out “miscellaneous”³ provisions. It provides, among other things, that the “Contracting Parties recognise state sovereignty and sovereign rights over energy resources,” “reaffirm that these must be exercised in accordance with and subject to the rules of international law,” and confirm that “each State continues to hold” certain rights related to energy resources.⁴ According to Azerbaijan, the Tribunal should apply this provision to award it USD 1.6 billion in “compensation” for what it alleges to be “Armenia’s denial of Azerbaijan’s access to the energy resources in the Occupied Territories for nearly 30 years, [and] exploitation of those resources for Armenia’s benefit.”⁵ Specifically, as stated in its Statement of Claim and repeated in its Observations on Bifurcation, Azerbaijan alleges 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.⁶

6. Article 18, however, does not itself establish *any* ECT rights or obligations. By its plain terms, it merely “recognise[s]” sovereign rights that already exist outside the scope of the ECT, “reaffirm[s]” that such rights are to be exercised in accordance with rules that exist outside the scope of the ECT, and notes that each State “continues to hold” rights with respect to energy exploitation that exist outside the ECT.

7. As such, Article 18 says nothing at all about one State’s obligations toward another State regarding the latter’s energy resources. It does not provide that one State must ensure another State’s access to energy resources within its territory or must refrain from impairing the

³ The International Energy Charter, *Consolidated Energy Charter Treaty with Related Documents* (17 Dec. 1994) (CL-001) (“**Energy Charter Treaty with Related Documents**”), p. 66 (“Part IV: Miscellaneous Provisions”).

⁴ Energy Charter Treaty with Related Documents (CL-001), ECT, Article 18.

⁵ Republic of Azerbaijan’s Statement of Claim (19 Nov. 2024) (“**Statement of Claim**”), para. 179.

⁶ Statement of Claim, para. 200; Republic of Azerbaijan’s Observations on Bifurcation (23 Jan. 2025) (“**Observations on Bifurcation**”), para. 33.

development of such resources. Nor does it establish a regime for “consent or compensation” between States for the use of contested resources. And it certainly does not contemplate the Treaty’s application in the context of inter-State disputes concerning armed conflict, territorial sovereignty, and the self-determination of peoples. Such matters, which implicate the most sensitive and complex aspects of international relations, were plainly *not* what the more than 50 different States that negotiated the ECT had in mind when they drafted a multilateral agreement on trade and investment in the energy sector.

8. Instead, Article 18 was simply designed to make clear that the provisions of the ECT do not affect a State Party’s existing sovereign rights to its energy resources. In that sense, Article 18 serves solely to inform the interpretation and application of the ECT’s operative provisions. There is no evidence whatsoever that this “miscellaneous” provision has any other purpose, let alone the far-reaching one that Azerbaijan seeks to attribute to it.

9. Azerbaijan nevertheless seizes on Article 18(1)’s reference to “international law” to read into the ECT a binding obligation on all States Parties to adhere to the “customary principle of permanent sovereignty over natural resources.”⁷ By means of this expansive interpretation, Azerbaijan purports to find a cause of action for one State to litigate claims against another State concerning questions that are *not* regulated by the ECT. Azerbaijan is not the first State to attempt unsuccessfully to manufacture jurisdiction through a “creative” reading of an isolated provision’s reference to State sovereignty or other broad concepts in international law. But as the ICJ has reaffirmed on multiple occasions, such provisions do “not impose [...] an obligation on States parties to act in a manner consistent with the many rules of international law which protect sovereignty in general, as well as all the qualifications to those rules.”⁸ Rather, “a general formulation” such as Article 18 “cannot, taken in isolation, be a basis for the jurisdiction” of an international tribunal.⁹

⁷ Statement of Claim, para. 181.

⁸ *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, Preliminary Objections, Judgment, I.C.J. Reports 2018 (RL-073), p. 321, para. 93.

⁹ *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Preliminary Objection, Judgment, I.C.J. Reports 1996 (RL-037), pp. 813, 815, paras. 27, 31.

10. For this reason, as explained in detail in Section II, Armenia respectfully requests that the Tribunal decline jurisdiction over Azerbaijan’s Article 18 claims. In so doing, the Tribunal will not only respect the clear limits of its jurisdiction under the ECT; it will also spare the Parties the waste of resources resulting from a protracted battle over Azerbaijan’s baseless claims.

11. There is also an obvious flaw in Azerbaijan’s Article 18 claims, which is relevant to the Tribunal’s decision on jurisdiction. As Armenia explained in its Request for Bifurcation, Azerbaijan’s claims ignore the historical context of Nagorno-Karabakh and involve an attempt to erase the presence of its majority ethnic Armenian population.¹⁰ The idea that the use of natural resources for the benefit of an indigenous population violates the principle of permanent sovereignty over natural resources ignores the content and historical development of this principle, which emanates precisely from the self-determination of peoples—a *jus cogens* norm.¹¹ The main energy resources over which Azerbaijan asserts claims are located within the territory of what was during the Soviet era the Nagorno-Karabakh Autonomous Oblast, an area that always had a majority ethnic Armenian population, long before Azerbaijan emerged as an independent State.¹²

12. Azerbaijan fails to respond in substance to this obvious flaw in the central theory of its case,¹³ which only underscores its impermissible attempt to expand the scope of the Tribunal’s jurisdiction *ad absurdum*. For example, and as Azerbaijan has not denied, the adjudication of its claims on the merits would necessarily require the Tribunal to decide whether the ethnic Armenians in Nagorno-Karabakh lawfully exercised their right to self-determination and to “freely dispose of their natural wealth.”¹⁴ This is not to mention the eventual counterclaims that would arise from, for example, the ethnic cleansing and forced displacement of 120,000 ethnic Armenians from Nagorno-Karabakh in September 2023, and the resulting deprivation of their ability to use and enjoy their

¹⁰ Request for Bifurcation, paras. 11-16.

¹¹ See *id.*, paras. 61, 83-84.

¹² See *id.*, para. 18.

¹³ See Observations on Bifurcation, para. 7.

¹⁴ International Covenant on Civil and Political Rights (1966) (**RL-027**), Article 1(2).

own natural resources.¹⁵ The ECT, however, does not govern such issues and the jurisdictional can of worms that Azerbaijan is attempting to pry open should remain firmly shut.

13. *Second*, Azerbaijan alleges that Armenia breached Article 7 by “interrupting the flow of gas from Garabagh to Nakhchivan as it transited through Armenia” along the Yevlakh-Nakhijevan pipeline (the “**Pipeline**”) beginning in December 1991.¹⁶ More specifically, Armenia allegedly “breached its obligations to facilitate the free transit of energy materials and products under Articles 7(1) to 7(3) and Article 7(5) of the ECT.”¹⁷

14. These separate claims were the subject of vague eleventh-hour allegations that Azerbaijan made after more than 14 months of negotiations over Azerbaijan’s ostensible Article 18 claims and only two months before it instituted these proceedings. Azerbaijan provided Armenia with a grand total of *two sentences and a footnote* purporting to describe its allegations, without even specifying which of its Article 7 obligations Armenia had supposedly breached and by what alleged conduct. It simply asserted, in passing, that “[REDACTED]”¹⁸ When Armenia requested basic information, Azerbaijan waited six weeks to respond, refused to provide any further information, and submitted its Notice of Arbitration *the very next business day*.

15. At the time these proceedings were instituted, the Parties did not even have a “dispute” concerning Article 7, let alone had they pursued any “negotiations,” as Article 27 requires. The ICJ and inter-State arbitral tribunals have regularly declined jurisdiction on these grounds in far less egregious circumstances. Moreover, and in any event, claims under Article 7 cannot be submitted for arbitration under Article 27. They are subject instead to the special dispute resolution mechanism provided for in Article 7(7).

16. For these reasons, as more fully explained in Section III of this Memorial, the Tribunal lacks jurisdiction over Azerbaijan’s Article 7 claims. But whatever jurisdictional theories

¹⁵ For the avoidance of doubt, Armenia maintains its reservation of rights to advance counterclaims after the Tribunal’s decision on jurisdiction, as appropriate. *See* Request for Bifurcation, para. 35, note 134.

¹⁶ Statement of Claim, para. 246. *See also* paras. 137-138.

¹⁷ *Id.*, para. 238.

¹⁸ Compilation of the Parties’ Pre-Arbitration Exchanges (**CE-063**) [PDF] p. 82, Letter from Azerbaijan to Armenia (16 Dec. 2022).

Azerbaijan may hope to rely on in support of what it calls this “small subset” of its case,¹⁹ it is clear that Article 7 of the ECT has nothing to do with gas transit through Armenia in the early 1990s.

17. The Yevlakh-Nakhichevan Pipeline was a project undertaken by the Soviet Union. It was constructed between 1976 and 1980.²⁰ Following the dissolution of the USSR in 1991, assets and infrastructure located on the territory of the newly independent States were transferred to the relevant national entities.²¹ The Soviet-era network of pipelines in the region appears in the map below, which was prepared by the International Energy Agency in the 1990s:



Figure 1 – Map of Oil and Gas Pipelines of Azerbaijan and the South Caucasus in the 1990s²²

¹⁹ Observations on Bifurcation, para. 5(b).

²⁰ See Statement of Claim, para. 133 (“The USSR Ministry of Gas Industry commissioned the Y-N Pipeline, which was constructed between 1976 and 1980.”).

²¹ Cf. M. Rafiqul Islam, *Unconventional Gas Reservoirs: Evaluation, Appraisal, and Development* (Elsevier, 2014) (RE-0043), p. 35.

²² “Caspian Oil and Gas: The Supply Potential of Central Asia and Transcaucasia,” *OECD* (2000) (RE-0042), pp. 17, 22. This map is included for illustrative purposes only and on a without prejudice basis. Minor typographical errors in the original have been corrected.

18. Referencing local Soviet-era official Azerbaijani newspapers, Azerbaijan alleges that, as early as December 1991, “Armenia had cut off the gas supply” to Nakhijevan.²³ However, even assuming *arguendo* that these allegations were accurate, Azerbaijan’s portrayal neglects and distorts the relevant context. In 1991, Azerbaijan launched a full-scale military campaign against the population of Nagorno-Karabakh in an effort to suppress their peaceful struggle for human rights and self-determination.²⁴ In addition to carrying out a large-scale campaign of pogroms and mass deportations of ethnic Armenians,²⁵ from November 1991 until May 1992—*i.e.*, at the same time that Azerbaijan alleges Armenia to have “cut off” the Pipeline—Azerbaijan was besieging and blockading Stepanakert, the capital of Nagorno-Karabakh.²⁶ Azerbaijan also weaponized energy resources against ethnic Armenians, including by imposing an energy embargo on Armenia following the dissolution of the USSR,²⁷ which continues to this day. Thus, even if the ECT could be applied retroactively to energy transit matters in the early 1990s, then it would be *Armenia* that would have claims to bring against Azerbaijan.²⁸

19. In any event, based on the evidence Azerbaijan itself cites,²⁹ and by its own admission,³⁰ it was ultimately Azerbaijan’s decision to halt the flow of gas through the Pipeline to Nagorno-Karabakh and Armenia “by shutting down the valves in Aghdam and then Barda,” after it lost control over the strategic town of Shushi to local ethnic Armenians in May 1992.³¹ As is

²³ Statement of Claim, para. 137.

²⁴ See Request for Bifurcation, para. 15. See also Human Rights Watch, *Bloodshed in the Caucasus: Escalation of the Armed Conflict in Nagorno-Karabakh* (Sept. 1992) (RE-0011), pp. 7-8.

²⁵ See Request for Bifurcation, paras. 14-15. See also D. Remnick, “‘Operation Ring’ Brings Fear, Confusion to Armenian Villages,” *Washington Post* (12 May 1991) (RE-0038); *Official Journal of the European Communities*, No. C 235/106 (12 Sept. 1988) (RE-0037), [PDF] p. 108; United States Department of Justice, *The Status of Armenians, Russians, Jews and Other Minorities* (1993) (RE-0040), p. 11.

²⁶ Human Rights Watch, *Bloodshed in the Caucasus: Escalation of the Armed Conflict in Nagorno-Karabakh* (Sept. 1992) (RE-0011), pp. 34-36; J. Carney, “Former Soviet Union Carnage in Karabakh,” *Time* (13 Apr. 1992) (RE-0039).

²⁷ M. Shapiro, “Armenia’s ‘Good Life’ Lost to Misery, Darkness, Cold,” *Washington Post* (29 Jan. 1993) (RE-0041).

²⁸ For the avoidance of doubt, Armenia maintains its reservation of rights to advance counterclaims.

²⁹ Eduard Ayrapetyan, “‘Artsakhgaz’ yesterday, today and tomorrow,” *Voice of Armenia* (8 May 2008) (CE-112), p. 1 (“Shushi was liberated, gas stopped flowing to Stepanakert. Nakhichevan ceased to be a factor for Baku”).

³⁰ Statement of Claim, para. 140.

³¹ *Id.* Contemporaneous international press reported that Nagorno-Karabakh was cut off from energy supplies even months before that. See J. Carney, “Former Soviet Union Carnage in Karabakh,” *Time* (13 Apr. 1992) (RE-0039), [PDF] p. 2 (“[Stepanakert] has been running without running water, electricity or telephones for three months; other regions of Karabakh have been without these basic services for much longer. A near total absence of fuel — a product

evident from the map above, this would also inevitably have cut off the gas supply to Nakhijevan further down the line.

20. By the time the First Nagorno-Karabakh War ended in May 1994, the flow of gas through the entirety of Yevlakh-Nakhijevan Pipeline had been disrupted and was never fully resumed. In 1997, the section of the Pipeline under Nagorno-Karabakh's control, which remained connected to Armenia's pipeline network, was reused by Nagorno-Karabakh's newly founded public company "Artsakhgaz" to restore gas supply to the region after years of energy deprivation caused by Azerbaijan's actions.³² The branch of the Pipeline connecting to Nakhijevan, however, has not been operational since at least 1992. And, as Armenia has explained, the ECT entered into force in 1998 and created no obligations pertaining to transit that had already ceased.³³

*

21. Whether under Article 18 or Article 7, the Tribunal lacks jurisdiction over all of Azerbaijan's claims and should dismiss this case in its entirety at this preliminary stage. The remainder of Armenia's Memorial is organized as follows:

22. **Section II** sets forth Armenia's objection to the Tribunal's jurisdiction *ratione materiae* over Azerbaijan's Article 18 claims; namely, that Article 18 does not state an obligation that gives rise to an independent cause of action and cannot serve as the basis for the Tribunal's jurisdiction over Azerbaijan's claims.

23. **Section III** addresses Armenia's objections to the Tribunal's jurisdiction over Azerbaijan's Article 7 claims; namely, that Azerbaijan cannot establish the existence of a dispute in relation to Article 7 at the time of its Notice of Arbitration, as Article 27 requires (**Section III.A**); even if a dispute existed under Article 7 (*quod non*), it would still be outside the Tribunal's jurisdiction because Azerbaijan did not fulfil the mandatory negotiations precondition, as Article 27 also requires (**Section III.B**); and, in all events, any dispute as to Article 7 should have been

of Azerbaijan's economic blockade of the enclave — has left Karabakh's factories silent, its workers unemployed and without pay.'").

³² "Artsakh Gaz," *Artsakh Gaz* (9 Feb. 2018) (**CE-200**). When the segment of the Pipeline from Armenia to Nagorno-Karabakh fell back into Azerbaijan's hands, Azerbaijan periodically interrupted and then completely halted the flow of natural gas, depriving the local ethnic Armenian population of heating in extreme winter conditions. See Letter from Armenia to the Registrar of the ICJ (14 Dec. 2022) [CONFIDENTIAL] (**RE-0026**), [PDF] p. 2.

³³ Request for Bifurcation, paras. 128-130, 135, 146.

referred to the mandatory dispute-resolution mechanism set out in Article 7(7), not to arbitration under Article 27 (**Section III.C**).

24. **Section IV** sets out Armenia’s requests for relief.

II. AZERBAIJAN’S CLAIMS UNDER ARTICLE 18 OF THE ECT ARE OUTSIDE OF THE TRIBUNAL’S JURISDICTION

25. As Armenia has explained,³⁴ in addition to being devoid of merit, Azerbaijan’s claims under Article 18 fall outside the Tribunal’s jurisdiction for several reasons. Among these is the reason that the Tribunal decided to hear as a preliminary matter, namely that “Article 18 of the ECT does not contain an obligation giving rise to an independent cause of action, and therefore cannot serve as the basis for the Tribunal’s jurisdiction.”³⁵

26. Indeed, Article 18 is a “[m]iscellaneous” or “contextual”³⁶ provision whereby, *inter alia*, the ECT’s Contracting Parties “recognise” and “reaffirm” basic principles of international law that serve to shed light on the interpretation of the Treaty’s operative provisions concerning investment and trade.³⁷

27. Yet, ever since Azerbaijan first notified these claims in 2021, it has openly stated its intention to use Article 18 to enforce what it refers to as the “customary principle of permanent sovereignty over natural resources.”³⁸ Its initial tactic was to argue that the Tribunal has jurisdiction directly to apply customary international law,³⁹ going as far as explicitly requesting relief on this

³⁴ *Id.*, § III.A.

³⁵ *Id.*, para. 42.

³⁶ Part IV was previously entitled “Contextual” during negotiations, and was only adjusted to “Miscellaneous” in a stylistic change by the Secretariat, without the intervention of the Contracting Parties, in the last iteration of the text. *See infra* note 174. *See also* Craig S. Bamberger, *The Energy Charter Treaty: A Description of Its Provisions*, International Energy Agency (1994) (**RL-108**), p. 23 (“Article 18, ‘Sovereignty Over Energy Resources,’ is located in Part IV entitled ‘Contextual.’”).

³⁷ Energy Charter Treaty with Related Documents (**CL-001**), ECT, Art. 18(1).

³⁸ Statement of Claim, para. 181. *See also id.* para. 9 (“By this conduct, Armenia breached its obligations under the ECT, including as informed by customary international law regarding sovereignty over natural resources.”); para. 182 (“This provision codifies a State’s inherent sovereign prerogatives.”); para. 190 (“Included in this bundle of sovereign rights is the concept of ‘permanent sovereignty over natural resources,’ which is a ‘principle of customary international law.’”); para. 192 (“A breach of Article 18 thus necessarily also violates the corresponding principle of sovereignty over natural resources as recognized under customary international law.”); para. 193 (“Article 18 applies the customary international law rule of sovereignty specifically to a State’s sovereign rights over its ‘energy resources.’”).

³⁹ *See* Compilation of the Parties’ Pre-Arbitration Exchanges (**CE-063**), [PDF] pp. 2-3, Letter from Azerbaijan to Armenia (8 October 2021).

basis.⁴⁰ However, faced with the obvious limits on the scope of the Tribunal’s jurisdiction *ratione materiae*, it now appears that Azerbaijan, in the words of the Tribunal, “is not raising any self-standing claims under customary international law.”⁴¹

28. While Armenia welcomes Azerbaijan’s withdrawal of its freestanding claims under customary international law, Azerbaijan appears still to attempt to shoehorn its claims concerning the “principle of sovereignty over natural resources as recognized under customary international law” into the ECT.⁴² However, as discussed below, Azerbaijan cannot establish that Article 18 provides a cause of action for such claims and therefore a valid basis for this Tribunal’s jurisdiction. Specifically, Azerbaijan cannot establish that Article 18, when interpreted in accordance with international law, empowers one ECT Contracting Party to sue another Contracting Party for the latter’s purported failure to respect the former’s permanent sovereignty over natural resources.

29. As Armenia explained in its Request for Bifurcation,⁴³ and as Azerbaijan appears to accept, it is well established in international law that even “where [a] treaty is in force, it does not ensue that all of its provisions establish rules imposing rights or obligations on the Parties.”⁴⁴ Some provisions, including those “in the operative part of certain treaties,” serve other purposes.⁴⁵ For example, as the ICJ has explained, some provisions may serve to “throw light on the interpretation of the other [t]reaty provisions,” and are “thus not without legal significance for such an

⁴⁰ Azerbaijan’s Notice of Arbitration contained a request for relief “[d]eclaring” that Armenia has breached its international obligations under Articles 18 and 7 of the ECT, *as well as applicable rules of customary international law*.” Republic of Azerbaijan’s Notice of Arbitration (27 Feb. 2023) (“**Notice of Arbitration**”), para. 64(a) (emphasis added).

⁴¹ Decision on Bifurcation, para. 91 (“Armenia’s second Article 18 Objection[] appears to be moot in light of Azerbaijan’s observation that it is not raising any self-standing claims under customary international law, but is simply invoking international law as an interpretative tool in support of its claims under Article 18.”).

⁴² Statement of Claim, para. 192. *Cf.* Observations on Bifurcation, para. 35.

⁴³ Request for Bifurcation, paras. 43-46.

⁴⁴ A. Pellet & D. Muller, “Article 38” in *The Statute of the International Court of Justice: A Commentary* (A. Zimmermann & C. Tams, eds., 2019) (3rd Ed., OUP) (**RL-075**), p. 894. *See also Appeal Relating to the Jurisdiction of the ICAO Council, Judgment, Separate Opinion of Judge Dillard, I.C.J. Reports 1972 (RL-028)*, p. 107, note 1. R. Baxter, “International Law in Her Infinite Variety,” *International and Comparative Law Quarterly*, Vol. 29, No. 4 (Oct. 1980) (**RL-031**), p. 553; J. d’Aspremont, “Dispositions Non Normatives des Actes Juridiques Conventionnels à la Lumière de la Jurisprudence de la Cour Internationale de Justice,” *Revue Belge de Droit International*, Vol. 36, No. 2 (2003) (**RL-150**), p. 508.

⁴⁵ A. Pellet & D. Muller, “Article 38” in *The Statute of the International Court of Justice: A Commentary* (A. Zimmermann & C. Tams, eds., 2019) (3rd Ed., OUP) (**RL-075**), pp. 894-895.

interpretation, but cannot, taken in isolation, be a basis for the jurisdiction” of an international court or tribunal.⁴⁶

30. Importantly, and as Azerbaijan also accepts,⁴⁷ broadly worded treaty provisions containing references to international law cannot be interpreted so as to impose, in the words of the ICJ, “an obligation on States parties to act in a manner consistent with the many rules of international law”⁴⁸ that are “unrelated to the stated object and purpose of” a treaty.⁴⁹ Accordingly, as the ICJ has affirmed on multiple occasions, a State seeking to base jurisdiction on such a provision must establish that it creates a cause of action to enforce the extrinsic rules of international law on which the State bases its claims.⁵⁰

31. Article 18 cannot serve as an independent basis for this Tribunal’s jurisdiction over Azerbaijan’s claims. Armenia explains in the following sections that Azerbaijan’s interpretation of Article 18 is not supported by the ordinary meaning of its text (**Section II.A**); the object and purpose of the ECT (**Section II.B**); the context of Article 18 (**Section II.C**); the ECT Contracting Parties’ subsequent practice and agreements (**Section II.D**); the requirement of good faith (**Section II.E**); or the *travaux préparatoires* (**Section II.F**).

⁴⁶ *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Preliminary Objection, Judgment, I.C.J. Reports 1996 (**RL-037**), p. 815, para. 31. See also *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment, I.C.J. Reports 2008 (**RL-155**), p. 177, para. 110 (interpreting the 1977 Treaty on Friendship and Cooperation between France and Djibouti to find that “the principles agreed by Djibouti and France in Articles 1 and 2 of the Treaty of 1977 can throw light on the interpretation to be made of the other provisions in that same Treaty.”).

⁴⁷ Observations on Bifurcation, para. 36 (“a party cannot seek to import unrelated international rules into a treaty on an entirely different subject matter.”).

⁴⁸ *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, Preliminary Objections, Judgment, I.C.J. Reports 2018 (**RL-073**), p. 321, para. 93. See also *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Preliminary Objection, Judgment, I.C.J. Reports 1996 (**RL-037**), p. 814, para. 28.

⁴⁹ *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, Preliminary Objections, Judgment, I.C.J. Reports 2018 (**RL-073**), p. 322, para. 95. See also *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Preliminary Objection, Judgment, I.C.J. Reports 1996 (**RL-037**), pp. 813-814, paras. 27-28.

⁵⁰ *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Preliminary Objection, Judgment, I.C.J. Reports 1996 (**RL-037**), p. 815, para. 31; *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, Preliminary Objections, Judgment, I.C.J. Reports 2018 (**RL-073**), p. 321, para. 93; *Certain Iranian Assets (Islamic Republic of Iran v. United States of America)*, Preliminary Objections, Judgment, I.C.J. Reports 2019 (**RL-170**), p. 28, para. 57.

A. The Ordinary Meaning of the Terms of Article 18 Does Not Support Azerbaijan

32. The plain text of Article 18 does not establish an obligation under the Treaty, let alone one that can be invoked as a standalone jurisdictional basis for Azerbaijan's claims.

33. Azerbaijan invokes Articles 18(1) and 18(3). Those provisions provide:

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

[...]

(3) Each state continues to hold in particular the rights to decide the geographical areas within its Area to be made available for exploration and development of its energy resources, the optimisation of their recovery and the rate at which they may be depleted or otherwise exploited, to specify and enjoy any taxes, royalties or other financial payments payable by virtue of such exploration and exploitation, and to regulate the environmental and safety aspects of such exploration, development and reclamation within its Area, and to participate in such exploration and exploitation, *inter alia*, through direct participation by the government or through state enterprises.⁵¹

34. The first sentence of Article 18(1) does no more than state that “[t]he Contracting Parties *recognise* state sovereignty and sovereign rights over energy resources.” This is a simple general *recognition* of pre-existing concepts in international law—“state sovereignty and sovereign

⁵¹ Energy Charter Treaty with Related Documents (CL-001), ECT, Articles 18; Energy Charter Treaty with Related Documents (French Version) (17 Dec. 1994) (RL-020), ECT, Article 18 (“1. Les parties contractantes reconnaissent la souveraineté nationale et les droits souverains sur les ressources énergétiques. Elles réaffirment qu’ils doivent être exercés en conformité et sous réserve des règles du droit international. [...] 3. Chaque Etat conserve en particulier le droit de décider des secteurs géographiques de sa zone qui sont destinés à être mis à disposition pour l’exploration et l’exploitation de ses ressources énergétiques, de l’optimisation de leur récupération et du rythme auquel elles peuvent être extraites ou autrement exploitées, de déterminer et de percevoir les taxes, redevances ou autres paiements financiers qui sont payables au titre de cette exploration et de cette exploitation et de régir les aspects environnementaux et de sécurité de cette exploration, de cette exploitation et de cette mise en valeur dans sa zone, ainsi que de participer à cette exploration et cette exploitation, notamment par une participation directe de son gouvernement ou des entreprises d’Etat.”).

rights over energy resources”⁵²—that are not established by the ECT. On its face, “this is an uncontroversial statement” or “affirmation,” to quote Professor Hobér.⁵³

35. The second sentence of Article 18(1) qualifies this affirmation by stating that the Contracting Parties “*reaffirm* that these [*i.e.*, state sovereignty and sovereign rights over energy resources] must be exercised in accordance with and subject to the rules of international law.” As Professor Hobér notes, “[t]his is again an uncontroversial statement.”⁵⁴ According to its ordinary meaning, this sentence does not purport to *expand* the scope of the affirmation stated in the first sentence. Rather, it *narrows* its import by making clear that the reference in the first sentence to state sovereignty and sovereign rights does not allow States to disregard their obligations under international law,⁵⁵ such as the obligation to provide compensation in case of expropriation.⁵⁶

36. Tellingly, in its interpretation of the provision Azerbaijan does not address the second sentence of Article 18(1).⁵⁷ It prefers to read the first sentence in isolation, without its qualifier. But these two sentences, which are two halves of the same provision, must be interpreted together. As Professor Hobér notes, “[r]eading the two sentences in subparagraph (1) together again illustrates one of the underlying philosophies of the ECT, *i.e.*, to strike a *reasonable and acceptable*

⁵² Energy Charter Treaty with Related Documents (CL-001), ECT, Article 18(1).

⁵³ K. Hobér, *The Energy Charter Treaty: A Commentary* (OUP, 2020) (CL-059), p. 348 (“Today *this is an uncontroversial statement*. No one disputes a State’s sovereign rights to natural resources, including energy resources, located within its territory. *This introductory statement* is probably to be seen against the sometimes fierce debates during the movement for Permanent Sovereignty over Natural Resources [...] States sometimes continue to insist that such sovereign rights be affirmed as a form of a *counterweight to obligations to respect the property of aliens and foreign investments*. This *affirmation* is thus found in the first sentence.”) (emphasis added). See also P. M. Norton, “Back to the Future: Expropriation and the Energy Charter Treaty,” in T. W. Wälde, *The Energy Charter Treaty: An East-West Gateway for Investment and Trade* (Kluwer, 1996) (RL-144), p. 370 (referring to Article 18(1) as a “generic affirmation” and as “restating what is, in fact, no more than a truism”).

⁵⁴ K. Hobér, *The Energy Charter Treaty: A Commentary* (OUP, 2020) (CL-059), p. 348.

⁵⁵ K. Hobér, *The Energy Charter Treaty: A Commentary* (OUP, 2020) (CL-059), p. 348 (“This is again an uncontroversial statement. It is generally accepted that one form of exercising state sovereignty is to enter into binding commitments—in the form of contracts, treaties, understandings, and other arrangements—with foreign States and foreign subjects. It is also widely accepted that once such commitments have been entered into, they are binding on the State: the principle of *pacta sunt servanda* is a *Grundnorm* in all legal systems, including public international law.”).

⁵⁶ See K. Hobér, *The Energy Charter Treaty: A Commentary* (OUP, 2020) (RL-172), p. 15; P. M. Norton, “Back to the Future: Expropriation and the Energy Charter Treaty,” in T. W. Wälde, *The Energy Charter Treaty: An East-West Gateway for Investment and Trade* (Kluwer, 1996) (RL-144), pp. 369-371.

⁵⁷ See Statement of Claim, paras. 186-188.

balance between the host States and Investors in the energy sector.”⁵⁸ In other words, as a provision in a treaty governing trade and foreign investment, Article 18(1) simply recognizes the perennial tension between a State’s right to regulate, on the one hand, and the economic rights of foreign nationals, on the other hand.⁵⁹

37. Article 18(3), for its part, provides that “[e]ach State continues to hold in particular” certain rights over energy resources. By its terms, this is a non-exhaustive (“in particular”) recognition of pre-existing rights (“continue to hold”). It does not establish new rights or obligations. As commentators have observed, Article 18(3) “*reconfirms* the contents of sovereignty with respect to energy resources.”⁶⁰ Thus, a State Party possesses (outside the ECT) sovereignty and sovereign rights with respect to its energy resources, but then (by means of the ECT’s other provisions) commits to accord protections to foreign investments in its energy sector.

38. What is conspicuously absent from both Articles 18(1) and 18(3) is any mandatory language indicating that it imposes any obligation on Contracting States—let alone a new obligation. The text does *not* provide that States “shall respect” or “undertake to respect” State sovereignty and sovereign rights over energy resources. Instead, the verbs used are expressly non-compulsory: “recognize” and “reaffirm.” This is no accident. When establishing binding obligations, States use *mandatory* language.⁶¹ When crafting provisions that have other purposes—such as “throw[ing] light on the interpretation of the other [t]reaty provisions”⁶²—States use *non-compulsory* language.⁶³

⁵⁸ K. Hobér, *The Energy Charter Treaty: A Commentary* (OUP, 2020) (CL-059), p. 348 (emphasis added).

⁵⁹ See, e.g., *id.*, p. 348 (“States sometimes continue to insist that such sovereign rights be affirmed as a form of a counterweight to obligations to respect the property of aliens and foreign investments.”) (emphasis added).

⁶⁰ See, e.g., *id.*, p. 349.

⁶¹ See, e.g., *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007 (RL-044), p. 43, para. 162 (“The ordinary meaning of the word ‘undertake’ is to give a formal promise, to bind or engage oneself, to give a pledge or promise, to agree, to accept an obligation. It is a word regularly used in treaties setting out the obligations of the Contracting Parties (cf., for example, International Convention on the Elimination of All Forms of Racial Discrimination (7 March 1966), Art. 2, para. 1; International Covenant on Civil and Political Rights (16 December 1966), Art. 2, para. 1, and 3, for example). It is not merely hortatory or purposive.”).

⁶² *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Preliminary Objection, Judgment, I.C.J. Reports 1996 (RL-037), p. 815, para. 31.

⁶³ See, e.g., L. Rajamani, “The 2015 Paris Agreement: Interplay Between Hard, Soft and Non-Obligations,” *Journal of Environmental Law*, Vol. 28, No. 2 (2016) (RL-163), pp. 356-357. Cf. *Application of the Convention on the*

39. There are few more frequently employed non-mandatory verbs than “reaffirm” and “recognize.” They are among the most common *preambular* verbs, routinely used by States to convey the object and purpose of treaties, the circumstances in which they are concluded, and the background and context informing their substantive obligations.⁶⁴ In fact, the preamble to the ECT itself contains two separate preambular paragraphs beginning with the word “recognising.”⁶⁵

40. And even when the word “recognize” is used outside of a treaty’s preamble, it is understood as non-mandatory. To take but one example, the Paris Agreement employs the term “recognize” two dozen times.⁶⁶ As a commentator has noted, these formulations “do not prescribe, whether in mandatory, recommendatory or even cajoling terms, a particular course of action for Parties” but rather “provide context” and state “shared understandings.”⁶⁷

41. Azerbaijan’s attempt to rely on a dictionary to argue that the word “recognise” should be read as “impos[ing] an obligation ‘to accept’ and act consistent with”⁶⁸ ignores treaty-making practice and is therefore unconvincing. As Armenia pointed out in its Request for Bifurcation,⁶⁹ Azerbaijan’s only legal authority does not even support its position.⁷⁰ In *Territorial*

Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (RL-044), p. 43, para. 162.

⁶⁴ See, e.g., Marrakesh Agreement Establishing the World Trade Organization (15 Apr. 1994) (RL-132), preamble; United States Model Bilateral Investment Treaty (2012) (RL-159), preamble; Stockholm Convention on Persistent Organic Pollutants (2001, as amended 2023) (RL-175), preamble; Rome Statute of the International Criminal Court (2002) (RL-149), preamble. See also M. M. Mbengue, “Preamble,” *Max Planck Encyclopedia of Public International Law* (2006) (RL-151), para. 1 (“Generally a preamble consists of a sequence of secondary clauses (considérants) that commence with words such as ‘Recognizing’, ‘Recalling’, ‘Mindful’, ‘Emphasizing’, ‘Conscious of’, etc.”).

⁶⁵ The International Energy Charter, *Consolidated Energy Charter Treaty with Related Documents* (17 Dec. 1994) (CL-001), ECT, preamble (“Recognising the necessity for the most efficient exploration, production, conversion, storage, transport, distribution and use of energy [...] Recognising the increasingly urgent need for measures to protect the environment, including the decommissioning of energy installations and waste disposal, and for internationally-agreed objectives and criteria for these purposes”) (emphasis added).

⁶⁶ See, e.g., Paris Agreement (2015) (RL-161), Articles 6(8) (“Parties recognize the importance of integrated, holistic and balanced non-market approaches being available to Parties to assist in the implementation of their nationally determined contributions [...]”), 7(6) (“Parties recognize the importance of support for and international cooperation on adaptation efforts [...]”), 8(1) (“Parties recognize the importance of averting, minimizing and addressing loss and damage associated with the adverse effects of climate change [...]).

⁶⁷ See Lavanya Rajamani, “The 2015 Paris Agreement: Interplay Between Hard, Soft and Non-Obligations” in *Journal of Environmental Law* (Volume 28, 2016) (RL-112), pp. 356-357 (describing these provisions as “non-obligations”).

⁶⁸ Statement of Claim, para. 187.

⁶⁹ Request for Bifurcation, paras. 56-57.

⁷⁰ Statement of Claim, para. 187 (citing *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment, I.C.J. Reports 1994 (CL-031), pp. 20-21, para. 39).

Dispute (Libya/Chad), the ICJ did *not* decide that the use of the word “recognize” should be generally understood as “indicat[ing] that a legal obligation is undertaken.”⁷¹ Rather, in the context of a bilateral treaty that “specifically addressed [...] the question of frontiers,”⁷² it found that the specific language⁷³ used reflected “[t]he manifest intention of the parties” to decide their boundaries.⁷⁴

42. In any event, Article 18 does not even speak about one State’s conduct with regard to another State’s sovereign rights. Rather, it is framed in terms of the rights of States over *their own* resources. It says nothing about the conduct that the Contracting Parties owe to other Contracting Parties as far as the latter’s energy resources are concerned. This framing, combined with the use of general and non-mandatory language, makes clear that Article 18’s ordinary meaning cannot be read to create a cause of action for Azerbaijan’s claims.

B. The Object and Purpose of the ECT Does Not Support Azerbaijan

43. Like any treaty provision, Article 18 must be interpreted in the light of the object and purpose of the treaty in which it is contained. A treaty’s object and purpose are especially relevant in the interpretation of general formulations like Article 18 (**Section II.B.1**). All available evidence establishes that the ECT’s object and purpose is to promote and regulate trade and investment in the energy sector, not to settle disputes between States concerning sovereignty over energy resources (**Section II.B.2**).

⁷¹ Statement of Claim, para. 187 (citing *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, *Judgment*, *I.C.J. Reports 1994* (CL-031), pp. 20-21, para. 39).

⁷² *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, *Judgment*, *I.C.J. Reports 1994* (CL-031), p. 20, para. 37. *See also id.*, p. 26, para. 52 (“The object and purpose of the Treaty thus recalled confirm the interpretation of the Treaty given above, inasmuch as that object and purpose led naturally to the definition of the territory of Libya, and thus the definition of its boundaries.”).

⁷³ *See* Treaty of Friendship and Good-Neighbourliness between the French Republic and the United Kingdom of Libya (1955) (RL-025), Article 3 (“Both High Contracting Parties recognize that the boundaries separating the territories of Tunisia, Algeria, French West Africa and French Equatorial Africa, on the one hand, from the territory of Libya, on the other hand, are those arising from the international instruments in force at the time of the formation of the United Kingdom of Libya, as defined in the attached exchange of letters (annex I).”).

⁷⁴ *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, *Judgment*, *I.C.J. Reports 1994* (CL-031), p. 24, para. 48. *See also id.*, p. 22, para. 42.

1. A General Formulation Cannot Give Rise to a Cause of Action That is Not in Accordance with the Object and Purpose of the Treaty

44. As explained above,⁷⁵ Article 18 of the ECT is simply a “[c]ontextual”⁷⁶ and “generic affirmation”⁷⁷—a restatement of “what is, in fact, no more than a truism;” namely, that “sovereign rights over energy resources ‘must be exercised in accordance with and subject to the rules of international law.’”⁷⁸

45. In the words of the ICJ, such “a general formulation cannot be interpreted in isolation from the object and purpose of the Treaty in which it is inserted.”⁷⁹ Applying this approach, the ICJ has declined jurisdiction over several cases in which the applicant States attempted to invoke general formulations in treaties as a basis for jurisdiction over external international obligations that were “not germane”⁸⁰ to the treaty’s subject matter. At least three examples are particularly relevant.

46. *First*, as Armenia explained in its Request for Bifurcation,⁸¹ in the *Oil Platforms* case, Iran sought to bring claims against the United States for the latter’s allegedly unlawful use of force against Iran’s oil platforms in the Persian Gulf. As a basis for certain claims, Iran invoked Article I of the two States’ bilateral Treaty of Amity, Economic Relations and Consular Rights of 1955 (“**Treaty of Amity**”), which provides that “[t]here shall be firm and enduring peace and sincere friendship between the United States . . . and Iran.”⁸² According to Iran, this provision “impose[d] upon the Parties ‘the minimum requirement . . . to conduct themselves with regard to the other in accordance with the principles and rules of general international law in the domain of

⁷⁵ See *supra* paras. 26, 34 (and sources cited therein).

⁷⁶ See Craig S. Bamberger, *The Energy Charter Treaty: A Description of Its Provisions*, International Energy Agency (1994) (**RL-108**), p. 23.

⁷⁷ P. M. Norton, “Back to the Future: Expropriation and the Energy Charter Treaty,” in T. W. Wälde, *The Energy Charter Treaty: An East-West Gateway for Investment and Trade* (Kluwer, 1996) (**RL-144**), p. 370.

⁷⁸ *Id.*

⁷⁹ *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Preliminary Objection, Judgment, I.C.J. Reports 1996 (**RL-037**), p. 813, para. 27.

⁸⁰ *Certain Iranian Assets (Islamic Republic of Iran v. United States of America)*, Preliminary Objections, Judgment, I.C.J. Reports 2019 (**RL-170**), p. 30, para. 65.

⁸¹ Request for Bifurcation, paras. 44-45.

⁸² *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Preliminary Objection, Judgment, I.C.J. Reports 1996 (**RL-037**), p. 812, para. 24 (ellipsis in original).

peaceful and friendly relations.”⁸³ As such, Iran argued, the Court would “have jurisdiction to evaluate the lawfulness of the armed actions of the United States in relation to the provisions of Article 1 of the Treaty of [Amity] and, accordingly, in relation to the rules of general international law thus ‘incorporated’ into the Treaty.”⁸⁴

47. The Court rejected Iran’s expansive reading of Article I, holding that “a general formulation cannot be interpreted in isolation from the object and purpose of the Treaty in which it is inserted.”⁸⁵ It concluded that, despite its broad title, the Treaty of Amity’s preamble and provisions made clear that it was devoted to economic and consular cooperation, not the use of force.⁸⁶ As such, because “the object and purpose of the Treaty of [Amity] was not to regulate peaceful and friendly relations between the two States in a general sense [...] Article I [could] not be interpreted as incorporating into the Treaty all of the provisions of international law concerning such relations.”⁸⁷ The Court therefore concluded that the provision could not be read to confer jurisdiction over Iran’s claims:

[T]he objective of peace and friendship proclaimed in Article I of the Treaty of [Amity] is such as to throw light on the interpretation of the other Treaty provisions [...] Article I is thus not without legal significance for such an interpretation, but cannot, taken in isolation, be a basis for the jurisdiction of the Court.⁸⁸

48. *Second*, in the *Immunities and Criminal Proceedings* case, Equatorial Guinea alleged that France had failed to respect the immunities of a Guinean official and the inviolability of its diplomatic premises in Paris.⁸⁹ As a basis for jurisdiction, Equatorial Guinea invoked Article 4 of the United Nations Convention against Transnational Organized Crime (the Palermo Convention), which provides in relevant part that “States Parties shall carry out their obligations under this Convention in a manner consistent with the principles of sovereign equality and territorial

⁸³ *Id.*, p. 812, para. 25 (ellipsis in original).

⁸⁴ *Id.*, p. 813, para. 25.

⁸⁵ *Id.*, p. 813, para. 27.

⁸⁶ *Id.*, pp. 813-814, paras. 27-28.

⁸⁷ *Id.*, p. 814, para. 28.

⁸⁸ *Id.*, p. 815, para. 31.

⁸⁹ *Immunities and Criminal Proceedings (Equatorial Guinea v. France), Preliminary Objections, Judgment, I.C.J. Reports 2018 (RL-073)*, pp. 300-301, paras. 18-19.

integrity of States and that of non-intervention in the domestic affairs of other States.”⁹⁰ Much like Azerbaijan in this case, Equatorial Guinea “claim[ed] that the customary international rules on immunities of States and State officials, and on the immunity of State property from execution, are incorporated into Article 4 through the reference in that Article to the principles of sovereign equality and non-intervention.”⁹¹

49. The Court rejected Equatorial Guinea’s theory of incorporation. It began its analysis by acknowledging that, unlike the provision at issue in *Oil Platforms*, Article 4(1) of the Palermo Convention could be construed as creating an obligation due to its use of the word “shall” (which, as discussed above, is notably absent from Article 18 of the ECT).⁹² Yet the Court noted that there was no indication that the Palermo Convention was intended to govern questions of State immunity, observing that its object and purpose was instead to promote cooperation in preventing and combatting transnational organized crime.⁹³ Therefore, “[t]he interpretation of Article 4 advanced by Equatorial Guinea, whereby the customary rules relating to immunities of States and State officials are incorporated into the Convention as conventional obligations, is unrelated to the stated object and purpose of the Palermo Convention.”⁹⁴ For the Court, the provision therefore could not be read to “impose, through its reference to sovereign equality, an obligation on States parties to act in a manner consistent with the many rules of international law which protect sovereignty in general, as well as all the qualifications to those rules.”⁹⁵

50. *Third*, in the *Certain Iranian Assets* case, another case Iran brought against the United States under the Treaty of Amity, Iran asked the Court to exercise jurisdiction over its claims that the United States had violated the sovereign immunities of its central bank. Among other provisions, it invoked Article IV(2) of the Treaty of Amity, which provides in relevant part:

Property of nationals and companies of either High Contracting
Party, including interests in property, shall receive the most constant

⁹⁰ *Id.*, p. 318, para. 74 (citing United Nations Convention Against Transnational Organized Crime and the Protocols thereto (2000), Article 4(1)).

⁹¹ *Id.*, p. 320, para. 90.

⁹² *Id.*, p. 321, para. 92.

⁹³ *Id.*, p. 321-322, paras. 94-95.

⁹⁴ *Id.*, p. 322, para. 95.

⁹⁵ *Id.*, p. 321, para. 93.

protection and security within the territories of the other High Contracting Party, in no case less than that required by international law.⁹⁶

51. As the Court explained, “Iran relie[d] on the explicit mention of the ‘require[ments of] international law’ contained in the opening sentence of this paragraph to argue that it incorporates by reference the rules of customary international law on sovereign immunities into the obligation it lays down.”⁹⁷ Citing its precedent in *Equatorial Guinea v. France*, the Court declined jurisdiction over Iran’s claims:

The Court observes in this regard that Iran’s proposed interpretation of the phrase referring to the “require[ments of] international law” in the provision quoted above is *not consistent with the object and purpose of the Treaty of Amity*. As stated in the Treaty’s preamble, the Parties intended to “encourag[e] mutually beneficial trade and investments and closer economic intercourse generally between their peoples, and [to] regulat[e] consular relations.” In addition, *the title of the Treaty* does not suggest that sovereign immunities *fall within the object and purpose of the instrument* concerned.⁹⁸

52. The consistent line of ICJ cases thus stands for the proposition that broadly worded provisions—whether referring to international law or not—cannot give rise to causes of action that are “unrelated to the stated object and purpose of the” Treaty.⁹⁹

2. The Object and Purpose of the ECT is Not to Settle Sovereignty or Territorial Claims over Natural Resources

53. A basic survey of the ECT’s text, including its preamble, its background and history, and relevant scholarship makes unequivocally clear that the object and purpose of the ECT is *not* to settle inter-State disputes concerning sovereignty over natural resources. Rather, its object and purpose is to serve as a multilateral framework for the promotion and protection of trade and investment in the energy sector.

⁹⁶ *Certain Iranian Assets (Islamic Republic of Iran v. United States of America)*, Preliminary Objections, Judgment, I.C.J. Reports 2019 (RL-170), p. 7, para. 53 (citing the Treaty of Amity).

⁹⁷ *Id.*, p. 7, para. 54.

⁹⁸ *Id.*, p. 7, para. 57.

⁹⁹ *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, Preliminary Objections, Judgment, I.C.J. Reports 2018 (RL-073), p. 322, para. 95.

54. The ECT project, and the objectives underlying it, can be traced back to a June 1990 European Council summit when a proposal was made to create a “European Energy Community.”¹⁰⁰ The purpose of the project was to modernize and diversify Eastern Europe’s energy sector through Western European foreign investment and innovation, while allowing Western Europe access to emerging Eastern European markets and resources.¹⁰¹ Interested States—which came to include Australia, Canada, and the United States, among others—began their project with the European Energy Charter (“EEC”), a non-binding political document that was officially adopted by 68 States in December 1991.¹⁰² In parallel, negotiations began toward a binding agreement that would become the ECT.¹⁰³ It was adopted in 1994, following three years of negotiations involving more than 50 States.¹⁰⁴

55. As adopted, the ECT reflects “a united commitment of an economic alliance of countries to achieve the following common goals:

- to provide open energy markets, and to secure and diversify energy supply;
- to stimulate cross-border investment and trade in the energy sector;
- to assist countries in economic transition in the development of their energy strategies and of an appropriate institutional and legal framework for energy, and in the improvement and modernisation of their energy industries.”¹⁰⁵

56. These objectives are reflected in black and white in Article 2 of the ECT, which defines the “Purpose of the Treaty” as “establish[ing] a legal framework in order to *promote long-*

¹⁰⁰ J. Doré, Negotiating the Energy Charter Treaty, in Thomas W. Wälde, *The Energy Charter Treaty: An East-West Gateway for Investment & Trade* (Kluwer ed., 1996) (RL-103), p. 138.

¹⁰¹ *Id.*, p. 138.

¹⁰² Energy Charter Treaty with Related Documents (CL-001), European Energy Charter, p. 27.

¹⁰³ K. Hobér, *The Energy Charter Treaty: A Commentary* (OUP, 2020) (RL-172), p. 15.

¹⁰⁴ J. Doré, Negotiating the Energy Charter Treaty, in Thomas W. Wälde, *The Energy Charter Treaty: An East-West Gateway for Investment & Trade* (Kluwer ed., 1996) (RL-103), pp. 137- 138.

¹⁰⁵ L. Reins “Article 2: Purpose of the Treaty,” in *Commentary on the Energy Charter Treaty* (Elgar, 2023) (RL-105), p. 62. *See also* Energy Charter Secretariat, *The Energy Charter Treaty: A Reader’s Guide* (2004) (RL-110), p. 6 (“The ECT aims to encourage and facilitate international energy co-operation. Its key principles of openness of energy markets and non-discrimination have the potential to stimulate foreign direct investment and cross-border trade. This will contribute towards securing energy supply of energy importing countries, and increasing capital inflows into energy exporting countries. Economies in transition need capital to develop and upgrade their energy industries.”).

term cooperation in the energy field.”¹⁰⁶ This “framework” is then reflected in the two main Parts of the Treaty, dedicated respectively to “Commerce” (*i.e.* trade) and “Investment Promotion and Protection.”¹⁰⁷

57. The Treaty’s preamble further emphasizes the ECT’s character as an instrument to “catalyse economic growth by means of measures to liberalise *investment and trade* in energy.”¹⁰⁸ It is filled with references to the World Trade Organization,¹⁰⁹ trade and investment terms of art,¹¹⁰ and explicit statements of economic objectives, such as “the objective of progressive liberalisation of *international trade*” and “the principle of avoidance of discrimination in *international trade*.”¹¹¹ This aligns with the Treaty’s goal of assisting former Eastern Bloc States with their transition into market economies, by promoting the development of modern energy policies and institutions.¹¹²

58. Nothing in the ECT signifies any other object and purpose beyond these specific goals in the fields of trade and investment. The ECT’s object and purpose is decidedly *not* to affect the sovereignty or territorial rights of the 42 States that signed it in 1994. Nor was it designed to regulate the implementation of the “concept of ‘permanent sovereignty over natural resources,’ ”¹¹³ which is itself a corollary of the principle of self-determination of peoples. These matters are squarely the subject of other international instruments, including the two International Covenants on Human Rights, and various seminal resolutions of the UN General Assembly.¹¹⁴

¹⁰⁶ Energy Charter Treaty with Related Documents (CL-001), ECT, Article 2 (emphasis added).

¹⁰⁷ *Id.*, ECT, Parts II-III, pp. 44, 53.

¹⁰⁸ *Id.*, ECT, preamble, p. 38 (emphasis added). The *travaux* also confirm that the investment section was a central pillar of the ECT. See ECT Travaux, Summary of General Statements on Investment (30 Apr. 1993) (RL-129).

¹⁰⁹ Energy Charter Treaty with Related Documents (CL-001), ECT, preamble (“Having regard to the objective of progressive liberalisation of international trade and to the principle of avoidance of discrimination in international trade as enunciated in the Agreement Establishing the World Trade Organization and as otherwise provided for in this Treaty [...] Looking to the eventual membership in the World Trade Organization of those Contracting Parties which are not currently members thereof and concerned to provide interim trade arrangements which will assist those Contracting Parties and not impede their preparation for such membership.”).

¹¹⁰ *Id.*, ECT, preamble, pp. 38-39 (*e.g.*, “national treatment,” “most favoured nation treatment,” “barriers to trade,” “abuse of dominant position”).

¹¹¹ *Id.*, ECT, preamble, p. 38 (emphasis added).

¹¹² L. Reins “Article 2: Purpose of the Treaty,” in *Commentary on the Energy Charter Treaty* (Elgar, 2023) (RL-105), p. 62; Energy Charter Secretariat, *The Energy Charter Treaty: A Reader’s Guide* (2004) (RL-110), p. 9.

¹¹³ Statement of Claim, para. 190.

¹¹⁴ International Covenant on Civil and Political Rights (1966) (RL-027), Article 1; International Covenant on Economic, Social, and Cultural Rights (1966) (RL-026), Article 1; United Nations General Assembly, *Resolution*

59. The fact that the ECT was not designed to regulate these questions is further evidenced by the absence—apart from Article 18—of any reference whatsoever in the Treaty to sovereignty and/or sovereign rights over energy resources. Instead, as commentators have recognized, this isolated provision is “a distant echo of the debates generated by the movement for permanent sovereignty over Natural Resources during the 1960’s and 1970’s.”¹¹⁵ Such a “distant echo” was not designed to sweep an entire field of international law into the ECT’s ambit. Rather, its inclusion reflects the fact that “States sometimes continue to insist that such sovereign rights be affirmed as a form of a *counterweight to obligations to respect the property of aliens and foreign investments*.”¹¹⁶ Indeed, as emphasized by the chairman of the legal committee during negotiations, the provision “pertains especially to investment issues.”¹¹⁷

60. Unable to point to anything in the ECT’s preamble or anywhere else indicating that the Treaty’s object and purpose extends to governing matters of State sovereignty and sovereign rights, Azerbaijan refers instead to an entirely different instrument: the EEC.¹¹⁸ As explained, the 1991 EEC was a non-binding political declaration of principles that preceded the adoption of the ECT by some three years.¹¹⁹ The relevant provision of the EEC, which Azerbaijan cites only in part, simply provides background context for a non-binding instrument addressing trade and investment in the energy sector:

1803: Permanent Sovereignty Over Natural Resources, UN Doc. A/RES/1803 (XVII) (14 Dec. 1962) (**CL-002**); United Nations General Assembly, *Resolution 3171 (XXVIII): Permanent Sovereignty Over Natural Resources*, UN Doc. A/RES/3171(XXVIII) (17 Dec. 1973) (**CL-013**). See also United Nations Charter (1945) (**CL-006**), Article 1(2) (“The purposes of the United Nations are [...] [t]o develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples.”); Request for Bifurcation, para. 61.

¹¹⁵ K. Hobér, *The Energy Charter Treaty: A Commentary* (OUP, 2020) (**CL-059**), p. 347.

¹¹⁶ *Id.*, p. 348 (emphasis added).

¹¹⁷ C. S. Bamberger, Overview of the Energy Charter Treaty, in Thomas W. Wälde, *The Energy Charter Treaty: An East-West Gateway for Investment & Trade*, (Kluwer ed., 1996) (**RL-107**), pp. 1, 16-17; Craig S. Bamberger, *The Energy Charter Treaty: A Description of Its Provisions*, International Energy Agency (1994) (**RL-108**), p. 23.

¹¹⁸ Statement of Claim, para. 194.

¹¹⁹ Energy Charter Treaty with Related Documents (**CL-001**), EEC, p. 27. See also K. Hobér, *The Energy Charter Treaty: A Commentary* (OUP, 2020) (**RL-172**), p. 15 (“The European Energy Charter is a non-binding political declaration. The Charter represents a commitment to co-operation in the energy sector, based on the principles of open and efficient energy markets. It is intended to promote the creation of conditions that will stimulate private investment and the participation of private enterprise on a non-discriminatory basis.”) See also J. Doré, Negotiating the Energy Charter Treaty, in Thomas W. Wälde, *The Energy Charter Treaty: An East-West Gateway for Investment & Trade* (Kluwer ed., 1996) (**RL-103**), pp. 138-139.

Within the framework of State sovereignty and sovereign rights over energy resources and in a spirit of political and economic cooperation, [States] undertake to promote the development of an efficient energy market throughout Europe, and a better functioning global market, in both cases based on the principle of non-discrimination and on market-oriented price formation, taking due account of environmental concerns.¹²⁰

61. If anything, the EEC only further confirms that principles relating to sovereignty and sovereign rights were *not* the subject of the negotiations that began in 1991. Rather, they served as context, provided the “framework,” for the Contracting States’ negotiations of a complex and comprehensive trade and investment regime for energy resources following the end of the Cold War. The vestigial Article 18 recalls this background context, which serves merely to “throw light on the interpretation of the other Treaty provisions.”¹²¹

62. In sum, the object and purpose of the ECT—which the ICJ has held to be of particular importance in interpreting a provision such as Article 18—provides no support for Azerbaijan’s theory of its case.

C. The Context of Article 18 Does Not Support Azerbaijan

63. In accordance with Article 31(1) of the VCLT, the terms of a treaty must be interpreted “in their context.” Article 31(2) specifies that:

The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.¹²²

¹²⁰ The International Energy Charter, *Consolidated Energy Charter Treaty with Related Documents* (17 Dec. 1994) (CL-001), EEC, p. 29 (emphasis added).

¹²¹ *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Preliminary Objection, Judgment, I.C.J. Reports 1996 (RL-037), p. 815, para. 31.

¹²² VCLT (CL-011), Article 31(2).

64. There is no context within the ECT itself, or in any related agreement or instrument, to support Azerbaijan’s interpretation of Article 18.

65. For example, at the time of the ECT’s adoption, the Contracting Parties expressly agreed on various understandings concerning its interpretation, some of which were adopted “with respect to the Treaty as a whole.”¹²³ In one such understanding, the Contracting Parties expressly emphasized the limited scope of the ECT: “[t]he representatives underline[d] that the provisions of the Treaty have been agreed upon *bearing in mind the specific nature of the Treaty* aiming at a legal framework to *promote long-term cooperation in a particular sector* [...]”¹²⁴

66. Article 18(2)—which falls between the two provisions invoked by Azerbaijan—provides additional instructive context:

Without affecting the objectives of promoting access to energy resources, and exploration and development thereof on a commercial basis, the Treaty shall in no way prejudice the rules in Contracting Parties governing the system of property ownership of energy resources.

67. This provision is clearly a “no prejudice” clause. Consistent with the other paragraphs of Article 18, it seeks not to create rights or obligations, but to preserve those arising elsewhere, in this instance under national property law. In that sense, it further reflects Article 18’s overall concern with the balancing of individual economic rights with the State’s sovereign prerogatives.¹²⁵ Inspired by Article 222 of the Treaty of Rome establishing the European Economic Community, Article 18(2) clarifies that the ECT does not infringe on each State’s right to elaborate its own regime—public, private, or otherwise—for the ownership of energy resources.¹²⁶

68. However, and again reflecting the delicate balance that was being struck, the Contracting States adopted a declaration that “Article 18(2) shall not be construed to allow the

¹²³ Energy Charter Treaty with Related Documents (CL-001), ECT, p. 37.

¹²⁴ *Id.* (emphasis added).

¹²⁵ See *infra* paras. 86-67.

¹²⁶ Craig S. Bamberger, *The Energy Charter Treaty: A Description of Its Provisions*, International Energy Agency (1994) (RL-108), p. 23. See also K. Hobér, *The Energy Charter Treaty: A Commentary* (OUP, 2020) (CL-059), pp. 348-349.

circumvention of the application of the other provisions of the Treaty.”¹²⁷ In other words, the “no prejudice” aspect of Article 18 was strictly circumscribed to matters *not* governed by the ECT. In the same vein, when the Treaty was adopted, the Chairman of the Conference stated that “in particular in the context of Article 18(2) [representatives] recalled that a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”¹²⁸ Accordingly, Article 18(2) preserves a State’s rights with respect to national property law and provides context for the application of the ECT’s obligations, but cannot be invoked to excuse noncompliance with those obligations. This confirms the overall function of Article 18 as an interpretive tool for the ECT’s provisions, and not as the source of stand-alone rights and obligations.

69. Azerbaijan’s interpretation of Article 18 is further undermined by the title and contents of the part of the Treaty in which it is included: “Part IV: Miscellaneous Provisions.”¹²⁹ By definition, miscellaneous provisions of a treaty do not seek to regulate the subject of a treaty and would not ordinarily be the source of freestanding obligations divorced from the main operative parts of the agreement. Rather, they address a grab bag of points ancillary to the regulatory provisions of the treaty, often of a clarificatory, procedural, or administrative nature. In the case of the ECT, its miscellaneous provisions are all geared toward the implementation of its other operative parts, *i.e.*, “Part II: Commerce” and “Part III: Investment Promotion and Protection.” Other than Article 18, these “miscellaneous” provisions are:

- Article 19, entitled “Environmental Aspects,” which sets out various aspirations concerning sustainable development. It calls upon Contracting Parties to, *inter alia*, “take account of environmental considerations throughout the formulation and implementation of their energy policies.”¹³⁰ It serves the purpose of adding “colour, texture and shading”¹³¹ to the application of the ECT’s operative trade and investment provisions. It does not, by calling on each Contracting Party to “tak[e] into account its

¹²⁷ Energy Charter Treaty with Related Documents (CL-001), Final Act of the European Energy Charter Conference, Declaration V, p. 66.

¹²⁸ *Id.*, Chairman’s Statement at Adoption Session on 17 December 1994, p. 66.

¹²⁹ *Id.*, ECT, p. 66.

¹³⁰ *Id.*, ECT, Article 19 (“In pursuit of sustainable development and taking into account its obligations under those international agreements concerning the environment to which it is party, each Contracting Party shall *strive* to minimise in an economically efficient manner harmful Environmental Impacts occurring either within or outside its Area from all operations within the Energy Cycle in its Area, taking proper account of safety.”) (emphasis added).

¹³¹ To borrow the terms of the WTO Appellate Body in interpreting the WTO Agreement’s preambular reference to sustainable development. See World Trade Organization, *United States - Import Prohibition of Certain Shrimp and Shrimp Products: Report of the Appellate Body*, No. AB-1998-4 (12 Oct. 1998) (RL-146), para. 153.

obligations under those international agreements concerning the environment to which it is party,”¹³² seek to codify such obligations or transform the ECT into an environmental treaty.

- Article 20, entitled “Transparency,” which briefly addresses ancillary requirements for giving effect to the ECT’s trade and investment regimes. This includes the specification that “[l]aws, regulations, judicial decisions and administrative rulings of general application [...] which affect other matters covered by this Treaty shall also be published promptly in such a manner as to enable Contracting Parties and Investors to become acquainted with them.”¹³³ Article 20 is thus expressly linked to “other matters” governed by the ECT and was elaborated with “investors” in mind. Like the other “miscellaneous” provisions of Part IV, it seeks to support the implementation of the ECT’s trade and investment provisions.
- Article 21, entitled “Taxation,” which provides specific rules concerning which operative provisions—*i.e.* Articles 7, 10, and 13—shall apply to which types of taxation measures. It also clarifies “for the avoidance of doubt” when certain substantive provisions do not affect Contracting Parties’ taxation rights. In other words, it addresses the scope of the ECT’s main obligations, creating carve outs and providing clarifications.
- Articles 22 and 23, which concern “State and Privileged Enterprises” and “Observance by Sub-National Authorities,” respectively. Both serve to clarify that a State’s obligations under the Treaty cannot be circumvented by actions undertaken by its State-owned entities or political subdivisions. They thus pertain to the interpretation and implementation of the Treaty’s operative provisions contained in Parts II and III.
- Article 24, which sets forth the ECT’s “Exceptions.” On its face, this provision governs the interpretation and application of the Treaty’s *other* provisions. Article 24’s exceptions concern a wide range of measures, including those pertaining to “human, animal or plant life or health,” “aboriginal people or socially or economically disadvantaged individuals or group,” and “war, armed conflict or other emergency.”¹³⁴ Such measures are not the subject of the ECT, but rather extrinsic circumstances that may affect the operation of the Treaty’s provisions.

70. What Part IV’s “miscellaneous” provisions all have in common is that they are designed to support the functioning of Parts II and III. They provide clarifications and carveouts, assist in the interpretation of provisions, or detail ancillary obligations designed to give effect to the Treaty’s main trade and investment regimes. In light of this context, Article 18 must similarly be

¹³² Energy Charter Treaty with Related Documents (CL-001), ECT, p. 67, Article 19(1).

¹³³ *Id.*, ECT, Article 20.

¹³⁴ *Id.*, ECT, Article 24.

understood as ancillary to the ECT's trade and investment regimes. As a "miscellaneous" provision, it cannot be interpreted as establishing an independent cause of action to litigate disputes concerning permanent sovereignty over natural resources, which is not the subject matter of the ECT.

D. The Contracting Parties' Subsequent Practice and Agreements Do Not Support Azerbaijan

71. Article 31(3)(a) and (b) of the VCLT provide that:

There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.¹³⁵

72. As the ICJ observed in *Legality of the Threat or Use of Nuclear Weapons*, the absence of State practice in support of an interpretation is instructive.¹³⁶ Crucially, in *Oil Platforms*, the ICJ supported its interpretation of Article 1 of the Treaty of Amity by noting the absence of relevant practice by the parties, which had never before invoked the provision, despite having had occasion to do so. It accordingly found that "the practice followed by the Parties in regard to the application of the Treaty d[id] not lead to any different conclusions" than those the Court had reached.¹³⁷ The European Court of Human Rights has similarly relied on the absence of relevant State practice—where such practice would be expected—in refusing to expand the scope of its jurisdiction under the European Convention on Human Rights.¹³⁸

¹³⁵ VCLT (CL-011), Article 31(3)(a)-(b).

¹³⁶ *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (RL-036)*, p. 226, paras. 55-56 (finding that the absence of practice treating "poison or poisoned weapons" as referring to nuclear weapons supported the interpretation that the use of nuclear weapons was not prohibited by the provision at issue).

¹³⁷ *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996 (RL-037)*, p. 803, para. 30. See also *Certain Iranian Assets (Islamic Republic of Iran v. United States of America), Preliminary Objections, Judgment, I.C.J. Reports 2019 (RL-170)*, p. 26, para. 49 (reflecting a similar argument made by the United States).

¹³⁸ See *Banković et. al. v. Belgium et. al.*, ECHR Application no. 52207/99, Decision on Admissibility (12 Dec. 2001) (RL-148), para. 62 ("The Court finds State practice in the application of the Convention since its ratification to be indicative of a lack of any apprehension on the part of the Contracting States of their extra-territorial responsibility in contexts similar to the present case. Although there have been a number of military missions involving Contracting States acting extra-territorially since their ratification of the Convention (inter alia, in the Gulf, in Bosnia and Herzegovina and in the FRY), no State has indicated a belief that its extra-territorial actions involved an exercise of

73. There is no subsequent agreement among the ECT Parties that interprets Article 18. Further, there is nothing in the subsequent practice of the dozens of Contracting Parties to the ECT—including Azerbaijan itself¹³⁹—that establishes an agreement of those Parties supporting Azerbaijan’s radical interpretation of Article 18. Plainly, no other State has ever before invoked—or even suggested that it could invoke—Article 18 as a basis for the jurisdiction of an international tribunal to resolve disputes concerning State sovereignty. This is despite the fact that, since the ECT’s entry into force in 1998, there have been numerous ongoing sovereignty and territorial disputes among its signatories.¹⁴⁰ Indeed, finding that Article 18 can serve as a basis for actionable claims under the ECT would set a far-reaching precedent, opening the door for other ECT Contracting Parties to arbitrate disputes relating to State sovereignty following armed conflicts.

74. Nor is there anything from the recent negotiations for the modernization of the ECT that would support Azerbaijan’s interpretation of Article 18. If anything, during this process Azerbaijan itself emphasized the need to balance State sovereignty with “the rights of investors,”¹⁴¹ and endorsed the view that Article 18(1) was “very general.”¹⁴²

E. A Good Faith Reading of Article 18 Does Not Support Azerbaijan

75. The general rule of treaty interpretation enshrined in Article 31 of the VCLT makes clear that “a treaty shall be interpreted *in good faith* in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” The centrality of the principle of good faith to the interpretation of treaties is widely recognized:

Article 31 envisages good faith as being at the centre of the application of the General Rule. The notion prevails throughout the process of interpretation. Good faith prevents an excessively literal interpretation of a term by requiring consideration of its context [...]

jurisdiction within the meaning of Article 1 of the Convention by making a derogation pursuant to Article 15 of the Convention.”).

¹³⁹ See Request for Bifurcation, para. 147.

¹⁴⁰ [REDACTED]

¹⁴¹ ECT Modernisation Travaux, First Negotiation Round of 6-9 July 2020, Negotiation Draft (26 June 2020) (RL-173), p. 74.

¹⁴² ECT Modernisation Travaux, Fifth Negotiation Round, Summary Record of the Modernisation Group Meeting of 1-4 June 2021 (11 June 2021) (RL-174), para. 35.

and of other means of interpretation. In particular, good faith implies consideration of the object and purpose of a treaty.¹⁴³

76. International tribunals have found that the principle of good faith requires treaty parties “to refrain from taking unfair advantage”¹⁴⁴ and “prohibits a party from exacting from the other party advantages which go beyond their common and reasonable intention at the time of the conclusion of the treaty.”¹⁴⁵ Rather, treaties “should be construed in good faith; that is to say, by taking into account the consequences of their commitments the parties may be considered as having reasonably and legitimately envisaged.”¹⁴⁶ This precludes overly expansive or “extraordinary” interpretations of treaty provisions in order to expand the material scope of a tribunal’s jurisdiction.¹⁴⁷

77. Azerbaijan proposes just such an “extraordinary” interpretation of Article 18, and invites the Tribunal to exercise jurisdiction over various interrelated and fundamental rules and principles of the post-1945 legal order. It argues that Article 18’s reference to “state sovereignty and sovereign rights” incorporates a “bundle of sovereign rights,” which in turn includes “the concept of ‘permanent sovereignty over natural resources.’”¹⁴⁸ It refers in passing to the UN Charter and “various UNGA resolutions,” including Resolution 1803 (concerning “Permanent sovereignty over natural resources”).¹⁴⁹ Attempting to sweep all those fundamental rules and principles of

¹⁴³ M. E. Villiger, “Article 31: General Rule of Interpretation,” in *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Brill, Nijhoff, 2008) (RL-154), p. 426.

¹⁴⁴ *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award (15 Apr. 2009) (RL-156), para. 107.

¹⁴⁵ B. Cheng, *General Principles of Law as Applied by Courts and Tribunals* (CUP, 2006) (RL-152), p. 118. *See also* L. McNair, “Miscellaneous Points” in *The Law of Treaties* (OUP, 1986) (RL-115), p. 465 (“[I]t would be a breach of [the] obligation [of good faith] for a party to make use of an ambiguity in order to put forward an interpretation which it was known to the negotiators of the treaty not to be the intention of the parties.”); J. Salmon, “Article 26 Pacta sunt servanda,” in *The Vienna Convention on the Law of Treaties: A Commentary* (OUP, 2011) (RL-158), p. 678 (noting that good faith requires a party “to give it a reasonable and equitable effect according to the correct interpretation of its terms.”).

¹⁴⁶ *Amco Asia Corporation et al v. Indonesia*, ICSID Case No. ARB/81/1, Decision on Jurisdiction (25 Sept. 1983) (RL-114), para. 14.

¹⁴⁷ *Victor Pey Casado and others v. Republic of Chile*, PCA Case No. 2017-30, Award (28 Nov. 2019) (RL-171), para. 202 (“an interpretation of Article 10 of the Treaty that would allow claims based on Chilean law to be brought to international arbitration, as long as such disputes ‘concern investments’, is an *extraordinary interpretation of the Treaty that is not in good faith* and is also not supported by the context in which the words are situated.”) (emphasis added).

¹⁴⁸ Statement of Claim, para. 190.

¹⁴⁹ *Id.*

international law within the jurisdiction of an ECT tribunal is simply not a good faith interpretation of Article 18.

78. Moreover, what Azerbaijan fails to acknowledge is that permanent sovereignty over natural resources is but a component of the larger principle of self-determination of peoples.¹⁵⁰ For example, UNGA Resolution 1803 was adopted to give effect to “the status of permanent sovereignty over natural wealth and resources as a *basic constituent of the right to self-determination*.”¹⁵¹ For their part, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights enshrine in common Article 1 that:

All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.¹⁵²

79. Under Azerbaijan’s all-encompassing reading of Article 18, the Tribunal would have jurisdiction to adjudicate all the components of the right to self-determination as they relate to natural resources. The Tribunal would thus have jurisdiction to decide, for example, whether the majority indigenous ethnic Armenians in Nagorno-Karabakh lawfully exercised their right to self-determination and to “freely dispose of their natural wealth.”¹⁵³ Moreover, the Tribunal would also have jurisdiction to entertain a counterclaim by Armenia that, by ethnically cleansing Nagorno-Karabakh in September 2023, Azerbaijan violated the permanent sovereignty of the indigenous ethnic Armenian people over their own natural resources.¹⁵⁴

80. These would be the extraordinary consequences of Azerbaijan’s contrived interpretation of Article 18. It cannot in good faith stand.

¹⁵⁰ See, e.g., N. Schrijver, “Self-determination of peoples and sovereignty over natural wealth and resources” in *Realizing the Right to Development* (OHCHR, Dec. 2013) (RL-058).

¹⁵¹ United Nations General Assembly, *Resolution 1803: Permanent Sovereignty Over Natural Resources*, UN Doc. A/RES/1803 (XVII) (14 Dec. 1962) (CL-002), p. 15 (emphasis added).

¹⁵² International Covenant on Civil and Political Rights (1966) (RL-027), Article 1(2); International Covenant on Economic, Social, and Cultural Rights (1966) (RL-026), Article 1(2).

¹⁵³ *Id.*

¹⁵⁴ For the avoidance of doubt, Armenia reserves its right to advance counterclaims as appropriate.

F. The ECT's *Travaux Préparatoires* Do Not Support Azerbaijan

81. Under Article 32 of the VCLT, recourse to the preparatory work of a treaty is permissible as a supplementary means of interpretation, either to confirm an interpretation under Article 31, or to determine a provision's meaning when an interpretation pursuant to Article 31 leaves the meaning ambiguous or obscure or "leads to a result which is manifestly absurd or unreasonable."¹⁵⁵

82. As explained above, there is a clear and logical interpretation of Article 18 that has been endorsed by commentators and is consistent with a good faith reading of the provision in light of its text, context, the ECT's object and purpose, and the subsequent practice of the Contracting Parties. Strictly speaking, there is therefore no need to have recourse to the Treaty's *travaux préparatoires* to uphold Armenia's straightforward interpretation of Article 18. The *travaux*, however, dispel any doubt that Azerbaijan's far-reaching reading of Article 18 was never contemplated by the Treaty's drafters.

83. To begin with, Azerbaijan—unsurprisingly—cannot point to anything in the ECT's *travaux* to support its position that Article 18 should serve as a basis for inter-State disputes concerning State sovereignty over energy resources. As the ICJ has repeatedly held, the absence of *travaux* in support of interpretations with significant consequences is telling.¹⁵⁶ For example, in *Oil Platforms*, the Court reinforced its interpretation of the Iran-U.S. Treaty of Amity by noting the

¹⁵⁵ VCLT (CL-011), Article 32 ("Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.").

¹⁵⁶ See, e.g., *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, Preliminary Objections, Judgment, I.C.J. Reports 2016 (RL-067), p. 3, para. 47 ("the travaux préparatoires give no indication as to the precise purpose behind the addition of what became the second paragraph of Article LVI. The Court also notes that, if Colombia's view as to the significance of the second paragraph were correct, then the insertion of the new paragraph would have operated to restrict the effect of the provision which, even before the United States made its proposal, the parties were contemplating carrying over from the 1929 Treaties. Yet there is no indication anywhere in the travaux préparatoires that anyone considered that incorporating this new paragraph would bring about such an important change") (emphasis added); *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)*, Preliminary Objections, Judgment, I.C.J. Reports 2017 (RL-168), p. 3, para. 104 ("That summary of the MOU mentions its title, the contents of the fifth paragraph, and the provision for its entry into force contained in the seventh paragraph. No mention is made of the sixth paragraph. If it had the significance given to it by Kenya, it is to be expected that this would have been highlighted by the State whose representative had been instrumental in drafting the MOU.") (emphasis added); *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v. Colombia)*, Judgment, I.C.J. Reports 2023 (RL-176), para. 76.

absence of any *travaux* favoring Iran's interpretation, because "it may be thought that, if that Article had the scope that Iran gives it, the Parties would have been led to point out its importance during the negotiations or the process of ratification."¹⁵⁷

84. Azerbaijan limits its brief treatment of the *travaux* to selective citations to support the general proposition that the "Contracting Parties drafted this provision to ensure that they would preserve and protect States' 'sovereignty rights' over energy resources while contextualizing those rights within international law at large."¹⁵⁸ But this does not assist Azerbaijan's case. Rather, it is entirely consistent with Article 18's function, explained above, to act as a bridge between the non-discriminatory treatment owed to foreign investments and States' rights over energy resources under existing rules of international law.¹⁵⁹ As shown in the *travaux* cited by Azerbaijan, during the negotiations, States discussed the need to include a reference to "international law" in Article 18 to clarify "that sovereign rights are exercised in accordance with the rules of international law."¹⁶⁰

85. Moreover, key documents from the *travaux* that Azerbaijan did *not* submit unequivocally confirm Armenia's interpretation of Article 18.

86. *First*, the *travaux* make clear that, from the beginning of the negotiations, the concept of "sovereignty over energy resources" was conceived of solely as concerning investor-State relationships, as a means to counterbalance the protection granted to investors in the investment section of the treaty¹⁶¹ and "affirm state authority over the disposal of energy resources."¹⁶² Norway, which originally proposed the sovereignty provision, suggested adding a declaration to the article explaining that:

¹⁵⁷ *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Preliminary Objection, Judgment, I.C.J. Reports 1996 (RL-037), p. 814, para. 29.

¹⁵⁸ Statement of Claim, para. 192.

¹⁵⁹ See *supra* Section II.B.

¹⁶⁰ Letter from J. Pierson to H. Steeg re: European Energy Charter Treaty Negotiations 14-18 December 1993 (20 Dec. 1993) (CL-030), p. 11. See also ECT Travaux, "Comments of the United States on Basic Protocol draft of 11 September 1991" (11 Sept. 1991) (CL-019), p. 1 ("[a]nything on [sovereignty over natural resources] should be qualified by express reference to the requirements of international law"); ECT Travaux, Conference Secretariat, "Summary Note of the Second Plenary Session of the Conference" (31 Oct. 1991) (CL-021), p. 5;

¹⁶¹ See, e.g., ECT Travaux, Memorandum from France commenting on the investment provisions of the Draft Basic Agreement (15 Mar. 1993) (RL-128), p. 1 (describing the sovereignty provision as relating to investors).

¹⁶² ECT Travaux, Memorandum on the Final Plenary Session of the Energy Charter Treaty Negotiations of 7-11 June 1994 (13 June 1994) (RL-133), [PDF] p. 2.

Together Article 21 [former numbering of Article 18] and Part III [investment] of the ECT are intended to represent a *balanced approach to the legal relationship between the host state and the investment of investors* in the exploration and development of energy resources [...].¹⁶³

87. Describing the finalized Article 18, the Legal Adviser of the Conference explained that, although not located in Part III on Investment, the provision “pertain[ed] especially to investment issues.”¹⁶⁴

88. The paragraph that became Article 18(3) was eventually added to describe the kinds of sovereign powers the Contracting Parties would retain in relation to access to resources.¹⁶⁵ However, delegates became concerned that the provision would effectively allow Contracting Parties to derogate from their investment and contractual obligations.¹⁶⁶ Accordingly, States then proposed to add to the article a duty to grant access to energy resources “*to investors*”¹⁶⁷—a principle that was ultimately reflected in Article 18(4) of the ECT.¹⁶⁸

89. *Second*, and relatedly, the *travaux* confirm that Article 18, and in particular paragraph (1), was meant to be a declaratory, interpretive provision that did not create independent legal obligations. For instance, in June 1994, the negotiation Conference’s Legal Sub-Group

¹⁶³ ECT Travaux, Letter from Norway to the Conference Secretariat regarding Article 21(2) (1 Sept. 1994) (**RL-140**), p. 2 (emphasis added); ECT Travaux, Note from Norway to the Conference Secretariat on Article 21(2) (Sovereignty over Energy Resources) (16 Aug. 1994) (**RL-138**), [PDF] p. 3.

¹⁶⁴ ECT Travaux, Memorandum from C. Bamberger (Legal Adviser of the Conference) explaining the Final Text of the ECT (26 Sept. 1994) (**RL-143**), p. 10.

¹⁶⁵ ECT Travaux, Press Notice on the European Energy Charter Negotiations (14 Dec. 1992) (**RL-121**), p. 3.

¹⁶⁶ See ECT Travaux, Revised Draft Basic Agreement for the European Energy Charter Treaty (1 Mar. 1993) (**RL-127**); ECT Travaux, Letter from C. Bamberger (Legal Adviser of the Conference) to Ambassador Rutten (Chairman of the Conference) (10 Aug. 1994) (**RL-136**), p. 1; ECT Travaux, Letter from the US to C. Bamberger (Legal Adviser of the Conference) (10 Aug. 1994) (**RL-137**).

¹⁶⁷ ECT Travaux, Note from the Conference Secretariat to C. Jones (Secretary-General of the Conference) enclosing a proposal on Article 4 (Sovereignty over and access to energy resources) (5 Feb. 1992) (**RL-118**), [PDF] p. 11 (proposal on Article 4 (on sovereignty) to add a second paragraph obliging parties to “facilitate access to and development of resources *by investors*.”) (emphasis added); ECT Travaux, Revised draft Basic Agreement for the European Energy Charter (24 June 1992) (**RL-120**).

¹⁶⁸ Energy Charter Treaty with Related Documents (**CL-001**), ECT, Article 18(4) (“The Contracting Parties undertake to facilitate access to energy resources, *inter alia*, by allocating in a non-discriminatory manner on the basis of published criteria authorisations, licences, concessions and contracts to prospect and explore for or to exploit or extract energy resources.”).

explained that paragraph (1) “state[d] the obvious,” was “otiose,” and “harmless.”¹⁶⁹ Indeed, one negotiating State underscored that “[it] would like to have it clearly recorded that it can accept Article [18] as currently drafted on the basis that *it is merely declaratory of existing international law*.”¹⁷⁰ Paragraph (4) was similarly described as “purely declaratory.”¹⁷¹

90. In fact, Norway—one of the most active States in the negotiation—repeatedly expressed the view that the sovereignty provision was only intended to affect “the interpretation and application of other articles of the ECT,” not create a legal obligation of its own.¹⁷² Indeed, Article 18 was originally placed in an introductory “Definitions and Principles” section,¹⁷³ then moved to a section entitled “Contextual.” It then became “Miscellaneous” in a stylistic change by the Secretariat in the last iteration of the document.¹⁷⁴

91. The *travaux* thus make clear that Article 18’s function is to provide *context* for the application of the ECT’s trade and investment provisions. There is no evidence whatsoever supporting Azerbaijan’s reading of Article 18 as creating a separate cause of action for inter-State disputes concerning sovereignty over energy resources.

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92. In sum, there is nothing to support Azerbaijan’s interpretation of Article 18 as enshrining a free-standing obligation that could serve as a cause of action, let alone for claims of the nature advanced by Azerbaijan. Armenia respectfully requests that the Tribunal thus reject Azerbaijan’s claims based on Article 18 as outside of its jurisdiction.

¹⁶⁹ ECT Travaux, Fax from the UK to C. Bamberger (Legal Adviser of the Conference) regarding various articles (17 June 1994) (**RL-134**).

¹⁷⁰ ECT Travaux, Letter from Australia to C. Bamberger (Legal Adviser of the Conference) on Article 21 (22 Aug. 1994) (**RL-139**) (referring to the prior numbering of Article 18).

¹⁷¹ ECT Travaux, Fax from the UK to Norway on Article 21 (1 Sept. 1994) (**RL-141**), p. 1.

¹⁷² ECT Travaux, Memorandum from Norway to C. Bamberger (Legal Adviser of the Conference) on Article 21 (2 Aug. 1994) (**RL-135**); ECT Travaux, Letter from Norway to the Conference Secretariat regarding Article 21(2) (1 Sept. 1994) (**RL-140**).

¹⁷³ ECT Travaux, Note from the Conference Secretariat enclosing the draft Basic Agreement (21 Jan. 1992) (**RL-117**).

¹⁷⁴ Compare ECT Travaux, Proposed Final Text of the ECT (14 Sept. 1994) (**RL-142**), with the final text of the ECT. The Part was still titled “Contextual” in the final draft the negotiating parties agreed upon, meaning the “Miscellaneous” title was decided during the Secretariat’s final review of the text, after the negotiations had ended.

III. AZERBAIJAN'S CLAIMS UNDER ARTICLE 7 ARE OUTSIDE OF THE TRIBUNAL'S JURISDICTION

93. In its Statement of Claim, Azerbaijan alleges that Armenia violated Articles 7(1)-(3) and (5) of the ECT.¹⁷⁵ As explained above in Section I, these claims concern the alleged interruption of the transit of gas through the Yevlakh-Nakhijevan Pipeline that formerly crossed through the territory of Armenia between two parts of Azerbaijan.

94. As Armenia has demonstrated, these claims are plainly outside the Tribunal's jurisdiction *ratione temporis* and are premised on an untenable interpretation of Article 7.¹⁷⁶ While Azerbaijan seeks to circumvent the temporal defect in its claims through a contrived theory of continuing breach,¹⁷⁷ such a theory presupposes—at a minimum—the existence of an applicable international obligation *after* the entry into force of the ECT.¹⁷⁸ But, as Armenia has explained, the provisions of Article 7 concerning the disruption of transit apply only to *existing* transit, not past, future, or potential transit.¹⁷⁹ Whether in 1991, 1998, or 2025, there are no relevant obligations to

¹⁷⁵ Statement of Claim, Section VI(B).

¹⁷⁶ See *supra* para. 20; Request for Bifurcation, Sections III.B.4, III.C.1.

¹⁷⁷ Observations on Bifurcation, para. 54.

¹⁷⁸ See International Law Commission (ILC), *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, Report of the ILC on the work of its Fifty-third Session (2001) (RL-041) Articles 13, 14(2).

¹⁷⁹ See Request for Bifurcation, paras. 127-136. Article 7(1) imposes an obligation of conduct only in relation to existing transit, and Article 7(2) only imposes a “soft” obligation to cooperate. See D. Azaria, *Treaties on Transit of Energy Via Pipelines and Countermeasures* (OUP, 2015) (CL-052), pp. 67-68 (discussing Article 7(1) and noting that “[t]he obligation (as read in all authentic treaty texts) is one of due diligence. ECT Contracting Parties are obliged to show a degree of vigilance in adopting a regulatory framework within their domestic legal system, which facilitates transit without discrimination, unreasonable restrictions, delays, or charges, and in enforcing their relevant regulations on public and private operators of pipeline cable systems within their jurisdiction.”) (emphasis added); K. Hobér, *The Energy Charter Treaty: A Commentary* (OUP, 2020) (CL-059), pp. 157-158 (noting that “[p]aragraph (2) [of Article 7] is a soft law obligation to encourage relevant entities to co-operate.”); A. Konoplyanik and T. Walde, “Energy Charter Treaty and its Role in International Energy” in *Journal of Energy & Natural Resources Law* (Volume 24, 2006) (CL-042), p. 543 (“Article 7 [...] creates [...] a soft obligation to favour the construction of new facilities.”) (emphasis added); ECT Travaux, Background Paper for the Chairman of the Conference prepared by the Conference Secretariat (26 Nov. 1993) (RL-131) (describing paragraph (2) of Article 7 (at the time numbered as Article 8) as a “soft law paragraph.”); ECT Travaux, Memorandum from C. Bamberger (Legal Adviser of the Conference) about ECT negotiations of 1-6 Feb. 1993 (9 Feb. 1993) (RL-124), p. 7 (describing paragraph (2) of Article 7 as establishing “no meaningful obligations”). Article 7(3), in turn, expands on the principle of non-discrimination enshrined in Article 7(1), but covers only “discriminatory treatments that would arise from different legal regimes applicable to energy materials and products or legal regimes governing the use of energy transportation facility.” C. G. Stănescu, “Article 7, Transit,” in R. Leal-Arcas, *Commentary on the Energy Charter Treaty* (Elgar, 2023) (RL-092), para. 7.09. See also K. Hobér, *The Energy Charter Treaty: A Commentary* (OUP, 2020) (CL-059), p. 162 (the provision only requires a State to “commit itself to ensure that its domestic legislation, regulations, and rules, meet a certain standard with respect to transport of energy materials and the use of transport facilities”). Finally, Article 7(5) requires Contracting Parties to “secure established flows of Energy Materials and Products to, from or between the Areas of other

apply to the alleged disruption of the Pipeline, let alone one that would have required the establishment of new transit.¹⁸⁰

95. In any event, as explained below, Azerbaijan’s Article 7 claims must also be dismissed on three other jurisdictional grounds that the Tribunal deemed appropriate to hear in this bifurcated phase of the proceedings. *First*, Azerbaijan cannot establish that a “dispute” as to Article 7 and the interruption of transit existed between the Parties at the time it initiated this arbitration, as Article 27 requires (**Section III.A**). *Second*, even if such a dispute existed, Azerbaijan has not fulfilled the mandatory precondition to negotiate the dispute before submitting it to arbitration, as Article 27 also requires. (**Section III.B**). *Third*, and in any event, if a transit dispute did exist under the ECT, it should have been referred to Article 7(7)’s mandatory conciliation mechanism, not to arbitration under Article 27 (**Section III.C**).

A. Azerbaijan Cannot Establish that a Dispute in Relation to Article 7 Existed at the Time of its Notice of Arbitration

96. As Armenia will explain further below, Article 27 is not the dispute resolution provision applicable to transit disputes under the ECT. But even assuming *arguendo* that it were, a tribunal constituted under Article 27—as this Tribunal is—only has jurisdiction to hear a “dispute” concerning the application or interpretation of the ECT (**Section III.A.1**). But no dispute as to

Contracting Parties.” This obligation expressly applies only to “established” energy flows. *See* K. Hobér, *The Energy Charter Treaty: A Commentary* (OUP, 2020) (**CL-059**), pp. 165-166.

¹⁸⁰ That the ECT did not create obligations for Armenia as to the former Yevlakh-Nakhijevan Pipeline transit is further confirmed by the Parties’ attitudes during the negotiations of the ECT. In February 1992, Azerbaijan provided the negotiating Conference’s Secretariat with a detailed description of its energy situation, even mentioning that “oil exports were continuing to Russia, Georgia and (!) Armenia.” ECT Travaux, Note from the Conference Secretariat regarding Azerbaijan (25 Feb. 1992) (**RL-119**), p. 2 (exclamation point in the original). Azerbaijan did not refer at any point in time during the negotiations of the ECT’s transit provisions to the Pipeline, the First Nagorno-Karabakh War, or any transit issues with Armenia. This is the case even though, by Azerbaijan’s own account, the alleged interruption would have occurred a few months before the relevant negotiations began. Moreover, during negotiations, Armenia consistently advocated for strong obligations on transit, and plainly never understood them as having retroactive application to the events of the First Nagorno-Karabakh War. *See, e.g.*, ECT Travaux, Armenia’s Comments on Article 11 (Transit) (15 Dec. 1992) (**RL-122**), (proposing to prohibit the “limitation” and not just the “interruption” of transit during transit disputes described in paragraph 5 of the article on transit); ECT Travaux, Draft Basic Agreement – Article 11 (1 Feb. 1993) (**RL-123**), [PDF] p. 5. Armenia was even opposed to the possibility of transitional arrangements for the Transit provisions. ECT Travaux, Armenia’s Proposal on Transitional Arrangements (Article 36) (9 Oct. 1993) (**RL-130**). By contrast, Azerbaijan for a long time reserved its position on the entire Transit article. *See, e.g.*, ECT Travaux, Revised draft Basic Agreement for the European Energy Charter (24 June 1992) (**RL-120**), [PDF] p. 35 (showing Azerbaijan’s general reserve); ECT Travaux, Draft Basic Agreement – Article 11 (1 Feb. 1993) (**RL-123**).

Article 7 existed when Azerbaijan instituted these proceedings on 27 February 2023, the undisputed critical date for jurisdictional purposes (**Section III.A.2**).¹⁸¹

1. Article 27 of the ECT Gives the Tribunal Jurisdiction Only over a “Dispute” Within the Meaning of the Term Under International Law

97. By its plain terms, Article 27 requires that a dispute must exist prior to, and as a precondition for, the institution of proceedings before an arbitral tribunal. In particular, Articles 27(1) and 27(2) provide:

(1) Contracting Parties shall endeavour to settle *disputes* concerning the application or interpretation of this Treaty through diplomatic channels.

(2) If a *dispute* has not been settled in accordance with paragraph (1) within a reasonable period of time, either party thereto may, except as otherwise provided in this Treaty or agreed in writing by the Contracting Parties, and except as concerns the application or interpretation of Article 6 or Article 19 or, for Contracting Parties listed in Annex IA, the last sentence of Article 10(1), upon written notice to the other party to *the dispute* submit the matter to an ad hoc tribunal under this Article.¹⁸²

98. Thus, under Article 27(2), only “a dispute”—*i.e.* a dispute “concerning the application or interpretation of” the ECT within the meaning of Article 27(1)—may be submitted to a tribunal for arbitration. When interpreting compromissory clauses like Article 27, international courts and tribunals have uniformly held that the existence of a dispute is an essential limitation to

¹⁸¹ See, e.g., *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (RL-067)*, p. 27, para. 52 (“[T]he critical date for determining the existence of a dispute is the date on which the application is submitted to the Court.”).

¹⁸² Energy Charter Treaty with Related Documents (**CL-001**), ECT, Article 27 (emphasis added); Energy Charter Treaty with Related Documents (French Version) (17 Dec. 1994) (**RL-020**) (“1. Les parties contractantes s’efforcent de régler les *différends* relatifs à l’application ou l’interprétation du présent traité par la voie diplomatique. 2. Lorsqu’un *différend* n’a pas été réglé conformément au paragraphe 1 dans un délai raisonnable, chaque partie *au différend* peut, à moins que le présent traité n’en dispose autrement ou que les parties contractantes en aient convenu autrement par écrit, et sauf s’il s’agit de l’application ou de l’interprétation de l’article 6 ou de l’article 19 ou, pour les parties contractantes énumérées à l’annexe IA, de la dernière phrase de l’article 10 paragraphe 1, *soumettre le différend* à un tribunal d’arbitrage ad hoc en vertu du présent article, moyennant notification écrite adressée à l’autre partie au différend.”) (emphasis added).

the consent of contracting States to arbitral or judicial settlement, and is therefore a jurisdictional requirement.¹⁸³ Azerbaijan does not—and cannot—contest this.

99. As numerous international courts and tribunals have also found, the term “dispute” has a well-established meaning under international law: “a disagreement on a point of law or fact, a conflict of legal views or of interests” between the parties.¹⁸⁴ The question of whether a dispute

¹⁸³ See, e.g., *Republic of Ecuador v. United States of America*, PCA Case No. 2012-5, Award (29 Sept. 2012) (**RL-052**), para. 208 (“Article VII confers jurisdiction over ‘[a]ny dispute between the Parties concerning the interpretation or application of the Treaty which is not resolved through consultations or other diplomatic channels.’ In construing the meaning of this grant of jurisdiction to State-to-State arbitral tribunals, the Tribunal must determine whether a ‘dispute’ exists between the Parties.”); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Preliminary Objections, Judgment, I.C.J. Reports 2022 (**RL-088**), pp. 491, 502, paras. 30, 63 (finding that “[t]he existence of a dispute between the parties is a requirement for the Court’s jurisdiction under Article IX of the Genocide Convention,” which provides that “[d]isputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, [...] shall be submitted to the International Court of Justice at the request of any of the parties to the dispute” (emphasis added)); *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary Objections, Judgment, I.C.J. Reports 2011 (**RL-048**), paras. 29-30 (finding that the word “dispute” in Article 22 of the Convention on the Elimination of All Forms of Racial Discrimination referred to the Court’s jurisdictional requirement of the existence of a dispute); *Application of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Canada and Netherlands v. Syrian Arab Republic)*, Provisional Measures, Order of 16 November 2023, I.C.J. Reports 2023 (**RL-177**), p. 595, para. 24 (“Article 30, paragraph 1, of the Convention against Torture makes the Court’s jurisdiction conditional on the existence of a dispute relating to the interpretation or application of the Convention.”); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)*, Provisional Measures, Order of 26 January 2024, I.C.J. Reports 2024 (**RL-178**), para. 19 (Article IX of the Genocide Convention makes the Court’s jurisdiction conditional on the existence of a dispute relating to the interpretation, application or fulfilment of the Convention.”). See also *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006 (**RL-111**), p. 39, para. 88 (“When [the parties’] consent is expressed in a compromissory clause in an international agreement, any conditions to which such consent is subject must be regarded as constituting the limits thereon”) (emphasis added).

¹⁸⁴ *Mavrommatis Palestine Concessions*, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2 (**RL-021**), p. 11; *Republic of Ecuador v. United States of America*, PCA Case No. 2012-5, Award (29 Sept. 2012) (**RL-052**), para. 212 (“The Parties both acknowledge that the term ‘dispute’ has a specific meaning in international law and practice and are largely in agreement on the legal framework to be applied, aptly and succinctly summarized by the ICJ in its judgment in *Georgia v. Russia* : [...] ‘A dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons.’”) (emphasis added); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Preliminary Objections, Judgment, I.C.J. Reports 2022 (**RL-088**), p. 502, para. 63; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary Objections, Judgment, I.C.J. Reports 2011 (**RL-048**), paras. 29-30; *Application of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Canada and Netherlands v. Syrian Arab Republic)*, Provisional Measures, Order of 16 November 2023, I.C.J. Reports 2023 (**RL-177**), p. 595, para. 24; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)*, Provisional Measures, Order of 26 January 2024, I.C.J. Reports 2024 (**RL-178**), para. 19. See also *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom)*, Preliminary Objections, Judgment, I.C.J. Reports 2016 (**RL-070**), para. 37; *Dispute Concerning Delimitation of the Maritime Boundary between Mauritius and Maldives in the Indian Ocean (Mauritius/Maldives)*, ITLOS Case No. 28, Preliminary Objections, Judgment (28 Jan. 2021) (**RL-085**), para. 323.

exists in a particular case “turns on the evidence of opposition of views.”¹⁸⁵ It is not sufficient for the interests of the parties to be in conflict.¹⁸⁶ Rather, “[i]t must be shown that the claim of one party is *positively opposed* by the other.”¹⁸⁷ As to disputes concerning the alleged violation of an international obligation, “the two sides [must] hold *clearly opposite views* concerning the question of the performance or non-performance of certain international obligations.”¹⁸⁸

100. Whether a dispute exists is a matter of objective determination.¹⁸⁹ In making that determination, the Tribunal may consider “any statements or documents exchanged between the parties.”¹⁹⁰ However, “a statement can give rise to a dispute only if it refers to the subject-matter of a claim with *sufficient clarity* to enable the State against which [the] claim is made to identify that there is, or may be, a dispute *with regard to that subject-matter*.”¹⁹¹ In particular, the statements must “articulate[] an alleged breach” and the “particulars” of the conduct giving rise to it.¹⁹²

¹⁸⁵ *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom)*, Preliminary Objections, Judgment, I.C.J. Reports 2016 (RL-070), p. 855, para. 57.

¹⁸⁶ *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa)*, Preliminary Objections, Judgment of 21 December 1962: I.C.J. Reports 1962 (CL-008), p. 328.

¹⁸⁷ See, e.g., *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom)*, Preliminary Objections, Judgment, I.C.J. Reports 2016 (RL-070), p. 855, para. 37 (emphasis added); *Dispute Concerning Delimitation of the Maritime Boundary between Mauritius and Maldives in the Indian Ocean (Mauritius/Maldives)*, ITLOS Case No. 28, Preliminary Objections, Judgment (28 Jan. 2021) (RL-085), paras. 323-324; *Republic of Ecuador v. United States of America*, PCA Case No. 2012-5, Award (29 Sept. 2012) (RL-052), para. 212.

¹⁸⁸ See, e.g., *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom)*, Preliminary Objections, Judgment, I.C.J. Reports 2016 (RL-070), p. 855, para. 37 (emphasis added).

¹⁸⁹ See, e.g., *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, Preliminary Objections, Judgment, I.C.J. Reports 2016 (RL-067), p. 26, para. 50; *Republic of Ecuador v. United States of America*, PCA Case No. 2012-5, Award (29 Sept. 2012) (RL-052), para. 212.

¹⁹⁰ See, e.g., *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom)*, Preliminary Objections, Judgment, I.C.J. Reports 2016 (RL-070), p. 849, para. 39.

¹⁹¹ *Id.*, p. 853, para. 49 (emphasis added).

¹⁹² *Id.*, pp. 853-855, paras. 50-51, 57. See also *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, I.C.J. Reports 2012 (RL-051), para. 54; *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, Preliminary Objections, Judgment, I.C.J. Reports 2016 (RL-067), para. 76; *Republic of Ecuador v. United States of America*, PCA Case No. 2012-5, Award (29 Sept. 2012) (RL-052), para. 227 (holding that a dispute did not exist because Ecuador had not invoked a specific article and had not alleged a breach to it).

101. Because the existence of a dispute turns on the “*positive*” opposition of views, the unilateral notification of a claim by the claimant, without also evidence of the respondent’s opposition, does not suffice. Moreover, the respondent’s positive opposition may not be inferred from its silence, absent special circumstances.¹⁹³

102. The requirement that a dispute must exist when proceedings are instituted is not a mere formality. International courts and tribunals routinely dismiss cases on the sole basis that a dispute did not exist at the time of the institution of the proceedings.¹⁹⁴

103. For example, in *Republic of Ecuador v. United States of America*, the arbitral tribunal dismissed the case because a “dispute” as defined under international law did not exist as to the “interpretation or application” of the US-Ecuador BIT.¹⁹⁵ In that case, Ecuador sent a diplomatic note setting out its views on the interpretation of a provision of the BIT and asked the United States to confirm that it shared this interpretation. The note stated that “if the United States had a different understanding of Article II(7) than was described in the note, or if the United States did not respond, Ecuador would consider itself to be in dispute with the United States over the interpretation of the Treaty.”¹⁹⁶ Shortly thereafter, Ecuador’s Ambassador to the United States met with the U.S. Department of State Legal Adviser to discuss the interpretation of Article II(7).¹⁹⁷ During that meeting, the United States advised that it would “study Ecuador’s views and initiate its inter-agency process for determining the United States’ position on this issue,” but did not then express its views.¹⁹⁸ The United States then proceeded to respond to Ecuador’s diplomatic note

¹⁹³ As the tribunal in the *Ecuador v. US* case noted, “the inference of ‘positive opposition’ [from the respondent’s silence] is warranted *only when all other reasonable interpretations of the respondent’s conduct and surrounding facts can be excluded*.”). *Republic of Ecuador v. United States of America*, PCA Case No. 2012-5, Award (29 Sept. 2012) (**RL-052**), para. 223 (emphasis added). According to the ICJ, “the existence of a dispute may be inferred from the failure of a State to respond to a claim,” but *only* “in circumstances where a response is called for,” and “[t]he question whether such an inference may be drawn depends on the particular circumstances of each case.” *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Preliminary Objections, Judgment, I.C.J. Reports 2022 (**RL-088**), para. 75.

¹⁹⁴ *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom)*, Preliminary Objections, Judgment, I.C.J. Reports 2016 (**RL-070**); *Republic of Ecuador v. United States of America*, PCA Case No. 2012-5, Award (29 Sept. 2012) (**RL-052**).

¹⁹⁵ *Republic of Ecuador v. United States of America*, PCA Case No. 2012-5, Award (29 Sept. 2012) (**RL-052**), paras. 208, 219, 228, 233.

¹⁹⁶ *Id.*, para. 209.

¹⁹⁷ *Id.*, para. 43.

¹⁹⁸ *Id.*

stating that it “look[ed] forward to remaining in contact about this,” but then chose not to respond further,¹⁹⁹ despite Ecuador’s multiple attempts to follow up by telephone.²⁰⁰ The United States eventually called Ecuador’s Ambassador and informed him that it would “give *no response at all*,” without further explanation.²⁰¹ More than eight months later, Ecuador filed a notice of arbitration instituting proceedings.²⁰²

104. After considering these exchanges spanning many months, the tribunal concluded that a dispute did *not* exist between the parties due to the lack of opposition from the United States. It refused to infer the United States’ positive opposition to Ecuador’s claims from its silence. It found that there were other “reasonable explanations” for the United States’ silence, including that it was “consistent with a principled stance of not wanting to interfere with the decisions of [...] investor-State tribunals.”²⁰³

105. In the *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament* cases, the ICJ dismissed the three cases the Marshall Islands instituted against India, Pakistan, and the United Kingdom respectively, based on the absence of a dispute on the alleged obligation to negotiate nuclear disarmament when the applications were filed.²⁰⁴ The Court notably found that the Marshall Islands’ statements in multilateral fora could not have given rise to a dispute because they did not refer to the subject matter “with sufficient clarity to enable the State against which [the] claim is made to identify that there is, or may be, a dispute with regard to that subject-matter.”²⁰⁵ In particular, the statements did

¹⁹⁹ *Id.*, para. 211.

²⁰⁰ *Id.*, para. 45.

²⁰¹ *Id.*, para. 46 (emphasis in the original).

²⁰² *Id.*, para. 3.

²⁰³ *Id.*, paras. 219-224. In addition, the Tribunal found that a dispute as to the duty to consult under Article V of the BIT “in light of the Respondent’s subsequent refusal to discuss the matter” also did not exist because “Ecuador neither invoked Article V nor argued a breach thereof.” *See id.*, para. 227.

²⁰⁴ *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom)*, Preliminary Objections, Judgment, I.C.J. Reports 2016 (RL-070), para. 57; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. India)*, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2016 (RL-166), para. 55; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. Pakistan)*, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2016 (RL-167), para. 55.

²⁰⁵ *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom)*, Preliminary Objections, Judgment, I.C.J. Reports 2016 (RL-070), para. 49; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament*

“not mention the obligation to negotiate, [did not] say that the nuclear-weapon States [were] failing to meet their obligations in this regard,”²⁰⁶ and did not “specify the conduct [of the State] that gave rise to the alleged breach.”²⁰⁷

106. In addition, international courts and tribunals have declined jurisdiction over discrete claims when no dispute existed as to them, even when a dispute did exist as to other claims *sub judice*. This is because, even when the underlying facts are identical or connected (and *a fortiori* when they are not), exchanges concerning one legal obligation cannot demonstrate the existence of a dispute as to separate legal obligations that raise “*different legal problems*.”²⁰⁸

107. For example, in *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, the ICJ found that a dispute existed as to Senegal’s alleged failure to investigate and to extradite or prosecute Hissène Habré for acts of torture.²⁰⁹ At the same time, the Court found that a dispute did *not* exist as to Senegal’s alleged breach of its obligation to bring criminal proceedings against Mr. Habré for alleged crimes against humanity if it did not extradite him. According to the Court:

While it [was] the case that the Belgian international arrest warrant transmitted to Senegal with a request for extradition [...] referred to [...] crimes against humanity [...] and other crimes, *neither document stated or implied that Senegal had an obligation under*

(*Marshall Islands v. India*), *Jurisdiction and Admissibility, Judgment*, I.C.J. Reports 2016 (RL-166), para. 46; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. Pakistan)*, *Jurisdiction and Admissibility, Judgment*, I.C.J. Reports 2016 (RL-167), para. 46.

²⁰⁶ *Id.*

²⁰⁷ *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom)*, *Preliminary Objections, Judgment*, I.C.J. Reports 2016 (RL-070), para. 50; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. India)*, *Jurisdiction and Admissibility, Judgment*, I.C.J. Reports 2016 (RL-166), para. 47; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. Pakistan)*, *Jurisdiction and Admissibility, Judgment*, I.C.J. Reports 2016 (RL-167), para. 47.

²⁰⁸ *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, *Judgment*, I.C.J. Reports 2012 (RL-051), p. 444, para. 54. See also *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, *Preliminary Objections, Judgment*, I.C.J. Reports 2011 (RL-048), paras. 63-64 (finding that exchanges in relation to an alleged unlawful use of force could not have notified a dispute under the CERD because they did not relate to racial discrimination).

²⁰⁹ *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, *Judgment*, I.C.J. Reports 2012 (RL-051), paras. 49-52.

*international law to exercise its jurisdiction over [crimes against humanity] if it did not extradite Mr Habré.*²¹⁰

108. The Court explained that “[t]he facts which constituted those alleged crimes *may have been closely connected to the alleged acts of torture*” but the second submission still “*raise[d] quite different legal problems*” and thus had to be considered separately for purposes of ascertaining whether a dispute existed at the time Belgium instituted the proceedings.²¹¹

109. Similarly, in *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, Nicaragua invoked the Pact of Bogotá to “make[] two distinct claims—one that Colombia has violated Nicaragua’s sovereign rights and maritime zones, and the other that Colombia has breached its obligation not to use or threaten to use force.”²¹² The Court proceeded to “examine these two claims *separately* in order to determine, *with respect to each of them, whether there existed a dispute* [...] at the date of filing of the Application.”²¹³ Importantly, the Court considered these to be two “distinct claims,” even though both claims relied on similar facts, *i.e.* “alleged incidents at sea.”²¹⁴ After analyzing the evidence presented concerning the Parties’ correspondence and conduct before the critical date, the Court found that a dispute existed as to the first claim that Colombia violated Nicaragua’s rights in its maritime zones,²¹⁵ but not as to Nicaragua’s second claim that Colombia breached its obligation not to use or threaten to use force, because “nothing in the evidence suggest[ed] that Nicaragua had indicated that Colombia had violated its obligations under Article 2, paragraph 4, of the Charter of the United Nations or under customary international law regarding the threat or use of force.”²¹⁶ The Court thus upheld jurisdiction over Nicaragua’s first claim, but declined jurisdiction over the latter claim since there was no dispute.²¹⁷

²¹⁰ *Id.*, para. 54 (emphasis added).

²¹¹ *Id.* (emphasis added).

²¹² *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (RL-067)*, para. 67.

²¹³ *Id.* (emphasis added).

²¹⁴ *Id.*, paras. 71, 76.

²¹⁵ *Id.*, para. 74.

²¹⁶ *Id.*, para. 76.

²¹⁷ *Id.*, paras. 78-79.

110. In sum, international courts and tribunals do not have jurisdiction in the absence of a dispute. Moreover, the existence of a dispute as to one legal claim does not automatically mean that there is a dispute as to separate legal claims concerning different legal obligations. Rather, the requirement needs to be established as to each separate claim that raises “different legal problems.”

2. No “Dispute” Existed as to Article 7 When Azerbaijan Submitted Its Notice of Arbitration

111. As of 27 February 2023, the day that Azerbaijan submitted its Notice of Arbitration, there was no dispute between the Parties as to Article 7. *Pro memoria*:

112. On 8 October 2021, Azerbaijan sent Armenia what it labelled a “[REDACTED]”²¹⁸ The notice alleged only facts relating to Armenia’s purported “[REDACTED]” that allegedly violated “[REDACTED]”²¹⁹ The notice also alleged only a violation of Article 18—not Article 7.²²⁰

113. On 20 December 2021, after Armenia requested that Azerbaijan elaborate on its factual and legal assertions,²²¹ Azerbaijan sent a letter purporting to clarify the scope of its notice of dispute. Again, Azerbaijan identified only Article 18 and “[REDACTED]” as relevant legal rules.²²² It listed in bullet points alleged violations of Article 18 and of “[REDACTED],” all of which were limited to the alleged deprivation of Azerbaijan’s rights to access, regulate, exploit, and benefit from resources in the so-called “Occupied Territories,” including several hydropower facilities and geothermal resources, as well as the alleged exploitation of Azerbaijan’s hydropower and mineral resources.²²³ At no point

²¹⁸ Compilation of the Parties’ Pre-Arbitration Exchanges (CE-063), [PDF] pp. 2-3, Azerbaijan’s Notice of Dispute of 8 October 2021.

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.*, [PDF] p. 6, Letter from Armenia to Azerbaijan (24 November 2021).

²²² *Id.*, [PDF] pp. 9-10, Letter from Azerbaijan to Armenia (20 Dec. 2021).

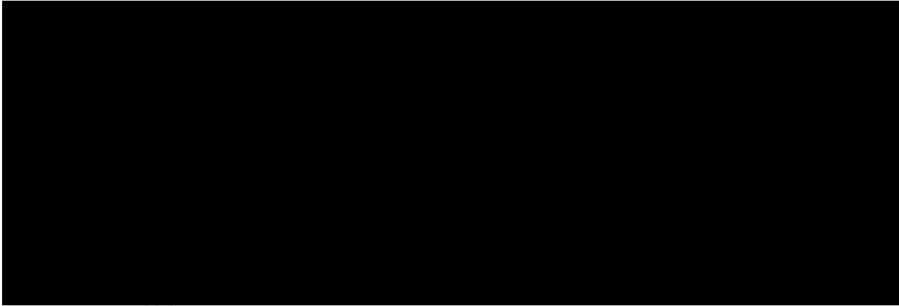
²²³ *Id.*, [PDF] p. 10, Letter from Azerbaijan to Armenia (20 Dec. 2021).

in this letter, or in any of its correspondence during the year of negotiations that followed, did Azerbaijan mention Article 7, transit, natural gas, or the Yevlakh-Nakhijevan Pipeline.²²⁴

114. On 24-25 November 2022, following several exchanges, Armenia and Azerbaijan held an meeting during which Armenia presented its substantive observations on Azerbaijan’s Article 18 claims. Armenia pointed out during that meeting, *inter alia*, that those claims suffered from multiple jurisdictional defects.²²⁵

115. On 16 December 2022, *i.e.* three weeks later and *more than 14 months* after its original notice of dispute, Azerbaijan mentioned *for the first time* the alleged “

,” and asserted—as an “” argument—that Armenia had violated Article 7. Azerbaijan did so in a cursory and cryptic statement, which reads in full:


²²⁶

116. This invocation of natural gas supply and Article 7—which read as an afterthought—appears to have been an ill-conceived attempt to salvage Azerbaijan’s ECT case after Armenia pointed out the myriad flaws in its Article 18 claims. As Armenia explained,²²⁷ while the allegations came as a surprise at the time, in hindsight they also seem to have been raised in reaction to Armenia’s letter to the ICJ sent two days prior, on 14 December 2022, in the context of the case concerning the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan)*. In that letter, Armenia pointed out that Azerbaijan had, since 13 December 2022, cut off the supply of gas to Nagorno-Karabakh, leaving tens of

²²⁴ See generally, Compilation of the Parties’ Pre-Arbitration Exchanges (CE-063), [PDF] pp. 1-81.

²²⁵ *Id.*, [PDF] p. 85, Letter from Armenia to Azerbaijan dated 16 January 2023. The content of this meeting is confidential.

²²⁶ *Id.*, [PDF] p. 82, Letter from Azerbaijan to Armenia (16 Dec. 2022).

²²⁷ See Request for Bifurcation, para. 107.

thousands of ethnic Armenians freezing in extreme cold and threatening irreparable prejudice to their rights under the Convention on the Elimination of All Forms of Racial Discrimination.²²⁸

117. On 16 January 2023, *i.e.* immediately following the Western and Armenian holiday period, Armenia responded to Azerbaijan's 16 December 2023 letter. Armenia noted that Azerbaijan's new allegations appeared to raise "[REDACTED]" that it had never raised before. In light of the inchoate nature of Azerbaijan's allegations, Armenia requested more information to be able to formulate its views and respond accordingly.²²⁹ It wrote:

[REDACTED]

[REDACTED]

[REDACTED]²³⁰

118. Armenia was simply not in a position to (and did not) express its views on Azerbaijan's wholly unexplained invocation of Article 7 or its vague reference to "[REDACTED]" that "[REDACTED]".²³¹

119. On 24 February 2023, *i.e.* six working weeks later, Azerbaijan replied to Armenia's letter but failed to provide any additional information on its Article 7 claim. In fact, Azerbaijan's letter did not contain any mention of the alleged interruption of the Pipeline transit, nor Article 7,

²²⁸ Letter from Armenia to the Registrar of the ICJ (14 Dec. 2022) [CONFIDENTIAL] (RE-0026).

²²⁹ Compilation of the Parties' Pre-Arbitration Exchanges (CE-063), [PDF] p. 86, Letter from Armenia to Azerbaijan (16 Jan. 2023).

²³⁰ *Id.* (emphasis added).

²³¹ *Id.*, [PDF] p. 82, Letter from Azerbaijan to Armenia (16 Dec. 2022).

except in a short footnote arguing that the Article 7 allegations somehow formed part of the Article 18 dispute. That footnote stated in full:

[REDACTED]

120. Quite apart from the fact that it is premised on demonstrably false assertions,²³³ this footnote conspicuously did not respond to the request Armenia set out in its letter of 16 January 2023; namely, that Azerbaijan “ [REDACTED] .”²³⁴

121. The Parties had no further exchanges on this issue. Nor could they have. Azerbaijan immediately filed its Notice of Arbitration *the very next business day* on Monday, 27 February 2023.

122. The exchanges between the Parties do not establish the existence of a dispute concerning Article 7 for at least three reasons.

123. *First*, Azerbaijan did not describe—whether factually or legally—its claims with “sufficient clarity to enable” Armenia to “identify that there is, or may be, a dispute with regard to that subject-matter.”²³⁵ Azerbaijan’s 16 December 2022 Letter, in which it raised an alleged breach of Article 7 for the first time, failed to provide the “ [REDACTED] .”²³⁶ The letter merely mentioned an alleged “ [REDACTED] ”

²³² *Id.*, [PDF] pp. 87-89, Letter from Azerbaijan to Armenia (24 Feb. 2023), note 8.

²³³ *See infra* paras. 127-131.

²³⁴ Compilation of the Parties’ Pre-Arbitration Exchanges (CE-063), [PDF] p. 86, Letter from Armenia to Azerbaijan (16 Jan. 2023).

²³⁵ *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom)*, Preliminary Objections, Judgment, I.C.J. Reports 2016 (RL-070), p. 853, para. 49.

²³⁶ Compilation of the Parties’ Pre-Arbitration Exchanges (CE-063), [PDF] p. 82, Letter from Azerbaijan to Armenia (16 Dec. 2022).

“[REDACTED],”²⁴³ but could not and did not formulate any views on the allegations. As the tribunal in *Ecuador v. United States* held, neither an indication that the respondent is willing to further consider the claimant’s claims nor a withholding of views necessarily amount to the “positive opposition” international law requires.²⁴⁴

126. This case is *a fortiori* to *Ecuador v. United States*. There, unlike here, the respondent had clearly stated that it would not respond to the claimant’s claims and the claimant waited more than eight months before initiating the arbitration.²⁴⁵ Yet, the tribunal in that case still found that a dispute did not exist.²⁴⁶ Here, Armenia expressly indicated its willingness to discuss the Article 7 allegations and requested more information in order to be able to formulate its views. Instead of explaining its position and waiting for a response from Armenia, Azerbaijan pressed forward with its plans and instituted proceedings one business day later. Azerbaijan’s hasty conduct deprived Armenia of the opportunity to even form views on Azerbaijan’s wholly unspecified claims.²⁴⁷

127. *Third*, and contrary to Azerbaijan’s assertion,²⁴⁸ its Article 7 claims do not form part of the same dispute as its Article 18 claims for the purpose of satisfying the jurisdictional requirements of Article 27.

128. In its Observations, Azerbaijan alleges that during the negotiations between the Parties concerning Article 18, it mentioned “Armenia’s ‘exploitation of [Azerbaijan’s] energy

²⁴³ *Id.*, [PDF] pp. 86, Letter from Armenia to Azerbaijan (16 Jan. 2023).

²⁴⁴ *Republic of Ecuador v. United States of America*, PCA Case No. 2012-5, Award (29 Sept. 2012) (**RL-052**), paras. 219-224.

²⁴⁵ *See supra* paras. 103-104.

²⁴⁶ *Id.*

²⁴⁷ This is a far cry from a case in which the respondent fails to respond altogether “where a response is called for.” *See Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom)*, *Preliminary Objections, Judgment*, *I.C.J. Reports 2016 (RL-070)*, p. 850, para. 40. Even if that had been the case, the tribunal in *Ecuador v. United States* correctly noted that the inference of “positive opposition” from silence is warranted “only when all other reasonable interpretations of the respondent’s conduct and surrounding facts can be excluded.” *Republic of Ecuador v. United States of America*, PCA Case No. 2012-5, Award (29 Sept. 2012) (**RL-052**), para. 223. Here, even if Armenia’s correspondence of 16 January 2023 could be interpreted as “silence” (*quod non*), opposition could not be inferred from it as there would be another reasonable interpretation for this silence. Namely, as stated in the contemporaneous record, Armenia needed to obtain more information about Azerbaijan’s Article 7 claim before it could formulate its views thereon.

²⁴⁸ *See* Compilation of the Parties’ Pre-Arbitration Exchanges (**CE-063**), [PDF] pp. 87-89, Letter from Azerbaijan to Armenia (24 Feb. 2023), note 8; Statement of Claim, paras. 175-176.

resources and infrastructure,”²⁴⁹ and that, according to Azerbaijan, “[t]he concept of ‘energy infrastructure’ plainly encompasses the Yevlakh-Nakhchivan Pipeline.”²⁵⁰ The problem for Azerbaijan is that it expressly limited the scope of the negotiations to a dispute arising from the alleged “[REDACTED]”²⁵¹ It made such claims strictly under Article 18 as part of its theory that Armenia allegedly violated Azerbaijan’s sovereignty over natural resources through its purported “occupation” of Nagorno-Karabakh.²⁵² When Azerbaijan did refer to specific examples of “[REDACTED]” in those exchanges, these were limited to power plants located in the so-called “[REDACTED],” and always in relation to Article 18.²⁵³ There is therefore no question that, until 16 December 2022, Azerbaijan’s claims never concerned, even implicitly, the Yevlakh-Nakhichevan Pipeline or any transit obligations under Article 7.

129. Azerbaijan also claims that its Article 7 claims form part of the same dispute as its Article 18 claims because they rely on “[REDACTED].”²⁵⁴ That is false. These Article 7 claims do not rely on the same type of conduct, nor do they arise from events within the same territory or even the same time period. As mentioned, the Article 18 claims raised during negotiations concerned the alleged “exploitation” of and denial of access to natural resources (hydropower, geothermal and coal) on Azerbaijan’s territory during Armenia’s alleged

²⁴⁹ Observations on Bifurcation, para. 59.

²⁵⁰ *Id.* Azerbaijan also submitted that it “consistently reserved its rights to pursue additional claims as it progressed its investigation into the extent of Armenia’s breaches.” *Id.* But reserving the right to raise additional claims does not eliminate the requirement to establish a dispute as to those additional claims or the obligation to negotiate for a reasonable period of time an amicable settlement of that dispute. *See, e.g., Guaracachi America, Inc. and Rurelec PLC v. Plurinational State of Bolivia*, PCA Case No. 2011-17, Award (31 Jan. 2014) (**RL-160**), paras. 398-399 (explaining that a reservation of rights “can only be understood as comprising the possibility of new claims *related to that dispute and not new claims from new (albeit factually older) disputes*. [...] The notification of a claim cannot be interpreted as incorporating previous potential claims that were not asserted in the notification even though they were already in existence.”).

²⁵¹ Compilation of the Parties’ Pre-Arbitration Exchanges (**CE-063**), [PDF] p. 2, Azerbaijan’s Notice of Dispute of 8 October 2021.

²⁵² As explained, this argument is fallacious, as the concept of sovereignty over natural resources cannot extend to mere energy “infrastructure.” *See* Request for Bifurcation, para. 96. Crucially, Azerbaijan has not claimed that Armenia exploited Azerbaijan’s *natural gas*, only that it allegedly used and damaged the Pipeline itself. *See* Statement of Claim, para. 277.

²⁵³ *See* Compilation of the Parties’ Pre-Arbitration Exchanges (**CE-063**), [PDF] p. 10, Letter from Azerbaijan to Armenia (20 Dec. 2021); *id.*, [PDF] p. 64, Letter from Azerbaijan to Armenia (6 June 2022).

²⁵⁴ *See id.*, [PDF] pp. 87-89, Letter from Azerbaijan to Armenia (24 Feb. 2023), note 8.

“decades-long occupation” of the so-called “Occupied Territories,” *i.e.* Nagorno-Karabakh and parts of some surrounding districts.²⁵⁵ By contrast, Azerbaijan’s Article 7 claims concern the alleged *interruption* of natural gas transit in the Yevlakh-Nakhichevan Pipeline *within Armenia’s own territory*, as shown below.²⁵⁶



Figure 2 – Close-up Map of the Yevlakh-Nakhichevan Pipeline²⁵⁷

²⁵⁵ See Statement of Claim, Section V.

²⁵⁶ See *id.*, para. 138 (alleging that “Armenia had terminated the supply of gas to Nakhchivan by cutting the Y-N Pipeline *near the Armenia-Nakhchivan border*,” *i.e.*, in Armenia.) (emphasis added); *id.*, paras. 246-247 (“[B]y interrupting the flow of gas from Garabagh to Nakhchivan *as it transited through Armenia*, Armenia breached its obligation under Article 7(1).”) (emphasis added); *id.*, para. 248 (“In direct contravention of its obligation to ‘secure’ such flows, Armenia instead disrupted them by maintaining its termination of gas supply between regions of Azerbaijan.”); *id.* para. 249 (“Armenia breached its obligation under Article 7(3) to treat the gas transiting through the Y-N Pipeline to Nakhchivan in ‘no less favorable a manner’ than comparable materials originating in or destined for its own territory, by maintaining its disruption of Azerbaijani-supplied gas to the Azerbaijani exclave of Nakhchivan.”).

²⁵⁷ This map is a close-up version of Figure 1, modified for illustrative purposes only and without prejudice. As explained above, it was ultimately Azerbaijan’s decision to halt the flow of gas through the Pipeline to Nagorno-

130. Moreover, Azerbaijan’s Article 18 claims are limited to the period of 1993 to 2023,²⁵⁸ and in particular the period of the alleged “occupation” following the cessation of hostilities between Armenia and Azerbaijan in mid-1994. By contrast, the Article 7 claims, as specified only in the Notice of Arbitration and Statement of Claim, concern the alleged interruption of the transit in the Yevlakh-Nakhichevan Pipeline that allegedly occurred in 1991,²⁵⁹ *i.e.* during an early phase of the active hostilities of the First Nagorno-Karabakh War.

131. Because they are different in nature and they arise from different time periods and different factual contexts, the dispute relating to the alleged exploitation of Nagorno-Karabakh’s natural resources does not subsume the would-be dispute as to the interruption of the Pipeline transit.²⁶⁰

132. In addition, Azerbaijan’s Article 7 claims raise fundamentally different legal issues. Article 18 is located in the “Miscellaneous” Part IV of the ECT and concerns, according to

Karabakh and Armenia “by shutting down the valves in Aghdam and then Barda [Berde]” further northeast up the line to Yevlakh. *See supra* para. 19.

²⁵⁸ *See, e.g.*, Statement of Claim, paras. 2 (“This dispute arises from the decades-long refusal of the Republic of Armenia (‘Armenia’) to recognize Azerbaijan’s sovereignty and sovereign rights over its energy resources in territories of Azerbaijan that Armenia unlawfully occupied for nearly thirty years, until its occupation came to an end in 2020.”), 107 (“During the first half of 1993, Armenia occupied and took control of the region where the Chardaghli site is located.”), 204-205 (Armenia prevented Azerbaijan from accessing the Tartar HPP and the Sarsang Reservoir from February 1993, through the ECT’s entry into force in April 1998, until September 2023), 206 (“Armenia’s direct conduct and the conduct of its Installed Regime *throughout the occupation period* [...]”) (emphasis added), 216 (“[T]hroughout 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.”) (emphasis added), 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.”) (emphasis added), 235 (“After Armenia’s occupation of Jabrayil in 1993 and sustained exertion of military force barring Azerbaijan from the district, Azerbaijan was prevented from accessing the territory surrounding the project sites.”). *See also* Expert Report of Boaz Moselle (12 Nov. 2024) (**CER-1**), para. 12 (“Counsel has instructed me to: estimate the value to Azerbaijan of having had control of the Tartar HPP *from February 1993 to March 1998 (inclusive)*”) (emphasis added), note 9 (“I understand that February 1993 is the date when Azerbaijan permanently lost access to the Tartar HPP”); Expert Report of John Morgan (19 Nov. 2024) (**CER-2**), p. 1 (describing his engagement to “[a]ssess the development, expansion, and activities at the Chardaghli coalfield *between 1993 and September 2023*”) (emphasis added). As Armenia previously explained, because they cover acts that occurred before the entry into force of the ECT in 1998, these claims are outside the Tribunal’s jurisdiction *ratione temporis*. *See* Request for Bifurcation, Section III.C.1.

²⁵⁹ *See* Statement of Claim, para. 137 (“However, by December 1991, local Nakhchivan news reported that Armenia had cut off the gas supply to Nakhchivan and some consumers had not received any natural gas since 11 December 1991.”).

²⁶⁰ This is the case whether Azerbaijan frames its claims concerning the Pipeline in terms of a breach of Article 7 or Article 18, as it attempts to do in passing. *See* Statement of Claim, para. 212. For the avoidance of doubt, if *par impossible* the Tribunal were to uphold jurisdiction over Azerbaijan’s claims under Article 18, this jurisdiction could not in any event extend to Azerbaijan’s allegations concerning the Pipeline for the reasons explained in Sections III.A-III.B.

Azerbaijan, the “customary principle of permanent sovereignty over natural resources.”²⁶¹ By contrast, Article 7, which is located in the ECT’s Part II on “Commerce,” concerns the transit of energy. Article 7 imposes a detailed, distinctive and self-contained legal regime for Transit States, with its own definitions section,²⁶² and, as further explained below, its own dispute-resolution mechanism.²⁶³ Its substantive provisions, which are inspired by the GATT, cover various trade-law concepts.²⁶⁴ And indeed, Azerbaijan now makes several types of claims under Article 7; namely, that Armenia allegedly failed to “facilitate” transit under Article 7(1), that it failed to “cooperate” to mitigate the disruption under Article 7(2)(c), that it failed to “secure” flows of energy under Article 7(5), and that it breached its non-discrimination obligations under Article 7(3).²⁶⁵ These claims have nothing to do with the concept of permanent sovereignty over natural resources. As such, Azerbaijan’s Article 18 and Article 7 claims raise “different legal problems”²⁶⁶ and, in line with consistent ICJ jurisprudence, the dispute requirement must be established “*with respect to each of them*”²⁶⁷—but it has not.

133. In sum, at the time of the Notice of Arbitration, a dispute as to Article 7 and the Yevlakh-Nakhijevan Pipeline did not exist between the Parties. The Tribunal therefore lacks jurisdiction over Azerbaijan’s relevant claims.

²⁶¹ *Id.*, para. 181.

²⁶² See Energy Charter Treaty with Related Documents (CL-001), ECT, Article 7(10). In particular, “Transit” is defined at Article 7(10)(a) as opposed to being defined with other defined terms in Article 1 of the ECT like most other definitions of the Treaty. See C. G. Stănescu, “Article 7, Transit,” in R. Leal-Arcas, *Commentary on the Energy Charter Treaty* (Elgar, 2023) (RL-092), p. 108.

²⁶³ Energy Charter Treaty with Related Documents (CL-001), ECT, Article 7(7). See *infra* Section III.C.

²⁶⁴ See K. Hobér, *The Energy Charter Treaty: A Commentary* (OUP, 2020) (CL-059), p. 158.

²⁶⁵ Statement of Claim, paras. 246-249.

²⁶⁶ *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, I.C.J. Reports 2012 (RL-051), p. 445, para. 54.

²⁶⁷ See *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, Preliminary Objections, Judgment, I.C.J. Reports 2016 (RL-067), p. 31, para. 67 (emphasis added).

B. Even If a Dispute as to Article 7 Existed, Azerbaijan Has Not Fulfilled the ECT's Negotiation Precondition

134. Even if a dispute could be found to exist as to the interruption of the Pipeline transit and Article 7 (*quod non*), Azerbaijan's claims would still fall outside the Tribunal's jurisdiction because it did not fulfil the requirement to negotiate before going to arbitration.

135. Article 27(1) provides that the "Contracting Parties shall endeavour to settle disputes concerning the application or interpretation of this Treaty through diplomatic channels." It is only "[i]f a dispute has not been settled in accordance with paragraph (1) within a reasonable period of time,"²⁶⁸ that a party may submit the dispute to arbitration.

136. Like the requirement that there be a dispute, this pre-condition is not merely a formality. As the ICJ has noted, such negotiation requirements fulfil three important functions. *First*, they "delimit[] the scope of the dispute and its subject-matter."²⁶⁹ *Second*, they "encourage[] the parties to attempt to settle their dispute by mutual agreement, thus avoiding recourse to binding third-party adjudication."²⁷⁰ *Third*, and crucially, negotiation requirements "perform[] an important function in indicating the limit of consent given by States," and therefore the Tribunal's

²⁶⁸ Energy Charter Treaty with Related Documents (CL-001), ECT, Article 27(1)-(2).

²⁶⁹ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (RL-048)*, p. 124, para. 131.

²⁷⁰ *Id.* The UN General Assembly has indeed emphasized that "direct negotiations are a flexible and effective means of peaceful settlement of [inter-State] disputes." Manila Declaration on the Peaceful Settlement of International Disputes, UNGA Res. 37/10 (A/37/590) (15 Nov. 1982) (RL-113), para. 10. *See also* United Nations' Office of Legal Affairs noted in its United Nations Office of Legal Affairs, *Handbook on the Peaceful Settlement of Disputes between States*, UN Doc. OLA/COD/2394 (1992) (RL-116), p. 10, para. 23 ("[I]n the reality of international life, negotiation, as one of the means of peaceful settlement of disputes, is most often resorted to by States for solving contentious issues and that, while it is not always successful, it does solve the majority of disputes.") (emphasis added). The ICJ has also underlined "the fundamental character of this method of settlement." *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969 (CL-010)*, para. 86.

jurisdiction.²⁷¹ Accordingly, international courts and tribunals have dismissed claims and entire cases based on a failure to fulfil similar negotiation preconditions.²⁷²

137. Taken together, paragraphs (1) and (2) of Article 27 impose two distinct requirements insofar as negotiations are concerned. *First*, parties must “endeavour to settle disputes concerning the application or interpretation of this Treaty through diplomatic channels.”²⁷³ This is an obligation of conduct. As the ICJ has explained:

[N]egotiations are distinct from mere protests or disputations. Negotiations entail more than the plain opposition of legal views or interests between two parties, or the existence of a series of accusations and rebuttals, or even the exchange of claims and directly opposed counter-claims. As such, the concept of “negotiations” differs from the concept of “dispute,” and *requires — at the very least — a genuine attempt by one of the disputing parties to engage in discussions with the other disputing party, with a view to resolving the dispute.*²⁷⁴

138. Such a “genuine attempt” is typically shown through the existence of multiple exchanges and meetings between the parties.²⁷⁵

²⁷¹ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (RL-048)*, p. 124, para. 131. *See also Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006 (RL-111)*, para. 88 (“The Court recalls in this regard that its jurisdiction is based on the consent of the parties and is confined to the extent accepted by them [...]. When that consent is expressed in a compromissory clause in an international agreement, any conditions to which such consent is subject must be regarded as constituting the limits thereon. *The Court accordingly considers that the examination of such conditions relates to its jurisdiction and not to the admissibility of the application.*”) (emphasis added).

²⁷² *See, e.g., Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (RL-048)*, paras. 184, 187 (dismissing case on that basis); *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006 (RL-111)*, para. 91 (rejecting a claim under the Convention on the Elimination of All Forms of Discrimination Against Women based on a failure to satisfy the prerequisite of negotiations).

²⁷³ The International Energy Charter, *Consolidated Energy Charter Treaty with Related Documents* (17 Dec. 1994) (CL-001), Article 27(1).

²⁷⁴ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (RL-048)*, p. 132, para. 157 (emphasis added).

²⁷⁵ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan), Preliminary Objections, Judgment, 12 November 2024 (RL-101)* paras. 53-58 (several rounds of negotiations and exchanges, including face-to-face meetings over the course of two years); *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on*

139. *Second*, under the plain terms of Article 27, the parties must negotiate for “a reasonable period of time” before the dispute can be referred to arbitration.²⁷⁶ As Azerbaijan has noted, there is no definition in the Treaty of what constitutes a “reasonable period of time.”²⁷⁷ While it is true that the Treaty does not provide a precise yardstick measured in years or months, what is a “reasonable” time period for inter-State negotiations can be discerned from international practice.

140. By way of example, the International Convention for the Suppression of the Financing of Terrorism similarly provides that disputes can only be referred to the ICJ if they “cannot be settled through negotiation *within a reasonable time*.” Applying this provision in the *Ukraine v. Russian Federation* case, the ICJ considered negotiations to have been attempted for a “reasonable time” after the parties had negotiated *for almost two years*.²⁷⁸ Indeed, for political and diplomatic reasons, inter-State negotiations typically proceed at a measured pace. Weeks or months pass between correspondence and meetings, and negotiations last for years before recourse to dispute settlement.²⁷⁹

the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2019 (RL-077), para. 120 (two years of diplomatic correspondence and face-to-face meetings); *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, I.C.J. Reports 2012 (RL-051), p. 446, para. 58 (several exchanges and various meetings between the Parties over the course of several months); *Appeal relating to the Jurisdiction of the ICAO Council under Article II, Section 2, of the 1944 International Air Services Transit Agreement (Bahrain, Egypt and United Arab Emirates v. Qatar)*, Judgment, I.C.J. Reports 2020 (RL-083), paras. 91-92 (series of communications over the course of several months).

²⁷⁶ Energy Charter Treaty with Related Documents (CL-001), ECT, Article 27(1)-(2).

²⁷⁷ See Statement of Claim, para. 174.

²⁷⁸ *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, Preliminary Objections, Judgment, I.C.J. Reports 2019 (RL-077), para. 70. See also *Barbados v. Trinidad and Tobago*, PCA Case No. 2004-02, Award (11 Apr. 2016) (RL-164), paras. 194-195 (finding that the parties had negotiated for a “reasonable period of time” under Articles 74 and 83 of UNCLOS because the parties had held discussions “since the late 1970s,” and had formal rounds of negotiations from July 2000 and November 2003”); *Timor Sea Conciliation (Timor-Leste v. Australia)*, PCA Case No. 2016-10, Decision on Australia’s Objections to Competence (19 Sept. 2016) (RL-165), paras. 79, 80, 82 (finding that the parties had negotiated for a “reasonable period of time” under Articles 74 and 83 of UNCLOS because negotiations had taken place between 2003 and 2006 and between 2014 and 2015).

²⁷⁹ See, e.g., *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan)*, Preliminary Objections, Judgment, 12 November 2024 (RL-101), paras. 53-58 (several rounds of negotiations and exchanges, including face-to-face meetings over the course of two years); *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, Preliminary Objections, Judgment, I.C.J. Reports 2019 (RL-077), para. 120 (two years of diplomatic correspondence and face-to-face meetings); *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, Preliminary Objections, Judgment, I.C.J. Reports 2019 (RL-077), para. 70; *Barbados v. Trinidad and Tobago*, PCA

141. Moreover, Article 27 must be read in its context, which includes Article 26 concerning the settlement of disputes between an investor and a Contracting Party. Article 26(2) provides that disputes between an investor and a Contracting Party can be referred to arbitration only if they are not settled amicably “within a period of three months.”²⁸⁰ This three-month period—which is relatively short even in the investor-State context—must be seen as an absolute bare minimum threshold in the context of inter-State negotiations, which, as stated, proceed at a slower pace and last for many months if not years.

142. In any event, and as Azerbaijan has acknowledged, the determination of whether negotiations have been attempted for a “reasonable period of time” also includes, at minimum, “an assessment of whether continued negotiations are meaningful, or rather futile.”²⁸¹ The ICJ has held that negotiations are considered futile when “no reasonable probability exists that further negotiations would lead to a settlement.”²⁸² The futility of negotiations cannot be presumed, especially given the important functions negotiations in the inter-State context serve. Rather, the party claiming futility must present “substantial and credible evidence” to satisfy its “considerable burden of proof.”²⁸³ In particular, “[a] mere showing that the steps a treaty requires to be taken prior to arbitration are *unlikely* to result in a satisfactory outcome for the [claimant] would not satisfy a requirement of demonstrating that it was *futile*.”²⁸⁴

Case No. 2004-02, Award (11 Apr. 2016) (**RL-164**), paras. 194-195 (informal discussions “since the late 1970s,” and formal rounds of negotiations over three years); *Timor Sea Conciliation (Timor-Leste v. Australia)*, PCA Case No. 2016-10, Decision on Australia’s Objections to Competence (19 Sept. 2016) (**RL-165**), paras. 79, 80, 82 (several rounds of negotiations from 2003 to 2006 and between 2014 and 2015).

²⁸⁰ The International Energy Charter, *Consolidated Energy Charter Treaty with Related Documents* (17 Dec. 1994) (**CL-001**), ECT, Article 26(2).

²⁸¹ K. Hobér, *The Energy Charter Treaty: A Commentary* (OUP, 2020) (**CL-059**), p. 479; see Statement of Claim, para. 174.

²⁸² *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, I.C.J. Reports 2012 (**RL-051**), p. 445, para. 57. See also *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan)*, Preliminary Objections, Judgment, 12 November 2024 (**RL-101**), para. 58 (finding that the negotiations had become futile because “there was no realistic possibility, at that stage, of a bilateral negotiated settlement of the disagreement between the Parties”) (emphasis added).

²⁸³ *Louis Dreyfus Armateurs SAS v. Republic of India*, PCA Case No. 2014-26, Decision on Jurisdiction (22 Dec. 2015) (**RL-162**), paras. 97-98.

²⁸⁴ *Id.*, para. 97 (emphasis added).

143. Contrary to Azerbaijan’s suggestion,²⁸⁵ the fact that there were negotiations about Article 18 does not mean that the negotiation requirement for Article 7 was fulfilled. It is well-established that the very goal of the negotiation requirement is to “delimit[] the scope of the dispute and its subject-matter.”²⁸⁶ For this reason, “the subject-matter of the negotiations *must relate to the subject-matter of the dispute* which, in turn, must concern *the substantive obligations [...] in question.*”²⁸⁷ The only exchanges relevant to assessing whether Azerbaijan fulfilled the requirement to negotiate as to its Article 7 claims are therefore the exchanges following Azerbaijan’s first notice of its Article 7 claims on 16 December 2022.

144. The record is clear that those exchanges neither were a “genuine attempt” at negotiations nor were they pursued for a “reasonable period of time.”

145. *First*, even assuming *arguendo* that a dispute as to Article 7 existed, Azerbaijan did not make a “genuine attempt” to engage in discussions with Armenia “with a view to resolving th[at] dispute.”²⁸⁸ As explained,²⁸⁹ Azerbaijan first raised its allegations concerning Article 7 and the Pipeline on 16 December 2022, and even then with no elaboration.²⁹⁰ Armenia responded on 16 January 2023, observing that the Article 7 allegations appeared to concern a “[REDACTED]” that Azerbaijan had never previously raised. In that letter, Armenia asked Azerbaijan to elaborate on the factual and legal bases for its allegations.²⁹¹ After nearly six weeks of silence, Azerbaijan responded with a letter that failed to provide the requested information. It then proceeded to initiate this arbitration the following business day.

146. As such, the Parties had no more than one written exchange concerning Azerbaijan’s ill-defined Article 7 allegations, comprising a total of *two paragraphs and a footnote*. No meeting

²⁸⁵ Observations on Bifurcation, para. 56; Statement of Claim, paras. 175-176.

²⁸⁶ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (RL-048)*, p. 124, para. 131.

²⁸⁷ *Id.*, para. 161. *See also id.*, para. 170 (finding that prior negotiations were not relevant to the Court’s jurisdiction over a particular dispute because they could “not be said to have covered such matters”). *See also id.*, para. 180 (excluding negotiations on armed activities as relevant because they did not “pertain to CERD-related matters”).

²⁸⁸ *Id.*, para. 157.

²⁸⁹ *See supra* Section III.A.2.

²⁹⁰ Compilation of the Parties’ Pre-Arbitration Exchanges (CE-063), [PDF] p. 82, Letter from Azerbaijan to Armenia (16 Dec. 2022).

²⁹¹ *Id.*, [PDF] pp. 86, Armenia’s Letter of 16 January 2023.

was ever held. Worse still, Azerbaijan did not even give Armenia an opportunity to express any views on Azerbaijan's new allegations. The Parties' lone exchange stands in stark contrast to the cases in which the ICJ has previously found that there had been a "genuine attempt" to negotiate, which involved multiple exchanges and meetings between the parties discussing the legal and factual substance of the claims.²⁹² It also contrasts with the Parties' own exchanges in relation to Azerbaijan's Article 18 claims, which spanned more than a year, and involved over 30 correspondences and two meetings.

147. *Second*, even if this single exchange could somehow be considered a "genuine attempt" at negotiations (*quod non*), Azerbaijan certainly did not pursue those negotiations for "a reasonable period of time." Azerbaijan waited only a little over two months between when it first notified Armenia of its Article 7 claim and the filing of its Notice of Arbitration. This short period would not even meet the bare minimum requirement of a three-month cooling-off period for investor-State disputes under Article 26(2) and is thus objectively not a "reasonable period of time."

148. In any event, to the extent they existed, negotiations concerning Article 7 had in no way become futile or deadlocked by the time of Azerbaijan's Notice of Arbitration.

²⁹² See *supra* note 275.

149. In the inter-State context, international courts and tribunals have found negotiations to be futile in limited scenarios when one of the parties expressly refused to enter into negotiations²⁹³ or when one of the parties failed to respond to an invitation to negotiate.²⁹⁴

150. By contrast, when the Parties have agreed to engage in negotiations, as Armenia did in the case at hand, negotiations have been found to be futile or deadlocked only when the parties' respective positions had not evolved after several rounds of negotiations, typically spanning several years. For example, in *Ukraine v. Russian Federation*, the ICJ observed:

[T]he negotiations between the Parties lasted *for approximately two years and included both diplomatic correspondence and face-to-face meetings*, which, in the Court's view, and despite the lack of success in reaching a negotiated solution, indicates that a genuine attempt at negotiation was made by Ukraine. Furthermore, the Court is of the opinion that, *during their diplomatic exchanges, the Parties' respective positions remained substantially the same*. The Court thus concludes that the negotiations between the Parties had

²⁹³ *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, Judgment, *I.C.J. Reports 1980 (RL-030)*, p. 27, para. 51 (concluding that negotiations between the United States and Iran "had reached a deadlock, owing to the refusal of the Iranian Government to enter into any discussion of the matter"); *Appeal relating to the Jurisdiction of the ICAO Council under Article II, Section 2, of the 1944 International Air Services Transit Agreement (Bahrain, Egypt and United Arab Emirates v. Qatar)*, Judgment, *I.C.J. Reports 2020 (RL-083)*, p. 204, para. 96 ("Senior officials of the Appellants stated that they would not negotiate with Qatar, recalling the demands that they had addressed to Qatar."); *Dispute Concerning Delimitation of the Maritime Boundary between Mauritius and Maldives in the Indian Ocean (Mauritius/Maldives)*, ITLOS Case No. 28, Preliminary Objections, Judgment (28 Jan. 2021) (**RL-085**), p. 98, paras. 289-290 ("[T]he Maldives, for most of the time, refused to negotiate with Mauritius."); *id.*, para. 274 ("[T]here can be a number of reasons for which the States concerned cannot reach an agreement. They may not be able to do so after exhaustive negotiations or because one State refuses to negotiate or withdraws from negotiations after initially engaging in them."); *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident of Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)*, Preliminary Objections, Judgment, *I.C.J. Reports 1998 (RL-145)*, p. 17, para. 21 ("[T]he Respondent has always maintained that the destruction of the Pan Am aircraft over Lockerbie did not give rise to any dispute between the Parties regarding the interpretation or application of the Montreal Convention, and that, for that reason, in the Respondent's view, there was nothing to be settled by negotiation under the Convention.").

²⁹⁴ *Dispute Concerning Delimitation of the Maritime Boundary between Mauritius and Maldives in the Indian Ocean (Mauritius/Maldives)*, ITLOS Case No. 28, Preliminary Objections, Judgment (28 Jan. 2021) (**RL-085**), p. 99, para. 291 ("[B]y not responding to Mauritius' invitation [...] to a second round of discussions following the Chagos advisory opinion, it became clear that there was nothing more that Mauritius could have accomplished in insisting on having delimitation negotiations with the Maldives."); *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates)*, Provisional Measures, Order of 23 July 2018, *I.C.J. Reports 2018 (RL-169)*, para. 38 ("[G]iven the fact that the UAE did not respond to that formal invitation to negotiate, the Court is of the view that the issues raised in the present case had not been resolved by negotiations at the time of the filing of the Application.").

become futile or deadlocked by the time Ukraine filed its Application under Article 22 of CERD.²⁹⁵

151. This is plainly not a situation in which Armenia failed to respond or refused to negotiate with Azerbaijan. On the contrary, in its 16 January 2023 response to Azerbaijan, Armenia indicated that it stood “ [REDACTED]

[REDACTED].”²⁹⁶ Even after the arbitration commenced, Armenia continued to express willingness to negotiate with Azerbaijan and offered to refer the matter to the ECT Secretariat to facilitate the discussions.²⁹⁷ Azerbaijan refused.²⁹⁸

152. This is also not a situation in which the parties’ positions did not evolve over rounds of negotiations. Indeed, the Parties’ positions *could not* have evolved over the course of what was only a single exchange, particularly when Armenia was not even given enough information to express its position in the first place.

153. In an attempt to feign compliance with the negotiation requirement, Azerbaijan argues that “at no stage did negotiations yield any positive gains that could have led to an amicable resolution of Azerbaijan’s claims”²⁹⁹ and that “[g]iven Armenia’s failure to engage substantively in the diplomatic exchanges leading up to this arbitration, negotiations [as to the Article 7 claims] [were] unlikely to lead to an amicable resolution.”³⁰⁰ But the fact that prior negotiations concerning

²⁹⁵ *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2019 (RL-077)*, para. 120 (emphasis added). See also *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan), Preliminary Objections, Judgment, 12 November 2024 (RL-101)*, para. 58 (“[T]he Parties’ respective positions remained substantially unaltered between the end of 2020 and September 2021”).

²⁹⁶ Compilation of the Parties’ Pre-Arbitration Exchanges (CE-063), [PDF] p. 86, Armenia’s Letter of 16 January 2023 (emphasis added).

²⁹⁷ See Letter from Armenia to the Energy Charter Secretariat (27 Apr. 2023) (RE-0030).

²⁹⁸ Letter from the Energy Charter Secretariat to the Parties (23 May 2023) (RE-0031).

²⁹⁹ Observations on Bifurcation, para. 60. See also Statement of Claim, para. 177.

³⁰⁰ Observations on Bifurcation, para. 57.

a separate dispute were unsuccessful is not evidence—let alone “substantial and credible evidence”³⁰¹—that negotiations about a different dispute would also fail.³⁰²

154. This is especially true given that Azerbaijan’s Article 7 allegations, which concerned only the interruption of natural gas transit in one pipeline, were of a narrower scope and entirely different nature than its sweeping claims under Article 18. That the Parties did not resolve Azerbaijan’s ill-conceived attempt to relitigate the Nagorno-Karabakh conflict—together with issues of sovereignty and self-determination that Azerbaijan’s claims implicate—says nothing about the prospects of resolving a purported trade law dispute concerning natural gas transit. In fact, if Azerbaijan had articulated its factual and legal allegations under Article 7 and negotiated them, this purported dispute could very well have been, at a minimum, narrowed by Armenia’s observations. This is borne out by the fact that Azerbaijan’s Article 7 claims *did* evolve even as between its Notice of Arbitration and Statement of Claim, presumably as a result of Armenia’s observations thereon during the Parties’ hearing on procedural matters in January 2024.³⁰³

155. In any event, Azerbaijan misrepresents the year-long pre-arbitral negotiations concerning Article 18. Armenia did not “fail to engage substantively” with Azerbaijan. The record shows that Armenia responded to all of Azerbaijan’s correspondence, from Azerbaijan’s purported 8 October 2021 “Notice of Dispute” through its institution of these proceedings on 27 February 2023.³⁰⁴ Even though Azerbaijan resisted particularizing its complaints under Article 18,³⁰⁵

³⁰¹ *Louis Dreyfus Armateurs SAS v. Republic of India*, PCA Case No. 2014-26, Decision on Jurisdiction (22 Dec. 2015) (**RL-162**), paras. 97-98.

³⁰² See *Burlington Resources, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Jurisdiction (2 June 2010) (**RL-157**), para. 314 (“In the view of the Tribunal, the fact that negotiations proved futile in this second dispute does not mean that negotiations over a prior, unrelated dispute would have similarly proven futile.”).

³⁰³ Transcript of First Procedural Meeting (12 Jan. 2024), 108:16-20 (Salonidis) (“Article 7(7) provides for a separate process to notify and resolve disputes under Article 7, including through a conciliation co-ordinated by the Energy Charter Treaty Secretary General. Azerbaijan has not pursued that process.”). In its Notice of Arbitration, Azerbaijan had alleged the additional claim that Armenia had breached Article 7(6) of the ECT. Notice of Arbitration, para. 53(e), note 81. Azerbaijan later dropped this claim in its Statement of Claim, perhaps upon realization that Article 7(6) implies the mandatory referral of transit disputes to Article 7(7) conciliation, as explained below. See Statement of Claim paras. 246-249; *infra* Section III.C.

³⁰⁴ See generally Compilation of the Parties’ Pre-Arbitration Exchanges (**CE-063**).

³⁰⁵ See, e.g., Compilation of the Parties’ Pre-Arbitration Exchanges (**CE-063**), [PDF] p. 6, Letter from Armenia to Azerbaijan (noting that Azerbaijan’s notice of dispute “”); *id.*, [PDF] p. 61, Letter from Armenia to Azerbaijan dated 17 May 2022 (“”).

Armenia engaged meaningfully in negotiations, including by attending two meetings with Azerbaijan.³⁰⁶ During the Parties' first meeting on 12 May 2022, which was supposed to be a two-day meeting, Azerbaijan:

[REDACTED]

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156. During the Parties' second round of meetings on 24-25 November 2022, Armenia was given the opportunity to present detailed substantive observations, and posed no fewer than 17 questions to Azerbaijan on the facts and merits of its Article 18 claims, to which Azerbaijan never responded.³⁰⁸ Moreover, as stated, Armenia proposed to involve the Energy Charter Secretariat early on in the negotiations as an independent, neutral mediator to increase the chances of successful negotiations³⁰⁹—but Azerbaijan consistently refused.³¹⁰

157. The record thus shows that Armenia *did* negotiate substantively with Azerbaijan about its Article 18 claims, and was committed to the success of the negotiations. There is therefore no evidence that negotiations about Azerbaijan's Article 7 allegations were or would have been futile.

[REDACTED]"); *id.*, [PDF] p. 67, Letter from Armenia to Azerbaijan dated 20 June 2022 ("[REDACTED]").

³⁰⁶ See *id.*, [PDF] p. 61, Letter from Armenia to Azerbaijan (17 May 2022) (referring to a 12 May 2022 meeting); *id.*, [PDF] p. 82, Letter from Azerbaijan to Armenia (16 Dec. 2022) (referring to meetings held on 24 and 25 November 2022). See also Statement of Claim, para. 176.

³⁰⁷ Compilation of the Parties' Pre-Arbitration Exchanges (**CE-063**), [PDF] p. 84, Letter from Armenia to Azerbaijan dated 16 January 2023.

³⁰⁸ *Id.*, [PDF] p. 85, Letter from Armenia to Azerbaijan dated 16 January 2023. The content of this meeting is confidential.

³⁰⁹ See *id.*, [PDF] p. 32, Letter from Armenia to Azerbaijan dated 23 February 2022. See also *id.*, [PDF] p. 52, Letter from Armenia to Azerbaijan dated 31 March 2022. As the Secretariat itself noted, "a neutral third party, such as the Secretariat, could sometimes help unlock an impasse in bilateral discussions and explore alternative options." Letter from the Energy Charter Secretariat to the Parties (23 May 2023) (**RE-0031**).

³¹⁰ See Compilation of the Parties' Pre-Arbitration Exchanges (**CE-063**), [PDF] p. 40, Letter from Azerbaijan to Armenia dated 1 March 2022 ("[REDACTED]").

158. In sum, Azerbaijan failed to fulfil its obligation to negotiate its Article 7 claims for a reasonable period of time, thereby depriving the Tribunal of jurisdiction over those claims.

C. Even If a Dispute as to Article 7 Existed, It Should Have Been Referred to Article 7(7)'s Mandatory Dispute-Resolution Mechanism

159. In any event,³¹¹ even if a transit dispute under Article 7 existed and Azerbaijan had endeavored to negotiate, it would still be excluded from the scope of Article 27 and therefore the Tribunal's jurisdiction. Such disputes must be referred to conciliation in accordance with Article 7(7) of the Treaty. Azerbaijan conspicuously failed to respond to the substance of this objection in its Observations.

160. Article 27 provides for disputes to be resolved by arbitration "*except as otherwise provided in this Treaty*,"³¹² in which case such disputes would fall outside the jurisdiction *ratione materiae* of a tribunal constituted under Article 27.³¹³ Azerbaijan's own legal authorities explain that Article 7(7) is one of the provisions of the Treaty that derogate from the general dispute-resolution mechanism Article 27 creates:

Article 27 of the ECT [...] applies to the application and interpretation of the Treaty as a whole — *with very limited exceptions*. Special provisions have been developed in the ECT for the resolution of inter-state disputes in the area of trade (Article 29, Annex D) and transit (Article 7). They derogate from the otherwise applicable general provisions on state-to-state dispute settlement.³¹⁴

161. As another commentator put it, "[t]he ECT [...] establishes *compulsory dispute resolution mechanisms; two general and four special*. The general forms are: (1) state-to-state

³¹¹ In Armenia's view, the Tribunal need not even refer to the preconditions to arbitration of Article 27 because it could decide, on the basis of Article 7(7), that arbitration under Article 27 is not even available for a purported dispute on transit, and that it therefore lacks jurisdiction over such claims. In any event, the existence of a dispute is a requirement under both Articles 27 and 7(7). See Energy Charter Treaty with Related Documents (CL-001), ECT, Article 7(7) ("The following provisions shall apply to a *dispute* [...]") (emphasis added). In all cases, Armenia invites the Tribunal to approach these objections in the order it sees fit in light of judicial economy. Moreover, for the avoidance of doubt, the same circumstances that deprive the Tribunal of jurisdiction over Azerbaijan's claims also render them inadmissible. Armenia reserves all rights in this regard.

³¹² Energy Charter Treaty with Related Documents (CL-001), ECT, Article 27(2) (emphasis added).

³¹³ K. Hobér, *The Energy Charter Treaty: A Commentary* (OUP, 2020) (CL-059), p. 480.

³¹⁴ A. Konoplyanik and T. Walde, "Energy Charter Treaty and its Role in International Energy" in *Journal of Energy & Natural Resources Law* (Volume 24, 2006) (CL-042), pp. 546-547 (emphasis added).

arbitration concerning the application or interpretation of the ECT (Article 27) [...] *The special forms comprise dispute settlement mechanisms for: 1. transit disputes (Article 7(7)) [...]*.”³¹⁵

162. Article 7(7) states in relevant part that:

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

(a) A Contracting Party party to the dispute may refer it to the Secretary General by a notification summarising the matters in dispute. The Secretary General shall notify all Contracting Parties of any such referral.

(b) Within 30 days of receipt of such a notification, the Secretary General, in consultation with the parties to the dispute and the other Contracting Parties concerned, shall appoint a conciliator. Such a conciliator shall have experience in the matters subject to dispute and shall not be a national or citizen of or permanently resident in a party to the dispute or one of the other Contracting Parties concerned.

(c) The conciliator shall seek the agreement of the parties to the dispute to a resolution thereof or upon a procedure to achieve such resolution. If within 90 days of his appointment he has failed to secure such agreement, he shall recommend a resolution to the dispute or a procedure to achieve such resolution and shall decide the interim tariffs and other terms and conditions to be observed for Transit from a date which he shall specify until the dispute is resolved.

(d) The Contracting Parties undertake to observe and ensure that the entities under their control or jurisdiction observe any interim decision under subparagraph (c) on tariffs, terms and conditions for 12 months following the conciliator’s decision or until resolution of the dispute, whichever is earlier. [...].³¹⁶

³¹⁵ Danae Azaria, “Energy Transit under the Energy Charter Treaty and the General Agreement on Tariffs and Trade,” in *Journal of Energy & Natural Resources Law* (Volume 27, 2009) (CL-045), pp. 563-564 (emphasis added).

³¹⁶ Energy Charter Treaty with Related Documents (CL-001), ECT, Article 7(7); Energy Charter Treaty with Related Documents (French Version) (17 Dec. 1994) (RL-020), ECT, Article 7(7) (“Les dispositions qui suivent s’appliquent au différend décrit au paragraphe 6, mais uniquement après épuisement de tous les moyens contractuels ou autres de règlement des différends préalablement convenus entre les parties contractantes parties au différend ou entre toute

163. As stated in the first sentence, Article 7(7) refers to disputes “described in paragraph (6).” For its part, Article 7(6) provides that:

A Contracting Party through whose Area Energy Materials and Products transit shall not, in the event of a dispute over any matter arising from that *Transit*, interrupt or reduce, permit any entity subject to its control to interrupt or reduce, or require any entity subject to its jurisdiction to interrupt or reduce the existing flow of Energy Materials and Products prior to the conclusion of the dispute resolution procedures set out in paragraph (7), except where this is specifically provided for in a contract or other agreement governing such Transit or permitted in accordance with the conciliator’s decision.³¹⁷

164. Article 7(10) defines “Transit” as including “the carriage through the Area of a Contracting Party of Energy Materials and Products originating in the Area of another Contracting

entité visée au paragraphe 6 et une entité d’une autre partie contractante partie au différend : a) Une partie contractante partie au différend peut déférer celui-ci au secrétaire général par une notification résumant l’objet du différend. Le secrétaire général notifie cette saisine à toutes les parties contractantes. b) Dans les trente jours suivant la réception de cette notification, le secrétaire général, en consultation avec les parties au différend et les autres parties contractantes concernées, nomme un conciliateur. Ce conciliateur doit avoir une expérience des questions faisant l’objet du différend et ne doit pas être un ressortissant, un citoyen ou un résident permanent sur le territoire d’une partie au différend ou de l’une ou l’autre des parties contractantes concernées. c) Le conciliateur recherche l’accord des parties au différend sur une solution de celui-ci ou sur une procédure permettant de parvenir à une telle résolution. Si, dans les quatre-vingt-dix jours de sa nomination, il n’est pas parvenu à dégager un tel accord, il recommande une résolution du différend ou une procédure permettant de parvenir à une telle résolution et il décide des tarifs douaniers provisoires et d’autres conditions et modalités devant être respectées pour le transit à partir de la date qu’il détermine jusqu’au règlement du différend. d) Les parties contractantes s’engagent à observer et à garantir que les entités soumises à leur contrôle ou relevant de leur juridiction observent toute décision provisoire prise au titre du point c) en ce qui concerne les tarifs douaniers et les conditions et modalités au cours des douze mois suivant la décision du conciliateur ou jusqu’au règlement du différend, l’échéance retenue étant celle qui se produit en premier lieu.”).

³¹⁷ Energy Charter Treaty with Related Documents (CL-001), ECT, Article 7(6) (emphasis added); Energy Charter Treaty with Related Documents (French Version) (17 Dec. 1994) (RL-020), ECT, Article 7(6) (“Une partie contractante dans la zone de laquelle transitent des matières et produits énergétiques s’abstient, en cas de différend portant sur une question quelconque soulevée par ce transit, d’interrompre ou de réduire le flux existant de matières et produits énergétiques, ou de permettre à toute entité soumise à son contrôle ou d’enjoindre à une entité relevant de sa juridiction d’interrompre ou de réduire ce flux avant l’achèvement des procédures de règlement de différend décrites au paragraphe 7, sauf si cela est expressément prévu par un contrat ou un autre accord régissant ce transit ou autorisé en conformité avec la décision du conciliateur.”).

Party and destined for the Area of that other Contracting Party.”³¹⁸ Article 7(7) applies to “dispute[s] over *any matter arising from*” transit through the Area of a Contracting Party.³¹⁹

165. Article 7(7) thus has a broad scope of application *ratione materiae*.³²⁰ As Professor Hobér explains, it includes not only disputes relating to “tariffs, fees and prices, but also ‘*any matter*’” arising from transit of any energy goods through the Area of a Contracting Party,³²¹ whether there is a threat of interruption of the existing flow of energy or not.³²²

166. Here, according to Azerbaijan, the purported dispute—the particulars of which Azerbaijan specified only after the institution of proceedings—would pertain to transit between Yevlakh (located in Azerbaijan) and Nakhijevan (an Azerbaijani exclave) through the territory of Armenia.³²³ Assuming *arguendo* that Article 7 were applicable to this scenario,³²⁴ the putative dispute Azerbaijan alleges would plainly concern “Transit” within the meaning of Article 7(10)(a)(ii) and therefore fall within the scope of Article 7(7).

167. The Article 7 conciliation mechanism is exclusive and mandatory. *First*, Article 7(7) provides that its dispute-resolution provisions “*shall* apply to a dispute described in paragraph (6).” This plain text indicates that it is a compulsory dispute-resolution mechanism for transit disputes.³²⁵

³¹⁸ Energy Charter Treaty with Related Documents (CL-001), ECT, Article 7(10); Energy Charter Treaty with Related Documents (French Version) (17 Dec. 1994) (RL-020), ECT, Article 7(10)(a)(ii) (“Aux fins du présent article [...] « Transit » désigne : [...] le transport, à travers la zone d’une partie contractante, de produits et matières énergétiques originaires de la zone d’une autre partie contractante et destinés à la zone de cette autre partie contractante, [...]”).

³¹⁹ Energy Charter Treaty with Related Documents (CL-001), ECT, Article 7(6) (emphasis added).

³²⁰ K. Hobér, *The Energy Charter Treaty: A Commentary* (OUP, 2020) (CL-059), pp. 165, 168 (“The definition of transit dispute in Article 7(6) is very broad.”)

³²¹ *Id.*, p. 168. According to Professor Hobér, this would even cover “matters falling within the regulatory powers of the transit Contracting Party, such as environmental, health and safety matters.” *Id.*, p. 165.

³²² *Id.*, pp. 165-166.

³²³ See, e.g., Statement of Claim, paras. 10, 31, 131-132, 134, 246.

³²⁴ As Armenia explained above and in its Request for Bifurcation, however, Article 7 is not at play here. See *supra* para. 94, note 179; Request for Bifurcation, Section III.B.4.

³²⁵ See Martha M. Roggenkamp, “Transit of Network-bound Energy: the European Experience,” in Thomas W. Walde, *The Energy Charter Treaty: An East-West Gateway for Investment and Trade* (Kluwer ed., 1996) (RL-106), p. 511 (“Unless the contract or other agreement renders special provisions regarding the interruption or reduction of transit, the dispute settlement mechanism of Article 7(7) applies.”).

Moreover, because Article 7(7) is a more specific dispute-resolution mechanism than that of Article 27, it must be understood as prevailing over Article 27.³²⁶

168. *Second*, this reading accords with the context of Article 7(7). For example, Article 7(6) provides that parties to a dispute within its scope:

[S]hall not [...] interrupt or reduce, [...] the existing flow of Energy Materials and Products *prior to the conclusion of the dispute resolution procedures set out in paragraph (7)*, except where this is specifically provided for in a contract or other agreement governing such Transit *or permitted in accordance with the conciliator's decision*.³²⁷

169. This provision necessarily presupposes that parties to such a dispute must refer it to the dispute-resolution mechanism of Article 7(7): otherwise, Article 7(6) would have no *effet utile*. To argue the opposite would lead to the absurd result whereby a party that elected to submit its dispute to Article 27 instead of Article 7(7) would *never* be allowed to interrupt or reduce transit even after the dispute was resolved by an arbitral tribunal. Indeed, Article 7(6) makes specific reference to the conciliator's decision concerning interruption, not to the decision of an arbitral tribunal.

170. *Third*, the object and purpose of Article 7(7) confirms that conciliation is mandatory and exclusive. That Article 7 contains its own dispute-resolution mechanism reflects the "special importance" the ECT assigns to transit matters³²⁸ and the related goal of securing existing transit.³²⁹ More specifically, Article 7(7) was the result of a proposal by Poland to provide a "fast-track" dispute-settlement method for transit-related disputes after many such disputes arose due to the

³²⁶ See International Law Commission (ILC), *Fragmentation of International Law, Report of the Study Group* (18 July 2006) (RL-153), p. 8 ("The maxim *lex specialis derogat legi generali* is a generally accepted technique of interpretation and conflict resolution in international law. It suggests that whenever two or more norms deal with the same subject matter, priority should be given to the norm that is more specific. The principle may be applicable [...] between provisions within a single treaty.").

³²⁷ Energy Charter Treaty with Related Documents (CL-001), ECT, Article 7(6) (emphasis added).

³²⁸ Danae Azaria, "Energy Transit under the Energy Charter Treaty and the General Agreement on Tariffs and Trade," in *Journal of Energy & Natural Resources Law* (Volume 27, 2009) (CL-045), p. 587. See also R. Liesen, "Transit under the 1994 Energy Charter Treaty," *Journal of Energy & Natural Resources Law*, Vol. 17 (1999) (RL-147), p. 62 ("Article 7 [...] covers a very important and vital issue.").

³²⁹ Danae Azaria, "Energy Transit under the Energy Charter Treaty and the General Agreement on Tariffs and Trade," in *Journal of Energy & Natural Resources Law* (Volume 27, 2009) (CL-045), pp. 563-564.

break-up of the Soviet Union, creating concerns for Eastern European States like Poland.³³⁰ The objective was to guarantee “immediate and interim dispute resolution,”³³¹ thereby avoiding unnecessary interruptions of transit.

171. And indeed, under Article 7(7) conciliation, a dispute could be resolved in under 120 days. It must first be referred to the Secretary General of the Energy Charter Secretariat,³³² who must appoint a conciliator within 30 days of such a referral.³³³ The appointed conciliator must secure an agreement of the Parties for the resolution of the dispute within 90 days, failing which, the conciliator recommends “a resolution to the dispute or a procedure to achieve such resolution.”³³⁴ By contrast, arbitration under Article 27 could take years to conclude (as the timetable for this case demonstrates).

172. A specific dispute-resolution mechanism was also needed for transit disputes because they can involve technical trade-law issues and require specific transit expertise.³³⁵ Professor Hobér explains: “Issues, which are likely to arise in many, if not most, transit disputes, include prices, price reviews, determination and assessment of tariffs and take-or-pay obligations.”³³⁶ Indeed, Article 7(7)(c) may require the conciliator to decide “interim tariffs and other terms and conditions to be observed for Transit from a date which he shall specify until the

³³⁰ See Danae Azaria, “Energy Transit under the Energy Charter Treaty and the General Agreement on Tariffs and Trade,” in *Journal of Energy & Natural Resources Law* (Volume 27, 2009) (CL-045), pp. 582, 584 (underlining the “special interest in and need for urgent resolution of transit disputes in the energy sector”); T. Wälde (ed.), *The Energy Charter Treaty: An East-West Gateway for Investment and Trade* (Kluwer, 1996) (RL-035), pp. 511-512. This is confirmed by the *travaux* of the ECT. See ECT Travaux, Fax from S. Fremantle (Chairman of Working Group II) to C. Jones (Secretary-General of the Conference) attaching a redraft of Article 11 on Transit (18 Feb. 1993) (RL-126); ECT Travaux, Memorandum from C. Bamberger (Legal Adviser of the Conference) about ECT negotiations of 1-6 Feb. 1993 (9 Feb. 1993) (RL-124).

³³¹ Danae Azaria, “Energy Transit under the Energy Charter Treaty and the General Agreement on Tariffs and Trade,” in *Journal of Energy & Natural Resources Law* (Volume 27, 2009) (CL-045), p. 584.

³³² Energy Charter Treaty with Related Documents (CL-001), ECT, Article 7(7)(a).

³³³ *Id.*, ECT, Article 7(7)(b).

³³⁴ *Id.*, ECT, Article 7(7)(c).

³³⁵ K. Hobér, *The Energy Charter Treaty: A Commentary* (OUP, 2020) (CL-059), p. 172. This is notably confirmed by the *travaux*. See ECT Travaux, Letter from S. Fremantle (Chairman of Working Group II) to the Conference Secretariat regarding Article 11, para. 6 (12 Feb. 1993) (RL-125), [PDF] p. 3 (emphasizing the importance of transit experience for the resolution of transit disputes); ECT Travaux, Fax from S. Fremantle (Chairman of Working Group II) to C. Jones (Secretary-General of the Conference) attaching a redraft of Article 11 on Transit (18 Feb. 1993) (RL-126).

³³⁶ See K. Hobér, *The Energy Charter Treaty: A Commentary* (OUP, 2020) (CL-059), p. 172.

dispute is resolved.”³³⁷ Article 7(7)(b) thus requires the conciliator to have “experience in the matters subject to dispute.”³³⁸ No such transit expertise requirement exists under Article 27.

173. *Finally*, the compulsory and exclusive nature of the conciliation mechanism is confirmed by the *travaux*. They show that when the settlement of transit disputes was discussed, both options were considered. Norway originally argued that transit disputes should be dealt with under the Treaty’s inter-State arbitration clause. However, Poland’s proposal of fast-track won the most support and Norway’s proposal was expressly rejected—confirming that the options are mutually exclusive.³³⁹ The resort to inter-State arbitration for transit disputes was envisaged only as a last resort if no agreement could be reached through conciliation.³⁴⁰

174. In sum, Article 7(7) establishes a mandatory and exclusive dispute resolution mechanism for transit disputes as defined within Article 7. Azerbaijan’s own articulation of its Article 7 claims—advanced for the first time after the institution of the proceedings—makes clear that they would constitute just such a transit dispute and would be excluded from the Tribunal’s jurisdiction under Article 27. Azerbaijan should instead have raised the purported dispute when the ECT entered into force, and referred it to the conciliation mechanism of Article 7(7). Needless to say, at no point in time since the entry into force of the ECT did Azerbaijan even attempt to do so.³⁴¹ Accordingly, the Tribunal lacks jurisdiction over Azerbaijan’s Article 7 claims.

³³⁷ Energy Charter Treaty with Related Documents (CL-001), ECT, Article 7(7)(c).

³³⁸ See K. Hobér, *The Energy Charter Treaty: A Commentary* (OUP, 2020) (CL-059), p. 172 (“Given the fact that the conciliator has the power to decide interim tariffs, as well as other terms and conditions, on an interim basis, it is, needless to say, of upmost importance that the appointed conciliator has experience and knowledge of such matters.”).

³³⁹ See ECT Travaux, Memorandum from C. Bamberger (Legal Adviser of the Conference) about ECT negotiations of 1-6 Feb. 1993 (9 Feb. 1993) (RL-124), pp. 7 (“Norway argued in that case for Article 24 [former numbering of Article 27] binding arbitration, but *Poland won support [...] with an argument for fast-track conciliation.*”), 8 (“Poland replied that it wanted *fast-track conciliation, not arbitration.*”) (emphasis added).

³⁴⁰ ECT Travaux, Fax from S. Fremantle (Chairman of Working Group II) to C. Jones (Secretary-General of the Conference) attaching a redraft of Article 11 on Transit (18 Feb. 1993) (RL-126), [PDF], p. 9 (“[L]astly, if agreement still cannot be reached, for the Conference to trigger arbitration.”). Accordingly, at the very least, failure to have recourse to the mandatory dispute resolution mechanism of Article 7 would render claims inadmissible in arbitration.

³⁴¹ This is so even after Armenia proposed to refer the issue to the Secretariat to facilitate discussions, which would have been an opportunity for Azerbaijan to launch the conciliation process under Article 7(7). See Letter from Armenia to the Energy Charter Secretariat (27 Apr. 2023) (RE-0030) (notably reserving its “procedural rights under Article 7”).

IV. REQUEST FOR RELIEF AND RESERVATION OF RIGHTS

175. For the foregoing reasons, Armenia respectfully requests that the Tribunal issue an award:

- a. Finding that it lacks jurisdiction over all of Azerbaijan's claims or declaring them inadmissible, and dismissing them in their entirety with prejudice;
- b. In all events, ordering Azerbaijan to pay all costs and expenses related to this arbitration, including but not limited to the fees and expenses of the Tribunal, the administrative fees and expenses of the PCA, and all costs of Armenia's legal representation, with interest running from the date at which such costs were incurred at a rate that the Tribunal deems proper; and
- c. Granting any other or additional relief as may be appropriate under the circumstances or as may otherwise be just and proper.

176. Armenia expressly reserves its rights to supplement or otherwise amend the above requests.

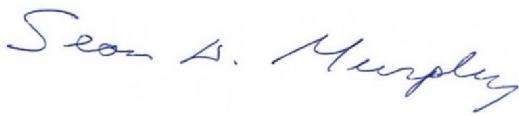
Respectfully submitted,



DEPUTY REPRESENTATIVE OF THE REPUBLIC OF
ARMENIA ON INTERNATIONAL LEGAL MATTERS



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