

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 REPLY ON PRELIMINARY OBJECTIONS

4 November 2025

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1. Pursuant to the Amended Procedural Timetable of 8 November 2024, the Republic of Armenia (“**Armenia**”) respectfully submits this Reply on Preliminary Objections in the proceedings instituted by the Republic of Azerbaijan (“**Azerbaijan**”) against Armenia (together, the “**Parties**”) under Article 27 of the Energy Charter Treaty (the “**ECT**” or the “**Treaty**”).

I. INTRODUCTION

2. As a trade and investment treaty, the ECT simply does not regulate inter-State disputes about sovereign rights over natural resources. Armenia will demonstrate in this Reply that Azerbaijan has failed in its Counter-Memorial to overcome this fundamental and insurmountable hurdle to establishing the Tribunal’s jurisdiction. Instead, Azerbaijan devotes its Counter-Memorial to rehashing the same unavailing arguments that it already made in its previous submissions, at times without even responding to Armenia’s counterarguments.

3. Moreover, Azerbaijan continues to minimize—if not outright ignore—the consistent case law of the International Court of Justice (“**ICJ**”) and inter-State tribunals rejecting the jurisdictional theories that Azerbaijan advances in this case. In fact, of the small number of new authorities produced with the Counter-Memorial, many are cherry-picked investor-State cases that are of no assistance to Azerbaijan’s case on jurisdiction in this inter-State case. Azerbaijan similarly fails to muster any useful support in the *travaux* of the ECT or the many academic commentaries on the record. This is not surprising because there is no such support for its novel interpretations of the ECT, which are unprecedented in the Treaty’s three-decade history. Azerbaijan is thus left to fill the footnotes of its Counter-Memorial with citations to basic truisms about the ECT that are neither disputed nor particularly relevant to its case.

4. Armenia will demonstrate in this Reply that Azerbaijan’s poorly disguised attempt to shoehorn the decades-long Nagorno-Karabakh conflict into the ECT should be dismissed in this preliminary phase. As Armenia has explained, the timing of this arbitration is not accidental.¹ Azerbaijan’s claims concern events dating back to the early 1990s, which, on Azerbaijan’s view, could have been brought at any time after the entry into force of the ECT in 1998. The reason that Azerbaijan waited so long is not, as Azerbaijan would have it, because it did not have access to the

¹ Armenia’s Memorial on Preliminary Objections (3 Apr. 2025) (“**Memorial**”), para. 2.

so-called “Occupied Territories” until it “liberat[ed]” them in 2020.² It is because this case was designed to divert public attention from Azerbaijan’s armed attack on Nagorno-Karabakh in 2020, and from Armenia’s efforts to seek accountability for Azerbaijan’s gross human rights violations.³ In response, Azerbaijan claims that the forcible displacement of 120,000 ethnic Armenians from Nagorno-Karabakh—during the pendency of these proceedings and in flagrant violation of Azerbaijan’s duty of non-aggravation⁴—is irrelevant,⁵ and makes false factual allegations about the First Nagorno-Karabakh War of the early 1990s.⁶ While Armenia will not repeat what it has already established in its previous pleadings,⁷ suffice it to say that Armenia wholly rejects Azerbaijan’s account of the facts underlying its claims.

5. In any event, Azerbaijan’s attempt to rewrite the past cannot change the fact that the Tribunal has no jurisdiction to entertain its claims under the ECT. In its Counter-Memorial, Azerbaijan has failed to demonstrate otherwise regarding either of its two different sets of claims.

6. **Section II** of this Reply shows that Azerbaijan has still failed to establish the Tribunal’s jurisdiction over its claims that Armenia violated Azerbaijan’s “[REDACTED]” through Armenia’s alleged conduct during the purported “[REDACTED]” of the so-called “Occupied Territories” following the end of the First Nagorno-Karabakh War in 1994.⁸ These claims relating to the alleged “exploitation” of and “denial of access” to energy resources

² See Azerbaijan’s Counter-Memorial on Preliminary Objections (4 Aug. 2025) (“**Counter-Memorial**”), para. 85, note 185.

³ See Memorial, para. 2, note 1. Following Azerbaijan’s 2020 invasion of Nagorno-Karabakh, Armenia initiated proceedings against Azerbaijan under the Convention on the Elimination of All Forms of Racial Discrimination (“**CERD**”) before the ICJ on 16 September 2021. See *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan)*, Application Instituting Proceedings and Request for the Indication of Provisional Measures (16 Sep. 2021) (**RE-0047**). Azerbaijan sent its first note verbale to Armenia concerning alleged violations of the ECT three weeks thereafter, on 8 October 2021. See Compilation of the Parties’ Pre-Arbitration Exchanges (**CE-063**), [PDF] pp. 1-3, Letter from Azerbaijan to Armenia (8 Oct. 2021).

⁴ Armenia reserves all rights in that regard, should these proceedings ever advance to the merits.

⁵ Counter-Memorial, para. 6.

⁶ *Id.*, paras. 6-10.

⁷ See Memorial, paras. 17-20; Republic of Armenia’s Request for Bifurcation (23 Dec. 2024) (“**Request for Bifurcation**”), paras. 10-23.

⁸ See Compilation of the Parties’ Pre-Arbitration Exchanges (**CE-063**), [PDF] p. 2, Letter from Azerbaijan to Armenia (8 Oct. 2021); Republic of Azerbaijan’s Statement of Claim (19 Nov. 2024) (“**Statement of Claim**”), paras. 202-211, 213-237.

and infrastructure in Nagorno-Karabakh are made under an overexpansive interpretation of Article 18 of the ECT.⁹

7. But the plain text of that provision—which provides in relevant part 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 “[e]ach State continues to hold” certain rights related to energy resources¹⁰—does not create any legal obligations that could give rise to an independent cause of action. Rather, as the *travaux préparatoires* also confirm, Article 18 was designed to balance the rights of host States against the rights of *foreign investors* under the ECT, a trade and investment treaty.¹¹ Azerbaijan fails to draw any consequence from the unequivocal history of the ECT or its object and purpose and continues to assert that Article 18 can regulate inter-State claims of sovereignty over energy resources.

8. The centerpiece of Azerbaijan’s interpretation is an out-of-context reading of a single word—“recognise”—coupled with a citation to the ICJ’s interpretation of the same word in a different treaty, operating in the entirely different context of the recognition of a territorial border in *Territorial Dispute (Libya/Chad)*. But as the Court recently confirmed, outside the special context of recognition of title to territory, a treaty clause containing the verb “recognize” does not itself create “any standards or legally binding obligations” but rather, “reflects the understanding that parties share, and *provides the context for other standard-setting provisions*.”¹² The absence of a legal obligation is especially obvious when the term is deployed *in abstracto* as in Article 18’s generic reaffirmation of all ECT Contracting States’ sovereignty over unspecified energy resources.

9. Even if the text of Article 18 could be construed as creating an obligation (*quod non*), a State cannot rely on a general formulation in a treaty as a jurisdictional basis for the application of external rules of international law that do not fall within the treaty’s subject matter. As Armenia has explained, the ICJ’s *jurisprudence constante* is unequivocal on this point—and

⁹ Statement of Claim, para. 179, Section V.B.

¹⁰ The International Energy Charter, *Consolidated Energy Charter Treaty with Related Documents* (17 Dec. 1994) (CL-001) (“**Energy Charter Treaty with Related Documents**”), ECT, Article 18(1), (3).

¹¹ See *infra* paras. 47-48, 78, 108, 151, 156-158; Memorial, paras. 36, 74-86.

¹² See *Obligations of States in Respect of Climate Change, Advisory Opinion* (23 July 2025) (RL-268), para. 255 (emphasis added). See also *id.*, para. 178.

rightly so, given the ramifications of upholding unwieldy jurisdictional theories like that of Azerbaijan.¹³ Indeed, Azerbaijan intends to import the customary international law principle of “permanent sovereignty over natural resources” into Article 18.¹⁴ But Azerbaijan ignores the fact that, as a corollary to the broader right of self-determination, permanent sovereignty over natural resources is a right held by *peoples*, not only by States.¹⁵ If, *par impossible*, the Tribunal were to find that the ECT regulates permanent sovereignty over natural resources, the adjudication of Azerbaijan’s 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.”¹⁶ A good-faith interpretation of Article 18, however, does not permit venturing so far outside the scope of the ECT.¹⁷

10. **Section III** demonstrates that Azerbaijan’s claims relating to the alleged interruption—in Armenia’s sovereign territory sometime in 1991¹⁸—of the transit of natural gas through the Yevlakh-Nakhijevan pipeline (the “**Pipeline**”) fall outside the Tribunal’s jurisdiction.¹⁹ Azerbaijan first mentioned these allegations on 16 December 2022, *i.e.*, more than 14 months after the Parties began exchanging views about Azerbaijan’s original claims, and just over two months

¹³ Memorial, paras. 46-52; Request for Bifurcation, paras. 44-45, 59, 80-81.

¹⁴ Statement of Claim, para. 190. *See also id.*, paras. 189-192, 199 (referring to the so-called “core components of the bundle of rights inherent to sovereignty”); Counter-Memorial, paras. 32, 36.

¹⁵ *See* United Nations General Assembly, *Resolution 1803: Permanent Sovereignty Over Natural Resources*, UN Doc. A/RES/1803 (XVII) (14 Dec. 1962) (**CL-002**), p. 15 (declaring that “[t]he right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned.”) (emphasis added).

¹⁶ *See* Memorial, para. 12 (citing International Covenant on Civil and Political Rights (1966) (**RL-027**), Article 1(2) (“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.”)).

¹⁷ For the avoidance of doubt, Armenia maintains its reservation of rights to advance counter-claims after the Tribunal’s decision on jurisdiction, as appropriate. *See* Memorial, para. 12, note 15; Request for Bifurcation, para. 35, note 134.

¹⁸ As Armenia explained, these claims concerning an alleged interruption of the Pipeline transit in 1991 are also manifestly outside the Tribunal’s jurisdiction *ratione temporis*. *See* Request for Bifurcation, Section III.C.1, para. 128; Memorial, para. 94.

¹⁹ Statement of Claim, para. 246. *See also id.*, paras. 137-138. As Armenia explained in its Memorial, Azerbaijan’s allegations distort the relevant factual context. Even according to its own evidence, it was ultimately Azerbaijan’s decision to halt the flow of gas through the Pipeline “by shutting down the valves in Aghdam and then Barda,” in May 1992. *See* Memorial, paras. 17-20; Statement of Claim, para. 140; J. Carney, “Former Soviet Union Carnage in Karabakh,” *Time* (13 Apr. 1992) (**RE-0039**), [PDF] p. 2.

before Azerbaijan filed its Notice of Arbitration.²⁰ This separate set of claims is premised mostly on a misreading of Article 7 of the ECT, which concerns the transit of energy.²¹ Azerbaijan additionally makes, in a single paragraph, a claim under Article 18 based on the alleged interruption of Pipeline transit.²² However, whether under Article 7 or Article 18, these claims fall outside the Tribunal’s jurisdiction for three distinct reasons, none of which Azerbaijan can overcome.

11. **Section III.A** explains that, because no dispute had arisen between the Parties as to Azerbaijan’s claims concerning the alleged interruption of Pipeline transit by the time Azerbaijan filed its Notice of Arbitration as required by Article 27, these claims fall outside the Tribunal’s jurisdiction. Azerbaijan’s attempt to assimilate these last-minute claims to its original dispute about the alleged exploitation of energy resources in Nagorno-Karabakh is unpersuasive.²³ Azerbaijan argues that “the same underlying set of facts can form the basis of claims for multiple different breaches of law.”²⁴ That may be true, but in addition to raising different legal problems, Azerbaijan’s eleventh-hour claims concern an *entirely new set of facts*, alleging different conduct (the interruption of transit), at a different time (sometime in 1991, during the First Nagorno-Karabakh War), and in a different geographic area (Armenia’s sovereign territory, somewhere between Azerbaijan and its Nakhichevan exclave).²⁵ For these reasons, in accordance with the well-established jurisprudence of international courts and tribunals, these new claims do not form part of the same dispute as Azerbaijan’s original claims, and would have needed to independently satisfy Article 27’s existence of a dispute requirement.

12. **Section III.B** shows that, even if such a dispute had arisen by the time of the Notice of Arbitration, Azerbaijan’s claims would still fall outside the Tribunal’s jurisdiction because it failed to fulfill Article 27’s requirement to negotiate its new claims for “a reasonable period of

²⁰ Compilation of the Parties’ Pre-Arbitration Exchanges (**CE-063**), [PDF] p. 82, Letter from Azerbaijan to Armenia (16 Dec. 2022).

²¹ See Statement of Claim, paras. 246-249; Energy Charter Treaty with Related Documents (**CL-001**), ECT, Article 7. As Armenia explained, Article 7 is not genuinely at issue here because Azerbaijan’s factual allegations, even if proven, are not capable of breaching Article 7. Notably, Article 7 does not impose an obligation to establish non-existing transit. See Request for Bifurcation, Section III.B.4; Memorial, paras. 20, 94, note 179.

²² Statement of Claim, para. 212. See *infra* para. 181.

²³ Counter-Memorial, paras. 5, 68-69, 78-79, 81-82.

²⁴ *Id.*, para. 5.

²⁵ See *infra* paras. 175-178, 193-198.

time.”²⁶ Contradicting its prior stance in this arbitration and in the *Armenia v. Azerbaijan* ICJ case, Azerbaijan now argues that this requirement is not a mandatory precondition to the Tribunal’s jurisdiction but rather goes to the admissibility of its claims.²⁷ Ignoring the consistent case law of inter-State courts and tribunals, Azerbaijan selectively cites a handful of investor-State decisions to support its view.²⁸ But as Armenia shows in this Reply, even investor-State cases overwhelmingly support Armenia’s view that negotiations requirements are preconditions to jurisdiction. Here, it is not disputed that the Parties only exchanged three letters within the span of less than three months concerning the alleged interruption of the Pipeline transit.²⁹ For its part, Azerbaijan devoted no more than a few sentences to these claims, which it never particularized. By any measure, such exchanges do not amount to a “genuine attempt” to negotiate the claims “for a reasonable period of time,” as is required under Article 27 and applicable rules of international law. Nor could the negotiations have been deadlocked or futile by the time of the Notice of Arbitration, as Armenia did not even have the opportunity to express a position on these new claims.

13. **Section III.C** demonstrates that, in any event, if a dispute as to the Pipeline transit claims existed, it should have been referred to Article 7(7)’s mandatory conciliation mechanism, not to this Tribunal. Azerbaijan argues instead that Article 27 arbitration must be exhausted *before* transit disputes may be referred to conciliation.³⁰ This theory defies common sense, the principle of *effet utile*, and even the selected *travaux* Azerbaijan itself put on the record. As Armenia demonstrates in this Reply, the obligation to refer transit disputes in the first instance to conciliation rather than Article 27 arbitration is supported by the text of Article 7(7), its context, object and purpose, the *travaux préparatoires*, as well as the majority of commentators.

14. Finally, **Section IV** sets out Armenia’s requests for relief, including its plea that Azerbaijan be ordered to pay all of Armenia’s costs and expenses related to this arbitration.

²⁶ Energy Charter Treaty with Related Documents (CL-001), ECT, Article 27(2).

²⁷ Counter-Memorial, Section III.B.1.

²⁸ *See id.*, paras. 89-90, 92-94.

²⁹ Compilation of the Parties’ Pre-Arbitration Exchanges (CE-063), [PDF] pp. 82-89.

³⁰ Counter-Memorial, paras. 109, 111, 117.

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

15. 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 jurisdictional objection 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. As explained below, Azerbaijan continues to ignore the well-established approach to jurisdiction in inter-State disputes with respect to provisions like Article 18 (**Section II.A**), and thus fails to establish that Article 18 can properly be invoked as a standalone basis for its claims (**Section II.B**).

A. Azerbaijan Ignores the Well-Established Approach to Jurisdiction in Inter-State Disputes with Respect to General Treaty Terms

16. In both its Request for Bifurcation and its Memorial,³¹ Armenia explained that the Tribunal's task in interpreting Article 18 does not present a particularly novel problem in international law.³² Azerbaijan is far from the first State to invoke "a general formulation"³³ in the operative part of a treaty as an alleged jurisdictional basis for claims that do not fall within the subject matter of the treaty in question. As Armenia noted, there are a number of cases in which the ICJ has considered whether a broadly formulated treaty provision could be used as a gateway to

³¹ See Request for Bifurcation, paras. 43-46, 59; Memorial, paras. 44-52.

³² Inter-State dispute settlement "in international relations [...] is relatively exceptional" because it is non-compulsory and "consensual in character." J. Crawford, "Third Party Settlement of International Disputes," in *Brownlie's Principles of Public International Law* (9th Ed., OUP, 2019) (**RL-247**), p. 692. See also *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award (8 Dec. 2008) (**RL-218**), para. 69 ("Like the PCIJ, and the ICJ, the Centre and ICSID tribunals appointed by the Centre, do not have general jurisdiction over States – they are tribunals of limited powers; and no presumption in favour of their jurisdiction can be made. On the contrary, the acceptance by a State of the jurisdiction of an international court or tribunal always requires to be expressed by means of a positive act or conduct (of 'contracting-in'); *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award (22 Aug. 2012) (**RL-227**), para. 175 ("Non-consent [of a State to jurisdiction] is the default rule; consent is the exception."). This lack of broad jurisdiction has led States—sometimes "for understandable reasons"—to seek "to shoehorn" disputes into treaties or "force content into an inappropriate container." See *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation: 32 States Intervening)*, Preliminary Objections, Judgment, 2 February 2024, Partially Dissenting Opinion of Judge Abraham (**RL-267**), para. 19.

³³ *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.

another rule or body of law, thereby expanding the Court’s scope of jurisdiction.³⁴ On every such occasion, the ICJ has rejected such attempts at jurisdictional bootstrapping.

17. In a single paragraph in its Counter-Memorial, Azerbaijan dismisses Armenia’s reliance on the ICJ’s case law as “misplaced.”³⁵ Azerbaijan is forced to ignore these cases—to which the parallels are striking—because their application here would be fatal to its Article 18 claims. Armenia has already discussed in detail the relevant rules of international law reflected in these cases. By way of summary:

18. First, Armenia pointed to the *Oil Platforms* case as the *locus classicus* for the ICJ’s approach to treaty provisions like Article 18. Azerbaijan has *nothing* to say about this case.³⁶

19. As Armenia explained, in that case, Iran invoked Article I of its Treaty of Amity with the United States, which provides that “[t]here shall be firm and enduring peace and sincere friendship between the United States . . . and Iran.”³⁷ According to Iran, this provision “does not merely formulate a recommendation or desire . . . , but imposes actual obligations on the Contracting Parties, obliging them to maintain long-lasting peaceful and friendly relations [...] in accordance with the principles and rules of general international law in the domain of peaceful and friendly relations.”³⁸ 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.”³⁹

³⁴ See Request for Bifurcation, paras. 44-45; 80-81; Memorial, paras. 46-52 (citing *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Preliminary Objection, Judgment, I.C.J. Reports 1996 (RL-037); *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, Preliminary Objections, Judgment, I.C.J. Reports 2018 (RL-073); *Certain Iranian Assets (Islamic Republic of Iran v. United States of America)*, Preliminary Objections, Judgment, I.C.J. Reports 2019 (RL-170)).

³⁵ Counter-Memorial, para. 30.

³⁶ No reference to the case is made above the line in Azerbaijan’s Counter-Memorial. The only two citations to the case are buried as “*Compare also*” references at the end of footnotes without any analysis. See *id.*, footnotes 52, 58.

³⁷ *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 the original); Treaty of Amity, Economic Relations, and Consular Rights Between the United States of America and Iran (1957) (RL-183), Article I.

³⁸ *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Preliminary Objection, Judgment, I.C.J. Reports 1996 (RL-037), p. 812, para. 25 (unbracketed ellipsis in the original).

³⁹ *Id.*, p. 813, para. 25.

20. In other words, Iran seized on an open-ended formulation in the operative part of a treaty (“[t]here shall be firm and enduring peace and sincere friendship”) in an attempt to “incorporate” into that treaty “general international law in the domain of peaceful and friendly relations.”⁴⁰ Azerbaijan seeks to do the same here, albeit in a context where the word “shall” is not even present. It invokes Article 18’s “recogni[tion]” and “reaffirm[ation]” of “state sovereignty and sovereign rights over energy resources” in order to incorporate into the ECT a “bundle of sovereign rights” including “the concept of ‘permanent sovereignty over natural resources,’ which is a ‘principle of customary international law.’”⁴¹

21. The parallels to *Oil Platforms* are indeed striking. Iran argued (and now Azerbaijan argues) that a breach of customary international law would, *ipso facto*, amount to a breach of the relevant treaty.⁴² In fact, among the “bundle of sovereign rights” that Azerbaijan seeks to import into the ECT are those enshrined in the very same instruments that Iran sought to import into the Treaty of Amity, including General Assembly Resolution 2625.⁴³

22. But the ICJ rejected Iran’s interpretation of the Treaty of Amity. It held that “a general formulation cannot be interpreted in isolation from the object and purpose of the Treaty in which it is inserted.”⁴⁴ The treaty was plainly one devoted to economic and consular cooperation,

⁴⁰ *Id.*, pp. 812-813, para. 25.

⁴¹ Statement of Claim, para. 190. *See also id.*, paras. 189-192, 199 (referring to the so-called “core components of the bundle of rights inherent to sovereignty”); Counter-Memorial, paras. 32, 36.

⁴² *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Preliminary Objection, Judgment, I.C.J. Reports 1996 (RL-037), pp. 812-813, para. 25. (“[A]ny violation by one party at the expense of the other of the rules of international law pertaining to the threat and use of force, as well as pertaining to friendly relations between States, must at the same time be considered as a violation of the Treaty of Amity.”); *see* Statement of Claim, paras. 192-193 (“A breach of Article 18 thus necessarily also violates the corresponding principle of sovereignty over natural resources as recognized under customary international law. [...] Article 18 applies the customary international law rule of sovereignty specifically to a State’s sovereign rights over its ‘energy resources.’”).

⁴³ *See* Statement of Claim, paras. 189-190 (“The Friendly Relations Declaration, adopted by the UN General Assembly [...] in 1970, further elaborates upon the principle of sovereign equality of States: States ‘have equal rights and duties and are equal members of the international community, notwithstanding differences of an economic, social, political or other nature.’”); *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Preliminary Objection, Judgment, I.C.J. Reports 1996 (RL-037), p. 812, para. 25 (“That Article would [according to Iran], then, impose upon the Parties ‘the minimum requirement . . . to conduct themselves with regard to the other in accordance with the principles and rules of general international law in the domain of peaceful and friendly relations’ and, particularly, in accordance with the relevant provisions of the Charter of the United Nations and of customary law governing the use of force, as well as with General Assembly resolution 2625 (XXV) concerning friendly relations among States.”) (emphasis added) (ellipsis in the original).

⁴⁴ *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.

and its “object and purpose [...] was not to regulate peaceful and friendly relations between the two States *in a general sense*.”⁴⁵ As such, the provision invoked by Iran could “not be interpreted as incorporating into the Treaty all of the provisions of international law concerning such relations.”⁴⁶ Instead, Article I of the Treaty of Amity was to “be regarded as fixing an objective, in the light of which the other Treaty provisions are to be interpreted and applied.”⁴⁷ It follows that, while “general formulation[s]” in the operative part of a treaty may “throw light on the interpretation of the other Treaty provisions” and are “not without legal significance for such an interpretation,” they “cannot, taken in isolation, be a basis for the jurisdiction of the Court.”⁴⁸

23. In Armenia’s submission the Tribunal should—indeed must—apply the same analysis to Article 18. The Court’s approach in *Oil Platforms*—which it has reaffirmed on multiple occasions, as discussed below—reflects the relevant rules and canons of treaty interpretation for ascertaining the scope of jurisdiction *ratione materiae* granted by inter-State compromissory clauses.⁴⁹ A treaty provision containing an open-ended reference to broad concepts, whether it be “enduring peace,” “state sovereignty,” or “sovereign rights,” cannot serve as the basis for jurisdiction whenever conduct is alleged to have touched upon those concepts.

24. *Second*, in this connection, Armenia also cited *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*,⁵⁰ in which the Court rejected an attempt by Equatorial Guinea to invoke a treaty provision’s reference to “principles of sovereign equality” as a

⁴⁵ *Id.*, pp. 813-814, paras. 27-28 (emphasis added).

⁴⁶ *Id.*, p. 814, para. 28.

⁴⁷ *Id.*

⁴⁸ *Id.*, p. 815, para. 31.

⁴⁹ See, e.g., C. Tomuschat, “Article 36,” in A. Zimmermann & C. Tams, *The Statute of the International Court of Justice: A Commentary* (3rd Ed., OUP, 2019) (RL-248), p. 753 (“The compromissory clauses contained in bilateral or multilateral treaties must always be construed in connection with the substantive provisions of the treaty concerned (jurisdiction *ratione materiae*). Whenever appropriate, the Court painstakingly examines whether and to what extent the complaints brought by the applicant are susceptible of coming within the purview of those provisions. In this regard, [...] [i]n its judgment on the preliminary objections [in the *Oil Platforms* case], the Court, [...] went through the relevant provisions one by one, rejecting Article I as a pure objective which did not set forth truly binding international obligations.”); R. K. Gardiner, “The General Rule: (1) The Treaty, its Terms, and their Ordinary Meanings,” in *Treaty Interpretation* (2nd Ed., OUP, 2015) (CL-051), pp. 215-216, 218.

⁵⁰ See Request for Bifurcation, paras. 80-81; Memorial, paras. 48-49.

jurisdictional basis for its claims.⁵¹ This is the only ICJ case cited by Armenia on this issue to which Azerbaijan has responded, albeit briefly. Azerbaijan argues that:

[T]he ICJ declined the [Applicant]’s invitation to import customary sovereign immunity rules wholesale into the Palermo Convention Against Transnational Organized Crime, since the purpose of that Convention—“the promotion of co-operation to prevent and combat transnational organized crime more effectively”—was “unrelated” to sovereign immunity. That is a far cry from this Tribunal’s enforcement of an express Treaty obligation—Article 18 of the ECT—which provides for sovereignty over energy resources, in the context of a Treaty whose purpose is to promote long-term cooperation among States in the energy sector.⁵²

25. Tellingly, Azerbaijan does not attempt to distinguish *Equatorial Guinea v. France* by denying that, in the present case, it is seeking to import rules of customary international law into the ECT, because this is precisely what it hopes to do.⁵³ Instead, Azerbaijan claims that the present case is distinguishable from *Equatorial Guinea v. France* because the customary rules that Equatorial Guinea sought to import were “unrelated” to the object and purpose of the Palermo Convention.⁵⁴ Yet, as will be discussed in Section II.B.2 below, Azerbaijan’s attempt to use Article 18 to enforce inter-State obligations pertaining to permanent sovereignty over natural resources is decidedly “unrelated” to the ECT’s object and purpose to promote and regulate trade and investment in the energy sector.

26. Moreover, Azerbaijan’s two-sentence rebuttal oversimplifies Equatorial Guinea’s jurisdictional theory and the Court’s analysis, and ignores the obvious parallels to the case at hand.

27. By way of reminder, as a basis for its claims against France, Equatorial Guinea invoked Article 4 of the United Nations Convention against Transnational Organized Crime (the Palermo Convention), entitled “Protection of Sovereignty.” That article provides in full:

1. States Parties shall carry out their obligations under this Convention in a manner consistent with the principles of sovereign

⁵¹ *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, Preliminary Objections, Judgment, I.C.J. Reports 2018 (RL-073), paras. 78, 102.

⁵² Counter-Memorial, para. 30.

⁵³ See, e.g., Statement of Claim, para. 192; Counter-Memorial, paras. 32, 36.

⁵⁴ Counter-Memorial, para. 30.

equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States.

2. Nothing in this Convention entitles a State Party to undertake in the territory of another State the exercise of jurisdiction and performance of functions that are reserved exclusively for the authorities of that other State by its domestic law.⁵⁵

28. Just as Azerbaijan attempts to do with Article 18 of the ECT, Equatorial Guinea seized on Article 4's broad formulations to argue that the Court's jurisdiction under the Palermo Convention extended to various customary international law principles. Relying on this reading, it alleged that certain criminal proceedings against its officials and property in France "amount[ed] to a violation of 'the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States' to which Article 4 of the Palermo Convention refers."⁵⁶

29. Contrary to Azerbaijan's submissions, Equatorial Guinea considered that Article 4 had been violated for two reasons.⁵⁷ On the one hand, "it argue[d] that the rules relating to the immunity *ratione personae* of certain holders of high-ranking office and the immunity from execution of State property flow directly from the principles of sovereign equality and non-intervention referred to in Article 4."⁵⁸ On the other hand, it also argued that France had "overextended its criminal jurisdiction" and that, *inter alia*, "France's unilateral determination that the alleged predicate offences of [...] corruption were in fact committed in Equatorial Guinea amounts to a violation of the principles of sovereign equality and non-intervention in the internal affairs of another State reflected in Article 4 of the Palermo Convention."⁵⁹

⁵⁵ United Nations Convention Against Transnational Organized Crime and the Protocols Thereto (2000) (RL-207), Article 4.

⁵⁶ *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, Preliminary Objections, Judgment, I.C.J. Reports 2018 (RL-073), pp. 310-311, paras. 54-56.

⁵⁷ *Id.*, p. 318, para. 81 ("Equatorial Guinea relies on Article 4 in two ways.").

⁵⁸ *Id.* See also *id.*, p. 320, para. 90 ("Equatorial Guinea claims 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.").

⁵⁹ *Id.*, p. 311, para. 55. See also *id.*, pp. 318-319, para. 82 ("Second, Equatorial Guinea relies on the principles expressly referred to in Article 4, asserting that France has failed to carry out various obligations under the Palermo Convention in a manner consistent with those principles. In particular, Equatorial Guinea argues that France has violated Article 4 by asserting jurisdiction pursuant to Articles 6 and 15 of the Palermo Convention over alleged offences which fall exclusively within the jurisdiction of Equatorial Guinea's courts.").

30. For its part, “France argue[d] that the Palermo Convention is not intended to organize *in a general way* the legal relations between States in light of the principles of sovereign equality, territorial integrity and non-intervention, nor to create a system of immunities or establish the status of property belonging to States parties.”⁶⁰ In response to France’s position,

Equatorial Guinea concede[d] that Article 4 does not require respect for the principles of sovereign equality and non-intervention (including the rules on immunities of States and State officials which it claims flow from those principles) *in a general sense*. It does not seek to dissociate Article 4 from the Convention’s other provisions. Rather, it argues that respect for those principles becomes a treaty obligation for a State party when it is applying the other provisions of the Convention.⁶¹

31. In other words, unlike Azerbaijan, Equatorial Guinea conceded that a provision referring to external rules of international law cannot be invoked in isolation. Rather, it argued that “[r]especting the principles of sovereign equality and non-intervention *when applying the other provisions* of the Palermo Convention is a treaty obligation.”⁶² If anything, Equatorial Guinea’s interpretation of Article 4 was less extreme than Azerbaijan’s radical reading of Article 18. As noted by the Court, Article 4 of the Palermo Convention creates an obligation due to, *inter alia*, its use of the word “shall,” which is notably absent from Article 18 of the ECT.⁶³ Moreover, Article 4 of the Palermo Convention governs inter-State relations by expressly addressing States’ obligations of conduct vis-à-vis “the territory of another State.”⁶⁴ This text is in stark contrast to Article 18 of the

⁶⁰ *Id.*, p. 320, para. 88 (emphasis added).

⁶¹ *Id.*, p. 319, para. 83 (emphasis added).

⁶² *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, Preliminary Objections, Written Statement of the Observations and Submissions of the Republic of Equatorial Guinea on the Preliminary Objections Raised by the French Republic (Registry Translation) (31 July 2017) (**RL-241**), para. 2.17 (emphasis added). *Cf. Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, Preliminary Objections, Preliminary Objections of the French Republic (Registry Translation) (30 Mar. 2017) (**RL-240**), para. 98.

⁶³ *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, Preliminary Objections, Judgment, *I.C.J. Reports 2018* (**RL-073**), p. 321, para. 92.

⁶⁴ United Nations Convention Against Transnational Organized Crime and the Protocols Thereto (2000) (**RL-207**), Article 4(1) (“Nothing in this Convention entitles a State Party to undertake in the territory of another State the exercise of jurisdiction and performance of functions that are reserved exclusively for the authorities of that other State by its domestic law.”).

ECT, which was included in the ECT to inform the application of investment protections as between investors and host States, and does not speak of inter-State relations.⁶⁵

32. The Court nevertheless rejected Equatorial Guinea's reliance on Article 4 of the Palermo Convention as a jurisdictional basis for its claims. It began its analysis by acknowledging that Article 4 is "not preambular in character, nor does it merely formulate a general aim, as the Court held that Article I of the Treaty of Amity did in *Oil Platforms*."⁶⁶ Yet, despite finding that Article 4 created obligations, the Court emphasized that "*Article 4 is not independent of the other provisions of the Convention*. Its purpose is to ensure that the States parties to the Convention perform their obligations in accordance with the principles of sovereign equality, territorial integrity and non-intervention in the domestic affairs of other States."⁶⁷

33. Accordingly, in its textual analysis of the ordinary meaning of the provision, the Court refused to read a reference to general principles of international law as expanding its jurisdiction to an external body of international law:

Article 4 refers only to *general principles* of international law. *In its ordinary meaning*, Article 4 (1) does not impose, through its reference to sovereign equality, an obligation on States parties to act in a manner consistent with the many rules of international law which protect sovereignty in general, as well as all the qualifications to those rules.⁶⁸

34. As Azerbaijan admits,⁶⁹ the Court also found that "[t]he interpretation of Article 4 advanced by Equatorial Guinea [...] is unrelated to the stated object and purpose of the Palermo Convention."⁷⁰ It further held that Article 4 could not be isolated from its context, and in particular the absence of other provisions in the Palermo Convention relevant to Equatorial Guinea's claims.⁷¹

⁶⁵ Request for Bifurcation, paras. 53-54; Memorial, paras. 36-37, 74, 86. *See also infra* paras. 47-48, 73, 78, 108, 151.

⁶⁶ *Immunities and Criminal Proceedings (Equatorial Guinea v. France), Preliminary Objections, Judgment, I.C.J. Reports 2018 (RL-073)*, p. 321, para. 92.

⁶⁷ *Id.* (emphasis added).

⁶⁸ *Id.*, p. 321, para. 93 (emphasis added).

⁶⁹ Counter-Memorial, para. 30.

⁷⁰ *Immunities and Criminal Proceedings (Equatorial Guinea v. France), Preliminary Objections, Judgment, I.C.J. Reports 2018 (RL-073)*, p. 322, para. 95.

⁷¹ *See id.*, p. 321, para. 94 ("[N]one of the provisions of the Palermo Convention relates expressly to the immunities of States and State officials.").

35. *Equatorial Guinea v. France* thus stands for the proposition that not all treaty provisions—even those that create obligations and are non-preambular in character—can be invoked in isolation as a basis for jurisdiction. This proposition is consistent with the Court’s finding in *Oil Platforms* that general formulations “cannot, taken in isolation, be a basis for the jurisdiction of the Court.”⁷² In Armenia’s submission, the Tribunal should apply the same lens to Article 18’s “recogni[tion]” and “reaffirm[ation]” of general principles of “state sovereignty and sovereign rights over energy resources.”

36. *Third*, Azerbaijan fails to engage with Armenia’s reliance on another ICJ case, *Certain Iranian Assets*.⁷³ As in *Oil Platforms*, Iran also brought this case against the United States under the Treaty of Amity, claiming this time that the United States had violated the sovereign immunities of its central bank in violation of the Treaty.⁷⁴ With jurisdiction under Article 1 of the Treaty of Amity precluded by the Court’s decision in *Oil Platforms*, Iran invoked other provisions as a purported basis for the Court’s jurisdiction.

37. For example, Iran invoked Article IV(2) of the Treaty of Amity, which provides in relevant part that “[p]roperty of nationals and companies of either High Contracting Party, including interests in property, shall receive the most constant protection and security within the territories of the other High Contracting Party, in no case less than that required by international law.”⁷⁵

38. As the Court explained,

According to Iran, if there has been a breach by the United States of the immunities enjoyed under customary international law by the Iranian State and Iranian State-owned entities, as it claims on the merits, it follows that the “[p]roperty of nationals and companies of either High Contracting Party” did not “receive the most constant protection and security”, and that the protection and security received did not comply with the obligation that they be no “less

⁷² *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.

⁷³ See Memorial, paras. 50-51. As with *Oil Platforms*, Azerbaijan makes no reference to *Certain Iranian Assets* above the line in its Counter-Memorial. The only two citations to the case are references in footnotes without any analysis. See Counter-Memorial, notes 57-58.

⁷⁴ *Certain Iranian Assets (Islamic Republic of Iran v. United States of America)*, Preliminary Objections, Judgment, I.C.J. Reports 2019 (RL-170), p. 22, para. 33.

⁷⁵ *Id.*, p. 27, para. 53 (citing the Treaty of Amity, Economic Relations, and Consular Rights Between the United States of America and Iran (1957) (RL-183)).

than that required by international law” ; that, consequently, Article IV, paragraph 2, has been breached by the United States.⁷⁶

39. Unlike in *Oil Platforms* and *Equatorial Guinea v. France*, it was not in dispute that Article IV(2) created freestanding legal obligations. The United States itself pointed out that the provision concerns “the minimum standard of treatment for the property of aliens in the host State — a well-known concept in the field of investment protection.”⁷⁷ Yet, the Court held that Article IV(2) could not be relied on to transform a treaty about trade and investment into something else:

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.⁷⁸

40. Consistent with its *jurisprudence constante*, the Court reaffirmed in *Certain Iranian Assets* that isolated references to external principles of international law cannot have the effect of expanding an international tribunal’s jurisdiction beyond the scope of the treaty in which they are contained. Azerbaijan’s insistence that its approach to Article 18 is not external to, but falls squarely within, the scope of the ECT is not persuasive.⁷⁹ As Armenia explains in Section III.B.2 below, the ECT is not a treaty designed to address one State’s alleged use or exploitation of another State’s energy resources; it has nothing to do with sovereignty or sovereign rights in that sense. Rather, it is part of a different “sub-system of law”⁸⁰ designed to address trade and investment in the energy sector. Article 18 must be understood in that context.

⁷⁶ *Certain Iranian Assets (Islamic Republic of Iran v. United States of America)*, Preliminary Objections, Judgment, I.C.J. Reports 2019 (RL-170), p. 27, para. 54.

⁷⁷ *Id.*, p. 27, para. 55.

⁷⁸ *Id.*, p. 28, para. 57 (emphasis added).

⁷⁹ Counter-Memorial, para. 30.

⁸⁰ See *Eskosol S.P.A. in Liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50, Decision on Italy’s Request for Immediate Termination and Italy’s Jurisdictional Objection Based on Inapplicability of the Energy Charter Treaty to Intra-EU Disputes (7 May 2019) (RL-250), para. 181 (“It is useful to recall that the international legal system is a general system without any central authority from whom the entire system flows. It is composed of different legal sub-systems which have independent life, even if at times there may be interactions between them. As a whole, the international legal system is bound by general principles of international law, *i.e.*, by customary international law,

41. Finally, the recent case *Allegations of Genocide (Ukraine v. Russia)* is a further example of the ICJ rejecting an expansive reading of inter-State compromissory clauses. In that case, Ukraine had relied on the precept that States are only permitted to implement the Genocide Convention “within the limits permitted by international law” to argue that the Genocide Convention could be violated by the breach of extrinsic rules of international law.⁸¹ According to Ukraine, because Russia had made allegations of genocide to justify its invasion of Ukraine, the ICJ would have jurisdiction under the Genocide Convention to decide on the legality of Russia’s use of force. The ICJ rejected this interpretation of the Genocide Convention “as incorporating rules of international law that are extrinsic to it.”⁸² As the Court explained, if Russia had indeed implemented its obligations under the Convention in a manner contrary to international law, “it is not the Convention that the Russian Federation would have violated but the relevant rules of international law applicable to the recognition of States and the use of force.”⁸³ The Court concluded that these matters were simply “not governed by the Genocide Convention” and declined jurisdiction accordingly.⁸⁴

*

42. The ICJ cases on which Armenia relies are far from isolated examples. They reflect a general tendency of international tribunals to circumscribe strictly the scope of jurisdiction under inter-State compromissory clauses.⁸⁵ And for good reason—an expansive reading of the many references to international law contained in myriad bilateral and multilateral treaties would have

including norms such as *jus cogens* and *pacta sunt servanda* as discussed above. But below this level of general principles there exist various sub-systems of international law, with no precise hierarchy between the different norms established in each sub-system. *Rather, each of these sub-systems is governed by its own applicable norms, and vests dispute resolution authority in particular bodies obligated to proceed under those norms.* [...] The ECT is one such [...] sub-system of law, and it vests authority in arbitral tribunals such as this one.”) (emphasis added).

⁸¹ *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation: 32 States Intervening), Preliminary Objections, Judgment, 2 February 2024 (RL-097)*, para. 145.

⁸² *Id.*, para. 146.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ See, e.g., R. K. Gardiner, “The General Rule: (1) The Treaty, its Terms, and their Ordinary Meanings,” in *Treaty Interpretation* (2nd Ed., OUP, 2015) (CL-051), p. 218 (“The Oil Platforms case considered above is but one of several ICJ cases which have been concerned with the extent of the jurisdiction conferred upon it, or another tribunal, by the parties to a dispute. The Court has in this context considered the object and purpose of the parties *as requiring great care not to stretch jurisdiction beyond that specifically conferred by those parties.*”) (emphasis added).

the effect of circumventing State consent.⁸⁶ Such a reading would create a system of compulsory jurisdiction over disputes involving numerous rules of customary international law. While Azerbaijan has so far refused to situate its arguments within the well-established approach to jurisdiction in inter-State disputes, the interpretation of Article 18 cannot be divorced from this framework. The rules and canons of treaty interpretation applied by the ICJ in comparable circumstances should inform the Tribunal's analysis in the present case.

B. Article 18 Does Not Establish an Obligation that Can Be Invoked as a Standalone Basis for Azerbaijan's Claims

43. Applying the principles of treaty interpretation enshrined in the Vienna Convention on the Law of Treaties ("VCLT") in light of the ICJ's *jurisprudence constante* discussed above, Armenia demonstrated in its Memorial that Article 18 cannot provide a basis for the Tribunal's jurisdiction over Azerbaijan's claims. In its Counter-Memorial, Azerbaijan fails to convincingly rebut Armenia's arguments based on the ordinary meaning of Article 18 (**Section II.B.1**); the ECT's object and purpose (**Section II.B.2**); the context of Article 18 (**Section II.B.3**); the requirements of good faith (**Section II.B.4**); the subsequent practice of the ECT's Contracting States (**Section II.B.5**); or, as a subsidiary means of interpretation, the ECT's *travaux* (**Section II.B.6**).

1. The Ordinary Meaning of Article 18 Does Not Support Azerbaijan's Interpretation

44. The Parties appear to agree that the starting point for an interpretation of Article 18 is its text. While Azerbaijan invokes only Articles 18(1) and 18(3), it is worth reproducing Article 18 in full:

(1) The Contracting Parties recognise state sovereignty and sovereign rights over energy resources. They reaffirm that these

⁸⁶ See, e.g., International Convention for the Suppression of Financing of Terrorism (1999) (**RL-206**), Article 20 ("The States Parties shall carry out their obligations under this Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States."); International Convention for the Suppression of Terrorist Bombing (1997) (**RL-203**), Article 17 ("The States Parties shall carry out their obligations under this Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States."); International Convention Against the Recruitment, Use, and Financing of Mercenaries (2001) (**RL-208**), Article 16 ("The present Convention shall be applied without prejudice to: a. The rules relating to the international responsibility of States; b. The law of armed conflict and international humanitarian law, including the provisions relating to the status of combatant or of prisoner of war").

must be exercised in accordance with and subject to the rules of international law.

(2) 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.

(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.

(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.⁸⁷

45. To guide its interpretation, Azerbaijan cites the statement of the International Law Commission (“**ILC**”) that “the very essence of the textual approach” is that “the parties are to be presumed to have that intention which appears from the ordinary meaning of the terms used by them.”⁸⁸ Attempting to elucidate the intention that appears from the ordinary meaning of Article 18, Azerbaijan argues that the ECT “Contracting Parties *intended that there be concrete legal consequences* to the recognition of sovereignty and sovereign rights,”⁸⁹ and that “they agree[d] to *draw the legal consequences that flow from* the existence of those rights.”⁹⁰

⁸⁷ Energy Charter Treaty with Related Documents (**CL-001**), ECT, Article 18.

⁸⁸ Counter-Memorial, para. 18, note 38 (citing International Law Commission, *Draft Articles on the Law of Treaties* (1966) (**CL-009**), p. 221, para. (12)).

⁸⁹ Counter-Memorial, para. 24 (emphasis added).

⁹⁰ *Id.*, para. 21 (emphasis added).

46. However, Azerbaijan does not directly assert that the ordinary meaning of Article 18 would evince an intention of the ECT Contracting Parties to render the customary international law principle of permanent sovereignty over natural resources actionable as between them in an inter-State dispute under the Treaty. Azerbaijan does not say as much because it cannot credibly argue that such an intention is evident from the text of Article 18. Instead, Azerbaijan sets a lower bar for itself, and merely seeks to establish that the ordinary meaning of the text reflects an intention that “legal consequences [...] flow” from Article 18.

47. But Armenia has never argued otherwise. It is not Armenia’s position that Article 18 has no *effet utile*. Rather, it is Armenia’s position that Article 18 serves to “throw light on the interpretation of the [ECT’s] other [...] provisions,” just as the ICJ viewed Article I of the Treaty of Amity.⁹¹ Article 18 does so by pointing to the existence of an external principle that might, in some instances, serve as a counterweight to the application of the ECT’s investment protections.⁹² In other words, Article 18 serves to ensure that the ECT’s protections for foreign investors are not interpreted in a vacuum, and that they are duly balanced with competing concerns of State sovereignty and the right to regulate.⁹³

48. Armenia has already pointed out that it is not alone in holding this interpretation. For example, Professor Hobér ascribes the same meaning to the provision:

In the first sentence of subparagraph (1) the Contracting Parties recognize state sovereignty and sovereign rights over energy resources.

Today *this is an uncontroversial statement*. No one disputes a State’s sovereign rights to natural resources, including energy

⁹¹ *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.

⁹² See Memorial, paras. 36, 86-88.

⁹³ See 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. 369 (“The ‘great expropriation debate’ of the early 1970s was fought over the alleged conflict between a state’s sovereign rights over its natural resources and its obligations under international law - at least in the view of the capital-exporting states - to observe contractual or property rights of foreign investors involving those resources. Although no one disputes a state’s sovereign rights over its resources, many states have been assiduous in insisting that obligations to respect foreign investments be coupled with affirmations of those rights. In the ECT this affirmation appears in Article 18.”) (emphasis added). See also *AES Solar and others (PV Investors) v. Spain*, PCA Case No. 2012-14, Final Award (28 Feb. 2020) (CL-060), paras. 568-570 (“[T]he Parties to the ECT aimed at realizing a balance between the sovereign rights of the State over energy resources and the creation of a climate favorable to the flow of investments on the basis of market principles.”) (emphasis added).

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.

In the second sentence of subparagraph (1) the Contracting Parties ‘reaffirm’ that the sovereign rights must be exercised in accordance with international law. This is again an uncontroversial statement.

[...]

Reading the two sentences in subparagraph (1) together again illustrates one of the underlying philosophies of the ECT, i.e., to strike a *reasonable and acceptable balance between the host States and Investors in the energy sector*.⁹⁴

49. As Armenia has explained,⁹⁵ and will address further in Section II.B.6 below, the ECT’s *travaux* also establish that the Contracting Parties intended to give Article 18 the same meaning that Armenia, Professor Hobér, and other commentators ascribe to it.⁹⁶

50. Unable to overcome the plain meaning of Article 18, Azerbaijan raises several unavailing arguments related to the text of the provision.

51. *First*, Azerbaijan’s central argument is that the word “recognise” in the first sentence of Article 18(1) “imposes an obligation to accept—and act consistent with—the exclusive legal authority of each State over its territory and resources.”⁹⁷ It argues that “[t]his is the plain meaning

⁹⁴ K. Hobér, *The Energy Charter Treaty: A Commentary* (OUP, 2020) (CL-059), p. 348 (emphasis added). See also K. Hobér, “Part III: Investment Promotion and Protection,” in *The Energy Charter Treaty: A Commentary* (OUP, 2020) (RL-253), p. 273 (“During the debates in the 1960’s and 1970’s concerning a State’s rights over its natural resources and the expropriation thereof, one issue raised was the extent to which States were under an obligation under international law to observe contractual or property rights of *foreign investors* involving such natural resources. Whilst the State’s sovereignty rights over its resources were seldom disputed, some States insisted that *foreign investors* affirm these rights. A similar affirmation is now found in Article 18(1) of the ECT.”) (emphasis added).

⁹⁵ See Memorial, Section II.F.

⁹⁶ See, e.g., 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. 369 (“Although no one disputes a state’s sovereign rights over its resources, many states have been assiduous in insisting that obligations to respect foreign investments be coupled with affirmations of those rights. In the ECT this affirmation appears in Article 18.”).

⁹⁷ Counter-Memorial, para. 18.

of ‘recognise,’ an interpretation that the International Court of Justice [...] has endorsed in its *Territorial Dispute* judgment.”⁹⁸ This is incorrect.

52. As Armenia explained in its Request for Bifurcation and Memorial,⁹⁹ Azerbaijan’s reliance on the ICJ’s judgment in *Territorial Dispute (Libya/Chad)* does not assist it. The interpretation of a single word—“recognise”—in one treaty cannot be neatly transposed to another treaty. That is not how treaty interpretation works. Rather, “[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.”¹⁰⁰ As the ILC emphasized in preparing what became the VCLT, “the natural and ordinary meaning of terms is not to be determined in the abstract but by reference to the context in which they occur.”¹⁰¹

53. The context of a term like “recognise” is particularly important in seeking to ascertain its meaning. As Armenia explained, in the context of the law on title to territory, the act of “recognition” has a specific meaning.¹⁰² To recognize a border is to agree to a set of facts (*e.g.*, boundary coordinates) that have a specific legal consequence, namely a State’s legal title to certain territory. As the late Judge Crawford explained, “title may exist on the basis of a treaty alone, the

⁹⁸ *Id.*, para. 18.

⁹⁹ Request for Bifurcation, paras. 56-57; Memorial, para. 41.

¹⁰⁰ Vienna Convention on the Law of Treaties (1969) (**CL-011**), Article 31(1) (emphasis added).

¹⁰¹ International Law Commission (ILC), *Yearbook of the International Law Commission, Volume II* (1964) (**RL-185**), p. 56, para. (14). *See also* *Competence of the ILO to Regulate Agricultural Labour, P.C.I.J. (1922), Series B, Nos. 2 and 3 (RL-179)*, p. 23 (“In considering the question before the Court upon the language of the treaty, it is obvious that the treaty must be read as a whole, and that its meaning is not be determined merely upon particular phrases which, if detached from the context, may be interpreted in more than one sense.”); R. K. Gardiner, “The General Rule: (1) The Treaty, its Terms, and their Ordinary Meanings,” in *Treaty Interpretation* (2nd Ed., OUP, 2015) (**CL-051**), p. 198.

¹⁰² *See* Request for Bifurcation, note 70, (citing J. Crawford, *Brownlie’s Principles of Public International Law* (9th Ed., OUP, 2019) (**RL-076**), p. 214). *See id.*, pp. 204-205 (“Title to territory, like ownership of land, is normally ‘objective’, but there is no system of registration, no international Torrens title. Unquestioned title is a contingency arising from history, general *recognition*, and the absence of any other claimant.”) (emphasis added). Recognition is also a term of art with legal consequences in the context of statehood, as evidenced by, *inter alia*, the constitutive theory of State recognition. *See, e.g.*, J. Crawford, “Recognition of States and Governments,” in *Brownlie’s Principles of Public International Law* (9th Ed., OUP, 2019) (**RL-249**), pp. 135-138. *Cf.* Montevideo Convention on the Rights and Duties of States (1934) (**RL-181**), Articles 6 (“The recognition of a state merely signifies that the state which recognizes it accepts the personality of the other with all the rights and duties determined by international law. Recognition is unconditional and irrevocable.”), 7 (“The recognition of a state may be express or tacit. The latter results from any act which implies the intention of recognizing the new state.”).

treaty marking a reciprocal *recognition* of sovereignty in solemn form.”¹⁰³ Consistent with its past jurisprudence on boundary disputes,¹⁰⁴ the Court gave the terms “recognise” and “recognition” their special meaning in the context of territorial title.

54. While Azerbaijan only selectively relies on *Territorial Dispute (Libya/Chad)*, a brief consideration of that case is sufficient to make clear its lack of relevance for interpreting Article 18. In that case, the ICJ was tasked with deciding a territorial dispute between Libya and Chad, the latter having gained independence from France. For its part, “Libya proceed[ed] on the basis that there [was] no existing boundary, and ask[ed] the Court to determine one.”¹⁰⁵ Chad instead argued “that there [was] an existing boundary” between the two States,¹⁰⁶ which had been fixed by the 1955 Treaty of Friendship and Good Neighbourliness between France and Libya (the “**1955 Treaty**”).¹⁰⁷

55. As the Court explained, “[o]ne of the matters specifically addressed [by the 1955 Treaty] was the question of frontiers, dealt with in Article 3 and Annex 1.”¹⁰⁸ The dispute between Chad and Libya thus centered on the interpretation of Article 3, which provides in full:

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).¹⁰⁹

¹⁰³ J. Crawford, *Brownlie’s Principles of Public International Law* (9th Ed., OUP, 2019) (**RL-076**), p. 214 (emphasis added). See also M. Kohen and M. Hébié, “Territory, Acquisition,” in *Max Planck Encyclopedias of International Law* (OUP, 2023) (**RL-263**), para. 13 (“Unilateral acts can adopt the form of an explicit renunciation of territorial sovereignty and/or recognition that sovereignty belongs to another State.”).

¹⁰⁴ See, e.g., *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), Merits, Judgment of 15 June 1962: I.C.J. Reports 1962 (RL-184)*, p. 33 (“Both Parties, by their conduct, recognized the line and thereby in effect agreed to regard it as being the frontier line.”).

¹⁰⁵ *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994 (CL-031)*, p. 14, para. 19.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*, p. 15, para. 21.

¹⁰⁸ *Id.*, p. 20, para. 37.

¹⁰⁹ Treaty of Friendship and Good-Neighbourliness between the French Republic and the United Kingdom of Libya (1955) (**RL-025**), Article 3. See also *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994 (CL-031)*, pp. 20-21, para. 39 (citing an unofficial translation by the Registry).

56. For its part, Annex I listed six agreements concluded between 1898 and 1919 among Great Britain, France, Italy and the Ottoman Empire,¹¹⁰ all of which dealt with defining the boundaries among the colonial powers.¹¹¹ The annex also further elaborated on the border that had been fixed in one of the treaties, stating “it was *recognized* by the two delegations that [...] the frontier traverses the following three points....”¹¹² It further provided for a process for “the task of marking out the frontier, wherever that work has not yet been done.”¹¹³

57. The Court applied the usual rules of treaty interpretation to elucidate the meaning of Article 3 and Annex I in light of their text, context and the 1955 Treaty’s object and purpose. It identified “[t]he manifest intention of the parties” to finally decide their boundaries in the text of Article 3.¹¹⁴ It supported its interpretation with the provision’s context, including provisions in an appended convention that presupposed established frontiers.¹¹⁵ And it confirmed that the 1955 Treaty’s “object and purpose led naturally to the definition of the territory of Libya, and thus the definition of its boundaries.”¹¹⁶ This object and purpose was evidenced, *inter alia*, by the Treaty’s preamble which enshrined the Parties’ “conviction that the signature of the treaty would ‘serve to facilitate the settlement of all such questions as arise for the two countries from their *geographical location*...’.”¹¹⁷

58. Azerbaijan points to the following passage in the Court’s judgment in order to draw conclusions about the meaning of “recognise” within the ECT:

According to Article 3 of the 1955 Treaty, the parties ‘recognize [reconnaissent] that the frontiers . . . are those that result’ from certain international instruments. The word ‘recognize’ used in the Treaty indicates that a legal obligation is undertaken. *To recognize a frontier is essentially to ‘accept’ that frontier*, that is, to draw legal

¹¹⁰ *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment, I.C.J. Reports 1994 (CL-031), p. 21, para. 40.

¹¹¹ *Id.*, pp. 29-33, paras. 58-62.

¹¹² *Id.*, p. 21, para. 40 (emphasis added).

¹¹³ *Id.*

¹¹⁴ *Id.*, p. 24, para. 48.

¹¹⁵ *Id.*, pp. 26-27, paras. 53-54.

¹¹⁶ *Id.*, p. 26, para. 52.

¹¹⁷ *Id.*, pp. 25-26, para. 52.

consequences from its existence, to respect it and to renounce the right to contest it in future.¹¹⁸

59. This passage simply confirms Armenia’s explanation that “recognition” is a term of art in the realm of territorial title and boundary delimitation. In fact, Libya did not even dispute that the use of the term “recognize” could have the effect given to it by Chad, but instead argued that the parties had only recognized some frontiers but not others.¹¹⁹

60. That “recognition” has a special meaning in the context of territorial title is also confirmed by another passage omitted by Azerbaijan:

The fixing of a frontier depends on the will of the sovereign States directly concerned. There is nothing to prevent the parties from deciding by mutual agreement to consider a certain line as a frontier, whatever the previous status of that line. *If it was already a territorial boundary, it is confirmed purely and simply. If it was not previously a territorial boundary, the agreement of the parties to ‘recognize’ it as such invests it with a legal force which it had previously lacked.* International conventions and case-law evidence a variety of ways in which such *recognition* can be expressed.¹²⁰

61. In other words, recognition of a boundary where none existed before results in the creation of a new legal title. But recognition of an already defined border is merely confirmatory.¹²¹ In this sense, Azerbaijan’s misguided reliance on this one case does not even support its interpretation of Article 18. The Parties agree that Article 18 refers to preexisting principles of

¹¹⁸ *Id.*, p. 22, para. 42 (emphasis added) (ellipsis in the original). See Counter-Memorial, para. 20.

¹¹⁹ *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment, I.C.J. Reports 1994 (CL-031), p. 22, para. 43. The Court rejected this approach: “In the view of the Court, the terms of the Treaty signified that the parties thereby recognized complete frontiers between their respective territories as resulting from the combined effect of all the instruments listed in Annex 1; no relevant frontier was to be left undefined and no instrument listed in Annex 1 was superfluous. It would be incompatible with a recognition couched in such terms to contend that only some of the specified instruments contributed to the definition of the Frontier, or that a particular frontier remained unsettled. So to contend would be to deprive Article 3 of the Treaty and Annex 1 of their ordinary meaning. By entering into the Treaty, the parties recognized the frontiers to which the text of the Treaty referred.” *Id.*

¹²⁰ *Id.*, p. 23, para. 45 (emphasis added). See also *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, Merits, Judgment of 15 June 1962: I.C.J. Reports 1962 (RL-184), p. 33.

¹²¹ See, e.g., *Obligations of Israel in relation to the Presence and Activities of the United Nations, Other International Organizations and Third States in and in relation to the Occupied Palestinian Territory*, Advisory Opinion (22 Oct. 2025) (RL-270), para. 222 (referring to the “recognized borders for both” Israel and Palestine); *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, Advisory Opinion (19 July 2024) (CL-068), para. 283.

international law.¹²² Accordingly, any “recognition” of these principles means that they are “confirmed purely and simply”¹²³ and not established anew.

62. That the word “recognise” may have different meanings in different contexts was recently reaffirmed by the ICJ. In interpreting the Paris Agreement, the Court declined to ascribe a binding meaning to the word “recognize” within operative provisions of the treaty, finding instead that the relevant provisions serve an interpretive function:

[P]aragraph 4 of Article 7 of the Paris Agreement provides that “Parties *recognize* that the current need for adaptation is significant and that greater levels of mitigation can reduce the need for additional adaptation efforts, and that greater adaptation needs can involve greater adaptation costs”. This provision reflects the understanding that parties share, and *provides the context for other standard-setting provisions contained in Article 7, but does not itself create any standards or legally binding obligations*. Other provisions that provide context in relation to adaptation obligations are Article 7, paragraph 2, in which parties “*recognize* that adaptation is a global challenge”, Article 7, paragraph 5, in which parties “acknowledge that adaptation action should follow a country-driven, gender-responsive, participatory and fully transparent approach”, and Article 7, paragraph 6, in which parties “*recognize* the importance of support for and international cooperation on adaptation efforts”. *These provisions do not prescribe obligations of a legally binding character for the parties, but reflect a common understanding of the parties as to the nature of the problem being addressed. In the Court’s view, these provisions provide context for the interpretation of other provisions containing obligations.*¹²⁴

63. Likewise, here, the use of the word “recognise” in Article 18 does not create legally binding standalone obligations. Instead, Article 18 provides context for other provisions of the ECT, in particular its investment section.

¹²² Counter-Memorial, para. 32.

¹²³ *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment, I.C.J. Reports 1994 (CL-031), p. 23, para. 45.

¹²⁴ *Obligations of States in Respect of Climate Change*, Advisory Opinion (23 July 2025) (RL-268), para. 255 (emphasis added). See also *id.*, para. 178 (stating that the principles contained in Article 3 of the UNFCCC do not constitute standalone obligations within the climate change treaty framework, they guide the interpretation of the treaty obligations).

64. In this connection, Azerbaijan attempts to bolster its interpretation of the word “recognise” in Article 18 by drawing a parallel to the use of the word in another provision of the ECT, Article 15(1). That provision, contained within Part III of the ECT on “Investment Promotion and Protection,” addresses subrogation of an investor’s claims by an indemnifying party (*e.g.*, an insurer or guarantor). It provides: “[t]he Host Party *shall recognise*: (a) the assignment to the Indemnifying Party of all the rights and claims in respect of such Investment.”¹²⁵ Here, too, Azerbaijan misses the mark. Article 15(1) uses the mandatory term “shall,”¹²⁶ which is conspicuously absent from Article 18.

65. Moreover, the recognition by a third party of rights transferred between two parties is a discrete concept not transferable to the use of the term in other circumstances. When subrogation is at issue, the ECT sets out a binding regime that requires the relevant “Host Party” to “recognise” the “rights and claims” of a specific “Indemnifying Party” with regard to the corresponding “Investment.”¹²⁷ In this particular context, the recognition of standing to pursue claims and the validity of rights logically has a legally binding effect, but that does not mean that such effect operates whenever the term “recognise” is used. Indeed, the use of the word “recognise” in Article 15(1) reinforces Armenia’s position that the meaning of the word is context specific.

66. In any event, Azerbaijan has cherry-picked the word “recognise” from Article 15(1) because the use of the word elsewhere plainly cannot support its position. In fact, the compilation of the ECT and related instruments submitted by Azerbaijan contains nearly 40 instances in which forms of the words “recognise” or “recognition” are used.¹²⁸ Most uses are contained within non-binding instruments such as the International Energy Charter (“**IEC**”) or the European Energy Charter (“**EEC**”).¹²⁹ These are aspirational statements, such as the affirmation that the signatories to the IEC “*recognise* the importance of the avoidance of double taxation to foster private

¹²⁵ Energy Charter Treaty with Related Documents (**CL-001**), Article 15(1) (emphasis added).

¹²⁶ *Cf. Immunities and Criminal Proceedings (Equatorial Guinea v. France), Preliminary Objections, Judgment, I.C.J. Reports 2018 (RL-073)*, p. 321, para. 92.

¹²⁷ Energy Charter Treaty with Related Documents (**CL-001**), ECT, Article 15(1).

¹²⁸ *See, e.g., id.*, IEC, pp. 11, 12, 13, 16, 17, 18, 19, 20, 24, 25; *id.*, EEC, pp. 28, 31, 32, 33, 34; *id.*, ECT, preamble, p. 39, Understanding with respect to Article 1(12), Article 15(1), Understanding with respect to Article 24, Article 32(1), Annex W, p. 142; *id.*, Protocol on Energy Efficiency and Related Environmental Aspects, preamble, pp. 156-157, Article 3(6).

¹²⁹ *See, e.g., id.*, IEC, pp. 11, 12, 13, 16, 17, 18, 19, 20, 24, 25; *id.*, EEC, pp. 28, 31, 32, 33, 34.

investment” or that they “*recognise* that transit of energy products through their territories is essential for the liberalisation of trade in energy products.”¹³⁰ Within the ECT itself, the term “*recognising*” is twice deployed in the Treaty’s preamble.¹³¹ And the word “recognise” is used in a binding understanding adopted by the Contracting Parties with respect to Article 1(12): “[t]he representatives *recognise* the necessity for adequate and effective protection of Intellectual Property rights according to the highest internationally-accepted standards.”¹³² These uses of the term do not entail actionable obligations and its use in Article 18 is no different.

67. Azerbaijan’s attempt to divorce the word “recognise” from any context and to ascribe it a universal and binding meaning is not in accordance with the principles of treaty interpretation.

68. *Second*, after fixating on a single word in the first sentence of Article 18(1), Azerbaijan briefly turns its attention to the second sentence of Article 18(1) which the Parties appear to agree must be read together with the first sentence:¹³³ “[t]he 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”.¹³⁴

69. The phrase “reaffirm that these” highlights how the first sentence is not *establishing* rights, but at most *acknowledging* rights that exist outside the ECT. Moreover, as Armenia explained in its Memorial,¹³⁵ this second sentence does not purport to expand the scope of the affirmation contained in the first sentence. Rather, it narrows its scope 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.¹³⁶ For example, sovereignty cannot be invoked

¹³⁰ *Id.*, IEC, p. 18 (emphasis added).

¹³¹ *Id.*, ECT, preamble, p. 39 (emphasis added).

¹³² *Id.*, ECT, p. 43.

¹³³ See Counter-Memorial, para. 23.

¹³⁴ Energy Charter Treaty with Related Documents (CL-001), ECT, Article 18(1) (emphasis added).

¹³⁵ Memorial, para. 35.

¹³⁶ See K. Hobér, *The Energy Charter Treaty: A Commentary* (OUP, 2020) (CL-059), p. 348 (“[T]he second sentence of subparagraph (1) [...] 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

to disregard obligations to provide compensation for expropriation, to refrain from illegal discrimination, or to respect the basic due process rights of individuals. Similarly, as pointed out by Professor Hobér, if a State enters into binding agreements with an investor, the principle of *pacta sunt servanda* also has the effect of limiting the exercise of sovereign rights.¹³⁷

70. Azerbaijan’s only answer to this point is to state that:

[C]ontrary to Armenia’s contention, the second sentence of Article 18(1)—in which the Contracting Parties “reaffirm that [sovereignty and sovereign rights over energy resources] must be exercised in accordance with and subject to the rules of international law”—does not “narrow[]” the impact of the recognition in the first sentence. Instead, as one commentator has observed, the second sentence flows from the first, and is a further affirmation of the Contracting Parties’ ‘freedom to develop their energy resources subject to the rights and responsibilities under international law’—that is, their responsibilities to one another as sovereign States.”¹³⁸

71. This argument is difficult to understand. To begin with, it is unclear how an “affirmation” that the recognized rights are “subject to” other rules does not narrow the import of the first sentence. Moreover, Azerbaijan’s claim that its interpretation of Article 18 enjoys the support of commentators is misleading. The commentary cited by Azerbaijan does not address the relationship between the two sentences of Article 18(1), but simply states: “Paragraph 1 enunciates a [*sic*] Contracting Parties’ freedom to develop their energy resources subject to the rights and responsibilities under international law.”¹³⁹ Azerbaijan does not explain how it leaps from this generic restatement to the notion that Article 18 concerns the Contracting Parties’ “responsibilities to one another as sovereign States.”¹⁴⁰

72. In this connection, Armenia pointed out in its Memorial that nothing in the language of Article 18 suggests that the Contracting Parties had the intention to regulate their respective

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.”).

¹³⁷ *Id.*, p. 348.

¹³⁸ Counter-Memorial, para. 23.

¹³⁹ P. Vajda *et al.*, “Article 18 – Sovereignty Over Energy Resources,” in R. Leal-Arcas, *Commentary on the Energy Charter Treaty* (2nd Ed., Elgar, 2023) (CL-065), p. 277, para. 18.08. See Counter-Memorial, para. 23, note 46.

¹⁴⁰ Counter-Memorial, para. 23.

sovereign rights as between them.¹⁴¹ That is to say, the text is focused on the rights retained by the State with regard to its own territory. Azerbaijan disagrees with this plain reading and argues that: “[a]s between ECT Contracting Parties, the “legal consequences” of such recognition necessarily entail an obligation that each State respects the sovereignty and sovereign rights of all other States. Indeed, the Contracting Parties would hardly need to enter into a multilateral agreement to recognize their own sovereign rights.”¹⁴²

73. But Azerbaijan misses the point. In the context of a treaty regulating trade and investment protections, it makes complete sense to focus on the interplay between a State’s sovereign rights in its own territory and the limitations to those rights in favor of foreign investors. Put another way, through Article 18, State A recognizes that State B maintains its sovereign rights despite affording certain rights to the nationals of State A under the ECT. That is a far cry from State A undertaking obligations vis-à-vis State B’s resources. It is therefore a sleight of hand to suggest that the legal consequences of recognizing state sovereignty and sovereign rights over energy resources “necessarily entail an obligation that each State respects the sovereignty and sovereign rights of all other States.”¹⁴³ No such legal or logical necessity exists when the purpose of Article 18 and its context are properly understood.

74. Armenia’s interpretation of Article 18 is fully consistent with Article 18’s purpose of informing the interpretation and application of the ECT as between States and foreign nationals. If the Contracting Parties were concerned with the obligations of States vis-à-vis the sovereignty, territory, or resources of other States, one would expect this to have been specified. Among other examples,¹⁴⁴ Article 4 of the Palermo Convention—discussed above—makes clear that its reference to principles of State sovereignty has an inter-State component:

¹⁴¹ Memorial, para. 42.

¹⁴² Counter-Memorial, para. 22 (emphasis in the original).

¹⁴³ *Id.*

¹⁴⁴ See, e.g., International Convention for the Suppression of Financing of Terrorism (1999) (**RL-206**), Article 20 (“The States Parties shall carry out their obligations under this Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States.”); International Convention for the Suppression of Terrorist Bombing (1997) (**RL-203**), Article 17 (“The States Parties shall carry out their obligations under this Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States.”). See also Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction (2023) (**RL-262**), Article 11 (4) (“No State shall

1. States Parties shall carry out their obligations under this Convention in a manner consistent with the principles of sovereign equality and *territorial integrity of States and that of non-intervention in the domestic affairs of other States*.

2. Nothing in this Convention entitles a State Party *to undertake in the territory of another State* the exercise of jurisdiction and performance of functions that are reserved exclusively for the authorities of *that other State* by its domestic law.¹⁴⁵

75. Article 18 contains no such language referring to the rights and obligations of one State with regard to *another State's* sovereignty and sovereign rights over energy resources.

76. *Third*, faced with the problem that Article 18(1) contains language simply acknowledging pre-existing, non-ECT rights, Azerbaijan attempts to pivot its case to Article 18(3). It alleges that Armenia “ignores the Contracting Parties’ expansive and concrete rights set out in Article 18(3).”¹⁴⁶ It further insists that “[a]ny doubt about whether the Contracting Parties intended that there be concrete legal consequences to the recognition of sovereignty and sovereign rights in Article 18(1) is removed by the illustrative, non-exhaustive list of rights set out in Article 18(3).”¹⁴⁷

77. To be clear, Armenia did not ignore Article 18(3), whether in its Request for Bifurcation or in its Memorial.¹⁴⁸ Rather, it explained that Article 18(3) simply provides that “[e]ach State continues to hold in particular” certain rights over energy resources. By its own terms, it concerns *pre-existing* rights (“continue to hold”) and does not itself establish new rights or obligations. As commentators have observed, Article 18(3) “*reconfirms* the contents of sovereignty with respect to energy resources.”¹⁴⁹ Just like the first paragraph of Article 18, the third paragraph is purely confirmatory in character.¹⁵⁰

claim or exercise sovereignty or sovereign rights over marine genetic resources of areas beyond national jurisdiction. No such claim or exercise of sovereignty or sovereign rights shall be recognized.”).

¹⁴⁵ United Nations Convention Against Transnational Organized Crime and the Protocols Thereto (2000) (RL-207), Article 4 (emphasis added).

¹⁴⁶ Counter-Memorial, para. 11.

¹⁴⁷ *Id.*, para. 24.

¹⁴⁸ See Memorial, paras. 37-38, 88; Request for Bifurcation, para. 54.

¹⁴⁹ See, e.g., K. Hobér, *The Energy Charter Treaty: A Commentary* (OUP, 2020) (CL-059), p. 349 (emphasis added).

¹⁵⁰ Cf. *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment, I.C.J. Reports 1994 (CL-031), p. 23, para. 45.

78. Moreover, it is not contested that Article 18(3) is more detailed than Article 18(1). But Azerbaijan cannot point to anything in the text of Article 18(3) that establishes that the Contracting Parties intended to render the principle of permanent sovereignty over natural resources as a binding rule of the ECT enforceable vis-à-vis the resources of *other* States. Rather, on its face, Article 18(3) plainly has been crafted with investor-State relations in mind. It serves the purpose of clarifying that the State is preserving its rights vis-à-vis foreign investors and/or the private sector. Indeed, Article 18(3) refers to issues that are emblematic of the perennial tension between investment protection and a State’s sovereign right to regulate. For example, it addresses “taxes” and “royalties,” “regulat[ing] [...] environmental and safety aspects,” and the role of “state enterprises.”¹⁵¹

79. Azerbaijan makes much of the fact that, as Armenia has already pointed out,¹⁵² Article 18(3) is non-exhaustive. It refers only to certain rights “in particular” that “[e]ach state continues to hold.” But the non-exhaustive character of Article 18(3) is yet another reason why it cannot be seen as creating enforceable rights. If the Contracting Parties had understood that they were committing to new and specific treaty obligations in relation to the territories and resources of other States, they would have been expected to do so in a detailed and not open-ended manner.

80. *Finally*, in this connection, Azerbaijan argues that Article 18 can serve as a basis for the Tribunal’s jurisdiction because it “codif[ies]” within the ECT a rule of customary international law “making the rule then enforceable as a treaty obligation.”¹⁵³

81. This argument defies common sense and basic precepts of international law.

¹⁵¹ Energy Charter Treaty with Related Documents (CL-001), ECT, Article 18(3).

¹⁵² Memorial, para. 37.

¹⁵³ Counter-Memorial, para. 35. Armenia notes that Azerbaijan has again changed its position on the role of customary international law. After Armenia objected in its Request for Bifurcation to Azerbaijan’s attempt to import customary international law into the ECT, Azerbaijan insisted that it was only relying on the interpretive rule of Article 31(3)(c) of the VCLT. *See* Request for Bifurcation, Section III.A.2. Azerbaijan’s Observations on the Request for Bifurcation (23 Jan. 2025) (“**Observations on the Request for Bifurcation**”), para. 36 (“[A] party cannot seek to import unrelated international rules into a treaty on an entirely different subject matter, but courts and tribunals may take account of customary principles to aid their treaty interpretation when deciding the merits of a claim.”). In its Counter-Memorial, Azerbaijan is once again pursuing a theory of incorporation. *See* Counter-Memorial, para. 36 (“Here, the codification of the customary principle in Articles 18(1) and 18(3)’s recognition of State sovereignty and sovereign rights over energy resources results in separate and distinct obligations under the ECT.”). *See also* Decision on Bifurcation (13 Feb. 2025), 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.”).

82. Codification of international law does not occur through a provision like Article 18, which briefly “recognise[s]” and “reaffirm[s]” expansive fields of international law. Article 18 is, in the words of commentators, an “uncontroversial statement,” an “introductory statement,”¹⁵⁴ a “generic affirmation” restating “what is, in fact, no more than a truism.”¹⁵⁵

83. Codification, in contrast, is an intentional and systematic process that requires identifying and memorializing precise rules of customary international law. For example, the Statute of the ILC—*i.e.*, the United Nations body mandated to, *inter alia*, codify international law—defines the codification of international law as “the more precise formulation and systematization of rules of international law in fields where there already has been extensive State practice, precedent and doctrine.”¹⁵⁶ Article 18 is not a more precise formulation and systemization of the rule of permanent sovereignty over natural resources, but rather a “generic affirmation” of the principle.¹⁵⁷

84. In this connection, Azerbaijan’s attempt to draw parallels between Article 18 and the VCLT is self-defeating.¹⁵⁸ The VCLT was the product of two decades of preparation by the ILC with the aim of codifying the numerous and nuanced customary rules of treaty interpretation.¹⁵⁹ The Convention’s 85 articles establish a detailed framework for the application of the codified rules as concrete treaty obligations.¹⁶⁰ This is in stark contrast to Article 18’s open-ended reaffirmation of external principles. Were Article 18 intended to transform rules of customary international law on sovereignty and sovereign rights into an operative treaty rule, far greater specificity would have been expected and required. And far greater care and attention would have been exercised by the Contracting Parties.

¹⁵⁴ K. Hobér, *The Energy Charter Treaty: A Commentary* (OUP, 2020) (CL-059), p. 348.

¹⁵⁵ 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.

¹⁵⁶ Statute of the International Law Commission (1947) (RL-182), Article 15.

¹⁵⁷ 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.

¹⁵⁸ Counter-Memorial, para. 35.

¹⁵⁹ See generally M. E. Villiger, “History of the Convention,” in *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Brill, Nijhoff, 2008) (RL-214).

¹⁶⁰ Vienna Convention on the Law of Treaties (1969) (CL-011).

85. Indeed, there are provisions of the ECT that come close to codifying customary international law, such as Article 10(1) concerning fair and equitable treatment and Article 13(1) concerning expropriation.¹⁶¹ Through these provisions, the Contracting Parties started with two basic rules on the protection of foreign nationals and their property, elaborated their content, and adapted them to fit the specific objectives of the ECT. Those provisions use mandatory language (“shall”) and contain details on how they are to be implemented.¹⁶² They were subject to intense debate by negotiating States, with Article 10 in particular resulting in multiple States recording declarations and binding understandings.¹⁶³

86. Simply put, States would never “codify” a rule as fundamental as what constitutes State sovereignty and sovereign rights over critical resources in such a cavalier way, especially if their intention was to create an actionable provision. Rather, as Azerbaijan recognizes, the issue of permanent sovereignty over natural resources was the subject of extensive discussions among States throughout the 1960s and 1970s.¹⁶⁴ And instruments that made attempts at codifying these

¹⁶¹ Energy Charter Treaty with Related Documents (**CL-001**), ECT, Articles 10(1), 13(1).

¹⁶² See *id.*, ECT, Articles 10(1) (“Each Contracting Party *shall*, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area. Such conditions *shall* include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment. Such Investments *shall* also enjoy the most constant protection and security and no Contracting Party *shall in any way* impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal. *In no case shall* such Investments be accorded treatment less favourable than that *required* by international law, including treaty obligations. Each Contracting Party *shall* observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party.”) (emphasis added), 13(1) (“Investments of Investors of a Contracting Party in the Area of any other Contracting Party *shall not* be nationalised, expropriated or subjected to a measure or measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as ‘Expropriation’) except where such Expropriation is: (a) for a purpose which is in the public interest; (b) not discriminatory; (c) carried out under due process of law; and (d) accompanied by the payment of prompt, adequate and effective compensation. Such compensation *shall amount* to the fair market value of the Investment expropriated at the time immediately before the Expropriation or impending Expropriation became known in such a way as to affect the value of the Investment (hereinafter referred to as the ‘Valuation Date’). Such fair market value *shall* at the request of the Investor be expressed in a Freely Convertible Currency on the basis of the market rate of exchange existing for that currency on the Valuation Date. Compensation *shall also include* interest at a commercial rate established on a market basis from the date of Expropriation until the date of payment.”) (emphasis added).

¹⁶³ *Id.*, ECT, pp. 53-58. See also K. Hobér, “Part III: Investment Promotion and Protection,” in *The Energy Charter Treaty: A Commentary* (OUP, 2020) (**RL-253**), p. 184 (“That Article 10 was a difficult—and perhaps controversial—provision to negotiate is illustrated by the fact that it is accompanied by four understandings, three declarations, two chairman’s statements, and one decision.”).

¹⁶⁴ See, Statement of Claim, para. 190 (citing United Nations General Assembly, *Resolution 1803: Permanent Sovereignty Over Natural Resources*, UN Doc. A/RES/1803 (XVII) (14 Dec. 1962) (**CL-002**)). See also United Nations General Assembly, *Resolution 3171 (XXVIII): Permanent Sovereignty Over Natural Resources*, UN Doc. A/RES/3171(XXVIII) (17 Dec. 1973) (**CL-013**); United Nations General Assembly, *Resolution 3281 (XXIX): Charter of Economic Rights and Duties of States*, UN Doc. A/RES/3281(XXIX) (12 Dec. 1974) (**CL-015**); United Nations

principles—such as the 1974 Charter of Economic Rights and Duties of States—were the result of intense debate and remain contentious even today.¹⁶⁵ The idea that States codified such rules in Article 18 is a non-starter.

87. Instead, as commentators have recognized, Article 18 is merely “a distant echo of the debates generated by the movement for permanent sovereignty over Natural Resources during the 1960’s and 1970’s.”¹⁶⁶ This “distant echo” was not designed to sweep an entire field of international law into the ECT’s ambit.

88. Moreover, even putting to one side the question of codification, Armenia explained in Section II.A above that broad formulations—including far more precise and sophisticated ones than Article 18—cannot “be interpreted as incorporating into [a] [t]reaty all of the provisions of international law concerning” a field of law that is not the subject matter of the treaty.¹⁶⁷

General Assembly *Ad Hoc* Committee of the Sixth Special Session, *Resolution 3201 (S-VI): Declaration on the Establishment of a New International Economic Order* (1 May 1974) (CL-014).

¹⁶⁵ See United Nations General Assembly, *Resolution 3281 (XXIX): Charter of Economic Rights and Duties of States*, UN Doc. A/RES/3281(XXIX) (12 Dec. 1974) (CL-015); Organisation for Economic Co-operation and Development, “The Multilateral Agreement on Investment: The MAI Negotiating Text as of 24 April 1998”, DAF/MAI/NM(98)2/REV1 (1998) (RL-204), notes 1 (“One delegation, with the support of another delegation, proposes that the Preamble include the following language on natural resources: ‘Reaffirming the sovereignty and sovereign rights of States over natural resources within the limits of national jurisdiction.’”), 114 (“[S]ome delegations propose a two - pronged alternative solution [with respect to an article granting authorizations for the prospection, exploitation and production of minerals] which would a) recognise the sovereign rights of the State over the country’s natural resources while b) confirming the full applicability of the MAI obligations at the time of the granting to MAI investors and their investments of any specific right under a concession, license, authorisation or permit concerning the prospection, exploitation or production of all natural resources, including hydrocarbons or minerals.”). See also Y. Tyagi, “Permanent Sovereignty over Natural Resources,” *Cambridge Journal of International and Comparative Law*, Vol. 4, Issue 3 (2015) (RL-236), p. 611 (“A categorical answer to the question whether PSNR can be accurately characterised as a fundamental right of states would amount to an oversimplification of the complex webs of norms that manifest PSNR in different fields. The international debate on PSNR began in the context of the right to self-determination of nations. Later, it moved on to the direction of international economic law. Subsequently, it entered the mainstream of international human rights law. Eventually, it expanded into the fields of international environmental law and international trade law. Since PSNR as a fundamental right of states has not been equally and uniformly developed in all these fields, any generalisation of the status of the said right is bound to conceal more than what it would reveal.”).

¹⁶⁶ K. Hobér, *The Energy Charter Treaty: A Commentary* (OUP, 2020) (CL-059), pp. 347-348.

¹⁶⁷ *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.

89. In sum, Azerbaijan cannot demonstrate that the ECT Contracting Parties’ “intention which appears from the ordinary meaning of the terms” of Article 18 was to create an inter-State cause of action for disputes regarding permanent sovereignty over natural resources.¹⁶⁸

2. The Object and Purpose of the ECT Does Not Support Azerbaijan’s Interpretation

90. As Armenia explained in its Memorial and in Section II.A above, general formulations in treaties cannot be the basis for a tribunal’s jurisdiction over external obligations that fall outside the treaty’s subject matter. As also explained,¹⁶⁹ the ICJ pays particular attention to the object and purpose of a treaty when assessing whether a general formulation, taken in isolation, can form the basis for its jurisdiction.¹⁷⁰

91. Azerbaijan argues that the object and purpose of the ECT “is broad and far reaching in scope,”¹⁷¹ and that its interpretation of Article 18 is consistent with this “broad” purpose. Azerbaijan’s attempt to broaden the scope of the ECT’s object and purpose in order to shoehorn its claims into the Treaty cannot succeed.

92. Armenia does not dispute that the starting point for ascertaining the ECT’s object and purpose is Article 2, which defines the “Purpose of the Treaty” as “establish[ing] a legal framework in order *to promote long-term cooperation in the energy field*.”¹⁷² But for Armenia, the “legal framework” referred to in Article 2 is then reflected in the two main Parts of the Treaty,

¹⁶⁸ International Law Commission, *Draft Articles on the Law of Treaties* (1966) (CL-009), p. 221, para. (12).

¹⁶⁹ Memorial, paras. 46-47.

¹⁷⁰ See *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; *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, Preliminary Objections, Judgment, I.C.J. Reports 2018 (RL-073), p. 321-322, para. 95; *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.

¹⁷¹ Counter-Memorial, para. 51. Azerbaijan cites the *Landesbank v. Spain* investor-State arbitration in an attempt to prove that the ECT is “broad and far reaching in scope, distinguishing it from investment treaties.” See *id.*, note 97. But in that case, the only thing the tribunal stated was that its scope was not confined to “western investment in eastern Europe,” which Armenia does not deny. *Landesbank and others v. Kingdom of Spain*, ICSID Case No. ARB/15/45, Decision on the “Intra-EU” Jurisdictional Objection (25 Feb. 2019) (CL-142), para. 119. Armenia also never argued that the ECT is only an investment treaty like bilateral investment treaties. Rather, it is a multilateral trade and investment framework.

¹⁷² Energy Charter Treaty with Related Documents (CL-001), ECT, Article 2 (emphasis added); see Memorial, para. 56.

dedicated respectively to “Commerce” (*i.e.*, trade) and “Investment Promotion and Protection.”¹⁷³ No other Part of the ECT is devoted to a substantive subject matter.

93. Azerbaijan argues that “[t]he ECT takes a broad view of that legal framework, incorporating, *inter alia*, provisions on transit, competition, transfer of technology, access to capital, and environmental regulation.”¹⁷⁴ But this supports Armenia’s point. All but one of the provisions Azerbaijan refers to are within the “Commerce” part of the treaty.¹⁷⁵ They are also subject matters that are regularly addressed in trade agreements, such as competition, transfer of technology and access to capital.¹⁷⁶ The only other provision, Article 19 on “Environmental Aspects,” is in the Miscellaneous Part, and, as Armenia has explained, is an interpretive provision setting out the Treaty’s aspirations on sustainable development in order to influence the interpretation of the ECT’s trade and investment Parts.¹⁷⁷ In any event, none of the provisions cited by Azerbaijan has the effect of altering the object and purpose of the ECT such that it would support an interpretation of Article 18 as enforcing the sovereign rights of one State over its energy resources as against other States.

94. Armenia has also shown¹⁷⁸ that the preamble of the ECT—which Azerbaijan does not dispute evidences the Treaty’s object and purpose—emphasizes the ECT’s goal to “catalyse economic growth by means of measures to liberalise *investment and trade* in energy.”¹⁷⁹ The preamble is replete with references to trade and investment objectives, such as:¹⁸⁰

- “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

¹⁷³ *Id.*, ECT, Parts II-III, pp. 44, 53; *see* Memorial, para. 56.

¹⁷⁴ Counter-Memorial, para. 51.

¹⁷⁵ *See* Energy Charter Treaty with Related Documents (CL-001), ECT, Articles 6 (Competition), 7 (Transit), 8 (Transfer of Technology), 9 (Access to Capital).

¹⁷⁶ According to a study by the World Bank, the majority of preferential trade agreements (“PTAs”) registered with the WTO address competition and access to capital (free transfer or movement of capital). *See* A. Mattoo *et al.*, *Handbook of Deep Trade Agreements*, World Bank (2020) (RL-254), p. 8, Figure O.2 (“Number of policy areas covered in PTAs, by policy”), p. 572 (mentioning that several trade agreements provide for the transfer of technology).

¹⁷⁷ *See* Energy Charter Treaty with Related Documents (CL-001), ECT, Article 19; Memorial, para. 69.

¹⁷⁸ Memorial, para. 57.

¹⁷⁹ Energy Charter Treaty with Related Documents (CL-001), ECT, preamble, p. 38 (emphasis added).

¹⁸⁰ *Id.*, ECT, preamble, pp. 38-39 (emphasis added).

the Agreement Establishing the World Trade Organization and as otherwise provided for in this Treaty;”

- “Affirming that Contracting Parties attach the utmost importance to the effective implementation of *full national treatment and most favoured nation treatment*, and that these commitments will be applied to the *Making of Investments* pursuant to a supplementary treaty;”
- “Determined progressively *to remove technical, administrative and other barriers to trade* in Energy Materials and Products and Energy-Related Equipment, technologies and services;”
- “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;” and
- “Having regard to competition rules concerning mergers, monopolies, anticompetitive practices and abuse of dominant position.”

95. In fact, of the 15 preambular paragraphs, seven are explicitly devoted to trade and investment; the rest concern nuclear weapons, energy, the environment, or describe the context leading up to the adoption of the Treaty.¹⁸¹ The preoccupation with the interaction between the ECT and the nascent World Trade Organization (“**WTO**”) permeates the entire treaty, demonstrating the Contracting Parties’ understanding of the subject matter of the Treaty as overlapping with the WTO framework and the General Agreement on Trade and Tariffs specifically.¹⁸²

96. By contrast, as Armenia pointed out,¹⁸³ the preamble does not contain any provision that speaks to the obligation of a State vis-à-vis another State’s energy resources. In fact, the preamble does not even refer to “sovereignty” or “sovereign rights” at all. Rather, Article 18 is the

¹⁸¹ See *id.*, pp. 37-39.

¹⁸² See, e.g., *id.*, ECT, Article 4 (“Non-Derogation from WTO Agreement”), Article 5 (“[T]his shall be without prejudice to the Contracting Party’s rights and obligations under the WTO Agreement.”), Article 14(6), Article 20(1), Article 25(3), Article 29, Understanding with respect to Article 24, Annex W.

¹⁸³ Memorial, para. 59.

only reference to sovereignty in the entire Treaty, outside of the definition of “Area,” which refers to “territory under [a Contracting Party’s] sovereignty.”¹⁸⁴

97. Armenia has also explained that the history of the ECT confirms its object and purpose to promote trade and investment in the energy sector.¹⁸⁵ The ECT was the culmination of a project to assist Eastern European economies in transitioning into market economies following the collapse of the USSR. In particular, the ECT was designed to modernize and diversify Eastern European States’ energy sectors through Western European foreign investment, while also ensuring energy security for Western European countries by allowing them access to emerging Eastern European energy markets and resources.¹⁸⁶ This was the kind of “long-term cooperation [...] based on complementarities and mutual benefits” envisaged in Article 2 of the ECT.¹⁸⁷

¹⁸⁴ Energy Charter Treaty with Related Documents (CL-001), ECT, Article 1(10).

¹⁸⁵ See Memorial, paras. 54-55, 57

¹⁸⁶ J. Doré, “Negotiating the Energy Charter Treaty,” in T. W. Wälde, *The Energy Charter Treaty: An East-West Gateway for Investment & Trade* (Kluwer, 1996) (RL-103), pp. 138-139; A. Konoplyanik and T. Walde, “Energy Charter Treaty and its Role in International Energy,” *Journal of Energy & Natural Resources Law*, Vol. 24 (2006) (CL-042), pp. 524-525, 529; Energy Charter Secretariat, *The Energy Charter Treaty: A Reader’s Guide* (2004) (RL-110), p. 6.

¹⁸⁷ Energy Charter Treaty with Related Documents (CL-001), ECT, Article 2; see D. Azaria, “Energy Transit under the Energy Charter Treaty and the General Agreement on Tariffs and Trade,” *Journal of Energy & Natural Resources Law*, Vol. 27 (2009) (CL-045), pp. 562-563 (“In exchange for guarantees in investment protection, trade and transit, EC Member States would provide capital to develop the rich natural resource endowments of former-USSR states. Producers, consumers and transit states were to benefit mutually.”); K. Hobér, *The Energy Charter Treaty: An Overview* (2007) (CL-124), p. 324 (“In the early 1990s, various ideas were discussed on how to develop energy cooperation between Eastern and Western Europe. Russia and many of its neighbouring countries were rich in energy but in great need of investment to reconstruct their economies. At the same time, Western European countries were trying to diversify their sources of energy supplies to decrease their potential dependence on other parts of the world. There was, therefore, a recognized need to set up a commonly accepted foundation for energy cooperation between the states of the Eurasian continent. It was out of this need that the Energy Charter Process was born.”); P. Muchlinski, “The Energy Charter Treaty: Towards a New International Order for Trade and Investment or a Case of History Repeating Itself?,” in T. W. Wälde, *The Energy Charter Treaty: An East-West Gateway for Investment & Trade* (Kluwer, 1996) (RL-199), pp. 205-206 (“In essence the bargain was to be that, in exchange for guarantees of investment protection and promotion given by all the signatories, the EU Member States would ensure closer cooperation with the FSU and the CEE states in the field of energy investment and as regards access to EU energy markets. In this way both sides would benefit. The postsocialist states would gain access to investment capital and technology from EU sources, enabling them to expand their energy resources industries both domestically and for export, while the EU Member States would secure access to energy resources from their Eastern neighbours, thereby reducing their dependence on Middle Eastern sources. This deal would also correspond with the emerging industrial organisation of the EU energy market, especially in the field of natural gas, where existing and projected pipelines are expected to transport increased volumes of such gas from Eastern to Western Europe.”); C. S. Bamberger, “Overview of the Energy Charter Treaty,” in T. W. Wälde, *The Energy Charter Treaty: An East-West Gateway for Investment & Trade*, (Kluwer, 1996) (RL-107), p. 1.; J. Doré, “Negotiating the Energy Charter Treaty,” in T. W. Wälde, *The Energy Charter Treaty: An East-West Gateway for Investment & Trade* (Kluwer, 1996) (RL-103), pp. 138-139; A. Marhold, “Fragmentation and the Nexus between the WTO and the ECT in Global Energy Governance – A Legal-Institutional Analysis Twenty Years Later,” *Journal of World Investment & Trade*, Vol. 16 (2015) (RL-235), p. 397; A.

98. Armenia has further made clear that it is far from alone in understanding the ECT as having the object and purpose of promoting trade and investment. Both the ECT Secretariat¹⁸⁸ and all commentaries on the record see it that way.¹⁸⁹ In fact, one of the commentaries extensively cited by both Parties is even entitled “*The Energy Charter Treaty: An East-West Gateway for Investment and Trade*.”¹⁹⁰

99. Azerbaijan cannot overcome—and therefore studiously ignores—Armenia’s detailed demonstration in this regard.

Konoplyanik and T. Walde, “Energy Charter Treaty and its Role in International Energy,” *Journal of Energy & Natural Resources Law*, Vol. 24 (2006) (CL-042), p. 530.

¹⁸⁸ 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.”).

¹⁸⁹ See A. Konoplyanik and T. Walde, “Energy Charter Treaty and its Role in International Energy,” *Journal of Energy & Natural Resources Law*, Vol. 24 (2006) (CL-042), p. 526 (“[The ECT] is emerging as a significant international legal instrument providing protection for investment and the facilitation of trade and transit.”) (emphasis added); D. Azaria, “Energy Transit under the Energy Charter Treaty and the General Agreement on Tariffs and Trade,” *Journal of Energy & Natural Resources Law*, Vol. 27 (2009) (CL-045), pp. 562-563; K. Hobér, *The Energy Charter Treaty: A Commentary* (OUP) (2020) (RL-172); L. Brazell, “The Energy Charter Treaty: Some Observations on its International Context and Internal Structure,” in T. W. Wälde, *The Energy Charter Treaty: An East-West Gateway for Investment and Trade* (Kluwer, 1996) (RL-200), p. 226 (“The Treaty is thus, first and foremost, a treaty to govern the conditions under which investments can be made with minimum risk and the products of those investments traded on the global markets.”); L. Reins “Article 2: Purpose of the Treaty,” in *Commentary on the Energy Charter Treaty* (Elgar, 2023) (RL-105), p. 62; P. Muchlinski, “The Energy Charter Treaty: Towards a New International Order for Trade and Investment or a Case of History Repeating Itself?,” in T. W. Wälde, *The Energy Charter Treaty: An East-West Gateway for Investment & Trade* (Kluwer, 1996) (RL-199), pp. 205-206 (“The Charter Treaty has its origins in the earlier European Energy Charter. This had as its basic concept the encouragement of economic growth through measures of liberalisation in investment and trade in the energy field. As such it sought to create a liberal international order for trade and investment in a specific industrial sector.”) (emphasis added); A. Marhold, “Fragmentation and the Nexus between the WTO and the ECT in Global Energy Governance – A Legal-Institutional Analysis Twenty Years Later,” *Journal of World Investment & Trade*, Vol. 16 (2015) (RL-235), p. 397 (“The objective of the Treaty is to provide a stable and predictable framework for trade in energy materials, products and energy-related equipment, based on GATT/WTO rules.”).

¹⁹⁰ See Counter-Memorial, notes 290, 291 (citing M. M. Roggenkamp, “Transit of Network-bound Energy: the European Experience,” in T. W. Wälde, *The Energy Charter Treaty: An East-West Gateway for Investment and Trade* (Kluwer, 1996) (RL-106) (emphasis added). See also A. Marhold, “Fragmentation and the Nexus between the WTO and the ECT in Global Energy Governance – A Legal-Institutional Analysis Twenty Years Later,” *Journal of World Investment & Trade*, Vol. 16 (2015) (RL-235), pp. 396-397 (“The ECT is a similar treaty regime to the WTO, but specifically tailored to energy trade, in addition to incorporating a significant investment part and an environmental protocol. In essence, the ECT was born as an alternative to concluding an energy specific agreement within the GATT/WTO framework after the Cold War had ended. [...] The objective of the Treaty is to provide a stable and predictable framework for trade in energy materials, products and energy-related equipment, based on GATT/WTO rules.”).

100. Rather than rely on the ECT itself, Azerbaijan spends the bulk of its analysis on two other instruments, the EEC and IEC because of these documents' references to sovereignty.¹⁹¹ Both of these documents, of course, are non-binding political declarations and should accordingly be given limited if any weight.¹⁹²

101. In that regard, Azerbaijan claims that the EEC is relevant because Article 2 of the ECT provides that the ECT establishes a legal framework “in accordance with the objectives and principles of the Charter” (*i.e.*, the EEC).¹⁹³ But it is one thing to say that the ECT's interpretation should be guided by the principle of sovereignty by *renvoi* to the EEC. It is quite another to argue that this principle of sovereignty constitutes *the object and purpose* of the ECT.¹⁹⁴

102. Regardless, Armenia's interpretation of Article 18 is consistent with the objectives and principles of the EEC. As explained, the 1991 EEC is a non-binding political declaration of principles that preceded the adoption of the ECT.¹⁹⁵ As the first step of the Energy Charter Process that culminated in the adoption of the ECT, the EEC's objective—like that of the ECT—was to encourage the liberalization of “*investment and trade* in the energy field.”¹⁹⁶ While the EEC's preamble “recognis[es] State sovereignty and sovereign rights over energy resources,”¹⁹⁷ this single preambular paragraph cannot be read in isolation. Rather, it must be read in conjunction with the

¹⁹¹ Counter-Memorial, paras. 51-53; Statement of Claim, para. 194.

¹⁹² The IEC in particular emphasizes that it “is a declaration of political intention aiming at strengthening the energy cooperation between the signatories and does not bear any legally binding obligation.” Energy Charter Treaty with Related Documents (CL-001), IEC, p. 11.

¹⁹³ Counter-Memorial, paras. 50-51.

¹⁹⁴ *Id.*, para. 53. In that regard, Azerbaijan seems to blur the distinction between a treaty's stated purpose (which is obviously relevant to determine the treaty's object and purpose for purposes of treaty interpretation), and a treaty's “principles.”

¹⁹⁵ See Memorial, para. 60.

¹⁹⁶ P. Muchlinski, “The Energy Charter Treaty: Towards a New International Order for Trade and Investment or a Case of History Repeating Itself?,” in T. W. Wälde, *The Energy Charter Treaty: An East-West Gateway for Investment & Trade* (Kluwer, 1996) (RL-199), p. 205 (emphasis added). See also Energy Charter Treaty with Related Documents (CL-001), EEC, Title I (“The signatories are desirous of improving security of energy supply and of maximising the efficiency of production, conversion, transport, distribution and use of energy, to enhance safety and to minimise environmental problems, on an acceptable economic basis.”).

¹⁹⁷ Energy Charter Treaty with Related Documents (CL-001), EEC, preamble, p. 28.

rest of the preamble, which emphasizes the EEC's goals of "establish[ing] closer, mutually beneficial commercial relations and *promot[ing] energy investments*."¹⁹⁸

103. Moreover, as Armenia explained,¹⁹⁹ the other references to sovereignty in the declaration are merely as a "*framework*" for the goal of promoting trade and investment in the energy field. For example, Title I describes the EEC's principles as:

Within the framework of State sovereignty and sovereign rights over energy resources and in a spirit of political and economic cooperation, they undertake to promote the development of an efficient energy market throughout Europe, and a better functioning global market, in both cases based on the principle of non-discrimination and on market-oriented price formation, taking due account of environmental concerns. They are determined to create a climate favourable to the operation of enterprises and to the flow of investments and technologies by implementing market principles in the field of energy.²⁰⁰

104. Thus, the EEC's scattered references to sovereignty do not support Azerbaijan's interpretation of Article 18 as enforcing rights and obligations between States. If anything, they confirm that the right to sovereignty was only meant to guide the interpretation of investment provisions and investor-State relationships.

105. As to the IEC, Azerbaijan fails to explain how this 2015 document could shed light on the object and purpose of the ECT, which was adopted two decades earlier in 1994. The IEC was negotiated by 80 States, many of which were not signatories to the EEC.²⁰¹ Its goal was to encourage cooperation in the energy field among its signatories and, to a lesser extent, to encourage its signatories to consider acceding to the ECT if they were not already parties to it.²⁰² In any event,

¹⁹⁸ *Id.* (emphasis added). The preamble also recognizes "*the role of entrepreneurs*, operating within a transparent and equitable legal framework, in promoting cooperation under the Charter." *Id.* (emphasis added).

¹⁹⁹ Memorial, paras. 60-61.

²⁰⁰ Energy Charter Treaty with Related Documents (CL-001), EEC, Title I (emphasis added). *See also id.*, Title II ("In order to attain the objectives set out above, the signatories will, within the framework of State sovereignty and sovereign rights over energy resources, take coordinated action to achieve greater coherence of energy policies, which should be based on the principle of *non-discrimination and on market-oriented price formation*, taking due account of environmental concerns.") (emphasis added).

²⁰¹ The International Energy Charter: Agreed text for adoption in The Hague at the Ministerial Conference of the International Energy Charter (20 May 2015) (CL-135), pp. 19, 23-24.

²⁰² *Id.*, pp. 20, 21.

the references to sovereignty in the IEC are also by way of background informing the objectives of “promot[ing] the development of efficient, stable and transparent energy markets at regional and global levels based on the principle of non-discrimination and market-oriented price formation.”²⁰³

106. Finally, Azerbaijan attempts to invoke investor-State case law in support of its position on the ECT’s object and purpose—also to no avail. Azerbaijan states that “[t]ribunals interpreting the ECT have found that long-term cooperation in the energy field requires respecting States’ sovereignty, as embodied in each State’s particular role, responsibilities, and purview over its own energy resources under international law.”²⁰⁴ It cites only two cases for this proposition, *SunReserve v. Italy* and *AES v. Spain*.²⁰⁵

107. The first case says nothing of the sort. In *SunReserve*, the tribunal merely stated that “the ECT is intended to establish a ‘legal framework’ so as to promote long-term cooperation between the ECT Contracting Parties,” noting in particular that “strengthening the rule of law constitutes an important purpose behind the ECT.”²⁰⁶ That statement was the second aspect of the object and purpose that the tribunal identified, the first being that “the ECT prioritizes the objectives of stability and transparency in the legal framework both at the national and the global level.”²⁰⁷ Thus, this case offers no support for Azerbaijan’s argument that the object and purpose of the ECT revolves around the protection of one State’s sovereignty and sovereign rights from another State’s interference.

108. In *AES v. Spain*, the tribunal stated that “the Parties to the ECT aimed at realizing a balance between the sovereign rights of the State over energy resources and the creation of a climate

²⁰³ Energy Charter Treaty with Related Documents (**CL-001**), IEC, Title I; *id.*, Title II (“In order to attain the objectives set out above, the signatories will, without prejudice to the sovereignty of each State over its energy resources, and its rights to regulate energy transmission and transportation within its territory respecting all its relevant international obligations, take coordinated action to achieve greater coherence of energy policies, which should be based on the principle of non discrimination and on market-oriented price formation, taking due account of environmental concerns.”).

²⁰⁴ Counter-Memorial, para. 54.

²⁰⁵ *Id.*, para. 54, note 101.

²⁰⁶ *SunReserve Luxco Holdings SRL v. Italy*, SCC Case No. 132/2016, Final Award (25 Mar. 2020) (**CL-061**), para. 681.

²⁰⁷ *Id.*, paras. 679-681.

favorable to the flow of investments on the basis of market principles.”²⁰⁸ But Armenia does not dispute that. It has in fact been Armenia’s consistent position that Article 18’s reference to the principle of sovereignty was meant as a balance against the rights of foreign investors under the ECT.²⁰⁹ What this decision (and by definition any other investor-State decision) does *not* support, however, is the view that the ECT’s provision on sovereignty could regulate *inter-State relationships*. Indeed, the tribunal in that case referred to the object and purpose of the ECT to interpret Article 10(1), which provides an obligation to accord fair and equitable treatment to investors.²¹⁰ The tribunal specified that “State sovereignty” in the ECT referred to “the State’s right to regulate and to adapt the regulatory framework to changed circumstances,”²¹¹ a well-known defense for host States against accusations of a failure to accord fair and equitable treatment. The tribunal added that “the protection of investments and the right to regulate operate in a balanced way under the ECT *as in all other investment treaties*.”²¹²

109. Moreover, numerous tribunals have acknowledged the commonsense point that the ECT’s object and purpose is, in fact, the promotion of trade and investment in the energy field.²¹³

²⁰⁸ *AES Solar and others (PV Investors) v. Spain*, PCA Case No. 2012-14, Final Award (28 Feb. 2020) (**CL-060**), para. 570.

²⁰⁹ *See* Memorial, paras. 36, 74, 86-87.

²¹⁰ Energy Charter Treaty with Related Documents (**CL-001**), ECT, Article 10(1); *AES Solar and others (PV Investors) v. Spain*, PCA Case No. 2012-14, Final Award (28 Feb. 2020) (**CL-060**), paras. 561-570.

²¹¹ *AES Solar and others (PV Investors) v. Spain*, PCA Case No. 2012-14, Final Award (28 Feb. 2020) (**CL-060**), para. 570.

²¹² *Id.* (emphasis added). *See also EBL and Tubo Sol v. Kingdom of Spain*, ICSID Case No. ARB/18/42, Award (11 Jan. 2024) (**RL-266**), paras. 681, 683 (stating that “the ECT’s object and purpose [...] reflect[s] a balance between maintaining sovereign rights and *promoting private investment*” and that “State sovereignty and sovereign rights over energy resources,” must be seen “within the context” of “the creation of a favorable climate for cross-border investment”) (emphasis added).

²¹³ *See, e.g., Cem Cengiz Uzan v. Republic of Turkey*, SCC Case No. V 2014/023, Award on Respondent’s Bifurcated Preliminary Objection (20 Apr. 2016) (**RL-238**) (“Without having to examine the preparatory works of the ECT, it is clear that its ‘object and purpose’ was to create a wide expanding energy framework for the ease and encouragement of international energy investments.”); *Khan Resources Inc., Khan Resources B.V. and CAUC Holding Company Ltd. v. the Government of Mongolia and MonAtom Co., Ltd.*, PCA Case No. 2011-09, Decision on Jurisdiction (25 July 2012) (**CL-130**), paras. 425-426 (“It is [...] necessary to investigate with particular attention the ‘object and purpose’ of the Treaty. *The Treaty seeks to create a predictable legal framework for investments in the energy field.* [...] This lack of certainty would impede the investor’s ability to evaluate whether or not to make an investment in any particular state. *This would be contrary to the Treaty’s object and purpose.*”) (emphasis added); *Vattenfall AB and Others v. Federal Republic of Germany (II)*, ICSID Case No. ARB/12/12, Decision on the Achmea Issue (31 Aug. 2018) (**RL-244**), para. 198 (“[T]he ECT aims to promote cooperation and the flow of international investment in the energy field to serve the ultimate goal of creating and maintaining a stable and efficient energy market.”); *LSG Building Solutions GmbH and others v. Romania*, ICSID Case No. ARB/18/19, Decision on Jurisdiction, Liability and Principles of

3. The Context of Article 18 Does Not Support Azerbaijan's Interpretation

110. In accordance with Article 31(1) of the VCLT, the terms of a treaty must be interpreted “in their context.”²¹⁴ As Armenia explained in its Memorial,²¹⁵ and as Azerbaijan does not appear to dispute, the context of a provision includes the treaty's other text, including its preamble.²¹⁶

111. Azerbaijan fails to rebut the contextual support for Armenia's interpretation of Article 18 and can muster no contextual support of its own.

112. *First*, Azerbaijan ignores a relevant binding interpretation that restricts the scope of the ECT. In accordance with the VCLT, a treaty's context includes “any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty.”²¹⁷ As Armenia explained,²¹⁸ 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.”²¹⁹ In one such understanding, the Contracting Parties expressly emphasized the limited scope of the ECT:

The representatives underline that the provisions of the Treaty have been agreed upon *bearing in mind the specific nature of the Treaty*

Reparation (11 July 2022) (**RL-260**), para. 435 (“[T]he object and purpose of the ECT [...] is to confer certain benefits upon investors of Contracting Parties to this multilateral instrument.”); *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Responsibility and on the Principles of Quantum (30 Nov. 2018) (**RL-246**), para. 242 (“[T]he ECT[’s] common purpose is ‘to promote the development of an efficient energy market throughout Europe’ in view of creating ‘a climate favourable to the operation of enterprises’ and ‘to the flow of investments and technologies by implementing market principles in the field of energy.’”); *EBL and Tubo Sol v. Kingdom of Spain*, ICSID Case No. ARB/18/42, Award (11 Jan. 2024) (**RL-266**), paras. 681, 683.

²¹⁴ Vienna Convention on the Law of Treaties (1969) (**CL-011**), Article 31(1).

²¹⁵ Memorial, para. 63.

²¹⁶ Vienna Convention on the Law of Treaties (1969) (**CL-011**), Article 31(2). *See also* O. Dörr & K. Schmalenbach, “Article 31: General Rule of Interpretation,” in *Vienna Convention on the Law of Treaties - A Commentary* (Springer, 2012) (**RL-224**), p. 543 (“The entire text of the treaty is to be taken into account as ‘context’, including title, preamble and annexes.”); R. K. Gardiner, “The General Rule: (1) The Treaty, its Terms, and their Ordinary Meanings” in *Treaty Interpretation* (2nd Ed., OUP, 2015) (**CL-051**), p. 205; J. M. Sorel & V. Boré Eveno, “Article 31 – General Rule of Interpretation” in O. Corten & P. Klein, *The Vienna Conventions on the Law of Treaties – A Commentary* (OUP, 2011) (**RL-221**), p. 824.

²¹⁷ Vienna Convention on the Law of Treaties (1969) (**CL-011**), Article 31(2)(a).

²¹⁸ Memorial, para. 65.

²¹⁹ Energy Charter Treaty with Related Documents (**CL-001**), ECT, p. 37.

aiming at a legal framework to *promote long-term cooperation in a particular sector* and as a result cannot be construed to constitute a precedent in the context of other international negotiations.²²⁰

113. Given that the ECT was an unprecedented undertaking in terms of its scale and ambition, and was concluded at a pivotal moment in history, the Contracting Parties took care to emphasize that its provisions were without prejudice to the negotiation of other international obligations outside the scope of the Treaty. This binding understanding reflects a concern to ensure that the carefully negotiated trade and investment obligations in the ECT did not spill over into other trade and investment agreements, such as the Marrakesh Agreement establishing the WTO, which was concurrently being negotiated.²²¹ It is inconceivable that the same States that were this concerned about the ECT's impact on other trade and investment agreements would have understood Article 18 as infringing on even more sensitive questions of international law like the content of the principle of permanent sovereignty over natural resources.

114. *Second*, Azerbaijan does not offer any convincing response to Armenia's reliance on Article 18(2) as confirming the overall interpretive function of Article 18.²²² Article 18(2)—which falls between the two provisions invoked by Azerbaijan—provides instructive context: “[w]ithout 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.”²²³

115. Article 18(2) serves as a “without prejudice” clause, clarifying that the ECT does not infringe upon each State's right to elaborate its own regime for the ownership of energy resources.²²⁴ At the same time, reflecting the need to balance sovereignty and private investment, the Contracting States adopted a declaration that “Article 18(2) shall not be construed to allow the circumvention of the application of the other provisions of the Treaty.”²²⁵ In other words, Article

²²⁰ *Id.* (emphasis added).

²²¹ Cf. K. Hober, “Preamble,” in *The Energy Charter Treaty: A Commentary* (OUP, 2020) (RL-255), pp. 53-54.

²²² See Memorial, paras. 66-68.

²²³ Energy Charter Treaty with Related Documents (CL-001), ECT, Article 18(2).

²²⁴ C. 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), p. 349.

²²⁵ Energy Charter Treaty with Related Documents (CL-001), ECT, p. 66. 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]

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 other provisions, and not as the source of stand-alone rights and obligations.

116. Azerbaijan describes Armenia's reliance on Article 18(2) as "puzzling" and argues that the provision and its accompanying declaration "simply do not speak to th[e] question" of whether "Articles 18(1) and 18(3) generate no enforceable rights."²²⁶ But as Azerbaijan's own authority acknowledges, a contextual interpretation begins with the "immediate context" including "the wording of surrounding provisions."²²⁷ Article 18(2) is wedged between the two provisions invoked by Azerbaijan, and is therefore of particular relevance to their interpretation.

117. Azerbaijan then argues that Article 18(2) is not of assistance to Armenia because the negotiators of the ECT were concerned that the provision could contradict other provisions of the treaty, and that "[h]ad the negotiators considered Article 18(2) to have no substantive legal effect—as would be the case under the arguments Armenia presses before this Tribunal—they would not have been so concerned with its application in a dispute and its potential to 'gut' other provisions of the Treaty."²²⁸

118. Azerbaijan again misstates Armenia's position. Armenia does not contend that Article 18 has no legal effect at all. Its position is simply that Article 18 only has an interpretive effect on other provisions of the Treaty, while not in itself creating substantive rights and obligations giving rise to an independent cause of action. Thus, Article 18 is "not without legal significance": it serves to "throw light on the interpretation of the other Treaty provisions."²²⁹ The fact that Article 18(2) could be seen to contradict possible interpretations of other provisions is consistent with the

recalled that a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty." *Id.*

²²⁶ Counter-Memorial, para. 46.

²²⁷ R. K. Gardiner, "The General Rule: (1) The Treaty, its Terms, and their Ordinary Meanings" in *Treaty Interpretation* (2nd Ed., OUP, 2015) (CL-051), pp. 197, 199.

²²⁸ Counter-Memorial, para. 47 (citing ECT Travaux, European Energy Charter Conference Secretariat, Note for file regarding "Article 21(2) (Sovereignty over Energy Resources)" (25 Aug. 1994) (CL-115)).

²²⁹ *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.

view that Article 18 was designed to influence the *interpretation of other provisions*. It does not follow, as explained, that Article 18 itself creates legal rights and obligations.

119. Moreover, the *travaux* document cited by Azerbaijan further supports Armenia's position that Article 18 (formerly 21) was merely declaratory of existing rights. Indeed, as the Chairman explained in relation to Article 18(2), "the meaning of Article 21 is that no [Contracting Party] is obliged to change the system of property ownership (*which is why it was considered superfluous to have such an Article in the first place*). The Treaty has no impact on existing regimes/systems."²³⁰ In other words, it was clarified that Article 18(2)—just like Articles 18(1) and 18(3)—could *not* create new legal rights or obligations.

120. *Third*, Azerbaijan's argument that Article 18 must impose an obligation, otherwise it would have been placed in the preamble, goes nowhere.²³¹ As Armenia already demonstrated in both its Request for Bifurcation and Memorial,²³² 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."²³³ Some provisions, including those "in the operative part of certain treaties," serve other purposes.²³⁴

121. Azerbaijan cites one of Armenia's sources for the proposition that "if [a provision] is located in the operational part of the treaty, it has *the capacity* to generate rights and obligations for Parties."²³⁵ But the truism that an operative article *can* generate obligations does not mean that it automatically does so; the truism stands equally for the proposition that an operative article may

²³⁰ ECT Travaux, European Energy Charter Conference Secretariat, Note for file regarding "Article 21(2) (Sovereignty over Energy Resources)" (25 Aug. 1994) (CL-115), p. 4 (emphasis added).

²³¹ Counter-Memorial, paras. 28, 39.

²³² Request for Bifurcation, paras. 43-46; Memorial, para. 29.

²³³ A. Pellet & D. Muller, "Article 38," in A. Zimmermann & C. Tams, *The Statute of the International Court of Justice: A Commentary* (3rd Ed., OUP, 2019) (RL-075), p. 894. See also R. R. Baxter, "International Law in Her Infinite Variety," *International and Comparative Law Quarterly*, Vol. 29, No. 4 (Oct. 1980) (RL-031), p. 553 ("[C]ertain provisions of treaties are merely hortatory."); *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; 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.

²³⁴ A. Pellet & D. Muller, "Article 38," in A. Zimmermann & C. Tams, *The Statute of the International Court of Justice: A Commentary* (3rd Ed., OUP, 2019) (RL-075), pp. 894-895.

²³⁵ Counter-Memorial, para. 66 (citing L. Rajamani, "The 2015 Paris Agreement: Interplay Between Hard, Soft and Non-Obligations," *Journal of Environmental Law*, Vol. 28, No. 2 (2016) (RL-163), p. 343) (emphasis added).

not exercise such capacity so as to generate a right or obligation. In fact, the same journal article, which concerns the Paris Agreement, describes many operative articles of that treaty as creating no legal obligations.²³⁶ And as explained above, the ICJ recently affirmed the same.²³⁷

122. *Fourth*, Azerbaijan misstates Armenia’s position regarding the relevance of the “Miscellaneous” title of Part IV as context for interpreting Article 18. Azerbaijan represents Armenia’s position as being that treaty provisions in Part IV “cannot ‘be the source of freestanding obligations.’”²³⁸ Armenia explained its far more nuanced position as follows:

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.”²³⁹

123. Simply put, Armenia’s position is that, based on the character and content of the other provisions within Part IV, it would be unexpected—to say the least—for Article 18 to have the function that Azerbaijan attributes to it. On Azerbaijan’s reading of Article 18, it can be invoked—completely independently from any provisions pertaining to trade or investment—as an independent cause of action for enforcing one State’s obligations in relation to another States’ sovereignty and sovereign rights over energy resources. This would make Article 18 an extreme outlier among the other “Miscellaneous” provisions, which are all ancillary to the ECT’s trade and investment provisions.

²³⁶ 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.

²³⁷ *Obligations of States in Respect of Climate Change, Advisory Opinion* (23 July 2025) (RL-268), paras. 178 (stating that the principles contained in Article 3 of the UNFCCC “do not constitute standalone obligations within the climate change treaty framework, they guide the interpretation of the treaty obligations”), 181 (“As with the other principles, the Court observes that the principle of sustainable development does not in itself create specific rights and obligations for States, but informs the interpretation of the obligations under the climate change treaties.”), 255.

²³⁸ Counter-Memorial, para. 41.

²³⁹ Memorial, para. 69. See also R. K. Gardiner, “The General Rule: (1) The Treaty, its Terms, and their Ordinary Meanings” in *Treaty Interpretation* (2nd Ed., OUP, 2015) (CL-051), p. 201 (“Articles of treaties frequently have titles or descriptive headings. These are clearly part of the context for the purposes of interpretation.”).

124. Armenia explained in detail in its Memorial the role and functions of each of Articles 19-24 and will not repeat itself.²⁴⁰ By way of reminder, those provisions concern: environmental and sustainable development aspirations to guide States’ “formulation and implementation of their energy policies” (Article 19);²⁴¹ transparency, including the publication of laws “which affect other matters covered by this Treaty” (Article 20);²⁴² taxation carveouts and clarifications (Article 21);²⁴³ the application of the ECT to State-owned enterprises and subnational authorities (Articles 22-23);²⁴⁴ and exceptions, such as for essential security (Article 24).²⁴⁵ All of these provisions are designed to support the functioning of the ECT’s trade and investment provisions. None of them have the kind of standalone and wide-ranging function that Azerbaijan attributes to Article 18.

125. Yet, Azerbaijan insists that Armenia’s “argument is disproved by the Treaty text” of the other provisions of Part IV, which “includ[e] multiple instances in Articles 19 through 24 stating that the Contracting Parties ‘shall’ take certain actions.”²⁴⁶ Again, Armenia’s position is not that these provisions are devoid of any legal effect. Rather, they are simply ancillary to the main substantive parts of the Treaty. Whether an individual provision has aspirational, clarificatory, procedural, administrative, or other functions depends on the provision in question. Moreover, while it is correct that some provisions of Part IV use the word “shall,” that does not automatically entail the creation of mandatory obligations. For example, Azerbaijan cites Article 19 which provides that “each Contracting Party shall strive to minimise” harmful environmental impacts and “shall strive to take precautionary measures to prevent or minimise environmental degradation.”²⁴⁷ The use of “shall” in this context does not alter the aspirational character of Article 19.

126. Azerbaijan also points to Article 20’s transparency provisions, such as Article 20(2), which provides that “[l]aws [...] which affect other matters covered by this Treaty shall also be

²⁴⁰ Memorial, para. 69.

²⁴¹ Energy Charter Treaty with Related Documents (CL-001), ECT, Article 19.

²⁴² *Id.*, ECT, Article 20.

²⁴³ *Id.*, ECT, Article 21.

²⁴⁴ *Id.*, ECT, Articles 22, 23.

²⁴⁵ *Id.*, ECT, Article 24.

²⁴⁶ Counter-Memorial, paras. 41-42.

²⁴⁷ Energy Charter Treaty with Related Documents (CL-001), ECT, Article 19(1).

published promptly.”²⁴⁸ But as is clear from the face of this provision, this obligation is expressly tied to the “other matters covered by” the ECT. Indeed, the requirement to publish laws is arguably already inherent in other basic investment protections, such that Article 20(2) serves a largely clarificatory function.

127. In any event, Azerbaijan’s position that the majority of the *other* provisions of Part IV use mandatory language like “shall” is self-defeating since no such language appears in Articles 18(1) or 18(3).

128. *Fifth*, Azerbaijan argues that “the broader textual context in which Article 18 appears confirms that the Contracting Parties intended that the provision impose substantive obligations that are enforceable in arbitration between States.”²⁴⁹ There is no context to support this conclusion and Azerbaijan can point to none.

129. Instead, Azerbaijan claims that, “[w]here the drafters intended” not to create a binding obligation, “they said so unequivocally.”²⁵⁰ It thus advocates for an *a contrario* reading of Article 18 in light of one other provision of the ECT, Article 21(1). As a preliminary matter, the ICJ has emphasized that an “*a contrario* reading of a treaty provision [...] is only warranted, however, when it is appropriate in light of the text of all the provisions concerned, their context and the object and purpose of the treaty.”²⁵¹ There is nothing that warrants using an unrelated provision, Article 21(1), to vest Article 18 with a meaning that it does not have. Article 21(1) is a taxation carveout provision, the function of which is to expressly limit the effect of the ECT in a particular domain. It states that “[e]xcept as otherwise provided in this Article, nothing in this Treaty shall create rights or impose obligations with respect to Taxation Measures of the Contracting Parties.”²⁵²

130. Setting aside its contrived attempt to rely on Article 21(1), Azerbaijan’s position that treaty provisions that do not establish a freestanding obligation must explicitly contain a disclaimer

²⁴⁸ Counter-Memorial, para. 42, footnote 77; Energy Charter Treaty with Related Documents (**CL-001**), ECT, Article 20(2).

²⁴⁹ Counter-Memorial, para. 40.

²⁵⁰ *Id.*

²⁵¹ *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. 64.

²⁵² Energy Charter Treaty with Related Documents (**CL-001**), ECT, Article 21(1).

makes little sense. Treaty provisions must be interpreted in accordance with international law to determine whether they create any obligations at all, and, if so, whether such obligations can “taken in isolation, be a basis for the jurisdiction of” a tribunal.²⁵³

131. In this connection, Azerbaijan’s argument that Article 27 does not expressly exclude Article 18 from the Tribunal’s jurisdiction goes nowhere. To begin with, given its interpretive function as a counterbalance to investment provisions, there would be no need to expressly exclude Article 18 from the scope of dispute resolution. Armenia’s position is not that Article 18 could never be interpreted by an inter-State arbitral tribunal. Rather, its position is that it cannot be relied on as a cause of action for inter-State disputes about permanent sovereignty over natural resources. That position does not exclude the possibility that, in the event of an inter-State dispute regarding the interpretation of an investment provision (*e.g.*, Article 10(1) concerning fair and equitable treatment), an Article 27 tribunal could look to Article 18 for interpretive guidance in resolving the dispute. In any event, in the *Oil Platforms* case, for example, there was no express provision in the compromissory clause of the Treaty of Amity excluding Article 1 from dispute resolution. Rather, the ICJ interpreted Article 1 itself and found that it could not serve as a standalone basis for jurisdiction.

4. A Good Faith Reading of Article 18 Does Not Support Azerbaijan’s Interpretation

132. Azerbaijan maintains that its claims are fully in line with a good-faith interpretation of Article 18, yet its interpretation is both unreasonable and lacking in common sense.²⁵⁴

133. Good faith plays a central role that “prevails throughout the process of interpretation.”²⁵⁵ Good faith “means more than simply *bona fides* in the sense of absence of *mala fides*, or rejection of an interpretation resulting in abuse of rights (though, of course, it includes such absence and rejection).”²⁵⁶ In other words, the good faith element of treaty interpretation is not

²⁵³ *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.

²⁵⁴ See Counter-Memorial, para. 4. Cf. Memorial, Section II.E.

²⁵⁵ 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.

²⁵⁶ R. K. Gardiner, “The General Rule: (1) The Treaty, its Terms, and their Ordinary Meanings,” in *Treaty Interpretation* (2nd Ed., OUP, 2015) (CL-051), p. 171.

limited to the normative function of preventing parties “from taking unfair advantage.”²⁵⁷ Rather, a good faith reading requires “common sense and reasonableness,”²⁵⁸ “finding the intention of the parties,”²⁵⁹ and giving it “reasonable and equitable effect.”²⁶⁰ It requires arriving at an interpretation that “tak[es] into account the consequences of th[e] commitments the parties may be considered as having reasonably and legitimately envisaged.”²⁶¹

134. Good faith thus plays the role of precluding overly broad interpretations that have the effect of expanding the material scope of a tribunal’s jurisdiction beyond what the parties could have anticipated.²⁶² As such, an interpretation of Article 18 that would result in an arbitral tribunal exercising jurisdiction over subject matters that are extrinsic to the ECT would not be in accordance with the requirement of good faith. Yet that is precisely what Azerbaijan seeks to achieve with its interpretation of Article 18’s “uncontroversial”²⁶³ and “generic affirmation” of the “truism” of sovereignty and sovereign rights over energy resources.²⁶⁴ Rather than limiting its interpretation to

²⁵⁷ *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award (15 Apr. 2009) (**RL-156**), para. 107.

²⁵⁸ R. K. Gardiner, “The General Rule: (1) The Treaty, its Terms, and their Ordinary Meanings,” in *Treaty Interpretation* (2nd Ed., OUP, 2015) (**CL-051**), p. 171.

²⁵⁹ *Id.*, p. 168. See also B. Cheng, *General Principles of Law as Applied by Courts and Tribunals* (CUP, 2006) (**RL-152**), p. 118 (“[Good faith [...]] 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.”); 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.”).

²⁶⁰ J. Salmon, “Article 26 Pacta sunt servanda,” in *The Vienna Convention on the Law of Treaties: A Commentary* (OUP, 2011) (**RL-158**), p. 678.

²⁶¹ *Amco Asia Corporation et al v. Indonesia*, ICSID Case No. ARB/81/1, Decision on Jurisdiction (25 Sep. 1983) (**RL-114**), para. 14.

²⁶² See *Victor Pey Casado and others v. Republic of Chile*, PCA Case No. 2017-30, Award (28 Nov. 2019) (**RL-171**), para. 202 (“[A]n 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.”).

²⁶³ K. Hobér, *The Energy Charter Treaty: A Commentary* (OUP, 2020) (**CL-059**), p. 348.

²⁶⁴ 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.

“finding the intention of the parties,”²⁶⁵ and giving it “reasonable and equitable effect,”²⁶⁶ Azerbaijan seizes on Article 18 to shoehorn its claims into the ECT.

135. However, as explained in Section II.A above, the ICJ has repeatedly rejected attempts to import extrinsic legal rules into treaties because of the can of worms that would be opened. For example, in *Equatorial Guinea v. France*, it held that “Article 4(1) [of the Palermo Convention] does not impose, through its reference to sovereign equality, an obligation on States parties to act in a manner consistent with the *many rules of international law* which protect sovereignty in general, as well as *all the qualifications to those rules*.”²⁶⁷ In other words, it is rarely possible to neatly import one extrinsic legal rule without also having to examine the corollaries, qualifications, and exceptions to that rule.

136. Here, Azerbaijan cannot invoke “‘pre-existing concepts in international law,’ and specifically, the customary international legal principle of permanent sovereignty over natural resources” in a vacuum.²⁶⁸ Rather, as Armenia has explained, any application of that principle would require the Tribunal to engage with all of its facets.²⁶⁹ Azerbaijan cannot selectively import only the rules of international law that suit its claims, while excluding all the qualifications to those rules that would favor Armenia’s defenses.

137. For example, Azerbaijan’s own legal authorities give effect to “the status of permanent sovereignty over natural wealth and resources as a *basic constituent of the right to self-determination*.”²⁷⁰ It is indeed trite international law that permanent sovereignty over natural

²⁶⁵ R. K. Gardiner, “The General Rule: (1) The Treaty, its Terms, and their Ordinary Meanings,” in *Treaty Interpretation* (2nd Ed., OUP, 2015) (CL-051), p. 168.

²⁶⁶ J. Salmon, “Article 26 Pacta sunt servanda,” in *The Vienna Convention on the Law of Treaties: A Commentary* (OUP, 2011) (RL-158), p. 678.

²⁶⁷ *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, Preliminary Objections, Judgment, I.C.J. Reports 2018 (RL-073), p. 321, para. 93 (emphasis added).

²⁶⁸ Counter-Memorial, para. 32.

²⁶⁹ Memorial, paras. 78-79.

²⁷⁰ 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).

resources is a component of the broader *jus cogens*²⁷¹ human right of self-determination.²⁷² As Armenia has already explained, 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.²⁷³

138. As such, an obvious defense to Azerbaijan’s claims is that the principle of permanent sovereignty over natural resources allegedly enshrined in Article 18 cannot have been breached if the majority indigenous ethnic Armenians in Nagorno-Karabakh exercised their right to self-determination and to “freely dispose of their natural wealth.”²⁷⁴ Azerbaijan’s only response to this, stated in passing in the introduction to its Counter-Memorial, is that “it is Azerbaijan that holds the sovereign rights to decide how to use its energy resources for the benefit of its entire population, regardless of their ethnicity.”²⁷⁵ But permanent sovereignty over natural resources, as a corollary of self-determination, belongs above all to *peoples*.²⁷⁶ It is “the right of *peoples* to exercise, subject to the relevant provisions of both International Covenants on Human Rights, full and complete

²⁷¹ See *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion* (19 July 2024) (CL-068), para. 233 (“The Court considers that, in cases of foreign occupation such as the present case, the right to self-determination constitutes a peremptory norm of international law.”); International Law Commission, *Draft Conclusions on Identification and Legal Consequences of Peremptory Norms of General International Law (Jus Cogens)* (2022) (RL-258), p. 6, Annex (listing “the right of self-determination” as a norm that the ILC has previously referred to as having the status of *jus cogens*).

²⁷² *Obligations of States in Respect of Climate Change, Advisory Opinion* (23 July 2025) (RL-268), para. 357 (“the territorial integrity of States and their permanent sovereignty over their natural resources [...] are closely connected with the right to self-determination.”).

²⁷³ 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).

²⁷⁴ *Id.*

²⁷⁵ Counter-Memorial, para. 7.

²⁷⁶ See United Nations General Assembly, *Resolution 1803: Permanent Sovereignty Over Natural Resources*, UN Doc. A/RES/1803 (XVII) (14 Dec. 1962) (CL-002), p. 15 (declaring that “[t]he right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned”) (emphasis added). Azerbaijan’s own authority recognized “the Palestinian people’s right to permanent sovereignty over natural resources.” *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion* (19 July 2024) (CL-068), para. 133 (emphasis added).

sovereignty over all their natural wealth and resources.”²⁷⁷ Accordingly, “[t]he right of peoples and nations to permanent sovereignty over their natural wealth and resources *must be exercised in the interest of their national development and of the well-being of the people* of the State concerned.”²⁷⁸ In fact, the General Assembly has declared that all peoples have the right to enjoy their natural resources free from “alien and colonial domination,” “racial domination,” or “apartheid.”²⁷⁹

139. As Armenia explained in its Request for Bifurcation,²⁸⁰ the ethnic Armenians of Nagorno-Karabakh endured decades of oppression at the hands of Azerbaijani authorities, which they characterized as a form of apartheid,²⁸¹ leading to their attempt to exercise their own self-determination. Contrary to Azerbaijan’s contention, the status of the resources of Nagorno-Karabakh, and therefore the application of Azerbaijan’s theory of its case, depends on the Tribunal first adjudicating questions concerning the self-determination of its population.

140. But the Tribunal need not, and cannot, consider such questions: that is not what the ECT Contracting Parties “may be considered as having reasonably and legitimately envisaged”²⁸² as part of inter-State dispute resolution under the ECT. Instead, a good faith interpretation based on “common sense and reasonableness”²⁸³ favors Armenia’s understanding of Article 18 as an interpretive counterweight to the application of the ECT’s investment protections.

²⁷⁷ Declaration on the Right to Development, General Assembly Resolution 41/128 (4 Dec. 1986) (**RL-188**), preamble (emphasis added).

²⁷⁸ United Nations General Assembly, *Resolution 1803: Permanent Sovereignty Over Natural Resources*, UN Doc. A/RES/1803 (XVII) (14 Dec. 1962) (**CL-002**), para. 1 (emphasis added).

²⁷⁹ See Declaration on the Establishment of a New International Economic Order, General Assembly resolution 3201 (S-VI) (1 May 1974) (**RL-186**), para. 4(f), (h).

²⁸⁰ Request for Bifurcation, paras. 12-18.

²⁸¹ Declaration on the Proclamation of the Nagorno-Karabakh Republic (2 Sep. 1991) (**RE-0010**) (“Taking into consideration that the policy of apartheid and discrimination pursued in Azerbaijan created an atmosphere of hatred and intolerance in this republic towards the Armenian people, which led to armed conflict, human casualties, mass deportation of the population from peaceful Armenian villages; [...] Respecting and being guided by the principles of Universal Declaration on Human Rights, International Covenant on Economic, Social and Cultural Rights, International Covenant on Civil and Political Rights.”).

²⁸² *Amco Asia Corporation et al v. Indonesia*, ICSID Case No. ARB/81/1, Decision on Jurisdiction (25 Sep. 1983) (**RL-114**), para. 14.

²⁸³ R. K. Gardiner, “The General Rule: (1) The Treaty, its Terms, and their Ordinary Meanings,” in *Treaty Interpretation* (2nd Ed., OUP, 2015) (**CL-051**), p. 171.

5. The Subsequent Practice of the ECT Contracting Parties Does Not Support Azerbaijan's Interpretation

141. In its Counter-Memorial, Azerbaijan fails to engage with Armenia's argument that there is no subsequent agreement or practice among the dozens of ECT Contracting Parties to support the invocation of Article 18 as a basis for an international tribunal's jurisdiction under Article 27. Addressing this point in passing under the heading of "Article 18's Context," Azerbaijan suggests that the lack of State practice is not "relevant to the interpretation of Article 18."²⁸⁴ But Armenia has explained that the sustained absence of State practice in support of a reading of a treaty provision—particularly where repeated opportunities to act have arisen—is *directly relevant* under Article 31(3)(b) of the VCLT and may crystallize a concordant understanding of that provision's meaning.²⁸⁵ To support its position, Armenia referred to the well-established case law of the ICJ and the European Court of Human Rights,²⁸⁶ to which Azerbaijan offers no response.

142. Instead, Azerbaijan claims that the absence of any invocation of Article 18 by ECT Contracting Parties can somehow be explained by the fact that "this is the very first inter-State case to be filed under the ECT" and that "no other State has invoked any Article of the ECT as a basis for a tribunal's jurisdiction under Article 27."²⁸⁷ But what matters in this context is the lack of any attempt by Contracting Parties to use Article 18 in circumstances tailor-made for its deployment, whether in the course of diplomatic relations or in inter-State adjudication.

143. Far from undermining Armenia's position, the unprecedented nature of these proceedings only underscores the point. Had the ECT Contracting Parties understood Article 18 to create a justiciable, inter-State obligation of the kind Azerbaijan asserts, they would have said so—

²⁸⁴ Counter-Memorial, para. 48.

²⁸⁵ See Memorial, para. 72. See also O. Dörr & K. Schmalenbach, "Article 31: General Rule of Interpretation," in *Vienna Convention on the Law of Treaties - A Commentary* (Springer, 2012) (RL-224), p. 557 ("Subsequent practice may also serve as a means to determine the scope of application of a treaty, and then even to establish that the latter does not apply. Thus, under lit b, the interpreter may just as well consider the practice of parties in the 'non-application of the treaty', ie draw conclusions from the fact that the parties did not apply their treaty when treaty provisions might have been thought to be applicable.") (emphasis added); R. K. Gardiner, "The General Rule: (2) Agreements as Context, Subsequent Agreements, and Subsequent Practice," in *Treaty Interpretation* (2nd Ed., OUP, 2015) (RL-237), pp. 262-263.

²⁸⁶ *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996* (RL-036), p. 248, paras. 55-56; *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996* (RL-037), p. 815, para. 30; *Banković et. al. v. Belgium et. al.*, ECHR Application no. 52207/99, Decision on Admissibility (12 Dec. 2001) (RL-148), para. 62.

²⁸⁷ Counter-Memorial, para. 48 (emphasis omitted).

or acted upon it—at some point over the three decades since the ECT entered into force. Such conduct would be especially expected given that, during this period, the ECT’s signatories have navigated multiple long-running sovereignty disputes over territories with energy resources.

144. [REDACTED]

[REDACTED]

[REDACTED]

145. These are precisely the kinds of circumstances in which, on Azerbaijan’s reading, Article 18 would have been invoked to seek inter-State relief regarding sovereign control over energy resources or related infrastructure. Yet, no State has indicated that Article 18 could provide a basis for an inter-State proceeding under Article 27, let alone pursued it. Across decades and a range of geopolitical disputes among ECT Contracting Parties, there is thus no trace of attempts to

288 [REDACTED]

[REDACTED]

289 [REDACTED]

[REDACTED]

290 [REDACTED]

[REDACTED]

291 [REDACTED]

[REDACTED]

[REDACTED]

employ Article 18 as an inter-State cause of action. Azerbaijan’s outlier position is untethered to any State practice.

146. This conclusion is further reinforced by the recent ECT modernization negotiations, which also constitute relevant subsequent practice of the Contracting Parties in the interpretation of the ECT. As Armenia has already pointed out, nothing in the record suggests that during such negotiations, the Contracting Parties contemplated, asserted, or even debated Article 18 as a basis for inter-State adjudication of sovereignty over resources.²⁹² In fact, the limited and contextual function of Article 18 was acknowledged in those discussions.²⁹³ At a meeting held in June 2021 (*i.e.*, before Azerbaijan’s “Notice of Dispute”²⁹⁴), Azerbaijan itself stated “that the wording of Article 18(1) was very general.”²⁹⁵ In a process designed to adapt the Treaty to new and existing challenges, there were no signals that the Contracting Parties believed that Article 18 supplied a justiciable inter-State obligation. Azerbaijan similarly failed to address this lack of subsequent practice in its Counter-Memorial.

147. In sum, there is nothing in the decades of practice of dozens of ECT Contracting Parties to support Azerbaijan’s interpretation of Article 18, which cannot be upheld.

6. The ECT’s *Travaux* Do Not Support Azerbaijan’s Interpretation

148. Azerbaijan agrees with Armenia that the *travaux préparatoires* of the ECT can be relied on to confirm an interpretation,²⁹⁶ in accordance with Article 32 of the VCLT.²⁹⁷ Moreover,

²⁹² Memorial, para. 74.

²⁹³ See Memorial, para. 74 (citing ECT Modernisation Travaux, First Negotiation Round of 6-9 July 2020, Negotiation Draft (26 June 2020) (RL-173), p. 74; 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).

²⁹⁴ Compilation of the Parties’ Pre-Arbitration Exchanges (CE-063), [PDF] pp. 1-3, Letter from Azerbaijan to Armenia (8 Oct. 2021).

²⁹⁵ 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. Azerbaijan’s statement was thus either disinterested (as it occurred before the pendency of these proceedings) or against interest. Both forms of evidence have been considered particularly persuasive by the ICJ. See, *e.g.*, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *Merits, Judgment*, I.C.J. Reports 1986 (CL-016), p. 43, para. 69.

²⁹⁶ See Memorial, para. 81; Counter-Memorial, para. 56.

²⁹⁷ Vienna Convention on the Law of Treaties (1969) (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.”).

when a proffered interpretation leads to a manifestly unreasonable result—as Azerbaijan’s interpretation of Article 18 does—recourse to the *travaux* can be determinative.²⁹⁸ Either way, as Armenia has explained,²⁹⁹ the absence of *travaux* in support of an interpretation with significant consequences for the contracting parties is a ground for rejecting such an interpretation.³⁰⁰

149. Against this background, recourse to the *travaux* confirm that Azerbaijan’s interpretation of Article 18 cannot be upheld. Azerbaijan has failed to explain why the Tribunal should disregard the numerous *travaux* documents adduced by Armenia in support of its interpretation (**Section II.B.6.a**). Moreover, Azerbaijan has no serious affirmative case in support of its own radical reading of Article 18, having failed to identify any meaningful support in the *travaux* (**Section II.B.6.b**).

²⁹⁸ See *id.*, Article 32(b); O. Dörr & K. Schmalenbach, “Article 32: Supplementary Means of Interpretation,” in *Vienna Convention on the Law of Treaties - A Commentary* (Springer, 2012) (**RL-225**), p. 582; R. K. Gardiner, “Supplementary Means of Interpretation,” in *Treaty Interpretation* (2nd Ed., OUP, 2015) (**RL-234**), pp. 353-355; Y. le Bouthillier, “Article 32: Supplementary Means of Interpretation” in O. Corten & P. Klein, *The Vienna Conventions on the Law of Treaties - A Commentary* (OUP, 2011) (**RL-222**), pp. 846-851; M. E. Villiger, “Article 32: Supplementary Means of Interpretation,” in *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Brill, Nijhoff, 2008) (**RL-215**), p. 447.

²⁹⁹ Memorial, para. 83.

³⁰⁰ See, e.g., *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 (“[I]t 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.”); *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. 25, para. 47 (“[T]he *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. 42, 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**), p. 446, para. 76 (“[A]lthough the Parties have referred extensively to the *travaux préparatoires* of UNCLOS, it appears that the possibility of one State’s extended continental shelf extending within 200 nautical miles from the baselines of another State was not debated during the Third United Nations Conference on the Law of the Sea.”). See also O. Dörr & K. Schmalenbach, “Article 32: Supplementary Means of Interpretation,” in *Vienna Convention on the Law of Treaties - A Commentary* (Springer, 2012) (**RL-225**), pp. 585-586 (“[T]he silence of the preparatory work may prove to be a significant element in showing that a conclusion at odds with a literal reading of a treaty provision was within a permissible range of interpretations.”).

a. Azerbaijan Cannot Explain Away the Extensive Travaux Supporting Armenia's Interpretation of Article 18

150. Azerbaijan cannot explain why the *travaux* documents relied on by Armenia in its Memorial do not mean what they say, or should somehow be ignored. In fact, in its Counter-Memorial, Azerbaijan does not even cite or engage with at least five of the *travaux* documents produced by Armenia.³⁰¹

151. *Pro memoria*, in its Memorial, Armenia produced more than a dozen *travaux* documents confirming its interpretation of Article 18.³⁰² In particular, Armenia produced *travaux* confirming that the reference to “sovereignty over energy resources” was conceived of as a means to counterbalance the protection granted to investors in the investment section of the Treaty, and to “affirm state authority over the disposal of energy resources” in the context of investor-State relationships.³⁰³ For example, Armenia produced:

³⁰¹ ECT Travaux, Fax from the UK to C. Bamberger (Legal Adviser of the Conference) regarding various articles (17 June 1994) (**RL-134**); ECT Travaux, Letter from Australia to C. Bamberger (Legal Adviser of the Conference) on Article 21 (22 Aug. 1994) (**RL-139**); ECT Travaux, Fax from the UK to Norway on Article 21 (1 Sep. 1994) (**RL-141**); ECT Travaux, Memorandum on the Final Plenary Session of the Energy Charter Treaty Negotiations of 7-11 June 1994 (13 June 1994) (**RL-133**); 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**).

³⁰² See Memorial, paras. 86-90 (citing ECT Travaux, Memorandum from France commenting on the investment provisions of the Draft Basic Agreement (15 Mar. 1993) (**RL-128**); ECT Travaux, Memorandum on the Final Plenary Session of the Energy Charter Treaty Negotiations of 7-11 June 1994 (13 June 1994) (**RL-133**); ECT Travaux, Letter from Norway to the Conference Secretariat regarding Article 21(2) (1 Sep. 1994) (**RL-140**); ECT Travaux, Note from Norway to the Conference Secretariat on Article 21(2) (Sovereignty over Energy Resources) (16 Aug. 1994) (**RL-138**); ECT Travaux, Memorandum from C. Bamberger (Legal Adviser of the Conference) explaining the Final Text of the ECT (26 Sep. 1994) (**RL-143**); ECT Travaux, Press Notice on the European Energy Charter Negotiations (14 Dec. 1992) (**RL-121**); 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**); 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**); ECT Travaux, Revised draft Basic Agreement for the European Energy Charter (24 June 1992) (**RL-120**); ECT Travaux, Fax from the UK to C. Bamberger (Legal Adviser of the Conference) regarding various articles (17 June 1994) (**RL-134**); ECT Travaux, Letter from Australia to C. Bamberger (Legal Adviser of the Conference) on Article 21 (22 Aug. 1994) (**RL-139**); ECT Travaux, Fax from the UK to Norway on Article 21 (1 Sep. 1994) (**RL-141**); ECT Travaux, Memorandum from Norway to C. Bamberger (Legal Adviser of the Conference) on Article 21 (2 Aug. 1994) (**RL-135**); ECT Travaux, Note from the Conference Secretariat enclosing the draft Basic Agreement (21 Jan. 1992) (**RL-117**); ECT Travaux, Proposed Final Text of the ECT (14 Sep. 1994) (**RL-142**)).

³⁰³ 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.

- Several documents from Norway, the State that originally proposed Article 18, in which it explains that “[t]ogether 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.”³⁰⁴
- A memorandum from Craig Bamberger, the Legal Adviser of the Conference, explaining the final text of the ECT and describing Article 18 under the category of “principal investment provisions” as “pertain[ing] especially to investment issues.”³⁰⁵
- A memorandum commenting on the investment provisions of an earlier draft of the ECT, in which France referred to the “sovereignty over resources” provision as “concern[ing] investors.”³⁰⁶
- A press notice on the ECT negotiations describing its provisions and explaining that Article 18(3) was added to describe the kinds of sovereign powers the Contracting Parties would retain in relation to access to resources by “companies.”³⁰⁷

152. Armenia also submitted *travaux* documents confirming that Article 18, in particular its paragraph (1), was meant to be a declaratory, interpretive provision.³⁰⁸ For example:

³⁰⁴ ECT Travaux, Letter from Norway to the Conference Secretariat regarding Article 21(2) (1 Sep. 1994) (**RL-140**), [PDF] p. 2; 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. *See also* J. Doré, “Negotiating the Energy Charter Treaty,” in T. W. Wälde, *The Energy Charter Treaty: An East-West Gateway for Investment & Trade* (Kluwer, 1996) (**RL-103**), pp. 143-144 (explaining that the “Norwegian delegation made several attempts at softening the obligations [of national treatment] while emphasising explicit recognition of sovereignty over energy resources within the Energy Charter Treaty” because it was “particularly unhappy about” the move of the obligation of national treatment to the pre-investment stage).

³⁰⁵ ECT Travaux, Memorandum from C. Bamberger (Legal Adviser of the Conference) explaining the Final Text of the ECT (26 Sep. 1994) (**RL-143**), pp. 7, 10.

³⁰⁶ ECT Travaux, Memorandum from France commenting on the investment provisions of the Draft Basic Agreement (15 Mar. 1993) (**RL-128**).

³⁰⁷ ECT Travaux, Press Notice on the European Energy Charter Negotiations (14 Dec. 1992) (**RL-121**), p. 3. (“The Sovereign Rights of governments will be maintained in the Basic Agreement, for instance in decisions on whether or when to license areas for oil and gas exploration and on what environmental and safety rules to apply. The signatory countries will however commit themselves to allowing Charter companies Access to Energy Resources, such as oil and gas reserves, under transparent and non-discriminatory rules.”).

³⁰⁸ Memorial, paras. 89-90.

- A fax from the United Kingdom’s delegate commenting on what became Article 18 and stating that its paragraph (1) “state[s] the obvious,” is “otiose,” and “harmless.”³⁰⁹
- A letter from Australia expressing the view that Article 18 is “merely declaratory of existing international law.”³¹⁰

153. Instead of engaging with the text of these documents, Azerbaijan offers several arguments against Armenia’s overall reliance on the *travaux*, none of which can succeed.

154. *First*, unable to overcome the overwhelming evidence of Article 18’s purpose as a counterbalance to investor rights, Azerbaijan argues that the provision’s function somehow favors its own interpretation. It states that “there is no ‘counterbalance’ to speak of unless Article 18 concretized a binding set of rights potentially conflicting with other provisions of the Treaty.”³¹¹ But as explained above,³¹² a reference to external rules of international law can serve an interpretive function without actually codifying—or, to use Azerbaijan’s latest term, “concretizing”—those external norms as *treaty* obligations.³¹³ Indeed, Armenia has produced *travaux* confirming that Article 18 was meant to counterbalance the ECT’s trade and investment provisions only by *influencing their interpretation and application*, not by creating separate opposable (and actionable) legal obligations. For example, Norway expressed in multiple documents that the sovereignty provision was only intended “to affect the interpretation and application of other articles of the ECT,” not to “undermine the application of any provision of the ECT,” let alone create legal obligations of its own.³¹⁴

³⁰⁹ ECT Travaux, Fax from the UK to C. Bamberger (Legal Adviser of the Conference) regarding various articles (17 June 1994) (**RL-134**), [PDF] p. 3.

³¹⁰ ECT Travaux, Letter from Australia to C. Bamberger (Legal Adviser of the Conference) on Article 21 (22 Aug. 1994) (**RL-139**), [PDF] p. 2.

³¹¹ Counter-Memorial, para. 62.

³¹² *See supra* Section II.A.

³¹³ Counter-Memorial, para. 62.

³¹⁴ ECT Travaux, Memorandum from Norway to C. Bamberger (Legal Adviser of the Conference) on Article 21 (2 Aug. 1994) (**RL-135**), [PDF] p. 1; ECT Travaux, Letter from Norway to the Conference Secretariat regarding Article 21(2) (1 Sep. 1994) (**RL-140**), [PDF] p. 2. *See also* ECT Travaux, Letter from Australia to C. Bamberger (Legal Adviser of the Conference) on Article 21 (22 Aug. 1994) (**RL-139**), [PDF] p. 2 (“We do not read [Article 18] as overriding any other provision of the Treaty [...] This is in line with the view expressed by Norway that [Article 18 is] not intended to undermine or ‘gut’ the Treaty.”).

155. *Second*, in this connection, Azerbaijan alleges that Armenia “misinterprets States’ comments in the negotiations surrounding Article 18, including August and September 1994 letters from Norway.”³¹⁵ Tellingly, Azerbaijan does not actually address many such comments by States relied on by Armenia, such as those of the UK and Australia that underscore the “otiose,” “harmless” and “purely declaratory” character of Article 18.³¹⁶ Rather, it argues that Armenia misunderstands Norway’s position because it stated elsewhere—in a document produced and relied on by Armenia—that “Article [18] *gives the State a right as resource owner* to decide the optimalization of the recovery of its energy resources.”³¹⁷

156. But again, this does not mean that Article 18 creates obligations owed by one State to another State capable of giving rise to an independent cause of action. In fact, Norway says in the very next sentence of the document that Article 18 serves as a reconfirmation of preexisting sovereign rights and how they are to be balanced with the rights and obligations of private investors:

The intention of this provision is to *reconfirm* [...] the right of the State as resource owner to decide the necessary measures in order to ensure that the recovery of petroleum shall take place in accordance with prudent technical and sound economic principles and in such a manner that waste of petroleum or reservoir energy is avoided. Thus, if needed for reasons of good reservoir management, the *investors* may be required to, e.g., inject gas or water into a reservoir [...].³¹⁸

157. Azerbaijan’s attempt to rely on the words “gives the State a right” isolated from their context is far from supportive of its interpretation of Article 18 as governing inter-State disputes over sovereignty. Rather, the *travaux* overwhelmingly establish that Norway—among other States—consistently saw Article 18 as only reconfirming existing rights of States under customary international law that would serve to counterbalance *investors’* rights under the Treaty.

³¹⁵ Counter-Memorial, para. 63.

³¹⁶ ECT Travaux, Fax from the UK to C. Bamberger (Legal Adviser of the Conference) regarding various articles (17 June 1994) (**RL-134**), [PDF] p. 3; ECT Travaux, Letter from Australia to C. Bamberger (Legal Adviser of the Conference) on Article 21 (22 Aug. 1994) (**RL-139**), [PDF] p. 2; ECT Travaux, Fax from the UK to Norway on Article 21 (1 Sep. 1994) (**RL-141**), [PDF] p. 2.

³¹⁷ See Counter-Memorial, para. 64 (emphasis in the original) (citing ECT Travaux, Note from Norway to the Conference Secretariat on Article 21(2) (Sovereignty over Energy Resources) (16 Aug. 1994) (**RL-138**), [PDF] p. 4).

³¹⁸ ECT Travaux, Note from Norway to the Conference Secretariat on Article 21(2) (Sovereignty over Energy Resources) (16 Aug. 1994) (**RL-138**) [PDF] p. 4 (emphasis added).

158. This understanding is borne out by another passage of the same document. Norway further explains that:

Together Article [18] and Part III of the ECT are intended to represent a balanced approach to the legal relationship between the resource state and the *investments of investors in the exploration and development of energy resources*. The rights of the state as resource owner constitute an important element in this legal relationship, as do the protection granted to investors and their investments under Part III. Article [18(2)] *preserves* the right of Contracting Parties to maintain rules governing the system of property ownership based on the principle of the resource state's ownership rights to its energy resources. *Article [18] is intended to affect the interpretation and application of the rest of the ECT, including provisions of Part III. It is not intended to undermine or to gut the application of any provision of the ECT.*³¹⁹

159. *Third*, Azerbaijan argues that a memorandum explaining the final text of the ECT—and submitted by Armenia—supports its position. That memorandum lists Article 18 under the category of “Principal Investment Provisions.”³²⁰ According to Azerbaijan, the characterization of Article 18 as an investment provision should be ignored. Instead, the Tribunal should turn its attention to the title of a different section—“Other Substantive Rights and Obligations”—which comes *after* Article 18 is discussed. According to Azerbaijan, the use of the word “other” in the title of this section implies that Article 18 must also be a “substantive” right or obligation.³²¹ This purported implication is a *non sequitur*. Even if such a meaning could be inferred from the title of a different section, Article 18 was discussed alongside multiple substantive investment obligations contained in Part III of the ECT. The previous section likewise addressed substantive obligations in the ECT's Part II dedicated to trade. Accordingly, all that the title “Other Substantive Rights and Obligations” suggests is that the previous sections addressed some substantive rights and obligations. It does not specifically indicate that *all* provisions that preceded were “substantive rights and obligations.”

³¹⁹ 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 (italics added and underlining in the original).

³²⁰ ECT Travaux, Memorandum from C. Bamberger (Legal Adviser of the Conference) explaining the Final Text of the ECT (26 Sep. 1994) (RL-143), pp. 7, 10.

³²¹ Counter-Memorial, para. 59.

160. *Fourth*, as to Armenia’s reliance on a press notice about the ECT negotiations, which explained that Article 18(3) was added to describe the kinds of sovereign powers that the Contracting Parties would retain in relation to access to resources by companies,³²² Azerbaijan’s only response is that the document does not explicitly refer to Article 18(3). But the passage cited expressly notes that States’ rights to make “decisions on whether or when to license areas for oil and gas exploration and on what environmental and safety rules to apply” will be maintained under the ECT. This statement is an unequivocal reference to Article 18(3), which provides that “[e]ach 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, [...] and to regulate the environmental and safety aspects of such exploration.”³²³

161. *Fifth*, Azerbaijan has failed to overcome Armenia’s argument that Article 18’s placement in prior drafts indicates that it is merely an interpretative provision. Indeed, what became Article 18 was previously placed in an introductory “Definitions and Principles” section, then moved to a section entitled “Contextual,” before becoming a “Miscellaneous” provision.³²⁴

162. Azerbaijan points out that the article for a time, in even earlier drafts of the Treaty, also was considered under the “General Obligations” section (a section which does not appear in the final version of the treaty).³²⁵ But this is misleading. It is true that the sovereignty article was first considered as part of the “General Obligations” section in the first three drafts of the ECT in 1991.³²⁶ But Azerbaijan conveniently fails to note that some of the other provisions in that section were plainly not provisions creating substantive legal obligations, but rather (i) limited the applicability of other provisions, (ii) described the relationship between the Treaty and its protocols

³²² ECT Travaux, Press Notice on the European Energy Charter Negotiations (14 Dec. 1992) (**RL-121**), p. 3. (“The Sovereign Rights of governments will be maintained in the Basic Agreement, for instance in decisions on whether or when to license areas for oil and gas exploration and on what environmental and safety rules to apply. The signatory countries will however commit themselves to allowing Charter companies Access to Energy Resources, such as oil and gas reserves, under transparent and non-discriminatory rules.”). See Memorial, para. 88.

³²³ Energy Charter Treaty with Related Documents (**CL-001**), ECT, Article 18(3).

³²⁴ See Memorial, para. 90; Counter-Memorial, para. 66.

³²⁵ Counter-Memorial, para. 66 (citing Draft Treaty, Basic Protocol to the European Energy Charter (20 August 1991) (**CL-018**)).

³²⁶ See Draft Treaty, Basic Protocol to the European Energy Charter (20 August 1991) (**CL-018**), Article 7; Draft Treaty, Basic Protocol to the European Energy Charter (12 Sep. 1991) (**RL-189**), Article 5; Draft Treaty, Basic Protocol to the European Energy Charter (31 Oct. 1991) (**RL-190**), Article 5.

and other agreements, (iii) described principles that ought to guide energy policies, (iv) clarified that provisions applied to sub-federal authorities of a State, or (v) provided for exceptions to the application of the Treaty, such as for essential security interests.³²⁷

163. Azerbaijan also fails to give an accurate account of how the text evolved after these first three drafts. The sovereignty article was placed under the heading “Definitions and Principles” from the fourth draft of 21 January 1992 until March 1993, along with other interpretive provisions such as articles entitled “Definitions” and “Principles” and “Objective of the Treaty.”³²⁸ In the 15 March 1993 draft, the “sovereignty” article was then moved to the “Contextual” section, whose content closely mirrors that of the final “Miscellaneous” section.³²⁹ As Armenia explained, the “Contextual” section was in fact simply renamed as “Miscellaneous” in a stylistic change during the Secretariat’s final review of the text, after the negotiations had ended in September 1994.³³⁰ This evolution shows that for the vast majority of the negotiations, Article 18 was considered by the negotiating States to be a contextual provision.

164. In sum, Azerbaijan cannot overcome Armenia’s detailed engagement with numerous *travaux* documents that support its interpretation of Article 18. In addition to failing to explain away the *travaux* documents it does engage with, Azerbaijan has *nothing* to say about several key documents, including those referring to Article 18 as “otiose” and “purely declaratory.”

³²⁷ See Draft Treaty, Basic Protocol to the European Energy Charter (20 August 1991) (**CL-018**) (20 August 1991) (**CL-018**), Articles 2, 3, 4, 5, 15, 16; Draft Treaty, Basic Protocol to the European Energy Charter (12 Sep. 1991) (**RL-189**), Articles 2, 3, 4, 6, 17, 18; Draft Treaty, Basic Protocol to the European Energy Charter (31 Oct. 1991) (**RL-190**), Articles 2, 3, 4, 6, 17, 18.

³²⁸ See ECT Travaux, Note from the Conference Secretariat enclosing the draft Basic Agreement (21 Jan. 1992) (**RL-117**), Article 4; Draft Basic Agreement for the European Energy Charter (9 Apr. 1992) (**RL-191**), Article 4; Draft Basic Agreement for the European Energy Charter (19 June 1992) (**RL-192**), Article 4; ECT Travaux, Revised draft Basic Agreement for the European Energy Charter (24 June 1992) (**RL-120**), Article 4; ECT Travaux, Conference Secretariat, “Draft Basic Agreement for the European Energy Charter” (12 Aug. 1992) (**CL-023**), Article 4; Draft Basic Agreement for the European Energy Charter (21 Oct. 1992) (**RL-193**), Article 4; Draft Basic Agreement for the European Energy Charter (25 Nov. 1992) (**RL-194**), Article 4; Draft Basic Agreement for the European Energy Charter (21 Dec. 1992) (**RL-195**), Article 4; Draft Basic Agreement for the European Energy Charter (9 Feb. 1993) (**RL-196**), Article 4; ECT Travaux, Revised Draft Basic Agreement for the European Energy Charter Treaty (1 Mar. 1993) (**RL-127**), Article 4.

³²⁹ Draft Basic Agreement for the European Energy Charter - Compromise Text (15 Mar. 1993) (**RL-197**), Article 21.

³³⁰ Memorial, para. 90, note 174.

b. Azerbaijan Has No Serious Affirmative Case for Its Interpretation of Article 18 Based on the Travaux

165. In its Counter-Memorial, Azerbaijan’s brief affirmative reliance on the *travaux* consists mostly in sweeping statements about how “the Contracting Parties understood States’ binding obligations in respect of sovereignty over natural resources as broadly applicable to inter-State relationships.”³³¹ Such statements, however, are not actually accompanied by supportive *travaux* documents. Instead, Azerbaijan merely cites previous drafts of the ECT that shed no light on the interpretation of Article 18—most of which have been on the record since the Statement of Claim.³³²

166. In fact, as far as Armenia can tell, Azerbaijan has only submitted two new *travaux* documents in relation to Article 18 with its Counter-Memorial, only one of which it cited in its *travaux* section.³³³ This is a 1991 explanatory memorandum describing the draft provisions of the ECT.³³⁴ Azerbaijan emphasizes that Article 5(1) (an early version of Article 18) is described as “mak[ing] [a] provision for States to decide which areas of their territory may be made available for exploration and exploitation.”³³⁵ But this description actually supports Armenia’s position. The passage begins by explaining that Article 18 “*reiterates* the principal of national sovereignty over natural resources,”³³⁶ thus confirming that it is meant to reaffirm an existing principle of international law, not create a new actionable legal obligation.

167. In the absence of any *travaux* support, Azerbaijan raises four other unavailing arguments.

³³¹ Counter-Memorial, para. 57.

³³² See Counter-Memorial, paras. 57-58, notes 106-109.

³³³ ECT Travaux, Explanatory Memorandum of the Draft Basic Protocol from Working Group II of the European Energy Charter (11 Sep. 1991) (CL-111); ECT Travaux, European Energy Charter Conference Secretariat, Note for file regarding “Article 21(2) (Sovereignty over Energy Resources)” (25 Aug. 1994) (CL-115). The latter document, cited by Azerbaijan in its “Context” subsection, concerns only Article 18(2) and does not support Azerbaijan’s interpretation, as discussed in the context section above. See *supra* paras. 117-119.

³³⁴ ECT Travaux, Explanatory Memorandum of the Draft Basic Protocol from Working Group II of the European Energy Charter (11 Sep. 1991) (CL-111).

³³⁵ *Id.*, p. 3.

³³⁶ *Id.* (emphasis added).

168. *First*, Azerbaijan cites a draft of what became Article 18 from September 1993 that provided that “[t]he Contracting Parties recognise state sovereignty and sovereign rights over energy resources in accordance with and subject to international legal rights and obligations including the provisions of this Agreement.”³³⁷ It argues that this formulation indicates that “the legal rights and obligations concerning sovereignty reflected in this draft Article [18] will be balanced against other, *equally binding* rights and obligations found elsewhere in the ECT.”³³⁸ Setting aside the fact that this formulation was later abandoned and can hardly supplant the current wording of Article 18, all it does is note that the customary principle of sovereignty over natural resources may be limited by the provisions of the ECT. This formulation says nothing about Article 18 being the source of a freestanding obligation under the ECT. If anything, it establishes a distinction between Article 18 and the actual obligations enshrined in the operative provisions of the ECT.

169. *Second*, Azerbaijan points out that Article 18 was consistently considered as part of what it calls the “operational” (*i.e.*, operative) part of the Treaty, as opposed to its preamble.³³⁹ But as explained in Section II.B.3 above,³⁴⁰ it is well established in international law that even provisions contained in the operative part of a treaty may be preambular in character and function.

170. *Third*, as to Article 18(3) specifically, Azerbaijan argues that “[t]he travaux also confirm that [it] was intended to provide a concrete elaboration of the rights encompassed by the principle of sovereignty and sovereign rights to energy resources.”³⁴¹ But the citation supporting this sentence is a reference to Professor Hobér’s commentary, *not* the *travaux*.³⁴² The only *travaux*

³³⁷ Counter-Memorial, para. 58 (citing ECT Travaux, Conference Secretariat, “Draft Energy Charter Treaty - fourth version” (7 July 1993) (CL-028), Article 21).

³³⁸ Counter-Memorial, para. 58 (emphasis added).

³³⁹ *Id.*, paras. 58, 66.

³⁴⁰ See also Request for Bifurcation, paras. 43-46; Memorial, para. 29.

³⁴¹ Counter-Memorial, para. 60.

³⁴² *Id.*, para. 60, note 112 (citing K. Hobér, *The Energy Charter Treaty: A Commentary* (OUP, 2020) (CL-059), p. 349). As Armenia noted, this passage of the commentary supports Armenia’s view that Article 18(3) merely “reconfirms the contents of sovereignty with respect to energy resources.” K. Hobér, *The Energy Charter Treaty: A Commentary* (OUP, 2020) (CL-059), p. 349. See Memorial, para. 37. As Professor Hobér further explained, “[t]he generality of this confirmation is perhaps also to be seen in the fact that reference is made to ‘each state’ rather than to Contracting Parties.” K. Hobér, *The Energy Charter Treaty: A Commentary* (OUP, 2020) (CL-059), p. 349. This indeed supports the view that Article 18(3) is merely a declaratory article describing rights that all States hold under

document that Azerbaijan cites for this proposition is one that describes the rights encompassed by Article 18(3) as “far-reaching,” and stating that Article 18(3) “must be understood as elaborating on and referring to Article 18(1).”³⁴³ But it is not disputed that Article 18(3) elaborates on the general principle referred to in Article 18(1). Moreover, the document goes on to describe how Article 18(3) interacts with the investment provisions of the ECT, confirming once again that the intent behind Article 18 was to address investor-State relationships.³⁴⁴

171. *Finally*, Azerbaijan argues that “throughout the *travaux* there is no reference to any Contracting Party’s intention of interpreting Articles 18(1) and 18(3) as non-binding” and that “[t]his stands in stark contrast to the approach taken to States’ obligations under Article 18(4).”³⁴⁵ Azerbaijan quotes a statement from the Chairman of the Legal Sub-Group indicating that Article 18(4) “seems to be a ‘best efforts’ commitment” that “uses the word ‘undertake’ (revised back from ‘shall ensure’) to bring ‘it into line with the European Energy Charter’s several non-binding references to undertakings of access to energy resources.’”³⁴⁶ This argument is unpersuasive. For one, Armenia *has* adduced several *travaux* documents showing that Article 18, in particular its paragraph (1) was seen as merely declaratory, and Azerbaijan has failed to respond to those documents.³⁴⁷ In any event, it makes sense that the negotiating States would make such qualifying statements during the negotiation of 18(4). Article 18(4) uses the word “undertake,” which, as Armenia explained, bears the hallmark of a substantive obligation. Since—contrary to Article 18(4)—Articles 18(1) and 18(3) do not have that obligatory language, there was no doubt that those provisions would not give rise to an obligation, and there would have been no reason to specify as much during the negotiations.

custom. Article 18(3) by definition could not create obligations or rights of its own because treaties are only binding upon their Contracting Parties, not “each State.”

³⁴³ Counter-Memorial, para. 60 (citing ECT Travaux, Chairman of Legal Subgroup, Memorandum regarding “Paragraph (2) of Article 21, ‘Sovereignty over Energy Resources’” (12 Aug. 1994) (CL-033), p. 5).

³⁴⁴ ECT Travaux, Chairman of Legal Subgroup, Memorandum regarding “Paragraph (2) of Article 21, ‘Sovereignty over Energy Resources’” (12 Aug. 1994) (CL-033), p. 6.

³⁴⁵ Counter-Memorial, para. 61.

³⁴⁶ *Id.* (citing ECT Travaux, Chairman of Legal Subgroup, Memorandum regarding “Paragraph (2) of Article 21, ‘Sovereignty over Energy Resources’” (12 Aug. 1994) (CL-033), p. 6).

³⁴⁷ *See supra* para. 152; Memorial, para. 89.

172. In sum, unlike Armenia, Azerbaijan has failed to produce any *travaux* that could support its overbroad interpretation of Articles 18(1) and (3). Given that extraordinary interpretation, this lacuna in the *travaux* alone is fatal to Azerbaijan’s claims under Article 18. To borrow the words of the ICJ, “it may be thought that, if that Article had the scope that” Azerbaijan “gives it, the Parties would have been led to point out its importance during the negotiations or the process of ratification,”³⁴⁸ and that “[i]f it had the significance given to it by” Azerbaijan, “it is to be expected that this would have been highlighted [...] in drafting the [ECT].”³⁴⁹

*

173. For the foregoing reasons, Azerbaijan has not, and cannot, meet its burden to establish that Article 18 constitutes a basis for this Tribunal’s jurisdiction over its claims.

³⁴⁸ See, e.g., *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.

³⁴⁹ *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)*, Preliminary Objections, Judgment, I.C.J. Reports 2017 (RL-168), p. 42, para. 104.

III. AZERBAIJAN’S CLAIMS IN RELATION TO THE ALLEGED INTERRUPTION OF THE PIPELINE ARE OUTSIDE OF THE TRIBUNAL’S JURISDICTION

174. In its Counter-Memorial, Azerbaijan seeks to demonstrate that the Tribunal has jurisdiction over its claims relating to the alleged interruption of the Pipeline,³⁵⁰ arguing that it has satisfied any precondition imposed by Article 27,³⁵¹ and that Article 7(7) does not preclude arbitration of these claims.³⁵² For the reasons indicated below, these arguments fall short; Azerbaijan’s last-minute claims relating to the alleged interruption of the Pipeline are outside the scope of the Tribunal’s jurisdiction and should be dismissed at this preliminary stage.³⁵³

175. *Pro memoria*, on 8 October 2021, Azerbaijan sent Armenia a self-styled “Notice of Dispute under the Energy Charter Treaty,” in which it alleged that Armenia had violated Azerbaijan’s “[REDACTED]” in contravention of Article 18 of the ECT.³⁵⁴ For the next fourteen months, the Parties exchanged numerous letters and held a meeting to discuss these claims. These discussions exclusively concerned Azerbaijan’s allegations about Armenia’s purported conduct in the so-called “Occupied Territories” following the First Nagorno-Karabakh War, and Azerbaijan’s theory that Armenia violated Article 18 of the ECT (the “Original Claims”).³⁵⁵

176. Then, on 16 December 2022, *i.e.*, fourteen months after its “Notice of Dispute,” Azerbaijan for the first time purported to “[REDACTED]”

³⁵⁰ Counter-Memorial, paras. 72-85.

³⁵¹ *Id.*, paras. 86-105.

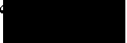
³⁵² *Id.*, paras. 106-122.

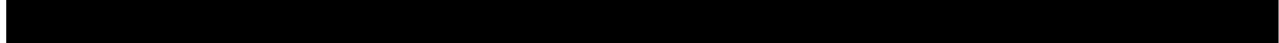
³⁵³ *See* Memorial, Section III.

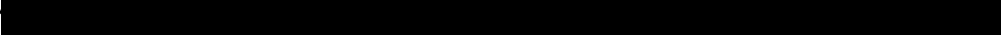
³⁵⁴ *Id.*, para. 112 (citing Compilation of the Parties’ Pre-Arbitration Exchanges (CE-063), [PDF] pp. 2-3, Letter from Azerbaijan to Armenia (8 Oct. 2021)).

³⁵⁵ *See* Memorial, paras. 113-114; Compilation of the Parties’ Pre-Arbitration Exchanges (CE-063), [PDF] pp. 1-81. Azerbaijan’s claims that Armenia breached customary international law, made together with Azerbaijan’s allegations concerning Article 18, have since been withdrawn.

³⁵⁶ Compilation of the Parties’ Pre-Arbitration Exchanges (CE-063), [PDF] p. 82, Letter from Azerbaijan to Armenia (16 Dec. 2022).

177. These new claims, which appeared at a time when Azerbaijan was already threatening to end negotiations,³⁵⁷ were not particularized. In its 16 January 2023 response, Armenia thus asked Azerbaijan to elaborate on their factual and legal bases.³⁵⁸ Armenia nevertheless noted that these new allegations appeared to concern a factual basis “ ” to the alleged conduct in the “Occupied Territories” that the Parties had been discussing for fourteen months, and relied on a provision of the ECT that had never been invoked before by Azerbaijan—Article 7.³⁵⁹ Instead of particularizing its allegations in response to Armenia’s letter, Azerbaijan abruptly ended the Parties’ negotiations on 24 February 2023,³⁶⁰ and filed this arbitration the very next business day on 27 February 2023.

178. Azerbaijan’s submissions have since confirmed that its allegations about “  ”³⁶¹ have nothing to do with the dispute that it originally notified. The conduct at issue, *i.e.*, the interruption of the Pipeline transit, allegedly occurred not in the “Occupied Territories” (*i.e.*, Nagorno-Karabakh) but *within Armenia’s* own territory, as shown in Figure 1 below. Moreover, they concern events that allegedly occurred in 1991, well before the alleged “occupation” following the end of the First Nagorno-Karabakh War in 1994.³⁶²

³⁵⁷ *See id.* (“”).

³⁵⁸ *Id.*, [PDF] p. 86, Letter from Armenia to Azerbaijan (16 Jan. 2023).

³⁵⁹ *Id.*

³⁶⁰ *Id.*, [PDF] pp. 87-89, Letter from Azerbaijan to Armenia (24 Feb. 2023).

³⁶¹ *Id.*, [PDF] p. 82, Letter from Azerbaijan to Armenia (16 Dec. 2022).

³⁶² *See* Statement of Claim, para. 137. As Armenia explained, for this reason, the Pipeline Transit Claims also all fall outside the Tribunal’s jurisdiction *ratione temporis*, as the alleged interruption on which they rely would have occurred years before the entry into force of the ECT for the Parties in 1998. *See* Memorial, paras. 20, 94; Request for Bifurcation, Sections III.B.4, III.C.1.

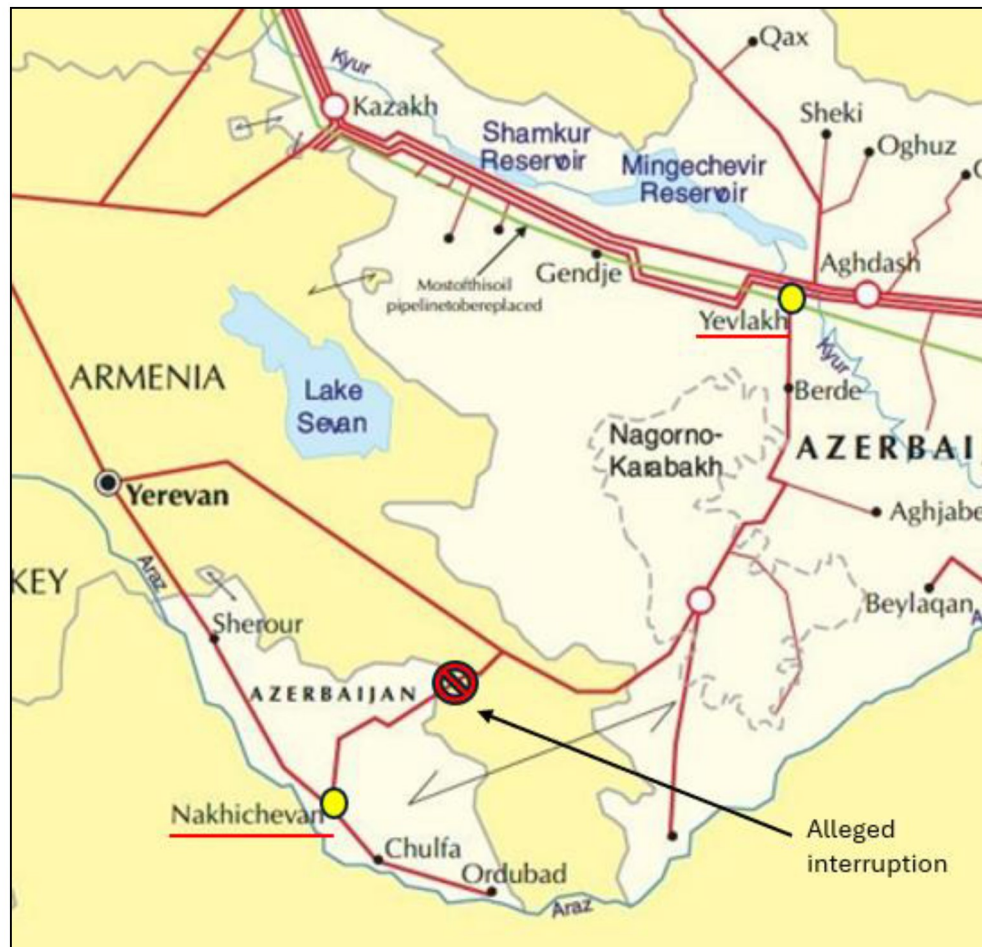


Figure 1 – Close-up Map of the Yevlakh-Nakhichevan Pipeline³⁶³

179. Armenia notes that Azerbaijan now attempts to salvage its case on jurisdiction by insisting that it makes claims concerning the Pipeline not only under Article 7, but also under Article 18. According to Azerbaijan, rejecting the Article 7 claims “would result in parallel proceedings adjudicating the same overlapping set of facts—including the splintering of the Y-N Pipeline claims, which fall under both Articles—and potentially arriving at inconsistent conclusions.”³⁶⁴ This argument is defective for several reasons. First of all, efficiency is not a substitute for consent. An international tribunal cannot entertain claims that fall outside its jurisdiction, no matter how allegedly “efficient” it would be to do so.

³⁶³ See Memorial, paras. 17, 129, note 257. This map is a modified version of Figure 1 of Armenia’s Memorial, reproduced for illustrative purposes only and without prejudice.

³⁶⁴ Counter-Memorial, para. 121. See also *id.*, paras. 68-70.

180. In any event, the efficiency concerns that Azerbaijan raises are not real. Contrary to what Azerbaijan suggests, Armenia has already specified,³⁶⁵ and will further explain below, that its objections to the Pipeline Transit Claims apply irrespective of the treaty provisions under which they are asserted. Whether raised under Article 7 or 18, the Pipeline Transit Claims concern the same factual allegations first “notifie[d]” in vague terms in Azerbaijan’s letter of 16 December 2022.³⁶⁶ The Pipeline Transit Claims would have needed to satisfy independently the requirement of the existence of a dispute, as well as the precondition of negotiations and, as further explained below,³⁶⁷ they concern matters arising from transit that should have been referred to conciliation.

181. While Armenia has naturally focused its pleadings on Article 7, this focus is because Azerbaijan’s misguided allegation that the interruption of the Pipeline transit breached Article 18 was made only in passing, in a single paragraph in Azerbaijan’s Statement of Claim.³⁶⁸ It cannot be right that such a fractional portion of its claims should dictate the Tribunal’s approach to jurisdiction as a whole. That said, and for the avoidance of doubt, Armenia’s objections relating to Azerbaijan’s Article 7 claims apply equally to its allegation that the interruption of the Pipeline transit breached Article 18.³⁶⁹

182. As Armenia explains below, the Pipeline Transit Claims are outside the Tribunal’s jurisdiction for three reasons. *First*, there was no “dispute” as to the alleged interruption of the

³⁶⁵ See Memorial, para. 131, note 260.

³⁶⁶ See Statement of Claim, Section III.C.5.

³⁶⁷ See *infra* para. 264.

³⁶⁸ See Statement of Claim, para. 212 (alleging a breach of Article 18 because “Armenia had cut off the natural gas supply to Nakhchivan and had not restored supply, interfering with Azerbaijan’s rights to determine how to exploit its gas resources and to receive financial benefits from such exploitation”). Armenia notes that Azerbaijan also makes allegations about access to and use of the Pipeline infrastructure in Nagorno-Karabakh. *Id.*, paras. 207, 210 (“Armenia violated Azerbaijan’s sovereign rights under Article 18(1) by denying Azerbaijan access to the gas supplied by the Y-N Pipeline and to the Pipeline infrastructure in the Occupied Territories” and “Armenia co-opted Azerbaijan’s natural gas infrastructure for its own use and benefit, further violating Azerbaijan’s rights to access, regulate, and enjoy financial benefits from those assets under ECT Articles 18(1) and 18(3). [...] Through Artsakh Gaz, Armenia co-opted the section of the Y-N Pipeline from Asgaran to Lachin to supply the residents there”). These allegations do not appear to concern the interruption of the Pipeline transit through the territory of Armenia to Nakhichevan. Instead, they appear designed to assimilate the situation of the Pipeline infrastructure in Nagorno-Karabakh to Azerbaijan’s other misguided Article 18 claims concerning so-called “energy assets” in Nagorno-Karabakh. See Request for Bifurcation, para. 96.

³⁶⁹ For the avoidance of doubt, all Article 18 claims relating to the Pipeline would also suffer from the same jurisdictional defects as the remaining Article 18 claims, including as set forth above. See *supra* Section II; Memorial, Section II. See also Request for Bifurcation, Section III.A. The Pipeline Transit Claims would also all be barred by the essential security interests exception. See *id.*, Section III.D.

Pipeline at the time of the Notice of Arbitration, which is a prerequisite to the Tribunal's jurisdiction (**Section III.A**).³⁷⁰ *Second*, and in any event, even if there were such a dispute (*quod non*), the corresponding negotiations requirement of Article 27 was not fulfilled as to these claims (**Section III.B**).³⁷¹ *Third*, these claims also fall outside the Tribunal's jurisdiction because they should instead have been referred to Article 7(7) conciliation (**Section III.C**).³⁷² Azerbaijan's Counter-Memorial contains no convincing response on any of these issues.

A. Azerbaijan Has Still Failed to Establish that a Dispute in Relation to the Pipeline Transit Claims Existed at the Time of the Notice of Arbitration

183. In its Memorial, Armenia explained that, by its plain terms,³⁷³ Article 27 requires that a dispute must exist prior to, and as a precondition for, the institution of proceedings before an arbitral tribunal.³⁷⁴ Armenia then established that no dispute as to the Pipeline Transit Claims existed when Azerbaijan instituted these proceedings on 27 February 2023, the undisputed critical date for jurisdictional purposes.³⁷⁵ Azerbaijan has not shown otherwise in its Counter-Memorial. After clarifying the applicable legal standard (**Section III.A.1**), Armenia explains that the Pipeline Transit Claims do not form part of the same dispute as Azerbaijan's Original Claims (**Section III.A.2**), and that, even after Azerbaijan first mentioned them, a dispute did not arise as to these new claims by the time of the Notice of Arbitration (**Section III.A.3**).

1. Azerbaijan Concedes that the Existence of a Dispute is a Jurisdictional Requirement

184. In its Counter-Memorial, Azerbaijan does not dispute that, in accordance with Article 27, a "dispute" must exist as a condition to the Tribunal's jurisdiction.³⁷⁶ The Parties also

³⁷⁰ See Memorial, Section III.A.

³⁷¹ See *id.*, Section III.B.

³⁷² See *id.*, Section III.C.

³⁷³ Energy Charter Treaty with Related Documents (**CL-001**), ECT, Article 27.

³⁷⁴ Memorial, Section III.A.1.

³⁷⁵ *Id.*, Section III.A.2.

³⁷⁶ See Counter-Memorial, Section III.A; Memorial, paras. 97-98, 102-109 (and citations therein). Azerbaijan seems to suggest in passing that the requirement of the existence of a dispute is an admissibility issue. See Counter-Memorial, para. 95 ("Viewed through the proper lens of admissibility, efficiency and equity concerns weigh heavily against granting Armenia's objections with regard to the purported lack of negotiations—or lack of a 'dispute'—over Azerbaijan's Article 7 claims.") (emphasis added). In its treatment of Armenia's objection, however, Azerbaijan does not contest that the existence of a dispute is a jurisdictional requirement. See *id.*, paras. 73-77. In all events, it is a well-established rule of international law that the existence of a dispute is a *jurisdictional* requirement, which is also

generally agree on the definition of “dispute.” Azerbaijan concedes that a “dispute” under international law requires a showing that the parties had “opposing views ‘concerning the question of the performance or non-performance of certain international obligations.’”³⁷⁷

185. Azerbaijan also does not appear to challenge³⁷⁸ the well-established requirement that, for a dispute to exist, “[i]t must be shown that the claim of one party is *positively opposed* by the other.”³⁷⁹

186. The Parties likewise largely agree that a claimant’s statements can give rise to a dispute only if they reach a certain level of specificity.³⁸⁰ However, contrary to what Azerbaijan argues, Armenia’s standard of specificity is not “inexplicably high,” and Armenia does not argue that the claimant should “particularize each and every detail in respect of the ‘dispute.’”³⁸¹ Rather,

reflected in the plain text of Article 27. *See e.g., Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Preliminary Objections, Judgment, I.C.J. Reports 2022 (RL-088)*, 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 [...]”); *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (RL-048)*, pp. 84-85, paras. 29-30 (finding that the word “dispute” in Article 22 of the CERD referred to the Court’s jurisdictional requirement of the existence of a dispute). *See also 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)*, p. 12, para. 19; *Republic of Ecuador v. United States of America*, PCA Case No. 2012-5, Award (29 Sept. 2012) (RL-052), para. 208. *See also Burlington Resources, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Jurisdiction (2 June 2010) (RL-157), para. 287.

³⁷⁷ Counter-Memorial, para. 75 (citing *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)*, pp. 26-27, para. 50) (emphasis omitted); Memorial, para. 99 (citing *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).

³⁷⁸ Counter-Memorial, paras. 75, 80(c).

³⁷⁹ Memorial, para. 99 (emphasis in the original) (citing *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).

³⁸⁰ *See* Memorial, para. 100; Counter-Memorial, paras. 75-77.

³⁸¹ Counter-Memorial, para. 74 (emphasis omitted).

Armenia, much like Azerbaijan,³⁸² submits that “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.”³⁸³ Azerbaijan has also not contested that such statements must “articulate[] an alleged breach” and the “particulars” of the conduct giving rise to it.³⁸⁴

187. Azerbaijan attempts to put forward a lower standard of specificity for statements to give rise to a dispute, which it purportedly distils from investor-State case law.³⁸⁵ Azerbaijan has not explained why investor-State arbitration cases would be more apposite to this inter-State dispute than the *jurisprudence constante* of the ICJ and other inter-State tribunals. But in any event, investor-State case law fully accords with the well-established rule of public international law that, to give rise to a dispute, a party’s statements must specifically describe its claims. Indeed, Azerbaijan’s own investor-State authorities provide that a notice of dispute must be “sufficiently detailed [so as] to allow [the State] to become aware of the existence of a dispute in relation to the [relevant treaty] and the facts giving rise to the dispute and to enable it to enter into negotiations with [the claimant] on this subject.”³⁸⁶ As another investment tribunal put it, “the dispute must

³⁸² See *id.*, para. 75.

³⁸³ Memorial, para. 100 (citing *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) (emphasis added). 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), p. 85, para. 30.

³⁸⁴ See Memorial, para. 100, (citing *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), pp. 853-855, paras. 50-51, 57; *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, I.C.J. Reports 2012 (RL-051), pp. 444-445, 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), p. 33, 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)). Azerbaijan specifies that, under the ICJ’s jurisprudence, a claimant “need not even ‘expressly refer to a specific treaty in its exchanges with the other State to enable it later to invoke that instrument.’” Counter-Memorial, para. 75 (emphasis omitted). However, that is not at issue here, since there is no question that Azerbaijan expressly invoked the ECT and a specific provision (Article 18) from the beginning of the negotiations, and Article 7 from 16 December 2022.

³⁸⁵ Counter-Memorial, para. 76.

³⁸⁶ *Joseph Houben v. Republic of Burundi*, ICSID Case No. ARB/13/7, Award (12 Jan. 2016) (CL-136), para. 145 (additional excerpt translated by Armenia’s counsel) (emphasis added). See also *Khan Resources Inc., Khan Resources B.V. and CAUC Holding Company Ltd. v. the Government of Mongolia and MonAtom Co., Ltd.*, PCA Case No. 2011-09, Decision on Jurisdiction (25 July 2012) (CL-130), para. 404 (“[I]n making the amicable settlement request referred to at Article 26(2) of the ECT, the investor need[s to] [...] describe the dispute in a manner sufficient to enable the other party to understand what is being referred to.”) (emphasis added); *Limited Liability Company*

relate to *clearly identified issues between the parties*” and “must go beyond general grievances and must be susceptible of being stated in terms of a concrete claim.”³⁸⁷

188. As Azerbaijan accepts, the existence of a dispute must be assessed by the Tribunal objectively on the basis of the parties’ interactions.³⁸⁸ Azerbaijan’s subjective characterization of what constitutes a “dispute” is therefore irrelevant.³⁸⁹

189. Finally, the requirement of the existence of a dispute must be fulfilled at the time of institution of proceedings (here, the Notice of Arbitration).³⁹⁰ Therefore, contrary to what Azerbaijan suggests, whether Armenia has “actively contest[ed] the facts underlying Azerbaijan’s Article 7 claims and the legal bases for those claims”³⁹¹ in its Request for Bifurcation or Memorial on Preliminary Objections is wholly irrelevant to this inquiry³⁹²—especially when Armenia has done so without prejudice to its position that the claims are outside the scope of the Tribunal’s jurisdiction *ratione voluntatis*.

190. Applying the above standard to the facts at hand establishes that Azerbaijan has failed to demonstrate that a dispute as to the Pipeline Transit Claims (whether under Article 18 or 7) existed at the time of the Notice of Arbitration.

Amto v. Ukraine, SCC Case No. 080/2005, Final Award (6 Mar. 2008) (**CL-073**), para. 57 (the notice must at least “inform the State of the state of affairs involving [the] disagreement [at issue]”).

³⁸⁷ *Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision on Jurisdiction (25 Jan. 2000) (**CL-117**), para. 94 (emphasis added).

³⁸⁸ Counter-Memorial, para. 77.

³⁸⁹ See *id.*, para. 81 (“The Y-N Pipeline claims form part and parcel of that same dispute, as Azerbaijan explained in its 24 February 2023 letter to Armenia.”).

³⁹⁰ 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. 27, para. 52; *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. 85, para. 30.

³⁹¹ Counter-Memorial, para. 95.

³⁹² 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. 851, para. 43 (“[N]either the application nor the parties’ subsequent conduct and statements made during the judicial proceedings can enable the Court to find that the condition of the existence of a dispute has been fulfilled in the same proceedings.”).

2. The Pipeline Transit Claims Do Not Arise from the Same Dispute as Azerbaijan's Original Claims

191. Azerbaijan's main defense to Armenia's objection is that there is purportedly only one overall "dispute" between the Parties that encompassed, from the beginning of the Parties' exchanges, the Pipeline Transit Claims.³⁹³ This argument is incorrect for several reasons.

192. *First*, Azerbaijan engages in revisionist history by arguing that from its very first purported "Notice of Dispute," Azerbaijan's communications encompassed claims concerning the Pipeline.³⁹⁴ In particular, Azerbaijan now asserts that:

The gravamen of Azerbaijan's ECT claims, from the submission of its October 2021 Notice of Dispute to the February 2023 Notice of Arbitration to the November 2024 Statement of Claim, has been Armenia's denial and usurpation of Azerbaijan's rights to access and use its energy resources as a result of actions taken *during the First Garabagh War and continued throughout the occupation*.³⁹⁵

193. This is false. As Armenia has explained,³⁹⁶ Azerbaijan's first letter of 8 October 2021 had a specific legal and factual scope: it expressly defined the purported dispute as "[redacted]

[redacted]"³⁹⁷ The letter only mentioned alleged conduct in the so-called "Occupied Territories" (*i.e.*, Nagorno-Karabakh) and during the time that Armenia allegedly "occupied" those territories (*i.e.*, *after* the First Nagorno-Karabakh War). Moreover, the letter specified only *one* provision of the ECT that was allegedly at issue, "[redacted]

[redacted]"³⁹⁸

194. The scope of Azerbaijan's purported claims and their underlying facts did not evolve throughout the Parties' subsequent exchanges.³⁹⁹ In its 20 December 2021 letter,

³⁹³ See Counter-Memorial, Section III.A, para. 78.

³⁹⁴ *Id.*, paras. 78, 78(a)-(b).

³⁹⁵ *Id.*, para. 81 (emphasis added).

³⁹⁶ See Memorial, para. 128.

³⁹⁷ Compilation of the Parties' Pre-Arbitration Exchanges (CE-063), [PDF] pp. 2-3, Letter from Azerbaijan to Armenia (8 Oct. 2021) (emphasis added).

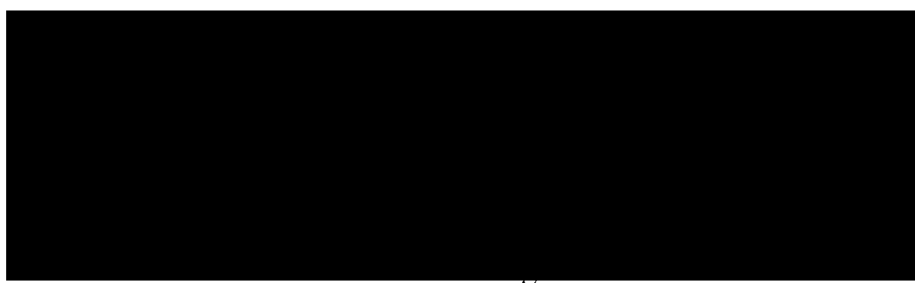
³⁹⁸ *Id.* (emphasis added).

³⁹⁹ See generally, Compilation of the Parties' Pre-Arbitration Exchanges (CE-063).

responding to Armenia’s request that Azerbaijan particularize its “Notice of Dispute,” Azerbaijan again identified only Article 18 as the applicable legal basis for its claims under the ECT.⁴⁰⁰ Further, Azerbaijan limited the factual basis of the dispute to Armenia’s alleged “"

.”⁴⁰¹ Again in a letter of 6 June 2022, Azerbaijan maintained that it was only making claims under Article 18 of the ECT and concerning Armenia’s alleged conduct “ .”⁴⁰² In that letter, it even expressly listed the energy resources and so-called energy “assets” over which it now asserts claims, none of which relates to the Pipeline.⁴⁰³ And it is undisputed that during the 24-25 November 2022 negotiation meetings, the Parties only discussed the Article 18 claims as they had been described by Azerbaijan until then.

195. Crucially, in its letter of 16 December 2022, Azerbaijan itself indicated that it had not considered claims in relation to the Pipeline until then. Azerbaijan stated that:

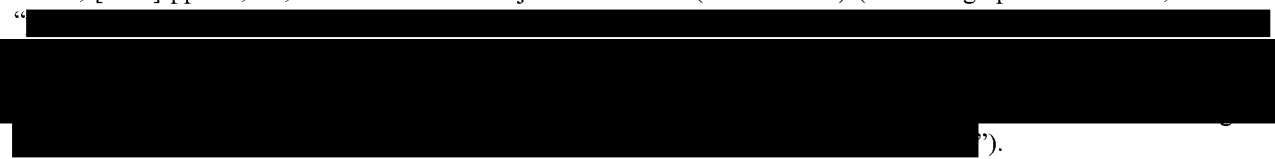

.”⁴⁰⁴

196. This language confirms that these claims were new and had not thus far been the subject of exchanges between the Parties. If Azerbaijan considered that these claims were part of the same dispute that had been negotiated for over a year, it would not have felt compelled to “” them in a belated attempt to satisfy the requirements of Article 27.

⁴⁰⁰ *Id.*, [PDF] pp. 9-10, Letter from Azerbaijan to Armenia (20 Dec. 2021).

⁴⁰¹ *Id.* (emphasis added).

⁴⁰² *Id.*, [PDF] pp. 63-64, Letter from Azerbaijan to Armenia (6 June 2022).

⁴⁰³ *Id.*, [PDF] pp. 64, 66, Letter from Azerbaijan to Armenia (6 June 2022) (describing specific conduct, such as “”).

⁴⁰⁴ *Id.*, [PDF] p. 82, Letter from Azerbaijan to Armenia (16 Dec. 2022) (emphasis added).

197. In sum, until 16 December 2022, the scope of the Parties' exchanges was explicitly limited to: (i) Armenia's alleged illegal exploitation of and denial of Azerbaijan's access to energy (ii) *in the territory of Azerbaijan*, specifically in the so-called "Occupied Territories," (iii) *during the occupation* of said territories, and (iv) *in violation of Article 18 of the ECT*. Until that date, Azerbaijan never mentioned (i) any pipeline or natural gas resources, (ii) any conduct that occurred outside Azerbaijan's territory, (iii) events that occurred during the First Nagorno-Karabakh War, or (iv) Article 7 or any other trade-related provisions of the ECT.

198. As the ICJ has explained, negotiations "delimit[] the scope of the dispute and its subject-matter."⁴⁰⁵ Thus the fact that the Parties' exchanges were limited to a specific scope for more than 14 months confirms that the dispute that arose during that time only encompassed that specific scope. As such, Azerbaijan's temporally, geographically, and legally distinct claims do not arise from the same dispute as Azerbaijan's Original Claims. Although Azerbaijan now attempts to blur the temporal scope of these new Pipeline Transit Claims,⁴⁰⁶ Azerbaijan has made clear that it claims that the alleged interruption of the pipeline occurred in 1991, namely *during* an active phase of the First Nagorno-Karabakh War, not in its "aftermath."⁴⁰⁷ This is *three years* before the temporal scope of the Article 18 dispute, which begins with the alleged occupation of Nagorno-Karabakh in mid-1994.⁴⁰⁸

199. *Second*, Azerbaijan appears not to contest that, in accordance with the ICJ's decisions in, *inter alia*, *Belgium v. Senegal* and *Nicaragua v. Colombia*, claims raising "different legal problems" must independently satisfy the dispute requirement.⁴⁰⁹ And here, the Pipeline

⁴⁰⁵ *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 *id.* p. 84, para. 30 ("While the existence of a dispute and the undertaking of negotiations are distinct as a matter of principle, the negotiations may [...] delineate its subject-matter.").

⁴⁰⁶ See Counter-Memorial, para. 82.

⁴⁰⁷ See Statement of Claim, para. 137.

⁴⁰⁸ See Memorial, para. 130.

⁴⁰⁹ See Memorial, paras. 106-109 (citing *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, I.C.J. Reports 2012 (RL-051), p. 444, para. 54 and *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), pp 31, para. 67.). See also *Burlington Resources, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Jurisdiction (2 June 2010) (RL-157), paras. 291-331 (analyzing separately whether claims relating to "Block 23" and "Block 24" (two different oil exploration areas) independently satisfied the existence of the dispute requirement and finding that, while a dispute existed as to Block 23, a dispute had not arisen as to Block 24). See also *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Preliminary Objections, Judgment, I.C.J.

Transit Claims plainly raise different legal problems from the Original Claims because they concern different types of conduct, during a different period of time, in the context of active hostilities, and in a different State's territory.⁴¹⁰ Claims in relation to the pipeline interruption accordingly raise distinct legal issues relating, for example, to the application of international humanitarian law and the ECT's essential security interests exception. They also raise different issues of attribution (the conduct having allegedly occurred in Armenia's territory and allegedly by Armenia's own actions) and of jurisdiction *ratione temporis*.

200. Azerbaijan attempts to distinguish *Belgium v. Senegal* and *Nicaragua v. Colombia* by stating that the claims in those cases arose from a "separate instrument or body of law."⁴¹¹ Azerbaijan does not explain why or how this was a determinative factor in the Court's reasoning. In any case, here, the Pipeline Transit Claims also implicate a separate body of law than the Original Claims, namely the trade law rules regarding transit provided for in Article 7. The fact that the claims arise from the same treaty cannot under any analysis be determinative where the treaty addresses different matters and bodies of law. And in this case, as Armenia has explained, Article 7 and Article 18 (as interpreted by Azerbaijan) address very different bodies of law:

Article 18 is located in the "Miscellaneous" Part IV of the ECT and concerns, according to Azerbaijan, the "customary principle of permanent sovereignty over natural resources." 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, and, as further explained below, its own dispute-resolution mechanism. Its substantive provisions, which are inspired by the GATT, cover various trade-law concepts. And indeed, Azerbaijan now makes several types of claims under Article 7;

Reports 1992 (RL-034) p. 266, para. 67-70 (finding that the new claim concerning the disposal of overseas assets of the British Phosphate Commissioners would be a distinct dispute from the one originally submitted in the Application concerning the rehabilitation of certain phosphate lands mined under Australian administration, which would need to independently satisfy the dispute requirement). In *Certain Phosphate Lands in Nauru*, the Court emphasized that the claims would have constituted separate disputes because the new claim would require the Court to consider "a number of questions that appear to it to be extraneous to the original claim, such as the precise make-up and origin of the whole of these overseas assets; and the resolution of an issue of this kind would lead it to consider the activities conducted by the Commissioners not only, *ratione temporis*, after 1 July 1967, but also, *ratione loci*, outside Nauru (on Ocean Island (Banaba) and Christmas Island) and, *ratione materiae*, in fields other than the exploitation of the phosphate (for example, shipping)." *Id.*, para. 68.

⁴¹⁰ See Memorial, paras. 129-130.

⁴¹¹ Counter-Memorial, para. 80(b) (emphasis added).

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). 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.”⁴¹²

201. Azerbaijan has failed to respond to this point.

202. Azerbaijan also cites a plethora of investor-State cases in which claims that were not notified in the original notice of dispute were still admitted. These cases do not concern the existence of a dispute, which is at issue here, but rather concern the fulfilment of notice or waiting period requirements and the admissibility of new claims not notified in the original notice of dispute.⁴¹³

203. But these investor-State cases actually support Armenia’s position. Indeed, Azerbaijan concedes that the new claims in these cases were admitted only when they were found to be “closely related to” the dispute before the Tribunal, or when they “ar[o]se out of substantially the same subject matter.”⁴¹⁴ All these cases concerned the situation of a claimant adding claims that arose from the same pattern of conduct affecting the same investment as the original claims. Many of those cases in fact concerned the addition of new measures by the State enacted *after* the

⁴¹² Memorial, para. 132.

⁴¹³ Counter-Memorial, para. 83 (and notes therein).

⁴¹⁴ *Id.*, para. 83, note 181 (citing *Tenaris S.A. and Talta Trading E Marketing Sociedade Unipessoal LDA v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/26, Award (29 Jan. 2016) (**CL-137**), paras. 245-246 (finding claims that were “closely related to” and “arise out of substantially the same subject matter” as the noticed claims did not require a separate dispute notice); *Greentech Energy Systems A/S, NovEnergia II Energy & Environment (SCA) SICAR, and NovEnergia II Italian Portfolio SA v. The Italian Republic*, SCC Case No. V 2015/095, Award (23 Dec. 2018) (**CL-141**), para. 213 (rejecting respondent’s objection that certain claims not specifically referenced in the dispute notices were outside the scope of the dispute, because “[e]ach measure objected to by Respondent relates to the same subject matter as other measures referred to in the letters”) (emphasis added); *Infrastructure Services (Antin) v. Kingdom of Spain*, ICSID Case No. ARB/13/31, Award (15 June 2018) (**CL-054**), paras. 354, 357 (finding that claims based on new Spanish laws and regulations enacted the year after claimants sent their dispute notices were part of a “single, on-going dispute between the Parties” because of the “inseparable relationship” between the new laws and the predecessor laws referenced in the dispute notices)).

original notice of dispute.⁴¹⁵ Others concerned the addition of other alleged violations of the treaty based on the same underlying conduct.⁴¹⁶

204. By contrast here, despite Azerbaijan’s submissions to the contrary,⁴¹⁷ the Pipeline Transit Claims are not “closely related to” its Original Claims nor do they “arise out of substantially the same subject matter.”⁴¹⁸ As explained, they relate to different types of conduct that occurred before the original notice of dispute. In fact, not only does the new alleged conduct (the interruption of the Pipeline) predate the notice of dispute, but it even predates by several years Armenia’s alleged conduct forming the basis of Azerbaijan’s Original Claims.

205. If the Tribunal were minded to look to investor-State arbitration by analogy, the situation here is more akin to *Rurelec v. Bolivia*. In that case, the original notice of dispute identified claims concerning the nationalization of the claimant’s investment.⁴¹⁹ The claimant subsequently notified new claims *under the same treaty* relating to certain regulatory changes,⁴²⁰ but did not satisfy the applicable treaty’s waiting period requirement as to the new claims.⁴²¹ The tribunal held that the claimant’s “‘New Claims’ [were] distinct and separate from the ‘main claim’ for compensation for the nationalisation” and that they were not part of the same dispute.⁴²²

⁴¹⁵ See *Gabriel Resources Ltd. and Gabriel Resources (Jersey) v. Romania*, ICSID Case No. ARB/15/31, Redacted Award (8 Mar. 2024) (**CL-148**), para. 676, 684; *Greentech Energy Systems A/S, NovEnergia II Energy & Environment (SCA) SICAR, and NovEnergia II Italian Portfolio SA v. The Italian Republic*, SCC Case No. V 2015/095, Award (23 Dec. 2018) (**CL-141**), para. 208; *Vestey Group Limited v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award (15 Apr. 2016) (**CL-138**), para. 151-155; *Infrastructure Services (Antin) v. Kingdom of Spain*, ICSID Case No. ARB/13/31, Award (15 June 2018) (**CL-054**), paras. 354, 357.

⁴¹⁶ See *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award (8 Apr. 2013) (**CL-131**), para. 339; *Joseph Houben v. Republic of Burundi*, ICSID Case No. ARB/13/7, Award (12 Jan. 2016) (**CL-136**), paras. 146, 212-215 (finding a breach of the full protection and security standard and an indirect expropriation based on the same set of facts).

⁴¹⁷ Counter-Memorial, paras. 81-84.

⁴¹⁸ *Id.*, para. 83 (citing *Tenaris S.A. and Talta Trading E Marketing Sociedade Unipessoal LDA v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/26, Award (29 Jan. 2016) (**CL-137**), paras. 245-246; *Greentech Energy Systems A/S, NovEnergia II Energy & Environment (SCA) SICAR, and NovEnergia II Italian Portfolio SA v. The Italian Republic*, SCC Case No. V 2015/095, Award (23 Dec. 2018) (**CL-141**), para. 213; *Infrastructure Services (Antin) v. Kingdom of Spain*, ICSID Case No. ARB/13/31, Award (15 June 2018) (**CL-054**), paras. 354, 357.

⁴¹⁹ See *Guaracachi America, Inc. and Rurelec PLC v. Plurinational State of Bolivia*, PCA Case No. 2011-17, Award (31 Jan. 2014) (**RL-160**), para. 230(b).

⁴²⁰ See *id.*, p. 7 (“New Claims”).

⁴²¹ *Id.*, para. 391.

⁴²² *Id.*, paras. 387, 395-396.

According to the tribunal, the regulatory changes at issue in the new claims had been made “years before the nationalisation” and the claimant had not demonstrated how the two sets of claims were connected.⁴²³ The tribunal emphasized that the dispute as defined by the claimant in its original notice concerned “only the nationalisation decree and its consequences.”⁴²⁴ It concluded that “[t]he 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 [...] at the time of such notification.”⁴²⁵ In the case at hand, the alleged Pipeline interruption had been known to Azerbaijan for three decades at the time of its original 8 October 2021 “Notice of Dispute.”

206. The case law of the ICJ in relation to the admissibility of counter-claims is also instructive by analogy here, since it considers whether counter-claims are “directly connected” to the principal claims.⁴²⁶ In particular, the Court determines whether the counter-claims arise out of the “same factual complex” as the principal claims,⁴²⁷ which requires assessing whether they arise from “the same geographical area,” “the same time period,” and whether they allege “similar types of conduct.”⁴²⁸ For example, in *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, the Court declared one of Uganda’s counter-claims alleging a violation of the Lusaka Agreement to be inadmissible on the ground that it concerned facts “of a different nature” because it related to events occurring *after* a ceasefire had been reached and

⁴²³ *Id.*, para. 396.

⁴²⁴ *Id.*, para. 397.

⁴²⁵ *Id.*, paras. 398-399. See also *Supervisión y Control v. Costa Rica*, ICSID Case No. ARB/12/4, Final Award (18 Jan. 2017) (**RL-239**), paras. 341-346 (rejecting new claims not notified to the State because they were not directly related to those notified, where the new claims concerned either different government measures or different violations under the treaty).

⁴²⁶ *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*; *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Counter-Claims, Order of 18 April 2013, I.C.J. Reports 2013 (**RL-230**), p. 213, para. 34; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Order of 29 November 2001, I.C.J. Reports 2001 (**RL-209**), p. 680, para. 43; *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, Counter-Claims, Order of 15 November 2017, I.C.J. Reports 2017 (**RL-243**), p. 296, para. 23.

⁴²⁷ *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, Counter-Claims, Order of 15 November 2017, I.C.J. Reports 2017 (**RL-243**), p. 297, para. 24; *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*; *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Counter-Claims, Order of 18 April 2013, I.C.J. Reports 2013 (**RL-230**), p. 213, para. 34; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Order of 29 November 2001, I.C.J. Reports 2001 (**RL-209**), p. 680, para. 42.

⁴²⁸ *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, Counter-Claims, Order of 15 November 2017, I.C.J. Reports 2017 (**RL-243**), p. 297, para. 24.

concerning alleged ceasefire violations, while the DRC's claims related to conduct *during* the conflict.⁴²⁹ And in *Certain Activities carried out by Nicaragua in the Border Area*, the Court declared two of Nicaragua's counter-claims inadmissible because, *inter alia*, they (i) did not relate to the same geographical area as the principal claims, (ii) referred to facts that predated the conduct underlying the principal claims, and (iii) concerned facts of a different nature than those underpinning the principal claims.⁴³⁰ This is also precisely the case for the Pipeline Transit Claims.

207. Finally, contrary to what it argues,⁴³¹ Azerbaijan's reservation of rights during the negotiations cannot magically absolve new claims of Article 27's jurisdictional requirements. Azerbaijan cannot point to any case in which an international court or tribunal has held as much. Rather, the *Rurelec* tribunal made clear, as Azerbaijan admits,⁴³² 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*."⁴³³ This does not assist Azerbaijan because, as explained, it has failed to demonstrate that the Pipeline Transit Claims relate to the same dispute as its Original Claims.⁴³⁴

⁴²⁹ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Order of 29 November 2001, I.C.J. Reports 2001 (RL-209), p. 680, para. 42.

⁴³⁰ *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*; *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Counter-Claims, Order of 18 April 2013, I.C.J. Reports 2013 (RL-230), p. 213, para. 34. See also *id.*, p. 214, para. 36; *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, Counter-Claims, Order of 15 November 2017, I.C.J. Reports 2017 (RL-243), p. 301, para. 37 (declaring Colombia's first and second counter-claims inadmissible because the nature of the alleged facts was different from those of the principal claims).

⁴³¹ Counter-Memorial, paras. 83-84.

⁴³² *Id.*, para. 84.

⁴³³ *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 (emphasis added).

⁴³⁴ Article 20 of the UNCITRAL Rules is equally unhelpful to Azerbaijan. See Counter-Memorial, para. 85, note 186 (citing UNCITRAL Arbitration Rules (1976) (RL-029), Article 20). This article, which is not at issue here, provides that "[d]uring the course of the arbitral proceedings either party may amend or supplement his claim or defence unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it or prejudice to the other party or any other circumstances. However, a claim may not be amended in such a manner that the amended claim *falls outside the scope of the arbitration clause* or separate arbitration agreement." UNCITRAL Arbitration Rules (1976) (RL-029), Article 20 (emphasis added). In other words, additional claims brought under Article 20 must satisfy the jurisdictional requirements of the instrument of consent. In the case at hand, such requirements include the existence of a dispute under Article 27. Moreover, tribunals applying this rule, such as the Iran-US Claims Tribunal, consider additional claims concerning different facts and different time periods as the original claims to be inadmissible "new claims" and not mere "amendments" of the original claims within the meaning of Article 20. See, e.g., *Vera-Jo Miller Aryeh, Laura Aryeh, J.M. Aryeh v. Islamic Republic of Iran*, IUSCT Case Nos. 842, 843, 844, Award (22 May 1997) (RL-201), paras. 62-70. See also by analogy *Ahmadou Sadio Diallo (Republic*

208. The allegation that “the scope of the factual evidence available to Azerbaijan increased as it regained access to territories from which it had been blocked for 30 years and progressed its investigation” also does not excuse the jurisdictional defects of the Pipeline Transit Claims.⁴³⁵ Even if this alleged hindrance were relevant for jurisdictional purposes (*quod non*), the alleged interruption of the pipeline did not occur during the alleged occupation or within the alleged “Occupied Territories.” On Azerbaijan’s own case, the interruption affected its exclave Nakhijevan,⁴³⁶ over which it has always retained control. Where, when, and for how long its own citizens were purportedly deprived of gas is the kind of information that falls, and has always fallen, squarely within Azerbaijan’s control, not Armenia’s. This fact is borne out by the type of “evidence” Azerbaijan has submitted in support of the alleged interruption, which consists of (i) data issued by Azerbaijan’s State Statistical Committee, (ii) Azerbaijani newspapers, (iii) gas distribution records kept by Azerbaijan, and (iv) speeches made by the President of Azerbaijan.⁴³⁷

209. Thus, Azerbaijan’s recent access to the so-called “Occupied Territories” has nothing to do with its belated and inchoate notification of its Pipeline Transit Claims. Rather, as Armenia has twice explained, Azerbaijan’s new claims seem to have been raised in reaction to Armenia’s December 2022 letter to the ICJ pointing out that Azerbaijan had cut off the supply of gas to Nagorno-Karabakh in the middle of winter.⁴³⁸

of Guinea v. Democratic Republic of the Congo), *Merits, Judgment*, *I.C.J. Reports 2010 (RL-011)*, pp. 656-659, paras. 39-47, in which the Court held that “additional claims formulated in the course of proceedings are inadmissible if they would result, were they to be entertained, in transforming ‘the subject of the dispute originally brought before [the Court] under the terms of the Application.’” Even when it would otherwise have jurisdiction, the Court deems such new claims inadmissible unless they were “implicit in the Application,” or if they “arise directly out of the question which is the subject-matter of the Application.” *Id.*, p. 657, para. 41. It is not sufficient to merely show “links between [the original and new claims] of a general nature.” *Id.* In that case, the Court concluded that new claims concerning the arrest and detention measures taken against Mr. Diallo in 1988-1989 were inadmissible *despite the fact* that it found the original and new claims to be “closely related in subject-matter.” *Id.* pp. 658-659, paras. 46-47. The Application’s initial claim concerned violations of Mr. Diallo’s rights arising from arrest, detention and expulsion measures taken against him at a different period of time (in 1995-1996) and were based on different legal bases. *Id.*, p. 657, para. 43. For that reason, the Court determined that the new claims were neither “implicit” in the Application, nor did they directly arise out of the subject-matter of the Application. *Id.* pp. 657-659, paras. 43-47. *See also Certain Phosphate Lands in Nauru (Nauru v. Australia)*, *Preliminary Objections, Judgment*, *I.C.J. Reports 1992 (RL-034)*, pp. 265-267, paras. 65-70.

⁴³⁵ Counter-Memorial, para. 85.

⁴³⁶ *See* Statement of Claim, paras. 137-144.

⁴³⁷ *See id.*, paras. 137-144, notes 297-307.

⁴³⁸ Memorial, para. 116; Request for Bifurcation, para. 107.

210. In sum, the Pipeline Transit Claims do not form part of the same dispute as Azerbaijan’s Original Claims, and Article 27’s dispute requirement for these new claims needed to be satisfied independently. As shown below, it was not.

3. No Dispute Concerning the Pipeline Transit Claims Arose Before the Institution of These Proceedings

211. As stated, Azerbaijan mentioned the Pipeline Transit Claims for the first time in its letter of 16 December 2022. However, no dispute as to those claims arose from that date until the critical date for the assessment of the Tribunal’s jurisdiction, namely, when Azerbaijan filed its Notice of Arbitration approximately two months later on 27 February 2023.

212. *First*, the 16 December 2022 letter was not, as Azerbaijan’s own authority put it, “sufficiently detailed to allow” Armenia “to become aware of the existence of [...] the facts giving rise to the dispute and to enable it to enter into negotiations with [the claimant] on this subject.”⁴³⁹ The letter failed to articulate the “particulars” of the conduct giving rise to the alleged breach.⁴⁴⁰ Instead, Azerbaijan obliquely stated that “[REDACTED]”⁴⁴¹ They were not.

213. Although the letter appeared to refer to a specific event (“the interruption of the supply of natural gas from Azerbaijan to the Nakhchivan exclave”), it did not provide a specific timeframe, let alone a date for that event, referring vaguely to “the aftermath of the First Garabagh War”—which could have been any time from a few days to several years after the end of that war in 1994.⁴⁴² And that timeframe later turned out to be inaccurate, with Azerbaijan now stating that the interruption occurred in the beginning of December 1991, *i.e.*, during the First Nagorno-

⁴³⁹ *Joseph Houben v. Republic of Burundi*, ICSID Case No. ARB/13/7, Award (12 Jan. 2016) (**CL-136**), para. 145 (additional excerpt translated by Armenia’s counsel). *See also Khan Resources Inc., Khan Resources B.V. and CAUC Holding Company Ltd. v. the Government of Mongolia and MonAtom Co., Ltd.*, PCA Case No. 2011-09, Decision on Jurisdiction (25 July 2012) (**CL-130**), para. 404 (“[I]n making the amicable settlement request referred to at Article 26(2) of the ECT, the investor need[s] to [...] describe the dispute in a manner sufficient to enable the other party to understand what is being referred to.”) (emphasis added).

⁴⁴⁰ *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. 856, para. 57.

⁴⁴¹ Compilation of the Parties’ Pre-Arbitration Exchanges (**CE-063**) [PDF] p. 82, Letter from Azerbaijan to Armenia (16 Dec. 2022).

⁴⁴² *Id.*

Karabakh War.⁴⁴³ Further, contrary to what Azerbaijan suggests,⁴⁴⁴ the letter did not provide a location for the alleged interruption—it only mentioned which pipeline was affected, and that the pipeline “[REDACTED]”⁴⁴⁵ This information was simply not specific enough for Armenia to understand the allegation.

214. Azerbaijan’s letter of 16 December 2022 also failed to specify the legal basis for its claims. It merely referred to “[REDACTED]”
[REDACTED]”⁴⁴⁶ Azerbaijan offered no explanation as to how the alleged interruption of a pipeline outside its territory could violate Article 18. And as Armenia has explained,⁴⁴⁷ Article 7 has 10 subparagraphs and is four pages long. It is one of “the most elaborate set[s] of multilateral rules concerning energy transit,”⁴⁴⁸ and involves various types of obligations. These obligations not only pertain to securing existing flows of energy, but also to non-discrimination and cooperation. While Azerbaijan may not have needed to explicitly list every subparagraph of Article 7 that may have been implicated, it should have at least referred to the types of obligation that it later put at issue (*i.e.*, non-discrimination, cooperation, etc.).

215. *Second*, and in any event, Azerbaijan has not shown that Armenia “positively opposed” these claims.⁴⁴⁹ As stated, in its response of 16 January 2023, Armenia merely noted that the new claims (i) “[REDACTED],” concerning “[REDACTED],” and (ii) concerned Article 7, “[REDACTED]”
[REDACTED]”⁴⁵⁰ Armenia invited Azerbaijan to “state the legal and factual basis for this allegation,” and, unable to express its views on those unspecified

⁴⁴³ See Statement of Claim, para. 137.

⁴⁴⁴ See Counter-Memorial, para. 78(d).

⁴⁴⁵ Compilation of the Parties’ Pre-Arbitration Exchanges (CE-063) [PDF] p. 82, Letter from Azerbaijan to Armenia (16 Dec. 2022).

⁴⁴⁶ *Id.* (emphasis added).

⁴⁴⁷ Memorial, para. 124.

⁴⁴⁸ C. G. Stănescu, “Article 7, Transit,” in R. Leal-Arcas, *Commentary on the Energy Charter Treaty* (Elgar, 2023) (RL-092), p. 109.

⁴⁴⁹ 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. 37.

⁴⁵⁰ Compilation of the Parties’ Pre-Arbitration Exchanges (CE-063), [PDF] p. 86, Letter from Armenia to Azerbaijan (16 Jan. 2023).

claims, merely reserved its position and stated that it “ [REDACTED]

[REDACTED].”⁴⁵¹

216. The only “opposition” that Azerbaijan identified between the Parties was about whether the Pipeline Transit Claims concerned “an entirely unrelated factual basis” than Azerbaijan’s Original Claims.⁴⁵² But opposition about whether these new claims formed part of the same dispute or not is wholly irrelevant. For a dispute to arise, what is required is a showing that “the two sides hold clearly opposite views *concerning the question of the performance or non-performance of certain international obligations*,”⁴⁵³ i.e., in this case, about whether Armenia breached Articles 7 or 18 by allegedly interrupting the pipeline transit. Azerbaijan cannot dispute that Armenia expressed no views on this issue in its 16 January 2023 letter or at any other point before the Notice of Arbitration.

217. Azerbaijan also suggests that Armenia’s “positive opposition” could be inferred from the mere “tone” of Armenia’s letter.⁴⁵⁴ It has provided no authority for the proposition that the positive opposition of a State could be inferred from a mere “tone.”⁴⁵⁵ Indeed, the most relevant case, *Ecuador v. United States*, supports Armenia’s position that, at best, the positive opposition of a State can only be “inferred” from the State’s *silence*, and even then, only in extreme

⁴⁵¹ *Id.*

⁴⁵² Counter-Memorial, para. 78(e).

⁴⁵³ *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. 37 (emphasis added).

⁴⁵⁴ Counter-Memorial, para. 78(e) (emphasis added).

⁴⁵⁵ Azerbaijan cites *Burlington Resources, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Jurisdiction (2 June 2010) (RL-157), para. 320, because in that case the tribunal found that “the tone and context” of the claimant’s letter “manifest[ed] a disagreement over rights and obligations,” specifically on whether the State had breached its obligation to provide full protection and security. But in that case, the State’s “positive opposition” was not what was at issue. The tribunal was analyzing the tone of the *claimant’s* letter not the State’s. The tribunal found that both the letter’s “tone and context” indicated that the State had *previously refused* to provide protection. The Tribunal’s conclusion came down to the fact that the letter, which requested the State’s assistance, used the words “*insist[s]*” that the Armed Forces and the National Police act to ensure that the hostages be liberated,” and that the “very use of the word ‘insist’ suggests that the request was previously made without success.” *Id.*, para. 321 (emphasis added). The tribunal also noted that the letter “reminded [the respondent] that it is its ‘duty’ to ‘guarantee the safety of the operations’” and found that “[t]his reminder, *in a context which suggests that previous security requests remained unheard*, is indicative of a disagreement concerning rights and obligations.” *Id.*, para. 322 (emphasis added). The context also included another letter in which the claimant had informed the State-owned entity that it had made repeated requests for protection and security, to no avail. *Id.*, paras. 323-324. Thus, if anything, the State’s positive opposition was inferred from the State’s previous refusals or inaction in light of these requests, not from the claimant’s “tone,” let alone the State’s.

circumstances.⁴⁵⁶ As Armenia explained, in that case, the United States had explicitly indicated that it would not respond to Ecuador's claims.⁴⁵⁷ Nevertheless, the tribunal refused to infer opposition from the United States' silence. It noted that "the inference of 'positive opposition' is warranted only when all other reasonable interpretations of the respondent's conduct and surrounding facts can be excluded."⁴⁵⁸

218. Armenia agrees with Azerbaijan that Armenia's response is not comparable to the United States' response in the *Ecuador v. United States* case⁴⁵⁹—because in this case Armenia *did not* remain silent. It sought to engage with Azerbaijan's new inchoate claims, requesting more information to formulate its views. If positive opposition could not be inferred from the United States's silence, then no positive opposition could be inferred from Armenia's good faith request for more information and continued engagement in negotiations.

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219. In sum, by the date of the Notice of Arbitration, no dispute had arisen as to the Pipeline Transit Claims because Azerbaijan did not refer to the claims with sufficient specificity and, in any event, Armenia never positively opposed those claims.

⁴⁵⁶ *Republic of Ecuador v. United States of America*, PCA Case No. 2012-5, Award (29 Sept. 2012) (**RL-052**), para. 223. See also *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. 507, para. 75 (positive opposition "may be inferred from the failure of a State to respond to a claim," but only "in circumstances where a response is called for").

⁴⁵⁷ See Memorial, para. 103 (citing *Republic of Ecuador v. United States of America*, PCA Case No. 2012-5, Award (29 Sept. 2012) (**RL-052**), para. 46).

⁴⁵⁸ *Republic of Ecuador v. United States of America*, PCA Case No. 2012-5, Award (29 Sept. 2012) (**RL-052**), para. 223. Azerbaijan attempts to paint this case as an "outlier," stating that in "the other cases examined by the tribunal, the respondent's failure to directly or adequately respond to the claimant's allegations did lead to an inference of 'positive opposition.'" Counter-Memorial, note 170 (emphasis omitted). But in *Ecuador v. United States*, the tribunal concluded that these cases all supported its conclusion "that the inference of 'positive opposition' is warranted *only when all other reasonable interpretations of the respondent's conduct and surrounding facts can be excluded*," as these cases concerned exceptional situations where the State's conduct could only indicate opposition, such as by remaining "silent when faced a serious allegation of breach." *Republic of Ecuador v. United States of America*, PCA Case No. 2012-5, Award (29 Sept. 2012) (**RL-052**), para. 223 (emphasis added). This is not what happened in this case. The ICJ's case law also confirms that the inference of positive opposition from a State's conduct is exceptional. See *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. 507, para. 75.

⁴⁵⁹ See Counter-Memorial, para. 80(c).

B. Even If a Dispute as to the Pipeline Transit Claims Existed, Azerbaijan Has Still Failed to Establish that It Fulfilled the ECT’s Negotiation Precondition

220. As Armenia demonstrated in its Memorial, even if a dispute as to the Pipeline Transit Claims could be found to exist, Azerbaijan’s claims would still fall outside the Tribunal’s jurisdiction because it did not fulfill the corresponding negotiation requirement under Article 27.⁴⁶⁰ Contrary to what Azerbaijan now argues, this requirement is a mandatory precondition to the Tribunal’s jurisdiction (**Section III.B.1**), and the record shows that Azerbaijan failed to fulfil it (**Section III.B.2**).

1. Contrary to Azerbaijan’s Self-Serving New Position, Article 27’s Negotiation Precondition Is a Mandatory Jurisdictional Requirement

221. In its latest submission, Azerbaijan argues that the requirement of negotiations under Article 27 is not a mandatory precondition to the Tribunal’s jurisdiction, but an admissibility or “procedural” provision that may be ignored by claimants at will.⁴⁶¹ This contrasts with Azerbaijan’s previous submissions, in which it consistently referred to the negotiation requirement as a “pre-condition to arbitration,”⁴⁶² even after Armenia had articulated this objection as relating to the Tribunal’s jurisdiction *ratione voluntatis*.⁴⁶³ For the first time, Azerbaijan now asserts that the “consultation period” of Article 27 only impacts the “inadmissibility of claims,” and that such provisions are “directory and procedural rather than mandatory and jurisdictional in nature.”⁴⁶⁴

222. Azerbaijan’s argument is also at odds with the position it took against Armenia in another inter-State dispute before the ICJ. Armenia brought that case under Article 22 of the Convention on the Elimination of All Forms of Racial Discrimination (“**CERD**”), which provides

⁴⁶⁰ See Memorial, Section III.B.

⁴⁶¹ See Counter-Memorial, paras. 89-92.

⁴⁶² See Notice of Arbitration, Section V.B (“The Sole *Pre-Condition to Arbitration* Has Been Fulfilled”), para. 57 (“The sole *precondition to inter-State arbitration* under the ECT is that the disputing parties ‘endeavor to settle disputes concerning the application or interpretation of this Treaty through diplomatic channels.’”) (emphasis added); Statement of Claim, Section IV.D, para. 173 (“The sole *precondition to inter-State arbitration* under the ECT is that the Contracting Parties that are party to the dispute should first ‘endeavour to settle disputes concerning the application or interpretation of [the ECT] through diplomatic channels.’”) (emphasis added).

⁴⁶³ Observations on the Request for Bifurcation, para. 56 (referring to it as the objection “that the Tribunal lacks jurisdiction over Azerbaijan’s Article 7 claims because Azerbaijan failed to satisfy the preconditions to the Tribunal’s jurisdiction under ECT Article 27”). See also *id.* p. 27, Section III.A.2.b (“Armenia’s Article 7 *Ratione Materiae* and *Ratione Voluntatis* Objections Would Result in Significant Procedural Inefficiencies if Bifurcated.”).

⁴⁶⁴ Counter-Memorial, para. 89.

that “[a]ny dispute between two or more States Parties with respect to the interpretation or application of this Convention, *which is not settled by negotiation* [...], shall, at the request of any of the parties to the dispute, be referred to the [ICJ].”⁴⁶⁵ In that case, Azerbaijan argued that the ICJ had “*no jurisdiction over Armenia’s claims because the precondition of negotiation under Article 22 of CERD has not been satisfied.*”⁴⁶⁶

223. Now that Azerbaijan finds itself on the other side of the *v.* in this case, it changes its position. But Azerbaijan’s new argument is not just an about-face; it is legally unfounded. This position contradicts the plain text of Article 27 and the overwhelming weight of international jurisprudence.

224. *First*, Azerbaijan’s position that the negotiation requirement is virtually optional is irreconcilable with the letter of Article 27. It is a well-established principle of treaty interpretation that a treaty’s terms must be given effect.⁴⁶⁷ Using unequivocally mandatory language, Article 27(1) of the ECT provides that “Contracting Parties *shall* endeavour to settle disputes concerning the application or interpretation of this Treaty through diplomatic channels.”⁴⁶⁸ Article 27(2) in turn provides that it is only “[i]f a dispute has not been settled in accordance with paragraph (1) within a reasonable period of time,” that a Contracting Party may refer such a dispute to arbitration.⁴⁶⁹ The ordinary meaning of these provisions thus establishes an obligation to attempt to settle disputes by negotiations, and makes it a condition precedent to the Tribunal’s jurisdiction.

⁴⁶⁵ *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. 35 (emphasis added).

⁴⁶⁶ *Id.*, para. 39 (emphasis added); *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan)*, Preliminary Objections of Azerbaijan (21 Apr. 2023) (**RL-264**), para. 23 (“As the Court concluded in the *Georgia v. Russian Federation* case, the Court lacks jurisdiction of a CERD claim if the negotiation precondition in Article 22 is not satisfied.”). See also *Bern Convention Arbitration (Azerbaijan v. Armenia)*, PCA Case No. 2023-60, Azerbaijan’s Opposition to Bifurcation of Preliminary Objections (24 July 2025) (**RL-269**), Section III.B.2, para. 68 (not disputing Armenia’s characterization of its objection as that the tribunal “lacks jurisdiction because the negotiation requirement in Article 18(2) of the Bern Convention has not been met”) (emphasis added).

⁴⁶⁷ See, e.g., *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary Objections, Judgment, I.C.J. Reports 2011 (**RL-048**), p. 125, para. 133.

⁴⁶⁸ Energy Charter Treaty with Related Documents (**CL-001**), Article 27(1) (emphasis added).

⁴⁶⁹ *Id.*, Article 27(2) (emphasis added).

Professor Hobér, whose commentary on the ECT both Parties have cited with approval, shares this interpretation of Article 27.⁴⁷⁰

225. *Second*, inter-State courts and tribunals have invariably interpreted such negotiation requirements in treaty compromissory clauses as mandatory preconditions to jurisdiction.⁴⁷¹ On this point, Azerbaijan argues that “Armenia’s reliance on two ICJ cases, where the Court treated negotiation preconditions in a compromissory clause as jurisdictional and accordingly dismissed claims for failure to satisfy those conditions, is misplaced” because “[i]t entirely ignores the weight of authority demonstrating how arbitral tribunals have approached negotiations or consultations provisions in *treaties*—the more appropriate analogue to the provision at issue here.”⁴⁷²

226. This statement is incorrect in a number of respects. There are not merely two ICJ cases that confirm this. The Court—and its predecessor, the PCIJ—has consistently treated such preconditions as jurisdictional requirements on *numerous* occasions. And contrary to what Azerbaijan misleadingly suggests, these cases are all perfectly apposite because they interpret

⁴⁷⁰ See K. Hobér, *The Energy Charter Treaty: A Commentary* (OUP, 2020) (CL-059), pp. 478 (“The words ‘shall endeavor’ indicates that the Contracting Parties have an obligation to try to settle the dispute in question within the framework provided in Article 27.”) (emphasis added), 479 (“The temporal element is vital for the timing of the commencement of arbitration proceedings. *Arbitration cannot start until and unless the relevant Contracting Parties have tried to reach a settlement during ‘a reasonable period of time’.*”) (emphasis added).

⁴⁷¹ See, e.g., *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), pp. 39-40, para. 88; *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, I.C.J. Reports 2012 (RL-051), p. 445, para. 56; *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), pp. 598-599, para. 34; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary Objections, Judgment, I.C.J. Reports 2011 (RL-048), pp. 128, 130, paras. 141, 148; *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), pp. 588, 598, paras. 69, 106; *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. 50; *Mavrommatis Palestine Concessions*, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2 (RL-021), p. 11 (“The question therefore arises whether the conditions laid down by Article 26 [of the Mandate for Palestine] in regard to the acceptance of the Court’s jurisdiction, the absence of which would render such acceptance inoperative, are fulfilled in the case before the Court.”); *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), pp. 344-346; *Barbados v. Trinidad and Tobago*, PCA Case No. 2004-02, Award (11 Apr. 2016) (RL-164), paras. 188-200; *Timor Sea Conciliation (Timor-Leste v. Australia)*, PCA Case No. 2016-10, Decision on Australia’s Objections to Competence (19 Sep. 2016) (RL-165), paras. 77-82.

⁴⁷² Counter-Memorial, para. 91 (emphasis in the original).

negotiation preconditions contained in the inter-State compromissory clauses of *treaties*, exactly like Article 27 of the ECT. For example:

- In *DRC v. Rwanda*, the Court held that the negotiations requirement contained in the compromissory clauses of *four* different conventions were mandatory preconditions to its jurisdiction.⁴⁷³ In particular, it interpreted Article 29(1) of the Convention on Discrimination Against Women, which provides that: “[a]ny dispute between two or more States Parties concerning the interpretation or application of the present Convention which is not settled by negotiation shall, at the request of one of them, be submitted to arbitration” and “[i]f within six months from the date of the request for arbitration the parties are unable to agree on the organization of the arbitration, any one of those parties may refer the dispute to the [ICJ].”⁴⁷⁴ In that case, the DRC argued that these preconditions pertained to the admissibility of the claims, not the jurisdiction of the Court.⁴⁷⁵ The Court disagreed. It explained that:

[I]ts 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.* [...] This conclusion applies *mutatis mutandis* to all of the other compromissory clauses invoked by the DRC.⁴⁷⁶

- In *Belgium v. Senegal*, the ICJ reached the same conclusion for the Convention Against Torture. The Court stated that the conditions in the Convention’s compromissory clause that “the dispute cannot be settled through negotiation and that, after a request for arbitration has been made by one of the parties, they have been unable to agree on the organization of the arbitration within six months from the request,” were “conditions which should be met for it to have jurisdiction.”⁴⁷⁷

⁴⁷³ These clauses were: Article 29, paragraph 1, of the Convention on Discrimination against Women; Article 75 of the WHO Constitution; Article XIV, paragraph 2, of the UNESCO Constitution; Article 14, paragraph 1, of the Montreal Convention. *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)*, pp. 35-36, 41, 43-44, 46, paras. 80, 94, 102, 110.

⁴⁷⁴ *Id.*, pp. 35-36, para. 80. *See also id.*, pp. 43, 45-46, 49, paras. 100 (Article 75 of the WHO Constitution), 108 (Article XIV(2) of the UNESCO Constitution), 118 (Article 14(1) of the Montreal Convention).

⁴⁷⁵ *Id.*, p. 37, para. 85.

⁴⁷⁶ *Id.*, pp. 39-40, para. 88 (emphasis added).

⁴⁷⁷ *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, I.C.J. Reports 2012 (RL-051)*, p. 445, para. 56. *See also Application of the Convention against Torture and Other Cruel, Inhuman or*

- In *Georgia v. Russia*, the ICJ similarly interpreted the compromissory clause in Article 22 of the CERD, which provided that “[a]ny dispute [...] which is not settled by negotiation or by the procedures expressly provided for in this Convention [...] shall, at the request of any of the parties to the dispute, be referred to the [ICJ].”⁴⁷⁸ Building on its existing case law, the Court found that Article 22 of the CERD likewise “establish[ed] preconditions to be fulfilled before the seisin of the Court.”⁴⁷⁹
- The Court reaffirmed that Article 22 of CERD established a mandatory and jurisdictional precondition of negotiations in two subsequent cases brought under it: in *Ukraine v. Russia*,⁴⁸⁰ and *Armenia v. Azerbaijan*.⁴⁸¹ The Court reached the same conclusion in *Ukraine v. Russia* with regard to the compromissory clause of the International Convention for the Suppression of the Financing of Terrorism.⁴⁸²

227. The only ICJ case that Azerbaijan cites in purported support of its position is the 1984 *Nicaragua v. United States* judgment, which is inapposite here.⁴⁸³ In that case, one of the bases for jurisdiction on which Nicaragua relied was Article XXIV(2) of the Treaty of Friendship, Commerce and Navigation between Nicaragua and the United States, which contained the following compromissory clause: “[a]ny dispute between the Parties as to the interpretation 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), pp. 598-599, para. 34 (“Article 30, paragraph 1, of the Convention against Torture sets out procedural preconditions which must be met before a dispute may be referred to the Court.”).

⁴⁷⁸ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary Objections, Judgment, I.C.J. Reports 2011 (RL-048), pp. 120-121, para. 117.

⁴⁷⁹ *Id.*, p. 128, para. 141.

⁴⁸⁰ *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, Preliminary Objections, Judgment, I.C.J. Reports 2019 (RL-077), p. 598, para. 106.

⁴⁸¹ *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. 50.

⁴⁸² *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, Preliminary Objections, Judgment, I.C.J. Reports 2019 (RL-077), p. 588, para. 69 (“The Court considers that Article 24, paragraph 1, of the ICSFT requires, as a first procedural precondition to the Court’s jurisdiction, that a State makes a genuine attempt to settle through negotiation the dispute in question with the other State concerned. According to the same provision, the precondition of negotiation is met when the dispute ‘cannot be settled through negotiation within a reasonable time.’”). See also *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. 273 (“The Special Chamber considers that article 74, paragraph 1, and article 83, paragraph 1, of [UNCLOS] entail an obligation to negotiate in good faith with a view to reaching an agreement on delimitation.”).

⁴⁸³ See Counter-Memorial, para. 97 (citing *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment on Jurisdiction & Admissibility, I.C.J. Reports 1984 (CL-110), para. 83).

application of the present Treaty, *not satisfactorily adjusted by diplomacy*, shall be submitted to the International Court of Justice.”⁴⁸⁴

228. The ICJ in that case simply noted that the “dispute [was] [...] clearly one which is not ‘satisfactorily adjusted by diplomacy’” even though Nicaragua “ha[d] not expressly referred in negotiations with [the United States] to a particular treaty as having been violated by conduct of [the United States].”⁴⁸⁵ But the ICJ has since clarified that it reached this conclusion due to the specific language of the compromissory clause in that case, which, unlike that of the ECT and many other treaties, did not impose an obligation to negotiate the dispute as a precondition to the Court’s jurisdiction. The ICJ explained as much in *Alleged Violations (Iran v. United States)*, in which it applied a provision similar to the one at issue in *Nicaragua*:

The Court recalls that Article XXI, paragraph 2, of the 1955 Treaty is not phrased in terms similar to those used in certain compromissory clauses of other treaties, *which, for instance, impose a legal obligation to negotiate prior to the seisin of the Court* [such as the CERD]. Instead, the terms of Article XXI, paragraph 2, of the 1955 Treaty are *descriptive in character* and focus on the fact that the dispute must not have been “satisfactorily adjusted by diplomacy” [as in *Nicaragua*]. *Thus, there is no need for the Court to examine whether formal negotiations have been engaged in or whether the lack of diplomatic adjustment is due to the conduct of one party or the other. It is sufficient for the Court to satisfy itself that the dispute was not satisfactorily adjusted by diplomacy before being submitted to it.*⁴⁸⁶

⁴⁸⁴ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment on Jurisdiction & Admissibility, I.C.J. Reports 1984 (CL-110), p. 427, para. 81 (emphasis added).

⁴⁸⁵ *Id.*, p. 428, para. 83.

⁴⁸⁶ *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v. United States of America)*, Provisional Measures, Order of 3 October 2018, I.C.J. Reports 2018 (RL-245), pp. 637-638, para. 50 (emphasis added). See also *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Jurisdiction and Admissibility, Separate Opinion of Judge Nagendra Singh (26 Nov. 1984) (RL-187), pp. 445-446 (contrasting the language of the compromissory clause in the Treaty of Friendship, Commerce and Navigation of 1956, which did not “specifically prescribe [negotiations] as a sine qua non for the Parties to proceed to the Court,” with “several treaties which do categorically specify negotiations as a condition precedent to resorting to the [ICJ]” such as Article 13, paragraph 1, of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, which provides that “[a]ny dispute between two or more States Parties concerning the interpretation or application of this Convention *which is not settled by negotiation* shall, at the request of one of them, be submitted to arbitration.”) (emphasis added); *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award (8 Dec. 2008) (RL-218), paras. 137-140 (distinguishing the *Nicaragua* case on the basis, *inter alia*, that the “not satisfactorily adjusted by diplomacy”

229. Finding no support in the ICJ’s case law, Azerbaijan relies instead on a handful of investor-State decisions (the most recent of which dates back 12 years) that have considered waiting or “cooling-off” periods in investor-State dispute-settlement provisions of investment treaties to be merely procedural and non-mandatory.⁴⁸⁷ Azerbaijan contends that these investor-State cases are somehow more analogous than the numerous ICJ cases cited above that interpret *inter-State* compromissory clauses similar to Article 27 of the ECT.⁴⁸⁸

230. But even if the Tribunal were minded to look to investor-State cases, the view that such requirements do not affect a tribunal’s jurisdiction is *a minority view*.⁴⁸⁹ The consistent majority view, including as reflected in more recent jurisprudence, is in fact that preconditions to arbitration in investment treaties, such as negotiation requirements, are mandatory and

language created a mere “option,” and not an obligation to negotiate the dispute as condition *sine qua non* for the seisin of the Court).

⁴⁸⁷ Azerbaijan relies on seven cases for this point: *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction (6 Aug. 2003) (**CL-121**); *Ethyl Corp. v. Canada*, UNCITRAL (NAFTA), Award on Jurisdiction (24 June 1998) (**CL-116**); *Ronald S. Lauder v. Czech Republic*, Ad Hoc UNCITRAL, Award (3 Sep. 2001) (**CL-118**); *Bayindir İnşaat Turizm Ticaret ve Sanayi A.Ş. v. Islamic Republic of Pakistan (I)*, ICSID Case No. ARB/03/29, Decision on Jurisdiction (14 Nov. 2005) (**CL-123**); *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award (24 July 2008) (**CL-126**); *Stati v. Republic of Kazakhstan*, SCC Arbitration V (116/2010), Award (19 Dec. 2013) (**CL-133**); *Mohammad Ammar Al-Bahloul v. Republic of Tajikistan*, SCC Arbitration No. V (064/2008), Partial Award on Jurisdiction and Liability (2 Sep. 2008) (**CL-046**). See Counter-Memorial, paras. 89-95.

⁴⁸⁸ Counter-Memorial, para. 91.

⁴⁸⁹ As Azerbaijan’s own authority states, “there is certainly no general principle that an investor may ignore consultation or settlement clauses with impunity.” *Limited Liability Company Amto v. Ukraine*, SCC Case No. 080/2005, Final Award (26 Mar. 2008) (**CL-73**), para. 50.

jurisdictional. Armenia can cite at least three times as many decisions in support of this majority view,⁴⁹⁰ including cases interpreting similarly worded provisions to Article 27 of the ECT.⁴⁹¹

⁴⁹⁰ See *Louis Dreyfus Armateurs SAS v. Republic of India*, PCA Case No. 2014-26, Decision on Jurisdiction (22 Dec. 2015) (**RL-162**) para. 94; *Itisaluna Iraq LLC and Others v. Republic of Iraq*, ICSID Case No. ARB/17/10, Award (3 Apr. 2020) (**RL-256**), paras. 180, 183, 189-190; *Murphy Exploration and Production Company International v. Republic of Ecuador*, ICSID Case No. ARB/08/4, Award on Jurisdiction (15 Dec. 2010) (**RL-220**), paras. 132-157; *Guaracachi America, Inc. and Rurelec PLC v. Plurinational State of Bolivia*, PCA Case No. 2011-17, Award (31 Jan. 2014) (**RL-160**), paras. 389-390; *Burlington Resources, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Jurisdiction (2 June 2010) (**RL-157**), para. 315; *Almasryia for Operating & Maintaining Touristic Construction Co., L.L.C. v. State of Kuwait*, ICSID Case No. ARB/18/2, Award on the Respondent's Application Under Rule 41(5) of the ICSID Arbitration Rules (1 Nov. 2019) (**RL-251**), paras. 39-43, 48; *Tulip Real Estate Investment and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Decision on Bifurcated Jurisdictional Issue (5 Mar. 2013) (**RL-229**), paras. 61-72, 91; *Noble Energy, Inc. and Machalapower Cia. Ltda. v. Republic of Ecuador and Consejo Nacional de Electricidad*, ICSID Case No. ARB/05/12, Decision on Jurisdiction (5 Mar. 2008) (**RL-217**), para. 212; *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award (22 Aug. 2012) (**RL-227**), paras. 180-183, 193-194; *ST-AD GmbH v. Bulgaria*, PCA Case No. 2011-06, Award on Jurisdiction (18 July 2013) (**RL-232**), paras. 336-337, 348; *Ömer Dede and Serdar Elhüseyni v. Romania*, ICSID Case No. ARB/10/22, Award (5 Sep. 2013) (**RL-233**), paras. 221-225, 262-263; *Impregilo S.p.A. v. Argentine Republic (I)*, ICSID Case No. ARB/07/17, Award (21 June 2011) (**RL-223**), paras. 90-91, 94; *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award (16 Sep. 2003) (**RL-212**), paras. 14.2-14.3; *Kiliç İnşaat İthalat İhracat Sanayi Ve Ticaret Anonim Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/1, Award (2 July 2013) (**RL-231**), paras. 6.2.9, 6.3.15, 6.4.2; *Merrill & Ring Forestry L. P. v. Government of Canada*, ICSID Case No. UNCT/07/1, Decision on a Motion to Add a New Party (31 Jan. 2008) (**RL-216**), para. 29; *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award (8 Dec. 2008) (**RL-218**), paras. 119-122, 127, 149, 142; *ICS Inspection and Control Services Limited v. Argentine Republic (I)*, PCA Case No. 2010-09, Award on Jurisdiction (10 Feb. 2012) (**RL-226**), paras. 250-251; *Urbaser S.A. and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic*, ICSID Case No. ARB/07/26, Decision on Jurisdiction (19 Dec. 2012) (**RL-228**), paras. 123, 125, 128, 130; *Nasib Hasanov v. Georgia*, ICSID Case No. ARB/20/44, Decision on Respondent's Inter-State Negotiation Objection (19 Apr. 2022) (**RL-259**), paras. 89, 98; *Methanex Corporation v. United States of America*, UNCITRAL, Partial Award (7 Aug. 2002) (**RL-211**), para. 120; *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction (14 Jan. 2004) (**RL-213**), para. 88.

⁴⁹¹ See *Itisaluna Iraq LLC and Others v. Republic of Iraq*, ICSID Case No. ARB/17/10, Award (3 Apr. 2020) (**RL-256**), paras. 183, 189-190 (“While the *chapeau* of Article 17 addresses ‘conciliation or arbitration’, and the terms of Article 17(1) suggest that resort to conciliation requires agreement between the parties, *there is no avoiding the ‘if ... then’ language of Article 17(2). It necessarily follows from this language that resort to arbitration is conditional on the prior resort to conciliation.* [...] These provisions [...] constitute the consent of these Contracting Parties to investor-State arbitration. [...] [R]esort to conciliation, and the failure of the conciliation process, is a condition precedent to resort to arbitration. The Tribunal considers that it follows from the terms of Article 17(2) of the OIC Agreement, in all of its parts, that it constitutes consent to arbitration in general terms, *subject (on the Tribunal’s analysis) on the fulfilment of the condition precedent of prior resort to, and exhaustion of, the conciliation process.*”) (emphasis added); *Almasryia for Operating & Maintaining Touristic Construction Co., L.L.C. v. State of Kuwait*, ICSID Case No. ARB/18/2, Award on the Respondent's Application Under Rule 41(5) of the ICSID Arbitration Rules (1 Nov. 2019) (**RL-251**), para. 38 (“[P]aragraph 2 also incorporates mandatory language (‘shall be referred for resolution’) and in addition to that, it establishes a period of six months from the date in which either of the two parties ‘requested an amicable settlement by notifying the other party in writing.’ The Tribunal observes that the language used is conditional: the provision allows the referral of the dispute for resolution ‘if’ the dispute is not solved within six-months starting from a specific action (‘the request of an amicable settlement’) through written notification. The language of this provision plainly indicates that neither the written notification nor the six-month time-period is optional; rather, these steps are to be complied with before an arbitration may be initiated.”); *Tulip Real Estate Investment and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Decision on Bifurcated Jurisdictional Issue (5 Mar. 2013) (**RL-229**), paras. 70-71; *Wintershall Aktiengesellschaft v. Argentine*

231. As some of those tribunals have noted, the decisions cited by Azerbaijan in support of the minority view contradict the relevant treaties' explicit text (and thus rules of international law on treaty interpretation), deny the State an opportunity to settle the dispute amicably, and encourage claimants to ignore procedural requirements at their discretion.⁴⁹²

232. Contrary to what Azerbaijan claims, investor-State and national court cases applying Article 26 of the ECT are not "[p]articularly relevant."⁴⁹³ Azerbaijan places much emphasis on a Swedish court's view that "the fact that the provisions in Articles 26 and 27 ECT have a similar structure indicates that they should be interpreted in the same way."⁴⁹⁴ This is wrong. Article 26 contains language different from Article 27. Notably, contrary to the unqualified language of Article 27(1), Article 26(1) merely requires that disputes between an investor and a

Republic, ICSID Case No. ARB/04/14, Award (8 Dec. 2008) (**RL-218**), paras. 119-122, 142; *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award (22 Aug. 2012) (**RL-227**), paras. 180-183.

⁴⁹² See, e.g., *Murphy Exploration and Production Company International v. Republic of Ecuador*, ICSID Case No. ARB/08/4, Award on Jurisdiction (15 Dec. 2010) (**RL-220**), paras. 147-148, 154 ("The tribunal in the *Lauder* case concluded that the six-month waiting period '...is not a jurisdictional provision, [...] but rather a procedural rule that must be satisfied by the Claimant....' That Tribunal however, does not decide what happens if claimant does not comply with such obligation. *It is contrary to the fundamental rules of interpretation to state that while it constitutes a 'procedural rule that must be satisfied by the claimant', non-compliance does not have any consequence whatsoever.* Such a way of interpreting the obligation simply ignores the 'object and the purpose' of the rule, which is contrary to Article 31(1) of the aforementioned Vienna Convention. Similarly, the *SGS v. Pakistan* [and *Ethyl Corporation v. Canada*] 'Tribunals [treated] consultation periods as directory and procedural rather than as mandatory and jurisdictional in nature.' *This Tribunal cannot agree with that statement which implies that, even though there is an explicit treaty requirement, the investor may decide whether or not to comply with it as it deems fit.* [...] The tribunal in *SGS v. Pakistan* held that '...it does not appear consistent with the need for orderly and cost-effective procedure to halt this arbitration at this juncture and require the Claimant first to consult with the Respondent before re-submitting the Claimant's BIT claims to this Tribunal.' [...] This Tribunal finds that rationale totally unacceptable: *it is not about a mere formality, which allows for the submission of a request for arbitration although the six-month waiting period requirement has not been met, and if the other party objects to it, withdraws and resubmits it. It amounts to something much more serious: an essential mechanism enshrined in many bilateral investment treaties, which compels the parties to make a genuine effort to engage in good faith negotiations before resorting to arbitration.*") (emphasis added) (unbracketed ellipsis in the original); *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award (16 Sep. 2003) (**RL-212**), paras. 14.2- 14.3; *Merrill & Ring Forestry L. P. v. Government of Canada*, ICSID Case No. UNCT/07/1, Decision on a Motion to Add a New Party (31 Jan. 2008) (**RL-216**), para. 29; *Almasryia for Operating & Maintaining Touristic Construction Co., L.L.C. v. State of Kuwait*, ICSID Case No. ARB/18/2, Award on the Respondent's Application Under Rule 41(5) of the ICSID Arbitration Rules (1 Nov. 2019) (**RL-251**), paras. 39-43 (disagreeing with the conclusions of *SGS v. Pakistan* and *Biwater Gauff* on this point); *Kiliç İnşaat İthalat İhracat Sanayi Ve Ticaret Anonim Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/1, Award (2 July 2013) (**RL-231**), para. 6.3.4 (stating that the tribunal majority in *Abaclat* "fell into legal error" on this point).

⁴⁹³ Counter-Memorial, paras. 92, 94.

⁴⁹⁴ *Stati v. Republic of Kazakhstan*, Svea Court of Appeal Case No. T2675-14, Judgment (9 Dec. 2016) (**CL-140**), p. 49.

Contracting Party “shall, *if possible*, be settled amicably.”⁴⁹⁵ And Article 26(2) provides for a waiting period of three months (the more usual period being of six months), while Article 27(2) mandates that parties endeavor to settle their disputes diplomatically for a “reasonable period of time,”⁴⁹⁶ which, as explained below, would typically be much longer than three months. In any event, the authority on Article 26 is far from “compelling,” as Azerbaijan put it.⁴⁹⁷ As Azerbaijan’s own source noted, “there appears to be no uniform practice on the issue of the interpretation of Art[icle] 26.”⁴⁹⁸

233. In sum, the text of Article 27, inter-State jurisprudence, and even investor-State case law support the view that the negotiation requirement of Article 27 is a precondition to the Tribunal’s jurisdiction. Azerbaijan’s failure to fulfill it thus defeats the Tribunal’s jurisdiction over Azerbaijan’s Pipeline Transit Claims.

2. Azerbaijan Cannot Establish that It Fulfilled the Negotiation Precondition of Article 27

234. As explained above, a dispute as to the Pipeline Transit Claims did not exist between the Parties at the time of the Notice of Arbitration.⁴⁹⁹ But even if (*quod non*) the Tribunal were to find that such a dispute did arise before the Notice of Arbitration, then as Armenia

⁴⁹⁵ Energy Charter Treaty with Related Documents (CL-001), Article 26(1) (emphasis added).

⁴⁹⁶ *Id.*, Article 27(2). The Swedish Court in *Stati* mistakenly concluded that “[t]he difficulties associated with the assessment of what constitutes ‘reasonable time’ indicate that a condition for the arbitral tribunal’s jurisdiction is not at issue.” *Stati v. Republic of Kazakhstan*, Svea Court of Appeal Case No. T2675-14, Judgment (9 Dec. 2016) (CL-140), p. 49. This conclusion is at odds with international jurisprudence, which recognizes that requirements to negotiate disputes for a reasonable time are *jurisdictional* preconditions. See, e.g., *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2019 (RL-077)*, p. 588, para. 69 (“The Court considers that Article 24, paragraph 1, of the ICSFT requires, as a first procedural precondition to the Court’s jurisdiction, that a State makes a genuine attempt to settle through negotiation the dispute in question with the other State concerned. According to the same provision, the precondition of negotiation is met when the dispute ‘cannot be settled through negotiation within a reasonable time.’”); *Barbados v. Trinidad and Tobago*, PCA Case No. 2004-02, Award (11 Apr. 2016) (RL-164), paras. 194-195; *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.

⁴⁹⁷ Counter-Memorial, para. 94.

⁴⁹⁸ *Stati v. Republic of Kazakhstan*, Svea Court of Appeal Case No. T2675-14, Judgment (9 Dec. 2016) (CL-140), p. 50.

⁴⁹⁹ See *supra* Sections III.A.2-3.

explained in its Memorial,⁵⁰⁰ the Tribunal would still lack jurisdiction over the Pipeline Transit Claims because Azerbaijan did not fulfil the precondition of negotiation as to those claims.

235. At the outset, a fundamental flaw in Azerbaijan’s position is that it considers negotiations relating to its Original Claims to be relevant to establish that negotiations as to the Pipeline Transit Claims occurred.⁵⁰¹ But as explained, the Pipeline Transit Claims would have formed part of a different dispute than that of the Original Claims.⁵⁰² For the negotiation precondition to be fulfilled, “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.*”⁵⁰³

236. Moreover, as the ICJ held in *Georgia v. Russia*, only exchanges that occur after a dispute has arisen are relevant to determining whether the precondition of negotiation is fulfilled.⁵⁰⁴ Here, as explained, Azerbaijan only mentioned the alleged interruption of the Pipeline transit for the first time in its letter of 16 December 2022.⁵⁰⁵ Consequently, that date is the earliest on which a dispute as to the Pipeline Transit Claims could have possibly arisen. Therefore, only exchanges relating to the Pipeline Transit Claims and from that date are relevant to determine if the negotiation precondition is fulfilled as to this purported dispute.

237. Accordingly, Azerbaijan’s statement that it “genuinely attempted to negotiate its ECT dispute, encompassing both its Article 18 and Article 7 claims, with Armenia for almost a

⁵⁰⁰ See Memorial, Section III.B.

⁵⁰¹ See Counter-Memorial, paras. 100-101, 104-105.

⁵⁰² Memorial, para. 143.

⁵⁰³ *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. 133, para. 161 (emphasis added). See also *id.*, p. 136, 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”); *id.*, p. 136, para. 180 (excluding negotiations on armed activities as relevant because they did not “pertain to CERD-related matters”).

⁵⁰⁴ *Id.*, p. 135, paras. 167-168 (“After examination of the evidence submitted by the Parties, the Court concluded that a dispute between Georgia and the Russian Federation falling within the ambit of CERD arose only in the period immediately before the filing of the Application. [...] It stands to reason that it was only possible for the Parties to be negotiating the matters in dispute, namely, the Russian Federation’s compliance with its obligations relating to the elimination of racial discrimination, between 9 August 2008 and the date of the filing of the Application, on 12 August 2008, i.e., the period during which the Court found that a dispute capable of falling under CERD had arisen between the Parties.”) (emphasis added).

⁵⁰⁵ See *supra* paras. 176, 180, 195, 211; Compilation of the Parties’ Pre-Arbitration Exchanges (CE-063), [PDF] p. 82, Letter from Azerbaijan to Armenia (16 Dec. 2022).

year and a half” is incorrect and misleading.⁵⁰⁶ To be clear, the Parties’ exchanges relating to the Pipeline Transit Claims consisted of only three letters:

- Azerbaijan’s letter of 16 December 2022, in which it—for the first time—mentioned Article 7 and the Pipeline in three sentences;⁵⁰⁷
- Armenia’s letter in response of 16 January 2023 seeking more information;⁵⁰⁸ and
- Azerbaijan’s last letter of 24 February 2023, in which Azerbaijan devoted no more than a footnote to the Pipeline Transit Claims.⁵⁰⁹

238. The Parties held no meetings about the Pipeline Transit Claims. Nor could they have done so, as Azerbaijan filed its Notice of Arbitration on the very next business day following its last letter.⁵¹⁰ These three limited communications spanning barely over two months contrast starkly with the Parties’ negotiations concerning the Original Claims, which consisted of “30 letters” and “three meetings over a period of over 16 months.”⁵¹¹

239. These limited exchanges about the Pipeline Transit Claims did not constitute a genuine attempt to negotiate the alleged dispute for a “reasonable period of time” (**Section III.B.2.a**). And when Azerbaijan ended the exchanges, the negotiations as to the Pipeline Transit Claims had not become deadlocked or futile (**Section III.B.2.b**).

a. Azerbaijan Made No Genuine Attempt at Negotiating the Pipeline Transit Claims for a “Reasonable Period of Time”

240. The Parties agree on the applicable standard for determining whether the precondition of negotiation under Article 27 was fulfilled; namely, that Azerbaijan must show (i) it made “a genuine attempt [...] to engage in discussions with the other disputing party, with a view

⁵⁰⁶ Counter-Memorial, para. 101. This view seems to hinge on the notion that “exchanges between the parties need not even expressly reference the treaty.” Counter-Memorial, para. 97. But this misses the point given that there is no question that Azerbaijan expressly invoked the ECT, or Article 7 from 16 December 2022.

⁵⁰⁷ Compilation of the Parties’ Pre-Arbitration Exchanges (**CE-063**), [PDF] pp. 82-83, Letter from Azerbaijan to Armenia (16 Dec. 2022).

⁵⁰⁸ *Id.*, [PDF] pp. 84-86, Letter from Armenia to Azerbaijan (16 Jan. 2023).

⁵⁰⁹ *Id.*, [PDF] pp. 87-89, Letter from Azerbaijan to Armenia (24 Feb. 2023), note 8.

⁵¹⁰ *See* Memorial, para. 121.

⁵¹¹ *See* Counter-Memorial, para. 100.

to resolving the dispute;”⁵¹² and (ii) that the Parties negotiated for “a reasonable period of time.”⁵¹³ These are two distinct but mutually reinforcing requirements that arise from the *jurisprudence constante* of the ICJ in the application of negotiation requirements, and reflect the express language of Article 27.

241. Armenia has indeed explained that a “genuine attempt” at negotiating an alleged dispute is usually shown through the existence of multiple exchanges and meetings between the parties spanning an extended period of months or often years.⁵¹⁴ For its part, Azerbaijan argues that “the actual number or duration of exchanges is not dispositive.”⁵¹⁵ But it cannot point to a *single case* in which an international court or tribunal did not look at the number and duration of exchanges to determine whether a genuine attempt to negotiate the dispute had been made. Indeed, the ICJ has found a genuine attempt to negotiate a dispute in the following scenarios:

- In *Belgium v. Senegal*, after dozens of *notes verbales* were exchanged over the course of four years;⁵¹⁶
- In the *Ukraine v. Russia* CERD case, after two years of diplomatic correspondence and multiple face-to-face meetings;⁵¹⁷
- In *Canada and The Netherlands v. Syria*, after the parties had exchanged 66 diplomatic notes and held two in-person meetings over the course of three years;⁵¹⁸

⁵¹² See Counter-Memorial, para. 98; Memorial, para. 137; *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, Preliminary Objections, Judgment, I.C.J. Reports 2019 (RL-077), p. 602, para. 116; *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.

⁵¹³ Energy Charter Treaty with Related Documents (CL-001), ECT, Article 27(2). See also Counter-Memorial, para. 104.

⁵¹⁴ See Memorial, para. 138.

⁵¹⁵ Counter-Memorial, para. 99.

⁵¹⁶ *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, I.C.J. Reports 2012 (RL-051), pp. 432-437, 446, paras. 21-33, 59 (describing notes verbales of 22 September 2005, 30 November 2005, 7 December 2005, 23 December 2005, 11 January 2006, 9 March 2006, 4 May 2006, 9 May 2006, 20 June 2006, 20 & 21 February 2007, 8 May 2007, 5 October 2007, and the filing of the application on 19 February 2009).

⁵¹⁷ *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, Preliminary Objections, Judgment, I.C.J. Reports 2019 (RL-077), p. 603, para. 120.

⁵¹⁸ *Id.*, pp. 599, 601, paras. 36, 41-42.

- In *Armenia v. Azerbaijan*, after seven rounds of negotiations and 40 diplomatic exchanges, including face-to-face meetings over the course of ten months;⁵¹⁹
- In *South West Africa*, after multiple communications at the UN over the course of ten years;⁵²⁰
- In *ICAO Appeal (Bahrain, Egypt and United Arab Emirates v. Qatar)*, after a series of communications and exchanges during an Extraordinary Session of the ICAO Council over five months.⁵²¹
- In *Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire)*, after 10 meetings over six years of negotiations.⁵²²

242. Moreover, in cases where there was a compromissory clause similarly requiring negotiations to last specifically for a “reasonable time” or “reasonable period of time,” inter-State courts and tribunals have considered the condition to be fulfilled after extended periods of time:⁵²³

- In the *Ukraine v. Russia* case, after almost two years of negotiations;⁵²⁴

⁵¹⁹ *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. 45, 54-57; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan)*, Armenia’s Written Statement of Observations and Submissions on the Preliminary Objections of the Republic of Azerbaijan (21 Aug. 2023) (**RL-265**), para. 18.

⁵²⁰ *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**), pp. 344-346.

⁵²¹ *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**), pp. 199, 201-203, paras. 77-79, 91-93 (describing a series of communications between June 2017 and the filing of the application on 30 October 2017).

⁵²² *Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire)*, ITLOS Case No. 23, Judgment (23 Sep. 2017) (**RL-242**), p. 162, para. 604.

⁵²³ See Memorial, para. 140, note 278.

⁵²⁴ *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**), pp. 578, 588-589, paras. 34, 70 (applying Article 24(1) of the International Convention for the Suppression of the Financing of Terrorism, which provides that “[a]ny dispute between two or more States Parties concerning the interpretation or application of this Convention which cannot be settled through negotiation within a reasonable time shall, at the request of one of them, be submitted to arbitration”) (emphasis added).

- In *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, after multiple *notes verbales* and a meeting over the course of several years,⁵²⁵
- In *Barbados v. Trinidad and Tobago*, when the parties had held discussions “[s]ince about the late 1970s,” and had formal rounds of negotiations from July 2000 to November 2003, after which proceedings were instituted in February 2004,⁵²⁶
- In the *Timor Sea Conciliation*, after several rounds of negotiations took place between 2003 and 2006 and between 2014 and 2015, with proceedings then instituted in April 2016.⁵²⁷

243. These cases are not “cherry-picked,”⁵²⁸ as Azerbaijan puts it, but rather reflect the *jurisprudence constante* of inter-State courts and tribunals regarding negotiation preconditions. These decisions and the circumstances prevailing in them stand in stark contrast to the three letters exchanged between the Parties over the course of merely two months and 11 days.

244. And contrary to what Azerbaijan argues,⁵²⁹ Armenia’s position that Azerbaijan did not fulfill the negotiation requirement in this case is not inconsistent with its position in the *Armenia v. Azerbaijan* CERD case before the ICJ. In the CERD case, the parties engaged in numerous written exchanges and multiple rounds of meetings as to the dispute for a period of ten months.⁵³⁰ In its pleadings, Armenia pointed out that “the Court has found preconditions of negotiation to have been satisfied in circumstances where exchanges between the parties had been

⁵²⁵ *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, *Preliminary Objections, Judgment, I.C.J. Reports 2018 (RL-073)*, pp. 303-305, paras. 25-28 (describing exchanges from 2011 to 2012), p. 317, paras. 75-76 (describing negotiations from October 2015 to March 2016 and interpreting Article 35 of the Palermo Convention, which required the parties to attempt to negotiate a settlement of the dispute “for a reasonable time”).

⁵²⁶ *Barbados v. Trinidad and Tobago*, PCA Case No. 2004-02, Award (11 Apr. 2016) (RL-164), paras. 1, 194-195 (applying Articles 74 and 83 of the United Nations Convention on the Law of the Sea (“UNCLOS”), which provide that “[i]f no agreement can be reached *within a reasonable period of time*, the States concerned shall resort to the procedures provided for in Part XV”) (emphasis added).

⁵²⁷ *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. 30, 79, 80, 82 (also applying Articles 74 and 83 of UNCLOS).

⁵²⁸ Counter-Memorial, para. 99.

⁵²⁹ *Id.*, paras. 99, 104.

⁵³⁰ *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. 53-57; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan)*, Armenia’s Written Statement of Observations and Submissions on the Preliminary Objections of the Republic of Azerbaijan (21 Aug. 2023) (RL-265), para. 18.

less extensive than they were in this case.”⁵³¹ But the three cases Armenia cited for this proposition are entirely consistent with Armenia’s position here because, although the exchanges in those cases were less extensive than in the CERD case, they were still more extensive in duration and content than in this case.⁵³² In fact, these three cases are already cited above.⁵³³

245. Indeed, Azerbaijan cannot point to a single case in which an inter-State court or tribunal has found that such short and limited exchanges met the “reasonable period of time” requirement.⁵³⁴ The only inter-State authority that Azerbaijan was able to adduce is an *obiter* statement from the PCIJ decision in *Mavrommatis*, which noted that “[n]egotiations do not of necessity always presuppose a more or less lengthy series of notes and despatches; it may suffice that a discussion should have been commenced, and this discussion may have been very short.”⁵³⁵ But Azerbaijan selectively quotes this sentence. The full passage states:

Negotiations do not of necessity always presuppose a more or less lengthy series of notes and despatches; it may suffice that a discussion should have been commenced, and this discussion may have been very short; *this will be the case if a dead lock is reached, or if finally a point is reached at which one of the Parties definitely declares himself unable, or refuses, to give way, and there can therefore be no doubt that the dispute cannot be settled by diplomatic negotiation. This will also be the case, in certain*

⁵³¹ *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. 49.

⁵³² See *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan)*, Armenia’s Written Statement of Observations and Submissions on the Preliminary Objections of the Republic of Azerbaijan (21 Aug. 2023) (RL-265), para. 29 (citing *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, I.C.J. Reports 2012 (RL-051), p. 446, para. 59; *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. 97; *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. 345).

⁵³³ See *supra* para. 241.

⁵³⁴ Even the investor-State cases on which Azerbaijan relies confirm that, when pursued, negotiations entail multiple communications over several months or years. For example, in *Abaclat v. Argentina*, the tribunal found that the negotiation requirement had been met because consultations had taken place and lasted years, between 2002 and 2006, and included numerous letters and meetings. *Abaclat and Others v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (4 Aug. 2011) (CL-129), paras. 84, 559, 566. In *Luigiterzo Bosca v. Lithuania*, the tribunal found the negotiation requirement to be met after there had been numerous exchanges and a meeting over the course of a year. *Luigiterzo Bosca v. Republic of Lithuania*, PCA Case No. 2011-05, Award (17 May 2013) (CL-132), paras. 95, 118, note 96.

⁵³⁵ Counter-Memorial, para. 99 (citing *Mavrommatis Palestine Concessions*, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2 (RL-021), p. 13) (emphasis omitted).

*circumstances, if the conversations between the Governments are only the continuation of previous negotiations between a private individual and a government.*⁵³⁶

246. Armenia agrees that negotiations can be brief if one of the parties categorically refuses to negotiate or if they become deadlocked. This is not what happened here. Simply put, *Mavrommatis* does not stand for the proposition that such short and limited exchanges as occurred in this case can suffice to meet the negotiations requirement without a showing of futility. And, on its facts, the situation in *Mavrommatis* was very different because there *had* been lengthy exchanges which had gone on for years.⁵³⁷ Thus, if anything, *Mavrommatis* is yet another authority supporting Armenia.

247. Finally, Azerbaijan has no convincing response to Armenia's contextual interpretation of Article 27. As Armenia has explained,⁵³⁸ in accordance with the customary rules of treaty interpretation, the terms "reasonable period of time" in Article 27(2) must be interpreted within their context.⁵³⁹ The context here includes Article 26, which establishes a waiting period of three months.⁵⁴⁰ Contrary to what Azerbaijan claims, Armenia does not suggest that this three-month period should apply to inter-State disputes as well; as explained above, Articles 26 and 27 contain different language to which different effect should be given.⁵⁴¹ Armenia simply points out that the three-month period should *a fortiori* be an absolute *floor* for what constitutes a "reasonable period of time" for *inter-State* negotiations. This is due to the paramount importance of negotiations as the primary dispute-settlement method in the inter-State context.⁵⁴² And as

⁵³⁶ *Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2 (RL-021)*, p. 13 (emphasis added).

⁵³⁷ Although the exchanges were not directly between the relevant States but between the investor and the host State, the PCIJ still found that these exchanges could be imputed to the applicant State and concluded that the negotiation requirement was fulfilled. *Id.*, p. 15.

⁵³⁸ Memorial, para. 141.

⁵³⁹ Vienna Convention on the Law of Treaties (1969) (CL-011), Article 31(1).

⁵⁴⁰ Energy Charter Treaty with Related Documents (CL-001), ECT, Article 26(2).

⁵⁴¹ See *supra* para. 232.

⁵⁴² See Memorial, para. 136.

Armenia has explained, in practice, inter-State negotiations typically proceed at a much slower pace than investor-State negotiations, for political, diplomatic, and protocol-related reasons.⁵⁴³

248. In any case, Azerbaijan would not have satisfied Article 26’s minimal requirement because *it did not even wait three months* after it first mentioned the Pipeline Transit Claims before filing this arbitration.

249. In light of the above, Azerbaijan has failed to show that it made a “genuine attempt” at negotiating its Pipeline Transit Claims for a “reasonable period of time.”

b. Azerbaijan Ended the Negotiations as to the Pipeline Transit Claims Before They Could Become Deadlocked or Futile

250. Azerbaijan also argues that the negotiation requirement was met in this case because the negotiations became “futile or deadlocked.”⁵⁴⁴ Armenia agrees that negotiations must be pursued at least until they become futile or deadlocked, *i.e.*, until “no reasonable probability exists that further negotiations would lead to a settlement.”⁵⁴⁵ The Parties also agree that “the doctrine [of futility] imposes a *considerable burden of proof* on a claimant wishing to invoke it to excuse non-compliance with preconditions to arbitrate,” and that “the existence of futility cannot be presumed, but rather it must be proven, *based on substantial and credible evidence*.”⁵⁴⁶

251. Yet, Azerbaijan has failed to meet its considerable burden of proving futility here.

⁵⁴³ See Memorial, paras. 140-141.

⁵⁴⁴ Counter-Memorial, paras. 98, 100-102, 105.

⁵⁴⁵ See Memorial, para. 142; *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, I.C.J. Reports 2012 (RL-051), pp. 445-446, 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.

⁵⁴⁶ See Counter-Memorial, para. 98, note 213; Memorial, para. 142 (citing *Louis Dreyfus Armateurs SAS v. Republic of India*, PCA Case No. 2014-26, Decision on Jurisdiction (22 Dec. 2015) (RL-162), para. 97) (emphasis added). See also *ST-AD GmbH v. Bulgaria*, PCA Case No. 2011-06, Award on Jurisdiction (18 July 2013) (RL-232), para. 364 (explaining that a jurisdictional requirement may be dispensed of only “if there is a clear and insuperable futility in following a required procedure”); *Kiliç İnşaat İthalat İhracat Sanayi Ve Ticaret Anonim Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/1, Award (2 July 2013) (RL-231), paras. 8.1.3, 8.1.4 (requiring “compelling” or “best” evidence of futility).

252. The Parties agree that negotiations become futile or deadlocked if (i) one party fails to respond to an invitation to negotiate;⁵⁴⁷ (ii) one party categorically refuses to negotiate;⁵⁴⁸ or (iii) if the parties' "basic positions have not subsequently evolved after several exchanges of diplomatic correspondence or meetings."⁵⁴⁹ But none of these scenarios apply here.

253. As Armenia explained, Azerbaijan raised the Pipeline Transit Claims for the first time in its 16 December 2022 letter. In its 16 January 2023 response, Armenia acknowledged these new claims and indicated that it stood "[REDACTED]

[REDACTED]".⁵⁵⁰

254. Contrary to Azerbaijan's position, a request for more information when faced with a vague allegation of breach cannot amount to a refusal "to engage on substance or constructively

⁵⁴⁷ See *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**), p. 420, 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.").

⁵⁴⁸ See *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. 97 ("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**), para. 289 ("[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. 122, para. 20 ("[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.").

⁵⁴⁹ *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, *I.C.J. Reports 2012* (**RL-051**), p. 446, para. 59. See also Memorial, para. 150 (and citations therein); Counter-Memorial, para. 98.

⁵⁵⁰ See Memorial, para. 151 (citing Compilation of the Parties' Pre-Arbitration Exchanges (**CE-063**), [PDF] p. 86, Letter from Armenia to Azerbaijan (16 Jan. 2023)).

towards a possible solution.”⁵⁵¹ Rather, such a request is exactly what is expected of a State if it seeks to engage constructively in negotiations in circumstances where it does not understand the allegations raised. As Azerbaijan’s own authority—an investor-State tribunal applying Article 26 of the ECT—explains:

The purpose of a request for amicable settlement is to discuss the dispute, with a view to exchanging views over its causes, the interests involved, *clarifying factual uncertainties and possible misunderstandings*, and identifying possible solutions within the framework of the promotion of long term cooperation in the energy field based on complementarities and mutual benefits. [...] The [claimant] must inform the [respondent] of the state of affairs involving disagreement, and request amicable settlement. *If the [respondent] considers there is insufficient information to initiate discussions then the good faith response is simply to so advise the [claimant], and require more detail.* In other words, to initiate the type of communications envisaged by Article 26(2).⁵⁵²

255. The present case is also not a situation in which the parties’ positions failed to evolve over several rounds of negotiations. As noted, the ICJ has found negotiations to be deadlocked when the parties’ positions did not evolve during multiple exchanges spanning several months or years. For example:

- In the *Ukraine v. Russia* CERD case, after the parties’ respective positions had “remained substantially the same” for two years of diplomatic correspondence and face-to-face meetings;⁵⁵³
- In *Armenia v. Azerbaijan*, after the parties’ respective positions “remained substantially unaltered between the end of 2020 and September 2021” (*i.e.*, after more than 10 months of correspondence and face-to-face meetings),⁵⁵⁴

⁵⁵¹ Counter-Memorial, para. 100(i).

⁵⁵² *Limited Liability Company Amtol v. Ukraine*, SCC Case No. 080/2005, Final Award (26 Mar. 2008) (**CL-073**), para. 57 (emphasis added). Nor can Armenia’s view that the new Article 7 claims concerned “an entirely unrelated factual basis” under a provision not “previously invoked by Azerbaijan or discussed by the Parties” be considered unconstructive. Counter-Memorial, para. 100(i). Not only was this observation correct, it pointed to questions of jurisdiction that would have been directly relevant to negotiating the claims.

⁵⁵³ See, e.g., *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, Preliminary Objections, Judgment, I.C.J. Reports 2019 (**RL-077**), p. 603, para. 120.

⁵⁵⁴ *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

- In *Belgium v. Senegal*, after there had been “no change in the respective positions of the [p]arties concerning the prosecution of Mr. Habré’s alleged acts of torture during the period covered by the above exchanges,” *i.e.*, after several years of numerous *notes verbales* and an in-person meeting.⁵⁵⁵

256. In this case, the Parties exchanged only *three letters in less than three months*, including Azerbaijan’s last letter, which effectively ended the negotiations and only mentioned the Pipeline Transit Claims in a footnote. As Armenia has already noted, 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.⁵⁵⁶ Indeed, Armenia did not have the opportunity at all to express a position on the Pipeline Transit claims. Azerbaijan cannot dispute that it waited over a month to reply to Armenia’s 16 January 2023 letter, and then immediately initiated this arbitration the next business day, without giving Armenia a chance to further engage.

257. Unable to overcome these facts, Azerbaijan insists on relying on prior exchanges relating to the Original Claims in order to argue that further exchanges relating to the Pipeline Transit Claims would have been futile.⁵⁵⁷ But Armenia has explained that the fact that prior negotiations relating to a different dispute—even between the same parties—were unsuccessful, is not evidence that negotiations about a different dispute would be futile.⁵⁵⁸ This is particularly true for these claims,⁵⁵⁹ which concern only the interruption of natural gas transit in one pipeline in Armenia, and were thus of much narrower scope and of an entirely different nature than Azerbaijan’s sweeping Original Claims concerning the alleged exploitation of energy resources in Nagorno-Karabakh. As Armenia noted, if Azerbaijan had factually and legally particularized its Pipeline Transit Claims and negotiated them, this purported dispute could very well have been, at a minimum, narrowed by Armenia’s observations. Indeed, Azerbaijan’s Article 7 claims have

⁵⁵⁵ *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, I.C.J. Reports 2012 (RL-051), p. 446, para. 59.

⁵⁵⁶ Memorial, para. 152.

⁵⁵⁷ See Counter-Memorial, paras. 100-101.

⁵⁵⁸ See Memorial, para. 153 (citing *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.”)).

⁵⁵⁹ Memorial, para. 154, note 303.

evolved even as between its Notice of Arbitration and Statement of Claim.⁵⁶⁰ Moreover, Armenia and Azerbaijan have been pursuing negotiations on opening of communications between the two countries facilitated by the United States and recently signed a joint declaration on the matter, which further dispels any idea that negotiations would have been futile.⁵⁶¹

258. In any event, Azerbaijan’s assertion that “Armenia refused from the outset to engage in good-faith discussions of Azerbaijan’s ECT claims”⁵⁶² is not correct. Armenia reiterates that it meaningfully engaged in good-faith negotiations with Azerbaijan in relation to Article 18.⁵⁶³ Azerbaijan cannot deny that Armenia responded to all of Azerbaijan’s correspondence and attended two negotiation meetings.⁵⁶⁴ And Azerbaijan admits that Armenia communicated a list of 17 questions during the second round of meetings.⁵⁶⁵ Contrary to Azerbaijan’s misleading suggestion,⁵⁶⁶ those questions *did* address the substance of Azerbaijan’s claims. Moreover, Armenia was not “[i]gnor[ing] Azerbaijan’s invitation to negotiate” by asking for more information about Azerbaijan’s claims.⁵⁶⁷ As stated above, such requests are in themselves meaningful contributions to negotiations.⁵⁶⁸ It was rather Azerbaijan that “engaged in dilatory tactics”⁵⁶⁹ by withholding details about its claims despite Armenia’s repeated requests.⁵⁷⁰

⁵⁶⁰ See Memorial, para. 154, note 303. See *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, I.C.J. Reports 2012 (RL-051), p. 446, para. 59 (explaining *a contrario* that “[t]he fact that, as results from the pleadings of the Parties, their basic positions have not subsequently evolved confirms that negotiations did not and could not lead to the settlement of the dispute”).

⁵⁶¹ See Joint Declaration by the President of the Republic of Azerbaijan, the Prime Minister of the Republic of Armenia and the President of the United States of America on the outcomes of their meeting in Washington D.C., United States of America (9 Aug. 2025) (RE-0070); “Azerbaijan and Armenia sign peace deal at White House that creates a ‘Trump Route’ in region,” *The Guardian* (9 Aug. 2025) (RE-0071) (stating that “[t]he deal includes an agreement that will create a major transit corridor linking Azerbaijan to its exclave of Nakhchivan”).

⁵⁶² Counter-Memorial, para. 100.

⁵⁶³ See Memorial, paras. 155-157. See generally Compilation of the Parties’ Pre-Arbitration Exchanges (CE-063).

⁵⁶⁴ See Memorial, paras. 155-157.

⁵⁶⁵ Counter-Memorial, para. 100(h).

⁵⁶⁶ *Id.*

⁵⁶⁷ *Id.*, para. 100(b).

⁵⁶⁸ *Supra* para. 254.

⁵⁶⁹ Counter-Memorial, para. 100.

⁵⁷⁰ See Memorial, para. 155, note 305.

259. Armenia also rejects Azerbaijan’s preposterous claim that Armenia cancelled a meeting “*falsely* alleging that Azerbaijan had launched an armed aggression.”⁵⁷¹ Indeed, Armenia proposed to hold a meeting on 13-14 October 2022 in its letter of 12 September 2022.⁵⁷² However, as Armenia explained in response to Azerbaijan’s letter accepting those dates:

[REDACTED]

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Armenia thus indicated at the time that its “ [REDACTED]

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260. Azerbaijan’s armed attack of 13 September 2022 and its grave violations of international humanitarian law have been widely reported in independent media and by international NGOs,⁵⁷⁵ and have been condemned by States.⁵⁷⁶ The attack also led to the convening of an emergency session of the United Nations Security Council,⁵⁷⁷ in which several members

⁵⁷¹ Counter-Memorial, para. 100(g) (emphasis added).

⁵⁷² Compilation of the Parties’ Pre-Arbitration Exchanges (CE-063), [PDF] p. 73, Letter from Armenia to Azerbaijan (12 Sept. 2022).

⁵⁷³ *Id.*, [PDF] p. 75, Letter from Armenia to Azerbaijan (7 Oct. 2022).

⁵⁷⁴ *Id.*

⁵⁷⁵ See, e.g., Lemkin Institute for Genocide Prevention and Human Security, *Red Flag Alert for Genocide - Azerbaijan Update 2* (19 Sep. 2022) (RE-0056); Lemkin Institute for Genocide Prevention, *Red Flag Alert for Genocide - Azerbaijan - Update 3* (7 Oct. 2022) (RE-0062); Genocide Watch, *Genocide Warning: Azerbaijan and Nagorno-Karabakh* (23 Sep. 2022) (RE-0057); Human Rights Watch, *Video Shows Azerbaijan Forces Executing Armenian POWs* (14 Oct. 2022) (RE-0063); “An Execution Near Sev Lake,” *Bellingcat* (20 Oct. 2022) (RE-0064); “Armenia says 105 troops killed in Azerbaijan border clashes,” *BBC News* (15 Sep. 2022) (RE-0054); “About 100 troops killed in clashes between Armenia and Azerbaijan,” *The Guardian* (13 Sep. 2022) (RE-0050); “Armenia and Azerbaijan Clash Raises Fears of Broader Conflict,” *The New York Times* (13 Sep. 2022) (RE-0051); “Pelosi condemns Azerbaijan’s attacks on Armenia,” *Reuters* (18 Sep. 2022) (RE-0055).

⁵⁷⁶ See, e.g., Hellenic Ministry of Foreign Affairs, @GreeceMFA, *X* (4 Oct. 2022) (RE-0059); MoFA Lebanon, @Mofalebanon, *X* (certified translation from Arabic) (6 Oct. 2022) (RE-0061); Ministry for Europe and Foreign Affairs of the French Republic, *Armenia - Azerbaijan - from the press briefing* (4 Oct. 2022) (RE-0060); “EU wants probe into alleged war crimes by Azerbaijan,” *EU Observer* (3 Oct. 2022) (RE-0058).

⁵⁷⁷ Letter from the Permanent Representative of Armenia to the United Nations addressed to the President of the Security Council (13 Sep. 2022) (RE-0052).

condemned Azerbaijan's attacks on Armenian civilian infrastructure.⁵⁷⁸ It cannot be seriously contended that, in those circumstances, Armenia should have prioritized negotiation of Azerbaijan's 30-year old claims above a Security Council meeting and urgent ICJ proceedings⁵⁷⁹ addressing an armed attack on its territory. Armenia's cancellation was in good faith, and it duly agreed to reschedule the meeting and continued to engage in negotiations thereafter.⁵⁸⁰

261. In summary, Azerbaijan abruptly ended negotiations as to its Pipeline Transit Claims while they were still in their infancy. Even if (*quod non*) previous negotiations concerning a separate dispute could be relevant, Armenia meaningfully and diligently engaged in negotiations as to the Original Claims, and there was no reason to believe that Armenia would not have done the same for Azerbaijan's Pipeline Transit Claims.

262. Azerbaijan has once again failed to adduce a single case in which negotiations in similar circumstances were held to be deadlocked or futile. In particular, the investor-State cases it has cited concerned extreme situations clearly distinguishable from the facts of this case:

- In *Occidental Petroleum v. Ecuador*, the negotiations were found to be futile after the investor had made numerous submissions protesting the impugned measure over the course of 18 months and to no avail;⁵⁸¹

⁵⁷⁸ See Letter from the Permanent Representative of Armenia to the United Nations addressed to the President of the Security Council (S/2022/688) (13 Sep. 2022) (**RE-0053**), [PDF] pp. 8 (United States: "we are deeply troubled by the outbreak of violence along the Armenian-Azerbaijani border, including reports of the shelling of civilian infrastructure in Armenia"), 10 ("France is very concerned about the military actions on the border between Armenia and Azerbaijan, which have led to dozens of casualties. Several areas on Armenian territory have been fired on and there are reports of strikes on civilian infrastructure."), 3-4 (Norway: "we are deeply concerned about the ongoing military hostilities along the Armenia-Azerbaijan border, including the reported artillery strikes that have hit civilians and civilian infrastructure inside Armenia"), 4 ("Ireland is deeply concerned by the serious fighting that has broken out along the Armenia-Azerbaijan border in recent days, including reports of attacks directed at critical civilian infrastructure inside Armenian territory").

⁵⁷⁹ This aggression prompted Armenia's legal team to request a modification of the ICJ's order of provisional measures in the *Armenia v. Azerbaijan* CERD case, requesting the Court to explicitly extend its order to these events. *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan), Request for the Modification of the Order Indicating Provisional Measures of 7 December 2021, Order of 12 October 2022, I.C.J. Reports 2022 (RL-261)*, p. 580, para. 9.

⁵⁸⁰ Compilation of the Parties' Pre-Arbitration Exchanges (**CE-063**), [PDF] p. 78, Letter from Armenia to Azerbaijan (28 Oct. 2022).

⁵⁸¹ *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Jurisdiction (9 Sep. 2008) (**CL-127**), paras. 19, 93-95.

- In *Lauder v. Czech Republic*, the State had failed to reply to multiple invitations to negotiate;⁵⁸²
- In *Biwater Gauff v. Tanzania*, “[b]y the time the Request for Arbitration was filed, a long process of negotiation and renegotiation had already failed, and the [State]’s position was entrenched.”⁵⁸³

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263. In light of the above, Azerbaijan has failed to demonstrate that it made a genuine attempt to negotiate its Pipeline Transit Claims for a “reasonable period of time,” or that it would have been futile to do so. Accordingly, Azerbaijan did not fulfil the negotiations requirement of Article 27, and the Pipeline Transit Claims are outside of the Tribunal’s jurisdiction also for this reason.

⁵⁸² *Ronald S. Lauder v. Czech Republic*, Ad Hoc UNCITRAL, Award (3 Sep. 2001) (**CL-118**), para. 188-189.

⁵⁸³ *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award (24 July 2008) (**CL-126**), para. 347. *See also* *Bayindir İnşaat Turizm Ticaret ve Sanayi A.Ş. v. Islamic Republic of Pakistan (I)*, ICSID Case No. ARB/03/29, Decision on Jurisdiction (14 Nov. 2005) (**CL-123**), para. 102 (“The Tribunal further notes that Pakistan made no proposal to engage in negotiations with Bayindir following Bayindir’s notification of 4 April 2002, which made an explicit reference to the failure of the efforts to negotiate.”). *See also* *Mohammad Ammar Al-Bahloul v. Republic of Tajikistan*, SCC Arbitration No. V (064/2008), Partial Award on Jurisdiction and Liability (2 Sep. 2008) (**CL-046**), para. 155 (“There is nothing in the record showing that Respondent demonstrated a willingness to find an amicable settlement to the dispute raised by Claimant either at the time of Vivalo’s letters of February 2003 or at the time of the 2008 formal notice of dispute.”); *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction (6 Aug. 2003) (**CL-121**), para. 184 (considering the negotiations to be futile after the Supreme Court of Pakistan had taken a firm position on the claims at issue and “in the prolonged period of time from termination of the PSI Agreement by Pakistan to the submission of SGS’s written consent under the BIT, there was little indication of any inclination on the part of either party to enter into negotiations or consultations”); *Ethyl Corp. v. Canada*, UNCITRAL (NAFTA), Award on Jurisdiction (24 June 1998) (**CL-116**), para. 84 (“The Tribunal has been given no reason to believe that any ‘consultation or negotiation’ pursuant to Article 1118 [...] was even possible.”); *State Development Corporation “VEB.RF” v. Ukraine*, SCC Case No. V 2019/88, Partial Award on Preliminary Objections (31 Jan. 2021) (**RL-257**), paras. 222-227 (finding that negotiations were futile after the State did not respond to claimant’s invitation to negotiate until a few days before the expiry of the six-month waiting period, the State took steps to aggravate the dispute, and nine months had passed from the notice of dispute until the launch of the arbitration). In many of these cases, the tribunal also found that the respondent had waived the objection of the negotiation requirement. *See Mohammad Ammar Al-Bahloul v. Republic of Tajikistan*, SCC Arbitration No. V (064/2008), Partial Award on Jurisdiction and Liability (2 Sep. 2008) (**CL-046**), para. 155 (“In this regard, it is noteworthy that Respondent, in its letter of March 3, 2009 objecting to the jurisdiction of the Tribunal, did not raise non-compliance with the cooling-off period as an issue.”); *Bayindir İnşaat Turizm Ticaret ve Sanayi A.Ş. v. Islamic Republic of Pakistan (I)*, ICSID Case No. ARB/03/29, Decision on Jurisdiction (14 Nov. 2005) (**CL-123**), para. 102; *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award (24 July 2008) (**CL-126**), para. 347 (“[T]he Arbitral Tribunal considers that any such condition was waived by the Republic.”).

C. In Any Event, Azerbaijan Has Still Failed to Establish that It Could Have Referred the Pipeline Transit Claims to Arbitration Under Article 27 Without First Pursuing Conciliation Under Article 7(7)

264. As Armenia explained in its Memorial, even if a dispute existed and negotiations as to the Pipeline Transit Claims had been exhausted, the claims would still fall outside the Tribunal’s jurisdiction because Article 7(7) requires that a transit dispute be referred to conciliation.⁵⁸⁴ A transit dispute is defined under Article 7(6) as a dispute “over *any matter* arising from [...] Transit.”⁵⁸⁵ Article 7(10)(a)(ii) in turn 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 Party and destined for the Area of that other Contracting Party.”⁵⁸⁶ Here, according to Azerbaijan, the purported dispute would concern transit of natural gas between Yevlakh (located in Azerbaijan) and Nakhijevan (Azerbaijan’s exclave) through the territory of Armenia.⁵⁸⁷ Thus, the Pipeline Transit Claims (whether under Article 7 or Article 18) plainly concern “Transit” within the meaning of Article 7(10)(a)(ii) and therefore fall within the scope of Article 7(7). In its Counter-Memorial, Azerbaijan has failed to provide evidence to the contrary.⁵⁸⁸

265. The record confirms that Armenia’s position is supported by the ordinary meaning of the terms of Articles 27 and 7(7) in their context (**Section III.C.1.**), by their object and purpose (**Section III.C.2.**), by the subsequent practice of the ECT’s Contracting Parties (**Section III.C.3.**), and by the ECT’s *travaux préparatoires* (**Section III.C.4.**).

⁵⁸⁴ See Memorial, Section III.C.

⁵⁸⁵ Energy Charter Treaty with Related Documents (**CL-001**), ECT, Article 7(6)-(7) (emphasis added). According to Professor Hobér, Article 7(7) has a broad scope of application that is not limited to disputes under Article 7 specifically, but also any other matter relating to transit, such as “tariffs, fees and prices” or “health and safety matters.” K. Hobér, *The Energy Charter Treaty: A Commentary* (OUP, 2020) (**CL-059**), pp. 165-166, 168.

⁵⁸⁶ Energy Charter Treaty with Related Documents (**CL-001**), ECT, Article 7(10)(a)(ii).

⁵⁸⁷ See Compilation of the Parties’ Pre-Arbitration Exchanges (**CE-063**), [PDF] p. 82, Letter from Azerbaijan to Armenia (16 December 2022) (“[REDACTED]”).

[REDACTED]”) (emphasis added); Statement of Claim, paras. 10(e), 31, 131-144, 212, 246.

⁵⁸⁸ See Counter-Memorial, Section III.C.

1. The Ordinary Meaning of the Terms in Their Context Supports Armenia's Interpretation

266. Azerbaijan argues, against a plain reading of the relevant text, that Article 7(7) conciliation does not prevail over Article 27 arbitration with respect to disputes relating to transit. To recall,⁵⁸⁹ Article 27(2) provides for disputes to be resolved by arbitration “except as otherwise provided in this Treaty.”⁵⁹⁰ Article 7(7) provides that its conciliation provisions “*shall apply*” to transit disputes as defined in Article 7(6).⁵⁹¹ Thus, when it comes to the resolution of transit disputes, Article 7(7) is one article of the ECT that “provides otherwise.” Reading Article 27(2) and Article 7(7) together, it follows that transit disputes must be referred to the conciliation mechanism of Article 7(7), and not to arbitration under Article 27(2). Rather than grapple with what the provisions actually say, Azerbaijan appears to raise several arguments, none of which withstand scrutiny.

267. *First*, the academic commentators cited by Azerbaijan do not support its position. Azerbaijan cites Professor Hobér’s commentary, in which he states that “[a]part from disputes arising from Articles 5 and 29, Article 27 does not limit its scope of applicability to any particular kind of disputes between Contracting Parties, thus—at least indirectly—covering any and all such disputes, including a dispute over transit.”⁵⁹² But this brief statement by Professor Hobér is best understood as focusing on the effect of Article 28 (“Non-Application of Article 27 to Certain Disputes”) rather than carefully assessing the individual provisions of Article 27. Indeed, if one reads those provisions, Professor Hobér’s statement is clearly incomplete, as Article 27(2) *does* exclude from its scope of applicability *other* provisions of the Treaty. To be sure, Article 27(2) provides in full:

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

⁵⁸⁹ Memorial, paras. 160-162.

⁵⁹⁰ Energy Charter Treaty with Related Documents (CL-001), ECT, Article 27(2).

⁵⁹¹ *Id.*, ECT, Article 7(7) (emphasis added).

⁵⁹² Counter-Memorial, para. 112(a) (citing K. Hobér, *The Energy Charter Treaty: A Commentary* (OUP, 2020) (CL-059), p. 169) (emphasis omitted). *See also* Counter-Memorial, para. 115.

notice to the other party to the dispute submit the matter to an ad hoc tribunal under this Article.⁵⁹³

268. Article 28 of the ECT, in turn, provides that: “[a] dispute between Contracting Parties with respect to the application or interpretation of Article 5 or 29 shall not be settled under Article 27 unless the Contracting Parties parties to the dispute so agree.”⁵⁹⁴

269. Read together, these two provisions exclude from the scope of Article 27 arbitration *three* different categories of provisions: (i) Article 28 excludes from the scope of Article 27 disputes relating to Articles 5 and 29; (ii) Article 27(2) excludes from its scope disputes concerning Articles 6 and 19, and, for Contracting Parties listed in Annex IA, the last sentence of Article 10(1); and finally, (iii) in a catch-all clause, Article 27(2) also excludes from arbitration other articles of the Treaty that “otherwise provide[]” as to the resolution of certain disputes. This latter category thus includes transit disputes under Article 7, since, as explained, Article 7(7) provides “otherwise” by stating that its conciliation provisions “shall” apply to transit disputes. The reason why Article 7 was not wholly and expressly excluded from the scope of Article 27(2) like Articles 5, 29, 6, 19 and 10(1) is because, unlike those provisions, as Armenia explained,⁵⁹⁵ Article 7 allows parties to eventually refer a transit dispute to arbitration under Article 27(2) if the conciliation mechanism has failed to finally resolve the dispute.⁵⁹⁶

270. And in any event, Professor Hobér’s further view that “[f]rom this perspective, Article 27 of the ECT *seems to be an alternative* to the conciliation procedure set out in [Article

⁵⁹³ Energy Charter Treaty with Related Documents (CL-001), ECT, Article 27(2) (emphasis added).

⁵⁹⁴ *Id.*, ECT, Article 28.

⁵⁹⁵ See Memorial, para. 173, note 340.

⁵⁹⁶ This is because, failing the agreement of the parties on a resolution of the dispute, the conciliator’s decision is only an “interim” one, and Article 7(7) contemplates that the dispute may then be finally resolved by other means. See Energy Charter Treaty with Related Documents (CL-001), ECT, Article 7(7)(c)-(d) (“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*. 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.”) (emphasis added). See K. Hobér, *The Energy Charter Treaty: A Commentary* (OUP, 2020) (CL-059), p. 174: (“If the twelve-month period has expired and no agreement has been reached, it is [...] open to the disputing parties to commence state-to-state arbitration pursuant to Article 27 of the ECT.”). See *a contrario*, Article 6(7), which expressly allows referral of a competition dispute to negotiations under Article 27(1), but not under Article 27(2). Energy Charter Treaty with Related Documents (CL-001), ECT, Article 6(7).

7(7)]” is tentative, at best.⁵⁹⁷ As Armenia has already pointed out,⁵⁹⁸ the former Deputy Secretary-General of the Energy Charter Secretariat, Professor Konoplyanik, and Professor Wälde, in a commentary produced by Azerbaijan, have affirmed with more certainty that:

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.⁵⁹⁹

271. Azerbaijan’s only response to this is that it is a “passing reference” in “no more than two sentences, with no elaboration or further reference to other sources.”⁶⁰⁰ But the same thing could be said about the statements that Azerbaijan cites in support of its position, including Professor Hobér’s tentative statements on this point cited above.

272. Moreover, other commentators support Armenia’s view. Professor Azaria has described the ECT as “establish[ing] compulsory dispute resolution mechanisms; two general and four special. The general forms are: (1) state-to-state arbitration concerning the application or interpretation of the ECT (Article 27) [...] The special forms comprise dispute settlement mechanisms for: 1. transit disputes (Article 7(7)) [...]”⁶⁰¹ Azerbaijan attempts to dismiss Professor Azaria’s statement by arguing that describing “Article 7(7) as a ‘special’ dispute settlement

⁵⁹⁷ K. Hobér, *The Energy Charter Treaty: A Commentary* (OUP, 2020) (CL-059), pp. 169, 174 (emphasis added). See also *id.* p. 170 (“[I]nterstate arbitration pursuant to Article 27 of the ECT *could* be an alternative to the conciliation procedure under paragraph (7).”) (emphasis added). As explained below, Professor Hobér then seems to depart from this, noting that “[t]his possibility arises from the question whether this form of arbitration is covered by the words ‘relevant dispute resolution remedies’,” but then taking the firm view that it is not. See *infra* paras. 282-283.

⁵⁹⁸ See Memorial, paras. 160-161.

⁵⁹⁹ 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).

⁶⁰⁰ Counter-Memorial, para. 112(d).

⁶⁰¹ D. 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. See also A. Marhold, “Fragmentation and the Nexus between the WTO and the ECT in Global Energy Governance – A Legal-Institutional Analysis Twenty Years Later,” *Journal of World Investment & Trade*, Vol. 16 (2015) (RL-235), pp. 406 (describing the ECT as containing “[m]echanisms for the resolution of various disputes, such as trade related disputes, state-to-state and / or investor-to-state disputes – set out in Part V, Articles 26 to 32 – of the ECT, and transit disputes, in Article 7 ECT”) (emphasis added), 413 (“The ECT [...] provides mechanisms for the settlement of both energy trade and investment disputes, more precisely, it offers State-State [citing Article 27], Investor-State, Transit [citing Article 7(7)], Energy Trade, and Environment and Competition dispute settlement.”).

mechanism for Transit disputes, as opposed to the ‘general’ mechanisms in Articles 26 and 27” does not mean that this special mechanism is “compulsory.”⁶⁰² But Azerbaijan ignores that, as the quotation above makes clear, Professor Azaria not only described conciliation as a “special” mechanism, but she precisely described it as a “*compulsory* dispute resolution mechanism.”⁶⁰³ Similarly, Professor Marhold unequivocally states that “[r]esolution of transit disputes under the ECT *is accounted for in Article 7(7) ECT*. It prescribes that in case of an energy transit dispute, ECT parties *will have recourse to the mechanism under Article 7(7) ECT*, after exhausting any other relevant contractual remedies between them.”⁶⁰⁴

273. For her part, Professor Roggenkamp has unqualifiedly explained that “[u]nless the contract or other agreement renders special provisions regarding the interruption or reduction of transit, *the dispute settlement mechanism of Article 7(7) applies*.”⁶⁰⁵ Azerbaijan suggests that Professor Roggenkamp supports the view that Article 7(7) is an alternative option to Article 27(2) because “she state[d] that, in the event of a transit dispute, transit shall not be interrupted or reduced ‘prior to the conclusion of one of the dispute settlement procedures of the ECT.’”⁶⁰⁶ But this appears to be an extrapolation of Article 7(6), which only provides that transit shall not be interrupted or reduced “prior to the conclusion of the dispute resolution procedures *set out in paragraph (7)*.”⁶⁰⁷

274. As Armenia has explained, Article 7(6), which forms part of the context of Article 7(7), in fact confirms the mandatory nature of the conciliation mechanism because it presupposes that parties must refer a transit dispute to conciliation under Article 7(7). The opposite conclusion would lead to the absurd result whereby a party that submitted its dispute to Article 27 instead of

⁶⁰² Counter-Memorial, para. 112(c).

⁶⁰³ D. 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).

⁶⁰⁴ A. Marhold, “Fragmentation and the Nexus between the WTO and the ECT in Global Energy Governance – A Legal-Institutional Analysis Twenty Years Later,” *Journal of World Investment & Trade*, Vol. 16 (2015) (**RL-235**), p. 414 (emphasis added).

⁶⁰⁵ M. M. Roggenkamp, “Transit of Network-bound Energy: the European Experience,” in T. W. Wälde, *The Energy Charter Treaty: An East-West Gateway for Investment and Trade* (Kluwer, 1996) (**RL-106**), p. 511 (emphasis added).

⁶⁰⁶ Counter-Memorial, para. 112(b) (citing M. M. Roggenkamp, “Transit of Network-bound Energy: the European Experience,” in T. W. Wälde, *The Energy Charter Treaty: An East-West Gateway for Investment and Trade* (Kluwer, 1996) (**RL-106**), p. 511) (emphasis omitted).

⁶⁰⁷ Energy Charter Treaty with Related Documents (**CL-001**), ECT, Article 7(6) (emphasis added).

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.⁶⁰⁸

275. *Second*, Azerbaijan claims that the text of Article 7(7)(a) indicates that resort to conciliation is optional because it provides that “[a] Contracting Party party to the dispute *may* refer it to the Secretary General by a notification summarising the matters in dispute.”⁶⁰⁹ But this overlooks the chapeau of Article 7(7), which provides in relevant part:

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.⁶¹⁰

276. As stated, the terms “*shall* apply” in the chapeau of Article 7(7) denotes a *mandatory* provision that excludes all other dispute-resolution mechanisms, at least until conciliation has been exhausted. The fact that subparagraph (a) uses the word “*may*” cannot override that. Indeed, the word “*may*” read in its context simply denotes that a party is *authorized* to refer the dispute to conciliation following the exhaustion of other previously agreed remedies but has no *obligation* to do so unless it wishes to follow formal dispute resolution.

277. Indeed, the words “*may* refer” do not indicate that a party may refer the dispute to any other dispute-settlement mechanism. These words are commonly used in compromissory clauses of treaties. Indeed, Article 27(2) of the ECT itself similarly provides that, after certain preconditions are fulfilled, “either party [to the dispute] *may* [...] *submit the matter to an ad hoc*

⁶⁰⁸ See Memorial, para. 169. Azerbaijan's only response to this point is that Article 27(2) is another “dispute resolution remed[y] previously agreed between the Contracting Parties,” that would need to be exhausted before the dispute can be referred to Article 7(7). See Counter-Memorial, para. 111. As explained below, this view is untenable.

⁶⁰⁹ Counter-Memorial, para. 108.

⁶¹⁰ Energy Charter Treaty with Related Documents (CL-001), ECT, Article 7(7) (emphasis added).

tribunal.”⁶¹¹ Evidently, under Article 27(2), like under Article 7(7), a party is not under an *obligation* to submit its dispute to a dispute-resolution mechanism, since it can choose not to refer the dispute for resolution at all. But Azerbaijan does not—and cannot—argue that the arbitration mechanism of Article 27(2), when applicable, is optional and not mandatory because of the use of the words “may [...] submit.” The same interpretation must be given to Article 7(7), which also creates a mandatory dispute-resolution mechanism notwithstanding the use of the words “may refer.”

278. Azerbaijan also seeks support for its view in the reference by the Energy Charter Conference (“ECC”) to the “voluntary referral” of disputes to the Secretary-General and its statement that there is “no obligation for any Contracting Party to refer the Transit dispute to the conciliation process under Article 7.7 of the ECT.”⁶¹² But this is simply consistent with the view that parties have no obligation to refer a dispute to *any* dispute resolution mechanism.

279. *Third*, Azerbaijan contends that the words “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” only “dictate[] the order in which various options may be deployed, and the procedural steps for the conciliation option” but “in no way mandate[] that conciliation must be first.”⁶¹³ Armenia agrees that the ordinary meaning of this sentence is that Contracting Parties must first exhaust “all relevant contractual or other dispute resolution remedies previously agreed between” them, but this does not negate the mandatory nature of the words “*shall apply*.”

280. *Fourth*, and relatedly, one of Azerbaijan’s main theories underlying its interpretation is that Article 27(2) arbitration is another one of the “dispute resolution remedies previously agreed between the Contracting Parties” that must first be exhausted before referring a transit dispute to conciliation under Article 7(7).⁶¹⁴ In other words, Azerbaijan suggests that transit

⁶¹¹ Energy Charter Treaty with Related Documents (CL-001), ECT, Article 27(2) (emphasis added).

⁶¹² See Counter-Memorial, para. 109(a) (citing Energy Charter Secretariat, *Commentary to the Rules Concerning the Conduct of Conciliation of Transit Disputes* (20 June 2016) (CL-139), paras. 56, 66).

⁶¹³ Counter-Memorial, para. 108.

⁶¹⁴ See *id.*, paras. 109(c), 111.

disputes should indeed be referred to Article 7(7), but only *after* they have been referred to arbitration under Article 27(2).

281. This reading is untenable because it would lead to a manifestly absurd result. The arbitration mechanism of Article 27(2) provides for the “*final and binding*” resolution of disputes.⁶¹⁵ Once a dispute has been resolved through arbitration, there is evidently no need to submit the same dispute to conciliation—and in fact this is disallowed by the plain terms of the provision. And since all Contracting Parties that can be party to a transit dispute have by definition also all agreed to the arbitration mechanism of Article 27(2), adopting Azerbaijan’s reading would mean that a transit dispute could *never* be referred to the conciliation mechanism of Article 7(7), making it dead letter. An interpretation depriving Article 7(7) of *any effet utile* is impermissible under international law.⁶¹⁶

282. Professor Hobér fully agrees with this view. He first notes that it would not make sense for “previously agreed remedies” to include arbitration, due to its finality:

[Article 7(7)] does not define the word “exhaustion”. The ordinary meaning of “exhaustion” seems to indicate that, with respect to each dispute settlement method, the parties to a dispute must pursue the remedy in question to its final stage. *In the case of international arbitration, this implies a final and binding arbitral award. [...] If this understanding of “exhaustion” is correct, it would seem that under normal circumstances the dispute will have been settled [...] through the arbitral award [...]. There is a query therefore which role the conciliation procedure foreseen in paragraph (7) could actually play, since paragraph 7 assumes that there is still a dispute between the parties concerned.*⁶¹⁷

283. Then, specifically considering whether arbitration under Article 27(2) would need to be exhausted before resort to conciliation under Article 7(7), Professor Hobér states that:

[T]he answer should be in the negative. Arbitration pursuant to Article 27 is not specifically intended for transit disputes, but rather for disputes in general concerning the interpretation and application

⁶¹⁵ Energy Charter Treaty with Related Documents (CL-001), ECT, Article 27(3)(h) (emphasis added).

⁶¹⁶ *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. 125, para. 133. Cf. J. M. Sorel & V. Boré Eveno, “Article 31 – General Rule of Interpretation” in O. Corten & P. Klein, *The Vienna Conventions on the Law of Treaties – A Commentary* (OUP, 2011) (RL-221), p. 831.

⁶¹⁷ K. Hobér, *The Energy Charter Treaty: A Commentary* (OUP, 2020) (CL-059), p. 169 (emphasis added).

of the ECT. Also, the dispute resolution mechanism referred to in the text of Article 7(7) *must reasonably be understood to mean to refer to other mechanisms than those contained in the ECT*. This conclusion is supported by the consequence of including Article 27 in this reference, viz., *practically to eliminate the usefulness of the conciliation procedure*.⁶¹⁸

284. *Fifth*, Azerbaijan bases its interpretation of Article 7(7) on a single sentence in what it calls “official guidance,” namely the ECC Secretariat’s 2016 Commentary to the Rules Concerning the Conduct of Conciliation of Transit Disputes.⁶¹⁹ But Azerbaijan has failed to explain the interpretive value of this document or why it would override the plain text of the ECT and the principle of *effet utile*.⁶²⁰ In fact, the ECC Secretariat itself specified that this document “does not impose the interpretation to be given to individual provisions but rather serves as a reference, non-binding explanatory tool.”⁶²¹

285. *Finally*, Azerbaijan’s attempt to overcome Armenia’s *lex specialis* argument also fails.⁶²² It argues that Armenia’s “total displacement model[...] in which the more specific norm entirely supplants the general, has been almost universally rejected.”⁶²³ Azerbaijan misunderstands the concept of *lex specialis* and the sources on which it relies. As the ILC has explained:

⁶¹⁸ *Id.*, p. 170 (emphasis added).

⁶¹⁹ See Counter-Memorial, para. 109(c) (citing Energy Charter Secretariat, *Commentary to the Rules Concerning the Conduct of Conciliation of Transit Disputes* (20 June 2016) (CL-139), para. 59).

⁶²⁰ Armenia also notes that the ECC Secretariat seems to exclude from the scope of Article 7 certain “transit disputes” such as those related to “pricing, quantity, quality.” See Energy Charter Secretariat, *Commentary to the Rules Concerning the Conduct of Conciliation of Transit Disputes* (20 June 2016) (CL-139), para. 59. This is incorrect. As Armenia explained, Article 7(7) has a broad scope of application, as it applies to “dispute[s] over *any matter arising from*” transit. See Memorial, para. 164-165 (citing Energy Charter Treaty with Related Documents (CL-001), ECT, Article 7(6) (emphasis added); 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.”)). Article 7(7) makes no such exclusions and such disputes would fall within the scope of Article 7(7) as well. See also Energy Charter Treaty with Related Documents (CL-001), ECT, Article 7(1) (referring to pricing).

⁶²¹ Energy Charter Secretariat, *Commentary to the Rules Concerning the Conduct of Conciliation of Transit Disputes* (20 June 2016) (CL-139), para. 5. Cf. *RWE Innogy v. Kingdom of Spain*, ICSID Case No. ARB/14/34, Decision on Jurisdiction, Liability, and Certain Issues of Quantum (30 Dec. 2019) (RL-252), para. 439 (“The Tribunal notes that, to support their general contentions on the ECT, both Parties have also referred to the Reader’s Guide to the ECT that has been published by the ECT Secretariat. This Guide does not purport to offer any definitive interpretation of the Treaty’s provisions. It is, on its face, a guide, nothing more, and the Tribunal considers it of little assistance in the current exercise of interpretation.”).

⁶²² See Counter-Memorial, para. 113; Memorial, para. 167, note 326.

⁶²³ Counter-Memorial, para. 113.

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 in several contexts [including] *between provisions within a single treaty*.⁶²⁴

286. Armenia's argument is a simple application of this canon of interpretation. Both Article 7(7) and Article 27(2) "deal with the same subject-matter," *i.e.*, dispute resolution. But Article 7(7) is more specific because it only applies to transit disputes, while Article 27(2)'s scope is more general. Therefore, for transit disputes, Article 7(7) must prevail as *lex specialis* over Article 27(2), the *lex generalis*.

287. Contrary to what Azerbaijan suggests, the ICJ has not rejected this application of the *lex specialis* doctrine.⁶²⁵ Rather, it has merely refused to displace an entire body of law (international human rights law) in favor of another body of law (international humanitarian law) for reasons specific to the nature of those legal regimes.⁶²⁶ Far from rejecting the *lex specialis* doctrine, however, the Court has reaffirmed that even as between these bodies of law some rights and obligations "may be matters of both these branches of international law" and that "the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law."⁶²⁷ For example:

In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis* namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities.⁶²⁸

⁶²⁴ See International Law Commission (ILC), *Fragmentation of International Law, Report of the Study Group* (18 July 2006) (RL-153), p. 8, para. 5 (emphasis added).

⁶²⁵ Counter-Memorial, para. 113.

⁶²⁶ See, e.g., *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, I.C.J. Reports 2004 (CL-122), pp. 177-178, paras. 105-106; *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, I.C.J. Reports 1996 (RL-036), p. 240, para. 25.

⁶²⁷ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, I.C.J. Reports 2004 (CL-122), pp. 177-178, para. 105-106 (emphasis added).

⁶²⁸ *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, I.C.J. Reports 1996 (RL-036), p. 240, para. 25. See also *Case of the SS Wimbledon, Series A, No. 1*, Judgment (17 Aug. 1923) (RL-180) p. 23-24; *European Communities — Regime for the Importation, Sale and Distribution of Bananas*, Appellate Body Report, WTO Doc. WT/DS27/AB/R (9 Sep. 1997) (RL-202), para. 255 ("uphold[ing] the Panel's finding that both Article 1.3 of the

288. More recently, in its advisory opinion on *Obligations of States in respect of Climate Change*, the ICJ reaffirmed that:

The principle of *lex specialis* is a maxim of interpretation that is used for determining which of several potentially applicable rules is to prevail or whether the rules simply coexist. It is generally accepted that, in some cases, a specific rule, or a specific set of rules, takes precedence over more general or less focused rules.⁶²⁹

289. Thus, these decisions make clear that, while *lex specialis* cannot displace an entire body of law and such bodies of law should be interpreted harmoniously to the extent possible, if two specific norms do conflict, *lex specialis* applies to resolve that conflict.

290. Moreover, international courts have applied the *lex specialis* doctrine to give priority to one specific provision of a treaty over another more general provision dealing with the same subject matter. For example, in the *Rudolf Gabriel* case before the European Court of Justice, the court, interpreting the Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, found that “Article 5(1) of the Brussels Convention relates to contractual matters in general, whereas Article 13 thereof specifically covers various types of contracts concluded by consumers.”⁶³⁰ It thus concluded that “Article 13 of the Brussels Convention [...] constitutes a *lex specialis* in relation to Article 5(1) thereof.”⁶³¹ Having determined that the action fell “within the scope of Article 13, [...] it is for that reason unnecessary to examine whether it is covered by Article 5(1) thereof.”⁶³²

291. Similarly, according to the *jurisprudence constante* of the European Court of Human Rights, Article 5(4) of the European Convention on Human Rights, which provides that “[e]veryone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided,” “constitutes a *lex*

Licensing Agreement and Article X:3(a) of the GATT 1994 apply to the EC import licensing procedures, with the modification that *the Panel should have applied the provisions of the Licensing Agreement first, as it is the more specific and detailed agreement*”) (emphasis added).

⁶²⁹ *Obligations of States in Respect of Climate Change, Advisory Opinion* (23 July 2025) (RL-268), para. 166.

⁶³⁰ *Case C-96/00, Rudolf Gabriel*, Judgment, CJEU, Case No. ECR (2002) I-06367 (11 July 2002) (RL-210), pp. 6398-6399, paras. 35-36.

⁶³¹ *Id.*

⁶³² *Id.*, p. 6404, para. 59.

specialis in relation to the more general requirements of Article 13,”⁶³³ which provides more generally for a right to an effective remedy.⁶³⁴ As such, in cases of arrest or detention specifically, the court only examines whether the requirements of Article 5(4) were fulfilled, and not those of Article 13.⁶³⁵

292. Likewise, in the present case, because Azerbaijan’s alleged dispute is undisputedly a “transit dispute,” Article 7(7) of the ECT applies.

293. In summary, the ordinary meaning of Articles 27(2) and 7(7) in their context, supported by the principles of *lex specialis* and *effet utile*, establish that transit disputes must first be referred to the conciliation mechanism of Article 7(7) to the exclusion of arbitration. Azerbaijan’s interpretation of Article 7(7) as requiring parties to first exhaust the arbitration mechanism of Article 27(2) is untenable.

2. The Object and Purpose of Article 7(7) Supports Armenia’s Interpretation

294. Armenia explained in its Memorial that the object and purpose of Article 7(7) supports its interpretation.⁶³⁶ Azerbaijan has failed to provide a convincing response to this point.⁶³⁷

295. In particular, Armenia has explained that the goal of Article 7(7) was to establish a “fast-track” dispute-resolution mechanism for transit disputes.⁶³⁸ Indeed, under Article 7(7)

⁶³³ See, e.g., *Nikolova v. Bulgaria*, ECtHR Application No. 31195/96, Judgment (25 Mar. 1999) (**RL-205**), p. 13, para. 54, pp. 18-19, para. 69.

⁶³⁴ See *id.*, pp. 18-19, paras. 67, 69.

⁶³⁵ See, e.g., *id.*; *Murray v. United Kingdom*, ECtHR Application No. 14310/88, Judgment (28 Oct. 1994) (**RL-198**), pp. 31-32, para. 98.

⁶³⁶ See Memorial, paras. 170-172.

⁶³⁷ See Counter-Memorial, paras. 116-118.

⁶³⁸ See Memorial, para. 170, note 330 (citing D. 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; 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**)).

conciliation, a dispute can be resolved in under 120 days.⁶³⁹ Rather than disputing this, Azerbaijan concedes that the object and purpose of the conciliation mechanism in Article 7(7) is to guarantee “immediate and interim dispute resolution,” thereby avoiding unnecessary interruptions of transit.⁶⁴⁰

296. But this object and purpose is irreconcilable with Azerbaijan’s argument that Article 27(2) arbitration must be exhausted before a dispute can be referred to conciliation.⁶⁴¹ As explained above, Article 27 arbitration leads to the *final* resolution of the dispute and thus precludes the possibility (or necessity) of subsequently referring that dispute to conciliation for an “*interim*” decision.⁶⁴² Leaving that fundamental point aside, and assuming *arguendo* that a dispute resolved through Article 27(2) arbitration could somehow be referred to conciliation under Article 7(7) thereafter, this would still completely negate the purpose of establishing Article 7(7) as a “fast-track” dispute-resolution mechanism.

297. In response, Azerbaijan makes the convoluted argument that, because “Article 7(7) permits referral to conciliation under the ECT ‘only following the exhaustion of all relevant contractual or other dispute resolution remedies’ with such ‘other’ remedies including international arbitration, which may ‘take twelve to eighteen months,’” the purpose of speedy resolution cannot be invoked to support Armenia’s interpretation of conciliation as mandatory.⁶⁴³ Azerbaijan appears to turn treaty law on its head, suggesting that because this stated purpose does not accord with its interpretation of Article 7(7) as requiring the exhaustion of an arbitration process, it cannot be the purpose of Article 7(7).⁶⁴⁴ But it is the interpretation of Article 7(7) that must accord with its object and purpose, not the other way around. And contrary to what Azerbaijan suggests, the fact that Article 7(7) provides that “all relevant contractual or other dispute resolution remedies” must be

⁶³⁹ See Memorial, para. 171.

⁶⁴⁰ See Counter-Memorial, para. 116; Memorial, para. 170 (citing D. 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).

⁶⁴¹ See Counter-Memorial, para. 117.

⁶⁴² See *supra* paras. 281-283.

⁶⁴³ Counter-Memorial, para. 117 (emphasis omitted).

⁶⁴⁴ *Id.* (“The availability of international arbitration as a mechanism satisfying the preconditions to engaging conciliation undermines Armenia’s invocation of speed as a factor in favor of construing Article 7(7) as a mandatory and exclusive mechanism.”).

exhausted before conciliation is available is not inherently incompatible with that purpose. It only means that contractual or other specifically agreed dispute-resolution mechanisms between the parties to a dispute must prevail over conciliation. The conciliation mechanism of Article 7(7) is merely meant to provide a fast-track mechanism for disputes that are *not* already governed by contractual or other specific arrangements. As established, this cannot include arbitration under Article 27(2), since it would render Article 7(7) without any *effet utile*.

298. To pay lip service to the object and purpose of Article 7(7), Azerbaijan argues that Article 7(7) is an optional process that would somehow only apply to “urgent” matters such as “pricing or tariff disputes.”⁶⁴⁵ This interpretation has been plucked from thin air, and contradicts Azerbaijan’s own positions. Azerbaijan does not deny that Article 7(7) applies to *any* transit dispute.⁶⁴⁶ And the text of Article 7(7) makes no distinction between urgent and non-urgent disputes. Thus, under Azerbaijan’s view, any such transit disputes, whether urgent or not, would first have to be referred to Article 27(2) arbitration before they could be referred to conciliation under Article 7(7). Again, this is incompatible with the object and purpose of providing a fast-track dispute resolution mechanism for transit disputes.

299. Moreover, Armenia has also explained that a specific dispute-resolution mechanism was needed for transit disputes because they can involve technical trade-law issues and require specific transit expertise.⁶⁴⁷ This is borne out by the fact that Article 7(7)(b) requires the conciliator to have “experience in the matters subject to dispute.”⁶⁴⁸ No such transit expertise requirement exists for arbitrators under Article 27. Azerbaijan has not responded to this point.

3. Subsequent Practice Does Not Support Azerbaijan’s Interpretation

300. Azerbaijan next argues that “the only publicly available record of relevant State practice supports Azerbaijan’s submission of its Article 7 claims to inter-State arbitration under

⁶⁴⁵ Counter-Memorial, para. 118.

⁶⁴⁶ See K. Hobér, *The Energy Charter Treaty: A Commentary* (OUP, 2020) (CL-059), p. 172 (“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.”).

⁶⁴⁷ Memorial, para. 172.

⁶⁴⁸ Energy Charter Treaty with Related Documents (CL-001), ECT, Article 7(7)(b).

Article 27.”⁶⁴⁹ This is incorrect. Azerbaijan refers to a dispute between Slovenia and Croatia that arose in 2002, in which Slovenia requested bilateral consultations with Croatia “under Article 27(1).”⁶⁵⁰ Armenia fails to see how these negotiations would support Azerbaijan’s interpretation.

301. It is clear from the text of Article 27 that only *arbitration* under Article 27(2) is displaced by Article 7(7) or other articles that provide “otherwise.”⁶⁵¹ Article 27(1), which provides for dispute resolution via diplomatic channels, contains no such caveat. Thus Article 27(1) negotiations are *always available* whether the dispute is one that falls within the scope of Article 7(7), or within the scope of Article 27(2). More generally, parties are always allowed to opt out of a dispute-resolution mechanism by mutual consent and to choose negotiations instead. In any event, given that the dispute was resolved by negotiations, it cannot be known whether Slovenia and Croatia would have agreed to proceed to conciliation or to arbitration, or whether they would have disagreed on the applicable mechanism.

4. The *Travaux Préparatoires* Support Armenia’s Interpretation

302. As explained above, the Parties agree that recourse to the *travaux préparatoires* can be made to confirm an interpretation of the treaty.⁶⁵² As Armenia explained in its Memorial, the *travaux préparatoires* of the ECT support the compulsory nature of the Article 7(7) conciliation mechanism because the possibility of resolving transit disputes via inter-State arbitration was brought up during negotiations but explicitly rejected in favor of a fast-track conciliation procedure.⁶⁵³ Indeed, the *travaux* 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.⁶⁵⁴ However, Poland’s proposal of a fast-track mechanism won the most support and Norway’s proposal was expressly rejected—confirming that

⁶⁴⁹ Counter-Memorial, para. 119.

⁶⁵⁰ Memorial, para. 119 (citing Energy Charter Secretariat, Decision of the Energy Charter Conference, CCDEC200201 (20 June 2002) (CL-120), p. 4).

⁶⁵¹ Energy Charter Treaty with Related Documents (CL-001), ECT, Article 27(2); K. Hobér, *The Energy Charter Treaty: A Commentary* (OUP, 2020) (CL-059), p. 480 (“Certain categories of disputes fall outside the jurisdiction of the *arbitration mechanism* laid down in Article 27”) (emphasis added).

⁶⁵² See *supra* para. 148.

⁶⁵³ See Memorial, para. 173.

⁶⁵⁴ See *id.*

the options are mutually exclusive.⁶⁵⁵ The resort to inter-State arbitration for transit disputes was envisaged only as a last resort if no agreement could be reached through conciliation.⁶⁵⁶

303. Azerbaijan has not rebutted this fundamental fact about the origins of Article 7(7). Instead, it has now submitted three “*travaux*” documents that purportedly support its interpretation.⁶⁵⁷ They do not.

304. The first document is a memorandum written by Craig Bamberger, the legal adviser of the negotiating conference, in which he wrote that “binding arbitration would apply to every other dispute arising under the Agreement, including disputes based on trade provisions that are not identical with the analogous provisions of the GATT (e.g. [then] Article 11 on ‘Transport and Transit’).”⁶⁵⁸ The problem for Azerbaijan is that this document is from December 1992, *i.e.*, months before a transit conciliation mechanism was fully developed and included in the draft of the ECT.⁶⁵⁹ Indeed, the first developed version of the conciliation mechanism provisions appears in the 1 March 1993 draft, and even then, this early version did not contain the language “*shall apply*” that was eventually included in Article 7(7).⁶⁶⁰ Thus, the conclusion quoted from Mr. Bamberger’s memorandum is irrelevant for interpretive purposes.

305. The second document is a fax exchange between Mr. Bamberger and Clive Jones, the Secretary-General of the Conference, in which Mr. Bamberger “describe[s] circumstances

⁶⁵⁵ 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.”).

⁶⁵⁶ 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.

⁶⁵⁷ See Counter-Memorial, para. 120.

⁶⁵⁸ Counter-Memorial, para. 120(a) (citing Letter from C. Bamberger to H. Steeg and J. Ferriter re: European Energy Charter Basic Agreement Negotiations, 14-18 December 2022 (23 Dec. 1992) (**CL-025**), p. 3).

⁶⁵⁹ 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; 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] pp. 2-7.

⁶⁶⁰ Compare Draft Basic Agreement for the European Energy Charter (21 Dec. 1992) (**RL-195**), pp. 31-33, with Draft ECT Travaux, Revised Draft Basic Agreement for the European Energy Charter Treaty (1 Mar. 1993) (**RL-127**), p. 36 (including the first version of the provisions on the conciliation process, which did not even have the “shall apply” language).

where inter-State arbitration and conciliation might occur ‘simultaneously.’”⁶⁶¹ It is doubtful that this document, which contains the theoretical musings of its authors and is often framed in rhetorical questions, reflects the common intent of the negotiating parties. Regardless, Armenia notes that Mr. Bamberger considered that conciliation and arbitration of a transit dispute could occur “simultaneously” only in certain “circumstances.” This view is reflected in the following—again, rhetorical and informal—statements:

- “[I]f the Transit state disagrees with the contention that the dispute is within the scope of para(6) — e.g., because the goods allegedly didn’t ‘originate’ in the ‘Area’ of the complaining [Contracting Party] — the complaining [Contracting Party] apparently can follow simultaneously both the Art. 31 [current Article 27] route and the Art. 8(7) route;”
- If the Secretary-General “decline[s] to appoint a conciliator if he agreed with the Transit state’s interpretation that the dispute in question is not within the scope of para. (8)? If he took that position, [...] the complaining state could presumably resort to Art. 31, and in doing so could challenge the Secretary-General’s interpretation;”
- “May the conciliator examine the Jurisdictional question? (There is no mechanism through which he can obtain an advisory opinion). If he does so and reaches a conclusion, cannot the disagreeing party thereupon initiate an Art. 31 proceeding over that conclusion?;” and
- “Or, suppose that the Transit state declines to conciliate, or alternatively that it does conciliate and in either case the conciliator agrees with the complaining party and makes the interim decisions provided for in para(7)(d) in a manner contrary to the Interests of the Transit state. Presumably, the Transit state could at that point initiate an Art. 31 proceeding.”⁶⁶²

306. All this document suggests is that the issue of whether a dispute falls within the scope of Article 7(6) (*i.e.*, the scope of jurisdiction *ratione materiae*) can be referred to arbitration concurrently with the conciliation, and that a conciliator’s decision may later be challenged via

⁶⁶¹ Counter-Memorial, para. 120(b) (citing ECT Travaux, Fax from C. Bamberger (Legal Adviser of the Conference) to C. L. Jones (Secretary-General of the Conference), regarding Art. 8(6) and (7) (16 July 1994) (CL-113)) (emphasis omitted).

⁶⁶² ECT Travaux, Fax from C. Bamberger (Legal Adviser of the Conference) to C. L. Jones (Secretary-General of the Conference), regarding Art. 8(6) and (7) (16 July 1994) (CL-113), [PDF] p. 4.

arbitration. This does not contradict the view that resorting to conciliation for transit disputes is mandatory in the first instance.

307. Armenia does not exclude the possibility that an arbitral tribunal would have jurisdiction to decide whether an alleged dispute falls within the scope of Article 7(6), and thus of the conciliation mechanism. In fact, Armenia has raised before this Tribunal a *ratione materiae* preliminary objection arguing that transit obligations are not even at issue here.⁶⁶³

308. In any event, the Bamberger fax cited above does not support, and in fact squarely contradicts Azerbaijan's main theory, which is that arbitration under Article 27(2) must be exhausted for a transit dispute *before* it can be referred to conciliation. If anything, this document supports Armenia's position that transit disputes *must* be referred to the conciliation mechanism in the first instance. Indeed, Mr. Bamberger, describing what would become Article 7(6), states that "[o]nly when the conciliation steps in Article 7 have been gone through and failed to achieve a resolution (i.e. 12 months after the conciliators interim decision) is the transit country allowed to interrupt" transit.⁶⁶⁴ As Armenia explained, Article 7(6) supports the view that referral of transit disputes to conciliation is mandatory. Mr. Bamberger also described the conciliation procedure of Article 7 as "unconditional," "nondiscretionary" in nature, and "unqualified."⁶⁶⁵

309. Finally, the third document is a letter from Sydney Fremantle, chairman of a negotiating working group, to Mr. Bamberger.⁶⁶⁶ Mr. Fremantle similarly posits that conciliation "com[es] into play only after any claim that a dispute is not covered by [Article 7(6)] has been resolved under Article 31 [current Article 27]."⁶⁶⁷ He also adds that "para 7(a) requires Contracting Parties to a dispute referred to in paragraph 6 to exhaust any contractual or other dispute resolution remedies they have previously agreed, which must include Article 31 [current Article 27]."⁶⁶⁸ It

⁶⁶³ See Request for Bifurcation, Section III.B.4. Azerbaijan opposed the bifurcation of this *ratione materiae* objection. See Observations on the Request for Bifurcation, paras. 53-62. Armenia reserves all rights in this regard.

⁶⁶⁴ ECT Travaux, Fax from C. Bamberger (Legal Adviser of the Conference) to C. L. Jones (Secretary-General of the Conference), regarding Art. 8(6) and (7) (16 July 1994) (CL-113), [PDF] p. 7 (emphasis added).

⁶⁶⁵ *Id.*, [PDF] p. 6.

⁶⁶⁶ See Counter-Memorial, para. 120(c) (citing ECT Travaux, Letter from S. Fremantle (Chairman of Working Group II) to C. Bamberger (Legal Adviser of the Conference) (22 July 1994) (CL-114)).

⁶⁶⁷ ECT Travaux, Letter from S. Fremantle (Chairman of Working Group II) to C. Bamberger (Legal Adviser of the Conference) (22 July 1994) (CL-114), p. 3.

⁶⁶⁸ *Id.*, p. 2-3.

is not clear whether these sentences, read together, mean that parties would first need to exhaust a *ratione materiae* objection via arbitration before submitting the dispute to conciliation—a possibility that Armenia does not exclude, as stated above. If this statement means that the *transit dispute* must first be resolved on the merits through arbitration before being submitted to conciliation, Armenia has already explained in detail why that interpretation is untenable.⁶⁶⁹

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310. In summary, the ordinary meaning of the text of the ECT, its context, the object and purpose of Article 7(7), and the *travaux* all support Armenia’s view that transit disputes must first be referred to conciliation under Article 7(7). Azerbaijan has adduced no persuasive evidence to the contrary. The Pipeline Transit Claims are therefore outside the scope of the Tribunal’s jurisdiction because Azerbaijan has failed to refer these claims to conciliation.

⁶⁶⁹ See *supra* paras. 281-283.

IV. REQUEST FOR RELIEF AND RESERVATION OF RIGHTS

311. 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.

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

Respectfully submitted,



REPRESENTATIVE OF THE REPUBLIC OF ARMENIA ON
INTERNATIONAL LEGAL MATTERS



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