

In the matter of an arbitration
under the Rules of Arbitration of
the United Nations Commission
on International Trade Law

PCA Case No. 2023-65

Permanent Court of Arbitration
Peace Palace
The Hague
The Netherlands

Day 1 Tuesday, 7 April 2026
Hearing on Preliminary Objections

Before:

MS JEAN KALICKI
PROFESSOR DONALD M McRAE
PROFESSOR BRIGITTE STERN

THE REPUBLIC OF AZERBAIJAN

Claimant

-v-

THE REPUBLIC OF ARMENIA

Respondent

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MR BRYCE WILLIAMS, legal counsel, appeared for
the Permanent Court of Arbitration.
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Questions from THE TRIBUNAL280

08:18

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Tuesday, 7 April 2026

2 (9.15 am)

3 THE PRESIDENT: Good morning to all. Welcome to the first
4 day of the Hearing on Preliminary Objections in PCA Case
5 No. 2023-65, The Republic of Azerbaijan v The Republic
6 of Armenia. We welcome all of the representatives of
7 the parties and their counsel to this session.

8 Before we begin, some introductions are in order.
9 My name is Jean Kalicki. I am delighted to be joined
10 here on the Tribunal by my colleagues Professor Donald
11 McRae and Professor Brigitte Stern. We are also very
12 grateful for the assistance of Ms Ashwita Ambast and her
13 other colleagues from the PCA, to my assistant
14 Ms Zsofia Young, and to all the others who made it
15 possible for these facilities to be available to us
16 today.

17 I'd like to invite the parties to introduce their
18 delegations. We'll begin with Armenia and then
19 Azerbaijan.

20 H.E. DR ANDREASYAN: Good morning, Madam President, members
21 of the Tribunal. My name is Karen Andreasyan. I am
22 the Representative of the Republic of Armenia on
23 International Legal Matters and its Agent in these
24 proceedings.

25 Armenia's delegation today includes Mr Artyom

09:17 1 Sujoyan, Deputy Representative of Armenia on
2 International Legal Matters; Ms Kristine Stepanyan,
3 First Secretary of the Embassy of Armenia to
4 the Netherlands.

5 The counsel team is led by Dr Constantinos Salonidis
6 from the law firm Foley Hoag LLP, joined by Professor
7 Sean Murphy of George Washington University Law School,
8 Ms Alison Macdonald KC of Essex Court Chambers, and
9 Professor Pierre d'Argent, Mr Amir Ardelan Farhadi,
10 Ms Diem Huong Ho, Ms Charlotte Verdon, Ms Jennifer
11 Schoppmann and Ms Deborah Langley of Foley Hoag LLP.

12 Thank you.

13 THE PRESIDENT: Thank you very much.

14 And for Azerbaijan?

15 H.E. MR MAMMADOV: Very good morning, Madam President,
16 esteemed members of the Tribunal, esteemed members of
17 the delegation of the Republic of Armenia.

18 My name is Elnur Mammadov. I'm the Agent for the
19 Government of Azerbaijan and Deputy Minister of Foreign
20 Affairs of the Republic of Azerbaijan and Ambassador
21 Extraordinary and Plenipotentiary.

22 I will be introducing the members of our delegation.
23 To my left, His Excellency Mr Mammad Ahmadzada,
24 Ambassador Extraordinary and Plenipotentiary of
25 the Republic of Azerbaijan to the Kingdom of

09:18 1 the Netherlands; Mr Badir Bayramov, Head of the
2 International Litigation and Arbitration Division within
3 the Ministry of Foreign Affairs of the Republic of
4 Azerbaijan; Ms Ilkana Gasimova, Second Secretary within
5 the same Division; Mr Jumshud Hajiyevev, attaché in
6 the same Division.

7 And our legal counsel team. I'll start with
8 Mr Jeffrey Sullivan KC, partner with Debevoise
9 & Plimpton LLP; Ms Natalie Reid, partner in the same
10 firm; Dr Conway Blake, partner in the same firm;
11 Ms Ashika Singh, counsel; Ms Lisa Wang Lachowicz,
12 associate; Ms Charlotte Bocage, associate; Ms Arundathi
13 Venkataraman, associate; Ms Maria Epishkina, associate;
14 Ms Rebecca Murphy, associate; Ms Isabel Paolini, law
15 clerk; and Ms Mary Grace McEvoy, senior case manager.

16 This is our delegation. I thank you for your
17 attention.

18 THE PRESIDENT: Thank you. Welcome again to everybody.

19 Before we begin with the scheduled order of
20 proceedings, are there any other preliminary
21 housekeeping matters that the parties wish to raise?

22 DR SALONIDIS: Good morning, Madam President. Nothing from
23 Armenia.

24 THE PRESIDENT: Thank you.

25 MS REID: Good morning, Madam President, members of the

09:19 1 Tribunal. Two matters of housekeeping for the Republic
2 of Azerbaijan.

3 First, consistent with Procedural Order No. 2,
4 Claimant will have a demonstrative exhibit. We provided
5 that electronically to Respondent yesterday. We have
6 hard copies in the room for the Tribunal and the usual
7 distribution, but we note that it will be included in
8 our slide deck for this afternoon. So, as the members
9 of the Tribunal wish, we can provide the demonstrative
10 exhibits separately now, but you can be confident
11 it will be included in the deck this afternoon.

12 THE PRESIDENT: Thank you.

13 My understanding is that these are materials that
14 will be used only this afternoon. I think in that event
15 it is sufficient if we receive them one hour in advance,
16 as Procedural Order No. 2 provides for the rest of your
17 slide presentation. Subject to my colleagues, I don't
18 see that there is a need to receive them immediately
19 this morning.

20 MS REID: Thank you very much, Madam President.

21 On the second order, we note in the schedule, of
22 course as agreed, that it contemplates a break in both
23 the morning and the afternoon roughly halfway through
24 the allocation of time. As sometimes happens in the
25 allocation of topics, it is possible that the speaker

09:21 1 for Azerbaijan -- which will probably be me -- the time
2 that I will take for my submissions will be longer than
3 the break that's contemplated.

4 So, subject of course to how things develop,
5 we would propose that the break halfway through
6 Azerbaijan's opening statement occur roughly ten minutes
7 later than it currently says in the schedule. We will
8 still take the same amount of time; it's just shifting
9 that anticipated break.

10 THE PRESIDENT: A certain degree of flexibility is of course
11 warranted and appropriate. Just please be mindful of
12 the comfort of all involved.

13 MS REID: Indeed. Thank you.

14 THE PRESIDENT: Thank you very much.

15 Any other preliminary matters to raise? No?

16 Alright. Well, in that event we will proceed with
17 Armenia's opening statement, and my understanding is
18 that you too will look for an appropriate break point
19 about halfway through. Thank you.

20 (9.22 am)

21 Opening statement on behalf of Respondent

22 H.E. DR ANDREASYAN: Madam President, distinguished members
23 of the Tribunal, it is an honour to appear before you as
24 the Agent of the Republic of Armenia in these
25 proceedings.

09:22 1 Armenia is a committed party to the Energy Charter
2 Treaty: it has been since the treaty's inception, and it
3 remains so today, at a time when several states have
4 chosen to renounce it. Not only that, but Armenia has
5 diligently participated in the treaty's modernisation
6 process, and has chosen to apply the modernised
7 amendments provisionally.

8 Armenia has done so because it believes in what the
9 treaty stands for: a legal framework for the promotion
10 of investment and trade in the energy field. Indeed,
11 the ECT was designed to liberalise investments and trade
12 in energy, in large part to assist economies in
13 transition and to secure energy supply across borders.
14 It was not designed to serve as a basis for adjudicating
15 disputes between its many and diverse state parties over
16 state sovereignty or sovereign rights over natural
17 resources.

18 Yet that is precisely what Azerbaijan asks this
19 Tribunal to do. It asks you to use a miscellaneous
20 provision of the treaty, Article 18, to award it more
21 than US\$1.6 billion, in connection with the
22 Nagorno-Karabakh conflict of the 1990s. It asks you to
23 adjudicate claims about sovereign rights over natural
24 resources and the consequences of armed conflict. These
25 are matters that are regulated by other sources of

09:24 1 international law, and that are squarely outside
2 the scope of this treaty.

3 In Armenia's view, this case should never have been
4 brought in the first place. It is not a positive
5 development for the future of the ECT, at a time when
6 the treaty is under threat. It is not contributing to
7 the promotion of trade and investment in the Caucasus.
8 And it is consuming precious resources that could have
9 gone to peace-building and reconciliation.

10 Yet this case also comes before you at a time when
11 the parties are closer to peace than ever. Until that
12 moment of final peace arrives, however, we are in your
13 good hands. We ask you to uphold Armenia's good faith
14 objections to jurisdiction, and to decline to endorse
15 interpretations of the treaty that would set
16 a far-reaching precedent.

17 (Slide 1) Allow me now to briefly outline our
18 presentations for today.

19 First, Professor Sean Murphy will present Armenia's
20 objection that Azerbaijan's Article 18 claims are
21 outside the Tribunal's jurisdiction because Article 18
22 does not contain an obligation giving rise to
23 independent cause of action. As Professor Murphy will
24 explain, this interpretation is supported by the text
25 and context of Article 18, the object and purpose of the

09:25 1 treaty, the principle of good faith and the subsequent
2 practice of the parties.

3 Second, Mr Amir Farhadi will explain why Armenia's
4 interpretation of Article 18 is confirmed by the
5 preparatory works of the treaty.

6 Third, Ms Alison Macdonald will begin our
7 presentation on Armenia's three objections to the
8 Tribunal's jurisdiction over the pipeline transit
9 claims. Following an overview of those objections,
10 she will explain why no dispute in relation to those
11 claims arose before the Notice of Arbitration.

12 Fourth, Dr Constantinos Salonidis will explain that
13 Azerbaijan failed to fulfil Article 27's negotiation
14 precondition to arbitration as to those claims.

15 Fifth and finally, Professor Pierre d'Argent will
16 demonstrate that those claims should have been referred
17 to the mandatory conciliation mechanism of Article 7(7).

18 Madam President, members of the Tribunal, Armenia's
19 case is straightforward: the Tribunal lacks jurisdiction
20 over all of Azerbaijan's claims. We are confident that
21 once you have heard our presentations, you will agree.

22 With your permission, I now hand the floor to
23 Professor Murphy.

24 PROFESSOR MURPHY: Madam President, members of the Tribunal,
25 it's a great honour to appear before you on behalf of

09:27 1 the Republic of Armenia.

2 (Slide 3) My task today is to present on Armenia's
3 first jurisdictional objection, namely that the Tribunal
4 lacks jurisdiction *ratione materiae* over Azerbaijan's
5 claims based on Article 18 of the European Charter
6 Treaty. As Armenia has consistently explained,
7 Article 18 does not contain an obligation giving rise to
8 an independent cause of action, and therefore cannot
9 serve as the basis for the Tribunal's jurisdiction.

10 Our presentation will begin with a high-level
11 overview of the parties' Article 18 positions, so as to
12 situate the issue for the Tribunal. Thereafter, I will
13 follow the familiar framework of Article 31 of the
14 Vienna Convention on the Law of Treaties, looking at
15 text, object and purpose, context, subsequent practice
16 and good faith, all with an eye to Azerbaijan's
17 counter-arguments. We submit that all of these VCLT
18 elements, working together in the crucible of the treaty
19 interpretation process, result in an inescapable
20 conclusion, which is that Article 18 does not provide
21 a standalone basis for one state to sue another state
22 under the ECT.

23 After me, Mr Farhadi will take up the VCLT
24 Article 32 issues.

25 (Slide 4) So I begin with an overview of the

09:29 1 parties' very different interpretations of Article 18,
2 and in particular, their interpretations of
3 Article 18(1).

4 (Slide 5) You see Article 18 on your screen. It's
5 the first article of Part IV, which is entitled
6 "Miscellaneous Provisions", and this article is entitled
7 "Sovereignty over Energy Resources".

8 Now, for the time being, I will focus on
9 Article 18(1), which has two sentences that read as
10 follows. The first sentence:

11 "The Contracting Parties recognise state sovereignty
12 and sovereign rights over energy resources."

13 The second sentence:

14 "They reaffirm that these must be exercised in
15 accordance with and subject to the rules of
16 international law."

17 While Article 18 as a whole needs to be a part of
18 your interpretation, this particular paragraph plays
19 a central role. At a high level, Armenia maintains that
20 the correct interpretation of this paragraph is that
21 it simply acknowledges the decades-long balancing of
22 interest between host states' rights and the rights of
23 foreign investors. In essence, it provides
24 an interpretive touchstone for the ECT provisions on
25 transnational trade and investment, but does not itself

09:30 1 seek to establish or regulate any inter-state rights or
2 obligations. The exceptionally broad text of these two
3 sentences, the verbs used in them of "recognise" and
4 "reaffirm", and the absence of more mandatory language,
5 such as "shall" or "undertake", are all supportive of
6 that interpretation.

7 So why include the interpretive touchstone in
8 the ECT? As the Tribunal is well aware, the concepts of
9 sovereignty and of sovereign rights were the subject of
10 intense debate during the 1960s and 1970s, during the
11 period of decolonisation and the promotion of the
12 self-determination of peoples, and it climaxed with
13 the call for a new international economic order.

14 (Slide 6) That debate played out in various
15 instruments adopted during the period; not just in
16 treaties, such as the two human rights covenants, but
17 also in General Assembly resolutions, such as
18 Resolution 1803 of 1962, which is now on your screen.

19 The text of that resolution spoke, on the one hand,
20 to a state's sovereignty over its natural resources and
21 to its right to regulate such resources under national
22 law, but on the other hand, to the use of foreign
23 capital for the exploration, development and disposition
24 of such resources, which may only be expropriated based
25 on grounds or reasons of public utility and subject to

09:32 1 appropriate compensation. Thus, we can see here in this
2 resolution a balancing act, a weighing of host states'
3 rights against those of foreign investors.

4 Several important General Assembly resolutions were
5 adopted thereafter. I won't go through them, but they
6 progressively place greater emphasis on the rights of
7 developing states.

8 But then, especially after the Cold War and the
9 desire for greater East/West economic integration, there
10 was a swing back towards protection of foreign
11 investors, notably in bilateral investment treaties, in
12 foreign trade agreements and in the ECT itself, because
13 developing and newly emerging economies came to see
14 those protections as important for fostering foreign
15 investment. In any event, all of these instruments
16 sought to capture the same balancing as between host
17 states' rights and the rights of foreign investors.

18 (Slide 7) So, seen from this perspective,
19 Article 18(1), a miscellaneous provision found in
20 a treaty adopted in 1994, is simply recognising an
21 enduring balancing act. The first sentence acknowledges
22 the sovereignty and sovereign rights over energy
23 resources of host states. The second sentence
24 acknowledges that such rights must be exercised in
25 accordance with international law, such as law

09:34 1 protective of foreign capital. In essence, Article 18
2 gave comfort to the ECT parties that the ECT was not in
3 some fashion altering that overall balance.
4 (Slide 8) Armenia is not alone in this understanding
5 of Article 18. Professor Kaj Hobér, in his highly
6 regarded treatise on the ECT (CL-59, page 348),
7 characterises the first sentence as "uncontroversial"
8 and as an "introductory statement". He said it is:
9 "... probably to be seen against the sometimes
10 fierce debates during the movement for Permanent
11 Sovereignty over Natural Resources ..."
12 He goes on to say:
13 "States sometimes continue to insist that such
14 sovereign rights be affirmed as a form of ...
15 counterweight to obligations to respect the property of
16 aliens and foreign investments. This affirmation is
17 thus found in the first sentence [of Article 18(1)]."
18 He likewise sees the second sentence as
19 "uncontroversial". And he concludes, and you can see it
20 there at the bottom of this slide, that:
21 "Reading the two sentences in subparagraph (1)
22 together again illustrates one of the underlying
23 philosophies of the ECT, i.e. to strike a reasonable and
24 acceptable balance between the host States and Investors
25 in the energy sector."

09:36 1 To be clear, seeing Article 18(1) in this way does
2 not leave it bereft of legal value; quite the opposite.
3 Article 18(1) provides important context for the
4 interpretation and application of the ECT's main
5 operative provisions, principally those found in
6 Part III, but it is not itself operating to establish
7 rights or obligations under the ECT in relation between
8 ECT parties.

9 (Slide 9) So what then, at a high level, is
10 Azerbaijan's interpretation of Article 18?

11 (Slide 10) Azerbaijan's core position has remained
12 the same from the Statement of Claim through to its
13 Rejoinder. In the Statement of Claim (paragraph 180),
14 Azerbaijan tells the Tribunal that:

15 "Respect for sovereignty is an 'essential foundation
16 of international relations,' and this bedrock principle
17 is also central to the object and purpose of the ECT."

18 You are then told that:

19 "As set forth in its Preamble, one of the ECT's core
20 objectives is '[r]ecognising the sovereignty of each
21 State over its energy resources.'"

22 Allow me to pause here to note that Azerbaijan's
23 quote is not in fact in the ECT's preamble. There's no
24 reference whatsoever to sovereignty in the preamble of
25 the ECT. It is now common ground that Azerbaijan's

09:38 1 quote comes from the European Energy Charter,
2 a non-binding instrument that preceded the conclusion of
3 the ECT by some three years.

4 That being said, Azerbaijan's interpretation
5 continues as follows:

6 "The ECT thus codifies, at Article 18, the
7 fundamental principle of permanent sovereignty over
8 natural resources, which is 'commonly understood as
9 a state's right to dispose of its natural resources as
10 it sees fit'."

11 Again, to be clear, this common understanding also
12 does not come from the ECT, which, as Azerbaijan is
13 forced to acknowledge, does not define sovereignty or
14 define sovereign rights. Indeed, what Azerbaijan has to
15 do in a section of its Statement of Claim is to
16 explicate sovereignty as a principle of customary
17 international law, drawing inspiration from the UN
18 Charter, various resolutions of the UN General Assembly
19 and other sources of law outside the ECT.

20 (Slide 11) Continuing with what they say in their
21 Statement of Claim, this time at paragraph 182,
22 Azerbaijan argues that:

23 "Article 18(1) of the ECT imposes a substantive
24 obligation on each Contracting Party to recognize
25 another Party's sovereignty and sovereign rights over

09:40 1 energy resources."

2 This obligation, Azerbaijan says, is:

3 "... an affirmative duty not to prevent, deny, or
4 compromise the exercise of these sovereign rights, such
5 as those enumerated in Article 18(3)."

6 And they continue:

7 "This provision codifies a State's inherent
8 sovereign prerogatives to decide if, when, where, how,
9 by whom, and at what price its energy resources are
10 explored, developed, and exploited."

11 In other words, for Azerbaijan, any interference by
12 one ECT contracting state with another ECT contracting
13 state's sovereignty or sovereign rights over energy
14 resources violates Article 18.

15 This interpretation, looked at from a high level,
16 imbues Article 18 with two remarkable elements: first,
17 a purported codification, in two short sentences, of one
18 of the most complex areas of international law; and
19 second, obligations based on that law owed by all ECT
20 parties to each other.

21 Neither element finds support in a basic [VCLT]
22 analysis, as I'll soon discuss. But for present
23 purposes, the point is that Azerbaijan's interpretation
24 transforms the ECT from a trade and investment treaty
25 into a treaty regulating conduct as between ECT state

09:42 1 parties on all aspects of sovereignty and sovereign
2 rights that in some fashion relate to energy.

3 Indeed, all of a sudden, the ECT is regulating
4 whether Armenia prevented Azerbaijan from realising its
5 plans for a hydroelectric project in cooperation with
6 Iran. Unexpectedly, the ECT is now regulating whether
7 Armenia was involved in the local generation of
8 electricity in Nagorno-Karabakh through small-scale
9 hydropower plants.

10 Suddenly the ECT is opening the door to wide-ranging
11 claims by Azerbaijan against Armenia seeking
12 compensation relating to so-called "energy assets".
13 It's essentially any energy-associated infrastructure,
14 from dams to water reservoirs to power plants. Yet none
15 of these types of rights or obligations are indicated
16 anywhere in Article 18, whether one looks at
17 paragraph (1) or at paragraph (3).

18 (Slide 12) Moreover, the Tribunal will wish to bear
19 in mind -- and I have back on the screen Article 18(1)
20 itself -- that Article 18 is not just referring to
21 sovereign rights over energy resources. Article 18(1)
22 is also referring to state sovereignty.

23 Any ECT party, on Azerbaijan's interpretation, could
24 bring a claim under the ECT for the alleged control of
25 its territory by another ECT party, given that such

09:44 1 control invariably has some connection to energy.
2 Indeed, any territorial disputes between ECT parties,
3 even relatively minor issues of boundary delimitation,
4 are magically capable of being arbitrated under the ECT.
5 Azerbaijan therefore is in the unenviable position
6 of trying to convince you that the Energy Charter Treaty
7 is a very different kind of treaty than is commonly
8 understood, regulating inter-state conduct that extends
9 vastly -- vastly -- beyond anything found in the ECT.
10 (Slide 13) I turn now to the interpretive framework
11 set out in Article 31 of the VCLT (CL-11).
12 (Slide 14) While interpretation under Article 31 is
13 a single combined operation, it may be helpful for the
14 Tribunal to scrutinise Article 18 through the individual
15 elements of Article 31.
16 To a large extent, Azerbaijan's Rejoinder simply
17 repeats arguments in this regard that were advanced in
18 its Counter-Memorial, and to which we responded in the
19 Reply. But if Azerbaijan advanced any new points in its
20 Rejoinder, I will seek to address them in the course of
21 my presentation.
22 (Slide 15) So, I begin with the text to be
23 interpreted, which Armenia addressed at paragraphs 32-42
24 of our Memorial, and paragraphs 44-89 of our Reply.
25 (Slide 16) Once again, we have the text of

09:46 1 Article 18 on the screen.

2 Now, in support of its position, Azerbaijan invokes
3 Article 18(1) and Article 18(3). But note that the
4 article has a total of four paragraphs, and each should
5 be considered. Indeed, Armenia's interpretation of
6 Article 18 is based on all four of these paragraphs: the
7 terms that they use, where they are situated, how they
8 fit within the context of the treaty as a coherent whole
9 and how they sit with its object and purpose.

10 So starting with Article 18(1), Azerbaijan has
11 criticised Armenia for allegedly focusing its
12 interpretation only on this paragraph, while largely
13 disregarding Article 18(3). But Azerbaijan itself says
14 in its Rejoinder that Article 18(3) particularises the
15 alleged rights found in Article 18(1). So Azerbaijan's
16 case is dependent on the threshold issue of how to best
17 interpret Article 18(1), with Article 18(3) just being
18 a further elaboration.

19 (Slide 17) As we have seen, this first sentence of
20 Article 18(1) provides that:

21 "The Contracting Parties recognise state sovereignty
22 and sovereign rights over energy resources."

23 Commentators looking at this first sentence have not
24 found a dramatic incorporation in the ECT of
25 wide-ranging substantive obligations located elsewhere.

09:47 1 Rather, they refer to it as "an uncontroversial
2 statement" (CL-59, page 348), a "generic affirmation",
3 "no more than a truism" (RL-144, page 370).
4 (Slide 18) What about the second sentence? The
5 second sentence of Article 18(1) qualifies the first.
6 It says that: the contracting states "reaffirm that"
7 the sovereignty and sovereign rights:
8 "... must be exercised in accordance with and
9 subject to the rules of international law."
10 Scholars looking at this second sentence similarly,
11 like Professor Hobér, view it as "an uncontroversial
12 statement" (CL-59, page 348). He says that it's
13 essentially explaining that sovereignty is not
14 a get-out-of-jail-free card, allowing states to do as
15 they wish. Rather, a state's rights must be exercised
16 with any limitations that they have freely agreed to,
17 including the ECT's Part III provisions on the rights of
18 foreign investors.
19 (Slide 19) Now, Azerbaijan says in its Rejoinder
20 that its claims are based squarely on obligations set
21 out in the ECT and not on extraneous legal principles.
22 It even says -- and this is paragraph 49 of the
23 Rejoinder -- these obligations in the ECT are "specific
24 and concrete". Yet there are no obligations expressed
25 in Article 18(1) at all. There is no language here of

09:49 1 "The Contracting Parties shall" do this or do that, as
2 is found throughout Parts II and III of the ECT.

3 Further, neither sovereignty nor sovereign rights,
4 as referred to in Article 18(1), are established by the
5 ECT. Rather, they are pre-existing and external rights
6 which clearly -- clearly -- are not codified in
7 Article 18, as Azerbaijan seeks to argue. Indeed, the
8 scope, the content, the source of those rights, and any
9 obligations in relation to them, obviously are not
10 specified in Article 18, as one would expect if the ECT
11 itself was creating or codifying such rights or
12 obligations.

13 (Slide 20) We submit this quite clearly puts
14 Article 18(1) in the same category as numerous other
15 general formulations contained in many treaties.
16 According to the International Court of Justice, such
17 provisions may "throw light on the interpretation of ...
18 other Treaty provisions" (RL-37, paragraph 27), and are
19 "not without legal significance for such
20 an interpretation", but they "cannot, taken in
21 isolation, be a basis for ... jurisdiction" (RL-37,
22 paragraph 31).

23 This was the holding of the ICJ in the seminal
24 Oil Platforms case brought by Iran against the
25 United States. As a basis for certain claims, Iran

09:51 1 invoked Article 1 of the bilateral Treaty of Amity,
2 Economic Relations and Consular Rights of 1995, which
3 provided that, and I quote -- this is Article I:
4 "There shall be firm and enduring peace and sincere
5 friendship between the United States ... and Iran."
6 I note that Article I contained mandatory language.
7 The verb here is "shall", language not found in
8 Article 18.
9 (Slide 21) Now, Iran took Article I and said this
10 provision:
11 "... impose[d] upon the Parties
12 "[a] requirement ... to conduct themselves with
13 regard to [each] other in accordance with the principles
14 and rules of ... international law in the domain of
15 peaceful and friendly relations'"
16 As such, Iran argued, the court would have
17 "jurisdiction to evaluate the lawfulness of the armed
18 actions of the United States" under the relevant rules
19 of international law, which Iran said were
20 "incorporated" into the Treaty of Amity (RL-37,
21 paragraph 25).
22 (Slide 22) The court rejected Iran's expansive
23 reading of Article I. Despite the mandatory language,
24 and despite the Treaty of Amity's rather broad title,
25 the court concluded, after looking at the treaty's

09:52 1 preamble and at its provisions generally, that it was
2 devoted to economic and consular cooperation, not
3 the myriad rules on peaceful relations. In short,
4 the court said (RL-37, paragraph 28):

5 "... Article I [could not] be interpreted as
6 incorporating into the Treaty all of the provisions of
7 international law concerning such relations."

8 Now, Azerbaijan, in its Rejoinder, acknowledges
9 the court's interpretation, but it fails to see that
10 Azerbaijan is essentially replicating Iran's argument.
11 Azerbaijan is seeking to incorporate into the ECT,
12 a treaty about investment and trade in the energy
13 sector, the many provisions of international law
14 concerning state sovereignty and sovereign rights over
15 natural resources.

16 Azerbaijan argues in its Rejoinder that Article I of
17 the Treaty of Amity is distinguishable from our
18 Article 18 because it was initially derived from
19 a preambular formulation found in earlier US friendship
20 treaties. But that's a surprising point to make, given
21 that Article 18(1) is an echo of a similar preambular
22 provision of the 1991 European Energy Charter.

23 I note that Azerbaijan appears to have abandoned its
24 initial suggestion that the words of the second sentence
25 of Article 18(1), which reads, "in accordance with and

09:54 1 subject to ... international law", somehow expands the
2 rights of states. Rather, Azerbaijan appears now to
3 accept that the second sentence of Article 18(1)
4 qualifies the first sentence, limiting its import.

5 So that really leaves Azerbaijan with just the first
6 sentence of Article 18(1) on which to hang its
7 interpretation, and that sentence leaves Azerbaijan with
8 a single word: "recognise".

9 (Slide 23) According to Azerbaijan, as stated in its
10 Counter-Memorial (paragraph 18) and essentially repeated
11 in the Rejoinder, the text of Article 18(1) is clear.
12 Azerbaijan says the undertaking to "recognise":

13 "... imposes an obligation to accept -- and act
14 consistent with -- the exclusive legal authority of each
15 State over its territory and resources."

16 Now, in support of that position, Azerbaijan again
17 cites in its Rejoinder to the 1994 ICJ boundary
18 delimitation case between Libya and Chad. I will not
19 repeat the detailed unpacking of that case by Armenia,
20 which you can find in our Reply at paragraphs 52-63, but
21 allow me to make three points.

22 (Slide 24) First, the dispute in the Libya/Chad case
23 centred on the interpretation of Article 3 of a 1955
24 France-Libya Treaty of Friendship, Commerce and
25 Navigation (RL-25), which was concluded before Chad

09:56 1 received its independence from France. Translated from
2 the original French and Arabic, Article 3 states that
3 the high contracting parties "recognize that the
4 boundaries separating" Libya from its neighbours "are
5 those arising from" a defined set of instruments.

6 Those six instruments are then listed in annex I to
7 the treaty. And the annex even states -- and you can
8 see it at the lower right-hand side of your screen --
9 the annex even states that the parties recognised
10 Libya's border as running through three specific
11 geographical points.

12 This text in this treaty is not anything close to
13 what we have in the text of Article 18(1).

14 (Slide 25) Second point about the Libya/Chad case.
15 The court explained that, and here I'll quote (CL-31,
16 paragraph 51):

17 "The text of Article 3 clearly conveys the intention
18 of the parties to reach a definitive settlement of the
19 question of their common frontiers. Article 3 and
20 Annex I are intended to define frontiers by reference to
21 legal instruments which would yield the course of such
22 frontiers."

23 That legal conclusion is also a far cry from
24 interpreting Article 18 as an agreement between ECT
25 parties definitively settling their positions on the

09:58 1 myriad issues that arise with respect to sovereignty and
2 sovereign rights over energy resources.

3 (Slide 26) Third point about the Libya/Chad case:
4 the court did not -- did not -- consider the text of
5 Article 3 in isolation, which is what Azerbaijan is
6 doing with Article 18. Rather, the court supported its
7 interpretation by carefully considering Article 3's
8 context, including other provisions of the treaty that
9 presupposed the existence of a defined border.

10 Further, the court explained (CL-31, paragraph 52)
11 that the 1955 treaty's:

12 "... object and purpose led naturally to the
13 definition of the territory of Libya, and thus
14 the definition of its boundaries."

15 This object and purpose was evidenced, inter alia,
16 by the treaty's preamble, which enshrined:

17 "The parties['] ... conviction that the signature of
18 the treaty would 'serve to facilitate the settlement of
19 all such questions as arise for the two countries from
20 their geographical location ...'"

21 It follows that the Libya/Chad case is of no
22 assistance to Azerbaijan. All it shows is that a verb
23 such as "recognise" can have different meanings in
24 treaties depending on the context in which it is used.

25 In Article 3 of the 1955 treaty, and in the context

09:59 1 of Law on Title to Territory, using that verb had
2 a legal significance, in recognising factually the
3 existence of a border and the legal consequences that
4 followed from that fact. In Article 18 of the ECT, the
5 verb "recognise" has no such significance, at least not
6 in the way that Azerbaijan advances.

7 (Slide 27) If anything, the use of the verb
8 "recognise" in Article 18 is more akin to its use in the
9 Paris Agreement on Climate Change, which was interpreted
10 by the ICJ in its 2025 advisory opinion (RL-268). There
11 the court considered certain provisions found in
12 Article 7 of the Paris Agreement, which said that the
13 parties "recognize" or acknowledge certain things, such
14 as "the ... need for adaptation ... mitigation" and
15 cooperation. The court held that:

16 "[Such] provisions do not prescribe obligations of
17 a legally binding character for the parties, but reflect
18 a common understanding of the parties as to the nature
19 of the problem being addressed."

20 The court goes on to say:

21 "In the Court's view, these provisions provide
22 context for the interpretation of other provisions
23 containing obligations."

24 Armenia submits that the same is true with respect
25 to Article 18, including paragraphs (1) and (3).

10:01 1 Article 18 reflects an understanding that the ECT
2 parties share, and it provides context for understanding
3 the other standard-setting provisions in the ECT, but
4 it does not itself establish any standards or legal
5 obligations.

6 Azerbaijan contends in its Rejoinder that no analogy
7 can be drawn with the Paris Agreement because the
8 relevant Paris Agreement provisions were not
9 standard-setting provisions. But that just means that
10 Azerbaijan concedes that the use of the verb "recognise"
11 in a treaty does not by itself make a provision
12 standard-setting, thereby potentially serving as a basis
13 for an inter-state action.

14 Yet if somehow one saw in Article 18(1) more
15 mandatory language -- which it doesn't have -- but if
16 one saw more mandatory language, under the ICJ's
17 jurisprudence, that still does not mean it creates
18 an actionable inter-state obligation.

19 (Slide 28) Indeed, we can compare Article 18 to
20 Article 4 of the UN Convention on Transnational
21 Organized Crime (RL-207), also known as the TOC or
22 Palermo Convention, a convention adopted in 2000, just
23 six years after the adoption of the ECT. Article 4(1)
24 of that convention reads:

25 "States Parties shall carry out their obligations

10:03 1 under this Convention in a manner consistent with
2 the principles of sovereign equality and territorial
3 integrity of States and that of non-intervention in ...
4 domestic affairs ..."

5 (Slide 29) Now, in the Immunities and Criminal
6 Proceedings case at the ICJ (RL-73), Equatorial Guinea
7 invoked Article 4 to allege that France had overextended
8 and unilaterally gone beyond the bounds of its criminal
9 jurisdiction through money laundering proceedings
10 against Equatorial Guinea's officials and property in
11 France. According to Equatorial Guinea, the denial of
12 official immunities from French criminal jurisdiction
13 amounted to a violation of principles of sovereign
14 equality, territorial integrity and non-intervention, to
15 which Article 4 refers, given that the rules on immunity
16 flow directly from those principles. The court,
17 however, rejected Equatorial Guinea's theory, largely on
18 the basis of Article 4's ordinary meaning, read in light
19 of the court's jurisprudence in cases such as
20 Oil Platforms.

21 Now, Azerbaijan attempts to rebut this case in its
22 Rejoinder, as well as the comparable Iranian Assets
23 case, essentially by saying that extrinsic rules in such
24 cases, the extrinsic rules at issue in those cases, bore
25 no relation to the underlying treaty that was at hand.

10:05 1 By contrast, Azerbaijan says, in our case the extrinsic
2 rules do relate to the ECT. With respect, that
3 distinction just does not hold up.

4 (Slide 30) First, it's worth recalling that in the
5 Immunities and Criminal Proceedings case (RL-73,
6 paragraph 92), the court said that it considered that
7 the word "shall" in Article 4(1) "imposes an obligation
8 on [the] States parties". Moreover, the court said that
9 "Article 4(1) is not preambular in character, nor does
10 it merely formulate a general aim", as compared with
11 Article I of the Oil Platforms case.

12 So here, according to the court, we have an article
13 that imposes an obligation, and further, is not general
14 in nature. Yet despite that -- despite that --
15 the court found that:

16 "... Article 4 is not independent of the other
17 provisions of the Convention. Its purpose is to ensure
18 that the States parties to the Convention perform their
19 obligations in accordance with the principles of
20 sovereign equality, territorial integrity and
21 non-intervention ..."

22 Therefore, even if this Tribunal were to find that
23 Article 18 imposes mandatory obligations on ECT
24 contracting parties, which it does not, and even if the
25 Tribunal were to find that Article 18 is not expressing

10:07 1 a general aim, which it does, it still does not follow
2 that Article 18 can be invoked as a freestanding
3 jurisdictional basis in isolation from the other
4 provisions of the treaty.

5 (Slide 31) My second point about this case is: in
6 Equatorial Guinea v France, the court did not see
7 immunities as unrelated to the principle of sovereign
8 equality identified in Article 4. To the contrary, as
9 you see at the top of the slide, the court recognised
10 that immunities are "derive[d] from the principle of
11 sovereign equality". That's in the very first sentence
12 of paragraph 93. Nevertheless, the court explained:

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

20 We submit the same approach is warranted in this
21 case. Article 18's general reference to sovereignty and
22 sovereign rights over energy resources is not
23 an invitation to interpret that article as imposing
24 an obligation on ECT states parties to act in a manner
25 consistent with the many complex and qualified rules of

10:09 1 international law that derive from such concepts.

2 (Slide 32) I turn briefly to Article 18(2), upon
3 which Azerbaijan does not rely. But this paragraph also
4 indicates that the thrust of Article 18 is not to
5 establish causes of action for one ECT party against
6 another. Rather, it is a without-prejudice clause, pure
7 and simple. In essence, the ECT does not prejudice
8 national rules on ownership of property. Thus,
9 Article 18(2) is also recalling the balance being struck
10 between economic rights of foreign investors and
11 the state's right to regulate.

12 Azerbaijan argues in its Rejoinder that
13 a without-prejudice clause must indicate that there are
14 substantive consequences in the ECT. But the point is
15 that those substantive consequences are in Parts II and
16 III, not in Article 18.

17 Also in its Rejoinder, Azerbaijan advances
18 a convoluted understanding of Article 18(2), based
19 largely on a debate that arose during the drafting of
20 the ECT, which Mr Farhadi will address shortly. For my
21 part, I will just note that on Azerbaijan's aggressive
22 reading of Article 18, Article 18(2) would presumably
23 sweep into the scope of the ECT any disputes between ECT
24 parties about ownership of property in the energy
25 sector. That can't be right.

10:11 1 (Slide 33) Turning now to Article 18(3).

2 Azerbaijan maintains in its Rejoinder that because
3 Article 18(3) is more detailed than Article 18(1),
4 it supports Azerbaijan's overall interpretation of
5 Article 18 as creating an obligation that can be the
6 basis of the Tribunal's jurisdiction. But we submit
7 that Azerbaijan ignores the text of Article 18(3), which
8 is fully consistent with our interpretation.

9 The opening words, "Each state continues to hold in
10 particular" -- "in particular" -- is referring back to
11 both Article 18, paragraph (1) and paragraph (2), as
12 Azerbaijan concedes in the Rejoinder. We've already
13 seen that those two earlier paragraphs are simply
14 recognising, affirming or avoiding prejudice to, rights
15 outside the ECT. So Article 18(3) is in the same vein.
16 It's referring to each state continuing -- that's the
17 words -- continuing to hold rights. No new rights or
18 obligations are being established or codified in
19 Article 18(3).

20 Now, what rights are being referred to here? That's
21 a further point to note. Article 18(3) was plainly
22 crafted -- plainly crafted -- with investor-state
23 relations in mind. It refers to a state continuing to
24 hold the right to decide where geographically energy
25 resources will be made available for exploration and

10:13 1 development; reserves to the state the right whether to
2 impose taxes and royalties on such development, to
3 decide to regulate environmental and safety aspects, and
4 so on.

5 Just like paragraphs (1) and (2) of Article 18,
6 there is nothing in Article 18(3) that even hints at
7 the idea of regulating inter-state rights. Rather,
8 Article 18(3) confirms that the article as a whole is
9 providing context for the interpretation of other ECT
10 provisions regulating relations between a state and
11 foreign nationals.

12 (Slide 34) Finally, the text of paragraph (4) of
13 Article 18, on which Azerbaijan has little to say. Here
14 too, more of the same. This paragraph is clearly
15 focused on investor-state relations. It's speaking to
16 a state undertaking to "facilitate access to energy
17 resources ... in a non-discriminatory manner", with
18 reference to "licences, concessions and contracts".
19 Again, there's no sense that this paragraph is meant to
20 address inter-state relations.

21 (Slide 35) So that's text. Moving beyond text to
22 object and purpose. Article 18 has to be interpreted in
23 light of the object and purpose of the ECT, which we
24 addressed in our Memorial in paragraphs 43-62 and Reply
25 at paragraphs 90-109.

10:14 1 (Slide 36) Like many international courts and
2 tribunals, the ICJ has given particular weight to
3 a treaty's object and purpose in assessing whether
4 provisions like Article 18 can constitute the basis for
5 jurisdiction. To that end, in cases like Equatorial
6 Guinea v France (RL-73) or the Certain Iranian Assets
7 case (RL-170), the court assesses whether the given
8 meaning of a provision falls within the object and
9 purpose of the instrument. The court in particular has
10 rejected interpretations that would have the effect of
11 extending its jurisdiction to customary rules of
12 international law that are not the subject of the treaty
13 on which its jurisdiction is based.

14 (Slide 37) So, for example, in the Oil Platforms
15 case (RL-37, paragraph 27), the ICJ observed that
16 the Treaty of Amity did not, despite its very broad
17 title, have as its object the regulation of peaceful
18 relations between the parties. It explained that
19 Article I is not inserted in a treaty of that type, but
20 rather in a treaty whose object relates to trade,
21 investment and consular affairs.

22 (Slide 38) And then the court concluded (RL-37,
23 paragraph 28) that since "the object and purpose of
24 the Treaty ... was not to regulate peaceful and friendly
25 relations ... in a general sense", Article I could not

10:16 1 be interpreted as a provision upon which the court's
2 jurisdiction could be based.

3 In its Rejoinder, Azerbaijan notes that the court
4 proceeded on the merits to address an entirely different
5 article of the treaty, which was Article 10(1),
6 an article that was directly regulating commerce between
7 the parties, including oil commerce. Well, that's true,
8 but it's irrelevant. The point is that there was no
9 jurisdiction for a claim based on Article I, which is
10 akin to our case with respect to Article 18.

11 (Slide 39) So what then is the object and purpose of
12 the ECT? Armenia's position has been consistent: it is
13 to promote and regulate transnational trade and
14 investment in the energy sector. Article 2 of the
15 ECT -- it's on your screen -- defines the purpose of
16 the treaty as establishing:

17 "... a legal framework in order to promote long-term
18 cooperation in the energy field ..."

19 That legal framework, as referred to in Article 2,
20 is then reflected in the two main parts of the treaty:
21 Part II is dedicated to the rights and obligations with
22 respect to "Commerce", i.e. trade; Part III is dedicated
23 to rights and obligations with respect to "Investment
24 Promotion and Protection". Those two parts is what
25 the ECT is all about.

10:18 1 (Slide 40) The ECT's object and purpose is also
2 reflected in its preamble, which establishes the goal of
3 catalysing economic growth by means of measures to
4 liberalise investment and trade in energy. Indeed,
5 the preamble is replete with references to trade and
6 investment objectives, some of which you can see on
7 the screen.

8 (Slide 41) Azerbaijan appears to agree with Armenia
9 that trade and investment are the centrepieces of the
10 ECT. Indeed, in its Rejoinder (paragraph 57),
11 Azerbaijan now says that it does not contend -- does not
12 contend -- that "sovereignty itself constitutes the
13 ECT's object and purpose". That's a welcome concession,
14 given that there's no support for the ECT having as its
15 object and purpose the regulation of state sovereignty
16 or sovereign rights.

17 That said, Azerbaijan maintains in its Rejoinder
18 (paragraph 58) that the object and purpose of the ECT is
19 "broad-ranging". For Azerbaijan, Article 2 of the ECT
20 confirms this breadth. But breadth is not an object and
21 breadth is not a purpose. Azerbaijan itself does not
22 actually articulate an object and purpose for the ECT
23 that meaningfully differs from the one advanced by
24 Armenia. And Azerbaijan's effort in the Rejoinder to
25 invoke the non-binding EEC and investor-state case law

10:20 1 leads nowhere, as we explain in paragraphs 100-109 of
2 our Reply.

3 (Slide 42) This brings me to the context.

4 THE PRESIDENT: Before you move off of object and purpose,
5 just one question. If you could go back to your slide
6 which showed Article 2; I think it was your slide 39.
7 Thank you.

8 The last clause of Article 2 cross-references "the
9 objectives and principles of the Charter". Could you
10 explain, in your view, what the consequence is of that
11 cross-reference? In other words, does it expand the
12 object and purpose of the ECT to incorporate the object
13 and purpose of the Charter, or is it an interpretive
14 principle?

15 PROFESSOR MURPHY: Thank you, Madam Chair.

16 In our view, it does not expand what is being stated
17 in Article 2, that the purpose of the treaty is as
18 established there. It does then, towards the end, as
19 you indicate, say this is in accordance with what was
20 intended with respect to the Charter. But we think it's
21 just too broad of an interpretation to assert that the
22 object and purpose of this treaty is to be understood
23 based on the rather lengthy charter that was several
24 years before.

25 THE PRESIDENT: Thank you very much.

10:21 1 PROFESSOR MURPHY: So I'm turning now to the issue of
2 context of Article 18, which we addressed in our
3 Memorial at paragraphs 63-70 and in the Reply at
4 paragraphs 110-131.

5 We've identified about half a dozen contextual
6 indicators in support of Armenia's interpretation of
7 Article 18, which are drawn from across the ECT and its
8 understandings. For present purposes, given limited
9 time, I'll focus on just one such indicator, about
10 which, with respect, Azerbaijan seems a bit confused,
11 which is Article 18's placement, along with other
12 provisions, in a part of the ECT entitled "Part IV:
13 Miscellaneous Provisions".

14 (Slide 43) We stated at paragraph 69 of our Memorial
15 that these other provisions, like Article 18, are all
16 ancillary to the provisions of the treaty, often of
17 a clarificatory, procedural or administrative nature.
18 We also said that miscellaneous provisions would not
19 ordinarily be the source of freestanding obligations,
20 but we never claimed that none of these other provisions
21 contain obligations.

22 In its Counter-Memorial, Azerbaijan went on at
23 length that some of these other provisions do create
24 legal obligations. So in our Reply at
25 paragraphs 122-127, we sought to correct Azerbaijan's

10:23 1 misperception, reiterating that these other provisions,
2 whether they express legal obligations or not, are all
3 ancillary to the matters regulated under Parts II and
4 III of the treaty; that is, they operate in tandem with
5 those other parts. The best that Azerbaijan could do in
6 response was to repeat in its Rejoinder that many of the
7 other articles contain binding and enforceable language,
8 without engaging with our position that they are all
9 ancillary to Parts II and III.

10 So, for example, Azerbaijan says in its Rejoinder --
11 it points to Article 20(1) on transparency with respect
12 to laws and regulations. But the point is that
13 Article 20(1) expressly concerns trade-related laws and
14 regulations on energy, as Azerbaijan's footnote 46 in
15 the Rejoinder itself acknowledges.

16 Azerbaijan further attempts in the Rejoinder to
17 argue that Article 19 expresses an inter-state
18 obligation concerning environmental protection. But
19 again, it still doesn't grapple with the ancillary
20 aspect of Article 19.

21 With respect to the broader range of contextual
22 indicators that support Armenia's interpretation of
23 Article 18, Azerbaijan claims in its Rejoinder that they
24 fail to displace the compelling contextual evidence that
25 Article 18 was drafted and positioned as a source of

10:25 1 justiciable obligations under the treaty.

2 The problem for Azerbaijan, however, is that that is
3 a mere assertion. Azerbaijan has not actually mustered
4 any plausible contextual support for the notion that
5 the ECT contemplates the adjudication of inter-state
6 disputes over sovereignty and sovereign rights to energy
7 resources.

8 Azerbaijan's attempt in the Rejoinder to rely on
9 the lack of a carve-out for Article 18 in Article 27 on
10 dispute resolution, for example, falls quite flat, given
11 that there is no need to carve out a provision that
12 creates no legal obligation, and given that Article 18
13 can be used by a dispute settlor when interpreting
14 the provisions of Parts II and III.

15 Rather, Azerbaijan's reading of Article 18 is based
16 on an acontextual reading of one cherry-picked sentence
17 in a 70-page treaty, namely the first sentence of
18 Article 18(1). If that sentence had the meaning
19 Azerbaijan seeks to ascribe to it, one would expect to
20 find some contextual indicators to that end somewhere in
21 the treaty. But there are none.

22 (Slide 44) That brings me to a further element --

23 PROFESSOR MCRAE: Professor Murphy, before you leave
24 context, do you regard -- I want to narrow it. You were
25 talking about context at a much broader scale, but

10:27 1 I want to ask you whether you see paragraph (3) of
 2 Article 18 as part of the context for [paragraph] (1).
 3 Or do you interpret [paragraph] (3) as part of the
 4 context or do you treat them separately? Because you
 5 certainly treated them quite separately in your opening
 6 remarks, but I wondered if you do see paragraph (3) as
 7 context for paragraph (1).

8 PROFESSOR MURPHY: Armenia takes the approach that it's
 9 really Article 18 as a whole that the Tribunal needs to
10 assess in terms of deciding whether you have
11 jurisdiction to proceed. The focus certainly has been
12 on Article 18(1); and for Azerbaijan, the relation to
13 paragraph (3). But in our view, it is the article as
14 a whole that you need to interpret. So that's why
15 I think, for purposes of my presentation, I did not
16 refer to the other paragraphs as contextual in nature.

17 Having said that, I can see an approach that
18 a tribunal might take that would say, "We're really
19 interpreting these particular one or two provisions, and
20 the others are context". I think there's a line to be
21 drawn there somewhere, and I've drawn it where I have.

22 PROFESSOR McRAE: Thank you very much.

23 PROFESSOR MURPHY: (Slide 44) That brings me to a further
24 element under the VCLT, which is subsequent practice of
25 the ECT parties, which we addressed in our Memorial,

10:28 1 paragraphs 71-73, and in the Reply, paragraphs 141-147.

2 (Slide 45) State practice in the application of
3 a treaty is not confined to the affirmative action of
4 states; it also includes inaction in circumstances where
5 state action would otherwise be expected. That
6 proposition is not controversial. It was recognised by
7 the ILC in its 2018 Draft Conclusions on Subsequent
8 Agreements and Subsequent Practice (CL-196, page 31),
9 which said that:

10 "Subsequent practice ... include[s] omissions,
11 including ... silence, which contribute to [the
12 establishment of an agreement among the parties]."

13 Now, Azerbaijan takes issue with this proposition in
14 its Rejoinder, essentially asserting that our case is
15 different from other cases that have used omissions in
16 state practice as relevant to treaty interpretation.

17 Yet, just as the international court in the Nuclear
18 Weapons Advisory Opinion saw it relevant that states had
19 never advanced an interpretation that nuclear weapons
20 fell within the scope of treaties on the prohibition of
21 poisoned weapons, in our case, no ECT party has ever
22 advanced until now, in any context, whether through
23 arbitration or otherwise, the interpretation that
24 Azerbaijan now implores you to adopt, and no ECT party
25 has done so even in situations where such a path to

10:30 1 arbitration would have been quite welcome, if it truly
2 existed.

3 At a minimum, we submit that any affirmative conduct
4 by ECT parties in support of Armenia's position can be
5 used to confirm a tribunal's interpretation based on
6 other elements. That's basically what the ICJ did in
7 the Oil Platforms case (RL-37, paragraph 30), where
8 it said:

9 "The practice followed by the Parties in regard to
10 the application of the Treaty does not lead to
11 [a] different conclusion[]."

12 (Slide 46) I turn to the last relevant element that
13 I will touch upon in Article 31 of the VCLT: good faith,
14 which Armenia addressed in the Memorial,
15 paragraphs 75-80, and the Reply, paragraphs 132-140.

16 (Slide 47) Now, as the members of the Tribunal well
17 know, good faith plays a central role that prevails
18 throughout the process of interpretation. Among other
19 things, good faith, under Article 31, acts as a common
20 sense and reasonableness check on interpretation.
21 It requires finding the intention of the parties, and
22 giving that intention "reasonable and equitable effect"
23 (RL-158, page 678). It requires (RL-114, paragraph 14)
24 arriving at an interpretation that:

25 "... tak[es] into account the consequences of [the]

10:32 1 commitments the parties may be considered as having
2 reasonably and legitimately envisaged."

3 In Armenia's submission, Azerbaijan's interpretation
4 of Article 18 does not pass this basic test. And the
5 reasons for that are obvious: no state could have
6 reasonably and legitimately envisaged that Article 18 of
7 the ECT, a miscellaneous provision in a trade and
8 investment treaty, could form the basis for
9 an inter-state claim about state sovereignty, and
10 sovereign rights over energy resources, especially
11 a claim that seeks more than \$1.6 billion in
12 compensation. There's no evidence that this was the
13 intention of the parties, and it would certainly be
14 a surprising outcome by any measure.

15 To take but one example of the unreasonableness of
16 Azerbaijan's position, it is not disputed by Azerbaijan
17 that permanent sovereignty over natural resources is
18 a component of the broader jus cogens human right of
19 self-determination.

20 It follows that, under Azerbaijan's interpretation,
21 by virtue of it ratifying the ECT, it agreed, under
22 Article 18, to arbitrate a dispute with any other ECT
23 party over whether the resources of Nagorno-Karabakh
24 were being lawfully utilised by the population. For
25 present purposes, this consequence of Azerbaijan's

10:34 1 interpretation of Article 18 is illustrative of its
2 manifest unreasonableness.

3 Madam President, this concludes my presentation.

4 Unless I can be of further service, I request that you
5 give the floor to Mr Farhadi to address subsidiary means
6 of interpretation.

7 THE PRESIDENT: Thank you. Let me just ask my colleagues if
8 they have any questions for you.

9 Thank you very much.

10 PROFESSOR MURPHY: Thank you so much.

11 MR FARHADI: Good morning, Madam President, members of
12 the Tribunal. It's an honour for me to appear before
13 you on behalf of the Republic of Armenia.

14 (Slide 48) I will continue Armenia's presentation of
15 its objection to Azerbaijan's Article 18 claims by
16 addressing relevant aspects of the ECT's preparatory
17 work.

18 Professor Murphy has just explained Armenia's
19 interpretation of Article 18 pursuant to the general
20 rule of interpretation set out in Article 31 of the
21 VCLT. If the tribunal is convinced, then its
22 interpretative exercise need proceed no further. That
23 said, any doubt that may remain can be dispelled by the
24 preparatory work of Article 18, to which I will now
25 turn.

10:36 1 (Slide 49) As you know, in accordance with
2 Article 32 of the VCLT (CL-11), the Tribunal may have
3 recourse to supplementary means of interpretation, such
4 as the travaux préparatoires, to confirm the meaning
5 resulting from the application of the elements of treaty
6 interpretation in Article 31.

7 (Slide 50) Now, Armenia has produced more than
8 a dozen travaux documents that support its
9 interpretation. For a complete discussion of those,
10 I respectfully refer the Tribunal to paragraphs 81-92 of
11 our Memorial and paragraphs 148-164 of our Reply. For
12 ease of reference, however, you do have a selection of
13 some key documents listed on your screen.

14 For today's purposes, I'll limit myself to briefly
15 presenting and recalling some of these documents which,
16 in our view, establish not only the origins and
17 development of what became Article 18, but also how that
18 provision was understood by the states that negotiated
19 the ECT at the time.

20 I will show how the travaux are fully consistent
21 with Armenia's interpretation of Article 18 as
22 a declaratory, interpretive provision concerning
23 investor-state relations; that is to say, as a means to
24 counterbalance, through interpretation, the enforceable
25 protections granted to investors, on the one hand, with

10:37 1 the state's inherent sovereign right to regulate, on the
2 other hand. I will also address Azerbaijan's efforts to
3 sidestep this evidence in pursuit of an interpretation
4 that finds no supportive travaux to speak of.

5 (Slide 51) It appears to be common ground between
6 the parties that what became Article 18 was included in
7 early drafts of the ECT at Norway's insistence. As
8 a commentator explained (CL-103, page 144), Norway,
9 which of course is a state with substantial state-owned
10 hydrocarbon reserves, was particularly concerned about
11 the ECT requiring it to afford national treatment to
12 foreign companies at the pre-investment stage. It
13 therefore sought to have a provision included which
14 would impose a balanced approach between the rights of
15 investors and host states.

16 (Slide 52) And we can see this clearly stated in
17 Norway's memorandum of 16 August 1994 (RL-138, PDF
18 page 3), devoted to explaining Article 18, which was
19 then numbered as Article 21. Norway explained:

20 "Together Article 21 and Part III of the ECT ..."

21 Part III being devoted to investment:

22 "... are intended to represent a balanced approach
23 to the legal relationship between the resource state and
24 the investments of investors in the exploration and
25 development of energy resources. The rights of the

10:38 1 state as resource owner constitute an important element
2 in this legal relationship, as do the protection granted
3 to investors and their investments under Part III."

4 Further down, we see that it says:

5 "Article 21 is intended to affect the interpretation
6 and application of the rest of the ECT, including
7 provisions of Part III."

8 (Slide 53) In the same memo (PDF page 4), Norway
9 further described Article 18 as:

10 "... giv[ing] the State a right as resource owner to
11 decide the optimalization of the recovery of its energy
12 resources."

13 It specified, however, that the right was "not
14 unlimited". Rather:

15 "The decision should primarily be based on what is
16 considered economical, both from the point of view of
17 the investor and the resource owner."

18 Meaning the state.

19 "In case of conflict of interest between the
20 investor and the resource owner, the State may choose to
21 let its interests as resource owner prevail."

22 As the original proponent of the provision, Norway's
23 position on Article 18, we say, is particularly
24 informative. It put forward a detailed memorandum
25 outlining the objectives of the provision and explaining

10:40 1 with some granularity how it would function.

2 It expressly requested in its cover letter to that
3 memorandum that it be circulated to the participating
4 delegations.

5 There is no indication of any other state
6 questioning Norway's position regarding the investment
7 focus of Article 18, nor is there any indication in the
8 travaux to suggest any additional meaning or objectives
9 behind the provision. If Article 18 had been understood
10 in any other way, one would expect to see that reflected
11 somewhere, particularly following Norway's detailed
12 memo.

13 (Slide 54) You can also see from this fax dated
14 1 September 1994 (RL-140, PDF page 4) that Norway even
15 proposed to add the explanation of its balanced approach
16 as a declaration with respect to Article 18.

17 Azerbaijan, for its part, tries to undermine
18 Armenia's reliance on Norway's explanatory statements in
19 a few ways. First, it argues that Norway's position is
20 somehow restricted to interpreting only Article 18(2).
21 It's true that these documents arose as a result of
22 debates about Article 18(2) and the interpretative
23 declaration that was ultimately adopted alongside it.
24 However, Norway's explanations and the discussions
25 extended to Article 18 as a whole, as we just saw.

10:41 1 (Slide 55) Now, as you can see on the screen,
2 Azerbaijan nevertheless insists that Norway's statements
3 have to be viewed in the context of the negotiating
4 parties' concerns that Article 18, and in particular
5 Article 18(2), could "gut" or undermine other treaty
6 provisions (Rejoinder, paragraph 88). Azerbaijan argues
7 that the fact that some states had this concern
8 necessarily means that Article 18 was meant to create
9 independent obligations. It says that:

10 "... Armenia still fails to explain how Article 18
11 could serve as an effective 'counterbalance to investor
12 rights,' let alone raise concerns that it could override
13 other treaty provisions, if it did not impose legal
14 obligations."

15 But this is, respectfully, a non sequitur.
16 A provision may effectively counterbalance a treaty
17 obligation by affecting its interpretation as part of
18 its context without necessarily creating independent
19 obligations of its own. In other words, a state could
20 reasonably be concerned that Article 18 perhaps went too
21 far in emphasising the right to regulate; that it might
22 have the effect of softening, through interpretation,
23 the ECT's expropriation protection, for example. But
24 that is a far cry from saying that Article 18 was meant
25 to be a freestanding cause of action among states.

10:43 1 In any event, Norway was not alone in underscoring
2 the role of Article 18 as relevant to investment.
3 France included what became Article 18 in a list of
4 "Other articles that directly or indirectly concern
5 investors". It discussed this in a 15 March 1993
6 memorandum, which is on the record as RL-128.

7 (Slide 56) We can also see the emphasis of
8 investor-state relations in a 26 September 1994 document
9 prepared by Craig Bamberger, the legal advisor of the
10 ECT Conference (RL-143, pages 8-10). That memo
11 describes the final text of the ECT, and mentions
12 Article 18 under the category of "Principal Investment
13 Provisions". As Mr Bamberger explains, Article 18 is
14 located in Part IV, which was then entitled
15 "Contextual", rather than in Part III, on investment.
16 Nevertheless, he explains, it "pertains especially to
17 investment issues".

18 At most, the only disagreement amongst states was
19 about just how much effect Article 18 could have on the
20 application of the investment provisions of the ECT. In
21 this context, some states confirmed that they saw the
22 provision as purely declaratory of external principles
23 of international law, and not vested with any particular
24 force, even within the ECT framework.

25 (Slide 57) So we have, for example, a fax of

10:44 1 22 August 1994 from Australia's delegate (RL-139),
2 writing that:

3 "Australia would like to have it clearly recorded
4 that it can accept Article 21 ..."

5 Meaning Article 18:

6 "... as currently drafted on the basis that it is
7 merely declaratory of existing international law. We do
8 not read it as overriding any other provision of
9 the Treaty."

10 Australia then went on to note its understanding:

11 "... that Article 21 does not override the core
12 obligations contained in Article 13 in relation to the
13 standard of treatment to be provided to investments."

14 (Slide 58) And then we also have a June 1994 fax
15 sent to Craig Bamberger by the United Kingdom's
16 representative (RL-134). And the UK representative
17 commented, with some candour, that paragraph (1) of
18 Article 18 "state[d] the obvious", was "otiose" and
19 "harmless".

20 Like Armenia and multiple commentators, Australia
21 and the UK saw Article 18 as a truism, included to
22 address the concerns of developing and resource-owning
23 states about protecting their right to regulate.

24 Azerbaijan's response to these documents (Rejoinder,
25 paragraph 91) is to say that:

10:45 1 "Isolated statements by two individual States do not
2 illuminate the Contracting Parties' 'common
3 understanding as to the meaning' of Article 18."

4 Well, although admittedly this is only the statement
5 of two states, that is two states more than can be
6 mustered to support Azerbaijan's interpretation.

7 That said, these statements do help illuminate the
8 common understanding of the meaning of the provision
9 because they were shared with the legal sub-group
10 charged with finalising the provision and they reflected
11 the consensus that was emerging in the months leading up
12 to the finalisation of the treaty.

13 Further evidence that Article 18 was not understood
14 as establishing actionable obligations can be found, for
15 example, in the evolution of its placement within drafts
16 of the treaty over time.

17 (Slide 59) So, as Azerbaijan rightly points out, the
18 sovereignty article was first considered as part of the
19 "General Obligations" section in the first three drafts
20 of the ECT over three months in 1991 (CL-18).

21 (Slide 60) But the provision was then quickly moved
22 and placed under the heading "Definitions and
23 Principles" in the fourth draft of 21 January 1992
24 (RL-117), and it stayed there in numerous subsequent
25 drafts all the way up until March 1993. It featured in

10:47 1 that section alongside other interpretive provisions,
2 such as articles entitled "Definitions", "Principles",
3 and "Objective of the Treaty".

4 (Slide 61) Then in the 15 March 1993 draft (RL-197),
5 the provision was moved to the "Contextual" part, whose
6 content closely mirrors that of the final
7 "Miscellaneous" part, Part IV of the ECT, and it
8 remained there through the adoption of the final text.

9 (Slide 62) Now, following the adoption of the final
10 text, the heading "Contextual" was renamed as
11 "Miscellaneous" in a stylistic change that occurred
12 during the Secretariat's finalisation of the text.
13 Again, this happened after the negotiations ended in
14 late September 1994, but before the ECT's opening for
15 signature in December of that same year.

16 (Slide 63) This is shown in the timeline on your
17 screen. Article 18 was quickly moved out of the
18 category of "Obligations", moved for a time to
19 "Principles", and then spent the last year and a half of
20 negotiations labelled by states as "Contextual". The
21 fact that "Contextual" was changed to "Miscellaneous"
22 without discussion at the last minute does not undermine
23 the shared understanding that it serves a contextual
24 purpose, as originally intended by the state proposing
25 the provision.

10:48 1 Turning now to the travaux that Azerbaijan claims
2 supports its interpretation. I can be brief, because
3 there is not much.

4 Across its four pleadings, Azerbaijan has put
5 forward a few previous drafts of the ECT that shed no
6 meaningful light on the interpretation of Article 18.
7 Aside from this, Azerbaijan submits only one travaux
8 document in support of its Article 32 analysis, in
9 section II.D of its Counter-Memorial, and then nothing
10 new in the corresponding section of its Rejoinder.

11 (Slide 64) That one document is a 1991 explanatory
12 memorandum describing the draft provisions of the ECT
13 (CL-111). Azerbaijan emphasises that what was then
14 Article 5(1), a very early version of Article 18, is
15 described as:

16 "... mak[ing] provision for States to decide which
17 areas of their territory may be made available for
18 exploration and exploitation ..."

19 For Azerbaijan, this apparently means that
20 Article 18 should be understood as creating actionable
21 obligations.

22 But Azerbaijan overlooks that the passage begins by
23 explaining that Article 18 "reiterates the principle of
24 national sovereignty over natural resources".

25 Similarly, the final version of Article 18(3) makes it

10:49 1 clear that the contracting states continue to hold such
2 rights.

3 All this is perfectly consistent with Armenia's
4 interpretation of Article 18 as reaffirming existing
5 principles of international law in the context of
6 investment protections afforded to foreign nationals.
7 This document does not even hint at actionable legal
8 obligations in inter-state relations.

9 (Slide 65) So, unable to point to its own supportive
10 travaux, Azerbaijan downplays the importance of the
11 travaux produced by Armenia that we just saw. As you
12 can see on the screen (Rejoinder, paragraph 88),
13 Azerbaijan insists that:

14 "Nowhere in its letters did Norway state, as Armenia
15 now argues, that the sovereignty provision 'was only
16 intended' to have interpretative effect, or that
17 articles 18(1) and 18(3) did not 'create legal
18 obligations of [their] own'."

19 It further insists (paragraph 89) that:

20 "... each of the documents Armenia cites as supposed
21 support fails to show that Article 18 is solely
22 concerned with investor-State relations ..."

23 For Azerbaijan, the travaux documents that
24 explicitly support Armenia's interpretation can thus be
25 ignored because they do not explicitly preclude

10:51 1 Azerbaijan's interpretation; in other words, because
2 they do not prove a negative.

3 But the onus should not be on Armenia to produce
4 documents that explicitly state something to the effect
5 that, "Oh, well, by the way, we confirm that Article 18
6 is not a freestanding, actionable provision in the
7 inter-state context for disputes over sovereign rights
8 over natural resources". Such a statement does not
9 exist because this possibility was, we say, not even
10 contemplated.

11 For its part, Armenia has instead presented travaux
12 that confirm its reasonable interpretation of Article 18
13 as an investment-related provision, widely shared by
14 states and commentators. Azerbaijan has produced
15 nothing to support its own unprecedented interpretation.
16 And this, we say, is quite a problem for Azerbaijan.

17 The ICJ has stressed in multiple cases that when
18 a state proposes an interpretation with significant
19 consequences for the contracting parties, it should be
20 expected that such an interpretation would have been
21 discussed during the negotiations, and thus reflected in
22 the travaux. So the court has relied on the absence of
23 supporting travaux to confirm its rejection of
24 consequential interpretations of treaty provisions
25 proffered by states.

10:52 1 (Slide 66) To take one example, in the maritime
2 delimitation case between Somalia and Kenya (RL-168),
3 the court was tasked with interpreting the sixth
4 paragraph of a memorandum of understanding between
5 the two states. The paragraph provided that the
6 delimitation of the continental shelf between the
7 parties "shall be agreed on the basis of international
8 law".

9 Somalia's position was that the provision simply
10 acknowledged the parties' pre-existing obligations under
11 UNCLOS. Kenya, on the other hand, argued that
12 paragraph 6 imposed a positive obligation on the parties
13 to hold negotiations with a view to reaching
14 an agreement on delimitation.

15 After interpreting the provision in accordance with
16 Article 31 of the VCLT, the court turned to the relevant
17 travaux. It noted (paragraph 104) that:

18 "No mention is made of the sixth paragraph. If
19 [that paragraph] had the significance given to it by
20 Kenya, it is to be expected that this would have been
21 highlighted by the State whose representative had been
22 instrumental in drafting the MOU."

23 The court went on to reject Kenya's interpretation,
24 taking together the Article 31 and Article 32
25 interpretative exercise.

10:53 1 (Slide 67) Likewise here, there's a total absence of
2 travaux supporting Azerbaijan's unprecedented
3 interpretation which gives Article 18, and Article 18(1)
4 in particular, a great deal of significance. And
5 Azerbaijan admits as much. It states in its Rejoinder
6 (paragraph 92) that:

7 "While the ECT's drafters discussed in depth the
8 function of Article 18(2) vis-à-vis foreign investors,
9 they did not specifically engage with the terms
10 'recognise' or 'continue to hold' in Articles 18(1) or
11 18(3)."

12 But as Professor Murphy explained, Azerbaijan hangs
13 its entire interpretation of Article 18 on the word
14 "recognise", but it's now common ground that no state
15 ever pointed to the term as having any particular
16 significance. The lack of any travaux in support of
17 Azerbaijan's interpretation should thus leave no doubt
18 that it cannot be upheld.

19 This concludes my presentation. I thank the
20 Tribunal for its attention. Madam President, might
21 I suggest this might be an opportune moment to break for
22 coffee, and after which Ms Macdonald will resume
23 Armenia's presentation.

24 THE PRESIDENT: Thank you. Let me just ask my colleagues if
25 they have any questions about the travaux.

10:54 1 Alright. Thank you very much, counsel. We will
2 take our 15-minute break now, so we will return,
3 I guess, at 11.10. Thank you very much.

4 (10.55 am)

5 (A short break)

6 (11.15 am)

7 THE PRESIDENT: Thank you. Welcome back to everybody.

8 Counsel, when you're ready to resume.

9 MS MACDONALD: Madam President, members of the Tribunal,
10 it is my honour to continue Armenia's presentation.

11 (Slide 69) I will begin our submissions on the
12 jurisdictional objections relating to the claims
13 concerning the Yevlakh-Nakhijevan pipeline transit,
14 which, for convenience, we have been calling
15 the "pipeline transit claims".

16 (Slide 70) The pipeline was a Soviet project of the
17 late 1970s that served both of the former republics of
18 Armenia and Azerbaijan. As we can see on the screen,
19 it starts and finishes in Azerbaijan, but in the middle,
20 a section runs across the sovereign territory of
21 Armenia. We can also see that it runs through the
22 former Nagorno-Karabakh Autonomous Oblast. And towards
23 the left, we see that in Armenia's territory, a branch
24 of the pipeline also splits off to serve Yerevan.

25 (Slide 71) The route of the pipeline is accurately

11:16 1 described by Azerbaijan in the Statement of Claim
2 (paragraph 132), as we see on screen.

3 (Slide 72) Azerbaijan's pipeline transit claims
4 allege that Armenia violated Article 7 of the ECT,
5 subparagraphs (1), (2)(c), (3) and (5), and we see these
6 provisions on screen.

7 (Slide 73) The underlying factual allegation is that
8 in 1991, during the First Nagorno-Karabakh War, Armenia
9 took action within its sovereign territory to cut off
10 the gas supply to Nakhijevan and then maintain this
11 state of affairs. And we can see the allegation here as
12 it's set out in two paragraphs of the Statement of Claim
13 (paragraph 137-138).

14 (Slide 74) In addition, Azerbaijan claims that this
15 alleged interruption of transit also somehow violates
16 Article 18, as we can see here at paragraph 212 of the
17 Statement of Claim, which comes at the end of a list of
18 alleged Article 18 breaches.

19 (Slide 75) Now, the Tribunal will recall that it
20 bifurcated three preliminary objections to the
21 jurisdiction of the Tribunal over these pipeline transit
22 claims: first, that no dispute as to those claims
23 existed at the time of the Notice of Arbitration, as
24 required by Article 27 and international law; second,
25 that even if, quod non, a dispute as to those claims did

11:18 1 arise at some point before the Notice of Arbitration,
2 then Azerbaijan failed to fulfil the precondition of
3 negotiation; and third, that if, again quod non, there
4 is a dispute, then it is a transit dispute within the
5 meaning of Article 7 and should therefore have been
6 referred to conciliation under Article 7(7).

7 We address the dispute issue first because before
8 either conciliation or negotiation could happen, there
9 has to be a dispute in the first place. So the
10 existence of a dispute, as we see it, is an umbrella
11 requirement. Then of course the negotiation and
12 conciliation issues could be considered in either order,
13 since if we are correct about the conciliation
14 requirement, then this, rather than negotiations, was
15 the route that Azerbaijan should have taken.

16 Now, in addition to these three bifurcated
17 objections, the Tribunal will recall that it has joined
18 to the merits three other jurisdictional objections in
19 respect of the pipeline transit claims: first, that the
20 Tribunal lacks jurisdiction *ratione temporis*, given that
21 the alleged interruption of transit took place in 1991,
22 seven years before the ECT entered into force between
23 the parties in 1998; second, that the Tribunal lacks
24 jurisdiction *ratione materiae* because Article 7 applies
25 only to established transit, and does not create binding

11:19 1 obligations for a state to allow new transit to be
2 established through its territory.

3 Third, and in any event, there is the question of
4 the ECT's essential security exception. It appears to
5 be common ground that the interruption of transit
6 occurred during a period of armed conflict. I should
7 make clear that Armenia does not accept that it was
8 responsible for the interruption. But even if this
9 could be attributable to Armenia, quod non, Armenia's
10 case is that such a measure would fall squarely within
11 the essential security exception.

12 So those are the three additional matters that would
13 remain, should this claim proceed beyond this initial
14 stage.

15 (Slide 77) So with that introduction, returning to
16 today's business, I will address the first objection,
17 Dr Salonidis will address the second, and
18 Professor d'Argent the third. But before we turn to
19 the individual objections, it may be helpful if we take
20 a look at the relevant chronology.

21 (Slide 78) We begin on 8 October 2021, when
22 Azerbaijan sent Armenia what it labelled a "[REDACTED]
23 [REDACTED]" (CE-63,
24 pages 2-3).

25 (Slide 79) The factual and legal basis for the

11:21 1 dispute is set out in two paragraphs, which we can see
2 on screen.

3 Starting with the first sentence of the first of
4 those paragraphs, Azerbaijan describes its allegation
5 that Armenia illegally occupied what it terms the
6 "[REDACTED]". It goes on to say that during
7 that time, Armenia carried out various unlawful acts,
8 and it goes on to say that:

9 "[REDACTED]
10 [REDACTED]
11 [REDACTED]"

12 Then in the next paragraph, we see what legal
13 provisions this alleged conduct is said to have
14 breached: firstly, "[REDACTED]"; and
15 secondly, what Azerbaijan describes as "[REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]".

19 So while this is a surprisingly terse, even vague,
20 document to use in purported commencement of
21 an inter-state dispute, it does at least convey four
22 important threshold matters: firstly, where the wrongful
23 conduct is said to have taken place; secondly, when this
24 is said to have happened; thirdly, what conduct is said
25 to have been wrongful; and fourthly, what legal

11:22 1 provisions are said to have been violated.

2 (Slide 80) Then over the page, we see that
3 the letter states that Azerbaijan seeks:

4 " [REDACTED]
5 [REDACTED]
6 [REDACTED]"

7 And the letter goes on to invite Armenia to commence
8 negotiations in relation to "[REDACTED]"; in other
9 words, the dispute that was framed in the two prior
10 paragraphs that we've just seen.

11 (Slide 81) Now, I've taken a moment to go through
12 this important letter because as we'll see when we turn
13 to Armenia's first objection, Azerbaijan argues in terms
14 that this letter, we see on screen (Counter-Memorial,
15 paragraph 78(a)), "encompasses ECT claims related to the
16 Y-N Pipeline". And as I will explain shortly, Armenia
17 says that this is obviously not correct.

18 (Slide 82) Moving the chronology along, Armenia
19 replied on 24 November 2021 (CE-63, page 6), pointing
20 out that Azerbaijan's letter:

21 "[REDACTED]
22 [REDACTED]
23 [REDACTED] [REDACTED]
24 [REDACTED]
25 [REDACTED]"

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[REDACTED]

[REDACTED]

[REDACTED]"

Accordingly, Armenia invited Azerbaijan to elaborate on these matters in writing in order to ensure that any subsequent negotiations are conducted in good faith.

(Slide 83) Azerbaijan's reply came on 20 December (CE-63, pages 9-10). It stated that the questions asked by Armenia "[REDACTED]". And the letter goes on to repeat that the allegations relate to alleged conduct by Armenia, namely:

"[REDACTED]"

[REDACTED]

[REDACTED]"

Again it points to Article 18, and again the

"[REDACTED]"

[REDACTED]".

(Slide 84) Then if we go over the page, we see the letter set out five bullet points. It introduces these by saying:

"[REDACTED]"

[REDACTED]

[REDACTED]"

The five points we see on the screen, all matters relating to the same time period and the same territory

11:25 1 as we saw described in the letter of 8 October. And
2 again, no mention of different factual conduct on
3 different territory in a different time period, and no
4 mention of interruption to the gas supply.

5 (Slide 85) After this, there followed a period of
6 exchanges in relation to potential modalities of
7 negotiations, and we can see those exchanges represented
8 in simple graphic form on the timeline on the screen.

9 Then in May 2022, following the parties' agreement
10 to hold two days of meetings to allow Armenia to hear
11 Azerbaijan's claims, Azerbaijan delivered a presentation
12 lasting less than 40 minutes. It then informed Armenia
13 that it did not deem it necessary to hold a second day
14 of meetings.

15 (Slide 86) Then on 6 June 2022, Azerbaijan sent
16 a letter summarising once again its ECT claims (CE-63,
17 pages 63-64), which were again limited to allegations
18 that Armenia had "[REDACTED]
19 [REDACTED]" and had "[REDACTED]
20 [REDACTED]" in the territory of
21 Nagorno-Karabakh in the years following the armed
22 conflict.

23 Azerbaijan then all but disappeared over the summer,
24 sending only one letter: to decline, at the last minute,
25 Armenia's invitation to hold another meeting.

11:26 1 (Slide 87) Then in the morning hours of
2 [13] September 2022, Azerbaijan attacked Armenia's
3 sovereign territory, causing loss of life, injury and
4 the displacement of civilians. After several attempts
5 to find mutually convenient dates for the parties to
6 meet in September, Armenia had proposed to hold meetings
7 in October 2022. But the humanitarian and diplomatic
8 crisis caused by Azerbaijan's attack made it impossible
9 for negotiations to proceed that month.

10 (Slide 88) But a month later, on 24 and
11 25 November 2022, Armenia and Azerbaijan did hold
12 a meeting, during which Armenia presented its
13 substantive observations on Azerbaijan's Article 18
14 claims.

15 (Slide 89) Azerbaijan's follow-up to that meeting
16 came in the form of a letter dated 16 December 2022
17 (CE-63, page 82), and this is the first time that the
18 alleged interruption of pipeline transit or Article 7
19 feature anywhere in the record.

20 As we see, the letter refers to "[REDACTED]
21 [REDACTED]", and it goes
22 on to say that, as we see on the screen, it "[REDACTED]
23 [REDACTED]
24 [REDACTED]" of the matters we see on
25 screen: an alleged interruption in the supply of natural

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As I've said, this is the first time that Article 7 is raised by Azerbaijan. And in our view, there's some important wording used here: " " and " ". So in other words, on the plain terms of the letter, this allegation had not been previously notified to Armenia, but was being notified by means of that very letter.

And to fully understand the timing of the allegation, the Tribunal will recall that it was mentioned for the first time only 14 months after the initial Notice of Dispute; only two days after Armenia wrote to the International Court of Justice, raising the interruption of the gas supply in Nagorno-Karabakh in the middle of winter. And we invite the Tribunal to review that letter in due course, which it will find at RE-26.

(Slide 90) Understandably, Armenia was puzzled by the letter of 16 December. If we look again at its reply of 16 January (CE-63, pages 84-86), we see Armenia expressing that surprise, saying that it could not see how this new allegation related to the dispute described in the letter of 8 October 2021, and asking for a legal

11:29 1 and a factual explanation.

2 Now, one thing that you may hear this afternoon is
3 that Armenia, when it asked for further information
4 here, was somehow stalling. In fact, "specious" is the
5 word that Azerbaijan uses for this request for
6 information. But again, Armenia will invite you to
7 consider this point in view of the sheer lack of detail,
8 factual or legal, with which Armenia was presented.

9 (Slide 91) Then on Friday, 24 February 2023,
10 Azerbaijan replied (CE-63, pages 87-88). The main body
11 of the letter contains no mention of the pipeline
12 transit claims, nor of Article 7. The sole reference to
13 these matters is to be found in a footnote on the second
14 page of the letter, which we can see on screen.

15 Now, clearly this footnote does not answer Armenia's
16 request, as we just saw (CE-63, page 86), for Azerbaijan
17 "[REDACTED]
18 [REDACTED]". But it does appear to foreshadow the
19 erroneous argument that Azerbaijan now advances before
20 you to the effect that, despite the "[REDACTED]"
21 and "[REDACTED]" language that we just saw, the
22 pipeline transit claims had somehow been part of its
23 claim since the outset.

24 And that letter marks the end of the procedural
25 history since three days later, on Monday, 27 February,

11:31 1 Azerbaijan filed its Notice of Arbitration.

2 (Slide 92) So with that background in mind, I turn
3 now to Armenia's first jurisdictional objection to these
4 claims: the absence of a dispute.

5 (Slide 93) We can see the text of Article 27 on
6 screen. And like many such provisions, it requires the
7 existence of a dispute before the institution of
8 proceedings. So whether or not a dispute had
9 crystallised before the Notice of Arbitration is a key
10 threshold question for the Tribunal.

11 (Slide 94) Starting with the law, we do not need to
12 spend long on the basic definition of "dispute". The
13 members of the Tribunal will have been referred in
14 countless cases to the Mavrommatis definition (RL-21,
15 page 11):

16 "... a disagreement on a point of law or fact,
17 a conflict of legal views or of interests ..."

18 And we do not understand this to be in contention
19 between the parties. As we list at paragraph 99 of our
20 Memorial, there are numerous international cases which
21 have applied this definition.

22 (Slide 95) Now, as the International Court of
23 Justice has repeatedly stated, whether a dispute exists
24 is a matter of objective determination. This statement
25 can be found, for example, at paragraph 50 of Nicaragua

11:32 1 v Colombia (RL-67), which we see on screen.

2 (Slide 96) Now, as to the evidence on which this
3 objective determination should be based, this comprises
4 the "statements or documents exchanged between the
5 parties", as the court noted in the Marshall Islands
6 cases (RL-70, paragraph 39).

7 And to state perhaps the obvious, the relevant time
8 period for such exchanges is before the initiation of
9 the claim. So as the court emphasised in those cases
10 (RL-70, paragraph 40):

11 "... neither the application nor the parties'
12 subsequent conduct and statements made during the
13 judicial proceedings can enable the Court to find that
14 the condition of the existence of a dispute has been
15 fulfilled in the same proceedings ..."

16 As to what these exchanges between the parties must
17 show, the starting point is that the party making the
18 claim must set out its position clearly. This
19 commonsense requirement is again settled law. As the
20 court put it in the Marshall Islands cases that we just
21 looked at (paragraph 49):

22 "... a statement can give rise to a dispute only if
23 it refers to the subject-matter of a claim 'with
24 sufficient clarity to enable the State against which
25 [the] claim is made to identify that there is, or may

11:34 1 be, a dispute with regard to that subject-matter' ..."

2 Azerbaijan refers to investor-state case law in this
3 regard, apparently to suggest a lower requirement of
4 specificity. While Armenia submits that the inter-state
5 case law is a far more relevant source of guidance, in
6 any event the investor-state cases cited by Azerbaijan
7 show that tribunals in that field have taken just the
8 same approach.

9 (Slide 97) We review the case law in detail in the
10 Reply. But to take just one example, as we see on
11 screen, in Houben v Burundi (CL-188, paragraph 145),
12 the tribunal stated that a notice of dispute must be:

13 "... sufficiently detailed [so as] to allow [the
14 state] to become aware of the existence of a dispute [in
15 relation to the relevant treaty] and the facts giving
16 rise to [the dispute], [and to enable it to enter into]
17 negotiations ... on this subject."

18 (Slide 98) So assuming then that one party advances
19 a sufficiently particularised claim, the next
20 requirement is that that claim is positively opposed by
21 the other party. This has been the jurisprudence
22 constante of the ICJ and numerous other international
23 courts and tribunals, and we see on screen the relevant
24 passages from the ITLOS decision in Mauritius/Maldives
25 (RL-85, paragraphs 323-324).

11:35 1 (Slide 99) Likewise, we see the same approach being
2 adopted in the investor-state context in *Teinver*
3 *v Argentina* (RL-54, paragraph 119).

4 (Slide 100) Going back to the Marshall Islands
5 cases, as the court put it:

6 "The two sides must 'hold clearly opposite views
7 concerning the question of the performance or
8 non-performance of certain" international
9 obligations' ..."

10 Now, this means of course that the unilateral
11 notification of a claim, without objective evidence of
12 the respondent's opposition to it, is not sufficient to
13 establish a dispute over that claim; and the necessary
14 positive opposition may not be inferred from a party's
15 silence, other than in special circumstances.

16 (Slide 101) As the Tribunal in *Ecuador v The United*
17 *States* noted (RL-52, paragraph 223):

18 "... the inference of 'positive opposition' is
19 warranted only when all other reasonable interpretations
20 of the respondent's conduct and surrounding facts can be
21 excluded."

22 (Slide 102) Likewise, the International Court of
23 Justice has stated (RL-88, paragraph 75) that:

24 "... 'the existence of a dispute may be inferred
25 from the failure of a State to respond to a claim [but

11:36 1 only] in circumstances where a response is called
2 for' ... The question ..."

3 In their view:

4 "... whether such an inference may be drawn depends
5 on the particular circumstances much each case."

6 Now, the requirement of a dispute that I've just
7 mapped out is no mere technicality. Numerous
8 international cases have failed for that reason alone.

9 (Slide 103) For example, to return to Ecuador
10 v The United States, the tribunal dismissed the case
11 because a dispute did not exist as to the interpretation
12 or application of the US-Ecuador BIT.

13 In that case, Ecuador had sent a diplomatic note
14 setting out its views on the interpretation of
15 a provision of the BIT, and it asked the United States
16 to confirm that it shared this interpretation. Shortly
17 afterwards, Ecuador's ambassador to the United States
18 met with the US Department of State legal advisor to
19 discuss the interpretation of that provision. During
20 the meeting, the United States advised that it would
21 "study Ecuador's views and initiate its enter-agency
22 process for determining the United States' position on
23 this issue" (RL-52, paragraph 43), but it did not at
24 that point express its views.

25 The United States then responded to Ecuador's

11:37 1 diplomatic note, stating that it "'look[ed] forward to
2 remaining in contact about this'" (paragraph 45), but it
3 then chose not to respond further, despite Ecuador's
4 multiple attempts to follow up by telephone. The United
5 States eventually telephoned Ecuador's ambassador and
6 informed him that it would "'give no response at all'"
7 (paragraph 46). More than eight months later, Ecuador
8 filed its notice of arbitration.

9 (Slide 104) After considering these exchanges
10 spanning many months, the tribunal concluded that
11 a dispute did not exist between the parties because
12 there was no positive opposition from the United States.
13 Crucially, the tribunal refused to infer positive
14 opposition from the United States' silence or refusal to
15 respond, because it found that there were other
16 reasonable explanations for this conduct, including that
17 it was (paragraph 219):

18 "... consistent with a principled stance of not
19 wanting to interfere with the decisions of ...
20 investor-State tribunals ..."

21 (Slide 105) Now, Azerbaijan has attempted to
22 undermine the relevance of this decision by arguing that
23 it is, in its words, "an outlier" (Counter-Memorial,
24 footnote 170), stating that:

25 "In ... the other cases examined by the tribunal,

11:39 1 the respondent's failure to directly or adequately
2 respond to the claimant's allegations did lead to
3 an inference of 'positive opposition.'"

4 (Slide 106) But as we've just seen, the tribunal,
5 after examining these other cases, found that they all
6 concerned exceptional situations where the states'
7 conduct could not be explained by other reasons than
8 opposition, and were thus distinguishable. So the case
9 law supported the tribunal's conclusion (paragraph 223)
10 that:

11 "... the inference of 'positive opposition' is
12 warranted only when all other reasonable interpretations
13 of the respondent's conduct and surrounding facts can be
14 excluded."

15 (Slide 107) And similarly, in the Marshall Islands
16 cases (RL-70, paragraph 49), the ICJ dismissed the cases
17 on the basis that there was no dispute, because the
18 Marshall Islands' statements did not refer to the
19 subject matter:

20 "... 'with sufficient clarity to enable the State
21 against which [the] claim is made to identify that there
22 is, or may be, a dispute with regard to that
23 subject-matter' ..."

24 And as well as dismissing claims in their entirety
25 for lack of a dispute, international courts and

11:40 1 tribunals have also dismissed specific claims raised by
2 a party even when a dispute existed in relation to other
3 claims.

4 (Slide 108) To take an example, in *Belgium v Senegal*
5 (RL-51, paragraph 54), the ICJ found that a dispute
6 existed as to Senegal's alleged failure to investigate
7 and to extradite and prosecute Hissène Habré for acts of
8 torture, but the court found that a dispute did not
9 exist as to Belgium's separate claim that Senegal had
10 breached its obligation to prosecute or extradite
11 Mr Habré for alleged crimes against humanity. This was
12 because although:

13 "... the Belgian international arrest warrant
14 transmitted to Senegal with a request for extradition
15 ... referred to ... crimes against humanity ... neither
16 document stated or implied that Senegal had
17 an obligation under international law to exercise its
18 jurisdiction over [crimes against humanity] if it did
19 not extradite Mr Habré."

20 And while the court noted that "The facts which
21 constituted those alleged crimes may have been closely
22 connected to the alleged acts of torture", it found that
23 the second claim still "raise[d] quite different legal
24 problems", and thus had to be considered separately when
25 deciding whether a dispute existed when Belgium

11:41 1 instituted the proceedings.

2 (Slide 109) Similarly, in Nicaragua v Colombia
3 (RL-67, paragraph 67), Nicaragua invoked the Pact of
4 Bogotá to make:

5 "... two distinct claims -- one that Colombia had
6 violated Nicaragua's sovereign rights and maritime
7 zones, and the other, that Colombia has breached its
8 obligations not to use or threaten to use force."

9 Again, the court proceeded to "examine these two
10 claims separately in order to determine", it said, "with
11 respect to each of them, whether there existed
12 a dispute ... at the date of [the] filing of the
13 Application". Importantly, the court considered these
14 to be two distinct claims that both needed to fulfil the
15 dispute requirement independently, even though both
16 claims relied on similar facts, namely alleged incidents
17 at sea.

18 And the court found that a dispute existed as to the
19 first claim, that Colombia violated Nicaragua's rights
20 in its maritime zones, but not as to the second claim,
21 that Colombia breached its obligation not to use or
22 threaten to use force, because, in the court's view
23 (paragraph 76):

24 "... nothing in the evidence suggested that
25 Nicaragua had indicated that Colombia had violated its

11:43 1 obligations under Article 2, paragraph 4, of the Charter
2 of the United Nations or under customary international
3 law regarding the threat or use of force."

4 So in summary, the existence of a dispute as to one
5 legal claim does not automatically mean that there is
6 a dispute as to separate legal claims concerning
7 different legal obligations, even under the same treaty.
8 Rather, the requirement of a dispute needs to be
9 established for each claim that raises, to use the
10 court's words, "different legal problems". And
11 Azerbaijan's ritual reservation of rights in its
12 Article 18 letters cannot help it to circumvent the very
13 clear legal requirements that we have just looked at.

14 Now, with that legal framework in mind, I can turn
15 briefly to apply those legal principles to the facts.

16 Azerbaijan's key argument is that there was, right
17 from the start of the parties' exchanges in
18 October 2021, a single dispute between the parties which
19 encompasses the pipeline transit claims. Azerbaijan is
20 forced to make this argument since if those claims were
21 only raised in the letter of 16 December 2022, then,
22 even leaving aside the question of a dispute, they would
23 fail under Armenia's second jurisdictional objection,
24 the lack of negotiations.

25 (Slide 111) Azerbaijan's position is really

11:44 1 encapsulated in its statement in the Counter-Memorial
2 (paragraph 81) that we see on screen, characterising
3 what it calls "The gravamen of Azerbaijan's ECT claims".

4 Now, the first point to make here is that of course
5 nothing in the Notice of Arbitration or the Statement of
6 Claim can help Azerbaijan establish the existence of
7 a dispute. As we have seen, a dispute must crystallise
8 before the claim is filed; it cannot be generated
9 retroactively through the exchange of pleadings.

10 The second point we would make is that Azerbaijan is
11 trying to frame the issues here at an extraordinarily
12 high level of generality. This broadbrush attempt to
13 define the "gravamen" of the dispute falls far short of
14 the requirements of specificity and clarity that we've
15 seen in the case law, and it also flies in the face of
16 the actual wording of the letter of 8 October (CE-63,
17 pages 2-3), which we can bring back on to the screen
18 (Slide 112).

19 The letter, as we saw, speaks only about the
20 exploitation of energy resources during the years
21 following the end of active hostilities in
22 Nagorno-Karabakh; that is, in mid-1994. And as we've
23 seen, the transit pipeline claims allege that Armenia
24 cut off the supply of gas in 1991, during the armed
25 conflict itself. So the pipeline transit claims fall

11:45 1 some three years outside the time period to which this
2 letter specifically refers.

3 The letter also frames the allegations entirely in
4 terms of "[REDACTED]
5 [REDACTED]", and again, this positively excludes
6 the pipeline transit claims.

7 (Slide 113) We can see on screen a map showing
8 the location of the alleged interruption on Armenia's
9 sovereign territory, nowhere near Nagorno-Karabakh,
10 which we also see marked on the map.

11 (Slide 114) Now, back to the letter. It also raises
12 a type of conduct, the alleged exploitation of natural
13 resources, which is fundamentally different to
14 an alleged interruption of transit.

15 You will, we expect, hear Azerbaijan put the
16 argument it has set out in the pleadings, for example at
17 paragraph 104 of the Rejoinder, that the pipeline
18 transit claims are somehow part and parcel of its
19 Article 18 claims relating to access to the pipeline in
20 Nagorno-Karabakh in the years following the armed
21 conflict. We see those set out, for reference, at
22 paragraphs 206-211 of the Statement of Claim.

23 We will hear what is said. But for now, we simply
24 place a marker that the pipeline transit claims which we
25 are discussing in this objection cannot simply be rolled

11:47 1 up in those other claims just because they all involve
2 the pipeline, regardless of when, where or what is said
3 to have been done, and how such conduct is said to have
4 violated the ECT or international law.

5 Thirdly, again on this letter, when it comes to
6 defining the legal problems which arise, the letter, as
7 we've seen, refers only to Article 18 and to:

8 " [REDACTED]
9 [REDACTED]
10 [REDACTED] "

11 So no mention of Article 7. And we note in passing
12 that Article 7 falls within a completely separate part
13 of the treaty, dealing with separate issues. In
14 addition, the pipeline transit claims raise a range of
15 other different legal issues, including as to the
16 application of international humanitarian law,
17 attribution and jurisdiction *ratione temporis*.

18 The upshot of all this, we say, is that no
19 reasonable reader of this letter in 2021 could have had
20 the slightest idea that it covered an allegation that
21 Armenia, in 1991, took action in its sovereign territory
22 to cut off the gas supply to Nakhijevan, thus violating
23 Article 7 of the treaty.

24 (Slide 115) Moving on to the letter of
25 16 December 2022 (CE-63, PDF page 82). We can bring

11:48 1 the relevant wording back on screen, and we recall the
2 language of "[REDACTED]" and "[REDACTED]
3 [REDACTED]"; in other words, as I've said, language that
4 makes crystal-clear that this is a new claim.

5 And as we've seen, the follow-up correspondence did
6 not shed any light at all. We have the one footnote in
7 the letter of 24 February, and then this arbitration was
8 commenced on the next working day.

9 (Slide 116) And neither the few sentences in the
10 letter of 16 December nor the footnote in the letter of
11 24 January make it remotely clear what Armenia was said
12 to have done as a matter of fact, or how that was said
13 to have breached the ECT.

14 So that is the first problem for Azerbaijan: that
15 the pipeline transit claims have never been notified to
16 Armenia with the necessary clarity.

17 The next point to consider is whether Armenia has
18 positively opposed the pipeline transit claims, and
19 I can deal very briefly with this.

20 (Slide 117) As you have seen, Armenia replied to the
21 letter of 16 December 2022 on 16 January 2023 (CE-63,
22 pages 84-86), noting that this appeared to be a new
23 allegation, and asking for an explanation.

24 (Slide 118) Then we've just seen the footnote in
25 Azerbaijan's letter of 24 February (CE-63, PDF page 88),

11:50 1 to which Armenia never had a chance to give any response
2 before Azerbaijan filed this claim.

3 (Slide 119) Now, Azerbaijan says that this flimsy
4 record adds up to positive opposition because, to use
5 its words (Counter-Memorial, paragraph 79):

6 "Armenia acknowledged receipt of the Y-N Pipeline
7 claims; contested Azerbaijan's position that the claims
8 arose from the same set of facts; and questioned the
9 legal basis for those claims."

10 But none of those matters can possibly amount to
11 opposition, and Azerbaijan cites no authority to suggest
12 otherwise. Recall for a moment the conduct of the
13 United States in the Ecuador case. If that could not
14 amount to opposition, then still less could one prompt
15 and polite letter from Armenia, asking very reasonably
16 for more information, satisfy the opposition
17 requirement.

18 For the sake of completeness on this point, I should
19 add finally that if Armenia is correct that the pipeline
20 transit claims were not included in the claims as set
21 out in the letter of 8 October 2021, then it follows
22 that Armenia's opposition to those claims cannot amount
23 also to opposition to the pipeline transit claims.

24 We've also explained in the pleadings how neither
25 Azerbaijan's reservation of rights nor the principle of

11:51 1 judicial economy can assist it on this issue, and we
2 will return to these points in the second round, if
3 necessary.

4 In conclusion, Madam President, members of the
5 Tribunal, the pipeline transit claims fail to meet any
6 of the well-settled requirements of a dispute, and
7 we invite you to dismiss them for that reason.

8 Unless I can assist with any questions at that
9 stage, I now invite you to call upon Dr Salonidis.

10 THE PRESIDENT: Thank you. I do have one or two questions
11 before we proceed.

12 Could you return to your slide 93, please. Thank
13 you. And here we see the language of Article 27.

14 MS MACDONALD: Yes.

15 THE PRESIDENT: My question concerns the use of the word, in
16 the last clause of Article 27(2), "the matter".

17 Essentially, Article 27(1) refers to the settlement of
18 disputes. Article 27(2) says, "If a dispute has not
19 been settled", and then it says the other party may
20 "submit the matter to an ad hoc tribunal".

21 Are we to take anything from the distinction between
22 the existence of a dispute and the submission of
23 a "matter", rather than submission of that dispute? Are
24 these terms synonymous? Is one broader than the other?

25 MS MACDONALD: In my submission, we don't take anything from

11:53 1 that, because one couldn't sensibly read "matter" there
2 to mean issues which had not come through the processes
3 set out earlier in the article. So in other words,
4 you've got a dispute, you shall endeavour to settle it
5 through diplomatic channels; if that dispute hasn't been
6 settled in accordance, then, et cetera, one may proceed.

7 We wouldn't consider it to be a viable reading of
8 "matter" there that, at the very end of the carefully
9 crafted series of steps, it opens it up to issues which
10 have not proceeded through the route set out in (1)
11 and (2).

12 THE PRESIDENT: Okay, thank you.

13 And the other question concerns the next slide,
14 slide 94. And of course we're all quite familiar with
15 this definition of a "dispute" (RL-21, page 11), but one
16 thing that has often puzzled me is the inclusion of two
17 uses of the word "or" in this definition. So we have
18 "a point of law or fact", and then we have "a conflict
19 of legal views or of interests".

20 Does the existence of the two "ors" suggest that
21 a dispute can exist even if it has not yet centred on
22 a particular legal provision, a point of law or legal
23 views, so long as it centres on a disagreement over
24 facts or conflict of interests?

25 MS MACDONALD: Yes, well, I think several points there.

11:55 1 Certainly it's clear that there may be many
 2 conflicts of interest sub silentio between states on
 3 different issues which have not crystallised into
 4 opposed communications, and that would clearly not
 5 suffice, both in terms of the court's analysis in
 6 Mavrommatis and obviously subsequent case law.

 7 Again, sitting as we do today and reading this in
 8 light of the way that this has been applied and
 9 developed through the case law that I discussed briefly
10 10 in my presentation, we would say that very clearly there
11 11 has to be -- and we look at Belgium v Senegal as
12 12 a perfect example -- there has to be very clear
13 13 invocation of specific legal provisions.

14 14 So when you have Belgium saying to Senegal, "You've
15 15 failed to prosecute or extradite, investigate
16 16 an individual for grave crimes", they refer to torture;
17 17 they do not refer to crimes against humanity. They do
18 18 refer to crimes against humanity, but not specifically
19 19 enough to the legal obligations attaching to that in
20 20 regards to investigation, to prosecution.

21 21 So that's a very high -- building on the Mavrommatis
22 22 analysis, that's a very high threshold for specificity
23 23 of legal provisions that we see, and again in the
24 24 Nicaragua/Colombia case as well.

25 25 So I would say as we sit here today, trying to

11:56 1 review law in the round, stemming partly from this
2 slightly Delphic sentence, through the way that the
3 court has interpreted it, then it isn't enough for
4 states to say -- even to crystallise exchanges saying,
5 "We have a tension between our different interests on
6 this matter"; there has to be some real legal flesh put
7 on the bones of that.

8 THE PRESIDENT: Okay. Thank you very much.

9 Do my colleagues have anything further on
10 the existence of a dispute issue?

11 In that case, we'll proceed. Thank you.

12 MS MACDONALD: Thank you.

13 Then I would invite the Tribunal to call on
14 Dr Salonidis.

15 THE PRESIDENT: Yes, of course.

16 DR SALONIDIS: Madam President, members of the Tribunal,
17 it is an honour to address you on behalf of the Republic
18 of Armenia.

19 (Slide 121) Ms Macdonald has shown that no dispute
20 existed between the parties as to the pipeline transit
21 claims when Azerbaijan filed its Notice of Arbitration.
22 If such a dispute did exist, quod non, Azerbaijan should
23 have taken it to conciliation under Article 7(7), as
24 Professor d'Argent will explain after me.

25 I will demonstrate that even assuming that this

11:57 1 alleged dispute could go to arbitration under
2 Article 27, Azerbaijan has failed to satisfy the
3 negotiation precondition. And that failure alone,
4 we say, deprives the Tribunal of jurisdiction
5 *ratione voluntatis*.

6 Before moving on with the remainder of my speech,
7 I would like to simply revisit Madam President's
8 question about the dispute requirement, to recall that,
9 according to the *Mavrommatis* definition, a dispute --
10 i.e. there has to be a positive opposition to infer the
11 existence of a dispute -- may relate to a question of
12 fact. It is very amply reflected in the definition
13 adopted in the *Mavrommatis* case.

14 But I will simply recall -- and of course we will
15 revisit the matter, if of interest to the Tribunal, in
16 our second round -- that actionable disputes under
17 the Energy Charter Treaty have to relate to the
18 interpretation and application of the provisions of the
19 treaty, not simply questions of law. They have to be
20 disputes concerning legal provisions implicated under
21 the Energy Charter Treaty.

22 Returning now to my presentation, there are three
23 main points of contention between the parties.

24 The first one concerns the consequence of
25 non-compliance with a negotiation precondition. For

11:59 1 Armenia, negotiation is a mandatory precondition to
2 jurisdiction: if it is not met, the Tribunal has no
3 competence to hear the claims. Azerbaijan, on the other
4 hand, says negotiation is a matter of admissibility that
5 can be disregarded without sanction.

6 The second disagreement between the parties concerns
7 whether the limited communications on the pipeline
8 transit claims satisfy the negotiation precondition.
9 Armenia says they do not; Azerbaijan says the opposite.

10 The third disagreement concerns whether the parties'
11 exchanges on the original Article 18 claims may count as
12 negotiations on the pipeline transit claims. And again,
13 Armenia says that they do not and cannot; and again,
14 Azerbaijan says the opposite.

15 (Slide 122) I will take each of these points in
16 turn, and I will start with the nature of the
17 negotiation precondition. And of course we need to
18 start by looking at the text of paragraphs (1) and (2)
19 of Article 27, which should now be on your screen.

20 Paragraph (1) uses unequivocally mandatory language.
21 The parties:

22 "... shall endeavour to settle disputes concerning
23 the application or interpretation of [the ECT] through
24 diplomatic channels."

25 Paragraph (2) is equally clear in conveying the

12:00 1 mandatory nature of that first step. It provides that
2 "If" -- and for Armenia, that is to say "only if" --
3 "a dispute has not been settled in accordance with
4 paragraph (1) within a reasonable period of time" -- and
5 I will return to that -- may either party "submit
6 the matter to an ad hoc tribunal" for arbitration.

7 The sequence established by the two provisions, read
8 against established international law, is
9 straightforward: make a genuine attempt to engage in
10 discussions with the other disputing party with a view
11 to resolving the dispute; pursue negotiations as far as
12 possible within a reasonable period of time; and if the
13 dispute is not settled, then and only then, arbitrate.

14 (Slide 123) As the ICJ has observed (RL-48,
15 paragraph 131), negotiation requirements "perform[]
16 an important function in indicating the limit of consent
17 given by States". They are thus a condition precedent
18 to international courts or tribunals' jurisdiction.

19 (Slide 124) Professor Hobér, whose commentary on
20 the ECT both sides have cited with approval, confirms
21 (CL-59, page 478) that:

22 "The words 'shall endeavour' [in Article 27(1)]
23 indicates that the contracting parties have
24 an obligation to try to settle the dispute in question
25 within the framework provided in Article 27."

12:02 1 "Arbitration cannot start", Professor Hobér writes
2 (page 479):

3 "... until and unless the relevant Contracting
4 Parties have tried to reach a settlement during
5 'a reasonable period of time'."

6 Azerbaijan will tell you that these words mean
7 something different: that "shall" must be read as
8 "should". This interpretation, however, contradicts
9 the plain text of the provision; and it also contradicts
10 the interpretation of similarly worded clauses by
11 numerous international courts and tribunals, including
12 the ICJ, which consistently have found that the
13 negotiation requirements constitute mandatory
14 preconditions to jurisdiction.

15 (Slide 126) In DRC v Rwanda (RL-111, paragraph 80),
16 for example, the ICJ grappled with the interpretation of
17 Article 29(1) of the Convention on the Elimination of
18 All Forms of Discrimination Against Women, which now is
19 on your screen. The language is similar to that of
20 Article 27(2):

21 "'Any dispute between two or more States Parties ...
22 which is not settled by negotiation shall ... be
23 submitted to arbitration.'"

24 And failing agreement on arbitration within
25 six months, it may be referred to the ICJ.

12:03 1 (Slide 127) The DRC, like Azerbaijan here, argued
2 that these preconditions pertain to the admissibility of
3 its claims, and not to the jurisdiction of the court.
4 The court disagreed. It explained:
5 "When ... consent is expressed in a compromissory
6 clause in an international agreement, any conditions to
7 which such consent is subject must be regarded as
8 constituting the limits thereon. The Court accordingly
9 considers that the examination of such conditions
10 relates to its jurisdiction and not to the admissibility
11 of the application."
12 (Slide 128) The court took the same approach in
13 Georgia v Russia, where it had occasion to interpret
14 Article 22 of the Convention on the Elimination of All
15 Forms of Racial Discrimination, or CERD, in short.
16 You will note again on your screens the familiar
17 language of the compromissory clause (RL-48,
18 paragraph 117).
19 Georgia argued that this language neither
20 established an obligation to negotiate nor a general
21 duty to attempt to settle the dispute before seising the
22 court. Building on its existing jurisprudence, however,
23 the court found that Article 22 "establish[ed]
24 preconditions to be fulfilled before the seisin of the
25 Court" (paragraph 141). And the court reaffirmed this

12:04 1 holding in Ukraine v Russia.

2 If anything, the mandatory nature of the negotiation
3 requirement is even more evident in Article 27. This is
4 because, unlike the compromissory clauses in the
5 aforementioned treaties, Article 27 includes in
6 paragraph (1) an express obligation of the contracting
7 states to endeavour to settle their disputes through
8 diplomatic channels.

9 Azerbaijan has not engaged with any of these cases;
10 and how could it really, since Azerbaijan relied on the
11 very same cases to object to the court's jurisdiction in
12 the case Armenia initiated against it before the ICJ
13 under the CERD.

14 (Slide 130) When the shoe was on the other foot,
15 Azerbaijan argued, as you can see on your screens
16 (RL-101, paragraph 39), that the ICJ had no jurisdiction
17 over Armenia's claims because the precondition of
18 negotiation under Article 22 of the CERD had not been
19 satisfied. Armenia defended against Azerbaijan's
20 objections, but never disputed the mandatory
21 jurisdictional nature of the negotiation requirement.
22 And the court eventually dismissed Azerbaijan's
23 objection, confirming yet again that nature.

24 Azerbaijan knows, of course, that it cannot defend
25 its objection based on inter-state case law. So

12:06 1 it invites the tribunal to look elsewhere, to
2 investor-state case law, as if investor-state tribunals
3 somehow apply less rigorous analysis to these questions.
4 But Armenia has shown in its Reply how contemporary
5 investor-state jurisprudence underscores that when
6 a negotiation precondition is explicitly couched in
7 mandatory terms, it is a precondition to arbitral
8 jurisdiction.

9 Among [the] more than 20 cases that we have cited in
10 our pleadings [that] have concluded as much, Armenia
11 pointed to the thoughtful discussion of the tribunal in
12 ST-AD v Bulgaria, and the endorsement of that approach
13 by the tribunal in LDA v India. I will say no more
14 about all this because the tribunal is well aware of the
15 relevant debates.

16 This takes me to the second point of contention
17 between the parties: whether Azerbaijan fulfilled the
18 negotiation precondition in respect of the pipeline
19 transit claims through the parties' limited exchanges.
20 The answer, in our respectful submission, is: no.

21 (Slide 132) When did Azerbaijan first raise the
22 pipeline transit claims? Not in October 2021, when
23 Azerbaijan sent its initial Notice of Dispute under
24 Article 18; not in the 14 letters that followed over the
25 next 14 months. There is no mention in any of these

12:07 1 letters of either Article 7 or, crucially,
2 the underlying factual conduct.

3 It was only on 16 December 2022, less than two and
4 a half months before filing its Notice of Arbitration,
5 that Azerbaijan mentioned Article 7 and the pipeline,
6 the alleged offensive conduct, for the first time. And
7 after that point, what were the parties' actual
8 exchanges on the pipeline transit claims? As
9 Ms Macdonald has already shown you -- and apologies for
10 the slide repetition of these points -- the record shows
11 just three letters.

12 (Slide 133) In the first, dated 16 December 2022,
13 which is now excerpted on your screens (CE-63, page 82),
14 Azerbaijan -- you notice the very key wording -- "hereby
15 notifie[d]" Armenia of claims concerning the pipeline
16 under Article 7, in three sentences, with no
17 elaboration.

18 (Slide 134) Armenia replied on 16 January 2023
19 (CE-63, pages 85-86), naturally asking for details.

20 (Slide 135) And then after six weeks of silence,
21 Azerbaijan sent a final letter on 24 February 2023
22 (CE-63, pages 87-88), in which the pipeline transit
23 claims were addressed in a footnote.

24 No meetings were ever held on these claims.
25 Azerbaijan filed its Notice of Arbitration the very next

12:08 1 business day.

2 Madam President and members of the Tribunal, under
3 Article 27, read in light of established inter-state and
4 investor-state case law, Azerbaijan bears the burden of
5 showing two things: first, that it made a genuine
6 attempt to negotiate the alleged dispute with a view to
7 resolving it; and second, that this process was allowed
8 to run for a reasonable period of time. Both
9 requirements must be met for the negotiation
10 precondition to be fulfilled; and in Armenia's
11 respectful submission, neither one was.

12 Starting with the "genuine attempt to negotiate"
13 requirement. This is, as you very much are aware of,
14 typically satisfied through the existence of multiple
15 exchanges and meetings between the parties over
16 an extended period of time.

17 In Belgium v Senegal, for example, the ICJ found
18 a genuine attempt to negotiate a dispute after the
19 parties had exchanged dozens of diplomatic notes over
20 four years. In Canada and The Netherlands v Syria,
21 there were 66 diplomatic notes and two in-person
22 meetings over three years.

23 And in the Armenia v Azerbaijan case under the CERD,
24 Armenia overcame Azerbaijan's objection because there
25 were seven rounds of talks and 40 written exchanges over

12:10 1 ten months. In stark contrast with what it argues in
 2 this case, Azerbaijan argued in that case that even
 3 those seven rounds of talks, in-person meetings or
 4 virtual meetings, and 40 written exchanges, even those
 5 exchanges were insufficient to fulfil the negotiation
 6 requirement.

 7 So state practice, including the parties' own
 8 practice, demonstrates quite clearly, in our view, what
 9 is expected of genuine diplomatic negotiations at the
 10 inter-state level: dozens of exchanges, face-to-face
 11 meetings following a genuine invitation by the claimant
 12 to negotiate, years of correspondence. That is what
 13 genuine negotiations look like in the inter-state
 14 context. But here Azerbaijan gave Armenia one letter;
 15 and when Armenia asked for more, it gave it a footnote.

 16 I now turn to the duration requirement. When treaty
 17 clauses have called for negotiations to continue for
 18 a reasonable time or reasonable period, as Article 27
 19 asks here, inter-state tribunals have consistently held
 20 that those requirements were complied with after
 21 extended periods of engagement.

 22 In Ukraine v Russia, for example, where one of the
 23 compromissory clauses at issue in that case, Article 24
 24 of the Convention for the Suppression of the Financing
 25 of Terrorism, conditioned access to arbitration and ICJ

12:11 1 jurisdiction on the parties' failure to settle the
2 dispute through negotiation within a reasonable time,
3 the ICJ accepted that the condition was met after nearly
4 two years of exchanges.

5 In Equatorial Guinea v France, where the court was
6 applying Article 35 of the United Nations Convention
7 against Transactional Organised Crime, which similarly
8 called for negotiation within a reasonable time, the ICJ
9 accepted that the condition was met after several
10 exchanges over two years, and a meeting held several
11 years after those exchanges.

12 Azerbaijan's two months and eleven days do not come
13 close to those benchmarks. And Azerbaijan has been
14 unable to identify a single inter-state precedent -- not
15 one -- in which a tribunal accepted that such
16 a compressed timeline as is applicable here met
17 the negotiation precondition.

18 Azerbaijan instead says that those cases are all
19 inapt because the court assessed the parties' entire
20 negotiating history of the dispute rather than
21 claim-specific exchanges. This may be true. But it is
22 also true that on those cases, there was no piecemeal
23 notification of unrelated claims to those originally
24 notified. Those decisions therefore remain highly
25 relevant in setting expectations of what negotiation

12:13 1 over "a reasonable period of time" means in the national
2 practice.

3 Azerbaijan further claims that Armenia itself has
4 relied on cases where courts and tribunals were
5 satisfied with negotiation periods of only two, four or
6 five months. But in every one of those cases, by the
7 time of the filing of the request for arbitration or
8 recourse to the court, negotiations had become futile,
9 either because one party met invitations to negotiate
10 with a conspicuous silence or even outright refusal, or
11 because the substance of the dispute had already been
12 fully ventilated in other contexts.

13 None of these factual circumstances exist here, as
14 I will explain in a moment. And there is no reason to
15 claim, let alone assume, that negotiations of the
16 pipeline transit claims would have been futile. Far
17 from undermining Armenia's positions, these cases
18 therefore reinforce it. Absent futility, "a reasonable
19 period of time" means what it says: an extended, genuine
20 period of engagement.

21 That brings me to Azerbaijan's argument that further
22 negotiations would have been pointless, so it should not
23 be penalised for cutting them short.

24 The bar for establishing futility is high, and
25 Azerbaijan concedes as much. In its own words, with

12:14 1 which Armenia agrees, the doctrine demands "substantial
2 and credible evidence" and imposes "a considerable
3 burden of proof".

4 The parties further agree, in line with established
5 inter-state and investor-state jurisprudence, that
6 negotiations reach the point of futility in a limited
7 number of situations: the first is when a party fails to
8 respond to an invitation to negotiate; the second is
9 when the other disputing party categorically refuses to
10 negotiate; and the third is if the parties' "basic
11 positions have not subsequently evolved" after several
12 exchanges of diplomatic correspondence or meetings.
13 None of these scenarios apply here.

14 Armenia did respond with its 16 January 2023 letter,
15 and in that letter Armenia did not refuse to engage. On
16 the contrary, Armenia wrote back within a month of
17 receiving the notification of Azerbaijan's new claims
18 under Article 7, asking for more information and stating
19 that it was ready to discuss the allegations. The first
20 two scenarios are thus off the table.

21 And as for the third one, that the parties'
22 positions have become deadlocked, a deadlock requires
23 that both sides have stated their positions, engaged
24 with each other's arguments, and reached an impasse.
25 Paragraph 120 of Ukraine v Russia, that is Respondent's

12:16 1 Legal Exhibit 77, paragraph 58 of Armenia v Azerbaijan,
2 Respondent's Legal Exhibit 101, and paragraph 59 of
3 Belgium v Senegal, Respondent's Legal Exhibit 51, are
4 instructive in that regard.

5 The factual circumstances of this case -- a few
6 sentences in two letters advancing Azerbaijan's
7 position, some of them in the footnote that
8 I mentioned -- are a far cry from these cases. Armenia
9 had barely been told what the dispute was about, and
10 it was never given an opportunity to state its position.
11 There cannot be a deadlock when only one side has
12 spoken, and even that side has said almost nothing. And
13 of course, by launching these proceedings one business
14 day after its last letter, Azerbaijan slammed the door
15 to negotiations.

16 In its Rejoinder, Azerbaijan also asks the tribunal
17 to look at Armenia's substantive positions after this
18 arbitration was initiated as evidence that any further
19 consultations would have been futile. It relies on two
20 ICJ cases, but in both of those cases the parties had
21 already engaged in extensive exchanges over many years,
22 and had reached a clear deadlock before proceedings were
23 ever initiated. We discussed both these cases in our
24 Reply at paragraph 241, to which I will respectfully
25 refer you, in the interest of time.

12:17 1 (Slide 137) Moreover, as Ms Macdonald has already
2 mentioned, the court has made it very clear that it will
3 only look at conduct subsequent to the filing of the
4 application to confirm the fulfilment of the different,
5 admittedly, jurisdictional requirement, the existence of
6 a dispute. The court has said (RL-70, paragraph 43):

7 "... neither the application nor the parties'
8 subsequent conduct and statements made during the
9 judicial proceedings can enable the Court to find that
10 the condition of the existence of a dispute has been
11 fulfilled in the same proceedings ..."

12 There is no reason to hold otherwise with regard to
13 the separate requirement, if a dispute exists, of
14 negotiations.

15 To borrow from the same passage in the court's
16 judgment, if the Tribunal were to consider the
17 negotiation requirement fulfilled based on the parties'
18 exchanges in the contentious proceedings before it,
19 Armenia would be deprived of the opportunity to settle
20 the dispute amicably before the institution of these
21 proceedings, and the rule that the negotiation
22 requirement must in principle be fulfilled prior to
23 the filing of the application would be subverted.

24 The fact that Armenia contests in this proceeding the
25 factual and legal basis of Azerbaijan's claims cannot be

12:18 1 used to establish that the negotiations the parties
2 never had would have been futile.

3 I come to my last issue, and this is Azerbaijan's
4 last line of defence, which is to fold the pipeline
5 transit claims into the original Article 18 claims, to
6 argue that because it negotiated the dispute over the
7 former, and Armenia has not objected to the Tribunal's
8 jurisdiction over that dispute, it must be presumed that
9 Azerbaijan negotiated the dispute over the latter as
10 well. And of course that is plainly wrong, since the
11 pipeline transit claims concern different conduct from
12 a different time period in a different territory, and
13 invoke a different provision of the ECT.

14 As Ms Macdonald explained, the pipeline transit
15 claims were only notified on 16 December 2022. They
16 were therefore not part and parcel of the dispute over
17 the original Article 18 claims.

18 (Slide 139) And with all this in mind, the law is
19 absolutely clear (RL-48, paragraph 161). For the
20 negotiation precondition to be met:

21 "... the subject-matter of the negotiations must
22 relate to the subject-matter of the dispute which, in
23 turn, must concern the substantive obligations ... in
24 question."

25 And it was precisely for this reason that the ICJ

12:20 1 considered in Georgia v Russia that only diplomatic
 2 exchanges that took place after the dispute had
 3 crystallised would count towards satisfying
 4 the negotiation precondition.

 5 Accordingly, for the purpose of assessing whether
 6 Azerbaijan fulfilled the precondition in respect of the
 7 pipeline transit claims, the starting point must be
 8 Azerbaijan's letter dated 16 December 2022, in which
 9 it notified Article 7 and the pipeline factual conduct
10 10 for the first time. Everything before that date, the
11 11 entire year of correspondence about the original
12 12 Article 18 claims, is irrelevant to the task of
13 13 the Tribunal.

14 14 Azerbaijan also, in a somewhat similar fashion,
15 15 attempts to infer futility from the parties' earlier
16 16 exchanges on the original Article 18 claims. The logic
17 17 seems to be that because the Article 18 negotiations did
18 18 not produce a resolution, Article 7 negotiations would
19 19 have equally been futile.

20 20 But that reasoning again does not hold up. As
21 21 the tribunal in Burlington v Ecuador (RL-157) aptly
22 22 observed, the failure of negotiations in one dispute
23 23 tells you nothing about whether negotiations in
24 24 a different dispute would have succeeded, even in the
25 25 same context. And again, the two sets of claims here

12:21 1 are fundamentally different.

2 And of course in any event, as explained in our
3 Reply, and Azerbaijan has not seriously contested the
4 point in its Rejoinder, Armenia does not dispute that it
5 meaningfully engaged in good faith negotiations with
6 Azerbaijan in relation to the original Article 18
7 claims, so the question of futility does not even arise
8 to begin with.

9 Madam President, members of the Tribunal, to
10 conclude, Azerbaijan has not shown that it made any
11 genuine effort to negotiate the pipeline transit claims,
12 let alone that it did so for a reasonable period. Three
13 letters as between the parties, three sentences in one
14 of them and a footnote in the other from Azerbaijan
15 explaining those claims, over only ten weeks; and after
16 the second letter, an arbitration filed the very next
17 business day. By any measure, that does not come close
18 to what Article 27 demands. The negotiation
19 precondition was not fulfilled, and the pipeline transit
20 claims fall outside of your jurisdiction for that reason
21 as well.

22 I thank you for your attention, and unless I can be
23 of further assistance, Professor d'Argent stands ready
24 to address Armenia's next objection in relation to those
25 claims, and also hereby conclude our presentation of

12:22 1 Armenia's objections this morning.

2 THE PRESIDENT: Thank you very much. As I had for your
3 colleagues, I do have one question for you on your
4 arguments.

5 DR SALONIDIS: Please.

6 THE PRESIDENT: Are we to consider it relevant at all the
7 way tribunals have proceeded in the admittedly slightly
8 different context of attempts to add additional claims
9 to a proceeding once an arbitration has already
10 commenced? Different context, but in that context
11 tribunals are often asked to consider: is there
12 a requirement of a new notice of dispute, is there
13 a requirement of a new negotiation period? And they
14 often look to the provisions of the applicable
15 arbitration rules, whether that is the UNCITRAL Rules or
16 the ICSID Rules and so forth.

17 But the additional claims jurisprudence, is that
18 relevant to us at all?

19 DR SALONIDIS: Thank you very much, Madam President, for
20 the excellent question.

21 I understand, and you confirmed, I believe, that
22 you're referring to the addition of -- well, if that
23 would be a bit pleonastic -- to the addition of
24 additional claims or ancillary claims, and the need to
25 confirm that they are captured under the -- that they

12:24 1 fulfil the preconditions -- any preconditions attached
2 to disputes falling within the jurisdiction of the
3 relevant international court and tribunal.

4 So we will certainly revisit this, we will return to
5 this in our second round tomorrow, but my preliminary
6 response to your question is: yes, this is something
7 that the tribunal could usefully review for purposes of
8 deciding our objection.

9 THE PRESIDENT: I'm sorry: so yes, there is some relevance
10 to that jurisprudence --

11 DR SALONIDIS: Precisely.

12 THE PRESIDENT: -- even though it's a slightly different
13 context?

14 DR SALONIDIS: Precisely. Precisely. And the issue of
15 course arises not just in the context of investor-state
16 cases but also in the context before the International
17 Court of Justice and the context of inter-state case law
18 as well. So we will be happy to review it closely and
19 report further in our second round.

20 THE PRESIDENT: Thank you very much.

21 DR SALONIDIS: Thank you.

22 THE PRESIDENT: Any questions? No.

23 Thank you very much.

24 DR SALONIDIS: Thank you.

25 PROFESSOR D'ARGENT: Madam President, members of the

12:25 1 Tribunal, it is an honour to appear before you on behalf
2 of the Republic of Armenia.

3 (Slide 141) As you know, Armenia's final preliminary
4 objection is that Azerbaijan's pipeline transit claims
5 are outside the Tribunal's jurisdiction because
6 Azerbaijan has failed to refer them to the mandatory
7 conciliation mechanism of Article 7(7), as required
8 under the first exception to arbitration provided under
9 Article 27(2).

10 (Slide 142) Article 27(2) appears on your screen.
11 Well, it is by now a provision which certainly the
12 Tribunal is well aware [of] and familiar with, and I do
13 not need to read it.

14 But, Madam President, if you allow me, as the text
15 of Article 27(2) is on the screen, and to come back on
16 the question you posed to Ms Macdonald, allow me, as the
17 Francophone member of Armenia's delegation, to refer to
18 those last words in Article 27:

19 "... upon written notice to the other party to the
20 dispute submit the matter to an ad hoc tribunal under
21 this Article."

22 Well, the very same sentence, in the equally
23 authentic French version of Article 27(2), reads:

24 "... soumettre le différend à un tribunal
25 d'arbitrage ad hoc en vertu du présent article,

12:26 1 moyennant notification écrite adressée à l'autre partie
2 au différend."

3 Thus, the French version of the same provision does
4 not make the distinction between "dispute" and "matter",
5 and uses both times the word "dispute". And under
6 Article 33(3) of the Vienna Convention on the Law of
7 Treaties, this equally authentic version is presumed to
8 have the same meaning. And I think this supports
9 Ms Macdonald's answer to your question.

10 Let me return now to my presentation. I don't need
11 to read Article 27(2); you know it very well. And
12 I think it is clear from this text that Article 27(2)
13 provides for the right to submit an inter-state dispute
14 to arbitration after failed negotiations, except in four
15 cases. And those four cases are grouped by two, under
16 each of the two subordinating conjunctions "except" that
17 you see underlined on the screen. And it is common
18 ground between the parties that only the very first of
19 these four exceptions is at issue in this case.

20 Thus, the question is: what does "except as
21 otherwise provided in this Treaty" actually mean?

22 (Slide 144) Azerbaijan contends that those few words
23 refer only to Article 28, which provides that:

24 "A dispute between Contracting Parties with respect
25 to the application or interpretation of Article 5 or 29

12:28 1 shall not be settled under Article 27 unless the
2 Contracting Parties parties to the dispute so agree."

3 Thus, Azerbaijan wants to read "except as otherwise
4 provided in this Treaty" as "except as otherwise
5 provided in Article 28". But that is clearly not what
6 Article 27(2) says. And even if the Article 27(2) very
7 first exception includes Article 28, Azerbaijan offers
8 no reason to limit the exceptions provided in this
9 treaty to Article 28 only.

10 But moreover, as you saw, Article 28 states that
11 Article 5 and Article 29 disputes are outside the
12 *ratione materiae* and *ratione voluntatis* scope of
13 jurisdiction of an Article 27 arbitral tribunal, and
14 that those disputes can only fall within such
15 jurisdiction if both parties to the dispute consent to
16 submit them to arbitration after they have arisen.

17 (Slide 145) Madam President, members of the
18 Tribunal, the ordinary meaning and linguistic function
19 of the subordinating conjunction "except", in "except as
20 otherwise provided in this Treaty", is different: it is
21 to create exceptions to the preceding verb "may", which
22 concerns disputes that do not need additional consent to
23 be arbitrated, but whose arbitrability is governed by
24 Article 27 itself.

25 (Slide 146) As a subordinating conjunction, "except"

12:30 1 has the sense of "unless", as in the French version of
2 the ECT. And I refer to the French version once again:
3 "... chaque partie au différend peut, à moins
4 que ..."

5 Unless:

6 "... à moins que le présent traité n'en dispose
7 autrement ..."

8 Thereby restricting/modulating the right to bring
9 an ECT dispute to arbitration.

10 The ordinary meaning of "as otherwise provided in
11 this Treaty" is to make a renvoi to other provisions of
12 the treaty, other than 27(2) itself. Thus, "except as
13 otherwise provided in this Treaty" indicates that the
14 right to arbitrate under Article 27(2) is curtailed by
15 the lex specialis found elsewhere in the treaty.

16 (Slide 147) Article 21(5)(b) is an example of an ECT
17 provision that provides otherwise, within the meaning of
18 Article 27(2), for certain tax disputes. And you can
19 see this provision on your screen. As the members of
20 the Tribunal are aware, it provides for a mandatory
21 referral of allegations of expropriation or
22 discrimination, based on tax, to the competent tax
23 authorities before such a dispute can be resolved by
24 an Article 26 or an Article 27 arbitral tribunal.

25 (Slide 148) Well, we submit that Article 7(7) of the

12:32 1 ECT is another article that provides otherwise: for the
2 settlement, this time, of transit disputes, namely that
3 they must be referred to a conciliation mechanism.

4 Article 7(7) provides in relevant parts -- you have it
5 on your screen. I will read it:

6 "The following provisions shall apply to a dispute
7 described in paragraph (6) ..."

8 That is, a transit dispute:

9 "... but only following the exhaustion of all
10 relevant contractual or other dispute resolution
11 remedies previously agreed between the ... parties ..."

12 I will come back to those words.

13 And then in subparagraph (a), it is explained that
14 the conciliation mechanism is set in motion by the
15 seising of the ECT Secretary General:

16 "A Contracting Party ... to the dispute may refer it
17 to the Secretary General ...", et cetera.

18 The ordinary meaning of the words "shall apply"
19 leaves, in our opinion, no doubt as to the mandatory
20 nature of the conciliation mechanism for transit
21 disputes.

22 Azerbaijan contends that Armenia "puts undue weight
23 on the word 'shall'". Well, we know by now that
24 Azerbaijan does not like this word at all. But,
25 Madam President, members of the Tribunal, the fact

12:33 1 remains that the unequivocal ordinary meaning of
2 "shall" -- "shall apply", in a legal context -- is to
3 express what is mandatory, and not merely optional.
4 This has been repeatedly recognised by international
5 courts and tribunals. And the latest iteration of such
6 truism can be found, for instance, at paragraph 202 of
7 the Advisory Opinion on Climate Change delivered by
8 the ICJ.

9 Thus, when Article 7(7) says that conciliation
10 "shall apply" to a transit dispute, it is plain and
11 simple: conciliation is mandatory, it must be applied.

12 Azerbaijan seeks to rewrite this clause so as to
13 state that if a party chooses conciliation, then
14 conciliation provisions shall apply, or that
15 conciliation shall be available. But this is plainly
16 not what the text of Article 7(7) provides.

17 (Slide 149) And I note that the equally authentic
18 French version of the ECT, now on your screen, uses the
19 imperative present tense:

20 "Les dispositions qui suivent s'appliquent au
21 différend ..."

22 There is no leeway.

23 (Slide 150) And contrary to what Azerbaijan argues,
24 the words "may refer" in subparagraph (a), which
25 provides for the seising of the ECT Secretary General

12:35 1 for setting the conciliation mechanism in motion, those
2 words do not undermine the mandatory nature of "shall
3 apply" in the chapeau of Article 7(7). The word "may",
4 read in its context, simply denotes that a party is
5 authorised to seek settlement of a transit dispute, but
6 it is not obliged to do so.

7 Article 27(2) itself, like many mandatory dispute
8 settlement clauses in treaties, uses the words "may ...
9 submit" the dispute to an arbitral tribunal. There is
10 thus no obligation to seek the resolution of a transit
11 dispute. But if a party wishes to resolve it, it must
12 refer it to conciliation because conciliation shall
13 apply.

14 (Slide 150) Azerbaijan has also contested the
15 mandatory character of conciliation because, as the
16 Tribunal may remember, Article 7(7) provides that
17 conciliation:

18 "... shall apply to a dispute ... only following the
19 exhaustion of all relevant ... dispute resolution
20 remedies previously agreed between the Contracting
21 Parties party to the dispute ..."

22 According to Azerbaijan, arbitration under
23 Article 27(2) would be such "previously agreed" dispute
24 resolution remedy. Thus, in essence, Azerbaijan's
25 position is that conciliation should follow arbitration,

12:36 1 and that the renvoi from Article 27(2) to Article 7(7)
2 would be followed by another renvoi from Article 7(7) to
3 Article 27(2).

4 (Slide 151) Well, such a circular reading of the two
5 provisions is clearly untenable, and we are not alone in
6 saying so. In fact, in a paper by Mr Craig Bamberger,
7 the chair of the legal advisory committee of the ECT
8 negotiation, a paper submitted by Azerbaijan with its
9 Rejoinder (CL-176, PDF page 15), Mr Bamberger writes
10 that the very interpretation put forward by Azerbaijan:

11 "... surely must be rejected since it could
12 effectively nullify the Article 7(6)-(7) conciliation
13 mechanism."

14 And like Mr Bamberger, we have explained in detail
15 why considering Article 27 arbitration as a "dispute
16 resolution remed[y] previously agreed" under
17 Article 7(7) would indeed deprive conciliation of any
18 effet utile: because all contracting parties that can be
19 party to a transit dispute have also agreed to
20 Article 27, and thus a transit dispute could never be
21 referred to conciliation.

22 Thus, we read "relevant ... dispute resolution
23 remedies previously agreed" in Article 7(7) as referring
24 to means specifically agreed by parties on an ad hoc
25 basis. And none exist in this case.

12:38 1 THE PRESIDENT: Sorry, just to jump in here. Is there
2 anything you wish to add about the use of the word
3 "previous", which would seem to have a temporal
4 component?

5 PROFESSOR D'ARGENT: In Article 7(7), Madam President?

6 THE PRESIDENT: Yes; I mean, in relation to your
7 interpretation that it can't refer to Article 27.

8 PROFESSOR D'ARGENT: "... resolution remedies previously
9 agreed"?

10 THE PRESIDENT: Yes.

11 PROFESSOR D'ARGENT: Yes, indeed.

12 Well, Azerbaijan says that "previously agreed"
13 refers to the treaty itself. But "previously" is before
14 a transit dispute arises, and it is either contractual
15 or an agreement that has been previously agreed before
16 the dispute, the transit dispute, arises.

17 Do I answer your question?

18 PROFESSOR STERN: Let me jump in here, because I really had
19 trouble understanding these provisions.

20 Let's put aside "previously agreed". But you did
21 not discuss at all in Article 27, "except as ... agreed
22 in writing by the Contracting Parties". Isn't
23 Article 27 agreed in writing by the contracting parties?

24 PROFESSOR D'ARGENT: This is one of the -- thank you for
25 your question. This is one of the exceptions.

12:40 1 PROFESSOR STERN: I mean, this takes aside the question of
2 "previously".

3 PROFESSOR D'ARGENT: They can opt out. They can opt out by
4 agreement. So in 27, paragraph --

5 PROFESSOR STERN: But isn't it agreed in writing?

6 Article 27 is not agreed in writing by the contracting
7 parties? I mean, the whole treaty is agreed in writing,
8 no?

9 PROFESSOR D'ARGENT: Yes, but I think Article 27 -- this
10 second prong in the first exception creates an exception
11 to the right to arbitrate. If the contracting parties
12 have specifically agreed that they would not arbitrate,
13 then you cannot arbitrate, because there is the right --
14 after negotiations, you may submit a dispute, except in
15 certain cases. The first of those cases is "except as
16 otherwise provided in this Treaty". The second is:
17 except when there is a written agreement between
18 the parties, between contracting parties. So there's
19 a right to opt out.

20 And I think this is also clear from the French text;
21 if you want, I can bring it to you (Slide 146).

22 And then the second grouping of exceptions
23 concerning the right to submit a dispute to arbitration
24 follow, and the second "except" concerns two exceptions.

25 Shall I ...?

12:41 1 PROFESSOR STERN: Okay, thank you.

2 PROFESSOR D'ARGENT: Well, the French version, if I may:

3 "... à moins que le présent traité n'en dispose
4 autrement ou que les parties contractantes en aient
5 convenu autrement par écrit ..."

6 And that relates to the right to submit the dispute
7 to an arbitral tribunal. That right is curtailed by the
8 agreement of the parties. The parties may opt out.
9 I think that's what this provision means.

10 (Slide 152) Madam President, members of the
11 Tribunal, the mandatory character of conciliation for
12 transit disputes is further confirmed when read within
13 the context of Article 7(6), which provides that transit
14 must not be interrupted or reduced prior to the
15 conclusion of the dispute resolution procedures set out
16 in paragraph (7), unless the conciliator decides
17 otherwise.

18 Because the substantive obligation not to interrupt
19 or reduce transit is linked to conciliation under
20 Article 7(6), a party would be free to escape that
21 substantive obligation if it initiates arbitration
22 rather than conciliation. But that is clearly something
23 the drafters of the ECT wanted to avoid, and that, in
24 our opinion, confirms the mandatory character of
25 conciliation for transit disputes.

12:43 1 (Slide 153) In sum, we submit that the ordinary
2 meaning of the terms of Article 27(2) and of
3 Article 7(7), read in their context, indicate that
4 disputes concerning transit must be referred to
5 conciliation. And, as you can see on the screen, this
6 is an interpretation shared by the majority of
7 commentaries on the record.

8 The same commentators also underscore that
9 the object and purpose of Article 7(7) is to establish
10 a fast-track dispute resolution mechanism for transit
11 disputes, and this was a clear concern at the collapse
12 of the USSR. Azerbaijan does not dispute this
13 rationale. And clearly, as we very well know in this
14 room, conciliation under the treaty can be resolved in
15 a matter of 120 days, which is much faster than
16 arbitration.

17 So the object and purpose support our
18 interpretation. Conciliation is mandatory because
19 it promotes a fast resolution of transit dispute;
20 it encourages mutual understanding and cooperation
21 between the parties, which is central to the free
22 transit of energy; and it reduces the risk of transit
23 interruption, as I just recalled by referring to
24 Article 7(6).

25 Azerbaijan's main response is that not all disputes

12:44 1 require a fast-track option. But that does not solve
2 the issue. Even for disputes that could be resolved
3 much longer, Azerbaijan does not explain why for
4 non-urgent disputes, the requirement of conciliation
5 would not comport better with the object and purpose of
6 the ECT.

7 And in his commentary, Professor Hobér also
8 underscores the point that transit disputes should be
9 presented to conciliation, and that conciliation is
10 required because a transit dispute may involve technical
11 law trade issues and they also require specific transit
12 disputes, and Azerbaijan has not responded to that
13 point.

14 Madam President, if I may very quickly turn to
15 the travaux, because the travaux clearly support our
16 interpretation.

17 (Slide 155) The document that you see is a document
18 by Mr Craig Bamberger, the legal advisor of the
19 conference (RL-124). It summarise the negotiations that
20 were held between 1 and 6 February 1993, and these
21 negotiations concern both the article on transit and the
22 inter-state dispute settlement provision. At page 7 of
23 that document, you can see that it recounts negotiations
24 about what would become Article 7(6), which is this
25 provision that in case of a transit dispute:

12:46 1 "... the transit state won't interrupt or reduce
2 the flow until ... [the] dispute conciliation."
3 (Slide 156) Then (page 5):
4 "Norway argued in that case for Article 24 ..."
5 The former numbering of Article 27:
6 "Norway argued ... for binding arbitration, but
7 Poland won support ..."
8 From several states that you can see on the screen:
9 "... with an argument for fast-track conciliation."
10 (Slide 157) And again at page 8, it is said:
11 "Fremantle ..."
12 Mr Sydney Fremantle, who was the chairman of
13 the negotiating Working Group II:
14 "Fremantle there[fore] returned to the Polish
15 proposal for conciliation of ... transit disputes
16 suggesting a fast-track arbitration procedure ..."
17 But then:
18 "Poland replied that it wanted fast-track
19 conciliation, not arbitration."
20 (Slide 158) And the next travaux document is a fax
21 from Mr Fremantle to Mr Clive Jones (RL-126),
22 the Secretary-General of the Conference, and it also
23 confirms that "Poland outlined the general idea for
24 a fast track procedure to be applicable to transit
25 disputes", that Poland won support by Belarus, Russia

12:47 1 and Hungary, and that "no-one opposed".

2 Azerbaijan's response to this document is that those
3 documents would not expressly discuss any hierarchy or
4 order of operation between the two provisions. But
5 I think it is clear from those documents that when
6 the drafters of the treaty discussed the settlement of
7 transit disputes, both arbitration and conciliation were
8 duly considered, and that conciliation was explicitly
9 preferred to arbitration, following the Polish proposal
10 that was supported by other state negotiators without
11 any opposition, confirming thus that both methods were
12 not seen as interchangeable.

13 Then Azerbaijan submits four documents related to
14 the travaux to support its own position. I don't know
15 if I have the time to address them, Madam President, but
16 very briefly, if I may?

17 THE PRESIDENT: Yes, briefly. Thank you.

18 PROFESSOR D'ARGENT: Thank you very much.

19 (Slide 159) The first document, CL-025, is
20 a document by Mr Craig Bamberger in which he wrote:
21 "... binding arbitration would apply to every other
22 dispute arising under the Agreement, including ...
23 [at the time] (... 'Transport and Transit')."

24 The problem for Azerbaijan is that this document is
25 from December 1992, some months before Poland prevailed

12:48 1 in convincing other negotiators that conciliation was to
2 be preferred.

3 (Slide 160) The second document put forward by
4 Azerbaijan is a long fax exchanged between Mr Bamberger
5 and Mr Clive Jones (CL-113). You can see some excerpts
6 of that long fax on the screen. And the reflections of
7 Mr Bamberger in this exchange essentially boil down to
8 two points: first, if a party declines to conciliate
9 because it considers that the dispute is not about
10 transit, arbitration could be used to settle this
11 *ratione materiae* difference; and second, arbitration can
12 be used during conciliation to challenge the
13 conciliator's interim decisions. Indeed, in the
14 conciliation, the [conciliator] can take interim
15 decisions; in particular, decisions on interim tariffs.

16 And of course none of this contradicts, in our view,
17 the fact that resorting to conciliation is mandatory.
18 If anything, this document supports Armenia's position
19 that transit dispute must be referred to conciliation.
20 Mr Bamberger's fax describes conciliation as
21 "unconditional, nondiscretionary ... unqualified".

22 (Slide 162) The third document relied [on] by
23 Azerbaijan is a letter from Sydney Fremantle to
24 Mr Bamberger (CL-114, page 2). And Mr Fremantle states:
25 "It seems to me then that [conciliation] come[s]

12:50 1 into play only after any claim that a dispute is not
2 covered by [what is now Article 7(6) on transit dispute]
3 has been resolved under Article 31 ..."

4 The current Article 27.

5 But again, we do not deny that if one party contests
6 that transit is at issue, an arbitral tribunal may
7 eventually rule on that *ratione materiae* matter. That
8 only, in our view, reinforces our point, because there
9 would be no cause for arbitration in such an instance if
10 conciliation was optional.

11 (Slide 163) And finally, in its Rejoinder,
12 Azerbaijan added a fax from Mr Fremantle (CL-156,
13 page 4), attaching a redraft of the article on transit.
14 Mr Fremantle writes that it:

15 "... provides machinery for conciliation should
16 a dispute over transit threaten to interrupt the flow of
17 oil or gas and thus threaten the security of the
18 Community's gas supplies."

19 Azerbaijan argues (Rejoinder, paragraph 190) that
20 this would support its position that:

21 "... conciliation is ... appropriate [only] for
22 emergent circumstances that are simply not present in
23 this case ..."

24 The problem, again, is that this document is from
25 December 1991, long before Poland prevailed over the

12:51 1 mandatory character of conciliation. And at the time,
2 conciliation was substantially different: it only
3 related to the terms and conditions of transit; not, as
4 today in Article 7, about any matter relating to
5 transit.

6 (Slide 165) Thus, we submit, Madam President,
7 members of the Tribunal, that the travaux completely
8 support our position that conciliation is mandatory; and
9 that because conciliation is mandatory, and because
10 Azerbaijan has failed to refer its pipeline transit
11 claims to conciliation, that those claims do not fall
12 within your jurisdiction.

13 This concludes my presentation, Madam President.
14 Thank you very much for the additional few seconds, and
15 unless there are any questions from the Tribunal, this
16 would conclude Armenia's presentations.

17 PROFESSOR STERN: I continue to be quite troubled by
18 the interaction between Article 27 and Article 7. But
19 if I read Article 7(6), it means that the parties shall
20 not interrupt the flow of energy before the conclusion
21 of the conciliation provided in Article 7(7).

22 PROFESSOR D'ARGENT: Yes, unless the conciliator so decides.

23 PROFESSOR STERN: No, but they shall not interrupt before
24 the conciliation. But here we are in a very different
25 situation: it's already interrupted. And this seems to

12:53 1 be able to be decided by Article 27. Because if not,
2 I think it's very difficult to reconcile the two, if we
3 don't see the difference between these two situations.

4 PROFESSOR D'ARGENT: Thank you very much.

5 Of course the interpretation of the treaty as such
6 must be made in this case. But the articulation between
7 27(2) and 7(7) is a general question for the
8 interpretation of the treaty in any circumstance.

9 And what we say is simply referring to Article 7(6)
10 as an indicator that because the drafters of the ECT
11 included a substantive provision not to interrupt the
12 flow of gas when a transit dispute exists, and that
13 pending the entire duration of conciliation, unless the
14 conciliator decides otherwise on an interim basis, the
15 parties must respect that substantive obligation, we
16 take that substantive obligation as the clear sign that
17 in the mind of the drafters, there is clearly a link
18 between -- that clearly indicates that conciliation in
19 their mind was compulsory.

20 Now, in this case there was no interruption at all.
21 In fact, as my colleagues recalled, the flow of gas,
22 according to Azerbaijan, stopped seven years -- did not
23 exist seven years before ECT entered into force between
24 the parties. So it was an empty pipeline, as it were,
25 and there was no interruption.

12:55 1 But we say that the right to arbitrate under
2 Article 27(2) is under the terms of 27(2). And the
3 renvoi that 27(2) makes to other provisions, this right
4 to arbitrate is otherwise regulated. And we need to
5 import in 27(2) the command of Article 7(7), which in
6 our opinion clearly has mandatory language.

7 So this is our submission. But we -- I mean, of
8 course this substantive -- had Azerbaijan brought the
9 pipeline claims to conciliation as it should have, of
10 course the substantive obligation of 7(6) would not have
11 applied because there was no transit of energy to be
12 suspended. This is our point.

13 PROFESSOR STERN: Yes, but this is another issue.

14 PROFESSOR D'ARGENT: The interpretive -- the system of
15 the treaty --

16 PROFESSOR STERN: I think you did not completely answer
17 my question. Because I think conciliation is so that
18 you don't interrupt, and here it's already interrupted.
19 And I think these are two very, very different factual
20 situations.

21 PROFESSOR D'ARGENT: Conciliation is about a transit
22 dispute, about any matter, about any matter --

23 PROFESSOR STERN: About "shall not", I mean, I read --

24 PROFESSOR D'ARGENT: Pending conciliation, you shall not
25 interrupt.

12:56 1 PROFESSOR STERN: "... shall not ... interrupt ... prior to
2 the conclusion". But here it's interrupted. So it
3 comes later, doesn't it?

4 PROFESSOR D'ARGENT: It's a substantive obligation that is
5 triggered, indeed, pending conciliation. But that has
6 no bearing, in our opinion, on the mandatory character
7 of conciliation itself, because there is this system of
8 renvoi between 27(2) and 7(7) and the mandatory words of
9 7(7).

10 So you may ask yourself: why is there a pipeline
11 transit claim by Azerbaijan? When the ECT entered into
12 force, there was no flow of gas in that pipeline;
13 seven years before, according to their claim, it was
14 interrupted. But that's another matter. Whether the
15 obligation not to suspend or interrupt the flow in the
16 pipeline applies or not, for us of course it would not
17 have applied during conciliation.

18 But the point we make is that because 7(6) is
19 written in such a way, and contains a substantive
20 obligation that is clearly linked to conciliation, this
21 reinforces the mandatory character of conciliation
22 under 7(7).

23 THE PRESIDENT: Would you argue that Article 7(7)
24 conciliation is mandatory also for disputes which are
25 solely of an interpretive nature, a dispute over what

12:58 1 Article 7 means? I know that Article 27 doesn't
2 distinguish between interpretation and application, and
3 yet it is difficult to read the conciliation process as
4 designed to render interpretations of the treaty; that
5 would seem to be solely the province of an arbitration
6 tribunal.

7 PROFESSOR D'ARGENT: As I said, on the basis of the travaux,
8 we fully accept that if one party, faced with a request
9 for conciliation for a transit dispute over any matter,
10 including, for instance -- and that would be, I presume,
11 Azerbaijan's claim -- "You must open the gas flow
12 because the ECT provides for free transit", even if the
13 gas was cut long before the ECT entered into force,
14 faced with such a claim, if a party says it is not
15 a transit dispute, then we fully admit that the
16 interpretation question, which is a *ratione materiae*
17 issue, whether it is or not a transit dispute, that can
18 be arbitrated. This is an issue of interpretation of
19 whether the dispute is about transit. But if the other
20 party does not contest that, then notification of the
21 claim to the ECT Secretary General must be made, and
22 the conciliation is set in motion.

23 And that, in our submission, is the design of the
24 treaty. The logic, the articulation between 27(2) and
25 7(7), requires that. And in our submission, this is the

13:00 1 only way to give effet utile both to the exception
2 "otherwise provided under this Treaty" and to the "shall
3 apply" of 7(7) concerning transit disputes.
4 PROFESSOR McRAE: I probably shouldn't continue this
5 discussion, but it is interesting. And we saw earlier
6 on the references to this as a "fast-track" procedure,
7 and I wonder if that has any implications for this
8 question of whether -- if it is about transit that
9 doesn't exist anymore, is Article 7(7) so relevant?
10 Because you yourself said it was about transit. But if
11 there is no transit, but it's a question about something
12 that happened some time ago, do you then go -- to
13 conciliate something that really can't be conciliated,
14 do you go to the interpretative process of 27?
15 PROFESSOR D'ARGENT: Well, there is no -- fundamentally,
16 what we say is that it can be an issue of fast-track
17 even if there is an interruption of the flow of gas. If
18 the flow of gas is so essential to Nakhijevan, I presume
19 Azerbaijan would say it's a matter of urgency also.
20 So we don't think that -- because the gas was
21 interrupted a long time ago, the question you may ask
22 is: why did Azerbaijan wait for so many years? But
23 I don't think it has any bearing on -- and the
24 fast-track is simply something that came out during the
25 negotiations of the ECT treaty. They wanted something

13:01 1 that was more practical, and they made that thing --
2 conciliation concerning transit disputes -- they made
3 that thing mandatory. This is our point.

4 And again, it is about any matter under
5 Article 7(7). Any matter concerning a pipeline transit
6 claim should, must, in our opinion, be put to
7 conciliation.

8 So the fact that the drafters of the Convention had
9 a specific situation -- and as I said, in the 1990s,
10 I mean, there were many interruptions in the post-USSR
11 context, and that led them to consider that for this
12 type of dispute, conciliation was to be preferred and
13 was to be enshrined as a mandatory requirement under
14 Article 7(7).

15 And we read the first exception in Article 27(2) as
16 incorporating in Article 27(2) the right to submit --
17 may submit a dispute, except as otherwise provided. In
18 our reading of the ECT, that creates a system of -- and
19 a certain form of comity between the means of
20 settlement.

21 PROFESSOR McRAE: Thank you. I understand the position.

22 THE PRESIDENT: Just to follow up, does the requirement, if
23 there is one, to proceed to Article 7 conciliation
24 contain any kind of futility exception?

25 I ask this because of my colleague's question and

13:03 1 your response, which was the -- you said: the fact that
2 the drafters had a specific situation in mind in the
3 1990s doesn't limit the treaty text to that situation.
4 If the treaty text is broader, the requirement still
5 exists.

6 Does the requirement exist even if, arguably, the
7 purposes of the conciliation mechanism are less apt to
8 a specific situation that has arisen?

9 PROFESSOR D'ARGENT: Azerbaijan has not made that argument,
10 and we will respond if we hear such an argument.

11 In our opinion, it would certainly not be futile,
12 and it's a means of settlement of disputes that is
13 available under the ECT, that in our opinion is
14 commended by the terms of the treaty. And if you think
15 about the practicalities between neighbouring states,
16 and also of the fact that populations rely on the flow
17 of energy, I think it makes full sense that the drafters
18 of the ECT considered that conciliation was something
19 that needed to be -- you know, that it was the route
20 that any dispute, any transit dispute, had to go
21 through.

22 And in our submission, we don't dispute -- I mean,
23 maybe this is not precisely, but the whole system -- and
24 paragraph (1) of 27 refers to "diplomatic channels", and
25 we would not dispute that indeed conciliation would

13:05 1 fulfil that purpose, if it were used, okay?

2 So of course, in Azerbaijan's submission -- and
3 we all agree that the negotiations are a threshold
4 requirement of jurisdiction. But we are not arguing
5 that, you know -- and maybe Azerbaijan will make a fuss
6 about that later on, but -- will say: this is illogical,
7 and we would need to negotiate after conciliation,
8 et cetera. No; by definition, conciliation includes
9 exchange between the parties.

10 And we are not saying that a transit dispute cannot
11 be settled at the end of the day under the ECT, because
12 of course we are aware that conciliators, except on
13 an interim basis, don't take decisions: they submit
14 a settlement proposal to the parties and it's up [to]
15 them to take or reject it.

16 But I think it's a means to bring parties closer
17 together. And for the specific context of pipelines
18 transiting energy through territories of neighbouring
19 states, in our opinion, this is completely consonant
20 with the object and purpose of the ECT: for the smooth
21 transit of energy.

22 THE PRESIDENT: Alright. Hearing no further questions from
23 my colleagues, I think this concludes this subject.
24 Thank you for tolerating our active questions on
25 the topic.

13:07 1 PROFESSOR D'ARGENT: Thank you, Madam President. It was my
2 pleasure. Thank you.

3 THE PRESIDENT: My understanding is that this also concludes
4 Armenia's opening statement?

5 PROFESSOR D'ARGENT: Yes.

6 THE PRESIDENT: So in that event, we will now adjourn for
7 our lunch break, which is scheduled for an hour and
8 30 minutes. So we'll see everybody back here at about
9 2.35, 2.40. Thank you very much.

10 PROFESSOR D'ARGENT: Thank you very much.

11 (1.07 pm)

12 (Adjourned to 2.35 pm)

13 (2.43 pm)

14 THE PRESIDENT: Welcome back to everyone.

15 We are now ready to resume with the opening
16 statement by Azerbaijan. When you're ready.

17 Opening statement on behalf of Claimant

18 H.E. MR MAMMADOV: Madam President, esteemed members of
19 the Tribunal, good afternoon. I am privileged to stand
20 before you as Agent for the Government of Azerbaijan.

21 Azerbaijan has brought this historic case to seek
22 redress for Armenia's decades-long breaches of
23 Azerbaijan's sovereign rights over its energy resources.
24 These resources are located in what unquestionably was,
25 and is still, Azerbaijan's sovereign territory. Indeed,

14:44 1 the United Nations Security Council issued multiple
 2 resolutions during the First Garabagh War recognising
 3 the occupied areas as Azerbaijan's sovereign territory.

 4 Azerbaijan does not bring these claims to pour salt
 5 into old wounds. It is true that the parties have made
 6 significant strides towards peace in recent years, and
 7 Azerbaijan looks forward to continuing to move from
 8 a history of conflict to an era of peace, calm, security
 9 and cooperation. But a critical part of any transition
 10 to sustainable peace is accountability and
 11 reconciliation in respect of past violations.

 12 Azerbaijan has long supported the Energy Charter
 13 Treaty as an important framework for international
 14 energy cooperation. During Azerbaijan's chairmanship of
 15 the Energy Charter Conference in 2020, Azerbaijan
 16 prioritised a modernisations process as part of its work
 17 to expand cooperation amongst ECT contracting parties.
 18 It is precisely because of Azerbaijan's strong
 19 commitment to the treaty, and to the integrity of its
 20 framework, that it has invoked the ECT in these
 21 proceedings to uphold the core principle of that
 22 framework, which is state sovereignty and sovereign
 23 rights over energy resources.

 24 The Agent of Armenia said this morning that
 25 Azerbaijan is asking the Tribunal to award it damages in

14:45 1 connection with the Garabagh conflict of the 1990s. But
2 this is not a dispute about the wider conflict between
3 the parties. This is a dispute about energy resources
4 specifically -- hydropower, coal, natural gas -- and
5 Armenia's denial of access to, exploitation of, and
6 other interference with Azerbaijan's sovereign rights
7 over those resources, as provided by the ECT. For that
8 reason, it falls well within the four corners of the ECT
9 and is not an expansion or misapplication of the treaty.

10 Azerbaijan liberated parts of its formerly occupied
11 territories beginning in November 2020, and did not
12 regain full access until September 2023. And only then,
13 Azerbaijan was finally able to begin assessing the full
14 scope of damage to Azerbaijan's energy resources wrought
15 by 30 years of Armenia's occupation of a significant
16 portion of Azerbaijan's sovereign territory.

17 What Azerbaijan found was: energy infrastructure
18 damaged or destroyed, including gas transmission and
19 distribution infrastructure related to the
20 Yevlakh-Nakhchivan Pipeline; hydropower plants seized
21 and exploited to export power to Armenia, with many new
22 plants built without Azerbaijan's authorisation, and
23 then damaged or destroyed as Armenian forces retreated
24 from Azerbaijan's territory during the Second Garabagh
25 War; a previously unexploited coal deposit developed

14:47 1 without Azerbaijan's consent and exploited to ship coal
2 to Armenia.

3 These are energy resources that Azerbaijan, under
4 the ECT, had the sovereign right to access, and to
5 decide how and when to develop and exploit. Instead,
6 Armenia exercised this right without Azerbaijan's
7 consent and without compensation. So this case must be
8 viewed in light of this unique context, which this
9 Tribunal cannot simply disregard.

10 Madam President, esteemed members of the Tribunal,
11 Azerbaijan's distinguished counsel will now address
12 Azerbaijan's preliminary objections. Mr Jeffrey
13 Sullivan will address the Tribunal first. Thank you for
14 your attention.

15 MR SULLIVAN: Madam President, members of the Tribunal, it's
16 a privilege to appear before you today on behalf of
17 the Republic of Azerbaijan.

18 You should have been given a copy of the slides, and
19 they will be on the screen before you as well.

20 (Slide 2) We're here today, of course, to address
21 four preliminary objections raised by Armenia in respect
22 of the claims that have been brought before you. I'll
23 start by just recapping what those four objections are,
24 and you'll see them on the slide.

25 First, Armenia suggests that Article 18 "does not

14:48 1 create any legal obligations that could give rise to
2 an independent cause of action" (Reply, paragraph 7).
3 In other words, Armenia claims that there are no
4 obligations imposed by Article 18; it is instead
5 an interpretive provision only.

6 The second and third objections are essentially
7 procedural objections relating to the pipeline transit
8 claims. The second objection is that there is no
9 "dispute" in respect of the pipeline transit claims.
10 And if it is wrong on this point, Armenia then suggests,
11 as its third objection, that there was insufficient
12 negotiation of those pipeline transit claims prior to
13 submitting them to arbitration. So that's 2 and 3.

14 And then fourth and finally, Armenia argues that
15 Azerbaijan's pipeline transit claims are excluded from
16 the Tribunal's Article 27 jurisdiction because they
17 should have been referred to [a] mandatory and exclusive
18 conciliation mechanism under Article 7(7).

19 (Slide 3) Before turning to the substance of those
20 objections, let me first provide you with a brief
21 roadmap of our submissions today.

22 I will begin, and be relatively brief, addressing
23 two threshold matters, two matters which we say are
24 crucial to the Tribunal's understanding of the issues
25 that are raised by the four preliminary objections we're

14:50 1 hearing today.

2 Following those threshold matters, my colleague
3 Ms Reid will address the detail of Armenia's Article 18
4 objection and explain why Article 18 does in fact impose
5 obligations on ECT contracting parties.

6 Following Ms Reid, my colleague Dr Blake will
7 address the substance of Armenia's objections with
8 respect to the pipeline transit claims, and again
9 he will show those objections should be rejected.

10 So that's the roadmap for the submissions. Let me
11 start with the two threshold matters.

12 (Slide 4) The first threshold matter relates to the
13 scope of the claims that have been brought before you by
14 Azerbaijan. Contrary to what Armenia would have you
15 believe, the legal bases for those claims are relatively
16 narrow in scope. At its core, the question before you
17 is as follows: did Armenia breach the obligations it
18 accepted under the ECT by interfering with Azerbaijan's
19 sovereign rights over its energy resources, including
20 the transit of those resources?

21 As Mr Mammadov just said, the claims before you are
22 not a referendum on the wider set of disputes that exist
23 between Azerbaijan and Armenia. The dispute before you
24 does not import obligations intrinsic to the ECT;
25 it does not expand the scope of the ECT's dispute

14:51 1 resolution framework beyond what was intended by
2 the contracting parties.

3 Rather, Azerbaijan asserts that Armenia has breached
4 its obligations under two specific provisions of the
5 ECT.

6 (Slide 5) The first provision is Article 18. You
7 have it on the slide before you now. This covers
8 the bulk of Azerbaijan's claims.

9 Article 18(1) of course requires the ECT contracting
10 parties to "recognise state sovereignty and sovereign
11 rights over energy resources". Article 18(3) then
12 contains a non-exhaustive list of those concrete
13 sovereign rights that states hold, including
14 the exclusive rights to make decisions about the
15 exploration, exploitation, regulation and development of
16 their energy resources.

17 The claims arise under both Articles 18(1) and
18 18(3), which we say should be read together.

19 The Article 18 claims arise from Armenia's
20 interference with Azerbaijan's internationally
21 recognised sovereign rights over energy resources,
22 located in territory that Armenia illegally occupied for
23 nearly 30 years. Specifically, Armenia denied
24 Azerbaijan access to and impaired Azerbaijan's
25 development of energy resources in the formerly occupied

14:53 1 territories, and it exploited those resources for its
2 own benefit. That's the Article 18 claims.

3 (Slide 6) The second provision that Azerbaijan
4 invokes is Article 7. Article 7 imposes a specific
5 obligation on ECT contracting parties to facilitate
6 the free transit of energy materials and products, and
7 to mitigate the effects of any disruption in supply.

8 Article 7 applies to a subset of Azerbaijan's claims
9 relating to the Yevlakh-Nakhchivan Pipeline, and
10 we refer to those as the "pipeline transit claims".
11 Those claims arise out of Armenia's suspension of the
12 transit of natural gas between two areas of Azerbaijan
13 through the pipeline for several decades, and they also
14 concern Armenia's diversion of the pipeline to supply
15 gas from third-party states to areas under Armenia's
16 control.

17 So those are the two provisions which Azerbaijan
18 invokes in this case. It is of course Azerbaijan's
19 position that the claims fall squarely under Articles 18
20 and 7. They are within the scope of the Tribunal's
21 jurisdiction to hear disputes pursuant to Article 27 of
22 the treaty.

23 Now, the reason we address this as a threshold point
24 is because, in its written submissions and also this
25 morning, Armenia attempts to paint a different picture

14:54 1 of those claims, and the relatively narrow legal bases
2 for those claims that are before you. It
3 mischaracterises those claims, and then suggests that
4 a catalogue of direct consequences will follow if the
5 Tribunal were to allow those claims to proceed. So let
6 me make a few points in response to that.

7 (Slide 7) First, Azerbaijan's claims are not
8 an attempt to "shoehorn the decades-long []Karabakh
9 conflict into the ECT". And you can see this is one of
10 the assertions that has been made in Armenia's Reply at
11 paragraph 4. Azerbaijan's claims do not require the
12 Tribunal to resolve any issues regarding that broader
13 conflict. That conflict does, of course, form part of
14 the factual backdrop for these claims, but it has no
15 impact on the Tribunal's jurisdiction.

16 Complex factual foundations are of course routine --
17 indeed, to be expected -- in inter-state disputes, but
18 the Tribunal needs to focus on the specific claims that
19 have been brought before it. That a broader set of
20 disputes may exist does not mean that the Tribunal
21 should decline jurisdiction over the much more narrow
22 legal claims that have been brought before it.

23 And for that premise, I would refer you to the
24 Tehran Hostages case. And in that inter-state dispute,
25 the ICJ rejected Iran's argument that the court could

14:56 1 not rule on claims brought by the United States because
2 they were intertwined with other alleged violations of
3 international law, again arising from a wider
4 complicated set of disputes between those two states.

5 The ICJ observed that the court should not:

6 "... decline to take cognizance of one aspect of
7 a dispute merely because that dispute has other aspects,
8 however important."

9 So that's RL-30, the May 1980 Tehran Hostages case,
10 at paragraph [36].

11 Relatedly, this is not a dispute about territorial
12 sovereignty or self-determination. Armenia argues that
13 the ECT:

14 "... does not contemplate ... inter-State disputes
15 concerning armed conflict, territorial sovereignty, and
16 the self-determination of peoples."

17 That's on the slide; it's from the Memorial at
18 paragraph 7.

19 Azerbaijan is not asking this Tribunal to decide any
20 such disputes. Indeed, Azerbaijan's internationally
21 recognised territorial sovereignty over its natural
22 resources has not been disputed by Armenia; that is
23 an important point. Armenia does not claim that it had
24 any sovereign rights over the formerly occupied
25 territories. There is no territorial or sovereignty

14:57 1 dispute to resolve. The claim before the Tribunal only
2 concerns whether Armenia breached its obligations under
3 the ECT by interfering with Azerbaijan's undisputed
4 sovereign rights.

5 That's my first point.

6 The second point: Azerbaijan's claims are in fact
7 treaty claims arising under Articles 18 and 7, as I have
8 just set out. They are not claims under any
9 freestanding customary international law obligations.

10 That much has in fact been confirmed by the Tribunal
11 in its Decision on Bifurcation, where it correctly noted
12 that Azerbaijan is not raising any standalone claims
13 under customary international law; that's paragraph 91
14 of the Tribunal's Bifurcation Decision.

15 As Armenia accepts, Article 18 of the ECT does in
16 fact affirm pre-existing customary rights. References
17 in Azerbaijan's submissions to those customary
18 international law rights are included for one reason,
19 and that's to inform the interpretation of Article 18
20 itself. The Tribunal is not being asked to import
21 extraneous rules of international law into the ECT;
22 it is simply being asked to apply Article 18 itself.

23 (Slide 8) Third, because Azerbaijan's claims arise
24 under the express wording of the treaty, the Tribunal is
25 simply being asked to apply and interpret the ECT, and

14:59 1 nothing more. Article 27 of course expressly provides
2 for jurisdiction over an inter-state dispute regarding
3 the application and interpretation of the ECT's
4 provisions; and as Ms Reid will explain, that includes
5 Article 18.

6 So there is no risk, although this has been
7 suggested by Armenia -- and you see the quote on the
8 slide: it's from the Reply at paragraph 42 -- but there
9 is no risk that state consent would be subverted. And
10 Azerbaijan is not seeking to transform Article 27 of the
11 ECT into a compulsory jurisdiction clause for the
12 enforcement of general customary international law
13 obligations; that's not part of the claim before you.

14 So the legal bases for the claims before you are
15 narrow. They arise under the ECT, and only under the
16 ECT. Armenia's attempts to suggest that they are much
17 broader is a red herring. So we ask that the Tribunal
18 of course focus on the claims that have been brought by
19 Azerbaijan.

20 (Slide 9) The second threshold point I wish to
21 address relates to the ECT's scope and purpose. And
22 of course a central tenet of Armenia's case, both in its
23 written submissions and we heard this again this
24 morning, is that the ECT is simply a trade and
25 investment treaty.

15:00 1 From that assertion, Armenia draws two conclusions
2 that are key to its proposed interpretation of
3 Article 18, and what we have on the next slide (10) is
4 a summary of the first of those two key conclusions that
5 Armenia draws.

6 It claims that Article 18 imposes no obligations
7 whatsoever, and instead simply serves to inform the
8 interpretation of the ECT's investment protection
9 provisions. And you can see that from the two quotes on
10 the slide; they come from the Memorial at paragraphs 8
11 and 36. That's the sole purpose Armenia claims
12 Article 18 serves.

13 (Slide 11) The second conclusion that Armenia draws
14 from its assertion that the ECT is merely a trade and
15 investment treaty is that sovereignty over energy
16 resources is "not regulated by the ECT" and that it is
17 "not the subject matter of the ECT", and you see that
18 from paragraphs 9 and 70 of Armenia's Memorial.

19 It is our case that those two conclusions are
20 plainly wrong. They are based on a fundamental
21 misunderstanding of the Energy Charter Treaty.

22 It is not a simple trade and investment treaty,
23 comparable to BITs or even more elaborate free trade
24 agreements. It does indeed cover trade and investment,
25 but its purpose was to establish a broad and

15:02 1 wide-ranging legal framework for long-term cooperation
2 between contracting parties in the energy sector.

3 Fundamentally, the ECT is an instrument of
4 international energy law. A central component of the
5 ECT's legal framework is the obligation for states to
6 recognise and respect every other state's sovereign
7 rights over their energy resources. That is not
8 a surprise in a treaty devoted to covering a range of
9 issues all related to the development, exploitation,
10 investment and trade in energy resources. State
11 sovereignty is a cornerstone of international energy
12 law.

13 As detailed in the Statement of Claim, of course
14 the case, as I've mentioned, revolves around Armenia's
15 denial to Azerbaijan of access to those sovereign energy
16 resources. Those are precisely the rights -- the
17 sovereign rights -- that Articles 18(1) and 18(3) are
18 designed to protect.

19 Now, as I said, the first conclusion that is drawn
20 from Armenia's assertion that the ECT is a mere trade
21 and investment treaty is that Article 18 serves as
22 an interpretive provision only in the context of
23 investment disputes, or balancing the rights of states
24 and foreign investors, and it also claims that
25 sovereignty is not the subject of the ECT.

15:03 1 That proposed interpretation of Article 18 would
 2 require the tribunal to adopt a particularly constrained
 3 interpretation of the ECT, and in particular Article 18.
 4 It would be an interpretation viewed solely through the
 5 lens of investment protection, and it would fail to give
 6 effect to the ECT's broad scope and purpose. I want to
 7 spend a few minutes talking about the purpose of the ECT
 8 and its scope.

 9 (Slide 12) Professor Murphy took us through
10 Article 2 this morning; I will do the same.

11 Article 2 helpfully sets out the purpose in plain
12 terms. That purpose is broad and systemic. It states
13 that the ECT:

14 "... establishes a legal framework ... to promote
15 long-term cooperation in the energy field, based on
16 complementarities and mutual benefits, in accordance
17 with the objectivity and principles of the Charter."

18 The "Charter" is a reference to the European Energy
19 Charter. I will come back to that point in a minute.

20 In light of Armenia's case, it's worth noting what's
21 not in Article 2. Article 2 does not confine the ECT's
22 purpose to promoting trade or protecting foreign
23 investment. Rather, the stated purpose is to create
24 a legal framework for long-term cooperation in the
25 energy sector amongst the contracting parties. As

15:04 1 I said, it's an instrument of international energy law.

2 On the next slide (13), you will see a quote from
3 Mr Craig Bamberger (RL-108, page 8). We've seen other
4 references to Mr Craig Bamberger's commentaries this
5 morning. He was of course the chair of the legal
6 advisory committee during the ECT's negotiations.
7 He describes the ECT as a:

8 "... unique ... multilateral sectoral treaty broadly
9 covering trade, investment, and a range of other matters
10 in the energy field."

11 In other words, its scope is not limited to trade
12 and investment, as Armenia suggests.

13 He then describes, in the rest of that paragraph,
14 the extensive nature of the scope of the ECT itself.

15 The broad purpose of the ECT is then reflected in
16 its operative provisions. And on the next few slides,
17 I'm going to take you through some of the provisions
18 that showcase the range of matters covered by the
19 treaty, all of which are critical to a treaty designed
20 to create a legal framework for the long-term
21 cooperation in the energy field.

22 (Slide 14) Article 6 addresses competition matters.

23 Article 7 deals, of course, with facilitation of
24 free and non-discriminatory transit of energy materials
25 and products.

15:06 1 (Slide 15) Article 18 addresses sovereignty over
2 natural resources.

3 Article 19 addresses environmental matters and
4 sustainable development.

5 Article 20 contains binding obligations relating to
6 transparency, requiring contracting parties to publish
7 their laws and regulations, not just in relation to
8 trade and investment but all matters covered by
9 the treaty.

10 (Slide 16) Article 22 contains binding provisions
11 with respect to state enterprises, including an
12 obligation to ensure that any governmental authority
13 must be exercised in a manner consistent with
14 the treaty.

15 Article 23 contains similar binding provisions with
16 respect to sub-national authorities.

17 Now, Armenia's case is that many of the provisions
18 found in Part IV of the treaty -- which, as we heard
19 this morning, is labelled "Miscellaneous" -- its case is
20 that many of those articles contain "ancillary
21 obligations designed to give effect to the Treaty's main
22 trade and investment regimes". That's the Memorial at
23 paragraph 70. So that's what Armenia says about certain
24 of the provisions in Part IV.

25 We disagree with that. But even if it is correct,

15:07 1 it doesn't assist Armenia's interpretation of
2 Article 18. Armenia accepts that many of the provisions
3 established binding obligations applicable to and
4 enforceable as between the ECT's contracting parties.
5 Whether those obligations are in furtherance of the
6 trade and investment provisions is neither here nor
7 there. They are enforceable obligations as between the
8 ECT contracting parties, and the same is true of
9 Article 18.

10 Ms Reid will take you through the text of Article 18
11 in some detail. She will explain that it does in fact
12 impose a binding obligation to respect sovereignty over
13 energy resources as between the contracting parties.
14 Even if that is viewed as furthering the objectives of
15 the trade and investment provisions, it is still
16 a binding obligation as between the contracting parties.

17 Armenia has also referred to the historical context
18 of the ECT. And it is true that the ECT emerged after
19 the collapse of the Soviet Union. It is also correct
20 that one of the key objectives of the treaty was to
21 facilitate access by Western European states, or Western
22 states, to the vast energy resources in the former
23 Soviet Union. That is true.

24 Armenia draws the wrong lessons from this historical
25 context. It is precisely against this background, the

15:08 1 West seeking to gain access to energy resources in
 2 the East, that it was crucial for the ECT to contain
 3 an express provision that made clear that each state
 4 party to the treaty was required to respect the
 5 sovereignty of other states over their own energy
 6 resources. Without setting out this obligation, there
 7 would be no ability for contracting parties to enforce
 8 any unlawful exploitation of a state's resources by
 9 another state, either directly or indirectly, through
 10 entities acting under state control.

 11 (Slide 17) The reference in Article 2, if we can go
 12 back to Article 2, it refers to "complementarities and
 13 mutual benefits". That reflects a reciprocal bargain
 14 struck by the ECT contracting parties; it's not
 15 a one-sided arrangement. That reciprocal bargain
 16 depends on each contracting party's recognition of the
 17 other contracting parties' sovereignty over their own
 18 energy resources.

 19 And if we return to Article 2, I want to come back
 20 to the reference at the end of that provision which
 21 refers to:

 22 "... in accordance with the objectives and
 23 principles of the Charter."

 24 As I said, the reference to "the Charter" is to
 25 the European Energy Charter of 1991. That was the

15:10 1 declaration that provided the political foundation for
2 the ECT itself.

3 Armenia, not surprisingly, dismisses the relevance
4 of the Charter. But Article 2, "Purpose", specifically
5 ties the ECT's purpose to "the objectives and principles
6 of the Charter". It's there in plain terms.

7 The reference to the Charter doesn't just appear in
8 Article 2; it's also found in the ECT preamble, which
9 states that the ECT's contracting parties concluded
10 the treaty to:

11 "... establish the structural framework required to
12 implement the principles enunciated in the European
13 Energy Charter ..."

14 The two are inextricably linked.

15 If there was any doubt about the relevance of
16 the Charter, on the next slide (18), you will see
17 a reference again to Mr Bamberger's 1994 treatise
18 (RL-108, page 8), where he confirms that the purpose of
19 the ECT was indeed "to implement the objectives ... of
20 the [European Energy] Charter".

21 (Slide 19) Let's look at what the Charter says, and
22 I suspect you will then realise why Armenia downplays
23 its significance.

24 The starting point, the very starting point for the
25 Charter, the framework within which the signatories

15:11 1 agreed to operate, was one of state sovereignty and
2 sovereign rights over energy resources. The Charter is
3 anchored in this concept: you see it appears in its
4 preamble; it appears in the first section, entitled
5 "Objectives"; it appears again in the second section,
6 entitled "Implementation"; and it is said to form the
7 very framework for the Charter itself. The concept
8 permeates the Charter. And of course, as we've just
9 seen, the treaty confirms that it implements
10 the Charter's principles and objectives.

11 The multiple express references to sovereignty over
12 energy resources in the Charter, and the existence of
13 a specific provision in the ECT itself, Article 18,
14 we say cannot be reconciled with Armenia's claim that
15 sovereignty over energy resources is not the subject of
16 the ECT or is not regulated by the ECT. It most
17 certainly is indeed.

18 And as I said before, state sovereignty over energy
19 resources is a core concept of international energy law,
20 so it's not surprising at all that you see these
21 references to sovereignty both in the Charter and in the
22 treaty. What is surprising is Armenia's proposed
23 restrictive interpretation of the ECT, because it is
24 contrary to the treaty's stated purpose.

25 The fundamental tenet of Armenia's proposed

15:13 1 interpretation -- that sovereignty is not the subject of
2 the ECT, that Article 18 should be read as nothing more
3 than an interpretive provision with respect to
4 investment protection -- excessively narrows the treaty,
5 and Article 18 in particular, and fails to give effect
6 to the ECT's broad scope and stated purpose.

7 That is the second threshold point I wanted to
8 address, relating to the purpose of the ECT and its
9 scope. Unless there are questions, I will now hand over
10 to Ms Reid, who will take you through the detail of
11 Article 18.

12 THE PRESIDENT: Thank you very much.

13 MS REID: Madam President, distinguished members of
14 the Tribunal, good afternoon. It is a privilege to
15 appear before you today on behalf of the Republic of
16 Azerbaijan.

17 I will now address Armenia's objection to
18 Azerbaijan's claims under Article 18 of the ECT.

19 (Slide 21) As set out in the Tribunal's Bifurcation
20 Decision, the question raised by this objection, which
21 is before the Tribunal for decision now, is whether
22 Article 18 contains an obligation giving rise to
23 an independent cause of action or whether, as Armenia
24 maintains, it's merely hortatory or interpretive.

25 It's worth pausing to note what is and what is not

15:15 1 really in dispute here. To hear and resolve
2 Azerbaijan's claims asserting breach of Article 18 and
3 seeking compensation for the harm caused, the Tribunal
4 must be satisfied on two points, which are reflected on
5 the slide: first, that Articles 18(1) and 18(3), the two
6 provisions on which Azerbaijan's claims are based,
7 impose legally binding obligations between states that
8 are contracting parties to the ECT; and second, that
9 Article 27 confers jurisdiction over disputes concerning
10 the interpretation and application of these provisions.

11 As to Azerbaijan's Article 18 claims, there is no
12 real dispute on this second point. I know that
13 Professor Murphy made a passing reference to whether
14 Article 27 covers Article 18 claims; I will come to that
15 in more detail. But Azerbaijan's position is that the
16 text is clear, and there is no doubt that this Tribunal
17 has the authority to decide on the interpretation and
18 application of Article 18.

19 That is in fact the task that we are all engaged in
20 right now. What does the treaty text mean? What
21 function does it serve? And does it impose
22 an obligation the breach of which gives rise to the
23 responsibility of a state, and triggering the obligation
24 to make reparation?

25 (Slide 22) For that task, our analysis and my

15:16 1 submissions today are guided by the classic interpretive
2 steps under the Vienna Convention on the Law of
3 Treaties, the VCLT, which we will take in turn. Each of
4 those steps leads to the conclusion that Article 18
5 imposes concrete obligations between states to
6 recognise, and thus respect, sovereignty and sovereign
7 rights over energy resources.

8 (Slide 23) I begin, as always, with the text.

9 (Slide 24) On the screen now is the now-familiar
10 text of paragraphs (1) and (3) of Article 18. Armenia
11 contends that this language "simply acknowledg[es]
12 pre-existing, non-ECT rights"; that's a quote from
13 paragraph 76 of their Reply, a characterisation that
14 it essentially repeated this morning.

15 In short, on Armenia's reading, neither provision on
16 the screen does any real work. But it can only maintain
17 that position by ignoring what the text actually says,
18 by reading any real legal consequence out of the term
19 "recognise" in paragraph (1), and by ignoring the
20 detailed list of sovereign rights in paragraph (3).

21 Although Armenia finally spent a few minutes this
22 morning discussing paragraph (3), its position in its
23 papers and the rest of this morning's argument makes
24 clear that Armenia would like nothing more than for your
25 eye to skip right over that large block of text in

15:17 1 paragraph (3).

2 (Slide 25) So to really appreciate the content and
3 import of this provision, we have broken out each of the
4 substantive rights listed in that paragraph. These are
5 not abstract principles. They refer, in unmistakable
6 terms, to the exclusive prerogatives of each sovereign
7 state to decide whether, where, when, how, by whom, and
8 with what payment to the state, its energy resources can
9 be explored, exploited and developed.

10 So what work does Article 18(3) do? Three things,
11 all of which are fatal to Armenia's objection and
12 perhaps explain Armenia's short shrift.

13 First, it makes crystal-clear that Article 18(1) is
14 not just a toothless exhortation or a mere interpretive
15 tool. The sovereign rights to which Article 18(1)
16 refers are real-world, concrete, operative entitlements,
17 exclusively held by each state in its area, that must be
18 respected.

19 Second, Article 18(3) confirms that Article 18(1) is
20 not a broad invocation of sovereignty, implicating the
21 myriad of issues such as self-determination or border
22 disputes. Article 18 is focused on sovereign rights
23 over energy resources, including these exclusive
24 prerogatives set out on the screen.

25 And third, Article 18(3) concretely answers

15:19 1 the question of what a breach of the Article 18(1)
2 obligation would look like. It would be precisely the
3 kind of claims that Azerbaijan has brought here,
4 alleging deliberate violations of all of these rights
5 with regard to the hydropower, natural gas and coal
6 resources and infrastructure in the former occupied
7 territories.

8 It is for these reasons that Azerbaijan's case rests
9 on both Article 18(1) and Article 18(3), which are meant
10 to be read together.

11 Let me turn then to the ordinary meaning of
12 Article 18(1), and in particular the term "recognise".

13 It's common ground that the word "recognise" may
14 have different meanings in different contexts, and we
15 heard Armenia's counsel agree with that again this
16 morning. In other words, to put it simply, whether the
17 term gives rise to a binding treaty obligation depends
18 on what exactly the parties have agreed to recognise.

19 Now, Armenia has conceded that the contexts that can
20 invest the term "recognise" with the legal consequence
21 of a binding obligation include, and perhaps in
22 Armenia's view are limited to, when it is used as a term
23 of art in the context of title to territory or in the
24 context of statehood. In addition to Professor Murphy's
25 submissions this morning, Armenia says that in

15:20 1 paragraph 53 and note 102 of its Reply.

2 But that argument proves too much. The common
3 thread between territorial title, statehood and
4 the provision at issue in this case is sovereignty.
5 Recognition of sovereign status and sovereign rights
6 brings with it the consequence of concomitant
7 obligations.

8 In this case, as Azerbaijan has explained, when
9 contracting parties agree to recognise state sovereignty
10 and sovereign rights over energy resources, they
11 undertake an obligation to accept, and to act
12 consistently with, the exclusive legal authority of each
13 state over its own energy resources. And contrary to
14 Armenia's arguments, that reading is confirmed by the
15 three ICJ cases discussed at length in the parties'
16 papers. For each of these, we look first at the treaty
17 text in issue and then the court's reasoning.

18 (Slide 27) First is the Territorial Dispute case;
19 this is the Libya/Chad case (CL-31). In the relevant
20 treaty provision, Article 3 of the 1955 Franco-Libyan
21 treaty, as quoted in paragraph 39 of the judgment in the
22 excerpt displayed on the screen, the parties agreed to:

23 "... recognize that the frontiers ... are those that
24 result from the international instruments in force ..."

25 (Slide 28) The court made clear that this language

15:22 1 was not merely descriptive. It held that in this
2 context (paragraph 42):

3 "The word 'recognize' ... indicates that a legal
4 obligation is undertaken."

5 Full stop. It then went on to explain what that
6 meant for this particular provision, explaining what the
7 obligation was in that case:

8 "To recognize a frontier" -- the court said -- "is
9 essentially to 'accept' that frontier, that is, to draw
10 legal consequences from its existence, to respect it and
11 to renounce the right to contest it in [the] future."

12 Armenia claims that the next paragraph on the
13 screen, paragraph 45 from the judgment, shows that this
14 meaning of "recognize" is confined to territorial title
15 and boundary delimitation. This is an argument it made
16 at paragraph 59 of its Reply.

17 But that is far too cramped a reading. Instead, the
18 more natural lesson to draw from the court's reasoning
19 is that, depending on both the subject and the
20 underlying facts, the legal consequences of the
21 agreement to recognise can be either to confirm existing
22 rights and obligations, or to create new ones. It all
23 depends on the context, and reading the provision as it
24 stands.

25 (Slide 29) The same reasoning appears in the court's

15:23 1 more recent decision in Gabon v Equatorial Guinea
2 (CL-211). The first excerpt on the slide (paragraph 23)
3 again sets out the relevant language, this time as
4 quoted in one of the judges' declarations, and the
5 second shows the court's interpretation of the term
6 "recognize". Here again, the court confirms, in the
7 highlighted sentence right at the bottom of the slide
8 (paragraph 77), that:

9 "The verb '... recognize' suggests that a legal
10 obligation is undertaken."

11 Now, the third case, and Armenia's reliance on the
12 Paris Agreement discussed in that case, is the Climate
13 Change Advisory Opinion. We submit that Armenia's
14 reliance on the Paris Agreement and that opinion only
15 underscores the weakness of its position regarding the
16 proper interpretation of Article 18.

17 (Slide 30) The provisions of the Paris Agreement
18 (RL-161) on which Armenia relies, which are set out in
19 the current slide, plainly deal with a different kind of
20 recognition. Remember, what "recognise" means depends
21 on what is being recognised. We can see on the slide,
22 the "Parties recognize that adaptation is a global
23 challenge"; the "Parties recognize ... the current need
24 for adaptation is significant", and so on.

25 (Slide 31) Now, as the court explained in the

15:24 1 advisory opinion (RL-268, paragraph 255), these
2 provisions do not regulate conduct or allocate rights
3 and obligations between states. They simply acknowledge
4 a shared understanding of common challenges and problems
5 that are the backdrop and context for other provisions.
6 As the court said:
7 "These provisions ..."
8 In the Paris Agreement:
9 "... do not prescribe obligations of a legally
10 binding character for the parties ..."
11 Article 18 is fundamentally different. It does not
12 merely acknowledge a policy objective. It embodies
13 a legal entitlement: sovereignty and sovereign rights
14 over energy resources. And the parties' agreement to
15 recognise that entitlement is an operative obligation.
16 The similarity between Article 18 and the provisions
17 at issue in the first two cases, Territorial Dispute and
18 Gabon v Equatorial Guinea, is therefore clear. In all
19 of these cases, the legal function of "recognise" is the
20 same: to require states to accept and act consistently
21 with the sovereign entitlement. While the subject
22 matter differs, the legal effect does not.
23 Now, the commonsense approach to this step of
24 the VCLT analysis, ordinary meaning and context, can
25 sometimes get lost in these detailed discussions where

15:26 1 we parse the words of ICJ judgments. So let me try to
2 put this in a simpler, more everyday way.

3 The difference between "recognise" in the Paris
4 Agreement and "recognise" in Article 18 and the two
5 other cases is the difference between saying,
6 "I recognise that the sky is blue", and, "I recognise
7 that you own this car, that this is your car". The
8 first is an acknowledgment of a general fact; the second
9 carries concrete, real-world legal consequences. Having
10 recognised your ownership of the car, I can't take it
11 and drive it without permission, or damage it without
12 compensation, or lease it to someone and collect rental
13 payments as if I owned it.

14 That is the situation here. The recognition in
15 Article 18 carries real consequences, including
16 liability for breach and the obligation to make
17 reparations.

18 (Slide 32) And that conclusion is reinforced by
19 the dispute resolution provision in Article 27.
20 Article 27(2) and Article 28, as displayed on the
21 screen, identify specific carve-outs from dispute
22 settlement. Where the contracting parties intended to
23 exclude matters, they did so expressly. And Article 18
24 is not among them.

25 Now, in paragraph 131 of its Reply and again this

15:27 1 morning, Armenia suggests that no express exclusion is
2 needed because Article 18 is merely interpretive. And
3 Armenia attempts to draw a comparison to Oil Platforms,
4 saying that the court in that case did not need language
5 expressly excluding Article 1 to conclude that it could
6 not ground jurisdiction. That comparison is flawed and
7 the argument fails.

8 Unlike the Treaty of Amity in that case, the ECT
9 reflects deliberate decisions by the contracting parties
10 about what falls within and what is carved out from the
11 jurisdiction of an eventual arbitral tribunal. Where
12 the contracting parties considered a provision
13 unsuitable for Article 27 arbitration, they said so
14 expressly, and provided for specific dispute mechanisms
15 in those instances. Armenia's argument would therefore
16 require the Tribunal to read into the treaty
17 an exclusion that the contracting parties chose not to
18 include.

19 And these are not the only efforts by Armenia to
20 escape the plain meaning of the clear text. It
21 maintains that Articles 18(1) and 18(3) cannot create
22 binding obligations because they merely reconfirm or
23 acknowledge pre-existing rights. Armenia is mistaken.

24 We've already seen in the Territorial Dispute case,
25 displayed back on slide 28, that a recognition that

15:29 1 confirms an existing right or entitlement can indeed be
2 a binding legal obligation.

3 This morning Armenia asserted that the resolution
4 enshrining permanent sovereignty over natural resources,
5 Resolution 1803, which is in the record as Claimant's
6 Legal Authority 2, that that resolution did nothing more
7 than reflect -- from this morning I'm quoting
8 (page 12:2-3) -- "a balancing act, a weighing of host
9 states' rights against those of foreign investors",
10 contending, in support of its restrictive reading of
11 Article 18, that the principles in this resolution did
12 not implicate an obligation as between states to respect
13 each other's sovereignty.

14 With respect, this is a novel interpretation of
15 Resolution 1803. The new international economic order,
16 to which Armenia correctly referred this morning, was
17 about the assertion of sovereignty of newly decolonised
18 and emerging states with regard to both private
19 investors and other states, which of course had
20 historically not just supported and protected their
21 investors but also directly participated in the
22 exploitation of natural resources in those new or newly
23 decolonised states.

24 And that is indeed what we see in Resolution 1803,
25 the resolution that Armenia cited, in text that it did

15:30 1 not put on the screen for you in its slide number 6.

2 We would point the Tribunal to paragraph 6 of
3 the resolution, which states that:

4 "International co-operation for the economic
5 development of developing countries, whether in the form
6 of public or private capital investments ... shall be
7 based upon respect for their sovereignty over their
8 natural wealth and resources."

9 And the final sentence of the resolution, in
10 paragraph 8, expressly provides that:

11 "... States and international organizations shall
12 strictly and conscientiously respect the sovereignty of
13 people and nations over their natural wealth and
14 resources ..."

15 Armenia also attempts to draw a distinction between
16 reaffirming and reiterating rights, on one hand, and
17 codifying rights, on the other. But that distinction
18 has no relevance to the Tribunal's interpretive exercise
19 under the Vienna Convention.

20 (Slide 34) The fact that a treaty provision
21 embodies -- let's use the term "embodies", as the ICJ
22 did in the Nicaragua case -- a pre-existing custody rule
23 does not diminish its binding character. That is plain
24 from the court's discussion in Nicaragua (CL-16,
25 paragraph 178), where it held that:

15:31 1 "... even if two norms belonging to two sources of
2 international law appear identical in content, and even
3 if the States in question are bound by these rules both
4 on the level of treaty-law and on that of customary
5 international law, these norms retain a separate
6 existence."

7 In sum, where a treaty provision embodies a rule of
8 customary international law, it is not just the
9 meaningless echo that Armenia would have the Tribunal
10 view it as. It creates an additional, independent legal
11 obligation that is binding on the parties.

12 From the plain text, I now turn to the context of
13 Article 18.

14 (Slide 35) As already explained by Mr Sullivan,
15 Article 18 is situated in Part IV of the treaty,
16 alongside other substantive inter-state commitments,
17 such as those in Articles 19, 20(1), Article 22,
18 Article 23. As such, it is clear that neither the
19 location of Article 18 nor the "Miscellaneous" heading
20 of that part of the treaty drives the analysis of
21 whether its terms impose substantive obligations.

22 (Slide 36) Armenia maintains, including in some
23 arguments this morning, that the context points in the
24 opposite direction: that Article 18 is merely a tool for
25 interpretation. In particular, it places significant

15:33 1 weight on Article 18(2), which is now on the screen
2 again. That argument, however, rests on a misreading of
3 Article 18(2) and of its relationship with
4 paragraphs (1) and (3).

5 I want to take the opportunity here to correct
6 an assertion that Armenia made this morning. This
7 morning, counsel for Armenia asserted (page 32:22-25)
8 that Azerbaijan's interpretation of paragraph 2 of
9 Article 18:

10 "... would presumably sweep into the scope of the
11 ECT any disputes between ECT parties about ownership of
12 property in the energy sector."

13 This is not correct. As always, we stick to
14 the text, which expressly provides that:

15 "... the Treaty shall in no way prejudice the rules
16 in Contracting Parties governing the system of property
17 ownership of energy resources."

18 When speaking of rules of ownership within a state,
19 therefore, Article 18(2) says the ECT will in no way
20 prejudice those rules. With regard to sovereignty and
21 sovereign rights over energy resources, resource
22 ownership as between states, Article 18(1) and 18(3) are
23 expressly on point.

24 Now, Armenia has suggested that Article 18(2) must
25 be of particular relevance because it is positioned

15:34 1 between paragraphs (1) and (3). But on review, that
2 proves nothing. The placement of paragraph (2) reflects
3 drafting logic and discussions between the parties, not
4 any supposed interpretive limitation. This is one
5 instance in which we will dip into the travaux, which
6 make this clear.

7 (Slide 37) As the Tribunal can see on the slide,
8 some contracting parties, perhaps recognising that the
9 provisions in paragraph (1) and paragraph (3) go
10 together, suggested reordering the paragraphs so that
11 these two provisions would read in sequence. But Norway
12 emphasised, again in the selection on the slide
13 (CL-115), that it could not sign the treaty unless the
14 sequence that we now see in the final text --
15 paragraphs (1), (2) and (3) -- was maintained.

16 That is, in its view, the last sentence of
17 paragraph (1) -- sovereign rights "must be exercised in
18 accordance with and subject to the rules of
19 international law" -- must be immediately followed by
20 paragraph (2)'s provision that "the Treaty shall in no
21 way prejudice the rules in Contracting Parties governing
22 the system of ... ownership", that we just looked at.
23 And then, by placement and text, it would be clear that
24 paragraph (3) and its list of rights referred back to
25 both of the preceding paragraphs.

15:35 1 As a result, and as explained in the second excerpt
2 from the travaux on the slide (CL-33), paragraph (3)
3 gives concrete expression to both the sovereign rights
4 in paragraph (1) and the domestic legal framework
5 referenced in paragraph (2). On that point,
6 the parties, I believe, are in agreement.

7 The next slide (38) shows that the chairman of this
8 legal sub-group, Mr Bamberger, about whom we have
9 already heard much, had also expressed concern that
10 Article 18(2) could override other provisions of the
11 treaty (CL-33). He warned that adjudicators would be
12 required to give it meaning even at the risk of gutting
13 other obligations. Those concerns make sense only if
14 Article 18, including Article 18(2), was understood to
15 carry independent normative force.

16 (Slide 39) Armenia argues that Article 18(2) is just
17 a without-prejudice clause. We see it in the extract
18 from their Reply (paragraph 115) on the screen, and
19 again we heard it from Armenia's counsel this morning.
20 It's just a without-prejudice clause that:

21 "... confirms the overall function of Article 18 as
22 an interpretive tool for the ECT's other provisions, []
23 not as the source of stand-alone rights and
24 obligations."

25 But that reading turns the law on its head.

15:37 1 A without-prejudice clause does not negate legal
2 obligations. Parties use without-prejudice clauses
3 precisely because both the without-prejudice clause and
4 the clause to which it refers impose substantive legal
5 consequences; otherwise there would be no need for
6 the without-prejudice clause.

7 If Armenia is right, therefore, that Article 18(2)
8 is a without-prejudice clause, that would confirm
9 Azerbaijan's reading of this provision: that Article 18
10 is not merely interpretive.

11 We see international tribunals applying precisely
12 this reading to without-prejudice clauses.

13 (Slide 40) So in the Beagle Channel Arbitration
14 (CL-152), for example, there the tribunal was asked to
15 resolve competing sovereignty claims over islands and
16 maritime boundaries. The presence of "without
17 prejudice" language did not deprive the provisions of
18 legal effect; it framed their interaction.

19 (Slide 41) The same was true in AAPL v Sri Lanka
20 (CL-155): again, "without prejudice" language was
21 understood as preserving, not negating, substantive
22 obligations.

23 (Slide 42) Armenia's remaining contextual arguments
24 fare no better. Its reliance on the contracting
25 parties' understanding appended to the final act, which

15:38 1 is reproduced on the current slide, is misplaced. That
2 passage does not address the legal effect of Article 18.
3 It simply reflects that the ECT was not intended to
4 serve as a precedent for other negotiations of other
5 instruments. It says nothing about the enforceability
6 of obligations imposed by Article 18 within the treaty
7 itself.

8 In sum, Armenia's attempt to redirect the Tribunal's
9 attention to its reading of Article 18(2) or to the
10 ECT's understanding doesn't succeed. The ordinary
11 meaning of Article 18, properly read in its context,
12 confirms that the provision imposes binding obligations
13 as a matter of treaty law between the contracting
14 parties.

15 As we heard again this morning, in its attempts to
16 escape this meaning, Armenia relies on what it presents
17 as a consistent line of jurisprudence from the
18 International Court of Justice. It invokes these cases
19 to suggest that provisions framed in general terms --
20 again, focusing on Article 18(1) and ignoring the detail
21 in Article 18(3) -- cannot give rise to jurisdiction.

22 But that argument rests on a selective reading of
23 the court's case law and ignores the distinction that
24 the court has consistently drawn between two very
25 different situations: on one hand, attempts to rely

15:39 1 a general or unrelated treaty language to bring claims
2 that fall outside the scope of the treaty and are
3 unrelated to its subject matter; and on the other hand,
4 reliance on specific treaty provisions that regulate
5 the very subject matter of the dispute. This case falls
6 squarely in the second category.

7 So let's look at Armenia's discussion of these
8 cases, beginning with Oil Platforms, on which Armenia
9 places particular weight.

10 (Slide 43) As the current slide shows, Armenia
11 repeatedly cites the court's refusal to ground
12 jurisdiction on Article I of the Treaty of Amity,
13 a provision referring to firm and enduring peace and
14 sincere friendship, and we've circled each instance of
15 "Article I" there.

16 Now, just reading these submissions, or looking at
17 slides 20-22 and 38 from Armenia's presentation this
18 morning, which again referred only to Article I of the
19 Treaty of Amity, you might be forgiven for believing
20 that this was the only provision Iran invoked and the
21 only provision analysed by the court. It was not.

22 (Slide 44) In fact, Iran relied on other provisions in
23 support of its claims, including, importantly,
24 Article X(1).

25 (Slide 45) And here, for comparison, is the text of

15:41 1 Article I and Article X(1). You've heard about
2 Article I. Article X(1) provides, in relevant part,
3 that:
4 "Between the territories of the two High Contracting
5 Parties ..."
6 The United States and Iran:
7 "... there shall be freedom of commerce and
8 navigation."
9 (Slide 46) Now, the difference in the texts of these
10 provisions would prove dispositive for the court.
11 As to Article I, the court explained (RL-37,
12 paragraph 31) that it threw light on the interpretation
13 of the other treaty provisions:
14 "... but cannot, taken in isolation, be a basis for
15 the jurisdiction of the Court."
16 So much, so far, we agree with Armenia. That is
17 in fact what the court held.
18 By contrast, however, in a portion of the decision
19 that Armenia never grapples with, and did not discuss
20 this morning, the court accepted its jurisdiction under
21 Article X(1) to entertain the claims made by the Islamic
22 Republic of Iran, and in its reasoning (paragraph 50)
23 the court held that this provision, which protected, in
24 broad terms, freedom of commerce, meant that:
25 "Any act which would impede that 'freedom' is

15:42 1 thereby prohibited."

2 To conclude otherwise, the court reasoned, would be
3 to render such freedom illusory.

4 The true lesson to draw from Oil Platforms is
5 therefore clear. It's not that broadly framed
6 provisions can never give rise to obligations. It is
7 that jurisdiction depends on whether the provision
8 invoked governs the subject matter of the claim.

9 That is precisely the case here, where Azerbaijan's
10 claims are grounded in Articles 18(1) and 18(3), which
11 set out, in even more concrete terms than the freedom of
12 commerce clause in Oil Platforms, the sovereign rights
13 of states over their energy resources.

14 (Slide 47) Armenia relies on another ICJ case
15 concerning the same Treaty of Amity, Certain Iranian
16 Assets (RL-170), to suggest that treaty provisions
17 reflecting broader principles of international law
18 cannot ground jurisdiction. That reliance is also
19 misplaced, because that is not what the court held.

20 In this case, Iran sought to challenge measures
21 taken by the United States affecting its property,
22 access to courts and freedom of commerce by invoking
23 rules of sovereign immunity. But those rules were not
24 contained in the Treaty of Amity; they arose under
25 customary international law.

15:43 1 In an attempt to incorporate those rules into the
2 treaty and ground its claim, Iran invoked several
3 different provisions: Articles IV(2) and XI(4), which
4 referred in passing to international law or the laws of
5 immunities, and Articles III(2), IV(1) and X(1), which
6 contained no express reference to the law of immunities
7 or to customary international law in general.

8 (Slide 48) And here is how the court ruled (RL-170,
9 paragraphs 50-51 and 80). The court examined each of
10 these provisions in turn, and concluded that none
11 incorporated rules of sovereign immunity. So because
12 the immunity rules on which Iran relied in that case
13 were extrinsic to the treaty and unrelated to its
14 subject matter, the court concluded that claims
15 predicated on those rules fell outside of its
16 jurisdiction under the compromissory clause.

17 (Slide 49) The same is true of another case on which
18 Armenia relies, Immunities and Criminal Proceedings
19 (RL-73). In that case, Equatorial Guinea had argued
20 that the reference to "sovereign equality and ...
21 non-intervention" in the Palermo Convention incorporated
22 the customary international rules on sovereign immunity
23 into the treaty.

24 (Slide 50) The court rejected that argument. It
25 held that the reference to sovereign equality did not

15:44 1 impose an obligation to comply with "the many rules of
2 international law which protect sovereignty in general"
3 (RL-73, paragraph 93). The court also reasoned that
4 those customary rules of sovereign immunity were
5 unrelated to the stated object and purpose of the
6 Palermo Convention, which is to prevent and combat
7 organised transnational crime.

8 (Slide 51) Finally, Armenia invokes the court's
9 decision in Allegations of Genocide (RL-97). In that
10 case between Ukraine and Russia, the court rejected
11 jurisdiction over two of Ukraine's claims, concerning
12 the legality of Russia's use of force and its
13 recognition of separatist regions, which Ukraine had
14 brought under Articles 1 and 4 of the Genocide
15 Convention.

16 Ukraine argued that Russia's conduct violated the
17 convention because it relied on allegations of genocide
18 as a pretext while in fact breaching other rules of
19 international law; in particular, the customary
20 international legal prohibition on the use of force.

21 (Slide 52) The court rejected that framing, holding that
22 the Genocide Convention does not incorporate "rules of
23 international law that are extrinsic to it" (RL-97,
24 paragraph 146); in particular, those governing the use
25 of force.

15:46 1 Again, the through-line through all these cases is
2 consistent and the reasoning is clear. The treaty could
3 not be used as a vehicle to adjudicate alleged breaches
4 of legal rules that fall outside its scope.

5 Azerbaijan's claims bear no resemblance to the
6 claims rejected in those cases. Azerbaijan does not
7 rely on general references to international law as
8 a conduit for importing external rules into the ECT, or
9 on the application of extrinsic legal norms.
10 Azerbaijan's claims are grounded directly in the
11 specific operative language of Articles 18(1) and 18(3)
12 of the ECT.

13 Madam President, members of the Tribunal, unless
14 there are questions about the provision's ordinary
15 meaning and context, I will turn next to the object and
16 purpose of the ECT.

17 PROFESSOR McRAE: I know you've put 18(1) and 18(3)
18 together, and we've heard this morning how they can be
19 looked at separately. Maybe you don't want to speculate
20 on this, but if paragraph (3) didn't exist, would you be
21 able to make the same argument about paragraph (1)?

22 MS REID: We would. It is Azerbaijan's submission that
23 the obligation is set out in Article 18(1). The purpose
24 of 18(3), as I set out, is to make crystal-clear these
25 three points, that these are in fact really operative

15:47 1 obligations. It is to remove doubt. Article 18(3)
2 doesn't create the claim; it particularises it, again in
3 its own terms.

4 So even if Article 18(3) was not in the treaty,
5 Azerbaijan would still be able to bring its claim. It's
6 our position that you read the two together in order
7 precisely to respond to the concerns and the objections
8 that Armenia has raised.

9 Our claim is grounded on both because it is clear,
10 when you look at Article 18(3): what are these sovereign
11 rights? What do they actually mean in practice, and how
12 could one breach them? You breach them by disregarding
13 and taking affirmative conduct that impugns, that
14 breaches, that compromises and that prejudices the
15 exercise of those rights by the sovereign state that is
16 entitled to exercise them.

17 PROFESSOR McRAE: Thank you.

18 MS REID: (Slide 53) So I move now to the object and purpose
19 step in the Tribunal's VCLT analysis.

20 Now, the recognition and respect of each contracting
21 party's sovereign rights over its energy resources, as
22 Mr Sullivan has set out, is a foundational element of
23 the ECT framework, and fully consistent with
24 the treaty's object and purpose.

25 Armenia's argument rests on several incorrect

15:48 1 premises, two of which are notable here: first, that
2 Azerbaijan is attempting somehow to "shoehorn" its
3 claims into a treaty allegedly confined to trade and
4 investor protection; and second, that Azerbaijan
5 contends that sovereignty itself constitutes the ECT's
6 context and purpose.

7 Azerbaijan of course advances no such position.
8 Rather, Armenia's reading of the treaty's object and
9 purpose reflects an unduly narrow and selective reading
10 of the treaty, one that cannot be reconciled with its
11 stated objectives.

12 (Slide 54) The starting point again, as we have seen
13 in the parties' papers and the arguments today, is
14 Article 2 of the treaty, which is perhaps unusual among
15 treaty provisions for actually saying: this is the
16 purpose of the treaty. As discussed earlier and in our
17 papers, what it confirms is that the ECT aims to:

18 "... establish[] a legal framework ... to promote
19 long-term cooperation in the energy [sector] ..."

20 Importantly, that formulation is broad. It does not
21 privilege a single objective; it reflects a framework
22 within which multiple interests are accommodated.

23 (Slide 55) The preamble reinforces this broader
24 understanding: while it refers to trade and investment,
25 it also emphasises wider objectives. As the slide

15:50 1 shows, the treaty seeks:

2 "... to establish the structural framework required
3 to implement the principles enunciated in the European
4 Energy Charter ..."

5 And it recognises the need:

6 "... for the most efficient exploration, production,
7 conversion, storage, transport, distribution and use of
8 energy ..."

9 Armenia's suggestion that the preamble contains
10 nothing relevant to inter-state organisations cannot be
11 reconciled with these express statements. Article 2's
12 reference, of course, to "the objectives and principles
13 of the [EEC]" is therefore particularly significant.

14 (Slide 56) As we saw with Mr Sullivan, energy
15 cooperation is to occur:

16 "Within the framework of State sovereignty and
17 sovereign rights over energy resources ..."

18 Sovereignty here is not presented as an abstract
19 political value. It is a structural premise of the
20 energy charter system, within which market development,
21 investment flows and energy security are to be pursued.

22 Armenia's emphasis on the non-binding character of
23 the European Energy Charter does not alter this
24 conclusion. Its relevance stems from the fact that the
25 ECT expressly incorporates its objectives and principles

15:51 1 in the provision, saying: this is the purpose of
2 the ECT.

3 The interpretation that Armenia presses would seek
4 to detach the promotion of investment and trade from
5 that sovereign framework within which energy cooperation
6 operates. It reduces the treaty to a narrow subset of
7 its provisions, and thereby treats Article 18 as no more
8 than an interpretive tool. That reading, we submit,
9 cannot be reconciled with the treaty's text, structure
10 or context.

11 (Slide 57) It is also confirmed by arbitral
12 practice. So in a decision that will be familiar to the
13 Tribunal, in EBL v Spain (RL-266, paragraph 683),
14 the tribunal did not treat the framework of state
15 sovereignty and sovereign rights as merely contextual,
16 or as serving only to inform the interpretation of
17 investment provisions. Instead, it held that the treaty
18 reflects:

19 "... both 'the framework of State sovereignty and
20 sovereign rights over energy resources,' and the
21 creation of a favourable climate for cross-border
22 investment [which] must be seen within the context of
23 each other, and neither objective can be said to
24 dominate the other."

25 In other words, the tribunal correctly recognised

15:52 1 that both objectives form part of the treaty's operative
2 balance. And as Azerbaijan has maintained, the treaty
3 does not privilege one objective over another, as
4 Armenia would ask this Tribunal to do by reading all
5 the provisions of the treaty, including especially
6 Article 18, through this lens of investment and trade.

7 So, properly understood, the ECT establishes
8 a comprehensive framework for energy cooperation among
9 states; and within that framework, Article 18 plays
10 a fundamental role. Interpreting Articles 18(1) and
11 18(3) as enforceable inter-state obligations is
12 therefore not an expansion of the treaty, it is the
13 interpretation that gives effect to its object and
14 purpose.

15 I will move to subsequent practice.

16 Yes, Madam President.

17 THE PRESIDENT: Let me just pause over this slide (57), and
18 perhaps for obvious reasons, since I'm the author of
19 the words in question.

20 MS REID: There's always the risk, yes.

21 THE PRESIDENT: Yes.

22 Just more generally, investor-state cases, by
23 definition, are discussing the balance of rights between
24 investors and states. And this passage, at least as
25 I understand it, is simply saying that the ECT can

15:54 1 neither be reduced to pro-investor objectives or
2 pro-state objectives; that there is a balance between
3 the rights and interests of investors and states.

4 How do you extrapolate from that proposition to
5 the broader principle that you're trying to apply this
6 case to?

7 MS REID: It is the idea -- and I always speak under the
8 control of the author of the text in front of me -- that
9 the treaty has a framework that is already, by its
10 structure and intent, balances these different
11 interests.

12 In the context of that case, the tribunal was
13 confronted with arguments that essentially sought to
14 prioritise one objective over the other. And the
15 response [of] the tribunal was that the treaty itself
16 references both of these objectives, and neither can be
17 said to dominate the other.

18 That's the key point here, because we submit that
19 that applies -- because that is about the design and
20 architecture of the treaty, and it permeates the
21 treaty -- it applies both in investor-state cases, where
22 there might be competing arguments about which is said
23 to dominate the other, and in this case, where we're
24 trying to understand: how does the ECT function as
25 a whole?

15:55 1 In our submission, the principle that is reflected
 2 here better aligns with Azerbaijan's reading of the
 3 treaty, rather than Armenia's reading of the treaty,
 4 which, with respect, for all of the extracts that we've
 5 shown on the screen from its submissions, seeks to
 6 prioritise the investor-state provisions of the treaty
 7 over the several references to state sovereignty and
 8 sovereign rights over energy resources that are in the
 9 text of the treaty and that inform its object and
 10 purpose.

11 THE PRESIDENT: Thank you.

12 MS REID: (Slide 58) I turn next to the issue of subsequent
13 practice under Article 31(3)(b) of the
14 Vienna Convention. I will give a little bit of
15 a preview: there is a question mark after that for
16 a reason.

17 Armenia's argument on state practice, on Article 18,
18 rests almost entirely on absence. It says that because
19 no state has previously brought an inter-state claim
20 under Article 18, the provision must lack legal effect.
21 But that approach again turns the interpretive exercise
22 on its head: it asks the Tribunal to infer agreement
23 from the absence of conduct.

24 But in the circumstances of this case, this alleged
25 absence of practice, this supposed silence on the part

15:56 1 of the contracting parties to the ECT, does not in fact
2 help Armenia's argument. So first, let's be clear about
3 how this step actually works in treaty interpretation.

4 (Slide 59) To have meaning for the interpretation of
5 a treaty provision, the subsequent practice must
6 establish the agreement of the parties. So much is
7 plain from the text of Article 31(3)(b) of the VCLT
8 itself.

9 (Slide 60) Moreover, that agreement, that shared
10 understanding, must be that of the parties as a whole.
11 This is the guidance from the International Law
12 Commission's commentary to the VCLT, which is now on the
13 screen (CL-9, page 222), referring to "the understanding
14 of the parties", which of course was the language in the
15 draft at the time that the commentary was prepared.

16 (Slide 61) This rule explains the court's reasoning
17 in Oil Platforms (RL-37), a decision on which Armenia
18 relies.

19 The fact that neither the United States nor Iran had
20 previously relied on Article I of the Treaty of Amity to
21 ground jurisdiction in earlier proceedings was
22 meaningful because they were the only two parties to
23 that bilateral treaty. Armenia's reliance is therefore
24 misplaced because, by contrast, the ECT is
25 a multilateral treaty and there have been no prior

15:57 1 inter-state proceedings under the ECT at all, not
2 between Azerbaijan and Armenia, and not between any
3 contracting parties.

4 A proper analogy between Oil Platforms and the
5 current dispute would require evidence that contracting
6 parties routinely bring inter-state claims under the ECT
7 but consistently refrain from invoking Article 18.
8 Armenia did not and cannot make that showing.

9 (Slide 62) Next, silence can amount to subsequent
10 practice, but where it occurs in circumstances calling
11 for a response. As the ICJ has made clear, the
12 significance of silence depends on the surrounding
13 circumstances, and in particular whether a reaction
14 would reasonably have been expected.

15 The decision in The Temple of Preah Vihear is one
16 illustration of this point. Now, in that case, the
17 court found that Thailand's silence in response to
18 a boundary map relied upon by Cambodia amounted to
19 acquiescence. But that conclusion rested on very
20 specific circumstances: a clear and formal
21 representation by one state, and a situation in which
22 a response from the other state would reasonably have
23 been expected. As the court held (RL-184, page 23):

24 "... the circumstances were such as called for some
25 reaction ... They did not do so ... and thereby must be

15:58 1 held to have acquiesced."

2 That is an example of when silence can carry legal
3 weight. There are no such equivalent circumstances
4 here. Armenia points to no representation, no course of
5 conduct and no situation that would have called for
6 a response by Azerbaijan, or indeed any other
7 contracting party. Nor does it identify any consistent
8 position on the meaning of Article 18 against which such
9 silence could be assessed.

10 Finally, courts have also found that silence
11 constitutes subsequent practice where the clarity and
12 consistency of treaty parties' conduct in not invoking
13 a provision or not acting as would be predicted by one
14 interpretation reflected that shared understanding of
15 the provision's meaning.

16 (Slide 63) In the Nuclear Weapons Advisory Opinion,
17 for example, on the screen (RL-36, paragraph 55), the
18 ICJ examined whether the prohibitions on poisoned
19 weapons under international humanitarian law applied to
20 nuclear weapons. The court found they did not because
21 states had a consistent practice of applying those
22 prohibitions to some weapons, i.e. those "whose primary,
23 or even exclusive, effect is to poison or asphyxiate".
24 That practice, the court held:

25 "... is clear, and the parties to those instruments

16:00 1 have not treated them as referring to nuclear weapons."

2 In other words, that reflected an express and
3 consistent understanding of the treaty parties over
4 a 70-year period from the 1925 protocol. It was derived
5 from actual interpretive engagement with the relevant
6 provisions.

7 As such, the court's conclusion in Nuclear Weapons
8 was grounded not in the absence of practice but
9 essentially subsequent treaty practice confirming the
10 exclusion of nuclear weapons. That practice of course
11 included the negotiation, conclusion and ratification of
12 Additional Protocol I to the Geneva Conventions, during
13 which it was made clear that the new rules did not
14 regulate or prohibit nuclear weapons.

15 (Slide 64) The same is true of Bankovic (RL-148,
16 paragraph 62). There the court considered numerous
17 extraterritorial military operations carried out by
18 states parties to the European Convention on Human
19 Rights. It found that the absence of derogations under
20 Article 15 in relation to those operations reflected
21 a shared understanding that the Convention did not apply
22 extraterritorially in that context.

23 There is simply no analogy with the present case.
24 Armenia identifies no comparable interpretive practice
25 as to Article 18 of the ECT. It cites no formal

16:01 1 statements, subsequent treaty practice or consistent
2 conduct by the contracting parties evidencing a shared
3 understanding that Articles 18(1) and 18(3) do not
4 impose substantive obligations.

5 Armenia does refer to disputes between third states
6 in which it says Article 18 was supposedly not invoked.
7 So it refers to this, for example, in paragraph 144 of
8 its Reply. But that reference doesn't save its argument
9 for at least three reasons.

10 First, it is simply not possible to know what treaty
11 provisions may have been invoked in confidential
12 negotiations, whether in the disputes cited by Armenia
13 or elsewhere. As we say in our Rejoinder at
14 paragraph 76, judicial enforcement of inter-state
15 obligations is the exception, not the rule.

16 Second, the mere fact that a dispute did not proceed
17 to arbitration does not mean that the states concerned
18 did not regard the relevant obligations as legally
19 enforceable. Countless treaty obligations are never
20 tested before a tribunal or a court, or decades pass
21 before they are tested, yet they remain fully binding
22 and capable of enforcement.

23 Third, to be relevant to an assessment of subsequent
24 practice, Armenia would need to show that the disputes
25 raised constitute practice in the application of the

16:02 1 treaty in question. Armenia cannot show that these
2 disputes involved or invoked the ECT, let alone that
3 they established some sort of common understanding of
4 the contracting parties to the ECT as to the meaning and
5 operative effects of Article 18.

6 In any event, those disputes, those third-party
7 disputes to which Armenia refers, it describes as
8 disputes over sovereignty, disputes over territorial
9 control. This present case bears no resemblance to
10 those disputes. As you have heard now from the Agent
11 for Azerbaijan and Mr Sullivan, this is not a dispute
12 over territorial sovereignty. The areas in question are
13 part of Azerbaijan's internationally recognised
14 territory, which is not contested in this proceeding.

15 So all in all, Armenia does not and cannot show that
16 this supposed absence of practice qualifies as the kind
17 of subsequent practice that is given meaning in VCLT
18 interpretations, and has given no valid basis for this
19 Tribunal to depart from the interpretation that follows
20 from the treaty's text, context and purpose.

21 (Slide 65) Absent questions on subsequent practice,
22 I will turn to the travaux.

23 At the outset, let me recall Azerbaijan's position:
24 the Tribunal does not need to go beyond the text of
25 Articles 18(1) and 18(3) to the negotiating history of

16:04 1 the treaty and those provisions. Our submission, again
2 in accordance with Article 31 of the VCLT, is that these
3 provisions established binding obligations and there is
4 no ambiguity, obscurity, absurdity or unreasonableness
5 that calls for recourse to supplementary means of
6 interpretation under Article 32.

7 If the Tribunal is nonetheless minded to consider
8 the travaux, we have two points: first, the travaux
9 confirm as Azerbaijan's interpretation of Article 18,
10 not Armenia's; and second, Armenia misreads the travaux
11 of Article 18, relying on a selective set of documents
12 that do not fully reflect what consideration
13 the contracting parties gave to the context.

14 So turning to my first argument, that the travaux
15 in fact confirm Azerbaijan's interpretation.

16 (Slide 66) Now, negotiations on the ECT began in
17 1991 and concluded in 1994. Throughout that period, and
18 as shown on the slide, across successive drafts,
19 sovereignty over natural and later energy resources was
20 consistently expressed in the kind of affirmative terms
21 that we see in the final text.

22 I'll pause here again to correct one of Armenia's
23 statements from this morning; in fact, it's not
24 a statement, it was a significant argument of theirs.

25 Its contention that Norway's views should be given

16:05 1 particular weight regarding the meaning of the entirety
2 of Article 18 because it was the proponent of that
3 article is incorrect. The text that would eventually
4 become the Article 18 that is the subject of this part
5 of our arguments was included from the beginning of
6 the negotiations and drafting, well pre-dating Norway's
7 submissions in mid-to-late 1994, three years later,
8 about the particular concerns on which Armenia has
9 focused its arguments in its papers and this morning.

10 Now, I'll have more to say about that shortly. But
11 as to all of the contracting parties' consideration of
12 the full article in negotiations and drafting, this
13 slide illustrates that continuity.

14 The first extract, from August 1991, one of the
15 earliest drafts (CL-18), provides, "The Contracting
16 Parties recognise the principle of national sovereignty
17 over natural resources", then affirms that states are
18 free to determine the use of their territories, and
19 elaborates on the scope of those sovereign rights.

20 The subsequent draft, from October 1991 (RL-190),
21 adopts the same approach, while caveating those
22 sovereign rights as being "subject to ... international
23 legal obligations", and retains the detailed description
24 of the sovereign rights concerned.

25 By January 1992 (RL-117), the terminology shifts and

16:07 1 becomes more precise, from "natural resources" to
2 "energy resources", but continues to articulate
3 sovereignty in concrete terms, with a comparable list of
4 rights.

5 And the July 1993 draft (CL-28) follows the same
6 pattern. The language is reorganised, but the core
7 elements are unchanged.

8 And of course the final text of Articles 18(1) and
9 18(3) closely reflects these earlier drafts.

10 On the slide, we have put brackets for the number of
11 the articles. As the Tribunal will recall, the
12 numbering of the articles shifted quite a bit in the
13 drafting. The precise references will be in the
14 footnote at the bottom of the slide. But just for ease
15 of discussion and the flow of argument, we have
16 bracketed "Article [18]" to make it clear we are always
17 referring to the same provision.

18 Now, that continuity, the expression of sovereignty
19 in affirmative operative language, is significant.
20 It shows that sovereignty over energy resources wasn't
21 an incidental reference. It wasn't, again, this
22 meaningless "echo". It was a consistent and deliberate
23 feature of the drafting process. And it confirms what
24 follows from the plain text of the treaty itself: that
25 it reflects a deliberate choice of the drafters,

16:08 1 expressed in terms that are capable of giving rise to
2 consequential legal effect.

3 (Slide 67) And that's in fact what the travaux say.
4 So in the first extract on the slide, an October 1991
5 note from the chairman of the relevant working group
6 (CL-20, page 4), "There was general agreement on
7 the need for" a sovereignty provision.

8 The travaux go on to show that the negotiating
9 parties intended for the clause to "make[] provision for
10 states to decide" how their territories would be used
11 for exploration and exploitation of energy resources.
12 That's what's reflected in the second extract (RL-189,
13 page 3).

14 And to dispel any doubt about the scope of rights
15 set out in Article 18(3), the travaux then describe
16 them -- in a memorandum by Mr Bamberger again,
17 the chairman of the legal sub-group -- describing those
18 rights, set out eventually in Article 18(3), as
19 "far-reaching" (CL-33, page 5).

20 Not only was the sovereignty provision important to
21 the negotiating contracting parties -- because, you
22 know, as they said, there was a need for it -- it was
23 always couched in terms that, Azerbaijan submits,
24 established binding treaty obligation between
25 the parties.

16:09 1 By contrast, nothing in the travaux conclusively
2 supports Armenia's reading that Article 18 as a whole
3 was intended to be only an interpretive tool, to
4 counterbalance investor rights, with no concrete legal
5 consequences. To support that argument, Armenia
6 cherry-picks the travaux.

7 (Slide 68) Now, this slide is for illustrative
8 purposes only. The column that is currently on the
9 screen depicts the full universe of the travaux,
10 spanning the full course of negotiations from 1991
11 through to September 1994.

12 This middle column reflects the selection of that
13 universe that has been submitted by both parties into
14 the record of this case. Armenia's arguments rest on
15 an even narrower subset, drawn primarily from the very
16 end of the negotiating process, after June 1994. And
17 this focus on post-June 1994 documents was again
18 confirmed in Armenia's presentation this morning,
19 beginning at slide 50.

20 Now, that timing is significant, because it was only
21 at that late stage that what became Article 18(2) was
22 introduced by Norway, shifting the discussions after
23 that point to that state's preoccupation about the
24 relationship between the sovereign prerogatives in
25 Article 18 and the rest of the treaty, particularly the

16:10 1 investment provisions. That is what is reflected in
2 the documents on which Armenia relies.

3 So, for another perhaps everyday explanation of what
4 we're seeing here, what Armenia has done here --
5 focusing on only one part of the record, and
6 extrapolating from that to claim that this is what the
7 travaux as a whole shows -- is like the parable of the
8 blind men and the elephant, where each man touches
9 a different part of the animal and believes that they
10 are engaging with the whole. One touches a leg and
11 says, "I'm touching a tree"; one touches the trunk and
12 says, "I'm touching a snake".

13 But that's not how recourse to the travaux works in
14 treaty interpretation. If the Tribunal reaches this
15 step in the analysis, it must look at the whole, not
16 the cherry-picking that Armenia has done.

17 So we turn to those post-June 1994 documents.

18 (Slide 69) As the first excerpt on the slide shows,
19 Norway insisted on the inclusion of that paragraph,
20 explaining that [Article] 18(2) -- and again, that is
21 going to be very important:

22 "... article [18](2) is intended to affect the
23 interpretation and application of other articles of
24 the ECT."

25 The reference to the record there is to Respondent's

16:12 1 Legal Exhibit 135.

2 Now, listening to Armenia's arguments this morning,
3 you would be forgiven for believing that Norway's
4 position was that Article 18 was intended to affect the
5 interpretation and application of other articles of the
6 ECT. This makes clear that what Norway is focused on,
7 in introducing paragraph 2, is that it says paragraph 2
8 should "affect the interpretation and application of
9 other articles of the ECT". So even the way that
10 Armenia reads "affect the interpretation", it misreads
11 it to apply to the entire article, as opposed to this
12 particular paragraph.

13 The second excerpt (CL-33) reflects the reaction to
14 Norway's proposal. Again, Mr Bamberger speaking
15 expresses concern that the provision could override or
16 affect other parts of the treaty. He noted that the
17 article -- 21(2) then, now Article 18(2) -- created
18 a potential for conflict with other provisions.

19 He then went on to refer specifically to the
20 investment provisions, and again, as we noted earlier,
21 observed that:

22 "... in close cases [this paragraph] would weigh
23 heavily against a finding that host country conduct
24 violates the ECT's investment provisions."

25 With that context in mind, Armenia's reliance on

16:13 1 this post-June 1994 travaux does not assist its case.
2 Pointing to letters with the United Kingdom and
3 Australia describing Article 18 as "stating the obvious"
4 or "otiose", or "merely declaratory" do not carry the
5 weight that Armenia attributes to them. It's in the
6 context of a debate between states about whether, why or
7 how Article 18(2) would have this effect on those
8 provisions. And in any event, statements by Australia
9 and the United Kingdom do not and cannot reflect
10 a common understanding of the contracting parties as
11 a whole.

12 So much is clear from the tribunal's award in the
13 Iron Rhine case -- this is, in the record, Claimant's
14 Legal Authority 175 -- which says that those kinds of
15 statements, cherry-picked from negotiations, simply show
16 the desire or understanding of one or two parties in
17 an extended negotiation; [they] do not actually have
18 the character of the kind of travaux that can be given
19 weight.

20 But even so, we submit that those statements must be
21 read in context, made after the introduction of 18(2),
22 and should be understood in that light.

23 The same is true of the memorandum from Mr Bamberger
24 that was extracted on Armenia's slide 56 this morning
25 (RL-143), where he makes the reference to the

16:14 1 sovereignty provision "pertain[ing] especially to
2 investment issues". The more natural reading of that
3 sentence, in context, is that Mr Bamberger meant to
4 explain to the reader that Article 18 was relevant to
5 investment issues, notwithstanding its location in
6 Part IV of the treaty rather than Part III.

7 So that explains why this post-June 1994 travaux
8 focuses so heavily on investor rights. Armenia of
9 course takes that late-stage development and projects it
10 back on to Article 18 as a whole, and treats this
11 discussion, this debate, this back-and-forth specific to
12 Article 18(2), at the very end of the negotiations, as
13 if it defined the entire provision.

14 But in any event, even on its own terms, Armenia's
15 reading of Article 18(2) does not hold. Nothing in the
16 documents shows that the sovereignty provision as
17 a whole was only intended to have this interpretive
18 effect. On the contrary, as the Tribunal will be able
19 to see from the slide (69), Norway intended for the text
20 "to affect the interpretation and application ... of the
21 [treaty]" (RL-135). Now, you cannot affect the
22 interpretation and application of a treaty if the
23 provision is as legally inert as Armenia submits.

24 I would like to make also one very limited point
25 concerning the weight that Armenia places on the

16:16 1 evolving location of eventual Article 18 in the travaux
2 and the heading of the sections in which it appeared.
3 In our submission, this carries no more weight than
4 the section headings do in the final text. They do not
5 determine whether Article 18 has binding effect. To
6 determine that, the Tribunal would look at the text, in
7 context and in light of the object and purpose.

8 Now, Armenia says that the absence of travaux
9 expressly stating that Article 18 is binding and
10 enforceable between states is fatal to Azerbaijan's
11 claims. That is incorrect. Review of the travaux is
12 not a burden of proof exercise. There's no rule that
13 a party must produce drafting history expressly saying
14 in terms: this provision is binding and arbitrable
15 between states.

16 Article 32, of course, refers to supplementary
17 means. If the travaux are inconclusive, that does not
18 help Armenia; it simply means that they do not alter the
19 result reached under Article 31.

20 This was the approach that the ICJ took in the CERD
21 case between Georgia and the Russian Federation (RL-48).
22 There the court found that the usefulness of the travaux
23 of the compromissory clause in the CERD, the critical
24 language it was looking at, was limited because there
25 was very little discussion regarding the legal question

16:17 1 at issue. Therefore, the court reached its
2 determination through the main method of ordinary
3 meaning interpretation.

4 The court did the same in 2020 in Equatorial Guinea
5 v France (RL-73), after determining that the preparatory
6 work provided it with no clear indication of what
7 constitutes "premises of the mission" under Article 1(i)
8 of the VCDR, and thus relied on the classic steps of
9 interpretation under Article 31.

10 Similarly here, even if the Tribunal accepts
11 Armenia's submission that there is nothing in the
12 travaux regarding the operative weight of Article 18,
13 all that means is that the [Tribunal] would follow the
14 court's interpretative guidance and that of the VCLT,
15 and rely upon an ordinary meaning interpreted.

16 (Slide 71) I turn finally to the last element under
17 Article 31 of the Vienna Convention: the treaty shall be
18 interpreted in good faith. We treat it last, but of
19 course in the text of the VCLT it's clear that this is
20 core and central to the task of treaty reading because
21 it appears in the very first words of Article 31.

22 It's well established that this good faith
23 requirement is not about reading a treaty expansively or
24 narrowly. Critically, what good faith does not permit
25 is an interpretation that reduces operative treaty

16:18 1 language to surplusage or renders a fundamental
2 provision legally inert.

3 As the International Law Commission's commentary --
4 in the record at Claimant's Legal Authority 9 --
5 explains at page 219:

6 "When a treaty is open to two interpretations one of
7 which does and the other which does not enable the
8 treaty to have appropriate effects, good faith and the
9 objects and purposes of the treaty demand that the
10 [first] interpretation be adopted."

11 But this is precisely what Armenia's interpretation
12 does: it urges the Tribunal to adopt a cramped reading
13 of Article 18, supported by inapposite case law and
14 highly selective accounts of the travaux.

15 As Mr Sullivan noted at the outset, Armenia also
16 invokes a parade of horrors, urging this Tribunal to
17 decline to exercise the jurisdiction it rightfully has
18 under Article 27 by invoking speculative and
19 far-reaching consequences. (Slide 73) Those concerns
20 are ill-conceived and provide no valid basis to refuse
21 to hear and resolve a dispute falling within the scope
22 of the authority conferred by the treaty. Courts and
23 tribunals have repeatedly declined to forgo jurisdiction
24 on the basis of conjectural or external circumstances
25 where the treaty requirements for jurisdiction are

16:20 1 otherwise met.

2 First, Armenia asserts that allowing Azerbaijan to
3 press forward with its Article 18 claims will
4 necessarily implicate other aspects of international
5 law, such as self-determination, that it claims falls
6 outside the scope of this Tribunal's jurisdiction. That
7 argument fails for at least two reasons.

8 First, that a defence or a counterclaim to a treaty
9 claim may arise under other parts of international law
10 is not at all unusual in international adjudication.
11 It in no way affects the Tribunal's exercise of
12 jurisdiction over the primary claim arising under the
13 treaty. That's confirmed by one of the cases on which
14 Armenia relies, and which Mr Sullivan discussed earlier.

15 (Slide 75) In Tehran Hostages (RL-30, paragraph 36),
16 the court explained that it wouldn't "decline to take
17 cognizance of one aspect of the dispute merely because
18 the dispute has other aspects, however important",
19 noting explicitly that Iran could "present its own
20 arguments ... either by way of [a] defence ... or ...
21 counter-claim". The same reasoning applies here.

22 Second, Armenia suggests -- in, for example,
23 paragraphs 138-139 of its Reply -- that hearing
24 Azerbaijan's claims would require the Tribunal to engage
25 with this broader dispute. But that is also not

16:21 1 a reason to read this treaty the way that Armenia urges.

2 Inter-state relations are often complex. States may
3 be engaged in broader disputes or in multiple disputes
4 arising from the same circumstances. That wider context
5 does not alter the Tribunal's task: whether this
6 particular dispute, as pleaded by Azerbaijan, falls
7 within the scope of the ECT.

8 Here too, Tehran Hostages dispenses with Armenia's
9 argument (RL-30, paragraph 37). The fact that a legal
10 dispute forms only one aspect of a broader political
11 dispute does not justify declining to resolve the legal
12 questions before it. To hold otherwise would, in the
13 court's words, "impose a far-reaching and unwarranted
14 restriction [on its] role ... in the peaceful settlement
15 of international disputes".

16 (Slide 76) The arbitral tribunal in South China Sea
17 reached a similar conclusion.

18 China had argued that the Philippines' claims were
19 in substance sovereignty claims, thereby falling outside
20 the tribunal's jurisdiction under the United Nations
21 Convention on the Law of the Sea (CL-190,
22 paragraph 154). The tribunal rejected that position.
23 It observed that it was "to be expected that the
24 Philippines and China would have disputes regarding
25 multiple subjects", but that did not mean that the

16:22 1 existence of a dispute over sovereignty would make
2 sovereignty the appropriate characterisation of the
3 Philippines' claims in that case.

4 The tribunal held, fully conscious of the limits of
5 the claims submitted to it, that its decisions would
6 "neither advance[] nor detract[] from either Party's
7 claims to land sovereignty in the South China Sea".
8 The same reasoning applies here.

9 (Slide 77) And in a case brought by an investor
10 under the ECT, again very familiar to the Tribunal,
11 Eskosol v Italy, the tribunal was asked to decline
12 jurisdiction because of potential enforcement issues
13 stemming from the intra-EU nature of the dispute. The
14 claim was that that complication would render its award
15 potentially unenforceable. The tribunal refused,
16 holding (RL-250, paragraph 235) that a tribunal:

17 "... should not decline to exercise that
18 jurisdiction, simply because there are certain scenarios
19 under which one or other Party might face challenges in
20 enforcement in certain jurisdictions ..."

21 On the contrary, the tribunal concluded that:

22 "[It] has a duty to exercise the jurisdiction it has
23 found to exist, and will proceed to do so with respect
24 to the issues remaining in [the] case."

25 The same reasoning applies here. Where the

16:23 1 requirements of the treaty are satisfied, as they
2 plainly are in this case, the Tribunal must exercise
3 the jurisdiction conferred upon it. To do otherwise
4 would leave Azerbaijan without a remedy for the repeated
5 intentional violations of its sovereign rights under
6 Article 18.

7 Unless there are questions from the Tribunal, this
8 concludes my presentation regarding Armenia's objections
9 under Article 18, and we would propose to take
10 the break.

11 THE PRESIDENT: Thank you.

12 Any questions for counsel?

13 Thank you. We will take our 15-minute break now, so
14 we'll see everybody back at 4.40. Thank you very much.

15 (4.24 pm)

16 (A short break)

17 (4.43 pm)

18 THE PRESIDENT: Welcome back to everybody.

19 Counsel, when you're ready, please proceed.

20 DR BLAKE: Thank you, Madam President.

21 Madam President, distinguished members of
22 the Tribunal, good afternoon. It is an honour to appear
23 before you today on behalf of the Republic of
24 Azerbaijan.

25 As my colleague Ms Reid just explained, Armenia's

16:43 1 preliminary objections with regard to Article 18 are
2 without merit. And as I will come on to explain in
3 a few minutes, the same is true of Armenia's objections
4 related to Article 7, the transit claims.

5 Fundamentally, Armenia's objections under Article 7
6 rest on a flawed premise. They proceed on the premise
7 that Azerbaijan's transit claim is wholly distinct from
8 the broader dispute concerning the violation of
9 Azerbaijan's sovereign rights over its natural resources
10 and infrastructure. Thus, Armenia contends that
11 the pipeline claim required its own separate notice,
12 a separate round of negotiations, and recourse to
13 separate conciliation and not arbitration.

14 Armenia's position is misconceived, not only because
15 it is based on inaccurate and exaggerated articulation
16 of the legal principles but also because it
17 mischaracterises the nature and scope of Azerbaijan's
18 pipeline claims.

19 At the outset, it is important to clarify where the
20 transit claims sit within the parties' broader dispute.
21 The dispute as a whole concerns Armenia's misconduct in
22 relation to a broad range of energy resources and
23 infrastructure in Azerbaijan, including the gas pipeline
24 which runs from Yevlakh to Nakhchivan.

25 (Slide 79) However, Azerbaijan's pipeline claims are

16:44 1 not simply concerned with the initial interruption of
2 the pipeline. As is clear from our pleadings, the
3 claims concern the entire stretch of the pipeline you
4 see on the map, as well as Armenia's wrongful conduct
5 with respect to the pipeline over the nearly
6 three decades of occupation.

7 That wrongful conduct includes, but is not limited
8 to, Armenia's interruption of the pipeline and the
9 resulting breach of Article 7, but also Armenia's
10 failure to re-establish supply after the initial
11 interruption; Armenia's diversion of portions of the
12 pipeline and the natural gas within it, which deprived
13 Azerbaijani citizens of the benefit of that natural
14 resource; Armenia's denial of Azerbaijan's access to
15 portions of the pipeline during the occupation; and
16 damage caused to the pipeline when Armenia allowed it to
17 deteriorate, in the absence of access on the part of
18 Azerbaijan.

19 We contend that all this conduct demonstrates that
20 Armenia breached Azerbaijan's sovereign rights over its
21 energy resources and infrastructure, contrary to the
22 terms of the ECT. More specifically, Armenia's conduct
23 breached both Article 18 and Article 7 of the ECT.

24 It is important to note that Armenia's
25 jurisdictional objections are limited in scope. They

16:46 1 concern only the transit component of the claim; that
2 is, the claims concerning disruption to the cross-border
3 movement of gas articulated in our claim as a breach of
4 Article 7. Thus, even if the Tribunal were to accept
5 Armenia's jurisdictional objections with respect to
6 Article 7, all of the remaining elements of the pipeline
7 claim, including most of the other claims you see on the
8 slide there, would remain in the case and would be
9 pursued under Article 18 of the ECT.

10 So what then is the scope of Armenia's challenge?

11 (Slide 80) Armenia does not deny that a broad
12 Article 18 dispute regarding Azerbaijan's sovereign
13 right to access, use and exploitation of natural
14 resources and infrastructure was the subject of
15 negotiations and is properly before this Tribunal today.
16 Nor does it deny that a broad sovereignty dispute
17 encompasses the claim in relation to the Y-N Pipeline.
18 What it argues, however, is that insofar as Azerbaijan
19 argues that Armenia's treatment of the pipeline also
20 amounted to a breach of Article 7, the Tribunal has no
21 jurisdiction to hear the transit-related aspects of the
22 claim because there was no dispute regarding those
23 elements.

24 In effect, Armenia seeks to splinter and
25 artificially carve out the transit elements of the

16:48 1 dispute, and attack it on jurisdictional grounds, on the
2 basis that the transit element was not the subject of
3 separate, iterative and exhaustive negotiations, or to
4 separate conciliation. However, that is not the correct
5 approach to determining questions of jurisdiction under
6 international law.

7 (Slide 81) The settled approach under international
8 law is to avoid rigid and formalistic approaches when
9 determining questions of jurisdiction and admissibility.
10 And a review of the jurisprudence, including the
11 jurisprudence on the slide, confirms that tribunals
12 widely apply a flexible view of what constitutes
13 a dispute and what suffices as proper notice of
14 a dispute.

15 And that is for good reason. A narrow and
16 artificial approach, such as the approach advanced by
17 Armenia, is wasteful, procedurally inefficient,
18 draconian in its effect, and ultimately incompatible
19 with the ECT's overriding aim of promoting the peaceful
20 settlement of disputes.

21 Armenia's approach cannot be reconciled with these
22 principles and should be rejected. Were the Tribunal to
23 accept it, the result would be to impose artificial
24 procedural barriers, to encourage inefficiency, and
25 depart from the jurisdictional approach which is

16:49 1 mandated under international law.

2 (Slide 82) Now, in the rest of the time that's
3 allotted to me, I wish to develop these points more
4 fully, and so will structure my submissions as follows.

5 First, I will explain why we say that at the time
6 Azerbaijan constituted and started these arbitration
7 proceedings, there was a dispute between the parties
8 encompassing the so-called "pipeline transit claims".

9 Second, I will show that the parties engaged in
10 a reasonable period of consultations as to the dispute
11 as a whole; and that even taking the pipeline transit
12 element in isolation, there was a reasonable
13 consultation for the purposes of the ECT.

14 And third and finally, I will address why the
15 pipeline transit claims are properly the subject of
16 arbitral proceedings under Article 27 and should not be
17 conciliated under Article 7(7), as is advanced by
18 Armenia.

19 (Slide 83) So let us now turn to Armenia's first
20 objection: the question of whether there was at all
21 material times a "dispute" encompassing the pipeline
22 transit claims.

23 Before engaging with the details of Armenia's
24 argument, it is helpful to begin with the settled
25 principles of law that should guide the Tribunal's

16:51 1 approach to jurisdiction.

2 (Slide 84) As the Tribunal will be aware, the
3 concept of a "dispute" is broadly and liberally defined
4 under international law. And you would be excused this
5 morning when you heard a presentation from counsel
6 opposite in the approach they took to the issue of
7 negotiations and dispute, because the approach of
8 counsel to look at the negotiations as if construing
9 a statute, or engaging in a VCLT exercise and parsing
10 the words in correspondence, is not the approach we see
11 of courts and tribunals when trying to understand
12 whether they are properly clothed with jurisdiction.

13 As the Permanent Court of International Justice
14 affirmed over a century ago in the Mavrommatis case
15 (RL-21, page 11):

16 "A dispute is [simply] a disagreement on a point of
17 law or fact ..."

18 It is nothing more or nothing less. And therefore
19 an enquiry as to the existence of a dispute is not
20 formulaic or formalistic. Indeed, a dispute may exist
21 as between states even where no specific treaty or
22 treaty provision has been invoked by either party, and
23 the ICJ made that clear in the Gambia v Myanmar case
24 (RL-88, paragraph 72).

25 And so it is striking that my friends on the other

16:52 1 side have placed so much emphasis on whether or not
2 Azerbaijan has invoked a treaty provision, and when they
3 did so, because the settled jurisprudence of the ICJ
4 lets us know that no state needs to invoke a treaty,
5 much less a provision of a treaty, for the tribunal to
6 find that a dispute exists.

7 The Gambia case also affirmed (RL-88, paragraph 75)
8 that while there must be an opposition of views between
9 the parties for a dispute to exist, such opposition
10 "need not ... be stated expressis verbis"; it may be
11 inferred from the parties' conduct. And I will come
12 back to that question later in my submissions.

13 (Slide 85) And finally, the Tribunal should also
14 note that a dispute is not the same as the constituent
15 claims and facts which form part of the general dispute,
16 and which may evolve and develop as the dispute goes on.
17 As the tribunal in *Vestey v Venezuela* noted (CL-138,
18 paragraph 151):

19 "A dispute ... is a broader concept ... [and] may
20 originate from different sources [and] emerge at
21 different times ..."

22 The constituent claims may emerge, but the dispute
23 remains the same. And that distinction is fundamental
24 in understanding the nature of Azerbaijan's claims. And
25 this distinction between dispute and claim explains why

16:53 1 tribunals have routinely permitted new claims to be
2 introduced in the notice of arbitration where the claim
3 falls within the general dispute between the parties.
4 (Slide 86) So we see on the slide an example from
5 Montauk v Colombia (CL-209, paragraph 463). The same
6 was done in A11Y (CL-192) and the case of Orascom
7 (CL-193), two cases noted in the footnote on the slide.
8 In each of these cases, the new claims were not the
9 subject of separate notice requirements or independent
10 negotiations, and there was no requirement for showing
11 that they give rise to a different or distinct dispute.
12 The tribunals properly assumed jurisdiction over those
13 claims in those cases because they formed a part of
14 the broader dispute before the tribunal.

15 And the question was asked this morning by
16 the President of the Tribunal. We say that this is
17 a recognised approach in international law, but also
18 a general principle: we see this also in civil procedure
19 rules in local courts, where you are able to add a new
20 claim after the institution, once it falls squarely
21 within the dispute that the court has already been
22 seised of, or the tribunal has already been seised of.

23 THE PRESIDENT: Let me just jump in there.

24 A number of the cases you cite, including Montauk
25 Metals and Orascom, and really all the cases on this

16:55 1 slide, are ICSID cases. The ICSID Rules have a specific
2 provision that addresses additional ancillary claims.
3 Obviously we're not under the ICSID Rules, but it's your
4 proposition that under the UNCITRAL Rules and the ECT,
5 the same general test about related facts would apply?

6 DR BLAKE: It is our submission that it applies.

7 But it's not merely a procedural matter. When you
8 look at Article 27(2), you have to decide whether there
9 was a dispute that was negotiated, and so you have to
10 decide what is the definition of a "dispute".

11 We say, when properly understood, the dispute in
12 this case was negotiated. We say to the extent that our
13 friends on the other side seek to quibble about the
14 transit element, that is merely a claim, and the claim
15 should not wag the dog. The dispute was properly
16 negotiated. And if you are satisfied that the transit
17 claim forms part of the wider dispute, then you have
18 satisfied yourself that there was a negotiation of the
19 wider dispute and there's no other question to be asked.

20 So it doesn't turn, in our submission, on niceties
21 of the procedural rules. It goes to that fundamental
22 question: what is the interpretation of the word
23 "dispute" in Article 27(2)?

24 So, taking stock for a moment, we see that the
25 jurisprudence speaks with a constant voice. The concept

16:56 1 of a "dispute" is approached in a broad, pragmatic and
2 non-technical manner, reflecting what the ICJ has
3 expressed as a preference for substance over procedural
4 rigidity.

5 Now, the legal principles I have just highlighted
6 make clear that the underlying premise of Armenia's
7 first objection is misconceived. Contrary to Armenia's
8 assertions, the jurisdiction of this Tribunal does not
9 turn on whether Azerbaijan can prove that during
10 the negotiations there was a separate and specific
11 difference of views regarding the transit element of
12 the pipeline claim.

13 The correct approach, we submit, is to ask whether
14 the transit element falls properly within the ambit of
15 the broad dispute that Azerbaijan originally noticed,
16 and which Armenia accepts arose prior to the institution
17 of this arbitration. And we say that the simple answer
18 to this question is: yes, the transit claim falls
19 squarely within the ambit of the parties' broader
20 dispute.

21 (Slide 87) And that is clear when one looks at the
22 Notice of Dispute which Azerbaijan first sent to Armenia
23 in October 2021 (CE-63, page 2). There the dispute is
24 defined as:

25 " [REDACTED]

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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] "

That is the dispute before the Tribunal. And the dispute, you can see, is described in very broad terms in the Notice and covers a range of energy resources and infrastructure. It was not expressed in exclusive or exhaustive terms.

Now, Azerbaijan's very next letter (CE-63, page 10) explains that the dispute encompasses a non-exhaustive list of energy resources and infrastructure, and clearly states that Armenia's breaches:

" [REDACTED]

" [REDACTED]

[REDACTED]

[REDACTED] "

Again, a broadly drawn dispute, which is the subject of negotiation and the subject of the diplomatic exchanges between the two parties.

And thus, on examination, it is clear that the transit claim is merely an articulation, a particularisation of Azerbaijan's wider complaint about how Armenia blocked access to, exploited and prevented the development of its infrastructure and

16:59 1 resources.

2 Now, the fact that the transit claim falls within
3 the ambit of the overall dispute is undeniable, given
4 the strong factual and legal nexus between that claim
5 and the overall dispute. Let us first look at the
6 factual nexus.

7 (Slide 89) As I mentioned, Azerbaijan's second
8 letter following the Notice of Dispute (CE-63, page 10)
9 described the parties' dispute as concerning
10 Azerbaijan's right to "[REDACTED]
11 [REDACTED]" natural resources and
12 infrastructure.

13 The interruption of the transit through the Y-N
14 Pipeline follows the same factual pattern. In the
15 Statement of Claim (paragraph 212), Azerbaijan's claim
16 remains that Armenia's interruption of the pipeline and
17 its failure to restore supply interfered with:

18 "... Azerbaijan's right[] to determine how to
19 exploit its gas resources and to receive financial
20 benefit from such exploitation."

21 And, as you can see on the screen (paragraph 260),
22 that:

23 "Armenia denied Nakhchivan access to the supply of
24 natural gas via the Y-N Pipeline ..."

25 So you can see the critical and operative words in

17:00 1 the letter from Azerbaijan in December 2021 in the top
 2 box; and you can see in the Statement of Claim
 3 an articulation of our pipeline claim, which echoes
 4 the themes of exploitation, illicit benefit from
 5 exploitation of other natural resources, and a lack of
 6 access to supply and to infrastructure.

 7 So we say the factual nexus between the claim and
 8 the wider dispute, as it's been articulated from the
 9 very inception of this dispute, is undeniable. So in
 10 other words, the ultimate effect of pipeline
 11 interruption, we say, is the same as it was for the
 12 other categories of energy resources: an impairment of
 13 Azerbaijan's sovereignty.

 14 Now, Armenia argues that the transit claim is wholly
 15 separate, including because the Notice of Dispute refers
 16 to "[REDACTED]".

 17 And while the Article 7 claim concerns Armenia's conduct
 18 within its territory, they draw a distinction that the
 19 acts that were complained of in the Article 7 claim are
 20 acts -- the interruption, they say, happened within
 21 Armenian territory, but the rest of the dispute concerns
 22 acts and offences that happened on Azerbaijan's
 23 territory. But we say, with respect, that distinction
 24 is a facile one.

 25 The initial interruption of the pipeline came about

17:02 1 due to actions in Armenia, allegedly. We do not know,
 2 because the facts are yet to emerge, and that's a big
 3 theme here. It is for Armenia to give an account of who
 4 and when and what and where, because it is its claim and
 5 its conduct, and that's what we imagine would emerge at
 6 the merits phase. But as I explained, the Article 7
 7 claim also covers Armenia's subsequent conduct,
 8 including the failure to restore supply and the
 9 diversion of the pipeline within Azerbaijan's sovereign
 10 territory.

 11 So the pipeline claim and the transit element
 12 doesn't only apply or cover the initial interruption.
 13 If you look at Article 7, there are also obligations in
 14 relation to the redirection of pipeline and other
 15 infrastructure. And we say that the pipeline transit
 16 claim covers not only the initial interruption, which
 17 may or may not have happened on Armenia's territory, but
 18 also acts which undoubtedly happened on Azerbaijan's
 19 territory.

 20 And so that distinction, that territorial
 21 distinction that is being sought to be drawn, we say is
 22 not sustainable.

 23 In any event, we say the impact of the interruption
 24 was felt within Azerbaijani territory. That is a common
 25 thread in all the claims: adverse impact on the energy

17:03 1 resources and the infrastructure in Azerbaijan. That is
2 an undeniable factual link, and the strongest link, we
3 say, and the most important link that the Tribunal needs
4 to consider.

5 Similarly, a strong legal nexus exists between the
6 Article 7 claim and the wider dispute. Both the transit
7 claim and the broader sovereignty dispute are advanced
8 under the same body of law: the provisions of the Energy
9 Charter Treaty.

10 Now, Armenia argues that the claims are wholly
11 unconnected because the broader dispute concerns
12 sovereignty over resources and infrastructure, and
13 Article 7 concerns what Armenia describes as a "trade
14 provision". Well, that is, we say, another facile
15 distinction.

16 Clearly the claims are closely connected, as they
17 arise from the same treaty, and all the claims fall
18 under Article 18 of the treaty, as I showed before. And
19 though the transit claims also engage Article 7, that
20 does not make it a separate dispute altogether. All the
21 claims ultimately concern Armenia's obligation to
22 facilitate and not to disrupt Azerbaijan's access to and
23 enjoyment of its resources and infrastructure.

24 Both the Article 7 and Article 18 claims are based,
25 therefore, on the same general legal theory, even though

17:05 1 not on the same legal provision. And as I showed
2 earlier, the ICJ has urged against being obsessed about
3 the niceties of the legal provisions which have been
4 pleaded. In determining whether there is a dispute,
5 you should step back and ask yourself whether this
6 claim, generally articulated, falls within the ambit of
7 the dispute which both sides agree [is] properly before
8 you.

9 Now, contrary to the approach endorsed in the
10 authorities, Armenia has sought to salami-slice the
11 dispute in an effort to generate a basis for challenging
12 jurisdiction. And in seeking to justify that approach,
13 it relies on decisions of the ICJ, including the
14 decision in *Belgium v Senegal* (RL-51) and in *Nicaragua*
15 *v Colombia* (RL-67). In both cases, the ICJ upheld
16 jurisdiction over some claims, but held that there was
17 no dispute as between the parties on certain other
18 claims.

19 However, these decisions do not in any way negate
20 the well-established principle endorsed by the ICJ, and
21 a host of other tribunals, that the concept of a dispute
22 is to be approached in a broad and flexible and
23 non-technical approach. The decisions that Armenia has
24 cited turn on their own facts and are distinguishable
25 from the case at hand.

17:06 1 (Slide 90) Let us take Belgium v Senegal (RL-51).
2 The court held in that case that the parties had
3 exchanged views on alleged breaches under the Convention
4 Against Torture, and therefore there was a dispute under
5 that treaty. However, that exchange of views did not
6 pertain to obligations to prosecute war crimes under
7 customary international law, and there was therefore no
8 dispute regarding that international war crimes claim.
9 There was therefore a weak factual nexus between the
10 claims, as the new claim pertained to war crimes which
11 were distinct from the acts which were at issue under
12 the Torture Convention.

13 The court also emphasised the lack of a legal nexus
14 between the claims: whereas the dispute arose under the
15 Torture Convention, the new putative claim arose under
16 an entirely separate body of law, international
17 humanitarian law.

18 In Nicaragua v Colombia (RL-67), the court held that
19 there was a dispute concerning sovereign rights over
20 maritime zones. However, the court found that there was
21 no dispute regarding Colombia's alleged use of force.
22 Again, the court placed particular emphasis on the lack
23 of a legal nexus between the claims. Whereas the
24 dispute arose with respect to the Law of the Sea,
25 i.e. maritime zones, the new putative claim arose under

17:07 1 an entirely different body of law, the rules governing
2 the use of force under the United Nations Charter.

3 The court also took account of the fact that before
4 initiating the claim, Nicaragua had expressly stated
5 that relations between the parties were calm and stable,
6 and that affirmation negated the existence of a dispute
7 on the issue of the use of force.

8 So you can see when you look closely at those cases,
9 the ICJ's approach, why it may have looked at these new
10 claims and drawn the conclusion that there was no
11 dispute between them, is clear. In the case of
12 Colombia, it had negated the existence of any use of
13 force before the proceedings had started, so it could
14 not have maintained a credible case that there was
15 a dispute on the use of force, having made that
16 representation internationally. And in Belgium
17 v Senegal, we see legal distinctions, not sharing
18 the same body of law, and a weak factual nexus.

19 That is the very opposite here. Unlike the case in
20 Belgium v Senegal and Nicaragua v Colombia, the transit
21 claim here arises from the same factual matrix and under
22 the same body of law. It is simply an element of the
23 larger dispute over which the Tribunal has jurisdiction.
24 And indeed, to the extent that Armenia accepts that the
25 Tribunal has competence over the broader dispute, it

17:09 1 must necessarily accept that the Tribunal's competence
 2 to hear the transit claims in relation to the pipeline
 3 are part of that dispute, and therefore the Tribunal has
 4 jurisdiction over that dispute.

 5 But we say that even if the Tribunal were to agree
 6 with Armenia that the existence of a dispute ought to be
 7 examined with respect to the transit claims in
 8 isolation, the clear conclusion to be drawn from the
 9 evidence is that at all relevant times there was
10 a dispute with respect to the transit claim.

11 First, it is clear from the record of negotiations
12 that at no point did Armenia accept Azerbaijan's
13 position on the transit claim. Nor can it be said that
14 Armenia was neutral towards the claim, as was arguably
15 the position of the United States in the case of
16 Ecuador v United States. All objective indications are
17 that Armenia did not accept even the premise of the
18 claim. It challenged what it called a purported breach
19 of Article 7, and intended to object to it fully, as it
20 eventually did in these proceedings.

21 Second, Armenia's opposition to the pipeline claim,
22 we say, is evident from and may properly be inferred
23 from its conduct during the course of the negotiations.
24 What was Armenia's attitude to the claim? It did not
25 affirmatively respond to the claims. While Armenia was

17:10 1 not technically silent, it deployed what commentators
2 have referred to as "non-responsive speech", where
3 a state refuses to engage with the substance of a claim
4 put to it, instead offering evasive, irrelevant or
5 formal replies that do not address the substance of the
6 dispute.

7 (Slide 91) Armenia's non-responsive speech is
8 a critical factor here because, as the ICJ made clear in
9 Georgia v Russian Federation (RL-48, paragraph 30):

10 "... the existence of a dispute may be inferred from
11 the failure of a State to respond to a claim in
12 circumstances where a response is called for."

13 Azerbaijan articulated a serious claim: it claimed
14 and alleged that Armenia breached its international
15 obligations under Articles 7 and 18 of the ECT. That
16 allegation, that claim, required a response. All
17 Armenia provided was tactical silence and evasion. But
18 looking beyond the obfuscation, it is clear that Armenia
19 did not accept Azerbaijan's claim, and the claim was
20 effectively opposed. There is no other plausible reason
21 for Armenia's non-responsiveness.

22 Armenia has suggested that it did not have enough
23 information to respond, but that is not a credible
24 argument. Armenia has adopted an extreme position,
25 including an argument that it could not be expected to

17:12 1 respond because Azerbaijan did not identify the person
2 who interrupted the pipeline, or the exact location or
3 the exact date of the interruption. But those are
4 matters of proof, to be established after disclosure and
5 interrogation of evidence at a merits hearing, not the
6 precondition for engagement with a party that has made
7 a credible allegation of a breach of international law.

8 (Slide 92) The jurisprudence is clear on this
9 matter: all that Azerbaijan was required to do was to
10 identify "the subject-matter of the treaty with
11 sufficient clarity" so that Armenia could "identify that
12 there is, or may be, a dispute" (RL-48, paragraph 30).

13 We note this morning that Ms Macdonald suggested
14 that there was or may have been a disagreement on
15 the standard of sufficient clarity, and there isn't.
16 Azerbaijan agrees the standard is sufficient clarity,
17 a standard which we say was clearly met in this case.

18 Now, Armenia also contends that no dispute arose in
19 relation to Article 7 because the parties' conduct in
20 relation to the transit claim was qualitatively
21 different from their posture with respect to
22 negotiations around the Article 18 claim. However, that
23 distinction cannot be sustained. If Armenia accepts, as
24 it does, that there is a dispute regarding Azerbaijan's
25 sovereignty over its energy resources, and the pipeline

17:13 1 and other infrastructure claims are covered under
2 Article 18, then it must, as a matter of principle and
3 logic, accept that there is a dispute regarding
4 the pipeline transit claim.

5 That is because, when one looks beyond the noise,
6 Armenia's response to Article 7 was fundamentally no
7 different than its response to the wider sovereignty
8 dispute which was being negotiated. Armenia never
9 affirmatively opposed any of the claims during the
10 negotiations. It asked questions, sure. It demanded
11 evidence, true. But it did not ever affirmatively say,
12 "I oppose your Article 18 claim".

13 (Slide 93) What the record shows is that throughout
14 the negotiations, Armenia engaged in a consistent
15 pattern of conduct in indefinitely putting off any
16 resolution of the claim.

17 We start with Azerbaijan's Notice of Dispute under
18 the ECT (CE-63, page 2), which we saw before. In
19 response to that notice, Armenia called the dispute
20 a "[REDACTED]" one, and demanded particulars of
21 the claim (CE-63, page 6).

22 Azerbaijan provided particulars in response to
23 Armenia's demand. We see, for example, that Azerbaijan
24 specified the energy resources and infrastructure it had
25 so far identified, including, but not limited to,

17:15 1 hydropower, coal and geothermal resources (CE-63,
2 page 10).

3 Still Armenia did not say affirmatively, "I oppose
4 your claims". Instead, it repeated the demand for even
5 further particulars of the claim (CE-63, page 61).

6 (Slide 94) This pattern only continued. Here we
7 have Azerbaijan elaborating on its infrastructure claims
8 on the screen (CE-63, page 82). It described how
9 Armenia blocked access to and exploited the
10 Yevlakh-Nakhchivan Pipeline, and noted that this would
11 constitute a breach of Article 18 and, in the
12 alternative, Article 7.

13 Armenia's response was essentially no different than
14 before: it demanded more particulars (CE-63, page 86).
15 It also asserted that there was an entirely separate
16 purported dispute, purportedly entailing "[REDACTED]
17 [REDACTED]" -- those were its words -- and suggested that
18 the parties would need to restart negotiations,
19 modalities and all, to address the Article 7 claim
20 separately.

21 In response, Azerbaijan made clear that the transit
22 claim is not a separate dispute but arises from the same
23 conduct, over the same period, under the same treaty
24 breaches as the claims already identified (CE-63,
25 page 88).

17:16 1 Azerbaijan recognised Armenia's letter for what it
2 was: a continuation of Armenia's prevaricating and their
3 delay. And so it signalled to Armenia that the
4 negotiations had become futile and that Azerbaijan would
5 proceed to arbitration.

6 The fact that Azerbaijan did not expressly invoke
7 Article 7 at an earlier stage of the negotiation does
8 not mean that there was no dispute regarding the
9 pipeline or transit through it. As I mentioned earlier,
10 the ICJ in *Gambia v Myanmar* (RL-88) has made clear:
11 a specific reference to a treaty or its provision is not
12 required for establishing a dispute.

13 Now, looking at the substance of Armenia's case,
14 what it is really arguing is that there was no dispute,
15 and that the Tribunal should not exercise jurisdiction
16 because Azerbaijan did not wait around in the vain hope
17 that Armenia would state affirmatively at some point
18 that it opposed one of the claims. However, that
19 approach finds no support in the law of jurisdiction,
20 and the Tribunal should be cautious not to condone such
21 an approach, not least because of the deleterious
22 consequences of such an approach.

23 (Slide 95) As the ICJ noted in *Gambia v Myanmar*
24 (RL-88, paragraph 71), which is on the screen, the law
25 "does not require that the respondent must expressly

17:18 1 oppose the claims of the applicant", because:

2 "If that were the case, a respondent could prevent
3 a finding that a dispute exists by remaining silent in
4 the face of an applicant's legal claims."

5 In effect, if Armenia's position is accepted,
6 we give respondent states an effective veto.

7 Members of the Tribunal, that is exactly what
8 Armenia is seeking to do today: to prevent a finding
9 that a dispute exists by seeking to capitalise on its
10 own strategic refusal to express a position one way or
11 another during negotiations, and to reserve in its
12 arsenal all of its actual objections, so that it can say
13 in this arbitration that there was no dispute;
14 essentially, to engage in performative negotiations with
15 the goal of indefinitely putting off liability. That is
16 what some legal scholars, and the experts on the issue
17 of silence in international law, have expressed as "the
18 tactical 'weaponization' of [state] silence" (CL-210,
19 page 188).

20 The Tribunal can and should reject such an attempt
21 in this case. Instead, it should find that the
22 evidence, taken as a whole, confirms that there was, at
23 the relevant time, a dispute with respect to the
24 pipeline claims.

25 (Slide 96) Now, finally, we submit that

17:19 1 an examination of Armenia's conduct following the
2 commencement of the arbitration also confirms that
3 it opposed the pipeline transit claim. And as the ICJ
4 affirmed in *Marshall Islands v United Kingdom* (RL-70,
5 paragraph 43), which is on the screen, a tribunal may
6 examine the parties' conduct subsequent to the
7 initiation of proceedings to confirm whether a dispute
8 existed.

9 Now, the Tribunal may recall that Armenia also cited
10 this paragraph today. But to be clear, the court's
11 decision was that the subsequent conduct cannot
12 establish the existence of the dispute but it certainly
13 can serve to confirm, it can throw light on the evidence
14 of the negotiations and the attitude and dispositions of
15 the party before the claim was started, to confirm that
16 there was a dispute all along.

17 (Slide 97) It is clear from Armenia's written
18 submission that it opposes multiple dimensions of the
19 transit claim. This is the subsequent conduct. We have
20 seen their pleadings now, and it is clear that they have
21 opposed multiple dimensions of the transit claim, given
22 their thoroughgoing rebuttals in their submissions.

23 For example, in its [Request for] Bifurcation
24 (paragraph 5), Armenia asserts that the pipeline claims
25 are "temporally and procedural defective", and that

17:20 1 "they are substantively unfounded". In its Memorial
2 (paragraph 18), Armenia suggests that the underlying
3 factual allegations in the claim are not accurate. And
4 you can then see another reference that the transit
5 claim would be "all ... barred by the essential security
6 interests exception" (Reply, footnote 369).

7 So Armenia's objections are wide-ranging and
8 unequivocal, spanning issues of jurisdiction, of factual
9 substantiation and of substantive law. The breadth of
10 the opposition cannot have emerged overnight;
11 it necessarily reflects the positions it held, at the
12 very least, before the arbitration was initiated.

13 And against that background, Armenia's suggestion
14 that it was indifferent to the pipeline claim is simply
15 not credible. Its conduct during the negotiations,
16 characterised by silence and reflection, was not
17 neutrality but a tactical posture in the face of
18 a dispute it already contested.

19 Its subsequent objections make this explicit.
20 They confirm that Armenia opposed the entirety of
21 Azerbaijan's case, including the transit claim, and that
22 the dispute was firmly crystallised by the time
23 the arbitration was commenced.

24 Now, those are my submissions on the first issue
25 I'm addressing, the issue of "dispute". I don't know if

17:22 1 the Tribunal members have any questions before I move to
2 the next phase of my submissions.

3 THE PRESIDENT: Please proceed.

4 DR BLAKE: Thank you.

5 (Slide 98) I now want to turn to the second
6 objection concerning the pipeline transit claim: the
7 complaint that the transit claim was not properly
8 negotiated. Now, this objection is also premised on
9 a rigid, unduly formalistic and distorted approach,
10 we say, to the dispute resolution provisions of the ECT.

11 (Slide 99) Let us start by looking at Article 27,
12 and what it actually requires in relation to
13 negotiations.

14 You will see, members of the Tribunal, the treaty
15 language here is permissive. Parties are required to
16 "endeavour" to settle their dispute. What is required,
17 therefore, is that the parties make an attempt at
18 settlement. There is no requirement that those efforts
19 take one form or another, that they yield specific
20 results or that they last for a certain duration.

21 If, having attempted diplomatic settlement, the
22 dispute is not settled "within a reasonable period of
23 time", then either party may initiate arbitration. And
24 what constitutes "a reasonable period of time" for the
25 purposes of Article 27 will depend on the circumstances

17:23 1 of each case, and that is because the drafters of the
2 ECT considered but rejected proposals to prescribe
3 a specific time period for negotiations under
4 Article 27.

5 (Slide 100) During the treaty negotiations, the
6 drafters considered a consultation period of six months
7 (CL-158), and then a period of 180 days (CL-159), and
8 finally a period of 60 days (CL-161). Ultimately,
9 they abandoned those proposals and instead adopted
10 a permissive standard: "a reasonable period of time".

11 (Slide 101) And that is in contrast, you will note,
12 with the approach in Article 26, which governs
13 investment treaty arbitration. In that provision, the
14 period prescribed for amicable settlement is a minimum
15 of three months.

16 But the drafters took the deliberate decision not to
17 adopt this approach to the inter-state context, no doubt
18 recognising that inter-state disputes vary greatly from
19 case to case. Indeed, the state of diplomatic relations
20 between the disputing states and other complex factors
21 will determine whether it is reasonable or feasible for
22 the parties to engage in diplomatic consultations for
23 a prolonged period.

24 (Slide 102) The vagaries of diplomatic negotiations
25 were recognised over a century ago by the Permanent

17:25 1 Court of International Justice in the Mavrommatis case
2 (RL-21). There, Great Britain had complained (page 2)
3 about "the very small number and brevity of the ...
4 communications" exchanged between it in negotiations
5 with Greece. But the Permanent Court noted (page 13)
6 that:

7 "... the question of the ... chances of success of
8 diplomatic negotiations is essentially a relative one.
9 Negotiations do not of necessity always presuppose
10 a more or less lengthy series of notes and dispatches."

11 Everything turns on the context.

12 So what then is the context here? Azerbaijan's ECT
13 claim arose against the backdrop of a protracted and
14 deeply entrenched conflict between two parties: two
15 wars, separated by nearly 30 years of occupation.
16 It was in the immediate aftermath of that conflict that
17 these negotiations took place.

18 Now, I must pause here to respond to a point raised
19 this morning by Ms Macdonald. The Tribunal will recall
20 that she showed a timeline of the negotiations and
21 claimed that there was an armed attack on Armenian
22 territory in September 2022.

23 Now, the position of the parties on these events
24 [is] a matter of public record. For the record in this
25 case, Azerbaijan denies the characterisation and refers

17:26 1 the Tribunal to those public statements. In any event,
2 it is not clear for what purpose Armenia has raised
3 those events: they are not at all necessary to the
4 Tribunal's determination.

5 Now, returning to the relevant context, we note here
6 that these were not the only negotiations at the time.
7 The ECT negotiations were not the only negotiations.
8 The parties were advancing parallel claims under other
9 treaties; claims which, in due course, also proceeded to
10 arbitral and judicial mechanism, reflecting the broader
11 breakdown in diplomatic engagement.

12 So to this day, the parties have not established
13 diplomatic relations. This is not a situation involving
14 cooperative states seeking to resolve a discreet
15 disagreement against a backdrop of normal diplomatic
16 relations. The prospect of negotiation and having
17 a negotiated result was, from the outset, limited.

18 In that context, the Tribunal should be slow to
19 conclude that further negotiations would have yielded
20 a different result. The reality is that the dispute had
21 reached the point where recourse to arbitration was both
22 appropriate and inevitable.

23 (Slide 103) In sum, Armenia has argued that
24 the Tribunal should find that Article 27 prescribes
25 a minimum duration for negotiation; in their

17:28 1 submissions, they say years or months. That submission
2 is at odds with the text of the ECT, an unprincipled
3 attempt to write words into the treaty and to impose
4 an arbitrary restriction on arbitration. Article 27
5 imposes no set requirement. What constitutes
6 a reasonable period depends, as I have said, on
7 the factual circumstances.

8 And a review of the record and the circumstances of
9 this case shows that the period of consultation here was
10 eminently reasonable. The question of "reasonable" must
11 be evaluated, we say, across the entire period of the
12 negotiations for the dispute as a whole. The assessment
13 is not conducted on a claim-by-claim basis.

14 Article 27 says, as you can see on the screen:

15 "If a dispute has not been settled ... within
16 a reasonable period of time, either party thereto
17 may ... submit the matter to [arbitration] ..."

18 It does not say, "If a claim is not settled";
19 it refers to "a dispute". And I refer the Tribunal back
20 to my reference to *Vestey v Venezuela* (CL-138), and the
21 distinction sensibly made there between a broader
22 dispute and constituent facts, claims and other elements
23 of the dispute.

24 Now, Armenia has not raised a negotiation objection
25 in relation to the dispute as a whole, and therefore

17:29 1 concedes that the 16 months of exchanges and
2 negotiations was reasonable under the treaty. Given
3 that concession, we submit that the Tribunal is not
4 required to conduct a further enquiry into the duration
5 of the transit claim negotiations.

6 As we have already established, reasonableness is
7 not evaluated claim by claim. But even if the Tribunal
8 were minded to look at the portion of those negotiations
9 which relate to the transit claim, the two months
10 Azerbaijan waited after addressing that claim is
11 reasonable, given the evident futility of the continued
12 consultation by that point.

13 (Slide 104) As the ICJ noted in *Belgium v Senegal*
14 (RL-51, paragraph 59), negotiations will be futile where
15 "negotiations did not make any progress towards
16 resolving the dispute" and "There was no change in the
17 respective positions of the Parties".

18 The court made a similar observation in the
19 *South West Africa Case* (CL-8, page 30), that
20 negotiations will be futile where:

21 "... a deadlock was reached in the collective
22 negotiations in the past and ... written pleadings and
23 oral arguments ... in the present proceedings ...
24 confirmed the continuance of this deadlock ..."

25 That was exactly the case here: the 16 months of

17:30 1 negotiations did not make any progress towards resolving
2 the dispute. It was no different after Azerbaijan
3 expressly articulated the pipeline claim under
4 Article 7. And the deadlock between the parties
5 continues to the present proceedings.

6 As I described earlier, throughout the negotiations,
7 Armenia's approach was to delay any progress towards
8 arbitration. It refused to engage substantively with
9 Azerbaijan's claim, and raised protracted arguments
10 about procedural modalities of negotiations. But
11 Armenia's main dilatory tactic was to demand more
12 information at every turn. Even when Azerbaijan
13 provided relevant information, Armenia failed to engage
14 substantively; it simply demanded more.

15 And so, over a year into the unfruitful
16 negotiations, when Azerbaijan regarded particulars
17 regarding the transit claim, Armenia continued in the
18 same vein: it responded as it had done at the outset by
19 requesting further information. By that stage, however,
20 the pattern was clear: this was a delaying tactic and
21 it had become a futile endeavour to persist in.

22 The reasonable period had elapsed without
23 settlement: sixteen months of exchanges, thirty letters,
24 three meetings. And given Armenia's reactions to the
25 Article 7 claim, it was reasonable in the circumstances

17:32 1 for Azerbaijan to begin arbitration rather than persist
2 in futility.

3 And as we have described in detail in our written
4 submissions, there are many cases where notice periods
5 well below the sixteen months in this case, and even
6 below the two months that Armenia ascribes to the
7 transit claim, were deemed to be reasonable.

8 (Slide 105) On the slide, we have examples of some
9 of those cases, along with respective notice periods:
10 zero days (CL-116); two days (CL-121); eleven days
11 (CL-123); seventeen days (CL-118) in some cases, cases
12 cited by Azerbaijan; and periods of two months (RL-169);
13 four months (RL-162); and [six] months (CL-126).

14 Now, this morning, counsel for the other side said
15 that there was no inter-state case that we cited which
16 had a shorter negotiation period than two months. But
17 here on the slide, we point in particular to the ICJ
18 case Qatar v United Arab Emirates (RL-169).

19 Compared to those cases on the slide, the sixteen
20 months here, and even the two months that Armenia
21 insists on pushing, were clearly reasonable.

22 (Slide 106) Now, Armenia nevertheless argues that
23 it was unreasonable for Azerbaijan to initiate
24 arbitration after sixteen months. It asserts that the
25 parties could have possibly "narrowed" the transit

17:33 1 claim, if only Azerbaijan had given it a chance.

2 This is very carefully chosen language, members of
3 the Tribunal. Armenia does not say that it would have
4 settled the transit claim if only it were given more
5 time; it merely suggests that it might have offered
6 observations to "narrow[]" them. With respect, that is
7 no more than self-serving speculation from Armenia.

8 Clearly, the negotiations failed. And given the
9 nature of the negotiations, and the lack of any concrete
10 efforts on the Armenian side to reach a settlement,
11 there is no principled basis to now shut Armenia out of
12 a mechanism designed to have it vindicate its legal
13 rights under the ECT.

14 (Slide 107) I now propose to turn to my final set of
15 submissions regarding conciliation.

16 So I'm going to address the argument that the
17 transit claims should have been conciliated under
18 Article 7(7) of the treaty. This is yet another
19 objection that is based on a very overly technical and
20 formalistic approach to the ECT, one we say is not borne
21 out by the text or by the jurisprudence on jurisdiction
22 and admissibility.

23 (Slide 108) But before turning to the argument, it's
24 important for us to delineate the issues that are
25 actually in dispute. This is made a little bit

17:35 1 difficult by Armenia's shifting case, because while
2 Armenia, in its Memorial (paragraph 173), states that
3 conciliation is a "mandatory and exclusive" remedy for
4 transit claims, in fact Armenia is not contending, as we
5 understand it, that transit disputes, such as the one we
6 have here, cannot be submitted in any circumstances to
7 Arbitration under Article 27 of the ECT.

8 So we're left to ask: what does exclusivity mean?

9 When one looks at Armenia's Reply, Armenia retreats
10 from its earlier position, it seems, on exclusivity and
11 conciliation. First (paragraph 269), Armenia concedes
12 that a transit claim may be submitted to arbitration in
13 the event conciliation fails, so after conciliation.
14 But it also concedes that you can also submit a transit
15 dispute to arbitration first; for example, to determine
16 whether the dispute can be conciliated at all
17 (paragraph 307).

18 Taking these concessions, Armenia cannot then
19 sensibly maintain that conciliation is mandatory or
20 exclusive. Armenia seems to be tying itself in knots to
21 avoid the arbitration.

22 In reality, its conciliation objections do not come
23 down to issues of exclusivity, but seem to be about the
24 sequencing of dispute mechanisms under the ECT. Armenia
25 is arguing that this Tribunal should decline to hear the

17:37 1 transit claim here because the parties were obliged to
2 first pursue non-binding conciliation and then
3 arbitrate, if necessary, under Article 27. In
4 substance, this is an admissibility objection, one about
5 timing, and not about the Tribunal's competence to hear
6 the transit claim about the application and
7 interpretation of the ECT.

8 But regardless of whether the Tribunal approaches
9 this as an issue of admissibility or an issue of
10 jurisdiction, Armenia's objections fail. Ultimately,
11 its case is unsustainable on the language and the
12 context of the ECT, and it would lead to absurd and
13 undesirable consequences involving splintering what is
14 in reality a single dispute into parallel and
15 potentially conflicting proceedings.

16 Instead, the Tribunal should adopt a harmonious
17 interpretation of the ECT. Contrary to Armenia's
18 position, there is no normative conflict between
19 the conciliation provisions in Article 7(7) and the
20 arbitration provisions in Article 27. They operate as
21 a set of complementary and co-equal mechanisms where
22 disputes qualify for both. It follows that Azerbaijan
23 was not required to fragment its dispute across
24 different fora, and the Tribunal is properly seised of
25 the claims, including the Article 7 claim.

17:38 1 (Slide 109) So to determine which dispute resolution
2 mechanism applies to the transit claims in this case,
3 it is necessary to consider what each of the relevant
4 mechanisms says and how they operate.

5 Under Article 27, disputes "concerning the
6 application or interpretation of [the ECT]" may be
7 submitted to inter-state arbitration. And under
8 Article 7, a dispute arising out of transit through
9 a contracting party may be referred for conciliation.

10 It is important to note that these two provisions
11 capture different kinds of disputes in general. The
12 conciliation procedure covers a broad range of transit
13 disputes, including, for example, contractual disputes,
14 tariff disputes, pricing disputes, regulatory disputes
15 on the domestic law of a state, disputes between states
16 and disputes between entities that are non-states.

17 It's important -- the Article 7 dispute resolution
18 mechanism, the conciliation, is not limited to
19 inter-state; it covers any aspect of a transit claim.
20 And you will see, when one looks at Article 7, a lot of
21 references to contracts. Because what was envisaged in
22 crafting this dispute resolution was not a classic
23 inter-state dispute dealing with treaty interpretation;
24 it was a whole range of matters that have to do with
25 transit, including gas price review and contracts and

17:40 1 tariffs.

2 And so it is important to note -- and I'll come back
3 to this -- that Article 7 conciliation is not really
4 tailor-made for the kind of dispute that we have here,
5 but covers a broad range. And you can look in Hobér and
6 in the other commentaries; we're happy to provide
7 references to the Tribunal, should it require them.

8 Article 7 is also made to be relatively swift, and
9 it is of course a non-binding mechanism. The
10 conciliator issues a non-binding recommendation, and
11 the parties may choose whether or not they decide to
12 accept it. On the other hand, Article 27 arbitration is
13 dedicated to the broad range of inter-state disputes
14 concerning the interpretation and application of
15 the treaty, and of course the goal there is binding
16 adjudication.

17 The issue before this Tribunal is what happens when,
18 in the narrow circumstances as we have here, there is
19 a dispute which qualifies for both. And it's really
20 a narrow window. What happens when a dispute qualifies
21 for both? A dispute, for example, between two states,
22 an aspect of which concerns transit through one of the
23 two states, and which requires the interpretation and
24 application of provisions of the ECT.

25 In such a case, the analysis is no different than in

17:41 1 other cases where there are multiple agreed mechanisms.
2 The Tribunal should look at the language of the
3 agreements, and if there is no indication that one was
4 intended to override the other in cases of overlap, then
5 you must construe both mechanisms as being available in
6 parallel.

7 Now, Armenia argues, however, that conciliation is
8 "mandatory and exclusive", whatever "exclusive" means to
9 them, that it's a mandatory and exclusive remedy for the
10 transit element of the claim, and the Tribunal should
11 therefore decline jurisdiction, despite the broad
12 provisions of Article 27. So what then is the relevant
13 treaty language on which Armenia rests its argument
14 about conciliation having precedence over arbitration?

15 (Slide 110) Armenia argues that Article 27 is not
16 the governing provision in this case of transit because
17 Article 27 arbitration only applies to inter-state
18 disputes, "except as otherwise provided in [the]
19 Treaty". In other words, Armenia points to an exception
20 in Article 27, and argues that the exception is engaged
21 because Article 7 in turn applies to this case.

22 (Slide 111) It contends that the exception is
23 engaged because Article 7(7) provides that the
24 conciliation procedure "shall apply" to matters arising
25 from transit. But in doing so, Armenia does not merely

17:43 1 apply the plain text of Article 7. Instead, we submit,
2 they read words into Article 7(7) so that, in effect,
3 it reads: conciliation shall apply, to the exclusion of
4 all other agreed mechanisms.

5 Members of the Tribunal, we see a number of
6 difficulties with this legal proposition, but I will
7 just focus on three for present purposes.

8 (Slide 112) Despite what Armenia says, Article 7(7)
9 is not an exclusive remedy and it does not actually
10 preclude other dispute mechanisms. To the contrary,
11 it expressly states that conciliation does not apply
12 until:

13 "... the exhaustion of all relevant contractual or
14 other dispute resolution remedies previously agreed
15 between the Contracting Parties ... to the dispute ..."

16 So, for example, where a dispute arises in the
17 context of a contractual relationship or has some
18 contractual flavour, Article 7(7) requires the parties
19 to first exhaust any arbitral mechanism that is agreed
20 in that contract and that may have a bearing on
21 the transit dispute.

22 It is no different in the situation where there is
23 a transit dispute between ECT contracting parties,
24 we say, and which concerns the application or
25 interpretation of the ECT. There, inter-state

17:44 1 Arbitration under Article 27 is also, we submit,
2 a previously agreed mechanism that must be exhausted
3 before conciliation. There is no principled reason to
4 treat inter-state arbitration any different than you
5 would treat contractual arbitration that must be
6 exhausted before conciliation by the plain terms of
7 Article 7(7).

8 THE PRESIDENT: If I could ask you to clarify your argument.

9 I thought your argument was that the two proceedings
10 could, in principle, proceed in parallel. Now you seem
11 to be saying that the arbitration under Article 27 must
12 be concluded, must be exhausted, before you can even
13 start conciliation. And I thought I had seen in your
14 last written pleading that Azerbaijan had in fact moved
15 away from the exhaustion contention and was at
16 the parallel contention. Now you're back to exhaustion.

17 So if you could please clarify what you're arguing.

18 DR BLAKE: For present purposes, I'm responding to the --

19 I'm trying to set out the train of logic that Armenia is
20 following, to understand the case I am responding [to].
21 But I will give you my case in summary.

22 We say that the two dispute resolution mechanisms --
23 put differently, we say there is no principle basis for
24 saying that conciliation trumps arbitration, and that
25 there is a jurisdictional defect if you do not

17:46 1 conciliate before going to arbitration. That is really
2 the issue that is at the core of this objection. And
3 we say there is no principle reason for saying that
4 conciliation comes first.

5 And there are two reasons for saying that. One,
6 we say, both Article 7(7) and Article 27(2) say that
7 the parties "may". And we say that in both situations
8 it is open to the parties to choose whichever dispute
9 resolution mechanism is best in the circumstances.

10 Now, I have to meet an argument about the chapeau of
11 Article 7 and what the "shall apply" means. But we say
12 at the general level -- and this is mapping where I want
13 to go -- that the use of the word "may" in Article 7(7)
14 and the use of the word "may" in 27(2) means that
15 they're both available and there's no hierarchy.

16 THE PRESIDENT: I understand that portion of your argument.
17 But don't we, as a Tribunal, eventually have to render
18 an interpretation about whether Article 27 is or is not
19 an "other dispute resolution remed[y] previously
20 agreed"? And if we do have to address that question,
21 are you contending therefore that there is an exhaustion
22 requirement?

23 DR BLAKE: So I'm reading -- so my primary argument is made.
24 I have to contend with what the exception in Article 27
25 means, and it says "except as otherwise provided". Now,

17:47 1 our argument is that 7(7) is not "as otherwise
2 provided". I'll make that point good.

3 In Article 27, the exception says: you go to
4 inter-state arbitration "except as otherwise provided".
5 And we're saying that that exception is not engaged;
6 that Article 7(7) is not one of the mechanisms
7 "otherwise provided" by Article 27.

8 THE PRESIDENT: Alright. Maybe we're talking at
9 cross-purposes. Again, I understand you to be saying
10 that Article 27 does not cross-reference Article 7.

11 DR BLAKE: Yes.

12 THE PRESIDENT: I'm asking the opposite question: are you
13 contending that Article 7(7) cross-references Article 27
14 when it requires "exhaustion of ... other dispute
15 resolution remedies previously agreed"?

16 DR BLAKE: Well, I say that is an interpretation that is
17 open to the Tribunal. I'm not going to say that there
18 is a definitive answer to that question. I think that's
19 a -- as you will see, it's certainly the view of the
20 Energy Charter Conference, in a decision that has been
21 rendered by that body and endorsed by all the
22 contracting parties of the ECT, including Armenia,
23 without any objection. It is also the view of
24 Mr Bamberger, who, as you know, was a key figure in
25 the negotiations of the treaty.

17:49 1 But there are a number of contingent arguments. Our
2 primary argument is that it's "may", and that they are
3 open equally to states.

4 Now, if you are minded to say that you're going to
5 apply 7(7), pursuant to the exception in 27(2), we still
6 have to contend with Armenia's argument that it's
7 exclusive. We say it's not exclusive because there is
8 a clear exhaustion requirement.

9 And what are the pre-agreed remedies that ought to
10 be exhausted? We've said, for example -- and certain
11 commentators agree -- that one of the things that would
12 have to be exhausted before you can go to conciliation
13 is any agreement in a contract, for example, to
14 arbitrate. And it seems to us that if you accept that
15 one of the mechanisms that would have to be exhausted
16 would be contractual arbitration, it seems arbitrary to
17 say that inter-state arbitration should be somehow
18 different, particularly in light of the interpretation
19 from sources which suggest that Article 7(7) is also
20 referring to -- when it says exhaustion of pre-agreed
21 remedies, that it also applies to Article 27.

22 I'm not for one moment suggesting that this is
23 a very tidy set of drafting that we have here. The
24 question is: what do the words on the page and the
25 context tell us, and what do the supplementary means of

17:50 1 interpretation help us to say?

2 And we say: when you look at the words of the treaty
3 in their context, and you look at the supplementary
4 means -- and I'll come to the travaux; I'll also come to
5 what we say are some really important supplementary
6 means that the Tribunal should give weight to. We say
7 that, at bottom, the conclusion you should draw is that
8 conciliation is not exclusive, and that you cannot and
9 should not decline jurisdiction in this case on the
10 basis that Azerbaijan should have started conciliation
11 first.

12 Now, there are various routes to getting there, and
13 it will be your job to decide which one you find more
14 compelling. But I think at core we say their case fails
15 because on any interpretation, whether you follow us and
16 you go to "may", or you go through the route of
17 Article 27 and a renvoi to 7(7), you still have to
18 contend with that exhaustion. And my friends have to
19 contend with the argument and the fact that Article 7(7)
20 is simply not exhaustive, which is, as I understand it,
21 the bedrock of their argument, and why they say
22 we cannot properly bring this arbitration.

23 THE PRESIDENT: I don't want to hold you up and engage too
24 much.

25 DR BLAKE: No, please.

17:52 1 THE PRESIDENT: But just as to your point that it would be
2 arbitrary to read Article 7(7) as requiring exhaustion
3 of contractual arbitration but not inter-state
4 arbitration, could not the provision be read to refer to
5 extraneous instruments, by which there is an agreement
6 between the parties on a mechanism -- contractual
7 dispute resolution, contractual arbitration -- but not
8 a renvoi to other provisions of this same treaty?

9 DR BLAKE: That is possible. I mean, there is no definitive
10 way.

11 Where I take my guidance from: it is open-ended.
12 It says: other dispute resolutions that are pre-agreed.
13 Now, there was a debate about pre-agreed when, and
14 whether it's in the ECT or outside the ECT.

15 I mean, the plain text of that provision tells that
16 its resolution remedies previously agreed; it doesn't
17 say where. Previously agreed between the contracting
18 parties to the ECT: Article 27 is a remedy previously
19 agreed between the contracting parties. And it is open
20 to this Tribunal, and we say it is certainly a proper
21 reading of the words there.

22 And if you look beyond the words -- the words give
23 you some help, but they don't get you all the way there.
24 When I come to the views and the guidance issued by the
25 Energy Charter Conference, and when we look at the

17:53 1 travaux, that gives more weight to the argument that one
2 of the pre-agreed remedies is Article 27.

3 But we don't even get to Article 7(7) if we say that
4 Article 7(7) doesn't fall within the exception in 27(2).

5 So there are a number of obstacles that my learned
6 friends need to meet before they get to this place of
7 exclusion to make good on their jurisdictional challenge
8 that we are somehow jurisdictionally defective because
9 we have engaged Article 27.

10 THE PRESIDENT: Right, I've held you up too much, so why
11 don't you continue.

12 DR BLAKE: I'm going to try and regain my bearings.

13 (Slide 112) So as I was saying, we say it's no
14 different -- where a transit dispute arises in the
15 context of a contractual relationship, we say the
16 parties must first exhaust -- for example, if there is
17 arbitration in that contract, that will be a pre-agreed.
18 And I made the point that it seems really arbitrary to
19 say that arbitration is excluded if it's inter-state but
20 it's not excluded if it's contractual. And I don't
21 think the words in that provision bear the weight of
22 that distinction.

23 And we say it is no different in the situation where
24 there is a transit dispute, as I say, between states.
25 We say it's a respectable reading, and we think it's

17:55 1 a coherent reading, to say that a previously agreed
2 mechanism includes Article 27 and there's no reasonable
3 distinction.

4 (Slide 113) And that view is shared and we reflect
5 it in the travaux. And here, I think this is one of the
6 excerpts from the Bamberger exchanges (CL-114,
7 pages 2-3), and it says there:

8 "... [paragraph] 7(a) requires Contracting Parties
9 to a dispute referred to in paragraph 6 to exhaust any
10 contractual or other dispute resolution remedies they
11 have previously agreed, which must include
12 [Article 27]."

13 So there you have discussion during the negotiations
14 which sheds some light on what that arguably ambiguous
15 statement in Article 7(7) means.

16 But it is also the view, as I said, of the Energy
17 Charter Conference in the note of guidance issued in ...

18 (Pause to resolve a technical problem)

19 So I was saying it's not merely in the context of
20 the travaux that we see a recognition that inter-state
21 dispute resolution is one of the previously agreed -- or
22 can be interpreted and is interpreted, certainly by
23 the legal advisor at the time, who was obviously
24 implementing the political will of the parties and
25 giving effect in legal terms to what they were seeking

17:57 1 to achieve. His view -- and this is in terms of the
2 negotiation -- was that Article 27 falls within the
3 ambit of the previously agreed mechanisms under 7(7)(a).

4 But we see here also the Energy Charter Secretariat
5 in its guidance in 2016 (CL-139, paragraph 59). This
6 guidance note is endorsed by all the contracting
7 parties, as I said, including Armenia, in the Energy
8 Charter Conference. And I would commend this document
9 to you: it's very interesting, because it shows the
10 shared understanding of the working mechanism between
11 the contracting parties of how these provisions, which
12 are understandably complex, how they understand
13 the treaty to operate.

14 And we say these and other sources say that
15 arbitration may precede conciliation. But certainly
16 we've seen nothing that suggests that conciliation
17 precedes arbitration, and that if you went to
18 arbitration, there would somehow be a jurisdictional
19 defect.

20 Now, you will notice this morning that Armenia was
21 silent on the Energy Charter Conference document, but in
22 its papers it argued that the Tribunal should disregard
23 this source because it is non-binding. However,
24 Azerbaijan does not suggest that this interpretive
25 statement is binding. We say that these documents are

17:58 1 plainly relevant as supplementary means of
2 interpretation, which the Tribunal is entitled to take
3 account of on the settled principles of treaty
4 interpretation.

5 And we say this document in particular carries
6 particular weight because it is endorsed by the Energy
7 Charter Conference, and thus reflects the shared
8 assumptions and views of the contracting parties
9 regarding the operation of the treaty; and ignoring
10 these documents would risk unsettling that common
11 understanding and the consistent practice that is
12 developing around this treaty.

13 Now, Armenia also asserts that Article 7
14 conciliation should be construed as having precedence
15 over arbitration because conciliation was intended as
16 a fast-track measure. That is not a credible
17 interpretive argument, we suggest, because, as you saw,
18 Article 7(7) expressly requires that parties first
19 exhaust other mechanisms, which may include pre-agreed
20 arbitration.

21 I'm not saying that conciliation cannot be used for
22 fast-track dispute resolution. But to suggest that
23 it should be viewed as exhaustive because it is
24 a fast-track mechanism we say doesn't stand up, because
25 it is a qualified speed that you have to apply; because

17:59 1 if you have agreed to some other dispute resolution
2 mechanism, it has to be exhausted first, before you can
3 avail yourself of conciliation.

4 So once you look at the text, the notion that
5 conciliation is intended to be the default, or is
6 presumptively the first stop on recourse, simply falls
7 away.

8 Ultimately, Article 7 does not say what Armenia
9 wants it to say. It does not say that conciliation
10 comes first in the circumstances of this case. In fact
11 the language indicates, as I've just discussed, that
12 arbitration may take precedence. And that is certainly
13 the view of a very well-situated member of the drafting
14 team in the ECT, and also of the Energy Charter
15 Conference.

16 Now, the second difficulty -- and we're talking
17 about the difficulty with Armenia's exclusivity
18 argument -- is that it misconstrues the meaning of the
19 words "shall apply" in Article 7(7), so coming back to
20 one of the arguments I wanted to make. Armenia puts
21 a lot of emphasis on "shall apply": it says this is
22 mandatory and exclusionary because it says in the
23 chapeau of 7(7) that it "shall apply" to these transit
24 disputes.

25 But as this Tribunal -- a very experienced

18:01 1 Tribunal -- very well knows, "shall" is not invariably
2 exclusive or mandatory in the sense that Armenia
3 suggests. Its legal effect depends on the context and
4 the instrument as a whole. We have already seen, for
5 example, that the words "shall apply" do not mean "shall
6 apply to the exclusion of other mechanisms", because on
7 the face of Article 7(7), other mechanisms may trump
8 conciliation.

9 So what then does "shall apply" signify? We say
10 that the most plausible reading of the text in its
11 context is that the reference to "shall apply" in
12 Article 7(7) serves to indicate that conciliation
13 procedures apply to transit. It's just a directive;
14 it is an indication of the availability of this
15 mechanism. And the phrase is therefore descriptive of
16 the scope of Article 7, and nothing more. It does not
17 purport to make conciliation exclusive, that is evident
18 on the face of the provision; still less to displace
19 other resolution mechanisms which have been expressly
20 provided elsewhere in the treaty.

21 (Slide 114) Now, the third difficulty with Armenia's
22 position and its reading is that it misconstrues,
23 we say, the terms of Article 27, and in particular
24 the words "otherwise provided" in Article 27(2).

25 When one looks closely, it is clear that Armenia's

18:02 1 argument on the meaning of "otherwise provided" is
2 incoherent. The treaty provides that Article 27 applies
3 "except as otherwise provided". That is an exception to
4 Article 27 jurisdiction, with the result that if the
5 treaty can be said to provide otherwise, there is no
6 standing consent to submit transit disputes to
7 arbitration. If it falls outside -- because of course
8 Article 27 is a compromissory clause -- if it falls
9 within the exception to the compromissory clause, what
10 that is suggesting is that there is no standing consent
11 to submit transit disputes to arbitration.

12 However, Armenia's position, as outlined, for
13 example, in paragraph 266 of its Reply, is that
14 Article 27 "provides otherwise" for transit disputes.
15 So it is suggesting logically that there is no consent
16 to arbitrate transit disputes; that's its argument.

17 Indeed, we heard today from Professor d'Argent,
18 he argued (page 114:13-16):

19 "... 'except as otherwise provided in this Treaty'
20 indicates that the right to arbitrate under
21 Article 27(2) is curtailed by the *lex specialis* found
22 elsewhere in the treaty."

23 So that must be the logical consequence of their
24 argument: that transit disputes are "otherwise
25 provided".

18:04 1 However, Armenia also says, just three paragraphs
2 later in the same document (Reply, paragraph 269), that
3 parties may "eventually refer a transit dispute to
4 arbitration". That rather suggests that there is in
5 fact consent under Article 27 to arbitrate transit
6 disputes.

7 However, those propositions, we submit, cannot both
8 be true, and it is emblematic of a number of
9 contradictions and inconsistencies that we see in the
10 argument which Armenia tries to put forward to exclude
11 this arbitration.

12 Once again, we say our learned friends are in knots.
13 The logical consequence of Armenia's position is that
14 the reference to "provides otherwise" in Article 27(2)
15 does not exclude Article 7 transit claims. If they say
16 that you can arbitrate before a conciliation, as they
17 have said earlier, and you can arbitrate after
18 a conciliation, you cannot say at the same time that
19 arbitration is "provide[d] otherwise", and doesn't fall
20 within the standing consent of the parties to dispute
21 resolution.

22 (Slide 115) So what does it then mean for the treaty
23 to say "provides otherwise"? One clear example is
24 Article 27 itself. And I know it's a bit tautologous,
25 but this is what we see in the treaty. This is a treaty

18:05 1 that is very self-referential, with various provisions
 2 referring back and forth to each other. We say that
 3 Article 27 itself, which excludes from arbitration
 4 disputes concerning Article 6, Article 19 and, for
 5 certain contracting parties, Article 10.

 6 Article 6 and Article 19, respectively, concern
 7 competition and environmental claims. These articles
 8 have separate exclusive mechanisms for dispute
 9 resolution: enforcement by competition authorities in
10 the case of Article 6; and a review by the Charter
11 Conference of environmental disputes in the case of
12 Article 19.

13 Another example, and we say the main example of
14 the treaty providing otherwise, is Article 28, of
15 course. It provides that arbitration does not apply to
16 Article 5 or Article 29, both of which have to do with
17 trade. And those provisions are subject -- or were
18 subject to GATT, and later to WTO dispute resolution
19 mechanisms, which are likewise understood to be
20 exclusive.

21 So the feel here is exclusion from Article 27 and
22 submission to an exclusive dispute resolution,
23 an alternative exclusive dispute resolution.

24 What this context suggests is that what Article 27
25 is saying is that states must arbitrate all inter-state

18:07 1 disputes involving the application of the treaty unless
2 the option is expressly excluded by another provision of
3 the treaty and another dispute resolution mechanism is
4 prescribed. The exception in Article 27(2) concerns
5 a situation where inter-state arbitration is simply not
6 available. And we say that Article 7 is not a true
7 exception because it does not exclude, for example,
8 the application of Article 27.

9 Similarly, this morning Professor d'Argent
10 suggested that Article 21(5) is also a provision that
11 provides otherwise. You may recall him mentioning that.
12 But we have had a little examination of that provision
13 and we do not, with respect, agree with him.

14 Article 21(5) is not an exception to jurisdiction
15 under Article 27(2). On the contrary, it envisages that
16 an inter-state arbitral tribunal will have jurisdiction
17 over certain expropriation matters dealing with tax.
18 All it does is to require that the tribunal take into
19 account relevant views of competent tax authorities.

20 So Article 21(5), when you look at it -- and I would
21 suggest we look at that -- that is a provision which
22 really still envisages inter-state arbitration. It
23 merely tells the tribunal that when you're looking at
24 an expropriation matter dealing with tax, that's a very
25 narrow set of disputes that are carved out under the

18:08 1 ECT, and if there is an allegation that the tax is
2 discriminatory, you have to give the local competent tax
3 authorities six months to come and provide their views
4 to you.

5 But it is not an exception to inter-state dispute
6 resolution. On its face, Article 21 envisages that
7 inter-state dispute arbitration will deal with
8 the matters that are set out in Article 21. And so
9 we say that is also not the treaty providing otherwise.

10 The most coherent reading of the treaty is that it
11 is Article 28, which is an absolute exclusion, that is,
12 we say, a coherent reading of an exception to
13 Article 27. And we say: because Article 7 is not
14 an exclusion, because you can have other dispute
15 resolution mechanisms, including inter-state mechanisms,
16 it is also not falling within the exception.

17 What Article 7 is, we say, is a provision which
18 sequences. It allows you to go to conciliation, but
19 it is subordinate, it is secondary to the other dispute
20 resolution mechanisms which must be exhausted. And this
21 is clear from the language of Article 7, for example,
22 which says that conciliation cannot -- and you saw that
23 language -- cannot proceed unless the parties have first
24 exhausted other means.

25 The fact that Article 7 is not excepted from

18:10 1 Article 27 -- that is to say, the fact that transit
2 disputes are not removed altogether from inter-state
3 arbitration -- is also clear when we look at
4 the commentary cited by Armenia.

5 (Slide 116) Now, a lot has been said about
6 Professor Hobér's commentaries. But you will see, for
7 example, when you look, he opines that Article 27 does
8 not exclude transit, and therefore arbitration is
9 an available alternative to conciliation (CL-59,
10 pages 169 and 174). For it to be an alternative, there
11 must be consent, and the consent for that is in
12 Article 27. It cannot sit in an exception to
13 Article 27.

14 (Slide 117) The same view prevailed during the ECT
15 negotiations, and here we have on the screen
16 a contemporaneous account by Mr Bamberger (CL-113),
17 the chairman of the legal committee during the ECT
18 negotiations. When describing the intentions of
19 the drafters, Mr Bamberger wrote that "nothing ... in
20 the ECT insulates" transit from inter-state arbitration.

21 Now, this morning Armenia selectively quoted from
22 CL-113 on their slide 161 to suggest that Article 7 is
23 unconditional and non-discretionary in nature. That was
24 the sentiment that was expressed. But when you read
25 these exhibits in their context, Mr Bamberger was

18:11 1 actually talking about the non-discretionary nature of
2 Article 7(6), the obligation not to impair transit while
3 dispute resolution mechanisms have not been exhausted.

4 When you read the document as a whole, Mr Bamberger
5 concludes that all through the conciliation process,
6 there is the potential for collateral litigation,
7 including inter-state arbitration, during, before and
8 after conciliation.

9 (Slide 118) And in subsequent commentary in 2006,
10 Mr Bamberger again undertook a detailed analysis of the
11 subject, an analysis at CL-176, that I commend to the
12 Tribunal as the most rigorous and insightful treatment
13 of this.

14 Now, Armenia has said that -- listed a slide of
15 so-called "commentaries" that they say the Tribunal
16 should look at.

17 Now, a lot of commentators have made assertions
18 about the interaction between Articles 27 and 7;
19 obviously this Tribunal must decide on the weight
20 it will ascribe to one commentator over another.
21 We suggest that what should lean in favour of
22 Mr Bamberger's commentary is obviously he was in the
23 room where it happened, the negotiation of the ECT; but
24 also, when you look at his commentary, he gives the most
25 detailed and forensic analysis of this provision.

18:13 1 And he notes that there may be disputes that qualify
2 for both inter-state arbitration and transit
3 conciliation, as we have here in this case, and he notes
4 that although Article 27 disallows arbitration when the
5 treaty provides otherwise, "Article 7 does not seem to
6 'provide otherwise'". He concludes, therefore, that:

7 "... conciliation and ... arbitration can be
8 available in parallel or sequentially with regard to
9 the same energy transit dispute."

10 (Slide 119) Bamberger's reading is consistent with
11 the contracting parties' state practice. And this can
12 be seen, for example, in the 2002 transit dispute
13 between Slovenia and Croatia. The record of that
14 dispute (CL-120) shows that the two states engaged in
15 bilateral consultations, under Article 27(1), under the
16 auspices of the ECT Secretariat. Neither Slovenia or
17 Croatia, or the ECT Secretariat for that matter, even
18 mentioned transit conciliation as an option, and
19 they certainly did not characterise it as the sort of
20 exclusionary, mandatory requirement that Armenia now
21 makes it out to be.

22 This is one incident, and an example of state
23 practice -- I'm not suggesting it's widespread because,
24 as we know, these inter-state disputes under the ECT are
25 very rare. But what we see is this instance of state

18:14 1 practice being consonant with the view of the Energy
2 Charter Conference and being consonant with the view of
3 Mr Bamberger, who I think it is common ground is some
4 authority on the drafting of the treaty.

5 So, members of the Tribunal, the texts, as supported
6 by the views of the contracting parties, the travaux and
7 learned commentators alike, confirm that conciliation
8 and arbitration are available in parallel with respect
9 to the narrow category of disputes, such as the one you
10 have before you, that qualify both for arbitration and
11 for conciliation.

12 Now, I want to quickly deal with two subsidiary
13 points that have been raised. The first has to do
14 with -- I think there are two points: effet utile and
15 lex specialis.

16 (Slide 120) So Armenia argues that this Tribunal
17 must find that conciliation takes priority over the
18 inter-state arbitration, otherwise Article 7(7) will be
19 rendered a dead letter. However, that assertion is
20 inaccurate; it's an exaggeration. Conciliation remains
21 available to the state that opts to do it over
22 arbitration, including, for example, because they need
23 an urgent resolution to a dispute. That is not what we
24 have here, but one can very well imagine that states
25 that have an urgent dispute can make an ad hoc agreement

18:16 1 to go to conciliation.

2 Conciliation also remains available for transit
3 disputes where Article 27 does not apply. And as
4 I mentioned earlier, there are a host of transit
5 disputes to which Article 27 does not apply: for
6 example, if one or both of the parties is not a state,
7 or, for example, a state-owned entity; or a transit
8 dispute that has nothing to do with a question of treaty
9 interpretation but is more a question of the technical
10 calculation of tariffs or gas pricing, for example.

11 And there are many such disputes: contractual
12 disputes, as I said; regulatory disputes; tariff and
13 pricing disputes. It is these kinds of commercial
14 transit disputes that the drafters had in mind when
15 crafting the conciliation clause, and not really the
16 type of interpretive disputes that we have here, which
17 have systemic implications for the understanding of
18 the ECT.

19 So we say therefore the Tribunal can properly decide
20 that arbitration is available here, that they are
21 properly seised, without robbing Article 7(7) and
22 the conciliation regime of its effet utile.

23 (Slide 121) The argument about *lex specialis* has not
24 really been pursued in oral argument but it was pursued
25 in writing. The very simple formulation, the argument,

18:17 1 is that Article 7(7) is more specific, as it relates to
2 transit disputes, and therefore it should override
3 Article 27 dispute resolution because it is more
4 specialist.

5 Now, we say: fundamentally, *lex specialis* is just
6 not engaged in this context. The ILC has made it very
7 clear that for *lex specialis* to apply, it is not enough
8 that the same subject matter is dealt with by the two
9 provisions. There must be some actual inconsistency
10 between them, or a discernible intention that one
11 provision is to exclude the other.

12 And as we know, there is no discernible intention
13 that conciliation displace arbitration, including
14 because of the clear terms of Article 7(7). There is
15 clearly a discernible intention to exclude Article 6,
16 Article 19, Article 10(1), Article 5 and Article 29 from
17 the ambit of Article 27 because those provisions
18 expressly carve out that exception. However, there is
19 no such discernible intention with regard to Article 27.

20 And there is no actual inconsistency. We say that
21 Article 27 and Article 7(7) can be read consistently.

22 (Slide 122) And when you want to understand how
23 *lex specialis* may operate in the context of dispute
24 resolution mechanisms, we look at the WTO DSU (CL-164):
25 that is well understood to be *lex specialis*, and there

18:19 1 is clear language, as you can see on the slide, in the
2 DSU agreement which excludes any other form of dispute
3 resolution.

4 So that ends my argument, unless there are any
5 questions from the Tribunal, in which case I'll just
6 wrap up with my final conclusions.

7 THE PRESIDENT: Any questions on these issues?

8 Why don't you wrap up, and we may have some issues
9 for the parties more generally, but why don't you
10 conclude your argument first.

11 DR BLAKE: Thank you, Madam President.

12 (Slide 123) So, taking a step back, and with what
13 we've seen in mind, we say that Armenia's objections
14 ultimately come down to an issue of admissibility,
15 because as we've seen, conciliation is not exclusive.
16 The real dispute here is one of sequencing, and whether
17 we ought to have conciliated before going to
18 arbitration, because Armenia concedes that you can have
19 arbitration before or after conciliation. There is no
20 exclusion; that's the argument. They concede that if
21 conciliation fails, arbitration is still available. And
22 that is a classic admissibility objection. It is not
23 concerned with whether the claim is arbitrable at all;
24 only the consequence and the sequence and timing,
25 rather, of the arbitration.

18:21 1 (Slide 124) And that's really how Armenia itself has
2 framed this issue. As you can see on the slide, it says
3 (Memorial, paragraph 173):

4 "... failure to have recourse to [conciliation]
5 would render [the] claims inadmissible in arbitration."

6 Of course, they say "at the [minimum]". But they
7 recognise that this is ultimately an issue of
8 admissibility.

9 And this is really no different then from Armenia's
10 other objections in relation to the transit claim, based
11 on purported lack of dispute and a purported
12 insufficiency of negotiations. It is an unduly
13 formalistic and technical objection, focused on
14 thwarting the dispute resolution mechanism, based on
15 alleged non-fulfilment of procedural steps: steps which
16 have become evidently futile, and steps which by now,
17 three years later, are well and truly mooted.

18 Now, to be clear, the issue of admissibility does
19 not arise if the Tribunal agrees with Azerbaijan that
20 the two mechanisms are available in parallel. However,
21 if the Tribunal is inclined to agree with Armenia that
22 Azerbaijan perhaps should have tried to conciliate
23 first, the Tribunal should treat this, we submit, as
24 a matter of admissibility, and nevertheless exercise its
25 jurisdiction over the transit claims.

18:22 1 (Slide 125) I will not spend any time dealing with
2 the distinction dealing with the jurisprudence on
3 admissibility and on jurisdiction, except to say that
4 the ICJ has endorsed a flexible approach in Croatia
5 (CL-180), and I commend that case to you, and we urge
6 you to adopt a similar approach here.

7 (Slide 126) And you should consider, in adopting the
8 approach, whether the decision you make will have dire
9 consequences for this dispute and for disputes
10 generally, and weigh that against the procedural and
11 technical nature of the complaints that have been raised
12 by Armenia.

13 Tribunal members, I thank you, unless you have any
14 other questions.

15 THE PRESIDENT: I think no questions for you on this portion
16 of the argument. Thank you very much.

17 Am I correct that this concludes Azerbaijan's
18 opening statement?

19 MS REID: It does, Madam President.

20 THE PRESIDENT: Thank you very much.

21 DR BLAKE: Thank you.

22 THE PRESIDENT: Before we break for the evening, I believe
23 at least one of my colleagues, perhaps the other,
24 I'm not sure, may have some more general questions for
25 the parties to consider overnight. I've been putting my

18:23 1 questions fairly actively to you during the course of
2 the day, so I don't have additional ones for tonight.
3 But let me invite my colleagues, if they wish.

4 (6.23 pm)

5 Questions from THE TRIBUNAL

6 PROFESSOR STERN: Thank you, Madam President.

7 Well, although I might open a Pandora's box, I would
8 like to ask both parties a very general question for
9 tomorrow which has not been dealt with so far.

10 I will just start by referring to the slides of the
11 presentation of Azerbaijan: slide 49, referring to
12 Article 4 of the Palermo Convention. So I will just
13 read it:

14 "States Parties shall carry out their obligations
15 under this Convention in a manner consistent with
16 the principles of sovereign equality and territorial
17 integrity of States ..."

18 And the ICJ -- and this is slide 50 -- analysed this
19 article in the following way in paragraph 93 (RL-73):

20 "... Article 4(1) does not impose, through its
21 reference to sovereign equality, an obligation on States
22 parties to act in a manner consistent with the many
23 rules of international law which protect sovereignty in
24 general ..."

25 So coming now to the scope of Article 18, I wonder

18:24 1 whether the issues raised by Azerbaijan imply only the
2 interpretation of the ECT, or imply -- and I paraphrase
3 the ICJ citation just mentioned -- imply "many rules of
4 international law which protect sovereignty in general".

5 So I will particularise what is my main concern
6 here. During this first day, we heard numerous
7 references to sovereignty and sovereign rights. But
8 unless I'm mistaken, I did not hear any mention of
9 the concept of effective sovereignty or the concept of
10 occupation.

11 I heard that we do not need to look at the overall
12 dispute between the two countries, but I'm not sure this
13 is possible. If the Tribunal were to find that it has
14 jurisdiction to deal with Azerbaijan's claims, would it
15 or would it not need to discuss many rules of
16 international law which are not part of the ECT? For
17 example, would the Tribunal need or need not discuss
18 whether there is a difference between the assertion of
19 sovereignty and the effective sovereignty? Also, would
20 the Tribunal need or need not examine what are the legal
21 consequences of occupation?

22 So this is a long way to arrive at my general
23 question: are the just-mentioned issues necessary to
24 decide the case? And if so, are they legitimate issues
25 to be decided under Article 18 of the ECT?

18:26 1 THE PRESIDENT: Alright. That's not a question for today;
2 it's a question for you to consider overnight. I think
3 that's the only question we have for you overnight. You
4 will of course have time to reflect on the questions the
5 Tribunal has put to both parties during the course of
6 the day, and on each other's arguments.

7 So unless either party has any housekeeping matters,
8 which I should ask you, I would otherwise wrap up.

9 Any housekeeping matters for Armenia?

10 DR SALONIDIS: No, Madam President, nothing.

11 MS REID: And none for Azerbaijan.

12 THE PRESIDENT: Thank you.

13 Well, then we will see you all at 11.00 tomorrow.

14 We wish you a good evening. Thank you to both sides for
15 your excellent presentations today. Thank you.

16 (6.27 pm)

17 (The hearing adjourned until 11.00 am the following day)

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