

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 2 Wednesday, 8 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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10:15

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Wednesday, 8 April 2026

2 (10.59 am)

3 THE PRESIDENT: Good morning. Welcome back to all for this
4 second day of our hearing in PCA Case No. 2023-65,
5 The Republic of Azerbaijan v The Republic of Armenia.

6 Before we begin with the second round of arguments,
7 are there any housekeeping matters that have arisen
8 overnight?

9 DR SALONIDIS: No housekeeping matters on Armenia's side,
10 Madam President.

11 THE PRESIDENT: Thank you.

12 DR SALONIDIS: Good morning to you and the members of
13 the Tribunal.

14 MS REID: Good morning, Madam President, members of
15 the Tribunal. One small housekeeping matter.

16 The Republic of Azerbaijan will comply with the
17 procedural order and provide an electronic copy of our
18 slides for the afternoon an hour in advance. We'll also
19 provide hard copies for the Tribunal. But because
20 we will likely be working right up until that deadline,
21 to be as responsive as possible to the morning, we won't
22 have paper copies for everybody. We're happy to follow
23 up with paper copies if you'd like, but the Tribunal
24 will have their paper copies as well.

25 THE PRESIDENT: Thank you. I personally do not require

11:00 1 a paper copy, but my colleagues I think would. So --

2 MS REID: Okay.

3 THE PRESIDENT: -- thank you very much.

4 MS REID: Thank you.

5 THE PRESIDENT: Alright. Then unless there are any other

6 matters that the parties wish to raise, I think we can

7 begin with Armenia's closing statement, which will be

8 a total of two hours, and please look for an appropriate

9 break point halfway through.

10 (11.01 am)

11 Closing statement on behalf of Respondent

12 PROFESSOR MURPHY: Thank you, Madam President.

13 In Azerbaijan's first-round presentation, both

14 Mr Sullivan and Ms Reid asserted that Azerbaijan's

15 claims in this case are narrow. Therefore, they say,

16 any implications from interpreting Article 18 as

17 a standalone provision need not concern the Tribunal.

18 We don't think that Azerbaijan's claims are narrow.

19 They address wide-ranging aspects of alleged

20 interference with many types of energy assets across

21 a wide geographic area and over a lengthy period of

22 time. They are pretty far-reaching, as the price tag of

23 more than \$1.6 billion attests.

24 But moreover -- and this goes to the question asked

25 by Professor Stern at the close of yesterday -- these

11:02 1 claims are not narrow in the legal sense because
2 they would require, in the context of this case, the
3 application of a wide range of rules of international
4 law that go well beyond any conceivable scope of
5 the Energy Charter Treaty.

6 Azerbaijan's claims are predicated entirely on
7 an assertion of effective control by Armenia over the
8 areas in and around Nagorno-Karabakh. Yet a belligerent
9 control of the enemy's territory triggers the law of
10 belligerent occupation. That is clear from, for
11 example, the 2024 Advisory Opinion on Occupied
12 Palestinian Territories, where the ICJ said that in the
13 aftermath of an armed conflict, a state occupies
14 territory that is not its own when and to the extent
15 that it exercises effective control over it.

16 Moreover, the court made that statement in the
17 context of determining that the law of armed conflict
18 was of particular relevance, and that Israel's duties
19 were governed by the Fourth Geneva Convention, the
20 Hague Regulations and customary international law. Now,
21 those sources of law in turn regulate the occupying
22 power's rights and obligations vis-à-vis exploitation of
23 natural resources in the occupied territory.

24 So, and despite what Azerbaijan told you yesterday,
25 on Azerbaijan's own case, the Tribunal would have to

11:04 1 apply the rights and obligations of Armenia as
2 an occupying power, including those arising under the
3 1907 Hague Regulations, notably Articles 42 to 56; under
4 the 1949 Geneva Conventions, notably Articles 27 to 34
5 and 47 to 78 of the Fourth Geneva Convention; under
6 Additional Protocol 1 to those Conventions; under other
7 instruments of the law of war, such as the 1954
8 Hague Convention; and under associated customary
9 international law. Such applicable law would take the
10 Tribunal to rules that are vastly different than
11 anything found in the Energy Charter Treaty.

12 For example, rather than the supposedly specific and
13 concrete rules that Azerbaijan pretends to find in
14 Article 18(1), the relevant rules concerning belligerent
15 occupation that the Tribunal would have to apply would
16 principally concern the occupying power's right of
17 usufruct, which is set out in Article 55 of the Hague
18 Regulations and reflects customary international law.
19 Those rules grant the occupying power the right to
20 administer the immovable property of the occupied state,
21 whether renewable or non-renewable, including
22 state-owned mines, for the benefit of the occupying
23 forces and the civilians in the occupied territory.

24 Thus, while Azerbaijan alleges that Armenia
25 exploited its natural -- its mineral resources, such

11:06 1 acts are not in violation of the law on usufruct.

2 An occupying power is fully entitled to do that. To the
3 extent that Azerbaijan's allegations are that in using
4 such resources, Armenia failed to administer them
5 properly, that's also a matter regulated by the law of
6 armed conflict.

7 So to directly answer Professor Stern's general
8 question: yes, the issues of law that would be necessary
9 to decide this case on the merits are well beyond the
10 ECT; and no, they are not issues that the ECT parties
11 could possibly have envisaged as a legitimate use of
12 Article 18.

13 But our central point is not so much that the law to
14 be applied to this particular case on the merits is well
15 outside the bounds of the ECT, although that is
16 certainly true. Our central point is that it is
17 inconceivable that the ECT parties, when adopting the
18 ECT in 1994, viewed Article 18 as opening the door to
19 applying wide-ranging rules across the entire spectrum
20 of international law.

21 Why do we say it's inconceivable? Recall that in
22 the early 1990s, the Soviet Union and Yugoslavia
23 fragmented to form numerous states. Indeed, a central
24 reason for the ECT was to try to cope with East/West
25 economic integration in the context of an efficient

11:08 1 market-based energy system. But it must also be
2 recalled that many of these new countries in Central and
3 Eastern Europe had boundary disputes, several of which
4 endure today. Is it conceivable that those states
5 intended the ECT as a means for addressing such disputes
6 over sovereignty?

7 It's no answer to say that under Article 18 there
8 must be some connection to energy, as a connection to
9 energy exists in any territory where you find minerals,
10 sun, wind, water. It's pretty much everywhere. And
11 bear in mind that Azerbaijan's theory, which leans very
12 heavily on the text found in Article 18(3), maintains
13 that whenever and wherever an ECT state interferes with
14 another state's ability to develop, tax or impose
15 environmental regulation on energy resources, that
16 interference falls within the scope of Article 18. So
17 all boundary disputes are fair game under Article 18(1)
18 if Azerbaijan's theory of interpretation holds.

19 Consider another example for why it's inconceivable
20 that this interpretation is correct. Recall that in
21 Article 1(10) of the ECT, the ECT defines the "Area" of
22 a contracting party, and it says that the "Area"
23 includes maritime areas where the contracting party
24 exercises sovereign rights. In other words, the ECT
25 includes trade and commerce in relation to

11:10 1 the continental shelf.

2 So what's the consequence of this, if Azerbaijan's
3 theory is correct?

4 The Tribunal is well aware that states adopted in
5 1982 the Law of the Sea Convention, a convention that
6 contains detailed provisions in Part VI with respect to
7 sovereign rights to, and delimitation of, the
8 energy-rich continental shelf, including rules on what
9 to do when an area is disputed.

10 Further, Part XV of that convention contains
11 a sophisticated process for handling inter-state
12 disputes, including important provisions allowing state
13 parties to carve out from compulsory jurisdiction
14 certain disputes, including those on delimitation.

15 Azerbaijan would have us believe that a decade after
16 adopting the Law of the Sea Convention, and at the very
17 moment when that convention is entering into force, some
18 50 states, coming from across Europe, Asia and the
19 Middle East, opted to join a treaty, the ECT, that in
20 Article 18, operating in conjunction with Article 27,
21 produced a wide-open and unadorned arbitral process for
22 addressing the very same disputes to sovereign rights
23 that are at issue in the Law of the Sea Convention, yet
24 without any of the detailed rules in the ECT regulating
25 those sovereign rights and the resolution of any related

11:12 1 disputes.

2 That interpretation simply is not credible. As
3 we've stressed in our pleadings, states are very, very
4 careful about granting consent to compulsory
5 international adjudication. They don't carefully
6 address sovereign rights and associated dispute
7 resolution in one treaty, and then blithely and casually
8 treat the same matter in a two-sentence miscellaneous
9 provision in another treaty.

10 We acknowledge that Azerbaijan in this case is not
11 advancing claims about sovereignty or sovereign rights
12 relating to the continental shelf, but that's not the
13 point. The point is that Azerbaijan's interpretation of
14 Article 18 requires us to believe that the ECT states
15 were quite happy, and without any discussion, to join
16 a treaty that would expose them to dispute resolution
17 over territorial and maritime disputes, and to do so
18 based on the two sentences you've got in Article 18(1).

19 To avoid the consequences of its interpretation
20 under Article 18(1), Azerbaijan has sought not only to
21 convince you yesterday that its claims were narrow,
22 it continued to downplay the extent to which it is
23 relying on rules falling entirely outside the four
24 corners of the ECT. This was part of Mr Sullivan's
25 first threshold matter, that Azerbaijan is not relying

11:13 1 on extrinsic rules. But Azerbaijan clearly is relying
2 on rules extrinsic to the ECT.

3 We acknowledge that Azerbaijan is not saying that
4 this Tribunal has jurisdiction over a customary
5 international law claim. But a claim based on
6 Article 18(1) cannot possibly be based just on the two
7 sentences in Article 18(1), not just because of the
8 brevity of that paragraph, which tells us nothing about
9 sovereignty or about sovereign rights over energy
10 resources, but also because of its very terms of
11 recognition and reaffirmation that are clearly referring
12 to concepts and rules of international law that exist
13 elsewhere.

14 Under their theory, Article 10(1) is essentially
15 a choice of law rule. It's pointing to more detailed
16 rules that exist elsewhere and, under its theory,
17 attempting to bring those detailed rules into the ECT.
18 So to determine what is meant by "sovereignty", we must
19 go to a place like the UN Charter; to determine what is
20 meant by "sovereign rights", we have to go to UN General
21 Assembly Resolutions, such as the Declaration on
22 Friendly Relations or the Charter on Economic Rights.

23 I'm not making this up: it's in Azerbaijan's
24 Statement of Claim. Asserting that Azerbaijan is not
25 relying on rights or obligations extrinsic to the treaty

11:15 1 is simply not plausible.

2 And yet where would you even find those rules? Who
3 knows? International law on sovereignty and sovereign
4 rights is one of the most complicated, debated and
5 sensitive areas of international law, one with which
6 states have struggled for decades.

7 So this is yet another reason why Azerbaijan's
8 interpretation is simply not believable. Some 50 states
9 joined the treaty, binding themselves to unknown,
10 uncodified and unsettled rights and obligations in
11 an area central to every state's national security.
12 It really doesn't make sense.

13 Further, contrary to what you heard yesterday,
14 Azerbaijan's claims are not grounded in specific and
15 concrete obligations arising under Article 18(3).
16 Article 18(3) says nothing about what types of energy
17 assets of one state are protected from the action by
18 another state. It says nothing about what constitutes
19 foreign interference in such assets. It says nothing
20 about what are the standards to be applied when
21 assessing any alleged interference. It says nothing
22 about what exceptions might exist when applying any such
23 standards.

24 In short, there's nothing in Article 18(3)
25 comparable to what one finds in Parts II and III of the

11:17 1 ECT, which impose specific and concrete obligations upon
2 the states parties in relation to foreign nationals.
3 The contrast between the detail found in Parts II and
4 III and the parsimony of Article 18(1) and (3) speaks
5 volumes.

6 (Slide 2) Allow me to focus a bit more directly on
7 the text of Article 18, so as to respond to some of the
8 points raised yesterday by Azerbaijan.

9 Azerbaijan accused us of ignoring Article 18(3),
10 although please recall that I put that up on the screen
11 with highlights and explained to you why it was
12 consistent with our interpretation. In any event, it
13 remains the case that Armenia views all four paragraphs
14 as demonstrating that Article 18 operates in a manner
15 that is ancillary to Parts II and III.

16 First, none of those four paragraphs that you've got
17 on your screen say the contracting parties "shall" do
18 this or that. They're completely different from the
19 provisions found elsewhere throughout the ECT that
20 indicate legal obligations. Azerbaijan has no real
21 answer to that point.

22 Second, the text of all of these paragraphs are
23 naturally read in relation to Parts II and III. Here
24 too, Azerbaijan has no real response. So if you take
25 that first paragraph, it recognises and affirms,

11:19 1 basically capturing an age-old dichotomy that serves as
2 a backdrop for contemporary rules addressing
3 transnational commercial investment and investment
4 activity. It's therefore ancillary to Parts II and III.

5 I would add that if this paragraph said, "Armenia
6 recognises that Azerbaijan has a car", then sure.
7 That's different text, and that might well give
8 Azerbaijan legal rights to a car. But that's not this
9 text.

10 In fact, we submit that this text is actually much
11 closer to a text that says, "We recognise the sky is
12 blue", given that Article 18(1) is simply pointing to
13 a general phenomenon, albeit one that resides in the
14 realm of inter-state relations rather than high in
15 the sky above them.

16 Moreover, it's worth noting that in Article 18(1),
17 it actually doesn't recognise each state's sovereignty
18 and sovereign rights; it recognises sovereignty and
19 sovereign rights writ large and in the abstract.
20 There's no reference here to the rights of states at
21 all, as such, anywhere.

22 Okay. Article 18(2), it's a without-prejudice
23 clause. It's also operating in relation to Parts II and
24 III. It's basically saying: whatever obligations
25 a state has to foreign nationals under those parts do

11:20 1 not prejudice local laws governing ownership of
2 property.

3 Azerbaijan keeps saying that this without-prejudice
4 clause somehow proves its case, but Azerbaijan, I think,
5 misunderstands what these clauses typically do. Such
6 clauses acknowledge that certain rules have been
7 expressed. Here, in paragraph (2), the reference is to
8 the ECT as a whole, with a nod to "access to energy
9 resources ... on a commercial basis". But then
10 without-prejudice clauses typically provide that those
11 rules don't prejudice something. Here the rules in the
12 ECT don't prejudice local property law on ownership.

13 So this paragraph, again, it's ancillary. It's
14 providing a gloss on how to understand Parts II and III.

15 (Slide 3) A related issue is the declaration by
16 the parties to Article 18(2). You've got it up on
17 the screen there. This declaration says:

18 "The representatives declared that Article 18(2)
19 shall not be construed to allow the circumvention of
20 the application of the other provisions ..."

21 Now, Mr Farhadi will explain a bit more about this,
22 but we submit that this text was basically crafted to
23 preserve certain aspects in the text of national law,
24 but in this declaration to say: we're not going to have
25 that national law upend the provisions in Parts II and

11:22 1 III. That's how we see what's going on here, and it's
2 confirming our basic position on what this paragraph is
3 all about.

4 (Slide 4) Article 18(3) begins, as I explained
5 yesterday, with the words "in particular", which means
6 that Article 18(3) is referring back to the first two
7 paragraphs, one of which is clearly a no-prejudice
8 clause. And further, you've got the words "continues to
9 hold" that are found here. Those words are signalling
10 that the rights are not being established in the ECT;
11 these are words which pre-date and are found outside
12 the ECT. So in our submission, Article 18(3) is also
13 ancillary.

14 Paragraph (4), which Azerbaijan basically ignores,
15 is in the same vein. It's all about facilitating
16 authorisations, licences, concessions, contracts.
17 Again, ancillary to what's going on in Parts II and III.

18 (Slide 5) Now, Azerbaijan did argue yesterday that
19 because Article 18 is not expressly excluded from the
20 scope of Article 27, this somehow means that it must be
21 possible to rely on Article 18 to establish the
22 jurisdiction of a tribunal under Article 27.

23 Now, that's wrong for two reasons. First, some
24 provisions and treaties simply don't create rights and
25 obligations; there's no need to exclude it from

11:24 1 a tribunal's jurisdiction. But second, as we
2 explained -- and you really can see this in the
3 Oil Platforms judgment -- because provisions like this
4 can provide an interpretive gloss on other provisions of
5 the treaty, you don't want to exclude it from the
6 tribunal's ambit. The tribunal should be allowed to
7 look at a provision like Article 18 when interpreting
8 a different provision. If you were to carve it out in
9 Article 27, a tribunal would not be allowed to do that.

10 Let me move on to the ICJ cases that Azerbaijan
11 strived yesterday to distinguish from its case. It was
12 a valiant effort, on our part as we watched, but we
13 found it wholly unpersuasive. Now, time doesn't permit
14 me to go through all of those cases in detail, but allow
15 me to respond on a couple of them and then say some
16 general things about these cases.

17 So take the Oil Platforms case (RL-37). Opposing
18 counsel said we neglected Article X(1) in the court's
19 judgment on jurisdiction. I have to admit that it's
20 been some time since I litigated the Oil Platforms case
21 at both the jurisdictional and merits phase, but even
22 so, I find Azerbaijan's reference to Article X(1) in the
23 Treaty of Amity a bit mystifying.

24 First, Article X(1) contained mandatory language,
25 and was quite specific as to a particular obligation

11:25 1 between Iran and the United States. Article X(1) read:
 2 "Between the territories of the two High Contracting
 3 Parties there shall be freedom of commerce and
 4 navigation."

 5 We don't have that kind of mandatory language or
 6 specific language in Article 18(1).

 7 Second, the principal question before the court at
 8 the jurisdictional stage was whether the term "commerce"
 9 in paragraph 1 should be interpreted as narrowly
 10 relating to maritime commerce; and further, as narrowly
 11 relating to acts of purchase and sale. In addressing
 12 those particular issues, the court considered the very
 13 detailed other paragraphs of Article X, which addressed
 14 in depth maritime commerce, and further considered the
 15 numerous other provisions of the Treaty of Amity that
 16 related to commerce.

 17 In short, the detailed text and context of
 18 Article X(1), a provision on commerce, embedded in
 19 a treaty on commerce, is nothing like our Article 18(1).
 20 Rather, the analogous provision in that case was
 21 Article I of the Treaty of Amity, with its very general
 22 reference to, "There shall be firm and enduring peace
 23 and sincere friendship between the [contracting
 24 parties]", over which the court found no jurisdiction.

 25 Now, interestingly, the bundle of rights that

11:27 1 Azerbaijan is asking you to import into the ECT are
2 enshrined in the very same instruments that Iran sought
3 to import into Article I of the Treaty of Amity,
4 including the Friendly Relations Declaration and others.

5 Now, with respect to the Libya/Chad case (CL-31),
6 Azerbaijan yesterday once again leaned heavily on it,
7 essentially insisting that the recognition of a frontier
8 is just like recognising sovereignty and sovereign
9 rights over energy resources. Well, it isn't, and it
10 isn't for two reasons.

11 First, the ECT is not at all analogous to the 1955
12 treaty at issue in the Libya/Chad case. While the ECT
13 has several very detailed annexes, it contains no annex
14 setting out what is being recognised in Article 18(1).
15 Unlike in Libya/Chad, there's no ECT annex telling us
16 where it is that ECT states exercise sovereignty and
17 sovereign rights, at land or at sea, nor an annex that
18 catalogues what those sovereign rights to energy
19 resources are exactly. A blanket and unqualified
20 recognition of sovereignty and sovereign rights is
21 simply not the same as the recognition of a specific
22 border between two countries.

23 (Slide 7) Moreover, while Azerbaijan yesterday said
24 that recognition in the context of territory can be
25 easily applied in other contexts, it should be noted

11:29 1 that recognition in relation to territory has
 2 a particular legal quality, one that Article 18 lacks.
 3 As the late Judge Crawford explained (RL-76,
 4 pages 214-215), you see it on your screen:

 5 "... title may exist on the basis of a treaty alone,
 6 the treaty marking a reciprocal recognition of
 7 sovereignty in solemn form."

 8 (Slide 8) And that's precisely how the ICJ looked at
 9 it in that case (CL-31). You've got paragraph 45 up on
10 the screen now; I won't read it all out for you. But it
11 is saying:

12 "The fixing of a frontier depends on the will of the
13 sovereign States ... concerned."

14 And then it finishes this paragraph:

15 "If it was not already a territorial boundary, the
16 agreement of the parties to 'recognize' it as such
17 invests it with a legal force which it had previously
18 lacked."

19 Looking across the various ICJ cases raised in our
20 pleadings, counsel for Azerbaijan yesterday argued that
21 the through-line for these cases is that you cannot
22 establish jurisdiction under a treaty to address rules
23 that fall outside its scope. The problem for
24 Azerbaijan, we submit, is that trying to use a general
25 and non-mandatory provision in the ECT to address rules

11:31 1 that are not in the ECT is exactly what Azerbaijan is
2 doing.

3 (Slide 9) Perhaps one way of seeing this is to
4 quickly compare the rules at issue in the ICJ cases with
5 the situation in our case. On your screen is a table
6 that briefly indicates the relevant aspects of several
7 of the ICJ cases we've been discussing, with an emphasis
8 on how, in each case, the claimant was trying to use
9 a broad provision to bring into the treaty detailed
10 rules found outside the treaty, and in each decided
11 case, that effort was rejected.

12 So we've got the list of cases on the left-hand
13 column; the next column is giving you the relevant
14 general provision in the treaty under discussion; then
15 the third column, the rules that the claimant is trying
16 to import or incorporate into the treaty; the fourth
17 column, the possible connection of those rules to
18 the treaty -- in each instance there is some kind of
19 connection -- and then the conclusion reached in
20 the four cases actually decided: no jurisdiction or no
21 actionable provision. Obviously, lower right-hand box
22 is Armenia's position: it's for you to decide what you
23 think. But that's how we basically see these cases
24 fitting into your decisions.

25 Let me further say, as a general matter, and this as

11:32 1 a way of wrapping up the ICJ cases, I think you could
2 approach your decision in a few different ways.

3 So first, you might find that Article 18(1) is just
4 recognising a general proposition, and therefore it's
5 not a standard-setting provision. That would be similar
6 to the Climate Change Advisory Opinion.

7 Second, you might find that because Article 18(1)
8 does not recognise any detailed facts or rules found in
9 the ECT, then it does not establish a legal right or
10 obligation. That would be consistent with the
11 Libya/Chad case, where what was recognised was
12 a boundary that had been identified or confirmed with
13 specificity in the treaty.

14 Third, you might find that Article 18(1), given
15 the nature of the text, has a preambular quality to it,
16 such that it is not capable of generating rights or
17 obligations, but that it does provide context for
18 understanding other ECT articles. That would be the
19 approach taken in the Iranian Oil Platforms case.

20 Fourth, although Article 18(1) has no mandatory
21 language, no text saying states "shall" do something,
22 even so, maybe you would find that Article 18(1) is not
23 just preambular in nature and that it does establish
24 a legal obligation of some sort. This isn't our
25 position, but perhaps you might reach that kind of

11:34 1 a conclusion. But you could still say that the
2 obligation is of such a general nature that it can only
3 be seen as context for understanding the other ECT
4 provisions and is not itself a standalone provision that
5 can sustain jurisdiction. That would be consistent with
6 the Equatorial Guinea/France case.

7 And finally, you might find that Article 18(1)
8 establishes a legal obligation, but not one that goes so
9 far as to cover all aspects of the myriad rules that
10 Azerbaijan is necessarily relying on to support its
11 claims. That would be similar to the Iranian Assets
12 case.

13 Let me turn briefly to the object and purpose of
14 the ECT, which I do think is important.

15 Our position on this has been consistent: the object
16 and purpose of the treaty is to regulate and promote
17 trade and investment in the energy sector. Now, counsel
18 for Azerbaijan told us yesterday that Armenia's reading
19 of the object and purpose was unduly narrow and
20 selective, and can't be reconciled with the stated
21 objectives.

22 While it's clear that Azerbaijan rejects our
23 understanding of the object and purpose, we still have
24 not actually heard a clear and consistent statement of
25 what Azerbaijan thinks is the object and purpose. On

11:36 1 the one hand, in the Rejoinder they conceded that the
2 object and purpose is not sovereignty; they said that.
3 On the other hand, yesterday we heard from Mr Sullivan,
4 if I heard him correctly, that sovereignty over energy
5 resources is the subject of the ECT.

6 (Slide 11) But let me turn to Article 2, which
7 I think is also important for this discussion.
8 Azerbaijan points to this and says: we've got a broad
9 formulation here, it doesn't privilege a single
10 objective, it has multiple interests that are being
11 accommodated.

12 It's still not clear exactly what Azerbaijan
13 considers the parameters of those apparently multiple
14 objects and purposes of the ECT. Perhaps Azerbaijan
15 considers them to be sufficiently broad to extend to
16 an object or purpose of regulating sovereignty, of
17 regulating sovereign rights. If so, that's a pretty
18 dramatic claim. Rare indeed is the treaty that has as
19 its object the regulation of sovereignty.

20 Moreover, it feels a bit like Azerbaijan is trying
21 to make the object and purpose of the treaty conform to
22 its Article 18 interpretation rather than the other way
23 around, reaching the interpretation that fits the object
24 and purpose.

25 So how should the Tribunal approach Article 2? Now,

11:37 1 admittedly, Article 2 does not say the words "trade and
2 investment". Rather, what we have here is opening
3 words:

4 "This Treaty establishes a legal framework ..."

5 We submit that, clearly then, is the purpose of
6 the treaty, establishment of a legal framework.

7 Moreover, that legal framework is going to, as this
8 article says, "promote long-term cooperation in the
9 energy field". So we are establishing a legal framework
10 in this area. It's a framework that's going to do
11 something in this area.

12 But what is that area? That area, that framework,
13 is Parts II and III. That's where this cooperation is
14 going to unfold. Those parts, when one reads them, are
15 based on the complementarities and mutual benefits that
16 are referred to here in Article 2. Complementarities:
17 I'm going to trade -- my nationals are going to trade
18 and invest in your territory, yours are going to invest
19 in mine. That's what this purpose is talking about.

20 Madam Chair, you quite rightly asked yesterday: what
21 about this final clause, which says that the framework
22 is being established "in accordance with the objectives
23 and principles of the Charter"?

24 As I said yesterday, we don't see that as saying
25 that the purpose of the ECT, a legally binding treaty,

11:39 1 is the same as all of the many objectives and principles
2 set out in the non-binding Charter that was concluded
3 years earlier. Rather, the particular purpose of the
4 ECT -- and I note that the title of Article 2 is in the
5 singular -- the purpose of the ECT is consistent with,
6 and in that sense in accordance with, the objectives and
7 principles of the Charter, but that still does not mean
8 that all of those objectives and principles define
9 the purpose of the ECT.

10 But let me be even clearer on this point.
11 Azerbaijan claims that we are dismissing the Charter as
12 irrelevant. That's not true. Armenia addressed
13 Azerbaijan's arguments regarding the Charter in detail
14 at paragraphs 100-104 of our Reply. In short, we don't
15 contest that the Charter may shed some light on the
16 ECT's object and purpose. But that light only gets you
17 so far, and it certainly does not get us to Azerbaijan's
18 interpretation of Article 18(1).

19 (Slide 12) So let's look at the Charter. When you
20 go there, and you look for sovereignty and sovereign
21 rights, you find it in three places. The first place,
22 at the top of your screen, reads:

23 "Recognising State sovereignty and sovereign rights
24 over energy resources ..."

25 Obviously this text is very similar to the first

11:41 1 sentence of Article 18(1), and as such, it only gets us
2 so far in then understanding what is the meaning of
3 Article 18(1). The fact that the text appears in the
4 preamble of the Charter but was excluded from the
5 preamble of the ECT suggests that the text was not
6 viewed as an object and purpose of the ECT.

7 Moreover, the fact that this text is preambular here
8 we think is an indication that what became Article 18(1)
9 was seen as, at best, serving a contextual role.
10 It provides an interpretive gloss for the rights and
11 obligations that appear in Parts II and III; it's not
12 a standalone provision.

13 It's like Article I of the Treaty of Amity: text
14 originally in preambular instruments that the US was
15 negotiating moved into the treaty, but nevertheless
16 regarded as having a preambular quality to it.

17 The second reference to state sovereignty and
18 sovereign rights you see there on the screen. It's
19 a bit longer. But when you read that text closely, what
20 it's saying is, "Within the framework of State
21 sovereignty and sovereign rights", we're going to do
22 certain things: we're going to create an efficient
23 energy market. That's going to be based on a principle
24 of non-discrimination, it's going to be based on
25 market-oriented price formation.

11:42 1 So we submit that what this is saying is -- there's
2 a sense of sovereignty and sovereign rights as being
3 a backdrop, right, a framework for what is now being
4 pursued; in other words, a recognition that you have
5 state sovereignty, you have sovereign rights over
6 particular resources, and now we're going to pursue
7 an initiative that's going to relate to, basically,
8 trade and investment. It's not saying that the Charter
9 itself is attempting to codify rules on sovereignty and
10 sovereign rights.

11 The third reference is very similar; it adds nothing
12 further to the analysis.

13 So even if we reach back to the Charter, to these
14 three references on sovereignty and sovereign rights,
15 we submit that the Charter does not support Azerbaijan's
16 interpretation of Article 18(1). Instead, it's serving
17 as background or contextual role for the rest of the ECT
18 on matters concerning trade and investment.

19 (Slide 13) Now, in discussing the object and purpose
20 of the ECT, Azerbaijan again yesterday quoted
21 Craig Bamberger's statement (RL-108, page 8) that:

22 "The ECT is unique as a multilateral ... treaty
23 broadly covering ..."

24 And then he says:

25 "... trade, investment and a range of other

11:44 1 matters ..."

2 And for Azerbaijan, this "range of other matters"
3 would include allowing tribunals to decide issues of
4 sovereignty and sovereign rights. That's a pretty
5 remarkable interpretation. A matter as serious as
6 inter-state obligations with respect to sovereignty and
7 sovereign rights is relegated to just "other matters".

8 We think there's a far more obvious explanation as
9 to what's going on here: the "other matters" being
10 referred to are topics like competition, transit,
11 transfer of technology, access to capital, some of which
12 Azerbaijan had on its slides yesterday. But as Armenia
13 explained in the Reply, these are all topics that are
14 commonly found in multilateral trade and investment
15 agreements.

16 (Slide 14) The diagram you see on your screen comes
17 from a World Bank study (RL-254) on so-called "deep
18 trade agreements", which are bilateral and multilateral
19 economic agreements. They include provisions going
20 beyond the traditional trade obligations, concerning
21 investment, concerning intellectual property and so on.

22 These kinds of agreements, most of which are broader
23 than the ECT, do not seek to regulate state
24 interferences with sovereignty or sovereign rights.
25 These just aren't topics that come up in these

11:45 1 agreements, and we submit isn't a topic being regulated
2 by the ECT.

3 This brings me to the context of Article 18.
4 Azerbaijan still has no contextual support for its
5 interpretation of Article 18, so it spent most of its
6 time yesterday criticising the context we rely on.
7 We think that's very telling. But I should respond to
8 Azerbaijan's criticism of our reliance on a general
9 understanding that was made with respect to the ECT,
10 which you now see on your screen (Slide 16).

11 At the time of the ECT's adoption, the contracting
12 parties expressly agreed to various understandings
13 concerning its interpretation, some of which were with
14 respect to the treaty as a whole. In one such
15 understanding, the contracting parties said what you've
16 got there on the screen:

17 "[We want to] underline that the [Treaty]
18 provisions ... have been agreed upon bearing in mind the
19 specific nature of the Treaty ... to promote long-term
20 cooperation in a particular sector and as a result
21 cannot be construed to constitute a precedent in
22 the context of other international negotiations."

23 Now, Azerbaijan dismisses this as irrelevant
24 because, according to Azerbaijan, it just concerns
25 the WTO process. But our point on this is it's

11:47 1 inconceivable that the states that were concerned about
2 the ECT's impact on other trade and investment
3 agreements would have blithely intended Article 18 to
4 infringe on all these other areas of international law
5 of much greater sensitivity, including matters such as
6 maritime and land delimitation.

7 (Slide 17) Turning to another point on context.
8 Yesterday Azerbaijan pointed to the use of the word
9 "recognise" in another provision of the ECT, and this is
10 Article 15(1) that you now have on the screen. As that
11 provision has an actionable legal obligation, basically
12 for Azerbaijan this is an "A-ha!" moment:
13 it demonstrates that Article 18 also possesses
14 an actionable legal obligation.

15 I direct you to paragraphs 64-66 of our Reply.
16 We basically note that this has mandatory language,
17 the parties "shall recognise"; reference to the parties,
18 reference to "shall".

19 Moreover, the type of rights that are at issue here,
20 third-party rights being transferred, possess a certain
21 legal concept to it that imbues recognition here in
22 a particular way. And we submit that when you look at
23 our Reply, you'll see that we say recognition in this
24 context of transfer of rights is a circumstance where
25 you could imagine a legal obligation arising. We don't

11:49 1 see that as true with respect to Article 18(1).

2 (Slide 18) In fact, the word "recognise" is used no
3 fewer than 40 times in the ECT and its related
4 documents. You've got some examples on the screen;
5 we gave more in our pleadings. It's most often used to
6 accompany aspirational statements, including in the
7 non-binding Charter, European Energy Charter and
8 International Energy Charter. As such, we think there's
9 no reason to view that word in Article 18 as suddenly
10 establishing or codifying inter-state rights and
11 obligations.

12 Turning finally to subsequent practice. Azerbaijan
13 yesterday impugned our position on this, largely
14 focusing on the lack of prior inter-state claims based
15 on Article 18. But I must note that the subsequent
16 practice of the ECT parties is not exclusively of that
17 nature.

18 The novelty of Azerbaijan's Article 18
19 interpretation is also evident in the subsequent
20 practice of all the states parties in the ECT
21 modernisation negotiations, as we noted in our Memorial
22 at paragraph 74 and in our Reply at paragraph 146.
23 Despite extensive discussions by the ECT parties about
24 modernisation, including reforms to the claims process,
25 there's nothing in those discussions indicating that

11:50 1 the parties viewed Article 18 the way Azerbaijan does.

2 (Slide 20) Indeed, such acknowledgment was even made
3 by Azerbaijan itself. When you look at the screen,
4 you'll see that in June 2021 (RL-174, paragraph 35),
5 it basically refers to Article 18(1) as "very general".

6 (Slide 21) And then also in a separate discussion
7 (RL-173, page 74), Azerbaijan raised the issue of
8 sovereignty over energy resources and basically is
9 characterising the situation as we have: it's an issue
10 in relation to investment.

11 So when one looks at the position taken by all of
12 the state representatives during these modernisation
13 negotiations, including Azerbaijan itself, we submit
14 that the subsequent practice demonstrates
15 an interpretation of Article 18 that is not Azerbaijan's
16 interpretation.

17 (Slide 23) As a last point, I'll just note that
18 Azerbaijan raised the Bankovic case in this context.
19 When you look at Bankovic (RL-148, paragraph 62) --
20 you've got it up on the screen -- we think this is
21 squarely in our corner.

22 The court supported its interpretation of the
23 European Convention on Human Rights as not applying
24 extraterritorially because states have not shown any
25 sign of understanding it in that way when acting

11:52 1 extraterritorially. We submit that this same kind of
2 practice is the kind of practice that we bring before
3 you today in this case, and is a reason why you should
4 feel comfortable with our interpretation of
5 Article 18(1).

6 Madam Chair, that concludes my presentation. Unless
7 I can be of further service, I ask you to call on
8 Mr Farhadi to continue our second-round presentation.

9 THE PRESIDENT: Thank you.

10 Any questions? Yes.

11 PROFESSOR McRAE: I have a question actually going back to
12 paragraph (3). Because I understand your argument about
13 the implications of accepting paragraph (1) as
14 establishing obligations, and that may bring in wider
15 considerations. But in your discussion you didn't
16 indicate what the point was in paragraph (3), because
17 the way you set it up, paragraph (3) does nothing more
18 than paragraph (1) does already.

19 So I'm concerned, or want to know: what do you think
20 paragraph (3) was all about? Why bother? If
21 paragraph (1) has the scope that you say it has, what's
22 the point of paragraph (3)? Paragraphs (2) and (4) have
23 a specific point, but there seems to be no point in
24 paragraph (3).

25 PROFESSOR MURPHY: Well, I think that obviously one would

11:53 1 want to look a bit at the travaux on that, and
2 Mr Farhadi will talk about that.

3 But I think it is the case that in both
4 paragraph (1) and paragraph (3), we basically have
5 either a recognition or an idea that there's
6 a continuing to hold these rights that are out there,
7 separate from the ECT, and that there was some desire to
8 be clear in [paragraph] (3) that those rights included
9 things like the ability to tax exploitation of natural
10 resources, the ability to earn royalties on the
11 exploitation of natural resources. Presumably that's
12 not, you know, captured in paragraph (1).

13 And this gives you a little bit more sense of what
14 maybe this is all about: we're preserving the host
15 state's ability, in the context of trade and investment,
16 to do certain things. Paragraph (2) is about ownership;
17 paragraph (3) is about things like royalties and taxes
18 and things of that kind. To us, it's just -- it is
19 giving you somewhat more detail, but it's still all in
20 the context of not establishing any mandatory language
21 and all in the context of basically an eye to what's
22 going on in Parts II and III.

23 Beyond that, I think one would have to go through
24 the travaux a bit, and Mr Farhadi will do a little bit
25 of that, including with respect to these paragraphs.

11:55 1 PROFESSOR McRAE: Okay. Thank you very much.

2 PROFESSOR MURPHY: Thank you.

3 MR FARHADI: Good morning, Madam President, members of
4 the Tribunal.

5 I'll take the floor just for a few minutes before
6 the break to respond a bit to what we heard yesterday
7 from Azerbaijan regarding the travaux of Article 18.
8 I hope to clear up any doubt there may be about what
9 travaux are on the record, what documents Armenia relies
10 on, when they are from and why they are relevant.

11 (Slide 25) Yesterday, counsel for Azerbaijan showed
12 you the diagram you see on the screen. As noted in the
13 footnote, it is meant to be for illustrative purposes;
14 it does not actually depict any specific documents on or
15 off the record.

16 The point of the diagram seems to be saying that
17 Armenia is cherry-picking its travaux and putting
18 forward a misleading picture of how Article 18 was
19 negotiated and understood. This is not the case. And
20 even if Armenia were cherry-picking the dozen or so
21 documents that we rely on, then the question becomes:
22 well, where are Azerbaijan's cherries?

23 (Slide 26) In order to ensure that the Tribunal has
24 all the elements before it, we prepared the timeline you
25 can now see on your screen. This is not illustrative;

11:57 1 it's our best effort to assemble before you all of the
2 travaux documents relied on by either party in relation
3 to Article 18.

4 So the scroll icons that you can see at the top of
5 the timeline, those are drafts, prior drafts. So as
6 I noted yesterday, the actual text of the provision did
7 not change in especially illuminating ways over the
8 years, so neither Armenia nor Azerbaijan are really
9 making too much of a point of those.

10 But the round icons, those represent all of the
11 other travaux submitted by either party. We discussed
12 many of those yesterday.

13 You can see that, as Azerbaijan rightly pointed out,
14 there's only a smattering of documents each year from
15 1991 to 1993. Azerbaijan implies that this is because
16 Armenia is holding back travaux from this period, but
17 that's not the case. The fact of the matter is there's
18 not much in the way of interesting travaux from those
19 years because Article 18 was not subject to any real
20 debate or controversy. For Armenia, this is a strong
21 indication that it was a simple contextual provision
22 that was not intended to have the significance that
23 Azerbaijan gives to it.

24 Then, in 1994, something happened to spark more
25 debate, leading to the flurry of travaux that you can

11:58 1 see reflected on the right-hand side of the screen.

2 (Slide 27) So let's take a closer look at 1994.

3 We can see that on 13 June, we have RL-133, which
4 reports on the amendment of Article 18 to include for
5 the first time Article 18(2). As explained by counsel
6 for Azerbaijan yesterday, that was indeed a key
7 development that sparked some controversy. There was
8 apprehension, as you've heard before, among certain
9 delegations that this could lead to a gutting or
10 undermining of the substantive protections of the ECT.

11 Apparently at his own initiative, and to the
12 consternation of certain states and delegations,
13 Mr Bamberger held some discussions and solicited views
14 on the effects of Article 18(2) in early August 1994.
15 Then the legal sub-group which was led by Bamberger
16 issued a memo on the topic on 12 August (CL-33),
17 expressing the view that the version of Article 18(2)
18 being considered could indeed potentially have
19 unintended effects on the treaty's investment
20 provisions.

21 This memo by the legal sub-group prompted reactions
22 from states, some of them strong, including that of
23 Norway, which of course Norway being the proponent of
24 not only Article 18(2) but Article 18 in general. So
25 then on August 16, we see Norway circulating its memo

11:59 1 that we went over yesterday (RL-138).

2 In providing its reactions to this Article 18(2)
3 debate, Norway also provided comprehensive views on
4 Article 18 as a whole. And Norway was not alone.
5 States that had not before given their views on
6 Article 18 began to weigh in on the debate, providing
7 some interesting travaux material. In other words, the
8 controversy of Article 18(2) prompted a re-examination
9 of Article 18 as a whole, which had until then flown
10 somewhat under the radar.

11 (Slide 28) Taking a closer look at that legal
12 sub-group memo (CL-33), we can see that the advice was
13 indeed sought with regard to 18(2), and the question of
14 whether it "may conflict with and potentially override
15 other provisions of the ECT".

16 (Slide 29) The memo then continues by explaining
17 the background to the addition of Article 18(2),
18 saying it:

19 "... grew out of a negotiation between the EU and
20 Norway, which had separately agreed the following
21 preambular language in their draft bilateral Protocol on
22 the Petroleum Sector, connected with Norway's accession
23 to the [European Community] ..."

24 In other words, Norway was inspired by a provision
25 it negotiated with the EU in another context and sought

12:01 1 to have similar text included within the ECT.

2 (Slide 30) The legal memo discusses the uncertainty
3 as to the significance of the potential which
4 Article 21(2) holds for overriding other provisions of
5 the ECT. For example, Bamberger opines that:

6 "... I believe ... in close cases [that]
7 Article [18](2) would weigh heavily against a finding
8 that host country conduct violates the ECT's investment
9 provisions."

10 So in other words, you have Bamberger here sort of
11 unilaterally sounding the alarm that maybe the balance
12 being struck is off-kilter.

13 (Slide 31) So in view of that, one of the proposed
14 solutions was to have a declaration interpreting
15 the provision, and we'll come back to that later.

16 (Slide 32) But the work of the sub-group was
17 contentious and these conclusions were contentious, and
18 so we see Norway reacting here (RL-138). This is the
19 cover letter to the memo that we went over yesterday.
20 The Norwegian Ambassador states that:

21 "As you are aware Article 21 is the outcome of
22 extensive negotiations between the [EU] and Norway."

23 And I'll pause here to say that based on this text
24 and the academic commentary that we cited yesterday,
25 it's Armenia's understanding that Norway was indeed at

12:02 1 the origin of Article 18 from the early days of the ECT,
2 and not just the June 1994 proposal of Article 18(2).

3 And this also explains why Norway goes on to state:

4 "The Article is of an utmost importance to Norway
5 and reflects in its present drafting the bottom line of
6 what Norway can accept if we are to sign and ratify
7 the ECT."

8 So I'll not address the contents of that memo again
9 in detail, but I would emphasise that the memo and the
10 discussions that ensued very much concerned Article 18
11 as a whole. While it was Article 18(2) that prompted
12 things, the debate ended up taking on a wider dimension.

13 (Slide 33) We can see this reflected in two similar
14 quotes from Norway that are on the screen.

15 The first is what Azerbaijan showed you yesterday
16 (RL-135). For Azerbaijan, the fact that Norway refers
17 explicitly here to 18(2) as having an interpretive
18 function is somehow evidence that the rest of Article 18
19 does not have that function. But that statement is from
20 2 August 1994, before the legal sub-group's memo and
21 Norway's own memo; in other words, before the debate
22 kicked off.

23 So that's why you see in the second quote (RL-138)
24 that on 16 August, Norway unequivocally says that
25 Article 18, 21 here:

12:03 1 "... is intended to affect the interpretation and
2 application of the rest of the ECT, including provisions
3 of Part IIII."

4 (Slide 34) And of course, as we saw yesterday, you
5 have very explicit statements elsewhere from Norway,
6 the UK and Australia clearly interpreting Article 18 as
7 a whole, and not just Article 18(2). And in fact the
8 UK's statement was that Article 18(1), the provision
9 invoked by Azerbaijan, is "harmless" (RL-134). That's
10 Article 18(1).

11 (Slide 35) Allow me to just open a brief
12 parenthetical here. Azerbaijan's insistence on
13 Article 18(2) as having a life of its own, distinct from
14 Article 18's other provisions, is not how states
15 viewed it.

16 For example, we have the statement in the legal
17 sub-group's memo (CL-33) that Article 18(2)'s meaning is
18 "in part ... indicated by paragraph [18](3)". In other
19 words, the property ownership system addressed in
20 Article 18(2) fits neatly with Article 18(3)'s
21 provisions about royalties, taxes and the like. As
22 such, Article 18(3) is by no means only connected to
23 Article 18(1).

24 And I would also refer you to CL-115 of 25 August,
25 where states discuss and reject a reordering of the

12:05 1 provisions that would have moved (3) up to be right next
2 to (1).

3 (Slide 36) So another example of how the character
4 of all four paragraphs of Article 18 served interpretive
5 functions can be seen in a 1 September 1994 letter that
6 was from the UK to Norway, but circulated to other
7 delegations (RL-141).

8 The UK explains that it rejects the idea that "the
9 issue of 'access of energy resources' is exhaustively
10 regulated in Article [18]". So we have here another
11 rejection of Article 18's ability to exclusively govern
12 access to resources even within the ECT. And this is
13 also, as you can see further down, an indication that
14 anything related to resource access was really something
15 with foreign investment in mind. And we do also have
16 a statement here about Article 18(4) as being purely
17 declaratory.

18 So really, viewed in the whole, we can see that that
19 is imbued in all four paragraphs.

20 (Slide 37) Now, returning to our Article 18(2)
21 debate. What was its fate after all of these debates?

22 So the concerns raised by Bamberger and others
23 resulted in some slight modifications to the text of the
24 provision, which occurred right before the final text
25 was adopted on 14 September 1994. But much more

12:06 1 importantly, we say, is the binding declaration that
2 Professor Murphy referred to earlier, and that was
3 adopted at the very last minute before the final text.
4 That declaration, as we saw, provides that:

5 "... 18(2) shall not be construed to allow the
6 circumvention of the application of the other provisions
7 of the Treaty."

8 And as Professor Murphy mentioned, Azerbaijan seems
9 content to ignore this declaration, which very much
10 detracts from its theory that Article 18(2) is
11 a provision with teeth that should lend a similar
12 binding gloss to Articles 18(1) and Article 18(3).

13 But the fact is that Article 18(2), which was once
14 perceived as the paragraph of Article 18 that had the
15 most normative thrust to it, was watered down at the
16 last minute with this declaration. It seems that the
17 contracting parties settled on a sort of compromise
18 where Norway got its text in the treaty for interpretive
19 purposes, but the other parties got assurances that
20 there would be no gutting of the ECT's investment
21 protections. This solution reflects the caution with
22 which the negotiating parties approached the balancing
23 act between state and investor rights.

24 Moreover, a common theme we see through the travaux
25 is the preoccupation among delegations and conference

12:07 1 officials to maintain buy-in from a diversity of states.
2 Concerns were consistently expressed that key states,
3 like the United States, Russia, Japan, Australia and
4 others, would not sign on to the treaty if their
5 concerns about their national interests were not
6 sufficiently addressed.

7 So we say in this context it would be very strange
8 indeed [if] some of those negotiating states that were
9 so attuned to soliciting maximum engagement and keeping
10 everyone on board would also decide to vest a provision
11 like Article 18 with the expansive and unwieldy meaning
12 that Azerbaijan gives to it.

13 Before concluding, Professor McRae, I wish I had had
14 a little bit more time: I just opened a couple of
15 documents on my computer to try to answer your question.

16 But I think in a general sense, when we're looking
17 at what is Article 18(3) doing that goes beyond
18 Article 18(1), I think it can really be traced back --
19 and we see this a lot in the travaux -- to just the
20 preoccupation of Norway, being this resource-rich state
21 with a lot of public involvement in its oil and gas
22 sector, and a sort of -- I would say it comes through
23 a little bit of a paranoia and an apprehension of US and
24 UK systems of privatised investment in minerals, and
25 it's really trying to emphasise the things that

12:09 1 it means.

2 And that's also, I think, why we see 18(2) coming
3 in. So Norway is negotiating this protocol with the EU
4 also about its petroleum, and it puts this provision in
5 there about system of ownership, right? And then it
6 thinks: oh, my gosh, let me also add this clause on to
7 18(1), in addition to the other clauses from 18(3). So
8 I think that they're all there sort of to provide a bit
9 of comfort.

10 And unless there are any other questions, I conclude
11 my remarks there, and it might be an opportune moment
12 for that break.

13 THE PRESIDENT: Any questions for counsel before the break?

14 Thank you very much. We will take then a 15-minute
15 break. We'll return at 25 after the hour. Thank you.

16 (12.10 pm)

17 (A short break)

18 (12.28 pm)

19 THE PRESIDENT: Welcome back to all. We now resume.

20 Ms Macdonald, when you're ready.

21 MS MACDONALD: Thank you.

22 Madam President, members of the Tribunal, I will
23 response to the submissions we heard yesterday from
24 Azerbaijan on the existence of a dispute. In the
25 interests of time, I won't respond to everything that

12:28 1 was said, but I'll focus on what we understand to be
2 the key points of disagreement.

3 I'll begin with the legal principles. Azerbaijan
4 said, as a starting point, that you ought not to be
5 unduly formalistic when deciding on the existence of
6 a dispute, and that it's all a question of form over
7 substance; or as Azerbaijan put it in the heading to its
8 slide 84, the contours of a dispute can be "Broadly and
9 Liberally Defined".

10 We looked yesterday at some of the ICJ's decisions
11 to which I referred you on the existence of a dispute,
12 and these make clear that in order to generate
13 a dispute, the starting point is for the claim to be
14 raised with considerable clarity and specificity.
15 I won't go back through all of those again, but you have
16 them on our slides from yesterday and in our written
17 submissions, and these include the clear requirements
18 set out by the court in the Marshall Islands cases
19 (RL-70, RL-166, RL-167).

20 What I will take a moment to respond to is what
21 Azerbaijan seeks to draw from the court's decision on
22 jurisdiction in *Gambia v Myanmar* (RL-88).

23 Now, that decision is doing some heavy lifting in
24 Azerbaijan's case. You will recall that counsel
25 yesterday afternoon said that the ICJ made clear -- and

12:30 1 I quote from counsel (Day 1/217:21-23) -- that:

2 "... a dispute may exist as between states even
3 where no specific treaty or treaty provision has been
4 invoked by either party ..."

5 (Slide 39) And indeed, at paragraph 72 of that
6 decision (RL-88), which we see on the screen, the court
7 did state that in theory, a specific reference to
8 a treaty or to a provision is not required. But context
9 is everything, and that's why I'm going to take a moment
10 to flesh that out.

11 The discussion in that case turned in part on
12 statements that The Gambia had made in the General
13 Assembly, And so we see that in the same paragraph,
14 the court noted that:

15 "... the statements of The Gambia in September 2018
16 and in September 2019 ..."

17 Those were statements which it had made in
18 the General Assembly:

19 "... were made shortly after the publication of the
20 Fact-Finding Mission's reports [which] specifically
21 alleged the perpetration of crimes in Rakhine State that
22 were similar in nature, gravity and scope to those that
23 have allowed genocidal intent to be established in other
24 contexts, while the 2019 report specifically referred to
25 Myanmar's responsibility under the Genocide Convention."

12:31 1 Now, the court then went on to find that
2 The Gambia's statements to the General Assembly were
3 clearly referring to these UN reports, one of which
4 even:
5 "... identified The Gambia as one of the States
6 making efforts to pursue a case against Myanmar before
7 the Court under the Convention."
8 And so, the court said:
9 "Myanmar could not have been unaware of this fact."
10 Now, the court, in its analysis, went on to draw
11 positive opposition from Myanmar's rejection in strong
12 terms of the allegations of genocide which were made in
13 the UN reports and endorsed by The Gambia. So Myanmar
14 rejected in strong terms those reports in its statements
15 in the General Assembly.
16 (Slide 40) And we can see the court's conclusion on
17 positive opposition on screen at paragraph 73.
18 (Slide 41) Then if we go on to the next paragraph,
19 we see that, not content to leave things as they were
20 with the exchange of positively opposed statements in
21 the General Assembly, [The] Gambia actually followed up
22 with a note verbale that specifically cited and endorsed
23 the UN fact-finding conclusions that Myanmar was
24 committing crimes under the Genocide Convention. And
25 the note verbale, and we see the court recording this:

12:32 1 "... 'emphatically reject[ed] Myanmar's denial of
2 its responsibility for the ongoing genocide against
3 Myanmar's Rohingya population, and its refusal to fulfil
4 its obligations under the Genocide Convention', and
5 it asked Myanmar to comply with those obligations."

6 (Slide 42) The court went on to note at
7 paragraph 75, and we see there, first yellow highlight
8 that "Myanmar never responded to [that] Note Verbale",
9 even though in the court's view, in the circumstances,
10 a response was called for.

11 (Slide 43) So, drawing together the threads at
12 paragraph 76, the court inferred positive opposition
13 from two matters, the General Assembly exchanges and
14 Myanmar's failure to respond to the note verbale, the
15 latter failure being for very specific reasons. And as
16 we see on screen:

17 "... the Note Verbale did not constitute the first
18 time that these allegations were made known to Myanmar.
19 In light of the nature and gravity of the allegations
20 made in The Gambia's Note Verbale and Myanmar's prior
21 knowledge of their existence, the Court is of the view
22 that Myanmar's rejection of the allegations made by
23 The Gambia can also be inferred from its failure to
24 respond to the Note Verbale within the one-month period
25 preceding the filing of the Application."

12:34 1 So this decision cannot possibly be read in the
2 broadbrush way that Azerbaijan suggests. It actually
3 shows a state setting out a very clearly particularised
4 claim, in fact and law, with reference to underlying
5 evidence, and meeting a very clear opposition of views.

6 And if we think about it, the proper analogy between
7 the Gambia case and the case before this Tribunal would
8 be if, firstly, an authoritative international body had
9 issued a report concluding that Armenia had violated its
10 energy transit obligations under Article 7 of the ECT,
11 citing Azerbaijan's intention to bring arbitral
12 proceedings in respect of that breach; secondly,
13 Azerbaijan had publicly cited and endorsed that report
14 in multilateral fora, with Armenia publicly denying the
15 allegations; and thirdly, Azerbaijan had then followed
16 up by citing the report's detailed Article 7 conclusions
17 in a note verbale.

18 But to state the obvious, we have absolutely nothing
19 like that here. I'll review again the scant
20 correspondence in a moment. And indeed, given the many
21 years which have elapsed since the alleged interruption
22 of the gas supply in 1991, it is actually quite striking
23 that the record contains no evidence of Azerbaijan ever
24 making such a complaint in any international forum.

25 Now, moving on to the cases in which part of the

12:35 1 claim has failed the dispute requirement. You heard the
2 submissions yesterday morning that we made on
3 Belgium v Senegal and Nicaragua v Colombia.

4 Now, it was said by Azerbaijan, with reference to
5 its slide 90, that: well, those cases involve disputes
6 arising under separate instruments or separate bodies of
7 law. And its argument is that, by contrast, in this
8 case we are dealing with claims under the same treaty,
9 the ECT, so all of those claims necessarily form part of
10 the same dispute.

11 But as various counsel discussed yesterday, the ECT
12 is a complex and capacious treaty. Article 7 concerns
13 the transit of energy. It is located in Part II,
14 "Commerce", and contains trade law provisions largely
15 inspired by the GATT. It imposes a self-contained legal
16 regime for transit states, with its own definition
17 section and, as Professor d'Argent discussed
18 yesterday, its own dispute resolution mechanism.

19 Article 7 is four pages long. It contains multiple
20 obligations of different kinds, such as those pertaining
21 to securing existing flows of energy, obligations
22 relating to non-discrimination and cooperation, all of
23 which Azerbaijan alleges that Armenia breached. This is
24 its Statement of Claim at paragraphs 246-249.

25 Article 18, by contrast, as Professor Murphy has

12:37 1 explained, is located in Part IV, "Miscellaneous
2 Provisions".

3 Now, the fact that Azerbaijan's two sets of claims
4 under Article 7 and Article 18 arise under the same
5 overarching treaty cannot, we say, automatically mean
6 that they form a single dispute. This formalistic
7 approach, if it was correct, would mean that, for
8 example, a claim relating to the use of force under
9 Article 2, paragraph 4 of the UN Charter would
10 automatically form part of the same dispute as a claim
11 under, say, Article 105 of the Charter on the privileges
12 and immunities of the United Nations, even though, as
13 we can readily see, the two claims involve completely
14 different bodies of law.

15 Consider also the UN Convention on the Law of
16 the Sea, which covers everything from the resolution of
17 maritime boundary disputes under Annex VII to the
18 protection of sedentary species, to the obligation of
19 states to cooperate in the promotion of maritime
20 research. Again, it would be absurd to say that any and
21 every claim raised by one state against another under
22 UNCLOS automatically forms the same dispute. That would
23 ultimately be the same sort of formalistic approach that
24 Azerbaijan itself has urged you not to adopt.

25 (Slide 45) And in this context, the ICJ is not the

12:38 1 only adjudicatory body that has found that different
2 claims must independently satisfy the dispute
3 requirements even when they arise under the same treaty.
4 Burlington v Ecuador (RL-157), if we look at the
5 investor-state context, is an example of an ICSID case
6 in which the tribunal took the same approach.

7 Now, this case, in brief, concerned, among other
8 things, claims of breach of the full protection and
9 security obligation in relation to two different oil
10 exploration areas, block 23 and block 24. So the same
11 treaty provision, the same facts in relation to each
12 block -- resistance from the local population -- but
13 occurring at different times.

14 And the tribunal looked very carefully at the record
15 in relation to each separate block. As to block 24, the
16 tribunal found (paragraph 298) that while the claimant
17 had sent "a diplomatic request for further assistance in
18 connection with the indigenous opposition in the Block":

19 "... this request for assistance [did] not express
20 disagreement with the manner in which the Respondent has
21 fulfilled its obligation to provide protection and
22 security in the Block."

23 And thus it concluded that this did not give rise to
24 a dispute in relation to block 24 specifically.

25 Then when the tribunal examined the language of

12:39 1 the trigger letter (paragraph 309), it also found that,
2 and we can see on the screen:

3 "... the Trigger Letter [did] not articulate
4 Claimant's disagreement with a reasonable degree of
5 specificity."

6 And so again this did not give rise to a dispute.

7 (Slide 46) By contrast, the tribunal did find that
8 there was a dispute as to the specific claim relating to
9 block 23 (paragraph 331), although it ended up also
10 finding that claim to be inadmissible because it had not
11 been properly notified.

12 Now, this is a striking decision, we say, since it
13 shows a tribunal looking at claims based on the same
14 alleged conduct, violating the same legal provision in
15 the same treaty, and still requiring the existence of
16 a dispute to be separately established for each of
17 the claims.

18 So still less on this, we say, correct approach
19 can one conflate claims that differ in their factual and
20 legal bases simply because they both fall under the same
21 treaty.

22 My next point, building on the previous one, is
23 that, contrary to the broad and liberal approach urged
24 on you by Azerbaijan, the ICJ has emphasised the
25 importance of a very analytical approach to whether

12:41 1 a claim forms part of an existing dispute.

2 (Slide 47) Here we might look briefly at the ICJ
3 decision in Certain Phosphate Lands (RL-34). In the
4 context of assessing the admissibility of new claims not
5 mentioned in the application instituting proceedings,
6 the court held that a new claim would constitute
7 a different dispute where it concerned different factual
8 conduct at a different period of time and in a different
9 geographical area.

10 In that case, Nauru had made claims about the
11 alleged failure to observe the trusteeship agreement and
12 about the rehabilitation of the phosphate lands. In its
13 memorial, Nauru added a claim concerning the disposal of
14 overseas assets of the British Phosphate Commissioners.
15 To determine admissibility, the court examined if the
16 new claim arose directly out of the question which is
17 the subject matter of that application.

18 Dr Salonidis will come back shortly to
19 Madam President's question about the addition of new
20 claims in the investor-state context. For my
21 purposes -- and this is simply an illustrative analysis,
22 we say -- the relevant aspect of the court's reasoning
23 is its analysis of the existence of a dispute
24 specifically.

25 So, as we see on screen (paragraph 68), the court

12:42 1 noted that:

2 "... if it had to entertain such a dispute on
3 the merits ..."

4 So in other words, the new claim which Nauru sought
5 to raise:

6 "... the subject of the dispute on which it would
7 ultimately have to pass would be necessarily distinct
8 from the subject of the dispute originally submitted to
9 it in the Application."

10 And when it went on to consider what resolving such
11 a dispute involved, the court noted that it "would have
12 to consider a number of questions that appear to it to
13 be extraneous to the original claim", and we see it
14 drawing attention to the different *ratione* -- *ratione*
15 *temporis*, *ratione loci*, *ratione materiae* -- aspects of
16 the new claim. The court went on to reject this new
17 claim as inadmissible.

18 So there we have, we say, some helpful observations
19 from the court as to the importance of a granular
20 approach to matters including the location, the timing
21 and the nature of the conduct said to form part of
22 the dispute.

23 THE PRESIDENT: Counsel, before you move on from these
24 slides to your next topic --

25 MS MACDONALD: Yes.

12:43 1 THE PRESIDENT: -- for both the Burlington v Ecuador case
2 and the Certain Phosphate Lands case, you referred to
3 decisions made in the context of inadmissibility rather
4 than jurisdiction. And I know your principal position
5 has been that for the ECT, the existence of a dispute is
6 a matter of jurisdiction, not admissibility.

7 Could you explain why you feel that for us it's
8 a matter of jurisdiction, whereas it was addressed as
9 a matter of admissibility in these other cases?

10 MS MACDONALD: Yes.

11 We say -- our foundation is: Article 27 requires
12 the existence of a dispute. That's a clear textual
13 indication in the treaty that, as a threshold matter,
14 defining the claims which fall within this Tribunal's
15 jurisdiction, there must be a dispute.

16 So it depends very much on the treaty framework
17 which is in issue in the particular case, on the
18 procedural rules which govern the particular case and on
19 other matters, including the stage at which a claim is
20 sought to be raised, for example.

21 So potentially different considerations apply, for
22 example, when a claim is to be added. So it depends
23 whether one is looking at, for example, Article 46 of
24 the ICSID Rules.

25 So in this case, we say Article 27 clearly requires

12:45 1 there to be a dispute before the Tribunal will have
2 jurisdiction. So, like in some of the ICJ cases that
3 we looked at yesterday, the existence of a pre-filing of
4 the claim dispute is a hard-edged matter of
5 jurisdiction; it's not simply a question of
6 admissibility.

7 THE PRESIDENT: Alright, thank you.

8 MS MACDONALD: So the next point I would pick up on the law
9 is the potential relevance of statements made by the
10 parties once the proceedings have commenced, and in
11 particular in the pleadings.

12 Yesterday Azerbaijan argued that the evidence of
13 Armenia's positive opposition on the pipeline transit
14 claims would include statements in Armenia's pleadings
15 in the preliminary objections phase of this arbitration,
16 and it listed some of those at its slide 97.

17 (Slide 48) In support of this argument, Azerbaijan
18 showed an excerpt from paragraph 43 of the Marshall
19 Islands case (RL-70), and you can see on the screen
20 where we've replicated Azerbaijan's slide 96 and we see
21 the words which they have chosen to highlight.

22 But there's actually a very important second half to
23 that paragraph, which must be read in full. You can see
24 this on the next slide (49). So the second half of the
25 paragraph, starting with "However", the court

12:46 1 immediately qualified the statement which Azerbaijan
2 emphasised, and the court stressed that:
3 "... neither the application nor the parties'
4 subsequent conduct and statements made during the
5 judicial proceedings can enable the Court to find that
6 the condition of the existence of a dispute has been
7 fulfilled in the same proceedings ..."
8 And the court explained that:
9 "If the Court had jurisdiction with regard to
10 disputes resulting from exchanges in the proceedings
11 before it, a respondent would be deprived of the
12 opportunity to react before the institution of
13 proceedings to the claim made against its own conduct.
14 Further[] ..."
15 And we would draw particular attention to this:
16 "... the rule that the dispute must in principle
17 exist prior to the filing of the application would be
18 subverted."
19 So the court was clear: a dispute must exist before
20 the filing of the application.
21 Azerbaijan pretty much accepted as much yesterday.
22 It appears to have conceded that, quoting from
23 the transcript (Day 1/237:11-14):
24 "... subsequent conduct cannot establish the
25 existence of a dispute but it can ... throw light on

12:47 1 the evidence of [such dispute] ..."

2 But in this case, as you have seen, there is no
3 evidence to throw light on in the first place.

4 So with that, I turn to apply the legal
5 principles -- and I have simply picked up some of the
6 points that arose yesterday -- I turn to apply those to
7 the facts of the case.

8 Counsel for Azerbaijan represented Armenia as saying
9 that the pipeline transit claims required its own
10 separate notice of dispute, separate round of
11 negotiations and recourse to separate conciliation, and
12 counsel described this position which was attributed to
13 Armenia as being (Day 1/215:18-21):

14 "... wasteful, procedurally inefficient, draconian
15 in its effect, and ultimately incompatible with the
16 ECT's overriding aim of promoting the peaceful
17 settlement of disputes."

18 But of course it's not Armenia's position that
19 the pipeline transit claims required their own separate
20 communications or their own separate procedural track.
21 It's not a question of needing a separate piece of paper
22 to raise the claim or a separate meeting room to discuss
23 it. There would have been no problem with raising those
24 claims in the same notice of dispute, discussing them in
25 the same written exchanges and at the same meetings.

12:48 1 The point that Armenia makes is not that this couldn't
2 have been done; it's that it wasn't done.

3 And picking up on the word "draconian", this is
4 a strong word to use, we say, in response to Armenia's
5 argument that when you look at the case law and how
6 a claim needs to be raised, the pipeline transit claims
7 fall short. If it's draconian for a claim to fail for
8 lack of a dispute, then this draconian result has been
9 reached in the many ICJ and investor-state cases
10 we touched on.

11 And to turn it around, while the results of those
12 cases must have disappointed the putative claimants,
13 they serve the important principle that, as the court
14 put it in the Marshall Islands decision that we just saw
15 on screen, a state should not be deprived, in the
16 court's words, of the opportunity to react before the
17 institution of proceedings to the claim made against its
18 own conduct.

19 But when we look at the correspondence, this is
20 exactly the opportunity of which Armenia was deprived in
21 relation to the pipeline transit claims. So let's turn
22 to Azerbaijan's submissions on the relevant exchanges.

23 The Notice of Dispute of 8 October 2021 (CE-63,
24 pages 2-3) is fundamental to Azerbaijan's case. As
25 I noted yesterday, it's critical to Azerbaijan to show

12:50 1 that the pipeline transit claims were raised in that
 2 letter, because if they were only raised in the letter
 3 of 16 December 2022, then on any view they have not been
 4 negotiated, let alone been met with an opposition of
 5 views. And you'll hear more from Dr Salonidis about the
 6 negotiations.

 7 Azerbaijan's oral submissions on the 8 October
 8 letter, it seemed to us, involved two strategies. The
 9 first of these is to try to read the type of conduct
10 described in the letter as including the termination of
11 gas supply.

12 (Slide 51) So if we bring up the letter again,
13 Azerbaijan, in its slides, has placed emphasis on words
14 such as "[REDACTED]", "[REDACTED]", "[REDACTED]" and
15 "[REDACTED]", and these were picked out in its
16 slides 87-89.

17 And you may recall -- and this is all of a piece
18 with its representation in slide 80 of the blue circles,
19 with the "Transit Claims" sitting inside the "Pipeline
20 Claims", and the "Pipeline Claims" sitting inside what
21 it terms the "Resource & Infrastructure Sovereignty
22 Dispute".

23 So counsel described the pipeline transit claims
24 (Day 1/222:23-223:2) as:

25 "... merely an articulation, a particularisation, of

12:51 1 Azerbaijan's wider complaint about how Armenia blocked
2 access to, exploited and prevented the development of
3 its infrastructure and resources."

4 Now, in theory, one can zoom out from any set of
5 disputes to the point where you can find a sufficiently
6 abstract umbrella term that might cover the whole thing.
7 Here you might say: well, it's all about energy. But
8 however Azerbaijan seeks to put it, you simply cannot,
9 we say, say that a claim that the gas supply was cut off
10 is part of a broader claim about resource sovereignty.

11 (Slide 52) And we've sought to summarise the key
12 differences between the broader denial of access claims
13 and the pipeline transit claims in a table which we put
14 on screen here. I won't read it all out, but we've
15 sought to indicate, as you see down the left-hand side,
16 the "Alleged conduct", the "Alleged location", the
17 "Alleged period" and the "Alleged violations of the ECT"
18 in respect of each of the two categories of claim, and
19 we've put pleading references which we hope will be of
20 assistance in due course.

21 Now, as well as conflating two different types of
22 conduct, differing in the ways that we see on screen
23 here, Azerbaijan's second strategy is to ignore or to
24 seek to explain away the ways in which the letter of
25 8 October defines the location and the timing of the

12:53 1 allegedly wrongful conduct.

2 As to location, I addressed you yesterday on the
3 fact that the letter describes the wrongful conduct as
4 taking place in Nagorno-Karabakh, while the pipeline
5 transit allegations involve conduct in the sovereign
6 territory of Armenia.

7 Azerbaijan described this yesterday afternoon as
8 a "facile" distinction (Day 1/224:25), and counsel made
9 two points: firstly, that later unspecified acts
10 happened on Azerbaijan's territory; and secondly, that
11 adverse impact "was felt" on Azerbaijan's territory
12 (Day 1/225:24), and these two factors are said to amount
13 to what was described as an undeniable factual link.

14 But the problem that we see for Azerbaijan here is
15 that whether or not the alleged conduct had
16 a cross-border effect as a matter of fact, none of this
17 was actually said in the letter. There's no hint at all
18 in the 8 October letter of an effects-based analysis,
19 and we simply can't read that in after the event.

20 So that's location.

21 Then as to timing -- so in other words, the
22 difference between 1991 and 1994 -- you heard nothing
23 at all. You were offered no explanation for how
24 we reconcile the post-1994 period in the letter with
25 an allegation dating back to the armed conflict in 1991.

12:54 1 So in summary, if you asked the reader of this
2 letter whether it could possibly cover an allegation
3 that Armenia took action in its own territory in 1991 to
4 cut the gas supply, thus violating the detailed
5 provisions of Article 7 in the "Commerce" section of the
6 ECT, the reader would say: obviously not. The reader
7 would point to the fact that such claims are positively
8 excluded by the framing of the letter.

9 And if that's right -- and we say it's the only
10 possible conclusion to draw from the wording of the
11 letter -- then all the submissions you heard from
12 Azerbaijan about silence, about non-responsive speech,
13 about weaponising silence, simply fall away. And that's
14 because those submissions all rest on the premise that
15 Armenia stayed silent about the pipeline transit claims
16 in the 14 months of exchanges and negotiations that
17 began with the 8 October letter in relation to
18 the Article 18 claims.

19 This is a particularly odd argument, given that it's
20 common ground that the pipeline transit claims were not
21 expressly raised until 16 December 2022. So the
22 argument amounts to saying that Armenia was tactically
23 remaining silent for 14 months in the face of something
24 that hadn't actually been said by Azerbaijan.

25 (Slide 53) And this is perhaps an appropriate moment

12:56 1 to recall that the first time that the word "pipeline"
2 is used in correspondence on the record by either of
3 the parties is by Armenia in its letter to the ICJ of
4 14 December 2022 (RE-26) in the context of its case
5 under the CERD. And we see the relevant paragraph here
6 on the screen.

7 So only two days after the letter that we see on
8 screen, we get the letter of 16 December, in which
9 Azerbaijan raises the word "pipeline" itself for the
10 very first time. So not in the -- Madam President,
11 I sense a question.

12 THE PRESIDENT: I'm sorry, I'm just wondering about
13 the precision of your statement.

14 You said that was the first time the word "pipeline"
15 was raised. But your own chart in slide 52 suggests
16 that the 8 October 2021 letter mentioned the pipeline --
17 a different section of it -- but mentioned the pipeline
18 as notified on 8 October, you say, the denial of access
19 to the section in Nagorno-Karabakh.

20 So if you could just be precise. Are you saying
21 that the word "pipeline" was not mentioned before that,
22 or this section of the pipeline was not mentioned?

23 MS MACDONALD: The allegations up to that date were about
24 lack of access to gas supply. So it was about gas
25 resources. The allegations that pipeline specifically

12:57 1 had been cut were first made in the 14 December --

2 THE PRESIDENT: You said, "the first time ... the word
3 'pipeline' [was] used", and that seemed to me
4 a different proposition. Thank you.

5 MS MACDONALD: (Slide 54) So then we get the letter of
6 16 December (CE-63, page 82), in which Azerbaijan raises
7 the Article 7 claim in relation to the pipeline transit
8 disputes. So at that point, Azerbaijan now seeks to
9 frame the letter of 16 December as part of a continuum
10 of correspondence, and see, for example, its slide 94.

11 But I drew your attention yesterday to the wording
12 of "[REDACTED]" and "[REDACTED]", which
13 indicate that Azerbaijan itself considered this to be
14 something new. And as a matter of first principle,
15 the fact that a claim is being raised after a dispute
16 has arisen does not necessarily mean that the claim is
17 part of that pre-existing dispute.

18 (Slide 55) You saw yesterday that Armenia then
19 replied asking for information (CE-63, pages 84-86), and
20 Azerbaijan's oral submissions yesterday were critical of
21 this request, saying that it was all part and parcel of
22 a strategy of "weaponising silence". Well, members of
23 the Tribunal, you can look at the correspondence and you
24 can consider whether this is a reasonable conclusion to
25 draw.

12:59 1 Perhaps recognising that it's not, Azerbaijan really
2 just falls back on the prior 14 months, stating that
3 Armenia's opposition to the pipeline claim was evident
4 from and may properly be inferred from its conduct
5 during the course of the negotiations. But again, this
6 depends entirely on the proposition that the pipeline
7 transit claims were being negotiated in the 14 months
8 before they were ever expressly raised, and I've already
9 explained why that argument doesn't work. And
10 Dr Salonidis will take up the negotiation issues in
11 a moment.

12 So, in conclusion, Madam President, members of
13 the Tribunal, the pipeline transit claims were not
14 raised in the letter of 8 October 2021 or in any of the
15 subsequent negotiations. They were "[REDACTED]",
16 with a significant lack of detail, in the letter of
17 16 December 2022, and Armenia's prompt request for
18 further details cannot, we say, possibly meet
19 the requirement of positive opposition.

20 So accordingly we ask you to dismiss those claims on
21 the basis that there was no dispute as to those matters
22 when Azerbaijan filed the Notice of Arbitration.

23 So unless I can assist further on this point, that
24 concludes my submissions, and I would invite you to call
25 upon Dr Salonidis.

13:00 1 THE PRESIDENT: Any questions?

2 Thank you.

3 DR SALONIDIS: So I will address again today Armenia's
4 second objection in respect of the pipeline transit
5 claims.

6 Azerbaijan said yesterday that what constitutes
7 a "reasonable period of time" depends on
8 the circumstances of its case.

9 In this case, Azerbaijan argues that the
10 reasonableness must be evaluated "across the entire
11 period of ... negotiations" (Day 1/243:11-12),
12 encompassing negotiations of both the original
13 Article 18 claims and of the pipeline transit claims.
14 Azerbaijan thus claims that it negotiated the pipeline
15 transit claims for 16 months.

16 Azerbaijan also contended that even the two-month
17 portion of purported negotiations of the pipeline
18 transit claims meets the reasonableness requirement,
19 "given the evident futility of the continued
20 consultation by that point" (Day 1/244:11-12).

21 Azerbaijan is wrong on both counts.

22 On Azerbaijan's first argument, Armenia agrees that
23 what constitutes a "reasonable period of time" for
24 negotiations depends on the circumstances of its case.
25 But that does not negate the requirement that there has

13:02 1 to be an extended and genuine period of engagement
2 between the parties. As I explained yesterday, national
3 courts and tribunals have consistently found, across
4 different inter-state disputes, that such a requirement
5 was satisfied only after several months or years of
6 negotiations.

7 (Slide 57) In response, Azerbaijan relies on the
8 Mavrommatis case (RL-21, page 13), in which the
9 Permanent Court of International Justice noted:

10 "Negotiations do not always presuppose a more or
11 less lengthy series of notes and dispatches."

12 But Azerbaijan omits this part of the quote that
13 immediately follows, and you see it on your screen:

14 "This will also be the case, in certain
15 circumstances, if the conversations between the
16 Governments are only the continuation of previous
17 negotiations between a private individual and
18 a government."

19 Thus, in Mavrommatis, the substance of the dispute
20 had already been fully ventilated in separate
21 negotiations with the relevant private entities for
22 years prior to the commencement of proceedings. If
23 anything, Mavrommatis is yet another authority
24 supporting Armenia's position.

25 Azerbaijan further points to the travaux of

13:03 1 Article 27, which reveal that the drafters considered,
 2 but ultimately did not adopt, a fixed consultation
 3 period of six months, or 180 days. Far from assisting
 4 Azerbaijan's position, however, this drafting history
 5 supports Armenia's, because it recognises that
 6 inter-state negotiations could well require longer than
 7 six months.

 8 (Slide 58) Azerbaijan relies on a travaux document,
 9 CL-161 -- you see it on your screen -- in which it
 10 claims that the drafters considered a consultation
 11 period of 60 days. As the Tribunal can see, this is
 12 a handwritten note that appears to recall the United
 13 States' proposal, but one that has been crossed out in
 14 its entirety. The text is difficult to decipher, and
 15 it is far from clear whether this proposal was ever
 16 considered.

 17 Azerbaijan says that ultimately all this is besides
 18 the point because it has allegedly negotiated the
 19 pipeline transit claims, which it insists form part of
 20 the same dispute as the original Article 18 claims, for
 21 a period of 16 months. Ms Macdonald just explained why
 22 that argument fails.

 23 The two sets of claims differ in both their factual
 24 and legal aspects. The pipeline transit claims and the
 25 original Article 18 claims are not, to use Azerbaijan's

13:04 1 words, "constituent claims" of some broadly defined
2 dispute under the ECT; rather, they are two separate
3 disputes.

4 Madam President, now may be the appropriate moment
5 for me to return, as I promised yesterday, to your
6 question addressed to me as to the relevance of the
7 jurisprudence concerning additional or ancillary claims
8 to a proceeding once an arbitration has already
9 commenced.

10 In response yesterday, I indicated that such
11 jurisprudence would be relevant to the tribunal's
12 consideration of our objection. To be clear, and as you
13 rightly pointed out, Madam President, such jurisprudence
14 arises in a very different context, the addition of
15 claims after an arbitration has already commenced,
16 whereas here we are dealing with the fulfilment of
17 a jurisdictional precondition by virtue of the piecemeal
18 notification of claims during the negotiations.

19 But you could look at that jurisprudence to confirm
20 the caution that deciding Armenia's objection here
21 respectfully asks for. Because even where tribunals
22 examine whether to admit -- and that is why this issue
23 arises under the guise of admissibility -- admit new
24 claims raised in an already-commenced arbitration or
25 litigation, they refuse to do so unless -- unless --

13:06 1 the new claims arise directly out of the subject matter
2 of the dispute.

3 Where the pipeline transit claims and the original
4 Article 18 claims rest on distinct not just legal but
5 factual bases, the former cannot be said to arise
6 directly out of the subject matter of the latter. They
7 constitute two separate disputes, and the negotiation
8 precondition cannot be treated as satisfied in that
9 circumstance, or by virtue of the fact that Azerbaijan
10 engaged in consultations on an entirely different
11 dispute.

12 Turning now to Azerbaijan's second argument,
13 Azerbaijan seeks to discharge its burden of establishing
14 the futility of the pipeline transit claims negotiations
15 through the supposed unfruitful negotiations of the
16 original Article 18 claims, negotiations that took place
17 before Armenia had even become aware of the pipeline
18 transit claims.

19 (Slide 59) And I will refer the Tribunal again to
20 Burlington v Ecuador (RL-157, paragraph 314), where
21 the tribunal says:

22 "... the fact that negotiations proved futile in
23 [the] second dispute does not mean that negotiations
24 over a prior, unrelated dispute would have similarly
25 proven futile."

13:07 1 To be clear, Azerbaijan does not and cannot claim
2 that limited exchanges over ten weeks, some in
3 a footnote, can prove futility, which is precisely why
4 it has to piggyback on the negotiations of the original
5 Article 18 claims.

6 But even assuming, arguendo, that such negotiations
7 were somewhat relevant, there can be no doubt that
8 Armenia meaningfully engaged in good faith negotiations
9 with Azerbaijan in relation to those claims. Armenia
10 responded to all of Azerbaijan's letters. Armenia
11 attended two negotiation meetings and communicated
12 the list of 17 questions addressing the substance of
13 Azerbaijan's complaints.

14 Azerbaijan's characterisation of Armenia's requests
15 for further information as a failure to engage
16 substantively, and indeed as a "dilatory tactic"
17 (Day 1/245:11), is truly untenable. Armenia acted in
18 a manner expected of a state that seeks to participate
19 constructively in negotiations where the allegations
20 raised against it remain unclear.

21 (Slide 60) Azerbaijan's own authority,
22 Amto v Ukraine (CL-73, paragraph 57), an ECT case, is
23 pertinent, where the tribunal notes:

24 "The purpose of a request for amicable settlement is
25 to discuss the dispute, with a view to [inter alia]

13:08 1 clarifying factual uncertainties and possible
2 misunderstandings, and identifying possible solutions
3 ... If the [Respondent] considers there is insufficient
4 information to initiate discussions then the good faith
5 response is simply to advise the [Claimant] and require
6 more detail."

7 Which is precisely what Armenia did in this case.

8 This brings me to my final point, Madam President.
9 We heard from counsel yesterday that Armenia
10 misrepresented to the Tribunal that there was no
11 inter-state case that -- my apologies, I should take
12 a step back and start over.

13 We heard from counsel yesterday that we
14 misrepresented to the Tribunal that there was no
15 inter-state case that we cited which had a shorter
16 negotiation period than two months. And the argument
17 was, by counsel, that we failed to account for
18 Qatar v UAE, which is an ICJ case.

19 Now, this case, however, is not -- is definitely not
20 a case in which a shorter negotiation period satisfied
21 the negotiation requirement, as counsel would have you
22 believe. Counsel relied on the ICJ's order on
23 provisional measures where the court observed (RL-169,
24 paragraph 38) that "the UAE did not respond to [Qatar's]
25 formal invitation to negotiate", and therefore:

13:10 1 "... the Court [was] of the view that the issues
2 raised in the present case had not been resolved by
3 negotiations at the time of the filing of
4 the Application."

5 A very different case. Armenia did respond to
6 Azerbaijan's letter, so this is the first reason why
7 counsel's reliance on this case is unfortunate.

8 Now, the second reason is that the court, in its
9 order, merely assessed its prima facie jurisdiction to
10 indicate the provisional measures Qatar requested. In
11 its typical fashion, at paragraph 78 of its order, which
12 is at Respondent's Legal Exhibit 169, the court states
13 that its decision "in no way prejudices the question
14 of ... jurisdiction".

15 When the time of preliminary objections came in that
16 case, the UAE did object on the basis of the negotiation
17 precondition. The court never decided the objection,
18 having dismissed jurisdiction on another ground. The
19 court's judgment is not on the record, but I trust that
20 counsel will not take issue with my representation of
21 the case.

22 So Qatar v UAE does not remedy Azerbaijan's failure
23 to cite a single inter-state case where an applicant
24 state was found to have fulfilled the negotiation
25 precondition by engaging in negotiations for less than

13:11 1 two months.

2 Madam President, members of the Tribunal, Azerbaijan
3 cannot stretch two months and eleven days into
4 a reasonable period of negotiation, no matter how
5 creatively it tries to fold it into prior negotiations
6 of a separate dispute. It cannot manufacture futility
7 out of Armenia's good faith engagement with Azerbaijan's
8 claims. It cannot rely on authorities that, on closer
9 inspection, undermine its own case.

10 The negotiation precondition under Article 27 exists
11 for a reason: to ensure that states make a genuine
12 effort to resolve their differences before resorting to
13 arbitration. Azerbaijan did not do so, and this is, for
14 us, a very serious reason why the Tribunal should
15 decline jurisdiction over the pipeline transit claims.

16 Madam President, if I could very briefly return to
17 a question that you posed to Ms Macdonald a few moments
18 before I took the floor. If we could go back to
19 slide 52, please. And of course, as is evident, we
20 probably created some confusion and we want to clarify
21 the matter.

22 So this table was meant to summarise the two sets of
23 claims Azerbaijan presented in its Statement of Claim.
24 I would like to clarify that the first column refers to
25 Azerbaijan's "Exploitation/Denial of Access Claims", and

13:12 1 some of those claims were mentioned in Azerbaijan's
2 letter of 8 October 2021, which, Madam President,
3 I believe prompted your question.

4 The last line of the table, which includes
5 a reference to pipeline claims, does not refer to the
6 8 October 2021 letter, but refers to how Azerbaijan then
7 developed those claims subsequently to the commencement
8 of the arbitration in its Statement of Claim. This is
9 very, very important, Madam President, which is why
10 we are trying to make it clear for the record in this
11 a bit uncomfortable manner.

12 To be clear, again, in its 8 October 2021 Notice of
13 Dispute, Azerbaijan did not mention a pipeline or even
14 natural gas. And it never mentioned any pipeline -- the
15 word "pipeline", it was never mentioned anywhere for the
16 14 months of negotiations that ensued.

17 The Article 18 claims in relation to the pipeline
18 appeared for the first time in its 16 December 2022
19 letter, and were later, of course, expanded, with the
20 benefit of Armenia's positions already in the context of
21 the negotiations, in Azerbaijan's Statement of Claim
22 after the commencement of this arbitration.

23 So to clarify, Ms Macdonald's statement that
24 the first time that the word "pipeline" appeared in
25 correspondence was in Armenia's letter indeed to the ICJ

13:14 1 of 14 December 2022, that statement is absolutely
2 correct and fully corroborated by the record.

3 And unless I can be of any further assistance to the
4 Tribunal, I would like to invite Professor d'Argent to
5 the podium to address Armenia's third objection to the
6 pipeline transit claims.

7 THE PRESIDENT: Thank you. Any questions on these issues?

8 Thank you.

9 DR SALONIDIS: Thank you.

10 PROFESSOR D'ARGENT: Madam President, members of
11 the Tribunal, our conciliation objection appears
12 limited, narrow or formalistic, as Azerbaijan portrays
13 it, only if the rest of Azerbaijan's pipeline claim
14 under Article 18 survives. But of course Azerbaijan's
15 wish or submission is that any claim, whether related to
16 a pipeline or not, based on an alleged breach of
17 an alleged obligation under Article 18 is not
18 arbitrable. As Professor Murphy explained, Article 18
19 does not create a web of bilateral obligations not to
20 interfere with states' respective sovereignty and
21 sovereign rights over energy resources.

22 Thus, our conciliation objection is neither limited
23 nor formalistic once this case is cut back to what it
24 ought to be under the ECT; that is, an Article 7 transit
25 claim.

13:16 1 Azerbaijan says that it was not obliged to fraction
2 its claims, and we say that Armenia does not have to
3 suffer from Azerbaijan's choice to repackage and glue
4 an afterthought and reactive transit claim into
5 a sovereignty claim that has no legal foundation under
6 the ECT.

7 (Slide 62) Second, we are aware that, as
8 Mr Bamberger underscores (CL-176, page 4), the ECT
9 negotiation was conducted with a "spirit of urgency",
10 "in a context of mounting impatience", and that, as
11 a result, it is not surprising that the ECT dispute
12 resolution mechanism is, as he puts it, "sketchily
13 outlined".

14 Albeit sketchy, the dispute resolution mechanism of
15 the ECT is nevertheless -- exists nevertheless, and
16 the tribunal is tasked to make sense of that mechanism,
17 which in our view must be read as establishing, through
18 different and interrelated provisions, a system of
19 dispute resolution.

20 Madam President, members of the Tribunal, the ECT
21 dispute resolution system might be sketchy, but some
22 interpretative issues under it are not so difficult to
23 resolve.

24 (Slide 63) This is the case, in our opinion, of the
25 terms "shall apply" in the chapeau of Article 7(7) and

13:17 1 of the term "may" in subparagraph (a) of the same
2 provision. The parties remain divided on the meaning of
3 those terms, but I'm not sure I could assist the
4 Tribunal any further on this. Nothing we have heard
5 from Azerbaijan's oral submission yesterday gives us
6 pause on that issue. For Armenia, those two verbs, in
7 their respective places in that provision, fulfil very
8 different normative functions.

9 I turn now to certain misrepresentations of our
10 argument. Dr Blake said (Day 1/252:15-16) that:

11 "Armenia argues that Article 27 is not the governing
12 provision [of] this case of transit ..."

13 That is not our position. Our position is that
14 the Tribunal's jurisdiction is of course governed by
15 Article 27, and that the right of Azerbaijan to bring
16 this case of transit to this Tribunal is also governed,
17 and thus eventually limited, modulated, curtailed, as
18 I said yesterday, by the same provision, Article 27.

19 Dr Blake also asserted that it would be Armenia's
20 position that the words "as otherwise provided" in
21 Article 27(2) mean that "there is no consent to
22 arbitrate transit disputes" (Day 1/266:15-16), and that
23 our entire objection would be riddled with
24 inconsistencies and contradictions because while arguing
25 for conciliation, we also admit that arbitration can

13:19 1 play a role in transit disputes.

2 (Slide 65) Well, again, with respect, this is either
3 a misrepresentation or a misunderstanding of our
4 position. We accept that Article 27 does not materially
5 exclude Article 7 dispute from its realm, in the way
6 that Article 6 or Article 19 disputes are materially
7 excluded from arbitration by Article 27(2), and thus
8 we accept that certain transit issues can be arbitrated,
9 and I have mentioned some of them yesterday.

10 If a party declines conciliation because it
11 considers that the dispute is not about transit, that
12 *ratione materiae* threshold issue about whether
13 conciliation applies is an interpretive question that
14 can be arbitrated. The interim decisions of the
15 conciliator can be arbitrated. And finally, the transit
16 dispute itself can be arbitrated if it remains open
17 after failed conciliation.

18 So we are not contending that conciliation is
19 exclusive. We are saying that conciliation is
20 mandatory, and we don't conflate the two.

21 In other words, the interpretative issue to be
22 decided here is about the interplay between conciliation
23 and arbitration in a case of transit dispute. It is not
24 about whether "conciliation trumps arbitration", to use
25 Dr Blake's misleading description of our position

13:20 1 (Day 1/254:24).

2 The issue is not about whether conciliation is
3 "insulated" from arbitration, to use a verb found by
4 Azerbaijan in the travaux, as if our position was that
5 the two had nothing to do with each other. Indeed, we
6 have not submitted, as Dr Blake wants you to believe,
7 that "as otherwise provided" has the effect of taking
8 transit disputes out of the realm of Article 27
9 altogether.

10 What we have submitted is that for transit disputes,
11 the ECT provides otherwise than the usual sequence of
12 failed negotiations, then arbitration. For transit
13 disputes, the ECT provides for compulsory conciliation
14 under Article 7(7), and because Article 27(2) contains
15 the words "except as otherwise provided in this Treaty",
16 a party that has a transit dispute with another party
17 may not submit that dispute to arbitration straight
18 after it used diplomatic channels to try to settle it.

19 Azerbaijan suggests that claimant in a transit
20 dispute is free to choose between conciliation and
21 arbitration. But in our submission that is not the
22 case, because Article 27(2) makes clear that a party to
23 a dispute may only submit it directly to arbitration
24 after failed negotiations if the treaty does not provide
25 otherwise, as is the case by Article 7(7) for transit

13:22 1 disputes.

2 Thus, we say that there is a system of dispute
3 settlement within the ECT according to the subject
4 matter of the claims, and not simply options randomly
5 offered by the treaty to contracting parties, options
6 that they could pick up and choose from.

7 (Slide 66) And that is true also for
8 Article 21(5)(b), about which Azerbaijan's counsel again
9 mischaracterised our position. We have not said that
10 Article 21(5)(b) about taxation would be an exception to
11 jurisdiction under Article 27(2), as Dr Blake said.
12 What we have said is simply that this provision provides
13 otherwise than the normal Article 27 possibility to go
14 straight to arbitration after failed negotiations, by
15 requiring that tax disputes be first submitted to
16 the competent tax authorities.

17 So we have not singled out that provision as
18 an exception to arbitration altogether, but as
19 an example of a provision modulating the right to bring
20 a dispute to arbitration, which is a right modulated
21 under Article 27(2).

22 And of course, because there is a system of dispute
23 settlement under the ECT according to the subject matter
24 of the dispute, Article 21(5)(b) is not the same as
25 Article 7(7). But they both modulate the right to

13:24 1 arbitrate under Article 27(2) because that provision
2 contains a renvoi to those other treaty provisions
3 through the "except as otherwise provided" language
4 it contains, which is best understood as "unless", as
5 I submitted yesterday on the basis of the French version
6 of the ECT.

7 Azerbaijan suggests that it is free to choose
8 between conciliation and arbitration, but in its attempt
9 to articulate Article 7(7) and Article 27(2),
10 it actually ends up with arbitration as the exclusive
11 route for transit disputes. Dr Blake struggled with
12 your question, Madam President, on that point. But he
13 confirmed that Azerbaijan continues to hold the view
14 that conciliation under Article 7(7) would be excluded
15 by its own terms, because arbitration under
16 Article 27(2) would be a dispute resolution remedy
17 previously agreed between the parties to the dispute.

18 This interpretative issue is indeed central in order
19 to make sense of the dispute settlement system
20 established by the ECT.

21 I have also recalled that Mr Bamberger holds
22 the opinion that Azerbaijan's position must be rejected.

23 And indeed, Azerbaijan's reading of Article 7(7)
24 results in two logical inconsistencies that Dr Blake
25 declined to address. First, how could conciliation and

13:26 1 arbitration be available in parallel, as Azerbaijan
2 argues? And how could a claimant have a choice between
3 them if, by its own terms, Article 7(7) conciliation
4 excludes itself for all ECT parties because arbitration
5 under Article 27(2) is allegedly a previously agreed
6 dispute resolution remedy within the meaning of
7 Article 7(7)?

8 Azerbaijan's flawed position boils down to making
9 arbitration exclusive, thus destroying the very choice
10 it pretends to have.

11 Second, to set in motion conciliation only following
12 the exhaustion of inter-state arbitration would be
13 absurd, as arbitration puts an end to the dispute.
14 Thus, the prior exhaustion carve-out in Article 7(7)
15 cannot include inter-state arbitration under
16 Article 27(2). Inter-state arbitration is not
17 previously agreed in any transit situation or dispute.
18 It was concurrently, simultaneously agreed with
19 Article 7(7) itself, and it has nothing to do with
20 a particular transit dispute arising after the ECT
21 entered into force.

22 Our position, as I said yesterday, is that dispute
23 resolution remedies previously agreed must be exhausted
24 prior to conciliation, must have been agreed on
25 an ad hoc basis. And as I said, none exists here.

13:28 1 Madam President, we admit that the ECT dispute
2 resolution system is a bit sketchy, but not to the point
3 of Azerbaijan's illegal, illogical and circular
4 proposition.

5 Azerbaijan drew from the Article 27(1) consultation
6 requested by Slovenia in a road transit dispute with
7 Croatia that conciliation was not mandatory. But of
8 course we have never suggested that conciliation
9 rendered Article 27(1) consultations unavailable.
10 We only argued that a party to a transit dispute must
11 submit it to conciliation, and certainly do so before
12 arbitration.

13 Azerbaijan also sought to draw from a letter by
14 Mr Fremantle during the travaux. Together with the
15 other travaux document I have already mentioned about
16 the fact that conciliation is not insulated from
17 arbitration, this was the only travaux document referred
18 to by Azerbaijan yesterday on this issue.

19 Thus, Azerbaijan did not, and could not, rebut our
20 submission showing that Poland won the day during the
21 negotiations by requiring compulsory conciliation for
22 transit disputes.

23 (Slide 68) But let me return to Mr Fremantle's
24 letter referred to yesterday by Azerbaijan (CL-114).
25 Unfortunately, Azerbaijan only very partially quoted

13:29 1 from that document.

2 What was the issue addressed by Mr Fremantle in that
3 document, and what did he write? Well, he addressed
4 the question I've already discussed, which is that
5 arbitration can be resorted to if a party disagrees that
6 transit is at issue. And he said that in that context,
7 arbitration could precede conciliation, and that there
8 was a hook for that purpose in the conciliation
9 provision.

10 You have on your screen the text of the document.
11 I'm not going to read it out loud; we have no time for
12 that. But what is very clear is that Mr Fremantle did
13 not state in general that arbitration under 27(2) would
14 be a previously agreed resolution remedy under
15 Article 7(7) that needs to be exhausted prior to any
16 conciliation, displacing thus conciliation altogether;
17 and if he did, well, we submit he was wrong, for all
18 the reasons I have explained.

19 The same is true of the ECT Secretariat commentary
20 referred to by Azerbaijan. Beyond the fact that this
21 document is not binding and it's difficult to square
22 with Articles 31 and 32 of the VCLT, we submit that
23 bureaucrats can be wrong, if Azerbaijan's reading of
24 that document is correct, and this is an instance then
25 where they must be found to be wrong. Surely the

13:30 1 drafters of this document were not faced with your
2 questions, Madam President, and they have not had
3 the benefit of adversarial submissions.

4 (Slide 69) As far as Mr Bamberger's paper published
5 in Transnational Dispute Management (CL-176), as you
6 remember, that paper really cuts both ways, as it
7 entirely and unequivocally dismisses Azerbaijan's
8 position as to the meaning of previously agreed dispute
9 resolution remedies within the meaning of Article 7(7).

10 For the rest, as you can see on the screen,
11 Mr Bamberger is particularly careful, stating that
12 "Article (7) does not seem", and that "It appears",
13 et cetera. So he may have been present in the room, but
14 his propositions are still tentative. And Mr Bamberger
15 ends his paper with suggestions for the improvement of
16 the ECT dispute resolution system that he described as
17 being "sketchy" at the beginning of the same paper.

18 And this brings me, Madam President, very briefly,
19 to the last issue: jurisdiction or admissibility?

20 Because the renvoi operated from Article 27(2) to
21 Article 7(7) is included in the ECT compromissory
22 clause, we submit it should be viewed as jurisdictional
23 since it concerns -- this objection is jurisdictional
24 since it concerns the consent to arbitrate, and the way
25 that consent is modulated. Of course we can also very

13:32 1 well see why this objection can be viewed as belonging
2 to the realm of admissibility, which is why we have
3 invited the Tribunal in the alternative to dismiss
4 the pipeline transit claims as inadmissible.

5 But we do object to the import in this debate of
6 the Croatia v Serbia genocide case, which addressed
7 a completely different situation, which concerned
8 a *ratione personae* jurisdictional issue that arose
9 because Serbia applied for UN membership after Croatia
10 filed its application; and thus, retrospectively, this
11 meant that at the time of the filing of the application,
12 Serbia was not a UN Member State bound by the
13 ICJ Statute, and could thus not be a party to a case.

14 However -- and this is crucial in that case -- this
15 condition was fulfilled by the time the court assessed
16 its jurisdiction, and that is why the court made -- on
17 the basis of the sound administration of justice in
18 a lengthy genocide case, that is why the court made
19 an exception to the fundamental principle according to
20 which jurisdiction must be assessed on the day
21 the application is filed.

22 So this is an entirely different situation from this
23 case, and the defect due to the absence of any
24 conciliation stage in this case is still not cured.

25 Madam President, members of the Tribunal, this

13:34 1 concludes my presentation, and I thank very much the
2 Tribunal for its kind attention. And unless there are
3 any questions from the members of the Tribunal, may
4 I ask you, Madam President, to invite the Agent of
5 the Republic of Armenia, Dr Karen Andreasyan to --

6 DR SALONIDIS: Madam President, my apologies for speaking
7 out of turn.

8 There was a bit of confusion. We should have
9 clarified at the beginning of the hearing day about when
10 the respective Agents of the parties will deliver their
11 final submissions.

12 Having read and re-read the agreement of the
13 parties, another alternative to Mr Andreasyan delivering
14 our final submissions now would be to have him deliver
15 our final submissions at the end of Azerbaijan's oral
16 argument, because technically the agreement of
17 the parties is: at the close of oral argument.

18 But we are entirely in your hands, of course.

19 THE PRESIDENT: I confess that I had myself interpreted
20 the parties' agreement as providing for the final
21 submissions of both parties at the end of today's
22 proceedings. If the parties prefer to do that instead
23 at the end of each side's argument, I have no objection.

24 MS REID: I believe that lead counsels' gesticulating to
25 each other across the chamber has confirmed that

13:35 1 the parties are content for both Agents to put in their
2 final submissions at the end of the day today.
3 THE PRESIDENT: Back to back --
4 MS REID: Back to back.
5 THE PRESIDENT: -- at the end of the proceedings. So let us
6 do that.
7 I take it then that this concludes Armenia's closing
8 statement?
9 PROFESSOR D'ARGENT: Yes, Madam President.
10 THE PRESIDENT: Thank you.
11 Alright. We will take our lunch break now, which
12 was agreed to be 90 minutes. So that brings us to just
13 a little bit past 3 o'clock: 3.05. Thank you all.
14 PROFESSOR D'ARGENT: Thank you.
15 (1.36 pm)
16 (Adjourned until 3.05 pm)
17 (3.07 pm)
18 THE PRESIDENT: Welcome back, counsel.
19 When you are ready, we're happy to proceed with
20 Azerbaijan's closing submission.
21 MS REID: Thank you very much, Madam President. Just to
22 confirm, as a minor order of housekeeping, that you have
23 received the electronic copy of our closing slides?
24 THE PRESIDENT: I believe we have. I had a small delay in
25 uploading at my end, but I think it might be here.

15:07 1 MS REID: Okay. And your colleagues, the other members of
2 the Tribunal, have their paper copies; and that counsel
3 for the other side has indeed received their paper
4 copies as well. Okay.

5 (3.08 pm)

6 Closing statement on behalf of Claimant

7 MS REID: (Slide 2) Madam President, members of the
8 Tribunal, we are honoured to appear before you once
9 again on behalf of the Republic of Azerbaijan to respond
10 to the arguments made this morning by counsel for the
11 Republic of Armenia. I will respond to the arguments
12 that remain as to Article 18, and Dr Blake will respond
13 to the arguments as to the pipeline transit claims under
14 Article 7.

15 We thank the Tribunal for its attention and
16 questions throughout the arguments, and will endeavour
17 to respond to them all, including the question posed by
18 Professor Stern at the end of yesterday's session.

19 (Slide 3) Now, Armenia's rebuttal this morning
20 focused on its three principal efforts to persuade the
21 Tribunal to decline to hear Azerbaijan's Article 18
22 claims, but Armenia continues to attack a case that
23 Azerbaijan has not brought. I will respond to each of
24 these three attacks in turn, focusing on what Azerbaijan
25 has actually pleaded.

15:09 1 So we begin first with Armenia's contention that
2 Azerbaijan's case fails because it has the same fatal
3 flaws as the claims rejected in other cases. This first
4 attack is the one that implicates Professor Stern's
5 question about the International Court of Justice's
6 reasoning and the outcome in the Immunities and Criminal
7 Proceedings case.

8 Second attack: that Azerbaijan's claims will
9 necessarily bring in other areas of international law in
10 a way that would deprive this Tribunal of the ability to
11 exercise jurisdiction over Azerbaijan's treaty claims.

12 And finally, that the word "recognise" in Article 18
13 is not the right kind of recognition: it's not the
14 recognition that actually carries with it legal
15 obligations.

16 So let's start with the first argument.

17 Armenia says that Azerbaijan's case is fatally
18 flawed in the same way as those other cases in which
19 the ICJ rejected parties' claims, saying in
20 particular -- and referring to Professor Murphy's
21 submissions this morning -- that Azerbaijan's reading of
22 the treaty is unacceptably broad because it brings in
23 "the entire spectrum of international law"
24 (page 5:19-20).

25 So what is actually Azerbaijan's reading of the

15:10 1 treaty? I think the Tribunal will appreciate by now
2 that I think it's helpful to look at things visually.

3 (Slide 4) So here we have the ECT and the range of
4 other matters, other areas of international law that are
5 discussed in its text. We refer here and we are drawing
6 from both Mr Bamberger's memo that was discussed by
7 Mr Sullivan and the points that Mr Sullivan made
8 yesterday about the broad scope of the treaty. So these
9 are the areas. But what is the relationship among these
10 different areas, and how do we read the treaty to
11 understand this relationship?

12 (Slide 5) This is what Armenia says Azerbaijan's
13 reading of the treaty is: that we view Article 18 as
14 opening the door to applying wide-ranging rules across
15 the entire spectrum of international law, so that the
16 ECT grows extremely broad and subsumes all of these
17 areas of law. That is incorrect.

18 (Slide 6) This is actually Azerbaijan's theory.
19 It's the theory of the framework of the ECT, as
20 a sector-specific treaty about energy, that overlaps
21 with, but does not subsume, these other topics and areas
22 of international law.

23 That is consistent with the language of the
24 understanding that both parties have discussed in their
25 submissions yesterday and today: that the ECT aims at

15:11 1 a legal framework to promote long-term cooperation in
2 a particular sector. So it's a sector-specific treaty,
3 and these other areas of law are brought in in the text,
4 are implicated, solely to the extent that they overlap
5 with these questions of energy.

6 So on this representation, where is the legal basis
7 for Azerbaijan's claims? It's here. This is what
8 Mr Sullivan referred to yesterday when he said that
9 the legal basis for our claims was narrow. So when
10 Professor Murphy said this morning that Azerbaijan's
11 claims are broad because of the number of claims,
12 because of the period of time, he actually misunderstood
13 what Mr Sullivan had said yesterday. Our focus and our
14 reading of the treaty is rigorous, and results in
15 a narrow legal basis for our claims.

16 So turning to the specific case that gave rise to
17 Professor Stern's question. And as I go through, I will
18 sometimes refer again to what this graphic really means.
19 Turning to the specific case for Professor Stern's
20 question, how is what Azerbaijan views as this
21 relationship between the topic and the subject of the
22 treaty and sovereignty different from what happened in
23 Immunities and Criminal Proceedings?

24 (Slide 7) So for that, let's look at the judgment
25 (RL-73).

15:12 1 Now, in Immunities and Criminal Proceedings,
2 Equatorial Guinea challenged criminal proceedings that
3 had been brought in France against its Vice President,
4 as well as measures taken against its property in France
5 that it claimed formed part of its diplomatic mission.

6 As displayed on the screen and as discussed
7 yesterday, Equatorial Guinea relied on Article 4 of the
8 Palermo Convention, which, as shown on the screen
9 (RL-73, paragraph 78), refers to principles such as
10 sovereign equality and non-intervention to argue that
11 France was required to respect immunities under
12 customary international law.

13 What Armenia does not mention, and did not mention
14 in its papers or in its discussion, is that just as --
15 and this is very similar to the move that they made in
16 discussing Oil Platforms -- is that this was just
17 the first of the asserted treaty bases that Equatorial
18 Guinea invoked in its case before the ICJ. It did not
19 rely on Article 4 of the Palermo Convention alone.

20 (Slide 8) For its challenge concerning actions taken
21 in and against its French property, it also invoked
22 specific provisions of the Vienna Convention on
23 Diplomatic Relations, specifically Article 1(i) --
24 we have the definition (RL-73, paragraphs 129-130) --
25 and Article 22, under the compromissory clause in

15:14 1 Article 1 of the Optional Protocol to the VCDR.

2 (Slide 9) So there are different claimed bases for
3 jurisdiction: on one hand, Article 4, which is what the
4 discussion has been about to date; and on the other
5 hand, the Vienna Convention, through its Optional
6 Protocol.

7 (Slide 10) Critically, one of the key features in
8 this case, in the Equatorial Guinea case, is that
9 Equatorial Guinea conceded that for its Article 4
10 argument, it was not relying on a textual obligation in
11 the Palermo Convention to respect principles of
12 sovereign equality and non-intervention. That's the
13 exact opposite of what Azerbaijan claims here. We'll
14 come back to that.

15 So what was the outcome in that case? How did the
16 ICJ actually work through and what did it conclude about
17 what was a permissible ground for jurisdiction?

18 (Slide 11) As has been discussed, the court rejected
19 Equatorial Guinea's Article 4 argument, concluding
20 (RL-73, paragraph 93) that that provision "refers only
21 to general principles of international law", and:

22 "In its ordinary meaning, [the text] does not
23 impose, through [essentially this passing] reference to
24 sovereign equality, an obligation on States parties to
25 act in a manner consistent with the many rules of

15:15 1 international law which protect sovereignty in
2 general ..."

3 So thinking back to my Venn diagram, what the court
4 is saying here is that you cannot use this reference to
5 "sovereign equality" as a gateway to go through and
6 beyond what is in the text of the treaty before us and
7 invoke everything that is in the rest of that circle
8 outside of the overlap, and somehow use that to create
9 a basis for jurisdiction.

10 So the conclusion was: because the claim, which
11 relied on rules of immunity outside of whatever was
12 relevant in that treaty, it doesn't actually concern --
13 and this is the second callout (RL-73, paragraph 102) --
14 Equatorial Guinea's claim did not actually "concern
15 the interpretation or application of the Palermo
16 Convention", and therefore the court lacked
17 jurisdiction.

18 Importantly, when the court reached the different
19 asserted treaty basis, it reached a different outcome.
20 It said: Article 22 of the Vienna Convention does
21 "provide[] a regime of inviolability, protection and
22 immunity", and it "guarantees immunity" (RL-73,
23 paragraph 133).

24 So Equatorial Guinea's claim that France's actions
25 had breached immunity that were conferred by that treaty

15:16 1 could be an appropriate basis for jurisdiction. So the
2 court concluded that "it has jurisdiction", or that it
3 had jurisdiction, "under ... the Optional Protocol"
4 (RL-73, paragraph 135).

5 That therefore, in our reading and in our
6 submission, reinforces the critical point that is in
7 dispute between the parties and before the Tribunal now.
8 Where a treaty provides a concrete jurisdictional basis
9 tied to specific obligations, the court will -- and this
10 Tribunal should -- exercise jurisdiction. So there,
11 because the court found that the claim before it
12 concerned the premises of the mission, which were
13 squarely covered by the grant of inviolability under
14 Article 22, it fell within the court's compromissory
15 clause.

16 (Slide 12) That reinforces the lesson that
17 Azerbaijan submits the Tribunal should draw from this
18 case: with different theories of jurisdiction, there are
19 different outcomes.

20 So we have first here the key features of Equatorial
21 Guinea's Article 4 theory, the theory that had been
22 rejected.

23 As I noted, Equatorial Guinea had conceded that
24 they were not invoking a treaty obligation of respect
25 for sovereignty, of respect for sovereign equality.

15:18 1 Instead, they were using sovereign equality as a gateway
2 to get into the whole body of rules protecting
3 sovereignty, including the subset of rules relating to
4 sovereign immunities, which they then said became
5 a treaty obligation somehow through indirect
6 incorporation. That approach, that theory, was soundly
7 and, in Azerbaijan's submission, rightly rejected by
8 the court.

9 Armenia says that you have the same outcome here
10 because Azerbaijan's theory of the case is flawed in the
11 same way as Equatorial Guinea's. You will recall from
12 Professor Murphy's submissions this morning that he put
13 up a slide, I think it was slide 10, comparing what
14 Armenia says Azerbaijan's theory is to the theories of
15 unsuccessful claimants in other cases. So I summarise
16 that here.

17 Armenia describes Azerbaijan's theory as saying that
18 Article 18 imposes an obligation of respect for
19 sovereignty and sovereign rights over energy resources.
20 In their papers and in their submissions yesterday, we
21 understood Armenia to be saying that Azerbaijan was
22 somehow using sovereignty as a gateway for, for example,
23 any sovereign dispute that was touching on energy. This
24 morning I think we heard a variation on that argument
25 where Professor Murphy said that Azerbaijan was using

15:19 1 energy as a gateway to bring in all of these other areas
2 of international law.

3 But that is not in fact Azerbaijan's case. Instead,
4 this is.

5 Article 18 imposes a treaty obligation of respect
6 for sovereignty over energy resources -- so we're not
7 treating sovereignty as somehow some free-floating
8 gateway -- and sovereign rights over energy resources.
9 That is, in stark contrast to Equatorial Guinea,
10 Azerbaijan has always expressed its claim in the form of
11 an express treaty obligation.

12 Second, that that duty to recognise "sovereignty and
13 sovereign rights over energy resources" is an express
14 treaty obligation with a separate existence from the
15 customary international norm of permanent sovereignty
16 over natural resources.

17 One of the ways to perhaps understand Armenia's
18 series of complaints or series of critiques about
19 Azerbaijan's claims, and how broad our reading of the
20 treaty must be, is that they can't find a limiting
21 principle to Azerbaijan's invocation of Article 18(1).
22 In our submission, as we have said throughout our papers
23 and our arguments here, the treaty itself provides
24 a limiting principle. We do not view Article 18(1), or
25 Article 18(3) for that matter, as being a gateway for

15:20 1 any freestanding claims of self-determination or any
2 broad claims of territorial title.

3 In our reading, and we submit in our consistent
4 arguments before this tribunal, Article 18 is not
5 open-ended. It is defined and limited by the very text
6 of the treaty itself, imposing a substantive obligation
7 on each contracting party. As I've said yesterday, that
8 provision confirms and embodies, as a matter of treaty
9 law, the state's inherent sovereign prerogatives to make
10 the critical decisions about the exploration,
11 exploitation and development of its energy resources.

12 The implications of that I will tease out a little
13 bit more, because Article 18 concerns disputes about
14 interference and breaches of sovereign rights over
15 energy resources; it does not implicate disputes about
16 sovereignty in the abstract. That distinction, we
17 submit, is what was illustrated in my Venn diagram
18 slide. There is an area of overlap between the ECT and
19 other fields of international law, and with regard to
20 sovereignty, Article 18 operates within that overlap.

21 But general disputes concerning territorial title or
22 boundary delimitation -- that is, who owns or controls
23 a territory at the international plane -- fall outside
24 the scope of Article 18. They belong to that broader
25 legal sphere, the rest of that circle, and must be

15:22 1 resolved in the appropriate forum. Unless there is no
2 dispute about territorial title, or until such disputes
3 and questions are resolved in that appropriate forum,
4 that is the point at which the consequences for
5 sovereign rights over energy resources arise under
6 Article 18.

7 So let me put it plainly. What Article 18 does not
8 concern, and what Azerbaijan has never asked the
9 Tribunal to determine, and what its reading of the
10 treaty would not ask any ECT tribunal to determine, is
11 questions of title of territory, of effective control,
12 or of the broader content of international law relating
13 to sovereignty. Instead, Article 18, as the basis for
14 Azerbaijan's claims, addresses disputes between states
15 insofar as they concern the exercise of sovereign rights
16 over energy resources.

17 Now, the question was raised this morning, again by
18 opposing counsel, that our reading of the treaty can't
19 be accepted because unlike, for example, the 1955 treaty
20 at issue in the Territorial Dispute case between Libya
21 and Chad, there's no annex that actually tells us --
22 okay, so if there's an agreement about the sovereign
23 rights and sovereignty, it doesn't tell us where ECT
24 states exercises sovereignty and sovereign rights over
25 energy resources.

15:23 1 Again, we submit that that is not correct. The
2 treaty text gives us the answer. Each state, each
3 contracting party to the ECT, exercises its sovereignty
4 and sovereign rights, has that sovereignty and sovereign
5 rights, and is entitled to the respect for its
6 sovereignty and sovereign rights over energy resources
7 in its capital-A "Area" as defined under Article 1(10)
8 of the treaty. That is the geographic extent of the
9 sovereign rights and sovereignty over energy resources
10 that this and any other tribunal would apply in a case
11 under Article 18.

12 So just as with the accepted bases for jurisdiction
13 in Oil Platforms and in the Equatorial Guinea criminal
14 proceedings case -- the bases that the court accepted as
15 opposed to the bases that it rejected -- Azerbaijan's
16 claims concern what is squarely provided for in the
17 treaty. Unlike Equatorial Guinea's claim that was
18 rejected, it is not inviting the Tribunal to import
19 obligations from other areas of international law
20 extrinsic to the treaty, whether by using general
21 language or a passing reference as a gateway.

22 One final point on the reading of the treaty.
23 Professor Murphy again this morning discussed the object
24 and purpose of the treaty. I think it is clear that,
25 perhaps because the plain text of the treaty leaves you

15:25 1 with no other option, the parties agree that Article 2
 2 of the ECT contains the statement of the object and
 3 purpose of the treaty.

 4 Now, is it Azerbaijan's case that object and purpose
 5 includes sovereignty over energy resources? Yes, but
 6 it's not the only purpose. It is a component of
 7 the object and purpose.

 8 One cannot have a treaty on international energy law
 9 that does not include as part of its purpose sovereignty
10 over energy resources. That principle, as Mr Sullivan
11 explained yesterday, is the cornerstone of international
12 energy law. It is our position that sovereignty over
13 energy resources most certainly is one of the subjects
14 of the ECT, and we know that because of the invocation
15 and the reference to the EEC, where it was very clearly
16 one of the objectives.

17 We also know that none of the objectives of the ECT
18 is supposed to dominate the other. This was the
19 exchange that I had with President Kalicki yesterday.

20 Now, Professor Murphy said this morning that this
21 view of sovereignty over energy resources as being part
22 of the object and purpose of the ECT was a "dramatic
23 claim" (page 22:18). In our submission, it's not
24 dramatic at all.

25 The contracting parties included a specific

15:26 1 provision in the ECT on this very topic. What is
2 surprising is Armenia's suggestion that the contracting
3 parties would have taken that step, would have said from
4 the beginning of the drafting that there was a need to
5 have an express provision on sovereignty over energy
6 resources, but somehow did not in fact intend for
7 sovereignty over energy resources to be a subject of
8 the treaty, and the kind of objective of the treaty that
9 would have to be taken into account in interpreting
10 its text.

11 Professor Murphy also said that we were seeking
12 somehow to make the object and purpose of the treaty
13 conform to our interpretation of Article 18 rather than
14 the other way around. Again, we think this turns what
15 our case and what our arguments are on their head.

16 We know that the object and purpose of the treaty
17 without doubt includes this respect for sovereignty over
18 energy resources and sovereign rights over energy
19 resources not only because Article 18 exists and
20 addresses the point directly, but because of that direct
21 cross-reference in Article 2 to the EEC, which confirms
22 that this is the very framework of the Charter, and thus
23 the ECT itself, which implements the Charter's
24 principles into a legally binding document. What
25 Armenia tries to do is to read the principle of

15:27 1 sovereignty over energy resources out of the ECT
2 entirely.

3 Before I turn to the second attack, I want to be
4 sure that I have answered Professor Stern's question
5 yesterday about why Azerbaijan is not concerned with how
6 the court dealt with Equatorial Guinea's Article 4 claim
7 in that case.

8 PROFESSOR STERN: More or less. But you just said -- maybe
9 I take this opportunity to ask you a question on what
10 you said -- you said:

11 "... who owns or controls a territory at the
12 international [level] -- fall outside the scope of
13 Article 18."

14 Don't we have to decide who owns or controls
15 the territory on which are the resources that you are
16 claiming?

17 MS REID: So I will answer that question in two ways.

18 I will first answer it with specific reference to this
19 case; and second, to our reading of the treaty, so how
20 it might apply in other cases.

21 In this case, the Tribunal doesn't have to decide
22 who owns the territory because it is undisputed that
23 the territory in which all of the energy resources that
24 we mention as the basis for our claims, it is undisputed
25 that that is Azerbaijan's sovereign territory. It was,

15:29 1 again, the subject of repeated Security Council
2 resolutions. And Armenia does not dispute that as
3 between states at the international level, there is no
4 question that this is Azerbaijan's sovereign territory.

5 The only question that Armenia has raised -- at
6 times by implication, at times actually setting out --
7 is whether the principle of self-determination somehow
8 puts before this Tribunal the need to decide whether
9 Azerbaijan actually had sovereign rights over the energy
10 resources. In our submission, that is
11 a misunderstanding of whether and how self-determination
12 would ever come to play in this case.

13 If we think, for example, of -- both parties have
14 referred to the principle of permanent sovereignty over
15 natural resources. And in Armenia's account, the way
16 that self-determination comes into this case is: you
17 have this customary international legal principle,
18 permanent sovereignty over natural resources, that is
19 embodied in Article 18, in a treaty obligation, and
20 therefore anything that is embodied in that customarily
21 international legal principle can be brought into this
22 case. That's how they say that when you look at that
23 customary international legal principle, it implicates
24 self-determination, so that anything this Tribunal has
25 to consider about sovereignty would necessarily get to

15:30 1 self-determination.

2 We think there are lots of problems with that. But
3 perhaps the principal problem is: if we think about the
4 way this is expressed, even in Resolution 1803 and even
5 in the other declarations recognising this principle of
6 permanent sovereignty over natural resources, there are
7 in fact references to the rights of peoples and nations
8 to sovereign resources; but when those instruments refer
9 to the relationships between states, they consistently
10 refer to the obligation of each state for mutual respect
11 to the other state's sovereignty.

12 That is, as between states at the international
13 plane, the question is not self-determination; it is
14 sovereignty. And because Article 18, as a treaty
15 obligation, is an inter-state obligation, the question
16 is: who owes what obligation to whom? It is the
17 obligation that Armenia owes to Azerbaijan to respect
18 its sovereignty over its natural resources; in this
19 case, its energy resources.

20 PROFESSOR STERN: (Inaudible: no microphone).

21 MS REID: I don't think your microphone is on,

22 Professor Stern.

23 PROFESSOR STERN: It is on. Oh, it has to be red.

24 MS REID: Yes.

25 PROFESSOR STERN: Okay. That's not logical. Okay.

15:31 1 You answered that there is no question of who owns
2 the territory because the United Nations resolution has
3 said that the sovereignty of Azerbaijan is
4 Nagorno-Karabakh. But might there be a question of who
5 controls Karabakh? Armenia, does it control? I mean,
6 is that not an issue?

7 MS REID: So to be clear, Armenia has never asserted in this
8 case that it owns -- or, I believe, in any other case --
9 that it controls Garabagh. Armenia's only potential
10 legal challenge as to whether or not Azerbaijan has
11 an exercise of sovereignty and sovereign rights over
12 the energy resources is not based on a state right or
13 entitlement that Armenia may have; it is at the level of
14 self-determination within Azerbaijan.

15 PROFESSOR STERN: Okay.

16 MS REID: Thank you.

17 Are there any other questions that other members of
18 the Tribunal have on this first point? Okay.

19 We turn then to the second attack, which is that, on
20 Armenia's telling, dealing with Azerbaijan's claims will
21 inevitably bring in other areas of law. And we heard
22 repeatedly this morning that the law to be applied on
23 the merits is well outside the balance of the ECT, and
24 that, for example, Armenia would argue that the acts,
25 the conduct, that we have set out in the Statement of

15:33 1 Claim would not give rise to liability because they are
2 not in violation, for example, of the law on usufruct.

3 This may be, in fact, what Professor Stern was
4 referring to when Professor Murphy spoke about
5 belligerent occupation and the right to use resources
6 with regard to usufruct.

7 (Slide 14) Now, that is similar to what Armenia said
8 in its papers, in its Reply, for example, where at
9 paragraph 9 it says that:

10 "... the adjudication of Azerbaijan's claims on the
11 merits would necessarily require the Tribunal to
12 decide ..."

13 And this is the point that I was making about the
14 right to self-determination. It then says again in
15 paragraph 138, it refers to "an obvious defence to
16 Azerbaijan's claims", and says that because of this
17 obvious defence, the Tribunal could not exercise
18 jurisdiction over our Article 18 claims.

19 Now, as another illustration of this supposed
20 hurdle, this morning Professor Murphy suggested that
21 you can't exercise jurisdiction because there is no
22 detail about the protection, the rights, that Azerbaijan
23 asserts. [He] says: even in Article 18(3), it says
24 nothing about what assets are protected, what
25 constitutes foreign interference, what standards are to

15:34 1 be applied when assessing interference and what
2 exceptions might exist when applying any such standards.

3 Now, we think it is notable that Professor Murphy
4 offered you no authority for the proposition that this
5 lack of detail deprives you of jurisdiction. And
6 there's a good reason for that: because that proposition
7 is unsustainable.

8 To understand why, you need only consider another
9 provision of the treaty, in Article 10(1). That
10 provision includes the host state's commitment to:

11 "... accord at all times to Investments of Investors
12 of other Contracting Parties fair and equitable
13 treatment."

14 Like Article 18, it says nothing about the standard
15 to be applied, nothing about what exceptions might apply
16 and nothing about what constitutes fair or equitable.

17 Professor Murphy would have you believe that because
18 Article 10(1) says nothing about those things,
19 an Article 26 tribunal would and must decline
20 jurisdiction over a claim for a breach of Article 10(1).
21 With respect, that makes no sense. And no ECT tribunal
22 has ever held that, nor would they, because such
23 tribunals correctly understand that under
24 Article 26(6) -- this is the parallel to the provision
25 for inter-state disputes in Article 27(3)(g) -- they can

15:36 1 in fact analyse defences or counterclaims arising under
2 other areas of international law.

3 Now, Professor Murphy gave a long list of other
4 rules of international law that the tribunal might have
5 to apply on the merits, invoking several instruments
6 under international humanitarian law and customary
7 international law itself. But what he conceded at the
8 end of that list is key. He stated that (page 4:9-11):

9 "Such applicable law would take the Tribunal to
10 rules that are vastly different [to] anything found in
11 the Energy Charter Treaty."

12 In short, this is an issue of applicable law, not
13 jurisdiction. But we know that tribunals applying
14 treaties and international law, including this treaty,
15 do not fall into the trap of conflating jurisdiction --
16 sorry, if we move through -- conflating jurisdiction and
17 applicable law.

18 (Slide 18) So a useful illustration in this
19 respect -- again, a case that I know is familiar to the
20 Tribunal -- is *Eskosol v Italy* (RL-250).

21 In *Eskosol*, Italy claimed that the tribunal was
22 required to consider and apply EU law to questions of
23 both jurisdiction and the merits. Certain principles of
24 EU law were raised by Italy as a jurisdictional defence,
25 but they were also raised as a defence to the claims on

15:37 1 the merits asserted by the claimant; in that case,
2 a breach of Article 10 of the ECT.

3 And in particular, Italy claimed that EU law needed
4 to be applied by the tribunal under Article 26(6) of
5 the ECT, which provides -- again, in terms very similar
6 to Article 27(3)(g) on inter-state disputes -- that
7 investor-state tribunals:

8 "... shall decide the ... dispute in accordance with
9 this Treaty and applicable rules and principles of
10 international law."

11 And the way in which that tribunal approached
12 the question is set out on these slides.

13 So in paragraphs 113 and 114, the tribunal notes
14 the conclusion of an earlier tribunal that Article 26(6)
15 "'applies only to the merits of a dispute'", that this
16 question of applicable law comes up when you have,
17 again, sort of questions of law that are raised in
18 defence, for example, to a claim. So "'It does not
19 apply'", that earlier tribunal had held, "'to issues or
20 questions relating to the Tribunal's jurisdiction'".

21 That tribunal "[found] that reasoning persuasive" --
22 that's at the end of this extract from paragraph 113 --
23 and then went on to say that:

24 "However, even if ... that were not the case --
25 [even if] Article 26(6) were considered relevant to

15:38 1 issues of jurisdiction as well as the merits --
2 [it] does not agree that the effect would be to
3 incorporate EU law as part of the applicable law."

4 (Slide 19) Now, the reasoning of the tribunal again
5 sort of really rested on: what does it mean [by]
6 "applicable rules and principles of international law"?
7 And the conclusion that EU law was not within that
8 phrase, did not fall within the scope of that phrase,
9 was based on the idea that EU law does not apply to
10 states in general; that it was really sort of this
11 narrow subset of states.

12 Now, that's the particular outcome of the Eskosol
13 tribunal's reasoning in that case. The key point,
14 however, that we would suggest can be extracted from the
15 Vattenfall tribunal, which the Eskosol tribunal referred
16 to, and the Eskosol tribunal's reasoning, is that this
17 question is not a hurdle to jurisdiction; rather, it is
18 one of applicable law.

19 In that case, Italy's EU law defences were rejected
20 because they would not have applied to jurisdiction and
21 could not have had any bearing either on
22 the determination of merits.

23 Now, had Italy raised a general principle of law,
24 applicable not just to the subset of EU states but one
25 that would apply broadly as a defence on the merits, in

15:40 1 our submission, in our humble submission -- as always
2 I act under the control of the members of the Tribunal
3 who were in that case -- we think the Eskosol tribunal
4 could very well have reached a different conclusion and
5 considered that that general principle of international
6 law would have been part of the applicable law, based on
7 its analysis in paragraphs 115-121 of that decision.

8 Now, why does all of this matter for our case?
9 Armenia has exhorted this Tribunal to reject
10 jurisdiction because it might open the door for you to
11 consider wider issues of international law, such as
12 self-determination, such as the law of belligerent
13 occupation, et cetera.

14 But that is not a question of jurisdiction; it is
15 a question of applicable law. We don't yet have
16 Armenia's full position on the merits but it may well
17 raise a host of defences based on other issues of
18 international law that it may claim apply to the
19 assessment of the merits in this case, and that the
20 Tribunal may need to consider those issues as part of
21 the applicable law does not remove its jurisdiction.

22 The claims before the Tribunal in this part of
23 the case are based on an alleged breach of the text of
24 Article 18. There should be no doubt, as I began
25 my submissions yesterday, that the Tribunal has

15:41 1 jurisdiction to consider the application and
2 interpretation of that text. That is the power that is
3 expressly granted to it in Article 27(1).

4 I'm about to move on to my response to the third
5 attack, unless there are questions from the Tribunal on
6 this question.

7 THE PRESIDENT: Please proceed.

8 MS REID: Thank you.

9 So the third attack on Azerbaijan's case from
10 Armenia's submissions this morning is that "recognise"
11 as used in Article 18(1) is somehow different,
12 it doesn't have the right connotation, it's somehow
13 different from the "recognize" that was given legal
14 weight in Libya/Chad or in Gabon/Equatorial Guinea, or
15 even in Article 15 of the ECT itself.

16 So in many respects, we are ending here where the
17 Tribunal must always start, which is the ordinary
18 meaning of the key words.

19 (Slide 21) Yesterday in our submissions, both
20 parties discussed the Territorial Dispute case (CL-31),
21 and we said, quoting from paragraph 42, that it was key
22 to the ICJ's discussion in that case that:

23 "The word 'recognize' used in the Treaty indicates
24 that a legal obligation is undertaken."

25 Full stop.

15:42 1 Now, Armenia's starting position in its ordinary
2 meaning interpretation of the treaty is that you know
3 when a treaty imposes an obligation because there is
4 mandatory language: there are words like "shall". And
5 it claimed that Azerbaijan had no response to that
6 argument.

7 In fact our response had been set out in our papers,
8 and I will confess I thought the parties' arguments had
9 moved beyond this point of thinking that there is magic
10 language somehow that indicates whether there is or is
11 not an obligation. That task is determined by reading
12 the text in context and in light of the object and
13 purpose. And we know that because, for example, the
14 treaties in these ICJ cases discussing "recognise" don't
15 say "shall recognise", and yet "recognise" is given
16 legal effect.

17 (Slide 22) So this morning Armenia maintained that:
18 well, those cases are different because "recognise" has
19 a special meaning in the context of territorial title.
20 But it had to concede that "recognise" in Article 15 of
21 the ECT also imposes a legal obligation when it's
22 dealing with subrogation.

23 Professor Murphy said: well, this is different,
24 because "recognise" here is imbued in a particular way
25 when one is dealing with third-party rights, because

15:44 1 that's the subject of subrogation. I will confess,
2 I don't understand, and Armenia does not explain, why
3 "recognise" has this meaning when dealing with
4 third-party rights, but not the rights of contracting
5 states as between each other.

6 Professor Murphy's reading of Article 15 also relied
7 on the presence of the word "shall". He said: "shall
8 recognise" -- again, this magic language -- is how
9 you know that Article 15 imposes a legal obligation.
10 But let's test that.

11 So if we take out everything up to the word "shall",
12 and we replace it with the words "The Contracting
13 Parties" and we read that, what you have is:

14 "The Contracting Parties recognise:

15 "(a) the assignment to the Indemnifying Party of all
16 the rights and claims ...

17 "[The Contracting Parties recognise:]

18 "(b) the right of the indemnifying party to exercise
19 all such rights ...", et cetera.

20 Would any of us think that that language does not
21 impose a legal obligation?

22 In our submission, what we have shown, and as
23 the jurisprudence of the International Court of Justice
24 confirms, "recognise" does not have a fixed meaning.
25 It doesn't require the magic addition of words like

15:45 1 "shall". Instead, its meaning turns on what is being
2 recognised.

3 When, as in those cases and as in Article 15,
4 "recognise" is used in relation to a legal fact, the act
5 of recognising that fact imposes legal consequences:
6 that legal status, recognising those rights. It is the
7 undertaking of an obligation. That principle applies
8 equally to Article 18. Recognition of sovereignty is
9 recognition of a legal fact: it bears legal consequences
10 arising from sovereignty.

11 So in sum, if we think about the different arguments
12 and different views that have been presented by the
13 parties in this case, to accept Armenia's arguments and
14 reject Azerbaijan's claim at this stage of the case, the
15 Tribunal would have to ignore the case that Azerbaijan
16 has actually pleaded, including the narrow legal basis
17 for Azerbaijan's claims, and its theory of the treaty
18 that is materially different, in a critical manner, from
19 the theories that were rejected by the ICJ in those
20 other cases.

21 The Tribunal would have to disregard the detail in
22 Article 18(3). And in this respect, we think of
23 Professor McRae's question in the morning session, which
24 is: while Armenia's description of Azerbaijan's case
25 really focuses on Article 18(1), we have consistently

15:47 1 maintained that if you want to understand what
2 Article 18(1) protects, you look at Article 18(3). And
3 we think of the three particular functions that
4 Article 18(3) plays in this treaty, and therefore in our
5 case.

6 First, it makes clear that these are concrete
7 operative rights and therefore concrete operative
8 obligations that are imposed.

9 Second, it makes clear that this is not about
10 sovereignty in general. It is about sovereignty over
11 energy resources, because of the specificity and the
12 link to exercising those rights over energy resources in
13 that detail in 18(3).

14 And finally, it gives you that picture of what
15 a breach of Article 18(1) would look like. It would
16 look, just as in Azerbaijan's Statement of Claim, like
17 the deliberate breach of each and every one of the
18 rights that is set out in Article 18(3).

19 But to accept Armenia's arguments here, you would
20 have to disregard not just the word "recognise" in
21 Article 18(1), but disregard all of the detail that is
22 provided by Article 18(3). And you would also have to
23 diverge from the jurisprudence distinguishing between
24 the different kinds of recognition, and consistently
25 holding that a recognition of legal status and rights

15:48 1 imposes an obligation that can give rise to not just
2 a breach, but liability and the obligation to make
3 reparations.

4 That, Madam President and members of the Tribunal,
5 is not an interpretation of Article 18; it is
6 a neutralisation of that text.

7 Unless there are additional questions that the
8 Tribunal has, that would be the end of our submissions
9 on Article 18, and we would propose that we could take
10 the break now.

11 THE PRESIDENT: Thank you very much. We will do that, and
12 return at 4 o'clock -- actually, no, 4.05.

13 MS REID: Thank you.

14 (3.49 pm)

15 (A short break)

16 (4.08 pm)

17 THE PRESIDENT: Welcome back to all.

18 Counsel, whenever -- you're free, please, to
19 continue.

20 DR BLAKE: Just one administrative point, Madam President.
21 In the break, we made a few corrections to some
22 typographical errors in the slides. We'll ensure that
23 corrected versions are circulated. These were minor
24 corrections. Thank you.

25 Members of the Tribunal, I am honoured to appear

16:09 1 again on behalf of the Republic of Azerbaijan.

2 Today in rebuttal I would like to offer a few points
3 and observations on each of Armenia's objections as to
4 the existence of the dispute and the alleged
5 insufficiency of negotiations, and then I would like to
6 make some observations on the conciliation mechanism
7 under Article 7, and the best and permissible
8 interpretive approach that that provision can handle,
9 given its very sketchy drafting. And the hope will be
10 to give the Tribunal a roadmap as to the potential ways
11 in which it can resolve that very difficult and knotty
12 issue.

13 (Slide 24) So, with the Tribunal's permission, let
14 me proceed in the same order that I've taken these
15 objections in the opening presentation.

16 We say that fundamentally, Armenia's objections as
17 to the existence of a dispute cannot be reconciled with
18 the existing jurisprudence. The existing jurisprudence,
19 as we outlined yesterday, endorses a flexible and
20 pragmatic approach to the characterisation and
21 evaluation of a dispute.

22 But you would be mistaken this morning, when
23 listening to the presentation of Ms Macdonald, because
24 she urged on you a granular approach, looking at every
25 single dimension of the dispute and interpreting the

16:10 1 record of the negotiations as if it were a statute or
2 a piece of legislation.

3 But that kind of approach cannot be reconciled with
4 the principles articulated, including by the ICJ in the
5 Gambia v Myanmar decision (RL-88), where it says:

6 "The Court's determination of the existence of
7 a dispute is a matter of substance and not ... of form
8 or procedure ..."

9 That can be found at paragraph 64.

10 So we say again, in Armenia's presentation,
11 an attempt to move away from the approach that has been
12 endorsed by the preponderance, if not all, of
13 the jurisprudence on this matter.

14 As the Tribunal will recall, Azerbaijan's primary
15 case is that the question of the Tribunal's jurisdiction
16 does not turn on identifying a separate and specific
17 dispute as to the transit element of the claim. The
18 correct question, we say, is whether the transit claim
19 falls within the scope of the broader dispute that was
20 notified. And as we say, Armenia does not dispute
21 the fact that that broader dispute was notified and
22 negotiated.

23 And we say when you look at the record, when you
24 look at the evidence, it is clear that the transit
25 element of the claim falls within the very wide ambit of

16:12 1 the dispute that was noticed. And that is clear from
2 the Notice of Dispute -- I will not bring you to it
3 again; that is a matter for you to interpret and to look
4 at in the round -- and the subsequent correspondence
5 that clarified Azerbaijan's dispute.

6 Armenia did not take you to the subsequent
7 correspondence; it focused on the Notice of Dispute.
8 But you should look at the whole trail of correspondence
9 to see how the dispute and the articulation of the
10 dispute developed over time. And you are told that you
11 can do that, including by the tribunal in Vestey
12 (CL-138), which made the very mundane point, of course,
13 that disputes evolve and claims arise over time, but the
14 dispute, the initial dispute, does not change.

15 So if you look at the correspondence, what you see
16 is a broad definition of "dispute" and a clear statement
17 that the articulation of the constituent part of
18 the dispute was not exhaustively addressed.

19 And so we say, given the very broad nature of the
20 dispute that was being negotiated and that was the
21 subject of the correspondence, it is very clear when you
22 look that the pipeline claim, and the pipeline as
23 a piece of infrastructure, and the transit element is
24 an implicit part of the pipeline. Because if you have
25 pipeline as a piece of infrastructure, the question is:

16:13 1 what goes through the pipeline? And we're speaking
2 about natural resources: of course the gas goes through
3 the pipeline.

4 Now, my learned friends make a point about: there
5 was no reference to "pipeline", there was no reference
6 to "gas". But of course both parties are very familiar
7 with that territory: they know the assets that are
8 there, they know the resources that are there and they
9 know the infrastructure that are there. And that should
10 also inform your assessment of what would have been
11 known to the parties. And you would have seen in the
12 final notice and the final correspondence Azerbaijan
13 making that very point: that the facts around this asset
14 should be known to you.

15 So these are not strangers coming to a negotiation.
16 And so the Tribunal should take that factor into account
17 when looking in the round at the reasonableness and
18 whether the Respondent would have had a clue, an idea,
19 a sense of what was properly in dispute.

20 So this morning we have not heard any real response
21 to Azerbaijan's points on these matters. Counsel has
22 brought to the Tribunal various authorities, including
23 the Certain Phosphates case and the Burlington v Ecuador
24 case, and we've heard some submissions this morning that
25 the mere fact that the same treaty has been invoked does

16:15 1 not necessarily make this a single dispute.

2 But Azerbaijan's case is not simply to say that the
3 fact that both claims arise under the ECT means that
4 we have shown that it's a part of the same dispute.
5 That is too reductive an approach and a view of our
6 submissions.

7 Instead we say that the legal nexus between the
8 transit claims and the overall dispute is much tighter
9 than Armenia suggests. The transit claims allege the
10 same kinds of acts under the same single legal theory:
11 that Armenia breached Azerbaijan's sovereign rights over
12 its energy resources by blocking access to and
13 exploiting Azerbaijan's resources and infrastructure.
14 And because of the nature of the resource in question --
15 that is, the pipeline -- the same acts also violate
16 various provisions of Article 7.

17 And it is important for us to step back and ask what
18 we mean by a "transit claim" and whether that is
19 properly a claim about access.

20 Now, this transit claim of course is a very peculiar
21 transit claim because it involved the transit of gas
22 from one country, Azerbaijan, through Armenia to
23 Azerbaijani territory. And so to suggest that the
24 question of the blockage or a lack of transit is not
25 also a lack or a blockage of access of Azerbaijan and

16:16 1 Azerbaijanis to natural resources, we say, just does not
2 hold up to scrutiny.

3 So we say Armenia's attempts to draw fine temporal,
4 geographic and other factual distinctions between
5 the claims is simply unfounded. It goes against the
6 approach, as I mentioned earlier, endorsed by the ICJ
7 and a host of other arbitral authorities.

8 So let us look at the distinctions -- there's
9 a table I would like to throw up (Slide 26) -- let us
10 look at the distinctions that Armenia has sought to draw
11 between the claim and the dispute in its bid to
12 undermine jurisdiction.

13 It has said that the alleged conduct is different.
14 But as I just mentioned, members of the Tribunal,
15 the conduct, properly characterised, is the same: lack
16 of access, blocking access to the ability of Azerbaijan
17 to access its resources, to exploit it, to use it and to
18 benefit from it. And the various permutations of that
19 wrongful act shouldn't undermine the fact that we are
20 alleging one single wrongful act, with the various
21 iterations and various claims falling under that general
22 dispute, which is a dispute undeniably about energy
23 resources in a set territory within a set period of
24 time.

25 And that takes me to the question of location.

16:18 1 There has been much debate on the Armenian side about
2 whether there is a difference in locus as to the claim
3 to do with transit and the claim to do with sovereignty.

4 We respectfully submit, members of the Tribunal,
5 that transit necessarily implicates the borders. Taking
6 the case at its lowest, transit necessarily implicates
7 the border, two borders of Azerbaijani territory, both
8 in the mainland and in the autonomous region of
9 Nakhchivan.

10 But we've gone further, to articulate the fact that
11 our claim doesn't only -- our transit claim doesn't only
12 involve the question of the initial cut-off of gas,
13 because if you look at the substantive obligations in
14 Article 7, they include, among other things, obligations
15 to facilitate the flow of energy resources. They also
16 have -- there are also obligations in relation to energy
17 infrastructure and a specific obligation not to re-route
18 or to in any way modify energy infrastructure, which
19 would implicate the pipeline and, we say, the various
20 acts Armenia committed, including the redirection of
21 the pipeline during the period of occupation.

22 So to say that, "Oh, an Article 7 claim is merely
23 a transit claim to do with whether you've turned off the
24 tap or not", is first a mischaracterisation of our
25 claim. When properly understood, our claim implicates,

16:19 1 very much implicates, the territory of Azerbaijan and on
2 that score is very similar to our other sovereignty
3 claims.

4 The temporal point. You will see there on the
5 slide, Tribunal members, this temporal point has been
6 made: that the initial shut-off was in 1991 and
7 the other claims pertain to a period in 1994. There are
8 two elements of this, we say.

9 First, as I've just articulated, our Article 7
10 claim -- let's just move away from using the word
11 "transit" -- our Article 7 claims implicate obligations
12 that took place in the territory of Azerbaijan and in
13 the temporal period that is similar to the other
14 sovereignty claims.

15 The other point we would make on this score is
16 that -- or the pipeline claim also, we assert, is
17 a continuing breach. We say that the wrongful act
18 committed by Armenia is a continuing breach. And so to
19 draw the type of temporal distinctions that Armenia
20 seeks to make, to say that that claim pertains to that
21 period, and your pipeline or your Article 7 claim only
22 is cabined off to 1991, again is a gross
23 mischaracterisation of our case. And when you look at
24 our case, properly understood, it undermines this
25 argument that there is some sort of temporal distinction

16:21 1 to be drawn between the two sets of claims.

2 And of course this question of the violation in
3 question.

4 First of all, we say that the Tribunal really should
5 not be looking at this fourth point in relation to the
6 question of whether there is a dispute because, as we
7 have explained yesterday with reference to ICJ
8 jurisprudence, the question of whether a dispute exists
9 or not does not turn on whether a state has invoked
10 a treaty, much less a treaty provision. And so the
11 obsession and the fixation on whether we have put in
12 some paper, Article 7, we say, is not the correct
13 approach, and certainly not the correct approach and
14 guidance we receive from ICJ jurisprudence.

15 And so we say that the nexus, both factual and
16 legal, between our Article 7 claim and the broader
17 dispute that was negotiated is as close as it can be,
18 and certainly the closest we've seen in any of the cases
19 that have been put before you. What has been put before
20 you are a number of cases which bear no comparison to
21 the case and the facts that you have.

22 So let us look at Burlington (RL-157), the case that
23 was presented this morning. When you look at
24 Burlington, you will see that that case is absolutely
25 inapposite.

16:22 1 Now, Ms Macdonald suggested (page 53:12-16) that
2 the Burlington tribunal was:

3 "... looking at claims based on the same alleged
4 conduct, violating the same legal provision in the same
5 treaty, and still requir[ed] the existence of [this]
6 dispute to be ... established for each of the claims."

7 This is simply not what happened in Burlington.

8 The problem in Burlington was that the trigger
9 letter sent by Burlington identified a breach of
10 the treaty in respect of certain specific conduct:
11 Ecuador's passage of what is known as Law 42. You may
12 be familiar with it. Law 42 initially imposed a 50% tax
13 over certain oil profits, which later went up to 99%.

14 But the dispute in question, the dispute found not
15 to have existed, was a dispute in relation to
16 Burlington's claim that Ecuador had failed to provide
17 full protection and security in respect of block 24 by
18 preventing members of the indigenous population from
19 impeding access, blocking access to that block. That
20 conduct was never mentioned in the trigger letter, which
21 only referenced Law 42, imposing its fiscal measure,
22 that 99% tax on oil profits.

23 And so you can see just from this description the
24 difference between those claims: one having to do with
25 physical security and indigenous communities and

16:24 1 physical access to a block, and another dealing with tax
2 measures and fiscal measures imposed by the government.

3 Now, the tribunal found that because the trigger
4 letter only identified Law 42 as Ecuador's conduct that
5 violated the treaty, this was not enough to identify the
6 existence of a dispute in respect of Ecuador's conduct
7 regarding the failure to provide full protection and
8 security in relation to the physical assets and stopping
9 the indigenous population from impeding access.

10 So it is not correct for Ms Macdonald to say and to
11 suggest that the tribunal found in that case -- that
12 what they found was that the claims were based on the
13 same conduct; and that, having found that they were
14 based on the same conduct, they still required the
15 existence of a dispute in relation to each of those
16 claims.

17 What the tribunal found was that Burlington was
18 seeking to allege a dispute in respect of different
19 conduct that was never identified by Burlington in its
20 trigger letter. It found, not unsurprisingly, that
21 there was no dispute with respect to this different
22 conduct.

23 So that case, we submit, doesn't help Armenia here.
24 In our case, the conduct at issue was identified at the
25 very outset: Armenia's interference with Azerbaijan's

16:26 1 access to and exploitation of its energy infrastructure
2 and resources. Burlington simply is inapposite.

3 Now, other cases were raised this morning, such as
4 the Certain Phosphates case in the ICJ (RL-34). That
5 again is a case that we can distinguish very easily.

6 First of all, that case doesn't have to do with same
7 facts. It really is a case about whether, and to what
8 extent, a court would allow a claimant to amend their
9 claim to introduce a new claim at the memorial stage;
10 not even at the initiation stage, at the memorial stage.

11 So having filed an application with the ICJ, Nauru
12 pleaded one case in its application but then introduced
13 a new claim in its memorial. Unsurprisingly, the risk
14 of prejudice in this sort of situation is heightened,
15 and therefore the scrutiny that the court will bring to
16 bear in these situations is much different than the kind
17 of scrutiny that one would expect to be the reasonable
18 notice one would get in the context of pre-arbitration
19 negotiations and notice.

20 In any event, the original claim in Certain
21 Phosphates had to do with allegations that Australia had
22 failed in relation to their rehabilitation of certain
23 phosphate mines. That was the original claim. And the
24 claim that Nauru sought to add in its memorial had to do
25 with the disposition of certain assets of the British

16:27 1 Phosphate Commissioners; completely different facts
2 altogether.

3 We're not saying that facts that are in the same --
4 you know, happen in the same region at the same time in
5 relation to the same actors will all be connected;
6 it will be a matter of degree. It will be a matter of
7 degree. And what you're seeing in the cases that are
8 being put to you is that degree is very far apart,
9 markedly different from the very close legal and factual
10 nexus we have in this case.

11 This morning I was very surprised when Armenia
12 accused Azerbaijan of employing what they call
13 a "formalistic approach" (page 51:22) because
14 we suggested that the fact that Article 7 and the
15 sovereignty claim arise under the same treaty. We don't
16 shy away from that. But as I said before, that is not
17 the reason why we say the claims are the same. It is
18 not merely the fact that they fall under the same
19 umbrella. That is of course a relevant factor, because
20 of course they are in the energy sector, have to do with
21 energy, but they are also closely related because of
22 the facts which bind them together.

23 So we say when you look at the claims and you look
24 at the dispute as noticed, as it has evolved, it is
25 undeniable that this claim is a claim that falls within

16:28 1 the general dispute. And so you should not be
2 salami-slicing. This is not a claim which requires
3 the kind of granular slicing which is at odds with the
4 approach endorsed by the ICJ. It doesn't require --
5 it's not an exceptional case requiring you to depart
6 from well-established authority.

7 But we say that even if the Tribunal were inclined
8 to examine the transit claims in isolation, we submit
9 that the answer would be the same, because on a proper
10 analysis of the facts and circumstances of this case,
11 the only credible legal conclusion is that Armenia
12 opposed all the claims, including the transit claim; or,
13 should I say, the Article 7 claim.

14 It is clear on the record, members of the Tribunal,
15 of the negotiations that at no point Armenia accepted
16 Azerbaijan's position on the transit claims, and nor can
17 it be said that they remain neutral regarding what it
18 called "purported breaches of Article 7 of the ECT".

19 Armenia's opposition to the transit claim is evident
20 from, and may properly be inferred from, its conduct
21 during the course of negotiations. And we went through
22 that in some detail yesterday.

23 Nor, as I explained yesterday, can the State of
24 Armenia weaponise its tactical non-responsiveness. And
25 as I said, was there silence? No. A lot was being

16:30 1 said, but very little achieved, and not much -- or
2 anything -- of substance.

3 But we say that tactical non-responsiveness is
4 governed by similar principles as used by tribunals to
5 determine and infer a dispute and opposition from
6 silence. Because Armenia did not ask for clarification
7 over and over again; it consistently sought to reframe
8 and interrogate the dispute while resisting engagement
9 with the substance that was being raised. And as
10 we said yesterday, a respondent state cannot defeat
11 jurisdiction by insisting that a dispute is never
12 sufficiently crystallised unless every single point is
13 pleaded to its satisfaction. That is not what the law
14 requires.

15 So having established those general points, I want
16 to turn to three remaining points of detail on this
17 topic.

18 First, the Tribunal will recall that the parties
19 discussed yesterday a line of cases raised by Azerbaijan
20 where claims were allowed even in the notice of
21 arbitration. And this is again a line of cases which we
22 say is relevant to the distinction between claims and
23 dispute and the relationship between claims and dispute.

24 The principle established in those cases is that so
25 long as a claim falls within the ambit of a dispute that

16:31 1 has been properly notified to the respondent, there is
2 no need to separately establish a dispute and sufficient
3 negotiations.

4 Yesterday the President asked whether those line of
5 cases turn on the terms of the ICSID Convention and
6 Procedural Rules, and we had an exchange on that. And
7 we say the answer is: no, the decisions generally turn
8 on the definition of "dispute". And I want to elaborate
9 a little bit more on the answer that I gave yesterday by
10 taking the Tribunal to the case of A11Y v Czech
11 Republic, and that case is at CL-192.

12 In that case the claimant filed a notice of dispute
13 claiming a breach of an article of a BIT, specifically
14 Article 2(2), and it also reserved its right to
15 supplement the claim. The problem for the claimant,
16 however, was that the agreement to arbitrate was limited
17 to certain provisions, which did not include
18 Article 2(2). So the claimant amended its memorial in
19 the arbitration to include breaches in relation to
20 Articles 2(3) and 5.

21 The Czech Republic complained that it was never
22 notified of the dispute under any of these articles, and
23 hence that those specific provisions were never
24 subjected to amicable settlement under the four-month
25 period specified in that treaty. Now, the tribunal

16:33 1 rejected that argument (paragraph 148), finding:

2 "... as of the date of the Notice ... the Respondent
3 was clearly aware of the existence of a dispute,
4 the facts from which it arose, the legal basis of
5 the dispute (to wit the Treaty) ..."

6 And I underscore that: for this tribunal, it was
7 sufficient that the respondent understood "the ... basis
8 of the dispute (to wit the Treaty)".

9 "... and an estimate of the damages sought."

10 Here again, a tribunal not being overly concerned
11 with the specifics of the provisions that are invoked.

12 So what lessons can we take from the tribunal in
13 A11Y?

14 First, the decision does not validate Armenia's
15 approach, but rather endorses the principle that
16 claimants are not required to supply excessively
17 detailed particulars of each and every claim in order to
18 provide sufficient pre-arbitration notice of a dispute.
19 As the tribunal noted, it was sufficient that the
20 respondent was aware of the existence of the dispute,
21 the facts from which it arose and the treaty involved.

22 Second, the decision also establishes that the
23 claimant need not specify exhaustively, or at all, the
24 individual treaty provision which gave rise to the
25 dispute; it was sufficient for the notice to identify

16:34 1 the treaty involved. This again undermines Armenia's
2 argument that there could be no dispute between
3 Azerbaijan and Armenia because Azerbaijan did not
4 expressly invoke Article 7 in the two months before
5 the arbitration.

6 Third, the decision also endorses the broad approach
7 to the characterisation of a dispute, and recognises
8 the key distinction between "dispute" and its
9 constituent claims which we discussed yesterday. It
10 recognises that while a claim may evolve, that does not
11 change the fundamental character and the existence of
12 the dispute.

13 I now want to turn to a decision, a case, that was
14 addressed yesterday but not today in argument, and that
15 is a case that Armenia has relied on to some extent:
16 the decision in Ecuador v United States.

17 Now, Armenia cites this decision for the proposition
18 that the Tribunal cannot infer opposition from silence
19 if there is some reasonable alternative explanation for
20 the respondent's silence. But that principle and
21 decision in that case does not assist Armenia in the
22 face of its non-responsive speech and intransigence in
23 the context of the negotiations.

24 Ecuador v US (RL-52), that case turned on a very
25 unique set of facts. The tribunal found that there was

16:36 1 no dispute between the parties because there was no
2 allegation of breach of international law or any real
3 factual dispute in the traditional sense. Now,
4 I'm paraphrasing, because a member of the Tribunal sat
5 on that tribunal. But the claim, certainly to our eyes,
6 was a pure legal concoction on the part of Ecuador.

7 (Slide 27) Ecuador, as you can see on the slide
8 (RL-52, paragraphs 41-42), basically asked
9 the United States to state its position on the
10 Chevron/Ecuador tribunal's interpretation of
11 a particular treaty. Essentially, Ecuador was seeking
12 a referendum on the Chevron v Ecuador award. It hoped
13 that by writing the letter to the US, it would generate
14 a dispute, and that an inter-state tribunal might
15 provide a different interpretation that would conflict
16 with that of the Chevron/Ecuador tribunal.

17 It is in that context that the tribunal found that
18 the US's refusal to respond substantively to Ecuador's
19 requests could not be interpreted unequivocally as
20 an opposition or evidence of a dispute. Because
21 of course, as the tribunal rightly found in that case,
22 it could very well be that the State Department didn't
23 want to wade in and to be seen to be overriding the
24 adjudicative authority of an established investment
25 treaty tribunal.

16:37 1 Compare that, if you will, with Azerbaijan's notice
2 of the transit claims, on the right (CE-63, page 82).
3 Azerbaijan gave notice of a serious breach of the treaty
4 in the context of a dispute for which it was seeking
5 full reparation for damages. This type of notice called
6 for a response.

7 To borrow a related analogy from my colleague
8 Ms Reid, it is the difference between saying to someone,
9 "Will you accept that you damaged my car?", versus,
10 "Will you accept that my car is blue?" That is what
11 Ecuador was doing: "Don't you have a view on this
12 treaty?" As opposed to this situation, where we are not
13 merely asking for a view on the treaty. We're saying:
14 you have breached the treaty in multiple ways,
15 fundamental ways, and we are seeking reparation under
16 international law.

17 (Slide 28) Indeed, that is the very type of case the
18 Ecuador tribunal said would amount to a dispute.
19 It said: when you are faced with a serious breach of
20 international law and obligation, that is the type of
21 situation that calls for a response.

22 So we say in this case, the circumstances of this
23 case means that Armenia was required to give a response
24 substantively, and it did not do so.

25 And so the citation of these cases really amount to

16:39 1 apples-and-oranges comparisons. This is not a situation
2 where there's a reasonable alternative explanation for
3 the purported silence. And actually it is notable that
4 Armenia has not really provided an explanation for its
5 non-responsiveness. The only logical conclusion then is
6 that it opposed and continued to oppose the pipeline
7 claim, just as it opposed and continues to oppose
8 the rest of the dispute.

9 (Slide 29) Members of the Tribunal, I will propose
10 to move to the next point of rebuttal: the negotiation
11 objection.

12 Now, Armenia again starts its argument with
13 a fundamentally flawed premise: that the transit claims
14 must be independently negotiated, that they must
15 independently -- each claim must independently satisfy
16 the negotiation requirement.

17 Now, if the Tribunal agrees, we say, with
18 Azerbaijan, that the transit claims are just that,
19 claims, then you need not decide the negotiation
20 objection. As Article 27(2) makes clear, the diplomatic
21 consultations apply to disputes, not to claims, and
22 Armenia makes no negotiation objection as it relates to
23 the broader dispute.

24 Now, Armenia's negotiation objections depends on
25 the Tribunal finding that the transit claims are their

16:40 1 own standalone dispute, rather than what they actually
2 are, which are claims falling within the broader ambit
3 of the dispute.

4 And in the two days of argument, we have not really
5 heard any single case which applied the negotiation
6 requirement on a claim-by-claim basis. The best
7 authority that has been cited by Armenia is the
8 Burlington case, for the proposition that separate
9 disputes need to be substantively and separately
10 negotiated, not claims.

11 Armenia must concede, however, that as the tribunals
12 in the Montauk case (CL-209), the Orascom case (CL-193)
13 and the A11Y case (CL-82) which I just brought the
14 Tribunal to, as they have recognised, claims falling
15 within disputes do not need their own negotiations, and
16 they can be included in the notice of arbitration or
17 even later. And of course we're not speaking about
18 including a claim in a notice of arbitration; this claim
19 was notified months before this arbitration was
20 initiated. And so the Tribunal's analysis of the
21 negotiation objection need not go any further if you are
22 with us on the characterisation of the claim.

23 I also want to make, however, a few other
24 observations on the points that Armenia raised. The
25 first concerns the proposition advanced by Armenia that

16:42 1 there is some higher standard applicable to inter-state
2 cases for what counts as sufficient negotiations.

3 With respect, we disagree. While it is true that
4 the ICJ has, on the facts of specific cases, found that
5 months or a year of diplomatic exchanges was required
6 for negotiations to suffice, that does not mean that
7 there is any sort of uniformly longer period required
8 for inter-state negotiations. And as we have shown, the
9 opposite approach is taken in the cases: a contextual,
10 case-driven approach, as was endorsed by the Permanent
11 Court of International Justice in the Mavrommatis case.

12 Now, there was some suggestion this morning that you
13 should read a gloss or qualify the Mavrommatis statement
14 to this effect, and if we could pull up the bit of the
15 judgment that the Tribunal was brought to this morning
16 (RL-21, page 13). (Pause)

17 Okay, let's move on.

18 The suggestion this morning was to suggest that
19 there was some gloss on the Mavrommatis principle of
20 there being no set period for diplomatic negotiations,
21 and that these negotiations may be short, they may be
22 long, depending on the circumstances.

23 If you look at the slides given by Armenia this
24 morning, you will see that that qualification just
25 doesn't stand up. It's not a qualification which

16:44 1 changes the principle, which is what this Tribunal is
2 certainly applying.

3 In any event, the treaty text, we say, in this case
4 eschews a specific time period and instead favours
5 a "reasonable period of time". And we say that requires
6 a contextual approach to the assessment of the
7 reasonableness of negotiations.

8 (Slide 30) And we have discussed and you heard some
9 discussion of the inter-state decision in Qatar v UAE
10 (RL-169). And you can see the ICJ there was satisfied
11 by a two-month gap between Qatar's notice of dispute in
12 April 2018 and its commencement of proceedings in
13 June 2018.

14 The court took account of the background context,
15 including the broader dispute between the parties on the
16 blockade of Qatar. And the Tribunal here should also do
17 the same in evaluating the context, and you will recall
18 we outlined the context in our opening yesterday.

19 Now, Dr Salonidis said today that you should ignore
20 this case because it was only a prima facie decision on
21 jurisdiction. Nevertheless, it was a finding of the ICJ
22 that jurisdiction is not precluded by a formalistic view
23 on the negotiation period.

24 Here, the two-month period between the Notice of
25 Dispute and commencement of the claim came after

16:45 1 a series of other exchanges and public statements on the
2 wider conflict. The same approach ought to be taken
3 here if the Tribunal is inclined to view the transit
4 claim as its own dispute: then it can and should take
5 into account the surrounding context, including
6 the failed negotiations.

7 Now, I will pause here on the question of public
8 statements, because it was suggested this morning, and
9 it was said that it was surprising, that there were no
10 public statements ever made about the transit disruption
11 in the pipeline. On instructions, we can say that there
12 were public statements to the effect at the time, and
13 should the Tribunal want to receive such statements,
14 we would be happy to supply them.

15 DR SALONIDIS: Madam President -- my apologies, Dr Blake,
16 for the interruption -- just to state the obvious: to
17 the extent that the Tribunal is minded to invite any
18 such public statements, we would like an opportunity to
19 comment on that. Thank you.

20 THE PRESIDENT: Thank you. I think at this point we are not
21 calling for any additions to the record, but if that
22 were to occur, we would certainly give both parties
23 the opportunity to comment.

24 DR BLAKE: So taking the case of Qatar. We say it is not
25 true, as Dr Salonidis suggested this morning, that

16:46 1 inter-state negotiations are held to a higher standard
2 or there are no inter-state cases with a relatively
3 short negotiation period.

4 Now, he may add a qualification, but the principle
5 is really what matters here, and it's the Mavrommatis
6 principle, which is a sensible principle which
7 understands that the length of negotiations will be
8 conditioned by a number of factors, including the state
9 of diplomatic relations between the parties and what is
10 going on between the parties at the time, the nature of
11 the dispute, and other factors that are really unique to
12 the inter-state context.

13 Ultimately, we submit, comparisons to what was done
14 in other cases is really unhelpful, and in any event not
15 required by the treaty. But we think it was important
16 to dispel this notion of a higher, heightened standard
17 in inter-state disputes.

18 (Slide 31) Now, Armenia suggests that the
19 consultation period was unreasonable at least in respect
20 to the transit claim because Armenia had ostensibly
21 offered to negotiate those claims. Their submissions on
22 this point, I think we can -- they're found in the
23 transcript at 103:16-20. Their submissions on this
24 point you can see on the screen:

25 "Armenia ... ask[ed] for more information and

16:48 1 stat[ed] that it was ready to discuss the allegations."

2 Azerbaijan's position is that this was not a genuine
3 offer to negotiate at all. Read in context, it was the
4 same sort of prevaricating response: a strategic demand
5 for more information, a refusal to respond on the
6 substance, and even a refusal to acknowledge the claims
7 as legitimate ones.

8 Now, in his argument this morning, Dr Salonidis said
9 that there was a good faith effort at negotiations, and
10 he identified three factors. The first factor is that
11 Armenia responded to letters. That was the first: that
12 they responded to letters. The second was that they
13 attended meetings. And the third was that they raised
14 17 questions arising from the meetings.

15 Now, that gives you an indication of some of
16 the factors that arose and some of the factors that are
17 present here. But of course the Tribunal does not have
18 a record of those meetings: you do not know what
19 happened in them, and why a state, having gone to those
20 meetings, might have emerged thinking that further
21 engagement would have been futile.

22 What you do know is that going into the meetings,
23 there were demands and demands for more information,
24 more information, more information; and then emerging
25 from the meetings, a list of 17 questions. So it is

16:49 1 therefore unsurprising, when there were only more
2 questions coming from the other side, that a decision
3 would have been made that further negotiations are
4 futile.

5 In any event, we say, the fact that a party
6 professes some sort of openness to dialogue does not
7 negate the existence of a dispute or that the
8 negotiations are viable. And the ICJ noted this in the
9 Nicaragua/Colombia case (RL-67, paragraph 69). It said
10 that:

11 "... the fact that the Parties remained open to
12 a dialogue does not by itself prove that, at the date of
13 the filing of the Application, there existed no dispute
14 between them ..."

15 So a mere statement at the end of a letter saying,
16 "We remain open", is not dispositive, does not move the
17 needle. It has to be judged in all the circumstances,
18 including circumstances to which this Tribunal is not
19 privy. Because if a respondent could defer arbitration
20 simply by professing a willingness to negotiate, it
21 would always do so. A bare assertion of being ready to
22 engage, without any substantive response, cannot suffice
23 to postpone indefinitely, still less deprive this
24 Tribunal of its jurisdiction.

25 And to be clear, we do not suggest that it was

16:51 1 improper for Armenia to request further information in
2 good faith, in the context of the negotiations.
3 However, that is not, we submit, the situation we had
4 here. A request for particulars can be legitimate, but
5 that is not the whole story, because we say that the
6 frequent asking and the consistent asking for questions,
7 and yet they responded --

8 DR SALONIDIS: Madam President -- my apologies, Dr Blake,
9 but I left you the first time to go with it. But this
10 is the second time that Dr Blake is making assertions,
11 submissions, on matters -- speaking about negotiations
12 which I presume he did not attend. There is nothing on
13 the record about what transpired in the context of those
14 negotiations other than what is reflected in the letters
15 exchanged after those meetings.

16 So this is the second time that he is speaking about
17 what was allegedly transpiring, and I feel that this is
18 a bit inappropriate, since he is not a witness and
19 he was not present.

20 THE PRESIDENT: I took the argument to refer to the letters
21 that are in our record and the contents thereof;
22 I didn't take it to refer to anything beyond the record.
23 And we will consider the arguments in that context.

24 DR BLAKE: For the avoidance of any doubt, what I mentioned
25 was the fact of the negotiations. I am as much in

16:52 1 the dark as the Tribunal is, and that is a fact.

2 Second, I referred to 17 questions which were
3 referred to by Dr Salonidis this morning on the record,
4 and the fact of those 17 questions are in correspondence
5 between the parties. If that clarification is
6 necessary, we can provide it by the end of the day.

7 THE PRESIDENT: Just a factual question: are the
8 17 questions in our record or are they not?

9 DR BLAKE: No, the fact of the 17 questions.

10 THE PRESIDENT: A reference to the existence?

11 DR BLAKE: Exactly, which is as far as I've gone.

12 So finally, the Tribunal will note that Armenia does
13 not provide a substantive response on the issue of
14 futility. Instead, it simply asserts that there is
15 a high bar for establishing futility, and further
16 asserts that Azerbaijan conceded a so-called
17 "considerable burden of proof" for proving futility, and
18 that there must be "substantial and credible evidence"
19 (Day 1/102:25-103:4).

20 In fact, Azerbaijan did not adopt such a submission,
21 or that position. Azerbaijan's position is that the
22 Tribunal should adopt a commonsense review of the record
23 on a case-by-case basis of whether negotiations are
24 futile in the circumstances, and that you can see from
25 our Counter-Memorial at paragraph 98. And that specific

16:53 1 and case-specific analysis here must take into account
2 the broader state of diplomatic relations between the
3 parties, the backdrop of the dispute and the parallel
4 failed negotiations under other treaty mechanisms.

5 As the ICJ said in the South West Africa Case
6 (CL-8), if deadlock was reached in the collective
7 negotiations in the past or present proceedings confirm
8 the continuation of a deadlock, then there is no
9 obligation to proceed in futility. And you will note
10 the ICJ there took account of conduct after the
11 initiation of the proceedings to determine whether
12 deadlock would have likely been passed in
13 the negotiations.

14 Here, after six months, there was no meaningful
15 movement on either side. Azerbaijan maintained its
16 claims; Armenia maintained its refusal to engage on
17 liability.

18 (Slide 32) And we need look no further to confirm
19 the continuation of the deadlock than in yesterday's
20 proceedings. Indeed, Armenia has taken pains to remind
21 the Tribunal that in addition to its three bifurcated
22 objections, it has another three non-bifurcated
23 jurisdictional objections to the transit claim, and that
24 it "does not [even] accept that it was responsible for
25 the interruption" in the first place

16:55 1 (Day 1/63:17-64:12).

2 In these circumstances, we say, the position is
3 clear: the parties had reached a deadlock well before
4 the commencement of these proceedings, and the deadlock
5 has only been confirmed in the course of this
6 arbitration.

7 Those are my submissions on the negotiation
8 requirement, and unless there are any questions, I will
9 move very quickly to the meaty issue of conciliation.

10 THE PRESIDENT: Please do.

11 DR BLAKE: (Slide 33) So we say fundamentally the issue
12 before the Tribunal as it concerns the question of
13 conciliation is whether, as Armenia asserts, this
14 Tribunal lacks jurisdiction because it was improper for
15 Azerbaijan to initiate arbitration in respect of the
16 Article 7 claims instead of pursuing conciliation first.

17 Now, the goalposts have moved a bit, because in
18 coming to this case and this argument, I was arguing
19 a case against exclusivity. That's now moved, and now
20 I'm meeting a case this morning about modulation.
21 I'm not sure what the content is of modulation and what
22 modulation means. I think tribunals understand
23 jurisdiction and lack of jurisdiction and admissibility,
24 but modulation is a concept I must confess I have not
25 yet encountered in an international law textbook.

16:56 1 But as I understand it, to succeed in this
2 jurisdictional challenge, Armenia has the burden of
3 showing that conciliation constitutes an exclusive
4 remedy for transit disputes such as the one before
5 the Tribunal; exclusive in that it must go to
6 a conciliation and you don't have jurisdiction to hear
7 the claim. Because if you have jurisdiction, then we
8 need not argue. But that argument necessarily means
9 that you lack jurisdiction, which means that
10 the exclusive jurisdiction goes to the conciliating
11 part, the conciliator.

12 THE PRESIDENT: Just so I understand how you're using
13 the concept of exclusivity, I understood the case being
14 put to us was that conciliation was a mandatory
15 precondition, but that eventually, if it fails, one
16 could then go to arbitration. Is that your concept of
17 exclusivity, or is that ...?

18 DR BLAKE: Well, I'm trying to understand the case that
19 I have to meet, because, as we outlined yesterday, in
20 the papers "mandatory and exclusive" was used
21 consistently.

22 I do agree. And as things stand now,
23 Professor d'Argent said that it's now a matter of
24 sequencing, and there's now a question of: are you able
25 to go first? But the question then it begs is: is it

16:58 1 that you have concurrent jurisdiction, but then you are
2 obliged to have one mechanism go before you? What is
3 the power? What is the legal source? Do you have
4 jurisdiction, and when does that jurisdiction kick in?

5 So these are some of the questions that come up in
6 light of the changes in the argument that have been put
7 to you, and I will do my best to engage with them, as
8 I'm sure you will too.

9 But on this basis, which is the case that was put,
10 it is argued that conciliation is "mandatory" in the
11 transit sphere. Now, that's a word that was used today,
12 and I hope it's accurate. "Mandatory" in the transit
13 sphere. But that might mean, and it's likely to mean,
14 mandatory in that it must go first.

15 But to succeed on that jurisdictional challenge,
16 I think Armenia must demonstrate that the Tribunal's
17 jurisdiction is curtailed in some way, some meaningful
18 way.

19 But, members of the Tribunal, today we've heard, as
20 I mentioned, another shift in the case. Professor
21 d'Argent now says, "We're not contending that
22 conciliation is exclusive but mandatory". So at best we
23 have, we say, an admissibility objection, and one that
24 says that Azerbaijan filed for arbitration too soon and
25 should have first gone to non-binding conciliation.

16:59 1 But this is how I come at this. There is no dispute
2 that the Tribunal has prima facie jurisdiction,
3 subject-matter jurisdiction, to determine the present
4 transit claim. It is a claim which concerns the
5 interpretation and application of the ECT, and therefore
6 falls within the broad terms of the parties' standing
7 agreement to arbitrate under Article 27.

8 To dislodge the jurisdiction, this Tribunal's
9 jurisdiction, as Armenia is seeking to do, it must show
10 that the contracting parties did not intend and did not
11 consent to the submission of the inter-state transit
12 dispute to arbitration, certainly, or not first.

13 This may be for three reasons. The first reason may
14 be because we are barred from coming directly to you
15 because of an exception specified in the compromissory
16 clause. That's one option. The second option is that
17 there is a provision somewhere else in the treaty which
18 operates to override or bar you from exercising
19 jurisdiction that you have. And the third is that there
20 might be an agreement outside of the ECT between
21 the parties whereby they have agreed to exclude transit
22 claims from inter-state arbitration.

23 I don't think it's suggested that there is
24 an agreement. And so what Armenia has to show is that
25 there is either applicable exception in the

17:01 1 compromissory clause or that there is another provision
2 in the treaty which operates to rob the Tribunal, for
3 the time being, of your prima facie jurisdiction and
4 the power you have, which is clear from Article 27.

5 As we established yesterday, Article 27 provides
6 that parties may initiate arbitration except if some
7 other provision of the ECT says otherwise. This is the
8 effective meaning of the phrase "except as otherwise
9 provided". Our position is that this operates as
10 an exception to the parties' consent to arbitrate, so
11 that any issues falling within the exception --
12 specified elsewhere in the treaty, for example -- cannot
13 be arbitrated.

14 (Slide 34) And so here we have a table summarising
15 which articles are excepted from Article 27. The key
16 example, of course, is Article 28: it expressly provides
17 that specific trade issues are excluded from inter-state
18 arbitration and are subject to their own dispute
19 resolution mechanisms. Indeed, that was what was
20 contemplated in the travaux: Article 27 would exempt,
21 for example, GATT, with the language "except as
22 otherwise provided".

23 Importantly, each of the provisions which are
24 expressly excluded from Article 27 are excluded because
25 they have an alternative mechanism that is understood to

17:02 1 be exclusive. Article 7, as we've said, is not such
2 a mechanism. In fact, it contemplates the exhaustion of
3 other remedies, including potentially contractual
4 arbitration and potentially inter-state arbitration, and
5 we'll get back to that matter in a minute. In other
6 words, it deals solely with sequencing of available
7 mechanisms.

8 Article 21(5), which was raised yesterday, similarly
9 deals with sequencing rather than exclusivity.
10 It provides that allegations that tax measures are
11 expropriatory must be referred to competent tax
12 authorities first.

13 (Slide 35) Now, I'd like to spend some time on
14 Article 21(5). Here we have the full article.
15 Armenia's opening presentation, and again its
16 presentation this morning, truncates the provision.

17 You can see -- we should look at (iii) and (iv).
18 We see in those paragraphs that they're actually quite
19 explicit in their instructions on how this provision
20 interacts with the inter-state arbitration provision.

21 You see that there can be an arbitration before tax
22 referral, in which case the tribunal refers the matter
23 to the tax authority, or there can be arbitration after
24 they take the tax authority's opinion. Either way, the
25 tax authority process cannot unduly delay the Article 27

17:04 1 process.

2 This detailed regime, we submit, only serves to
3 illustrate how Article 7 is in comparison. It's silent
4 on interaction with Article 27, because both mechanisms
5 were considered to be, we say, available in parallel.
6 That remains our primary position. So we say that
7 articles having to do with sequencing are exempted from
8 Article 27.

9 Armenia nevertheless maintains its core challenge
10 that Article 7(7) of the ECT operates as an exception to
11 Article 27, albeit modulated. Armenia concedes that
12 Article 7(7) does not expressly exclude transit disputes
13 from inter-state arbitration. This is important because
14 we know that the drafters of the ECT were, for the most
15 part, very keen on expressly stating which provisions
16 are and are not subject to arbitration and other dispute
17 mechanisms. In that regard, the drafters were very
18 clear.

19 Despite this, Armenia nevertheless asserts -- and
20 we heard the new framing of it this morning -- that
21 Article 7(7) modulates the right to bring arbitration.
22 The question for the Tribunal is whether, as a matter of
23 proper interpretation of Article 7(7), Armenia can
24 maintain that that provision operates to exclude or
25 override your prima facie jurisdiction over

17:06 1 an inter-state claim to do with the interpretation and
2 application of the ECT.

3 Now, Armenia's modulation argument turns on
4 two points.

5 It points to the language in Article 7(7) which says
6 that conciliation "shall apply" to transit disputes. It
7 argues that this is mandatory language, which means, as
8 Professor d'Argent put it yesterday, the parties have
9 no leeway, but must go to non-binding conciliation for
10 transit disputes.

11 However, as we have noted in our paper, the use of
12 the word "shall" does not necessarily mean that
13 conciliation is mandatory or exclusive. The words
14 "shall apply" may simply be directive or descriptive,
15 rather than foreclosing the possibility of arbitration
16 where that route would otherwise be available to
17 disputing parties. And I won't bore you any more with
18 the distinction between "shall" and "may".

19 Our primary argument, however, is that the words
20 "shall apply" are merely directory in the context, and
21 that the operative word here is "may". And therefore
22 contracting parties may go to arbitration in a dispute,
23 such as the one before the Tribunal, or they may go to
24 conciliation.

25 We say that the context supports this reading

17:07 1 because it is clear that conciliation was not meant to
2 be the only dispute mechanism for transit. Article 7(7)
3 designates conciliation as a secondary remedy because
4 conciliation can only be pursued after other pre-agreed
5 remedies are exhausted. This could be other binding
6 procedures, court procedures, for example,
7 administrative procedures or indeed arbitration.

8 And indeed Professor d'Argent, to the best of my
9 recollection, did not address the question of this need
10 for exhaustion and how that affects the question of the
11 quality of Article 7(7), and whether it is an exclusive
12 remedy or whether it is a secondary, subsidiary remedy,
13 as we submit it is.

14 We say that the reading that we've put forward is
15 consistent with the object and purpose of the treaty,
16 which is the facilitating of the settlement of energy
17 disputes.

18 (Slide 36) And you can see we have illustrated how
19 our primary argument works. Now, I'm not going to bring
20 you through this, because it's quite complex, but it's
21 for your bedtime reading, and it may assist you in
22 trying to navigate this maze, this sketchy maze.

23 What you will see is a set of questions saying, "Are
24 you a state?" If you're not a state, there is no -- if
25 it's "Yes", you go to the opposing party. If the other

17:08 1 party is a state, you may go to conciliation. So you'll
2 see a decision tree which shows you how we see
3 the different parts of this thing hanging together.

4 Now, Armenia has made an object and purpose argument
5 suggesting that the purpose of Article 7(7) was speed.
6 However, our reading, a reading that gives the parties
7 maximum flexibility and optionality, is consistent with
8 the requirement of efficiency in dispute resolution.
9 It does not force a party to engage in a process that is
10 likely to be completely inapt for the circumstances of
11 its case.

12 As some of the questions from Professors Stern and
13 McRae were getting at yesterday, the traditional transit
14 dispute looks very different than the type of dispute
15 we have here, and we can see that from Article 7 itself.

16 (Slide 37) Article 7(6) talks about the obligation
17 not to "interrupt or reduce", or allow state entities to
18 interrupt or reduce, existing flows of energy while
19 a transit dispute is pending. But as Professor Stern
20 pointed out, that obligation is simply not at play here,
21 indicating that the drafters were really contemplating
22 situations of active energy flow. That's not what's
23 happening here.

24 Article 7(6) also refers to "a contract or other
25 agreement" that specifically provides for transit. And

17:10 1 so the implication of that article is that Article 7(7)
2 conciliation will entail transit disputes of
3 a commercial and contractual nature, not the
4 interpretive inter-state dispute, which has really
5 knotty interpretive issues of international law at their
6 core.

7 Paragraphs (c) and (d) also talk about conciliation
8 "within 90 days", where a conciliator will decide
9 interim tariffs which the entities must observe. That
10 of course has nothing to do at all with Azerbaijan's
11 transit claims, which are in any event far too complex
12 to be resolved in 90 days in a non-binding procedure.
13 We have already been in the throes of proceedings
14 lasting many times over 90 days.

15 (Slide 38) And so going back, we say this graph
16 represents -- you know, our primary argument is that
17 this is the co-equal, equally available remedies that
18 a party, a state party, can avail itself of.

19 Now, non-state actors do not have the privilege of
20 Article 27. But for the unique inter-state dispute,
21 which is a transit dispute which has to do with the
22 application and interpretation of Article 7(7), we say
23 that the parties have a choice under the regime that has
24 been drafted.

25 And as I explained yesterday, our reading does not

17:11 1 deprive Article 7(7) of effet utile, because even though
2 states are free to pursue arbitration, they may
3 nonetheless pursue conciliation if they so choose. And
4 conciliation remains available in the vast majority of
5 transit claims which involve non-state entities or do
6 not turn on the interpretation of the treaty.

7 We also say that this interpretation is bolstered by
8 the supplementary means of interpretation, namely the
9 travaux and the commentaries that are worthy of the
10 Tribunal's consideration, chief among them the writings
11 of Mr Bamberger.

12 So this is our primary case. This is our primary
13 case.

14 However, we also rely on a secondary case. We say
15 that if the Tribunal accepts Armenia's argument that the
16 words "shall apply" in Article 7(7) is mandatory, that
17 still does not deprive it of jurisdiction in this case.
18 That is because the Tribunal is still required to apply
19 Article 7(7) according to its terms; and in particular,
20 to satisfy itself that there are no other dispute
21 resolution remedies previously agreed between the
22 contracting parties which are party to the dispute. If
23 there is any such remedy, Article 7(7) tells us that
24 that remedy takes precedence.

25 Now, this is very broad language, which we say may

17:13 1 be read to cover the agreement to arbitrate in
2 Article 27. So we say that this carve-out or this
3 exception in 7(7) is broad enough to encompass
4 Article 27; or, put differently, inter-state arbitration
5 may be interpreted as a dispute resolution remedy
6 previously agreed between the contracting parties,
7 parties to the dispute. Such an interpretation is
8 supported by the plain text, it's certainly not excluded
9 from it, and nothing in the context of the provision
10 negates such an interpretation.

11 Now, there is an important point that has emerged
12 this morning, because Professor d'Argent stated this
13 morning, if I can recall -- and I would like to bring it
14 up so we're clear -- that the reading that I'm speaking
15 about just now is unsustainable because previously
16 agreed remedies are those that must have been agreed
17 before the ECT.

18 Could we blow that up a little bit more? It's
19 difficult to see. (Pause) Can we have the highlighting
20 in -- thank you.

21 "Yes, indeed.

22 "Well, Azerbaijan says that 'previously agreed'
23 refers to the treaty itself. But 'previously' is when
24 a transit dispute arises, and it is either contractual
25 or an agreement that has been previously agreed before

17:15 1 the dispute ..."

2 Is that -- then there's another one. So that was
3 yesterday (Day 1/119:12-17): Professor d'Argent said
4 "previously agreed" means a remedy previously agreed
5 before the dispute.

6 But let us look at what was said this morning
7 (page 85:15-18):

8 "Inter-state arbitration is not previously agreed in
9 any transit situation or dispute. It was concurrently,
10 simultaneously agreed with Article 7(7) itself ..."

11 This is another shifting goalpost that I'm not sure
12 how to take it. Our case -- I understood coming in that
13 this was common ground. But our case is that
14 "previously agreed" is previously agreed before the
15 dispute, not before the ECT came into effect; and on
16 that reading, "previously agreed" can definitely cover
17 Article 27 of the ECT.

18 (Slide 39) In any event, the supplementary means,
19 including the travaux, support our interpretation.
20 Significantly, this is also the view of the Energy
21 Charter Secretariat in its guidance (CL-139,
22 paragraph 59), and we spoke about this yesterday.

23 We are bringing it up on the slide because
24 Professor d'Argent tried to dismiss it today as the
25 busywork of bureaucrats. But we submit, members of the

17:16 1 Tribunal, that it is more than that. In circumstances
2 where it is agreed that the treaty's terms are unclear,
3 sketchily drafted, supplementary means take on an added
4 importance.

5 And in circumstances where the travaux may be less
6 than clear itself, then statements such as these, which
7 are not often available for treaties, where a body is
8 set up under the auspices of the treaty, which is
9 populated by states parties who have studied this
10 document -- and you will see on the cover page of this
11 document that it was circulated to all the states
12 parties with an opportunity for them to object,
13 including Armenia, and no state party objected to
14 this -- and this is a working interpretation, we submit,
15 of the document.

16 So we say it should have particular weight, and have
17 more weight, we submit, than, for example, the works and
18 the assertions of commentators who are merely academic
19 but have no real insight into the assumptions and
20 the working methods of the ECT.

21 So I commend this quote to you, members of
22 the Tribunal. It says:

23 "... Article 27 of the ECT would be considered as
24 'other resolution remedy previously agreed between the
25 Contracting Parties' [if] the specific transit dispute

17:18 1 at hand relates to an obligation contained in Article 7
2 of the ECT. Other transit disputes not directly linked
3 to Article 7 of the ECT (pricing, quantity, quality...) are not covered by Article 27 of the ECT and, in those
4 cases Article 27 is not considered as 'other resolution
5 remedy previously agreed between the Contracting
6 Parties.'"

8 So this quote also recognises that this
9 interpretation does not rob the provision of
10 effet utile, because it recognises that there are a host
11 of other transit disputes which have nothing to do with
12 Article 7 and which will be able to have full access to
13 the conciliation mechanism.

14 And so how then -- so that, we say, is our secondary
15 argument. We say regardless of which interpretation
16 you take, it is superior, it is preferable to the
17 interpretation that is being advanced by Armenia.

18 Let me try and articulate my understanding of how
19 the Armenian position would unfold.

20 If you are a state with an inter-state transit
21 claim, you would first go to non-binding conciliation.

22 On their case, if there is a dispute about the
23 characterisation of transit, where there is a dispute,
24 "Is this transit or not?", not dissimilar to the kind of
25 debates we're having today, you can then go to

17:19 1 arbitration to determine that interpretive question.

2 After the arbitrators have issued their award on
3 that question of competence, presumably you would go
4 back to conciliation and then you would do the whole
5 90 days gamut, and if you failed to reach an agreement,
6 presumably you go back to arbitration.

7 Now that, it is my submission, is not a sensible
8 approach. It is certainly not an approach which is in
9 line with the text, not an approach which is in line
10 with the object and purpose, even the stated objective
11 and purpose of facilitating prompt settlement of these
12 sorts of disputes, and certainly not in accordance with
13 the supplementary means we have brought you to,
14 including the ones we have said you should pay
15 particular notice of.

16 So we say that that is not a territory we want to
17 end up in. So we do not exclude the second option
18 I spoke about. It is certainly the view that is
19 endorsed by the treaty parties in the Energy Charter
20 Conference, and so the Tribunal could feasibly conclude
21 that that is the correct reading, if you're not with us,
22 of course, on our primary case.

23 And we don't deny that there is some tension in
24 these interpretations and that it may not be the most
25 intuitive. However, as we have said, the drafting is

17:21 1 not a model of clarity, and I think we are at common
2 ground on that, and we should therefore not expect the
3 interpretive exercise to result in an elegant outcome.

4 But there is elegant and there is not elegant and
5 there is worst. And there is a clear explanation for
6 this lack of elegance and this lack of clear drafting,
7 this lack of clarity. The travaux indicate that the
8 drafters, when they were looking at this, were grappling
9 with the issue with the interplay between conciliation
10 and arbitration.

11 (Slide 41) While it is true that the Polish proposal
12 for conciliation was ultimately adopted, the travaux
13 show that there was a general recognition that
14 conciliation could not be exclusive, but would have to
15 be allowed for arbitration before conciliation; in some
16 circumstances, alongside conciliation.

17 In other words, Poland succeeded in getting
18 a conciliation option added to the treaty for transit
19 disputes, but it did not resolve the thorny question of
20 what you do when a party refuses to conciliate or says
21 the conciliation did not apply. Nor did it resolve the
22 thorny question of what a previously agreed remedy is.

23 In short, there remained a fundamental and unsolved
24 problem: how can Article 7(7) conciliation stand alone,
25 function as a self-contained regime? And the answer

17:22 1 that they all came to was that it cannot.

2 And so a holistic review of the travaux post-dating
3 the one on the left reveals that the drafters
4 continued -- even after the Polish view took the day,
5 they continued to confront these issues after the
6 travaux cited by Armenia. Because yesterday Armenia
7 said: you should disregard all our travaux, because
8 it all related to the position before Poland's position
9 was adopted.

10 But we also rely on travaux post that decision, and
11 we see the members of the drafting committee still
12 grappling and coming -- all coming to the conclusion
13 that arbitration plays a central role. And this transit
14 dispute mechanism, while helpful for certain kinds of
15 disputes, the ones that were preoccupying the parties
16 that were vying for it -- you know, the ability to have
17 a quick, rough-and-ready, non-binding solution -- that
18 was a laudable thing to include. But there was no
19 suggestion that it would take precedence over binding
20 inter-state arbitration in cases where it was
21 appropriate to do so.

22 So the bottom line is that we say the text of the
23 treaty, the context of the provisions and the object and
24 purpose of the ECT and the various supplementary means
25 of interpretation, taken together, point clearly to

17:23 1 the conclusion that conciliation is not exclusive or
2 modulated, or it doesn't trump arbitration in the
3 circumstances of this case.

4 Thank you, members of the Tribunal, for your kind
5 attention.

6 THE PRESIDENT: Thank you very much.

7 Before we turn to closing submissions and then
8 housekeeping, if I could just confirm that this
9 completes Azerbaijan's closing arguments?

10 MS REID: It does, Madam President.

11 THE PRESIDENT: Thank you very much.

12 So turning to what remains left on the agenda.

13 My first understanding is that the parties have
14 agreed we would invite their respective Agents to make
15 their closing submissions, five minutes each, beginning
16 with Armenia.

17 I'm sorry, I'm reminded that the schedule called for
18 us to take a 15-minute break? No, actually ... (Pause)

19 Sorry, please continue.

20 (5.25 pm)

21 Final submissions on behalf of Respondent

22 H.E. DR ANDREASYAN: Madam President, distinguished members
23 of the Tribunal, these are the final submissions of
24 the Republic of Armenia.

25 We respectfully request that the Tribunal issue

17:25 1 an award finding that it lacks jurisdiction over all of
2 Azerbaijan's claims or declaring them inadmissible and
3 dismissing them in their entirety with prejudice.

4 In all events, ordering Azerbaijan to pay all costs
5 and expenses related to this arbitration, including, but
6 not limited to, the fees and expenses of the Tribunal,
7 the administrative fees and the expenses of the PCA, and
8 all costs of Armenia's legal representation, with
9 interest running from the date at which such costs were
10 incurred, at a rate that the Tribunal deems proper.

11 And granting any other or additional relief as may
12 be appropriate under the circumstances or as may
13 otherwise be just and proper.

14 This concludes Armenia's submissions on its
15 preliminary objections. With your kind indulgence,
16 I wish only to thank the PCA staff and court reporters
17 for their professional assistance throughout these
18 proceedings, and of course to thank you once again,
19 members of the Tribunal, for your kind and patient
20 attention.

21 THE PRESIDENT: Thank you very much.

22 From Azerbaijan. Thank you.

23 (5.26 pm)

24 Final submissions on behalf of Claimant

25 H.E. MR MAMMADOV: Madam President, esteemed members of

17:26 1 the Tribunal, it is my privilege to appear before you
2 again as the Agent of the Government of Azerbaijan and
3 to present the final submissions of our Republic.

4 Azerbaijan wishes to reiterate its support for the
5 Energy Charter framework, as well as for the positive
6 developments towards building good neighbourly relations
7 with Armenia that Azerbaijan initiated.

8 Azerbaijan's ECT case is not in tension with the
9 overall reconciliation efforts, but rather an essential
10 component of them, building the foundation for a durable
11 peace, based on the international rule of law.

12 Recognition of Azerbaijan's sovereign rights over its
13 energy resources, and of the consequences flowing from
14 the breach, is therefore an important step towards
15 restoring confidence between the parties.

16 For the reasons explained in Azerbaijan's
17 Counter-Memorial dated 4 August 2025, Rejoinder dated
18 4 February 2026 and during these hearings, Azerbaijan
19 respectfully requests that the Tribunal: (a) dismiss
20 with prejudice all of Armenia's objections being heard
21 in this preliminary phase; (b) order Armenia to bear all
22 costs incurred by Azerbaijan in opposing Armenia's
23 preliminary objections; and finally, (c) order such
24 other relief that the Tribunal deems just and necessary
25 in the circumstances.

17:28 1 Madam President, esteemed members of the Tribunal,
2 I thank you for your kind attention on behalf of the
3 Republic of Azerbaijan. Please allow me to thank as
4 well the Permanent Court of Arbitration for its
5 assistance, and the staff for their dedication and hard
6 work throughout this hearing. I thank you.

7 THE PRESIDENT: Thank you very much, sir.

8 Alright, housekeeping matters. There are only
9 a few.

10 First, given the extensive citations that both
11 parties have made to the travaux during the last
12 two days, and recognising that this request is without
13 prejudice to the possibility that we may not reach the
14 travaux, we want to make sure that we fully understand
15 the sequence in which we should read any travaux.

16 We would find it useful if the parties could
17 together create an agreed folder of the travaux exhibits
18 that are already in the record, no additional material,
19 but set them out in chronological order rather than
20 exhibit number order; just name each document
21 year/month/day and then Exhibit CLA or Exhibit RLA, or
22 whatever the case may be.

23 We think we have all of the materials you've both
24 cited, but both of you have at times said that the other
25 side is jumping around in sequence, and we want to make

17:29 1 sure we don't jump around in sequence. So it would help
2 us to have an agreed upload to the PCA website of just
3 a folder, just number them 1 through 20, or number them
4 by date, just so we can read them all in sequence.

5 We will leave it to the parties to discuss
6 the timetable for that and get back to us.

7 Second, the parties, I know, wish to report to us on
8 the timing and any procedure regarding transcript
9 corrections. I don't know if that's something you've
10 discussed already, or you need time to discuss.

11 DR SALONIDIS: Madam President, we haven't. But I'm sure
12 we can and we will, very promptly, and revert to you.

13 MS REID: That is correct.

14 THE PRESIDENT: Very good. We will leave that in your
15 hands. And as I say in many cases, of course, please
16 focus your energies on changes that would have
17 a substantive impact on the meaning of your arguments.
18 For the sake of the juniors on your team, don't worry
19 about punctuation and things of that sort.

20 The third item on my list is the timing of
21 publication of the hearing transcripts. Once you have
22 agreed on the final version of them, we will need to in
23 due course publish them, I think was the understanding.
24 So we'll expect on to hear back from you on the timing
25 of that step.

17:31 1 And finally, I wanted to remind you that, pursuant
2 to the prior agreement, the publication of the video
3 recordings of these sessions would be determined by
4 agreement of the parties within 30 days of this hearing.
5 So we will again wait to hear back from you as to when
6 there has been an agreement. And of course if there are
7 any portions of the video that need to be excluded from
8 the published version, you will alert us to that.

9 That was all I had on my housekeeping list. Before
10 we do the usual thanks, are there any other housekeeping
11 matters that I have left off the list from either side?

12 Let me ask Armenia first, as you have been
13 the moving party in these proceedings.

14 DR SALONIDIS: Thank you, Madam President.

15 I guess there is one item that I had in mind, and
16 that is costs. I'm not sure if the Tribunal would wish
17 to see the parties' costs and/or argument on allocation,
18 on guiding or suggesting how its discretion can be
19 exercised before the issuance of the award. We're
20 obviously entirely in your hands.

21 I suspect since you did not raise the matter, this
22 is not something that we should be concerned with right
23 now, which is also fine with us. I just wanted to make
24 sure that we are on the same page.

25 THE PRESIDENT: Thank you for reminding me. And both

17:33 1 parties have referred to costs at various times, so it's
2 something we will certainly need to address.

3 I would welcome the parties in the first instance
4 discussing with each other their preferred format and
5 timing for submissions. I would hope that, in terms of
6 format, that you might agree on a schedule, and if you
7 feel the need to have substantive comment, that it would
8 be in fairly short form and not elaborate submissions on
9 allocation principles. But I'll leave that first in
10 your hands to discuss and to revert to us.

11 Were there any other housekeeping matters?

12 MS REID: No, Madam President. We had the same thought
13 about costs.

14 THE PRESIDENT: Thank you. There's always something that
15 I've left off, and I appreciate the reminder.

16 With that then, it falls to me to thank the parties,
17 their counsel, the Agents for both sides, the PCA staff,
18 our very hard-working court reporter and my excellent
19 colleagues on the Tribunal for all of your efforts, not
20 only during these two days of hearings but all the work
21 that has gone into the written submissions leading up to
22 today. You have both given us a lot to think about,
23 a lot to review. We will be doing so in a very careful
24 and deliberate manner, but we're very grateful for all
25 the superb assistance that we've received from both

17:34 1 sides.

2 So with that, I think we can declare today's session
3 closed, and I wish everybody a safe journey home.

4 Thank you.

5 (5.35 pm)

6 (The hearing concluded)

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