PCA Case No. 2023-65

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

- and -

THE ARBITRATION RULES OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW 1976

- between -

THE REPUBLIC OF AZERBAIJAN

- and -

THE REPUBLIC OF ARMENIA

DECISION ON BIFURCATION

Arbitral Tribunal

Ms. Jean Kalicki (Tribunal President)
Professor Donald M. McRae
Professor Brigitte Stern

Registry

Permanent Court of Arbitration

13 February 2025

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I. INTRODUCTION

1. The parties to these proceedings are the Republic of Azerbaijan ("**Azerbaijan**") and the Republic of Armenia ("**Armenia**") (together, the "**Parties**").

2. According to Azerbaijan, a dispute has arisen between the Parties under the Energy Charter Treaty (the "**ECT**" or the "**Treaty**"). In its Notice of Arbitration dated 27 February 2023 ("**Notice of Arbitration**"), Azerbaijan alleges, among other things, that Armenia has breached its obligations under Article 18 and Article 7 of the ECT.[1]

3. Armenia has indicated that it has objections to the Tribunal's jurisdiction and to the admissibility of Azerbaijan's claims. By way of its Request for Bifurcation submitted on 23 December 2024 ("**Request for Bifurcation**"), Armenia requested that the Tribunal bifurcate the proceedings in order to determine these objections in a preliminary phase. Azerbaijan opposes that request. This Decision determines the issue.

II. RELEVANT PROCEDURAL HISTORY

A. COMMENCEMENT OF THE ARBITRATION AND CONSTITUTION OF THE TRIBUNAL

4. By its Notice of Arbitration, Azerbaijan commenced arbitration proceedings against Armenia pursuant to Article 27 of the ECT and Article 3 of the 1976 Arbitration Rules of the United Nations Commission on International Trade Law (the "**1976 UNCITRAL Rules**").[2]

5. In its Notice of Arbitration, Azerbaijan requested the Tribunal issue a final award that:

> a. DECLARES that Armenia has breached its international obligations under Articles 18 and 7 of the ECT, as well as applicable rules of customary international law;
>
> b. ORDERS that Armenia pay to Azerbaijan monetary compensation for damage and loss suffered as a result of Armenia's breaches, in an amount to be quantified during the course of these proceedings;
>
> c. ORDERS Armenia to pay all the costs and expenses of this arbitration, including the fees and expenses of the Tribunal, and costs that Azerbaijan has and will incur in pursuing this action, including without limitation, all legal and other professional fees and expenses associated with any and all proceedings undertaken in connection with the arbitration;

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1 Notice of Arbitration, ¶¶ 49-53.

2 Notice of Arbitration, ¶ 1.

d. ORDERS Armenia to pay interest (both pre- and post-award) on the sums ordered to be paid above, at a rate to be determined during the course of these proceedings; and

e. ORDERS any such other and further relief as may be available and appropriate in the circumstances.

6. Azerbaijan has appointed Professor Donald M. McRae, a national of Canada and New Zealand, as arbitrator. Armenia has appointed Professor Brigitte Stern, a national of France, as arbitrator. On 8 September 2023, the Tribunal was fully constituted with the appointment of Ms. Jean Kalicki, a national of the United States, as the Tribunal President.

B. ADOPTION OF THE RULES OF PROCEDURE AND PROCEDURAL TIMETABLE

7. On 16 February 2024, following written and oral submissions from the Parties, the Tribunal issued Procedural Order No. 1, establishing the Rules of Procedure and Procedural Timetable for these proceedings. Relevantly, Article 17 of the Rules of Procedure provides:

> **Pleas as to the Jurisdiction of the Arbitral Tribunal**
>
> Article 17
>
> 1. The Arbitral Tribunal shall have the power to rule on objections that it has no jurisdiction, including any objections with respect to the existence or validity of the arbitration clause.
> 2. The Arbitral Tribunal shall have the power to determine the existence or the validity of the treaty of which an arbitration clause forms a part. For the purposes of Article 17, an arbitration clause which forms part of the treaty shall be treated as an agreement independent of the other terms of the treaty. A decision by the Arbitral Tribunal that the treaty is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.
> 3. A plea that the Arbitral Tribunal does not have jurisdiction shall be raised not later than in the statement of defence, or with respect to a counter-claim, in the reply to the counter-claim. A plea that the Arbitral Tribunal does not have jurisdiction arising out of a second or subsequent round of pleadings shall be made no later than the next pleading of the Party raising the plea, or, in the case of the last pleading of the arbitration, within thirty days.
> 4. In general, the Arbitral Tribunal should rule on a plea concerning its jurisdiction as a preliminary question. However, the Arbitral Tribunal may proceed with the arbitration and rule on such a plea in its final award.

8. The Procedural Timetable adopted by the Tribunal in Procedural Order No. 1 envisaged the submission of Azerbaijan's Statement of Claim, followed, in the event Armenia requested bifurcation of its preliminary objections, by one round of written submissions on bifurcation (Armenia's Request for Bifurcation of Preliminary Objections, and Azerbaijan's Observations on the Request for Bifurcation), as follows:

EVENT	DATE	TIME ELAPSED
First Procedural Meeting	Friday, 12 January 2024	N/A
Azerbaijan's Statement of Claim	Tuesday, 12 November 2024	+10 mos.
Armenia's Request for Bifurcation of Preliminary Objections	Thursday, 12 December 2024	+1 mo.
Azerbaijan's Observations on Request for Bifurcation	Monday, 13 January 2025	+1 mo.
Target for Decision on Bifurcation	Monday, 3 February 2025	+3 weeks

9. The Procedural Timetable further outlined the procedural steps in the event the Tribunal decides to bifurcate the proceedings (Scenario A), or not bifurcate the proceedings (Scenario B).

C. SUBMISSION OF AZERBAIJAN'S STATEMENT OF CLAIM

10. On 6 November 2024, the Parties jointly requested an extension of the deadlines for the filing of the Statement of Claim, the Request for Bifurcation of Preliminary Objections, and the Observations on the Request for Bifurcation.

11. On 8 November 2024, the Tribunal granted the request and issued an amended Procedural Timetable, as follows:

EVENT	DATE	TIME ELAPSED
First Procedural Meeting	Friday, 12 January 2024	N/A
Azerbaijan's Statement of Claim	**Tuesday, 19 November 2024**	~+10 mos.
Armenia's Request for Bifurcation of Preliminary Objections	**Monday, 23 December 2024**	~+1 mo.
Azerbaijan's Observations on Request for Bifurcation	**Thursday, 23 January 2025**	+1 mo.
Target for Decision on Bifurcation	**Thursday, 13 February 2025**	+3 weeks

12. On 19 November 2024, Azerbaijan submitted its **Statement of Claim**, accompanied by the witness statement of Mr. Nazim Samadzade, the expert reports of Dr. Boaz Moselle and Mr. John Morgan, factual exhibits, and legal authorities, in accordance with the amended Procedural Timetable.

D. WRITTEN SUBMISSIONS ON BIFURCATION

13. On 23 December 2024, Armenia submitted its Request for Bifurcation, accompanied by factual exhibits and legal authorities, in accordance with the amended Procedural Timetable.

14. On 23 January 2025, Azerbaijan submitted its Observations on Armenia's Request for Bifurcation ("**Observations on Bifurcation**"), accompanied by legal authorities, in accordance with the amended Procedural Timetable.

15. On 29 January 2025, Armenia wrote to the Tribunal, confirming its intention to also object to the Tribunal's jurisdiction *ratione materiae* on the basis set out in Section III.E of the Request for Bifurcation (regarding the attribution of the Nagorno-Karabakh Authorities' conduct to Armenia), and requesting that such objection be addressed as a preliminary matter.

III. PARTIES' POSITIONS

A. REQUESTS FOR RELIEF

16. In its Request for Bifurcation, Armenia requests that the Tribunal:[3]

> a. Order that these proceedings be bifurcated to address and decide all or any of the [objections to jurisdiction and/or admissibility set out in the Request] as a preliminary matter; and
>
> b. Adopt the timetable provided in Scenario A of the Procedural Timetable in Procedural Order No. 1.

17. In its Observations on Bifurcation, Azerbaijan requests that the Tribunal:[4]

> a. [Deny] Armenia's Bifurcation Request in its entirety;
>
> b. [Adopt] the timetable provided in Scenario B of the Procedural Timetable in Procedural Order No. 1, as amended;
>
> c. [Order] Armenia to bear all costs incurred by Azerbaijan in the preparation of this Opposition to the Bifurcation Request and any further briefing on bifurcation; and

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[3] Request for Bifurcation, ¶ 168. In its Request for Bifurcation, Armenia also articulated the following reservation of rights (at ¶ 169):

> Armenia reserves all rights to expand or modify the preliminary objections identified herein as appropriate. Furthermore, Armenia's request for bifurcation of the objections identified herein is without prejudice to its right to raise, at the appropriate juncture, any other jurisdictional or admissibility objections that do not appear, at this stage, to be suitable for preliminary treatment. Finally, Armenia reserves the right to request, at the appropriate juncture, that the Tribunal order Azerbaijan to bear all costs incurred by Armenia in the preparation of this Request and any further briefing on bifurcation.

[4] Observations on Bifurcation, ¶ 90.

d. [Order] such other relief as the Tribunal deems just and necessary in the circumstances.

B. APPLICABLE STANDARD

(a) *Armenia's Position*

18. Armenia contends that there is strong presumption in favor of bifurcation, in both the Rules of Procedure for this proceeding and in inter-State dispute resolution more generally, whenever an objection presents an exclusively preliminary character.[5] As such, "unless an objection *cannot* be addressed without trespassing on the merits, it should be heard in a preliminary phase."[6]

19. Armenia first recalls that Article 17(4) of the Rules of Procedure provides that "in general, the Arbitral Tribunal *should* rule on a plea concerning its jurisdiction as a preliminary question."[7] Armenia observes that Article 17(4) of the Rules of Procedure is based on Article 21(4) of the 1976 UNCITRAL Rules, which is widely acknowledged to establish a presumption favoring the bifurcation of preliminary objections.[8]

20. In Armenia's view, this presumption is even stronger in the present context of an inter-State arbitration under the ECT.[9] Armenia submits that bifurcation was "nearly universal" in proceedings involving States and would have been the Contracting Parties' expectation in 1994, when the ECT was adopted (including its Article 27).[10] Today, Armenia explains, inter-State tribunals continue to resolve objections to jurisdiction and admissibility in a preliminary phase,

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5 Request for Bifurcation, ¶ 24.

6 Request for Bifurcation, ¶ 31 (emphasis in original).

7 Request for Bifurcation, ¶ 25, *citing* Procedural Order No. 1, Rules of Procedure, Article 17(4) (emphasis added by Armenia).

8 Request for Bifurcation, ¶ 26, *citing* ECT, Article 27(3)(f) (**CL-1**); 1976 UNCITRAL Rules, Article 21(4) (**RL-29**); *Mesa Power Group LLC (USA) v. Canada*, PCA Case No. 2012-17, Procedural Order No. 2, 18 January 2013, ¶ 16 (**RL-56**) ("***Mesa Power***").

9 Request for Bifurcation, ¶ 26.

10 Request for Bifurcation, ¶ 27, *citing Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Decision on Jurisdiction, 14 April 1988, ¶ 62 (**RL-33**).

as evidenced by both their rules of procedure[11] and decisions on bifurcation.[12] Armenia notes that where inter-State tribunals have rejected bifurcation requests, the relevant rules of procedure did not contain the same presumption of bifurcation.[13]

21. Armenia submits that the "overriding consideration" in inter-State disputes is State sovereignty, as distinct from investor-State arbitration, in which procedural efficiency is prioritized.[14] To that end, inter-State arbitral tribunals and the International Court of Justice (the "**ICJ**") have recognized that a respondent State has a "fundamental procedural right" to raise preliminary objections to be ruled on before the merits, unless the court or tribunal lacks the necessary facts or such a ruling would decide part or all of the merits of the dispute.[15]

22. Armenia observes that, while not the overriding consideration, bifurcation can ensure procedural efficiency.[16] Armenia considers it "good practice to let the parties 'know where they stand'" early in the proceedings and not to impose the burden of "full-fledged proceedings" on the Parties

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11 Request for Bifurcation, ¶ 28, *citing Bern Convention Arbitration (Azerbaijan v. Armenia)*, PCA Case No. 2023-60, Rules of Procedure, 29 March 2024, Article 14(4) (**RL-98**); *The ARA Libertad Arbitration (Argentina v. Ghana)*, PCA Case No. 2013-11, Rules of Procedure, 31 July 2013, Article 13(3) (**RL-14**); *The Arctic Sunrise Arbitration (Netherlands v. Russian Federation)*, PCA Case No. 2014-02, Rules of Procedure, 17 March 2014, Article 20(3) (**RL-15**); *The South China Sea Arbitration (Philippines v. China)*, PCA Case No. 2013-19, Rules of Procedure, 27 August 2013, Article 20(3) (**RL-16**); *Arbitration under the Timor Sea Treaty (Timor-Leste v. Australia)*, PCA Case No. 2015-42, Rules of Procedure, 9 September 2016, Article 18(4) (**RL-69**); *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v. Russian Federation)*, PCA Case No. 2017-06, Rules of Procedure, 18 May 2017, Article 10(4) (**RL-71**); *Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen (Ukraine v. Russian Federation)*, PCA Case No. 2019-28, Rules of Procedure, 22 November 2019, Article 11(3) (**RL-80**).

12 Request for Bifurcation, ¶ 28, *citing The South China Sea Arbitration (Philippines v. China)*, PCA Case No. 2013-19, Procedural Order No. 4, 21 April 2015, ¶ 1.3 (**RL-62**); *The Arctic Sunrise Arbitration (Netherlands v. Russian Federation)*, PCA Case No. 2014-02, Award on Jurisdiction, 26 November 2014, ¶¶ 44-47 (**RL-60**); *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v. Russian Federation)*, PCA Case No. 2017-06, Procedural Order No. 3, 20 August 2018, ¶¶ 1-2 (**RL-74**); *Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen (Ukraine v. Russian Federation)*, PCA Case No. 2019-28, Procedural Order No. 2, 27 October 2020, p. 5, ¶ 1 (**RL-84**); *Indus Waters Treaty Arbitration (Pakistan v. India)*, PCA Case No. 2023-01, Procedural Order No. 1, 2 February 2023, ¶ 1.2 (**RL-93**).

13 Request for Bifurcation, n. 36, *citing Chagos Marine Protected Area (Mauritius v. United Kingdom)*, PCA Case No. 2011-03, Rules of Procedure, 29 March 2012, Article 11(3) (**RL-50**); *The 'Enrica Lexie' Incident (Italy v. India)*, PCA Case No. 2015-28, Rules of Procedure, 19 January 2016, Article 10(4) (**RL-66**).

14 Request for Bifurcation, ¶ 29, *citing Emmis International Holding, B.V., et al. v. Republic of Hungary*, ICSID Case No. ARB/12/2, Decision on Bifurcation, 13 June 2013, ¶ 37(2) (**RL-57**).

15 Request for Bifurcation, ¶¶ 30-31, *citing Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Merits, Judgment, I.C.J. Reports 2010, ¶ 44 (**RL-11**); *The South China Sea Arbitration (Philippines v. China)*, PCA Case No. 2013-19, Award on Jurisdiction and Admissibility, 29 October 2015, ¶ 390 (**RL-65**) (*citing Appeal Relating to the Jurisdiction of the ICAO Council*, Judgment, I.C.J. Reports 1972, p. 56 (**RL-10**)).

16 Request for Bifurcation, ¶ 34.

unnecessarily.[17] In Armenia's view, it is especially important to bifurcate the proceedings where preliminary objections can dispose of all claims, in order to avoid unnecessary expenditure of time and resources.[18]

(b) ***Azerbaijan's Position***

23. Azerbaijan disputes that Article 17(4) of the Rules of Procedure (or Article 21(4) of the 1976 UNCITRAL Rules, upon which it is based) establishes a strong presumption in favor of bifurcation.[19] In Azerbaijan's view, the term "should" in Article 17(4) is permissive, rather than mandatory, and simply "[directs] tribunals to consider the appropriateness of bifurcation."[20] In that regard, tribunals retain broad discretion over whether to bifurcate objections or to "proceed with the arbitration and rule on [such objections] in [their] final award," as Article 17(4) also contemplates.[21] To the extent that any presumption in favor of bifurcation exists, it is "seldom decisive."[22]

24. Azerbaijan further rejects the proposition that there is an "even stronger" presumption in favor of bifurcation in inter-State disputes, flowing from an "overriding consideration" of State sovereignty.[23] On the contrary, Azerbaijan highlights that when a State consents to binding dispute settlement in a treaty, it "both exercises and relinquishes, in part, its sovereignty."[24] Here, Armenia has consented to arbitration under rules that do not provide for bifurcation by default.[25] To the extent that "[c]onsiderations of State consent grounded in State sovereignty" *are* relevant, the decisions of investor-State arbitral tribunals applying equivalent rules to States as respondents are more instructive than those of the ICJ, given that the ICJ's Rules of Court are framed

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17 Request for Bifurcation, ¶ 34, *citing Mesa Power*, ¶ 16 (**RL-56**).

18 Request for Bifurcation, ¶ 34.

19 Observations on Bifurcation, ¶¶ 9-10.

20 Observations on Bifurcation, ¶ 11, *citing Glamis Gold Ltd. v. United States of America*, UNCITRAL, Procedural Order No. 2 (Revised), 31 May 2005, ¶ 9 (**RL-43**) ("***Glamis Gold***").

21 Observations on Bifurcation, ¶¶ 10-11.

22 Observations on Bifurcation, ¶ 11, *citing Nord Stream 2 v. European Union*, PCA Case No. 2020-07, Procedural Order No. 4, Decision on Request for Preliminary Phase on Jurisdiction, 31 December 2020, ¶ 45 (**CL-101**) ("***Nord Stream 2***").

23 Observations on Bifurcation, ¶¶ 9, 12.

24 Observations on Bifurcation, ¶¶ 12-13, *citing Indus Waters Treaty Arbitration (Pakistan v. India)*, PCA Case No. 2023-01, Award on the Competence of the Court, 6 July 2023, n. 316 (**CL-105**).

25 Observations on Bifurcation, ¶ 13.

differently than the 1976 UNCITRAL Rules: they "*specifically* provide for the suspension of the merits proceedings if a State files an objection to jurisdiction."[26]

25. For its part, Azerbaijan submits that "questions of fairness and procedural efficiency are determinative in considering a bifurcation application."[27] While efficiency is the "primary motive" underlying Article 21(4) of the 1976 UNCITRAL Rules,[28] it must be balanced against the need for Parties to have an "adequate opportunity to be heard and to put [their] case."[29]

26. To that end, the Tribunal "is free to consider all factors that it considers relevant in the particular circumstances."[30] Nevertheless, Azerbaijan contends that the three factors identified in *Glamis Gold* are "highly relevant" in determining whether bifurcation is appropriate,[31] namely:

    (a) whether the objections are "*prima facie* sufficiently serious and substantial to warrant bifurcation."[32] In that regard, while "'frivolous' objections plainly do not meet that threshold … 'between frivolous and serious there may be degrees of seriousness that do not carry the weight to justify bifurcation'";[33]

    (b) whether the objections, if upheld, materially reduce the scope of next phase of the proceedings by disposing of "all or an essential part of the claims raised"; [34] and

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26 Observations on Bifurcation, ¶ 14 (emphasis in original). With respect to the relevance of investor-State cases, Azerbaijan further observes that "[t]here is no reason for a '*stronger'* presumption in favor of bifurcation in cases where the claimant, which has already consented to the Tribunal's jurisdiction by choosing to file its claims, is also a State." Observations on Bifurcation, ¶ 14.

27 Observations on Bifurcation, ¶ 15, *citing Cairn Energy Plc and Cairn UK Holdings Limited v. Republic of India*, PCA Case No. 2016-7, Procedural Order No. 4, Decision on the Respondent's Application for Bifurcation, 19 April 2017, ¶ 78 (**CL-86**).

28 Observations on Bifurcation, ¶ 16, *citing Glamis Gold*, ¶ 11 (**RL-43**).

29 Observations on Bifurcation, ¶ 16, *citing Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia*, ICSID Case No. ARB/12/39, Decision on Bifurcation, 21 January 2015, ¶ 85 (**CL-81**) ("***Gavrilovic***"); *Red Eagle Exploration Limited v. Republic of Colombia*, ICSID Case No. ARB/18/12, Decision on Bifurcation, 3 August 2020, ¶ 42 (**CL-97**) ("***Red Eagle***").

30 Observations on Bifurcation, ¶ 9, *citing Gran Colombia Gold Corp. v. Republic of Colombia,* ICSID Case No. ARB/18/23, Procedural Order No. 3, Decision on the Respondent's Request for Bifurcation, 17 January 2020, ¶¶ 25-26 (**CL-96**) ("***Gran Colombia***").

31 Observations on Bifurcation, ¶ 18, *citing Gran Colombia*, ¶ 25 (**CL-96**). Azerbaijan acknowledges that these factors are "not exhaustive" nor intended to function as a "rigid test." Observations on Bifurcation, ¶ 18, *citing Glamis Gold,* ¶ 12(c) (**RL-43**).

32 Observations on Bifurcation, ¶ 19.

33 Observations on Bifurcation, ¶ 19, *citing Red Eagle*, ¶ 42 (**CL-97**).

34 Observations on Bifurcation, ¶¶ 17, 20, *citing Glamis Gold*, ¶ 12(c) (**RL-43**); *Carlos Sastre and others v. United Mexican States*, ICSID Case No. UNCT/20/2, Procedural Order No. 2, Decision on Bifurcation, 13 August 2020, ¶ 41 (**CL-98**).

(c) whether the objections are capable of assessment independently of the merits. If the "same or similar arguments and facts are likely to be relevant" to both the objections and the merits of the case, then bifurcation may risk prejudgment of the merits and is unlikely to result in greater efficiencies.[35]

27. Azerbaijan contends that the *Glamis Gold* factors are intended to apply *cumulatively*, such that "objections to that fail to meet *any one* of these criteria are unsuitable for bifurcation."[36]

28. In addition to these "efficiency-focused" factors, Azerbaijan argues that considerations of procedural fairness require that the Tribunal hear objections that are "highly fact-dependent or turn on contested facts" together with the merits, with the benefit of a fully developed record, including witness evidence and evidence obtained through document production.[37]

29. According to Azerbaijan, where numerous objections are raised but not *all* have an exclusively preliminary character, both efficiency and fairness considerations counsel against bifurcation of *any* objections, even if the bifurcatable objection(s) could still dispose of the entire case.[38] Joining all of the objections to the merits reduces the risk of substantial delay and wasted expense from addressing issues twice, as well as the risk of "inconsistent submissions by the Parties or prejudicial decisions by the Tribunal."[39]

30. Finally, Azerbaijan highlights that the Tribunal's decision in this "seminal, complex case" could have "significant implications" for future disputes.[40] As such, the Tribunal should take a "cautious approach," and only reach its final decision when it has "a complete picture of the factual evidence and fully particularized legal claims and defenses."[41]

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35 Observations on Bifurcation, ¶ 21, *citing Nord Stream 2*, ¶ 50 (**CL-101**).

36 Observations on Bifurcation, ¶ 22 (emphasis in original).

37 Observations on Bifurcation, ¶ 26(c).

38 Observations on Bifurcation, ¶ 24.

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

40 Observations on Bifurcation, ¶ 25, *citing Nord Stream 2*, ¶ 48 (**CL-101**).

41 Observations on Bifurcation, ¶ 25, *citing Nord Stream 2*, ¶ 48 (**CL-101**).

C. ARMENIA'S OBJECTIONS TO JURISDICTION AND/OR ADMISSIBILITY AND APPLICATION OF THE STANDARD

1. Armenia's Objections

31. In its Request for Bifurcation and its letter dated 29 January 2025, Armenia identifies eleven objections to the Tribunal's jurisdiction and/or to the admissibility of Azerbaijan's claims that, in its view, warrant determination in a preliminary phase of the proceedings (together, "**Armenia's Objections**"). Armenia categorizes its objections in five groups, which are that:

(a) Azerbaijan's claims under Article 18 of the ECT fall outside of the Tribunal's Jurisdiction (the "**Article 18 Objections**");[42]

(b) Azerbaijan's claims under Article 7 of the ECT fall outside of the Tribunal's Jurisdiction (the "**Article 7 Objections**");[43]

(c) Azerbaijan's claims under the ECT are precluded by temporal limitations (the "**Temporal Objections**");[44]

(d) the essential security interest exception in Article 24(3)(a) of the ECT prevents the ECT's application (the "**Essential Security Exception Objection**");[45] and

(e) the conduct of the Nagorno-Karabakh Authorities is not attributable to Armenia on the legal theory advanced by Azerbaijan, and so falls outside of the Tribunal's Jurisdiction (the "**Attribution Objection**").[46]

32. Armenia's Objections, as well as the Parties' specific observations on bifurcation in relation to each of the objections, are elaborated further in sub-sections C.3 to C.7 below.[47]

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42 Request for Bifurcation, Section III.A.

43 Request for Bifurcation, Section III.B.

44 Request for Bifurcation, Section III.C.

45 Request for Bifurcation, Section III.D.

46 Request for Bifurcation, Section III.E; Letter from Armenia to the Tribunal, 29 January 2025, p. 2.

47 The summaries of Armenia's Objections in this Section C are included for the purpose of contextualizing the Tribunal's decision on bifurcation only; the Tribunal makes no substantive findings in this Decision in relation to the Objections.

2. The Parties' General Observations on Bifurcation of Armenia's Objections

(a) *Armenia's Position*

33. Armenia contends that each of its objections is of an exclusively preliminary character, and therefore should be bifurcated.[48] According to Armenia, its objections are "based on strictly legal questions and concern the scope of the ECT provisions."[49] Further, the Tribunal "has before it all necessary facts to determine [Armenia's Objections] and doing so would not prejudge the merits."[50]

34. In addition, Armenia argues that bifurcation of its objections is appropriate, given:

(a) the context of these proceedings, which Armenia alleges were initiated "to deflect attention from Armenia's serious human rights claims in other international proceedings";[51]

(b) procedural efficiency considerations, as the objections "are capable of disposing of the claims in their entirety";[52] and

(c) Armenia's intention to advance counterclaims, in the event Azerbaijan's case theory under Articles 18 and 7 of the ECT is upheld. The scope of Armenia's counterclaims would depend on the Tribunal's interpretation and application of these provisions. As such, a decision on preliminary objections would "avoid unnecessarily expanding the scope of the dispute between the Parties."[53]

(b) *Azerbaijan's Position*

35. Azerbaijan highlights that this case is "a complex case of first impression,"[54] where bifurcation of Armenia's Objections is "highly unlikely to bring about increased efficiency" and risks prejudgment of the merits of the dispute.[55] For these reasons, Azerbaijan submits that the Tribunal should join all of Armenia's Objections to the merits.

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48 Request for Bifurcation, ¶ 32.

49 Request for Bifurcation, ¶ 32.

50 Request for Bifurcation, ¶ 32.

51 Request for Bifurcation, ¶ 33.

52 Request for Bifurcation, ¶ 34.

53 Request for Bifurcation, ¶ 35.

54 Observations on Bifurcation, ¶ 3.

55 Observations on Bifurcation, ¶ 30, *citing Glamis Gold*, ¶ 12(c) (**RL-43**).

36. In particular, Azerbaijan observes that:

(a) almost all of Armenia's jurisdictional objections are intertwined with the merits and will require the Tribunal to conduct the same intensive inquiry into the facts and law as will be necessary in the merits phase.[56] The "contested and fact-intensive nature" of the Request for Bifurcation underscores this point;[57]

(b) a number of Armenia's Objections are insubstantial "as they misstate Azerbaijan's arguments or the relevant law";[58] and

(c) other objections address only small subsets of Azerbaijan's claims, such that their disposal would not meaningfully reduce the scope of the merits phase.[59]

3. Armenia's Article 18 Objections

37. Armenia presents three objections to the Tribunal's jurisdiction to determine Azerbaijan's claims under Article 18 of the ECT, each of which (it says) warrants preliminary treatment.[60]

38. *First,* Armenia submits that the Tribunal lacks jurisdiction because "Article 18 of the ECT does not contain an obligation giving rise to an independent cause of action."[61] Armenia observes that not all provisions in international conventions impose rights or obligations,[62] and those which do not "cannot, taken in isolation, be a basis for the jurisdiction" of an international court or tribunal.[63] Applying the Vienna Convention on the Law of Treaties (the "**VCLT**"), Armenia argues that each of the ordinary meaning of the text of Article 18,[64] the object and purpose of the

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56 Observations on Bifurcation, ¶ 28.

57 Observations on Bifurcation, ¶¶ 6-7.

58 Observations on Bifurcation, ¶ 29.

59 Observations on Bifurcation, ¶ 29.

60 Request for Bifurcation, ¶ 37.

61 Request for Bifurcation, ¶¶ 38, 42.

62 Request for Bifurcation, ¶ 43, *citing* A. Pellet & D. Muller, "Article 38" in *The Statute of the International Court of Justice: A Commentary* (A. Zimmermann & C. Tams, eds., 2019) (3rd Ed., OUP), pp. 894-895 (**RL-75**); *Appeal Relating to the Jurisdiction of the ICAO Council*, Judgment, Separate Opinion of Judge Dillard, I.C.J. Reports 1972, p. 107, n. 1 (**RL-28**); *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Preliminary Objection, Judgment, I.C.J. Reports 1996, ¶ 31 (**RL-37**) ("***Oil Platforms***").

63 Request for Bifurcation, ¶¶ 44-45, *citing Oil Platforms*, ¶¶ 24-25, 31 (**RL-37**).

64 Request for Bifurcation, ¶¶ 48-58.

ECT,[65] the context of Article 18,[66] subsequent practice as to Article 18,[67] and the *travaux préparatoires* of the ECT,[68] support its position that Article 18 is a "miscellaneous provision" that serves "only as a general interpretative principle,"[69] and that cannot serve as an independent basis for the Tribunal's jurisdiction.[70]

39. *Second*, Armenia submits that even if Article 18 contained an obligation establishing a cause of action (*quod non*), neither Article 18 nor Article 27 of the ECT vests the Tribunal with "jurisdiction over rules of customary international law that do not have their source in the ECT."[71] In that regard, Armenia argues that Azerbaijan elides the "'cardinal distinction' between applicable law and the scope of a tribunal's jurisdiction,"[72] and impermissibly attempts to import into Article 18 "the many rules of international law which protect sovereignty in general, as well as all the qualifications to those rules."[73] As such, Azerbaijan's claims "under extrinsic customary international law cannot be shoehorned into the ECT, and therefore fall outside the Tribunal's jurisdiction *ratione materiae*."[74]

40. *Third*, Armenia submits that, even if Article 18 of the ECT contained an obligation incorporating principles of customary international law (*quod non*), Azerbaijan's claims fall outside of the Tribunal's jurisdiction *ratione materiae*, because the conduct Azerbaijan alleges is *not capable of violating* Article 18.[75] In that regard, Armenia acknowledges that the jurisdictional analysis required is a legal one in which the Tribunal may "accept *pro tem*" the facts alleged by Azerbaijan, but alternatively may analyze and adopt its own characterization of the facts.[76] Either way, according to Armenia, the alleged conduct could not have violated Article 18 of the ECT,[77] given

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65 Request for Bifurcation, ¶¶ 59-63.

66 Request for Bifurcation, ¶¶ 64-66.

67 Request for Bifurcation, ¶¶ 67-68.

68 Request for Bifurcation, ¶¶ 69-70.

69 Request for Bifurcation, ¶¶ 38, 54.

70 Request for Bifurcation, ¶¶ 46-47.

71 Request for Bifurcation, ¶¶ 72, 86.

72 Request for Bifurcation, ¶ 76.

73 Request for Bifurcation, ¶ 82, *citing Immunities and Criminal Proceedings (Equatorial Guinea v. France),* Preliminary Objections, Judgment, I.C.J. Reports 2018, ¶ 93 (**RL-73**).

74 Request for Bifurcation, ¶ 86.

75 Request for Bifurcation, ¶¶ 87, 96.

76 Request for Bifurcation, ¶ 89, *citing Oil Platforms (Islamic Republic of Iran v. United States of America)*, Preliminary Objection, Judgment, Separate Opinion of Judge Higgins, I.C.J. Reports 1996, ¶ 32 (**RL-38**).

77 Request for Bifurcation, ¶¶ 89-90.

that: (i) the customary obligation to respect the permanent sovereignty of peoples over their natural resources does not apply in situations governed by international humanitarian law and the law of occupation;[78] and (ii) many of Azerbaijan's claims (for example, those concerning water supply and irrigation, as well as "energy assets"[79]) clearly exceed the substantive scope of both the ECT and the principle of permanent sovereignty over natural resources.[80]

(a) *Armenia's Position on the Bifurcation of its Article 18 Objections*

41. Armenia submits that its Article 18 Objections warrant treatment in a preliminary phase as they are of an exclusively preliminary character, concern purely legal questions regarding the interpretation of Article 18, and are not intertwined with the merits of the dispute.[81]

42. Armenia contends that its first and second Article 18 Objections are each capable of disposing of all of Azerbaijan's claims, and its third Article 18 Objection could dispose of claims "worth several hundred million dollars."[82] As such, upholding any objection would at a minimum materially reduce the scope of the case and contribute to procedural efficiency.[83]

(b) *Azerbaijan's Position on the Bifurcation of the Article 18 Objections*

43. According to Azerbaijan, Armenia's three "separate" Article 18 Objections ultimately boil down to the contention that "Article 18 imposes no substantive treaty obligation that can be breached by the conduct Azerbaijan has alleged."[84] Resolving such a contention requires a "careful assessment of mixed questions of law and fact," which renders it inappropriate for preliminary treatment.[85] Considerations of procedural efficiency equally weigh against the bifurcation of Armenia's Article 18 Objections.[86]

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78 Request for Bifurcation, ¶¶ 91-92, *citing Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, I.C.J. Reports 2005, ¶ 244 (**RL-18**).

79 Request for Bifurcation, ¶¶ 95-96, *citing* Statement of Claim, ¶¶ 196, 268-269.

80 Request for Bifurcation, ¶¶ 94-96.

81 Request for Bifurcation, ¶ 97.

82 Request for Bifurcation, ¶ 97.

83 Request for Bifurcation, ¶ 97.

84 Observations on Bifurcation, ¶ 32.

85 Observations on Bifurcation, ¶ 32.

86 Observations on Bifurcation, ¶ 47.

44. *First*, Azerbaijan asserts that Armenia mischaracterizes Azerbaijan's claims under Article 18, as well as the applicable law, in "an attempt to manufacture a jurisdictional issue."[87] Azerbaijan clarifies that it is not bringing any claims under customary international law, as suggested in Armenia's second Article 18 Objection. Instead, it is Azerbaijan's position that Article 18 itself codifies the customary rule of permanent sovereignty over natural resources.[88] According to Azerbaijan, the "real question" Armenia's Article 18 Objections pose is what it means, in the circumstances of this case, to "recognize state sovereignty and sovereign rights over energy resources" under Article 18 of the ECT.[89] Resolving *this* question requires a determination of whether all of the conduct alleged by Azerbaijan is capable of violating Article 18, and in turn "an assessment of facts and arguments deeply intertwined with the merits."[90]

45. *Second*, Azerbaijan submits that determining Armenia's Article 18 Objections would require the Tribunal to "conduct a detailed assessment of mixed questions of law and fact," which would be inappropriate at a preliminary stage without the complete record.[91] For example, to ascertain whether the customary law principle of permanent sovereignty over natural resources operates, the Tribunal would need to analyze "whether, for each alleged violation, Azerbaijan has sufficiently asserted a governmental policy of denial or exploitation," an inquiry involving "heavily contested facts."[92]

46. Azerbaijan contends that the Tribunal will likewise need to engage substantially with the facts of the dispute in relation to "political motivations, demographic patterns, and use of [energy] resources," in order to rule on Armenia's Article 18 Objections.[93] These facts are not "neutral or commonly accepted," and will need to be established by the relevant Party.[94] Considerations of procedural fairness dictate that such an analysis should occur only at the merits stage, after a disclosure phase and further investigations to be undertaken by Azerbaijan.[95]

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87 Observations on Bifurcation, ¶ 36.

88 Observations on Bifurcation, ¶ 35, *citing* Statement of Claim, ¶ 180.

89 Observations on Bifurcation, ¶ 37.

90 Observations on Bifurcation, ¶ 37.

91 Observations on Bifurcation, ¶¶ 38-41.

92 Observations on Bifurcation, ¶ 41.

93 Observations on Bifurcation, ¶¶ 45-46, *citing Mesa Power Group, LLC v. Government of Canada*, PCA Case No. 2012-17, Procedural Order No. 3, 28 March 2013, ¶ 73 (**CL-79**).

94 Observations on Bifurcation, ¶¶ 45-46.

95 Observations on Bifurcation, ¶ 46.

47. *Third*, Azerbaijan contends that determining Armenia's Article 18 Objections will neither dispose of the case nor increase the efficiency of the proceedings, as Azerbaijan's Article 7 claims and Armenia's other preliminary objections would remain.[96] Further, bifurcation of Armenia's objection that certain claims do not relate to energy resources would be inefficient, as disposing of these claims would not materially reduce the next phase of the proceedings in any event.[97]

4. Armenia's Article 7 Objections

48. Armenia identifies four objections to the Tribunal's jurisdiction to determine Azerbaijan's claims under Article 7 of the ECT, each of which (it says) warrants preliminary treatment.[98]

49. *First,* Armenia submits that no "dispute" between Azerbaijan and Armenia concerning the interpretation or application of Article 7 of the ECT existed at the time Azerbaijan commenced these proceedings (the critical date for jurisdictional purposes).[99] According to Armenia, the existence of a "dispute" is a jurisdictional requirement of Article 27 of the ECT.[100] The existence of a "dispute" moreover is a matter for the Tribunal's objective determination, considering the statements or documents exchanged between the Parties.[101] With respect to the exchanges in this case, Armenia argues that: (i) Azerbaijan did not describe its claims with sufficient clarity to enable Armenia to identify that there was, or might be, a dispute with respect to Article 7 of the ECT;[102] (ii) Azerbaijan's allegations concerning a breach of Article 7 were not "positively opposed" by Armenia at the relevant date, as required;[103] and (iii) Azerbaijan's Article 7 allegations "had nothing to do with the Parties' dispute concerning Article 18, and cannot now be subsumed within that dispute for the purpose of satisfying the jurisdictional requirements of Article 27."[104]

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96 Observations on Bifurcation, ¶¶ 47-48.

97 Observations on Bifurcation, ¶¶ 49-50.

98 Request for Bifurcation, ¶ 99.

99 Request for Bifurcation, ¶ 100.

100 Request for Bifurcation, ¶ 100, *citing Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar),* Preliminary Objections, Judgment, I.C.J. Reports 2022, ¶ 63 (**RL-88**).

101 Request for Bifurcation, ¶ 102, *citing Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom),* Preliminary Objections, Judgment, I.C.J. Reports 2016, ¶ 39 (**RL-070**).

102 Request for Bifurcation, ¶ 112.

103 Request for Bifurcation, ¶ 113.

104 Request for Bifurcation, ¶ 114.

50. *Second*, Armenia submits that even if a dispute concerning Article 7 existed, the dispute would be outside the Tribunal's jurisdiction *ratione voluntatis*, as Azerbaijan did not fulfil Article 27's negotiation requirement for its Article 7 claims.[105] According to Armenia, Article 27 of the ECT requires the Parties to genuinely attempt to resolve a dispute through negotiations for a "reasonable period of time" before submitting the dispute to arbitration.[106] However, Azerbaijan made no genuine attempt to resolve the dispute for a "reasonable period of time," and there can be no question of negotiations being futile, because Armenia expressly stated that it stood ready to discuss any of Azerbaijan's new or existing allegations under the ECT.[107] Further, the Parties' negotiations in relation to Article 18 of the ECT have no bearing on the negotiation requirement for Azerbaijan's Article 7 claims.[108]

51. *Third,* Armenia submits that even if a dispute concerning Article 7 existed (*quod non*), the dispute would be outside the Tribunal's jurisdiction, given the mandatory conciliation mechanism that Article 7(7) establishes for such disputes.[109] According to Armenia, Article 27 of the ECT provides for disputes to be resolved by arbitration "except as otherwise provided in this Treaty."[110] The mandatory conciliation mechanism established in Article 7(7) for Transit-related disputes constitutes such an exception,[111] and applies to Azerbaijan's claims under Article 7 concerning the "alleged suspension of gas flow between Yevlakh (located in Azerbaijan) to Nakhijevan (Azerbaijan's enclave) through the territory of Armenia."[112] As such, these claims are excluded from the Tribunal's jurisdiction under Article 27.[113]

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105 Request for Bifurcation, Section III.B.2.

106 Request for Bifurcation, ¶¶ 116-117.

107 Request for Bifurcation, ¶ 118.

108 Request for Bifurcation, ¶ 120.

109 Request for Bifurcation, Section III.B.3.

110 Request for Bifurcation, ¶ 121.

111 Request for Bifurcation, ¶ 124.

112 Request for Bifurcation, ¶ 123. The Tribunal notes that the Parties use different anglicizations (and in some instances different nomenclature entirely) for the same place names, such as "Nakhijevan" referenced here (Armenia's term) versus "Nakhchivan" referenced in the next paragraph (Azerbaijan's term), or elsewhere, "Garabagh" (Azerbaijan's term) versus "Nagorno-Karabakh" (Armenia's term). For present purposes, where quoting or summarizing the arguments of the Parties, the Tribunal uses the terms adopted by each Party in the statements quoted or summarized. The Tribunal makes no findings regarding the appropriate name (or best anglicization) for place names, and no inferences should be drawn from the use of one name versus another in this Decision.

113 Request for Bifurcation, ¶ 126.

52. *Fourth*, Armenia submits that Azerbaijan's claims fall outside of the Tribunal's jurisdiction *ratione materiae* because the conduct alleged by Azerbaijan is *not capable of violating* Article 7.[114] In particular, Armenia argues that:

(a) Azerbaijan's claims under Article 7 concern the alleged "[interruption of] the flow of gas from Garabagh to Nakhchivan as it transited through Armenia," since December 1991 (namely, before the ECT's entry into force between the Parties in 1998).[115] However, Article 7(1) does not "create an obligation for a Contracting Party to allow transit that is not *already established* on its territory";[116]

(b) in relation to Article 7(2), Azerbaijan has "alleged no facts that, if established, could amount to a violation of this obligation of conduct to encourage cooperation among relevant entities";[117]

(c) Article 7(3) covers only discriminatory treatment arising from differences in legal regimes, and "Azerbaijan has alleged no facts relating to Armenia's legal regime which, if established, could amount to a violation of this obligation";[118] and

(d) finally, in relation to Article 7(5), the relevant obligation (to secure the flows of Energy Materials and Products between Contracting Parties) "applies expressly only to '*established*' existing transit," and since no transit existed at the time of the ECT's entry into force between the Parties, "Armenia was under no obligation to 'secure' it."[119]

(a) *Armenia's Position on the Bifurcation of its Article 7 Objections*

53. Armenia contends that its objections to Azerbaijan's Article 7 claims warrant preliminary treatment as they are of an exclusively preliminary character. The objections concern purely legal questions, which do not require consideration of the merits.[120]

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114 Request for Bifurcation, ¶ 128.

115 Request for Bifurcation, ¶ 128, *citing* Statement of Claim, ¶ 246.

116 Request for Bifurcation, ¶ 128 (emphasis in original).

117 Request for Bifurcation, ¶ 132.

118 Request for Bifurcation, ¶ 134.

119 Request for Bifurcation, ¶ 135 (emphasis in original).

120 Request for Bifurcation, ¶ 137.

54. Further, the objections are capable of disposing of the totality of Azerbaijan's Article 7 claims, such that upholding any objection would materially reduce the scope of the case, and contribute to procedural efficiency.[121]

(b) ***Azerbaijan's Position on the Bifurcation of the Article 7 Objections***

55. Azerbaijan submits that considerations of procedural efficiency and fairness weigh against bifurcating Armenia's Article 7 Objections, as the objections raise issues that are intertwined with the merits or are otherwise unsuitable for bifurcation.[122]

56. *First*, Azerbaijan contends that determining Armenia's fourth Article 7 Objection (that the conduct alleged is not capable of breaching Article 7), would require a factual and contextual analysis to ascertain whether the relevant acts were "completed or continuing."[123] Given that that analysis overlaps with the evaluation required at the merits stage, bifurcation "would not be procedurally efficient."[124] Azerbaijan adds that the relevant factual determinations "cannot be made now without compromising procedural fairness," as "[c]ertain facts pertaining to both jurisdiction and liability are within Armenia's exclusive knowledge or control and thus best addressed at the merits stage after both Parties have presented their full case."[125]

57. *Second*, Azerbaijan contends that preliminary determination of Armenia's first and second Article 7 Objections (that Azerbaijan failed to satisfy necessary preconditions under Article 27 of the ECT) would "prolong the dispute and needlessly multiply proceedings."[126] Were the objections to be upheld, Azerbaijan would simply re-file its Article 7 claims.[127] In the meantime, Azerbaijan's Article 18 claims (which are underpinned by the same facts) would still need to be determined.[128] Further, to assess whether Azerbaijan complied with the relevant preconditions would require an understanding of "the interrelationship between various events and measures,"

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121 Request for Bifurcation, ¶ 137.

122 Observations on Bifurcation, ¶ 52.

123 Observations on Bifurcation, ¶ 54.

124 Observations on Bifurcation, ¶¶ 53-55.

125 Observations on Bifurcation, ¶ 55.

126 Observations on Bifurcation, ¶ 56.

127 Observations on Bifurcation, ¶ 57.

128 Observations on Bifurcation, ¶ 58.

a matter that is not suitable for accelerated determination, and "tread[s] too closely to the merits."[129]

58. *Third*, Azerbaijan contends that Armenia's third Article 7 Objection (on mandatory conciliation under Article 7(7)) should not be bifurcated given the other Article 7 Objections are unsuitable for bifurcation.[130] Azerbaijan reiterates that upholding the objection would not dispose of any of Azerbaijan's factual allegations (which also underpin its related Article 18 claims), and joining the objection to the merits would be more efficient than bifurcation.[131]

5. Armenia's Temporal Objections

59. In addition to its Article 18 Objections and Article 7 Objections, Armenia identifies an objection to the Tribunal's jurisdiction *ratione temporis,* and a temporal objection to the admissibility of Azerbaijan's claims, each of which it says warrants preliminary treatment.[132]

60. *First*, Armenia submits that all of Azerbaijan's claims lie outside of the Treaty's temporal scope of application, and in turn, the Tribunal's jurisdiction *ratione temporis*, because they "crystallized when Azerbaijan lost access to the relevant territories in the early 1990s, years before the ECT entered into force between the Parties in 1998."[133] To that end, Armenia contends that there is no basis for Azerbaijan's characterization of the conduct underpinning its claims as either "continuing wrongful acts or composite acts" that crystallized on or after the Treaty's entry into force between the Parties.[134] According to Armenia, the alleged seizure of resources and ending of transit occurred and was completed in the early 1990s, and those acts did not have a "continuing character."[135] As for composite acts, the wrongful acts alleged by Azerbaijan are either "not composite in nature" or "at best are composite but crystalized as a breach during the early 1990s."[136]

61. *Second*, Armenia submits that the "unreasonable delay" between the ECT's entry into force between the Parties in 1998 and Azerbaijan's advancement of claims in 2021 renders the claims

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129 Observations on Bifurcation, ¶¶ 59-61.

130 Observations on Bifurcation, ¶ 63.

131 Observations on Bifurcation, ¶¶ 64-65.

132 Request for Bifurcation, ¶ 138.

133 Request for Bifurcation, ¶ 139.

134 Request for Bifurcation, ¶¶ 140-141.

135 Request for Bifurcation, ¶ 143, *citing* Notice of Arbitration, ¶¶ 34, 43.

136 Request for Bifurcation, ¶¶ 144, 145.

inadmissible.[137] According to Armenia, "the inadmissibility of a belated claim must be determined in light of the circumstances of each case, taking into account the effects of time on the equality of the parties."[138] In this case, Armenia contends that: (i) it could not reasonably have expected Azerbaijan to pursue claims relating to the First Nagorno-Karabakh War of 1991-1994 either when it acceded to the ECT in 1998, or in 2021, 23 years later;[139] and (ii) Armenia has been disadvantaged by Azerbaijan's belated formulation of claims, including as a result of the loss, destruction, or loss of control of evidence, such that "it is impossible to conduct a fair procedure respecting the equality of the Parties."[140]

(a) *Armenia's Position on the Bifurcation of its Temporal Objections*

62. Armenia contends that its Temporal Objections warrant preliminary treatment, given that they are of an exclusively preliminary character and raise discrete legal issues that do not require an extensive examination of the facts. Further, the objections have the potential, if upheld, to resolve the entire purported dispute at a preliminary stage, promoting procedural economy.[141]

(b) *Azerbaijan's Position on the Bifurcation of the Temporal Objections*

63. Azerbaijan submits that bifurcation of Armenia's Temporal Objections should be denied as the objections are intertwined with the merits and/or insufficiently substantial to warrant bifurcation.[142]

64. *First*, Azerbaijan asserts that resolving Armenia's objection to the Tribunal's jurisdiction *ratione temporis* requires a detailed analysis of the facts, to determine whether the acts underlying each alleged breach are of a continuing or composite nature, or rather "'completed,' one-off acts … that merely had continuing effects."[143] Such an analysis is only possible at the merits stage, when the Tribunal has the benefit of the full record, including Armenia's substantive response to Azerbaijan's allegations.[144] Azerbaijan adds that upholding this objection would not materially

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137 Request for Bifurcation, ¶¶ 147, 151.

138 Request for Bifurcation, ¶ 148.

139 Request for Bifurcation, ¶¶ 15, 150.

140 Request for Bifurcation, ¶ 151.

141 Request for Bifurcation, ¶ 152.

142 Observations on Bifurcation, ¶ 66.

143 Observations on Bifurcation, ¶¶ 68-69.

144 Observations on Bifurcation, ¶¶ 69-70, *citing Société Générale in respect of DR Energy Holdings Limited and Empresa Distribuidora de Electricidad del Este, S.A. v. The Dominican Republic*, LCIA Case No. UN 7927, Award on Preliminary Objections to Jurisdiction, 19 September 2008, ¶¶ 90–91 (**CL-74**); *Global*

reduce the scope of the proceedings, as it has alleged a number of breaches "that occurred *well after* the ECT's entry into force."[145]

65. *Second*, in Azerbaijan's view, determining Armenia's admissibility objection (based on delay) would require a "*merits-based* analysis as to when each wrongful act alleged … began and ended."[146] Further, Armenia's assertions of undue delay and procedural disadvantage are "frivolous," given: (i) "it was Armenia's *own conduct* that impeded Azerbaijan's ability to pursue its claims";[147] (ii) Armenia was in exclusive possession or control of relevant evidence at the time Azerbaijan notified it of the dispute;[148] and (iii) Armenia has not provided any evidence of its alleged disadvantage.[149] In the circumstances, the objection is insufficiently substantial to warrant bifurcation.[150]

6. Armenia's Essential Security Exception Objection

66. Armenia identifies a further objection to the Tribunal's jurisdiction arising from the "essential security exception" in Article 24(3)(a) of the ECT, which Armenia contends should also be examined in a preliminary phase.[151]

67. Armenia submits that, even if Azerbaijan's allegations are accepted as true, and the relevant conduct is attributable to Armenia, such conduct would fall outside of the Tribunal's jurisdiction as it would constitute measures that Armenia would have considered necessary for the protection of its essential security interests, per Article 24(3)(a) of the ECT.[152]

68. According to Armenia, the effect of the invocation of an essential security exception is that "the substantive obligations under the Treaty do not apply," and the relevant measures are excepted from the scope of the ECT.[153] In turn, as the measures are *not capable of constituting violations*

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

145 Observations on Bifurcation, ¶ 71 (emphasis in original).

146 Observations on Bifurcation, ¶ 72 (emphasis added).

147 Observations on Bifurcation, ¶ 72 (emphasis in original).

148 Observations on Bifurcation, ¶ 74.

149 Observations on Bifurcation, ¶ 74.

150 Observations on Bifurcation, ¶¶ 72-74.

151 Request for Bifurcation, ¶ 153.

152 Request for Bifurcation, ¶ 153.

153 Request for Bifurcation, ¶ 155.

of obligations under the ECT, the Tribunal lacks jurisdiction *ratione materiae* in relation to these measures.[154]

69. Armenia contends that, in this case, the measures that are the subject of Azerbaijan's claims clearly fall within the ambit of the essential security exception. In particular, Armenia argues that:

(a) the exception is of a "self-judging" character. As such, Armenia has discretion to determine both what Armenia's "essential security interests" entail, and what measures it considers necessary for the protection of those essential security interests. That discretion is limited only by Armenia's obligation to apply the ECT in good faith;[155]

(b) the measures fall within subparagraph (ii) of the exception, as they were "taken in time of war, armed conflict or other emergency in international relations," which can be determined on the facts as alleged by Azerbaijan;[156]

(c) further, the measures clearly were necessary to protect Armenia's essential security interests arising in the context of this conflict (for example, as "military decision[s] taken against a co-belligerent");[157] and

(d) there is no reason to suggest that the exception is not invoked in good faith, and Azerbaijan has never suggested otherwise.[158]

(a) *Armenia's Position on the Bifurcation of its Essential Security Exception Objection*

70. Armenia contends that its Essential Security Exception Objection warrants treatment in a preliminary phase as it is of an exclusive preliminary character, requires only reference to the law and to the facts as alleged by Azerbaijan, and is capable of disposing of all of Azerbaijan's claims.[159]

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154 Request for Bifurcation, ¶ 155.

155 Request for Bifurcation, ¶ 156.

156 Request for Bifurcation, ¶¶ 157-158.

157 Request for Bifurcation, ¶ 159.

158 Request for Bifurcation, ¶ 159.

159 Armenia notes that should the case proceed to the merits, it reserves the right to invoke other, non-self-judging exceptions found in Article 24 of the ECT. Request for Bifurcation, ¶ 161.

(b) *Azerbaijan's Position on the Bifurcation of the Essential Security Exception Objection*

71. Azerbaijan submits that the Essential Security Exception Objection is too intertwined with the merits of its claims to be bifurcated.[160]

72. *First,* in Azerbaijan's view, Armenia's invocation of the ECT's essential security interest clause "does not raise a jurisdictional question but rather provides a defense on the merits," and so would require an actual determination on the merits.[161]

73. *Second*, even if the essential security interest clause implicated the Tribunal's jurisdiction (*quod non*), the "good faith-review" to be undertaken would require the Tribunal to "look at the specific interest or interests invoked, determine whether they constitute 'essential security interests,' and then establish the nexus between each of the measures in question and the interest invoked," a "complicated" and "fact-intensive" analysis.[162]

74. In the circumstances, bifurcation of the Essential Security Exception Objection would be "unlikely to bring about increased efficiency" and risks pre-judgment of the merits.[163]

7. Armenia's Attribution Objection

75. In its Request for Bifurcation, Armenia foreshadowed a further potential objection, relating to the attribution of the conduct of the Nagorno-Karabakh Authorities to Armenia, that it considered might be appropriate for bifurcation.[164] In its letter dated 29 January 2025, Armenia confirmed its intention to object to the Tribunal's jurisdiction *ratione materiae* on the basis foreshadowed, and requested that the objection be examined in a preliminary phase of the proceedings.[165]

76. Armenia recalls that, under international law, a State can only be held responsible for wrongful acts that are attributable to it.[166] According to Armenia, Azerbaijan has "failed to state – let alone substantiate – its theory [of attribution]" in its Statement of Claim.[167] According to Armenia,

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160 Observations on Bifurcation, ¶ 75.

161 Observations on Bifurcation, ¶ 76.

162 Observations on Bifurcation, ¶¶ 78-80.

163 Observations on Bifurcation, ¶ 82, *citing Glamis Gold*, ¶ 12(c) (**RL-43**).

164 Request for Bifurcation, Section III.E.

165 Letter from Armenia to the Tribunal, 29 January 2025, p. 2.

166 Request for Bifurcation, ¶ 162.

167 Request for Bifurcation, ¶ 162.

Azerbaijan's case on attribution appears to be premised on the approach taken by the European Court of Human Rights in *Chiragov v. Armenia.*[168] However, Armenia argues that that approach involved applying a "*lex specialis* standard … that is specific to establishing jurisdiction under the [European Convention on Human Rights]."[169] In Armenia's view, that standard is "qualitatively different and less exacting than the 'effective control' test established under customary international law for determining international responsibility."[170] Armenia asserts that "there would be no *prima facie* case of breach with respect to Azerbaijan's claims relating to the conduct of the [Nagorno-Karabakh Authorities]" if the correct standard is applied.[171]

(a) *Armenia's Position on the Bifurcation of its Attribution Objection*

77. Armenia contends that consideration of its Attribution Objection in a preliminary phase would promote procedural efficiency.[172] Armenia adds that the objection concerns a purely legal question that would materially reduce the scope of the proceedings if upheld or, at minimum, clarify the legal framework related to attribution.[173]

(b) *Azerbaijan's Position on the Bifurcation of the Attribution Objection*

78. Azerbaijan asserts that a claimant is only required to make out a *prima facie* case of attribution to establish the Tribunal's jurisdiction, and that it has "more than satisf[ied]" that standard.[174] Azerbaijan further observes that upholding the Attribution Objection would not materially reduce the scope of the proceedings, as it would not dispose of Azerbaijan's claims relating to "conduct unquestionably committed by Armenian state organs, such as the Armenian military."[175] In addition, Azerbaijan highlights that attribution is "a difficult and fact-intensive question" and thus more appropriate to address at the merits stage with the benefit of the full record.[176]

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168 Request for Bifurcation, ¶ 163.

169 Request for Bifurcation, ¶ 165.

170 Request for Bifurcation, ¶ 165.

171 Request for Bifurcation, ¶ 166.

172 Request for Bifurcation, ¶ 166.

173 Letter from Armenia to the Tribunal, 29 January 2025, p. 2.

174 Observations on Bifurcation, ¶¶ 85-86.

175 Observations on Bifurcation, ¶¶ 84, 86-87.

176 Observations on Bifurcation, ¶¶ 88-89, *citing Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic*, ICSID Case No. ARB/09/1, Decision on Jurisdiction, 21 December 2012, ¶ 274 (**RL-54**); *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2010, ¶¶ 142–144 (**CL-76**) ("***Hamester***").

IV. TRIBUNAL'S ANALYSIS

79. The Tribunal has carefully reviewed and considered the arguments presented by the Parties. The fact that this Decision may not expressly reference all arguments does not mean that such arguments have not been considered; the Tribunal includes only those points which it considers most relevant for its determination. Further, this Decision relates exclusively to Armenia's Request for Bifurcation and is without prejudice to the Tribunal's eventual decision on the substance of Armenia's various objections to the Tribunal's jurisdiction and/or the admissibility of Azerbaijan's claims.

A. CONSIDERATIONS RELEVANT TO BIFURCATION

80. The Tribunal's discretion in ruling on the Request for Bifurcation is reflected in Article 21(4) of the 1976 UNCITRAL Rules and replicated in Article 17(4) of the Rules of Procedure:

> In general, the arbitral tribunal should rule on a plea concerning its jurisdiction as a preliminary question. However, the arbitral tribunal may proceed with the arbitration and rule on such a plea in their final award.

81. Armenia asserts, correctly, that this provision (unlike Article 23(3) of the later 2010 UNCITRAL Rules) reflects a presumption of bifurcation with respect to jurisdictional objections.[177] However, that presumption is not absolute. In ruling on a bifurcation request, the Tribunal naturally should take into account the presumption in favor of bifurcation, but also is free to consider whatever circumstances it considers appropriate in determining how justice would best be served in a given case. These circumstances are not appreciably different as between an investor-State arbitration and an inter-State arbitration in which the Parties agreed (as under the ECT) to arbitrate pursuant to the 1976 UNCITRAL Rules.

82. Notably, the 1976 UNCITRAL Rules do not set forth any particular standard applicable to the Tribunal's exercise of discretion, nor even a list of specific factors to be considered or weighed. The Rules rather leave this decision to the good faith judgment of a tribunal regarding the best interests of a given case, in light of its particular circumstances.

83. Prior tribunals in both UNCITRAL and ICSID proceedings have identified a number of criteria that may be relevant to assessing the suitability of bifurcation in any particular case. These include, *inter alia*, whether the objection is substantial and/or not frivolous; whether the objection has the potential to dispose of the entire case, or at least to result in a material reduction of scope in the next phase of proceedings; and whether the jurisdictional issue is sufficiently discrete from

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177 Request for Bifurcation, ¶¶ 24-26.

the factual and legal issues that would need to be heard in later phases, so that it may be resolved without the parties being put to the burden and expense of potentially duplicative presentations.[178] More generally, in addressing the question of procedural efficiency, tribunals consider whether the "costs and time required of a preliminary proceedings … will be justified in terms of the reduction in costs at the subsequent phase of proceedings."[179] The Tribunal agrees that these are all relevant considerations.

84. Yet, while the jurisprudence identifies certain relevant considerations, it does not suggest that there is a rigid or mandatory formula regarding the process of weighing these considerations. Azerbaijan argues that the *Glamis Gold* factors are intended to apply *cumulatively*, such that "objections that fail to meet *any one* of these criteria are unsuitable for bifurcation."[180] In fact, the *Glamis Gold* tribunal referred to these simply as non-exhaustive "considerations relevant to [the] analysis … *inter alia*,"[181] without suggesting either that these factors were the only relevant ones, nor that they were "steps" to be considered in any particular order. As the *Gran Colombia* tribunal subsequently noted, there is no consensus in the jurisprudence as to whether these considerations "are to be considered holistically or sequentially (much less in what sequence); whether any particular factor is mandatory; or whether certain factors should be weighted more heavily than others for purposes of reaching an eventual result."[182] The Tribunal agrees that given the absence of standards in the 1976 UNCITRAL Rules, no "'one-size-fits-all' analytical structure [should] be imposed on the reasoning process, leaving each tribunal free to consider all factors that it considers relevant in the particular circumstances of its case."[183]

85. The Tribunal also agrees with the tribunal in *Gran Colombia* that a useful "starting point" is that jurisdictional objections "must not be frivolous on their face: it is self-evident that a frivolous objection would not warrant bifurcation and the attendant delay in proceeding to determination of the merits."[184] But, as that tribunal also noted, "this does not mean that every jurisdictional objection that surpasses that low threshold presumptively warrants bifurcation."[185] Rather, a

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178 *See, e.g.*, *Glamis Gold*, ¶ 12 (**RL-43**); *Gran Colombia*, ¶ 25 (**CL-96**), *citing Apotex*, ¶ 10 (**CL-78**).

179 *Glamis Gold*, ¶ 12(c) (**RL-43**).

180 Observations on Bifurcation, ¶ 22 (emphasis in original).

181 *Glamis Gold*, ¶ 12(c) (**RL-43**).

182 *Gran Colombia*, ¶ 26 (**CL-96**).

183 *Gran Colombia*, ¶ 26 (**CL-96**); *see also Gavrilovic,* ¶ 66 (**CL-81**) ("the Tribunal does not consider that it should be placed in the 'straightjacket' of considering this question by reference to the *Glamis Gold* factors, and nothing further").

184 *Gran Colombia*, ¶ 27 (**CL-96**).

185 *Gran Colombia*, ¶ 27 (**CL-96**).

tribunal must still "assess[] the procedural framework that best serves the overall interests of the case," including "appropriate attention to concerns about fairness and efficiency, including whether granting bifurcation on balance is likely to conserve time and resources or to impose burdens that otherwise could be minimized or avoided."[186] That assessment must be made holistically and not mechanically.

B. THE SUITABILITY FOR BIFURCATION OF ARMENIA'S VARIOUS OBJECTIONS

86. In the view of the Tribunal, four of the eleven issues that Armenia presents for preliminary determination are capable of resolution in an early stage, without significant overlap with the factual or legal issues that would need to be addressed if the case otherwise were to continue.

87. Two of those are entirely legal in nature and present important but narrow questions of treaty interpretation. Armenia's first Article 18 Objection presents the discrete issue of whether Article 18 of the ECT contains an obligation giving rise to an independent cause of action (as Azerbaijan contends), or whether it is merely hortatory or interpretative (as Armenia contends). Armenia's third Article 7 Objection presents the equally discrete question of whether the dispute resolution mechanism under Article 7(7) of the ECT is mandatory and exclusive. Both objections present questions that appear to be purely issues of law. Individually, each has the potential to dispose of an entire category of claims (all those under each respective Article), and together, they have the potential to dispose of the entire dispute. Neither of these issues would require any inquiry into the facts of this case. The Tribunal accordingly considers these issues appropriate for resolution in a preliminary proceeding.

88. By contrast, Armenia's third Article 18 Objection and fourth Article 7 Objection assert that the conduct Azerbaijan alleges is *not capable of violating* whatever obligations the respective Articles impose. These objections necessarily would require the Tribunal to interpret the *substantive content* of the Articles, and then apply that content to a range of *specific conduct* alleged. While in principle this analysis could be undertaken on a *prima facie* basis, on the basis of pleadings rather than fact-finding, the Tribunal is not persuaded that such a distinction would be straightforward in the circumstances of this case. Unless the briefing could be boiled down to abstract principles – *i.e.,* "do the obligations apply in times of armed conflict?" – it is more likely that the Tribunal would be drawn into nuanced debates about the actual character of the conduct alleged, and the degree to which those allegations are (or are not) supported by persuasive

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186 *Gran Colombia*, ¶ 27 (**CL-96**).

evidence. In these circumstances, the Tribunal considers it preferable that these objections be deferred to a merits stage if one otherwise is reached.

89. The Tribunal likewise considers the Temporal Objections and Attribution Objection to be inappropriate for bifurcation, because they appear to require a deeper understanding of the underlying facts, and of the relationship between various events and measures, than is suitable for determination in advance of the merits phase. For example, the Temporal Objections apparently will require determination of when various disputes arose and whether the alleged conduct could be considered continuing or composite in nature; this may require nuanced assessments about the interrelationship between events occurring before and after the critical date. Similarly, the Attribution Objection seems likely to require a deeper understanding not only of the "Nagorno-Karabakh Authorities" but also of the basis on which they acted on various occasions. As a "practical matter," such objections are often "best dealt with at the merits stage, in order to allow for an in-depth analysis of all the parameters of the complex relationship between certain acts and the State."[187] The Tribunal is not convinced that either the Temporal Objections or the Attribution Objection can be resolved in such a discrete fashion that it would prove advantageous or efficient to attempt to do so.

90. With respect to the Essential Security Exception Objection, the Tribunal agrees with Azerbaijan's position that the objection is in essence a merits defense. This no doubt explains why similar objections in other cases generally have been resolved after proceedings on the merits, not on a bifurcated preliminary objection basis. Even in the context of "self-judging" exceptions, there is often argument about remaining room for arbitral oversight of certain merits issues, for example relating to the timing, circumstances, and basis on which the objection has been invoked. Those issues may be narrow, but they also presume some nuanced understanding of the underlying events.

91. This leaves three discrete objections remaining for discussion. The first, Armenia's second Article 18 Objection, appears to be moot in light of Azerbaijan's observation that it is not raising any self-standing claims under customary international law, but is simply invoking international law as an interpretative tool in support of its claims under Article 18.[188] Based on this clarification, there is no need for a Tribunal decision on bifurcation of this objection.

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187 *Hamester*, ¶¶ 143-144 (**CL-76**).

188 Observations on Bifurcation, ¶ 35.

92. As for Armenia's first and second Article 7 Objections, concerning Azerbaijan's alleged failure to: (i) properly notify Armenia of a dispute under Article 7 of the ECT prior to its Notice of Arbitration; and (ii) engage in diplomatic negotiations as required pursuant to Article 27, these are discrete in a different way. These issues present limited questions of treaty interpretation related to procedural requirements under Article 27 of the ECT, entirely unrelated to the ultimate merits issues in the case (which concern Armenia's actions or omissions that are alleged to have violated its Treaty obligations). To the extent factual inquiry would be required, it would be focused on a discrete and limited time period, namely the period before Azerbaijan filed its Notice of Arbitration. The Parties also may need to brief legal issues regarding the admissibility of additional claims following an initial notice of dispute raising other claims, and regarding the scope of "futility" doctrines as applied to negotiation requirements, but neither issue is intertwined with the merits.

93. The Tribunal does not consider these two objections so substantive that it necessarily would have bifurcated proceedings simply to address them on their own. However, given its decision to bifurcate two other more substantive objections – Armenia's first Article 18 Objection and third Article 7 Objection – the Tribunal considers it appropriate for the Parties to address the first and second Article 7 Objections also as part of the preliminary bifurcated stage.

C. SUMMARY AND PROCEDURAL IMPLICATIONS

94. Based on the analysis above, the Tribunal concludes that the threshold for bifurcation is met with respect to the first Article 18 Objection, and first, second, and third Article 7 Objections, which present narrow, straightforward, and potentially dispositive objections to proceeding with some or all of this dispute. By contrast, the efficient management of these proceedings would not be advanced by addressing Armenia's remaining proposed objections at a preliminary stage prior to receiving full briefing on the merits.

95. The Tribunal is mindful that the amended Procedural Timetable provides a presumptive schedule for a bifurcated proceeding (under Scenario A), leading to a hearing of up to one week in late March 2026. That schedule presumed certain briefing periods that may, in retrospect, be longer than are actually required for the limited issues accepted for bifurcation. It also presumed a document request stage that may not be needed for the limited bifurcated issues. The Parties are encouraged to confer regarding any appropriate adjustments to the schedule in light of this ruling, including whether they wish to explore the possibility of advancing the hearing dates. The latter may prove difficult given the number of schedules that would need to be aligned, but the Tribunal remains open to exploring possibilities should that be requested by the Parties.

V. ORDER

96. For the reasons stated above, the Tribunal:

(a) grants Armenia's Request for Bifurcation with respect to the first Article 18 Objection and first, second and third Article 7 Objections;

(b) joins the remainder of Armenia's Objections to the merits;

(c) decides that the proceedings will continue according to the schedule set out in Scenario A of the amended Procedural Timetable, unless hereafter adjusted following consultation with the Parties; and

(d) reserves its decision with respect to the costs of the Request for Bifurcation.

On behalf of the Tribunal

Ms. Jean Kalicki
Tribunal President

Dated: 13 February 2025