PCA CASE NO. 2023-60

IN THE MATTER OF AN ARBITRATION UNDER THE CONVENTION ON THE CONSERVATION OF EUROPEAN WILDLIFE AND NATURAL HABITATS OF 19 DECEMBER 1979

- between -

THE REPUBLIC OF AZERBAIJAN

- and -

THE REPUBLIC OF ARMENIA

ARMENIA'S RESPONSE TO OPPOSITION TO BIFURCATION

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4 September 2025

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I. INTRODUCTION

1. Pursuant to the Procedural Timetable adopted by Procedural Order No. 2, the Republic of Armenia respectfully submits its Response to Azerbaijan's Opposition to Bifurcation of Preliminary Objections dated 24 July 2025 ("**Opposition to Bifurcation**").

2. In its Memorial on Preliminary Objections, Armenia[1] put forward seven discrete preliminary objections to the Tribunal's jurisdiction:

- Armenia's first two objections concern Azerbaijan's failure to comply with the mandatory preconditions contained in the Convention's dispute settlement provision, Article 18. Specifically, Armenia's *first* objection is that Azerbaijan failed to refer the matter, in the first instance, to the Standing Committee. Armenia's *second* objection is that Azerbaijan further failed to fulfill the precondition of negotiations before seizing this Tribunal.

- Armenia further objects to the Tribunal's jurisdiction over Azerbaijan's claims under Articles 2, 3, 4, 6, and 7 of the Convention relating to Armenia's alleged conduct in respect of the so-called "Affected Area" for reasons pertaining to the applicability of the Convention. In particular, in its *third* objection, Armenia shows that the relevant obligations do not apply to Armenia in respect of a territory allegedly under its effective control. In the alternative, Armenia argues, as its *fourth* objection, that given Azerbaijan's theory that Armenia had obligations in the "Affected Area" by virtue of its "effective control" or "occupation" thereof, the Tribunal cannot determine Azerbaijan's claims without first resolving issues under the law of armed conflict—which are outside its jurisdiction *ratione materiae*.

- Armenia's *fifth* and *sixth* objections are that the Tribunal lacks jurisdiction *ratione materiae* over Azerbaijan's claims under Articles 4(4) and 11(1)(a). In its *fifth* objection, Armenia shows that the Convention's cooperation obligations are not engaged when there exists an armed conflict and there are no diplomatic relations between the Parties. In its *sixth* objection, Armenia shows that, additionally, it had

[1] Defined terms in this Response correspond *mutatis mutandis* to the defined terms in Armenia's Memorial on Preliminary Objections.

no duty to cooperate under Article 11(1)(a) specifically because Azerbaijan has failed to demonstrate that it took any relevant conservation measures.

- Armenia's *seventh* and final objection set forth in its Memorial is that the Tribunal lacks jurisdiction with respect to the "Affected Area" Claims for the additional reason that Azerbaijan has failed to establish even a *prima facie* case on attribution.

3. The Tribunal's determination at this stage—whether to hear these objections in a preliminary phase—is governed by Article 14(4) of the Rules of Procedure. Using unequivocally mandatory language, this article provides that the Tribunal "*shall* rule on any Preliminary Objection in a preliminary phase of the proceedings," establishing the preliminary treatment of objections as the default position.[2] This is confirmed by the briefing schedule, whereby the burden is on Azerbaijan to oppose, not Armenia to request, such a preliminary treatment.[3] The Tribunal may depart from this default position if—and only if—an objection "does not possess an exclusively preliminary character" or "otherwise shall be ruled in conjunction with the merits."[4]

4. As the exception to the rule, these grounds must be construed strictly, and cannot be applied in a manner that would render the default rule of preliminary treatment of objections without effect. Yet this is precisely what Azerbaijan seeks to achieve by arguing that the Tribunal should consider a host of factors that it improperly seeks to import from the investor-State arbitration context. This includes the alleged requirement that an objection must be assessed as "substantial" and "serious" for it to be treated in a preliminary phase.[5] This approach overlooks not just the letter of Article 14(4), but also the Parties' procedural exchanges leading to the Tribunal's adoption of that provision.

5. As the language of Article 14(4) makes plain, the first and primary question before the Tribunal is not whether Armenia's preliminary objections should be upheld, which Azerbaijan appears to be asking the Tribunal to assess prematurely, but whether they possess an *exclusively preliminary character*. If the Tribunal determines that they do, it shall rule on such objections in a preliminary phase unless compelled "otherwise." This could be the case for exceptional reasons

[2] Rules of Procedure (29 Mar. 2024), Article 14(4).

[3] Procedural Order No. 2 (Procedural Timetable) (15 May 2024), Timetable B.

[4] Rules of Procedure (29 Mar. 2024), Article 14(4).

[5] Opposition to Bifurcation, ¶¶ 17-19.

relating to the character of the objection, such as, for example, if the objection is only capable of disposing of a small portion of the case and would not obviate the need for a merits phase. But the "seriousness" or "substantiality" of the objections has no role in the Tribunal's assessment, and it would be inappropriate to prejudge the substance of Armenia's preliminary objections before they have even been fully briefed.

6. Under the applicable standard, each of Armenia's objection must be heard in a preliminary phase. To begin with, as Azerbaijan itself concedes, Armenia's first and second objections relating to Article 18 of the Bern Convention possess an exclusively preliminary character and, if either is upheld, would dispose of Azerbaijan's case in full. Azerbaijan's *only* challenge to these objections is their supposed lack of seriousness—a contention that is wholly without merit but in any event, premised on considerations irrelevant to the Tribunal's present inquiry.

7. Contrary to Azerbaijan's baseless assertion, Armenia's third and fourth objections pertaining to the applicability of the Bern Convention are not in any way "intertwined with the merits."[6] These objections, which are of the kind typically considered by the ICJ and inter-State arbitral tribunals in a preliminary phase, involve purely legal questions regarding whether the Bern Convention obligations apply to the circumstances invoked by Azerbaijan. Deciding them does not require the Tribunal to determine disputed facts, let alone Armenia's alleged breaches of the Convention. If granted, these objections would reduce Azerbaijan's case solely to its discrete transboundary claims and dispose of more than 90% of its claim for compensation.

8. Armenia's objections relating to Azerbaijan's claims under Articles 4(4) and 11(1)(a) of the Bern Convention also present pure issues of law concerning the applicability of the duty to coordinate or cooperate to the facts alleged by Azerbaijan. They possess an exclusively preliminary character and, together with the objections relating to the applicability of the Convention to the "Affected Area," would materially reduce the scope of Azerbaijan's case.

9. Without prejudice to any of its rights and while reserving the objection, in the interests of procedural economy, Armenia will, for the time being, not seek a preliminary ruling on Azerbaijan's failure to advance even a *prima facie* case of attribution in relation to the alleged

[6] *Id.*, ¶ 10(a).

conduct in the so-called "Affected Area." This objection raises a preliminary question of law and, if addressed, would dispose of the bulk of Azerbaijan's claims. However, given the manifest strength of Armenia's third and fourth objections in relation to claims concerning the alleged conduct in the "Affected Area"—each of which is independently dispositive—Armenia considers that engaging the Tribunal on attribution at this juncture would not be necessary. Armenia's present decision, however, should be understood solely as a measure of procedural economy.

10. In yet another attempt to divert the Tribunal from the proper inquiry under Article 14(4), Azerbaijan asserts that Armenia's objections are based on "mischaracterizations of the nature of Azerbaijan's claims and facts underlying the dispute."[7] In particular, Azerbaijan disputes that "[its] only basis for its assertion that Armenia is bound by the Bern Convention in respect of alleged conduct occurring in the 'Affected Area' is its sweeping 'effective control' theory" and that Azerbaijan's claims cannot be addressed without determining that "Armenia was in fact an Occupying Power within the meaning of the law of armed conflict."[8] It is hard to see, however, how Armenia mischaracterizes Azerbaijan's claims in the "Affected Area" as being predicated on Armenia's alleged status as an Occupying Power when, in Azerbaijan's own words, its claims involve "[Armenia's] conduct in the Affected Area, where Armenia exercised jurisdiction and control in the relevant time period."[9] The "jurisdiction and control" invoked by Azerbaijan is nothing other than the alleged "effective control" and purported occupation it claims Armenia carried out in the "Affected Area."[10]

11. In dismissing Armenia's objections as "mischaracterizations," Azerbaijan seeks to downplay its own "effective control" theory, which is the *cornerstone* of its claims under the Convention. Indeed, except for the discrete allegation of transboundary harm in the Voghji (Okhchuchay) River, every claim advanced by Azerbaijan presupposes that Armenia exercised "jurisdiction and control" over the so-called "Affected Area,"[11] an assumption that itself depends

[7] *Id.*, ¶ 2.

[8] *Id.*, ¶ 3 (citing Armenia's Memorial on Preliminary Objections (12 June 2025) ("**Memorial on Preliminary Objections**"), ¶¶ 135, 166-167, 202).

[9] Opposition to Bifurcation, ¶ 5.

[10] *See* Azerbaijan's Statement of Claim (12 Feb. 2025) ("**Statement of Claim**"), ¶¶ 1, 5, 8, 16, 25, 49, 51, 160, 229, 230, 232.

[11] Opposition to Bifurcation, ¶ 5.

entirely on proving Armenia's alleged "effective control" of that territory. So indispensable is this premise to Azerbaijan's claims that it demanded 12 months from the procedural conference to file its Statement of Claim, arguing that "Azerbaijan's claims *arise from Armenia's illegal occupation that lasted almost 30 years*" and that it needed "substantial time and resources" to review "millions of documents [it collected] from various offices of *the regime Armenia installed in Garabagh*, including documents potentially relevant to this proceeding from the 'ministry' of the environment."[12]

12. Thus, the true threshold issue that the Tribunal must resolve before proceeding to the merits of almost all of Azerbaijan's claims is whether Armenia bore any obligations under the Convention with respect to territory that Azerbaijan *itself* insists was under Armenia's "effective control." Armenia's third and fourth objections directly answer this: they concern whether the Tribunal has jurisdiction to determine the existence of such "effective control" and whether such control, even if established, could trigger the applicability of the Convention.

13. Azerbaijan's exhortation that "fairness and efficiency" demand that Armenia's Preliminary Objections be deferred to the merits phase "to avoid further delay"[13] is also unavailing and, in light of its own procedural conduct, somewhat ironic. It is well accepted that threshold jurisdictional and admissibility objections must be heard at the earliest possible stage precisely so that the parties are not forced to engage in protracted merits briefing if the tribunal ultimately lacks competence. Preliminary treatment of these objections therefore serves, rather than frustrates, the values of efficiency and fairness that Azerbaijan invokes. Moreover, Azerbaijan is singularly ill-placed to complain about the specter of "further delay"—it was Azerbaijan that requested, and received, more than two years to file its Statement of Claim.[14]

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[12] Azerbaijan's Written Submission on the Procedural Timetable (14 Mar. 2024), pp. 2-3 (emphasis added). *See also* First Procedural Hearing Transcript, 12:2-20 (Amirfar) (claiming that the challenges to "Azerbaijan's evidentiary development are compounded by the enormous volume of documents that Azerbaijan has recovered and continues to collect since October 2023, after liberating the remaining portions of its territories" and that Azerbaijan "is working diligently to collect, review and catalogue millions of pages of documents from the Liberated Territories [which] appear to include the records of Armenia's illegally installed regime in Azerbaijan").

[13] Opposition to Bifurcation, ¶¶ 6-7.

[14] Azerbaijan's Written Submission on the Procedural Timetable (14 Mar. 2024), p. 2 (requesting that Azerbaijan "be afforded 12 months from the procedural conference to submit its Statement of Claim and supporting evidence"); First Procedural Hearing Transcript, 7:17-20 (Amirfar) (claiming that "12 months from today's procedural conference is necessary for [Azerbaijan] to have a full and fair opportunity to present its Statement of Claim"). In the Procedural Timetable adopted in Procedural Order No. 2, the Tribunal granted Azerbaijan 10 months from the first procedural

14. Azerbaijan finally seeks to oppose the preliminary treatment of Armenia's objections on the basis that "this is a complex case of first impression, involving both novel issues of interpretation of the Bern Convention and detailed scientific and expert evidence relating to environmental harm occurring over decades."[15] But it is precisely these characteristics that make bifurcation desirable. Where a case involves intricate questions of law, resolving these threshold legal issues first can entirely obviate the need for extensive and costly fact-finding, including the presentation of detailed scientific and expert evidence. This conserves the resources of both the Parties and the Tribunal, and avoids unnecessary expenditure of time and effort on matters that may ultimately prove irrelevant.

15. As Armenia demonstrates below, Azerbaijan has failed to meet the burden of convincing the Tribunal not to hear Armenia's objections in a preliminary phase.

16. The remainder of this submission proceeds as follows. **Section II** explains that Article 14(4) of the Rules of Procedure establishes preliminary treatment of Armenia's objections by default and the Tribunal may defer such objections to the merits only for limited reasons.

17. **Section III** then demonstrates that Azerbaijan has failed to show that Armenia's objections should not be ruled on in a preliminary phase. In particular:

- **Section III.A** addresses Armenia's first and second objections under Article 18 of the Bern Convention, which must be heard in a preliminary phase because Azerbaijan admits that they possess an exclusively preliminary character and, if granted, would dispose of its case in its entirety. In any event, Azerbaijan has failed to show that these objections are frivolous.
- **Sections III.B and III.C** address Armenia's third and fourth objections relating to the applicability of the Bern Convention to Azerbaijan's claims over alleged conduct in the "Affected Area." Each of these objections possesses an exclusively preliminary character and, if granted, would result in a material reduction of

conference to file its Statement of Claim. Azerbaijan therefore had more than two years from its Notice of Arbitration to file its Statement of Claim.

[15] Opposition to Bifurcation, ¶ 6.

Azerbaijan's case. In any event, Azerbaijan has failed to demonstrate that they are frivolous.

- **Section III.D** addresses Armenia's fifth and sixth objections relating to Azerbaijan's claims under Articles 4(4) and 11 of the Convention. These objections, too, are exclusively preliminary in character; and while they concern only a limited part of Azerbaijan's case, principles of procedural economy and judicial efficiency militate strongly in favor of addressing them in the preliminary phase, together with Armenia's other objections. As is the case with Armenia's other objections and in any event, Azerbaijan has failed to show that these objections are frivolous.

18. **Section IV** sets out Armenia's request for relief.

II. THE RULES OF PROCEDURE PROVIDE FOR PRELIMINARY TREATMENT OF OBJECTIONS BY DEFAULT AND THE TRIBUNAL MAY DEFER OBJECTIONS TO THE MERITS ONLY FOR LIMITED REASONS

19. Prior to the adoption of the Rules of Procedure, Azerbaijan proposed a standard of treatment of objections to jurisdiction and admissibility that would have granted the Tribunal broad discretion to decide whether to hear them in a preliminary phase.[16] This proposed standard was rejected by the Tribunal in favor of the current text of Article 14(4), which largely reflects Armenia's proposal.[17] In its Opposition to Bifurcation, Azerbaijan pretends that this sequence of events never took place, and purports to read Article 14(4) as if the Tribunal adopted Azerbaijan's alternative proposal as to the relevant wording. To support its reading, Azerbaijan relies exclusively on decisions—the vast majority of which were made in investor-State cases—that applied *different* standards than Article 14(4), and that are accordingly irrelevant here.

20. The Tribunal must naturally be guided only by Article 14(4) of the Rules of Procedure and by any jurisprudence that applies an identical standard. Unlike the procedural rules applicable to the decisions relied on by Azerbaijan, Article 14(4) provides for the preliminary treatment of objections by default (**Section I.A.)**. Such a preliminary treatment may be denied only on limited grounds (**Section I.B.**), which are inapplicable here. And even if the Tribunal were able to consider the strength of Armenia's objections (*quod non*), Azerbaijan would have to show that the objections are frivolous (**Section I.C.**), which is a showing that it cannot possibly make.

A. Article 14(4) of the Rules of Procedure Provides for Bifurcation by Default

21. As the Tribunal will recall, Azerbaijan originally had proposed a rule of treatment of objections that would grant broad discretion to the Tribunal to decide or not to decide objections at a preliminary stage. Specifically, Azerbaijan proposed wording as follows: "[t]he Arbitral Tribunal *may* rule on any objection to jurisdiction or admissibility either as a preliminary question or in an award on the merits."[18] In proposing this rule, Azerbaijan argued that the Tribunal should "have flexibility to determine the appropriate procedure for dealing with

[16] *See* Azerbaijan's Submissions on Procedural Rules (21 December 2023), pp. 1-2.

[17] *See* Armenia's Submissions on Procedural Issues (22 December 2023), p. 2.

[18] Azerbaijan's Submissions on Procedural Rules (21 December 2023), p. 1 (emphasis added).

preliminary objections to jurisdiction or admissibility," as opposed to adopting "a prescriptive approach that establishes a presumption that […] the arbitration [shall be] bifurcated."[19] The Tribunal rejected Azerbaijan's proposal and adopted, in Article 14(4), wording setting out the very presumption that Azerbaijan advocated against. Article 14(4) provides in full that "[t]he Tribunal shall rule on any Preliminary Objection in a preliminary phase of the proceedings, unless the Tribunal determines, after inviting the views of the Parties, that such objection does not possess an exclusively preliminary character or otherwise shall only be ruled upon in conjunction with the merits."[20]

22. The provision is thus consistent with the international law principle that, especially in inter-State proceedings, "a party should not have to give account of itself on issues of merits before a tribunal which lacks jurisdiction in the matter or whose jurisdiction has not yet been established."[21] Preliminary treatment of objections also increases the efficiency of proceedings and conserves the parties' resources by avoiding potentially unnecessary litigation. As the ICJ has explained, the hearing of objections in a preliminary phase is intended to avoid the situation in which "the Court would ultimately decide the case on the preliminary objection, after requiring the parties to fully plead the merits," which would result in the "unnecessary prolongation of an expensive and time-consuming procedure."[22]

23. The procedural calendar in this arbitration confirms that preliminary treatment of objections is the default position: it was Azerbaijan's burden to *oppose* such preliminary treatment after receiving Armenia's Memorial on Preliminary Objections. Had Azerbaijan failed to do so, the Tribunal would have proceeded directly to hearing Armenia's objections in a preliminary phase.[23]

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[19] *Id.*, pp 1-2.

[20] Rules of Procedure (29 Mar. 2024), Article 14(4).

[21] *Appeal Relating to the Jurisdiction of the ICAO Council (India* v. *Pakistan), Judgment, I.C.J. Reports 1972* (**ARL-0013**), p. 56, ¶ 18; *The South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China)*, PCA Case No. 2013-19, Award on Jurisdiction and Admissibility (29 Oct. 2015) (**ARL-0069**), ¶ 390.

[22] *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United States of America), Judgment on Preliminary Objections, I.C.J. Reports 1998* (**AZL-0247**) (also submitted as **ARL-0033**), pp. 27-28, ¶ 49.

[23] *See* Procedural Order No. 2 (Procedural Timetable) (15 May 2024), Timetable B ("If no Opposition is raised by 24 July 2025, proceedings continue with Step B3 [Azerbaijan's Counter-Memorial on Preliminary Objections].").

24. Ignoring the Tribunal's careful consideration of the Parties' extensive submissions on this very issue, Azerbaijan now maintains that Article 14(4) grants the Tribunal "broad discretion" to decide whether to hear Armenia's objections as a preliminary matter, citing decisions that were made under different, inapplicable standards. But Article 14(4) significantly differs from the standards applicable in the cases that Azerbaijan cites.

25. Indeed, the majority of the decisions on which Azerbaijan relies originate from investor-State arbitrations conducted under:

- the 2006 Arbitration Rules of the International Center for the Settlement of Investment Disputes ("**ICSID**") (or its Additional Facility Rules),[24] which provide that the tribunal "*may* deal with the objection as a preliminary question *or* join it to the merits of the dispute;"[25]
- the 2022 ICSID Arbitration Rules,[26] which similarly provide that "[t]he Tribunal *may* address a preliminary objection in a separate phase of the proceeding *or* join the objection to the merits;"[27] or

[24] *See Gavrilović and Gavrilović d.o.o. v. Republic of Croatia*, ICSID Case No. ARB/12/39, Decision on Bifurcation (21 Jan. 2015) (**AZL-0259**); *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Procedural Order No. 3 (Decision on Bifurcation and Non-Bifurcation) (25 Jan. 2013) (**AZL-0257**); *Global Telecom Holding S.A.E. v. Canada*, ICSID Case No. ARB/16/16, Procedural Order No. 2 (Decision on Respondent's Request for Bifurcation) (14 Dec. 2017) (**AZL-0263**); *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 Jan. 2020) (**AZL-0269**); *Red Eagle Exploration Limited v. Republic of Colombia*, ICSID Case No. ARB/18/12, Decision on Bifurcation (3 Aug. 2020) (**AZL-0271**); *Eco Oro Minerals Corp. v. Republic of Colombia*, ICSID Case No. ARB/16/41, Procedural Order No. 2 (Decision on Bifurcation) (28 Jun. 2018) (**AZL-0265**); *Mr. Edmond Khudyan and Arin Capital & Investment Corp. v. Republic of Armenia*, ICSID Case No. ARB/17/36, Procedural Order No. 3 (Decision on the Respondent's Request for Bifurcation (5 Dec. 2018) (**AZL-0266**); *RTI Rotalin Gas Trading AG and Rotalin Gaz Trading S.R.L. v. Republic of Moldova*, ICSID Case No. ARB(AF)/22/4, Procedural Order No. 2 (11 Oct. 2023) (**AZL-0276**); *Canepa Green Energy Opportunities I, S.á r.l. and Canepa Green Energy Opportunities II, S.á r.l. v. Kingdom of Spain*, ICSID Case No. ARB/19/4, Procedural Order No. 3 (Decision on Bifurcation) (28 Aug. 2020) (**AZL-0272**); *Naftiran Intertrade Co. (NICO) Limited v. Kingdom of Bahrain*, ICSID Case No. ARB/22/34, Procedural Order No 4 (Decision on Respondent's Request for Bifurcation) (12 Aug. 2024) (**AZL-0277**).

[25] ICSID Convention, Regulations and Rules (2006) (**ARL-0129**), Arbitration Rules, Rule 41(4) (emphasis added). *See also* ICSID Additional Facility Rules (2006) (**ARL-0128**), ICSID Convention, Article 45(5); ICSID Convention, Regulations and Rules (2006) (**ARL-0129**), ICSID Convention, Article 41(2) ("Any objection by a party to the dispute that that dispute is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the Tribunal, shall be considered by the Tribunal which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute.").

[26] *See Access Business Group LLC v. United Mexican States*, ICSID Case No. ARB/23/15, Procedural Order No. 3 (Bifurcation) (29 Aug. 2024) (**AZL-0278**).

[27] ICSID Convention, Regulations and Rules (2022) (**ARL-0140**), Rule 43(4) (emphasis added).

- the 2010 UNCITRAL Arbitration Rules,[28] which likewise provide that "[t]he arbitral tribunal *may* rule on a [jurisdictional objection] *either* as a preliminary question *or* in an award on the merits."[29]

26. As the tribunals in each of those cases noted, the operative provision, in contrast to Article 14(4), vested them with broad discretion and did not establish any presumption of bifurcation.[30] Those decisions therefore are wholly inapposite to this arbitration.

27. Azerbaijan also invokes cases applying the 1976 version of the UNCITRAL Arbitration Rules.[31] Article 21(4) of those rules provides that "*[i]n general*, the arbitral tribunal

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[28] *Glencore Finance (Bermuda) Ltd. v. Plurinational State of Bolivia*, PCA Case No. 2016-39, UNCITRAL, Procedural Order No. 2 (31 Jan. 2018) (**AZL-0264**).

[29] UNCITRAL Arbitration Rules (as revised in 2010) (**ARL-0132**), Article 23(3) (emphasis added).

[30] *See Gavrilović and Gavrilović d.o.o. v. Republic of Croatia*, ICSID Case No. ARB/12/39, Decision on Bifurcation (21 Jan. 2015) (**AZL-0259**), ¶ 63 ("The [ICSID] Rules […] contain no […] mandatory suspension; nor is there any reference to a presumption in favour of bifurcation."); *Access Business Group LLC v. United Mexican States*, ICSID Case No. ARB/23/15, Procedural Order No. 3 (Bifurcation) (29 Aug. 2024) (**AZL-0278**), ¶ 35 ("It is evident from the provisions [of the ICSID Rules] that there is no presumption for or against bifurcation."); *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 Jan. 2020) (**AZL-0269**), ¶ 27 ("[T]he current [ICSID] Arbitration Rules do not build in any presumption of bifurcation."); *Red Eagle Exploration Limited v. Republic of Colombia*, ICSID Case No. ARB/18/12, Decision on Bifurcation (3 Aug. 2020) (**AZL-0271**), ¶ 40 ("[T]he Tribunal has discretion to bifurcate or not depending on the circumstances of each case. The Tribunal *may* bifurcate a proceeding to decide a preliminary objection. ICSID Arbitration Rule 41 does not establish a presumption in favor or against bifurcation.") (emphasis in the original); *Eco Oro Minerals Corp. v. Republic of Colombia*, ICSID Case No. ARB/16/41, Procedural Order No. 2 (Decision on Bifurcation) (28 Jun. 2018) (**AZL-0265**), ¶ 47; *Mr. Edmond Khudyan and Arin Capital & Investment Corp. v. Republic of Armenia*, ICSID Case No. ARB/17/36, Procedural Order No. 3 (Decision on the Respondent's Request for Bifurcation (5 Dec. 2018) (**AZL-0266**), ¶ 38 ("The ICSID Convention and the Arbitration Rules leave the matter to the discretion of the Tribunal. As there is no general presumption in favor of bifurcation under the ICSID Convention or the Arbitration Rules."); *Canepa Green Energy Opportunities I, S.á r.l. and Canepa Green Energy Opportunities II, S.á r.l. v. Kingdom of Spain*, ICSID Case No. ARB/19/4, Procedural Order No. 3 (Decision on Bifurcation) (28 Aug. 2020) (**AZL-0272**), ¶ 66 ("ICSID Arbitration Rule 41(4) stipulates that the Tribunal 'may deal with the objection as a preliminary question or join it to the merits of the dispute.' […] As such, there is no presumption in favour of bifurcation in ICSID proceedings."); *Naftiran Intertrade Co. (NICO) Limited v. Kingdom of Bahrain*, ICSID Case No. ARB/22/34, Procedural Order No 4 (Decision on Respondent's Request for Bifurcation) (12 Aug. 2024) (**AZL-0277**), ¶ 42 ("Pursuant to these provisions, it is for the Tribunal to exercise its discretionary powers to decide whether to bifurcate preliminary objections, and it is well understood that there is no presumption in favor of or against bifurcation in ICSID arbitration."); *Glencore Finance (Bermuda) Ltd. v. Plurinational State of Bolivia*, PCA Case No. 2016-39, UNCITRAL, Procedural Order No. 2 (31 Jan. 2018) (**AZL-0264**), ¶ 38 ("Articles 17.1 and 23.3 of the UNCITRAL Rules give discretion to the Tribunal to decide jurisdictional objections. Neither of those provisions imposes a presumption in favor or against bifurcation.").

[31] *Energy Charter Treaty Arbitration (The Republic of Azerbaijan v. The Republic of Armenia)*, PCA Case No. 2023-65, Decision on Bifurcation (13 Feb. 2025) (**AZL-0279**); *Glamis Gold Ltd. v. United States of America*, UNCITRAL, Procedural Order No. 2 (Revised) (31 May. 2005) (**AZL-0248**).

should rule on a plea concerning its jurisdiction as a preliminary question."[32] While this provision does establish a presumption in favor of bifurcation,[33] it is significantly weaker than the presumption in Article 14(4), which uses the mandatory word "*shall*," not "*should*," and is not qualified by "*in general*." Cases under the 1976 UNCITRAL Rules are thus no more relevant than cases under the 2010 version of the UNCITRAL Rules or the ICSID framework.[34]

B. The Tribunal May Decide to Hear Armenia's Objections with the Merits Only for Two Limited Reasons

28. Not only does Article 14(4) impose preliminary treatment of objections as the default rule, but it also prescribes the limited circumstances in which the Tribunal may nonetheless decide to hear such objections with the merits. Article 14(4) indeed provides that the tribunal shall rule on any preliminary objection at a preliminary stage "*unless* the Tribunal determines, after inviting the views of the Parties, *that such objection does not possess an exclusively preliminary character or otherwise shall only be ruled upon in conjunction with the merits*."[35]

29. As explained, the term "*shall*" requires preliminary treatment by default. The conjunction "*unless*" then introduces exceptions to that default principle, while the conjunction "*or*" placed between the two exceptions indicates an order of alternative possibilities. The

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[32] UNCITRAL Arbitration Rules (1976) (**ARL-0120**), Article 21(4) (emphasis added).

[33] *See Glamis Gold Ltd. v. United States of America*, UNCITRAL, Procedural Order No. 2 (Revised) (31 May. 2005) (**AZL-0248**), ¶ 9 ("Article 21(4) establishes a presumption in favor of the tribunal preliminarily considering objections to jurisdiction. Simultaneously, however, Article 21(4) does not require that pleas as to jurisdiction must be ruled on as preliminary questions. The choice not to do so is left to the tribunal's discretion."); *Energy Charter Treaty Arbitration (The Republic of Azerbaijan v. The Republic of Armenia)*, PCA Case No. 2023-65, Decision on Bifurcation (13 Feb. 2025) (**AZL-0279**), ¶ 81.

[34] Azerbaijan also relies on the *Chagos Marine Protected Area* bifurcation hearing transcript and the United Kingdom's Preliminary Objections in that case to support its contention that tribunals have considered "if upholding the objection would not result in a material reduction of the scope of the proceedings" and "whether the objections are *prima facie* sufficiently serious and substantial to warrant bifurcation." *See* Opposition to Bifurcation, ¶¶ 18-19. It is misleading (and misguided) for Azerbaijan to cite a party's written and oral *pleadings* when referring to *tribunal decisions*, in support of its position. Regardless, the Rules of Procedure in *Chagos* created no presumption of bifurcation and afforded broad discretion to the tribunal. *See Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, PCA Case No. 2011-03, Rules of Procedure (29 Mar. 2012) (**ARL-0133**), Article II(3) ("The Arbitral Tribunal *may*, after ascertaining the views of the Parties, determine whether objections to jurisdiction or admissibility shall be addressed as a preliminary matter or deferred to the Tribunal's final award.") (emphasis added). The case is therefore also inapposite. In any event, the Tribunal's bifurcation decision in that case was not reasoned, and is thus of limited relevance.

[35] Rules of Procedure (29 Mar. 2024), Article 14(4) (emphasis added).

combination of those terms indicates that each of these exceptions must, as is the case for all exceptions to a rule, be construed strictly.[36]

30. Armenia addresses these two exceptions in turn.

1. The Objection "Does Not Possess an Exclusively Preliminary Character"

31. Article 14(4) spells out only one specific reason to hear a preliminary objection with the merits, that is, if the objection "does not possess an exclusively preliminary character." The fact that only this reason is specifically mentioned and that it is listed first indicates that it is the primary inquiry for the Tribunal under Article 14(4).

32. This approach is in line with the practice of international courts and tribunals in inter-State disputes. Under Article 79(9) of the Rules of Court of the ICJ, for instance, the ICJ must hear objections at a preliminary stage, and the only exception to that rule is if the objection "lacks an exclusively preliminary character."[37] The rules of procedure of numerous inter-State arbitral tribunals also provide that objections must be heard in a preliminary phase unless they lack an "exclusively preliminary character."[38]

33. In inter-State disputes, it is well established that an objection does not possess an "exclusively preliminary character" when the international court or tribunal in question does not

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[36] *See, e.g.*, *The Indus Waters Western Reserve Arbitration (Pakistan/India)*, PCA Case No. 2023-01, Award on Issues of General Interpretation of the Indus Waters Treaty (8 Aug. 2025) (**ARL-0143**), ¶ 440 ("[E]xceptions […]are to be strictly construed.").

[37] *Obligation to Negotiate Access to the Pacific Ocean (Bolivia* v. *Chile), Preliminary Objection, Judgment, I.C.J. Reports 2015* (**ARL-0134**), p. 610, ¶ 53 ("The Court recalls however that it is for it to decide, under Article 79, paragraph 9, of the Rules of Court, whether in the circumstances of the case, an objection lacks an exclusively preliminary character. If so, the Court must refrain from upholding or rejecting the objection at the preliminary stage, and reserve its decision on this issue for further proceedings.").

[38] *See, e.g.*, *The ARA Libertad Arbitration (Argentina v. Ghana)*, PCA Case No. 2013-11, Procedural Order No. 1 (31 Jul. 2013) (**AZL-0004**), Article 13; *The Arctic Sunrise Arbitration (Netherlands v. Russia)*, PCA Case No. 2014-02, Procedural Order No. 2 (17 Mar. 2014) (**AZL-0005**), Article 20; *The South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China)*, PCA Case No. 2013-19, Rules of Procedure (27 Aug. 2013) (**AZL-0258**), Article 20; *Arbitration under the Timor Sea Treaty (Timor-Leste v. Australia)*, PCA Case No. 2015-42, Rules of Procedure (9 Sep. 2025) (**ARL-0145**), Article 18; *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v. the Russian Federation)*, PCA Case No. 2017-06, Rules of Procedure (18 May. 2017) (**AZL-0008**), Article 10; *Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen (Ukraine v. the Russian Federation)*, PCA Case No. 2019-28, Procedural Order No. 1 (22 Nov. 2019) (**AZL-0010**), Article 11.

have before it all facts necessary to decide the preliminary objection,[39] or when by "answering the preliminary objection [it] would determine the dispute, or some elements thereof, on the merits,"[40] and would thus "entail prejudging" it.[41] These inquiries are highly fact-specific, as they turn on the "circumstances of a particular case."[42]

34. The mere fact that the determination of an objection "touch[es] upon certain aspects of the merits of the case" is not sufficient to deprive the objection of its exclusively preliminary character.[43] This openness to some connection with the merits underscores that proving that an objection "does not possess an exclusively preliminary character" is a high bar.

35. In the inter-State cases cited by Azerbaijan, international courts and tribunals have accordingly found objections to lack an exclusively preliminary character only in limited scenarios, *i.e.* when their determination was "*dependent on* the conclusions to be reached by the Court" on issues pertaining to the merits;[44] when it would be "tantamount" to a finding on the

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[39] *See, e.g.*, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Judgment on Preliminary Objections, I.C.J. Reports 2008* (18 Nov. 2008) (**AZL-0252**), ¶ 129 (explaining that Serbia's preliminary objection did not possess, in the circumstances of that case, an exclusively preliminary character because "[i]n order to be in a position to make any findings on each of these issues [raised by the objection], the Court will need to have more elements before it").

[40] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment on Preliminary Objections, I.C.J. Reports 2007* (**AZL-0251**), p. 852, ¶ 51. *See also The South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China)*, PCA Case No. 2013-19, Award on Jurisdiction and Admissibility (29 Oct. 2015) (**ARL-0069**), ¶ 382 ("[T]he accumulated jurisprudence of the International Court of Justice indicates that whether or not a preliminary objection will be found, in the circumstances of a particular case, to 'possess an exclusively preliminary character' will depend on two types of enquiry: first, whether the Tribunal has had the opportunity to examine all the necessary facts to dispose of the preliminary objection; and second, whether the preliminary objection would entail prejudging the dispute or some elements of the dispute on the merits."); *Obligation to Negotiate Access to the Pacific Ocean (Bolivia* v. *Chile), Preliminary Objection, Judgment, I.C.J. Reports 2015* (**ARL-0134**), p. 610, ¶ 53 (finding that the objections did not lack an exclusively preliminary character because "[i]n the present case, the Court consider[ed] that it has all the facts necessary to rule on Chile's objection and that the question […] can be answered without determining the dispute, or elements thereof, on the merits").

[41] *The South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China)*, PCA Case No. 2013-19, Award on Jurisdiction and Admissibility (29 Oct. 2015) (**ARL-0069**), ¶ 382.

[42] *Id*. *See also* International Court of Justice, Rules of Court (1978) (**ARL-0121**), Article 79(9).

[43] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment on Preliminary Objections, I.C.J. Reports 2007* (**AZL-0251**), p. 852, ¶ 51.

[44] *Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic*, Ad hoc Arbitration, Decision (14 Mar. 1978) (**AZL-0245**), ¶ 16. *See also Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Judgment on Preliminary Objections, I.C.J. Reports 2008* (18 Nov. 2008) (**AZL-0252**), p. 459, ¶ 127 (deferring the determination of the objection to the merits because it "would [] be impossible to determine the questions raised by the objection without to some degree *determining issues properly pertaining to the merits*.") (emphasis added). *See also Pajzs, Csáky,*

merits that the claim was "not well-founded in substance;"[45] or when the objection "has the character of a defence on the merits."[46] None of Armenia's preliminary objections can be characterized in these ways, as will be discussed further below.

36. Moreover, and notwithstanding Azerbaijan's suggestion to the contrary, the mere "potential for overlap" with merits issues or "overlapping arguments or issues of fact or law"[47] cannot affect the exclusively preliminary character of an objection. For this lower threshold, Azerbaijan again cites investor-State arbitrations, which did not apply an "exclusively preliminary character" standard and are thus inapposite to the Tribunal's inquiry here.[48]

37. Azerbaijan also suggests that a preliminary objection that relies on facts and evidence automatically lacks an exclusively preliminary character, or amounts to a defense on the merits rather than an objection to jurisdiction.[49] This is incorrect: it is well recognized in international jurisprudence that a preliminary objection, even if it deals with issues of fact, is not intertwined with the merits so long as the relevant factual issues are discrete and separate from those pertaining to the merits.[50] This standard applies even in the investor-State cases that

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Esterházy, Order on Preliminary Objection, PCIJ Series A/B. No 66 (**AZL-0241**), p. 9 (deferring determination of objections to the merits phase because their adjudication would prejudge of the merits).

[45] *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain), Judgment on Preliminary Objections, I.C.J. Reports 1964* (**AZL-0243**), p. 44.

[46] *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United States of America), Judgment on Preliminary Objections, I.C.J. Reports 1998* (**AZL-0247**) (also submitted as **ARL-0033**), ¶ 48.

[47] Opposition to Bifurcation, ¶ 17, notes 20-21.

[48] *Id.*, notes 20, 21. *See Global Telecom Holding S.A.E. v. Canada*, ICSID Case No. ARB/16/16, Procedural Order No. 2 (Decision on Respondent's Request for Bifurcation) (14 Dec. 2017) (**AZL-0263**) ¶ 38 (merely considering whether "the objection can be examined without […] *entering the merits*") (emphasis added); *Glencore Finance (Bermuda) Ltd. v. Plurinational State of Bolivia*, PCA Case No. 2016-39, UNCITRAL, Procedural Order No. 2 (31 Jan. 2018) (**AZL-0264**), ¶ 39(c) (considering "[w]hether bifurcation is impractical in the sense that the issues are too intertwined with the merit that it is very unlikely that there will be any savings in time or cost or can the objection be examined without prejudging or entering the merits").

[49] Opposition to Bifurcation, ¶¶ 53 ("Armenia's objection also puts in issue facts and evidence relevant to its compliance with its obligations"), 54 ("Based on this premise, Armenia devotes pages of its own Objections to making additional factual allegations based on newly introduced sources, which Armenia claims establish a factual context that absolved Armenia of any obligations under Articles 4(4) and 11.").

[50] *See, e.g.*, *Energy Charter Treaty Arbitration (The Republic of Azerbaijan v. The Republic of Armenia)*, PCA Case No. 2023-65, Decision on Bifurcation (13 Feb. 2025) (**AZL-0279**), ¶ 92 (bifurcating an objection even though it would require a factual inquiry because "[t]o 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."). *See also*, *a contrario*, *Delimitation of Maritime Boundary (Guyana v. Suriname)*, PCA Case No. 2004-04, Procedural Order No. 2 (18 Jul. 2005) (**AZL-0249**), ¶ 2 ("[B]ecause the facts and arguments in support of Suriname's submissions in its Preliminary

Azerbaijan cites.[51] Many exclusively preliminary objections in fact *turn on* factual evidence.[52] For example, a preliminary objection based on the non-fulfillment of preconditions to arbitration or adjudication necessarily relies on factual evidence of negotiations or exchanges between parties[53] (such as the Article 18 objections in the present case, which Azerbaijan admits are

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Objections are in significant measure *the same as the facts and arguments on which the merits of the case depend*, and the objections are not of an exclusively preliminary character, the Tribunal does not consider it appropriate to rule on the Preliminary Objections at this stage.") (emphasis added).

[51] *See, e.g., Access Business Group LLC v. United Mexican States*, ICSID Case No. ARB/23/15, Procedural Order No. 3 (Bifurcation) (29 Aug. 2024) (**AZL-0278**), ¶ 43 (bifurcating an objection which "concerns a discrete legal issue that can be determined without an inquiry into the merits of the dispute" because "[a]t least at first sight, the review of the relevant legal issue, […] does not appear to call for the assessment of facts. In any event, *even if it did, as the Claimant contends, the facts to be established would necessarily be more limited than in a full assessment of the merits*") (emphasis added); *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 Jan. 2020) (**AZL-0269**), ¶ 32 (bifurcating an objection because "[w]hile a second part of the objection is factual (*i.e.*, were the FTA's grounds for denial of benefits met in this case?), the factual issues to be explored are quite limited, revolving around ownership and control of the Claimant and the nature and substantiality of its business activities in Canada. These issues are entirely discrete from – and not intertwined with – the sequence of events underlying the challenged State measures"); *Red Eagle Exploration Limited v. Republic of Colombia*, ICSID Case No. ARB/18/12, Decision on Bifurcation (3 Aug. 2020) (**AZL-0271**), ¶ 43 ("[A] jurisdictional objection is not intertwined with the merits if it concerns a self-contained, limited set of facts different from those relating to the merits of the dispute.").

[52] *See, e.g.*, *Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen (Ukraine v. the Russian Federation)*, PCA Case No. 2019-28, Award on the Preliminary Objections of the Russian Federation (27 Jun. 2022) (**ARL-0141**), ¶ 109 (determining in a bifurcated jurisdictional phase whether activities are "military" and thus excluded from the tribunal's jurisdiction, by looking "at the events that occurred leading to the arrest and detention of the Ukrainian naval vessels and the prosecution of their crews, taking account, where relevant, of the events subsequent to the arrest"); *The South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China)*, PCA Case No. 2013-19, Award on Jurisdiction and Admissibility (29 Oct. 2015) (**ARL-0069**), ¶ 218 (deciding in a bifurcated jurisdictional phase whether a binding agreement to negotiate disputes existed based notably on the parties' conduct); *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment on Preliminary Objections, I.C.J. Reports 2007* (**AZL-0251**), ¶¶ 62-82 (looking at facts to determine whether a treaty that purportedly governed the dispute was in force in 1948).

[53] *See, e.g.*, *Energy Charter Treaty Arbitration (The Republic of Azerbaijan v. The Republic of Armenia)*, PCA Case No. 2023-65, Decision on Bifurcation (13 Feb. 2025) (**AZL-0279**), ¶ 92; *The Arctic Sunrise Arbitration (Netherlands v. Russia)*, PCA Case No. 2014-02, Award on Jurisdiction (26 Nov. 2014) (**AZL-0007**), ¶ 61 (deciding in a bifurcated phase on the existence of a dispute between the parties based on their exchanges of diplomatic notes); *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016* (**AZL-0230**), ¶¶ 68 *et seq*. (analyzing the declarations and statements made by the parties to determine in a preliminary phase whether a dispute existed); *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011* (**ARL-0059**), pp. 85-120, 134-140, ¶¶ 31-113, 164-184 (analyzing in a preliminary phase facts and statements to determine if a dispute existed and if the precondition of negotiations was fulfilled); *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* (**ARL-0070**) , pp. 852-856, ¶¶ 46-57 (analyzing statements and conduct of parties to determine the existence of a dispute in a preliminary phase); *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2019* (**ARL-0077**) pp. 587-591, 600-603, ¶¶ 66-77, 114-121 (analyzing evidence showing that the precondition of negotiation was fulfilled); *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia* v. *Azerbaijan),*

exclusively preliminary in character).[54] Indeed, the procedural calendar in this case foresees the possibility of document production for the preliminary objections phase,[55] as it is also common practice in international arbitration.

38. As explained in further detail below, Armenia's remaining objections either concern purely legal questions or require the Tribunal simply to review the facts as alleged by Azerbaijan and take them as true *pro tem*.[56] In other words, none of these objections requires the Tribunal to determine disputed facts, let alone facts that would entail prejudging the dispute on the merits. It is well accepted that such objections possess an exclusively preliminary character.[57]

2. The Objection "Otherwise Shall Only Be Ruled upon in Conjunction with the Merits"

39. The second exception to the default rule that the Tribunal shall hear objections as a preliminary matter is if the objection "otherwise shall only be ruled upon in conjunction with the merits."[58] Azerbaijan's case in this regard rests on the term "otherwise," which it reads so broadly as to displace the default rule set out in Article 14(4). Contrary to what Azerbaijan

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Preliminary Objections, Judgment (12 Nov. 2024) (**ARL-0105**), ¶¶ 39-59 (same); *Dispute Concerning Delimitation of the Maritime Boundary between Mauritius and Maldives in the Indian Ocean (Mauritius/Maldives)*, ITLOS Case No. 28, Preliminary Objections, Judgment (28 Jan. 2021) (**ARL-0083**), ¶¶ 276-293 (analyzing conduct of parties to determine if the precondition of exchange of views was fulfilled).

[54] Notably, Armenia's objection that Azerbaijan failed to fulfill Article 18(2)'s mandatory precondition to negotiation relies on extensive factual evidence on the record, including the exchanges between the parties and Azerbaijani officials' statements. *See* Memorial on Preliminary Objections, Chapter II, Section B. Azerbaijan does not dispute that this objection has an exclusively preliminary character. *See* Opposition to Bifurcation, Section III.B.2.

[55] *See* Procedural Order No. 2 (Procedural Timetable) (15 May 2024), Timetable B.

[56] These objections are (i) that the obligations under Articles 2, 3, 4, 6, and 7 of the Bern Convention do not apply to Armenia in respect of the alleged conduct in the "Affected Area" because they are not extraterritorial obligations; (ii) that even if the relevant Bern Convention obligations applied extraterritorially, given Azerbaijan's theory that Armenia was an Occupying Power in the "Affected Area," the dispute at issue would be governed by the law of armed conflict which lies outside the Tribunal's jurisdiction *ratione materiae*; and (iii) that the Tribunal also lacks jurisdiction *ratione materiae* over Azerbaijan's claims under Articles 4(4) and 11(1)(a) of the Bern Convention. *See* Memorial on Preliminary Objections, Chapters III-IV.

[57] *See, e.g.*, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azerbaijan* v. *Armenia), Preliminary Objections,* Judgment (12 Nov. 2024) (**ARL-0106**), ¶¶ 90-91; *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2019* (**ARL-0077**), ¶¶ 57, 96.

[58] Rules of Procedure (29 Mar. 2024), Article 14(4).

suggests, however, "otherwise" does not allow the Tribunal to bifurcate an objection "for *any* other reason."[59] This broad interpretation must be rejected for at least three reasons.

40. *First*, Azerbaijan's interpretation would render the first part of the sentence meaningless: if the Tribunal could deny bifurcation for "any reason" then there would have been no point in specifying that the Tribunal may deny bifurcation if the objection "does not possess an exclusively preliminary character." It is well established under the interpretative canon of *effet utile* that provisions cannot be interpreted so as to leave their terms without effect. As explained, the explicit and primary placement of this factor indicates that it is the Tribunal's foremost inquiry. Accordingly, if an exception is deemed exclusively preliminary, bifurcation may be denied only for the most exceptional reasons.

41. *Second*, Azerbaijan's interpretation would effectively grant the Tribunal unfettered discretion to deny preliminary treatment. This interpretation would revive Azerbaijan's original proposal,[60] which, as previously discussed, the Tribunal has already rejected. Like the exception for an objection that "does not possess an exclusively preliminary character," the "otherwise" exception should be strictly construed so as to preserve and give full effect to the default position under Article 14(4).

42. *Third*, Azerbaijan's focus on the term "otherwise" conveniently ignores the rest of the sentence: "*shall only* be ruled upon in conjunction with the merits." The operative terms "shall only" were added by the Tribunal itself, replacing the original, less stringent proposed formulation "*should*."[61] In Armenia's respectful submission, "shall only" means that, if an objection is deemed exclusively preliminary, then the Tribunal may only refuse preliminary treatment of the objection for an exceptional reason that *compels* it (and not just leaves it to the Tribunal's discretion) to rule on the objection in conjunction with the merits.

43. Armenia finds unequivocal support for this interpretation in the first exception to the default rule in favor of preliminary treatment. Under the interpretative canon of *ejusdem*

[59] Opposition to Bifurcation, ¶ 14 (emphasis added). Azerbaijan's broad interpretation of the term "otherwise" is not advanced in any way by its reliance on Article 9 of the Rules of Procedure; the Tribunal's "discretion to conduct the arbitration 'in such a manner as it considers appropriate'" remains subject to the other provisions of the Rules of Procedure, including Article 14(4). *See* Opposition to Bifurcation, ¶ 14.

[60] Azerbaijan's Submissions on Procedural Rules (21 December 2023), p. 1.

[61] *See* Rules of Procedure (Tribunal Revisions) (Mark-Up) (15 Feb. 2024), p. 7.

generis, a general word ("otherwise") after a list of specifics ("[the] objection does not possess an exclusively preliminary character") must be interpreted to include only items "of the same class" as those specifically listed.[62] In this context, "otherwise" is to be understood as referring to reasons *of the same class* as the question whether the objection has an "exclusively preliminary character." This first exception has nothing to do with the substantive strength of the objection itself. Rather, it calls for an assessment of the *character* of the objection—specifically whether, regardless of its likelihood of success, the objection possesses an exclusively preliminary character. Thus, the second exception likewise must not call for an assessment of the substantive strength of the objection but whether the objection is of such a *character* that it compels consideration alongside the merits of the case. For example, one reason not to bifurcate an objection notwithstanding its exclusively preliminary character would be if the objection is only capable of disposing of an immaterial portion of the case. If that were true, then even if the objection is successful, it would not obviate the need for a merits phase or significantly reduce its scope. On the other hand, an assessment—even *prima facie* (and setting aside the risk of prejudgment)—of the "seriousness" of the objection, as urged by Azerbaijan,[63] would not be "of the same class" as the "exclusively preliminary character" exception and thus would go beyond the bounds of the limited exceptions of Article 14(4).[64]

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44. In sum, under Article 14(4), the primary inquiry for the Tribunal is whether Armenia's objections are of an "exclusively preliminary character." If the Tribunal decides that

[62] *Black's Law Dictionary*, 12th ed. (Thomson Reuters) (2024) (**ARL-0142**), "*Ejusdem Generis*." This principle has been applied by international courts and tribunals in numerous cases. *See, e.g.*, *India – Additional and Extra-additional Duties on Imports from the United States*, WTO, WT/DS360/R, Report of the Panel (9 Jun. 2008) (**ARL-0131**), ¶ 7.141 ("[C]onsistently with the well-established *ejusdem generis* canon of construction, the category of 'other duties or charges' [in Article II.1(b) of the General Agreement on Tariffs and Trade] imposed on the importation of a product should be considered as encompassing only such duties or charges as are of the same kind as ordinary customs duties [which were listed specifically in the article]."); *Lillian Byrdine Grimm v. The Government of the Islamic Republic of Iran*, IUSCT Case No. 71, Award (Award No. 25-71-1) (22 Feb. 1983) (**ARL-0122**) ("[U]nder the well-known principle of ejusdem generis the words 'other measures' in Article II, paragraph 1, ought to be, especially in the context of 'debts and contracts', construed as generically similar to 'expropriations'."); *Prosecutor v. Duško Tadić*, ICTY, Opinion and Judgement (7 May. 1997) (**ARL-0123**), ¶ 748 (applying the *ejusdem generis* canon to interpret "other inhumane acts" in light of other crimes against humanity listed in Article 5(i) of the Rome Statute).

[63] Opposition to Bifurcation, ¶ 19.

[64] Unsurprisingly, the only cases Azerbaijan cites in support of its "seriousness" element are cases where the applicable rules create no presumption in favor of preliminary treatment, as noted earlier. *See id.*, ¶ 19, notes 26-31.

they are, it "shall rule" on them in a preliminary phase, unless "otherwise" compelled by further characteristics of the objections. The "seriousness" or "substantiality" of the objections has no role in the Tribunal's assessment.

C. Even If Lack of "Seriousness" Could Be a Reason to Deny Preliminary Treatment of an Objection, a High Threshold of Frivolousness Would Still Need to Be Met

45. Azerbaijan invites the Tribunal to assess the "seriousness" of Armenia's preliminary objections.[65] As explained, Article 14(4) does not provide for such an assessment. But even if the term "otherwise" in Article 14(4) were interpreted to encompass reasons related to the substantive strength of the objection (*quod non*), such reasons would still have to be construed in light of the overriding presumption in favor of bifurcation and the phrase "*shall only* be ruled upon in conjunction with the merits," both of which indicate that bifurcation should be denied only for highly exceptional reasons. Moreover, because the preliminary treatment of objections is the default, the burden falls on Azerbaijan to establish that exceptional reasons command otherwise.

46. In essence, Azerbaijan argues that an objection may be joined to the merits if it is "not sufficiently serious and substantial," even though it is nonfrivolous.[66] Unsurprisingly, only a handful of the authorities that Azerbaijan cites (most of which are investor-State cases) admit a power to thread the needle in this manner: the view that an international tribunal may deny preliminary treatment of an objection because, although not frivolous, it is not "serious" enough, is only a *minority* view.[67]

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[65] *Id.*, ¶ 19.

[66] *Id*.

[67] Tellingly, Azerbaijan cites only four cases in support of this lower threshold: *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 Jan. 2020) (**AZL-0269**); *Glencore Finance (Bermuda) Ltd. v. Plurinational State of Bolivia*, PCA Case No. 2016-39, UNCITRAL, Procedural Order No. 2 (31 Jan. 2018) (**AZL-0264**); *Red Eagle Exploration Limited v. Republic of Colombia*, ICSID Case No. ARB/18/12, Decision on Bifurcation (3 Aug. 2020) (**AZL-0271**); and *Eco Oro Minerals Corp. v. Republic of Colombia*, ICSID Case No. ARB/16/41, Procedural Order No. 2 (Decision on Bifurcation) (28 Jun. 2018) (**AZL-0265**). *See* Opposition to Bifurcation, ¶ 19, notes 28-30. Azerbaijan also cites *Mr. Edmond Khudyan and Arin Capital & Investment Corp. v. Republic of Armenia*, ICSID Case No. ARB/17/36, Procedural Order No. 3 (Decision on the Respondent's Request for Bifurcation (5 Dec. 2018) (**AZL-0266**) because it cited the *Glencore* and *Eco Oro* decisions, but this was only for the proposal that objections must be supported by "concrete factual allegations." *Id.* ¶ 41. To be sure, the standard in that case comports to the majority view, as described below, that bifurcation may be denied on the basis of substantive strength only if it is not "*prima facie* serious." *Id.*, ¶ 42. Azerbaijan also cites *Gavrilovic v. Croatia* for the proposal that "even objections that 'could be determined

47. The majority view is that bifurcation may be denied on the basis of a lack of seriousness *only* if the objection has "no reasonable chance of success," is "frivolous, vexatious, or clearly without merit," or is not "*prima facie* serious," not "arguable," or not "advanced in good faith."[68] Cases expressing this view include the *Glamis Gold* case, an oft-cited case in investment arbitration on the standard for bifurcation (but which Azerbaijan conspicuously avoids citing on this point).[69] In Armenia's respectful submission, if the Tribunal were to consider seriousness as a factor to deny bifurcation, it should only decline to bifurcate an objection if Azerbaijan discharges its burden to prove that the objection meets a high threshold of frivolousness.

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discretely' in a preliminary phase […] may be joined to the merits when they are not serious or substantial enough to justify bifurcation on their own." Opposition to Bifurcation, ¶ 58 (citing *Gavrilović and Gavrilović d.o.o. v. Republic of Croatia*, ICSID Case No. ARB/12/39, Decision on Bifurcation (21 Jan. 2015) (**AZL-0259**), ¶ 83). But this is misleading: in that case, the tribunal may have declined to bifurcate an objection because it appeared not to be "substantial enough […], in and of itself," but that referred to the fact that the objection was not capable of disposing of the entire case, not to the substantive strength of the objection, on which the tribunal said nothing. *See Gavrilović and Gavrilović d.o.o. v. Republic of Croatia*, ICSID Case No. ARB/12/39, Decision on Bifurcation (21 Jan. 2015) (**AZL-0259**), ¶ 82.

[68] No fewer than eight of Azerbaijan's cases support the majority view: *Global Telecom Holding S.A.E. v. Canada*, ICSID Case No. ARB/16/16, Procedural Order No. 2 (Decision on Respondent's Request for Bifurcation) (14 Dec. 2017) (**AZL-0263**) ¶¶ 100(a), 102 ("[T]he Tribunal considers that each of the five objections advanced by the Respondent is *arguable, has been advanced in good faith*, and merits the Tribunal's consideration") (emphasis added); *Mr. Edmond Khudyan and Arin Capital & Investment Corp. v. Republic of Armenia*, ICSID Case No. ARB/17/36, Procedural Order No. 3 (Decision on the Respondent's Request for Bifurcation (5 Dec. 2018) (**AZL-0266**) ¶¶ 42, 56 (an objection may be bifurcated if it has "[no] chance of success"); *Glamis Gold Ltd. v. United States of America*, UNCITRAL, Procedural Order No. 2 (Revised) (31 May. 2005) (**AZL-0248**), ¶ 12(c); *RTI Rotalin Gas Trading AG and Rotalin Gaz Trading S.R.L. v. Republic of Moldova*, ICSID Case No. ARB(AF)/22/4, Procedural Order No. 2 (11 Oct. 2023) (**AZL-0276**), ¶ 41 (objections may be bifurcated if they have "no reasonable chance of success or are otherwise frivolous, vexatious or clearly without merit"); *Canepa Green Energy Opportunities I, S.á r.l. and Canepa Green Energy Opportunities II, S.á r.l. v. Kingdom of Spain*, ICSID Case No. ARB/19/4, Procedural Order No. 3 (Decision on Bifurcation) (28 Aug. 2020) (**AZL-0272**), ¶ 67; *Naftiran Intertrade Co. (NICO) Limited v. Kingdom of Bahrain*, ICSID Case No. ARB/22/34, Procedural Order No 4 (Decision on Respondent's Request for Bifurcation) (12 Aug. 2024) (**AZL-0277**), ¶ 43; *Access Business Group LLC v. United Mexican States*, ICSID Case No. ARB/23/15, Procedural Order No. 3 (Bifurcation) (29 Aug. 2024) (**AZL-0278**), ¶ 36; *The Carlyle Group L.P., Carlyle Investment Management L.L.C., Carlyle Commodity Management L.L.C. and others v. Kingdom of Morocco*, ICSID Case No. ARB/18/29, Procedural Order No. 4 (Decision on Bifurcation) (20 Jan. 2020) (**AZL-0270**), ¶ 66. Armenia notes that the *Apotex* decision makes no mention of "seriousness" at all. *See Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Procedural Order No. 3 (Decision on Bifurcation and Non-Bifurcation) (25 Jan. 2013) (**AZL-0257**).

[69] *See Glamis Gold Ltd. v. United States of America*, UNCITRAL, Procedural Order No. 2 (Revised) (31 May. 2005) (**AZL-0248**), ¶ 12(c) ("The tribunal may decline to [bifurcate] when doing so is unlikely to bring about increased efficiency in the proceedings. Considerations relevant to this analysis include, *inter alia*, (1) whether the objection is substantial inasmuch as the preliminary consideration of a *frivolous* objection to jurisdiction is very unlikely to reduce the costs of, or time required for, the proceeding") (emphasis added).

48. Mere alleged "misstatements" of law or fact or "internal inconsistencies"[70]—which Armenia will show exist only in Azerbaijan's rhetoric—are not enough to demonstrate frivolousness. In the cases cited by Azerbaijan, even those applying the minority view, bifurcation was denied on the basis of frivolousness or lack of seriousness only in extreme scenarios, namely: (i) where the preliminary objection relied on an interpretation of the treaty without any textual support;[71] (ii) where the respondent provided no evidence in support of an objection that turned on a simple factual issue;[72] or (iii) where the respondent failed to particularize its objection.[73] As Armenia explains below, none of these scenarios are at play here for each of the preliminary objections advanced by Armenia.

[70] *See* Opposition to Bifurcation, ¶¶ 56, 58, 66, 68, 88.

[71] *Glencore Finance (Bermuda) Ltd. v. Plurinational State of Bolivia*, PCA Case No. 2016-39, UNCITRAL, Procedural Order No. 2 (31 Jan. 2018) (**AZL-0264**), ¶ 42.

[72] *Red Eagle Exploration Limited v. Republic of Colombia*, ICSID Case No. ARB/18/12, Decision on Bifurcation (3 Aug. 2020) (**AZL-0271**), ¶¶ 62-64; *Mr. Edmond Khudyan and Arin Capital & Investment Corp. v. Republic of Armenia*, ICSID Case No. ARB/17/36, Procedural Order No. 3 (Decision on the Respondent's Request for Bifurcation (5 Dec. 2018) (**AZL-0266**), ¶¶ 55-56.

[73] *Mr. Edmond Khudyan and Arin Capital & Investment Corp. v. Republic of Armenia*, ICSID Case No. ARB/17/36, Procedural Order No. 3 (Decision on the Respondent's Request for Bifurcation (5 Dec. 2018) (**AZL-0266**), ¶¶ 55-56; *RTI Rotalin Gas Trading AG and Rotalin Gaz Trading S.R.L. v. Republic of Moldova*, ICSID Case No. ARB(AF)/22/4, Procedural Order No. 2 (11 Oct. 2023) (**AZL-0276**), ¶ 43.

III. AZERBAIJAN HAS FAILED TO SHOW THAT ARMENIA'S OBJECTIONS SHOULD NOT BE RULED UPON IN A PRELIMINARY PHASE

49. As noted, the primary inquiry under Article 14(4) of the Rules of Procedure is whether Azerbaijan has shown that the objections are not of an exclusively preliminary character.[74] For the reasons described below, all six of Armenia's objections possess an exclusively preliminary character and there is no reason compelling the Tribunal to rule on them in conjunction with the merits. All of Armenia's objections can either fully dispose of or very substantially reduce the claims Azerbaijan has brought before the Tribunal. And even if the strength of the objections had any relevance to the Tribunal's inquiry (*quod non*), Azerbaijan has failed to show that the objections meet any standard of frivolousness, even under Azerbaijan's lower proposed threshold.

A. Armenia's Objections Under Article 18 of the Bern Convention

1. The Article 18 Objections Are of an Exclusively Preliminary Character and Could Dispose of Azerbaijan's Entire Case

50. Azerbaijan does not dispute that Armenia's objections under Article 18 of the Convention are exclusively preliminary in character.[75] The Tribunal's inquiry should end here, as Azerbaijan has not demonstrated any reason why these objections must only be ruled in conjunction with the merits. Further, if upheld, these objections would dispose of Azerbaijan's entire case, which Azerbaijan also does not dispute.[76]

2. Moreover, Azerbaijan Has Failed to Show That the Objections Were Frivolous

51. Azerbaijan argues that "Armenia's Article 18 objections are not serious or substantial enough to warrant bifurcation because they are based on misstatements of fact and law, and thus unlikely to succeed on the merits."[77] Even if the "seriousness" of an objection were a relevant factor (*quod non*), however, Azerbaijan would need to show that Armenia's Article 18 objection surpasses a high threshold of frivolousness, *i.e.*, that it has "no reasonable chance of

[74] *See supra* Section II.

[75] *See* Opposition to Bifurcation, Section III.B.1.

[76] *Id.*

[77] *Id.*, ¶ 58.

success," or is "clearly without merit."[78] Azerbaijan has not done so, and cannot do so. The fact that it has devoted 12 pages, more than a quarter of its submission, to demonstrating the supposed lack of seriousness of Armenia's Article 18 objections serves only to underscore their seriousness.

52. As explained below, Armenia's objection that Azerbaijan did not fulfill the mandatory precondition of referring its claims against Armenia to the Standing Committee is serious (and, it follows, nonfrivolous) (**Section II.B.1**). This is also the position in relation to Armenia's objection that Azerbaijan has failed to fulfill the mandatory negotiation precondition contained in Article 18(2) (**Section II.B.2**).

a. Azerbaijan Has Failed to Show That the Objection Concerning Its Non-Fulfillment of the Mandatory Precondition of Referring the Matter to the Standing Committee Is Frivolous

53. Article 18 provides in relevant part:

> 1. The Standing Committee shall use its best endeavours to facilitate a friendly settlement of any difficulty to which the execution of this Convention may give rise.
>
> 2. Any dispute between Contracting Parties concerning the interpretation or application of this Convention which has not been settled on the basis of the provisions of the preceding paragraph or by negotiation between the parties concerned shall, unless the said parties agree otherwise, be submitted, at the request of one of them, to arbitration. […].[79]

54. In its Memorial on Preliminary Objections, Armenia argues that the Tribunal lacks jurisdiction over this case because Azerbaijan failed to fulfill the mandatory precondition of referring the matter to the Standing Committee.[80]

55. Azerbaijan does not dispute that it did not refer the matter to the Standing Committee.[81] Instead, Azerbaijan contends that it was not required to do so, and that Armenia's argument to the contrary is not "sufficiently serious" to warrant bifurcation.[82] In reality, however,

[78] *See supra* Section I(C); Opposition to Bifurcation, ¶ 19.

[79] Bern Convention (**AZL-0001 (ENG & FR)**), Article 18.

[80] *See* Memorial on Preliminary Objections, Chapter II.A.

[81] *See Id.*, ¶ 40.

[82] *See* Opposition to Bifurcation, Section III.B.1.

Armenia put forward voluminous legal and factual support for its position, explaining how it is supported by (i) the plain text of Article 18, (ii) its context, (iii) the subsequent practice of Contracting Parties, and (iv) the object and purpose of the Convention.[83] Armenia referred to no fewer than 36 different legal authorities in support of its arguments, including the Standing Committee's own documents, international case law, and commentary on the Convention that *expressly* supports this view.[84] By any standard, the objection is therefore serious, and none of Azerbaijan's arguments demonstrate otherwise.

(i) The Ordinary Meaning of Article 18's Terms

56. Surprisingly, Azerbaijan argues that there is "no support in the text" of Article 18(2) for the argument that it establishes two cumulative preconditions to arbitration, including the requirement to refer the matter to the Standing Committee.[85] This argument is plainly false. Armenia has already explained that grammatically, "or" as part of a negative sentence (such as in Article 18(2) of the Convention) can be read as establishing cumulative conditions. The ICJ itself has affirmed this.[86] There is thus clear textual support for Armenia's interpretation in Article 18(2).

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[83] *See* Memorial on Preliminary Objections, Chapter II.A. *See also* Vienna Convention on the Law of Treaties (1969) (**AZL-0014**), Article 31(1).

[84] Memorial on Preliminary Objections, ¶ 70 (citing C. Lasén Díaz, "The Bern Convention: 30 Years of Nature Conservation in Europe," *Review of European Community & International Environmental Law,* Vol. 19(2) (2010) (**ARL-0052**), p. 195 ("In addition to the system of complaints and case-files, a 'final resort' tool is available in the Bern Convention, which provides for recourse to arbitration when mediation *and* negotiation have failed.") (emphasis added)).

[85] Opposition to Bifurcation, ¶ 60.

[86] *See* Memorial on Preliminary Objections, ¶ 44 (citing *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2019* (**ARL-0077**), pp. 598-599, ¶ 107 ("The Court notes that the conjunction 'or' appearing between 'negotiation' and the 'procedures expressly provided for in this Convention' is part of a clause which is introduced by the word 'not', and thus formulated in the negative. While the conjunction 'or' should generally be interpreted disjunctively if it appears as part of an affirmative clause*, the same view cannot necessarily be taken when the same conjunction is part of a negative clause*. […] It follows that, in the relevant part of Article 22 of CERD, the conjunction 'or' may have either disjunctive *or conjunctive meaning*.") (emphasis added)). Armenia also cited *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006* (**ARL-0043**), p. 43, ¶ 100. *See* Memorial on Preliminary Objections, note 72. Azerbaijan appears not to understand the relevance of this case. *See* Opposition to Bifurcation, ¶ 61, note 144. In that case, the Court was reviewing its jurisdiction under Article 75 of the WHO Constitution, which provides that "[a]ny question or dispute concerning the interpretation or application of this Constitution which is *not* settled by negotiation *or* by the Health Assembly shall be referred to the International Court of Justice." *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006* (**ARL-0043**), p. 41, ¶ 94 (emphasis added). The Democratic Republic of Congo argued

57. Azerbaijan suggests that the ICJ's judgment in the *Ukraine v. Russia* case under the CERD— concluding that the preconditions set out in Article 22 of the CERD were not cumulative—should somehow be dispositive.[87] But the Court in that case interpreted a different treaty with a different text, a different context, and a different object and purpose. There are fundamental differences between the CERD and the Bern Convention that compel a different conclusion here.

58. *First*, the terms of Article 18 are not "nearly identical" to those of Article 22 of CERD, as Azerbaijan contends;[88] on the contrary, they are significantly different. As explained,[89] Article 18—the only provision of the Convention falling in the chapter entitled "Settlement of Disputes"—is divided into two subparagraphs, the first of which provides that "[t]he Standing Committee *shall use its best endeavours to facilitate a friendly settlement of any difficulty* to which the execution of this Convention may give rise."[90] Thus, Article 18(1) creates an explicit, obligatory role for the Standing Committee as the first step of any "Settlement of Disputes." As also explained, the use of the word "difficulty," which is antecedent to the full-fledged "dispute" referred to in Article 18(2), further indicates that matters such as claims of noncompliance with the Convention's provisions must first be referred by a Contracting Party to the Standing

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that these conditions were alternative, and that it had fulfilled the negotiations requirement, so it did not need to refer the dispute to the Health Assembly. *See Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility*, Counter-Memorial of the Democratic Republic of Congo (20 May. 2003) (**ARL-0125T**), ¶¶ 63-64. Rwanda, on the other hand, argued that the conditions were cumulative. *See Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility*, Memorial of Rwanda (20 Jan. 2003) (**ARL-0124**), ¶ 3.37. The Court concluded that it did not have jurisdiction over the alleged dispute because the applicant had not proved that it had fulfilled the "precondition*s*" (emphasis added on the plural) for the seisin of the Court under Article 75. *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006* (**ARL-0043**), p. 43, ¶ 100. This use of the plural suggests that the Court viewed the preconditions of Article 75 as cumulative (*i.e.*, that the applicant had to satisfy *both*), as otherwise it would have been more appropriate to say that the applicant had failed to satisfy *either* of the preconditions. Since Article 75 of the WHO Constitution also contains the conjunction "or" in a similar negative construction, this case thus supports Armenia's interpretation of Article 18(2).

[87] *See* Opposition to Bifurcation, ¶ 61.

[88] *Id.*

[89] *See* Memorial on Preliminary Objections, ¶¶ 35-36.

[90] Bern Convention (**AZL-0001 (ENG & FR)**), Article 18(1) (emphasis added).

Committee so that it can address and hopefully resolve the "difficulty" before it becomes a "dispute" that allows the complaining State to proceed under Article 18(2).[91]

59. By contrast, neither the CERD's provision on dispute settlement, Article 22, nor Article 11, setting forth the CERD Committee's procedures, imposes such obligations on a State Party to refer a difficulty to the CERD Committee or on the CERD Committee itself to endeavor to resolve that difficulty.[92]

60. In this regard, Azerbaijan argues that Article 18(1) creates no "express requirement" or "corresponding obligation" for the Contracting Parties to submit their difficulties to the Standing Committee.[93] But an obligation need not be "express" in order to exist: Article 18 also does not provide for an "express requirement" for the Contracting Parties to negotiate a dispute before its submission to arbitration, but Azerbaijan accepts that such an obligation exists.[94] Such a reading is therefore inconsistent with the customary international law requirement that treaties be interpreted in good faith.[95]

61. Moreover, as Armenia has explained:

> The Standing Committee's obligation to use its "best endeavours" to facilitate friendly settlement does not apply only to matters that the Parties would selectively choose to bring to its attention—rather it applies to "*any* difficulty" that should arise under the Convention. For this provision to have any *effet utile*, *i.e.*, for the Standing Committee to be able to effectively implement this requirement, the Contracting Parties must have a corresponding obligation to refer any such "difficulty" to the Standing Committee.[96]

62. Without a corresponding obligation on the Contracting Parties to refer "any difficulty" that may arise to the Standing Committee, the Standing Committee would have nothing to "facilitate." A common sense and good faith reading of Article 18(1) therefore indicates that

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[91] *See* Memorial on Preliminary Objections, ¶¶ 45-46.

[92] *See* International Convention on the Elimination of All Forms of Racial Discrimination (1969) (**AZL-0244**), Articles 11, 22.

[93] Opposition to Bifurcation, ¶¶ 60, 63.

[94] *See* Statement of Claim, ¶ 137.

[95] This rule is codified in the Vienna Convention on the Law of Treaties. *See* Vienna Convention on the Law of Treaties (1969) (**AZL-0014**), Article 31(1).

[96] Memorial on Preliminary Objections, ¶ 43 (emphasis in the original).

there is a corresponding obligation on the Contracting Parties. Azerbaijan does not engage with this point.

(ii) The Context of Article 18

63. The context of the respective treaties also starkly differs. In this regard, Azerbaijan misrepresents the *Ukraine v. Russia* case.[97] In that case, the Court indeed found that "'negotiation' and the [CERD Committee procedure] are two means to achieve the same objective, namely to settle a dispute by agreement."[98] But Azerbaijan does not elaborate on the reasoning of the Court on this point. A proper reading of the Court's judgment does not support Azerbaijan's opposition; it positively undermines it.

64. The Court's holding was based on the "context" of Article 22, namely, Articles 11-13 of CERD governing the "CERD procedures" referred to in Article 22.[99] The Court took note of the following pertinent elements from those provisions:[100]

- "if a State party considers that another State party 'is not giving effect to the provisions of [the] Convention, it may bring the matter to the attention of the [CERD] Committee'" (Article 11(1) of CERD);
- "the CERD Committee 'shall then transmit the communication to the State Party concerned', which, within three months, 'shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken'" (Article 11(1) of CERD);
- the State Party concerned "has the right to refer the matter back to the CERD Committee through a second communication '[i]f the matter is not adjusted to the satisfaction of both parties, either by *bilateral negotiations* or by any other procedure open to them, within six months after the receipt by the receiving State of the initial communication'" (Article 11(2) of CERD);

[97] *See* Opposition to Bifurcation, ¶ 62.

[98] *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2019* (**ARL-0077**), p. 599, ¶ 110.

[99] *Id.*, p. 599, ¶ 108.

[100] *Id.*, p. 599, ¶¶ 108-109 (emphasis added).

- "[a]fter the CERD Committee has obtained the necessary information, its chairperson shall appoint an *ad hoc Conciliation Commission*, the good offices of which shall be made available to the States concerned '*with a view to an amicable solution of the matter*'" (Article 12(1) of CERD);
- "when the Commission has fully considered the matter, it shall submit to the chairperson of the CERD Committee a report containing 'such recommendations as it may think proper for the *amicable solution of the dispute*'" (Article 13(1) of CERD);
- "the States concerned, within three months of receiving such recommendations from the chairperson of the Committee, shall inform the chairperson as to '*whether or not they accept the recommendations contained in the report of the Commission*'" (Article 13(2) of CERD).

65. On that basis, the Court observed that "[b]oth negotiation and the CERD Committee procedure *rest on the States parties' willingness to seek an agreed settlement of their dispute*."[101] It thus concluded that "it would not be reasonable to require States parties which have already failed to reach an agreed settlement through negotiations to engage *in an additional set of negotiations* in accordance with the modalities set out in Articles 11 to 13 of CERD."[102]

66. The context and the subsequent practice of the Bern Convention are different. As explained, the Standing Committee Procedure's primary objective is to "assist Contracting Parties in complying with the Convention."[103] Unlike the CERD Committee, which is composed of elected human rights experts,[104] the Standing Committee is a multilateral, political body composed of representatives of Contracting Parties and observer States, and which may be attended by representatives of international organizations and NGOs.[105] And unlike the CERD

[101] *Id.*, pp. 599-600, ¶ 110 (emphasis added).

[102] *Id.* (emphasis added).

[103] *See* Memorial on Preliminary Objections, ¶¶ 58-63. In this regard, Azerbaijan is wrong to say that "on Armenia's own case, both 'endeavours' by the Standing Committee and negotiations serve this ultimate purpose of attempting to settle a dispute by agreement." Opposition to Bifurcation, ¶ 62. As reaffirmed here, Armenia's position is instead that, while the Standing Committee procedure may ultimately foster dispute resolution, its primary focus is on compliance with the Convention, not inter-State dispute settlement.

[104] *See* International Convention on the Elimination of All Forms of Racial Discrimination (1969) (**AZL-0244**), Article 8(1).

[105] *See* Memorial on Preliminary Objections, ¶¶ 50-51, 57-58.

Committee procedure, the Standing Committee Procedure does not "rest on the States parties' willingness to seek an agreed settlement of their dispute."[106] It does not foresee a period of bilateral negotiations, nor does it involve a conciliation mechanism that recommends a way to amicably settle the matter. Rather, the Procedure focuses on fact-finding and recommendations on how to comply with the Convention in advance of negotiations.[107] In the first instance, the State against which a "complaint" is made is invited to submit information to the Secretariat of the Convention.[108] The complaint is then presented at a Standing Committee meeting, during which the Secretariat, other Contracting Parties represented, and groups of experts may address the complaint, including by making proposals to the Committee.[109] The Standing Committee next studies the complaint and any proposals and either adopts specific recommendations or decides to first conduct an on-the-spot appraisal.[110] But the recommendations, as explained, "include proposed actions to be taken to comply with the Convention, and do not address issues of State responsibility."[111] The Procedure is thus more akin to a dialogue between the Standing Committee and the concerned States aimed at compliance than to a procedure of conciliation between two States.

67. Moreover, Armenia does not suggest that under Article 18 of the Convention, the Parties would have to engage first in bilateral negotiations and then submit their dispute to the Standing Committee, but quite the opposite. The Standing Committee Procedure is the first step in the dispute settlement process and must *precede* negotiations.[112] It refers to the settlement of a "difficulty," not a "dispute." The Standing Committee thus seeks to resolve a difficulty and prevent it from escalating to a dispute, but if it fails to do so, the dispute must then be pursued

[106] *See Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2019* (**ARL-0077**), pp. 599-600, ¶ 110.

[107] *See* Memorial on Preliminary Objections, ¶¶ 58-59.

[108] As explained, the Standing Committee Procedure or "case-file system" is not spelled out in the Bern Convention itself but was developed through the Standing Committee's practice. *See* Memorial on Preliminary Objections, ¶ 52. *See* Bern Convention Standing Committee, 27th meeting, Analysis of the Rules of Procedure for the Case File System, T-PVS (2007) 6 (29 Mar. 2007) (**ARL-0045**), pp. 10-12.

[109] Bern Convention Standing Committee, 27th meeting, Analysis of the Rules of Procedure for the Case File System, T-PVS (2007) 6 (29 Mar. 2007) (**ARL-0045**), pp. 11-12.

[110] *Id.*, p. 12.

[111] Memorial on Preliminary Objections, ¶ 58.

[112] *See id.*, ¶¶ 45-47.

through negotiations under Article 18(2).[113] This is why the Standing Committee Procedure is set out in the first paragraph of Article 18, and why it is listed first in the cumulative preconditions of the second paragraph.

68. Thus, as Armenia explained, the Standing Committee Procedure is not redundant either in its purpose or in its methods with "negotiations between the parties concerned"—these preconditions are rather complementary.[114] Azerbaijan has failed to address these crucial distinctions.

(iii) The Object and Purpose of the Bern Convention

69. Azerbaijan also ignores the fundamentally different objects and purposes of the CERD and Bern Conventions. As Armenia has explained, another key basis for the ICJ's finding in *Ukraine v. Russia* that the Article 22 preconditions were alternative was the CERD's object and purpose.[115] In particular, the Court noted that:

> Article 2, paragraph 1, of CERD provides that States parties to CERD undertake to eliminate racial discrimination "*without delay*". Articles 4 and 7 provide that States parties undertake to eradicate incitement to racial discrimination and to combat prejudices leading to racial discrimination by adopting "*immediate* and positive measures" and "*immediate* and effective measures" respectively. The preamble to CERD further emphasizes the States' resolve to adopt all measures for eliminating racial discrimination "*speedily*".[116]

70. The Court thus concluded that the CERD's object and purpose was to "eradicate all forms of racial discrimination effectively and *promptly*" and that "the achievement of such aims could be rendered more difficult if the procedural preconditions under Article 22 were cumulative."[117]

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[113] *See id.*, ¶¶ 45, 47.

[114] *See id.*, ¶ 63.

[115] *See id.*, ¶ 64, citing *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2019* (**ARL-0077**), p. 600, ¶ 111.

[116] *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2019* (**ARL-0077**), p. 600, ¶ 111 (emphasis added).

[117] *Id.*

71. Unlike the CERD, the Bern Convention places no such emphasis on speed, promptness or immediacy. Rather, as Armenia has explained in detail, the Convention places strong emphasis on cooperation,[118] and referring difficulties to the Standing Committee as a first step of a dispute-resolution process enhances that cooperation.[119] Thus, unlike in *Ukraine v. Russia*, the object and purpose of the Bern Convention militates in favor of the preconditions to arbitration being *cumulative*. Once again, Azerbaijan has entirely failed to engage with this argument.

(iv) The Subsequent Practice of Contracting Parties

72. Azerbaijan argues that the subsequent practice of Contracting Parties does not support Armenia's position because "Armenia fails to mention that only *five* inter-state cases have purportedly been brought to the Committee by a Contracting Party."[120] But Armenia did not "fail to mention" the number of inter-State cases brought to the Standing Committee: it expressly stated that it was aware of "at least five complaints raised by a Contracting Party,"[121] and Azerbaijan relies on *Armenia*'s own evidence to make this assertion.[122] Moreover, while Azerbaijan attempts to downplay the importance of this number, five cases is a larger sample than the unprecedented arbitration that Azerbaijan has chosen to initiate. Indeed, Azerbaijan has not shown that other inter-State matters concerning the Convention were *not* brought to the Committee, which is telling in and of itself. Equally important, the ILC has not imposed any quantitative criterion for the number of parties making positive acts to establish a subsequent practice of interpretive relevance.[123]

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[118] Memorial on Preliminary Objections, ¶¶ 64-65.

[119] *Id.*, ¶¶ 66-69.

[120] Opposition to Bifurcation, ¶ 65.

[121] Memorial on Preliminary Objections, ¶ 53.

[122] *See* Opposition to Bifurcation, ¶ 65, note 159.

[123] International Law Commission, *Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, with commentaries* (2018) (**AZL-0160**), Conclusion 10(2) ("The number of parties that must actively engage in subsequent practice in order to establish an agreement under article 31, paragraph 3 (b), may vary. Silence on the part of one or more parties may constitute acceptance of the subsequent practice when the circumstances call for some reaction."); *id.*, Commentary of Conclusion 10, ¶ (12) ("The first sentence of paragraph 2 confirms the principle that not all the parties must engage in a particular practice to constitute agreement under article 31, paragraph 3 (b).")

73. Azerbaijan further questions "whether [in those five prior cases] a dispute was actually resolved or, if it was resolved, whether the Standing Committee played more than a limited role," contending that it would thus "make no sense for 'resolution' by the Standing Committee to be a 'mandatory precondition' to arbitration."[124] But this does make sense: a mandatory precondition does not *successfully* resolve difficulties in every case. Indeed, Article 18(2) of the Convention expressly anticipates that the Standing Committee Procedure may not be successful in settling a difficulty, which is why it is only *a first* step, not the *only* step, in Chapter VIII's provisions on the "Settlement of Disputes." In other words, whether the Standing Committee was actually successful in solving those inter-State complaints says nothing about the mandatory nature of this precondition (and of course, nothing about whether the Standing Committee would have been successful in *this* case). But the fact that five inter-State complaints were submitted to the Standing Committee while *no inter-State dispute* was ever referred to arbitration without first being submitted to the Standing Committee (until now) shows that in all these five prior cases, the Standing Committee Procedure helped prevent an escalation of the difficulty into a full-blown dispute. In any event, Azerbaijan only raised "doubts" as to two of these cases, and itself admitted that the difficulties were resolved in at least two others.[125]

74. Further, unlike what Azerbaijan contends,[126] that the Standing Committee may take a lengthy period of time to address complaints is not material. There is no reason to assume that such a lengthy period is the inevitable consequence of the Article 18(1) procedure; no doubt much depends on the complexity of the matter and the willingness of the relevant Contracting Parties to engage with the Committee in an effort to resolve the complaint. In any event, there is no waiting period requirement set out in Article 18 for a complaining State and, as Armenia has already explained, compromissory clauses that allow parties to submit their disputes for resolution if they "have not been settled" by other means require the claimant to *attempt* to settle the dispute by such means.[127] There is also no requirement under Article 18(2) that the Standing Committee

[124] Opposition to Bifurcation, ¶ 65.

[125] *See id.*, ¶ 65, note 162 (stating that in *Hainburg Alluvial Forest* (1983/2), the "situation improved," and that the Standing Committee successfully closed the file in *Introduction of exotic bees in Portugal* (1995/5), and ordered the monitoring of the situation by a group of experts, a routine follow-up practice of the Committee).

[126] *Id.*, ¶ 65.

[127] Memorial on Preliminary Objections, ¶¶ 37-38 (and citations therein).

definitively close a case or otherwise definitively dispose of it before a party can proceed to negotiations.

75. Finally, Azerbaijan argues that Armenia's objection is not sufficiently serious or substantial because it is purportedly "plagued by internal inconsistencies."[128] However, Azerbaijan mentions only *one* alleged inconsistency: that Armenia allegedly argues, on the one hand, that the Standing Committee and bilateral negotiations are not redundant because they have different functions, and on the other hand that the Standing Committee's involvement is "a necessary component of bilateral negotiations" or "constitutes an integral part of those negotiations."[129] Once again, however, Azerbaijan mischaracterizes Armenia's position. Armenia never stated that the Standing Committee Procedure was a "necessary component of bilateral negotiations" or an "integral part of those negotiations." Rather, Armenia argues that Azerbaijan's repeated "refusal to rely on the Standing Committee's expertise in the context of such a complex and overarching matter shows that it did not genuinely intend to settle the purported dispute amicably through negotiations."[130]

76. These arguments are not contradictory. The fact that the Standing Committee can contribute to an amicable settlement of inter-State difficulties and thus either obviate or focus subsequent negotiations is true regardless of whether the Tribunal agrees that resort to the Standing Committee is a mandatory precondition to arbitration. In other words, Azerbaijan's refusal to involve the Standing Committee in any capacity can be both a failure to fulfill a *legal requirement* and *factual evidence* of Azerbaijan's lack of genuine intent to settle the "dispute" amicably (especially in light of other evidence Armenia has adduced, as discussed below).

77. In sum, Armenia's objection under Article 18(1) is serious and well-supported in law and in fact. Azerbaijan's attempts to poke holes in it do not make it frivolous and in any event, they fall flat. Since there can be no question that Armenia's objection is exclusively preliminary in character and can dispose of Azerbaijan's entire case, Armenia respectfully asks the Tribunal to hear it in a preliminary phase.

[128] Opposition to Bifurcation, ¶ 66.

[129] *Id.*, ¶ 66.

[130] Memorial on Preliminary Objections, ¶ 85.

b. Azerbaijan Has Failed to Show That the Objection Concerning Its Non-Fulfillment of the Mandatory Precondition of Negotiation Under Article 18(2) Is Frivolous

78. In its Memorial on Preliminary Objections, Armenia argued that the Tribunal lacks jurisdiction because Azerbaijan failed to fulfill the precondition of negotiation under Article 18(2), which Azerbaijan concedes is mandatory.[131] In particular, Armenia showed that Azerbaijan's alleged attempt to settle the purported dispute was not "genuine," and, in the alternative, that even if it were genuine (*quod non*), Azerbaijan did not pursue the negotiations "as far as possible" until they became futile or deadlocked.[132] This objection is also supported by numerous legal authorities and factual exhibits.

79. Azerbaijan argues that this objection is frivolous because it is "based on misstatements of both law and fact."[133] But it is Azerbaijan's opposition that is premised on misstatements of law and fact, for the following reasons.

80. *First*, in an attempt to undermine Armenia's showing that there was no dispute between the Parties until 28 June 2022,[134] Azerbaijan criticizes Armenia for seeking to exclude from the negotiation record exchanges on "procedural modalities."[135] This is a straw man. To be clear, Armenia does *not* contend that exchanges concerning procedural modalities are not relevant for the negotiation requirement. After all, this was *Azerbaijan's* position before the ICJ, and that argument was flatly rejected by the Court.[136] The basis on which Armenia argues that such exchanges (and others) should be excluded *in this case* is because they occurred *before the alleged dispute arose*. As such, these exchanges are not relevant to determining whether Azerbaijan made a genuine attempt to settle the *dispute* through negotiations.

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[131] *See* Memorial on Preliminary Objections, Chapter II.B; *id.*, ¶ 72; Statement of Claim, ¶ 137.

[132] *See* Memorial on Preliminary Objections, Chapter II.B.

[133] Opposition to Bifurcation, ¶ 68.

[134] Memorial on Preliminary Objections, ¶¶ 97-107.

[135] Opposition to Bifurcation, ¶ 70.

[136] *See Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia* v. *Azerbaijan), Preliminary Objections,* Judgment (12 Nov. 2024) (**ARL-0105**)*,* ¶ 54. Armenia notes that in that case there was no question of exchanges occurring before the dispute arose because Azerbaijan had unequivocally "reject[ed] Armenia's allegations as set forth in its [notice letter]." *Id.*, ¶ 53. It was therefore undisputed that Azerbaijan positively opposed Armenia's claims from the very beginning of the Parties' exchanges. This is not the case here.

81. *Second*, Azerbaijan appears to conflate the requirement of negotiations with the requirement of the existence of a dispute, which is impermissible.[137] It states, for example, that the *Georgia v. Russia* case is inapposite, notwithstanding the fact that the Court in that case "found that because a 'dispute' did not crystallize until a relatively late date, prior interactions between the parties could not be considered for purposes of a negotiation requirement."[138] Azerbaijan is of the view that the case is inapposite because it "presented Armenia with a Notice of Dispute specifically referencing the Bern Convention and Armenia's violations thereof."[139] It then proceeds to cite case law showing that "'specific references' to the relevant instrument are sufficient to show that an exchange […] forms part of negotiations."[140] This may be so, but this does not meet Armenia's objection. The "specific references" to the relevant instrument in all of the cases Azerbaijan cites concerned whether the *negotiation* requirement had been fulfilled, not the separate requirement of the existence of a *dispute*.[141] If anything, these cases confirm that a dispute must have *already arisen* in order for exchanges to be considered relevant to the negotiations precondition (as these exchanges must relate *to the dispute*). As Armenia has explained, this interpretation follows logically from the fact that the negotiation precondition requires "a genuine attempt by one of the disputing parties to engage in discussions with the other

[137] *See Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011* (**ARL-0059**), p. 132, ¶ 157 (explaining that the concept of "negotiations" differs from the concept of "dispute.").

[138] Opposition to Bifurcation, ¶ 70.

[139] *Id.*

[140] *Id.*

[141] *See Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2019* (**ARL-0077**), p. 603, ¶ 119; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia* v. *Azerbaijan), Preliminary Objections,* Judgment (12 Nov. 2024) (**ARL-0105**), ¶ 53 ("The Court notes that the Parties began exchanging written correspondence *related to the present dispute* under CERD in November 2020 […] In the Court's view, [] specific references to CERD [in four letters exchanged between the parties] show that the subject-matter of these exchanges related to the subject-matter of the Convention.") (emphasis added); *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates), Provisional Measures, Order of 23 July 2018, I.C.J. Reports 2018* (**ARL-0074**), p. 420, ¶ 38. Armenia notes with regard to the latter case that the existence of a dispute had not been disputed by the parties. In any event, it is well established that silence can be interpreted as positive opposition in certain circumstances, such that the UAE's silence in that case could both constitute the United Arab Emirates' positive opposition and establish that negotiations had failed. *See, e.g.*, *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine* v. *Russian Federation: 32 States Intervening)*, Preliminary Objections, Judgment (2 Feb. 2024) (**ARL-0100**), p. 581, ¶ 45.

disputing party, *with a view to resolving the dispute*."[142] Simply put, there is nothing to negotiate until a dispute arises between the parties.

82. Because Azerbaijan mischaracterizes the legal issue at play, it fails to engage with Armenia's well-supported argument that there could be no "dispute" under the Bern Convention between the Parties until 28 June 2022.[143] In particular, Azerbaijan fails to address the well-established rule that statements can only give rise to a dispute if they refer "to the subject-matter of a claim *with sufficient clarity* to enable the State against which [the] claim is made to identify that there is, or may be, a dispute with regard to that subject-matter," by "articulat[ing] an alleged breach" but also the "particulars" of the conduct giving rise to it.[144] Accordingly, Azerbaijan fails to engage with Armenia's argument that Azerbaijan's claims were too vague to give rise to a dispute until Azerbaijan's letter of 26 April 2022.[145] Nor does Azerbaijan discuss the rule from the ICJ's established case law that the existence of a dispute "turns on the evidence of opposition of views" and is established only if it can be shown that "the claim of one party is positively opposed by the other."[146] As a result, Azerbaijan also fails to address the fact that Armenia did not "positively oppose" Azerbaijan's claims until 28 June 2022.[147]

83. *Second*, on the issue of Azerbaijan's failure to make a genuine attempt to negotiate, Azerbaijan argues that Armenia "mischaracterizes the record of negotiations," and Azerbaijan adduces different facts in support of its view that its attempt at negotiating was indeed genuine.[148] But Armenia has also presented substantial arguments and factual evidence in support of its view that Azerbaijan's attempt was not genuine.[149] The very volume of that evidence makes clear that its objection is not frivolous. It is thus for the Tribunal to evaluate the evidence, in a

[142] Memorial on Preliminary Objections, ¶ 97 (emphasis added).

[143] *Id.*, ¶¶ 97-107.

[144] *Id.*, ¶ 99 (citing *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 2016* (**ARL-0070**), pp. 853-854, 856, ¶¶ 49-51, 57.

[145] Memorial on Preliminary Objections, ¶¶ 100-105.

[146] *Id.*, ¶ 99 (citing *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 2016* (**ARL-0070**), pp. 849, 856, ¶¶ 37, 57).

[147] Memorial on Preliminary Objections, ¶ 106.

[148] Opposition to Bifurcation, ¶¶ 71-72.

[149] Memorial on Preliminary Objections, ¶¶ 78-93.

bifurcated preliminary objections phase, and decide whether the factual evidence supports Armenia's contention.

84. Azerbaijan also suggests that statements made outside of bilateral negotiations "and not even referencing the Bern Convention"[150] cannot show a lack of sincerity in negotiations.[151] Armenia is puzzled as to why that would be the case, and Azerbaijan has cited no authority in support of that point. In this case, *the very same State official* who led Azerbaijan's delegation in purported negotiations under the Bern Convention and is its designated Agent in these proceedings *simultaneously* publicly proclaimed Azerbaijan's unequivocal intent to file a lawsuit. It is common sense that such statements would give rise to serious doubts as to the genuineness of Azerbaijan's purported attempt to negotiate.[152]

85. In any event, the ICJ *has* relied on statements made by States outside of bilateral negotiations to determine whether a negotiation requirement had been fulfilled.[153] If such statements can be relied on to conclude that the negotiation precondition has been fulfilled, *a fortiori*, they can also be relied on to arrive at the opposite conclusion.

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[150] Once again Azerbaijan seems to suggest that the statements Armenia referred to at paragraphs 80-83 of its Memorial on Preliminary Objections were actually not about the Bern Convention, although these statements expressly referred to "damage to the environment" or the "ecology" in Nagorno-Karabakh, which is at the heart of Azerbaijan's claims in these proceedings. These statements also explicitly referred to claims under international conventions, "international arbitration" and "international courts." *See* Memorial on Preliminary Objections, ¶¶ 80-82 (and citations therein). Azerbaijan still fails to identify what other lawsuit against Armenia these statements possibly could have been referring to.

[151] Opposition to Bifurcation, ¶ 73.

[152] *See* Memorial on Preliminary Objections, ¶ 80 (citing C. Safarli, "Azerbaijan to file two lawsuits against Armenia in 2022 – MFA," *Trend News Agency* (8 Dec. 2021) (**AR-0033**)).

[153] *See, e.g.*, *Appeal relating to the Jurisdiction of the ICAO Council under Article 84 of the Convention on International Civil Aviation (Bahrain, Egypt, Saudi Arabia and United Arab Emirates* v. *Qatar), Judgment, I.C.J. Reports 2020* (14 Jul. 2020) (**ARL-0138**), p. 112, ¶ 96 ("The Court considers that, as of the close of the Extraordinary Session, settlement of the disagreement by negotiation within ICAO was not a realistic possibility. *The Court also takes into account developments outside of ICAO.* Diplomatic relations between Qatar and the Appellants had been severed on 5 June 2017, concurrently with the imposition of the aviation restrictions. *Senior officials of the Appellants stated that they would not negotiate with Qatar, recalling the demands that they had addressed to Qatar*. There is no indication that the positions of the Parties as to the aviation restrictions changed between the imposition of those restrictions and the filing of Qatar's application before the ICAO Council on 30 October 2017. *Under these circumstances*, the Court considers that, at the moment of the filing of Qatar's application before the ICAO Council, there was no reasonable probability of a negotiated settlement of the disagreement between the Parties regarding the interpretation and application of the Chicago Convention, whether before the ICAO Council or in another setting.") (emphasis added).

86. Azerbaijan also utterly fails to address Armenia's other factual basis for its position that the negotiations were not genuine, namely, that Azerbaijan categorically refused to involve the Standing Committee's expertise in the purported dispute.[154]

87. *Third*, concerning the reasonable prospects of further negotiations, Azerbaijan's only argument is that Armenia allegedly did not provide factual support for the claim that "the Parties had made significant progress in the negotiations."[155] This assertion is not true. Armenia has notably explained that: after the dispute arose, Armenia (i) "actively participated in two rounds of meetings with Azerbaijan and replied promptly to Azerbaijan's correspondence;"[156] (ii) "presented numerous detailed questions and comments on both jurisdictional and merits issues;"[157] (iii) Armenia's position was evolving during the negotiations and "[d]uring the 19 June 2022 meeting, 'Armenia […] responded positively to certain requests made by Azerbaijan at the Parties' 5 May [2022] meeting, and presented specific proposals to Azerbaijan in that regard";[158] and (iv) by 25 August 2022, Armenia expressed the view that "an amicable solution might be reached 'with regard to the merits claims without having an agreement on threshold issues,'" and proposed to "mov[e] forward with the discussions on the merits issues."[159]

88. *Finally*, Azerbaijan claims that Armenia "suggests that a different standard would apply for its own counterclaims" because Armenia stated that "if the Tribunal were to find that it has jurisdiction over Azerbaijan's claims," it would "present counter-claims in respect of Azerbaijan's environmental misconduct as concerns both Nagorno-Karabakh and Armenian territory."[160] Aside from bearing no relevance to the seriousness of Armenia's objection, Azerbaijan's assumption is false: Armenia never suggested that a "different standard" would apply with regard to the negotiation requirements for its counter-claims, or that it would attempt to bypass this requirement in any way. Armenia's statement merely implied that if the Tribunal

[154] *See* Memorial on Preliminary Objections, ¶ 84. Azerbaijan merely suggested that this point was contradicted by Armenia's argument that the Standing Committee Procedure is a mandatory precondition to the Tribunal's jurisdiction. As explained above, this is false. *See supra* ¶ 75.

[155] Opposition to Bifurcation, ¶ 73.

[156] Memorial on Preliminary Objections, ¶ 108.

[157] *Id.*, ¶ 108.

[158] *Id.*, ¶ 112.

[159] *Id.*, ¶ 109.

[160] Opposition to Bifurcation, ¶ 75 (citing Memorial on Preliminary Objections, ¶ 19).

found that it had jurisdiction *ratione materiae* over Azerbaijan's claims, it would also have jurisdiction *ratione materiae* over Armenia's counterclaims with regard to Azerbaijan's environmental misconduct.

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89. In short, Azerbaijan has conceded that Armenia's objections under Article 18 are exclusively preliminary in character and has adduced no argument that could remotely put into question the seriousness of those objections. These objections must therefore be heard in a preliminary phase.

B. Armenia's Objection Relating to the Applicability of Articles 2, 3, 4, 6, and 7 to Alleged Conduct in the "Affected Area"

90. Armenia's third objection is that the Tribunal has no jurisdiction *ratione materiae* over Azerbaijan's claims under Articles 2, 3, 4, 6, and 7 of the Bern Convention insofar as they relate to the "Affected Area" because those provisions do not impose obligations on a Contracting Party in respect of an area outside its sovereign territory and in which it allegedly exercised "effective control."[161]

91. Azerbaijan contends that this objection "hinges on a mischaracterization of Azerbaijan's claims," which "do not assert or require broad extraterritorial application of the Bern Convention, but instead application of the Convention within Armenia's own territory (in relation to transboundary harm) and *other territory under Armenia's jurisdiction and control (i.e. the Affected Area)*."[162] It is difficult to see where the "mischaracterization" lies. Armenia's objection is precisely directed at Azerbaijan's latter claims, which involve the extraterritorial application of the Bern Convention.

92. Azerbaijan then puts forward three grounds for opposing the preliminary treatment of Armenia's objection: *first*, Azerbaijan argues, Armenia's objection "does not possess an exclusively preliminary character";[163] *second*, even if successful, the objection "would not result

[161] *See* Memorial on Preliminary Objections, Chapter III.A.

[162] Opposition to Bifurcation, ¶ 23 (emphasis added).

[163] *Id.*, ¶¶ 24-29.

in a material reduction in the scope of complexity of the proceeding";[164] and *third*, it is "insufficiently serious or substantial to warrant bifurcation."[165] Each of these arguments is wrong.

93. As explained above, the Tribunal's primary inquiry is whether the objection possesses an exclusively preliminary character. Armenia's objection, which involves a pure legal question, is exclusively preliminary in character and can be decided at a preliminary stage without prejudging the merits (**Section B.1**). If granted, and contrary to Azerbaijan's position, it would result in a material reduction of the scope of Azerbaijan's case (**Section B.2**). Under Article 14(4), the Tribunal must therefore "rule on [this] objection in a preliminary phase." And to the extent that the Tribunal may consider it relevant to assess the *prime facie* "seriousness" of the objection (*quod non*), Azerbaijan has failed to show that Armenia's objection is frivolous (**Section B.3**).

1. The Objection Possesses an Exclusively Preliminary Character

94. In essence, Armenia's objection boils down to a purely legal question, which can be answered solely on the basis of the established rules of treaty interpretation: do Articles 2, 3, 4, 6, and 7 impose obligations on a Contracting Party in a territory that is not its sovereign territory but over which it allegedly exercises "jurisdiction and control"? Or to use Azerbaijan's own words, is it legally correct to claim that "[t]he Bern Convention's obligations […] apply to all areas within the effective control of a Contracting Party"?[166] This is a pure question of law that can be decided at a preliminary stage without prejudging the merits (*i.e.* whether Armenia breached those obligations and, importantly, whether Azerbaijan's assertion that Armenia exercised "effective control" over the "Affected Area" is, in fact, correct).

95. Azerbaijan suggests that Armenia's objection "directly concerns the substantive scope or content of each of 'Articles 2, 3, 4, 6 and 7,' and the extent to which [they] confer[] obligations on Armenia in relation to 'conduct occurring in the Affected Area,'"[167] which Azerbaijan claims to be "the determination that the Tribunal will need to make in relation to Azerbaijan's relevant claims on the merits."[168] Setting aside the fact that Armenia's objection

[164] *Id.*, ¶ 30.

[165] *Id.*, ¶ 31.

[166] Statement of Claim, ¶ 159.

[167] Opposition to Bifurcation, ¶ 24.

[168] *Id.*

does not in fact require the tribunal to determine the "substantive scope or content" of any of the Bern Convention's provisions beyond their territorial scope of application, this is not the applicable test. As Armenia explained above, the relevant test is whether the Tribunal has "before it all the necessary facts to decide the question raised [and whether] answering the preliminary objection would determine the dispute, or some elements thereof, on the merits."[169] And even if "[t]he determination […] of […] jurisdiction may touch upon certain aspects of the merits of the case," this is not enough to disregard the exclusively preliminary character of an objection.[170]

96. In this regard, Azerbaijan appears to conflate two distinct exercises. The first one is the interpretation of treaty obligations solely to ascertain their potential applicability to the alleged facts (which are assumed to be true *pro tem*), which does *not* entail any prejudgment of the merits. The second, by contrast, is the interpretation of treaty obligations for the purpose of applying them to the facts of the case (rather than the facts as pleaded by the claimant) to determine whether the obligations have been breached—a process which necessarily entails a determination on the merits.

97. Armenia's objection is confined strictly to the former exercise. It does not invite the Tribunal, for instance, to interpret Articles 2, 3, 4, 6, and 7 to ascertain if they impose obligations of conduct or of result, or which specific measures Armenia was obliged to take under those provisions, and to apply such interpretation to the facts. Rather, Armenia's objection merely requests that the Tribunal determine whether those articles are applicable, in principle, to Armenia in respect of the "Affected Area," assuming Azerbaijan's allegations with respect to Armenia's alleged conduct in relation to the "Affected Area" are true. There is nothing that prevents the Tribunal from determining the "scope and content of treaty obligations" to answer, at a preliminary phase, a legal question regarding the applicability of the Bern Convention. The ICJ has repeatedly made clear that determining its jurisdiction as a preliminary matter "may require […] that the Court *interpret the provisions which have allegedly been violated and which define the scope of the treaty*."[171] Accordingly, the ICJ has frequently engaged in the interpretation of a

[169] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment on Preliminary Objections, I.C.J. Reports 2007* (**AZL-0251**), p. 852, ¶ 51.

[170] *Id.*

[171] *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine* v. *Russian Federation: 32 States Intervening)*, Preliminary Objections, Judgment (2 Feb. 2024) (**ARL-0100**), ¶ 136. *See also Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic*

treaty's obligations, *at a preliminary stage*, in order to determine their normative limits and whether it has jurisdiction thereunder.[172]

98. For example, in its judgment on preliminary objections in *Oil Platforms*, the ICJ determined the substantive scope and content of each provision of the 1955 Treaty of Amity that Iran invoked as having been breached by the alleged actions of the United States. In particular, the Court examined the territorial scope of the fair and equitable treatment standard contained in Article IV, paragraph 1, and whether that standard applied to actions carried out by the United States against Iran itself, as opposed to Iranian nationals and companies as well as their property and enterprises.[173] The Court also ascertained the "meaning to be given to Article I" and whether it was a mere statement of aspiration or imposed actual obligations on the contracting parties.[174] Likewise, it closely assessed whether the term "commerce" in Article X, paragraph 1, was limited to "maritime commerce" and to "acts of purchase and sale."[175]

99. In *Certain Iranian Assets*, the United States objected to the ICJ's jurisdiction over "all claims […] that are predicated on the United States' purported failure to accord sovereign immunity from jurisdiction and/or enforcement to the Government of Iran, Bank Markazi, or Iranian State-owned entities."[176] To answer this objection, the ICJ examined, at the preliminary stage, "each of the provisions on which Iran relies, in order to ascertain whether it permits the question of sovereign immunities to be considered as falling within the scope *ratione materiae* of the Treaty of Amity."[177] The Court did so notwithstanding that several provisions Iran relied on set out substantive obligations for the contracting parties, encompassing the guarantee of

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Republic of Iran v. *United States of America), Judgment on Preliminary Objections, I.C.J. Reports 2021* (**AZL-0273**), pp. 31-32, ¶ 75; *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2019* (**ARL-0077**), p. 584, ¶ 57.

[172] *See id.*; *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996* (**ARL-0029**), pp. 814-815, ¶¶ 27-31.

[173] *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996* (**ARL-0029**), p. 816, ¶¶ 35-36.

[174] *Id.*, pp. 814-815, ¶¶ 29-31.

[175] *Id.*, pp. 817-819, ¶¶ 41-49.

[176] *Certain Iranian Assets (Islamic Republic of Iran* v. *United States of America), Judgment on Preliminary Objections, I.C.J. Reports 2019* (13 Feb. 2019) (**AZL-0267**), p. 25, ¶ 48.

[177] *Id.*, p. 26, ¶ 52.

protection and security for property,[178] freedom of access to courts of justice and administrative agencies,[179] fair and equitable treatment,[180] and freedom of commerce and navigation.[181]

100. Similarly, in *Immunities and Criminal Proceedings*, the ICJ interpreted, at the preliminary stage, multiple substantive provisions of the United Nations Convention Against Transnational Organized Crimes to determine whether they applied to the claims brought by Equatorial Guinea. For instance, the Court looked at whether Article 4 of that convention imposed an obligation on States parties to act in a manner consistent with customary international law relating to immunities of States and State officials.[182] It further interpreted Article 6 of the same convention to find that these provisions do not concern "whether any particular individual has committed a predicate offence abroad" nor "provide for the exclusive jurisdiction of the State on whose territory such an offence was committed."[183] The Court therefore concluded that these provisions did not cover Equatorial Guinea's claims relating to France's extension of its jurisdiction over offences allegedly committed in Equatorial Guinea by and against nationals of Equatorial Guinea.[184]

101. In all these cases, the ICJ undertook a thorough process of treaty interpretation, guided by the established rules set out in Articles 31 and 32 of the VCLT. This interpretive process involved a careful examination of the ordinary meaning of the relevant substantive provisions, considered in their context and in light of the object and purpose of the treaty as a whole. Where appropriate, the Court also took into account the subsequent practice of the parties in applying its terms and the negotiating history of the treaty. This process is precisely what Azerbaijan contends the Tribunal *cannot* undertake in relation to Articles 2, 3, 4, 6, and 7 of the Bern Convention at a preliminary stage. Azerbaijan's position is thus flatly contradicted by the ICJ's established case law.

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[178] *See id.*, pp. 27-28, ¶¶ 53-58.

[179] *See id.*, pp. 30-32, ¶¶ 66-70.

[180] *See id.*, pp. 32-33, ¶¶ 71-74.

[181] *See id.*, pp. 33-34, ¶¶ 75-80.

[182] *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Preliminary Objections, Judgment, I.C.J. Reports 2018* (**ARL-0137**), pp. 320-323, ¶¶ 90-102.

[183] *Id.*, pp. 327-328, ¶¶ 115-116.

[184] *Id.*, p. 328, ¶ 117.

102. It is also contradicted by the practice in investment arbitration, on which Azerbaijan so heavily relies. Indeed, in several investor-State arbitrations brought by Ukrainian investors against Russia following its annexation of the Crimean Peninsula, arbitral tribunals have addressed similar questions in a separate jurisdictional phase.

103. In *PJSC CB PrivatBank v. Russia*, for example, the claimants contended that measures allegedly taken by Russia in February-March 2014—culminating in the annexation of Crimea—and subsequently actions directed at PrivatBank, violated the claimants' rights under the bilateral investment treaty between Ukraine and Russia ("**Ukraine-Russia BIT**") in respect of their investment in a banking network in the peninsula.[185] The principal question facing that tribunal was the application of the Ukraine-Russia BIT in respect of the Crimean Peninsula from February 2014 as a result of the change in character of the peninsula from being part of Ukraine to a territory that was "incorporate[d] […] into the Russian Federation," and "for the international relations of which the Russian Federation ha[d] become responsible."[186] To answer the question—which it considered a "threshold jurisdictional issue"[187] and decided at the preliminary stage—the *PrivatBank* tribunal engaged in an analysis of the language of the BIT, Article 29 of the VCLT, the law on State succession, and the parties' conduct in respect of the peninsula and the BIT.[188]

104. Similarly, the tribunal in *Stabil LLC et al v. Russia* dealt with the territorial application of the Ukraine-Russia BIT in the Crimean Peninsula in a bifurcated jurisdictional phase. It assessed the ordinary meaning of the term "territory" as contained in Article 1(4) of the treaty, its context, the object and purpose of the treaty, its *travaux préparatoires*, and the principle of good faith, and examined Russia's actions to incorporate Crimea into its territory.[189]

105. If, as Azerbaijan suggests, any objections involving the interpretation of the scope and content of treaty obligations to determine their applicability to the alleged facts should be

[185] *PJSC CB PrivatBank & Finance Company Finilon LLC v. Russia*, PCA Case No. 2015-21, Interim Award (Corrected) (27 Mar. 2017) (**ARL-0135**), ¶ 3.

[186] *Id.*, ¶¶ 162-163, 180, 250.

[187] *Id.*, ¶¶ 141-142.

[188] *See id.*, ¶¶ 166-187.

[189] *See Stabil LLC et al v. Russia*, PCA Case No. 2015-35, Award on Jurisdiction (26 Jun. 2017) (**ARL-0136**), ¶¶ 131-174.

joined to the merits, the range of objections that could be addressed at the preliminary stage would be severely limited. Indeed, scarcely any objections would be suitable for early determination. Such an approach would undermine the purpose of preliminary objections, which is to allow international courts and tribunals to resolve threshold issues of jurisdiction and admissibility efficiently, without unnecessarily proceeding to a full examination of the merits. As explained above, doing so would also be inconsistent with the basic rule in inter-State proceedings that jurisdiction is based on consent and that a State should not be required to give account of itself on issues of merits until the requisite consent has been established.[190]

106. Azerbaijan asserts that "international tribunals have repeatedly found that similar objections requiring in-depth assessments of the scope and content of treaty obligations and related facts do not possess an exclusively preliminary character and should be joined to the merits."[191] It relies on four cases, but provides little to no analysis of the relevant objections or why they are "similar" to Armenia's objection.[192] On a proper analysis, these cases are of no assistance to Azerbaijan because, *first*, none of the objections that were joined to the merits was the same type of objection as Armenia's objection; and *second*, in any event, their outcomes were fact and issue-dependent.

107. To begin with, in *Guyana v. Suriname*, Guyana raised three claims under UNCLOS, and Suriname objected to the tribunal's jurisdiction over and/or the admissibility of all three claims. Without specifying the objection it wishes to discuss, Azerbaijan simply asserts that "the tribunal rejected Suriname's request to bifurcate an objection related to whether the dispute fell within the scope of [UNCLOS's] dispute resolution provision."[193] It appears that Azerbaijan is referring to Suriname's objection to Guyana's request that the tribunal "delimit the maritime boundary between [the two countries] in a line emanating from the Guyana-Suriname land terminus."[194] Suriname raised a jurisdictional objection over this claim on the basis that there was "no agreed land boundary terminus upon which the tribunal can rely in its analysis of the

[190] *See supra* ¶ 22.

[191] Opposition to Bifurcation, ¶ 25.

[192] *Id.*, ¶¶ 25-28.

[193] *Id.*, ¶ 25.

[194] *Delimitation of Maritime Boundary (Guyana v. Suriname)*, PCA Case No. 2004-04, Guyana's Notification and Statement of Claim (24 Feb. 2004) (**ARL-0127**), ¶ 33(1).

maritime boundary."[195] Azerbaijan does not articulate why this objection is "similar" to Armenia's objection in the present case, other than the fact that the "scope" of a treaty was also at issue. In fact, the two objections differ fundamentally.

108. Suriname's objection essentially disputed whether a point on the west bank of the Corentyne River—recommended by a Mixed Boundary Commission in 1936 to be fixed as the northern end of the border between British Guiana and Suriname—could constitute the land boundary terminus for the purpose of maritime delimitation.[196] In order to determine Suriname's objection, therefore, the tribunal would have had to examine, *inter alia*, the history of negotiations and other practices of the parties and their colonial predecessors, the geographical location of the point, and its impact on maritime entitlements.[197] In other words, Suriname's objection not only required the tribunal to actually settle a factual and legal dispute, but also asked the tribunal to make determinations that would prejudge the maritime delimitation between the parties—the very task the tribunal was asked to carry out at the merits stage.

109. By contrast, Armenia's objection relates to a threshold legal issue concerning the applicability of the Bern Convention obligations to a Contracting Party in respect of a territory that was allegedly under its effective control. Deciding that issue requires *no* factual analysis, including as to whether the territory was in fact under Armenia's effective control. It would also not prejudge the question of whether, assuming that the Bern Convention *does* apply to a Contracting Party in respect of a territory under its effective control, and that Armenia had such control over the "Affected Area," Armenia actually *breached* these obligations (which Armenia does not dispute would be a question for the merits).

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[195] *Delimitation of Maritime Boundary (Guyana v. Suriname)*, PCA Case No. 2004-04, Procedural Order No. 2 (18 Jul. 2005) (**AZL-0249**), p. 1.

[196] *See Delimitation of Maritime Boundary (Guyana v. Suriname)*, PCA Case No. 2004-04, Award (17 Sep. 2007) (**ARL-0130**), ¶¶ 174-177.

[197] *Id.*, ¶¶ 176 ("Suriname's position is that if there is no agreement on the maritime boundary in the territorial sea, there has been no agreement between the Parties or their colonial predecessors as to the location of the land boundary terminus, and that the Tribunal therefore lacks jurisdiction to resolve Guyana's first claim. Suriname's interpretation of the history of negotiations and other practices of the Parties and their colonial predecessors is that the 1936 Point has never been regarded as definitive."), 177 ("In Suriname's view, the precise location of the land boundary terminus makes a substantial difference to the maritime entitlements in this case, referring in particular to an analysis using Point X (6° 08′ 32″N, 57° 11′ 22″W), the position Suriname considers to be the most northerly possible location for a land boundary terminus. Suriname contends that the 1936 Point is not located where the western bank of the Corantijn River joins the sea, being the reference point established in the 1799 Agreement of Cession, and cites, *inter alia*, instances where the land boundary terminus has been referred to without mention of the 1936 Point.").

110. The second case on which Azerbaijan relies is the *Coastal State Rights* arbitration, in which the tribunal initially bifurcated Russia's jurisdictional objection that the Sea of Azov and the Kerch Strait are "internal waters" not regulated by UNCLOS but subsequently found the objection not to be of an exclusively preliminary character.[198] Again, Azerbaijan fails to explain how this objection is "similar" to Armenia's objection.

111. In that case, Ukraine instituted that arbitration seeking to affirm its rights as a coastal State in the Black Sea, the Sea of Azov, and the Kerch Strait, following Russia's annexation of Crimea.[199] Russia argued that the tribunal lacked jurisdiction over any of Ukraine's claims relating to the Sea of Azov and the Kerch Strait on the basis that those waters constituted internal waters—a regime not governed by UNCLOS.[200] Ukraine, however, disputed that characterization, asserting that the Sea of Azov is an enclosed or semi-enclosed sea and that the Kerch Strait is a strait used for international navigation.[201] Russia's objection thus raised a dispute regarding the status of those two specific bodies of water, which under UNCLOS, automatically determines what rights and obligations Ukraine would or would not enjoy as a coastal State. Any decision on that issue would have therefore necessarily prejudged the rights of both Ukraine and Russia in those maritime areas, which was precisely the subject matter of Ukraine's claims on the merits.

112. For this reason, the tribunal noted that:

> In order to determine whether the Sea of Azov and the Kerch Strait constitute internal waters, […] the Arbitral Tribunal must examine not only the subsequent agreements between the Parties but also how the Parties have acted vis-à-vis each other or vis-à-vis third States in the above areas. In particular, this would require the Arbitral Tribunal to scrutinize the conduct of the Parties with respect to such matters as navigation, exploitation of natural resources, and

[198] Opposition to Bifurcation, ¶ 26 (citing *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v. the Russian Federation)*, PCA Case No. 2017-06, Award Concerning the Preliminary Objections of the Russian Federation (21 Feb. 2020) (**ARL-0080**), ¶¶ 296-297).

[199] *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v. the Russian Federation)*, PCA Case No. 2017-06, Award Concerning the Preliminary Objections of the Russian Federation (21 Feb. 2020) (**ARL-0080**), ¶¶ 2-3.

[200] *Id.*, ¶ 199.

[201] *Id.*, ¶ 200.

> protection of the marine environment in the Sea of Azov and the Kerch Strait.[202]

113. These determinations involved the close scrutiny of facts asserted by the parties, and concerned the very rights and obligations that Ukraine sought to affirm, namely, its right to "engage in, authorize, and regulate exploration and exploitation of natural resources" and "to authorize and regulate fishing" in the Sea of Azov, its right to passage through the Kerch Strait, and Russia's obligation to "provide all due cooperation to Ukraine in the […] preservation of the marine environment" in the Sea of Azov.[203] The tribunal thus rightly concluded that Russia's objection was not exclusively preliminary in character.

114. A similar objection in this case would have required the Tribunal to determine the legal status of the "Affected Area" under international law. But Azerbaijan cannot plausibly claim that Armenia's objection requires the Tribunal to resolve this question. On the contrary, Armenia's objection accepts *pro tem* Azerbaijan's allegation that the "Affected Area" was not Armenia's sovereign territory but that it was nevertheless under its "effective control" and asks the Tribunal whether, in such a situation, the relevant provisions of the Bern Convention would impose obligations on Armenia in respect of that Area. Armenia's objection does not require the Tribunal to address whether Armenia complied with those obligations, assuming they apply to it in the "Affected Area"—matters which, Armenia acknowledges, relate to the merits of Azerbaijan's claims.

115. The third case on which Azerbaijan relies is *Right of Passage over Indian Territory*. Azerbaijan contends that the ICJ found India's jurisdictional objection not to have an exclusively preliminary character because it was based on a treaty reservation and "would require [the Court] to consider issues related to the scope of the reservation."[204] Simply characterizing an objection as relating to the "scope" of something, however, does not in itself make the objection "similar" to Armenia's objection in this case.

116. In *Right of Passage over Indian Territory*, Portugal sought to have the ICJ recognize its right of passage between the Portuguese territory of Daman, on the west coast of the

[202] *Id.*, ¶ 291.

[203] *Id.*, ¶ 9.

[204] Opposition to Bifurcation, ¶ 27.

Indian subcontinent, and the territories of Dadrá and Nagar-Aveli, which were enclaves within Indian territory, as well as between those two enclaves.[205] Portugal claimed that India had prevented the exercise of this right, in violation of international law, and sought to establish the Court's jurisdiction on the basis of the parties' declarations under Article 36(2) of the Court's Statute.[206] India, however, argued that the Court lacked jurisdiction over Portugal's claims because India's declaration excluded from the Court's jurisdiction "disputes with regard to questions which by international law fall exclusively within the jurisdiction of the Government of India."[207] India contended that Portugal's reliance on treaty, custom, and general principles of law as well as historical evidence to establish its claimed right was "insufficien[t]" to demonstrate that it is a matter regulated by international law.[208] According to India, the question of "passage of Portuguese persons and goods over Indian territory" was:

> [A] question falling exclusively within the jurisdiction of India unless there is clear evidence before the Court either of an express grant of permanent rights of passage by the territorial sovereign to Portugal or of the specific consent of the territorial sovereign to the enjoyment by Portugal of permanent rights of passage.[209]

117. India further presented its own factual evidence to "correct the Portuguese version of the historical matters."[210] As a result, the Court observed that:

> [T]he elucidation of those facts, and their legal consequences, involves an examination of the actual practice of the British, Indian and Portuguese authorities in the matter of the right of passage—in particular as to the extent to which that practice can be interpreted, and was interpreted by the Parties, as signifying that the right of passage is a question which according to international law is exclusively within the domestic jurisdiction of the territorial sovereign. There is the further question as to the legal significance of the practice followed by the British and Portuguese authorities, namely, whether that practice was expressive of the common

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[205] *Case concerning right of passage over Indian territory (Preliminary Objections), Judgment of November 26th, 1957: I.C.J. Reports 1957* (**AZL-0242**), p. 127.

[206] *Id.*, pp. 127-128.

[207] *Id.*, p. 149.

[208] *Case Concerning Right of Passage over Indian Territory (Portugal* v. *India)*, Preliminary Objections of the Government of India (Apr. 1957) (**ARL-0119**), ¶¶ 62-63.

[209] *Id.*, ¶ 156.

[210] *Id.*, ¶ 64.

> agreement of the Parties as to the exclusiveness of the rights of domestic jurisdiction or whether it provided a basis for a resulting legal right in favour of Portugal.[211]

118. India's objection thus involved not just disputed facts, but facts that concerned the existence and legal basis of Portugal's right to passage—the very right that it was seeking to have recognized in the proceedings. There is thus no question that this objection could not be decided "without prejudging the merits."[212] There is, however, no resemblance between India's objection and Armenia's objection in the present case, which involves *no* disputed facts, let alone facts determinative of the merits of Azerbaijan's claims, and instead only requires the Tribunal to determine a pure question of law.

119. Finally, Azerbaijan invokes the decision of the tribunal in the *Energy Charter Treaty Arbitration* to defer to the merits Armenia's objections "that the conduct Azerbaijan alleges is not capable of violating" Articles 18 and 7 of the Energy Charter Treaty ("**ECT**").[213] But again, this decision is irrelevant to the Tribunal's consideration in the present case.

120. *First*, the ECT tribunal was operating under a different procedural framework for bifurcation, which was based on the 1976 UNCITRAL Rules. As explained above, these rules grant much broader discretion to an arbitral tribunal.[214]

121. *Second*, if anything, the ECT tribunal's reasoning on which Azerbaijan relies supports the preliminary treatment of Armenia's objection in the present case. The ECT tribunal considered that an objection that "could be boiled down to abstract principles—*i.e.* do the obligations apply in times of armed conflict?'" *would* be appropriate for bifurcation.[215] Armenia's objection here is precisely an obligation that "boils down to abstract principles," namely, do the obligations under Articles 2, 3, 4, 6, and 7 of the Bern Convention apply to a Contracting Party in respect of an allegedly occupied territory? It is a purely legal question that does *not* require the

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[211] *Case concering right of passage over Indian territory (Preliminary Objections), Judgment of November 26th, 1957: I.C.J. Reports 1957* (**AZL-0242**), p. 150.

[212] *Id.*

[213] Opposition to Bifurcation, ¶ 28.

[214] *See supra* ¶ 27.

[215] *Energy Charter Treaty Arbitration (The Republic of Azerbaijan v. The Republic of Armenia)*, PCA Case No. 2023-65, Decision on Bifurcation (13 Feb. 2025) (**AZL-0279**), ¶ 88.

Tribunal to enter "nuanced debates about the actual character of the conduct alleged, and the degree to which those allegations are (or are not) supported by persuasive evidence."[216]

122. *Third*, the ECT tribunal's decision to bifurcate two objections raised by Armenia in that case provides strong support for the preliminary treatment of Armenia's objection here. In particular, the ECT tribunal observed that Armenia's objection relating to Article 18 of the ECT "presents the discrete issue of whether [that article] contains an obligation giving rise to an independent cause of action […] or whether it is merely hortatory or interpretative."[217] It further noted that Armenia's objection relating to Article 7 of the ECT "presents the equally discrete question of whether the dispute resolution mechanism under Article 7(7) is mandatory and exclusive."[218] The tribunal concluded that since these objections "are entirely legal in nature" they were "appropriate for resolution in a preliminary proceeding."[219] Applying the same rationale, Armenia's objection in this case is also a pure issue of law and must likewise be bifurcated.

123. Having failed to explain how any of the cited cases demonstrate that Armenia's objection does not possess an exclusively preliminary character, Azerbaijan asserts that, in order to decide Armenia's objection:

> [T]he scope and content of each of these obligations would need to be analyzed, taking into account the text of the Convention, its object and purpose, subsequent agreement and practice, including as reflected in the work of the Standing Committee, and the negotiating history of the Convention. In addition, to determine whether Armenia's obligations under Articles 2, 3, 4, 6, and 7 applied in the Affected Area, the Tribunal would need to consider the nature of each obligation and whether it is *applicable* based on Armenia's jurisdiction and control over the Affected Area, including through its Installed Regime.[220]

124. But Armenia's objection does *not* require the Tribunal to decide whether Armenia had "jurisdiction and control over the Affected Area," but rather at this stage accepts that assertion *pro tem*. Azerbaijan is thus wrong to claim that the Tribunal "would need to consider the question

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[216] *Id.*, ¶ 88.

[217] *Id.*, ¶ 87.

[218] *Id.*

[219] *Id.*

[220] Opposition to Bifurcation, ¶ 29 (emphasis added).

of Armenia's exercise of effective control over the Affected Area."[221] As Armenia makes abundantly clear in its Memorial, its objection is that "the obligations which Azerbaijan invokes do not bind Armenia in respect of the alleged conduct occurring in the 'Affected Area' *even if* […] Armenia could be characterized as having 'occupied' that area."[222] The Tribunal thus need not delve at all into the question of whether and how Armenia "exercise[d] […] effective control" in the "Affected Area."

125. Azerbaijan's characterization of the task before the tribunal is otherwise nothing more than an exercise of pure treaty interpretation. In Azerbaijan's own words as quoted above, the Tribunal is not required to *apply* the provisions to Armenia's alleged conduct in respect of the "Affected Area," but rather needs only determine if the provisions are "*applicable*,"[223] a task that is, as discussed above, exclusively preliminary in character and does not prejudge the merits.

2. The Objection Would Result in a Material Reduction of the Scope of the Case

126. Azerbaijan also claims that Armenia's objection, if granted, "would not result in a material reduction in the scope and complexity of the proceeding."[224] Azerbaijan is wrong.

127. Azerbaijan first claims that Armenia's objection would not entirely dispose of Azerbaijan's claims under Articles 2, 3, 4, 6, and 7.[225] This misses the point, namely that Armenia's objection will dispose of a substantial part of those claims.

128. Azerbaijan asserts three bases for Armenia's alleged obligations in the "Affected Area": *first*, that Armenia was obliged to "observe and implement the Bern Convention obligations within the Affected Area," which was purportedly "under Armenia's effective control and jurisdiction from the early 1990s until the liberation in 2020";[226] *second*, that "the nature of many of the Bern Convention's obligations means that observing those obligations required Armenia to take affirmative steps to control the activities of persons or entities under its

[221] *Id*.

[222] Memorial on Preliminary Objections, ¶ 120 (emphasis added).

[223] Opposition to Bifurcation, ¶ 29.

[224] *Id.*, ¶ 30.

[225] *Id.*

[226] Statement of Claim, ¶ 160; Opposition to Bifurcation, ¶ 23.

jurisdiction, control, or influence, that could result in harms to species and habitats […] in the Affected Area";[227] and *third*, that "Armenia is […] required to observe the Bern Convention's obligations with respect to conduct that occurs within Armenia but has a transboundary effect in Azerbaijan."[228]

129. Azerbaijan claims that Armenia's objection does not materially reduce the claims before the Tribunal because it does not address Azerbaijan's second argument[229] notwithstanding the fact that Armenia's Memorial expressly does so.[230] Azerbaijan also argues that Armenia "conflates" these alleged obligations "with those arising out of its effective control of the Affected Area."[231] Azerbaijan, however, fails to explain how, in Azerbaijan's own words, "persons or entities […] who were acting in the Affected Area"[232] can be said to have been "under Armenia's jurisdiction, control or influence" without Armenia having had "effective control" in the area.

130. Apart from the passage cited above, Azerbaijan refers to Armenia's obligations with respect to "actors under [its] jurisdiction and influence" in only four other paragraphs in its Statement of Claim.[233] In three of those, the relevant obligation which Azerbaijan invokes is the

[227] Statement of Claim, ¶ 161; Opposition to Bifurcation, ¶ 23.

[228] Statement of Claim, ¶ 162; Opposition to Bifurcation, ¶ 23.

[229] Opposition to Bifurcation, ¶ 23.

[230] *See* Memorial on Preliminary Objections, ¶¶ 167, 172-175 ("Finally, Azerbaijan asserts that 'the nature of many of the Bern Convention's obligations means that observing these obligations required Armenia to take affirmative steps to control the activities of *persons or entities under its jurisdiction, control, or influence*, that could result in harms on species and habitats outside Armenia.' Azerbaijan relies on the advisory opinion on climate change of ITLOS […]. This opinion […] is irrelevant to the territorial application of the Bern Convention.") (emphasis added). Azerbaijan claims that Armenia "briefly acknowledges its obligations in respect of persons or entities under its jurisdiction, control, or influence" in the "Affected Area." Opposition to Bifurcation, ¶ 30. Armenia never made any such acknowledgement.

[231] Opposition to Bifurcation, ¶ 30.

[232] *Id.*, ¶ 37.

[233] Statement of Claim, ¶¶ 201, 211, 256, 364. Additionally, Azerbaijan refers generally to the obligation to "control … activities which may indirectly result in [harm to species and habitats]" in several other paragraphs but does not specify that such an obligation relates to actors under Armenia's "jurisdiction, control, or influence" or provide further explanation. *See* Statement of Claim, ¶¶ 218, 263, 266, 273, 294, 303.

prevention of transboundary harm,[234] to which this objection does not relate,[235] and which is subsumed within Azerbaijan's third argument. In the last paragraph, Azerbaijan argues that under Article 4(1), Contracting Parties "must not only implement but also *enforce* the necessary and appropriate legislative and administrative measures, including by controlling the activities of actors within their jurisdiction and control."[236] Here again, Azerbaijan says nothing about how Armenia's enforcement obligations could extend to actors in the "Affected Area"—as those under Armenia's "jurisdiction and control"—without its alleged "effective control" over the area.

131. The ITLOS Climate Change Advisory Opinion on which Azerbaijan seeks to rely does not elucidate Azerbaijan's ambiguous legal argument. In that advisory opinion, ITLOS held that "the obligation to take measures necessary to protect and preserve the marine environment requires States to ensure that non-State actors under their jurisdiction or control comply with such measures."[237] This finding makes clear that the implementation and enforcement of the relevant measures are subject to the limits of "jurisdiction and control," which Azerbaijan must demonstrate in respect of actors in the "Affected Area." In any event, as Armenia explained in its Memorial, the concept of "jurisdiction and control" in the specific context of UNCLOS is distinct from Azerbaijan's "effective control" theory.[238] It also does not encompass "influence"—a term that Azerbaijan seems to have plucked out of thin air.

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[234] *Id.*, ¶¶ 201, 211, 364 (arguing that "Armenia's obligations under Article 2 also required Armenia to take necessary and appropriate steps to avoid transboundary impacts of activities within Armenia or by actors under Armenia's jurisdiction and influence," that Armenia "has been and continues to be responsible to take requisite measures with respect to conduct within Armenia or by actors under its jurisdiction and influence that has transboundary impacts on species populations in violation of Article 2," and that "these obligations [referring to Articles 2, 3, 4, 4(3), 6, and 7] also required Armenia to take necessary and appropriate steps to avoid transboundary impacts of activities within Armenia or by actors under Armenia's jurisdiction and influence.

[235] Armenia made clear in its Memorial that this objection relates to conduct occurring in the "Affected Area" only, not conduct occurring in Armenia with transboundary effect. It is for this reason that Armenia noted that Azerbaijan "does not claim that conduct in Armenian territory has transboundary effects in the 'Affected Area.'" Memorial on Preliminary Objections, ¶ 167. The alleged harm in the "Affected Area" is not the result of the alleged pollution to the Voghji (Okhchuchay) River. Memorial on Preliminary Objections, ¶ 3, Chapter III. *See also* Opposition to Bifurcation, ¶ 30.

[236] Statement of Claim, ¶ 256 (emphasis in the original).

[237] *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law,* ITLOS Case No. 31, Advisory Opinion (21 May. 2024) (**AZL-0196**), ¶ 396.

[238] Memorial on Preliminary Objection, ¶ 172-175.

132. However the legal basis for Azerbaijan's second argument might be interpreted, it undoubtedly involves the application of the Convention to a territory allegedly under the "effective control" of a Contracting Party, and thus falls within the scope of Armenia's objection.

133. Armenia's objection thus responds to two out of three purported legal bases for Azerbaijan's claims in the "Affected Area," with the only exception being its transboundary harm claims. Apart from approximately 15 pages specifically addressing transboundary harm,[239] Azerbaijan devotes the bulk of its more-than-200-page Statement of Claim to its claims related to Armenia's alleged obligations in respect of the "Affected Area" by virtue of its alleged "effective control" over it. In Azerbaijan's own words, it is "Azerbaijan's *principal* argument that Armenia itself had affirmative obligations under the Convention due to its *effective control* of the territory."[240]

134. The reality is that, if granted, Armenia's objection will limit the scope of Azerbaijan's claims under Articles 2, 3, 4, 6, and 7 solely to the alleged transboundary pollution of the Voghji (Okhchuchay) River. In its Statement of Claim, Azerbaijan claims US$ 20,900,000 as the costs to offset harms to the river, which represents less than 8% of its total compensation claim of US$ 265,179,102.[241] In other words, Armenia's objection would reduce more than 90% of Azerbaijan's case in financial terms. It is thus astonishing for Azerbaijan to claim that this reduction is somehow not meaningful or material.[242]

135. Azerbaijan also argues that Armenia's objection "would not affect Azerbaijan's claims under Articles 4(4) and 11."[243] But Azerbaijan itself concedes that these claims are confined to just two articles and are not included in "the amount of compensation that Azerbaijan seeks in the proceedings."[244] Accordingly, even though Armenia's objection would not dispose

[239] Statement of Claim, pp. 41-44, 63-68, 197-199. Azerbaijan also mentions transboundary harm in fewer than 30 paragraphs in its liability chapter. *See* Statement of Claim, ¶¶ 162, 165, 193, 201, 205, 208, 211–12, 226, 233, 241–42, 266, 274, 282, 288, 290, 303, 310–11, 314, 317, 332, 336, 347, 350, 353, 355.

[240] Opposition to Bifurcation, ¶ 38 (emphasis added).

[241] Statement of Claim, ¶¶ 367, 387.

[242] *See* Opposition to Bifurcation, ¶¶ 21, 30.

[243] *Id.*, ¶ 30.

[244] *Id.*, ¶ 55.

of these claims, it would still lead to a significant reduction in the scope and complexity of Azerbaijan's case.

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136. Because Armenia's objection possesses an exclusively preliminary character and would materially reduce the scope and complexity of Azerbaijan's case, the Tribunal's enquiry may appropriately end here and the objection must be bifurcated. In the alternative and as explained below, even if the seriousness of the objection were relevant (*quod non*), Azerbaijan has also failed to show that the objection is frivolous.

3. In Any Event, Azerbaijan Has Failed to Show That the Objection Is Frivolous

137. Azerbaijan devotes a single paragraph to arguing that Armenia's objection is "clearly without merit" or frivolous.[245] In that paragraph, Azerbaijan says nothing about Armenia's argument (developed over 44 paragraphs) that a proper interpretation of Articles 2, 3, 4, 6, and 7 of the Bern Convention confines those obligations to the sovereign territory of the Contracting Party and that they therefore do not apply to Armenia's alleged conduct in respect of the "Affected Area."[246] Armenia grounded that submission in a comprehensive analysis of the ordinary meaning of the treaty text, its context, the object and purpose of the Convention, and the Parties' adherence to and subsequent practice under the Convention.[247] Azerbaijan leaves equally unaddressed Armenia's further contention that Armenia's alleged "effective control" over the "Affected Area" cannot, as a matter of law, extend the territorial reach of the relevant Convention provisions to Armenia's acts or omissions in that area.[248] This contention is substantiated through a meticulous examination of every legal authority on which Azerbaijan purported to rely, including case law of the ICJ, ITLOS, and the ECtHR, none of which is relevant to, let alone supports, its assertion. In fact, Azerbaijan does not even claim that Armenia's objection is inarguable or has no chance of success.

[245] *Id.*, ¶ 31.

[246] Memorial on Preliminary Objections, ¶¶ 121-165.

[247] *Id.*

[248] *Id.*, ¶¶ 166-176.

138. Instead, Azerbaijan latches on to a single argument that Armenia made in relation to the ordinary meaning of Articles 2 and 3 to mischaracterize Armenia's objection in its entirety as "attacking a strawman."[249]

139. Armenia's argument was that there is no textual basis in either Article 2 or 3 to suggest that they apply extraterritorially, because reading these provisions otherwise "would impose an impossible obligation on Contracting Parties […] to be responsible for wild flora and fauna everywhere" and would "give license to States to extend jurisdiction over wildlife in areas beyond national jurisdiction which is subject to other legal regimes."[250] In making that argument, Armenia sought to demonstrate that the ordinary meaning of these provisions can only be read to indicate that, in principle, they do not apply extraterritorially but only within a Contracting Party's sovereign territory, thus excluding a territory allegedly under its "effective control." To be clear, Armenia does not ask the Tribunal to determine whether the relevant obligations under the Bern Convention apply extraterritorially in the abstract. Indeed, nowhere in its Memorial did Armenia claim this was "the relevant question." The relevant question, as Armenia's Memorial makes abundantly clear, is whether Articles 2, 3, 4, 6, and 7 apply to Armenia's alleged conduct in respect of the "Affected Area."[251]

140. Azerbaijan's misguided argument thus fails to challenge the strength of Armenia's objection at all, let alone to show that it is frivolous.

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141. In conclusion, Azerbaijan has failed to show that Armenia's objection regarding the applicability of relevant obligations under the Bern Convention to Armenia in respect of the "Affected Area" does not possess an exclusively preliminary character or that there exist other compelling reasons for the Tribunal to override the strong presumption in favor of the preliminary treatment of this objection.

[249] Opposition to Bifurcation, ¶ 31.

[250] Memorial on Preliminary Objections, ¶ 125.

[251] *See id.*, ¶¶ 120, 134-137, 149, 151-158, 166-176.

C. Armenia's Objection That Azerbaijan's Claims Cannot Be Resolved Without Determining Prerequisite Questions Governed by the Law of Armed Conflict

142. In its Opposition, Azerbaijan characterizes Armenia's fourth objection as claiming that "its obligations do not apply in the context of occupation."[252] This characterization is misleading. As explained in Armenia's Memorial on Preliminary Objections, Azerbaijan's claim that Armenia had obligations under the Convention *vis-à-vis* the "Affected Area" cannot be addressed unless the Tribunal first determines, as a matter of the law of armed conflict, that Armenia was in fact an Occupying Power.[253] If so (*quod non*), the Tribunal would then need to ascertain the scope of Armenia's obligations under the applicable rules regarding an Occupying Power's obligations to protect the environment in an occupied territory. These are not minor ancillary issues but a prerequisite to the Tribunal's determination of Azerbaijan's claims. They, however, lie outside the Tribunal's jurisdiction.

143. After misrepresenting Armenia's objection, Azerbaijan then begins its opposition to the preliminary treatment of this objection with a litany of attacks on its substance.[254] In fact, these attacks constitute the bulk of Azerbaijan's opposition. They are not only unmeritorious but also irrelevant at this stage. As Armenia explained, whether the objection is sufficiently serious and substantial is *not* the question before the Tribunal. Under Article 14(4), the Tribunal's enquiry begins with assessing whether the objection possesses an exclusively preliminary character, and then the effect of the objection, if granted, on the scope of the case. Azerbaijan has failed to show that the objection is not exclusively preliminary in character (**Section C.1**) and that the objection would not result in a material reduction of the scope and complexity of the case (**Section C.2**). The objection must therefore be heard in a preliminary phase.

144. In the alternative, even if the "seriousness" of the objection were a relevant consideration, Azerbaijan has failed to demonstrate that Armenia's objection is frivolous (**Section C.3**).

[252] Opposition to Bifurcation, Section III.A.3.

[253] Memorial on Preliminary Objections, ¶ 202.

[254] Opposition to Bifurcation, ¶¶ 40-47.

1. The Objection Possesses an Exclusively Preliminary Character

145. In essence, Armenia's objection is that the claims presented by Azerbaijan concerning the Affected Area cannot be resolved simply through the "interpretation or application" of the Bern Convention; rather, they are inescapably governed by the law of armed conflict, both in terms of whether Armenia was an Occupying Power in the Affected Area and, if so, in what rights or obligations Armenia had *vis-à-vis* the environment under the law of armed conflict. Such rights would include, as explained in Armenia's Memorial, the right of usufruct, which, as set out in Article 55 of the 1907 Hague Regulations and reflected in customary international law, grants the Occupying Power the right to administer the immovable properties of the occupied State, including State-owned forests and mines, and to enjoy their proceeds as long as it "safeguards the capital of these properties."[255] This right would naturally be in conflict with obligations under the Bern Convention as pertaining to forests and other immovable properties of the State. Simply put, the Tribunal cannot resolve Azerbaijan's claims without deciding fundamental questions of the law of armed conflict, over which the Tribunal does not have jurisdiction.

146. Azerbaijan again refers to the cases discussed in Sections II and III.B.1 above and claims that "courts and tribunals have repeatedly found that bifurcation is inappropriate where an objection relates to the scope of obligations and to the underlying facts relevant to assessing the nature and substance of the applicant's claims."[256] As noted earlier, however, those cases are of limited assistance to the Tribunal. They do not stand as a general bar on international courts and tribunals considering or determining the scope of treaty obligations (including their substantive scope) and issues of fact at a preliminary stage.[257] Nor can their outcomes be directly transposed to the present case because they turn on the specific claims, objections, and relevant treaty

[255] Hague Regulations (**ARL-0001**), Article 55. *See also* L. Oppenheim & H. Lauterpacht, *International Law: A Treatise*, 7th ed. (D. McKay 1952-1955) (**ARL-0012**), p. 398 (noting that the occupant is "prohibited from exercising [its] right [of usufruct] in a wasteful or negligent way so as to decrease the value of the stock and plant. Thus, for instance, he must not cut down a whole forest, unless the necessities of war compel him"). *See also Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, Advisory Opinion (19 Jul. 2024) (**ARL-0104**), ¶ 124.

[256] Opposition to Bifurcation, ¶ 48.

[257] *See supra* Sections II and III.B.

provisions, and, most importantly, whether answering the specific objection would *prejudge* the merits.[258]

147. In this regard, Azerbaijan seems confused as to the applicable test. It suggests that Armenia's objection "require[s] delving into the scope of each of the relevant Bern Convention obligations and the evidence and arguments underlying Azerbaijan's claims."[259] Relying on *Guyana v. Suriname*, it argues that objections that "involve 'facts and arguments on which the merits of the case depend' are not exclusively preliminary in character."[260] In that case, however, Suriname's objections were considered intertwined with the merits *not* because they merely "*involve*" facts and arguments on which the merits of the case depend, but because "facts and arguments in support of Suriname's [objections] *are in significant measure the same as the facts and arguments on which the merits of the case depend*."[261] That a tribunal has to look at the facts and arguments on the merits—without deciding them—to resolve an objection does not necessarily strip that objection as such of its exclusively preliminary character, however.

148. Azerbaijan once again appears to conflate the distinction between, on the one hand, construing facts to determine if they establish a breach of treaty obligations, which is a *merits* question, and on the other hand, looking at facts and evidence as alleged to determine the real issue raised by such facts and evidence and whether it falls within the scope of the treaty, which is a *preliminary* question. Armenia's objection relates solely to the latter; it calls for a determination at a preliminary stage of the proceeding whether Azerbaijan's claims relating to the Affected Area necessarily entail application of a subject matter area (the law of armed conflict) that falls outside the Tribunal's jurisdiction.

149. Indeed, the ICJ and arbitral tribunals have regularly considered the determination of the subject matter of the claims to possess an exclusively preliminary character. In the *Fisheries Jurisdiction* case, for example, the ICJ had to determine whether the dispute between Spain and Canada concerned Canada's lack of entitlement to exercise jurisdiction on the high seas, as Spain

[258] *See supra* Section III.B.

[259] Opposition to Bifurcation, ¶ 48.

[260] *Id.*, ¶ 49.

[261] *Delimitation of Maritime Boundary (Guyana v. Suriname)*, PCA Case No. 2004-04, Procedural Order No. 2 (18 Jul. 2005) (**AZL-0249**), ¶ 2 (emphasis added).

argued, or concerned the adoption of measures for the conservation and management of fisheries stocks and their enforcement, as Canada contended.[262] This question was significant, since accepting Canada's characterization would have brought the dispute within the scope of one of Canada's reservations to its declaration under Article 36(2) of the ICJ Statute, and thus would have placed it outside the Court's jurisdiction.[263] In its judgment on preliminary objections, the Court observed that "uncertainties or disagreements [might] arise with regard to the real subject of the dispute with which the Court has been seised, or to the exact nature of the claims submitted to it."[264] In such cases, it "cannot be restricted to a consideration of the terms of the Application alone"[265] but has to make an "objective" determination based on "the position of both parties,"[266] as reflected in "*diplomatic exchanges, public statements and other pertinent evidence*."[267] The Court accordingly looked beyond Spain's application to "various written and oral pleadings placed before [it]."[268] It also considered "*specific acts of Canada which Spain contends violated its rights under international law*" which "were carried out on the basis of certain enactments and regulations adopted by Canada."[269]

150. Similarly, in *Alleged Violations of the 1955 Treaty*, the United States objected to the ICJ's jurisdiction on the basis that Iran's claims under the Treaty of Amity exclusively pertained to the United States' decision to withdraw from the Joint Comprehensive Plan of Action concerning the nuclear program of Iran, and thus had no real relationship to the treaty invoked by Iran.[270] In answering this objection in a preliminary phase, the Court determined the "subject-matter of the dispute" "on an objective basis" by looking at Iran's application, the written and

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[262] *Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998* (4 Dec. 1998) (**AZL-0088**), p. 446, ¶ 23.

[263] *Id.*, p. 457, ¶ 61.

[264] *Id*., p. 448, ¶ 29.

[265] *Id.*

[266] *Id.*, p. 448, ¶ 30.

[267] *Id*, p. 449, ¶ 31 (emphasis added).

[268] *Id.*, pp. 449-450, ¶ 33.

[269] *Id.*, p. 450, ¶ 34 (emphasis added).

[270] *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran* v. *United States of America), Judgment on Preliminary Objections, I.C.J. Reports 2021* (**AZL-0273**), p. 24, ¶ 42.

oral pleadings of the parties, and "the facts that the applicant identifies as the basis for its claim."[271]

151. Ascertaining the subject matter of the claims is particularly necessary at a preliminary stage when the "real issue in dispute" is, on the claimant's own case, the reason for the alleged applicability of the instrument it invokes.

152. In the *South China Sea* arbitration, the Philippines brought claims relating to the role of historic rights, the source of maritime entitlements, and the status of certain maritime features in the South China Sea.[272] The Philippines also argued that certain actions of China in that area of the sea violated UNCLOS.[273] China did not participate in the proceedings but published a "Position Paper" in which it explained the reasons why it considered that the tribunal "does not have jurisdiction over [the] case."[274] One such reason was that "[t]he essence of the subject-matter of the arbitration is the territorial sovereignty over several maritime features in the South China Sea, which […] does not concern the interpretation and application of [UNCLOS]."[275] The tribunal decided to bifurcate the proceedings and deal with China's Position Paper, which it treated as constituting "a plea concerning [the] Tribunal's jurisdiction," as a preliminary question.[276] In its Award on Jurisdiction and Admissibility, the tribunal analyzed the submissions, diplomatic communications and other "pertinent evidence" submitted by the Philippines and concluded that while there existed a sovereignty dispute between the parties in the South China Sea, it was not the real dispute presented by the Philippines' claims.[277]

153. Notably, the tribunal observed the importance of ascertaining the nature of the dispute to the question of its jurisdiction:

> The nature of the dispute may have significant jurisdictional implications, including whether the dispute can fairly be said to concern the interpretation or application of the Convention or

[271] *Id.*, p. 26, ¶ 53.

[272] *The South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China)*, PCA Case No. 2013-19, Award on Jurisdiction and Admissibility (29 Oct. 2015) (**ARL-0069**), ¶¶ 4-5.

[273] *Id.*, ¶ 6.

[274] *Id.*, ¶ 14.

[275] *Id.*

[276] *Id.*, ¶ 68.

[277] *Id.*, ¶¶ 150-153.

> whether subject-matter based exclusions from jurisdiction are applicable. Here again, an objective approach is called for, and the Tribunal is required to "isolate the real issue in the case and to identify the object of the claim." In so doing it is not only entitled to interpret the submissions of the parties, but bound to do so.[278]

154. Similarly, in the *Coastal State Rights* arbitration, which, as discussed, concerned Ukraine's claimed rights as a coastal State in the Black Sea, the Sea of Azov, and the Kerch Strait. Russia objected to the tribunal's jurisdiction, *inter alia*, on the basis that Ukraine's claim "would require the Tribunal first to render a decision on sovereignty over Crimea" and "the relative weight of the dispute lies (overwhelmingly) with that sovereignty dispute."[279] Ukraine opposed the bifurcation of Russia's objection, arguing that it was "deeply intertwined with the merits of th[e] case and lack[ed] an exclusively preliminary character."[280] Specifically, Ukraine contended that Russia's objection "call[ed] on the [t]ribunal to consider evidence relevant to the merits of Ukraine's claims as part of a *fact-bound analysis as to where the relative weight of the Parties' dispute lies*."[281] The tribunal, nonetheless, decided to bifurcate the proceedings as it considered Russia's preliminary objections, including the objection that the Tribunal has no jurisdiction over Ukraine's sovereignty claim, "to be of a character that requires them to be examined in a preliminary phase."[282] In its Award on Preliminary Objections, the tribunal engaged in this so-called "*fact-bound analysis*" to determine that there in fact existed a sovereignty dispute over Crimea between Russia and Ukraine[283] which was "a prerequisite to the [tribunal's] decision on a number of claims submitted by Ukraine."[284]

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[278] *Id.*, ¶ 150.

[279] *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v. the Russian Federation)*, PCA Case No. 2017-06, Preliminary Objections of the Russian Federation (19 May. 2018) (**ARL-0113**), ¶ 25.

[280] *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v. the Russian Federation)*, PCA Case No. 2017-06, Procedural Order No. 3 (27 Aug. 2018) (**AZL-0009**), p. 3.

[281] *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v. the Russian Federation)*, PCA Case No. 2017-06, Procedural Order No. 3 (27 Aug. 2018) (**AZL-0009**), p. 3 (emphasis added).

[282] *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v. the Russian Federation)*, PCA Case No. 2017-06, Award Concerning the Preliminary Objections of the Russian Federation (21 Feb. 2020) (**ARL-0080**), ¶ 22.

[283] *See id.*, ¶¶ 162-190.

[284] *Id.*, ¶¶ 151-154, 191-195.

155. The exercise undertaken by the ICJ and various arbitral tribunals is precisely the approach which Armenia invites this Tribunal to adopt—namely, to examine the claims and evidence submitted by Azerbaijan in order to accurately characterize the subject matter of the dispute before it. Contrary to Azerbaijan's suggestion, such an exercise contains *no* "aspects relating to the merits" and does not "delve[] into the disputed facts."[285]

156. *First*, it does not require the Tribunal to decide any disputed issues of fact.

157. *Second*, Armenia's objection does not involve deciding if the relevant facts and arguments would lead to the results alleged by Azerbaijan, namely, that Armenia breached the relevant obligations under the Bern Convention. All it requires is for the Tribunal to consider whether, on Azerbaijan's claims and evidence relating to the "Affected Area," the subject matter of the dispute is inescapably grounded in an interpretation or application of the law of armed conflict. On Azerbaijan's case, Armenia "occupied almost one-fifth of Azerbaijan's territory for almost three decades"[286] and "maintained effective control over the Affected Area through its Installed Regime."[287] Such claims and evidence present the issue of whether Armenia was an Occupying Power within the meaning of the law of armed conflict—an issue the Tribunal simply cannot avoid. For if it was an Occupying Power, rules of international environmental law, including the Bern Convention, do not operate in the same way; rather, the law of armed conflict determines what rights and obligations the Occupying Power has, which may or may not entail adherence to specific rules that would normally operate in peacetime.

158. Azerbaijan also wrongly claims that Armenia's objection asks the Tribunal to "conduct 'a detailed analysis' of the substance of Azerbaijan's claims under Article 2, 3, 4, 6, and 7 of the Bern Convention."[288] It does not. The reference to a "detailed analysis" arises in the context of Armenia's objection in relation to Azerbaijan's claims under Articles 4(4) and 11 of the Convention. This, in turn, refers to the test articulated by the ICJ for determining, at a preliminary stage, whether "the alleged acts […] if established, are capable of constituting

[285] Opposition to Bifurcation, ¶ 49.

[286] Azerbaijan's Notice of Arbitration (18 Jan. 2023), ¶ 28.

[287] Statement of Claim, ¶ 51.

[288] Opposition to Bifurcation, ¶ 48.

violations of" the relevant treaty.[289] Indeed, when making such a determination, the ICJ conducts a detailed analysis of the treaty obligations and the facts as alleged by the applicant and, where appropriate, adopted its own characterization of the facts. While this exercise is exclusively preliminary in character, as Armenia further discusses below,[290] it is not relevant to Armenia's objection here.

159. Ignoring the practice of the ICJ and arbitral tribunals, Azerbaijan relies on the *Chagos Arbitration* in which it claims that the tribunal refused to bifurcate the United Kingdom's objection that Mauritius' claims would require the tribunal to determine the issue of sovereignty over the Chagos Archipelago.[291] According to Azerbaijan, this "confirms" that these types of objection "are not exclusively preliminary in character."[292] Azerbaijan is wrong.

160. In *Chagos*, the relevant rules of procedure provided for a wide discretion of the tribunal to "determine whether objections to jurisdiction or admissibility shall be addressed as a preliminary matter or deferred to the […] final award."[293] Thus, the *Chagos* decision says little about the "exclusively preliminary character" of the United Kingdom's objection, especially since the tribunal never explained its reasoning as to why it denied the objection's preliminary treatment.[294]

161. In light of the above, Azerbaijan has failed to demonstrate that Armenia's objection does not possess an exclusively preliminary character.

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[289] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azerbaijan* v. *Armenia), Preliminary Objections,* Judgment (12 Nov. 2024) (**ARL-0106**), ¶ 91; *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine* v. *Russian Federation: 32 States Intervening)*, Preliminary Objections, Judgment (2 Feb. 2024) (**ARL-0100**), ¶ 136.

[290] *See infra* Section III.D.

[291] Opposition to Bifurcation, ¶ 49.

[292] *Id.*

[293] Rules of Procedure (29 Mar. 2024), Article 11(3).

[294] *See Chagos Marine Protected Area (Mauritius v. United Kingdom)*, PCA Case No. 2011-03, Award (18 Mar. 2015) (**ARL-0068**), ¶¶ 29-31.

2. The Objection Would Result in a Material Reduction of the Scope of the Case

162. Azerbaijan is entirely mistaken to claim that this objection, if successful, "would not dispose of a significant portion of Azerbaijan's claims."[295] It argues that, "like Armenia's so-called 'extraterritoriality' objection, the 'occupation' objection concerns only Armenia's obligations flowing from its effective control of the Affected Area and ignores other bases for Azerbaijan's claims."[296] As explained above, however, this objection—like Armenia's objection concerning the applicability of the Bern Convention to Armenia's conduct in respect of the "Affected Area"—addresses two out of the three bases for Azerbaijan's claims.[297] If accepted, it would confine Azerbaijan's case solely to its claims concerning transboundary harm. This reduction represents more than 90% of Azerbaijan's compensation claim.

163. Azerbaijan also repeats its argument that this objection would not dispose of the claims under Articles 4(4) and 11(1)(a),[298] which are the subject of a separate objection, discussed below. Given the limited scope of these claims which Azerbaijan admits, however, the fact that they would remain would not affect the material reduction of Azerbaijan's case that would result from the Tribunal ruling in favor of Armenia in relation to this objection.[299]

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164. Since Azerbaijan has failed to show that Armenia's objection does not possess an exclusively preliminary character and that it would not result in a material reduction in the scope and complexity of Azerbaijan's claims, the Tribunal must rule upon this objection as a preliminary matter. In the alternative, assuming *arguendo* that the "seriousness" of the objection were a relevant factor, the Tribunal could not deny preliminary treatment of Armenia's objection unless Azerbaijan demonstrates that the objection meets a high threshold of frivolousness.[300] Azerbaijan has not even come close to meeting this threshold, as shown below.

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[295] Opposition to Bifurcation, ¶ 50.

[296] *Id.*

[297] *See supra* Section III.B.

[298] Opposition to Bifurcation, ¶ 50.

[299] *See supra* Section III.B.

[300] *See supra* Section II.

3. In Any Event, Azerbaijan Has Failed to Show That the Objection Is Frivolous

165. Armenia has outlined above the exceptional scenarios in which bifurcation has been denied on the basis of frivolousness or lack of seriousness.[301] Azerbaijan does not claim that the objection at issue gives rise to any of those exceptional scenarios.[302] Instead, it argues that Armenia's objection lacks seriousness because "its central premise is divorced from both Azerbaijan's actual claims and from the relevant law."[303] Even if either of these arguments were sufficient to prove frivolousness (*quod non*), they are plainly wrong.

166. *First*, Azerbaijan argues that "[c]ontrary to Armenia's arguments, Azerbaijan's actual claims are not based on whether Armenia is an 'Occupying Power' for purposes of the Law of Armed Conflict."[304] For this purpose, Azerbaijan quotes its Statement of Claim that it "does not seek to place Armenia's conduct in respect of the invasion at issue in this case."[305] Azerbaijan also observes that its claims "expressly exclude environmental harms that resulted from the Second Garabagh War in 2020."[306] The fact that Azerbaijan excludes from its claim Armenia's alleged conduct in respect of "the invasion" and the Second Nagorno-Karabakh War, however, does not mean that Azerbaijan excludes Armenia's alleged conduct as a purported Occupying Power in relation to the environment in the allegedly occupied territory. Moreover, it is not for Azerbaijan to determine on its own whether Armenia had or did not have obligations as an Occupying Power or what those obligations were; these are questions that can only be resolved based on the law of armed conflict. As described in detail in Armenia's Memorial on Preliminary Objections, this issue is central to Azerbaijan's claims with respect to the "Affected Area."[307] Similarly, notwithstanding Azerbaijan's assertion to the contrary,[308] the fact that Azerbaijan's claims are limited to Armenia's purported conduct from 2008 onwards—a natural result of the

[301] *See supra* Section II.B.

[302] *See* Opposition to Bifurcation, ¶¶ 40-47.

[303] *Id.*, ¶ 40.

[304] *Id.*

[305] *Id.* (quoting Statement of Claim, ¶ 49).

[306] Opposition to Bifurcation, ¶ 41.

[307] Memorial on Preliminary Objections, Section III.B.

[308] Opposition to Bifurcation, ¶ 41.

ratione temporis limitations placed on any claims against Armenia under the Bern Convention[309]—does not equate to the exclusion of Armenia's alleged conduct as a purported Occupying Power in allegedly occupied territory.

167. With respect to the "actual claims" that Azerbaijan has put forward, Azerbaijan inexplicably states, on the one hand, that "Azerbaijan has not requested that the Tribunal determine Armenia's status as an '*Occupying Power*' under LOAC to resolve any issue before it, nor does the Tribunal need to do so"; and on the other hand, that the Tribunal "need only determine *effective control* as a factual matter for the claims that are based on Armenia's jurisdiction and control of the Affected Area."[310] There is, however, no daylight between Azerbaijan's theories of "effective control" and "occupation" for purposes of establishing Armenia's obligations with respect to the "Affected Area." On Azerbaijan's own case, the area over which Armenia allegedly exercised "effective control" is coextensive with the area which Armenia purportedly occupied.[311] Armenia's alleged violations with respect to the "Affected Area" also ended under Azerbaijan's theory of "effective control" when the purported occupation ended in 2020.[312] For all intents and purposes, Azerbaijan's theories that Armenia had obligations with respect to the "Affected Area" by virtue of effective control and by virtue of occupation are one and the same. Whether labelled "occupation" or "effective control," the factual predicate and the legal consequences Azerbaijan put forward are identical. Indeed, as Armenia noted in its Memorial on Preliminary Objections, Azerbaijan acknowledged this during negotiations, when it referred to whether "Armenia's occupation and control of Azerbaijan's sovereign territory […] could engage Armenia's obligations under the Bern Convention" as being a "*threshold* question"

[309] Azerbaijan itself notes that the temporal scope of its claim begins "from the date Armenia acceded to its obligations under the Bern Convention." Opposition to Bifurcation, ¶ 41.

[310] *Id.*, ¶ 46 (emphasis added).

[311] *See*, *e.g.*, Statement of Claim, ¶ 1 ("This dispute […] arises from the significant harms to species and habitats in Azerbaijan's Garabagh and Eastern Zangezur economic regions, which were under Armenia's *occupation and effective control* for nearly three decades.") (emphasis added). *See also* Statement of Claim, p. iv (defining "Affected Area" as "[t]he areas of the internationally recognized sovereign territory of Azerbaijan that Armenia occupied and controlled from the early 1990s through to the liberation of the majority of those areas in November 2020 and the remaining areas in September 2023").

[312] Statement of Claim, ¶¶ 20(a)-(f) (arguing that Armenia failed to take requisite measures from "1 August 2008 until the end of its occupation in 2020" vis-à-vis the "Affected Area" with respect to each of the alleged violations claimed by Azerbaijan).

for Azerbaijan's claims.[313] Thus, on Azerbaijan's own case, the issue of occupation is a prerequisite to determining whether Armenia's obligations under the Bern Convention could even be engaged.

168. Yet Azerbaijan continues to argue that Armenia focuses "on a point of semantics" by pointing to Azerbaijan's own formulation of its dispute as one centered on Armenia's "occupation" of the "Affected Area."[314] But referring to Azerbaijan's own characterization of the dispute as "semantics" and "descriptive"[315] is far from convincing when Azerbaijan's own Agent expressly asserted before the Tribunal that "*[o]ur case is that* the Bern Convention requires – indeed, it demands – that Armenia fairly compensate Azerbaijan for the *damage caused by its three decades of illegal occupation* of the Garabagh and East Zangazur economic regions of Azerbaijan."[316] Azerbaijan conveniently ignores this statement, which paints a very different picture from Azerbaijan's newfangled claim that "occupation" was merely used as a descriptive term.[317]

169. In any case, determining whether the occupation issue must be decided as a prerequisite matter is an objective exercise which this Tribunal must undertake, as elaborated in detail below and in Armenia's Memorial on Preliminary Objections.[318]

170. *Second*, according to Azerbaijan, Armenia contends that just because "a dispute is embedded in a broader political or military context, that fact [would] oust the jurisdiction of the tribunal under the compromissory clause."[319] At the risk of stating the obvious, this is *not* Armenia's argument. Nowhere in its Memorial did Armenia argue that the Tribunal lacks jurisdiction merely because the "dispute is embedded in a broader political or military context." Rather, Armenia's position is, and always has been, that the Tribunal lacks jurisdiction because,

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[313] Memorial on Preliminary Objections, ¶ 192 (quoting Letter from Azerbaijan to Armenia (26 Apr. 2022) (**AZ-0081**), p. 1 (emphasis added)).

[314] Opposition to Bifurcation, ¶ 42.

[315] *Id.*

[316] Memorial on Preliminary Objections, ¶ 187 (quoting First Procedural Conference Transcript (12 Apr. 2024), pp. 5-6, 12:06-12:08 (Mammadov) (emphasis added)).

[317] *See* Opposition to Bifurcation, ¶ 42.

[318] *See* Memorial on Preliminary Objections, ¶¶ 181-190.

[319] Opposition to Bifurcation, ¶ 43.

on Azerbaijan's own case, the applicability of the Convention is premised on Armenia's alleged occupation of the "Affected Area," which is a prerequisite issue to determine Azerbaijan's claims and which inescapably requires the application of the law of armed conflict.

171. Azerbaijan relies on the ICJ's decision in *Croatia v. Serbia*,[320] in which the Court held that the compromissory clause of the Genocide Convention "provides for jurisdiction only with regard to disputes relating to the interpretation, application or fulfilment of the Genocide Convention"[321] but "does not prevent the Court from considering, in its reasoning, whether a violation of international humanitarian law or international human rights law has occurred *to the extent that this is relevant for the Court's determination of whether or not there has been a breach of an obligation under the Genocide Convention*."[322] Specifically, the ICJ noted that "the rules of international humanitarian law may be relevant in order to decide whether the acts alleged by the Parties constitute genocide within the meaning of Article II of the [Genocide] Convention."[323]

172. The circumstances in *Croatia v. Serbia*, however, are fundamentally different from those at issue here. In that case, the law of armed conflict was not argued to be inconsistent with obligations under the Genocide Convention; rather, it was used to assist the Court in determining whether the alleged acts constituted genocide[324]—a question arising directly from the interpretation and application of the Genocide Convention. Indeed, in most (if not all) instances, an act of genocide encompasses violations of the law of armed conflict and human rights law in the gravest forms. In contrast, Azerbaijan does not—and cannot—argue that the law of armed conflict is relevant to establishing whether the acts it alleges amount to breaches of specific obligations under the Bern Convention. These two bodies of law do not interact in the

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[320] *Id.*

[321] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Judgment on Merits, I.C.J Reports 2015* (**AZL-0260**), p. 45, ¶ 85.

[322] *Id.* (emphasis added). Azerbaijan also cites of Article 24 of the Rules of Procedure, which provide that the Tribunal "shall decide the dispute in accordance with the Bern Convention, as well as applicable rules and principles of international law." Opposition to Bifurcation, note 89. This provision in the Rules of Procedure does not enable the Tribunal to exercise its jurisdiction over claims that do not concern the interpretation or application of the Bern Convention, including any alleged claims about violations of international humanitarian law. *See* Memorial on Preliminary Objections, ¶ 178.

[323] *See Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Judgment on Merits, I.C.J Reports 2015* (**AZL-0260**), p. 68, ¶ 153.

[324] *See id.*, pp. 67-68, ¶¶ 152-153.

same way, and, as Armenia pointed out in its Memorial, can conflict in a number of potential respects.[325]

173. Armenia's position is therefore that, to the extent that Armenia was an Occupying Power (*quod non*), the law of armed conflict is central to defining the scope and content of Armenia's environmental obligations in the allegedly occupied territory. As such, in the context of this case, the law of armed conflict does not serve to determine whether a breach of the Bern Convention occurred.

174. *Third*, Azerbaijan claims that the legal standard Armenia articulates—that is, the legal standard for determining the Tribunal's jurisdiction to hear claims requiring prerequisite ruling on issues outside its jurisdiction—is the wrong legal standard.[326] This argument is also unavailing for several reasons.

175. As a general observation, Azerbaijan tellingly reserves the opportunity to present its full arguments on this legal standard "at the appropriate stage."[327] Since Azerbaijan's argument against preliminary treatment rests on its allegation that Armenia's objections are "divorced from […] the relevant law,"[328] the present stage *is* the "appropriate stage" to fully present Azerbaijan's arguments regarding "the relevant law," including the correct legal standard on this issue. For this reason alone, Azerbaijan has failed to show that Armenia's objection is frivolous.

176. Azerbaijan's limited arguments regarding the "relevant law" are also misplaced. Azerbaijan claims that "Armenia's proposed […] test is inconsistent with the approach the [ICJ] has consistently applied to determine jurisdiction under the compromissory clause of a treaty."[329] Yet the standard articulated by the ICJ—namely, determining "whether the actions or omissions of the respondent complained of by the applicant fall within the scope of the treaty allegedly

[325] Memorial on Preliminary Objections, ¶ 202.

[326] *See* Opposition to Bifurcation, ¶ 44.

[327] Opposition to Bifurcation, ¶¶ 44 (noting that "Azerbaijan will respond to Armenia's arguments in full at the appropriate stage"), 46 (noting that "Azerbaijan will respond to Armenia's arguments in full at the appropriate stage").

[328] *Id.*, ¶ 40.

[329] *Id.*, ¶ 44.

violated"[330]—does not preclude, and indeed presupposes, an inquiry into the genuine subject matter of the dispute and the very applicability of the instrument relied on by the applicant in light of the circumstances it invokes.

177. Azerbaijan further argues that "the Court has repeatedly rejected attempts to recast a claimant's pleadings in the manner advanced by Armenia."[331] But Armenia has not attempted to recast Azerbaijan's pleadings. Rather, as noted above, it has merely pointed out that, on Azerbaijan's own case, whether "Armenia's occupation and control of Azerbaijan's sovereign territory […] could engage Armenia's obligations under the Bern Convention" is a "*threshold* question"[332] or a prerequisite matter. In this regard, Azerbaijan's reliance on *Alleged Violations of the 1955 Treaty* is also misplaced.[333] In that case, the ICJ had to determine the subject matter of the dispute between Iran and the United States.[334] The issue in particular was whether a mixed dispute could be a dispute "relating to the interpretation or application" of a treaty.[335] The Court found that while the dispute arose in a particular political context, that context "does not *in itself preclude* the dispute from relating to the interpretation or application of the Treaty of Amity."[336] In doing so, the Court observed that its "'duty to isolate the real issue in the case and to identify the object of the claim' […] does not permit it to modify the object of the [Applicant's] submissions, especially when they have been clearly and precisely formulated."[337] It is, however,

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[330] *Id.* (citing *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine* v. *Russian Federation: 32 States Intervening)*, Preliminary Objections, Judgment (2 Feb. 2024) (**ARL-0100**), ¶¶ 135–36).

[331] Opposition to Bifurcation, ¶ 45.

[332] Memorial on Preliminary Objections, ¶ 192 (quoting Letter from Azerbaijan to Armenia (26 Apr. 2022) (**AZ-0081**), p. 1 (emphasis added)).

[333] Opposition to Bifurcation, ¶ 45.

[334] *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran* v. *United States of America), Judgment on Preliminary Objections, I.C.J. Reports 2021* (**AZL-0273**), p. 26, ¶¶ 51-53.

[335] *Id.*, p. 27, ¶¶ 55-56.

[336] *Id.*, p. 27, ¶ 56 (emphasis added).

[337] *Id.*, p. 28, ¶ 59. The other cases cited by Azerbaijan at note 94 of its Opposition are also similarly distinguishable. In *Ukraine v. Russia (ICSFT/CERD)*, though Russia argued that "the real issue in dispute between the Parties does not concern racial discrimination but the status of Crimea," it never made the case that—as Armenia does here—adjudication of Ukraine's CERD claims would require the Court to improperly extend its jurisdiction to determine the status of Crimea. *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2019* (**ARL-0077**), p. 591, ¶ 79. Similarly, as Armenia explained in its Memorial on Preliminary Objections, the *Appeal relating to the Jurisdiction of the ICAO Council* case

a distinct question whether a claim that requires a court or tribunal to determine issues outside the scope of the relevant instrument as a *prerequisite* matter can be a dispute relating to the interpretation and application of that instrument. This is Armenia's objection. It was not the question put to the ICJ by the United States in its preliminary objection.[338]

178. Moreover, in that case, the ICJ found that it "cannot infer the subject-matter of the dispute from the political context in which the proceedings have been instituted, rather than basing itself on what the applicant has requested of it."[339] Here, Armenia is not asking the Tribunal to infer the subject-matter of the dispute; it is asking the Tribunal to determine the central issue based on Azerbaijan's own formulation that "*[o]ur case is that* the Bern Convention requires – indeed, it demands – that Armenia fairly compensate Azerbaijan for the damage *caused by its three decades of illegal occupation* of the Garabagh and East Zangazur economic regions of Azerbaijan."[340]

179. Azerbaijan next attempts to distinguish the cases cited by Armenia that articulate the test for determining whether a tribunal has jurisdiction to hear a claim which requires a prior determination of an external issue.[341] Azerbaijan first argues that "each of these cases [cited by Armenia] essentially dealt with the same issue: whether an UNCLOS Annex VII tribunal could assess a claim that allegedly required it to determine territorial sovereignty."[342] This is not true. Armenia also relied on, for example, the *Pedra Branca* case, which dealt with whether the ICJ

was distinct because it related to an issue raised by the Respondent that the ICJ deemed was a defense on the merits. *See* Memorial on Preliminary Objections, note 366 (*citing Appeal relating to the Jurisdiction of the ICAO Council under Article II, Section 2, of the 1944 International Air Services Transit Agreement (Bahrain, Egypt and United Arab Emirates* v. *Qatar), Judgment, I.C.J. Reports 2020* (**ARL-0082**), p. 192, ¶ 49).

[338] *See Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran* v. *United States of America), Judgment on Preliminary Objections, I.C.J. Reports 2021* (**AZL-0273**), p. 24, ¶ 42 (summarizing the United States' argument that "[t]he dispute […] exclusively pertains to the United States' decisions relating to the [a matter outside the scope of the relevant instrument]; the case is inextricably bound up in the latter and has no real relationship to the [relevant instrument]").

[339] *Id.*, pp. 27-28, ¶ 59.

[340] Memorial on Preliminary Objections, ¶ 187 (quoting First Procedural Conference Transcript (12 Apr. 2024), pp. 5-6, 12:06-12:08 (Mammadov) (emphasis added)).

[341] *See* Opposition to Bifurcation, ¶ 46.

[342] *Id*.

could assess a claim that required it to determine a maritime delimitation while the special agreement only granted it jurisdiction over territorial sovereignty.[343]

180. Azerbaijan next asserts that, unlike the UNCLOS cases, there is no similar "precursor" legal question in the present case. Azerbaijan is mistaken. Armenia outlined in detail the precursor legal questions at issue in its Memorial.[344]

181. These questions include all the rules of the law of armed conflict related to the environment that shape and may displace obligations under the Bern Convention.

182. For example, in its Memorial, Armenia explained that in a situation of occupation, the ability of an Occupying Power to legislate in the occupied territory is highly restricted,[345] and that, in accordance with Article 43 of the Hague Regulations, an Occupying Power must "respect[], unless absolutely prevented, the laws in force in the [occupied] country."[346] The "laws in force" are those that apply in the occupied territory when the occupation begins.[347] On that account, and because the Bern Convention entered into force for Azerbaijan on 1 July 2000,[348] it could not even be considered as a "law in force" when, according to Azerbaijan, Armenia's alleged occupation began "from the early 1990s."[349] If the Tribunal were to interpret and apply the law of armed conflict—and it cannot—it would end up finding that to the extent Armenia was

[343] *See* Memorial on Preliminary Objections, ¶ 185.

[344] *See id.*, ¶¶ 192-202.

[345] *See id.*, ¶ 134.

[346] Hague Regulations (**ARL-0001**), Article 43. *See also Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, Advisory Opinion (19 Jul. 2024) (**ARL-0104**), ¶ 134 (observing that "the occupying Power must in principle respect the law in force in the occupied territory unless absolutely prevented from doing so").

[347] Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land (French version) (1907) (**ARL-0118**), Article 43 ("L'autorité du pouvoir légal ayant passé de fait entre les mains de l'occupant, celui-ci prendra toutes les mesures qui dépendent de lui en vue de rétablir et d'assurer, autant qu'il est possible, l'ordre et la vie publics en respectant, sauf empêchement absolu, *les lois en vigueur dans le pays*.") (authoritative French text) (emphasis added). *See also* Y. Dinstein, "Legislation Under Article 43 of the Hague Regulations: Belligerent Occupation and Peacebuilding," *HPCR Occasional Paper Series* (2004) (**ARL-0126**), p. 4 (noting that Article 43 "[s]urely […] refers only to those laws which were 'in force' in the occupied territory at the time of the commencement of the occupation") (other internal quotation marks omitted).

[348] Council of Europe, Chart of signatories and ratifications of Convention on the Conservation of European Wildlife and Natural Habitats (as of 27 Aug. 2025) (**ARL-0144**).

[349] Statement of Claim, ¶ 4.

an Occupying Power (*quod non*), it would not have had obligations to respect the Bern Convention in the allegedly occupied territory.

183. Azerbaijan does not engage with any of these precursor legal questions. Instead, as explained above, it seeks to make the artificial distinction between "occupation" and "effective control." Azerbaijan has thus not only failed to address the precursor legal questions for the determination of Azerbaijan's claims; it has also failed to show that Armenia's objection is frivolous on the basis that "its central premise is divorced from both Azerbaijan's actual claims and from the relevant law."[350]

184. *Finally*, Azerbaijan claims that "[w]hile Armenia tries to deny that it is arguing 'that the law of armed conflict entirely displaces international environmental law,' that is precisely the implication of Armenia's arguments."[351] According to Azerbaijan, this implication means that "the Tribunal lacks jurisdiction to consider if the Convention applies and if Armenia breached it, and that any and all environmental obligations existing in the Affected Area are 'governed by the law of armed conflict, not the Bern Convention.'"[352] This is another straw man.

185. Armenia made clear in its objection that the Tribunal lacks jurisdiction, first, over those aspects of environmental protection in a situation of occupation that are regulated exclusively by the law of armed conflict, and second, over the question of how that body of law shapes the application of the residual environmental obligations that are *not* displaced.[353] Armenia therefore drew attention to the potential normative conflicts between the Bern Convention and the law of armed conflict that the Tribunal would inevitably have to confront were it to entertain Azerbaijan's claims. Thus, under Armenia's objection, what is "governed by the law of armed conflict" are both the prerequisite questions of whether Armenia was an Occupying Power and what obligations it has in respect of the environment in an allegedly occupied territory.

186. Azerbaijan then devotes the rest of its submission to attacking this straw man. It claims that "[n]ot a single court or tribunal has endorsed the view that such obligations, whether they arise under a multilateral instrument like the Bern Convention, custom, or otherwise, are

[350] Opposition to Bifurcation, ¶ 40.

[351] *Id.*, ¶ 47.

[352] *Id.*

[353] Memorial on Preliminary Objections, ¶ 199.

wholly displaced by the existence of an armed conflict such that a tribunal would be deprived of jurisdiction to hear such claims,"[354] notwithstanding that Armenia never put forward such a view itself. To support its argument, Azerbaijan cites two advisory opinions of the ICJ and a judgement of the European Court of Human Rights seemingly relating to the concurrent applicability of several legal regimes in an occupied territory—a general principle which, as explained, Armenia does not dispute.

187. Azerbaijan additionally argues that "Armenia's position is […] inconsistent with the international community's increasing recognition of the importance of ensuring the environment is fully protected even during armed conflict, including within the Council of Europe and the Standing Committee itself."[355] This is also incorrect. The Bureau of the Standing Committee has noted that "the Convention neither explicitly covers nor explicitly excludes environmental damage caused by an act of war or military hostilities in its text."[356] As explained in Armenia's Memorial on Preliminary Objections, the protection of environmentally sensitive areas during armed conflict "remains a subject for *further recommendations and for an additional Protocol to the Bern Convention*."[357] Furthermore, the other sources Azerbaijan cites for its vague proposition that the international community "increasing[ly] recogni[zes] […] the importance of ensuring the environment is fully protected even during armed conflict" *all* postdate the alleged violations in respect of the "Affected Area."[358] Needless to say, such a "recognition" by the international community—which Azerbaijan is careful not to characterize as an obligation—cannot bind Armenia for purported conduct which pre-dates said "recognition." In any event, this increasing recognition certainly has no bearing on this Tribunal's jurisdiction over Azerbaijan's claims.

[354] Opposition to Bifurcation, ¶ 47.

[355] *Id.*

[356] Bern Convention Standing Committee, 43rd Meeting, Meeting Report, T-PVS(2023)07 (13 Apr. 2023) (**AZL-0191**), ¶ 2.3.

[357] Memorial on Preliminary Objections, ¶ 197 (emphasis added).

[358] *See* Opposition to Bifurcation, ¶ 47, note 102 (citing*, e.g.*, International Committee of the Red Cross, Guidelines on Protection of Natural Environment in Armed Conflict (2020) (**AZL-0268**); International Law Commission, Draft principles on protection of the environment in relation to armed conflicts, Yearbook of the International Law Commission, Volume II, Part Two (2022) (**AZL-0274**); International Court of Justice, *Obligations of States in Respect of Climate Change,* Advisory Opinion (23 Jul. 2025) (**AZL-0282**)).

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188. For the foregoing reasons, Azerbaijan has failed to discharge its burden of showing that Armenia's objection should not be given preliminary treatment.

D. Armenia's Objections Relating to Articles 4(4) and 11(1)(a) of the Bern Convention

189. In its Memorial on Preliminary Objections, Armenia argued that:

> The Tribunal lacks jurisdiction over Azerbaijan's claims under Articles 4(4) and 11 of the Bern Convention in relation to both the "Affected Area" and the purported transboundary harm because the alleged conduct, even if accepted as true (*quod non*), is not capable of constituting a breach of those provisions, given the circumstances of the present case.[359]

190. Armenia makes two different objections in this regard.

191. *First*, Armenia argues that the cooperation obligations in Articles 4(4) and 11(1)(a) expressly apply only "as appropriate" or "whenever appropriate."[360] As a matter of law, the existence of an armed conflict and the lack of diplomatic relations between the Parties—which are undisputed facts[361]—means that it was not "appropriate" to require the Parties to cooperate under these provisions. As such, Armenia's alleged conduct, even if accepted as true (*quod non*), was not capable of violating them.[362]

192. *Second*, Armenia argues that Article 11(1)(a) only creates an obligation to cooperate "to enhance the effectiveness" of conservation measures taken under the Convention.[363] Given that Azerbaijan has not presented any evidence that it ever took any such conservation measures, it has not shown that this duty was triggered in the first place, and Armenia's alleged conduct is thus not capable of breaching Article 11(1)(a) for that reason either.[364]

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[359] Memorial on Preliminary Objections, ¶ 204.

[360] Bern Convention (**AZL-0001 (ENG & FR)**), Articles 4(4), 11.

[361] *See, e.g.*, Statement of Claim, ¶¶ 16, 20, 59.

[362] Memorial on Preliminary Objections, ¶ 208.

[363] *Id.*, ¶ 226.

[364] *Id.*, ¶ 226-227.

193. Armenia's objections involve purely legal questions that are exclusively preliminary in character and can be decided at a preliminary stage (**Section D.1**). Even if the Tribunal could assess the *prima facie* "seriousness" of the objections, in any event, Azerbaijan has failed to show that Armenia's objection is frivolous (**Section D.2**).

1. The Objections Possess an Exclusively Preliminary Character

194. Azerbaijan argues that these objections are "intertwined with the merits" because they require interpreting Articles 4(4) and 11(1)(a) of the Convention, which Azerbaijan claims is an "issue of treaty interpretation that the Tribunal will need to address on the merits."[365] In support of this argument, Azerbaijan primarily relies on the tribunal's decision in the *ECT Arbitration*.[366] But that case is inapposite because the tribunal was not applying an "exclusively preliminary character" test. Rather it was operating under the 1976 UNCITRAL Rules, which leave decisions on bifurcation "to the good faith judgment of a tribunal regarding the best interests of a given case, in light of its particular circumstances."[367] Moreover, as explained above,[368] the ECT tribunal's reasoning actually points to preliminary treatment here because the ECT tribunal accepted that "abstract principles" are appropriate for preliminary treatment.[369] Unlike the ECT tribunal, the Tribunal here would *not* "be drawn into [any] nuanced debates about the actual

[365] Opposition to Bifurcation, ¶ 52.

[366] *Id.*, ¶ 53, note 120 (citing *Energy Charter Treaty Arbitration (The Republic of Azerbaijan v. The Republic of Armenia)*, PCA Case No. 2023-65, Decision on Bifurcation (13 Feb. 2025) (**AZL-0279**), ¶ 40). Azerbaijan also purports to rely on *Apotex Holdings* for this point, but that case offers no support for its position either. Azerbaijan argues that in that case, "the tribunal considered the Respondent's objection that the relevant measures were incapable, as a matter of law, of constituting a breach of the applicable treaty to be too intertwined with issues of liability, such that a separate phase risked delay and duplication." Opposition to Bifurcation, ¶ 53. This is, however, a misstatement of the case. The tribunal in that case only stated generally that there were "overlapping jurisdictional and liability issues," but it did not specify the overlapping issues or what particular objection they implicated. *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Procedural Order No. 3 (Decision on Bifurcation and Non-Bifurcation) (25 Jan. 2013) (**AZL-0257**), ¶ 11. In any event, the respondent's objections were that the claimant was not a qualified "investor" with covered "investments" within the meaning of the treaty, and that there was no "legally significant connection" between the challenged measure and the investor or its investment. *See Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Counter-Memorial on Merits and Objections to Jurisdiction of Respondent United States of America (14 Dec. 2012) (**AZL-0255**), Section II. Armenia fails to see how they compare to its objections here.

[367] *Energy Charter Treaty Arbitration (The Republic of Azerbaijan v. The Republic of Armenia)*, PCA Case No. 2023-65, Decision on Bifurcation (13 Feb. 2025) (**AZL-0279**), ¶¶ 82-83.

[368] *See supra* ¶ 121.

[369] *Energy Charter Treaty Arbitration (The Republic of Azerbaijan v. The Republic of Armenia)*, PCA Case No. 2023-65, Decision on Bifurcation (13 Feb. 2025) (**AZL-0279**), ¶ 88.

character of the conduct alleged,"[370] such as whether Armenia's conduct could be characterized as cooperation, or whether it occurred during an occupation. The only question is whether, as a matter of law, the obligations in question apply in the circumstances alleged.

195. The ICJ has established that *ratione materiae* jurisdictional objections arguing that a particular conduct is not "capable" of constituting a treaty breach are exclusively preliminary in character, and the Court routinely examines them at a preliminary stage.[371] This is because these objections do not require the tribunal or court to determine whether the alleged conduct occurred and indeed breached the treaty (which would be a merits determination).[372] Rather, such objections ask the tribunal to interpret a treaty in the abstract and purely as a matter of law,[373] accepting for this purpose the alleged conduct as true, to determine whether it is even possible for

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[370] *Id.*

[371] *See Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2019* (**ARL-0077**), p. 595, ¶¶ 95-97 ("At the current stage of the proceedings, the Court only needs to ascertain whether the measures of which Ukraine complains fall within the provisions of the Convention. […] The Court, taking into account the broadly formulated rights and obligations contained in the Convention, […] considers that the measures of which Ukraine complains […] are capable of having an adverse effect on the enjoyment of certain rights protected under CERD. These measures thus fall within the provisions of the Convention. Consequently, the Court concludes that the claims of Ukraine fall within the provisions of CERD."); *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar* v. *United Arab Emirates), Preliminary Objections, Judgment, I.C.J. Reports 2021* (**ARL-0139**), pp. 108-109, ¶¶ 111-112, ("The Court will now turn to the question whether these and any other measures as alleged by Qatar are capable of falling within the scope of the Convention, if, by their purpose or effect, they result in racial discrimination against certain persons on the basis of their Qatari national origin. […] [T]he Court concludes that, even if the measures of which Qatar complains in support of its 'indirect discrimination' claim were to be proven on the facts, they are not capable of constituting racial discrimination within the meaning of the Convention."); *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine* v. *Russian Federation: 32 States Intervening)*, Preliminary Objections, Judgment (2 Feb. 2024) (**ARL-0100**), ¶ 136 ("[I]t must be ascertained whether the actions or omissions of the respondent complained of by the applicant fall within the scope of the treaty allegedly violated, in other words whether the facts at issue, if established, are capable of constituting violations of obligations under the treaty. This may require, to a certain extent, that the Court interpret the provisions which have allegedly been violated and which define the scope of the treaty."); *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azerbaijan* v. *Armenia), Preliminary Objections,* Judgment (12 Nov. 2024) (**ARL-0106**), ¶ 90. *See also Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996* (**ARL-0029**), p. 810, ¶ 16; *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Preliminary Objections, Judgment, I.C.J. Reports 2018* (**ARL-0137**), p. 308, ¶ 46; *Certain Iranian Assets (Islamic Republic of Iran* v. *United States of America), Judgment on Preliminary Objections, I.C.J. Reports 2019* (13 Feb. 2019) (**AZL-0267**), p. 23, ¶ 36. *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran* v. *United States of America), Judgment on Preliminary Objections, I.C.J. Reports 2021* (**AZL-0273**), pp. 31-32, ¶ 75.

[372] *See Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azerbaijan* v. *Armenia), Preliminary Objections,* Judgment (12 Nov. 2024) (**ARL-0106**), ¶ 91.

[373] *See id.*, ¶ 92 (interpreting "racial discrimination").

the alleged conduct to have breached the treaty.[374] As the ICJ has explained, including in the context of proceedings between the Parties, when examining such objections, it "must ascertain whether the actions and omissions of the Respondent complained of by the Applicant fall within the scope of [the Treaty]; in other words whether the acts at issue, if established, are *capable of* constituting [a breach]."[375]

196. Hence, for example, in the *Azerbaijan v. Armenia* proceedings under the CERD, Azerbaijan had argued that certain alleged acts of environmental harm constituted racial discrimination within the meaning of CERD.[376] Armenia objected to the ICJ's jurisdiction *ratione materiae* on the basis that the alleged conduct, even if accepted as true, could not amount to a breach of the CERD because, *inter alia*, the alleged environmental harm could not amount to a distinction based on race.[377] Azerbaijan did not dispute that the objection was of an exclusively preliminary character. After analyzing the facts as alleged by Azerbaijan in detail, taking them as true,[378] the ICJ concluded that the alleged conduct could not constitute a distinction based on race and that it therefore was not capable of violating the CERD.[379]

197. Here, the first objection relating to Articles 4(4) and 11(1)(a) invites the Tribunal to determine whether provisions requiring the Parties to coordinate and cooperate "*as appropriate*" or "*whenever appropriate*" are capable of being breached when there was an armed conflict and no diplomatic relations between the concerned parties.[380] This is a straightforward legal question of treaty interpretation. It does not require the Tribunal to delve into the merits of

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[374] *See Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, Separate Opinion of Judge Higgins, I.C.J. Reports 1996* (**ARL-0030**), p. 856, ¶ 32; *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine* v. *Russian Federation: 32 States Intervening)*, Preliminary Objections, Judgment (2 Feb. 2024) (**ARL-0100**), ¶ 136 ("[I]t must be ascertained whether […] whether the facts at issue, *if established*, are capable of constituting violations of obligations under the treaty.") (emphasis added); *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azerbaijan* v. *Armenia), Preliminary Objections,* Judgment (12 Nov. 2024) (**ARL-0106**), ¶ 90-91.

[375] *See Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azerbaijan* v. *Armenia), Preliminary Objections,* Judgment (12 Nov. 2024) (**ARL-0106**), ¶ 90 (emphasis added).

[376] *Id.*, ¶ 18.

[377] *Id.*, ¶¶ 79-80.

[378] *Id.*, ¶¶ 93-94.

[379] *Id.*, ¶¶ 95-99.

[380] Memorial on Preliminary Objections, ¶ 208.

this claim (*e.g.*, whether Armenia actually failed to cooperate or coordinate with Azerbaijan and thus breached the obligation).

198. Azerbaijan mistakenly suggests that this objection is a merits-based defense because it relies on additional factual evidence.[381] But as explained, an objection may still be considered exclusively preliminary in character even if it raises issues of fact, so long as those issues are discrete and separate from the factual issues pertaining to the merits.[382] For example, Armenia's objections under Article 18 raise numerous facts for the Tribunal's consideration, and yet Azerbaijan rightly does not argue that those objections do not have an exclusively preliminary character. Here, to the extent that Armenia relies on additional factual evidence for this objection, it is factual evidence that is either undisputed or originates from Azerbaijan itself.

199. Indeed, it is undisputed that an armed conflict existed in the relations of the Parties at different relevant periods.[383] It is also undisputed that the Parties have not had at the relevant periods, and still do not have, diplomatic relations. Azerbaijan's own officials have stated that cooperation in the field of ecology with Armenia was "impossible."[384] Those factual issues are uncontroversial, discrete, and are completely separate from the merits of this case, *i.e.*, whether Armenia actually failed to cooperate or not. They therefore do not affect the exclusively preliminary character of this objection.

200. The second issue of law relating to Article 11(1)(a) is whether the acts alleged by Azerbaijan are capable of breaching Article 11(1)(a) if Azerbaijan has not shown that it undertook conservation measures, and thus that the duty of cooperation was triggered in the first place.

201. Azerbaijan acknowledges that the duty to cooperate applies to "enhance the effectiveness" of conservation measures taken under other articles of this Convention.[385] For this obligation to be triggered, Azerbaijan must therefore demonstrate that it actually undertook

[381] Opposition to Bifurcation, ¶¶ 53 ("Armenia's objection also puts in issue facts and evidence relevant to its compliance with its obligations."), 54 ("Based on this premise, Armenia devotes pages of its own Objections to making additional factual allegations based on newly introduced sources, which Armenia claims establish a factual context that absolved Armenia of any obligations under Articles 4(4) and 11.")

[382] *See supra* Section I.B.1.

[383] *See* Memorial on Preliminary Objections, ¶¶ 212-215.

[384] *See id.*, ¶¶ 219-225.

[385] Statement of Claim, ¶ 354.

conservation measures pursuant to the Convention—which it has not even claimed.[386] As such, even accepting the facts as alleged by Azerbaijan as true, they are not capable of showing the existence of a duty to cooperate under Article 11(1)(a). It is difficult to imagine a more straightforward legal question.

202. Therefore, Armenia's objections under Articles 4(4) and 11(1)(a) are both exclusively preliminary in character. Azerbaijan has not identified any other compelling reason that would justify departing from the default position under Article 14(4). While these objections concern only some of Azerbaijan's claims, as a matter of principle, a State should not have to defend the merits of a claim if jurisdiction over that claim is not established.[387] Moreover, together with the other objections relating to Articles 2, 3, 4, 6, and 7, which also warrant bifurcation, Armenia's objections under Articles 4(4) and 11 would dispose of the majority of Azerbaijan's case.

2. In Any Event, Azerbaijan Has Not Shown That the Objections Are Frivolous

203. As explained above, the "seriousness" of an objection is not a relevant factor for the Tribunal to decide bifurcation under the Rules of Procedure. But even if the Tribunal viewed this as a relevant factor, Azerbaijan has not discharged its burden of proving that these objections are frivolous. Nor could it, as they are plainly serious and substantial.

204. To begin with, as Armenia has explained, the objections have clear textual support. Articles 4(4) and 11(1)(a) qualify the obligations to cooperate with the phrases "as appropriate" and "whenever appropriate," respectively.[388] Moreover, Article 11(1)(a) expressly creates a duty to cooperate "where this would enhance the effectiveness of *measures taken under other articles of this Convention*."[389]

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[386] *See* Memorial on Preliminary Objections, ¶ 226.

[387] *Appeal Relating to the Jurisdiction of the ICAO Council (India* v. *Pakistan), Judgment, I.C.J. Reports 1972* (**ARL-0013**), p. 56, ¶ 18(b); *The South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China)*, PCA Case No. 2013-19, Award on Jurisdiction and Admissibility (29 Oct. 2015) (**ARL-0069**), ¶ 390.

[388] Bern Convention (**AZL-0001 (ENG & FR)**), Articles 4(4), 11(1)(a).

[389] *Id.*, Article 11(1)(a) (emphasis added).

205. Armenia has also provided ample legal support for the proposition that obligations of cooperation are suspended in times of armed conflict.[390] Armenia has likewise submitted substantial evidence that the Parties have been in conflict and have had no diplomatic relations since 1991, and that Azerbaijan viewed cooperation with Armenia, including in the field of ecology, as impossible.[391]

206. Azerbaijan raises limited counterpoints against these objections, but they all ring hollow.

207. *First*, Azerbaijan argues that the objections are not serious because they contradict a position advanced in another objection.[392] In particular, Azerbaijan claims that it is inconsistent for Armenia to argue, on one hand, that it could not have been required to cooperate with Azerbaijan under Articles 4(4) and 11(1)(a) because of the existence of an armed conflict and the lack of diplomatic relations between the Parties, and, on the other hand, to argue that there was still a "reasonable probability […] that further negotiations would lead to a settlement."[393] But both *can* be true: an obligation to cooperate or coordinate actions "*as appropriate*" or "*whenever appropriate*" cannot be equated to a strict and unqualified obligation to "genuine[ly] attempt" to negotiate with a view to settling a particular dispute until negotiations become futile.[394] Armenia's contention is that, given the circumstances, it would not have been "appropriate" as a matter of law to require the Parties to cooperate on issues of conservation. It is, in contrast, not disputed that both Parties were under an obligation to negotiate any purported dispute arising under the Convention regardless of the existence of an armed conflict or the lack of diplomatic relations. The ICJ has indeed confirmed in several cases that parties must fulfill the negotiations requirement regardless of the existence of an armed conflict or the lack of diplomatic relations between them—including in cases between Armenia and Azerbaijan.[395] Such an obligation is *not*

[390] Memorial on Preliminary Objections, ¶¶ 209-211.

[391] *Id.*, ¶¶ 212-225.

[392] Opposition to Bifurcation, ¶ 56.

[393] *Id.*

[394] *See* Memorial on Preliminary Objections, ¶ 74.

[395] *See Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia* v. *Azerbaijan), Preliminary Objections,* Judgment (12 Nov. 2024) (**ARL-0105**), ¶¶ 50-59; *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2019* (**ARL-0077**), pp. 601-603 ¶¶ 116-21; *Application of the International Convention on*

the kind that could be suspended by an armed conflict or the lack of diplomatic relations between the Parties. Indeed, Azerbaijan itself has never contended that an armed conflict or the lack of diplomatic relations was somehow a bar to negotiations, or that it was not required to make a genuine attempt to settle any purported dispute. Moreover, the question of whether there was still a reasonable possibility that the negotiations would have succeeded when Azerbaijan ended them is an issue of fact that needs to be assessed against the Parties' conduct during the negotiations and the progress achieved. It is an entirely different inquiry to examine whether it would have been "appropriate" as a matter of law to require Armenia to cooperate with Azerbaijan on issues of conservation given the circumstances between the Parties.

208. *Second*, Azerbaijan argues that the objections are not serious because "Armenia does not cite to a single source suggesting that either Article 4(4) or Article 11, *specifically*, might not apply between Contracting Parties engaged in armed conflict or strained diplomatic relations."[396] But an alleged failure to provide such a specific source does not prove that Armenia's contention is meritless, especially given the absence of any inter-State case law under the Convention generally, let alone under these particular provisions. As explained, Armenia's argument requests the Tribunal to reason by analogy and apply general principles of international law, for which it has provided ample support, including a textual hook in the Convention itself.[397]

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209. In sum, Azerbaijan has failed to show that Armenia's objections under Articles 4(4) and 11(1)(a) lack an exclusively preliminary character or that there is any other compelling reason for the Tribunal to reverse the default position of bifurcation. Accordingly, these objections must be bifurcated.

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the Elimination of All Forms of Racial Discrimination (Georgia v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011* (**ARL-0059**), pp. 134-40, ¶¶ 163-84. *Cf.*, by analogy, *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine* v. *Russian Federation: 32 States Intervening)*, Preliminary Objections, Judgment (2 Feb. 2024) (**ARL-0100**), ¶¶ 44-52 (discussing the requirement of positive opposition).

[396] Opposition to Bifurcation, ¶ 57 (emphasis added).

[397] Memorial on Preliminary Objections, ¶¶ 208-211.

IV. REQUEST FOR RELIEF

210. For the reasons set out above, Armenia respectfully requests that the Tribunal:

(a) Rule on all of Armenia's objections (except its seventh objection) in a preliminary phase; and

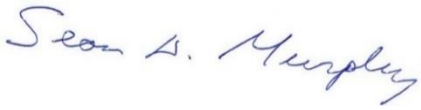
(b) Order Azerbaijan to bear all costs incurred by Armenia in the preparation of this Response to Opposition to Bifurcation.

Respectfully submitted,

REPRESENTATIVE OF THE REPUBLIC OF ARMENIA ON INTERNATIONAL LEGAL MATTERS

FOLEY HOAG LLP

PROFESSOR LINOS-ALEXANDER SICILIANOS
UNIVERSITY OF ATHENS



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